UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KELVIN J. COCHRAN,

Plaintiff,

v.

CITY OF ATLANTA, GEORGIA; and MAYOR KASIM REED, IN HIS INDIVIDUAL CAPACITY,

Defendants.

Case No. 1:15-cv-00477-LMM

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendant City of Atlanta punished, and ultimately fired, Plaintiff Kelvin Cochran because it disagreed with the religious beliefs he expressed in a book he wrote for a men's Bible study.[1] Chief Cochran wrote the book on his own personal time while chief of the Atlanta Fire and Rescue Department ("AFRD"), in order to help Christian men lead faith-filled, virtuous lives. He self-published the book in November 2013 and later gave a few free copies to AFRD members who either requested them or with whom he had previously established a relationship as a fellow Christian. The book, the city, and the AFRD peacefully coexisted for an entire year, until one solitary instance of personal disagreement with its contents surfaced. But having once been made aware of that disagreement, Defendant then immediately took both private and public issue with the book's contents, suspended Chief Cochran, and launched a much publicized investigation into his leadership of AFRD.

Although that investigation ultimately revealed that the religious beliefs expressed by Chief Cochran in his book did not affect the way he discharged his

[1] Based upon this Court's ruling on Defendants' Motion to Dismiss, Plaintiff's claims sounding in First Amendment retaliation and free speech pertain to Defendant City of Atlanta alone, while his Fourteenth Amendment procedural due process claim pertains to Defendants City of Atlanta and Mayor Reed, in his individual capacity.

duties as fire chief, Defendant summarily terminated him anyway. The record reveals that Defendant's discipline was predicated upon its substantive objections to the content of Chief Cochran's book. It was only after Defendant had acted pursuant to those objections that it then attempted to justify its discipline on policies that either do not exist, or cannot be constitutionally applied here. Indeed, each of the decisions made by Defendant—both to suspend and to terminate Chief Cochran—independently violated his constitutional right to free speech. Moreover, by depriving him of the protections that were his due under the City's Code of Ordinances and Code of Ethics, Defendants—both the City of Atlanta and Mayor Reed in his individual capacity—violated Chief Cochran's right to procedural due process.

Accordingly, for the reasons discussed herein, Chief Cochran is entitled to summary judgment on his First Amendment retaliation, viewpoint discrimination, prior restraint, unbridled discretion, and procedural due process claims.

FACTUAL BACKGROUND

Chief Cochran's Exemplary Record as Firefighter and Fire Leader

Before Defendant unconstitutionally suspended and terminated him, Chief Cochran had painstakingly earned a sterling reputation as a fire service professional. *See* Yancy Dep. 114:22-24 (testifying that Chief Cochran "was

really good at his job" and "nationally recognized at it"). He worked his way up from firefighter to training officer to fire chief of the Shreveport Fire Department, holding that top leadership positon for nearly a decade. *See* First Amended Verified Complaint ("Am. Comp.") ¶¶ 44-49. In January 2008 he was appointed AFRD Fire Chief by then-Mayor Shirley Franklin. *Id*. at ¶¶50-51; Defs' Ex. 1. In July 2009 President Obama nominated Chief Cochran to head the U.S. Fire Administration, and upon his confirmation by the Senate he became the highest ranking fire official in the nation. *Id*. at ¶¶52, 55. Chief Cochran returned to Atlanta in June 2010 to serve under Mayor Kasim Reed as AFRD Fire Chief. *Id*. at ¶58. During his tenure at AFRD, Chief Cochran was awarded Fire Chief of the Year by Fire Chief magazine, and achieved the City's first Class 1 Public Protection Classification rating, which "indicates an exemplary ability to respond to fires" and resulted in insurance premiums being lowered throughout the City. *See* Pl's Ex. 2 (thanking Chief Cochran for his "pioneering efforts to improve performance and service within the [AFRD]" and recognizing the award as "much-deserved"); Pl's Ex. 7; Reed Dep. 86:9-15.

Chief Cochran's Devotion to Dignity and Respect for All AFRD Members

Chief Cochran personally experienced being treated differently based on his race while a young firefighter, so he worked diligently throughout his career to ensure that no one under his command would be mistreated because of his or

her personal traits, beliefs, or membership in a particular group. Am. Comp. ¶¶81-82. Consistent with this leadership philosophy borne of hard experience, Chief Cochran instituted what came to be known as the Atlanta Fire Rescue Doctrine, the goal of which was to develop a governing philosophy that would ensure that the AFRD was a high performing—but also inclusive—organization. *See id*. at ¶¶ 23-28; Pl's Ex. 117 at Nos. 14-15. The Doctrine was created by Chief Cochran and a deliberately chosen, diverse group of AFRD members, at least two of whom were members of the LGBT community. Am. Comp. at ¶77.

Given his solicitude for both excellence and diversity, it is not surprising that no member of the Mayor's cabinet or any AFRD member could ever cite a single instance in which Chief Cochran had discriminated against anyone or treated them differently based on his religious beliefs. *See* Reed Dep. 156:10-13; Yancy Dep. 102:11-14; Geisler Dep. 66:18-21; Mullinax Dep. 19:19-20:4; Pl's Ex. 17. In fact, Special Advisor to the Mayor Melissa Mullinax testified that Chief Cochran was "always . . . very supportive" of "gay pride events" and "gay firefighters." Mullinax Dep. 19:19-20:1.

Chief Cochran's Religious Beliefs and His Decision to Write a Book

The impetus for Chief Cochran's inclusive leadership style, evidenced by the Atlanta Fire Rescue Doctrine, is his abiding faith in God. Am. Comp. ¶¶17, 19-23. He is an evangelical Christian whose sincerely held religious beliefs

include a historical Christian view of vocation and work, which compels him to honor God in all aspects of his work by doing everything with excellence throughout his job. *Id*. at ¶¶16-17. After facilitating a Bible study at his church focused on God's purpose for men, Chief Cochran felt led to write a book to further expound on the matter. Cochran wrote the book on his own personal time, finished it in the Fall of 2013, and self-published it in late-November 2013. Am. Comp. ¶91; Pl's Ex. 116 at No. 23. Entitled *Who Told You That You Were Naked?: Overcoming the Stronghold of Condemnation*, the book was intended to help each man fulfill God's purpose for his life. Am. Comp. ¶¶92-94; Cochran Depo. 43:1-144:21. The majority of the book discusses the Christian teaching concerning original sin and the ability of Christians to overcome its influence in their lives—a small portion of it addresses sexual morality from a Biblical standpoint. Am. Comp. ¶¶96, 103-04; Pl's Ex. 11 at 78-85.

On October 31, 2012—around the same time he set out to write the book—Chief Cochran contacted Nina Hickson, the City of Atlanta Ethics Officer, for ethics advice "regarding [the] non-city-related book he [was] authoring." Hickson Dep. 44:14-21; Cochran Dep. 107:17-111:13; Am. Comp. ¶105. Chief Cochran testified that Nina Hickson gave him permission to write and publish his book

during that call. *See* Cochran Dep. 110:14-18.[2] Once the book was published, Chief Cochran eventually gave a few free copies to AFRD members who either requested them or with whom he had previously established a relationship as a fellow Christian. Am. Comp. ¶¶126-27, 129; Cochran Dep. 217:3-5. Chief Cochran also gave a copy of the book to Mayor Reed's assistant, Lilly Cunningham, about a week before the mayor's State of the City address in February 2014. Cochran Dep. 152-53. He spoke to Mayor Reed after that address and the mayor confirmed that he had received a copy of the book and intended to read it on an upcoming flight. *Id*. at 153.[3]

The City Suspends Chief Cochran Based on the Content of His Book

Approximately one year after the book was published, one AFRD member expressed disagreement with "some very explicit conservative Christian ideals" contained in it. Borders Dep. 54:12-55:17. Defendant almost immediately seized upon the content of the book to manufacture a human resources crisis where

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[2] Whether Nina Hickson gave Chief Cochran permission to write and publish his book is disputed, but that dispute is not material here.

[3] Mayor Reed testified as to his recollection regarding this matter. *See* Reed Dep. 90-91. When Director of Communications Anne Torres later discussed the matter with an inquiring reporter, she indicated that the mayor had in fact received the book but had not read it at that time. *See* Torres Dep. 52-56; Pl's Ex. 72 ("He did not read the book when he handed it to him."). Regardless of whether the Mayor read the book, he was clearly aware of it and had the opportunity to read it.

none existed, and none needed to exist. *See* Wan Dep. 46-47, 51:23-24; 53:2-3; Yancy Dep. 26:22-27:7. Upon being made aware of the book, City officials repudiated Chief Cochran's beliefs and suspended him without pay. *See* Yancy Dep. 26:22, 69:8-9, 105-06; Pl's Ex. 10; Wan Dep. 84-85; Pl's Ex. 108. The ostensibly offensive content of the book featured prominently at Chief Cochran's suspension meeting, at which he was also informed that he would be required to attend remedial sensitivity training because of the nature of the beliefs he expressed in his book. Yancy Dep. 68-69, 76, 93; Pl's Ex. 10; Cochran Dep. 200-202. Finally, Defendant launched an investigation into Chief Cochran's leadership of AFRD—based on the content of his book—despite the fact that his AFRD tenure was unblemished to that point. Yancy Dep. 62-64, 102, 107:5-8 (Yancy testified that the "purpose of the investigation was to ensure that [Chief Cochran] had not treated anyone differently because of the views he espoused in the book"); Geisler Dep. 57:24-58:1 (testifying that a purpose of the investigation was "to address any concerns, different community groups, the LGBT would have had about the chief's stand on things").

Although Defendant's Own Investigation Proved Chief Cochran Had Done No Wrong and Discriminated Against No One, It Terminated Him and Continued to Publicly Repudiate His Beliefs to All the World

The City Law Department concluded in its Investigative Report that "[n]o interviewed witness could point to a specific instance in which any member of the

organization has been treated unfairly by Chief Cochran on the basis of his religious beliefs," and further concluded that there was "no indication that Chief Cochran allowed his religious beliefs to compromise his disciplinary decisions." Pl's Ex. 13 at 3-4. The City Law Department noted that some AFRD members took issue with the "sentiments expressed in the book" and were "offended by the viewpoints expressed" therein, but it could not help but report that no one "provided any examples of having experienced Chief Cochran displaying the influence of any of these viewpoints in his professional capacity," and no one could offer "specific complaints of maltreatment."[4] *Id*. at 4.

This is not surprising, because up until Chief Cochran wrote his book and one AFRD member expressed personal disagreement with its contents, he was never disciplined for any reason whatsoever by Defendant, but rather lauded for his extraordinary accomplishments. Pl's Ex. 2 (announcing that "[u]nder Chief Cochran's leadership, the department has seen dramatic improvements in response times and staffing"); Ex. 7. In fact, the record is clear that Chief Cochran—both before and after he wrote and published his book—never discriminated against any AFRD employee, never created or enforced any

[4] It is unclear how many witnesses were actually consulted by the City Law Department before it composed its Investigative Report, as it relies on generalities rather than specifics to make its claims. ("There was consistent sentiment . . . There is also general agreement . . . "). *See* Pl's Ex. 13 at 3-4.

discriminatory policy against any AFRD employee, and never permitted discrimination by or against any AFRD employee. Pl's Ex. 117 at Nos. 11-13.

Yet despite the unequivocal finding of the City Law Department that Chief Cochran's religious beliefs had not affected his leadership of the AFRD (whether as to discrimination or discipline), Pl's Ex. 13 at 3-4, and despite the fact that no City leader or employee could recall any instance in which Chief Cochran had discriminated against anyone, Reed Dep. 56:10-13; Geisler Dep. 47:2-13; Yancy Dep. 102:11-14; Mullinax Dep. 19:19-20:4, Defendant terminated him summarily on January 6, 2015, the day his suspension was due to end. Am. Comp. ¶169; Pl's Ex. 34; Yancy Dep. 122-23. Inexplicably, Defendant then continued to publicly repudiate the contents of Chief Cochran's book, even though his termination had ostensibly ended the matter once and for all. Pl's Ex. 14 at 2; Pl's Ex. 77; Torres Dep. 76-77. The Mayor's Director of Communications, Anne Torres, just one week after Defendant terminated Chief Cochran, sent out for distribution, to all of the City's "supporters and organizations," myriad social media posts suggesting that the content of the book constituted discrimination against AFRD members. Torres drafted Tweets reading "#IStandWithKasim because all employees have a right to a boss who does not speak of them as 2nd class citizens," and "#IStandWithKasim because there is no place for discrimination in the workplace." Pl's Ex. 77. These Tweets and corresponding

Facebook posts—focused on the content of various "passages in the book"—were deliberately crafted for public consumption despite the fact that the City knew it had no evidence to suggest that Chief Cochran had discriminated against anyone in the City's employ. Torres Dep. 77:5-7; Pl's Ex. 36; Pl's Ex. 13 at 3-4. In fact, the evidence it did have, from its own investigation, showed quite the opposite. Pl's Ex. 13 at 3-4.

ARGUMENT

Summary judgment is proper where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. "A genuine issue of material fact does not exist unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict in its favor." *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995).

I. Chief Cochran is Entitled to Summary Judgment on His First Amendment Retaliation Claim.

Because the record demonstrates that Defendant improperly suspended and terminated Chief Cochran based upon its disagreement with the content of his book, its actions cannot pass constitutional muster, and he should be granted summary judgment on his retaliation claim.

The First Amendment protects the right of citizens to speak freely on matters of "public concern," *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454 (1995) ("*NTEU*"); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.*, 391

U.S. 563, 573 (1968), and therefore a "government employer may not [discipline] a public employee in retaliation for [such] speech." *Alves v. Bd. of Regents of the Univ. Sys. of Ga.*, 804 F.3d 1149, 1159 (11th Cir. 2015). That proscription applies to Chief Cochran, who was not required to "relinquish [his] First Amendment right[] to comment on matters of public interest by virtue of [his] government employment." *Connick v. Myers*, 461 U.S. 138, 140 (1983).

To prevail on a First Amendment retaliation claim, a plaintiff must show:

> (1) the speech involved a matter of public concern; (2) the employee's free speech interests outweighed the employer's interest in effective and efficient fulfillment of its responsibilities; and (3) the speech played a substantial part in the adverse employment action.

Cook v. Gwinnett Cty. Sch. Dist., 414 F.3d 1313, 1318 (11th Cir. 2005). Once an employee satisfies these requirements, "the burden . . . shifts to the employer to show . . . that it would have made the same decision . . . in the absence of the protected speech." *Id.*

A. Chief Cochran Spoke as a Citizen on a Matter of Public Concern.

This Court previously found that Chief Cochran had sufficiently pled a claim that he spoke as a private citizen on a matter of public concern. *Cochran v. City of Atlanta*, 150 F. Supp. 3d 1305, 1313-14 (N.D. Ga. 2015). As discovery produced no material to cast any doubt upon this Court's holding, no further

analysis is necessary to establish this factor as a matter of law. *See Cook*, 414 F.3d at 1318 (this inquiry is a "question of law").

B. Chief Cochran's Free Speech Interest Outweighs Defendant's Interests.

Because Chief Cochran's speech implicates a matter of public concern, Defendant "bears [the] burden of justifying [his] discharge on legitimate grounds." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). Defendant's burden to justify its disciplinary action is particularly high here, where Chief Cochran's "speech more substantially involved matters of public concern." *Connick*, 461 U.S. at 152 (stating that in such cases "a stronger showing may be necessary" by the employer); *Cochran*, 150 F. Supp. 3d at 1313 (wherein this Court found that Chief Cochran had addressed in his book issues that were "frequently the subject of political and social commentary").

The inquiry used to decide this factor looks at "(1) whether the speech at issue impedes the government's ability to perform its duties efficiently, (2) the manner, time and place of the speech, and (3) the context within which the speech was made." *Bryson v. City of Waycross*, 888 F.2d 1562, 1567 (11th Cir. 1989) (citations and quotations omitted). Analysis of these questions reveals that Chief Cochran's interest should prevail over Defendant's.

1. Chief Cochran's Speech Did Not Impede Defendant's Ability to Efficiently Perform Its—or His—Duties.

Defendant has adduced no evidence to show that Chief Cochran's book impeded its ability to efficiently administer City government or interfered with the AFRD's internal operations. In fact, the record demonstrates quite the opposite conclusion. Defendant's investigation revealed that the beliefs reflected in Chief Cochran's book did not affect how he ran the department. *See* Yancy Dep. 102:11-13 ("The investigation showed that he had . . . not treated people differently, which I was . . . ecstatic to see and hear"); Geisler Dep. 66-67; Pl's Ex. 13 at 3-4. The City Law Department specifically found that Chief Cochran had neither discriminated against anyone nor permitted his religious beliefs to affect his disciplinary decisions. Pl's Ex. 13 at 3-4.

These findings were notably consistent with the experience of Mayor Reed, Commissioner of Human Resources Yvonne Yancy, Chief Operations Officer Michael Geisler, Special Advisor to the Mayor Melissa Mullinax, and AFRD Public Communications Officer Janet Ward, with respect to Chief Cochran's leadership of the AFRD. *See* Reed Dep. 156:10-13; Yancy Dep. 102:11-14 (noting that the investigative results exonerating Chief Cochran of any discrimination were "consistent with [Yancy's] knowledge of [Chief] Cochran"); Geisler Dep. 66:18-21; Mullinax Dep. 19:19-20:4 (stating that Chief Cochran had "always been very supportive" of "gay pride events"); Pl's Ex. 17. None of these City

personnel—managers, peers, and subordinates alike—could offer any indication that Chief Cochran ever exhibited discrimination towards, or unfair treatment of, any AFRD employee. This unalloyed evidence of fairness and equity on the part of Chief Cochran in running the day-to-day operations of the AFRD defeats any contention that the book impeded or even threatened to impede the operation of City government or the AFRD.

Of course, Defendant may attempt to argue that the personal offense taken by some AFRD employees and City leaders to the content of the book is tantamount to disruption or inefficiency. They have testified, for instance, that City leaders and managers were offended by the beliefs expressed in the book. *See* Yancy Dep. 27:2-10; Reed Dep. 125:5-13, 135:2-8; Pl's Ex. 10; Shahar Dep. 40:12-41:19. But "the law cannot, directly or indirectly, give . . . effect" to "private biases." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). Personal disagreement—or even less, the mere possibility of its future communication—is not equivalent to disruption or inefficiency. *See Battle v. Mulholland*, 439 F.2d 321, 324 (5th Cir. 1971) (*quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 505, 508 (1969) (stating that "[u]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"). Permitting the thin gruel of "disruption by disagreement" to do so here would be to reward Defendant for advancing what amounts to little more than a City-sponsored heckler's veto,

and it is axiomatic that such a predicate for stifling speech is constitutionally infirm. *See Flanagan v. Munger*, 890 F.2d 1557, 1566-67 (10th Cir. 1989) (where speech was unrelated to internal functioning of police department, record was "devoid of evidence of actual or potential internal disruption," and "evidence pointed only to potential problems which might be caused by the public's reaction to plaintiffs' speech," reversing summary judgment against police officers, holding that defendant could not "justify disciplinary action . . . simply because some members of the public find plaintiffs' speech offensive"); *Berger v. Battaglia*, 779 F.2d 992, 996, 1001 (4th Cir. 1985) (where there was no "disruption of the [Police] Department's internal harmony and operations resulting from any of [plaintiff police officer's public] performances in blackface," holding that "threatened disruption by others reacting to [that] speech simply may not be allowed to serve as justification for [department's] disciplinary action"); *see also Feiner v. N.Y.*, 340 U.S. 315, 320 (1951) (holding that "the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker").

2. The Manner, Time, and Place of the Speech Demonstrate That Chief Cochran's Speech Interest Outweighs Defendant's Interest.

Chief Cochran wrote and published his book on his own personal time. *See* Cochran Dep. 136:19-137:13; Am. Comp. ¶90. From approximately January-

March 2014, he gave a few free copies of his book to those he knew to be Christian and had established a prior relationship with and to those who had requested a copy from him when the book was completed. *See* Cochran Dep. 217:2-5; Am. Comp. ¶¶126-27, 129. The book was published and for sale for almost a year before any objection was raised to it—and even then the offense taken was on a personal level, as to the content of the book, by one AFRD member who had had the book in hand for almost four months or more before he complained. *See* Pl's Ex. 116 at No. 23; Borders Dep. 54-55; Am. Comp. ¶91. Chief Cochran never indicated to any AFRD member that reading the book or following its teachings was relevant to that member's status or potential for advancement in the AFRD, and no record evidence permits any conclusion to the contrary. *See* Am. Comp. ¶135; Pl's Ex. 13 at 3-4.

Taken together, these facts demonstrate that the book did not cause municipal disruption or inefficiency. The timeline of long and undisturbed peaceful coexistence between the book and the workplace—prior to one person being offended and Defendant itself conspicuously taking issue with the contents of the book—shows that any allegation of negative workplace impact rests not upon objective evidence but rather on rank speculation and prognostication of possible future disruption or inefficiency. Although the City Law Department later alleged that some unnamed AFRD members took issue with the book, *see*

Pl's Ex. 13, Defendant's asseveration of disruption is far "more apparent than real." *Waters v. Chaffin*, 684 F.2d 833, 839–40 (11th Cir. 1982) (where nine months had elapsed between police officer uttering insubordinate remark and department discipline, holding that no "reasonable likelihood of harm to [the department's] efficiency, discipline, or harmony" existed, because any allegation of adverse effect was "belie[d]" by the "long delay between the incident and the notice of discharge"). Because Defendant has not shown even a reasonable likelihood of harm to its operations, much less actual harm, Chief Cochran's paramount interest in his right to free speech must prevail.

And the fact that Chief Cochran gave a copy of his book to some AFRD members does nothing to alter this conclusion, because there is no evidence to suggest that those gifts came with any strings attached whatsoever. *See* Am. Comp. ¶135. In fact, such interaction is part and parcel of the many private communications that mark life in the modern workplace, communications for which speech restriction and punitive discipline are inappropriate. *See Rankin*, 483 U.S. at 393 (Powell, J., concurring) (noting that where "a statement is on a matter of public concern, it will be an unusual case where the employer's legitimate interests will be so great as to justify punishing an employee for . . . private speech that routinely takes place at all levels in the workplace").

3. The Context of Chief Cochran's Speech Demonstrates That His Interest Outweighs Defendant's Interest.

As with the discussion relating to the manner, time, and place of the book, the context of Chief Cochran's speech also demonstrates that his interests prevail over Defendant's. Chief Cochran's book is a religious commentary on matters of public concern that did not implicate or affect the administration of City government or AFRD affairs. *See Cochran*, 150 F. Supp. 3d at 1313-14 (finding that Chief Cochran had sufficiently pled a claim that he spoke as a private citizen on a matter of public concern); Am. Comp. ¶¶92-93; 96; 98; 100; 103-104; 115-16; 142-44. No AFRD member was required to read the book or to agree with its contents in order to receive fair treatment or to advance in the organization, and Defendant's own investigation revealed no evidence to suggest otherwise. *See* Am. Comp. ¶135. Pl's Ex. 13 at 3-4. Defendant has proffered only a hypothetical possibility of future disruption posed by Chief Cochran's book—a mere conclusory allegation masquerading as proof—but that is not enough. *See Stanley v. City of Dalton, Ga.*, 219 F.3d 1280, 1289–91 (11th Cir. 2000) (in the absence of "evidence of disruption of the . . . department's operations," holding that a police officer's right to voice a "theft accusation" against a superior officer outweighed the department's interest in maintaining "mutual respect, discipline, and trust," even where that theft allegation ultimately proved false).

C. Chief Cochran's Speech Played a Substantial Role in Defendant's Decision to Suspend and Terminate Him.

From the time Defendant admits it became aware of the book in November 2014, straight through to its termination of Chief Cochran on January 6, 2015, and even after that date, Defendant exhibited a clear and consistent practice of privately and publicly repudiating the beliefs expressed in the book. Indeed, the entire affair began with one individual's personal offense, and that initial preoccupation with the book's content never abated, was indeed taken up in earnest by Defendant, persisting even after Chief Cochran's termination had been fully effectuated. The record is simply replete with evidence demonstrating that Defendant acted based upon its substantive disagreement with the book. *See supra* at 6-10. In light of these undisputed facts—especially given their sheer number and consistency—it cannot be seriously argued that content did not play a substantial and even decisive role in Defendant's decision to suspend and later terminate Chief Cochran. Although Defendant later manufactured other reasons for its discipline, those reasons are immaterial to the question of whether speech played a substantial role in that discipline. The evidence shows beyond doubt that it clearly did.

D. Defendant Cannot Show That It Would Have Suspended and Terminated Chief Cochran Absent His Speech.

Because Chief Cochran has sustained his burden under *Pickering*, Defendant must show that "'its legitimate reason, standing alone, would have induced it to make the same decision.'" *Bryson*, 888 F.2d at 1566 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). This it cannot do. The content of Chief Cochran's book so pervaded Defendant's entire handling of the disciplinary process that it is impossible to conclude that absent that content, Defendant would have similarly suspended and terminated Chief Cochran.[5]

With respect to Chief Cochran's suspension, it bears repeating that content triggered the controversy, was a main point of discussion at his suspension meeting, and was the reason Defendant launched an investigation and ordered remedial sensitivity training. *See supra* at 4-6; Yancy Dep. 62-64, 76. Defendant maintains it would have suspended Chief Cochran solely for his failure to secure approval to write his book, *see* Yancy Dep. 104-105, but its persistent, orchestrated efforts to distance itself from the substance of the book belie that assertion.[6] *See*, *e.g.*, Pl's Ex. 10; Pl's Exs. 80-84; Pl's Ex. 14 at 1-2; Torres Dep. 76-

[5] It is undisputed that nothing related to Chief Cochran's job performance would have justified either his suspension or termination, and no record evidence exists to dispute this conclusion. *See* Pl's Ex. 2; Yancy Dep. 114; Taylor-Parks Dep. 56.
[6] Such a disciplinary decision would itself have been unconstitutional in any event. *See infra* at 23-31. Additionally, requesting permission to write the book

77; Pl's Ex. 77. Any other conclusion would render Defendant's orchestrated communications strategy—which broadly castigated the beliefs expressed in the book—inexplicable.

The same is true of termination. Defendant claims an investigation was needed to ascertain whether Chief Cochran's religious beliefs—revealed in his book—affected his leadership of the AFRD. Yancy Dep. 62-64; Geisler Dep. 57:17-58:6. Yet even after the investigation exonerated Chief Cochran as to this concern, *see* Pl's Ex. 13 at 3-4, Defendant terminated him anyway. Defendant pivots away from content, explaining that its termination of Chief Cochran was rooted in his failure to get permission to write his book. *See, e.g.*, Yancy Dep. 102:14-19; Reed Dep. 167:14-17.[7] But this clearly pretextual fallback position is

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would have been futile, as it is clear on this record that Defendant would never have granted it, given its vociferous rejection of the beliefs contained therein.

[7] It is disputed what was said between Chief Cochran and Ethics Officer Nina Hickson during their conversations, and whether Hickson gave Chief Cochran permission to write and publish his book. *See* Cochran Dep. 110:14-18 ("She [Hickson] did specifically point out that as long as it doesn't have to do with subject matter pertaining to my job as fire chief or my role in city government, based on the description that I gave her, that it was permissible."); Yancy Dep. 55 ("I spoke with Ms. Hickson, and I spoke with Mr. Cochran, and both concurred they had a conversation. They do not agree on the content of that conversation."). One of the duties of the Ethics Officer is to "[e]ducat[e] and train[] all city officials and employees to have an awareness and understanding of the mandate for and enforcement of ethical conduct and advising of the provisions of the code of ethics of the city." Pl's Ex. 1. This dispute is not material to finding a legal violation by Defendant on this claim, however.

contradicted by Defendant's own statements. Defendant already knew—before it suspended Chief Cochran and before the investigation began—that he had not directly sought approval to write and/or publish the book from the Board of Ethics or from Mayor Reed. *See* Geisler Dep. 84:21-25 ("Yvonne Yancy in that initial visit [before the suspension] brought up that permission had not been granted, and part of her concern had to do with the fact that the ethics board . . . had not approved of the book . . ."); Reed Dep. 118-119. Thus the investigation merely confirmed what Defendant already knew on that score. Moreover, even with the knowledge that Chief Cochran failed to secure approval from the Board of Ethics or Mayor Reed, Defendant is on record indicating that it nonetheless intended to retain him once the suspension period ended. *See* Yancy Dep. 105:22-106:9; 129:21-23 ("We intended to bring him back to work. I contracted to do sensitivity training with the vendor."). In other words, Defendant clearly discarded from the outset Chief Cochran's failure to seek permission from the Board of Ethics or Mayor Reed as a reason for termination. And it should not now be credited—at this late date and only for purposes of bolstering Defendant's summary judgment prospects—as an independent reason for termination.[8]

[8] This conclusion is only further strengthened when it is again considered that Defendant continued to publicly take issue with the content of Chief Cochran's book even after it terminated him, which casts serious doubt on any claim that it was something other than the content of the book that formed the predicate for

In sum, given these undisputed facts, the *Pickering* analysis reveals that Chief Cochran suffered a deprivation of his constitutional right to free speech. By writing and publishing his book, Chief Cochran spoke as a private citizen on a matter of public concern, and that book did not disrupt or negatively impact Defendant's administration of City government or AFRD internal operations. Because no evidence suggests that Chief Cochran would have been similarly disciplined absent the particular content of his book, he is entitled to summary judgment on his retaliation claim.

II. Defendant Engaged in a Policy and Practice of Prohibiting Chief Cochran's Constitutionally Protected Free Speech.

A. Defendant Engaged in Content and Viewpoint Discrimination By Suspending and Terminating Chief Cochran as a Result of His Writing and Publishing His Book.

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 v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *see also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (internal quotations and citations omitted) (holding that the "First Amendment forbids the government to regulate speech in ways that favor

termination. *See supra* at 9-10. For if content were immaterial, Defendant's persistent attempts to distance itself from it would make no sense.

some viewpoints or ideas at the expense of others"). Because "[g]overnment discrimination among viewpoints . . . is a more blatant and egregious form of content discrimination," strict scrutiny is demanded, which means that the government must "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2230-31 (2015) (internal quotations and citations omitted).

In this case, Defendant consistently repudiated the beliefs expressed in Chief Cochran's book and predicated his suspension and termination upon its substantive disagreement with the book's contents. *See supra* at 6-10; Yancy Dep. 69:8-9 ("[H]e espoused beliefs that were offensive to many different groups."); Pl's Ex. 10 (Mayor Reed stated that he was "deeply disturbed by the sentiments expressed in the paperback").[9] Moreover, Defendant's investigation was launched because of concerns with content, and expressly focused at least in part on how groups with opposing viewpoints to Chief Cochran's felt about his book. *See* Yancy Dep. 107:5-8; Geisler Dep. 57:24-58:1. Defendant even went so far as to publicly characterize Chief Cochran's beliefs as discriminatory, after its

[9] Many of Defendant's pronouncements were the official product of its communications department. *See, e.g.*, Pl's Ex. 10; Pl's Ex. 77; Pl's Exs. 80-84. These deliberate statements were timed for maximum effect. *See* Torres Dep. 69-78. Defendant should therefore not be permitted to dismiss them as the merely personal or random musings of assorted City employees.

official investigation found to the contrary, and after he was terminated. *See* Pl's Ex. 77 (sending out Tweet reading "#IStandWithKasim because there is no place for discrimination in the workplace"). Finally, Defendant ordered Chief Cochran to attend sensitivity training to remediate his wayward beliefs. Yancy Dep. 67-69, 76:6-9; Pl's Ex. 10.

Given these undisputed facts, it cannot be plausibly denied that Chief Cochran was disciplined precisely because of the views he communicated in his book. *See Rosenberger*, 515 U.S. at 831 (holding that the exclusion of one view on a particular subject is "offensive to the First Amendment"). Defendant's solicitude for—and unqualified acceptance of—those who held beliefs contrary to Chief Cochran's solidifies this conclusion and justifies a grant of summary judgment in his favor on his content and viewpoint discrimination claim.

B. Defendant's Written and Unwritten Policies Requiring Pre-Clearance To Publish Written Works Unrelated to the Subject Matter of Government Employment Violate the First Amendment.

1. Defendant's Policies Constitute Impermissible Prior Restraints As Applied to Such Written Works.

A prior restraint exists whenever a speaker must obtain permission before speaking. *See Alexander v. United States*, 509 U.S. 544, 550 (1993); *Cooper v. Dillon*, 403 F.3d 1208, 1215 (11th Cir. 2005) (a "prior restraint . . . prohibits or censors speech before it can take place"). It is "the most serious and the least

tolerable infringement on First Amendment rights," *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1976), and "comes [with] a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Absent the most exceptional of circumstances, a prior restraint will pass constitutional muster only where it is "narrowly tailored to serve a significant governmental interest." *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). Defendant cannot meet that heavy burden here.

Section 2-820(d) of the City of Atlanta Code of Ethics ("Code") provides that "[City officials and employees] . . . may engage in private employment or render services for private interests only upon obtaining prior written approval from the board of ethics." Defendant interprets this provision to mean that City officials and employees like Chief Cochran must get permission from the City before they write and/or publish *any* written work. *See* Reed Dep. at 107:14-17, 118-19; Pl's Ex. 15; Pl's Ex. 36. Defendant also enforces an informal policy requiring those working for the Mayor to get pre-clearance from him—personally—before writing and/or publishing *any* work. *See* Pl's Exs. 14, 22, 71; Reed Dep. 119:2-5.

Tellingly, Defendant maintains that these requirements apply even where, as here, the speech at issue concerns subjects wholly unrelated to government employment. *See* Yancy Dep. 87-88; Reed Dep. 118-119. The City has thus ceded unto itself the final authority over speech, regardless of the content or context of

that speech, before it can be uttered. This is improper, as the United States Supreme Court's holding in *NTEU* makes clear.

In *NTEU* the Court struck down a congressional enactment which "chill[ed] potential speech before it happen[ed]." 513 U.S. at 468. The statute in question had prohibited "federal employees from accepting any compensation for making speeches or writing articles," and applied "even when neither the subject of the speech or article nor the person or group paying for it ha[d] any connection with the employee's official duties." *Id.* at 457. The sheer breadth of the law led the Court to conclude that the "government's burden [was] heavy," requiring it to "show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by th[e] expression's necessary impact on the actual operation of the Government." *Id.* at 468 (internal quotations and citations omitted). Notably, the Court pointed out that this burden is greater even than that imposed by *Pickering*, which necessarily involves post-hoc "supervisory decision[s]," rather than the *ex ante* decisions implicated in *NTEU*. *Id.* at 467-68, 481.

Given these strictures, the Court unsurprisingly found that although "operational efficiency is undoubtedly a vital governmental interest," the law was not "a reasonable response" to any concerns on that score. *Id.* at 473. A similar conclusion is compelled here. The Code, much like the law in *NTEU*, applies to a

broad swath of City personnel. *See* Pl's Ex. 1 at Section 2-820(d). And Defendant has interpreted the Code as granting it the power to approve or disapprove of employee speech, before it happens, even speech that has absolutely no connection to an employee's official duties. *See* Yancy Dep. 87:14-88:5. Under the logic of *NTEU*, any generic concerns Defendant has with respect to municipal efficiency cannot justify its sweeping interpretation and enforcement of the Code. Authority from myriad other jurisdictions only tends to bolster this conclusion. *See, e.g.*, *Liverman v. City of Petersburg*, 844 F.3d 400, 407 (4th Cir. 2016) (holding that police department's social networking policy, which contained a sweeping "Negative Comments Provision," was constitutionally infirm pursuant to *NTEU* analysis); *Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004) (concluding that university president's preclearance directive, which effectively banned faculty members and students from speaking with prospective student athletes about their belief that university's mascot was degrading, constituted an impermissible prior restraint); *Harman v. City of New York*, 140 F.3d 111 (2d. Cir. 1998) (holding that city policy, which required pre-clearance before child welfare and social service agency employees could speak to media, was not justified by city's concern with municipal effectiveness, and therefore violated the First Amendment); *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204 (9th Cir. 1996)

(rejecting government claim that workplace ban on religious advocacy was necessary because it adversely impacted the actual operation of the government).

Given the record facts, and the relevant controlling and persuasive authority, Defendant's pre-clearance policies must fail. Both policies constitute prior restraints for which Defendant has neither advanced a significant interest nor been able to demonstrate narrow tailoring. As a result Chief Cochran is entitled to summary judgment on his prior restraint claim.

2. Defendant's Application of Its Policies Impermissibly Grant It Unbridled Discretion.

Prior restraints must also "not delegate overly broad . . . discretion to [] government official[s] . . . and must not be based on the content of the message." *Forsyth Cty., Ga.*, 505 U.S. at 130. But here Defendant—through Section 2-820(d) and Mayor Reed's informal pre-clearance policy—has arrogated to itself virtually unfettered discretion to pass upon the speech of its employees, even speech wholly unrelated to the concerns of City government.

Although Section 2-820(d) provides that "[t]he board of ethics shall review each request [for private employment] individually," the Code is entirely silent as to the criteria the board is to be guided by in making its determination. Pl's Ex. 1. The Mayor's informal policy is similarly restrictive and arbitrary, ceding control over non-work related speech to the Mayor while offering no standards as

to what will be considered permissible or impermissible speech. *See* Reed Dep. 121:10-14 (Mayor's pre-clearance requirement not based on codified policy).

Notwithstanding the lack of identifiable standards or criteria, Defendant claims that both policies can stand as a predicate for punishment. *See* Yancy Dep. 105:22-106:9 (concluding that the failure to get permission for a book is "enough to fire you right there on its face"); Reed Dep. 118:19-120:3-4 (concluding that "this offense was very serious and needed to be acted on immediately" because "there was a book that was written without my permission"); Yancy Dep. 37:20-21 (concluding that if the Mayor had not approved Chief Cochran's book, Defendants "were going to have to suspend or terminate him"); Yancy Dep. 87:21-88:5 (concluding that if an employee fails to follow the processes required to get approval to write a book, discipline is "absolutely" appropriate). Defendant has even gone so far as to claim it retains discretion to make decisions based on the content of a proposed book. *See* Reed Dep. 54:5-6 (concluding that the question as to whether an opinion from the ethics board is necessary "depends [upon] what the content of the book was").

The ineluctable conclusion to be drawn from these undisputed facts is this: City employees who wish to speak on issues unrelated to City government are subject to a review system entirely bereft of any guidelines or standards. Their requests to speak or write may be greeted sympathetically by City officials or

they may not, but there is no way to tell whether and why such requests will be granted or denied. Such a system—which cedes power to whim and personal predilection rather than to judgment based on objective criteria—is an intolerable form of unbridled discretion that cannot be sustained. *See Bloedorn v. Grube*, 631 F.3d 1218, 1236 (11th Cir. 2011) (holding that an official should be guided by "narrowly drawn, reasonable, and definite standards" to avoid the danger of unbridled discretion). And the offense here is particularly concerning because the Code, as interpreted and enforced by Defendant, poses the "potential for censorship," *Harman*, 140 F.3d at 120, which "justifies an additional thumb on the employee['s] side of [the] scale[]." *Sanjour v. E.P.A.*, 56 F.3d 85, 97 (D.C. Cir. 1995). Ultimately, because Defendant cannot proffer any warrant to justify the license it has granted to itself to bless or condemn speech, Chief Cochran is entitled to summary judgment on his unbridled discretion claim.

III. Chief Cochran is Entitled to Summary Judgment on His Procedural Due Process Claim Under Section 114-528 of the City of Atlanta Code of Ordinances and Under Section 2-820 of the City of Atlanta Code of Ethics.

Defendants—both the City of Atlanta and Mayor Reed in his individual capacity—deprived Chief Cochran of a property interest in his employment without affording him the procedural due process to which he was entitled.

It is axiomatic that the government must provide "procedural due process" when it seeks to deprive a person of "liberty or property." *Warren v. Crawford*,

927 F.2d 559, 562 (11th Cir. 1991). Once a "legitimate claim of entitlement" to a benefit obtains, "the right to some kind of prior hearing is paramount." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-570, 577 (1972). Courts look to state law in order to determine whether a public employee like Chief Cochran has a property interest in his job. *Warren*, 927 F.2d at 562; *see also Dixon v. Metro. Atlanta Rapid Transit Auth.*, 242 Ga. App. 262, 264 (2000) (same).

This court has previously recognized that "[u]nder Georgia law, a public employee has a property interest in employment when that employee can be fired only for cause." *Cochran*, 150 F. Supp. 3d at 1325 (internal quotations and citations omitted). Chief Cochran had a property interest in his employment by operation of Section 114-528 of the City of Atlanta's Code of Ordinances, which provides that "[n]o employee shall be dismissed from employment . . . except for cause." Because a property interest obtained, he was entitled "to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). Yet none of the procedures required by *Loudermill*, or by Section 114-530—which mirrors *Loudermill*'s due process requirements—were ever afforded to Chief Cochran by Defendants. Yancy Dep. 74-77; Geisler Dep. 74-75; Am. Comp. ¶¶319-321.

In addition to the "for cause" property interest this Court has already recognized, state law also provides that a property interest in employment can be "created by local ordinance or by implied contract," and may exist where an "employment arrangement is modified by additional contractual or statutory provisions." *Dixon*, 242 Ga. App. at 264. For instance, "personnel rules and regulations may create a property interest if they impose requirements or procedures regarding dismissals which are analogous to requiring cause." *Brown v. Ga. Dep't of Revenue*, 881 F.2d 1018, 1026 (11th Cir. 1989); *see also Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (an interest implicates due process "if there are such rules . . . that support [a] claim of entitlement to [it] . . . that . . . may [be] invoke[d] at a hearing"). A property interest may exist even where it would appear that employment is at-will. *Doss v. City of Savannah* is instructive on this point. 290 Ga. App. 670 (Ga. Ct. App. 2008).

In *Doss* the plaintiff claimed that as a public employee she had a property interest in her job. But the city's employee handbook explicitly disclaimed an "express or implied contract," and further provided that employment was at-will. *Id*. at 673. The Savannah Police Department's Standard Operating Procedure Manual ("SOP"), however, set out "procedures to be followed for disciplinary matters." *Id*. The plaintiff argued that this disciplinary protocol meant she could only be terminated for cause. The court found that "the SOP and other city

policies . . . prevent[ed] a finding as a matter of law that [the plaintiff's] employment was terminable at will." *Id*. at 674.

Consistent with *Doss*, *Brown*, and *Dixon*, Chief Cochran had a property interest in his employment by virtue of the rights and remedies contained in the City of Atlanta's Code of Ethics. By "impos[ing] . . . procedures . . . analogous to requiring cause," *Brown*, 881 F.2d at 1026, the "additional . . . statutory provisions" contained in the Code entitled him to procedural due process. *Dixon*, 242 Ga. App. at 264. Because Defendants (after the fact) allege they punished Chief Cochran for his failure to acquire approval for his book from the Board of Ethics, they were required to afford him all the procedural protections contained in the Code before they suspended and terminated him. With respect to those procedural protections, Section 2-806 of the Code requires the Board of Ethics to "conduct investigations into alleged violations," and to "hold hearings and issue decisions" resulting from that process. Pl's Ex. 1. More specifically, Section 2-806 provides that if "the board determines after a preliminary investigation . . . that . . . probable cause [exists to support the] belief that [an ethics violation has been committed]," it is required to "give notice to the person involved to attend a hearing to determine whether there has been a violation." *Id*.

Despite the clarity and unequivocal nature of these protections, promised to all those suspected of violating the Code, Defendants never afforded any of

them to Chief Cochran. *See* Hickson Dep. 84:9-11; Ex. 117 at No. 4. In fact, Defendants invoked the Code to suspend and terminate Chief Cochran, *see* Yancy Dep. 49; 102, but provided to him none of its explicit procedural guarantees. *See* Yancy Dep. 58:17-25, 60:20-22 ("I don't need an ethics violation to discipline an employee for a matter that's unethical."); Hickson Dep. 98:15-17 (contending that, "whether it's wise or not," the city's human resources department can independently discipline an employee for an alleged ethics violation). In fact, Defendants—once their own investigation demonstrated that Chief Cochran's beliefs had not affected his ability to lead the department—chose to bypass the independent ethics process altogether. *See* Reed Dep. 41:3-4 (admitting that the ethics process is an independent one); Yancy Dep. 60:16-17; 89-90 (same). Defendants, in other words, wielded the Code as a sword against Chief Cochran, yet deprived him of the shield that was his due by statutory right. Such treatment, which is not only undisputed by Defendants but defended as entirely proper by them, represents a violation of procedural due process that entitles Chief Cochran to summary judgment on this claim.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court grant his Motion for Summary Judgment.

Respectfully submitted this 19th day of May, 2017.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this document was prepared in Century Schoolbook 13-point font and fully complies with Local Rules 5.1C and 7.1D.

/s/ Kevin H. Theriot
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of May, 2017, the foregoing document was filed with the Clerk of the Court using the ECF system, which will effectuate service on all parties.

/s/ Kevin H. Theriot
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