No. 17-2418

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THE COALITION FOR EQUITY AND EXCELLENCE IN MARYLAND HIGHER EDUCATION, INC., *ET AL.*,

Plaintiffs-Appellees,

v.

MARYLAND HIGHER EDUCATION COMMISSION, *ET AL.*,

Defendants-Appellants,

On Appeal from the United States District Court
for the District of Maryland
Civil Action No. 1:06-cv-02773-CCB

FINAL BRIEF OF APPELLEES-CROSS-APPELLANTS

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October 18, 2018

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

who is appellee/cross-appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Karen N. Walker Date: December 21, 2017

Counsel for: Plaintiffs/Appellees/Cross-Appellants

CERTIFICATE OF SERVICE

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I certify that on December 21, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Karen N. Walker
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December 21, 2017
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JURISDICTIONAL STATEMENT

Appellees brought this action under Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment based on Maryland's failure to dismantle the vestiges of former segregation in the State's public higher education system as required by *United States v. Fordice*, 505 U.S. 717 (1992). The trial court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1367, and 1441. The district court conducted two bench trials, the first in 2012, after which the court found liability against Maryland for failing to dismantle vestiges of the *de jure* segregation era. After a second trial in 2017 that addressed remedies for the constitutional violation, the district court entered final judgment and an injunction on November 8, 2017. The State filed a notice of appeal on December 8, 2017, and plaintiffs filed a notice of cross-appeal on other claims on December 21, 2017. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

PRELIMINARY STATEMENT

After a six-week liability trial, including dozens of witnesses and hundreds of exhibits spanning the last eighty years, the district court found Maryland frustrated the efforts of its Historically Black Institutions ("HBIs") to diversify and desegregate their student bodies.[1] The State prevented students from being educated in a

[1] The HBIs are Bowie State University, Coppin State University, Morgan State University, and the University of Maryland Eastern Shore ("UMES").

desegregated environment by limiting the ability of the HBIs to attract students regardless of race. It did so by denying them unique, high-demand programs and by engaging in a practice of unnecessary program duplication so extensive the district court found it to be as bad as, if not worse than, the situation in Mississippi more than twenty years ago evaluated in *Fordice*. (J.A. 158.) The evidence overwhelmingly proved that unnecessary program duplication in Maryland affects student choice and has segregative effects. (J.A. 167 ("The Coalition convincingly demonstrated that duplication does have a palpable effect on student choice.").)

Indeed, precisely because duplication does affect student choice and furthers segregation at the State's HBIs, the Maryland Attorney General's Office decried as "alarming" the State's 2005 decision to duplicate an HBI's MBA program by two of the State's Traditionally White Institutions ("TWIs") over that office's objection. (J.A. 6867.)[2] In a blunt warning, the Office of the Attorney General advised that Maryland was "in a vulnerable position, legally, with respect to the law governing the unnecessary duplication of academic programs." (J.A. 6866.) This warning

[2] The State's insistence on using the phrase "non-HBI" to refer to the TWIs is disingenuous. The State itself, along with legions of authors, commentators, and courts, have used the well-established term "TWIs" for decades, including throughout this litigation. The TWIs include the University of Maryland, College Park; University of Maryland, Baltimore; University of Baltimore; University of Maryland University College; Salisbury University; Towson University; University of Maryland Baltimore County; and St. Mary's College. (J.A. 117.)

rightly referred to Maryland as a "desegregating system of higher education with very specific and continuing legal obligations." (J.A. 6867.)

In its brief, however, the State attempts to rewrite history and relitigate on appeal *factual* findings that the district court resolved to the State's dissatisfaction. The State poses two "questions presented" -- the first attacking the trial court's liability decision and the second its remedial decision.

In the first question presented, the State rehashes the unprecedented and legally baseless argument that there can be no constitutional violation where *some* of the State's institutions are desegregated. Appellants' continued focus on the desegregation of Maryland's TWIs is misplaced -- the racial diversity of Maryland's TWIs is not relevant to *this* case, which has always been about segregation at Maryland's HBIs. Desegregation at the TWIs simply does not excuse Maryland's obligation to dismantle practices that foster segregation at the HBIs. After all, as the Maryland Attorney General's Office said the year before this litigation was filed, "it is possible for the State to have dismantled some aspects of prior segregation, and be discharged of any remedial obligation with respect to those factors, while remaining responsible for remedial measures in other areas." (J.A. 10507.)

In fact, in both Mississippi and Alabama, the courts found liability and ordered remedies despite percentages of African-American students at the TWIs the defendants in those cases claimed established desegregation. *See Fordice*, 505 U.S.

at 724-26; *Knight v. Alabama*, 787 F. Supp. 1030, 1207 (N.D. Ala. 1991). In Maryland, the 2000 Partnership Agreement between Maryland and the Office of Civil Rights ("OCR") likewise confirmed that desegregation is two-pronged, focusing on: (i) continued integration of the TWIs *and* (ii) desegregation of the HBIs through various commitments Maryland undertook to make the HBIs competitive with the TWIs. (J.A. 6577.) Moreover, the Eleventh Circuit's opinion in *Knight* makes clear that these two types of desegregation are distinct. *Knight v. Alabama*, 14 F.3d 1534, 1539 (11th Cir. 1994). Accordingly, the State's primary "issue presented" on appeal -- whether the State can be held liable "when Maryland has fully integrated its formerly white universities" (Page Proof Brief of Appellants, Doc. No. 31 ("Appt. Br.") at 3) -- is completely off the mark.

Nor are the State's sub-issues properly framed. While the State implies it should be allowed to foster segregation at the HBIs based on its current program approval regulations, current revisions cannot excuse or erase a policy of program duplication traceable to the *de jure* era and proven to have segregative effects. Those vestiges must be affirmatively "dismantled" under *Fordice*. 505 U.S. at 731. Finally, the State's complaint that the trial court's definition of program duplication was improper and based on "discredited" expert testimony cannot justify reversal on appeal. The trial court analyzed program duplication consistently with *Fordice*. The factfinder's interpretation of the evidence and evaluation of expert testimony is a

paramount function of the trial judge.[3] Maryland cannot obtain reversal by simply disagreeing with such findings and ignoring the evidence.

Maryland's second (and remaining) "issue for review" relates to the remedies judgment below. The State claims the trial court did not "tailor" the remedies order to the violation found, but the record entirely undermines this argument. Because the court below found that program duplication had harmed the HBIs and caused segregative effects, it tailored its order to create new unique, high-demand programs at the HBIs. (*See* J.A. 167; J.A. 235.) After the first trial, the court found that in 2010, Maryland's HBIs only offered 11 unique and high-demand programs compared to 122 such programs at the TWIs. (J.A. 158.) Despite the State's revision of its program approval regulation, this overall programmatic imbalance actually *increased* during the intervening period to only 10 such programs at the HBIs and 171 at the TWIs at the time of the remedial trial. (J.A. 5137-38; J.A. 11891.) The State also complains that the trial court did not properly "weigh" the hardship to the State compared to the likely success of the remedies ordered, but that is a blatant misrepresentation of the "balancing" test for injunctive relief, which involves a

[3] One of Maryland's principal arguments is that the district court should have credited its expert's critique of plaintiffs' expert at the remedial stage. The district court was well within its sound discretion in rejecting defendants' expert's opinion given that it was contrary to "the longstanding consensus among key players in Maryland higher education, including the State itself." (J.A. 222.)

"balance of *hardships*" to each party, not the hardship to one party against the *benefit* to the other. (J.A. 193 ("the injury to plaintiffs outweighs any burden imposed by an injunction").)

These issues for review present challenges to the factual determinations made by the trial court -- findings that are not "clearly erroneous" but fully supported by the record. The evidence at trial was not close: "[T]he Coalition convincingly demonstrated that duplication does have a palpable effect on student choice." (J.A. 167.) Unnecessary program duplication in Maryland is responsible for "intensification of the HBIs' racial identifiability over the past twenty years." (J.A. 165.) It "prevents the HBIs from attracting non-black students, perpetuating the racial identifiability of the HBIs." (J.A. 159.)

In light of such findings, it is far from "undisputed" that all Maryland students "can attend a racially diverse public college or university." (Appt. Br. at 4.) While it may be that the State has chosen to make the historically-favored traditionally white institutions (TWIs) racially diverse, Maryland's historically black institutions (HBIs) are not. The State's representation that all students can attend a racially diverse institution ignores the right of *HBI students* to be educated in a racially diverse environment. The only logical interpretation of the State's position is that Maryland is suggesting that if students wish to be educated in a desegregated

environment, they *must* exercise the "choice" to forego the HBIs and enroll in one of the historically-favored TWIs.

In doing so, the State mischaracterizes the Supreme Court's *Fordice* decision in numerous ways. The State implies that, under *Fordice*, student "choice" absolves a state of the responsibility to dismantle its vestiges of segregation. (Appt. Br. at 6.) But *Fordice* specifically recognized that state practices that foster segregation "impede" freedom of choice unconstitutionally and must be further dismantled. In stating that Mississippi had "impeded" free choice, the Court was explicit that "[t]he full range of policies and practices must be examined." 505 U.S. at 743. The State also selectively quotes from *Fordice* to argue that whether a school is predominantly white or black does not matter. (Appt. Br. at 6.) That citation, however, ignores the next sentence: "But surely the State may not leave in place policies . . . *that serve to maintain the racial identifiability of its universities.*" 505 U.S. at 743 (emphasis added). Race-neutral policies alone are not sufficient where segregation continues, and both "sophisticated as well as simple-minded" methods of segregation violate the Equal Protection Clause. *Id*. at 729. *Fordice* actually stated that these practices violate the Constitution whether by influencing choice *or* fostering segregation in *other facets* of the system. 505 U.S. at 731.

STATEMENT OF THE ISSUES

1. Were the district court's factual findings that Maryland had failed to satisfy its burden to show it had eradicated the vestiges of *de jure* era segregation by failing to dismantle the effects of unnecessary program duplication clearly erroneous?

2. Did the district court abuse its discretion in fashioning an injunction designed to remedy the constitutional violation established?

3. Did the district court err in applying an overly narrow legal standard to plaintiffs' mission and funding claims?

STATEMENT OF THE CASE

During the *de jure* era, Maryland's practice, as set forth in state-commissioned reports, was to maintain its HBIs as inferior institutions solely for black students. These documents describe "[t]he continuous uphill struggle on the part of the Negro colleges to secure facilities on a par with white institutions." (J.A. 11027.) One of the State's many historical commissions -- the 1937 Soper Commission -- summarized the disparities in stark terms: "It is thus clear that the white population has had the advantage of generous state support for its higher education many years in advance of the Negro population. The contrast between the amounts of money received by the two racial groups would show, if possible of compution, an enormous differential in favor of the white race." (J.A. 7016.) The 1947 Marbury

Commission found that "[n]one of these schools [was] equal in quality to the corresponding institution maintained for the white population." (J.A. 7108.)[4]

Contrary to the State's assertion that it ended *de jure* segregation in 1954, "Maryland continued to operate a segregated system of higher education for more than a decade" after *Brown*. (J.A. 121.) By the State Attorney General's own admission, "Maryland operated *de jure* segregated public higher education programs before 1969." (J.A. 160.) Moreover, Maryland continued to perpetuate segregation, *e.g.*, by denying the 1968 request of one of its HBIs to become a "biracial university," by creating new institutions rather than expanding the role of the HBIs, by violating a 2000 agreement with OCR aimed at desegregating Maryland's HBIs, and by continuing extensive unnecessary program duplication. (J.A. 158-59.) In short, as the State itself admitted in this litigation, "for a number of years there continued to be at best benign neglect of the State's obligation to desegregate and at worst outright hostility and foot-dragging." (J.A. 678-79.)

Specifically, as the district court chronicled, "during the 1960s and 1970s, in the wake of *Brown*, Maryland's HBIs began offering unique, high-demand programs and began attracting significant numbers of white graduates." (J.A. 160.) "Rather

[4] Maryland formed the Soper and Marbury commissions to examine what actions Maryland needed to take in order to make its separate system "equal" before the Supreme Court found "separate but equal" unconstitutional in 1954 in *Brown v. Board of Education*, 347 U.S. 483 (1954).

than building on that progress, however, Maryland made very large investments in TWIs, particularly newly created Towson and UMBC, that undermined preliminary gains in desegregation." (*Id*.) Significantly, "[t]hese investments included further duplication of programs at already existing TWIs and creating new public institutions in geographic proximity to existing HBIs, including UB, Towson, and UMBC." (*Id*.)

Although the HBIs wanted integration, the State did not. After all, the HBIs did not segregate themselves. The State did. As the district court noted, "[t]he early gains that had been made in integration at Maryland's HBIs halted almost as soon as they began, and the State has continued to duplicate HBI programs at TWIs, failing to address the dual system it created in the de jure era." (J.A. 161.) Maryland dragged its feet for decades despite notification by the federal government that it was in violation of civil rights laws. (J.A. 678-79.)[5]

As the State engaged in negotiations with OCR over three decades, it continued to duplicate HBI programs, stifling the HBIs' efforts at desegregation. (J.A. 122-26.) In 1999, Maryland's Larson Task Force determined that the State had not met its obligations to develop a desegregation plan for the HBIs. (J.A. 10244-

[5] In 1969, Maryland was one of ten states that OCR notified were operating their higher education systems in violation of Title VI and applicable federal law. (J.A. 10504.)

245.) In 2000, Maryland entered into a Partnership Agreement with OCR that set forth the commitments Maryland would undertake to comply with Title VI and *Fordice*. (J.A. 6572.) Contrary to Maryland's arguments on appeal, the State recognized its legal obligations relating to unnecessary program duplication were two-fold. *First*, the State agreed to avoid unnecessary program duplication between the State's TWIs and HBIs. (*Id.*) *Second*, the State agreed to establish and fund unduplicated, unique, high-demand programs at the HBIs that would be attractive to students regardless of race. (J.A. 3793.) The State acknowledged that it would do so to comply with its legal obligation to provide "desegregated institutions," including both desegregated TWIs *and* HBIs. (J.A. 6598.) Of utmost importance to desegregating the HBIs, the State and OCR agreed, was "the uniqueness and mix of quality academic programs that are not unnecessarily duplicated at proximate TWIs." (J.A. 6606.)

These commitments, the Maryland Attorney General's Office later explained in a published 2005 opinion, were designed to "enhance student choice" and "reduce the stigmatic racial identifiability of institutions." (J.A. 10512.) This was legally necessary, according to the Attorney General's Office, because "some policies, such as program duplication at geographically proximate schools, are traceable" to the *de jure* era. (J.A. 160.) The Partnership Agreement commitments reflected the "consensus reached by Maryland educators and OCR officials" to "identify policies

with segregative effects and to implement appropriate remedies." (J.A. 10511.) Nevertheless, the State did not fulfill its commitments. For example, the Attorney General's Office would later describe as "alarming" the State's decision to duplicate an HBI's MBA program. (J.A. 6867.) The memorandum warned the State that it was furthering segregation at the HBI, in violation of the Constitution, *Fordice*, and the Partnership Agreement, and that the decision left the State vulnerable legally under the laws addressing unnecessary program duplication. (J.A. 6866.)

Acknowledging its continuing legal obligation, Maryland reported to OCR in 2006 that it was committed to desegregating its HBIs in exactly the way the district court has now ordered -- by providing unique, high-demand programs to the HBIs and ensuring that they are not duplicated. (J.A. 6660.) According to the State, there was a strong historical basis for this approach, given that "the last time Morgan had a number of unique programs at the graduate level was in the late 1960s and early 1970s. During that period a *minority* of enrollments at the graduate level were African-American." (J.A. 6712.) As the district court held, however: "Unfortunately, the State did not follow through on this commitment, and white enrollment at HBIs only continued to decline following the Partnership Agreement, such that HBI racial identifiability has continued to increase." (J.A. 161.)

Even the most recent commission to address the issue of the State's HBIs, the 2009 Bohannon Commission, and its panel of experts in higher education, the HBI

Panel, implored the State to "restructure the process that has caused the inequities and lack of competitiveness" between the HBIs and TWIs. (J.A. 6496.) It called upon the State to eliminate "vestiges and effects of prior discrimination and the disadvantages created by the cumulative shortfall of funding over many decades." (J.A. 6539.) As it had done with so many other commissions, Maryland ignored the recommendations.

As a result of program duplication equal to or worse than Mississippi's of the 1970s, at the time of the liability trial, the HBIs had only 11, unique, high-demand programs, compared to 122 at the TWIs. (J.A. 158.) Indeed, in 2005, the Presidents of the HBIs had complained about the State's unnecessary program duplication, noting "[t]he position of these four institutions threatens to deteriorate even further as certain TWIs are being targeted as growth institutions and any uniqueness in missions and programs between HBIs and TWIs is being systematically eroded." (J.A. 6845.) Maryland's systemic refusal to desegregate its HBIs led to the filing of this lawsuit approximately a year later.

PROCEDURAL HISTORY

Plaintiffs (the Coalition for Equity and Excellence in Higher Education along with HBI students and alumni) brought this action in 2006. In their complaint, plaintiffs sought redress of Maryland's violation of the Equal Protection clause, *inter alia*, the practice of allowing the TWIs to duplicate programs and failing to redress

desegregation (as the State had committed to do in the Partnership Agreement). (J.A. 359-60 at ¶¶ 144-151.) After years of discovery and motions practice, failed mediation efforts, and a judicial reassignment, the case went to trial in 2012.

During pretrial proceedings, various contentions on each side were accepted and rejected, although the State repeatedly misrepresents prior rulings purporting to have rejected only plaintiffs' claims. For example, the State claims the trial court rejected plaintiffs' claim "that Maryland had breached the 2000 OCR Partnership Agreement." (Appt. Br. at 8.) The trial court, however, found no such thing -- its holding was based *only* on the fact that plaintiffs were not *party* to the agreement and thus could not sue for its breach. (*See* J.A. 328.) The fact that Maryland did not remedy the constitutional violations that the Partnership Agreement addressed, however, continued to be a central feature of the case through trial. (*See* J.A. 161.) The State also mischaracterizes the court's summary judgment ruling in 2011, claiming the court found that Maryland had desegregated all the TWIs (Appt. Br. at 8), when, in reality, the court simply recognized that plaintiffs were not claiming that this case was about segregation at the *TWIs*. (J.A. 108.)

The case proceeded to trial in January and February 2012, after which the court issued a comprehensive opinion finding the State liable. Applying the three-part *Fordice* test, *see* n.6 below, the court concluded that plaintiffs had established "current policies and practices of unnecessary program duplication that continue to

have segregative effects as to which the State has not established sound educational justification." (J.A. 115.)[6] Regarding the first prong of *Fordice*, whether unnecessary program duplication was a policy or practice traceable to the *de jure* era, the district court found that Maryland continued to have a "dual structure" of higher education in which there is a "substantial amount of unnecessary or non-essential program duplication between the TWIs and [H]BIs, and there is not meaningful program uniqueness at both sets of institutions." (J.A. 158-59.) It found that Maryland had continued to operate a dual system of higher education in which the HBIs lacked an institutional identity beyond race, and had only 11 unique, high-demand academic programs compared to 122 at the TWIs. (J.A. 156, 158-59.) The State offered no evidence that it has made any serious effort to address continuing historic duplication and "even more troublingly, the State has failed to prevent *additional* unnecessary duplication, to the detriment of the HBIs." (J.A. 162-63.)

Despite the State's claim that the court based liability on "a single" example of duplication, the district court actually provided numerous examples to show, *inter*

[6] In *Fordice*, the Supreme Court established a three-step analysis for determining whether a state has discharged its duty to dismantle former systems of *de jure* segregation. (J.A. 134.) *First*, plaintiff must show a policy is "traceable" to to the *de jure* era. *Second*, the burden shifts to the State to prove it has "dismantled" its prior segregated system and that the challenged policies have no continuing "segregative effects." (J.A. 135.) *Third*, if segregative effects continue, the State must show those policies have a "sound educational justification" and cannot be "practicably eliminated." (*Id.*)

alia, that "the duplication of a unique HBI program at a TWI can have an effect on the overall enrollment at the HBI." (J.A. 165.)

- Bowie "offered an MS in Computer Science before Towson," but once Towson offered it, "enrollment in Bowie's program dropped precipitously." (J.A. 165-66.)
- Enrollment in Bowie, Coppin, and Morgan's teaching programs all dropped substantially between 2002 and 2008 after UMBC began offering the program. (J.A. 166.)
- "When UB entered the public system offering an MBA, the MBA program that Morgan had been operating by itself suffered." (J.A. 166 (citing J.A. 3457 (testifying that the impact of UB's MBA on Morgan's program "illustrates the type of effect you may get when you have duplicative programs nearby")).)
- Coppin experienced a 73% decline in white graduate student enrollment after the partnership agreement and Bowie experienced a 67% decrease, while at the same time graduate enrollments grew rapidly at TWIs "while stagnating at HBIs." (J.A. 161.)
- "[D]espite Morgan's overwhelmingly black enrollment, because it is one of only two public universities in Maryland to offer such programs, 83% of the Landscape Architecture degrees it awarded in 2010 were to white students, as were 33% of the Architecture degrees it awarded." (J.A. 168 (citing J.A. 3411).)

These examples of duplication (and the effect of unique programs) were part of a historical pattern in which the State steered non-black students away from the HBIs.

The district court stressed the State's prior awareness of the problem it now denies on appeal: "The State has recognized that its HBIs are not successful at attracting other-race students." (J.A. 164.) In doing so, the court indicated that in order for racial desegregation to occur at the HBIs, they must offer programs not

offered at the TWIs. (J.A. 164-65.) When the HBIs possess unique programs, "they will be more empowered to attract a diverse student body." (J.A. 166.) Maryland's own history confirms this. During the 1960s and 1970s, significant numbers of white students graduated from unique, high-demand programs offered by Maryland's HBIs. (J.A. 160.) Unfortunately, these early gains in integrating Maryland's HBIs were abandoned "almost as soon as they began" and the investment in the TWIs and ongoing duplication of programs led to decreased white enrollment at the HBIs. (J.A. 161.)

In fact, the court noted that Maryland's 2000 Partnership Agreement with OCR *committed* the State to developing unique, high-demand programs and avoiding future duplication. (J.A. 161.) "As embodied in the OCR Partnership agreement, a remedy for unnecessary program duplication likely includes both avoidance of such duplication and 'expansion of mission and program uniqueness and institutional identity at the HBIs.'" (J.A. 171.)

In making its findings, the court also relied on plaintiffs' expert, Dr. Clifton Conrad, "the nation's preeminent scholar on this issue, having served as a testifying expert and conducted similar duplication analyses for OCR in *Fordice* and its progeny." (J.A. 157.) The court agreed with Dr. Conrad and found that "Maryland continues to have a dual structure of higher education" in which "there is a substantial amount of unnecessary or non-essential program duplication" between

the HBIs and TWIs. (J.A. 158-59.) Based on Dr. Conrad's duplication analysis, the court found that statewide 60% of the noncore programs at Maryland's HBIs were unnecessarily duplicated, compared with only 18% of the noncore programs at the TWIs. (J.A. 157.) At the time of the liability trial, the TWIs had six times as many unique masters programs as the HBIs and over thirteen times as many unique doctoral programs. (J.A. 158.)

Pursuant to the second *Fordice* step, the court found segregative effects because the HBIs lacked sufficient academic programs with the uniqueness, quality, and demand to attract other-race students. (J.A. 132.)[7] The State did not meet its burden of proving that "the current unnecessary program duplication that exists in Maryland at its HBIs does not continue to have segregative effects." (J.A. 136.)

Finally, as to the third *Fordice* step, the court found the State had not proven there were "sound educational justifications preventing the elimination of this duplication." (*Id.*) The court concluded that "the extensive program duplication in Maryland is a traceable vestige of the *de jure* era, that it continues to exacerbate the

[7] In its brief, the State touts the increase in other race students at the HBIs between the 2012 liability trial and the 2017 remedies trial. In fact, the percentage of white students at the four HBIs combined remained at about 5% at the time of the remedies trial. (J.A. 11905-906; J.A. 3138.) In addition, Asian and Hispanic students only comprised 3.8% of the student body at the HBIs. (*Id.*) Instead, the increase in "other race" students was driven by less relevant categories -- foreign students, multiracial students, and students who declined to state their race. (J.A. 11905-906; J.A. 3137-39.)

racial identifiability of Maryland's HBIs by limiting their competitiveness in program offerings, and that there is no sound educational justification preventing the mitigation of this duplication." (J.A. 171.)

The court indicated that "[r]emedies will be required" to dismantle the extensive unnecessary program duplication in Maryland. (J.A. 115.) The court indicated that a remedy should include revised policies and practices to ensure both the "avoidance of such duplication" in the future and the "expansion of mission and program uniqueness and institutional identity at the HBIs." (J.A. 171.) After discussing the obstacles the HBIs had traditionally faced in attracting other-race students, the court concluded that "[w]here HBIs possess unique programs, however, they will be more empowered to attract a diverse student body." (J.A. 166.) In discussing needed remedies, the court suggested the development of niches that include unique and/or high-demand programs to create institutional identity at the HBIs. (J.A. 171 (citing plaintiffs' expert, Dr. Walter Allen, who recommended that: "[e]ach HBI should develop programmatic niches of areas or areas of excellence in at least two high-demand clusters within the next three to four years.").)

After more failed mediation efforts, discovery, and expert reports concerning remedies, the court conducted a seven-week trial on remedies in January and February of 2017. The State stood by the remedial plan that the district court had rejected a year earlier, and called no experts on desegregation remedies. Instead, it

chose to rely on the so-called quantitative analysis of Dr. Alan Lichtman, a history professor, to criticize plaintiffs' experts. Dr. Lichtman proposed no remedy at all, and the district court once again urged the State to submit a serious remedial proposal. Incredibly, the State claimed that it did not "have that authority." (J.A. 4620-21.) The trial court had just two days earlier expressed concern about the State's attempt to obstruct a meaningful remedy: "Well, what I don't understand is why you might not have worked with the Plaintiffs and their experts to come forward with an idea." (J.A. 4481.) Dr. Lichtman neither endorsed the State's remedial plan, nor provided a plan of his own.

On November 8, 2017, the district court issued its opinion on remedies, finding that the creation of "new unique, high-demand programs at the HBIs will achieve the greatest possible reduction in the segregative effects of unnecessary program duplication in Maryland's institutions of higher education." (J.A. 235.) The trial court began its analysis finding that "current policies and practices traceable to the *de jure* system, in the form of unnecessary program duplication having segregative effects at the HBIs, persist." (J.A. 174.)

The court observed that given such a finding, "the Supreme Court has placed the burden squarely on the state to reform such policies." (J.A. 174-75.) The court criticized the State because it "did not engage in a serious effort to propose a remedy

prior to the hearing" and did not permit the parties "to consult meaningfully with relevant state actors." (J.A. 175.) The court set forth the basis for its remedial plan:

> All parties need to recall that this case is not about institutions but about the constitutional right of students to attend any public college or university for which they are qualified without being required to accept racial segregation at that institution. Maryland's TWIs already meet that standard of integration; Maryland's HBIs do not.

(*Id*.) Accordingly, the court indicated that a remedial plan "must encourage other-race students to attend the HBIs." (*Id*.) Specifically, the court agreed with plaintiffs that academic program offerings should be the focus of the remedy. It held that "TWI and HBI presidents largely agreed that academic program offerings -- especially unique, high-demand program offerings -- can play some role in attracting students to a particular university." (J.A. 210.)

The trial court relied on an extensive historical record and applicable precedent, finding that "plaintiffs' proposal for new unique high-demand programs finds strong support in: (1) Maryland's own past support for creating unique, high demand programs at HBIs; and (2) previous desegregation remedies under the *Fordice* standard." (J.A. 221.) The court found "there is much historical support, including recommendations endorsed by the State in the past, for the implementation of unique, high-demand programs at the HBIs to encourage other-race student enrollment." (*Id*.) That support included, *inter alia*, the 2000 Partnership Agreement between the State and OCR (J.A. 6569-618), the 2006 Committee I

Report (J.A. 6653-796), and the 2005 HBI Submission to the Legislative Black Caucus (J.A. 6843-64). The court found such historical documents and State reports to be compelling evidence "regarding the remedial potential of unique, high-demand programs." (J.A. 222.) It also noted that "[t]he principles endorsed in these documents are consistent with the remedial strategies employed historically by the Office of Civil Rights in the higher education desegregation context." (J.A. 225.) The court was "convinced that the historical record, together with the opinions of the plaintiffs' experts and both HBI and TWI presidents" all provided "strong support for the establishment of unique, high-demand programs at the HBIs." (J.A. 226.) The court concluded "that creating new unique, high-demand programs at the HBIs will achieve the greatest possible reduction in the segregative effects of unnecessary program duplication in Maryland's institutions of higher education." (J.A. 235.)[8]

[8] The court's conclusion that new programs are an appropriate remedy is in no way undermined by the Fifth Circuit's holding in *Ayers v. Fordice*, 111 F.3d 1183 (5th Cir. 1997), as the State suggests. (Appt. Br. at 24.) In fact, the *Ayers* court stressed that "evidence presented by the United States and defendants indicates that well-planned programs that respond to the particular needs and interests of local populations can help to desegregate historically black institutions. Witnesses for both parties testified that programs not duplicated at proximate institutions . . . have had success in attracting white students to historically black institutions in other states." 111 F. 3d at 1213-14.

The court indicated it was "convinced" by the testimony of plaintiffs' expert, Dr. Allen, finding it was "well-supported, considered, and holistic, drawing on multiple perspectives within and without Maryland and especially attentive to the view of the affected HBIs." (J.A. 236.) The court also noted that "[o]ther courts applying the *Fordice* standard have followed this approach." (*Id*.) The court recognized that "an exact estimate for the desegregative effects of creating these programs" was not possible, but that "the effects of a proposed remedy need not be precisely computed before a court may adopt it." (J.A. 237.)[9]

Contrary to the State's characterization (Appt. Br. at 25), the trial court then applied both this Circuit's injunctive relief standards as well as those announced in *Fordice* to order "the creation of unique, high-demand programs" drawing on "the programmatic niches proposed by the HBIs." (J.A. 237.) The court's injunction clearly provided that the remedial plan should include "a set of unique and/or high demand programs at each HBI," that such programs "shall build on the areas of strength at individual HBIs" and use "plaintiffs' experts' suggested programmatic

[9] The trial court properly rejected the State's 11th-hour *Daubert* motion attempting to exclude much of the testimony of plaintiffs' remedial experts, Dr. Allen and Dr. Conrad. (J.A. 1836-89.) The State's repeated assertion that no "qualitative or quantitative analysis" supports the conclusion that unique, high-demand programs are appropriate remedies was baseless in light of the vast historical and testimonial evidence cited above upon which the court and these experts relied.

niches" particularly where such niches "overlap with suggestions made by the HBIs in their remedial proposals." (J.A. 244.)

Because the State blocked efforts to identify specific programs for each HBI (J.A. 175), the court decided to appoint a special master, who would (at the court's direction) consult with the HBIs, TWIs, and other relevant State officials. (J.A. 244.) Under the district court's supervision, the special master would develop a proposed remedial plan "subject to the supervision and orders of the court." (J.A. 243.) The special master would submit a "draft" of the remedial plan "to the court for approval." (J.A. 246.)

The district court stopped short of requiring the State to change the language of its program approval regulations, but rejected the State's argument that no further judicial review was required based on that revision. (*Id.*) Contrary to the State's suggestion on appeal, the court was not persuaded that Maryland had abandoned the practice of approving duplicative programs, as it required ongoing oversight of the approval process. (J.A. 241 (requiring "consultation with the Special Master before future program approvals are made").) In any event, changes to the program approval process would be only part of an appropriate remedy. As outlined in the Partnership Agreement, the State's 2006 submission to OCR, and both the court's liability and remedies opinions, dismantling unnecessary program duplication has two components: (i) addressing the program approval process, and (ii) creating and

enhancing unique, high-demand programs at the HBIs. (*See, e.g.*, J.A. 161.) Because "the State did not engage in a serious effort to propose a remedy" prior to the hearing and did not permit the Coalition's experts "to consult meaningfully with relevant state actors including the presidents," the district court had no confidence that Maryland would implement such programs, and no confidence that it would allow them to go unduplicated. (J.A. 175; J.A. 246.)

After the trial court entered judgment, the State moved to alter or amend the judgment and also noticed this appeal, seeking reversal of the court's finding of unnecessary program duplication and imposition of remedies. The Coalition then cross-appealed, seeking reversal of the court's dismissal of plaintiffs' claims that the State's mission and funding practices were also traceable vestiges that violated the Constitution. (J.A. 136.) The district court itself recognized that its potential error with respect to plaintiffs' mission and funding claims could require the court's remedy to be to "substantially altered." (J.A. 272 at n.2.)

STANDARD OF REVIEW

The State's appeal of the court's liability ruling contests the district court's factual findings. Those findings are reviewed under the clearly erroneous standard. *See, e.g., Universal Furniture Int'l, Inc. v. Collezione Europa USA, Inc.*, 618 F.3d 417, 427 (4th Cir. 2010) ("factual findings may be reversed only if clearly erroneous"). *See also TFWS, Inc. v. Franchot*, 572 F.3d 186, 196 (4th Cir. 2009)

("if the district court's account of the evidence is plausible in light of the record in its entirety, we will not reverse the district court's finding simply because we have become convinced that we would have decided the question of fact differently"). The appellate court can find no clear error where there are two permissible views of the evidence, and the district court as factfinder chooses one over the other. *Anderson v. Bessemer City*, 470 U.S. 564 (1985). In particular, when the findings of fact are based on determinations regarding the credibility of witnesses, the trial court's findings are entitled to even greater deference. *Id*. at 575.

The State's appeal of the court's remedial order and specifically the grant of injunctive relief -- is reviewed for abuse of discretion. *Legend Night Club v. Miller*, 637 F.3d 291, 297 (4th Cir. 2011).

Plaintiffs' appeal of the court's dismissal of their mission and funding claims is based on the court's erroneous interpretation of the standard for finding a traceable policy or practice under *Fordice*. In both instances, the court imposed a higher burden than required by *Fordice*. These legal questions are reviewed *de novo*. *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 502 (4th Cir. 2016).

SUMMARY OF ARGUMENT

Maryland's appeal rests on the remarkable proposition that it can escape liability for unnecessary program duplication because it has desegregated *some* of its institutions and eliminated *some* of the vestiges of the *de jure* era. The State

makes this argument despite being urged by its own educational task forces and commissions to discontinue unnecessary program duplication because it furthers segregation at the HBIs. It does so after agreeing to discontinue program duplication and promote new programs at the HBIs in the 2000 Partnership Agreement. It does so after being explicitly warned that the State was "in a vulnerable position, legally, with respect to the law governing the unnecessary duplication of academic programs." (J.A. 6866.) It does so after being advised that program duplication in Maryland has caused "independent segregative effects" and the "intensification of the HBIs' racial identifiability over the past twenty years." (J.A. 165.)

Liability. Based on this compelling record, the court's finding of unnecessary program duplication is not clearly erroneous and all the State's challenges fail. *First*, the fact that the court found the wording of the State's current program approval regulation "adequate" has no effect on the conclusion that Maryland engaged in unnecessary program duplication that continues to have segregative effects. (*See* I.A.) *Second*, the fact that Maryland's TWIs are desegregated is irrelevant to this case and to the court's finding of continuing segregative effects at the HBIs. (*See* I.B.) *Third*, there is no support for the State's contention that a finding of unnecessary program duplication alone cannot constitute a traceable policy or practice under *Fordice*. (*See* I.C.) *Finally*, the court's reliance on the voluminous

evidence and the plaintiffs' experts' opinions establishing unnecessary program duplication was proper and certainly not "clearly erroneous." (*See* I.D.)

Remedies. In addition, the remedy the court ordered for this constitutional violation is the very one the State previously agreed to in the OCR Partnership Agreement and which the evidence at trial showed to be sound and practicable. While the State claims the remedy was not "tailored" to the violation found, there was an extensive record supporting the potential for unique, high-demand programs to desegregate the HBIs. (*See* II.A.) In arriving at this remedy, the district court properly weighed the equities under this Circuit's law and *Fordice*. (*See* II.B.) Finally, the court's proposed use of a special master in conjunction with its remedial plan was proper under the Federal Rules and applicable case law, including specifically the prior higher education cases in Mississippi, Louisiana and elsewhere. (*See* II.C.) In short, the court did not abuse its discretion in fashioning its remedy.

Cross-Appeal. As opposed to the State's grounds for appeal challenging the extensive factual findings made by the district court, the Coalition bases its two cross-appeal grounds on the court's misapplication of *Fordice*. *First*, with respect to mission, the district court's decision was inconsistent with *Fordice*, *Knight*, and *Ayers*. It required plaintiffs to show that the State "continues to 'effectively fix' the scope of HBI offerings based on their *de jure* era missions." (J.A. 137.) This standard is not consistent with (and imposes a higher standard than) *Fordice*. The

court also erred in holding that the HBIs' limited missions are "better assessed in the context of unnecessary program duplication, not separately as a traceable 'mission' related policy or practice." (J.A. 141.) Finally, the court erred in finding that the "State currently plays an overall minor role in setting the mission of each institution" because the institutions create the initial drafts of their mission statements. (J.A. 138.) This narrow interpretation of mission is inconsistent with *Fordice* and ignored statutory requirements that missions be consistent with the Maryland State Charter and State Plan for Higher Education. Under a proper legal interpretation of mission, the evidence would confirm the limited role and missions of Maryland's HBIs are traceable to the *de jure* era. (*See, e.g.*, J.A. 6725.)

Second, with respect to funding, the court's decision was similarly flawed under *Fordice* and its progeny. The court applied an incorrect threshold standard in finding there could be no traceable policy if the "current funding formula" is shown to be "different from any of Maryland's prior funding policies or practices." (J.A. 150.) This was error because a traceable policy or practice may exist even though specific aspects differ from earlier periods or the *de jure* era. *Fordice*, 505 U.S. at 728. This error led the court to dismiss plaintiffs' funding claims based on how the State's funding policies "structurally" and "functionally" worked. (J.A. 150.) In terms of structure, the court improperly disregarded the role of both mission and cumulative underfunding in the State's funding process. Because the State has

continuously allocated funds based on mission designations and classifications, "inequalities among the institutions largely follow the mission designations, and the mission designations to some degree follow the historical racial assignments." *Fordice*, 505 U.S. at 740-41. In addition, the cumulative underfunding of the HBIs is relevant under *Fordice*. *See, e.g.*, *Knight v. Alabama*, 900 F.Supp. 272, 311 (N.D. Ala. 1995) (holding that "[i]nequality in funding over a number of years cannot be made up overnight" and that underfunding in one year becomes "embedded" in an institution). In terms of function, the court improperly compared funding levels solely based on a current per student (or "FTE") funding comparison. Based on its overly narrow reading of *Fordice*, the court erred in finding the HBIs adequately funded based on current FTE funding. Finally, the court's erroneous standard cause it to disregard relevant evidence and prematurely dismiss plaintiffs' capital funding claims.

ARGUMENT

I. LIABILITY: THE DISTRICT COURT CORRECTLY FOUND A CONSTITUTIONAL VIOLATION UNDER *FORDICE* BASED ON UNNECESSARY PROGRAM DUPLICATION.

Program duplication is "part and parcel of the prior dual system of higher education." *Fordice*, 505 U.S. at 738. Indeed, "the whole notion of 'separate but equal' required duplicative programs" in segregated schools, and the perpetuation of duplicative programs is a continuation of that practice. *Id.* Unnecessary program

duplication occurs when a state's HBIs and TWIs offer broadly similar academic programs that are not essential for the provision of general and specialized education in the core liberal arts and sciences at the undergraduate level. (J.A. 8316.) In order for racial desegregation to occur at HBIs and for HBIs to attract, recruit and retain white students, they must be able to offer programs not available at the TWIs. *Knight v. Alabama*, 787 F. Supp. 1030, 1331 (N.D. Ala. 1991) (holding the placement of "unduplicated high demand programs has a definite impact on the enrollment of other race individuals at an otherwise racially identifiable institution"). As the *Knight* court explained:

> The location of such programs at the state's HBUs should materially assist their desegregation. Likewise, the continued placement of high demand programs at the predominantly white institutions in close proximity to the predominantly black institutions has a restricting influence on the latter's ability to attract white students and to meet their constitutional duty to desegregate.

Id. That court also held that federal oversight of the program approval process was "important to ensure the desegregation of the state's predominantly black institutions" so that "program allocation does not impermissibly encourage or continue an institution's racial identity." *Id.* In *Knight*, the court identified program duplication at HBIs and TWIs in the same geographic area as a traceable policy that discourages whites from choosing an HBI. As a result of such policies, "whites *can* satisfy their curricular desires at HWIs, and *cannot* satisfy them at HBIs, thereby

discouraging them from choosing to attend HBIs." *Knight v. Alabama*, 14 F.3d 1534, 1541 (11th Cir. 1994) (emphasis in original).

The district court's factual determinations regarding unnecessary program duplication had ample evidentiary support and are not clearly erroneous. "There is no doubt that Maryland operated *de jure* segregated public higher education programs before 1969 when OCR found the State in violation of Title VI, and that some policies, such as program duplication at geographically proximate schools, are traceable to that era." (J.A. 10504.) Maryland therefore committed to avoid unnecessary program duplication and take appropriate steps to ensure that unique, high-demand programs promote the competitiveness of its HBIs and their ability to attract students of all races. (J.A. 6605.) Yet Maryland has not avoided unnecessary program duplication nor provided a meaningful number of new, high-demand, high quality programs at the HBIs.

A. The Trial Court's Finding of Unnecessary Program Duplication Traceable to Maryland's *De Jure* Era Was Not Cleary Erroneous.

In a myopic and distorted reading of the trial court's opinion on *remedy*, defendants claim that there can be no constitutional violation based on program duplication because the State's program approval regulation -- passed in 2012 after the liability trial -- is legally adequate *as written* for future program approval reviews. Unnecessary program duplication under *Fordice*, however, is not limited to forward-looking approvals, but focuses on whether unreasonable program

duplication exists and is traceable to the *de jure* era. A traceable policy or practice (such as program duplication) may exist even though specific aspects differ from earlier periods or the *de jure* era. *Fordice*, 505 U.S. at 728. Contrary to the State's suggestion that it can erase a constitutional violation by tweaking a regulation in 2012 (before the district court demanded as much), the Supreme Court mandates that "a State does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior *de jure* dual system that continue to foster segregation." 505 U.S. at 728. Here, the evidence was overwhelming that the State failed to do so, and the district court's finding was not clear error.

The evidence showed overwhelmingly that Maryland had failed to eradicate policies and practices regarding program duplication that were traceable to the prior system of *de jure* segregation. As the Maryland Attorney General's Office acknowledged the year before this lawsuit was filed, Maryland's policies and practices of unnecessary program duplication were hallmarks of its racially segregated higher education system during the *de jure* era. (*See* J.A. 10504; J.A. 6866 ("Unnecessary program duplication is part and parcel of the prior segregated system of higher education in Maryland.").) The duplication of academic programs between the State's HBIs and TWIs was exacerbated by the fact that program offerings at the HBIs were much more limited in scope than at the TWIs (J.A. 6926-

27), and remained so despite the State's commitment to recruit other-race students to the HBIs through unique academic programs. (J.A. 8922.)

Plaintiffs presented extensive testimony at trial regarding the continued existence of Maryland's *de jure* era academic programming policies and practices. (*See, e.g.*, J.A. 3624.) In 2010, Dr. Conrad (a professor of higher education at the University of Wisconsin) tabulated the number and instances of unnecessary program duplication. Dr. Conrad found that statewide, 65 of the 109 noncore programs at Maryland's HBIs were unnecessarily duplicated at a TWI. (J.A. 8538-39.) He also found that from 2001 to 2009 Maryland had approved 18 new programs at TWIs that unnecessarily duplicated programs at HBIs. Of those, 13 duplicated high-demand programs at HBIs. (J.A. 8410.)[10]

The evidence also flatly contradicts the State's contention that its post-liability trial regulatory revisions resolved the constitutional violation and erased the court's finding of a traceable policy. At the first trial, Dr. Conrad found the disparity in unique program offerings to be 122 high-demand programs at the TWIs compared with only 11 at the HBIs. (J.A. 158.) By the second trial in 2017, Dr. Conrad found

[10] Unnecessary program duplication refers to "those instances where two or more institutions offer the same nonessential or noncore programs." *Fordice*, 505 U.S. at 738. Core programs, meanwhile, refer to the basic "liberal arts and sciences course work" that can be expected to be offered at most institutions. *Id*. Non-duplicated programs are referred to as unique, and those particularly sought by a large number of students are referred to as high-demand. (J.A. 157-58.)

that the situation had substantially *worsened* to 171 such programs at the TWIs compared to just 10 at the HBIs. (J.A. 11891.) In short, unnecessary program duplication has been and remains widespread, continuous, and uncured by the State's modest 2012 regulatory adjustments, which the court recognized contained "adequate" language compared to plaintiffs' proposed revision, but nonetheless had not eradicated the State's traceable policy of unnecessary program duplication. The court's conclusion was not clearly erroneous.

B. The Court's Finding of Segregative Effects Despite Desegregation of the TWIs Was Not Clearly Erroneous.

The State next argues that it cannot be held liable for the constitutional violation of unnecessary program duplication because its TWIs are adequately integrated. (*See* Appt. Br. at 41-44.)[11] As an initial matter, whether the TWIs are integrated or not is simply irrelevant to this case, in which the constitutional challenge centers on whether the HBIs are desegregated. Regardless, the State's oft-repeated assertion that plaintiffs cannot prevail when the TWIs are desegregated is baseless. *Fordice* made clear that a State "does not discharge its constitutional

[11] Incidentally, although the State implies the University of Maryland Baltimore County ("UMBC") was always desegregated because it was founded in 1966, Maryland had not desegregated its system as of that time, as discussed above. In any event, even by 1970, the record shows that UMBC was not desegregated. (*See* J.A. 9647 (classifying UMBC as one of the State's "predominantly white institutions" and indicating that even as of 1970 UMBC had a full-time undergraduate black student population of only 5.2%).)

obligations until it eradicates policies and practices traceable to its prior *de jure* dual system that continue to foster segregation." *Fordice*, 505 U.S. at 728. The language does not say "that continue foster segregation at the TWIs." *Id.* In analyzing this issue, courts must determine "whether the State has perpetuated its formerly *de jure* segregation in *any facet of its institutional system*." *Id.* (emphasis added). There is no basis for the State's suggestion that desegregation of *part* of a state's higher education system satisfies its constitutional obligation under *Fordice*.

The State's position would lead to perverse results. For example, under the State's proposed standard, if the HBIs were racially integrated but the TWIs had no black students, the State would be legally immune from liability under *Fordice*, a position that would be absurd on its face and legally baseless. Desegregation at the TWIs simply does not excuse Maryland's obligations to desegregate the HBIs. After all, "it is possible for the State to have dismantled some aspects of prior segregation, and be discharged of any remedial obligation with respect to those factors, while remaining responsible for remedial measures in other areas." (J.A. 10507.)

In both *Knight* and *Ayers*, liability was found and remedies ordered despite percentages of other-race students at the TWIs the defendants claimed established desegregation. *See Fordice*, 505 U.S. at 724; *Knight*, 787 F. Supp. at 1063. In Maryland, the 2000 Partnership Agreement itself focused both on continued integration of TWIs *and* desegregation of the HBIs. (J.A. 6574.) As in *Knight*,

Fordice can be violated solely based on the failure to desegregate HBIs. *Knight*, 14 F.3d at 1541. In sum, the State's asserted error is meritless.

Nor does the existence of "choice" excuse program duplication. *Fordice* reversed the Court of Appeals precisely because choice alone was not sufficient. 505 U.S. at 729 ("We do not agree . . . that the adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system.") The Court specifically found that "choice" was not the answer to the constitutional question:

> That college attendance is by choice and not by assignment does not mean that a race-neutral admissions policy cures the constitutional violation of a dual system. In a system based on choice, student attendance is determined not simply by admissions policies, but also by many other factors. Although some of these factors clearly cannot be attributed to state policies, many can be. Thus, even after a State dismantles its segregative *admissions* policy, there may still be state action that is traceable to the State's prior *de jure* segregation and that continues to foster segregation. The Equal Protection Clause is offended by sophisticated as well as simple-minded modes of discrimination.

Id. (quotations omitted). If the State perpetuates segregation "whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system," the State "has not satisfied its burden of proving that it has dismantled its prior system." *Id*. at 731. Such practices "run afoul of the Equal Protection Clause." *Id.*

Defendants also argue that unless plaintiffs can prove that *all* segregation is due to program duplication, a violation does not exist, invoking a misreading of the Supreme Court's decision in *Bazemore v. Friday*, 478 U.S. 385 (1986). The State claims that, under *Bazemore*, where the racial composition of a state-funded organization is at least partially attributable to the participants' "choice," then the State cannot be found to be responsible for *any* of the ensuing segregation at that organization. (Appt. Br. at 44.) However, unlike the voluntary clubs in *Bazemore*, 478 U.S. at 407, the State's institutions are not treated equally under the existing policies and practices. (*See* J.A. 175 ("this case is . . . about the constitutional right of students to attend any public college or university for which they are qualified without being required to accept racial segregation at that institution").) Where State policies affect student choice, the *Fordice* Court made clear that a court could only apply the *Bazemore* "choice" holding "after satisfying [itself] that the State had not fostered segregation by playing a part in the decision of which club an individual chose to join." *Fordice*, 505 U.S. at 731. In fact, the *Fordice* Court distinguished *Bazemore*:

> *Bazemore* plainly does not excuse inquiry into whether Mississippi has left in place certain aspects of its prior dual system that perpetuate the racially segregated higher education system. If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects -- whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system -- and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden

> of proving that it has dismantled its prior system. Such policies run afoul of the Equal Protection Clause, even though the State has abolished the legal requirement that whites and blacks be educated separately and has established racially neutral policies not animated by a discriminatory purpose.

Id. at 731-32. Whether the focus in this case is Maryland's unnecessarily duplicating programs at the HBIs or its allocating unduplicated, high-demand programs almost exclusively to the TWIs, the State's practices clearly "foster[] segregation by playing a part in the decision of which [university] an individual [chooses] to join," and "by influencing student enrollment decisions." *Id.*

The fact that the racial identifiability of the HBIs may also be *partially* attributable to other factors as well does nothing to change this conclusion. *Fordice*, 505 U.S. at 729 ("That college attendance is by choice and not by assignment does not mean that a race-neutral admissions policy cures the constitutional violation of a dual system. In a system based on choice, student attendance is determined not simply by admissions policies, but also by many other factors. Although some of these factors clearly cannot be attributable to state policies, many can be.").

C. The District Court's Finding that Unnecessary Program Duplication Alone Can Constitute a Traceable Policy or Practice Under *Fordice* Was Not Clearly Erroneous.

The State next creates out of whole cloth an argument that even if unreasonable program duplication is found, it cannot constitute a constitutional violation by itself but must be accompanied by some *other* violation as well. This

is simply nowhere to be found in *Fordice* or elsewhere, including in Maryland's own legal analyses. Because the court properly rejected the State's contention and applied the correct standard, its factual findings were not clearly erroneous.

The Supreme Court has "consistently" asked whether racial identifiability (such as at the HBIs in this case) is attributable to the State and has "examined a wide range of factors to determine whether the State has perpetuated its formerly *de jure* segregation in any facet of its institutional system." *Fordice*, 505 U.S. at 728. The fact that the Supreme Court in *Fordice* condemned more than one of Mississippi's practices -- including program duplication -- does not mean any one practice did not individually constitute a violation. In fact, the Supreme Court took pains to say before examining certain practices: "It is important to state at the outset that we make no effort to identify an exclusive list of unconstitutional remnants of Mississippi's prior *de jure* system." *Id.* at 733 (cautioning that by only examining certain practices, the Court "by no means" intended to suggest that the court on remand should not examine "each of the other policies" that "have been challenged or that are challenged on remand").

With such caveats, the Court addressed admission standards, program duplication, and institutional missions, but never indicated those had to be found *collectively* in order to establish a constitutional violation. *Id.* In fact, the Court examined each practice *individually*, and specifically found Mississippi's practice

of program duplication to be constitutionally suspect separate and apart from the other policies challenged. 505 U.S. at 738. With respect to program duplication specifically, the Court explained:

> It can hardly be denied that such duplication was part and parcel of the prior dual system of higher education -- the whole notion of "separate but equal" required duplicative programs in two sets of schools -- and that the present unnecessary [program] duplication is a continuation of that practice. *Brown* and its progeny, however, established that the burden of proof falls on the *State*, and not the aggrieved plaintiffs, to establish that it has dismantled its prior *de jure* segregated system.

Id. at 738-39. The Court likewise referred to "the constitutional defect of unnecessary duplication" in isolation. It did not require that the "defect" be duplication "plus" some additional violation. *Id*. at 739.

Contrary to the plain language of *Fordice*, defendants willfully conflate concepts of sufficiency and necessity to argue that because unnecessary program duplication was just one of the suspect practices in Mississippi and Alabama, then unnecessary program duplication may only ever be unconstitutional when it coexists with other prohibited policies and practices.[12] There is no support for this logical fallacy. The fact that in another case (like Mississippi) there may be four violations does not mean that liability must always rest on four violations. Indeed, the district

[12] Defendants repeatedly claim this case is "unprecedented" because its facts are different from "all" other desegregation cases, but the only other higher education court cases where liability was determined post-*Fordice* are Mississippi and Alabama. The facts in this case contain similarities and differences when compared to those two states, as one would expect.

court rejected defendants' precise argument because it "fails to appreciate, as demonstrated by the Coalition, the independent segregative effects that unnecessary program duplication has had in Maryland." (J.A. 164.)[13] Likewise, while the *Fordice* Court instructed the district court to consider the combined segregative effects of violations that occurred in tandem in addition to their individual segregative effects, it nowhere stated that only a combination of violations may be actionable under *Fordice*. Instead, *Fordice* stands for the proposition that each "constitutionally suspect" policy can be independently lethal to the constitutionality of a state's segregative higher education system. Indeed, *Fordice* and its progeny repeatedly recognize the potential for unnecessary program duplication (on its own) to impact student choice. *See, e.g.*, *Ayers v. Fordice*, 879 F. Supp. 1419, 1445 (N.D. Miss. 1995). Accordingly, the court's factual findings of program duplication are consistent with *Fordice* and entitled to deference.

[13] Defendants attempt to limit *Fordice* by invoking Justice Scalia's *dissenting* opinion. Justice Scalia in no way rejected "program duplication" as a possible violation -- he in fact *concurred in the judgment* to remand such practices for consideration by the lower court. He dissented on the grounds that the "restrictive choice" standard might be too vague, but his incomplete hypothetical (with all programs duplicated equally) would not in any event reflect the real world situation presented here, where program duplication "continues to exacerbate the racial identifiability of Maryland's HBIs." (J.A. 171.)

D. The Court's Findings Were Not Clearly Erroneous Because the Court Properly Defined Program Duplication, Applied *Fordice*, and Relied on Plaintiffs' Experts and Other Evidence.

The State argues that the district court's liability finding is erroneous "because it rests on a misapplication of 'unnecessary' program duplication as that term is used in *Fordice*." (Appt. Br. at 49.) This claim is based on the erroneous premise that plaintiffs' theory and the trial court's decision posit that "*any* duplication of Maryland HBI programs classified by Dr. Conrad as 'unnecessary' should be presumed to perpetuate a policy of racial segregation." (Appt. Br. at 50.) According to the State, Dr. Conrad's duplication analysis inflates the incidence of unnecessary program duplication and fails to account for the impact of demographics on student enrollment. (Appt. Br. at 56-57; 60-61.)

The district court correctly applied the prevailing legal standard articulated in *Fordice* to the evidence presented, and its finding is not clear error. Ignoring substantial evidence in the record from multiple sources that unnecessary program duplication in Maryland has independent and ongoing segregative effects, Appellants suggest that the lower court's reliance on Dr. Conrad's methodology constitutes reversible error. However, the district court's evaluation of unnecessary program duplication -- including its reliance on expert evidence presented by Dr. Conrad -- is an intensely fact-based inquiry that appropriately belongs in the court that has presided over the presentation of evidence, heard all of the witnesses, and

has the "closest and deepest understanding of the record." *See U.S. Bank Nat'l Ass'n. v. Vill. at Lakeridge, LLC*, 138 S.Ct. 960, 962 (2018). Moreover, credibility determinations about expert analysis made as part of that process are appropriately committed to the district courts, and appellate courts must defer to those decisions. *See United States v. Heyer*, 740 F.3d 284, 292 (4th Cir. 2014).

In any event, the district court did *not* simply conclude that "any" duplication of Maryland HBI programs classified as "unnecessary" should be presumed to perpetuate a policy of racial segregation. (Appt. Br. at 50.) Rather, the trial court found that plaintiffs had successfully demonstrated a current practice of "substantial" unnecessary program duplication that is "comparable to, and in some cases more pronounced than, the duplication found in Mississippi during the *Fordice* remand proceedings that held the state liable for its desegregation efforts." (J.A. 158-59.) The court based its decision on an extensive historical record. (*Id.*)[14] The

[14] That evidence included documents such as the reports of the Soper Commission (J.A. 6869-7020); Marbury Commission (J.A. 7021-438); Frampton Commission (J.A. 7579-631); Cox Task Force (J.A. 7703-83); 2000 Partnership Agreement with OCR (J.A. 6569-618); 2005 Attorney General Memorandum (J.A. 10486-516; 2006 Committee I Report (J.A. 6653-796); 2008 HBI Panel Report (J.A. 6367-534); and the 2009 Maryland State Plan (J.A. 6303-66). It also included witness testimony. (*See* J.A. 3796 (continuation of the state's impermissible policy of program duplication); J.A. 4237, J.A. 4239 (acknowledging program duplication's effect on student choice).) Finally, it was supported by expert opinion testimony. (*See* Conrad Report I (J.A. 8224-308); Conrad Expert Report II (J.A. 8309-453); Conrad Expert Report III (J.A. 8454-621); Conrad Supp. Expert Report (J.A. 8622-29).

court also credited trial testimony and expert analysis indicating, for example, that Maryland's TWIs had a total of 296 unique, non-core programs while its HBIs had only 44 such programs. (J.A. 157-58.)

More importantly, the court noted that Maryland "did not, for the most part, present evidence that unnecessary program duplication could not be eliminated consistent with sound educational practices, relying instead on the argument that no traceable policy or practice existed to begin with." (J.A. 168.) Both at trial and on appeal, the State misstates its legal burden and the relevance of "educational justifications" for *individual* programs to excuse its policy of unnecessary duplication. (Appt. Br. at 50.) While duplicative programs are not automatically suspect, once a state has been found to have operated a dual system of higher education -- as Maryland has been found to have done here -- it must take affirmative steps to dismantle that system or it is presumed that the ongoing segregative effects are associated with the illegal policy or practice. *Fordice*, 505 U.S. at 731.

After two trials, the district court was left with a record replete with evidence of a traceable policy of unnecessary program duplication with independent segregative effects, but noticeably devoid of evidence of sound educational justification or analysis of less segregative and practicable alternatives. This record does not allow the reviewing court to conclude with a "definite and firm conviction

that the [d]istrict [c]ourt's key findings are mistaken." *See North Carolina St. Conf. of the NAACP v. McCrory*, 831 F.3d 204, 220 (4th Cir. 2016).[15]

As there is no legal error, the trial court's findings – including its reliance on expert evidence – may only be overruled where they constitute clear error. *Universal Furniture Int'l Inc. v. Collezione Europa USA, Inc.*, 618 F.3d 417, 427 (4th Cir. 2010). The Supreme Court has held that judicial review of cases which rely largely on expert testimony are particularly appropriate for judicial deference. *See Graver Tank and Mfg. Co v. Linde Air Prods. Co.*, 336 U.S. 271, 274 (1949). The Fourth Circuit has held that "evaluating the credibility of experts and the value of their opinions is a function best committed to the district courts, and one to which appellate courts must defer." *Heyer*, 740 F.3d at 292.

In order to assess the unnecessary program duplication in Maryland, plaintiffs presented the expert testimony of Dr. Conrad to evaluate the extent to which Maryland maintains a policy of approving broadly similar noncore programs at geographically proximate institutions. To the extent that Appellants cite to contrary evidence to challenge Dr. Conrad's duplication analysis, this is precisely the type of

[15] As discussed above (at n.6), *Fordice* establishes a three-step analysis in which the plaintiff only has the burden at the first step -- proving a traceable policy or practice. The State had the burden of proving, in the second step, that it had dismantled its system and there were no continuing segregative effects. Finally, the State also had the burden of proving any traceable policies had a sound educational justification and could not be practicably eliminated. *Fordice*, 505 U.S. at 731.

credibility determination and weighing of the evidence that is most appropriately left to the district court. *See United States v. Hall*, 664 F.3d 456, 462 (4th Cir. 2012) ("[e]valuating the credibility of experts and the value of their opinions is a function best committed to the district courts, and one to which appellate courts must defer" and appellate courts should be "especially reluctant to set aside a finding based on a trial court's evaluation of conflicting expert testimony").

In any event, the record fully supports the court's reliance on plaintiff's expert evidence. The court found Dr. Conrad possesses the "knowledge, skill, experience, training, or education" including his extensive experience in "higher education desegregation research and litigation" to qualify him to provide expert testimony in this case. (J.A. 183 at n.5.) Indeed, Dr. Conrad is "the nation's preeminent scholar on this issue, having served as a testifying expert and conducted similar duplication analyses for OCR in *Fordice* and its progeny." (J.A. 157.)[16] In this case, Dr. Conrad conducted a duplication analysis that looked at instances where two or more institutions offer the same nonessential or noncore programs. (J.A. 8224-308; J.A. 8309-453; J.A. 8454-621; J.A. 8622-29; J.A. 11831-891.) Contrary to the State's

[16] In fact, the State itself relied on Dr. Conrad and his expertise on academic programs in its early negotiations with OCR. Several years prior to this litigation, Maryland retained Dr. Conrad as a consultant to evaluate unnecessary program duplication and advise it with respect to its obligation to desegregate its system of higher education. (J.A. 3656-59.)

contention, his methodology accounted for the fact that some level of programmatic duplication is necessary and anticipated within a system of higher education, as most four-year institutions must offer a common inventory of programs essential to a general college education (*i.e.*, core programs).

In order to determine which instances of duplication might implicate a constitutional violation, Dr. Conrad developed a classification system to distinguish those "core" programs from "unique" or "noncore" programs -- which are the hallmark of institutional identity. (J.A. 11849.) He defined core programs as those "essential to providing general and specialized education in the basic liberal arts and sciences at the undergraduate level," while graduate programs are considered noncore as they are not required or deemed an essential part of a traditional liberal arts education. (*Id*.) To identify instances of unnecessary or impermissible program duplication, Dr. Conrad first evaluated whether an HBI and a TWI offered broadly similar noncore programs. (J.A. 8316. J.A. 8318.)[17] He then confirmed the results of his analysis with an independent evaluation of each school's program offerings. (J.A. 8623. J.A. 8625-27.)[18]

[17] Dr. Conrad noted that while geographic proximity of institutions is relevant, what is more important in a duplication analysis is the extent to which racially identifiable institutions have the same "service area" or compete for prospective students. (J.A. 8314, J.A. 8316; J.A. 11840.)

[18] CIP codes refer to the Classification of Instructional Program code used in Maryland and other states to classify academic programs within a higher education

While Appellants claim that terms like "unnecessary program duplication," "core," and "noncore" are arbitrary constructs without a widely accepted meaning, (Appt. Br. at 51), Maryland's own regulations prove otherwise. They specifically reference and define core programs in a manner consistent with Dr. Conrad's classification system: "Ordinarily, proposed programs in undergraduate core programs consisting of basic liberal arts and sciences disciplines are not considered unnecessarily duplicative. Unreasonable duplication is a more specific concern in vocational/technical, occupational, graduate, and professional programs which meet special manpower needs." COMAR 13B.02.03.09.

Similarly, Maryland's agreement with OCR is consistent with Dr. Conrad's analysis of unnecessary program duplication. The Partnership Agreement specifically defines unnecessary program duplication as instances in which "broadly similar academic programs" are offered "in areas other than the core undergraduate liberal arts and sciences" at "geographically proximate" TWIs and HBIs. (J.A. 6604.)[19] In any event, adjustments to the list of core programs would have a "very

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system. It allows the comparison of broadly similar academic programs. (J.A. 8460-61; J.A. 11884.) Given some of the limitations of the CIP analysis, Dr. Conrad supplemented that analysis by conducting an independent review of the program offerings at different institutions to assess whether offerings with identical CIP codes were in fact identical or broadly similar. (J.A. 11883-84.)

[19] Appellants complain that Dr. Conrad did not use the same list of core programs that he developed for Mississippi or Alabama. (Appt. Br. at 54-56.) It is to be expected that over the course of thirty years, changes would occur across time and

modest" effect on plaintiffs' analysis, and the State did not even attempt to provide a contrary analysis. (J.A. 5212, J.A. 5231.)

Contrary to Appellants' claims, Dr. Conrad's duplication analysis is not inconsistent with that relied upon in other higher education desegregation cases. Critiques of Dr. Conrad's analysis in *Knight* and *Ayers* are not instructive here as both Mississippi and Alabama ultimately did find unnecessary program duplication. Moreover, as noted above, Dr. Conrad addressed the concerns in the Alabama and Mississippi cases here by using additional methods to confirm his findings. Specifically, he accounted for the limitations associated with reliance on CIP codes by assessing program title, purpose, and curriculum with the specific purpose of evaluating the extent to which his inventory may have underestimated or overestimated the level of unnecessary program duplication. (J.A. 8623.) This methodology offered a "sound overall classification for identifying program offerings" and determining duplication. (J.A. 1700-01.)

Finally, the State claims the district court erred by failing to account for the demographic shifts that contributed to the racial identifiability of the HBIs. (Appt. Br. at 58-62.) The State faces a high hurdle on this issue because the State had the

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jurisdictions. Minor differences in the list of core programs produced or the number of programs on that list do little to undermine his analysis or the trial court's reliance on it. (J.A. 5120-21, J.A. 5128-29, J.A. 5222-23.)

burden at the time of the liability trial of disproving that unnecessary program duplication had a segregative effect, *Fordice*, 505 U.S. at 739, and the district court's finding as to whether the State carried that burden is a factual determination subject to the clear error standard. Fed. R. Civ. P. 52. The State falls far short of meeting its burden and demonstrating that the district court committed clear error.

The State advances three arguments with regard to demographics. *First*, it claims that the court erred in its liability opinion by concluding that after the 1970s white enrollment at the HBIs declined as HBIs' programs were further duplicated. (Appt. Br. at 58-59.) The State points to two sentences from one document referencing some increases in white enrollment during the 1980s and 1990s. (*Id.* at 59 (citing to J.A. 8732-33).) This flimsy argument is insufficient for the State to demonstrate clear error. Indeed, the very report cited shows that 1973 was the high water mark for the number of white graduate students, and that even that number had dropped by roughly a third from 1973 to the mid-1980s. (J.A. 8739.) The district court also cited to specific examples where the white enrollment in HBI programs plummeted after the programs were duplicated by TWIs, and to evidence that non-duplicated HBI programs were able to attract white students. (J.A. 164-68.) Additionally, the court also cited state statistics showing the HBIs were racially identifiable, and even more so, since the 1970s. (J.A. 165 (referencing the "intensification of the HBIs' racial identifiability over the past twenty years").)

Second, the State contends the HBIs were losing white students because the areas in which they were located had become increasingly African-American since the 1970s. (Appt. Br. at 59-60.) As an initial matter, the State's untimely arguments on demographics were waived during the liability phase, and the district court had no obligation to reconsider this issue at the remedial phase. *Carlson v. Boston Sci. Corp.*, 856 F.3d 320, 325–26 (4th Cir. 2017) (discussing the law-of-the-case doctrine, the district court's discretion over reconsidering prior rulings, and affirming the district court's denial of reconsideration); *Wood v. Crane Co.*, 764 F.3d 316, 326 (4th Cir. 2014) (noting that "[o]ur litigation system typically operates on a raise-or-waive model"). Even if the State's arguments were timely, the State cannot demonstrate clear error. At the liability trial, the State's own demographer testified that the HBIs drew students from all over the state. (J.A. 4000, J.A. 4005.) Likewise, Morgan students came from a broader area than just Baltimore City and areas surrounding the school. (J.A. 3460.) At Bowie, the substantial decrease in other-race students was not merely attributable to Prince George's County demographic changes because there was a significant drop in other-race students enrolling from *outside* of Prince George's County. (J.A. 4250; J.A. 11526)

Plaintiffs had already rebutted these claims when the State raised them during the remedial trial. (J.A. 3143-44)[20]

Third, the State implies that plaintiffs had the burden to account for any segregative effects that may have been due to demographics. (Appt. Br. at 61-62.) The State fundamentally misunderstands *Fordice*'s three-step analysis and the fact that the State carries the burden on segregative effect. *Fordice*, 505 U.S. at 731, 738-39. Indeed, the State cannot point to another post-*Fordice* decision that placed the burden on plaintiffs to account for changing demographics. *See generally Knight*, 900 F. Supp. at 281-82, 322 (citing the Eleventh Circuit's instructions after *Fordice* that the State carries the burden on "segregative effects"); *Ayers v. Fordice*, 111 F.3d 1183, 1221 (5th Cir. 1997) (affirming district court's decision because it did not place burden on plaintiffs to show segregative effects.).[21]

[20] In addition, the data showed that the TWIs were drawing substantial percentages of white students from Baltimore City and Baltimore County whereas the HBIs were not. (J.A. 3143-44.)

[21] The State cites to *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1339 (11th Cir. 2005) for support, but *Holton* merely recognized that when the evidence shows "demographic factors have 'substantially caused' the racial imbalances," plaintiffs must do more than "merely assert[] that demographics *alone* do not explain the racial imbalances". *Holton*, 425 F.3d at 1339. Not only is the case inapplicable (since demographics were not shown to have "substantially caused" any of the racial imbalance in this case), but in any event, the record clearly demonstrates that plaintiffs have done more than "merely assert" their claims.

II. REMEDY: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING INJUNCTIVE RELIEF WAS APPROPRIATE UNDER *FORDICE* AND EQUITABLE PRINCIPLES.

A. The Trial Court's Remedial Order Was Specifically Tailored to the Proven Constitutional Violation.

Defendants argue that the injunctive relief set forth in the court's remedial order is not tailored to the proven constitutional violation, but none of their arguments are persuasive, let alone establish an abuse of discretion.

First, defendants reassert their claim that program duplication "does not restrict student choice, but expands it" (Appt. Br. at 67), and should thus not serve as the basis for any remedy. This claim fails for the same reasons already discussed demonstrating the substantial segregative effects the State's unnecessary program duplication has on student choice. (*See* I.C, above.) Simply put, the State's policy and practice of duplicating HBI programs at TWIs and disproportionately allocating unduplicated programs to TWIs steers students away from HBIs. *See Knight*, 14 F.3d at 1541 (finding that policies with segregative effects include "policies that discourage whites from seeking to attend HBIs, examples of which include: duplication of programs at HBIs and HWIs in the same geographic area"). *Fordice* moreover, did not limit constitutional violations to restrictions on choice, but held that policies violate the Constitution if they "continue to have segregative effects -- *whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system*." *Fordice*, 505 U.S. at 731 (emphasis added).

Second, defendants argue that, because unnecessary program duplication was the only vestige of *de jure* segregation proven at trial, requiring the non-duplication of new programs at the HBIs infringes the rights of students to enroll in the same program elsewhere (presumably a TWI). (Appt. Br. at 67.) The State confuses the "rights" at issue in this case. Students do not have a fundamental right to attend a school that offers every program; students have a right to attend desegregated schools. *Fordice*, 505 U.S. at 733. (*See also* J.A. 175 ("[T]his case is . . . about the constitutional right of students to attend any public college or university for which they are qualified without being required to accept racial segregation at that institution.").)[22] The State's citation to *Brown v. Board of Education* is far-fetched, as the remedial plan contemplates that the unduplicated programs to be placed and maintained at the HBIs would be "available to all on equal terms" in precisely the same way the State contends all currently unique, high-demand programs exclusively housed at TWIs are. *Brown*, 347 U.S. at 493. The State's concern seems to be that the proposed remedy *will succeed* in affecting student choice and *attract students of all races to the HBIs*. In other words, it would be a well-tailored remedy.

[22] The State cites *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 743 (2007) for the proposition that Equal Protection claims are analyzed at the individual level. (Appt. Br. at 68.) *Parents Involved* did not involve a jurisdiction with a traceable, *de jure* practice of segregation and is in no way inconsistent with *Fordice* or the district court's decision. *See* 551 U.S. at 753.

Third, defendants misleadingly conflate Maryland's decades-long policy and practice of *unnecessarily* duplicating programs and the *necessary* program duplication that takes place elsewhere without segregative effects. (Appt. Br. at 68.) As discussed above (*see* I.C), not all program duplication is constitutionally suspect, only policies and practices that exacerbate segregation and are traceable to the *de jure* era. As an initial matter, *Fordice* made clear that "the State bears the burden of proving that present-day program duplication is not constitutionally defective." *Ayers v. Fordice*, 111 F.3d at 1218 (citing *Fordice*, 505 U.S. at 738). Thus, defendants' argument is an improper attempt to shift that burden to plaintiffs. However, more importantly, the policy and practice of unnecessary program duplication in Maryland is simply not "pervasive" in "all systems throughout the country which have more than one university." *Ayers*, 879 F. Supp. at 1444 (describing program duplication generally). Instead, Maryland's practice of unnecessary program duplication is "comparable to, and in some cases more pronounced than, the duplication found in Mississippi during the *Fordice* remand proceedings that held the state liable for failing in its desegregation efforts." (J.A. 158.) Accordingly, relief to address such program duplication is appropriate.

Finally, the district court in fact tailored every single aspect of the remedial plan to the specific and factually-supported constitutional violations proven at trial. After finding that Maryland's practice of maintaining unnecessarily duplicated

programs exacerbated segregation by creating a programmatic disparity of unique programs that dramatically disfavored the HBIs, the court ordered "the creation of unique, high-demand programs" drawing on the "programmatic niches" proposed by the HBIs and "suggested by the plaintiffs' experts." (J.A. 237, J.A. 242.) After hearing evidence that the historical and contemporary consensus is that "each historically black public [institution] should develop its own specialty areas or programs within the total state system of higher education that will broaden the appeal of the institution to a more diverse student body" (J.A. 7822-23), the court ordered that the new programs "shall build on the areas of strength at the individual HBIs." (J.A. 244.)

At the same time, the court also rejected other remedies the plaintiffs and HBIs suggested. For example, based on the testimony of some TWI presidents, the court denied transfers in its remedial order except by mutual institutional consent. (J.A. 244.) There is little better evidence of "tailoring" than such remedial scraps being left on the court's cutting room floor. This pattern of attentive tailoring continues throughout the remedial order, each component of which is drawn from the court's specific findings in the case. For example, the court heard testimony that program approvals can jeopardize accreditations, (J.A. 216-27), so it ordered that accreditation issues be taken into account when proposing new programs. (J.A. 244.) The court heard testimony about the value of additional funding for marketing,

student recruitment, financial aid, and other related activities, so it included related measures in the remedial order as well. (J.A. 245.)

The court also heard testimony about the State's current regulatory process and found it to be "adequate." (J.A. 241.) Defendants argue this finding should preclude any remedy to address the segregative effects of unnecessary program duplication. (Appt. Br. at 38-41.) However, all the court found was that the language of the State's current regulation (which had been changed between the liability and remedial phases) was not "significant[ly] differen[t]" enough from plaintiffs' proposed standard to justify judicial modification. (J.A. 241.) Moreover, the State's regulation has never been the entire "policy or practice" under judicial scrutiny here. *See, e.g. Ayers*, 111 F.3d at 1190 ("[T]he mere adoption and implementation of race-neutral policies [is] insufficient to demonstrate complete abandonment of the racially dual system."). Indeed, while reviewing the *Ayers* court's findings on remand, the Fifth Circuit specifically found that the lower court's finding that "the Board's program review process is an educationally sound way of managing duplication in the system . . . makes no pretense of disposing of the issue of potential segregative effects." *Id.* at 1221 (quotations omitted). Indeed, the district court in *Ayers* found an unnecessary program duplication violation (affirmed on appeal) despite finding no constitutional defect in the contemporary program approval process. *Ayers*, 879 F. Supp. at 1444-45. Moreover, notwithstanding the

"adequacy" of the language in the State's regulation, the evidence demonstrated that the disparity in unique programming in favor of the TWIs *actually grew* under this new language. (J.A. 11891.) Accordingly, the court did not order changes to the State's regulations, but required the State to consult with a special master before approving future programs. (J.A. 241.) Far from "untailored," such a remedy instead demonstrates a careful balancing of the issues at hand in light of the facts as presented in the record.

B. The State Misrepresents the Applicable Balancing Test for Injunctive Relief and Fails to Establish the Ordered Relief is Improper Under *Fordice*.

Defendants next assert that the court failed to "balance the equities" in determining the scope of injunctive relief ordered. (Appt. Br. at 63.) However, the court did not ignore the four-factor injunctive relief test but explicitly applied it (J.A. 192-93), and made extensive findings regarding the benefits and potential harm of various remedies discussed at trial. The court balanced those equities to find against transfer of programs from TWIs to HBIs (J.A. 244), and in favor of creating new programs at the HBIs to "achieve the greatest possible reduction in the segregative effects of unnecessary program duplication in Maryland's institutions of higher education." (J.A. 235.) Defendants' discussion merely disputes the *facts* as the court found them.

The court specifically found that injunctive relief was appropriate "under the traditional four-factor analysis" the State cites:

> First, this court already found that the traceable *de jure* era policy of unnecessary program duplication "continues to exacerbate the racial identifiability of Maryland's HBIs," thus causing irreparable injury to their students. (Oct. 7, 2013 Mem. at 59, ECF No. 382). "Irreparable injury comes from the maintenance of segregative policies which are educationally unsound . . . not from dismantling of those policies." *U.S. v. State of La.*, 815 F. Supp. 947, 955 (E.D. La. 1993). Second, monetary damages are inadequate, because "a State does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior *de jure* system that continue to foster segregation." *Fordice*, 505 U.S. at 728. Third, the *Fordice* analysis already incorporates a balance of hardships inquiry with the "practicable and educationally sound" test. Given those parameters for any remedial order, the injury to plaintiffs outweighs any burden imposed by an injunction. Fourth, "upholding constitutional rights is in the public interest." *Legend Night Club*, 637 F.3d at 303.

(J.A. 192-193.) The court thus properly considered irreparable injury, inadequate remedy at law, balance of hardships, and the public interest. *SAS Inst., Inc. v. World Programming Ltd.*, 874 F.3d 370, 385 (4th Cir. 2017) (describing four-factor injunctive relief standard). The State focuses on the "balance of hardships" factor, but completely misstates it, asserting that "the degree of efficacy" must be "balanced" against solely the hardship to defendants. The four-factor test, however, involves "considering the balance of *hardships* between the plaintiff and defendant," not a balancing of efficacy. *EBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006) (emphasis added). In any event, as discussed above, defendants' arguments about the "efficacy" of new programs is simply a disagreement over the *facts* the

court found to conclude that "there is strong and widely-accepted support for the creation of unique, high-demand programs at Maryland HBIs." (J.A. 237.)[23]

C. The Trial Court Properly Incorporated the Use of a Special Master Here as in Numerous Other Civil Rights Cases.

The State claims that the district court "abdicated the court's Article III adjudicative responsibility," improperly displaced itself, and violated Rule 65 by delegating certain functions regarding the remedy to a special master. (Appt. Br. at 78-79.) The essence of the State's claim is that the district court needed to spell out the details of the remedial order, including defining what the State calls inherently "*undefinable*" terms such as "unique and/or high demand programs" and "programmatic niches." (*Id.* at 79-80.)

The district court's utilization of a special master is not only consistent with Article III and Rule 65, but with what many other courts in higher education desegregation cases have done previously. Federal Rule of Civil Procedure 65 requires that an injunction identify "the reasons why it [was] issued," "its terms specifically," and "in reasonable detail . . . the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1). Moreover, the court's use of a special master was in line

[23] Appellants devote a section of their brief to arguing that desegregation of the HBIs is not constitutionally permitted and thus should not be the goal of a remedy. (Appt. Br. at 75-78.) Citing only non-higher education cases, the State blithely ignores the clear legal and historical record indicating that segregation based on traceable policies and practices must be eliminated. *Knight*, 14 F.3d at 1551-53 (acknowledging violation under *Fordice* based on failure to desegregate HBIs).

with the way other courts have managed complex injunctions with institutional parties. *See, e.g.*, *Thomas S. by Brooks v. Flaherty*, 902 F.2d 250, 255-56 (4th Cir. 1990) (finding the appointment of a special master to monitor decree requiring reforms at state psychiatric hospital appropriate given the individualized consideration necessary to remedy the violation); *United States v. Yonkers Bd. of Educ*., 29 F.3d 40, 44 (2d Cir. 1994) (holding that the district court did not overstep its constitutional authority by appointing a special master to implement a long-term order as needed to remedy housing segregation).

All of the courts in other higher education segregation cases have used special masters, monitors, and/or monitoring committees in the remedial stages of cases. *See, e.g.*, *Ayers v. Fordice*, 879 F. Supp. at 1494 (initial use of a monitoring committee in Mississippi); *Ayers v. Thompson*, 358 F.3d 356, 363 n.6 (5th Cir. 2004) (subsequent appointment of a sole monitor in Mississippi); *Geier v. Sundquist*, 128 F. Supp. 2d 519, 546 (M.D. Tenn. 2001) (use of a sole monitor to "facilitate the orderly and timely implementation of [the settlement agreement] and to mediate points of controversy between the parties"); *Knight v. Alabama*, 829 F. Supp. 1286, 1288 (N.D. Ala. 1993) (appointment of a sole monitor in Alabama who was authorized to oversee compliance with the remedial decree that included personal visits to the universities, meeting with representatives, and hiring independent experts); *United States v. Louisiana*, 811 F. Supp. 1151, 1170 (E.D. La. 1992) *and*

Alfreda Diamond, *Black, White, Brown, Green and Fordice: The Flavor of Higher Education in Louisiana and Mississippi*, 5 Hastings Race & Poverty L.J. 57, 114 (2008) (use of a monitoring committee to oversee the implementation of a remedy). Indeed, the court made note of how it closely examined what had been done in the prior cases as part of its decision. (J.A. 226-32.)

Contrary to the State's allegation, the district court did not abdicate its authority. The remedial order states that the special master is appointed by the district court, is an agent of the district court, is "subject to the supervision and orders of the court," and can be removed or replaced by the district court. (J.A. 243-46.) The court outlined thirteen components, both substantive and procedural, for the special master to follow in constructing the draft remedial plan. (J.A. 246-48.) A "final draft" of the remedial plan must be submitted to the court within a year, and the plan must be approved by the court. (J.A. 246.) The remedial order also sets forth the terms of a reporting plan the special master must implement and authorizes the special master to appoint a committee to assist him or her. (J.A. 246-48.)

This is a far cry from the primary case the State cites in support of its argument: *City of New York v. Mickalis Pawn Shop*, LLC, 645 F.3d 114 (2d Cir. 2011). In *Mickalis*, the defendants were required to adopt practices that, "*in the opinion of the Special Master*," would serve to prevent in whole or in part the illegal sale of firearms and "prevent the movement of guns into the illegal market." *Id.* at

145. If a defendant disputed a determination of the special master, the district court would review it under an "arbitrary and capricious" standard with the defendant having to pay the costs and attorneys' fees of the special master if the district court ruled against the defendant. *Id.*

The foregoing makes clear that the court neither "abdicated" its role in deciding the case nor left the decision to the opinion of the special master as the court did in *Mickalis*. Instead, the court acted in compliance with Article III and Rule 65 in laying out a detailed set of instructions for the special master. It issued a sixty-page opinion on liability in 2013, a seventy-page opinion explaining its decision on remedy in 2017, and a six-page order as to how the remedy was to be implemented in 2017. This more than meets the requirements of Article III for adjudicating a case and of Rule 65 for laying out its order in "reasonable detail." Fed. R. Civ. P. 65(d)(1).

Rule 53 also clearly allows the use of a special master as outlined by the court. *See* Fed. R. Civ. P. 53. A court may even rely on a special master to "hold trial proceedings and make recommended findings of fact." Fed. R. Civ. P. 53(a)(1). A special master may in particular be used to "address pretrial and posttrial matters that cannot be effectively and timely addressed" by the court. *Id*. A master may "regulate all proceedings," may "take all appropriate measures to perform the assigned duties," and may even "exercise the appointing court's power to compel,

take, and record evidence." *Id.* at 53(c)(1). The court's order clearly complies with the elements of Rule 53 as well.

III. CROSS APPEAL: THE COURT ERRED IN FINDING THERE WAS NO TRACEABLE POLICY REGARDING INSTITUTIONAL MISSION.

The parties agree that institutional missions influence many aspects of a university's operations, including "[the] programs it offers, the funding it receives, the buildings it constructs, and the students it attracts." (J.A. 688.) Under *Fordice*, mission assignments can be a traceable policy that is the subject of a claim: "[M]ission designations interfere with student choice and tend to perpetuate the segregated system." 505 U.S. at 741. The lower courts in Mississippi and Alabama both found contemporary mission assignments were traceable to the *de jure* era. *Ayers*, 879 F. Supp. at 1437, 1445; *Knight*, 14 F.3d at 1544-46. Despite the similarities between Maryland and these other cases, the district court erred in finding that the more limited and largely duplicative missions of the HBIs were not a policy traceable to the de jure era. The court made three fundamental errors.

First, citing to the Eleventh Circuit's opinion in *Ayers*, the district court required plaintiffs to demonstrate "that the State continues to 'effectively fix' the scope of HBI offerings based on their *de jure* era missions." (J.A. 137.) This misstates the operating standard in *Fordice*, which requires only that the present day missions "have as their antecedents the policies enacted to perpetuate racial

separation during the *de jure* segregated regime." 505 U.S. at 740. The Supreme Court went on to say that a violation was likely when the current mission designations follow the historical racial assignments to "some degree." *Id*. at 741. On remand, the district court in Mississippi found a violation on facts that closely resemble those here. *Ayers*, 879 F. Supp. at 1445.

Second, the court found that although the HBIs had duplicated and more limited missions (compared to the TWIs), that was not an issue of mission but of program duplication. This finding is in conflict with applicable case law. The Supreme Court in *Fordice* made clear that the mission designation analysis is a comparative analysis because of its relationship to student choice and that, while related to unnecessary program duplication, it is distinct. Indeed, in Alabama and Mississippi, the lower courts found violations regarding mission designations separate from program duplication. *See, e.g.*, *Ayers*, 879 F. Supp. at 1445.

Third, the district court erred in finding that the "State currently plays an overall minor role in setting the mission of each institution" (J.A. 138), because the HBIs have "independence and flexibility in crafting [their] mission statements." (J.A. 137.) This narrow focus on mission *statements* is inconsistent with *Fordice*. Had the court applied the proper legal interpretation of mission, the evidence would have confirmed that the limited role and institutional missions of Maryland's HBIs were traceable to the *de jure* era. (*See, e.g.*, J.A. 6725 (finding the State had an

obligation to remedy all traceable policies and practices, including among such remedies the "expansion of mission and program uniqueness and institutional identity" at the HBIs).) While acknowledging (though minimizing the significance of the fact) that the mission statements are subject to review by the State, the court failed to address statutory language requiring mission statements to be consistent with the State Plan of Higher Education and the State Charter (higher education provisions in the Education Code) itself, which are traceable to the assignments from the *de jure* era and effectively limit the missions of the HBIs compared to the TWIs.

Had the court applied the proper legal standard, it would have found a violation. In *Fordice*, the Supreme Court found that in Mississippi "[t]he institutional mission designations adopted in 1981 have as their antecedents the policies enacted to perpetuate racial separation during *de jure* segregated regime." 505 U.S. at 740. The Court concluded that mission designations "interfere with student choice and tend to perpetuate the segregated system." *Id*. at 741. The Court relied on facts similar to this case, such as the fact that the HBIs were more limited than the TWIs in their assigned academic missions during the *de jure* era. Though the scope of the HBIs had expanded in the post *de jure* era, the HBIs had more limited mission designations. The Court cited the findings of the Court of Appeals reflecting the traceability of these racial assignments: "'[I]nequalities among the institutions largely follow the mission designations and the mission designations to

some degree follow the historical racial assignments.'" *Id*. at 740-41 (quoting *Ayers v. Allain*, 914 F.2d 676, 692 (5th Cir. 1990)). Moreover, these designations affected the programmatic scope of the HBIs: "[T]he Court of Appeals found that the record 'supports the plaintiffs' argument that the mission designations had the effect of maintaining the more limited program scope at the historically black institutions.'" *Id*. at 741 (quoting *Allain*, 914 F.2d at 690).

On remand, the court found that the HBIs' limited missions were traceable to the *de jure* era. *Ayers*, 879 F. Supp. at 1437. The TWIs had broader missions than the HBIs both in the *de jure* era and afterward, expanded earlier, and had more programs overall and more graduate programs than the HBIs. *Id.* Based on these facts, the district court concluded that the "limited missions" of the HBIs were "remnants of the past" and that their disadvantaged position "was caused by the State's past educational policies and practices." *Id.* at 1445.

In Alabama, the trial court likewise found the mission assignments of the HBIs were traceable to the *de jure* era, and the Eleventh Circuit affirmed that finding. *Knight*, 14 F.3d at 1544-46. In the 1950s, '60s, and '70s, the state invested hundreds of millions of dollars into creating satellite campuses of the University of Alabama and Auburn University that were geographically proximate to the HBIs and enabled those campuses to offer programs that the HBIs were not allowed to consider. *Id.* The two HBIs were assigned to the most restrictive mission category and, for many

years in the post *de jure* era, were not permitted to offer courses outside of that category. *Id.* at 1543. The flagship schools offered a broader range of programs and more graduate programs than the HBIs at the time of trial. *Id.* at 1542.

The facts in Maryland bear a strong similarity to those in Mississippi and Alabama related to mission: in all three states, the HBI missions continued to lag behind the TWIs as in the *de jure* era. With respect to the schools that began as teacher's schools and are currently designated as comprehensive universities, the HBIs have consistently been given a more limited role than the TWIs. In 1934, the Maryland General Assembly granted Towson, Frostburg, and Salisbury authority to offer Bachelor of Science degrees in education, which allowed for four year degrees in elementary education. (J.A. 6949.) The state legislation converted the TWIs to "state colleges" whereas HBIs Coppin and Bowie remained normal schools. (J.A. 6949-50.) As in Mississippi and Alabama, the post-war period saw dramatic growth with disproportionate development of the TWIs -- including the expansion of their missions -- as compared to the HBI missions. (J.A. 7464; J.A. 7666; J.A. 10580.) Consistent with the differences in mission and curriculum expansion, most of the enrollment growth between 1953 and 1959 took place at the TWIs. (J.A. 7467; J.A. 7638.) The same pattern occurred between 1964 and 1974 when, during a period of explosive enrollment growth, TWIs received the bulk of capital investment and corresponding enrollment growth. (J.A. 10518.)

The difference in scope between the TWIs and their HBI counterparts persists until the present day. For example, as of 2008, Towson offered 107 degree programs, Salisbury offered 57 degree programs, and Frostburg offered 51 degree programs, compared to 42 degree programs at Bowie and 34 degree programs at Coppin. (J.A. 7844.) The more limited mission of the HBIs, both in the *de jure* era and today, is also true of the land grant/liberal arts turned research universities (UMES and Morgan). In the *de jure* era, numerous state reports set forth in detail how far behind their TWI counterparts UMES and Morgan were. (J.A. 6890; J.A. 6958; J.A. 7119; J.A. 7195; J.A. 11032-33; J.A. 11037; J.A. 11054-55.)

The 2008 HBI Panel did a thorough comparison of the research and doctoral capacity of Maryland's HBIs and TWIs and found that the HBIs suffered in comparison. With respect to UMES and Morgan, "[t]he panel found *a substantial lack of comparability* both in terms of the institutional platform upon which doctoral programs are built and specific programs offered by MSU and UMES." (J.A. 6413 (emphasis added).) Maryland's HBI Panel linked the lack of research capabilities at UMES and Morgan to their historic treatment by the State, in particular the process by which the State sets new missions. (J.A. 6495.)

Maryland's Education Code sets forth the role of many of the individual institutions in the public system of higher education. While the Code specifies ambitious roles for several TWIs, the HBIs are primarily identified as HBIs, and if

not, their roles are duplicative of the TWIs. The Education Code provides that the university system's Chancellor is to develop an overall plan that incorporates a number of priorities. The Code specifically mentions four TWIs and each has a special status. The first priority is to "[e]nhance the mission of the University of Maryland, College Park Campus as the State's flagship campus with programs and faculty nationally and internationally recognized for excellence in research and the advancement of knowledge." Md. Code Ann., Educ. § 12-106(a)(1)(iii). Another TWI-specific priority is to "[m]aintain and enhance an academic health center and a coordinated Higher Education Center for Research and Graduate and Professional Study in the Baltimore area, comprised of the University of Maryland, Baltimore Campus and the University of Maryland Baltimore County, with a focus on science and technology." *Id.* A third TWI-specific priority is to "[s]upport Towson University as the largest comprehensive institution." *Id.* With respect to the HBIs, the only reference to a priority relates to their status as HBIs: "Enhance the historically African American institutions and recognize the role of the University of Maryland Eastern Shore as the State's 1890 land grant institution." *Id.*

The Maryland state Charter expressly provides a mission statement approval process. Md. Code Ann., Educ. § 11-302. Although "[t]he president of each public institution of higher education is responsible for developing a mission statement," Md. Code Ann., Educ. § 11-302(a), the presidents cannot simply determine the

mission of their schools. The mission statement must be approved by the State, and approval is contingent on the statement being "consistent with the Charter and the statewide plan." Md. Code Ann., Educ. § 11-302(b)(2).

The mission approval process has disadvantaged the HBIs. In 1999, five institutions sought new or supplemental doctoral granting authority (Bowie, Towson, UB, UMUC, and UMES) and all but UMES's was approved. (J.A. 8845-54.) During the 2005-2006 period, the State approved mission enhancements for two TWIs -- Towson and UB -- over Morgan's objection. Towson, for example, successfully had its mission statement revised to identify itself as the State's metropolitan university, duplicating Morgan's mission. (J.A. 9007.)

As in Mississippi and Alabama, the missions of Maryland's HBIs are underdeveloped today compared to the TWIs and are traceable to the limited and inferior missions of the HBIs historically. The district court erred in applying a standard that required the Coalition to demonstrate that the State had effectively fixed the scope of HBI offerings based on their *de jure* era missions. In Mississippi and Alabama, the missions and program offerings of the HBIs were not based on *de jure* missions; they had expanded but in a more limited way than the TWIs.

The court also erred in subordinating mission, as it applies to programmatic development, to unnecessary program duplication. The Supreme Court in *Fordice*, as well as the lower courts in the Mississippi and Alabama cases, looked at missions

in the context of programs and unnecessary program duplication separately. Finally, the district court erred in determining that because, under the current system, the HBI presidents originally draft their mission statements, the State plays a minor role in setting the mission. The mission statements of the HBIs are subject to the State Code, which defines the roles of the institutions, the State Plan for Higher Education, and review by the State. HBIs cannot simply set their missions; indeed, their missions are largely set forth by the historical and current role of the institution as defined by the State.

IV. CROSS APPEAL: THE COURT ERRED IN DISMISSING THE COALITION'S FUNDING CLAIMS.

With respect to funding, the court's decision was similarly flawed based on a misapplication of *Fordice*. Unlike the State's arguments on appeal, plaintiffs' funding argument does not attempt to relitigate any *facts*. Instead, plaintiffs contend that the district court applied an incorrect legal threshold in holding there could be no traceable policy if the "current funding formula" is shown to be "different from any of Maryland's prior funding policies or practices." (J.A. 150.) This was error because a traceable policy or practice may exist even though specific aspects differ from earlier periods or the *de jure* era. *Fordice*, 505 U.S. at 728. This erroneous legal threshold caused the court to overlook evidence of Maryland's traceable policies and practices such as: (i) the State's reliance on institutional mission as part of its funding formulas (in both the *de jure* and subsequent eras); (ii) the State's

cumulative underfunding of the HBIs; (iii) the inadequacy of FTE funding as a measure of the State's policies and practices; (iv) the State's failure to fund land grant institutions equitably; and (v) the State's traceable capital funding practices. Had the court applied the correct legal standard (as set forth in *Fordice* and *Knight*), it would have found a traceable policy with respect to funding.

First, the court erred in disregarding the State's reliance on mission designations in its funding practices. By statute, operational funding for each institution shall be "in accordance with the role and mission of the institution, as approved by the Maryland Higher Education Commission." Md. Code Ann., Educ. § 10-203(c)(1). By incorporating mission into its funding system, the State maintains an essential structure of the dual system, just as with respect to mission designations. For the same reasons, this practice is thus traceable to the *de jure* era.

Maryland's funding practices and policies are traceable to the *de jure* era because the State allocates funds based on university mission classifications. More funding goes to the universities with higher mission classifications, and the mission classifications to a significant degree replicate the *de jure* hierarchy that existed between the TWIs and HBIs. As in *Fordice*, "inequalities among the institutions largely follow the mission designations, and the mission designations to some degree follow the historical racial assignments." *Fordice*, 505 U.S. at 740-41. Maryland has expressly incorporated mission classifications into its funding formula.

Defendants asserted below that their funding formula is not traceable to the *de jure* era because the formula in use today is not the same one previously used. (ECF 207-1 at 30-31.) Plaintiffs, however, need not show the State has always funded by the *same* formula it used in the *de jure* era. In *Fordice*, the court made clear that new policies that maintain the structures or patterns of the *de jure* era are not saved by their "newness." The mission designations held to be traceable in *Fordice* had been adopted in 1981, well after the *de jure* era. *Fordice,* 505 U.S. at 740. Thus, like Maryland's funding formula, Mississippi's institutional mission designations represented a new policy, and even a new type of policy. Those designations were nevertheless held to be traceable because they "to some degree follow[ed] the historical racial assignments." *Id.* at 740-41. As demonstrated above, the same is true of Maryland's funding formula. *See also Ayers*, 111 F.3d at 1207 (it is not required "that a challenged policy as it exists today must have been in effect during the *de jure* period in order to be constitutionally problematic").

Second, the court likewise erred in disregarding the *cumulative* underfunding of the HBIs. As the court in *Knight* noted: "Inequality in funding over a number of years cannot be made up overnight. The funding level over a period of years affects a school's mission, program, facilities, and reputation, all of which can then change only very slowly." 900 F. Supp. at 311 (noting that underfunding in one year becomes "embedded" in an institution). Had the court applied the correct legal

standard and considered cumulative underfunding, the evidence would have overwhelmingly compelled the finding of a traceable policy. The district court acknowledged the State's long history of underfunding its HBIs and the State's various admissions that the HBIs needed substantial additional resources to overcome past discriminatory funding. (*See, e.g.*, J.A. 3982 ("there is no question that we have not done right over time by Historically Black Institutions and they deserve special scrutiny and attention in terms of adequacy of funding"); J.A. 6539 (calling for additional funding for the HBIs "to eliminate any vestiges and effects of prior discrimination and the disadvantages created by the cumulative shortfall of funding over many decades").)

The district court, however, disregarded these facts, concluding there was no traceable funding policy. (J.A. 146.) In doing so, however, the court acknowledged that it differed from *Knight*, where the court held that cumulative underfunding becomes embedded in a state's funding structure, making it a traceable policy. (*Id*.) The district court's analysis was overly restrictive in not taking into account the cumulative underfunding that occurred in Maryland. (*See* J.A. 11546 (demonstrating that Maryland's HBIs experienced a "cumulative deficiency" of nearly $800 million from 1984-2010, and a deficiency of over $900 million if the remedial component of the HBIs' dual mission is included).)

The drastic under-resourcing of the HBIs was well-established by the evidence and was another keystone structure of the dual system. The court in *Knight* properly applied the *Fordice* rule to hold that even 25 years of favorable funding did not suffice to dismantle the dual system if it did not yet allow the HBIs to "provide an education today free from the stigma of past discrimination." *Knight*, 900 F. Supp. at 308. The test was not whether funding had improved for the HBIs, but whether such funding had undone the vestige of *de jure* segregation, which was the maintenance of the second-class status of the HBIs and the attendant segregative effects. The court found that this was *not* the case: "[S]uch funding has not yet put those institutions in the place they would have been but for their black heritage and the *de jure* system. Formula funding, like Alabama's system, is the effect of cumulative past history." *Id.* at 307 (citations omitted). The *de jure* era practice of maintaining a set of black institutions with inferior resources had effectively continued, because the HBIs had never been brought to a comparable level with TWIs. As in *Knight*, Maryland's HBIs have been kept at a level that "prevents white students who would otherwise attend an HBI, from choosing to do so." *Id.* at 307.

Third, the court's erroneous legal interpretation also led it to improperly interpret the evidence. For example, having disregarded the legal significance of mission-based and cumulative underfunding, the court erroneously compared funding levels solely based on a current per student (or "FTE") funding comparison.

Based on its overly narrow reading of *Fordice*, the court erred in finding the HBIs adequately funded based on current FTE funding. Because of their smaller size, dual mission, and financial aid challenges, the HBIs have higher per FTE funding currently, just as they did during the *de jure* era. *Knight*, 900 F. Supp. at 308. The district court in *Knight* likewise indicated that the HBIs in Alabama had higher FTE funding for a number of years, but nonetheless found that higher FTE funding was not enough to make funding a non-traceable policy. *Id.* at 311.

Thus, the State's arguments and the court's observations about higher FTE funding at the HBIs are not dispositive but indeed echo past arguments. In fact, Maryland made the very same arguments during the *de jure* era to justify "separate but equal" education, pointing out in its brief in the *Murray* case that Princess Anne received more funding per student in light of its small size ($468) than the two white (and decidedly superior) University of Maryland schools ($88 and $80). That argument carried no weight, as the Maryland Court of Appeals rejected the State's argument and found the University of Maryland had violated the Fourteenth Amendment. *See Pearson v. Murray*, 182 A. 590, 592 (Md. 1936).

Fourth, another specific area where the court's erroneous standard caused the court to disregard evidence of the State's practice of underfunding traceable to the *de jure* era is with respect to land grant funding. In 1862, the federal government passed the Morrill Act, which provided funding for the creation of programs that

focused on agriculture and mechanic arts. Because states like Maryland did not allow black students to go to the land grant schools, the Morrill Act of 1890 was created to require the "separate but equal" states to provide similar opportunities to black students. Princess Anne, which later became UMES, has been the 1890 land grant school in Maryland. In the *de jure* era, various state reports discussed the lack of state support for UMES to the point of recommending it be closed. (J.A. 6958; J.A. 11054-55.) There is a federal requirement that states match land grant funds provided by the federal government dollar for dollar and that "[a]ny amount unmatched with non-federal funds will be deducted from the annual federal allocation to the university." (J.A. 11357.) UMCP receives five dollars of state funding for every federal dollar it receives, while UMES receives less than 30% of the required matching funds. (J.A. 11356, Fig. 2; J.A. 3380; J.A. 3336.) Unlike UMCP, UMES had to use general operating funds to compensate for the lack of state funding and lost faculty and staff positions. (J.A. 11357.) While acknowledging this disparity in financial support, the district court deemed it acceptable because of UMCP's "flagship" status. (J.A. 154.) By reaching this conclusion summarily without analyzing it under the *Fordice* three-part test, the court committed legal error.

Finally, the court erred in dismissing -- on summary judgment no less -- the Coalition's *capital* funding claim, refusing to even allow the relevant evidence to be

presented. This was error (particularly under Rule 56) because there were, at the very least, material facts in dispute supporting plaintiffs' legal claim that capital underfunding was a traceable policy similar to operational funding. Fed. R. Civ. P. 56(a). *See also Pulliam Inv. Co. v. Cameo Props.*, 810 F.2d 1282, 1286 (4th Cir. 1987). A court should not grant summary judgment where, as here, it would require weighing evidence or making credibility determinations. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Summary judgment was particularly inappropriate here because the legal sufficiency of plaintiffs' capital funding claim is established by statute. Like operational funding, capital funding for Maryland's higher education institutions are based on institutional mission. Md. Code Ann., Educ. § 10-203(c)(3) ("Capital funding to support construction, operation, and maintenance of a physical plant that is consistent with each institution's mission."). In light of the unequivocal statement in Maryland's Code that Maryland's current policy on capital funding is based on institutional mission, and the court's determination that plaintiffs had set forth an issue of material fact regarding whether institutional missions were traceable to the era of *de jure* segregation, the court should not have dismissed plaintiffs' capital funding claim on summary judgment.

In addition to the statutory incorporation of mission into the State's capital funding formula, the *cumulative* capital underfunding of the HBIs in Maryland is

similar to that in *Knight*. The *Knight* court found even though at some point Alabama began to provide better capital funding to its HBIs, it had not overcome the disadvantage it had created in favor of its TWIs. *Knight*, 787 F. Supp. at 1370. The court stated: "The conclusion that there is no ongoing violation of the funding procedures does not vitiate the fact that the condition of the facilities on the HBUs continues to be a vestige of segregation which must be eliminated by the state if its actions are to comport with the Constitution." *Id.* The long-term underdevelopment of the HBIs created a pervasive segregative effect that could not be undone even with a number of years of more favorable funding, so that additional capital funding was required at the two universities to remedy this effect. *Id*. at 1283.

As in Alabama, plaintiffs have shown that facilities at the HBIs still "visibly lag behind the TWIs," as the State's own 2008 panel put it. (J.A. 6506, J.A. 6512; *see also* J.A. 10408.) Thus, like Alabama's HBIs, Maryland's HBIs "have not been in the position to improve their facilities to the level necessary to attract other race students particularly in the face of strong competition for capital funding from the predominately white universities located in close geographic proximity." *See Knight*, 787 F. Supp. at 1281. It was error for the court to foreclose plaintiffs from presenting their capital funding claim at trial, particularly in light of the admission by the State's former Secretary of Higher Education and 30(b)(6) witness that the

facilities disparities between the two sets of institutions are a vestige of the *de jure* era. (ECF 355 at 50.)

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below and remand to the district court for further proceedings as set forth in the final judgment and order.

REQUEST FOR ORAL ARGUMENT

Plaintiffs-Appellees-Cross-Appellants respectfully request oral argument in light of the importance of the issues presented by this appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 28 AND 32

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B)(i), as modified by Order of this Court, because this brief contains 21,756 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman size 14-point font with Microsoft 2016.

Date: October 18, 2018

s/ Karen N. Walker
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CERTIFICATE OF SERVICE

I, Karen N. Walker, hereby certify that on this 18th of October, 2018, the Final Brief of Appellees-Cross-Appellants was filed electronically and served on the following counsel of record for appellants, all of whom are registered CM/ECF users.

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