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 RESPONSE AND REPLY BRIEF OF APPELLANTS/CROSS-APPELLEES

BRIAN E. FROSH
Attorney General of Maryland

ADAM D. SNYDER
JENNIFER A. DEROSE
Assistant Attorneys General
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6398

September 18, 2018

Attorneys for Appellants/Cross-Appellees

TABLE OF CONTENTS

Page

REPLY BRIEF OF APPELLANTS 2

REPLY ARGUMENT 3

I. THE TYPE OF PROGRAM DUPLICATION THAT THE DISTRICT COURT FOUND DOES NOT GIVE RISE TO LIABILITY UNDER *FORDICE*. 5

A. Maryland Does Not Maintain a Current Policy of Unnecessary Program Duplication. 5

1. The District Court Properly Concluded That Maryland's Program-Review Policy Is Legally Adequate. 5

2. The District Court Erred by Imposing Liability Based on Past Program Duplication. 10

B. The Undisputed Fact That Maryland's Non-HBIs Are Fully Desegregated Sets this Case Apart from *Fordice* and Its Progeny. 15

C. Program Duplication, on Its Own, Does Not Restrict Student Choice and Thus Cannot Be the Sole Basis for Liability Under *Fordice*. 21

D. The District Court's Reliance on Dr. Conrad's Malleable and Subjective Definition of "Unnecessary Program Duplication" Merits Reversal Even Under the Clearly Erroneous Standard of Review. 25

II. THE DISTRICT COURT FAILED TO BALANCE THE EQUITIES OR TAILOR ITS INJUNCTIVE RELIEF TO THE VIOLATION FOUND, AND INSTEAD ORDERED RELIEF THAT SUPREME COURT PRECEDENT DOES NOT ALLOW 27

A. The District Court Failed to Evaluate Whether the Relief It Ordered Would Address the Harm It Identified or Weigh that Relief Against the Harm It Would Cause the State's System of Higher Education. 28

B. Contrary to *Fordice*'s Emphasis on Preserving Student Choice, the Relief Ordered Below Seeks to Influence Enrollment at HBIs by Denying Students the Opportunity to Pursue Certain High-Demand Programs at Other State Universities. 35

RESPONSE BRIEF OF CROSS-APPELLEES 39

SUMMARY OF ARGUMENT 39

RESPONSE ARGUMENT 42

I. THE DISTRICT COURT CORRECTLY FOUND ON SUMMARY JUDGMENT THAT MARYLAND'S POLICIES FOR FUNDING THE OPERATIONS AND CAPITAL NEEDS OF ITS PUBLIC UNIVERSITIES ARE NOT TRACEABLE TO THE *DE JURE* ERA. 42

A. The District Court Correctly Concluded That Maryland's Operational Funding Policy Is Not Traceable to the *de Jure* Era. 43

1. To Be "Traceable" Under *Fordice*, a Current Policy Must Perpetuate a *de Jure* Policy. 44

2. Maryland's Operational Funding Policy Is the Third to Be Adopted After the *de Jure* Era and Is Not Traceable to that Era. 45

3. Plaintiffs' Criticisms of the District Court Ruling on Operational Funding Lack Merit. 50

a. Institutional Mission: That a School's Mission Is Relevant to its Operational Funding Does Not Make it a Traceable Policy. 51

b. Past Underfunding: *Fordice* Does Not Require States to Make Up for Cumulative Underfunding of the HBIs During the *de Jure* Era. 54

c. Per-FTE Comparisons: Comparing Institutional Funding Levels on a Per-Student Basis Is a Commonly Accepted Way of Accounting for the Different Sizes of Institutions. 56

d. Land Grant Funding: That UMES Received Less Funding Than the State's Much Larger "Flagship" Institution Is Not Evidence of a Traceable Funding Policy. 58

B. The District Court Correctly Concluded that Maryland's Current Capital Funding Policy Is Not Traceable to the *de Jure* Era, as Plaintiffs' Experts Conceded. 60

II. THE DISTRICT COURT CORRECTLY FOUND THAT MARYLAND'S SYSTEM OF DEFINING EACH INSTITUTION'S EDUCATIONAL MISSION IS NOT TRACEABLE TO THE *DE JURE* ERA. 68

A. The District Court Did Not Require Plaintiffs to Demonstrate That the HBIs' Current Mission Designations Are "Effectively Fixed" to the *de Jure* Era. 68

B. The District Court Properly Considered Overlapping Programs as Evidence of Program Duplication Rather than Mission Designations. 70

C. The District Court Properly Found That the HBIs' Missions Were Set by the Institutions Themselves and Not Imposed on Them by the State. 73

CONCLUSION 79

CERTIFICATE OF COMPLIANCE WITH RULE 32(A) 80

CERTIFICATE OF SERVICE 81

TABLE OF AUTHORITIES

Page

Cases

Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985) 27

Ayers v. Fordice, 111 F.3d 1183 (5th Cir. 1997)..... passim

Ayers v. Fordice, 879 F. Supp. 1419 (N.D. Miss. 1995)..... passim

Bazemore v. Friday, 478 U.S. 385 (1986)..... 20, 21

eBay, Inc. v. MercExchange, LLC, 547 U.S. 388 (2006) 27

Gill v. Whitford, 138 S. Ct. 1916 (2018).....32

Gomillion v. Lightfoot, 364 U.S. 339 (1960).....22

Grutter v. Bollinger, 539 U.S. 306 (2003).....22

Knight v. Alabama, 14 F.3d 1534 (11th Cir. 1994) 8, 77

Knight v. Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991)..... passim

Knight v. Alabama, 900 F. Supp. 272 (N.D. Ala. 1995)..... 30, 55

Lane v. Wilson, 307 U.S. 268 (1939).....44

Lewis v. Casey, 518 U.S. 343 (1996).....32

Milliken v. Bradley, 418 U.S. 717 (1974)..... 27, 37

Missouri v. Jenkins, 515 U.S. 70 (1995).....37

Pearson v. Murray, 169 Md. 478 (1936).....57

Raleigh Wake Citizens Ass'n v. Wake County Bd. of Elections,
827 F.3d 333 (4th Cir. 2016) 24

SAS Inst., Inc. v. World Programming Ltd.,
874 F.3d 370 (4th Cir. 2017) 27

United States v. Fordice, 505 U.S. 717 (1992) ..... passim

United States v. Louisiana, 9 F.3d 1159 (5th Cir. 1993) 19

Walker v. Kelly, 589 F.3d 127 (4th Cir. 2009) 27, 81

Statutes

1988 Md. Laws ch. 246 58

20 U.S.C. § 1060 76

20 U.S.C. § 1061(2) 76

20 U.S.C. § 1063c, Part B 76

20 U.S.C. § 1067a(b) 76

2018 Md. Laws ch. 9 61

Md. Code Ann., Educ. § 10-203(c)(1) (LexisNexis 2018) 51

Md. Code Ann., Educ. § 10-203(c)(2)(i) (LexisNexis 2018) 51

Md. Code Ann., Educ. § 10-203(c)(3) (LexisNexis 2018) 63

Md. Code Ann., Educ. § 10-209(f) (LexisNexis 2018) 58

Md. Code Ann., Educ. § 10-210(f)(4) (LexisNexis 2018) 58

Md. Code Ann., Educ. § 11-105(b)(2)(ii) (LexisNexis 2018) 61

Md. Code Ann., Educ. § 11-105(b)(5)(i) (LexisNexis 2018) 58

Md. Code Ann., Educ. § 11-105(h)(4) (LexisNexis 2018) 47

Md. Code Ann., Educ. § 11-105(i) (LexisNexis 2018) 61

Md. Code Ann., Educ. § 11-206.1(e) (LexisNexis 2018) 6, 14

Md. Code Ann., Educ. § 11-302(a) (LexisNexis 2018) 73

Md. Code Ann., Educ. § 11-302(d)(1) (LexisNexis 2018) 73

Md. Code Ann., Educ. § 11-302(d)(2) (LexisNexis 2018) 73, 74

Md. Code Ann., Educ. § 12-106 (a)(1)(iii)1 (LexisNexis 2018) 58

Md. Code Ann., Educ. § 12-106(a)(1)(iii)5 (LexisNexis 2018) 75

Regulations

COMAR 13B.02.03.09A 6

COMAR 13B.02.03.09B.....6

COMAR 13B.02.03.09C..... 6, 12, 13

COMAR 13B.02.03.09C(2)(g) 6

Miscellaneous

Mike Maciag, *A State-by-State Look at Growing Minority Populations*, Governing (June 25, 2015) 17

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 RESPONSE/REPLY BRIEF OF APPELLANTS/CROSS-APPELLEES

Today students in Maryland, regardless of race, have the choice of enrolling in any of the State's public colleges and universities, including Maryland's increasingly diverse historically black institutions ("HBIs"). More than half of the African-American students who enroll in a Maryland public university attend one of Maryland's non-HBIs, and as the demographics of Maryland have grown more diverse, so too has its student population. Other students of all races choose to attend

Maryland's HBIs, which are an indispensable part of the diverse set of enrollment options available to Maryland students. These circumstances set this case apart from earlier higher education cases, all of which involved university systems from 20 to 30 years ago that retained racially discriminatory admissions practices.

The Supreme Court in *United States v. Fordice* established that the goal of dismantling the *de jure* systems of higher education must be to guarantee each student a "truly free" choice of where to pursue their education. 505 U.S. 717, 743 (1992). To that end, the Court required states to eliminate policies and practices that are traceable to the *de jure* era and continue to have segregative effects by restricting student choice. In doing so, it left room for HBIs to exist as institutions "open to all on a race-neutral basis, but with established traditions and programs that might disproportionately appeal to one race or another." 505 U.S. 717, 749 (Thomas, J., concurring). That Maryland's increasingly diverse HBIs continue to enroll a majority of African-American students is not the result of a policy of discrimination but is instead a function of student choice.

REPLY BRIEF OF APPELLANTS

REPLY ARGUMENT

In both their response to the State's arguments on appeal and in their own arguments on cross-appeal, plaintiffs focus on the effects of *de jure*-era policies rather than on whether Maryland maintains current policies traceable to that era. Shrugging off the district court's finding that Maryland's current policy against program duplication is legally sufficient and functioning properly, plaintiffs argue for liability based on programs approved well before the State adopted its current policy against unnecessary duplication. And they dismiss as irrelevant the undisputed fact that Maryland has long since eliminated racially discriminatory admissions policies and gives *all* students the choice of enrolling in any of its public colleges and universities.

But 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 policies and practices rooted in the *de jure* era that restrict student choice by effectively steering incoming students to racially identifiable schools based on their race. *Fordice* does not, however, require a state to undo the historical *effects* of policies that it has long abandoned. *See, e.g.*, *id.* at 730 n.4 ("To the extent we understand private petitioners to urge us to focus on present discriminatory effects without addressing whether such consequences flow from policies rooted in the prior system, we reject this position."). The cases applying *Fordice* similarly make clear

this fundamental distinction between policies and effects, and the states' obligations with respect to the two. *See, e.g.*, *Ayers v. Fordice*, 111 F.3d 1183, 1223 (5th Cir. 1997) ("*Ayers II*") ("*Fordice* required the district court to examine challenged policies and practices to determine if they had roots in the *de jure* era. The district court correctly focused on the traceability of policies and practices that result in funding disparities rather than the traceability of the disparities themselves, as plaintiffs urge.").

The district court recognized the analytical flaw in plaintiffs' theory of liability when it addressed their funding and mission claims and correctly determined that the disparity they claim is "a remnant of past discrimination, not the result of any ongoing traceable policy or practice as required under *Fordice*." (ECF 382 at 40; *see also id*. at 27, 32.) But when it came to program duplication—the only one of plaintiffs' many original claims that survived below—the district court lost sight of the distinction between policies and effects and ordered relief to "lessen or eliminate the segregative effects of *past* program duplication." (ECF 641 at 70 (emphasis added).) As discussed below, that legal error is reviewable de novo and should be reversed.

I. THE TYPE OF PROGRAM DUPLICATION THAT THE DISTRICT COURT FOUND DOES NOT GIVE RISE TO LIABILITY UNDER *FORDICE*.

A. Maryland Does Not Maintain a Current Policy of Unnecessary Program Duplication.

In its liability opinion, the district court distinguished between two aspects of program duplication: (1) the "forward facing" policy that Maryland employs to combat program duplication and (2) the program duplication that accumulated before Maryland adopted effective safeguards against program duplication. (ECF 382 at 50.) After concluding that Maryland's current policy is constitutionally adequate, the district court erred by imposing liability based on its finding of past program duplication alone. In defending the district court's liability finding, plaintiffs continue to focus on the current effects of past program duplication and downplay the obvious fact that Maryland's anti-program-duplication policy has no roots in the *de jure* era.

1. The District Court Properly Concluded That Maryland's Program-Review Policy Is Legally Adequate.

The district court properly concluded that Maryland's "forward facing" anti-program-duplication policy is legally adequate. (ECF 641 at 69.) That policy declares that "[t]he elimination of unreasonable program duplication is a high priority" and requires institutions seeking approval for new programs to submit "[e]vidence demonstrating that a proposed program is not duplicative of similar

offerings in the State." COMAR 13B.02.03.09A, B. If a school believes that 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," it may file an objection with the Commission. Md. Code Ann., Educ. § 11-206.1(e). The court also found it "[n]otabl[e]" that a 2012 amendment to the program-review regulations added language specifically requiring consideration of the "'[e]ducational justification for the dual operation of programs broadly similar to unique or high-demand programs at HBIs.'" (ECF 382 at 52 n.12 (quoting COMAR 13B.02.03.09C(2)(g)).) The court concluded that the inclusion of that language "[c]ertainly . . . is a much clearer statement of the standard applicable under *Fordice*." (*Id.*)[1]

Plaintiffs' attacks on the district court's conclusion fail to hit their mark. Plaintiffs misinterpret the court's statements approving the adequacy of Maryland's current program-review policy to mean that the court did not view the current regulation and plaintiffs' proposed remedy as dissimilar enough to justify ordering

[1] In reaching its conclusion that Maryland's policy was legally adequate, the district court had before it Dr. Conrad's testimony, in which he criticized Maryland's policy for using the term "unreasonable" instead of "unnecessary" in describing the type of program duplication it addressed (1/10/12 AM Tr. 142-44 (Conrad).) The applicable regulations, however, use the terms interchangeably, *see* COMAR 13B.02.03.09A (using "unreasonable program duplication" and "unnecessarily duplicative"), and the district court ultimately concluded that "there is not a significant difference between" the two (ECF 641 at 69).

amendment of the regulation. Page Proof Brief of Appellees-Cross-Appellants, Doc. No. 35 ("Br.") at 34-35. Even if interpreted that way, the district court's purpose in ordering the remedy was to bring Maryland into compliance with what it believed to be the State's constitutional obligations. The court's conclusion that the current regulation is adequate to do so disposes of this contention.

Nor is it true, as plaintiffs claim, that the district court "required ongoing oversight of the [program] approval process." Br. 24. Although the court's remedial order required "consultation with the Special Master before future program approvals are made" (ECF 641 at 69), it did so only to make sure that the Maryland Higher Education Commission ("MHEC") was "conscious of the court's remedy in deciding whether to approve future program requests" (*id.*). The court's remedial order makes this point clear: "the Special Master shall be given the opportunity to provide input during any MHEC program approval processes that occur *to ensure they do not interfere with the Remedial Plan*." (ECF 642 at 4 (¶ 6, emphasis added).) Thus, there is no basis for plaintiffs' assertion that the district court required "further judicial review" of Maryland's current program-review policy. Br. 24.

The district court not only concluded that Maryland's current anti-program duplication policy is facially adequate but also that, as applied, it is "functioning properly." (ECF 641 at 69.) Plaintiffs take issue with that finding, citing their expert's testimony that he had counted the number of "unique" and "high-demand"

programs at the HBIs and non-HBIs and concluded that program duplication had increased since 2012. Br. 34. But Dr. Conrad's analysis has many flaws, as several courts have already found. *See* Page Proof Brief of Appellants, Doc. No. 31 ("State's Opening Br.") at 49-63. As those courts have discerned, counting the number of programs offered at different institutions reveals little about whether programs are duplicative in practice. *See Ayers v. Fordice*, 879 F. Supp. 1419, 1445 (N.D. Miss. 1995) ("*Ayers I*"); *Knight v. Alabama*, 787 F. Supp. 1030, 1319 (N.D. Ala. 1991) ("Simply looking at program labels is not adequate.") ("*Knight I*"), *aff'd in pertinent part*, 14 F.3d 1534, 1539-40, 1556-57 (11th Cir. 1994) ("*Knight II*"). Indeed, Dr. Conrad himself conceded as much. (1/25/17 AM Tr. 126 (testifying that CIP codes were "not perfect" and counting programs based on them—as he had done—can lead analysts to place programs "in the wrong category").)

Even if plaintiffs' claim of increased program duplication since 2012 were true, it should come as no surprise that there would be more "unique, high-demand" programs at the larger, more numerous non-HBIs than at the HBIs. Maryland has *twice* as many non-HBIs and they enroll roughly *seven times* as many students as do the HBIs. (DRE 81 at 14 (2016 MHEC Data Book).) Included within the non-HBIs is University of Maryland, College Park ("UMCP"), Maryland's flagship institution, which offers a range of programs that far exceeds that of all other Maryland institutions—HBI and non-HBI alike—and thus skews any comparison of which it

is a part. *See* Pages 58-59 below. As with much of Dr. Conrad's analysis, simply counting programs is no substitute for direct testimony about how Maryland's anti-program-duplication policy is operating.

On this question, the testimony supported the district court's finding that Maryland's current policy is not only "adequate" on its face, but is "functioning properly" in practice. (ECF 641 at 69.) Dr. Houston Davis, who has been active in the administration of higher education in several different states, 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)); *see also* 12/9/16 Dep. Tr. at 273 (Dr. Davis testifying that Maryland has "taken steps to make certain that program duplication issues were considered") and 275 ("I did not feel like it was fair for the plaintiffs to be representing that the state higher education system in Maryland was not doing anything to protect the interest of the HBIs. Quite the contrary.").)

Witnesses with experience within Maryland higher education echoed Dr. Davis's testimony. Dr. Mickey Burnim, then-President of Bowie State University, testified that "the 2012 amended MHEC approval process is generally working as it should," (ECF 641 at 37 (citing Dr. Burnim's testimony)), and Dr. Maria Thompson, President of Coppin State University, testified that "she was unaware of any time when MHEC approved a program over an objection from

Coppin." (*Id.* at 38 (citing Dr. Thompson's testimony).) These witnesses were in a far better position than Dr. Conrad—a University of Wisconsin professor with no experience administering a university or working at an HBI—to say whether Maryland has been guarding against unnecessary program duplication. The district court's crediting of their testimony over Dr. Conrad's simple program-count was not clearly erroneous.

2. The District Court Erred by Imposing Liability Based on Past Program Duplication.

In faulting Maryland for "not address[ing] the substantial duplication that existed since, essentially, the beginning of Maryland's system of public higher education" (ECF 382 at 50), the district court legally erred because *Fordice* draws a clear distinction between current traceable policies, which a state must reform, and a past policy's lingering effects. 505 U.S. at 729, 730 n.4.

The duplication that occurred under the *de jure* system is an effect of that bygone system, not a current traceable policy. The district court recognized this distinction in the context of funding, where it rejected as "inconsistent with *Fordice*" the "suggest[ion] that the effects of past funding inequities must be remedied even if the state has since fixed its funding practices and they are no longer traceable to the *de jure* era policies that caused the inequities." (ECF 382 at 34 n.7.) Adherence to *Fordice* also required the district court to reject plaintiffs' argument that the

effects of past program-duplication must be remedied, even though Maryland's current policy is adequate.

Accumulated duplication is an effect, and not a policy, because it cannot be eliminated by adopting new policies that are not traceable to the *de jure* era, which is what *Fordice* requires. Undoing accumulated program duplication would require the elimination of programs at the non-HBIs or the transfer of those programs to the HBIs. As the district court found, however, that type of remedy is not educationally justified; it requires uprooting faculty and disrupting an institution's curriculum in a way that would cause lasting damage to the institution and its students, of all races. (ECF 641 at 66-68.) The same is true of cumulative funding disparities; once the money is spent, it cannot be transferred to the HBIs without similar disruption. Both are effects of a prior, traceable policy, not current policies themselves.

As *Fordice* states, program duplication was part "of the prior dual system of higher education—the whole notion of 'separate but equal' required duplicative programs in two sets of schools." 505 U.S. at 738. During the *de jure* era, programs at HBIs were routinely duplicated elsewhere. Indeed, the trial record establishes that the bulk of the program duplication in Maryland accumulated before the State adopted a program-review process that guards against it. Dr. Popovich—who served on MHEC staff from 1976 until 1990 (1/5/12 AM Tr. 4 (Popovich))—testified that "one of the essential features" of Maryland's earlier system of public higher

education was that "it did not have true coordination [until] the mid-70s." (*Id.* at 19-20.) Accordingly, "most of what we know as Maryland higher education now"—including the significant duplication in the Baltimore area—"was already in place" by 1976, when Maryland first put in place the coordinating board that ultimately became MHEC. (*Id.* at 20.) As a result, "it was a very difficult job to have a coordinating board come on the scene and try to guide the growth and development, because so much had already taken place." (*Id.*)

In 1988, MHEC was created and soon thereafter began putting in place measures to guard against program duplication. After an initial period of ad hoc regulation, MHEC in 1996 promulgated the program-review regulations that were in place during the liability trial. *See* 23:13 Md. Register 945 (June 21, 1996) (finalizing initial program-review regulations, which had been proposed at 23:7 Md. Register 564, 567 (March 29, 1996)). Then, in 2012, MHEC amended its regulations to focus its program-review process more closely on the extent to which a program proposed for a non-HBI would affect a unique, high-demand program at an HBI. *See* 39:6 Md. Register 409 (March 23, 2012) (finalizing revisions to COMAR 13B.02.03.09C proposed in 39:1 Md. Register 54, 59 (Jan. 13, 2012). It is these regulations that the district court concluded were legally adequate to address program duplication going forward.

Each of these regulatory steps demonstrates that Maryland has for many years had a policy of preventing unnecessary program duplication, not fostering it. That policy is not designed to eliminate all duplication; some duplication is necessary to meet workforce demand and the needs of the specific institution involved. *See* COMAR 13B.02.03.09C(1)(f) (requiring the consideration of "the market demand for the program" in determining whether a program is unreasonably duplicative); *see also* ECF 641 at 36; 2/7/17 Tr. 80-81 (Monica Wheatley, MHEC's Associate Director of Collegiate Affairs, testifying that a shortage of nurses is "a good example" of something that might demonstrate "that there is a need in the state for that type of duplication"). At the margin, some program approvals might be controversial, as was MHEC's 2006 approval of the MBA program jointly offered by the University of Baltimore ("UB") and Towson University ("Towson"). The trial record showed, however, that with the MHEC program-review measures in place, very few duplicative programs have been approved over the objection of an HBI. Between 2000 and 2005, for example, MHEC reviewed 1,250 programs and only *two* were approved over an HBI's objection. (PTX 7 at 8.) In the years after 2005, the since-discontinued UB/Towson joint MBA program was the only one approved over an HBI objection, and that approval came only after the objecting

institution (Morgan State University ("Morgan")) declined to develop the proposed program itself.[2] (ECF 382 at 57.)

This track record hardly establishes a policy of program duplication; it establishes just the opposite. By giving the institutions the opportunity to challenge program proposals that threaten to duplicate their already-established programs, Educ. § 11-206.1(e), Maryland's current policy ensures that the program duplication that occurs is not the sort that prevailed during the *de jure* era. However one views the efficacy of Maryland's anti-program-duplication measures, they are not traceable to the *de jure* era, during which program duplication was "designed to separate the races for the sake of separating the races." *Fordice*, 505 U.S. at 749 (Thomas, J., concurring). Such separation-for-the-sake-of-separation is not present today in Maryland, where a clear majority of African-American students attend non-HBIs, several of which have majority-minority enrollment or nearly so.

[2] The district court faulted the State for not considering alternative means to increase the capacity of UB's existing MBA program, such as "offering Morgan additional funding" or "considering another HBI to fill this need." (ECF 382 at 57.) But as the district court found elsewhere, the State provided greater relative funding to HBIs (including Morgan) during this period. (ECF 382 at 38.) As for offering the MBA program to another HBI, MHEC has no authority to place programs at institutions that have not proposed them. (2/7/17 Tr. 86-87 (Wheatley).) More fundamentally, the majority opinion in *Fordice* does not require states to abandon educationally justified goals.

B. The Undisputed Fact That Maryland's Non-HBIs Are Fully Desegregated Sets this Case Apart from *Fordice* and Its Progeny.

As the State described in its opening brief, none of the cases applying *Fordice* has found liability when a state has desegregated its non-HBIs, as Maryland has done. State's Opening Br. 41-44. The plaintiffs dismiss this inconvenient fact as "irrelevant," Br. 35, but it goes to the heart of the *Fordice* inquiry.

A key part of *Fordice*'s guidance instructs courts on how to address the circumstance where a state has eliminated racially discriminatory admissions policies but nevertheless maintains other, more "sophisticated" policies that perpetuate a "separate but equal" system. 505 U.S. at 729. Where, as in *Fordice*-era Mississippi and *Knight*-era Alabama, both HBIs and non-HBIs remain racially identifiable, it suggests that a policy of racial separation remains at work in the background. The same inference cannot be drawn, however, where a state's non-HBIs are fully integrated, as Maryland's are. The integration of a state's non-HBIs conclusively rebuts the presumption that the state is perpetuating a "separate but equal" dual system.

In pressing the contrary claim, plaintiffs rely heavily on the district court decision in *Knight*, Br. 31, as they have throughout this litigation. But as the district court below observed, the decision in *Knight* is "sometimes difficult to parse." (ECF 382 at 34 n.7.) Due to that difficulty, *Knight* could be read to impose on states the

obligation to remedy "the effects of past" practices "even if the state has since fixed" those practices—a reading that the district court rightly noted is clearly "inconsistent with *Fordice*." (*Id.*)

That interpretive difficulty may have led plaintiffs to cite *Knight* for the proposition that *Fordice* imposes liability even where the state "claimed" that it had fully desegregated its non-HBIs. Br. 36. Regardless of what Alabama may have claimed, the district court in *Knight* made no such finding. Instead, the court found that one of Alabama's two principal *non*-HBIs, Auburn University, still had not fully desegregated. *See Knight I*, 787 F. Supp. at 1166 ("At only four percent, Auburn's black enrollment clearly evinces that its admissions policies," found to be traceable, "have a disproportionate impact on black students.").

By contrast, Maryland does not simply "claim" that it has desegregated its non-HBIs; plaintiffs *concede* the point. *See, e.g.*, Br. 27 (noting "the fact that Maryland's TWIs are desegregated"); (1/10/12 AM Tr. 115 ("Q: Dr. Conrad, are the traditionally white institutions in Maryland desegregated? A: They are, yes, indisputably.").[3] As the district court found, minority students attend Maryland's

[3] Given these concessions, it is odd that plaintiffs suggest that the district court has not "found that Maryland had desegregated all the TWIs." Br. 4. The district court has made that finding, several times. (*See, e.g.*, ECF 641 at 3 (stating that Maryland's non-HBIs "already meet" the "standard of integration" articulated by the court), 63 ("[U]nlike earlier *Fordice* litigation, Maryland's TWIs are no longer segregated. Indeed, significant numbers of African-American students are educated

non-HBIs in "significant numbers," and 59% of African-American students attending public four-year institutions in Maryland are enrolled at non-HBIs. (ECF 242 at 7 & n.8.) The proportion of African-American students choosing to attend non-HBIs in Maryland rises to 80% if one considers both public and private non-profit four-year institutions. (DRE 81 at 14-15.)

Enrollment at the non-HBIs reflects the full diversity of Maryland's population. The University of Maryland, University College ("UMUC") and UB each enroll a student population that is 60% non-white (ECF 641 at 31 n.15, DRE 81 at 14-15), and Towson enrolls approximately 37% non-white students. Although the HBIs do not exhibit the same levels of diversity, their student populations consistently report double-digit other-race enrollment. *See* State's Opening Br. 18-19 (collecting enrollment statistics demonstrating other-race enrollment of more than 30% at the University of Maryland, Eastern Shore ("UMES"), 17% at Bowie, and 25% at Morgan).[4]

---

in integrated settings at TWIs every year."), 67 (referring to Maryland's non-HBIs as "integrated institutions").)

[4] Plaintiffs downplay the rising levels of "other race" enrollment in HBIs and characterize it as "less relevant" than white enrollment. Br. 18 n.7. But white enrollment is on the decline throughout Maryland, just as the percentage of white *residents* is on the decline; whites are projected to be in the minority within the next decade. Mike Maciag, *A State-by-State Look at Growing Minority Populations*, Governing (June 25, 2015) *available at* http://www.governing.com/topics/urban/gov-majority-minority-populations-in-states.html. Plaintiffs' insistence on

The salient point about *Knight I* is that it analyzed the existence and legality of program duplication in circumstances that simply do not exist in Maryland. The *Knight* court evaluated program duplication in specific paired instances, namely, where high-demand education and business programs were established at both an HBI and a "proximately located predominately white institution[]." *Knight I*, 787 F. Supp. at 1046; *see also id.* at 1279 (making "a comparison of the white and black proximate universities"). Maryland public institutions do not present prospective students with demographic disparities like those in *Knight*-era Alabama. The full desegregation of Maryland's non-HBIs has opened up educational opportunities to Maryland students of all races.

That Alabama's HBIs and non-HBIs were each racially identifiable is not merely a *factual* distinction between 1990s Alabama and Maryland in 2018; it also has legal significance. As the State pointed out in its opening brief, State's Opening Br. 43, the district court in *Knight* included the racial identifiability of the HBIs and the non-HBIs in its definition of the "unnecessary program duplication" that it found actionable in Alabama. The district court found "the situation in Alabama problematic" because of the allegation that "the proximate institutions are racially identifiable *and* the allegation that this racial identifiability, rather than sound

---

analyzing diversity in higher education without reference to Asian, Latino, mixed-race, and international students does not reflect Maryland or national demographics.

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. Similarly, the Fifth Circuit's opinion in *Ayers II* repeatedly limited "unnecessary program duplication" to duplication between "proximate, racially identifiable institutions." *See Ayers II*, 111 F.3d at 1218; *see also id.* at 1219-21; *see also United States v. Louisiana*, 9 F.3d 1159, 1165 n.5 (5th Cir. 1993) (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)").

The racial diversity of Maryland's non-HBIs is important for the present analysis because it means that there is no instance in Maryland today—as there were in Alabama and Mississippi more than thirty years ago—where duplicative programs are offered at two proximate, racially identifiable institutions, *each* visibly serving a different demographic segment of the population. Maryland does not maintain any two such proximate racially identifiable institutions. Morgan, for example, is proximate to two non-HBIs—UB and Towson—that report non-white enrollment of 60% and 37%, respectively. (DRE 81 at 8-9.) Maryland thus offers students a "truly free" choice, *Fordice*, 505 U.S. at 743, between pursuing an education at a majority-African-American but increasingly diverse HBI, or doing so at an already diverse

non-HBI. This free choice is expanded, not hampered, by the duplication of programs across the public universities.

Nor does *Bazemore v. Friday*, 478 U.S. 385 (1986), support plaintiffs' position, as they seem to argue. Br. 37-38. *Bazemore* makes clear that a state is not liable for maintaining separate, racially identifiable institutions if the racial identifiability of those institutions is the result, not of state-imposed policies, but of student choice. Plaintiffs seem to think that *any* decision by a public university system that might "affect student choice" gives rise to liability under *Fordice*, Br. 38, but that ignores the obvious truth that *all* decisions about the programs, facilities, and faculty at an institution potentially influence student choice. If Morgan builds a new architecture center or if the University of Maryland, Baltimore County ("UMBC") offers a new gourmet dining center, those decisions may influence student enrollment decisions, but, if so, they influence all students, regardless of race. The important inquiry under *Fordice* and *Bazemore* is not whether those decisions have an effect on student choice, but whether they have a *racially biased* effect on student choice, by steering students to an HBI or a non-HBI on the basis of race.

In the absence of racially discriminatory admissions practices, the kind of program duplication that the district court found here does not foster segregation within the meaning of *Bazemore* and *Fordice*. If an HBI program is duplicated at a

non-HBI, it may well draw students away from the HBI, but it will draw students of *all* races. We know that because, in the years after the close of the *de jure* era, African-American students chose to attend non-HBIs in significant numbers and continue to make that choice today. There is no basis on which to conclude that Maryland plays a racially discriminatory part in that decision, which is what *Bazemore* and *Fordice* forbid.

C. Program Duplication, on Its Own, Does Not Restrict Student Choice and Thus Cannot Be the Sole Basis for Liability Under *Fordice*.

Fordice cautions against evaluating program duplication "in isolation" rather than in combination "with other [traceable] policies, such as differential admissions standards," 505 U.S. at 739. Caution with respect to program duplication is understandable, for at least two reasons. First, program duplication, on its own, "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).[5] Second, program duplication is "pervasive" in "all systems throughout the country which have more than one university," *Ayers I*, 879 F. Supp. at 1444; for that reason, the courts in both

[5] That Justice Scalia concurred in the judgment in *Fordice* does not, as plaintiffs seem to believe, Br. 42 n.13, support the argument that they press here. Justice Scalia concurred in the judgment solely because "Mississippi has not borne the burden of demonstrating that intentionally discriminatory admissions standards have been eliminated," 505 U.S. at 758, which plaintiffs concede is not an issue here.

Ayers and *Knight* found it necessary to insist that "*only* program duplication *between* proximate, *racially identifiable* institutions was traceable to *de jure* segregation and had segregative effects," *Ayers II*, 111 F.3d at 1218 (emphasis added); *see id.* at 1218, 1219, 1221 (repeating same formula); *accord Knight I*, 787 F. Supp. at 1319.

Before reaching a finding of unconstitutionality, courts must be careful to distinguish permissible duplication from duplication that is constitutionally suspect—duplication where "proximate institutions are racially identifiable," *Knight I*, 787 F. Supp. at 1319—and then must exercise similar caution to determine when such duplication is "unnecessary." Plaintiffs do not dispute either of these points, or the fact that none of the cases that have applied *Fordice* has imposed liability based on program duplication alone. Br. 39-41. Rather, plaintiffs make the point that, just because "there may be four violations" in one case "does not mean that liability must always rest on four violations," Br. 41, and that any one of the *Fordice* factors can be "lethal." Br. 42.

But context matters here. The Supreme Court has cautioned that, when dealing with claims of race-based governmental action, courts must be careful not to draw generalizations "'out of context in disregard of variant controlling facts.'" *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44 (1960)). The "variant controlling facts" in all the cases imposing liability under *Fordice* were that the institutions perpetuated, in some form or other,

the discriminatory admissions standards that had been used in the *de jure* era and thus remained segregated. That is not the case here in Maryland, which plaintiffs concede.

Still, it may be true that, as to some of the vestigial policies identified in *Fordice* and its progeny, a finding of a single current traceable policy, standing alone, could suffice to establish liability. Discriminatory admissions standards are the most obvious example of a traceable policy that, in itself, violates the Constitution; all nine justices agreed that racially discriminatory admissions practices that steer students based on race are unconstitutional. 505 U.S. at 734, 758-59 (Scalia, J., concurring in part and dissenting in part). Other policies may similarly suffice on their own if they erect barriers that effectively sort students by race and channel them accordingly.

Program duplication is different. Although indisputably a necessary part of the *de jure* dual system, program duplication on its own did not erect barriers to student enrollment or otherwise "steer" students by race. Instead, it served to facilitate the discriminatory admissions standards that lay at the heart of the dual system. In the absence of racially discriminatory policies, program duplication facilitates nothing more than student choice. If an HBI duplicates a program previously available only at a non-HBI, the effect will be to give a second option to all students, regardless of race. It might well be that students of one race or another

might disproportionately choose the new option, but—in the absence of discriminatory admissions standards or some other policy steering students based on race—that personal decision is not influenced by the State in a way that would give rise to liability under *Fordice*. In other words, program duplication is necessary to a dual system but not sufficient on its own to constitute a dual system.

Because program duplication does not restrict the "truly free" choice that is the goal of *Fordice*, 505 U.S. at 743, the Supreme Court warned against evaluating program duplication "in isolation," *id*. at 739, and the Mississippi district court cautioned subsequently that "[t]he program duplication issue . . . does not stand alone," *Ayers I*, 879 F. Supp. at 1445. True to that guidance, no court, other than the district court below, has imposed liability under *Fordice* solely on the grounds of program duplication. Plaintiffs concede this. Br. 41 n.12. Given that legal background, the district court's decision to grant plaintiffs judgment on program duplication alone constitutes legal error that should be reviewed de novo and not on the clearly erroneous standard. *See* Br. 39; *see also Raleigh Wake Citizens Ass'n v. Wake County Bd. of Elections*, 827 F.3d 333, 340 (4th Cir. 2016) ("'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.'" (citations omitted)).

D. The District Court's Reliance on Dr. Conrad's Malleable and Subjective Definition of "Unnecessary Program Duplication" Merits Reversal Even Under the Clearly Erroneous Standard of Review.

As described in the State's opening brief, Dr. Conrad's conclusions about the extent of "unnecessary program duplication" in Maryland rest on a malleable and subjective analysis that was criticized by the trial courts in both *Ayers* and *Knight* as unhelpful and unpersuasive. State's Opening Br. 52-53. Even the district court below recognized that Dr. Conrad's analysis contained "methodological flaws." (ECF 641 at 13.)

Plaintiffs dismiss the flaws in Dr. Conrad's analysis, and they seek to minimize the significance of what they call "[m]inor differences" in the list of "core programs" that he has employed in the various *Fordice*-related cases where he has testified. Br. 49 n.19. But Dr. Conrad admitted that the differences were anything but "minor," when he acknowledged that he had reduced his list of core programs by *sixty percent* to generate the opinions that he offered in this case. (1/24/17 Tr. 140 (Conrad).) He did so by wholly unjustifiable analytical decisions, such as classifying computer science as a core program in 1990 Alabama, but not in 2017 Maryland. (*Id*. at 137, 142.) These are not "minor" differences, not in their own right nor in how they affect Dr. Conrad's ultimate conclusion about the extent of program duplication here in Maryland. That is because reducing the number of core programs by 60% correspondingly *increases* the number of non-core programs and

thus exaggerates the amount of program duplication that Dr. Conrad claims is present.

Because of this malleability and arbitrary subjectivity, other courts have criticized Dr. Conrad's approach to defining program duplication. Plaintiffs dismiss those judicial "[c]ritiques" as "not instructive," because those courts "ultimately did find unnecessary program duplication." Br. 50. But in both *Ayers* and *Knight*, the district courts found unnecessary program duplication *despite* Dr. Conrad's testimony, not because of it. *See Ayers I*, 879 F. Supp. at 1445 (finding it "difficult to accept the proposition that Conrad's analysis actually yields an answer to the threshold question he himself poses"); *Knight I*, 787 F. Supp. at 1317-19 ("Dr. Conrad's Program Duplication Testimony is Unpersuasive"). The same troubling characteristics of Dr. Conrad's testimony that those courts found unhelpful and unpersuasive appears in the record here. For example, Dr. Conrad's idiosyncratic approach to the analysis of program duplication led him to testify that unnecessary program duplication is increasing here in Maryland even while—according to the witnesses who would know—Maryland's standards for combatting such duplication are "functioning properly." (ECF 641 at 69.)

The State recognizes that the standard by which this Court reviews the trial court's acceptance of expert testimony is deferential. But the imposition of a $1 billion, ten-year remedy on the basis of Dr. Conrad's arbitrary conclusions should

leave this Court "with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985); *see Walker v. Kelly*, 589 F.3d 127, 141 (4th Cir. 2009).

II. THE DISTRICT COURT FAILED TO BALANCE THE EQUITIES OR TAILOR ITS INJUNCTIVE RELIEF TO THE VIOLATION FOUND, AND INSTEAD ORDERED RELIEF THAT SUPREME COURT PRECEDENT DOES NOT ALLOW.

The relief ordered by the district court placed Maryland's system of public higher education under the supervision of a special master for an initial ten-year period, during which the master was authorized to propose measures to "lessen or eliminate the segregative effects of past program duplication." (ECF 641 at 70.) In so ordering, the district court erred in two respects. First, the court did not comply with precedent requiring it to balance the hardship that such open-ended relief might cause the State against the concededly speculative benefits that it would provide plaintiffs. *See eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006); *SAS Inst., Inc. v. World Programming Ltd*., 874 F.3d 370, 385 (4th Cir. 2017). Second, by issuing an order directed toward adjusting the HBIs' racial makeup, as opposed to revising current, traceable policies, the court strayed from Supreme Court precedent that forbids relief prescribing any level of racial balance, *Milliken v. Bradley*, 418 U.S. 717, 740 (1974) ("*Milliken I*"), and instructs that states need only "reform[]" any traceable policy "still in force and hav[ing] discriminatory effects," but need not '"eliminate its continuing effects[.]" *Fordice*, 505 U.S. at 729, 730 n.4.

Both defects in the district court's ruling are errors of law that warrant reversal on de novo review.

A. The District Court Failed to Evaluate Whether the Relief It Ordered Would Address the Harm It Identified or Weigh that Relief Against the Harm It Would Cause the State's System of Higher Education.

Plaintiffs do not address the fact that the district court, when it ultimately applied the four-factor test for injunctive relief, misapplied 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.) Instead, plaintiffs claim, first, that the district court really *did* weigh the "benefits and potential harm" of the relief it granted, Br. 59, and, second, that the court was right not to consider whether the relief it ordered would work, Br. 60-61. Neither contention is supported by the record or the law.

Plaintiffs state that the district court "made extensive findings regarding the benefits and potential harm of various remedies discussed at trial," Br. 59, and, as the State acknowledged in its opening brief, the court made such findings in rejecting plaintiffs' proposal to transfer programs from the non-HBIs to the HBIs. State's Opening Br. 73. But the court did not do the same with respect to the relief that it *did* order.

Plaintiffs estimated that the relief ordered by the court—the creation of unique, high-demand "programmatic niches" at the HBIs—would cost the State as

much as $650 million (ECF 641 at 41) and that funding for "marketing and scholarships" and "equipment, materials, and support" would add another $400 million to that figure over ten years (*id.*). The total $1.05 billion figure is staggering enough, but it does not fully describe the impact to the State and its system of public higher education.

The court acknowledged that a transfer of appropriations of that magnitude would "indirect[ly] harm" the State's non-HBIs (*id.* at 63), but it made no effort to assess the magnitude of that harm. Nor did the court assess the many other ways in which special-master intervention would disrupt Maryland's system of public higher education, despite testimony that it would have a "huge negative impact" on the non-HBIs. (2/6/17 Tr. 166-67 (Miyares).) Even plaintiffs' experts conceded that the relief the court ordered would stifle the development of programs at other institutions. (*See* 1/23/17 Tr. 87 (Dr. Allen testifying that the creation of programmatic niches at HBIs "casts a pretty large shadow" over other institutions); 1/25/17 AM Tr. 130 (Dr. Conrad testifying about the need to minimize the "disruption" that program transfer or enhancements would cause).) That disruption will harm all the students and faculty at the non-HBIs, including the majority of African-American students who attend those institutions. If, as the district court stated, "this case is not about institutions," but the constitutional rights of students

(ECF 641 at 3), the court should have considered how the relief granted would affect those students as well.

Nor did the district court weigh the remedy's harm against its putative benefits. That may be because the plaintiffs' experts conceded that there is no way of knowing whether the remedy they proposed (and the court ordered) would even work. (ECF 480-1, ¶ 328 (stating that it "remains impossible to find 'textbook examples' or to 'scientifically test' the desegregative impact of the Plaintiffs' remedial proposal").) But the court should have understood from previous cases implementing *Fordice* that program enhancements ordered by courts have *failed* to diversify enrollment. *See Ayers II*, 111 F.3d at 1213 (concluding "that 'merely adding programs and increasing budgets' is not likely to desegregate an HBI," and citing "the Louisiana experience" that "was not successful in attracting white students to historically black universities" despite significant investment in "new academic programs at those universities"); *accord Knight v. Alabama*, 900 F. Supp. 272, 285 (N.D. Ala. 1995) ("*Knight III*") (citing "Louisiana's dismal experience with large scale enhancement of HBIs" as a basis for the court's "wish[] to avoid enormous expenditures of money which have no practical effect on institutions or students").

In addition to the pertinent case authority, the evidence adduced at trial, much of it undisputed, demonstrated the ineffectiveness of a program enhancement

remedy as a means of diversifying enrollments. Dr. Allan Lichtman—an expert qualified in qualitative and quantitative methodologies in the higher education context (2/13/17 AM Tr. 13)—testified that, when evaluated quantitatively, the data from Mississippi and Louisiana rebut the suggestion that so-called "unique" and high-demand programs "have any desegregative potential." (2/13/17 Tr. 202 (Lichtman).) The Maryland data demonstrates the same negligible desegregative potential, because it shows that white enrollment in the Maryland HBIs' unduplicated, high-demand programs is actually *lower* than it is in other programs. (2/14/17 Tr. 19-20 (Lichtman).) Plaintiffs' expert Dr. Allen acknowledged that the program-development remedies in Alabama and Louisiana are widely regarded as "failure[s]" because they did not materially increase diversity at HBIs. (1/18/17 PM Tr. 37 (Allen).) But he maintained—based on no empirical evidence—that the "prior desegregation decrees in the other states failed because they did not emphasize the creation or strengthening of niches," (1/19/17 PM Tr. 44 (Allen)), a vague term that he and Dr. Conrad invented in 2005 (1/19/17 PM Tr. 48 (Allen); 1/25/17 Tr. 117-19 (Conrad)), and one that has not been widely used in university administration. The "lesson" that Dr. Allen "learned" from the failure of unique, high-demand programs to diversify enrollment (1/18/17 PM Tr. 15 (Allen)) was not to try something else, but to create "more programs" in the HBIs (*id.* at 38).

Had the district court appropriately balanced the equities, that analysis would have brought into focus the tenuousness of the order's benefits and the certainty of the harm it would cause the larger system of public higher education. Just this past term, the Supreme Court emphasized "the rule that a 'remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established.'"[6] *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). If, as the district court found, plaintiffs' injury is "based on the ongoing segregative effects of Maryland's policy of program duplication" (ECF 641 at 9), the remedy must be "limited to" that "inadequacy." *Gill*, 138 S. Ct. at 1930. But the testimony at the remedies trial showed that there is little evidence that the creation of so-called unique and high-demand programs at Maryland's HBIs would have any desegregative effect.[7] That same conclusion

[6] Given that the district court concluded that UMES did not suffer unnecessary program duplication (ECF 641 at 65-66), its decision nevertheless to include UMES in a remedial order requiring the creation of "a set of new unique and/or high-demand programs at each HBI" (ECF 642 at 2) is legal error under the rule applied in *Gill*.

[7] Although Dr. Allen was able to identify a few unique, high-demand programs that were created at HBIs as a result of earlier court-ordered remedies and that had high levels of white enrollment (1/18/17 AM Tr. 37-38 (Allen)), he acknowledged that whatever success those remedies had achieved was "mixed" at best and that they were otherwise regarded as having failed to diversity HBI enrollment (*id.*). Dr. Allen also acknowledged the danger of drawing analytical conclusion based on individual, "cherry-picked" programs. (1/19/17 PM Tr. 82 (Allen).)

logically would follow from the district court's own finding that, in its view, the HBIs remain racially identifiable, despite its having also found that "Maryland has maintained a policy of enhancing HBI mission and programming at least since the 1970s." (ECF 382 at 27.)

The *Fordice* inquiry into whether a traceable policy is "practicable and consistent with sound educational practices," 505 U.S. at 729, is no substitute for the equitable balancing required by the Supreme Court's limitations on injunctive relief, and plaintiffs make no effort to defend the district court's conflation of the two. "Practicability" presumably would include cost as a consideration, and whether a remedy is consistent with "sound educational practices" would presumably encompass at least some concerns about how it will disrupt other institutions. But the *Fordice* inquiry is designed to apply to an *existing* policy that has a *known* effect on educational and institutional integrity. It evaluates that track record to determine whether the policy may be maintained despite being traceable and having segregative effects.

The remedy adopted here, by contrast, has at best only speculative benefits. As plaintiffs' experts conceded, there is no way of knowing whether it will achieve anything other than cost the State more than a billion dollars and hamstring its higher education system for a decade. (ECF 480-1, ¶ 328 (Dr. Conrad conceding "it remains impossible" to test "the desegregative impact of the Plaintiffs' remedial

proposal"). The State's concern is thus not that the proposed remedy will succeed, as plaintiffs seem to think, Br. 55, but that it will fail, as the evidence suggests it will, and at great monetary expense and with lasting damage to Maryland's schools, system of higher education, and economy.

As the State acknowledged in its opening brief, the district court was not required to "guarantee" the success of its remedy, State's Opening Br. 75, but it was required to weigh the benefits and burdens of the relief it ordered. That there may have been "strong and widely-accepted support for the creation of unique, high-demand programs at Maryland HBIs" (ECF 641 at 65) is no substitute for evidence that the remedy will achieve its goal. Nor is it enough that, despite the acknowledged failure of other, similar remedial orders to diversify HBI enrollment, plaintiffs' experts nonetheless believe that the solution is to create more programs at HBIs.

To compound the problem, the district court did not identify specific programs that must be created at specific institutions, as prior remedial orders had done. *See, e.g.*, *Ayers I*, 879 F. Supp. at 1494 (requiring the implementation of programs in the fields of "allied health" at one HBI and graduate programs in social work, urban planning, and business at another). Instead, the court simply concluded that plaintiffs' proposal was a "promising" (ECF 641 at 5, 17) "starting point" (ECF 642 at 2 (¶ 2.c).) for remedial relief and then left it to a special master to fill in the "reasonable detail" required by Rule 65. Directing the special master to "build on

the areas of strength at individual HBIs" (ECF 642 at 2 (¶ 2(b)) is not the remedial precision that the rule requires.

Of course, improving the quality of the HBIs and their attractiveness to *all* students is a worthwhile goal, and a goal that the State has pursued for more than thirty years, as the district court found. (ECF 382 at 27.) But it comes at a cost, both to the taxpayers and to the other institutions within the State's diverse system of public higher education. Those considerations should have weighed heavily in the balancing that the district court failed to conduct, when it concluded that *Fordice* obviated the need to balance the hardships before issuing an injunction. Because that failure constitutes an error of law, it is reviewed *de novo* and should be reversed on that basis.

B. Contrary to *Fordice*'s Emphasis on Preserving Student Choice, the Relief Ordered Below Seeks to Influence Enrollment at HBIs by Denying Students the Opportunity to Pursue Certain High-Demand Programs at Other State Universities.

The district court's remedial decision orders relief that is inappropriate in the higher education context. The relief that the district court ordered (i.e., giving HBIs a monopoly on an undetermined number of high-demand programs to be identified by the special master) is based on the assumption that it is constitutionally permissible to use programming decisions to induce students—of all races—to attend HBIs, by denying those students the choice to pursue high-demand programs

at other state universities. This denial of choice is warranted, according to the plaintiffs, so that the students already enrolled at HBIs are not "required to accept racial segregation at that institution." Br. 55. That premise suffers from multiple problems.

The students who are already enrolled in the HBIs are not "required" to attend those universities; they have selected those institutions with full knowledge of, and in many cases because of, the institutions' racial identity. And they have selected those institutions over Maryland's non-HBIs, many of which are either majority-minority or nearly so. Although no student is required to accept segregation as a condition of matriculation, under *Fordice* the fact that an institution is racially identifiable does not make it "segregated," when the racial makeup of the institution is the result—as it is in Maryland—of student choice and not the effect of current policies that steer students on the basis of race. In the absence of such policies, there is no constitutional harm: "That an institution is predominantly white or black does not in itself make out a constitutional violation." *Fordice*, 505 U.S. at 743.

Fordice specifically rejected a remedy premised on *requiring* students to attend an HBI. That type of remedy may be permissible in the context of secondary education, where the state "assign[s] . . . students to a particular institution," 505 U.S. at 729, but a remedy involving "student reassignment" is "inappropriate[]" in the university setting, *id.* at 730 n.4. But that kind of denial of choice is, essentially,

what plaintiffs demand. As Dr. Conrad testified, "If you have a monopoly on an academic program . . . you will attract more students because you don't have to share your enrollments. You're not competing, in other words, with other campuses." (01/24/17 Tr. 114 (Conrad); *see also* 01/17/17 AM Tr. 49-50 (Dr. Richardson, the President Emeritus of Morgan, explaining that, if the UB's MBA program were closed and funds and staff transferred to Morgan, Morgan would be "the only campus in Baltimore that is offering a high quality program in business and management," and "the students, regardless of their race, will come").

That type of remedial order is at odds with Supreme Court precedents. *See Missouri v. Jenkins*, 515 U.S. 70, 98 (1995) (rejecting the use of "desegregative attractiveness" to "induce nonminority students to enroll in" historically black schools); *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977) ("*Milliken II*") (desegregation order "contemplating the 'substantive constitutional right [to a] particular degree of racial balance or mixing' is . . . infirm as a matter of law" (citation omitted)); *Milliken I*, 418 U.S. at 740 (Supreme Court precedent "does not require any particular racial balance"). Plaintiffs do not dispute this body of law; they instead seek to confine these precedents to the context of primary or secondary

education. Br. 61, n.23.[8] But as the Court made clear in *Fordice*, a court's remedial options in the higher education context are *more* narrowly circumscribed—not less so—than in the context of secondary education, because the state does not "assign" students in higher education. 505 U.S. at 729. If a district court is barred from ordering a "particular racial balance" in high schools, where the state actually *can* control the amount of desegregation, it surely is barred in the university setting.

Contrary to the remedial theory advanced by plaintiffs and embraced by the district court, *Fordice* and its progeny do not place upon former *de jure* states the constitutional obligation to, in effect, assign students—of all races—to an HBI if they wish to pursue certain high-demand programs. That is the sort of relief that the Court in *Fordice* deemed unsuited to higher education, where matriculation is a matter of student choice and not state edict. It is also the sort of relief that, if successful, will undermine what the HBIs and their students consider to be the HBIs' cherished identity. As explained by Justice Thomas in his concurrence, "these institutions have succeeded in part because of their distinctive histories and traditions; for many, historically black colleges have become 'a symbol of the highest attainments of black culture.'" *Fordice*, 505 U.S. at 748. The Constitution

[8] Plaintiffs misread *Fordice* and its progeny as requiring "desegregation of the HBIs." Br. 61 at n.23. Again, *Fordice* requires the elimination of traceable *policies*, not the elimination of racial identifiability. *See id.*, 505 U.S. at 730, n.4.

does not prevent a state from "operat[ing] a diverse assortment of institutions—including historically black institutions—open to all on a race-neutral basis, but with established traditions and programs that might disproportionately appeal to one race or another." *Id.* at 749. "[S]uch institutional *diversity*" has "'sound educational justification,'" and is not "even remotely akin to program *duplication*, which is designed to separate the races for the sake of separating the races." *Id.* Although "a State is not constitutionally *required* to maintain its historically black institutions as such," *Fordice* does not "hold that a State is *forbidden* to do so." *Id.*

RESPONSE BRIEF OF CROSS-APPELLEES

SUMMARY OF ARGUMENT

In contrast to its decision on program duplication, the district court properly analyzed plaintiffs' funding and mission claims by focusing not on the segregative effects of past policies, but on the inquiry *Fordice* prescribes: whether Maryland maintains a *current policy* that is traceable to the *de jure* era. The evidence in the record amply supports the court's conclusion that Maryland does not maintain traceable policies regarding operational funding, capital funding, or approval of institutions' mission statements.

Operational Funding. The evidence was undisputed that the way in which Maryland provides operational funding to public colleges and universities has gone through a succession of three distinct policies since the close of the *de jure* era, each of which, plaintiffs' funding expert conceded, was "dramatically changed" from the one before it. (PTX 324 at 10.) Because of how these policies evolved, plaintiffs' expert conceded that "[t]he current funding formula used in Maryland can be traced back to 1999," but no earlier. (*Id*. at 11.) In terms of actual funding, the uncontroverted evidence was that, over the past thirty years or so, the HBIs have received many millions more in per-student operational funding than their non-HBI counterparts. Plaintiffs do not challenge these findings.

The challenges that plaintiffs do mount do not come close to justifying reversal. That an institution's funding might be related to its mission is common sense, not evidence of a traceable policy, particularly when the district court *upheld* Maryland's mission policy as not traceable to the *de jure* era. Nor was the district court's use of per-student funding as a comparator across institutions somehow improper; per-student comparison is a way of evaluating funding policies across institutions of different sizes, a method widely used within the field, even by plaintiffs' own funding expert. In making those types of comparisons, it is also analytically appropriate to exclude a "flagship" campus like UMCP, which has a size and complexity of programs that can skew the conclusions reached. For this

reason, the district court properly rejected plaintiffs' argument that it was inappropriate that UMCP—Maryland's oldest land grant university—receives more in operational funding than UMES, Maryland's land grant HBI. In the end, plaintiffs resort to arguing about the *effects* of past policies (here, the cumulative underfunding of HBIs during the *de jure* era) rather than focus on the question that matters under *Fordice*, which is whether Maryland's current policies themselves are traceable.

Capital Funding. Maryland's capital funding process is more complex than its operational funding, involving as it does four separate governmental actors: the university, MHEC, the Governor, and the General Assembly. The only expert testimony on the topic concluded that Maryland's current capital funding policy bore no relation to *de jure* era policies. The factual evidence further showed that, while all institutions need more funding and some HBI buildings need repair, the HBIs fare better on a per-student basis than their non-HBI counterparts in terms of square footage of facility space, deficiencies in laboratories, and age of physical plant, and since 1984 have received more than $400 million in capital allocations above what they would have been due if capital funding had been allocated on an FTE-student basis (excluding the flagship UMCP). (*See* ECF 207-8 at 25, 33 (¶¶ 15, 18).)

Mission Designations. There are three parts to plaintiffs' mission argument, none of which merits reversal. First, plaintiffs cite two words in the district court's liability decision that they believe misstate their burden by requiring them to prove

that Maryland's current mission-designation policy "effectively fix[es]" the HBIs' current program offerings to their *de jure* missions. Br. 65. But plaintiffs misunderstand the point of the quoted passage, which merely expresses the court's rejection of the plaintiffs' contention that the State has a traceable policy of imposing missions on HBIs. Second, plaintiffs argue that the district court improperly considered evidence of program *overlap* between HBIs and non-HBIs as evidence of program *duplication* instead of the HBIs' limited missions. Finally, plaintiffs claim that the HBIs' ability to propose their own educational missions does not matter when those missions must be consistent with Maryland's State Plan for Higher Education and statutory provisions, which continue to identify Maryland's HBIs *as* HBIs. This final part of their argument is foreclosed by the factual record, which established that the institutions determine their own missions with minimal State involvement, and by *Fordice*, which does not require states to prohibit their historically black institutions from embracing their unique heritage and roles.

RESPONSE ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND ON SUMMARY JUDGMENT THAT MARYLAND'S POLICIES FOR FUNDING THE OPERATIONS AND CAPITAL NEEDS OF ITS PUBLIC UNIVERSITIES ARE NOT TRACEABLE TO THE *DE JURE* ERA.

The district court's conclusion that Maryland's current operational and capital funding policies are not traceable to the *de jure* era has ample evidentiary support in the record. Plaintiffs did not genuinely dispute that evidence with respect to capital

funding, and on appeal do not dispute that evidence with respect to either operational or capital funding. Br. 73 (disavowing argument that the district court incorrectly determined "any *facts*"). Instead, plaintiffs claim that, with respect to their funding and mission arguments, the district court misinterpreted what it means to be a "traceable" policy under *Fordice* and thus "applied an incorrect legal threshold." *Id.* That interpretive mistake, plaintiffs argue, led the district court to "overlook" evidence of what they contend to be traceable policies involving institutional missions, cumulative underfunding of the HBIs, and capital funding practices. *Id.*

As described below, the district court correctly rejected these arguments and did so by adhering to *Fordice*'s mandate that courts focus on policies, not effects, in determining whether a state has fully dismantled its *de jure* system of public higher education. In this respect, the district court's focus on *current* policies, as opposed to the effects of *past* policies, highlights both the correctness of its conclusions on the funding issues and the interpretive missteps it made with respect to program duplication.

A. The District Court Correctly Concluded That Maryland's Operational Funding Policy Is Not Traceable to the *de Jure* Era.

The district court found that the plaintiffs had "adduced no evidence linking the current [Maryland operational] funding formula to *de jure* era policies and practices" and that "there is no evidence that the current process employed by the

State is in any way traceable to [a] *de jure* era funding practice or policy." (ECF 382 at 40.) Unable to cite any contrary evidence, plaintiffs offer four arguments with respect to operational funding, all of which reflect a misunderstanding of what makes a current policy "traceable" under *Fordice*.

1. To Be "Traceable" Under *Fordice*, a Current Policy Must Perpetuate a *de Jure* Policy.

The focus of *Fordice* is on current policies. It asks whether "the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects." 505 U.S. at 731. To be "traceable," it is not enough for a current policy to resemble a past policy or have similar effects; a current policy must be "*rooted* in the prior dual system." *Id.* at 732 n.6 (emphasis added); *see also id.* at 730 n.4 ("rooted in the prior system"). The State may not "*leave in place* policies *rooted in* its prior officially segregated system that serve to maintain the racial identifiability of its universities." *Id.* at 743 (emphasis added).

Of course, the fact that a policy is newly adopted does not necessarily mean that it is not traceable. Because "[t]he Equal Protection Clause is offended by 'sophisticated as well as simple-minded modes of discrimination,'" *Fordice*, 505 U.S. at 729 (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)), a state does not inoculate itself from liability by adopting new policies if those policies are simply a less obvious way of perpetuating a segregated system. But the adoption of new policies that do not perpetuate *de jure* practices will satisfy a state's obligations

under *Fordice* even if those policies result in funding differences, enrollment patterns, and other effects that resemble those that prevailed in the *de jure* era. That is why the Supreme Court observed in *Fordice* that racial identifiability is not enough: "That an institution is predominantly white or black does not in itself make out a constitutional violation." *Id.* at 743. Instead, the Court has "consistently asked whether existing racial identifiability is attributable to the State" through its existing policies. *Id.* at 728. It is also why the Fifth Circuit on remand upheld Mississippi's funding policies, even though the state's current policies had "'practically the same result'" as its previous, traceable formula. *Ayers II*, 111 F.3d at 1221 (quoting the district court), 1223 (affirming district court). Because Maryland's current operational funding policy does not perpetuate a *de jure* policy and provides the HBIs comparatively greater funding on a per-student basis, it easily survives scrutiny under *Fordice*.

2. Maryland's Operational Funding Policy Is the Third to Be Adopted After the *de Jure* Era and Is Not Traceable to that Era.

Maryland's approach to funding the operating expenses of its public four-year universities has changed considerably since the end of the *de jure* era. In the *de jure* era, operational funding levels were established more or less on an ad hoc basis without reference to any kind of "funding formula" or "funding guideline." In 1968, Maryland first adopted something like a funding formula, which was based on a

number of individualized factors at each institution, including attendance, program offerings, research, library volumes, and the total square footage of the institution's facilities. (ECF 382 at 34; ECF 207-2 at 6 (¶ 10, citing the Seventh Annual Report and Recommendations of the Maryland Council for Higher Education, 1971).)

In 1988, Maryland restructured its system of public higher education by enacting legislation creating the University System, which now includes all of the public colleges and universities except for Morgan and St. Mary's. In the wake of that restructuring, MHEC in 1989 adopted a new funding methodology that took a "school-by-school" approach to funding decisions. (ECF 382 at 35.) Plaintiffs' funding expert contrasted this school-by-school funding methodology with the process previously used in the 1980s and observed that MHEC's 1989 budgetary guidelines "dramatically changed" the way in which funding recommendations were made to the state legislature. (PTX 324 at 10.) MHEC used this process for approximately ten years, until 1999, when it adopted its current approach. (1/31/12 PM Tr. 81 (Newman); ECF 382 at 35.)

The current version of Maryland's operational funding policy does not rely on a variety of individualized factors, as had the 1971-1989 version, or use a school-by-school approach, as had the version in place from 1989 to 1999. Instead, it takes an objective, mathematical approach to funding Maryland's institutions based on

how peer institutions are funded, with adjustment for the size of the student body. (ECF 382 at 35; *see also* PTX 324 at 11-13.)

Under current law, MHEC is required to develop funding guidelines to "assess the adequacy of the operating and capital funding based on comparisons with institutions designated as peer institutions and other appropriate factors." Educ. § 11-105(h)(4). The current guidelines operate by identifying "peer" institutions for each school, determining the 75th percentile level of funding for the peer group on a full-time equivalent student basis,[9] and then multiplying this target level of funding by the number of full-time students at the institutions. (ECF 382 at 35-36; *see also* ECF 207-2 at 7 (¶ 12).) These guidelines provide a framework for quantifying, for each institution, the budgetary appropriation that will be sufficient for the institution to remain competitive with its peer group.

Maryland thus has adopted a succession of *three* different operational funding policies after the close of the *de jure* era, each different from the one that came before it. Plaintiffs' funding expert conceded as much. Prof. Toutkoushian stated that "[t]he concept of using a funding formula to make recommendations to the legislature on funding can be traced back to . . . 1968," (PTX 324 at 10), and that,

[9] The "full-time equivalent" concept is used to account for part-time students by translating them into an equivalent number of full-time students. Although the term is often reduced to its acronym "FTE," we will use the more familiar term "per student."

since then, "[t]he process used in Maryland for making funding recommendations to the State legislature about appropriations has undergone important changes" (*id.*). The 1989 guidelines, for example, "dramatically changed" the funding process (*id.*), and the 1999 funding methodology—the essentials of which remain in place—effectively "abandoned" the approach used in the 1989 guidelines (*id.* at 11). Because of these wholesale changes since 1968, Prof. Toutkoushian conceded that "[t]he current funding formula used in Maryland can be traced back to 1999" and no earlier. (*Id.*) On this record, the district court had little difficulty concluding that "the Coalition has not demonstrated that Maryland's current funding practices or policies are traceable to the *de jure* era." (ECF 382 at 38.)

Comparing Maryland's current funding methodology to the Mississippi funding approach at issue in *Ayers* shows that Maryland's methodology easily satisfies the requirements of *Fordice*. In *Ayers*, Mississippi had switched from a 1974 policy, which had allocated funds based on mission designations, to a 1987 formula that allocated funds based on the size of each institution's enrollment, faculty, and physical plant. *Ayers II*, 111 F.3d at 1221. Although the Mississippi guidelines "follow[ed]" the *de jure* "mission assignments" to some extent, *Ayers I*, 879 F. Supp. at 1477, and the funding levels that resulted from the new policy were "practically the same" as those under the prior, traceable policy, *id.* at 1449, the district court upheld Mississippi's new policy. The court concluded that "[t]here is

no per se funding policy or practice traceable to the *de jure* era," *id.* at 1453, and that the current funding formula "is largely geared to funding the students without consideration of race at whichever institution the students choose to attend and at the program level the students choose." *Id.*

In affirming that conclusion, the Fifth Circuit charted the development of Mississippi's funding policy and described how the state's current policy differed from its earlier policies:

> Unlike the previous formula, which allocated funds based on mission designations, the present formula allocates funds as a function of the size of each institution's enrollment, faculty, and physical plant. While the formula responds to conditions that to a significant degree have resulted from the mission designations (and consequently results in the [T]WIs receiving a greater proportion of funds), the manner in which the formula does so is guided by valid educational concerns and is not linked to any prior discriminatory practice.

Ayers II, 111 F.3d. at 1224.

The history of Maryland's funding policy compares favorably. Whereas the funding policy upheld in *Ayers II* immediately succeeded the policy that the Supreme Court found traceable in *Fordice*, Maryland's current policy is three generations removed from any traceable funding policy, and as plaintiffs' expert conceded, each of Maryland's successive funding policies differed dramatically from its predecessor. Whereas the Mississippi policy yielded the same funding levels for HBIs as did its traceable predecessor and "the court found that 'the historical disparity in funding between the [historically white institutions] and HBIs once

practiced by law persist[ed]'" under the new policy, *Ayers II*, 111 F.3d at 1221, Maryland's policy, over the period 1984-2010, provided the HBIs with nearly $464 million more in operational funding than their per-student share of the State's total enrollment would require, if one excludes the statistical outlier and "flagship" College Park (DX 64A at 13 (computation excluding UMCP). "[E]ven including College Park," the district court found, the amount of additional funding figure still amounted to $84 million during that same period. (ECF 382 at 38, 43; 2/1/12 PM Tr. 52-54 (Lichtman).) Moreover, Mississippi's funding policy operated within an overall university system that continued to employ racially discriminatory admissions standards, which plaintiffs acknowledge is not the case in Maryland. For all of these reasons, the district court correctly found that Maryland's policy is not traceable to the *de jure* system.

3. Plaintiffs' Criticisms of the District Court Ruling on Operational Funding Lack Merit.

Ignoring their own expert's concession that Maryland's current funding policy is not traceable to the *de jure* era, plaintiffs claim that the district court erred in reaching the same conclusion. According to plaintiffs, the court's error was not giving adequate weight to four considerations that, apparently, their own expert failed to consider. None merits reversal on plaintiffs' funding cross-appeal.

a. Institutional Mission: That a School's Mission Is Relevant to its Operational Funding Does Not Make it a Traceable Policy.

Plaintiffs' first complaint is that the district court failed to give proper weight to the fact that Maryland law requires that each institution receive a certain amount of "base funding" that would be "in accordance with the role and mission of the institution." Educ. § 10-203(c)(1); *see* Br. 74.[10] "By incorporating mission into its funding system," the argument goes, "the State maintains an essential structure of the dual system." Br. 74. Plaintiffs' argument on this point simply piggy-backs on their other argument, discussed below, that Maryland maintains institutional missions that can be traced back to the *de jure* era. Because, for the reasons discussed on pages 68-78 below, the district court properly concluded that plaintiffs had not demonstrated that Maryland's adoption of institutional missions is traceable to the *de jure* era, this aspect of plaintiffs' funding argument must fail as well.[11]

---

[10] Plaintiffs cite this provision but ignore the very next one on the page, which provides for "special initiative funding . . . [f]or academic programs at historically African American colleges and universities." Educ. § 10-203(c)(2)(i).

[11] It is worth noting how plaintiffs use what they believe to be evidence of one "vestige" to establish the existence of another. As discussed below, plaintiffs continue try to use evidence of program duplication to establish a traceable policy about institutional missions and then continue to assert that Maryland's funding policies are constitutionally infirm because they refer to the allegedly traceable institutional missions. Although the *Fordice* examples of potentially traceable policies sometimes overlap, as the district court understood (*e.g.*, ECF 382 at 28), that does not relieve plaintiffs of their burden to prove the existence of each such policy.

Even if plaintiffs' argument were not foreclosed, the statutory requirement that funding levels accord with the institution's mission does not mean that Maryland is perpetuating the funding policies of the *de jure* era. UMUC, for example, is a distance learning institution focused on the needs of working adults. (2/6/17 Tr. 11 (Miyares).) It has no tenured faculty (*id*. at 25) and supports no faculty research (*id*. at 37). Because it has a very different educational model from doctoral research institutions such as UMCP and Morgan, it receives the least amount of State financial support, on a per-student basis, of any Maryland public university. *See id*. at 34. Other schools might require targeted funding for cutting-edge research in, for example, the agricultural sciences, such as the experimental farm that UMES recently acquired. (ECF 382 at 40; *see also id.* at 36 (describing how UMES's peer group was adjusted to reflect its "research functions").) Ensuring that funding levels reflect each institution's pursuit of its self-professed objectives constitutes common sense, not a vestige of segregation.

Nor does accounting for an HBI's mission mean that the funding it receives is determined by its status as an HBI. The evidence below demonstrated that the "peer" institutions for Maryland's HBIs are identified in a way that ensures that "'an HBI's peer group wouldn't be too heavily weighted with HBIs as peers.'" (ECF 382 at 35 (quoting 1/31/12 PM Tr. 92-93 (Newman).) Funding for Morgan, for example, was pegged to a group of 18 institutions, only four of which were HBIs. The list

included institutions that Morgan itself proposed as peers, and a mix of schools rated at or above Morgan on the Carnegie Classification system. (2/1/12 AM Tr. 15-16 (Newman); *see also* ECF 382 at 37.) Nor were HBIs forced to accept peer groups that resulted in lower funding. Coppin's funding increased by 98% from 2001 to 2010 under the peer-group funding process (ECF 382 at 36), Morgan's increased by nearly $10 million in fiscal year 2010 alone (*id*. at 37), and the peer group for UMES was adjusted to reflect its research functions, which resulted in a new peer group that the institution found satisfactory (*id.* at 36).[12]

Overall, the evidence demonstrated that funding for HBIs is not limited by their status as HBIs and, in fact, on a per-student basis exceeds the amount received by non-HBIs. As discussed above, between 1984 and 2010, Maryland's HBIs received $84,621,000 more in funding than they would have expected to receive if funding had been determined purely on a per-student basis (ECF 382 at 38), nearly

[12] Maryland's HBIs also received more funding relative to their peer groups than all other Maryland institutions except for UMCP. For example, in fiscal year 2012, Coppin received state appropriations amounting to 110.8% of the funding received by its peer institutions, Morgan 77.5%, UMES 71.6%, and Bowie 70.2%. (DX 404 at 5.) These institutions ranked 1st, 2d, 4th, and 5th in funding relative to peers. The only non-HBI ranked within the top five was UMCP, which received 75.1% of the amount received by its peers. (*Id*.) The bottom six were all non-HBIs and ranged from Frostburg at 68.7% to UMUC at 36.5%. (*Id*.) A similar pattern holds true with respect to per-student funding: the four lowest-funded institutions are all non-HBIs (Towson, Salisbury State University, UB, and Frostburg). (DX 64A at 75.)

$464 million more if one excludes UMCP from the comparison (DX 64A at 13). As the district court further found, that favorable treatment of HBIs continues. (ECF 382 at 38-39 ("Today, Maryland appropriates nearly an equal amount of funding per full-time student at HBIs and TWIs (with slightly more funding per-FTE going to the HBIs).").) There is no basis for disturbing that finding on appeal.

b. Past Underfunding: *Fordice* Does Not Require States to Make Up for Cumulative Underfunding of the HBIs During the *de Jure* Era.

Plaintiffs' next argument—that the district court "erred in disregarding the *cumulative* underfunding of the HBIs," Br. 75—is based on a misreading of *Fordice* and the states' obligations under it. *Fordice* made clear that, in the absence of a current traceable policy of underfunding HBIs, the states are not constitutionally obligated to reverse the effects of a past policy of underfunding those institutions: "To the extent we understand private petitioners to urge us to focus on present discriminatory effects without addressing whether such consequences flow from policies rooted in the prior system, we reject this position." 505 U.S. at 730 n.4. As the district court noted, *Fordice* "expressly states that a state is only liable for inequities that flow from current 'policies rooted in the prior system[.]'" (ECF 382 at 34 n.7 (quoting *Fordice*, 505 U.S. at 730 n.4).)

The proceedings in *Ayers v. Fordice* after remand from the Supreme Court confirm that the cumulative effects of past underfunding policies are not grounds for

liability. Emphasizing the distinction between traceable policies and effects, the Fifth Circuit affirmed the district court's conclusion that Mississippi's funding formula was not itself a traceable policy despite the uncontested fact that Mississippi's HBIs suffered from a resource disparity that flowed from the *de jure* era. *Ayers II*, 111 F.3d. at 1223-24. In rejecting the same type of argument that plaintiffs make here—the "enhancement of the HBIs in order to rectify the detrimental effects of past *de jure* segregation," *id*. at 1210—the Fifth Circuit observed that "[t]he Supreme Court expressly rejected the proposition that the State's duty to dismantle its prior *de jure* system requires elimination of all continuing discriminatory effects." *Id*. (citing *Fordice*, 505 U.S. at 730 n.4).

Knight is not to the contrary. Although the *Knight* decision on remand is "sometimes difficult to parse" (ECF 382 at 34 n.7), it held that Alabama's funding policies were traceable in large part because—as the court below put it—"the same elements of the funding formula that harmed HBIs during the *de jure* era had never been addressed." (*Id.* at 34.) The district court in *Knight* found that the Alabama funding formula was "driven from" the "historic distribution of past resources" and "emanate[d] from the allocations and expenditures of the past." *Knight III*, 900 F. Supp. at 308 (quoting and paraphrasing *Knight I*, 787 F. Supp. at 1207). That is not the case here, where Maryland's funding formula is based on a peer-group analysis that—according to plaintiffs' funding expert—is "dramatically" different even from

the formula that immediately preceded it, which itself had no connection to the *de jure* era. (PTX 324 at 10). *Knight* simply does not support plaintiffs' claims.

The facts here show that the HBIs currently receive more funding per FTE student than Maryland's non-HBIs, as they have been for more than 30 years. As the district court acknowledged, enhancing funding for some institutions "unavoidabl[y]" reduces funding for others. (ECF 641 at 63.) In the absence of a current traceable funding policy, underfunding in the distant past is not a constitutional violation.

c. Per-FTE Comparisons: Comparing Institutional Funding Levels on a Per-Student Basis Is a Commonly Accepted Way of Accounting for the Different Sizes of Institutions.

Plaintiffs next fault the district court for having compared the funding levels of HBIs and non-HBIs on a "per-FTE student" basis, observing that HBIs have historically had higher funding per student because of their smaller enrollments. Br. 77-78. But as Dr. Lichtman explained below, adjusting for the size of the student body is a commonsense and academically accepted way of drawing comparisons across institutions that differ from one another substantially in terms of size of student bodies and the number of part-time students. The use of per-student counts provides an accurate measure of Maryland's comparative funding among institutions and the "bang for the buck" that the funding provides. (DX 64A at 5 (¶ 5).) In fact,

even the plaintiffs' own expert, Dr. Toutkoushian, analyzed comparative funding levels using FTE student figures. (*See, e.g.*, PTX 324 at 25-26.)

That HBIs may have received higher per-student funding during the *de jure* era as well is not a reason for disregarding per-student funding comparators, as plaintiffs argue. Br. 78. The HBIs had a higher per-student level of funding in the *de jure* era because their enrollment was exponentially smaller than at the white schools to which they were compared,[13] but that former disparity does not hold true today. For example, Bowie, an HBI, and Frostburg State University, a non-HBI, have similar student populations in 2010 and yet Bowie still received slightly greater per-student funding from the State. (DX 405 at 28 (Bowie student population of 4,496, Frostburg student population of 4,434); PTX 755 at 7 ($7,669 per FTE for Bowie and $7,075 per FTE for Frostburg).) There is no basis for concluding that the district court erred by considering this commonly used statistical comparator.

[13] Although *Pearson v. Murray*, 169 Md. 478 (1936), does not in any way undermine the district court's comparison of funding levels on an FTE basis, even plaintiffs acknowledge that the comparatively higher per-student funding rate for the Princess Anne Academy—which is now UMES—was due to its "small size." Br. 78.

d. Land Grant Funding: That UMES Received Less Funding Than the State's Much Larger "Flagship" Institution Is Not Evidence of a Traceable Funding Policy.

Plaintiffs next argue that the district court disregarded their evidence that UMES—Maryland's HBI land grant institution—is underfunded relative to Maryland's other land grant institution, UMCP. Br. 78. But the evidence before the district court established that UMCP is a special case when it comes to funding. Although UMCP began as a land grant institution, it soon became the largest institution in Maryland's system of public higher education, and in 1988 was statutorily designated as Maryland's "flagship" campus. 1988 Md. Laws ch. 246; Educ. §§ 10-209(f)(1), 11-105(b)(5)(i), 12-106(a)(1)(iii)1.A. As the flagship institution, UMCP is required by statute to receive "the level of operating funding and facilities necessary to place it among the upper echelon of its peer institutions." *Id*. § 10-209(f)(4). Accordingly, UMCP is assigned "aspirational" peers that result in higher levels of funding than would otherwise be the case. (1/31/12 PM Tr. at 91-92 (Newman).)

The evidence established that UMCP's status as Maryland's flagship campus makes it an inapt comparator in other respects as well. For example, UMCP enrolls many more students than Maryland's other institutions, HBIs and non-HBIs alike. (2/1/12 PM Tr. 21 (Lichtman); PTX 755 at 7.) As a result, UMCP receives a greater share of State higher education dollars than all the other non-HBIs *combined*. (*See*

DX 405.3.) Indeed, UMCP's funding remains disproportionately large even when one adjusts for size of the student body. (DX 405.2 (showing that, in 2010, UMCP received state funding amounting to $13,072 per student while the other non-HBIs received on average less than half that ($6,431 per student).) Dr. Lichtman testified that the combination of UMCP's inordinate size and its legislative designation as Maryland's flagship university, along with the priority funding associated with its flagship role, made comparisons to UMCP's numbers unhelpful.[14]

After hearing all the evidence, the district court found no basis on which to conclude that Maryland maintained an operational funding policy traceable to the *de jure* era:

> In light of the recent history of Maryland's higher education funding process, while it may be true that the HBIs are at a "competitive disadvantage" with TWIs because of past discriminatory treatment, . . . the Coalition has not demonstrated that Maryland's current funding practices or policies are traceable to the *de jure* era. Structurally, the current funding formula is entirely different from any of Maryland's prior funding policies or practices; functionally, the current formula has not disadvantaged the HBIs or provided them any less state-controlled funding than the TWIs.

(ECF 382 at 38 (citations omitted).) Plaintiffs offer no persuasive grounds for overturning that finding on appeal.

[14] Plaintiffs' expert Dr. Kaiser ultimately conceded that the University of Maryland at College Park was an "outlier" due to its large size, research focus and special designation as Maryland's flagship university. (ECF 207-11 at 200 (Kaiser Dep.), *see also id.* at 194-95.)

B. The District Court Correctly Concluded that Maryland's Current Capital Funding Policy Is Not Traceable to the *de Jure* Era, as Plaintiffs' Experts Conceded.

The process by which Maryland allocates capital funding to its four-year public schools was established decades after the close of the *de jure* era, and it bears no resemblance to the capital funding methodology employed during that era. (ECF 207-2 at 12-13 (¶ 22).) Geoffrey Newman—MHEC's Director of Finance Policy—testified by declaration and at trial as to the different features of the current capital funding methodology. First, capital allocations focus on specific construction or renovation projects identified by the institution's president and other leaders as high priorities. (ECF 207-2 at 8 (¶ 14).) Because the State's finances are limited, MHEC and the Maryland Department of Budget and Management ("DBM") look to the individual institutions of higher education to set relative priorities on their capital projects. (*Id*.)

Second, planning and budgeting for capital projects have a longer lead time than annual appropriations for operating budgets. The Governor's Capital Improvement Program process sets five-year planning windows, and a major capital project on a university campus (e.g., a library complex) can take up to ten years to complete. (*Id.* at 9 (¶ 15).)

Third, Maryland applies two distinct capital budget processes depending on the type of building or facility being requested and the source of funding, whether it

be bond funding, public/private partnerships, or other sources of capital funds. (*Id.* at 10 (¶ 18).) The first capital budget process is known as the Capital Improvement Program. It applies to capital funding for *academic* facilities and involves funding from General Obligation Bonds, Academic Revenue Bonds, and State General Funds, among other sources. (*Id.*) The second capital budget process is the System-Funded Construction Program, which governs requests for funding for *auxiliary* projects that are ultimately self-funded, such as student unions, parking facilities, and campus dormitories. (*Id.* at 10-11 (¶ 19).)

The results of the two capital budgeting processes are then submitted to MHEC and DBM on parallel tracks. (ECF 207-2 at 9 (¶ 17).) MHEC reviews the proposal for consistency with the State Plan for Higher Education, which, after 1999, was required to "compl[y] with the State's equal educational opportunity obligations." 1999 Md. Laws, ch. 515 (enacting what is now Educ. § 11-105(b)(2)(ii)); *see also* Educ. § 11-105(i); (ECF 207-2 at 11-12 (¶ 21).) At the same time, DBM reviews the proposed capital projects to determine whether they can be completed within the State's debt limit, as recommended by the Capital Debt Affordability Committee. (*Id.* at 12 (¶ 21).) After a project is incorporated into the overall state budget, it is forwarded to the Governor for submission to the General Assembly, which then reviews it and approves it as part of the capital budget bill. (*Id.* at 9 (¶ 17)); *see, e.g.*, 2018 Md. Laws ch. 9 (2018 Capital Budget Bill).

Mr. Newman summarized the difference between the current and past capital funding approaches:

> The capital budget processes that have been in use for over a decade do not resemble the funding processes from the State's era of racial segregation of college campuses. The budgeting process, the sources of funding and the financial sophistication employed throughout the budgeting process in 2011 bear no relationship to capital budgeting and funding of the past.

(ECF 207-2 at 12-13 (¶ 22).)

Plaintiffs did not dispute the State's description of how the capital funding process works and how it differs from the process in place during the *de jure* era. (ECF 242 at 8-9.) As the district court noted, plaintiffs' expert on higher education funding, Dr. Robert Toutkoushian, "did not address capital improvements in his funding analysis" at all (*id.* at 9), and Dr. Harvey Kaiser—plaintiffs' late-designated facilities expert—did not "identify a current 'traceable' policy or practice related to capital funding" (*id.* (citing excerpts from Dr. Kaiser's deposition).)

On appeal, plaintiffs insist that the "material facts" about Maryland's capital funding policy were "in dispute," but they do not substantiate that claim with evidence in the record. Br. 80. Instead, they offer three arguments, none of which suffices to defeat summary judgment.

First, they argue that summary judgment was "inappropriate" given their *legal* argument that Maryland's capital funding process must be traceable to the *de jure* era because Maryland law requires that capital funding reflect an institution's

mission. Br. 80. Of course, a legal argument does not create a dispute of material fact, particularly here, where the district court found—after a full trial—that the institutional missions of Maryland's HBIs were *not* traceable to the *de jure* era. But even if that were not the case, the statute that plaintiffs cite does not limit capital funding by mission; it simply requires that the "physical plant" that is to be constructed or maintained with capital funding be "consistent with each institution's mission." *See* Educ. § 10-203(c)(3). In other words, St. Mary's should not receive funding for a building designed to house architecture programs, because it does not offer an architecture degree as part of its undergraduate liberal arts programs. Nor should UMBC receive funding for an experimental farm—like UMES has—because agriculture is not part of UMBC's STEM mission. It is hardly a vestige of segregation that institutions receive funding only for the facilities that they will actually use.

Next, plaintiffs rely on *Knight I* for the proposition that "*cumulative* capital underfunding" is a basis for liability even in the absence of a current, traceable policy. Br. 80-81. As discussed above with respect to operational funding, however, *Fordice* does not require states to undo the cumulative effects of past policies; the focus must be on "the traceability of policies and practices that result in funding disparities rather than the traceability of the disparities themselves." *Ayers II*, 111 F.3d at 1223.

As they have throughout this litigation, plaintiffs ultimately resort to anecdotal evidence instead of empirical proof. Whereas below they offered Dr. Kaiser, who testified about the "tired old" buildings he had seen at Maryland's HBIs (ECF 207-11 at 70), plaintiffs now rely on the 2008 report of the Bohanan Commission's HBI Study Panel (PTX 2), which was charged with making recommendations to the larger Commission about HBI funding needs. Br. 81. After visiting various campuses within the Maryland system, the panel concluded that "[a]ll institutions have unmet capital needs" and that the State had made "substantial efforts to improve the facilities, physical space, and other institution-wide operational and administrative elements of the HBIs." (PTX 2 at 118.) The panel "wishe[d] to make a special case for addressing the needs of the HBIs," however, as their facilities "visibly lag behind" those at other institutions. (*Id.*)

But the panel members were not in a position to quantitatively compare the two sets of facilities. That task was left to the larger report to which the panel contributed, and it found that the *non*-HBIs, on average, had older buildings and greater deficiencies in laboratory space. (*Id.* at 83 (Appx. 1.13), 85 (Appx. 1.15).) Another report, from 2006, also indicated that the physical plant at Maryland's HBIs compared favorably to those at its non-HBIs in terms of space and facilities and academic library holdings. (*See* PTX 9 at Tables 11-14 (comparing each HBI to an average of the non-HBIs)

The State offered expert evidence—unrebutted by the plaintiffs—that, by multiple measures, Maryland's HBIs do not "lag behind" their non-HBI counterparts in terms of capital funding. Dr. Lichtman found that, since the 1980s, Maryland had more generously funded the construction and renovation of HBI facilities when compared to those at the non-HBIs:

- Between 1984 and 2012, Maryland had provided the four HBIs more than $400 million in capital allocations *above* what they would have been due if capital funding had been allocated on an FTE-student basis (DX 64A at 31);
- Maryland's HBIs have more square feet of facilities per student than the non-HBIs (*id.* at 34);
- The physical plant at Maryland's HBIs is newer, with more physical plant built since 1982 and 1992 than at the non-HBIs (*id.* at 35); and
- Historically black institutions have less deficiency in research laboratory space than the non-HBIs. Although most institutions have some deficiency, the deficiency for the HBIs is relatively small compared to the non-HBIs (*id.* at 36).

Dr. Lichtman testified that the HBIs came out ahead of the non-HBIs with respect to a majority of these types of measurable, "objective indicators." (2/2/12 AM Tr. 19 (Lichtman); *see also id.* at 31.)[15] Neither of plaintiffs' experts offered anything

[15] Although the district court had already awarded the State summary judgment on plaintiffs' capital funding claim, the court allowed plaintiffs to offer testimony about the condition of HBI facilities as it might relate to the other issues that remained in play during the liability trial. Dr. Lichtman's testimony, among other things, rebutted the plaintiffs' evidence on that topic. (*See generally* 2/2/12 AM, PM Tr.)

disputing Dr. Lichtman's analysis. The district court found that "Dr. Toutkoushian did not address capital improvements in his funding analysis nor did he dispute defense expert Dr. Allan Lichtman's calculations." (ECF 242 at 9.) Dr. Kaiser, for his part, conceded that he did "not contest the [capital improvement] calculations in Dr. Lichtman's report" (ECF 172-3 at 9), as the district court found (ECF 242 at 9),[16] and that those calculations showed that, from 1984 to 2010, "Maryland has provided substantially more capital allocations to HBIs" on an FTE student-basis and that "capital funding provided has risen at a faster rate for HBIs than for TWIs." (ECF 172-3 at 9.) Neither of plaintiffs' experts was able to "identify a current 'traceable' policy or practice related to capital funding." (ECF 242 at 9.) These unrebutted facts amply supported summary judgment.

As *Ayers* confirms, these facts establish that Maryland has more than satisfied its obligations under *Fordice*. On remand from the Supreme Court, the Fifth Circuit upheld the constitutional validity of Mississippi's capital funding policies, which

[16] Dr. Kaiser did take issue with Dr. Lichtman's use of per-student funding as a comparator and the fact that Dr. Lichtman did not account for the cumulative underfunding of the HBIs (ECF 172-3 at 8)—two issues addressed above with respect to operational funding. Dr. Kaiser also criticized Dr. Lichtman for not having extended his analysis further back in time and adjusted for inflation. In his reply report, Dr. Lichtman extended his empirical analysis to 1975 and adjusted for inflation; the results showed a substantial *increase* in the amount of excess capital appropriations to historically black institutions. (ECF 186-4 at 23 (¶ 29); *see also* 2/2/12 AM Tr. 10-11 (Lichtman).)

had provided Mississippi's HBIs with a percentage of capital funds that exceeded their percentage of system wide enrollment. *Ayers II*, 111 F.3d at 1222, 1224. Here, as Dr. Lichtman established, since 1984 Maryland has similarly made generous allocations for capital improvements at the HBIs, in excess of what non-HBIs received per student. That fact was unrebutted. (ECF 242 at 8-9.)

How the HBIs *spend* that excess capital funding is determined according to priorities set by the HBI presidents. As MHEC's Director of Finance Policy testified, "Each institution has broad authority to designate new construction (e.g., a science center or humanities building) as a higher priority than a renovation project (e.g., modernizing an academic building or campus signs or landscaping)," or to "rank renovations as a higher priority than new buildings." (ECF 207-2 at 8 (¶ 14).) Because the State's finances are limited, MHEC and DBM "look to the individual institutions of higher education to set relative priorities on their capital projects." (*Id.*)

It well may be that an institution has one or more buildings that need repair at the same time that it has brand new, state-of-the-art facilities. That an institution elects to focus its capital funding on the construction of new facilities over repairing existing ones does not constitute evidence of a statewide, traceable policy. *See Ayers II*, 111 F.3d at 1224-25. On that point, plaintiffs offered no evidence at all; neither of their experts was able to "identify a current 'traceable' policy or practice related

to capital funding." (ECF 242 at 9.) The district court appropriately awarded the State summary judgment on that issue.

II. THE DISTRICT COURT CORRECTLY FOUND THAT MARYLAND'S SYSTEM OF DEFINING EACH INSTITUTION'S EDUCATIONAL MISSION IS NOT TRACEABLE TO THE *DE JURE* ERA.

Plaintiffs' second argument on cross-appeal—that Maryland follows a policy, traceable to the *de jure* era, of assigning HBIs educational missions that are more limited than their non-HBI counterparts—repeats many of the same interpretive mistakes in their arguments about program duplication and funding. Plaintiffs continue to focus on the current effects of *past* policies, rather than consider whether Maryland's *current* policies remain a "vestige" of the prior *de jure* system. Plaintiffs also continue to cherry-pick from the evidentiary record and now 25-year-old case law, in an effort to portray Maryland in 2018 as indistinguishable from Mississippi and Alabama of two to three decades ago. Given the evidence below, which made clear that Maryland does not dictate or limit the HBIs' institutional missions, the district court was right to reject plaintiffs' arguments.

A. The District Court Did Not Require Plaintiffs to Demonstrate That the HBIs' Current Mission Designations Are "Effectively Fixed" to the *de Jure* Era.

According to plaintiffs, the district court held them to a higher "traceability" standard than *Fordice* allows by requiring them to show that "the State continues to 'effectively fix' the scope of HBI offerings based on their *de jure* era missions." Br.

65 (quoting ECF 382 at 25.) Instead, plaintiffs claim, all they must show is that "the current mission designations follow the historical racial assignments to 'some degree.'" Br. 66 (quoting *Fordice*, 505 U.S. at 741).

Plaintiffs misunderstand both the district court's ruling and what *Fordice* requires. The district court did not employ the "effectively fix" language as a traceability standard. Instead, it used that language while making the point that plaintiffs had not demonstrated that the HBIs' current missions are mandated *by the State*. The district court believed that the mission statements of Maryland's HBIs are "in some ways historically linked to their *de jure* era analogs," but concluded that the Coalition had "not demonstrated that *the State* continues to 'effectively fix' the scope of HBI offerings based on their *de jure* era missions" or that the State "continue[s] to *impose* missions on the HBIs." (ECF 382 at 25 (emphasis added).) Instead, the district court made a factual finding that the HBIs "have independence and flexibility in crafting mission statements." (*Id.*) Rather than requiring plaintiffs to meet a more exacting traceability standard, the district court was simply holding plaintiffs to their burden of proving that the current mission designations are the result of a state-imposed *policy*.

Nor is the traceability standard that *Fordice* requires as lax as plaintiffs claim. Plaintiffs do not establish a constitutional violation by showing simply that the current mission designations follow their *de jure* analogs to "some degree." Br. 66.

If that were so, no HBI would be able to embrace the "distinctive histories and traditions" that they developed during the *de jure* era—a result squarely at odds with *Fordice*. 505 U.S. at 748 (Thomas, J., concurring). Rather, to establish that a current policy is traceable to the *de jure* era, the plaintiffs must show that it is "rooted in" or has "antecedents" in that era, *Fordice*, 505 U.S. at 740, 743, or is "effectively fixed" to earlier discriminatory policies. *Ayers II*, 111. F.3d at 1210. The Court remanded in *Fordice* on this issue, but only because Mississippi's mission designations, "when combined with the differential admission practices" that Mississippi continued to employ, perpetuated a segregated system. *Id.* at 741. Maryland, of course, has no such discriminatory admissions practices and has fully desegregated its non-HBIs, as plaintiffs concede. *Fordice* thus does not support a finding of liability here.

B. The District Court Properly Considered Overlapping Programs as Evidence of Program Duplication Rather than Mission Designations.

Next the plaintiffs fault the district court for treating their evidence that "HBIs had duplicated and more limited missions" as evidence of program duplication instead of an issue of mission. Br. 66. Though plaintiffs themselves now acknowledge that program duplication and mission designations are "distinct" issues, *id.*, they "conflate[d]" the two before the district court. (ECF 382 at 28.) Unable to "identif[y]" a "traceable policy or practice specifically controlling HBI

'missions'" (*id.*), plaintiffs tried to use evidence of duplicative "individual programmatic decision[s]" to circumstantially *imply* the existence of a policy (*id.*).

This can be seen in the testimony of Dr. Allen, one of plaintiffs' experts, who defined "mission" so broadly as to encompass everything that "the institution actual[ly] does." (2/8/12 PM Tr. 2.) Dr. Allen acknowledged that an institution's mission statement is "an overview" and "a philosophical" document (*id.*), and yet he proceeded to include within "mission" virtually everything that the institution *does*, from the "resources that are in place," "the assigned classes, courses, the day-to-day operation, and what have you." (*Id.*) Under that expansive definition of "mission," *all* of the evidence in this case would be relevant to mission, whether it related to funding, program duplication, or, for that matter, admissions standards. That definition bears little resemblance to *Fordice*, which speaks more precisely in terms of "institutional mission *assignments*" as an indicator separate from the others at issue in the case. 505 U.S. at 733 (emphasis added).

In Mississippi, for example, the institutions' missions consisted of their categorization by the state as "comprehensive," "regional," or "urban," with the highest tier occupied only by predominantly white institutions and the lowest only by HBIs. *Id.* at 740. Maryland does not impose such a mission-classification scheme; instead, each institution adopts its own mission statement that *describes* its

role within the overall system of public higher education.[17] The Carnegie Commission on Higher Education, by contrast, does have such a classification scheme and Maryland's HBIs and non-HBIs are well distributed throughout its different levels. HBIs make up two of the four Maryland institutions that occupy the "Doctoral Universities" level at the top of the Carnegie Classification scheme,[18] and only two of the six Maryland institutions within the lower "Master's Colleges & Universities" level are HBIs.

[17] For example, Bowie's mission statement currently reads as follows: "Bowie State University empowers a diverse population of students from Maryland, the nation, and the world to reach their full potential through its high-quality, liberal-arts-based bachelor's, master's, and doctoral programs. The University provides a nurturing environment distinguished by a culture of success that supports students in completing their course of study. As Maryland's first historically black university, Bowie State inspires and prepares ethical and socially responsible leaders who can think critically, discover knowledge, commit to lifelong learning, value diversity, and function effectively in a highly technical and dynamic global community." https://www.bowiestate.edu/about/vision-goals/mission-vision/ (last visited Sept. 14, 2018); *see also* PTX 8 (MHEC Mission Review Statement, setting all of the institutions' missions as of February 2006).

[18] As of the date of the liability trial, the two HBIs designated "Doctoral Universities" were Morgan and Bowie. (ECF 216-8 (setting forth Carnegie Classifications as of 2010).) UMES subsequently moved up into the Doctoral Universities category and Bowie is now rated in the Master's category. *See* http//carnegieclassifications.iu.edu/lookup. The Carnegie Classification scheme further differentiates among institutions within the basic "doctoral" and "master's" levels. For example, College Park is classified as a doctoral university with the "highest research activity," which one would expect from the State's flagship campus.

There is no basis on which to conclude Maryland maintains the same type of stratified mission-categorization that the Court found suspect in *Fordice*. Each institution's funding, course offerings, and day-to-day operations may well be related to their missions, but these other considerations are, as plaintiffs concede, analytically "distinct" from mission designation. Br. 66. The district court appropriately evaluated them separately in accordance with the different "policies" identified in *Fordice*. 505 U.S. at 733.

C. The District Court Properly Found That the HBIs' Missions Were Set by the Institutions Themselves and Not Imposed on Them by the State.

In their final mission-related complaint, plaintiffs take aim at the district court's finding that the State plays only a "'minor role in setting the mission of each institution.'" Br. 66 (quoting ECF 382 at 26). But, as plaintiffs are forced to concede, Br. 71, Maryland law specifically leaves it to the *institution* to set its own mission. Educ. § 11-302(a) ("The president of each public institution of higher education is responsible for developing a mission statement."); (1/23/12 AM Tr. 26-27 (Howard).) MHEC has the ability to review the institution's mission statement to see whether it "is consistent with the State Plan for Higher Education," Educ. § 11-302(d)(1), but the statement enjoys a presumption of "consistency"; if MHEC does not act within 30 days, the statement is "deemed approved." *Id.* § 11-302(d)(2).

Even if MHEC were to act within 30 days and find that the statement is not consistent with the State Plan, it has no power to rewrite the mission on its own. Instead, MHEC must "negotiate" with the institution's president and governing board, which ultimately are the ones to "amend the statement or prepare a new statement." *Id.* § 11-302(d)(2)(3)(ii). MHEC will "go back to the campuses . . . and try to have some discussion about the mission statements," (1/23/12 AM Tr. 27 (Howard)), and make suggestions about how to improve or add to what an institution proposes, (1/4/12 PM Tr. 3-4 (T. Thompson)), but the evidence supported the district court's factual finding that "the State currently plays an overall minor role in setting the mission of each institution." (ECF 382 at 26.)

By contrast, there is no evidence in the record that MHEC has ever failed to approve an HBI's proposed mission statement. Plaintiffs cite an instance in 1999 when five institutions sought doctoral degree-granting authority and, according to plaintiffs, "all but UMES's was approved." Br. 72. But the record plaintiffs cite shows that MHEC recommended only a seven-month "delay" on UMES's request "until the new State Plan is completed in April, 2000." (PTX 254 at 108.) The request was ultimately approved and UMES now has eight doctoral programs: Physical Therapy; Educational Leadership; Pharmacy; Food Science and Technology; Marine-Estuarine-Environmental Sciences; Pharmaceutical Sciences; Organizational Leadership; and Toxicology. UMES, "Graduate Programs,"

https://www.umes.edu/Grad/Pages/ Graduate-Programs/ (last accessed Sept. 13, 2018). Moreover, even if MHEC had denied UMES's request, a "single example does not demonstrate that the State's mission statement policies and practices are rooted in or a continuation of the mission planning process that limited HBIs during the *de jure* era." (ECF 382 at 26.)

Nor is there any evidence that Maryland's mission-approval process has "disadvantaged" the HBIs more generally, as plaintiffs claim. Br. 72. The one example plaintiffs offer is the 2005 – 2006 expansion of the missions of Towson and UB, which they contend "duplicat[ed]" Morgan's mission. But as the district court noted, Towson identifying itself as the State's "metropolitan" university says nothing about Morgan's status as the State's "urban" university. (ECF 382 at 30.) That one school *expanded* its mission does not mean that the other's was *limited*, particularly when Morgan has "benefitted" from its designation (*id.*) and has enthusiastically embraced its role as the educational engine for Baltimore City (*Id.* at 32 (quoting 1/4/12 AM Tr. 39 (Wilson).); *see also* 1/3/12 PM Tr. 66 (Wilson) (referring to Morgan's "embracing wholeheartedly" a dual, urban mission).

There is likewise no evidence that Maryland defines its HBIs exclusively by their historically racial character, as plaintiffs suggest. Br. 70-71. Maryland is statutorily committed to "[e]nhanc[ing] the historically African American institutions," Educ. § 12-106(a)(1)(iii)5, and in expressing that commitment, the

HBIs are identified *as HBIs*, just as Congress has enacted statutes recognizing the importance of "predominantly black institutions," 20 U.S.C. § 1059e, and "historically black colleges and universities," 20 U.S.C. §§ 1060-1063c, Part B. *See also, e.g.*, 20 U.S.C. § 1067a(b); 20 U.S.C. § 1061(2). But it does not violate the Constitution to recognize the HBIs' unique role. It is "undisputable that these institutions have succeeded in part because of their distinctive histories and traditions," and a state is not constitutionally "*forbidden*" to "maintain its historically black institutions as such." *Fordice*, 505 U.S. at 748-49 (Thomas, J., concurring).

Ultimately, much of plaintiffs' argument about mission-designations resorts to the claim that Maryland today bears a "strong similarity" to Mississippi in 1981 and Alabama in the mid-1990s. Br. 69. But in *Fordice*, a mission-related remedy was appropriate for Mississippi only because the Supreme Court found that, "[w]hen combined with the differential admission practices and unnecessary program duplication, it is likely that the mission designations interfere with student choice." *See* 505 U.S. at 741. Of course, Maryland does not maintain differential admissions policies, as plaintiffs have conceded. Moreover, the district court found from ample evidence that, unlike Mississippi at the time of *Fordice*, "Maryland has maintained a policy," not of limiting missions to perpetuate *de jure* segregation, but "of enhancing HBI mission and programming . . . in an effort to mitigate the effects of *de jure* discrimination." (ECF 382 at 27.)

Nor do the facts in *Knight* support the conclusion that the mission designations in 2018 Maryland are similar to those in mid-1990s Alabama. Alabama limited both of its HBIs to providing no more than a master's level of education, which was "the most restrictive of the mission categories for four-year public universities," according to the Carnegie classification scheme. *Knight II*, 14 F.3d at 1543, 1546; *see also Knight I*, 787 F. Supp. at 1308-09 (discussing Carnegie classification scheme). One Alabama HBI (Alabama A & M University) had only three "fledgling" doctoral programs and the other (Alabama State University) had none. *Knight II*, 14 F.3d at 1542. Even under a new missions policy adopted in 1985, Alabama's HBIs still had "more limited academic roles" than even the flagship university's satellite campuses, *id.* at 1543. The *Knight* plaintiffs argued—and the state effectively conceded—that Alabama's "classification scheme perpetuates vestiges of a dual system of higher education by denying to the state's predominately black schools the ability to offer degree programs beyond the master's level." *Knight I*, 787 F. Supp. at 1310; *see also Knight II*, 14 F.3d at 1544 ("Defendants do not dispute that the current limited missions of the HBIs are traceable to *de jure* segregation.").

Maryland's system of mission-designation bears no resemblance to Alabama's. Three of Maryland's four HBIs (Morgan, Bowie, and UMES) offer doctoral programs, and in numbers that dwarf those in Alabama. *See* https://

www.morgan.edu/academics/academic_programs.html (16 doctoral programs); https://www.umes.edu/Grad/Pages/Graduate-Programs/ (8 programs); https://www.bowiestate.edu/academics-research/the-graduate-school/ (2 programs) (all three last visited Sept. 17, 2018). And, as discussed above, HBIs make up two of the four Maryland institutions in the "Doctoral Universities" and only two of the six within the lower "Master's Colleges & Universities" level. *See* p. 72, above. HBIs and non-HBIs are thus distributed evenly throughout the Carnegie Classification scheme in a way that Alabama's institutions were not.

* * *

The fundamental premise of *Fordice* is that the focus must be on whether a state's current, traceable policies and practices foster or maintain segregation. The district court, in rejecting plaintiffs' mission-related arguments, properly focused on the State's current policies and practices and correctly found that plaintiffs have "identified no traceable policy or practice specifically controlling HBI 'missions' that the State must eliminate." (ECF 382 at 28.) Though the district court lost sight of that basic feature of *Fordice* with respect to program duplication, the court correctly applied the principle in evaluating plaintiffs' other claims.

CONCLUSION

The judgment of the United States District Court for the District of Maryland should be reversed with respect to its rulings on program duplication and affirmed as to all other claims for relief.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

ADAM D. SNYDER
JENNIFER A. DEROSE
Assistant Attorneys General
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6398

Attorneys for Appellants

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 18,701 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.

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.	*	

* * * * * * * * * * * * * * * * * * *

CERTIFICATE OF SERVICE

I certify that on this 18th day of September 2018, the Page Proof Response and Reply Brief of Appellants/Cross-Appellees was filed electronically and served on the following counsel of record for the appellees, all of whom are registered CM/ECF users.

Michael D. Jones, Esquire
Karen N. Walker, Esquire
Devin C. Ringger
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
Email: michael.jones@kirkland.com

Jon Greenbaum, Esquire
Brenda Shum, Esquire
Genevieve Bonadies Torres, Esquire

Lawyers' Committee for Civil Rights Under Law
1401 New York Avenue, N.W., Suite 400
Washington, D.C. 20005
Email: jgreenbaum@lawyerscommittee.org

John C. Brittain, Esquire
2513 Gadsby Place
Alexandria, Virginia 22311
Email: jbrittatty@comcast.net

s/Adam D. Snyder
Adam D. Snyder