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 SUMMARY JUDGMENT

INTRODUCTION

Black Federalsburg voters, the Caroline County NAACP, and the Caucus of African American Leaders seek summary judgment to vindicate their rights to equal voting opportunities irrespective of race pursuant to Section 2 of the Voting Rights Act and 42 U.S.C. § 1983. Such judgment, so well deserved and long overdue, will enable the Plaintiffs and other community members to overcome the racially discriminatory election practices and policies that the Town of Federalsburg has employed to oppress its Black residents throughout its 200-year history.

From the outset of this litigation, Defendant's primary defense has been to urge the Court to deny all relief to Plaintiffs on grounds of mootness. Throughout, the defense has been unavailing, and it remains so today. The Supreme Court permits rejection of a case as moot "only if 'it is impossible for a court to grant any effectual relief whatever.'" *Mission Product Holdings,*

Inc. v. Tempnology, LLC, 139 S.Ct. 1652, 1660 (2019), *quoting Chafin v. Chafin*, 568 U.S. 165, 172 (2013).[1] Defendant comes nowhere close to meeting this demanding standard.

As set forth in Plaintiffs' summary judgment motion and below, Plaintiffs are entitled both to declaratory relief and nominal damages to redress Defendant's longstanding violation of their fundamental voting rights. Although partially intertwined, each of these entitlements independently satisfies Article III's redressability requirement, thereby defeating mootness. First, and most simply, so long as "there is any chance of money changing hands, [the] suit remains live," *Mission Product Holdings*, 139 S.Ct. at 1660, "even when the claim is for nominal damages." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), *citing* 13C Charles Alan Wright & Arthur R. Milller, Federal Practice and Procedure (hereafter "Wright & Miller") § 3533.3, n.47 (3d ed.) (collecting cases). *See generally Uzuegbunam v. Preczewski*, 141 S.Ct. 792 (2021). Second, Plaintiffs' "path to complete relief runs through this Court" in the form of a declaratory judgment, and thus the parties retain "a personal stake in the ultimate disposition of the lawsuit" justifying that relief. *Moore v. Harper*, No. 21-1271, slip op. at 7-8 (U.S. June 27, 2023), (finding election challenge not moot despite lower court's withdrawal of decision under review, due to need for additional technical relief to completely resolve case).

Defendant disputes no material facts relevant to disposition of Plaintiffs' legal claims so as to preclude summary judgment. Instead, the Town recounts a distorted version of the parties' failed negotiations leading to this action and during suit. Overall, Defendant complains that the Black residents it has oppressed for 200 years acted *prematurely* to challenge that oppression through a lawsuit and that Plaintiffs unfairly seek a final judgment to secure full vindication of Black voters'

[1] *Accord*, *Nat'l Fed'n for the Blind v. Lamone*, 438 F.Supp.3d 510 (D. Md. 2020) (rejecting mootness defense where election officials alleging policy changes to comply with the law failed to meet "stringent standard" required to establish mootness).

rights. In so doing, Defendant ignores the reality of what enormous strength and determination it took for the Plaintiffs to bring this case, and falsely attributes ulterior motives to Plaintiffs' request for summary judgment—contending that counsel are pursuing the litigation solely to generate attorneys' fees. Not only are Defendant's contentions offensive and absurd, but they also blithely overlook the fact that much of the so-called "collaboration" offered by the Town took place against the expressed wishes of Black residents in the form of half-baked and obviously unlawful reform proposals that it abandoned only when ordered to do so by this Court, a fact undermining Defendant's attempt to portray itself as acting voluntarily.[2] Defendant's accusations to the contrary notwithstanding,[3] in pursuing this case and litigating it to final judgment, Plaintiffs have courageously and selflessly stood up to represent their entire community in challenging the entrenched racial oppression that has plagued Federalsburg for generations. They deserve nothing but praise and appreciation for their efforts.

[2] To see this, one need look no further than the March 10, 2023 letter (Defendant's Opposition Exhibit A), falsely accusing Plaintiffs of using the litigation to gin up attorneys' fees and demanding that Plaintiffs drop their claims. Had the Plaintiffs succumbed to this demand, the election system in place for the September 2023 election would, at most, be that embodied in Charter Amendment 23-04, an illegal plan affording Plaintiffs only half the justice this Court has opined they are due—the possibility of just one seat at the Town's four-seat table. As such, Defendant's submission defeats its own purpose. Clearly, this litigation was necessary to achieve a complete remedy under the law, and the accusation that it was in any way motivated by monetary interests is meritless. Rather, this is a lawsuit Plaintiffs had no choice but to file and litigate due to Defendant's actions and inactions.

[3]The Town's strawman argument about attorneys' fees is not properly before the Court at this stage; attorneys' fees are a matter for another day. But, contrary to Defendant's view, the law is clear in this Circuit that civil rights plaintiffs who succeed in reforming unlawful government practices or procedures—even through a mix of cajoling and meritorious litigation—are entitled to recover full fees and costs required for this reform. *See, e.g., Project Vote/Voting for Am. v. Dickerson,* 444 Fed.Appx. 660 (4th Cir. 2011) (*per curiam*) (reversing district court's denial of fee and cost recovery to civil rights plaintiffs who secured reform of unlawful government practices through so-called "voluntary" government compliance plus nominal damages.); *Mercer v. Duke Univ.*, 401 F.3d 199 (4th Cir. 2005) (awarding full fees in civil rights case mooted but for nominal damages award); *Reyazuddin v. Montgomery Cnty.*, No. DKC 11-951, 2022 WL 4608331, at *2 (D. Md. Sept. 30, 2022) ("[A] fee award is warranted when a plaintiff seeking an injunction persuades the defendant to provide most of the real-world relief the injunction would have provided, making the injunction itself unnecessary."). Having forced its Black residents into litigation, Defendant bears responsibility for reimbursement of the costs they incurred, including, for example, those associated with providing the Town expert advice on VRA-compliant election plans.

ARGUMENT

I. Plaintiffs are Currently Entitled to Declaratory Relief to Redress Defendant's Unlawful Practices and Policies.

The crux of Defendant's argument as to why the Court should deny the Plaintiffs summary judgment, notwithstanding its admitted violation of Plaintiffs' rights, is that the Town is now finally changing the election system that enabled it to suppress the Black vote and maintain its all-white government all these years. Defendant is mistaken.

Federal courts routinely hold that "retrospective" declaratory relief is proper where, as here, the request is intertwined with a claim for further relief such as damages or clarification of the law impacting the parties' dispute.[4] For example, the Fourth Circuit followed this principle recently in a case about transgender students' rights after the district court rejected the defendants' argument that the student's graduation from high school mooted his claims for declaratory relief and nominal damages. *Grimm*, 972 F.3d 586, *affirming* No. 4:15-cv-54, 2017 WL 9882602, at *3 (E.D.Va. 2017). Citing *Powell v. McCormack*, 395 U.S. 486 (1969), the *Grimm* court ruled that because it "must decide the constitutional issue in order to make possible a decision" awarding nominal damages, neither Mr. Grimm's request for "a retrospective declaratory judgment" nor his claim for nominal damages to redress past violations was moot. In endorsing the district court's decision on appeal, the Fourth Circuit emphasized that declaratory relief is "particularly important

[4] *See, e.g.*, *Lippoldt v. Cole*, 468 F.3d 1204 (10th Cir. 2006) (plaintiff's claim for declaratory relief was not moot where court must determine whether a past violation occurred to resolve plaintiffs' entitlement to damages or to influence current or future behavior of the parties); *Crue v. Aiken,* 370 F.3d 668, 677 (7th Cir. 2004) (even when a claim for injunctive relief is barred, a claim for declaratory relief as a predicate to remaining damages claim survives); *F.E.R. v. Valdez*, 58 F.3d 1530, 1533 (10th Cir. 1995) (patient's claim for declaratory judgment that government investigators improperly invaded their privacy not mooted by return of records); *Coleman through Bunn v. District of Columbia*, 306 F.R.D. 68, 75 (D.D.C. 2015) (request for declaratory relief not moot where "intertwined with a claim for monetary damages that requires [the Court] to declare whether a past constitutional violation occurred") (citing *Lippoldt*).

in the civil rights context, because such rights are often vindicated through nominal damages." 972 F.3d at 604.

The same is true here, as declaratory relief is needed both as predicate for Plaintiffs' claims for nominal damages, and to ensure enforceability of the racially fair plan that is the subject of Resolution 23-07, notwithstanding general constitutional limits on use of race in redistricting[5] and the superseding provision of the Town Charter that mandates an unlawful election system for the 2023 election.

II. The Court Should Grant Summary Judgment and Award Plaintiffs the Relief to Which They are Entitled, Even if Beyond That Expressly Sought in the Complaint.

Beyond mootness, the other principal argument Defendant makes in opposition to summary judgment is its contention that relief should be denied because Plaintiffs have not explicitly sought the precise relief they are now due. Like mootness, this argument falls flat. It is Black letter law under the Declaratory Judgment Act and Federal Rule of Civil Procedure 54(c) that this Court is authorized to award all "necessary and proper relief," including all "relief to which [each party] is entitled, even if the party has not demanded such relief in [its] pleadings." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 65-66 (1978) ("although the prayer for relief may be looked to for illumination . . . its omissions are not in and of themselves a barrier to redress of a meritorious claim"); Wright & Miller, 10 Federal Practice & Procedure §2664 (4th ed.). This has been controlling law in the Fourth Circuit for over 50 years: A party's failure explicitly to request certain relief in his complaint does not preclude grant of that relief where warranted, as

[5] Repeatedly during the course of this litigation, Plaintiffs have argued that a judgment as to the illegality of the Town's prior election system is needed to support its use of a race-conscious remedy going forward, as is standard in Section 2 cases, through structuring of these cases in liability and remedy phases. This case has proceeded differently, with the Town seeking to avoid judgment on liability to support its chosen remedy, which has given rise to concerns for the Plaintiffs. However, this issue also will be solved by the Court's entry of a "retrospective" declaratory judgment, as that judgment will support both the Town's remedial plan and the Plaintiffs' damages.

"pleadings serve only as a rough guide to the nature of the case." *Robinson v. Lorillard Corp*., 444 F.2d 791, 803 (4th Cir. 1971) (holding that plaintiffs were entitled to back pay despite the complaint's failure to seek such relief and counsel's disclaimer of any demand for back wages prior to trial).[6]

This Court has so ruled in a closely comparable case, declaring itself duty-bound to allow a damages remedy where warranted, despite the plaintiff's failure to plead it in its complaint:

> [Rule 54(c)] has "been liberally construed, leaving no question that it is the court's duty to grant whatever relief is appropriate in the case on the facts proved." *Robinson v. Lorillard Corporation*, 444 F.2d 791, 803 (4th Cir. 1971). Courts in this district have consequently determined that a plaintiff's failure to demand punitive damages is not determinative of the plaintiff's ultimate relief. *See Adams v. Montgomery Coll. (Rockville)*, 2012 WL 94614, at *4 n.1 (D. Md. Jan. 11, 2012) ("the presence (or absence) of such a demand is not dispositive of a party's ability to recover punitive damages").

Brightview Grp., LP v. Teeters, No. SAG-19-2774, 2022 WL 846208, at *7 (D. Md. Mar. 22, 2022) (reaffirming established rule that plaintiff's "failure to plead punitive damages is not determinative of the plaintiff's ultimate entitlement to relief"). If this rule holds true for potentially large punitive damage awards, it is certainly true for nominal damages. Indeed, as the Supreme Court opined in *Uzuegbunam*, due to the nature of nominal damages in vindicating fundamental rights, such damages should be presumed upon proof of a civil rights violation. 141 S.Ct. at 800.[7]

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[6] *Accord New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20, 24 (4th Cir. 1963) (under liberal pleading standards, complaint need not demand any particular relief "for the court will award appropriate relief if the plaintiff is entitled"); *Ins. Servs. of Beaufort, Inc. v. Aetna Cas. & Sur. Co.*, 966 F.2d 847, 851–52 (4th Cir. 1992) (relief granted under Declaratory Judgment Act does not need to have been demanded or even proved; "[t]he district court clearly had the power to hear the issue of damages after deciding the issue of liability and declaring the parties' rights in an equity action"); *Mora v. Lancet Indem. Risk Retention Grp., Inc*., No. PX-16-960, 2018 WL 1811516 (D. Md. Apr. 17, 2018) (same).

[7] *Accord*, *Basista v. Weir*, 340 F.2d 74, 87 (3d Cir. 1965)("As a matter of federal common law it is not necessary to allege nominal damages and nominal damages are proved by proof of deprivation of a right to which the plaintiff was entitled."); *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").

Lastly, the fact that the relief due to the Plaintiffs evolved over the course of the litigation does not diminish the Plaintiffs' entitlement to this relief. *United States v. City of Cambridge*, 799 F.2d 137 (4th Cir. 1986) (evolution of relief requested in Voting Rights Act lawsuit and lack of specific demand for special election in the complaint did not diminish district court's responsibility to provide full relief for the City's VRA violation, including requiring special election). Such flexibility is especially apt here, where the particular relief now due results in large part to strategies undertaken by the Town in trying to evade a court judgment.[8] Established precedent requires that the Court consider and award the relief due to the Plaintiffs now: 1) declaratory relief affirming the VRA's requirement that the 2023 election be conducted using the plan embodied in Resolution 23-07 rather than the unlawful conflicting plan required by the Charter; and 2) declaratory relief and nominal damages to redress the Town's past race discrimination, including its longstanding vote dilution perpetrated through Federalsburg's unlawful election system. [9]

III. A Declaratory Judgment is Needed to Ensure Enforceability of a VRA-Compliant Election Plan for 2023.

As this Court held in rejecting the State Election Board's effort to avoid a court judgment in *Nat'l Fed'n of the Blind v. Lamone*, a defendant's "voluntary" reform of a challenged policy or

[8] How, for example, could the Plaintiffs possibly have been expected to know at the outset of this litigation that partway through the case the Town would amend its Charter to adopt a new unlawful election system, then simultaneously adopt a conflicting plan by simple resolution, necessitating declaratory relief to invalidate the superseding Charter provision? *See* Part IV below.

[9] Even if there remained any question as to the Court's authority to grant Plaintiffs the specific declaratory relief and nominal damages award they now seek to remedy the Defendant's infringement of their voting rights, that concern would be completely resolved by a simple amendment to the Complaint, as Defendant concedes. ECF 37 at 11. Federal Rule of Civil Procedure 15 requires courts to "freely give leave when justice so requires." The Fourth Circuit's policy is "to liberally allow amendment." *Galustian v. Peter*, 591 F.3d 724, 729 (4th Cir. 2010). Accordingly, leave to amend should be denied only if "prejudice, bad faith, or futility" is present. *See Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509-10 (4th Cir. 1986). Plainly, that is not the case here. Thus, if the Court were to determine that Plaintiffs' failure to expressly seek declaratory relief about the Town's unlawful Charter amendment or to seek nominal damages in its original complaint limits the Court's ability to award such relief now, Plaintiffs should be granted leave to amend to make these minor clarifying updates. *See Grimm*, 972 F.3d 586 (plaintiff whose claims for injunctive relief became moot due to change in circumstances could properly secure nominal damages and other relief not previously contemplated through amendment to complaint).

practice renders judgment unnecessary *only* if the reform "make[s] it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur" and that the reform will "completely eradicate the issues the Plaintiffs have encountered in the past." 438 F.Supp.3d at 522. Such completeness and clarity are lacking here due to conflicting election plans enacted simultaneously by the Town: one lawful and one not; one through simple resolution, and the other through formal Charter amendment. Defendant seeks to downplay this problem, but established procedures for adoption of municipal election plans and the plain language of the two plans at issue make clear that concerns remain threatening enforceability of the VRA-compliant plan enacted through mere resolution. Judgment in Plaintiffs' favor will completely resolve this matter, ensuring that the VRA-compliant election plan is the one in place for September's Town elections.

Analysis of this issue begins with a brief review of the basic structure of municipal laws. "A municipal charter is foundational law for a Town in the same way a constitution is for a state or the nation." *Clough v. Mayor and Council of Hurlock*, 445 Md. 364, 369 (Md. 2015). As such, the Charter by which "a municipal corporation is organized and created is its organic law and the corporation can do no act nor make any contract not authorized by that charter." 2A McQuillin Mun. Corp. § 9:23 (3d ed.). On the other hand, a resolution is "simply an expression of opinion or mind . . . ordinarily ministerial in character and relating to the administrative business of the municipality." *Inlet Assocs. v. Assateague House Condo. Ass'n*, 313 Md. 413, 428 (1988) (citation omitted). Whereas any charter amendment takes effect only after satisfying elaborate process and notice requirements, resolutions are considered the most informal means for a municipality to make policy "not rising to the dignity" of even an ordinance, let alone a charter amendment. *See, e.g.*, *Kendall v. Howard Cnty.*, 431 Md. 590, 596 (2013) (citation omitted).

Moreover, "[m]unicipal charters generally 'contemplate that all legislation creating liability or *affecting in any important or material manner the people of the municipality* should be enacted by ordinances.'" *Inlet Assocs.*, 313 Md. at 428 (citation omitted) (emphasis added). The Maryland Supreme Court has said this applies specifically to election plans, invalidating a Prince George's County redistricting plan enacted by resolution on grounds that a more formal bill was required to make it enforceable. *See Prince George's Cnty. v. Thurston*, 479 Md. 575, 605-606 (2022).

In interpreting municipal laws for purposes of summary judgment, including those detailing the Town's dueling election plans, the Court must apply regular rules of statutory construction, including determining whether the method used by the Town to adopt each plan was proper. *Thurston*, 479 Md. at 586. This means if "the court concludes that the language in a section of a municipal charter is clear and that it can discern the city's intent in enacting the section with certainty, then it does not resort to other rules of statutory interpretation" such as consideration of outside evidence. 2A McQuillin Mun. Corp. § 9:23 (3d ed.). Moreover, "[w]hen the language of the municipal charter is clear and unambiguous, the court must interpret it literally, giving the words of the charter their plain and ordinary meanings." [10] *Id.* Where application of these rules reveals any conflict, the charter provision takes precedence as the weightier authority. *Clough,* 445 Md. 377-78.

Such conflict exists here. Specifically, the Town Charter, as amended on May 23, dictates that the 2023 municipal election will be "***for the election of the Mayor and two (2) Councilmembers, each from a different district.***" In direct contradiction of this Charter

[10] Even if the Charter's plain meaning was not so evident, the Town has left no room for doubt about its intent as to the Charter amendment here. Its stated aim in amending the Charter was to put this plan in place for the 2023 elections, and for months it has publicly misrepresented that the Charter's plan fully remedied and mooted Plaintiffs' claims—undoubtedly influencing community sentiment.

amendment, Resolution 23-07 provides "***for the election of the Mayor and two (2) Councilmembers that reside in District 1 and two (2) Councilmembers that reside in District 2.***"[11] The Charter provision clearly states that *only two council positions—one from each district*—will be up for election in 2023. Resolution 23-07 is equally clear but directly conflicting, providing that all four council positions, *two from each district*, will be up for election in 2023.

While Plaintiffs and the Court have questioned the legality of the Charter plan, all parties agree that Resolution 23-07's plan is VRA compliant. However, in order to be enforceable given the Charter amendment and regular rules of statutory construction, the latter plan must be adopted by Court order. This is due both to the conflict between the two plans, and because, pursuant to the Maryland Supreme Court's reasoning in *Thurston*, an election plan aiming to protect Black voters' rights and bring the Town into compliance with the Voting Rights Act is far too important to be left to a mere informal resolution intended for ministerial matters. 479 Md. at 606*; Kendall*, 431 Md. at 596. Absent a Court order reinforcing the resolution, it is unenforceable—just as the Prince George's County redistricting plan was.

Plaintiffs have opposed the Charter amendment since its proposal and throughout preliminary injunction proceedings as insufficient to meet the requirements of the Voting Rights Act; they extensively briefed the issue and offered expert testimony at the May 9 hearing to support their position. *See* Plaintiff's Motion for Preliminary Injunction (March 9, 2023) and Reply in support (May 1, 2023); Tr., May 9 Hrg. 7-18. The Court itself commented at oral argument that

[11] The Charter also mandates that the two Council members elected in 2023 will serve five-year terms. On the other hand, Resolution 23-07 creates an entirely new and untested system whereby councilmembers with the highest number of votes from each district will be elected to a five-year term, while the second highest number of votes will be elected to three-year terms.

the plan embodied in the Charter "changes things somewhat but doesn't correct the racial unfairness." Tr., May 9 Hrg. 41:7-9. [12]

Although the Court did not consider the matter of the Charter plan's illegality properly before it during preliminary injunction proceedings, the Town's dueling proposals for election reform and its attempt to enact a lawful plan by resolution alone have placed it before the Court now. In order to completely reform the Town's Voting Rights Act violation, a declaratory judgment is needed to ensure that the election plan in place for the 2023 election is VRA compliant. And while Plaintiffs bore a heavy burden to establish likelihood of irreparable harm at the preliminary injunction stage, the burden is reversed now; it is now Defendant that must refute the Plaintiffs' claims in order to avoid a grant of summary judgment to the Plaintiffs. The Town falls woefully short of meeting this burden.

Even if, as defense counsel has suggested, some Council members might resign early in order to ameliorate the conflict between the Charter and the resolution, it is undisputed that they are not required to do so. As such, the legality of the Charter remains at issue, necessitating that the Court address Plaintiffs' request for declaratory relief, find the recently amended Charter for Federalsburg's 2023 municipal election unlawful under Section 2 of the Voting Rights Act, and order into effect the plan adopted by Resolution 23-07. Not only are Plaintiffs entitled to this relief

[12] The Court reiterated its concerns about the illegality of the election system required by the Charter during the June 8 hearing:

> While I have not been asked to make a finding as to the earlier revised election system approved by the Town which would have only provided the Town's Black population with the opportunity to elect one councilmember in September—again, I haven't been asked to make a finding as to that proposal, but I certainly expressed some concerns about that proposal during our prior hearing.

Tr., June 8 Hrg. 19:22– 20:3.

by law; an order of the Court mandating the Town's adoption of Resolution 23-07 is the only way to ensure that the upcoming election is conducted in a lawful, racially fair manner.

IV. Plaintiffs Properly Seek Declaratory Relief and Nominal Damages under 42 U.S.C. §1983 to Remedy Defendants' Denial of Their Voting Rights on the Basis of Race in Violation of Section 2 of the Voting Rights Act.

Defendant cannot and does not deny that Plaintiffs bring this suit under both the Voting Rights Act and Section 1983. The Complaint clearly so states in both the caption and text of its Claim for Relief: "Plaintiffs bring this claim both under the Voting Rights Act itself, as well as pursuant to 42 U.S.C. § 1983." Complaint ¶ 53. The Town has failed to challenge this claim at any phase in the litigation, and even now, concedes that Section 2 is properly enforceable to seek additional relief, including damages, pursuant to § 1983.

A. Defendant has failed to rebut Plaintiffs' showing that Section 2 is enforceable under § 1983.

The analysis for determining enforceability of a federal law under § 1983 is straightforward. First, the proponent must demonstrate that the federal statute confers an individual right by showing that the statutory language "confers rights on a particular class of persons." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002). Once that showing is made, "the right is presumptively enforceable by § 1983." *Id.* An opponent can "rebut this presumption by showing that Congress specifically foreclosed a remedy under § 1983." *Id.* at n.4 (citation omitted). This requires a showing that "Congress shut the door to private enforcement either expressly, through specific evidence from the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id*. (citations and quotations omitted).

Even before the Supreme Court's sweeping endorsement of § 1983 enforceability in *Health & Hosp. Corp. of Marion Cnty. v. Talevski,* 143 S.Ct. 1444 (2023), two federal courts had very

recently employed this precise analysis to find Section 2 enforceable under §1983. *Coca v. Dodge City*, No. 22-1274-EFM, 2023 WL 2987708 (D. Kansas Apr. 18, 2023); *Turtle Mountain Band of Chippewa Indians v. Jaeger,* No. 3:22-cv-22, 2022 WL 2528256 (D. N.D. July 7, 2022).[13] No court has disagreed, and in any event, the issue has been settled by *Talevski*.

Both the *Dodge City* and *Turtle Mountain* courts found that that the VRA clearly includes rights-creating language needed to establish a presumption of enforceability: "[t]he plain language of Section 2 mandates that no government may restrict a citizen's right to vote based on an individual's race or color." *Turtle Mountain*, at *5. Indeed, the *Turtle Mountain* court observed as to Section 2: "*It is difficult to imagine more explicit or clear rights creating language*." *Id.* (emphasis added). The *Dodge City* court agreed, finding this reasoning "highly persuasive." 2023 WL 2987708 at *6.[14] Defendant makes no attempt whatsoever to rebut Plaintiffs' showing that the VRA is properly enforceable under §1983, failing even to acknowledge the *Talevski* Court's full-throated reaffirmation of the presumptive enforceability of federal laws like Section 2 under §1983. Instead the Town dismisses rulings by other courts on this point and invites this Court to shirk its responsibility to address the issue before it on grounds that it has never had cause to do so in the past.

Plaintiffs have properly pled a claim for relief from Defendant's Section 2 violation under § 1983 and the Town has failed to rebut the claim. The fact that the precise legal issue presented

[13] Defendant's suggestion that these thoughtfully-reasoned authorities on all fours with this case should be disregarded because they are not yet published must be rejected. In fact, the *Dodge City* ruling has in fact been designated for publication, incorporating thorough analysis and discussion of *Turtle Mountain*.

[14] Further, upon careful review, each court also found no indication that Congress foreclosed § 1983 enforcement as incompatible with Section 2's remedial scheme: "Not only does Section 2 contain clear rights-creating language—a legal position thus far unquestioned by any members of the Supreme Court—but it also does not contain a comprehensive enforcement scheme incompatible with individual enforcement. The extensive history of Section 2 enforcement by individuals, combined with Congress's silence on the issue when reenacting the VRA, establishes this fact for the purposes of this Order." *Dodge City,* 2023 WL 2987708 at *6.

has not previously been addressed by this Court does nothing to preclude it from resolution today. Indeed, if Defendant's reasoning were to deter court rulings on every new legal issue, the law would be frozen in time, and the advancement of civil rights hopelessly forestalled.

B. A declaratory judgment is needed to award damages to the Plaintiffs.

As discussed in Section II above, declaratory relief is needed here as a predicate to the Court's determination of the Plaintiffs' entitlement to damages. *E.g., Wolff v. McDonnell*, 418 U.S. 539, 555 (1974); *Powell v. McCormack*, 395 U.S. 486 (1969) (rejecting argument that mooting of primary relief sought foreclosed consideration of the Plaintiffs' entitlement to secondary declaratory and monetary relief, even if money owed was insubstantial).

Plaintiffs seek a declaratory judgment as to Defendant's egregious violations of Black residents' rights through use of a racially discriminatory election system over the course of decades, in order to undergird an award of nominal damages to vindicate their rights. They are plainly entitled to this relief under § 1983. *Carey v. Piphus*, 435 U.S. 247 (1978).

C. Awarding nominal damages will vindicate Plaintiffs' voting rights.

Nearly a century ago, the U.S. Supreme Court held unanimously, in an opinion authored by Justice Oliver Wendell Holmes, that damages are a remedy available to people unlawfully denied the right to vote based on their race. *Nixon v. Herndon*, 273 U.S. 536 (1927). There, Mr. Nixon met all voter qualifications, except that, as a Black man, Texas law denied him access to the ballot based on his race. He challenged the denial under the Fourteenth and Fifteenth Amendments and § 1983, seeking $5,000 in monetary damages for the State's discrimination. The lower courts rejected the claims, but the Supreme Court reversed, saying Mr. Nixon's entitlement to pursue damages as redress for the State's past infringement of his right to vote was not "open to doubt." *Id*. at 540. *Accord Lane v. Wilson*, 307 U.S. 268 (1939) (Black Oklahomans alleging

violation of right to vote based on race in violation of Fifteenth Amendment entitled to sue for damages).

From the time of *Nixon v. Herndon* in the 1920s, to its ringing endorsement of presumed damages to redress civil rights violations a century later in *Uzuegbunam,* the Supreme Court has affirmed and reaffirmed the principle that the law guarantees people like Plaintiffs, who suffer infringement of the right to vote based on race, the opportunity to vindicate their rights through a court judgment and award of damages. This principle applies emphatically here to justify summary judgment and nominal damages to the Federalsburg Plaintiffs upholding—in this historic bicentennial year—the fundamental rights of the Town's Black residents to enjoy equal election opportunities in their community irrespective of race.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court grant the Plaintiffs' motion for summary judgment, find that the Defendant's past election system violated Section 2 of the Voting Rights Act, order Defendant's Resolution 23-07 as the remedy for their VRA violation, and award nominal damages to each of the Individual Plaintiffs.

Respectfully Submitted,

Dated: July 11, 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 the foregoing **PLAINTIFFS' MEMORANDUM IN REPLY TO THE TOWN OF FEDERALSBURG'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** was served electronically upon all counsel of record by electronic filing via the Court's CM/ECF system.

Dated: July 11, 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