

Exhibit I



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VIA EMAIL

Re: Unconstitutional Termination of Volunteer Minister Devon Kurtz

Dear Mr. Bovat:

We represent Mr. Devon Kurtz ("Mr. Kurtz"), a former registered Quaker ministry volunteer of the Vermont Department of Corrections ("VT DOC"), with respect to his wrongful termination by the Vermont Agency of Human Services (the "Agency")¹ in retaliation for his involvement with the publication of the book *Sketches from Behind Prison Walls* ("Sketches").

We request Mr. Kurtz's immediate reinstatement as a registered volunteer, so that he may return to his important ministry work and continue to serve the incarcerated men at Southern State Correctional Facility ("SSCF"). We contend that Mr. Kurtz's compiling of *Sketches* is core protected speech activity under the First Amendment and Article 13 of the Vermont Constitution.² Mr. Kurtz's firing, prompted solely by his compilation of *Sketches*, constitutes adverse employment action by VT DOC. Accordingly, VT DOC's termination of Mr. Kurtz from his Quaker ministry volunteer position was retaliatory and

¹ Pursuant to 3 V.S.A. § 3081, the Department of Corrections is housed within the Agency of Human Services.

² The Vermont Supreme Court has indicated that Article 13 of the Vermont Constitution is, at a minimum, coextensive with the First Amendment of the United States Constitution. See *Shields v. Gerhart*, 658 A.2d 924, 929 (Vt. 1995). For state law claims of retaliation against employees for engaging in protected activities, the Vermont Supreme Court has followed the analytical approaches adopted by the United States Supreme Court. See *In re McCort*, 650 A.2d 504, 509 (Vt. 1994).

unconstitutional. In effort to avoid litigation, we request that Mr. Kurtz be reinstated by January 7, 2025.

I. Factual Background

A. Mr. Kurtz's Volunteer Background and Training.

In October 2020, VT DOC's Volunteer Services staff ("Volunteer Services") began training Mr. Kurtz to work at SSCF as a Hartford Community Restorative Justice Center volunteer. Due to the COVID-19 pandemic, Mr. Kurtz's onboarding process took place online rather than on-site at a VT DOC facility. Mr. Kurtz received a set of training materials, including the VT DOC Contracted and Volunteer Staff Facility Site Security Training Manual ("Training Manual"). A true and correct copy of excerpts from the Training Manual is attached hereto as Exhibit A.

The Training Manual details ten policies "directly related to volunteer services." Ex. A at 3. The Training Manual also lays out the Work Rules for VT DOC, which bind VT DOC employees and volunteers alike, and highlights that volunteers' work at VT DOC facilities is "essential to the success of many of [VT DOC's] programs." *Id.* at 1, 16–17. Mr. Kurtz signed and submitted the Training Manual and other training materials to Volunteer Services on October 27, 2020, acknowledging that he had read and understood the materials. *Id.* at 19. VT DOC also ran a background check on Mr. Kurtz, which he passed on October 28, 2020. A true and correct copy of an email confirming Mr. Kurtz's successful background check is attached hereto as Exhibit B.

Mr. Kurtz began working at SSCF under the supervision of Volunteer Services Coordinator Anthony Giordano in January 2021. After two years of working as a registered secular volunteer, Mr. Kurtz shifted to working as a registered religious volunteer, reviving a previously dormant Quaker ministry at SSCF in February 2023.

VT DOC regularly provides volunteers with updated trainings and manuals. Mr. Kurtz received an updated Volunteer Orientation and Training Manual ("Updated Training Manual") after beginning his work at SSCF. A true and correct copy of excerpts from the Updated Training Manual is attached hereto as Exhibit C. Like the original Training Manual, the Updated Training Manual includes eleven policies "directly related to volunteer services" and makes clear that VT DOC volunteers are subject to the same rules as VT DOC employees: "As a staff member ([a] correctional employee, contractor, or other person providing services to Corrections Involved Individual's on behalf of the Department of Corrections) you are required to follow these Department Work Rules at all times." Ex. C at 2. The Updated Training Manual also reiterates the original Training Manual's assertion that volunteers are integral to VT DOC's mission and functioning. *Id.* at 7.

Notably, none of the training materials provided to Mr. Kurtz over his more than three years as a VT DOC volunteer included Policy #26.01 on Media Access ("Media Access

Directive” or the “Directive”). *See* Exs. A & C. A true and correct copy of the Media Access Directive is attached hereto as Exhibit D.

B. VT DOC and the Agency were Aware of Mr. Kurtz’s Contribution to *Sketches* Yet Raised No Concerns Prior to His Termination.

Mr. Kurtz began compiling material for *Sketches* in 2023. The book is the first in a four-part creative work focused on prisoners’ rights. Mr. Kurtz became involved in this project when one of the incarcerated men at SSCF who attended Mr. Kurtz’s Quaker services, Mr. Rein Kolts, presented Mr. Kurtz with his artwork and writings, asking that they be made public.

To create *Sketches*, Mr. Kurtz compiled portraits illustrated by Mr. Kolts and personal writings by other incarcerated men at SSCF. As the project’s curator, Mr. Kurtz organized the materials into chapters and wrote a preface, introduction, commentary, and afterword. Importantly, Mr. Kurtz did not interview any incarcerated individuals for *Sketches*; rather, those who wanted to contribute to the book proactively and voluntarily sent their writings to Mr. Kolts’ wife, who gave them to Mr. Kurtz. Neither did Mr. Kurtz take photographs, audio recordings, or video recordings of the incarcerated men featured in *Sketches*, and no such material is published in the book. A true and correct copy of select pages from the *Sketches* manuscript is attached hereto as Exhibit E.

In the book’s Introduction, Mr. Kurtz writes that *Sketches* is “an uncomfortably honest interpretation of what it means to be an American in the age of mass incarceration.” Ex. E at xviii. *Sketches*’ pairing of artworks and writings covers themes including the “indignities of incarceration,” “loss and connection during incarceration,” and “existential questions of God, sin, and death.” *Id.* at xix–xx.

Prior to the book’s publication, Mr. Kolts’ caseworker, Ms. Annie Manhardt, who serves as the Prisoners’ Rights Office Supervising Attorney at the Vermont Office of the Defender General, was made aware of the ongoing collaborative project between Mr. Kurtz and Mr. Kolts. A true and correct copy of emails between Ms. Manhardt and Mr. Kurtz is attached hereto as Exhibit F. Further, to facilitate his work on the book, Mr. Kurtz regularly sent pages of the *Sketches* manuscript to Mr. Kolts through the Getting Out app. On information and belief, every message Mr. Kurtz sent with the *Sketches* manuscript attached was reviewed by a VT DOC corrections employee before being transmitted to Mr. Kolts.

Sketches was published by The Quaker Institute for the Future on April 20, 2024. Shortly after publication, Mr. Kurtz brought several copies of *Sketches* to SSCF, which were examined by VT DOC security when he entered the prison, as is customary for any outside materials entering the prison. Mr. Kurtz gave one copy to his supervisor, Mr. Giordano. On May 3, 2024, the VAULT, a gallery in nearby Springfield, hosted an opening reception for its new exhibit, “Faces of Mass Incarceration,” a curated display of Kolts’ sketches and the incarcerated men’s writing, as published in *Sketches*. A true and

correct copy of the press release for the exhibit is attached hereto as Exhibit G. The event had over fifty attendees, including Bill Storz, a Correctional Educator at the VT DOC Community High School of *Vermont*; Mr. Ward Goodenough, the Windsor County State's Attorney; Meghan Place, a Victim Advocate at the Windsor County State's Attorney Office; and multiple Vermont politicians, journalists, and community members. A true and correct copy of a list of event attendees is attached hereto as Exhibit H. Up to this point, no one from VT DOC or the Agency raised concerns with Mr. Kurtz about his work to help publish *Sketches*.

C. VT DOC and the Agency Terminated Mr. Kurtz for *Sketches*.

On July 9, 2024, Mr. Kurtz received an email from Director of Victim Services, Meredith Pelkey. A true and correct copy of the email exchange between Ms. Pelkey and Mr. Kurtz is attached hereto as Exhibit I. In the email, Pelkey asked if Mr. Kurtz had time to meet with her and Victim Services Specialist Ashley Fisk. *Id.* Pelkey gave only one reason for this meeting: "It has come to our attention that you recently wrote a book." *Id.* Mr. Kurtz responded to Ms. Pelkey's email that same day, requesting to know the nature of the meeting. Mr. Kurtz expressed a "great deal of respect for [Victim Services'] work" and stated that if the meeting was "a friendly discussion about literary interests and a general expression of concern about victim impact, [he would be] happy to chat." *Id.* Otherwise, Mr. Kurtz indicated that he would need to include his attorneys in the meeting, as he had concerns over "DOC victim's services quelling [his] journalistic and artistic interests." *Id.* Mr. Kurtz received no response.

Instead, later that day, Mr. Giordano called Mr. Kurtz notifying him that he was being terminated because of his work on *Sketches*. During the phone call, Mr. Giordano stated that Mr. Kurtz's termination was "out of his hands."

Shortly thereafter, Mr. Kurtz received an official termination letter from VT DOC and the Agency, signed by Mr. David A. Bovat. A true and correct copy of the official termination letter is attached hereto as Exhibit J. The only reason provided for Mr. Kurtz's termination was a violation of a work rule specifying that "[n]o employee shall violate any provision of the collective bargaining agreement of State or Department work rule, policy, procedure, directive, local work rule or post order." *Id.* Specifically, the letter indicated that the relevant violation was Mr. Kurtz's "failure to comply with VT DOC Policy #26.01 Media Access as seen in [his] book *Sketches From Behind Prison Walls*." *Id.*

For the past six months, Mr. Kurtz has been unable to serve the incarcerated men at SSCF through his Quaker Ministry, an experience that he had described to Mr. Giordano as one of the most rewarding of his life. To remedy their violation of Mr. Kurtz's rights guaranteed under the First Amendment and the Vermont Constitution, VT DOC and the Agency must reverse their decision and reinstate Mr. Kurtz as a registered religious volunteer.

II. The Media Access Directive Does Not Apply to Mr. Kurtz and Thus Does Not Constitute Proper Grounds for His Termination.

As a preliminary matter, any alleged violation of the Media Access Directive by Mr. Kurtz does not justify terminating his position because the Directive does not bind Mr. Kurtz. Nothing in the Media Access Directive restricts or prohibits Mr. Kurtz from compiling and publishing SSCF prisoners' sketches and writings. *See* Ex. D. The Media Access Directive "establish[es] guidelines in how the Vermont Department of Corrections relates to media organizations and in responding to [their] requests." *Id.* Media organizations are defined in the Directive as "[o]rganizations that focus on delivering information to the general public or a target audience in the form of news, film, photography, audio, etc." *Id.* at 2. Based on the Directive's plain language, the only publications restricted or prohibited are those produced by media organizations and not those compiled by volunteer ministers. *See id.* at 1-5. Further, while the policy requires "Facility Superintendents and Field District Managers [to] ensure that all staff have read and understood this directive," the Directive was never provided to Kurtz nor referenced in his volunteer onboarding and training materials. In sum, Directive does not apply to Mr. Kurtz, so his wrongful termination on the grounds that *Sketches* violated this policy violated his free speech rights. *See id.*

III. VT DOC Violated Mr. Kurtz's First Amendment Rights by Wrongfully Terminating Him in Retaliation for His Book.

The First Amendment "prohibits [the government] from punishing its employees in retaliation for the content of their protected speech." *Reuland v. Hynes*, 460 F.3d 409, 415 (2d Cir. 2006) (quoting *Locurto v. Safir*, 264 F.3d 154, 166 (2d Cir. 2001)). Recognizing both that public employees do not "relinquish the First Amendment rights they would otherwise enjoy as citizens" simply because of their public employment, and that "government offices could not function if every employment decision became a constitutional matter," courts have fashioned a balancing test to determine whether a public employee's speech is protected. *Pickering v. Board of Education of Township High School District*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 143 (1983). Thus, to establish a First Amendment retaliation claim, an employee must prove that (1) "he has engaged in protected First Amendment activity," (2) "he suffered an adverse employment action," and (3) "there was a causal connection between the protected activity and the adverse employment action." *Dillon v. Morano*, 497 F.3d 247, 251 (2d Cir. 2007).

As demonstrated herein, Mr. Kurtz was terminated for helping publish *Sketches*, which offers First Amendment-protected critical commentary on the experiences of incarcerated individuals at SSCF and on mass incarceration more generally. Because Mr. Kurtz's speech is protected by the First Amendment, and because Mr. Kurtz's firing is directly traceable to his work on *Sketches*, VT DOC and the Agency have unconstitutionally retaliated against Mr. Kurtz by firing him and chilling his speech. Accordingly, VT DOC must reinstate Mr. Kurtz to remedy his ongoing constitutional injury.

A. Mr. Kurtz Engaged in Protected Speech.

Mr. Kurtz's work on *Sketches* is an archetypal exercise of the First Amendment right to speak and express oneself freely. In *Pickering*, the Supreme Court established a two-step

test to determine whether a government employer may enjoin a public employee's speech without running afoul of the First Amendment. 391 U.S. at 568. The threshold inquiry asks whether an employee's speech was on a matter of public concern. *Id.* The second step balances the government's "interest ... as an employer in promoting the efficiency of the public services it performs through its employees" against the employee's First Amendment right to speak on matters of public concern. *Id.* Unless the former outweighs the latter, a court will rule that the government unlawfully retaliated against the employee for exercising their constitutional rights. *Id.*

1. The *Pickering* Test Applies to Mr. Kurtz's Free Speech Exercised in the Course of His Government Employment.

The *Pickering* test applies to Mr. Kurtz's speech because he is a public employee.³ In other words, his status as a "volunteer" does not diminish his status as a government employee. Indeed, "no court has held that volunteers are not protected by the First Amendment." *Barton v. Clancy*, 632 F.3d 9, 25–26 (1st Cir. 2011). The Second Circuit and several sister circuits "have found that volunteer positions are entitled to constitutional protection." *Andersen v. McCotter*, 100 F.3d 723, 727 (10th Cir. 1996) (citing, *inter alia*, *Janusaitis v. Middlebury Volunteer Fire Dep't*, 607 F.2d 17, 25 (2d Cir.1979)); *see also Monz v. Rocky Point Fire Dist.*, 519 F. App'x 724, 726 (2d Cir. 2013) (applying the public employee First Amendment retaliation claim analysis from *Pickering* to a volunteer firefighter). As such, Mr. Kurtz is entitled to *Pickering*'s protections.

The Agency's own volunteer training manuals confirm Mr. Kurtz's status as an "employee" for the purposes of *Pickering*. Both manuals provided to Mr. Kurtz during his tenure at SSCF note that volunteers are "essential to the success of many of [VT DOC's] programs," and require that volunteers receive appropriate supervision before and during administration of VT DOC programs. *See* Exs. A & C. The original Training Manual notes that registered volunteers are treated as "correctional professionals" and are thus held to the same workplace expectations as other staff and contractors, including in training, supervision, and adherence to protocol and Work Rules. Ex. A; *see also* Ex. J (alleging that Mr. Kurtz was in violation of a rule binding "employees" to VT DOC work rules). In keeping with the expectations of his employer, Mr. Kurtz, under the supervision of Mr. Giordano and other VT DOC staff, provided services and undertook routine tasks, such as delivering his ministry to the incarcerated men of SSCF. Because Mr. Kurtz was "subject to the[] control," *Anderson*, 100 F.3d at 726, of VT DOC staff in the course of performing his routine volunteer duties, he must be considered a "government employee."

³ The VT DOC Glossary of Terms defines "employed" to "include employment that is full-time or part-time for a period of time exceeding 14 days, or for an aggregate period of time exceeding 30 days during a calendar year, whether financially compensated, *volunteered*, or for the purpose of governmental or educational benefit." A true and correct copy of an excerpt from VT DOC's Glossary is attached hereto as Exhibit L.

Moreover, the indemnification policies detailed in the Agency's Volunteer Services and Management Guide clarify that "DOC [registered] volunteers are considered State employees for purposes of determining the State's obligation to defend and/or indemnify them from civil suits and damages and criminal charges," and "for purposes of determining whether they are entitled to workers' compensation if they are injured performing their ... duties." A true and correct copy of an excerpt from the Volunteer Services and Implementation Management Guide is attached hereto as Exhibit K. The Second Circuit has applied *Pickering* to volunteer workers in this very situation—where a law specifically provides that "volunteer[s] . . . shall be construed to be employees of the [government] for the purposes of workmen's compensation." *Janusaitis*, 607 F.2d at 25–26. By indemnifying volunteers as they do employees, the Agency and VT DOC have thus rendered Mr. Kurtz an "employee" protected from unconstitutional retaliation under *Pickering*.

2. Mr. Kurtz's Speech was on a Matter of Public Concern.

Because Mr. Kurtz's work on *Sketches* constitutes speech on a matter of public concern, it is protected by the First Amendment. *Pickering*, 391 U.S. at 568. "To constitute speech on a matter of public concern, an employee's expression must 'be fairly considered as relating to any matter of political, social, or other concern to the community.'" *Jackler v. Bryne*, 658 F.3d 225, 236 (2d Cir. 2011) (quoting *Connick*, 461 U.S. at 146; *see also City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004) (stating that a topic is a matter of public concern if it is of "general interest" or of "legitimate news interest")). In contrast, a matter of private concern is "an issue that is 'personal in nature and generally related to [the speaker's] own situation.'" *Id.* (quoting *Ezekwo v. N.Y.C. Health & Hosps. Corp.*, 940 F.2d 775, 781 (2d Cir. 1991) (brackets in original)); *see also Lewis v. Cowen*, 165 F.3d 154, 163–64 (2d Cir. 1999) ("the court should focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose.").

The Second Circuit has determined that the quality and administration of various services in prisons is a matter of public concern. *See Catletti ex rel. Catletti v. Rampe*, 334 F.3d 225, 230 (2d Cir. 2003) ("The quality of mental health services provided in the County prison is plainly a matter of public concern.") Further, "[a]dvocacy for a change in public perception and law, a fundamental component of democracy, is certainly a matter of public concern, regardless of the underlying subject matter." *Melzer v. Bd. of Educ. of City Sch. Dist. of City of New York*, 336 F.3d 185, 196 (2d Cir. 2003).

Sketches highlights the lived experiences of incarcerated individuals at SSCF, and attempts "to humanize [the] social problem" of mass incarceration. Ex. E at 77. *Sketches* was, in fact, compiled and published for the very purpose of drawing attention to matters of public concern, including prison conditions and mass incarceration. As Mr. Kurtz writes in the book's afterword: "Culture holds incredible power to translate aspects of society that can seem opaque or disconcerting into forms we can understand and sympathize with, culminating in a desire to improve the conditions we see to be deficient." *Id.* Mr. Kurtz

concludes the book by stating that *Sketches* aims to “catalyze more conversation, more art, and more action in regard to prisons and the people locked away in them.” *Id.* at 78. Given that Mr. Kurtz intended to advance public knowledge of mass incarceration and encourage prison reform efforts, the topics addressed in *Sketches* are “certainly . . . matter[s] of public concern” because the book advocates “change in public perception and law,” and encourages reflection on “a fundamental component of democracy.” *See Melzer*, 336 F.3d at 196.

In sum, *Sketches* is not about “an issue that is ‘personal in nature and generally related to [Mr. Kurtz’s] own situation,’” *Jackler*, 658 F.3d at 236; rather, the drawings and poetry voluntarily contributed by the incarcerated men at SSCF shed light on prison conditions and are a paradigmatic example of speech on a matter of public concern. *See Catletti*, 334 F.3d at 230.

3. The Balance of Interests Weighs in Favor of Reinstating Mr. Kurtz.

Mr. Kurtz’s interest in “commenting upon matters of public concern,” like prison conditions and mass incarceration, clearly outweighs VT DOC’s professed interests in “promoting the efficiency of the public services it performs through its employees.” *Pickering*, 391 U.S. at 568.

It is the government’s burden to “show[] that despite First Amendment rights, the employee’s speech so threatens the government’s effective operation that discipline of the employee is justified.” *Melzer*, 336 F.3d at 193. “The weight afforded each side of the *Pickering* balance” must consider “[t]he ‘manner, time, and place’ in which the speech occur[ed]” and “the content of the speech.” *Lewis*, 165 F.3d at 162. The more an employee’s speech “touches on matters of significant public concern, the greater the level of disruption to the government that must be shown.” *Id.*; *see also Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995).

As previously noted, *supra* Section II, the Directive plainly does not encompass Mr. Kurtz’s activities in compiling and helping to publish *Sketches*. Mr. Kurtz is not a media organization, nor is he a representative of a media organization. *See* Ex. D (defining “media organizations”). Yet, according to Mr. Kurtz’s termination letter, he was fired for failure to abide by the Media Access Directive—a rule that does not apply to him. Accordingly, the Agency’s supposed interest in Mr. Kurtz’s adherence to a Directive to which he is not subject cannot possibly safeguard the efficient administration of VT DOC’s services, as required under *Pickering*. Further, Mr. Kurtz did not interview any incarcerated individuals for *Sketches*, nor did he take or include any photographs, audio recordings, or video recordings of the incarcerated men featured in *Sketches*. *See id.* In this way, the Directive likewise does not apply to Mr. Kurtz’s contributions to *Sketches*, and VT DOC lacks any interest in “promoting the efficiency [of its] public services” through its enforcement of the Directive as applied to Mr. Kurtz. *Pickering*, 391 U.S. at 568. VT DOC failed to delineate disruption to any other function of the Agency, VT DOC, or SSCF. It appears, then, that

VT DOC's purported interest in enforcement of the Directive is mere pretext or a misapplication of the Directive.

By contrast, Mr. Kurtz's interests in protecting his First Amendment rights are unquestionable. Mr. Kurtz has an interest in protecting his constitutional right to speak freely on matters of public concern. *See Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 534–35 (1980) (holding that the First Amendment “embraces at the least the liberty to discuss publicly and truthfully all matters of public concern”) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101–102 (1940)); *see also Mills v. Alabama*, 384 U.S. 214, 218 (1966). Indeed, *Sketches* itself is a testament to Mr. Kurtz's committed interest in sparking public discussion about prison reform through art. By showcasing the stories and drawings of men he met while volunteering at SSCF, Mr. Kurtz's *Sketches* gives voice to what he conceives of as the mistreatment prisoners and the deficiencies of the prison system. *See Huth v. Haslun*, 598 F.3d 70, 75 (2d Cir. 2010) (holding that allegations of “pervasive or systemic misconduct by a public agency or public official” are matters worthy of “public attention”).

There is no legitimate justification under *Pickering* for terminating Mr. Kurtz. Simply put, the First Amendment protection afforded to *Sketches* and Mr. Kurtz as its co-author is significant—the book speaks *exclusively* to matters of public concern. *See Lewis*, 165 F.3d at 162 (“[t]he more [the] speech touches on matters of public concern, the greater the level of disruption the government must show.”). Moreover, the Agency has not and cannot point to issues with the “content of [Mr. Kurtz's] speech,” nor the manner in which he chose to disseminate his message. *See id.* (the time, place, manner, and content of speech should be weighed under *Pickering*'s balancing test). For its part, the Agency has failed to articulate a single valid interest served by terminating Mr. Kurtz pursuant to the Media Access Directive. *See Pickering*, 391 U.S. at 568. Accordingly, VT DOC unjustifiably punished Mr. Kurtz for engaging in protected First Amendment speech.

B. VT DOC Took Adverse Employment Action Against Mr. Kurtz For the Lawful Exercise of His First Amendment Rights.

Mr. Kurtz suffered “adverse employment action,” when VT DOC took unconstitutional retaliatory measures and terminated his volunteer position at SSCF for his work on *Sketches*. *See Dillon*, 497 F.3d at 251. In evaluating First Amendment retaliation claims, “[o]nly retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights constitutes an adverse action.” *Dawes v. Walker*, 239 F.3d 489, 493 (2d Cir. 2001). The term “adverse employment action” can refer to multiple types of action against an employee. *Anemone v. Metro. Transp. Auth.*, 629 F.3d 97, 120 n.14 (2d Cir. 2011) (recognizing that “‘adverse employment actions’ can take a wide variety of forms”). In the Second Circuit, “[a]dverse employment actions include discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand.” *Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 226 (2d Cir. 2006) (quoting *Morris*, 196 F.3d at 110); *see also Kaluczky v. City of White Plains*, 57 F.3d 202, 208 (2d Cir. 1995).

Additionally, in the First Amendment context, a “chilling effect” on the employee’s speech may constitute “adverse employment action.” *Morrison v. Johnson*, 429 F.3d 48, 51–52 (2d Cir. 2005).

In this case, adverse employment action was taken against Mr. Kurtz by VT DOC and the Agency when they terminated Mr. Kurtz’s registered volunteer position in retaliation for his work on *Sketches*. See Ex. J. Termination for engaging in First Amendment protected speech plainly constitutes adverse employment action that would deter similarly situated individuals of “ordinary firmness” from exercising their right to speak. See *Dawes*, 239 F.3d at 493; *Zelnik*, 464 F.3d at 226. Mr. Kurtz’s termination has likewise chilled his speech—he has not and cannot continue his volunteer work at SSCF—constituting additional adverse employment action. See *Morrison*, 429 F.3d at 51–52.

C. The Cause of Mr. Kurtz’s Termination by VT DOC was His Constitutionally Protected Speech.

The cause of Mr. Kurtz’s termination by VT DOC was his participation in the creation and publishing of *Sketches*, an exercise of his constitutionally protected right to free speech. In First Amendment retaliation cases, “[c]ausation 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.” *Morris*, 196 F.3d at 110; see also *Sumner v. United States Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990). “The causal connection must be sufficient to warrant the inference that the protected speech was a substantial motivating factor in the adverse employment action, that is to say, the adverse employment action would not have been taken absent the employee’s protected speech.” *Morris*, 196 F.3d at 110.

In this case, Mr. Kurtz has direct evidence that his participation in creating and publishing *Sketches*—a constitutional exercise of his free speech rights—was not just “a substantially motivating factor” for his termination, but *the only* motivating factor for his termination. See *Morris*, 196 F.3d at 110. The plain language of the termination letter cited only one reason for Mr. Kurtz’s dismissal: violation of Work Rule #1, “evidenced by [Mr. Kurtz’s] failure to comply with VT DOC Policy #26.01 Media Access as seen in [his] book *Sketches From Behind Prison Walls*.” Ex. J. Further, the termination proceedings began with an email from the Director of Victim Services, noting that the singular issue she wanted to discuss with Mr. Kurtz was that he “recently wrote a book.” Ex. I. This direct evidence demonstrates the causal connection between Mr. Kurtz’s speech and his termination. See *Morris*, 196 F.3d at 110. Given that *Sketches* was the only reason cited for Mr. Kurtz’s termination, the termination clearly would not have taken place absent Mr. Kurtz’s protected speech. See *id.*

IV. Conclusion

For the foregoing reasons, we request that the Agency and VT DOC immediately reinstate Mr. Kurtz in his registered volunteer capacity at SSCF, since he was terminated in

retaliation for exercising his constitutional rights. We request written confirmation of his reinstatement within fourteen days of today's date, January 7, 2025.

Please be advised that we would like to resolve this matter in a satisfactory manner for all parties involved, and would welcome a discussion for that purpose, but are concurrently reviewing all of Mr. Kurtz's legal options.

Sincerely,

**CORNELL LAW SCHOOL
FIRST AMENDMENT CLINIC⁴**

By: /s/ Jared Carter

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⁴ Clinic students Alexandra Kapilian, Zachary Jacobson, and Jae Hyung "John" Seo drafted portions of this letter. The First Amendment Clinic is housed within Cornell Law School and Cornell University in Ithaca, NY. Nothing in this letter should be construed to represent the views of these institutions, if any.