

**IN THE DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES  
General Counsel's Office, 10th floor  
80 F Street, NW  
Washington, DC 20001

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES  
LOCAL 2578  
8601 Adelphi Rd., Rm. 1920  
College Park, Prince George's County, MD 20740

Plaintiffs,

v.

OFFICE OF SPECIAL COUNSEL  
1730 M Street, N.W., Suite 218,  
Washington, D.C. 20036

Defendant.

Docket No. \_\_\_\_\_

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

## INTRODUCTION

1. “[P]ublic employees do not renounce their citizenship when they accept employment.” *Lane v. Franks*, 573 U.S. 228, 236 (2014). It is therefore well settled that public employees do not “relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest.” *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). To the contrary, because “public employees are often the members of the community who are likely to have informed opinions” on the pressing issues of the day, *Liverman v. City of Petersburg*, 844 F.3d 400, 406 (4th Cir. 2016), the First Amendment guarantees that public employees remain free to engage in the “interchange of ideas for the bringing about of political and social changes desired by the people.” *Lane*, 573 U.S. at 236.

2. This case concerns an unprecedented attempt to stifle the speech of public employees on matters of the utmost public concern—whether the President is fit to remain in office and whether his Administration’s policies serve the best interests of the country. In 2018, the federal government’s Office of Special Counsel issued guidance sharply limiting federal employees’ ability to advocate for or against impeachment of the President, and broadly restricting federal employees from expressing “resistance” to the Administration’s policies.

3. The Office of Special Counsel issued its guidance pursuant to the Hatch Act, but the Hatch Act does not encompass the restrictions that the agency imposed, and if it did, the law would violate the First Amendment. The Hatch Act exists to ensure that federal employees do not use their government positions and resources improperly to seek to influence partisan elections, and to ensure that “[federal] employees [are] free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs.” *U.S. Civil Serv. Comm’n v. Nat’l Ass’n*

*of Letter Carriers*, 413 U.S. 548, 566 (1973). Preventing federal employees from advocating for or against impeachment and from expressing opposition to federal policies does not remotely serve these purposes. Speech on these topics does not inherently relate to any election at all.

4. In issuing the challenged guidance, the Office of Special Counsel badly misconstrued the text and purposes of the Hatch Act. The Hatch Act specifically provides that federal “employees should be encouraged to exercise fully, freely, and without fear of penalty or reprisal . . . their right to participate or to refrain from participating in the political process of the Nation.” 5 U.S.C. § 7321. Far from “encourag[ing]” federal employees to engage in the political process “without fear of penalty,” the Office of Special Counsel’s directives chill federal employees from engaging in speech that is not only protected, but at the heart of the First Amendment. Federal employees, including members of Plaintiffs the American Federation of Government Employees and its Local 2578, must refrain from speaking out of fear that they could lose their jobs if they run afoul of the Office of Special Counsel’s overbroad directives.

5. Plaintiffs seek an injunction against enforcement of the Office of Special Counsel’s draconian interpretation of the Hatch Act, so that federal government employees may fully and freely exercise their First Amendment rights within the bounds of the Hatch Act.

#### **PARTIES**

6. Plaintiff American Federation of Government Employees (“AFGE”) is a national labor organization and unincorporated association headquartered in Washington, DC. AFGE represents over 600,000 federal civilian employees in agencies and departments across the federal government. AFGE and its affiliated councils and locals are the certified exclusive representative, under 5 U.S.C. § 7111, of the employees they represent. AFGE works to ensure that its members’ constitutionally guaranteed rights, including their freedom of speech and their

right to due process, are protected. AFGE's members include federal employees whose speech has been prohibited or chilled by the Office of Special Counsel's guidance relating to advocacy for or against impeachment and to use of the term "#Resist" and variations thereof.

7. Plaintiff American Federation of Government Employees Local 2578 ("AFGE Local 2578") is a local branch of AFGE that is headquartered in College Park, Maryland and represents over 300 federal civilian employees of the National Archives and Records Administration. AFGE Local 2578 and its affiliated council and national organization are the certified exclusive representative, under 5 U.S.C. § 7111, of the employees they represent. AFGE Local 2578 works to ensure that its members' constitutionally guaranteed rights, including their freedom of speech and their right to due process, are protected. AFGE Local 2578's members include federal employees whose speech has been prohibited or chilled by the Office of Special Counsel's guidance relating to advocacy for or against impeachment and the use of the term "#Resist" and variations thereof.

8. Defendant United States Office of Special Counsel ("OSC") is an independent federal investigative and prosecutorial agency headquartered in Washington, DC. OSC investigates and prosecutes, *inter alia*, violations of the Hatch Act, 5 U.S.C. §§ 7321-7326, a federal law that limits federal employees' ability to engage in certain partisan political activities. OSC investigates alleged Hatch Act violations, makes recommendations to federal agencies concerning employee discipline for alleged violations, and prosecutes alleged violations before the Merit Systems Protection Board ("MSPB"). 5 U.S.C. §§ 1214, 1216. OSC also issues advisory opinions about conduct that OSC considers to violate the Hatch Act. *See* 5 U.S.C. § 1212(f).

## **JURISDICTION AND VENUE**

9. The Court has jurisdiction under 28 U.S.C. § 1331.

10. The Court may award declaratory and injunctive relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and under the First Amendment to the United States Constitution.

11. Venue is proper in this district under 28 U.S.C. §§ 1391(b) and 1391(e)(1).

## **STATEMENT OF FACTS**

### **A. The Statutory Framework**

12. The Hatch Act, 5 U.S.C. §§ 7321-7326, is a federal law that prohibits federal employees from engaging in “political activity” while “on duty,” when in any room or building being used by the federal government, while wearing a government uniform or insignia, or while using federal government property. 5 U.S.C. § 7324. Federal regulations define “political activity” in this context to include “an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.” 5 C.F.R. § 734.101.

13. The Hatch Act imposes added restrictions on the political activities of certain career federal employees, including career members of the Senior Executive Service, administrative law judges, contract appeals board members, administrative appeals judges, and employees of the Central Intelligence Agency, the Criminal Division of the Department of Justice, the Defense Intelligence Agency, the Election Assistance Commission, the Federal Bureau of Investigation, the Federal Election Commission, the MSPB, the National Geospatial Intelligence Agency, the National Security Agency, the National Security Council, the National Security Division of the Department of Justice, the Office of Criminal Investigation of the Internal Revenue Service; the Office of the Director of National Intelligence, the Office of

Investigative Programs of the United States Customs Service, the Office of Law Enforcement of the Bureau of Alcohol, Tobacco, and Firearms, the Office of Special Counsel, and the Secret Service. These employees, commonly referred to as “Further Restricted Employees,” face certain restrictions on engaging in political activity even while not at work.

14. The Hatch Act makes clear, though, that “it is the policy of the Congress that employees should be encouraged to exercise fully, freely, and without fear of penalty or reprisal, and to the extent not expressly prohibited by law, their right to participate or to refrain from participating in the political process of the Nation.” 5 U.S.C. § 7321. Thus, as OSC has previously explained, “all federal employees may discuss current events, policy issues, and matters of public interest at work or on duty. Such discussions are usually not ‘political activity,’ i.e., activity directed at the success or failure of a political party, partisan political group, or candidate for partisan political office. Therefore, the Hatch Act does not prohibit employees at any time, including when they are at work or on duty, from expressing their personal opinions about events, issues, or matters, such as healthcare reform, gun control, abortion, immigration, federal hiring freeze, etc.” OSC, *Hatch Act FAQs*, <https://osc.gov/Pages/HatchAct-FAQs.aspx>.

15. OSC enforces the Hatch Act as applicable to federal employees. Individuals and organizations, including members of the public, may file complaints with OSC alleging that a federal employee violated the Hatch Act. If OSC receives such a complaint, it may investigate the matter and, at its discretion, issue warning letters or prosecute violations before the MSPB. 5 U.S.C. § 1216.

16. Violating the Hatch Act can carry severe consequences. A federal employee found to have violated the Hatch Act may be suspended, fined, reprimanded, removed from their position, or disbarred from seeking federal employment for up to five years. 5 U.S.C. § 7326.

17. OSC often issues advisory opinions to provide guidance to federal employees on conduct that OSC deems to violate the Hatch Act and that may subject employees to prosecution or reprimand. 5 U.S.C. § 1212(f).

**B. The Challenged OSC Guidance**

18. On November 27, 2018, OSC issued an advisory opinion addressing three topics: (1) whether and when federal employees may advocate for or against the impeachment of the President; (2) whether and when federal employees may use the term “#Resist” or variations thereof; and (3) whether and when federal employees may engage in strong criticism of an administration’s policies and actions. *See* OSC, Memo. (Nov. 27, 2018) (the “Advisory Opinion”), <https://bit.ly/2KrzRsx>. OSC distributed the Advisory Opinion to employees across the federal government.

19. On November 30, 2018, OSC issued a “Clarification” of the Advisory Opinion. *See* OSC, Clarification (Nov. 30, 2018) (the “Clarification”), <https://bit.ly/2KrzRsx>.

**1. Impeachment**

20. In the Advisory Opinion, OSC stated that “any advocacy for or against an effort to impeach a candidate”—*i.e.*, President Trump—“is squarely within the definition of political activity for purposes of the Hatch Act.” Advisory Opinion at 2. OSC reasoned that “[a]dvocating for a candidate to be impeached, and thus potentially disqualified from holding federal office, is clearly directed at the failure of that candidate’s campaign for federal office.” *Id.*

21. In the Clarification, OSC explained that “OSC considers advocacy for or against the impeachment of a candidate for federal office to be political activity under the Hatch Act.” Clarification at 2 (emphasis in original). OSC sought to draw a distinction between “advocacy”

regarding impeachment (which OSC considers prohibited) and “merely discussing impeachment” (which OSC does not consider prohibited). OSC offered purported examples of the difference between these two activities. An employee “may discuss whether reported conduct by the president warrants impeachment and express an opinion about whether the president should be impeached without engaging in political activity.” But an employee may not display “a poster that states ‘#Impeach45’” in their office, or “place a ‘Don’t Impeach Trump’ bumper sticker on a government-owned vehicle.” *Id.* Such behavior is prohibited, according to OSC, because it “advocates for or against an impeachment of a candidate for federal office.”

22. OSC’s guidance regarding speech about impeachment improperly equates advocating for impeachment with an activity directed toward the success or failure of a candidate for partisan political office. Expressing a view on whether an elected official’s conduct warrants impeachment is not the same as engaging in partisan activities to support or oppose a candidate in an election.

23. To begin with, OSC’s guidance regarding impeachment in the Advisory Opinion and in the Clarification rest on the erroneous premise that impeaching a President would “bar [that] individual from serving as president” in the future. Advisory Opinion at 1-2. Contrary to OSC’s understanding, impeachment would not automatically bar President Trump from running for, or serving as, President in the future.

24. Under the U.S. Constitution, impeachment proceedings begin in the U.S. House of Representatives, which is assigned “the sole Power of Impeachment.” U.S. Const. art. I § 2, cl. 5. A committee of House members first undertakes an investigation of the federal officer in question, in this case the President. If the investigation uncovers information that the investigators deem impeachable, they may draft articles of impeachment and report those articles

to the full House. If the House determines that the President has committed an impeachable offense, the House may vote to impeach. *See* T.J. Halstead, CRS Report for Congress: An Overview of the Impeachment Process 2-4 (2005), <https://bit.ly/2Pj6zwx>.

25. If the House votes to impeach, the U.S. Senate, to whom the Constitution assigns the “sole Power to try all Impeachments,” U.S. Const. art. I § 3, cl. 6, may conduct a trial-like inquiry into whether the offense in question occurred. After this inquiry has concluded, the Senate votes on whether to convict on the articles of impeachment. If the officer is convicted, he or she is removed from office. Under the Constitution, “remov[al] from Office” is the only automatic punishment for a federal officer impeached by the House and convicted by the Senate of “Treason, Bribery, or other high Crimes and Misdemeanors.” U.S. Const. art. II, § 4.

26. After an officer has already been impeached by the House and convicted by the Senate, then and only then “the Senate may subsequently vote on whether the impeached official shall be disqualified from again holding an office of public trust under the United States.” Halstead, *supra*, at 6; *see also* Procedure and Guidelines for Impeachment in the United States Senate, S. 99-33, 2d Sess., at 93. Indeed, most of the officials that Congress has impeached and removed from office were *not* disqualified from holding future office.<sup>1</sup> In other words, disqualification from future office is a question that the Senate would vote on separately and subsequently from the question of removal from office, after impeachment by the House and conviction by the Senate have already occurred.

27. Thus, impeachment and conviction of President Trump would not necessarily preclude him from running for President in 2020 or in any subsequent election for federal office.

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<sup>1</sup> Cass Sunstein, *Impeachment: A Citizen’s Guide* at 109–11 (2017) (demonstrating that of 19 officials that have been impeached by the House—eight of whom were removed from office by the Senate—only three were disqualified from holding future office.)

As one reporter succinctly put it, an impeached president “could, legally, run again.” Laurence Arnold, *Everything You Need to Know About Impeachment: QuickTake Q&A*, Wash. Post, Aug. 22, 2018.

28. More fundamentally, beyond the misapprehension that impeachment would necessarily disqualify the President from holding future office, OSC’s analysis in the Advisory Opinion and the Clarification is flawed because there simply is no basis to assume that federal employees’ advocacy for or against impeachment is “clearly directed at the failure of [the President’s] campaign for federal office.” Advisory Opinion at 2. OSC has conflated the impeachment process, which the Constitution enshrines as the sole extra-electoral means of removing a federal official from office, with the traditional partisan electoral process from the which the Hatch Act was designed to insulate government employees. Federal employees, like any other citizens, may advocate for or against impeachment based on factors having nothing to do with their partisan preferences for an upcoming election, such as whether the President has in fact committed high crimes or misdemeanors that warrant impeachment.

29. Indeed, the Advisory Opinion and the Clarification impermissibly expand the definition of prohibited “political activity” to infringe on important legal obligations imposed on federal employees to identify waste, fraud, and abuse in government and to fulfill their oaths of office to uphold the Constitution. Federal civil servants are required by statute to swear to “support and defend the Constitution of the United States against all enemies, foreign and domestic” and “bear true faith and allegiance to the same.” 5 U.S.C. § 3331. The Office of Government Ethics requires all federal employees to “disclose waste, fraud, abuse, and corruption to the appropriate authorities.” 5 C.F.R. § 2635.101(b)(11). OSC’s Advisory Opinion and Clarification purport to supersede these authorities and *punish* federal employees

for commenting on the most severe possible infractions—treason, high crimes, or misdemeanors by the President. Under OSC’s view, members of the other Office of Special Counsel—formerly led by Robert Mueller—could be punished for, in the view of many, recommending that Congress commence impeachment proceedings against the President. Of course this is absurd.

30. OSC’s Advisory Opinion and Clarification purport to distinguish between permissible and impermissible speech concerning impeachment, but the distinction is illusory. The Advisory Opinion asserts that employees may *state* that the President should or should not be impeached, but may not *advocate* that he should or should not be impeached. The Advisory Opinion and Clarification’s attempt to distinguish between “state” and “advocate” fails because in both examples, the hypothetical federal employee is expressing a normative judgment: that impeachment should or should not occur. At a minimum, this purported distinction is vague and fails to provide fair notice to federal employees about when discussions of impeachment may be deemed to violate the Hatch Act and subject the employees to potential disciplinary action.

31. By prohibiting “advocacy” for or against impeachment, OSC has prohibited and chilled speech on matters of the utmost public concern lying at the heart of the First Amendment.

## **2. “Resistance”**

32. In the Advisory Opinion, OSC asserts that federal employees’ use of the terms “resistance” or “#resist” would *presumptively* be treated as political activity directed at President Trump in the 2020 election, and therefore is prohibited by the Hatch Act. Advisory Opinion at 2.

33. OSC asserted that, “[t]o the extent that the statement relates to resistance of President Donald J. Trump . . . usage of the terms ‘resistance,’ ‘#resist,’ and derivatives thereof is political activity.” Advisory Opinion at 2. OSC recognized that these terms “gained prominence shortly after President Trump’s election in 2016.” But OSC claimed, based on its

own unidentified evidence, that the terms “have become inextricably linked with the electoral success (or failure) of the president.” *Id.* That is, what began as resisting *President* Trump and his policies while in office—which is permissible under the Hatch Act—has become automatically resisting *candidate* Trump in his quest for reelection—which is prohibited under the Hatch Act. “Now that President Trump is a candidate for reelection, [OSC] must *presume* that the use or display of “resistance,” “#resist,” “#resistTrump,” and similar statements is political activity unless the facts and circumstances indicate otherwise.” *Id.* (emphasis added). OSC thus will “*presume* that the use or display of the hashtags #resist and #resistTrump, *in isolation*, is political activity under the Hatch Act.” *Id.* (emphases added).

34. In the Clarification, OSC explained that it considers use of the terms “resistance” and “#resist” to be partisan political activity because those terms purportedly “have become slogans of political parties and partisan political groups” such as the Democratic National Committee and MoveOn Political Action. OSC also sought to distinguish between prohibited uses of “resist” and those that are not prohibited because they are “in relation to an issue,” such as “#ResistHate” or “#ResistKavanaugh.” *Id.* at 2.

35. The Clarification did not amend the Advisory Opinion’s guidance, however, that OSC will “presume” that use of the terms “resistance,” “#resist,” or variations thereof “in isolation” constitutes prohibited political activity in violation of the Hatch Act.

36. Contrary to OSC’s analysis, the terms “Resistance,” “#Resist,” and variations thereof are not associated with the Democratic Party or any partisan political group. As Newsweek has explained: “The #Resistance . . . is not an explicitly partisan movement. It is an amorphous set of groups and activities aimed at challenging President Donald Trump and derailing his policy priorities. Many of the organizations that have formed in the wake of

Trump’s victory, like Indivisible, are nonprofits that aren’t allowed to formally coordinate with a party.” Emily Cadei, *The DNC Wants to Join the Resistance: Will Activists Allow It?*, Newsweek, June 3, 2017. The Democratic Party did not create or popularize the term #Resist, most members of the public do not associate the term with the Democratic Party, and the fact that the Democratic National Committee and other political groups have invoked the term for their own purposes in no way means that when a federal employee uses the term he or she is publicly affiliating with or supporting particular candidates of the Democratic Party or the Democratic Party itself.

37. As applied to federal employees, the “Resistance” is most commonly understood to refer to public servants who remain committed to protecting longstanding norms and democratic guardrails. *See, e.g.*, Justin Caffier, *How Federal Civil Servants Are Waging Bureaucratic War Against Trump*, Vice, Feb. 13, 2017, <https://bit.ly/2YSqKor>. At its root, the Resistance is the latest version of “bureaucratic resistance.” *See* Jennifer Nou, *Bureaucratic Resistance from Below*, Notice & Comment, Nov. 16, 2016, <https://bit.ly/2KF8sSu>.

38. Other political parties such as the Green Party have invoked the term “#resist” for their own purposes. The same is true of members of the President’s own Administration. In a now-famous op-ed in the New York Times, an anonymous senior administration official described himself or herself as “part of the resistance.” *I am Part of the Resistance Inside the Trump Administration*, N.Y. Times, Sept. 5, 2018. Under OSC’s guidance, this official seemingly violated the Hatch Act by using the term “resistance,” even though the official made clear that he or she did not support the Democratic Party. And that op-ed constituted quintessential speech on matters of public concern that the First Amendment protects, no different from the letter to the local newspaper sent by the public school teacher in *Pickering*.

39. OSC's directive regarding "resistance" and the logic behind it is inconsistent with OSC's approach in other contexts. At nearly the same time OSC issued the Advisory Opinion, it cleared members of the Trump Administration of alleged violations of the Hatch Act for using the term "MAGAnomics." "MAGA" is short for "Make America Great Again," which is the *official* slogan of the Trump campaign. If any term is "inextricably intertwined" with candidate Trump, it is "MAGA." However, OSC concluded that OMB Director Mick Mulvaney did not violate the Hatch Act when he tweeted "#MAGAnomics" "because the Trump Administration has branded its economic plan with the name . . . ." Letter from OSC to CREW, Nov. 30, 2018, <https://bit.ly/2Q5go55>. Rather than preclude Administration officials from employing terminology originating with the President's partisan electoral campaign in official government communications, OSC's approach improperly legitimized the wholesale adoption of rhetoric and slogans from the President's partisan campaign in executive branch policy discussion. Whereas OSC made a logical leap that, at some unspecified point, people who used "resistance" terms slipped into political activity because Trump is a candidate for office in 2020, OSC refused to make the obvious connection between "MAGAnomics" and the same 2020 campaign.

40. OSC's guidance, including the presumptive prohibition against using terms like "Resistance" or "#Resist" untethered to some specific issue, restricts and chills a wide range of speech on matters of public concern that have nothing to do with advocating for or against the defeat of a candidate for office. Federal employees use these terms to express policy goals or disagreements, social activism, and any number of other sentiments that do not relate to electoral politics and that occupy the highest rungs of First Amendment protection.

41. Moreover, OSC's guidance is utterly vague as to when the use of "#Resist" or variations thereof will be deemed "in relation to an issue." For instance, if a federal employee

shares an article on social media about the President’s desire to build a border wall with a caption that simply stated “#Resist,” would that be an impermissible political statement about President Trump, or a permissible statement because it is “in relation to an issue”? It is anyone’s guess, but federal employees cannot afford to take such risks when their careers are at stake.

### **3. Restrictions on Speech While Off Duty**

42. The Advisory Opinion and the Clarification not only restrict speech by federal employees while at work, but may also restrict certain speech even outside the workplace. OSC has stated in separate guidance that, even when off duty, federal employees may not post, retweet, link to, or share solicitations for political contributions or invitations to political fundraising events. *Hatch Act Guidance on Social Media* (“OSC’s Social Media Guidance”) at 5.<sup>2</sup> The Advisory Opinion and the Clarification thus would seem to prohibit all federal employees—even while off duty and outside the workplace—from posting, retweeting, linking to, or sharing solicitations for donations to organizations that have as their purpose advocating for the impeachment of the President, or organizations that use some variant of “#Resistance” in their name. OSC’s Advisory Opinion and Clarification likewise would seem to prohibit federal employees from ever sharing invitations to fundraising events of such organizations.

43. OSC’s Social Media Guidance also prohibits federal employees, even when off duty, from mentioning their official titles or positions when posting messages directed at the success or failure of a political candidate. OSC Social Media Guidance at 7. The Advisory Opinion and the Clarification therefore would seem to prohibit all federal employees—even while off duty and outside the workplace—from mentioning their federal government position in any post that advocates for or against impeachment or that uses the term “#Resist” of some

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<sup>2</sup> [http://ogc.osd.mil/defense\\_ethics/resource\\_library/hatch\\_act\\_and\\_social\\_media.pdf](http://ogc.osd.mil/defense_ethics/resource_library/hatch_act_and_social_media.pdf).

variation thereof. For example, a State Department employee sitting at home on her couch seemingly could not write a Facebook post saying that, based on her State Department experience working in foreign countries, impeachment would be unwise because it could unsettle diplomatic relations. And a different State Department employee seemingly could not Tweet from home in support of impeachment on the ground that his State Department experience has taught him that government officials must be held accountable for alleged serious misconduct.

44. The Advisory Opinion and the Clarification may impose additional prohibitions on Further Restricted Employees while off duty. OSC's Social Media Guidance explains that Further Restricted Employees may not share or retweet posts from, or the page of, partisan political groups. OSC Social Media Guidance at 9. The Advisory Opinion and Clarification therefore would seem to prohibit Further Restricted Employees—even while off duty and outside the workplace—from sharing or retweeting posts from, or the pages of, any organization that has as its purpose advocating for the impeachment of the President, or any organization that uses some variant of “#Resistance” in its name.

### **C. Harm to Plaintiffs' Federal-Employee Members**

45. Being found guilty of violating the Hatch Act can come with serious consequences. If OSC chooses to prosecute an employee and the employee is found guilty before the MSPB, the employee may be suspended, fined, reprimanded, removed from their position, or disbarred from seeking federal employment for up to five years. 5 U.S.C. § 7326.

46. Moreover, the MSPB considers OSC's guidance when ultimately ruling in Hatch Act cases. Even though the guidance itself is not legally binding on MSPB, the MSPB has made clear that “OSC's view is worthy of consideration” and should be “afford[ed] . . . [the] weight it deserves.” *Special Counsel v. Sims*, 102 M.S.P.R. 288, 294 n.3 (2006).

47. Plaintiffs' members include federal employees whose speech has been prohibited or chilled by OSC's Advisory Opinion and the Clarification. The chilling effect on the speech of Plaintiffs' members is particularly pronounced given the adverse employment consequences of an OSC determination that an employee violated the Hatch Act, and given the vagueness, overbreadth, and internal contradictions of the Advisory Opinion and the Clarification.

## **CLAIMS FOR RELIEF**

### **COUNT I (Overbreadth in Violation of the First Amendment)**

48. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

49. "The First Amendment protects a public employee's right . . . to speak as a citizen addressing matters of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). Thus, the First Amendment protects Plaintiffs' members' speech on matters of public concern both while at work and when outside of the workplace.

50. A statute is overbroad in violation of the First Amendment where "a substantial number of [the statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010).

51. OSC's interpretation of the Hatch Act, as set forth in the Advisory Opinion and Clarification, restricts prohibits protected speech by federal employees advocating for or against impeachment, or using the term "#Resist" or variations thereof. These prohibitions restrict speech far outside of the statute's legitimate sweep of preventing federal employees from engaging in partisan political activity directed at the success or failure of a political candidate.

52. OSC's interpretation of the Hatch Act, as set forth in the Advisory Opinion and Clarification, is unconstitutionally overbroad in violation of the First Amendment.

53. In the alternative, as a matter of constitutional avoidance, this Court should declare that, contrary to OSC's guidance, the Hatch Act does not cover protected speech advocating for or against impeachment or using the term "#Resist" or variations thereof, and that OSC lacked authority to issue its guidance.

**COUNT II**  
**(Content and Viewpoint Discrimination in Violation of the First Amendment)**

54. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

55. Government action that targets speech based on its content is presumptively unconstitutional and is justified only if the Government demonstrates that it is narrowly tailored to serve a compelling state interest. *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

56. OSC's interpretation of the Hatch Act, as set forth in the Advisory Opinion and Clarification, is content-based because it restricts speech on specific topics (*e.g.*, impeachment) and using specific terms (*e.g.*, "#Resist" and variations thereof).

57. OSC's interpretation of the Hatch Act, as set forth in the Advisory Opinion and Clarification, imposes unconstitutional content-based restrictions because it is not narrowly tailored to serve the compelling state interests of preventing federal employees from engaging in partisan political activity directed at the success or failure of a political candidate.

58. OSC's interpretation of the Hatch Act, as set forth in the Advisory Opinion and Clarification, is not only impermissibly content-based, but it also impermissibly discriminates based on the viewpoint of the speaker. *See Matal v. Tam*, 137 S. Ct. 1744 (2017). In restricting use of the term "#Resist" and variations thereof, OSC's interpretation of the Hatch Act targets and discriminates against speakers who oppose the Trump Administration's policies. And the prohibitions regarding discussions of impeachment, in purpose and effect, target and discriminate against speakers who believe that the President should be impeached.

59. “[I]t is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011). OSC cannot advance any compelling state interest, much less narrow tailoring of its guidance in the Advisory Opinion and Clarification, to justify its viewpoint discrimination.

60. Consequently, OSC’s interpretation of the Hatch Act, as set forth in the Advisory Opinion and Clarification, restricts protected speech based on content and viewpoint in violation of the First Amendment.

61. In the alternative, as a matter of constitutional avoidance, this Court should declare that, contrary to OSC’s guidance, the Hatch Act does not cover protected speech advocating for or against impeachment or using the term “#Resist” or variations thereof, and that OSC lacked authority to issue its guidance.

### COUNT III

#### **(Vagueness in Violation of the Fifth and First Amendments)**

62. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

63. The “void-for-vagueness doctrine guarantees that ordinary people have fair notice of the conduct a statute proscribes.” *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018). And “where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms.” *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). “When speech is involved, rigorous adherence to [due process] requirements is necessary to ensure that ambiguity does not chill protected speech.” *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

64. OSC’s interpretation of the Hatch Act, as set forth in the Advisory Opinion and Clarification, is vague and fails to afford fair notice of the conduct and speech that it prohibits.

65. With respect to impeachment, the Clarification asserts that “two employees may discuss whether reported conduct by the president warrants impeachment and express an opinion about whether the president should be impeached without engaging in political activity,” but the Clarification elsewhere asserts that “OSC considers advocacy for or against the impeachment” of the President to be prohibit political activity. Federal employees lack fair notice and meaningful standards for understanding when speech arguing for against impeachment is permissible or when it is impermissible “advocacy” that could cost them their jobs.

66. With respect to uses of the term “#Resist” and variations thereof, the Advisory Opinion and the Clarification fail to provide fair notice and meaningful standards for federal employees to determine when their use of these terms is permissible and when it is impermissible and could cost them their jobs. The Advisory Opinion and the Clarification are utterly vague on when uses of these terms will be considered to be “in isolation” (which OSC deems impermissible), and when they will be considered to be “in relation to an issue” (which OSC deems permissible).

67. The vagueness of OSC’s interpretation of the Hatch Act, as set forth in the Advisory Opinion and Clarification, unconstitutionally chills protected speech by federal employees on matters of public concern.

68. In the alternative, as a matter of constitutional avoidance, this Court should declare that, contrary to OSC’s guidance, the Hatch Act does not cover protected speech advocating for or against impeachment or using the term “#Resist” or variations thereof, and that OSC lacked authority to issue its guidance.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs seek an order and judgment to:

- a. Declare that OSC's interpretation of the Hatch Act, as set forth in the Advisory Opinion and Clarification, is overbroad in violation of the First Amendment, or in the alternative, that the Hatch Act does not cover protected speech advocating for or against impeachment or using the term "#Resist" or variations thereof and that OSC lacked authority to issue its guidance;
- b. Declare that OSC's interpretation of the Hatch Act, as set forth in the Advisory Opinion and Clarification, impermissibly discriminates against federal employees based on the content and/or viewpoint of their speech in violation of the First Amendment, or in the alternative, that the Hatch Act does not cover protected speech advocating for or against impeachment or using the term "#Resist" or variations thereof and that OSC lacked authority to issue its guidance;
- c. Declare that OSC's interpretation of the Hatch Act, as set forth in the Advisory Opinion and Clarification, is vague in violation of the First and Fifth Amendments, or in the alternative, that the Hatch Act does not cover protected speech advocating for or against impeachment or using the term "#Resist" or variations thereof and that OSC lacked authority to issue its guidance;
- d. Enjoin OSC from enforcing or relying on the Advisory Opinion and the Clarification;
- e. Order OSC to rescind the Advisory Opinion and the Clarification;
- f. Award all other relief that the Court deems just and proper.

Dated: August 13, 2019

Respectfully Submitted,

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