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

REPLY BRIEF OF APPELLEES-CROSS-APPELLANTS

JON GREENBAUM
BRENDA SHUM
GENEVIEVE BONADIES TORRES
LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Ave., NW
Washington, DC 20005
(202) 662-8600

MICHAEL D. JONES
Counsel of Record
KAREN N. WALKER
DEVIN C. RINGGER
KIRKLAND & ELLIS LLP
655 Fifteenth Street
Washington, D.C. 20005
(202) 879-5000

Counsel for Appellees-Cross-Appellants

October 18, 2018

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules and Statutes

INTRODUCTION

The State's response to the Coalition's cross-appeal rehashes some of the same principal themes it raised in its appeal -- that the TWIs are desegregated and that the State's policies have changed cosmetically and thus are not traceable. Therefore, the State asserts, the Coalition's mission and funding claims are not traceable under *United States v. Fordice*, 505 U.S. 717 (1992). Regarding mission, the State claims the HBIs' missions are not "rooted" in the *de jure* era. (Doc. 40 at 70.) The State's position is unfounded. Where, as here, the State has imposed more limited missions on its HBIs from the *de jure* era to the present day, such mission designations are traceable policies. 505 U.S. at 739-41. Under *Fordice*, limited mission assignments can be a traceable policy because they "tend to perpetuate the segregated system." *Id*. at 741.

Regarding funding, the State claims its policies have changed over time, negating a finding of traceability. For example, the State claims the traceability chain is broken because there have been three post-*de jure* iterations of its funding formula. (Doc. 40 at 47.) However, a policy may be traceable even if some aspects differ from the *de jure* era. *Fordice*, 505 U.S. at 728. Notwithstanding modifications over time, the State's practices have continuously perpetuated the cumulative underfunding of the HBIs and continuously allocated funds by incorporating mission classifications, which State policies have continuously limited. 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. Accordingly, both Maryland's mission and funding policies constitute traceable practices under *Fordice*.

ARGUMENT

The State advances two overarching arguments to attack Plaintiffs' mission and funding claims: (i) that its TWIs are desegregated, and (ii) that its policies have changed over time. (*See, e.g.*, Doc. 40 at 40, 70.) *First*, the State continues to tout that there can be no constitutional violation where Maryland "has fully desegregated its non-HBIs [TWIs]." (Doc. 40 at 70.) The State still contends that *Fordice* cannot be violated unless a practice is "combined with the differential admission practices" such as those employed in Mississippi. (*Id.*) This is simply not the law and does not militate against the Coalition's mission and funding arguments in its cross-appeal. *Second*, the State argues there is no obligation to dismantle vestiges based on practices traceable to the *de jure* era where the State is not implementing the *same* policies as in the *de jure* era. (*Id.* at 44-45 (arguing that "the adoption of new policies" will satisfy *Fordice* "even if those policies result in . . . effects that resemble those that prevailed in the *de jure* era").) Modifications to a traceable policy, however, do not erase the violation.

Maryland's overly narrow reading of *Fordice* combined with its disregard for its own history undercuts both of its arguments. Maryland does not dispute, for example, that it agreed in the OCR Partnership Agreement that its legal obligation was to provide "desegregated institutions" (including both desegregated TWIs and HBIs). Maryland specifically agreed to do so by eliminating vestiges that foster segregation at the HBIs, such as limited missions, underfunding, and unnecessary program duplication. (*See* J.A. 6574.) Nor does the State dispute that the Maryland Attorney General warned of its legal vulnerability under *Fordice*. (J.A. 163.) Instead, the State attempts to avoid its vulnerability by interpreting *Fordice* in a manner that would effectively rewrite the decision.

Maryland attempts to do so by elevating Justice Scalia's dissent to the majority opinion. Justice Scalia argued that a former *de jure* state could leave in place vestiges that foster segregation at its HBIs as long as it eliminated discriminatory admissions policies at its TWIs. *Fordice*, 505 U.S. at 758 (Scalia, J., concurring in part and dissenting in part) ("Only one aspect of a historically segregated university system need be eliminated: discriminatory admissions standards."). The majority, however, rejected this argument and instead analyzed a much broader (and non-exhaustive) list of *de jure* era vestiges. Looking at vestiges that fostered segregation *at the TWIs*, the Court found only one -- discriminatory admissions policies, which excluded black students. All of the other vestiges (*e.g.*,

limited mission, funding, unnecessary program duplication) fostered segregation *at the HBIs*. As explained by the Eleventh Circuit in *Knight*, states could violate the Fourteenth Amendment by failing to dismantle traceable practices that result in segregation at the TWIs *or* the HBIs:

> *Fordice* recognized as having segregative effects policies that "influenc[e] student enrollment decisions." In its discussion of several of the *Fordice* plaintiffs' specific challenges to Mississippi higher education policy, the Court offered examples of two broad categories of practices that can inhibit "free choice" by students as to university attendance. The first category comprises policies that have the effect of discouraging or preventing blacks from attending HWIs, examples of which include the maintenance of more stringent admissions requirements for HWIs than for HBIs. The second category consists of 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; the assignment to HBIs of institutional missions that restrict them to programs of instruction that cannot effectively attract whites; and the failure to fund HBIs comparably to HWIs or to locate high-prestige programs at HBIs. As a result of such policies, disproportionate numbers of whites can satisfy their curricular desires at HWIs, and cannot satisfy them at HBIs, thereby discouraging them from choosing to attend HBIs.

Knight v. State of Ala., 14 F.3d 1534, 1541 (11th Cir. 1994) (quotations and citations omitted) (*Knight II*). The *Fordice* Court thus understood that elimination of discriminatory admissions policies at the TWIs would not affect segregation *at the HBIs*, and was entirely independent of limited mission, unnecessary program duplication, or HBI funding practices. To argue otherwise is to completely rewrite the majority opinion.

Fordice likewise dispenses with the State's overarching contention that if its policies or practices have changed over time, it has discharged its duties even if the effects are the same. (Doc. 40 at 45.) This argument is inconsistent with the *Fordice* requirement that the State actively dismantle the vestiges of the *de jure* era. *Fordice*, 505 U.S. at 744-45 (O'Connor, J., concurring) ("Only by eliminating a remnant that unnecessarily continues to foster segregation or by negating insofar as possible its segregative impact can the State satisfy its constitutional obligation to dismantle the discrimination system[.]".) As discussed below in the specific context of mission and funding, practices need not be precisely the same to be traceable.

As an overall theme, moreover, the State's arguments are meritless. Under Maryland's reasoning, a former *de jure* state's obligation is limited to desegregating only its TWIs, and that, with respect to its HBIs, the State's only obligation is to adopt "forward facing" policies even if they have no desegregative impact and perpetuate segregative effects. The State thus dismisses limited HBI missions and cumulative underfunding as acceptable "effects" of past policies rather than evidence of ongoing traceable policies or practices. (Doc. 40 at 68.) *Fordice*, however, is directly to the contrary.

For example, *Fordice* treated the continued existence of all eight Mississippi institutions (TWIs and HBIs) as a vestige or practice traceable to the *de jure* era, rather than the effect of a policy which created the institutions decades earlier.

Accordingly, the Supreme Court ordered the trial court to consider "whether retention of all eight institutions itself affects student choice and perpetuates the segregated higher education system, whether maintenance of each of the universities is educationally justifiable, and whether one or more of them can be practically closed or merged with other existing institutions." *Fordice*, 505 U.S. at 742.

The Court similarly considered wide-spread unnecessary program duplication not as an "effect" of prior policy, but as an ongoing vestige or practice of the *de jure* era. *Id.* at 742-43. In sum, the State's argument that liability for limited missions and underfunding are dependent on the existence of discriminatory admissions policies at the TWIs is directly undercut by *Fordice*, as is the State's stilted argument that by labeling a remnant or practice an "effect" it can avoid its constitutional obligation to dismantle the vestiges of its prior *de jure* system.[1]

[1] The State also attempts to rewrite Justice Thomas' concurrence as a defense of state policies which foster segregation of the HBIs when it was just the opposite. Justice Thomas joined the majority opinion, and wrote separately to highlight that the Court's decision should not be read to support closure of the HBIs even though they might have "established traditions and programs that might disproportionately appeal to one race or another." *Fordice*, 505 U.S. at 748-49. But contrary to the State's suggestion, these "established traditions and programs" that would be allowed to persist were not the traceable vestiges which fostered segregation at the HBIs (such as limited missions). Indeed, Justice Thomas wrote: "No one, I imagine, would argue that such institutional *diversity* is without 'sound educational justification,' or that it is even remotely akin to program *duplication*, which is designed to separate the races for the sake of separating the races." *Id.* at 749. Rather than sanction segregative vestiges, he condemned them.

The fact that traceable policies may have changed over time through various iterations does not negate them, as the State implies. If the State could simply revise its policies through tweaks, there would have been no need for the State to agree to the OCR Partnership Agreement to desegregate the HBIs. (J.A. 6590-93.) That Agreement focused not on the specific language of the policies or formulas of the State, but on lessening the segregative impact of its traceable policies. Similarly, the Maryland Attorney General described the traceable policies more broadly as "traceable" to the *de jure* era. (J.A. 160.) Thus, even if Maryland had an articulated policy of non-discrimination, the State is in violation of the Constitution if in fact it maintains segregation. "Forward-facing" revisions or iterations (*e.g.*, of mission-setting or funding formulas) would no more affect the segregative impact of these policies than if Mississippi had adopted a "forward-facing" policy precluding the additional creation of TWIs and HBIs while leaving all eight institutions in place.

In sum, neither the desegregation of the TWIs nor the different iterations of the State's regulations insulate the State from liability for its mission and funding policies traceable to the *de jure* era.

I. THE COURT ERRED IN FINDING THERE WAS NO TRACEABLE POLICY REGARDING INSTITUTIONAL MISSION.

The parties agree that institutional mission influences 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 State's opposition to the Coalition's cross-appeal fails to persuasively address any of the three legal errors the district court made in finding that the Coalition failed to establish that the State's policies and practices related to mission are traceable to the *de jure* era: (1) the district court erred in applying a standard requiring the Coalition to show that the current HBI missions were "effectively fixed" in the *de jure* era as opposed to only needing to show that the current mission designations follow the historical racial assignments to "some degree;" (2) the district court erred by treating the limited missions of the HBIs as a program duplication violation and not as a violation regarding mission as well; and (3) the district court erred by equating a university's mission statement with its mission designation and then ignoring State-imposed statutory restraints on the HBIs in drafting their mission statements. Each of these errors requires remand.

With respect to the Coalition's first argument, the State claims that the district court used the "effectively fix" language not as part of the traceability argument but to require plaintiffs to show "that the current mission designations are the result of a state-imposed *policy*." (Doc. 40 at 69.) The State's argument is refuted by the first paragraph of the district court's opinion in its mission section, where it sets forth the

circumstances when a limited HBI mission can be a traceable policy. The court explicitly uses the "effectively fix" language in defining traceability and referring to missions in the *de jure* era:

> If the State continues to impose more "limited" missions on public HBIs than their TWI counterparts, such mission designations may be traceable policies. *See Fordice*, 505 U.S. at 739-41; *Ayers*, 111 F.3d at 1210-11 ("[T]he mission designations adopted by the [state] . . . effectively fixed the scope of programmatic offerings that were in place at each university during the *de jure* period . . . [p]olicies and practices governing the missions of the institutions of higher learning are traceable to de jure segregation and continue to foster separation of the races." (quotation omitted)); *Knight*, 14 F.3d at 1544-46 (affirming district court's finding that the limited missions of Alabama's HBIs are traceable policies and remanding on issue of segregative effects). As explained below, while the mission statements of Maryland's HBIs are in some ways historically linked to their *de jure* era analogs, the Coalition has not demonstrated that the State continues to "effectively fix" the scope of HBI offerings based on their *de jure* era missions, nor does it continue to impose missions on the HBIs, which have independence and flexibility in crafting mission statements.

(J.A. 136-37.) Indeed, in other parts of the section where the district court explains why mission is not a traceable policy, the district court references representations by the State that it in fact aspired to expand HBI missions beyond those in the *de jure* era. (J.A. 139 ("Maryland has maintained a policy of enhancing HBI mission and programming at least since the 1970s in an effort to mitigate the effects of *de jure* discrimination").)

The district court's requirement that the Coalition show that the present HBI missions were effectively fixed since the *de jure* era is a material error. This error

caused the district court to reach a different result than the courts in *Knight* and *Ayers*, where the courts found liability even though the HBI missions had expanded since the *de jure* era, because HBI missions lagged behind TWI missions in the *de jure* era and continued that way until the time of trial. The findings in *Knight* and *Ayers* on this point were detailed in the Coalition's earlier brief. (Doc. 35 at 65-69.)[2]

The State also falls short in addressing the second legal error made by the district court -- its mistaken conclusion that the duplicated and more limited missions of the HBIs are not an issue of mission, but only of program duplication. In doing so, the State repeats the district court's erroneous conclusion that the mission of a university is limited to its mission statement or formal mission assignment. (Doc. 40 at 70-73.) The courts in *Ayers* and *Knight* did not define mission in such a constrained way. In *Knight*, the district court stated that "[t]he current limited mission assignments of AAMU and ASU that are the present focus of this litigation

[2] The State quibbles with the Coalition's assertion that the standard for traceability is that the present day missions trace the *de jure* missions to "some degree," and instead contends that the standard should be that the present day missions are "rooted in" or have "antecedents" in the *de jure* era. (Doc. 40 at 70.) The Coalition's proposed standard is based on *Fordice*: the Supreme Court in *Fordice* stated that the Court of Appeals found that the mission designations in Mississippi followed the *de jure* mission designations to "some degree" and this "likely" constituted a violation. 505 U.S. at 740-41. But more important than which term is used is the fact that the *Knight* and *Ayers* courts found mission violations when the current missions at the HBIs were materially broader than the *de jure* missions but at all times remained more limited than the TWI missions.

are the role and scope of the institutions," and the *Knight* district court defined "role" and "scope" not in terms of a formal mission statement or assignment but by what the university actually does. *Knight v. Alabama*, 900 F. Supp. 272, 290 (N.D. Ala. 1995) (*Knight III*). In *Ayers*, the district court stated that "[a] university's 'mission' is that which defines the institution relative to all the other institutions within the system." *Ayers v. Fordice*, 879 F. Supp. 1419, 1438 (N.D. Miss. 1995) (*Ayers I*). In analyzing mission, the *Ayers* court went on to address not only how the State classified the university (*i.e.*, "comprehensive," "urban," and "regional") but what that meant in terms of program offerings.[3]

Consistent with their more functional view of mission, the courts in *Ayers* and *Knight* discussed mission and programmatic offerings in the same section of their decision because of overlap between the two. *Ayers v. Fordice*, 111 F.3d 1183, 1210-15 (5th Cir. 1997) (*Ayers II*); *Knight III*, 900 F. Supp. at 290-92. In contrast, the district court's formalistic construction of mission in this case separates missions

[3] The State attempts to differentiate the facts in Mississippi and Alabama by comparing the number of doctoral programs at HBIs in Alabama decades ago to the current program offerings at HBIs in Maryland. That comparison makes no sense because programmatic offerings have expanded dramatically since then. For example, until the mid-1990s, Morgan, Maryland's HBI research university, had one doctoral program (J.A. 7823), and UMES, Maryland's land grant university, did not have the authority to offer doctorates in the 1990s. (J.A. 8849-50.) The relevant comparison is between Maryland's HBIs and its TWIs, because the students are choosing between Maryland HBIs and TWIs today, not between Alabama's HBIs in the 1990s and Maryland's HBIs today.

and programs and leads to some incongruous determinations. For example, the district court found that Maryland higher education suffers from "mission creep," and that this disproportionately harms HBIs, but mistakenly stated that mission creep relates to program duplication and not mission:

> Indeed, MHEC itself has recognized that "[m]ission creep" is a problem across the state's institutions of higher learning, undermining the competitiveness and uniqueness of each institution, not because the state's mission-assignment policies need to be reformed, but because the state is accepting "program proposals exceed[ing] the boundaries of [institutional] missions." (MHEC "Review of Mission Statements" (January 11, 2012), PTX 866, at 19.) As explained below, because the HBIs are already disproportionately affected by excessive duplication of their offerings, this mission creep harms the HBIs significantly more than the TWIs. Thus, the court recognizes the struggles of the HBIs to compete with the TWIs in program offerings, but finds that no current mission-related policy or practice is traceable to the *de jure* era.

(J.A. 141.) For these reasons, the district court erred in defining mission too narrowly.

In addition, Maryland makes a factual assertion that is simply incorrect. It claims that unlike Mississippi and Alabama, it does not classify its universities in tiers. In fact, it does. The five schools (including two HBIs) that started out as teachers' colleges, became comprehensive universities (J.A. 10579; J.A. 10587; J.A. 10591; J.A. 10598; J.A. 10608), with TWI Towson University statutorily designated as the largest comprehensive university. Md. Code. Ann. Educ. § 12-106(a)(1)(iii). The Coalition's opening brief discusses how these institutions developed from

teachers' colleges to the present day with the State keeping the development of TWIs ahead of that of HBIs at all times. (Doc. 35 at 69-70.)

HBIs Morgan and UMES are on a different tier than Bowie and Coppin because they were not teachers' colleges and because of their research/land grant functions. But within that tier they have also lagged behind their comparator TWIs (which include UMCP and UMBC) both historically and currently. In 2008, a State-commissioned panel that studied the HBIs found that the missions and roles of the HBIs were inferior to that of their comparator TWIs because of discrimination and a historical lack of support:

> **Maryland's Process for Planning, Mission and Program Approval, Funding and Accountability**
>
> In carrying out its charge from the Commission to define comparability and competitiveness, the Panel's attention was frequently directed to historical and contemporary situations and circumstances that, while related to funding were caused or affected by other parts of the state's process for coordinating higher education. Understanding the development and nature of this coordinating process has become particularly relevant to our deliberations over capacity, comparability and competitiveness among Maryland doctoral institutions and the doctoral programs offered at these institutions.
>
> We refer to the process by which a state sets university missions, approves new programs, funds them through some model or process, and then holds universities accountable for results. Whether intentional or not, the past treatment of the historically black institutions in this process in contrast to the treatment of other public institutions in the state has had the effect of substantially marginalizing the HBIs and their ability to develop and maintain comparable quality and competitiveness in the state's system of higher education. This is especially the case

> with respect to the doctoral granting status of Morgan State University (MSU) and the University of Maryland, Eastern Shore (UMES).
>
> The current result of these longstanding past practices is that there exists a substantial lack of comparability and capacity (as compared generally with quality doctoral granting institutions both in and outside of the state, taking scale and composition into account) at both MSU and UMES (whose status as a doctoral granting institution is somewhat different from that of MSU). The substantial lack of comparability, and therefore the inability to be competitive, exists both in terms of the institutional platform upon which doctoral programs must be built and sustained, and with respect to the quality and nature of the specific doctoral programs offered by these two HBIs.

(J.A. 6494-95.)

The State's response to the third error identified by the Coalition as it relates to mission – that the district court improperly defined mission narrowly as the mission statement process and that the district court erred when it found that the State played a minor role in that process -- is similarly unavailing. As discussed above, the district court's definition of mission conflicts with that of the courts in Mississippi and Alabama, and does not reflect the reality of what a university's mission actually is, as illustrated by the findings of the State-commissioned HBI Panel. (*Id*.)

In arguing that the State plays only a minor role with respect to the mission statements, the State cites some of the relevant statutes and some testimony. (Doc. 40 at 73-74.) But in doing so, the State ignores the statutory constraints set by the State itself that limit what schools can say in a mission statement. The State notes

that MHEC can review the mission statement of a university to determine whether it is consistent with the State Plan for Higher Education, but underplays what that means. (*Id*.) The State fails to note, for example, that the mission statement does not go into effect until MHEC approves it. Md. Code. Ann. Educ. § 11-302(d). In addition, the State omits the fact that, for the USM schools, the statement must first be approved by the Chancellor of USM and then the USM Board, who must ensure that the statement is consistent with the State Education Code (the Charter) and the USM's system plan. The USM Board can withhold approval or amend the schools' submissions -- effectively rewriting even those statements proffered by the schools themselves. The USM Board then submits all of the mission statements in one package to MHEC, as opposed to the institutions individually submitting their mission statements to MHEC. Md. Code. Ann. Educ. § 11-302(b). The State notes that MHEC will negotiate with the institutions if it does not approve of a school's mission statement (Doc. 40 at 74), but does not make clear that such negotiations would include the USM Board for USM schools. Md. Code. Ann. Educ. § 11-302(d). As a result, the State (via both MHEC and USM) plays a significant role in this process based on the express language of the statutes governing mission statements -- the State has the authority to approve a mission statement, the authority to amend what an institution submits, and the authority to negotiate changes. That is the opposite of a minor role.

Moreover, the requirement that a mission statement comply with the Maryland Education Code is significant. As detailed in the Coalition's Opening Brief, the Maryland Education Code sets forth the roles of many of the institutions, with many of the TWIs designated for ambitious roles whereas the HBIs are primarily identified as HBIs, and where they are not, their roles are duplicative of TWIs. (Doc. 35 at 70-71.) The State neglects to address this point directly. Instead, the State defends its nearly exclusive statutory designation of the HBIs based on their HBI status by referring to federal statutes regarding HBIs. The State misses the point. The problem is not that the HBIs are identified as HBIs (Doc. 40 at 75-76); it is that the State has given them little identity *beyond* their status as HBIs as reflected in the Maryland Education Code.

Finally, the State attempts to address three examples the Coalition provided in its Opening Brief of where the mission statement process disadvantaged HBIs – one example where UMES's authority to offer doctorates was delayed by MHEC while five institutions had their requests approved and two examples where MHEC approved substantial mission enhancements to Towson and the University of Baltimore over the objection of Morgan State University on the grounds of mission duplication. (Doc. 40 at 74-75.) The State tries to characterize the examples as insignificant, but they were significant enough to the HBIs for them to raise an issue

with MHEC during the mission statement process. In sum, the limited missions imposed on the HBIs by the State constitute a traceable policy under *Fordice*.

II. THE COURT ERRED IN FINDING THERE WAS NO TRACEABLE POLICY REGARDING FUNDING.

With respect to funding, the State initially argues that because there have been three versions of its funding formula since the *de jure* era, there can be no traceable policy. (Doc. 40 at 40.) Next, based largely on that flawed premise, the State contends that evidence of mission-based funding, cumulative underfunding, FTE funding bias, and land grant funding inequalities may be ignored. (*Id*. at 40-41.)

A. The State's Modifications to its Funding Methods Do Not Negate Traceability under *Fordice*.

Maryland's traceability argument is based on the contention that it "has adopted a succession of *three* different operational funding policies after the close of the *de jure* era." (Doc. 40 at 47.) The State claims that, because of these modifications over time, the traceability chain is broken and it should escape liability. (*Id*. at 45-47.)[4] In short, the State continues to insist that *Fordice* should be narrowly construed to ignore segregative effects that continue despite non-identical practices perpetuating them. (Doc. 40 at 43.)

[4] The State identifies these three iterations as: (i) the 1968 "individualized factors" method; (ii) the 1989 "school-by-school" approach; and (iii) the 1999 "peer institutions" method. (*Id*.) Yet as described below, all these methods perpetuate the limited missions and cumulative underfunding of the *de jure* era.

The State is wrong. *Fordice* and its progeny make clear that practices need not be exactly the same as those in effect in the *de jure* era to be unlawful. Such an argument would be illogical -- in the *de jure* era, schools had explicit policies mandating segregation. The practices in *Fordice* and thereafter did not expressly mandate segregation, but involved later practices that perpetuated discrimination (such as the testing requirements in *Fordice* itself). 505 U.S. at 734.

Here, while the State points to three iterations of its funding policy since the *de jure* era, it does not and cannot dispute that the HBIs' limited missions are incorporated, explicitly or implicitly, in each iteration. (*See, e.g.*, Doc. 40 at 45-47 (first iteration considers program offerings, second iteration considers individual schools' missions, and third is based on "peer" institutions with similar missions).) Accordingly, the use of mission in the funding policy runs throughout the State's three iterations.

In such circumstances, 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. Contrary to the State's suggestion that it can erase a constitutional violation by tweaking funding formulas over the years, 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. Maryland has not eradicated the traceable policy of

underfunding established by the record here. (J.A. 3877 ("It is important to recognize that this pattern of underfunding goes back to the very inception of those campuses, and has been continued, and has cumulative effects over a century relative to the TWIs.").)

The State argues that the adoption of new policies "will satisfy a state's obligations under *Fordice* even if those policies result in funding differences, enrollment patterns, and other effects that resemble those that prevailed in the *de jure* era." (Doc. 40 at 44-45.) But post-*de jure* revisions to policies, by themselves, cannot excuse or erase a policy 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. 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. Thus, the State concedes, as it must, that "the fact that a policy is newly adopted does not necessarily mean that it is not traceable." (Doc. 40 at 44.) But this is precisely what the State goes on to argue.

Plaintiffs 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. Yet the Supreme Court found that "[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. Thus, like Maryland's funding formulas, 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. The same is true of Maryland's funding formula. *See also Ayers II*, 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").

Accordingly, a policy or practice is "traceable" if to some degree it follows and maintains the structures that were inherent to *de jure* segregation. *Fordice* referred to such policies as "remnants" and specifically held certain practices traceable because they maintained structures that were inherent to racial segregation in the *de jure* era, regardless of whether these practices were embedded in new policies that did not exist in that form in the *de jure* era. *Fordice*, 505 U.S. at 733. In short, "inequalities among the institutions largely follow the mission designations, and the mission designations to some degree follow the historical racial assignments." *Id*. at 740-41. Because "[t]he Equal Protection clause is offended by 'sophisticated as well as simple-minded modes of discrimination,'" *Fordice*, 505

U.S. at 729 (citation omitted), the State cannot escape liability by adopting new policies if they continue to foster segregation.

The State attempts to rely on *Ayers II*, 111 F.3d at 1221, for the proposition that it is not sufficient to show only that current policies have "practically the same result" as the *de jure* practices to prove a violation. (Doc. 40 at 45.) Here, Plaintiffs have shown not just that the effects are the same, but that the intervening policies perpetuate the same funding disparities. Moreover, Plaintiffs submit that insulating a race-neutral funding formula that maintained the same results as the Mississippi *de jure* funding formula is inconsistent with the Supreme Court's decision in *United States v. Fordice*. The Supreme Court expressly held that Mississippi could not maintain a policy or practice that was originally adopted in the *de jure* era but now was based on race-neutral reasons. 505 U.S. at 734-35. For example, the admissions standards for the Mississippi schools were originally adopted for discriminatory reasons, but because they "derived from policies enacted in the 1970's to redress the problem of student unpreparedness," the district court and the Fifth Circuit had held that the change in justification had removed the discriminatory taint. *Id*. at 734. The Supreme Court, however, found that the lower courts had erred: "Obviously, this mid-passage justification for perpetuating a policy enacted originally to discriminate against black students does not make the present admissions standards any less constitutionally suspect." *Id*.

In any event, the facts in Mississippi regarding the funding practices are factually distinguishable from those here. The district court and Fifth Circuit in *Ayers* found that Mississippi's funding formula was not based on institutional mission. *See Ayers I*, 879 F. Supp. at 1449; *Ayers II*, 111 F.3d at 1224. In contrast, Maryland's funding formula -- as described in detail below -- is driven by institutional mission. This distinction is critical because, as discussed above in the mission section, the courts in *Ayers* identified the limited missions of the HBIs as traceable, and the Fifth Circuit in *Ayers* remanded the issue of equipment funding to the district court because it appeared that the district court had found equipment funding was based on mission. 111 F.3d at 1225.

The district court in *Knight* was sensitive to sophisticated modes of discrimination involved and held that Alabama's funding formula was traceable to the *de jure* era, even though it was adopted in 1973. *See Knight III*, 900 F. Supp. at 308-12 (discussing the traceable aspects of Alabama's funding formula). Central to this holding was its conclusion that, even though Alabama's HBIs were comparable in per-FTE funding to the TWIs, they still had not received the funding necessary to "provide an education to its students in a manner which has overcome the effect of past discriminatory underfunding for the operations of [HBIs] and to provide an education today free from the stigma of past discrimination such as poor physical facilities and the tarnish of a reputation of lack of quality education." *Id.* at 308

(quotations and citation omitted). The district court in *Knight* explained that "[w]hite students' perceptions of the inferiority of black institutions are traceable to the *de jure* history of Alabama." *Id*. at 320. It further explained that: "White students perceptions flow from the fact of the HBIs academic inferiority resulting from historical underfunding." *Id*.

As discussed further below, the State's funding practices are traceable because, among other things, the different iterations of the State's funding guidelines all contained a mission-based component, and because of the effect of cumulative underfunding over time. Maryland's funding 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.[5]

[5] Incidentally, the fact that the State incorporates mission designations into its funding methods has no bearing on whether Plaintiffs have proven each as a traceable policy, as the State contends. (Doc. 40 at 51 n.11.) Even if there were no traceable policy of limited missions, the incorporation of mission into a state's funding practice would still be relevant to show the traceability of the practice to the

Likewise, as the *Knight* court observed, inequitable funding over a number of years "cannot be made up overnight." *Knight III*, 900 F. Supp. at 311. The cumulative effect of such deficiencies over a period of time affects a school's mission programs, facilities, and reputation, "all of which can then change only very slowly." *Id*. Discrepancies tend to "grow and become embedded" over time. *Id.* "Of the major considerations that can affect raw financial comparisons -- such as economy of scale, enrollment trends, and historical patterns -- the historical patterns are the most important. This is because historical deficits tend to continue over a period of time, and become cumulative, which, of course, means they cannot be erased overnight." *Id.*

In sum, the fact that Maryland has changed its funding formula over the years does not insulate it from liability under *Fordice*. Switching policies alone does not matter when the practices are traceable and continue to have discriminatory effects. *Fordice*, 505 U.S. at 734. The policies reviewed in *Fordice* long post-dated the *de jure* era and had changed over time, but the court held they constituted a traceable policy with "present discriminatory effects." *Id*. The same is true here.

---

de jure era. Here, Plaintiffs have shown that both the State's mission and funding practices are traceable.

B. Maryland's Traceable Funding Practices Are Supported by Record Evidence.

1. Mission-Based Funding

The court erred in disregarding the State's reliance on mission designations in its funding practices. By incorporating mission into its funding system, the State maintains an essential structure of the dual system, just as with respect to mission designations (discussed above). For the same reasons, this practice is thus traceable to the de jure era.

Limited missions were part and parcel of the *de jure* system in that they served "to restrict the educational opportunities of its black citizens." *Ayers II*, 111 F.3d at 1210. Such mission designations "tend to perpetuate the segregated system." *Fordice*, 505 U.S. at 741. As such, limited mission practices "are traceable to *de jure* segregation and continue to foster separation of the races." *Ayers I*, 879 F. Supp. at 1477.

The different iterations of the State's funding guidelines all contained a mission-based component. For example, Maryland's funding guidelines during the 1980s "had a mission component to the funding that colleges received." (1/17/12 PM Trial Tr. at 105-106 (Toutkoushian).) During the 1990s, Maryland's funding guideline was likewise primarily driven by institutional mission. (*Id*. at 79.) Mission continued to have -- and still has -- a direct effect on funding.

By statute since 1988, 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) (emphasis added). *See also* Md. Code Ann., Educ. § 12-105(a)(1)(i) (USM shall "[e]stablish standards for funding based on differences in the size and *mission of the constituent institutions*") (emphasis added).

The Commission develops "guidelines to assess the adequacy of operating and capital funding based on comparisons with institutions designated as peer institutions and other appropriate factors" in consultation with the segments of higher education. Md. Code Ann., Educ. § 11-105(h)(4). The Commission, in consultation with the Department of Management and Budget also presents to the Governor and the General Assembly "a consolidated operating and capital budget for higher education" that includes, among other things, "a report on the current funding of the adopted sets of peer institutions, and recommendations regarding the funding of higher education." Md. Code Ann., Educ. § 11-105(i)(2).

By current statute, MHEC must "[a]ssess the adequacy of operating and capital funding for public higher education and establish operating funding guidelines based on comparison with peer institutions and on other relevant criteria." Md. Code Ann., Educ. § 10-207(5). The funding guideline is calculated "by determining the seventy-fifth percentile of the sum of State appropriation and tuition

and fee revenue per FTES of the competitor state peer institutions. The resulting per student rate is multiplied by the institution's projected enrollment and projected institutional tuition and fee revenue is subtracted." (J.A. 6403 at n.3; J.A. 9020.) The current funding guideline is thus driven in large part by mission. MHEC uses a statistical methodology called a "cluster analysis" to identify peer institutions for the funding guidelines based on similarities in institutional missions, among other things. (1/17/12 PM Trial Tr. at 31-33 (Toutkoushian).)

As Plaintiffs' expert explained: "The contemporary funding disparities, those disparities that persist, are due to an assignment of less research intensive and prestigious missions to HBCUs, the point being there that a research mission, for example, translates into higher levels of funding because it is just presumed and understood that you need different resources, you need different faculties, you need different facilities. So to the extent that that mission category has been denied HBCUs, then their potential for receiving higher levels of funding has been capped." (J.A. 3877.)

In sum, 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.

2. Cumulative Underfunding

Defendants invoke a misreading of *Fordice* to suggest that cumulative underfunding of the HBIs cannot be a traceable policy or practice under *Fordice*. They claim that only *current* funding policies, viewed in isolation, can be policies or practices "rooted in the prior system." 505 U.S. at 730 n.4. But *Fordice* and the other cases cited by Defendants rebut this very misreading.

Defendants claim that the present effects of historic cumulative underfunding are beyond *Fordice's* judicial reach. (Doc. 40 at 54.) However, the Supreme Court made no such holding in *Fordice*, and instead only refused to "focus on present discriminatory effects *without addressing whether such consequences flow from policies rooted in the prior system*." 505. U.S. at 730 n.4. The fact that the court was instructed on remand to conduct precisely this analysis does not "confirm that the cumulative effects of past underfunding policies are not grounds for liability," (Doc. 40 at 54-55), but rather, confirms the Supreme Court's mandate that an inquiry into "whether such consequences flow from policies rooted in the prior system" is

required in the first place. 505 U.S. at 730 n.4. It is precisely this inquiry that the lower court failed to do, and it is that legal error from which Plaintiffs now appeal.

The fact that the court on remand in *Ayers* failed to find Mississippi's funding formula traceable does not cure the lower court's failure in this case to make the necessary inquiry. *Id.* As a threshold matter, Plaintiffs respectfully submit that the reason the *Ayers II* court failed to find Mississippi's funding apparatus traceable is because it failed to conduct this necessary analysis. In *Ayers II*, despite accepting the lower court's findings that "the historical disparity in funding between the [TWIs] and HBIs once practiced by law persists through perpetuation of the status quo as it existed then," 111 F.3d at 1221, the court ended its analysis after concluding "there is no *per se* funding policy or practice traceable to the *de jure* era." *Id.* at 1222. But state policies and practices traceable to the *de jure* era that are responsible for ongoing segregative effects are unconstitutional whether they perpetuate segregation "ingeniously or ingenuously." *Cooper v. Aaron*, 358 U.S. 1, 17 (1958). *Fordice* contemplates that a single practice may be traceable even though specific aspects differ from earlier periods or the *de jure* era. *Fordice*, 505 U.S. at 728. Compounding this injury, the *Ayers* panel stopped its analysis of the funding formula in question after deciding that it was "largely geared" to funding students without consideration for race. *Ayers II*, 111 F.3d at 1222 (citing *Ayers v. Fordice*, 879 F. Supp. at 1453). But *Fordice* does not exonerate or otherwise exempt policies that

are "largely geared" toward not segregating schools; *Fordice* demands that states "dismantle" their prior systems of segregation. *Fordice*, 505 U.S. at 743-44.

More problematically, however, the court in *Ayers II* failed to consider how the current funding apparatus (comprising not just the current funding formula, but also the ongoing practice of maintaining the cumulative underfunding of the HBIs, and their impact when combined as they were in Mississippi at the time of the trial) might produce ongoing segregative effects. It failed to do so despite finding that "the formula responds to conditions that to a significant degree have resulted from the mission designations (and consequently results in the [TWIs] receiving a greater proportion of funds)." *Ayers II*, 111 F.3d at 1224. In doing so, the court abandoned its duty under *Fordice* to evaluate policies whose elements may have changed from the *de jure* era and which appear "racially neutral." *Fordice*, 505 U.S. at 731-32.

The lower court's reliance on *Ayers II*'s misstated legal standard also contradicts *Knight*, whose language squarely supports Plaintiffs' position despite Defendants' attempts to escape its plain meaning. As an initial matter (and as Defendants begrudgingly admit), both *Knight* courts to consider the issue found that cumulative underfunding was a vestige of the *de jure* era with ongoing segregative effects. *See, e.g.*, *Knight III*, 900 F. Supp. at 307-13. These courts did so despite the fact that the funding formula at issue had changed several times, despite the fact that the Alabama HBIs had received more funding per FTE student than the TWIs, and

despite the fact that the Alabama funding formula relied in part on "peer" data from other schools. *Knight I*, 787 F. Supp. 1030 at 1194. Like Alabama, Maryland's funding formula has been changed several times, its HBIs have received more funding per FTE students than the TWIs in recent years, and its funding is based in part on a peer-group analysis. Thus, contrary to Defendants' claims, these three features of Maryland's funding history and funding formula are not distinguishing at all, and instead demand closer adherence to *Knight*, not its abandonment.

Furthermore, in addition to not being distinguishing, Defendants' claims are also not persuasive. 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. What matters is whether they are ultimately found to be traceable to the *de jure* era and cause ongoing segregative effects. *Fordice*, 505 U.S. at 731-32. Nor is it significant that the HBIs have been "favorably" funded during recent years. *Knight III*, 900 F. Supp. at 308 (finding that even 25 years of favorable funding did not suffice to dismantle the dual system and allow the HBIs to "provide an education today free from the stigma of past discrimination").

More importantly, Plaintiffs respectfully disagree with the lower court's interpretation of *Knight's* holding to mean that funding policies are traceable only where "the same elements of the funding formula that harmed HBIs during the *de jure* era had never been addressed." (J.A. 146.) To be clear, despite the citation to

Knight, that language is not in any of the *Knight* decisions. Nor is it in *Fordice*. In fact, *Knight* stands against this proposition, as the historical cumulative underfunding it found to be a traceable vestige was the product of many factors other than the single factor ("more complex curricula") that benefitted the TWIs under the existing formula. It was not the fact that disparately "complex curricula" had accrued to the TWIs during segregation and were still benefitting them in the current funding formula that violated *Fordice*. It was the fact that the total funding apparatus, including the current funding formula and its interactions with extant and ongoing cumulative underfunding, was traceable as a whole and continued to produce segregative effects. Nowhere did the court find that the same "element" had to be on both sides of the "formula" versus "cumulative underfunding" ledger. And yet, on the basis of that conclusion, the lower court here expressly found un-appealed portions of the *Knight* decision to be inconsistent with *Fordice*, and effectively overruled them. It did so despite the fact that on appeal in *Knight II* (post-*Fordice*), the Fifth Circuit reinforced the decision not to isolate the funding formula from its interactions with cumulative underfunding (unlike the lower court here), and despite the fact that on remand, the district court again reiterated its findings regarding cumulative underfunding. *Knight III*, 900 F. Supp. at 307-13.

Likewise, Defendants' attempts to factually distinguish the funding formula at issue in *Knight* from the formula at issue here in Maryland fail entirely. As an

initial matter, rather than singling out Alabama's funding policy as *specifically* traceable because "the same elements of the funding formula that harmed HBIs during the *de jure* era had never been addressed," (J.A. 146), the court in *Knight* was instead speaking broadly about all funding formulas: "The Alabama formula is no exception [to the general rule that formulas are ultimately driven from some historic distribution of past resources]." *Knight III*, 900 F. Supp. at 308 (explanation in original). This is precisely why *Fordice* demanded that courts "carefully explore" how the ongoing and continuing maintenance of extant features (such as duplicative institutions or cumulative funding) interact with other potential vestiges such as a funding formula to form an ongoing traceable policy or practice. *Fordice*, 505 U.S. at 742. When the *Knight* courts conducted their analysis, they found that despite its differences from previous iterations, its higher per-FTE awards to HBIs, and its use of a peer institution analysis, "the Alabama formula favors large, complex HWUs," precisely those organizations that had received historically higher cumulative funding. *Knight III*, 900 F. Supp. at 308. It is this *interaction* between the current funding formula and cumulative funding that the lower court failed to consider when it concluded that 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.)

The *Knight* court went on to elaborate at length how, even without interaction with an existing funding formula, maintaining a policy or practice of cumulative underfunding can significantly impact the HBIs' ability to desegregate:

> 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.
>
> Of the major considerations that can affect raw financial comparisons - such as economy of scale, enrollment trends, and historical patterns - *the historical patterns are the most important*. This is because historical deficits *tend to continue over a period of time, and become cumulative*, which, of course, means they cannot be erased overnight.

Knight III, 900 F. Supp. at 311. *See also id.* ("[d]iscrepancies in funding grow and become embedded over the years").

Here, 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 court also acknowledged that "Maryland's funding formula arguably takes mission and programs, which are linked to an institution's history, into account through the Carnegie peer selection

process." (J.A. 152.) Finally, the court also found that Plaintiffs' expert, Dr. Toutkoushian, presented "an elaborate calculation of alleged 'cumulative deficiencies' present in the HBIs because of past funding discrimination." (*Id.*) But rather than analyze whether the combined funding apparatus -- which properly defined includes not only the current funding formula but also its interactions with these cumulative deficiencies -- is traceable and produces a segregative effect, the court found that "even if such resource deficiencies can be quantified, they are a remnant of past discrimination," and so, disregarded them. (*Id.*) Rather than apply the test from *Knight*, the court deployed its own legal threshold test that relied solely on its own findings about the current funding formula and per-FTE funding, and disregarded how that formula produces its segregative effects in concert with the rest of the funding apparatus, including cumulative underfunding. (*Id.*)

By stopping its inquiry at the existing funding formula, and by failing to take into consideration evidence of the continuing and ongoing policy and practice of maintaining cumulative funding disparities that continue to have have significant segregative effects at the HBIs under the current funding formula, the lower court failed to heed the holdings of *Fordice* and *Knight*, and thus committed legal error.

3. FTE Funding

The lower court also erred by relying solely on per-FTE comparisons as a way of comparing institutional funding levels. Rather than conduct this fulsome analysis,

the lower court instead relied almost completely upon a per-FTE comparison alone, and failed to appreciate how those issues are directly connected to the traceable policies and practices that continue to exacerbate segregation at the HBIs. For example, while the court recognized that "the Coalition adduced a substantial about of evidence showing that Maryland's HBIs struggle financially more than its TWIs," it mistakenly exonerated the State for its role in the development of those factors. (J.A. 153 (finding "many factors outside of State control").) While finding that "these characteristics may have a serious effect on the fiscal health of the HBIs" -- currently, and ongoing in light of the current funding formula -- the court nonetheless concluded that "they are, at most, effects of past discrimination, not current policies or practices attributable to the state." (*Id*.) In doing so, the court failed to appreciate that by continuing to operate necessarily within the context of these 'cumulative disparities,' the current funding formula directly implicates them and should have been analyzed in light of that interaction's potential segregative effects. By cabining its inquiry and disregarding what even the court acknowledged to be "substantial evidence" of the HBIs' continuing financial struggle in light of the current funding formula, and by focusing almost exclusively on per-FTE funding levels, the court committed legal error.

Rather than conduct a meaningful analysis of the issues, the district court cursorily dispensed with them in contravention of *Knight*, but not before actually

highlighting (and quickly disregarding) additional ways that the current Maryland funding formula continues to interact with 'cumulative disparities' to hamstring and further segregate its HBIs. The court first highlights the fact that Maryland deploys a "peer-based funding guideline method" (J.A. 147), without regard for the fact that the formula found traceable in *Knight I* also used "peer" data, and despite the fact that what constitutes a "peer" organization is necessarily connected to the historical circumstances that led the HBIs to classification in their disadvantaged cohort. This failure also infects the court's analysis of the "economies to scale" concern, which rests upon the notion that if all HBIs in the nation have been collectively reduced to a lower economy of scale by all states that have them (a group that, by definition, consists almost exclusively of states that deployed *de jure* segregated education systems), then Maryland cannot be held accountable for its role in continuing to subjugate its own HBIs likewise. This analysis is also incomplete because it once again disregards the fact that the peer group is based, in part, on degrees awarded, a factor that the lower court itself recognized was a reflection of discriminatory state action. (*See* J.A. 146 (discussing with approval *Knight* ruling that Alabama's funding formula that benefitted institutions with "complex curricula" was traceable and actionable under *Fordice*).)

Defendants misconstrue Plaintiffs' argument by claiming that Plaintiffs take issue with the Court's *consideration* of per-student or "per-FTE" funding levels.

(Doc. 40 at 56.) Quite to the contrary, Plaintiffs only claimed that "the court erroneously compared funding levels *solely* based on a current per student (or 'FTE') funding comparison." (Doc. 37 at 77.) The court did not err by considering the evidence of per-FTE funding levels. The court did err, however, by considering that evidence to be dispositive of the issue of whether Maryland's funding policies and practices were traceable vestiges of the *de jure* era with continuing segregative effects.

Nowhere in *Fordice* or its progeny has any court held that per-FTE funding comparisons are the only evidence relevant to this inquiry. In large part, this is because, like any single data point, a per-FTE funding measure only provides a very limited window into a comparison between institutions. The *Knight* court, for instance, went to great lengths to explain how per-FTE funding comparisons are inadequate to address the necessary question of whether a program is traceable and continuing to have segregative effects. *See Knight v. Alabama*, 787 F. Supp. 1030, 1192-1272 (N.D. Ala. 1991) (*Knight I*). Rather than provide a complete (and dispositive) picture of institutional support, the court found that per-FTE funding levels can vary according to other institutional factors, including recent enrollment trends, differing expenditures in differing academic fields, economies to scale that favor large, complex organizations (most of which were TWIs), and tuition received from students. *Id*. at 1207. Per-FTE comparisons also fail to take into account the

fact that "HBUs also have a disproportionate share of poorer students, who also impose additional costs on the institution." *Id.* at 1227-28. Evaluating these considerations in light of its record, the *Knight* court concluded: "This means, of course, that the HBUs will appear to be in a better financial position than they are in actuality." *Id.* at 1228.

Plaintiffs' reliance on an expert who also analyzed per-FTE funding is in no way inconsistent with Plaintiffs' claim. As the court in *Knight* found, even two per-FTE comparisons of the same schools can differ significantly depending on the methods used, further undermining the lower court's decision to rest its cumulative funding opinion solely on per-FTE comparisons. *See Knight I*, 787 F. Supp. at 1263-64. In fact, the value of a purely per-FTE comparison is called into question by the fact that the same metric being could have been cited *during segregation* to make the same incorrect claim that the HBIs were not being underfunded. Frankly, any measurement that is subject to that level of disconnect from the segregative and educational realities of the dual system is inherently suspect. It is no surprise then that the court in *Knight* discussed at length the per-FTE funding measure, its limitations, and other methods the courts used to evaluate the ongoing state funding apparatus as a whole. *See Knight I*, 787 F. Supp. at 1192-1272; *Knight III*, 900 F. Supp. at 307-13. It was legal error for the lower court not to conduct the same analysis.

By looking almost exclusively at per-FTE funding measures, and by failing to conduct the necessary inquiries into either the adequacy of that metric or how the current funding formula interacts with well-documented and court-acknowledged cumulative underfunding, the court abdicated its duty under *Fordice* and directly rejected *Knight*. In so doing, it committed legal error.

4. Land-Grant Funding

The inadequate and vastly unequal funding of the HBI land grant institutions as compared to the TWI land grant institutions is a practice traceable to the *de jure* era. The State does not deny the essential facts in Plaintiffs' opening brief (Doc. 35 at 78-79), which establish that the State's underfunding of its HBI land grant school (UMES) compared to its TWI land grant school (UMCP) is a policy or practice traceable to the era of *de jure* segregation: (1) UMCP became a land grant pursuant to the Morrill Act of 1862, which provided funding for the creation of programs that focused on agriculture and mechanic arts; (2) the federal government created the Morrill Act of 1890 to enable African American students to obtain a college education in the agricultural and mechanical arts in states like Maryland which did not permit African American students to attend its white land grant; (3) State-commissioned reports from the *de jure* era, found that Princess Anne (now UMES), the African American land grant was woefully underfunded by the state to the point that it was recommended that the State close it; and (4) the underfunding of UMES

as a land grant continues to this day, as best reflected by the fact that UMCP receives five dollars of state funding for every federal dollar it receives, while UMES receives only 30 cents of state funding for every federal dollar it receives.

Instead, the State's response is that there is a "flagship" exception to *Fordice*: because UMCP is a flagship university, any disparities in funding between it as the TWI land grant and the HBI land grant are not actionable under *Fordice*. (Doc. 40 at 58-59.) The State's position is essentially the same as the district court's holding, and it is deficient. *Fordice* does not contain a flagship exemption to the traceability standard and neither the State nor the court cite to case law in setting forth their position that there is a flagship exception to *Fordice*. Nor should there be such an exception, particularly in this context where there is only one TWI land grant and one HBI land grant and the creation of the HBI land grant was mandated by the federal government because Maryland, and states like it, barred African American students from attending the TWI land grant. It is incidental that the TWI land grant also happens to be the flagship.

Moreover, as the State acknowledges (Doc. 40 at 58), UMCP was not designated as the flagship until 1988. The State does not attempt to explain how the designation of UMCP changed how Maryland funded the respective land grant functions of UMCP and UMES differently because UMCP was a flagship. To the contrary, the contemporary underfunding of UMES as compared to UMCP is

traceable to the *de jure* era. For these reasons, the district court erred as a matter of law when it found that there is a flagship exemption to *Fordice* as applied to land grant funding.

C. The State's Capital Funding Arguments Are Similarly Flawed.

The trial court erred in dismissing Plaintiffs' capital funding claims based on the same principal flaw affecting the operational funding analysis. The error is even more pronounced because the court dismissed the claim on summary judgment, rather than permitting the Coalition to present evidence at trial, as was required because of the material facts in dispute regarding the State's funding practices. Fed. R. Civ. P. 56.[6] The State's argument regarding capital funding focuses on the same argument it made with respect to operational funding, *i.e.*, that the State's current method "differs from the process in place during the *de jure* era. (Doc. 40 at 62.) But just as the operational funding methods described above continuously incorporate institutional mission as in the *de jure* era, so too does the State's capital funding policy. *See, e.g.*, Md. Code Ann., Educ. § 10-203(c)(3) ("Capital funding

[6] The State erroneously states that the trial court "correctly found *on summary judgment* that Maryland's policies for funding the operations and capital needs of its public universities are not traceable to the *de jure* era." (Doc. 40 at 42.) This is incorrect. The court *only* dismissed the Coalition's capital funding claims on summary judgment. It determined the operational funding claims presented triable issues. (Doc. 35 at 80.)

to support construction, operation, and maintenance of a physical plant that is consistent with each institution's mission.").

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.

Respectfully submitted,

s/ Michael D. Jones
Michael D. Jones

JON GREENBAUM
BRENDA SHUM
GENEVIEVE BONADIES TORRES
LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Ave., NW
Washington, DC 20005
(202) 662-8600

MICHAEL D. JONES
KAREN N. WALKER
DEVIN C. RINGGER
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth Street
Washington, D.C. 20005
(202) 879-5000
mjones@kirkland.com

October 18, 2018

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)(C), as modified by Order of this Court, because this brief contains 11,325 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
Karen N. Walker

CERTIFICATE OF SERVICE

I, Karen N. Walker, hereby certify that on this 18th of October, 2018, the Reply 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.

Brian E. Frosh
Adam D. Snyder
Jennifer A. DeRose
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
Email: asnyder@oag.md.us

Date: October 18, 2018

s/ Karen N. Walker
Karen N. Walker