IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE COALITION FOR EQUITY AND EXCELLENCE IN MARYLAND HIGHER EDUCATION, INC., et al.,	)	
Plaintiffs,	)	
v.	)	Civil No. 06-2773-CCB
MARYLAND HIGHER EDUCATION COMMISSION, et al.,	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Date: August 13, 2012

TABLE OF CONTENTS

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE COALITION FOR EQUITY AND EXCELLENCE IN MARYLAND HIGHER EDUCATION, INC., et al.,	)	
Plaintiffs,	)	
v.	)	Civil No. 06-2773-CCB
MARYLAND HIGHER EDUCATION COMMISSION, et al.,	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

The plaintiffs' proposed findings of fact and conclusions of law, though voluminous, serve to confirm their failure to present evidence needed to establish either their standing to sue or the threshold element of their claim on the merits. Nowhere in the 477 pages of their proposed findings do the plaintiffs cite any evidence in the record to support the minimum jurisdictional prerequisite, which requires actual injury to the named plaintiffs themselves. Similarly, the plaintiffs' proposed findings fail to cite evidence that would be needed to prove the essential element of their claim under the Constitution and Title VI, which demands proof of "current state policies that are 'traceable to the State's prior *de jure* segregation and that continue[] to foster segregation.'" Doc. 242, Memorandum Opinion on Summary Judgment ("Mem. Op.") at

2 (quoting *United States v. Fordice*, 505 U.S. 717, 729 (1992)). Unable to cite proof of these fundamentals of their case, the plaintiffs instead choose, as they did in their trial presentation, to focus on the allegedly inferior state of Maryland's four public historically black institutions of higher education ("HBIs") relative to other institutions. Even if the plaintiffs were able to prove these allegations, which they cannot, that showing "is not enough" to satisfy the plaintiffs' burden because, as this Court has already ruled, it is not "sufficient for the plaintiffs to show, for example, a present imbalance in resources without identifying a current policy or practice rooted in *de jure* segregation that allegedly causes that imbalance." Mem. Op. at 7.

While the plaintiffs repeatedly refer to various public acknowledgments and proposals recommending enhancement of the HBIs so that they might become "comparable and competitive" with Maryland's other universities, that evidence does nothing to establish the requisite "traceability" or otherwise prove their claim. Nor can the State's alleged failure to achieve higher funding for HBIs be confused with an actual constitutional violation. In their pursuit of that mistaken theory of the case, the plaintiffs continue to rely heavily on the State's voluntary partnership agreement with the Office for Civil Rights of the United States Department of Education ("the Partnership Agreement"). This Court has already ruled, however, that the plaintiffs lack "the right to enforce the [Partnership] Agreement's terms," Doc. 57, Memorandum and Order Re: Contract Claim ("Mem. and Order") at 15, and the Court has further recognized that the Partnership Agreement "is not itself a basis of the lawsuit." Doc. 234, Transcript of May

11, 2011 Hearing at 5. Though the Partnership Agreement expired in December 2005, and a June 19, 2006 Final Report confirmed Maryland's fulfillment of its commitments under the Agreement, Mem. and Order at 7-8, the enhancement of HBIs toward making them "comparable and competitive" remains an important goal that the State voluntarily sets for itself. It is not a constitutional mandate, and it is certainly not a right enforceable by these plaintiffs.

By focusing almost entirely on alleged disparities between HBIs and other Maryland institutions and the fact that HBIs have large minority enrollments, the plaintiffs' proposed findings succumb to fundamental errors. First, they wrongly equate high minority enrollments at HBIs with segregation, even though (a) the undisputed evidence demonstrates that the Maryland higher education system is integrated and open to all students, and (b) the plaintiffs identify no current State policy or practice traceable to *de jure* segregation. Second, by incorrectly treating the alleged (but not proven) uneven allocation of resources between the HBIs and other schools as if it were itself a form of unlawful discrimination, the plaintiffs essentially make the very argument that *Fordice* rejected. *See Fordice*, 505 U.S. at 743 (rejecting plaintiffs' request "to order the upgrading" of Mississippi's HBIs, though recognizing that funding might play a role in a court-ordered remedy *after* plaintiffs first proved ongoing segregative state policies rooted in prior *de jure* segregation, and even then only if and to the extent "an increase in funding is necessary to achieve a full dismantlement" of the traceable policies); *id.* at 749 (Scalia, J., concurring in the judgment in part and dissenting in part) (agreeing with the

Court's conclusion "that the Constitution does not compel Mississippi to remedy funding disparities between its historically black institutions (HBI's) and historically white institutions (HWI's)"). Thus, contrary to the thrust of the plaintiffs' presentation at trial as reiterated in their proposed findings, the Supreme Court has rejected "the claim that the Constitution requires [a state] to correct funding disparities between HBIs" and other schools, "since it is students and not colleges that are guaranteed equal protection of the laws." *Fordice*, 505 U.S. at 759 (Scalia, J.) (citing majority opinion at 505 U.S. at 743; other citations omitted).

Finally, the plaintiffs' findings fail to identify evidence from which the Court could infer that any specific policy or practice traceable to *de jure* segregation "continues to foster segregation." *Fordice*, 505 U.S. at 729. The evidence cited by the plaintiffs does not, and cannot, show that HBIs receive fewer resources than the other schools; or show that specific policies disproportionately impede minority access to the non-HBIs, as Mississippi's test score requirements did in *Fordice*; or show that particular alleged deficiencies at HBIs result from specific segregative policies or practices maintained by the defendants.

It would not be productive or even possible to address in this brief response all of the deficiencies and inaccuracies within the 477 pages of the plaintiffs' proposed findings. Instead, this response will focus on the three most salient reasons why they should be rejected.

First, the plaintiffs' proposed findings effectively confirm that they presented no evidence to satisfy their burden of proving at trial that they have standing to bring their claims, as required by Article III of the Constitution and applicable Supreme Court precedent.

Second, even assuming the plaintiffs have established the necessary standing, their proposed findings demonstrate their failure to prove that the State, in policy or practice, has violated the Equal Protection Clause or Title VI of the Civil Rights Act of 1964. Indeed, the plaintiffs' proposed findings illustrate their failure to satisfy the threshold showing of a current Maryland policy that is traceable to *de jure* segregation.

Third, even if plaintiffs had identified such a traceable policy or practice, there is no evidence of segregative effects on Maryland's system of higher education. In fact, the evidence produced at trial shows an absence of segregation and a level of diversity that compares favorably with education systems in other states.

I. PLAINTIFFS FAIL TO ESTABLISH THEIR STANDING TO PURSUE THEIR CLAIMS.

As explained in the defendants' proposed findings at 14-43, before the Court may address the substance of the plaintiffs' claims, they must first establish standing. The elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case"; "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof"; and once the case proceeds beyond preliminary motions, "those facts (if controverted) must be 'supported adequately by the evidence adduced at trial.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted); *see Bennett v. Spear*, 520 U.S. 154, 167-68 (1997) (same).

The plaintiffs' proposed findings confirm that they failed to present evidence to prove the first element of Article III standing, which demands that "the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized" (*i.e.* "the injury must affect the plaintiff in a personal and individual way") and "(b) 'actual or imminent, not 'conjectural' or hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 and n.1 (1992) (citations omitted). Far from demonstrating the kind of "concrete and particularized" injury that is required by Supreme Court precedent, the plaintiffs' proposed findings state, in conclusory fashion, that "[a]ll members of the Coalition assert that they are impacted by the Defendants' discrimination with respect to higher education." Pl. Prop. Findings at 73 ¶ 1.

The plaintiffs then patently disregard the Supreme Court's admonition that, after the pleading stage, "the plaintiff can no longer rest on such 'mere allegations'" but must produce "evidence" of "specific facts." *Lujan*, 504 U.S. at 561. Rather than comply with this requirement, the plaintiffs seek to support their assertion of standing by citing only to their unverified complaint, or to alleged facts lacking any record citation, or to immaterial facts that fail to show standing under Article III and prudential standing requirements. *See* Pl. Prop. Findings at 73 ¶ 1 - 75 ¶ 10. They do not cite to any trial evidence showing current harm or imminently threatened injury that might justify a request for injunctive relief. Their inability to cite support in the trial record is unsurprising, because they introduced no evidence to demonstrate current or imminent harm to any plaintiff as a result of defendants' alleged failure to eliminate vestiges of *de jure* segregation in Maryland's current policies and practices.

With regard to the Coalition's standing, the plaintiffs simply refer to allegations from their unverified complaint. *See* Pl. Prop. Findings at 73 ¶ 1 (citing Fourth Am. Compl. at pp. 3-5). None of those allegations was *ever* proved at trial; the plaintiffs did not even present any evidence to support their allegation that the Coalition includes current HBI students. Indeed, the plaintiffs have not identified a single member of the Coalition who currently attends an HBI.

As to the individual plaintiffs, the plaintiffs' proposed findings cite no evidence in the trial record to show that any of them faces the only kind of actual or imminent injury that would be relevant to their claims, which is some "concrete and particularized" harm

to an individual student's ability to obtain an education at the public institution of her choice. For plaintiff Muriel Thompson, the plaintiffs admit that, according to their own evidence, Ms. Thompson was due to have graduated in May 2012. *See* Pl. Prop. Findings at 74 ¶ 3. Their remaining proposed findings pertaining to her standing describe Ms. Thompson's first-hand knowledge of HBIs in Maryland, but never discuss any particular injury that she claims to be experiencing. *See id.*

Next, the plaintiffs discuss David Burton, whom they concede is a Morgan alumnus who last attended an HBI in 1967. Pl. Prop. Findings at 74-75 ¶ 4. The plaintiffs do not, and cannot, assert that he is being injured by any alleged constitutional violation.

Plaintiff Chris Heidelberg received his Ph.D. from Morgan in 2008, well before the trial in this case, and thus is an alumnus and not a current student. Pl. Prop. Findings at 75 ¶ 5. Here, too, the plaintiffs do not, and cannot, assert that he is being injured by any alleged constitutional violation. The plaintiffs later cite his testimony that he chose to teach at Loyola and not at a Maryland HBI because of an alleged lack of comparable state-of-the art facilities at the HBIs in his academic area (entertainment and communications), *see id.* at 204, ¶ 350, but they do not claim that he has been injured by this supposed disparity.

The plaintiffs' evidence regarding plaintiff Anthony Robinson is similar to that of David Burton. He is an alumnus, having graduated from Morgan in 1970. Pl. Prop.

Findings at 75-76, ¶ 6. As with Mr. Burton, the plaintiffs do not assert any current or threatened injury to Mr. Robinson.

Finally, the plaintiffs presented *no* evidence at trial with respect to three of the remaining plaintiffs (Kelly Thompson, Damien Montgomery, and Rashaan Simon) and virtually none for the last plaintiff (Jomari Smith). *See* Pl. Prop. Findings at 76-77, ¶¶ 7-10. Even according to the plaintiffs' largely unsupported allegations, two of these plaintiffs (Thompson and Simon) are alumni (*id.* at ¶¶ 7, 9), one (Montgomery) apparently is a former student (*see id.* at ¶ 8), and one (Smith) never attended an HBI and there is no indication that he plans to attend an HBI (*id.* at ¶ 10).

As shown by their own proposed findings, the plaintiffs' proof is not even close to the type and specificity of evidence needed to support standing under Article III and under prudential standing requirements. Not once do the plaintiffs' proposed findings cite evidence that any of the plaintiffs are personally experiencing or suffering from the harm that the plaintiffs allegedly seek to remedy with this lawsuit, which is Maryland's alleged failure to desegregate its HBIs. While standing is indispensable in every case, the need to ensure adequate proof of standing "assumes a special importance when," as in this case, "a constitutional question is presented." *Bender v. Williamsport Area Sch. Bd*., 475 U.S. 534, 541-42 (1986). "In such cases [the Supreme Court] ha[s] strictly adhered to the standing requirements. . . ." *Id.* at 542. Under this strict regime, the plaintiffs are not entitled to fill the gaps in their evidence by relying on assumptions. *ACLU-NJ v. Township of Wall*, 246 F.3d 258, 266 (3d Cir. 2001) (Alito, J.) ("Mere assumption would

not satisfy the plaintiffs' burden to prove an element of their cause of action at this stage of the litigation and it cannot satisfy their burden to prove standing.").

For these reasons, the plaintiffs have failed to satisfy their burden of proving the standing that is essential to the Court's subject matter jurisdiction.

II. PLAINTIFFS HAVE NOT PROVED THAT MARYLAND VIOLATES THE UNITED STATES CONSTITUTION.

A. Plaintiffs' Legal Theory Is Wrong.

To establish the threshold element of a claim under *Fordice*, the plaintiffs had the burden of proving at trial that Maryland currently maintains a segregative policy that is "traceable to the State's prior *de jure* segregation." 505 U.S. at 729. The plaintiffs' proposed findings confirm what was manifest throughout the trial: the plaintiffs cannot satisfy this threshold requirement and have diverted their energies toward a presentation that is not probative of that element.

The legal theory pursued at trial and reflected in the plaintiffs' proposed findings cannot be reconciled with the Supreme Court's holding in *Fordice*, which rejects the very propositions that the plaintiffs advocate. That is, the plaintiffs claim that Maryland's policies are unconstitutional because they allegedly fail to make up for past underfunding of the HBIs; that the alleged failure to make up for past underfunding results in the continuing existence of disparities among the schools; and that this alleged disparity results in continued racial identifiability of HBIs. *Fordice* itself confirms that the plaintiffs are wrong as a matter of law. The Supreme Court in *Fordice* explicitly declined to interpret the Constitution and Title VI of the Civil Rights Act to require equal facilities

among HBIs and traditionally white institutions. *See* 505 U.S. at 743 ("If we understand private petitioners to press us to order the upgrading of Jackson State, Alcorn State, and Mississippi Valley State *solely* so that they may be publicly financed, exclusively black enclaves by private choice, we reject that request.") (emphasis in original); *see also id.* (rejecting as unacceptable a system of improved HBIs that are "separate, but 'more equal'"). Similarly, *Fordice* rejects the notion that the Constitution is violated by continuing to have HBIs that are racially identifiable as predominantly African American schools. *See id.* ("That an institution is predominantly white or black does not in itself make out a constitutional violation."). Instead, the question that matters – and the one the plaintiffs have evaded – is whether Maryland "perpetuates policies and practices traceable to its prior system" of *de jure* segregation "that continue to have segregative effects." *Id.* at 731.

Instead of proving that the allegedly unsatisfactory conditions at HBIs result from current policies traceable to *de jure* segregation, the plaintiffs sidestep the required causal analysis. Part VII of their proposed findings, which purports to address traceability, focuses entirely on the State's alleged failure to remedy alleged "disadvantages" faced by the HBIs. *See* Pl. Prop. Findings at 342 ¶ 691 - 410 ¶ 935. But these claimed disparities stem from an alleged failure to erase the inequities of *de jure* segregation, which is not to be equated with a current *policy* that is traceable to the former system. *See Ayers v. Fordice*, 111 F.3d 1183, 1223 (5th Cir. 1997) (The correct focus for the district court is "the traceability of policies and practices that result in funding disparities rather than the

traceability of the disparities themselves."). Rather than show that HBIs currently receive unequal funding, which the trial record thoroughly disproves, *see* Def. Prop. Findings at 54-78, the plaintiffs insist that HBIs should receive even more greatly *enhanced* funding, over and above what is provided to Maryland's other public universities. The plaintiffs claim that such disproportionate overspending on HBIs is necessary to compensate for relatively lower levels of HBI funding in a previous era of Maryland's history. *See* Pl. Prop. Findings at 454 ¶ 123 ("While the parties may have presented conflicting evidence as to whether year-to-year allocations were equitable to the HBIs, the record is clear that such funding was not sufficient to 'overcome the effect of past discriminatory underfunding' of the HBIs.").

This Court has already rejected similar arguments made by the plaintiffs with respect to capital funding levels. *See* Doc. 212, Plaintiffs' Opposition to Motion for Summary Judgment at 40 (arguing "that substantial additional resources must be invested in HBIs to overcome competitive disadvantages caused by prior discriminatory treatment: the lack of modern 'state of the art' science and technology labs, the aging physical plants, and lack of consistent funding for maintenance" (citation omitted)). In granting summary judgment for the defendants on the plaintiffs' capital funding claims, the Court held that, notwithstanding the historic and allegedly ongoing disparity in resources allocated to HBIs, the plaintiffs' failure to "identify a current 'traceable' policy or practice related to capital funding" meant that "there is not sufficient evidence to go forward on a claim. . . ." Mem. Op. at 9.

In effect, the plaintiffs are demanding a remedy (greater funding for HBIs) without first proving the elements of a constitutional violation, an approach that has been soundly rejected by federal courts. As the Fifth Circuit stated in *Ayers* following remand after *Fordice*, a mere showing of discriminatory effects "does not establish a constitutional violation," because "*Fordice* rejects the notion that the State must remedy all present discriminatory effects without regard to whether such consequences flow from policies rooted in the prior system." *Ayers*, 111 F.3d at 1226 (citations omitted). Similarly, in its summary judgment ruling, this Court instructed the plaintiffs that they could not prevail at trial on their remaining claims unless they could present proof linking any current inequity with a current policy or practice emanating from past *de jure* segregation: "[I]t is not enough for plaintiffs to focus on present discriminatory effects without demonstrating that such consequences 'flow from policies rooted in the prior system.'" Doc. 242, Mem. Op. at 7 (quoting *Fordice*, 505 U.S. at 730 n.4). As the Court further explained, "neither is it sufficient for the plaintiffs to show, for example, a present imbalance in resources without identifying a current policy or practice rooted in *de jure* segregation that allegedly causes that imbalance." Mem. Op. at 7 (citing *Ayers*, 111 F.3d at 1223).

The plaintiffs cannot satisfy the test that this Court so clearly articulated, because the evidence shows that Maryland's HBIs receive funding from the State that is equal to or greater than that provided to the State's other universities, and the plaintiffs are unable to show that Maryland's current method of appropriating funds is traceable to the prior *de*

jure system. Unable to make the required showing, the plaintiffs rely, throughout much of their proposed findings, upon the Partnership Agreement. *See, e.g.*, Pl. Prop. Findings at 291 ¶ 581 ("However, Maryland did not abide by Commitments 8 and 9 of the Partnership Agreement."). In doing so, the plaintiffs ignore this Court's express ruling that the Partnership Agreement does not provide them with enforceable rights. Doc. 57, Mem. and Order at 15; Doc. 234, Tr. 5. Thus, apart from their view that they are entitled to enhanced funding due to past discrimination, the plaintiffs fail to make any showing that Maryland's current funding levels for the HBIs violate the Constitution.

The plaintiffs fare no better with respect to the two other policies they cite as the basis for their claim of a constitutional violation, which are (1) program duplication and the lack of "unique, high demand" programs at the HBIs; and (2) the alleged designation of limited roles and missions to its HBIs. *See* Pl. Prop. Findings at 417 ¶ 10. Again, they are confusing potentially available remedies with still unproven constitutional violations. For example, when the plaintiffs state that Maryland has a policy and practice of duplicating programs, what they really mean is that Maryland has allegedly failed to locate "unique, high-demand programs" exclusively at the HBIs, to the relative disadvantage of other Maryland institutions and the students who attend them. Again, this complaint that HBIs have not been given the most desirable programs does not amount to a showing that Maryland is violating the Constitution due to a current policy or practice traceable to *de jure* segregation. Instead, it is merely a complaint that Maryland has not instituted new policies that the plaintiffs would prefer as a means to address

whatever racial imbalance might still exist. "*Fordice* rejects the notion" that such remedies are required, however, absent proof of current "policies rooted in the prior [*de jure*] system." *Ayers*, 111 F.3d at 1226.

Similarly, the plaintiffs have not shown that Maryland has a current policy or practice with respect to mission assignment rooted in *de jure* segregation. Instead, they state that Maryland once limited the institutional missions of the HBIs and that "[c]onsistent with their limited role and mission, the state has failed to assign as many new graduate programs at the HBIs as it did at the TWIs, impeding their ability to become comparable or competitive with the TWIs."[2] Pl. Prop. Findings at 405 ¶ 921. Again, instead of identifying a traceable policy, the plaintiffs cite the need "[t]o recognize and correct historical and current inequities." *Id.* In *Fordice*, by contrast, a mission-related remedy was deemed to be available 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 Fordice*, 505 U.S. at 719. Indeed, the Supreme Court made clear that differences in program missions were acceptable absent some discriminatory purpose. *See id.* at 741 ("We do not suggest that absent discriminatory purpose the assignment of different missions to various institutions in a State's higher education system would raise an equal

[2] Although various panels have discussed the HBIs' aspiration to become "comparable and competitive," *none* has determined that Maryland currently has a policy or practice of treating HBIs inequitably with respect to funding, of unnecessarily duplicating programs offered at HBIs, or of otherwise undermining their success.

protection issue where one or more of the institutions become or remain predominantly black or white."). Such purposeful discrimination is not an issue in this case. To the extent a claim of intentional discrimination was previously asserted by the plaintiffs, this Court has already rejected it. Doc. 242, Mem. Op. at 9.

In sum, the plaintiffs completely fail to identify any *policy* or *practice* of program duplication, inferior programs, or limited mission that is traceable to the era of *de jure* segregation. Instead, they seek an increase in funding for the HBIs by arguing that inadequate funding dissuades white students from attending HBIs, and thereby contributes to the HBIs' predominantly African American demographics. This evidence of allegedly inadequate infrastructure and insufficient resources at the HBIs does not establish a constitutional violation.[4] *See, e.g.*, *Ayers*, 111 F.3d at 1224 (refusing to provide the Mississippi HBIs with "general funds to enhance [their] facilities" because

[4] For example, in *Ayers*, the Fifth Circuit found that Mississippi's policy of awarding scholarships for out-of-state children of alumni to pay in-state tuition was constitutional despite its segregative effect because the policy was not traceable to the *de jure* era:

> We agree that this practice, which the district court found to result in the disproportionate award of such scholarships to white students, has present segregative effects. We are not persuaded, however, that traceability has been established on this record. Plaintiffs' argument rests upon the exclusion of blacks from the HWIs during the de jure period. This fact, without more, does not establish the traceability of the alumni element of the present nonresident fee waivers. In effect, plaintiffs seek relief for "present discriminatory effects without addressing whether such consequences flow from policies rooted in the prior system." *Fordice*, 505 U.S. at 730 n.4. The Supreme Court has rejected this position. *Id.*

Ayers 111 F.3d at 1209.

there was "no pattern of inequity in funding *in recent years for the HBIs as a group*") (emphasis added).

Although Maryland is committed to making its HBIs "comparable and competitive," and the evidence demonstrates the considerable expenditure of public funds toward that end, the Supreme Court has rejected the notion that the Constitution requires states to have equivalent resources at each of their public institutions. *See Fordice*, 505 U.S. at 743; *id.* at 749 (Scalia, J.); *see also San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 23 (1973).

In addition to the faulty premise of their legal theory, the plaintiffs' arguments also fail on the facts as they were established at trial. As the plaintiffs' proposed findings effectively demonstrate, the plaintiffs were unable to prove any of the three allegedly segregative policies or practices they identified prior to trial.

B. Plaintiffs Have Presented No Evidence That Maryland Has A Current Policy Or Practice Of Underfunding Its HBIs.

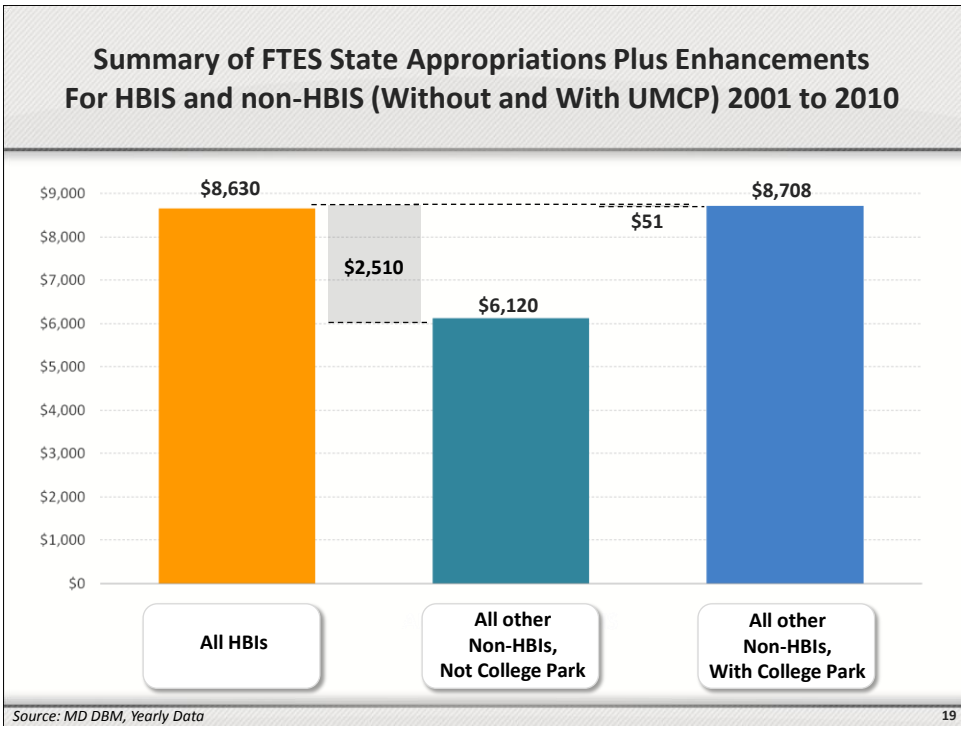
As to the first allegedly segregative policy pertaining to operational funding, the plaintiffs offer only two criticisms of the data presented by defendants' expert, Dr. Allan Lichtman, which show that Maryland's HBIs and its non-HBIs receive roughly equal funding. First, the plaintiffs contend that such a comparison is misleading, because "[f]or much of their histories, Maryland's HBIs have received higher funding per FTE ["Full Time Equivalent" student] than the TWIs." Pl. Prop. Findings at 387 (Subsection II. 2). However, that historical fact does not prevent an FTE-based analysis from providing the most accurate way to gauge funding equity today. Indeed, even the plaintiffs' own

expert, Dr. Robert Toutkoushian, measures funding using FTE student figures. *See* Toutkoushian Trial Tr. vol. 1, 8 and *passim* (Feb. 8, 2012). In an earlier era, use of FTE student funding comparisons might have been misleading if used to suggest that segregated black schools received substantially greater funding than segregated white schools, because the FTE student enrollments at that time were exponentially smaller at the black schools than at the white schools to which they were compared. That former size disparity does not hold true today, however. In fact, for Fiscal Year 2010, a comparison of the similarly sized Bowie, an HBI with a student population of 4,496, and Frostburg, a non-HBI with a student population of 4,434, shows that Bowie received slightly greater per FTE funding from the State ($7,669 per FTE for Bowie and $7,075 per FTE for Frostburg). DX 405.28; DX 146 at 7.

Second, the plaintiffs cite only one reason for disputing Dr. Lichtman's conclusion that the HBIs received state funding equal to or above the funding received by non-HBIs during the last ten years. That one criticism, which questions his exclusion of the flagship university UMCP, was fully refuted by Dr. Lichtman's showing that the exclusion of the much larger UMCP is supported by applicable principles of economic analysis, for the reasons explained at length by Dr. Lichtman. *See* Def. Prop. Findings at 67-71 (recounting the reasons for excluding UMCP from the funding comparison).[5] The

[5] The plaintiffs try to cast aspersions on Dr. Lichtman's methodology and conclusions by citing his failure to "identify any statistical analysis, such as a standard deviation analysis, that he used in determining that College Park is a statistical outlier." Pl. Prop. Findings at 390 ¶ 863. In fact, as Dr. Lichtman explained in his testimony, when the differences are billions of dollars and many thousands of students, the logic of College

plaintiffs do not offer any meaningful analysis to refute Dr. Lichtman's reasoning. Dr. Lichtman also provided the following chart comparing average State per-FTE student funding for Maryland's HBIs versus average State per-FTE student funding of non-HBIs during the years 2001 to 2010, with and without UMCP included in the non-HBI group:



Park as an outlier is unassailable. *See generally, e.g.*, Lichtman Trial Tr. vol. 2, 18-30, 36, 39 (Feb. 1, 2012). The rebuttal testimony of the plaintiffs' expert, Dr. Toutkoushian, presented no evidence of standard errors or any other information to show that massive differences such as the ones described by Dr. Lichtman could conceivably be the result of chance, which is the only purpose of a standard deviation analysis. *See* Toutkoushian Trial Tr. vol. 1, 3-67 (Feb. 8, 2012).

As demonstrated by Dr. Lichtman's figures, which the plaintiffs do not dispute, if UMCP is left out of the calculus, Maryland's HBIs, on average, received an excess of $2,500 more per FTE student when compared to Maryland's non-HBIs during the years 2000 to 2010; if UMCP is included in the non-HBI comparison group, the figures show that Maryland funded HBIs and non-HBIs at roughly the same level during that same, recent ten-year period. The funding data for 2011 (the most recent available) tilt even more in favor of the HBIs. During this most recent period, State funding to HBIs, on average, was more than $3000 greater per FTE student than State funding to non-HBIs without UMCP in the comparison group, and more than $500 greater per FTE student than the average received by the non-HBI group including UMCP. *See* DX 405 at 17.

Unable to refute Dr. Lichtman's data and analysis, the plaintiffs' proposed findings must resort to some creative phrasing to generate even the appearance that HBIs are underfunded. For example, in one such carefully crafted sentence they state: "When one accounts for enrollment shares, tuition and fee revenues, and/or the remediation component of the dual mission, Maryland's HBIs have experienced substantial cumulative revenue deficiencies in their state appropriations and enhancements, unrestricted revenues, and total revenues for both 1984-2010 and 1990-2010." Pl. Prop. Findings at 383 ¶ 827. That sentence is instructive in two ways: First, the plaintiffs avoid any claim that a cumulative deficiency in State appropriations exists for the years 2000 to 2010 – *i.e.*, during the most recent decade for which funding information has been published. As shown by the defendants' uncontradicted evidence, no such

deficiency of funding occurred during that period; instead, the HBIs received an excess of nearly $2,500 per FTE student compared to other Maryland institutions, excluding UMCP. *See* Def. Prop. Findings at 58 ¶ 139; 65 ¶ 158; 72 n.28; 74 ¶ 184, and evidence cited therein.

Second, the plaintiffs qualify their assertion in significant ways that render it incapable of establishing the showing they must make. The plaintiffs do not claim that HBIs experienced "deficiencies in their state appropriations and enhancements [and] revenues" as such. Instead, the plaintiffs allege that deficiencies emerge only "when one accounts for" three other factors (enrollment share, tuition and fee revenues, and the costs of providing remedial education). Not only does the Constitution not require states to "account for" those factors, the plaintiffs make no attempt to quantify any of them.[7]

The plaintiffs do not dispute the approximate equality of funding per FTE student awarded by the State to its HBIs and non-HBIs during the last ten years or so. Instead, the plaintiffs insist that funding the institutions at roughly the same amounts is somehow inequitable. The plaintiffs go even further to suggest that even generously increasing the funding of HBIs "over an extended period" of years, to the relative detriment of Maryland's other institutions, "may still not satisfy the state's obligation." Pl. Prop. Findings at 449 ¶ 109. To support this claim, the plaintiffs argue that the HBIs are

[7] Although Dr. Toutkoushian apparently relies on the Bohanan Funding Commission's Report that remedial education would cost an additional $1400 per student, there is no independent analysis behind Dr. Toutkoushian's estimate, and he did not recall any analysis done by the Bohanan Funding Commission in arriving at that $1400 number. *See* DX 405.40 (quoting Toutkoushian Trial Tr. vol. 2, 127-28 (Jan.17, 2012)).

entitled to a *greater* share of state appropriations as compared to the non-HBIs because of their "dual mission" and the effects of "economies of scale."[8]

The plaintiffs argue that equal FTE student funding is not fair to the HBIs because of what they themselves deem to be their dual mission, which, in the plaintiffs' view, tends to make operating HBIs more expensive than operating other institutions. But many factors can influence whether a school needs to spend more or less money to operate. Some of those factors may depend on the school's own programmatic and fiscal choices, and other factors may involve geographic, social and economic variables that cannot possibly be attributed to the former *de jure* system. For example, is the school a research institution with a need for expensive laboratory equipment? Does it sponsor a football team? Does it offer many small courses with a low student-teacher ratio or does it primarily provide large lecture courses, which are less expensive to operate?

The State recognizes that some schools have greater financial needs than others, and its funding approach takes into account that variation in relative need.[9] Still, nothing in the Constitution or applicable precedent permits a finding of constitutional violation to

[8] The enhanced funding that the plaintiffs claim the HBIs should receive every year on account of their "dual missions" and lack of "economies of scale" would be *in addition to* the enhanced funding to which the plaintiffs claim the HBIs are entitled due to past underfunding.

[9] The plaintiffs concede that Maryland takes into account demographic factors in making funding decisions, and they quote the defendants' witness Joseph Vivona as follows: "[w]e look at institutions, the capacity for tuition, and then we consider . . . the amount of general funds we would use to support institutions that will not be able to generate very much in the way of tuitions, given the demographic profile of a particular population[]." Vivona Trial Tr. vol. 1, 12-13, *quoted in* Pl. Prop. Findings at 378 ¶ 806.

rest upon a showing that one institution faces greater challenges than another due to a larger percentage of underprepared students, or that the available funding does not adequately address the educational challenges posed by the regrettable social phenomenon of underprepared students.

In fact, that was precisely the claim made unsuccessfully by the plaintiffs in *Fordice*. They argued that the greater costs attributable to remedial education entitled Mississippi's HBIs to increased funding. That position was ultimately rejected on the ground that the plaintiffs were not entitled to relief because they had not "identified any traceable policy related to the funding of remedial education." *Ayers*, 111 F.3d at 1224.[10] The same is true here.

Similarly, the alleged failure to account for economies of scale is not even arguably a current policy traceable to *de jure* segregation. Even if economies of scale could somehow be deemed relevant, however, it would be difficult to draw useful conclusions from the supposed presence or absence of such economies. Irrespective of their history or current demographics, not all schools would benefit from economies of scale to the same degree, and not every school would opt to seek those benefits at the

[10] Like the plaintiffs here, the *Fordice* plaintiffs argued that "the funding formula should be adjusted to take into account the proportion of students at a university who are in need of financial aid." *Ayers*, 111 F.3d at 1224. The Fifth Circuit rejected that position: "Again, however, plaintiffs have identified no traceable policy concerning the adequacy of scholarship and fellowship funds provided to the HBIs. Any potential segregative effects of the failure of the formula to take financial need into account is a function of the socioeconomic status of black applicants, not a traceable policy of the de jure system." *Id*. at 1224.

expense of educational advantages associated with a smaller, more manageable student population. While there may be some marginal cost advantage to enrolling 10,000 students as compared to 2,000 students, there is nothing to suggest that the HBIs are disadvantaged any more than other institutions of similar size.

In an effort to show some link to past policies, the plaintiffs allege that Maryland awarded increased "capital appropriations" to certain institutions of similar size during the 1964-1974 time period and that those institutions grew in enrollment size as a result ("[i]t made a difference in student enrollment"), while the HBIs shrank in size and lost student population. *See* Pl. Prop. Findings at 142 ¶ 179.[11] Even if the plaintiffs' numbers were accurate, it would still be impossible to determine from the data they present whether additional revenue spurred growth, as they allege, or whether it was the other way around: enrollment growth required the State to provide some schools with more money. The latter is a more likely scenario because the term "appropriations" – although used by the plaintiffs to mean "capital funding" – is generally used in the parlance of Maryland higher education budgeting to mean "operating expenses." *See* Treasure Trial Tr. vol. 2, 33 and 48 and *passim* (Jan. 30, 2012); Newman Trial Tr. vol. 2,

[11] The "evidence" that the plaintiffs cite in support of that argument does not show anything comparable to what the plaintiffs claim. The plaintiffs show a chart at pp. 154-55 of their proposed findings and purport to support it with PX 735, but PX 735 is another chart created by the plaintiffs, this one citing PX 22, an 81-page report, as a source. The only data in PX 22 that supports the plaintiffs' chart and contentions in ¶¶ 179 and 180 of their proposed findings is found in the 1974 FTE column. PX 22 contains no funding data and no 1964 FTE funding figures. Accordingly, there is no way to assess the accuracy of the data referenced in the plaintiffs' proposed findings.

74-76, 89 and *passim* (Jan. 31, 2012). At any rate, the only information that can be discerned from the chart that appears in the plaintiffs' proposed findings at 154-55 is funding per FTE student during the period 1964 to 1974. The plaintiffs' data show that UMES, Bowie, Coppin and Morgan ranked first, third, fourth and fifth, respectively, among Maryland public universities in funds per FTE student during that 10-year period.

However one wishes to construe the cited data, it is of no consequence to the plaintiffs' constitutional claims whether, in fact, the State gave the non-HBIs more funds during the period 1964 to 1974 and thereby fueled their growth. The only relevant inquiry must address Maryland's *current* policies and practices, which cannot be evaluated using 38-year-old financial data. The evidence in the record does not support any finding that the Constitution is violated by the State's current higher education funding policies and practices.

C. Plaintiffs Have Presented No Evidence That Maryland Has A Current Policy Or Practice Of Unnecessarily Duplicating Academic Programs.

As to the second set of policies targeted by the plaintiffs, they are unable to show that Maryland has a policy or practice of program duplication that is traceable to *de jure* segregation. In fact, even the plaintiffs' own evidence confirms that Maryland has for many years had procedures designed to guard against unnecessary program duplication. For example, the plaintiffs point out that Maryland hired their expert, Dr. Clifton Conrad, in 1995 to opine "whether two proposed academic programs at TWIs would unnecessarily duplicate programs at HBIs within the State." Pl. Prop. Findings at 311 ¶

595. When Dr. Conrad concluded that the proposed programs would cause unnecessary duplication, Maryland "did not implement those programs." *Id.* This acknowledged fact from 17 years ago attests to Maryland's longstanding policy and practice of *avoiding* unnecessary program duplication.

Despite their own acknowledgement of Maryland's well-established commitment to the prevention of unnecessary duplication, the plaintiffs nonetheless persist in maintaining that Dr. Conrad's analysis in 2012 reveals duplication between the academic programs offered at HBIs and those offered at geographically proximate non-HBIs. The plaintiffs' reliance on Dr. Conrad's opinion is misplaced, however, because it suffers from a significant and all too obvious flaw. According to Dr. Conrad's analysis, program duplication is ubiquitous and affects schools of all types, irrespective of their demographics or historical background. That is, academic programs are just as often "duplicated" between one non-HBI and another non-HBI. *See* PX 71 at 77-82, 93-110. Accordingly, if duplication exists, it is not the result of a policy or practice traceable to *de jure* segregation but must instead be attributable to something else. Thus, the plaintiffs fail to identify *any* evidence of program duplication in violation of federal law.[12]

[12] Moreover, as noted in the defendants' proposed findings (¶¶ 122-24), because the plaintiffs acknowledge that the TWIs are desegregated, and that there are no *white* racially identifiable institutions, it makes no sense to talk about program duplication in the first place.

D. Plaintiffs Have Presented No Evidence That Maryland Has A Current Policy Or Practice Of Discriminating Against The HBIs By Limiting Their Missions.

Finally, the plaintiffs also incorrectly accuse the State of limiting the missions of the HBIs and, therefore, inhibiting their growth and funding.[13] The record contains no evidence to support their claim that Maryland defines its HBIs exclusively by their historically racial character and thereby denies them a greater role in the State's system of higher education. The purported "evidence" that the plaintiffs cite in support of their claim simply does not support it. For example, the plaintiffs charge MHEC with stunting the development of UMES and characterize MHEC's September 1999 action recommending a delay in the approval of UMES' request for five to seven new doctoral programs as a "denial" of the request. *See* Pl. Prop. Findings at 262 ¶ 488 (citing PX 254 at 108-09). Contrary to that characterization, the text cited by the plaintiffs in fact states that "[t]he Commission staff recommend[ed] . . . a delay on approval of expansion of Ph.D. programs until the new State Plan [was] completed in April, 2000." PX 254 at 109. Obviously, delaying a decision on UMES' request for seven months is not the same as denying it. Moreover, undeniable historical facts belie the plaintiffs' suggestion that UMES has been deterred from developing programs. The trial record reveals that UMES has developed seven doctoral programs since 1999: Food Science and Technology; Marine-Estuarine-Environmental Science; Toxicology; Educational

[13] Again, even if it were true that the State's past policies are responsible for the allegedly static size of the HBIs, the plaintiffs would have proved nothing except that the State has allegedly failed to make the HBIs "comparable and competitive" – not that it continues to follow a policy or practice rooted in *de jure* segregation.

Leadership; Organizational Leadership; Pharmacy; and Physical Therapy. DX 067 (MHEC Academic Program Data Spreadsheet).

Similarly, citing 30-year-old testimony, the plaintiffs complain that the State has "hampered" Morgan's "ability to develop programs" by insisting "that new proposed programs be 'urban oriented.'" Pl. Prop. Findings at 14, ¶ 211. Morgan has, in fact, made its own deliberate choice to *embrace* an urban mission. *See* Wilson Trial Tr. vol. 2, 66 (Jan. 3, 2012) (referring to Morgan's "embracing wholeheartedly" a dual, urban mission); *see also id.* at 39 (Jan. 4, 2012) (responding to counsel's question whether President Wilson was aware that the State had given Morgan the option of rejecting an urban mission by asking rhetorically "why would our university want to move away from addressing critical problems in the City of Baltimore that stand in the way of the State's competitiveness?").

There is no evidence that the State has "imposed" a mission on any institution. *See* Howard Trial Tr. vol. 1, 27 (Jan. 23, 2012). Although the plaintiffs cite a list of program opportunities that have allegedly been denied to Morgan due to its "urban mission," the record confirms that Morgan has in fact been able to develop a significant number of those same programs. For example, Morgan now has undergraduate programs in computer science and information systems and offers master's programs in 35 disciplines, including, for example, engineering, electrical engineering, and construction management, and doctoral programs in 15 disciplines that include engineering and bio-environmental sciences, among others. *See* DX 069.

As these facts confirm, the evidence falls far short of proving a constitutional violation.

III. MARYLAND'S HIGHER EDUCATION SYSTEM DOES NOT SUFFER FROM SEGREGATIVE EFFECTS.

As shown above, the plaintiffs did not identify a single policy or practice rooted in *de jure* segregation currently in effect in Maryland. If they had, it would be up to the defendants to show that such policy or practice does not currently have segregative effects. The genesis of any claim based on a state's failure to dismantle structural segregation, however, is to identify the current segregative impact of that alleged failure. The plaintiffs cannot do so. In fact, the evidence adduced at trial shows an absence of segregation and a level of diversity that meets or exceeds that of comparable education systems in other states.

The plaintiffs concede that the State's non-HBIs are desegregated. *See* Pl. Prop. Findings at 417 ¶ 13. As shown in the defendants' proposed findings, Maryland's HBIs are also desegregated, because their enrollment of "other race" students exceeds 10% of the student population. According to the Maryland Higher Education Commission Data Books for the years 2009 through 2011 (PX 144, 177, and 755), the percentages of other-race enrollment by headcount at each of Maryland's HBIs for the years 2007 through 2009 ranged from 9.3% to 23.2%. *See* Def. Prop. Findings at 89-90 ¶ 52. Moreover, for the academic year 2009-10, Maryland's HBIs averaged other-race enrollment of 13.1%. DX 146 at 10. Morgan's other-race enrollment for 2010-11 was 14.6% (Wilson Trial Tr. vol. 1, 56 (Jan. 3, 2012)), and its other-race enrollment for the 2011-12 school year was 15%. *Id.*

The plaintiffs do not dispute these numbers. Instead, they choose to be selective in their use of the numbers: the plaintiffs count only "white" enrollment at the HBIs, instead of "other race" enrollment (which includes white enrollment), and from that bit of intentional undercounting, they conclude that the HBIs are segregated. The plaintiffs are unable to cite any support for their position in legal authority or in the academic literature.

Contrary to the theory that the plaintiffs have pursued, they cannot prove that Maryland's system of higher education is segregated merely by citing the percentage of white students at HBIs. At most, the demographics at Maryland's HBIs show racial imbalance, which Supreme Court precedent deems wholly different from racial segregation. The Supreme Court has emphasized that "the Constitution is not violated by racial imbalance, without more." *Parents Involved in Community Schools v. Seattle Sch. Dist.*, 551 U.S. 701, 721 (2007). For that reason, it is important to understand the critical difference between segregation, which is unlawful, and racial imbalance, which is not. Racial segregation is "the deliberate operation of a school system to carry out a governmental policy to separate pupils in schools solely on the basis of their race," whereas "[r]acial imbalance is the failure of . . . individual schools to match or approximate the demographic makeup of the student population at large." *Id.* at 749, 751 (Thomas, J., concurring). "Although presently observed racial imbalance *might* result from past *de jure* segregation, racial imbalance can also result from any number of innocent private decisions. . . ." *Id.* at 750 (emphasis added). Therefore, the HBIs' predominantly African American student population cannot, in itself, be equated with

evidence of segregative effects, because "racial imbalance without intentional state action to separate the races does not amount to segregation." *Id.*[15]

The plaintiffs repeatedly cite what they claim are "admissions" by the State that it has failed to dismantle the formerly segregated system of higher education. Maryland has made no such "admission." What Maryland has acknowledged is its goal to enhance its HBIs – an undertaking it has accepted willingly and not because it is compelled to do so by any requirement of federal law. For example, although the plaintiffs rely upon the 2000 Partnership Agreement as alleged proof that the goal of making the HBIs "comparable and competitive" is relevant to the legal standard articulated in *Fordice*, and that MHEC viewed the Agreement as defining the State's constitutional obligations (*see* Pl. Prop. Findings at 429, ¶ 51), the plaintiffs fail to find anything in the Agreement that actually identifies any segregated conditions or effects. Indeed, because they can find no support for their position in the Agreement itself, the plaintiffs quote John Oliver's interpretation of it. *See, e.g.*, Pl. Prop. Findings at 225 ¶ 412. This Court has already rejected the plaintiffs' previous attempts to substitute Mr. Oliver's "subjective point of view" for "the terms of the

[15] This same principle applies to remedies. "[A] school cannot 'remedy' racial imbalance in the same way that it can remedy racial segregation. Remediation of past *de jure* segregation is a one-time process involving the redress of a discrete legal injury inflicted by an identified entity. At some point, the discrete injury will be remedied." *Id.* at 756. To hold otherwise would be to keep the federal courts in the business of running school districts in perpetuity. *Id.* at 756-57 ("Unlike de jure segregation, there is no ultimate remedy for racial imbalance. Individual schools will fall in and out of balance in the natural course, and the appropriate balance itself will shift with a school district's changing demographics. Thus, racial balancing will have to take place on an indefinite basis – a continuous process with no identifiable culpable party and no discernible end point.").

Partnership Agreement" itself. *See* Doc. 57, Mem. and Order at 16 ("The Court has no reason to doubt the sincerity of Mr. Oliver's statement – however, what is material is what was agreed by the terms of the contract.").

The Partnership Agreement clearly and categorically states at the very outset that it "has not attempted to make legal findings or to conduct any type of legal proceedings." PX4 at 1. Similarly, though the plaintiffs attempt to make much of them, neither the Bohanan Funding Commission Report (PX 2) nor the 2009 State Plan (PX 1) mentions *Fordice* or its analysis of applicable law. Finally, the HBI study panel, although tasked to define and study the competitiveness and comparability of HBIs, expressly stated on page 1 of its report (PX 3) that the report "is not intended to assess Maryland's compliance with the legal requirements of *U.S. v. Fordice* or Title VI of the Civil Rights Act." *See also* O'Keefe Trial Tr. vol. 1, 97-98 (Jan. 30, 2012) (stating that, although Maryland believed it fulfilled its obligations under the Agreement with OCR, it committed voluntarily to continuing its efforts).

The evidence of alleged segregation cited by the plaintiffs comes nowhere near the showing that the Supreme Court has required. In *Fordice*, the Supreme Court found in Mississippi's system of higher education these stark indicia of persistent segregation:

> By the mid-1980's, 30 years after *Brown* [*v. Board of Education*], more than 99 percent of Mississippi's white students were enrolled at University of Mississippi, Mississippi State, Southern Mississippi, Delta State, and Mississippi University for Women [the state's TWIs]. The student bodies at these universities remained predominantly white, averaging between 80 and 91 percent white students. Seventy-one percent of the State's black students attended Jackson State, Alcorn State, and Mississippi Valley State

> [the state's HBIs], where the racial composition ranged from 92 to 99 percent black.

Fordice, 505 U.S. at 724-25. In contrast to the circumstances in Mississippi circa 1992, by 2010, 56 years after *Brown v. Board of Education*, the student bodies at Maryland's public four-year so-called "traditionally white" colleges and universities *did not* remain predominantly white. Instead, their populations ranged from 37.8 percent to 81.1 percent white, with an average of only 53.8 percent white. *See* PX 755, 2011 Data Book at 10-11. As of Fall 2009, only 41.1 percent of the African American students attending Maryland public institutions attended Bowie, Coppin, Morgan, or UMES, where the racial composition ranged from 77.6 to 90.7 percent black, with an average of 86.9 percent black. *See id.* Only 19.1% of African American students who chose to attend a degree-granting institution in Maryland chose one of Maryland's HBIs. PX 755, 2011 Data Book at 11-12. The most recent data available show a continuation of a trend toward greater diversity with, for example, the highest black enrollment at an HBI falling to 85.4 percent. *See* 2012 Data Book, *available at* www.mhec.state.md.us/publications/research/AnnualPublications/2012DataBook.pdf (accessed on August 2, 2012).

Thus, the same type of analysis that *Fordice* employed to show that Mississippi operated a segregated system in 1992 also serves to demonstrate that Maryland does *not* operate a segregated system in 2012. Just as important, *Fordice* makes clear that establishing the existence of racial imbalance is only the beginning of the constitutional inquiry. There, even though the numbers in Mississippi showed a marked separation

along racial lines (which the Maryland statistics do not show), the Supreme Court posed the only relevant question: To what extent did the racial imbalance result from a current practice or policy rooted in *de jure* segregation? If the imbalance resulted from other factors, such as historical effects of segregation, there was no constitutional violation and, therefore, no requirement that the state take measures to eliminate the racial imbalance. The key question is "whether existing racial identifiability is attributable to the State." *Fordice*, 505 U.S. at 728; *see also 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."). Where racial imbalance results from "the wholly voluntary and unfettered choice of private individuals," *id.* at 731, no remedy is required.[17] *See Fordice*, 505 U.S. at 743 ("That an institution is predominantly white or black does not in itself make out a constitutional violation."); *see also id.* at 745 ("racial imbalance does not itself establish a violation of the Constitution").

All of the evidence cited by the plaintiffs pertaining to segregative effects addresses the general racial imbalance at HBIs, not the purported segregative effect of the alleged vestiges of discrimination. *See* Pl. Prop. Findings at 409 ¶ 936 – 412 ¶ 944. Moreover, the plaintiffs' legal argument concerning segregative effects relies entirely on

[17] Indeed, it is only because the Constitution *does not* "compel the elimination of all observed racial imbalance" that *Fordice* "portends neither the destruction of historically black colleges nor the severing of those institutions from their distinctive histories and traditions." *Fordice*, 505 U.S. at 745 (Thomas, J., concurring).

findings in *Knight v. Alabama*, 14 F.3d 1534 (11th Cir. 1994), which pertain to Alabama's traceable policies that were found to have a segregative effect. The plaintiffs are unable to cite any evidence of segregative effects presented in this case, and unlike the plaintiffs in *Knight*, the plaintiffs here have proved no current State policy traceable to *de jure* segregation. *See generally id.* at 452 ¶ 116 – 455 ¶ 124. The plaintiffs have offered no proof that the alleged underfunding, program duplication, or limited mission statements actually caused white students to avoid attending the HBIs, which proudly and quite properly cherish their African American cultural and historical heritage. That heritage was cited by the plaintiffs' own witnesses as a principal reason for their decision to attend those schools. *See*, *e.g.*, Burton Trial Tr. vol. 1, 96-97 (Jan. 17, 2012); Thompson Trial Tr. vol. 2, 31-33 (Jan 3, 2012).

CONCLUSION

For the reasons stated, the Court should reject the plaintiffs' proposed findings and conclusions of law, and the Court should instead adopt those submitted by the defendants. The plaintiffs having failed to prove the requisite standing, their claims should be dismissed for lack of subject matter jurisdiction. If the Court determines not to dismiss the case entirely, then judgment should be entered in favor of the defendants on all remaining claims.

Respectfully submitted,

DOUGLAS F. GANSLER
Attorney General of Maryland

STEVEN M. SULLIVAN
Federal Bar No. 24930
CAROLYN W. SKOLNIK
Federal Bar No. 23484
BEATRICE NUNEZ-BELLAMY
Federal Bar No. 29582
KATHERINE D. BAINBRIDGE
Federal Bar No. 29591
Assistant Attorneys General
200 St. Paul Street, 20th Floor
Baltimore, Maryland 21202
410-576-6325

CATHERINE M. SHULTZ
Federal Bar No. 15635
Assistant Attorney General
DENISHA A. WATSON
Federal Bar No. 29214
Special Assistant Attorney General
Maryland Higher Education Commission
6 N. Liberty Street, 10th Floor
Baltimore, MD 21201
410-767-3311

KENNETH L. THOMPSON
Federal Bar No. 03630
CRAIG A. THOMPSON
Federal Bar No. 26201
GREGORY T. WASYLAK
Federal Bar No. 26966
Venable LLP
750 East Pratt Street, Suite 900
Baltimore, MD 21202
410-244-7400

Counsel for Defendants