No. _____

IN THE
Supreme Court of the United States

DAVID P. DEMAREST,

Petitioner,

v.

TOWN OF UNDERHILL,
a municipality and charter town, *et al.,*

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL M. BERGER*
*Counsel of Record
MANATT, PHELPS
& PHILLIPS, LLP
2049 Century Park East,
Suite 1700
Los Angeles, CA 90067
(310) 312-4000
mmberger@manatt.com

JEREMY GRANT
PRIMMER PIPER
EGGLESTON & CRAMER PC
30 Main Street, Suite 500
Burlington VT 05401
(802) 864-0880
jgrant@primmer.com

QUESTIONS PRESENTED

Frequently in these troubled times, citizens and municipal governments are experiencing conflict. For recent illustrations, see *Lozman v. City of Riviera Beach*, 568 U.S. 115 (2013) and *Lozman v. City of Riviera Beach*, 585 U.S. 87 (2018). In the *Lozman* cases, this Court had to intervene to protect a property owner who had been harassed by his city government in retaliation for his speaking out at public meetings. This case presents similar issues of municipal retaliation against an outspoken citizen.

The questions presented are:

1. When a property owner exercises his First Amendment right to speak out at public meetings, does it violate that Constitutional guarantee when the governmental body punishes the citizen by interfering with access to his property?

2. When local government treats similarly situated property owners differently for no valid reason, particularly when some of those other, comparator-owners are officials or employees of the very agency engaging in the disparate treatment, has a violation of the Fourteenth Amendment's equal protection guarantee occurred?

3. In order to state an equal protection claim under the Court's standards for a "class of one," is it sufficient for the complaint to allege different treatment for similarly situated parties? Is the

inequality exacerbated when the comparators are officials of the defendant government agency and profit from the differential treatment?

PARTIES TO THE PROCEEDING

Petitioner David P. Demarest was the plaintiff in the District Court and appellant in the Court of Appeals.

Respondents are the Town of Underhill, a municipality and charter town, Daniel Steinbauer, as an individual and in official capacity as Selectboard Chair, Bob Stone, as an individual and in official capacity, Dick Albertini, as an individual and in official capacity, Seth Friedman, in official capacity, Marcy Gibson, as an individual and in official capacity, Rick Heh, as an individual and in official capacity, Brad Holden, as an individual and in official capacity, Anton Kelsey, in official capacity, Karen McKnight, as an individual and in official capacity, Nancy McRae, as an individual and in official capacity, Steve Owens, as an individual and 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, as an individual and in official capacity, Steve Walkerman, as an individual and in official capacity, and Mike Weisel, as an individual and in official capacity. They were the defendants in the District Court and appellees in the Court of Appeals.

The following were named as defendants in the district court but were not involved in the appeal: Judy Bond, in official capacity, Peter Brooks, in official capacity, Peter Duvall, in official capacity, Barbara Greene, in official capacity, Carolyn Gregson, in official capacity, Stan Hamlet, as an individual and in official capacity, Faith Ingulsrud, in official capacity, Kurt Johnson, in official capacity, Michael Oman, in official capacity, Mary Pacifici, in official capacity, Barbara Yerrick, in official capacity, Front Porch Forum, as a Public Benefit Corporation fairly treated as acting under color of law due to past and present factual considerations while serving the traditional governmental role of providing "essential civic infrastructure" ranging from the distribution of public meeting agendas to the coordination of civilian natural disaster relief efforts, Jericho Underhill Land Trust, as Non-Profit Corporation fairly treated as acting under color of law due to past and present factual considerations and a special relationship willfully participating in and actively directing acquisition of municipal property by the town of Underhill.

RELATED PROCEEDINGS

- *Demarest v. Town of Underhill*, no. 22-956, 2022 WL 17481817 (2d Cir. Dec. 12, 2022), cert. den., 143 S.Ct. 2643 (2023);
- *Demarest v. Town of Underhill*, Vermont Supreme Court, docket no. 20-098; judgment entered Feb. 26, 2021; 256 A.3d 554;
- *Demarest, et al. v. Town of Underhill*, Vermont Supreme Court, docket no. 15-248; judgment entered Jan. 15, 2016; 138 A.3d 206;
- *In re Town Highway 26, Town of Underhill*, Vermont Supreme Court, docket no. 14-386 (2015);
- *Demarest, et al. v. Town of Underhill*, Vermont Supreme Court, docket no. 12-403; judgment entered Sept. 27, 2013; 87 A.3d 439.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

STATUTES

OTHER AUTHORITIES

RULES

PETITION FOR WRIT OF CERTIORARI

Petitioner David Demarest respectfully petitions for a writ of certiorari to review a decision of the United States Court of Appeals for the Second Circuit.

INTRODUCTION

Politics can get rough. That is what inspired Finley Peter Dunne to have his famous Chicago bartender, Mr. Dooley, opine that "politics ain't beanbag." (Finley Peter Dunne, Mr. Dooley: In Peace and in War xiii (1898).) True enough. But even politicians must follow some rules. One is that you treat all people equally. Another is that you don't use positions of governmental authority to retaliate against people for expressing differing views and that a potentially proper exercise of municipal discretion is improper if motivated by animus.

Both rules were violated in this case. As detailed in the complaint, members of the Selectboard for the Town of Underhill, Vermont, singled out Mr. Demarest because they took offense at his repeated comments on Town policy. In retaliation, they severely restricted access to his single-family home on a large parcel of land by converting the highway that had provided access (since the 1800s) into a "trail" that the Town would no longer maintain. They also dumped boulders on the road to block his access and sought legal advice on how to evade promises of continued access they had made to him when he bought his land.

Moreover, in this case the problem was compounded by the lower courts' application of a statute of limitations, mechanically treating it as a

jurisdictional bar to filing suit. That violated a series of this Court's recent decisions declaring statutes of limitation to be mere claim processing tools that should not be automatically applied to bar claimants from court, culminating in *Wilkins v. United States*, 143 S.Ct. 870 (2023). (See discussion *post*, pp. 17-20.)

Certiorari is needed to assert the supremacy of the First Amendment and Fourteenth Amendment over parochial wishes of local government.

OPINIONS BELOW

The Second Circuit Court of Appeals Summary Order is not published but is available at 2025 WL 88417 and is reproduced at Pet.App.1a. The District Court's Opinion and Order is not published but is available at 2023 WL 9322825 and is reproduced at Pet.App.10a.

JURISDICTION

The Second Circuit Court of Appeals filed its Summary Order on January 14, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law … abridging the freedom of speech … or the right of the people … to petition the Government for a redress of grievances."

The Fifth Amendment to the United States Constitution provides: "nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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

STATEMENT OF THE CASE

A. Mr. Demarest Bought Land in the Town and Built a House, With the Town's Promise That He Would Have Access. But That Promise Was Broken.

David Demarest bought a 51.64-acre parcel of land in the Town of Underhill, Vermont in 2002, adjacent to Town Highway-26. He built a single-family home on this large parcel, having been explicitly assured by the Town that he would have

access. (Pet.App.28a) Surrounded by so many of his own acres, he reasonably expected significant privacy.

Since then, the complaint alleges that the Town has had a long-term goal of rescinding both its implicit and explicit promises for reasonable access to his home and surrounding acreage. (Pet.App.29a) To accomplish this goal, the Town refused to provide any maintenance at all to the road and then reclassified a portion of Town Highway-26 to a mere trail that it would not maintain (Pet.App.29a) and that presently appears on National Geographic maps as a recreational trail (Pet.App.64a), impliedly inviting outsiders to use the trail and adjoining land, including Mr. Demarest's parcel.

When Mr. Demarest purchased his property, the highway was generally a through road, providing continuous access in both directions. After converting it to a trail, the Town advertised the general area as a recreational destination. As a consequence, the Demarest property was subject to trespassers and miscreants who used the property as a dump site, creating a public nuisance at the Town's invitation. (Pet.App.65a.)

The Town also blocked the road with large boulders and refused to remove them when Mr. Demarest complained about the obstruction to his access. (Pet.App.16a, 29a.)

The upshot of the Town's actions was to take a 49.5-foot-wide swath of private property and convert it to public use without compensation. The Town has taken not only the reasonable access to Mr. Demarest's home, a common law right of access

owned by neighboring landowners, but his reasonable expectation of privacy around the home. (Pet.App.71a.)

B. The Town Discriminates Against Mr. Demarest for Speaking Out at Town Meetings.

This case bears resemblance to litigation with which this Court is familiar involving a property owner named Fane Lozman. Like Mr. Demarest, Mr. Lozman irritated members of his local government by speaking out at public meetings. In consequence, they towed away and destroyed his floating home (*Lozman v. City of Riviera Beach*, 568 U.S. 115 (2013)) and in a separate incident, had him arrested at a public meeting (*Lozman v. City of Riviera Beach*, 585 U.S. 87 (2018)). This Court granted certiorari in both cases and ruled in the property owner's favor. Mr. Lozman currently has a third petition for certiorari pending, challenging the city's prevention of economically productive use of his property. (*Lozman v. City of Riviera Beach*, no. 24-908, docketed Feb. 24, 2025.)

Here, Mr. Demarest was vocal about his treatment by the Town. In consequence, the Town took the actions noted above to isolate his property from the general system of roads in the area. The Town removed money from the budget that would have preserved reasonable access to his property. The Town went so far as to seek legal advice on how it might renege on its promise to Mr. Demarest to keep access to his home open. In May of 2023, Town officials openly discussed erecting gates to block his access. In response to his request to repair a culvert,

they expressed their intent to eliminate his access altogether. They repeatedly refused to allow him to speak about items on the Selectboard agendas, and even scheduled a site visit to failed culverts on the road the only day of the year they could be certain Mr. Demarest could not attend, i.e., the date on which he was arguing his case against the Town in the Second Circuit Court of Appeals in New York City. (Pet.App.68a).

C. The Town Treats Similarly Situated Property Owners — Including Members of the Town Selectboard — in More Favorable Ways that Enrich Themselves and Denigrate Mr. Demarest's Interests.

Mr. Demarest wanted to subdivide his parcel into 9 lots. He was denied even a preliminary access permit to simply present his plans to the Development Review Board. In contrast, Defendant Town officials Albertini and Gibson's nearby subdivisions were promptly allowed preliminary access permits and expedient final subdivision approvals, resulting in substantial financial gain for them, while Mr. Demarest could not even be heard.

Mr. Demarest's modest request for a culvert repair was denied, while the Town readily considered construction of a more expensive "Beaver Deceiver" (to prevent flooding and preserve access for humans) on similarly situated property. (Pet.App.52a)

When the Town reduced the status of the Town Highway that accessed his property, he was denied the abutters reversionary property rights that

owners of other similar Town Highway properties have been granted.

D. Proceedings Before the Lower Courts.

Mr. Demarest has been in litigation with the Town for many years, largely in the Vermont state courts. Although, to some degree, that litigation related to his access road, it was crimped and restricted by (1) limitations of the statutory construction of state law, and (2) the prohibition in *Williamson County Reg. Planning Agency v. Hamilton Bank*, 473 U.S. 172 (1985), overruled in pertinent part in *Knick v. Township of Scott,* 139 S.Ct. 2162 (2019), on litigating federal constitutional issues in federal court.

Under state law, Mr. Demarest was restricted to an abuse of discretion review of the Town's actions rather than an in-depth trial of their validity. Thus, although some issues regarding the legality of the Town's blockage of his access were reviewed, he was precluded from a non-deferential standard of review and the kind of examination that would have been available as of right under 42 U.S.C. § 1983.

To make matters worse, he was prevented from bringing his federal claims in federal court at all. Precluded, that is, until *Knick* overruled *Williamson County* and, for the first time as of June 21, 2019, allowed property owners like Mr. Demarest to bring suit directly in federal court.

When Mr. Demarest brought suit in federal court, the district court applied the statute of limitations as though it were jurisdictional and dismissed the case. (Pet.App.11a.)

That court also concluded that a state court is fully competent to adjudicate federal constitutional claims. The court said that without any consideration of *Knick* and this Court's conclusion that property owners were *entitled at their option* to have access to a federal court to remediate their federal constitutional injuries. The court said it could ignore *Knick* because Mr. Demarest had litigated his claim in state court and lost. (See Pet.App.4a.) That ignores, however, the restricted nature of the state court litigation and the fact that Mr. Demarest was precluded from litigating his constitutional claims there. (*See Ketchum v. Town of Dorset*, 22 A.3d 500, 505-06 (Vt. 2011)). The Second Circuit affirmed in a brief unpublished disposition. (Pet.App.1a.)

On remand, the district court afforded Mr. Demarest, who was *pro se* at the time, the opportunity to amend his complaint. When Mr. Demarest tendered a revised complaint that alleged in detail the unconstitutional treatment he had been accorded by the Town, that court dismissed the case. (Pet.App.10a.) On appeal, the Second Circuit affirmed. (Pet.App.1a.)

The courts below both ignored this Court's now standard rules for examining pleadings, i.e., they need contain "only enough facts to state a claim to relief that is plausible on its face" and "above the speculative level." (*Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).) A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." (*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)

(plausibility standard "not akin to a 'probability requirement'").) Contrary to this Court's standard, the courts below refused to draw any positive inferences from the complaint's allegations. (Pet.App.19a)

This Petition for Certiorari followed.

REASONS FOR GRANTING CERTIORARI

I. The Court Should Grant Certiorari to Ensure the Primacy of the Fourteenth Amendment's Equal Protection Guarantee, Particularly When Unequal Treatment is Accorded to Members of the Local Government's Own Governing Board.

A. Clarification is Needed: The Standard for "Class of One" Equal Protection Claims Remains Unsettled and This Court's Assistance is Needed Since Few Courts Have Addressed It.

The decision below amply demonstrates the confusion extant in equal protection litigation. Most cases, as the Court knows, deal with discrimination against protected classes. However, discrimination can also be directed at individuals. The Court recognized this in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).

Plainly, the key to a "class of one" equal protection claim (as with any equal protection claim) is that similarly situated parties are treated differently, as *Olech* makes clear. How much detail is required in a complaint should be subject to the *Twombly* and *Iqbal* analysis noted above. What the

focus of the allegations (and eventual proof) needs to be is uncertain.

As the opinion below shows, the Second Circuit has alternative ways of establishing unequal treatment, depending on whether the defendant acted with or without ill will toward the plaintiff. *Hu v. City of New York*, 927 F.3d 81, 93 (2d Cir. 2019).[1] The type of proof required depends on whether ill will is at the root of the case. But there is no clarity on how — and at what stage — to *prove* the existence of ill will. That determination is critical, as the standard of proof required by the Second Circuit on the issue of unequal treatment hinges on that determination.

One branch (which the Second Circuit dubs the *Olech* branch) requires a high degree of similarity. The other (which the Second Circuit dubs the *Le Clair* branch [after *LeClair v. Saunders*, 627 F.2d 606 (2d Cir. 1980)]) requires less specificity because it is based on ill will. But how and when to make that determination is confused. As shown below, Mr. Demarest sought to base his claim on ill will — which he plainly alleged — but the Second Circuit insisted on reviewing it as one based solely on differential treatment, thus requiring a higher degree of *proof*.

But there is the rub. This case was decided on the pleadings. There was no arena or opportunity for proof. Indeed, there was not even any opportunity for discovery to flesh out the facts based on

---

[1] The Seventh Circuit has three alternatives. *See FKFJ, Inc. v. Village of Worth*, 11 F.4th 574 (7th Cir. 2021).

information known to the Town, but not yet disclosed to Mr. Demarest before the complaint was filed. It cannot satisfy Fourteenth Amendment standards to require the plaintiff to ***prove*** his case in the complaint, on pain of never being allowed to go to trial or even resort to ordinary discovery procedures. *See Frederickson v. Landeros*, 943 F.3d 1054 (7th Cir. 2019). As the Tenth Circuit put it:

> "in the typical equal protection case the plaintiff will not be able to show that the challenged rule discriminates on its face or that direct evidence of discrimination exists. Those who wish to use the law to discriminate against others are often wilier than that." *SECSYS, LLC. v. Vigil*, 666 F.3d 678, 689 (10th Cir. 2012).

The kind of "proof" demanded by the Second Circuit cannot be required at the pleading stage which, as the Court explained in *Twombly* and *Iqbal*, require allegations of "plausibility" not "probability" and certainly not proof.

This Court dealt with this issue recently. In *Tyler v. Hennepin County*, 598 U.S. 631, 637 (2023), the Court concluded:

> "At this initial stage of the case, Tyler *need not definitively prove* her injury or disprove the County's defenses. She has plausibly pleaded on the face of her complaint that she suffered financial harm from the County's action, *and that is enough for now*." (Emphasis added.)

The extent of the impairment, and the compensation due, is an issue of fact for trial. *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1978). Motions to dismiss for failure to state a claim in every civil lawsuit in the initial pleadings stage are not meant to screen out claims where liability might seem remote. *Iqbal*, 556 U.S. at 681 (court may not dismiss "because it thought that claim too chimerical to be maintained"). The launch phase of litigation is not the place to categorically rule that a factfinder cannot determine that the defendant could not be held responsible for its actions. Trial is needed to determine the facts.

Employment discrimination cases provide guidance. There, although proof of unlawful discrimination is required *at trial*, a different standard prevails at the pleading stage. "[A]t the initial stage of the litigation …, the plaintiff *does not need substantial evidence* of discriminatory intent." *Littlejohn v. City of New York,* 795 F.3d 297, 307-11 (2d Cir. 2015) (emphasis added). Instead, the plaintiff "need only give plausible support to a minimal inference of discriminatory motivation." *Id.*; *accord Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 86-87 (2d Cir. 2015).

In making the plausibility determination, the court must be mindful of the "elusive" nature of intentional discrimination, *see Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 255 n.8 (1981), and the truism that "clever men may easily conceal their motivations." *Robinson v. 12 Lofts Realty, Inc.,* 610 F.2d 1032, 1043 (2d Cir.1979) (simplified). Because discrimination claims implicate an employer's usually unstated intent and

state of mind, *see Meiri v. Dacon,* 759 F.2d 989, 998 (2d Cir. 1985), rarely is there "direct, smoking gun, evidence of discrimination," *Richards v. N.Y.C. Bd. of Educ.,* 668 F.Supp. 259, 265 (S.D.N.Y.1987), *aff'd,* 842 F.2d 1288 (2d Cir. 1988). Instead, plaintiffs usually must rely on "bits and pieces" of information to support an inference of discrimination, i.e., a "mosaic" of intentional discrimination. *Gallagher v. Delaney,* 139 F.3d 338, 342 (2d Cir.1998), *abrogated in part on other grounds by Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742 (1998).

The same is true here. In cases like this, direct evidence of improper intent is unlikely to emerge in the absence of extensive discovery and trial. To hold a plaintiff to a standard of proving his case in the complaint flies in the face of this Court's settled law.

B. Where a Plaintiff Charges an Equal Protection Violation and the Favored Comparators Include Officials of the Governing Body, Trial Should be Presumed Unless Discovery Demonstrates Otherwise.

The equal protection violation is exacerbated here because the comparators were officials of the very government agency that is charged with discriminating against Mr. Demarest.

This is no run of the mill equal protection case. Here, it is not merely that the Town treated some citizens differently than others, but that at least some of those who were favored by the Town's actions were either members of the Town's own governing body or employees of that entity.

In a straightforward suit against the government for damages or compensation, a jury would be required under the 7th Amendment if demanded. *A fortiori*, where violation of the 5th Amendment is charged, with disparate benefits being bestowed on comparators who are agents of the regulating body, the matter should be settled by trial, rather than by motion.

II. Certiorari is Needed to Affirm the Rights of Citizens to Petition Local Government for Redress of Grievances Without Fear of Retaliation for Being Outspoken.

The complaint alleges at length, incorporating by reference numerous recordings and transcripts of Town Selectboard meetings, actions of the Respondents that demonstrate at least a hostility toward Mr. Demarest similar to the enmity demonstrated toward Mr. Lozman in the two cases already decided in his favor by this Court. *See Lozman*, 568 U.S. 115 and 585 U.S. 87.[2] There was at least enough alleged in the complaint for the lower courts to draw inferences of discriminatory treatment.

Mr. Demarest has sufficiently alleged a claim for First Amendment retaliation based on the fact that

---

[2] In fact, on the few occasions when Mr. Demarest was permitted to speak, the Selectboard often misrepresented his speech to a degree that forced him to buy the domain UnderhillVT.com to bring public awareness to genuine facts contrary to the Defendants' narratives. Both the website and notable excerpts of archived public meeting recordings were incorporated by reference in ¶48 and ¶50 of the Second Amended Complaint; Pet.App.40a, 41a).

he has filed several lawsuits against the Town in State Court. Moreover, Mr. Demarest alleges that the Town and Municipal Defendants singled him out for different treatment not only for filing lawsuits against the Town, but also for publicly advocating for the Town to maintain and repair the former highway that provided him access and for his "outspoken criticism of Defendants' acts with respect to TH-26." (Pet.App.16a.) Mr. Demarest also advocated for upkeep and maintenance of all Class IV roads. The Town's response was to decide to maintain all such roads except the one serving Mr. Demarest's property. (Pet.App.49a) In addition, Mr. Demarest further alleged that he submitted a Conflict of Interest Complaint against Municipal Defendant Dan Steinbauer on October 8, 2020, (Pet.App.59a) and also a "Petition On Public Accountability" which was "properly filed with the support of over 5% of Underhill's voters on November 30, 2020" (Pet.App.79a) only to have Defendant Dan Steinbauer use discretion to prevent the advisory articles in the 2020 petition from being merely placed before voters on a ballot. Damage from the Town's actions is also properly alleged, showing how Mr. Demarest's property was first isolated and then allowed to be invaded by third parties as a consequence of the Town's actions. The valuation impact is shown on a chart showing the comparative values of his property and its neighbors. (Pet.App.54a-56a.)

As in the case of equal protection, direct evidence of governmental malfeasance is difficult to obtain before a complaint is filed and discovery can be undertaken. For that reason, Rule 9(b) of the

Federal Rules of Civil Procedure expressly provides that "[m]alice, intent, knowledge and other conditions of a person's mind may be alleged generally." The facts alleged in the complaint are adequate to raise the issue and allow it to proceed to trial.

The enmity shown by the Town and its officials is amply demonstrated in the records and proceedings of the Town Selectboard. For example, Mr. Demarest alleges that Municipal 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." (Pet.App.80a.) It also shows that the Town placed boulders to block access to his home, openly spoke of obtaining advice on how to avoid its earlier promises to him about road maintenance and, in 2023, about placing gates to block his access. The complaint shows actions taken by the Town in response to Mr. Demarest's First Amendment exercises.

This Court has held that "the right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government." *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 896-97 (1984); *Lozman*, 585 U.S. at 101 (explaining that the right to petition the government for a redress of grievances is "one of the most precious of the liberties safeguarded by the Bill of Rights," and is "high in the hierarchy of First Amendment Values.") (cleaned up).

"'[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions' for engaging in protected speech." *Nieves v. Bartlett*, 587 U.S. 391, 398 (2019) (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)).

Pursuant to the Fourteenth Amendment, Congress acted to provide protection for rights guaranteed by the U.S. Constitution when it enacted 42 U.S.C. § 1983. Petitioner invoked this statutory remedy when the Town ignored its constitutional obligation to allow him to speak his mind at public meetings without retribution. He asked the courts to compel the Town to abide by the First Amendment's guarantee of that right. The lower courts refused.

Section 1983 was intended to provide "a uniquely federal remedy" (*Mitchum v. Foster*, 407 U.S. 225, 239 (1972)) with "broad and sweeping protection" (*Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972) (quoting with approval)) so that individuals in a wide variety of factual situations are able to obtain a federal remedy when their federally protected rights are abridged (*Burnett v. Grattan*, 468 U.S. 42, 50, 55 (1984)).

Contrary to the decision below, there is no strict exhaustion requirement under Section 1983, merely a need for the government position to be clear. (*Pakdel v. City & County of San Francisco* (2021) 141 S.Ct. 2226.)

The lower courts simply ignored this key federal statute designed to compel local governmental compliance with the federal Constitution. Ignoring a

directly applicable federal statute is reason enough for this Court to review this errant decision.

III. Certiorari is Needed to Solidify the Court's Evolving Rules Regarding Statutes of Limitations in Property Cases.

For the past several years, the Court has been updating and modernizing the appropriate rules for statutes of limitations.

A. The Second Circuit's Decision Conflicts With this Court's Recent Decisions Holding that Statutes of Limitation are Mere Claim Processing Rules, Not Jurisdictional Barriers.

This Court's recent precedents plainly show "that most time bars are *not jurisdictional*." *United States v. Wong*, 575 U.S. 402, 410 (2015) (emphasis added). "Time and again," this Court has "described filing deadlines as 'quintessential claim-processing rules,' which 'seek to promote the orderly progress of litigation,' but *do not deprive a court of authority* to hear a case." *Id.* (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) (emphasis added)).

The reason for so holding is the "harsh consequences" that result from labeling a rule jurisdictional. *Wong*, 575 U.S. at 409. Jurisdictional rules are "unique in our adversarial system" and can be used to "disturbingly disarm litigants." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013). "The Court has therefore stressed the distinction between jurisdictional prescriptions and

nonjurisdictional claim-processing rules." *Fort Bend Cty., Texas v. Davis*, 139 S.Ct. 1843, 1849 (2019).

Moreover, the Court has articulated a "readily administrable bright line" rule to determine whether a filing rule is jurisdictional. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 5116 (2006). That rule requires clear explication from Congress. Absent a "clear statement" from Congress, courts should treat filing deadlines "as nonjurisdictional in character." *Sebelius*, 568 U.S. at 153. Congress need not "incant magic words" to make a rule jurisdictional, but "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences." *Wong*, 575 U.S. at 410 (quoting *Sebelius*, 568 U.S. at 153). "[A]bsent such a clear statement, … courts should treat the restriction as nonjurisdictional." *Wong*, 575 U.S. at 409-10 (simplified).

The importance of this distinction is that when the limitation period is not jurisdictional the burden is on the defendants to prove its application. That was not done here, where the decision was made as a matter of law, conflicting with decisions of this Court.

Fortifying the importance of trial, and the proper placement of the burden of proof, is the applicability of concepts such as equitable tolling. This Court's view of equitable tolling, issued only three years ago, is clear:

> "Equitable tolling is a traditional feature of American jurisprudence and a background principle against which Congress drafts limitations periods. [Citation.] Because we do not understand Congress to alter that

> backdrop lightly, ***nonjurisdictional limitations periods are presumptively subject to equitable tolling***. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)." *Boechler, P.C. v. Commissioner*, 142 S.Ct. 1493, 1500 (2022) (emphasis added).

Determination of the statute of limitations issue without putting the defendants to their full burden of proof conflicts with this Court's precedent. Moreover, taking the allegations in the complaint as true, the Respondents have engaged in a continuous course of conduct violative of Mr. Demarest's constitutionally protected rights.

There is no clear legislative statement about the jurisdictional nature of this limitations statute. The Vermont statute uses what this Court calls "mundane statute-of-limitations language, saying only what every time bar, by definition must: that after a certain time a claim is barred." *Wong*, 575 U.S. at 410. As held by this Court in the cases cited above, such language is not sufficient to create a jurisdictional hurdle.

B. The Second Circuit Conflicts with Other Decisions on Whether State or Federal Law Determines the Accrual of a Section 1983 Cause of Action.

Using state law, the trial court determined that Mr. Demarest's claims arose years ago, when the Town determined to reclassify his former highway access, transforming it into a natural trail for recreational use. (Pet.App.4a.) That was contrary to the federal law that controls this § 1983 issue.

Although the *length* of the statute of limitations is determined by borrowing from state law (*Wilson v. Garcia*, 471 U.S. 261 (1985)), the *accrual* date of a § 1983 cause of action is a "question of federal law that is not resolved by reference to state law." *Wallace v. Kato*, 549 U.S. 384, 388 (2007). Until the Second Circuit's ruling in this case, there had been "no federal court of appeals holding to the contrary." *Id.* at 388. Now, there is conflict.

Under federal law, accrual occurs "when the plaintiff has a complete and present cause of action, that is, *when the plaintiff can file suit and obtain relief*[.]" *Id.* at 388 (emphasis added). Clearly, Mr. Demarest could not "file suit and obtain relief" in federal court before June 21, 2019, when this Court decided *Knick*. Until then, *Williamson County* restricted his litigation to state court and the kind of deferential review available in Vermont's courts precluded raising the constitutional issues at the heart of this case, because Vermont law restricts such review to an abuse of discretion standard. *Ketchum v. Town of Dorset*, 22 A.3d 500, 505-06 (Vt. 2011).

In such a case, if it is necessary for state law to step aside, then so be it. This Court has been clear:

> "One of the 'main aims' of § 1983 is to 'override'—and thus compel change of—state laws when necessary to vindicate federal constitutional rights. *Monroe v. Pape*, 365 U.S. 167, 173, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); see *Zinermon v. Burch*, 494 U.S. 113, 124, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). Or said otherwise, the ordinary and expected outcome of many a meritorious § 1983 suit is

to declare unenforceable (whether on its face or as applied) a state statute as currently written. *See*, *e.g.*, *Cedar Point Nursery v. Hassid*, 594 U.S. —, 141 S.Ct. 2063, 210 L.Ed.2d 369 (2021)." *Nance v. Ward*, 142 S.Ct. 2214, 2223-24 (2022).

CONCLUSION

The petition for certiorari should be granted.

MICHAEL M. BERGER*
**Counsel of Record*
MANATT, PHELPS & PHILLIPS, LLP
2049 Century Park East, Suite 1700
Los Angeles, CA 90067
(310) 312-4000
mmberger@manatt.com

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JANUARY 14, 2025

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

24-147

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, 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,

Appendix A

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,

FRONT PORCH FORUM, AS A PUBLIC BENEFIT CORPORATION FAIRLY TREATED AS ACTING UNDER COLOR OF LAW DUE TO PAST AND PRESENT FACTUAL CONSIDERATIONS WHILE SERVING THE TRADITIONAL GOVERNMENTAL ROLE OF PROVIDING "ESSENTIAL CIVIC INFRASTRUCTURE" RANGING FROM THE DII,

Appendix A

JERICHO UNDERHILL LAND TRUST, AS NON-PROFIT CORPORATION FAIRLY TREATED AS ACTING UNDER COLOR OF LAW DUE TO PAST AND PRESENT FACTUAL CONSIDERATIONS AND A SPECIAL RELATIONSHIP WILLFULLY PARTICIPATING IN AND ACTIVELY DIRECTING ACQUISITION OF MUNICIPAL PROPERTY BY THE TOWN OF UNDERHILL,

Defendants.

Filed January 14, 2025

DEBRA ANN LIVINGSTON, *Chief Judge*, JOHN M. WALKER, JR., SARAH A. L. MERRIAM, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the District of Vermont (Sessions III, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff-Appellant David Demarest ("Demarest") appeals from a judgment of the United States District Court for the District of Vermont (Sessions III, *J.*), entered on December 12, 2023, denying his motion for leave to file a Second Amended Complaint and closing the case. Demarest alleges that Defendants-Appellees—the Town of Underhill, Vermont, and a group of individuals working on behalf of the Town of Underhill (collectively, the "Town")—retaliated against him in violation of his

First Amendment rights and treated him differently than similarly- situated persons in violation of the Fourteenth Amendment's Equal Protection clause.

This appeal arises out of a longstanding dispute over the Town's reclassification to a legal trail of portions of Town Highway 26 ("TH 26"), a road abutting Demarest's Vermont property. Demarest previously challenged aspects of this reclassification in Vermont state administrative and judicial proceedings, leading to four Vermont Supreme Court decisions. *See Demarest v. Town of Underhill*, 256 A.3d 554 (Vt. 2021); *Demarest v. Town of Underhill*, 138 A.3d 206 (Vt. 2016); *In re Town Highway 26, Town of Underhill*, No. 2014-386, 2015 WL 2383677 (Vt. May 14, 2015) (unpublished op.); *Demarest v. Town of Underhill*, 87 A.3d 439 (Vt. 2013). He then commenced this action, alleging numerous constitutional violations. *See Demarest v. Town of Underhill*, No. 2:21-CV-167, 2022 WL 911146 (D. Vt. Mar. 29, 2022). The district court dismissed Demarest's Amended Complaint ("First Amended Complaint"), and we affirmed, concluding that "the relevant portions of the complaint were barred by claim preclusion and the running of the statute of limitations, or otherwise failed to state a valid claim." *Demarest v. Town of Underhill*, No. 22-956, 2022 WL 17481817, at *1 (2d Cir. Dec. 7, 2022) (summary order). Demarest then sought leave to file a Second Amended Complaint, and the district court denied his motion. We assume the parties' familiarity with the underlying facts, the remaining procedural history, and the issues on appeal.

When, as here, "the denial of leave to amend is based on . . . a determination that amendment would be futile, a reviewing court conducts a *de novo* review." *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014) (citation omitted). Amendment is futile when the amended complaint "could not withstand a motion to dismiss." *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 165 (2d Cir. 2015) (citation omitted). And to withstand a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When, as here, the plaintiff appeared *pro se* in the district court, we construe his pleadings liberally "to raise the strongest arguments that they suggest." *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994). We are not, however, "required to accept as true allegations that are wholly conclusory." *Krys v. Pigott*, 749 F.3d 117, 128 (2d Cir. 2014).

I. EQUAL PROTECTION

This Court has identified two "distinct pathways" under which a plaintiff can assert a "non- class-based Equal Protection violation": (1) a *LeClair* claim, and (2) an *Olech* claim. *Hu v. City of New York*, 927 F.3d 81, 93 (2d Cir. 2019). Both "require a showing that the plaintiff was treated differently from another similarly situated comparator," but "they differ in at least two key respects." *Id.* On the one hand, "an *Olech* claim does not require proof of a defendant's subjective ill will towards a plaintiff," *id.*, whereas a *LeClair* claim requires a plaintiff to prove that "the selective treatment was motivated by an intention to

discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person," *id.* at 91 (citation omitted). On the other hand, an *Olech* claim requires plaintiffs to satisfy an "extremely high similarity standard," whereby "(i) no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendant acted on the basis of a mistake." *Id.* at 94 (citation and internal quotation marks omitted). A *LeClair* claim, by contrast, "merely requires a 'reasonably close resemblance' between a plaintiff's and comparator's circumstances." *Id.* at 93. We have justified this lower similarity standard based on the fact that a plaintiff bringing a *LeClair* claim "ha[s] the extra burden of proving that their negative treatment was *caused by* an impermissible motive." *Id.* at 95 (emphasis added).

The district court analyzed Demarest's allegations under the framework for an *Olech* claim, and it concluded that Demarest had failed to establish the requisite similarity between himself and his comparators. On appeal, Demarest argues that his Second Amended Complaint should have been construed as asserting a *LeClair* claim, and that his comparators meet *LeClair*'s less rigorous similarity standard.

We need not determine whether Demarest can satisfy even the *LeClair* similarity standard, however,

because his claim fails for two independent reasons. First, Demarest cannot state a claim based on allegations of selective treatment with respect to his conflict-of-interest complaint because disregard of a complaint is not alone a cognizable injury, *cf. Demarest v. Town of Underhill*, No. 22-956, 2022 WL 17481817, at *2 (2d Cir. Dec. 7, 2022) (no First Amendment injury arising from Defendants' failure to "'listen [or] respond'" to Demarest's speech (quoting *Lawyers' Comm. for 9/11 Inquiry, Inc. v. Garland*, 43 F.4th 276, 284 (2d Cir. 2022)), and Demarest alleges no prejudice arising from the selective treatment.

Second, Demarest has not plausibly alleged that any of the remaining "disparate treatment" he experienced within the limitations period,[1] and which he neither has nor could have challenged in a prior state court proceeding, "was *caused by* [an] impermissible motivation." *Hu*, 927 F.3d at 91 (citation omitted). Demarest's Second Amended Complaint offers only conclusory allegations that the Town's remaining actions were caused by an impermissible motivation. *See, e.g.*, App'x at 58 ¶ 168. Such allegations cannot alone support a plausible *LeClair* claim. *See Ashcroft*, 556 U.S. at 681. Accordingly, Demarest would have to satisfy *Olech*'s "extremely high similarity standard" to state an Equal Protection claim. *Hu*, 927 F.3d at 94 (citation and internal quotation marks omitted).

1. A claim under 42 U.S.C. § 1983 adopts the limitations period for a state personal injury tort—which in Vermont is three years. *See Demarest*, 2022 WL 17481817, at *2 (citing *Morse v. Univ. of Vt.*, 973 F.2d 122, 125–27 (2d Cir. 1992)). Thus, because Demarest filed this lawsuit on June 21, 2021, claims accruing before June 21, 2018 are time-barred. *Id.*

Yet he does not challenge the district court's conclusion that his Second Amended Complaint cannot meet this standard.

II. FIRST AMENDMENT

"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 v. Hasty*, 802 F.3d 212, 222 (2d Cir. 2015) (citation and internal quotation marks omitted). With respect to the third requirement, "[i]t 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." *Nieves v. Bartlett*, 587 U.S. 391, 398 (2019). "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." *Id.* at 399 (citation omitted).

For the same reasons discussed above, Demarest has failed to plausibly allege that any of the Town's actions within the limitations period and which Demarest has not and could not have challenged in prior state court proceedings were caused by a retaliatory motive and caused him a cognizable injury. The allegations contained in his Second Amended Complaint thus cannot support a plausible First Amendment retaliation claim.

* * *

We have considered Demarest's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT, FILED DECEMBER 12, 2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Case No. 2:21-cv-167

DAVID P. DEMAREST,

Plaintiff,

v.

TOWN OF UNDERHILL, *et al.*,

Defendants.

Filed December 12, 2023

OPINION AND ORDER (Doc. 75)

Pro se plaintiff David P. Demarest brings this action against the Town of Underhill (the "Town") and a group of individuals working on behalf of the Town. His claims arise out of the reclassification of a portion of Town Highway 26 ("TH 26") to trail status. Demarest's property abuts TH 26, and he has litigated the reclassification in state court. This Court previously dismissed Demarest's Amended Complaint on several grounds, including claim

preclusion, statute of limitations, and failure to state a claim. The Court also allowed him to move to amend his seventh and eighth causes of action, each of which alleged First Amendment violations. Demarest appealed, and the United States Court of Appeals for the Second Circuit affirmed this Court's rulings. Now before the Court is Demarest's motion for leave to file a Second Amended Complaint. For reasons set forth below, that motion is **denied**.

Factual and Procedural Background

In 2002, Demarest purchased a 51.3-acre parcel of land adjacent to TH 26. As the Supreme Court of Vermont explained in the context of Demarest's prior state court litigation:

> The Town reclassified portions of TH 26 as a legal trail in 2001 and stopped maintaining the roadway at that time. The Town initiated a new reclassification proceeding in 2010, after a suit was filed, that challenged the sufficiency of the 2001 reclassification and sought an order requiring the Town to maintain the roadway. [Demarest] was involved in that suit. The June 2010 Selectboard reclassification decision found that reclassification was for the public good and convenience and necessary for the Town's inhabitants. The Town's reclassification resulted in TH 26 being divided into three 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.

[Demarest], and other landowners, appealed the Selectboard's reclassification decision under Vermont Rule of Civil Procedure 75. . . . Ultimately, the superior court concluded that the Town's 2010 reclassification was supported by the evidence. That case was appealed, and this Court affirmed, holding that the Selectboard's decision was supported by the evidence. *See Demarest v. Town of Underhill*, 2013 VT 72, ¶¶ 26-32, 195 Vt. 204, 87 A.3d 439 (affirming Town's decision to reclassify road as a trail).

When [Demarest] initially purchased his property in 2002, the Town approved the construction of a residence on the property. The parties dispute whether access to the property was primarily by Fuller Road or New Road prior to the reclassification. After the Town reclassified a portion of TH 26 as a trail, [Demarest's] only highway access was by Fuller Road. If [Demarest] could use the trail to access New Road, he would have a more direct route to Underhill Center.

In August 2015, [Demarest] applied to the Town's Selectboard for highway access to a proposed new subdivision on his property. He proposed that some of the lots would have

> access by Fuller Road with the remaining lots to have vehicular access via the [Crane Brook] trail to New Road. The Selectboard denied the application in May 2016.
>
> [Demarest] filed this suit, seeking a declaration that he had a right of vehicular access over Crane Brook Trail and appealing the denial of the permit. The parties cross-moved for summary judgment on different grounds. [Demarest] moved for summary judgment on the issue of whether he had a right of access over the trail. . . . The Town moved for summary judgment on the ground that [Demarest's] claim was barred by res judicata.

Demarest v. Town of Underhill, 2021 VT 14, ¶¶ 2–7, 256 A.3d 554. The Vermont Supreme Court determined that:

> [T]he claim here regarding [Demarest's] reasonable and convenient access to his property involves the same set of facts as those relevant to the Rule 75 appeal in that the facts are related in time, space, origin, and motivation. Both cases originated with the Town's act of reclassifying a portion of TH 26 as a trail. This action gave rise to both the appeal of the classification decision and [Demarest's] dispute over whether he was entitled to vehicle access across the new trail.

Id. ¶ 14. The Vermont Supreme Court further noted that "[Demarest's] motivation for challenging the

reclassification decision was the same as his motivation underlying his current request for a declaratory judgment. [Demarest's] concern has always been his access to his property via the trail." *Id.* ¶ 15. Accordingly, the court held that Demarest's "declaratory-judgment claim asserting a right of access over the trail is barred because it should have been brought in the first suit given that both claims stemmed from the same transaction." *Id.* ¶ 19. Justice Robinson dissented from the majority opinion.

On June 21, 2021, Demarest filed the instant *pro se* action asserting constitutional violations by the Town and its Selectboard Chair. On July 13, 2021, Defendants moved 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. On August 2, 2021, Demarest filed a twelve-count Amended Complaint against the Town, individual defendants working on behalf of the Town, an online forum, and a land trust.

Defendants again moved to dismiss. On March 29, 2022, the Court issued an Opinion and Order granting the motion. The Court dismissed the first four causes of action, which alleged violations of Demarest's due process rights, on the basis of *res judicata*. The Court also dismissed the fifth and sixth causes of action, which alleged an unconstitutional taking, as barred by *res judicata*. The Court held that Demarest's seventh and eighth causes of action, which alleged First Amendment violations, failed to state a claim. Demarest has stipulated to the dismissal of his ninth and tenth causes of action,

and the Court dismissed his eleventh and twelfth causes of action as insufficient and untimely. The Court also allowed Demarest to petition for leave to amend Counts Seven and Eight.

Demarest appealed the Court's ruling to the United States Court of Appeals for the Second Circuit. That court affirmed, holding that any claims that "could have been brought in the case that gave rise to the Vermont Supreme Court's decision" are barred by claim preclusion. The court also noted that "the remaining claims are largely time barred," as "much of the conduct targeted by [Demarest's] complaint dates from long before." Finally, with respect to Demarest's First Amendment claims, the Second Circuit concluded that to the extent such claims would survive "both the time bar and the application of claim preclusion . . . Demarest has otherwise failed to state a claim upon which relief could be granted." For support of this last point, the court cited *Zherka v. Amicone*, 634 F.3d 642, 643 (2d Cir. 2011) ("Private citizens alleging retaliation for their criticism of public officials must show . . . [an] 'actual chilling' of their exercise of their constitutional right free speech . . . [or] some other form of concrete harm. . . .") and *Lawyers Committee for 9/11 Inquiry, Inc. v. Garland*, 43 F.4th 276, 284 (2d Cir. 2022) ("[T]he First Amendment 'does not impose any affirmative obligation on the government to listen [or] to respond' to a citizen's speech" (quoting *Smith v. Arkansas State Highway Emp. Loc. 1315*, 441 U.S. at 463, 465 (1979)).

Now before the Court is Demarest's motion for leave to file a Second Amended Complaint against the Town and

individuals working on behalf of the Town. His proposed claims, like the prior claims, arise from the reclassification of TH 26, the resulting access issues, and Defendants' responses to his challenges. Demarest also cites a meeting on May 9, 2023, during which three individual defendants allegedly discussed a plan to install gates to block access. He claims that these discussions, together with intermittent blocking of TH 26 with boulders, were in retaliation for his "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." ECF No. 77 at 2.

The proposed Second Amended Complaint alleges violations of Demarest's First Amendment rights through retaliation, censorship, and manipulation of public records. Demarest also claims that he has been treated differently than similarly-situated persons in violation of his rights under the Fourteenth Amendment. Each of these causes of action is accompanied by a claim that the Town is liable under *Monell v. Department of Social Services*, 436 U.S. 658 (1978) for a pattern or practice of such allegedly-unconstitutional conduct.

Defendants oppose the motion to amend, arguing that the proposed pleading goes beyond Counts Seven and Eight of the prior Amended Complaint, and that amendment would be futile.

Appendix B

Discussion

I. Legal Standard for Leave to Amend

"Generally, leave to amend should be freely given, and a *pro se* litigant in particular should be afforded every reasonable opportunity to demonstrate that he has a valid claim." *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014) (internal quotation marks and citation omitted). However, leave to amend "may be denied when there is a good reason to do so, such as futility, bad faith, or undue delay." *Kropelnicki v. Siegel*, 290 F.3d 118, 130 (2d Cir. 2002). A proposed amendment is deemed futile when it "could not withstand a motion to dismiss." *See Balintulo v. Ford Motor Co.*, 796 F.3d 160, 164-65 (2d Cir. 2015).

To evaluate whether a proposed amended complaint would state a claim, courts rely on "the same standards as those governing the adequacy of a filed pleading." *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012). Accordingly, "[i]n assessing whether the proposed complaint states a claim, [the Court] consider[s] the proposed amendments . . . along with the remainder of the complaint, accept[s] as true all non-conclusory factual allegations therein, and draw[s] all reasonable inferences in plaintiff's favor to determine whether the allegations plausibly give rise to an entitlement to relief." *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 119 (2d Cir. 2012) (internal quotation marks and citations omitted).

II. First Amendment Claims

Demarest's amended First Amendment claims, set forth in the Second Amended Complaint's first and second causes of action, replace the seventh and eighth causes of action in the prior Amended Complaint. In his prior pleading, Demarest's allegations included claims that the Town had a pattern or practice of improperly editing or removing public records; refused to honor a petition submitted in 2002; defamed his character by referring to him and others as "litigious"; and prevented him from speaking at least once in a public meeting. The Court ruled that none of these allegations was sufficient to state a plausible First Amendment claim, and the Second Circuit affirmed that ruling.

In the proposed Second Amended Complaint, Demarest largely restates his grievances with the Town of Underhill and Town officials dating back approximately 20 years. Specifically, he cites "vindictive" conduct in 2009 (paragraph 36); fraud in the prior state court proceedings (paragraph 42); denial of a permit application in 2016 (paragraph 47); and issues with the interpretation of Vermont statutes (paragraph 52). His new causes of action specifically highlight paragraph 143 of the Second Amended Complaint, which alleges that portions of minutes from a certain meeting were deleted. ECF No. 77 at 35. He also cites paragraphs 147 and 148, which claim that the Town refused to consider certain proposals and withdrew a state court filing, thereby allegedly denying Demarest "standing" in that proceeding. *Id.* at 37. Demarest also alleges that Town officials prevented him

from speaking "outside of a brief 'public comment period'" at the beginning and end of a public meeting while others were allowed to "speak freely" (paragraph 157), and that certain Defendants interrupted his "polite effort to speak to a matter being discussed on the agenda" (paragraph 158). *Id.* at 39.

In his reply brief on the motion to amend, Demarest further cites paragraph 138, which alleges that one of the Defendants "was demonstrably bothered and took great issue with Plaintiff's effort to speak on matters of public importance which were being discussed on the agenda." *Id.* at 34. This allegation, he submits, gives rise to an inference that he was silenced. He makes the same argument with respect to the "interruptions" referenced in paragraph 158. *Id.* Nothing in those allegations, however, supports an inference that Demarest's speech was effectively curtailed, as discussed more fully below.

To state a plausible claim of a violation of the right to free speech, a plaintiff must allege "that official conduct actually deprived them of that right." *Williams v. Town of Greenburgh*, 535 F.3d 71, 78 (2d Cir. 2008). To prove this deprivation, a plaintiff must allege facts "showing either that (1) defendants silenced him or (2) defendants' actions had some actual, non-speculative chilling effect on his speech." *Id.* (cleaned up); *see also Spear v. Town of W. Hartford,* 954 F.2d 63, 68 (2d Cir. 1992) (requiring plaintiff to show that defendants "inhibited him in the exercise of his First Amendment freedoms"). Moreover, as noted by the Second Circuit, the government is under no obligation to listen or respond to a citizen's speech. *See Laws.' Comm. for 9/11 Inquiry, Inc.*, 43 F.4th at 284.

Demarest does not allege that he has been effectively silenced or that his speech has been chilled. In fact, he reportedly maintains a website and a YouTube channel offering his "observations of problems within Underhill's governance beginning in the winter of 2004 and continuing to the present day." ECF No. 77 at 11. Demarest also makes clear that he has "continued speaking up at Selectboard meetings and joined multiple petitions for road maintenance." ECF No. 77 at 3. And as the Court held previously, his allegations about the Town's management of public records, ostensibly after he had already expressed himself, do not support a finding that Defendants suppressed or otherwise impaired his right to free speech.

Demarest argues in the alternative that a First Amendment claim does not require chilled speech so long as he can show some other form of concrete harm. Indeed, the Second Circuit had held that "[c]hilled speech is not the *sine qua non* of a First Amendment claim," and that "[a] plaintiff has standing if he can show either that his speech has been adversely affected by the government retaliation or that he has suffered some other concrete harm." *Mangino v. Inc. Vill. of Patchogue*, 808 F.3d 951, 956 (2d Cir. 2015) (emphasis added) (quoting *Dorsett v. Cnty. of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013)). Here, however, that 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.

Demarest's most recent allegation, that in May 2023 certain Defendants discussed placing a gate in a location

that would bar access to TH 26, speculates about future harm that may fall well within the discretion of the Town, and in any event fails to present an actual case or controversy that this Court can review. *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687 (2d Cir. 2013) ("A claim is not ripe if it depends upon contingent future events that may not occur as anticipated, or indeed may not occur at all."). Accordingly, for each of the reasons discussed above, Demarest's motion to amend his First Amendment claims is denied.

III. Equal Protection Claims

Much of the proposed Second Amended Complaint focuses on official actions impacting other citizens in the Town. Citing the Fourteenth Amendment, Demarest claims that such actions show that he has been treated differently from those similarly situated, and that he may therefore bring a cause of action under the "Equal Treatment Clause." ECF No. 77 at 43. The Court construes this allegation as brought under the Fourteenth Amendment's Equal Protection Clause. *See Stradford v. Sec'y Pennsylvania Dep't of Corr.*, 53 F.4th 67, 73 (3d Cir. 2022) ("At bottom, the Equal Protection Clause requires equal treatment of all persons similarly situated." (internal quotation marks omitted)).

While the Equal Protection Clause typically focuses upon the treatment of persons who fall within certain protected classes, Demarest contends that he qualifies as a "class of one." ECF No. 79 at 6; *see Progressive Credit Union v. City of New York*, 889 F.3d 40, 49 (2d Cir.

2018) (recognizing equal protection "class of one" claim where plaintiff is not alleging membership in a protected class). To state a claim under that theory, Demarest must show that "he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). In the Second Circuit, persons asserting a class-of-one equal protection claim "must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves." *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006) (citation omitted). More specifically, "a plaintiff must establish that (i) no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendants acted on the basis of a mistake." *Ruston v. Town Bd. for Town of Skaneateles*, 610 F.3d 55, 60 (2d Cir. 2010) (affirming grant of motion to dismiss).

Demarest cites several instances in which the Town allegedly treated similarly-situated persons differently. For example, paragraph 33 of the proposed Second Amended Complaint claims that Defendant Marcy Gibson directed the Underhill Road Crew to create a school bus turnaround for the benefit of her grandchildren and certain property values. The pleading does not allege how those properties, or the area in question, compare to the portion of TH 26 at issue here. Paragraph 39

alleges that abutters of TH 11, unlike abutters of TH 26, have been "granted the reversionary private property right" guaranteed by state statute when a town highway is discontinued as such. ECF No. 77 at 8, 26. As a map on page 8 of the Second Amended Complaint appears to show, however, Demarest is not the only abutter of TH 26, and the Court is therefore unable infer that this allegedly-unequal treatment is singular to him as a class of one. Nor is it plain from the proposed pleading that TH 11 and TH 26 are comparable and that any abutters are similarly situated.

Paragraph 58 claims that certain members of the Selectboard denied Demarest's preliminary access permit for a proposed 9-lot subdivision, while at the same time allowing "lucrative subdivisions" to other, similarly-situated permit applicants. *Id.* at 14. The specifics of those other applications are not presented. Demarest also claims that the Town denied his 2009 request for a culvert on TH 26, while other Town roads have received requested maintenance. *Id.* at 18, 20. More generally, Demarest alleges that certain Defendants have "abused" their "unbridled discretion" to "enrich[] their own similarly situated privately owned parcels." *Id.* at 15. He also claims that the Town's initiation of the 2010 reclassification process treated his property differently than those similarly situated, and that he possesses "years of video recordings" showing violations of his equal protection rights. *Id.* at 25-26.

While these examples do not constitute the entirety of Demarest's unequal treatment claims, the Court has

reviewed the allegations set forth in the proposed Second Amended Complaint and finds none that meet the "high degree of similarity" standard required for a class-of-one equal protection claim. *Clubside, Inc.*, 468 F.3d at 159; *see also Hu v. City of New York*, 927 F.3d 81, 92 (2d Cir. 2019) ("a plaintiff must establish that he and a comparator are 'prima facie identical'" (citation omitted)). Moreover, 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.

IV. Cumulative Harm and the Continuing Violation Doctrine

Finally, Demarest's briefing compels the Court to address his references to the "continuing violation doctrine" and the concept of cumulative harm. His briefing asserts that "the continuing violation doctrine permits consideration of the cumulative patterns and practices involving claims at issue which could not previously form a triable unit." ECF No. 79 at 2. He appears to be using the doctrine both to invite reconsideration of the timeliness issue, and to buttress his *Monell* claims of municipal patterns or practices.

The continuing violation doctrine is typically used to avoid the impact of a statute of limitations. *See, e.g., Harris v. City of New York*, 186 F.3d 243, 248 (2d Cir. 1999) (noting that the doctrine provides an "exception to

the normal knew-or-should-have-known accrual date"). 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." *Gonzalez v. Hasty*, 802 F.3d 212, 220 (2d Cir. 2015). "A claim will be timely, however, only if the plaintiff 'allege[s] . . . some non-time-barred acts' contributing to the alleged violation." *Id.* (quoting *Harris*, 186 F.3d at 250).

Here, this Court and the Second Circuit have held that Demarest's claims in his Amended Complaint were barred by claim preclusion, untimeliness, and/or failure to state a claim. Although he asserts new facts, such as the alleged discussion at the May 2023 meeting, none of his timely allegations support a plausible cause of action under either the First or Fourteenth Amendments. Furthermore, his efforts to tie those allegations to earlier, time-barred claims do not convert those discrete acts into ones that are actionable. See *Gonzalez*, 802 F.3d at 222 ("The mere fact that the effects of retaliation are continuing does not make the retaliatory act itself a continuing one." (quoting *Deters v. City of Poughkeepsie*, 150 F. App'x 10, 12 (2d Cir. 2005) (summary order)). For reasons discussed above, Demarest still has not plausibly alleged that his speech was chilled, that he suffered timely and actionable concrete harm, or that he has been treated differently than others who were similarly-situated in violation of his equal protection rights.

Giving his *pro se* filings the required liberal reading, Demarest also appears to be arguing that such "continuing

violations" support his *Monell* claims of unlawful patterns or practices by the Town. However, without a viable constitutional claim underlying the alleged municipal violations, there can be no *Monell* claim. *See Segal v. City of New York*, 459 F.3d 207, 219 (2d Cir. 2006) ("Because the district court properly found no underlying constitutional violation, its decision not to address the municipal defendants' liability under *Monell* was entirely correct.").

Conclusion

For the reasons set forth above, Demarest's motion for leave to file a Second Amended Complaint (ECF No. 75) is **denied**. This case is closed.

DATED at Burlington, in the District of Vermont, this 12th day of December, 2023.

/s/ William K. Sessions III
William K. Sessions III
U.S. District Court Judge

APPENDIX C — SECOND AMENDED COMPLAINT FOR VIOLATION OF CIVIL RIGHTS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT, FILED OCTOBER 2, 2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

CASE NO: 2:21-cv-167
(42 U.S.C. § 1983)
(42 U.S.C. § 1983 Monell)
Jury Trial Demanded

DAVID P. DEMAREST, AN INDIVIDUAL,

Plaintiff,

v.

DEFENDANT TOWN OF UNDERHILL, A MUNICIPALITY AND CHARTER TOWN, AND DEFENDANT TOWN OFFICIALS: DANIEL STEINBAUER, AS AN INDIVIDUAL, DEFENDANT BOB STONE, AS AN INDIVIDUAL, DEFENDANT DICK ALBERTINI, AS AN INDIVIDUAL, DEFENDANT SETH FRIEDMAN, AS AN INDIVIDUAL, DEFENDANT MARCY GIBSON, AS AN INDIVIDUAL, DEFENDANT ANTON KELSEY, AS AN INDIVIDUAL, DEFENDANT KAREN MCKNIGHT, AS AN INDIVIDUAL, DEFENDANT STEVE OWENS, AS AN INDIVIDUAL, DEFENDANT DAPHNE

Appendix C

TANIS, AS AN INDIVIDUAL, DEFENDANT
STEVE WALKERMAN, AS AN INDIVIDUAL,
DEFENDANT MIKE WEISEL,
AS AN INDIVIDUAL.

Filed October 2, 2023

SECOND AMENDED COMPLAINT FOR VIOLATION OF CIVIL RIGHTS

(Non-Prisoner Complaint)

SUMMARY OF COMPLAINT

1. Plaintiff's First and Fourteenth Amendment rights were violated by a series of actions taken by the Defendants with respect to Plaintiff and his 50+ acres of residential property in the Town of Underhill.

2. Prior to Plaintiff's purchase of his property on New Road, Defendant Town of Underhill expressly promised reasonable access to the parcel (NR144). Plaintiff also had an attorney review the land records and purchased title insurance.

3. Plaintiff would not have purchased the property were it not for the promises made by Defendants.

4. At the time Plaintiff built his home (under New Dwelling Permit B02-41), New Road was a Class III & Class IV thru-road shown on the official Agency of Transportation map (dated 2010 and earlier) as Town Highway 26 (TH-26).

5. In the furtherance of their own personal interests and gains, Defendants have engaged in actions inimical to Plaintiff's constitutional rights for more than 14 years. Exercising his First Amendment rights, Plaintiff sought to have the Town engage in minimal road repairs on TH-26. When the Town failed to do so, Plaintiff continued speaking up at Selectboard meetings and joined multiple petitions for road maintenance. Instead of repairing and maintaining TH-26 the way similarly situated roads in town were maintained, Defendants "reclassified" the road from Plaintiff's driveway to the Town Highway Department facilities as a "Legal Trail."

6. In addition to abandoning maintenance on portions of TH-26 both north and south of Plaintiff's driveway, Defendants have denied Plaintiff's request to maintain the "Trail" segment of TH-26 at his own expense, and intermittently blocked TH-26 access with boulders which causes recurring difficulties accessing Plaintiff's domicile.

7. On May 9, 2023 Defendants Karen McKnight, Anton Kelsey, and Daphne Tanis discussed an additional plan to install gates to block ongoing motor vehicle access and to direct public use towards Plaintiff's property.

8. The Defendants' actions were taken in retaliation 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.

9. Plaintiff has been singled out for this harsh treatment. Other similarly situated property owners—including some of the Defendants themselves—have been treated quite differently, as alleged hereafter.

10. The Defendants acted maliciously and in concert to deprive Plaintiff of rights guaranteed by the Constitution to all citizens.

JURISDICTION

11. The federal rights asserted by Plaintiff are enforceable under 42 U.S.C. § 1983.

12. This Court has jurisdiction over these claims under 28 U.S.C. §§ 1331, 1343(a)(3) and has the authority to grant declaratory and injunctive relief under 28 U.S.C. § 2201-2202 and Fed. R. Civ. P. 57 and 65.

VENUE

13. Venue is proper in the District of Vermont under 28 U.S.C. § 1391(b) since Plaintiff and majority of Defendants are residents of this judicial district.

14. All the actions and inactions by Defendants giving rise to all causes of action occurred within this judicial district.

Appendix C

PARTIES

15. THE TOWN OF UNDERHILL, P.O. Box 120, Underhill, VT 05489, a municipality and charter town of The State of Vermont.

16. DANIEL STEINBAUER, 52 Range Road, Underhill VT 05489. Current Underhill Selectboard Chair and Justice of the Peace (and former Underhill Conservation Commission Member), as an individual.

17. BOB STONE, 54 River Road #A, Underhill VT 05489, current Underhill Selectboard Member, as an individual.

18. DICK ALBERTINI, 66 Kiln Rd, Essex Junction, VT 05452, former Underhill Conservation Commission Member, and former Underhill Planning Commission Chair, as an individual.

19. SETH FRIEDMAN, 139 Pleasant Valley Rd, Underhill VT 05489, former Underhill Selectboard Member (and current Underhill Recreation Committee Member), as an individual.

20. MARCY GIBSON, 50 New Rd, Underhill, VT 05489, former Jericho Underhill Park District member, as an individual.

21. ANTON KELSEY, 200 Pleasant Valley Rd, Underhill, VT 05489, Underhill Recreation Committee Chair, as an individual.

22. KAREN MCKNIGHT, 164 Beartown Rd, Underhill, VT 05489 Underhill Conservation Commission Chair and Development Review Board, and former Trails Committee Member, as an individual.

23. STEVE OWENS, 180 River Road, Underhill VT 05489, former Underhill Selectboard Member, as an individual.

24. DAPHNE TANIS, 359 Irish Settlement Rd, Underhill, VT 05489, Underhill Conservation Commission Member, as an individual.

25. STEVE WALKERMAN, 5631 Dorset St, Shelburne, VT 05482, former Underhill Selectboard Member, as an individual.

26. MIKE WEISEL, 626 Irish Settlement Rd, Underhill, VT 05489, Underhill Infrastructure Committee Member, as an individual.

27. Due to a lack of transparency within the governance of Defendant Town of Underhill, discovery may reveal material information, including information solely in the possession of Defendants, to substantiate addition of parties or Causes of Action.

GENERAL ALLEGATIONS

28. Plaintiff asserts having exercised the First Amendment Right to Petition for a Redress of

Grievances by being a co-party to a "Notice of Insufficiency" involving TH-26 dated February 17, 2010 and submitting a "Petition on Fairness in Town Road Maintenance on Public and Private Roads" dated April 29, 2010 which was signed by over 5% of Underhill's registered voters, and having publicly exercised, and attempted to exercise, protected speech on matters of local importance in Underhill Vermont for the span of approximately 20 years.

29. Plaintiff asserts the Underhill Selectboard Meeting Minutes dated March 4, 2010 involving the 2010 reclassification of TH-26 (New Road) state, "Steve Walkerman moves the motion as written: Whereas a petition has been filed with the Chittenden Superior Court [by Plaintiff]" (Exhibit 1)

30. Plaintiff alleges a longstanding pattern and practice of Defendants' willful actions and inactions involving both Plaintiff and treating the central segment of TH-26 differently than other similarly situated public rights of way has been primarily motivated by retaliation against Plaintiff for the exercise of his First Amendment Rights asserted above.

31. Plaintiff alleges the treatment of Plaintiff, Plaintiff's property, the segment of TH-26 abutting Plaintiff's property, and self-executing private right of access to Plaintiff's property by way of TH-26 have been treated differently relative to Defendant actions and inactions in similarly situated situations.

32. Plaintiff alleges there to have not been a rational basis founded upon legitimate local governmental interests, as opposed to defendant officials own self-interests for the disparate treatment of Plaintiff relative to others that are similarly situated.

33. Plaintiff asserts the question posed 22 minutes 32 seconds into the April 24, 2010 New Road Reclassification demonstrates Plaintiff's lifestyle and off-grid domicile was not adversely impacting anyone or the environment and therefore there was no valid rational basis to treat Plaintiff differently than similarly situated residents. Plaintiff asserts the speed this question was answered demonstrates Defendant awareness sustaining unequal treatment of the central segment of TH-26 would cause an increasingly disproportionate impact to Plaintiff's way of life; in comparison Defendant Marcy Gibson directed the Underhill Road Crew to develop a school bus turnaround on the Town's conservation land opposite her property for the sole benefit of her grandchildren and the property values of NR-48 and NR-50 (according to an information request responded to January 19, 2023 the estimated town cost was $3,875).

34. Defendant Town of Underhill had been receiving state funding to maintain the entire former class III segment and the non-deferential County Road Commissioners Report in prior proceedings dated June 26, 2013 involved factual findings entirely in favor of Plaintiff and two co-petitioners; describing

the cumulative impacts of sustained abandonment of municipal maintenance of the central TH-26 segment

35. The Defendants chose to incur the cost of appeal based solely upon a legal theory that the gap in the court's non-deferential jurisdiction is justification enough to exercise unbridled municipal defendant discretion and continue to refuse to maintain (or even remove illegally dumped items) for a distance of ~3000 feet of TH-26 south of Plaintiff's driveway and also refuse to maintain (or even remove illegally dumped items) north of Plaintiff's driveway until past his northerly property line.

36. Plaintiff asserts Defendants Town of Underhill, Daniel Steinbauer, Steve Owens, Steve Walkerman vindictively responded to Plaintiff publicly advocating to pursue a grant to replace a culvert on TH-26 by seeking legal advice in a letter dated October 8, 2009 to determine "if there is any way the Town could rescind the access" which Plaintiff was previously promised *and* actively utilizing for access to Plaintiff's domicile and surrounding private property; this letter is incorporated by reference and available publicly at: https://www.underhillvt.com/october-8-2009-letter

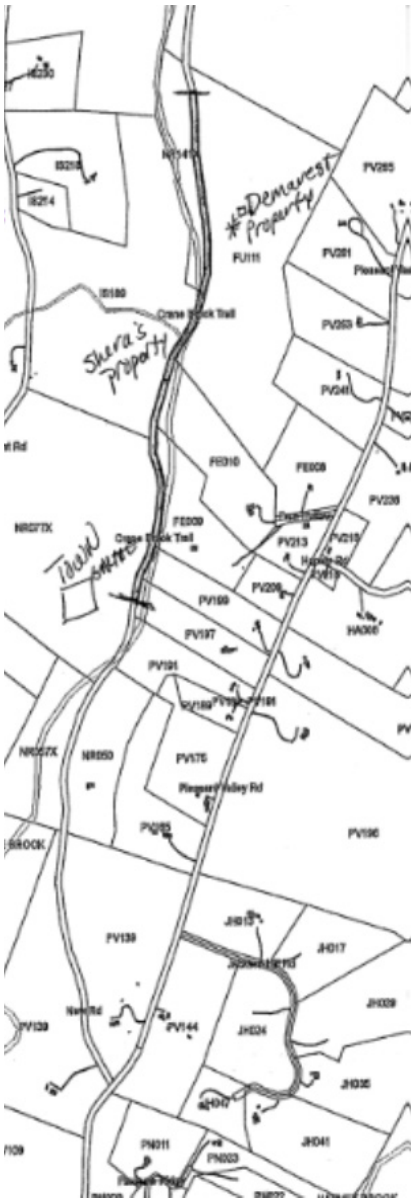
37. Plaintiff asserts Defendants attending the May 8, 2023 joint meeting of the Underhill Conservation Commission and Underhill Recreation Committee have articulated an additional plan to further harm Plaintiff's by, *inter alia*, building gates to block his continued vehicular access for compelling personal

and business purposes to his domicile and surrounding lands.

38. The schematic to the right shows the general spatial layout of Plaintiff's property and similarly situated properties; the segment of TH-26 between the two hand-drawn lines is the segment which the October 8, 2009 letter expressed the intention to *rescind* Plaintiff's access *in response to* Plaintiff's speech advocating the Town pursue a grant to replace a failed culvert on TH-26 abutting Plaintiff's property (if the grant were pursued and awarded, the cost would have been ~$1600); the small mark on the road next to "Shera's property" was the legal transition between Class III and Class IV road at that time. (Exhibit 2 includes more detail).

39. Plaintiff asserts following the sustained abandonment of any public maintenance of a segment of Town Highway 11, unlike similarly situated abutters to TH-26, TH-11 abutting property owners have been granted the reversionary private property right which Vermont Statutes of 1906, Chapter 170 Sec. 3904, the relevant law following the laying out of both TH-11 and TH-26, guaranteed abutting property owners if a town highway were to be *discontinued as a town highway*.

Appendix C


Demarest Property
Shira's Property
Cross Brook Trail
Ridgewood Valley Rd
Nash Rd

40. In violation of the First Amendment, Defendants acted under color of law to discriminate against Plaintiff by preventing his speech in public meetings and misrepresenting protected speech (including preventing factual evidence from ever being incorporated into the legal record in prior administrative proceedings) and violated Plaintiff's right to Equal Treatment as similarly situated individuals following his protected speech on matters of public concern.

41. Plaintiff asserts the current Selectboard Rules of Procedure, as modified by Defendant Bob Stone, unreasonably constrain public comment based upon the unbridled discretion section granted under F4 ("The chair . . . may bypass any or all steps when he or she determines, in his or her sole discretion, that deviation from the process is reasonable and warranted . . . "); in addition Plaintiff alleges only some residents are permitted to speak outside of the two to five minute "Open Public Comment" period.

42. Plaintiff alleges Defendants have committed fraud on the court during a Kafkaesque maze of non-chronological Vermont state court deferential Rule 75 administrative proceedings would have been avoided if Defendants had been willing to treat Plaintiff and Plaintiff's property the same as similarly situated parties and other similarly situated properties.

43. Plaintiff asserts Defendants falsely claim the Town of Underhill reclassified a segment of TH-26 in 2001

despite the Vermont Superior Court's ruling dated May 31, 2011, at a non-deferential standard of review which found on the merits, "The court concludes that the Town's 2001 attempt to reclassify TH-26 was not valid because the Town did not comply with the requirement the Selectboard's order be recorded in the Town's land records." (Defendants chose not to appeal, Docket No S0234-10 CnC).

44. Plaintiff acknowledges Defendants' Underhill Trail Ordinance continues to prevent a Takings claim from being plausible on its face by having an official policy of prohibiting motor vehicle use over a segment of TH-26 by the general public for a portion of the year while simultaneously codifying an official policy that "permits *shall be* issued" for legitimate needs (and "legitimate need" is defined in the ordinance as "a compelling personal or business purpose").

45. Plaintiff asserts despite the cumulative deterioration of portions of the central portion of the TH-26 right of way he has continued to exercise a common law and 19 V.S.A. 717(c) self-executing private right of access to his domicile and surrounding private property over the TH-26 right of way from both the North and South.

46. Plaintiff asserts having traditionally allowed respectful public use of a detour outside of the duly laid out TH-26 right of way in accordance with the protections of the Vermont Landowner Protection Act and incorporates by reference imagery of the

detour outside of the duly laid out TH-26 right of way near Plaintiff's driveway obtained from maps. vcgi.vermont.gov/parcelviewer (search for "FU111", Accessed October 2, 2023).

47. Despite ongoing off-road capable motor vehicle use of the TH-26 right of way all the way from Pleasant Valley Road to Irish Settlement Road, as of October 2, 2023 Plaintiff is unaware of any instances of the Underhill Trail Ordinance being enforced in any way other than Defendants' use of the discretion they afforded themselves in the ordinance as the basis to discretionarily deny Plaintiff's *preliminary* 9-lot access permit application on May 5, 2016.

48. Plaintiff has engaged in protected speech advocating Selectboard members and other Town Officials recuse themselves when they have a Conflict of Interest, and explicitly stated observations of problems within Underhill's governance beginning the winter of 2004 and continuing to the present day with the launching of the Plaintiff's website, www.UnderhillVT.com, and the YouTube Channel @underhillvt.

49. Plaintiff references a prior Town of Underhill Road Foreman's knowledge of relevant facts (Exhibit 3) as partial substantiation there was never a rational basis for unequal treatment of the central segment of TH-26 relative to similarly situated properties over the span of 20 years which was never allowed into Defendants' prior administrative records.

50. Excerpts of factual documentation and recordings of public meetings and hearings in which town officials demonstrated demeanor characteristic of willful indifference towards Plaintiff's civil rights combined with malicious intentions and animosity towards Plaintiff while choosing to make specific actions and inactions which were reasonably knowable to cause harm to Plaintiff are incorporated by reference to the archived public meeting recordings made by MMCTV.

Current Statutory Construction of Vermont Law, Deferential Administrative Proceedings & Non-Deferential Findings of Fact Relevant to Present Claims

51. Upon learning of Defendants' intentions expressed in the above-mentioned October 8, 2009 letter seeking "any way" to "rescind" previously promised access, Plaintiff retained legal counsel in a timely-manner and Petitioned the Court for a redress of grievances as a co-petitioner to a Notice of Insufficiency.

52. Due to Defendant Town of Underhill use of the unbridled discretion Vermont statute grants a municipality to "reclassify" a Town Highway without admitting the Town Highway is "altered" or "resurveyed" in the process, Vermont courts were denied non-differential jurisdiction under the Rule 74 standard of review. Were the Vermont courts to have non-deferential jurisdiction, the proceedings involving TH-26 would have concluded with the defendant town's claimed 2001 New Road reclassification having

been determined to be *invalid* (Full-Faith should be granted to Vermont Superior Court Ruling Dated May 31, 2011 on Docket No. S0234-10Cnc) and the Vermont courts could have exercised non-deferential jurisdiction to compel Defendants follow the Report of the County Road Commissioners on Docket No. 234-10 Cnc dated June 26, 2013 which Ordered, "Repairs are to consist of those repairs recommended by petitioners . . . "

53. Due to the statutory construction of *19 V.S.A. 701(2)*, Vermont state courts currently lack non-deferential jurisdiction when a Town Highway is "reclassified" and the only avenue of appeal is a deferential Rule 75 standard of review which begins akin to seeking a *writ of certiorari* in opposition to the administrative record created by the defendants; as applied this level of defendant discretion prevented the cumulative impacts of Defendants' discretionary decisions to be challenged by Plaintiff until harm to Plaintiff was more than speculative and the pattern and practice of unequal treatment of Plaintiff relative to similarly situated parties was also more than speculative.

54. Defendant conduct and the statutory construction of Vermont law prevented the County Road Commissioner findings of fact from, "trump[ing] the selectboard's decision through their own view of what the public requires." Id. at 622, 795 A.2d at 1269

55. Judicial Estoppel requires Defendants be bound by their prior narratives when adjudicating present

claims at a non-deferential standard of review; since "Classification of a town highway is not a mandate about the road's physical appearance, but about its categorization." (*Ketchum v. Town of Dorset*, 22 A.3d 500 (Vt. 2011), 10-165) the consideration of what qualifies as a "similarly situated property owner" should likewise not be altered by the classification of an abutting public right of way. The Town of Underhill willfully treats Plaintiff and the vast majority of Plaintiff's previously clearly recognized bundle of private property rights differently than similarly situated property owners.

56. Causes of Action involving the cumulative harm to Plaintiff caused by Defendants' violations of the First Amendment and Equal Treatment Clause require a non-deferential standard of review as of right and accrual of these Causes of Action required sufficient factual differences in the treatment of sufficiently similar parties and their respective properties to accrue.

57. Plaintiff notes in accordance with the statutory construction of *19 V.S.A. 701(2) as applied due to stare decis*, "[Vermont state courts still] cannot say that it is wholly irrational for the Legislature to choose to have a different standard of review for the selectboard's decision to reclassify a town highway than for the altering, laying out or resurveying of a highway" (*Ketchum v. Town of Dorset*), and Plaintiff asserts equitable estoppel requires determination of what constitutes "similarly situated parties" and

"similarly situated parcels" requires continuing to consider the entire current and former TH-26 length to have never been legally changed by the process of "altering, laying out or resurveying" following Plaintiff's construction of his domicile with a New Dwelling Permit issued to NR144 on July 1, 2002.

58. Plaintiff diligently appealed the Selectboard's discretionary denial of a preliminary access permit to a proposed 9-lot subdivision despite Vermont law constraining court jurisdiction to a cursory administrative review of the Defendants' narrative, the Selectboard exercised discretion for the benefit of Defendants Dick Albertini, Marcy Gibson, as well as other similarly situated (but less thoroughly prepared) *preliminary* access permit applications which were granted the opportunity to present their proposals to the Development Review Board and granted lucrative subdivisions.

59. Contrary to Defendants' own administrative proceeding narratives, the ongoing use of off-road capable motor vehicles on the central TH-26 "trail" segment has been acknowledged by Defendant Anton Kelsey's statements in the Joint Conservation Commission and Recreation Committee meeting of May 8, 2023 and Defendant Mike Wiesel's sworn testimony August 2, 2021 (which involved DRB Docket No. DRB-21-12 and his bicycle club's construction of a new public trail extension and bridge without first seeking a permit and with what has been asserted to be an unsafe entrance onto TH-26 due to inadequate

sight lines on the well maintained most northerly portion of TH-26).

60. Plaintiff alleges Defendants have deceived the Vermont state courts in administrative proceedings on narrowly defined issues by misrepresenting or censoring relevant facts and creating debates of clearly known facts in a pattern of invidious delays aimed at retaliating against Plaintiff for the exercise of his First Amendment rights.

61. Plaintiff asserts one of the delay strategies Defendants have utilized was denial of the Town of Underhill having previously installed culverts and provided general maintenance of the central segment of TH-26 in prior administrative proceedings despite the town knowing that to be a false claim given well known history of public use to access public landfills.

62. Plaintiff asserts Selectboard Meeting Minutes May 27, 2010 acknowledge Defendant Town of Underhill legal counsel drafted the Selectboard Reclassification Order and Plaintiff asserts due to the purely administrative nature of the Selectboard's Order of Reclassification no longer requiring genuine fact-finding due to the statutory construction of *19 V.S.A. 701(2)* the discretionary decision was not supported OR opposed by any duly sworn in testimony.

63. Plaintiff incorporates by reference the recording of the reclassification hearing held April 24, 2010 and asserts Defendants willfully refused to recuse

themselves from a proceedings they inherently involved a structural conflict of interest given in Defendant Dan Steinbauer's own words beginning 3 minutes and 30 seconds into the recording, stated in part, the purpose of the hearing was "to cross the T's and dot the I's."

64. The unbridled discretion Defendants have abused in purely administrative proceedings to both ever increasingly harm Plaintiff while enriching their own similarly situated privately owned parcels demonstrates why the Vermont Legislature needs to correct the unconstitutionally vague statutory construction of *19 V.S.A. 701(2)*, which currently grants small towns in Vermont unbridged discretion on matters which may result in the cumulative violation of one or more Constitutional rights.

65. The *Rhodes* decision succinctly summarizes the statutory construction of current Vermont law:

> The selectboard's decision to downgrade its status to a trail did not—as we have elsewhere held—constitute a "taking" entitling abutting landowners to compensation. See Ketchum v. Town of Dorset, 2011 VT 49, ¶ 13, 190 Vt. 507, 22 A.3d 500 (mem.) (reaffirming rule that "downgrading a road does not involve a taking"); Perrin v. Town of Berlin, 138 Vt. 306, 307, 415 A.2d 221, 222

(1980) (holding that downgrading of town highway to a trail "does not involve the acquisition of property rights from the abutting owners" so that "no damages are involved").

66. Plaintiff asserts the prior landowners of NR144 (Shakespeare, Sims, and Slater) requesting to have a segment of TH-26 discontinued is fundamentally different than a reclassification into a legal trail against the will of abutting property owners; a town highway discontinuance provides reversionary property rights to abutting landowners, ensures landowner privacy, and preserves a landowner's private right of way over the discontinued corridor in accordance with common law and Vermont Statute 19 V.S.A. § 717(c).

67. Plaintiff respectfully observes the Vermont Legislature's 2023 Bill H.370 as introduced does not remedy the unbridled discretion the Vermont legislature has afforded small town officials involving the "Road-to-Trail" model developed by Defendants to cumulatively treat similarly situated individuals dramatically differently without the statutory ability of the courts to exercise non-deferential jurisdiction; indeed it could be argued the proposed amendment to 19 V.S.A.§ 302 (5) grants even more unbridled discretion and potential for unequal treatment of similarly situated parties if passed as proposed.

68. Plaintiff asserts it is exceedingly implausible given years of litigation Defendants could possibly be unaware of the Vermont Supreme Court Decision *Rhodes v. Town of Georgia* dated March 23, 2012 involving Article 7 of the Vermont Constitution which is an additional reason qualified immunity does not shield their extremely similar pattern and practice of mistreating Plaintiff.

General Chronology of Facts Relevant to The Present Claims

69. Selectboard meeting minutes dated April 11, 2002 state:

> The UCC would like to have town buy the Shakespeare [the prior owners' of Plaintiff's property and prior donors of NR141x] land. There is no penalty for them to give it to the town.

70. Plaintiff met with the Town of Underhill Selectboard prior to his purchase of NR144; meeting minutes failed to record the entirety of the promises officially made by Defendant Town of Underhill and the former Selectboard Chair Stanton Hamlet to Plaintiff involving, *inter alia*, abutting landowners recognized right of access on New Road (but plowing the segment from the Town Highway Maintenance Building to Irish Settlement Road was up to landowners).

71. Plaintiff had already built a domicile, and the Defendant Town of Underhill presently continues to retain the property code "NR-141x" for the property opposite a *northern* portion of Plaintiff's property despite changing Plaintiff's lot code from NR144 to FU111; for the purposes of present claims judicial estoppel requires "reclassification" of TH-26 should not now deviate from Plaintiff's past administrative narratives into Defendants' that changes to TH-26 did not involve the plain meaning of either the words "alter" or "resurvey."

72. In response to Plaintiff's speech urging consideration a grant which, if granted, would preserve *all* reasonable public uses *and* private uses *while* protecting the environment for approximately $1,600 (based upon the prior Underhill road foreman estimate of $8,000 to replace a failed TH-26 culvert on the segment abutting Plaintiff's property), on October 8, 2009, after years of refusing to conduct reasonable and necessary maintenance to the central segment of TH-26 while continuing to receive State A.O.T. funds to maintain the entire Class III segment, Defendants Town of Underhill, Daniel Steinbauer, Steve Owens, Steve Walkerman and others acting under color of law but outside of public awareness.

73. Plaintiff asserts the dialogue between Defendant Karen McKnight and Defendant Dan Steinbauer beginning 16 minutes and 42 seconds of the 2010 New Road Reclassification hearing was indicative of a willful collaboration to falsely claim that Plaintiff

and other interested parties strongly opposing to the reclassification would still have reasonable access to the entirety of their respective properties.

74. Plaintiff asserts his lifestyle living in an off-grid home in the middle of over 50 acres of private property was so minimally impactful to both TH-26 and his neighbors that the question asked 22 minute and 32 seconds into the Reclassification hearing combined with Defendants response demonstrates a lack of any rational basis founded upon legitimate governmental purposes for the Defendants' efforts to find "any way" to "rescind" the access Plaintiff had been promised instead of simply replacing a failed culvert the way they would have done on any other road in town (or agreeing to provide the materials for Plaintiff to work on the road if he provided the labor, as had been done previously).

75. The actions of Defendants Town of Underhill, Daniel Steinbauer, Steve Owens, Steve Walkerman, Marcy Gibson, Karen McKnight, the late Stan Hamlet, and others acting under color of law but outside of public awareness demonstrates knowledge, that Town Highway 26 (also known to as "TH-26" / "New Road" / Fuller Road / "Crane Brook Trail" / "Old Dump Road"), *in accordance with clearly established law*, 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..

76. Defendants' lack of any rational basis founded upon legitimate governmental interests for their actions is demonstrated by the sustained refusal to pursue a grant which, if granted, could have achieved replacement of a failed culvert along Plaintiff's prior road frontage for a mere $1,600, or the sustained refusal to remove litter and illegally dumped items from the TH-26 corridor.

77. After reading the November 19, 2020 Recreation Committee Minutes which discussed a planned bridge on the "Crane Brook Trail," Plaintiff contacted Seth Friedman in good faith to discuss the idea. Plaintiff then personally met with Defendants Seth Friedman and Anton Kelsey on November 28, 2020 to visit the proposed location of the bridge and discuss the planned bridge.

78. On November 28, 2020, Plaintiff emailed Defendant Seth Friedman and asked him to forward the email to Anton Kelsey to both memorialize their meeting and continue the dialogue on the potential to, inter alia, "work together to achieve a reasonable level of public maintenance of public infrastructure by replacing the failed culvert in a manner that kept the corridor usable by all . . . "Plaintiff asserts the location of the Town's Highway Department's garage on TH-26 made it very reasonable to provide equal maintenance to the entire length of TH-26 between Pleasant Valley Road and Irish Settlement Road.

79. The preceding assertion is supported by an affidavit from the Town of Underhill's former Road Foremen (Exhibit 3) which opposed Defendants' unequal treatment of Plaintiff by objectively recognizing there was never a compelling justification for Defendant Town of Underhill to stop maintaining any segment of TH-26 between Pleasant Valley Road and Irish Settlement Road given similar Class III and Class IV town highways in the Town of Underhill were regularly maintained.

80. As one example of Defendant's disparate treatment of Plaintiff, the Town of Underhill treatment of similarly situated landowners abutting Corbett Road is planning as of 2023 to install a "Beaver Deceiver" to preserve vehicular use while protecting the environment and downstream water quality in contract 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.

81. Additional examples of disparate treatment of Plaintiff's TH-26 frontage and private accessibility over a public corridor include TH-9 (North Underhill Station Road) maintenance through a wetland, TH-11 (Butler Road) providing requested culvert to Class IV portion, permitting segments of TH-11 (Butler Road), TH-33 and TH-41 to be discontinued instead of discretionarily turned into a "Legal Trail," and a segment of TH-26 which was Class 4 being discretionarily upgraded from Class 4 to Class 3.

82. As depicted in Table 1, The Town of Underhill's appraisals of properties on and near TH-26 demonstrate the disproportionate negative financial impact of the Unequal Treatment of TH-26 and Plaintiff's property compared to nearby real estate values and the indefinite delay of reasonable investment backed returns or appreciation in comparison to nearby similarly situated properties.

83. Named Defendants financially benefiting from Defendants' pattern and practice of Unequal Treatment of Plaintiff are underlined in Table 1.

84. Defendants Dick Albertini and Marcy Gibson are two of the most notable examples of Defendants who significantly profited from a completed subdivision process which was dramatically easier than the Town of Underhill's unequal treatment of Plaintiff's efforts to obtain a *preliminary* access permit.

85. Defendant Town of Underhill assessments conducted in 2019 recognize the dramatic devaluation of Plaintiff's property compared to nearby properties that are similarly situated.

Appendix C

Table 1	**2019 Assessment Exclusive Of Improvements**		(Named Defendants Are Underlined) (Properties Are Listed North to South)	
Parcel ID	**Acres**	**Parcel $**	**$ Acre**	**Ownership**
IS-359	10.02	$117,800	$11,756	Walter and Daphne (UCC Member) Tanis
FU-11	3.4	$87,400	$25,705	Jessica Butler and Jeremy Rector
FU-12x	0.33	$23,000	$69,697	Town of Underhill
FU-23	7.5	$100,000	$13,333	John and Tammy Viggato
FU-49	49.5	$162,900	$3,291	Trust for Jeff and Angela Moulton (formerly co-petitioner with plaintiff)
FU-54X	17	$127,300	$7,488	Town of Underhill
FU-57	122.4	$267,600	$2,186	Jonathan and Lisa Fuller (formerly co-petitioner with plaintiff)

Appendix C

FU-111	51.64	$108,000	**$2,091**	**David Demarest**
NR-141x	10.19	$122,100	**$11,982**	**Town of Underhill**
NR-50	8.98	$114,600	$12,762	Marcy Gibson (JUPD and JULT member)
NR-48	3.77	$98,600	$26,154	Kevin Gibson (Marcy Gibson's son)
NR-3	30.3	$163,100	$5,383	John and Denise Angelino
PV-200	24	$170,000	$7,083	Anton (Recreation Committee Chair) and Amy Kelsey
PV-139 (with frontage opposite NR-3)	30	$207,100	$6,903	Trust of Seth Friedman (current Recreation Committee and former Selectboard member) and Allison Friedman (JULT member)

Appendix C

PV-109[1]	25.02	$526,000[2]	$21,023	Dick (former UCC and Planning Commission member) and Barbara Albertini (JULT members)

Substantiation of Monell claims against Town of Underhill includes:

86. Defendants' disregard for the Equal Treatment Clause and First Amendment and Fourteenth Amendments (as well as the Vermont Constitution and Vermont Open Meeting Laws) is entrenched within the culture, and patterns and practices, of the Town's governance.

87. Plaintiff asserts unequal treatment involving what grants are, and are not, applied for and how those grants and the entire municipal budget is used (for instance, the improvement of the intersection of New Road and Pleasant Valley Road to support the desired purchase of Defendant Dick Albertini's property for a gravel pit and the Town of Underhill acting as a fiscal agent for a local church to receive a $60,000 grant, which is hoped to enable a local

1. PV-109 was a 5-lot subdivision at time of this assessment, which provided substantial personal profit for Dick and Barbara Albertini.

2. Due to presumed typo in assessment, this is the "Full" value since there were no structures at time of assess-ment.

church to obtain ~2 acres of land functionally for free, even though Defendants still refuse to apply for a grant to replace a culvert on Plaintiff's TH-26 road/trail frontage).

88. Town officials refuse to recuse themselves when conflicts of interest are mentioned by Plaintiff which has exacerbated Unequal Treatment of Plaintiff relative to other similarly situated property owners.

Official Policies and Patterns and Practices Relevant to Monell Claims

89. Defendants' pattern and practice of sustained *willful* intentions, actions, and inactions over the span of over 20 years focused primarily upon treating some landowners abutting TH-26 dramatically differently than similarly situated property owners.

90. Public records, and missing public records, document Defendant Town of Underhill willfully engaging in an ongoing pattern of censorship and misrepresentation of the public record.

91. Plaintiff engaged in good faith efforts to obtain equal treatment from Town of Underhill officials, including Plaintiff's protected speech as a member of the Underhill Trails Committee, *prior to* Defendants Town of Underhill, Dan Steinbauer, Steve Walkerman, and Steve Owen responding to Plaintiff's speech in the October 8, 2009 letter seeking legal advice on "any way" to "rescind" prior promises made to Plaintiff and all subsequent litigation.

92. Due to the public nature of litigation against a resident's local town government, the selective removal of public records, *which were previously readily available on the Town of Underhill official website*, and intentionally vague or misrepresentative meeting minutes has materially harmed both Plaintiff's local reputation and on-line reputation by censoring an accurate history of the events that caused past and present litigation.

93. Plaintiff asserts an example of a record which would be publicly exonerating to Plaintiff's personal and professional reputation, while simultaneously politically harming and incriminating for Defendants Town of Underhill and town officials involved in the October 9, 2009 Selectboard meeting, is the fact that minutes on that date reference the October 8, 2009 letter which sought to *rescind* Plaintiff's prior access vaguely as, "Crane Brook Trail: Chris has sent a letter to Vince." *in the very same meeting* the Better Back Roads Grant program was discussed ***and*** the Underhill Trails Handbook was about to have a press release.

94. The public record should properly document Plaintiff spent considerable personal time participating in drafting the Underhill Trails Handbook as a Trails Committee member in a good faith effort to find solutions to problems caused by Defendant Town of Underhill's refusal to provide appropriate municipal maintenance to public roads and trails combined with numerous trail users causing problems for landowners; at present Defendant Town of Underhill *still* refuses to follow these outlined best management practices.

95. Plaintiff asserts Defendant Steve Walkerman and other named Defendants should have recused themselves from decisions involving the central segment of TH-26 given their documented personal interests in goals wholly unrelated to any legitimate state objective, specifically discouraging driving through New Road between Pleasant Valley Road and Irish Settlement Road from the early 2000's onward primarily for their own personal enrichment and encouraging cross-country skiing at the cost of all other legitimate uses of the public road.

96. Plaintiff incorporates by reference the recordings of the Selectboard meetings in which Plaintiff's Conflict of Interest Complaint submitted against Defendant Dan Steinbauer submitted October 8, 2020 was treated dramatically differently (by simply disregarding the allegations) than the Conflict of Interest Complaint submitted by Jim Beebe-Woodard against Peter Duval which resulted in both a quasi-judicial hearing on September 21, 2020, and the Defendants even going to the time and taxpayer expense of changing the Town Charter following Mr. Duval's free speech in public meetings about problems within Underhill's governance which he referred to as "The Underhill Way."

97. Plaintiff incorporates by reference public records and recordings and transcripts involving individual Defendants interest in developing recreational opportunities for themselves while willfully indifferent to the adverse impacts their actions have on nearby private property owners and the environment, Plaintiff alleges personal recreational interests are an impermissible basis

for Unequal Treatment of Plaintiff's property relative to similarly situated properties.

98. Plaintiff alleges Defendants Karen McKnight, Marcy Gibson, Steve Walkerman, Dan Steinbauer, as well as former town officials Trevor Squirrell and Stan Hamlet colluded to treat Plaintiff differently than similarly situated property owners would reasonably expect by initiating the 2010 New Road Reclassification process with assistance of legal counsel for the Town of Underhill, to reach a *predetermined* future reclassification decision in order to treat Plaintiff's property differently than similarly situated property. Plaintiff has years of video recordings and personal experiences observing Defendants' *willful indifference* to Plaintiff's Right to Equal Treatment Under the Law.

99. Defendants' purported conservation efforts created substantial economic gains for Defendants Dick Albertini, Steve Walkerman, Marcy Gibson, and others; the most dramatic of which being Dick Albertini's 5-lot subdivision (see Table 1 on page 22)

100. Defendants Town of Underhill, Dan Steinbauer, and Bob Stone treated similarly situated abutters to TH-11 (Butler Road) differently than Plaintiff by granting the reversionary private property rights of abutters' private ownership and access rights after the town had for many years abandoned maintenance of a TH-11 segment.

101. Inappropriate personal desire of a handful of individuals to have landowners give away recreational

use of private property for free (even if it would come at the extreme cost of taking landowners reasonable access to their homes), which was followed by a relentless and malicious retaliation and intentional violation of Plaintiff's other constitutional rights.

102. Defendants have a pattern and practice of attempting to inhibit, and retaliating against, any landowners that wish to exercise the fundamental private property right to exclude others.

103. Defendants and members of the public (based on Defendants' acts and omissions) have felt entitled to disregard Plaintiff's property rights and go up onto Plaintiff's private property as if it were a part of the "Crane Brook Conservation District."

104. Plaintiff has been plagued by illegal dumping and other problems caused by public use and abuse of the "Crane Brook Area," the proximate cause of which is Defendant's advertising of the area as a recreational destination.

105. Defendant's Trail Ordinance *willfully* misled Plaintiff and Vermont courts by making the Taking of a protected property right implausible due to the provision that "permits **shall be issued** only to persons who . . . have a legitimate need to operate a vehicle on the Crane Brook Trail. For the purposes of this ordinance, 'legitimate need' shall mean a compelling personal or business purpose."

106. Defendants willfully refused to mitigate numerous problems caused by Defendant's "Crane Brook Conservation area," such as the public nuisance caused by trash such as mattresses and tires that are illegally dumped and people going from the public areas onto private areas"

107. Despite willfully refusing to mitigate increases in problems for over 20 years, Defendants have expressed the strong desire to increase public use of the Crane Brook Area (especially as related to developing and later advertising a "Pump Track" on Town property despite being unsure exactly how much such a development would increase public recreational traffic or resultant potential parking issues and additional environmental impacts to the area).

108. Plaintiff asserts that when Plaintiff purchased NR144 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.

109. Plaintiff exercised the maximum degree due diligence prior to purchasing property than having retained an attorney to review the land records and the purchase and sale agreement, having purchased title insurance, and having personally met with the local Selectboard prior to purchasing NR144.

110. Plaintiff was misled by town officials' statement that the rougher condition of New Road north of the Town Garage was due primarily due to town budgetary constraints; only in hindsight did it become non-speculative that Defendants' refusals to conduct *any* maintenance to the central segment of TH-26 were based upon a malicious intention to *rescind* Plaintiff's access to his home and land for their own gain.

111. The Town received substantial legal advice throughout the past 20 years, so qualified immunity cannot protect individual town officials acting with deliberate indifference to Plaintiff's constitutional rights or individuals maliciously wielding municipal authority during this time because it is entirely implausible that Town Officials were not *fully aware* they were exceeding their lawful authority.

112. Plaintiff alleges that renaming TH-26 from "Dump Road" to "New Road" instead of the "Crane Brook Road" or other name consistent with typical naming practices was presumably to mislead the public given TH-26 has existed as a through road since the 1800s. In 2002, Defendants' typical pattern and practice of creating revisionist history, intentionally fabricated a second set of meeting minutes which inaccurately stated that "David Demarest (new owner of the Shakespeare property) is plowing Fuller Road to his property." The other set of minutes referred to Plaintiff plowing New Road.

113. The Town of Underhill first broke its written promise to move boulders placed in the way of Plaintiff's

right of way on November 13, 2019; Plaintiff mitigated the harm caused by this breach of Defendant's promise by moving the boulders out of the way with his tractor.

114. Plaintiff has both accessed and previously plowed TH-26 all the way from the Underhill Town Garage to Irish Settlement Road.

115. Plaintiff asserts that the marketing of the "Trails Handbook" intentionally creates a false assurance that the Town of Underhill would follow the Best Management Practices, but Plaintiff is unaware of any instances in which Defendants have followed the Best Management Practices outlined in the Underhill Trails Handbook.

116. Plaintiff asserts that since the 2010 New Road Reclassification, National Geographic Maps were updated to depict a significant portion of Plaintiff's former road frontage as a recreational trail, which has resulted in increased problems for Plaintiff and other nearby property owners without any meaningful effort by the Town of Underhill to mitigate this intermittent harm.

117. Plaintiff has experienced repeated problems caused by specific individuals and public recreational use of New Road over many years due in a large part to the Town of Underhill's widespread marketing of the recreational use of the general "Crane Brook District" / "Crane Brook Area" / "Crane Brook Trail;" Plaintiff incorporates by reference a recording of an interaction with a bicyclist upset by Plaintiff's appeal to the Vermont Environmental Court involving the new bridge and public

trail entrance to the northern portion of TH-26 built by Defendant Mike Wiesel's mountain biking club.

118. The number and degree of problems Plaintiff has experienced is dramatically higher than similarly situated private properties on other Class III or Class IV roads (or properly managed trails) due to the outright refusal of the Town of Underhill to help mitigate the increased number of issues with: the public nuisance of having vehicles parked on Plaintiff's property or in the way of Plaintiff's property access, the public nuisance of litter and illegal dumping, criminal trespass, crimes of vandalism, the theft of thousands of dollars of Plaintiff's personal property, and Plaintiff has even been shot at once while on his private property.

119. Selectboard Minutes in spring of 2010 document one notable instance of unequal treatment in the exercise of "discretion" when Defendants Steve Walkerman, Dan Steinbauer, and Steve Owen spent a highway surplus on the Pleasant Valley Road Reconstruction of approximately $108,000, considered obtaining a FEMA grant to replace a culvert on a *private* road for approximately $92,000, ***and*** preparation for the April 24 public hearing to reclassify a segment of New Road while ignoring the opposition raised by the interested parties which included Plaintiff, Michael and Tammy Linde, and Jonathon and Lisa Fuller.

120. Plaintiff believes there is no way to accurately summarize the amount of emotional duress protracted litigation over access to one's home and land can take on a person, or the loss of privacy at one's home, but

Plaintiff having to bear witness to Defendants spending legal funds entertaining the precedent setting idea of Underhill helping to obtain replacement of a *private* road culvert while simultaneously pursuing "any way" of access to as much of Plaintiff's land (and corresponding lifestyle and sense of life's purpose) in ways which were once inconceivable for *mere recreation* (and their own personal profit) would be unbearable for anyone that found themselves in a similar situation.

121. The video recording of the April 24, 2010 New Road Reclassification hearing (viewable at https://youtu.be/DECP4mepuMg?feature=shared) and the entirety of written submissions to Defendants' *sua sponte* administrative proceedings are incorporated by reference to substantiate: A) Defendants did not receive any sworn testimony in the administrative proceedings. B) Defendants' colluding in the predetermined process which was initiated in response to Plaintiff exercise of the Right to Petition in the form of both being a co-party to the First-Filed Notice of Insufficiency in Vermont state court and the duly submitted Petition on Fairness in Town Road Maintenance on Public and Private Roads which was supported by 119 of Underhill's registered voters.

122. Defendants have had over 13 years to work on how the "legal trail" will be managed without having taken any meaningful steps to mitigate the problems caused by public use and abuse of Plaintiff's current and former TH-26 road frontage, and willfully ignored and at times created, problems for private property owners and the environment.

123. Defendants Steve Walkerman, Dan Steinbauer, Steve Owen, Marcy Gibson and Karen McKnight colluded to adversely impact the public and private usability of the central current and former TH-26 corridor for all reasonable interest groups could have been maintained for a very minimal financial municipal investment.

124. Plaintiff asserts unequal treatment of Plaintiff based upon to Defendants' efforts to allow Defendant Dick Albertini to substantially profit from the sale of his property for a Town gravel pit, after the Town gave him a special deal without publicly announcing a Request for Proposals from similarly situated landowners such as Plaintiff's parcel and even did the prospecting for Dick Albertini's property at the Town's expense instead of initiating a Request For Proposals process.

125. Defendant Town of Underhill's abandonment of maintenance to the central segment of TH-26 occurred concurrent with ongoing exceptionally maintained access to parcel NR-77, which was built in what was once a sensitive ecosystem and wildlife habitat, approximately half a mile from Pleasant Valley Road, which is a paved road to the south.

126. Avoiding the extremely difficult to traverse "trail" segment of TH-26 and taking a northerly route from Plaintiff's domicile necessitates driving 15-20 minutes out of the way and substantial personal time and expense on a regular basis.

127. 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, despite spending significant sums of taxpayer money on litigation against Plaintiff and other residents of Underhill.

128. 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.

129. Plaintiff incorporates by reference the discretionary upgrade of TH-21 from "Not Up To Standards" to Class III as disparate treatment of a similarly situated parcel.

130. Plaintiff asserts that the Class IV Roads Committee scheduled a site visit to the failed culverts on TH-26 north of Plaintiff's driveway for the same day as Plaintiff was known to be making oral arguments before the Second Circuit Court in New York City involving the inadequately pled Takings Claims. Plaintiff asserts it was physically impossible to make it to both the Oral Arguments and the site visit to the central TH-26 segment Defendants intend to continue to treat differently than similarly situated Class IV roads.

131. Plaintiff asserts a May 2019 Planning Commission meeting is an example of Plaintiff's protected speech being kept from the public by meeting minutes making no mention of Plaintiff bringing up the outright refusal of the Town of Underhill to follow the Best Management Practices outlined in the Underhill Trails Handbook, which Plaintiff had taken part of in efforts to ameliorate some of the problems recreationalists in Underhill had been causing for landowners, and that the Trails Handbook should not be promoted if it is not actually being followed because the Town should not promising things it is unwilling to uphold.

132. In this meeting, Plaintiff pointed out parking issues, the lack of the town educating trail users to not leave the trail right of way to go onto private property without permission, and a number of other concerns, which proper planning could help mitigate, but all points brought up by Plaintiff in the meeting were censored to the point that the recorded minutes and the public at large would not be aware of the substance behind the vast majority of the points Plaintiff raised.

133. In June of 2019, to discourage Plaintiff and other residents attempting to have a say in their own local government, the Planning Commission Chair Jonathan Drew wrote an email to Plaintiff in response to a post made on www.FrontPorchForum.com, stating, "Your incessant whining and profound ignorance is of little importance and interest. If you don't like it here leave."

134. Town Officials have a longstanding pattern and practice of willfully and wantonly ignoring multiple failed culverts on the current and former TH-26 despite replacing similarly situated culverts when they benefit residents other than Plaintiff.

135. Selectboard members *willfully* and *obstinately* refused to allow September 21, 2020 Selectboard meeting minutes from giving "a true indication of the business of the meeting," and the exclusion of Plaintiff's protected speech was predicated upon a desire to prevent factually and politically important details being publicly readily available.

136. Town of Underhill has continued to refuse the Conflict of Interest allegations submitted against Dan Steinbauer to be available for the public to review on the Town website; Conflict of Interest allegations which Jim Beebe Woodard, who at the time was the Town Administrator, submitted against Selectboard Member Peter Duval were readily viewable on the Town of Underhill website and Front Porch Forum did not censor substantial negative comments directed personally at Selectboard member Peter Duval.

137. Selectboard meeting recordings from the Fall and Winter of 2020 demonstrate what has been publicly referred to by former selectboard member Peter Duval as the "Underhill Way," with examples of multiple procedural due process violations, willful censorship of Plaintiff's protected speech, and violation of Plaintiff's Ninth Amendment rights since it is not constitutionally

acceptable for a single person to wield the power of the town against landowners as Dan Steinbauer does.

138. Defendants Dan Steinbauer, Bob Stone, and Brad Holden decided to have a Selectboard meeting at 8:30 AM in December 2020 as a way to minimize public involvement in the budgetary process and avoid public oversight of issues within Underhill's governance; Defendant Bob Stone was demonstrably bothered and took great issue with Plaintiff's effort to speak on matters of public importance which were being discussed on the agenda.

139. Despite Plaintiff's reasonable expectation of privacy being impacted by the start of a recreational trail at the bottom of his driveway, the Recreation Committee decided to treat Marcy Gibson's property at 50 New Road differently since the committee, "didn't think it was right to have parking so close to Marcy's house and thought it would be better if it was to the right of the entrance to the town garage for convenience to the trails."

140. Plaintiff asserts Defendants Town of Underhill, Anton Kelsey, and Seth Friedman retaliatorily "pulled money out of the budget for a bridge on the Crane Brook Trail abutting Mr. Demerests [SIC] property" (as stated in Recreation Committee Meeting Minutes dated January 21, 2021) instead of collaborating with Plaintiff to attempt to mitigate the damages of public use of the TH-26 right of way.

Appendix C

Substantiation of Claims Specific to First and Second Causes of Action

141. Plaintiff incorporates by reference Selectboard (SB), Underhill Recreation Committee (URC), Planning Commission (PC) and Underhill Conservation Commission (UCC) meeting recordings and transcripts in which Plaintiff's protected speech in public meetings was effectively chilled and how public awareness of Defendants' treatment of Plaintiff would deter a person of ordinary firmness from continuing to engage in speech or conduct in opposition to the will of the Defendants.

142. Defendants have a pattern and practice of going to great efforts to subvert landowner rights and the ability of impacted landowners to have a say in their own town's governance; this same type of behavior repeated itself in 2020 and included efforts to silence Plaintiff's attempts to have a say in the Town's budget discussion in a *morning* meeting which Plaintiff asserts was an effort by Defendants to avoid public involvement in budget decisions.

143. The Town of Underhill deleted *significant* portions of Trails Committee Meeting Minutes in which Plaintiff participated; Plaintiff was even involved in the drafting of The Underhill Trails Handbook, which Defendants continue to refuse to follow.

144. TH-26 was a thru-road as a matter of law until the deferential ratification of the Selectboard's 2010 New Road Reclassification Order and there was never a rational basis

related to a legitimate government interest when Town officials ignored a petition submitted with the support of 60 residents in 2002 opposing the Underhill Trails Ordinance stated, in part: "We the legal voters of the Town of Underhill would like to petition the Selectboard of the Town of Underhill to reconsider their efforts and/or attempts to close down or stop thru traffic to any and or all motorized vehicles at any time of the year on the New Road (AKA the old Dump Road) It would be more beneficial for all taxpayers and the surrounding landowners of New Road for the road to be repaired and maintained for all residents to utilize instead of an elite few."

145. Plaintiff asserts written correspondence April of 2013 between Plaintiff's attorney and Defendant Town of Underhill's attorney stated:

> I have had a more detailed discussion with my clients.
>
> They are willing to stipulate to a remand and sign-off on a revised application by the trails committee if it includes the following:
>
> 1. Physical impediments constructed as part of the trail development which prevent use of side trails that extend onto adjoining private property.
>
> 2. Clear, obvious, periodic signage along the east side TH-26 starting just north of the town garage to the Fuller property notifying users of

TH-26 that adjoining lands are private property and that there should be no trespassing. It is worth noting that people also cross the town property and other parcels on the west side of TH-26 in the area of the beaver pond (e.g., in the winter), come to TH-26, and then cross over onto the private property on the east side of TH-26. This will only increase as the town encourages residents to use recreational trails in the area.

3. Development of the town trails will presumably create more need for parking as more people make use of the trails. In order to avoid "informal" parking on TH-26 which would create the same issues as "formal" parking in that location, some provision should be made for parking. Available land for parking that is already available to the town, would avoid the issue of blocking TH-26, and would meet my clients' needs include the trailhead up on Irish Settlement Road, and town property just to the south of the town garage on New Road/TH-26. Making parking available there, coupled with no parking signs on TH-26 just to the north of the town garage, would seem to address both the town's needs and my clients' concerns.

I would anticipate that my clients would work with the town and its trails committee in developing the revised application. To the extent the DRB departs from any of the

> elements of the application forming the basis of my clients' agreement, however, they would reserve the right to appeal.
>
> If the town and its trails committee is amenable to the above, let me know and I will inform the court that a settlement has been reached involving a remand, and will prepare a stipulated motion for remand for review. Thanks.

146. Plaintiff asserts later the same day Defendant Town of Underhill's Correspondence to Vermont Superior Court Docket No 160-10-11Vtec stated:

> The Town of Underhill and its Trail's Committee has formally withdrawn its application to construct trails and related crossings/signage on property owned by the Town of Underhill at 77 New Road, Underhill Vermont. Consequently, a hearing on this appeal will no longer be necessary.

147. Relevant allegations Plaintiff asserts based upon paragraphs 145 and 146

None of the three proposed stipulations, which were based upon Plaintiff's experience of living near or in Defendant's *ipse dixit* "Crane Brook Conservation District," were unreasonable.

148. Instead of considering reasonable stipulations, Defendants withdrew their application circumventing

Plaintiff's standing in Vermont Superior Court Docket No 160-10-11Vtec, publicly blamed Plaintiff, and moved forward without ensuant procedural protections, such as constructive notice, which the Development Review Process should provide to nearby landowners and other interested persons.

149. The same pattern and practice of Defendants development of recreation directed towards the central segment of TH-26 and Plaintiff's property occurred when Defendant Mike Wiesel's bicycling club developed a new public trail entrance onto a northerly segment of TH-26 in 2021 without, *inter alia*, constructive notice to interested parties or adequate sight lines.

150. The preferential treatment of Defendant Mike Wiesel's bike club retroactive permit application for both Conditional Use and Variance following the construction of the bridge and public trail entrance onto TH-26 in 2021 is asserted to have an adverse impact on the safety of all TH-26 users at that new intersection and is an ongoing matter of unequal treatment Plaintiff's reasonable interest of safe motor vehicle use on the northern segment of TH-26 in favor of a single recreational interest group; these proceedings are currently before the Vermont Environmental Court: Brewster River Mountain Bike Club Conditional Use Review No. 21-ENV-00103.

151. Plaintiff incorporates by reference a video of the treatment of a northern segment of TH-26 by the public (available at https://youtu.be/qL660Bz1iP8?feature=shared) following the Town of

Underhill's decision to retroactively approve a Conditional Use and Variance despite refusing to permit Plaintiff to plow the southerly segment of TH-26 from his driveway despite having previously plowed the entire segment of TH-26 from the Underhill Town Highway Department building to Irish Settlement Road.

152. The cumulative and pernicious impacts of Underhill's obstinate refusal to maintain the central segment of TH-26, or to even permit Plaintiff to maintain the southerly route at his own expense, Plaintiff's attempt to have these issues resolved in the September 14, 2020 Underhill Conservation Commission meeting and the May 10, 2021 meeting have cumulatively been treated dramatically differently than the Town of Underhill's response to similarly situated parcels in multiple other areas of town adjacent to water or wetlands including: Irish Settlement Road, TH-26 near the Town Highway Department building, on Corbett Road, and on North Underhill Station Road.

153. Plaintiff asserts it took substantial persistence by Plaintiff, which would chill a person of ordinary firmness from continuing to engage in public meeting involvement, to convince Defendants to approve a revised version of the censored elements of the 9/14/2020 meeting minutes *nine months later* and the impact of this willful censorship persists since very few members of the public dig through meeting minutes that old and the potential to apply for the grant Plaintiff mentioned required waiting for the next grant-writing cycle.

154. As of August 2, 2021, the revised 9/14/2020 Underhill Conservation Commission minutes state "that could cover the partial cost (80% matching grant) of the ~$8,000 baffler" even though as emphasized by Plaintiff, it would be a 20% matching grant, and 80% of the cost could be covered by the grant.

155. The recording of the June 14, 2021 Underhill Conservation Commission meeting demonstrates Town Officials are willfully ignoring the fact public meetings minutes *are purely to document what has occurred in or been submitted to the meeting* and meeting minutes do not permit censorship, revisionist history, or the exercise of *creative* license.

156. The "Underhill Conservation Commission" diverted landowners to the "Underhill Trails Committee" which made a "Trails Handbook" which to the best of Plaintiff's knowledge has never been followed by the Town of Underhill which effectively creates a knowingly false-promise in Defendants interest to deceive landowners into allowing further development of trails despite absolutely no legal obligation to provide any maintenance on a trail.

157. Plaintiff asserts Town officials have violated Plaintiff's First amendment right by preventing him and other members of the public from speaking outside of a brief "public comment period" at the beginning and end of a public meeting about all topics being discussed in the meeting while other members of the public are permitted to speak freely during the same meetings.

158. Plaintiff incorporates by reference meetings in which Defendants Daniel Steinbauer, Bob Stone, and Karen McKnight immediately interrupted Plaintiff's polite effort to speak to a matter being discussed on the agenda.

159. Plaintiff asserts Unequal Treatment of the handling of a Conflict-of-Interest allegation against former Selectboard member Peter Duval resulted in a Charter Change but allegations against Defendant Daniel Steinbauer and Plaintiff's Petition on Public Accountability was circumvented by Defendant Daniel Steinbauer despite being properly filed with the support of over 5% of Underhill's voters on November 30, 2020.

160. The effortless *preliminary* subdivision process of Defendant Dick Albertini's property and a similarly effortless *preliminary* subdivision process for Defendant Marcy Gibson were dramatically quick with a minimal level of preparation relative to the Town of Underhill's treatment of Plaintiff's property.

161. Defendants' collusion during the 2010 New Road Reclassification is evidenced in part by the question Defendant Karen McKnight posed to Defendant Dan Steinbauer combined with Defendant Karen McKnight's part in the May 8, 2023 meeting stating the plan to install gates in the future to rescind Plaintiff's currently exercised compelling personal access to his domicile and surrounding lands by motor vehicle.

Appendix C

162. April 29th, 2014 is an example of the pattern and practice of unequal treatment in which Defendants' personal interests outweighed the compelling public speech of impacted parties Nancy Shera, Jeff Moulton, Carol Butler, Jeff Sprout and Kane Smart (Downs Rachlin Martin, attorney for David Demarest and Jeff Moulton).

163. Plaintiff built his domicile on New Road *before* Marcy Gibson purchased her property and the disproportionate personal profit for Defendants enjoying optimal access relatively to similarly situated parties, or a streamlined subdivision and development process while other similarly situated parties are treated differently, is not a legitimate governmental interest.

164. The harm caused by Unequal treatment by Defendants efforts to enrich themselves and retaliate against Plaintiff relative to similarly situated properties is demonstrated by Table 1 on page **Error! Bookmark not defined.**.

165. 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.

166. Public recordings of Bob Stone following Plaintiff's filing of the 2020 Petition on Public Accountability and Plaintiff's brief comment in support of Maple Syrup Producers ability to haul sap on public roads during sugaring season resulted in strong animosity towards Plaintiff and a willful disregard of the responsibility

town officials have to treat similarly situated individuals equally.

167. The Town of Underhill has a pattern and practice of Unequal Treatment in which, even if requires legal advice on how best to go against the findings of a State of Vermont Speed Study or results in protracted litigation with residents, the desires of a clique of Underhill residents are catered to despite no basis in advancing genuine governmental interests.

168. Materially adverse actions by Town Officials intended presumably to dissuade landowners and other residents that may disagree with a town official from speaking out against problems within Underhill's governance, which in the most extreme circumstances prevents residents from contacting the Town about both minor and major issues for fear of retaliation.

169. Defendants also used deceptive exaggerations such as "Several members of the Conservation Commission" in attempts to fabricate a rational basis to wield governmental authority to treat Plaintiff and Plaintiff's property dramatically differently than similarly situated parties and nearby properties; a petition submitted by Lisa Fuller with the support of 60 residents, Plaintiff's 2010 Petition in Fairness in Town Road Maintenance of Public and Private Roads which was duly submitted with over 5% of Underhill's registered voters signatures, and Plaintiff's most recent 2020 Petition on Public Accountability duly submitted with the support of over 5% of Underhill's registered voters are alleged to be

indicative of a cumulative willful divergence of individual Defendant decisions from the will of Underhill voters that all property owners receive Equal Treatment as others which are similarly situated.

FIRST CAUSE OF ACTION[3]

Violation of the First Amendment—Retaliation for Plaintiff's Protected Speech, Censorship, and Manipulation of Public Records of Plaintiff's Protected Speech

170. Plaintiff re-alleges and incorporates by reference herein all relevant paragraphs of this Complaint.

171. Allegations against Defendants outlined in paragraph 143 on page 35, paragraph 147 and 148 beginning on page 37, paragraph are some of the most notable instances substantiating this cause of action.

172. It is inherently retaliatory to remove money from a budget which would improve the condition of the public right of way adjacent to Plaintiff's property simply because Plaintiff requested the maintenance be conducted in a manner that would benefit *all* reasonable interest groups, as opposed to only a few.

173. The Town of Underhill providing winter maintenance to one Class IV road segment while continuing to respond to Plaintiff's good faith inquiries

3. Previously Seventh Cause of Action

into the Town of Underhill's willingness to apply for a grant to replace a failed culvert with a municipal investment of a mere $1,600 (or assist in removal of litter for the segment of New Road abutting Plaintiff's property north of the Town Garage) is demonstrative of a level of *de facto* bias against, retaliation against, and collusion against Plaintiff without furthering *any* legitimate government interest.

SECOND CAUSE OF ACTION[4]

Corresponding First Amendment
42 U.S.C. § 1983 Monell Claim

Plaintiff against Defendant Town of Underhill (¶9) for Violation of the **First Amendment**—Retaliation for Plaintiff's protected speech, Censorship and Manipulation of Public Records of Plaintiff's protected speech

174. Plaintiff re-alleges and incorporates by reference all actions and inactions perpetuated by Town officials which are claimed under the Seventh Cause of Action as a Monell Claim against the Town of Underhill with resultant municipal liability.

175. Plaintiff has personally witnessed a longstanding pattern and practice of the Town of Underhill willfully misrepresenting, editing, and deleting, and suppressing protected speech from public meetings and other records.

4. Previously Eighth Cause of Action

Appendix C

THIRD CAUSE OF ACTION[5]

Violation of the Equal Treatment Clause—

176. Plaintiff re-alleges and incorporates by reference above cumulative factual allegations contained herein of Defendants' willful treatment of Plaintiff and Plaintiff's property dramatically differently compared to those that are similarly situated, and when considered in their entirety having no rational basis founded upon permissible local governmental authority as opposed to Defendants' own personal self-interests, as violations of the Equal Treatment Clause.

FOURTH CAUSE OF ACTION[6]

Corresponding 42 U.S.C. § 1983 Monell Claim Against Town of Underhill for Violation of the Equal Treatment Clause

177. Plaintiff re-alleges and incorporates by reference all actions and inactions by Defendants alleged under the Third Cause of Action as a Monell Claim against the Town of Underhill with resultant municipal liability.

---

5. Supplemental claim relating back to both the original complaint and subsequent facts.

6. Supplemental claim relating back to both the original complaint and subsequent facts.

Appendix C

JURY DEMANDED

Plaintiff demands a jury trial.

REQUEST FOR RELIEF SPECIFIC TO FIRST AND SECOND CAUSES OF ACTION

A. Compensatory damages for Defendants' retaliatory actions and inactions the proximate cause of which were Plaintiff's protected speech.

B. Punitive damages for Defendants' retaliatory actions and inactions the proximate cause of which were Plaintiff's protected speech.

C. Punitive damages for Defendants' *willful* mischaracterization of, or *willful* censorship of, public records and Plaintiff's protected speech which has resulted in personal and professional harm to Plaintiff's good name and reputation.

D. Payment of compensatory damages, together with statutory pre and post judgement interest, consisting of all legal fees, expenses, and professional services Plaintiff has incurred in administrative proceedings the proximate cause of which was solely Defendants' sustained pursuit of "*any way* the Town could *rescind* the access [to Plaintiff's domicile and surrounding land]" and the cumulative impacts of this willful retaliation for the exercise of his First Amendment rights and the violation of his right to equal treatment under the law.

E. Compensatory damages, together with statutory pre and post judgement interest, for the extreme stress, mental and emotional pain and suffering, and the physical health impacts caused by Defendants' intention to rescind previously promised private access which was expressed in the October 8, 2009 letter and further elaborated upon on May 9, 2023 (as alleged in ¶7-10 and throughout Complaint).

F. Declaratory relief to protect Plaintiff from further Unequal Treatment planned by Defendants' new "multi-year" plan articulated on May 9, 2023 in the Joint Underhill Conservation Commission and Recreation Committee Meeting involving, *inter alia*, plans to install gates to block Plaintiff's continued compelling personal and business access to his domicile and surrounding private property.

G. Declaratory relief requiring the Town of Underhill to treat Plaintiff and Plaintiff's private property the same as other similarly situated landowners and similarly situated real estate.

H. Payment of legal expenses and expert testimony.

I. Payment of reasonable attorney's fees pursuant to 42 U.S.C. Section 1988.

J. All other relief the Court may deem to be just or proper.

Appendix C

CERTIFICATION AND CLOSING

178. Under Federal Rule of Civil Procedure 11, by signing below, I certify to the best of my knowledge, information, and belief that this complaint: (1) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) is supported by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the complaint otherwise complies with the requirements of Rule 11.

179. I agree to provide the Clerk's Office with any changes to my address where case–related papers may be served. I understand that my failure to keep a current address on file with the Clerk's Office may result in the dismissal of my case.

Date of signing: October 2, 2023

Signature of Plaintiff: /s/ David Demarest

David P Demarest
P.O. Box 144
Underhill, VT 05489
(802)363-9962
david@underhillvt.com

Appendix C

TOWN OF UNDERHILL
SELECTBOARD MEETING MINUTES
Thursday, March 4, 2010

Present: Steve Walkerman—Chair, Dan Steinbauer—Vice Chair, Steve Owen—Selectboard, Sherri Morin—Town Clerk/Treasurer, Faith I. Brown—Interim Administrator

6:00 PM **Meeting is called to order.** Sherri Morin swears in Steve Owen. Dan Steinbauer makes a motion to elect Steve Walkerman as Chair. Steve Owen seconds the motion. All vote in favor of Steve Walkerman. The Selectboard reappoints Jennifer Silpe as Animal Control Officer for one year. The Selectboard agrees to act as Fence Viewers, Weighers of Coal, Inspectors of Lumber, Shingles and Wood and Tree Wardens for the town of Underhill. Steve Walkerman agrees to be the clerk for the Selectboard.

6:04 PM **Meeting Continues:**

- **Speed on Poker Hill—Sheri Morin, Underhill Town Clerk:** Sherri reports that someone that was picked up for speeding on the ½ mile section of Poker Hill contested the ticket. It was then discovered that the section marked 25 MPH was actually changed to 35 mph mistakenly in the early 2000's. The town now has the option of keeping the speed limit

of that ½ mile section 35 mph or to have an engineering study done to determine if the speed can be reduced to 25 mph. Selectboard asks Faith to find out what an engineering study might cost.

- **Reclassification of TH 26 (New Road) to a Trail**—Steve Walkerman moves the motion as written:

  Whereas a petition has been filed with the Chittenden Superior Court challenging the legal sufficiency of the 2001 reclassification of a portion of Town Highway 26 as a trail; and

  Whereas the Town since 2001 has recognized a portion of the Town Highway 26 as a legal trail; and

  Whereas it is in the best interests of the Town to clarify the status of 4000 feet of Town Highway 26 currently recognized as a trail; and

  Whereas the Town of Underhill Selectboard has the statutory authority to initiate reclassification proceeding on its own initiative;

  Now therefore, pursuant to 19 V.S.A. §708 (a), the Town of Underhill Selectboard moves that the Town of Underhill initiate and

repeat the proceedings to reclassify as a trail the portion of Town Highway 26 described as follows:

Approximately 4000 feet of New Road from a Class 3/Class 4 to a Trail, starting just North of the Town Garage entrance for approximately 4000 feet to a point approximately 70 fee southerly of the south line of lands now or formerly of Fuller; said point being bounded on the east by lands now or formerly of Demarest and on the west by the Town of Underhill.

- **Feedback from Town Meeting**—Faith shares with the Selectboard the comments from Bill Wilson's form that was handed out at town meeting.

- **Melvina Doner Property**—Faith shares Joan Lehouiller's email about the request to write off the delinquent taxes on the estate of Melvina Doner. The Selectboard unanimously agrees to write off the delinquent taxes due on Melvina Doner's estate.

- **Cloverdale Culvert**—Faith shares with the Selectboard that Laura DiPietro reports that she met with the town of Westford and the town of Westford has agreed to give the town of Underhill a legal easement to replace and maintain the culvert on Cloverdale Road.

The precedent setting nature of maintaining a culvert on a private road is discussed.

- **Town Planner/Town Administrator—**Faith reports that the Planning Commission supports offering the planning job to Kari Papelbon, Zoning Administrator if Sharon Murray will agree to mentor Kari for 6 – 12 months. Faith will follow-up with Sharon.

- **Approval of Minutes, Signing of Warrants and Signing of Land Contracts occurs.**

6:45 PM The Selectboard unanimously agrees to **adjourn**.

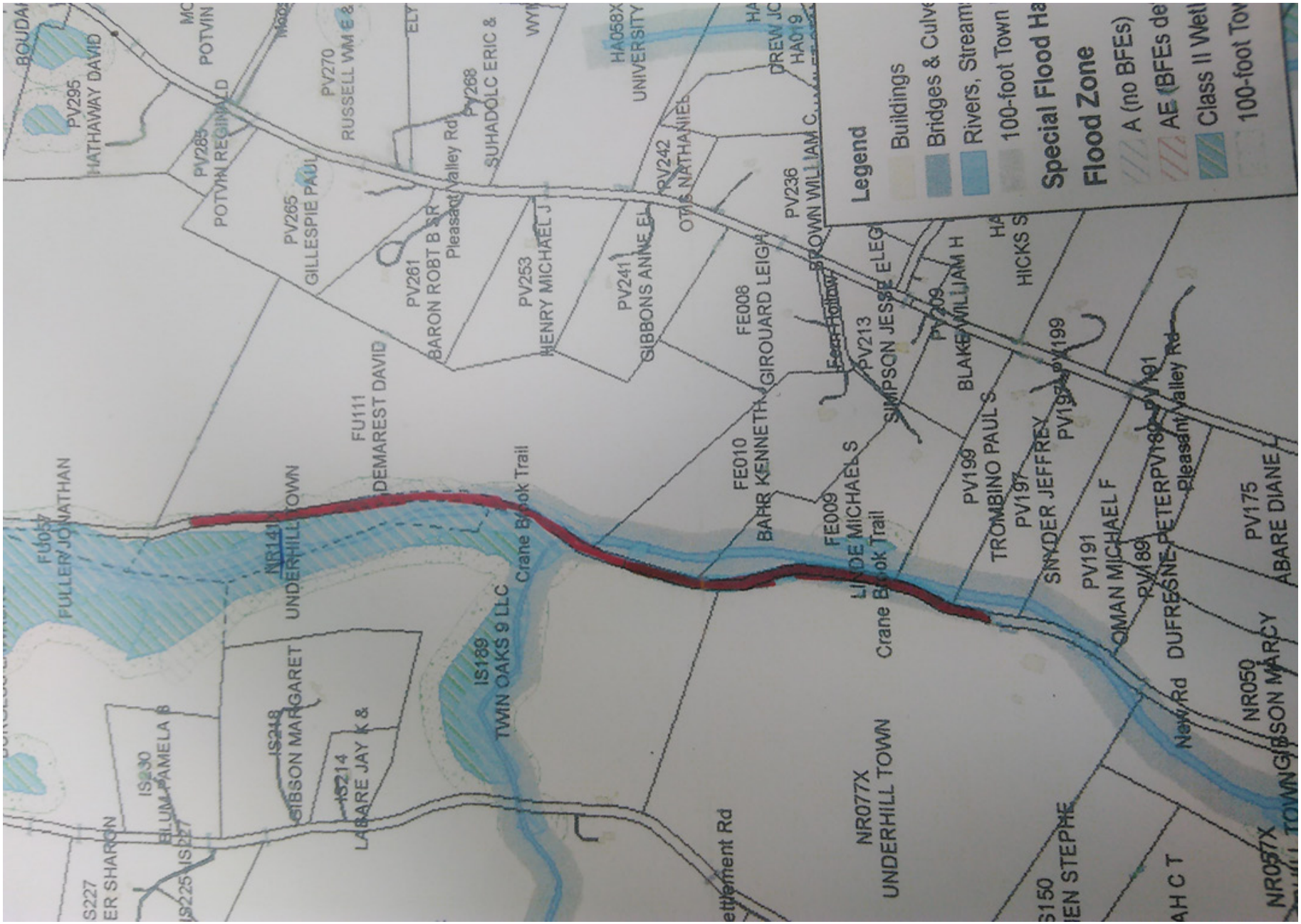
Respectfully submitted,
Faith I. Brown, Interim Town Administrator

Read and Approved as submitted/amended

_____

Steve Walkerman, Chair Date

Appendix C


Legend
Buildings
Bridges & Culve
Rivers, Stream
100-foot Town
Special Flood Ha
Flood Zone
A (no BFEs)
AE (BFEs de
Class II Wetl
100-foot Tow
Crane Brook Trail
Pleasant Valley Rd
New Rd
Settlement Rd
UNDERHILL TOWN
TWIN OAKS 9 LLC
GIBSON MARGARET
LABARE JAY K &
FULLER JONATHAN
DEMAREST DAVID
BARON ROBT B SR
GILLESPIE PAUL
POTVIN REGINALD
HATHAWAY DAVID
GIROUARD LEIGH
BAHR KENNETH
LINDE MICHAEL S
SIMPSON JESSE ELEG
BLAKE WILLIAM H
TROMBINO PAUL S
SNYDER JEFFREY
OMAN MICHAEL F
DUFRESNE PETER
ABARE DIANE H
GIBSON MARCY
HICKS S
BROWN WILLIAM C
OTIS NATHANIEL
HENRY MICHAEL J
SUHADOLC ERIC &
RUSSELL WM E &
UNIVERSITY
BLUM PAMELA B
ER SHARON