24-147

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

David P. Demarest,

Plaintiff-Appellant,

v.

Town of Underhill, a municipality and charter town, Daniel Steinabauer, as an individual and in official capacity as Selectboard Chair, Bob Stone, as an individual and in official capacity, Peter Duval, in official capacity, Dick Albertini, as an individual and in official capacity, Judy Bond, in official capacity, Peter Brooks, in official capacity, Seth Friedman, in official capacity, Judy Bond, in official capacity, Peter Brooks, in official capacity, Marcy Gibson, as an individual and in official capacity, Barbara Greene, in official capacity, Carolyn Gregson, in official capacity, Stan Hamlet, as an individual and in official capacity, Rick Heh, Brad Holden, as an individual and in official capacity, Faith Ingulsrud, in official capacity, Kurt Johnson, in official capacity, Karen McKnight, as an individual and in official capacity, Nancy McRae, as an individual and in official capacity, Michael Oman, in official capacity, Steve Owens, as an individual and in official capacity, Mary Pacifici, in official capacity, Clifford Peterson, as an individual and in official capacity, Patricia Sabalis, as an individual and in official capacity, Cynthia Seybolt, as an individual and in official capacity, Trevor Squirrell, as an individual and in official capacity, Rita St. Germain, as an individual and in official capacity, Daphne Tanis, as an individual and in official capacity, Walter Ted Tedford, Steve Walkerman, as an individual and in official capacity, Mike Weisel, as an individual and in official capacity, Barbara Yerrick, in official capacity, Anton Kelsey, in official capacity,

Defendants-Appellees,

(DEFENDANTS CONTINUED ON INSIDE COVER)

On appeal from the United States District Court, District of Vermont, No. 2:21-cv-167

BRIEF OF DEFENDANTS-APPELLEES

Kevin L. Kite, Esq.
Carroll, Boe, Pell & Kite, P.C.
64 Court Street, Middlebury, VT 05753
(802) 388-6711; kkite@64court.com

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.

Table of Contents

Table of Authorities

Cases

Statutes

Statement of the Issues Presented for Review

1. In stating his claims, is the Appellant barred from relying on untimely allegations that occurred before the applicable limitations period?
2. In stating his claims, is the Appellant barred from relying on claims that have been precluded?
3. Given the Appellant has not challenged the district court's stated grounds for dismissing his Second Amended Complaint, can the Appellant identify any alternate basis for asserting his claims?
4. Do Appellant's timely allegations in the Second Amended Complaint state a plausible claim for First Amendment retaliation?
5. Do Appellant's timely allegations in the Second Amended Complaint state a plausible *LeClair* equal protection claim?

Statement of the Case: Factual Background

Plaintiff-Appellant David Demarest ("Demarest") appeals from an order by the United States District Court for the District of Vermont (William K. Sessions III, Judge) denying Demarest leave to further amend his Amended Complaint. A-65–A-82. The Municipal Defendants[1] opposed Demarest's request for leave to amend, and the district court held that the claims asserted in Demarest's proposed Second Amended Complaint were barred by claim preclusion and/or applicable statutes of limitations or they failed to state a claim upon which relief could be granted.

As Demarest notes in his Brief,[2] the district court opinion lays out the extensive factual background of this dispute, stretching from 2002 forward. *See* A-66 through A-70 (reciting facts and quoting *Demarest v. Town of Underhill*, 2021 VT 14, ¶2–¶7, ¶14, ¶15, ¶19, 214 Vt. 250). Demarest reviews much of this factual background himself in his Brief. *See* DktEntry 36.1 at 5–13 (recounting events from "2002" forward).

---

[1] This Brief collectively refers to the named individual defendants and the Town of Underhill (the "Town") as the "Municipal Defendants."

[2] DktEntry 36.1 at 5 n.2.

This Brief does not attempt to state its own version of the underlying facts. The district court summary and Demarest's summary are adequate. Instead, this Brief accentuates a few important factual and legal issues that are crucial to determining this appeal.

First, it is essential to understand the location of Demarest's property and its relationship to the various rights of way referenced in the Second Amended Complaint. Demarest provided a figure in his Second Amended Complaint depicting these features. A-25. For the convenience of the Court, and for the sake of clarity, Demarest's figure is reprinted here as Figure 1 and coloring has been added to clarify the location of Demarest's property and the various rights of way.

Figure 1

Demarest marked the location of his property in handwriting on his figure and, in Figure 1, his property is shaded light green. Fuller Road, a portion of Town Highway 26 ("TH-26") that is classified as a Class 4 highway, appears at the top of Figure 1 and is highlighted in yellow. (The significance of the right-of-way classifications is discussed *infra*). Crane

Brook Trail, which is classified as a legal trail, continues south from Fuller Road and is highlighted in dark green. New Road, a portion of TH-26 that is classified as a Class 3 highway, continues south from Crane Brook Trail and is highlighted in blue. Finally, Pleasant Valley Road, a highway that is classified as a Class 3 highway, intersects with New Road and is highlighted in orange in Figure 1. Not shown on the map, but referenced in the Second Amended Complaint, is Irish Settlement Road, which connects to Fuller Road north of Demarest's property.

As one can see at the top of Figure 1, Demarest's property abuts a portion of Fuller Road to the north. Demarest enjoys vehicle access to his property via this portion of Fuller Road.[3] As Figure 1 shows, a significant portion of Demarest's property abuts Crane Brook Trail, which follows the western boundary of Demarest's parcel south of Fuller Road.

Second, it is important to understand some key features of Vermont law governing highways and legal trails. Demarest's serial litigation with the Town of Underhill has been driven by the Town's efforts to reclassify a portion of TH-26 into a legal trail. These reclassification efforts include a flawed effort in 2002 and a

---

[3] Demarest does *not* allege that the Town's actions have deprived him of access to his property over Fuller Road. DktEntry 36.1 at 6 and 30 (acknowledging that Demarest has "highway access" to his property over Fuller Road).

successful effort in 2010 that reclassified TH-26 into three different segments: "(1) New Road, a class 3 town highway; (2) Fuller Road, a class 4 town highway, and (3) Crane Brook Trail, a legal trail connecting New Road and Fuller Road."[4] Understanding the distinctions under Vermont law between Class 3 highways, Class 4 highways, and legal trails is essential to understanding the nature of Demarest's claims and resolving the issues at stake in this appeal.

Legal trails and town highways are public rights of way under Vermont law. 19 V.S.A. § 301(7) and (8). The classification of these public rights of way matters because each classification imposes a separate and distinct maintenance and repair obligation upon a municipality. *See, generally, e.g.*, 19 V.S.A. § 302 (classification of highways and trails), § 310 (defining maintenance and repair standards). Specifically, under Vermont law, a class 3 highway must be "negotiable under normal conditions all seasons of the year by a standard manufactured pleasure car." 19 V.S.A. § 302. A Class 3 highway, therefore, by definition, must always be maintained in a manner that allows vehicular access year-round.

However, maintenance and repair of a class 4 highway is discretionary under Vermont law. A class 4 highway "*may* be maintained to the extent required by the necessity of the town, the public good and the convenience of the inhabitants of the

[4] DktEntry 36.1 at 6.

town." 19 V.S.A. § 310(b) (emphasis added). The Vermont Supreme Court has held that § 310(b) vests a town "selectboard with broad discretion to determine the necessity of making repairs to class 4 highways." *Town of Calais v. County Rd. Comm'Rs*, 173 Vt. 620, 620, 795 A.2d 1267, 1268 (2002); *also Demarest v. Town of Underhill*, 2016 VT 10, ¶16, 201 Vt. 185, 192. This discretion extends to providing "only minimal maintenance" for a Class 4 highway. *Town of Calais*, 173 Vt. at 623, 795 A.2d at 1271.

For legal trails, Vermont law expressly states that a town "shall not be liable for construction, maintenance, repair, or safety of trails," 19 V.S.A. § 310, and "shall not be responsible for any maintenance [on trails], including culverts and bridges," 19 V.S.A. § 302(a)(5).

The reclassification of TH-26 and the cessation of vehicle access over Crane Brook Trail has been the primary driver of Demarest's to-date unsuccessful lawsuits against the Town of Underhill.

In 2013, the Vermont Supreme Court rejected Demarest's challenge to the Town's 2010 reclassification of a portion of TH-26 into the legal trail now known as Crane Brook Trail and confirmed that the 2010 reclassification was valid. *Demarest v. Town of Underhill*, 2013 VT 72, ¶28, 195 Vt. 204, 216.

In 2015, the Vermont Supreme Court affirmed the dismissal as moot of a suit brought by Demarest to compel the Town of Underhill to restore, repair and

maintain Crane Brook Trail.[5] The Vermont Supreme Court concluded that the Town had no duty to maintain a legal trail under Vermont law[6] and specifically rejected Demarest's argument that the Town was required to provide Demarest with "a more 'convenient' route" of vehicle access along Crane Brook Trail.[7]

In 2016, the Vermont Supreme Court rejected Demarest's efforts to compel the Town to perform "repairs and maintenance to drainage, culverts, and the road surface" of Fuller Road. *Demarest v. Town of Underhill*, 2016 VT 10, ¶5, ¶16, 201 Vt. 185, 187, 192. The Court held:

> Although the Town's road policy establishes less town responsibility for Class 4 highway repair and maintenance than appellees desire, or even than the Commissioners' recommend, it is fully consistent with the discretion accorded by § 310(b). Both appellees and the Commissioners are bound to respect the Town's discretion, and cannot "trump the selectboard's decision through their own view of what the public good requires." *Id.* at 622, 795 A.2d at 1269.

Demarest v. Town of Underhill, 2016 VT 10, ¶16, 201 Vt. 185, 192 (citing *Town of Calais*, 173 Vt. at 622, 795 A.2d at 1269-1270). The Court also specifically held that Demarest had failed to provide "evidence of an arbitrary or discriminatory

---

[5] *In re Town Highway 26*, 2015 Vt. Unpub. LEXIS 87, *5, 199 Vt. 648, 114 A.3d 505, 2015 WL 2383677 (Vt. 2015).

[6] *Id*. at *9 ("The ultimate fact remains, as explained by the trial court, that the disputed segment of TH 26 is a trail, and the town has no legal obligation to maintain a trail.").

[7] *Id*. at *11.

purpose in the implementation of the Town's policy concerning Class 4 highways." *Demarest v. Town of Underhill*, 2016 VT 10, ¶14, 201 Vt. 185, 191.

In 2021, the Vermont Supreme Court affirmed the 2016 denial of Demarest's subdivision preliminary access permit and rejected Demarest's request for a declaration that Demarest had a right of vehicle access over Crane Brook Trail; the Vermont Supreme Court held Demarest's declaratory judgment claims were barred by claim preclusion and affirmed the permit denial because the Town acted "well within its discretion" to bar vehicle access along Crane Brook Trail. *Demarest v. Town of Underhill*, 2021 VT 14, ¶20, ¶30, 214 Vt. 250, 260.

This Brief adds nothing further here to the factual summaries provided by the district court and Demarest because those summaries properly show that the present action arises from a long-standing dispute between Demarest and the Town of Underhill, in which Demarest has sought relentlessly, but unsuccessfully, to claim a right of vehicular access over Crane Brook Trail and to challenge the Town's maintenance decisions with respect to both Fuller Road and Crane Brook Trail. The Argument that follows will supplement the district court and Demarest's summaries as necessary. The next section recounts some procedural history that is essential to resolution of this appeal.

Statement of the Case: Procedural History

Procedurally, this is Mr. Demarest's second time before this Court in this

matter.

Demarest first appealed to this Court when the district court dismissed *with prejudice* Counts 1–6 and 8–12 of the [First] Amended Complaint[8] on the ground that those Counts and claims were precluded under Vermont law and/or were barred by applicable statutes of limitation. Doc. 63 at 31–32.[9] With respect to Demarest's First Amendment claims, the district court determined that the allegations in the [First] Amended Complaint were conclusory and legally insufficient to state a claim. Doc. 63 at 28–30.[10] Nonetheless, the district court held that Demarest "may petition the court for leave to amend" the First Amendment claims. Doc. 63 at 32.[11]

Noting that it "must apply Vermont claim preclusion law to Vermont state court judgments," *Demarest v. Town of Underhill*, 2022 U.S. App. LEXIS 33638,

---

[8] For purposes of clarity, this Brief will reference Demarest's Amended Complaint, Doc. 46, as the "[First] Amended Complaint" to distinguish it from Demarest's Second Amended Complaint, which appears in the Appendix at A-18 through A-64.

[9] The district court's opinion is reported in electronic databases as *Demarest v. Town of Underhill*, 2022 U.S. Dist. LEXIS 56635, 2022 WL 911146 (D. Vt. March 29, 2022). The cite in the text appears at 2022 U.S. Dist. LEXIS 56635, *3.

[10] *Demarest v. Town of Underhill*, 2022 U.S. Dist. LEXIS 56635, *42-45, 2022 WL 911146.

[11] *Demarest v. Town of Underhill*, 2022 U.S. Dist. LEXIS 56635, *48, 2022 WL 911146.

*2, 2022 WL 17481817 (2d Cir. 2022), this Court affirmed the district court's dismissal of the [First] Amended Complaint, holding that Demarest's claims were precluded under Vermont law, time-barred by applicable statutes of limitations, and/or failed to state a claim upon which relief could be granted. *Id*. at *4-5. With respect to Demarest's First Amendment claims, this Court stated:

> To the extent Demarest's First Amendment claims would survive both the time bar and the application of claim preclusion, we conclude that Demarest has otherwise failed to state a claim upon which relief could be granted. Even with the requisite liberal construction afforded to the pleadings and filings of pro se litigants, the relevant non-conclusory allegations of the amended complaint do not establish a plausible First Amendment claim.

Id. at *4 (internal citations omitted).

Demarest, through counsel, appealed this Court's 2022 ruling to the United States Supreme Court via a petition for certiorari filed by counsel, and the Supreme Court denied the petition. *Demarest v. Town of Underhill*, No. 22-1098, 143 S. Ct. 2643 (June 20, 2023).

For over a year after the Supreme Court denied certiorari, Demarest took no action to prosecute his claims. On July 19, 2023, the district court issued an Order to Show Cause why Demarest's action should not be dismissed for "lack of prosecution." Doc. 71. In response, Demarest filed a Motion to Amend, attaching his proposed Second Amended Complaint. *See* A-16 through A-64. The Municipal Defendants opposed Demarest's motion for leave to amend. Doc. 78.

In considering Demarest's amended claims, the district court observed that Demarest continued to allege harms involving "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. The district court explained that, when one considers Demarest's "timely allegations," they do not "support a plausible cause of action under either the First or Fourteenth Amendments." A-80.

The district court also rejected Demarest's argument that his claims could survive dismissal under a continuing harm theory. A-79 through A-81. The district court concluded that Demarest's "efforts to tie [recent] allegations to earlier, time-barred claims do not convert those discrete acts into ones that are actionable." A-80.

The district court held that Demarest's First Amendment claims failed because Demarest "does not allege that he has been effectively silenced or that his speech has been chilled." A-74. The district court also concluded that Demarest had not shown "some other form of concrete harm" that would support the claims, reasoning that the harms Demarest had identified arose from the discontinuance of TH-26, and that such claims would be "barred as claim precluded, untimely, or both." A-75.

The district court dismissed Demarest's equal protection claims, rejecting

Demarest's argument, expressly advanced in his Motion for Leave to Amend,[12] that he had successfully stated a "class-of-one claim" under *Olech*, concluding:

> many of the allegedly-discriminatory acts took place more than a decade ago, concern actions that either were or could have been challenged in the prior state court proceedings, and offer no support for either a plausible discrimination claim against the individual Defendants or a *Monell* claim against the Town.

A-79.

Demarest appealed the district court's second dismissal to this Court. Doc. 82.

In his current appeal, Demarest explains that the "crux" of his argument on appeal is that the district court failed to understand that the allegations in the Second Amended Complaint did not arise solely from the reclassification of TH 26 to a legal trail. DktEntry 36.1 at 13. Demarest argues that the district court overlooked

> more recent allegations, which when accepted as true and drawing all reasonable inferences from those allegations in Demarest's favor, state viable First Amendment retaliation and Equal Protection claims that would survive a motion to dismiss.

DktEntry 36.1 at 14. Specifically, Demarest argues that the district court failed to recognize that the Second Amended Complaint alleges sufficient "concrete harm"

---

[12] *See* Doc. 79 at 6-7 (arguing that Demarest has stated an equal protection claim under "*Village of Willowbrook v. Olech*, 528 U.S. 562 (2000)").

to support a First Amendment retaliation claims, *id*. at 15–16, and that the allegations would support a "different kind of Equal Protection Claim," *id*. at 16, namely, a *LeClair* equal protection claim recognized by this Court in *Hu v. City of New York*, 927 F.3d 81 (2d Cir. 2019), *id*. at 26.

The following Argument demonstrates that the district court properly dismissed Demarest's Second Amended Complaint.

Standard of Review

This Court will "review de novo the denial of leave to amend based on futility, applying the same standard used to evaluate a dismissal under Rule 12(b)(6)." *Dasler v. Washburn*, 2024 U.S. App. LEXIS 10050, *2, 2024 WL 1787123 (2d Cir. 2024) (citing *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014)). Accordingly, this Court will accept as true all the plaintiff's factual allegations, drawing reasonable inferences in the plaintiff's favor. *Teichmann v. New York*, 769 F.3d 821, 825 (2d Cir. 2014). In addition, a court may consider those matters of which judicial notice may be taken, including documents and decisions filed in prior litigation, which are particularly important in the *res judicata* context, where the court must consider what claims were possible in the prior litigation. *E.g.*, *Simmons v. Trans Express Inc.*, 16 F.4th 357, 360 (2d Cir. 2021); *Dixon v. Blanckensee*, 994 F.3d 95, 103 (2d Cir. 2021); *Williams v. N.Y. City Hous. Auth.*, 816 Fed. Appx. 532, 534 (2d Cir. 2020).

To avoid dismissal, the complaint must allege "enough facts to state a claim to relief that is plausible on its face" and those allegations must "nudge" the plaintiff's claims "across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, (2007). Further,

> the tenet that a court must accept as true all the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). This Court "may affirm on any basis supported by the record." *Brock v. Zuckerberg*, 2022 U.S. App. LEXIS 11368, *2, 2022 WL 1231044 (2d Cir. 2022) (citing *Coulter v. Morgan Stanley & Co.*, 753 F.3d 361, 366 (2d Cir. 2014)).

This Court will "review a pro se complaint with 'special solicitude,' interpreting it 'to raise the strongest claims that it suggests.'" *Marvin v. Peldunas*, 2022 U.S. App. LEXIS 16345, *2, 2022 WL 2125851 (2d Cir. 2022) (quoting *Hill v. Curcione*, 657 F.3d 116, 122 (2d Cir. 2011)). However, even with this solicitude, a *pro se* complaint must nonetheless "state a plausible claim for relief." *Brock, supra*, at *2-3. Furthermore, when 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. *Tracy v. Freshwater*, 623 F.3d 90, 102 (2d Cir. 2010) (discussing level of solicitude due a *pro se* plaintiff and citing *Davidson v. Flynn*, 32 F.3d 27, 31 (2d Cir. 1994)).

Given this standard of review, this appeal narrows 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 is no.

Argument

The summary of the Municipal Defendants' Argument is straightforward: Demarest cannot rely on untimely allegations and claim-precluded claims to state a claim in his Second Amended Complaint. When the untimely allegations and the precluded claims are excluded from consideration, Demarest fails to state a plausible First Amendment retaliation claim or a *LeClair* equal protection claim. Accordingly, the Municipal Defendants respectfully request this Court affirm the district court's dismissal of Demarest's Second Amended Complaint.

I. Demarest cannot rely on untimely factual allegations or precluded claims to state the claims asserted in his Second Amended Complaint.

In its opinion, the district court noted that, based on the prior state and federal rulings in this case, "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. The district court relied on this reasoning to exclude recognition of Demarest's time-barred allegations and precluded claims, and analyzed Demarest's amended claims only in light of Demarest's "timely allegations." A-75, A-79. The

district court's ultimate conclusion was that the timely allegations were insufficient to state a claim, be it a First Amendment retaliation claim or an equal protection claim.

The district court also held that Demarest could not rely on the continuing violation doctrine to avoid applicable statutes of limitations because

> The doctrine applies "not to discrete unlawful acts ... but to claims that by their nature accrue only after the plaintiff has been subjected to some threshold amount of mistreatment."

A-79-A-81 (citing *Gonzalez v. Hasty*, 802 F.3d 212, 220 (2d Cir. 2015)). Accordingly, the district court concluded, Demarest cannot "tie" his "timely allegations" to "earlier, time-barred claims" to "convert those discrete acts into ones that are actionable." *Id*. at 80. The district court's continuing violation holding is correct.

Demarest does *not* contest the Court's ruling on either of these issues. Demarest's Brief does not argue that claim preclusion or a statute of limitations should *not* apply to Demarest's claims and does not argue that the continuing violation doctrine *should*. 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 and cannot avoid the applicable statute of limitations by relying on the continuing violation doctrine.

A litigant—*pro se* or represented—who fails to address an issue in his

principal brief is deemed to have waived or abandoned the issue and this Court may affirm the district court's ruling on that basis.[13]

II. Demarest cannot use *Gagliardi* and *Dougherty* to avoid the three-year statute of limitations that applies in this case.

This Court has already held that a three-year statute of limitations applies to Demarest's claims. *Demarest v. Town of Underhill*, 2022 U.S. App. LEXIS 33638, *3, 2022 WL 17481817 (2d Cir. 2022). As discussed above, the district court properly held that the continuing violation doctrine does not apply to Demarest's claims. Accordingly, the claims asserted in Demarest's Second Amended Complaint may only be based on events that occurred within three years of the

---

[13] *E.g., Demarest v. Town of Underhill*, 2022 U.S. App. LEXIS 33638, *3 n.4, 2022 WL 17481817 (2d Cir. 2022) ("Demarest does not challenge the district court's determination that the individual Municipal Defendants were in privity with the Town of Underhill, which was the opposing party in his earlier state actions. He has therefore abandoned any argument to the contrary.") (citing *Nick's Garage, Inc. v. Progressive Cas. Ins. Co.*, 875 F.3d 107, 122 n.11 (2d Cir. 2017)); *Green v. Dep't of Educ. of N.Y.*, 16 F.4th 1070, 1074 (2d Cir. 2021) (holding that even "a pro se litigant abandons an issue by failing to address it in the appellate brief"); *Chepilko v. City of New York*, 847 Fed. Appx. 94, 95 (2d Cir. 2021) ("Chepilko fails to address the district court's bases for its decisions. We thus conclude that he has waived any challenge to these decisions.") (citing *Terry v. Inc. Village of Patchogue*, 826 F.3d 631, 632-33 (2d Cir. 2016)); *Losacco v. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir. 1995) ("[Appellant] did not raise this issue in his appellate brief. Consequently, he has abandoned it."); *Gerstenbluth v. Credit Suisse Sec. (USA) LLC*, 728 F.3d 139, 142 (2d Cir. 2013) ("[Appellant] does not mention the substance of the District Court's ruling for [the defendant] in his brief on appeal except obliquely and in passing. Accordingly . . . . we find that he has waived any challenge to this aspect of the District Court's judgment.").

filing of his Complaint (i.e., after June 21, 2018). Consistent with this reasoning, the district court declined to consider Demarest's time-barred allegations while reviewing Demarest's claims and determined that Demarest's timely allegations were insufficient by themselves to state a plausible claim. A-75.

Demarest's Brief does not confront this problem head-on. Rather, he comes at it indirectly during his argument regarding the First Amendment retaliation claims. In that argument, Demarest cites *Gagliardi v. Village of Pawling*, 18 F.3d 188 (2d Cir. 1994) for the following proposition:

> "[w]hile a bald and uncorroborated allegation of retaliation might prove inadequate to withstand a motion to dismiss, it is sufficient to allege facts from which a retaliatory intent on the part of the defendants may be inferred."

DktEntry 36.1 at 20–21 (citing *Gagliardi*, 18 F.3d at 195 (citations omitted)). Demarest then argues that his present claims should survive dismissal because he

> sets forth an entire chronology of events spanning a period of over a decade displaying a general pattern of egregious treatment by the Town and Municipal Defendants.

DktEntry 36.1 at 24 (citing *Dougherty v. Town of North Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 92 (2d Cir. 2002)).

Gagliardi and *Dougherty* do not help Demarest avoid statutes of limitations and claim preclusion in this case and do not establish that Demarest may rely on untimely allegations.

Neither *Gagliardi* nor *Dougherty* involved claim preclusion or statutes of

limitations. The defendants in those cases did not argue that the plaintiff's claims should be dismissed on statute of limitations or claim preclusion grounds, and neither court discussed those issues in reaching its decision. Indeed, the defendants in those cases would have been hard pressed to make such arguments because, in both cases, the plaintiffs had *successfully* challenged prior municipal actions to New York state courts within the limitations period and were alleging, in part, that the municipalities had not complied with the state court decisions the plaintiffs had secured.[14]

Here, Demarest lost in all of his state court efforts to challenge the Town of Underhill's road classification, maintenance, and repair decisions over the last 15 years. Moreover, both Vermont state courts and federal courts have ruled that Demarest's allegations arising from these events are time-barred and that the resulting claims are claim precluded. This Court has repeatedly affirmed dismissal

---

[14] In *Gagliardi*, the plaintiffs successfully challenged the issuance of a 1987 building permit and won a New York state court annulment of the building permit; in their 1990 complaint, the plaintiffs alleged that the defendants failed to comply with the 1987 state court order. *Gagliardi*, 18 F.3d at 190. In *Dougherty*, the plaintiff successfully challenged a Board of Zoning appeals 1996 permit denial to New York courts, which held there was no rational basis for the Board's denial. *Dougherty*, 282 F.3d at 86. In 1999, the Board, on remand from the New York Court of Appeals, again denied Demarest's permit, and plaintiff filed a federal court action. *Dougherty*, 282 F.3d at 87. Notably, these allegations that the relevant municipality had defied a state court order would have fallen within the applicable three-year statute of limitations in both cases.

of claims (including First Amendment retaliation claims) when they were brought outside the applicable statute of limitations and the continuing violation doctrine did not apply. *E.g.*, *Smith v. New York City Dep't of Educ.*, 524 Fed. Appx. 730, 732 (2d Cir. 2013) (summary order); *Deters v. City of Poughkeepsie*, 150 Fed. Appx. 10, 12 (2d Cir. 2005) (summary order); *Crosland v. Safir*, 54 Fed. Appx. 504, 505 (2d Cir. 2002) (summary order); *Smith v. City of New York*, 664 Fed. Appx. 45, 46-47 (2d Cir. 2016) (summary order).

As already noted above, Demarest does not contest the district court's holding that the continuing violation doctrine does not apply. *Gagliardi* and *Dougherty*—to the extent they were offered for this purpose—do not establish that Demarest may avoid the applicable statute of limitations and do not establish that Demarest may rely on allegations of conduct occurring before June 21, 2018. Accordingly, as the district court correctly held, Demarest cannot rely on untimely factual allegations to support his claims and cannot tie his new allegations "to earlier, time-barred claims [to] convert those discrete acts into ones that are actionable." A-80 (citing *Gonzalez*, 802 F.3d at 222).

Because the district court correctly held Demarest cannot rely on precluded claims or time-barred allegations and Demarest has not demonstrated that he is entitled to do so, this Court should not consider *any* claim or allegation that is subject to claim preclusion or falls outside of the statute of limitations applicable to

this case.

If one sets aside Demarest's untimely allegations and precluded claims, it becomes clear that Demarest has few allegations to rely on and his First Amendment retaliation and *LeClair* equal protection claims cannot survive dismissal.

III. The factual allegations that Demarest offers in support of his claims are grounded in time-barred allegations and claim-precluded claims regarding the Town's reclassification of a portion of TH-26 into Crane Brook Trail and the Town's maintenance and repair decisions with respect to Crane Brook Trail and Fuller Road.

In support of his First Amendment retaliation and equal protection claims, Demarest offers the following allegations of Town conduct:

(A) An ongoing refusal by the Town, from 2009 forward, to fix a "failed culvert on TH-26."[15]

(B) An ongoing refusal by the Town, from 2009 forward, to provide "any maintenance to any portion of [Demarest's] limited remaining Class IV frontage."[16]

(C) The Selectboard's 2020 refusal to add Demarest's advisory articles to the Annual Town Meeting vote, as requested in Demarest's

---

[15] *See* DktEntry 36.1 at 20 (offering "failed culvert" allegation in support of First Amendment claims and citing A-40 at ¶87; A-50 at ¶134); *id.* at 29 (citing offering "broken culvert" allegations in support of equal protection claims and citing A-37 at ¶80).

[16] *See id*. at 22 (offering maintenance allegations in support of First Amendment claims and citing A-48–A-49 at ¶127); *id*. at 30 (offering maintenance and repair allegations in support of equal protection claims and citing A-48–A-49 at ¶127).

voter-supported Petition on Public Accountability.[17]

With respect to Demarest's First Amendment retaliation claims, Demarest also offers the following allegations of Town conduct:

> (D) A November 19, 2019 incident in which the Town is alleged to have broken a "written promise" by placing boulders in Demarest's "right of way," requiring Demarest to remove the boulders himself.[18]
>
> (E) A June 2019 incident in which factual errors noted by Demarest in a matrix prepared by Rick Heh allegedly went uncorrected.[19]

Finally, with respect to his *LeClair* equal protection claims, Demarest offers the following allegation of Town Conduct:

> (F) In 2016, the Town refused to grant Demarest a subdivision preliminary access permit that would have allowed Demarest to access his property by vehicle via Crane Brook Trail.[20]

Before turning to analysis of these factual allegations, it should be noted that *none* of these allegations are newly asserted in the Second Amended Complaint. The [First] Amended Complaint contained the same allegations as in the Second

---

[17] *See* DktEntry 36.1 at 22 (offering Petition allegation in support of First Amendment claims and citing A-56 at ¶159); *id*. at 30 (offering Petition allegation in support of equal protection claim and citing A-56 at ¶159).

[18] *See id.* at 20 (offering boulder incident in support of First Amendment retaliation claim and citing A-45 at ¶113).

[19] *See id.* at 22 (offering matrix incident in support of First Amendment claim and citing A-49 at ¶128).

[20] *See, e.g.*, DktEntry 36.1 at 8, 11, 30–31 (offering allegation of 2016 permit denial in support of equal protection claim).

Amended Complaint regarding the culvert,[21] the Class 4 maintenance, [22] the Town's handling of Demarest's voter-supported Petition on Public Accountability,[23] the boulders,[24] the matrix,[25] and the alleged unequal treatment concerning subdivision access permits.[26]

---

[21] *Compare* Amended Complaint, Doc. 46, at ¶57, ¶65, ¶190, and ¶269 (alleging that the Town refused to pursue a $1,600 grant to repair a "failed culvert" on the Class 4 road adjoining Demarest's property) with A-24, A-25 at ¶38, at ¶36 (alleging same).

[22] *Compare* Amended Complaint, Doc. 46, at ¶141, ¶168, ¶171 and at Request for Relief, ¶B (alleging that Town failed to provide "any maintenance" of the Class 4 portions of TH-26) with Second Amendment Complaint at ¶110, ¶127, ¶158 (retaining original allegations).

[23] *Compare* Amended Complaint, Doc 46, at ¶241, ¶280 (alleging that named defendants "unanimously refused to abide by the demands of the 2020 Petition on Public Accountability") with A-56 at ¶159 (alleging that named defendant "circumvented [Plaintiff's Petition on Public Accountability] despite being properly filed with the support of over 5% of Underhill's voters").

[24] *Compare* Amended Complaint, Doc 46, at ¶57, ¶153, ¶194 (alleging that the Town intermittently placed boulders "in the way of Plaintiff's access" on Crane Brook Trail, including incidents as early as 2005 and on November 13, 2019) with Second Amended Complaint at ¶6, ¶113 (retaining original allegations).

[25] *Compare* Amended Complaint, Doc. 46, at ¶172 (alleging that Town refused to correct factual errors in matrix presented by Rick Heh) with A-49 at ¶128 (alleging same).

[26] *Compare* Amended Complaint, Doc. 46, at ¶84, ¶230, and ¶233 (alleging that the subdivision process for Gibson and Albertini was "dramatically easier", "effortless", and "streamlined" compared to Demarest's process) *with* A-25 ¶58, A-38 at ¶84, and A-57 at ¶160, ¶163 (alleging that the subdivision process for Gibson and Albertini was implemented for "their benefit" and was "dramatically easier", "dramatically quick", and "streamlined" compared to Demarest's

Moreover, in 2021, while litigating the Town's motion to dismiss the [First] Amended Complaint, Demarest (unsuccessfully) relied on the very same allegations in an effort to avoid dismissal of his claims before the district court.[27] In short, the arguments that Demarest makes now on appeal are based on allegations already present in Demarest's First Amended Complaint and are arguments that could and should have been made in 2021 when Demarest opposed dismissal of the Town's Motion to Dismiss the Amended Complaint.

In any event, close examination of the six primary factual allegations offers in support of Demarest's "amended" claims demonstrates that the allegations 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.

---

process).

[27] *See* Doc. 55 at 3 (arguing that the defendants "refus[ed] to replace bridges and culverts"), 20 (arguing that the Town of Underhill "refused to move the boulders which were sporadically placed in the way of Plaintiff's southerly access route on the current and former TH-26 corridor" on November 13, 2019), 23 (arguing that "Extreme levels of arbitrary and capricious municipal road maintenance decisions which result in an alteration of the usability of a town highway are likewise entirely discretionary."); 17 (arguing that the Selectboard refused to allow a vote on Demarest's 2020 petition while "entertain[ing] requests made by the right person or clique of people.").

A. Demarest's "culvert" allegations arise from the reclassification and road maintenance disputes already litigated in Vermont courts.

According to the argument in Demarest's Brief, the "failed culvert" 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. This is confirmed by the allegations in the amended pleading. The Second Amended Complaint describes the "failed culvert" as being located along "Demarest's prior road frontage." A-36 at ¶76. The Second Amended Complaint also repeatedly refers to the "failed culvert" as being located on the "central section" of TH-26", i.e., Crane Brook Trail. A-37 at ¶80; Figure 1. The Second Amended Complaint also alleges that if the "failed culvert" were replaced, it would keep "the [TH-26] corridor usable by all . . . between Pleasant Valley Road and Irish Settlement Road," which is, in fact, the entire length of the New Road/Crane Brook Trail/Fuller Road corridor. A-36 at ¶78. The Second Amended Complaint also indicates that the "failed culvert" issue began sometime before 2009.[28] These allegations make clear that Demarest's "failed culvert" allegation arises from his efforts to force the Town to repair Crane Brook Trail in

[28] A-25 at ¶38 (alleging that in response to his request that the Town apply for a grant to repair the "failed culvert," the Town instead asked counsel via letter dated October 9, 2009 about ways to "rescind" Demarest's vehicle access along Crane Brook Trail).

general and to repair the "failed culvert" in particular so Demarest could maintain his vehicle access along the legal trail.[29] This dispute reached a judicial resolution in 2016, when the Vermont Supreme Court held that the Town has no legal obligation to maintain or repair Crane Brook Trail *at all*. *In re Town Highway 26*, 2015 Vt. Unpub. LEXIS 87, *9, 199 Vt. 648, 114 A.3d 505, 2015 WL 2383677 (Vt. 2015). Accordingly, Demarest cannot state *any* claim based on a failure to replace a culvert located on Crane Brook Trail because, in addition to being based on events that took place in the 2000s, the issue has already been litigated to a judicial resolution which holds that the Town has no legal obligation to do so.

To the extent Demarest intends to argue that the Town "continues" to refuse to replace the failed culvert, DktEntry 36.1 at 8–9 (citing A-40 at ¶87), there are no nonconclusory factual allegations in the Second Amended Complaint supporting such a claim, and Demarest has cited no legal basis on which the Town would have

---

[29] *See* A-37 at ¶80 (alleging that "the failed culvert on the central section of TH-26 abutting Plaintiff's property has created both access problems and environmental problems where neither previously existed); A-40 at ¶87 (referencing replacement of "a culvert on Plaintiff's TH-26 road/trail frontage"); *see also, e.g.*, A-37 at ¶79 (alleging that the Town's decision "to stop maintaining any segment of TH-26 between Pleasant Valley Road and Irish Settlement Road"—i.e., Crane Brook Trail—was unjustified.); A-44 at ¶108 (alleging that when he purchased his property "in 2002, it was possible for a standard two-wheel drive car to drive the vast majority of TH-26 so long as the driver proceeded with caution and the entire road was easily driven in a standard pickup truck all the way from Pleasant Valley Road to Irish Settlement Road.").

a legal obligation to replace or repair a culvert on Crane Brook Trail.[30]

Accordingly, the Municipal Defendants respectfully request this Court decline to consider the "failed culvert" allegations in determining whether Demarest has stated plausible claims.

B. Demarest's Class 4 maintenance and repair allegations arise from the reclassification and road maintenance disputes already litigated in Vermont courts.

Demarest's Class 4 road maintenance and repair allegations should also be set aside because they are time-barred, claim-precluded, conclusory, and fail to state a claim upon which relief could be granted. Most of the allegations in the Second Amended Complaint regarding Class 4 highway maintenance refer to Demarest's contention that the Town of Underhill improperly stopped maintaining the Class 4 portion of TH-26 *prior* to 2010 and then reclassified the disputed

---

[30] Demarest could not have intended to allege that the "failed culvert" was located on Fuller Road, abutting his property, because Demarest argues that he continues to have highway access to his property over Fuller Road. *See* DktEntry 36.1 at 6 and 30 (acknowledging that Demarest has "highway access" to his property over Fuller Road). Moreover, such a claim is not alleged in the Second Amended Complaint and is not argued in Demarest's Brief. However, even if it had been adequately alleged and argued, such a claim would be claim precluded because the Vermont Supreme Court has already heard a challenge from Plaintiff regarding the Town's maintenance decisions with respect to Fuller Road and the Court has held that the Town's maintenance decisions have been "fully consistent with the discretion accorded by § 310(b)." *Demarest v. Town of Underhill*, 2016 VT 10, ¶16, 201 Vt. 185, 192.

central segment into a legal trail in 2010, thereby creating access problems for vehicles along the legal trail.[31] Obviously, any maintenance allegation premised on these events would fail to state a claim for the reasons already discussed above. The reclassification of Crane Brook Trail occurred in 2010, and Demarest's arguments regarding a maintenance obligation for Crane Brook Trail have been conclusively resolved, and, as just discussed, Demarest has no right to demand that the Town repair, restore, or maintain Crane Brook Trail.

Furthermore, as mentioned above, Demarest has already sought to compel the Town of Underhill to maintain the Class 4 portion of Fuller Road that abuts Demarest's property, and the Vermont Supreme Court has rejected those efforts, holding that the Town's maintenance of Fuller Road[32]—including maintenance

---

[31] *See, e.g.*, A-19 at ¶4 and A-25 at ¶38 (alleging that when Demarest purchased his property, the existing roadway from his driveway to the south was Class 3 and Class 4 the entire stretch, with the dividing line located at the point marked "Shera's property" in Figure 1); A-38 at ¶75 (alleging that named defendants knew that TH-26 was a "Class III / Class IV Town Highway connecting Irish Settlement Road to the North with Pleasant Valley Road to the South until the 2010 New Road reclassification."); A-37 at ¶79 (alleging there was no "compelling justification" for the Town "to stop maintaining any segment of TH-26 between Pleasant Valley Road and Irish Settlement Road"); A-37 at ¶80 (alleging that Town's refusal to repair "the failed culvert on the central section of TH-26 abutting Plaintiff's property has created both access problems and environmental problems where neither previously existed").

[32] *See Demarest v. Town of Underhill*, 2016 VT 10, ¶1 n.1, 201 Vt. 185, 186 (noting that the segment under discussion was "Fuller Road").

performed since the 2010 reclassification[33]—"was not arbitrary or applied in a discriminatory fashion"[34] and was "fully consistent with the discretion accorded [the Town] by § 310(b)."[35] Accordingly, whatever allegations Demarest might have with respect to the maintenance of Fuller Road prior to June 21, 2018 are subject to both the applicable three-year statute of limitations and/or claim preclusion.

The one allegation specifically referencing current maintenance of Fuller Road is entirely conclusory:

> Plaintiff asserts the Town of Underhill has 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 before this court.

A-48–A-49 at ¶127. This allegation cites no specific conduct by the Town or the named defendants and is entirely conclusory. Moreover, there is no basis for concluding that the allegation involves conduct that would lie outside the scope of the Town's broad discretion with respect to the maintenance of a Class 4 highway under Vermont law, as already affirmed by the Vermont Supreme Court. Nor is

---

[33] *See Demarest v. Town of Underhill*, 2016 VT 10, ¶4, 201 Vt. 185, 187 (noting maintenance performed on Fuller Road in 2013).

[34] *Demarest v. Town of Underhill*, 2016 VT 10, ¶14, 201 Vt. 185, 191.

[35] *Demarest v. Town of Underhill*, 2016 VT 10, ¶16, 201 Vt. 185, 192.

there any indication from this conclusory allegation that the alleged failure to maintain Fuller Road has resulted in a violation of the Town's legal duties or otherwise caused Demarest any actionable harm.

Accordingly, the Municipal Defendants respectfully request that this Court decline to consider Demarest's maintenance and repair allegations while considering the viability of Demarest's amended claims.

C. Demarest's allegations regarding his Petition on Public Accountability have already been considered and resolved by this Court.

In his Brief, Demarest argues that his equal protection claim is supported by the Town's handling of Demarest's voter-supported Petition on Public Accountability because the Town disregarded Demarest's request to submit advisory articles to the voters but allowed a conflict of interest complaint against Peter Duval submitted by Jim BeebeWoodard to proceed to a quasi-judicial hearing. *See* DktEntry 36.1 at 31–32 (citing A-56 at ¶159 and arguing that Town disregarded Demarest's voter-supported Petition while allowing the Beebe Complaint to proceed to a quasi-judicial hearing). Demarest also alleges that the Town posted information regarding Beebe's complaint on the Town's website, while not posting information regarding Demarest's voter-supported petition. *See* DktEntry 36.1 at 12.

The district court and this Court have already considered Demarest's

objections to the Town's handling of Demarest's voter-supported Petition on Public Accountability. The district court concluded that the Town's refusal to add Demarest's advisory articles to the annual Town Meeting did "not offend the Constitution" and could not support a First Amendment claim. Doc. 63 at 30.[36] The district court also held that Demarest had no cognizable constitutional claim based on "the Town's handling of its public records" because "the 'inaccuracy of records compiled or maintained by the government is not, standing alone, sufficient to state a claim of constitutional injury.'" Doc. 63 at 29.[37] This Court affirmed those rulings. *Demarest v. Town of Underhill*, 2022 U.S. App. LEXIS 33638, *4-5, 2022 WL 17481817 (2d Cir. 2022). Unless Demarest can offer something additional to these allegations, they cannot support a First Amendment claim.[38]

D. Demarest's allegation that the Town broke a "written promise" by placing boulders in his "right of way" are time-barred and

---

[36] *Demarest v. Town of Underhill*, 2022 U.S. Dist. LEXIS 56635, *46, 2022 WL 911146.

[37] *Demarest v. Town of Underhill*, 2022 U.S. Dist. LEXIS 56635, *44, 2022 WL 911146.

[38] Demarest argues that the Town's handling of the Petition on Public Accountability should be compared with the Town's handling of the Beebe Complaint to state a *LeClair* equal protection claim. DktEntry 36.1 at 30. That argument is discussed *infra*.

claim-precluded because they arise from Demarest's efforts to retain vehicle access over Crane Brook Trail.

As the allegations in the Second Amended Complaint show, the November 19, 2019 boulder incident is grounded entirely in the TH-26 reclassification saga. Demarest alleges that, on November 19, 2019, the Town "broke its written promise to move boulders placed in the way of Plaintiff's right of way," requiring Demarest to move the boulders himself. DktEntry at 36.1 (citing A-45 at ¶113). The "boulders" that Demarest references in the allegation are boulders that blocked Demarest's access to Crane Brook Trail.[39] The "promise" Demarest references is a promise to allow "reasonable access" to his parcel, a promise alleged to have been made before Demarest purchased his property in 2002. A-18 at ¶¶2–3. The "promised reasonable access" Demarest alleges is the ability to leave his driveway on Fuller Road, turn south, and drive continuously with a vehicle, over Crane Brook Trail, over New Road, to the intersection of Pleasant Valley Road.[40] This "reasonable access" would save Demarest "driving 15-20 minutes out of the way and substantial personal time and expense on a regular basis." A-48 at ¶126. The Second Amended Complaint appears to indicate that the "written promise" was

---

[39] *See* A-19 at ¶6 (alleging that Town has refused to allow Demarest to maintain Crane Brook Trail at his own expense and "intermittently blocked" access to the trail with boulders).

[40] *See* A-36 at ¶78, A-37 at ¶79, A-41 at ¶95, A-44 at ¶108.

made in 2009, when the Town adopted the Underhill Trails Handbook. A-56 at ¶156.

This alleged "promise"—the ability to travel by car over Crane Brook Trail—has been at the heart of this litigation since the very beginning. The alleged broken promise is alleged to have been made in the 2000s, and since those times, the Town has taken many actions limiting Demarest's ability to access Crane Brook Trail with a vehicle, including reclassifying the trail, not maintaining the trail, and rejecting Demarest's 2016 request for vehicle access along the trail. Indeed, that string of actions and Demarest's efforts to invalidate them and gain vehicle access to Crane Brook Trail have been the primary drivers for Demarest's state and federal litigation to date. The Second Amended Complaint continues this 20-year campaign to acquire vehicle access over Crane Brook Trail by asking the court to "protect" Demarest from plans by the Underhill Conservation Committee and Underhill Recreation Committee "to install gates to block" Demarest's access to the legal trail. A-62 at ¶ F. If 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 19, 2018. Such a claim is both time-barred *and* claim precluded.

Moreover, as already mentioned multiple times, 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. Accordingly, the "boulder incident" cannot serve as retaliatory conduct in support of a First Amendment claim. As the district court noted, if the Town decided to block off access to Crane Brook Trail, by use of boulders or by gates, that discretionary control over vehicle access to the Trail would likely lie within the Town's discretion. A-75. Demarest offers no factual allegations or law to demonstrate the contrary.

Accordingly, the Municipal Defendants respectfully request that this Court decline to consider the boulder allegation while considering the viability of Demarest's claims.

E. Demarest's allegations regarding the June 2019 "matrix" incident has already been considered and resolved by this Court and, in any event, cannot support a First Amendment retaliation claim.

In support of his First Amendment retaliation claims, as evidence of "some other harm" Demarest has experienced,[41] Demarest offered the following allegation:

> In June of 2019, Rick Heh created a matrix of Class IV Road characteristics in an attempt to rationalize past and potential future Town of Underhill maintenance of Class IV roads and factual errors in this matrix are willfully prejudicial to Plaintiff since Plaintiff publicly made note of specific errors which have persisted over time.

---

[41] DktEntry 36.1 at 22 (citing A-49 at ¶128).

A-49 at ¶128. This allegation was presented in Demarest's [First] Amended Complaint and was retained unchanged in Demarest's Second Amended Complaint.[42]

In its ruling on the Town's Motion to Dismiss the [First] Amended Complaint, the district court rejected Demarest's inaccurate records theory. Doc. 63 at 29[43] ("the 'inaccuracy of records compiled or maintained by the government is not, standing alone, sufficient to state a claim of constitutional injury.'") (citing *Steuerwald v. Cleveland*, 2015 U.S. Dist. LEXIS 44246, 2015 WL 1481564, at *7 (D. Vt. 2015)). This Court affirmed the district court's ruling on this issue. *Demarest v. Town of Underhill*, 2022 U.S. App. LEXIS 33638, *4-5, 2022 WL 17481817 (2d Cir. 2022). Demarest's cursory argument on this allegation fails to provide any legal or factual basis for concluding that the allegation could constitute a constitutionally cognizable harm or otherwise support a First Amendment retaliation claim.

Accordingly, the Municipal Defendants respectfully request this Court

---

[42] *Compare* Amended Complaint, Doc. 46 at ¶172 (alleging that Town refused to correct factual errors in matrix presented by Rick Heh) with A-49 at ¶128 (alleging same).

[43] *Demarest v. Town of Underhill*, 2022 U.S. Dist. LEXIS 56635, *44, 2022 WL 911146.

decline to consider this allegation when considering the viability of Demarest's claims.

F. Demarest's allegations regarding the denial of Demarest's 2016 subdivision preliminary access permit are time-barred and claim-precluded.

Finally, Demarest attempts to use the 2016 denial of his subdivision preliminary access permit as evidence of an equal protection claim. This allegation is both time-barred and claim precluded. The denial occurred in 2016, well before the June 21, 2018 limitations date for Demarest's present claims. Moreover, Demarest litigated the validity of the permit denial in Vermont state court and lost. *Demarest, v. Town of Underhill*, 2021 VT 14, ¶30, 214 Vt. 250, 263 (affirming access permit denial); *see also* Doc. 63 at 20[44] (noting Vermont Supreme Court decision regarding permit denial and concluding "any cause of action asserted, or that could have been asserted, in any of the prior cases and included in this action is barred.")

Accordingly, the Municipal Defendants respectfully request this Court decline to consider this allegation when considering the viability of Demarest's equal protection claims.

IV. Demarest has failed to state a *plausible LeClair* equal protection claim.

---

[44] *Demarest v. Town of Underhill*, 2022 U.S. Dist. LEXIS 56635, *29-30, 2022 WL 911146.

The previous section demonstrated that most of the allegations offered in support of Demarest's present claims are time-barred or claim-precluded. Once the time-barred factual allegation and claim-precluded claims are set aside there is precious little left of the claims Demarest presents in his Brief.

Demarest argues that he can state a plausible claim under *LeClair v. Saunders*, 627 F.2d 606 (2d Cir. 1980) and its progeny.[45] DktEntry 36.1 at 28–29.

> To prove a *LeClair* Equal Protection claim, a plaintiff must establish that "(1) the person, compared with others similarly situated, was selectively treated," and "(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 . . . ."

Hu v. City of New York, 2023 U.S. App. LEXIS 12318, *3 (2d Cir. 2023) (quoting *Zahra v. Town of Southold*, 48 F.3d 674, 683 (2d Cir. 1995)). In stating a *LeClair* claim, a plaintiff must show that "she was similarly situated in all material respects to the individuals with whom she seeks to compare herself.'" *Hu*, 927 F.3d at 96 (citing *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000); *see also Hu v. City of New York*, 2023 U.S. App. LEXIS 12318, *3 (affirming dismissal of

---

[45] Demarest does not attempt to show he has stated an equal protection claim under *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The district court found that Demarest had failed to state an *Olech* claim, and Demarest does not challenge that holding here. DktEntry 36.1 at 28–29. Any Olech argument is therefore waived or abandoned.

LeClair claim because plaintiffs "offered no specific details . . . to establish that the pond was in a materially similar state on the two dates in question."). A plaintiff must also show that the comparators "have 'engaged in comparable conduct.'" *Stewart v. Naples*, 308 Fed. Appx. 526, 527 (2d Cir. 2009) (citing *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64 (2d Cir. 1997)).

Furthermore,

> A plaintiff cannot merely rest on a demonstration of different treatment from persons similarly situated. Instead, he must prove that the disparate treatment *was caused* by the impermissible motivation.

Hu, 927 F.3d at 91 (internal quotation marks and citations omitted) (emphasis added); *also Bizzarro v. Miranda*, 394 F.3d 82, 87 (2d Cir. 2005); *Zahra*, 48 F.3d at 684; *Le Clair*, 627 F.2d at 610-611.

Indeed, "but-for" causation is an essential requirement of any claim brought, as here, under 42 U.S.C. § 1983. *Naumovski v. Norris*, 934 F.3d 200, 213 (2d Cir. 2019); *Myers v. Doherty*, 2022 U.S. App. LEXIS 26982, *6, 2022 WL 4477050 (2d Cir. 2022); *see also Nieves v. Bartlett*, 587 U.S. 391, 398-399 (2019) (applying "but for" causation to First Amendment retaliation claim); *Hillary v. Murray*, 2023 U.S. App. LEXIS 15969, *5, 2023 WL 4169427 (2d Cir. 2023) (holding that *LeClair* claim failed because plaintiff "established no facts to suggest 'that the disparate treatment was caused by the impermissible motivation.'").

A. Demarest has not alleged any timely, plausible selective treatment.

In his Brief, Demarest identifies four specific instances in which he was "selectively treated," identifies individual comparators with which this selective treatment may be compared, and argues that these allegations suffice to state a *LeClair* Claim.[46] The four instances of selective treatment are (1) the Town's refusal to apply for a grant to replace the failed culvert; (2) the Town's refusal to maintain and repair Fuller Road (a Class 4 highway); (3) the Town's refusal to correct the factual errors allegedly in the matrix prepared by Rick Heh; and (4) the Town's disregard of Demarest's voter-supported Petition on Public Accountability. *See* DktEntry 36.1 at 22 (identifying four instances of selective treatment).

As already discussed in detail above, all of these allegations are 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. Accordingly, when these four instances are set aside, Demarest's *LeClair* equal protection claim would fail because Demarest has not identified any actionable "selective treatment" by the Town.

B. The proffered comparators differ from Demarest in material respects.

Even if one were to consider the proffered allegations as evidence of selective treatment, Demarest's *LeClair* claims would still fail because the

---

[46] DktEntry 36.1 at 29–32.

comparators with which Demarest compares himself are not similarly situated in all material respects. The district court rejected Demarest's equal protection claims in part because Demarest did not allege or explain how the proffered properties and rights of way were comparable to Demarest's property on Crane Brook Trail/Fuller Road, and the district court concluded:

> many of the allegedly-discriminatory acts took place more than a decade ago, concern actions that either were or could have been challenged in the prior state court proceedings, and offer no support for either a plausible discrimination claim against the individual Defendants or a *Monell* claim against the Town.

A-77 through A-79.

In addition to failing to provide specifics about the comparators sufficient to determine whether the comparators are substantially similar, the Second Amended Complaint provides allegations affirmatively demonstrating that the proffered comparators are *not* similarly situated in all material respects.

First, with regard to the "culvert" allegation, Demarest compares the Town's refusal to repair a culvert on Crane Brook Trail (which is a legal trail) with the Town's decision to improve New Road and Pleasant Valley Road (both of which are Class 3 highways). DktEntry 36.1 at 29. Second, Demarest compares the Town's maintenance of Fuller Road (a Class 4 highway) with the Town's decision to construct a school bus turnaround on Town property abutting New Road (which is a Class 3 highway). DktEntry 36.1 at 30. Third, Demarest compares his 2016

preliminary access permit (which sought access over Crane Brook Trail, a legal trail) with subdivision preliminary access permits for Dick Albertini for property located on Pleasant Valley Road (a Class 3 highway) and Marcy Gibson for property located on New Road (a Class 3 highway).[47]

All of these comparators differ markedly from Demarest in that the comparators owned property located on *Class 3* highways. In contrast, Demarest's property is located on a legal trail and a Class 4 highway. As has been mentioned many times above, under Vermont law, a Town has no obligation to restore, repair or maintain a legal trail and has broad discretion over what maintenance to perform on a Class 4 highway and may only provide "minimal maintenance" on such roads. However, the Town has an affirmative legal duty to ensure that Class 3 highways allow a pleasure vehicle to travel year-round. Given these differences, Demarest cannot establish the requisite degree of similarity.

Hu demonstrates the insufficiency of Demarest comparators. The *Hu* court emphasized that the *LeClair* claim that survived was a "close one" and that the

---

[47] The Second Amended Complaint does not identify when the Town is alleged to have acted in relation to the comparators' properties. There is therefore no way to determine how the compared conduct is temporally related to the Town's conduct with respect to Demarest or whether the compared conduct occurred after June 21, 2018—the limitations cut-off date for Demarest's claims. This kind of vagueness is one of the reasons why the district court rejected Demarest's comparators. A-76–A-79.

claim survived only "barely," even though the plaintiff alleged "differential treatment by the *same* defendant . . . for the *same* conduct . . . at the *same* jobsite." *Hu*, 927 F.3d at 97 (emphasis added). The bare sufficiency of the *Hu* claim was emphasized four years later, when this Court affirmed summary judgment for the *Hu* defendants because the plaintiff did not demonstrate that that the catch pond at issue was in a similar state during both of the inspector's visits and because the facts showed a key legal difference at work, namely, that "the [same] site could not have been penalized again [during the inspector's second visit, when no citation was issued] because the second visit occurred during the prescribed window of time in which violators are permitted to cure the condition." *Hu*, 2023 U.S. App. LEXIS 12318, *8. As in the 2023 *Hu* case, Demarest cannot allege the "same jobsite" because his comparators live on different classes of highways (i.e., different "ponds"), and he cannot allege the "same conduct" by the Town because the Town's maintenance and repair decisions with respect to the respective highways are governed by different legal standards.

Similarly, Demarest's comparison of subdivision preliminary access permits are not comparable because Demarest's 2016 access permit would have required approving vehicle travel along Crane Brook Trail—something the Vermont Supreme Court said the Town has discretion to deny—whereas the Albertini and Gibson access permits involved access over Class 3 highways—highways over

which the Town has a statutory duty to enable vehicle access. In connection with the school bus comparison, Demarest is attempting to compare repair and maintenance of a Class 4 highway to construction of a school bus turnaround on Town property abutting a Class 3 highway, two entirely different "ponds" altogether. All of these comparators fail because the locations, legal duties, and the substance of the Town decisions were materially different.

Demarest's fourth comparator is Jim Beebe-Woodard, who submitted a conflict-of-interest complaint against Peter Duval. Demarest alleges that the Town took the Beebe Complaint to a quasi-judicial hearing, while disregarding a voter-supported petition submitted by Demarest. DktEntry 36.1 at 31–32. Demarest's Petition on Public Accountability asked the Town "to have three non-binding articles properly warned and subsequently placed on the 2021 Town Meeting Day ballot." Doc. 63 at 3 n.3.[48] In contrast, the Beebe complaint was filed pursuant to the "Town's Conflict of Interest Policy, adopted on October 11, 2012," and the quasi-judicial hearing was held pursuant to that policy.[49] The two events are

---

[48] *Demarest v. Town of Underhill*, 2022 U.S. Dist. LEXIS 56635, *21 and n.3, 2022 WL 911146.

[49] Underhill Selectboard Meeting Minutes for September 21, 2020 at 6, publicly available at https://www.underhillvt.gov/media/4696. This Court may consider this document because Demarest incorporated the September 21, 2020 proceeding by reference in his Second Amended Complaint and relies on the quasi-judicial hearing as a basis for his asserted claims. *See* A-42 at ¶96 (relying on

materially different, in that Demarest's petition sought to have articles added to a public meeting that the Town had no legal obligation to add,[50] and the quasi-judicial hearing was held pursuant to a Conflict of Interest Policy that had no connection to articles to be warned and voted at an annual town meeting. The two events are not materially similar, and Demarest and Mr. Beebe were not similarly situated.

Demarest's *LeClair* equal protection claims must fail because Demarest has failed to identify a comparator who is similarly situated to Demarest in all material respects. Accordingly, the Municipal Defendants respectfully request this Court affirm the dismissal of Demarest's equal protection claims on this ground.

September 21, 2020 hearing). *E.g.*, *Simmons*, 16 F.4th at 360; *Dixon*, 994 F.3d at 103; *Williams*, 816 Fed. Appx. At 534.

[50] *See Demarest v. Town of Underhill*, 2022 U.S. Dist. LEXIS 56635, *45-47, 2022 WL 911146 (D. Vt. 2022) (holding that although Mr. Demarest had a right to submit petitions to the Town of Underhill, there is no constitutional requirement that "government policymakers have to listen or respond to individuals' communications on public issues"); *Demarest v. Town of Underhill*, 2022 U.S. App. LEXIS 33638, *4-5, 2022 WL 17481817 (2d Cir. 2022) (affirming district court's ruling and citing *Lawyers' Comm. for 9/11 Inquiry, Inc. v. Garland*, 43 F.4th 276, 284 (2d Cir. 2022) for the proposition "[T]he First Amendment 'does not impose any affirmative obligation on the government to listen [or] to respond' to a citizen's speech.").

C. Demarest fails to allege any facts demonstrating that the alleged selective treatment was caused by an intent to retaliate.

Finally, even if Demarest had provided the required timely allegations of selective treatment and even if Demarest had identified comparators who were similarly situated with Demarest in all material respects, Demarest's claims would still fail because Demarest has failed to provide *any* factual allegations demonstrating that "the disparate treatment was *caused by* the impermissible motivation." *Hu*, 927 F.3d at 91. Nor has Demarest provided any factual allegations that would demonstrate "but-for" causation, a requirement of a § 1983 claim. *Naumovski*, 934 F.3d at 213.

The allegations in the Second Amended Complaint regarding the intent and motivation of the named individuals and the Town of Underhill are entirely conclusory.[51] Moreover, although Demarest's Brief correctly states that a *LeClair* claimant must "prove that the disparate treatment was caused by the impermissible motivation," DktEntry 36.1 at 26, the Brief provides no argument at all regarding causation. *See* DktEntry 36.1 at 25–34 (not discussing causation). Instead, Demarest's argument focuses primarily on whether he can satisfy the "lower

[51] *See, e.g.*, A-19 at ¶8; A-22 at ¶30; A-28 at ¶50; A-23 at ¶89; A-31 at ¶60; A-43 at ¶101, ¶102; A-58 at ¶168 (stating only conclusory allegations regarding intent and motivation and providing no specific factual allegations).

similarity standard necessary for a *LeClair* Equal Protection claim." *Id*. at 32.

Hu is once again instructive in demonstrating the insufficiency of Demarest's *LeClair* claims. As the *Hu* court explained, *LeClair* plaintiffs have a reduced similarity burden because *LeClair*

> requires plaintiffs to not only demonstrate that they have been treated differently from another similarly situated comparator but that "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."

Hu, 927 F.3d at 95 (citing *Zahra*, 48 F.3d at 683). The *Hu* court only allowed one *LeClair* claim to continue, "albeit barely." *Hu*, 927 F.3d at 96. The specific claim that was allowed to proceed was the claim that

> [Chief Inspector] Burkart issued [Asian workers] a violation "for having a pool of water" on the 34th Avenue Jobsite. Later, Burkart returned to the location when white workers were performing work on the jobsite. Even though these white workers were also working next to a pool of water, Burkart did not issue them a notice of violation or otherwise interrupt their work. Instead, Burkart reserved "such negative treatment for Asian workers." *Id.* at A39 ¶202.

Hu, 927 F.3d at 96. Allegation of racial animus was deemed sufficient in *Hu* because the plaintiff alleged that the inspector "issued a violation for the pool of water when Asian workers were working at the 34th Avenue Jobsite, but declined to issue a violation for the same pool of water when white workers were working at the location." *Id*. at 98. The *same* inspector, at the *same* jobsite, making different decisions depending on the race of the workers who were present, was enough to

create the required inference of racial animus.

Demarest has not presented similar factual allegations here to demonstrate an intent to punish him. Instead, Demarest merely asserts that, because Demarest has repeatedly (but unsuccessfully) litigated the access and maintenance issues of TH-26, the Town as a municipal entity and the named defendants as individuals, *must* intend to punish him.[52] In *Ashcroft*, the U.S. Supreme Court rejected similar allegations as too conclusory to support a plausible claim. *Ashcroft*, 556 U.S. at 681 ("It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."). This Court should reach here the same conclusion as the U.S. Supreme Court reached in *Ashcroft*.

Having failed to provide *any* argument demonstrating that he has met the required causation element, Demarest may not attempt to revisit that issue in his Reply brief. *See, e.g., EDP Med. Computer Sys. v. United States*, 480 F.3d 621, 625 n.1 (2d Cir. 2007) (holding that where appellant's opening brief failed to "question the remaining elements of the district court's res judicata analysis," the appellant's failure to press those issues in its opening brief waives them."); *Tardif*

---

[52] *See, e.g.*, A-5 at ¶30, A-31 at ¶60, A-43 at ¶101, ¶102 (presenting conclusory allegations of retaliatory intent).

v. City of New York, 991 F.3d 394, 404 n.7 (2d Cir. 2021) (declining to consider plaintiff's effort to "extend her legal claim" for the first time in her Reply); *Doherty v. Bice*, 101 F.4th 169, 175 and n.3 (2d Cir. 2024) (holding that plaintiff "cannot will his way into a complaint that he did not file, and he certainly cannot amend his complaint on appeal" and that argument presented for the first time in his reply brief would not be considered).

For all the reasons above, Demarest has failed to state a viable *LeClair* equal protection claim. Demarest's *LeClair* claims are impermissibly based on factual allegations and legal issues that are barred by claim preclusion or statutes of limitations, and Demarest therefore cannot demonstrate timely allegations of selective treatment. Moreover, Demarest's proffered comparators differ from Demarest in material respects. Finally, Demarest has not alleged any facts demonstrating that selective treatment was caused by an improper motivation. Any *one* of these failures would doom Demarest's equal protection claim.

Accordingly, the Municipal Defendants respectfully request this Court affirm the district court's dismissal of Demarest's equal protection claims.

V. Demarest has failed to state a First Amendment retaliation claim.

Demarest argues[53] that he has alleged sufficient "other concrete harm" to

---

[53] DktEntry 36.1 at 17–25.

support a retaliation claim.

> In order to state a claim for retaliation in violation of the First Amendment, a plaintiff must allege "(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action."

Gonzalez, 802 F.3d at 222.

> To prevail on such a claim, a plaintiff must establish a "causal connection" between the government defendant's "retaliatory animus" and the plaintiff's "subsequent injury." It is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must cause the injury. Specifically, it must be a "but-for" cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive.

Nieves, 587 U.S. at 398-399; *also Handsome, Inc. v. Town of Monroe*, 2024 U.S. App. LEXIS 12830, *13, 2024 WL 2747142 (2d Cir. 2024) (citing *Nieves*).

"[P]rivate citizens claiming retaliation for their criticism of public officials have been required to show that they suffered an 'actual chill' in their speech as a result." *Zherka v. Amicone*, 634 F.3d 642, 645 (2d Cir. 2011). However, this Court has stated that "in limited contexts, other forms of harm have been accepted in place of this 'actual chilling' requirement." *Id*. Demarest attempts to fit his case into one of these "limited contexts" and argues he has adequately alleged that he has "suffered some other form of concrete harm." DktEntry 36.1 at 21–24.

The Municipal Defendants do not dispute that Demarest has adequately alleged exercise of Demarest's First Amendment rights. As already discussed,

Demarest has repeatedly sued the Town. In addition, Demarest alleges that he has repeatedly participated in public meetings and criticized "Defendants' acts with respect to TH-26." DktEntry 36.1 at 7. Moreover, Demarest alleges that, since 2004 to the present day, he has maintained a website on which he "explicitly stated observations of problems within Underhill's governance." A-28 at ¶48. Indeed, Demarest's active exercise of his First Amendment rights is the very reason the district court concluded that Demarest could not show "that his speech has been chilled." A-74-A-75.

However, has Demarest sufficiently alleged retaliatory acts by the Town or the named Defendants? In the absence of actual chilling, has Demarest sufficiently alleged "some other concrete harm"[54] that might support his retaliation claims? And, crucially, has Demarest provided nonconclusory allegations demonstrating "but-for" causation, "meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive."?[55] The following argument demonstrates the answer to each question is no.

---

[54] *Dorsett v. County of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013).

[55] *Nieves v. Bartlett*, 587 U.S. 391, 398-399 (2019).

A. Demarest has failed to allege retaliatory conduct because the proffered allegations are claim-precluded, time-barred or fail to state retaliation because the alleged conduct is lawful.

Demarest's Brief argues that the defendants retaliated against Demarest by engaging in the following conduct: (1) placing boulders in Demarest's right of way on November 19, 2019; (2) refusing to fix the failed culvert; (3) refusing to provide maintenance on Fuller Road; (4) refusing to correct factual errors in the matrix prepared by Rick Heh; and (5) disregarding Demarest's Petition "properly filed 'with support of over 5% of Underhill's voters.'" DktEntry 36.1 at 20, 22.

All of these allegations fail for the reasons discussed extensively above: they are based on factual allegations that are time-barred, claims that are claim-precluded, or simply fail to state a claim because they are lawful actions and not retaliatory. For the reasons already provided, the Municipal Defendants respectfully request that this Court hold that Demarest has failed to state a First Amendment retaliation claim because Demarest has not alleged timely, non-precluded allegations of retaliation.

B. Demarest has failed to provide factual allegations indicating that any Town conduct was motivated by an intent to retaliate.

Demarest argues[56] that the following allegation sufficiently pleads retaliatory motive:

---

[56] DktEntry 36.1 at 19–21.

> Defendants Steve Walkerman, Dan Steinbauer, and Steve Owens unanimously retaliated against Plaintiff for exercising the right to file a lawsuit and filing the 2010 Petition on Fairness in Town Road Maintenance.

DktEntry 36.1 at 20 (citing A-58 at ¶165). Although the allegation names Defendants Walkerman, Steinbauer, and Owens, and it mentions an exercise of Demarest's First Amendment rights performed 14 years ago, the allegation provides no further factual content, such as what the retaliatory conduct was, how it occurred, or even when it happened. This allegation is nothing "more than an unadorned, the-defendant-unlawfully-harmed-me accusation," and a "naked assertion[]" devoid of "further factual enhancement"; a plausible claim requires more. *Ashcroft*, 556 U.S. at 678. The other allegations in the Second Amended Complaint are no better. They are even more conclusory because they fail to identify *any* specific individuals beyond the blanket group label "defendants."[57]

Apparently aware of this failing, Demarest argues that "while not expressly stated" and "while not clearly alleged," this Court should divine that the 2019 boulder allegation and the failure to fix the "failed culvert" allegation should be interpreted as allegations of retaliation "in response to Demarest's exercise of his First Amendment rights by filing lawsuits against the Town." DktEntry 36.1 at 20.

---

[57] A-22 at ¶30; A-31 at ¶60; A-43 at ¶101-¶102; A-58 at ¶168.

This argument underscores how sheer the causal cloth is from which Demarest attempts to fashion his retaliation claim. He alleges *no* 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. Appellant's Brief provides no legal authorities demonstrating that such vague, nonspecific, and conclusory allegations are sufficient to show a causal connection between Demarest's exercise of First Amendment activity and retaliatory conduct by the Municipal Defendants.[58] Demarest "cannot will his way into a complaint that he did not file, and he certainly cannot amend his complaint on appeal." *Doherty*, 101 F.4th at 175.

In the absence of any specific factual allegations supporting Demarest's contention that retaliatory conduct was motivated by a retaliatory intent, Demarest's First Amendment retaliation claims must fail. *E.g.*, *Washington v. County of Rockland*, 373 F.3d 310, 320-321 (2d Cir. 2004) (dismissing claim because plaintiff failed to provide sufficient causal connection between retaliation and motive). The Municipal Defendants therefore respectfully request this Court

---

[58] To the extent that Demarest intends to argue that *Gagliardi* and *Dougherty* entitle him to infer the requisite causation from a long sequence of alleged misconduct, the argument must fail. As discussed *supra* in section II, Demarest cannot rely on these two cases to assert time-barred allegations in support of his retaliation claims.

affirm dismissal of Demarest's First Amendment retaliation claims on this ground.

C. Demarest has failed to provide factual allegations demonstrating concrete harm sufficient to support a First Amendment retaliation claim.

Demarest cites the following allegations as evidence of concrete harm he has suffered as a result of the Town's retaliatory conduct: (1) failure to correct the factual errors in the matrix prepared by Rick Heh;[59] (2) the Selectboard's disregard of Demarest's voter-supported petition against "Defendant Dan Steinbauer";[60] (3) reduced property values as evidenced by a Table of Values prepared by Demarest in 2019;[61] and nuisance, litter, illegal dumping, trespass, vandalism, and theft arising from public use of Crane Brook Trail since 2001.[62]

The first two of these allegations cannot serve as evidence of "concrete harm" for the reasons discussed extensively above. The Town's handling of public records, even if it leads to inaccuracies, does not, by itself, represent constitutional

---

[59] *Id.* at 22 (citing A-49 at ¶128).

[60] DktEntry 36.1 at 22 (citing A-56 at ¶159).

[61] DktEntry 36.1 at 15, 23–24 (citing A-46 at ¶118 and A-38–A-39 at ¶82 and Table 1).

[62] DktEntry 36.1 at 15, 23 (citing A-46 at ¶118 and A-38 at ¶82).

harm. Doc. 63 at 29.[63] Similarly, the Town's refusal to take any further action with respect to Demarest's voter-supported Petition does not, by itself, represent a constitutional harm and cannot therefore serve as a basis for harm in a First Amendment retaliation claim. Doc. 63 at 30-31.[64] Demarest's retaliation claims fail to the extent they rely on these allegations to demonstrate "concrete harm."

The other two allegations—reduced property values and vandalism arising from public use of the trail—are not new to the amended pleading. These same allegations were asserted in Demarest's [First] Amended Complaint and were simply restated in the Second Amended Complaint.[65] Demarest's argument does not explain why these old allegations, which were insufficient to support Demarest's claims in his [First] Amended Complaint, are now sufficient to support claims of harm in his Second Amended Complaint.

Furthermore, the reduced property value and vandalism allegations are untethered from *any* conduct by the Municipal Defendants. In his Brief, Demarest

---

[63] *Demarest v. Town of Underhill*, 2022 U.S. Dist. LEXIS 56635, *44, 2022 WL 911146.

[64] *Demarest v. Town of Underhill*, 2022 U.S. Dist. LEXIS 56635, *46, 2022 WL 911146.

[65] *Compare* [First] Amended Complaint at ¶82-¶85 and Table 1 (alleging reduced property values) *with* A-38–A-39 at ¶82–¶85 and Table 1) (restating same allegations); *compare* [First] Amended Complaint at ¶161 with A-25 at ¶118 (restating vandalism claims).

does not identify what actionable Town conduct caused the alleged reduction in property values, and indeed, both the Vermont Supreme Court and the district court declined to find any actionable harm arising from claims of reduced property values. *See* Doc. 63 at 17 n.5[66] (declining to find actionable harm based on reduced property values and noting that Vermont Supreme Court had done the same). Furthermore, the Second Amended Complaint expressly describes the vandalism and other nuisance allegations as arising from conduct by the "public," not from the individual conduct of town officials. A-46 at ¶118. These allegations fail to establish any concrete harm arising from conduct by the Municipal Defendants.

Demarest has not identified any harm caused by the Municipal Defendants that is not barred by applicable statutes of limitations or precluded due to Demarest's prior litigation with the Town. Demarest cannot demonstrate actual chilling of his speech. Demarest has not provided any factual allegations demonstrating any actionable harm resulting from Town conduct. Accordingly, Demarest has failed to allege "some other concrete harm" that would support a First Amendment retaliation claim.

For all the reasons cited above, the Municipal Defendants respectfully

---

[66] *Demarest v. Town of Underhill*, 2022 U.S. Dist. LEXIS 56635, *26, 2022 WL 911146.

request this Court dismiss Demarest's equal protection claims.

Conclusion

Demarest's Second Amended Complaint fails to state any actionable claims based on timely allegations. The factual allegations identified in Demarest's Brief as supporting his claims are primarily based on allegations that occurred before June 21, 2018—the statute of limitations cut-off date applicable to Demarest's claims. Furthermore, the factual allegations assert liability or harm based on legal claims that have been held to be claim-precluded by both Vermont and federal courts. Demarest has not identified any legal authority that would allow him to assert untimely claims or revive precluded claims. When the untimely factual allegations and precluded claims are excluded from consideration, Demarest's First Amendment retaliation and *LeClair* equal protection claims collapse.

Demarest has failed to state a *LeClair* equal protection claim. First, Demarest has not provided timely factual allegations demonstrating selective treatment by the Municipal Defendants. Second, Demarest's allegations regarding proffered comparators are vague and indefinite and other allegations in the Second Amended Complaint demonstrate that the comparators differ materially from Demarest because the comparators' properties and requests were based on entirely different highway classes, governed by entirely different standards of legal obligation by the Town. Finally Demarest has provided no timely factual

allegations indicating that any selective treatment was caused by an intent to punish Demarest for his exercise of constitutional Amendment rights.

Demarest has also failed to state any First Amendment retaliation claim. First, Demarest's allegations of retaliatory conduct are based on untimely allegations or rely on claim-precluded claims to demonstrate their retaliatory nature. Second, Demarest has not demonstrated any timely or actionable allegations of "concrete harm." Finally, Demarest has provided no nonconclusory factual allegations demonstrating that any retaliatory conduct was motivated by an intent to retaliate against Demarest for his exercise of his First Amendment rights.

Because Demarest cannot state any plausible claims based on timely factual allegations, the Municipal Defendants respectfully request this Court affirm the district court's dismissal of Demarest's Second Amended Complaint.

Respectfully submitted on this 24th day of July 2024.

CARROLL, BOE, PELL & KITE, P.C.

BY: /s/ Kevin L. Kite, Esq.

Kevin L. Kite, Esquire
64 Court Street
Middlebury, VT 05753
(802) 388-6711
kkite@64court.com
Attorneys for Appellees

CERTIFICATE OF COMPLIANCE

Counsel for Appellees hereby certifies that the foregoing brief complies with the type-volume set forth in F.R.AP. 32(a)(7)(B) and Local Rule 32.1(a)(4). Based on the word count tool in Microsoft Word, the number of words in the foregoing brief, excluding the sections excludable under F.R.A.P. 32(f), is 13,565.

Respectfully submitted on this 24th day of July 2024.

CARROLL, BOE, PELL & KITE, P.C.

BY: /s/ Kevin L. Kite, Esq.
Kevin L. Kite, Esquire
(802) 388-6711
kkite@64court.com