IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 2578, Plaintiffs, v. OFFICE OF SPECIAL COUNSEL, Defendant.	Case No. 8:19-cv-02322-PX ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

This case concerns an unprecedented policy issued by the federal government's Office of Special Counsel (OSC), censoring the constitutionally protected speech of federal employees on matters of the utmost public concern. OSC has prohibited all federal employees from advocating for or against the impeachment of the President, and from using terms such as "resist" and "resistance" to express opposition to the Administration's conduct. These restrictions not only harm the federal employees who are censored, but the public interest at large, as the restrictions restrict speech on topics over which federal employees have unique knowledge and expertise. The restrictions strike at the heart of the First Amendment.

OSC issued its policy pursuant to the Hatch Act, but the Hatch Act does not encompass the restrictions the agency imposed, and if it did, the law would facially 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. But speech related to impeachment or "resistance" does not inherently have anything to do with an election, and OSC seriously erred in presuming that it does merely because President Trump is a candidate. Making matters worse, OSC has not enforced its policy against numerous Administration officials who have brazenly violated it by advocating against the President's impeachment, or by denigrating the "resistance." In practice, the policy stifles speech only on the other side of the debate.

OSC's policy is unconstitutionally overbroad and viewpoint discriminatory, in violation of the First Amendment. It also impermissibly vague. Plaintiffs are overwhelmingly likely to succeed on the merits, and a preliminary injunction is necessary to prevent the ongoing irreparable harm to Plaintiffs' federal-employee members, and to serve the public interest by fostering robust and informed debate on the most important issues of the day.

BACKGROUND

A. Overview of the Hatch Act

The Hatch Act, 5 U.S.C. §§ 7321–7326, prohibits federal employees from engaging in "political activity" while they are "on duty," in any room or building being used by the federal government, wearing a government uniform or insignia, or using federal government property. 5 U.S.C. § 7324. For purposes of the Hatch Act, "political activity" means "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. While the Hatch Act limits such "political activity" by federal employees, "it is the policy of 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.

The Office of Special Counsel ("OSC") is an independent agency charged with enforcing the Hatch Act. OSC investigates potential Hatch Act violations by federal employees and may, at its discretion, issue warning letters or prosecute alleged violations before the Merit Systems Protection Board ("MSPB"). 5 U.S.C. § 1216. Being found guilty of a Hatch Act violation can carry serious consequences. If OSC prosecutes 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.

OSC also 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). 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).

B. The Advisory Opinion and Clarification

On November 27, 2018, OSC issued an advisory opinion addressing two topics of relevance here: (1) whether federal employees may advocate for or against the impeachment of the President; and (2) whether and when federal employees may use the term "#Resist" or variations thereof. *See* Decl. of R. Stanton Jones ("Jones Decl."), Ex. A (the "Advisory Opinion"). OSC distributed the Advisory Opinion to employees across the federal government.

On November 30, 2018, OSC issued a "Clarification" of the Advisory Opinion that was also distributed to employees across the federal government. *See* Jones Decl., Ex. B (the "Clarification," and, together with the Advisory Opinion, the "Policy").

1. Impeachment

With respect to impeachment, OSC stated in the Advisory Opinion 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.*

In the Clarification, OSC elaborated by attempting to draw a distinction between "advocacy for or against the impeachment of a candidate for federal office [which is] political activity under the Hatch Act," and "merely discussing impeachment," which OSC said is not prohibited. Clarification at 2 (emphasis in original). OSC offered examples of the purported 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.*

OSC's analysis rested on the supposition that "[i]mpeachment" leads to the President being "disqualified from holding any future 'Office of honor, Trust, or Profit of the United States,'" including the Presidency. Advisory Opinion at 1-2. But OSC's apparent assumption that impeachment is synonymous with, and necessarily results in, disqualification from future office is incorrect. 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. 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).[1] The House does not have the power to disqualify the President or any other federal officer from holding future office.

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. Under the Constitution, "removv[al] from Office" is the *only* automatic punishment for a federal officer convicted by the Senate of "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. art. II, § 4.

After an officer has been impeached by the House and convicted by the Senate, "the Senate may subsequently vote on whether the impeached official shall be disqualified from again

[1] *Available at* https://www.hsdl.org/?view&did=830732.

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. In other words, disqualification from future office is an issue that the Senate would vote on separately from, and subsequent to, the question of impeachment and removal from office. Accordingly, advocating for impeaching (and even convicting) a President does not equate to advocating against the President's election in a future campaign.

2. "Resistance"

In the Advisory Opinion, OSC also asserted that federal employees' use of the terms "resistance" or "#resist" would presumptively be treated as political activity directed at President Trump's reelection in 2020, and therefore prohibited by the Hatch Act. Advisory Opinion at 2. OSC recognized that these terms "gained prominence shortly after President Trump's election in 2016 and generally related to efforts to oppose administration policies." *Id.* But OSC claimed, without citing any evidence, that "resistance, #resist, and similar terms have become inextricably linked with the electoral success (or failure) of the president." *Id.* OSC advised that, "[n]ow 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.* 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.*

In the Clarification, OSC elaborated 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. However, the Clarification did not amend the Advisory Opinion's guidance that OSC will "presume" that, "in isolation," any use of "resistance," "#resist," or "similar terms" constitutes prohibited political activity under the Hatch Act.

As with its impeachment guidance, OSC's policy regarding "resistance" rests on erroneous assumptions. 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. Indeed, 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 Trump 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.

Nor is the concept of "Resistance" "inextricably linked with the electoral success (or failure) of the president," as OSC claims. Advisory Opinion at 2. 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.

3. Restrictions on Speech While Off Duty

The OSC Policy set forth in the Advisory Opinion and Clarification restrict speech by federal employees not only while they are at work, but also outside the workplace. OSC has stated in separate guidance that the Hatch Act 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. *See* OSC, Hatch Act Guidance on Social Media ("OSC's Social Media Guidance") at 7.[2] The Advisory Opinion and 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 variation thereof.

OSC's Social Media Guidance also directs 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. OSC's Social Media Guidance at 5. The Policy 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 or against the impeachment of the President, or organizations that use some variant of "#Resistance" in their name. And OSC's Policy would seem to prohibit federal employees from ever sharing invitations to fundraising events of such organizations.

[2] *Available at* http://ogc.osd.mil/defense_ethics/resource_library/hatch_act_and_social_media.pdf.

C. The Chill on Protected Speech of Plaintiffs' Federal-Employee Members

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.

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.

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

The exhibits attached to this motion include declarations from two Local 2578 members whose speech has been chilled by OSC's Policy. One of these members is a federal employee in Maryland who works for the National Archives and Records Administration. Jones Decl., Ex. C.

This member has been following the impeachment proceedings involving President Trump closely and believes that impeachment is an important issue facing the country. *Id.* The member attests that he wishes to express an opinion at work about whether the President should be impeached, but, because of the guidance from the OSC, has refrained from talking about impeachment at all while at work. *Id.*

The other member is a federal employee in Missouri working for the National Archives and Records Administration. Jones Decl., Ex. D. This member wishes to use iterations of the term "resist" or "resistance" at work, but, because of the guidance from the OSC, has refrained from using such terms. *Id.*

ARGUMENT

To obtain a preliminary injunction, Plaintiffs must demonstrate that (1) they are "likely to succeed on the merits"; (2) they "will likely suffer irreparable harm absent an injunction"; (3) "the balance of hardships weighs in their favor"; and (4) "the injunction is in the public interest." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014). "In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted). Plaintiffs satisfy each of the relevant factors here.

I. Plaintiffs Are Likely to Succeed on the Merits

Plaintiffs are overwhelmingly likely to succeed on their claims. It is well established that "[p]ublic employees may not 'be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest.'" *Liverman v. City of Petersburg*, 844 F.3d 400, 406 (4th Cir. 2016) (quoting *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, *id.* (internal quotation marks omitted), the First Amendment dictates that public employees must remain free to engage in the "interchange of ideas for the bringing about of political and social changes desired by the people," *Lane v. Franks*, 573 U.S. 228, 236 (2014). "So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are *necessary* for their employers to operate efficiently and effectively." *Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006).

OSC's Policy violates the First Amendment in three independent ways. First, the Policy is unconstitutionally overbroad. It prohibits speech by public employees on matter of the utmost public concern, and OSC cannot demonstrate a compelling government interest to justify these restrictions where the Policy restricts speech that has nothing to do with a political campaign. Second, the Policy reflects viewpoint discrimination. OSC has not enforced the Policy against numerous Administration officials who have advocated *against* impeachment or the resistance, and thus the Policy stifles speech on only one side of these topics. Finally, the Policy is unconstitutionally vague. The Policy draws a distinction that no federal employee could possibly decipher between "advocating" for or against impeachment and expressing an "opinion" about impeachment. And the Policy fails to offer meaningful guidance on what speech is prohibited by the restrictions related to "resistance." The result of these glaring ambiguities is to chill protected speech and open the door to selective enforcement.

A. The Policy Is Unconstitutionally Overbroad

The Supreme Court's decision in *United States v. Nat'l Treasury Emps. Union* ("*NTEU*"), 513 U.S. 454, 467-68 (1995), and the Fourth Circuit's decision in *Liverman v. City of*

Petersburg, 844 F.3d 400, 406 (4th Cir. 2016), set forth the framework for evaluating the constitutionality of a statute or policy that *prospectively* restricts the speech of a class of public employees. 844 F.3d at 407. The standard for evaluating a statute or policy that "chills potential speech" of public employees "before it happens" is different from—and more stringent than—the test set forth in *Pickering* for evaluating "post-hoc disciplinary action[s]" against individual employees. *Liverman*, 844 F.3d at 407; *see also Milwaukee Police Ass'n v. Jones*, 192 F.3d 742, 749 (7th Cir. 1999) (explaining the distinction between the *NTEU* and *Pickering* standards). Courts must first evaluate "whether the speech at issue relates to a matter of public concern." *Id.* at 406. If it does, the court "must balance the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 407 (alterations and internal quotation marks omitted). The "[g]overnment's burden is greater," however, when dealing with prospective restrictions on speech than with "isolated disciplinary action." *Id.* (quoting *NTEU*, 513 U.S. at 467-68). In such instances, "[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *Id.* (quoting *NTEU*, 513 U.S. at 468). "Further, the government 'must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'" *Id.* (quoting *NTEU*, 513 U.S. at 475).

OSC's Policy here clearly falls under the *NTEU* and *Liverman* framework. It is a policy that regulates a "broad category of expression" for millions of federal employees, "chill[ing] potential speech before it happens." *Liverman*, 844 F.3d at 407 (internal quotation marks

omitted). Just like the policy in *Liverman*, OSC's Policy makes clear to employees that they are prohibiting from engaging in particular speech, and threatens disciplinary action if they do. See id. at *404*.

Under the first prong of the *NTEU*/*Liverman* framework, there can be no dispute that OSC's Policy "regulates [employees'] rights to speaks on matters of public concern." *Liverman*, 844 F.3d at 407. The President's impeachment is *the* most pressing matter of public concern in this country today. Likewise, whether the President's policies should be opposed, and whether government employees should resist any trampling on democratic and institutional norms, could not be of greater public significance. "The interests of 'present and future employees' and their 'potential audiences'" in federal employees' views on these matters "is manifestly significant." *Id.* at 408 (quoting *NTEU*, 513 U.S. at 468).

Indeed, these topics are ones for which federal employees are uniquely situated to have "informed and definite opinions" from which the public would benefit. *Pickering*, 391 U.S. at 572. With respect to impeachment in particular, federal employees have unique knowledge of the budgetary and appropriations issues related to the President's conduct with respect to Ukraine, and thus would have special competency to express an informed opinion as to the appropriateness of the President's conduct and whether it warrants impeachment. Members of the foreign service similarly could opine with expertise on the foreign relations implications of the President's conduct. But under OSC's policy, such federal employees could not write an op-ed or social media post—when they were on- or off-duty—that identifies the employee by her official title and advocates for or against impeachment based on the employee's expertise. This censorship "imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said." *NTEU*, 513 U.S. at 470; *see also Liverman*,

844 F.3d at 408 ("social networking sites like Facebook have . . . emerged as a hub for sharing information and opinions with one's larger community").

Because OSC's Policy bans speech on matters of public concern, the Government maintains the burden to justify these restrictions. And the Government's burden is particularly high here: "A stronger showing of public interest in the speech requires a concomitantly stronger showing of government-employer interest to overcome it." *Liverman*, 844 F.3d at 409 (quoting *McVey v. Stacy*, 157 F.3d 271, 279 (4th Cir. 1998) (Murnaghan, J., concurring in part and concurring in the judgment)). The Government cannot come close to meeting its burden here for the simple reason that OSC relied on the Hatch Act to justify the Policy, but the Policy proscribes broad swaths of speech that the Hatch Act does not reach. The Hatch Act solely regulates speech that is "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. On both relevant topics, the Policy bans speech that does not involve any political campaign.

Regarding impeachment, speech advocating for or against impeachment does not inherently advocate for the success or failure of candidate Trump in the 2020 election. Rather, advocacy for or against impeachment merely reflects an opinion on whether the President has committed "Treason, Bribery, or other high Crimes and Misdemeanors" for which the President should be removed from office. U.S. Const. art. II, § 4. Many citizens believe that the President's conduct does *not* warrant impeachment, and yet still oppose his reelection. Two Democratic members of the House appear to fall in this camp; Representatives Colin Peterson and Jared Golden voted against one or both articles of impeachment but have provided no indication that they support candidate Trump in the 2020 election. Conversely, advocacy in favor of impeachment does not necessarily reflect speech aimed at defeating the President in a

political campaign. As explained *supra*, OSC appears to have presumed that impeachment results in disqualification from future office, but that is not so. Whether the President should be disqualified from future office is a separate question from whether he should be impeached, and the Senate votes on disqualification if and only if it has already voted to convict the President on impeachment. Most of the officials that Congress has impeached and removed from office have *not* been disqualified from holding future office.[3] OSC seriously erred in conflating advocacy for or against impeachment with speech that is necessarily directed at an election.

OSC equally erred in "presuming" that the terms "resistance," "resist," and "similar terms" constitute partisan political speech directed at the success or failure of candidate Trump in the next election. Advisory Opinion at 2. OSC reasoned that "resist" and variations thereof are associated with opposition to the President, and "President Trump is a candidate for reelection." *Id.* But it simply cannot be that expressing opposition to (or support for) an elected official's conduct violates that Hatch Act merely because the official is a declared candidate for reelection. If it were, that would mean that nearly any speech by Executive Branch officials opposing the conduct of members of Congress violates the Hatch Act, if those members are candidates for reelection. For instance, White House Counsel Pat Cipollone has sent letters to Speaker Pelosi and the Chairs of relevant House committees expressing fervent opposition to their conduct and what could only be described as "resistance" to cooperation with the House's oversight and impeachment activities.[4] Do Cipollone's letters constitute prohibited speech directed at the

[3] 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.).

[4] *See, e.g.*, *READ: White House letter to Pelosi rejecting cooperation in impeachment inquiry*, TheHill (Oct. 8, 2019), https://thehill.com/homenews/administration/464908-read-white-house-letter-to-pelosi-rejecting-cooperation-in.

failure of candidate Pelosi in the 2020 election merely because she is a candidate for office? Of course not. And what about speech by Executive Branch officials *praising* the President's conduct and policies? Nobody would seriously consider such speech prohibited under the Hatch Act, but under OSC's reasoning, it would be because "President Trump is a candidate for reelection." Advisory Opinion at 2.

In the Clarification, OSC also relied on the fact that the terms "#resist" and "the Resistance" have been invoked by "partisan political groups" including the Democratic National Committee. Clarification at 1-2. But a political group's use of a term for its own purposes does not transform the meaning of the term or automatically convert it into one that federal employees are prohibited from using in their speech. The "Resistance," as it has come to be understood since President Trump's election, is not connected to any political party. To the contrary, the "Resistance" is an "amorphous set of groups and activities aimed at challenging President Donald Trump and derailing his policy priorities." Cadei, *supra*. As explained, groups and individuals who expressly are not part of the Democratic Party have used the term, including a senior Trump administration official who wrote an anonymous op-ed and now book describing himself or herself as "part of the resistance." *I am Part of the Resistance Inside the Trump Administration*, N.Y. Times, Sept. 5, 2018. To be sure, "Resist" and the "Resistance" *can* be used to support a political candidate or to work against President Trump's reelection. In such cases, that speech would be properly prohibited by the Hatch Act. However, OSC has decided to "*presume* that the use or display of 'resistance,' '#resist,' '#resistTrump,' and similar statements is political activity." Advisory Opinion at 2 (emphasis added). This presumption is quintessentially overbroad.

OSC's Policy also does not advance the governmental interests that underlie the Hatch Act. As the Supreme Court has explained, "the Hatch Act aimed to *protect* employees' rights, notably their right to free expression, rather than to restrict those rights." *NTEU*, 513 U.S. at 471. Congress sought "to make sure that Government employees would be 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." *Id.* (quoting *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 566 (1973)). Congress relatedly sought to prevent federal employees from being "employed to build a powerful, invincible, and perhaps corrupt political machine." *Id.* (quoting *Letter Carriers*, 413 U.S. at 471). In other words, Congress enacted the Hatch Act to ensure that the President could not force or pressure federal employees to advance his electoral interests.

OSC's Policy prohibiting speech on impeachment and resistance does not advance these purposes—if anything, it undermines them. In practice, as explained in more detail below, the Policy's effects are to disproportionately prevent federal employees from speaking out against the President, whether in advocating for his impeachment or expressing resistance to the Administration's conduct and policies. The Policy muzzles criticism of the President by Executive Branch employees, exactly the opposite of what the Hatch Act intended.

B. The Policy Constitutes Unlawful Viewpoint Discrimination

The Policy independently violates the First Amendment because, "[i]n its practical operation," the Policy constitutes "viewpoint discrimination." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011) (internal quotation marks omitted). It is axiomatic that the Government may not restrict speech in order "to suppress a disfavored message." *Id.* at 572; *see also Matal v.*

Tam, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment).

Here, in its purpose and "practical operation," *Sorrell*, 564 U.S. at 565, OSC's Policy disproportionally burdens those who advocate *for* impeaching the President, and who wish to *support* "resistance" to the Administration's conduct and policies. This discriminatory purpose and effect is clear from the fact that many employees covered by the Hatch Act have continued to advocate *against* impeachment, or have *denigrated* the "resistance," and yet have not been subject to disciplinary action by OSC pursuant to the Policy.

With respect to impeachment, numerous senior Administration officials covered by the Hatch Act have publicly advocated against impeachment—while on-duty and speaking in their official capacities—but to Plaintiffs' knowledge, none of these officials have been subject to adverse action from OSC for violating the Policy. Below are just some of the many examples of Administration officials advocating against impeachment:

- On October 2, 2019, in an interview with British outlet Sky News, Secretary of Commerce Wilbur Ross decried the then-threat of impeachment as "patently ridiculous," and "based on gossip." Jones Decl., Ex. E.

- On October 31, 2019, White House senior advisor Kellyanne Conway said in an interview with Fox & Friends: "Impeaching a president is an extraordinary event that's rarely done because we have democratic elections... Don't allow people to overturn the last election results or to interfere in the next one." Jones Decl., Ex. F.

- On November 1, 2019, White House Deputy Press Secretary Hogan Gidley told NPR that "They're trying to impeach a president on nothing." Jones Decl., Ex. G.

- On November 12, 2019, White House Press Secretary Stephanie Grisham tweeted: "I encourage people to take the time to read this. 'The Democrats do not even pretend their impeachment game is fair or actually about fact finding. This is simply about using a grant of power in the Constitution arbitrarily and politically, outside the bounds of due process...'" Jones Decl., Ex. H.

- On November 13, 2019, White House Press Secretary Stephanie Grisham tweeted: "Rep Turner rightly points out that the first 2 'star' witnesses in this impeachment sham have

never even spoken to @POTUS. Think about that: in a Presidential impeachment hearing, the dems witnesses have never even spoken w President Trump. This country deserves so much better." *Id.*

- On November 14, 2019, White House Social Media Director Dan Scavino Jr. tweeted a quote form an article that stated, "Adam Schiff is wasting the nation's time with impeachment hearings." Jones Decl., Ex. I.

- On November 17, 2019, White House Press Secretary Stephanie Grisham tweeted: "Very well said! If the dems had the votes they wouldn't be prolonging this charade. They're just working with their partners in the media to say the words "impeach" & "bribery" as much as they can, for as long as they can. But the people of this country are smarter than that!" Jones Decl., Ex. H.

- On November 24, 2019, White House Deputy Press Secretary Hogan Gidley said in an interview with Jeanine Pirro: "He's done nothing wrong and everyone now knows it. After a couple of weeks of an illegitimate, ridiculous, sham impeachment proceeding you now see when simply asked the question ... is there any evidence of any wrongdoing … every single witness said no….The President's done nothing wrong." *Hogan Gidley reacts to House impeachment inquiry, comments by Rudy Giuliani,* Nov. 24, 2019, https://video.foxnews.com/v/6108158781001#sp=show-clips.

- On December 3, 2019, White House Social Media Director Dan Scavino Jr. tweeted: "Watching Schiff hold an embarrassing Impeachment Sham press conference in THE SWAMP from my phone." Jones Decl., Ex. I.

- On December 4, 2019, the official White House twitter account tweeted: "Democrats are conducting an impeachment inquiry in search of a crime." Jones Decl., Ex. J.

- On December 6, 2019, White Deputy Press Secretary Hogan Gidley said in a television interview: "as we head into Christmas, please remember that impeachment isn't putting food on the table of the American people." Jones Decl., Ex. K.

- On December 18, 2019, Attorney General Barr stated in a Fox News interview: "The articles of impeachment here do not allege a violation of law, and it looks as if it's going to be along partisan lines -- I think -- you know, I'm concerned about it being trivialized and used as a political tool." Jones Decl., Ex. L.

All of these statements represent blatant violations of the Policy, as they all clearly constitute advocacy against impeachment, but none of these officials have faced any apparent consequences. The lack of any enforcement of the Policy against these officials strongly underscores that the Policy's purpose and effect is to silence only one side of the debate.

The same view-discriminatory non-enforcement of the Policy has occurred with respect to its restrictions of speech relating to "resistance." In a November 2019 speech to the Federalist Society that has been published on the Department of Justice's website, Attorney General William P. Barr stated the following:

> Immediately after President Trump won election, opponents inaugurated what they called "The Resistance," and they rallied around an explicit strategy of using every tool and maneuver available to sabotage the functioning of his Administration. Now, "resistance" is the language used to describe insurgency against rule imposed by an occupying military power. It obviously connotes that the government is not legitimate. This is a very dangerous – indeed incendiary – notion to import into the politics of a democratic republic. What it means is that, instead of viewing themselves as the "loyal opposition," as opposing parties have done in the past, they essentially see themselves as engaged in a war to cripple, by any means necessary, a duly elected government. Jones Decl., Ex. M.

These statements "relate[] to resistance to President Donald J. Trump" and thus obviously violate the Policy. Advisory Op. at 2. And yet Attorney General Barr has not, to Plaintiffs' knowledge, been subject to any disciplinary action from OSC. Meanwhile, federal employees such as Plaintiffs' members who wish to express support for the resistance must censor their speech.

"[I]t is all but dispositive" under the First Amendment where, "in practice," a regulation on speech is "viewpoint-discriminatory." *Sorrell*, 564 U.S. at 571. OSC cannot advance any compelling state interest, much less narrow tailoring, to justify its viewpoint discrimination here. A preliminary injunction is warranted. *See, e.g.*, *Christian Legal Society v. Walker*, 453 F.3d 853, 866 (7th Cir. 2006) (issuing preliminary injunction where, "as the record stands, there is strong evidence that the policy has not been applied in a viewpoint neutral way.").

C. The Policy Is Unconstitutionally Vague

Plaintiffs are likely to succeed on the merits for yet another independent reason: the Policy's restrictions on protected speech are impermissibly vague. A provision is

"unconstitutionally vague if [it] fail[s] to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Center for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 280 (4th Cir. 2013) (internal quotations omitted). This doctrine ensures "that ordinary people have fair notice" of what conduct is prohibited. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018). When "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). Thus, "[w]hen 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). In addition to its chilling effect, a vague restriction on speech raises profound concerns of affording government actors undue "discretion" in restricting speech, which can lead to selective enforcement. *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 290 (4th Cir. 2008).

OSC's Policy restricting speech about impeachment is hopelessly vague. OSC has advised that employees may not "advocate for or against impeachment," but "may discuss whether reported conduct by the president warrants impeachment and express an opinion about whether the president should be impeached." Clarification at 2. The distinction between "advocating" for or against impeachment and "expressing an on opinion about whether the president should be impeached" is indecipherable. A federal employee cannot possibly be expected to understand the difference between the two, particularly where the employee could lose her job if she guesses wrong. In reality, the only safe course for federal employees is to censor their speech and avoid *any* discussion of impeachment. Such self-censorship is precisely what the void-for-vagueness doctrine seeks to prevent.

The Policy's restriction on the term "resist" and variations thereof is similarly vague. OSC has stated that it will "presume" that "use or display of ''resistance,' '#resist,' '#resistTrump,' and similar statements is political activity" when used "in isolation." Advisory Op. at 3. But, OSC says, using these terms "in relation to an issue" is not prohibited. Clarification at 2. The distinction between using the terms "in isolation" versus "in relation to an issue" is murky at best. For instance, if an individual authors a social media post that simply says "#Resist," but that links to a news story about a specific issue, would that be considered in isolation or in relation to a policy issue? What if an employee writes or says "resist" in relation to a specific action that President Trump took, such as ordering the killing of an Iranian military leader? It is anyone's guess whether OSC would consider such speech to violate the Policy.

What's more, OSC's prohibition on making "*similar statements*" to "resistance" and "#resist" provides no guidance at all. Federal employees are left to speculate what terms or phrases OSC will consider sufficiently "similar" to the ones delineated in the Policy. OSC's "we'll know it when we see it approach" is antithetical to core First Amendment principles. *N.C. Right to Life*, 525 F.3d at 290. And again, the result of these ambiguities will be that federal employees will steer clear of any speech that conceivably could fall within the Policy's orbit, especially in light of the serious consequences if a violation were found.

Because the Policy does not provide federal employees with fair notice and meaningful standards for differentiating between permissible speech and prohibited speech that could cost them their jobs, it is unconstitutional.

D. Alternatively, as a Matter of Constitutional Avoidance, this Court Can Hold That the Policy is Inoperative Because the Hatch Act Does Not Encompass the Speech Restricted by the Policy

While the Policy violates the First Amendment for all of the reasons explained above, this Court can avoid ruling on the Policy's constitutionality by holding that the Hatch Act does not cover the speech that the Policy proscribes, and therefore OSC's issuance of the policy was ultra vires. "The principle of constitutional avoidance requires the federal courts to avoid rendering constitutional rulings unless absolutely necessary." *In re Under Seal*, 749 F.3d 276, 293 (4th Cir. 2014) (internal quotation marks omitted). The canon "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

For all the reasons described above, the Hatch Act's prohibition on "political activity" by federal employees does not plausibly cover any and all speech advocating for our against impeachment or related to "resistance." But even if the Policy reflected a plausible interpretation of the term "political activity" as defined under the Hatch Act (and it does not), at a minimum, it is equally plausible that speech related impeachment or "resistance" does not constitute "political activity" as intended by Congress under the statute. 5 U.S.C. § 7324. This Court accordingly can avoid ruling on the constitutional questions presented by holding that the Hatch Act does not cover the speech in question, and therefore OSC lacked authority to issue the Policy. There is no dispute that OSC would lack authority to issue the Policy if not pursuant to the Hatch Act.

II. Plaintiffs Will Suffer Irreparable Harm Absent Injunctive Relief

"[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Legend Night Club v. Miller*, 637 F.3d 291, 302

(4th Cir. 2011) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). For this reason, "[w]here a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed." *Gracepointe Church v. Jenkins*, 2006 WL 1663798, at *3 (D.S.C. June 8, 2006) (quoting *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 349 (2d Cir. 2003)). Here, Plaintiffs' members are irreparably harmed from every moment that they are prohibited from engaging in First Amendment-protected speech.

III. The Balance of Hardships and the Public Interest Support a Preliminary Injunction

The balance of hardships and the public interest also support a temporary injunction. "These [two] factors merge when the government is the opposing party." *Nken*, 556 U.S. at 435; *see also J.O.P. v. U.S. Dep't of Homeland Sec.*, No GJH19-1944, 2019 WL 3536786, at *7 (D. Md. Aug. 2, 2019) (similar). Here, the balance of hardships overwhelmingly favors Plaintiffs. Plaintiffs face unconstitutional restrictions on their speech on the most important issues facing our country. Conversely, OSC "is in no way harmed by issuance of an injunction that prevents [it] from enforcing unconstitutional restrictions." *Legend Night Club*, 637 F.3d at 302-03. Indeed, "upholding constitutional rights" always is in "the public interest." *Id.* That is particularly true here, where OSC's Policy prevents speech by federal employees who are "members of the community" uniquely situated to have "informed opinions" on the topics that are subject to OSC's restrictions. *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 82 (2004). OSC's policy robs the public of these knowledgeable voices, lessening the quality of the conversation about some of the most important issues of our time.

CONCLUSION

For the reasons set forth above, Plaintiffs request that this Court enter a preliminary injunction prohibiting OSC from implementing or enforcing the Policy.

Dated: January 24, 2020

Respectfully Submitted,

/s/ R. Stanton Jones

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* Admitted *pro hac vice*
** *Pro hac vice* applications forthcoming

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2020, I caused a copy of the foregoing to be electronically served upon all parties receiving CM/ECF notices in this case.

/s/ R. Stanton Jones
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