STATE OF RHODE ISLAND

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: January 27, 2022)

MARY BURKE PATTERSON, ROBERT E. PATTERSON, MELISSA JENKINS, VALERIE ANN HENRY, PAULA CHILDS, DAVID H. STENMARK, and CAROL M. STENMARK,	:	
Plaintiffs,	:	
v.	:	**C.A. No. WC-2020-0130**
THE BONNET SHORES FIRE DISTRICT,	:	
Defendant.	:	

DECISION

TAFT-CARTER, J. Before the Court for decision are Plaintiffs' Motion for Summary Judgment, Defendant Bonnet Shores Fire District's (the BSFD) Objection to Plaintiffs' Motion and Cross-Motion for Summary Judgment, and Plaintiffs' Reply Memorandum and Objection to Defendant's Cross-Motion. Jurisdiction is pursuant to Rule 56 of the Superior Court Rules of Civil Procedure in accordance with G.L. 1956 §§ 8-2-14 and 9-30-1 and 42 U.S.C. § 1983.

I

Facts and Travel

Incorporated in 1930 by an act of the General Assembly, the BSFD is located in the northern part of the Town of Narragansett. (Compl. ¶ 8.) Under the terms of the Bonnet Shores Fire District Charter & Related Legislation (BSFD Charter), the BSFD possesses

> "all rights and powers generally had and enjoyed by business corporations and fire districts in the state, including (but without limiting the generalities of the foregoing) the right to acquire, hold and dispose of real and personal property necessary for its corporate purposes; the right to have and use a common seal; the right to sue

> or be sued; and the right to borrow money from time to time and to issue its notes, bonds or other evidences of indebtedness theretofore." (Compl. Ex. A, § 1(4)).

The BSFD Charter also specifically authorizes the BSFD to collect taxes, at the rate of up to seven mills on each dollar of valuation, on real estate within the District.[1] *Id.* at Ex. A, § 7. Among other purposes, the BSFD may use the taxes raised to establish and maintain

> "a water supply system for domestic use and fire prevention; a fire, police or life saving department; a lighting system; a garbage removal system, or any similar system deemed necessary for the protection of lives and property within the district or for the general improvement[,] upbuilding and beautifying of district property[.]" *Id.* at Ex. A, § 7.

Currently, the BSFD does not provide water, fire services, police services, road maintenance, snow removal, public schools, or parking enforcement, all of which are provided by the Town of Narragansett instead. (Def.'s Mem. Ex. 1, ¶ 3.) The BSFD does provide "[r]efuse collection" services, beach maintenance and operations, harbor operations, a summer camp for youth, and limited private security patrols. *Id.* at Ex. 1, ¶ 4.

The BSFD is also empowered to "adopt such rules, regulations, ordinances and by-laws as may be reasonably necessary to enable it to fulfill its corporate purposes and may provide a penalty for the breach" thereof in the form of "a fine not exceeding fifty dollars . . . or imprisonment for a term of not exceeding thirty days[.]" (Compl. Ex. A, § 5 (footnote omitted).) Through its ordinances, the BSFD "may also prescribe . . . the conduct and control of the district inhabitants. . . ." *Id.* Accordingly, BSFD has enacted enforceable ordinances governing conduct within its boundaries, including parking regulations, a trash removal and anti-littering ordinance, and a dog leashing ordinance. (Compl. Ex. B, 19-21.)

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[1] A mill is a "monetary unit equal to one-tenth of a cent." Black's Law Dictionary 1190 (11th ed. 2019). In other words, the BSFD may collect $7 in taxes for every $1,000 in assessed value.

Under § 6 of the BSFD Charter, BSFD voters

> "may elect a clerk, three assessors of taxes, a collector of taxes, a district council [of] not less than three and no more than seven qualified voters, one or more fire wardens, one or more police officers and such other officers and committees as said district may require for its corporate purposes." (Compl. Ex. A, § 6.)

By the terms of the Bonnet Shores Fire District By-Laws (BSFD By-Laws), members of the district council are elected to three-year terms and officers are elected annually; both officers and council members must be qualified voters. (Compl. Ex. D, Art. II § 2, Art. III § 1.) Voter eligibility in BSFD elections is governed by § 2 of the BSFD Charter, which provides that:

> "Every firm, corporation, unincorporated association and every person, irrespective of sex, of the age of eighteen years, who is possessed in his or her own right of real estate in said district of the value of . . . Four Hundred ($400) Dollars over and above all encumbrances, being an estate in fee simple, fee tail, for the life of any person, or an estate in reversion or remainder, the conveyance of which estate shall if by deed, have been recorded at least ninety (90) days, shall thereafter have a right to vote at all meetings of the corporation. . . . Every person or firm qualified to vote as aforesaid shall vote in person, except that a person in common ownership to real estate may vote as the proxy of the other person who has been verified as being in common ownership in said real estate[.]" (Compl. Ex. A, § 2 (footnotes omitted).)

Owners with at least $400 of equity in real property located in the BSFD, including commercial and nonresidential parcels, are therefore entitled to vote in BSFD elections regardless of whether they reside in the District. (Compl. ¶¶ 27-28.) Conversely, adult residents who do not possess the requisite property ownership interest are not entitled to vote in BSFD elections. *Id.* ¶ 29.

While the exact numbers of BSFD residents and qualified voters are unclear, potentially hundreds of nonresidents could be enfranchised through the BSFD Charter. Compl. ¶¶ 37, 70; Answer ¶¶ 37, 70. For example, the 2020 Tax Rolls prepared by the Narragansett Tax Assessor identify 2,029 taxable parcels within the BSFD, 930 of which appear to be nonresidential

bathhouses or cabanas located at the Bonnet Shores Beach Club (Beach Club). (Pls.' Reply Mem. 14-15 & Ex. H.) Of those 930 parcels, the 2020 Tax Rolls indicate that 827 are owned by persons with a mailing address outside the BSFD's boundaries. *Id.* at 15. In June 2021, the Beach Club sent its members an e-mail endorsing candidates for the upcoming BSFD Annual Meeting and Election and explaining how multiple owners of a single Beach Club unit could cast their votes by proxy. (Pls.' Reply Mem. Ex. I, at 2-4.) In the ensuing election, the BSFD handed out 698 ballots, up from 219 ballots in 2019 and 316 ballots in 2018. (Pls.' Reply Mem. Ex. J, at 2-4.)

Before filing suit, Plaintiffs brought their grievances with the BSFD Charter's voting provisions to the attention of Rhode Island's Attorney General, Board of Elections, and Secretary of State. (Compl. ¶ 39.) In an August 22, 2019 letter to BSFD Chairperson Michael Vendetti, Rhode Island Secretary of State Nellie M. Gorbea (Secretary Gorbea) suggested that the BSFD Charter's property-based voting restriction may be unconstitutional in light of the Rhode Island Supreme Court decision *Flynn v. King*, 433 A.2d 172 (R.I. 1981). (Compl. Ex. E, at 2.) BSFD Council member Anita Langer then moved to amend the BSFD Charter at an October 16, 2019 Council meeting, citing the "need to link the right to vote in the BSFD to residency because the current taxpayer requirement is unconstitutional." (Compl. Ex. F, at 2-3.) The motion failed for lack of a second. *Id.* at 3.

Plaintiffs filed the instant Complaint against the BSFD on March 13, 2020.[2] Plaintiff Melissa Jenkins (Jenkins), a resident of the BSFD and an otherwise qualified voter over the age of eighteen, is not listed on the deed of the home where she resides; she is thus unable to vote in

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[2] Pursuant to G.L. 1956 § 9-30-11, because the Complaint alleges that the BSFD Charter is unconstitutional, Plaintiffs served a copy of the Complaint on the Attorney General of the State of Rhode Island. (Compl. 15.) In an April 7, 2020 filing, the Attorney General's Office acknowledged receipt of the Complaint and declined to brief the constitutional issues while reserving the right to do so at a later date or on appeal. (Notice of Att'y General 1.).

BSFD elections. (Compl. ¶¶ 3, 45.) Under Count I of the Complaint, Jenkins seeks a declaratory judgment that the BSFD Charter's property ownership requirement is an unconstitutional restriction on her right to vote under both the Fourteenth Amendment to the United States Constitution and article 2, section 1 of the Rhode Island Constitution. *Id.* ¶¶ 46-50. Under Count II, Jenkins brings a claim against BSFD under 42 U.S.C. § 1983 for denying her the right to vote in contravention of the Fourteenth Amendment to the United States Constitution. *Id.* ¶¶ 54-57.

Plaintiffs Mary Burke Patterson, Robert E. Patterson, Valerie Ann Henry, Paula Childs, David H. Stenmark, and Carol M. Stenmark (collectively, the Voter Plaintiffs) both reside and own property within the BSFD. *Id.* ¶¶ 1-2, 4-7. As a result, they are eligible to vote in BSFD elections and have voted in previous elections. *Id.* ¶¶ 62, 72. Under Count III of the Complaint, the Voter Plaintiffs seek a declaratory judgment that the BSFD Charter unconstitutionally dilutes their votes by allowing numerous nonresident landowners to vote in BSFD elections. *Id.* ¶¶ 60-66. Under Count IV, Voter Plaintiffs bring their vote dilution claim against BSFD under 42 U.S.C. § 1983 as a violation of their Fourteenth Amendment rights. *Id.* ¶¶ 69-74.

Plaintiffs end their Complaint with the following requests for relief:

> "A. A finding and declaration that BSFD is a quasi-municipal entity which exercises general governmental authority over its geographic area;
>
> "B. A finding and declaration that the limitation of voting rights to property holders holding over $400 in equity found in the BSFD Charter is unconstitutional under the Fourteenth Amendment of the United States Constitution;
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> "C. A finding and declaration that the limitation of voting rights to property holders holding over $400 in equity found in the BSFD Charter is unconstitutional under Article I, § 2 of the Rhode Island Constitution;

> "D. A finding and declaration that the distribution of voting rights to nonresidents of BSFD is unconstitutional under the Fourteenth Amendment of the United States Constitution;
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> "E. A finding and declaration that the distribution of voting rights to nonresidents of BSFD is unconstitutional under Article I, § 2 and Article II, § 1 of the Rhode Island Constitution;
>
> "F. A finding and declaration that subsequent elections for BSFD offices must be open only to all residents of BSFD who are over eighteen years of age, consistent with Article II, § 1 of the Rhode Island Constitution;
>
> "G. A finding and declaration that currently-elected BSFD officers must exercise their offices as trustees of BSFD, for the benefit of the residents of BSFD, until such time as the General Assembly amends the BSFD Charter in conformance with this Court's decision or new elections consistent with this Court's decision may be held;
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> "H. Judgment against BSFD for depriving Plaintiff Melissa Jenkins of her right to vote in BSFD elections pursuant to official policy;
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> "I. Judgment against BSFD for depriving Plaintiffs Mary Burke Patterson, Robert Patterson, Valerie Ann Henry, Paula Childs, David H. Stenmark, and Carol M. Stenmark of their constitutional right not to have their votes debased and diluted;
>
> "J. An award of costs and attorneys' fees pursuant to 42 U.S.C. § 1988; and
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> "K. Such other and further relief as this Court deems just and proper under the circumstances." *Id.* at 14-15.

BSFD filed a Motion to Dismiss for Failure to Join Indispensable Parties on May 4, 2020. In a December 17, 2020 decision, this Court granted the Motion with respect to Plaintiffs' claims for relief in paragraphs D, E, and F and denied the Motion as to Plaintiffs' remaining claims. *Patterson v. The Bonnet Shores Fire District*, No. WC-2020-0130, 2020 WL 7638840, at *8 (R.I. Super. Dec. 17, 2020). An order was entered granting BSFD's Motion to Dismiss "as to Count III of Plaintiffs' complaint and the relief sought thereunder in paragraphs D, E, and F of said complaint" but denying the Motion as to "all remaining claims." (Order, Jan. 7, 2021 (Taft-Carter, J.) ¶¶ 1-2.)

On April 20, 2021, Plaintiffs filed a Motion for Summary Judgment with respect to Counts I, II, and IV of their Complaint pursuant to Rule 56 of the Superior Court Rules of Civil Procedure. The BSFD filed an Objection to Plaintiff's Motion for Summary Judgment and a Cross-Motion for Summary Judgment on June 30, 2021. On July 28, 2021, Plaintiffs filed a Reply to the BSFD's Objection and an Objection to the BSFD's Cross-Motion. The American Civil Liberties Union of Rhode Island (ACLU-RI), appearing as amicus curiae, also filed a Memorandum in Support of Plaintiffs' Motion for Summary Judgment. This Court heard oral arguments on September 21, 2021, and now issues a decision on the parties' Motions for Summary Judgment.

II

Standard of Review

Under Rule 56, "'[s]ummary judgment is appropriate when, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party, the court determines that there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law.'" *Roadepot, LLC v. Home Depot, U.S.A., Inc.*, 163 A.3d 513, 519 (R.I. 2017) (quoting *5750 Post Road Medical Offices, LLC v. East Greenwich Fire District*, 138 A.3d 163, 166-67 (R.I. 2016)). "'The moving party bears the initial burden of establishing the absence of a genuine issue of fact.'" *McGovern v. Bank of America, N.A.*, 91 A.3d 853, 858 (R.I. 2014) (quoting Robert B. Kent et al., *Rhode Island Civil Procedure* § 56:5, VII-28 (West 2006)) (alteration omitted). Once the moving party has satisfied its burden, "'[t]he burden then shifts . . . and the nonmoving party has an affirmative duty to demonstrate . . . a genuine issue of fact.'" *Id.* (quoting Kent et al., cited *supra*, at § 56:5, VII-28). To do so, the nonmoving party must point to "competent evidence" and cannot rely upon "mere allegations or denials in the pleadings, mere

conclusions or mere legal opinions." *Mruk v. Mortgage Electronic Registration Systems, Inc.*, 82 A.3d 527, 532 (R.I. 2013) (internal quotation and citations omitted).

III

Analysis

A

Count I: Declaratory Judgment – Disenfranchisement

Under Count I, Jenkins seeks a declaration that the BSFD Charter's property ownership voting requirements, which prevent her from voting in BSFD elections, are unconstitutional. (Compl. ¶¶ 46-50.) Jenkins's claim rests on a line of U.S. Supreme Court cases applying the Equal Protection Clause of the Fourteenth Amendment to restrictions on the right to vote. (Pls.' Mem. 7.) Jenkins maintains that because the BSFD is a quasi-municipal entity possessing general governmental powers, the Fourteenth Amendment applies to its voting requirements. *Id.* at 8-9. Jenkins also asserts that the BSFD's property-based voting requirements are subject to strict scrutiny under the Fourteenth Amendment. *Id.* at 10. Finally, because she argues that the property ownership requirements are not narrowly tailored to advance a compelling state interest, Jenkins concludes that they are unconstitutional. *Id.* at 11-12.

The BSFD responds by stating that Jenkins must prove that the BSFD Charter is unconstitutional beyond a reasonable doubt. (Def.'s Mem. 5-6.) Emphasizing the narrow scope of its activities, the BSFD then argues that its voting requirements are not subject to the Fourteenth Amendment because it is not a governmental body. *Id.* at 6-10. Anticipating the counterargument that the BSFD Charter grants broader powers than the BSFD now exercises, the BSFD says that considering purely hypothetical applications of the BSFD Charter is inappropriate and would expand Jenkins's as-applied challenge into a facial challenge. *Id.* at 11-12.

Jenkins agrees that she must prove the challenged provision unconstitutional beyond a reasonable doubt but argues in her reply that the BSFD has misconstrued the application of the burden of proof against the framework of Fourteenth Amendment scrutiny. (Pls.' Reply Mem. 3-4.) As to whether the BSFD is a governmental body, Jenkins argues that the BSFD's own admissions show that it currently exercises general governmental powers. *Id.* at 5-7. Jenkins also states that her attack on the BSFD's property ownership requirement is a facial challenge in that she challenges the disenfranchisement of all non-owner residents. *Id.* at 8. Finally, Jenkins states that her argument does not rely on powers the BSFD is not using but notes that decisions on whether to exercise such latent powers are themselves exercises of governmental authority. *Id.* at 9.

1

Jenkins's Burden of Proof

Jenkins attacks BSFD's property ownership requirement under the Equal Protection guarantees of both the Fourteenth Amendment to the United States Constitution and article 1, section 2 of the Rhode Island Constitution. (Compl. ¶¶ 46-49.) The Rhode Island Supreme Court has held that claims advanced under "parallel" provisions of the federal and state constitutions call for "'a hybrid analysis that nevertheless reflects the autonomous character of each constitution's inviolable guarantees.'" *Federal Hill Capital, LLC v. City of Providence*, 227 A.3d 980, 989 (R.I. 2020) (quoting *East Bay Community Development Corporation v. Zoning Board of Review of Town of Barrington*, 901 A.2d 1136, 1150 (R.I. 2006)). It has also held that while "the United States Supreme Court's explication of fundamental rights . . . applies to [the Rhode Island] Constitution[,] . . . '[t]he equal-protection guarantees secured by the Fourteenth Amendment . . . in no way limit those protections Rhode Island citizens possess by nature of article 1, section 2.'"

Id. at 988 (quoting *Providence Teachers' Union Local 958, AFL-CIO, AFT v. City Council of City of Providence*, 888 A.2d 948, 956 (R.I. 2005)). Without losing sight of Jenkins's claim under the state constitution, the Court will therefore draw extensively from relevant U.S. Supreme Court cases. *Cf. Flynn*, 433 A.2d at 174 (taking same approach).

"The burden lies on the party challenging [a] statute's constitutionality to 'prove beyond a reasonable doubt that the act violates a specific provision'" of the federal or state constitutions. *Oden v. Schwartz*, 71 A.3d 438, 456 (R.I. 2013) (quoting *Mackie v. State*, 936 A.2d 588, 595 (R.I. 2007)); *see also Parella v. Montalbano*, 899 A.2d 1226, 1233 (R.I. 2006) (applying the "time-honored burden of proof—beyond a reasonable doubt—to the plaintiffs, who were challenging the constitutionality" of a state statute). However, if a plaintiff can successfully demonstrate that a heightened level of scrutiny is appropriate, then the government must advance a sufficient justification for the challenged law. *See Federal Hill Capital, LLC*, 227 A.3d at 985 & n.6 ("[I]n a case where strict scrutiny is the proper basis under which to examine a legislative act, the burden is no longer on the challenger to prove that it is unconstitutional beyond a reasonable doubt.").

Under the Equal Protection Clause of the Fourteenth Amendment, "[w]hen a suspect class or a fundamental right is implicated, . . . the Court will scrutinize the legislative action strictly and the action will survive only if it is 'suitably tailored to serve a compelling state interest.'" *Federal Hill Capital, LLC*, 227 A.3d at 985 (quoting *In re Advisory from the Governor*, 633 A.2d 664, 669 (R.I. 1993)); *see also Kramer v. Union Free School District No. 15*, 395 U.S. 621, 627-28 (1969) ("[In] reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable."). Once a plaintiff has established the existence of such a "presumptively invidious" classification, "it is

appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). Determining the appropriate burden of proof for Jenkins's challenge thus requires examining the substance of her claim.

2

Facial and As-Applied Challenges

Before reaching that claim, the parties also dispute whether Jenkins's assertion that the BSFD Charter's property-based voting provision should be declared unconstitutional represents a facial challenge or an as-applied challenge. Def.'s Mem. 11-12; Pls.' Reply Mem. 8. Although the distinction between the two types of constitutional challenges is not always clear, "the current consensus appears to be that 'facial challenges are generally equated with claims of unconstitutionality in toto,'" and "as-applied challenges evaluate the constitutionality of a statute 'as applied to the particular facts at issue.'" *Narragansett Indian Tribe v. State*, 110 A.3d 1160, 1163 (R.I. 2015) (first quoting Gillian E. Metzger, *Facial and As–Applied Challenges Under the Roberts Court*, 36 Fordham Urb. L.J. 773, 786 (2009), then quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18 (2010)). A "key distinction" between the two "'goes to the breadth of the remedy employed by the Court.'" *Id.* (quoting *Citizens United v. Federal Election Commission*, 558 U.S. 310, 331 (2010)).

The choice of a particular label is thus less crucial than a clear understanding of the scope of the challenge and the requested relief. The provision of the BSFD Charter at issue can be viewed as bearing two faces: one that prevents any resident without the requisite property interest from voting, and another that permits a broad class of nonresident property owners to vote. (Compl. Ex. A, § 2.) Under Count I, Jenkins challenges the exclusion of all non-owner residents from BSFD

elections and seeks a declaration that the $400 property ownership requirement is an unconstitutional limitation on the franchise. Compl. ¶ 48; Pls.' Reply Mem. 8. Count I could thus be understood as a facial challenge against the restrictive facet of the property-ownership voting provision, which is inherent in the text of the BSFD Charter. *See Narragansett Indian Tribe*, 110 A.3d at 1163 (quoting Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 Am. U.L. Rev. 359, 428 (1998)) (describing a "'valid rule facial challenge'" as "'a challenge to a statute based on a constitutional infirmity evident in the written words of the statute itself'"). "[A] plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the [law] would be valid,' *i.e.*, that the law is unconstitutional in all of its applications." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Again, however, for Count I the universe of relevant applications are only those in which the property ownership requirement is used to restrict the right to vote in BSFD elections.

Count I could therefore also be understood as an as-applied challenge to a particular subset of the voting provision's applications. *See Flynn*, 433 A.2d at 174 ("The defendants claim that the provisions, as applied, exclude nonproperty owners from elections and as such violate the equal protection clause of the United States Constitution."). In *Flynn*, after concluding that the "legislative charter of the West Glocester Fire District denie[d] equal protection to certain qualified voters and therefore [was] invalid[,]" the remedy awarded by the Supreme Court was a declaration that all "persons who reside in the district and are eligible to vote in a general or special election in the town of Glocester, shall be permitted to vote, whether or not they own taxable property." *Id.* at 175-76. Whichever label is used, the result is the same: under Count I, Jenkins seeks a declaration that the BSFD may not prevent residents from voting on the basis of property

ownership.[3] *Cf. Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 826 (1st Cir. 2020) (explaining in First Amendment context "that where the challengers 'do[ ] not seek to strike [a statute] in all its applications' but the relief sought 'reach[es] beyond the particular circumstances of [the] plaintiffs,' they must 'satisfy [the] standards for a facial challenge *to the extent of that reach*'" (quoting *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010))). Accordingly, the proper focus of the constitutional inquiry under Count I is the restrictive face of the property ownership requirement, not that requirement—or the BSFD Charter—as a whole.

3

Jenkins's Equal Protection Challenge

Substantively, Jenkins alleges that the BSFD's property-based voting restriction violates the "one-person, one-vote principle established in *Reynolds v. Sims*, 377 U.S. 533. . . ." *Ball v. James*, 451 U.S. 355, 360 (1981). "The United States Supreme Court has stated that in an election of general interest, restrictions on the franchise other than residence, age, or citizenship must promote a compelling state interest in order to survive constitutional attack." *Flynn*, 433 A.2d at 174 (citing *Kramer*, 395 U.S. 621). In *Flynn*, the Rhode Island Supreme Court applied an Equal Protection challenge under the state and federal constitutions to the "enfranchisement provisions of the West Glocester Fire District's legislative charter." *Id.* at 172. Those provisions—much like the BSFD's—limited the right to vote to "owner[s] of taxable property in the district[,]" thereby disenfranchising residents who did not own property. *Id.* at 173. The *Flynn* Court concluded that, "[a]lthough there may have been a 'rational basis' for limiting the franchise to taxable-property

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[3] Conversely, under the now-dismissed Count III, Voter Plaintiffs had challenged any application of the property-ownership voting provision to allow nonresidents to vote in District elections. (Compl. ¶¶ 60-67, 75.) As 42 U.S.C. § 1983 claims for damages to compensate Plaintiffs for prior deprivations of constitutional rights, Counts II and IV are as-applied challenges aimed at the specific facts at issue. *See, e.g.*, *Graff v. Motta*, 695 A.2d 486, 492-94 (R.I. 1997).

owners, . . . no ‘compelling state interest was promoted’ by the exclusion of otherwise qualified voters who did not own property[,]” and that exclusion was unconstitutional. *Id.* at 175.

Here, the BSFD does not dispute that Jenkins and other residents are prevented from voting in BSFD elections by the plain meaning of the property ownership requirement. (Def.’s Mem. 2-3, 6.) The BSFD also does not maintain that this requirement advances any compelling state interest. *Id.* at 6, 10-11. Instead, the BSFD attempts to distinguish the facts of this case from *Flynn* and argues that the BSFD Charter’s voting requirement passes muster because

> “the strict demands of *Reynolds* . . . are not applicable to a district election when the district neither enacts laws governing the conduct of citizens nor administers the normal functions of government such as the maintenance of streets, the operation of schools, police and fire departments, hospitals and other facilities designed to improve the quality of life within the district.” *Flynn*, 433 A.2d at 174 (citing *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973)).

In *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, cited *supra*, the United States Supreme Court held that a California water storage district could limit the right to vote in its general elections to district landowners without violating the Equal Protection Clause. *Salyer Land Co.*, 410 U.S. at 725-28. The district in question had “relatively limited authority” because “[i]ts primary purpose, indeed the reason for its existence, [was] to provide for the acquisition, storage, and distribution of water for farming” in an area comprised entirely of “intensively cultivated, highly fertile farm land.” *Id.* at 723, 728. As a result, district operations had a “disproportionate effect . . . on landowners as a group[,]” and “it [was] quite understandable that the statutory framework for election of directors . . . focuse[d] on the land benefited, rather than on people as such.” *Id.* at 728-30.

Similarly, in *Ball v. James*, cited *supra*, the United States Supreme Court held that an Arizona water reclamation district could restrict the right to vote to district landowners. *Ball*, 451

U.S. at 361. The Court's analysis focused on "whether the purpose of the District is sufficiently specialized and narrow and whether its activities bear on landowners so disproportionately as to distinguish the District from those public entities whose more general governmental functions demand application of the [one person, one vote] principle." *Id.* at 362 (citing *Reynolds*, 377 U.S. 533). Because the water reclamation district's primary purposes were the storage and distribution of water to landowners, the Court noted that

> "the District simply does not exercise the sort of governmental powers that invoke the strict demands of *Reynolds*. The District cannot impose ad valorem property taxes or sales taxes. It cannot enact any laws governing the conduct of citizens, nor does it administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services." *Id.* at 366.

In short, although "the state legislature [had] allowed water districts to become nominal public entities in order to obtain inexpensive bond financing, the districts remain[ed] essentially business enterprises, created by and chiefly benefiting a specific group of landowners." *Id.* at 368.

Arguing that the same exception to the *Reynolds* principle applies here, the BSFD represents that it exercises a "narrow and confined" set of powers that are "tied directly to its existence in a beach community." (Def.'s Mem. 7.) In a June 7, 2021 Affidavit, Janice McClanaghan, then the acting chair of the BSFD Council, stated that the BSFD does not provide police or fire services, water, sewage disposal, schools, road maintenance, snow removal, or parking enforcement. (Def.'s Mem. Ex. 1, ¶ 3.) The BSFD does provide "[r]efuse collection" services, a youth summer camp, sporadic private security patrols, and maintains and operates local beaches and a harbor. *Id.* at Ex. 1, ¶ 4. The BSFD collects property taxes based on valuations established by the Town of Narragansett but does not collect auto excise taxes. *Id.* at Ex. 1, ¶¶ 5-6. While the BSFD holds regular elections for council members and officers, the BSFD receives

no state assistance or supervision in conducting those elections and the lists of eligible voters are supplied by the Town of Narragansett. *Id.* at Ex. 1, ¶¶ 7-8.

In response, Jenkins argues that the BSFD exercises multiple governmental powers. (Pls.' Reply Mem. 6.) Unlike the district at issue in *Ball*, the BSFD collects ad valorem property taxes and provides sanitation services by collecting garbage. *Id.* The BSFD can also enforce the taxing powers granted by the BSFD Charter through tax sales of delinquent properties. Pls.' Mem. Ex. A, § 8; *see Finnegan v. Seaside Realty Trust*, 777 A.2d 548, 548 (R.I. 2001) ("[A] tax collector for the Bonnet Shores Fire District sold the property to [plaintiff] for non payment of taxes."). Additionally, pursuant to the BSFD Charter, the BSFD has passed multiple ordinances enforceable by fines of up to fifty dollars. *Id.* at Ex. A, § 5. Among these ordinances are parking regulations, a trash removal and anti-littering ordinance, a dog leashing ordinance, and an ordinance prohibiting loitering, consuming alcoholic beverages, or engaging in athletic activities on beaches or other public areas without a permit. *Id.* at Ex. B, at 4, 19-21. As Jenkins points out, these ordinances are "laws governing the conduct of citizens." (Pls.' Reply Mem. 7) (quoting *Ball*, 451 U.S. at 366).

There is clearly no genuine issue of dispute that the BSFD actively exercises governmental powers that make BSFD elections matters of "general interest" to all residents. *Flynn*, 433 A.2d at 174. Through the ordinances, lawfully enacted in compliance with the powers delegated by the General Assembly through the BSFD Charter, the BSFD purports to regulate a broad swath of "the conduct . . . of the district['s] inhabitants." (Compl. Ex. A, § 5.) In so doing, the BSFD exercises "a part of the sovereign power of the state[,] . . . one of the basic elements of a municipal" or quasi-municipal corporation. *Kennelly v. Kent County Water Authority*, 79 R.I. 376, 380, 89 A.2d 188, 190 (1952); *see also State ex rel. Town of Richmond v. Roode*, 812 A.2d 810, 813 (R.I. 2002) ("It is well-established that cities and towns have limited power 'to enact ordinances, except [by virtue

of] those powers from time to time delegated to them by the Legislature.'" (quoting *Hawkins v. Town of Foster*, 708 A.2d 178, 181 (R.I. 1998))).

The BSFD also exercises a quintessential governmental power through the collection of *ad valorem* property taxes. *See, e.g.*, *Ramsden v. Ford*, 88 R.I. 144, 146, 143 A.2d 697, 698 (1958) ("[T]he levy, assessment and collection of taxes are governmental functions."). The United States Supreme Court has explicitly recognized that the imposition of property taxes is one of the "governmental powers that invoke the strict demands of *Reynolds*." *Ball*, 451 U.S. at 366. As with the ability to promulgate legally enforceable ordinances, the BSFD can only collect property taxes by virtue of the General Assembly's decision to delegate a portion of the state's governmental powers. *See Amico's Inc. v. Mattos*, 789 A.2d 899, 903 (R.I. 2002) ("[T]he Legislature continues to exclusively occupy the fields of education, elections, and taxation, thereby precluding any municipality's foray into these areas, absent specific legislative approval."); *Kennelly*, 79 R.I. at 380, 89 A.2d at 190 (distinguishing limited authority of water district from "fire districts heretofore created by the legislature which are vested with a portion of the state's taxing power").

Furthermore, the BSFD provides sanitation services within its boundaries by collecting and removing refuse. Def.'s Mem. Ex. 1, ¶ 4; Pls.' Mem. Ex. B, at 20. By the terms of the BSFD Charter, the BSFD may use its tax revenues to establish and maintain "a garbage removal system, or any similar system deemed necessary for the protection of lives and property within the district. . . ." (Compl. Ex. A, § 7.) Garbage removal is a sanitation service routinely provided by municipalities, either directly or through a private contractor, as an exercise of the governmental authority to protect the public health. *See, e.g.*, *Truk Away of Rhode Island, Inc. v. Macera Brothers of Cranston*, 643 A.2d 811, 812 (R.I. 1994) ("In March of 1992 the city of Warwick invited sanitation contractors to bid on a citywide sanitation contract. . . . as part of an effort to privatize

the removal of trash from the city."); *see also Ball*, 451 U.S. at 366 (describing the administration of "sanitation . . . services" as one of the "normal functions of government").

Unlike the water storage districts at issue in *Ball* and *Salyer Land Co.*, the BSFD's functions do not disproportionately affect property owners as opposed to residents. As mentioned, many of the BSFD's ordinances regulate the conduct of all persons within the BSFD's boundaries. (Pls.' Mem. Ex. B, at 4, 19-21.) Similarly, "[t]he fact that a fire district is supported by a property tax does not mean that only those subject to a direct assessment [feel] the effects of the tax burden." *Flynn*, 433 A.2d at 175. Property taxes indirectly affect those who, like Jenkins, are not listed on the deeds of the homes where they reside. *See City of Phoenix, Arizona v. Kolodziejski*, 399 U.S. 204, 210-11 (1970) (discussing how property taxes assessed on rental or commercial properties are normally "treated as a cost of doing business" and passed on to tenants and consumers). The BSFD's maintenance of local beaches and a harbor and the provision of sanitation services affect the quality of life of "[e]very person who either owns property or resides within the district[,]" and non-owner residents such as Jenkins undoubtedly "share a common interest with the property owners" in how their beach community operates. *Flynn*, 433 A.2d at 175; *see also Kolodziejski*, 399 U.S. at 209 ("[I]t is unquestioned that all residents of Phoenix, property owners and nonproperty owners alike, have a substantial interest in the public facilities and the services available in the city. . . .").

Given the governmental powers that the BSFD actively exercises, the argument that *Flynn* is distinguishable because BSFD does not provide fire protection services is unavailing. (Def.'s Mem. 10-11.) The decisive factor in *Flynn* was not fire protection *per se*, but the exercise of a governmental function that "substantially affect[ed]" every resident of the West Glocester Fire District. *Flynn*, 433 A.2d at 175. By the same token, because the West Glocester Fire District

performed the governmental function of fire protection, the fact that it did not offer police protection or operate schools was immaterial. *Id.* at 174-75. As the Rhode Island Supreme Court recognized, a wide range of local elections must obey the "basic principle . . . that as long as the election is one of general interest, any restriction must demonstrate that it serves a compelling state interest." *Id.* at 174 (citing United States Supreme Court cases). "While there are differences in the powers of different officials, the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process."[4] *Hadley v. Junior College District of Metropolitan Kansas City, Mo.*, 397 U.S. 50, 55 (1970).

As a result, to survive Jenkins's Equal Protection challenge, the BSFD's property-based voting restriction "must be shown to be necessary to 'promote a compelling state interest.'" *Flynn*, 433 A.2d at 175 (quoting *Kramer*, 395 U.S. at 630). Here, the BSFD does not argue that the restriction advances any compelling state interest. *See* Def.'s Mem. 6, 10-11; *cf. Flynn*, 433 A.2d at 175 (holding "that no 'compelling state interest was promoted' by the exclusion of otherwise qualified voters who did not own property"). The Court cannot conceive of any circumstances in which the BSFD could permissibly use the property ownership requirement to prevent otherwise qualified residents from voting in BSFD elections. Given the undisputed facts of this case, the unavoidable conclusion is that the BSFD Charter's denial of district residents' right to vote on the basis of property ownership is unconstitutional.

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[4] While the BSFD's current activities suffice to make its elections of general interest to all residents, it is noteworthy that the BSFD retains legal authority under the BSFD Charter to provide fire protection, to maintain a "police or life saving department[,]" and generally to exercise broader powers than it currently does. (Compl. Ex. A, § 7.) "[A] decision not to exercise a function within the [district]'s power . . . is just as much a decision affecting all citizens of the [district] as an affirmative decision." *Avery v. Midland County, Texas*, 390 U.S. 474, 484 (1968).

Consequently, the Court finds that the BSFD is a quasi-municipal entity that exercises general governmental powers and that the provisions of the BSFD Charter which prevent residents from voting in BSFD elections on the basis of property ownership are unconstitutional under both the Fourteenth Amendment of the United States Constitution and article 1, section 2 of the Rhode Island Constitution.

B

Count II: 42 U.S.C. § 1983 – Disenfranchisement

In addition to the request for a declaratory judgment, Jenkins seeks to recover monetary damages pursuant to 42 U.S.C. § 1983 for prior deprivations of her right to vote. (Pls.' Mem. 12.) Jenkins argues that BSFD is a "person" to whom § 1983 applies because the BSFD is a local governmental unit created by the General Assembly. *Id.* at 13. Jenkins also argues that the BSFD has acted under color of state law in enforcing its voting restriction because the BSFD exercises governmental powers and conducts elections pursuant to the delegated powers of the BSFD Charter. *Id.* at 13-14. Finally, Jenkins reprises her argument that the voting restriction has violated her constitutional rights under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 15. In response, the BSFD primarily relies on the arguments that its voting provisions do not violate the Fourteenth Amendment due to the BSFD's narrow and limited functions and that Plaintiffs must prove that the BSFD Charter is unconstitutional beyond a reasonable doubt. *See* Def.'s Mem. 5-12. The BSFD also points out that the voting provisions of the BSFD Charter represent the judgment of the General Assembly. (Hr'g Tr. 8:10-14, 9:16-19, Sept. 21, 2021).

"'The very purpose of § 1983 [is] to interpose the . . . courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial.'" *Jolicoeur*

Furniture Co. v. Baldelli, 653 A.2d 740, 749 (R.I. 1995) (quoting *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 503 (1982)). As a federal cause of action, the "elements of, and the defenses to, [§ 1983] are defined by federal law." *Howlett v. Rose*, 496 U.S. 356, 375 (1990). Under § 1983,

> "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]" 42 U.S.C. § 1983.

A 42 U.S.C. § 1983 claim requires the Court to examine "two immediate subjects of inquiry, namely, who and what." *Brunelle v. Town of South Kingstown*, 700 A.2d 1075, 1081 (R.I. 1997). "First, *who* acting under color of state law has caused the plaintiff's alleged deprivation, and second, of *what* federal right, privilege, or immunity secured by the Federal Constitution or federal statutes has the plaintiff been deprived?" *Id.* In addition, municipalities may be held liable under § 1983 "only when a deliberate choice to follow a course of action is made by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Dyson v. City of Pawtucket*, 670 A.2d 233, 238 (R.I. 1996) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483–84 (1986)).

1

Persons under § 1983

Beginning with the first inquiry, as to whether the BSFD is a person for the purposes of § 1983, in *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), the United States Supreme Court held that "[l]ocal governing bodies" are persons that can be sued under § 1983 when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that

body's officers." *Monell*, 436 U.S. at 690; *see also Howlett*, 496 U.S. at 376 ("[M]unicipal corporations and similar governmental entities are 'persons[.]'"); *Four Star Ranch, Inc. v. Cooper*, No. 2:08-CV-394 TS, 2010 WL 3489567, at *8 (D. Utah Sept. 2, 2010) (holding that, as quasi-municipal corporations, local districts are "persons" under § 1983).

In *Adler v. Lincoln Housing Authority* (*Adler II*), 623 A.2d 20 (R.I. 1993), a plaintiff brought a successful § 1983 claim against a local housing authority, a type of entity that the Rhode Island Supreme Court defined as "'a public or quasi-municipal corporation which exercise[s] police powers in the general public interest[.]'" *Adler II*, 623 A.2d at 23 (quoting *State ex rel. Costello v. Powers*, 80 R.I. 390, 394, 97 A.2d 584, 586 (1953)). As previously discussed, the BSFD also exercises governmental powers, such as taxation and regulation, that the General Assembly has delegated through the BSFD Charter. The Court finds that the BSFD is a public or "quasi-municipal corporation" that is "endowed with the right to exercise . . . a portion of the political power of the state[,]" and is therefore a person for purposes of § 1983. *Kennelly*, 79 R.I. at 380-81, 89 A.2d at 191.

2

Acting under Color of State Law

The BSFD also acts under color of state law in enforcing the property-based voting requirement set forth in the BSFD Charter. In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the United States Supreme Court addressed the close relationship between the "under color of [state] law" requirement of § 1983 and the "state action" requirement of the Fourteenth Amendment. *Lugar*, 457 U.S. at 928. The Court concluded that "[i]f the challenged conduct of [defendants] constitutes state action as delimited by our prior decisions, then that conduct was also action under color of state law and will support a suit under § 1983." *Id.* at 935. In turn, "it is now

beyond question" that the "actions of local government are the actions of the State" for purposes of the Fourteenth Amendment. *Avery v. Midland County, Texas*, 390 U.S. 474, 480 (1968). The actions of local governing bodies like the BSFD thereby occur under color of state law. *See Polk County v. Dodson*, 454 U.S. 312, 317–18 (1981) ("[A] person acts under color of state law only when exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941))); *cf. Brunelle*, 700 A.2d at 1081 (finding "clear showing" in § 1983 claim against municipality and its officials that challenged actions occurred under color of state law).

3

Official Policy

The United States Supreme Court has held that local governments may only be held liable under § 1983 "when execution of [the] government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury. . . ." *Monell*, 436 U.S. at 694. In other words, there must be a "policy attributable to the municipality that violated the plaintiff's constitutional rights." *Dyson*, 670 A.2d at 238. "[T]he word 'policy' generally implies a course of action consciously chosen from among various alternatives[.]" *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985). The policy need not be an ongoing course of conduct, as "a single decision by a municipality constitutes an act of official policy possibly rendering it liable under an otherwise valid § 1983 claim." *Adler v. Lincoln Housing Authority (Adler I)*, 544 A.2d 576, 582 (R.I. 1988) (citing *Pembaur*, 475 U.S. at 483-84).

In the narrow sense that the BSFD enforces the property-based voting restriction, that restriction represents the BSFD's official policy as to who may vote in BSFD elections. Nevertheless, there is a genuine dispute as to whether the voting restriction is the official policy of

the BSFD in the sense that it represents a "deliberate choice to follow a course of action . . . made by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Dyson*, 670 A.2d at 238 (citing *Pembaur*, 475 U.S. at 483–84). The complicating factor here is that the voting restriction stems from the BSFD Charter, a state law enacted by the General Assembly. The Court must therefore consider the "issue of whether—and under what circumstances—a municipality can be liable for enforcing a state law. . . ." *Vives v. City of New York*, 524 F.3d 346, 351 (2d Cir. 2008).[5] On the one hand, this issue implicates the legitimate interests of "injured citizens, who may [only] be able to recover against a municipality" that has enforced an unconstitutional state law because states are not persons under § 1983 and municipal officials can often assert a defense of qualified immunity. *Id.* at 351. On the other hand, the issue implicates the legitimate interests of municipalities, "which may incur significant and unanticipated liability" for actions that complied with state law. *Id.*

In an effort to resolve this tension, the *Vives* court focused on "the foundational question of whether a municipal policymaker has made a meaningful and conscious choice that caused a constitutional injury." *Id.* On the first element of that inquiry, whether the municipality has made a meaningful choice to enforce the challenged state law, the *Vives* court noted that a municipality will lack any meaningful choice where a state law explicitly mandates municipal enforcement. *See id.* at 353 ("Freedom to act is inherent in the concept of 'choice.'"); *cf. id.* at 354 ("[The state law]

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[5] As the *Vives* court recognized, the federal circuits have taken somewhat different approaches to this issue, which has not yet been addressed by the United States Supreme Court. *See Vives*, 524 F.3d at 351-53 (comparing cases from Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits); *see also Bethesda Lutheran Homes & Services, Inc. v. Leean*, 154 F.3d 716, 718 (7th Cir. 1998) (acknowledging circuit split). For that reason, the Court has chosen to rely on the persuasive value of *Vives*, a fairly recent attempt to synthesize relevant cases from the federal circuits into a coherent framework. *Cf. Martin v. Evans*, 241 F. Supp. 3d 276, 284-85 (D. Mass. 2017) (Saris, C.J.) (noting that the "First Circuit has not weighed in on this question" before applying *Vives* framework to plaintiff's § 1983 claim against municipality for enforcing state law).

itself does not constitute such a mandate because it simply defines an offense without directing municipal officials to take any steps to act when the statute is violated.”). Conversely, a meaningful choice may occur “if a municipality decides to enforce a statute that it is authorized, but not required, to enforce[.]” *Id.* at 353.

On the second element, whether a municipal policymaker has made a conscious choice to enforce the state law, “[w]hile it is not required that a municipality know that the statute it decides to enforce as a matter of municipal policy is an unconstitutional statute, . . . it is necessary, at a minimum, that a municipal policymaker have focused on the particular statute in question.” *Id.* (citing *Owen v. City of Independence, Mo.*, 445 U.S. 622, 650 (1980)). “Evidence of a conscious choice may, of course, be direct or circumstantial.” *Id.* The presence of a meaningful and conscious choice is also closely tied to the issue of causation, as “‘the conclusion that the action taken or directed by the municipality or its authorized decisionmaker itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains.’” *Id.* at 357 (quoting *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 405 (1997)).

Here, while the property-ownership voting restriction originates from the General Assembly’s enactment of the BSFD Charter, it may nonetheless constitute the official policy of the BSFD if the BSFD had the legal authority to either waive or amend the restriction but made a conscious decision to retain and enforce it instead. *Cf. Cooper v. Dillon*, 403 F.3d 1208, 1222 (11th Cir. 2005) (finding that “§ 1983 liability is appropriate because [the municipality] did adopt the unconstitutional proscriptions in [the state law] as its own”). The difficulty facing the Court on parties’ cross-motions for summary judgment is that neither party has directed their factual and legal submissions to the issues discussed in *Vives*. As a result, the current record lacks sufficient

evidence to determine, as a matter of law, whether the BSFD has made a meaningful and conscious decision to enforce the property-based voting restriction. *Cf. Vives*, 524 F.3d at 348, 353 (vacating summary judgment because the issue of whether municipality made a meaningful and conscious choice to enforce state law could not be resolved on record before the court).

On this record, a question exists as to whether the BSFD could have chosen not to enforce the voting restriction by amending the terms of the BSFD Charter. Section 9 of the BSFD Charter, which governs potential amendments to the Charter, states that no amendment "shall be effective as to said district unless and until" it is approved "by the affirmative vote of a majority of the voters of said district . . . at a special or annual meeting of said district duly held within two years after the passage of such amendment, at which meeting a quorum shall be present," but does not state who may pass such an amendment in the first instance. (Compl. Ex. A, § 9.) While the text of the BSFD Charter indicates that the General Assembly has amended the Charter on multiple occasions, the only evidence that any of these amendments were approved by the BSFD's voters relates to the creation of the Bonnet Shores Land Trust, a distinct entity. *Compare id.* Ex. A, 13 n.21 ("As required by the Fire District Charter, this legislation creating the Bonnet Shores Land Trust was approved, 47-4, by Bonnet Shores Fire District voters at a Special Meeting of the Fire District held on November 21, 1991."), *with id.* Ex. A, § 2 n.3 ("The R.I. General Assembly removed the requirement that a qualified voter be 'a citizen of Rhode Island' when it amended the BSFD Charter in 1982."). There is also no evidence as to whether the BSFD Council, as the general policymaking body of the BSFD,[6] has enacted any amendments to the BSFD Charter that

[6] *See* Compl. Ex. A, § 6 ("The district council shall have general supervision and management of the business and affairs of the district and, together with other officers and committees, shall have such further powers and duties as may be created or imposed in the by-laws of the district."); Pls.' Mem. Ex. C, Art. II § 3 ("[T]he district council . . . may exercise all such powers of the district

were then ratified through Section 9. The minutes of the BSFD Council's October 16, 2019 meeting indicate that BSFD Council member Anita Langer moved to amend the BSFD Charter to allow all residents to vote. The record does not indicate whether the motion's failure to receive a second was due to other members' opposition to the change or their belief that the Council lacked the power to amend the Charter.[7] *See id.* Ex. F, 2-3.

"'[T]he only task of a trial justice in passing on a motion for summary judgment is to determine whether there is a genuine issue concerning any material fact.'" *Reniere v. Gerlach*, 752 A.2d 480, 482 (R.I. 2000) (quoting *Industrial National Bank of Rhode Island v. Peloso*, 121 R.I. 305, 307, 397 A.2d 1312, 1313 (1979)). "However, the trial justice is constrained to perform this function without passing upon the weight or credibility of the evidence." *Id.* (citing *Industrial National Bank of Rhode Island*, 121 R.I. at 308, 397 A.2d at 1313). As a result, the Court cannot resolve the amendment issue on the limited and inconclusive evidence available.

With respect to the issue of whether the BSFD made a conscious decision to enforce the voting restriction, there is some indication that the BSFD's "policymaker[s] have focused on the particular statute in question." *Vives*, 524 F.3d at 353. In an August 22, 2019 letter to BSFD Council Chairperson Michael Vendetti, Secretary Gorbea suggested that the property-based voting

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and do all such lawful acts and things as are not by law, by the charter or by these by-laws directed or required to be exercised or done by the qualified voters of said district.").

[7] Also unclear on the current record is whether amendment of the BSFD Charter's voting provisions falls within the constitutional authority of the General Assembly to regulate "the time, manner and place of conducting elections" and whether the General Assembly has delegated that authority through the BSFD Charter. R.I. Const. art. II, § 2; *see Opinion to the House of Representatives*, 80 R.I. 288, 296–97, 96 A.2d 627, 631 (1953) (stating that General Assembly may allow municipalities to deviate from statewide election laws, but in so doing "should expressly provide by special act for all necessary procedures to be followed"); *see also Amico's Inc.*, 789 A.2d at 903 ("[T]he Legislature continues to exclusively occupy the fields of education, elections, and taxation, thereby precluding any municipality's foray into these areas, absent specific legislative approval.").

restriction might be unconstitutional under *Flynn v. King*, cited *supra*, and encouraged the BSFD "to review your charter and make any necessary changes. . . ." (Compl. Ex. E.) The minutes of the BSFD Council's ensuing October 16, 2019 meeting indicate that Secretary Gorbea's letter was a topic of discussion, as was a related "complaint made by individuals to the R.I. Attorney General's Office." *Id.* Ex. F, 2-3. The record is unclear as to when the BSFD may first have become aware of those complaints. While probative of the BSFD Council's awareness of the challenged voting restriction as of October 2019, and potentially also of the Council's tacit endorsement of the restriction as of that date, the current record does not conclusively demonstrate an instance of meaningful and "conscious decision making by the [BSFD]'s policymakers" that would support a grant of summary judgment. *Vives*, 524 F.3d at 353.

"[A] trial court may not enter a summary judgment which rests on a chain of inferences from subsidiary facts not conclusively established in the record." *Pepper & Tanner, Inc. v. Shamrock Broadcasting, Inc.*, 563 F.2d 391, 393 (9th Cir. 1977) (citing *Fortner Enterprises, Inc. v. United States Steel*, 394 U.S. 495, 506 (1969)). Accordingly, with respect to the issue of whether the voting restriction constitutes the BSFD's official policy, parties' cross-motions for summary judgment are denied.

4

Jenkins's Federal Right

The question posed by Jenkins in Count II "of *what* federal right, privilege, or immunity secured by the Federal Constitution or federal statutes" has been infringed upon is substantively identical to the claim brought under Count I. *Brunelle*, 700 A.2d at 1081. As previously

established, BSFD's enforcement of the property-based voting restriction against Jenkins violates her right to vote under the Equal Protection Clause of the Fourteenth Amendment.

Under Count II, the Court finds that the BSFD is a person acting under color of state law and that enforcement of the property-based voting restriction against Jenkins violates her right to vote under the Equal Protection Clause of the Fourteenth Amendment. However, on the current record, the Court cannot determine whether the BSFD's enforcement of the voting restriction represented a meaningful and conscious choice sufficient to establish liability under *Vives*, cited *supra*.[8] Accordingly, Plaintiffs' Motion for Summary Judgment is granted in part and denied in part, and Defendant BSFD's Cross-Motion for Summary Judgment is denied.

C

Standing of Voter Plaintiffs

Turning to Voter Plaintiffs, as a threshold matter the BSFD argues that Voter Plaintiffs' claims should be dismissed for lack of standing. (Def.'s Mem. 2.) The BSFD points out that the Voter Plaintiffs cannot advance the disenfranchisement claims of Counts I and II of the Complaint because they are able to vote in BSFD elections. *Id.* at 3. Next, the BSFD argues that this Court's prior dismissal of Count III and the claims for relief in paragraphs D, E, and F of the Complaint eliminates Voter Plaintiffs' standing for their vote dilution claims by foreclosing any remedy for the alleged dilution. *Id.* at 4. According to the BSFD, the Court cannot find that the Voter Plaintiffs have standing without holding that vote dilution occurred, thereby disenfranchising the nonresident property voters the Court previously found to be indispensable parties. *Patterson*, 2020 WL 7638840, at *5 (finding that "nonresident property owners are indispensable parties as

[8] If Jenkins can establish the BSFD's liability on Count II, the appropriate measure of damages will be a fact question for the jury. *See Memphis Community School District v. Stachura*, 477 U.S. 299, 307-08 (1986).

to requests for relief D, E, and F pursuant to § 9-30-11"); Hr'g Tr. 8:15-9:24, Sept. 21, 2021. The BSFD also contends that Voter Plaintiffs lack the particularized injury required to establish standing because their claims are identical to other resident voters. Def.'s Mem. 4 (citing *Burns v. Sundlun*, 617 A.2d 114 (R.I. 1992)).

In response, the Voter Plaintiffs acknowledge that they have not been disenfranchised; instead, they rely on the fact that this Court's prior decision and order did not dismiss Count IV or the related claims for relief in paragraphs I and J of the Complaint. *See* Pls.' Reply Mem. 12; *see also Patterson*, 2020 WL 7638840, at *8. The Voter Plaintiffs thereby distinguish their now-dismissed request for declaratory relief from their surviving 42 U.S.C. § 1983 claim and argue that if this Court finds that BSFD has violated Voter Plaintiffs' constitutional rights, the Court can provide a remedy under § 1983 by awarding them damages and attorneys' fees. (Pls.' Reply Mem. 13-14.) Substantively, Voter Plaintiffs maintain that the unconstitutional dilution of their votes under the BSFD Charter is an injury in fact sufficient to confer standing. *Id.* at 14.

To establish standing, a party "'must allege that the challenged action has caused him injury in fact, economic or otherwise.'" *In re 38 Studios Grand Jury*, 225 A.3d 224, 232 (R.I. 2020) (quoting *Watson v. Fox*, 44 A.3d 130, 135 (R.I. 2012)). An injury in fact is "'an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent[.]'" *Pontbriand v. Sundlun*, 699 A.2d 856, 862 (R.I. 1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The requirement of an injury in fact ensures that the plaintiff "'has a stake in the outcome that distinguishes his claims from the claims of the public at large.'" *In re 38 Studios Grand Jury*, 225 A.3d at 233 (quoting *Watson*, 44 A.3d at 136).

Beginning with the nature of Voter Plaintiff's alleged injury, "[i]t is certain that the right to vote—the wellspring of all rights in a democracy—is constitutionally protected." *Bonas v. Town*

of North Smithfield, 265 F.3d 69, 74 (1st Cir. 2001). And the right to vote "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555; *see also Lyman v. Baker*, 954 F.3d 351, 361-62 (1st Cir. 2020) (distinguishing plaintiffs' allegation of a "sufficiently concrete and particularized" vote dilution injury from the ultimate merits of their claim).

As a result, Voter Plaintiffs possess the "personal stake in the outcome" that is the "*sine qua non* of standing." *Mruk*, 82 A.3d at 535. Voter Plaintiffs reside in the BSFD and have voted in prior BSFD elections. (Compl. ¶ 36.) Pursuant to the plain language of the BSFD Charter, which ties voting rights to property ownership rather than residency, Voter Plaintiffs have alleged—and the BSFD has admitted—that numerous nonresidents were also eligible to vote in those prior elections. Compl. ¶¶ 37, 70; Answer ¶¶ 37, 70. This allegation is supported by the Narragansett Tax Assessor's 2020 Tax Rolls, which indicate that a significant percentage of taxable parcels in the BSFD are owned by persons with mailing addresses outside the district's boundaries. (Pls.' Reply Mem. 14-15.) Voter Plaintiffs have thereby advanced specific facts in support of the claim that their right to vote has been violated by the BSFD's official policy. If successful, Voter Plaintiffs could potentially recover damages for those prior injuries pursuant to § 1983. *See Memphis Community School District v. Stachura*, 477 U.S. 299, 310-11, 311 n.14 (1986) (discussing availability of compensatory damages for deprivation of constitutional right to vote); *cf. Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021) (holding that award of nominal damages for constitutional violation "satisfies the redressability requirement" of standing).

The BSFD's argument that Voter Plaintiffs lack standing because the Court cannot afford them relief without disenfranchising nonresident voters is unavailing. In ruling on the BSFD's Motion to Dismiss for Failure to Join Indispensable Parties, this Court dismissed Voter Plaintiffs'

requests for declarations that the "distribution of voting rights to nonresidents of BSFD is unconstitutional" under the federal and state constitutions and that "subsequent elections for BSFD offices must be open only to all residents of BSFD who are over eighteen years of age" because they would necessarily require the Court to "adjudicate the rights of absent parties." *Patterson*, 2020 WL 7638840, at *2, *6 (quoting Compl. 14). Pursuant to § 9-30-11, the nonresident voters were thus indispensable to Voter Plaintiffs' requests for declaratory relief under Count III. *Id.* at *5. Conversely, the Court found that the nonresident voters were not indispensable to the remaining claims, including Voter Plaintiffs' claim against BSFD under Count IV, "which only *may* affect the nonresident property owners." *Id.* at *8; *see Middle Creek Farm, LLC v. Portsmouth Water & Fire District*, 252 A.3d 745, 755 (R.I. 2021) (holding that an "unsubstantiated or speculative risk" of an adverse outcome "is insufficient" to support a finding that an absent party is indispensable). Any imposition of liability against the BSFD on Count IV will be a "[j]udgment against BSFD for depriving [Voter Plaintiffs] of their constitutional right not to have their votes debased and diluted" on the specific facts of prior elections, not a declaratory judgment as to who may vote in future elections. (Compl. 14.)

BSFD's argument that Voter Plaintiffs lack standing because they possess only a generalized grievance also fails. *Burns v. Sundlun*, *supra*, cited by BSFD for the proposition that a claim shared by other voters is not a particularized injury, bears little resemblance to this case. (Def.'s Mem. 4.) In *Burns*, "a registered voter and taxpayer" challenged a statutorily authorized decision by the state Department of Business Regulation "to license already existing gambling facilities to simulcast" out-of-state horse races without first holding a public referendum. *Burns*, 617 A.2d at 115. The Supreme Court held that the plaintiff failed to establish a personal stake in the controversy because the only injury asserted, "'that [plaintiff] ha[d] been denied his right to

vote on the establishment of off track betting and the extension of an existing gambling activity[,]'" was "shared by each and every registered voter in the State of Rhode Island." *Id.* at 116.

By contrast, Voter Plaintiffs' claimed injury is specific to their personal right to vote in regularly held elections in the district where they reside. The Voter Plaintiffs have standing to pursue their remaining claim "because they [are] 'asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes,' and not merely a generalized grievance." *Lyman*, 954 F.3d at 362 (quoting *Baker v. Carr*, 369 U.S. 186, 208 (1962)). The United States Supreme Court has held that because "a person's right to vote is 'individual and personal in nature[,]' . . . 'voters who allege facts showing disadvantage to themselves as individuals have standing to sue' to remedy that disadvantage." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (first quoting *Reynolds*, 377 U.S. at 561, then quoting *Baker*, 369 U.S. at 206) (internal citation omitted). "The voter, after all, is presumptively the best person to bring a challenge to an alleged infringement of her constitutionally protected voting rights." *Lyman*, 954 F.3d at 362. The fact that other BSFD residents could bring similar claims does not transform Voter Plaintiffs' alleged injuries to their individual rights into "generalized claims alleging purely public harm[.]" *Watson*, 44 A.3d at 136.

D

Count IV: 42 U.S.C. § 1983 – Vote Dilution

Voter Plaintiffs bring a claim under 42 U.S.C. § 1983 for monetary damages and argue that the BSFD is a person acting under color of state law. (Pls.' Mem. 12-15.) Substantively, the Voter Plaintiffs allege that, by allowing nonresident property owners to vote, BSFD has violated their Fourteenth Amendment right not to have their votes unconstitutionally diluted. *Id.* at 15-16. Voter Plaintiffs argue that expansions of the franchise to nonresident property owners are subject to the same strict scrutiny as property-based restrictions because property ownership is a suspect

classification in the context of general-interest elections. *Id.* at 16-18. Further arguing that the inclusion of nonresident property owners in BSFD elections is not narrowly tailored to advance a compelling state interest, Voter Plaintiffs conclude that the BSFD has violated their constitutional rights. *Id.* at 19. In the alternative, the Voter Plaintiffs argue that no rational basis exists for the distribution of voting rights to owners who hold a $400 interest in property in the BSFD. *Id.* at 19-20.

Similarly, the Memorandum submitted by amicus curiae ACLU-RI in support of Plaintiffs characterizes the BSFD's extension of voting rights to nonresident property owners as absurd and irrational given the large number of owners that are enfranchised, the fact that many of them are legal rather than natural persons, and their often attenuated connections to the BSFD. (Amicus Curiae Mem. 9-10.) Once again, the BSFD primarily relies on the arguments that its voting provisions do not violate the Fourteenth Amendment due to the BSFD's narrow and limited functions and that Plaintiffs must prove that the BSFD Charter is unconstitutional beyond a reasonable doubt. *See* Def.'s Mem. 5-12. The BSFD also points out that the BSFD Charter represents the judgment of the General Assembly and questions why the Legislature should not be allowed to enfranchise nonresident taxpayers. (Hr'g Tr. 8:10-14, 9:16-19, Sept. 21, 2021).

Because Voter Plaintiffs also allege that the BSFD "acting under color of state law has caused the . . . alleged deprivation" of their rights, a significant portion of the Court's prior examination of those issues under Count II is equally applicable here. *Brunelle*, 700 A.2d at 1081. For the reasons previously discussed, this Court finds that the BSFD, in administering the voting provisions of the BSFD Charter, is a person acting under color of state law for purposes of § 1983. Similarly, the record is not sufficient to support a grant of summary judgment on the issue of whether the challenged action of enfranchising nonresident property owners in compliance with

the BSFD Charter represents the official policy of the BSFD under the meaningful and conscious choice standard of *Vives*, cited *supra*. As the BSFD has also moved for summary judgment, the Court will move on to analyze the merits of Voter Plaintiffs' claimed violation of a federal right, beginning with the question of what level of constitutional scrutiny is appropriate.

1

Proper Level of Scrutiny

Where Voter Plaintiffs' claim diverges from Jenkins's claim is on the question of "*what* federal right, privilege, or immunity secured by the Federal Constitution or federal statutes [have] the plaintiff[s] been deprived?" *Brunelle*, 700 A.2d at 1081. While Voter Plaintiffs also claim that the BSFD has deprived them of their right to vote under the Equal Protection Clause of the Fourteenth Amendment, their argument is that the BSFD has unconstitutionally diluted their votes by enfranchising nonresident property owners. (Compl. ¶¶ 69-75.) In contrast to the well-settled precedent that the Equal Protection clause protects against deprivations of the right to vote, Voter Plaintiffs' claims "present the less-explored question of whether the Equal Protection Clause of the Fourteenth Amendment provides a constitutional ceiling on a political entity's power to enfranchise voters to participate in its elections." *Day v. Robinwood West Community Improvement District*, 693 F. Supp. 2d 996, 1004 (E.D. Mo. 2010).

Contrary to Voter Plaintiffs' arguments, federal and state courts have typically applied rational basis review, rather than strict scrutiny, to laws allowing nonresidents to vote in local elections. *See, e.g.*, *May v. Town of Mountain Village*, 132 F.3d 576, 580 (10th Cir. 1997) ("[W]here a law expands the right to vote causing voting dilution, the rational basis test has been applied by the vast majority of courts."). *But see Locklear v. North Carolina State Board of Elections*, 514 F.2d 1152, 1154 (4th Cir. 1975) (applying strict scrutiny to residency-based vote

dilution claim). In practice, the question of whether allowing nonresidents to vote has a rational basis often focuses on whether the nonresidents "have a substantial interest in the operation" of the governing body at issue. *Duncan v. Coffee County, Tenn.*, 69 F.3d 88, 95 (6th Cir. 1995).

Multiple considerations support the decision to apply a rational basis or substantial interest test to nonresident vote dilution claims. First, nonresident voting cases involve extensions of the right to vote rather than restrictions. *See Brown v. Board of Commissioners of City of Chattanooga, Tenn.*, 722 F. Supp. 380, 398 (E.D. Tenn. 1989). Second, unconstitutional vote dilution is distinct from the garden-variety dilution that occurs whenever new voters are added to the rolls, and "'[i]n close cases, the decisions dictate that overinclusiveness is less of a constitutional evil than underinclusiveness.'" *Duncan*, 69 F.3d at 94 & n.3, 98 (quoting *Sutton v. Escambia County Board of Education*, 809 F.2d 770, 775 (11th Cir. 1987)). Third, due to "'the immense pressures facing units of local government, and of the greatly varying problems with which they must deal[,]'" courts are reluctant to impose the "'uniform straitjacket'" of strict scrutiny on elections that must be "'suitable for local needs and efficient in solving local problems.'" *Bjornestad v. Hulse*, 281 Cal. Rptr. 548, 562-63 (Ct. App. 1991) (quoting *Avery*, 390 U.S. at 485). Fourth, with some exceptions, nonresident vote dilution claims typically "do not deal with malapportionment of a general governmental entity resulting in lesser-weighted votes on an individual basis, or with discrete and insular groups foreclosed hopelessly from the political process, or with invidious discrimination." *Id.* at 563. *But see Brown*, 722 F. Supp. at 389, 397-99 (overturning nonresident voting provisions of city with history of discrimination against Black voters). Finally, while less demanding than strict scrutiny, the substantial interest test is not simply a rubber stamp of approval. *See Phillips v. Andress*, 634 F.2d 947, 952 (5th Cir. 1981); *Brown*, 722 F. Supp. at 399.

Given the lack of Rhode Island Supreme Court precedent on this issue and the persuasive value of the decisions cited above, this Court finds that for Voter Plaintiffs' vote dilution challenge to succeed, they must demonstrate that the nonresidents enfranchised by the BSFD Charter do not have a substantial interest in the BSFD's operations. Voter Plaintiffs' arguments that the enfranchisement of nonresidents based on property ownership must instead advance a compelling state interest are unavailing, as they do not squarely address the issue at hand.

For example, while Voter Plaintiffs cite *Reynolds v. Sims* for the proposition that vote dilution is a violation of the Equal Protection Clause, that case dealt with the relative weight accorded to votes cast in different districts under "state legislative districting schemes which [gave] the same number of representatives to unequal numbers of constituents. . . ." *Reynolds*, 377 U.S. at 563. The United States Supreme Court later described the holding of *Reynolds* and related cases as the principle that "in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it [is] practicable, as any other person's." *Hadley*, 397 U.S. at 54. Unlike the creation of unbalanced districts in a legislative system, expanding the right to vote in one local district's elections does not create a system where "'a vote is worth more in one district than in another.'" *Reynolds*, 377 U.S. at 563-64 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964)); *see also May*, 132 F.3d at 582 (noting that, under town charter, "equal weight is to be given to the votes of residents and nonresidents"); *Day*, 693 F. Supp. 2d at 1005 ("'[T]hose who claim their votes are being unconstitutionally diluted not through apportionment or weighting schemes, but through franchising of additional voters should bear the burden of demonstrating that the state's decision is irrational or otherwise impermissible.'" (quoting *Phillips v. Beasley*, 78 F.R.D. 207, 211 (D. Ala. 1978))). Nor does such an expansion effectively foreclose the possibility of obtaining legislative relief at the state level. *See Spahos v. Mayor & Councilmen of Town of*

Savannah Beach, Tybee Island, Ga., 207 F. Supp. 688, 692 (S.D. Ga. 1962), *aff'd sub nom. Spahos v. Mayor & Councilmen of Town of Savannah Beach, Tybee Island, Georgia*, 371 U.S. 206 (1962).

Moreover, the cases cited by Voter Plaintiffs for the proposition that property ownership is a suspect classification addressed restrictions of the right to vote, not expansions. *See, e.g.*, *Hill v. Stone*, 421 U.S. 289, 297 (1975) ("[A]s long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest."). Contrary to what Voter Plaintiffs contend, it does not necessarily follow that expansions of the right to vote based on property ownership are equally suspect. The U.S. Supreme Court has explained that the reason laws denying the franchise to "bona fide residents of requisite age and citizenship" must satisfy strict scrutiny is that they "pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives." *Kramer*, 395 U.S. at 626-27. Conversely, it is reasonable that in some circumstances local governments could find that nonresident property owners are sufficiently affected by their operations to justify their inclusion in the electorate. *See, e.g.*, *May*, 132 F.3d at 581.

Finally, in arguing that *Flynn v. King* provides implicit support for their position, Voter Plaintiffs read too much into the Rhode Island Supreme Court's disposition of that case. After considering the elections held by the West Glocester Fire District, the Supreme Court held that "[i]n all such elections, those persons who reside in the district and are eligible to vote in a general or special election in the town of Glocester, shall be permitted to vote, whether or not they own taxable property." *Flynn*, 433 A.2d at 176. While Voter Plaintiffs read that language to mean that only residents would be permitted to vote, "[t]he issue raised [was] whether the provisions of the charter which limit[ed] the right to vote and hold office in the fire district" were unconstitutional.

Id. at 174. As the Supreme Court did not address the issue of whether the extension of voting rights to nonresidents was also unconstitutional, its holding cannot be interpreted as having that effect. *See Pleasant Management, LLC v. Carrasco*, 960 A.2d 216, 223 (R.I. 2008) ("'[T]he opinions of [the Supreme] Court speak forthrightly and not by suggestion or innuendo.'" (quoting *Fracassa v. Doris*, 876 A.2d 506, 509 (R.I. 2005))). Consequently, the Court will apply rational basis scrutiny to Voter Plaintiffs' claim by examining whether the enfranchised nonresidents possess a substantial interest in the BSFD's elections.

2

Specifics of Voter Plaintiffs' Claim

As previously mentioned, Voter Plaintiffs allege that their voting rights have been unconstitutionally diluted through the BSFD's policy of permitting numerous nonresidents to vote. Compl. ¶¶ 69-75; Pls.' Reply Mem. 13-14. Voter Plaintiffs argue that the BSFD's policy is poorly tailored to the purposes of enfranchising property owners or taxpayers and point out that under the terms of the BSFD Charter, an enfranchised nonresident could pay as little as $2.80 per year in property taxes. (Pls.' Mem. 19 & n.6.) Noting that the BSFD Charter allows a significant number of nonresidents to obtain voting rights through "common ownership" of a single parcel, Voter Plaintiffs also allege that nearly half of all parcels and well over half the votes in BSFD elections belong to nonresidents with only seasonal ties to the BSFD, effectively erasing residents' votes. (Pls.' Mem. 19-20.)

In support of this allegation, Plaintiffs' Reply Memorandum presents an Affidavit from Voter Plaintiff Mary Burke Patterson detailing her review of the attached 2020 Town of Narragansett Tax Rolls (2020 Tax Rolls). (Pls.' Reply Mem. Ex. H, ¶¶ 2-3.) As outlined in the Affidavit, the 2020 Tax Rolls list 2,029 taxable parcels within the BSFD's boundaries; of those

parcels, approximately 930—or 45.8% of all taxable parcels in the district—are cabanas or bathhouses located at the Beach Club. *Id.* Ex. H, ¶ 5. On the 2020 Tax Rolls, 827 of those 930 Beach Club parcels—or 40.8% of all taxable parcels in the district—list an out-of-district contact address. *Id.* Ex. H, ¶ 7. The 2020 Tax Rolls also indicate that some of the Beach Club parcels are owned by three or more individuals, but do not identify the number of residents or nonresidents eligible to vote in BSFD elections. *Id.* Ex. H, ¶ 8. The Affidavit also states that Patterson received additional tax rolls from the BSFD during discovery, but that these tax rolls did not include the owners' contact addresses, thereby making determination of which owners were residents impossible. *Id.* Ex. H, ¶ 9. Voter Plaintiffs have also submitted a Narragansett Times article on the Beach Club's efforts to encourage its members to vote in the June 2021 BSFD election; according to that article, in the ensuing election the BSFD handed out 698 ballots, up from 219 ballots in 2019 and 316 ballots in 2018. *Id.* Ex. J, at 2, 4.

"[A] legislature's decision to expand the electorate is irrational and therefore unconstitutional where the enfranchised voters do not have a 'substantial interest' in the outcome of the election." *Day*, 693 F. Supp. 2d at 1005 (citing *Duncan*, 69 F.3d at 94-95). In *Duncan v. Coffee County, Tenn.*, cited *supra*, the Sixth Circuit considered the substantial interest question in light of "(1) the degree to which the nonresident voters finance the relevant district; [and] (2) the voting power of non-resident voters[.]"[9] *Day*, 693 F. Supp. 2d at 1005 (citing *Duncan*, 69 F.3d at 96). The first factor is relevant because the provision of financing gives nonresidents a stake in how the district operates. *See May*, 132 F.3d at 582-83. The second factor is relevant because an electoral scheme affording residents "little or no chance" to control their local government raises

[9] Because *Duncan* involved school board elections, the Sixth Circuit also considered two additional factors that are not applicable to the facts of this case. *See Duncan*, 69 F.3d at 96-97; *Day*, 693 F. Supp. 2d at 1005-06 (applying only the first two *Duncan* factors).

"grave constitutional concerns, even where out-of-district voters have a substantial interest." *Duncan*, 69 F.3d at 97. Together, the factors help illuminate where nonresidents' interests become so minute—and the resulting pool of nonresident voters so vast—as to unfairly overwhelm residents' rights to an "effective voice in the governmental affairs which substantially affect their lives." *Kramer*, 395 U.S. at 626-27.

Two cases with distinct sets of facts illustrate how the substantial interest test works in practice. In *Brown v. Board of Commissioners of City of Chattanooga, Tenn.*, cited *supra*, Chattanooga's charter allowed nonresident property owners to vote in city elections. *Brown*, 722 F. Supp. at 397-98. A total of 547 nonresidents, owning ".05% of the total assessed value of all real property in Chattanooga" and paying "a similar percentage" of its property taxes, were registered to vote. *Id.* at 398. The *Brown* court recognized that nonresident property owners had an interest in city affairs that could affect their property but noted that the charter "contain[ed] no limitation of the number of people who can 'vote' on a piece of property [and] no limitation as to any minimum property value required for the exercise of the franchise." *Id.* at 399. Noting that in one instance "15 nonresidents [were] registered to vote as co-owners of one parcel of property which ha[d] an assessed value of $100," the court found that such persons did not possess "a substantial interest in the operation of the city" and held that enfranchising nonresidents who owned "a trivial amount of property" did "not further any rational governmental interest." *Id.*

In *May v. Town of Mountain Village*, cited *supra*, residents of the town of Mountain Village, Colorado challenged provisions of the town charter allowing certain nonresident property owners to vote in municipal elections. *May*, 132 F.3d at 577-78. On appeal, the Tenth Circuit affirmed the federal district court's decision to employ a rational basis standard of review and its conclusion that nonresident property owners had a substantial interest in the town's elections. *Id.*

at 582-83. The Tenth Circuit gave great weight to the fact that Mountain Village was a "resort community" where nonresidents, many of whom owned seasonal homes in the town, paid eight times more in property taxes than residents. *Id.* at 579, 582. The *May* court also noted that "[w]ith nonresident voting power limited to those owning at least 50% of the fee title to real property, there [was] no possibility of 'loading up' the nonresident vote through excessive partitions of a piece of property. . . ." *Id.* at 582-83 (distinguishing case from facts of *Brown*).

Here, the BSFD Charter enfranchises nonresidents who own real estate in the BSFD worth at least $400 "over and above all encumbrances, being an estate in fee simple, fee tail, for the life of any person, or an estate in reversion or remainder, the conveyance of which estate shall if by deed, have been recorded at least ninety (90) days[.]"[10] (Compl. Ex. A, § 2.) A qualified voter need not be a citizen of Rhode Island and may either be a natural person aged at least eighteen years or a "firm, corporation or unincorporated association[.]" *Id.* at Ex. A, § 2 & n.3. Persons in common ownership to real estate may vote by proxy. *Id.* at Ex. A, § 2. The BSFD Charter thereby allows multiple nonresidents, each of whom may possess only a relatively minor property interest, to vote in BSFD elections. While not as extreme as the charter at issue in *Brown*, which contained "no limitation as to any minimum property value," the BSFD Charter implicates the same concerns that led the *Brown* court to hold that enfranchising nonresidents who owned "a trivial amount of property" did "not further any rational governmental interest." *Brown*, 722 F. Supp. at 399; *cf. May*, 132 F.3d at 582-83 ("With nonresident voting power limited to those owning at least 50% of the fee title to real property, there is no possibility of 'loading up' the nonresident vote through excessive partitions of a piece of property. . . ."). This is particularly true given the fact that the

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[10] In 1982, the General Assembly raised the minimum property value qualification from $134.00 to $400.00. (Compl. Ex. A, § 2 n.4.)

BSFD has not allowed residents to vote unless they possess the requisite property interest, thereby increasing the relative "voting strength" of nonresidents. *Duncan*, 69 F.3d at 97.

"It is well-settled law that the constitutionality of a statute is a question of law for the court to decide." *Power v. City of Providence*, 582 A.2d 895, 902 (R.I. 1990). It is also true that under rational basis review, "the burden is on the party challenging the statute to convince the court of its unconstitutionality . . . beyond a reasonable doubt." *Id.* at 903-04 (citing *Vance v. Bradley*, 440 U.S. 93, 111 (1979)). Once again, however, the problem facing the Court on parties' cross-motions for summary judgment is the lack of evidence on multiple facts germane to the substantial interest test applied in *Duncan* and similar cases. *Cf., e.g.*, *Sutton*, 809 F.2d at 773-74 (holding that factual findings made after trial "provide a sufficient basis for finding that [nonresidents] have an interest in the county school system's operation to constitutionally justify their inclusion in the electorate"). Accordingly, with respect to the issue of whether the BSFD has unconstitutionally diluted Voter Plaintiffs' votes by enfranchising nonresident property owners, parties' cross-motions for summary judgment are denied.

For example, as to the first *Duncan* factor—the extent the district is financed by nonresident voters—the BSFD Charter indicates that nonresident voters pay property taxes at the same rate as residents, that the property taxes finance BSFD operations, and that a nonresident voter could conceivably pay as little as $2.80 per year in property taxes. *Duncan*, 69 F.3d at 96; Compl. Ex. A, §§ 2, 7. But there is no information in the current record concerning how much property tax financing the BSFD receives in the aggregate or what proportion of the tax burden is borne by nonresident property owners. As multiple cases indicate, these relative totals are relevant to the determination of whether nonresident property owners are responsible for a sufficiently substantial amount of district financing such that the decision to enfranchise them is not arbitrary

or irrational. *See May*, 132 F.3d at 579 ("Nonresidents entitled to vote currently own over 34% of the assessed value of real property in the Town, while residents own only about 5%."); *Duncan*, 69 F.3d at 96-97 ("Tullahoma accounts for 21% of all local funds spent by the Rural Coffee County School District."); *Brown*, 722 F. Supp. at 398 & n.23 (distinguishing case from facts of *Glisson v. Mayor and Councilmen of Savannah Beach*, 346 F.2d 135, 136 (5th Cir. 1965)) ("The nonresident voters in Savannah Beach as a group had a much greater economic interest in the municipality than do the nonresident voters of Chattanooga.").

Moreover, "there may be grave constitutional concerns, even where out-of-district voters have a substantial interest[,]" where those voters wield such a disproportionate political influence that residents have "little or no chance to control" their local government. *Duncan*, 69 F.3d at 97; *see also Day*, 693 F. Supp. 2d at 1006 ("[I]n some circumstances enfranchising a large number of nonresident landowners might unconstitutionally disenfranchise a comparatively small number of registered voters[.]"). On this second factor—the relative voting power of nonresident voters—the missing information is even more significant: on the current record, it is simply not apparent how many persons were qualified to vote in the prior BSFD elections challenged by Voter Plaintiffs or how that electorate was split between residents and nonresidents. In addition to the weight accorded the voting strength of nonresidents in *Duncan* and other cases this Court has cited as persuasive authority, common sense would seem to dictate that the ratio of resident to nonresident voters is crucial to the question of vote dilution. *See Duncan*, 69 F.3d at 97-98 (finding that nonresidents' "most minuscule mathematical chance to control the Coffee County School Board. . . . is, in the final analysis, completely dependent on the votes of . . . residents"); *cf. Reynolds*, 377 U.S. at 577-78 (explaining that applications of constitutional rule that legislative

apportionment must be "based substantially on population" will turn "on the particular circumstances of the case").

Without this information, the Court has an inadequate factual basis on which to enter summary judgment. For example, Voter Plaintiffs present their analysis of the Beach Club parcels listed in the 2020 Tax Rolls as an illustration of the extent of nonresident voter dilution in the BSFD's elections. (Pls.' Reply Mem. 14.) But as Voter Plaintiffs acknowledge, any attempt to use the 2020 Tax Rolls to determine the number of resident and nonresident voters runs up against multiple limitations. *Id.* at 15. The 2020 Tax Rolls do not indicate which BSFD parcels are owned by multiple owners, or how many persons, residents or otherwise, meet the specific property ownership requirements of the BSFD Charter. Provision of an out-of-district contact address is also not conclusive proof that the owner or owners of the parcel do not reside in the BSFD. While a factfinder could potentially rely on "legitimate inferences" from Voter Plaintiffs' Affidavit, it would be inappropriate for this Court to do so on a motion for summary judgment where "all justifiable inferences are to be drawn in [nonmovant's] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). By "drawing inferences based upon the evidence presented," this Court would impermissibly "decide[] the factual issues in the case." *Almada v. Santos*, 755 A.2d 836, 837 (R.I. 2000). "[A] trial court may not enter a summary judgment which rests on a chain of inferences from subsidiary facts not conclusively established in the record[,] . . . weigh the evidence, pass upon credibility, or 'speculate as to ultimate findings of fact.'" *Pepper & Tanner, Inc.*, 563 F.2d at 393 (quoting *Fortner Enterprises, Inc.*, 394 U.S. at 506).

The Court also cannot conclude on the current record that the facts are "so one-sided" as to entitle the BSFD to summary judgment on Count IV. *Anderson*, 477 U.S. at 252. "It is a fundamental principle that '[s]ummary judgment is a drastic remedy, and a motion for summary

judgment should be dealt with cautiously.'" *Takian v. Rafaelian*, 53 A.3d 964, 970 (R.I. 2012) (quoting *Employers Mutual Casualty Co. v. Arbella Protection Insurance Co.*, 24 A.3d 544, 553 (R.I. 2011)). "[O]nly if [a] case is legally dead on arrival should the court take the drastic step of administering last rites by granting summary judgment." *Mitchell v. Mitchell*, 756 A.2d 179, 185 (R.I. 2000).

Here, the terms of the BSFD Charter enfranchise nonresidents who may possess only a fairly insignificant property interest, and the Affidavit submitted by Voter Plaintiff Patterson substantiates the claim that a sizable number of small parcels in the BSFD are owned by nonresidents. Compl. Ex. A, § 2; Pls.' Reply Mem. Ex. H. Voter Plaintiffs have made "a showing sufficient to establish the existence of an element essential to [their] case, and on which [they] . . . bear the burden of proof. . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Anderson*, 477 U.S. at 255 ("Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.").

Under Count IV, the Court finds that the BSFD is a person acting under color of state law. However, on the current record, the Court cannot determine whether BSFD's enforcement of the nonresident enfranchisement provision represented a meaningful and conscious choice sufficient to establish liability under *Vives*, cited *supra*, or whether the challenged provision enfranchised nonresidents who did not possess a substantial interest in BSFD elections under the standard discussed in *Duncan*, cited *supra*. Accordingly, Plaintiffs' Motion for Summary Judgment is granted in part and denied in part, and Defendant BSFD's Cross-Motion for Summary Judgment is denied.

IV

Conclusion

For the foregoing reasons, on Count I, Plaintiffs' Motion for Summary Judgment is granted, and Defendant BSFD's Cross-Motion for Summary Judgment is denied. On Count II, Plaintiffs' Motion for Summary Judgment is granted in part and denied in part, and Defendant BSFD's Cross-Motion for Summary Judgment is denied. On Count IV, Plaintiffs' Motion for Summary Judgment is granted in part and denied in part, and Defendant BSFD's Cross-Motion for Summary Judgment is denied. Counsel shall prepare the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Patterson, et al. v. The Bonnet Shores Fire District**
CASE NO:	**WC-2020-0130**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**January 27, 2022**
JUSTICE/MAGISTRATE:	**Taft-Carter, J.**
ATTORNEYS:	
For Plaintiff:	**Matthew T. Oliverio, Esq.**
For Defendant:	**Thomas M. Dickinson, Esq.**
For Interested Party:	**Lynette J. Labinger, Esq.** **James G. Rhodes, Esq.**