CASE NO. 18-10173

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES TRACY,

Appellant,

v.

FLORIDA ATLANTIC UNIVERSITY, ET AL.,

Appellees.

Appeal from the United States District Court
for the Southern District of Florida
Case No. 9:16-cv-80655-RLR-JMH

CORRECTED PRINCIPAL BRIEF OF APPELLANT JAMES TRACY

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Tracy v. FAU
Case No. 18-10173

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 – 26.1-3, Appellant, James Tracy, hereby certifies that the following persons or entities may have an interest in the outcome of this litigation:

1. Robin L. Rosenberg – United States District Judge, Southern District of Florida;
2. James M. Hopkins – United States Magistrate Judge, Southern District of Florida;
3. Florida Atlantic University Board of Trustees a/k/a Florida Atlantic University – Defendant / Appellee;
4. Diane Alperin – Defendant / Appellee;
5. Heather Coltman – Defendant / Appellee;
6. John W. Kelly – former Defendant;
7. Anthony Barbar – former Defendant;
8. Daniel Cane – former Defendant;
9. Christopher Beetle – former Defendant;
10. Michael Dennis – former Defendant;
11. Kathryn Edmunds – former Defendant;
12. Jeffrey Feingold – former Defendant;
13. Mary McDonald – former Defendant;
14. Abdol Moabery – former Defendant;
15. Robert Rubin – former Defendant;

16. Robert Stilley – former Defendant;

17. Paul Tanner – former Defendant;

18. Julius Teske – former Defendant;

19. Thomas Workman, Jr. – former Defendant;

20. Gary Perry – former Defendant;

21. Florida Education Association – former Defendant;

22. United Faculty of Florida – former Defendant;

23. Robert Zoeller, Jr. – former Defendant;

24. Michael Moats – former Defendant;

25. Louis Frank Leo, IV, Florida Civil Rights Coalition, P.L.L.C., Medgebow Law P.A., Co-Counsel for Plaintiff – Appellant;

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34. Roger W. Feicht, Gunster Yoakley & Stewart, P.A. – Counsel for Defendants – Appellees Florida Atlantic University Board of Trustees a/k/a Florida Atlantic University; Heather Coltman; Diane Alperin;

35. Sara N. Huff, Gunster Yoakley & Stewart, P.A. – Counsel for Defendants – Appellees Florida Atlantic University Board of Trustees a/k/a Florida Atlantic University; Heather Coltman; Diane Alperin;

36. Gerard J. Curley, Jr., formerly of Gunster Yoakley & Stewart, P.A.;

37. Keith E. Sonderling, formerly of Gunster Yoakley & Stewart, P.A.;

38. Robert F. McKee, Robert F. McKee, P.A., – Counsel for former Defendants Florida Education Association; United Faculty of Florida; Robert Zoeller, Jr.; and Michael Moats;

39. Melissa C. Mihok, Kelly & McKee, P.A., – Counsel for former Defendants Florida Education Association; United Faculty of Florida; Robert Zoeller, Jr.; and Michael Moats.

s/ Richard J. Ovelmen
RICHARD J. OVELMEN
Florida Bar No. 284904

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant James Tracy, a tenured public university professor, believes that oral argument would be beneficial to resolution of the issues on appeal which relate to his firing in violation of his free speech rights under the First Amendment for controversial blogging on issues of public concern.

PRELIMINARY STATEMENT

In this brief, Plaintiff-Appellant James Tracy will be referred to as Tracy. Defendant-Appellee Florida Atlantic University will be referred to as FAU.

The record will be referred to as "DE:X at Y," where "X" represents the docket number, and "Y" represents the page number. If preceded by a "§" or "¶," then the "Y" represents the section or paragraph number, respectively.

Where there exist multiple sources of support, citations are to the trial transcript unless a citation to the summary judgment record is more appropriate pursuant to the standard of review. The trial transcript will be referred to as "T.Vol.X at Y," where "X" represents the trial transcript volume number, and "Y" represents the page number. The trial transcripts are located between DE:465 and DE:473.

All emphasis is supplied and all internal quotation marks and citations are omitted, unless otherwise noted.

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STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1291 over this appeal from a final judgment of the United States District Court of the Southern District of Florida.

The district court's jurisdiction was pursuant to 28 U.S.C. § 1331, because the action arose under federal law, 28 U.S.C. § 1332, the amount in controversy exceeds the sum of $75,000.00, exclusive of interest and costs, and 28 U.S.C. § 1367, affords supplemental jurisdiction over the state law claim.

STATEMENT OF THE ISSUES

This appeal presents four questions for appellate review:

1. Whether FAU's policy regarding conflicts of interest created by faculty blogging on matters of public concern is unconstitutionally vague under the First Amendment.
2. Whether the conflict of interest blogging policy inherently constitutes a content-based viewpoint discriminatory violation of the First Amendment.
3. Whether the district court erred in resolving the First Amendment claims brought pursuant to 42 U.S.C. §1983 on exhaustion, standing, and waiver.
4. Whether any reasonable jury could have concluded that controversial blogging was not a motivating factor in FAU's decision to fire Tracy.

INTRODUCTORY STATEMENT

Chief Justice Roberts writing for eight justices of the Supreme Court in *Snyder v. Phelps*, 562 U.S. 443 (2011), reaffirmed that "'If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'" He held that deeply hurtful hate speech displayed on signs picketing a military funeral were fully protected by the First Amendment even though they stated "Thank God for dead soldiers," "God Hates Fags," "Priests Rape Boys," among other abhorrent messages, in protest of homosexuals being allowed in the military.

The Chief Justice's quotation of this bedrock First Amendment principle was from Justice Brennan's opinion for the Court striking down a state law prohibiting the burning of the American flag in protest, *Texas v. Johnson*, 491 U.S. 414 (1989). The Chief Justice further elaborated by observing "'the point of all speech protection…is to shield just those choices of content that in someone's eyes are misguided or even hurtful.'" *Snyder* at 458, citing *Hurley v. Irish-American Gay Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574 (1995). The lone dissenter in *Snyder*, Justice Alito, changed his mind last Term and wrote the opinion for a unanimous Court in *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017), holding that "the proudest boast of our free speech jurisprudence is that we protect

the freedom to express the 'thought we hate.'" The Court held that the refusal of the Federal Trade Mark Office to approve the racist term for Asians, "Slant," as a mark violates the First Amendment.

Notwithstanding this bedrock principle, Florida Atlantic University, a public school, fired award-winning, fully-tenured professor James Tracy in retaliation for his notorious internet blogging questioning the veracity of the Sandy Hook Massacre narrative. The school, the public, and the mass media found his posts deeply offensive, hurtful, and hateful. FAU claims Professor Tracy insubordinately refused to "disclose" the notorious public blogging on its conflict of interest form.

This termination violated the First Amendment for two fundamental reasons. First, the Conflict of Interest Blogging Policy is unconstitutionally vague. The University admitted to having no policy at all on blogging, that the conflict of interest forms and rules do not mention or allude to blogging, that the constituent terms of the Policy are undefined, and that other faculty blog and use social media without disclosing their activities. Administrators could not explain how blogging on a controversial public matter posed a conflict of interest with the University. This vague Policy violates both prongs of the test adopted in *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1319 (11th Cir. 2017) (en banc) (Marcus, J.). The Policy did not give Tracy reasonable notice that it required disclosure of his

blogging, and its vagueness enabled FAU to engage in content-based viewpoint discrimination against him.

Second, the record evidence, as well as the face of the Policy, established that to begin to determine whether blogging, fully protected speech activity, putatively needed to be disclosed required administrators to review its content. This vagueness of the Policy, combined with other record evidence, make it clear that FAU terminated Tracy in retaliation for his offensive blogging, that it was not insubordination, and the asserted insubordination was a pretext for engaging in viewpoint discrimination.

STATEMENT OF THE CASE AND FACTS

I. FACTS.

A. Professor Tracy And Florida Atlantic University.

Florida Atlantic University ("FAU") is a public university. DE:329¶8. At the time of Tracy's firing, John Kelly ("Kelly") served as President, Diane Alperin ("Alperin") was Vice Provost, and Heather Coltman ("Coltman") was Dean of the College of Arts and Letters, Tracy's former college. *Id*.¶¶14-17.

James Tracy was a distinguished tenured faculty member in FAU's School of Communications. T.Vol.2 at 51:2-19; DE:329¶4. He taught journalism history, communication theory, and courses on the media's coverage of conspiracy theories. T.Vol.2 at 51:2-6; T.Vol.3 at 187:9-22. Tracy received awards for his work, regularly earned "excellent" reviews, and was a former president of the faculty union. T.Vol.4 at 207; DE:447-14; T.Vol.2 at 112:13-15.

B. Tracy's Deeply Offensive Blogging On The Sandy Hook Massacre.

In 2012, Tracy started a blog titled "Memory Hole: Reflections on Media and Politics" that offered his personal opinions on politics and current events. T.Vol.2 at 53:24-54:25; DE:93¶¶36-37, 45-46; DE:250-2 at 10-24; DE:444-35 (list of blog posts from 2012-2016). Tracy blogged on his personal time and made the blog available for free to the public. T.Vol.2 at 57:13-21.; T.Vol.4 at 13:16-19. He was not compensated for his blogging but accepted donations to help cover the

server costs of running the website. T.Vol.3 at 40:21-41:17, 42:6-10. He received only $850 in donations prior to his termination, all of which went towards maintaining the blog. *Id*.

In December 2012, Tracy began blogging about Sandy Hook Elementary School and his belief that the mass shooting did not take place and may have been staged by the government to promote gun control. DE:248¶5; DE:270¶5. His posts garnered national criticism and were widely reviled by the public and media, including CNN. DE:93¶¶47-48; DE:249-30; T.Vol.3 at 66:16-67:6. The attention resulted in numerous calls from current and prospective students, donors, and the public at large for FAU to fire Tracy. T.Vol.4 at 79:4-25, T.Vol.5 at 45:20-46:4.

C. FAU Attempts To Censor Tracy For His Blogging In 2013.

In January 2013, Alperin and Coltman held meetings with high-ranking FAU officials, including the former president of FAU and staff from the press office to discuss the negative press surrounding Tracy's blog and to explore terminating him. T.Vol.4 at 87:20-94:8; T.Vol.5 at 163:14-17, 174:5-12. The group kept handwritten notes and agreed not to exchange emails so their discussions would not enter the public record. DE:250-10 at 1.

The notes recognized that FAU was bound by "freedom of speech" and "acad[emic] freedom," but stated Tracy's activities were "reckless + irresponsible," and that he was a "black eye on all faculty" and a "1-man argument

against tenure." DE:250-10 at 3. The notes also state "JT [is] not going to stop publishing," and the group was encouraged to "read his stuff" and "find winning metaphors" to circumvent the "1st Amendment." DE:250-10 at 4.

In direct retaliation for Tracy's expressive behavior, FAU began to actively explore whether Tracy committed a "violation" of the collective bargaining agreement ("CBA") by blogging about Sandy Hook. DE:250-10 at 3. The notes specifically list "Article 19–conflict of interest" as one of the grounds for "misconduct," and an inadequate "disclaimer" as another. *Id*. at 5. After meeting with Tracy, Coltman cited as one potential ground for discipline the disclaimer and his failure to fill out a Policy form disclosing his well-known blog to FAU so that they could review whether it posed a conflict of interest. She directed him to fill out the form. DE:447-1.

Tracy objected, citing his First Amendment rights and because he believed his disclaimer was sufficient and the personal blog did not need to be reported. DE:447-4. Indeed, the disclaimer clearly stated the blogs were his views alone but did identify him as an FAU professor. DE:250-29 at 2. FAU issued a formal notice of discipline, citing only the insufficient disclaimer and his use of his title, "Associate Professor," on the blog. DE:447-6. FAU did not discipline Tracy for failing to report the blog or refusing to submit a form. *Id*.; *see also* T.Vol.5 at

198:23-25. Tracy took that to mean he was not required to report his blog. T.Vol.2 at 123:8-18.

Around that time, constitutional rights groups the American Association of University Professors and the Foundation for Individual Rights in Education sent letters to FAU condemning the threatened discipline and supporting Tracy's right to maintain a his blog. DE:250-29. Tracy's union also supported him by helping defend against the discipline. T.Vol.2 at 112:3-9.

FAU and Tracy settled the matter, with FAU agreeing to drop the discipline and remove the disciplinary notice from his file in exchange for Tracy's agreement to stop using his FAU title in blog postings and to use a disclaimer drafted by FAU that stated the content of the blog were the views of Tracy and not FAU. DE:447-5. He is the only professor that FAU required to forgo using his work title on a blog or social media, and the only one required to use a custom disclaimer. T.Vol.2 at 121:23-122:14. Several years later, Tracy discovered the disciplinary notice remained in his file. T.Vol.2 at 121:15-22, T.Vol.4 at 32:5-12.

Tracy continued to blog on Sandy Hook in the 2014-2015 academic year, and FAU did not request any forms. T.Vol.2 at 123:24-124:4. His blogging did not affect his classroom performance, which remained "outstanding." T.Vol.2 at 192:18-193:23; T.Vol.3 at 200:9-22; DE:447-14.

D. FAU's Impermissibly Vague Conflict Of Interest Policy (The "Policy") Regarding Blogging.

1. FAU Has No Policy At All On Blogging.

FAU does not have a separate policy on blogging, podcasting, or posting on social media. T.Vol.2 at 55:13-21, T.Vol.4 at 217:6-23, T.Vol.5 at 176:14-16. Tracy's blogging is separate from his academic works and not a reportable conflict of interest. T.Vol.2 at 53:24-58:22, T.Vol.3 at 40:17-24.

2. The Policy Nowhere Addresses Blogging.

Blogging is not mentioned or defined in the documents and forms that comprise FAU's Policy. To apply the Policy to a blog, Alperin testified that administrators would have to examine the contents of the blog. DE:250-5 at 174:1-176:4. The same goes for social media posts: "I think it would depend on the content of the Twitter." DE:250-11 at 14:18-19. Likewise for books and honorariums—it depends on the subject matter. DE:447-13; T.Vol.4, at 207:22-209-3, 210:20-212:25.

3. The Policy Vaguely Requires Disclosure And Prior Approval Of Unspecified "Outside Activities."

All Florida public universities must have a conflict-of-interest policy pursuant to Chapter 112, Part III, Florida Statutes (2018). FAU's Policy consists of multiple documents and forms. DE:248¶11, DE:250-18, -32-37, -44.

FAU's "Report of Outside Employment Guidelines" instructs that, pursuant to Chapter 112, Florida Statutes, and University Ethics Regulation 5.011, all FAU

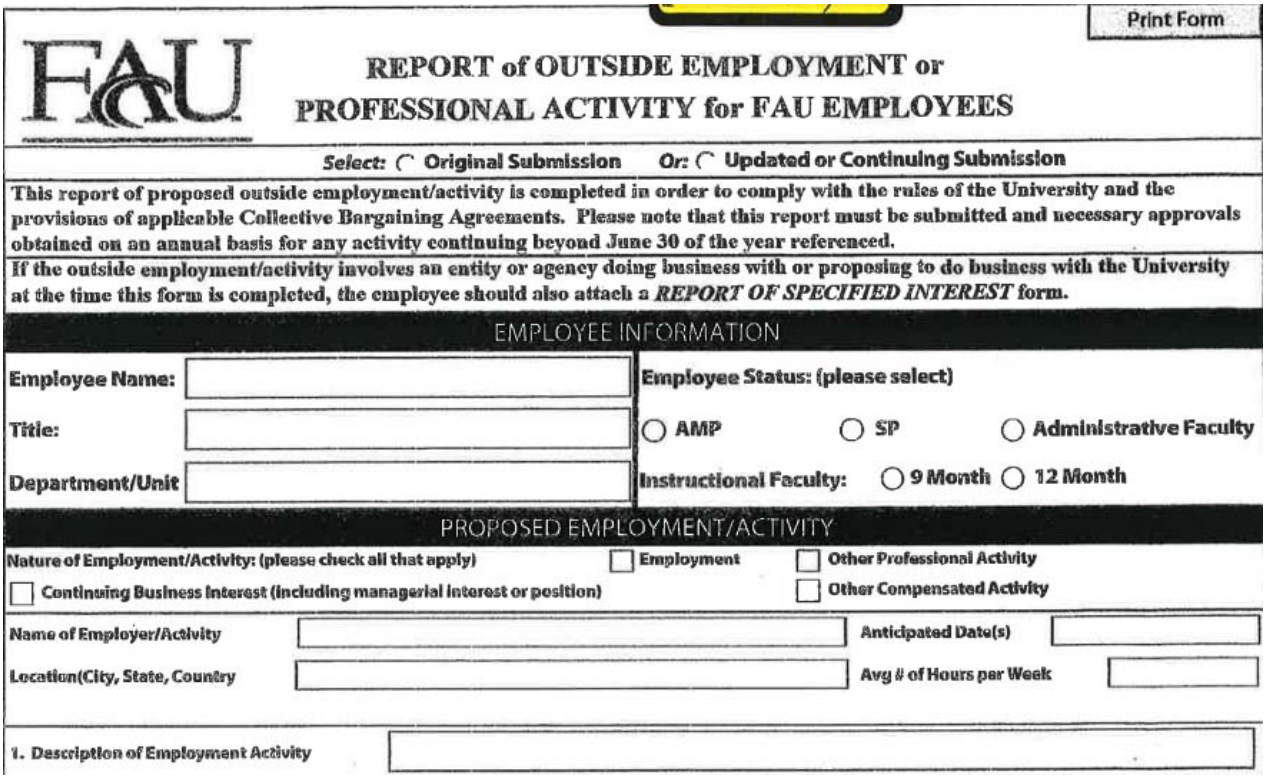
employees must report their conflicts of interest, conflicts of commitment, and outside activities "prior to" engaging in said activity. DE:250-33 at 7. Section 8 of FAU's Personnel Policy forbids employees from having an interest that interferes with the "full and competent performance of the employee's duties." DE:250-37. The CBA contains similar provisions. DE:250-32.

The Guidelines reference various statutes, regulations, and documents (including the CBA) and explain FAU's "[P]olicy reflected in the agreements and regulations is that an employee may participate in outside activities and hold financial interests as long as these activities and interests are reported and do not conflict with the employee's duties to the university." DE:250-33 at 5-6. Several documents attempt to define what is a reportable "conflict of interest." DE:250-32§19.2, DE:250-33 at 4-6, DE:250-34.

FAU intended the Policy to be broad "to best implement the state policy and to evade even the appearance of impropriety…." Univ.Reg.5.011(1).[1] Reporting is done on an annual basis on a form titled "Report of Outside Employment of Professional Activities for FAU Employees." DE:250-35. The form offers check boxes for four types of activities: "Employment"; "Professional Activity";

[1] https://www.fau.edu/regulations/chapter5/5.011_University_Ethics.pdf.

"Compensated Activity"; and "Continuing Business Interest." None is defined in the form or elsewhere. Blogging is not included or suggested by the form.



Print Form

FAU

REPORT of OUTSIDE EMPLOYMENT or PROFESSIONAL ACTIVITY for FAU EMPLOYEES

Select: ○ Original Submission *Or:* ○ Updated or Continuing Submission

This report of proposed outside employment/activity is completed in order to comply with the rules of the University and the provisions of applicable Collective Bargaining Agreements. Please note that this report must be submitted and necessary approvals obtained on an annual basis for any activity continuing beyond June 30 of the year referenced.

If the outside employment/activity involves an entity or agency doing business with or proposing to do business with the University at the time this form is completed, the employee should also attach a *REPORT OF SPECIFIED INTEREST* form.

EMPLOYEE INFORMATION

Employee Name: | Employee Status: (please select)

Title: | ○ AMP ○ SP ○ Administrative Faculty

Department/Unit | Instructional Faculty: ○ 9 Month ○ 12 Month

PROPOSED EMPLOYMENT/ACTIVITY

Nature of Employment/Activity: (please check all that apply) ☐ Employment ☐ Other Professional Activity

☐ Continuing Business Interest (including managerial interest or position) ☐ Other Compensated Activity

Name of Employer/Activity | Anticipated Date(s)

Location(City, State, Country | Avg # of Hours per Week

1. Description of Employment Activity

Id. No check box is offered for any type of uncompensated activity. *Id.*

Employees are not required to report "incidental use" of FAU equipment for outside activities. DE:250-33 at 7. Nor is there a need to report financial interests under $10,000 (at the time of Tracy's firing) for activities such as grants or contract proposals. *Id*. at 9-10. Indeed, not all money that changes hands in relation to an outside activity is reportable. DE:447-13; T.Vol.4 at 210:20-211:4, 215:17-216:23.

FAU employees who do not engage in a conflict of interest activity are not required to fill out a form. T.Vol.5 at 202:3-4. Compliance is based on the honor

system. T.Vol.4 at 160:25-161:1; T.Vol.6 at 88:16-17. No training or instruction on what constitutes an outside activity is provided. T.Vol.2 at 97:14-17.

4. The Policy's Key Terms Are Undefined.

The following terms are undefined in the Policy:

"**Professional practice**": The Policy requires employees to provide their supervisors with a written description of any "reportable outside activity" they engage in. DE:250-35. "Reportable Outside Activity" is defined as "any compensated or uncompensated professional practice, consulting, teaching or research, which is not part of the employee's assigned duties[.]" DE:250-32; DE:250-35 (referencing "professional activity"). The Policy does not define "professional practice" nor does it include blogging on public issues.

"**Public interests**": The Policy is supposed to prohibit conflicts of interest. DE:250-32. The definition of "conflict of interest" includes "any conflict between the private interests of the employee and the public interests of the University, the Board of Trustees, or the State of Florida[.]" *Id.*; DE:250-34 (same); Univ.Reg.5.011 (no state employee may engage in any activity that is in substantial conflict with the proper discharge of his/her duties in the public interest); DE:250-33 at 6 ("The university's personnel and resources must be used for the promotion of the mission of the university and the public interest rather than for private

gain."). The Policy does not define "public interests," "private interests," or "mission" of the University.

"**Full performance**": The definition of "conflict of interest" also includes "any activity which interferes with the full performance of the employee's professional or institutional responsibilities or obligations." DE:250-32; Univ.Reg.5.011 (requiring employee to file form prior to undertaking activity that could create conflict of interest or interfere with full performance of professional or institutional responsibilities); DE:250-33 at 6 (describing conflict of interest or commitment as including "[o]utside activities which represent time commitments that would interfere with [an employee's] accomplishing his or her university duties and responsibilities"); DE:250-37 (no employee shall "incur any obligation of any nature which is in substantial conflict with the full and competent performance of the employee's duties"); DE:250-34 at 1 (policy includes "any activity that interferes with the full performance of the employee's professional or institutional responsibilities or work obligations"); *id.* at 2 (employee must not engage in outside professional activity "which may interfere with the full performance of the employee's work duties"). The Policy provides no guidance as to what "full performance," or interference thereof, entails.

5. The Senate Faculty Protests The Policy's Vagueness.

During a Senate Faculty meeting at the start of the 2015-2016 academic year, several professors voiced concerns that FAU had threatened discipline to professors involved in outside activity under the Policy. DE:250-47 at 4. Professors expressed frustration that "[n]o one knows" what outside activities need to be reported, and "no one knows what outside activity the university is targeting." *Id*. at 5-6. One professor confirmed FAU took a colleague to the "wood[]shed" after he "wrote an op-ed [letter] to the local paper." *Id*. at 14. Alperin informed the professors present that FAU was working on revisions to clarify the Policy and forms. *Id*. at 24.

E. FAU Deploys The Policy As A Pretext For Firing Tracy.

Tracy's blogging on Sandy Hook again made waves in September 2015, resulting in numerous public complaints to FAU and calls for his termination. *E.g.*, DE:249-23 (email saying he "keeps posting abusive trash about moms, dads and residents of Sandy Hook").

1. FAU Monitors Tracy's Blogging As The Media Firestorm Continues.

Email traffic between FAU staff demonstrated that, as media coverage and negative publicity swelled, they continued to monitor Tracy's blog and internally circulated articles from the media and complaints from the public that were critical of Tracy and FAU for not having fired him. DE:249-1; DE:249-27; DE:447-25;

DE:447-31. Administrators compiled the negative news articles into email reports, and called them the "JT media reports." DE:249-1 at 6. The media frenzy peaked on December 10, 2015, when the *Sun Sentinel* published an op-ed written by a Sandy Hook victim's parents about Tracy. DE:249-25. The op-ed was widely viewed and resulted in complaints calling for Tracy's firing. T.Vol.4 at 197:21-199:8.

2. FAU Claims The Vague Policy Encompasses Tracy's Constitutionally-Protected Blogging Based On Content And Viewpoint.

In October 2015, notwithstanding the confusion and pending changes to the Policy, Tracy's supervisor, David Williams, sent Tracy an email reminding him to fill out forms for "outside employment income." DE:250-51; T.Vol.2 at 137:4-22. Between October and November 2015, Tracy asked for clarification about the Policy, including requesting a statement from FAU that his blogging did not qualify as a reportable outside activity. DE:447-15; DE:447-20; DE:447-21; T.Vol.2 at 139:3-148:4. Williams forwarded Tracy's emails to Alperin for further clarification. DE:447-18. Some went to FAU's legal department. DE:447-20. FAU never answered Tracy's questions nor met with him to instruct him on the scope or applicability of its vague Policy. T.Vol.6 at 14:23-17:4.

Instead, on November 10, 2015, Coltman sent Tracy a Notice of Discipline, which he did not receive until November 20, 2015, as he had been on paternity

leave. DE:250-56. The Notice cited his refusal to acknowledge receipt of his annual assignment and failure to submit conflict of interest forms for 2013, 2014, and 2015. *Id*. The Notice required Tracy to comply within 48 hours or face "additional disciplinary action." *Id*.

On November 22, 2015, Tracy responded by letter, informing Coltman that he had not received clarification on the "considerable confusion" created by the Policy that he and others had been expressing. DE:250-57 at 4. He raised concerns about the Policy's breadth and that it violated his First Amendment rights. *Id*. He informed Coltman that he had affirmed receipt of his annual assignment. *Id*. Coltman did not intend on answering Tracy's questions. T.Vol.6 at 28:1-3; DE:447-28.

3. FAU Fires Tracy For "Insubordination" For Failing To "Disclose" His Notorious Blogging Pursuant To The Policy.

On December 10, 2015, the same day as the *Sun Sentinel* op-ed, Coltman sent Alperin an email enclosing a word document called "tracy termination.docx." DE:249-3. It was the preliminary draft version of the Notice of Termination FAU would send Tracy six days later. T.Vol.4 at 185:8-189:12. In it, Coltman commented on text that Alperin had drafted, asking "DOES THIS MEAN THAT A REPRIMAND IS THE NEXT STEP, RATHER THAN TERMINATION?" DE:249-3 at 2; T.Vol.4 at 186:18-187:15.

Without calling for a meeting or answering Tracy's questions about the Policy, on December 11, 2015, Coltman officially responded to his November 22 letter via email, informing him that he had until 5:00 pm on December 14, 2015, to fill out the conflict of interest forms, otherwise he would "receive further disciplinary action up to and including termination." DE:447-34. Meanwhile, Coltman and Alperin were still receiving and exchanging emails from the public complaining about Tracy. T.Vol.6 at 36:15-18.

Tracy did not receive Coltman's email until the evening of December 15, 2015, as he was still on paternity leave. DE:250-50. He submitted the forms, including equipment use forms, that evening and listed two uncompensated, non-employment and non-professional speech activities on websites he did not own. T.Vol.2, at 187:17-189:16; DE447-33.

On December 16, 2015, Alperin sent Tracy a Notice of Termination, stating that he had failed to submit "properly completed forms" by the deadline. DE:249-7. Specifically, Tracy remained "recalcitrant" in refusing to report other activities that "may be in conflict with [his] employer," namely his "personal blog," which "deprived" FAU of the ability "to assess if a conflict exists for the blog activity...." *Id*. at 2. Tracy had 10 days to respond. *Id*.

Two days later, another professor released a statement to the *New York Times* and *Sun Sentinel* regarding Tracy's firing:

> The decision by Florida Atlantic University to fire James Tracy is not an assault on the institution of tenure as some of his supporters will claim.…Tracy's "scholarship" makes a mockery of what academics do. With every blog, post, tweet and proclamation of false flags, hoaxes, child actors and millionaire imposter parents, pressures build in the public to strip all faculty of the protections of tenure. His termination holds both Tracy accountable for his despicable behavior and reduces pressure on elected officials to end tenure.

DE:249-8. Upon reading this, Coltman called the author her "hero." *Id*.

Tracy received conflicting advice from his union as to whether he should grieve the discipline or go to court, so he never filed a formal response. T.Vol.2 at 180:1-10, 204:12-212:6. On January 5, 2016, FAU terminated him. DE:249-10. The final termination letter notes Tracy's use of "University resources" and states that he "again failed to submit any Activity Reports for the three years in question for your blog, which you clearly spend time and resources maintaining and contributing to." *Id*. at 2.

4. FAU Administrators Celebrate Tracy's Firing.

FAU administrators, including Coltman, mocked Tracy and joked about his termination. DE:249-12; DE:249-14; DE:249-15; DE:447-27; DE:447-28; DE:447-29. In one email with the subject "check out today's memory hole blog," Coltman called Tracy a "Nut job." DE:249-14. On Tracy's last day, Coltman sent her colleague an email asking: "How is your employee?"—referring to Tracy's wife (associate FAU librarian)—"Mine is packing up his office today." DE:249-13. On

his last day, she sent another colleague an image of a cocktail, indicating she was ready to party. DE:447-46.

F. FAU Issues Explanations About The Policy After Concerned Faculty Ask About Tracy's Firing.

Over twenty FAU professors maintain blogs or other social media sites. DE:250-14¶¶4-50 (as of 8/7/17); DE:250-20 (examples). None of these other professors have disclosed their blogs or social media profiles to FAU under the Policy, and none have been disciplined for failing to report their expressive activity. DE:250-14¶¶4-50.

Tracy is the only faculty member known to have ever been required to report a personal blog or similar online speech as a potential conflict of interest under the Policy. DE:250-14¶65. After his firing, concerned faculty members continued to question the scope of the Policy. DE:250-43; DE:250-45; DE:250-46.

II. DISPOSITION OF CASE BELOW.

A. Tracy's Civil Rights Lawsuit Pursuant To 42 U.S.C. §1983.

Tracy's Second Amended Complaint contains a count for First Amendment retaliation, facial and as-applied challenges to the Policy, and declaratory and injunctive relief. DE:93. Tracy alleged FAU retaliated against him because FAU administrators disapproved of the viewpoints he expressed about Sandy Hook and sought to have the Policy declared unlawful and be reinstated. *Id*.

B. The Summary Judgment Order Erroneously Dismisses Tracy's Primary Constitutional Claims On Exhaustion Grounds.

The parties filed competing motions for summary judgment. DE:242, DE:245, DE:247. With respect to the facial and as-applied challenges, Tracy argued the Policy was impermissibly vague, could not be enforced without reference to the content of the speech to determine whether it contradicts FAU's undefined "public interests," and granted unbridled discretion to FAU that resulted in viewpoint discrimination against Tracy. DE:247 at 12, 16.

The district court disregarded these arguments and granted summary judgment in favor of FAU on the inexplicable ground that his First Amendment claims other than retaliation needed to be grieved pursuant to the CBA. DE:362 at 20. Its only support came from a Sixth Circuit decision that did not involve the First Amendment and ignored the legion of cases holding exhaustion of administrative remedies is not required in a §1983 suit. *Id*. Tracy's motion for reconsideration, DE:373, was denied. DE:392.

C. Tracy's First Amendment Retaliation Claim Proceeds To Trial.

Tracy and FAU moved for summary judgment on the retaliation claim. DE:245 at 7-13, DE:247 at 3-10. The individual defendants separately moved for summary judgment, with Kelly arguing he was only involved in the decision to

terminate Tracy in a supervisory capacity (as FAU's President), and Alperin and Coltman arguing they were entitled to qualified immunity. DE:242 at 3-12.

Unlike the other First Amendment claims, the district court concluded this claim did not need to be grieved and fact issues required a trial. DE:362 at 12, 22. As for the individual defendants, the district court concluded Kelly had no direct participation in the termination, DE:362 at 23-24, and Alperin and Coltman were entitled to qualified immunity. DE:362 at 25-26.

The retaliation claim proceeded to a nine-day jury trial. DE:465-DE:473. Tracy presented almost all of the evidence cited above.

1. FAU Admits It Was Looking For Tracy To List The Blog On The Forms In 2015, As It Did In 2013.

Tracy testified about the vagueness of the Policy putatively requiring disclosure of his blogging, T.Vol.2 at 153:3-156:9, 201:19-204:6, and his fear that FAU wanted to use it to "censor" him. T.Vol.3 at 146:17. Alperin admitted as much when she testified that FAU was robbed of the opportunity to approve/disapprove of his blogging:

> Q. In 2013, you wanted him to report his blogging to you so you could have the right to approve or disapprove that activity, didn't you?
>
> A. Correct.
>
> Q. You wanted the same right in 2015, to approve or disapprove the activity?
>
> A. Correct.

T.Vol.5 at 16:22-17:3.

2. Testimony From Other Professors About FAU's Policy.

Tracy called several faculty members (past and present) who testified that they did not report their online speech activities and were not disciplined for it. Doug McGetchin testified that he posted online about mass shootings and gun control with views contrary to Tracy, referred to his title, and did not have a disclaimer. T.Vol.6 at 179:21-184:18. He did not turn in forms for Facebook or Twitter activities and was never asked to use a disclaimer. *Id.* at 185:7-13; 190:15-191:14.

Christopher Robé, former faculty union president, testified he had online social media activities and did not report them. *Id*., at 220:3-221:2. Nor did he ever turn in a Policy form. *Id.* at 229:12-25. He found the Policy "[a]bsolutely" confusing. *Id*. at 221:20.

Former tenured professor Douglas Broadfield, who also served as grievance chair for the faculty union representing members facing discipline, testified that faculty did not report use of work equipment to communicate online, and that no training was provided with respect to reporting a blog or using a work computer. T.Vol.6 at 210:19-211:2.

Another tenured professor, Steven Kajiura, testified that he was disciplined for non-compliance with the Policy and for research misconduct, and instead of

termination he was disciplined with a 5-day suspension without pay. T.Vol.3 at 26:17-29:25. Kajiura's violations of FAU regulations included actual harm to animals and potential harm to students. DE:447-39.

Tracy presented evidence that other faculty did not submit "reportable" activities (including Coltman), were given meetings and told what to submit on the forms, and were not disciplined for failing to report. T.Vol.4 at 140:13-141:23; 161:2-10; DE:447-13. Alperin did not know if those activities needed to be reported. T.Vol.5 at 21:2-22:1.

Alperin was also asked about an article by three FAU faculty members published in the *Palm Beach Post* and *Sun Sentinel*, disparaging Tracy for his speech on Sandy Hook. T. Vol. 4 at 126:20-127:6. The publication contained no disclaimer and identified the faculty members by their titles. *Id.* at 127:7-128:1. Administrators were not concerned that the statements did not have disclaimers or could be attributed to FAU. *Id*. at 126:20-127:14; 129:11-130:16. Alperin did not investigate the incident or discipline those involved. The implication was clear that FAU did not discipline them because, unlike Tracy, they expressed a viewpoint FAU supported. *Id*. at 128:5-132:15; T.Vol.6 at 169:22-170:14; DE:447-41.

3. The Exclusion Of The Faculty Senate Meeting Demonstrating The Policy's Vagueness.

The Senate Faculty meeting transcript contained a heated exchange among faculty about FAU's vague Policy. DE:250-47 at 4-6, 13-15. As noted above,

several professors expressed confusion about its application and feared it would be used to require faculty to ask for permission before speaking publically under threat of discipline. *Id.*

The district court excluded the entirety of the transcript on hearsay and 403 grounds. T.Vol.1 at 55:2–58:19. During Alperin's examination, FAU adduced testimony that one of Tracy's options if he had any questions about the Policy was to ask the Senate Faculty. T.Vol.5 at 39:4–10. The district court rejected Tracy's argument that this opened the door. *Id*. at 238:8–240:24.

4. FAU's Evidence.

FAU primarily relied on the testimony of Alperin and Coltman. Through them, FAU introduced evidence of another professor fired for violating the Policy, Char-Sy T. Copeland. She was a non-tenured Spanish instructor who worked for eight other schools teaching eleven Spanish classes for income. T.Vol.5 at 22:13-26:5, 112:24-121:9. She failed to disclose that to FAU, lied about it when confronted, and resigned. *Id*. at 116:20-25. FAU fired her instead. DE:444-31. She did not blog.

5. The Verdict.

The district court determined Tracy's blog speech was constitutionally protected and submitted the matter to the jury. T.Vol.8 at 72:23-80:19. The verdict form contained two questions: (1) whether Tracy's speech was a motivating factor

in his termination; and (2) if so, whether FAU would have fired him absent the controversial speech. DE:437. As to the first question, the jury was instructed as follows:

> [F]or Professor Tracy to prove that his speech was a motivating factor in FAU's decision, Professor Tracy does not have to prove that his speech was the only reason for FAU's actions. It is enough if Professor Tracy proves that his speech influenced FAU's decision. If Professor Tracy's speech made a difference in FAU's decision, you may find that it was a motivating factor in the decision.

DE:436 at 12. The jury answered "No" to the first question and never reached the second. DE:437.

The district court then entered a final judgment consistent with the verdict. DE:443. Tracy filed post-trial motions, DE:450, DE:453, DE:455, DE:458, DE:460, DE:463, which were denied. DE:484. In its order, the district court questioned whether Tracy now had standing to challenge the Policy in light of the verdict, and whether he waived his constitutional challenges by signing the CBA. DE:362 at 19. Tracy appealed the final judgment, DE:452, and order denying his post-trial motions. DE:486.

III. STANDARD OF REVIEW

A. Constitutional Facts—De Novo; Exacting Review.

Because this is a First Amendment case, the Court must review de novo all "constitutional facts," *i.e.* ultimate facts upon which the resolution of the constitutional question depends. *Holley v. Seminole Cty. Sch. Dist.*, 755 F.2d 1492,

1502 (11th Cir. 1985); *see also Booth v. Pasco Cty., Fla.*, 757 F.3d 1198, 1210 (11th Cir. 2014). The Court must undertake an exacting review of the record with a close focus on facts that are determinative of the constitutional right at issue. *Holley*, 757 F.3d at 1502.

B. Summary Judgment—De Novo.

The Court also reviews de novo the district court's grant of summary judgment, applying the same legal standards as the district court. *Chapman v. AI Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000). Summary judgment is appropriate if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law. In making this determination, the court must view all evidence and make all reasonable inferences in favor of the party opposing summary judgment." *Id.* "Cross motions for summary judgment may be probative of the nonexistence of a factual dispute." *Shook v. United States*, 713 F.2d 662, 665 (11th Cir. 1983).

C. Judgment As A Matter Of Law And New Trial—De Novo.

Review of Rule 50 motions is de novo. *Nebula Glass Int'l, Inc. v. Reichhold, Inc.*, 454 F.3d 1203, 1210 (11th Cir. 2006). The Court may grant judgment as a matter of law if "the [C]ourt finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1). If evidence "is so weighted" to one side, then "that party is entitled to

succeed" as a matter of law. *Abel v. Dubberly*, 210 F.3d 1334, 1337 (11th Cir. 2000). "[T]he jury's particular findings are not germane to the legal analysis." *Chaney v. City of Orlando*, 483 F.3d 1221, 1228 (11th Cir. 2007).

A Court has wider discretion in ruling on a motion for new trial than a motion for judgment as a matter of law. *See, e.g.*, *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). It is proper to grant the motion for new trial if the verdict is against the great weight of the evidence. *Ard v. Sw. Forest Indus.*, 849 F.2d 517, 520 (11th Cir. 1988). In reviewing the evidence, the Court "need not view it in the light most favorable to the verdict winner." *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 134 (2d Cir. 1998).

D. Exclusion Of Evidence—Abuse Of Discretion.

The Court reviews the exclusion of evidence for an abuse of discretion within the rules of evidence. *E.E.O.C. v. Manville Sales Corp.*, 27 F.3d 1089, 1092-93 (5th Cir. 1994).

SUMMARY OF ARGUMENT

FAU fired Tracy in retaliation for controversial posts he made on his personal blog regarding the legitimacy of the Sandy Hook Elementary School massacre. FAU's pretext for this termination is that Tracy was "insubordinate" for failing to disclose his blogging activity under its conflict of interest outside activity Policy. That Policy is impermissibly vague because blogging is not mentioned as a potential conflict of interest, key terms used within the Policy are undefined, and FAU does not have a policy on blogging. Over twenty professors have blogs or other online speech activities, and Tracy is the only one to have ever been required to report, much less disciplined, for failing to report under the Policy. This is all the more compelling given that Tracy's blog was publically available and well known to FAU, and his speech was widely reported and highly controversial.

Because of the Policy's vagueness, FAU acknowledges it had to look at the content of the speech to determine whether a conflict existed. Accordingly, and as FAU admitted, any enforcement of the Policy was necessarily content based. Also due to its vagueness, the Policy allowed FAU administrators engage in viewpoint discrimination. They terminated Tracy because of his offensive opinions about Sandy Hook in violation of the bedrock principle that even hated and offensive speech is protected by the First Amendment. This is particularly true in a university setting, where the protection of constitutional freedoms is vital, and even

more critical with regard to outside blogging on matters of public concern, which constitutes First Amendment activity in its purest form.

The district court could not dispute this and instead granted summary judgment in favor of FAU on Tracy's Policy challenges on the ground that he had to grieve whether blogging needed to be disclosed under the CBA. This is fundamental error because the CBA itself provides that a grievance need not be filed to bring a lawsuit; there is no exhaustion requirement for section 1983 claims under the First Amendment; the vagueness of FAU's Policy precluded Tracy from knowing he had to grieve; and the union told Tracy his claim was not grievable. FAU's general counsel acknowledged he could bring suit to defend his First Amendment rights and without grieving. The CBA in no way waives those rights. The only authority the district court relied on for its ruling is an out-of-circuit, non-First Amendment ruling that itself did not rely on any authority and has not been cited by other courts for this proposition, until now.

By the time the retaliation claim went to a jury, the court's ruling on vagueness denied Tracy of being able to make the key arguments that he could not have been insubordinate because he could not determine that blogging was subject to disclosure and FAU's rationale was pretextual because the impermissibly vague Policy did not mandate FAU to require disclosure; instead, it constituted viewpoint discrimination in firing Tracy. The Court should reverse and enter judgment in

favor of Tracy on the constitutional vagueness claims. The Court should reverse and/or remand for a new trial on all the other claims. No reasonable jury could have determined that Tracy's speech was not a motivating factor in his termination.

ARGUMENT

I. FAU'S POLICY IS IMPERMISSIBLY VAGUE.

FAU's Policy violates the First Amendment for the following reasons. First, the Policy is unconstitutionally vague because it fails to provide employees with a reasonable opportunity to understand what blogging it prohibits and authorizes. Second, because the Policy did not provide sufficient guidance as to what blogging had to be reported, it could not be enforced without reference to the content of an employee's speech, thereby facilitating viewpoint discrimination targeting disfavored speech. Indeed, FAU found Tracy's posting violated the Policy despite having no policy at all on blogging while it fully protected expression that it favored. *See Tobinick v. Novella*, 848 F.3d 935, 950–52 (11th Cir. 2017) (applying First Amendment to blogging).

Although the Policy was amended after Tracy was fired, these changes only confirm that personal blogging is not properly subsumed within the vague contours of conflict of interest concerns for FAU.

A. The Policy Is Unconstitutionally Vague On Its Face.

A law or policy may be vague for either of two reasons: "First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293,

1319 (11th Cir. 2017) (en banc).[2] When speech is involved, "rigorous adherence" to these requirements "is necessary to ensure that ambiguity does not chill protected speech." *Id.* at 1320; *see also Smith v. Goguen*, 415 U.S. 566, 573 (1974) ("Where a statute's literal scope…is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts."); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 604 (1967) ("[P]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms….The danger of that chilling effect…must be guarded against by sensitive tools which clearly inform teachers what is being proscribed."). The Policy is vague for both reasons.

1. Lack Of Reasonable Notice.

None of the documents that comprise the Policy provide definitional guidance to employees. FAU admits it has no policy at all on blogging, and nowhere in any of these documents is blogging mentioned or defined.

The operative terms that *are* included in the Policy provide no meaningful guidance to employees. In *Wollschlaeger*, this Court held that a provision of a Florida statute that regulated doctors' speech about firearm safety was unconstitutionally vague because it prohibited "unnecessarily harassing" behavior without defining the term, and it did not apply it according to common usage. 848

[2] Judge Marcus's separate majority opinion on vagueness is binding precedent.

F.3d at 1319. Here too, as set forth *supra* 12-13, all the key terms are undefined in the Policy, forcing employees to guess as to their meaning.

Just as in *Wollschlaeger*, the Policy does not apply the term "professional practice" according to common usage, since common usage would be job-related activity, but here it may be "uncompensated." 848 F.3d at 1320–21. In that case, the term "unnecessarily harassing" was incomprehensibly vague as a result of the modifier "unnecessarily," which was undefined and created ambiguity for the doctors governed by the policy. *Id.* at 1321. As the Court noted, the government took a plain word—"harassing"—and "rendered it incomprehensible by appending a wholly nebulous adverb"—"unnecessarily." *Id.* FAU has created the same conundrum here. By defining "professional practice" to include *uncompensated* activity,[3] FAU has rendered the term "professional practice" incomprehensible. And the meaning of "professional practice" is even less clear than in *Wollschlaeger*, because it can encompass potentially any act that an employee engages in (and contains no reference to blogging), whereas *Wollschlaeger* was limited to doctors' speech regarding firearms.

[3] The word "activity" clearly encompasses speech. *See Wollschlaeger*, 848 F.3d at 1308 (disapproving of interpretation attempting to distinguish between "speech" and "conduct").

The Form itself renders the term "professional practice" even less clear. It only contains a space for a "Description of Employment Activity," and does not include any space to fill out non-employment activity. FAU admitted that some employees refer to the Policy as the "Outside Employment" form, as did the chair of Tracy's department, not realizing that it also encompasses uncompensated activities. DE:250-14¶58; DE:447-21. As a result of this confusion over the scope of the term, reasonable professors are left guessing what activities to report and school officials themselves do not even know how to apply it. *Supra* 14-16.

Critically, the Policy does not define the "public interests" of FAU, the Board of Trustees, or the State of Florida, nor place any limits on what "public interests" include. Thus, professors "are left guessing" how to avoid violating this rule. *See Wollschlaeger*, 848 F.3d at 1326. Moreover, it is entirely implausible that free speech blogging on public affairs would be a conflict of interest to an institution that expressly promotes academic freedom. It does not provide a way to distinguish blogging from other expressive activities or how it could conflict without reviewing its content if there could be a conflict.

Nor does the Policy provide parameters for how to measure "full performance" or "interference" with teaching. It does not specify how many hours professors should be working, so it is difficult to determine how time-consuming an activity must be to constitute interference. Read literally, any activity (including

hobbies, having a family, community involvement) can interfere with full performance of a professor's activities. Indeed, the forms reflect Tracy spent only a few hours per week of personal time engaged in outside activities. DE:249-6. He blogged about 7 hours per week, while holding normal office hours of 20-25 hours per week. DE:243-5 at 167:20-168:8, 187:22-188:7; T.Vol.3 at 200:6-7. This is a textbook example of impermissible vagueness because it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Wollschlaeger*, 848 F. 3d at 1319.

The Policy is also vague because it does not define what the consequences are for failing to comply. Alperin and Coltman did not even know at first what sanctions to impose against Tracy when drafting his termination letter. The Policy grants school officials unfettered discretion to decide how to enforce it. In *Wollschlaeger*, lack of clarity on how to comply with the statute was problematic because the penalties for violating it were extreme, including the revocation of medical licenses. 848 F.3d at 1319. Here too "wrong guesses" as to what is required "will yield severe consequences," including termination and loss of tenure. *Id*. Therefore, as in *Wollschlaeger*, the Policy is unconstitutionally vague.

2. The Inherent Content-Based Viewpoint-Discriminatory Enforcement Of The Policy.

The Policy is also so vague that it inherently leads to content-based viewpoint-discriminatory enforcement that clearly facilitated the censorship here.

Wollschlaeger 848 F.3d at 1319. The Policy does not explain what activities must be reported, when the report must be submitted, or what sanctions will be imposed if violated. As a result, officials impose the Policy on subjective interpretations, rather than on objective criteria. This raises the likelihood of arbitrary or discriminatory enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999) (ordinance impermissibly gave absolute discretion to police officers to decide what activities constitute loitering).

B. The Policy Is Unconstitutionally Vague As Applied To Tracy.

The Policy is also vague as applied to Professor Tracy. It does not mention blogs or any other form of expression and did not give Tracy notice that he was required to report his blog. *E.g.*, *Balthazar v. Sup. Ct. of Mass.*, 573 F.2d 698, 702 (1st Cir. 1978). These ambiguities allowed the Policy to be discriminatorily applied to Tracy and none of the over twenty other professors that maintained blogs and social media at the time of Tracy's firing. Such selective enforcement is impermissible, especially where undisputed evidence demonstrates FAU enforced the Policy against Tracy for the purpose of chilling his protected speech because they found its content deeply offensive. *See Goguen*, 415 U.S. at 578 (holding statute void because its standards were so indefinite it allowed discriminatory enforcement based on expressive conduct by "police, court, and jury"). Because

ambiguities in the Policy enabled this arbitrary enforcement, the Policy is unconstitutionally vague.

II. THE POLICY CONSTITUTES CONTENT-BASED VIEWPOINT DISCRIMINATION WHICH CANNOT SURVIVE STRICT SCRUTINY.

Because it is impermissibly vague, the Policy is an inherently content-based restriction on blogging. It draws distinctions based on the message a speaker conveys, allows for viewpoint-based discrimination, and gives University officials unbridled discretion to target speech that they subjectively believe conflicts with the school's unidentified "public interests," even before it is published. These issues render the Policy subject to strict scrutiny, which it cannot survive.

A. The Policy Is A Content-Based Restriction On Speech.

The First Amendment prohibits policies that censor disfavored speech based on "its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015);[4] *see also Snyder v. Phelps*, 562 U.S. 443, 458 (2011); *Matal*, 137 S. Ct. at 1764.

A content-based policy is subject to strict scrutiny and is presumptively unconstitutional. *Reed*, 135 S. Ct. at 2226.; *see also Constr. and Gen. Laborers' Local Union No. 330 v. Town of Grand Chute*, 834 F.3d 745, 749 (7th Cir. 2016)

[4] *Reed* arguably broadens the test for determining whether a law is content based. *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1235 n.7 (11th Cir. 2017).

("content discrimination is almost always forbidden"). FAU bears the burden of proving the Policy is constitutional. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000).

A law is content based if "on its face" it "draws distinctions based on the message a speaker conveys." *Reed*, 135 S. Ct. at 2227. Facially content-neutral regulations will be considered content based if they "cannot be justified without reference to the content of the regulated speech," or "were adopted by the government because of disagreement with the message the speech conveys." *Id.* (cleaned up).

Here, the Policy is content based because it draws distinctions based on the message the speaker conveys. Because the Policy fails to provide any guidance, the FAU officials admitted the only way to determine whether a speech activity must be reported is by reviewing the content of the speech to determine whether it conflicts with FAU's "interests." *Supra* 9.

Employees are required to report "the activity, including…the **nature and extent** of the activity." DE:269 at 15; DE:270¶9. The only way to determine whether the "nature and extent" of blogging activity constitutes a "professional activity" is by assessing whether the blog is related to the speaker's employment, whether it took considerable time to research and write, and whether it draws upon

the speaker's area of study. None of this can be determined without reviewing the content of the speech.

It is impossible to determine from the form alone whether a "proposed" activity is a conflict. As the administrator charged with enforcing the Policy candidly admitted, to determine whether speech activity must be reported, the speech must be reviewed and its content assessed. *Supra* 9.

1. The Policy Inherently Constitutes Content-Based Enforcement And Viewpoint Discrimination Of Speech.

The Policy imposes an unconstitutional prior restraint, and by giving FAU officials unfettered discretion, results in viewpoint discrimination. The Policy gives FAU officials unbridled discretion to target speech they believe conflicts with FAU's undefined "public interest." Critically, it allows FAU administrators to demand speech for analysis and approval in advance of publication, much like a prior restraint. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (holding prior restraints presumptively invalid).

The Policy inherently permits viewpoint-based discrimination because it can be (and was) used to silence speech with which FAU disagrees. "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.…Viewpoint discrimination is thus an egregious form of content discrimination." *Rosenberger*

v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995). That the Policy permitted (and resulted in) blatant viewpoint discrimination is particularly egregious given that a university campus should serve as an incubator of ideas devoted to academic freedom and free speech. *Keyishian*, 385 U.S. at 603 ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

Because there were no criteria or guidelines on how the Policy should be applied, it permitted administrators to target Tracy's controversial views. This is demonstrated by the fact that Tracy was singled out for failing to report his blog, despite there being no policy on blogging and others not being required to do so. Indeed, the speech of another professor expressing views about Sandy Hook contrary to Tracy was not only permitted, but lauded by FAU administrators. *Supra* 17-18 (her "hero").

The unrebutted record shows FAU disagreed with Tracy's provocative viewpoints, had been monitoring his blog, and had looked for a way to terminate him as a result of his speech since 2013. This is classic viewpoint-based discrimination.

2. The Policy Does Not Survive Strict Scrutiny

To rebut the presumption the Policy is invalid, FAU must show the regulation is (1) necessary to serve a compelling state interest, and (2) narrowly

tailored to achieve that end. *Boos v. Barry*, 485 U.S. 312, 321–22 (1988). FAU cannot do so.

When strict scrutiny applies, courts must look beyond the entity's purported interests to determine the state's true interests. *See, e.g.*, *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 431 (2006); *see also Reed*, 135 S. Ct. at 2228 ("[A]n innocuous justification cannot transform a facially content-based law into one that is content neutral."). Thus, despite what FAU may contend is its interest in having this Policy, its actual interest, evidently, is to restrict their employees' speech. This is not a legitimate state interest, much less a compelling one. It would not even pass the rational basis test. *Playboy*, 529 U.S. at 818 ("It is rare that a regulation restricting speech because of its content will ever be permissible.").

The Policy is also grossly over-inclusive because it covers more speech than necessary to accomplish its goals. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121 (1991). Accordingly, it is not the least restrictive means available to FAU because it covers far more speech than actually poses a conflict of interest, including speech activities that require only a minimal amount of time such as posting on Facebook or Twitter.

For the same reason the Policy is over-inclusive, it is also unconstitutionally overbroad because protected activity is included in its sweep. *See Fla. Ass'n of*

Prof. Lobbyists, Inc. v. Div. of Legis. Info. Servs., 525 F.3d 1073, 1079 (11th Cir. 2008) ("A law is overbroad that does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech"); *NAACP v. Button*, 371 U.S. 415, 433 (1963) (government may regulate First Amendment "only with narrow specificity").

III. THE DISTRICT COURT INCORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF FAU ON GROUNDS OF EXHAUSTION, STANDING, AND WAIVER.

The district court did not rule on the constitutionality of the Policy but inconsistently granted summary judgment in favor of FAU on all of Tracy's constitutional claims except First Amendment retaliation on the ground that he had to administratively exhaust his facial and as-applied constitutional challenges. This is fundamental error because there is no exhaustion requirement for §1983 claims under the First Amendment. The court also later posited that Tracy might not have standing in light of the verdict or that he waived these claims. Each of these grounds was incorrect.

A. Tracy Was Not Required To Grieve His Constitutional Claims.

1. The CBA Specifically States Tracy Was Not Obliged To Grieve Before Filing Suit.

The CBA provides that Tracy could go to court to seek resolution of his claims without grieving. Specifically, §20.2 states that "prior to seeking resolution

of a dispute by filing an Article 20 grievance," an employee may request resolution "in any other forum, whether administrative or judicial…." DE:447-47 at 60. Because the grievance procedure is not the exclusive remedy provided in the CBA, there can be no argument that Tracy's federal suit required grieving. *Cf. Vaca v. Sipes*, 386 U.S. 171, 184 n.9 (1967) (if parties do not intend grievance procedure in contract to be an exclusive remedy, suit will normally be heard even though such procedures were not exhausted).

Moreover, §4.2 provides that "[o]nly violations of [the] limitations [imposed by the CBA] shall be subject to Article 20, Grievance Procedure." DE:447-47 at 11. No such "limitation" upon Tracy's First Amendment rights exists—indeed, §5.2(d) preserves an employee's right to exercise constitutional rights without censorship or discipline. *Id.* Not only is there no grievable limitation here, requiring Tracy to grieve would be antithetical to the CBA and the rights it purports to uphold. *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 386 (2011) ("There are some rights and freedoms so fundamental to liberty that they cannot be bargained away in a contract for public employment.").

2. Substantive §1983 Claims Do Not Need To Be Administratively Exhausted.

A plaintiff need not exhaust his remedies pursuant to a CBA prior to filing substantive §1983 claims on First Amendment grounds. *See Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 516 (1982); *Narumanchi v. Bd. of Trustees*

of Conn. State Univ., 850 F.2d 70, 73 (2d Cir. 1988) (reversing dismissal of First Amendment claims based on plaintiff's failure to avail himself of CBA grievance procedures because it is impermissible in light of *Patsy* "to require initial recourse to available state proceedings, including union grievance proceedings, for the enforcement of First Amendment rights protectable in federal court pursuant to section 1983"); *Hennessy v. City of Long Beach*, 258 F. Supp. 2d 200, 206–07 (E.D.N.Y. 2003) (rejecting argument that First Amendment claim must be grieved under CBA because Congress intended federal courts to address §1983 claims); *Hochman v. Bd. of Ed. of City of Newark*, 534 F.2d 1094, 1097 (3d Cir. 1976) ("When appropriate federal jurisdiction is invoked alleging violation of First Amendment rights,…we may not insist that [plaintiff] first seek his remedies elsewhere no matter how adequate those remedies may be.").

Importantly, these decisions did not distinguish between claims alleging retaliation and those challenging the constitutionality of a law or policy—nor is there any permissible basis to draw such a line between the right to immediate review of those constitutional claims by a federal court. *McDonald v. City of W. Branch, Mich.*, 466 U.S. 284, 290 (1984) ("[T]he very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law."). Neither FAU nor the district court cited to a case requiring a

First Amendment claim to be grieved. To hold otherwise would permit a challenge to FAU's actions, but not the unconstitutional mechanism through which those unlawful actions were accomplished.

3. The District Court's Reliance On *Hawks* Was Misplaced Because It Was Not A First Amendment Case.

In determining that Tracy was required to file a grievance pursuant to the CBA, the district court solely relied on *Hawks v. City of Pontiac*, 874 F.2d 347 (6th Cir. 1989), which was not a First Amendment case, let alone a binding Eleventh Circuit decision. Remarkably, *Hawks* cites no case for the proposition that a grievance was required there, and no case has cited it for this proposition, save the district court.

In *Hawks*, the plaintiff took issue with language that made unclear whether a residency provision only precluded his promotion or subjected him to demotion. *See id.* at 350. That is nothing like this case, which presents an impermissible content- and viewpoint-based restriction on highly controversial expression. Unlike the due process claim in *Hawks*, Tracy's First Amendment vagueness claims should be more heavily scrutinized than ordinary vagueness claims, because more is at stake—including the risk of chilling speech, which was not at issue in *Hawks*. *See Cramp v. Bd. of Pub. Instruction of Orange Cty., Fla.*, 368 U.S. 278, 287–88

(1961) ("[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech….").

To the extent the district court relied upon *Hawks* for the proposition that language directly incorporated from a city charter into a CBA must be grieved as contractual language, such a holding precludes meaningful constitutional review, and this Court should decline to follow it. But regardless, unlike *Hawks*, where the residency requirement was expressly incorporated into the CBA, there was no waiver of Tracy's First Amendment rights in the CBA nor any reference to blogging as a reportable conflict of interest. Indeed, the entire Policy, including that portion referenced in the CBA, was so unconstitutionally vague Tracy could not possibly have known that it was intended to cover his First Amendment rights and, consequently, that those rights had to first be grieved.

Similarly, *Hawks* is inapposite here because the Policy is not merely "part of" the CBA, but rather is a unilaterally-imposed University policy incorporated by reference in the CBA. The district court's analysis concluding otherwise demonstrates a fundamental misunderstanding of the Policy as challenged. Complying with the CBA provision alone (however that is done) is not sufficient to comply with the Policy, which consists of a number of documents that impose their own requirements, including forms and guidelines that exist outside the CBA. Additionally, the Policy applies to all employees, including those non-unionized

employees who are not parties to the CBA. The district court erred in treating the Policy as merely a contractual term that is "part of" the CBA and shielding it from constitutional scrutiny.

4. Exhaustion Would Have Been Futile.

Moreover, exhaustion of administrative remedies is not required where the administrative proceedings would have been futile. *N.B. by D.G. v. Alachua Cty. Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996). Here, filing a grievance would have been a meaningless gesture by Tracy, as he had received union confirmation at one point that the grievance process was not the proper avenue for redress of his claims. FAU's own general counsel acknowledged that Tracy could go to court to challenge his termination. DE:274-1.

Because these counts seek judicial redress for substantive claims beyond the scope of the grievance process, the district court should have addressed them on their clear merits.

B. Tracy Has Standing To Raise His Challenges.

The district court, in its order denying Tracy's motion for judgment as a matter of law, *sua sponte*, and as an alternative ground, suggested that Tracy may not have standing in light of the verdict finding his speech was not a reason he was fired. This suggestion is flawed for several reasons.

First, it runs contrary to longstanding edicts of the doctrine of standing, which require that standing be assessed at the outset of litigation and only if factual circumstances subsequently change can one lose standing. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (confirming standing at outset of litigation); *c.f. Schilling v. Belcher*, 582 F.2d 995, 999 (5th Cir. 1978) (during litigation plaintiff sold shares and lost standing to prosecute derivative action). Simply progressing through the course of proceedings should not form a basis that would change the status or legal rights of a party.[5] To hold otherwise would absurdly result in shielding substantive summary judgment decisions from appellate review provided the lower court permits at least one of the claims to proceed to trial.

Second, notwithstanding the fact that no reasonable jury would have a legally sufficient basis to find as it did, the district court's analysis disregards Tracy's underlying argument that the Policy was unconstitutionally vague, content based, and viewpoint discriminatory. A constitutionally infirm policy could not have legally been enforced against him. Thus, the jury verdict would fall with the

[5] The only case relied on by the district court involved injunctive relief sought after a verdict that, unlike here, was not appealed. *Lopez v. Garriga*, 917 F.2d 63, 66 (1st Cir. 1990) ("The [jury] finding has, therefore, become the law of the case.").

entry of judgment on his remaining constitutional claims, so, Tracy has standing to assert them.[6]

C. Tracy Has Not Waived His Constitutional Arguments.

The district court also suggested that because Tracy was aware of the terms of the CBA and had previously bargained for them as union president, he may have waived any challenge to it. This is incorrect.

First, FAU did not raise waiver as an affirmative defense, and acknowledged it was not pursuing that argument. T.Vol.8 at 82–83; T.Vol.9 at 4. Because waiver is an affirmative defense mandated by Rule 8(c) to be presented in a responsive pleading, FAU waived its right to advance it. *Steger v. Gen. Elec. Co.*, 318 F.3d 1066, 1077 (11th Cir. 2003).

Second, a waiver of a constitutional right must be knowing and voluntary. *Brady v. United States*, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."). The CBA did not refer to blogging or a waiver of one's First Amendment rights, and

[6] Even if this Court were to conclude that Tracy lacks standing for an as-applied challenge given the verdict, a well-established exception dictates that Tracy may challenge the Policy on First Amendment grounds on behalf others, regardless of his ability to assert his own claims. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984) ("Munson's ability to serve that function has nothing to do with whether or not its own First Amendment rights are at stake.").

therefore Tracy cannot be said to have knowingly and voluntarily waived them. Indeed, it would be duplicitous to say otherwise, as the CBA purports to preserve and protect his right to speak freely and exercise constitutional rights. Moreover, because the Policy consists of more than the CBA, Tracy's signing of it could not constitute a waiver of any challenge to the broader Policy.

IV. THE DISTRICT COURT ERRED BY DENYING TRACY'S POST-TRIAL MOTIONS DIRECTED AT THE RETALIATION CLAIM.

According to the district court, the core issue with respect to the retaliation claim was Tracy's "refusal to report **anything** despite multiple direct orders to do so, his refusal to acknowledge his duty to report (in the form requested), and also whether [Tracy]'s specific blog (for which he received compensation)[7] was so closely related to his professional, paid activities that he was required to report it." DE:484 at 16. The district court concluded that "[t]his was not a case about confusion, nor was this a case about what [Tracy] was thinking when he acted as he did." DE:484 at 17.

These statements demonstrate the district court failed to appreciate the premise upon which Tracy's case was built—that FAU could not enforce an unconstitutionally vague Policy, which allowed for unbridled discretion and viewpoint discrimination. By its summary judgment ruling, the district court

[7] As noted *supra* 5-6, Tracy received no compensation for his blog.

improperly stripped Tracy of critical arguments that he was not insubordinate because the Policy was so vague it could not be enforced and that the termination for insubordination was a pretext that impermissibly allowed FAU to engage in content-based viewpoint discrimination not required by the Policy at all.

If the Court agrees that the Policy is unconstitutional, then the Court should reverse and enter judgment in favor of Tracy on the constitutional vagueness claims. The Court should also reverse and/or remand for a new trial on all the other claims. No reasonable jury could have determined based on the evidence excluded and presented at trial that Tracy's speech was not a motivating factor in his termination. The district court erred in excluding evidence of the Senate Faculty meeting before and after the door was opened to its admissibility, and that error was not harmless.

Since the summary judgment on vagueness must be reversed and the verdict on retaliation cannot stand, the judgment for the individual defendants Alperin and Coltman must also be reversed. *See* DE:362 at 26 (relying on Policy to justify qualified immunity summary judgment ruling).

A. The Jury's Finding That The Speech Was Not A Motivating Factor In Tracy's Termination Is Contrary To Overwhelming Evidence Of Causation.

In determining that Tracy was not entitled to judgment as a matter of law on this issue, the district court appears to have eschewed the first question on the

verdict form and collapsed and/or conflated the analysis on motivating factor with that on pretext. This was error. Focusing on the first question, no reasonable juror could have answered "No" in light of the following evidence presented at trial demonstrating a causal link between Tracy's speech and the retaliation:

- Tracy's blogging was obviously not a conflict of interest;
- FAU's reason for firing Tracy was legally insufficient;
- FAU's history of disciplining and monitoring Tracy's blog;
- FAU's selective enforcement of a vague Policy;
- Evidence of complaints and negative publicity;
- FAU's termination letter citing the blog; and
- FAU emails celebrating Tracy's termination.

1. Tracy's Blogging Was Not A Conflict Of Interest.

FAU does not claim it fired Tracy due to poor performance, criminal activity, or for disrupting school functions. On the contrary, FAU conceded that Tracy received excellent evaluations from students while maintaining the blog, and that his firing was not about classroom performance. For that reason, FAU's claim that forms were required—because it needed to ascertain whether the time Tracy spent blogging caused a conflict for the time demands for his teaching—necessarily fails. It also fails because FAU could have reviewed the publically available blog as to the likely time commitment without the need for forms.

2. FAU's Reason For Firing Tracy—"Insubordination"—Was Legally Insufficient.

Tracy adduced compelling evidence that he never refused directives. FAU directed him to submit forms, despite having no reportable outside employment, and he did so as explained *supra* 15-17. According to Alperin, even though FAU did not have a policy or guidance on blogging, Tracy was "insubordinate" because he "interpreted blogging differently than [she] did" and concluded it was not a reportable activity. T.Vol.4, at 217:3-23. That was his grave offense.

FAU's alternative reasons for the firing—the donations and work equipment usage—fail to alternatively support the termination. The modest $850 in donations received prior to the termination was used to maintain the blog and not compensation. Indeed, all of the amounts Tracy received were below the Policy's de minimis threshold of $10,000, even if combined. Finally, Tracy's use of his work computer was a permissible "incidental use."

3. FAU had A History Of Disciplining Tracy And Monitoring His Blog Following Public Outcry Against His Speech.

FAU's motivations are further confirmed by its history of disciplining him and monitoring the blog after public outcry over his speech. Coltman's handwritten notes confirm that Tracy's blogging was a motivating factor for his discipline in 2013. FAU's first objective in response to the public outcry in 2013 was to explore

potential misconduct with respect to the blog. The same is reasonably inferred in 2015, when FAU again received public complaints for his blogging.

While Coltman tried to explain away her other notes, she could not explain what she meant by "First Amendment—Find Winning Metaphors." She claimed it was just a "collection of words." T. Vol. 5 at 176:19-177:17; T. Vol. 6 at 178:19-179:6. These words, perhaps the most important words of the trial, are self-explanatory—Coltman and Alperin knew Tracy was not going to stop blogging, and that the activity was protected by the First Amendment. So they had to find another seemingly valid reason to discipline him. This is all the more compelling in light of Coltman's awareness that Tracy did not turn in a form for his blog in 2013, and that he did not believe blogging or social media was reportable activity.

4. FAU's Selective Enforcement Of A Vague Policy Entails That Insubordination Was A Pretext And That Tracy Was Not Insubordinate.

FAU's motivations are confirmed by its selective use of the Policy. FAU admittedly has no policy on blogging or online social media activities. At the time of trial, there were over twenty professors with blogs and active social media accounts, and none had to submit forms for those activities. Yet, Tracy is the only faculty member that has been required to report his blog and disciplined for failing to do so. Indeed, McGetchin, Robe, Kajiura, and Alperin's testimony, along with the other witnesses who testified at trial about the scope and application of the

Policy, confirmed FAU enforced the Policy as content-based viewpoint discrimination.

This stands in stark contrast with the evidence FAU offered concerning the termination of the Spanish instructor who taught Spanish for pay at other institutions, and thus had an obvious conflict of interest. *Supra* 24. Indeed, this evidence showed what a true conflict of interest looks like. Her blatant violation of the Policy and attempts at covering it up by lying do not remotely resemble Tracy's attempts at compliance and eventual firing for failing to report the platform for his constitutionally-protected speech that FAU openly detested.

There was overwhelming evidence showing FAU intended the Policy to be vague so that it would not be clear to Tracy whether he was required to report the blog or not, nor would it prevent FAU from acting arbitrarily or with viewpoint discrimination. Even though Coltman knew Tracy's position was that the blog was not reportable, Coltman was vague in her 2015 directives to Tracy so that he would not know how to comply with the Policy, and she never specifically instructed him to put the blog on the form. When asked whether blogging and social media was reportable generally, Coltman did not know and said it depends. T.Vol.5 at 206:25-207:6; 211:1-14. The fact that Tracy's own boss did not know whether his blog speech was reportable compels the conclusion that the decision to fire him had to

be motivated, at least in part, by his highly controversial speech, particularly when she was directly receiving nasty emails from the public.

5. Evidence Demonstrated That Tracy's Blogging Influenced FAU's Decision.

It is no coincidence that Tracy's speech came under fire in 2013, and again in 2015, after his blogging caused complaints and generated immense pressure on FAU, as detailed *supra* 6, 14-15. Indeed, FAU had circulated a draft termination letter on December 10, 2015, the same day as the *Sun Sentinel* article calling for his termination, and well **before** Tracy's December 15 deadline to complete the forms. The fact that a termination letter was drafted and circulated shows that FAU had already decided to terminate Tracy before knowing whether he would submit the conflict of interest form on time. FAU was motivated by his speech—not any failure to timely submit forms or obey instructions.

And if there was any doubt, Coltman admitted at trial to sending a message to another FAU dean on December 18, 2015, shortly after the decision to terminate Tracy had been made that said the termination "holds Tracy…accountable for his despicable behavior…." DE:249-8. While another FAU professor wrote the statement, Coltman shared it with her peers and proclaimed the author her "hero." *Id.*

6. FAU's Termination Letter References Tracy's Blog.

Tracy's termination letter confirms that the blog was a motivating factor. As justification for the termination, it specifically cites Tracy's failure to submit "any Activity Reports for the three years in question for your blog, which you clearly, spend time and resources maintaining and contributing to." DE:447-36. Alperin conceded as much at trial when she testified she was looking to see whether Tracy would list his blog on the form. After succeeding in terminating Tracy for his blog, FAU administrators sent emails celebrating the removal of the "nut job." DE:447-30.

7. FAU's Theory As To Its Motivations Was Supported Only By Alperin And Coltman's Self-Serving Testimony.

The foregoing evidence is all the more compelling when compared to the only evidence FAU offered in support of its motivations: the self-serving testimony of Alperin and Coltman. No other administrator or professor corroborated their testimony or support their claims concerning FAU's decision to terminate. Nor did any internal reports, documents, or emails between FAU administrators support their trial testimony that Tracy was insubordinate because he did not disclose his blog. The unsupported self-serving testimony from these two individual defendants can hardly be considered sufficient to support the verdict. This is particularly true given the totality of the record evidence.

B. The District Court Erred In Excluding The Senate Faculty Meeting Transcript.

The Senate Faculty transcript relates to central issues of Tracy's First Amendment claim, and the jury should have heard it. By focusing only on its relevance to Tracy's confusion, DE:484 at 17-18, the district court failed to grasp the importance of this evidence in demonstrating the Policy was so vague it allowed FAU administrators to engage in content-based and viewpoint discrimination and to retaliate against Tracy for controversial speech. The meeting transcript also helped show that when Tracy responded in 2015, he was acting reasonably and not being insubordinate. The wrongful exclusion of this evidence directly impacted Tracy's ability to enforce his rights at trial, and thus was not harmless.

1. The Meeting Transcript Was Not Hearsay.

Evidence is not "hearsay" if it is offered for another purpose, such as to show its effect on the listener. *U.S. v. Rivera*, 780 F.3d 1084, 1092 (11th Cir. 2015). Because the meeting transcript was being offered for its effect on both Tracy and FAU, it need not fit within an exception to hearsay.

As for Alperin's statements at the meeting, those were clearly admissible under Rule 801(d)(2), because a statement is not hearsay if it is offered against an opposing party and "was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." Fed.R.Evid. 801(d)(2)(D).

Courts admit employee statements under this Rule "where there is some evidence that the statements reflected some kind of participation in the employment decision or policy of the employer." *Calvert v. Doe*, 648 F. App'x 925, 927 (11th Cir. 2016).

To support its ruling, the Court cited the inapposite case of *Staheli v. University of Mississippi*, 854 F.2d 121 (5th Cir. 1988). There, the court held that a professor's statement was not an admission because the professor "had nothing to do with Dr. Staheli's tenure decision—or with any personnel matter concerning Dr. Staheli." *Id*. at 127. Here, in contrast, Alperin spoke on the Policy in her capacity as Vice Provost and was unquestionably speaking on a matter within her authority.

This case is more like *Woodman v. Haemonetics Corp.*, where the employee's supervisor made statements in the scope of employment when she attended a management meeting, assessed the department employees, and recommended that the employee be relieved from his duties. 51 F.3d 1087, 1094 (1st Cir. 1995) (holding trial court misapplied Rule 801(d)(2) when it excluded those statements); *see also Marra v. Philadelphia Housing Auth.*, 497 F.3d 286, 298–99 (3d Cir. 2007) (holding that employee's statement of "his opinion regarding company policy" was not hearsay because it was made within the scope of his employment, even though he did not participate in decision-making).

2. The Senate Faculty Meeting Should Not Have Been Excluded Under Rule 403, And FAU Opened The Door To Its Admissibility.

Rule 403 is "an extraordinary remedy which should be used sparingly." *Aycock v. R.J. Reynolds Tobacco Co.*, 769 F.3d 1063, 1069 (11th Cir. 2014). It may be used "only when **unfair** prejudice **substantially** outweighs probate value." *Id*. "In applying Rule 403, courts must 'look at the evidence in a light most favorable to admission, maximizing its probative value and minimizing its undue prejudicial impact.'" *Id*.; *see also Higgs v. Costa Crociere S.p.A.*, 720 F. App'x 518, 520 (11th Cir. 2017) (when making a decision on Rule 403, "the balance should be struck in favor of admissibility"). The district court's wholesale exclusion of the transcript violated these precepts because the highly probative value of the transcript was not substantially outweighed.

Alternatively, the district court should have allowed the transcript in after FAU opened the door, as explained *supra* 24. "[I]nadmissible extrinsic evidence becomes admissible on redirect examination where defense counsel opens the door to the evidence during cross-examination." *United States v. Oliver*, 653 F. App'x. 735, 739 (11th Cir. 2016); *see, e.g.*, *United States v. Elliot*, 849 F.2d 554, 558–59 (11th Cir. 1988). Tracy should have been allowed to rebut and clarify that the Senate Faculty was not a viable option to him to address his concerns about FAU's enforcement of a vague Policy.

CONCLUSION

For the forgoing reasons, the summary judgment for FAU should be reversed and the summary judgment for Tracy granted. Additionally, the jury verdict regarding the First Amendment retaliation should be reversed and the Court should grant judgment as a matter of law, or in the alternative, a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Eleventh Circuit Rule 28-1. This brief contains 12,914 words and uses a Times New Roman 14 point font and contains 1,187 lines of text.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing this 6th day of August, 2018 to:

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