IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

Caroline County Branch of the National Association for the Advancement of Colored People, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 23-cv-00484-SAG
Town of Federalsburg, Maryland,	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN REPLY TO THE TOWN OF FEDERALSBURG'S OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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I. Introduction

This is an action brought under Section 2 of the Voting Rights Act of 1965 in which the Black voters of the Town of Federalsburg rise up to challenge their government's 200-year history of racial oppression and all-white rule. The Caroline County Branch of the NAACP, the Caucus of African American Leaders and seven individual Black voters assert that the Town's election practices, including its longstanding use of an at-large, staggered term election system, and its various 2023 proposals to modify the system and/or cancel 2023 elections, violate Section 2 by interacting "with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

After filing their Complaint on February 22, Plaintiffs followed with a Motion for Preliminary Injunction, due to the need for prompt action to bring the Town's election system into compliance with the Voting Rights Act in time for elections scheduled for September 2023. The Motion was supported by extensive expert analysis and powerful testimonial evidence from the Town's Black voters, laying bare the irreparable harms inflicted over many decades to Federalsburg's Black residents by the Town's entrenched system of all-white government.

Yet *without ever contesting or even mentioning Plaintiffs' compelling proof of racial discrimination and oppression,*[1] Defendant now seeks to evade court review, outrageously contending that Plaintiffs have suffered and will suffer no injury if the Court rejects their plea for

[1] Significantly, Defendant expressly admits numerous aspects of Plaintiffs' allegations in its Answer to the Complaint. (ECF 14). For example, the Town admits that its population is 47 percent Black and that no Black person in the Town's history has held elective office. Answer at ¶ 4. The Town further admits, as it must, that "Black residents of Maryland's Eastern Shore, including those in Caroline County and Federalsburg, have been subjected to racial discrimination and oppression, some of which was egregious." *Id.* at ¶ 19.

relief. Consistent with its routine practices of silencing and excluding Black residents, Defendant argues that the Court should stand by and allow the Town's white officials to go about the business of governance in the same manner they have always done things in the past. This, they say, is because Federalsburg officials allegedly are in the process of unilaterally mooting Black voters' claims by adjusting the election system as they see fit – albeit over the vigorous objections of Black voters and in ways that do not adequately remedy the Town's voting rights violations—including essentially guaranteeing that three of the four councilmembers will be white for at least the next two-and-a-half years.

Defendant's scheme must fail. Any proposal to remedy a Section 2 violation must itself conform with Section 2. *See e.g., McGhee v. Granville Cnty.,* 860 F.2d 110, 118 (4th Cir. 1988); *Edge v. Sumter Cnty. School Dist.,* 775 F.2d 1509, 1510 (11th Cir.1985). But as set forth below, the Resolution introduced by Defendant through its ordinary legislative process falls far short of remedying the violations established by the Plaintiffs and now conceded by Defendant; as such, they do not moot the Plaintiffs' claims.

II. By its Silence, the Town Concedes that It has Violated Plaintiffs' Rights Under the Voting Rights Act through its Use of a Racially Dilutive At-Large, Staggered Term Election System.

In assessing a Section 2 case, the Supreme Court requires this Court to evaluate the legality of a challenged election system before turning to assessment of the remedy for the violation. *See, e.g., Baltimore Cnty. Branch of the NAACP v. Baltimore Cnty.*, No. 21-cv-03232-LKG, 2022 WL 657562 (D. Md. Feb. 22, 2022) (holding initial proceeding as to Plaintiffs' Preliminary Injunction Motion challenging County redistricting plan then analyzing acceptability of County's proposed remedial plan separately); *Cane v. Worcester Cnty.*, 840 F.Supp. 1081 (D. Md. 1994) (structuring Voting Rights Act proceeding into separate liability and remedial phases); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F.Supp. 1022 (D. Md. 1994) (three-judge-court) (same). The

Town cannot avoid this established process by refusing to acknowledge it or by seeking to put the proverbial cart before the horse by jumping ahead to the remedial phase of the case. This is particularly true here, because the so-called remedy it offers reserves for Defendant significant discretion to continue practices that violate Plaintiffs' rights, unlawfully extends the reign of white dominance, and at best delays the Town's full compliance with the Voting Rights Act until years into the future.

Plaintiffs' Motion for Preliminary Injunction is ripe for review, and Defendant has not contested – nor even attempted to contest – Plaintiffs' comprehensive proof, despite having sought and been granted numerous extensions to allow them to do so.[2] As such, Defendant effectively concedes the violation pled and proven by the Plaintiffs:

> Against the backdrop of the area's history of racial oppression and its continuing legacy, and in conjunction with patterns of racial polarization among Federalsburg voters, the Town's at-large, staggered-term system enables the white majority to maintain Federalsburg's all-white government by overriding and diluting the influence of Black voters, suppressing Black candidacies, and preventing residents of color from electing their chosen representatives.

See Preliminary Injunction Motion at 2. Given Defendant's silence in the face of Black voters' showing of irreparable harm, Plaintiffs have established, and the Court should declare, that over a period of decades Defendant violated Black voters' rights under Section 2 of the Voting Rights Act. *See, e.g.*, *Jones v. Owens-Corning Fiberglas Corp.*, 69 F.3d 712, 718 (4th Cir. 1995) (contents of affidavits were conclusively established where uncontested by adverse party); *U.S. Labor Party v. Knox,* 430 F.Supp. 1359, 1362 (W.D.N.C. 1977) (crediting Plaintiffs'

[2] Defendant's misplaced confidence that it could moot Plaintiffs' claims and avoid court-ordered reform by unilaterally proposing and passing a resolution that fails to address Plaintiffs' concerns is demonstrated by Defendant's decision to disrupt settlement negotiations with filing of its offensive Opposition to Plaintiffs' Motion for Preliminary Injunction, despite Plaintiffs' offer of an additional extension of time to respond.

uncontradicted affidavit and restraining defendants on that basis); *Gowen v. Winfield,* No. 7:20cv00247, 2022 WL 822172, *3 (W.D. Va. Mar. 18, 2022) (in the summary judgment context, if a party fails to address another part's assertion of fact, the court may consider the fact undisputed). Only then is it proper for the parties and the Court to move on to consider how best to remedy this violation. *See, Keyes v. School Dist. No. 1 Denver,* 413 U.S. 189, 236-37 (1973) (holding that, "if there is a failure successfully to rebut the *prima facie case,* the inquiry then turns to what steps the Court must take to address the violation").

III. Plaintiffs are Entitled to Injunctive Relief Because Resolution 23-04 Does Not Remedy the Voting Rights Act Violations Established in this Case.

While not contesting Plaintiffs' proof of a VRA violation, Federalsburg officials nevertheless urge the Court not to grant Plaintiffs any relief, contending that they are in the process of adjusting their unlawful and discriminatory election system. But in fact, the "remedy" they propose is entirely illusory and inadequate. Given the history of discrimination and oppression Federalsburg's Black residents have endured, Plaintiffs certainly cannot be expected to simply trust Defendant to address its civil rights violations. To the contrary, examination of the Town's Resolution – particularly amid Defendant's bullying effort to "moot" the Plaintiffs' claims through unilateral action – makes clear that such trust would be thoroughly misplaced. As attested by Plaintiffs' Expert Demographer William S. Cooper, the Resolution fails to require that the Town's reformed election system comply with the Voting Rights Act or with principles of racial fairness; as a result, it does neither. *See* Second Declaration of William S. Cooper, attached as Exhibit A.

Rather than mooting Plaintiffs' claims as Defendant contends, the Town's proposal fails even to address its violation of Plaintiffs' rights in several respects. Specifically, the Resolution fails as a remedy for the Town's admitted violation for the following reasons:

1. Although the Resolution would alter the at-large structure to create two two-member districts, neither of the two districts is required to be majority Black in population.

2. Even assuming one of the two districts was designated as majority Black (which could be accomplished only via future resolution), by retaining staggering and dictating that only one candidate be elected from each district in 2023, the Resolution ensures that three of the four council seats will remain off limits to Black voters at least through late 2025.

3. By using the Town's ordinary legislative process to address a proven race discrimination claim, the Town strips the "remedy" of federal legal protection, subjecting Plaintiffs' fundamental rights to popular referendum and to suspension altogether if a petition effort moves forward.

Each of these flaws is fatal to the Resolution's legal acceptability as a remedy, as discussed in turn below.

A. Resolution 23-04's failure on its face to require an election system that complies with the Voting Rights Act or that establishes any majority-Black district makes it inadequate and unlawful as a remedy under Section 2.

Town Resolution 23-04 states as follows:

> The Town shall be divided into two (2) legislative districts for the election of members of the Council. Each legislative district shall contain two (2) Councilmembers who shall be elected by the registered voters of that legislative district only. The legislative districts shall be established on a map adopted by Resolution by a majority of the Mayor and Council.
>
> (i) Each legislative district shall consist of adjoining territory, be relatively compact in form, and include substantially the same population as other districts. Due regard shall be given to all constitutional standards in creating the legislative districts.
>
> (ii) From time to time as based on the latest U.S. Census Bureau data and after public hearing, the Mayor and Council may reestablish boundaries of the legislative districts for elections of the members of the Council.

While the Resolution explicitly requires that the legislative districts it establishes adhere to "traditional districting principles" such as compactness and contiguity, nowhere does it reference or require compliance with the Voting Rights Act or principles of racial fairness, and nowhere does it require that one of the two districts be majority Black in voting-age population. By Defendant's own description of the Resolution, this is not in dispute. *See* Defendant's PI Memorandum ("Opp. Br.") at 3. Instead, the Resolution gives the all-white Town Council

discretion to adopt whatever district map it chooses through further "Resolution by majority of the Mayor and Council." Because Resolution 23-04 has no requirement that the districts comply with the Voting Rights Act or principles of racial fairness, the district boundaries could be drawn to create two majority white districts, exchanging an at-large system that guarantees all-white governance, with a district system that guarantees all-white governance.

Given Defendant's decades-long record of racial oppression, violations of Black residents' fundamental voting rights through the maintenance of a racially discriminatory and dilutive election system, its passage of the Resolution over the objections of Black voters,[3] and its sleight of hand in purposefully omitting any specific remedial plan or actual requirement that the district plan adopted comply with the Voting Rights Act, the Resolution fails on its face as a remedy. *See* Cooper Second Decl. at ¶ 5.

B. Even if the Resolution did require that one of its two districts be majority Black in voting age population, the election scheme it establishes nevertheless fails to fully remedy the vote dilution proven by the Plaintiffs.

As explained in Part III.A, Resolution 23-04 is inadequate to address Plaintiffs' concerns because it lacks any requirement that one of the two legislative districts it establishes be majority Black in voting age population. Even if this were not so, however, and the Resolution did require racial fairness among the districts, it would still fail to comply with Section 2 because it continues to lock Black voters out of three of the Council's four positions at least through late 2025. The Resolution expressly states that the 2023 election shall be conducted as follows:

[3] Indeed, during the public hearing where the Town Council adopted the resolution, members of the Black community, including some Plaintiffs, voiced concern about the resolutions being passed. Their concerns were disregarded as the Town Council forged ahead by unanimous vote with its inadequate Resolution. *See* Town Council Meeting Agenda and Minutes, *Public Hearing and Regular Meeting* (Apr. 3, 2023), https://www.townoffederalsburg.org/agenda_details_T48_R138.php.

> On the fourth Tuesday of September in 2023 an election shall be held between the hours of 7:00 a.m. and 7:00 p.m. under this Charter, for the election of the Mayor and two (2) Councilmembers each from a different district. On the fourth Tuesday in September 2025 an election shall be held between the hours of 7:00 a.m. and 7:00 p.m. under this Charter for the election of two (2) Councilmembers each from a different district.

Resolution at Section C2-1 (a). This means that even if one of the two districts were to be established to include a majority Black voting age population, only one Councilmember (out of four) would be elected from this new district in 2023. This all but ensures – based on Plaintiffs' undisputed proof of racially polarized voting in Town elections – that the Town Council will continue to be dominated by white council members for *at least* another two-and-a-half years. That is, at least through the next election cycle in September of 2025, Black voters will be denied fair opportunity to elect representatives of their choice in numbers comparable to their share of the population, as required by the Voting Rights Act.

As Defendant concedes, Plaintiffs' proof establishes that Black residents of Federalsburg make up roughly half the Town's population. Answer at ¶ 4. They have demonstrated, consistent with the requirements laid out by the Supreme Court in *Thornburg v. Gingles,* that in the context of a racially fair election system, Federalsburg's Black population is sufficiently large, compact and politically cohesive to elect two Council members of their choice among the Town's four Council members in this year's upcoming election. Defendant does not dispute this either. Yet, the Town now asks this Court to endorse the notion that Plaintiffs should make do with half a remedy so that incumbent white officials can stay in control. This is impermissible.

When a Court assesses the adequacy of a remedial plan under Section 2, "the proper inquiry" is whether Black voters have the ability to elect candidates of their choice *in the present*, "not whether they will have this ability in the future." *Montes v. City of Yakima*, No. 12-CV-3108-TOR, 2015 WL 11120964, at *7 (E.D. Wash. Feb. 17, 2015) (rejecting City plan that relied on future compliance with the VRA, when full compliance was possible immediately under Plaintiffs'

alternative plan), *citing Ruiz v. City of Santa Maria,* 160 F.3d 543, 555 (9th Cir. 1998). As the *Montes* court opined, the prospect of future VRA compliance is "irrelevant to the Court's present inquiry. The only relevant fact is that the Defendant's . . . plan does not afford the Yakima Latino population a *present* ability to participate in the political process." *Montes,* 2015 WL 11120964, at *7 (emphasis in original).

Here, in determining the present adequacy of Defendant's proposed plan as a remedy, the Court must look to the equality of access it offers to Black and white voters. In this calculus, "[r]ough proportionality is a significant indicator of whether an electoral plan provides an adequate remedy to a Section 2 violation." *Id.* at *8. As explained by Plaintiffs' expert William Cooper, who was the demographer in the *Montes* case, the problem the court found there in rejecting the City's plan was that its use of staggering meant that it did not provide Latine voters a *present* opportunity "to obtain roughly proportional representation." *Id.*

The same is true in Federalsburg.

Resolution 23-04's failure as a remedy for the vote dilution established by Plaintiffs results directly from the Town's retention of staggered terms in its election system notwithstanding the Plaintiffs' challenge to that election feature as racially discriminatory.[4] Although the full impact

[4] As discussed in Plaintiffs' preliminary injunction motion and in supporting testimony provided by former Maryland Civil Rights Director Carl Snowden, minority vote dilution "is reinforced by the staggering of terms, because this practice makes it impossible for minority voters to 'single shoot' for their candidates of choice within a larger pool." PI Motion at 22, Snowden Decl. ¶ 19. Numerous courts have recognized the racially dilutive effect of election staggering. *See, e.g., City of Lockhart v. United States*, 460 U.S. 125, 135 (1983) ("The use of staggered terms also may have a discriminatory effect under some circumstances, since it, too, might reduce the opportunity for single-shot voting"); *Collins v. City of Norfolk*, 883 F.2d 1232, 1236 (4th Cir. 1989) ("The Supreme Court has long recognized that at-large voting in a multimember political unit . . . may prevent minorities from electing representatives of their choice by diluting their voting strength. The potential for this type of discrimination may be enhanced by staggered terms.") (citation omitted).

of election staggering is not generally felt in a single-member district system, just as in *Montes* its discriminatory impact would be maintained here because the Resolution employs two two-member districts and uses staggering to unlawfully extend white dominance within the government by mandating that Black voters be permitted only one opportunity to elect a candidate of their choice in the 2023 election. As discussed by Mr. Cooper, the problem presented by staggering in *Montes* left the Court with no choice but to remedy the City's violation by ordering all council members to stand for election in 2015, even if their terms were not set to expire due to the staggering. Cooper Second Decl. Ex. A at ¶ 8. This was necessary to provide a full and timely remedy, and was justified, the Court explained, because the incumbent council members had been elected under "an unequal election system [that] has substantially infringed upon a protected group's ability to affect the outcome of an election." *Montes,* 2015 WL 11120964, at *10, citing *Toney v. White*, 488 F.2d 310, 315 (5th Cir. 1973) (en banc).

Plaintiffs have shown that their numbers and political cohesion within Federalsburg's racially polarized electorate establish that they are currently entitled to equal opportunities with white voters – meaning the opportunity to elect *two representatives* of their choice to the four-member council *in the next election*. *See* Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction ("PI Motion") § III.B, at p. 9–20; PI Motion, Ex. 3, Decl. of William S. Cooper at p. 11–14. Defendant's alleged remedy denies them this right, and thus should be rejected by the Court.

C. Plaintiffs' fundamental voting rights cannot properly be subject to popular referendum.

It has been settled for over 50 years that federal courts have broad equitable powers permitting them to enforce federal legal rights to remedy violations that would otherwise occur by application of state or local laws. *See, e.g., Missouri v. Jenkins,* 495 U.S. 33, 52–53 (1990); *N.C.*

State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971); *Swann v. Charlotte–Mecklenburg Bd. of Educ.,* 402 U.S. 1, 15 (1971). This principle was clearly set forth in the landmark *Swann* school desegregation cases, where the U.S. Supreme Court held that state law provisions requiring school assignments to be color blind were necessarily preempted by the federal court's power to order a race-conscious remedy for longstanding discrimination and segregation violative of the Fourteenth Amendment. *N.C. State Bd. of Educ.*, 402 U.S. at 45. *Accord, Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 659-60 (1979) ("Any state-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause" and therefore "parties to this litigation may be ordered to prepare a set of rules that will implement the court's interpretation of the parties' rights even if state law withholds from them the power to do so").

Just as in the arena of constitutional litigation, the Supremacy Clause is implicated in cases like this seeking to effect electoral reform to protect minority voting rights. *See, e.g. Jamison v. Tupelo*, No. 1:04CV366, 2006 WL 2250963, at *2 (N.D. Miss. July 26, 2006) (rejecting arguments in Voting Rights Act challenge that municipal election system could only properly be reformed through Mississippi code procedures or that plaintiffs were required to exhaust state procedures); *Lopez v. Monterey County,* 871 F.Supp. 1254 (N.D. Cal. 1994) (in Section 2 challenge to at-large election system where remedial plan circumvented state constitution, Supremacy Clause nevertheless required that relief for Voting Rights Act violation take precedence over enforcement of state law.)

Despite these important principles, Defendant has insisted on pushing forward with half-baked "reforms" implemented outside the litigation process through the Town's ordinary legislative procedures in an attempt to moot Plaintiffs' claims and to deny the Town's Black voters

the protection a ruling from this Court would afford them. In so doing, and pursuant to rules prescribed by the Town's Charter, Defendant subjects any reform aimed at protecting Plaintiffs' voting rights to the possibility of popular referendum. Not only is this offensive to the principle that individual rights cannot be taken away at the whim of the majority, but a successful petition would suspend or cancel election reform entirely. Put differently, the referendum opens the possibility for the Town's white majority to petition the election changes and reverse the reform in its entirety. At the very least, the possibility of referendum adversely impacts the timeliness of relief due to the Plaintiffs in this bicentennial election year. For example, the time for petition of Resolution 23-04 does not run for several more weeks. More importantly, if Defendant were to seek to correct the flaws in Resolution 23-04 to ensure that the remedy it proposes fully complies with the Voting Rights Act, the entire process for legislation and public referendum would have to begin anew, pushing reform of the election system much too close to the scheduled election day in September to protect Plaintiffs' rights. Charter of the Town of Federalsburg, Art. II Elections § C3-10.

IV. Given the Violation Established by the Plaintiffs and the Inadequacy of the Defendant's Proposed Remedy, the Court Should Issue a Preliminary Injunction Protecting Plaintiffs' Fundamental Rights by Fully Remedying the Violation in Time for the 2023 Elections.

A legislative proposal that fails to remedy a VRA violation is due no deference from the Court. *Upham v. Seamon,* 456 U.S. 37, 41–42 (1982). Thus, where, as here, Black voters establish a Section 2 violation and the Defendant fails to provide a remedy that is legally adequate, "the responsibility falls on the District Court to exercise its discretion in fashioning a near optimal plan." *Cane v. Worcester Cnty.*, 35 F.3d 921, 925 (4th Cir. 1994), *quoting McGhee,* 860 F.2d at 115. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility is inherent in equitable

remedies." *Charlotte–Mecklenburg Bd. of Educ.,* 402 U.S. at 15. As the Fourth Circuit has counseled, a court-ordered voting rights remedy "should restructure the districting system to eradicate, to the maximum extent possible by that means, the dilution proximately caused by that system." *McGee*, 860 F.2d at 117–18 (emphasis in original). The Court should not, in the name of deference to the legislature, refrain from providing remedies fully adequate to redress [civil rights] violations which have been adjudicated and must be rectified." *White v. Weiser*, 412 U.S. 783, 797 (1973).

As the court did in *Montes* when faced with the same type of challenge respecting full and *timely* compliance with the Voting Rights Act, this Court "should exercise its traditional equitable powers to fashion the relief so that it *completely* remedies the prior dilution of minority voting strength and *fully* provides equal opportunity for minority citizens to participate and to elect candidates of their choice." *Dillard v. Crenshaw Cnty.* 831 F.2d 246, 250 (11th Cir.1987) (quoting 1982 U.S.C.C.A.N. 177, 208) (emphasis added by 11th Circuit); *Cane v. Worcester County*, 840 F.Supp. 1081, 1091 (D. Md. 1994) (same). Indeed, as the Supreme Court has stated:

> A district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

United States v. Paradise, 480 U.S. 149, 184 (1987) (quotations and citations omitted). Furthermore, the court "cannot authorize an element of an election proposal that will not *with certitude* completely remedy the Section 2 violation." *Dillard,* at 252.

Consistent with these principles, Plaintiffs ask the Court to implement a remedy that fully addresses the rights violations they have established in time for the Town's 2023 elections, and that protects their right to this hard-fought remedy from being overturned by white residents in a

popular referendum. Toward this end, Plaintiffs have submitted to the Court and to the Defendant sample election plans that would fully remedy the Voting Rights Act violation they have proven. The two options submitted by the Plaintiffs include one plan with four single-member districts, two of which are majority Black in voting age population ("VAP"), and one with two two-member districts, one majority Black in VAP. *See* ECF 8-5, Ex. 3 Decl. William Cooper at p. 13–14. Each of these plans complies with the Voting Rights Act, and implementation of either plan this year would permit Federalsburg's Black voters finally to gain the opportunity to have an equal say in their Town's governance. Furthermore, unlike in the *Montes* case where the Court was required to cut incumbent terms short to provide a complete remedy, here Plaintiffs' proposed remedies provide complete relief even if staggering is retained in light of the fact that only the Mayor and two Council members have terms expiring in 2023. That is, if the four-district plan is chosen, in keeping with court precedent favoring single-member-district plans,[5] 2023 elections can be held in the plan's two majority Black districts in order to bring the Town into compliance with the Voting Rights Act. If the plan including two two-member districts is selected, this year's election can be structured to elect two Council members from the one district that is majority Black in population.[6]

[5] The Supreme Court has counseled that in remedying minority vote dilution, courts should favor single-member-district plans over those, like that proposed by Federalsburg, that include multi-member districts. *E.g., Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) ("[A] court-drawn plan should prefer single member districts over multimember districts, absent persuasive justification to the contrary . . . We have repeatedly reaffirmed this remedial principle.") (collecting cases).

[6] As an interim remedy, this approach is certainly justified, given the Town's 200-year history of all-white government and the fact that all of the current incumbent council members reside in the plans' majority-white districts, thus ensuring full representation for residents there. If, in the future, the Town wishes to realign elections so that voters in both districts go to the polls at the same time, Defendant is free to eliminate staggered elections or to realign elections at a future date after the existing Voting Rights Act violation has been cured.

V. Because Plaintiffs Will Suffer Irreparable Loss of Fundamental Rights Without Court Intervention, This Action is Not Moot.

A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," which occurs "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (citations omitted). When a defendant claims its unlawful conduct ended "partway through litigation," it has "the heavy burden of persuading the court that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *6th Cong. Dist. Republican Comm. v. Alcorn*, 913 F.3d 393, 407 (4th Cir. 2019) (citations, quotations, and alteration omitted). This case plainly is not moot under these standards because a live controversy still exists, and as explained above, the court can, and should, grant relief to prevent the Defendant's continued violations of Black residents' voting rights. Defendant does not provide any argument or explanation to meet its heavy burden of showing that the Town's unlawful exclusion of Black voters from the political process will not continue during the 2023 election and into the foreseeable future. Nor can they.

Mootness occurs only if the change in defendant's conduct is unconditional, and only if the defendant's changed conduct "afford[s] complete relief" for the injury. *United States v. City of Cambridge*, 799 F.2d 137, 140 (4th Cir. 1986). Neither is true here. Instead, the change touted by the Town leaves in place the defendant's "authority and capacity to repeat [the] alleged harm." *Porter v. Clarke*, 852 F.3d 358, 364 (4th Cir. 2017) (citations and quotations omitted). As discussed in Part III above, because Resolution 23-04 does not require the Town's election system to include any majority-Black district or to comply with Section 2 at all, it fails to "afford complete relief." *City of Cambridge*, 799 F.2d at 140. *See also*, *Veasey v. Abbott*, 888 F.3d 792 (5th Cir. 2018) (appeal of district court's order enjoining state's voter identification law on ground that it

violated § 2 of Voting Rights Act was not rendered moot by state's adoption of remedial legislation, where appeal challenged rejection of remedial legislation as remedy for VRA violations). The Resolution leaves Defendant the option of adopting a district map that creates two majority white districts, and once again shuts out the Black community.[7] It further falls short in that it is subject to popular referendum, a feature of the legislative process that is outside of the Defendant's control and can possibly stymy any attempt to change the election system. And most importantly, because the Resolution explicitly requires the Town's Black voters to wait years before they finally secure election opportunities equal to those enjoyed by Federalsburg's white voters, the Town's "remedy" itself violates the Voting Rights Act.

In determining whether a defendant can meet its "formidable burden," of demonstrating mootness, courts require proof that the defendant's newfound commitment to compliance is

[7] This is precisely the type of situation that the Supreme Court and the Fourth Circuit have identified as "a well-recognized exception to the mootness doctrine." Time and again, both Courts have held that "'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Porter, supra, citing City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). As the *Porter* Court explained:

> The voluntary cessation exception "traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1, 121 S.Ct. 743, 148 L.Ed.2d 757 (2001). … *see also Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 132 S.Ct. 2277, 2287, 183 L.Ed.2d 281 (2012) ("The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed."). To that end, "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 190, 120 S.Ct. 693.

Porter, 852 F.3d at 364.

"unconditional and irrevocable", *Already, LLC v. Nike, Inc.*, 586 U.S. 85, 91–93 (2013), or that the change implemented "completely and irrevocably eradicate[s] the effects" of the challenged conduct. *Porter,* at 364, *citing Lindquist v. Idaho State Bd. of Corr.*, 776 F.2d 851, 854 (9th Cir. 1985). The Town has not come close to meeting this burden. Rather, the Resolution put forward by the Town is the type of conditional, self-serving half-step toward compliance with the Voting Rights Act that would allow white officials to continue in power by conducting the 2023 election in violation of Black voters' rights, while also allowing white residents of the Town to mount a referendum campaign to overturn the limited reforms it does offer. Plaintiffs' claims to relief are not moot.

VI. Defendant's Remaining Arguments are Meritless.

A. Plaintiffs Have Established that They Will Suffer Irreparable Harm Absent an Injunction.

Both in their initial Motion for Preliminary Injunction and in this Reply, Plaintiffs have shown that, absent an injunction from this Court, Black voters in Federalsburg will be denied the opportunity to elect representatives of their choice in proportion to their population in the September 2023 election, in violation of Section 2. Defendant's claim that "the election system complained of will not be used in the September 2023 election" (Opp. Br. at 8) is of no moment given that the very same violation complained of continues notwithstanding the change proposed to the election system pursuant to the Resolution. This continuing violation plainly distinguishes this case from *Navajo Nation Human Rights Comm'n v. San Juan Cnty.*, 215 F.Supp.3d 1201 (D. Utah 2016). There, as Defendant notes, the new election system remedied the acts complained of, and the Plaintiffs' remaining concerns related merely to the potential re-implementation of the prior system. Here, as in the *Montes* case, Defendant's violation is not remedied by the Town's

proposal, and therefore their baseless argument that Plaintiffs will not suffer irreparable injury must be rejected.

B. Plaintiffs' Claims Are Ripe.

The ripeness doctrine prohibits a federal court from exercising jurisdiction over a case until an actual controversy is presented so as to avoid court involvement in abstract disagreements. *See Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 579 (1985). Plaintiffs certainly present ripe claims here. Indeed, Defendant's contention that Black voters' claims challenging unlawful vote denial in existence for decades are not yet ripe would be laughable, if not so tragic. Plaintiffs' claims are ripe because there exists an actual case or controversy as to whether the election system the Town previously used to conduct municipal elections, as well as the system it proposes to use in 2023, violates Black voters' rights under Section 2. The claim is not merely ripe, but overly so.

VII. Conclusion

Three decades ago, in granting relief in another Eastern Shore voting rights case, Maryland's federal court remarked that in doing so, "we hope to unlock doors that for too long have been closed to the African–American community on the Eastern Shore." *Marylanders for Fair Representation v. Schaefer*, *supra*, 849 F. Supp. at 1064. It seems almost unimaginable that all this time later, Federalsburg officials would still be arguing that the Town's Black residents should wait longer yet to unlock the doors to local government. In introducing and passing legislation to revise its election system, the Town has acted without the Black community's active participation, and without regard to the Town's VRA violations and the rights of its Black residents. Such actions demonstrate precisely why a preliminary injunction is necessary. Defendant's arguments are unconvincing, and the Defendant's actions have not obviated the need for the Court's intervention.

As Carl Snowden stated in his declaration, Federalsburg "has for too long been run by and for the benefit of only its white residents. It may have been a long time coming, but I believe the chimes of justice are finally tolling for Caroline County and the Town of Federalsburg." PI Motion, Ex. 1, Decl. of Carl Snowden, ¶ 22. The Plaintiffs and other Black voters of Federalsburg already have waited far too long for an election system that treats them fairly, equally and with the full respect they are due. They should not be made to wait any longer.

For these reasons, Plaintiffs respectfully request this Court grant its Motion for Preliminary Injunction.

Dated: May 2, 2023

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of **PLAINTIFFS' MEMORANDUM IN REPLY TO THE TOWN OF FEDERALSBURG'S OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION** was served electronically upon all counsel of record by electronic filing via the Court's CM/ECF system.

Dated: May 2, 2023

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