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

APPELLANT JAMES TRACY'S PETITION FOR REHEARING AND REHEARING *EN BANC*

Enrique D. Arana
Steven M. Blickensderfer
Rachel A. Oostendorp
CARLTON FIELDS, P.A.
2 MiamiCentral
700 NW 1st Avenue, Ste. 1200
Miami, Florida 33136
Tel: (305) 530-0050
Fax: (305) 530-0055

Counsel for Appellant James Tracy

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;

26. Joel D. Medgebow, Florida Civil Rights Coalition, P.L.L.C., Medgebow Law P.A., Co-Counsel for Plaintiff / Appellant;

27. Matthew Benzion, Florida Civil Rights Coalition, P.L.L.C., Medgebow Law P.A., Co-Counsel for Plaintiff / Appellant;

28. Justin S. Wales, Carlton Fields, P.A. – Appellate Counsel for Plaintiff / Appellant;

29. Steven M. Blickensderfer, Carlton Fields, P.A. – Appellate Counsel for Plaintiff / Appellant;

30. Rachel A. Oostendorp, Carlton Fields, P.A. – Appellate Counsel for Plaintiff / Appellant;

31. Enrique D. Arana, Carlton Fields, P.A. – Appellate Counsel for Plaintiff / Appellant

32. Jack J. Aiello, 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

33. Edward A. Marod, 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

34. Holly L. Griffin, 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. 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;

36. 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;

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

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

39. 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;

40. 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/ Enrique D. Arana
Enrique D. Arana

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the Panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedents of this Circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

- *Freedman v. State of Maryland*, 380 U.S. 51 (1965)
- *Thomas v. Chicago Park District*, 534 U.S. 316 (2002)
- *Granite State Outdoor Advertising, Inc. v. City of St. Petersburg, Fla.*, 348 F.3d 1278 (11th Cir. 2003)
- *United States v. Playboy*, 529 U.S. 803 (2000)

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

- Whether a conflict-of-interest policy that requires employees and faculty to report speech and expressive activity, and for which they may be terminated for failing to report, without sufficiently defining which activities must be reported has the effect of impermissibly chilling speech, even if it is does not directly punish or restrict speech?

- Whether a content-based prior restraint in a public university's conflict-of-interest policy that grants unbridled discretion to university officials may be reviewed as a facial challenge and without a showing of a pattern of discriminatory enforcement?

/s/ *Enrique D. Arana*
Enrique D. Arana
Attorney of Record for James Tracy

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(Continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF CITATIONS
(Continued)

Page

Pursuant to Federal Rules of Appellate Procedure 40 and 35, Appellant James Tracy respectfully petitions for rehearing and rehearing *en banc* of this Court's November 16, 2020, Opinion.

STATEMENT OF ISSUES

1. Whether Panel rehearing should be granted on the basis that the Opinion overlooks or misapprehends critical points of law and/or fact by concluding:

(a) that FAU's reporting requirement clearly applied to Professor Tracy's personal blogging when the relevant issue is whether he engaged in similar *professional* activities, not whether he participated in any hobbies involving the same *subject matter* as the courses he taught;

(b) that the FAU reporting requirement is not facially vague even though it does not specify whether uncompensated activity such as blogging or social media constitutes "professional practice";

(c) that sufficient evidence supported the jury's finding that Tracy's speech was not a motivating factor in his termination, even though he was fired for not reporting a public blog that FAU was intimately familiar with; and

(d) that Tracy submitted no evidence that FAU had applied its "conflict of interest" rules to discriminate against speech activity when the record was to the contrary?

2. Whether rehearing *en banc* should be granted because the Court's holdings that (a) FAU's reporting requirement does not chill speech and (b) that Tracy cannot challenge the reporting requirement where he purportedly has not shown a pattern of discriminatory application against disfavored speech, conflict with Eleventh Circuit and Supreme Court precedent? This appeal is of exceptional importance because the Opinion permits a public university to retaliate against a tenured professor's unpopular speech by applying an unconstitutionally vague policy as pretext for termination.

INTRODUCTION

It is a bedrock First Amendment principle that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). 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 blogging on its conflict-of-interest form.

This termination violated the First Amendment for two fundamental reasons. First, the Policy is unconstitutionally vague. FAU 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 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.

COURSE OF PROCEEDINGS AND DISPOSITION

Tracy filed this action against FAU and administrators alleging First Amendment retaliation, facial and as-applied challenges to the Policy, and declaratory and injunctive relief. Tracy alleged FAU retaliated against him because administrators disapproved of the viewpoints he expressed about Sandy Hook and sought to have the Policy declared unlawful and be reinstated. On cross-motions for summary judgment, the district court granted summary judgment

in favor of FAU on Tracy's claims challenging the Policy, concluding that his First Amendment claims other than retaliation needed to be grieved pursuant to a collective bargaining agreement. The district court also granted summary judgment in favor of the individual defendants.

The First Amendment retaliation claim proceeded to a nine-day jury trial. 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. The jury answered the first question in the negative and never reached the second. The district court entered a final judgment and denied Tracy's post-trial motions. This appeal followed, and on November 16, 2020, this Court issued an Opinion affirming the decisions below.

STATEMENT OF FACTS

James Tracy was a distinguished tenured faculty member in FAU's School of Communications. He taught journalism history, communication theory, and courses on the media's coverage of conspiracy theories. In 2012, Tracy started a blog offering his personal opinions on politics and current events. 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. His posts garnered national criticism and were widely reviled by the public and media. IB 5-6.

In January 2013, FAU officials met to discuss the negative press surrounding Tracy's blog and explore terminating him, recognizing that FAU was bound by "freedom of speech" and encouraging the group to "find winning metaphors" to circumvent the "1st Amendment." FAU threatened discipline for inadequate disclaimer, but FAU and Tracy settled the matter in exchange for Tracy's agreement to stop using his FAU title in his blog and to use a disclaimer stating the content of the blog were the views of Tracy and not FAU. Tracy continued to blog in the 2014-2015 academic year, and FAU did not request any forms. IB 6-8.

All Florida public universities must have a conflict-of-interest policy. FAU's Policy consists of multiple documents and forms. FAU did not have a separate policy on blogging, podcasting, or posting on social media; blogging is not mentioned or defined in FAU's Policy; and to apply the Policy to a blog, administrators would have to examine the contents of the blog. Moreover, the Policy's key terms are undefined: employees must provide a description of "reportable outside activity," which means "any compensated or uncompensated professional practice, consulting, teaching or research, which is not part of the employee's assigned duties." The Policy prohibits "conflicts of interest," which include "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" and "any

activity which interferes with the full performance of the employee's professional or institutional responsibilities or obligations." IB 9-13. During a Senate Faculty meeting, several professors voiced concern that FAU had threatened to discipline professors involved in outside activity under the Policy, but "no one knows" what outside activities need to be reported. The then-vice provost (who fired Tracy for failing to report his blog) indicated FAU was working on revisions to clarify the Policy and forms. IB 14.

After Tracy's blog again made waves in September 2015, FAU continued to monitor the blog. In October 2015, Tracy's supervisor sent him an email reminding him to fill out the forms for "outside employment income." Tracy requested clarification about the Policy, including that his blogging, which was separate from his academic work, did not qualify as a reportable outside activity, but his questions went unanswered. Tracy raised concerns that he had not received clarification regarding the Policy and that it violated his First Amendment rights. Ultimately, FAU sent Tracy a notice of termination, stating he had failed to submit "properly completed forms" by the deadline, and refused to report activities that may be in conflict, namely his "personal blog," which "deprived" FAU of the ability to "assess if a conflict exists for the blog activity." IB 14-18.

ARGUMENT AND AUTHORITIES

I. PANEL REHEARING SHOULD BE GRANTED

A. The Panel Overlooks Or Misapprehends That The Policy Was Vague As Applied To Tracy

The Panel concludes that the Policy's "reporting requirement clearly applied to [Tracy's] own particular unreported activity" because his "blog closely mirrored what he did professionally" and therefore "clearly constituted a 'professional practice.'" Op. 14. In other words, the Opinion holds that Tracy's uncompensated personal blogging was a "professional practice" because the subject matter of his blog—his own personally-held views on politics, current events, and conspiracy theories—covered subject matter similar to some of the coursework—conspiracy theories in culture and mass media—that he taught at FAU.

Respectfully, this analysis misapprehends that the relevant question for reporting under the Policy is whether Tracy was engaging in *professional* activities (like consulting, teaching, research, *see infra*) similar to his employment at FAU, not whether he was blogging about a similar subject matter. Taken to its logical conclusion, this would mean a music teacher must report to FAU that she also plays in a garage band or a Spanish teacher must report that he meets with friends to speak Spanish. Indeed, the Opinion overlooks that FAU conceded in 2013 that this was a personal blog separate from Tracy's academic work when an FAU official admitted in her notes that the blog "is not academic" and "hobby is diff.

from work at a univ." Reply 5 n.2. And the disclaimer that FAU required Tracy to add to his blog in 2013 expressly clarified that the blogging was *not* an activity he was doing as a professor at FAU—*i.e.*, as part of his "professional practice." IB 8.

The ambiguities in the Policy allowed it to be discriminatorily applied and enforced against Tracy (and not the over twenty other professors who maintained unreported blogs and social media at the time of Tracy's firing) because FAU disagreed with the content of his blog. *See Smith v. Goguen*, 415 U.S. 566, 578 (1974) (statute void for vagueness because its standards were so indefinite it subjected plaintiff to discriminatory enforcement based on expressive conduct).

B. The Panel Overlooks Or Misapprehends That The Policy Was Vague On Its Face

The Panel holds that the Policy is not facially vague because the Policy's undefined term "professional practice" should be given its "ordinary meaning," which the Panel concludes is "engaging in an activity characteristic of one's profession." Op. 12. The Opinion further reasons that the fact that the term "appears in a list of activities typically engaged in by academics, such as 'consulting,' 'teaching,' and 'research,'" confirms it is limited to "activities that are 'professional' in nature." *Id.* at 12-13. Respectfully, however, the conclusion that "professional practice" means something professional in nature akin to consulting, teaching, or research overlooks the fundamental ambiguity about whether speech activity such as uncompensated personal blogging, social media

posting, or even article and op-ed writing would be encompassed within that term. Indeed, it is hardly apparent that these uncompensated forms of communication, which are ubiquitous today and may be done by anyone at their leisure and without any professional training or education, would qualify as "professional practice."

The Opinion also overlooks Tracy's argument that both the inclusion of the word "uncompensated" activity and the accompanying reporting form, which contains a space to describe only an "employment activity," but not non-employment activity, render the term "professional practice" incomprehensible, leaving professors guessing what activities to report, particularly with regard to speech such as blogging. IB 33-34. Moreover, because the Policy does not sufficiently explain what activities must be reported, when the report must be submitted, or what sanctions will be imposed if violated, officials are left to impose the Policy based on subjective interpretations instead of objective criteria, which raises the likelihood of arbitrary or discriminatory enforcement. *See City of Chicago v. Morales*, 527 U.S. 41, 63–64 (1999) (ordinance impermissibly gave absolute discretion to police officers to decide what activities constitute loitering).

C. The Panel Overlooks Or Misapprehends That The Weight Of The Evidence Does Not Support The Verdict

The Panel holds that although it agrees that Tracy "introduced some circumstantial evidence of First Amendment retaliation, the jury was entitled to

weigh the evidence," concluding that a reasonable jury could have found Tracy's firing was *entirely unrelated* to his speech because there was evidence to suggest he was fired for his failure to report his infamous blog to FAU. Op. 22-23. Respectfully, the conclusion that this was sufficient to support the jury's verdict overlooks the fact that the firing was based entirely on Tracy's failure to report a blog that FAU and its officials were already fully aware of—and indeed, closely monitored and held meetings about—for several years. IB 6-7, 14-15; IB 17 (Notice of Termination stated that Tracy remained "recalcitrant" in refusing to report other activities that "may be in conflict with [his] employer," namely his "personal blog," and that the failure to report his blog "deprived" FAU of the ability "to assess if a conflict exists for the blog activity"); DE 469 at 16:14-17:3 (testimony from dean who fired Tracy that she was waiting for Tracy to list the blog on his forms).

Rather than support the verdict, this evidence demonstrates that the sole purported reason for Tracy's firing—failing to report a blog that was well known to FAU and thus already effectively reported to the University—was a pretext for FAU's objection to the substance of Tracy's publication. Indeed, FAU's claim that the failure to report deprived FAU of the ability to "assess if a conflict exists for the blog activity" is clearly pretextual because FAU was aware of the public blog and could review it any time to assess if a conflict existed.

D. The Opinion Overlooks Record Evidence That FAU Determined Disfavored Outside Speech Activity Constituted A Conflict of Interest

The Opinion also incorrectly concludes that Tracy submitted no evidence that FAU ever used the Policy to attempt to prohibit another professor from engaging in any speech activity. Op. 17. To the contrary, the Senate Faculty meeting transcript describes one such example in 2015, when FAU used the Policy as a pretext to target another professor for writing an op-ed in the *Palm Beach Post* "that the University did not like." DE 246-14 at 18; DE 250-47 at 14. As explained at the deposition of another professor offered in support of Tracy's summary judgment motion, FAU used the Policy to justify placing a discipline letter in the author's personnel file, which could then be used for further discipline or termination under FAU's progressive discipline system. DE246-14 at 19. This is the "realistic danger" that the Panel concluded was missing from Tracy's "unbridled discretion" claim. *See infra*; Op. 17-18.

Moreover, Tracy has demonstrated that the reporting requirement was applied discriminatorily to him because he was required to report his disfavored speech whereas at least 20 other professors with blogs and social media, and three faculty who penned an op-ed with a viewpoint on Sandy Hook that FAU supported, were not required to report, much less fired for failing to do so. IB 19, 23.

II. REHEARING *EN BANC* SHOULD BE GRANTED

E. The Opinion Incorrectly Suggests That The Reporting Requirement Does Not Implicate The First Amendment

The Panel rejects Tracy's other First Amendment arguments regarding the Policy's reporting requirement, including that it is overbroad and constitutes a content- and viewpoint-based restriction on speech, because, the Opinion reasons, "the reporting requirement does not punish or restrict *any* speech; it requires only that faculty *report* certain types of speech activities." Op. 14. The Panel's conclusion that the Policy, which allows FAU administrators to demand speech to be reported for analysis under impermissibly vague standards, does not offend, or perhaps even implicate, the First Amendment is incorrect and is inconsistent with case law holding that reporting requirements can have a chilling effect on speech.[1]

For example, in *Doe v. Harris*, the Ninth Circuit held that a reporting provision of a sex offender registration statute violated the First Amendment. 772 F.3d 563 (9th Cir. 2014). The provision required persons covered by the statute to provide information including a list of internet identifiers and service providers used by that person. Any additions or changes were to be reported to law enforcement within 24 hours. *Id.* at 568–69. The Court first held that the statute implicated the First Amendment because, even though it did not on its face

[1] As explained below, the Policy also allows administrators to demand speech be reported to be approved in advance of publication, much like a prior restraint.

prohibit speech, "a law may burden speech—and thereby regulate it—even if it stops short of prohibiting it." *Id.* at 572. The Court then concluded that the statute unnecessarily chills protected speech because it did not make clear what sex offenders are required to report. *Id.* at 578–79 ("the ambiguities [regarding the meanings of internet identifier and service provider] may lead registered sex offenders to…underuse the Internet to avoid the difficult questions in understanding what, precisely, they must report"); *see also United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000) ("It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.").

Here too the reporting requirement—which contains undefined terms and does not address speech such as blogging at all, thus rendering entirely ambiguous what activity must be reported—creates a content-based burden on expression that unnecessarily chills speech. Indeed, Tracy presented evidence that professors were so confused about what outside activity must be reported that they refrained from participating in such activities lest they be fired. Reply 24 (professor who taught at FAU for over 30 years stating "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").

En banc review is required because the Opinion sets a dangerous and conflicting precedent which concludes that the First Amendment is not implicated by a vague reporting requirement that does not expressly punish or restrict speech, and which opens the door for public educational institutions to impermissibly chill the speech and expressive activities of its faculty and employees.

F. The Opinion Conflicts With This Circuit's Precedent By Holding That Tracy's Challenge To Unbridled Discretion Requires a Pattern of Discriminatory Enforcement

The Opinion also incorrectly rejects Tracy's argument that the Policy gives FAU officials unbridled discretion to target speech they believe conflicts with FAU's undefined "public interest" and allows administrators to demand speech for analysis and approval before publication, much like a prior restraint. The Panel holds that even if the Policy applies to speech activities, Tracy cannot maintain an "unbridled-discretion claim" because he has failed to establish a pattern of unlawful favoritism signaling an abuse of such discretion. Op. 16-18. Respectfully, the decision is in conflict with Eleventh Circuit and Supreme Court precedent.

This Court has recognized two lines of Supreme Court cases addressing whether statutes conferred excessive government discretion so as to chill speech, and which apply different requirements for content-based and content-neutral

regulations. *Granite State Outdoor Advert., Inc. v. City of St. Petersburg, Fla.*, 348 F.3d 1278, 1281 (11th Cir. 2003). In the first case, *Freedman v. Maryland*, a plaintiff who was convicted for exhibiting a film without first submitting it for approval challenged the statute requiring that films obtain a license prior to release and giving the licensing board exclusive discretion to deny a license if the film was obscene. 380 U.S. 51, (1965). The Supreme Court first held Freedman's facial challenge was viable even though he had not submitted the film for review: "In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license." *Id.* at 56. The Court invalidated the statute, holding that because it required a content-based review of speech, the restraint could only be valid if the licensing scheme contained specific procedural safeguards. *Id.* at 58–60.

In contrast, in *Thomas v. Chicago Park District*, the Supreme Court upheld a scheme for obtaining a permit to hold a public event in a park, holding that because the licensing scheme was "not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum," the "extraordinary procedural safeguards" requirement in *Freedman* was inapplicable, and only

"adequate standards to guide the official's decision" were required. 534 U.S. 316, 323–24 (2002).

This Court in *Granite State* concluded that a municipal billboard permitting ordinance was content-neutral, and thus applied *Thomas* to hold that the ordinance contained adequate safeguards against unlimited discretion because officials could only process applications based on objective ordinance criteria, not because of the proposed content. 348 F.3d at 1282. While the Court recognized the possibility that officials would delay the processing of certain permits and thereby arbitrarily suppress disfavored speech, unlike in *Freedman*, the Court did not address that hypothetical concern in the abstract, concluding that such abuse would "be dealt with if and when a pattern of unlawful favoritism appears." *Id.*

The Opinion applies the reasoning in *Granite State* to conclude that Tracy "has, at most, shown a 'hypothetical constitutional violation[] in the abstract'" because he purportedly had not shown instances where FAU determined an outside speech activity constituted a prohibited conflict of interest,[2] nor had he reported his own blog to test the breadth of FAU's Policy. Op. 16-18. However, unlike in *Granite State*, the reporting and conflict-of-interest requirements under the Policy are content-based restraints because they draw distinctions based on the message

[2] Even if such a showing is required, Tracy did submit such evidence. *See supra* at 11.

the speaker conveys; indeed, 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." IB 38. And by failing to provide sufficient guidance, the Policy gives FAU officials unfettered discretion, permitting it to be used by officials to target and silence speech with which they disagree. IB 38-40.

These circumstances are akin to the content-based film licensing scheme in *Freedman*—which, in light of the dangers of censorship, could be facially challenged by a plaintiff who, like Tracy, had not submitted his speech for review but instead was punished for failing to do so—and are unlike the content-neutral time, place, and manner licensing schemes for park use and billboards in *Thomas* and its progeny—which would be invalidated only upon a showing of abuse by officials. Accordingly, the Panel's requirement that Tracy show a pattern of discriminatory enforcement to support his argument that the Policy grants officials unbridled discretion that creates a danger of suppressing disfavored speech is in conflict with Eleventh Circuit and Supreme Court precedent on an issue of exceptional importance, thus requiring full review by this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for rehearing and rehearing *en banc*.

Respectfully submitted,

By: */s/ Enrique D. Arana*
Enrique D. Arana (FBN 189316)
Email: earana@carltonfields.com
Steven M. Blickensderfer (FBN 09270)
E-mail: sblickensderfer@carltonfields.com
Rachel A. Oostendorp (FBN 0105450)
E-mail: roostendorp@carltonfields.com
CARLTON FIELDS, P.A.
2 MiamiCentral
700 NW 1st Avenue, Ste. 1200
Miami, Florida 33136
Tel: (305) 530-0050
Fax: (305) 530-0055

Counsel for Plaintiff James Tracy

CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this document complies with the type-volume limit of Federal Rules of Appellate Procedure 35(b)(2)(A) and 40(b)(1) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and 11th Circuit Rule 35-1, this document contains 3,849 words. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point type.

/s/ Enrique D. Arana

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of January, 2021, 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:

Louis Leo IV
Florida Bar No. 83837
Email: louis@floridacivilrights.org
Joel Medgebow
Florida Bar No. 84483
Email: joel@medgebowlaw.com
Matthew Benzion
Florida Bar No. 84024
Email: mab@benzionlaw.com
FLORIDA CIVIL RIGHTS COALITION, P.L.L.C.
Medgebow Law, P.A. & Matthew Benzion, P.A.
4171 W. Hillsboro Blvd., Suite 9
Coconut Creek, Florida 33073
Tel. (954) 478-4223
Fax (954) 239-7771

Co-Counsel for Plaintiff

Jack J. Aiello
Florida Bar No. 440566
Email: jaiello@gunster.com
Edward A. Marod
Florida Bar No. 238961
Email: emarod@gunster.com
Holly L. Griffin
Florida Bar No. 93213
Email: hgriffin@gunster.com
Gunster, Yoakley & Stewart, P.A.
777 South Flagler Dr. Suite 500 East
West Palm Beach, FL 33401
Tel. (561) 655-1980
Fax (561) 655-5677

Counsel for FAU Defendants

/s/ Enrique D. Arana

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10173

D.C. Docket No. 9:16-cv-80655-RLR

JAMES TRACY,

Plaintiff-Appellant,

versus

FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES,
CHRISTOPHER BEETLE,
JOHN W. KELLY,
HEATHER COLTMAN,
DIANE ALPERIN,
FLORIDA EDUCATION ASSOCIATION,
ROBERT ZOELLER, JR.,
MICHAEL MOATS,

Defendants-Appellees,

ANTHONY BARBAR, et al.,

Defendants.

Appeal from the United States District Court
for the Southern District of Florida

(November 16, 2020)

Before MARCUS, JULIE CARNES, and KELLY,* Circuit Judges.

JULIE CARNES:

Following the December 14, 2012 Sandy Hook Elementary School shooting in Newtown, Connecticut, where twenty children and six adults lost their lives, Plaintiff James Tracy attracted national news media attention for publicly questioning whether the massacre had in fact occurred. At the time, Plaintiff held a tenured position in the School of Communication and Multimedia Studies at Florida Atlantic University and maintained a personal online blog, called the "Memory Hole Blog," where he criticized the media and explored conspiracy theories. The University did not ask Plaintiff to stop blogging but did request that he post an adequate disclaimer on his blog and report his outside activities, as required under the faculty's collective bargaining agreement ("CBA"). As part of a settlement agreement, Plaintiff complied in part, posting a University-approved disclaimer. But he adamantly refused to report his blog, arguing that the blog did

* Honorable Paul J. Kelly, Jr., United States Circuit Judge for the Tenth Circuit, sitting by designation.

not qualify as a "Reportable Outside Activity" under the CBA's "Conflict of Interest/Outside Activities" policy ("the Policy"). Approximately two years later, after Plaintiff refused multiple requests to submit outside-activity reports and ignored warnings that his recalcitrance could result in termination, the University fired him for insubordination.

Plaintiff sued the University and associated individuals alleging that the Policy was unconstitutionally vague, that his termination breached the CBA, and that the University had used his insubordination as a pretext for First Amendment retaliation. Concluding that Plaintiff had failed to exhaust his remedies and that his vagueness challenge as to the Policy was not viable, the district court granted summary judgment against Plaintiff on both his constitutional and breach-of-contract claims. The court denied summary judgment as to Plaintiff's First Amendment retaliation claim, sending this claim to trial. The jury rejected Plaintiff's First Amendment retaliation claim after a nine-day trial. On appeal, Plaintiff asks us to reverse the district court's summary judgment rulings and to overturn the jury verdict. We decline to do so and affirm the decisions below.

I. PROCEDURAL HISTORY

Plaintiff's Second Amended Complaint asserted six claims, only five of which are at issue on appeal.[1] Claims 1, 3, and 4 were constitutional challenges asserted under 42 U.S.C. § 1983. In Claim 1, Plaintiff alleged that Defendants had terminated him in retaliation for exercising his constitutionally protected speech rights. Claims 3 and 4 alleged that the Policy was vague and overbroad, both facially and as applied to Plaintiff. Claim 5 requested a declaratory judgment that the Policy was unconstitutional. Finally, in Claim 6, Plaintiff alleged that the University had breached the CBA by firing him.

Defendants moved for summary judgment on all claims. In response, Plaintiff moved for partial summary judgment on Claims 1, 3, 4, and 5, arguing that the evidence showed he was terminated in retaliation for his protected speech and that the Policy was unconstitutional. The district court denied Plaintiff's motion. As for Defendants' motion, the district court granted summary judgment to Defendants on Claims 2–6, but denied the motion with respect to Claim 1: the First Amendment retaliation claim.

At trial, the jury returned a verdict for the University on Claim 1, finding "[t]hat Professor Tracy's blog speech was [not] a motivating factor in FAU's

[1] Plaintiff alleged in Claim 2 that his union conspired with the University to interfere with his civil rights. On appeal, Plaintiff does not challenge the district court's grant of summary judgment to Defendants on that claim.

decision to discharge him from employment." Plaintiff moved for judgment as a matter of law, arguing that the jury could not have reasonably found that his speech did not motivate the University to fire him. In the alternative, Plaintiff moved for a new trial, arguing that the verdict was against the great weight of the evidence, and that the court had abused its discretion in excluding a transcript of a Faculty Senate meeting where professors complained about the Policy. The district court denied Plaintiff's motions. This appeal followed.

II. DISCUSSION

A. Summary Judgment

The district court granted summary judgment to the University on Plaintiff's breach-of-contract claim (Claim 6), on his § 1983 claims that the Policy was facially unconstitutional (Claim 3) and unconstitutional as applied to him (Claim 4), and on his declaratory-judgment claim that the Policy should be declared unconstitutional (Claim 5). We affirm the district court's summary judgment rulings.

This Court reviews constitutional questions *de novo*. *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1239 (11th Cir. 2018). We also review *de novo* a district court's grant of summary judgment, viewing the evidence in the light most favorable to the non-moving party. *Id.* at 1239–40. "The court shall grant summary judgment if the movant shows that there is no

genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

1. Claim 6: Breach-of-contract claim

The district court correctly concluded that Plaintiff's failure to exhaust the CBA's mandatory grievance-and-arbitration procedures barred his claim that the University breached the CBA by firing him (Claim 6). "An employee claiming a breach by his employer of the collective bargaining agreement is bound by the terms of that agreement as to the method for enforcing his contractual rights" and "must attempt to use the grievance and arbitration procedure established by the employer and union in the collective bargaining agreement prior to bringing suit in federal court." *Redmond v. Dresser Indus., Inc.*, 734 F.2d 633, 635 (11th Cir. 1984).

Plaintiff concedes that he did not grieve his disputes in accordance with the CBA. He argues, however, that the grievance procedure was optional and that grieving would have been futile. Plaintiff's arguments are unpersuasive. The CBA clearly provides that the grievance procedure was mandatory, stating that that the procedure "shall be the sole and exclusive method for resolving the grievances of employees." As to his claim of futility, Plaintiff provides no support for his conclusory statement that "filing a grievance would have been a meaningless gesture." As the district court correctly observed, Plaintiff was not at the mercy of

the University's judgment because the collective bargaining agreement provided for an independent arbitrator. Accordingly, the district court did not err in granting summary judgment on Plaintiff's breach-of-contract claim.

2. Claims 3–5: Constitutional claims challenging the Policy

Although we affirm the district court on the constitutional claims, we get there by a different route than did that court. The district court granted summary judgment to the University on Plaintiff's constitutional claims challenging the Policy under the First and Fourteenth Amendments (Claims 3–5), ruling that Plaintiff failed to exhaust those claims through the CBA's grievance procedure and, in any event, that the CBA's contractual terms, unlike positive law, are not subject to a challenge on the ground of vagueness.[2]

[2] The district court also indicated its belief that Plaintiff lacked appellate standing to challenge the district court's grant of summary judgment on his claims that the Policy was unconstitutional because the jury's determination that the University did not fire Plaintiff based on his speech left Plaintiff with no standing to challenge that policy. We disagree with that assessment. "The primary limitation on a litigant's appellate standing is the adverseness requirement," under which "[o]nly a litigant who is aggrieved by the judgment or order may appeal." *Wolff v. Cash 4 Titles*, 351 F.3d 1348, 1353–54 (11th Cir. 2003) (alteration accepted) (quotation marks omitted). The jury's finding that the University did not fire Plaintiff for his speech did not decide Plaintiff's claim that the University fired him for failing to comply with what he asserts to be an unconstitutional policy. In any event, even if one concluded that the jury's finding precluded a reversal of the district court's grant of summary judgment on the constitutional claims, Plaintiff has standing to challenge the summary judgment ruling because he has appealed that jury verdict, meaning a successful appeal could result in a new trial.

The district court also ruled that Plaintiff had waived his constitutional challenge to the Policy because, as a former union president and as a union member, Plaintiff had accepted the CBA's terms, one of which terms included the policy that Plaintiff now challenges. Defendants expressly abandoned their waiver defense at trial, however, and that ruling is not before us on appeal.

In so explaining its ruling, the district court relied on *Hawks v. City of Pontiac*, 874 F.2d 347 (6th Cir. 1989). In that case, the plaintiff police officer had been demoted after violating a residency requirement in a collective bargaining agreement. *Id.* at 348–49. The Sixth Circuit held that the officer could not challenge the requirement because it was a contractual term that "may not be characterized as a positive law subject to due process challenge for vagueness" and the requirement's interpretation was subject to the collective bargaining agreement's grievance and arbitration process. *Id.* at 349–50. *Hawks* has some intuitive appeal because the vagueness doctrine concerns fair notice, and parties to a contract are ordinarily presumed to understand terms to which they have agreed. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (noting that the vagueness doctrine addresses "[a] fundamental principle in our legal system . . . that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required"); *see also* 27 Williston on Contracts § 70:114 (4th ed.) ("One who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them.").

Nevertheless, there are reasons to doubt the viability of the Sixth Circuit's reasoning, given the existence of caselaw indicating that § 1983 claims generally need not be exhausted and that collective bargaining agreements are not immune to

constitutional challenges, plus the fact that courts regularly entertain vagueness challenges to policies that do not qualify as positive law. *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 515–16 (1982) (holding that § 1983 claims need not be exhausted unless Congress has "carved out . . . [an] exception to the no-exhaustion rule"); *Beaulieu v. City of Alabaster*, 454 F.3d 1219, 1226–27 (11th Cir. 2006) ("The Supreme Court and this Court have held that there is no requirement that a plaintiff exhaust his administrative remedies before filing suit under § 1983." (citing *Patsy*, 457 U.S. at 516)); *Narumanchi v. Bd. of Trustees of Connecticut State Univ.*, 850 F.2d 70, 73 (2d Cir. 1988) ("Nor is it permissible, in light of *Patsy v. Board of Regents, supra*, 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."); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273–74, 284 (1986) (holding that a contractual provision in a collective bargaining agreement, which "operate[d] against whites and in favor of certain minorities," violated the Equal Protection Clause); *see, e.g.*, *Doe v. Valencia Coll.*, 903 F.3d 1220, 1232–33 (11th Cir. 2018) (concluding that a university's code of conduct, which did not qualify as positive law, was neither facially overbroad nor unconstitutionally vague); *see also Hamilton v. U.S. Postal Serv.*, 746 F.2d 1325, 1328 (8th Cir. 1984) (holding that a

collective bargaining agreement's standard for discipline was not unconstitutionally vague).

That said, we need not accept or reject the Sixth Circuit's reasoning to resolve this appeal, as Plaintiff loses on the merits of his challenge. *See Wetherbee v. S. Co.*, 754 F.3d 901, 905 (11th Cir. 2014) (noting that we may affirm a district court's summary judgment ruling on any ground supported by the record). Thus, without deciding the issue, we assume for the purposes of this appeal that Plaintiff could constitutionally challenge the Policy on vagueness grounds.

In evaluating the merits of Plaintiff's challenge, we note first that the CBA's Policy has two components. First, the Policy includes a reporting requirement, under which a faculty member who proposes to engage in a "Reportable Outside Activity" must submit "a detailed written description of the proposed activity." The CBA defines "Reportable Outside Activity" as "any *compensated or uncompensated professional practice*, consulting, teaching or research, which is not part of the employee's assigned duties and for which the University has provided no compensation." (Emphasis added.) Second, the Policy includes a prohibition on engaging in any "conflict of interest," which is defined as including (1) "any conflict between the private interests of the employee and the public interests of the University," (2) "any activity which interferes with the full performance of the employee's professional or institutional responsibilities or

obligations," and (3) "any outside teaching employment." Thus, the Policy's reporting requirement allows the University to assess whether a professor's outside activity constitutes a conflict of interest, while the Policy's prohibition on conflicts of interest provides a mechanism for the University to prohibit an outside activity that so qualifies.

Plaintiff raises two primary arguments, which roughly correspond to the Policy's two components. First, he argues that the reporting requirement is unconstitutionally vague because the term "professional practice" in the definition of "Reportable Outside Activity" does not give fair notice to professors as to what must be reported. In particular, he contends that the term "professional practice" is undefined and broad enough to encompass any outside activity because the Policy states that the term includes both "compensated and uncompensated" activities.

Plaintiff's argument is unpersuasive. "The void-for-vagueness doctrine serves two central purposes: (1) to provide fair notice of prohibitions, so that individuals may steer clear of unlawful conduct; and (2) to prevent arbitrary and discriminatory enforcement of laws." *Mason v. Fla. Bar*, 208 F.3d 952, 959 (11th Cir. 2000). Accordingly, "[v]agueness arises when a statute is so unclear as to what conduct is applicable that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* at 958.

Here, the term "professional practice" is not vague, especially when considered in context. Further, the fact that the Policy does not define "professional practice" is not dispositive. When a term is left undefined, "we normally construe it in accord with its ordinary or natural meaning." *See Smith v. United States*, 508 U.S. 223, 228 (1993); *accord F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994). On that score, the ordinary meaning of "professional practice" is readily understandable, and its scope is limited. "Practice" means "to make use of" or "to carry on or engage in." *Practice*, Merriam-Webster Unabridged, https://unabridged.merriam-webster.com/unabridged/practice (last visited Nov. 3, 2020). "Professional" is generally defined as "of, or relating to, or characteristic of a profession or calling" or "engaged in one of the learned professions or in an occupation requiring a high level of training and proficiency." *Professional*, Merriam-Webster Unabridged, https://unabridged.merriam-webster.com/unabridged/professional (last visited Nov. 3, 2020). Thus, "professional practice" refers to engaging in an activity characteristic of one's profession. That the Policy uses the term "professional practice" in this sense is further confirmed by the fact that it appears in a list of activities typically engaged in by academic professionals, such as "consulting," "teaching," and "research." *See Third Nat'l Bank in Nashville v. Impac Ltd., Inc.*, 432 U.S. 312, 322 (1977) ("It is a familiar principle of statutory construction that words grouped in a list should

be given related meaning."); *see also Ace Am. Ins. Co. v. Wattles Co.*, 930 F.3d 1240, 1258–59 (11th Cir. 2019) (discussing the "associated words canon"). Finally, because the plain meaning of "professional practice" limits the term's application to activities that are "professional" in nature, the term does not encompass any and all outside activities, as Plaintiff contends.

While certain activities might less clearly connote a professional practice than would other activities, that possibility does not render the Policy unconstitutionally vague. *See United States v. Williams*, 553 U.S. 285, 306 (2008) ("What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is."); *see also Fox Television Stations*, 567 U.S. at 253 ("[A] regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved."). "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). In short, we conclude that the plain meaning of "professional practice" provides fair notice to persons of ordinary intelligence as to what is reportable under the Policy and does not present a risk of arbitrary or discriminatory enforcement.

Plaintiff's vagueness challenge fails for the additional reason that the reporting requirement clearly applied to his own particular unreported activity. *Cf. Valencia Coll.*, 903 F.3d at 1233 ("[A] plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim . . . ." (alteration and ellipsis in original) (quotation marks omitted)). As his union president later testified, the blog clearly constituted "professional practice" because Plaintiff was a media expert who taught courses such as "The Culture of Conspiracy," and the blog closely mirrored what he did professionally.

Finally, we find meritless Plaintiff's overarching First Amendment arguments that the Policy's reporting requirement is facially overbroad and constitutes a content-based restriction on speech. A facial-overbreadth challenge requires a showing that "the statute punishes a substantial amount of protected free speech." *Valencia Coll.*, 903 F.3d at 1232 (emphasis omitted) (quotation marks omitted). But the reporting requirement does not punish or restrict *any* speech; it requires only that faculty *report* certain types of speech activities. That University officials must perform a "cursory examination" of a professor's speech content—which is at most what the Policy requires to assess whether an activity qualifies as a professional practice—does not transform the reporting requirement into a content-based regulation. *See Hill v. Colorado*, 530 U.S. 703, 721–22 (2000) ("We have never held, or suggested, that it is improper to look at the content of an

oral or written statement in order to determine whether a rule of law applies to a course of conduct."). Nor has Plaintiff offered any persuasive argument why, as applied to him, the requirement became a content-based regulation. Accordingly, Plaintiff's facial and as-applied First Amendment challenges to the Policy's reporting requirement fail.

Plaintiff's second argument is that the Policy's definition of "conflict of interest," combined with its prohibition of such conflicts, operates as a prior restraint on speech that is unconstitutional under the unbridled-discretion doctrine. The unbridled-discretion doctrine generally applies to licensing or permitting schemes that require individuals to obtain permission before engaging in speech activities. *See, e.g.*, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 769–70 (1988). Under the doctrine, a licensing scheme that "allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity" can be challenged as facially unconstitutional. *Id.* at 755–56. "To avoid unbridled discretion, the permit requirements should contain narrowly drawn, reasonable, and definite standards to guide the official's decision." *Bloedorn v. Grube*, 631 F.3d 1218, 1236 (11th Cir. 2011).

Here, Plaintiff contends that the definition of "conflict of interest," which includes any activity that conflicts with "the public interests of the University," fails to adequately constrain the University's authority to prohibit outside

activities. At first glance, Plaintiff's argument is not entirely implausible. *See Lakewood*, 486 U.S. at 769–70, 772 (holding that a licensing ordinance, which gave the mayor authority to deny a permit if he deemed it "necessary and reasonable," was facially unconstitutional under the unbridled-discretion doctrine because "nothing in the law as written require[d] the mayor to do more than make the statement 'it is not in the public interest' when denying a permit application").

On closer inspection, however, Plaintiff's argument suffers from a critical defect. Even assuming that the Policy applies to some speech activities, Plaintiff's unbridled-discretion claim fails because he has, at most, shown a "hypothetical constitutional violation[] in the abstract." *Granite State Outdoor Advert., Inc. v. City of St. Petersburg*, 348 F.3d 1278, 1282 (11th Cir. 2003) (noting that "we [were] reluctant to invalidate an entire legitimately-enacted ordinance absent more of a showing it is as problematic as [the plaintiff] claims"). The Supreme Court has held that, even when "unduly broad discretion" creates "a risk that [a licensing official] will favor or disfavor speech based on its content," such "abuse must be dealt with if and when a pattern of unlawful favoritism appears, rather than by insisting upon a degree of rigidity that is found in few legal arrangements." *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323, 324–25 (2002); *Wright v. City of St. Petersburg*, 833 F.3d 1291, 1299 (11th Cir. 2016) ("A discriminatory

enforcement claim can be brought only if a pattern of selective enforcement appears.").

Here, Plaintiff submitted no evidence that the University has prohibited any professor from engaging in any speech activity, much less that the University has relied on a "public interest" rationale in doing so. Plaintiff's failure to identify even a single instance in which the University has determined that an outside speech activity constitutes a prohibited "conflict of interest" is telling, as the trial evidence indicated that the Policy's language has been part of the CBA for well over a decade. Indeed, Plaintiff's claim that the "conflict of interest" definition is facially overbroad is purely speculative. As the party with "the burden of demonstrating, from the text of the law and from *actual fact*, that substantial overbreadth exists," Plaintiff has not shown "a *realistic danger* that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Valencia Coll.*, 903 F.3d at 1232 (emphasis added) (quotation marks omitted).

In short, we decline to require "a degree of rigidity that is found in few legal arrangements" based on nothing more than a hypothetical fear that the University might discriminate based on speech content when determining which outside activities constitute a "conflict of interest." *Thomas*, 534 U.S. at 325. Indeed, Plaintiff could have tested the breadth of the conflict-of-interest prong by reporting

the activity in question. At that point, the University could have decided whether or not the conduct represented a conflict of interest and responded accordingly.[3] It was Plaintiff's decision not to do so. Thus, Plaintiff's challenge to the Policy's conflict-of-interest provision fails on the merits.

Given that Plaintiff's constitutional challenges to the Policy asserted in Claims 3 and 4 fail on the merits, his declaratory-judgment claim based on those same grounds (Claim 5) fails as well. Accordingly, we affirm the district court's grant of summary judgment to the University on Claims 3–5.[4]

---

[3] Indeed, the district court cited a lack of ripeness as an alternative ground for granting summary judgment to the University on Plaintiff's as-applied challenge, found in Claim 4. By failing to address this ruling in his opening brief, Plaintiff has arguably abandoned Claim 4. *Starship Enterprises of Atlanta, Inc. v. Coweta Cty.*, 708 F.3d 1243, 1252 n.12 (11th Cir. 2013). In any event, we conclude that the district court's ripeness ruling was correct insofar as it addressed Plaintiff's challenge to the University's application of the Policy's "conflict of interest" definition. "The ripeness doctrine protects federal courts from engaging in speculation or wasting their resources through the review of potential or abstract disputes." *Digital Props., Inc. v. City of Plantation*, 121 F.3d 586, 589 (11th Cir. 1997). Here, Plaintiff's as-applied challenge to the conflict-of-interest provision was unripe because he failed to report his blog, thereby depriving the University of an opportunity to determine whether his blog speech constituted a prohibited "conflict of interest" under the Policy. *See id.* at 590 (holding that a First Amendment as-applied challenge to a zoning ordinance was unripe because the plaintiff did not satisfy its "obligation to obtain a conclusive response from someone with the knowledge and authority to speak for the City regarding the application of the zoning scheme to [the plaintiff's] proposal"). In other words, the University never *applied* the conflict-of-interest provision and therefore never restricted Plaintiff's speech.

[4] On appeal, Plaintiff argues that we must reverse the district court's grant of qualified immunity to two of the individual defendants on Claim 1 if we reverse the court's summary judgment ruling on Claims 3–5. Because we affirm the district court's summary judgment rulings, we obviously do not disturb the district court's qualified-immunity rulings.

B. Motions for Judgment as a Matter of Law and for a New Trial

Plaintiff not only attacks the district court's grant of summary judgment as to certain claims, but also challenges the jury's verdict against him on the one claim that went to trial: the retaliation claim. Arguing that no reasonable juror could have found that his blog speech did not motivate the University to fire him, Plaintiff argues that the district court erred in denying his motion for judgment as a matter of law and abused its discretion in denying his motion for a new trial. Plaintiff, however, cherry-picks the evidence supporting his theory of the case, while ignoring the substantial body of evidence supporting the jury verdict. Accordingly, his contentions on this point are unpersuasive.

We review *de novo* a district court's denial of a renewed motion for judgment as a matter of law, considering the evidence in the light most favorable to the nonmoving party. *EEOC v. Exel, Inc.*, 884 F.3d 1326, 1329 (11th Cir. 2018), *cert. denied sub nom. Travis v. Exel, Inc.*, 139 S. Ct. 1373 (2019). Judgment as a matter of law is appropriate where a court finds that "a reasonable jury would not have a legally sufficient evidentiary basis to find for [a] party on [an] issue." Fed. R. Civ. P. 50(a)(1). "We will not second-guess the jury or substitute our judgment for its judgment if its verdict is supported by sufficient evidence." *Exel*, 884 F.3d at 1329 (quoting *Lambert v. Fulton Cty.*, 253 F.3d 588, 594 (11th Cir. 2001)).

We review for an abuse of discretion a denial of a motion for new trial. *Pensacola Motor Sales Inc. v. E. Shore Toyota, LLC*, 684 F.3d 1211, 1231 (11th Cir. 2012). "A judge should grant a motion for a new trial when the verdict is against the clear weight of the evidence or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir. 2001) (quotation marks omitted). "Because it is critical that a judge does not merely substitute his judgment for that of the jury, new trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great—not merely the greater—weight of the evidence." *Id.* (quotation marks omitted).

To establish that he was discharged in retaliation for protected speech, Plaintiff had to prove, among other things, that his speech played a "substantial part" in the University's decision to terminate him. *Anderson v. Burke Cty.*, 239 F.3d 1216, 1219 (11th Cir. 2001). The jury found that Plaintiff had failed to do so, as it found that Plaintiff's blog speech was not a motivating factor in the University's decision. We conclude that there was more than sufficient evidence to support the jury's verdict.

First, Vice Provost Diane Alperin and Dean Heather Coltman, who were involved in the decision to fire Plaintiff, testified that the University terminated

Plaintiff for insubordination, that the University would not have disciplined him if he had submitted complete outside-activity reports, and that they never asked Plaintiff to stop writing his blog. And contrary to Plaintiff's argument, this "self-serving testimony" was not "the only evidence [the University] offered in support of its motivations."

The record shows that the University waged a multi-year battle to get Plaintiff to comply with his obligation to report outside activities. The administration told Plaintiff to file an outside-activity form in 2013. He refused to do so; instead he argued that he did not need to report his blog. Then, in 2015, Plaintiff instigated a new conflict over the reporting requirements when he refused to accept the "Terms and Conditions" of his annual academic assignment, one of which terms included an acknowledgement that faculty must report outside activities. Rather than agreeing to the "Terms and Conditions" and simply reporting his blog, Plaintiff insisted that the University clarify in writing that his blog could not constitute a conflict of interest.

Accordingly, in November 2015, the University sent Plaintiff a Notice of Discipline, which gave him 48 hours to submit outside-activity reports and warned that failure to do so would constitute insubordination. When Plaintiff did not submit the forms and expressed confusion about the Policy, the University extended the deadline, warning him that failure to comply with the new deadline

could result in termination.[5] But Plaintiff did not meet that deadline either. Instead, Plaintiff untimely submitted incomplete outside-activity reports that failed to identify his blog. Due to his failure to timely file complete outside-activity reports, the University sent a final Notice of Proposed Discipline, which warned Plaintiff that he would be terminated if he did not respond within ten days. Astonishingly, Plaintiff did not respond and was terminated based on his own default.[6]

Given the University's multiple warnings that Plaintiff was required to file outside-activity reports and Plaintiff's repeated refusal to do so, there is little doubt that Plaintiff was insubordinate. Indeed, Plaintiff privately confessed to his union president that his conduct was "cut-and-dry" insubordination and that he had not complied with University directives because he believed his tenure status would insulate him against any discipline. Moreover, according to Vice Provost Alperin, Plaintiff was not the only faculty member who was fired for insubordination after failing to complete outside-activity reports. Given this evidence, and the undisputed fact that the University had allowed Plaintiff to continue blogging for

[5] Notably, while Plaintiff feigned ignorance as to whether he should report his Memory Hole Blog, his union president advised him to report the blog because it was "in line with what [Plaintiff] did professionally, the conspiracy theories, the media critiquing, media criticism, . . . [things] that were arguably an extension of what he did professionally."

[6] Plaintiff blamed his failure to respond on his union attorney's incompetence.

over two years, a reasonable jury could have found that Plaintiff's insubordination—not his blog speech—was the University's sole motivation for firing him.

Although we agree that Plaintiff introduced some circumstantial evidence of First Amendment retaliation, the jury was entitled to weigh the evidence. It did so, and it found for the University. *See McGinnis v. Am. Home Mortg. Servicing, Inc.*, 817 F.3d 1241, 1254 (11th Cir. 2016) (holding that it is the jury's role at trial to weigh conflicting evidence and determine the credibility of witnesses). Because sufficient evidence clearly supported the jury's finding and because we cannot say that the jury's verdict was against the weight of the evidence, we affirm the district court's denial of Plaintiff's renewed motion for judgment as a matter of law and motion for a new trial.

C. Exclusion of the Faculty Senate Meeting Transcript

On appeal, Plaintiff argues that the court abused its discretion in excluding an excerpt of the transcript of a September 2015 Faculty Senate meeting, which excerpt captured a heated exchange over the Policy by faculty members. We review evidentiary rulings for an abuse of discretion. *U.S. Steel, LLC, v. Tieco, Inc.*, 261 F.3d 1275, 1286 (11th Cir. 2001). "An error on an evidentiary ruling will result in the reversal of a jury's verdict only if a party establishes a substantial prejudicial effect or a manifest injustice." *Id.* We conclude that the district court

did not abuse its discretion when it denied admission of this transcript. Accordingly, we affirm the court's evidentiary ruling.

This Faculty Senate meeting transcript that Plaintiff sought to introduce at trial reflected much antagonism by some faculty members as to the CBA Policy. Several professors expressed confusion about what outside activities were reportable under the Policy. Others took umbrage at the University's follow-up inquiries concerning certain activities that were reported. Vice Provost Alperin commented that the University had been working to clarify the outside-activity form. Finally, a faculty member who was running the meeting said that addressing the professors' concerns would be premature because he did not yet know the relevant facts, but that their complaints could be the subject of a future meeting.

The district court ruled that the transcript contained a great deal of inadmissible hearsay but, more importantly, that its admission would violate Federal Rule of Evidence 403. The court reasoned that the angry remarks of some of the professors, which did not concern Plaintiff's specific case, would focus the jury on the wisdom of the Policy, not on the question properly before the jury: whether the University had terminated Plaintiff because of his blog or instead because of his insubordination. As such, the transcript not only lacked probative value, but it also created a substantial risk of unfair prejudice and jury confusion.

We find no error in the district court's exclusion of this evidence pursuant to Rule 403, as we agree with that court's reasoning. Rule 403 permits a court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.[7] Given that the professors' pique was the predominant focus of the Faculty Senate meeting, there was a serious risk that admitting the transcript would cause the University to suffer unfair prejudice, forcing it to defend its character against inadmissible claims concerning other individuals, while distracting the jury from their central obligation to decide the issue before them.

Moreover, the district court correctly found that statements regarding faculty confusion had little probative value for the core issue at trial—whether the University fired Plaintiff for his speech rather than for his admitted insubordination. In seeking to introduce evidence of purported confusion by some faculty members about the Policy, Plaintiff sought to corroborate his claim that he was confused about the Policy, which he said might help to explain why he had

[7] We reject Plaintiff's argument that the professors' complaints about the University's enforcement of the Policy were relevant to show the effect of these remarks on Plaintiff and the University. As an initial matter, there is no evidence that Plaintiff was at the meeting. In any event, whether Plaintiff and the University knew that some professors disliked the Policy or that some professors indicated their confusion about the policy was irrelevant to whether the University fired Plaintiff because he wrote a blog.

acted in an insubordinate manner. But whether or not another faculty member was uncertain whether that member's particular activity was reportable had nothing to do with whether Plaintiff was confused about whether his own blogging activities met the reporting requirement. Moreover, as the district court correctly noted, the transcript evidence was cumulative of other evidence introduced by Plaintiff in support of his claim that he was confused.

In short, we conclude that the district court did not abuse its discretion in excluding the Faculty Senate meeting transcript.

III. CONCLUSION

After careful consideration, and with the benefit of oral argument, we affirm the district court's summary judgment rulings and its denial of Plaintiff's post-trial motions for judgment as a matter of law and for a new trial.

AFFIRMED.