IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AARON BOOTERBAUGH, Plaintiff, v. CITY OF MORROW, *et al*., Defendants.	Civil Action File No. 1:23-cv-01810-ELR

PLAINTIFF'S PARTIAL SUMMARY JUDGMENT MEMO OF LAW

Plaintiff Aaron Booterbaugh ("Plaintiff" or "Booterbaugh"), through his undersigned counsel, submits this Memorandum of Law in Support of his Motion for Partial Summary Judgment on Count II (Facial Challenge to Social Media Policies) and Count III in part (Georgia Open Records Act Violation) of his Complaint (ECF 1). The material facts pertinent to these claims are not in dispute. From January 2022 to the present, Defendant City of Morrow ("the City") has maintained a "Social Media Policy" on its website. In November 2022, the City also enacted a lengthier social media policy (collectively, "the Policies"). Both Policies remain in effect. As a matter of law, both Policies unconstitutionally restrict speech because they are not reasonable in light of the purpose of the fora in which they apply. They are also viewpoint-based, vague, and overbroad. Plaintiff respectfully requests that this Court enjoin their enforcement.

Plaintiff is also entitled to judgment for the City's violation of the Georgia Open Records Act ("ORA"), O.C.G.A. 50-18-70, *et seq.*, arising from its refusal to produce the list of users blocked from its Facebook Page ("Blocked Users List" or "the List"). Plaintiff requested the List on July 15, August 30, and November 1, 2022. As a matter of law, on each of these dates the List was within the City's custody and control and was subject to disclosure, but the City refused to produce it. Plaintiff requests that this Court declare that the City violated the ORA, enjoin the City from similar future violations, and award Plaintiff civil penalties.

SUMMARY JUDGMENT STANDARD

"Summary judgment is appropriate when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Hardigree v. Lofton*, 992 F.3d 1216, 1223 (11th Cir. 2021) (quoting Fed. R. Civ. P. 56(a)). On summary judgment, the court views the evidence in the light most favorable to the non-moving party. *Id.*

ARGUMENT

I. The City's Social Media Policies Are Unconstitutional.

A. The City's Social Media Policies.

The City maintains several Facebook pages including "City of Morrow Georgia," located at https://www.facebook.com/cityofmorrow/ ("City's Facebook Page" or "the Page"), "City of Morrow Fire Department, GA," located at

https://www.facebook.com/MorrowGAfire/, and "Visit Morrow Ga," located at https://www.facebook.com/visitmorrowga/.

The City has two policies governing its social media pages. The first appears on the City's website, is titled "Social Media Policy" (the "Web Policy"), and has been in place since January 2022. Ex. 51 (ECF 46-34); *see also* Ex. 35 (ECF 46-18) at 331-332; Ex. 32 (ECF 45-13) at 353. The second is a lengthier policy adopted by the Morrow City Council via ordinance on November 22, 2022 (the "2022 Policy"). Ex. 27 (ECF 46-17) at 316-17.

Per the Web Policy, the City's social media pages "are managed as a limited public forum" and "were created to provide our followers access to information about the City of Morrow, and platforms through which to interact with the city." Ex. 51 (ECF 46-34). The 2022 Policy, in Sections 5 and 7, similarly envisions that users will engage in speech on the City's social media pages. Ex. 27 (ECF 46-17) § 5 ("Moderating User Input") and § 7 ("Disclaimer").

After adopting the 2022 Policy, the City continued to allow users to comment on its Facebook Page and manually moderated comments from November 22, 2022 to on or about January 22, 2023. *See* Ex. 19 (ECF 43-19) at P820-21; Ex. 18 (ECF 43-18) at 32-40 (compare comments manually hidden by "City of Morrow Georgia" versus comments automatically hidden by "Moderation Assist"); *see also* ECF 43, City IT Director Vuong Tran Transcript ("Vuong Tran Tr.") at 85:11-20. On January

22, 2023, in response to complaints about a controversial traffic stop by Morrow police, the City began automatically hiding all user-generated comments on its Page. Ex. 75 at P870. The City still allows users (unless they are blocked) to publicly post non-verbal reactions on the Page such as "likes," hearts, and emojis, and to repost information from the Page elsewhere on social media. *See, e.g.*, Ex. 11 (ECF 43-11); Ex. 13 (ECF 43-13); Ex. 14 (ECF 43-14); Ex. 19 (ECF 43-19). The City is free at any time to turn off the comments filter and allow user comments to be visible on the Page. Ex. 75 at P869. Meanwhile, the City's Facebook pages for the Fire Department and "Visit Morrow" do not hide or restrict user comments. *See* Ex. 76 (6 of 6 visible comments); Ex. 77 (20 of 20 visible comments).

Both the Web Policy and the 2022 Policy facially limit what users can say. The Web Policy states that the City "reserve[s] the right to restrict comments that are threatening, discriminatory, graphic, obscene, defamatory, profane, or hateful," "off-topic or repetitive," or contain "personal attacks." Ex. 51 (ECF 46-34). The 2022 Policy provides that "[t]he City reserves the right, without notification and at [its] sole discretion, to remove any objectionable content posted by the public," including "personal attacks and harassment of any kind," comments that are "off topic" or that "make unsupported accusations," and "language that is considered threatening, defamatory, abusive, vulgar, hateful or racist." Ex. 27 (ECF 46-17) § 7. Both the Web Policy and the 2022 Policy also contemplate *blocking* users from

engaging in or receiving any speech on the City's social media pages. Ex. 51 (ECF 46-34); Ex. 27 (ECF 46-17) § 7. The City has never provided training on interpreting or applying either the 2022 Policy or the Web Policy. ECF 43 (Vuong Tran Tr.) at 43:20; ECF 44, John Lampl Transcript ("Lampl Tr.") at 139:06-11 & 162:04-8; ECF 46, Jeff Baker Transcript ("Baker Tr.") at 44:10-14 & 170:05-7; ECF 45, Rochelle Dennis Transcript ("Dennis Tr.") at 62:21-23 & 82:04-5.

B. Legal Standard.

The Supreme Court has adopted a "'forum based' approach for assessing [speech] restrictions that the government seeks to place on the use of its property." *Minnesota Voters All. v. Mansky*, 585 U.S. 1, 11 (2018) (quotation omitted). This applies to government-operated social media accounts, which are part of the "modern public square." *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017) (referring to social media generally); *see, e.g.*, *Biedermann v. Ehrhart*, No. 1:20-CV-01388-JPB, 2023 WL 2394557, at *1, *7 (N.D. Ga. Mar. 7, 2023) (state representative's Facebook page was a public forum); *Garnier v. O'Connor-Ratcliff*, 41 F. 4th 1158, 1179 (9th Cir. 2022) (government officials' social media pages were designated public fora), *vacated*, 601 U.S. 205 (2024), *in light of abrogation on other grounds by Lindke v. Freed*, 601 U.S. 187 (2024); *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019) (president's Twitter account was a public forum), *vacated as moot*, 141 S. Ct. 1220 (2021); *Davison v.*

Randall, 912 F.3d 666, 687 (4th Cir. 2019) (government official's Facebook page was a public forum).

The type of forum determines the degree of judicial scrutiny that applies. *Bloedorn v. Grube*, 631 F.3d 1218, 1230 (11th Cir. 2011). Government power to restrict speech is most limited in traditional public forums such as "parks, streets, sidewalks, and the like," *Mansky*, 585 U.S. at 11, and in designated public forums opened by the government "for expressive activity by part or all of the public." *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). The government has more flexibility in limited public fora that the government has reserved for speech by "certain groups or for the discussion of certain topics." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). But even in limited public fora, the government "may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,' nor may it discriminate against speech on the basis of its viewpoint." *Id.* (internal citation omitted). The government must "articulate some sensible basis for distinguishing what [speech] may come in from what must stay out." *Mansky*, 585 U.S. at 16.

Municipal policies are also subject to the doctrines of vagueness and First Amendment overbreadth, regardless of the type of forum in which the policy applies. *See Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 573-74 (1987) (declining to decide forum standard where overbreadth doctrine

applied); *Nat'l Abortion Fed'n v. Metro. Atlanta Rapid Transit Auth.*, 112 F. Supp. 2d 1320, 1327-28 (N.D. Ga. 2000) (applying vagueness doctrine to limited public forum). A regulation is void-for-vagueness if it (1) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or (2) "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). The fair notice prong addresses the "special First Amendment concerns" that vague regulations create by their "obvious chilling effect" on constitutionally protected speech. *Reno v. ACLU*, 521 U.S. 844, 872 (1997). The enforcement prong addresses the possibility that vague regulations "improperly delegate basic policy matters to individuals with no policy-making authority for resolution in a subjective, case-by-case manner which creates the risk that the individual will either discriminate, consciously or unconsciously, against those views with which it disagrees or will apply the policy arbitrarily." *See Nat'l Abortion Fed'n*, 112 F. Supp. 2d at 1327. Relatedly, a regulation is overbroad if it threatens to chill a substantial amount of protected expression. *See Jews for Jesus*, 482 U.S. at 574.

C. The 2022 Policy and the Web Policy Fail Reasonableness Review.

The Web Policy states that the City's "social media pages are managed as a limited public forum." Ex. 51 (ECF 46-34). While the City currently hides all user comments from public view on its Facebook Page, it allows users to post non-verbal

reactions such as "likes" and to repost information from the Page on their own social media, all of which are expressive activities. *Cf. Trump*, 928 F.3d at 237 (noting that, on Twitter, "[r]eplying, retweeting, and liking are all expressive conduct that blocking inhibits"). These interactive features of the City's Page likewise constitute a limited public forum. *See Garnier*, 41 F.4th at 1179 (finding limited public forum where all comments were blocked but users could post non-verbal reactions). The City's social media pages are therefore, at a minimum, limited public fora where speech restrictions must be reasonable and viewpoint-neutral. *Rosenberger*, 515 U.S. at 829. The 2022 and Web Policies survive neither test. Both restrict speech based on viewpoint which is impermissible in any forum. *Searcey v. Harris*, 888 F.2d 1314, 1324 (11th Cir. 1989). And the Policies' viewpoint-neutral restrictions fail to "articulate some sensible basis for distinguishing what may come in from what must stay out." *Mansky*, 585 U.S. at 16. The Policies should therefore be enjoined.

1. The restrictions on "personal attacks," "harassment," "abusive," "racist" and "hateful" speech are viewpoint-based.

Take first the 2022 and Web Policies' restrictions on "personal attacks," "harassment," "abusive," and "hateful" content. These proscriptions are plainly viewpoint-based. They allow positive speech that supports or uplifts another person, but suppress negative speech that attacks, abuses, expresses hate towards, or criticizes another person. In an analogous case, the Supreme Court held that a prohibition on the registration of trademarks that "disparage … or bring … into

contemp[t] or disrepute" any "persons" was viewpoint-based and thus unconstitutional, regardless of the forum. *Matal v. Tam*, 582 U.S. 218, 227, 243-44 (2017). There, the Court explained that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Id.* at 244 (quotation omitted). Yet the 2022 and Web Policies' provisions prohibiting attacks, abuse, harassing, and hateful speech seek to do exactly that.

The government has no legitimate interest in preventing offensive or hateful speech. *See id.* at 246 (rejecting idea that the government "has an interest in preventing speech expressing ideas that offend . . . [because it] strikes at the heart of the First Amendment"). These sorts of restrictions on speech are unconstitutional viewpoint discrimination. *See Ison v. Madison Local Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 895 (6th Cir. 2021) (striking public comment restrictions on "antagonistic," "abusive" and "personally directed" speech as viewpoint-based); *Mama Bears of Forsyth Cnty. v. McCall*, 642 F. Supp. 3d 1338, 1358 (N.D. Ga. 2022) (prohibition on abusive remarks was viewpoint-based); *Marshall v. Amuso*, 571 F. Supp. 3d 412, 422 (E.D. Pa. 2021) (enjoining school board policy prohibiting public comments that were "personally directed," "abusive" or "personal attacks" as likely viewpoint discrimination); *Moore v. Asbury Park Bd. of Educ.*, No. Civ.A.05–2971, 2005 WL 2033687, at *13 (D.N.J. Aug. 23, 2005) ("[T]he words 'personally directed' . . . have the effect of an impermissible viewpoint-based restraint and are unconstitutional").

The 2022 Policy's restriction on "racist" speech is likewise unconstitutionally viewpoint-based. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 393-94 (1992) (bias-motivated crimes statute applicable to fighting words that "communicate[d] messages of racial, gender, or religious intolerance" was selective and unconstitutional). The City has no more legitimate interest in selectively preventing speech of this sort than it does in preventing other forms of offensive speech. *Id.* at 396 (demonstrating "special hostility towards the particular biases thus singled out" is "precisely what the First Amendment forbids"); *see also Matal*, 582 U.S. at 246 ("Speech that demeans on the basis of race, ethnicity . . . or any other similar ground is hateful; but . . . we protect the freedom to express the thought that we hate.").

2. The Policies' restrictions on "defamatory," "unsupported accusations," and "off-topic" speech are unreasonable.

A restriction is "constitutionally unreasonable [if] it lack[s] objective and workable standards." *Young Israel of Tampa, Inc. v. Hillsborough Area Reg'l Transit Auth.*, 89 F.4th 1337, 1346 (11th Cir. 2024). And even "reasonable grounds for limiting access to a nonpublic forum will not save a regulation that is in reality a facade for viewpoint-based discrimination." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985). Neither the 2022 nor Web Policy contain objective and workable standards by which to enforce their respective provisions. The Policies instead create substantial risk that they will be used as a façade for discretion-driven viewpoint discrimination.

Both the 2022 Policy and the Web Policy's restrictions on "defamatory" comments are facially unreasonable because the City has no legitimate interest in generally preventing false speech. *Am. Freedom Def. Initiative v. King Cnty.*, 577 U.S. 1202, 1206 (2016) (explaining "broad, content-based restrictions on false statements in political messages" are generally impermissible); *United States v. Alvarez*, 567 U.S. 709, 723 (2012) ("Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth."). Even if the City could permissibly regulate "defamatory" speech, its Policies lack objective and workable standards for doing so. "Defamatory" can be a legal term of art, but neither Policy makes any effort to define it that way so as to comport with Georgia law or the First Amendment. *See generally* O.C.G.A. § 51-5-1; *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). This makes the restriction on "defamatory" comments little more than a prohibition on critical or offensive speech. *See Draego v. City of Charlottesville, Va.*, No. 3:16-CV-00057, 2016 WL 6834025, at *20 (W.D. Va. Nov. 18, 2016) (striking restriction on defamatory attacks during public-comment period where council used "defamation" colloquially and not "to curb actual defamation, but something more akin to offensive speech").

Further underscoring the lack of "objective and workable standards" for enforcing the restriction on "defamatory," *Young Israel of Tampa*, 89 F.4th at 1346, City officials deposed in this case had different understandings of what the term

means.[1] Without any uniform definition or standard, the restrictions on "defamatory" comments are little more than a pretext for viewpoint discrimination, giving City officials unfettered discretion to suppress negative comments they disagree with or dislike, including unwelcome criticism of themselves or other City officials. *See Ridley v. Mass. Bay Transp. Auth*., 390 F.3d 65, 86 (1st Cir. 2004) ("Suspicion that viewpoint discrimination is afoot is at its zenith when the speech restricted is speech critical of the government because there is a strong risk that the government will act to censor ideas that oppose its own."). Indeed, several of the comments Booterbaugh left on the City's Page the day he was blocked criticized City officials and could be characterized as "defamatory" by an untrained administrator.[2]

By the same token, the 2022 Policy's prohibition on "unsupported accusations" serves no legitimate governmental interest and is so broad that it invites *ad hoc*, discretionary enforcement. The City cannot prohibit "unsupported accusations" when "false" speech writ large is constitutionally protected. *See Am. Freedom Def. Initiative*, 577 U.S. at 1206; *Alvarez*, 567 U.S. at 723. Indeed, an "unsupported

[1] For example, Vuong Tran believes that "defame" includes simply "bringing up something that happened in the past." ECF 43 (Vuong Tran Tr.) at 72:9-72:23. Lampl characterized it as "talking smack about" someone. ECF 44 (Lampl Tr.) at 149:9-149:18.

[2] *See* ECF 43 (Vuong Tran Tr.) at 76:10-11 (referring to Ex. 14 (ECF 43-14) at P817, and testifying Booterbaugh's comment linking to Clayton News Daily article describing Lampl's documented criminal history was "defamatory").

accusation" need not even be *false* to be prohibited under the 2022 Policy—it need only be "unsupported" by sufficient information or documentation in the eye of an administrator. Moreover, determining whether a comment is sufficiently "supported" would be a fact intensive inquiry requiring review of relevant "evidence" or "documentation."[3] It is hard to imagine that this inquiry could be performed in any way other than based on the predispositions of the administrator, particularly when the City did not train any of its moderators on how to administer the 2022 Policy. ECF 46 (Baker Tr.) at 164:7-11; ECF 43 (Vuong Tran Tr.) at 33:13-15.[4]

The 2022 Policy and the Web Policy additionally restrict "off-topic" comments. The Web Policy also restricts "repetitive" comments. These provisions are unreasonable because the City's interest in preventing "off-topic" and "repetitive" comments is suspect, at best. Although similar restrictions have been upheld in the public-meeting context, *see, e.g.*, *Rowe v. City of Cocoa, Fla.*, 358 F.3d 800, 803 (11th Cir. 2004), social media is different. As the Ninth Circuit recognizes, "[i]n physical city hall meetings, where there is limited time and space available for public

[3] Vuong Tran suggested that the commenter would "have to provide the evidence," but when asked what would be sufficient, he said "I'm not a[n] attorney or a judge, so I don't know." ECF 43 (Vuong Tran Tr.) at 50:9-17. Dennis suggested the administrator would need to determine if the supporting documentation was "editorial." ECF 45 (Dennis Tr.) at 88:16-89:6.

[4] Ironically, if a commenter included a link to a source to support their accusation, their comment would be automatically hidden from public view by a filter—a practice which has never been announced to the public. Ex. 17 (ECF 43-17) at 1556 ("link in comment" filter turned on Jan. 22, 2023).

remarks, lengthy, irrelevant or repetitious comments interfere with the rights of other speakers or prevent the government from accomplishing its business." *Garnier*, 41 F.4th at 1181 (quotations omitted). In contrast, no such risk exists on Facebook and other social media sites because other users may "simply scroll past repetitive or irrelevant comments," and comments and reactions have no effect on the original post. *Id.*; *see also Kimsey v. City of Sammamish*, 574 F. Supp. 3d 911, 921 (W.D. Wash. 2021) (excluding off-topic comments "is overbroad because the inclusion of any comments has effectively the same minimal[ly] distractive and dilutive effect").

The Policies' prohibitions on "off-topic" and "repetitive" comments also lack "objective, workable standards" that are "capable of reasoned application." *Mansky*, 585 U.S. at 21, 23. Instead, these prohibitions are susceptible to use for suppressing viewpoints. This risk is not hypothetical—indeed, Plaintiff was blocked in July 2022 after posting several comments criticizing City officials, some of which comments the officials characterized as "off-topic."[5] Query whether a user would be similarly sanctioned for "off-topic" or "repetitive" comments that praised City officials.

[5] Two of Booterbaugh's comments were in response to Lampl's post about an arsonist fire at the Olde Towne Morrow project (now called The District) and concerned Lampl's checkered history with that project. One of these comments was later manually "hidden" from public view. Ex. 11 (ECF 43-11) at P812-14; Ex. 12 (ECF 43-12) at 1630. City administrators disagree about whether this hidden comment was "off-topic" given the connection between Lampl and Olde Towne Morrow. *Compare* ECF 45 (Dennis Tr.) at 94:06-7 (comment was on-topic); *with* ECF 43 (Vuong Tran Tr.) at 64:22-65:17 (comment was off-topic) *and*

D. The Policies are unconstitutionally vague and overbroad.

Both the 2022 Policy and the Web Policy are separately invalid for their vagueness and overbreadth, regardless of the type of forum. *See Jews for Jesus*, 482 U.S. at 573-74; *Nat'l Abortion Fed'n*, 112 F. Supp. 2d at 1327-28. The Policies' provisions prohibiting "personal attacks," "abusive," "harassing," and "defamatory" comments, as well as "unsupported accusations," not only encourage viewpoint discrimination but leave users to guess what the prohibited terms mean. This produces a chilling effect where users will self-censor their criticism of public officials rather than risk having their comments deleted or being blocked from the page. *See Acosta v. City of Costa Mesa*, 718 F.3d 800, 811 (9th Cir. 2013) (invalidating public-comment policy that prohibited "personal, impertinent, profane, insolent, or slanderous remarks" as overbroad); *Bach v. Sch. Bd. of Va. Beach*, 139 F. Supp. 2d 738, 743-44 (E.D. Va. 2001) (invalidating restriction on "personal

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ECF 44 (Lampl Tr.) at 232:22-25 (comment was "[p]robably" off topic). Plaintiff's other comments that pre-dated his blocking concerned: (1) Lampl's criminal history vis-a-vis Olde Towne Morrow which was written in response to a post featuring a video of Lampl speaking at an event at that property (comment was later hidden), Ex. 14 (ECF 43-14) at P817, and (2) Baker's criminal history as former Morrow Police Chief which was written in response to a post featuring Baker and Lampl at a municipal conference with the caption "Together we are stronger" (comment remains visible). Ex. 13 (ECF 43-13) at P053. It is hard to see how criticism of public officials would ever be "off-topic" to a post featuring those officials, yet both Lampl and Baker testified these comments were off-topic. ECF 44 (Lampl Tr.) at 268:12-269:07; ECF 46 (Baker Tr.) at 85:17-88:02.

attacks" during public comment for overbreadth); *Draego*, 2016 WL 6834025, at *21-22 (invalidating restriction on defamatory attacks during public comment as overbroad and vague where council was "not applying defamation in the legal sense but instead in an undefined, colloquial one").[6]

The Policies' restrictions on vulgar, graphic, and profane remarks are separately unconstitutional because they are vague and overbroad. There is no general exception to the First Amendment for "profane" or offensive language. *See Cohen v. California*, 403 U.S. 15, 25 (1971) (overturning conviction of man who wore "Fuck the Draft" jacket in courthouse). Restricting vulgar, graphic, or profane comments is also vague and encourages arbitrary and viewpoint-based enforcement. Indeed, in *Mama Bears*, a similar rule prohibiting profane remarks during public comment periods was enjoined as unreasonable and vague. 642 F. Supp. 3d at 1338, 1356-57. The court explained that because the policy at issue had no limitation that required profanity to be "actually disruptive," it constituted an unreasonable restriction on speech. *Id.* at 1356. Similarly, here neither Policy limits administrators'

[6] The arbitrariness of these provisions is further underscored by the fact that the City's Page itself has engaged in speech that could be deemed a "personal attack" or "harassment" on other government pages. For example, the City once commented on a Metropolitan Atlanta Rapid Transit Authority's (MARTA) post calling its staff "incompetent." *See* Ex. 68 at 2 ("We were promised rail!... Just further proof of incompetent staff at Marta."). That the City seeks to prohibit others from making similar remarks on *its own* page reveals that its policies are little more than a guise to censor critical speech.

discretion to restrict comments with vulgar, graphic, or prophane language. This creates substantial likelihood for arbitrary, viewpoint-based enforcement. *See Cohen*, 403 U.S. at 26 ("[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.").

E. The Policies' are Unconstitutional Because They Allow Blocking.

The Policies authorize blocking users' access to the City's social media on a page-wide basis. The Web Policy provides that "[t]he agency reserves the right to remove and/or block anyone who posts inappropriate material as determined by the City of Morrow." Ex. 51 (ECF 46-34). The 2022 Policy also embraces blocking by providing: "Any individual who repeatedly violates the terms of this policy will be blocked form posting to this page." Ex. 27 (ECF 46-17) § 7.

Blocking access, such that the user cannot even see the page, is an extreme restriction on both expressing and receiving speech. This is because in addition to not being able to post comments, a blocked user also cannot "share" what the City has posted on the Page to his own friends with his own commentary, nor post non-verbal reactions selected from a pre-set list of options (e.g., "likes," "thumbs down," "mad face," etc.), nor even read what the City has posted on the page. *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); *Trump*, 928 F.3d at 237

(observing that replying, retweeting, and liking a tweet are all protected expressive conduct).

As noted above, the constitutionality of a speech restriction in a limited public forum depends on whether the restriction is "reasonable in light of the purpose served by the forum." *Rosenberger*, 515 U.S. at 829; *Cornelius*, 473 U.S. at 806. According to the Web Policy, the purpose of the City's limited social media fora is "to *provide our followers access to information* about the City of Morrow, and platforms through which to *interact with the city*." Ex. 51 (ECF 46-34) (emphasis added). This is echoed by the 2022 Policy which requires each City social media page to post a disclaimer stating, among other things: "This site is maintained by the City of Morrow *for the purpose of providing information* and *engaging the community*." Ex. 27 (ECF 46-17) § 7 (emphasis added). The City's dual purpose of providing information and community engagement is utterly defeated when a user cannot even view the page, nor post a non-verbal reaction, nor share content from the page elsewhere on social media with his own commentary. Moreover, barring a user from seeing, reacting non-verbally, or sharing information does nothing to advance the City's goal of preventing so-called "inappropriate" comments on its own pages. This is particularly true for the City's Facebook Page where all comments are currently hidden anyway, regardless of content. *See Garnier*, 41 F.4th at 1183 (holding that blocking user access to the page did nothing to further

defendants' goal of preventing repetitive comments where word filters currently prevented all comments). Finally, if the City were to stop hiding all comments on its Facebook Page, it would still retain the ability to filter comments that run afoul of any constitutionally permissible prohibitions contained in the City's Policies, making complete blockage from the page unnecessarily overbroad. *See id.* (observing that if the defendants decided to allow comments on their page, they would still be able to hide or delete individual comments that were unduly repetitious, thus rendering blocking a user's entire access to the page unconstitutional); *cf. Lindke,* 601 U.S. at 204 (cautioning that blocking users' access to government official's social media on a page-wide basis risks First Amendment liability); *England v. Jackson Cnty. Pub. Libr.*, 596 F. Supp. 3d 1164, 1179 (S.D. Ind. 2022) (banning patrons from public library was not narrowly tailored and violated patrons' right to speak and receive information). The blocking provisions of the 2022 and Web Policies are therefore not reasonable and thus unconstitutional.

F. Enjoining Enforcement of the Policies is an Appropriate Remedy.

Facial relief enjoining enforcement of a municipal policy is appropriate where, as here, a policy's speech restriction "may deter or chill constitutionally protected speech." *HM Florida-ORL, LLC v. Governor of Fla.*, No. 23-12160, 2023 WL 6785071, at *3 (11th Cir. Oct. 11, 2023). The "evils" of "placing unbridled discretion in the hands of a government official" to regulate private speech "engender

identifiable risks to free expression that can be effectively alleviated only through a facial challenge." *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988). Notably, a finding of overbreadth "suffices to invalidate all enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (quotations omitted). Because both Policies challenged here are unreasonable, subsumed by vagueness and overbreadth, and grant unfettered discretion to administrators, "[s]triking down any particular provisions of the [policy] would fail to accomplish what would be necessary to save the remainder." *Lamar Co., LLC v. City of Marietta*, 538 F. Supp. 2d 1366, 1375 (N.D. Ga. 2008). Accordingly, enjoining enforcement of the Policies as a whole is appropriate, rather than severing defective provisions. *See Café Erotica of Fla., Inc. v. St. Johns Cnty*, 360 F.3d 1274, 1292 (11th Cir. 2004) ("[S]everance of just this one provision will not address our concerns [of] unfettered discretion.").

II. The City Violated the Georgia Open Records Act.

A. Booterbaugh's Open Records Requests for the Blocked Users List.

After being blocked from the City's Facebook Page, Booterbaugh made three open records requests for the list of users currently blocked from the Page ("the Blocked Users List" or "the List"). First, on July 15, 2022, he requested records

"evidencing all Facebook profiles that have been blocked by the City of Morrow government agents." Ex. 38 (ECF 46-21), at 1-2. The City never responded.[7]

Second, on August 30, 2022, while still blocked, Booterbaugh made another request to the City, this time for "all files, records, and other documents . . . that . . . relate to the City of Morrow Facebook Blocked Users. I hereby request the Blocked Facebook Users List." Ex. 10 (ECF 46-6) at P263. On September 1, 2022, without having produced any responsive records, the City (through its attorney) responded: "it appears there are no additional documents responsive to your request held by the City of Morrow." Ex. 71 at 3. On September 2, 2022, Booterbaugh attempted to appeal this denial of his request by emailing the City Attorney:

> It is a fact that the City of Morrow maintains a Facebook page. It is a fact that the city of Morrow Facebook administrators Block Facebook users. It is a fact that the Facebook Administrator for the City can retrieve the list of Blocked users. The link below shows two (2) ways to retrieve the Facebook Blocked List of users.

Ex. 24 (ECF 44-17/46-15), at 647-48. Booterbaugh's appeal also provided a link to a Facebook Help Center Article titled, "How do I view the profiles banned or blocked from my Facebook Page?" *Id.* That same day, the City Attorney responded, "[t]he City is not the holder of the record, the social media platform is. No further

[7] The City later claimed its response to Plaintiff's separate request submitted on July 18, 2022 was responsive to his July 15, 2022 request for the Blocked Users List. Ex. 69 at 232; *id*. at 240-49. However, the July 19 response did not reference or include any information about blocked users. *Id.*

action will be taken in response to your email," and copied City Manager Baker. *Id.* at 647. Baker forwarded this response to Lampl, adding the comment "Lol."[8] *Id.*

On November 1, 2022, while Booterbaugh was still blocked, he requested the Blocked Users List for a third time in a demand letter sent by his counsel to the City Attorney, with Baker and Lampl copied. Ex. 47 (ECF 46-30) at P271-77. The letter again included a link to instructions on how to access the List. *Id.* at P277. The City again failed to produce it. A year later, the City produced the List in discovery as it existed in November 2023, after Booterbaugh had been unblocked. Ex. 9 (ECF 43-9) at 325.

B. Legal Standard.

The ORA provides that all public records, except those exempted by court order or law, shall be open for inspection and copying. O.C.G.A. § 50-18-71(a). This includes electronic records:

> [A]n agency's *use of electronic record-keeping systems must not erode the public's right of access* to records under this article. Agencies shall produce . . . printouts of electronic records or data from data base fields that the agency maintains using the computer programs that the agency has in its possession.

[8] "LOL" is commonly used as an acronym for "laugh out loud." *See* Marriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/LOL. However, Baker testified he meant "lots of luck." ECF 46 (Baker Tr.) at 141:9-11.

Id. § 50-18-71(f) (emphasis added). The ORA authorizes suit "against persons or agencies having custody of records open to the public" who fail to comply with the ORA. *Id.* § 50-18-73(a). An agency has "custody" where it has "some level of control and care over the records being sought." *Cardinale v. Keane*, 869 S.E.2d 613, 619 (Ga. Ct. App. 2022).

C. The City Violated the ORA by Failing to Produce Blocked Users List.

The City's failure to produce the Blocked Users List contravenes the ORA's explicit requirement that an agency must produce copies of electronic data from computer programs in its possession. The Blocked Users List was within the City's custody because the administrators of the City's Page, including Vuong Tran, had access to the List. ECF 43 (Tran Tr.) at 60:2-19; *id.* at 61:5-62:5 (testifying that he could have accessed the List but Defendants did not make him aware of Booterbaugh's requests). This comports with well-established principles of custody and control. *See Cardinale*, 869 S.E.2d at 619; *see also Schroeder v. Provident Life & Accident Ins. Co.*, No. 1:05-CV-790, 2008 WL 11400761, at *3 (N.D. Ga. June 5, 2008) ("[I]f Defendant can enter a simple query into its database or other computer information system and produce data stored therein, the data remains in Defendant's possession, custody, and control and should be produced" in discovery).

Johnson v. CIA, 330 F. Supp. 3d 628, 642-43 (D. Mass. 2018), is instructive on this point. There, the plaintiff requested information available to the Central

Intelligence Agency (CIA) via the federal Freedom of Information Act on its public-facing Twitter account—namely, a "list of user applications" connected with that account. The plaintiff had also provided the CIA with step-by-step instructions on how to find the relevant record on its account. *Id.* at 642. The court rejected the CIA's argument that following these instructions would have required it to create a record, instead holding CIA's search "was inadequate because it failed to follow [plaintiff's] instructions, which would allow the Agency to locate, not create, the responsive record." *Id.* This was true even though the list was hosted on Twitter's website rather than within the CIA's record system, because "[t]he makeup of this list is controlled by the Agency's own decisions with regard to its Twitter account." *Id.* at 643.

Likewise, here, by having the ability to block and unblock users, the City had control over the content of the Blocked Users List, making it an agency record subject to disclosure under the ORA. Despite having control over the List and instructions on how to access it, City officials made no effort to produce it in response to Booterbaugh's requests. *See* ECF 44 (Lampl Tr.) at 94:9-17, 96:7-12 (testifying that he did not attempt to access the List); ECF 46 (Baker Tr.) at 97:6-20, 101:6-21, 119:19-120:14, 142:3-143:23, 147:18-148:3 (testifying that he did not attempt to access or direct anyone else to access the List). The City has offered no justification for this failure. *See* O.C.G.A. § 50-18-74(a) (explaining that an agency

violates the ORA where it "fail[s] or refus[es] to provide access to records not subject to exemption"). Instead, City officials mocked Booterbaugh's requests ("Lol") and relied on the electronic nature of the City's Facebook data to frivolously "erode [Plaintiff's] right of access" to the List. *Id*. § 50-18-71(f). Plaintiff is therefore entitled to judgment as a matter of law on his claim that the City violated the ORA by failing, three times over, to produce the Blocked Users List.

CONCLUSION

Based on the undisputed material facts and as a matter of law, the City's Social Media Policies are unreasonable in light of the purpose of the fora in which they apply. They are also viewpoint-based, vague, and overbroad. Plaintiff respectfully requests that this Court declare the 2022 and Web Policies unconstitutional and enjoin their enforcement. Additionally, as a matter of law, the Blocked Users List was within the City's custody and control and was subject to disclosure at the time of each of Plaintiff's requests on July 15, August 30, and November 1, 2022. Without justification, the City refused to produce the List. Plaintiff respectfully requests that this Court declare that the City three times violated the ORA, enjoin the City from similar future violations, and award Plaintiff civil penalties.

Respectfully submitted this 24th day of April, 2024.

[signatures on next page]

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), I hereby certify that the within and foregoing **PLAINTIFF'S PARTIAL SUMMARY JUDGMENT MEMO OF LAW** has been prepared in compliance with Local Rule 5.1(B) in 14-point Times New Roman type face.

This 24th day of April, 2024.

/s/ Clare R. Norins
Clare R. Norins
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CERTIFICATE OF SERVICE

I certify that on April 24, 2024, I filed the foregoing **PLAINTIFF'S PARTIAL SUMMARY JUDGMENT MEMO OF LAW** by filing it on ECF in the U.S. Federal District Court for the Northern District of Georgia which caused electronic copies to be served on:

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