

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK**

DECKER ADVERTISING INC.,

Plaintiff,

v.

DELAWARE COUNTY, NEW YORK; and
TINA MOLÉ; ARTHUR MERRILL; MARK
TUTHILL; THOMAS AXTELL; JEFFREY
TAGGART; WAYNE E. MARSHFIELD; JERRY
VERNOLD; JAMES E. EISEL; GEORGE HAYNES,
JR.; BETTY L. SCOTT; JAMES G. ELLIS; CARL
PATRICK DAVIS; ALLEN R. HINKLEY; ERIC T.
WILSON; JOHN S. KOSIER; WILLIAM LAYTON;
JOSEPH CETTA; and AMY MERKLEN, in their
individual and official capacities,

Defendants.

Case No. 3:23-cv-1531 (AMN/ML)

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

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PRELIMINARY STATEMENT

The First Amendment’s guarantee of freedom of the press enables journalists to play an “essential role in our democracy” — namely, to “bare the secrets of government and inform the people.” *N.Y. Times Co. v. United States*, 403 U.S. 713,717 (1971) (Black, J., concurring). The Constitution thus does not permit retaliation against press organizations because government officials disagree with their reporting. This is a rare case where Defendants have not only done precisely that by withdrawing advertising revenue from Catskills-based community newspaper *The Reporter*, but have also made their retaliatory intent crystal clear in an unprecedented letter signed by 39 County officials and leaked to another newspaper. In that letter, County officials admit that the “flagrant manipulation of facts and the manner in which your paper reports county business was one of the reasons the board of supervisors opted to change the official county paper” for publishing legal notices. (Grygiel Decl., Ex. 9, at 107:21-25, 108:1-9, Ex. 27). But these officials went even further in admitting their retaliatory intent: they proclaimed in that same letter that their retaliation “should have prompted an immediate change” in the newspaper’s reporting and demanded that the owners “make immediate changes as necessary to create a fair and ethical form of reporting.” (*Id.*, Ex. 28).

It is not the government’s prerogative to determine all the news that is fit to print. That is because “[t]he choice of material to go into a newspaper . . . and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment” that is a critical component of the “First Amendment guarantees of a free press.” *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974).

Documents and deposition testimony confirm what is already clear on the face of the County’s letter: *The Reporter*’s critical reporting of County business “was the straw that broke the

camel’s back” and triggered the de-designation of the newspaper. (Grygiel Decl., Ex. 9, at 56:19-25, 57:1-20). It is equally clear that Defendants’ claim that they de-designated the newspaper due to a cost increase is a pretext, given that County officials were looking at de-designating *The Reporter* prior to any announcement of the increase. (Grygiel Decl., Ex. 9, at 126:18-24, 127:1-16). Abundant undisputed evidence in the record — including Defendants’ own deposition testimony — demonstrates that *The Reporter*’s coverage was a substantial factor in de-designating *The Reporter*.

What is more, County officials have testified that the Board of Supervisors¹ has refused to re-designate *The Reporter* since 2023 for two constitutionally invalid reasons. *First*, because *The Reporter* filed this lawsuit, which is a form of First Amendment-protected petitioning; and *second*, because the newspaper’s unfavorable County coverage purportedly removed *The Reporter* from eligibility for designation.

For these reasons, this Court should grant summary judgment on the claim that the County retaliated against *The Reporter* for its First Amendment-protected speech by withdrawing legal notice advertising from the newspaper. It is beyond dispute that the de-designation punished *The Reporter* because of its news reporting, not for any “cost” reason. The March 2023 letter says so *on its face*, and documents and testimony provide additional direct evidence of Defendants’ retaliatory intent.

¹ Defendant Marshfield is the only Defendant currently on the Delaware County Board of Supervisors who has voted in favor of re-designating *The Reporter* since 2023.

STATEMENT OF FACTS

Plaintiff details the facts in its accompanying Statement of Undisputed Material Facts (“SUMF”), which are briefly summarized below.

A. The De-Designation.

Virtually since its founding in 1881, *The Reporter* had been designated by the Delaware County Board of Supervisors as an official county paper. SUMF ¶ 8. Under County Law § 214(2), the Board of Supervisors is obligated annually to “designate at least two newspapers published within the county as official newspapers for the publication of all local laws, notices and other matters required by law to be published.” The County is required to take into account “general circulation throughout the county” in designating an official newspaper for the purpose of publishing legal notices. N.Y. County Law § 214(2).

In the fall of 2019, *The Reporter*’s co-owner Kim Shepard and Defendant Tina Molé met regarding Editor Lillian Browne’s purportedly “negative bias[ed], nonfactual articles,” and Defendant Molé testified that her concerns remained unresolved over the next three years. SUMF ¶ 11.

Several months prior to the County’s de-designation of *The Reporter*, Defendant Joseph Cetta sent a text message to Defendant Molé on November 20, 2021, stating that “[w]e may not use the reporter as our official paper.” *Id.* ¶ 12. Defendant Molé responded by stating that she was “already looking into that.” *Id.* ¶ 13.

On January 5, 2022, the County Board of Supervisors again designated *The Reporter* as an official county newspaper. *Id.* ¶ 9. In February 2022, *The Reporter* announced that it was switching over to a statewide automated system for placing legal notices, during which it learned that it had

been undercharging for notices for decades and corrected its rates to conform with the rates prescribed under CPLR 8007. *Id.* ¶ 15.

Defendant Molé sent an undated text message to Defendant Merklen in the days leading up to the County de-designating *The Reporter*, raising issues with *The Reporter*'s coverage, including that "Lillian [*The Reporter*'s Editor] is already up to 2 more negative articles involving me, Craig and Joe." *Id.* ¶ 16. In response, Defendant Merklen proposed to Defendant Molé that the County switch to *The Hancock Herald*. *Id.* ¶ 17.

On March 15, 2022, the County Attorney's Office sent a letter to Kim Shepard of Decker Advertising "demand[ing] that the Reporter immediately retract and correct" a story about the removal of a town justice from his criminal court duties because it incorrectly identified which governing body removed the justice. *Id.* ¶ 20. The letter also alleged that *The Reporter*'s Editor had a history of publishing "stories about Delaware County which are selectively researched, one-sided, and . . . [s]he often uses sensationalism and exaggeration" that "undermin[e] [readers'] confidence in our County government by disparaging its actions and casting its leaders in a materially false light." *Id.* ¶ 22. After *The Reporter* ran a correction the very same day, Defendant Molé wrote to Defendant Merklen: "That's it?" *Id.* ¶¶ 23-24.

On March 16, 2022, Molé wrote to Merklen: "I want to switch official papers." Merklen responded: "OK. Will do. The articles in today's reporter are not that bad actually." *Id.* ¶¶ 25-26. The following day, Molé sent a memo drafted by Merklen to Republican Supervisors concerning *The Reporter*'s de-designation, stating that in addition to the increase in the cost of legal notices, "The Reporter, continues to disparage and write non-factual articles about the County. This has gone on for several years." *Id.* ¶¶ 27-30. The memo advised Board members that they could lawfully revoke *The Reporter*'s designation because the designation was never properly certified

and delivered to the Secretary of State as purportedly required by County Law § 214(2). *Id.* ¶ 32. But County Law § 214(2) does not require that the designation for legal notices be certified and delivered to the Secretary of State. *Id.* ¶ 33.

On March 23, 2022, the Board voted to de-designate *The Reporter* and designate in its place *The Hancock Herald*, according to a resolution, because “the cost of placing a legal notice in *The Reporter* has doubled since the beginning of 2022, along with the amount of time it takes to successfully place the notices. . . .” *Id.* ¶ 34; Grygiel Decl., Ex. 23.

The day after the de-designation of *The Reporter*, Defendant Molé told *The Reporter*’s co-owner Kim Shepard that the County de-designated it due to “[t]he dramatic increase in price and the County having to do the work and [*The Reporter*’s Editor] Lillian.” SUMF ¶ 38.

On January 4, 2023, the Board of Supervisors voted again to designate *The Hancock Herald* and not *The Reporter* as an official newspaper. *Id.* ¶ 40. *The Hancock Herald*’s publisher in June 2023 acknowledged that the paper had lower circulation than *The Reporter*. *Id.* ¶ 35.

B. The County’s March 2023 Letter Complaining About “Inflammatory” and “Negative” Coverage.

On March 8, 2023, the County sent a letter to *The Reporter*’s publishers demanding that the newspaper make immediate changes to its coverage of County news. *Id.* ¶ 44. In the letter, the County admitted that a reason for *The Reporter*’s de-designation was the paper’s purported “flagrant manipulation of facts.” *Id.* ¶ 46.

Defendant Molé claimed that the purportedly “negative bias[ed] reporting started” in 2019 with coverage of judicial proceedings concerning the suspension of the former Commissioner of Social Services Dana Scuderi-Hunter, (Grygiel Decl., Ex. 9, at 111:22-23), and that she personally met with co-owner of *The Reporter* Kim Shepard to register her complaint that the trial coverage “painted the county in a very negative light by not putting in . . . our side of the story,” *id.* at

112:21-24. Defendant Merklen referenced two specific stories during 2019 that: (i) featured Merklen’s hearing testimony, including a statement that she was allegedly above other Department Heads; and (ii) reported on a Notice of Claim against the County alleging a child had been illegally prosecuted and confined. (Grygiel Decl., Ex. 10, at 69:15-72:25).² Other Defendants who testified either said they could not name specific examples or pointed to stories about government business that actually ran after the de-designation took place. (*See, e.g.*, Grygiel Decl., Ex. 15, at 31:11-32:11, 61:23-62:14).

C. Failed Attempts to Re-Designate *The Reporter*.

County officials have had multiple opportunities to consider re-designating *The Reporter* in 2023, 2024, and 2025 in response to requests made by the Delaware County Democratic Committee. (Shepard Decl. ¶ 25). But shortly after this lawsuit was filed, Merklen advised the Board that re-designation efforts were fruitless because “legally *The Reporter* had removed itself from the ability to be designated as a legal paper pursuant to County Law 214(2),” (Grygiel Decl., ¶¶ 56-57, Ex. 10, at 215:13-25, 216:2-19), with Merklen clarifying that if an official paper “changes the way that it reports or goes to a certain bend or bias . . . they take themselves out of the running to be designated or re-designated,” (*id.* at 215:22-216:4). Other County officials have since pointed to another reason why *The Reporter* is purportedly ineligible for re-designation: *The Reporter* sued the County to vindicate its free press and free speech rights. *See, e.g.*, Grygiel Decl., Ex. 13, at 105:11-106:10 (“You don’t reward someone you’re in litigation with . . . If they’re suing you, you don’t go to contract with them. That’s irresponsible.”); Grygiel Decl., Ex. 11, at 58:1-6, 13-17 (stating Merklen claimed *The Reporter* was ineligible because of the lawsuit).

² Merklen did not request a correction with respect to either story. (Grygiel Decl., Ex. 10, at 70:18-25, 72:21-25).

LEGAL STANDARD

Summary judgment is warranted where the movant “shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A material fact is one that determines a claim or a defense. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And a dispute is “genuine” only “if the evidence is such that a reasonable factfinder could return a verdict for the non-moving party.” *Aetna Life Ins. Co. v. Big Y. Foods, Inc.*, 52 F.4th 66, 72 (2d Cir. 2022) (cleaned up). A party opposing summary judgment may not create a genuine dispute of fact merely by presenting “conclusory facts[.]” *BellSouth Telecommunications, Inc. v. W.R. Grace & Co.-Conn.*, 77 F.3d 603, 615 (2d Cir. 1996) (citing 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2738, at 486 & 489 (1983)).

ARGUMENT

I. THE REPORTER IS ENTITLED TO SUMMARY JUDGMENT ON ITS CLAIM THAT DEFENDANTS DE-DESIGNATED THE REPORTER BASED ON THE EXERCISE OF ITS FIRST AMENDMENT RIGHTS

It is bedrock law that government officials may not “use the power of the State to punish or suppress disfavored expression.” *Nat’l Rifle Ass’n of Am. v. Vullo*, 602 U.S. 175, 188 (2024) (citation omitted). “[T]he First Amendment prohibits government officials from retaliating against individuals for engaging in protected speech[.]” *Lozman v. City of Riviera Beach*, 585 U.S. 87, 90 (2018) (citation omitted), as well as from taking actions designed to coerce or chill speech in the future, *Vullo*, 602 U.S. at 189.

Courts time and again have found that it is “clearly” unconstitutional for government officials to withdraw government advertising from newspapers in response to critical reporting. *See, e.g., El Dia, Inc. v. Rossello*, 165 F.3d 106, 109-10 (1st Cir. 1999) (“It would seem obvious

that using government funds to punish political speech by members of the press and to attempt to coerce commentary favorable to the government would run afoul of the First Amendment.”) (citations omitted). This is because, as this Court has recognized, government officials “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech.” *Decker Adv. Inc. v. Delaware County, New York*, 765 F. Supp. 3d 128, 142 n.3 (N.D.N.Y. 2025) (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). This is true even where, as here, *The Reporter* had no “right” to the government benefit generally and it could have been denied otherwise for any number of legitimate reasons. *Id.*; *Bd. of Cnty. Comm’rs, Wabaunsee Cnty., Kan., v. Umbehr*, 518 U.S. 668, 686 (1996) (“recogniz[ing] the right of independent government contractors not to be terminated for exercising their First Amendment rights”).

This is as clear a case of unconstitutional retaliation as this Court will ever see because the County admitted in a smoking-gun letter published in a competing newspaper that it “withh[e]ld public patronage, in the form of its advertising,” in response to *The Reporter*’s news coverage, thereby “denying the [newspaper] business in retaliation for its protected speech.” *N. Mississippi Commc’ns, Inc. v. Jones*, 792 F.2d 1330, 1337 (5th Cir. 1986). To establish First Amendment retaliation, *The Reporter* must prove that: (1) it engaged in constitutionally protected speech; (2) an adverse employment action; and (3) a causal connection existed between the adverse action and the protected speech. *Specht v. City of N.Y.*, 15 F.4th 594, 600 (2d Cir. 2021); *see also Brooke v. County of Rockland*, 21-598-cv, 2022 WL 6585350, at *2 (2d Cir. Oct. 11, 2022) (asserting that the same standard applies to independent companies which contract with the government).³

³ To establish First Amendment retaliation that occurred after *The Reporter* was terminated as the County’s official newspaper, including the failure to re-designate *The Reporter* starting in 2023, *The Reporter* must prove as a private citizen that: “(1) [it] has a right protected by the First Amendment; (2) the defendant’s actions were motivated or

A. *The Reporter's* News Coverage of Delaware County Is Protected Speech.

The Reporter easily meets the first prong that the de-designation occurred in response to protected speech based both on the significant direct evidence that undergirds the Complaint itself and the undisputed testimony of several deponents.

The speech of *The Reporter* as an independent contractor “is protected by the First Amendment when the employee speaks as a citizen on a matter of public concern, rather than pursuant to his employment responsibilities,” *Specht*, 15 F.4th at 600.⁴ This Court already found “that *The Reporter* was speaking as a citizen, rather than as a contractor of the County, in relation to the coverage prior to the dedesignation” because its “relationship with the County was limited to posting legal notices and did not include its general news coverage.” Dkt. No. 116 at 11 n.4. The inquiry therefore turns on whether *The Reporter's* speech addressed matters of public concern. As this Court already recognized, an article that *The Reporter* published only two weeks prior to the de-designation regarding a judge being removed from his criminal court duties involved quintessential matters of public concern including “possible governmental misconduct” and “crime.” *Id.* at 12.

In addition to crime and misconduct, matters of public concern more broadly cover any “subject of legitimate news interest,” *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (quotation and citation omitted), and necessarily “assur[e] freedom of communication on matters relating to the functioning of government,” a “core purpose” of the First Amendment, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980). *The Reporter* routinely reports on public County

substantially caused by [its] exercise of that right; and (3) the defendant’s actions caused [it] some injury.” *Rupp v. City of Buffalo*, 91 F.4th 623, 634 (2d Cir. 2024) (internal quotation marks and citation omitted).

⁴ See also *McGuire v. Warren*, 207 Fed. Appx. 34, 36 (2d Cir. 2006) (applying the same standard for an individual public contractor).

meetings and business, engages in investigative reporting on the functioning of County government, and publishes related commentary on matters of legitimate news interest — all of which lie at the core of our First Amendment freedoms. *The Reporter*'s ability to report freely on County officials unconstrained by government overreach is fundamental to uphold our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open[.]” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). While that debate “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials[.]” *id.*, protections for the free press enshrined in the First Amendment are crucial for *The Reporter* in Delaware County and the press nationwide “to fulfill its essential role in our democracy.” *N.Y. Times Co. v. United States*, 403 U.S. at 717.

County officials admitted in the March 2023 letter they sent to the owners of *The Reporter* that “the manner in which [the] paper reports county business was one of the reasons the Board of Supervisors opted to change the official county paper to the Hancock Herald in 2022.” The letter referenced no specific examples of stories, but multiple Defendants since then have pointed to *The Reporter*'s coverage, starting in 2019, of judicial proceedings concerning the suspension of the former Commissioner of Social Services Dana Scuderi-Hunter. Defendant Molé stated that the “negative bias[ed] reporting started” then, (Grygiel Decl., Ex. 9, at 111:22-23), and that she personally met with co-owner of *The Reporter* Kim Shepard to register her complaint that the trial coverage “painted the county in a very negative light by not putting in . . . our side of the story,” *id.* at 112:21-24. Defendant Merklen referenced two specific stories during 2019 that: (i) featured Merklen's testimony during the judicial proceedings, including a statement that she was allegedly above other Department Heads; and (ii) reported on a Notice of Claim against the County alleging a child had been illegally prosecuted and confined. (Grygiel Decl., Ex. 10, at 69:15-72:25). *The*

Reporter's news coverage concerning the termination of the Social Services Commissioner and a Notice of Claim filed against the County plainly goes to the functioning of County government, a core First Amendment purpose.

B. The County Responded to What It Deemed Biased Reporting with Adverse Action.

Defendants' actions are patently adverse. “[R]etaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights constitutes an adverse action” in the context of a First Amendment retaliation claim. *Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 225 (2d Cir. 2006). “Adverse employment actions include discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand.” *Id.* (quoting *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999), *abrogated on other grounds by Lore v. City of Syracuse*, 670 F.3d 127, 163 (2d Cir. 2012)). However, “a combination of seemingly minor incidents” also qualifies. *Phillips v. Bowen*, 278 F.3d 103, 109 (2d Cir. 2002) (citation omitted).

Here, *The Reporter* was terminated from its role as an official County newspaper, an action that Courts have held sufficient to constitute an adverse action. *See, e.g., Umbehr*, 518 U.S. at 685 (establishing that the “termination of [a contractor’s] contract” would be a sufficient basis to assert a First Amendment retaliation claim). A newspaper of ordinary firmness would be chilled in exercising its First Amendment rights if funding is withdrawn and additional funding threatened based on County officials’ dislike of its coverage. *See, e.g., Robinson v. Jarris*, No. 1:07-CV-265, 2009 WL 3048473, at *5 (D. Vt. Sept. 17, 2009) (finding “cut-off of grant funds . . . that had been previously awarded to Plaintiffs, could constitute an adverse action”).

C. *The Reporter's De-Designation Was Caused by Its News Coverage of Delaware County.*

Finally, the causal link between *The Reporter's* constitutionally protected reporting and the County's de-designation and continued reprisals is abundantly clear. To prevail on summary judgment, the causal connection must be "sufficient to warrant the inference that the protected speech was a substantial motivating factor in the adverse employment action at issue." *Thomas v. Arteta*, No. 23-cv-2981, 2025 WL 2709977, at *6 (S.D.N.Y. Sept. 22, 2025) (internal quotation marks and citation omitted). "Causation can be established either indirectly by means of circumstantial evidence, for example, by showing that the protected activity was followed by adverse treatment in employment, or directly by evidence of retaliatory animus." *Mandell v. County of Suffolk*, 316 F.3d 368, 383 (2d Cir. 2003) (internal quotation marks and citation omitted). In cases relying on the circumstantial evidence of temporal proximity, the Second Circuit has "not drawn a bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between the exercise of a federal constitutional right and an allegedly retaliatory action." *Anderson v. State of New York, Off. of Ct. Admin. of Unified Ct. Sys.*, 614 F. Supp. 2d 404, 430 n.219 (S.D.N.Y. 2009). But "[t]here is, however, substantial authority holding" that a much longer period than that at issue here of "between five and six months is sufficient." *Id.* at 430. Direct evidence of retaliation may consist of "conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged retaliatory attitude." *McAvey v. Orange-Ulster BOCES*, 805 F. Supp. 2d 30, 40 (S.D.N.Y. 2011) (cleaned up).

County officials have made no attempt to hide their retaliatory intent, instead providing direct evidence by effectively "shout[ing] through a bullhorn:" if you write articles "disfavored by [the County], you will be punished!" *Wilmer Cutler Pickering Hale & Dorr LLP Wilmer Cutler*

Pickering Hale & Dorr LLP v. Exec. Off. of President, No. 25-cv-917, 2025 WL 1502329, at *14 (D.D.C. May 27, 2025). Indeed, county officials expressly stated in their March 8 letter: “[T]he manner in which [*The Reporter*] . . . reports county business was one of the reasons the Board of Supervisors opted to change the official county paper to the *Hancock Herald* in 2022,” and instructed that this switch should have “prompted an immediate change” in coverage.⁵ Grygiel Decl. Ex. 28. *Stajic v. City of New York*, 214 F.Supp.3d 230, 235 (S.D.N.Y. 2016) (“statements by persons involved in the decisionmaking process [] may be viewed as directly reflecting the alleged retaliatory attitude”) (quotation marks and citation omitted).

In their depositions, County officials repeatedly pointed to *The Reporter*’s so-called “biased” and “left leaning” reporting as substantial motivating factors for the County’s withdrawal of advertising. (*See, e.g.*, Grygiel Decl., Ex. 9, at 36:12-16) (“I thought that they were biased and negative towards the county.”); (*id.*, Ex. 10, at 135:19-23) (agreeing with statement that *The Reporter* “is a platform to undermine the County”); (*id.*, Ex. 13, at 39:9-20) (“Randy called me and we had a conversation. And I said, “Your biggest problem is Lillian Brown . . . He . . . wondered why I had agreed to de-designate The Reporter and signed this letter and I told them why . . . inaccurate reporting); (*id.*, at 39:5-7) (“She [Lillian Browne] writes slanted articles that have nothing to do with covering the news.”); (*id.*, Ex. 16, at 100:24-101:3) (“I would agree that The Reporter, if you want to call it leaning left, which would be anti-government, then yes.”).

“[A]lmost four years” of so-called “negative . . . nonfactual, slanted articles” “was the straw that broke the camel’s back” and led to de-designation, according to Defendant Molé.

⁵ A previous draft of the County’s March 8, 2023, letter was even more direct in establishing the nexus between *The Reporter*’s news coverage and the County’s retaliation, stating — before it was reviewed by County Attorney Merklen and finalized for distribution to Delaware County’s Department heads — “[t]his flagrant manipulation of facts and the manner in which your paper reports county business *led to* the Board of Supervisors changing the official county paper to the *Hancock Herald* in 2022.” Grygiel Decl., Ex.9 (emphasis added).

(Grygiel Decl., Ex. 9, at 55:21-57:17). While she attempted to change her testimony later in her deposition and claim that the true “straw that broke the camel’s back” was “getting calls on [The Reporter] doubling and tripling the prices [for legal notices], and having our employees do the work,” (*id.*, at 177:20-178:25), that conclusory testimony is belied by significant contemporaneous record evidence. Most notably, months prior to any increase in legal notice advertising prices, Defendant Molé wrote to Defendant Cetta in November 2021 that she was “already looking into” de-designating *The Reporter* when he raised the prospect. SUMF ¶ 13.

If the Board had genuinely de-designated the newspaper due to cost concerns and not because of disfavored coverage, evidence in the record would demonstrate that County officials had conducted a comparison of legal notice costs and the circulation of competing newspapers in reflecting that the Board had made a reasoned determination that the County should not pay *The Reporter* the statutory legal notice rate prescribed by the legislature to advertise in its paper, notwithstanding its greater County-wide reach. But the evidence demonstrates the opposite: in the days prior to the de-designation and in response to Defendant Molé’s complaint about “Lillian’s . . . negative articles,” Defendant Merklen and Clerk Christa Schafer identified *The Hancock Herald* as an alternative based on the limited information that it has “approximately 800 subscribers” and “newsstands in the Hancock/Deposit area.” (Grygiel Decl., Ex. 9, at 58:5-12). Based on that information, Defendant Molé instructed County Attorney Merklen to “prepare a memo to go to the Republican Supervisors from me as to why we are switching papers.” *Id.* No comparison of circulation numbers or legal notice costs for *The Reporter* and other Delaware County newspapers was provided to Defendant Molé at that time or is reflected anywhere in the record. Neither was any such information provided to Republican Supervisors in the County Attorney’s memorandum advocating *The Reporter*’s de-designation circulated six days prior to the

de-designation vote, which included only a cursory mention of the cost increase. (Grygiel Decl., Ex. 22).

The County's contention that the de-designation was motivated by *The Reporter's* ineligibility under County Law § 214, rather than retaliation, is similarly bogus. Although Merklen's memorandum purports to explain that the County could lawfully revoke *The Reporter's* designation because the designation was never properly certified and delivered to the Secretary of State, County Law § 214(2)—the specific provision governing designation for legal notices—does not require that such designation be certified and delivered to the Secretary of State. (Grygiel Decl., Ex. 30). A careful reading of County Law § 214 likewise does away with Defendant Merklen's contention—apparently made on advice of counsel—that *The Reporter* somehow removed itself from eligibility by “chang[ing] the way that it reports” on the political party in power. (Grygiel Decl., Ex. 10 at 215:22-216:4). As this Court already explained in its Memorandum-Decision and Order rejecting Defendants' Motion for Judgment on the Pleadings, “[t]hough a newspaper's political alignment is a required consideration under the statute, the law's plain text establishes that a newspaper's political independence does not disqualify a newspaper from designation.” (Dkt. No. 116 at 17-18). In any event, even if the County's interpretation of Section 214 held water (it does not), it is hornbook law that a state statute cannot trump the First Amendment. *See In re N.Y. Times Co.*, 828 F.2d 110, 115 (2d Cir. 1987) (“Obviously, a statute cannot override a constitutional right.”); *see also* U.S. Const. art. VI (“This Constitution . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 617 (2011) (“Where state and federal law directly conflict, state law must give way.”) (citations and quotation marks omitted).

Indeed, Defendant Molé’s cover email to the memorandum underscores the pretextual nature of these excuses by highlighting that “The Reporter, continues to disparage and write non-factual articles about the County. This has gone on for several years.” (Grygiel Decl., Ex. 22). Other contemporaneous communications in the days leading up to the de-designation show that Defendants Merklen and Molé were displeased with one article in *The Reporter* in particular concerning a judge’s removal from his criminal court duties. Indeed, only eight days prior to the de-designation, Defendant Merklen sent a letter to *The Reporter*’s co-owner Ms. Shepard demanding a retraction because the article incorrectly identified the governing body that had removed the judge. SUMF ¶¶ 20-21. That letter goes on to complain about *The Reporter*’s Editor’s reporting more generally, claiming that “stories about Delaware County . . . are selectively researched, one-sided, and . . . [s]he often uses sensationalism and exaggeration” that “undermin[e] [readers’] confidence in our County government by disparaging its actions and casting its leaders in a materially false light.” *Id.* ¶ 22. After *The Reporter* ran a correction the very same day, Defendant Molé complained to Defendant Merklen about the correction and almost immediately the following day set the de-designation wheels in motion by declaring to Defendant Merklen: “I want to switch official papers.” *Id.* ¶ 25. Only a week later, the Board followed through on Defendant Molé’s request by voting to de-designate *The Reporter*. *Id.* ¶ 34.

The day after the de-designation of *The Reporter*, Defendant Molé wrote to *The Reporter*’s co-owner Kim Shepard that the County de-designated it due to “[t]he dramatic increase in price and the County having to do the work and [*The Reporter*’s Editor] Lillian.” *Id.* ¶ 38. Defendant Molé declined a request from the newspaper’s owner to meet to discuss the de-designation, (Grygiel Decl., Ex. 25), and clarified in her deposition that this was because they had previously met years prior in the fall of 2019 regarding Lillian’s “negative bias[ed], nonfactual articles” and

those concerns remained unresolved. (Grygiel Decl., Ex. 9 at 123:18-124:7). Tellingly, Defendant Molé expressed no interest in meeting to even discuss the other reasons she cited for designation, including the increased price for legal notices and the switch to an online portal for placing the ads, because the “biased” reporting was indeed “the straw that broke the camel’s back.” (*Id.* at 55:21-57:17; *see also* Grygiel Decl., Ex. 14, at 60:16-23) (testifying that “we no longer had *The Reporter* as our official paper” because “*The Reporter* had written, in an inflammatory manner, facts that were either misrepresented or omitted stories”) (Grygiel Decl., Ex. 13, at 39:16-20) (testifying that the County de-designated *The Reporter* because of the “inaccurate reporting”); (Grygiel Decl., Ex. 12, at 23:13-24:3) (testifying that one of two reasons for de-designating *The Reporter* was its coverage because “some are dissatisfied with the coverage of some of the articles,” including Tina Molé and Amy Merklen).

Under the First Amendment, it is not the County’s job “to decide what counts as the right balance of private expression—to ‘un-bias’ what it thinks biased[.]” *Moody v. NetChoice, LLC*, 603 U.S. 707, 719 (2024). Rather, the County must “leave such judgments to speakers and their audiences.” *Id.* If the County were allowed to withdraw funding from any newspaper based on its coverage, that could incentivize newspapers to choose between editorial independence and “the safe[r] course [] to avoid controversy” by “blunt[ing] or reduc[ing]” coverage. *Tornillo*, 418 U.S. at 257.

What is more, Defendants have also pointed to the filing of this lawsuit as a reason not to re-designate *The Reporter* as an official County newspaper in the two years since the lawsuit commenced, *see supra* at 6, and have repeatedly complained through their counsel about coverage regarding this lawsuit, including going so far as “objecting” at a Court hearing about an article *The Reporter* published concerning public funds expended for this suit. (Grygiel Decl., Ex. 8, at 24:19-

21).⁶ But the First Amendment guarantees the right “to petition the Government for a redress of grievances,” U.S. Const. amend. 1, including “the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.” *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011). Put simply, “[f]iling and pursuing lawsuits are forms of protected petitioning,” *Wilmer Cutler Pickering Hale & Dorr LLP*, 2025 WL 1502329, at *18, that are “integral to the democratic process,” *Borough of Duryea*, 564 U.S. at 388. And *The Reporter*’s coverage of this lawsuit regarding alleged retaliation by County officials is unquestionably protected expression under the First Amendment.

It is hard to conceive of a case in which evidence of retaliatory intent could be clearer or more abundant. The record is replete with direct evidence of retaliatory animus, in addition to the circumstantial evidence of temporal proximity in the form of a news article published only two weeks prior to the de-designation vote. Accordingly, the Court should grant summary judgment on *The Reporter*’s cause of action that it was de-designated in retaliation for its constitutionally protected speech.

CONCLUSION

For all these reasons, the Court should grant Plaintiff’s Motion for Partial Summary Judgment, issue an injunction ordering Delaware County to reinstate *The Reporter* as an official county newspaper for the purpose of publishing legal notices, and declare that Delaware County and the Board of Supervisor Defendants violated *The Reporter*’s First Amendment rights by de-designating it as an official county paper in retaliation for its protected speech.

Date: December 1, 2025

⁶ As the Magistrate Judge rightly noted, “I’m not here to dictate to a news outlet what they should or shouldn’t print and how they got information. News flash: News outlets get top secret information from the Pentagon. Somebody leaks it and they print it, people aren’t happy, that’s what happens.” *Id.* at 26:1-5.

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