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

REPLY 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;

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s/ Richard J. Ovelmen
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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(Continued)

Page

TABLE OF CITATIONS

Page(s)

Cases

TABLE OF CITATIONS
(Continued)

Page

TABLE OF CITATIONS
(Continued)

Page

Statutes

Rules

INTRODUCTION

The evidence before the District Court was clear: Florida Atlantic University fired Appellant James Tracy because he published disturbing and controversial opinions on his personal blog that suggested the Sandy Hook Massacre shooting never happened. After several national media reports about Tracy's views on Sandy Hook, FAU grew concerned at how employing a man with such radical viewpoints could impact the University. Handwritten notes uncovered through discovery reveal that in January 2013, FAU officials secretly met to discuss how they could respond to calls from current and prospective students, donors, and the public at large for FAU to fire the tenured professor. Tellingly, the School recognized that it was bound by "freedom of speech" and tasked members of the administration to "find winning metaphors" around Tracy's constitutional rights. One such "metaphor," contemplated by the School *in writing*, was to explore whether they could get rid of Tracy for not disclosing his personal blog under the School's vaguely written conflict of interest Policy. Indeed, FAU ultimately did use this incomprehensible Policy, which does not mention personal blogging as requiring disclosure and had never been applied to other professors with known personal blogs, as the pretext for firing Tracy.

FAU's Response does not acknowledge the handwritten notes or secret meetings conducted by the administration, and treats Tracy's controversial

publications, which were and continue to be the subject of national attention, as barely on its radar. FAU's brief pays no attention to the evidence that the pretext of using the Policy's requirement that professors disclose "outside employment" was discussed by the administration as a potential means of firing Tracy. The brief also ignores the fact that the Policy underlying FAU's excuse is unconstitutionally vague, makes no reference to blogging activity, and has never been applied to the dozens of other FAU professors that maintained similar—albeit less controversial—personal blogs and social media (and who expressed their utter confusion regarding the Policy at a Senate Faculty meeting that the brief ignores). FAU doesn't respond to documents demonstrating its administrators spent years monitoring Tracy's blog and celebrated internally when they were finally able to fire him. According to FAU this case has nothing to do with the First Amendment, as is argued in every case that involves a governmental pretext to justify unconstitutional conduct.

As explained in this Reply, the Record is replete with evidence of FAU's animus against Tracy and his viewpoints. The District Court erred in not considering Tracy's constitutional claims, which did not have to be administratively grieved. Moreover, this Court should reverse the summary judgment granted for FAU because the Policy used as a pretext to fire Tracy was impermissibly vague in violation of the First Amendment and not understood by

Tracy, his union, other FAU professors, or even the School's administrators. The Record shows that Tracy attempted to comply with the Policy despite having no guidance from the School but was still fired because FAU hated his speech. Because the summary judgment ruling stripped Tracy of critical arguments that the Policy was so impermissibly vague it could not be enforced to personal blogging activities and the termination for insubordination was clearly a pretext, the verdict on retaliation and the District Court's ruling on qualified immunity must be reversed. Finally, the District Court improperly excluded the transcript of a Senate Faculty meeting that demonstrated that FAU professors and administrators alike were completely confused by the unconstitutionally vague Policy.

FACTS NOT ADDRESSED IN FAU'S RESPONSE[1]

The Initial Brief at pages 5–19, recounts with great detail the years of animosity and retaliatory planning conducted by FAU against Tracy. In a transparent attempt to characterize this case as one having nothing to do with the First Amendment, FAU's Response completely ignores the following relevant facts.

[1] In this brief, Plaintiff-Appellant James Tracy will be referred to as Tracy. Defendant-Appellee Florida Atlantic University will be referred to as FAU or School. The Initial Brief will be referred to as "I.B." and the Answer Brief as "A.B." The Record will be referred to as "DE:X at Y" and the trial transcript as "T.Vol.X at Y."

FAU significantly underplays the controversy that Tracy's speech generated. Tracy's blogging came under fire in 2013 and 2015, after his views on Sandy Hook became the subject of national press reports that generated significant public outcry that FAU fire him. I.B. at 6, 14–15. FAU suggests that the School was only vaguely aware of the controversy when in reality School administrators spent years monitoring Tracy's blogging and circulating articles from the press and complaints from the public that were critical of Tracy and FAU's continued employment of him. I.B. at 14–15.

FAU makes no mention of the meetings former Vice Provost Diane Alperin and Dean Heather Coltman held with high-ranking FAU officials to discuss the negative press around Tracy's views and how they could justify terminating him without liability. Remarkably, FAU's Response does not acknowledge the *handwritten notes* from these meetings in which FAU recognized that Tracy is protected by "freedom of speech" but nevertheless encouraged administrators to "find winning metaphors" to circumvent the "1st Amendment." These notes demonstrate that the very "Article 19-conflict of interest" FAU used to ultimately terminate Tracy was suggested in writing as a potential "winning metaphor" around Tracy's constitutional rights. I.B. at 6–7.

The School recognized in writing that Tracy was "not going to stop publishing," I.B. at 7, and attempted to distance itself from his blogging by issuing

him a formal notice of discipline that cited an insufficient disclaimer on his blog. Tracy worked with FAU to craft a disclaimer for his blog that noted it was a personal publication and not affiliated with his employment or the School.[2] FAU cites to the fact that Tracy's supervisor, Dean Coltman, told Tracy to report his blog in 2013, A.B. at 8–10, but omits critical undisputed facts, such as Tracy's contention that the Policy did not appear to encompass personal blogging. Rather than clarify the breadth of the Policy or work with Tracy on how he should comply with it, the School dropped their request that he report his blog. It was only years later, following continued national exposure around Tracy's blog and his views as a Sandy Hook denier, that FAU decided to enforce the outside employment Policy to Tracy's personal blog.

Among a climate of renewed national attention about Tracy's views and FAU's employment of him, the School attempted to cast the Policy as encompassing constitutionally-protected, personal blogging activity. I.B. at 15–16. FAU's interpretation of its Policy was controversial and never addressed Tracy's argument that the Policy was vague and a form of content-based viewpoint

[2] Despite this custom disclaimer and prohibition against using an official title on his blog, FAU insincerely attempts to imply that the blog was one and the same with Tracy's work at FAU. But FAU conceded this was a personal blog back in 2013, when Coltman wrote in her notes that the blog "is not academic" and "hobby is diff. from work at a univ." DE:250-10 at 4.

discrimination. FAU's Response disregards the fact that during a Senate Faculty meeting in Fall of 2015 several professors voiced concerns about the Policy and expressed frustration that no one knew what "outside activities" needed to be reported or "what outside activity the university [was] targeting." I.B. at 14. FAU does not address the testimony of other faculty members including Professor Robé who stated that the Policy and its forms were "absolutely confusing," I.B. at 22, or the fact that School officials responsible for enforcing the Policy demonstrated that they did not know the consequences for violating the Policy, *see* I.B. at 16 ("DOES THIS MEAN THAT A REPRIMAND IS THE NEXT STEP, RATHER THAN TERMINATION?").

Finally, FAU ignores various instances in which Tracy attempted to comply with FAU's demands, even where he did not agree with them. For example:

- When Tracy asked if he could acknowledge his assignment in hard-copy form, he was genuinely concerned that the check box also required him to affirm compliance with a Policy he had serious reservations and questions about. DE:250-51. Tracy even printed and signed the assignment acknowledgment form so as to not be insubordinate for failing to acknowledge his assignment. DE:246-12.

- Tracy also later checked the online box "under duress" in another effort to show he was willing to comply. DE:93-20.

- FAU did not ultimately discipline Tracy for failing to follow instructions with respect to the check box, contrary to the inference created by FAU's brief that it did, *see* A.B. at 12–13, 15 n.2.

- Alperin admitted at trial that Tracy was *not* sufficiently told prior to the November 10, 2015, Notice of Discipline what was expected of him. T.Vol.4 at 174:5–12.

- Alperin also did not know whether someone met with Tracy prior to issuing the Notice of Discipline, as was required pursuant to the University's progressive disciplinary procedures. T.Vol.4 at 179:12–25.

- Tracy nevertheless filled out the forms, even though his questions to his supervisors about the Policy, set forth in the Initial Brief at 15–16, went unanswered.

FAU presents a one-sided gloss of the Record that ignores years of efforts to chill Tracy's speech through a vague Policy that had never been applied to any of the dozens of other professors that maintain personal blogs. Tracy's termination was the result of a calculated effort by the School that was motivated by his offensive publication, the success of which was actively celebrated. *See* I.B. at 17–19 (citing a number of Coltman's emails, including DE:249-8 (calling professor her "hero" following statement to *New York Times* praising Tracy's firing); DE:249-14 (calling Tracy a "Nut job"); DE:249-13 (asking colleague "How is your employee?"—referring to Tracy's wife, a librarian at FAU—"Mine is packing up his office today."); DE:447-46 (sending to colleague an image of a cocktail on Tracy's last day)).

REPLY TO STANDARD OF REVIEW

As explained, FAU is wrong in arguing that this case does not implicate the First Amendment. FAU is likewise incorrect in asserting that the exacting standard

of review applicable to the Court's evaluation of constitutional facts is "irrelevant." A.B. at 22–23; *Booth v. Pasco Cty., Fla.*, 757 F.3d 1198, 1210 (11th Cir. 2014).

REPLY TO ARGUMENT

I. THE DISTRICT COURT IMPROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF FAU ON TRACY'S CONSTITUTIONAL CLAIMS.

A. FAU's Policy Is Unconstitutionally Vague And Constitutes Content-Based Viewpoint Discrimination Which Cannot Survive Strict Scrutiny.

FAU does not meaningfully respond to Tracy's arguments on the merits that the Policy is unconstitutionally vague and that the Policy is an impermissible content-based, viewpoint discriminatory restriction on speech. I.B. at 31–41. It also entirely fails to address Tracy's argument that the Policy is overbroad. *Id.* at 41–42.

FAU instead states in a conclusory fashion that the Policy uses words of common understanding, that the consequences for violating the Policy are plainly spelled out, and that the Policy is not void for vagueness for failing to define every word. But FAU fails to consider, as explained in the Initial Brief at 12–13, 33–35, that the additional terms set forth in the Policy that purport to define these "words of common understanding"—for example, defining "professional practice" as "uncompensated activity" and requiring to report such activity on an "outside employment form"—instead serve to render those words incomprehensible. *See Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1319–20 (11th Cir. 2017) (en

banc) (holding term "unnecessarily harassing" was incomprehensibly vague as a result of the modifier "unnecessarily," which was undefined and created ambiguity).

Moreover, other Policy terms such as "public interest" and "full performance" lack any definition and could mean possibly anything—even having a family—could constitute a conflict. Critically, FAU does not dispute that nowhere does the Policy mention blogging, yet it was enforced against Tracy for his blog.[3]

Nor does FAU address Tracy's argument that the Policy was so vague that it resulted in unfettered discretion for authorities to enforce it—and that School officials themselves demonstrated that they did not know the consequences for violating the Policy. *See supra* 6. Indeed, the Record is replete with examples that administrators and faculty alike did not understand what the Policy meant. *See, e.g.*, DE:250-43; DE:250-45; DE:250-46; DE:250-47.

FAU also makes the bare assertion that the Policy does not restrict speech and was not used here to restrict Tracy's speech. But the Policy allows FAU administrators to demand speech for analysis and approval in advance of

[3] The term "compensation" is likewise vague. FAU mischaracterizes the donations Tracy received as "compensation," *see* A.B. at 49, yet Alperin said she understood compensation to mean "income," not merely "money" changing hands, and that items such as a check from grandmother and gambling winnings need not be reported. DE:246-1 at 111:19–23; 112:4–9; 116:7–10.

publication, much like a presumptively invalid prior restraint. I.B. at 9–10; 39. Because of the Policy's vagueness, School officials necessarily have to examine the content of the speech in order to determine whether a conflict existed—a point demonstrated and explained by Alperin herself. I.B. at 9. This allows officials to engage in viewpoint discrimination, which is precisely what happened here. FAU exploited the Policy's vagueness in order to create a pretext that Tracy was fired for insubordination because he failed to report his blog pursuant to the administrators' interpretation of the Policy—despite the fact that none of the over twenty other professors who maintained blogs and social media at the time were required to report this outside speech activity, much less fired for failing to do so.

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

Despite FAU's continued insistence, Tracy did not need to grieve his constitutional claims before filing suit. Even the CBA language relied on by FAU does not support this contention. Specifically, FAU does not address Tracy's argument that Article 20 of the CBA explicitly permits an employee to bring his claims directly to court. FAU instead asserts that paragraph 20.1 of the CBA provides a mandatory grievance procedure as the "sole and exclusive remedy." This paragraph does provide that the procedures set forth "hereinafter" in Article 20 (which *include* grievance procedures) are the sole and exclusive method for resolving employee grievances. However, FAU fails to acknowledge that the very

next paragraph, titled "Resort to Other Procedures," states that "prior to seeking resolution of a dispute by filing an Article 20 grievance," an employee may request "resolution of the matter in any other forum, whether administrative or judicial…." DE:447-47 at 60, ¶20.2. The language of this Article makes clear that the grievance procedure is not the exclusive remedy provided in the CBA. *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).[4]

More troubling, however, is FAU's dogged assertion that Tracy's challenge to the Policy involves no more than the evaluation of contractual terms that does not give rise to constitutional claims. *See* A.B. at 27. For a number of reasons, this argument is without merit.

First, FAU's narrow characterization of the Policy as a mere contract term presents a fundamental misunderstanding of Tracy's challenge to the Policy.[5] The

[4] Neither does FAU address Tracy's argument that only the limitations imposed by the CBA are subject to the Article 20 grievance procedure, *see* DE:447-47 at 11, ¶4.2, and no such "limitation" exists on Tracy's First Amendment rights. *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.").

[5] FAU, for example, frames Count III and IV as challenges "to the Policy contained in Article 19 of the CBA." A.B. at 27–28. Although those counts cite to Article 19, they also specifically address the constitutionality of additional forms

Policy is a unilaterally-imposed University-wide policy incorporated by reference in the CBA. Compliance with the Policy is not accomplished by complying with Article 19 alone. Indeed, its mandate stems from Chapter 112, Florida Statutes. *See* Art. 19.1. The Policy consists of a number of documents that impose their own requirements, including forms and guidelines to which Tracy did not agree. I.B. at 9–12. The District Court fundamentally misunderstood this, and FAU would like this Court to do the same by focusing only on Article 19. FAU would also have this Court ignore the changes to the Policy, the form, and the "additional clarification" given to faculty after Tracy was fired—all of which is critical to understanding how FAU interprets and enforces its Policy to the speech activities of union members and non-union members alike.

Second, as explained, it is both incorrect and disingenuous for FAU to claim that Tracy's challenges to the Policy—which allege that the Policy is unconstitutionally vague and constitutes content-based viewpoint discrimination—do not raise constitutional and First Amendment issues. *See Wollschlaeger*, 848 F.3d at 1319; *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011); *Keyishian v. Bd. of Regents of Univ. of State*

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and guidelines. *See, e.g.*, DE:93 ¶183 ("FAU's March 2016 Memo, much like Article 19 and all other communications sent to FAU faculty members about the Policy, uses vague, overbroad, inconsistent and conflicting language….").

of N.Y., 385 U.S. 589, 604 (1967). The Policy can be (and was) enforced arbitrarily by School officials to discriminate against speech, ultimately resulting in the chilling of speech in violation of the First Amendment. To baldly deny that this case invokes the First Amendment borders the incredulous.

Indeed, the analysis is simple here: a party need not exhaust its remedies in order to bring a First Amendment claim in federal court. *See* I.B. at 43–45 (citing *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); *Hochman v. Bd. of Ed. of City of Newark*, 534 F.2d 1094, 1097 (3d Cir. 1976); *Hennessy v. City of Long Beach*, 258 F. Supp. 2d 200, 206–07 (E.D.N.Y. 2003)).

FAU asserts that a vagueness claim is different than retaliation for exhaustion purposes. But the non-exhaustion principle under §1983 applies equally to all claims challenging the constitutionality of a government's actions. Indeed, as explained in the Initial Brief, 43–45, there is no permissible basis—nor did FAU or the District Court cite any case instructing as such—to distinguish between §1983 claims alleging retaliation and those challenging the constitutionality of a law or policy, so as to foreclose Tracy's constitutional challenge on exhaustion grounds.

That Tracy need not grieve his §1983 constitutional claims is plainly apparent in the history and purpose of that statute. *See Patsy*, 457 U.S. at 504 (discussing the precursor Act to §1983: "Congress intended…to 'throw open the

doors of the United States courts' to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights…and to provide these individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary"); *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.").

Moreover, FAU's insistence that, had Tracy first grieved his constitutional claims, the court would have had the benefit of evaluating the School's official rationale and interpretation of the Policy is distracting at best because this is simply not required under §1983's non-exhaustion principle. Indeed, courts have indicated that where there is good reason to require exhaustion of state remedies before filing suit, Congress must specifically provide as such. *Cf. Patsy*, 457 U.S. at 508 ("In §1997e, Congress also created a specific, limited exhaustion requirement for adult prisoners bringing actions pursuant to §1983. Section 1997e and its legislative history demonstrate that Congress understood that exhaustion is not generally required in §1983 actions, and that it decided to carve out only a narrow exception to this rule."). There has been no such carve-out for professors and school employees who raise constitutional challenges. *See, e.g.*, *Patsy*, *Narumanchi*,

Hochman, *supra*. This is particularly true where, as here, a CBA explicitly provides for resort to judicial remedies in place of internal grievance procedures.

Third, FAU continues to primarily rely upon an out-of-circuit case that does not address the First Amendment, *Hawks v. City of Pontiac*, 874 F.2d 347 (6th Cir. 1989), in support of its exhaustion argument. FAU attempts to state that, similar to *Hawks*, Tracy's challenge involves only the interpretation of a contract, not speech. A.B. at 32–33. As explained, this is wrong—Tracy's claims strike at the very core of the First Amendment. 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…."); *Narumanchi*, 850 F.2d at 73 (recognizing that "First Amendment rights, in contrast to those rights protected by the procedural component of the Due Process Clause, are substantive in nature" and, as such, initial recourse to union grievance proceedings is not required).

Moreover, the Policy here consists of much more than just the CBA. *See supra* 11–12. And unlike *Hawks*, where the residency requirement was expressly incorporated into the CBA, the CBA did not purport to waive Tracy's First

Amendment rights and there was no reference to blogging as a reportable conflict of interest.

Finally, FAU does not address or otherwise rebut Tracy's arguments that exhaustion would have been futile here, that he has not waived his claims by signing the CBA, and that he has standing to raise his challenges. *See* I.B. at 47–50.

C. Tracy's As-Applied Challenge Is Ripe.

FAU argues that Tracy's as-applied challenge is not ripe because the Policy was never applied to him because he refused to comply with its requirements. This assertion is incorrect.

As an initial matter, the Court should consider this ripeness issue from the "most permissive" viewpoint—*i.e.*, in the light most favorable to Tracy, because this case involves a violation of the First Amendment. *Beaulieu v. City of Alabaster*, 454 F.3d 1219, 1227-28 (11th Cir. 2006) ("The injury requirement is most loosely applied when a plaintiff asserts a violation of First Amendment rights based on the enforcement of a law, regulation or policy.") (quoting *Digital Props., Inc. v. City of Plantation*, 121 F.3d 586, 590 (11th Cir. 1997)); *see also Cheffer v. Reno*, 55 F.3d 1517, 1523 n.12 (11th Cir. 1995) ("[T]he doctrine of ripeness is more loosely applied in the First Amendment context.").

Moreover, the argument that the Policy was not applied to Tracy is baseless. The Record demonstrates that FAU specifically cited a violation of the CBA (part of the challenged Policy) as justification for Tracy's termination. DE:249-7 at 2–3 ("You have engaged in continued misconduct in violation of…CBA Article 19. Therefore…this letter constitutes formal Notice of Proposed Discipline—Termination."). FAU cites only *Digital Properties, Inc.*, which was a *commercial speech* case involving an adult book store and zoning ordinances. In that case, the city did not actually apply the zoning ordinance at issue to Digital. *See* 121 F.3d at 590–91 (holding no ripeness and noting that "[i]n order for the city to have 'applied' the ordinance to Digital, a city official with sufficient authority must have rendered a decision regarding Digital's proposal"). In contrast, here, FAU applied the CBA in Tracy's termination letter.

Finally, this Court nonetheless tolerates pre-enforcement challenges that implicate the First Amendment. *See Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1305 (11th Cir. 2017) (en banc) ("Where the 'alleged danger' of legislation is 'one of self-censorship,' harm 'can be realized even without an actual prosecution'"); *Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 760 (11th Cir. 1991) (discussing *Solomon v. City of Gainesville*, 763 F.2d 1212 (11th Cir. 1985), and *Int'l Soc'y For Krishna Consciousness of Atlanta*

v. Eaves, 601 F.2d 809, 817 (5th Cir. 1979), and noting that both cases allowed "pre-enforcement challenges to local ordinances based on first amendment").

II. THE DISTRICT COURT ERRED IN DENYING THE POST-TRIAL RETALIATION CLAIM MOTIONS.[6]

A. The Policy Was So Vague It Could Not Be Enforced And Therefore "Insubordination" Was Clearly Pretext.

The verdict on retaliation must be reversed because the District Court's erroneous summary judgment ruling stripped Tracy of the ability to make critical arguments necessary to prove retaliation. FAU argued that Tracy was fired for insubordination for failing to complete a disclosure document, however his failure to fill out that form is not an objectively reasonable reason to terminate his employment given the vagueness of the Policy and the long-held plan of the School to use the Policy as a "winning metaphor" around Tracy's "freedom of speech." I.B. at 6–7. The Policy's enforcement was therefore transparently a pretext to find a way to terminate Tracy. As explained *infra* 19–21, Tracy's termination was clearly not motivated by the enforcement of the Policy, but as an admitted way to fire Tracy for his speech.

FAU notably offers no response to this argument and the Court should reverse the Jury's verdict on this basis alone. *See Rainey v. Jackson State Coll.*,

[6] FAU responds to Tracy's Section IV argument, I.B. at 50–57, in Section II of its brief, A.B. at 41–53.

481 F.2d 347, 350 (5th Cir. 1973) (concluding pretextual reasons president and trustee gave to justify firing professor "all gave way" when trustee admitted speech was the reason for withdrawing the contract).

B. There Was Insufficient Evidence To Support The Jury's Finding On "Motivating Factor."

FAU argues that "substantial and overwhelming" evidence was presented to the Jury that demonstrates that FAU was not motivated by Tracy's speech. A.B. at 43. However, when viewed alongside the evidence that FAU fails to acknowledge in its Response, *see supra* 3–7, the evidence presented to the Jury actually supports the conclusion that FAU fired Tracy for his speech.

First, FAU highlights that Alperin and Coltman were aware of Tracy's blog in 2013, and told him to disclose it on the conflict of interest forms. However, FAU fails to mention that Tracy responded to the 2013 request with questions regarding the scope and applicability of the Policy, including the concern that disclosure of his personal blog would violate his rights under the First Amendment. FAU did not address Tracy's concerns or work to clarify the vague language of Policy. Instead, FAU completely dropped the matter and appeared to accept Tracy's position that personal blogs did not constitute "outside employment" under the Policy. When FAU intensified its efforts to fire Tracy in 2015 following a new round of media coverage about his blog, the School's 2013 acceptance of Tracy's concerns about disclosing his blog demonstrate not insubordination, but confusion

as to why, all of a sudden, he was required to declare his blog as a source of outside employment when (1) it was not a source of outside employment; (2) the School had never required him to report it before; and (3) no other professors were required to disclose their personal blogs. As explained *supra* 6–7, Tracy nevertheless attempted to comply with the School's pretextual Policy, but was still fired by FAU. In fact, FAU drafted his termination letter prior to the artificial date they gave Tracy to comply with the vague Policy, which happened to fall during his paternity leave. I.B. at 16–17.

FAU also argues that no one told Tracy he had to stop blogging. However, Tracy never argued that FAU explicitly told him to stop blogging. Rather, his position has been that the reason for his firing was pretextual and in retaliation for his blogging. The fact that FAU never expressly told him not to blog is unsurprising given Coltman's handwritten notes that acknowledge his personal blog was protected by "freedom of speech" and asking FAU administrators to look for "winning metaphors" around Tracy's rights. I.B. at 6–7. Alperin even conceded at trial that she was looking for an opportunity to review the blog in order to determine whether or not Tracy could continue to engage in it. I.B. at 21–22.

FAU's Response overstates the evidence that Tracy was asked on "six different occasions" by "three different administrators" to check the box and submit forms to the School. Critically, FAU does not dispute that Tracy had asked

these administrators questions about the Policy as it related to his blogging activity, and that those questions went unanswered. The fact that Alperin and Coltman would later provide self-serving testimony that they thought Tracy knew what was required of him does not outweigh the evidence Tracy presented that *no one* understood what the vague Policy required professors to disclose.

FAU also argues that the verdict is supported by evidence that Tracy's union told him to grieve his claims. But Tracy introduced evidence that the union told him his constitutional claims could not be grieved, *see* I.B. at 18; T.Vol.7 at 125:17–22. This supports Tracy's point that the guidance and instructions he was receiving at the time were confusing, and that he was not acting insubordinately but rather earnestly questioning the application of a Policy so impermissibly vague even his union representatives and School administrators could not comprehend it.

FAU argues the verdict is also supported by evidence that Tracy privately admitted in emails to his union that his case of insubordination appeared "cut-and-dry." A.B. at 48. Again, Tracy was genuinely confused as to the scope and applicability of the Policy. DE:467; T.Vol.3 at 142:4–11. At the time of these emails Tracy was seeking advice from his union, who compounded the problem by first telling him his situation was grievable, and then telling him it was not grievable.

C. FAU Waived Its Argument That Tracy's Speech Was Not Ascertainable, Which it Was.

FAU's argument that Tracy has not identified the speech at issue is without merit. *See* A.B. at 52, 21 n.3.

First, the argument was raised at trial and rejected by the District Court judge who determined Tracy's speech to be both ascertainable and constitutionally protected. T.Vol.8 at 48:6–50:21, 71:15–72:5. FAU did not challenge this determination in any post-trial motions or cross-appeal, and has accordingly waived it. *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998) ("[I]ssues not raised below are normally deemed waived.").

Second, and as explained in the Initial Brief at 6–19, and 3–7 of this Reply, FAU was obsessively aware of Tracy's blog and his controversial views on Sandy Hook. The blog was the subject of national news and the School's administration met on numerous occasions in order to manage the fall-out from the press coverage and the ongoing calls from donors, students, and the public at large to fire Tracy for his blog. As a result of this media coverage, FAU ordered its staff to continuously monitor Tracy's blog and approvingly circulated editorials that criticized Tracy's viewpoint. DE:444-35. As was the case at trial, FAU's contention that Tracy's speech was unknown or unascertainable is entirely disingenuous.

Finally, FAU's reliance on *Kurtz v. Vickrey*, 855 F.2d 723 (11th Cir. 1988), and *Goffer v. Marbury*, 956 F.2d 1045, 1048 (11th Cir. 1992), are inapposite because in those cases only portions of the content at issue were related to public concern or were not readily ascertainable by the Court. Accordingly, the Courts held it reasonable for the protected or identifiable speech to be separated from unprotected or unidentifiable communications. Unlike those cases, Tracy's speech was admittedly well known by FAU, identifiable as part of the more than 40 articles posted about Sandy Hook on his personal blog, and constitutionally protected as speech related to matters of public concern.

III. THE DISTRICT COURT ERRED IN EXCLUDING THE FACULTY SENATE MEETING TRANSCRIPT.

A. The Meeting Transcript Was Not Hearsay.

The District Court erred in excluding the Faculty Senate meeting transcript as hearsay because (1) the transcript was not offered for the truth of the matter asserted and (2) Alperin's statements constituted statements by a party opponent.

First, the transcript is not hearsay because it was being offered to demonstrate its effect on both Tracy and FAU and not for the truth of the matter asserted. *United States v. Rivera*, 780 F.3d 1084, 1092 (11th Cir. 2015) ("Generally, an out-of-court statement admitted to show its effect on the hearer is not hearsay.").

The transcript demonstrates that other professors and even FAU administrators were confused about the Policy, particularly as it applied to speech activities. *See* DE:250-47 at 5 (professor stating "[n]o one knows what that means" and "until there's some clarity about what outside activity has to be reported I would recommend…that any new faculty member…do nothing because any outside activity exposes you to risk…and that risk includes discipline up to dismissal"); 24 (Alperin stating "I agree with you there needs to be clarity in that form").

FAU argues that Tracy's confusion is not relevant to the remaining issues in this case; however, his confusion is central to the retaliation issues because it shows he was acting reasonably—and not insubordinately—when he was unable to fill out the Outside Employment Form. FAU's Response focuses only on its relevance to Tracy's confusion and misses the point that it would have demonstrated the Policy was so vague it allowed administrators to engage in viewpoint discrimination and retaliate against Tracy for his controversial speech.

Second, Alperin's statements at the Faculty Senate meeting were not hearsay, but instead statements by a party opponent. 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). At the time of the meeting, Alperin was the vice-

provost of FAU—*i.e.*, an employee and agent of FAU—and her statement would have been offered against FAU.

FAU does not, and cannot dispute, that Alperin is a party opponent pursuant to Rule 801(d)(2)(D), and instead argues that her statement is not relevant to Tracy's claim. However, Alperin's comment about the clarity of the Policy directly relates to the issue of insubordination, as explained above. To enforce a form that FAU recognizes is confusing against Tracy—whose speech FAU openly disapproves of—demonstrates that the given justification for Tracy's termination, insubordination, is pretextual.

B. The Meeting Transcript Should Not Have Been Excluded Under Rule 403.

Federal Rule of Evidence 403 is "an extraordinary remedy which should be used sparingly." *Aycock v. RJ Reynolds Tobacco Co.*, 769 F.3d 1063, 1069 (11th Cir. 2014). Nonetheless, FAU argues Rule 403 should have excluded the transcript "given the prejudice to FAU of angry faculty members drawing legal conclusions about an unrelated situation." A.B. at 59.

Certainly the damning statements from confused Faculty Senate members was prejudicial to FAU, but admitting the transcript would not have *unfairly* prejudiced FAU, the proper standard under Rule 403. The District Court could have given the Jury limiting instructions about any legal conclusions made by faculty, but instead it chose wholesale exclusion. By doing so, the District Court

stripped Tracy of his ability to enforce his rights at trial by showing that FAU's Policy was so vague it gave FAU unfettered discretion to retaliate, and so confusing its excuse that Tracy was insubordinate was a pretext.

C. FAU Opened The Door To The Admissibility Of The Transcript.

FAU also "opened the door" to the admission of this transcript during Alperin's testimony. She testified Tracy "could have asked the university faculty senate, as a due process, he could have asked them to review the situation." T.Vol.5 at 39:4–7. The transcript demonstrates that the Faculty Senate was just as confused as he was about the Policy. Tracy should have been afforded an opportunity to refute her testimony with the transcript showing that Faculty Senate review was not a viable option.

FAU argues that the door was not opened because Alperin did not specifically refer to the Faculty Senate meeting. But a party need not refer to the evidence specifically in order to "open the door" and render it admissible. *See, e.g.*, *Shaps v. Provident Life & Acc. Ins. Co.*, 244 F.3d 876, 886 (11th Cir. 2001) (holding that plaintiff's attempt to portray herself as financially dependent opened door to evidence of her financial condition). Tracy should have been permitted to clarify that the Senate Faculty was not a viable option for him to address his concerns about FAU's enforcement of a vague Policy, as clearly demonstrated by the meeting transcript.

IV. THE INDIVIDUAL DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

As explained in the Initial Brief at 51, whether the individual defendants are entitled to qualified immunity necessarily turns on the lawfulness of the Policy. The District Court concluded that "Defendants Alperin and Coltman could have reasonably and lawfully decided to recommend Plaintiff's termination based upon how Plaintiff governed himself after being required to comply with the Policy." DE:362 at 26.

The Policy, however, is unconstitutional for all the reasons explained. Under the authority of *Bogle v. McClure*, 332 F.3d 1347, 1356 (11th Cir. 2003), Tracy argued below that the Record evidence, taken in the light most favorable to him, did not indisputably establish that Alperin and Coltman were actually motived by lawful considerations, even in part. *See id.* (holding plaintiffs set forth sufficient evidence suggesting stated "lawful" reason "was a sham designed to cover up…race-based transfer" and the Record therefore did not "undisputably" indicate defendants were motivated at least in part by objectively valid reasons). Instead, Tracy was disciplined under a vague Policy that repeatedly went unenforced and about which faculty had expressed concern and had submitted complaints—calling into question defendants' motivation in applying the Policy to Tracy's blogging. Should this Court determine that the Policy as it applies to speech activities such as blogging is unconstitutionally vague, that would necessarily undermine the

summary judgment in favor of the individual defendants and the qualified immunity afforded them must also be reversed.

CONCLUSION

For the foregoing 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 6,479 words and uses a Times New Roman 14 point font and contains 571 lines of text.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of November, 2018, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF which will provide service on all counsel of record, including those identified below, via Notice of Docket Activity generated by CM/ECF:

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