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

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

**PLAINTIFF'S OPPOSITION TO**
**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Aaron Booterbaugh ("Plaintiff" or "Booterbaugh") submits his Opposition to Defendants' Motion for Summary Judgment (ECF 51), which should be denied. Plaintiff relies upon and incorporates herein his Response to Defendants' Statement of Undisputed Material Facts and Plaintiff's Statement of Additional Material Facts, filed herewith, as well as Plaintiff's Motion for Summary Judgment (ECF 49).

## LEGAL 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." Fed. R. Civ. P. 56(a). "[A]ll evidence and factual inferences are viewed in the light most favorable to the non-moving party, and all reasonable doubts about the facts are

resolved in favor of the non-moving party." *Hardigree v. Lofton*, 992 F.3d 1216, 1223 (11th Cir. 2021).

## ARGUMENT

### I. Defendants violated Plaintiffs' First Amendment Rights by blocking him from the City Facebook Page and hiding his comments.

The City of Morrow ("the City") maintains a Facebook Page ("City Page" or "the Page") that allows users to post comments and non-verbal reactions, and to share content from the Page on their own social media (collectively, "interactive features"). When a government official or agency uses social media to communicate with the public about government duties and activities, the interactive features constitute a designated or limited public forum that is subject to the First Amendment.[1] Defendants admit that the City Page is a limited public forum. ECF 51-1 at 5. The First Amendment therefore prohibits viewpoint-based regulation of speech on the Page. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (viewpoint discrimination prohibited in limited public forum). Moreover,

[1] *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*, *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).

entirely blocking a user from accessing the Page as a response to the user's undesired comments is always an overbroad response that is unreasonable in light of the purpose of the Page, and therefore unconstitutional under the First Amendment.[2] As a jury could readily find that Plaintiff was blocked from the Page in violation of the First Amendment, judgment for Defendants on Count I must be denied.

A. Plaintiff was blocked from the Page and his comments were hidden.

The evidence supports that on July 13, 2022, Plaintiff was blocked from the City Page and some of his comments were hidden after he posted a series of comments criticizing Defendants Mayor John Lampl ("Lampl") and City Manager Jeff Baker ("Baker"). Two of Plaintiff's critical comments were in response to Lampl's post on the Page announcing that arson warrants had been issued in connection with a fire in "Olde Towne Morrow," a geographic area now called "the District." ECF 49-7 ("Arson Warrants Post"); ECF 43-12 at 1630. Lampl's history with Olde Towne Morrow is fraught. Prior to becoming mayor, Lampl had been Morrow's City Manager and then City Economic Development Director. ECF 44 (Lampl Tr.) at 43:4-17. In these roles, Lampl developed Olde Towne Morrow, "literally pulling it out of thin air," to create a mixed-use entertainment district to drive tourism to the City. *Id.* at 46:2-25, 47:22-48:3. Olde Towne Morrow opened

[2] Plaintiff incorporates by reference herein this argument as set forth in his Motion for Partial Summary Judgment. *See* ECF 49-1 (Pltff's SJ Brief) at 17-19.

in late 2009. *Id.* at 50:9-11. It shuttered around December 2010 because its structures did not comply with the City's fire codes. Ex. 28 (ECF 44-21) at 1. Lampl disagrees that this was why the property shut down, claiming it was "mostly based on politics." ECF 44 at 205:4-13.

In connection with Olde Towne Morrow, Lampl was indicted for conspiracy in restraint of free and open competition, false statements and writings, and perjury. ECF 49-8 at P959-963. The indictment alleged that Lampl submitted fire safety inspection reports for five buildings in Olde Towne Morrow that falsely stated that "the sprinklers were in compliance with the City of Morrow Code for issuance of a certificate of occupancy." *Id.* at P961-62. Lampl strenuously disputes these charges. ECF 44 (Lampl Tr.) at 195:11-14 (arguing "sprinkler systems are not required in those buildings"), 214:3-4 (arguing "a 5,000-square-foot building doesn't require a sprinkler system at all"), 218:1-6 (testifying he did not believe he endangered anyone's safety with respect to the Olde Towne Morrow Project). Lampl resolved the charges relating to false fire safety inspection reports by pleading to the lesser included offense of violating Clayton County Ordinance 42-63 (requiring commercial buildings to be protected with approved fire protection systems). ECF 49-9 at P969; ECF 49-15 § 42-63. The remaining indictment counts were *nolle prossed*. ECF 49-9 at P969. Lampl was later elected Mayor of Morrow, taking office in January 2020. ECF 44 at 39:15-23.

Against this backdrop, on July 13, 2022, Booterbaugh commented as follows on Lampl's Arson Warrants Post:

> I wonder if it will ever occur to any of the public that this entire place was a death trap! None of these bldgs was a home at this point, they were all intended to be commercial businesses. None of the bldgs were ever finished to "code". Rebuilding would at least mean the area would be rebuilt to code for commercial use and not a collection of fire hazards.
> That is IF we watch lampl and baker like hawks while they spend the city taxpayer's money on this commercial real estate developer's stubborn dream. lampl is supposed to be the Mayor of Morrow, not a self-serving real estate developer!
> This is lampl's baby! He cost the city $21 million the first time he built it and it's NEVER cleared a single dollar in profit, never has been fully operational. Thank goodness none of it was occupied. It should be clear to everybody that it was a death trap.
> The tiny city of Morrow, GA shouldn't be involved with developing real estate! . . . Clear the entire site of the bldgs that are left there, that are also not to code. . . Leave the RE development to commercial interests and not the taxpayers!
> I found the above post on the Morrow GA Citizens for a Better Government Facebook page for reference.
> This is a First Amendment Audit.

ECF 43-11 at P814. Booterbaugh's next comment was similarly critical:

> This post is from.
> Morrow GA Citizens for Better Government
> lampl has renamed it The District. I guess he decided there was too much "history" to Olde Towne Morrow. Haha. He's just moving businesses in there without fixing any of the problems that existed from the beginning. Same conditions exist as before, no commercial sprinklers, . . . and the Bridge is built on property that belongs to the Mall not the city, without the permission of the Mall owners. The DeTar administration settled all the debt for common use fees, but I don't know if lampl has kept that up or not. Exactly what we told everybody he'd do if he won. At least he's consistent, I suppose.
> This is a First Amendment Audit.

ECF 43-11 at P813. This second comment was "hidden" by the City Page, as confirmed by the City's Facebook data. ECF 43-12 at 1630.

Also, on July 13, 2022, Booterbaugh commented on the City's post that featured a photo of Lampl and City Manager Baker with the caption "City of Morrow is at the Georgia Municipal Association this weekend. Together we are stronger!" ECF 43-13 at P052-53. Booterbaugh's comment linked to a Clayton News Daily article titled, "Jeff Baker resigns as Morrow's police chief." The article discusses the ignominious end to Baker's law enforcement career following his arrest for driving under the influence in a City-owned vehicle. ECF 46-20 at P171-74.

Also, on July 13, 2022, Booterbaugh commented on the City's post of a video featuring Lampl speaking on a stage in Olde Towne Morrow at the City's July 4, 2022 "Freedom Fest." ECF 43-14 at P817; ECF 44 (Lampl Tr.) at 246:6-10. Booterbaugh's comment linked to a different Clayton News Daily article titled, "Former Morrow official John Lampl pleads no contest to wrongdoing in failed Olde Towne Morrow project." ECF 43-14 at P817. The article discusses Lampl's plea to resolve his criminal charges in connection with Olde Towne Morrow. ECF 44-21 at 1. This comment was also "hidden" by the City Page, as confirmed by its Facebook data. ECF 43-15 at 1629.

The same day that Booterbaugh posted the forgoing critiques of Lampl and Baker, two of which were uncontrovertibly hidden, he was also blocked from the

Page. ECF 49-3 (Booterbaugh Decl.) ¶¶ 8-11; ECF 43-12; ECF 43-15. Plaintiff promptly texted his girlfriend, former Morrow Councilwoman Van Tran, stating that his comments were being hidden and that he had been blocked. He also sent her a screenshot showing that he could no longer locate the Page, confirming that he was blocked. ECF 49-13 at 826, P831.

Defendants' current purported belief that Booterbaugh was never blocked emerged for the first time after this litigation was filed; Defendants never once mentioned it between July 13, 2022 and January 22, 2023 when Booterbaugh and his counsel were repeatedly communicating with the City asking that he be unblocked. *See* Ex. 72 (ECF 50-4) at P148-52. Defendants also failed to preserve their own data that would have showed Plaintiff was blocked.[3] And for purposes of summary judgment, Lampl and Baker's purported lack of knowledge of Booterbaugh's blocking or unblocking (ECF 51-3 (Lampl Decl.) ¶¶ 9, 12, 15; ECF 51-4 (Baker Decl.) ¶¶ 11-12, 14) do not defeat Plaintiff's contemporaneous screenshots and messages documenting that he was blocked. Rather, Lampl and Baker's claimed lack of knowledge serves only to create disputed questions of fact as to their involvement. *See Malibu Media, LLC v. Fitzpatrick*, No. 1:12-CV-22767, 2013 WL 5674711, at *3 (S.D. Fla. Oct. 17, 2013) (denying summary judgment to

[3] *See* ECF 55 & ECF 55-1 (Plaintiff's Motion and Memorandum of Law in Support thereof seeking sanctions for Defendants' spoliation of Electronically Stored Information pursuant to Federal Rule of Civil Procedure 37(e)).

defendant where his IP address was used to commit copyright infringement and defendant's denial of involvement, based on three different theories as to how a neighbor could have connected to his guest network, was "not corroborated by conclusive evidence").

B. Lampl blocked Plaintiff.

A jury could readily find that on July 13, 2022, Lampl hid Booterbaugh's comments and blocked him from the City Page. Lampl had both opportunity and motive to do so. First, Lampl had administrative access to the Page that enabled him to hide comments and block users. ECF 43-2 at 1548, 1555. Of the few administrators with this type of access, Lampl was the most active. ECF 49-4 (Snively Decl.) ¶ 4; ECF 49-18 at 1-3, 5-6, 13, 21-22, 45, 59, 62-63.

Second, Lampl had a viewpoint-based motive to block Booterbaugh and hide his comments. It was well known among City staff that Lampl was sensitive about his criminal history in connection with Olde Towne Morrow. ECF 49-4 (Snively Decl.) ¶ 7. Several of Booterbaugh's July 13, 2022 comments highlighted this history. Specifically, Booterbaugh left two of his most critical comments on the Arson Warrants Post that, according to the City's Facebook data, Lampl had authored. ECF 43-12 at 1630. Both comments described Lampl's nefarious history with Olde Towne Morrow, including fire code violations, and one of these comments was indisputably hidden. ECF 43-11 at P813-814; ECF 43-12 at 1630. Lampl

strongly disagrees these comment's perspective as he believes the abandonment of Olde Towne Morrow was "mostly based on politics" and not because the structures failed to meet the City's fire code. ECF 44 (Lampl Tr.) at 205:10-13. Meanwhile, Booterbaugh's comment on the City's "Freedom Fest" Post linked to a Clayton News Daily article that discussed the resolution of Lampl's criminal charges stemming from Olde Towne Morrow. ECF 43-14 at P817. Lampl also disagreed with this article's viewpoint, stating that it was "from somebody who just threw things together, and it's highly inaccurate." ECF 44 (Lampl Tr.) at 207:14-16.

Third, Lampl harbored personal animosity towards Booterbaugh based, in part, on Booterbaugh's dating former Morrow councilwoman Van Tran. ECF 47 (Booterbaugh Tr.) at 16:11-14, 47:24-48: 12. Lampl describes Van Tran as "psycho." *Id.* at 32:1-16, 61:22-23, 72:25, 133:20-22, 219:17-23. Lampl views Booterbaugh and Van Tran as one and the same. *Id.* at 37:19-22. Lampl characterized Booterbaugh as "unhinged" and "a tool." *Id.* at 37:23-25, 38:14, 235:22. Lampl also emailed Defendant Baker that Booterbaugh "reminds me of the scarecrow in the Wizard of Oz," which Lampl explained was an insult to Booterbaugh's intelligence because the scarecrow has no brain. ECF 44-16 at 508; ECF 44 (Lampl Tr.) at 86:4-13. Lampl's unabashed antipathy towards Booterbaugh reinforces that Lampl disliked Booterbaugh's perspective.

The foregoing cumulative evidence is more than sufficient for a jury to find that Lampl blocked Booterbaugh from the City Page based on disagreement with his viewpoint. Faced with this reality, Defendants attempt to argue that even if Booterbaugh was blocked, it did not relate to viewpoint because his two comments that were hidden were "off-topic." ECF 51-1 (Defts' Br.) at 4-7. This theory is unavailing for several reasons. First, the City's then-operative 2013 Social Media Policy did not prohibit "off topic" comments. *See* ECF 43-5 (2013 Policy). So, to make this argument, Defendants have to rely on the "off-topic" provision of the City's online Social Media Policy ("Web Policy"), which Defendants elsewhere argue was not a City policy at all. *Id.* at 9-10 (denying municipal liability on purported basis that Web Policy was not a policy). Defendants cannot have it both ways; they cannot rely on the Web Policy to justify City action when it suits them but disavow the Policy when it becomes a liability.

Second, Booterbaugh's comments were plainly **not** "off topic."[4] Third, even if his comments could be deemed "off topic," entirely blocking Booterbaugh from

[4] Lampl's Arson Warrants Post concerned a fire in Olde Towne Morrow. Lampl had previously been indicted for making false statements relating to fire safety in Olde Towne Morrow. ECF 49-8 at P961-62. Plaintiff's negative comments about Lampl's history with fire safety in Olde Towne Morrow and the project's current conditions therefore relate directly to the Arson Warrants Post. *See* ECF 45 (Dennis Tr.) at 94:6-7 (former City Page administrator testifying that comment was not "off-topic").

the Page was an overbroad response that was unreasonable in light of the purpose of the Page, and therefore unconstitutional.[5] Finally, Defendants' denial of blocking other users or hiding other comments only serves to reinforce that Lampl's singled out Booterbaugh for blocking because of his critical viewpoint. *Cf. Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 631 (2d Cir. 2005) (denying summary judgment to school that censored student's religious poster; while poster was arguably not responsive to the teacher's assignment, evidence supported inference that officials "would not necessarily have similarly censored secular images that were equally non-responsive"). In sum, there is sufficient evidence from which a jury could find that Lampl both hid Booterbaugh's comments and blocked him in retaliation for his criticisms. Defendants' "off topic" defense fails because it at most creates a jury question as to whether "off topic" or viewpoint discrimination

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Booterbaugh separately commented on the City's "Freedom Fest" Post by linking to an article about Lampl's Olde-Towne-Morrow-related criminal charges. Booterbaugh did so because the "Freedom Fest" Post featured a video of Lampl on stage in Olde Towne Morrow. Booterbaugh's comment, albeit negative, therefore directly related to both the location and the person depicted in the City's post.

Finally, Booterbaugh commented on the City's post of a picture of Baker and Lampl with the caption, "Together we are stronger," by linking to an article about Baker's resignation as police chief. Albeit negative, this comment clearly related to the original post because it pointed out the irony of claiming that disgraced police chief Baker was making the City stronger.

[5] Plaintiff incorporates by reference herein this argument as set forth in his Motion for Partial Summary Judgment. *See* ECF 49-1 (Pltff's Br.) at 17-19.

accounts for Booterbaugh being blocking, and under either explanation, blocking was an unconstitutionally overbroad, unreasonable response. ECF 49-1 at 17-19.

## II. The City is liable for violating Plaintiff's First Amendment rights.

If a jury finds that Lampl blocked Booterbaugh from the City Page in violation of the First Amendment, the City is liable on three different grounds with no defense of qualified immunity. *Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (municipalities may not assert qualified immunity).

### A. Lampl acted as final policy maker.

Lampl's decision to block Booterbaugh was not constrained by City policy and was not subject to review. Lampl therefore acted as final policy maker when he blocked Booterbaugh. "A municipality may be held liable for a single act or decision of a municipal official with final policymaking authority in the area of the act or decision." *McMillian v. Johnson*, 88 F.3d 1573, 1577 (11th Cir. 1996). This includes one-off decisions where a final policy maker takes "a course of action tailored to a particular situation and not intended to control decisions in later situations." *Scala v. City of Winter Park*, 116 F.3d 1396, 1399 (11th Cir. 1997) (quoting *See Pembaur v. City of Cincinnati,* 475 U.S. 469, 481 (1986)). Thus, even if Booterbaugh were the only user Lampl ever blocked from the City Page, municipal liability would still attach. Meanwhile, a government official such as Lampl becomes a final policymaker when his "discretionary decisions are not constrained by official

policies and are not subject to review." *Mandel v. Doe*, 888 F.2d 783, 792 (11th Cir. 1989) (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 125-28 (1988)).

Here, Lampl's decision to block Booterbaugh was unconstrained by policy. As the City concedes, "in July 2022, the City did not have an official policy addressing the City's procedures for blocking users." ECF 51-1 (Defts' Mot.) at 10. The 2013 Social Media Policy in effect in 2022 was silent on blocking users. *See* ECF 43-5 (2013 Policy); ECF 51-1 at 9 ("[T]he 2013 Policy does not have any procedure for blocking individuals[.]"). And the City disclaims that the Web Policy, which contemplates blocking, was actually a policy. ECF 51-1 at 9.[6] Moreover, neither Lampl nor the other employees with administrative access to the City Page were trained on any policy. ECF 45 (Dennis Tr.) at 62:21-23, 71:14-21; ECF 43 (Vuong Tran Tr.) at 33:13-15, 34:17-21, 38:13-19, 105:14-23; ECF 44 (Lampl Tr.) at 126:3-14, 139:6-11; ECF 46 (Baker Tr.) at 41:9-14. They instead administered the

[6] Of course, if the Web Policy were official policy, Lampl's blocking Booterbaugh pursuant to the Web Policy would plainly establish municipal liability. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978) (Municipal liability attaches "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."); *Calhoun v. Ramsey*, 408 F.3d 375, 379-80 (7th Cir. 2005) ("[O]ne application of the offensive policy resulting in a constitutional violation is sufficient to establish municipal liability."). *See also* ECF 49-1 (Pltff's Br.) at 17-19 (explaining that blocking access to City Page is always overbroad, unreasonable in light of purpose of the forum, and thus unconstitutional).

Page based solely on their own discretion. ECF 45 (Dennis Tr.) at 71:5-19. Lampl thus operated outside of and unconstrained by City policy in blocking Booterbaugh.

Lampl's decision to block Booterbaugh was also not subject to administrative review. The 2013 Policy contemplated that the City Manager or his designees (*i.e.*, "Social Media Administrators") would supervise the City's social media. *See* Ex. 5 (ECF 43-5) (2013 Policy) at P059; ECF 46 (Baker Tr.) at 40:3-17. But in practice, City Manager Baker admitted that he did not know if the 2013 Policy was being followed in 2022. ECF 46 (Baker Tr.) at 40:9-22. Baker never had administrative access to the City Page to review what those with access were doing, including blocking users. *Id*. at 27:14-19, 147:20-21; ECF 43 (Vuong Tr.) at 25:8-18. Indeed, Baker was not even aware that Lampl had administrative access to the Page, despite Lampl's being its most active administrator in July 2022. ECF 46 (Baker Tr.) at 34:11-13, 35:16-36:7; ECF 49-4 (Snively Decl.) at ¶ 4; ECF 43-2 at 1550-55; ECF 49-16 at P956; ECF 49-18 at 1-3, 5-6, 13, 21-22, 45, 59, 62-63. Baker's ignorance of Lampl's administration of the Page means Baker certainly was not the final arbiter of Lampl's decisions with respect to the Page. Further, Baker testified that Lampl did not need Baker's permission to act on behalf of the City, that he has never reversed any decision made by Lampl, and that he "ha[d] no idea" if he would have the authority to reverse Lampl's decision to block a user. ECF 46 (Baker Tr.) at 13:13-19, 50:15-22, 51:6-8. Finally, Baker never designated any Social Media

Administrators under the 2013 Policy to supervise the City Page in his stead. ECF 46 (Baker Tr.) at 53:19-54:10.[7] It is thus undisputed that Lampl's decision to block Booterbaugh was simply unreviewed by Baker or anyone else. As Lampl was also unconstrained by any City policy, as discussed above, Lampl therefore acted as the City's final policy maker when he blocked Booterbaugh from the City Page. *See Mandel*, 888 F.2d at 794 (physician's assistant was final policy maker on medical affairs at roadside jail because, in practice, he operated without supervision or review, except as he deemed appropriate); *Howard v. Wilkinson*, 380 F. Supp. 3d 1263, 1287-88 (M.D. Fla. 2019) (nurse was final policy maker at county jail where "vague and standard-less" policies did not constrain her and her decisions were not subject to administrative review); *Robinson v. Integrative Detention Health Services, Inc.*, No. 3:12-cv-20, 2014 WL 1314947, at *9-10 (M.D. Ga. Mar. 28, 2014) (health care company had final policymaking authority at county jail where there was no operative county policy and the company's decisions were not subject to review). Lampl's single decision to block Booterbaugh triggers municipal

[7] City IT Administrator Vuong Tran did not supervise the Page. Tran's only involvement was to give administrative access to other employees. He did not review or know what others, including Lampl, were doing on the Page. ECF 43 (Vuong Tr.) at 27:10-24, 31:5-14, 32:1-10, 53:7-25, 63:12-18, 92:22-25, 110:3-6.

liability. *See McMillian*, 88 F.3d at 1577 ("municipality may be held liable for a single act or decision of a municipal official with final policymaking authority").[8]

B. Failure to train caused Booterbaugh's rights violation.

If a jury finds that Lampl blocked Booterbaugh from the City Page in violation of the First Amendment, a jury could also find that this was the direct result of the City's deliberately indifferent failure to train Lampl or anyone else administering the Page on how to do so consistent with the First Amendment.

Municipal liability attaches when a city's failure to train its employees to carry out their duties in a constitutional manner amounts to deliberate indifference. *See City of Canton v. Harris*, 489 U.S. 378, 386-92 (1989). Deliberate indifference does not require proof of repeated constitutional violations. Rather, "a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability." *Bd. of Cty. Comm'rs v. Brown*, 520 U.S.

[8] Lampl's acting as final policymaker is not inconsistent with the City's position that Baker was also a final policymaker for the City Page. The Eleventh Circuit recognizes that "[w]ith respect to a particular action, more than one official . . . may be a final policymaker; final policymaking authority may be shared." *McMillian*, 88 F.3d at 1578. Here, Lampl at a minimum shared final policy-making authority with Baker given that he is the City's chief executive (Ex. 67 (ECF 49-17) at § 2.32(2)); he was far more involved than Baker in administering the City Page (ECF 49-4 at ¶ 4; Ex. 68 (ECF 49-18) at 1-3, 5-6, 13, 21-22, 45, 59, 62-63; ECF 46 (Baker Tr.) at 27:14-19), and Baker deferred to Lampl's decisions (ECF 46 (Baker Tr.) at 13:13-19, 50:15-22, 51:6-8).

397, 409 (1997). In the Eleventh Circuit, "deliberate indifference" requires that "a plaintiff must present some evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action." *Gold v. City of Miami*, 151 F.3d 1346, 1350 (11th Cir. 1998).

Here, it was obvious and known that administering a government social media page would involve First Amendment issues, including as relates to blocking users.[9] City Manager Baker testified "that's common knowledge" that blocking someone on social media could create a First Amendment issues. ECF 46 (Baker Tr.) 164:23-165:3. Baker and Mayor Lampl were both aware that blocking a user could be a liability risk as evidenced by their asking Morrow Deputy Chief of Police David Snively—who Baker viewed as the City's resident "social media expert"—whether users could be blocked from the City's social media. ECF 46 (Baker Tr.) at 43:13-19; ECF 49-4 (Snively Decl.) at ¶¶ 5-6. Snively encouraged them, without success, to attend training.[10] Finally, the day after Booterbaugh requested to be unblocked from the City Page, Lampl emailed Baker suggestions for social media compliance

[9] *See generally Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021); *Attwood v. Clemons*, 818 F. App'x 863 (11th Cir. 2020); *Robinson*, 921 F.3d 440 (5th Cir. 2019); *Knight*, 928 F.3d 226; *Davison*, 912 F.3d 666.

[10] Snively invited Baker, Lampl, and other employees with administrative access to the City Page to attend a Georgia Municipal Association training on social media presented by the First Amendment Clinic. ECF 44-18. Snively's invitation went unheeded by Baker and others. ECF 44 (Lampl Tr.) at 157:10-11; ECF 45 (Dennis Tr.) at 112:2-10; ECF 46 (Baker Tr.) at 58:22-24.

training. ECF 46-22; ECF 46-24. Collectively, these facts show that both Baker—who Defendants identify as the final policy maker for the City's social media (ECF 51-1 (Defts' Br.) at 3)—and Lampl knew of the need for training. Yet they took no action to train employees with administrative access to the City Page on how to constitutionally administer it, deferring instead to each administrator's complete discretion. ECF 45 (Dennis Tr.) at 62:21-23, 71:5-21; ECF 43 (Vuong Tran Tr.) at 33:13-15, 34:17-21, 38:13-19, 105:14-23; ECF 44 (Lampl Tr.) at 126:3-14, 139:6-11; ECF 46 (Baker Tr.) at 41:9-14, 44:10-17.

At a minimum, Baker and Lampl's failure to train creates a jury question as to municipal liability because a complete lack of training in the face of a known need gives rise to the inference that the City was deliberately indifferent. *See Littell v. Houston Indep. Sch. Dist.*, 894 F.3d 616, 627 (5th Cir. 2018) (noting that fact finder is "entitled (but not required) to infer that the [municipality] acted with deliberate indifference" if it knew officials "would certainly be placed in situations implicating [constitutional] law," knew the officials "would lack the legal knowledge necessary to handle those situations," and "failed to provide those officials any legal training on the subject"); *Ybarra v. Davis*, 489 F. Supp. 3d 624, 634 (W.D. Tex. 2020) (deliberate indifference could be inferred from county's total failure to train deputies on constitutional issues likely to recur during police stops).

C. Baker and the City Council chose to take no action.

Municipal liability attaches where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur*, 475 U.S. at 483-84. Omissions can also constitute a course of action by a policy maker where there is notice of a constitutional violation accompanied by failure to take steps to stop it. *See Carter v. Morris*, 164 F.3d 215, 218 (4th Cir. 1999) ("Municipal policy may be found … in certain omissions on the part of policymaking officials that manifest deliberate indifference to the rights of citizens.") (internal citations omitted); *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 127 (2d Cir. 2004) ("[A] single instance of deliberate indifference to subordinates' actions can provide a basis for municipal liability.").

Here, if Baker (in addition to Lampl) was the final policy maker for the City's social media blocking decisions as Defendants assert (ECF 51-1 (Defts' Br.) at 3), it is undisputed that he knew Booterbaugh was asserting he was blocked based on viewpoint yet he chose to do nothing about it. The City is liable for Baker's inaction. On July 20, 2022, approximately a week after Booterbaugh was first blocked, he emailed the City Clerk and copied Baker with the subject line: "Facebook Profile Unblock Request." ECF 46-22 at 439. Therein, he asked that his access to the City's Facebook Page be restored. *Id.* Baker understood this to be an unblocking request.

ECF 46 (Baker Tr.) at 102:4-12. Baker had authority under Morrow's Charter to investigate and direct that Booterbaugh be unblocked. ECF 46 (Baker Tr.) at 102:4-12; ECF 49-17 §§ 2.29 & 2.30. But without asking Lampl or anyone else if Booterbaugh was blocked, and without conducting any other investigation or inquiry, Baker claims he simply assumed that Booterbaugh was not blocked and took no action. ECF 46 (Baker Tr.) at 103:25-104:1, 102:4-15, 102:19-21, 103:13-1. Baker never informed Booterbaugh that he had come to this assumption. ECF 46 (Baker Tr.) at 149:6-15. Instead, the day after receiving Booterbaugh's request to be unblocked, Baker began working internally to update the City's social media policy. ECF 46-23 at 461.

Over the next few months, Baker was copied on multiple follow up communications about Booterbaugh's requests for the Blocked Users List and to himself be unblocked. *See* ECF 46-27 at P505; ECF 46-28 at 513; ECF 46-15 at 647. At no point did Baker attempt to access, or direct anyone else to access, the Blocked Users List to investigate his assumption that Booterbaugh was not blocked. ECF 46 (Baker Tr.) at 27:8-10, 97:6-16, 120:8-14, 143:3-5, 147:22-148:1.

On November 1, 2022, Baker received a letter from Booterbaugh's counsel explaining and attaching evidence that Booterbaugh had been blocked based on viewpoint in violation of the First Amendment and requesting that he be unblocked. ECF 46-30 at P270-P277. Despite this explicit notice of an alleged constitutional

violation, Baker still chose not to investigate or make any inquiries. He continued to do nothing. ECF 46 (Baker Tr.) at 147:18-148:20, 149:1-9. Booterbaugh remained blocked for over two more months. ECF 49-3 (Booterbaugh Decl.) ¶ 19.[11] Baker's animus towards Booterbaugh motivated this deliberate inaction.[12]

*Ware v. Unified Sch. Dist. No. 492*, 881 F.2d 906 (10th Cir. 1989), *modified on other grounds*, 902 F.2d 815 (10th Cir. 1990), is instructive on municipal liability arising from the failure to investigate. There, an employee alleged she was being terminated in retaliation for taking a public stand on a bond issue. *Id*. at 913. The school board was aware of her allegations of retaliation, but failed to ask the

[11] Baker claims he deferred to the City Attorney to investigate Booterbaugh's claim, but does not know what steps she took. *Id*. at 149:3-5. The City Attorney had no administrative access to the City Page and could not verify whether Booterbaugh was blocked or unblock him. ECF 43-2 at 1549-55; ECF 49-10 at 8-9. Neither the City Attorney nor Baker tasked IT Administrator Vuong Tran to investigate if Booterbaugh was blocked. This is apparent from Tran's testimony that he does not know whether Booterbaugh was blocked and never tried to unblock him, and he did not access the Blocked Users List in 2022. ECF 43 (Vuong Tr.) at 54:5-9, 60:2-9, 103:8-19. Discovery has not uncovered who unblocked Booterbaugh.

[12] Former City of Morrow Economic Development Director Rochelle Dennis testified that after receiving Plaintiff's counsel's November 1, 2022 letter, Baker made "a series of disparaging comments about Booterbaugh, basically that he's an idiot." ECF 45 (Dennis Tr.) at 106:14-108:16. Baker also mocked Booterbaugh in private emails with Lampl. *See* ECF 46-14 at 508 (writing "FYI – wonder what he is looking for??" regarding request for emails); ECF 46-15 at 647 (writing "Lol" when request for Blocked Users List denied). Baker further criticized Booterbaugh for making Open Records Requests and expressed frustration that Booterbaugh was dating councilwoman Van Tran. *See* ECF 46-28 at 13, 513; ECF 46-29 at 586.

superintendent recommending her termination any questions about his reasons. *Id*. This failure to inquire created a jury question as to whether the board was deliberately indifferent to the employee's First Amendment rights when it approved her termination. *Id*.

Similarly, here, Baker was aware that Booterbaugh was alleging First Amendment retaliation due to being blocking from the City Page. Baker's failure to investigate or make any inquiries, even into the threshold matter of whether Booterbaugh was blocked, and his gratuitous assumption that Booterbaugh was not blocked, creates a jury question regarding whether he was deliberately indifferent to the on-going violation of Booterbaugh's rights. *See Amnesty Am.*, 361 F.3d at 126 (liability attaches where "policymaker was aware of a subordinate's unconstitutional actions, and consciously chose to ignore them, effectively ratifying the actions"); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 902 (1st Cir. 1988) (following notification of constitutional violations, "it is reasonable to infer that the *failure* to take [corrective] steps … constitutes a choice 'from among various alternatives.' One obvious 'alternative' is to do something to make the violations stop.").

The Morrow City Council also failed to act. It had no authority under Morrow's charter or the 2013 Policy to remedy social media blocking decisions of its administrators without Baker's assistance. ECF 49-17 § 2.30 ("[T]he city council or its members shall deal with city officers and employees … solely through the city

manager[.]"). But even if it had, the Council effectively ratified Booterbaugh's blocking by failing to investigate or take any action to unblock him after the entire Council received the same November 1, 2022 letter that Baker did, asserting that Booterbaugh was blocked in violation of his First Amendment rights. Ex. 48 (ECF 46-31) at 752. Without investigation or inquiry, the City, via its attorney, simply denied violating Booterbaugh's rights, again raising a question of fact as to the Council's deliberately indifferent ratification. ECF 50-4 at P150. *See Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989) (ratification satisfies *Monell*'s policy requirement); *Shape v. Barnes Cnty., N.D.*, 396 F. Supp. 2d 1067, 1076-77 (D.N.D. 2005) (board of commissioners could be held liable for sheriff's decision to terminate an employee, regardless of whether sheriff or the board was final policymaker, where board itself denied fired employee's request to be reinstated). In sum, there are three separate grounds for municipal liability if a jury finds that Lampl blocked Booterbaugh in violation of the First Amendment. Summary judgment for the City on Count I should be denied.

## III. Neither Lampl nor Baker are Entitled to Qualified Immunity.

Qualified immunity exists so that officials "reasonably can anticipate when their conduct may give rise to liability for damages." *Davis v. Scherer*, 468 U.S. 183, 195 (1984). In July 2022, there existed a clearly established right not to be blocked from a social media page operated by the government or a government official acting

in their official capacity. *See Reisch*, 986 F.3d at 824-25; *Attwood*, 818 Fed. App'x. at 867-68; *Robinson*, 921 F.3d at 447; *Knight*, 928 F.3d at 237; *Davison*, 912 F.3d at 687; *see also Miko v. Jones*, No. 1:20-CV-02147-SDG, 2023 WL 196920, at *1 (N.D. Ga. Jan. 17, 2023) (awarding damages after default judgment in Facebook-blocking case). Lampl is therefore liable in his individual capacity if a jury finds that he blocked Booterbaugh in violation of the First Amendment. Baker is individually liable if a jury finds that, after receiving notice, he was deliberately indifferent in failing to investigate or stop the on-going rights violation. Qualified immunity is not a defense to Plaintiff's request for declaratory relief with respect to being blocked. *See Benning v. Ga. Dept. of Corr.*, 71 F.4th 1324, 1335 (11th Cir. 2023).

## IV. The City's Social Media Policies are Unconstitutional.

Defendants move for judgment on Count II. Plaintiff cross-moves, and incorporates herein the arguments set forth in his affirmative motion, ECF 49-1 (Pltff's Br.) at 2-20. Both the 2022 Policy (adopted by the City Council on November 22, 2022) and the Web Policy unconstitutionally restrict speech because these policies are not reasonable in light of the purpose of the fora in which they apply. They are also viewpoint-based, vague, and overbroad. Defendants' Motion as to Count II should be denied, and Plaintiff's Motion should be granted.

## V. The City violated the Georgia Open Records Act.

Defendants move for judgment on Count III. Plaintiff cross-moves, and incorporates herein the arguments set forth in his affirmative motion, ECF 49-1 (Pltff's Br.) at 20-24. Producing the Blocked Users List would not constitute creation of a "new" record. *Contra* ECF 51-1 (Defts' Mot.) at 23. Plaintiff provided instructions to Defendants on how to access the Blocked Users List in the City's Facebook data, at which point could be printed, copy/pasted, or a screenshot taken of it. *See Johnson v. CIA*, 330 F.Supp.3d 628, 642-43 (D. Mass. 2018) (finding that agency failed to conduct an adequate search when it refused to follow instructions provided by a FOIA-requester for accessing the list of user applications already maintained on the agency's Twitter account and holding that production of the requested list would not have constituted creation of a new record). Defendants' Motion as to Count III should be denied, and Plaintiff's Motion should be granted.

Respectfully submitted this 17th day of May, 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 OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** has been prepared in compliance with Local Rule 5.1(B) in 14-point Times New Roman type face.

This 17th day of May, 2024.

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

I certify that on May 17, 2024, I filed the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** 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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