No. 21-120

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

REPLY BRIEF

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Florida Atlantic University's reporting Policy requires its faculty and staff to disclose their outside professional activities to the university so that it may determine whether those activities constitute a conflict of interest. The Policy is unconstitutionally vague because it 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 James Tracy for not "disclosing" a notorious and widely criticized personal blog even though the Policy had never been applied to require the reporting of personal blogs by any of the dozens of other FAU professors and staff who maintain blogs or social media sites. The Policy also impermissibly chills speech by allowing university administrators to demand that speech be reported before publication for review under those impermissibly vague standards, and grants officials unbridled discretion to target speech they believe conflicts with FAU's undefined "public interest." The Petition demonstrated that the Eleventh Circuit's decision, which held that the Policy is not impermissibly vague, does not implicate the First Amendment because it does not directly restrict speech, and cannot be facially challenged for granting unbridled discretion absent a pattern of discriminatory enforcement, deserves review because it conflicts with decisions of this Court. This case also presents the important question of what First Amendment protections should be afforded to public university faculty and stafffor their non-work-related, off-campus speech and expressive activity.

FAU attempts to avoid certiorari review by mischaracterizing the Petition and the Eleventh Circuit's decision. Contrary to FAU's assertions, Professor Tracy does not seek to challenge the jury verdict finding of no First Amendment retaliation by the university, but rather the public university's Policy, which may not lawfully be applied to Tracy, regardless of FAU's motive for firing him. Nor can FAU avoid review because the Eleventh Circuit cited certain black letter constitutional principles in reaching its decision, because the Petition identifies clear conflict with important First Amendment precedents of this Court. Moreover, contrary to FAU's contention, the Eleventh Circuit in fact held that Tracy could not assert a facial challenge to the unbridled discretion granted by the Policy, which is contrary to this Court's precedents allowing facial challenges to content-based licensing schemes. Finally, FAU's argument that most of the authority in this area arises within the "government-as-a-sovereign" context only highlights the need for this Court to clarify that these First Amendment protections apply with equal force to the speech activity of public university professors outside of the classroom.

I. TRACY DOES NOT SEEK TO OVERTURN THE JURY'S VERDICT, BUT RATHER TO SHOW THAT FAU'S POLICY IS SO UNCONSTITUTIONALLY VAGUE THAT IT CHILLS SPEECH AND IMPERMISSIBLY GRANTS UNBRIDLED DISCRETION TO UNIVERSITY OFFICIALS

FAU repeatedly asserts that certiorari review is not warranted because Tracy effectively seeks to overturn the jury verdict finding no First Amendment retaliation by the university. This argument is mistaken. Nowhere

does the Petition challenge the sufficiency of the evidence or the jury verdict. Instead, Tracy seeks review of his facial and as-applied challenge to a Policy that is so impermissibly vague that it chills the off-campus speech of public university employees and grants university administrators unbridled discretion to target disfavored speech.

Notably, the jury concluded that Tracy was fired for failing to comply with FAU's instructions to report his well-known blog pursuant to the Policy. Tracy challenges that Policy as so unconstitutionally vague that it permitted university officials to discriminate against his speech by requiring him to report his personal off-campus blogging even though the Policy had not been applied to numerous other faculty and staff who maintained off-campus blogs and social media accounts. DE:250-14 ¶¶ 4-50; T.Vol.4 at 126-30. Professor Tracy's challenge to the Policy was made on summary judgment and is entirely separate from the jury question of whether he was fired for insubordination or whether his speech was a motivating factor in his termination.[1] Indeed, if the Policy were

1. The brief in opposition repeatedly mischaracterizes Tracy's actions as "refus[ing]" to comply with directives and "thumbing his nose at his supervisors and his employer." BIO at 3, 10, 11, 17. But the record reflects that Professor Tracy continually asked for clarification about the Policy and raised concerns that the Policy violated his First Amendment rights, but he was ignored by his supervisors. Pet. at 10 (citing DE:447-15; DE:447-20; DE:447-21; T.Vol.2 at 139-148; T.Vol.6 at 14-17; DE250-57). Moreover, Tracy's union did not advise him to report his blog in 2013, and FAU never previously disciplined him for not reporting it. DE:447-6. Tracy understood that to mean that he was not required to report his blog. T.Vol.2 at 123:8-18.

declared unconstitutional, it could not be applied to Tracy in the first instance.

II. TRACY DEMONSTRATES THAT THE ELEVENTH CIRCUIT'S DECISION IS IN CONFLICT WITH SEVERAL OF THIS COURT'S FIRST AMENDMENT PRECEDENTS

FAU asserts that there is no basis for certiorari jurisdiction because Tracy merely challenges the Eleventh Circuit's application of settled First Amendment and vagueness legal standards. BIO at 19, 30, 33-34. But an appellate court's recitation of certain black letter legal principles does not insulate its decision from certiorari review where the decision plainly conflicts with decisions of this Court.

First, FAU contends that the Eleventh Circuit applied the correct law because it cited the general standard for determining whether a statute is impermissibly vague, i.e., that vagueness arises where a law is so unclear that a person of ordinary intelligence must guess at its meaning. BIO at 19. But a citation to this general principle does not avoid conflict with precedents of this Court which dictate that the Policy at issue is unconstitutionally vague. For example, *City of Chicago v. Morales* held that the term "loitering," which has a common, accepted meaning, rendered an ordinance impermissibly vague because the definition provided in the ordinance was different than its ordinary meaning. 527 U.S. 41, 56–57 (1999). The Eleventh Circuit's decision conflicts with the holding in *Morales* that vagueness arises where a statutory definition diverges from common understanding because key terms of the Policy are defined differently from their ordinary meaning. Indeed, the Policy failed to define the term

"professional practice" in accordance with its common usage, i.e., job-related activity. Instead, the definition of "professional practice" includes "uncompensated" activity, but also appears in a list of activities including "consulting, teaching, or research," which must be reported on a form that provides a space only for a description of "employment activity." DE:250-32; DE:250-14 ¶ 58; DE:447-21; App. 12a. Upholding FAU's Policy notwithstanding these unusual and inconsistent definitions plainly conflicts with this Court's *Morales* decision.[2]

The Petition demonstrated that the Policy is even more incomprehensible and at odds with this Court's precedents when applied to purely expressive hobbies such as personal blogging, social media, and op-eds on personally-held beliefs, as it is hardly apparent that such ubiquitous, uncompensated forms of communication would qualify as a "professional practice" akin to consulting, teaching, and research. The Eleventh Circuit reasoned that speech activity like blogging would constitute a professional activity where it covers a subject matter

2. The Policy is likewise unconstitutionally vague as to what constitutes a prohibited conflict of interest with the university's "public interests" or the "full performance" of an employee's responsibilities, which could mean nearly any off-campus activity. FAU's sole response is that Tracy should have reported his blog to allow administrators to review it and determine whether the speech conflicted with FAU's "public interests" or Tracy's "full performance" as a professor. BIO at 24-25. But the fact that Tracy did not submit his speech for approval under the unconstitutional Policy does not mean that he cannot challenge its validity. Indeed, the Eleventh Circuit properly considered Tracy's facial challenge to the vagueness of the Policy and should have considered Tracy's challenge to the unbridled discretion afforded by the Policy. Pet. at 23-26; *see also infra*.

similar to the coursework taught. App.13a. But this logic would capture all manner of private interests and hobbies that may touch on a topic similar to the subject taught, including those involving language, writing, literature, sports, and politics.

The Eleventh Circuit's failure to even consider in its vagueness analysis that the Policy permits arbitrary and discriminatory enforcement against disfavored speech and inhibits the freedom of public university employees to engage in expressive conduct conflicts with this Court's precedents requiring a greater degree of specificity and precision where the vagueness of a regulation interferes with the exercise of First Amendment freedoms. Pet. at 18-21 (citing *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983); *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603–04 (1967); *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2046 (2021)).

In short, FAU's suggestion that there is no conflict simply because the Eleventh Circuit cited the black letter vagueness standards cannot carry the day. Nor does FAU's insistence that "a professor of reasonable intelligence" must understand that blogging, social media posting, and article and op-ed writing constitute professional activity. BIO at 26-27. The record reflects not only that faculty members were confused about the meaning of the Policy and which off-campus activities were governed by it, but they also self-censored in order to avoid the unknown consequences of non-compliance. DE:250-47 at 4-6.[3]

3. *Id.* at 5 ("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").

Second, contrary to FAU's contention, the Petition does not merely "express disagreement with the way the Eleventh Circuit applied [the] law" in concluding that the reporting requirement does not offend the First Amendment because it does not punish or restrict speech itself. BIO at 30. The Eleventh Circuit's conclusion is contrary to well-settled precedents of this Court which hold that burdens on speech may violate the First Amendment even if they do not prohibit it. Pet. at 23-25 (citing, *e.g.*, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000); *Doe v. Harris*, 772 F.3d 572, 583 (9th Cir. 2014) ("a law may burden speech—and thereby regulate it—even if it stops short of prohibiting it")). The Eleventh Circuit's decision is also in direct conflict with the Ninth Circuit, which held that an internet reporting statute unconstitutionally chilled protected speech because, like the Policy here, it did not make clear what was required to be reported and therefore could lead those governed by the statute to underuse or avoid the internet. *Doe*, 772 F.3d at 578–79.

Third, FAU maintains that the Petition does not identify a conflict with regard to Tracy's contention that the Policy grants unbridled discretion in university officials to target disfavored speech. BIO at 33-34. But the Eleventh Circuit's decision directly conflicts with this Court's precedents holding that a challenge to subject-matter censorship may be raised without first submitting the speech for review and without demonstrating a pattern of unlawful favoritism by the officials vested with discretion to apply the Policy. Pet. at 25-28 (citing, *e.g.*, *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988); *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 151 (1969); *Freedman v. State of Maryland*, 380 U.S. 51, 56 (1965)).

Simply put, the Eleventh Circuit's decision is in clear conflict with this Court's First Amendment precedents and is not a "one-off misapplication of law." BIO at 3-4 (quoting *Thompson v. Lumpkin*, 141 S. Ct. 977, 978 (2021) (Kagan, J., concurring)). The Policy permits public university officials to discriminate against the personal, off-campus speech of faculty and staff, which has resulted in chilling and self-censorship of that speech by FAU employees. The vagueness of the Policy allowed FAU to determine that Tracy's well-known blog must be reported in order to be approved or disapproved (T.Vol.3 at 146; T.Vol.5 at 16-17), and the tenured professor was ultimately terminated purportedly for failing to comply with the unconstitutional Policy. Without certiorari review, the Eleventh Circuit's decision impermissibly empowers public universities to police and chill disfavored, off-campus speech through the guise of conflict of interest reporting requirements.

III. THE ELEVENTH CIRCUIT'S DECISION THAT TRACY COULD NOT ASSERT A FACIAL CHALLENGE TO THE UNBRIDLED DISCRETION GRANTED BY THE POLICY CONFLICTS WITH THIS COURT'S PRECEDENTS

The Eleventh Circuit's decision also conflicts with this Court's precedents because it held that Tracy could not maintain a facial challenge to the Policy's grant of unbridled discretion without demonstrating a pattern of unlawful discrimination by university administrators, and Tracy had not reported his own blog to test the Policy. Pet. at 25-28; App.15a-17a. FAU asserts that there is no conflict because the Eleventh Circuit actually addressed Tracy's facial challenge, and properly held that he had not established a pattern of abuse by FAU officials. BIO

at 34-37. FAU misconstrues Tracy's argument and the applicable law.

The Eleventh Circuit relied upon this Court's decision in *Thomas v. Chicago Park District*, 534 U.S. 316 (2002). App.15a-17a. But *Thomas* upheld a park permitting scheme, holding that it was a content-neutral time, place, and manner regulation of the use of a public forum. 534 U.S. at 322. *Thomas* distinguished this Court's prior decision in *Freedman*, 380 U.S. at 56, which allowed a theater owner to facially challenge a licensing scheme that required review of a film for obscenity before it could be released. Unlike in *Freedman*, the park permitting scheme was "not subject-matter censorship," did not permit the licensor to pass judgment on the content of the speech or to deny a permit based on what a speaker might say, and was not even directed to communicative activity. *Thomas*, 534 U.S. at 322. Although this Court recognized the possibility that officials could delay the processing of certain permits and thereby arbitrarily suppress disfavored speech, that hypothetical concern would not be addressed in the abstract, but rather would "be dealt with if and when a pattern of unlawful favoritism appears." *Id.* at 325.

Here, the Policy permits content-based review and censorship of the off-campus speech of university employees and therefore a challenge to this provision may be raised without first submitting the speech for review and approval, and without demonstrating a pattern of discriminatory enforcement of the Policy. *See Freedman*, 380 U.S. at 56. Accordingly, the Eleventh Circuit's ruling directly conflicts with decisions of this Court.

IV. REVIEW IS NECESSARY TO REAFFIRM THE APPLICABILITY OF FIRST AMENDMENT PROTECTIONS FOR PUBLIC UNIVERSITY EMPLOYEES ENGAGING IN OFF-CAMPUS SPEECH

Finally, FAU maintains that the decisions cited in the Petition, which FAU classifies as "government-as-a-sovereign" cases regulating the First Amendment activity of non-employee citizens, are not relevant to the analysis of a Policy that addresses the personal, off-campus speech activity of public university professors. FAU insists that the more deferential body of government employment law should apply because the university as an employer "absolutely has the right to know what outside activities the employee is engaged in to protect the business from conflicts of interest" and, to that end, review the content of an employee's personal, off-campus speech to determine whether it should be allowed. BIO at 36-37; *see also* 22-23, 28-29.

FAU's argument that most of the authority in this area is in the "government-as-a-sovereign" context only highlights the need for review in this case, as it raises important questions regarding the scope of First Amendment protections afforded to public university employees for their non-work-related, off-campus speech and expressive activity. As this Court recently held in *Mahanoy Area School District v. B.L.*, the First Amendment protects off-campus student speech, including vulgar social media posts made by a student outside of the classroom. 141 S. Ct. 2038 (2021). *Mahanoy* recognized that although schools have special interests in regulating student speech that occurs under their

supervision, certain features of off-campus student speech "distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech." *Id.* at 2046. For example, because "regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day," "courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all." *Id.* This Court also emphasized that schools have their own interest in protecting a student's unpopular expression, particularly when that expression takes place off campus, reaffirming that "America's public schools are nurseries of democracy." *Id.* These features of off-campus speech, taken together, "mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished." *Id.*

Similarly, while the government may generally have a freer hand in dealing with public employees, courts should be more skeptical of a university's efforts to regulate off-campus speech, and this Court should review this case to clarify the scope of those First Amendment protections.

CONCLUSION

For the foregoing reasons, Professor James Tracy respectfully requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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