NO. 24-147

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DAVID P. DEMAREST,

Plaintiff-Appellant,

v.

TOWN OF UNDERHILL, Town of Underhill, a municipality and charter town,

Defendants-Appellees,
[caption continued on inside cover]

On Appeal from the United States District Court
for the District of Vermont

No. 2:21-cv-00167-wks, Hon. William K. Sessions III, Judge Presiding

REPLY BRIEF OF PLAINTIFF-APPELLANT
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Defendants-Appellees,

FRONT PORCH FORUM, as a Public Benefit 15 Corporation fairly treated as acting under color of law due to past and present 16 factual considerations while serving the traditional governmental role of providing 17 "Essential Civic Infrastructure" ranging from the dii, JERICHO UNDERHILL LAND TRUST, as Non-Profit 21 Corporation fairly treated as acting under color of law due to past and present 22 factual considerations and a special relationship willfully participating in and 23 actively directing acquisition of municipal property by the Town of Underhill,

Defendants.

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REPLY ARGUMENT

I. INTRODUCTION

In responding to this appeal, the Municipal Defendants adopted a simple plan of defense that is consistent throughout their Brief. In response to each issue, the Municipal Defendants contend, the issue is "time-barred" or "claim-precluded" or both, almost always with little explanation or legal support. By adopting this defense, the Municipal Defendants avoid or ignore confronting the serious and plausible allegations in the Second Amended Complaint that they discriminated and retaliated against Demarest.

The Municipal Defendants' efforts to ignore Demarest's allegations should not deter this Court from keeping its focus on the factual allegations in Demarest's Second Amended Complaint, from applying the applicable, liberal pleading standard that applies to *pro se* pleadings, or from drawing reasonable inferences from those allegations in Demarest's favor. For example, to the extent that some incident may be "time-barred," this Court should consider Demarest's allegations regarding the entire course of the Municipal Defendants' conduct as relevant background, further supporting the inference that the Municipal Defendants discriminated and retaliated against Demarest. Indeed, the claims at issue on this appeal are based on the Municipal Defendants' efforts to retaliate against Demarest for exercising his First Amendment rights and to subject Demarest to disparate

treatment, not motivated by any valid purpose, but based on the Municipal Defendants' ill-will and malice, violating his Equal Protection rights. Accordingly, Demarest's claims do not arise out of the prior litigation, are not time barred and deserve an opportunity to be fleshed out and refined through discovery.

Perhaps the clearest example of the Municipal Defendants' disregard of Demarest's constitutional rights is their evasion of the rampant favoritism they gave themselves, in sharp contrast to the way they treated Demarest. For example, most of the comparators identified to support Demarest's Equal Protection claim are individual members of the Municipal Defendants group now before this Court. The Second Amended Complaint fully alleges the way they blatantly favored themselves over Demarest and deserves to be fleshed out through discovery and scrutinized at trial in the cold light of day. Demarest's Second Amended Complaint, properly construed, establishes viable constitutional claims that must be fully aired. Accordingly, reversal is fully warranted.

II. DEMAREST'S *PRO SE* SECOND AMENDED COMPLAINT SHOULD BE REVIEWED WITH SPECIAL SOLICITUDE BECAUSE HE IS NOT EXPERIENCED IN LITIGATION

In their Brief, the Municipal Defendants correctly note that "[t]his Court will 'review a pro se complaint with special solicitude, interpreting it to raise the strongest claims that it suggests." DktEntry: 41.1, at p. 22 (citing *Marvin v. Peldunas*, No. 22-1824, 2022 WL 2125851 (2d Cir. June 14, 2022) (internal

citation and quotation omitted)).[1] The Municipal Defendants then point out that if a "'particular pro se litigant is experienced in litigation and familiar with the procedural setting presented,' it is appropriate to withdraw or lessen the solicitude ordinarily granted a pro se plaintiff." DktEntry: 41.1, at p. 22 (quoting *Tracy v. Freshwater*, 623 F.3d 90, 102 (2d Cir. 2010)). The Municipal Defendants, however, do not argue that this Court should withdraw or lessen the solicitude ordinarily granted a *pro se* plaintiff in this case, nor do they argue that Demarest is "experienced in litigation" or is "familiar with the procedural setting presented."

In this case, this Court should not withdraw or lessen the solicitude ordinarily granted a *pro se* plaintiff with regard to Demarest. The Municipal Defendants have not alleged that Demarest has sufficient Federal Court litigation experience that he should be charged with knowledge of pleading requirements.

To the contrary, the procedural background of this action demonstrates that this Court should review Demarest's Second Amended Complaint with the special solicitude ordinarily afforded to *pro se* litigants.[2] Doing so furthers "[t]he rationale

[1] The Municipal Defendants, however, then ignore this standard in the rest of their Brief since it does not support their arguments.

[2] For example, in this case, Demarest filed his *pro se* Complaint on June 21, 2021. A-68. On July 13, 2021, the Municipal Defendants then filed a motion to dismiss the Complaint "arguing, among other things, that Demarest had failed to include in the case caption numerous additional defendants identified in the Complaint." *Id.* On August 2, 2021, Demarest promptly filed an Amended Complaint, listing the

underlying this rule" because "a *pro se* litigant generally lacks both legal training and experience and, accordingly, is likely to forfeit important rights through inadvertence if he is not afforded some degree of protection." *Tracy*, 623 F.3d at 101 (citing *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 475 (2d Cir. 2006)). This is particularly true in a case such as this where the *pro se* litigant is asserting civil rights claims. *Tracy*, 623 F.3d at 102 (citing *Davis v. Good*, 320 F.3d 346, 350 (2d Cir. 2003) (explaining that this Court has "sometimes suggested that a court should be particularly solicitous of *pro se* litigants who assert civil rights claims.")).

III. DEMAREST'S CLAIMS ARE NOT BARRED BY CLAIM PRECLUSION OR A STATUTE OF LIMITATIONS

A. Demarest Addressed Claim Preclusion and the Statute of Limitations in His Brief and Did Not Waive or Abandon Those Issues

In their Brief, the Municipal Defendants generally contend that "Demarest's Brief does not argue that claim preclusion or a statute of limitations should *not* apply to Demarest's claims" and that by "ignoring these issues, Demarest fails to address the primary bases for the district court's holding, namely, that Demarest may *not* rely on time-barred allegations and precluded claims." DktEntry: 41.1, at

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individual defendants in the caption without the guidance of a Court Order outlining what the Court would require of an Amended Complaint. *Id.*

24. The Municipal Defendants then allege that Demarest waived or abandoned these issues. *Id.*

Contrary to the Municipal Defendants' allegation, Demarest's Brief clearly and unambiguously addressed these issues. Indeed, at the beginning of the "Summary of the Argument" section of the Brief, Demarest explains that:

> The crux of Demarest's argument on appeal is that the District Court erred in assuming that the First Amendment retaliation and Equal Protection claims set forth in Demarest's Second Amended Complaint "arise out of the reclassification of a portion of [TH-26] to trail status." A-65. Instead, Demarest's First Amendment retaliation and Equal Protection claims arise out of the Municipal Defendants and Town's negative and retaliatory treatment of him from the time TH-26 was reclassified until the present. The Second Amended Complaint contains allegations relating to the 2010 reclassification of TH-26 because those allegations are essential to understand why the Municipal Defendants and Town have treated and continue to treat Demarest like a pariah, just because he exercised his First Amendment rights. Accordingly, while the claims set forth in the Second Amended Complaint provide context for the Municipal Defendants and Town's wrongful acts, **Demarest is seeking redress for how the Municipal Defendants and Town are currently treating him, not how they treated him ten years ago when TH-26 was reclassified.**

DktEntry: 36.1 at 19 (emphasis added).

Moreover, the District Court's opinion on appeal did not thoroughly address or deny Demarest's Motion for Leave to File a Second Amended Complaint based on the grounds of claim preclusion. To the contrary, the District Court held that

Demarest's "proposed claims, like the prior claims, arise from the reclassification of TH 26, the resulting access issues, and Defendants' responses to his challenges." A-70. For example, the District Court held that with regard to his First Amendment claim, the "concrete harm involves TH 26, and it is now well established that a claim arising from the Town's reclassification of TH 26 is barred as claim precluded, untimely, or both." A-75.[3]

In his Brief, Demarest expressly explained that the District Court erred when it concluded that the concrete harm involves TH 26, which is barred as claim precluded, untimely, or both because the "District Court's conclusion rests on an overly narrow construction of the allegations set forth in the Second Amended Complaint and a fixation on construing Demarest's claims as only arising out of the 2010 reclassification of TH 26." DktEntry 36.1, at 21. In fact, Demarest's Brief argues that his proposed Second Amended Complaint pleads a viable First Amendment retaliation claim based on allegations and harms that occurred after June 21, 2018. *See id.* at 18-25. As a result, Demarest adequately preserved and

[3] Similarly, with regard to Demarest's Equal Protection claim, the District Court did not even expressly reference claim preclusion. Instead, the District Court merely held that "many of the allegedly-discriminatory acts took place more than a decade ago, concern actions that either were or could have been challenged in prior state court proceedings." A-79. However, as set forth in Demarest's Brief and in more detail below, Demarest's Second Amended Complaint alleges a variety of discriminatory acts that took place after June 21, 2018 and after the prior state court litigation concluded.

did not waive any argument concerning claim preclusion or the statute of limitations.

B. Demarest's Claims Arise Out of Appellees' Acts and Omissions That Occurred Within the Three-Year Statute of Limitations

In their Brief, the Municipal Defendants argue that the factual allegations identified by Demarest as supporting his First Amendment retaliation and Equal Protection claims "are based on events that are time-barred, based on claims that have been ruled precluded by the Vermont Supreme Court or by this Court, are conclusory, or fail to state any claim upon which relief can be granted because they do not involve unlawful conduct." DktEntry: 41.1, at 32. As set forth below, the Municipal Defendants' argument fails because it rests on a narrow construction of Demarest's proposed Second Amended Complaint.

i. Demarest's Class IV Maintenance and Repair Allegations Support His Equal Protection Claim and Are Not Claim Precluded

The Municipal Defendants incorrectly assert that "the 'failed culvert'" issue only relates to a culvert that "is located on the 'central segment of TH-26,' DktEntry 36.1 at 8 (citing A-37 at ¶ 80) – i.e., on Crane Brook Trail." DktEntry: 41.1, at 33. The Municipal Defendants ignore that Demarest alleged "[w]hen the Class IV Road Committee finally agreed to schedule a visit to look into the 'failed culverts on **TH-26 north of Plaintiff's driveway**,'" which section is also known as Fuller Road, they scheduled the visit when they knew Demarest was in New

York City arguing before this Court. DktEntry: 36.1, at 15 (citing A-49). Indeed, Demarest further argued that he "has repeatedly requested that the Town maintain and repair the Class IV segment of TH-26, now known as Fuller Road, because it is the only highway access to his property and the Town has repeatedly refused to do so." *Id.* at 36 (citing A-48, A-49, A-66).

Accordingly, these allegations have nothing to do with Demarest's "efforts to force the Town to repair Crane Brook Trail in general. . . so Demarest could maintain his vehicle access along the legal trail." DktEntry: 41:1, at 34. Nor are these allegations barred by the Vermont Supreme Court's decision holding that a town has no obligation to maintain or repair a legal trail, like Crane Brook Trail. *Id.* (citing *In re Town Highway 26*, 2015 WL 2383677, 199 Vt. 648, 114 A.3d 505 (Vt. 2015)).

ii. Demarest's Allegations Concerning the Conflict of Interest Complaint Supports His Equal Protection Claim

In their Brief, the Municipal Defendants claim that Demarest cannot support his Equal Protection claim by relying on his allegations concerning the Town's treatment of his conflict of interest complaint. DktEntry: 41.1, 38. The Municipal Defendants' argument misses the mark.

The Municipal Defendants are correct; both this Court and the District Court have held that the allegations concerning the conflict of interest complaint cannot support a First Amendment claim. However, in his Brief, Demarest does not argue

these allegations support his First Amendment claim. Instead, Demarest argues that these allegations support his Equal Protection claim, not his First Amendment claim. *See* DktEntry: 36.1, at 37-8.[4]

iii. Demarest's Allegations About the Town's Decision to Place Boulders to Block Demarest's Access to Crane Brook Trail in November 2019 are Not Time Barred or Claim-Precluded Because They Support His Equal Protection Claim

The Municipal Defendants further argue that "[i]f the Town made a promise to preserve Demarest's vehicle access to Crane Brook Trail, the Town broke that promise long before the limitations date of June [21] 2018." DktEntry 41:1, at 41. However, each breach of a promise or contract gives rise to a new cause of action. Accordingly, this allegation is not time-barred.

Nor is this allegation barred by claim preclusion based on prior litigation. The Municipal Defendants incorrectly construe Demarest's claim. The Municipal Defendants contend that the Vermont Supreme Court "has already held that the Town has the discretion to block vehicle traffic over Crane Brook Trail and has no legal obligation to maintain the trail or otherwise make it passable for vehicles." *Id.* at 41-2. However, the Town may not exercise that discretion for an improper

[4] In their Brief, the Municipal Defendants also improperly conflate Demarest's conflict of interest complaint and Demarest's separate voter-backed Petition on Public Accountability. DktEntry 41:1, at 30. As set forth in the Second Amended Complaint, the conflict of interest complaint is separate from the voter-backed Petition on Public Accountability. A-42, at ¶ 96; A-58, at ¶ 169.

purpose – such as to discriminate against Demarest for his exercise of his First Amendment rights and history of litigation with the Town. Demarest included these allegations of past actions to demonstrate that the Municipal Defendants are treating him differently than other similarly situated individuals during the limitations period.

iv. Demarest's Allegations Concerning the Matrix of Class IV Roads in the Town that was Created in June 2019 Support His Equal Protection Claim

The Municipal Defendants argue that this Court should not consider allegations relating to the matrix of Class IV Road characteristics that was created in June of 2019 "when considering the viability of Demarest's claims." DktEntry 41.1, at 44. The Municipal Defendants correctly note that both the District Court and this Court concluded that these allegations do not support a First Amendment retaliation claim. DktEntry 41.1, 42-3.

However, under the liberal pleading rules and standards for *pro se* plaintiffs, this Court can and should consider these allegations with regard to Demarest's Equal Protection claim. Demarest's allegations further establish that the Town is treating his section of Class IV road frontage (Fuller Road) differently from all other Class IV roads accessed by different individuals in Town.[5]

[5] In fact, the Municipal Defendants later concede that Demarest identified "the Town's refusal to correct the factual errors allegedly in the matrix prepared by

IV. DEMAREST'S SECOND AMENDED COMPLAINT SETS FORTH A VALID *LECLAIR* EQUAL PRTECTION CLAIM

The Municipal Defendants' argument that Demarest failed to plead a viable *LeClair* Equal Protection claim fails because it lacks any basis in law and ignores the allegations in Demarest's Second Amended Complaint. As set forth in more detail below, Demarest sufficiently alleged that he was subjected to selective treatment based on the Municipal Defendants' acts and omissions that occurred after the June 21, 2018 limitations date. In addition, Demarest's Second Amended Complaint contains sufficient allegations of similarly situated comparators, which is a fact-intensive inquiry, to survive a motion to dismiss. Lastly, Demarest adequately alleged that the Municipal Defendants' selective treatment was due to their ill will, malice, or to retaliate against him, to plead and support a viable *LeClair* Equal Protection claim and, as discussed below, the Municipal Defendants misconstrue the applicable legal requirements when arguing that Demarest was required to prove that the disparate treatment was caused by their impermissible motivations at this early pleading stage.

Rick Heh" as an allegation of "selective treatment" in support of his Equal Protection claim. DktEntry: 41.1, at 47.

A. Demarest Sufficiently Alleged Selective Treatment Based on the Town's Acts That Took Place Within Three Years of His Complaint

This Court should reject the Municipal Defendants' argument that Demarest's allegations of selective treatment are all "time-barred, and/or claim-precluded or are irrelevant because they do not constitute any sort of wrongful conduct on the part of the Town." DktEntry 41.1, at 47.

First, the Municipal Defendants have cited no authority to support their argument that Demarest's allegations of selective treatment must be based on "wrongful conduct" of the Municipal Defendants. As the Municipal Defendants acknowledge, a plaintiff need only allege that the plaintiff "compared with others similarly situated, was selectively treated." DktEntry 41.1, at 45 (quoting *Hu v. City of New York*, No. 22-83, 2023 WL 3563039, at *1 (2d Cir. May 19, 2023)). There is no requirement that the selective treatment be "wrongful" in and of itself. Instead, the conduct is wrongful when it is motivated by impermissible considerations.

In other words, Demarest does not dispute that the Municipal Defendants have wide discretion in deciding whether to maintain or repair a Class IV road or whether to take action on a conflict of interest complaint. Instead, Demarest's argument is that although the Municipal Defendants generally enjoy wide discretion in such decisions, the Equal Protection Clause of the Constitution prohibits the Municipal Defendants from exercising that discretion if their

decisions are motivated by impermissible motivations such as malice, ill will or in retaliation for exercising First Amendment rights. *See Airday v. City of New York*, No. 14-8065, 2020 WL 4015770, at *5 (S.D.N.Y. July 16, 2020); *Geinosky v. City of Chicago*, 675 F.3d 743, 747 (7th Cir. 2012) (reversing dismissal of a class-of-one claim in part because "[a]lthough the police are necessarily afforded wide discretion in performing their duties, that discretion does not extend to discriminating against or harassing people.").

Second, the Municipal Defendants make no effort to explain how the "four specific instances" that Demarest identified to demonstrate he was selectively treated are time-barred and/or claim-precluded. DktEntry: 41.1, at 47. For example, the Municipal Defendants do not explain how Demarest's allegations relating to his November 30, 2020 conflict of interest complaint against Municipal Defendant Dan Steinbaurer is barred by the statute of limitations or claim preclusion. Demarest further alleged that another similarly situated individual, Jim Beebe Woodard, also submitted a conflict of interest complaint, and the Municipal Defendants promptly set that for a quasi-judicial hearing on September 21, 2020 and publicized it on the Town's website. Demarest also alleged that his conflict of interest complaint was treated dramatically differently from Mr. Woodard's because the Municipal Defendants simply ignored his complaint while they took action on Mr. Woodward's complaint. Such allegations are neither barred by the

statute of limitations nor are they barred by claim preclusion. As set forth in more detail above, Demarest's allegations concerning the Municipal Defendant's refusal to maintain and repair Fuller Road and the Town's refusal to correct factual errors in the matrix prepared by Rick Heh are not barred by either claim preclusion or the statute of limitations.

B. Demarest's Comparators Are Sufficiently Similar to Support a Viable *LeClair* Equal Protection Claim

The Municipal Defendants also argue that Demarest failed to state a viable *LeClair* Equal Protection claim because "the comparators with which Demarest compares himself are not similarly situated in all material respects." DktEntry: 41.1, at 39-40. The Municipal Defendants' argument fails because it ignores the procedural posture and the unique factual context of the case.

This Court has explained that "[t]he question of whether parties are similarly situated is generally a *fact-intensive inquiry that depends heavily on the particular context of the case at hand*." *Hu v. City of New York*, 927 F.3d 81, 97 (2d. Cir. 2019) (emphasis added, citation, quotations and brackets omitted). "[I]t is precisely in light of the inquiry's fact-intensive nature that [this Court has] cautioned against deciding whether two comparators are similarly situated on a motion to dismiss." *Id.* (quoting *Brown v. Daikin America Inc.*, 756 F.3d 219, 230 (2d Cir. 2014) ("Ordinarily whether two employees are similarly situated presents a question of fact, rather than a legal question to be resolved on a motion to

dismiss.") (citation and internal quotations omitted)). In this case, the allegations set forth in Demarest's Second Amended Complaint are sufficiently detailed that they "'nudged [his] claims' of invidious discrimination 'across the line from conceivable to plausible.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 680, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2004)).

In this case, unique factual circumstances make it extremely difficult for Demarest to identify comparators that are similarly situated in all respects at the initial pleading stage of this litigation. First, Demarest is comparing how the Municipal Defendants treat his real property differently from how the Municipal Defendants treat real property owned by themselves or by other individuals. "It being axiomatic that real property is unique," Demarest cannot, in the context of this case, establish that other properties are similarly situated in all material respects. *In re Ricci-Breen*, No. 14-22798, 2015 WL 5156617, at *6 (S.D.N.Y. Aug. 31, 2015). Second, in this case, Demarest must find comparators that are similarly situated in all material respects in the small, rural Town of Underhill.[6] Small towns have fewer residents than cities or towns which naturally limits the

[6] This Court can take judicial notice of the fact that the Town of Underhill has a population of 3,129 individuals, as set forth on the United State Census Bureau's website. https://data.census.gov/profile/Underhill_town,_Chittenden_County,_Vermont?g=060XX00US5000773975

number of potentially available comparators. As a result, Demarest will have a more difficult time locating any individuals that are similarly situated in *all* material respects. Requiring a plaintiff like Demarest, living in a small town, to identify comparators that are similarly situated in all material respects before discovery at the pleading stage would create a legal framework that could deprive an individual of their Constitutional right to Equal Protection simply because they live in a small town that is not densely populated. Accordingly, as a matter of public policy, this Court should reject the Municipal Defendants' argument that Demarest must, at the initial pleading stage and before discovery, identify comparators that are similarly situated in all material respects.

C. Demarest Alleged Sufficient Facts to Give Rise to an Inference that the Municipal Defendants' Selective Treatment was Motivated By Malice, Ill Will and an Intent to Retaliate

In their Brief, the Municipal Defendants misconstrue the legal requirements to plead a viable *LeClair* Equal Protection at this stage of the litigation, even though they initially set forth the correct standard in their Brief. For example, Municipal Defendants correctly noted that in the Second Circuit "[t]o prove a *LeClair* Equal Protection claim" a plaintiff must allege that "(1) the person, compared with others similarly situated, was selectively treated," and also that "(2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as . . . to punish or inhibit the exercise of

constitutional rights, or by a malicious or bad faith intent to injure the person." *Hu v. City of New York*, 2023 WL 3563039, at * 1 (2d Cir. 2023) (quoting *Zahra v. Town of Southold*, 48 F.3d 674, 683 (2d Cir. 1995)); DktEntry: 41.1, at 45.[7]

However, after accurately citing the legal elements to establish a *LeClair* Equal Protection claim, the Municipal Defendants ignore the applicable standard of causation – that the selective treatment was motivated by impermissible consideration – to argue that Demarest must also "prove that the disparate treatment *was caused* by the impermissible motivation." *Hu v. City of New York*, 927 F.3d at 91 (quoting *Bizzarro v. Miranda*, 394 F.3d 82, 87 (2d Cir. 2005)) (emphasis in Municipal Defendants' Brief); DktEntry: 41.1, at 46. While the Municipal Defendants correctly quoted *Hu*, the quoted language comes from this Court's decision in the *Bizzarro* case, which analyzed whether the *Bizzarro* plaintiffs could establish a *LeClair* Equal Protection claim at summary judgment, after discovery. *Bizzarro*, 394 F.3d at 85-7. Rarely, if ever, will a plaintiff have sufficient knowledge at the pleading stage to "prove that the disparate treatment was caused by the impermissible motivation." *Hu*, 927 F.3d at 91. In other cases,

[7] In their Brief the Municipal Defendants omitted that a "malicious or bad faith intent to injure the person" is also one of the "impermissible considerations" that could give rise to a *LeClair* Equal Protection claim. Taken as true, the allegations set forth in Demarest's Second Amended Complaint at a minimum give rise to an inference that the Municipal Defendants' selective treatment of Demarest was motivated by their malicious or bad faith intent to injure him.

this Court has held that a plaintiff's *LeClair* claim "could still survive a summary judgment motion if it could show that the [government's] decision was motivated by an 'intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Harlen Associates v. Incorporated Village of Mineola*, 273 F.3d 494, 502 (2d Cir. 2001) (quoting *LaTrieste Restaurant and Cabaret Inc. v. Village of Port Chester*, 40 F.3d 587, 590 (2d Cir. 1994)).

Indeed, in *LeClair v. Saunders*, this Court explained that because the plaintiffs never alleged they were excluded due to a protected class "or other invidious reasons, or to prevent them from exercising, for example, their First Amendment right of free speech or any other constitutional right" the plaintiff's "claim, then, must rest on proof of [Defendant's] malicious or bad faith intent to injure [the plaintiffs] through selective treatment of their farm." 627 F.2d 606, 610 (2d Cir. 1980). The *LeClair* Court further noted that "[a]lthough [the plaintiffs] alleged malice in their complaint, the evidence presented at trial does not support such a finding." *Id.* In other words, only after discovery were the plaintiffs required to make a "showing that [the defendant] maliciously or in bad faith wanted to hurt [plaintiffs]." *Id.*

Accordingly, the Municipal Defendants' argument that Demarest was required to plead that the disparate treatment was caused by impermissible motivation or that the impermissible motivation was the "but-for" cause of the

disparate treatment lacks any basis in law. As this Court explained in *Hu*, "unlike a malice-based *LeClair* claim, an *Olech* claim does not require proof of a defendant's subjective ill will towards a plaintiff." 927 F.3d at 93; *See also Airday v. City of New York*, 2020 WL 4015770, at *5 ("A *LeClair* claim requires not only proof of differential treatment, but also malice."). At this stage of the litigation, Demarest only needed to allege that that the Municipal Defendant's disparate treatment was motivated by their subjective ill will towards him. Because Demarest's proposed Second Amended Complaint contains numerous allegations that the Municipal Defendants treated him differently from others due to their malice and subjective ill will towards him, Demarest adequately set forth a viable Equal Protection claim in his Second Amended Complaint.

V. DEMAREST'S SECOND AMENDED COMPLAINT SETS FORTH A VIABLE FIRST AMENDMENT RETALIATION CLAIM

This Court should reject the Municipal Defendants' argument that Demarest's Second Amended Complaint lacks sufficient allegations to state a viable First Amendment retaliation claim. As set forth in more detail below, construed under the liberal pleadings standards on a motion to dismiss, Demarest's Second Amended Complaint sets forth a viable First Amendment Retaliation claim.

A. Demarest has Sufficiently Alleged that the Municipal Defendants Engaged in Retaliatory Acts against Him

First, the Municipal Defendants summarily argue that Demarest's allegations of retaliation are time-barred, claim-precluded or are based on lawful actions that cannot be retaliatory. DktEntry: 41.1, at 59. The Municipal Defendants' argument lacks any basis in law and ignores the allegations of the retaliatory conduct set forth in Demarest's Second Amended Complaint.

The Municipal Defendants' argument that Demarest's allegations of retaliation are time-bared fails because it ignores allegations about the Town's actions after the June 21, 2018. The Municipal Defendants conceded that Demarest's claims are subject to a three year statute of limitations and, therefore, he may rely on allegations of conduct occurring after June, 21, 2018, which is three years after he filed his Complaint. DktEntry: 41.1, at 26, 28. There can be no dispute that the allegations referenced by the Municipal Defendants in their Brief cannot be barred by the statute of limitations:

(1) the Municipal Defendants placed boulders in Demarest's right of way on November 19, 2019,

(2) the Municipal Defendants refused to provide maintenance on Fuller Road,

(3) the Municipal Defendants refused to correct factual errors in a matrix prepared by Rick Heh in June of 2019, and

(4) the Municipal Defendants disregarded Demarest's 2020 conflict of interest complaint.

DktEntry: 41.1, at 59. Furthermore, Demarest's Second Amended Complaint further alleged that the Town "willfully and wantonly continued to refuse to provide **any** maintenance to any portion of Plaintiff's limited remaining Class IV Road frontage up to the date of the filing of the present case" and "scheduled a site visit to the failed culverts on TH-26 *north* of Plaintiff's driveway for the same day" Demarest was set to argue before this Court in 2022. A-48, at ¶ 127; A-49 at ¶130. These additional allegations are not time barred.

The Municipal Defendants then summarily argue that these same claims are also all claim-precluded, but offer no analysis or explanation for this conclusory allegation. DktEntry: 41.1, at 59. To the contrary, Demarest's allegations concerning both the Town's refusal to consider his 2020 conflict of interest complaint and to correct factual errors in the 2019 matrix prepared by Rick Heh have absolutely nothing to do with the prior litigation. Moreover, the Municipal Defendants are misconstruing Demarest's argument. Demarest is not denying that the Municipal Defendants have discretion to take certain actions. However, as noted above, Demarest is simply alleging that the Municipal Defendants are exercising that discretion to retaliate against him, in violation of his constitutional rights.

For example, if the Vermont Supreme Court has held that the Town has wide discretion in deciding whether to repair or maintain Class IV roads, claim preclusion does not bar Demarest from later arguing that the Town denied a subsequent request based on improper motives, which would give rise to a First Amendment retaliation claim if the improper motive behind the denial was Demarest's exercise of his First Amendment rights. Here, Demarest is alleging that after the state court litigation concluded, he made multiple requests for maintenance on Fuller Road, a Class IV road, and the Municipal Defendants denied his repeated requests, not based on exercising their discretion, but because they were retaliating against him for exercising his First Amendment rights.

In addition, the Municipal Defendants cite no legal authority to support their cursory argument that acts of retaliation must be based on acts that are unlawful in and of themselves. DktEntry: 41.1, at 59 (arguing that Demarest's allegations "fail to state a claim because they are lawful actions."). As set forth above, Demarest acknowledges that the Town has wide discretion to repair or maintain Class IV roads. However, the Town's exercise of that discretion becomes unlawful when it is motivated by impermissible motivations, such as, in this case, in retaliation for Demarest exercising his First Amendment rights. Accordingly, Demarest's Second Amended Complaint contains sufficient and plausible allegations of retaliatory acts by the Municipal Defendants to support a viable First Amendment retaliation.

B. Demarest's Second Amended Complaint Contains Sufficient Allegations to Support a Finding that the Municipal Defendants' Conduct Was Motivated by an Intent to Retaliate When Analyzed Under the Applicable Liberal Pleading Standards

Second, the Municipal Defendants' argument that Demarest failed to plead factual allegations to establish that the Town was motivated by an intent to retaliate is belied by the allegations set forth in Demarest's proposed Second Amended Complaint, particularly when construed under the proper standard at this stage in the litigation.

In fact, the Municipal Defendants expressly or implicitly are asking that this Court ignore the liberal pleading standards and draw inferences in their favor and ignore the facts, as pleaded in the Second Amended Complaint, facts which must be deemed true. For example, the Municipal Defendants analyze a single factual allegation and then make the conclusory argument that "[t]he other allegations in the Second Amended Complaint are no better." DktEntry: 41.1, at 60. The Municipal Defendants then assert that Demarest is "[a]pparently aware of this failing" because his argument relies on this Court applying the proper legal standard, which requires accepting "as true all [Demarest's] factual allegations" and "drawing all reasonable inferences in [Demarest's] favor." *Id.* In other words, even though the Municipal Defendants cite the applicable legal standard at the outset of their Brief, DktEntry 41.1, at 21, they later disregard the standard out of convenience to argue that relying on the proper legal standard "underscores how

sheer the causal cloth is from which Demarest attempts to fashion his retaliation claim." DktEntry 41.1, at 61. While such an argument should carry no weight at this early pleading stage of the litigation, it may be more applicable after the close of discovery.

Indeed, the Municipal Defendants miss the forest for the trees in arguing that Demarest must allege "specific conduct that would show a causal connection – much less a 'but for' connection – between any specific conduct by any of the Municipal Defendants and Demarest's First Amendment activity." *Id.* As the Municipal Defendants know, Rule 8's pleading standard "does not require 'detailed factual allegations'", since they quote the very next phrase, which provides that the pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. Taking all the facts alleged in Demarest's Second Amended Complaint as true, and drawing all reasonable inferences in his favor, Demarest is not simply asserting an "unadorned, the defendant-unlawfully-harmed-me-accusation."

Indeed, it is hard to imagine how anyone could read Demarest's Second Amended Complaint and not walk away thinking that the Municipal Defendants are retaliating against Demarest for "relentlessly" seeking redress of his grievances in litigation for more than a decade and for being outspoken at Town meetings, particularly when taking the allegations as true and drawing all reasonable

inferences in Demarest's favor. DktEntry: 41.1, at 16. It is also more than plausible that, after years of what they describe as Demarest's relentless litigation, the Municipal Defendants would harbor ill will or malice against Demarest, which would motivate them to retaliate against him. In fact, in his Second Amended Complaint, Demarest alleged that the Municipal Defendants singled him out for harsh treatment, acted maliciously to deprive him of constitutional rights, and retaliated against him "for Plaintiff's outspoken criticism of Defendants' acts with respect to TH-26, other matters of local public concern, and his efforts to compel the promised access to his home and surrounding land." A-19; A-20.

Moreover, the Municipal Defendants' argument lacks any basis in law. Rule 9(b) of the Federal Rules of Civil Procedure provides that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Determining the motivation for or intent to take an act requires an inquiry into conditions of a person's mind. Accordingly, the Municipal Defendants' argument that Demarest's First Amendment retaliation claim is not viable without "specific factual allegations supporting [his] contention that retaliatory conduct was motivated by retaliatory intent" fails. DktEntry: 41.1, at 61. Neither the Federal Rules of Civil Procedure nor the applicable liberal pleading standards require any such specificity to plead a viable First Amendment retaliation claim.

Unless and until Demarest is entitled to pursue discovery, Demarest lacks the ability to probe into the motivations behind various acts taken by the Municipal Defendants. Instead, he must rely on inferences to meet his burden at this early stage of the litigation, where it is not possible for Demarest to specifically allege facts to substantiate his plausible allegation that the Municipal Defendants were motivated by ill will, malice or a desire to retaliate against him for exercising his First Amendment rights.

Indeed, contrary to the Municipal Defendants' argument, Demarest's reliance on inferences does not "underscore how sheer the causal cloth is from which Demarest attempts to fashion his retaliation claim." DktEntry: 41.1, at 61. For example, in the context of similar employment discrimination cases, this Court has explained that:

> [w]here, as here, a plaintiff has not alleged facts that directly show discrimination, we have cautioned courts to 'be mindful of the elusive nature of intentional discrimination' when making a 'plausibility determination' at the motion-to-dismiss phase '[b]ecause discrimination claims implicate an employer's usually unstated intent and state of mind' and therefore 'rarely is there direct, smoking gun, evidence of discrimination.' [*Vega v. Hempstead Union Free School Dist.*, 801 F.3d 72, 86 (2d Cir. 2015)] (internal quotation marks and citations omitted). Thus, with respect to the issue of intent, '[t]he facts required by *Iqbal* to be alleged in the complaint need not give plausible support to the ultimate question of whether the adverse employment action was attributable to discrimination,' but rather 'need only give

> plausible support to a **minimal inference of discriminatory motivation**.'

Buon v. Spindler, 65 F.4th 64, 84 (2d Cir. 2023) (quoting *Littlejohn v. City of New York*, 795 F.3d 297, 311 (2d Cir. 2015) (emphasis added)). The result should be no different here. Both Demarest's First Amendment retaliation claim and his Equal Protection claim implicate the Municipal Defendants' state of mind and rarely is there direct, smoking gun, evidence of discrimination, improper motive or intent to retaliate. As a result, this Court should find that Demarest's Second Amended Complaint set forth a plausible and viable First Amendment retaliation claim and provide Demarest the opportunity to further develop these fact-intensive allegations through discovery.

C. Demarest's Second Amended Complaint Contains Sufficient Allegations Demonstrating that he Suffered Concrete Harms Sufficient to Support his First Amendment Retaliation Claim

Rather than confront the arguments Demarest made in his Brief to demonstrate that he sufficiently pleaded "concrete harm" in his Second Amended Complaint, the Municipal Defendants repeat their mantra that Demarest's allegations either "barred by applicable statutes of limitations or precluded due to Demarest's prior litigation with the Town." DktEntry: 41.1, at 63-4. In fact, the Municipal Defendants cite to no legal authority to support any of their arguments in this section of their Brief. *Id.* at 62-5.

As Demarest explained in his Brief, "this Court has held that whether the plaintiff suffered a concrete harm is an 'issue of fact that cannot properly be determined on a motion to dismiss.'" DktEntry 36.1, at 30 (quoting *Dougherty v. Town of North Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 92 (2d Cir. 2002) (reversing the district court's denial of plaintiff's motion for leave to amend the complaint to include a First Amendment claim of retaliation)). At this stage of the litigation, Demarest set forth sufficient allegations in his Second Amended Complaint that taken as true and drawing all reasonable inferences in his favor, plead sufficient concrete harms to support a First Amendment retaliation claim.

Moreover, the Municipal Defendants once again argue that Demarest must allege concrete harm that, in and of itself, "represent[s] a constitutional harm" that cannot "serve as a basis for harm in a First Amendment retaliation claim." DktEntry: 41.1, at 63. The Municipal Defendants cite to no legal authority to support this argument. However, had the Municipal Defendants addressed the legal authority set forth in Demarest's Brief, they would have discovered that courts frequently find sufficient concrete harm to survive a motion to dismiss when the retaliatory conduct "does not, by itself, represent a constitutional harm." *Id.*; *See* DktEntry 36.1, at 28-30. For example, in *Tomlins v. Village of Wappinger Falls Zoning Board of Appeals*, 812 F.Supp.2d 357, 371 n. 17 (S.D.N.Y. 2011), the district court held that the plaintiff alleged a sufficient concrete harm based on

allegations of retaliatory denial of a building permit and a denial of an unconditional variance.

The Municipal Defendants are correct, in a vacuum, Demarest's allegations of concrete harm do not constitute constitutional injuries. For example, if the Municipal Defendants properly exercised their discretion in refusing to take further action with respect to Demarest's conflict of interest complaint, there would be no cognizable injury to support a First Amendment retaliation claim. However, there would be a cognizable injury to support a First Amendment retaliation claim if the Municipal Defendants decided not to take any further action on his conflict of interest complaint in retaliation for exercising his First Amendment rights. The Municipal Defendants once again fail to appreciate that when they take certain actions or make certain decisions with a retaliatory motive, they transform otherwise proper discretionary acts into constitutional injuries. As set forth above, Demarest's allegations, construed under the applicable, liberal pleading standards, at minimum give rise to an inference that the Municipal Defendants' retaliatory motives caused Demarest's injuries and these allegations are sufficient to survive a motion to dismiss. Accordingly, Demarest's Second Amended Complaint sets forth a plausible and viable First Amendment retaliation claim.

CONCLUSION

In their Brief, the Municipal Defendants contend that the issues in this appeal boil down "to a fairly straightforward question: Once one sets aside the time-barred and claim-precluded allegations and claims in the Second Amended Complaint, has Demarest stated any plausible claims?"

The answer to that question is a resounding yes. The Municipal Defendants only reached a different conclusion by ignoring the applicable legal standard. This Court should reject the Municipal Defendants' approach. Instead, this Court should analyze Demarest's Second Amended Complaint under the applicable legal standard, accepting all the allegations as true and drawing all reasonable inferences from those allegations in Demarest's favor. In addition, this Court should review Demarest's Second Amended Complaint with the special solicitude ordinarily afforded to *pro se* litigants, especially those asserting civil rights claims, like Demarest.

Under the applicable legal standard, Demarest's Second Amended Complaint sets forth plausible and viable First Amendment retaliation and Equal Protection claims. For the reasons set forth above, as well as those set forth in Demarest's opening Brief, reversal is warranted.

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief complies with the type-volume limitation of Local Rule 32.1(a)(4)(B) because this brief contains 6,921 words (no more than 7,000), excluding items listed in Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface and style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: August 14, 2024

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