

**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)

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

CORNELL LAW SCHOOL
FIRST AMENDMENT CLINIC
Heather E. Murray
Myron Taylor Hall
Ithaca, NY 14853
Tel.: (607) 255-8518
Email: hem58@cornell.edu

GREENBERG TRAURIG, LLP
Michael J. Grygiel
Cynthia E. Neidl
Kelly L. McNamee
Christina N. Hernsdorf
54 State Street, 6th Floor
Albany, NY 12207
Tel.: (518) 689-1400
Email: grygielm@gtlaw.com
neidlc@gtlaw.com
mcnameek@gtlaw.com
christina.hernsdorf@gtlaw.com

Attorneys Pro Bono Publico for Plaintiff Decker Advertising Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	2
A. The De-Designation	2
B. The County’s March 2023 Letter.....	2
C. Failed Attempts to Re-Designate <i>The Reporter</i>	2
D. Delaware County Issues Gag Directive in Response to <i>The Reporter’s</i> Newsgathering Efforts	2
E. County Investigates Two Sitting Supervisors Regarding Their Communications with <i>The Reporter</i>	4
LEGAL STANDARD.....	5
ARGUMENT	5
I. DEFENDANTS CANNOT DEMONSTRATE ENTITLEMENT TO SUMMARY JUDGMENT ON THE CLAIM THAT DEFENDANTS DE-DESIGNATED THE REPORTER BASED ON THE EXERCISE OF ITS FIRST AMENDMENT RIGHTS...	5
A. County Law Section 214 Does Not Justify Defendants’ De-Designation of <i>The Reporter</i> and Is Immaterial to Plaintiff’s De-Designation Retaliation Claim.....	7
B. The Moving Supervisors Are Not Entitled to Summary Judgment on the De-Designation Claim Because the March 8 Letter Establishes a Causal Link Between <i>The Reporter’s</i> Constitutionally Protected Reporting and the County’s De-Designation.....	8
C. The Moving Supervisors Are Not Entitled to the <i>Mount Healthy</i> Defense	10
II. DEFENDANTS CANNOT DEMONSTRATE THEY ARE ENTITLED TO SUMMARY JUDGMENT ON THE PRIOR RESTRAINT CLAIM	12
A. Defendants Failed to Demonstrate That County Officials’ Speech Was Pursuant to Their Job Duties.....	13
B. Plaintiff Has Demonstrated the Existence of Willing Speakers	15
III. DEFENDANTS CANNOT DEMONSTRATE THEY ARE ENTITLED TO SUMMARY JUDGMENT ON THE GAG-RELATED RETALIATION CLAIM	19
A. Plaintiff Has Demonstrated a Causal Connection.....	19

B.	Plaintiff Has Demonstrated Defendants’ Gag Directive Constituted Sufficient Harm	22
IV.	DEFENDANTS CANNOT DEMONSTRATE THEY ARE ENTITLED TO SUMMARY JUDGMENT ON THE PUNITIVE DAMAGES CLAIM.....	23
	CONCLUSION.....	25

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>53rd Street, LLC v. U.S. Bank National Association</i> , 8 F.4th 74 (2d Cir. 2021)	5
<i>A.S. v. City School District of Albany</i> , 585 F. Supp. 3d 246 (N.D.N.Y. 2022)	19
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	5
<i>Aponte v. Perez</i> , 75 F.4th 49 (2d Cir. 2023)	2, 24
<i>BanxCorp v. Costco Wholesale Corp.</i> , 978 F. Supp. 2d 280 (S.D.N.Y. 2013)	9
<i>Barclay v. Michalsky</i> , 451 F. Supp. 2d 386 (D. Conn. 2006)	24, 25
<i>Bond v. Floyd</i> , 385 U.S. 116 (1966)	15
<i>Cameron v. City of New York</i> , 598 F.3d 50 (2d Cir. 2010)	24
<i>Davis v. East Baton Rouge Parish School Board</i> , 78 F.3d 920 (5th Cir. 1996)	16
<i>DeCrane v. Eckart</i> , 12 F.4th 586 (6th Cir. 2021)	14
<i>Dillon v. Suffolk County Department of Health Services</i> , 917 F. Supp. 2d 196 (E.D.N.Y. 2013)	6, 8, 9
<i>Dorsett v. County of Nassau</i> , 732 F.3d 157 (2d Cir. 2013)	19, 22
<i>Harman v. City of New York</i> , 140 F.3d 111 (2d Cir. 1998)	21
<i>Lane v. Franks</i> , 573 U.S. 228 (2014)	14

<i>Long v. Byrne</i> , 146 F.4th 282 (2d Cir. 2025)	13, 14
<i>Matthews v. City of New York</i> , 779 F.3d 167 (2d Cir. 2015).....	13, 14
<i>McKenna v. Nassau County</i> , No. 223CV4286ARRST, 2023 WL 8455670 (E.D.N.Y. Dec. 6, 2023).....	22, 23
<i>Mt. Healthy City School District Board of Education v. Doyle</i> , 429 U.S. 274 (1977).....	11
<i>New Windsor Volunteer Ambulance Corps., Inc. v. Meyers</i> , 442 F.3d 101 (2d Cir.2006).....	24
<i>In re New York Times Company</i> , 828 F.2d 110 (2d Cir. 1987).....	8
<i>Overbey v. Mayor of Baltimore</i> , 930 F.3d 215 (4th Cir. 2019)	15
<i>Pen American Center, Inc. v. Trump</i> , 448 F. Supp. 3d 309 (S.D.N.Y. 2020).....	16, 23
<i>Persaud v. City of New York</i> , No. 22-CV-2919 (AS), 2024 WL 2159852 (S.D.N.Y. May 14, 2024).....	9, 12
<i>PLIVA, Inc. v. Mensing</i> , 564 U.S. 604 (2011).....	8
<i>Smith v. County of Suffolk</i> , 776 F.3d 114 (2d Cir. 2015).....	11
<i>Smith v. Wade</i> , 461 U.S. 30 (1983).....	24
<i>Thomas v. Arteta</i> , No. 23 CV 2981(VB), 2025 WL 2709977 (S.D.N.Y. Sept. 22, 2025).....	11
<i>United States v. Wecht</i> , 484 F3d 194 (3d Cir. 2007).....	15
<i>Virginia State Board of Pharmacy v. Virginia Consumer Council</i> , 425 U.S. 748 (1976).....	15
<i>Werkheiser v. Pocono Township.</i> , 210 F. Supp. 3d 633 (M.D. Pa. 2016), <i>aff'd sub nom. Werkheiser v. Pocono</i> <i>Twp. Bd. of Supervisors</i> , 704 F. App'x 156 (3d Cir. 2017).....	13

<i>Werkheiser v. Pocono Township</i> , 780 F.3d 172 (3d Cir. 2015).....	15
--	----

<i>Wrobel v. County of Erie</i> , 692 F.3d 22 (2d Cir. 2012).....	5
--	---

State Cases

<i>Relihan v. Brink</i> , 285 A.D. 729 (3d Dep’t 1955).....	8
--	---

State Statutes

New York State County Law § 214.....	7, 8
--------------------------------------	------

Rules

Federal Rules of Civil Procedure 56(a)	5
--	---

Constitutional Provisions

U.S. Constitution, amend I.....	passim
U.S. Constitution, Article VI	8

PRELIMINARY STATEMENT

Defendants rely on self-serving affidavits in an attempt to avoid unequivocal documentary evidence demonstrating that County officials de-designated *The Reporter* in retaliation for unfavorable reporting. Their argument attempts to foist off an incredible proposition: while all but one of the Moving Supervisors¹ signed a letter proclaiming that the Board of Supervisors de-designated *The Reporter* because of its objectionable reporting, the Court should ignore this prima facie evidence because they didn't mean what they said in the letter they signed. According to what Defendants would now have the Court believe, they really de-designated *The Reporter* because the cost of legal notices had increased to the rate mandated by the New York State legislature. And the fact that Defendant Betty Scott didn't sign the letter supports their summary judgment motion, even though deposition testimony indicates that she "probably would have signed over the top of all of [the other] people" because "she disagreed with the news coverage of the department heads and County Government affairs," according to Defendant Merklen, but happened to miss the meeting where signatures were collected. Moreover, additional contemporaneous evidence belies Defendants' revisionist history and demonstrates that they voted to de-designate the newspaper because they didn't like the reporting.

Defendants' *Mount Healthy* defense likewise doesn't save them because they haven't met the high bar for it to be granted at summary judgment and abundant evidence exists from which a reasonable jury could infer that the de-designation primarily, if not entirely, stemmed from unfavorable news coverage about Delaware County government.

Nor should the Court grant summary judgment on the gag directive claims, which would require ignoring a plethora of so-called "poorly worded" documentary evidence that demonstrates

¹ Two Moving Supervisors are not listed as signatories, but one of them, James E. Eisel, passed away last month.

the existence of a ban on County employees and officials speaking to the press that was triggered by *The Reporter*'s First Amendment-protected newsgathering. Defendants' claim that no willing speaker exists here likewise ignores critical evidence that the County has conducted a leak investigation into two officials' communications with *The Reporter* since this lawsuit commenced as well as testimony from deponents regarding the existence of additional willing speakers.

Finally, with respect to punitive damages, Plaintiff has easily met the relatively low bar to present a question of fact to the jury by demonstrating direct evidence of retaliatory animus in addition to circumstantial evidence. Because this case does not involve significant compensatory damages, punitive damages may also be especially appropriate to "serve as a deterrent against future constitutional deprivations[.]" *Aponte v. Perez*, 75 F.4th 49, 56 (2d Cir. 2023).

STATEMENT OF FACTS

A. The De-Designation

Plaintiff incorporates herein by reference as if fully set forth below Section A of the Statement of Facts in Plaintiff's Motion for Partial Summary Judgment. Dkt. No. 246-2 at 3-5.

B. The County's March 2023 Letter

Plaintiff incorporates herein by reference as if fully set forth below Section B of the Statement of Facts in Plaintiff's Motion for Partial Summary Judgment. Dkt. No. 246-2 at 5-6.

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

Plaintiff incorporates herein by reference as if fully set forth below Section C of the Statement of Facts in Plaintiff's Motion for Partial Summary Judgment. Dkt. No. 246-2 at 6.

D. Delaware County Issues Gag Directive in Response to *The Reporter*'s Newsgathering Efforts

On May 15, 2023, Defendant Merklen wrote to Defendant Molé in response to an inquiry from *The Reporter* regarding a committee meeting: "[A]s a rule, individual departments should

not be sending emails/responses to the press, just like FOIL requests.” Plaintiff’s Response to Defendants’ Statement of Material Facts and Counterstatement of Additional, Undisputed Material Facts (“CSUMF”) ¶ 85. The following day, Defendant Merklen told Defendant Molé and County personnel director Carrara Knoetgen that “Department heads need to stop having conversations with [*The Reporter’s* Editor,] Lillian [Browne], after Ms. Browne requested “annual disclosure forms for [public defender] Joe Ermeti from 2019-present[.]” *Id.* ¶ 86.

The very next day, Defendant Molé emailed Clerk Penny Bishop directing her to notify all Department Heads that they were prohibited from “responding to any press inquiries.” Rather, all inquiries were to be channeled to “Amy [Merklen] and Shelly [Johnson-Bennett] as our Public Information Officer.” *Id.* ¶ 87.

Former Director of the Office of the Aging Wayne Shepard testified that the new policy was a significant change for him because he previously had responded to press inquiries. After the directive was issued, he testified that he “[r]efrained” from responding. *Id.* ¶ 88. Mr. Shepard affirmed that he normally would respond to inquiries from the press if he had not received that instruction. *Id.*

In response to the directive, District Attorney Shawn Smith asked whether he could still update the public about his caseload and respond to case-specific press inquiries. Ms. Bishop clarified that “[t]his reminder specifically relates to reporters asking for comments on County policies, etc.” and that that he could discuss his cases with the press. *Id.* ¶ 89.

Likewise, Public Works Commissioner Jim Thomas emailed for clarification and Shelly Johnson-Bennett responded that “pre-planned” and “pre-approved” interactions with the media were outside the scope of the policy but if the media “fishes for information about another topic . . . [they should] instruct the media to contact me or Amy for a county response.” *Id.* ¶ 90.

A month later, Public Defender Joe Ermeti described the directive in an email to *The Reporter* as follows: “I have been directed to refer all inquiries in this matter and any other matter that pertains to the Public Defender’s office to the County Attorney’s office.” *Id.* ¶ 91.

Ms. Merklen also issued a separate directive via email in May 2023 to County Supervisors to not respond to requests to speak with a *New York Times* reporter due to “potential litigation” with *The Reporter*. *Id.* ¶ 92. Defendant Cetta testified that a directive was also issued to Supervisors either in executive session or at a Board meeting by the County Attorney, which required that “any [press] inquiries should go through the County attorney.” *Id.*

E. County Investigates Two Sitting Supervisors Regarding Their Communications with *The Reporter*

After this litigation’s commencement, Defendant Marshfield and Supervisor Maya Boukai were subjected to investigative interviews conducted by Defendants’ counsel regarding their communications with *The Reporter* including, according to Defendant Merklen, whether they purportedly disclosed information from Board executive sessions to *The Reporter* and “other things as well.” Grygiel Decl.,² Ex. 10 at 289:19-294:10; Grygiel Rep. Decl.³ ¶ 28.

In connection with this investigation, Mr. Marshfield signed an affidavit in September 2025, nearly a month prior to his recall deposition, disputing the veracity of a de-designation-related conversation memorialized by Plaintiff’s co-owner in an October 2022 email. Grygiel Rep. Decl., Ex. 46. That email recorded a conversation Randy Shepard had with Defendant Marshfield

² References to the “Grygiel Decl.” refer to the Declaration of Michael J. Grygiel in Support of Plaintiff’s Motion for Partial Summary Judgment, dated Dec. 1, 2025. *See* Dkt. No. 246-11.

³ References to the “Grygiel Rep. Decl.” refer to the Reply Declaration of Michael J. Grygiel in Opposition to Defendants’ Motion for Partial Summary Judgment and in Further Support of Plaintiff’s Motion for Partial Summary Judgment dated January 6, 2026, that accompanies this brief.

regarding County Supervisors’ executive session discussions immediately prior to the vote to de-designate *The Reporter*. Grygiel Rep. Decl., Ex. 46; Shepard Decl.,⁴ Ex. 3.

The County’s investigative inquiry with respect to Supervisor Boukai had not been completed as of October 2025, according to Defendants’ counsel, and was more extensive than the investigation into Mr. Marshfield. Grygiel Decl., Ex. 17 at 115:8-15 (referencing the County’s leak investigation efforts and noting that Ms. Boukai is “going to learn a lot more, I’ll tell you that much”); *id.*, Ex. 10 at 289:19-294:10.

LEGAL STANDARD

Summary judgment is appropriate only where “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). To survive summary judgment, the non-moving party “need only present evidence from which a jury might return a verdict in [its] favor. If [it] does so, there is a genuine issue of fact that requires a trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). Summary judgment is “improper where the evidence is such that a reasonable jury could decide in the non-movant’s favor.” *53rd St., LLC v. U.S. Bank Nat’l Ass’n*, 8 F.4th 74, 77 (2d Cir. 2021) (citation omitted). Summary judgment is only proper “when the evidence is ‘so one-sided that one party must prevail as a matter of law.’” *Wrobel v. Cnty. of Erie*, 692 F.3d 22, 27 (2d Cir. 2012) (citation omitted).

ARGUMENT

I. DEFENDANTS CANNOT DEMONSTRATE ENTITLEMENT TO SUMMARY JUDGMENT ON THE CLAIM THAT DEFENDANTS DE-DESIGNATED THE REPORTER BASED ON THE EXERCISE OF ITS FIRST AMENDMENT RIGHTS

The Moving Supervisors assert that they are entitled to summary judgment on Plaintiff’s de-designation retaliation claim because the record “does not support finding a causal connection”

⁴ References to the “Shepard Decl.” refer to the Declaration of Randy Shepard in Support of Plaintiff’s Motion for Partial Summary Judgment, dated Dec. 1, 2025. *See* Dkt. No. 246-3.

between *The Reporter's* protected speech — its news coverage of Delaware County — and Defendants' "adverse action" of de-designating the newspaper. Mot. at 6-10. Moving Supervisors are wrong. As set forth in Plaintiff's motion for partial for summary judgment, undisputed evidence in the record— including a letter which *twelve* of the thirteen⁵ Moving Supervisors signed — establishes that *The Reporter's* reporting on Delaware County was *at least* a "substantial or motivating factor" for the de-designation. See Dkt. No. 246-2 at 12–18; *Dillon v. Suffolk Cnty. Dep't of Health Servs.*, 917 F. Supp. 2d 196, 215 (E.D.N.Y. 2013).

To establish the causation element of its retaliation claim, as this Court has stated previously, "Plaintiff 'need only establish that the protected activity was a substantial or motivating factor for the adverse employment action[.]' not that it was the only factor." Dkt. No. 116 at 21 (quoting *Dillon*, 917 F. Supp. 2d at 215). For this reason, it is immaterial that other factors may have also contributed to the de-designation decision. "[E]ven at the summary judgment stage," such a showing "does not automatically shield [Defendants] from liability." *Id.* Here, although the Moving Supervisors "point to other reasons for the de-designation decision," *id.*, they come nowhere close to establishing that Plaintiff's news coverage was not at least a substantial or motivating factor for the de-designation.

The Moving Supervisors assert that they are entitled to summary judgment on the retaliation claim — that is, that no reasonable juror could find in Plaintiff's favor on the retaliation claim — for three reasons, all of which are insufficient. First, the Moving Supervisors assert that County Law Section 214 somehow granted Defendants the authority to de-designate *The Reporter* based on the newspaper's perceived "political viewpoints." Mot. at 7-8. Not only is this claim factually unsupported in the record, it also only serves to reinforce Defendants' First Amendment

⁵ See *supra* n.1.

retaliation against Plaintiff. Second, the Moving Supervisors rely on self-serving declarations (and ignore unequivocal documentary evidence to the contrary) to claim that “the record conclusively demonstrates that the motivation for voting to de-designate was to avoid the increased costs for placing legal ads and the increased burden the new ad placement system imposed on County employees.” Mot. at 8. Third, the Moving Supervisors argue that, even if Plaintiff makes out a *prima facie* case for its retaliation claim, they have established their entitlement to a *Mount Healthy* defense — again, despite documentary evidence which demonstrates that Defendants de-designated *The Reporter* because of its protected First Amendment conduct. Mot. at 9-10. As discussed further below, the Moving Supervisors are not entitled to summary judgment on the de-designation claim.

A. County Law Section 214 Does Not Justify Defendants’ De-Designation of *The Reporter* and Is Immaterial to Plaintiff’s De-Designation Retaliation Claim

After this Court rejected Defendants’ argument that County Law Section 214 somehow *mandated* the de-designation, *see* Dkt. No. 116 at 17-19, Defendants now assert that Section 214 justifies the de-designation as a permissible exercise of discretion because “the Board was free to consider The Reporter’s political viewpoints when selecting an official paper” pursuant to Section 214. Mot. at 7-8. Even setting aside Defendants’ apparent continued confusion over subsections (1) and (2) of Section 214,⁶ their argument fails for multiple reasons. First, the Moving Supervisors cite *nothing* in the record to support their claim that the de-designation was due to their

⁶ Defendants continue to conflate Section 214 subsections (1) and (2). *The Reporter*’s designation as an official County paper prior to its 2022 de-designation was pursuant to Section 214(2), which provides that “[t]he board of supervisors shall annually 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.” N.Y. County Law § 214(2). In making these designations, “consideration shall be given to those newspapers advocating the principles of the two major political parties,” though “the fact that a newspaper is an independent newspaper not advocating the principles of any political party shall not disqualify it from consideration.” *Id.* Newspapers’ “general circulation throughout the county” must also be considered. *Id.* Section 214(2) does *not* include consideration of “the newspaper’s support of the political parties’ nominees.” *See* Mot. at 7 (claiming that Section 214(1) applies, requiring consideration of a “newspaper’s support of the political parties’ nominees”).

“consider[ation of] The Reporter’s political viewpoints” (nor could they). *See id.* And even if the record did support a finding that *The Reporter’s* political viewpoints were a motivating factor for the de-designation (and that such a consideration was permissible under Section 214(2) and the First Amendment),⁷ that finding would change nothing. *See* Dkt. No. 116 at 19 (“[T]he statute’s references to a newspaper’s political affiliation does not undermine Plaintiff’s contention that the de-designation was motivated by retaliation in violation of the First Amendment.”)

That is because the relevant question before the Court as to causation is whether *The Reporter’s* First Amendment protected activity was a “substantial or motivating factor” for the de-designation, “not that it was the only factor.” *See Dillon*, 917 F. Supp. 2d at 215. Whether *The Reporter’s* “political viewpoints” were an additional motivating factor for the de-designation has nothing to do with whether *The Reporter’s* coverage was itself a substantial or motivating factor. And, as discussed below, the Moving Supervisors cannot escape the unequivocal documentary evidence that County officials de-designated *The Reporter* in retaliation for unfavorable reporting.

B. The Moving Supervisors Are Not Entitled to Summary Judgment on the De-Designation Claim Because the March 8 Letter Establishes a Causal Link Between The Reporter’s Constitutionally Protected Reporting and the County’s De-Designation

As set forth in Plaintiff’s motion for partial for summary judgment, undisputed evidence in the record makes abundantly clear that *The Reporter’s* protected news coverage of Delaware County was *at least* a “substantial or motivating factor” for the de-designation. *See* Dkt. No. 246-2

⁷ Defendants’ argument that Section 214(2) allowed it to “consider The Reporter’s political viewpoints” in de-designating the newspaper, Mot. at 7-8, requires a logical leap not supported by the statute. Even if Section 214 could be read to justify de-designation based on *The Reporter’s* political viewpoints, the law would be unconstitutional under the First Amendment. 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)). The situation presented here is a far cry from the “debatable issue of judgment in the exercise of public power” presented in *Relihan v. Brink*, 285 A.D. 729, 731 (3d Dep’t 1955). *See* Mot. at 7 (citing *Relihan*).

at 12–18; *Dillon*, 917 F. Supp. 2d at 215. The Moving Supervisors’ claim that, instead, *they* are entitled to summary judgment on the de-designation claim because “cost and effort were the only reasons for their vote[s]” to de-designate finds no support in the record, other than their own self-serving declarations. *See* Mot. at 8. As a starting point, the Moving Supervisors’ declarations should not be credited over contradictory and undisputed documentary evidence, either to create a disputed material fact as to Plaintiff’s motion or to support Defendants’ own motion. *See BanxCorp v. Costco Wholesale Corp.*, 978 F. Supp. 2d 280, 296, 299 (S.D.N.Y. 2013) (finding no disputed issue of material fact on summary judgment when the “only evidence that might contradict” otherwise undisputed facts was a “self-serving declaration” “directly contradicted by a variety of documentary evidence” (citations and quotations omitted)); *see also Persaud v. City of New York*, No. 22-CV-2919 (AS), 2024 WL 2159852, at *5 (S.D.N.Y. May 14, 2024)(“[W]hether to credit a defendant’s self-interested, on-the-nose testimony is up to the jury.”).

Even if these declarations were sufficient to raise a material disputed issue of fact for purposes of *Plaintiff’s* motion for summary judgment (and they are not), the Moving Supervisors simply cannot get around the overwhelming evidence in the record of their retaliatory motives: namely, that all of the Moving Supervisors voted in favor of de-designation, and that twelve of the thirteen Moving Supervisors⁸ signed the March 8, 2023, letter stating that *The Reporter’s* coverage “was one of the reasons the Board of Supervisors opted to change the official county paper to the Hancock Herald in 2022.” CSUMF ¶ 80; Grygiel Decl., Ex. 28. Copious additional evidence in the record, including the Moving Supervisors’ own testimony, further establishes that the primary

⁸ Defendants Kosier, Tuthill, Axtell, Taggart, Haynes Jr., Layton, Wilson, Davis, Ellis, Cetta, Hinkley, and Vernold each signed the March 8, 2023, letter. Moving Supervisor Scott did not sign the March 8 Letter because she was not at the meeting where the March 8 Letter was signed, but she never expressed any reservations or disagreement with the March 8 Letter, and, according to Defendant Merklen’s deposition testimony, Scott “probably would have signed over the top of all of [the other] people” because “she disagreed with the news coverage of the department heads and County Government affairs.” Grygiel Rep. Decl. ¶ 15 and Ex. 10 at 139:23-25, 140:2-25, 141:2-5.

reason that the Board (including the Moving Supervisors) de-designated *The Reporter* was its news coverage, not cost and effort concerns. *See, e.g.*, Grygiel Decl., Ex. 21; *id.*, Ex. 29; *id.* Ex. 18; *id.* Ex. 20; *id.* Ex. 22; *id.* Exs. 25-28; *id.*, Ex. 9 at 55:21-57:17; *id.* Ex. 14 at 60:16-23; *id.*, Ex. 17 at 22:22-23:10; *id.*, Ex. 13 at 39:16-20; *id.*, Ex. 12 at 23:13-24:3. For example, Moving Supervisor Vernold testified 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.” CSUMF ¶ 70; Grygiel Decl., Ex. 14 at 60:16-23.

In addition, none of the Moving Supervisors deny that issues concerning the content of *The Reporter’s* reporting were discussed during “the Board meetings [they] attended where de-designation was discussed;” rather, the Moving Supervisors claim not to recall whether such issues were discussed. *See* CSUMF ¶ 77 (citing Moving Supervisors’ declarations). Similarly, none of the Moving Supervisors deny that issues concerning the content of *The Reporter’s* reporting was discussed during the Executive Session meeting immediately prior to the Supervisors’ vote to de-designate *The Reporter*. *See id.* ¶ 78 (citing Moving Supervisors’ declarations).

Based on this extensive evidence, there can be no real question that *The Reporter’s* protected news coverage of Delaware County was a “substantial or motivating factor” for the Moving Supervisors’ vote to de-designate *The Reporter*. At the very least, it reveals the existence of disputed material facts as to this issue. The Moving Supervisors’ motion for summary judgment should be denied as to Plaintiff’s de-designation claim.

C. The Moving Supervisors Are Not Entitled to the *Mount Healthy* Defense

To establish entitlement to the *Mount Healthy* defense, the Moving Supervisors must show that any reasonable jury *would have to find* by a preponderance of the evidence that the Moving Supervisors “would have reached the same decision as to [de-designation] even in the absence of

the protected [First Amendment] conduct” — that is, that the Moving Supervisors would have voted to de-designate *The Reporter* regardless of the content of its coverage of Delaware County. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *see also Smith v. Cnty. of Suffolk*, 776 F.3d 114, 122 (2d Cir. 2015) (“The operative question is whether defendants have demonstrated that a reasonable jury would have to find by a preponderance of the evidence that the [defendant agency] would have investigated, transferred, and suspended [plaintiff] absent his citizen-media speech.” (citations omitted)). “A *Mt. Healthy* defense presents a high bar at summary judgement.” *Thomas v. Arteta*, No. 23 CV 2981 (VB), 2025 WL 2709977, at *7 (S.D.N.Y. Sept. 22, 2025). “Where ‘sufficient circumstantial evidence exists from which a reasonable jury could infer [the adverse employment action] was primarily, if not entirely, based on the protected [conduct],’ summary judgment is not appropriate.” *Id.* (citing *Smith*, 776 F.3d at 125) (alterations in *Thomas*). “[I]f the evidence ‘permits only inferences,’ those inferences necessarily ‘may be drawn in either party’s favor,’ and ‘[the Court] require[s] more than inferences from an employer seeking summary judgment based on the Mount Healthy defense.’” *Id.*

The Moving Supervisors fall far short of this high bar. As discussed, overwhelming evidence in the record confirms that *The Reporter*’s news coverage of Delaware County was the primary reason that the Board (including the Moving Supervisors) de-designated *The Reporter*. *See* Dkt. No. 246-2 at 12–18; *supra* Section I.B. The Moving Supervisors therefore cannot establish that a reasonable jury would have to find the *opposite*: that the Moving Supervisors would have voted to de-designate *The Reporter* regardless of the content of its coverage of Delaware County. *See Smith*, 776 F.3d at 124 (rejecting *Mount Healthy* defense where “sufficient circumstantial evidence exists from which a reasonable jury could infer [adverse action] was primarily, if not entirely, based on the protected . . . speech”); *Thomas v. Arteta*, 2025 WL

2709977, at *8 (finding defendants did not meet their burden of establishing a *Mount Healthy* defense on summary judgment where “[a] reasonable jury . . . need not conclude [defendant] would have taken adverse employment actions against plaintiff in the absence of her protected First Amendment conduct” and could instead find defendant was motivated by retaliatory animus); *Persaud v. City of N.Y.*, 2024 WL 2159852, at *5-6 (rejecting *Mount Healthy* defense on summary judgment where documentary evidence “reveal[s] mixed motives[,] and defendants “rel[ied] largely on their own statements” in a “not exactly showstopping” attempt to “break that tie”).

If the Board, including the Moving Supervisors, 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, 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, as discussed in Plaintiff’s summary judgment motion, the evidence does no such thing. *See, e.g.*, Grygiel Rep. Decl. ¶ 16. Rather, the record demonstrates that *The Reporter’s* coverage of the County was indeed the primary motivating factor for the de-designation. *See* Dkt. No. 246-2 at 13-15. The Moving Supervisors therefore cannot establish a *Mount Healthy* defense as to the de-designation claim and their motion for summary judgment should be denied as to this claim.

II. DEFENDANTS CANNOT DEMONSTRATE THEY ARE ENTITLED TO SUMMARY JUDGMENT ON THE PRIOR RESTRAINT CLAIM

Despite the fact that the Court determined already “that the directive [against speaking to the press] is undoubtedly a prior restraint which restricts speech before it occurs,” Dkt. No. 116 at 28, Defendants argue that Plaintiff’s prior restraint claim fails because (i) no evidence demonstrates that Mr. Ermeti, Mr. Marshfield, or any other County official or employee spoke as

a private citizen on issues of public concern; and (ii) no willing speaker exists. Mot. at 13-14. “Because Plaintiff’s standing is derived from the existence” of County officials’ “First Amendment rights, such a finding would undermine [Plaintiff’s] claim.” Dkt. No. 116 at 29. But Defendants fall far short of demonstrating that County officials’ and employees’ speech is unprotected, and the clear “civilian analogue” to their speech here lends further support to Plaintiff’s position. *Matthews v. City of New York*, 779 F.3d 167, 173 (2d Cir. 2015). Moreover, Defendants fail to even take into account that “[t]he majority of courts . . . have found *Garcetti*’s limitation on the speech of public employees] inapplicable to elected officials[,]” like Defendant Marshfield and other County Supervisors. *Werkheiser v. Pocono Twp.*, 210 F. Supp. 3d 633, 638 (M.D. Pa. 2016), *aff’d sub nom. Werkheiser v. Pocono Twp. Bd. of Supervisors*, 704 F. App’x 156 (3d Cir. 2017) (collecting cases). Defendants’ claim that no willing speaker exists here likewise ignores both critical evidence that the County has conducted a leak investigation into two County officials’ communications with *The Reporter* since this lawsuit commenced and testimony from multiple deponents regarding the existence of additional willing speakers.

A. Defendants Failed to Demonstrate That County Officials’ Speech Was Pursuant to Their Job Duties

To support their position that County officials’ speech was pursuant to their job duties Defendants have merely proffered that (i) with respect to Mr. Ermeti, “[p]art of the duties of a public defender is to speak to the press when necessary”; and that, (ii) with respect to Mr. Marshfield, he likewise spoke pursuant to his job duties when he gave a comment to the *New York Times* in support of *The Reporter*. Mot. at 14. But “[i]t is not the case,” as Defendants appear to claim, “that all speech that is related to an employee’s duties is exempt from First Amendment protection.” *Long v. Byrne*, 146 F.4th 282, 295 (2d Cir. 2025). That is because “the mere fact that a citizen’s speech concerns information acquired by virtue of his public employment does not

transform that speech into employee—rather than citizen—speech.” *Lane v. Franks*, 573 U.S. 228, 240 (2014). Rather, the “critical question . . . is whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.” *Id.* The Second Circuit “ask[s] two questions to determine whether a public employee speaks as a citizen: (A) did the speech fall outside of the employee’s ‘official responsibilities,’ and (B) does a civilian analogue exist?” *Matthews*, 779 F.3d at 173.

Defendants’ vague statement that “[p]art of the duties of a public defender is to speak to the press when necessary,” Mot. at 14, in no way demonstrates that Mr. Ermeti’s speech regarding the Public Defender’s Facebook account was ordinarily within the scope of his official responsibilities. To the contrary, the U.S. Supreme Court in *Garcetti v. Ceballos* “reject[ed] . . . the suggestion that employers can restrict employees’ rights,” as the County attempts to do here, “by creating excessively broad job descriptions.” 547 U.S. 410, 424 (2006). Nor can Defendants credibly claim that Mr. Marshfield’s critical commentary about his colleagues in *The New York Times* was pursuant to his official duties. *See* Mot. at 14; Compl. Ex. O. As the Sixth Circuit noted recently, in cases where, as here, the government bars officials “from making disclosures to the media without approval,” Defendants’ argument that speaking to the press is pursuant to their job duties makes little sense because speaking “would have been acting *against* the directions of his public employer—not *pursuant* to them.” *DeCrane v. Eckart*, 12 F.4th 586, 597–98 (6th Cir. 2021) (emphasis in original). A clear civilian analogue to Defendant Marshfield’s and Mr. Ermeti’s conduct—the letter to a local newspaper in *Garcetti*—further supports that the speech is not related to their job responsibilities. *Long*, 146 F.4th at 298.

Defendants also fail to acknowledge, with respect to Mr. Marshfield and other elected officials, that “[m]any of the reasons for restrictions on employee speech appear to apply with

much less force in the context of elected officials. . . . In fact, debate and diversity of opinion among elected officials are often touted as positives in the public sphere.” *Werkheiser v. Pocono Twp.*, 780 F.3d 172, 178 (3d Cir. 2015). Because “[t]he manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy,” *Bond v. Floyd*, 385 U.S. 116, 135–36 (1966), Defendants cannot demonstrate that a blanket prohibition on elected Supervisors expressing their views on the designation or any other County policy passes First Amendment muster. Nor do they even attempt to do so, since their brief makes no distinction whatsoever between elected Defendants and employee Department Heads in analyzing whether their speech is protected under the First Amendment.

Finally, Defendants fail to analyze whether speech was made pursuant to job duties for several other County employees and officials identified in the evidentiary record and listed below as willing speakers and have thus waived any argument with respect to them.

B. Plaintiff Has Demonstrated the Existence of Willing Speakers

Speech recipients, like *The Reporter*, have standing to challenge restraints on speech as long as there are “willing speakers.” *Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 607–08 (2d Cir. 1988). “[W]here a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both.” *Va. State Bd. of Pharmacy v. Va Consumer Council*, 425 U.S. 748, 756 (1976). Whether a potential speaker agreed to the unconstitutional restriction “is irrelevant . . . as long as the third party can demonstrate that an individual subject to the order would speak more freely if the order is lifted or modified.” *United States v. Wecht*, 484 F.3d 194, 203 (3d Cir. 2007). Speakers can be considered willing where they decline to release information “because they believe themselves bound by” a directive prohibiting the free flow of information. *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 228–29 (4th Cir. 2019). Speakers can

also be considered willing where evidence demonstrates that they were willing speakers before a directive was put in place. *Davis v. E. Baton Rouge Par. Sch. Bd.*, 78 F.3d 920, 927 (5th Cir. 1996).

Defendants’ claim that no willing speaker exists ignores critical evidence that the County has conducted a leak investigation into two County officials’ communications with *The Reporter* since this lawsuit commenced, which presents “an objective harm and threat of future harm” that impedes their free speech, *Pen Am. Ctr., Inc. v. Trump*, 448 F. Supp. 3d 309, 324 n.3 (S.D.N.Y. 2020), and testimony from multiple other deponents that at the very least demonstrates a genuine issue of material fact regarding the existence of other willing speakers.

After this litigation’s commencement, two Supervisors have been subjected to investigative interviews conducted by Defendants’ counsel regarding their communications with *The Reporter*—Defendant Marshfield and Maya Boukai—including, according to Defendant Merklen, whether they purportedly disclosed information from executive sessions to *The Reporter* and “other things as well.” Grygiel Decl., Ex. 10 at 289:19-294:10; Grygiel Rep. Decl. ¶ 28. When Defendant Marshfield was asked in his deposition whether he had been threatened with punishment for speaking to *The Reporter*, Defendants’ counsel refused to allow Marshfield to answer on attorney-client privilege grounds. Grygiel Decl., Ex. 17 at 112:2-115:22. Tellingly, though, counsel elaborated: “Of course we’re asking for all that information [about communications with *The Reporter*]. We wanted to see what else was leaked . . . He knows that. He knows that in spades. He knows that more than anybody else, besides Ms. Boukai, and she’s going to learn a lot more, I’ll tell you that much.” Grygiel Decl., Ex. 17, at 115:8-15.

Defendants’ counsel shed further light on the substance of the County’s investigation into Defendant Marshfield’s communications with *The Reporter* during Marshfield’s deposition. Counsel interrupted Plaintiff’s deposition questioning to email Plaintiff’s counsel a Declaration

signed by Mr. Marshfield nearly a month prior to the deposition. Grygiel Rep. Decl. ¶¶ 24-27. In the Declaration, Mr. Marshfield contradicted an answer he had just given live in the deposition by disputing the veracity of a de-designation-related conversation memorialized by Plaintiff's co-owner in a 2022 email. *Id.* That email recorded a conversation Mr. Shepard had with Defendant Marshfield regarding County Supervisors' executive session discussions immediately prior to the vote to de-designate *The Reporter*. Grygiel Rep. Decl., Ex. 46, ¶¶ 5-6. Defendant Marshfield's belated introduction of an affidavit claiming Mr. Shepard lied conflicted with his prior deposition testimony, where Mr. Marshfield stated that he merely didn't recall having a conversation with Mr. Shepard regarding "another reason" for the de-designation aside from the cost increase and time that was initially put forth in executive session.⁹ Grygiel Decl., Ex. 17 at 42:17-58:24.

The County's investigative inquiry with respect to Supervisor Boukai has been even broader and, according to Defendants' counsel, had not been completed as of October 2025. *Id.* at 115:8-15 (referencing the County's leak investigation efforts and noting that Ms. Boukai is "going to learn a lot more"). Defendants' counsel likewise suggested as much during the deposition of *The Reporter's* co-owner Kim Shepard, where he questioned Ms. Shepard at length regarding any communications she had with Ms. Boukai, including any "personnel communications, policy communications internally, [or] other information that would normally have to be subject to a foil," after Defendants produced in discovery a letter that Ms. Boukai forwarded to Ms. Shepard. *See, e.g.*, Grygiel Rep. Decl., Ex. 34 at 109:5-111:12. That letter from a disgruntled citizen to the Supervisors registered his complaint that *The Reporter* had chosen not to run his letter to the editor

⁹ Plaintiff respectfully submits that Attorney Facciponte's representation of Defendant Marshfield in this case while at the same time investigating him on the County's behalf for purportedly leaking executive session information to *The Reporter* is a direct conflict of interest. Grygiel Rep. Decl. ¶ 28. Compounding this clear conflict, Attorney Facciponte attempted to influence Defendant Marshfield's deposition testimony through the introduction of a September 11, 2025, Declaration in the midst of Defendant Marshfield's recall deposition on October 8, 2025, which had the effect of defense counsel impeaching his own client's statements made under oath. *Id.* ¶¶ 24-27.

branding President Biden “an inexperienced ‘Master of Disasters and Lies,’” pursuant to the newspaper’s First Amendment-protected editorial discretion. Grygiel Rep. Decl., Ex. 41. The letter writer additionally requested that Supervisors “withhold legal notices from [*The Reporter*]. Hurt them in their pocketbook.” *Id.*

In addition to the leak investigation, former Director of the Office of the Aging Wayne Shepard testified that the County’s directive against speaking to the press was a significant change from past practice for him because he previously had responded to press inquiries. After the directive was issued, he testified that he “[r]efrained” from speaking. Grygiel Rep. Decl., Ex. 36 at 77:22-78:17. Mr. Shepard also affirmed that he normally would respond to inquiries from the press if he had not received that instruction. *Id.*, Ex. 35 at 54:25-57:10. And while Mr. Ermeti testified that he speaks to Ms. Browne now for stories and doesn’t recall ever having to get pre-approval from someone to do so, Grygiel Rep. Decl., Ex. 33 at 101:14-104:10, his June 2023 email on its face disputes that assertion because he himself admits at the time that he had “been directed to refer all inquiries in this matter and any other matter that pertains to the Public Defender’s office to the County Attorney’s office.” Grygiel Rep. Decl., Ex. 38. Ms. Browne testified that Mr. Ermeti told her he had to check with Tina Molé or Amy Merklen before responding to her questions. Grygiel Rep. Decl., Ex. 37 at 343:17-345:13.

Ms. Browne additionally testified that several other County employees and officials affirmed the existence of the gag directive and indicated that, but for the gag, they would speak to *The Reporter*. For example, she stated that election commissioners Maria Kelso and Judy Garrison refused to answer questions for a ballot box story “unless, and until, they spoke to someone at the County.” *Id.* at 408:17-20. Director of Probation Scott Gluckert refused to respond to questions about a public safety meeting, Ms. Browne said, stating that while “he didn’t want to be like the

rest of the people at the county who don't answer questions . . . he doesn't want to get involved in the lawsuit.” *Id.* at 408:21-409:5. County Clerks Deborah Goodrich and Haley Gransbury likewise told Ms. Browne that they had been instructed not to speak with her *Id.* at 412:8-15.

The evidence demonstrates the existence of County speakers who have declined to release information to *The Reporter* because of the gag directive or would speak more freely without the directive. The Court should therefore deny Defendants’ Motion for Summary Judgment as to the prior restraint claim.

III. DEFENDANTS CANNOT DEMONSTRATE THEY ARE ENTITLED TO SUMMARY JUDGMENT ON THE GAG-RELATED RETALIATION CLAIM

To allege a First Amendment retaliation claim as a private actor criticizing a public official’s conduct, *The Reporter* must assert “(1) [it] has a right protected by the First Amendment; (2) the [Defendants’] actions were motivated or substantially caused by [Plaintiff’s] exercise of that right; and (3) the [Defendants’] actions caused him some injury.” *Dorsett v. Cnty. of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013); *A.S. v. City Sch. Dist. of Albany*, 585 F. Supp. 3d 246, 269 (N.D.N.Y. 2022). Since Defendants concede that the speech at issue is protected by the First Amendment, Mot. at 10-11, *The Reporter* need only show a causal connection and injury to demonstrate the claim. These elements are easily met by the ample evidentiary record.

A. Plaintiff Has Demonstrated a Causal Connection

While Defendants claim there is no evidence of a “causal connection between the issuance of the advice and The Reporter’s participation in the New York Times story,” Mot. at 11, Defendants ignore that *The Reporter*’s retaliation claim stems from unfavorable coverage more generally and not just speech in connection with *The New York Times* story alone. Dkt. 116 at 22 n.8. Significant documentary evidence demonstrates that the directive was imposed because of First Amendment-protected newsgathering for reporting that County officials did not like.

Specifically, on May 15, 2023, Defendant Merklen wrote to Defendant Molé in response to an inquiry from *The Reporter* regarding a shared services committee meeting: “[A]s a rule, individual departments should not be sending emails/responses to the press, just like FOIL requests.” Grygiel Rep. Decl., 39. The following day, Defendant Merklen told Defendant Molé and County personnel director Carrara Knoetgen that “Department heads need to stop having conversations with [*The Reporter*’s Editor,] Lillian [Browne], after Browne requested “annual disclosure forms for [public defender] Joe Ermeti from 2019-present[.]” *Id.*, Ex. 42. The information sought in the annual disclosure forms regarding the maintenance of Mr. Ermeti’s private law practice alongside his public defender responsibilities has no connection whatsoever to the County’s potential litigation over the de-designation of *The Reporter*, as Ms. Molé essentially conceded in her deposition. *See* Grygiel Decl., Ex. 9 at 184:14-21 (responding “I don’t know” when Ms. Molé was asked whether the forms were related to the County’s potential litigation with *The Reporter*”).

The very next day, Defendant Molé emailed Penny Bishop directing her to notify all Department Heads that they were prohibited from “responding to any press inquiries.” Rather, all inquiries were to be channeled to “Amy [Merklen] and Shelly [Johnson-Bennett] as our Public Information Officer.” Grygiel Rep. Decl., Ex. 43. While Defendant Molé testified that her directive was not intended as a blanket prohibition on communications between Department Heads and the press and extended only to matters in connection with anticipated litigation, Ex. 9 at 137:14-18, this post-hoc rationalization is belied by the text of the directive itself. Grygiel Rep. Decl., Ex. 43.

Importantly, the County’s own employees likewise interpreted the directive’s language as a blanket prohibition on speech, given that the directive on its face bars all communications with the press. For example, former Director of the Office of the Aging Wayne Shepard testified that

the new policy was a significant change for him because he previously had responded to press inquiries. After the directive was issued, he testified that he “[r]efrained.” Grygiel Rep. Decl., Ex. 36 at 77:22-78:17. Mr. Shepard affirmed that he normally would respond to inquiries from the press if he had not received that instruction. *Id.*, Ex. 35 at 54:25-57:10. In response to the directive, District Attorney Shawn Smith asked whether he could still update the public about his caseload and respond to case-specific press inquiries. Ms. Bishop clarified that “[t]his reminder specifically relates to reporters asking for comments on County policies, etc.” and that that he could discuss his cases with the press. *Id.*, Ex. 44. Likewise, Public Works Commissioner Jim Thomas emailed for clarification and Shelly Johnson-Bennett responded that “pre-planned” and “pre-approved” interactions with the media were outside the scope of the policy but if the media “fishes for information about another topic . . . [they should] instruct the media to contact me or Amy for a county response.” *Id.*, Ex. 45. A month later, Public Defender Joe Ermeti described the directive in an email to *The Reporter* as a blanket prohibition regarding any matter whatsoever pertaining to his office, stating: “I have been directed to refer all inquiries in this matter and any other matter that pertains to the Public Defender’s office to the County Attorney’s office.” *Id.*, Ex. 38. A wide-ranging prohibition on commenting on any “County policies” or on any non-pre-approved topics, as is evidenced by these documents and testimony, undoubtedly touches on protected speech that transcends ordinary workplace issues. *See Harman v. City of New York*, 140 F.3d 111, 118 (2d Cir. 1998) (“[D]iscussion regarding current government policies and activities is perhaps the paradigmatic matter of public concern.”) (internal quotation marks omitted).

Ms. Merklen also issued a separate directive via email in May 2023 to County Supervisors to not respond to requests to speak with a *New York Times* reporter due to “potential litigation” with *The Reporter*. *Id.*, Ex. 40. While Defendants point to this email as evidence that the directive

solely concerned litigation risk, Mot. at 11, they ignore that Defendant Cetta testified that a directive was also issued either in executive session or at a Board meeting by the County Attorney, which required that “any [press] inquiries should go through the County attorney.” Grygiel Decl., Ex. 16 at 85:8-13.

As the series of emails in May and June 2023 regarding the issuance of the gag directive show, a causal connection plainly exists between Ms. Browne asking questions that County officials did not like and the issuance of a gag directive specifically to “stop” employees from “having conversations with [*The Reporter*’s Editor,] Lillian [Browne].” Grygiel Rep. Decl., Ex. 42.

B. Plaintiff Has Demonstrated Defendants’ Gag Directive Constituted Sufficient Harm

Defendants argue that Plaintiff’s retaliation claim fails because “County employees regularly spoke with The Reporter” and thus its speech was not actually chilled. Mot. at 12. But this argument ignores that testimony from Wayne Shepard and evidence of leak investigations against Supervisors demonstrate that speech has been chilled. *See supra* at 3-5. Even if there were no evidence of chilled speech, the Court already determined that this would not end the inquiry, ruling that Plaintiff need not demonstrate a chilling effect as long as “he has suffered some other concrete harm.” Dkt. No. 116 at 24-25 (citing *Dorsett*, 732 F.3d at 160 (collecting cases)). Cognizable injury includes government interference with the right to receive information. *See, e.g., Application of Dow Jones & Co., Inc.*, 842 F.2d at 607. That injury can include “immediately end[ing]” *The Reporter*’s newsgathering and “delays in *The Reporter*’s newsgathering activities.” Dkt. 116 at 25-26. The injury prong is also met if the retaliation “would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights.” *McKenna v. Nassau Cnty.*, No. 223CV4286ARRST, 2023 WL 8455670, at *9 (E.D.N.Y. Dec. 6, 2023).

Testimony demonstrates that *The Reporter*'s First Amendment newsgathering activity was "completely snuffed out" with respect to Wayne Shepard after the directive was issued. *See* Grygiel Rep. Decl., Ex. 36 at 77:22-78:17; *id.*, Ex. 35 at 54:25-57:10; *McKenna*, 2023 WL 8455670, at *9. Testimony also shows that two County Supervisors were subjected to investigative interviews for communicating with *The Reporter*, which would objectively deter a similarly situated Supervisor of ordinary firmness and *The Reporter*'s staff, in turn, from exercising their constitutional rights. Grygiel Decl., Ex. 10 at 289:19-294:10. And while Mr. Ermeti testified that he speaks to Ms. Browne now for stories and doesn't recall ever having to get pre-approval from someone to do so, Grygiel Rep. Decl., Ex. 33 at 101:14-104:10, a genuine issue of material fact exists with respect to constraints on Mr. Ermeti's speech. Ms. Browne testified that Mr. Ermeti told her he had to check with Ms. Molé or Ms. Merklen before responding to her questions. *Id.*, Ex. 37 at 343:17-345:13. Several other employees told Ms. Browne that they could not talk to her without pre-approval, resulting in the delay or denial of speech outright, including Maria Kelso and Judy Garrison with respect to a ballot box story, Scott Gluckert, Deborah Goodrich and Haley Gransbury. *See id.* at 408:17-409:5, 412:8-15. Requiring pre-approval of Mr. Ermeti's speech and other County employees "objectively chill[s]," at the very least, the "quality of their media speech," and, when pre-approval is not granted, "the volume" as well. *Pen Am. Ctr., Inc.*, 448 F. Supp. at 323–24.

Because Plaintiff has demonstrated a causal connection and an injury in fact sufficient to sustain its retaliation claim regarding the gag directive, Defendants' Summary Judgment Motion with respect to the gag directive retaliation claim must be denied.

IV. DEFENDANTS CANNOT DEMONSTRATE THEY ARE ENTITLED TO SUMMARY JUDGMENT ON THE PUNITIVE DAMAGES CLAIM

Punitive damages may be awarded in a Section 1983 claim where Defendants’ conduct was “motivated by evil motive or intent” or “involves reckless or callous indifference to the federally protected rights of others.” *Smith v. Wade*, 461 U.S. 30, 56 (1983). To present “a question of fact . . . to the jury” as to punitive damages, the “plaintiffs’ evidence need only be enough ‘to permit the factfinder to *infer* that the responsible official was motivated by malice or evil intent or that he acted with reckless or callous indifference.’” *Cameron v. City of New York*, 598 F.3d 50, 69 (2d Cir. 2010) (quoting *New Windsor Volunteer Ambulance Corps., Inc. v. Meyers*, 442 F.3d 101, 121–22 (2d Cir.2006)) (emphasis in original). In cases like here, where “compensatory damages alone result in systematic underassessment of costs” for constitutional deprivations “and hence in systematic underdeterrence,” “[p]unitive damages may be especially appropriate.” *Aponte*, 75 F.4th at 57.

Where the record contains “direct evidence of retaliatory animus,” courts find that compelling in defeating a summary judgment motion. *See, e.g., Barclay v. Michalsky*, 451 F. Supp. 2d 386, 398, 400 (D. Conn. 2006) (denying summary judgment where record contained both direct and indirect evidence of retaliatory animus). Plaintiff has already shown direct evidence of retaliatory animus with respect to both the de-designation and the gag directive claims that supports this Court’s denial of summary judgment as to the punitive damages claim. *See, e.g., Grygiel Decl.*, Ex. 28 (March 8 Letter signed by all Moving Defendants but Ms. Scott demanded that *The Reporter* make immediate changes to its coverage of County news and admitted that a reason for the newspaper’s de-designation was its purported “flagrant manipulation of facts”); *id.*, Ex. 10 at 139:23-141:5 (testifying that while Ms. Scott missed the meeting where signatures for the March 8 Letter were collected, she “probably would have signed over the top of all of [the other] people” because “she disagreed with the news coverage of the department heads and County

Government affairs”); *id.*, Ex. 22 (Memo sent to Moving Supervisors on March 17, 2022, advised that *The Reporter* should be de-designated because it “continues to disparage and write non-factual articles about the County. This has gone on for several years”); Grygiel Rep. Decl., Ex. 42 (a day before issuing gag directive Ms. Merklen proclaiming that “Department heads need to stop having conversations with [*The Reporter*’s Editor,] Lillian [Browne], after Ms. Browne requested “annual disclosure forms for [public defender] Joe Ermeti from 2019-present”).

Because Defendants’ conclusory claim that “[n]othing in the record supports such an inference” of evil intent, Mot. at 16, is belied by the evidentiary record, the punitive damages claim survives summary judgment. At most, Defendants have demonstrated a genuine issue of material fact by pointing to self-serving statements in their own declarations, which is plainly insufficient to carry their burden. *See, e.g., Barclay*, 451 F. Supp. 2d at 400.

CONCLUSION

For all these reasons, the Court should deny Defendants’ Motion for Partial Summary Judgment and grant whatever additional relief the Court deems necessary.

Date: January 6, 2026

By: /s/ Heather E. Murray
 Heather E. Murray
 CORNELL LAW SCHOOL
 FIRST AMENDMENT CLINIC
 Myron Taylor Hall
 Ithaca, NY 14853
 Tel.: (607) 255-8518
 Email: hem58@cornell.edu

GREENBERG TRAURIG, LLP
 Michael J. Grygiel
 Cynthia E. Neidl
 Kelly L. McNamee
 Christina N. Hernsdorf
 54 State Street, 6th Floor
 Albany, NY 12207
 Tel.: (518) 689-1400
 Email: grygielm@gtlaw.com
 neidlc@gtlaw.com
 mcnameek@gtlaw.com
 christina.hernsdorf@gtlaw.com

Attorneys Pro Bono Publico for Plaintiff Decker Advertising Inc.