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

RESPONSE BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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**pro hac vice* admission

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INTRODUCTION

Defendants' brief definitively establishes that Chief Cochran ("Cochran") was punished because of the speech contained in his book, which revealed religious beliefs with which the City did not agree. Indeed, even as Defendants attempt to distance themselves from the ineluctable, they cannot help but admit that the "language" and "views" contained in Cochran's book were dispositive factors in their disciplinary decisions. Defendants' Brief in Support of Summary Judgment ("Defs.' Br.") 18. Defendants seek to cover their tracks by proffering a number of alternative reasons for discipline, but the record reveals little more than shifting rationales signaling pretext, and a general lack of competent evidence to support their arguments. Defendants, for instance, seek on summary judgment to assert the Code of Ethics as a reason for termination, but they never gave Cochran the process he was due if that was the real reason for his suspension and termination. *See* Yancy Dep. 105:22-106:9, 129:21-23. And they posit disruption and inefficiency arising from Cochran's book without providing any actual evidence to support their *ipse dixit*. Because Defendants have thus failed to establish that they are entitled to judgment as a matter of law, their Motion for Summary Judgment should be denied in its entirety.

FACTUAL BACKGROUND

Cochran had a stellar reputation as AFRD Fire Chief, *see* Yancy Dep. 114:22-24,

earning the Fire Chief of the Year Award in 2012 and helping the City achieve its first Class 1 Public Protection Classification rating in 2014. See Pl.'s Exs. 2,7. He was also a leader who treated all with dignity and respect. Reed Dep. 156:10-13; Yancy Dep. 102:11-14; Geisler Dep. 66:18-21.

Cochran wrote a book, on his own time, arising out of a Bible study at his church, which he finished in the Fall of 2013 and self-published in late-November 2013. *See* First Amended Verified Complaint ("Am. Comp.") ¶91; Cochran Dep. 43:1-44:21. The book predominantly discusses the Christian teaching concerning original sin and in a small portion addresses sexual morality from a biblical standpoint. Am. Comp. ¶¶96, 103-04; Pl.'s Ex. 11 at 78-85.[1]

Before completing and publishing the book, Cochran consulted Ethics Officer Nina Hickson to inquire whether he needed to seek Board of Ethics approval for his book. Hickson Dep. 52:14-16, 53:8-10; Cochran Dep. 108:3-15. As Ms. Hickson did not advise him that he needed to do so, or that he needed to seek approval from the Mayor, Cochran understood that he could proceed without such approval. Hickson Dep. 44:14-21; 52:25-53:3, 52:19-20. Cochran spoke to Ms. Hickson in July 2013 regarding the book, and it was his understanding that at that time she gave him permission to state in the book that he was currently serving as AFRD Fire Chief. Cochran Dep. 127:5-8, 147:3-8; Hickson Dep. 58:24-

[1] Only exhibits not submitted in support of Plaintiff's motion are attached.

59:8. 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. Cochran Dep. 217:3-5; Am. Comp. ¶¶126-127, 129.

Despite having sought and received ethics advice from the very person tasked with providing it, see Pl.'s Ex. 133; Defs.' Ex. 12, approximately one year after the book was published Defendants very publicly suspended Cochran, castigated his beliefs, and launched an investigation into his leadership of AFRD. Yancy Dep. 26:22, 62-64, 105-106, Pl.'s Ex. 108. The record demonstrates that they did so because they disagreed with the beliefs expressed in the book. Yancy Dep. 68-69, 76, 107:5-8; Pl.'s Ex. 10. After their own investigation showed that Cochran had never discriminated against anyone, they terminated him anyway, even though Defendant could not cite even one instance in which Cochran was unfair or permitted his religious beliefs to affect his leadership of AFRD. Pl.'s Ex. 13 at 3-4; Reed Dep. 56:10-13; Geisler Dep. 47:2-13; Yancy Dep. 102:11-14.

Defendants claim that they suspended and ultimately terminated Cochran because he failed to seek and acquire approval to write and publish his book from the Board of Ethics and the Mayor, because he spoke to his co-religionists during his suspension, and because their Investigative Report concluded that he could not effectively lead the AFRD into the future. See Defs.' Br. 12. But in the light of the record facts these reasons are revealed to be mere pretexts. See Yancy

Dep. 105:22-106:9 (revealing that ethics concerns were an afterthought for Defendants who never gave Cochran the process required if a violation did occur)); Cochran Dep. 222:23, 267:1-2 (revealing that Defendants gave no instructions to Cochran as to their expectations); Yancy Dep. 102:11-14 (revealing that Defendants' investigation exonerated Cochran of their principal fear, discriminatory leadership).

I. Cochran's Speech Was Protected by the First Amendment.

A. Cochran's Interests Outweigh Defendant's Interests.

Under the test enunciated in *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968), the balance must be struck in Cochran's favor. Defendant disagrees, summarily concluding that its interests "vastly outweigh" Cochran's First Amendment rights because, in its view, his book "threatened AFRD's ability to operate effectively and risked destroying the public's trust in the Department." Defs.' Br. 14, 16. But aside from bald assertions, Defendant conspicuously fails to proffer any competent record evidence to support its conclusions. Defendant does provide a citation to its own Investigative Report as ostensible proof that its interests were endangered, but such "evidence" is not sufficient in either form or quantum for it to prevail.[2]

[2] The City Law Department concluded in its Investigative Report that there was "general agreement the contents of [Cochran's] book ha[d] eroded trust and ha[d] compromised [his] ability . . . to provide leadership in the future." Pl.'s Ex. 13 at

Defendant has produced not one witness, deponent, or affiant to support its claim that Cochran's book caused disruption or inefficiency in either the City government or the AFRD.[3]

Defendant's failure is not surprising, however, as the record actually indicates that Cochran's book did not disrupt operations or lead to inefficiency. The evidence demonstrates that Cochran earned a reputation for fairness and equity throughout his tenure with the AFRD, and that record persisted even after his book was written and published. *See* Brief in Support of Plaintiff's Motion for Summary Judgment ("Pl.'s Br.") 7-10. Indeed, despite the fact that the City investigated the effect of Cochran's religious beliefs on his leadership of the AFRD, no City employee could cite even one instance of unfair treatment on his part, ever. *Id*. Given this evidence—and Defendant's total failure to adduce even a solitary instance of disruption or inefficiency as a result of Cochran's speech—its *Pickering* argument must be rejected.

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4. But Defendant's reliance on this particular conclusion for purposes of securing summary judgment is unavailing, because the report amounts to inadmissible hearsay. *See Jones v. UPS Ground Freight*, 683 F.3d 1283, 1293 (11th Cir. 2012) (noting the general rule that "inadmissible hearsay cannot be considered on a motion for summary judgment"). Moreover, Defendant's self-serving conclusion points solely back to the content of the book.

[3] In fact, the record evidence contains the testimony of only one firefighter, union president Stephen Borders. He testified that despite Cochran's beliefs, and despite the fact that those beliefs had become widely known, he could have worked for Cochran if he had returned to work rather than having been terminated. Borders Dep. 108: 11-14.

Defendant's citations to *Lumpkin v. Brown*, 109 F.3d 1498 (9th Cir. 1997), *McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985), and *Grutzmacher v. Howard Cty.*, 851 F.3d 332 (4th Cir. 2017), do not alter this conclusion. In *Lumpkin* a San Francisco Human Rights Commissioner "implicitly endors[ed] violence against homosexuals," which placed him directly "at war with" the "charge" of his employer. 109 F.3d at 1500.[4] In *McMullen* the plaintiff appeared at a press conference and publicly announced himself as both an employee of the sheriff's office and a recruiter for the Ku Klux Klan, "an organization . . . antithetical to enforcement of the laws by state officers." 754 F.2d at 940. And in *Grutzmacher* a battalion chief in the county fire department "flout[ed] Department policies he was expected to enforce . . . advocated violence to certain classes of people . . . and expressly disrespected his superiors." 851 F.3d at 346-47.

[4] Defendant is mistaken in arguing that Cochran's explication of biblical passages constitutes disqualifying "behavior" pursuant to *Lumpkin*. Defs.' Br. 16. Such biblical exegesis is not behavior, but rather speech conveying Cochran's religious beliefs. Moreover, to the extent Defendant seeks to justify punishing Cochran based upon those beliefs, it engages in an impermissible religious test. *See infra* at 34. Finally, contrary to Defendant's argument, Cochran's book was aimed at helping Christian men "overcom[e] condemnation," and not at condemning any particular group or individual by singling them out. Cochran Dep. 109:10-11, 188:21-24, 191:23-193:1, 209:8-24. In fact, if anything Cochran was merely conveying the biblical teaching that because "all have sinned," including himself, all "need a Savior." *Id.* at 192:9-10, 209:8-11; *see also id.* at 199:1-3 (testifying "I'm a testimony . . . that . . .[c]lothed men transgress."). This is consistent with his testimony that firefighters "have to love . . . all categories of people." Cochran Dep. 46:1-2. It is also consistent with the beliefs of millions that the City would apparently never employ.

Merely reciting the facts of these cases reveals how inapposite they are. Cochran never tolerated violence against any person or class of persons. He was extremely proficient at his job. *See* Pl.'s Br. 2-3, 20 n.5; Pl.'s Exs. 2, 7. His book was neither antithetical to—nor did it interfere with—his job as AFRD Chief.[5] And he consistently and steadfastly enforced AFRD policy.[6]

B. Cochran's Speech Played a Substantial Role in Defendant's Decision to Suspend and Terminate Him.[7]

Defendant does not actually deny that the content of Cochran's book played a role in its decision to discipline him. In fact, Defendant conspicuously notes that Cochran's "book contains *language* denigrating and demeaning wide

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[5] *See* Pl.'s Br. 13-18. In fact, prior to one AFRD employee raising an objection to the contents of the book and Defendant taking public issue with a small fraction of its contents, there was nothing but peaceful coexistence between the book and the department for almost a full year after its publication.

[6] The Chick-Fil-A disciplinary matter cited by Defendant, *see* Defs.' Br. 15-16, far from indicting Cochran, actually illustrates his fealty to the City's nondiscrimination policy. *See* Cochran Dep. 294-299. And his creation of the Atlanta Fire Rescue Doctrine—with the assistance of a diverse group of firefighters—similarly shows his commitment to the ideals of equality, dignity, and respect. Cochran Dep. 46-47.

[7] Unlike the public concern inquiry and the *Pickering* balancing test, which are "questions of law" for a court to decide, this particular inquiry is a "question[] of fact." *Cook v. Gwinnett Cty. Sch. Dist.*, 414 F.3d 1313, 1318 (11th Cir. 2005). As such it is normally a question for a jury to resolve. *See Beckwith v. City of Daytona Beach Shores, Fla.*, 58 F.3d 1554, 1564 (11th Cir. 1995) (citing *Pullman–Standard v. Swint*, 456 U.S. 273, 289–90 (1982) for the proposition that "issues of discriminatory intent and actual motivation are questions of fact for the trier of fact"). Here, however, where Plaintiff has himself adduced more than sufficient record evidence to prevail on summary judgment on his retaliation claim, submission of this question to a jury is unnecessary.

swathes [sic] of people," which language led to its concern that the book "Risked Title VII Liability For the City." Defs.' Br. 17-18 (emphasis added). This unfounded concern—grounded directly in speech—prompted Defendant to suspend, investigate, and terminate Cochran, so it cannot be seriously argued that speech played no role in his punishment. *See* Pl.'s Br. 6-10, 19-23. Indeed, by conceding in its brief that it considered the "language" and "views" of the book problematic and that it took action based upon them, Defendant has admitted that speech played a substantial role in its discipline of Cochran. Defs.' Br. 18; *see also* Yancy Dep. 62-64 (explaining that the reason for the City's investigation was the "certain subset of beliefs" expressed by Cochran in his book); Geisler Dep. 57:24-58:1 (stating that one of the purposes of the investigation "was to address any concerns, different community groups, the LGBT would have had about the chief's stand on things").[8]

Defendant's assertion of alternative reasons for discipline does not mean that speech did not play a substantial role in that discipline. *See Beckwith*, 58 F.3d at 1564-65 (internal quotations and citations omitted) (to prevail on this factor "an employee's burden is not a heavy one," and "purely circumstantial

[8] Contrary to Defendant's assertion, its concern with the "language" and "views" expressed in the book does not constitute a "legitimate, non-retaliatory reason[] unrelated to [Cochran's] personal beliefs." Defs.' Br. 18. It is rather a reason grounded directly in the content of Cochran's book, which constitutes speech expressing his beliefs.

evidence . . . can create a jury question [as to] the government's motive"); *see also McKinley v. City of Eloy*, 705 F.2d 1110, 1115 (9th Cir. 1983) (establishing that a plaintiff need not "demonstrate that the dismissal was based solely on the[] [protected] activit[y]").

The record shows that it did. *See* Pl.'s Br. 6-10, 19. From start to finish and even beyond the close of its disciplinary process, Defendant castigated both privately and publicly the contents of Cochran's book. *See* Yancy Dep. 26:22, 69: 8-9; Pl.'s Ex. 10; Wan Dep. 84-85; Pl.'s Ex. 108. The beliefs expressed in Cochran's book featured prominently at his suspension meeting. *See* Yancy Dep. 63:6 (stating that the "subset of beliefs" expressed by Cochran prompted the investigation); 69:8-9 (testifying that Cochran "espoused beliefs that were offensive to many different groups"); Cochran Dep. 200-202. And the so-called "inflammatory" "material" in the book was a primary focus of the Mayor at his press conference announcing Cochran's termination, and continued to animate his communications department even after that. *See* Pl.'s Ex. 14 at 2; Pl.'s Ex. 77; Torres Dep. 76-77. Given the sheer number and consistency of Defendant's communications quarreling with the beliefs expressed in Cochran's book, no reasonable juror could conclude anything but that speech played a substantial

and even decisive role in its decision to discipline him.[9] But if further proof is needed to buttress the undeniably obvious, the fact that Defendant suspended Cochran just days after discovering his views more than provides it. *See* Yancy Dep. 20:2-11.[10]

C. Defendant Cannot Show That It Would Have Terminated Cochran Absent his Speech.[11]

Because Cochran has shown that speech played a substantial role in his discipline, Defendant must "prove that it would have terminated [him] even in the absence of his speech." *Moss v. City of Pembroke Pines*, 782 F.3d 613, 618 (11th Cir. 2015). Defendant proffers three alternative reasons for terminating

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[9] Cochran is protected against the unlawful infringement of his constitutionally protected speech in all phases of discipline—as to both suspension and termination. *See Goffer v. Marbury*, 956 F.2d 1045, 1049 n.1 (11th Cir. 1992) ("The *Pickering* line of cases protects against not only discharge but also any adverse employment action taken by the employer that is likely to chill the exercise of constitutionally protected speech. . . . e.g., refusal to hire, demotion, reprimand, refusal to promote.").

[10] *See Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007) (holding in a Title VII case that the "burden of causation can be met by showing close temporal proximity between the statutorily protected activity and the adverse employment action").

[11] This inquiry is also a "question[] of fact, [that] a jury resolves . . . unless the evidence is undisputed." *Moss*, 782 F.3d at 618. Here too a jury is unnecessary because the record establishes that Defendant would not have terminated Cochran absent his speech. Regardless, myriad disputes of material fact pertaining to Defendant's proffered reasons require submission to a jury. *See Beckwith*, 58 F.3d at 1564 (once a plaintiff has shown that speech played a substantial role in an employment decision, a defendant can "only rebut this showing by convincing the jury, not the court, that a legitimate reason justified the decision").

Cochran in its brief: 1) Cochran's alleged "violation of the Ethics Code"; 2) Cochran's speech regarding his suspension; and 3) the City Law Department's Findings. Defs.' Br. 18-19, 20 n.10. Each of Defendant's alternative predicates for discipline fails to secure a grant of summary judgment.

The City of Atlanta's Code of Ethics

Defendant's application of the Code against Cochran violates his First Amendment right to free speech and his Fourteenth Amendment right to procedural due process. *See* Pl.'s Br. 23-35. On that basis alone this rationale fails. But there is more. As Cochran has already demonstrated, Defendant's invocation of the code as a reason for punishment is highly questionable. *See* Pl.'s Br. 21-22. Defendant decided to retain Cochran even with the knowledge that he had not acquired approval from the Board of Ethics to write or publish his book, so it should not be permitted to recast this issue as an independently sufficient reason for termination. *See* Yancy Dep. 105:22-106:9; Geisler Dep. 84:21-85:9. If anything, Defendant's shift suggests that it is nothing more than a pretext. *See Tidwell v. Carter Prod.*, 135 F.3d 1422, 1428 (11th Cir. 1998) (stating that "the identification of inconsistencies in an employer's testimony can be evidence of pretext"); *Ballard v. Chattooga Cty. Bd. of Tax Assessors*, No. 4:12-CV-012-HLM-WEJ, 2013 WL 12176928, at *40 (N.D. Ga. Nov. 22, 2013), *report and recommendation adopted*, No. 4:12-CV-012-HLM, 2014 WL 12648448 (N.D. Ga.

Jan. 31, 2014) (cataloguing cases establishing that multiple or inconsistent explanations for an adverse employment decision can be evidence of pretext). Finally, even if this reason is granted credence it is undisputed that Defendant denied Cochran the procedural protections of the Code.

Additionally, Defendant never advised Cochran to seek approval from the Board of Ethics notwithstanding the fact that he sought advice with respect to his book directly from Ethics Officer Nina Hickson. Ms. Hickson was specifically charged with "*advising of the provisions of the code of ethics*," Pl.'s Ex. 1 (emphasis added); *see also* Defs.' Ex. 12 (revealing that the City of Atlanta Employee Ethics Pledge, which was signed by Cochran on June 21, 2010 provided for "seek[ing] advice from the Ethics Office . . . on how to . . . comply with the Code of Ethics."). Rule 3 of the Rules of the Board of Ethics required her to respond verbally or in writing to written, telephonic, or in-person requests for advice from employees. Accordingly, in October 2012 Cochran inquired of Ms. Hickson by phone whether he needed to seek ethics board approval. Hickson Dep. 44:17-45:13. Ms. Hickson did not advise Cochran to seek approval from the Board of Ethics or from Mayor Reed. Hickson Dep. 52:25-53:3 ("Q. So you did not advise him that it's a matter that he should bring to the ethics board? . . . A. No."); 52:19-20 ("I didn't advise him of anything other than to say that this is an ethics matter."). When Ms. Hickson advises employees to seek approval for

outside employment, her notes typically reflect that advice. *Id.* at 58:8-15. But her notes from that date do not do so. Pl.'s Ex. 23 at 1.[12] Consistent with this omission, Cochran understood that he could go forward without seeking ethics board approval. Cochran Dep. 111:3-13. Furthermore, as a result of a later phone call with Ms. Hickson, Cochran understood that he was permitted to identify himself in the "About the Author" section as AFRD Fire Chief.[13] Cochran Dep. 127:5-8; 147:3-8, 18-21. Given these facts, Defendant's attempt to invoke the Code of Ethics as a reason for discipline—whether suspension or termination—fails.[14]

Cochran's Communications During His Suspension

During his suspension, Cochran was approached by a number of individuals, churches, and religious organizations concerned about his suspension, after they had heard about it from Defendant's very public

[12] *See also* Pl.'s Ex. 23 at 2 (demonstrating clear directive from Ms. Hickson to Cochran to seek ethics board approval and Mayor's permission for multi-level marketing opportunity unrelated to his book); Cochran Dep. 126:13-16 (testifying Ms. Hickson told Cochran he would need to seek permission from the Board of Ethics and inform the Mayor in order to engage in that venture); Hickson Dep. 47:22-48:17 (testifying she told him to "clear it with the Mayor and then get authorization from the Board of Ethics.").

[13] Defendants cannot dispute this fact. *See* Hickson Dep. 58:24-59:8.

[14] Even if Defendant claims that Ms. Hickson's testimony contradicts Cochran's and was sufficiently instructive to require him to seek approval from the Board, at most this establishes a genuine of material fact to be resolved by the factfinder.

pronouncements. Cochran Dep. 265:1-8, 268:16-22, 271:8-12, 274:23-275:4; Pl.'s Ex. 10; Torres Dep. 33-35. Some of those churches and religious organizations asked Cochran to share his testimony and also offered him their assistance and support. *See* Cochran Dep. 271:8-12. Cochran testified that "at the time [his suspension] was taking place, due to the tremendous amount of stress and pressure, support from my church . . . really was helpful." Cochran Dep. 265:1-4. Defendant now seeks to exploit Cochran's decision to speak with and accept the support of his co-religionists as justification for his termination. But the record does not support this. Furthermore, this alternative reason for punishment, if accepted as legitimate, would itself independently trench upon Cochran's right to free speech and the free exercise of his religion.

Defendant's resort to this justification is particularly troubling, given its failure to apprise Cochran of its expectations of him during his suspension. Defendant gave Cochran no written instructions as to these expectations, *see* Cochran Dep. 222:23; 267:1-2. And the verbal communications Defendant claims it gave to Cochran remain in doubt.[15] Chief of Staff Candace Byrd testified that she could not recall exactly what she said to Cochran, but she believes she told him "[t]o remain quiet and not . . . talk about the events surrounding his

[15] Defendant's claim that Cochran "violated the terms of his suspension" must be rejected, as it never established any such terms. Defs' Br. 1.

suspension." Byrd Dep. 43:1-2. But Cochran recalls that Byrd told him "not [to] conduct any media interviews" during his suspension, which led him to request that Defendant send out a "media advisory so that [the media] would understand" he could not speak with them, as he had already denied interview requests seeking his take on his suspension, and anticipated many more to come. Cochran Dep. 222-224, 256-257.[16] This lack of clarity on the part of Defendant as to what was expected of Cochran during his suspension should be considered fatal to its attempt to use his communications during his suspension as a predicate for termination.

But worse yet is the fact that Defendant itself created the media firestorm for which it now seeks to blame Cochran. Defendant gratuitously mischaracterizes Cochran as having "portrayed himself as a religious martyr" during his suspension. Defs.' Br. 10. In truth it was Defendant which manufactured a public relations crisis by broadcasting to all the world that Cochran had discriminated against members of the AFRD on the basis of his

[16] Cochran's testimony that he understood Ms. Byrd's instruction to mean that "she did not want [him] to publicly disclose [his] side of the story" is consistent with his understanding that he was not to conduct media interviews or press conferences regarding his suspension. *See* Cochran Dep. 257:12-13, 222-24, 254. Tellingly, the record demonstrates that Cochran complied with Defendant's instructions, as he understood them, throughout the entirety of his suspension. *See* Cochran Dep. 222-224, 256-257.

religious beliefs, when that in fact did not happen.[17] *See* Pl.'s Br. 6-10; Cochran Dep. 280-82. Defendant stated that it doesn't "typically talk about employment matters to the media" and that it "reserve[s] comments surrounding suspensions or terminations," Byrd Dep. 44:2-5, but it made an exception when it publicly announced Cochran's suspension, repudiated the contents of his book, and denigrated his religious beliefs in the process. *See* Pl.'s Br. 6-10; Pl.'s Exs. 10, 49; Torres Dep. 32-35. It was Defendant's own public pronouncements that invited the public criticism that followed. *See* Reed. Dep. 136:1-23 (revealing that comments objecting to Defendant's treatment of Cochran began "right away" after news of his suspension was posted on the Mayor's Facebook page).

Thus, given its breach of normal employment protocol and its central role

[17] The record does not support Defendant's allegation that Cochran enlisted organizations to assist him, Cochran Dep. 268-69, nor does it support the charge that he orchestrated any "battle plan" or "offensive fire attack" against the City, Defs.' Br. 10-11. Cochran reviewed plans of assistance created by those who wished to help him, but he did not create or implement those plans. *See* Cochran Dep. 254:22-255:1. Moreover, however they are characterized, because Defendant had no knowledge of these facts when it terminated Cochran, *see* Yancy Dep. 128:10 (admitting Defendant had no knowledge of these facts); Reed Dep. 137:11-20 (Defendants became aware of these communications only in discovery), it cannot support Cochran's termination by invoking these communications. *See McKennon v. Nashville Banner Publ'g. Co.*, 513 U.S. 352, 360 (1995) (where "employer could not have been motivated by knowledge it did not have," it could not "claim that the employee was fired for [that] reason"); *Crapp v. City of Miami Beach*, 242 F.3d 1017, 1021 (11th Cir. 2001) (holding that after-acquired evidence of wrongdoing could not be used to deny claim for violation of Title VII and thus awarding compensatory damages).

in precipitating and encouraging widespread news coverage of the matter, Defendant should not be heard to complain of what amounts to little more than occasional reportage by Cochran—to his concerned co-religionists—on the mere fact of his suspension.[18] It is incredible that Defendants would publicly suspend and denigrate Cochran because of his views and then expect him not to tell his side of the story (which he refrained from doing). This pretext not only fails to rise to a legitimate reason for termination, it is government gamesmanship at its worst.

The City Law Department's Findings

The City Law Department concluded that not one witness could report any instance of discrimination or compromised disciplinary decision making on the part of Cochran. Pl.'s Ex. 13 at 4. Defendant's concern that Cochran's book betrayed a discriminatory leadership regime thus came entirely to naught as a result of its own investigation. *See* Yancy Dep. 102:11-14. Notwithstanding this exoneration, Defendant seizes upon the City Law Department's conclusion that

[18] Even in the testimonies Cochran gave to fellow Christians who asked him to speak, his focus was not on the discipline he received from Defendant, but rather upon "how [he] came into the knowledge of Christ and about [his] life and upbringing . . . up to that point in [his] life." Cochran Dep. 255: 21-24; 260:14-22 (explaining that the purpose of the Georgia Baptist Convention's invitation "was to share my testimony . . . which is a common Christian practice"); Cochran Dep. 274-75 (Cochran only briefly alluded to his suspension at the beginning of his talk to the First Baptist Church of Newnan, because his "invitation to speak was extended based on" news of that suspension).

there was "general agreement that the contents of the book ha[d] eroded trust and ha[d] compromised [Cochran's] ability . . . to provide leadership in the future" as a predicate for termination. Pl.'s Ex. 13 at 4. This will not do.

As Cochran has already established, this conclusion—and for that matter the entire Investigative Report from which it is excerpted—constitutes inadmissible hearsay. *See Jones*, 683 F.3d at 1293. As such, it cannot justify Cochran's termination. Regardless, this self-serving document shows little more than that some AFRD members disagreed with the content of Cochran's book, and made those feelings known after the matter was much-publicized by Defendant itself. As has already been established, such a heckler's veto cannot be countenanced by this Court. *See* Pl.'s Br. 14-15.

In sum, because it has not shown that its interests outweigh Cochran's, because it cannot show that speech did not play a substantial role in its discipline of Cochran, and because it cannot show it had an otherwise legitimate reason to terminate Cochran absent his speech, Defendant cannot prevail on summary judgment as to Cochran's retaliation claim.

D. Because Defendant City of Atlanta Punished Cochran Based Upon the Views Expressed in His Book, It Cannot be Granted Summary Judgment on His Viewpoint Discrimination Claim.

Although a wealth of record evidence demonstrates that Defendant disciplined Cochran based upon the views he expressed in his book, *see* Pl.'s Br.

6-10, 19-23, Defendant has heretofore attempted to deny the patently obvious. *See* Yancy Dep. 64:9-10; 66:13-14; Pl.'s Ex. 14 at 1 (announcing that Cochran's "personal religious beliefs [were] not the issue at all"). Indeed, in the retaliation context Defendant argued that Cochran's speech played no role in his punishment. *See* Defs.' Br. 17-18. But in the space of three pages in its brief, Defendant executes a remarkable flip-flop, admitting that the content of Cochran's speech justified his termination. *See* Defs.' Br. 21-22. Defendant argues that Cochran's book constituted government speech, so when he "expressed views antithetical to the City's," his subsequent ouster was permissible. *Id*. at 22. This argument not only negates a crucial portion of Defendant's retaliation defense, but also ignores the record facts and the law.[19]

As to the facts, Defendant claims that Cochran's book is government speech because in it he "purport[ed] to represent the City as Fire Chief." *Id* at 22. But Cochran mentioned his role as AFRD Fire Chief exactly twice in the space of a 162-page book. In the "About the Author" section of the book he discusses his birthplace, his faith and life mission, his family, his church, and his career as a firefighter, and only then briefly concludes that he was at that time "serving as

[19] Defendant's argument as to "government speech" should also be independently precluded by this Court's earlier holding that Cochran spoke as a private citizen on a matter of public concern. *See Cochran v. City of Atlanta*, 150 F. Supp. 3d 1305, 1313-14 (N.D. Ga. 2015).

Fire Chief of the City of Atlanta Fire Rescue Department (GA)." Pl.'s Ex. 11 at v. And later on in the book he notes that his faith is central to carrying out his mission as a fire professional. *Id*. at 76. These facts do not transform Cochran's book into government speech for which he could be disciplined.

Nor do the cases Defendant cites provide any support for such an argument. In *Pleasant Grove City, Utah v. Summum* the United States Supreme Court held that permanent monuments in a city park constituted government speech, because the city "selected those monuments that it want[ed] to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the [p]ark." 555 U.S. 460, 473 (2009). And in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* the Court held that license plates—traditionally regulated by the states, and subject to their "sole control"— also were government speech. 135 S. Ct. 2239, 2249 (2015). This case, however, is not even remotely similar to either *Summum* or *Walker*. Cochran is not arguing that Defendant must adopt his speech as its own or that it cannot express its own viewpoint, but rather that Defendant cannot stifle his private speech on matters of public concern—unrelated to the City or the AFRD—simply because it disagrees with him. Defendant is correct that "the City has the right to speak for itself," Defs.' Br. 21, but that is wholly irrelevant here.

Finally, this Court should reject Defendant's argument that it is entitled to

summary judgment because Cochran did not proffer a precise mirror image comparator. *See* Defs.' Br. 20 ("Plaintiff can point to no other public safety head . . ."). Defendant's position is both conceptually indefensible and detached from settled viewpoint discrimination analysis.[20] The flawed premise that there must be a showing of unequal treatment of ideological competitors before a viewpoint discrimination claim can obtain has been repudiated in the case law. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993) (recognizing use of hypothetical comparator to show viewpoint discrimination where the record contained no evidence that non-religious film series about "child rearing and family values" would not have been permitted, while religious series on same subject matter was actually prohibited); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) ("It is as objectionable to exclude both a theistic and atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint."). If Defendant disciplined Cochran based upon the viewpoint of his speech, on a permissible subject matter, that constitutional violation is no less real because

[20] Neither *Moss v. United States Secret Service*, 572 F.3d 962 (9th Cir. 2009), nor *Pine v. City of West Palm Beach, Florida*, No-13-80577-CIV, 2013 WL 5817651 (S.D. Fla. Oct. 29, 2013), does anything to salvage Defendant's argument. In *Pine* the ordinance was enforced without distinction "against those who violate[d] it," *id.* at *7, and in *Moss* demonstrators with opposing views were treated the same. 572 F.3d at 971. But here Cochran was punished for the views in his book.

Defendant has not previously disciplined a like employee whose views were opposed to Cochran's. In other words, an isolated act of viewpoint censorship is as much a First Amendment violation as if a fellow speaker had concurrently been given favorable treatment. *Arizona Life Coal. Inc. v. Stanton*, 515 F.3d 956, 972 (9th Cir. 2008) (holding unconstitutional the denial of a license plate application based on the "nature of the message"). Thus, because Defendant punished Cochran based on its substantive disagreement with his speech, it cannot be granted summary judgment on his viewpoint discrimination claim.[21]

E. Defendant's Pre-Clearance Requirements Cannot Be Sustained.

Defendant mistakenly claims that Cochran "does not dispute that he violated these ordinances, nor that . . . he understood and approved of their purpose." Defs.' Br. 22. The very gravamen of this case is that the City improperly disciplined Cochran based upon policies that cannot be constitutionally applied to him here. Defendant further claims that its policies are a necessary to prevent conflicts of interest. Defs.' Br. 24-25. But Cochran does not challenge that general municipal imperative—he rather objects to the

[21] Defendant cannot justify its viewpoint discrimination based upon its conclusion that Cochran's book "espoused beliefs that were offensive to many different groups," Yancy Dep. at 69:8-9, precisely because "[t]he Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience"). *Matal v. Tam*, No. 15-1293, 2017 WL 2621315 (June 19, 2017) (Kennedy, J., concurring); *see also supra* at 18.

application of Defendant's pre-clearance policies to a religious book on biblical subjects of public concern that implicates none of the concerns of the City or the AFRD. Put simply, contrary to Defendant's assertions, the City has no right to play gatekeeper with respect to such speech, whether or not it results in income.[22] This is especially so because these policies burden speech, lack narrow tailoring, and grant the City unbridled discretion.

These policies clearly burden speech. Although Defendant seeks refuge in the abstract claim that neither ordinance "specifically targets expressive activities," the record refutes that anodyne characterization, revealing that Defendant has exploited its policies to punish Cochran for his speech. *See* Defs.' Br. 9, 12, 20 n.10, 25. Similarly unsupported is Defendant's claim that "[e]mployees remain free to speak [or] write . . . without seeking approval . . . so long as they do not receive compensation for doing so." *Id*. at 26. In fact, Commissioner Yvonne Yancy testified that employees need to "get permission . . . to do anything outside of work," even if compensation is only possible or

[22] Defendant claims that Cochran sold his book for a profit, but it has provided no evidence to demonstrate this, and Cochran actually testified that he did not intend for the book to make a profit. Cochran Dep. 80:8-18. Additionally, Defendant did not know whether Cochran profited from his book before it disciplined him. *See* Yancy Dep. 51:16-52:5 (Yancy only knew the book was "for sale"). Even if evidence existed to show a profit, however, Defendant could not constitutionally prevent an employee from deriving such from a book of this kind.

"perceived." *See* Yancy Dep. 88:3-5; 52:5-7.[23]

Defendant's pre-clearance policies also lack narrow tailoring, as illustrated by its own case authority. *Weaver v. United States Information Agency*, 87 F.3d 1429, 1431-32 (D.C. Cir. 1996), upheld a prepublication review requirement that applied only to "material on matters of 'official concern'" pertaining to "foreign relations." *Wolfe v. Barnhart*, 446 F.3d 1096, 1098 (10th Cir. 2006), upheld a federal regulation prohibiting compensation (but not the underlying speech) for writing, speaking, or teaching on subjects related to an employee's "official duties." *Gibson v. Office of Attorney General, State of California*, 561 F.3d 920, 923 (9th Cir. 2009), upheld a state regulation requiring pre-approval for the "the private practice of law" by government attorneys, which was not constitutionally protected speech. And *Williams v. Internal Revenue Service*, 919 F.2d 745 (D.C. Cir. 1990), much like *Gibson*, upheld a federal regulation requiring written permission for a government-employed attorney to prosecute a private class action, which was also not constitutionally protected activity.[24] Here, however,

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[23] For reasons already explained, Defendant's resort to *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) and its progeny actually solidifies Cochran's prior restraint claim, rather than supporting its own attempt to secure summary judgment here. *See* Pl.'s Br. 25-29.

[24] Defendant's citation to the dated *Reichelderfer v. Ihrie*, 59 F.2d 873 (D.C. Cir. 1932), is similarly unavailing. There the court noted that because the general regulation in question was "susceptible of . . . produc[ing] unreasonable results," courts must "prevent a misapplication . . . by construing and applying it in conformity with its obvious purpose." *Id*. at 875. Defendant's attempt to apply its

in contradistinction to this authority, Defendant has applied its pre-clearance policies to speech by a private citizen on a matter of public concern that has no connection to, or conflict with, that citizen's official duties. This is the antithesis of narrow tailoring.[25]

Defendant also grants itself unbridled discretion in the application of its pre-clearance policies. Its policies lack "narrowly drawn, reasonable, and definite standards to guide" City officials in making their determinations as to what employment to permit and what to restrict. *Bloedorn v. Grube*, 631 F.3d 1218, 1236 (11th Cir. 2011). Furthermore, Defendant's citation to the "specific elements" contained in Section 114-437 and Section 2-820(d) does nothing but show that discernible and workable guideposts are entirely absent from these regulations. Defs.' Br. 27-28. Given Defendant's substantive disagreement with Cochran's book, *see* Pl.'s Br. 6-10, 19, 23-25, it is apparent that it would have permitted Cochran to write and publish his book, if at all, "only by toeing the [City] line." *Sanjour v. E.P.A.*, 56 F.3d 85, 97 (D.C. Cir. 1995); *see* Reed Dep.

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policies to a religious book not implicating the concerns of the City or AFRD is the very type of "misapplication" the *Reichelderfer* court adumbrated.

[25] The exception with respect to "single speaking engagements" does not show that Defendant's ethics regulations do not target speech, or that they are narrowly tailored, but rather that they are incoherent. Defs.' Br. 26. For a single speaking engagement could pose a potential conflict of interest just as easily as a single book, yet the former speaker is entirely absolved from participation in the review process, while the other—like Cochran—must apparently submit himself to it upon pain of suspension and termination.

134:3-8 (concluding that it was wrong for Cochran to write a book "that would clearly be offensive to some without getting an approval"). Such unbridled discretion cannot stand.

F. Defendants Violated Cochran's Right to Procedural Due Process.

Defendants argue that as an unclassified employee who was employed at-will, Cochran had "no property interest in his employment." Defs.' Br. 34. Defendants, however, are mistaken. The City of Atlanta's Code of Ethics and Code of Ordinances provided Cochran with the very property interest Defendants claim he lacked. *See* Pl.'s Br. 31-35.

Georgia law provides that "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). That interest may obtain even where it would appear that an employee's employment is at-will. *See Doss v. City of Savannah*, 660 S.E.2d 457 (Ga. Ct. App. 2008) (where department SOP established procedures for disciplinary matters, holding that a jury issue existed as to whether plaintiff was an at-will employee, even where employee handbook appeared to establish that she was).

In this case, by explicitly yoking their discipline of Cochran to his alleged

failure to abide by Section 2-820(d) of the City of Atlanta's Code of Ethics,[26] Defendants "impose[d] requirements [and] procedures . . . analogous to requiring cause." *Brown*, 881 F.2d at 1026. Put simply, once Defendants chose to punish Cochran based on the ethics code, they were required to provide him such "procedural protections as the particular situation demand[ed]." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). This means that Defendants were required to provide Cochran the procedures of Section 2-806 of the Code of Ethics. *See* Pl.'s Ex. 1 (detailing the Code's due process protections, including an independent Board of Ethics investigation, notice and subsequent hearing). *Laskar v. Peterson*, 771 F.3d 1291 (11th Cir. 2014), is instructive on this point.

In *Laskar*, Georgia Tech brought dismissal proceedings against an engineering professor for alleged misappropriation of resources. *Id.* at 1294. Although the professor was provided all the protections promised to him by the Georgia Tech Faculty Handbook and the Board of Regents before he was terminated, he nonetheless claimed that his right to procedural due process had been violated. *Id.* at 1295-96. The Eleventh Circuit disagreed, finding that because Laskar had received the "extensive pre-termination procedures" to which he was entitled by the institution's own rules, *id.* at 1298, defendants had comported with the due process requirements established by the Supreme Court

[26] *See* Yancy Dep. 49, 102.

in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985) (requiring "oral or written notice of the charges . . . an explanation of the employer's evidence, and an opportunity to present [one's] side of the story). Here, however, where Defendants denied to Cochran the very procedures guaranteed to him by the City of Atlanta's Code of Ethics, *Laskar* and other controlling authority compel the conclusion that Defendants denied him his right to procedural due process. *See Bass v. City of Albany*, 968 F.2d 1067, 1069 (11th Cir. 1992) (per curiam) (upholding department policy providing for full pre-termination hearing and investigatory proceeding before the City Manager (the hiring and firing authority), at which police officer was entitled to retain counsel and present evidence, as comporting with procedural due process); *Martin v. Guillot*, 875 F.2d 839, 844 (11th Cir. 1989) (after a federal district court had ordered the university to abide by its own procedures providing for a due process committee hearing, finding that due process had been satisfied where university provided administrative employee an opportunity to be heard at a hearing, at which "counsel . . . presented their respective arguments"); *Bowling v. Scott*, 587 F.2d 229, 230 (5th Cir. 1979) (per curiam) (due process satisfied where employee received "painstaking detail[s]" of the charges against him, and was represented by counsel and presented evidence at a faculty committee hearing).

Cochran never received a "meaningful opportunity to invoke the discretion

of the decisionmaker." *Loudermill*, 470 U.S. at 543. Indeed, although "the time to be heard is prior to the adverse employment action," *Laskar*, 771 F.3d at 1298, Defendants made both their suspension and termination decisions without permitting Cochran to make his case, merely relaying those determinations to him as *faits accompli*. *See* Defs.' Statement of Facts ¶¶59-60 (Mayor Reed decided to suspend Cochran and Yancy, Byrd, and Godfrey then met to notify Cochran of that suspension); Yancy Dep. 44:12-45:16 (Yvonne Yancy had suspension and termination letters drawn up before Cochran arrived for his suspension meeting); Defs.' Statement of Facts ¶58 (termination was recommended before speaking to Cochran); Cochran Dep. 200:13-15 (testifying that there was no discussion, but only an explanation, as to Defendants' suspension decision); Yancy Dep. 47:20-24 (sensitivity training had already been decided upon prior to the suspension meeting); Yancy Dep. 134:1-7 (Cochran was not given "all the reasons" he was being terminated, but was told his "services [were] no longer needed" and that Defendants "decided to go in a different direction"); Geisler Dep. 75:7-13 (Cochran's request to speak with the Mayor prior to his termination was denied, and that he was instead told that "the proceeding was final. . . [Defendants] were going to move forward . . . the opportunities had all been taken"). In suspending and terminating Cochran

Defendants thus ignored the strictures of *Loudermill* and its progeny.[27] As such, they cannot be granted summary judgment on Cochran's procedural due process claim. [28]

G. Defendants Cannot Be Granted Summary Judgment on Cochran's Free Exercise Claim.

Defendants' discipline of Cochran violates bedrock principles of federal free-exercise jurisprudence. Government efforts to penalize citizens because of their religious beliefs are strictly forbidden under the federal constitution. The state can neither "impose special disabilities on the basis of religious views," *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990), nor "target[] religious beliefs" by punishing citizens for holding or expressing them. *Church of the Lukumi Babalu Aye, Inc. v. City of*

[27] In addition to the Code of Ethics, Section 114-528 of Atlanta's Code of Ordinances provides that employees shall be dismissed only "for cause." This provision is not limited to classified employees. Defendants argue that this provision conflicts with the City Charter, *see* Defs.' Br. 34-35, but this inconsistency in the City's regulatory regime should not redound to its benefit here, especially when the ordinance created an expectation of a property interest in employment for Cochran, independent of the Code of Ethics.

[28] Contrary to Defendants' argument, Cochran did not need to file a writ of mandamus prior to bringing his procedural due process claim. While the Eleventh Circuit has held that there is no deprivation of *post-termination* due process where the deprivation can be remedied in state court, *McKinney v. Pate*, 20 F.3d 1550, 1563 (11th Cir. 1994), the government is still required, before it deprives a person of a property interest, to provide "notice and [an] opportunity for hearing appropriate to the nature of the case." *Loudermill*, 470 U.S. at 542. Here, Defendants provided to Cochran none of the procedures required by *Loudermill* or its own regulations.

Hialeah, 508 U.S. 520, 533 (1993). But by punishing Cochran for expressing his religious beliefs in his book, Defendants violated these axiomatic proscriptions.

Defendants assert that their pre-clearance policies "had no bearing on [Cochran's] ability to believe, profess, or teach whatever he chooses." Defs.' Br. 29. But this is not so—Defendants suspended and terminated Cochran based upon the substance of his religious beliefs.[29] *See* Pl.'s Br. 6-10, 19-25; Yancy Dep. 26:22-27:7, 69:8-9 (revealing that Yancy came away from reading the book feeling personally "offended" and concluded that "the content was problematic" because Cochran "espoused beliefs that were offensive to many different groups"); Shahar Dep. 80:6-81:25 (revealing that LGBT Advisor Robin Shahar and Special Assistant to the Mayor Melissa Mullinax concluded it was "very important that other religious perspectives be put in the public domain," and detailing their efforts to enlist the Anti-Defamation League to provide one); Mullinax Dep. 35:14-36:9 (same). Because the record shows not forbearance but

[29] Thus *Braswell v. Board of Regents of University System of Georgia*, 369 F. Supp. 2d. 1362 (N.D. Ga. 2005) is distinguishable. There the plaintiff had "improperly injected religion into" her work and was instructed not to do so moving forward. *Id.* at 1367. But here, Cochran wrote a book on his own time that he gifted to a small number of co-religionists, most of whom requested it. It was only after Defendants learned of his views that Cochran was suspended and terminated. Cochran was thus punished based on the content of his beliefs, which means that unlike in *Braswell*, Cochran's free exercise of religion *was* generally constrained.

rather targeting of Cochran's religious beliefs, Defendants' attempt to deny burdening religious exercise must be rejected.

So too must their asseveration of neutrality and general applicability. *See* Defs.' Br. 30-31. Defendants seek refuge in the fact that their pre-clearance policies do not explicitly "single out religious speech," and apply to all employees regardless of religious belief. *Id.* at 31. But "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Lukumi*, 508 U.S. at 534. Even if Defendants' pre-clearance policies are not so clumsy as to explicitly target religion outright, their punishing of Cochran based upon his religious beliefs is not thereby cured. Moreover, the record evidence amply demonstrates that Defendants' policies are not generally applicable, because they "selective[ly] impose[d] burdens only on conduct motivated by [Cochran's] religious belief." *Eternal Word Television Network, Inc.* v. *Sec'y of U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122, 1164 (11th Cir. 2016). Defendants' pre-clearance policies also fail the test of general applicability because they represent a system of individualized government assessments. Section 2-820(d), for instance, exempts "single speaking engagements" and "participation in conferences or on professional panels." And Section 2-820(f) implies that employees except the mayor "may . . . accept honoraria" from non-prohibited sources. Because Defendants condition the

ability of City employees to accept remuneration for speech on the status of the speaker, the medium of the speech (speeches and articles are okay, books apparently are not), and on the subject matter means that their pre-clearance policies cannot be considered generally applicable.

The lack of neutrality and general applicability demands strict scrutiny of Defendants' policies, which means that they must proffer a compelling interest and narrow tailoring to advance that interest. *Lukumi*, 508 U.S. at 546. But Defendants cannot meet that burden. Even assuming that avoiding conflicts of interest constitutes a compelling interest, that interest must be compelling here, under these facts, as applied to Cochran. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (courts must "look[] beyond broadly formulated interests" and scrutinize the government's specific interests under particular circumstances of the case). But Defendants had no compelling interest to impose discipline, precisely because Cochran's religious beliefs posed no conflict of interest.[30] Moreover, even assuming such an interest was compelling, "the [Code is] not drawn in narrow terms to accomplish" it. *Lukumi*, 508 U.S. at 546. By permitting Cochran to deliver the same speech

[30] To the extent that Defendants' argue that the City's nondiscrimination policy constitutes a compelling interest, their claim fails because their own investigation concluded that "[n]o interviewed witness could point to a specific instance in which any member of the organization has been treated unfairly by Cochran." Pl.'s Ex. 13 at 4.

orally for payment instead of in a book, the Code is underinclusive; by targeting his religious speech, which posed no conflict, while leaving unperturbed similar speech in another medium that could pose a conflict, it is overinclusive. This lack of fit is fatal to any assertion of narrow tailoring. *See Republican Party of Minn. v. White*, 416 F.3d 738, 751 (8th Cir. 2005).

Defendants' punishment of Cochran for his religious beliefs also constitutes a religious test, which the Constitution forbids. *See McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (plurality) (holding that a state cannot forbid a minister from holding a legislative office because of his religious exercise); *Torcaso v. Watkins,* 367 U.S. 488, 494 (1961) (stating that "limiting public offices to persons who have . . . a belief in some particular kind of religious concept" is a "historically and constitutionally discredited policy"); U.S. Const. art. VI, cl. 3. Here, Defendants foreclosed Cochran's ability to continue as AFRD Fire Chief because of the religious beliefs he expressed in his book and in speeches before his co-religionists. *See* Pl.'s Ex. 83 (wherein Defendants sent out a press release stating that "there was an issue with [Cochran] espousing [his] beliefs while identifying himself as the Atlanta Fire Chief"). That is improper. *See Torcaso*, 367 U.S. at 495 (holding that a state cannot withhold the office of notary public because of a person's unwillingness to declare a particular religious belief). Thus summary judgment for Defendants is not appropriate on Cochran's Free Exercise claim.

H. Defendant Cannot Be Granted Summary Judgment on Cochran's Freedom of Association Claim.

Defendant mistakenly claims that Cochran has failed to show he engaged in associative activity. Cochran wrote a book to help Christian men fulfill God's purpose for their lives, and that book was a direct outgrowth of a Bible study he undertook at Elizabeth Baptist Church. *See* Am. Comp. ¶¶83-89, 93-94; Cochran Dep. 143:1-6, 106-07. Then, as a member of that church, Cochran made the book available to the broader community, and later shared his testimony as requested by co-religionists of other churches and religious organizations. *See* Cochran Dep. 255:2-256:6, 274-78; Defs.' Dep. Ex. 52.

These associative activities are plainly protected by the Constitution. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (recognizing the "right to associate for the purpose of engaging in those activities protected by the First Amendment," including "speech . . . and the exercise of religion"); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987) (reaffirming the "freedom of individuals to associate for the purpose of engaging in protected speech or religious activities"). Cochran's freedom of association claim thus survives Defendant's challenge.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment should be denied in its entirety.

Respectfully submitted this 20th day of June, 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 20th day of June, 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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