IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

MARYLAND OFFICE OF THE PUBLIC DEFENDER, *et al.* PLAINTIFFS, *v.* TALBOT COUNTY, MARYLAND, DEFENDANT.	Civil Action No.: No. 1:21-cv-01088-ELH Judge Ellen L. Hollander

PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

It is unfortunate, but all too predictable, that in responding to the Complaint in this case about the unlawful Confederate statue on its courthouse grounds, Defendant Talbot County ("the County") presents the *viewpoint* of a majority white legislative body as though it were fact, while avoiding any serious effort to confront the cruelty and illegality of its conduct toward Black people.

First, the cruelty. Americans who know and care about United States history cannot reasonably view the Talbot Boys statue on the lawn of the Talbot County Courthouse as anything other than cruel toward Black people. To decent people of all stripes, the statue is offensive, not merely because it glorifies a racist past but also in its glorification of traitors to the United States and the State of Maryland.[1] But to Black people in particular, a monument glorifying a government based on white supremacy and an economy built on the backs of slaves is cruel.

The horror of the United States' 200-plus year history of racial bondage and subjugation is impossible to depict adequately in a legal brief, but it is important at the outset to frame the statue for what it is. While no comparison to the unique American tragedy of slavery and its legacy is adequate, a few may be considered to help illustrate the point. Do reasonable people today doubt that displays of Nazi iconography are not merely *offensive* to decent people generally, but downright *cruel* to Jewish people in particular, especially those of families whose loved ones suffered directly in the concentration camps and Jewish ghettos of Europe? Legalities

[1] "There are but two parties now: traitors and patriots. And I want hereafter to be ranked with the latter and, I trust, the stronger party." John Y. Simon (1969), "The Papers of Ulysses S. Grant: April to September, 1861", p.7, SIU Press (Letter of April 21, 1861, from Ulysses S. Grant to his father Jesse Root Grant). On simple policy grounds alone, the Talbot Boys statue makes no sense. In what other context of American history do we erect monuments glorifying our traitors?

aside, would anyone seriously question the *cruelty to German Jews* in particular were the German parliament to erect statues of Hitler or soldiers of his SS?

Or consider our own, albeit far less systematic, atrocities of recent history in the United States. Would it not be cruel and injurious—especially to the surviving victims and the families of victims—to erect in New York City a statue of Osama Bin Laden to commemorate the hijacking of commercial planes, the purposeful aiming of those planes at the Twin Towers, and the murder of over 2,800 innocent people? Or, in Oklahoma City, a statue of Timothy McVeigh in tribute to his mass killing of innocent civilians, including children, by his 1995 bombing of the federal building in that city? Or in Columbine, Colorado, would it not be cruel and injurious to the victims' families to erect on the grounds of the public high school a statue of Eric Harris and Dylan Klebold, honoring them for the massacre they carried out at the high school in 1999? Would it not be cruel and injurious to the victims and their families to erect statues similarly motivated to honor the killers at Virginia Tech University, or Sandy Hook Elementary School, or Stoneman Douglas High School in Florida, and on and on?

The County's argument that Plaintiffs have not pleaded injury specific and particular to each of them is simply false. Putting aside the question of why, on policy grounds, the County supports a monument that it recognizes in its own legal brief is offensive to so many residents, its defense on standing grounds fails because Plaintiffs are not representative of the public at large. Where the unlawful act is race-based, federal law and the federal courts have for decades recognized Black citizens as differently situated from the general population. The two individual Plaintiffs are Black people, while the National Association for the Advancement of Colored People – Talbot County Branch ("Talbot County NAACP," "NAACP – Talbot County Branch," or "NAACP") represents the interests of its Black members, and OPD represents the interests of

both its Black employees and clients, *inter alia*. The psychological harm the Talbot Boys statue causes Plaintiffs is distinct from the offense felt by the general public, and is no less real here than it was to the Black public-school children in Topeka, Kansas who were mandated to attend segregated schools before the Supreme Court held the "separate but equal" construct unconstitutional.[2]

In characterizing the response of Black residents to the Talbot Boys statue as merely offensive, the County ignores the unique place of Black citizens in the eyes of the law, and reveals how little it knows (or cares) about the impact that racism and the legacy of slavery in this country and in its own backyard have on its Black residents. The Talbot Boys statue is not merely a campaign sign in a neighbor's yard of some candidate others find unfit for office, or even a large religious symbol emblazoned in neon lights towering over the town square from a private business or place of worship that many residents find obnoxious and offensive. We are talking here about a monument of a Confederate soldier, erected in honor of men who fought for the Confederacy, installed and standing proud on the lawn of the county courthouse. It symbolizes one thing: a class system built on white supremacy and an economy built on slavery.

The statue is cruel, and the emotional and psychological injury it inflicts on Black residents is not meaningfully different than the cruelty and trauma caused by the system of "separate but equal" to Black school children. In *Brown*, the injury was also emotional and psychological—the Court struck down the system of "separate but equal" on equal protection grounds because it concluded that, notwithstanding the system's nominal appeal to "equality," the placement of Black kids in *separate* schools "generates a feeling of inferiority as to their

[2] *See Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 495 (1954).

status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[3]

The County insists that the legality of the monument is a political question that this Court may not touch. But the fact that a question can be resolved politically by the local government in no way informs whether a federal court may pass judgment on whether the local government has itself resolved the question in a way that violates constitutional rights or other laws. Under Talbot County's rationale, *Brown* was wrongly decided—after all, few areas of life are as committed to local political control as public K-12 education. Yet, it is precisely because questions of violations of federal constitutional rights by local and state governments are *per se* committed to the federal courts that the County's argument does not pass the red face test.

Finally, the manner by which the County treats Black people differently by maintaining the statue on the courthouse grounds gives rise to the equal protection and other violations alleged. Talbot County says through the statue exactly what Alabama Governor George Wallace said in his 1963 inaugural address, where, in defiance of *Brown* and its progeny, he proclaimed "segregation today, segregation tomorrow, segregation forever."[4] The Talbot Boys statue goes well beyond a single speech by a racist governor. It is maintained by tax dollars, and its existence has been repeatedly ratified by majority vote of the governing legislative body.[5] By definition, it is a legislative enactment that violates Plaintiffs' rights to the equal protection of the laws.

For these reasons, as explained more fully below, the County's Motion to Dismiss ("Motion") must be denied.

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[3] *Id.* at 494.
[4] *See* Alabama Governor George Wallace, 1963 Inaugural Address from Alabama State Capitol (Jan. 14, 1963).
[5] This continuing wrong is also what sinks the County's limitations defense.

ARGUMENT

I. Plaintiffs Have Standing to Assert Their Claims.

The County argues that Plaintiffs lack standing to challenge the existence of a Confederate monument on the lawn of the Talbot County Courthouse despite the fact that the monument—and the County's endorsement of it—blatantly convey the message that Black people are second class citizens. The County is wrong.

A. Legal Standard

For individuals, standing consists of three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Id.* at 560–561; *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 180–81 (2000); *Spokeo, Inc. v. Robins*, 578 U.S. 856, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016).[6] "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). An organization has standing to bring a claim on its own behalf where a defendant's actions have "perceptibly impaired" the organizational plaintiff's ability to carry out its established mission by creating a

[6] While the pleadings sufficiently demonstrate standing for all Plaintiffs, jurisdiction lies even if only one of them has standing. *See Little Sister of the Poor Saints Peter & Paul Home v. Pa.*, 140 S. Ct. 2367, 2379 n.6 (2020); *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement."); *see also Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330 (1999) (holding a case is justiciable if some but not all plaintiffs have standing as to a particular defendant); *Bostic v. Schaefer*, 760 F.3d 352, 370–71 (4th Cir. 2014) (same).

"drain on the organization's resources." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

Where, as here, the defendant contends "that the jurisdictional allegations of the complaint [are] not true[,]" *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982), this Court may look beyond the Complaint "and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations." *Id.* In evaluating standing, "the court must be careful not to decide the question on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *Cooksey v. Futrell*, 721 F.3d 226, 239 (4th Cir. 2013) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003)); *see also Whitmore v. Arkansas*, 495 U. S. 149, 155 (1990) ("Our threshold inquiry into standing in no way depends on the merits of the [petitioner's] contention that particular conduct is illegal. . . .") (internal quotations and citation omitted); *Davis v. United States*, 564 U.S. 229, 249 n.10 (2011) ("[S]tanding does not depend on the merits of a claim.") (internal quotations and citation omitted).

B. Plaintiffs Demonstrate Cognizable Injuries.

The Confederate States of America seceded from the United States in order to maintain a slave-based economy to support a society premised on the racial superiority of whites. Among other things, the Confederacy's constitution specifically prohibited any law that would impair the right to keep Black slaves as "property."[7] As a monument honoring those soldiers of Talbot County who fought for the Confederacy in the Civil War, the Talbot Boys statue is *per se* a symbol of white supremacy. It tells Black people no less clearly than the County could speak

[7] *See* Constitution of the Confederate States, Art. I, Sec. 9(4) (March 11, 1861), *available at* https://avalon.law.yale.edu/19th_century/csa_csa.asp ("No bill of attainder, ex post facto law, or law denying or impairing the right of property in negro slaves shall be passed.").

with words that they are inferior members of the community. *See*, *e.g.*, *Cath. League for Religious & Civ. Rts. v. City & Cnty. of S.F.*, 624 F.3d 1043, 1048 (9th Cir. 2010).

The cruelty of the statue to Blacks should be obvious. Mr. Potter and Ms. Petticolas have standing to pursue their claims because they are Black people who live or work in Talbot County and suffer professionally, psychologically, and aesthetically from being subjected to the racist messaging and maintenance of the statue. The Talbot County NAACP may bring claims on behalf of itself and its Black members. *See Hunt*, 432 U.S. at 343. The NAACP may also bring claims as an organizational plaintiff, *Coleman*, 455 U.S. at 379, and at the pleading stage must allege only that "the Defendant['s] actions would cause them to divert resources to counteract Defendant['s] actions or that the challenged actions would frustrate Plaintiffs' missions." *La Unión Del Pueblo Entero v. Ross*, 353 F. Supp. 3d 381, 391 (D. Md. 2018); *see also Equal Rts. Ctr. v. Equity Residential*, 798 F. Supp. 2d 707, 725 (D. Md. 2011) (expenditure and diversion of resources to investigate agency's action sufficient to show standing). OPD, for its part, may assert claims because the statue impedes its ability to provide its employees with a fair and dignified work environment that is free of racial discrimination, *see Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (stating that employers have an affirmative obligation to provide a harassment-free workplace), and its clients with fair and equal access to justice.

To establish an injury in fact, a plaintiff must allege a personal invasion of a legally protected interest that is concrete and particularized. *Spokeo*, 136. S. Ct. at 1543 (quoting *Lujan*, 504 U.S. at 560). This is satisfied where a plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends[.]" *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 72 (1978) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). The "personal stake"

requirement is met if the person seeking redress has suffered, or is threatened with, some "distinct and palpable injury" and if there is some causal connection between the asserted injury and the conduct being challenged. *Duke Power Co.*, 438 U.S. at 72 (citation omitted). The injury need not be physical. "To the contrary," this Court has ruled, "an injury-in-fact is often predicated on intangible harm, including the invisible wounds inflicted by discrimination." *Amador v. Mnuchin*, 476 F. Supp. 3d 125 (D. Md. 2020) (citing *Allen v. Wright*, 468 U.S. 737 (1984) (abrogated on other grounds) (remarking that the stigma of discrimination accords a basis for standing to those persons who are personally denied equal treatment)).

i. Plaintiffs Have Alleged an Invasion of Concrete, Legally Protectable Interests.

Plaintiffs each suffer concrete injuries from repeated subjection to the statue. It is well established that non-economic, non-physical injuries are cognizable. *Amador*, 476 F. Supp. 3d at 147. The law generally has long recognized "emotional distress" as a cognizable injury for which judicial relief can be granted.[8] Whether the distress-causing event is so great in a particular case as to justify damages is a merits issue; but we are long past the day when a plaintiff alleging emotional injury alone is dismissed for lack of an articulable injury. This is for good reason: the contemporary understanding that mental health and emotional well-being are just as important as physical health and well-being is reflected throughout the law.[9]

In short, psychological injury is no less an injury than being struck in the face, and it is often more severe. And, as should be expected, courts have recognized that psychological injury can provide the basis for constitutional and tort-based claims. *See, e.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982); *Am. C.L.*

[8] Restatement (Second) of Torts § 46.
[9] Mental Health Parity and Addiction Equity Act of 2008, 42 U.S.C. § 300gg-26.

Union of Ohio Found., Inc., v. DeWeese, 633 F.3d 424 (6th Cir. 2011); *Cath. League for Religious & Civ. Rts.*, 624 F.3d at 1053; *Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229, 305 (D.C. Cir. 2006); *Suhre v. Haywood Cnty.*, 131 F.3d 1083, 1085-86 (4th Cir. 1997). The Fourth Circuit in particular has recognized that animus expressed through race-based derogatory speech can give rise to employment discrimination claims even "outside the realm of tangible employment actions" where the animus creates a hostile work environment. *Spriggs v. Diamond Auto Glass Co.*, 242 F.3d 179, 186 (4th Cir. 2001)*; see also Boyer-Liberto v. Fountainbleu Corp.*, 786 F.3d 264 (4th Cir. 2015) (*en banc*).

Indeed, the seminal case of *Brown v. Board of Education of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 491-92 (1954) was premised on psychological injury of this nature. There, the Supreme Court recognized that the principle of "separate but equal" had a "detrimental effect upon the colored children" and was "usually interpreted as denoting the inferiority of the negro group." Since that "sense of inferiority affects the motivation of a child to learn," it was deemed by the Court to be a violation of equal protection laws guaranteed by the 14th Amendment. *Id.* at 494-95. *Brown* speaks directly to the psychic injury inflicted by racist speech, emphasizing that the *message* of segregation affects the "hearts and minds" of Black children "in a way unlikely ever to be undone." *Id.* at 494.

Courts have also long recognized that psychological injuries caused by direct contact with offensive symbols are legally redressable. *See, e.g.*, *Cath. League for Religious & Civ. Rts.*, 624 F.3d at 1072-73; *Suhre*, 131 F.3d at 1088. In the Establishment Clause context, direct and unwelcome contact with an object demonstrates psychological injury in fact sufficient to confer standing. *See id.* Racist symbols cause deep emotional scarring, and feelings of intimidation,

anxiety and fear that pervade every aspect of a victim's life. Confederate statues and monuments fall squarely within the category of offensive and racist symbols.

As officials across Maryland—including Maryland Attorney General Brian Frosh[10]—have acknowledged, Confederate imagery is unacceptable in the public square today because it is inextricably interwoven with Confederate ideals and cannot be divorced from hatred and violence perpetrated against Black people. The Confederacy, created to protect a slave-based economy, was "founded upon . . . the greatest truth that the negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition." Ellen Hunt, *What is a Confederate Monument?: An Examination of Confederate Monuments in the Context of the Compelled Speech and Government Speech Doctrines*, 37 Law & Ineq. 423, 425 (2019) (quoting Southern Poverty Law Center, *Whose Heritage?: Public Symbols of the Confederacy* (2016)). After the Civil War, Confederate sympathizers committed themselves to two "new" causes: the continuation of a racial caste system and the endurance of Antebellum culture. Derrick Bell, *Race, Racism, and American Law* 229-30 (6th ed. 2008). During the Reconstruction era in the late 1800's, organizations like the Ku Klux Klan, Knights of the White Camellias, and the White League sought to preserve white supremacy by using intimidation and violence to terrorize Black Americans. "[L]ocal Klan groups lynched, beat, burned, and raped" Black Americans. Howard Zinn, *A People's History of the United States* 203 (2001).

After Reconstruction, during the rise of the Jim Crow era, sympathizers began constructing Confederate monuments throughout the country. John J. Winberry, *"Lest we Forget" The Confederate Monument and the Southern Townscape*, 55 Southeastern Geographer 19, 20 (2015). These statues were erected as a means of racial intimidation and to reinforce the

[10] *See* https://www.marylandattorneygeneral.gov/press/2021/081121.pdf (Aug. 11, 2021).

notion that the pre-Civil War social order should remain. Southern Poverty Law Center, *Whose Heritage?: Public Symbols of the Confederacy* (2016). Confederate statuary were part and parcel of a broader effort to project white racial superiority and intimidate Black Americans. The Talbot Boys statue was created and installed on the Talbot County Courthouse lawn during this era, and it was even dedicated in 1916 on Confederate Memorial Day. Compl. at ¶¶ 34-36. The statue is forever tied to the Confederate cause of white supremacy.

History matters. Every time Ms. Petticolas, Mr. Potter, members of the NAACP, and Black staff and clients of OPD see the Talbot Boys statue, they confront messages from Talbot County that they as Black people are less worthy in the eyes of the law than whites.

Ms. Petticolas is a Black attorney who represents clients lacking resources to retain private counsel. Declaration of Kisha Petticolas ("Petticolas Decl.") at ¶¶ 3-4. To her and her Black clients, the Talbot Boys statue calls into question whether equal justice will (or even can) be served in Talbot County. *Id.* at ¶¶ 9-10. The statue communicates government support for the oppression of Black people and signals that she and her clients may not be treated equally by the County government and judiciary. *Id.* at ¶¶ 9-11. Ms. Petticolas also asserts that the statue interferes with her ability to use and enjoy the courthouse and courthouse lawn due to its display in the middle of the courthouse lawn, directly before the only entrance to the courthouse. *Id.* at ¶¶ 7-8.

OPD represents individuals in Talbot County and throughout Maryland and provides legal services in felony, misdemeanor, traffic, and juvenile delinquency actions where the individual may be subject to incarceration or detention. Declaration of Paul DeWolfe, Jr. ("DeWolfe Decl.") at ¶¶ 3, 6. OPD represents Black defendants in various legal actions in Talbot County, and OPD employs four Black full-time employees in Talbot County, all of whom must

appear in court in the Talbot County Courthouse. *Id.* at ¶ 6. OPD has been personally impacted by the Talbot Boys statue due to its effect on OPD's Black employees and Black clients. *Id.* at ¶¶ 9-12. OPD's Black employees and Black clients suffer feelings of fear, inferiority, and injustice when they encounter the statue. *Id.* at ¶¶ 10-12.

Mr. Potter is a Black man who works in and around the Talbot County courthouse as the President of the NAACP – Talbot County Branch. Declaration of Richard Potter ("Potter Decl.") at ¶¶ 1-2. He has been a resident of Talbot County for 39 years. *Id.* at ¶ 3. Mr. Potter encounters the Talbot Boys statue on a regular basis in his individual capacity and in his representative capacity of the NAACP. *Id.* at ¶¶ 8-9. To him, the statue is indicative of blatant racism sanctioned by the County, and he feels angry, frustrated, and disheartened every time he encounters the statue. *Id.* at ¶¶ 9-11. To Mr. Potter, the statue signals that the Talbot County government considers him a second-class citizen and that the County condones and encourages racial division. *Id.* at ¶¶ 12-16. The statue also interferes with Mr. Potter's ability to use and enjoy the courthouse and courthouse lawn due to its prominent display directly in front of the courthouse, mere feet from the only entrance to the courthouse. *Id.* at ¶ 17.

The Talbot County NAACP currently has approximately 150 members, including Walter Weldon Black, Jr., the Talbot County NAACP's former President and current Executive Committee member. Declaration of Walter Weldon Black, Jr. ("Black Decl.") at ¶¶ 1-2. The Talbot County NAACP has devoted substantial time, resources, and volunteers since 2015 to the effort of having the Talbot Boys statue removed. *Id.* at ¶ 5. It has done so because it believes that the statue is particularly hurtful to Black people in the community, as it is discriminatory in that it celebrates those who fought for the enslavement of Black people. *Id.* at ¶ 6. The statue, according to the Talbot County NAACP, is a symbol of white supremacy and signals to Black

people that they are viewed as second-class citizens by white society and unable to achieve as a result. *Id.* at ¶ 7. Mr. Black and other NAACP members are personally impacted by the statue's presence as it creates feelings of anger and inferiority due to its projected message of glorification of white supremacy and Black oppression. *Id.* The statue also interferes with NAACP's and its members' ability to use and enjoy the courthouse and courthouse lawn due to the statue's prominent display directly in front of the courthouse, a few feet away from the courthouse's only entrance. *Id.* at ¶¶ 6-7.

Talbot County says Plaintiffs' complaints are the result of "mere offense" and not actionable unequal treatment by the County. *See* Mot. at 13. The County's blind spot for the cruelty it inflicts on Black people does not change the fact that "[r]acist speech inflicts real harm" and that the harm "is far from trivial." Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431, 458-59 (June 1990). To Ms. Petticolas, Mr. Potter, NAACP members, and Black OPD staff and clients, the psychological damage that results from being constantly subjected to the Talbot Boys statue is tangible and significant. *E.g.*, *id.* at 455 ("[A]lthough there are many of us who constantly and in myriad ways seek to counter the lie spoken in the meaning of hateful words…, it is a nearly impossible burden to bear when one encounters hateful speech face-to-face.").

As Ms. Petticolas alleges, the personal anguish she experiences on account of the statue is like a "knife lodged in her soul." Petticolas Decl. at ¶ 11. Against this backdrop, it is easy to see why Ms. Petticolas feels intimidated, threatened, and harassed by the Talbot Boys statue, and why the OPD has a duty to protect her. *See Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 826 (4th Cir. 2004) (Gregory, J., concurring) (recognizing that an employer may have a cognizable duty to protect an employee from racist symbols).

The cruel nature of the statue is amplified because of its prominent position on the courthouse lawn in the center of the County's historic downtown in Easton. The injury here is akin to that realized in the Establishment Clause context. Courts, including the Fourth Circuit, have acknowledged standing based on injury resulting from unwelcome personal contact with state-sponsored religious displays. *E.g.*, *Suhre*, 131 F.3d at 1086-87. And, the spiritual affront of unwelcome contact with religious symbolism is compounded when the distress-inducing display is on public property because displays in these settings may seem like endorsements and may potentially impair the use of the affected facilities by individuals who harbor strong objections to the religious message. *Id.* In *Suhre*, as here, the offending display (Ten Commandments) was on county courthouse grounds, and the Fourth Circuit held that an atheist had standing to pursue claims under the Equal Protection Clause as a result of his interaction with the display as a consumer of the courthouse and as a participant in local business in the courthouse. *Id.* at 1091-92.

Being "part of the [community where challenged [racist] symbolism is located]. . .," *id.* at 1087, Ms. Petticolas, Mr. Potter, members of the NAACP in Talbot County, and OPD Black staff and clients "have more than an abstract interest in seeing that [the government] observes the Constitution." *Id.* (citation omitted). ("[W]here there is a personal connection between the plaintiff and the challenged display in his or her home community, standing is more likely to lie."). *Id.* As Talbot County community members and employers, Plaintiffs possess a special interest in removal of this cruel and injurious statue. *See, e.g.*, Compl. at ¶¶ 75-78. In addition, the statue prevents OPD from complying with its obligations to provide its employees (like Ms. Petticolas) with a workplace free of discrimination and racial hostility and its clients with the assurance they will receive fair and equal treatment under the law. DeWolfe Decl. ¶¶ 9, 11.

The Supreme Court has recognized that "discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community," "can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (internal citation and quotations omitted). There "can be no doubt" that stigmatism caused by racial discrimination is "one of the most serious consequences of discriminatory government action" and can support standing. *Allen*, 468 U.S. at 755.[11]

The bottom line is that Confederate monuments are not anodyne symbols. They have real, negative, measurable impacts on Black people. And these results are consistent with the psychological injuries Ms. Petticolas, Mr. Potter, the NAACP, and OPD have alleged. *See, e.g.*, Compl. at ¶¶ 75-78; Black Decl. at ¶ 7; Petticolas Decl. at ¶¶ 8, 11; Potter Decl. at ¶¶ 9-10.

[11] Studies have confirmed this. In one, almost 40 percent of Black persons surveyed in the South believed that Confederate monuments represent racial injustice and symbolize racial oppression. Lucy Britt, Emily Wager and Tyler Steelman, *Meanings and Impacts of Confederate Monuments in the U.S. South*, 17 Du Bois Rev. 105, 110 (2020). The study also revealed that when exposed to Confederate monuments protected by their government, Black persons felt like they belonged less than Black persons who were not exposed to government-protected Confederate monuments. *Id.* at 118. By contrast, exposure to government-protected Confederate monuments had no measurable effect on white persons' sense of belonging. *Id.* As its authors noted, the study's results indicate that "Blacks, disproportionately to Whites, feel excluded from their political communities when these communities take measures to protect exclusionary symbols." *Id.* at 120. "This is compounded by the already weak sense of belonging that Black people feel compared to Whites." *Id.* Yet another study demonstrates the potential for racist speech to influence how the non-targeted receivers of such speech may think about the victims of the speech. *See* Greenberg and Pyszcynki, *The Effect of an Overheard Ethnic Slur on Evaluations of the Target: How to Spread a Social Disease*, Journal of Experimental Social Psychology 61 (1985). Jury deliberations, among things, may be impacted by exposure to racist speech. The demonstrated potential for such bias is precisely why Ms. Petticolas believes the statue could potentially be outcome-influencing in cases involving her Black clients. Petticolas Decl. at ¶¶ 9, 11-12.

Cases arising in environmental litigation also support Plaintiffs' standing in this case. Federal courts routinely recognize the standing of plaintiffs challenging government actions affecting the environment where plaintiffs allege the loss of so-called "aesthetic" enjoyment owing to government action. *See, e.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (reasoning that such interests "are important ingredients of the quality of life in our society" that warrant judicial protection); *see also Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 179, 183 (D.C. Cir. 2017) (holding that plaintiff's "recreational, scientific, aesthetic, educational, moral, spiritual, and conservational interest" in observing the Valley Elderberry Longhorn Beetle in its natural habitat "for purely aesthetic purposes" was "undeniably a cognizable interest for purposes of standing"); *Moreau v. F.E.R.C.*, 982 F.2d 556, 565 (D.C. Cir. 1993) (holding a pipeline presented a "permanent aesthetic eyesore" sufficient to confer standing) (overruled on other grounds by *Allegheny Defense Project v. F.E.R.C.*, 964 F.3d 1 (D.C. Cir. 2020)).

It would be passing strange for federal courts to find Article III satisfied by plaintiffs challenging government action based on "aesthetic" injury but not by plaintiffs suffering from psychological and emotional anguish stemming directly from blatantly racist monuments on government property. Can it really be that amateur entomologists can bring lawsuits when they suffer *aesthetic eyesores*, but Black public defenders and social activists who live and work in the presence of public monuments glorifying white supremacy cannot? Indeed, on aesthetic-injury grounds alone, Plaintiffs have standing. Plaintiffs' loss of use and enjoyment of the public land located on the grounds of the Talbot County Courthouse is not substantively different from the environmental plaintiffs' injuries in *Moreau*, 982 F.2d 556, and *Ctr. for Biological Diversity*, 861 F.3d 174. *See* Petticolas Decl. ¶ 8; Potter Decl. ¶ 17; Black Decl. ¶ 7.

The County relies heavily on the Fifth Circuit's decision in *Moore v. Bryant*, 853 F.3d 245 (5th Cir. 2017), which concerned a Confederate emblem within the Mississippi flag, for the proposition that Plaintiffs have suffered, at most, stigmatization, and cannot show this stigmatization "has led to the *actual* denial of equal treatment." Mot. at 15. This argument lacks force on multiple grounds. First, whether Plaintiffs have "actually" been denied equal treatment is a factual question that cannot be decided on a motion to dismiss. *See Just Puppies, Inc. v. Frosh*, 438 F. Supp. 3d 448, 502 (D. Md. 2020) (citing *Giarratano v. Johnson*, 521 F.3d 298, 304 (4th Cir. 2008)). Second, the allegations in the Complaint, as supported here by Plaintiffs' declarations, present more than mere stigmatic injury. For example, Ms. Petticolas reacting to the statue as though it were "a knife lodged in her soul" is not merely stigmatic.

But most importantly, if this Court chooses to confront *Moore* head on, it should find the decision—which is obviously not controlling—to be wrongly decided. Among other things, the Fifth Circuit's rationale conflicts with controlling Fourth Circuit precedent that injury caused by racist speech is actionable even absent a tangible (*i.e.*, *actual*) negative consequence. *See Spriggs*, 242 F.3d at 185-86. Furthermore, the Fifth Circuit misconstrued *Allen*—a case noticeably absent from Talbot County's brief, and for good reason. *Allen* holds that stigmatic injury can in fact support standing, *see id.* at 755, and that, "[t]ypically, ... the standing inquiry requires careful judicial examination" of the allegations presented in the case before the court. *Id.* at 752.

Allen, for its part, addressed the standing of parents of Black *public-school* children to challenge an IRS policy that conditioned the tax-exempt status of *private schools* on their having non-segregation policies, but which the plaintiffs alleged was so riddled with holes that the segregation policies of some private schools with tax-exempt status were actually expanding. *See*

id. at 744. On the face of their complaint, plaintiffs had nothing at stake: there was no allegation the IRS policy impacted their own children's school, so the alleged stigma of being Black in a world where Blacks are not always treated equally, was by itself purely abstract. *See id.* at 756. The Court explained that while plaintiffs did allege an injury-in-fact in the form of their impaired ability to place their children in an integrated school (as required by *Brown*), that injury was not *traceable* to the IRS policy of which they complained because the impact of the IRS policy on rate of integration of public schools was just speculative. *See id.* at 758. Talbot County cannot, and does not, identify a traceability defect here.

Allen requires no more than what the Supreme Court has always required of a plaintiff: to allege injury personal *to the plaintiff*. *See id.* at 755. In other words, a "personal stake" in the outcome. *See Baker*, 369 U.S. at 204. As explained above, Plaintiffs have alleged sufficient injury from the statue, and as explained below, those injuries are particularized to each of them in the manner expected by *Allen*. The Fifth Circuit missed this point entirely: when stigma is coupled with personal injury, there is standing.

ii. The NAACP Has Alleged an Injury in Fact as an Association and an Organization.

The NAACP's mission includes: (1) ensuring the political, educational, social, and economic equality of all citizens; (2) achieving equality of rights and elimination of race prejudice among the citizens of the United States; and (3) seeking enactment and enforcement of federal, state, and local laws securing civil rights. *See* NAACP Mission, available at https://naacp.org/about/mission-vision. In addition to its charitable initiatives, the NAACP engages in public education, legislative advocacy, and other initiatives to foster more equality and diversity within the County to further its mission. *See id.* The County's repeated votes to retain the statue and its continued retention of the monument, notwithstanding the NAACP's

extensive efforts to call the government's attention to the significant harms the statue inflicts on Black Talbot Countians, have frustrated the organization's mission and forced it to shift attention and resources from serving its mission to the community. Black Decl. at ¶ 5. Indeed, the NAACP has alleged that over the last several years, its resources, time and attention have been devoted overwhelmingly to its campaign to remove the monument from the courthouse lawn, causing the organization to divert nearly all of its resources away from other work. *Id.*

In several recent cases, courts have denied motions to dismiss under analogous circumstances. For example, in *La Unión Del Pueblo Entero*, 353 F. Supp. 3d 381 at 392, a challenge to the Census Bureau's decision to add a citizenship question to the 2020 Census, Judge Hazel held sufficient to establish standing the allegation that organizational plaintiffs will "imminently divert resources away from other advocacy activity to secure more funding and resources for increased outreach and ensure an accurate count of hard-to-count populations in" the communities they serve. In *Casa De Maryland v. U.S. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758, 771 (D. Md. 2018), Judge Titus observed that organizational plaintiffs seeking to enjoin rescission of the Deferred Action for Childhood Arrivals ("DACA") program are "directly focused on aiding immigrants and their communities," and held "[t]he fact that one of their primary functions has been assisting their members with 'tens of thousands of DACA initial and renewal applications' is sufficient for standing in and of itself." And, in *Int'l Refugee Assistance Project v. Trump*, Judge Theodore Chuang held that a Presidential Proclamation that barred the entry into the U.S. of nationals of seven predominantly Muslim countries injured the organizational interests of several organizations by "impeding their efforts to accomplish their missions and by disrupting their ability to raise money, train staff, and convene programs designed to foster the free flow of ideas on topics of significance to their organization's

purpose." 265 F. Supp. 3d 570, 598 (D. Md. 2017), *aff'd*, 883 F.3d 233 (4th Cir. 2018), *as amended* (Feb. 28, 2018), *cert. granted, judgment vacated on other grounds*, 138 S. Ct. 2710 (2018); *see also The Equal Rts. Ctr. v. AvalonBay Communities, Inc.*, No. AW-05-2626, 2009 WL 1153397, at *4 (D. Md. Mar. 23, 2009) (holding organization sufficiently pled injury based on allegations that defendants' conduct frustrated its mission and caused it to divert significant resources).

The NAACP also has standing to assert claims on behalf of its Black members because those members have standing to sue in their own right. *See Hunt*, 432 U.S. at 343. Like Mr. Potter, the NAACP's members have been subjected to hateful racial discrimination by the County's display of the Talbot Boys statue.

iii. Plaintiffs' Injuries Are Particularized.

Contrary to the County's assertion, Plaintiffs' injuries are not too generalized to confer standing. "For an injury to be particularized, it must affect the plaintiff in a personal and individual way." *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 207 (4th Cir. 2017) (quoting *Spokeo*, 136 S.Ct. at 1548). Plaintiffs have alleged that: (1) they live or work in Talbot County, (2) they are Black or represent Black employees or clients, (3) they have come in contact with the Talbot Boys statue, (4) they will continue to come in contact with the statue, (5) they have suffered and continue to suffer feelings of inferiority, injustice, and terror that are unique to their experiences, (6) the statue and the County's insistence on maintaining the statue on the courthouse lawn convey a government message of disapproval and hostility towards Blacks, (7) that "sends a clear message" "that they are outsiders, not full members of the political community," (8) thereby chilling their access to the government, and (9) causing them to suffer from psychological distress and loss of aesthetic pleasure. *See Cath. League for Religious & Civil Rts.*, 624 F.3d at 1048; *see also Sierra Club*, 405 U.S. at 734.

The County argues that Plaintiffs' injuries are generalized because they are representative of various other members of the community, including clients of OPD and members of the NAACP. Mot. at 17. First, the County's premise is incorrect. "The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance." *Wikimedia Found.*, 857 F.3d at 207 (quoting *Spokeo*, 136 S.Ct. at 1548); *Clinton v. City of New York*, 524 U.S. 417, 434-36 (1998) ("[It is a] self-evident proposition that more than one party may have standing to challenge a particular action or inaction. Once it is determined that a particular plaintiff is harmed by the defendant, and that the harm will likely be redressed by a favorable decision, that plaintiff has standing—regardless of whether there are others who would also have standing to sue."); *United States v. SCRAP*, 412 U.S. 669, 688 (1973) ("To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.")

Second, the County is wrong because Plaintiffs' injuries, while they may be shared by others, are personal to them. The County's argument that Plaintiffs' interest in this litigation is common to all members of the public reflects a myopic and white-centric view of the issues in this case. Not everyone has known the experience of being victimized by racist speech, and all of society does not share equally the burden of the harm it inflicts.

> There is a great difference between the offensiveness of words that you would rather not hear—because they are labeled dirty, impolite, or personally demeaning—and the injury inflicted by words that remind the world that you are fair game for physical attack, evoke in you all of the millions of cultural lessons regarding your inferiority that you have painstakingly repressed and imprint upon you a badge of servitude and subservience for all the world to see.

Lawrence, 1990 Duke L.J. at 461. Further, "where there is a personal connection between the plaintiff and the challenged display in his or her own community, standing is more likely to lie."

Suhre, 131 F.3d at 1087, *accord Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679, 683 (6th Cir. 1994) ("The practices of our own community may create a larger psychological wound than someplace we are just passing through."); *Saladin v. City of Milledgeville*, 812 F.2d 687, 693 (11th Cir. 1987) ("The plaintiffs here...are part of the [c]ity and are directly affronted by the presence of the allegedly offensive word on the city seal.").

Where the harm is concrete, there is injury, even if the harm is widely shared. *See Clinton*, 524 U.S. at 24, 118 S.Ct. 1777; *Bishop v. Bartlett*, 575 F.3d 419, 425 (4th Cir. 2009). Plaintiffs have adequately pled and testified to their particularized, concrete injuries resulting from the continued presence of the Talbot Boys statue.

C. Plaintiffs Also Have Taxpayer Standing.

Mr. Potter and other Black Talbot County resident members of the NAACP represented here by the NAACP also have standing, as county taxpayers, to sue the County for using tax revenue for unlawful ends. *See Crampton v. Zabriskie*, 101 U.S. 601, 609 (1879); *Frothingham v. Mellon*, 262 U.S. 447, 486 (1923). Further, Article 15 of the Maryland Constitution guarantees taxpaying residents of Maryland a legal right to have the government spend their taxes for the benefit of the community, meaning on lawful and constitutional activities. *See George v. Balt. Cty.*, 463 Md. 263, 283 (2019); *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451 (2014).

Here, Mr. Potter and the Black members of the NAACP who are county residents have adequately alleged that they are taxpaying residents of Talbot County. Compl. at ¶¶ 16, 22; Black Decl. at ¶ 1; Potter Decl. at ¶ 1. The County's maintenance of the Talbot Boys statue is illegal, and this unlawful act causes monetary harm to taxpayers. *See* Compl. at ¶¶ 124-127. Plaintiffs object to the use of their taxpayer dollars by Talbot County to maintain the Talbot Boys monument and have standing to sue for that purpose, in addition to their injuries noted above.

II. Plaintiffs' Claims are Justiciable.

The County's assertion that the issue presented should be solved at the "ballot box" demonstrates how little regard the County has for the pain it is inflicting on its own Black community members. Moreover, the entire point of the 14th Amendment (with the 13th and 15th Amendments) was to divest state and local governments of the right to override, through local politics, *all* citizens' rights to exercise their fundamental rights.

"The freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power." *Schuette v. Coalition to Def. Affirmative Action, Integration and Immigrant Rts. & Fight for Equal. by Any Means Necessary*, 134 S.Ct. 1623, 1636 (2014). Thus, when the rights of persons are violated, "the Constitution requires redress by the courts," notwithstanding the more general value of democratic decision-making. *Id*. at 1637. The idea of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943). This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015) (quoting *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 638 (1943)).

Thus, while it is no doubt true Talbot County could—indeed, *should*—resolve this dispute through the political process, its refusal to act in a manner that respects the constitutional and legal rights of Plaintiffs is precisely why the matter is suited for this Court to decide. A controversy is non-justiciable on political question grounds only in that rare circumstance "where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Id.*

The political question doctrine has no application in a case like this—the *United States Congress* has most certainly not committed authority to Talbot County to decide questions arising under the *federal* Constitution and statutes. Talbot County also cannot show that the Maryland legislature committed the state law issues raised in the Complaint to the County to decide. Indeed, since *Baker,* 396 U.S., Plaintiffs are unaware of any case in which a federal court has held that the political question doctrine precludes an equal protection challenge to state or local government action based on racial discrimination, and the County cites none.

III. Plaintiffs Have Adequately Pleaded Their Claims and the County's 12(b)(6) Motion Must Be Denied.

A. Legal Standard.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). We accept as true all well-pleaded facts in a complaint and construe them in the light most favorable to the plaintiff. *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 422 (4th Cir. 2015). Indeed, a court cannot "favor[ ] its perception of the relevant events over the narrative offered by the complaint," thereby "recasting 'plausibility' into 'probability.'" *Id.* at 430. However, legal conclusions pleaded as factual allegations, "unwarranted inferences," "unreasonable conclusions," and "naked assertions devoid of further factual enhancement" are not entitled to the presumption of truth. *Id.* at 422.

B. Plaintiffs Have Sufficiently Pleaded Count I: Violation of the Equal Protection Clause of the Fourteenth Amendment.

The Fourteenth Amendment's Equal Protection Clause states: "No State shall. . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This "is essentially a direction that all persons similarly situated should be treated alike." *City of*

Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985). To prevail on an equal protection challenge, a plaintiff "must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Kolbe v. Hogan*, 849 F.3d 114, 146 (4th Cir. 2017) (*en banc*) (quoting *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001)). Next, the court must determine "whether the disparity in treatment can be justified under the requisite level of scrutiny." *Kolbe*, 849 F.3d at 146. "Classifications that occur along the axis of race, alienage, or national origin are subject to strict scrutiny because such factors are 'seldom relevant to the achievement of any legitimate state interest' and, instead, more likely 'reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others.'" *Just Puppies,* 438 F. Supp. 3d at 500 (quoting *Cleburne*, 473 U.S. at 440). That said, "at the Rule 12(b)(6) stage, the plaintiff need not prove that the challenged [conduct] violates equal protection"; plaintiff need only "'plead sufficient facts to overcome the presumption of rationality that applies to government classifications.'" *Id*. at 502 (citing *Giarratano*, 521 F.3d at 304 (citation omitted)).

Specific to Plaintiffs' equal protection claim, the County argues only that Plaintiffs do not have standing and that OPD, specifically, fails to state a claim because it does not have a *bona fide* comparator. Mot. at 20. First, the County fails to cite any authority to support its assertion that there is no *bona fide* comparator against which OPD's treatment may be measured. In any event, this issue turns on a question of fact that is not appropriate to resolve at the motion to dismiss stage. *Starr v. VSL Pharms., Inc.*, 509 F. Supp. 3d 417, 460 (D. Md. 2020) (declining to dismiss "arguments related to fact-based issues" on defendant's motion to dismiss).

Second, as to the County's standing argument, as explained in Part I, Plaintiffs have pleaded injuries caused by the County's legislative decision to maintain a racist statue on the lawn of the courthouse. Talbot County's maintenance of a statue that endorses white supremacy, and the County Council's vote to continue to display the statue, deny Plaintiffs equal protection. The principle of equal citizenship is central to any substantive understanding of the Equal Protection Clause. Lawrence, 1990 Duke L.J. at 438-39. Under this principle, "every individual is presumptively entitled to be treated by the organized society as a respected, responsible, participating member." *Id.* The Equal Protection Clause requires the "affirmative disestablishment of societal practices that treat people as members of an inferior or dependent caste, as unworthy to participate in the larger community." *Id.* at 439.

The principle of *Brown* applies here. Plaintiffs' injuries are inflicted by the meaning of the message. By displaying and maintaining a Confederate statue on the courthouse lawn, Talbot County is propagating the idea that Black people are inferior. The stigma, pain, intimidation, and trauma that Black residents and workers, like Ms. Petticolas, Mr. Potter, members of the NAACP, and OPD experience as a result of the County's dog whistling and inuendo is no different from the stigma, pain, and trauma of *per se* segregation.

Monuments displayed on public land constitute government speech. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470–71 (2009). The courthouse lawn is inextricably associated with the County and, like a public park, plays an important role in defining the identity that Talbot County projects to its own residents and to the outside world. *See, e.g.*, *id.* at 471-72. "Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and culture." *Id.* at 472. Thus, monuments that are accepted for public display are meant

to convey a government message. Public display constitutes "a more dramatic form of adoption than the sort of formal endorsement[,]" "unmistakably signifying" to all courthouse visitors that the county "intends the monument to speak on its behalf." *Id.* at 474. The message Talbot County conveys to everyone traversing the courthouse lawn by maintaining the Talbot Boys statue is clear: Black people are inferior to white people and will be treated as such behind the courthouse walls.

As explained in Part I, when exposed to Confederate monuments embraced by government bodies, Black people are much more likely than white people to feel excluded from their community. While white people may (and should) find the Talbot Boys statue offensive, to Black people it is cruel and demeaning: it conveys a message that they are "less than" merely because of the color of their skin and that they will never be fully recognized by their own County government. Black Decl. at ¶ 7; Petticolas Decl. at ¶¶ 9, 11; Potter Decl. at ¶¶ 10-11.

Moreover, there is at least a fair inference that racial discrimination was a motivating factor behind the Council's 2020 vote to maintain the statue. Before the 2020 vote, 32 members of the public spoke at a meeting before the Council, with 27 urging the Council to remove the statue. Compl. at ¶ 61. Nevertheless, the Council voted 3-2 to retain the statue. *Id.* Following the vote, community leaders across Talbot County, including Plaintiffs, organized protests and continue to voice strong opposition to the statue. *Id.* at ¶ 63. Black residents and others have also presented on the negative impact of the statue. *Id.* The Council is fully aware of the pain the statue inflicts on Mr. Potter, Ms. Petticolas, the OPD, members of the NAACP and other Black people who live and work in Talbot County. Yet, it affirmatively elects to maintain the statue. *Id.* Moreover, the Council has taken to silencing Black voices. When Mr. Potter and the NAACP tried to speak out on race issues at a public meeting, they were rudely silenced by white

councilmembers. *Id.* at ¶¶ 58, 59. And, Councilwoman Price went so far as to proclaim that Talbot County had no problem with racism. *Id.* at ¶ 58. That is as obtuse as it is hurtful.

The Fourth Circuit has held that racially derogatory messages in the workplace can give rise to colorable workplace discrimination claims based on hostile work environment. *See Spriggs*, 242 F.3d at 185-86. Racist statuary is no different than racist language, it just partakes of a different form of communication, and there is no reason to think that the principles that animate prohibitions on race-based discrimination applicable to private sector employers under the federal civil rights laws do not apply with equal force to a local government as a function of the equal protection of the laws it is obligated to guarantee under the 14th Amendment.

In all events, Plaintiffs' allegations—which, along with all reasonable inferences, must be construed in Plaintiffs' favor—raise important questions of fact about the extent of the harms caused by the County, and the manner by which those harms are caused, that cannot be resolved at this stage of litigation.

C. Plaintiffs Have Sufficiently Pleaded Counts II & III: Violation of Fundamental Rights Under the First and Fourteenth Amendments and Violation of Title II of the Civil Rights Act of 1964.

The presence of the Talbot Boys statue, in its current location, interferes with the administration of justice in Talbot County. *See Order Re: Confederate Monument on Roanoke County Property Adjacent to the Roanoke County Courthouse*, No. 202100607, Va. Cir. (Jul. 8, 2021) (finding location of confederate statue at Roanoke County Circuit Court interfered with administration of justice because it affects the appearance of judicial fairness and neutrality and ordering statue's removal). Slavery was, by a wide margin, the single most important cause of the Civil War. The Talbot Boy's message, in its present location, is offensive to the appearance of judicial fairness and neutrality.

Talbot County argues that Ms. Petticolas and OPD cannot maintain this claim because they have not been denied access to the courthouse. But, the County's whitewashed view of Plaintiffs' allegations again reflects its blatant disregard for the psychological impact of Confederate statues. Although the Talbot Boys statue does not physically preclude Ms. Petticolas and OPD from entering its doors, it sends a blaring message that once they do, they are placing their clients' fates in the hands of a justice system administered by a county that views Black people as second-class citizens.

Talbot County also insists that Mr. Potter's and the NAACP's claims must fail because they have not been denied the right to petition or access the court system. But the County sidesteps Plaintiffs' allegations that the location of the statue in front of the courthouse doors sends a message to Black people that they are unlikely to receive equal access to a fair justice system. Symbols are messages; they have meaning. The meaning conveyed by the statue due to its proximity to the Talbot County Courthouse impedes the administration of justice. Every day, Black people, like Ms. Petticolas, Mr. Potter, and Black NAACP members enter the courthouse to conduct business or do their jobs. Before Black people even enter the courthouse door, the Talbot Boys statue has branded them, merely because of the color of their skin, to all passersby as "less than" than their white fellow citizens.

D. Plaintiffs Have Sufficiently Pleaded Count IV: Violation of Title VI of the Civil Rights Act.

In Count IV, Plaintiffs pleaded a violation of Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, or national origin in programs or activities receiving federal financial assistance. The County directs the Court to an opinion by the District of Minnesota to argue that a specific "program or activity" must be identified from which Plaintiffs have been excluded. This Court, of course, is not bound by that opinion. Plaintiffs have

adequately pled that the County has engaged in and continues to engage in discriminatory implementation of policies and practices by preserving and maintaining the illegal statue on its grounds in violation of Title VI. The County further objects to the allegation that it receives federal funding as conclusory, but has not denied that it does. If anything, this is a matter to be resolved in discovery, not at the motion to dismiss phase.

E. Plaintiffs Have Sufficiently Pleaded Count V: Violation 42 U.S.C. § 1981.

In Count V, Plaintiffs pleaded a violation of their rights guaranteed under 42 U.S.C. § 1981. Talbot County says this claim should be dismissed because the appropriate cause of action is § 1983. But this misses the point: the *violation* is of the rights guaranteed by § 1981. Talbot County does not dispute a violation of § 1981 has been pled, and there is no ambiguity to the substance of the claim for notice-pleading purposes. There is nothing talismanic about the label of a cause of action, provided the elements are pled. *See, e.g.*, *Grant v. Atlas Rest. Grp., LLC*, No. GLR-20-2226, 2021 WL 2826771, at *3 (D. Md. July 7, 2021) (denying motion to dismiss as to plaintiffs' § 1981 claim); *Evans v. Md. Nat'l Cap. Parks & Plan. Comm'n*, No. CV TDC-19-2651, 2020 WL 6703718, at *7 (D. Md. Nov. 13, 2020) (plaintiff alleged a plausible hostile work environment claim under § 1981); *Ali v. BC Architects Eng'rs, PLC*, 832 F. App'x 167, 173 (4th Cir. 2020), as amended (Oct. 16, 2020) (plaintiff adequately pled a retaliatory-termination claim under § 1981).

The Motion should be denied as to Count V. At most, this is a non-substantive defect that the Court may (and should, if it deems appropriate) allow Plaintiffs to cure by amendment.

F. Plaintiffs Have Sufficiently Pleaded Count VI: Violation of Maryland Constitution, Art. 24.

Plaintiffs' claim for violation of the Maryland Constitution – Art. 24 is viable for the same reasons that Plaintiffs' federal equal protection claims are viable.

G. Plaintiffs Have Sufficiently Pleaded Count VII: Violation of Maryland Constitution, Art. 44.

The County erroneously argues that Article 44 of the Maryland Declaration of Rights is reserved only for times of war and that no private right of action exists. Article 44 requires courts to "protect and enforce every clearly defined legal right . . . without regard to the presence or absence of real or fancied emergencies." *Kenly v. Huntingdon Bldg. Ass'n*, 166 Md. 182, 170 A. 526, 528-29 (1934) (concurrence). This provision allows for a private right of action if a "clearly defined legal right" is not protected, whether during wartime or peacetime. *Id.*; *see also U.S. Mortg. Co. v. Matthews*, 167 Md. 383, 173 A. 903, 909, *rev'd*, 293 U.S. 232, 55 S. Ct. 168, 79 L. Ed. 299 (1934) (considering Article 44 constitutional challenge to Maryland statute; reversed on federal constitutional grounds). Plaintiffs plausibly alleged a violation of Article 44 by the County's continued subversion of Plaintiffs' rights by maintaining the Talbot Boys statue.

H. Plaintiffs Have Sufficiently Pleaded Count VIII: Violation of Maryland Constitution, Art. 15.

Plaintiffs' Complaint alleges a violation of Article 15 of the Maryland Constitution, which governs taxation, and requires that taxation supports good government and community benefit. Compl. at ¶¶ 124-27. The County ignores the text of Article 15 and the caselaw interpreting it in arguing that Plaintiffs have not alleged a violation of the Article. Maryland courts have read Article 15 broadly, to encompass both taxation and the use of taxpayer funds for public purposes. *See, e.g.*, *Horace Mann League of U. S. of Am., Inc. v. Bd. of Pub. Works*, 242 Md. 645, 653, 220 A.2d 51, 54 (1966) (holding that plaintiffs had standing to challenge the use of taxpayer funds for private religious schools); *Allied Am. Mut. Fire Ins. Co. v. Comm'r*, 219 Md. 607, 616, 150 A.2d 421 (1959) (finding that taxes are "designed to promote the public convenience or the general prosperity, as well as those to promote public safety, health and morals, since it extends to the satisfying of great public needs and the promotion of the general

welfare"); *Balt. & E.S.R. Co. v. Spring*, 80 Md. 510, 517, 31 A. 208 (1895) (finding that Talbot County tax is a violation of Article 15 because it does not serve a public purpose). The use of taxpayer funds to maintain a statue erected to celebrate traitors to the United States and to intimidate and harass Black members of the community cannot be said to be supporting "good government and community benefit" for all of the reasons described throughout this brief. Accordingly, Plaintiffs have sufficiently pleaded that the County has violated Article 15 of the Maryland Constitution.

I. Plaintiffs Have Sufficiently Pleaded Count IX: Tortious Interference With Contract.

The County argues that it is immune from liability for tortious interference with contract because operating the courthouse is inherently governmental, and, alternatively, OPD and Ms. Petticolas failed to plead satisfaction of the notice provision of the required Local Government Tort Claims Act ("LGTCA"), § 5-304(b)(1). These arguments are unavailing because Plaintiffs' suit relates to the maintenance of a statue (not the operation of the courthouse), which is not inherently governmental. Plaintiffs also had good cause to forgo LGTCA notice because their claim relates to declaratory relief. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-304.

Moreover, even if Plaintiffs did not satisfy the notice requirement of the LGTCA (they did), Plaintiffs' case must proceed. The LGTCA provides that "upon motion and good cause shown the court may entertain the suit even though the required notice was not given" unless "the defendant can affirmatively show that its defense has been prejudiced by lack of required notice[.]" Md. Code Ann., Cts. & Jud. Proc. § 5-304(d). The test for good cause is "whether the claimant prosecuted his claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances." *Quigley v. United States*, 865 F. Supp. 2d 685, 693 (D. Md. 2012) (citation omitted). And, "[t]he same acts and conduct that

establishes that the purpose of the statute has been satisfied may also constitute a waiver of notice[.]" *Moore v. Norouzi*, 371 Md. 154, 180, 807 A.2d 632, 648 (Md. 2002). Plaintiffs' widespread community organizing—including requesting the County remove the statue—provided the County ample notice and opportunity to investigate the harms alleged by Plaintiffs and satisfied the purpose of the statute. Accordingly, there is good cause to find that Plaintiffs substantially complied with the notice requirement, and doing so would not prejudice the County's defense.

IV. Plaintiffs' Claims Are Timely.

Without citation to a single legal authority, the County contends that because the Talbot Boys statue was erected in 1916, Plaintiffs' claims are untimely. Obviously, this is wrong, as the County's logic would insulate from challenge all manner of ongoing government wrongdoing. Segregated schools, for example, could not have been challenged in *Brown*, because the segregated system had been in place long before the Brown family came along to challenge it.

Even on general principles, the County's argument is frivolous. It is generally improper for a court to reach the merits of a limitations defense at the motion to dismiss stage. *See Md. Restorative Just. Initiative v. Hogan*, No. ELH-16-1021, 2017 WL 467731, at *16 (D. Md. Feb. 3, 2017). "Rather, an affirmative defense can be resolved by way of a Rule 12(b)(6) motion only in the relatively rare circumstances where… all facts necessary to the affirmative defense clearly appear[] *on the face of the complaint.*" *Id.* (internal quotations and citations omitted, emphasis in original.)

Here, Talbot County has fallen far short of meeting this standard. The Complaint alleges that Plaintiffs' rights to equal protection of the laws are violated on a daily basis by the County's glorification of white supremacy at the place where they work, engage in business and recreation, and seek justice. The statute of limitations cannot be invoked to immunize an ongoing

violation of constitutional rights. *See Va. Hosp. Ass'n v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989).

CONCLUSION

Times change, and standards evolve. In no area can we be more grateful this is true than with respect to race relations, given the atrocity of American slavery and the cause of the Confederate States.

The landscape surrounding Talbot County's Confederate monument has been transformed since 1916, and even just since 2016, after white supremacist murderer and Confederate adherent Dylann Roof triggered a profound national reassessment of the racist message inherent in Confederate imagery, leading to the toppling of monuments across America and even in the deepest reaches of the South. Talbot County now stands alone among all Maryland jurisdictions in its willfully blind insistence that it hurts no one for the County to continue glorifying white supremacy at the entrance to its Courthouse, notwithstanding years of protests and pleas from Black residents, including Plaintiffs, decrying the ways in which they are indeed injured by the monument. When people speak today of "systemic racism" in the United States, the Talbot Boys statue—and the County's fealty to it and what it represents—is exactly the sort of thing they are talking about

This context matters. As the Supreme Court has held, those charged with interpreting and applying the Constitution over time must remain open to seeing changes in the world around us, and to how these changes impact perceptions and expectations of justice:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Obergefell v. Hodges, 576 U.S. 644, 663-64 (2015).

For the reasons stated above, the County's Motion should be denied.

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Respectfully submitted,

/s/ Daniel W. Wolff

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**Motion for leave to appear pro hac vice forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August 2021, a copy of the foregoing was electronically filed with notice to:

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