UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Northern Division)

CAROLINE COUNTY BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*, Plaintiffs, v. TOWN OF FEDERALSBURG, MARYLAND, Defendant.	Civil Action No. 23-00484-SAG

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 105, Plaintiffs, by and through counsel, hereby respectfully move for summary judgment on the causes of action stated in Plaintiffs' complaint for a violation of Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301, and pursuant to 42 U.S.C. § 1983. The grounds supporting this motion are contained in the concurrently-filed supporting memorandum (including a statement of material, undisputed facts) and the documents referenced therein, which are hereby incorporated into this motion.

Plaintiffs request that the Court declare, pursuant to 28 U.S.C. §§ 2201-02, that Defendant's longtime use of an at-large, staggered term election system violated Plaintiffs' rights to be free from race discrimination in voting and election practices guaranteed under Section 2 of Voting Rights Act of 1965 and 42 U.S.C. § 1983, and award each individual Plaintiff nominal damages in recognition of the harms inflicted upon them due to Defendant's discrimination. Plaintiffs additionally request that the Court declare the current Federalsburg Charter, as amended on May 23, 2023 by Resolution 23-04, invalid to the extent that it mandates an election system for

the 2023 Federalsburg election that itself violates the Voting Rights Act and 42 U.S.C. § 1983, by continuing to dilute Black voting strength through its use of staggering elections.

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Enter summary judgment in Plaintiffs' favor and against Defendant pursuant to 28 U.S.C. §§ 2201-02, declaring that the Town's past election practices have subjected the Plaintiffs to racial vote dilution in violation of Section 2 of the Voting Rights Act, and further declaring the Federalsburg Town Charter, as amended by Resolution 23-04, invalid to the extent that it continues this violation;
2. Formally approve and order into effect the Defendant's plan under Resolution 23-07 to rectify this violation;
3. Award each Individual Plaintiff nominal damages against the Defendant pursuant to 42 U.S.C. § 1983; and
4. Grant such other and further relief as justice may require.

Respectfully Submitted,

Dated: June 16, 2023

/s/ *Deborah A. Jeon*
Deborah A. Jeon (Bar #06905)
Nicholas Taichi Steiner (Bar #19670)
AMERICAN CIVIL LIBERTIES UNION OF MARYLAND
3600 Clipper Mill Road Suite 350
Baltimore, MD 21211
(410) 889-8555

Counsel for the Plaintiffs

/s/ Daniel W. Wolff
Daniel W. Wolff (Bar #19940)
Katie Aber
Cori Schreider
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2621

Counsel for the Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT was served electronically upon all counsel of record by electronic filing via the Court's CM/ECF system.

Dated: June 16, 2023

/s/ *Deborah A. Jeon*
Deborah A. Jeon (Bar #06905)
Nicholas Taichi Steiner (Bar #19670)
AMERICAN CIVIL LIBERTIES UNION OF MARYLAND
3600 Clipper Mill Road Suite 350
Baltimore, MD 21211
(410) 889-8555

Counsel for the Plaintiffs

/s/ Daniel W. Wolff
Daniel W. Wolff (Bar #19940)
Katie Aber
Cori Schreider
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2621

Counsel for the Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Northern Division)

CAROLINE COUNTY BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*, Plaintiffs, v. TOWN OF FEDERALSBURG, MARYLAND, Defendant.	Civil Action No. 23–00484–SAG

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

This is an action brought by Black voters of the Town of Federalsburg, the Caroline County NAACP and the Caucus of African American Leaders pursuant to Section 2 of the Voting Rights Act of 1965 and 42 U.S.C. § 1983, challenging past and present race discrimination perpetrated by the Defendant against the Plaintiffs with respect to voting, elections and municipal administration. In the context of preliminary injunction proceedings, the Court has already recognized the Town's violation of Plaintiffs' rights under Section 2 through its use of at-large elections and staggering of terms to shut Black residents out of government throughout the Town's 200-year history. *See e.g.*, Tr., May 9 Hrg. 45:18–21; 46:6-9; Tr., June 8 Hrg. 19:17 –22, 20:4–21:1.

As set forth below,[1] there are no genuine disputes of relevant material facts, and no further development of the facts is necessary. Moreover, the case is not moot. As explained below, although the Town took steps to alleviate the Section 2 violations that would otherwise have prejudiced Plaintiffs and the Town's Black voters in the upcoming September election—thus causing this Court to deny Plaintiffs' request for a preliminary injunction on grounds that Plaintiffs were no longer likely to suffer irreparable harm—the underlying violations have not been eliminated or fully remedied. A live dispute remains that is now ripe for the Court's resolution.

Accordingly, Plaintiffs ask that the Court enter summary judgment in favor of Plaintiffs, finding that Defendant's election practices and system challenged in this case violate the Voting Rights Act, and that the Plaintiffs are entitled to legal redress for the harms caused to them by the

[1] For efficiency, much of what follows is carried over from Plaintiffs' Motion for Preliminary Injunction, including the referenced Declarations. Where appropriate, Plaintiffs supplement this brief with citations to the transcripts of the two hearings held on this matter, on May 9 and June 8, 2023.

Town's longstanding use of this racially discriminatory system. Specifically, Plaintiffs request that the Court: 1) enter summary judgment in Plaintiffs' favor and against Defendant pursuant to 28 U.S.C. §§ 2201–02, declaring that the Town's past election practices have subjected the Plaintiffs to racial vote dilution in violation of Section 2 of the Voting Rights Act, and further declaring the Federalsburg Town Charter, as amended by Resolution 23-04, invalid to the extent that it continues this violation; 2) formally approve and order into effect the Defendant's plan under Resolution 23–07 to rectify this violation; and 3) award each Individual Plaintiff nominal damages against the Defendant pursuant to 42 U.S.C. § 1983.

UNDISPUTED, MATERIAL FACTS

I. The Demographics of Federalsburg

As expert demographer William Cooper explains in his Declaration, Federalsburg is a small town on Maryland's Eastern Shore that is steadily diversifying. *See* Dkt. 8-5, Decl. of William S. Cooper ¶ 22 ("Cooper Decl."). Census data show sparse growth but increasing diversification in the Town, with the Black population increasing from 37 percent to 47 percent over the past 20 years. *Id*. Meanwhile, the Town's white population dropped from 59 percent in 2000 to 47 percent in 2020. *Id.* The Black population in Federalsburg encircles the downtown area, while the Town's white population lives primarily in the geographically compact area in the Town center. *Id.* ¶ 21. As the parties agree, as a result of this racial segregation, it is readily possible to create reasonably compact majority-Black districts that provide Black voters an equal opportunity to elect candidates of choice to Federalsburg's Council. *Id.* ¶ 14; Dkt. 14, Answer to Complaint ("Answer") ¶ 29.

II. Federalsburg Election System

The Town of Federalsburg has long maintained an at–large, staggered–term election

system, with four Council members and a Mayor. Historically, the Mayor has served a two–year term, while Council members serve four-year terms, with all elections for Mayor and Council conducted at large. Under this system, elections for Mayor and half the Council are conducted every two years, with elections conducted since 2009 in late September of odd years. *See* Charter of the Town of Federalsburg, Art. II Elections § C2-1 (a). The Town admits, as it must, that no Black resident has ever been elected to Town office. *See* Dkt. 14, Answer ¶¶ 1-4 ("Generally, Defendant admits that 47 percent of the Federalsburg population is Black and that no Black person has been elected yet to municipal office."). This is true despite efforts by Black candidates seeking election to Council seats. Moreover, as Mr. Cooper attests, *for at least two decades* Federalsburg's Black population has numbered over 35 percent-certainly large enough for Black voters to elect a representative of choice in a fair system. Dkt. 8–5, Cooper Decl. ¶ 19. The longevity of the Town's violation underscores its egregiousness.

Until forced to change by the Plaintiffs' filing of this lawsuit, Defendant has used the leverage of its majority-white population to exclude Black residents from the local franchise: Its use of a racially discriminatory at-large, staggered term system has consistently submerged the Black minority in the larger white voting pool, unlawfully diluting their votes and preventing Black voters' ability to elect their chosen candidates. *See Allen v. Milligan,* No. 21-1086, 2023 WL 3872517, at *2 (U.S. June 8, 2023) (*citing Thornburg v. Gingles*, 478 U.S. 30 (1986)). The minority vote dilution inherent in the Town's at-large system has been enhanced by its use of staggered terms, because this practice makes it impossible for minority voters to "single shoot" for their candidates of choice. Dkt. 8–3, Decl. of Carl Snowden ("Snowden Decl.") ¶¶ 13, 19. That is, through staggering of elections such that only two of the four council seats are contested at a time, with participation by the at-large electorate in all elections, Federalsburg has made it impossible

for Black voters to empower their chosen candidates strategically through single-shot voting in the way they might without the staggering. *Id.*

The absolute exclusion of Black candidates from Federalsburg public office reveals how elections in Federalsburg have been and continue to be polarized along racial lines. Polarized voting occurs when members of a protected class prefer candidate choices that are different from the rest of the electorate. As explained in greater detail by political science Professor Kassra Oskooii and as Defendant now concedes, Black voters on Maryland's Eastern Shore, including those in Federalsburg, have voted "cohesively" over the last decade of elections. *See* Dkt. 8-6, Report of Dr. Kassra Oskooii ("Oskooii Rpt.") ¶¶ 7(b), 39; Dkt. 30, Letter from Lyndsey Ryan dated June 6, 2023, (hereafter "Ryan Letter") at 2 (*citing* Report of Dr. Oskooii, and Plaintiffs' Motion for Preliminary Injunction). Moreover, Dr. Oskooii's analysis shows that the voting patterns of white voters across the Eastern Shore diverge from those of Black voters, with white residents bloc voting to successfully elect their candidates of choice at the expense of Black–preferred candidates. Dkt. 8–6, Oskooii Rpt. ¶¶ 7(c), 39. Because Black and white voters express different preferences, and because Black residents do not comprise a majority of the voting age population, Black voters have not been able to elect candidates of their choice. *Id.* ¶¶ 7(e), 45, 46.

This was the case on each occasion when Black candidates ran for Federalsburg office in the staggered, at–large system; the white candidates won easily. Most recently, this occurred in 2017, when Roberta Butler and Angel Greene ran at-large for the two Council seats open under the staggered term system. Ms. Butler and Ms. Greene were opposed by two white candidates, with the white candidates easily winning among the few voters (about 125) who participated in the election. *See* Dkt. 8–6, Oskooii Rpt. ¶ 45 & n. 20. Indeed, since the 2017 election and in many years prior to it, the specter of white bloc voting has discouraged Black candidates from even

running for Federalsburg office. *See* Dkt. 8–7, Declaration of Dr. Willie Woods ("Woods Decl.") ¶ 37.

Importantly for purposes of summary judgment, Defendant admits the Town has discriminated against and excluded Black residents from government throughout its history (Dkt. 14, Answer ¶¶ 19–26), and now further concedes the accuracy of Professor Oskooii's findings as to the racial polarization pervading the Town's electorate. Dkt. 30, Ryan Letter at 2 (describing "uncontroverted testimony that Black voters across the Eastern Shore are politically cohesive").

COURSE OF PROCEEDINGS

Prior to their filing of this lawsuit, Black Federalsburg residents and their supporters, including the Plaintiffs here, sought change through the political process, as the Town concedes. *See, e.g.*, Dkt. 14, Answer ¶¶ 27–28. Ultimately, however, due to the Town's resistance to full and timely compliance with the VRA, the Plaintiffs had no choice but to pursue legal recourse by filing and litigating this action. Indeed, still today, Plaintiffs must press forward with this litigation to secure the legal redress to which they are entitled, due to Defendant's ongoing opposition to *any* formal grant of relief to the Plaintiffs, notwithstanding the Town's admitted violations of Plaintiffs' fundamental voting rights.

In the ten months since Federalsburg's Black voters first raised concerns about the Town's ongoing violation of Black residents' rights, Defendant has continuously failed to follow through on commitments to promptly remedy the violation. Rather, after months of promises and delays, the Town moved forward with a plan – strongly opposed by Black voters – to amend the Town Charter to *cancel the 2023 elections* and extend the terms of the sitting white incumbents by 14 months beyond their elected terms. *See* Complaint, ¶¶ 37–45. Another aspect of this plan was to further amend the Town Charter to create a new hybrid at–large, district–based system that would

employ staggering to *alternate* between discriminatory at-large elections and district elections every two years, enabling white officials unlawfully to continue to dominate three of four Town Council seats for the foreseeable future. This plan – like Federalsburg's then-existing at–large, staggered term election system would itself deny and dilute the Black vote in violation of the VRA and thus continue unabated the Town's discrimination against Black residents. As a result of the Town's announcement of these proposals over Black voters' opposition, and with the election clock ticking, the Plaintiffs gave up on their attempts to resolve their claims cooperatively. On February 22, 2023, Plaintiffs filed this lawsuit, challenging rights violations flowing from both the existing election system and the Town's new plan to cancel 2023 elections and thereafter to continue at-large elections on a staggered basis.

Approximately two weeks after the lawsuit's filing, Defendant withdrew its plans to cancel elections and to alternate at-large elections with district elections. In place of these unlawful plans, the Town proposed a new discriminatory plan to be implemented through a different Charter Amendment, Resolution 23–04. Pursuant to that Resolution, 2023 elections would be reinstated and a new two-district system would be adopted at some future date, but staggering would be retained, so that only one person from each district would be elected in September 2023, thus allowing white voters and officials to continue their domination of Town government until at least 2026. Again, the Plaintiffs voiced opposition to this plan, which both denied them election opportunities and representation equal to those of the Town's white voters, and subjected their rights to popular referendum. Notwithstanding the Plaintiffs' opposition, Defendant introduced this plan as a Charter Amendment.

On March 9, 2023, following the introduction of Resolution 23–04, but prior to its adoption by the Council, Plaintiffs filed a Motion for Preliminary Injunction seeking expedited equitable

relief to ensure that the Town's Black residents would be afforded equal voting rights to those of white voters in the 2023 municipal elections. Notwithstanding the pendency of Plaintiffs' Motion and Black voters' vocal objections to Resolution 23–04, the Mayor and Council unanimously adopted this Charter Amendment on April 3, 2023. In response to Plaintiffs' motion, the Town did not contest in any respect Plaintiffs' proof that Defendant's election system and practices had violated Plaintiffs' rights under the Voting Rights Act. Rather than contesting liability for its violations of Plaintiffs' rights, Defendant urged the Court to reject Plaintiffs' claims on "mootness" grounds. This argument was founded upon two incorrect contentions, namely that: 1) the Court should disregard past harms the Town inflicted upon Black voters through its unlawful election practices; and 2) if enacted and not petitioned to referendum, Resolution 23–04 would fully remedy the Town's violation of Plaintiffs' rights.

Not only does the Town's "mootness" argument ignore the Plaintiffs' entitlement to declaratory relief and nominal damages (as discussed further below), but, as the Court later recognized, it is fatally flawed because the Charter Amendment proposed in Resolution 23–04 includes no actual district plan or map, and creates an election system for the 2023 election that itself violates the VRA. That is, the election system required for the September 2023 election by Resolution 23–04 dilutes Black residents' votes through its use of staggering to maintain a system with three council members elected from a majority white district, while allowing Black voters only a single opportunity to elect a candidate of their choice. Plaintiffs raised their concerns about the inadequacy and illegality of Resolution 23–04 in connection with their Motion for Preliminary Injunction.

On May 9, 2023, the Court held an evidentiary hearing on Plaintiffs' Motion for Preliminary Injunction. The Court heard testimony from Plaintiff Sherone Lewis and Plaintiffs'

expert demographer William Cooper; Defendant declined to submit any evidence to support its opposition to Plaintiffs' Motion. Despite the Town's contention that Plaintiffs' claims are "moot," Defendant was unable to produce any racially fair plan it had adopted for the 2023 election, and the Court found Resolution 23–04 inadequate on its face to meet VRA requirements. As a result, the Court ordered the Defendant to produce a concrete election plan – including an election district map supported by detailed demographic data – and indicated that a legally compliant plan would need to eliminate the continued discrimination against Black residents promulgated through the use of staggering in Resolution 23-04. *See* Tr., May 9 Hrg. 43:18–44:5; *see also id.* at 41:7-9 (noting that Resolution 23-04 "changes things somewhat but doesn't correct the racial unfairness").

Although the Court clearly suggested at the May 9 hearing and in its attendant Order that Resolution 23-04's retention of staggering for the 2023 election is unlawful and discriminatory, the Town nevertheless formally amended its Charter to adopt this provision, effective as of May 23, 2023.[2] *See* Dkt. 30, Ryan Letter at 2. As such, the amended Charter's discriminatory plan for 2023 elections remains in place today. On May 24, 2023, the day after the Town's unlawful plan took effect as part of its Charter, Defendant produced a new and different plan, Resolution 23–07. This Resolution states – in direct contradiction of the Amended Charter – that all four council member seats will be up for election in 2023.[3] Plaintiffs have advised Defendant and the Court that they believe the election plan embodied in Resolution 23–07 would comply with the Voting

[2] Formal adoption of this Charter Amendment by the Town followed after the expiration of the period for referendum on May 15 without any petition having been filed.

[3] Separate from the Resolution, Defendant has informed the Court and the Plaintiffs that two sitting white incumbents intend to end their terms early so as to facilitate this plan, although no evidence has yet been introduced to substantiate this point.

Rights Act, but have expressed concern that the unlawful plan required by the Town Charter overrides that set forth in Resolution 23–07, which Defendant proposed to adopt in the form of a simple resolution, a measure short of a Charter Amendment. This conflict renders the new plan legally vulnerable unless it is ordered into effect by the Court and/or the conflicting Charter provision is invalidated.

On June 9, 2023, the Court conducted a hearing to review the Town's new proposed remedial plan and to hear from the parties regarding the pending preliminary injunction motion. The Court stated on the record that Plaintiffs have established uncontested proof that the Town has violated their rights to equal participation in elections as guaranteed by Section 2. Tr., June 8 Hrg. 10:11–15. While declining to issue a preliminary injunction on grounds that the Town is now finally in the process of implementing a racially fair election system for this September's election, the Court also expressly rejected the Defendant's contention that this lawsuit is moot. Tr., June 8 Hrg. 9:2-8.

The Town admits its violation of Plaintiffs' rights under Section 2 and has, in essence, merely complied with the Court's order to adopt a remedial plan to alleviate the *immediate* illegality of its existing system (to defeat Plaintiffs' requested Preliminary Injunction). Indeed, in submitting its status report on its newest proposed revised election plan in response to the Court's Order of May 9, the Town stated:

> Assuming the Court determines that the legislative plan and district map are compliant with Section 2 of the Voting Rights Act of 1965, the Mayor and Council will adopt Resolution 2023–07 at their June 12th Regular Meeting. Resolution 2023–07 will become effective immediately upon adoption and is not subject to referendum. The election system in place when the Plaintiffs initiated this lawsuit is now extinct.

Dkt. 27, Letter from Lyndsey Ryan dated May 23, 2023 ("Pl. Status Rpt."), at 2. The Town did in fact adopt the new resolution on June 12. Dkt. 35, Letter from Lyndsey Ryan dated June 15, 2023.

Despite the Town's overdue step toward VRA compliance, its amended Charter remains the governing Charter of the Town, and directly conflicts with Resolution 23–07 by retaining staggering for the 2023 election and explicitly allowing only one candidate to be elected from each of the two districts. Here again, the Town concedes this conflict and the need for a Charter Amendment:

> at some point prior to September 2025, when the terms for the seats currently occupied by Councilmembers Willoughby and Phillips expire, the newly elected Mayor and Council will need to adopt a Charter amendment to extend those terms from September 2025 to November 2026 consistent with Resolution 23-07.

Dkt. 30, Ryan Letter at 2.

In short, while the Town's remedial effort set forth in Resolution 23–07 satisfied this Court that it minimizes the risks of further irreparable harms to the Plaintiffs during the 2023 election cycle, obviating the need for a preliminary injunction, *see* Dkt. 32; Tr., June 8 Hrg. 22:7–10, the underlying rights violations proven by Plaintiffs and embodied in the Town's Charter remain. Accordingly, as detailed below, there is relief yet due to the Plaintiffs in order for the Town to remedy fully its violations of the Voting Rights Act.

STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine dispute as to any material fact" and "the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. While all reasonable inferences must be drawn in favor of the non-moving party, non-moving parties "may not rest upon the mere allegations or denials of [their] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (citation omitted).

ARGUMENT

I. Plaintiffs are Entitled to Summary Judgment on Their Claims That They Suffered Unlawful Discrimination Under the Challenged Election System and Risk More of the Same Under the Current Town Charter, in Violation of Their Rights Under Section 2 of the Voting Rights Act and 42 U.S.C. § 1983.

Section 2 of the Voting Rights Act prohibits any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). As the Supreme Court explained nearly four decades ago:

> The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. This Court has long recognized that multimember districts and at–large voting schemes may operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.

Gingles, 478 U.S. at 47 (internal quotation omitted). In considering another vote dilution case from Maryland's Eastern Shore, this Court has further explained that minority vote dilution occurs within an at-large election system "where the white majority consistently votes together as a bloc to 'submerge' minority voters and to defeat their preferred candidates[.]" *Marylanders for Fair Representation v. Schaefer,* 849 F.Supp. 1022, 1044 (D. Md. 1994), *citing Voinovich v. Quilter,* 113 S.Ct. 1149, 1155, (1993); *Gingles*, 478 U.S. at 46 n.11.[4]

Under "the *Gingles* test", Section 2 plaintiffs prove their entitlement to relief by showing (1) the group in the minority (here, Black residents of Federalsburg) is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority

[4] As discussed *infra*, II.B, the Plaintiffs have also alleged claims under 42 U.S.C. § 1983, through which they are entitled to an award of nominal damages. *See Health & Hosp. Corp. of Marion Cnty. v. Talevski,* No. 21-806, 2023 WL 3872515, at *9–10 (U.S. June 8, 2023) (holding that rights-creating laws such as the Voting Rights Act can be enforced by protected class members to seek relief available under 42 U.S.C. § 1983).

group "is politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, at 50–51. Once these *Gingles* "preconditions" are established, courts move on to consider "the totality of the circumstances"—including factors identified in the Senate Report accompanying the 1982 amendments to the VRA—to determine whether, as a result of the challenged election structure or practices, "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation" by members of the minority group. *Id.* at 36 (quoting 52 U.S.C. § 10301(b)).

Just last week, the United States Supreme Court forcefully reaffirmed the continuing vitality and importance of Section 2 and the *Gingles* analysis. *See Allen*, 2023 WL 3872517, at *9. The Court reiterated that the risk of a Section 2 violation "is greatest 'where minority and majority voters consistently prefer different candidates and where minority voters are submerged in a majority voting population that 'regularly defeat[s]' their choices." *Id.* at *9–10 (quoting *Gingles*, 478 U.S. at 48) (modification in original). Recognizing that "*Gingles* has governed our Voting Rights Act jurisprudence since it was decided 37 years ago," and that Congress has never sought to modify the statute to correct any perceived defect in the *Gingles* analysis, *see id.* at *10, the Court expressly rejected arguments to "revise and reformulate" the *Gingles* test. *Id.* at *13.

Here, as the Court has previously recognized and Defendant has conceded, Tr., June 8 Hrg. 20:4–21; Dkt. 14, Answer ¶¶ 19–26, 29; Dkt 30, Ryan Letter at 2, the Plaintiffs both satisfy the *Gingles* test and establish an overwhelming showing that the totality of circumstances warrant complete relief.

A. Plaintiffs Satisfy All Three Factors of the Gingles Test.

1. *Gingles* Factor One: Federalsburg's Black population is sufficiently large and geographically compact to form a majority in two single-member districts.

The first *Gingles* factor is readily satisfied here because Federalsburg's Black population is "sufficiently large and geographically compact to constitute a majority" in not just one, but two single-member districts among the Town's four Council seats. *Gingles* at 50; Dkt. 8–5, Cooper Decl.¶ 14. The numerosity aspect of this precondition involves a "straightforward," "objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?" *Bartlett v. Strickland*, 556 U.S. 1 (2009); *accord, Marylanders for Fair Representation*, 849 F.Supp. at 1051–52 (collecting cases and holding that 53.6% Black voting-age population in proposed state delegate district was "sufficiently large" to satisfy *Gingles* factor 1).

Plaintiffs presented the Town with a plan that it subsequently adopted in large part (Dkt. 27, Pl. Status Rpt. at 1), showing that Federalsburg's Black community is sufficiently large and geographically compact to comprise more than 50% of the voting-age population in a reasonably compact two-member Council district within a two-district plan. As William Cooper has explained, the Town's Black population lives in a geographically compact area encircling Federalsburg's downtown. Dkt. 8–5, Cooper Decl. ¶ 21. Therefore, it is readily possible to create a substantial majority-Black district because the Town's Black population is 'large and geographically compact.'" *Id.* ¶ 41. Given the Town's four-member Council, this plan affords

Black voting opportunities as appropriate given the Town's roughly even Black-white split in overall population.[5]

The Town does not contend otherwise. The map it has adopted for the September 2023 election as part of Resolution 23-07 was modeled on the two–district map created by Mr. Cooper. *See* Dkt. 27, Pl. Status Rpt. at 1 ("The map is largely based on a draft map that was provided to the Town by William Cooper…"). Moreover, the Town admits in its Answer that Mr. Cooper's "sample plans create districts that are compact and contiguous, with population totals properly apportioned among the districts, in accordance with all traditional redistricting principles." Dkt. 14, Answer ¶ 29. Hence, Plaintiffs readily satisfy the first *Gingles* precondition.

2. *Gingles* Precondition Two: The Black community is cohesive.

The second *Gingles* precondition is also satisfied here because Plaintiffs have demonstrated, and Defendant concedes, that Black voters across the Eastern Shore—including those in Caroline County and Federalsburg—are politically cohesive. *Gingles*, 478 U.S. at 49. "Bloc voting by blacks tends to prove that the black community is politically cohesive, that is, it shows that blacks prefer certain candidates whom they could elect in a single-member, black majority district." *Id.* at 68. Dr. Oskooii, an expert in voting rights, analyzed voting patterns to assess polarization throughout the Eastern Shore. *See generally* Dkt. 8-6, Oskooii Rpt. ¶ 2. Moreover, as discussed below, Dr. Oskooii's analysis is strongly supported by testimony from

[5]As Mr. Cooper explains, the illustrative districts Plaintiffs propose satisfy analytical tests for compactness. Cooper Decl. ¶¶ 41–42. Additionally, this plan adheres to traditional redistricting principles, including that it (a) satisfies Constitutional one-person, one-vote requirements, (b) uses districts that are reasonably shaped, compact and contiguous, (c) respects communities of interest, and (d) prevents dilution of minority voting strength. Cooper Decl. ¶ 42. Within these districts, the total number of voters are equivalent to the total population in the other districts. *Id.* And, the Black population in Plaintiffs' proposed opportunity district is sufficiently large to constitute a majority. As shown in the population chart accompanying the plans, the Black voting age population in this Plan is 66.7 percent. *See* Cooper Decl. ¶ 50.

Federalsburg residents and Eastern Shore activists about their on-the-ground knowledge of community cohesion. All in all, as Defendant admits, the Plaintiffs have provided the Court with "uncontroverted testimony that Black Voters across the Eastern Shore are politically cohesive" Dkt. 30, Ryan Letter at 2, (crediting Dr. Oskooii's findings, and the Plaintiff's memorandum of law in support of motion for preliminary injunction.)

As both the Defendant and the Court have acknowledged, Plaintiffs' proof more than satisfies the legal threshold for a statistical showing of cohesive voting. *See Gingles*, 478 U.S. at 56 ("A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim.").

Moreover, beyond this statistical showing, Plaintiffs provide ample testimonial evidence of Black community cohesion in Federalsburg, Caroline County, and throughout the Eastern Shore. First, several witnesses describe the close-knit nature of the present-day Black community, both in Federalsburg and throughout Caroline County. The NAACP's Willie Woods eloquently describes Caroline County's Black community as a "beautiful fabric" weaving together families—like those of Plaintiffs Roberta Butler and Elaine Hubbard—who have lived in Federalsburg for generations, with newcomers to the Town, and Black residents from other towns and rural areas of the County. "Although each town and city has its own cluster of families, we are all connected through a greater sense of community." Plaintiffs also attest to the collective longing within the Black community for Black representation. *See* Dkt. 8–4, Butler Decl. ¶ 13 ("Members of the Black community were hopeful and excited that I was running for Town Council."); Dkt. 8–11, Hubbard Decl. ¶ 9 ("I want everyone in the town to feel as though they are on the same, level playing field. That's not possible without representation."); Dkt. 8–8, Lewis Decl. ¶ 12 ("[H]aving people who represent me and understand Black culture, having faces that look like mine in

positions of power, having my voice understood and respected; these things would make me feel more like I am a part of Federalsburg."); Dkt. 8–10, Johnson Decl. ¶ 13 ("Having a Black elected official would alleviate some of the stress I experience living and raising a family in Federalsburg. I want equal opportunity, and for someone to level the playing field so that I can achieve the dreams I have for myself and for my children").

And offering a long view, CAAL's Carl Snowden attests that over the course of decades, when Black residents on the Eastern Shore have been given a chance to elect their preferred candidates as a result of electoral reform, time after time, in small towns and larger counties alike, they have joined together to elect Black candidates. Dkt. 8–3, Snowden Decl. ¶¶ 13–17. As Mr. Snowden recounts, in a dozen Eastern Shore jurisdictions where at-large election systems were replaced by racially fair district plans as a result of Voting Rights Act challenges, Black voters cohesively have supported Black candidates for public office, bringing "historic and transformative change to the affected communities—literally changing the face of local Eastern Shore politics and affording Black residents a seat at table of government for the first time." *Id*. ¶ 17. *This is the ultimate test of Black cohesion*.

Accordingly, it is undisputed that *Gingles* Factor 2 is satisfied.

3. *Gingles* Precondition Three: White voters vote sufficiently as a bloc to usually defeat Black voters' preferred candidates.

Finally, both across the Eastern Shore and in Federalsburg, "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. Such bloc voting need not be motivated by racial animus or bias. *United States v. Charleston Cnty., S.C.*, 365 F.3d 341, 348 (4th Cir. 2004). Instead, "legally significant" white bloc voting refers to the frequency with which, and not the reason why, whites vote cohesively for candidates who are not backed by Black voters. *Id*. at 348–49. Again, analysis of elections

involving Black and white candidates are most probative in evaluating white bloc voting. *Cane v. Worcester Cnty, Md.,* 840 F.Supp. 1081, 1090 (D. Md. 1994).

Dr. Oskooii found high levels of white bloc voting for candidates running against the candidates whom Black voters cohesively supported. For example, in the 2022 Moore–Cox gubernatorial and Brown-Peroutka Attorney General races, the extreme racial polarization meant whites voting as a bloc were able to defeat Moore and Brown, the Black-preferred candidates, on the Eastern Shore. Dkt. 8–6, Oskooii Rpt. ¶¶ 35–36. While both Moore and Brown won the election statewide, their loss in the Eastern Shore as a result of white bloc voting demonstrates the racial polarization that persists in that region and ensures the defeat of Black-preferred candidates running for local office. The same was true in numerous other elections dating from 2012 through 2022. *Id.* ¶¶ 37–44 (white-preferred candidates defeated Black–preferred candidates on the Eastern Shore in the 2012 presidential election, the 2014 gubernatorial election, the 2016 Senate Democratic primary, the 2018 gubernatorial election, the 2022 gubernatorial and Attorney General Democratic primaries).

Dr. Oskooii's findings align closely with those of this Court in other cases assessing racially polarized voting on Maryland's Eastern Shore. *See Cane*, 840 F.Supp. at 1090 (finding the "statistics taken together with the voting patterns and electoral system show that the white majority votes significantly as a bloc to enable it usually to defeat the minority's preferred candidate") (internal quotation omitted); *Marylanders for Fair Representation*, 849 F.Supp. at 1059 (finding legally significant white bloc voting where Black candidates had never won in at-large systems or in majority-white single-member county council districts). While Section 2 does not guarantee Black electoral success, "vote dilution" can be inferred "from political famine." *Johnson v. De Grandy*, 512 U.S. 997, 1017–18 (1994).

Overall, Plaintiffs' evidence demonstrates that Black candidates of choice will lose elections in districts other than those where a majority of voters are Black. *See Gingles*, 478 U.S. at 68 ("Bloc voting by a white majority tends to prove that blacks will generally be unable to elect representatives of their choice."). Indeed, the power of white bloc voting to defeat Black candidates of choice has completely locked Black residents out of office in Federalsburg. This, in turn, has discouraged Black candidates from even running in the first instance. As Sherone Lewis testified in the hearing on May 9, Black residents view running for Town government under the at-large system as "a waste of . . . time and resources." Tr., May 9 Hrg. 26:16-20. *See also* Dkt. 8–7, Woods Decl. ¶ 38; Dkt. 8–4, Butler Decl. ¶ 17 ("I would never even consider running again as long as this current system stands."); Dkt. 8-8, Lewis Decl. ¶ 15 ("I would not consider running for office under the current election system"); Dkt. 8-9, Hammond Decl. ¶ 21 ("I would not consider running for office again under the current election system"). *Gingles* Factor 3 is satisfied.

B. Plaintiffs Satisfy the Totality of the Circumstances Test and the Senate Factors.

Once the three *Gingles* prerequisites are established, courts evaluate the totality of the circumstances, with special attention to the nonexhaustive list of "Senate factors" identified in *Gingles*, including: the extent to which members of a protected class are elected; any history of official discrimination in voting practices; discriminatory housing, education, and employment practices; and discriminatory election features and/or racial appeals. *Gingles*, 478 U.S. at 37–40 (citing S. Rep. No. 97–417, at 28–29 (1982)). Here, Plaintiffs not only easily satisfy the *Gingles* preconditions, but have demonstrated that the totality of the circumstances show a violation, as this Court already found. Tr., June 8 Hrg. 20:15–21.

The Supreme Court has instructed that "the most important" of the Senate Factors are the "extent to which minority group members have been elected to public office in the jurisdiction"

and the "extent to which voting in the elections of the state or political subdivision is racially polarized." *Gingles,* at 51 n.15 (internal quotations omitted). As such, it is key to this calculus that no Black candidate has been elected to public office in Federalsburg history. Dkt. 14, Answer ¶¶ 1-4. Equally paramount for consideration is the fact that the Black residents of Federalsburg inhabit a world deeply polarized along racial lines, in voting and all aspects of civic life. That is the "past and present reality" this Court must evaluate in determining Plaintiffs' entitlement to relief for Defendant's violation of their rights under Section 2, *Allen,* 2023 WL 3872517, at *11. Both of these "most important" factors strongly favor the Plaintiffs.

Next, the Court considers (a) the past history of voting discrimination and use of election practices that enhance discrimination; (b) the continuing legacy of past discrimination in the community; and (c) the unresponsiveness of the Town's government to Black community concerns.

1. Federalsburg and Caroline County have a long history of official, voting-related discrimination, including use of election features that enhance discrimination.

The glaring current reality of Federalsburg's all-white government showcases the present-day legacy of the long history of official discrimination with respect to voting across Maryland's Eastern Shore. Defendant openly admits the Town of Federalsburg has been complicit in this "egregious" discrimination, conceding 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." Dkt. 14, Answer ¶¶ 9-26. This history is important because it affects how and why people vote the way they do. *Brown v. Bd. of Sch. Comm'rs of Mobile Cnty., Al.,* 542 F.Supp. 1078, 1094 (S.D. Ala. 1982), *aff'd*, 706 F.2d 1103 (11th Cir. 1983),

aff'd 464 U.S. 1005 (1983); *Marylanders for Fair Representation*, 849 F.Supp. at 1061 (describing in detail the Eastern Shore's history of race discrimination with respect to voting rights).

Expanding upon a comment from the *Marylanders* Court that discriminatory voting practices "are not only found in the history books," Carl Snowden explains that Federalsburg's election structure and practices "submerges Black voters in the larger electorate of white voters, enabling the white majority to minimize the influence of the Black minority," and the staggered system dilutes the Black vote by inhibiting their ability to "'single shoot' for their candidates of choice within a larger pool. . . meaning voting for their top candidate and no other – as they could without the staggering." Dkt 8-3, Snowden Decl. ¶ 19.

Throughout the course of this litigation – including in its current Charter as amended on May 23, 2023 – the Town has endeavored to use staggering of its election terms to continue to thwart opportunities of Black voters. As noted, the amended Charter retains staggering to limit 2023 voters in the majority-Black district to one representative on the Council while retaining three representatives for the majority-white district.[6] *See 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).

But this is not the only racially discriminatory election practice used or threatened by the Town that contributes to minority vote denial and dilution in Federalsburg. As discussed above, after Plaintiffs had spent months seeking to negotiate with Town officials to collaboratively achieve election reform in time for elections in the Town's historic bicentennial year, the Town's

[6] As discussed *supra*, although Resolution 23-07 eliminates staggering for the 2023 election, staggering remains a part of the Charter both for 2023 and for all future elections.

all-white Council completely sabotaged the Plaintiffs' work by resolving to cancel the 2023 elections altogether and extend their terms in office for 14 additional months, thus denying Black voters' right to vote entirely. Only after this outrageous decision was challenged in this lawsuit was the threat abandoned. Other practices employed by the Town further discourage Black turnout for local elections. These include: (1) stand-alone municipal elections every two years[7]; (2) poll placement only in a single white area of town, typically at the Town office – a building described as "eerie" by the Plaintiffs due to its history as a racially segregated movie theatre where Black people were allowed only in the balcony; and (3) a lack of communication regarding basic information about the Town's elections, including when the election will be held and where the polls will be located. *See* Dkt. 8–3, Snowden Decl. at ¶ 20; Dkt. 8–4, Butler Decl. ¶ 14; Dkt. 8–8, Lewis Decl. ¶ 9; Dkt. 8–10, Johnson Decl.¶ 13; Dkt. 8–11, Hubbard Decl. ¶ 7. If Defendant is concerned about voter turnout, as Town officials expressed in past discussions, they could certainly open a polling location at the Community Civic League, a "hub for the Federalsburg Black community" that has endured as "a building of significant importance, standing as the former school for Black children during segregated America." Dkt. 8–7, Woods Decl. ¶¶ 8, 28.

Finally, Plaintiff Darlene Hammond recounts an example of *ad hoc* practices employed by Defendant to discourage Black residents from participating in the Town's political system. Ms. Hammond, a well-known and well-liked resident of Federalsburg, decided to run for Town Council, but just two weeks before the election, the Town announced that there would be a public platform where the candidates would have to speak in front of an audience. Dkt. 8–9, Hammond Decl. ¶¶ 12–14. Several white candidates were permitted to declare candidacies at the last minute

[7] Plaintiffs acknowledge that the Charter changes this; however, that change does not become effective until 2026.

and Ms. Hammond believes these changes were made merely to prevent her from winning the election. *Id.* Ms. Hammond participated in the public platform event, but felt the room shift notably and the predominantly white audience turn against her when she mentioned that she would bring "diversity" to the Council, pointing out that, despite having a diverse community, diversity was not reflected in Federalsburg's political system. *Id.* ¶¶ 15–16. Ms. Hammond ultimately lost the election to her white opponents. *Id.* ¶ 17.

2. Discrimination in Federalsburg and across the Eastern Shore has caused racial oppression over centuries, with lasting impacts today in the form of severe socioeconomic disparities.

The history of race relations on Maryland's Eastern Shore is a deeply troubling one, from the time of the first settlers and continuing through the 19th and 20th centuries, with impacts of the Shore's racial caste system persisting today.

> "Backwards" has long been a term used to describe the Eastern Shore, says writer Lydia Woolever, "justly so, as many of these small towns still feel stuck in something closer to the middle of the 20th century than 21 years into the 21st. On the Eastern Shore, past remains prologue, and decades of silence leave old wounds unhealed."

Lydia Woolever, *Turning Tides: After Decades of Silence, the Eastern Shore Begins to Reckon with Its Difficult History*, Baltimore Magazine, February, 2021[8] ("*Turning Tides*"). Carl Snowden portrays a similar picture of the Eastern Shore even in the late 20th Century, saying crossing the Bay Bridge was akin to "stepping back in time" to a "world characterized by racial apartheid not seen in other parts of our state for decades." Dkt, 8-3, Snowden Decl. ¶ 10. Later, describing the *current* situation in Federalsburg, Mr. Snowden sadly laments that it is not that different than those Eastern Shore communities of yesteryear. *Id.* at ¶ 18.

[8] https://www.baltimoremagazine.com/section/historypolitics/eastern-shore-begins-to-reckon-with-difficult-history-racism-slavery

For the Plaintiffs, the Town's current day domination by white residents and officials in violation of Black residents' rights is just more of what they have always known. Black residents describe feeling disrespected and unseen, portraying white officials in charge of Town government as oblivious to their concerns and dismissive of their opinions – *including, most recently and importantly, with respect to the Plaintiffs' views about how the Town should reform its election system in response to this lawsuit. See, e.g.,* Tr., May 9 Hrg. 29:1-23 (testimony from Plaintiff Sherone Lewis, describing her unsuccessful efforts in urging the Town not to move forward with Resolution 23-04 due to its inadequacy).

The Town's dual societies date back as long as residents can recall. Federalsburg natives like Roberta Butler and Elaine Hubbard grew up with segregated schools, a "whites only" swimming pool, and a movie theatre (now the site of the Town offices) where Black patrons were relegated to the balcony only. Ms. Butler tells the story of the Town's seizure of her grandparents' property without compensation to widen a road, and recounts her Mother telling her to just keep her "chin up" and "endure" as she was shunned and taunted with racial epithets during integration efforts. Dkt. 8–4, Butler Decl. ¶¶ 5–7; Dkt. 8–11, Hubbard Decl. ¶ 5. Sherone Lewis recalls noticing that her maternal grandfather, who generally had an awe-inspiring presence, would shrink in stature in the company of certain white individuals of the community, and that he was called "boy" by his boss. Dkt. 8–8, Lewis Decl. ¶ 3.

Even today, this dual society persists and racism, at its most base level, is being driven deeply into the minds of the Town's youngest generation. A white Federalsburg resident jeered at Ms. Lewis's child, asking where "n-word drive is" and her daughter had to endure unwelcome touching of her locks in school. Dkt. 8–8, Lewis Decl. ¶ 6. Ms. Lewis also recalls that there was a Confederate flag prominently displayed in the town for many years, visible from the high school.

Id. ¶ 10. Similarly distressing, one of Ms. Johnson's children was given a piece of cotton and cotton seeds from his teacher, and in another instance one of her son's teachers grabbed him by the collar. Dkt. 8–10, Johnson Decl. ¶ 9. Ms. Johnson's youngest, her seven–year–old son, was hit by the school officer just two years ago. *Id.* ¶ 10. There was no consequence or accountability in any of these disturbing events.

Black residents of the region today bear continuing effects of this longstanding racial caste system, including in housing, education, employment and throughout public life. "People might think it's a thing of the past, but it still informs the present," says retired Salisbury University history professor Clara Small, an Eastern Shore historian who is Black.[9]

Continuing socioeconomic disparities divide starkly along racial lines. As noted in the Complaint, "30 percent of Black adults never finished high school, the Black unemployment rate is nearly triple that of the white unemployment rate, and over 69 percent of households rely on food stamps to feed their families." Complaint ¶ 20.

Details of additional disparities are provided by William Cooper. For example:

- Black people in Federalsburg experience a poverty rate that is about two and a half times the poverty rate for white people. Nearly one–third (30.3%) of Black people live below the poverty line, as compared to 12.2% of white people.
- In Federalsburg, Black median household income is $28,427 – about 60% of the $47,411 median income of white households.
- Over three-quarters of Black households (83.5%) rent their residences in Federalsburg, as compared to a rental rate of about two–fifths (42.2%) for white households.
- Just 9.3% of Black people in Federalsburg are employed in management or professional occupations, as compared to 24.1% of white people.

[9] *See* L. Woolever, *Turning Tide*s.

Dkt. 8-5, Cooper Decl. ¶¶ 23–32.

3. Federalsburg is not responsive to its Black residents.

There is, and historically has been, a lack of responsiveness on the part of Federalsburg government to the particularized needs of the Black residents. *See, e.g.* Dkt. 8–10, Johnson Decl. ¶¶ 8–12, 14; Dkt. 8–8, Lewis Decl. ¶¶ 8–9; Dkt. 8–4, Butler Decl. ¶ 9; Dkt. 8–5, Cooper Decl. ¶ 22; Dkt. 8–11, Hubbard Decl. ¶¶ 7–8.

Of great relevance here, the Town's lack of responsiveness is evident in its resistance to the adoption of an election plan that is fully compliant with the Voting Rights Act, and its refusal to allow Black residents a voice in reforms the Town was adopting, even amid litigation of this lawsuit. Instead, Defendant's all white officials have insisted upon unilaterally using the Town's legislative procedures to launch inadequate reforms over Plaintiffs' objections, expecting Black residents to accept any "crumb" or half-measure the Town deigned to offer – as Plaintiff Sherone Lewis compellingly testified. Tr., May 9 Hrg. 29:5–23. So too, the Town's lack of responsiveness and disrespect for its Black residents are demonstrated by the Defendant's serial contentions of "mootness" designed to evade Court judgment so as to deny Plaintiffs the full relief they are due.

Over the course of this litigation, Defendant has repeatedly introduced legislative half–measures toward election reform over Plaintiffs objections, in a misguided effort to deny the Plaintiffs legal redress and "moot" the Plaintiffs' claims while permitting the Town's white officials to continue domination and control of the government in violation of the Voting Rights Act. The Town refuses to acknowledge the painful efforts the Plaintiffs have had to take to rectify the voting rights violations committed by the Defendant, instead ludicrously suggesting it is reforming its election system of its own volition. *See* Dkt. 30, Ryan Letter at 2 ("After hearing additional concerns at the May 9th Court proceeding, *the Defendant determined* that it could

further improve the legislative plan…") (emphasis added). This imperious refusal by the Town to credit the Plaintiffs for the enormous resources and effort they brought to this litigation and to take responsibility for the wrongs the Town has inflicted upon its Black residents repeats and reinforces Defendant's historical disrespect for the Black community.

II. Plaintiffs Are Entitled to Declaratory Judgment and Nominal Damages as Redress for Defendant's Violation of Their Voting Rights.

In seeking summary judgment, Plaintiffs are mindful that their efforts thus far in this case have led to the Town's proposal of a new plan for the 2023 election – submitted just this month following the Court's May 9 Order on Plaintiffs' Preliminary Injunction Motion – that finally has the potential to bring the Town into compliance with the Voting Rights Act. Nevertheless, Defendant's proposal cannot alone completely correct its violation nor fully redress the harms the Town has inflicted upon the Plaintiffs, for at least two reasons: First, the Town's remedial plan is at best conditional, and thus does not supplant the need for a declaratory judgment approving the plan as VRA compliant and ordering it into effect as necessary to remedy the Town's past violations of Plaintiffs' voting rights.[10] Second, Plaintiffs are entitled to an award of nominal damages to vindicate Defendant's violation of their voting rights, which alone defeats mootness.

[10] As Plaintiffs have previously argued, Plaintiffs' request for Declaratory Judgment in their favor finds further grounding in the Supreme Court's long line of constitutional and VRA cases requiring federal courts to make detailed factual findings as to the need for a race conscious electoral remedy such as that at issue here before approving such a plan, in order to insulate the relief from collateral attack. *See generally*, *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245 (2002) (per curiam) (rejecting race-based redistricting plan where neither the legislature nor court performed the analysis necessary to show a strong basis in evidence for the plan). In addition to removing the conditions upon the remedy currently offered by Town, summary judgment for the Plaintiffs here will satisfy also this goal and preserve the enforceability of the remedy being put into place by the Town.

Third, the relief allegedly provided to Plaintiffs remains conditional because Defendant's racially-conscious remedy may be subject to collateral constitutional challenge.

Plaintiffs now seek the complete relief to which they have thus far proven their entitlement:[11] This includes both 1) a declaration that the Charter as amended by Resolution 23-04 violates Section 2 of the VRA, just as the at-large, staggered term election system in place prior to the Charter amendment was racially discriminatory and unlawful; and 2) awards of nominal damages to each Individual Plaintiff to acknowledge and hold Defendant responsible for the harms it has inflicted upon the Plaintiffs.

A. Unless Judgment is Entered for Plaintiffs and Against the Town, Defendant's Compliance with the VRA Under Resolution 23–07 Remains Conditional, Unenforceable, and Vulnerable to Legal Challenge and Thus Does Not Completely Cure the Town's VRA Violation.

As Defendant and the Court have each acknowledged, Resolution 23–07 conflicts directly with the Town's Charter by opening up all four Council seats for the 2023 election when the Charter expressly states that only two seats—one from each district— will be up for election. As such, it is conditioned upon the voluntary premature resignations from office of two incumbent white officials (who, to date, have not stepped down[12]) ***and*** *further conditioned* upon a hypothetical future Charter Amendment to remove the conflicting election plan mandated by the

[11] Additionally, Plaintiffs reserve their rights, following final judgment, to seek reimbursement, as guaranteed under the Voting Rights Act, of the significant litigation costs and attorneys' fees incurred by the Plaintiffs as a result of Defendant's violation of the Voting Right Act and its unwillingness to remedy its violations without requiring the Plaintiffs to undertake and successfully pursue this litigation.

[12] Resolution 23–07 contains no date certain by which the current Council Members must resign, nor does it contain any mention of the premature resignations of these Council Members. It merely states, in conflict with the Charter, that all Council seats will be up for election in September 2023. Dkt. 27–1.

Charter. In the Court's words, such "moving parts" preclude a finding of mootness. Tr., June 8 Hrg. 9:2–5. To remove these conditions in advance of the 2023 election, a Court judgment in Plaintiffs' favor is needed declaring the illegality of Defendant's practices and conduct, detailing the factual and legal bases requiring the racially fair plan now proposed by the Town to overcome these violations, and invalidating the unlawful election system required under the Town Charter. Plaintiffs' proof establishes their entitlement to this declaratory relief, making clear that Defendant's latest contention of mootness must be rejected once and for all.

A case only becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (citations omitted). This occurs "only when it is *impossible* for a court to grant any effectual relief whatever to the prevailing party." *Id.* (emphasis added.) Defendant's position that the Plaintiffs "lack a legally cognizable interest" in securing Federalsburg's compliance with the Voting Rights Act during the Town's 2023 election or gaining relief from its past violations is obviously wrong.

Where, as here, a defendant claims its unlawful conduct ended partway through litigation, it bears "the heavy burden of persuading the court that it is *absolutely clear*" that its violations are fully cured. *6th Cong. Dist. Republican Comm. v. Alcorn*, 913 F.3d 393, 407 (4th Cir. 2019) (citations, quotations, and alteration omitted). That is, mootness occurs *only* if and when the change in defendant's conduct is *unconditional*, and only if the defendant's changed conduct "afford[s] complete relief" for the Plaintiffs' injuries. *United States v. City of Cambridge*, 799 F.2d 137, 140 (4th Cir. 1986). Neither is true here.

Rather, as Defendant and the Court recognize, the measure adopted by the Town via Resolution 23–07 to address its VRA violation leaves in place a superior and conflicting Charter provision requiring the Town to violate Black voters' rights in the upcoming 2023 election by

retaining staggering to authorize only one candidate to be elected from the majority Black district this year. Defendant's attempt to waive off this conflict is premised on its representation that the conflict will be cured so long as two incumbent white candidates resign from the Council prior to the 2023 election. Further, Defendant presumes without reliable support that no community member will seek to enforce the Charter to disrupt the 2023 election. This impermissibly conditions relief to Plaintiffs upon the willingness of two Council members to resign their offices, as well as residents' willingness to allow the Town to conduct the upcoming elections in direct violation of the Charter. But neither condition is legally required or pre-ordained, which is why Plaintiffs continue to need the Court to rule. *See, e.g.*, *Prince George's Cnty. v. Thurston,* 479 Md. 575, 606 (2022) (rejecting County's alternative redistricting plan that was introduced by resolution because it conflicted with the requirements of the County charter); *Inlet Assocs. v. Assateague House Condo. Ass'n*, 313 Md. 413, 434, (1988) (finding a simple resolution that conflicted with the requirements of the City Charter to be insufficient and without legal effect). The Court's judgment declaring the Charter invalid to the extent it mandates an unlawful election plan would fully address this problem by ensuring that the conflict between the Charter and Resolution 23–07 cannot be used to undo the progress made in this case by residents opposed to reform or any future Town Council.[13]

Moreover, the relief allegedly provided to Plaintiffs here remains conditional because Defendant's racially–conscious remedy may be subject to collateral constitutional challenge unless

[13] A charter amendment undoing the progress made in this case could be undertaken by a bare majority of the legislative body, which could be achieved with the two white district members and the Mayor, overcoming any opposition from Black elected representatives who might succeed in winning election to the Town Council in 2023. Md. Code Ann., Local Gov't § 4–304 (a)(1).

this Court finds "a strong basis in evidence" for concluding that such a remedy is required by the VRA. *Cooper v. Harris*, 581 U.S. 285, 292–93 (2017), quoting *Alabama Legis. Black Caucus v. Alabama*, 575 U.S. 254, 281 (2015); *see also Accord, Bethune–Hill v. Va. State Bd. of Elections*, 580 U.S. 178 (2018). While Plaintiffs have shown that such basis exists, a finding from this Court would help insulate the remedial plan from a collateral legal challenge with the potential to upend Defendant's plan and strip Plaintiffs of their remedy.

Because Defendant thus retains (and arguably *must* exercise) "authority and capacity to repeat [the] alleged harm," by reverting to the unlawful election plan required by its Charter, Plaintiffs' request for declaratory relief is not moot. *Porter v. Clarke*, 852 F.3d 358, 364 (4th Cir. 2017) (citations and quotations omitted).

B. To Fully Vindicate Their Rights, Plaintiffs are Entitled to an Award of Nominal Damages under 42 U.S.C. § 1983 for Defendant's Violations of the Voting Rights Act.

1. The Voting Rights Act is enforceable by Black voters under 42 U.S.C. § 1983.

Section 1983 is a Reconstruction-era statute enacted by Congress to facilitate enforcement by private plaintiffs of individual rights guaranteed to them by "the Constitution and laws" of the United States. As the United States Supreme Court strongly reaffirmed on June 8, Section 1983's reference to "laws" is unqualified, and thus courts reviewing claims seeking to enforce federal statutory rights under Section 1983 must take as a given that "*laws" "means what it says*." *Talevski,* 2023 WL 3872515, at *9–10. Writing for the majority, Justice Ketanji Brown Jackson said in *Talevski* that any federal law that "contains 'rights–creating,'" protections for individuals with an "'unmistakable focus on the benefited class,'" can be enforced to grant relief to an injured party pursuant to 42 U.S.C. § 1983. *Id.* The Voting Rights Act of 1965 is unquestionably such a rights-creating federal law, enacted to benefit the class of Black voters like the Plaintiffs who suffer

race discrimination with respect to voting and elections. Thus, while Black voters enduring such abuses are entitled to enforce their rights to relief directly under Section 2, *they may also* seek additional relief available under 42 U.S.C. § 1983. *See, e.g.*, *Coca v. City of Dodge*, No. 22–1274–EFM, 2023 WL 2987708 (D. Kan. 2023) (Voters may enforce their rights to be free from race discrimination in voting both directly under Section 2 and by making derivative Section 2 Claims under 42 U.S.C. § 1983); *Turtle Mountain Band of Chippewa Indians v. Jaeger*, No. 2:33–cv–22, 2022 WL 2528256 (D.N.D. July 7, 2022) (approving enforcement of Section 2 of the Voting Rights Act under 42 U.S.C. § 1983); *see also Schwier v. Cox*, 340 F.3d 1284, 1297 (11th Cir. 2003) (Voting Rights Act provision forbidding the practice of disqualifying potential voters for their failure to provide information irrelevant to determining their eligibility to vote could be enforced by a private right of action under § 1983).[14]

2. Pursuant to § 1983, Plaintiffs are entitled to awards of nominal damages for Defendant's violation of their rights under the Voting Rights Act, again ensuring against mootness.

In addition to equitable relief, the relief available on claims brought under § 1983 includes damages of all types, including compensatory and nominal damages. *See, e.g., Carey v. Piphus*, 435 U.S. 247, 266–67 (1978) (generally discussing damages recovery for claims under § 1983). Consistent with this principle, Plaintiffs here seek relief directly under Section 2, but also seek

[14] Although to Plaintiffs' knowledge no judge in this district has had cause to address the specific question of Section 2's enforceability under Section 1983, even long before the Supreme Court's expansive recent decision in *Talevsky*, this Court has affirmed the principle that a Plaintiff injured by a rights violation under a federal law may properly avail himself of a damages remedy against the government under Section 1983, even if the remedial scheme in the statute itself lacks a damages remedy. *Knussman v. Maryland*, 16 F.Supp.2d 601, 609 (D. Md. 1998) (finding that a state trooper alleging wrongful denial of his rights guaranteed under the FMLA could properly couple requests for declaratory and equitable relief directly under the FMLA with one for damages for the FMLA violation pursuant to 42 U.S.C. § 1983).

additional relief to include nominal damages available to them as a remedy under 42 U.S.C. § 1983 based upon their proof of Defendant's violation of their Section 2 rights.

Even in cases in which a plaintiff's entitlement to *injunctive* relief is undeniably moot, as the Defendant would have the Court believe is true here, proof of a rights violation under the federal constitution or laws entitles the injured party to damages under 42 U.S.C. § 1983, thus preserving a live controversy. A recent Supreme Court decision authored by Justice Clarence Thomas strongly reinforces the applicability of this principle here. In *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021), the Court was faced with a claim brought under Section 1983 by students at a public college, challenging campus restrictions on free speech as violative of the First Amendment. During the course of the litigation, the college lifted the restrictions entirely, arguing that in so doing it had completely cured its violation and thus that the students' lawsuit should be dismissed as moot. The lower courts obliged this request, dismissing the students' lawsuit. But the students fought the dismissal all the way to the Supreme Court, arguing that their entitlement to nominal damages as relief for the school's wrongdoing enabled them to satisfy the Article III redressability requirement to secure judgment and nominal damages in their favor. The Supreme Court agreed, opining about the value nominal damages awards convey in cases of government abuse, in the form of validation for the victims and accountability for the wrongdoers. *Id.* at 801. Discussing principles engrained in common law, the Court quoted England's Lord Holt:

> 'Every injury imports a damage,' so a plaintiff who prove[s] a legal violation [should] *always* obtain some form of damages because he 'must of necessity have a means to vindicate and maintain the right.

141 S.Ct. at 800 (emphasis added.) This is precisely the reason Plaintiffs seek nominal damages – to vindicate their rights to redress for the harms they have suffered, and to hold the Town

accountable for its egregious record of discrimination and wrongdoing against is Black citizens.[15] As the Supreme Court ruled in *Carey v. Piphus, supra*: "By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed." 435 U.S. at 266. Indeed, for this very reason, the *Uzuegbunam* Court explicitly noted the appropriateness of nominal damages in cases like this where a plaintiff's claim involves intangible and yet irreplaceable *voting rights* wrongfully denied. *Id*. at 799.[16]

---

[15] Although Plaintiffs' Complaint makes this request by way of a prayer for "further relief" rather than an express request for "nominal damages", it is well settled that this is no obstacle to a grant of nominal damages. Indeed, the Supreme Court said as much in *Uzuebeunam*, tracing the common law history of this remedy back hundreds of years, and referencing the prevailing view that "the common law inferred damages whenever a legal right was violated." *Id.* at *799 (citing *Ashby v. White*, 2 Raym. Ld. 938, 941–943, 948, 92 Eng. Rep. 126, 129, 130, 133 (K. B. 1703) (Holt, dissenting). *Accord*, *Edward B. Marks Music Corp. v. Charles K. Harris Music Publ'g Co.,* 255 F.2d 518, 522 (2d Cir.1958); *Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.*, 155 F.3d 17, 25 (2d Cir. 1998) (the monetary damages granted by the district court was proper, even when the relief was not "demanded, or even proved, in the original action for declaratory relief"). This Court has held the same. *See, e.g*., *Johnson v. Helion Techs., Inc*., No. CV DKC 18-3276, 2022 WL 3043413, at *3 (D. Md. Aug. 2, 2022), *appeal dismissed sub nom. Toomey v. Helion Techs., Inc.*, No. 22-1949, 2022 WL 18678813 (4th Cir. Oct. 18, 2022) (finding that nominal damages can be awarded despite not having been pled, so as to effectuate relief in cases of non-tangible harm). Indeed, the propriety of awarding nominal damages as "further relief" is especially apt in cases like this where additional facts become available to support such additional relief. *Edward B. Marks Music Corp, supra.*

[16] Numerous other cases likewise have affirmed the principle that those unfairly denied the right to vote can recover at least nominal damages for their loss, thus overcoming any mootness challenge. *See, e.g., Carey v. Piphus*, 435 U.S. *supra*, at 264–65 n. 22 ("The common–law rule of damages for wrongful deprivations of voting rights embodied in *Ashby v. White* would, of course, be quite relevant to the analogous question under § 1983"); *Wayne v. Venable*, 260 F. 64, 66 (8th Cir. 1919) ("In the eyes of the law" the right to vote "is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing… "); *Harris v. Harris*, 151 F.3d 186, 195 n.6 (5th Cir. 1998) (noting that a request for nominal damages preserves viability of a vote denial claim against a mootness challenge).

Since the filing of the Complaint, the Town of Federalsburg – while conceding its violation of Plaintiffs' fundamental voting rights – has done virtually everything in its power to evade a court judgment holding it accountable for its wrongdoing. Time after time, despite the clear harms the Plaintiffs have suffered, the Town has sought to deny Black voters the finality and vindication of any court awarded relief despite the indisputable reality that such relief is necessary to at last put an end to the Town's shameful 200-year history of denying Black residents their fundamental right to vote. Awards of nominal damages are due to the Plaintiffs here.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court enter summary judgment in Plaintiffs' favor and against Defendant pursuant to 28 U.S.C. §§ 2201–02. Specifically, the Court should: (i) declare that the Town's past election practices have subjected the Plaintiffs to racial vote dilution in violation of Section 2 of the Voting Rights Act, and that the Federalsburg Town Charter, as amended by Resolution 23-04, is invalid to the extent that it continues this violation; (ii) approve and order into effect the Defendant's plan under Resolution 23–07 to rectify this violation; and (iii) award each Individual Plaintiff nominal damages against the Defendant pursuant to 42 U.S.C. § 1983.

Dated: June 16, 2023

/s/ *Deborah A. Jeon*
Deborah A. Jeon (Bar #06905)
Nicholas Taichi Steiner (Bar #19670)
AMERICAN CIVIL LIBERTIES UNION OF MARYLAND
3600 Clipper Mill Road Suite 350
Baltimore, MD 21211
(410) 889-8555

/s/ Daniel W. Wolff
Daniel W. Wolff (Bar #19940)
Katie Aber
Cori Schreider
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2621

Counsel for the Plaintiffs

Counsel for the Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Northern Division)

CAROLINE COUNTY BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*, Plaintiffs, v. TOWN OF FEDERALSBURG, MARYLAND, Defendant.	Civil Action No. 23-00484-SAG

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Upon consideration of Plaintiffs' Motion for Summary Judgment, the memorandum and documents in support thereof, the opposition thereto, oral argument, if any, and the record in this action, this Court finds that Plaintiffs are entitled to judgment as a matter of law pursuant to 28 U.S.C. §§ 2201-02, that Defendant's longtime use of an at-large, staggered term election system violated Plaintiffs' rights to be free from race discrimination in voting and election practices guaranteed under Section 2 of Voting Rights Act of 1965 and 42 U.S.C. § 1983. This Court further finds that the current Federalsburg Charter, as amended on May 23, 2023 by Resolution 23-04, is invalid to the extent that it mandates an election system for the 2023 Federalsburg election that itself violates the Voting Rights Act and 42 U.S.C. § 1983, by continuing to dilute Black voting strength through its use of staggering elections.

Accordingly, the Court hereby GRANTS Plaintiffs' Motion for Summary Judgment. The Court hereby:

1. Enters summary judgment, pursuant to 28 U.S.C. §2201-02, and declares that the Town of Federalsburg's longtime use of an at-large, staggered term method of electing members of its Town Council violated Plaintiffs' rights by unlawfully diluting the votes

of Federalsburg's Black voters in violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301;

2. Declares the Federalsburg Town Charter, as amended by Resolution 23-04, invalid as racially discriminatory and unlawful in violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, to the extent that it continues this violation by retaining staggering for the Town of Federalsburg's 2023 municipal election and denies Plaintiffs full election opportunities to which they are legally entitled;
3. Approves and Orders into effect the election plan presented to this Court on June 8, 2023, whereby the September 2023 Federalsburg Town Council election will take place under the Defendant's Resolution 23-07, adopted on June 12, 2023; and
4. Awards nominal damages to each Individual Plaintiff in this case in the amount of one dollar.

SO ORDERED.

Dated: _____

_____
United States District Court