No. 17-2418

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THE COALITION FOR EQUITY AND EXCELLENCE IN MARYLAND HIGHER EDUCATION, *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
(Catherine C. Blake, District Judge)

PAGE PROOF BRIEF OF APPELLANTS

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May 21, 2018

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

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Signature: /s/ Jennifer A. DeRose Date: December 28, 2017

Counsel for: Appellants

CERTIFICATE OF SERVICE

****

I certify that on December 28, 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/ Jennifer A. DeRose
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes

Rules

Regulations

No. 17-2418

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BRIEF OF APPELLANTS

JURISDICTIONAL STATEMENT

This action alleges that Maryland has failed to dismantle vestiges of the former *de jure* segregation of its public higher education system, in violation of Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1367, and 1441. In a series of preliminary rulings, the court dismissed with prejudice seven claims, including plaintiffs' claim

of intentional discrimination, and allowed three claims to proceed to trial. (ECF 57, 171, 242.) A bench trial on liability yielded findings in favor of defendants on two of the remaining claims; on the third, the district court found that unnecessary program duplication among Maryland's historically black institutions ("HBIs") and its other public universities ("non-HBIs") constituted a vestige of the *de jure* era. (ECF 382.) On November 8, 2017, the court entered a final judgment disposing of all claims and ordering an injunction that included the appointment of a special master. (ECF 641, 642.)

On December 8, 2017, the State noticed a timely appeal from the district court's judgment. (ECF 649.) The State noted a second timely appeal from the judgment and the district court's denial of its Federal Rule of Civil Procedure 59 motion to alter or amend the judgment. (ECF 653). On December 21, 2017, plaintiffs cross-appealed. (ECF 658.) This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Did the district court err in concluding that duplication of programs among Maryland's historically black institutions and the other institutions within its public university system is a policy traceable to the *de jure* segregation era that, by itself, violates the Equal Protection Clause, when Maryland has fully integrated its formerly white universities and eliminated discriminatory admissions policies, funds its HBIs at a level equal to or better than its non-HBIs, and reviews the proposed addition of new programs under a policy that the court concluded was legally adequate—all on based on thoroughly discredited expert testimony purporting to identify "unnecessary" from ordinary duplication in a public university system?

2. Did the district court fail to tailor its injunction to the violation it found by placing Maryland's system of public higher education into a 10-year special master receivership when the evidence showed that a remedy requiring the creation of unique, high-demand programs at the HBIs would not boost white enrollment at those institutions and would re-allocate finite public resources in a way that would harm the other institutions within the State's system of higher education?

STATEMENT OF THE CASE

It is undisputed that in Maryland today every student, regardless of race, can attend a racially diverse public college or university. The district court found, and plaintiffs agree, that Maryland's ten public non-HBIs are fully desegregated. (ECF 641 at 63.) In Maryland, more than half of the African Americans who enroll in a public university attend one of Maryland's non-HBIs. (ECF 242 at 7.) Indeed, Maryland's non-HBIs include two majority-minority universities, one of which—the University of Maryland University College ("UMUC")—enrolls approximately 7,000 more African-American students than all Maryland's HBIs combined. (2/9/17 Tr. 25-26 (Schmoke); 2/6/17 Tr. 11, 41-42 (Miyares).) Maryland's public non-HBIs also include the University of Maryland, Baltimore County ("UMBC"), which is a national leader in STEM education for minority students. (1/30/17 Tr. 41-43 (Hrabowski).) These circumstances set this case apart from earlier higher education cases, all of which involved university systems that retained racially discriminatory admissions practices. (ECF 641 at 63.)

Maryland's system of *de jure* segregation in public higher education ended in 1954, when the United States Supreme Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954), and the Board of Regents of the University of Maryland declared that every branch of the university was open to "all residents of Maryland

without regard to race."[1] *Podberesky v. Kirwan*, 838 F. Supp. 1075, 1078 (D. Md. 1993) ("*Podberesky I*"). At that time, Maryland maintained six institutions that were open to white students but excluded African-American students (the institutions now named St. Mary's College of Maryland; Frostburg State University; Salisbury University; Towson University; University of Maryland, Baltimore; and University of Maryland, College Park) and four institutions that served black students (the institutions now named Morgan State University; Coppin State University; Bowie State University; and University of Maryland Eastern Shore ("UMES")). One Maryland institution, UMUC, had always been open to students of all races since its establishment in 1947 as part of the University of Maryland College Park.[2] (2/6/17 Tr. 9-10 (Miyares).)

The end of the *de jure* era began the process of desegregation, in which Maryland took steps to dismantle its segregated system of higher education. Under *United States v. Fordice*, 505 U.S. 717 (1992), a state discharges its obligation to desegregate its system of public higher education if it "eradicates policies and practices traceable to its prior *de jure* dual system that continue to foster

[1] At the time of its declaration, the Board of Regents oversaw only the University of Maryland campuses at Baltimore, College Park, and the Eastern Shore.

[2] UMUC became a separate institution in 1970. The State established UMBC in 1966 and acquired the University of Baltimore in 1975. *See* Md. Code Ann., Educ. §§ 10-101(m), 12-101(b)(6) (identifying all Maryland public senior higher education institutions).

segregation," *id.* at 728, or demonstrates that doing so would not be "practicable and consistent with sound educational practices," *id.* at 729.

Because the focus of *Fordice* is on guaranteeing "truly free" student choice, *id.* at 743, the mere fact "[t]hat an institution is predominantly white or black does not in itself make out a constitutional violation." *Id.* at 743. Instead, *Fordice* asks whether the State has "le[ft] in place *policies* rooted in its prior officially segregated system that serve to maintain the racial identifiability of its universities." *Id.* (emphasis added). Because, historically, states have "not assigned university students to a particular institution," and pursuit of higher education is "a matter of choice," *id.* at 729, traceable policies that offend the Constitution under *Fordice* are those that "substantially restrict a person's choice of which institution to enter," *id.* at 733.

Maryland today has no traceable policies that restrict student choice or foster segregation in the State's public institutions of higher education. Its non-HBIs are fully integrated and open to all students without regard to race. And those students who choose to attend one of Maryland's HBIs do so because of the universities' academic and institutional strengths, not because a state policy routes them there. (*See, e.g.*, 1/9/17 Tr. 76-76 (Wilson) (Morgan number one HBI in production of Fulbright scholars and grantees); 1/11/17 Tr. 59-60 (Burnim) (Bowie "ranked among the nation's top comprehensive universities").

Pretrial Proceedings

The Complaint

On October 13, 2006, the Coalition for Equity and Excellence in Maryland Higher Education ("the Coalition") along with individual plaintiffs[3] filed suit in state court against the State of Maryland, the Maryland Higher Education Commission ("MHEC"), the Secretary of Higher Education, and MHEC's chairperson. (ECF 2.) The defendants removed the case to the United States District Court for the District of Maryland. (ECF 1 (citing 28 U.S.C. §§ 1331, 1367, 1441); ECF 5.)

The plaintiffs alleged that, despite having achieved full integration of its non-HBIs, the State had continued discriminatory policies traceable to its prior *de jure* segregation in violation of Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. (ECF 2.) After amending the complaint several times, the plaintiffs filed the operative Fourth Amended Complaint on September 15, 2010 ("Complaint"). (ECF 165.) The Complaint principally alleged that Maryland had failed to satisfy commitments made in a 2000

[3] The Fourth Amended Complaint identified the individual plaintiffs as (a) current and former students at Morgan State University at the time the suit was filed, (b) a current student at Bowie State University, and (c) one high school student who alleged that he was a "potential" student at an HBI. (ECF 165 ¶¶ 13-20.) Those students have since graduated. The district court found standing based on the Coalition's representation of the interests of current student members. (ECF 382 at 17-20; ECF 641 at 8-9.)

Partnership Agreement with the federal Department of Health, Education, and Welfare's [now Department of Education's] Office for Civil Rights ("OCR") (asserted as state law breach of contract) and had violated the Equal Protection Clause by maintaining several policies traceable to the *de jure* era, including a policy of "allow[ing]" non-HBIs to duplicate certain programs at nearby HBIs. (ECF 165, ¶¶ 144-151.) The Complaint sought "significant increases for [HBI] funding" (*id.*, ¶ 100) "to make the state's [HBIs] whole and to develop complete parity between with [*sic*] the state's [non-HBIs]" (*id.*, ¶ 4).

Pre-Trial Dismissal of Most Claims

All told, the plaintiffs have asserted ten claims or theories of recovery in this case, and all but one of them have been resolved in favor of the State. In 2008, the district court rejected the plaintiffs' state law claim that Maryland had breached the 2000 OCR Partnership Agreement. (ECF 57.) In a June 6, 2011 decision partially granting the State's post-discovery motion for summary judgment, the district court acknowledged that there was no valid claim of intentional discrimination against Maryland (ECF 242 at 9), and that Maryland had desegregated all the non-HBIs (which the court referred to as "traditionally white institutions" or "TWIs") (*id.* at 7 (noting that "the Coalition is not pressing any claims relating to minority students at the [TWIs]")). The court found that "[m]inority students attend [Maryland's non-HBIs] in significant numbers today," and "[a]pproximately 59% of African-

Americans attending public four-year institutions [in Maryland] are enrolled at non-HBIs." (*Id.* at 7 n.8.)

The court also found that Maryland had eliminated other policies that were traceable to the former *de jure* system, including the types of policies that *Fordice* and its progeny had found to persist in the systems of other states. The court found no basis to conclude that Maryland has any traceable policies pertaining to the following:

(1) recruitment practices;

(2) admissions practices;

(3) retention rates at HBIs;

(4) graduation rates at HBIs; or

(5) capital funding.[4]

(ECF 242 at 8-10, 8 n.10; *see also* ECF 382 at 40-41.) The court determined that factual disputes necessitated a trial regarding only three claims: (1) unequal operational funding of HBIs, (2) limited institutional missions at HBIs, and (3) academic program duplication. (ECF 242.)

[4] In October 2010, the plaintiffs abandoned claims relating to academic and teacher-preparation programs, partnerships with elementary and secondary schools, and partnerships between the four-year institutions and community colleges. (ECF 171 at 5.) Prior to trial, the plaintiffs also stipulated that Maryland's non-HBIs were and are able to recruit and retain diverse faculty and staff. (ECF 272 at 30-31.)

Liability Trial

In January and February 2012, the district court held a six-week bench trial to consider the plaintiffs' remaining claims. The parties presented 37 witnesses and approximately 350 exhibits.

Rejection of Operational Funding and Mission Claims

On October 7, 2013, the district court issued factual findings and conclusions of law regarding liability. The court ruled in favor of the State on the plaintiffs' operational funding and mission claims. (ECF 382 at 27, 32-33, 38.) The court found that Maryland's current funding practices and policies, first adopted in 1999, are not "traceable to the *de jure* era," and the State's funding formula "[s]tructurally" is "entirely different from any of Maryland's prior funding policies or practices." (ECF 382 at 38.) Moreover, "functionally, the current [funding] formula has not disadvantaged the HBIs or provided them any less state-controlled funding than the [non-HBIs]," and "Maryland's HBIs are not 'underfunded' by the State, relative to the [non-HBIs]." (*Id.*) To the contrary, "between 1984-2010, Maryland's HBIs received $84,621,000 in state appropriations and enhancement funds above what they would have received if these funds had been distributed to all Maryland institutions in proportion to their student enrollment." (*Id.*) Although the HBIs had been less successful than other institutions in augmenting their state funding through grants and other means, the district court recognized that the State "has put policies

in place to address these disparities." (*Id*. at 41.) The court also concluded that the HBIs' "dual mission" (their "self-determined" commitment to offering a quality education to all students, but also educating students from economic circumstances that leave them unprepared for college (*id.* at 31, 33)) "does not require additional funding beyond what the HBIs already have received in enhancement funding from the state." (*Id*. at 41.)

With respect to the plaintiffs' claim that the State limited the HBIs' missions in a discriminatory manner, the district court found that "no current mission-related policy or practice is traceable to the *de jure* era." (*Id*. at 29.) Instead, "the State has actively worked to expand the roles of the HBIs since the *de jure* era and to place them on equal footing with Maryland's [non-HBIs]"; "Maryland has maintained a policy of enhancing HBI mission and programming since the 1970s in an effort to mitigate the effects of *de jure* discrimination"; and "Maryland's continued efforts to ensure its HBIs are comparable and competitive in terms of mission are commendable in light of past discrimination." (*Id.* at 27.)

Ruling Regarding Academic Degree Program Duplication

The district court ruled in favor of plaintiffs on only one of their claims: that the State had maintained a policy of "unnecessary program duplication" traceable to *de jure* segregation and that the policy has segregative effects at all the HBIs except UMES. (*Id*. at 44-59.) This conclusion was unprecedented in at least three respects.

First, it represents the first time any court applying *Fordice* has found a state liable where the facts show that the State had fully desegregated its formerly white institutions and had adequately funded its HBIs.

Second, the court below found "unnecessary program duplication" between HBIs and *fully integrated* non-HBIs, whereas *Fordice* and its progeny found duplication actionable only when between racially identifiable institutions, i.e., where a racially identifiable "white" school duplicates a program offered by a racially identifiable "black" school in an effort to maintain a parallel system. *See Ayers v. Fordice*, 111 F.3d 1183, 1218, 1221 (5th Cir. 1997) ("*Ayers II*"); *accord Knight v. Alabama*, 787 F. Supp. 1030, 1319 (N.D. Ala. 1991) ("*Knight I*"), *aff'd in pertinent part*, 14 F.3d 1534, 1539-40, 1556-57 (11th Cir. 1994) ("*Knight II*").

Third, by finding that program duplication is the sole remaining vestige of *de jure* segregation in Maryland, the court below became the first to rest a finding of constitutional violation solely on program duplication, a common attribute of public universities that has been found to be both "pervasive" and "true of all systems throughout the country which have more than one university." *Ayers v. Fordice*, 879 F. Supp. 1419, 1444 (N.D. Miss. 1995) ("*Ayers I*").

The district court's finding of "unnecessary program duplication" relied heavily on the testimony of Dr. Clifton F. Conrad, whom the district court described as "the nation's preeminent scholar on this issue" (ECF 382 at 45) based on his

testimony in earlier public higher education cases. Dr. Conrad's testimony in those cases, however, was criticized in previous court decisions, *see Knight I*, 787 F. Supp. at 1317-19, *Ayers I*, 879 F. Supp. at 1444-45, and his analyses of program duplication at trial contained several "methodological flaws." (ECF 641 at 13.)

The district court then concluded that Maryland's program-approval regulations in place at the time of the 2012 liability trial had failed to eliminate unnecessary duplication. The district court criticized the MHEC regulations on two grounds: (1) that they are "only forward facing," in that "they do not address the substantial duplication that existed since, essentially, the beginning of Maryland's system of public higher education"; and (2) that they "failed to prevent *additional* unnecessary duplication, to the detriment of the HBIs." (ECF 382 at 50-51.)

The district court based the latter conclusion on a single 2006 MHEC decision to approve—over Morgan State University's objection—an MBA program jointly offered by University of Baltimore ("UB") and Towson University. There is, however, no evidence that, during its brief existence, UB's joint program with Towson had any effect on enrollment at HBIs. Although the court found that UB's MBA program had an impact on Morgan when it entered the public university system in 1976 (*id*. at 54), uncontroverted testimony established that the joint program with Towson itself had no effect on white enrollment in Morgan's MBA program. (DRE 70 at 37; 2/9/17 Tr. 9-10 (Schmoke).)

The evidence at the trial also showed that Towson first approached Morgan as a potential partner in the joint program but Morgan was, "'for perfectly good reasons, not willing to direct its resources . . . to developing that program.'" (ECF 382 at 57 (quoting 1/30/12 p.m. Tr. 4-5 (O'Keefe)).) Though the district court found that the State had more than adequately funded Morgan's operations (ECF 382 at 38-39), the court nonetheless faulted the State for not "offering Morgan additional funding" for the UB joint program that Morgan declined to pursue, or, alternatively, for not "considering another HBI to fill this need" (*id*. at 57).[5] The UB/Towson MBA program was the only instance where the court found that the then-existing MHEC regulations had failed to avoid program duplication,[6] and the joint program was discontinued in 2015 by agreement of UB and Towson. (ECF 641 at 38 n.22.)

The district court acknowledged that the State in 2012 had amended its program-approval regulations in a way that provided "a much clearer statement of the standard applicable under *Fordice*." (ECF 382 at 52 n.12.) At the time of the

[5] This criticism reflected the court's misunderstanding of the role of MHEC, which has no authority to place programs at institutions that have not proposed them. (2/7/17 Tr. 86-87.)

[6] The district court cited only one other example of how MHEC applied program duplication safeguards—UMUC's 2009 proposal to offer a new Doctorate of Management degree in Community College Leadership—where MHEC limited the new UMUC program to out-of-state students to avoid duplication of a similar program offered by Morgan. (ECF 382 at 52; 2/16/17 Tr. 67 (Miyares); *see also* PTX 179.)

liability trial, the court had no evidence before it as to how the new policy was operating, but in its opinion after the 2017 remedies trial, the district court cited the testimony of HBI presidents and others that the amended regulation was "functioning properly" and "working as it should." (ECF 641 at 37, 69 (citing 1/11/17 Tr. a.m. 69-70, 72 (Burnim); 1/12/17 Tr. a.m. 8 (Thompson)).) The court thus determined the new MHEC policy was "adequate." (*Id.* at 69.)

Interlocutory Appeal of the Liability Order

On June 29, 2015, the district court certified the liability ruling for interlocutory appeal under 28 U.S.C. § 1292(b). (ECF 416, ECF 417.) The court ruled that there was "substantial ground for a difference of opinion" warranting interlocutory review about whether a State can be held liable under *Fordice* for unnecessary program duplication despite having fully desegregated its non-HBIs. (ECF 417 at 11.) The plaintiffs opposed review and filed a cross-petition. No. 15-243, Docket No. 14. On July 29, 2015, this Court denied the petition. No. 15-243, Docket No. 26.

Remedy Phase

Litigation Concerning the Need for a Further Trial

After this Court denied interlocutory review, the case returned to district court for determination of a remedy to increase other-race enrollment at the HBIs. The plaintiffs sought summary judgment on a remedial proposal developed by Dr.

Conrad and another of plaintiffs' experts (Dr. Walter Allen) that involved the creation of new "unique, high-demand" programs at the HBIs. (ECF 406.) The proposal was based on the idea that the specific programs offered at institutions substantially influence a prospective student's enrollment decision and, therefore, program duplication played a significant role in low white enrollment at the HBIs. The plaintiffs conceded in their motion that similar remedial plans in other states had failed to desegregate HBIs, but argued that those plans had "relied primarily on *discrete* new programs," whereas their proposal would succeed because it grouped those same programs together in "programmatic niches." (ECF 480-1 ¶ 209 (emphasis added).) Plaintiffs' experts acknowledged, however, that they had no empirical basis for their hypothesis and that it "remains impossible to find 'textbook examples' or to 'scientifically test' the desegregative impact of the Plaintiffs' remedial proposal." (*id.* ¶ 328.) They nevertheless believed it to be a "promising strategy." (*Id.* ¶ 204.)

In response, the State's expert, Dr. Allan Lichtman (an historian specializing in both quantitative and qualitative analytical methods), explained that the plaintiffs' submission offered no systematic analysis of the data regarding duplication of HBI programs, but rather "cherry-picked" examples based on "inaccurate and misleading data" which, "when corrected, contradict [the Coalition's] remedial theory." (ECF

448-5 at 13.) Dr. Lichtman testified that, in his opinion, "[n]o reliable inference can be drawn from such selective data presentation." (*Id.* at 23.)

Dr. Lichtman observed that the non-core, high-demand, unduplicated programs already in place at Maryland's HBIs had failed to attract a substantial number of white students, and unduplicated programs had attracted a smaller percentage of white students than had the HBIs' programs generally. (*Id.* at 6-7, Tables 1 and 2.) Dr. Lichtman also tested the plaintiffs' theory that so-called "high-demand" programs, even if duplicated, could still significantly diversify enrollment at the HBIs. (*Id.* at 26.) Dr. Lichtman's analysis showed that the current high-demand programs at the four HBIs did not contribute significantly to diversity in their student enrollments. (*Id.*, Table 6 and Table 7.)

In February 2016, the district court denied plaintiffs' motion for summary judgment as to remedy and concluded that a trial would be necessary "to inform the court on the complex question of what remedies are educationally sound, justified by the scope of the violation found, and best targeted to remedy that violation while enhancing rather than harming Maryland's system of public higher education." (ECF 460 at 1.)

2017 Remedies Trial

In early 2017, the district court held a seven-week trial to determine a remedy for the program duplication that formed the basis for its liability decision. Some of

the trial testimony concerned the impact of the plaintiffs' proposal to shut down programs at non-HBIs and transfer them to HBIs, which the district court declined to order. (ECF 641 at 70.) Other testimony focused on the adequacy and application of the State's standards (as amended in 2012) for approving new programs to avoid harm to the HBIs, which the district court determined to be adequate. (*Id.* at 69.)

The State also offered updated evidence about changing campus demographics and how the student bodies of Maryland's HBIs, like its population generally, had grown steadily more diverse. UMES, one of the most diverse HBIs in the nation, has steadily increased diversity on its campus, with the percentage of non-black entering freshman and transfer students increasing from 18% to 30% between 2008 and 2012. (DRE 164 at 3; DRE 40 at 4, 9.) Currently, only 67% of UMES's students are African American, 13% identify as white, and 20% identify as other races. (1/10/17 Tr. p.m. 79-80 (Bell).) Coppin experienced a 50% increase in its non-African-American student population (from 12% to 18%) between 2009 and 2014 (2/14/17 Tr. 8 (Lichtman)), and Bowie, in just one year, had "increased its percentage of non-African-American students from 15% to 17%." (DRE 35 at 2.) Likewise, at Morgan, "in seven years [it] has gone from a 90 percent-plus African-

American institution to an institution that is slightly below 75 percent African-American."[7] (*Id.*)

The primary focus of the remedies trial was on determining the scope of remedy that could be "justified by" the degree of constitutional violation found by the court and ensuring that the remedy selected is "best targeted" to redress that duplication without harming the State's university system. (ECF 460 at 1.) The State proposed additional funding for enrollment management, student aid, campus inclusion initiatives, and summer academies (ECF 641 at 22), while the plaintiffs continued to propose a remedy based on the creation of "unique, high-demand" programs within "programmatic niches" at the HBIs (*id.* at 23).

The parties' expert witnesses testified about the factors that influence student enrollment at universities and the relationship between increased white enrollment and programs that the plaintiffs' experts identified as unique, high-demand, or both. The evidence at trial showed that programs do not play a significant role in student college choice. (*See, e.g.*, DRE 183 at 51 (American Freshman College Survey, indicating that general academic reputation and employability are preeminent

[7] In concluding that Maryland's HBIs "remain racially identifiable institutions," the district court focused on the fact that "[w]hite students made up only 5% of the population of Maryland's HBIs." (ECF 382 at 20.) The figures cited above include the enrollment of students who identify as neither white nor black and thus reflect the full diversity of Maryland's HBIs.

considerations).) Presidents of HBIs and non-HBIs made that point (2/1/17 Tr. 35-36 (Schatzel) (testifying that the availability of a particular program at an institution is generally not a significant factor in student choice); 2/9/17 Tr. 153-54 (Schmoke) (freshmen enrolled at UB without realizing that the school did not offer certain undergraduate programs available at most universities)), while presidents of the non-HBIs testified that applicants to their schools, regardless of race, generally do not send their test scores to the HBIs and that the HBIs and non-HBIs generally are not "competitors" for the same students. (1/30/17 Tr. 49-51 (Hrabowski); 2/1/17 Tr. 24-26 (Schatzel); 2/6/17 Tr. 42-43, 51 (Miyares); 2/9/17 Tr. 36-37 (MBA program), 62-63 (criminal justice program) (Schmoke).)

The State's social science expert, Dr. Lichtman, found that the academic programs accounted for only 11.4% of the variation in white enrollment (2/14/17 Tr. 11-14, 93), meaning that 88.6% of the variation was due to other factors such as the "cost of the education . . . demography . . . welcoming atmosphere . . . [and] as-yet-unknown factors." (*Id*. at 14.) He testified about factors other than program duplication that might explain the racial makeup of public universities in Maryland. (2/13/17 Tr. 183-86 (Lichtman).) One important consideration was demographics. Undisputed Census data established that, across the country, the more diverse HBIs are in counties with majority- or plurality-white populations. (2/14/2017 Tr. 94.) Morgan, Coppin, and Bowie, however, are all located in areas that, since the 1970s,

have developed a sizable African-American majority. Based on this and other evidence, Dr. Lichtman testified that demographic changes in the areas near Morgan and Coppin (Baltimore), and Bowie (Prince George's County) would have had a greater effect than program duplication on the demographics of those schools. (*Id.* at 95 (Lichtman).

The State also called an expert in social science methodology in support of its pretrial motion (ECF 495 (deferred until trial by the district court)) to exclude the testimony of the plaintiffs' experts because their methods were unreliable and contrary to the standards for social science. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

Opinion Regarding Remedy

On November 8, 2017, the district court issued a memorandum opinion (ECF 641) and a final judgment, including an injunction (ECF 642). The district court concluded that neither side's remedial proposal was "sufficiently practicable, educationally sound, and likely to achieve the greatest possible reduction in segregative effects to justify ordering their imposition." (ECF 641 at 3.) But rather than devise a remedial plan based on the evidence presented at the trial, the district court delegated that task to a special master.

Before discussing the merits of the evidence about remedy, the district court resolved threshold questions about the admissibility of the plaintiffs' experts'

testimony on the scope of the violation and the efficacy of their remedial strategy and the applicability of the general four-factor standard for injunctive relief to cases involving equal protection claims under *Fordice*. (ECF 641 at 9-21.)

***Daubert* Ruling**

The State had challenged the admissibility of the opinions offered by Drs. Conrad and Allen about the extent to which creating unique, high-demand programs at the HBIs would increase diversity at those institutions. Specifically, the State had argued that the plaintiffs' experts' opinions were not based on an accepted social science methodology, contained numerous methodological flaws, and were based almost exclusively on their "experience" serving as plaintiffs' experts in previous *Fordice* litigation. (ECF 495.)

The district court acknowledged that, to the extent Drs. Conrad and Allen relied on quantitative and qualitative studies, the court "must determine whether the methodology of the studies they employed satisfies Rule 702." (ECF 641 at 16.) Even though the State had presented evidence of "methodological flaws" in the two experts' use of these studies (*Id*. at 13) and "a number of specific criticisms" about "generalizability, bias, and flaws in research design and execution" (*id.* at 16), the court ruled that those errors did not warrant exclusion of the experts' testimony (*id.* at 17). The court embraced the plaintiffs' suggestion that "the applicable standard is the one that governs testimony by *experiential* experts," and not traditional social

science experts, to the extent that their opinions were based on "experience, rather than a particular social science methodology." (*Id.* at 15 (emphasis added).)

Although Drs. Conrad and Allen did not purport to have experienced or observed any instance where introduction of high-demand programs had diversified any HBI's enrollment, the court credited their experience as expert witnesses who had testified in support of remedial proposals in prior cases (*id.* at 15-16), and deemed that experience "an additional factor in favor of their reliability" (*id.* at 19). The court did not acknowledge that in those prior cases courts had criticized Dr. Conrad's analysis and rejected remedial features he advocated as educationally unsound, impracticable, and unlikely to be effective. *See Ayers II*, 111 F.3d at 1213 (affirming finding that "'merely adding programs and increasing budgets' is not likely to desegregate an HBI"); *Knight v. Alabama*, 900 F. Supp. 272, 315 (N.D. Ala. 1995) ("*Knight III*") (rejecting program transfers as neither "educationally sound" nor "practicable"); *Knight I*, 787 F. Supp. at 1317-19 (critiquing Dr. Conrad's program-duplication testimony).

Ruling Regarding the Effectiveness of the Remedy

Rather than address these conflicting quantitative and qualitative analyses, the district court referred to its prior finding that duplication "'continues to exacerbate the racial identifiability of Maryland's HBIs.'" (ECF 641 at 20 (quoting ECF 382 at 59).) In concluding that the HBIs' racial identifiability could be redressed by

development of high-demand-program niches, the district court relied largely on the testimony of presidents of HBIs and some non-HBIs, as well as the OCR Partnership Agreement and other state plans and commitments regarding the HBIs. (ECF 641 at 38-39, 50-52.) Although these sources describe the measures the State has taken and could take to boost the comparability and competitiveness of the HBIs, including enhancing program offerings and avoiding unnecessary duplication, none contains a qualitative or quantitative analysis of whether unique, high-demand programs can increase white and other-race enrollment.

The district court also relied on the inclusion of program-based remedies in judicial orders in other states. Although the court cited decisions in earlier litigation (ECF 641 at 54-61), it did not acknowledge the Fifth Circuit's holding in *Ayers* that adding programs would be ineffective to diversify HBIs, 111 F.3d at 1213, or the plaintiffs' concession in their motion that similar remedial plans in other states had failed to desegregate HBIs. (ECF 480-1 ¶ 209.)

Ruling Regarding the Scope of Relief

Having decided on a program-based remedy, the district court next examined the suitability of equitable relief. Although it acknowledged the governing four-factor test for permanent injunctive relief, *see eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006), the district court nonetheless questioned whether it was obligated to apply that test when none of the post-*Fordice* cases from the 1990s had

"discuss[ed]" the issue. (ECF 641 at 20.) And even though the court stated that the four-factor test was met here, it ruled that it was not required to consider the third factor—the balance of the hardships—because "the *Fordice* analysis already incorporates a balance of hardships inquiry with the 'practicable and educationally sound test.'" (ECF 641 at 21.) As a result, the district court did not weigh the specific harm to the plaintiffs from program duplication at the HBIs against the harm to the students, faculty, and institutional integrity of Maryland's other public universities, which themselves enroll more African-American students than the HBIs.[8]

The District Court's Injunction and Order Appointing a Special Master

Despite having found for plaintiffs on only one claim, based largely on a single discontinued instance of program duplication, the district court placed Maryland's system of public higher education under a 10-year remedial plan to be determined by a court-appointed special master. (ECF 642.) The court directed the

[8] The district court did, however, reject the plaintiffs' proposal to transfer two dozen programs from non-HBIs to HBIs. Crediting testimony from non-HBI presidents and administrators that the transfers would irreparably harm those institutions, and the HBI presidents' mixed views of the proposed transfers, the court determined that such transfers would not be practicable or educationally sound. (ECF 641 at 66-67.) The district court also determined that, because "there did not appear to be unnecessary program duplication at [UMES] at the time of the liability trial, any remedy ordered for UMES must be limited to preserving and reinforcing its freedom from program duplication and degree of integration already achieved." (*Id*. at 65-66.)

special master to "propose a set of new unique and/or high demand programs at each HBI" (ECF 641 at 70), and to use the plaintiffs' remedial strategy as "a starting point" (ECF 642 at 2, ¶ 2.c.), because the court found it "promising" (ECF 641 at 5) despite its "methodological flaws" (*id*. at 13). The court also required that the special master be given "input" into the program-level administration of higher education in Maryland (ECF 642 at 4, ¶ 6) and to recommend open-ended funding to be directed to HBIs for student recruitment, financial aid, marketing, and related initiatives. (ECF 642 at 3, ¶ 2.g.) The court did not address why the limited duplication it found justified the sweeping relief it decreed or why its program remedy far exceeds that ordered in either Mississippi and Alabama, where there were not only several traceable policies but a much greater level of racial identifiability in both the HBIs and the non-HBIs. *See Ayers II*, 111 F.3d at 1218; *Knight I*, 787 F. Supp. at 1319.

On February 6, 2018, the district court granted the State's motion to stay all proceedings pending appeal. (ECF 669.) The court recognized "the unique circumstances of this litigation" and that "since *Fordice* was decided in 1992, the Fourth Circuit has had no opportunity to establish guidance for the trial courts in this Circuit." (ECF 669 at 1-2.) The district court had previously acknowledged that "there is substantial ground for difference of opinion" as to whether its liability ruling was based on a mistaken application of *Fordice*'s guidance on unnecessary

program duplication (ECF 417 at 11), and its stay decision noted that, in other *Fordice* litigation, "it has not been unusual for the circuit courts to reverse and remand, in part, aspects of the trial courts' rulings." (ECF 669 at 1-2.)

SUMMARY OF ARGUMENT

Because college attendance "is by choice," *Fordice*, 505 U.S. at 729, a state fulfills its obligation to desegregate its system of higher education when it removes the policies and practices left over from the *de jure* era that restrict student choice by effectively steering incoming students to racially identifiable schools based on their race. The one such practice the district court found—the unnecessary duplication of programs—restricts student choice only when combined with policies or practices that discriminate based on race. For this reason, every court to have found liability under *Fordice* has done so where the system of higher education continued to employ discriminatory admissions practices or other policies that channel students to racially identifiable schools based on their race. Because Maryland employs no such discriminatory policies, the limited program duplication the district court found cannot form the basis for liability.

Other reasons also require reversal here. First, Maryland does not maintain a policy of program duplication. It instead maintains a policy *against* program duplication, which the district court found is now legally "adequate" and "functioning properly." Any duplication left over from earlier periods does not

offend *Fordice*, which requires the eradication of *policies*, not the effects of those policies. Second, program duplication offends equal protection only when it occurs between geographically proximate, racially identifiable institutions. That is not the case in Maryland generally, where all of the non-HBIs are fully integrated. Nor was racial identifiability present in the two schools that collaborated to offer the program on which the district court based its unnecessary duplication finding. Finally, because program duplication does not have a segregative effect on its own, *Fordice* and its progeny caution against evaluating it on its own, as the district court did here. These legal infirmities are compounded by the fact that the court based its finding of "unnecessary" program duplication almost exclusively on the shifting and idiosyncratic opinions of an expert whose recommendations have been rejected in prior higher education cases.

Even if the limited program duplication the district court found were sufficient for liability under *Fordice*, the court's remedial strategy—while potentially harmful to Maryland's other public universities—is unlikely to diversify the HBIs' student populations. Abundant evidence in the record established that factors independent of program duplication accounted for the HBIs' racial identifiability; existing unique, high-demand programs at Maryland's HBIs do not tend to enroll white students at higher rates; and program-based interventions in other jurisdictions have failed to reduce the racial identifiability of those states' HBIs. Delegating to a

special master the task of discovering a suitable remedy, as the district court did, does not solve that problem and otherwise abdicates the court's adjudicative responsibilities under Federal Rule of Civil Procedure 65(d) and Article III of the Constitution.

ARGUMENT

In *United States v. Fordice*, the Supreme Court established the principles that govern whether state university systems have fully discharged their obligation to desegregate their systems of public higher education. Federal courts applied those principles in long-running litigation involving university systems in Mississippi, Alabama, and Louisiana, where traditionally white institutions remained racially identifiable and the states continued to apply admissions criteria that had the effect of steering students to schools based on their race.

The present case is the only instance where a court has applied *Fordice* to a public university system that does *not* maintain discriminatory admissions criteria and has fully integrated the schools that, in the *de jure* era, had excluded African-American students. Black students in Maryland in 2018 have free choice among all the State's HBIs and non-HBIs, without restriction—which was not the case decades ago for black students in Mississippi, Alabama, and Louisiana.

Fordice itself involved Mississippi's public universities, which were "almost exclusively single race" when the litigation began, *id.* at 723, and remained that way

in the late 1980s when the case was tried, *id.* at 724-25. Mississippi claimed to have dismantled its *de jure* system by adopting race-neutral student admission policies, *id.* at 725, but the evidence showed that it continued to steer students by race through the use of minimum ACT scores, which "restrict[ed] the range of choices of entering students as to which institution they may attend in a way that perpetuates segregation." *Id.* at 734. Mississippi also perpetuated its segregated system through multiple other policies, *id.* at 733, but it was Mississippi's admissions standards that all nine justices found problematic. *See id.* at 758 ("Mississippi has not borne the burden of demonstrating that intentionally discriminatory admissions standards have been eliminated." (Scalia, J., concurring in the judgment in part and dissenting in part)).

Maryland in 2018 is not Mississippi in 1975. Maryland has integrated all its non-HBIs and employs no admissions policies that discriminate—on their face or in effect—based on race. (ECF 641 at 63 ("[U]nlike earlier *Fordice* litigation, Maryland's [non-HBIs] are no longer segregated. Indeed, significant numbers of African American students are educated in integrated settings at [non-HBIs] every year."); *see also* ECF 242 at 8 n.10 (observing that the plaintiffs identified no recruitment, admission, or retention policies traceable to the *de jure* era).) Enrollment at Maryland's HBIs has diversified as well, with non-African-American

students comprising 15% to 30% of the student population at each HBI. (DRE 81 at 8.)

Although Maryland's HBIs remain majority-African-American, that is the result of student choice, not the effect of any policies or practices traceable to the *de jure* era. This Court in *Podberesky v. Kirwan* noted the "critical fact that application for admission to college is voluntary" and that "significant numbers" of African-American students "voluntarily limit[] their applications to Maryland's predominantly African-American institutions." 38 F.3d 147, 159-60 (4th Cir. 1994) (*Podberesky II*). That circumstance, Justice Thomas observed in *Fordice*, does not violate the Constitution:

> Although I agree that a State is not constitutionally *required* to maintain its historically black institutions as such, I do not understand our opinion to hold that a State is *forbidden* to do so. It would be ironic, to say the least, if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges.

505 U.S. at 748-49 (Thomas, J., concurring) (citations omitted); *see also id*. at 743 (majority opinion) ("That an institution is predominantly white or black does not in itself make out a constitutional violation.").[9] The diversity seen at all Maryland's

[9] The continued existence of "predominantly black institutions" of higher education and "predominantly minority institutions" is supported by several enactments of Congress. *See*, *e.g.*, 20 U.S.C. § 1059e(a) ("It is the purpose of this section to assist Predominantly Black Institutions in expanding educational opportunity through a program of Federal assistance."); 20 U.S.C. §§ 1060-1063c, Part B, "Strengthening Historically Black Colleges and Universities"; 20 U.S.C.

public universities reflects the ability of a qualified incoming student of any race to select any of Maryland's public universities. This is the kind of student choice that *Fordice* sought to ensure, not eliminate.

In the more than two decades since the Supreme Court decided *Fordice*, higher education in Maryland and the nation has undergone a series of significant changes that have transformed student choice. At the time courts began applying *Fordice* in the 1990s, "distance learning" via "television and computers" was in its infancy, but courts foresaw that "[t]he educational field [was] entering a revolutionary era because of advances in electronic technology." *Knight II*, 900 F. Supp. at 302. Even then, courts anticipated that those technological advances would someday render "meaningless" the issues the courts faced in *Fordice* and *Knight*, "'because [with] technology people are going to sit there at home and take courses from home or work and tap into whatever college they want.'" *Id.* (citation omitted). Thus, "within a few years, technology [would] make it impossible to protect a school from competition" with other institutions. *Id.* at 321.

As the courts predicted, the advent of online education, universities with nationwide and even global operations, and other innovations that were unknown in

§ 1061(2) (defining "part B institution" eligible for funding to include "any historically Black college or university that was established prior to 1964, whose principal mission was, and is, the education of Black Americans. . . .").

1992 have made the range of choices available to students in higher education greater today than ever before. Maryland students may access academic programs via the Internet from sources around the country, including any of the hundreds of colleges and universities that are currently registered to offer online programs in Maryland, Md. Code Ann., Educ. § 11.202.2(b), or that offer online programs through the State Authorization Reciprocity Agreement (SARA). An MHEC administrator explained to the district court that, in 2016, approximately 35,000 Maryland students were enrolled in online programs at out-of-state institutions. (2/7/18 Tr. 99-100 (Wheatley).)

The world of higher education is different today than it was in the 1990s, as are issues involving institutional missions, funding, and program duplication. On the current record, the district court found no grounds on which to question Maryland's policies on capital funding, recruitment practices, admissions practices, retention rates, and graduation rates. (*See* ECF 242 at 8-9.) The court also found no grounds for a claim of intentional discrimination on the part of the Maryland public higher education system (*id.* at 9), and recognized that Maryland had successfully desegregated all its non-HBIs (*id*. at 7). The district court found that minority students attend Maryland's non-HBIs in "significant numbers" and that 59% of African-American students attending public four-year institutions in Maryland are enrolled at non-HBIs. (*Id*.) And if one considers both public and private non-profit

four-year institutions and community colleges, more than 80% of African-American students pursuing higher education in Maryland attend non-HBIs. (DRE 81 at 8-10.)

The district court further confirmed that Maryland had eliminated other policies affecting HBIs that were traceable to the former *de jure* system, including policies that had been found to persist in the systems of other states, as documented in the Mississippi, Alabama, and Louisiana litigation. In its October 7, 2013 findings of fact and conclusions of law, the trial court ruled in favor of the State on plaintiffs' claims that state policies on operational funding and missions for HBIs were vestiges of *de jure* segregation. (*See* ECF 382 at 31, 41.) The court determined that "Maryland's HBIs are not 'underfunded' by the State, relative to the [non-HBIs]" (*id*. at 38), and in fact received $84 million more in state appropriations and enhancement funds than they would have received if funds had been distributed to all Maryland institutions equally "in proportion to their student enrollment." (*Id*.) The court found that Maryland has for several decades sought to "mitigate the effects of *de jure* discrimination" through a policy of enhancing HBI programming (*id*. at 27), and that, "'[a]t all levels, the State and its public education institutions have developed and implemented far-ranging initiatives designed to maximize higher education access and success for African-Americans'" (*id*. at 14 (quoting OCR

Partnership Agreement and its recognition of "the State's unflagging commitment to providing equal educational opportunities to all of its citizens").)

The trial court ruled in favor of the State on *all* of plaintiffs' claims except one, that involving "unnecessary program duplication," which the district found was traceable to the *de jure* era and continuing today. That finding—the sole basis for the State's liability—must be reversed for the reasons set forth below.

I. THE STANDARD OF REVIEW IS DE NOVO FOR LEGAL CONCLUSIONS, CLEAR ERROR FOR FACTUAL FINDINGS, AND ABUSE OF DISCRETION FOR THE GRANT OF INJUNCTIVE RELIEF.

This Court reviews "judgments resulting from a bench trial under a mixed standard of review: factual findings may be reversed only if clearly erroneous, while conclusions of law are examined de novo." *National Fed'n of the Blind v. Lamone*, 813 F.3d 494, 502 (4th Cir. 2016). "Findings will be deemed clearly erroneous if, for example, 'even though there is some evidence to support the finding, the reviewing court, on review of the record, is left with a definite and firm conviction that a mistake has been made,' or if findings were made using 'incorrect legal standards.'" *Raleigh Wake Citizens Ass'n v. Wake County Bd. of Elections*, 827 F.3d 333, 340 (4th Cir. 2016) (citations omitted). "'Of course, if the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard.'" *Id.* (quoting *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855 n.15 (1982)). As for mixed questions of

fact and law, the Supreme Court recently explained that "[m]ixed questions are not all alike" and the applicable standard of review for a mixed question may vary from clear error to *de novo* depending "on whether answering it entails primarily legal or factual work." *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018) (citations omitted). "In the constitutional realm, . . . the role of appellate courts 'in marking out the limits of [a] standard through the process of case-by-case adjudication' favors *de novo* review even when answering a mixed question primarily involves plunging into a factual record." *Id.* at 967 n.4.

The Court reviews an order granting a permanent injunction for "abuse of discretion," but it reviews the underlying "factual findings for clear error and legal conclusions *de novo*." *PBM Prod., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 125 (4th Cir. 2011). A court "has abused its discretion if its decision is guided by erroneous legal principles or rests upon a clearly erroneous factual finding." *Brown v. Nucor Corp.*, 576 F.3d 149, 161 (4th Cir. 2009) (internal quotation marks omitted). This Court also reviews the burdensomeness and scope of the injunction and will vacate it if it is '"more burdensome to the defendant'" or '"broader in scope than that necessary to provide complete relief to the plaintiff' or if an injunction does 'not carefully address only the circumstances of the case.'" *PBM Prod., LLC*, 639

F.3d at 128 (quoting *Kentuckians for Commonwealth v. Rivenburgh*, 317 F.3d 425, 436 (4th Cir. 2003)).

II. THE DISTRICT COURT ERRED IN FINDING THAT MARYLAND MAINTAINS A POLICY OF "UNNECESSARY PROGRAM DUPLICATION" AND IMPOSING LIABILITY ON THAT BASIS ALONE.

This Court should reverse the district court's imposition of liability because its conclusion that Maryland maintains a traceable policy of "unnecessary program duplication" is contradicted by the district court's own findings, and it is unsupported by the factual record and the cases construing *Fordice's* mandate. *Fordice* prescribed a three-part analysis to determine whether a state had fully met its obligation to eradicate the vestiges of a *de jure* system of higher education. First, plaintiffs must identify a policy or practice that is "traceable" to the state's former practices originating in the *de jure* era. 505 U.S. at 731. Second, they must demonstrate that the policy or practice continues to promote segregative effects. *Id*. If plaintiffs make these first two showings—and the plaintiffs here have not—the third inquiry evaluates whether a policy that originated in the *de jure* era nevertheless continues to have an educationally sound rationale or cannot be practicably eliminated. *Id*.

Although the district court properly applied *Fordice* with respect to nearly all of plaintiffs' claims, it erred with respect to the program duplication claim in three ways, each of which is grounds for reversal: (1) the district court's liability

conclusion is contradicted by the court's finding that MHEC's post-*de jure* anti-duplication policy is legally adequate; (2) the district court failed to adhere to the definition of unnecessary program duplication used in *Fordice* and *Knight* (i.e., duplication between proximate racially identifiable institutions); and (3) liability based on duplication alone departs from the teaching of *Fordice* that duplication must not be viewed in isolation.

A. Any Program Duplication in Maryland's University System Is Not the Result of a Policy Traceable to the *De Jure* Era.

The district court's 2013 conclusion that Maryland maintains a policy of "unnecessary program duplication" traceable to the *de jure* era cannot be squared with its later, more specific finding that the State's current program-approval policy, which includes robust measures to prevent unnecessary duplication, is "adequate" under *Fordice*. (ECF 641 at 69.) Because Maryland's current policy is not traceable to the *de jure* era, the district court's imposition of liability based on "unnecessary program duplication" cannot stand.

To be found "traceable" under *Fordice*, a current policy must "have as [its] antecedents" or be "derived from," "a continuation of," or "rooted in its prior officially segregated system." 505 U.S. at 740, 734, 738, 743. Maryland's program-approval and duplication-prevention policies in no way answer to that description. MHEC was established in 1988, after the *de jure* era. 1988 Md. Laws ch. 246. Since then, the General Assembly and MHEC have implemented additional safeguards to

prevent unnecessary program duplication. The Commission's current regulations, as amended in 2012, state that "[t]he elimination of unreasonable program duplication is a high priority" and require institutions seeking approval for new programs to submit "[e]vidence demonstrating that a proposed program is not duplicative of similar offerings in the State." Code Md. Regs. 13B.02.03.09A, B. In addition, institutions of higher education may also file an objection with the Commission if a proposed program is unreasonably duplicative or would be in "[v]iolation of the State's equal educational opportunity obligations under State and federal law." Md. Code Ann., Educ. § 11-206.1(e); (*see generally* ECF 382 at 50 (describing MHEC process in place as of 2012).)

The court heard testimony at the remedies trial about how the 2012 amendments to MHEC's anti-duplication policy had been working. (ECF 641 at 69.) Judge Blake credited the testimony of "[s]everal witnesses" who had "testified that the current MHEC program approval process is adequate." (*Id.* at 37.) For example, Dr. Houston Davis, who formerly served within the University System of Georgia and brought an outside perspective, testified that "'the process that MHEC has out there is sound. It's a good process.'" (*Id.* at 38 (quoting 10/28/16 Dep. Tr. at 89, ECF No. 616-1; 12/9/16 Dep. Tr. at 270-71, ECF No. 616-2 (Davis).) That view was shared by others closer to home, with the President of Bowie testifying that "the 2012 amended MHEC approval process is generally working as it should."

(*Id.* at 37 (citing 1/11/17 AM Tr. at 72 (Burnim).) The President of Coppin agreed; she "testified that she was unaware of any time when MHEC approved a program over an objection from Coppin." (*Id.* at 38 (citing 1/12/17 AM Tr. at 8 (Thompson).)

Based on this extensive factual record, the district court found that the post-2012 MHEC process for safeguarding against program duplication is now consistent with *Fordice*, "functioning properly," and legally "adequate." (*Id.* at 69.) That finding conclusively establishes that Maryland does not currently maintain a policy of program duplication that is traceable to the *de jure* era. *See United States v. Louisiana*, 9 F.3d 1159, 1167 (1993) (post-*de jure* four-board governance structure is not traceable and thus is evaluated for racially discriminatory purpose). In view of the district court's finding that Maryland has no other traceable policies, and the plaintiffs' abandonment of claims asserting other vestiges, the district court should have concluded that the State has discharged its "constitutional obligations" under *Fordice* because it has "eradicate[d] policies and practices traceable to its prior *de jure* dual system that continue to foster segregation." 505 U.S. at 728.

The court, however, faulted the State's policy for being "only forward facing" and for not addressing the "substantial duplication that existed since, essentially, the beginning of Maryland's system of public higher education." (ECF 382 at 50.) But *Fordice* is focused not on effects, but on policies, 505 U.S. at 730 n.4, and there is no evidence that Maryland has a *policy* of maintaining existing duplication of HBI

programs. Nor is there any evidence that an HBI has ever been denied a new program that *it* had requested. (1/23/12 Tr. 54 (Howard); 1/30/12 Tr. 2 (O'Keefe); 1/12/12 Tr. 10-11 (Sabatini Trial).)

The district court's conclusion that the State is not doing enough to *undo* previous program duplication is rebutted by the court's own remedial decision not to require the transfer of programs from non-HBIs to HBIs. The court correctly concluded that program transfers risk significant damage to the non-HBIs in many ways, from "undermin[ing] faculty and student recruitment" to "negative reputational impacts" to "disrupt[ing]" the integration of those institutions and "harm[ing] the students at those integrated institutions." (ECF 641 at 67.) These same concerns, of course, would be implicated by any administrative decision to undo existing program duplication and they establish a clear educational justification for not taking that extreme step. There is thus no basis on which to conclude that Maryland has an existing policy that would be actionable under *Fordice*.

B. Program Duplication Does Not Offend the Constitution Unless It Occurs Between Proximate, Racially Identifiable Institutions, Which Is Not the Case Here.

The district court's decision should be reversed on the related ground that it reaches the unprecedented conclusion that unnecessary program duplication can violate the Constitution where, as here, the non-HBIs are fully integrated. Plaintiffs submitted evidence of only *two* allegedly duplicative programs that ultimately were

approved at a non-HBI over an objection by an HBI—the UMUC Community College Leadership program and the Towson/UB Joint MBA program (ECF 382 at 51-52)—and both involved fully integrated non-HBIs. UMUC has a diverse student body and was never a segregated institution. Established in 1947 to serve veterans returning from World War II, UMUC enrolled black students even during the *de jure* era. (2/6/17 Tr. 9-10 (Miyares).) Today, it enrolls a student population that is 60% non-white. (ECF 641 at 31 n.15.) The same is true with respect to the Towson/UB joint MBA program: UB reported a majority (60%) of non-white enrollment, and Towson reported enrollment of 37% non-white students. (DRE 81 at 8-9 (MHEC, 2016 Data Book).)

These facts would not result in a finding of liability under the definition of "unnecessary program duplication" applied by the other courts that have implemented *Fordice*, including the lower courts on remand from that decision. In *Ayers*, the district court, on remand from the Supreme Court's *Fordice* decision, made clear that "*only* program duplication *between* proximate, *racially identifiable* institutions" can be constitutionally actionable. *See Ayers II*, 111 F.3d at 1218 (describing district court's decision, emphasis added); *id.* at 1218 (thrice repeating the formula: program duplication between "proximate, racially identifiable institutions"); *id.* at 1219 (repeating same formula twice); *id.* at 1221 (repeating same formula). In *Knight*, too, the district court specified that what makes program

duplication "problematic is the fact that the proximate institutions are racially identifiable *and* the allegation that this racial identifiability, rather than sound educational policy, is the impetus for non-core high demand program duplication between the proximate [historically black universities] and [historically white universities]." *Knight I*, 787 F. Supp. at 1319; *see also Louisiana*, 9 F.3d at 1165 (defining "proximate institutions" as two nearby institutions, "one of which is a predominantly black institution (or PBI), and one of which is a predominantly white institution (or PWI)").

These courts carefully and necessarily drew the line of constitutional impermissibility where they did because duplication of programs is "pervasive" in "all systems throughout the country which have more than one university." *Ayers I*, 879 F. Supp. at 1444. That is, "[t]hroughout the country," in state after state, "high demand non-core programs are duplicated by state institutions whether geographically proximate or not." *Knight I*, 787 F. Supp. at 1319. In the view of those courts, duplication can be a constitutional violation requiring remedy only where programs at HBIs are duplicated by racially identifiable non-HBIs, which the court below found to be nonexistent in Maryland. (ECF 641 at 63 ("[U]nlike earlier *Fordice* litigation, Maryland's TWIs are no longer segregated[.]").

Thus, the decision below represents the first time any court applying *Fordice* has found a state liable where that state already had fully desegregated its formerly

white institutions and had adequately funded its HBIs, while "maintain[ing] a policy of enhancing HBI mission and programming at least since the 1970s in an effort to mitigate the effects of *de jure* discrimination." (Doc. 382 at 27.) Imposing liability in these circumstances contradicts the Supreme Court's decision in *Bazemore v. Friday*, 478 U.S. 385 (1986), which held that the racial identifiability of state-university-sponsored 4H programs was not in itself an equal protection violation, where, as here, the district court found that "no evidence existed of any lingering discrimination in either services or membership." *Fordice*, 505 U.S. at 731 (analyzing *Bazemore*, 478 U.S. at 407). Under these circumstances, the state played no "part in the decision of which [program] an individual chose to join" and "any racial imbalance" that might exist "resulted from the wholly voluntary and unfettered choice of private individuals." *Id.*; *see also Podberesky II*, 38 F.3d at 159-60 (noting the "significant numbers" of African-American students who "voluntarily" choose to apply only to Maryland's HBIs). Here, as in *Bazemore*, the record contains "no evidence" of "any lingering discrimination in either services or membership," *Fordice*, 505 U.S. at 731, as the district court itself found. Under these circumstances, any duplication between Morgan and other, fully integrated institutions could not have erected racial barriers that restricted the choices of the incoming students to either institution and thus cannot form the basis for liability under *Fordice* and its progeny.

C. Program Duplication, on Its Own, Does Not Constitute an Equal Protection Violation in the Absence of Discriminatory Admissions Standards or Other Policies Traceable to the *De Jure* Era.

Even if the record showed that Maryland had maintained a policy of "unnecessary program duplication," that is not enough, on its own, to establish a constitutional violation. To prove a violation of the Equal Protection Clause, plaintiffs were required to show that the State steers students to, or away from, racially identifiable institutions by means of a policy traceable to *de jure* segregation. Stated differently, plaintiffs had to show that the reason Maryland's HBIs (but not its non-HBIs) remain racially identifiable is a traceable state policy of unnecessary program duplication, as opposed to some other reason. *See Fordice*, 505 U.S. at 728 (observing that the Court has "consistently asked whether existing racial identifiability is attributable to the State"); *id*. at 729 (explaining that, unlike public schools, students are not assigned to public universities); *id*. at 731 (distinguishing *Bazemore* because there "any racial imbalance resulted from the wholly voluntary and unfettered choice of private individuals").

The conceptual problem posed by having unnecessary program duplication stand "in isolation" as the sole traceable policy, rather than be evaluated in combination "with other [traceable] policies, such as differential admissions standards," *Fordice*, 505 U.S. at 739, stems from *Fordice*'s standard for determining whether a policy constitutes an equal protection violation. *Fordice* is premised on

ensuring student *choice*, and is aimed at removing traceable policies that "substantially restrict a person's choice of which institution to enter." *Id.* at 733; *see also id.* at 734 (condemning policies that "restrict the range of choices of entering students as to which institution they may attend in a way that perpetuates segregation"). As recognized by one justice in *Fordice*, however, program duplication itself "in no way *restrict*[*s*] the decision where to attend college," but will instead "*multiply*, rather than restrict, limit, or impede the available choices." *Id.* at 751 (Scalia, J., concurring in the judgment in part and dissenting in part).

Indeed, program duplication is "pervasive" in "all systems throughout the country which have more than one university." *Ayers I*, 879 F. Supp. at 1444. Because of that pervasive program duplication, in *Fordice* and the other public-higher-education cases that granted relief, the relevant state action has always included more than the mere existence of duplicative programs. In addition to Mississippi's duplicative institutions and programs, *Fordice* faulted the State's admission standards adopted "for discriminatory purposes" after *Brown*, as well as mission designations that "interfere[d] with student choice and tend[ed] to perpetuate the segregated system." 505 U.S. at 737, 741. After remand in *Fordice*, the Fifth Circuit identified at least six separate traceable policies still maintained in Mississippi. *See Ayers II*, 111 F.3d at 1203 (admission standards), 1207 (scholarships), 1215 (new academic programs), 1217 (land grant programs), 1221

(program duplication), 1225 (funding). And in *Knight v. Alabama*, the Eleventh Circuit let stand the district court's finding of six separate traceable policies in effect in Alabama and added at least one other that the district court had not found. *Knight II*, 14 F.3d at 1539, 1545. The case law reveals no prior example of a court finding a state's formerly white institutions to be fully desegregated and yet holding the state liable based solely on a finding of unnecessary program duplication and no other traceable policies.

Fordice itself did not determine that unnecessary program duplication was a free-standing equal protection violation; to the contrary, it criticized the lower court for considering program duplication "in isolation." 505 U.S. at 739. Indeed, citing this statement in *Fordice*, plaintiffs argued in the liability phase of *this* case that unnecessary program duplication "does not stand alone," but should be considered in conjunction with other funding and mission policies they contended perpetuated a segregated system. (ECF 367 ¶ 262.) Given the district court's rejection of the plaintiffs' other equal protection claims, unnecessary program duplication now "stand[s] alone" as the basis for holding the State liable and for conferring on a special master the power to order sweeping remedial measures.

It was only because the "duplication issue . . . does not stand alone," but instead operates "in conjunction" with "the element of differential admissions standards," that similar institutional offerings between Mississippi's HBIs and

geographically proximate, racially identifiable, traditionally white institutions raised an inference that duplication continued to promote segregation. *See Ayers I*, 879 F. Supp. at 1445. In this case, although plaintiffs cited "disparities in recruiting and admissions," the district court correctly dismissed those allegations as mere "alleged continuing segregative effects, not alleged policies or practices traceable to prior *de jure* segregation." (ECF 242 at 8 n.10.) Plaintiffs thus do not (and cannot) allege that Maryland racially discriminates between students with respect to the admissions process. That fact, combined with Maryland's anti-duplication program-review process, means that, even if plaintiffs had established that some programs are duplicated, they did not show that Maryland's policies and practices are traceable to the era of *de jure* segregation.

The district court here is the *only* court ever to impose liability on a state based solely on a finding of unnecessary program duplication and no other vestige traceable to the *de jure* era. This unique outcome raises the question whether offering a choice between two universities that provide similar programs violates the Equal Protection Clause. It may well constitute a violation in a state that continues to maintain parallel, racially identifiable white and black universities, but it is undisputed that in Maryland today the universities that once were open only to white students are fully desegregated, and the HBIs are increasingly diverse. Today, qualified students of all races who want to enroll in a Maryland public university

with a diverse student population can do so, and there are no discriminatory standards traceable to *de jure* segregation driving student admissions. Thus, unlike the Mississippi system addressed in *Fordice*, which featured duplication between a white school and a black school, influenced by discriminatory admissions policies and perpetuated by parallel systems, Maryland students have a "truly free" choice, 505 U.S. at 743, between pursuing an education at a majority-black but increasingly diverse HBI, or doing so at an already diverse non-HBI. In Maryland in 2018, the full integration of the formerly white institutions means that "program duplication . . . ha[s] quite the opposite effect" from what *Fordice* observed in Mississippi.

D. The District Court Misapplied *Fordice* by Adopting a Definition of "Unnecessary" Program Duplication That Does Not Imply the Lack of an Educational Justification.

Even if *Fordice* and its progeny allowed for a finding of liability based solely on the duplication of programs between an HBI and a desegregated non-HBI, the district court's finding here was erroneous as a matter of law and should be reversed because it rests on a misapplication of the concept of "unnecessary" program duplication as that term is used in *Fordice*. In *Fordice*, the Court observed that, within Mississippi's parallel system of higher education, "the absence of any educational justification" was "implicit" in "the District Court's finding of 'unnecessary' duplication." 505 U.S. at 739. Because Mississippi continued to

maintain discriminatory admissions policies, it was fair to presume that program duplication was intended to perpetuate a parallel, discriminatory system.

The premise of plaintiffs' liability theory—and the district court's liability decision—is that *any* duplication of Maryland HBI programs classified by Dr. Conrad as "unnecessary" should be presumed to perpetuate a policy of racial segregation. The validity of that premise depends on whether the scheme that Dr. Conrad used to classify program duplication is a reliable and coherent analytical framework that implies, as it did in *Fordice*, the absence of an educational justification. For two reasons, it does not.

1. Dr. Conrad's Testimony in the Remedies Trial Showed That His Definition of "Unnecessary" Program Duplication Is Arbitrary and Cannot be the Basis for Inferring a Discriminatory Policy.

The parties do not dispute that program duplication is common in public university systems, just as it is among private institutions. Thus, the existence of program duplication in higher education is not necessarily a vestige of the *de jure* system. Public institutions duplicate programs for many reasons including the demand for an adequately trained workforce. (2/7/17 Tr. 81 (Wheatley)); *see also Knight I*, 787 F. Supp. at 1319 ("A state that limits its high demand program offerings to only one . . . or to a very few institutions may well find itself facing acute shortages of trained personnel in certain areas[.]").

Because there is nothing inherently illegal or suspect about two public universities offering similar programs, plaintiffs' equal protection theory necessarily leans heavily on the pejorative implication of the word "unnecessary" in the term "unnecessary program duplication." To identify duplication that he believes is "unnecessary," Dr. Conrad differentiates between duplication of what he calls "core" programs and non-core programs. (1/24/17 Tr. 130 (Conrad); 1/10/12 Tr. 50 (defining "core" in liability phase trial).) Only the duplication of *non*-core programs is deemed "unnecessary" in Dr. Conrad's scheme. Non-core programs in Dr. Conrad's construct include bachelor's level "nonbasic liberal arts and sciences course work" and all programs "at the master's level and above." (*See* ECF 382 at 45 (quoting *Fordice*, 505 U.S. at 738).)

Terms like "unnecessary program duplication" and "core" and "non-core" programs do not have a widely accepted meaning in educational administration and policy; rather, they are constructs that Dr. Conrad has developed as a witness for plaintiffs in public higher education cases like this one. (1/10/12 Tr. 53-54 (Conrad).) Indeed, even Dr. Allen defined "core" in a way that differs from Dr. Conrad's definition; in fact, Dr. Allen defined "core" in *two* different ways, in his remedies trial and deposition testimony. (1/19 Tr. 61-62.)

The district court adopted Dr. Conrad's classification scheme, despite acknowledging its "methodological flaws" (ECF 641 at 13), because the court

mistakenly read *Fordice* as having "adopted" Dr. Conrad's definition of unnecessary program duplication. (ECF 382 at 45.) The Court in *Fordice*, however, recited Dr. Conrad's formula as a *description* of the record in the case before it; it did not adopt Dr. Conrad's test as a generally applicable legal rule to determine whether a given instance of program duplication is a vestige of *de jure* segregation or is educationally justified. *See* 505 U.S. at 738-39 (describing what "'[u]nnecessary' duplication refers [to], under the District Court's definition").

Courts that *have* evaluated Dr. Conrad's classification scheme, however, have raised significant concerns about its educational validity. In a lengthy section of its opinion headed "Dr. Conrad's Program Duplication Testimony is Unpersuasive," the district court in *Knight I* explained the many ways in which "the methodology used by Dr. Conrad to determine which courses are core and noncore, duplicated and unduplicated is so disassociated from the realities of higher education in Alabama as to be of minimal assistance," 787 F. Supp. at 1317. The court there criticized Dr. Conrad's definition of "core programs" as reflecting "an idealized curricula structure" drawn from a "classical" liberal arts model, under which "Portuguese and electron particle physics are core programs while elementary education and business are not." *Id.* at 1317. Dr. Conrad's definition, the court found, flies "in the face of the fact that every four year public college or university in Alabama has a program in business, management, or administrative science," *id.* at 1317, and it reflects "no

appreciation for the educational rational[e] for a particular program's existence," *id.* at 1318. Dr. Conrad's "overly restricted" definition of "core academic program" is "problematic" on its own, *id.*, but also results in an exaggerated and "extreme," *id.* at 1317, view of what qualifies as a *non*-core program that could be "unnecessarily" duplicated. Correcting for Dr. Conrad's personal bias in favor of the traditional liberal arts results in "considerably less unnecessary duplication." *Id.* at 1318.

Similarly, in the Mississippi litigation, some of these same deficiencies were identified by the district court on remand from the Supreme Court in *Fordice*: "[T]he plaintiffs' analysis is constructed upon a university framework remote in time from today's educational environment, and expands the field considerably so that nonessential or noncore programs include such highly desirable or high demand programs as elementary/secondary teacher education and business." *Ayers I*, 879 F. Supp. at 1444. As a result, the court concluded, "it is difficult to accept the proposition that [Dr.] Conrad's analysis actually yields an answer to the threshold question he himself poses: '[h]as this formally *de jure* curriculum system been dismantled?'" *Id.* at 1445.

A few examples illustrate the problem with Dr. Conrad's approach. Dr. Conrad deemed all teacher education programs non-core, and so offering them at non-HBIs and HBIs alike constitutes unnecessary program duplication, no matter how many students want to pursue education degrees and no matter how many future

teachers the State needs to educate. Likewise, nursing programs are unnecessarily duplicated even if there is a pressing shortage of nurses. The same is true of business and accounting programs. Dr. Conrad even deemed engineering and computer-science programs to be unnecessarily duplicated, notwithstanding the growing significance of information technology and STEM education to every sector of the contemporary economy. (*See* 1/24/17 Tr. 134 (Conrad).)

Although the liability trial revealed the many ways in which Dr. Conrad exaggerated the incidence of program duplication in Maryland, it was not until the remedies trial that it became clear that his classification scheme was arbitrary. In the remedies proceeding, Dr. Conrad testified that the classification scheme he used in Maryland treated engineering and computer science as non-core programs. (1/24/17 Tr. 132 (Conrad).) Asked if he had ever "classified computer science and related programs as being core programs," Dr. Conrad testified, "[N]o, I have not." (*Id.* at 134.) He said the same about engineering. (*Id.*)

But after he was confronted with his testimony in the *Knight* case in Alabama, Dr. Conrad admitted that he had classified computer science as a core program in 1990, in the early days of the information technology revolution. (*Id.* at 137, 142.) His list of core programs for the *Knight* case also included "five different computer and data-related or information-related courses as being core programs." (*Id.* at 138.) Dr. Conrad admitted that "the number of core programs" on his list had shrunk

over 27 years "[p]robably about 60 percent." (*Id*. at 140.) Dr. Conrad's confession that he had unilaterally opted to shrink the universe of core programs by 60% not only demonstrates the arbitrary nature of his classification system; it exaggerates the rate of duplication among "non-core" programs he identified in this case, as compared to others. In other words, duplication in Maryland has not been evaluated by the same yardstick Dr. Conrad applied when he testified in Mississippi and Alabama.

Pressed about whether today's list should include more STEM programs than his 1990 *Knight* list, Dr. Conrad allowed that "we may begin to see a few more . . . STEM programs included. And computer science would be . . . one of those that would potentially be included." (*Id*. at 141.) But Dr. Conrad never explained how computer science could be (a) merely a "potential" core program-in-waiting in 2017, but (b) an actual core program more than a quarter century before (*see id*. at 142), and in 1998 when he listed computer science and other computer-related disciplines as "core" in a Texas case (*id*. at 143). As for data processing technology, Dr. Conrad listed it as a core program in 1998, but "[n]ot today." (*Id*. at 145-46.) At the remedies trial, Dr. Conrad attributed these many inconsistencies to the fact that he was "continually sifting and winnowing" his classification scheme. (*Id*. at 148.)

There is no logic or method to this history of fluctuating definitions. Nor is there any external standard or empirical point of reference to determine whether a

program should be classified as core or non-core. Most significantly, there is no practical means of testing or debating Dr. Conrad's unilateral, subjective, and ever-changing determination of what is core and what is not, because he has established himself as the sole arbiter of these concepts. The momentous judgment that Maryland, in 2018, has failed to implement *Brown v. Board of Education*, and the imposition of a remedial edifice with the scope and impact of the district court's November 8, 2017 order, cannot be based on the shifting sands of what Dr. Conrad considers core programs.

2. Dr. Conrad Inflated the Incidence of "Unnecessary" Program Duplication in Maryland's Universities.

Other than the Towson/UB MBA proposal, the only basis for the district court's finding of liability for "unnecessary" program duplication is Dr. Conrad's testimony that, statewide, 60% of the HBIs' non-core programs are unnecessarily duplicated and that duplication "far more significantly affects the HBIs." (ECF 382 at 45, 47.) The evidence produced at both trials, however, demonstrated that Dr. Conrad's opinions were not only idiosyncratic and untestable, but also inflated the incidence of "unnecessary" program duplication.

First, Dr. Conrad included within his analysis programs at University of Maryland, College Park ("UMCP"), the State's flagship university, and UMUC, the online university, both of which offer extensive program inventories to fulfill their broader missions. Including them in calculations of program duplication distorts the

results by driving *up* the percentage of HBI programs that are considered duplicated, and driving *down* the percentage of non-HBI programs that are deemed duplicated. Although the district court accounted for this distortion in the Baltimore region, where excluding UMCP and UMUC programs reduced to 38% the HBI programs that were duplicated, it did not acknowledge how that distortion would affect the percentage of duplicated programs at *non*-HBIs statewide. (ECF 382 at 45-46 n.10.)

Second, the liability trial revealed that fully one-third of what Dr. Conrad described as unnecessary program duplication involved an HBI's own choice to duplicate a program offered by a *non*-HBI.[10] (*See* (ECF 367 ¶ 319.) That is, the HBIs chose to invest their resources in duplicating programs, rather than in new programs not offered by a non-HBI. Although plaintiffs include this HBI-initiated duplication in their count of duplicative programs, they do not contend that, by duplicating programs, the HBIs were pursuing a policy of segregation. Counting these instances of program duplication both inflates Dr. Conrad's statistics for duplication of HBI programs and highlights the fact, discussed above, that his definition of "unnecessary" duplication does not fairly imply the perpetuation of a segregative system of higher education.

[10] Although plaintiffs' list of duplicated programs included programs that were approved for an HBI after the program had already been established at the non-HBI, Dr. Conrad at times testified that programs duplicated in this manner were *not* counted. (1/10/12 Tr. 41 (Conrad).)

In other respects, as well, Dr. Conrad's inflated tally of duplicated programs did not withstand scrutiny. For example, Dr. Conrad submitted a table listing all the programs he identified as unnecessarily duplicative (DX 410, Table 1), but other experts pointed out the many ways in which the list over-counted instances of duplication. Dr. Susan Blanshan, the official who led the program-review division of MHEC, testified that many of Dr. Conrad's "duplicative" programs were not duplicative at all; they were different programs involving different subject matter or course curricula or located in different geographic regions of the State. (DX 411; 2/6/12 Tr. vol. 1, 58-66, 69-87 (Blanshan).)

3. Dr. Conrad Failed to Account for the Effect That Demographic Changes in the Areas Surrounding the HBIs Have on Enrollment Patterns.

For its finding that "unnecessary program duplication" after 1980 had segregative effects on student enrollment (ECF 382 at 48-49), the district court relied on expert testimony that failed to account for other factors contributing to the racial identifiability of the HBIs, particularly demographic changes to the areas that surround those institutions. The district court found that, during the 1960s and 1970s, Maryland's HBIs "began attracting significant numbers of white graduates," but that those numbers "began to decline very markedly" in the wake of enhancements to UB and Towson and the establishment of UMBC in 1966. (ECF 382 at 48-49.) Citing only Dr. Conrad's report, the district court concluded that "the

State has continued to duplicate HBI programs at [traditionally white institutions], failing to address the dual system it created in the *de jure* era." (*Id.* at 49.)

First, that over-simplified narrative of declining white enrollment at HBIs and program duplication after the 1970s contradicts a report introduced by plaintiffs at the liability trial. According to that report, entitled "Trends in White Graduate Students at Historically Black Institutions," "[t]he period during which the State's first desegregation plan was in effect (1985-1999) was accompanied by an increase in white enrollment at HBIs. . . . During the late 1970s and most of the 1980s the [State's] coordinating board gave priority to placing attractive and high demand programs at HBIs and it worked closely with the Office of the Attorney General to prevent program duplication. . . ." (PX 184 at 4-5.)

Second, the remedies-trial record demonstrated that any increase in the racial identifiability of Morgan, Coppin, and Bowie is far more likely to be the result, not of program duplication, but other factors, including dramatic demographic changes within their surrounding communities. After the 1970 census, the population of Baltimore (home to Morgan and Coppin) and Prince George's County (home to Bowie) changed from majority white to greater than 65% African American. (*See* DRE 70 (Expert Report of Allan J. Lichtman, Chart 2, Tables 15, 17).) According to 2015 enrollment data maintained by the Maryland State Department of Education, levels of white enrollment like those the district court found at Bowie, Morgan, and

Coppin are also found in the public high schools located in Prince George's County and Baltimore, which form the pool of students most proximate to Bowie, Morgan, and Coppin. (*Id*. at 59 n. 82.)

Experts for both sides agreed that the demographics of a school's vicinity play an important role in determining the racial composition of the school's enrollment. Dr. Donald R. Hossler, an expert on student choice in higher education, testified that "the demographic makeup of the area" where each school is located will "heavily influence the characteristics of who enrolls" and "makes a huge difference in what's going on." (2/6/12 p.m. Tr. 50.) Dr. Conrad agreed that changes in demographics of neighborhoods where institutions are located "[m]ost certainly" play an important role in enrollment rates. (1/10/12 a.m. Tr. 131.) Indeed, Dr. Conrad found it "very salient" that two former HBIs in West Virginia with very high white enrollment were in majority-white regions (1/25/17 Tr. 6-7)—a pattern that plays out across the country. (*See* 2/14/2017 Tr. 94 (Lichtman) (testifying that, nationally, the HBIs across the country that have white enrollment of 10% or greater are in areas with populations that are either majority-white or at least plurality-white).) This pattern is borne out in Maryland, where, as the district court found, UMES is the Maryland HBI with the greatest percentage of white enrollment (ECF 382 at 20), and, unlike Maryland's other three HBIs, UMES is located in a county where white residents are in the plurality.

Despite his concession about the importance of demographics, Dr. Conrad admitted on cross-examination that his analysis and opinions regarding enrollment at HBIs and non-HBIs did not consider any changes in demographics of areas where the institutions are located. (1/10/12 Tr. at 131-32.)

The failure of plaintiffs to account for changing demographics is significant in three ways. First, it confirms that Dr. Conrad's conclusions about "unnecessary program duplication" and its segregative effects are not based on objective scientific analysis. Instead, just as his shifting and expansive definition of "non-core" programs and his tabulation of duplicated programs inflate the numbers that lie behind his opinion, his decision to ignore the "certain[]" and "very salient" role that local demographics play in student enrollment is indicative of his result-oriented approach to the record.

Second, Dr. Conrad's failure to consider demographics ignores a significant cause of the racial makeup of Maryland's HBIs that cannot be attributed to unnecessary program duplication. If, as the evidence in this case suggests, "demographic factors have 'substantially caused' the racial imbalances" at HBIs, that evidence "'overcomes the presumption that segregative intent is the cause, and there is no constitutional violation.'" *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1339 (11th Cir. 2005) (citations omitted). The State was not required to "prove that demographics are the *sole* cause of the imbalances," *id.*, as the district

court apparently believed (ECF 382 at 55), because "'a plaintiff does not undermine the strength of a defendant's demographic evidence by merely asserting that demographics *alone* do not explain the racial imbalances.'" *Holton*, 425 F.3d at 1339 (quoting *Manning ex rel. Manning v. School Bd. of Hillsborough County, Fla.*, 244 F.3d 927, 944-45 (11th Cir. 2001)). "'Rather, for a plaintiff to preserve the presumption of *de jure* segregation, the plaintiff must show that the demographic shifts are the result of the prior *de jure* segregation or some other discriminatory conduct.'" *Id.* Neither Dr. Conrad nor the plaintiffs did that here.

The plaintiffs' failure to account for local demographics, either through their expert witnesses or otherwise, has broader legal significance as well. In *Freeman v. Pitts*, a case decided in the same term as *Fordice*, the Supreme Court made clear that, "[o]nce the racial imbalance due to the *de jure* violation has been remedied, the school district"—here the public university system—"is under no duty to remedy imbalance that is caused by demographic factors." 503 U.S. 467, 494 (1992).

To the extent plaintiffs' claim rests on racial identifiability that emerged *after* that period of integration, plaintiffs should have been required to prove that any post-1970s decrease in white enrollment at HBIs was the result of *intentional* discrimination on the part of the State rather than other causes. *See Fordice*, 505 U.S. at 732 n.6 ("[I]f challenged policies are not rooted in the prior dual system, the question becomes whether the fact of racial separation establishes a new violation

of the Fourteenth Amendment under traditional principles."); *id*. at 733 n.8 ("As for present policies" that are not traceable, "a claim of violation of the Fourteenth Amendment cannot be made out without a showing of discriminatory purpose."). Because the district court correctly concluded that plaintiffs had failed to make out a claim of intentional discrimination (ECF 242 at 9), the Complaint should have been dismissed on that ground as well.

III. THE DISTRICT COURT ERRED BY FAILING TO BALANCE THE EQUITIES AND TAILOR THE SCOPE OF INJUNCTIVE RELIEF TO THE VIOLATION FOUND AND INSTEAD DELEGATING THAT DECISION TO A SPECIAL MASTER.

Even if the district court's liability finding were legally and factually correct, reversal still would be appropriate because the court failed to balance the equities and tailor its injunction accordingly, as required by applicable Supreme Court precedent. Injunctions are never automatic; "'[a]n injunction is a drastic and extraordinary remedy'" that "'does not follow from success on the merits as a matter of course.'" *SAS Inst., Inc. v. World Programming Ltd.*, 874 F.3d 370, 385 (4th Cir. 2017) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010), and *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 32 (2008)); *see also Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 543 (4th Cir. 2007) (rejecting claim that a prevailing party is *entitled* to injunctive relief). Instead, as the Supreme Court has instructed in a series of decisions beginning in the 2000s, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court

may grant such relief. A plaintiff must demonstrate: (1) that plaintiff has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay*, 547 U.S. at 391. Thus, before a permanent injunction may be awarded, plaintiffs must prove and the district court must find, among other facts, that the "balance of hardships" warrants "a remedy in equity." *Id.*; *see SAS Inst.*, 874 F.3d at 385 (quoting *eBay*, 547 U.S. at 391); *see also Monsanto*, 561 U.S. at 157 ("An injunction should issue only if the traditional four-factor test is satisfied."); *Winter*, 555 U.S. at 32 ("[T]he balance of equities and consideration of the public interest . . . are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent.").

But balancing the equities under the traditional test for injunctive relief involves more than just deciding whether *some* injunction is appropriate. It means shaping the *scope* of the injunction in light of the hardships that would be avoided (for the plaintiff) and created (for the defendant and third parties such as taxpayers, students, and faculty at non-HBIs). "It is well established that 'injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs,'" *Rivenburgh*, 317 F.3d at 436 (quoting *Califano v. Yamasaki*,

442 U.S. 682, 702 (1979)), and "[a]n injunction should be carefully addressed to the circumstances of the case," *Virginia Soc'y for Human Life v. F.E.C.*, 263 F.3d 379, 393 (4th Cir. 2001) (citation omitted), *overruled on other grounds by The Real Truth About Abortion vs. F.E.C.*, 681 F.3d 544 (4th Cir. 2012). That is, "[w]henever the extraordinary writ of injunction is granted, it should be tailored to restrain no more than what is reasonably required to accomplish its ends." *Consolidation Coal Co. v. Disabled Miners of Southern W. Va.*, 442 F.2d 1261, 1267 (4th Cir. 1971); *see also Hayes v. North State Law Enf't Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993) (remanding to properly tailor injunction "to the wrong found in this case"). These principles apply with no less force in the school desegregation context, where the remedy must be determined by the nature and "scope" of the constitutional violation. *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995); *see also id.* ("The remedy must therefore be related to the *condition* alleged to offend the Constitution." (internal quotation marks omitted)). The balance of hardships is thus a consideration in deciding the proper scope of an injunction as well as whether to issue one at all, because "an injunction risks awarding more relief than is merited." *SAS Inst.*, 874 F.3d at 385.

Before the remedies trial, the district court recognized its obligation to tailor its injunction to the scope of the violation it found. One of the purposes of holding a trial on remedies, the court indicated, was "to inform the court on the complex

question of what remedies are educationally sound, *justified by the scope of the violation found*, and *best targeted* to remedy that violation while enhancing rather than harming Maryland's system of public higher education." (ECF 460 at 1 (emphasis added).) At the trial itself, however, and afterward in its remedial ruling, the district court lost sight of these important obligations.

The injunctive relief ordered by the district court was legally deficient in three respects. First, the sweeping relief it ordered does not fit the limited program duplication it found. Second, it failed to ascertain whether such an intrusive remedy would increase white enrollment at the HBIs and weigh that possibility against the certain harm that it would inflict on the higher education system more generally. Finally, the district court failed to identify the precise scope of the relief ordered and instead delegated that inquiry to a special master in a way that abdicated the court's responsibilities under Article III and Rule 65.

A. The District Court Failed to Balance the Equities to Tailor Its Injunctive Relief to the Violation Found.

The district court initially expressed doubt about whether the general standards for awarding injunctive relief apply in cases decided under *Fordice*, citing the fact that "courts ordering remedies under a *Fordice* analysis have done so without discussing the test for granting a permanent injunction." (ECF 641 at 20.) Then, when it ultimately applied the test, it did so in a way that *mis*applied the third factor—the balance of the hardships—by insisting that the "*Fordice* analysis already

incorporates a balance of hardships inquiry with the 'practicable and educationally sound' test." (ECF 641 at 21.) The two standards, however, are not equivalent.

The determination of an appropriate judicial remedy involves tailoring the remedy to the scope of the violation. *See Rivenburgh*, 317 F.3d at 436 (an injunction "'should not go beyond the extent of the established violation'" (citations omitted)). The sole remediable condition found by the district court is the duplication of HBIs' programs at Maryland's non-HBIs, but remedying that condition here presents profound constitutional difficulties on its own. First, the theory adopted in *Fordice* is premised on student *choice*, and aimed at removing traceable policies that "substantially restrict a person's choice of which institution to enter," 505 U.S. at 733, but program duplication itself does not restrict student choice, but expands it.

Second, because Maryland's public higher education system is acknowledged to have no other vestiges of *de jure* segregation, any court-imposed requirement that newly created programs at HBIs must be "unique" and unduplicated by the fully desegregated non-HBIs could not be founded on the Equal Protection Clause or justified on that ground. Nothing in the Fourteenth Amendment or elsewhere in the Constitution supports the proposition that a student at one public institution has a right to enroll in a given academic program, but a student who has chosen to attend another public institution must be denied that same program. Such a principle of exclusivity would betray the fundamental premise of *Brown v. Board of Education*,

which insists that educational opportunities provided by the State "must be made available to all on equal terms." 347 U.S. at 493.

The Supreme Court has repeatedly emphasized that an equal protection claim under the Fourteenth Amendment must be analyzed at the individual level, because "the Equal Protection Clause 'protect[s] *persons*, not *groups*'" and establishes "'the *personal* right to equal protection of the laws.'" *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 743 (2007) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995)). If an African-American student who chooses to attend an HBI is deemed to enjoy a "personal right" to benefit from a certain academic program contemplated as part of a judicial remedy, *Parents Involved*, 551 U.S. at 743, then that same "personal right" must also belong to the African-American students who choose to attend one of Maryland's non-HBIs. (ECF 242 at 7 n.8.)

Third, here the "'*condition* alleged to offend the Constitution,'" *Jenkins*, 515 U.S. at 88 (citation omitted), is the same condition that has been found to be "pervasive" in "all systems throughout the country which have more than one university," *Ayers I*, 879 F. Supp. at 1444. Despite the pervasiveness of this type of duplication nationwide, no other state has ever been held liable solely for having this "condition," and no court has ever ordered injunctive relief to address the precise condition found by the district court below.

The only instances where courts have ordered any relief to address unnecessary program duplication involved the following two material circumstances that, according to the district court's own findings and conclusions of law, do not exist in Maryland: (1) "program duplication *between* proximate, *racially identifiable* institutions," *Ayers II*, 111 F.3d at 1218 (emphasis added), in states which, unlike Maryland, had failed to fully desegregate their formerly all-white institutions and whose policies continued to "discourage or prevent blacks from attending the [historically white institutions]," *Ayers I*, 879 F. Supp. at 1434; and (2) the maintenance of multiple ongoing policies that were traceable to *de jure* segregation, rather than the single traceable policy of unnecessary program duplication found in Maryland, *see Ayers II*, 111 F.3d at 1228; *Knight II*, 14 F.3d at 1539, 1545, 1550.

B. The District Court Failed to Determine Whether the Relief It Ordered Would Address the Harm It Identified Without Unduly Harming the State's System of Higher Education.

The district court also failed to balance the equities by weighing the extent to which the injunctive relief would counter the segregative effect of program duplication against the harm that such relief would cause to the State's system of public higher education. During the remedies trial, the parties presented extensive evidence on the extent to which the racial identifiability of the HBIs was attributable to unnecessary program duplication, as opposed to demographics or other causes

unrelated to State action, and whether a remedy based on new unique, high-demand programs would be effective at increasing white enrollment at those institutions. Although the district court found that various governmental reports and other qualitative evidence supported the plaintiffs' remedial theory (ECF 641 at 38-40, 49-54), the court never addressed the scope or effectiveness of its remedial order in the face of direct quantitative evidence that the proposed remedy was disproportionate and almost certain to be ineffective.

The evidence at trial showed that program duplication plays a very small role in white enrollment within HBIs. For example, Dr. Lichtman performed a multiple regression analysis of the data set that Drs. Conrad and Allen had assembled (DRE 98) and found that the academic program variable included in the plaintiffs' model accounted for only 11.4% of the variation in white enrollment (2/14/17 Tr. 1-314, 93 (Lichtman)), meaning that 88.6% of the variation was due to other factors such as the "cost of the education . . . demography . . . welcoming atmosphere . . . [and] as-yet-unknown factors." (2/14/2017 Tr. 14.) That means most of the factors that affect white enrollment have nothing to do with programs, and the remedy the district court ordered would have little chance of remedying the "harm" plaintiffs identified.

This testimony went unrebutted. Plaintiffs admitted that prior remedial orders creating new unique, high-demand programs at HBIs had *not* been effective. (ECF

406-1 at 23, 26, 29, 34); *see also Ayers II*, 111 F.3d at 1213 (affirming finding that "'merely adding programs and increasing budgets' is not likely to desegregate an HBI"). Nor did plaintiffs present any empirical evidence that using "programmatic niches" would make a difference in white enrollment in the HBIs. In fact, Dr. Conrad conceded that "it remains impossible to find 'textbook examples' or to 'scientifically test' the desegregative impact of the Plaintiffs' remedial proposal." (ECF 480-1 ¶ 328.)

The district court also did not address the evidence presented by the State (e.g., Dr. Lichtman's expert opinion testimony) that demonstrated that the remedial opinions offered by plaintiffs' experts were no more reliable than the opinions they offered in the liability phase. The State introduced abundant evidence (ECF 495) that the opinions presented in Drs. Conrad's and Allen's reports (PRX 312) rested on qualitative and quantitative social science studies that did not employ reliable methodology. (ECF 641 at 15-16.)

For example, Dr. Conrad's testimony was based almost entirely on a 1994 study that he had prepared as a consultant for the *Fordice* plaintiffs on remand from the Supreme Court. Dr. Conrad initially testified that, before preparing that report, he "didn't have a clue what attracted whites to HBIs when [he] began to do [his] research" (1/24/17 Tr. 188), suggesting that the report was prepared without a preconceived notion of what its conclusions would be. But four years earlier,

Dr. Conrad had testified as an expert in the Alabama litigation that he had at that time (1990) already "concluded" that "unique and high-demand programs were a major incentive for white and other-race students to attend HBIs." (1/25/17 Tr. 34 (Conrad).)

Dr. Conrad's result-oriented approach to social science research was consistent with his failure, in the 1994 study, to employ even the most rudimentary methods to avoid researcher bias, such as the failures to search for "negative cases" (i.e. counterexamples), use multiple interviewers and multiple coders, and seek independent confirmation of his theory that unique programs drive white enrollment at HBIs. (ECF 495 at 26-32; *see also* ECF 641 at 16.)

Dr. Arrington—the expert whom plaintiffs called to rebut Dr. Lichtman's quantitative analysis of Dr. Conrad's testimony—fared little better. His principal critique of Dr. Lichtman's analysis was discredited by the revelation that it was not only based on a Wikipedia article, but on a Wikipedia article he had failed to read. (2/16/17 Tr. 186-89 (Arrington).) Nevertheless, Dr. Arrington agreed that the evidence did not show that high-demand programs would increase white enrollment at the HBIs (*id.* at 97, 129-30), and that programs classified as both high-demand and unique had a *negative* correlation with white enrollment. (PRX 331, Table 2.)

Although the district court acknowledged the "methodological flaws" in the plaintiffs' experts' opinions (ECF 641 at 13), it nevertheless accepted those opinions

as the principal basis for adopting the plaintiffs' theory that developing "unique, high-demand" programs at the HBIs would be a "promising starting point" for increasing white enrollment. (ECF 382 at 59, *see also* ECF 642 at 2.) But the court also acknowledged that "it may be true that other factors are more important than program offerings, for many students, in choosing a university" and that program duplication may well "play[] a less significant role than other factors in maintaining the racial identifiability of the HBIs." (ECF 382 at 55.) The court, however, made no attempt to quantify the amount of racial identifiability attributable to the program duplication it found other than to deem it "palpable" and "more than *de minimis*." (*Id*.) Without having done so, the court was not able to tailor a desegregative remedy to the "'*condition* alleged to offend the Constitution.'" *Jenkins*, 515 U.S. at 88 (citations omitted).

Balancing the equities should also have involved assessing the harm to the State from the injunctive relief awarded: how will a remedial strategy of creating new "unique, high-demand" programs at the HBIs affect education funding and resources available to students of all races at other public universities? The district court made these difficult balancing judgments in rejecting institution mergers and program transfers to HBIs (because they would be too harmful to other institutions and their students and faculties (ECF 641 at 67-68)), and in limiting relief with respect to UMES (because no segregative effects from duplication were shown (*id*.

at 65-66)). But the court was not so attentive to the balance of harms and the public interest in its consideration of proposed HBI program enhancement.

By plaintiffs' own estimate, the remedy adopted by the district court would require an increase in operational funding between $430 million and $1.05 billion within the first five years alone. (ECF 641 at 41.) Although the court acknowledged that an outlay of that magnitude could be expected to diminish the resources available for other educational purposes and would "indirect[ly] harm" the State's non-HBIs (*id.* at 63), the court made no effort to assess that harm or the many other ways in which special master intervention would disrupt Maryland's system of public higher education. (*See* 1/23/17 Tr. 87 (Dr. Allen testifying that the creation of programmatic niches at HBIs "casts a pretty large shadow" on other institutions); 2/6/17 Tr. 166-67 (Pres. Miyares testifying that restrictions associated with special master oversight would have "huge negative impact" on UMUC).) Nor did the district court weigh that harm against the remedy's putative benefits. That too was error; before awarding injunctive relief, the district court was required to "pay particular regard for the public consequences in employing the extraordinary remedy of injunction," *Winter*, 555 U.S. at 24, particularly in the field of higher education, where courts have a "tradition of giving a degree of deference" to the "complex educational judgments" involved. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

The district court was not required, as a legal matter, to develop a remedy with "a guarantee of success" (ECF 641 at 62), but precedent required it to quantify the segregative effect of the program duplication it found before subjecting Maryland's system of public higher education to "'judicial tutelage for the indefinite future,'" *Freeman*, 503 U.S. at 505 (Scalia, J., concurring) (quoting *Board of Educ. of Oklahoma City Public Schs. v. Dowell*, 498 U.S. 237, 249 (1991)). Only then would the district court have been in a position to weigh, as it must, (a) any speculative benefit that might result from judicial oversight and the creation of new high-demand, "niche" programs at the HBIs, against (b) the considerable harm that such oversight would inflict on the interests of the diverse students, faculty and staff at non-HBIs, in the form of disruption caused by interfering with the State's educational policies and fiscal harm from the diversion of State resources to the HBIs. Because the district court's failure to balance the equities flowed from its mistaken assumption that *Fordice* obviates the need for such balancing, its decision to award injunctive relief is reviewed *de novo* and must be reversed on that basis.

C. The District Court's Remedy Improperly Seeks the Racial Diversification of HBIs, Regardless of Student Choice.

The injunction ordered by the district court promotes the exact "ironic" result that Justice Thomas cautioned against in *Fordice*, namely, the compelled racial diversification of HBIs. 505 U.S. at 749 (Thomas, J., concurring). The district

court's 2017 ruling set forth its erroneous belief that the Constitution mandates the measurable "integration" of HBIs:

> 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.

(ECF 641 at 3.) The district court's mistaken belief that *Fordice* mandates HBI "integration" is further reflected in the remedial order itself, which requires annual reporting to the court regarding "[a]dmissions, enrollment, and graduation and completion data for each institution implicated in the plan . . . disaggregated by racial or ethnic identity . . . ." (ECF 642 at 6, ¶ 8(f)(iv)). Presumably, then, the goal of the remedial plan to be imposed by the special master is to "encourage other-race students to attend the HBIs" (ECF 641 at 3) and will be fulfilled only when the court's "standard of integration" at the HBIs has been met, regardless of whether the racial identifiability of HBIs exists and continues because of student choice.

The Supreme Court has rejected, in the primary and secondary education context, a district court's use of "desegregative attractiveness" to "induce nonminority students to enroll in" historically black schools. *See Jenkins*, 515 U.S. at 98. The Court rejected that approach because it "cannot be reconciled with our cases placing limitations on a district court's remedial authority." *Id.* "It is certainly theoretically possible," as the district court appears to have found here, that

increasing investment in HBIs will induce "some unknowable number of nonminority students" to enroll in those schools. *Id.* But that remedial approach "is not susceptible to any objective limitation" when "every increased expenditure" has that potential effect. *Id.*

Nor can an appropriate remedial goal be to attain a certain level of white enrollment at the HBIs when Supreme Court precedent "does not require any particular racial balance." *Milliken v. Bradley*, 418 U.S. 717, 740 (1974) ("*Milliken I*") (citation omitted). Because the Constitution is not offended merely because "an institution is predominantly white or black," *Fordice*, 505 U.S. at 743, low white enrollment at the HBIs is not, on its own, a constitutional violation, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 23-26 (1971). As a result, any desegregation order "contemplating the 'substantive constitutional right [to a] particular degree of racial balance or mixing' is . . . infirm as a matter of law," *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977) ("*Milliken II*") (citation omitted).

The district court's remedial order adopted the same remedial approaches that the Supreme Court rejected in *Missouri v. Jenkins* and both *Milliken v. Bradley* decisions: it has erroneously premised its remedy upon the goal of achieving integration at HBIs, and using "program enhancements" as the way to encourage the enrollment of non-black students at HBIs. The objective of increasing non-black

enrollment at HBIs is not a constitutionally permissible remedial goal under *Fordice* and related Supreme Court precedent.

D. The District Court Erred by Delegating to a Special Master the Court's Obligation Under Article III and Rule 65 to Determine the Proper Scope of the Injunctive Relief Ordered.

Federal Rule of Civil Procedure 65 requires that any injunction identify "specifically" and "in reasonable detail" the terms of the remedy it orders and "the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1). Instead of crafting a remedy that would address the harm it identified (i.e., the program duplication that occurred before the adoption of legally adequate safeguards) while minimizing the harm to the students, faculty, and institutions within Maryland's public university system, the district court delegated that decision to a special master in a way that abdicated the court's Article III adjudicative responsibility.

The issuance of an injunction based on a balancing of the equities is a non-delegable judicial function. Special masters may be delegated authority to monitor the implementation of an injunction and perhaps even fill in certain details as the need arises, but they cannot determine the scope of the injunction itself. "Serious constitutional questions arise when a master is delegated broad power to determine the content of an injunction." *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 145 (2d Cir. 2011) (vacating injunctions in part because "they vest the Special Master with discretion to determine the terms of the injunctions

themselves"). A special master may not "displace the court." *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957).

But that is exactly what the district court did here. Its order provided only the most general guidance, directing the special master to "propose a set of new unique and/or high demand programs at each HBI," "build[ing] on the areas of strength at individual HBIs," and using "the plaintiffs' experts' suggested programmatic niches as a starting point." (ECF 642 at 2, ¶ 2a.-c.) Although this direction might seem to provide detail, several of the terms it uses are undefined and, as discussed above, inherently *undefinable* in anything but the most arbitrary fashion. At the very least, the meaning of those terms was contested at the remedies trial, and it was error for the court to delegate the definition of those terms to the special master. *See Jenkins*, 515 U.S. at 101 ("Under our precedents, the State and the [school district] are 'entitled to a rather precise statement of [their] obligations under a desegregation decree.'" (quoting *Dowell*, 498 U.S. at 246)).

Ultimately, the district court perpetuated the same error it made in granting injunctive relief in the first place, namely, basing it on the assumption that the *Fordice* factors obviated the need to balance the equities: "While drafting the Remedial Plan the Special Master shall select, from possible alternatives consistent with this Order, the remedy best-suited for eliminating the vestiges of *de jure* segregation, considering the educational soundness and practicability of possible

alternatives." (ECF 642 at 3, ¶ 2.k.) It is the role of the court, not the special master, to "select . . . the remedy best-suited" to address the harm it identified, and to do so only after considering the harm to the students, faculty, and other institutions within the State's system of public higher education.

The district court's injunction order thus left unresolved the scope of the remedy—the number of programs, the cost of establishing those programs, and even the amount of funding for marketing, student recruitment, and scholarships. Those questions of scope are fundamental to the equitable balance of hardships that the court was required to undertake, and may not be assigned to a special master. These "sweeping delegations of power to the Special Master violate Rule 65(d)." *Mickalis Pawn Shop, LLC*, 645 F.3d at 145; *see United States v. Microsoft Corp.*, 147 F.3d 935, 954 (D.C. Cir. 1998) (concluding that injunction was improper insofar as "the parties' rights must be determined, not merely enforced," by special master).

* * * * *

The diversity of higher education in Maryland today bears no resemblance to the de facto segregation addressed in the litigation from 25 years ago involving university systems in Mississippi, Alabama, and Louisiana. Maryland's public higher education system is committed to providing diverse, inclusive, affordable, and academically excellent higher education opportunities for all Maryland students, and the State's four HBIs play an important and valued role in fulfilling this mission

of inclusion and excellence. Under these circumstances, when students may choose freely among all Maryland's public institutions of higher education, the limited program duplication the court found does not have the segregative purpose that *Fordice* is designed to address: It does not restrict student choice in a way that effectively steers incoming students to schools based on their race. Because there is no existing constitutional violation within the understanding of *Fordice*, the district court erred and abused its discretion in ordering relief that is educationally unsound, not justified by the scope of the violation found (indeed, not justified by any constitutional violation), and will harm, not enhance, Maryland's system of public higher education.

CONCLUSION

The judgment of the United States District Court for the District of Maryland should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), as modified by Order of this Court, because this brief contains 18,976 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 Microsoft Word in Fourteen point, Times New Roman.

PERTINENT STATUTES AND REGULATIONS

Constitution of the United States

Article III

Section 1.

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2.

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Section 3.

Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

United States Code

20 U.S.C. § 1059e. Predominantly Black Institutions

(a) Purpose

It is the purpose of this section to assist Predominantly Black Institutions in expanding educational opportunity through a program of Federal assistance.

(b) Definitions

In this section:

(1) Eligible institution

The term "eligible institution" means an institution of higher education that—

(A) has an enrollment of needy undergraduate students;

(B) has an average educational and general expenditure that is low, per full-time equivalent undergraduate student, in comparison with the average educational and general expenditure per full-time equivalent undergraduate student of institutions that offer similar instruction, except that the Secretary may apply the waiver requirements described in section 1068a(b) of this title to this subparagraph in the same manner as the Secretary applies the waiver requirements to section 1058(b)(1)(B) of this title;

(C) has an enrollment of undergraduate students that is not less than 40 percent Black American students;

(D) is legally authorized to provide, and provides, within the State an educational program for which the institution of higher education awards a baccalaureate degree or, in the case of a junior or community college, an associate's degree;

(E) is accredited by a nationally recognized accrediting agency or association determined by the Secretary to be a reliable authority as to the quality of training offered or is, according to such an agency or association, making reasonable progress toward accreditation; and

(F) is not receiving assistance under—

(i) part B;

(ii) part A of subchapter V; or

(iii) an annual authorization of appropriations under the Act of March 2, 1867 (14 Stat. 438; 20 U.S.C. 123).

(2) Enrollment of needy students

The term "enrollment of needy students" means the enrollment at an eligible institution with respect to which not less than 50 percent of the undergraduate students enrolled in an academic program leading to a degree—

(A) in the second fiscal year preceding the fiscal year for which the determination is made, were Federal Pell Grant recipients for such year;

(B) come from families that receive benefits under a means-tested Federal benefit program;

(C) attended a public or nonprofit private secondary school that—

(i) is in the school district of a local educational agency that was eligible for assistance under part A of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 6311 et seq.] for any year during which the student attended such secondary school; and

(ii) for the purpose of this paragraph and for such year of attendance, was determined by the Secretary (pursuant to regulations and after consultation with the State educational agency of the State in which the school is located) to be a school in which the enrollment of children meeting a measure of poverty under section 1113(a)(5) of such Act [20 U.S.C. 6313(a)(5)] exceeds 30 percent of the total enrollment of such school; or

(D) are first-generation college students and a majority of such first-generation college students are low-income individuals.

(3) First-generation college student

The term "first-generation college student" has the meaning given the term in section 1070a–11(h) of this title.

(4) Low-income individual

The term "low-income individual" has the meaning given such term in section 1070a–11(h) of this title.

(5) Means-tested Federal benefit program

The term "means-tested Federal benefit program" means a program of the Federal Government, other than a program under subchapter IV of this chapter and part C of subchapter I of chapter 34 of title 42, in which eligibility for the program's benefits, or the amount of such benefits, are determined on the basis of income or resources of the individual or family seeking the benefit.

(6) Predominantly Black Institution

The term "Predominantly Black Institution" means an institution of higher education, as defined in section 1001(a) of this title—

(A) that is an eligible institution with not less than 1,000 undergraduate students;

(B) at which not less than 50 percent of the undergraduate students enrolled at the eligible institution are low-income individuals or first-generation college students; and

(C) at which not less than 50 percent of the undergraduate students are enrolled in an educational program leading to a bachelor's or associate's degree that the eligible institution is licensed to award by the State in which the eligible institution is located.

(7) State

The term "State" means each of the 50 States and the District of Columbia.

(c) Grant authority

(1) In general

The Secretary is authorized to award grants, from allotments under subsection (e), to Predominantly Black Institutions to enable the Predominantly Black Institutions to carry out the authorized activities described in subsection (d).

(2) Priority

In awarding grants under this section the Secretary shall give priority to Predominantly Black Institutions with large numbers or percentages of students described in subsections 1 (b)(1)(A) or (b)(1)(C). The level of priority given to Predominantly Black Institutions with large numbers or percentages of students described in subsection (b)(1)(A) shall be twice the level of priority given to Predominantly Black Institutions with large numbers or percentages of students described in subsection (b)(1)(C).

(d) Authorized activities

(1) Required activities

Grant funds provided under this section shall be used—

(A) to assist the Predominantly Black Institution to plan, develop, undertake, and implement programs to enhance the institution's capacity to serve more low- and middle-income Black American students;

(B) to expand higher education opportunities for students eligible to participate in programs under subchapter IV of this chapter and part C of subchapter I of chapter 34 of title 42 by encouraging college preparation and student persistence in secondary school and postsecondary education; and

(C) to strengthen the financial ability of the Predominantly Black Institution to serve the academic needs of the students described in subparagraphs (A) and (B).

(2) Additional activities

Grant funds provided under this section shall be used for one or more of the following activities:

(A) The activities described in paragraphs (1) through (12) of section 1057(c) of this title.

(B) Academic instruction in disciplines in which Black Americans are underrepresented.

(C) Establishing or enhancing a program of teacher education designed to qualify students to teach in a public elementary school or secondary school in the State that shall include, as part of such program, preparation for teacher certification or licensure.

(D) Establishing community outreach programs that will encourage elementary school and secondary school students to develop the academic skills and the interest to pursue postsecondary education.

(E) Other activities proposed in the application submitted pursuant to subsection (f) that—

(i) contribute to carrying out the purpose of this section; and

(ii) are approved by the Secretary as part of the review and approval of an application submitted under subsection (f).

(3) Endowment fund

(A) In general

A Predominantly Black Institution may use not more than 20 percent of the grant funds provided under this section to establish or increase an endowment fund at the institution.

(B) Matching requirement

In order to be eligible to use grant funds in accordance with subparagraph (A), a Predominantly Black Institution shall provide matching funds from non-Federal sources, in an amount equal to or

greater than the Federal funds used in accordance with subparagraph (A), for the establishment or increase of the endowment fund.

(C) Comparability

The provisions of part C, regarding the establishment or increase of an endowment fund, that the Secretary determines are not inconsistent with this subsection, shall apply to funds used under subparagraph (A).

(4) Limitation

Not more than 50 percent of the grant funds provided to a Predominantly Black Institution under this section may be available for the purpose of constructing or maintaining a classroom, library, laboratory, or other instructional facility.

(e) Allotments to Predominantly Black Institutions

(1) Federal Pell Grant basis

From the amounts appropriated to carry out this section for any fiscal year, the Secretary shall allot to each Predominantly Black Institution having an application approved under subsection (f) a sum that bears the same ratio to one-half of that amount as the number of Federal Pell Grant recipients in attendance at such institution at the end of the academic year preceding the beginning of that fiscal year, bears to the total number of Federal Pell Grant recipients at all such institutions at the end of such academic year.

(2) Graduates basis

From the amounts appropriated to carry out this section for any fiscal year, the Secretary shall allot to each Predominantly Black Institution having an application approved under subsection (f) a sum that bears the same ratio to one-fourth of that amount as the number of graduates for such academic year at such institution, bears to the total number of graduates for such academic year at all such institutions.

(3) Graduates seeking a higher degree basis

From the amounts appropriated to carry out this section for any fiscal year, the Secretary shall allot to each Predominantly Black Institution having an application approved under subsection (f) a sum that bears

the same ratio to one-fourth of that amount as the percentage of graduates from such institution who are admitted to and in attendance at, not later than two years after graduation with an associate's degree or a baccalaureate degree, a baccalaureate degree-granting institution or a graduate or professional school in a degree program in disciplines in which Black American students are underrepresented, bears to the percentage of such graduates for all such institutions.

(4) Minimum allotment

(A) In general

Notwithstanding paragraphs (1), (2), and (3), the amount allotted to each Predominantly Black Institution under this section may not be less than $250,000.

(B) Insufficient amount

If the amounts appropriated to carry out this section for a fiscal year are not sufficient to pay the minimum allotment provided under subparagraph (A) for the fiscal year, then the amount of such minimum allotment shall be ratably reduced. If additional sums become available for such fiscal year, such reduced allotment shall be increased on the same basis as the allotment was reduced until the amount allotted equals the minimum allotment required under subparagraph (A).

(5) Reallotment

The amount of a Predominantly Black Institution's allotment under paragraph (1), (2), (3), or (4) for any fiscal year that the Secretary determines will not be needed for such institution for the period for which such allotment is available, shall be available for reallotment to other Predominantly Black Institutions in proportion to the original allotments to such other institutions under this section for such fiscal year. The Secretary shall reallot such amounts from time to time, on such date and during such period as the Secretary determines appropriate.

(f) Applications

Each Predominantly Black Institution desiring a grant under this section shall submit an application to the Secretary at such time, in such

manner, and containing or accompanied by such information as the Secretary may reasonably require.

(g) Application review process

Section 1068b of this title shall not apply to applications under this section.

(h) Duration and carryover

Any grant funds paid to a Predominantly Black Institution under this section that are not expended or used for the purposes for which the funds were paid within ten years following the date on which the grant was awarded, shall be repaid to the Treasury.

(i) Special rule on eligibility

No Predominantly Black Institution that receives funds under this section shall concurrently receive funds under any other provision of this part, part B, or part A of subchapter V.

20 U.S.C. § 1061. Definitions

For the purpose of this part:

(1) The term "graduate" means an individual who has attended an institution for at least three semesters and fulfilled academic requirements for undergraduate studies in not more than 5 consecutive school years.

(2) The term "part B institution" means any historically Black college or university that was established prior to 1964, whose principal mission was, and is, the education of Black Americans, and that is accredited by a nationally recognized accrediting agency or association determined by the Secretary to be a reliable authority as to the quality of training offered or is, according to such an agency or association, making reasonable progress toward accreditation,,1 except that any branch campus of a southern institution of higher education that prior to September 30, 1986, received a grant as an institution with special needs under section 1060 of this title and was formally recognized by the National Center for Education Statistics as a Historically Black College or University but was determined not to be a part B institution

on or after October 17, 1986, shall, from July 18, 1988, be considered a part B institution.

(3) The term "Pell Grant recipient" means a recipient of financial aid under subpart 1 of part A of subchapter IV of this chapter.

(4) The term "professional and academic areas in which Blacks are underrepresented" shall be determined by the Secretary, in consultation with the Commissioner for Education Statistics and the Commissioner of the Bureau of Labor Statistics, on the basis of the most recent available satisfactory data, as professional and academic areas in which the percentage of Black Americans who have been educated, trained, and employed is less than the percentage of Blacks in the general population.

(5) The term "school year" means the period of 12 months beginning July 1 of any calendar year and ending June 30 of the following calendar year.

20 U.S.C. § 1067a. Purpose; authority

(a) Congressional declaration of purpose

It is the purpose of this subpart to continue the authority of the Department to operate the Minority Institutions Science Improvement Program created under section 1862(a)(1) of title 42 and transferred to the Department by section 3444(a)(1) 1 of this title.

(b) Grant authority

The Secretary shall, in accordance with the provisions of this subpart, carry out a program of making grants to institutions of higher education that are designed to effect long-range improvement in science and engineering education at predominantly minority institutions and to increase the participation of underrepresented ethnic minorities, particularly minority women, in scientific and technological careers.

28 U.S.C. § 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

Annotated Code of Maryland

Education Article

§ 10-101. Definitions.

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

(b) "Charter" means the Maryland Charter for Higher Education.

(c) "Commission" means the Maryland Higher Education Commission.

(d) "For–profit institution of higher education" means an institution of higher education that generally limits enrollment to graduates of secondary schools, awards degrees at the associate, baccalaureate, or graduate level, and is not a public or private nonprofit institution of higher education.

(e) "Governing board" means:

(1) The Board of Regents of the University System of Maryland;

(2) The Board of Regents of Morgan State University;

(3) The Board of Trustees of St. Mary's College of Maryland; and

(4) The Board of Trustees of Baltimore City Community College.

(f) "Governing body" means:

(1) A governing board;

(2) A board of trustees of a community college;

(3) The governing entity of private nonprofit institutions of higher education;

(4) The governing entity of a for–profit institution of higher education; or

(5) The governing entity of a regional higher education center.

(g) "Independent institution of higher education" means a private nonprofit institution of higher education that generally limits enrollment to graduates of secondary schools, serves a public purpose, and awards degrees at the associate, baccalaureate, or graduate level.

(h) (1) "Institution of higher education" means an institution of postsecondary education that generally limits enrollment to graduates of secondary schools, and awards degrees at either the associate, baccalaureate, or graduate level.

(2) "Institution of higher education" includes public, private nonprofit, and for–profit institutions of higher education.

(i) (1) "Institution of postsecondary education" means a school or other institution that offers an educational program in the State for individuals who are at least 16 years old and who have graduated from or left elementary or secondary school.

(2) "Institution of postsecondary education" does not include:

(i) Any adult education, evening high school, or high school equivalence program conducted by a public school system of the State; or

(ii) Any apprenticeship or on–the–job training program subject to approval by the Apprenticeship and Training Council.

(j) "Private career school" means a privately owned and privately operated institution of postsecondary education other than an institution of higher education that furnishes or offers to furnish programs, whether or not requiring a payment of tuition or fee, for the purpose of training, retraining, or upgrading individuals for gainful employment as skilled or semiskilled workers or technicians in recognized occupations or in new and emerging occupations.

(k) (1) "Private nonprofit institution of higher education" means a private nonprofit institution of higher education that generally limits enrollment to graduates of secondary schools and awards degrees at the associate, baccalaureate, or graduate level.

(2) "Private nonprofit institution of higher education" includes an independent institution of higher education.

(l) "Program" or "educational program" means an organized course of study that leads to the award of a certificate, diploma, or degree.

(m) "Public senior higher education institution" means:

(1) The constituent institutions of the University System of Maryland and the University of Maryland Center for Environmental Science;

(2) Morgan State University; and

(3) St. Mary's College of Maryland.

(n) "Regional higher education center" means a higher education facility in the State that:

(1) Is operated by a public institution of higher education in the State or a private nonprofit institution of higher education operating under a charter granted by the General Assembly and includes participation by two or more institutions of higher education in the State;

(2) Consists of an array of program offerings from institutions of higher education approved to operate in the State by the Commission or by an act of the General Assembly that specifically satisfies the criteria set forth in § 10–212(b) of this title;

(3) Offers multiple degree levels; and

(4) Is either approved by the Commission to operate in the State or is established by statute.

(o) "Secretary" means the Secretary of Higher Education.

(p) "State Plan for Higher Education" means the plan for postsecondary education and research required to be developed by the Maryland Higher Education Commission under § 11–105(b) of this article.

§ 11-202. Certificate of Approval.

(a) (1) Except as provided in § 11–202.1 of this subtitle, an institution of postsecondary education may not commence or continue to operate, do business, or function without a certificate of approval from the Commission.

(2) Except as provided in §§ 11–202.1 and 11–202.2 of this subtitle, an institution of higher education that enrolls Maryland students in a fully online distance education program in the State may not commence or continue enrollment of Maryland students without registering with the Commission as provided under § 11–202.2 of this subtitle.

(3) An institution required to register under paragraph (2) of this subsection that is not accredited by an accrediting body recognized and approved by the United States Department of Education may not receive a registration from the Commission.

(b) The Commission shall issue a certificate of approval to an institution of postsecondary education if it finds that:

(1) The facilities, conditions of entrance and scholarship, and educational qualifications and standards are adequate and appropriate for:

(i) The purposes of the institution; and

(ii) The programs, training, and courses to be offered by the institution; and

(2) The proposed programs to be offered by the institution meet the educational needs of the State.

(c) (1) If the Commission believes that an institution of postsecondary education that applies for a certificate of approval does not meet the conditions or standards necessary for the issuance of the certificate, the Commission shall give the institution written notice of the specific deficiencies.

(2) (i) Within 20 days of receipt of a notice of deficiencies, the institution may request a hearing before the Commission.

(ii) Within 60 days of receipt of the request the Commission shall hold a hearing to determine if the certificate of approval should be issued.

(3) If, within 6 months from the date on which the application for certification was submitted to the Commission, the institution has received neither a certificate of approval under subsection (b) of this section nor written notice of deficiencies under this subsection, the institution may request within 20 days a hearing before the Commission to determine if the certificate of approval should be issued.

(c–1) (1) If the Commission believes that an institution of higher education that is required to register under subsection (a)(2) of this section or § 11–202.2 of this subtitle does not meet the conditions or standards necessary for the issuance of the registration, the Commission shall give the institution written notice of the specific deficiencies within 6 months after receipt of an application for registration.

(2) (i) Within 20 days after receipt of a notice of deficiencies, the institution may request a hearing before the Commission.

(ii) Within 60 days after receipt of the request for a hearing under subparagraph (i) of this paragraph, the Commission shall hold a hearing to determine if the registration should be issued.

(3) (i) If, after 6 months from the date on which the application for registration was submitted to the Commission, the institution has received neither a registration nor written notice of deficiencies under this subsection, the institution may request a hearing within 20 days before the Commission.

(ii) Within 60 days after receipt of the request for a hearing under subparagraph (i) of this paragraph, the Commission shall hold a hearing to determine if the registration should be issued.

(4) After a hearing held under this subsection, the Commission shall render a decision within 30 days.

(d) (1) Any institution of postsecondary education that is denied a certificate of approval by the Commission after a hearing granted under subsection (c) of this section or any institution of higher education that is denied a registration after a hearing granted under subsection (c–1) of this section has the right to judicial review provided by Title 10, Subtitle 2 of the State Government Article.

(2) The decision of the Commission shall be presumed correct, and the institution has the burden of proving otherwise.

(3) The Commission shall be a party to the proceeding.

§ 11.202.2. Online distance education program.

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

(2) "Fully online distance education program in the State" means a program, originating outside the State, offered by an out–of–state institution in which:

(i) A student domiciled in Maryland enrolls;

(ii) 51% or more of the program is offered through electronic distribution; and

(iii) The Commission determines that the portion of the program offered at a location in the State, if any, does not require a certificate of approval under § 11–202 of this subtitle for the institution to operate in the State.

(3) "Out–of–state institution" means an institution of higher education whose primary campus exists outside Maryland and whose authority to grant degrees is conferred by another state.

(b) (1) An institution of higher education that enrolls Maryland students in a fully online distance education program in the State shall file an application to register with the Commission before or within 3 months of enrolling the first Maryland student.

(2) This section does not apply to an institution of higher education that enrolls Maryland students in a fully online distance education program in the State that:

(i) Is subject to program review by the Commission under § 11–206 or § 11-206.1 of this subtitle;

(ii) Participates in the Southern Regional Education Board's Electronic Campus; or

(iii) Participates in the State Authorization Reciprocity Agreement (SARA).

(3) (i) After filing an application under paragraph (1) of this subsection, an institution that has enrolled a Maryland student before obtaining a registration under this section may continue to operate without a registration while the Commission considers the institution's application, conducts a hearing concerning the institution's application, or participates in judicial review regarding an institution's application.

(ii) An institution that continues to operate without a registration under subparagraph (i) of this paragraph shall furnish a performance bond or other form of financial guarantee to the State in an amount set by regulation that is in addition to and separate from a performance bond or other form of financial guarantee required under § 11–203 of this subtitle.

(c) Each institution of higher education required to register under this section shall:

(1) Be accredited by an accrediting body recognized and approved by the United States Department of Education;

(2) Submit to the Commission:

(i) Every 2 years, a financial statement reviewed by an independent accountant retained by the institution;

(ii) An affidavit from the president or chief executive officer of the institution affirming:

1. That the institution has not filed for bankruptcy protection under Title 11 of the United States Code during its existence; and

2. The willingness of the president or the chief executive officer to abide by the provisions of this section;

(iii) Proof of good business standing in the state in which the central administration of the institution is incorporated; and

(iv) Proof of good academic standing submitted by:

1. The regulatory higher education entity in the state in which the central administration of the institution is located; or

2. If the state in which the institution is located does not have a regulatory higher education entity, the accrediting body that accredited the institution;

(3) Promptly notify the Commission of a change in ownership or a change in majority control;

(4) Comply with the Principles of Good Practice for distance education established by the Commission through regulation;

(5) Make public and post on the institution's Web site:

(i) Whether the institution is registered in Maryland; and

(ii) The process by which to make complaints against the institution;

(6) Comply with the refund policy and procedures established by the Commission; and

(7) Be subject to complaint investigation by the Office of the Attorney General or the Commission or both.

(d) The refund policy and procedures established by the Commission shall allow for:

(1) (i) At least 2 weeks of required orientation or preenrollment instruction in a fully online distance education program in the State at no charge for a student who has completed less than 24 credits of college–level learning from an accredited institution; and

(ii) A prorated refund methodology that provides a refund to any student not covered by item (i) of this paragraph who has completed 60% or less of a course, term, or program within the applicable billing period; or

(2) A prorated refund methodology that provides a refund to any student who has completed 60% or less of a course, term, or program within the applicable billing period.

(e) (1) Subject to paragraph (2) of this subsection, the Commission shall require the payment of a fee set by regulation, as a condition of registration.

(2) (i) Subject to subparagraph (ii) of this paragraph, the fees charged shall be:

1. A fixed amount for all institutions regardless of type, location, or student enrollment; and

2. Set to cover the approximate cost of implementing a system of registration.

(ii) Notwithstanding subparagraph (i) of this paragraph, the Commission may charge an institution that enrolls not more than 20 Maryland students a fee that is less than the amount of the fee charged to other institutions.

(f) The Commission shall make public and post on its Web site:

(1) A list of registered institutions of higher education that offer fully online distance education programs in the State; and

(2) If the Commission denies or revokes the registration of an institution, the name of the denied or revoked institution.

(g) On or before December 1 each year, the Commission shall report to the Governor and, in accordance with § 2–1246 of the State Government Article, the General Assembly:

(1) The number of institutions of higher education that apply for registration under this section;

(2) The type and size of the institutions that apply;

(3) The number of institutions approved for registration;

(4) The number of institutions denied registration;

(5) The number of Maryland students enrolled in institutions required to register under this section;

(6) The results of the requirements of § 11–202.3 of this subtitle;

(7) The number of institutions found to be in violation of the requirement to register under this section;

(8) Any fines imposed, and in what amounts, on institutions that violate this section; and

(9) Any fine revenues collected from institutions for violation of this section.

§ 11-206. New programs; modification or discontinuance of programs; unreasonably duplicative programs.

(a) This section does not apply to:

(1) New programs proposed to be implemented by public and private nonprofit institutions of higher education using existing program resources in accordance with § 11–206.1 of this subtitle; and

(2) Programs offered by institutions of higher education that operate in the State without a certificate of approval in accordance with § 11–202.1(b) of this subtitle.

(b) (1) Prior to the proposed date of implementation, the governing body of an institution of postsecondary education shall submit to the Commission each proposal for:

(i) A new program; or

(ii) A substantial modification of an existing program.

(2) The Commission shall review each such proposal and:

(i) With respect to each public institution of postsecondary education, either approve or disapprove the proposal;

(ii) Except as provided in § 16–108(c) of this article, with respect to each private nonprofit or for–profit institution of higher education, either recommend that the proposal be implemented or that the proposal not be implemented; and

(iii) With respect to a private career school, either approve or disapprove the proposal.

(3) If the Commission fails to act within 60 days of the date of submission of the completed proposal, the proposal shall be deemed approved.

(4) Except as provided in paragraph (3) of this subsection, a public institution of postsecondary education and private career school may not implement a proposal without the prior approval of the Commission.

(5) (i) Except as provided in paragraph (3) of this subsection, and subject to subparagraph (ii) of this paragraph, a program that has not received a positive recommendation by the Commission may be implemented by:

1. Subject to the provisions of § 17–105 of this article, a private nonprofit institution of higher education; or

2. A for–profit institution of higher education.

(ii) If a private nonprofit or for–profit institution of higher education implements a proposal despite the recommendation from the Commission that a program not be implemented, the institution shall notify both prospective students of the program and enrolled students in the program that the program has not been recommended for implementation by the Commission.

(6) (i) If the Commission disapproves a proposal, the Commission shall provide to the governing body that submits the proposal a written explanation of the reasons for the disapproval.

(ii) After revising a proposal to address the Commission's reasons for disapproval, the governing body may submit the revised proposal to the Commission for approval.

(c) (1) Prior to discontinuation, each institution of postsecondary education that proposes to discontinue an existing program shall provide written notification to the Commission specifying:

(i) The name of the program; and

(ii) The expected date of discontinuation.

(2) By rule or regulation, the Commission may require the payment by a private career school of a refund to any student or enrollee who, because of the discontinuation of an ongoing program, is unable to complete such program.

(d) The Commission shall review and make recommendations on programs in private nonprofit and for–profit institutions of higher education.

(e) (1) In this subsection, "governing board" includes the board of trustees of a community college.

(2) The Commission shall adopt regulations establishing standards for determining whether 2 or more programs are unreasonably duplicative.

(3) The Commission may review existing programs at public institutions of postsecondary education if the Commission has reason to believe that academic programs are unreasonably duplicative or inconsistent with an institution's adopted mission.

(4) The Commission may make a determination that an unreasonable duplication of programs exists on its own initiative or after receipt of a request for determination from any directly affected public institution of postsecondary education.

(5) (i) If the Commission makes a determination under paragraph (4) of this subsection the Commission may:

1. Make recommendations to a governing board on the continuation or modification of the programs;

2. Require any affected governing board to submit a plan to resolve the duplication; and

3. Negotiate, as necessary, with any affected governing board until the unreasonable duplication is eliminated.

(ii) Notwithstanding the provisions of subparagraph (i) of this paragraph, if the Commission determines that 2 or more existing programs offered by institutions under the governance of different governing boards are unreasonably duplicative, the governing boards of the institutions of postsecondary education at which the programs are offered shall have 180 days from the date of the Commission's determination to formulate and present to the Commission a joint plan to eliminate the duplication.

(iii) If in the Commission's judgment the plan satisfactorily eliminates the duplication, the governing board of the affected institutions shall be so notified and shall take appropriate steps to implement the plan.

(iv) If in the Commission's judgment the plan does not satisfactorily eliminate the duplication, or if no plan is jointly submitted within the time period specified in paragraph (6) of this subsection, the governing board of the affected institutions shall be so notified. The Commission may then seek to eliminate the duplication by revoking the authority of a public institution of postsecondary education to offer the unreasonably duplicative program.

(6) (i) Prior to imposing a sanction under paragraph (5) of this subsection, the Commission shall give notice of the proposed sanction to the governing board of each affected institution.

(ii) 1. Within 20 days of receipt of the notice, any affected institution may request an opportunity to meet with the Commission and present objections.

2. If timely requested, the Commission shall provide such opportunity prior to the Commission's decision to impose a sanction.

(iii) The Commission's decision shall be final and is not subject to further administrative appeal or judicial review.

§ 11-206.1. Establishing or abolishing programs.

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

(2) "Public institution of higher education" means:

(i) A public senior higher education institution; and

(ii) A community college.

(3) "Private nonprofit institution of higher education" has the meaning stated in § 10–101(k) of this article.

(b) (1) A president of a public institution of higher education may propose to establish a new program or abolish an existing program if the action:

(i) Is consistent with the institution's adopted mission statement under Subtitle 3 of this title; and

(ii) Can be implemented within the existing program resources of the institution.

(2) A president of a private nonprofit institution of higher education may propose to establish a new program if the action:

(i) Is consistent with the mission statement published in the official catalog of the private nonprofit institution; and

(ii) Can be implemented within the existing resources of the institution.

(3) The president of a public institution of higher education shall report any programs that are proposed to be established or abolished in accordance with paragraph (1) of this subsection to:

(i) The institution's governing board; and

(ii) The Maryland Higher Education Commission.

(4) The president of a private nonprofit institution of higher education shall report any programs that are proposed to be established in accordance with paragraph (2) of this subsection to the Commission.

(5) Upon receipt of a proposed new program, the Commission shall notify all other institutions of higher education in the State.

(c) The governing board of a public institution of higher education shall:

(1) Review the actions taken under subsection (b) of this section;

(2) Ensure that any new program proposed to be established by a president:

(i) Is consistent with the institution's approved mission statement under Subtitle 3 of this title;

(ii) Meets a regional or statewide need consistent with the Maryland State Plan for Postsecondary Education;

(iii) Meets criteria for the quality of new programs, developed in consultation with the Commission; and

(iv) Can be implemented within the existing program resources of the institution, verified by a process established in consultation with the Commission.

(d) The Board of Regents of the University System of Maryland shall approve the proposed new program within 60 days if the program meets the criteria in subsection (c)(2) of this section, subject to the provisions of subsections (e) and (f) of this section.

(e) Within 30 days of receipt of a notice of an institution's intent to establish a new program in accordance with subsection (b) of this section, the Commission may file, or the institutions of higher education in the State may file with the Commission, an objection to implementation of a proposed program provided the objection is based on:

(1) Inconsistency of the proposed program with the institution's approved mission for a public institution of higher education and the mission statement published in the official catalog of a private nonprofit institution of higher education;

(2) Not meeting a regional or statewide need consistent with the Maryland State Plan for Postsecondary Education;

(3) Unreasonable program duplication which would cause demonstrable harm to another institution; or

(4) Violation of the State's equal educational opportunity obligations under State and federal law.

(f) (1) If an objection is filed under subsection (e) of this section by the Commission or an institution within 30 days of receipt of a notice of an institution's intent to establish a new program, the Commission shall immediately notify the institution's governing board and president.

(2) The Commission shall determine if an institution's objection is justified based on the criteria in subsection (e) of this section.

(3) An objection shall be accompanied by detailed information supporting the reasons for the objection.

(4) If the Commission determines that an objection is justified, the Commission shall negotiate with the institution's governing board and president to modify the proposed program in order to resolve the objection.

(5) If the objection cannot be resolved within 30 days of receipt of an objection, the Commission shall make a final determination on approval of the new program for a public institution of higher education or a final recommendation on implementation for a private nonprofit institution of higher education.

(g) (1) The Commission shall:

(i) Identify programs established under subsection (b) of this section that are inconsistent with the State Plan for Higher Education; and

(ii) Identify low productivity programs at public institutions of higher education.

(2) If the Commission identifies any programs that meet the criteria set forth in paragraph (1) of this subsection, the Commission shall notify the president of the institution.

(3) If the Commission notifies a president of an institution under paragraph (2) of this subsection, within 60 days the president of the institution shall provide to the Commission in writing:

(i) An action plan to abolish or modify the program; or

(ii) Justification for the continuation of the program.

(h) The Commission and the governing boards of the public institutions of higher education shall jointly develop a definition and accepted criteria for determining low productivity programs.

(i) The Commission shall:

(1) Monitor the program development and review process established under this section;

(2) Report annually to the Governor and, in accordance with § 2–1246 of the State Government Article, the General Assembly on the nature and extent of any duplication or proliferation of programs; and

(3) Make available a copy of the report under item (2) of this subsection to the public institutions of higher education and the private nonprofit institutions of higher education.

§ 12-101. Established; purpose; definitions.

(a) In order to foster the development of a consolidated system of public higher education, to improve the quality of education, to extend its benefits and to encourage the economical use of the State's resources, the University System of Maryland is established in accordance with the provisions of this title.

(b) (1) In this title the following words have the meanings indicated.

(2) "Board" or "Board of Regents" means the Board of Regents of the University System of Maryland.

(3) "Centers" or "institutes" means the following components of the System under the jurisdiction of the Board of Regents:

(i) University of Maryland Center for Environmental Science;

(ii) Cooperative Extension Service and the Agricultural Experiment Station;

(iii) Statewide Medical Education and Training System;

(iv) Fire and Rescue Institute;

(v) Center for Maryland Advanced Ventures;

(vi) University of Maryland Center for Economic and Entrepreneurship Development; and

(vii) Any other center, component, or institute established and operated by the System in accordance with its mission.

(4) "Chancellor" means the Chief Executive Officer of the University System of Maryland and the Chief of Staff for the Board of Regents.

(5) "Computer–based instructional technology" means computer hardware or software used by faculty and students in the delivery of the instructional program.

(6) "Constituent institutions", "institutions", or "campuses" means the following public senior higher education institutions under the jurisdiction of the Board of Regents:

(i) University of Maryland, which is a strategic partnership between the following two distinct campuses within the University System of Maryland:

1. The University of Maryland, Baltimore Campus; and

2. The University of Maryland, College Park Campus;

(ii) University of Maryland Baltimore County;

(iii) University of Maryland Eastern Shore;

(iv) University of Maryland University College;

(v) Bowie State University;

(vi) Coppin State University;

(vii) Frostburg State University;

(viii) Salisbury University;

(ix) Towson University; and

(x) University of Baltimore.

(7) "President" means the Chief Executive Officer of a constituent institution of the University System of Maryland.

(8) "Quasi–endowment funds" means funds that the University System of Maryland retains and manages in the same manner as an endowment.

(9) "Technology" means the latest state–of–the–art technology products and services, including:

(i) Copper and fiber optic transmission;

(ii) Computer;

(iii) Video and audio laser and CD–ROM discs;

(iv) Video and audio tapes or other technologies; and

(v) Technology used for online learning.

(10) "University" or "University of Maryland System" means the University System of Maryland.

Federal Rules of Civil Procedure

Rule 59

(a) In General.

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 28 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Rule 65

(a) Preliminary Injunction.

(1) Notice. The court may issue a preliminary injunction only on notice to the adverse party.

(2) Consolidating the Hearing with the Trial on the Merits. Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes

part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

(b) Temporary Restraining Order.

(1) Issuing Without Notice. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) Contents; Expiration. Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(3) Expediting the Preliminary-Injunction Hearing. If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) Motion to Dissolve. On 2 days' notice to the party who obtained the order without notice—or on shorter notice set by the court—the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(c) Security. The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages

sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

(d) Contents and Scope of Every Injunction and Restraining Order.

(1) Contents. Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.

(2) Persons Bound. The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

(e) Other Laws Not Modified. These rules do not modify the following:

(1) any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee;

(2) 28 U.S.C. §2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader; or

(3) 28 U.S.C. §2284, which relates to actions that must be heard and decided by a three-judge district court.

(f) Copyright Impoundment. This rule applies to copyright-impoundment proceedings.

Code of Maryland Regulations (COMAR)

COMAR 13B.02.03.09. Duplication of the Proposed Program.

A. The elimination of unreasonable program duplication is a high priority. 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. The issue of how a proposed program meets an institution's local and State area needs shall be addressed.

B. Evidence demonstrating that a proposed program is not duplicative of similar offerings in the State shall be submitted by the institution. At a minimum, this evidence shall be substantiated on the basis that the proposed program to be offered is not unreasonably duplicative of existing programs in a specific geographically proximate location in the State.

C. Determination of Duplication.

(1) In determining whether a program is unreasonably duplicative, the Secretary shall consider:

(a) The degree to be awarded;

(b) The area of specialization;

(c) The purpose or objectives of the program to be offered;

(d) The specific academic content of the program;

(e) Evidence of equivalent competencies of the proposed program in comparison to existing programs; and

(f) An analysis of the market demand for the program.

(2) The analysis shall include an examination of factors, including:

(a) Role and mission;

(b) Accessibility;

(c) Alternative means of educational delivery including distance education;

(d) Analysis of enrollment characteristics;

(e) Residency requirements;

(f) Admission requirements; and

(g) Educational justification for the dual operation of programs broadly similar to unique or high-demand programs at HBIs.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THE COALITION FOR EQUITY AND EXCELLENCE IN MARYLAND HIGHER EDUCATION, INC., *et al.*,	*	
Plaintiffs-Appellees,	*	No. 17-2418
v.	*	
MARYLAND HIGHER EDUCATION COMMISSION, *et al.*,	*	
Defendants-Appellants.	*	

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CERTIFICATE OF SERVICE

I certify that on this 21st day of May 2018, the Brief of Appellant was filed electronically and served on the following counsel of record for the appellees, all of whom are registered CM/ECF users.

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