No. 21-

IN THE

Supreme Court of the United States

JAMES TRACY,

Petitioner,

v.

FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES, A/K/A FLORIDA ATLANTIC UNIVERSITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Florida Atlantic University has a reporting policy that requires its faculty and staff to disclose outside professional activities to the university so that it may determine whether those activities constitute a conflict of interest. FAU used that policy as purported justification to terminate Professor James Tracy for not "disclosing" a notorious and widely criticized personal blog, which questioned the veracity of the Sandy Hook massacre narrative depicted by the government and the media. FAU's reporting policy incoherently defines professional practice as both compensated and uncompensated activity, does not make any reference to blogging or social media use, and was applied to Professor Tracy even though the policy had never been applied to require the reporting of personal blogs by any of the dozens of other FAU professors who maintain blogs or social media sites. The question presented is:

Whether FAU's conflict-of-interest reporting policy is unconstitutionally vague, impermissibly chills speech, and may be facially challenged because it grants the public university unbridled discretion to engage in content-based viewpoint discrimination against employees like Professor Tracy?

PARTIES TO THE PROCEEDING

Petitioner (plaintiff-appellant below) is James Tracy.

Respondents (defendants-appellees below) are Florida Atlantic University Board of Trustees, a/k/a Florida Atlantic University, Christopher Beetle, John W. Kelly, Heather Coltman, Diane Alperin, Florida Education Association, Robert Zoeller, Jr., and Michael Moats.

RELATED PROCEEDINGS

Tracy v. Florida Atlantic University Board of Trustees et al., No. 9:16-cv-80655, U.S. District Court for the Southern District of Florida. Judgment entered December 15, 2017.

Tracy v. Florida Atlantic University Board of Trustees et al., No. 18-10173, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered November 16, 2020, and become final February 25, 2021.

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James Tracy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

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The opinion of the Eleventh Circuit is reported at 980 F.3d 799 and reproduced at App.1a-25a. The district court's opinion is available at 2017 WL 4962652 and reproduced at App.72a-108a.

JURISDICTION

The Eleventh Circuit issued its judgment on November 16, 2020, which became final on February 25, 2021, when the Eleventh Circuit denied the petition for rehearing and rehearing en banc. App.109a-110a. On July 19, 2021, this Court extended the deadline to file a certiorari petition to 150 days in cases in which the order denying a timely petition for rehearing was issued prior to that date. The Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution states:

> Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

INTRODUCTION

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

The Chief Justice's quotation of this bedrock First Amendment principle was from Justice Brennan's opinion for the Court striking down a state law prohibiting the burning of the American flag in protest, *Texas v. Johnson*, 491 U.S. 414 (1989). The Chief Justice further elaborated by observing "'the point of all speech protection…is to shield just those choices of content that in someone's eyes are misguided or even hurtful.'" *Snyder*, 562 U.S. at 458 (citing *Hurley v. Irish-American Gay Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574 (1995)).

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

This termination violated the First Amendment for two fundamental reasons. First, FAU's conflict-of-interest 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. The Policy did not give Tracy reasonable notice that it required disclosure of his blogging, and its vagueness enabled FAU to engage in content-based viewpoint discrimination against him.

Second, the record evidence, as well as the face of the policy, established that to begin to determine whether blogging, fully protected speech activity, putatively needed to be disclosed required administrators to review its content. 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.

This Court has recently reaffirmed the bedrock principle that the First Amendment protects unpopular and even hurtful speech within the context of public schools, holding in *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038 (2021), that vulgar social media posts by a student outside of school are entitled to full First Amendment protection. The decision underscores that, as "the nurseries of democracy," public schools have "an interest in protecting a student's unpopular expression, especially when the expression takes place off campus."

Id. at 2046. This case presents the important question whether public university professors and staff are entitled to the same protections for their non-work-related speech and expressive activity. In particular, whether FAU's conflict-of-interest reporting policy is unconstitutionally vague, impermissibly chills speech, and may be facially challenged because it grants the public university unbridled discretion to engage in content-based viewpoint discrimination against employees like Professor Tracy

STATEMENT

A. Professor Tracy and Florida Atlantic University

Florida Atlantic University ("FAU") is a public university. 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. Tracy received awards for his work, regularly earned "excellent" reviews, and was a former president of the faculty union. Tr.Vol.4 at 207; DE:447-14; Tr.Vol.2 at 112, 214.[1]

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

In 2012, Tracy started a blog titled "Memory Hole: Reflections on Media and Politics" that offered his

1. Citations to the Appendix will be referred to as "App.X." Citations to documents in the district court's record will be referred to as "DE:X at Y." The trial transcript will be referred to as "T.Vol.X at Y," where "X" represents the trial transcript volume number, and "Y" represents the page number. The trial transcripts are located in the district court records between DE:465 and DE:473.

personal opinions on politics and current events. Tracy blogged on his personal time and made the blog available for free to the public. T.Vol.2 at 57.; T.Vol.4 at 13. He was not compensated for his blogging, but accepted donations to help cover the server costs of running the website. T.Vol.3 at 40-42. He received only $850 in donations prior to his termination, all of which went towards maintaining the blog. *Id.*

In December 2012, Tracy began blogging about the Sandy Hook Elementary School massacre and his belief that the mass shooting did not take place in the way depicted by the government and the media and may have been staged by the government to promote gun control. His posts garnered national criticism and were widely reviled by the public and media, including CNN. DE93 ¶¶ 47-48; DE:249-30; T.Vol.3 at 66-67. The attention resulted in numerous calls from current and prospective students, donors, and the public at large for FAU to fire Tracy. T.Vol.4 at 79-80; T.Vol.5 at 45-46.

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

In January 2013, FAU officials met to discuss the negative press surrounding Tracy's blog and explore terminating him. T.Vol.4 at 87-94; T.Vol.5 at 163, 174. The group kept handwritten notes and agreed not to exchange emails so their discussions would not enter the public record. DE:250-10 at 1. Their notes recognized that FAU was bound by "freedom of speech" and "acad[emic] freedom," but stated Tracy's activities were "reckless + irresponsible," and that he was a "black eye on all faculty" and a "1-man argument against tenure." *Id.* at 3. The

notes also state "JT [is] not going to stop publishing," and the group was encouraged to "read his stuff" and "find winning metaphors" to circumvent the "1st Amendment." *Id.* at 4.

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

Tracy objected, citing his First Amendment rights and his belief that his disclaimer, which stated the blog reflected his views alone but did identify him as an FAU professor, was sufficient and the personal blog did not need to be reported. *Id.*; DE:250-29 at 2. FAU issued a notice of discipline, citing only the insufficient disclaimer and Tracy's use of his title on the blog. FAU did not discipline Tracy for failing to report the blog or refusing to submit a form. DE:447-6. Tracy understood that to mean he was not required to report his blog. T.Vol.2 at 123:8-18.

Around that time, educational and constitutional rights groups sent letters to FAU condemning the threatened discipline and supporting Tracy's right to maintain his blog, and his union helped defend against the discipline. DE:250-29; T.Vol.2 at 112:3-9. 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 drafted by FAU stating the content of the blog were the views of Tracy and not FAU. DE:447-5. Tracy was the only professor required to forgo his work title on a blog or social media, and the only one required to use a custom disclaimer. T.Vol.2 at 121-22. Tracy continued to blog in the 2014-2015 academic year, and FAU did not request any forms.

D. FAU's Impermissibly Vague Conflict-Of-Interest Policy Regarding Blogging

All Florida public universities must have a conflict-of-interest policy. FAU's conflict-of-interest Policy (the "Policy") consists of multiple documents and forms. DE:248 ¶11, DE:250-18, 250-32, 250-37, 250-44. FAU did not have a separate policy on blogging, podcasting, or posting on social media. Blogging is not referenced or defined in the documents and forms that comprise FAU's Policy. And to apply the Policy to a blog, administrators would have to examine the contents of the blog.

The Policy instructs that all FAU employees must report their conflicts of interest, conflicts of commitment, and outside activities "prior to" engaging in the activity. DE:250-33 at 7. It forbids employees from having an interest that interferes with the "full and competent performance of the employee's duties." DE:250-37. "[A]n employee may participate in outside activities and hold financial interests as long as these activities and interests are reported and do not conflict with the employee's duties to the university." DE:250-33 at 6-7.

Reporting is done on an annual basis on a form titled "Report of Outside Employment of Professional Activities for FAU Employees." DE:250-35. The form offers check boxes for four types of activities: "Employment"; "Professional Activity"; "Compensated Activity"; and "Continuing Business Interest." None is defined in the form or elsewhere. Blogging is not included or suggested by the form. No check box is offered for any type of uncompensated activity. FAU employees who do not engage in a conflict of interest activity are not required to fill out a form, and compliance is based on the honor system. Tr.Vol.5 at 202:3-4; Tr.Vol.4 at 160:25-161:1; T.Vol.6 at 88:16-17.

The Policy's key terms are undefined. Employees must provide a written description of "reportable outside activity," which is defined as "any compensated or uncompensated professional practice, consulting, teaching or research, which is not part of the employee's assigned duties." DE:250-32. The Policy does not define "professional practice," nor does it include blogging on public issues.

The Policy is supposed to prohibit "conflicts of interest," the definition of which includes "any conflict between the private interests of the employee and the public interests of the University, the Board of Trustees, or the State of Florida" and "any activity which interferes with the full performance of the employee's professional or institutional responsibilities or obligations." DE:250-32. The Policy does not define "public interests" or "private interests," or provide guidance as to what "full performance," or interference thereof, entails. FAU officials admitted the only way to determine whether a blog, social media post,

book, or honorarium must be reported is by reviewing the content of the speech to determine whether it conflicts with FAU's "interests." 250-5 at 174-76; DE:250-11 at 14; DE:447-13;T.Vol.4 at 207-10.

E. Other Faculty Members Protested The Policy's Vagueness

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, and "no one knows what outside activity the university is targeting." DE:250-47 at 4-6. One professor, who taught at FAU for over 30 years, stated that "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." *Id.* at 5. One of the FAU administrators who fired Tracy informed the professors at the meeting that FAU was working on revisions to clarify the Policy and forms. *Id.* at 24.

In 2015, FAU used the Policy as a pretext to target another professor for writing a local newspaper op-ed "that the University did not like." DE:246-14 at 18; DE:250-47 at 14. FAU used the Policy to justify placing a discipline letter in the author's personnel file, which could then be used as a means for further discipline or termination under FAU's progressive discipline system. DE:246-14 at 19.

F. FAU Deployed The Policy As A Pretext For Firing Tracy

After Tracy's blog again made waves in September 2015, FAU continued to monitor the blog and internally circulated articles from the media and complaints from the public that were critical of Tracy and FAU for not having fired him, compiling the negative news articles into email reports and calling them the "JT media reports." DE:249-1; DE:249-27; DE:447-26; DE:447-31.

In October 2015, notwithstanding the confusion and pending changes to the Policy, Tracy's supervisor sent him an email reminding him to fill out the forms for "outside employment income." DE:250-51. Between October and November 2015, 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. DE:447-15; DE:447-20; DE:447-21; T.Vol.2 at 139-148; T.Vol.6 at 14-17. Tracy raised concerns that he had not received clarification on the "considerable confusion" created by the Policy, and regarding the Policy's breadth and that it violated his First Amendment rights. DE:250-57. 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." DE:249-7 at 2.

Over twenty (and likely countless more) FAU professors maintain blogs or other social media sites. None of these other professors have disclosed their blogs

or social media profiles to FAU under the Policy, and none have been disciplined, much less fired, for failing to report their expressive activity. DE250-14 ¶¶4-50. Tracy is the only faculty member known to have ever been required to report a personal blog or similar online speech as a potential conflict of interest under the Policy. DE:250-14 ¶65.

G. FAU Administrators Celebrated Tracy's Firing

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

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

DE:249-8. Tracy's boss, who was one of the FAU deans who fired him, forwarded this statement to another FAU dean and separately called the author her "hero." *Id.*; DE:249-9.

FAU administrators, including Tracy's boss who fired him, mocked Tracy and joked about his termination.

DE:249-12; DE:249-14; DE:249-15; DE:447-27; DE:447-28; DE:447-29. In one email with the subject "check out today's memory hole blog," the administrator called Tracy a "Nut job." DE:249-14. On Tracy's last day, the administrator sent her colleague an email asking: "How is your employee?"—referring to Tracy's wife, a librarian at FAU—"Mine is packing up his office today." DE:249-13. She sent another colleague an image of a cocktail. DE:447-46.

H. Tracy's Action Against FAU

Tracy filed this action pursuant to 42 U.S.C. §1983 against FAU and certain FAU 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 to be reinstated.

1. Trial court proceedings

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 Tracy's First Amendment claims other than retaliation needed to be grieved pursuant to a collective bargaining agreement. App.72a-108a.

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. Despite evidence that FAU officials closely monitored Tracy's blog, brainstormed ways to circumvent the First Amendment, fired him for failing to report a blog that was well known to FAU and thus effectively reported to the University, and celebrated his termination, the jury concluded that Tracy's speech was not a motivating factor in his termination and never reached the second question. The district court entered a final judgment and denied Tracy's post-trial motions. App.26a-71a; DE:484.

2. Appellate proceedings

Tracy appealed, arguing (among other things) that the Policy violated the First Amendment because it was impermissibly vague, could not be enforced without reference to the content of the speech to determine whether it contradicts FAU's undefined "public interests," and granted unbridled discretion to FAU that resulted in viewpoint discrimination against Tracy. Init.Br. 31-42. Tracy also argued that no reasonable jury could have determined that Tracy's speech was not a motivating factor in his termination. *Id.* at 50-57.

A panel of the United States Court of Appeals for the Eleventh Circuit rejected Tracy's arguments and affirmed the judgment against him. Unlike the district court, the Eleventh Circuit addressed Tracy's constitutional challenges to the Policy on the merits. App.6a-10a. The Court concluded that Tracy's vagueness challenge failed because the Policy's requirement that employees report any "professional practice" gives employees fair notice as that term's ordinary meaning is "readily understandable, and its scope is limited" and because the reporting

requirement "clearly applied" to Tracy's blogging activity. App.10a-13a. The Court next disregarded Tracy's argument that the Policy is overbroad and constitutes a content-based restriction on speech, suggesting that the reporting requirement does not implicate the First Amendment because it neither restricts nor punishes any speech. App.13a-14a. Finally, the Eleventh Circuit held that Tracy cannot facially challenge the Policy's conflict-of-interest provision as giving FAU officials unbridled discretion to demand speech for analysis and approval before publication based on its content. App.14a-17a. The Court also affirmed the jury's verdict that Tracy's speech was not a motivating factor in his firing. App.18a-22a.

Tracy petitioned for panel rehearing and rehearing en banc. The petition was denied on February 25, 2021. App.109a-110a. This petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH RELEVANT VAGUENESS DECISIONS OF THIS COURT BECAUSE FAU'S POLICY FAILS TO PROVIDE EMPLOYEES A REASONABLE OPPORTUNITY TO KNOW WHAT SPEECH IS REPORTABLE AND AN IMPERMISSIBLE CONFLICT OF INTEREST, AND PERMITS DISCRIMINATORY ENFORCEMENT TARGETING DISFAVORED SPEECH

The Policy requires that employees provide to FAU a description of "reportable outside activity," which purportedly means "any compensated or uncompensated

professional practice, consulting, teaching or research, which is not part of the employee's assigned duties." DE:250-32. It also prohibits "conflicts of interest," including "any conflict between the private interests of the employee and the public interests" of FAU and "any activity which interferes with the full performance of the employee's professional or institutional responsibilities or obligations." *Id.* The Eleventh Circuit held that the Policy was neither vague on its face because the undefined term "professional practice" should be given its ordinary meaning, nor as applied to Tracy because the Policy's reporting requirement "clearly applied" to his blog. App.10a-13a.

The Eleventh Circuit's decision conflicts with this Court's well-settled precedent regarding the doctrine of vagueness, particularly where, as here, the vagueness of a regulation operates to interfere with the exercise of First Amendment freedoms. Vague laws and regulations "offend several important values." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). First, laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." *Id.* Second, "laws must provide explicit standards for those who apply them" to prevent arbitrary and discriminatory enforcement. *Id.* "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108–09. Third, "where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings

inevitably lead citizens to 'steer far wider of the unlawful zone'...than if the boundaries of the forbidden areas were clearly marked." *Id.* at 109 (citation omitted). The Policy is unconstitutionally vague for all three reasons.

A. The Policy Fails To Give Fair Notice Regarding What Speech Activity Must Be Reported And What Speech Constitutes A Prohibited Conflict Of Interest

First, the Policy is unconstitutionally vague because it does not give fair notice to employees regarding what speech activity must be reported and what speech constitutes a prohibited conflict of interest. The Eleventh Circuit held that the term "professional practice" in the definition of "reportable outside activity" should be given its "readily understandable" ordinary meaning, which is "engaging in an activity characteristic of one's profession." App. 11a-12a. But this ruling is in conflict this Court's decisions which hold that even where a law's terms may have a common meaning or usage, the law may nonetheless fail to provide fair notice because those terms are employed in a manner that creates uncertainty. In *City of Chicago v. Morales*, for example, this Court held that Chicago's Gang Congregation Ordinance, which prohibited "criminal street gang members" from "loitering" with one another or other persons in any public place, was unconstitutionally vague on its face because, although the term "loitering" has a common and accepted meaning, the ordinance's definition of that term as "to remain in any one place with no apparent purpose" did not. 527 U.S. 41, 56–57 (1999). Thus, the "vagueness that doom[ed] th[at] ordinance [was] not the product of uncertainty about the normal meaning of 'loitering,' but rather about what loitering is covered by the ordinance and what is not." *Id.*

As in *Morales*, the Policy does not apply the term "professional practice" according to common usage because common usage would be job-related activity. By defining "professional practice" to include *uncompensated* activity, FAU has rendered the term "professional practice" incomprehensible. Moreover, the form on which employees must report their outside activities itself renders the term "professional practice" even less clear. It only contains a space for a "Description of Employment Activity," and does not include any space to fill out non-employment activity. FAU admitted that some employees refer to the Policy as the "Outside Employment" form, not realizing that it also encompasses uncompensated activities. DE:250-14 ¶58; DE:447-21.

The Eleventh Circuit's decision reasoned that the fact that the term "professional practice" "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." App. 12a. But the inclusion of those additional terms creates even further confusion. 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. It is hardly apparent that these uncompensated forms of communication, which are ubiquitous today and may be undertaken by anyone at their leisure and without any professional training or education, would qualify as "professional practice."

The vagueness of the Policy is even more apparent when applied to expressive hobbies such as Tracy's personal blogging. The Eleventh Circuit concluded 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.'" App.13a. In other words, the Eleventh Circuit held 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.

But the relevant question for reporting under the Policy is whether Tracy was engaging in *professional* activities (like consulting, teaching, research) 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. In fact, 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 v. diff. from work at a univ." DE:250-10 at 4. 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."

The Policy is also vague as to what activity constitutes a prohibited conflict with the school's "public interests" or the "full performance" of any employee's responsibilities.

The Policy does not define the "public interests" of FAU, the Board of Trustees, or the State of Florida, nor does it place any limits on what "public interests" include. Thus, professors are left guessing how to avoid violating this rule. Moreover, it is entirely implausible that free speech blogging on public affairs would be a conflict of interest to an institution that expressly promotes academic freedom.

Nor does the Policy provide parameters for how to measure "full performance" or "interference" with teaching. It does not specify how many hours professors should be working, so it is difficult to determine how time-consuming an activity must be to constitute interference. Read literally, any activity (including hobbies, having a family, community involvement) can interfere with the full performance of a professor's activities. Indeed, the forms reflect Tracy spent only a few hours per week of personal time engaged in outside activities. DE:249-6. He blogged about 7 hours per week, while holding normal office hours of 20-25 hours per week. DE:243-5 at 167-68, 187-88; T.Vol.3 at 200. This is a textbook example of impermissible vagueness because it fails to "provide...the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned*, 408 U.S. at 108.

B. The Policy Permits Arbitrary And Discriminatory Enforcement Against Disfavored Speech

Second, the Policy is unconstitutionally vague because its ambiguities allow it to be discriminatorily applied and enforced by FAU administrators against speech activity with which they disagreed. Even though this Court has recognized "that the more important aspect of vagueness doctrine 'is not actual notice but the other principal element

of the doctrine—the requirement that the legislature establish minimal guidelines to govern law enforcement,'" the Eleventh Circuit did not even address the issue in its vagueness analysis. *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983). Because "compensated or uncompensated professional practice" could encompass nearly any activity and there is no standard for determining whether an expressive activity constitutes a conflict of interest with FAU's "public interests" or interferes with an employee's "full performance," the Policy "vests virtually complete discretion in the hands of" FAU officials to determine whether speech activity must be reported and if it is a prohibited conflict of interest. *Id.* at 358.

This danger is not merely hypothetical, as these ambiguities allowed the Policy to be employed by FAU officials as a pretext to fire Tracy because they objected to the content of his personal blog. FAU disagreed with Tracy's provocative viewpoints, had been monitoring his blog, and had looked for a way to terminate him as a result of his speech since 2013. It is clear that the reporting requirement was discriminatorily applied to Tracy because he was singled out for failing to report his blog, even though there was no policy on blogging and at least twenty other professors who maintained blogs and social media at the time of Tracy's termination, as well as three faculty who published an op-ed with a viewpoint on Sandy Hook that FAU supported, were not required to report their speech activities, much less fired for failing to do so. DE:250-14 ¶¶ 4-50; T.Vol.4 at 126-30. FAU's claim that Tracy's failure to report his personal blog deprived FAU of the ability to "assess if a conflict exists for blog activity" was plainly pretextual because FAU was aware of, and indeed closely monitored, the public blog and could

review it any time to assess if a conflict existed. DE:469 at 16-17 (testimony from FAU official that she was waiting for Tracy to list the blog on his forms).

C. The Vagueness Of The Policy Chills Speech

Finally, the vagueness of the Policy is particularly dangerous because it operates to inhibit the fundamental First Amendment freedom of public university employees to speak on issues of public concern and engage in other expressive conduct. It is entirely unclear, for example, whether the Policy applies to speech activity such as uncompensated personal blogging, social media posting, or even article and op-ed writing. "Where a statute's literal scope…is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *see also Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603–04 (1967) ("[P]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms….The danger of that chilling effect…must be guarded against by sensitive tools which clearly inform teachers what is being proscribed."). Moreover, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Keyishian*, 385 U.S. at 603; *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2046 (2021) ("America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the 'marketplace of ideas.'...That protection must include the protection of unpopular ideas, for popular ideas have less need for protection.").

Vague restrictions, like the Policy, that infringe upon First Amendment rights are especially concerning because of their chilling effect on speech, leading individuals to "steer far wider of the unlawful zone... than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109; *see also Reno v. Am. C.L. Union*, 521 U.S. 844, 871–72 (1997) ("[T]he CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) ("[T]he vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution....The uncertain meanings of the oaths require the oath-taker—teachers and public servants—to 'steer far wider of the unlawful zone'...than if the boundaries of the forbidden areas were clearly marked.").

The Policy fails to give fair warning regarding what expressive activities must be reported, when they must be reported, which activities constitute a prohibited conflict of interest, and what sanctions will be imposed if violated. The disturbing result is that faculty and staff of a public academic institution self-censor or entirely avoid private speech activity and expressive hobbies, including uncompensated personal blogging, social media posting, and penning op-eds on politics and current events, in order to avoid unknown potential repercussions, which could include termination. *See* DE:250-47 at 5 (tenured professor 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"). In other words, the public

university's firing of a tenured professor for failing to report his free speech blogging on public affairs under a vague conflict-of-interest policy has had the effect of not just chilling, but freezing, the expression of its employees.

II. THE ELEVENTH CIRCUIT'S CONCLUSION THAT THE REPORTING REQUIREMENT DOES NOT IMPLICATE THE FIRST AMENDMENT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL, WHICH HAVE HELD THAT SIMILAR REPORTING REQUIREMENTS IMPERMISSIBLY CHILL SPEECH

The Eleventh Circuit rejected 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 reporting requirement does not punish or restrict *any* speech; it requires only that faculty *report* certain types of speech activities." App.13a-14a (emphasis in original). The Eleventh Circuit's conclusion that the reporting requirement does not implicate the First Amendment because it is not a direct restriction on speech is contrary to well-settled principles of this Court. *See 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.").

Moreover, the Eleventh Circuit's conclusion, which allows FAU administrators to demand that speech be reported for analysis under impermissibly vague standards, conflicts with other circuit precedent holding that reporting requirements, under similar conditions, can have a chilling effect on speech. 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 *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 impermissibly 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"); *cf. Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 874 (8th Cir. 2012) (invalidating reporting requirement in campaign contribution disclosure laws where the burdens imposed by the law chilled political speech).

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 impermissibly chills speech. Indeed, Tracy presented evidence that faculty and staff, including tenured professors, were so confused about what outside activity must be reported that they refrained from participating in such activities lest they be fired. DE:250-47 at 5. Review is required because the Eleventh Circuit's ruling opens the door for public educational institutions to impermissibly chill the speech and expressive activities of its faculty and employees.

III. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT BECAUSE IT PROHIBITS A FACIAL CHALLENGE TO A POLICY WHICH GRANTS FAU UNBRIDLED DISCRETION TO ENGAGE IN CONTENT-BASED VIEWPOINT DISCRIMINATION AGAINST EMPLOYEES SUCH AS PROFESSOR TRACY

The Policy's conflict-of-interest provision 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 in advance of publication, thus operating as a prior restraint. It is well settled that "in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988).

"'[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license' must contain 'narrow, objective, and definite standards to guide the

licensing authority.'" *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (citation omitted). This means that if a licensing scheme "'involves appraisal of facts, the exercise of judgment, and the formation of an opinion'...by the licensing authority, 'the danger of censorship and abridgment of our precious First Amendment freedoms is too great' to be permitted." *Id.* (citation omitted).

The Policy vests complete discretion in university administrators to approve or disapprove (akin to licensing) the off-campus speech or expressive activity of an employee based on whether it constitutes a prohibited conflict of interest with FAU's "public interests" or "interference" with the "full performance" of an employee's responsibilities, neither of which are defined or otherwise limited. DE:250-33, -34, -50. And the administrator's review of the speech is a content-based restraint because it draws distinctions based on the message the speaker conveys; indeed, FAU officials admitted the only way to determine whether a speech activity is prohibited is by reviewing the content of the speech to determine if it conflicts with FAU's "interests." DE:250-5 at 174:1-176:4; 250-11 at 14; DE447-13; T.Vol.4 at 207-12. 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. *See Forsyth*, 505 U.S. at 132–33 (invalidating ordinance requiring permit for parades and demonstrations where there were no articulated standards to determine permit fee, administrator based the fee on his own judgment of what would be reasonable, and ordinance often required that the fee be based on the content of the speech); *Lakewood*, 486 U.S. at 772 (holding ordinance gave

unconstitutional unfettered discretion to mayor to deny or limit newsrack permit application based on "any additional terms" he deemed "necessary and reasonable").

The Eleventh Circuit held that Tracy cannot maintain a challenge on this basis because he did not establish a pattern of unlawful favoritism signaling an abuse of such discretion. Specifically, the court concluded 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, nor had he reported his own blog to test the breadth of FAU's Policy. App.15a-17a.

The Eleventh Circuit's ruling that Tracy may not raise a facial claim of unbridled discretion conflicts with this Court's precedent which has "long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." *Lakewood*, 486 U.S. at 755–56 (permitting facial challenge by newspaper that elected not to seek permit under newsrack permitting ordinance). This is so because unbridled licensing schemes present a risk of "self-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied' without standards by which to measure the licensor's action." *Id.* at 759.

Indeed, it is well established that "a person faced with such an unconstitutional licensing law may ignore it and

engage with impunity in the exercise of the right of free expression for which the law purports to require a license." *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 151 (1969). "The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands." *Id.* In *Freedman v. State of Maryland*, for example, 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). This Court held that Freedman's facial challenge was viable even though he had not submitted the film for review because he had standing to challenge the 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.

Like the theater owner in *Freedman*, Tracy feared that FAU wanted to use the Policy to censor him and his controversial and publicly reviled opinions. T.Vol.3 at 146. Indeed, the administrator who fired Tracy admitted as much when she testified that when Tracy failed to report his blog, FAU was robbed of the opportunity to approve or disapprove of his blogging. T.Vol.5 at 16:22-17:3 ("In 2013, you wanted him to report his blogging to you so you could have the right to approve or disapprove that activity, didn't you? A. Correct. Q. You wanted the same right in 2015, to approve or disapprove the activity? A. Correct."). Contrary to the Eleventh Circuit's ruling, Tracy was not required to submit his personal blog as a test case under a

policy that permitted officials to suppress such disfavored speech.[2]

The content-based prior restraint imposed by the Policy in a manner that permits public university officials to engage in viewpoint discrimination against the private speech of faculty and staff is particularly egregious given that a university should serve as an incubator of ideas devoted to academic freedom and speech. *Keyishian*, 385 U.S. at 603; *Mahanoy*, 141 S. Ct. at 2046. This Court should review the Eleventh Circuit's validation of a public university policy which suppressess off-campus speech by professors and other employees.

2. The Eleventh Circuit's reliance upon *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), was misplaced. In *Thomas*, this Court upheld a scheme for obtaining a permit to hold a public event in the park, holding that because the licensing scheme was "not a subject-matter censorship but a content-neutral time, place, and manner regulation of the use of a public forum," additional safeguards curbing park district discretion were not required, and any potential for abuse "must be dealt with if and when a pattern of unlawful favoritism appears[.]" *Id.* at 316–17. Because the Policy is not a content-neutral time, place, and manner regulation, but a content-based prior restraint on speech and expressive activity, the principle set forth in *Thomas* is inapposite.

CONCLUSION

For all the reasons stated herein, the petition for writ of certiorari should be granted.

Respectfully submitted,

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July 26, 2021

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED NOVEMBER 16, 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10173
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. D.C.

November 16, 2020, Decided

Appendix A

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 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.

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

Appendix A

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

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.

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 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]

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

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.

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, 132 S. Ct. 2307, 183 L. Ed. 2d 234 (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, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (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, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (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, 113 S. Ct. 2050, 124 L. Ed. 2d 138 (1993); *accord F.D.I.C. v. Meyer*, 510 U.S. 471, 476, 114 S. Ct. 996, 127 L. Ed. 2d 308 (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, 97 S. Ct. 2307, 53 L. Ed. 2d 368 (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, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (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, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (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, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (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, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (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, 122 S. Ct. 775, 151 L. Ed. 2d 783 (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.

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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.

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]

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

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.

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, 203 L. Ed. 2d 609 (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

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.

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 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

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.

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 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.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED APRIL 24, 2018

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 9:16-CV-80655-ROSENBERG

JAMES TRACY,

Plaintiff,

v.

FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES A/K/A FLORIDA ATLANTIC UNIVERSITY, *et al.,*

Defendants.

April 24, 2018, Decided;
April 24, 2018, Entered on Docket

ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL AND DENYING PLAINTIFF'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

This matter is before the Court on Plaintiff's Motion for New Trial [DE 453] and Plaintiff's Renewed Motion for Judgment as a Matter of Law [DE 450]. The motions have been fully briefed. The Court has reviewed the briefing

papers, the evidence at trial, and the entire record. For the reasons set forth below, both motions are denied.

I. BACKGROUND[1]

Plaintiff, James Tracy, was a tenured professor at Florida Atlantic University—a Defendant in this case. DE 246 at 1. Plaintiff taught in the School of Communications and Multimedia Studies. *Id.* Some of Plaintiff's courses included "Public Opinion and Modernity" and "Culture of Conspiracy." *Id.* Plaintiff conducted research in mass shootings, the JFK assassination, and the Sandy Hook massacre—a mass shooting event in which many children were reported to have been killed. *See id.*

In December of 2012, Plaintiff began to blog about the Sandy Hook shooting. DE 248 at 2. Plaintiff's blog suggested that the Sandy Hook shooting had never taken place and was "staged by the government to promote gun control." *Id.* Plaintiff's blog garnered national attention and was widely reported by the press. *Id.* Many people called on FAU to fire Plaintiff. *See id.* at 2-9.

In January of 2013, FAU began to have internal discussions about Plaintiff's blog. *Id.* Ultimately, FAU issued a notice of discipline to Plaintiff pertaining to his lack of an adequate disclaimer (drawing a distinction between Plaintiff's opinions and FAU's opinions) on his blog. *Id.* at 3. Plaintiff's union defended him. *Id.*

1. These undisputed facts are taken from the Court's Order on Summary Judgment; these facts adequately summarize the background of this case as introduced and admitted at trial.

The parties eventually reached an agreement wherein Plaintiff used a disclaimer on his blog that was to FAU's satisfaction. *Id.* at 4.

After Plaintiff amended the disclaimer on his blog, he continued to teach courses at FAU. DE 246 at 5. In October of 2015, however, a new dispute—a contractual dispute—arose between the parties. *Id.* at 6. FAU has a Collective Bargaining Agreement (the "CBA") with its faculty. *Id.* at 2. The CBA contains many terms and conditions, including an article entitled "Conflict of Interest/Outside Activity." *Id.* This article imposes certain conditions upon faculty members. One such condition of the article is that "[c]onflicts of interest are prohibited." *Id.* at 131. A conflict of interest is defined as:

> (1) 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, including conflicts of interest specified under Florida Statutes;
>
> (2) any activity which interferes with the full performance of the employee's professional or institutional responsibilities or obligations; or
>
> (3) any outside teaching employment with any other educational institution during a period in which the employee has an appointment with Florida Atlantic University, except with written approval of the Dean.

Id. The article also imposes certain reporting requirements upon faculty, including the following:

> An employee who proposes to engage in outside activity shall provide his or her supervisor a detailed written description of the proposed activity. The report shall include where applicable, the name of the employer or other recipient of services; the funding source; the location where such activity shall be performed; the nature and extent of the activity; and any intended use of University facilities, equipment, or services. A new report shall be submitted for outside activity previously reported at the beginning of each academic year for outside activity of a continuing nature and whenever there is a significant change in an activity (nature, extent, funding, etc.) The reporting provisions of this section shall not apply to activities performed wholly during a period in which the employee has no appointment with the University. Any outside activity which falls under the provisions of this Article and in which the employee is currently engaged but has not previously reported, shall be reported within sixty (60) days of the execution of this Agreement and shall conform to the provisions of this Article.

Id. at 132. The CBA contains a mandatory grievance procedure that a faculty member must use if the member has a grievance with any portion of the CBA. *Id.* at 133.

Appendix B

In October of 2015, Plaintiff was completing an electronic acknowledgment form that FAU had sent to him. DE 246 at 6. That form required Plaintiff to check a box "acknowledging [his] obligation to report outside activities" as well as other things. *Id.* Plaintiff refused to check the box. *Id.* Instead, Plaintiff printed out a hard copy of the form and submitted it to FAU without checking the box. *Id.*

Also in October of 2015, an FAU supervisor ordered Plaintiff to report his outside activities by completing and submitting a conflict of interest form. *See* DE 248 at 5. Plaintiff does not appear to dispute that he was ordered to complete the conflict of interest form (also called an outside activities form) multiple times by his supervisors. *See* DE 274 at 5-6.[2] In lieu of completing the form in the manner in which FAU required, Plaintiff, in his own words, "asked his supervisors for clarification about the scope and application of the Policy" and he also required from FAU "a signed statement asserting FAU's position that his personal activities (media criticism, alternative journalism, and blogging) did not fall within the definition of 'conflict of interest'" under the CBA. DE 248 at 5.

On November 10, 2015, Defendants issued a notice of discipline to Plaintiff. *Id.* The notice required Plaintiff to submit conflict of interest forms within forty-eight hours. *Id.* On November 22, 2015, Plaintiff responded by letter, informing Defendants that he had not received the

2. Instead, it appears that Plaintiff's position is that he complied with his supervisor's directives by submitting a hard copy of the online form that did not contain a checkmark in the applicable box.

clarification that he had requested on the "considerable confusion" created by FAU's administration of the CBA, together with related policies. *Id.* On December 11, 2015, Defendants responded to Plaintiff's letter by informing him that he had until 5:00 p.m. on December 15, 2015, to "completely and accurately fill out the conflict of interest forms." *Id.* at 7. Plaintiff admits that he did not submit the forms by 5:00 p.m. on December 15, 2015. DE 467 at 112.

On December 16, 2015, Defendants issued a notice of termination to Plaintiff. Defendants' position was that because Plaintiff had refused to fill out his conflict of interest forms, Defendants could not ascertain whether Plaintiff was in compliance with the outside activities / conflict of interest portions of the CBA. *Id.*

Earlier, sometime during the month of November of 2015, Plaintiff requested assistance from his union. DE 246 at 7. Plaintiff's union hired an attorney for Plaintiff. *Id.* at 8. After Plaintiff received his notice of termination, Plaintiff was required to file a grievance contesting his termination within ten days. *Id.* Plaintiff's attorney negotiated for an extension for additional time to grieve. *See id.* The extension was granted. *Id.* at 9. Plaintiff never filed a grievance. Instead, Plaintiff filed this lawsuit on April 25, 2016.

Initially, Plaintiff filed this lawsuit against FAU, certain individual Defendants at FAU, his union, and certain individual Defendants at his union. During the pendency of this suit, however, Plaintiff reached a settlement agreement with all union Defendants. After

extensive motion practice, this case was tried from November 29, 2017, to December 11, 2017. A single count was submitted to the jury: Plaintiff's First Amendment retaliation claim. The jury returned a verdict on December 12, 2017, finding that Plaintiff's termination was unrelated to Plaintiff's exercise of his First Amendment rights. DE 437. On January 8, 2018, Plaintiff filed a Renewed Motion for Judgment as a Matter of Law. On January 12, 2018, Plaintiff filed a Motion for New Trial.

II. ANALYSIS AND DISCUSSION

A new trial should not be granted "unless, at a minimum, the verdict is against the great—not merely the greater—weight of the evidence." *Pensacola Motor Sales, Inc. v. Eastern Shore Toyota, LLC.*, 684 F.3d 1211, 1231 (11th Cir. 2012). Although the Court is permitted to weigh the evidence, it must be with this standard in mind. *See Watts v. Great Atlantic & Pacific Tea Co., Inc.*, 842 F.2d 307, 310 (11th Cir. 1988) ("In ruling on a motion for new trial, the trial judge is permitted to weigh the evidence, but to grant the motion he must find the verdict contrary to the great, not merely the greater, weight of the evidence.").

In assessing evidentiary rulings already made by this Court, the question is whether the exclusion of the evidence affected Plaintiff's substantial rights. "Error in the admission or exclusion of evidence is harmless if it does not affect the substantial rights of the parties." *Perry v. State Farm Fire & Cas. Co.*, 734 F.2d 1441, 1446 (11th Cir. 1984). Plaintiff bears the burden of showing that the decision(s) affected his substantial rights. *Id.*

Appendix B

Before the Court analyzes the merits of Plaintiff's arguments, the Court addresses one recurring issue in the motions before the Court. Plaintiff cites multiple times to the Court's Order on Summary Judgment and the Court's oral ruling denying Defendants' motion for judgment as a matter of law in support of his pending motions. Plaintiff's citations and quotations to the Court's prior orders reference the Court's discussion of the evidence. That is improper argument. The Court was required, in the cited orders, to view the evidence in the light most favorable to Plaintiff. With respect to Plaintiff's Motion for Judgment as a Matter of Law, the Court is required to view the evidence in the light most favorable to Defendants. With respect to Plaintiff's Motion for New Trial, the Court is required to independently weigh the evidence introduced at trial—not refer back to the Court's analysis of evidence viewed in the light most favorable to a specific party.

Plaintiff raises five separate arguments: (A) that the jury's verdict was not supported by the evidence, (B) that this Court erred in excluding a certain audio recording, (C) that this Court erred in excluding certain third-party letters, (D) that this Court should enter judgment as a matter of law in Plaintiff's favor, and (E) that this Court should reconsider its prior Order on Summary Judgment. Each argument is considered in turn.

A. The Jury's Verdict Was Supported by the Evidence at Trial

The central premise in Plaintiff's Motion for New Trial is that the jury's verdict was against the great weight of

the evidence. This contention is without merit. Instead, the Court concludes that the great weight of the evidence at trial was in favor of Defendants. The jury was entitled to disregard and discredit all of Plaintiff's evidence at trial, provided that there was an evidentiary basis on which to do so. And there was. Plaintiff's evidence was called into question in every possible way at trial. For the purpose of explaining why Plaintiff's premise is rejected by this Court, and for the purpose of demonstrating why the jury's decision was not against the great weight of the evidence, the Court sets forth below a portion of the evidence introduced at trial that favored Defendants.

First, evidence was repeatedly introduced that Plaintiff was at all times permitted to blog without any censorship by Defendants:

> *Q*. Did you place any limits on Professor Tracy's speech or his research?
>
> *A*. Never.
>
> *Q*. You didn't tell him to stop blogging and cut it off, none of that stuff?
>
> *A*. No. He had the freedom to do that.

E.g., DE 470 at 120. The jury was entitled to credit this testimony. Similarly, Defendants repeatedly elicited testimony that if Plaintiff had complied with his obligation to complete all necessary university forms, he would have been permitted to keep his job:

> *Q*. If Dr. Tracy had submitted the fully completed forms, would you have made the decision to send him the notice of proposed termination?
>
> *A*. I would not have sent him that notice, correct.

DE 469 at 36. The jury was entitled to credit this testimony. Moreover, the period of time running from Plaintiff's most controversial blog posts about Sandy Hook to the time of Plaintiff's termination was *three years*—this time period calls into question the entire theory of Plaintiff's case. While Plaintiff contends that Defendants essentially bided their time, and were waiting for an opening to terminate Plaintiff because they disliked Plaintiff's blog speech, evidence was introduced at trial that called Plaintiff's theory into question.[3] By way of example, another professor at FAU caused a controversy that resulted in "massive media attention," because of an event entitled "Stomp on Jesus." DE 470 at 135. That controversy resulted in a police presence on campus. DE 470 at 172. Yet, that professor was able to keep his job at FAU—there was no censorship. DE 470 at 135. Defendants' position throughout trial was that Plaintiff was terminated solely for his insubordination in refusing to fill out outside activities forms, and Plaintiff failed to produce any evidence of an employee at FAU who

3. Plaintiff also posited that persistent media attention triggered Defendants' termination of Plaintiff, but Defendants succeeded in calling into question this theory as well. *Compare* DE 471 at 26-28, *with* DE 473 at 36, 56-57.

refused[4] to fill out the form (when asked to do so) and was treated differently. Instead, the evidence showed that another professor who, like Plaintiff, did not fill out the necessary forms and who received compensation from outside activities received a notice of termination. DE 469 at 22-23; Defendant's Exhibit 206.[5] Finally, Plaintiff's own witness, Professor Robe, admitted that if he were asked to fill out outside activity forms he would do so lest he be considered insubordinate. DE 470 at 224.

Second, a large amount of evidence was introduced at trial that showed Plaintiff's refusal to fill out FAU forms was insubordinate. Plaintiff was advised to fill out the forms by virtually everyone—even his union representatives:

> *Q*. What did you advise Professor Tracy once you read this letter?
>
> *A*. I think I said something to the effect that -- I think I said something like sign it or -- I said, even if you say under duress, sign it, say you did it under duress to do it.

---

4. While Plaintiff may have testified that he never refused to complete FAU's outside activities forms, there was a plethora of evidence at trial upon which a reasonable juror could rely to conclude that Plaintiff unequivocally refused FAU's demand to complete outside activities forms. *E.g.*, "[Plaintiff] told me he refused to submit [the forms]." Video Deposition of Mr. Michael Moats, 293:06.

5. The professor at issue ultimately resigned before the termination process concluded. Defendant's Exhibit 206. FAU refused to accept the resignation, however, and treated the situation as a termination.

Q. You told him to submit the forms?

A. I believe so, yes, that is the best of my recollection. I am sure you have the emails that say that.

Q. Why did you recommend that Dr. Tracy fill out those outside activity forms in November 2015?

A. I was afraid he was going to get fired.

Q. And were you advising Dr. Tracy to try to help him keep his job?

A. Yes.

DE 471 at 86. Plaintiff's union representatives also advised Plaintiff that the insubordination charge was valid:

Q. And so you told Professor Tracy that the termination was likely valid, right?

A. Yes, I think that may have been my words.

Q. What was the reasoning, if any, behind that advice?

A. Well, one, every indication that I'd had from him prior to that was that they had a very good case against him on insubordination.

Appendix B

Video Deposition of Mr. Michael Moats, 214:17. Evidence showed that Plaintiff privately admitted to others that his refusal to fill out the forms was a mistake—that he thought he would be protected from termination because of his tenured status:

> *Q*. Based on your personal experience and your interactions with Dr. Tracy, did he seem to appreciate the gravity of this notice of proposed discipline and act in his own best interest?
>
> *A*. I know when he was terminated, and that was actually the first time that I actually talked to him, most of the other communications were via email, I said, you know, if you thought the university was after you, why did you make it so easy for them? And he said -- I was referring to not filling out the forms, and he said, I thought tenure would protect me.

DE 471 at 88. Additionally:

> *Q*. [W]hen in 2015 did you go back and look at [Plaintiff's file]?
>
> *A*. After [Plaintiff] called me and said, 'I think I fucked up.'

Video Deposition of Michael Moats, 90:14. Evidence in the form of an e-mail from Plaintiff showed that Plaintiff knew his refusal to fill out the forms was insubordinate insofar as he called the insubordination charge against him "cut-and-dry" as follows:

> So Doug, yes, I am interested in going through the necessary grievance procedure and would appreciate your help, I don't know if the union will support the case to arbitration, because in terms of the specific description of "insubordination" and my actions it's cut-and-dry, the admin is like a mule regardless of how irrational its stances may be, and the union might not think we can prevail. Then again it could be resolved before arbitration. In any event,

Defendants' Exhibit 111. Finally, the evidence also showed that Plaintiff was consistently told by others that any grievance of his proposed termination was unwinnable because the insubordination charge against him was so strong. *See* DE 471 at 96-105; Defendants' Exhibit 48.

Third, Plaintiff's contention at trial was that he did not fill out FAU forms because those forms were confusing, but Defendants introduced substantial evidence to call into question Plaintiff's position. As an initial matter, it appears that Plaintiff, and Plaintiff alone, completely refused to fill out the forms. It therefore follows that every other faculty member or, at the very least, every other faculty member who was asked to fill out the forms, did so. A logical inference that the jury was entitled to make, then, was: "If every faculty member fills out the forms, how can the forms be so confusing that Plaintiff could not possibly fill them out?" Similarly, Plaintiff ultimately *did* fill out the forms, albeit after the deadline imposed by FAU, which logically led to a related question: "If Plaintiff ultimately filled out the forms, how was it

impossible for him to fill out the forms earlier?" The reasonable and logical inference, then, that the jury was entitled to make, was that Plaintiff simply *chose* not to fill out the forms for his own purposes-to not even make an attempt. Defendants introduced evidence that showed that Plaintiff had an ulterior motive in choosing not to fill out the forms. Specifically, Plaintiff privately e-mailed a friend, using a non-university e-mail account, in which he said the following:

> hours per week. Nor was I ever asked to do so by my chair. Although I mentioned that I contribute to GR I don't plan on using those pieces for promotion because they're not peer reviewed. Yet, they may inform some of my research and teaching. So I'm uncertain whether I should fill out such a form for the activity ex post facto, especially since it might give them reason to take disciplinary action as my remarks may no longer be regarded solely my own free expression. Our union guy suggested I do so but I'm going to get some additional opinions.

DE 467 at 70; Defendants' Exhibit 114. This evidence, together with other evidence introduced at trial, could lead to the reasonable conclusion that Plaintiff did not want to disclose his outside activities because he did not want the university to have that information-but FAU never took any action against Plaintiff's blog speech[6] because Plaintiff

6. The Court notes that, in prior years, when Plaintiff did complete the outside activities forms, Defendants did not attempt to silence Plaintiff's speech on his blog.

refused to disclose his outside activities. In any event, the jury was entitled to discredit Plaintiff's explanation—confusion—because evidence was introduced to call into question Plaintiff's purported reason for his failure to comply.

Fourth, evidence was introduced that Plaintiff's refusal to fill out FAU forms was in the context of an actual violation, by Plaintiff, with respect to the outside activities that he refused to report. Plaintiff admitted that he received compensation through his blog; he simply contended that, according to him, the compensation was not enough to warrant reporting. DE 467 at 40-45. Even so, Plaintiff admitted that the *amount* of the compensation is not a determinative factor in terms of whether or not compensation (or an activity) should be reported. DE 467 at 48. Plaintiff took the position that his blog did not amount to a reportable outside activity. Yet, Plaintiff privately admitted to others that his blog was a reportable activity,[7] Plaintiff's union advised him that his blog could be a reportable outside activity,[8] Plaintiff's solicitation for donations on his blog was entitled "Memoryhole Independent Research Fund,"[9] Plaintiff admitted to spending hundreds of hours on his blog and related research, Plaintiff's blog was closely related in terms of subject matter to the courses that Plaintiff taught, and Plaintiff admitted to, at times, using school equipment

7. DE 467 at 70.

8. Video Deposition of Mr. Michael Moats, 88:20.

9. DE 467 at 48.

while working on his blog and associated podcasts.[10] Plaintiff privately conceded the close relationship of his blog and podcasts with the courses that he taught in an e-mail, using a non-university account, to a colleague:

> Because I teach journalism and media studies I had found doing the program a reinforcement to my formal professional endeavors, as I was able to interview authors, journalists, filmmakers, and fellow academics, getting their insights on what they do, and how they function and see the world. Because some of the content was controversial and in light of my personal experience and the press' controversial coverage of me since early 2013, I had felt uneasy about approaching my chair to ask that the project be acknowledged as part of my assignment.

Defendants' Exhibit 217m. Evidence also showed that Plaintiff admitted to his union that he had reportable outside activities:

> *A*. They fired him because they determined that he did not report the activity once he by his own admission admitted that the activity rose to the level of a reportable activity.
>
> *Q*. By his own admission where?

10. "[I]f he's using the University resources it's got to be reported no matter what he's doing with the blog." Video Deposition of Mr. Michael Moats, 188:09.

> *A*. To me.
>
> *Q*. When?
>
> A. When we had our first conversation about whether or not he needed to report this activity.

Video Deposition of Mr. Michael Moats, 88:20. Plaintiff also received compensation for a book that was published entitled "Nobody Died at Sandy Hook: It was a FEMA Drill to Promote Gun Control." DE 467 at 99.[11] That book, not disclosed to FAU, contained articles from Plaintiff's blog; Plaintiff promoted the book on his podcasts. Defendants' Exhibit 225. Plaintiff's receipt of compensation, both from his blog and the Sandy Hook book, is particularly significant in light of Plaintiff's concession that when "money would be changing hands this surely would make filling [the forms out] appropriate." Defendants' Exhibit 22.

Fifth, Defendants introduced evidence that called into question Plaintiff's truthfulness in general. By way of example, Plaintiff testified that the reason he did not communicate with FAU on various matters, such as reporting the book *Nobody Died at Sandy Hook*, and the reason Plaintiff did not respond to Defendants' compliance demands in a timely fashion, was because he was on paternity leave and was therefore either unable or unwilling to check his e-mail inbox. DE 467 at 82-83; 86-

11. Although the book was published prior to Plaintiff's termination and "an honorarium was discussed," it appears, as best as the Court can discern, that Plaintiff did not receive the honorarium check until after he was terminated. DE 467 at 99.

88; DE 466 at 188. Yet Defendants were able to show that Plaintiff authored detailed, lengthy e-mails concerning the Sandy Hook massacre during his paternity leave. Defendants' Exhibit 165. Similarly, Plaintiff testified that he was unable to inform FAU about the publication of the Sandy Hook book because he "was too busy attempting to defend [himself]" due to his refusal to complete FAU's outside activity form. DE 467 at 130-32. But during this same period of time, Defendants introduced evidence that Plaintiff took the time to conduct a podcast to promote the book. *Id.* Defendants' characterization of Plaintiff at trial was that he was condescending, arrogant, untruthful, and that he cared more about his blog than his duties as a teacher. The Court observed at trial that the tone, demeanor, and vernacular of Plaintiff on the witness stand could support, if the jury was so inclined, Defendants' characterization of Plaintiff.

Sixth and finally, Plaintiff's Motion for New Trial (which incorporates Plaintiff's Motion for Judgment as a Matter of Law) consistently distorts the evidence that was introduced at trial. By way of example, Plaintiff quotes and greatly relies upon the following phrases (taken from an e-mail), which Plaintiff attributes to FAU's employee Heather Coltman:

> [W]ith every blog post, tweet and proclamation of false flags, hoaxes, child actors and millionaire imposter parents, pressures build in the public to strip all faculty of the protections of tenure. His termination both holds Tracy accountable for his despicable behavior and reduces pressure on the elected officials to end tenure.

DE 450 at 2. Plaintiff treats this quote as if it is, without question, the opinion of Ms. Coltman and the opinion of FAU. That is improper for the purposes of a Motion for New Trial, because the jury was entitled, if it chose, to believe that this quote belonged to an independent FAU faculty member completely uninvolved in Plaintiff's discipline proceedings. According to Ms. Coltman, the origin of the quote is as follows:

> *Q*. (Referring to the quote above) That is what you sent, right?
>
> *A*. I did not write that statement, it was a copy and paste.
>
> . . .
>
> *Q*. And you said you sent this message because you agreed with it, right?
>
> *A*. No, that is not right.
>
> *Q*. Isn't this the real reason FAU fired Professor Tracy?
>
> *A*. No, it is not.
>
> *Q*. This isn't the real reason?
>
> *A*. This is not the real reason.
>
> *Q*. Who did you say wrote this?

Appendix B

A. This was written by Jeffrey Morton.

Q. And Jeffrey Morton was a faculty member at the university?

A. Yes.

Q. In your college?

A. Yes.

Q. He sent this statement to the press, didn't he?

A. Yes.

Q. To multiple media outlets, didn't he?

A. I don't know.

Q. You knew about this statement, didn't you?

A. Yes, I knew about the statement.

. . .

Q. Is the email something you wrote?

A. No.

Q. Who wrote it?

A. Jeffrey Morton.

Q. Again, who is he?

A. A professor of political science in the college.

Q. And you were explaining why you didn't stop him or prevent him from sending out this -- he sent it to the newspaper or something. How did it go?

A. As I recall, I believe the *New York Times* had written him requesting comment or something like that, and I believe he subsequently determined to send a statement to the *Sun Sentinel*. I may have that wrong. Yeah, he sent this out because he was able to make a statement as a matter of opinion.

. . .

Q. Why didn't you discipline him?

A. Faculty have a right to express their opinion.

DE 470 at 46-47, 78. The jury was entitled to credit this testimony. As a result, it was within the jury's purview to believe that the quote did not express Ms. Coltman's views or FAU's official views, and that Ms. Coltman had forwarded the quote in an e-mail only because it had been distributed to the news media by an independent professor at FAU expressing his personal views, much like Plaintiff James Tracy. Another point of distortion in Plaintiff's motion before the Court is Plaintiff's repeated

emphasis on the fact that other professors at FAU did not report their personal blogs or social media accounts to FAU. *E.g.*, DE 450 at 9-10. That was never the issue in this case. The issue was Plaintiff's refusal to report *anything* despite multiple direct orders to do so, his refusal to acknowledge his duty to report (in the form requested), and also whether Plaintiff's specific blog (for which he received compensation) was so closely related to his professional, paid activities that he was required to report it. As explained at trial by Mr. Michael Moats:

> *Q*. So, what you're saying is that every single faculty member at that University is in violation of Article 19 aside from Professor Tracy who's now been fired for it, is that what you're saying?
>
> *A*. Absolutely not. No.
>
> *Q*. Well, none of them have submitted their Facebook pages or their Twitter accounts that we know of.
>
> *A*. None of them—none of them have acknowledged that they're using their Facebook page for research. [Plaintiff] did.
>
> *Q*. Okay. And if they did acknowledge that they would be in violation of Article 19?
>
> *A*. Absolutely.

Video Deposition of Mr. Michael Moats, 124:16.

To be clear, the Court does not conclude that Plaintiff had no evidence in support of his claims—the Court did not grant judgment as a matter of law in favor of any party. Nor is it the Court's intent, in reciting the evidence above, to express any personal views about the evidence at trial. The Court has set forth the analysis of the evidence above to demonstrate a small portion of the evidence introduced at trial that favored Defendants' case and supported the jury's verdict. By contrast, Plaintiff's best evidence could adequately be divided into three categories: (1) Plaintiff's own testimony, (2) a vague phrase located in FAU documents, suggesting that, in the context of Plaintiff's employment, the university should "find winning metaphors" (a phrase the jury could construe to mean anything at all), and (3) celebratory e-mails that FAU employees exchanged after Plaintiff was terminated. When Plaintiff's evidence is juxtaposed to Defendants' evidence, the great weight of the evidence was in Defendants' favor, not Plaintiff's. For this reason, Plaintiff's Motion for New Trial is denied as to any argument that the evidence did not support the jury's verdict.

B. The Court's Exclusion of an Audio Recording

Plaintiff argues he is entitled to a new trial because the Court erred in excluding an audio recording of an FAU senate faculty meeting. The Court extensively reviewed that recording and excluded the recording in a detailed ruling. Plaintiff argues that the exclusion of this evidence prejudiced him at trial because the recording showed that FAU's outside activities policy and forms were confusing not just to Plaintiff, but to others as well.

This was not a case about confusion, nor was this a case about what Plaintiff was thinking when he acted as he did. This was a case about why Plaintiff was terminated. For that reason, evidence of Plaintiff's confusion, or evidence of the confusion of others, was not a core issue in this case. Still, Plaintiff's refusal to complete FAU's outside activity forms did warrant some sort of explanation, and Plaintiff's purported confusion was his explanation for his refusal. The Court therefore permitted Plaintiff—over Defendants' repeated objections—to introduce evidence of his confusion, but the Court cautioned Plaintiff that this was an area of limited probative value.

Plaintiff was successful in introducing evidence of his confusion and the confusion of others on a number of occasions throughout the trial. *E.g.*, DE 467 at 55 ("I had conversations with other faculty members on occasions and they expressed equal confusion concerning the policy and form."); DE 470 at 221 ("*Question to Mr. Robe*: Has the policy ever confused you? *Answer*: Absolutely.").[12] To the extent Plaintiff wishes he had introduced even more evidence of the confusion of others, the Court consistently reminded Plaintiff that he was not prevented from bringing in witnesses to testify about their own confusion. DE 470 at 63. ("I haven't precluded you from bringing in witnesses to testify about confusion."). As a result, even if the Court erred in excluding the audio recording, the Court's exclusion did not affect the substantial rights of Plaintiff, particularly in light of the large amount of

12. Plaintiff even admits that "confusion and uncertainty about the scope and application of the Policy was a recurring theme during testimony at trial." DE 450 at 9.

evidence introduced by Defendants that questioned the veracity of Plaintiff's purported confusion. *Perry v. State Farm Fire & Cas. Co.*, 734 F.2d 1441, 1446 (11th Cir. 1984). It is, however, the Court's conclusion that its decision to exclude the recording was correct for the reasons the Court set forth on the record as stated below:

> Defendant argues that hearsay testimony about what FAU professors said at a certain senate faculty meeting should be excluded. The Court agrees with Defendant that any such evidence would be hearsay. The Court has reviewed the audio recording of the faculty senate meeting. It is clear that the relevant subject matter of that meeting was that, generally, FAU policies were confusing, that FAU was improperly applying that policy to the faculty, and that the faculty thought that FAU should cease and desist from its administration of that policy.
>
> The Court is unable to discern how that evidence could be offered in any way other than to prove the truth of the matter and, as a result, Plaintiff would have to proffer a hearsay exception for this evidence to be admitted. Plaintiff argues that faculty member statements were admissions by a party opponent. The mere fact that some of the faculty members had administrative duties does not mean that the faculty members are empowered in the course of their duties to determine whether a policy is confusing, whether it is being applied correctly,

and whether the policy should continue to be applied. The operative inquiry for this Court is whether the hearsay declarants were speaking within the scope of his or her agency or employment. *City of Tuscaloosa v. Harcross Chemicals, Inc.*, 158 F.3d 548, 557 (11th Cir. 1998).

For example, in *Staheli v. University of Mississippi*, 854 F.2d 121, 127 (5th Cir. 1988), statements made to a Plaintiff professor by a professor that was a member of the faculty senate were not admissions of a party opponent because the senate professor "had nothing to do with Plaintiff's tenure decision" and "did not concern a matter within the scope of his agency."

The Defendant's motion on this point is therefore granted. For Plaintiff to be able to admit this hearsay evidence, Plaintiff would have to proffer to the Court evidence that the faculty members' duties included the administration of the FAU policy, such that their comments were within the capacity of their relationship with FAU. See *Wilkinson v. Carnival Cruise Lines, Inc.* 920 F.2d 1560, 1565 (11th Cir. 1991). This is quoting, "it is necessary, in order to support admissibility, that the content of the declarant's statement concerned a matter within the scope of the agency."

At present, the Court is unable to discern any evidentiary basis for which the comments at the senate faculty meeting, helpful and relevant to Plaintiff, would be within the agency and scope of the declarant's duties. Although the Court acknowledges that theoretically, perhaps, Plaintiff could proffer additional evidence such that certain statements at the senate faculty meeting could qualify as admissions of a party opponent, the Court's granting of Defendant's motion on this point is not without prejudice, it is with prejudice for the following reasons:

The Court notes that the majority of the faculty senate meeting recording is not relevant. Much of that recording concerns the university's efforts at outside community activities, and frustrations that various faculty members had about specific communications from FAU that have no bearing on this case. The Court excludes all such evidence as irrelevant.

To the extent that Plaintiff would attempt to admit the audio recording or otherwise elicit testimony about the statements at the senate faculty meeting on relevant matters, the Court concludes the probative value of that evidence is outweighed by danger of confusion of the issues and unfair prejudice. As to the probative value, the Court has already noted and ruled that the probative value of confusion about FAU policies is limited. In connection therewith, Plaintiff has

ample grounds through various witnesses to elicit testimony about faculty confusion about the policy. In contrast, the unfair prejudice and danger of confusion is substantial.

The faculty members at the senate meeting were angry. Much frustration can be heard in the recording. That frustration and anger, and the faculty members' reactions and discussion of the FAU policy, were framed by issues and communications entirely irrelevant to this case. For example, one faculty member was upset that he had received an email pertaining to his outside speech, and other faculty members at the meeting tried to support him. Thus, to the extent the faculty meeting did discuss matters somewhat relevant to this case, the FAU policy for outside activity disclosures, that discussion was framed and developed in an emotional, heated context completely irrelevant to this case.

The Court concludes that this evidence, even if otherwise admissible, is unfairly prejudicial to Defendant and could confuse the jury. For this reason and all of the foregoing reasons, Defendant's motion is granted insofar as Plaintiff is excluded from introducing testimony pertaining to the FAU senate faculty meeting or from introducing the audio recording of the senate faculty meeting, Plaintiff's Exhibit 67. Plaintiff's exhibits related to the audio

> recording, Exhibits 27, 28 and 106 are also excluded.

DE 465 at 55-58.[13] Finally, Plaintiff's argument that a witness opened the door to the admission of the audio recording is without merit. Plaintiff relies upon the following testimony:

> *Q*. And so, what options did Dr. Tracy have if he didn't agree that his memoryhole blog was a reportable outside activity?
>
> *A* He could have asked -- if he felt this was undue, he could have asked the university faculty senate, as a due process, he could have asked them to review the situation. He could have responded to this proposed grievance --proposed Notice of Discipline Termination. He could have -- he could have grieved the termination with the United Faculty of Florida independently or with an attorney.

DE 469 at 39. This witness (Diane Alperin) did not reference the senate faculty meeting recording, confusion at the senate, discussions at the senate, or any other issue implicated by the recording. Ms. Alperin merely stated that Plaintiff had certain administrative avenues available to him in lieu of refusing to comply with FAU's insistence that he complete an outside activities form. Even if

13. The Court also notes that the recording contained legal opinions and legal conclusions.

certain members of the senate faculty were unhappy with FAU's policies or personally thought the policies were confusing, this fact does not call into question Ms. Alperin's statement that the senate faculty was an avenue through which Plaintiff could air his grievances.

For the foregoing reasons, Plaintiff's Motion for New Trial is denied as to any argument pertaining to the Court's exclusion of the senate faculty audio recording, together with related exhibits.

C. The Court's Exclusion of Letters Authored by Constitutional Rights Groups

Plaintiff argues that he is entitled to a new trial because the Court excluded two letters from constitutional rights groups expressing their support for Plaintiff in the year 2013. The exclusion of those letters, which contained legal conclusions and were written years before Plaintiff's termination, did not affect Plaintiff's substantive rights at trial. Furthermore, in recognition that Plaintiff was seeking to introduce those letters to show the affect the letters had on FAU officials, the Court did not prevent Plaintiff from introducing evidence of the same through another form:

> *MR. BENZION*: The letters from FIRE are not being offered for their truth, but for the effect on the listener. FIRE are letters that will come up, 10-A and 10-B, 10-B being in Exhibit 36. These letters are written by constitutional rights groups in response to the discipline on the Plaintiff in 2013, and subsequent to receiving

> these letters, the Defendant university backed down from their discipline and entered into a settlement agreement with the Plaintiff.
>
> *THE COURT*: Okay, I understand. I am not going to allow it, it is hearsay. I understand you don't want it for the truth of the matter, but it seems to me you can accomplish the same goal by questioning whoever the witness is whom you would question about, you know, did you receive a letter from such and such on such and such date, you know, what action did you take as a result of that letter. So, there would be a way to accomplish what you need to accomplish without bringing in a letter which, although you are representing that it is not being offered for the truth of the matter, that is always a hard thing when you are giving a limiting instruction to a jury that, and it is absolutely a hearsay document, the prejudicial effect is outweighing the probative value when considering that the same goal can be accomplished by the Plaintiff through proper questioning of proper witnesses as to when and what witnesses received and how they responded as a result of receiving certain things.

DE 465 at 78-79. Accordingly, Plaintiff *did* introduce evidence that the letters were received:

> *Q*. Dr. Tracy, did you receive letters in support of your defense of this notice of discipline and after receiving the notice of discipline in 2013?

A. In April of 2013, yes.

Q. What effect did those letters have on you, if any?

A. It galvanized my belief that I was correct in my assertions that the disclaimer on my blog was sufficient and satisfactory.

Q. Did anyone else receive the letters, if you know?

A. Yes.

Q. Who?

A. Who were the letters cc'd to?

Q. Yes.

A. Dean Heather Coltman and Provost Diane Alperin and several members of the Florida Atlantic University Board of Trustees, and President Saunders, who was at the time President of Florida Atlantic University, Mary Saunders.

DE 466 at 118-19. Plaintiff's objection is that "Plaintiff's testimony would have been far more credible had the jury knew [sic] that credible civil rights groups came to his aid." DE 453 at 11. The Court concludes that the authorship or content of the letters, written years before Plaintiff's termination, would have had no impact on the great weight

of the evidence in this case, which favored Defendants, nor did the exclusion of the letters affect the substantive rights of Plaintiff. Accordingly, Plaintiff's Motion for New Trial is denied as to any argument premised upon the aforementioned letters.

For all of the foregoing reasons, Plaintiff's Motion for New Trial is denied.

D. Plaintiff's Renewed Motion for Judgment as a Matter of Law

For the same reasons the Court has denied Plaintiff's Motion for New Trial, the Court also denies Plaintiff's Renewed Motion for Judgment as a Matter of Law.

E. Plaintiff's Third Motion for Reconsideration

Defendants previously moved for summary judgment as to Plaintiff's claim that FAU's outside activity policy is unconstitutional. Defendants argued that Plaintiff could not challenge the constitutionality of the policy because, pursuant to his collective bargaining agreement, he was required to file a grievance before litigating the matter in court. In support of their argument, Defendants relied upon *Hawks v. City of Pontiac*, 874 F.2d 347, 349 (6th Cir. 1989). That case was analogous to the instant case, and this Court relied upon *Hawks* as follows:

> In *Hawks*, the plaintiff was an employee of a police department. *Id.* at 348. The plaintiff moved his residence out of the city in which he worked. *Id.* The plaintiff's collective bargaining

agreement required police officers to maintain residency in the city and, as a result of the plaintiff's decision to move his residence, he was demoted. *Id.* at 348-49. The plaintiff challenged the residency requirement as being unconstitutionally vague. *Id.* The district court in *Hawks* granted summary judgment in favor of the defendant by concluding that the contractual provision could not be challenged as unconstitutionally vague in the same manner as positive law. *Id.* The appellate court affirmed, finding: "As a contract provision entered into through voluntary collective bargaining, it may not be characterized as a positive law subject to due process challenge for vagueness. Its interpretation and clarification is subject to the grievance and arbitration process." *Id.*

Notably, the plaintiff in *Hawks* had a stronger basis to argue that his collective bargaining agreement terms were subject to a constitutional challenge than the Plaintiff in the instant case. In *Hawks*, the plaintiff argued that the residency requirement originated from the city's charter, and had only been *incorporated* into his collective bargaining agreement. *Id.* at 349. The *Hawks* court rejected that argument, and no such nuance exists in the instant case.

DE 362 at 19.[14] When Plaintiff filed his response to Defendants' Motion for Summary Judgment, Plaintiff limited his discussion of *Hawks* to two sentences: "In *Hawks v. City of Pontiac*, the Sixth Circuit affirmed summary judgment after concluding that the plaintiff 'has not demonstrated that' procedures used in the past would be futile in this case." 874 F. 2d 347, 351 (6th Cir. 1989). That is not the case here." DE 275 at 4-5. Plaintiff's analysis of *Hawks* was therefore extremely limited, and the Court accepted Defendants' argument as follows:

> Plaintiff argues that the holding in *Hawks* should not apply to his case because, if he had grieved, his grievance would have been futile. The Court does not agree. Here, Plaintiff alleges that the terms of the Policy are "overbroad and vague . . . do[] not serve a significant governmental interest . . . [and are] so vague and overbroad, persons of common intelligence must necessarily guess at its meaning and differ as to its application." DE 93 at 44. If Plaintiff had challenged the vagueness of the Policy by filing a grievance, the Court would have the benefit of evaluating the official rationale, purpose, and scope of the Policy through that grievance procedure—the plaintiff in *Hawks* complied with his grievance procedures and the court had the benefit of the

14. While Plaintiff pointed out at trial that there are employees at FAU who are subject to FAU's outside activities policy that are not bound by the dispute resolution procedures of Plaintiff's collective bargaining agreement, those employees are not before this Court.

> underlying record. Regardless of Plaintiff's reasons for failing to grieve, that fact remains that Plaintiff did not file a grievance. A grievance was required. DE 243-1 at 134-36; *see generally* DE 246-6. While Plaintiff may have subjectively believed that his desired outcome would have been a futile goal if he grieved, the grievance procedure would have enabled the Court to evaluate FAU's implementation of the scope, purpose, and terms of the Policy.
>
> On this issue, Plaintiff conflates the relief he seeks. Plaintiff's contention that he was advised that his employment situation was not grievable (DE 275 at 6) is not germane to the relief Plaintiff seeks through his vagueness challenges. Plaintiff seeks a declaration that the terms of the Policy are unconstitutionally vague. Any such declaration by the Court would have a far-reaching impact beyond Plaintiff's individual employment circumstances and would be directly tied to the wording and implementation of the Policy generally. Plaintiff has not shown or cited any evidence to this Court that it would have been futile to file a grievance to establish the rationale, purpose, and scope of the Policy.

DE 362 at 19-20.

After the Court's decision, Plaintiff filed a motion for reconsideration. For the first time, Plaintiff discussed *Hawks*, and attempted to distinguish it. The Court

denied the motion for reconsideration on many different grounds, each of which is set forth at docket entry 383. The Court need not restate those grounds here. For reasons the Court could not discern, Plaintiff moved for reconsideration a second time at the conclusion of trial, styling the motion for reconsideration as a motion for judgment as a matter of law. Now, Plaintiff has moved for reconsideration a third time, styling the request as part of his renewed motion for judgment as a matter of law.

Because Plaintiff has styled his third motion for reconsideration as part of his renewed motion for judgment as a matter of law, the Court is uncertain how the motion should be treated. If Plaintiff's intent was solely to move for reconsideration of the Court's Order on Summary Judgment for a third time, the Court denies that request for all of the reasons set forth in the Court's Order on Summary Judgment and also at docket entry 383 in the Court's order denying Plaintiff's first motion for reconsideration. If Plaintiff's intent was to move for judgment as a matter of law on his constitutional claims a second time, the Court denies that request as well because the Court cannot agree with Plaintiff, for all of the reasons set forth above, that "the record **unquestionably** establishes that FAU implemented a government policy, in the form of the conflict of interest Policy, that unconstitutionally chilled the speech of Plaintiff and others." DE 450 at 18 (emphasis added).

The Court addresses three final points. First, Plaintiff criticizes the Court's decision on the grounds that no court, besides the instant Court, has cited *Hawks* for the proposition outlined in the Court's prior order on summary

judgment. As best as the Court's research can discern, this is because no collective-bargaining-plaintiff—besides the instant Plaintiff—has ever tried to challenge a policy sourced in a collective bargaining agreement as unconstitutionally vague without first exhausting the governing dispute procedures in the applicable collective bargaining agreement. Plaintiff certainly has provided no case law that supports his challenge here in the context of his failure to comply with his collective bargaining agreement. Instead, Plaintiff's authority may establish the opposite. Plaintiff cites to *Gilson v. Pennsylvania State Police*, 676 F. App'x 130 (3d Cir. 2017), but in that case the plaintiff arbitrated his adverse employment action before filing suit in court. Plaintiff cites to *Hamilton v. USPS*, 746 F.2d 1325 (8th Cir. 1984), but in that case the plaintiff also grieved his adverse action before filing suit in court. Indeed, there are a number of cases in which a plaintiff has challenged the constitutionality of a policy *after* exhausting collective bargaining procedures or, alternatively, when no collective bargaining procedures apply. *E.g., Hawks*. The Court was unable to locate any analogous authority to the contrary, and Plaintiff has provided none.

Second, the Court is unable to make any sense of Plaintiff's argument that "[s]ubstantive 1983 claims such as these challenging a governmental policy on First Amendment grounds do not need to be grieved." DE 450 at 20.[15] Defendants have never sought to preclude Plaintiff's

15. As with Plaintiff's prior briefing on this subject, the cases that Plaintiff cites are not on-point. Plaintiff cites to *Patsy v. Florida*, 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982), but that case did not concern a challenge to the constitutionality of a policy in a

First Amendment section 1983 claim on failure-to-grieve grounds. Defendants have repeatedly stated the same in filings in this Court. *E.g.*, DE 455 at 11. Plaintiff's First Amendment section 1983 claim was presented to the jury. Plaintiff's confusion, and his exercise of free speech under the parameters of FAU's policies and the collective bargaining agreement, were the central issue at trial. While Plaintiff may have included a reference to 42 U.S.C. § 1983 in his constitutional challenges against FAU's policies, section 1983 "is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred." *Baker v. McCollan*, 443 U.S. 137, 144 n.3, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979). Just as section 1983 claims do not require the exhaustion of administrative procedures, constitutional challenges to positive, enacted law also have no exhaustion requirement. There is no exhaustion requirement to attack the constitutionality of a Florida statute. But contractual terms are not the same as positive law, and Plaintiff did not challenge the constitutionality of a state statute or some other enacted, positive law. *E.g., Stover v. U.S.*, No. 1:04CR298, 2007 U.S. Dist. LEXIS 21804, 2007 WL 928643 ("Positive law is defined as 'a system of law promulgated on and implemented within a particular community by political superiors . . . . Positive law typically consists of enacted law—the codes, statutes, and regulations that are applied in the courts.'" (quoting Black's Law Dictionary (8th ed.))).

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collective bargaining agreement; *Patsy* is a discrimination case in the context of employment law. Similarly, Plaintiff cites to *Narumanchi v. Connecticut State University*, 850 F.2d 70 (1988), but that case is a Title VII case—*Narumanchi* had nothing to do with a challenge to the constitutionality of a policy in a collective bargaining agreement.

Appendix B

Plaintiff challenged the constitutionality of FAU policies sourced in the contract terms of a collective bargaining agreement that he agreed to.[16] Plaintiff's own words, contained in his own pleading, confirm that his challenge is sourced in the collective bargaining agreement: "You have recommended that I complete a 'Report of Outside Employment/Activity Form' in accordance with the BOT/UFF Collective Bargaining Agreement." DE 93 at 17-18. Plaintiff's challenge rested on the premise that terms in the collective bargaining agreement, together with FAU's implementation of the same, were too vague. The Court has been unable to locate an example of a vagueness challenge against a collective bargaining agreement wherein the plaintiff did not first exhaust his administrative remedies. Plaintiff has provided no authority for the proposition that by inserting a reference to 42 U.S.C. § 1983 in the pleading of his contractual challenge that he is relieved of the obligation to comply with the terms of the grievance procedure in the very agreement he is challenging as vague, nor did Plaintiff distinguish the case law cited by the Court, *Hawks*, for the proposition that Plaintiff is *not* relieved of his requirement to grieve.[17]

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16. Plaintiff's constitutional challenge was focused and construed as seeking a declaration that FAU's policies were unconstitutional, together with related injunctive relief, as exemplified by Plaintiff's request for relief: "[T]his Court [should] issue an Order declaring that [the policy] is unconstitutional . . . . [Plaintiff] is entitled to declaratory relief [and] injunctive relief." DE 93 at 49-50.

17. The Court also stands by its decision on summary judgment that Plaintiff's "as-applied" challenge is not ripe for judicial review.

Third and perhaps most importantly, the Court is unable to ascertain how Plaintiff has standing to pursue his constitutional claims. Assuming, for the sake of argument, that the Court were to reinstate Plaintiff's constitutional challenge and permit a trial on those claims, the jury's verdict in Plaintiff's original trial binds Plaintiff. As a result of the jury's verdict, it is no longer possible for Plaintiff to be reinstated to his former position at FAU by this Court. Thus, while Plaintiff had standing to argue that FAU policies were unconstitutional at the onset of this case, the jury's verdict has had the result of Plaintiff losing his standing to make that argument. This case is like *Lopez v. Garriga*, 917 F.2d 63 (1st Cir. 1990). In *Lopez*, the jury returned a verdict that found that the plaintiff's rights had not been violated by the defendant. *Id.* at 66. After the verdict, Plaintiff sought injunctive relief. The appellate court held:

> A court can only grant permanent injunctive relief to a plaintiff who has met certain preconditions. The first of these implicates the doctrine of standing; an injunction-seeking plaintiff must establish that he "'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 103 S. Ct.

See Digital Properties, Inc. v. City of Plantation, 121 F.3d 586, 589 (11th Cir. 1997).

> 1660, 75 L. Ed. 2d 675 (1983) (citations omitted). **While Lopez, when he filed this suit, alleged a claim for injunctive relief which rose to the level of a case or controversy**, a court does not retain authority to grant an injunction, **even though the plaintiff originally had standing to ask for one, if during the course of the proceeding the plaintiff loses his toehold on the standing ladder**.

Id. at 67 (emphasis added). Although in *Lopez* the second claim sought injunctive relief, [18] the Court fails to see how Plaintiff can establish standing for his constitutional challenge to FAU's policies as a citizen no longer employed by FAU. As the Supreme Court set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992):

> If [the plaintiff is the object of the asserted injury], there is ordinarily little question that the action or inaction [of the government] caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. . . . it becomes

18. One of the claims that Plaintiff seeks to reinstate is a request for an injunction. DE 93 at 50.

> the burden of the plaintiff to adduce facts showing that those choices have been or will be made **in such manner as to produce causation** and permit redressability of injury.

(emphasis added). Thus, for Plaintiff to have standing to bring his constitutional claims, he must be able to show causation between FAU's unconstitutional policies and himself—the Court fails to see how Plaintiff could do so given that he is no longer an employee of FAU and cannot be reinstated to FAU by this Court. *Id.* Plaintiff cannot argue that FAU's policies caused his termination, because the jury's verdict found that Plaintiff's exercise of free speech had nothing to do with Plaintiff's termination. Instead, the issue squarely before the jury was whether Plaintiff was terminated as a result of his own actions—insubordination. Similarly, the Court cannot discern how Plaintiff could argue that FAU's policies were so unconstitutional that those policies *caused* him to become insubordinate, which caused his termination, in light of the fact that (1) every other faculty member complied with FAU policies, (2) those faculty members did not become insubordinate while trying to comply with those policies, and (3) Plaintiff complied with FAU policies in the past without becoming insubordinate.[19]

Other standing-related arguments preclude the reinstatement of Plaintiff's constitutional claims as well. The Supreme Court has recognized that constitutional

19. Stated another way, Plaintiff made a deliberate, conscience choice to engage in insubordination, even when peaceful avenues were available to him to dispute the constitutionality of FAU's policies—avenues Plaintiff chose not to utilize, although he had used those avenues before.

rights may be waived where the facts surrounding the waiver make it clear that the party waiving his or her rights did so voluntarily, with a full understanding of the consequences of the waiver. *Patterson v. Illinois*, 487 U.S. 285, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988). Factors courts consider in such a determination are whether the parties bargained equally, the parties negotiated, and whether the waiving party was advised by competent advisors. *See Erie Telecomms., Inc. v. Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988). Here, not only did Plaintiff agree to the terms of the collective bargaining agreement as a union employee, and not only were the terms of the collective agreement bargained for, but Plaintiff actually served as the *president of the union*, voted to ratify the collective bargaining agreement, and *signed* the agreement. DE 246 at 2; DE 274 at 1-2. The collective bargaining agreement is not so vague and ambiguous that Plaintiff could not have been aware of the consequences when he voted for the ratification of the agreement and signed the agreement on behalf of the union. Thus, to the extent the collective bargaining agreement restricts Plaintiff's ability to engage in outside activities that conflict with his responsibilities at FAU, or to the extent the agreement requires Plaintiff to disclose his outside activities to FAU, Plaintiff knowingly waived a challenge to the same by virtue of his knowing and intelligent consent to the terms of the collective bargaining agreement. *See Leonard v. Clark*, 758 F. Supp. 616, 619-20 (D. Or. 1991). Similarly, Plaintiff waived the argument that the terms of the collective bargaining agreement were vague when he presided over the union's adoption and negotiation of the very same agreement.

Appendix B

III. CONCLUSION

For all of the foregoing reasons, Plaintiff's Motion for New Trial [DE 453] and Renewed Motion for Judgment as a Matter of Law [DE 450] are both **DENIED**.

DONE and ORDERED in Chambers, Fort Pierce, Florida, this 24th day of April, 2018.

/s/ Robin L. Rosenberg
ROBIN L. ROSENBERG
UNITED STATES
DISTRICT JUDGE

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DATED NOVEMBER 11, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 9:16-CV-80655-ROSENBERG/HOPKINS

JAMES TRACY,

Plaintiff,

v.

FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES A/K/A FLORIDA ATLANTIC UNIVERSITY, *et al.*,

Defendants.

OMNIBUS ORDER ON ALL PENDING MOTIONS FOR SUMMARY JUDGMENT

This is a case with two competing stories. One such story is by the Plaintiff in this case. Plaintiff brought this suit alleging that he, a tenured university professor, was fired from his position because of his exercise of his First Amendment rights. A second story is told by Plaintiff's former employer, a university, together with members of the university's faculty. Defendants' story is that Plaintiff was fired because he refused to comply with university policies and procedures.

Appendix C

Before the Court are three motions: Plaintiff's Motion for Partial Summary Judgment [DE 247], and two Motions for Summary Judgment [DE 242] [DE 245] filed by Defendants. Each Motion has been fully briefed. For the reasons set forth below, Plaintiff's Motion for Partial Summary Judgment is denied and Defendants' Motions for Summary Judgment are granted in part and denied in part.

I. BACKGROUND AND INTRODUCTION

The Court sets forth below some of the facts in this case for background purposes. Although the Court has endeavored to only set forth undisputed facts, to the extent disputed facts below are germane to the Court's ultimate decision, those disputed facts are discussed in the Court's analysis section, *infra*.

Plaintiff, James Tracy, was a tenured professor at Florida Atlantic University—a Defendant in this case. DE 246 at 1. Plaintiff taught in the School of Communications and Multimedia Studies. *Id.* Some of Plaintiff's courses included "Public Opinion and Modernity" and "Culture of Conspiracy." *Id.* Plaintiff conducted research in mass shootings, the JFK assassination, and the Sandy Hook Massacre—a mass shooting event in which many children were reported to have been killed. *See id.*

In December of 2012, Plaintiff began to blog about the Sandy Hook shooting. DE 248 at 2. Plaintiff's blog suggested that the Sandy Hook shooting had never taken place and was "staged by the government to promote gun

control." *Id.* Plaintiff's blog garnered national attention and was widely reported by the press. *Id.* Many people called on FAU to fire Plaintiff. *See id.* at 2-9.

In January of 2013, FAU began to have internal discussions about Plaintiff's blog. *Id.* Ultimately, FAU issued a notice of discipline to Plaintiff pertaining to his lack of an adequate disclaimer (drawing a distinction between Plaintiff's opinions and FAU's opinions) on his blog. *Id.* at 3. Plaintiff's union defended him. *Id.* The parties eventually reached an agreement wherein Plaintiff used a disclaimer on his blog that was to FAU's satisfaction. *Id.* at 4.

After Plaintiff amended the disclaimer on his blog, he continued to teach courses at FAU. DE 246 at 5. In October of 2015, however, a new dispute—a contractual dispute—arose between the parties. *Id.* at 6. FAU has a Collective Bargaining Agreement (the "CBA") with its faculty. *Id.* at 2. The CBA contains many terms and conditions, including an article entitled "Conflict of Interest/Outside Activity." *Id.* This article, hereinafter referred to as the "Policy," imposes certain conditions upon faculty members. DE at 131-33. One such condition of the Policy is that "[c]onflicts of interest are prohibited." *Id.* at 131. A conflict of interest is defined as:

> (1) 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, including conflicts of interest specified under Florida Statutes;

> (2) any activity which interferes with the full performance of the employee's professional or institutional responsibilities or obligations; or
>
> (3) any outside teaching employment with any other educational institution during a period in which the employee has an appointment with Florida Atlantic University, except with written approval of the Dean.

Id. The Policy also imposes certain reporting requirements upon faculty, including the following:

> An employee who proposes to engage in outside activity shall provide his or her supervisor a detailed written description of the proposed activity. The report shall include where applicable, the name of the employer or other recipient of services; the funding source; the location where such activity shall be performed; the nature and extent of the activity; and any intended use of University facilities, equipment, or services. A new report shall be submitted for outside activity previously reported at the beginning of each academic year for outside activity of a continuing nature and whenever there is a significant change in an activity (nature, extent, funding, etc.) The reporting provisions of this section shall not apply to activities performed wholly during a period in which the employee has no appointment with the University. Any outside activity which

> falls under the provisions of this Article and in which the employee is currently engaged but has not previously reported, shall be reported within sixty (60) days of the execution of this Agreement and shall conform to the provisions of this Article.

Id. at 132. Importantly for this case, the CBA contains a mandatory grievance procedure that a faculty member must use if the member has a grievance with any portion of the CBA, including the disclosure Policy. *Id.* at 133.

In October of 2015, Plaintiff was completing an electronic acknowledgment form that FAU had sent to him. DE 246 at 6. That form required Plaintiff to check a box "acknowledging [his] obligation to report outside activities" as well as other things. *Id.* Plaintiff refused to check the box. *Id.* Instead, Plaintiff printed out a hard copy of the form and submitted it to FAU without checking the box. *Id.*

Also in October of 2015, an FAU supervisor ordered Plaintiff to report his outside activities by completing and submitting a conflict of interest form. *See* DE 248 at 5. Plaintiff does not appear to dispute that he was ordered to complete the conflict of interest form multiple times by his supervisors. *See* DE 274 at 5-6.[1] In lieu of completing the form in the manner in which FAU required, Plaintiff, in his own words, "asked his supervisors for clarification

1. Instead, it appears that Plaintiff's position is that he complied with his supervisor's directives by submitting a hard copy of the online form that did not contain a checkmark in the applicable box.

about the scope and application of the Policy" and he also required from FAU "a signed statement asserting FAU's position that his personal activities (media criticism, alternative journalism, and blogging) did not fall within the definition of 'conflict of interest'" under the Policy. DE 248 at 5.

On November 10, 2015, Defendants issued a notice of discipline to Plaintiff. *Id.* The notice required Plaintiff to submit conflict of interest forms within forty-eight hours. *Id.* On November 22, 2015, Plaintiff responded by letter, informing Defendants that he had not received the clarification that he had requested on the "considerable confusion" created by FAU's administration of the Policy. *Id.* On December 11, 2015, Defendants responded to Plaintiff's letter by informing him that he had until 5:00 p.m. on December 15, 2015, to "completely and accurately fill out the conflict of interest forms." *Id.* at 7. Plaintiff appears to admit that he did not submit the forms by 5:00 p.m. on December 15, 2015. *Id.* ("Tracy did not receive [the e-mail] until the evening of December 15, 2015.").

On December 16, 2015, Defendants issued a notice of termination to Plaintiff. Defendants' position was that because Plaintiff had refused to fill out his conflict of interest forms, Defendants could not ascertain whether Plaintiff was in compliance with the Policy (pertaining to outside activities) in the CBA. *Id.*

Earlier, sometime during the month of November of 2015, Plaintiff requested assistance from his union. DE 246 at 7. Plaintiff's union hired an attorney for Plaintiff.

Id. at 8. After Plaintiff received his notice of termination, Plaintiff was required to file a grievance contesting his termination within ten days. *Id.* Plaintiff's attorney negotiated for an extension for additional time to grieve. *See id.* The extension was granted. *Id.* at 9. Plaintiff never filed a grievance. Instead, Plaintiff filed this lawsuit on April 25, 2016.

Initially, Plaintiff filed this lawsuit against FAU, certain individual Defendants at FAU, his union, and certain individual Defendants at his union. During the pendency of this suit, however, Plaintiff reached a settlement agreement with all union Defendants. Only FAU and the FAU individual Defendants remain. The individual Defendants are John Kelly, the FAU President, Diane Alperin, an FAU Vice Provost, and Heather Coltman, an FAU Dean. The following counts are before the Court: a civil rights retaliation claim pertaining to Plaintiff's right to free speech (Count I), a claim alleging a conspiracy to interfere with Plaintiff's civil rights (Count II), a facial constitutional challenge against the Policy (Count III), an as-applied constitutional challenge against the Policy (Count IV), a request for a declaration on the constitutionality of the Policy (Count V), and a breach of contract claim (Count VI).

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate 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). The existence of a factual

dispute is not by itself sufficient grounds to defeat a motion for summary judgment; rather, "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute is genuine if "a reasonable trier of fact could return judgment for the non-moving party." *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1243 (11th Cir. 2008) (citing *Anderson*, 477 U.S. at 247-48). A fact is material if "it would affect the outcome of the suit under the governing law." *Id.* (citing *Anderson*, 477 U.S. at 247-48).

In deciding a summary judgment motion, the Court views the facts in the light most favorable to the non-moving party and draws all reasonable inferences in that party's favor. *See Davis v. Williams*, 451 F.3d 759, 763 (11th Cir. 2006). The Court does not weigh conflicting evidence. *See Skop v. City of Atlanta*, 485 F.3d 1130, 1140 (11th Cir. 2007). Thus, upon discovering a genuine dispute of material fact, the Court must deny summary judgment. *See id.*

The moving party bears the initial burden of showing the absence of a genuine dispute of material fact. *See Shiver v. Chertoff*, 549 F.3d 1342, 1343 (11th Cir. 2008). Once the moving party satisfies this burden, "the nonmoving party 'must do more than simply show that there is some metaphysical doubt as to the material facts.'" *Ray v. Equifax Info. Servs., LLC*, 327 F. App'x 819, 825 (11th Cir. 2009) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)). Instead, "[t]he non-moving

party must make a sufficient showing on each essential element of the case for which he has the burden of proof." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Accordingly, the non-moving party must produce evidence, going beyond the pleadings, to show that a reasonable jury could find in favor of that party. *See Shiver*, 549 F.3d at 1343.

III. ANALYSIS

The Court addresses Plaintiff's Motion for Summary Judgment and Defendants' Motions for Summary Judgment by considering each count in turn. After analyzing each count, the Court considers the individual Defendants' argument that they should be dismissed from this case.

A. *Plaintiff's Count I — First Amendment Retaliation*

For Plaintiff to establish a prima facie case for his First Amendment claim, he must show: (1) that his speech may be fairly characterized as constituting speech on a matter of public concern, (2) that Plaintiff's First Amendment interests outweigh the interest of his employer in promoting the efficiency of the public services it performs through its employees, and (3) that Plaintiff's speech played a substantial part in Defendants' decision to terminate Plaintiff. If Plaintiff proves the foregoing, then (4) the burden shifts to Defendants to prove that they would have taken the same action against Plaintiff even in the absence of any protected speech. *Morgan v. Ford*, 6 F.3d 750, 754 (11th Cir. 1993). The Court examines each element of Plaintiff's claim.

Appendix C

The Characterization of Plaintiff's Speech

Plaintiff contends that his constitutionally-protected speech is his blog postings. He characterizes his blogs as his observations, opinions, thoughts and viewpoints on government, the media, current events, history and politics. DE 248 at 2. Specifically, Plaintiff blogged about events in the national news media, including mass casualty events. *Id.* Plaintiff contends that he blogged from home during personal time on his personal computer. *Id.* Private speech on matters of public concern is protected by the First Amendment. *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983).

Defendants contest the characterization of Plaintiff's speech.[2] Defendants argue that Plaintiff's blogs overlapped with his work for FAU and that Plaintiff used FAU resources for his blog postings. DE 270 at 2. Defendants, *inter alia*, point to similarities between Plaintiff's courses and Plaintiff's blog; Defendants therefore contest that Plaintiff blogged as a private citizen and instead characterize Plaintiff's speech as that of a public employee. *See id.* "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

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2. Although Defendants' legal arguments on this point are quite brief, the Court does not construe Defendants' brief arguments as a concession or admission. Instead, Defendants have cited evidence to refute Plaintiff's evidence on this issue. *See* DE 270 at 2.

The Court concludes that each side has evidence supporting their respective positions and, as a result, a dispute of material fact precludes summary judgment on the issue of how Plaintiff's speech should be characterized. Each party's Motion for Summary Judgment is denied as to this issue.

The Balancing of Plaintiff's Speech with Defendants' Interest in Promoting the Efficiency of the Services it Performs through its Employees

With respect to the balancing of Plaintiff's speech with Defendants' interests, this is an issue only tangentially briefed by all parties. For Plaintiff's part, Plaintiff assumes (in a footnote) in a cursory fashion that Defendants are estopped from raising any such argument. DE 275 at 9 n.3. For Defendants' part, Defendants argue (also in a footnote) that Plaintiff's speech must be balanced against the Defendants' interest in "peacefully fulfilling its educational mission." DE 245 at 7 n.3. The Court declines to grant any relief on this incomplete record, and each parties' Motion for Summary Judgment is denied as to this issue.

Plaintiff's Speech must have Played a Substantial Part in Defendants' Decision to Terminate Plaintiff

The parties vigorously contest whether Plaintiff's speech in his blog postings played a substantial part in causing Defendants' decision to terminate Plaintiff. The Defendants rely upon evidence in the record that calls into question whether FAU's decision to terminate Plaintiff

was connected to his blog postings. For example, there were approximately two years between Plaintiff's most controversial blog posting—which pertained to Sandy Hook—and Plaintiff's termination. *See, e.g., id.* During that period of time, FAU permitted Plaintiff to blog as long as he abided by FAU-required disclaimers. *See id.* Defendants have sworn testimony that the basis for Plaintiff's termination was his willful refusal to comply with FAU's disclosure Policy. *See id.*

Plaintiff, on the other hand, emphasizes that while he was permitted to blog during this two-year time period, FAU was under constant public pressure to fire him. *See* DE 248 at 2-4. Plaintiff argues that his controversial speech was not isolated to a single point in time but rather, his speech continued to affect Defendants long after his speech was published. Plaintiff also relies upon evidence that FAU officials were distressed and embarrassed over the content on Plaintiff's blog. *See id.*

The record facts relevant to this issue are intertwined with the facts relevant to Plaintiff's evidence that Defendants' reason for termination was pretextual—those facts are discussed below. Because of the close relationship between the facts supporting the third element—causation—and the facts supporting pretext, the Court's ruling pertaining to causation is included in its analysis pertaining to pretext.

Appendix C

Defendants' Burden to Prove that they Would have Taken the Same Action Against Plaintiff even in the Absence of any Protected Speech

The central issue in this case is why Plaintiff was terminated. Defendants contend that Plaintiff was terminated because he willfully refused to comply with FAU's policy on the disclosure of outside activities. There is evidence in the record to support Defendants' position. Defendants issued a notice of discipline to Plaintiff informing him that he was required to comply with the Policy and that he had not complied. DE 243 at 6. Prior to being terminated, Plaintiff willfully refused on multiple occasions to comply with the Policy as FAU required. *Id.* at 6-7. Plaintiff's termination was officially premised on his refusal to comply with the Policy. *Id.*

Plaintiff's burden to refute Defendants' non-discriminatory reason for his termination is substantial. Plaintiff must take Defendant's reason "head on and rebut it" and he cannot succeed by "simply quarreling with the wisdom of that reason." *Alvarez v. Royal Atl. Dev., Inc.*, 610 F.3d 1253, 1265-66 (11th Cir. 2010). Plaintiff must have evidence that Defendant's non-discriminatory reason for firing him was pretextual. *Id.* at 1264. Plaintiff may satisfy this burden by showing that Defendants' reasons are not credible by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could find them unworthy of credence." *Id.* at 1265. The Court examines Plaintiff's evidence of pretext.

That Plaintiff's blog postings were provocative is, in Plaintiff's own words, "an understatement." DE 247 at 7. Plaintiff blogged that the Sandy Hook massacre did not occur and that the families of the victims of that massacre were "playing a role." *See id.*; DE 248 at 2-3. Plaintiff's comments resulted in national attention and a backlash from the parents of the victims at Sandy Hook. DE 248 at 2-6; DE 247 at 7. Parents also alleged, through an op-ed in the Sun Sentinel, that Plaintiff had harassed them by asking for proof in connection with the massacre. DE 248 at 6.[3] In the years following Plaintiff's blog postings about Sandy Hook, public pressure still existed on FAU to fire Plaintiff—the controversy surrounding Plaintiff's blogs never completely subsided.[4] *See id.* FAU met to discuss Plaintiff's blogging and the "impact" of the negative press. *Id.* at 2. Certain handwritten minutes indicate that Plaintiff's speech was a "black eye on all faculty" and that in the context of considering Plaintiff's First Amendment rights FAU needed to find "winning metaphors." DE 250-10. The minutes also indicate that there should be "no email on this." *Id.* After Plaintiff was terminated, an FAU dean circulated an e-mail that read "for the record, [Plaintiff] was not fired because he didn't report things." DE 250-45.

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3. FAU's decision to fire Plaintiff was made close in time with the publishing of the op-ed referenced above. *See* DE 248 at 6.

4. For this reason, the Court finds cases such as *Stanley v. City of Dalton, Ga.*, 219 F.3d 1280, 1291 (11th Cir. 2000) (finding a four year temporal gap insufficient to support causation) distinguishable from the instant case.

Appendix C

The Court is required to view Plaintiff's evidence in the light most favorable to him in connection with Defendants' Motion for Summary Judgment. Viewed in Plaintiff's favor, the evidence outlined above establishes that (i) Defendants had a powerful motivation to fire Plaintiff and (ii) Defendants were planning to find a way to do just that. Defendants' basis for terminating Plaintiff—his failure to comply with the Policy—has also been subjected to reasonable attack by other evidence. For example, FAU's administration of the Policy was altered after FAU reached a settlement with Plaintiff pertaining to Plaintiff's use of a disclaimer on his blog. DE 248 at 4. Perhaps, as Plaintiff contends, FAU altered its administration of the Policy because its prior efforts to censor Plaintiff had failed. Defendants arguably knew that their implementation of the Policy would have the result of resistance from Plaintiff. On September 4, 2015, FAU faculty members held a meeting in which several faculty members voiced concerns over the Policy being applied to constitutionally protected speech. *Id.* at 5. Soon after, Defendants enforced the Policy against the person who arguably had the most controversial public speech at the university—Plaintiff. Furthermore, notwithstanding Plaintiff's constitutionally-based protests against FAU's administration of the Policy, Defendants ultimately elected not to accept Plaintiff's untimely effort at full compliance. When these events are taken in their entirety, in context, and are viewed in Plaintiff's favor, a reasonable inference exists that Defendants altered and enforced their administration of the Policy against Plaintiff for the pretextual purpose of finding a way to retaliate against Plaintiff's speech.

After a full examination of the record, the Court concludes that Plaintiff has sufficient evidence to demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could find them unworthy of credence." Defendants contest many of the facts relied upon by the Plaintiff and there is evidence to support Defendants' position that Plaintiff was insubordinate. This juxtaposition of facts serves to highlight the dispute of material fact that exists as to the reason Plaintiff was terminated—a factual determination that must be made by a jury. For the foregoing reasons, each party's Motion for Summary Judgment is denied as to Count I, and Count I survives for trial.[5]

B. ***Plaintiff's Count II - Conspiracy***

Plaintiff's second count alleges that a conspiracy existed to terminate Plaintiff from his tenured position. Under the intra-corporate conspiracy doctrine, FAU employees cannot conspire amongst themselves or with FAU. *See Dickerson v. Alachua Cty. Comm'n*, 200 F.3d 761, 767 (11th Cir. 2000). Thus, Plaintiff argues that a conspiracy existed between Defendants and Plaintiff's union.

Defendants argue that Plaintiff has insufficient evidence to support his conspiracy claim. In response,

5. The Court also denies Defendants' request for summary judgment to be entered in their favor as to Defendants' failure to mitigate affirmative defense because of questions of material fact. *Compare* DE 246 at 11, *with* DE 274 at 9-10.

Plaintiff relies upon three points. The first is a timeline. The second is a quote. The third is a witness. As to Plaintiff's first point, Plaintiff contends that an agreement was reached between his union and FAU to convince Plaintiff not to file a grievance. He contends that this agreement was reached at a collective bargaining meeting on November 30, 2015.[6] DE 274 at 10. Prior to meeting, Plaintiff attests that he was advised by his union that "anything is grievable." *Id.* Subsequent to the meeting, Plaintiff's says he was advised by his union that his situation was "not grievable." *Id.*

The mere fact that there was a meeting between Plaintiff's union and FAU is not evidence of a conspiracy. *See Lee v. Christian*, 221 F. Supp. 3d 1370, 1379 (S.D. Ga. 2016). Upon review of Plaintiff's evidence, the Court concludes that Plaintiff's timeline does not support Plaintiff's theory of a conspiracy. The objective, undisputed evidence establishes the opposite. Plaintiff's own allegations establish that his union previously represented him against Defendants. DE 93 at 15-16. Plaintiff's union was successful in that representation. *Id.* Plaintiff's union defended him in connection with the instant case. DE 246 at 4-5. Plaintiff's union hired a lawyer to defend Plaintiff. *Id.* at 8. Plaintiff's union and union-appointed lawyer negotiated for an extension of time for Plaintiff to file a grievance *after* the date Plaintiff alleges a conspiracy was formed. *Id.* at 8-9; DE 246-16 at 18. Plaintiff was thereafter granted an extension. DE 246

6. Although Plaintiff's November 30, 2014 date is contested by Defendants, the Court accepts Plaintiff's date as true for the purposes of the Court's analysis on this issue.

at 9. The fact that Plaintiff's union doubted a grievance would lead to a positive result for Plaintiff is not evidence that Plaintiff's union was involved in a conspiracy. Thus, the objective timeline evidence in this case does not support Plaintiff's contention that his union was involved in a conspiracy with Defendants to deny him the right to grieve his termination.[7]

As for Plaintiff's second point, Plaintiff contends that a union official told a colleague "don't let [Plaintiff] respond." DE 274 at 10. Plaintiff relies upon this quote for the proposition that the union wanted Plaintiff to be prevented from filing a grievance. This quote, which is taken out of context, is a quote with ambiguous meaning. *See* DE 274-13. The content of the relevant e-mail concerns various, unclear matters but no reasonable inference may be gleaned from the e-mail that it was the union's intent to deprive Plaintiff of the right to grieve his termination due to a conspiracy with Defendants.

Third and finally, Plaintiff relies upon a witness to support his claim of a conspiracy. Plaintiff cites to the deposition testimony of Mr. Shane Eason. Mr. Eason was a colleague of both Plaintiff and certain members of Plaintiff's union. Mr. Eason had a conversation about Plaintiff with union officials. The contents of that

7. Other evidence, not cited here, establishes that (i) Plaintiff knew how important it was to file a grievance for his termination, (ii) Plaintiff chose not to grieve despite this knowledge, (iii) Plaintiff hired an independent lawyer on his own initiative, and (iv) even though this new acquisition of counsel was still within the time period for Plaintiff to file a grievance, Plaintiff did not file a grievance.

conversation were later relayed by Mr. Eason to Plaintiff. In support of an inference that a conspiracy existed between Plaintiff's union and Defendants, Plaintiff relies in part upon the following quote from Mr. Eason's deposition:

> Q: Did you ***tell Professor Tracy*** that Zoeller [a union official] worked with FAU's counsel -- at least Zoeller told you that he worked with FAU's counsel and worked to get rid of Professor Tracy?
>
> A: Yeah.

DE 246-17 at 23 (emphasis added). The practical effect of this quote, however, is lessened when placed in the context of adjacent questions:

> Q: Well, my question was whether you told Professor Tracy that Zoeller said that to you?
>
> A: But ***I don't know if Zoeller really said that to me***. I can't -- you know what I mean like —

Id. (emphasis added). This answer by Mr. Eason, in which he emphasizes that he cannot remember what union officials actually said to him, is a consistent theme throughout entirety of Mr. Eason' testimony. A second recurring theme in Mr. Eason's deposition is that all of the conversations he had with Plaintiff about a conspiracy were hypothetical. While Mr. Eason did testify to a certain level of discomfort with how Plaintiff was personally regarded

by union officials, Mr. Eason repeatedly emphasized that he was unaware of any conspiracy or criminal wrongdoing that caused Plaintiff's termination:

> Q: So, Zoeller detailed to you in your confidence that there was some kind of conspiracy that he was involved in or there was something he was involved in that was centered on getting rid of Professor Tracy?
>
> A: Again, I don't -- the word conspiracy is not one that he used.
>
> Q: Without using the word conspiracy though, he described a plot or some kind of an agreement to end Professor Tracy's employment, yes or no?
>
> A: I don't recall that. Like I said, he didn't like Jim and he was tired and frustrated by the whole thing.
>
> Q: That's what Zoeller told you?
>
> A: Yeah.
>
> Q: Among other things. It's not all he said, right?
>
> A: That's -- Yeah, some of the stuff I can recall. Yeah.

. . .

Q: When he described -- When I say he, I'm referring to Zoeller. When Zoeller described his dealings with FAU's lawyer, it was not just shoot-from-the-hip small talk. He was describing his efforts to end Professor Tracy's employment, yes or no?

A: He was telling me that.

Q: I'm asking whether Zoeller told -- when he was describing his relationship with Larry Glick [FAU counsel], it wasn't a conversation about Larry Glick.

A: Right.

Q: It was a conversation about Professor Tracy.

A: They would have off the cuff conversations about Jim, yeah.

Q: That's what Zoeller told you?

A: Right.

Q: Zoeller told you that Glick and Zoeller were communicating about Tracy's employment, yes?

A: The communication I don't know where it went, but these meetings or whatever to collective bargaining, during downtime they would chat. That's really the set—

> Q: About Tracy?
>
> A: Yeah, about -- Yeah, about Jim and about —
>
> . . .
>
> Q: Would you agree with the characterization of whatever Zoeller and Glick did outside of the collective bargaining realm was unlawful, the way that he described it to you?
>
> A: I don't know where it would fall under the law.
>
> Q: Did it sound wrong?
>
> A: Ethically.
>
> Q: What Zoeller conveyed to you was ethically wrong in your opinion?
>
> A: It could be, yeah.

Id. at 25. This evidence is further attenuated by other deposition testimony in which Mr. Eason was emphatic that any discussion he may have had with Plaintiff about how and why Plaintiff was terminated was hypothetical:

> Q: So, to the best of your recollection today what exactly did you tell Professor Tracy about your conversation with Zoeller?

A: The conversation I had back then with Jim would have been regarding the blog, regarding the frustration with Zoeller and the blog and the whole situation and telling Jim that Zoeller just doesn't really care for what it is that he's doing.

Q: And are you saying that you didn't tell Professor Tracy that Zoeller put the fix in on him?

A: I don't recall saying that.

Q: You know what I'm asking.

A: Right.

Q: You understand what -- when I said fix?

A: I understand, yeah, yeah.

Q: Sabotage —

A: Right.

Q: Railroad, there's a lot of ways we can describe it, but my question is do you remember telling Professor Tracy that had Zoeller had it out for him, you know?

A: We hypothesized about this stuff. We talked about it.

> Q: So, you are saying that you were speaking abstractly and posing hypotheticals about what happened?
>
> A: Yeah.
>
> . . .
>
> Q: Okay. And you said you were hypothetically speculating?
>
> A: Spec -- Yeah.
>
> Q: And so, were you talking about actual conversations you had had with Zoeller or just speculating as to what Zoeller's actions may have been?
>
> A: It was more I think speculation than anything

Id. at 21, 24.

For Plaintiff's conspiracy claim to survive summary judgment, Plaintiff must set forth specific facts that show there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The Court must make the threshold inquiry as to whether there is a genuine issue for trial that can be resolved by a factfinder because the issue may reasonably be resolved in favor of either party. *Id.* When the evidence can lead to but one reasonable conclusion,

the Court must grant summary judgment as a matter of law in favor of that evidence. *Id.* Here, the Court has reviewed Mr. Eason's deposition testimony carefully. The Court has considered all of the evidence cited by Plaintiff in the record and, based upon this review, concludes that no reasonable juror find that a conspiracy existed between Plaintiff's union and Defendants. Accordingly, Defendants' Motion for Summary judgment is granted as to Plaintiff's Count II.

C. *Plaintiff's Count III, Count IV, and Count V — Constitutional Challenges*

Plaintiff has alleged three counts challenging the constitutionality of FAU's Conflict of Interest Policy: Count III (styled as a facial challenge), Count IV (styled as an "as-applied" challenge), and Count V (styled as a request for a declaratory judgment). The premise of Plaintiff's claims is that the Policy is unconstitutionally vague. Defendants argue that summary judgment must be entered in their favor as to these counts because the Policy is not positive law—that is, it is not an enactment of a state, local, or federal government. Instead, Defendants argue that the Policy is part of the collective bargaining agreement between FAU and its faculty. Plaintiff provides no authority to this Court that the terms of the Policy may be challenged constitutionally in the same manner that positive law may be challenged. Instead, Plaintiff merely cites to unremarkable cases in which positive law has been challenged. By contrast, Defendants cite to persuasive authority for the proposition that the constitutionality of the Policy cannot be challenged on the record before the Court.

Appendix C

Defendants cite to *Hawks v. City of Pontiac*, 874 F.2d 347, 349 (6th Cir. 1989). In *Hawks*, the plaintiff was an employee of a police department. *Id.* at 348. The plaintiff moved his residence out of the city in which he worked. *Id.* The plaintiff's collective bargaining agreement required police officers to maintain residency in the city and, as a result of the plaintiff's decision to move his residence, he was demoted. *Id.* at 348-49. The plaintiff challenged the residency requirement as being unconstitutionally vague. *Id.* The district court in *Hawks* granted summary judgment in favor of the defendant by concluding that the contractual provision could not be challenged as unconstitutionally vague in the same manner as positive law. *Id.* The appellate court affirmed, finding: "As a contract provision entered into through voluntary collective bargaining, it may not be characterized as a positive law subject to due process challenge for vagueness. Its interpretation and clarification is subject to the grievance and arbitration process." *Id.*

Notably, the plaintiff in *Hawks* had a stronger basis to argue that his collective bargaining agreement terms were subject to a constitutional challenge than the Plaintiff in the instant case. In *Hawks*, the plaintiff argued that the residency requirement originated from the city's charter, and had only been *incorporated* into his collective bargaining agreement. *Id.* at 349. The *Hawks* court rejected that argument, and no such nuance exists in the instant case. In his Response, Plaintiff only acknowledges *Hawks* a single time. DE 275 at 4-5. Plaintiff argues that *Hawks* is distinguishable because in *Hawks* the plaintiff "ha[d] not demonstrated that procedures used in the past

would be futile." *Id.* Plaintiff argues that the holding in *Hawks* should not apply to his case because, if he had grieved, his grievance would have been futile. The Court does not agree.

Here, Plaintiff alleges that the terms of the Policy are "overbroad and vague . . . do[] not serve a significant governmental interest . . . [and are] so vague and overbroad, persons of common intelligence must necessarily guess at its meaning and differ as to its application." DE 93 at 44. If Plaintiff had challenged the vagueness of the Policy by filing a grievance, the Court would have the benefit of evaluating the official rationale, purpose, and scope of the Policy through that grievance procedure—the plaintiff in *Hawks* complied with his grievance procedures and the court had the benefit of the underlying record.[8] Regardless of Plaintiff's reasons for failing to grieve, that fact remains that Plaintiff did not file a grievance. A grievance was required. DE 243-1 at 134-36; *see generally* DE 246-6. While Plaintiff may have subjectively believed that his desired outcome would have been a futile goal if he grieved, the grievance procedure would have enabled the Court to evaluate FAU's implementation of the scope, purpose, and terms of the Policy.

On this issue, Plaintiff conflates the relief he seeks. Plaintiff's contention that he was advised that his employment situation was not grievable (DE 275 at 6)

8. The *Hawks* court analyzed the administrative record and determined that there was no basis to overturn the result of the plaintiff's administrative proceedings and grievance process. *Hawks*, 874 F.2d at 350.

is not germane to the relief Plaintiff seeks through his vagueness challenges. Plaintiff seeks a declaration that the terms of the Policy are unconstitutionally vague. Any such declaration by the Court would have a far-reaching impact beyond Plaintiff's individual employment circumstances and would be directly tied to the wording and implementation of the Policy generally. Plaintiff has not shown or cited any evidence to this Court that it would have been futile to file a grievance to establish the rationale, purpose, and scope of the Policy.

For the foregoing reasons,[9] Defendants' Motion for Summary Judgment is granted as to Count III, Count IV, and Count V and Plaintiff's Motion for Summary Judgment is denied as to the same.

D. ***Plaintiff's Count VI — Breach of Contract***

Plaintiff's final count, Count VI, is a breach of contract claim against Defendant FAU. Plaintiff alleges that he was wrongfully terminated pursuant to his collective bargaining agreement. Defendants argue they are entitled to summary judgment as to Count VI because Plaintiff did not file a grievance. *Mason v. Continental Grp., Inc.*, 763 F.2d 1219, 1222 (11th Cir. 1222) ("Employees claiming a breach of a collective bargaining agreement or wrongful termination of employment by their employer are bound by that agreement's terms providing a method for resolving

9. The Court also accepts and adopts Defendant's ripeness argument—that Plaintiff's First Amendment rights were never constrained by the Policy—as to Count IV without comment. *See* DE 245 at 6.

disputes between them and their employer."). Plaintiff only response is that his grievance would have been futile and that he was advised not to grieve.

Plaintiff relies on *Artz ex rel. Artz v. City of Tampa*, 102 So. 3d 747 (Fla. Dist. Ct. App. 2012) in support of his argument that the grievance process would have been futile. *Artz* is distinguishable. In *Artz*, administrative proceedings were exhausted by some parties—the only question before the court was whether other parties would be required to undergo the same proceeding for what was expected to be the same result. *Id.* at 751. Plaintiff relies upon one other case, *N.B. by D.G. v. Alachua County School Board*, 84 F.3d 1376 (11th Cir. 1996), but in that case the appellate court rejected every argument the appellant raised to establish that exhaustion would be futile. The law requires Plaintiff's exhaustion of administrative remedies: "It would be a strange doctrine indeed under which an employee could relieve himself of engaging in the grievance process merely by supinely accepting an adverse decision of his employer as unchallengeable until the filing of an action in court. Such a rule would render the exhaustion principle itself entirely meaningless." *City of Miami v. Fraternal Order of Police Lodge No. 20*, 378 So. 2d 20, 25 (Fla. Dist. Ct. App. 1979). Furthermore, the grievance process Plaintiff was required to follow ultimately allowed for adjudication by an independent arbitrator—Plaintiff has provided no argument or evidence that an independent arbitrator would have been biased against him. *See* DE 246-6 at 138. Plaintiff has not shown that his act of filing a grievance would have been so futile that he was relieved of the requirement to do so by law.

Plaintiff also argues that he was advised by his legal counsel (and possibly by counsel for a Defendant) that he could "always challenge in court adverse employment actions *that affect statutorily or constitutionally protected rights*." DE 275 at 4 (emphasis added). Even if Plaintiff's argument possessed some legal significance[10] and even if Plaintiff was so advised, there is nothing incompatible with the advice Plaintiff received and the Court's rulings herein—Plaintiff's claim for the violation of his First Amendment rights, Count I, shall proceed to the jury. Plaintiff's *contractual* claim, Count VI, is another matter, however, and for all of the foregoing reasons the Court grants Defendants' Motion for Summary Judgment as to Count VI and denies Plaintiff's Motion for Summary Judgment as to the same.

E. ***Arguments Specific to the Individual Defendants***

Defendants argue that the three individual Defendants in this case—Kelly, Alperin, and Coltman—are entitled to summary judgment. Defendant Kelly argues that he had no involvement with Plaintiff's termination. Defendants Alperin and Coltman argue that they only disciplined Plaintiff based upon his willful insubordination and refusal to comply with FAU's disclosure Policy and, as a result, they are both entitled to qualified immunity.

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10. The Court rejects any contention that Defendants should be estopped from arguing that Plaintiff failed to grieve.

Appendix C

Defendant Kelly

Defendant Kelly has cited evidence that he had no involvement in the events in this case. Defendant Kelly is the President of FAU. DE 243 at 1. As such, he has delegated his duty to discipline and terminate faculty to an FAU Provost who in turn delegated the duty to a Vice Provost—Defendant Alperin. *Id.* Supervisory officials are not liable under section 1983 claims on the basis of *respondeat superior* or vicarious liability. *Keith v. DeKalb Cnty., Ga.*, 749 F.3d 1034, 1047-48 (11th Cir. 2014). Instead, for a supervisor to be liable in his individual capacity the supervisor must either directly participate in unconstitutional conduct or there must be a causal connection between the actions of the supervisor and the alleged constitutional deprivation. *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003). "The standard by which a supervisor is held liable in [his] individual capacity for the actions of a subordinate is extremely rigorous." *Braddy v. Fla. Dep't of Labor*, 133 F.3d 797, 802 (11th Cir. 1998).

Plaintiff argues that Defendant Kelly is personally liable due to his personal involvement in this case because he admitted at his deposition that he has the "ultimate responsibility" for the termination of faculty members and that he "monitored the fallout" from Plaintiff's termination. *See* DE 273 at 3-4. That is precisely the kind of vicarious liability that the Eleventh Circuit has repeatedly held is insufficient as a matter of law. *See, e.g., Keith*, 749 F.3d at 1047-48. Plaintiff also argues that Defendant Kelly was personally involved in the events of this case because he sent an e-mail pertaining to Plaintiff

in which he said he intended to "deal with this personally." DE 273 at 4. That contention is frivolous. The e-mail and the record, reviewed in context, reveals that Defendant Kelly (i) was expressing his desire to communicate to the parents of a deceased child from the Sandy Hook massacre (who had called FAU to complain) personally and (ii) that he never actually spoke with the parents:

> Q: When you say, "Please ask Mr. Stern — for Mr. Stern to put the parents of the child in direct contact with me, I intend to deal with this personally," what do you mean by that?
>
> A: Frequently when someone has lost a child, if they -- if they lose a child who is here at the university, I write them a letter; and then if it's a university student, I also give a scholarship in their name, just a letter of condolence and how sorry I am for what happened and their loss. And I felt compelled -- the same thing with this -- this letter, that I'd like to send a letter just saying how sorry I am he lost a child.
>
> Q: What about Mr. Stern's communication, on December 11th, compelled you to respond?
>
> A: Just — I've lost a child before and I know the pain, and so when I read about a lost child, I felt like I should respond as a spokesperson for the university that I was sorry. I never did though, I never did write the letter.

> Q: Is there a reason why not?
>
> A: I guess I just decided that it wasn't something maybe the family wanted to have hashed up again.
>
> Q: Did you ever speak to Mr. Stern?
>
> A: No.
>
> Q: Did you ever speak to the individual that Mr. Stern's referring to whose daughter lost their life?
>
> A: No.
>
> Q: What was the result of your request to Stacy Volnick?
>
> A: There was no follow-up, further information, nothing else happened.

DE at 243-1 at 344; DE 243-2 at 89-90. Plaintiff has no evidence that Defendant Kelly directly participated in Plaintiff's termination or was otherwise casually involved and, at the very least, Plaintiff has no evidence upon which a reasonable juror could rely to meet the "extremely rigorous" standard necessary to impose supervisor liability on Defendant Kelly. The Court grants Defendant Kelly's Motion for Summary Judgment.

Appendix C

Defendants Alperin and Coltman

Unlike Defendant Kelly, Defendants Alperin and Coltman admit that they were personally involved with Plaintiff's termination. *See* DE 243. Both Defendants argue that they cannot be held personally liable in this case because they, acting in their undisputed capacity as university officials, are entitled to qualified immunity through their decision to terminate Plaintiff for his willful refusal to comply with FAU's disclosure Policy. This issue is intertwined with the central issue of this case: "Why was Plaintiff terminated?" The Court has already analyzed this issue at length and has concluded that a question of material fact exists as to why Plaintiff was terminated.

The mere fact that an issue of material fact exists, however, is not dispositive of a qualified immunity analysis. Defendants cite to *Sherrod v. Johnson*, 667 F.3d 1359 (11th Cir. 2012). In *Sherrod*, a plaintiff school teacher sued a defendant school board. *Id.* at 1361. The plaintiff alleged that he had been terminated because of his exercise of his First Amendment right to criticize the school board on matters of public concern through letters and appearances at board meetings. *Id.* The defendant cited evidence that the plaintiff had deviated from school curriculum standards and that he had been subject to multiple parental complaints for his teaching style. *Id.* On summary judgment, the district court determined that there was a question of material fact as to why the plaintiff had been terminated. *Id.* at 1363. Specifically, the district court determined that there was an issue of material fact as to

whether the defendant's non-discriminatory reasons for termination were pretextual. *Id.* Because of that dispute of material fact, the district court denied the individual defendants qualified immunity as a matter of law. *Id.* The Eleventh Circuit reversed, finding that qualified immunity did not turn on whether there was a material fact as to why the plaintiff had been terminated. *Id.* Instead:

> A proper analysis of [the individual defendants'] entitlement to qualified immunity is not whether they knew that terminating [plaintiff] in retaliation for protected speech was lawful, but rather whether terminating him based upon all the information available to them at the time, to include any knowledge of his protected speech, was objectively reasonable. In *Foy*, we noted that the presence of a jury issue about a defendant's improper intent does not necessarily preclude qualified immunity. *Foy*, 94 F.3d at 1533. We explained that "[w]here the facts assumed for summary judgment purposes in a case involving qualified immunity show mixed motives (lawful and unlawful motivations) and preexisting law does not dictate that the merits of the case must be decided in plaintiff's favor, ***the defendant is entitled to immunity***."

Id. at 1535 (emphasis added).

Sherrod is both analogous and binding on this Court. This is a mixed motives case, with both lawful and

unlawful motivations at issue. While Plaintiff may facially dispute whether he complied with Defendants' Policy, a close examination of Plaintiff's evidence reveals that there is no material dispute that (i) the Policy existed, (ii) FAU's administration of the Policy required Plaintiff to undertake certain actions, (iii) Plaintiff willfully did not comply with the specifics of what FAU required despite advice to the contrary and (iv) if Plaintiff ever attempted to fully comply with the Policy (as administered by FAU), his attempt was not timely. *See* DE 272. Viewing the record in the light most favorable to Plaintiff, the Court concludes that Defendants Aplerin 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. Accordingly, both Defendants are entitled to qualified immunity. *Sherrod*, 667 F.3d at 1364. Defendants Alperin's and Coltman's Motion for Summary Judgment is granted.[11]

The Court addresses one final matter. Both Plaintiff and Defendants moved to supplement the summary judgment record. Although the Court denied both motions, the Court notes that the requested supplements would not have changed the Court's disposition of the motions.

11. Because the individual Defendants are dismissed from this case, the Court need not consider the individual Defendants' arguments pertaining to punitive damages and failure to mitigate.

Appendix C

IV. CONCLUSION

It is therefore **ORDERED AND ADJUDGED** that:

1. Plaintiff's Motion for Partial Summary Judgment [DE 245] is **DENIED**.

2. Defendant FAU's Motion for Summary Judgment [DE 245] is **GRANTED IN PART AND DENIED IN PART** insofar as summary judgment is entered in Defendants' favor as to Count II, Count III, Count IV, Count V, and Count VI. Count I survives for trial.

3. The Individual Defendants' Motion for Summary Judgment [DE 242] is **GRANTED** and each individual Defendant is dismissed from this case.

DONE and ORDERED in Chambers, Fort Pierce, Florida, this 31st day of October, 2017.

/s/ Robin L. Rosenberg
ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED FEBRUARY 25, 2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10173-GG

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Appendix D

BEFORE: MARCUS, JULIE CARNES, and KELLY,* Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

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