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

AARON BOOTERBAUGH,	*	
	*	
Plaintiff,	*	
	*	
v.	*	1:23-CV-01810-ELR
	*	
CITY OF MORROW, et al.,	*	
	*	
Defendants.	*	
	*	

ORDER

This matter is before the Court on Plaintiff Aaron Booterbaugh's Motion for Partial Summary Judgment [Doc. 49], and Motion for Sanctions [Doc. 55], and Defendants City of Morrow, John Lampl, and Jeff Baker's Motion for Summary Judgment [Doc. 51].

I. Background[1]

A. Booterbaugh's Posts and Blocking

The City of Morrow, Georgia ("City") operates several Facebook pages, including one titled "City of Morrow Georgia" ("Facebook Page" or "Page"), which is at the center of this suit. Def.'s Statement of Material Facts (DSMF) ¶ 10 [Doc. 51-2]; Pl.'s Statement of Additional Material Facts (PSAMF) ¶¶ 1, 234 [Doc. 56-1]. The City uses the Page to disseminate City-related information and engage with the public. DSMF ¶ 10. Since April 2022, the City's Mayor, Defendant John Lampl, has had administrative access to the Page, allowing him to create or delete content, respond to comments and messages, and block users from accessing the Page. DSMF ¶¶ 11–12; PSAMF ¶ 65. Five other city employees had the same level of access to the Page in July 2022, when the alleged conduct at the center of this lawsuit occurred. PSAMF ¶ 65. These employers were IT Director Vuong Tran,

[1] The Court uses the Parties' proposed facts and responses as follows: where one side admits a proposed fact, the Court accepts it as undisputed for the purposes of this order and cites only the proposed fact. Where one side admits a proposed fact in part, the Court cites to the proposed fact and includes the undisputed part. Where one side denies a proposed fact in whole or in part, and such fact is material, the Court reviews the record and determines whether a factual dispute exists. If the denial is without merit, either because the proposed fact is deemed admitted or the record citation supports the proposed fact, then the Court cites only to the proposed fact and not the response. See LR 56.1(B)(2)(a)(2), NDGa. Finally, the Court excludes proposed facts that are immaterial, includes facts drawn from its review of the record, and considers all proposed facts in light of the standard for summary judgment. See LR 56.1(B)(2)(a)(2)(iii), NDGa.; Fed. R. Civ. P. 56(c)(3); Tomasini v. Mt. Sinai Med. Ctr. of Fla., 315 F. Supp. 2d 1252, 1260 n.11 (S.D. Fla. 2004) (explaining that a district court is not obligated to "scour the record" to determine whether triable issues exist).

Economic Development Director Rochelle Dennis, Events Coordinator Karina Martinez, Deputy Chief of Police David Snively, and former City Manager Jeff Moss. DSMF ¶ 11; PSAMF ¶¶ 65–71. Vuong Tran, Dennis, Martinez, Snively, and Moss all reported to and were supervised by the current City Manager, Defendant Jeff Baker. PSAMF ¶ 72.

Of the six City employees with administrative access to the Page, other City employees described Lampl as the most active. PSAMF ¶ 76. He frequently used the Page to make comments on City and non-City posts, often leaving his name and contact information. Id. ¶¶ 77–86. Baker has never had administrative access to the Page. DSMF ¶ 14; PSAMF ¶ 116. As a result, Baker has never posted content on the Page, hidden comments on the Page, or blocked users from the Page. DSMF ¶ 15.

On July 13, 2022, Plaintiff Aaron Booterbaugh made a series of comments and posts on the Page, many of which criticized Lampl and Baker. DSMF ¶¶ 27, 31– 32, 37–39, 51–52, 54; PSAMF ¶¶ 2–7, 18–19, 25–26, 29–31. One of those comments was a response to a post the City had made on June 8, 2022 (the "Arson Post"), in connection with a fire at "The District," a cluster of historic homes located in downtown Morrow. DSMF ¶ 37; PSAMF ¶¶ 7–9. Below is a screenshot of the Arson Post:

DSMF ¶ 37; PSAMF ¶¶ 7–9; [Doc. 43-11 at 1]. The District, previously called "Olde Towne Morrow," was a real estate development originally a mixed-use entertainment district intended to drive tourism to the City. PSAMF ¶ 11.

Lampl has a particularly sensitive history with the Olde Towne Morrow development. He oversaw the real estate development project from its inception, while serving as Morrow's City Manager and Economic Development Director. PSAMF ¶¶ 12–13. But in December 2010, about a year after Olde Towne Morrow

opened to the public, the development was shut down because its structures did not comply with the City's fire codes. Id. ¶¶ 14–15. Shortly thereafter, Lampl was indicted on charges of conspiracy in restraint of free and open competition, false statements and writings, and perjury in connection with the development. Id. ¶ 16.[2] In 2017, Lampl resolved the charges through a plea deal and was ordered to pay restitution. Id. ¶¶ 46–48, 51. It is well known among city staff that Lampl is sensitive about his criminal history in connection with the Olde Towne Morrow project. Id. ¶ 52. Lampl also testified that he believed the prosecution was politically motivated and continues to maintain his innocence. Dep. of John Lampl ("Lampl Dep.") at 205:10–13; 206:15–207:4; 255:3–8 [Doc. 44].

In response to the Arson Post, Booterbaugh posted the following comment on the City's Page:

> 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.

[2] Defendants object to the use of facts referencing Lampl's criminal history, arguing that such evidence is irrelevant, inadmissible character evidence under Federal Rule of Evidence 404, and unfairly prejudicial under Rule 403. Def.'s Resp. to PSAMF ¶¶ 16–17, 28, 41–54, 59, 95 [Doc. 64-1]. The Court disagrees. The comments Booterbaugh alleges were hidden by the City directly referenced Lampl's criminal history, which makes it relevant. And because the evidence could be used to establish Lampl's motive to block Booterbaugh and hide his comments, Rule 404(b) does not bar its admission. Lastly, because any prejudice does not substantially outweigh the evidence's probative value, Rule 403 does not bar its admission. The Court thus overrules Defendants' objection.

> 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! Especially not in an area that is dying to begin with. The Mall itself is barely hanging on, why would anybody think this little developement on it's perimeter could thrive. They couldn't even fill the little shop front spaces there in all the time it was operational. The Bridge is built on property that doesn't belong to the city. The retaining pond is Interstate runoff, NOT a spring feed pond! And nobody knows what's buried there, it was the dump area from when the mall was built. There is NO space for a parking lot. lampl depends on the Mall to provide the parking area, to which the mall owners have never agreed. lampl always refused to pay common area fees due to the Mall, making the city's relationship with the Mall adversarial.
> Clear the entire site of the bldgs that are left there, that are also not to code. Make it a city park or a business incubator area. 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.
>
> Federal Fourth Circuit Court of Appeals Davidson V. Randal. January 7, 2019.

DSMF ¶ 38; PSAMF ¶ 18; [Doc. 43-11 at 3]. A few minutes later, Booterbaugh made another comment on the same post:

> 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, no idea what's underneath the dirt out there, doors don't open the correct way for commercial business, still no parking 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.

DSMF ¶ 39; PSAMF ¶ 19; [Doc. 43-11 at 2].

Also on July 13, 2022, Booterbaugh commented on a video the City had posted on its Page several weeks earlier that depicted a portion of the City's "Freedom Fest" July 4th event (the "Freedom Fest Post"). DSMF ¶ 54; PSAMF ¶¶ 29–30. Below is a screenshot of the Freedom Fest Post:

DSMF ¶ 54; PSAMF ¶¶ 29–30; [Doc. 43-14]. The post includes a video of Lampl making comments on the event stage in Olde Towne Morrow. PSAMF ¶ 30. In his comment, Booterbaugh linked a Clayton News Daily article entitled "Former Morrow official John Lampl pleads no contest to wrongdoing in failed Olde Towne Morrow project." Id. ¶ 31. The article went on to discuss Lampl's involvement with the project, the charges against him, and the terms of his plea. Id. ¶ 32. Although Lampl repeatedly described the article as inaccurate. Lampl. Dep. at 212:3–23, 247:19–24.

Shortly after Booterbaugh made his comments and posts on the City's Page, he was no longer able to access the Page. PSAMF ¶ 37. When he tried to search for the Page from his personal Facebook account, the search returned the message "This Content Isn't Available," which appears when a user has been blocked from a Facebook page. DSMF ¶ 63; PSAMF ¶¶ 38, 40; [Doc. 49-13 at 10]. According to Booterbaugh, this message only appeared on his personal account; when he attempted to access the Page from a separate account he used for his business, the Page appeared as normal. DSMF ¶ 64; Decl. of Aaron Booterbaugh ("Booterbaugh Decl.") ¶¶ 10–15 [Doc. 49-3]. Booterbaugh took this to mean that his personal Facebook account had been blocked from the City's Page. Booterbaugh Decl. ¶ 11. On the afternoon of July 13, Booterbaugh texted a screenshot showing that he could not access the Page along with the message "they blocked me" to his girlfriend, former City councilwoman Van Tran. DSMF ¶ 61; [Doc. 49-13 at 5]. Additionally, at some point after Booterbaugh's posts, his second comment on the Arson Post and his comment on the Freedom Fest Post showed as "hidden" from public view. DSMF ¶¶ 41, 56; PSAMF ¶¶ 20, 33; [Docs. 43-12; 43-15].

The Parties dispute whether a City employee blocked Booterbaugh and hid his comments. Defendants deny that Lampl, Baker, or any other City employee blocked Booterbaugh or hid his comments from the Page. DSMF ¶¶ 42– 50, 57– 59, 66–73. To make the case for Lampl's involvement, Booterbaugh points to, among

other things, Lampl's personal animus towards him and his girlfriend—a political opponent of Lampl. PSAMF ¶¶ 87–101.

B. Booterbaugh's Open Records Requests

After being blocked from the Page in July 2022, Booterbaugh submitted requests under the Georgia Open Records Act (ORA) to the City, three of which asked for records related to his alleged blocking and hidden comments. DSMF ¶¶ 96, 109; PSAMF ¶¶ 156–57, 179, 192–93. Booterbaugh submitted his first ORA request on July 15, 2022, in an email to the City Clerk seeking, among other things, "all documents, notes, correspondence and memoranda evidencing all Facebook profiles that have been blocked by the City of Morrow government agents[.]" DSMF ¶ 96; PSAMF ¶ 157; [Doc. 46-21 at 2]. The City did not respond to that request, but it did respond to a similar ORA request that Booterbaugh made on July 18. DSMF ¶ 98; PSAMF ¶ 157; [Doc. 46-22 at 1–2]. The response, however, provided no information about blocked users. [Doc. 46-22 at 1–2].

On August 30, 2022, while still blocked from the City's Facebook Page, Booterbaugh submitted another ORA request asking for "all files, records, and other documents that relate to the City of Morrow Facebook Blocked Users" and "the Blocked Facebook Users List." DSMF ¶ 109; PSAMF ¶ 179; [Doc. 46-6]. The City Attorney responded two days later that "it appears there are no additional documents responsive to your request held by the City of Morrow." DSMF ¶ 109; PSAMF

¶ 182. The next day, Booterbaugh replied with an email appealing the denial. DSMF ¶ 110; PSAMF ¶ 183. In his email, Booterbaugh included a link with detailed instructions explaining how to access the Blocked Users List. Id.; [Doc. 44-17 at 2]. The City Attorney responded the same day, "The City is not the holder of the record, the social media platform is. No further action will be taken in response to your email." DSMF ¶ 111; PSAMF ¶ 186; [Doc. 44-17 at 1]. The Attorney copied Baker, who then forwarded the email to Lampl with the comment "Lol." PSAMF ¶ 188; [Doc. 44-17 at 1].

On November 1, 2022, Booterbaugh's counsel submitted another ORA request, again asking for the Blocked Users List and including the same retrieval instructions. PSAMF ¶ 192; [Doc. 46-30]. This letter included factual allegations and legal analysis explaining how Defendants had violated Booterbaugh's rights. [Doc. 46-30 at 2–8]. Booterbaugh's counsel copied Baker and Lampl on the letter. [Id. at 1]. The City again failed to produce the List. PSAMF ¶ 202. The City Attorney responded on November 11, simply stating that the City "denies any violation of law, regulation, or policy of the City of Morrow." Id. ¶ 200. When Booterbaugh's counsel asked for a more detailed response, the City Attorney stated: "I disagree with your contention that the City of Morrow violated the First Amendment nor was there a failure to comply with the Open Records Act." Id. ¶ 201.

A year later, in discovery in this action, the City produced the Blocked Users List as it existed in November 2023, showing no blocked users. Id. ¶ 191; [Doc. 43-9].

C. The City's Social Media Policies

When Booterbaugh lost access to the Page and his comments were hidden, the City had two social media policies in effect. The first policy was adopted on August 27, 2013, and governed the use of all City-operated social media platforms, including Facebook ("2013 Policy"). DSMF ¶¶ 20–21; PSAMF ¶¶ 102–10; [Doc. 43-5]. The 2013 Policy does not reference blocking users but does provide a process for removing comments. DSMF ¶ 21; PSAMF ¶ 105. Specifically, the Policy provides that "[p]ersonal attacks, vulgar language, discriminatory or inflammatory posts by others are strongly discouraged. If a post is determined to be in violation of this policy, such posts may be removed." [Doc. 43-5 § II(E)(4)]. Page administrators were largely unfamiliar with the 2013 Policy in July 2022 and testified that they had never received training on it. PSAMF ¶¶ 111–15.

The second policy the City posted on its website in January 2022 ("Web Policy"), after a City employee recommended doing so. DSMF ¶¶ 23–24; PSAMF ¶ 117; [Doc. 46-34]. The Web Policy provides, in relevant part, that "[t]he City of Morrow's social media pages were created to provide our followers access to information about the City of Morrow, and platforms through which to interact with

the city." [Doc. 46-34]. It also contains the following blocking provision: "The agency reserves the right to remove and/or block anyone who posts inappropriate material as determined by the City of Morrow." [Id.] The Web Policy further states,

> These pages are intended to create an open, productive forum for discussion. To foster an engaging environment, we reserve the right to restrict comments that:
>
> - are threatening, discriminatory, graphic, obscene, defamatory, profane, or hateful;
> - contain information that reasonably could compromise the safety, well-being, or reputation of any person or organization, including personal attacks;
> - spam or advertise;
> - are off-topic or repetitive;
> - promote or endorse political campaigns or candidates;
> - contain personal information about another person or that violate a person's privacy;
> - include copyrighted material that belongs to another person;
> - contain links to inappropriate websites[.]

[Id.] As with the 2013 Policy, none of the administrators of the City's Page received training on how to administer the Web Policy. PSAMF ¶ 123. Although most of the Page administrators were invited to a free, online training in April 2022 regarding the use of government social media pages, none attended or could remember attending. Id. ¶¶ 125–32. In practice, the City left the administration of the City's social media entirely up to the discretion of the Page administrators. Pl.'s Statement of Material Facts (PSMF) ¶ 124 [Doc. 49-2].

On November 22, 2022, the City voted to adopt a new social media policy ("2022 Policy"). DSMF ¶ 113; PSAMF ¶ 206; [Doc. 46-17]. That policy makes clear that the City's social media pages are purposed "to provide information and updates regarding official city business" and that all posted information "must relate to programs, services, and/or events managed or primarily sponsored by the City[.]" [Doc. 46-17 §§ 3(a), 4(c)]. Section 7 of the 2022 Policy requires all City of Morrow social media sites to include a disclaimer that gives the City "the right, without notification and at [its] sole discretion, to remove any objectionable content posted by the public." [Id. § 7]. "Objectionable content" is defined under the 2022 Policy as "personal attacks and harassment of any kind; pornography; language that is considered threatening, defamatory, abusive, vulgar, hateful or racist; content that suggests or encourages illegal activity or incites violence." [Id.] The 2022 Policy also allows moderators to "delete comments that are spam, are clearly 'off topic' or that promote services or products" and "unsupported accusations."[3] [Id.]. The City's Page currently uses a filter that screens out any comment containing any link. PSMF ¶ 217. Lastly, the 2022 Policy provides the following blocking provision: "Any individual who repeatedly violates the terms of this policy will be blocked from posting to this page." [Doc. 46-17 § 7].

[3] The 2022 Policy does not define "off-topic" or "unsupported accusations."

D. This Lawsuit

Booterbaugh initiated this lawsuit in April 2023, alleging that Defendants had violated his First Amendment rights by blocking him from the Page and hiding his comments (Count I); the City's 2022 Policy is unconstitutionally vague and overbroad (Count II); and the City violated the ORA by refusing to timely produce the List of users blocked from the City's Page (Count III). Compl. [Doc. 1]. Booterbaugh moves for summary judgment on Counts II and III, [Doc. 49], and Defendants cross-move for summary judgment on all three counts, [Doc 51]. Additionally, Booterbaugh moves for spoliation sanctions against Defendants. [Doc. 55]. Because the outcome of the motion for sanctions dictates the argument the Court will consider in its summary judgment analysis, the Court addresses that motion first.

II. Motion for Sanctions

Booterbaugh moves for sanctions under Rule 37(e), arguing that Defendants spoliated the Blocked Users List by failing to preserve it after being put on notice of potential litigation. [See Doc. 55-1]. According to Booterbaugh, absent spoliation, the List would have provided dispositive evidence that he was blocked from the City's Page from July 13, 2022, until about January 22, 2023 (the "Blocked Period"). [Id. at 2–3]. Booterbaugh asserts that instead of producing the List in response to several ORA requests or preserving it following a litigation hold, Defendants

unblocked him in January 2023, which erased his name from the List and destroyed the record that would have shown that he was blocked. [Id. at 4–10]. Booterbaugh claims that Defendants' actions have prejudiced his case by forcing him to rely on screenshots and testimonial evidence rather than direct evidence that Defendants blocked him from the City's Page. [Id. at 22–24]. He also argues that this failure was intentional, motivated by Lampl's and Baker's hostility towards him. [Id. at 17–22]. As for sanctions, Booterbaugh seeks an adverse presumption under Rule 37(e)(2) that the List would have shown that his account was blocked, or alternatively, an order under Rule 37(e)(1) precluding Defendants from arguing that the List did not exist or that it would have shown that Booterbaugh was not blocked from the Page. [Id. at 25].vc0020

Defendants respond that no spoliation occurred because there is no evidence that the List ever contained Booterbaugh's name or that the List was destroyed. [Doc. 65 at 3–6]. They base their argument on the testimony of several witnesses with administrative access to the Page that they never blocked Booterbaugh or accessed the "blocked users" setting during the Blocked Period. [Id. at 4–5]. Defendants assert that this evidence rebuts Booterbaugh's evidence that he was blocked. [Id. at 3–4]. Defendants further contend that even if evidence were lost, Booterbaugh cannot establish prejudice or bad faith, since he maintains that he has other proof that he was blocked. [Id. at 10–13]. They therefore urge the Court to

deny sanctions and to award them fees incurred in responding to the motion. [Id. at 1–2].

A. Legal Standard

Federal Rule of Civil Procedure 37(e) governs the loss of electronically stored information (ESI). "Rule 37(e) creates a two-tiered sanctions regime—with lesser sanctions under Rule 37(e)(1) and more severe sanctions under Rule 37(e)(2)." Skanska USA Civ. Se. Inc. v. Bagelheads, Inc., 75 F.4th 1290, 1311 (11th Cir. 2023). To justify sanctions under either subsection, the court must first find that the ESI "that should have been preserved in the anticipation or conduct of litigation" was "lost because a party failed to take reasonable steps to preserve it" and that the information "cannot be restored or replaced through additional discovery." Fed. R. Civ. P. 37(e). If these preconditions are satisfied, the court may impose sanctions under Rule 37(e)(1) if the lost evidence causes prejudice to another party, or under Rule 37(e)(2) if the spoliating party acted in bad faith.

Clarifying the difference between Rules 37(e)(1) and (2) sanctions, the Skanska court explained,

> Rule 37(e)(1) sanctions are centered on the *effect* of a violation; they apply only where lost electronic evidence causes "prejudice to another party," which then justifies sanctions "no greater than necessary to cure the prejudice." Rule 37(e)(2) sanctions, on the other hand, look more to the *cause* of the violation. They require a finding that "the party acted with the intent to deprive another party of the information's use in the litigation." If so, the court is justified in imposing more severe

> sanctions: adverse jury instructions, and even dismissal or default judgment.

75 F.4th at 1311. The more severe sanctions under Rule 37(e)(2) require a showing of bad faith, which "generally means destruction of evidence *for the purpose of hiding* adverse evidence." Id. at 1312 (alterations adopted) (quoting Tesoriero v. Carnival Corp., 965 F.3d 1170, 1184 (11th Cir. 2020)).

The court can base Rule 37(e)(2) sanctions on a party's affirmative acts or failure to act. Skansa, 75 F.4th at 1314. The key inquiry is whether the "circumstances point[] to a reasonable inference of bad faith[.]" Id. Because the power to sanction for spoliation derives from the court's "inherent power to manage its own affairs and to achieve the orderly and expeditious disposition of cases[,]" district courts have broad discretion to impose sanctions for the spoliation of evidence. Skanska, 75 F.4th at 1311 (cleaned up).

B. Analysis

The Court breaks its analysis into four parts. First, it considers Rule 37(e)'s preconditions—Defendants' duty to preserve the List, whether they failed in that duty, and if so, whether the List can be restored or replaced. Second, finding the preconditions met, it evaluates whether Booterbaugh was prejudiced by the loss of the List, warranting sanctions against Defendants under Rule 37(e)(1). Third, it examines whether Defendants acted in bad faith to hide the List from Booterbaugh,

warranting sanctions under Rule 37(e)(2). Fourth, it outlines the appropriate sanction and explains its purpose and limitations.

1. Preconditions of Rule 37(e)

Rule 37(e)'s preconditions boil down to "three preliminary questions": whether "(1) the party had a duty to preserve the ESI at issue; (2) the ESI was lost because the party failed to take reasonable steps to preserve it; and (3) the ESI evidence can[] be restored or replaced through additional discovery." Johnson v. Tuskegee Univ., No. 24-CV-3601, 2025 WL 2496312, at *4 (M.D. Ala. Aug. 28, 2025) (cleaned up); accord 2015 Committee Notes on Rule 37(e)(1) ("This subdivision applies only if information should have been preserved in the anticipation or conduct of litigation, a party failed to take reasonable steps to preserve the information, information was lost as a result, and the information could not be restored or replaced by additional discovery."). Booterbaugh has satisfied all three preconditions.

a. Duty to preserve

First, Defendants had a duty to preserve the List. The Eleventh Circuit has repeatedly held that "the duty to preserve arises when litigation is pending or reasonably foreseeable at the time of the alleged spoliation." Ala. Aircraft Indus., Inc. v. Boeing Co., No. 20-11141, 2022 WL 433457, at *14 (11th Cir. Feb. 14, 2022) (cleaned up). In determining whether a duty to preserve attached, "[c]ourts should

consider the extent to which a party was on notice that litigation was likely and that the information would be relevant." 2015 Committee Notes on Rule 37(e).

Defendants' duty to preserve the List arose no later than November 1, 2022, when Booterbaugh's counsel sent the City a letter asserting that Defendants had violated his First Amendment rights by blocking him from the City's Page and had violated the ORA by refusing to produce the List. [Doc. 46-30]. This letter included factual allegations and legal analysis explaining Booterbaugh's position. [Id. at 2–8]. The City Attorney responded to the letter and denied any wrongdoing by the City. [Id. at 1; see Docs. 44-17; 50-4 at 3–5]. Defendants thus had notice that the Parties were engaged in a legal dispute that could foreseeably lead to litigation. See Fed. Trade Comm'n v. F&G Int'l Grp. Holdings, LLC, 339 F.R.D. 325, 330 (S.D. Ga. 2021) (finding that the defendants were on notice that litigation was reasonably foreseeable" when they received a letter instructing them to prevent the destruction of certain documents). This notice triggered the duty to preserve any relevant evidence concerning the dispute. Id. To be sure, any remaining doubt of pending litigation evaporated when Booterbaugh's counsel followed up with a letter on December 13, 2022, specifically requesting "a litigation hold to City of Morrow officials regarding the issues raised in our letter." [Doc. 50-4 at 2]. The City Attorney confirmed the following day that she received the hold and discussed specific details about the City's process for producing requested records. A list showing whether

Booterbaugh was blocked from the City's Page during the Blocked Period is undoubtedly relevant to Booterbaugh's case. Accordingly, Defendants had a duty to preserve it.

Defendants argue that they had no duty to preserve a List containing Booterbaugh's name during the Blocked Period because such a List never existed. [Doc. 65 at 3–8]. While the Parties offer competing evidence to show whether the List would have contained Booterbaugh's name during the Blocked period, there is no dispute over the existence of the List itself. [See Docs. 55-1 at 4–11; 65 at 3–6]. As Defendants acknowledge, the Blocked Users List is built into the settings page of every Facebook account; it exists at all times, even when no names appear on it. [Doc. 65 at 5]. The November 2023 and January 2024 screenshots of those settings Defendants produced during discovery confirm as much. [See Docs. 46-5, 47-18]. Defendants' duty to preserve the List did not depend on whether Booterbaugh's name was on it. Even if Defendants' version of the facts is correct and Booterbaugh's name would not have appeared on the List during the time he alleges being blocked, they still had a duty to preserve it because, as explained, litigation was reasonably foreseeable, and the List—regardless of its contents—was relevant to that litigation. See Ala. Aircraft Indus., Inc., 2022 WL 433457, at *14. Such evidence would have definitively rebutted the allegation lying at the heart of this lawsuit—that Defendants violated Booterbaugh's First Amendment rights by blocking him from the Page.

Their failure to promptly preserve a version of the List that would have served as key rebuttal evidence further weakens their argument that the List did not contain Booterbaugh's name.

b. Failure to take reasonable steps to preserve

Second, the List was lost because Defendants failed to take reasonable steps to preserve it. Preserving ESI can sometimes be complicated, which is why Rule 37(E)(2) "does not call for perfection" but rather a reasonable, good-faith effort. 2015 Committee Notes on Rule 37(e)(2). Whether efforts are reasonable often depend on the extent of a party's possession, custody, or control of the evidence. Watson v. Edelen, 76 F. Supp. 3d 1332, 1343 (N.D. Fla. 2015). Courts have construed "control" in this context as "the legal right, authority, or practical ability to obtain the materials sought on demand." In re Disposable Contact Lens Antitrust, 329 F.R.D. 336, 430 (M.D. Fla. 2018) (cleaned up). "[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." Schroeder v. Provident Life & Accident Ins. Co., No. 05-CV-790, 2008 WL 11400761, at *3 (N.D. Ga. June 5, 2008).

Defendants do not dispute that they had control over the List. They acknowledge that the List was stored under the settings of the City's Page, which numerous City officials, including Lampl, had the ability to access. [See Docs. 43-2;

65 at 5, 8–9]. They also concede that none of the City officials with access to the List made any attempt to access this setting before litigation began, despite receiving detailed instructions from Booterbaugh in August 2022 on how to do so. [See Docs. 44-17; 46-15; 65 at 8–9]. Based on those instructions, all that Defendants would have had to do to preserve the List is open the blocked users setting, which would reveal the names of any users blocked from the City's Page, and take a screenshot. [See Doc. 65 at 9]. Such a simple action constitutes a reasonable step for preservation. See Schroeder, 2008 WL 11400761, at *3.

Defendants had no trouble following those simple instructions to produce screenshots of the List during discovery in November 2023 and January 2024. [See Docs. 46-5, 47-18]. But those screenshots were taken too late. The version of the List most relevant to whether Booterbaugh was blocked from the City's Page during the Blocked Period was, of course, the version that existed during the period in which he was allegedly blocked. After their duty to preserve triggered in November 2022, Defendants had over two months to preserve the List that would have shown whether Booterbaugh was blocked during the Blocked Period. Because they failed to timely act, the version of the List most relevant to Booterbaugh's case was irretrievably lost. See Skanska, 75 F.4th at 1314 (affirming spoliation sanctions against a party who "had an active litigation hold, but took no steps to implement it"). Accordingly, the second Rule 37(e) precondition is met.

c. Replacement of evidence through additional discovery

Third, the List, as it existed during the Blocked Period, cannot be restored or replaced through additional discovery. Facebook does not maintain any historical records of users who were once blocked from a page but later unblocked. [Doc. 55-1 at 16]; Vuong Tran Decl. ¶¶ 4, 6. The only way to tell whether a user is blocked from a page is to access the blocked user settings on the page during the time that user is blocked. Once the user is unblocked, that user's name is automatically and permanently removed from the list of blocked users, and any record that the user was ever blocked disappears. Here, no amount of discovery can turn back time and restore the List as it appeared during the Blocked Period. Defendants' window of opportunity to preserve the version of the List that mattered most closed on January 23, 2023, when Booterbaugh purportedly regained access to the Page and his name was removed from the List. Other evidence, such as Booterbaugh's screenshots and text messages, may corroborate his testimony that he was blocked, but they do not replicate the objective and authoritative evidence that the List itself could have provided. See Storey v. Effingham Cnty., No. 15-CV-149, 2017 WL 2623775, at *5 (S.D. Ga. June 16, 2017) (finding prejudice where spoliated videos deprived the

plaintiff "of the best and most compelling evidence of what happened"). The List is thus unique and cannot be replaced through additional discovery.

Defendants contend that sanctions are not warranted because Booterbaugh could have obtained the List by subpoenaing Facebook or other sources. [Doc. 65 at 12–14]. While the loss of ESI "may often be harmless when substitute information can be found elsewhere[,]" 2015 Committee Notes on Rule 37(e), it is clear that the List as it appeared during the Blocked Period cannot be found elsewhere because Facebook does not maintain data of users blocked in the past. [Id.] Moreover, it is questionable whether Facebook would have even responded to a subpoena requesting such information. Facebook policy cited by Booterbaugh makes clear that it will only respond to civil subpoenas with "basic subscriber information" that is "not within a party's possession[.]" [Doc. 66 at 12 n.7, 13 n.8]. As explained, Defendants possessed the List, which they had access through the settings of the City's Page.

Defendants cite two out-of-district cases for the proposition that sanctions are not warranted because Booterbaugh did not at least try to obtain the List from other sources. [Doc. 65 at 13 (citing In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig., 341 F.R.D. 474, 495–96 (S.D.N.Y. 2022); DeMartino v. Empire Holdings & Invs., LLC, No. 22-CV-14301, 2024 WL 712456, at *7 (S.D. Fla. Jan. 26, 2024))]. But those two cases are unpersuasive. In re Keurig simply reiterates

what Rule 37(e) already makes clear: a movant who is "able to obtain the same evidence from another source" cannot show prejudice warranting sanctions. 341 F.R.D. at 495. Nothing in In re Keurig imposes a duty on the movant to obtain the evidence from other sources before seeking sanctions if the evidence no longer exists. Similarly, the Court declines to rely on DeMartino to the extent that it requires the plaintiff to prove that it sought the ESI from other sources before seeking sanctions. Nothing in the Rule's text, advisory committee notes, or Eleventh Circuit cases suggests that sanctions are unavailable simply because the information might have been obtainable from some other source *before* it was lost. See Skanska, 75 F.4th at 1312 n.18 (instructing courts to consider "the rule's text, the advisory committee notes, and our spoliation caselaw" when analyzing Rule 37(e)'s applicability and rejecting factors that depart from Rule 37's plain standard). To hold otherwise would require the moving party to chase down substitute sources after making discovery demands just in case the other party fails to comply with them. Such a requirement is incompatible with Rule 37.

Because Defendants had a duty to preserve the List as it appeared during the Blocked Period, the List was lost because Defendants breached that duty, and the List cannot be restored through additional discovery, Booterbaugh has met Rule 37(e)'s threshold requirements for spoliation sanctions. See Skanska, 75 F.4th at

1311; Johnson, 2025 WL 2496312, at *4. The Court next evaluates the issues of prejudice and bad faith to determine the type of sanction that is most appropriate.

2. Prejudice under Rule 37(e)(1)

To impose sanctions under Rule 37(e)(1), the Court must find that the moving party was prejudiced by the loss of the ESI. This analysis does not focus on the cause of the spoliation, but its effect on the moving party. Skanska, 75 F.4th at 1311. While Rule 37 does not specifically define prejudice, the analysis "necessarily includes an evaluation of the information's importance in the litigation." 2015 Committee Notes on Rule 37(e)(1). Courts in this Circuit have incorporated that standard, explaining "that a non-spoliating party suffers 'prejudice' under Rule 37(e) if the unavailable ESI would have helped evaluate the merits of its positions, regardless of whether the ESI would be favorable to its case." Wilson v. HH Savannah, LLC, No. 20-CV-217, 2022 WL 3273718, at *7 (S.D. Ga. June 1, 2022).

Here, the loss of the List prejudiced Booterbaugh. This lawsuit centers on whether Booterbaugh was blocked from the City's Page during the Blocked Period—a question the List would have definitively answered. Accordingly, regardless of whether Booterbaugh's name appeared on it, the List would have helped him evaluate the merits of his position and assess the merits of Defendants' opposing position. See Coward v. Forestar Realty, Inc., No. 15-CV-0245, 2017 WL 8948347, at *8 (N.D. Ga. Nov. 30, 2017) (finding prejudice where the spoliated

evidence would have been "helpful in evaluating the merits of the Parties' positions"); Sosa v. Carnival Corp., No. 18-20957-CIV, 2018 WL 6335178, at *20 (S.D. Fla. Dec. 4, 2018) (finding prejudice where the spoliated evidence would have helped the plaintiff "probe the accuracy" of the defendants' version of events).

Defendants cite Skelton v. Action Traders, Ltd., No. 19-CV-2825, 2023 WL 2565361, at *2 (N.D. Ga. Mar. 16, 2023), and In re Delta/AirTran Baggage Fee Antitrust Litig., 770 F. Supp. 2d 1299, 1305 (N.D. Ga. 2011), to argue that Booterbaugh has not been prejudiced because the List is not crucial to proving his claims. [Doc. 65 at 10–12]. While those cases and some other district court decisions have required proof of cruciality, this Court is ultimately guided by Rule 37 (e)(1), which "leaves judges with discretion to determine how best to assess prejudice in particular cases" and simply instructs them to look at "the information's importance in the litigation." 2015 Committee Notes on Rule 37(e)(1). Given that the List would dispositively answer a key question in this case, its importance is obvious. Rule 37(e) does not require the Court to make further findings to justify spoliation sanctions under Rule 37(e)(1).

3. Bad faith under Rule 37(e)(2)

To impose the harshest kinds of spoliation sanctions, such as adverse inferences and jury instructions, the Court must find that Defendants acted in bad faith, that is "with the intent to deprive [Booterbaugh] of the information's use in

litigation[.]" Fed. R. Civ. P. 37(e)(2). Bad faith in this context does not require proof of malice or ill will, but it does require more than mere negligence or gross negligence. Skanska, 75 F.4th at 1312 (citing 2015 Committee Notes on Rule 37(e)(2)). A party seeking spoliation sanctions may rely on circumstantial evidence to establish bad faith, but only when the spoliator cannot credibly explain the loss absent bad faith. See Tesoriero, 965 F.3d at 1185.

Although the Court finds that Defendants' failure to preserve the List resulted in prejudice, the record does not support a finding that they acted with the intent to deprive Booterbaugh of that evidence. That finding would require evidence showing that Defendants knew that failing to timely preserve the List during the Blocked Period would result in its permanent deletion *and* intentionally sat on their hands so that it would be deleted. No such evidence exists. Booterbaugh points to Lampl and Baker's hostility toward him as circumstantial evidence that they acted in bad faith. [Doc. 55-1 at 20–21]. While Lampl's and Baker's hostility may very well demonstrate that Defendants had a motive to intentionally block him from the Page, it does not show that Defendants intentionally failed to preserve the List so that Booterbaugh could not rely on it in litigation. Moreover, City officials repeatedly deny ever accessing the List, which they would have had to do to unblock Booterbaugh from the Page and remove his name from the List. [See Doc. 65 at 4– 5 (citing deposition testimony and declarations of several City officials)]. In sum,

Booterbaugh has not shown that bad faith sanctions under Rule 37(e)(2) are warranted.

4. The sanction

The Court's final task is to decide the specific type of sanction to impose. Rule 37(e)(1) constrains the Court to "measures no greater than necessary to cure the prejudice" caused by Defendants' failure to preserve the List as it appeared during the Blocked Period. Because Defendants failed to preserve the List when their duty to do so arose, Booterbaugh has lost the ability to definitively answer a key question in this case: whether he was blocked from the City's Page during the time he alleges he was. Now, Booterbaugh must rely on circumstantial evidence to address an issue that Defendants had the duty and ability to resolve with a single screenshot. To cure the prejudice caused by Defendants' actions, the Court imposes a sanction aimed at preventing Defendants from exploiting the uncertainty they created: Defendants are prohibited from introducing evidence or argument at trial (1) that the Blocked Users List did not contain Booterbaugh's name from July 13, 2022, to January 22, 2023; (2) that the List's contents did not change over time; or (3) that the List never showed that Booterbaugh was blocked from the City's Page. The Court will likewise

disregard this prohibited evidence and argument when ruling on the Parties' motions for summary judgment.

At the same time, this sanction is appropriately limited in scope. It does not require the jury to presume that the List would have contained Booterbaugh's name or that Defendants destroyed the List—sanctions only available under Rule 37(e)(2). Nor does it bar Defendants from presenting their core defense that Booterbaugh was never blocked from the City's Page. Defendants remain free to argue, for example, that no City official ever accessed the blocked users setting or took any action to restrict Booterbaugh's access. They may also present testimony from administrators that they never saw Booterbaugh's name on the List, explain the City's general Facebook Page practices, and contend that they had no knowledge of any blocking or unblocking access to the City's Page. In addition, Defendants may challenge the reliability, completeness, or authenticity of Booterbaugh's evidence, including the evidence purportedly showing that his name appeared on the List, through cross-examination. What Defendants may not do, however, is exploit the absence of the contemporaneous List by arguing that it never existed during the Blocked Period, that its contents never changed over time, or that it would have shown Booterbaugh was not blocked. This targeted prohibition prevents Defendants from benefiting from the uncertainty created by their own failure to preserve the evidence, while still allowing them to fully contest Booterbaugh's claim through other admissible

evidence. It is therefore the most measured approach to cure the prejudice caused by the loss of the List.

III. Motions for Summary Judgment

Booterbaugh alleges that Defendants violated his First Amendment rights by blocking him from the City's Page (Count I); that the City's social media policies are facially unconstitutional (Count II); and that the City violated the ORA by repeatedly refusing to produce the Blocked Users List for inspection (Count III). Compl. ¶¶ 132–88. Booterbaugh moves for summary judgment on Counts II and III [Doc. 49], and Defendants cross-move for summary judgment on all three Counts, [Doc 51]. The Court addresses the merits of each claim in turn after reviewing the governing standard for summary judgment.

A. Legal Standard

The Court may grant summary judgment only if the record shows "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A factual dispute is genuine if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A

factual dispute is material if resolving the factual issue might change the suit's outcome pursuant to the governing law. Id.

When ruling on a motion for summary judgment, the Court must view all evidence in the record in the light most favorable to the non-moving party and resolve all factual disputes in the non-moving party's favor. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000). The moving party need not positively disprove the opponent's case; rather, the moving party must show the lack of evidentiary support for the non-moving party's position. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

If the moving party meets this initial burden, the non-moving party must then present competent evidence beyond the pleadings to show that there is a genuine issue for trial to survive summary judgment. Id., at 324–26. The essential question is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 252. There must be evidence on which the jury could reasonably find for the non-moving party. Id.

The standard of review for cross-motions for summary judgment does not differ from the standard applied to a solo summary judgment motion. Rather, cross motions simply require the court to determine whether either of the parties deserves judgment as a matter of law on the facts that are not disputed. Am. Bankers Ins. Grp.

v. United States, 408 F.3d 1328, 1331 (11th Cir. 2005). The court must consider each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration. Id. The Eleventh Circuit has explained that "[c]ross-motions for summary judgment will not, in themselves, warrant the court in granting summary judgment unless one of the parties is entitled to judgment as a matter of law on facts that are not genuinely disputed." United States v. Oakley, 744 F.2d 1553, 1555 (11th Cir. 1984). Cross-motions may, however, be probative of the absence of a factual dispute where they reflect general agreement by the parties as to the controlling legal theories and material facts. Id. at 1555–56.

B. First Amendment Blocking Claim (Count I)

Booterbaugh's first claim alleges that all three Defendants violated his First Amendment rights by blocking him from the Page and hiding his comments in retaliation for his constitutionally protected criticism of Lampl and Baker. Compl. ¶¶ 132–57. Defendants argue that the evidence does not establish any basis for a First Amendment violation and that, even if it did, both the City and individual Defendants are immune from liability. [Doc. 51-1 at 2–19]. Resolving this claim requires the Court to answer three questions: (1) Is there sufficient evidence for a jury to conclude that Defendants violated the First Amendment? (2) Can the City be

held liable for that conduct? (3) Can Lampl and Baker be held individually liable for that conduct? The Court answers each in turn.

1. Did Defendants violate the First Amendment?

The First Amendment prohibits the government from abridging the freedom of speech. U.S. Const. amend. I. That protection originates from the fundamental principle that "each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994). In the modern era, social media platforms "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to become a town crier with a voice that resonates farther than it could from any soapbox." Packingham v. North Carolina, 582 U.S. 98, 107 (2017) (cleaned up). Accordingly, the Supreme Court has consistently extended First Amendment protections in the social media context. See, e.g., Packingham, 582 U.S. at 105 (holding that social media sites are public forums entitled to full First Amendment protection); Lindke v. Freed, 601 U.S. 187 (2024) (holding that a public official engages in state action on social media when purporting to exercise governmental authority); Moody v. NetChoice, LLC, 603 U.S. 707 (2024) (holding that social media platforms' content-

moderation choices are protected expressive conduct). Determining how far those protections extend, however, depends on the forum where the speech occurs.

a. Social media forum analysis

The Supreme Court has adopted a "forum based" approach for assessing government restrictions on free speech. Minn. Voters All. v. Mansky, 585 U.S. 1, 11 (2018). Under this approach, the Court has discerned four types of forums: the traditional public forum, the designated public forum, the limited public forum, and the nonpublic forum. McDonough v. Garcia, 116 F.4th 1319, 1322 (11th Cir. 2024) (en banc) (citing Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 215–16 (2015)).[4] Traditional public forums are public areas like parks and sidewalks that have long "been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983) (citation omitted). A designated public forum is a public area "that has not traditionally been regarded as a public

[4] As the McDonough court recently recognized, these four categories have not always been so neatly defined. 116 F.4th at 1323–28. For example, the Supreme Court "has said at times that there are only three, using the categories of 'limited public forum' and 'nonpublic forum' interchangeably." Id. at 1325 n.4. The Court also originally described "limited public forums" as a subset of "designated public forums," Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 n.7 (1983), but later recast "limited public forums" as an independent category, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995). And most recently, the Court described the limited public forum as a category independent from both designated public forums and nonpublic forums, creating four categories. See Walker, 576 U.S. at 215–16. Hopefully, the Supreme Court offers clearer guidance in future opinions about these categories and when each applies. Until then, Walker's four-forum approach prevails in this Circuit. See McDonough, 116 F.4th at 1325.

forum" but has been "intentionally opened up for that purpose." Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009). A limited public forum is like a designated public forum but is reserved only "for certain groups or for the discussion of certain topics[.]" Walker, 576 U.S. at 215 (citation omitted). Finally, nonpublic forums are spaces "like mailboxes, military bases, or jails—government-owned property not by tradition or designation a forum for public communication." McDonough, 116 F.4th at 1328 (cleaned up).

Courts have only "recently begun to grapple with the First Amendment issues that arise from social media accounts maintained by public officials." Wagschal v. Skoufis, 442 F. Supp. 3d 612, 617 (S.D.N.Y. 2020). So far, the Eleventh Circuit has yet to directly address what type of forum government-run social media pages create.[5] But district courts and other circuits that have confronted the issue have consistently treated such pages as either designated or limited public forums. The precise classification, as with any forum, depends on how the government intends to use the page. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788,

[5] To this Court's knowledge, the Eleventh Circuit has addressed First Amendment issues in the context of government social media pages in only three cases. See Taylor v. Palmer, No. 21-14070, 2023 WL 4399992 (11th Cir. July 7, 2023); Charudattan v. Darnell, 834 F. App'x 477 (11th Cir. 2020); Attwood v. Clemons, 818 F. App'x 863 (11th Cir. 2020). But none required the court to decide which forum applied. However, it is worth noting that the district courts in Charudattan and Attwood conducted a public forum analysis, and both were affirmed. See Charudattan v. Darnell, 510 F. Supp. 3d 1101, 1110 (N.D. Fla. 2020); Attwood v. Clemons, 526 F. Supp. 3d 1152, 1172– 73 (N.D. Fla. 2021).

802 (1985). To discern intent, courts look to, among other things, the government's policy and practice. Id.

If the government provides the public access to a page and places no limits on how or by whom it may be used, courts have classified the page as a designated public forum. See, e.g., Davison v. Randall, 912 F.3d 666, 682 (4th Cir. 2019) (comment section of a county's Facebook page was a designated public forum where the county "placed no restrictions" on use and access); Schulte v. Leners, 783 F. Supp. 3d 1131, 1142 (W.D. Wis. 2025) (comments section of town's website placing no restrictions on speakers or content designated a public forum); Attwood v. Clemons, 526 F. Supp. 3d 1152, 1172–73 (N.D. Fla. 2021) (state legislator's social media pages providing "unrestricted access to the public for expressive activity" designated as public forums).

By contrast, courts have classified pages accessible to only certain speakers or topics of speech as limited public forums. See, e.g., Krasno v. Mnookin, 148 F.4th 465, 484 (7th Cir. 2025) (comments section on a public university's social media page that restricted certain comments was a limited public forum); People for the Ethical Treatment of Animals v. Tabak, 109 F.4th 627, 633–35 (D.C. Cir. 2024) (federal agency's social media page that blocked comments with certain keywords was a limited public forum); Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1178–79 (9th Cir. 2022) (school district's social media pages were designated public forums

when they were "available to the public without any restriction on the form or content of comments" but became limited forums when the government used word filters and other speech restrictions), vacated and remanded on other grounds, 601 U.S. 205 (2024); Charudattan v. Darnell, 510 F. Supp. 3d 1101, 1110 (N.D. Fla. 2020) (sheriff's Facebook page that limited public comments to certain topics was a limited public forum).

The distinction drawn by these cases is consistent with how the Eleventh Circuit has classified public forums in other contexts. For example, the McDonough court identified "two features" that distinguish designated and limited public forums: "whether the forum is limited to a specific class of speakers, and whether the forum is limited to speech on specific topics. If either (or both) is present, we have a limited public forum." 116 F.4th at 1328 (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)). Because city policy in that case limited public comments during city council meetings to matters pertinent to the city, the meetings were limited public forums. McDonough, 116 F.4th at 1328; see also Moms for Liberty - Brevard Cnty. v. Brevard Pub. Sch., 118 F.4th 1324, 1331 (11th Cir. 2024) ("[T]he school board meetings here qualify as limited public forums because they are created for certain groups or for the discussion of certain topics." (quotation omitted)); Barrett v. Walker Cnty. Sch. Dist., 872 F.3d 1209, 1225 (11th Cir. 2017)

(public comment sessions at school board meetings limiting who could speak and on what topics considered limited public forums).

In this case, the Parties submit that the City's Facebook Page is a limited public forum. [Docs. 49-1 at 8; 51-1 at 5]. Because City policy clearly limits the Page's purpose and content, the Court agrees. Both the 2022 Policy and Social Media Policy make clear that the City created its Facebook Page for a limited purpose: to provide users with information about the City and its activities. [See Docs. 46-17 § 3(a) ("All social media sites and websites concerning or affiliated with the City [] shall only be used to provide information and updates regarding official city business."), § 4(c) ("Information posted on the City's social media sites and website must relate to programs, services, and/or events managed or primarily sponsored by the City[.]"); 46-34 ("The City['s] social media pages were created to provide our followers access to information about the City" and "are managed as a limited public forum[.]")]. To advance that purpose, both policies contain an extensive list of restrictions limiting what users are permitted to post on the Page. [Docs. 46-17 § 4(m); 46-34]. "The City reserves the right to restrict or remove any content" that exceeds these limits. [Docs. 46-17 § 4(n)]. Thus, while the Page is available to the public at large, only specific topics can be discussed on the Page. That makes it a limited public forum. See McDonough, 116 F.4th at 1328. With that

decided, the next task is to define the boundaries of a limited public forum and determine whether Defendants exceeded them.

b. Viewpoint discrimination analysis

In a limited public forum, the government is permitted to place certain restrictions on speech. Cornelius, 473 U.S. at 799–800 ("Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities."). However, those restrictions "must not discriminate against speech on the basis of viewpoint," and "must be reasonable in light of the purpose served by the forum." Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001) (quotation omitted).

Viewpoint discrimination, which the Eleventh Circuit has described as "the greatest First Amendment sin," is prohibited in all forums. Honeyfund.com Inc. v. Governor, Florida, 94 F.4th 1272, 1277 (11th Cir. 2024). It occurs "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject[.]" Rosenberger, 515 U.S. at 829. Viewpoint discrimination is apparent, for example, if a government official's decision to take a challenged action was "impermissibly motivated by a desire to suppress a particular point of view." Cornelius, 473 U.S. at 812–13. "The government must abstain from regulating

speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." Rosenberger, 515 U.S. at 829.

"In the context of social media, courts have found viewpoint discrimination where government officials deleted comments or blocked individuals from their social media pages to prevent them from expressing negative opinions or contrary views." Biedermann v. Ehrhart, No. 20-CV-01388, 2023 WL 2394557, at *8 (N.D. Ga. Mar. 7, 2023). See, e.g., Felts v. Green, 91 F.4th 938, 940 (8th Cir. 2024) (affirming ruling that a public official engaged in viewpoint discrimination by blocking a political rival from his Twitter account after the rival posted critical comments); Garnier, 41 F.4th at 1163–66 (holding that a school board engaged in viewpoint discrimination by blocking two parents from their official social media pages after the parents posted critical comments); Robinson v. Hunt County, 921 F.3d 440, 447 (5th Cir. 2019) (finding viewpoint discrimination where government officials deleted the plaintiff's Facebook comment and banned her from their Facebook page, regardless of whether the government officials were motivated by the plaintiff's criticism of their office or by a determination that her comment was otherwise "inappropriate"); Davison, 912 F.3d at 687 (finding "black-letter viewpoint discrimination" where a government official banned the plaintiff from her Facebook page based on the plaintiff's comments alleging corruption).

Here, Booterbaugh alleges that Defendants engaged in viewpoint discrimination by blocking him from the Page and removing two of his comments criticizing Lampl and Baker. Compl. ¶¶ 132–57. Defendants counter that they are entitled to summary judgment on that claim because there is no evidence that Lampl, Baker, or any other City employee blocked Booterbaugh or hid his comments. [Doc. 51-1 at 2–3]. In response, Booterbaugh points to evidence showing that Lampl had the motive and opportunity to block Booterbaugh and remove his comments. [Doc. 56 at 8–10]. The Court concludes that there is sufficient evidence in the record for the claim against the City and Lampl to survive summary judgment, but not the claim against Baker.

Booterbaugh has presented some compelling evidence to show that a reasonable jury could find that some City employee or official blocked him from the Page and hid his comments. First, contrary to Defendants' view, there is evidence beyond Booterbaugh's own conjecture and speculation that he was blocked. In addition to a sworn declaration that he was blocked from accessing the City's Page on July 13, 2022, the same day he posted several critical comments about Lampl and Baker, Booterbaugh also submitted a screenshot showing that he could not access the Page from his personal Facebook account. [Doc. 49-13 at 10]. Booterbaugh has also submitted screenshots showing that his comments on the Arson Post and Freedom Fest Post were "hidden" from public view on July 13, 2022. [Docs. 43-12,

43-15]. From this evidence, a jury could reasonably conclude that Booterbaugh was blocked from accessing the Page after his critical comments and that his comments were hidden. Only six people had the level of administrative access to the Page that allowed them to block users and hide comments, and all six were City employees. DSMF ¶¶ 11–12; PSAMF ¶ 65. Moreover, no one other than those six employees had administrative access to the Page, and the Page was intended only for official City use. Accordingly, there is sufficient evidence to create a jury question about the City's involvement in blocking Booterbaugh and hiding his comments.

There is also a factual dispute about whether Lampl was responsible. While there is no direct evidence in the record that Lampl blocked Booterbaugh or hid his comments, there is some circumstantial evidence that the jury could rely on to find him liable. First, Lampl had the ability to block Booterbaugh and hide his comments and took a more active role in managing the Page around the time Booterbaugh was blocked. In April 2022, only a few months before Booterbaugh was blocked, Lampl was given "full administrative access" to the Page, allowing him to block users and hide comments. Decl. of David Snively ("Snively Decl.") ¶ 3 [Doc. 49-4]; [Doc. 43-2 at 7]. In the months surrounding Booterbaugh's blocking, Lampl was described as "the most active administrator" of the Page, and the Page's user history supports this testimony. Snively Decl. ¶ 4; [see Doc. 49-18]. From April to July 2022, Lampl left several comments from the Page on posts from other users, often

signing his name and leaving his contact information in the comments. [Doc. 49-18]. Moreover, "[o]n more than one occasion" before Booterbaugh's blocking, Lampl asked whether the City could block users from the Page or hide user comments. Snively Decl. ¶ 5.

Second, Booterbaugh's comments harshly criticized Lampl, evidencing a motivation for Lampl to remove them. The Arson Post comment called out Lampl by name and described at length how The District (previously known as Olde Towne Morrow), the City's multi-million dollar mixed-use development project, had been a failure. [Doc. 43-11 at 2]. The comment also stated that Lampl had renamed the development "The District" because "there was too much 'history' to Olde Towne Morrow." [Id.] The "history" Booterbaugh was referencing relates to Lampl's criminal history in connection with the Olde Towne Morrow project, which many knew to be a sore subject for Lampl. Snively Decl. ¶ 7. Booterbaugh exploited that sore subject even more with the comment he left on the Freedom Fest Post. [Doc. 43-14]. That comment included a link to a news article titled "Former Morrow official John Lampl pleads no contest to wrongdoing in failed Olde Towne Morrow project." [Doc. 44-21]. The article discusses Lampl's 2011 charges for conspiracy, false statements, and perjury in connection with the development of Olde Towne Morrow while Lampl was serving as the City manager and director of economic development. [Id.; Doc. 49-8]. According to Lampl, the charges were politically

motivated, and the article was inaccurate. Lampl Dep. at 247:1–22, 255:3–6. This evidence supplies why Lampl would have wanted the comments removed.

Third, Lampl's strained relationship with Booterbaugh further evidences his motive to block him and hide his comments in retaliation for Booterbaugh's criticism. In his deposition, Lampl does not leave to the imagination how he felt about Booterbaugh, repeatedly describing him as "not normal," "unhinged," "nuts," "an obnoxious ass," and "a tool." Lampl Dep. at 76:17–18. Lampl's history with Booterbaugh's girlfriend, former City councilwoman Van Tran, is similarly fraught. Throughout his deposition, Lampl repeatedly described Van Tran as his "opponent" and "enemy" and called her a "psycho," "not trustworthy," and "manipulative." Id. at 32:1–3, 10–12, 35:4–5, 36:12–18, 72:25, 133:19–22, 219:21–23. He also testified that he viewed Booterbaugh and Van Tran as "one in the same" [sic] and that he had the same view of them both in 2022. Id. at 37:17–22, 39:13–14. Suffice it to say, there is enough evidence in the record for a reasonable jury to conclude that Lampl blocked Booterbaugh and hid his comments.

Notwithstanding the evidence against Lampl, the evidence against Baker is lacking. Most significantly, it is undisputed that Baker had no administrative access to the Page and therefore could not have blocked Booterbaugh or hid his comments. DSMF ¶¶ 14–15; PSAMF ¶¶ 72, 116. There is also no evidence that Baker instructed anyone else to block Booterbaugh or hide his comments. Additionally, although

some comments Booterbaugh made on July 13, 2022, disparaged Baker, the only hidden comments referenced Lampl. For example, Booterbaugh's first comment on the Arson Post, which called out both Baker and Lampl, and a separate comment containing a hyperlink to Baker's criminal history were not hidden from the Page. [Docs. 43-11 at 3; 49-11]. Those comments remained on the Page despite Baker's apparent motive for removing them. Considered together, this evidence points to the conclusion that no reasonable juror could find Baker blocked Booterbaugh or hid his comments.

2. Is the City liable for the First Amendment violation?

Booterbaugh argues that municipal liability attaches because: (1) Lampl acted as an official policymaker when he blocked Plaintiff; (2) the City failed to train Lampl or anyone else administering the Page on how to comply with the First Amendment; and (3) Baker and the City Council chose to take no action after Booterbaugh was blocked. If the jury finds that Lampl or another City employee violated Booterbaugh's constitutional rights by blocking him or hiding his comments, that finding does not automatically make the City liable. This is because a local government cannot be held liable for the unlawful actions of its employees

under a *respondeat superior* theory of liability. Grech v. Clayton Cnty., 335 F.3d 1326, 1329 (11th Cir. 2003) (en banc).

"[T]o impose § 1983 liability on a municipality, a plaintiff must show: (1) that [his] constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." McDowell v. Brown, 392 F.3d 1283, 1289 (11th Cir. 2004) (citation omitted); see also Sauls v. Pierce Cnty. Sch. Dist., 399 F.3d 1279, 1287 (11th Cir. 2005) (citation omitted) ("To impose liability on a municipality under § 1983, the plaintiff must identify a municipal 'policy' or 'custom' causing the deprivation of federal rights.").

A plaintiff "can establish municipal liability [] in three ways: (1) identifying an official policy; (2) identifying an unofficial custom or widespread practice that is so permanent and well settled as to constitute a custom and usage with the force of law; or (3) identifying a municipal official with final policymaking authority whose decision violated the plaintiff's constitutional rights." Chabad Chayil, Inc. v. Sch. Bd. Of Miami-Dade Cnty., 48 F.4th 1222, 1229 (11th Cir. 2022) (citation omitted). Booterbaugh alleges that the City is liable because Lampl, as Mayor, acted as final policymaking authority when he blocked Booterbaugh. Defendants contend that Booterbaugh failed to establish liability in the first two ways, but they do not address

the argument that a single decision by a final policymaker can also establish liability. [Doc. 51-1 at 9].

A municipality may be liable under § 1983 when a final policymaker—an official with authority to establish municipal policy in a given area—makes a decision or takes an action that constitutes official municipal policy and causes a constitutional violation. See McMillian v. Monroe Cnty., 520 U.S. 781, 785–86 (1997). This includes one-off decisions where a final policymaker 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) (cleaned up).

"A single decision by a municipal policymaker may constitute an official policy where the evidence that the municipality had acted and that the plaintiff had suffered a deprivation of federal rights also proved fault and causation." Harvey v. City of Bradenton, No. 04-CV-1748, 2005 WL 3533155, at *10 (M.D. Fla. Dec. 22, 2005) (cleaned up). Thus, a single decision of a municipal policymaker may trigger municipal liability when the decision itself is the unconstitutional act. Id.

This is because "where the municipality's decision itself is unconstitutional, fault and causation are obvious, and therefore proof that the municipality's decision was unconstitutional would suffice to establish that the municipality itself was liable

for the plaintiff's constitutional injury." Kennedy v. Clarke Cnty. Sch. Dist., No. 06-CV-47, 2008 WL 203314, at *4 (M.D. Ga. Jan. 23, 2008) (cleaned up).

An official 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). "The opportunity for meaningful review will suffice to divest an official of any policymaking authority." Oladeinde v. City of Birmingham, 230 F.3d 1275, 1295 (11th Cir. 2000) (cleaned up).

"State and local positive law, as well [as] 'custom or usage' having the force of law," identifies the official "who speak[s] with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional . . . violation at issue." Mandel, 888 F.2d at 793.

Pursuant to the 2013 Policy, the City Manager determines the "Social Media Administrator(s)" responsible for the content and upkeep of all social media platforms used in the City. [Doc. 43-5 § II(B)]. The City Manager's authority to designate Social Media Administrators derives from the City's formally adopted 2013 Policy, which constitutes local positive law governing the allocation of responsibility for the City's official social media platforms. Although it is silent as to the blocking of users, the 2013 Policy also contemplates that the City Manager or his designees would supervise the City's social media postings. DSMF ¶ 21; PSAMF ¶ 105; see [Doc. 43-5 § II(E)(4), (8)]. Lampl, along with six other employees, are

designated as Page administrators. Snively Decl. ¶ 4; PSAMF ¶ 76. Defendants contend that because the City of Morrow Charter does not explicitly grant Lampl the power to moderate speech on behalf of the City or act as a moderator on the City's social media pages, Lampl cannot be the final policymaker on the blocking of users or hiding comments on the City's Facebook Page. [Doc. 64 at 7–8].

Though the City's written policy designates the City Manager as the official authorized to operate and moderate the City's Facebook page, record evidence reflects that Baker did not meaningfully exercise that authority. DSMF ¶ 15. Rather, Lampl was the most active employee with administrative access on the Page. PSAMF ¶ 76. Baker did not even have access to the Page and thus, Baker functionally ceded final decision-making authority over moderation decisions to those designated administrators, including Lampl. DSMF ¶ 14; PSAMF ¶¶ 72, 116. Accordingly, there was no opportunity for meaningful review to divest Lampl of his policymaking authority as to his activity on the Page. Oladeinde, 230 F.3d at 1295.

As to the act itself, Lampl's alleged decision to block Booterbaugh was not constrained by City policy.[6] The 2013 Policy does not reference the blocking of users, while the Web Policy broadly gave the "agency" the "right to remove and/or block anyone who posts inappropriate material as determined by the City of

[6] Defendants disclaim that the Web Policy is City Policy. [Doc. 51-1 at 9]. That question is immaterial here because municipal liability may attach where an official exercising delegated and unreviewed authority makes a final decision that itself violates the Constitution, even in the absence of written policy. Mandel, 888 F.2d at 793.

Morrow." DSMF ¶ 21; PSAMF ¶ 105; [Doc. 46-34]. None of the administrators with access received training on administering the Web Policy. PSAMF ¶ 123. Furthermore, the employees with administrative access to the Page were supervised by Baker, but as discussed, Baker did not even have administrative access to the Page. DSMF ¶ 14.

Although there is no evidence of prior similar violations, municipal liability may still attach through a one-off decision. McMillian v. Johnson, 88 F.3d 1573, 1577 (11th Cir. 1996). Here, blocking an individual from the Page on the basis of viewpoint discrimination is, itself, a First Amendment violation, making fault and causation obvious. Therefore, proof of the unconstitutional decision by the official exercising delegated municipal authority alone suffices to establish municipal liability. Kennedy, 2008 WL 203314, at *4.

Because Lampl acted pursuant to authority affirmatively granted, and effectively unchecked, by the City, and because the act of blocking constituted the alleged constitutional injury itself, the City may be held liable for Lampl's acts. In essence, when Lampl acted on the Page, he was acting as the equivalent of a City-authorized administrator exercising delegated municipal authority over the Page. Id. Therefore, for the purposes of Booterbaugh's alleged violation, Lampl is a final policymaker. Accordingly, Booterbaugh's final policymaker theory precludes summary judgment on municipal liability. Whether the challenged decision or act of

Lampl caused the deprivation of Booterbaugh's rights is a question reserved for the jury. See id.

Booterbaugh's second and third theory of liability—failure to train and failure to take action—do not fare as well. A municipality's failure to act, including a failure to train, may give rise to liability under § 1983 only where such inaction reflects deliberate indifference to constitutional rights and is properly attributable to the municipality itself. City of Canton v. Harris, 489 U.S. 378, 388–95 (1989).

To establish municipal liability under a failure to train theory, a plaintiff must produce evidence that the municipality's omission amounted to an official policy or custom of deliberate indifference. Id. at 390; Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691–95 (1978). Ordinarily, this requires evidence of a pattern of similar constitutional violations sufficient to put the municipality on notice that its training program (or lack thereof) was deficient and likely to result in constitutional harm. City of Canton, 489 U.S. at 397; Connick v. Thompson, 563 U.S. 51, 62 (2011). Although liability may arise in the rare case where the need for training is "so obvious" that the failure to provide it is likely to result in constitutional violations, such circumstances exist only in a "very narrow range of cases." Mingo v. City of Mobile, 592 Fed. Appx. 793, 800 (11th Cir. 2014).

The Court agrees with Defendants that Booterbaugh has failed to establish that the City was on notice of any need to train its officials or employees on the

moderation of social media accounts. [Doc. 64 at 10]. Booterbaugh has not identified any prior similar incidents or evidence of recurring constitutional violations that would have alerted the City to a deficiency in training. [Id.] Absent such notice, the record cannot support a finding of deliberate indifference, and the failure to train theory therefore cannot survive summary judgment.

Booterbaugh also contends that municipal liability attaches based on Baker's and the Morrow City Council's failure to act after learning that Booterbaugh had been blocked on the Page based on viewpoint discrimination. [Doc. 56 at 19–23]. However, liability under this theory requires proof that municipal inaction caused the constitutional violation by allowing it to occur or by permitting a known pattern of similar violations to continue. Connick, 563 U.S. at 61. Here, Booterbaugh's evidence shows, at most, that the City and Baker became aware of an alleged constitutional violation after the violation—i.e. the blocking—had already occurred. There is no evidence of prior notice or a pattern of similar incidents, nor is there evidence that any municipal inaction caused or perpetuated the alleged violation. Accordingly, a reasonable jury could not find that the City maintained a policy of inaction amounting to deliberate indifference.

3. Is Lampl individually liable for the First Amendment violation?

Lastly, the Court must decide whether Lampl may be held individually liable for the damages stemming from his conduct.[7] Defendants argue that Lampl has no individual liability because he is shielded by qualified immunity. [Doc. 51-1 at 14–19]. The Court agrees.

"Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. A right is clearly established when it is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." Rivas-Villegas v. Cortesluna, 595 U.S. 1, 5 (2021) (cleaned up). The law can be clearly established for qualified immunity purposes only by decisions of the U.S. Supreme Court, the Eleventh Circuit, or the state supreme court. Benning v. Ga. Dept. of Corr., 71 F.4th 1324, 1333 (11th Cir. 2023). If a case from one of these courts "has not staked out a bright line, qualified immunity almost always protects the defendant." Coffin v. Brandau, 642 F.3d 999, 1015 (11th Cir. 2011).

Here, Lampl is shielded by qualified immunity because Booterbaugh cannot establish that Lampl violated a clearly established right. Although some circuits had addressed the issue head on by July 2022, the Eleventh Circuit had not. See, e.g.,

[7] As explained above, there is insufficient evidence that Baker committed a constitutional violation to which immunity could apply.

Campbell v. Reisch, 986 F.3d 822, 824 (8th Cir. 2021); Robinson, 921 F.3d at 447; Davison, 912 F.3d at 687. Booterbaugh points to one Eleventh Circuit case involving the blocking of an individual on government social media pages: Attwood, 818 F. App'x at 863. [Doc. 56 at 24]. But Attwood does not "stake out a bright line" prohibiting officials from blocking users from government-run social media pages or hiding comments on those pages. Coffin, 642 F.3d at 1015. Rather, it focuses primarily on Eleventh Amendment and legislative immunity. Attwood, 818 F. App'x at 866–70. It does suggest that government officials "may not be allowed to exclude others" from social media pages "based on their views" and cites to out of circuit cases holding "that government officials can act in their official capacities when blocking persons from certain social media accounts related to their offices." Id. at 867. But that suggestion is far from a bright line rule sufficient to create a clearly established right. Accordingly, Lampl is immune from damages in his individual capacity.[8]

C. Facial Challenge to Social Media Policies (Count II)

Booterbaugh's second claim alleges that the City's two official policies currently governing its social media accounts—the Web Policy and the 2022 Policy—are facially unconstitutional because they are vague and overbroad, and

[8] While qualified immunity shields Lampl from liability for monetary damages, it does not resolve Booterbaugh's claim for declaratory relief. See Benning, 71 F.4th at 1335 ("[T]he entitlement of [state officials] to qualified immunity with respect to damages does not resolve the requests for declaratory relief.").

permit unreasonable, viewpoint-based discrimination of protected speech. Compl. ¶¶ 132–57. Defendants argue that the Policies are viewpoint-neutral and reasonable in light of the legitimate interest in maintaining a sense of decorum in the comments section of a Page used to provide information about the City. [Doc. 53 at 6, 11]. Resolving Booterbaugh's second claim requires the Court to answer three questions: (1) Are the Web Policy's and the 2022 Policy's restrictions on "personal attacks" and "harassment" and "abusive," "racist," and "hateful" speech viewpoint-based? (2) Are the Policies' content-based restrictions on "defamatory," "off-topic," and "unsupported accusations" unreasonable in light of the forum's purpose? (3) Are the blocking provisions vague and overbroad? The Court answers each question in turn.

As an initial matter, the Parties do not dispute, and the record establishes, that the City's Page constitutes a limited public forum as it is a comment space the City may open for public discussion while retaining control over the forum's purpose. [Docs. 49-1 at 8; 51-1 at 5]. As previously explained, in a limited public forum, the government may impose restrictions on speech so long as they are (1) viewpoint neutral, and (2) reasonable in light of the forum's purpose. Rosenberger, 515 U.S. at 829; Moms for Liberty, 118 F.4th at 1334. Facial challenges to policies may be based on overbreadth, vagueness, or unbridled discretion. A law is unconstitutionally overbroad if it "punishes a substantial amount of protected free speech, judged in relation to the [law's] plainly legitimate sweep." Fla. Ass'n of Prof'l Lobbyists, Inc.

v. Fla. Office of Legis. Servs., 525 F.3d 1073, 1079 (11th Cir. 2008). Vagueness exists when a regulation "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or "authorizes or even encourages arbitrary and discriminatory enforcement." Hill v. Colorado, 530 U.S. 703, 732 (2000).

The Supreme Court has long held that when the government targets particular views, it engages in viewpoint discrimination, and "the violation of the First Amendment is all the more blatant." Rosenberger, 515 U.S. at 828–29. Accordingly, a municipal government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015). "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate." Matal v. Tam, 582 U.S. 218, 246 (2017) (cleaned up).

The Eleventh Circuit's viewpoint discrimination framework, as articulated in its recent decision in Moms for Liberty, guides the Court's analysis here.[9] 118 F.4th at 1324. The plaintiff organization in Moms for Liberty argued that the Brevard

[9] Defendants cite an earlier phase of the Moms for Liberty litigation, Moms for Liberty - Brevard Cnty. v. Brevard Pub. Sch., 582 F. Supp. 3d 1214 (M.D. Fla. 2022), aff'd, No. 22-10297, 2022 WL 17091924 (11th Cir. Nov. 21, 2022), which addressed only whether the plaintiffs had satisfied the standard for preliminary injunctive relief. After the parties completed briefing in the case here, however, the Eleventh Circuit reversed the district court's subsequent grant of summary judgment to the Board, holding that the challenged policies were facially and as-applied unconstitutional.

County School Board's policy restrictions on parents' speech in board meetings were unconstitutional. Id. at 1328. The Eleventh Circuit agreed and found that a restriction on "abusive" speech was unconstitutional viewpoint discrimination and that a ban on "personally directed" speech was not reasonable in light of the purpose served by the limited public forum. Id. at 1335, 1337–38.

The court emphasized that even where the government has discretion to impose reasonable, content-based limits in a limited public forum, it may not suppress speech because officials find the viewpoint offensive, challenging, or negative. Moms for Liberty, 118 F.4th at 1334. A rule barring offensive or "unacceptable" speech while requiring "happy-talk" (positive or benign commentary) necessarily discriminates against speakers who express dissenting or critical perspectives. Id. (citing Matal, 582 U.S. at 246). The government has no authority to "prevent both willing and unwilling listeners from hearing certain perspectives," because "for every one person who finds these viewpoints offensive, there may be another who welcomes them." Id. The Constitution does not permit the government to curate public debate to avoid discomfort or controversy, but, rather, listeners must "judge the content of speech for themselves." Moms for Liberty 118 F.4th at 1335–36 (citation omitted).

The reasonableness inquiry in a limited public forum is flexible, but not toothless. The reasonableness analysis depends on whether the restriction is

consistent with the forum's purpose. Moms for Liberty, 118 F.4th at 1332; Cambridge Christian Sch. v. Fla. High Sch. Athletic Ass'n, Inc., 942 F.3d 1215, 1244–45 (11th Cir. 2019); Mansky, 585 U.S. at 16–17. However, even restrictions that pursue legitimate objectives may be unlawful if their enforcement cannot be "guided by objective, workable standards." Mansky, 585 U.S. at 21. The reasonableness test asks, in part, whether a restriction is enforced in an arbitrary or haphazard way. Moms for Liberty 118 F.4th at 1332 (citing Cambridge Christian Sch., 942 F.3d at 1240, 1243). If enforcement is "so inconsistent that it is impossible to discern the standard used," the restriction is unreasonable. Moms for Liberty 118 F.4th at 1335–36. An "indeterminate prohibition carries with it the opportunity for abuse," particularly when that prohibition "has received a virtually open-ended interpretation." Id. at 1332 (citing Mansky, 585 U.S. at 17). "So a policy is unreasonable if it fails to define key terms, lacks any official guidance, and vests too much discretion in those charged with its application." Moms for Liberty, 118 F.4th at 1332 (cleaned up). "Speech restrictions must be reasonable, viewpoint-neutral, and clear enough to give speakers notice of what speech is permissible." Id. at 1339.

1. Are the Policies' restrictions on "abusive," "racist," and "hateful" speech and "personal attacks" and "harassment" viewpoint-based?

The Policies' restrictions on "personal attacks" and "harassment" as well as "abusive," "racist," and "hateful" speech invite impermissible viewpoint

discrimination. These restrictions prohibit speech based on its disparaging or offensive nature and therefore fall squarely within the category of impermissible viewpoint discrimination restrictions. See Ison v. Madison Loc. Sch. Dist. Bd. of Educ., 3 F.4th 887, 894 (6th Cir. 2021).

The term "abusive" illustrates the constitutional defect common to all of the challenged restrictions. In Moms for Liberty, the Eleventh Circuit considered a ban on "abusive" speech that was left undefined. 118 F.4th at 1333. Examining the ordinary meaning of the term and the record before it, the court concluded that the absence of objectionable standards allowed officials to "shut down speakers whenever [they] saw their message as offensive." Id. at 1334. Because the restriction functioned as an "undercover prohibition on offensive speech," it was unconstitutional. Id. at 1335. The court emphasized that "a different policy—one prohibiting viewpoint-neutral characteristics of speech, for example, or explicitly and narrowly defining 'abusive'—could be constitutional." Id. Absent such definition, however, the restriction enabled censorship of speech precisely because it was offensive, thereby chilling expression and facilitating viewpoint discrimination. Id. at 1342.

The Supreme Court previously reached the same conclusion in Matal, striking down the Lanham Act's prohibition on registering trademarks that "disparage" or bring into disrepute any person. 582 U.S. 218. The "anti-

disparagement" clause discriminated based on viewpoint because "[g]iving offense is a viewpoint." Id. at 220, 243–44.

Relying on Matal, the Sixth Circuit likewise held that prohibitions on "abusive" speech impermissibly suppress speech merely because it is offensive. Ison, 3 F.4th at 894; Marshall v. Amuso, 571 F. Supp. 3d 412, 422 (S.D.N.Y. 2021).[10] There, the court determined that the "abusive" restriction barred "insulting" language and, as interpreted by the board, included speech "personally directed" at a single individual. Ison, 3 F.4th at 894. As in Moms for Liberty and Matal, the restriction turned on whether their speech offended or disparaged its target. Id. The Policies' restrictions do the same. They draw distinctions based on the viewpoint expressed, not on any objective or content-neutral feature of the speech. Critical comments are silenced precisely because they are critical.

a. Lack of objective standards and discretionary enforcement

Although the restricted terms already invite viewpoint-based judgments, the Policies' failure to supply objective standards ensures that such judgments control enforcement. The Policies authorize removal of comments deemed "abusive,"

[10] Defendants first argue that Matal is inapplicable because it arose in the trademark context. But Matal applied core First Amendment principles to its viewpoint discrimination analysis, rendering that analysis directly applicable to the Policies at issue here. Defendants next contend that Ison and Marshall are not binding on courts in the Eleventh Circuit. The Eleventh Circuit, however, applied the same First Amendment principles in Moms for Liberty that Ison and Marshall did. Indeed, the Eleventh Circuit expressly looked to Ison, noting that "the only other circuit to consider a similar policy has reached the same conclusion." 118 F.4th at 1335.

"hateful," "racist," or "harassment" or "personal attacks" without tethering those terms to objectively disruptive conduct. The record confirms that City employees exercise broad discretion to determine what constitutes "objectionable content," relying on their own subjective judgments rather than on defined or objective standards. Lampl Dep. at 168: 1–13. Page administrators received no guidance or training on how to apply the Policies. PSAMF ¶¶ 111–15, 123.

The ordinary meanings of the challenged terms underscore the problem. Personal means "of or relating to a person" and an "attack" is "unfriendly words" or "antagonistic action." Merriam-Webster's Dictionary, (online ed. Mar. 2026) (defining "personal" and "attack"). "Antagonistic," in turn, means "showing dislike or opposition." See id. (defining "antagonistic"). These definitions confirm that a "personal attack" is speech expressing opposition, hostility, or criticism towards an individual. And that type of speech turns on viewpoint discrimination.

The deposition testimony of the Page's administrators confirms that City officials did not share a common understanding of the term "personal attacks." Vuong Tran understood the term to mean defamation. Dep. of Vuong Tran ("Tran Dep.") at 48: 12–14. Lampl described a "personal attack" as singling someone out with "[t]he objective to hurt" or attack personal character. Lampl Dep. at 132:2–13. Baker understood it as targeting a person based on "dislike or distaste." Dep. of Jeff

Baker ("Baker Dep.") at 55:6–8. These materially different interpretations illustrate the absence of any workable boundary guiding enforcement.

As Ison explained, restrictions on "antagonistic" or "personally directed" speech prohibit expression because the speech opposes or offends, and therefore, such restrictions operate as viewpoint discrimination. 3 F.4th at 894. The same is true here. Without clear boundaries defining the scope of the prohibited speech, the Policies do not regulate the manner of expression in a neutral way. City officials remain free to remove speech that they view as critical of City policies or leadership, while permitting supportive or neutral commentary to remain.

The Policies do not confine enforcement to unprotected categories of speech, such as true threats, obscenity, spam, or objectively disruptive conduct. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 791 (2011). Instead, they seek to restrict the expression of certain views. The First Amendment, however, protects even speech that is harsh, offensive, or racially charged. Indeed, "[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" Matal, 582 U.S. at 246 (citation omitted). Yet the Policies authorize removal of speech because it is harsh, accusatory, or politically charged. That discretion enables censorship of viewpoints

critical of the City while preserving speech that aligns with official preferences, confirming that the Policies operate as viewpoint-based restrictions.

b. Purpose of Policies

As in Moms for Liberty, it is difficult to discern here how the City's restrictions on "personal attacks" and "harassment" and "hateful," "racist," and "abusive" speech advance the stated purposes of the City's Page or the challenged Policies. The 2022 Policy states that the Page exists to provide information and engage the community, while the Web Policy similarly states that the Page's purpose is "to provide our followers access to information about the City of Morrow, and platforms through which to interact with the city." [Docs. Doc. 46-17 § 7; 46-34]. Defendants contend that the policy restriction exists "to maintain a sense of decorum in the comments sections." [Doc. 53 at 11]. In support, they rely on the now-overturned district court decision in Moms for Liberty - Brevard Cnty. v. Brevard Pub. Sch., 582 F. Supp. 3d 1214 (M.D. Fla. 2022), which cited to the board's interest in preventing disruption, preserving reasonable decorum, and facilitating orderly meetings. That reliance is misplaced. On appeal from the district court's grant of summary judgment, the Eleventh Circuit held that such "ill-defined" restrictions fail

to provide a reasonable boundary capable of advancing the board's stated goals. Moms for Liberty, 118 F.4th at 1337.

Defendants fare no better by relying on Steinburg v. Chesterfield Cnty. Plan. Comm'n, 527 F.3d 377 (4th Cir. 2008). There, the Fourth Circuit upheld a restriction against "personal attacks" because it was justified by the government's "significant interest" in ensuring "efficient conduct" in a meeting and to "maximize citizen participation in the discussion." Id. at 386–87. Critically, there, the policy addressed the manner of speech in a live, time-limited forum, rather than the content of that speech. Id. at 387.

That rationale does not apply to the facts here. This case concerns restrictions on comments posted to a government-run Facebook page, which is not a live, time-limited forum. Postings on the Page pose no comparable risk of immediate disruption, and the Page does not present the constraints and logistical limits of a live public meeting. Unlike the policy in Steinburg, the challenged restrictions operate to suppress speech based on its expressive content and viewpoint, rather than to regulate the manner of participation in a live forum. Accordingly, Steinburg's decorum-based analysis provides no shelter for the viewpoint-discriminatory enforcement at issue here.

Moms for Liberty further confirms this conclusion. 118 F.4th at 1337. There the court held that the board's purpose of educating the board and the community

about community members' concerns was not, on its own, sufficient to restrict "personally directed" comments. Id. A policy that lacks a sensible basis for distinguishing what speech may be permitted and what may be excluded is at risk of being enforced in an unpredictable and unreasonable manner and, therefore, unconstitutional. Id. Indeed, speakers often cannot articulate concerns about government conduct without referring to particular individuals. Id.

Ison offers further support. 3 F.4th at 894. There, the court held that prohibitions on "personally directed," and "antagonistic" speech were unconstitutional because, by definition, they suppressed speech opposing or offending the board. Id. Antagonist means, for instance, "to antagonize with hostility toward oneself or one's person[;] . . . being hostile to people"; while "personally directed" means "either *harassing* [or] *abusive* statements directed at someone individually." Id. at 893 (emphasis added). As their ordinary meanings reflect, these concepts encompass speech that expresses hostility, opposition, or offense. Id. Without objective standards to guide enforcement, restrictions based on these concepts violate the First Amendment. Id.

Because the challenged restrictions in the Policies target speech based on whether it criticizes, offends, or expresses disapproval towards an individual, they constitute viewpoint discrimination. That discrimination is not reasonably related to the Page's asserted purposes. Public engagement in government affairs frequently

manifests as pointed criticism of officials or employees acting in their official capacity. Suppressing such speech does not further information-sharing or community engagement; it undermines these goals by eliminating one side of the public debate.

Accordingly, the Policies' prohibitions on "harassment" and "personal attacks" and "abusive," "hateful," "racist," speech suffer from the same defects—undefined contours, discretionary enforcement, and viewpoint-based suppression—that concerned the Ison and Moms for Liberty courts and are therefore facially unconstitutional. Booterbaugh prevails on the facial challenge.

2. Are the Policies' content-based restrictions on "defamatory," "off-topic," and "unsupported accusations" unreasonable in light of the forum's purpose?

The Policies' restrictions on "defamatory" speech, "unsupported accusations," and "off-topic comments" are facially viewpoint neutral. Just as with the other restrictions, however, none of the challenged terms are defined in either Policy, and the record reflects that Page administrators received no guidance or training on how to apply them. PSAMF ¶¶ 111–15, 123; [Doc. 46-17 § 7]. They are therefore unreasonable in light of the forum's purpose.

a. Defamatory restriction

The City's "defamatory" restriction is unconstitutional. City employees responsible for moderating the Page could not articulate a shared or objective

definition of what constitutes "defamatory" speech. Tran Dep. at 72:9–72:23 (to defame means to "bring[] up something that happened in the past"); Lampl Dep. at 149:9–18 ("talking smack" about someone is defamatory speech). As applied, the restriction operates not to address legally defamatory speech, but to suppress speech that is critical or offensive. Courts have rejected similar use of "defamation" as a colloquial proxy for offensive commentary rather than a narrowly defined legal concept. Draego v. City of Charlottesville, Va., No. 16-CV-00057, 2016 WL 6834025, at *20 (W.D. Va. Nov. 18, 2016).

b. Unsupported accusations

The Policies' prohibition on "unsupported accusations" suffers from the same defects. The term is undefined, and City employees with administrative access lack any uniform understanding of its application. PSMF ¶¶ 215–16. The record shows uncertainty as to what constitutes sufficient "support" for an accusation. It is unclear whether supporting materials must accompany a comment and who determines their adequacy. Dep. of Rochelle Dennis ("Dennis Dep.") at 88: 6–25, 89: 1–6 [Doc. 45] (expressing uncertainty about what would be enough to support an accusation); Baker Dep. at 171:9–12 [Doc. 46] (viewing unsupported accusations to be personal attacks, harassment, defamation, etc.); Tran Dep. at 49:16–23, 50:9–17 (considering unsupported accusation" to mean "accus[ing] someone without evidence . . . supporting your cause" and expressing belief that she is not a "lawyer or judge" who

can determine how much evidence would be sufficient); Lampl Dep. at 172:19–20 (indicating only that an individual needs to have "additional data").

The problem is compounded by the City's automatic filter, which removes any comment containing a hyperlink. PSMF ¶ 217. Thus, not only are posts with "unsupported" accusations subject to removal, but where a commenter relies on a hyperlink to "support" an accusation, that individual's comment is also removed. The restriction thus provides no clear way to comply and provides Page administrators no objective criteria to guide enforcement.

Defendants rely on Dyer v. Atlanta Indep. Sch. Sys., 426 F. Supp. 3d 1350 (N.D. Ga. 2019), aff'd 852 Fed. App'x 397 (11th Cir. 2021) to argue that prohibitions on "defamatory" statements and "unsupported accusations" are constitutional.[11] [Doc. 53 at 9–12]. That reliance is misplaced. Dyer involved an as-applied challenge in which the school board "codified its interest in orderly meetings through board policy" that banned "[a]pplause, cheering, jeering, or speech that defames individuals or stymies or blocks meeting progress." 426 F. Supp. 3d at 1360. Viewing the policy in the context of the board's treatment of the plaintiff, the Eleventh Circuit affirmed the constitutionality of the restriction because the board restricted the

[11] Defendants' treatment of the "unsupported accusations provision' is essentially the same as a restriction banning defamation." [Doc. 53 at 11].

plaintiff's speech due to proven disruption, not because it was offensive. 852 Fed. App'x at 402.

Maintaining decorum and preventing disruption are legitimate government interests. These interests do not resolve the facial challenge presented here. This case concerns a blanket restriction applied to asynchronous comments on a government-run Facebook page, where speech poses no comparable risk of immediate disruption. Absent any "sensible basis for distinguishing what may come in from what must stay out," the restrictions on "defamatory" speech and "unsupported accusations" are unreasonable. Mansky, 585 U.S. at 16. Enforcement that turns solely on a moderator's unguided judgment is arbitrary and therefore unconstitutional. Cambridge Christian Sch., 942 F.3d at 1243–44.

c. Off-topic restrictions

The City's "off-topic" restriction is also unreasonable. It lacks objective, workable standards and is not capable of being applied in a reasoned way. Mansky, 585 U.S. at 23. Nothing in the Policies or on the Page defines the meaning of "off-topic" or delineates the scope of discussion. PSMF ¶ 209. Reasonableness must be assessed in light of the forum's purpose, which is to provide information, engage

the community, and offer the public a platform through which to interact with the City. [Docs. 46-17 § 5; 46-34].

Defendants rely on an out-of-circuit district court decision, Krasno v. Mnookin, 638 F. Supp. 3d 954, 974 (W.D. Wis. 2022), for the proposition that clutter and distraction on a Facebook page constitute legitimate government interests. In Krasno, the defendant university issued "Interim Guidance" providing moderators with concrete standards and an explanatory example. Id. at 977. The district court concluded that the prohibition on comments that are "clearly off-topic" can be viewpoint-neutral and reasonable if administered pursuant to objective, workable standards, and it upheld the restriction. Id. at 974–77. The university's standards, however, did not survive appellate review. Reversing on appeal, the Seventh Circuit noted that, among other deficiencies, the university provided its staff only a "single example" and failed to specify whether "off-topic" referred to the subject of the university's webpages or to the subject of an individual post. Krasno, 148 F.4th at 484. Thus, the district court's decision in Krasno does not advance Defendants' argument.

The government must "draw a reasonable line," informed by "objective, workable standards," between what speech is permitted and what is excluded. Mansky, 585 U.S. at 16, 21. The City has not drawn any such line. Although narrow tailoring is not required, the government must articulate "some sensible basis for

distinguishing what may come in from what must stay out." Id. at 16. The City did not do so. The Policies do not define "off-topic" speech[12] and provide no guidance to Page administrators. See Lampl Dep. at 158:16–18 (describing "off-topic" as discernible through "common sense" and not requiring a definition); Dennis Dep. at 62:2–15 (acknowledging that the City provided no training and that different moderators could reasonably reach different conclusions as to what constitutes an off-topic comment). Further, Defendants have offered no explanation in this litigation clarifying the meaning of the term as applied under the Policies.

The question is not whether a person can generally understand the phrase "off-topic," but whether the Policy provides objective criteria sufficient to constrain enforcement and permit reasoned, consistent application. Mansky, 585 U.S. at 21– 23. Without such standards, the line between on-topic and off-topic speech is susceptible to subjective interpretation. The resulting risk of inconsistent and arbitrary enforcement is precisely what the Supreme Court and the Eleventh Circuit have warned against. Mansky, 585 U.S. at 16–22; Moms for Liberty, 118 F.4th at 1336. Accordingly, the City's "off-topic" restriction is facially unconstitutional.

3. Are the blocking provisions vague and overbroad?

Both Policies are overbroad because they vest City officials with unfettered discretion to block users entirely from the Page. [Doc. 49-1 at 17 (citing Stanley v.

[12] The Policies do not state what is topical for purposes of the forum.

Georgia, 394 U.S. 557, 564 (1969))]. 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.

a. Procedural challenge

Booterbaugh contends that the blocking provisions are not narrowly tailored to the Policies' purpose and are, therefore, unreasonable. [Doc. 49-1 at 19]. As a threshold matter, Defendants do not respond to the merits of Booterbaugh's challenge. Instead, they argue that Booterbaugh is procedurally barred from challenging the Policies' blocking provisions because the Complaint did not include a facial challenge to those provisions. The Court disagrees.

Count II asserts a facial vagueness and overbreadth challenge to both the 2022 Policy and the Web Policy and incorporates by reference the factual allegations set forth in paragraphs 1 through 120 of the Complaint. Those allegations assert that the 2022 Policy "allows the City . . . to block users," by granting officials "unfettered discretion" and thereby permitting "viewpoint-based retaliation." Compl. ¶ 95. Booterbaugh likewise alleges that the Web Policy's blocking provision permits the City to block users for posting "inappropriate material," without defining that term, thereby affording "the City unlimited discretion to censor and restrict public speech on the City Page based on viewpoint." Id. ¶¶ 102–105.

These allegations are sufficient to place Defendants on notice that Plaintiff's facial challenge encompasses not only content-removal provisions but also the Policies' authorization to block users entirely from the Page. See Gonzalez v. Asset Acceptance, LLC, 308 F. App'x 429, 430 (11th Cir. 2009) ("The purpose of Fed. R. Civ. P. 8(a)(2) is to provide the defendant with fair notice of what claim is being alleged, and the grounds upon which it rests."). Because Count II plausibly alleges that the Policies vest City officials with unfettered discretion to suppress speech—incorporating factual allegations describing blocking as a mechanism of that discretion—Plaintiff is not procedurally barred from pursuing this theory. Compl. ¶¶ 158–77.

b. Substantive challenge

Both the Web Policy and the 2022 Policy independently authorize City officials to block a user's access to the City's social-media page in its entirety based on perceived violations of content-moderation rules. Neither Policy imposes a time limit on any imposed block nor requires that the sanction be narrowly tailored to specific comments or posts. [Docs. 46-17 § 7; 46-34].

The 2022 Policy provides that "[a]ny individual who repeatedly violates the terms of this policy will be blocked from posting to this page." [Doc. 46-17 § 7]. This blocking provision is facially unconstitutional because it authorizes Page-wide exclusion without objective criteria to guide enforcement, leaving its application

indeterminate. Mansky, 585 U.S. at 16 (citation omitted). The provision authorizes Page-wide exclusion based entirely on violations of the Policy's underlying speech restrictions, which, as explained, permit viewpoint discrimination and are unreasonable in light of the forum's purpose. As in Moms for Liberty, the Policy lacks "a sensible basis for distinguishing what may come in and what must stay out," and therefore is "unreasonable and unconstitutional." Moms for Liberty, 118 F.4th at 1332 (quoting Mansky, 585 U.S. at 16). By conditioning complete denial of access to the forum on indeterminate and subjective standards, the blocking provision vests City officials with unfettered discretion and invites arbitrary and discriminatory enforcement.

The Web Policy's blocking provision is even broader. It states that "[t]he agency reserves the right to remove and/or block anyone who posts *inappropriate material* as determined by the City of Morrow." [Doc. 46-34 (emphasis added)]. As with the other provisions already discussed, "inappropriate material" is undefined. "Official censorship based on a state actor's subjective judgment that the content of protected speech is offensive or inappropriate is viewpoint discrimination." See Robinson, 921 F.3d at 447 (citing Matal, 582 U.S. at 243–44). Each Page administrator has unfettered discretion to apply his or her own understanding of what constitutes "inappropriate" content. See Lampl. Dep. at 142–44.

Even assuming the City has a legitimate and content-neutral interest in preventing disruptive or inappropriate comments, the blocking provisions are not narrowly tailored to that interest. A speech regulation may not "burden substantially more speech than is necessary to further the government's legitimate interests." Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989). Here, Page-wide blocking operates as a complete and indefinite exclusion and prevents a user from accessing government information and participating in public discussion altogether. That sweeping sanction extends far beyond the removal of violative comments.

Because the blocking provisions impose an indefinite Page-wide exclusion from a government-operated forum for public discussion, they are unreasonable in light of the forum's purpose. Accordingly, summary judgment on Booterbaugh's facial challenge of the Policies' blocking provisions is appropriate.

D. Georgia Open Records Act Claim (Count III)

In his final claim, Booterbaugh alleges that the City violated the Georgia Open Records Act (ORA), O.C.G.A. §§ 50-18-70 *et seq.*, by failing to timely produce the List of users blocked from the City's Facebook Page. Compl. ¶¶ 178–84. He moves for summary judgment on this claim, arguing that the undisputed facts show that the City possessed the List, refused to turn it over upon request, and did so without justification. [Doc. 49-1 at 23–25]. Booterbaugh requests that the Court declare that the City violated the ORA, enjoin the City from similar future violations, and award

him civil penalties. [Id. at 2]. The City cross-moves for summary judgment, arguing that it had no obligation to produce the List. [Doc. 51-1 at 22–24]. In its view, the List is not a public record under the ORA, producing the List would have required the City to create a new record, and Booterbaugh failed to pay the requested retrieval fee. [Id.]

1. The ORA's requirements

Georgia enacted the ORA to encourage public access to government information and to foster confidence in government actions. See O.C.G.A. § 50-18-70(a); Cardinale v. Keane, 869 S.E.2d 613, 616 (Ga. Ct. App. 2022). To that end, the ORA directs that "[a]ll public records shall be open for personal inspection and copying, except those which by order of a court of this state or by law are specifically exempted from disclosure." O.C.G.A. § 50-18-71(a)(1). "Government agencies therefore have a duty to disclose public records unless relieved of that duty by a specific exemption or court order." Campaign for Accountability v. Consumer Credit Rsch. Found., 815 S.E.2d 841, 844 (Ga. 2018). Government "agencies" include municipal corporations, like the City of Morrow. O.C.G.A. § 50-18-70(b)(1).

Once an agency receives an ORA request, if the records exists, it must "produce for inspection all records responsive to the request within . . . three

business days" of receiving the request. O.C.G.A. § 50-18-71(b)(1)(A). The ORA broadly defines "public record" to include

> all documents, papers, letters, maps, books, tapes, photographs, computer based or generated information, data, data fields, or similar material prepared and maintained or received by an agency or by a private person or entity in the performance of a service or function for or on behalf of an agency or when such documents have been transferred to a private person or entity by an agency for storage or future governmental use.

Id. § 50-18-70(b)(2). The statute applies equally to "electronic records or data from data base fields that the agency maintains using the computer programs." Id. § 50-18-71(f). Agencies must produce "electronic records, data, or data fields" if instructions for retrieval "can be executed using existing computer programs that the agency uses in the ordinary course of business to access, support, or otherwise manage the records or data." Id. Because the public policy rationale codified in the ORA strongly favors open government and transparency, the ORA should be "broadly construed to allow the inspection of governmental records," and exceptions should be "interpreted narrowly." O.C.G.A. § 50-18-70(a); Cardinale, 869 S.E.2d at 616.

The ORA creates a private right of action against persons or agencies who violate the Act. Cardinale, 869 S.E.2d at 617 (citing § 50-18-70(a)). Any person or entity who negligently violates the ORA is subject to civil fines. O.C.G.A. § 50-18-74(a). The ORA also permits the court to award "reasonable attorney's fees

and other litigation costs reasonably incurred" against an opposing party who "acted without substantial justification either in not complying with [the Act] or in instituting the litigation[.]" Id. § 50-18-73(b).

2. The City violated the ORA

The Parties agree that the City received requests under the ORA from Booterbaugh on July 15, August 30, and November 1, 2022, for records related to the List of profiles blocked from the City's Facebook Page. PSMF ¶¶ 157, 179, 193; DSMF ¶¶ 96, 109. The August 30 request sought "all files, records, and other documents in [the City's] possession that refer, reflect or relate to the City of Morrow Facebook Blocked Users" as well as "the Blocked Facebook Users List." PSMF ¶ 179; DSMF ¶ 109. The Parties also agree that the City refused to produce the List until over a year later, during discovery. PSMF ¶¶ 182, 186, 191; DSMF ¶¶ 109, 111. The remaining question then is whether the City's refusal was justified. The answer is no; all three of the City's justifications fall short.

First, the List lies squarely within the ORA's definition of a public record. "Public records" under the ORA include "computer based or generated information, data, data fields, or similar material" that an agency prepares and maintains or receives for future governmental use. O.C.G.A. § 50-18-70(b)(2). The settings and privacy section of every Facebook account contains a list of users who have been blocked from viewing the accountholder's page. That list exists from the moment a

user opens their account and can be accessed at any time with only a few clicks. Even if accountholder has not blocked anyone from its page, the list still exists; but instead of showing the names blocked users, it simply says "nothing to show." [See Doc. 47-18]. Because the List is an embedded feature of the City's Facebook account, the City prepared the List when it created the Facebook Page and maintained the List by exercising control over the Page. Additionally, the fact that the List was stored on Facebook's platform does not alter its status as a public record because the City maintains that platform and can access it at any time. See O.C.G.A. § 50-18-71(f) ("Agencies shall produce . . . electronic records or data from data base fields that the agency maintains using the computer programs that the agency has in its possession.").

Second, the List was an existing record in the City's possession when Booterbaugh requested it. The City is correct that it did not have to produce new reports, summaries, or compilations not in existence at the time of the request. [Doc. 51-1 at 23 (citing § 50-18-71(j))]. But there was nothing new about the List— it had existed for as long as the Page had, even if the City had never accessed it. Additionally, contrary to the City's argument, taking a screenshot of the List would not have created a new record; rather, it would have simply captured an existing record in an easily transmittable format. In that way, a screenshot is the functional equivalent of printing a requested record, which the City could have also

easily done by accessing the List in the Page's settings and printing it from an internet browser.

Third, the fact that Booterbaugh did not pay the $114 requested processing fee did not excuse the City from producing the List. The ORA provides a process for addressing the cost of retrieval: if it costs an agency more than $25 to retrieve a record, the agency must inform the requester within three business days of the estimated costs and may then defer its search and retrieval of the record until the requester agrees to pay the costs. O.C.G.A. § 50-18-71(d). The agency may not, however, require prepayment before retrieving the records, unless the cost of retrieval and production exceeds $500. Id. In his July 15 and August 30 requests, Booterbaugh himself prompted the City to "inform [him] about such costs as required by Georgia law." [Docs. 46-6, 46-21]. Despite Booterbaugh's prompts and the ORA's instruction for addressing fees, the City did not provide a timely cost estimate within three days. In fact, the City did not even suggest that there was a retrieval cost until December 6, 2022, a month after Booterbaugh's counsel last requested that the City produce the records. [Doc. 47-49 at 5]. And even after Booterbaugh's counsel indicated in a December 13, 2022 email that Booterbaugh was "amenable to paying reasonable fees upon production of the documents," the City did not produce the requested List. [Doc. 50-4 at 2]. Had the City timely responded to Booterbaugh's requests with cost estimates for retrieval and

Booterbaugh had delayed payment, this might have justified the City's delay in producing the List. But that is not what happened and under the facts here, O.C.G.A. § 50-18-71(d) does not shield the City from liability.

The undisputed facts underpinning Booterbaugh's claim under the ORA are straightforward: Booterbaugh asked the City to produce the List and the City said no; the record reflects no reasonable justification for the City's refusal. Under the facts presented, no reasonable juror could conclude that the City's refusal was justified. As a result, summary judgment in favor of Booterbaugh on the ORA claim is warranted.

E. Relief

Having concluded that Booterbaugh prevails on summary judgment on his claim that the City's Policies are unconstitutional (Count II) and on his claim that the City violated the ORA (Count III), the Court must determine what relief is appropriate. However, the present record does not permit a determination of the type and scope of the relief. To assist the Court, the Parties shall provide a proposed briefing schedule as directed below.

IV. Conclusion

For the reasons discussed above, the Court **GRANTS IN PART AND DENIES IN PART** Booterbaugh's Motion for Sanctions, [Doc. 55], and imposes the following sanction on Defendants under Rule 37(e)(1): Defendants are

prohibited from introducing evidence or argument at trial that (1) the Blocked Users List did not contain Plaintiff's name from July 13, 2022, to January 22, 2023; (2) the List's contents did not change over time; or (3) the List never showed that Plaintiff was blocked from the City's Page.

The Court also **GRANTS IN PART AND DENIES IN PART** Defendants' Motion for Summary Judgment. [Doc. 51]. Specifically, the Court **DENIES** Defendants' motion with respect to the City's liability. The Court **GRANTS** Defendants' motion with respect to Baker's liability in his official and his individual capacity and Lampl's liability in his individual capacity. Accordingly, the Court **DIRECTS** the Clerk to terminate Defendant Jeff Baker as a Party to this action.

Next, the Court **GRANTS** Booterbaugh's Motion for Partial Summary Judgment, [Doc. 49], and enters judgment in favor of Booterbaugh on the merits of Counts II and III of the Complaint. Within **21 DAYS** of the entry of this order, the Parties **SHALL** confer and submit a proposed schedule for (1) the briefing of the relief to be awarded on Counts II and III and (2) the filing of the Consolidated Pretrial Order on the claims remaining to be tried. The Court encourages the Parties to discuss and propose a pragmatic schedule that promotes the efficient resolution of the remaining issues in this case.

SO ORDERED, this 12th day of March, 2026.

Eleanor L. Ross
United States District Judge
Northern District of Georgia