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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Florida Atlantic University's reporting policy, which was created as part of the collective bargaining agreement specifically approved by Professor James Tracy, requires its faculty and staff to disclose outside professional activities to the university so that the university can determine whether a conflict of interest may exist, as described in the policy. In 2015, Tracy repeatedly refused to comply with the reporting policy. After multiple warnings and ignoring the advice of the union representative he consulted, Tracy persisted in his refusal. Ultimately, Tracy was discharged for insubordination. Bypassing the grievance procedure under the collective bargaining agreement, Tracy filed an action in district court, claiming violations of his freedom of speech. The court granted summary judgment in favor of FAU on facial and as-applied constitutional challenges, and Tracy received a jury trial on his civil rights retaliation claim. The jury found that FAU discharged Tracy solely for insubordination and that his blog speech was not a motivating factor in the termination. The jury's determination was reviewed and approved by the district court in post-trial motion practice and by the Eleventh Circuit on appeal. As to the facial and as-applied constitutional challenges, the Eleventh Circuit applied existing law to the language of FAU's reporting policy and related facts and found that Tracy's challenges failed.

The question presented is whether, on the facts of this case, the Eleventh Circuit erred in concluding that Tracy's constitutional challenges to the reporting policy fail.

PARTIES TO THE PROCEEDINGS

The Petitioner is James Tracy.

The Respondents 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.

CORPORATE DISCLOSURE STATEMENT

There are no publicly traded corporations among the parties to the proceeding.

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BRIEF IN OPPOSITION

INTRODUCTION

Professor Tracy's petition does not set forth a sufficient basis for certiorari review by this Court. A major supporting premise relied upon by Tracy is his steadfast but entirely incorrect assertion that Florida Atlantic University discharged him for the content of what he refers to in this litigation as his "deeply offensive"

blog. That supporting premise ignores the real-world jury verdict that found the opposite: Tracy's blog speech was not a motivating factor in FAU's decision to discharge him from employment. The jury's verdict was approved by the district court judge after a thorough review of the record, and approved again by the Eleventh Circuit in its opinion challenged here and then again in denying Tracy's motion for rehearing and rehearing en banc. Although the Petition briefly mentions the jury verdict, Tracy simply disagrees with the jury and the reviewing courts, arguing throughout the Petition as though the jury found in his favor, as though FAU discharged Tracy for the content of his blog. In doing so, as the Eleventh Circuit also experienced, Tracy "cherry-picks" the evidence supporting his theory of the case and ignores the substantial body of evidence supporting the verdict. Thus, Tracy improperly suggests that this Court should assume that the opposite of the thrice-approved jury verdict is actually true in evaluating his constitutional claim.

The constitutional claim that Tracy contends should be reviewed is his facial challenge to FAU's reporting policy. Tracy even asserts that the Eleventh Circuit decision prohibits a facial challenge to the Policy's conflict of interest provision. The Eleventh Circuit did not prohibit a facial challenge but, rather, like the other aspects of the facial claims, it entertained that challenge on the merits and applied existing law to the record in determining that the facial challenge fails.

Tracy begins by invoking bedrock principles involving the First Amendment as though this case is

really about those principles. In fact, there is no evidence in the record that FAU takes any issue with the First Amendment and the bedrock principles connected with it. There is no evidence in the record that FAU ever restricted or discouraged Tracy in any way as to what he could say or blog, regardless of how unpopular or controversial it may be. This case is not about the First Amendment at all. The exchanges in this matter did not reach the point of a possible restriction on free speech. The First Amendment has been used by Tracy as a diversion to escape the consequences of the fact that he, for reasons of his own, refused to comply with his collective bargaining agreement that, ironically, he helped to negotiate as president of the union and then *approved and signed* a few years before the events of this case.

Whether, by continuing to assert as true the opposite of the jury's severally-confirmed verdict, Tracy is requesting this Court to serve as yet another reviewing court on the sufficiency of the evidence, that does not present an issue warranting review by this Court. Likewise, Tracy's stated request for review of his facial challenge to FAU's reporting policy constitutes only a request that this Court review the Eleventh Circuit's application of properly stated rules of law to the facts at issue. That, also, is not an issue warranting review by this Court. As Supreme Court Rule 10 provides, "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *See Thompson v. Lumpkin*, 141 S.Ct. 977, 978

(2021) ("And assuming the decision below is a one-off misapplication of law, our rules counsel against granting review.") (Kagan, J., conc.).

STATEMENT

The Parties

FAU is a Florida public university that employs close to 3,300 employees, including approximately 1,000 faculty members. DE:246-1 at 25.[1]

Tracy was a tenured Associate Professor at FAU in the School of Communications and Multimedia Studies. DE:246-3, p.40. He taught courses including Public Opinion and Modernity, Introduction to Multimedia Studies, and Culture of Conspiracy. DE:246-3, pp.136-37. Tracy conducted research in areas including mass shootings, the JFK assassination, and the Sandy Hook Massacre. DE:246-3, pp.148-50,153-54,159-61,164-67.

Collective Bargaining Agreement (the "CBA")

FAU and the United Faculty of Florida ("the Union") have entered into a series of collective bargaining agreements that govern the relationship between "in-unit" faculty members and FAU. Tracy served as Chapter President for the Union and signed the collective

[1] "DE" refers to the district court's docket. Citations to the Petitioner's Appendix are "App.X." Citations to the Petition are "Pet.,X." Citations to the trial transcript are "Tr.Vol.X:X."

bargaining agreement for the years 2009 through 2012. DE:246-5, pp.9-10; DE:246-3, p.90. He also voted in favor of ratifying the 2009-2012 CBA, which contained a definition of "reportable outside activities" identical to the definition in effect at the time of his discharge. DE:246-3, pp.94-96. Tracy participated in bargaining over a mandatory grievance and arbitration procedure that was nearly identical to the procedure in effect at the time of his discharge. DE:246-3, p.95; DE:246-5, pp.9-10.

Article 19 of the CBA, Conflict of Interest/Outside Activity (the "Policy"), requires in-unit faculty members to report all "reportable outside activities" – including the name of the recipient of services, the funding sources, the location where the activity will be performed, the nature and extent of the activity, and any intended use of FAU facilities, equipment or services – so any potential conflicts of interest can be assessed. DE:246-6, pp.131-33. The requirement to report outside activities has existed at FAU and other Florida public universities since at least 1979. Tr.Vol.5:58.

The Policy 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." App.10a. The Policy ensures FAU is in compliance with its obligations under the Florida Code of Ethics for public employee conflicts of interest and work hours (Chapter 112, Part II, Florida Statutes). DE:246-4, pp.16-17. A

"conflict of interest" is defined as "any conflict between the private interests of the employee and the public interests of the University . . . " or "any activity which interferes with the full performance of the employee's professional or institutional responsibilities or obligations" or "any outside teaching employment . . . " DE:246-6, p.132. The disclosures required by the Policy are often required as a condition of the University's receipt of research grants. DE:246-1, pp.31-32,214.

If the proposed outside activity is determined to constitute a conflict of interest and the employee disagrees, the Policy provides an expedited grievance procedure. DE:246-6, p.133, ¶19.5. Additionally, the CBA contains a mandatory grievance and arbitration procedure for all claims concerning the interpretation or application of the CBA's terms and provisions. *Id.*, pp.133-42.

Tracy's Outside Activities

In 2012, Tracy began working with Global Research, an alternative news/media aggregator. DE:246-3, p.145. Tracy started a blog titled "Memory Hole Blog: Reflection on Media and Politics." DE:246-19, p.1. Tracy explained the blog as a way to bridge a divide between his scholarly endeavors and contemporary political issues and events. DE:246, pp.228-29. There is significant overlap between the topics Tracy addressed in his blog and the scholarly work he performed pursuant to his assigned academic duties at FAU. DE:246-7, pp.99-100,102-06; DE:246-3, pp.153-54,159-61,164-67,194-96;

DE:246-8, pp.92-93. Tracy also operated a weekly podcast through Truth Frequency Radio. DE:246-3, pp.57-59.

The Aftermath of the Sandy Hook Massacre

In late 2012, Tracy began blog-writing about the mass shooting that had just occurred at Sandy Hook Elementary School in Newtown, Connecticut. DE246-3, p.110. The blog identified Tracy as an Associate Professor at FAU and was linked to his scholarly work. Tr.Vol.6:95. Tracy's writings on the Sandy Hook massacre received significant international media attention. DE:246-1, pp.281-83.

In January 2013, Tracy's blog was brought to the attention of FAU officials. DE:246-1, p.280; DE:246-2, p.157. FAU officials met with Tracy to discuss concerns over his safety, the safety of his family and students, and the impact of the nationwide media attention. DE:246-1, pp.80-81; DE:246-2, pp.212-14. FAU reminded Tracy of his obligations under the CBA to report outside activities pursuant to the Policy and to add an appropriate disclaimer to his blog to make it clear that his comments represented his personal opinions and were not official positions of FAU. DE:246-1, pp.80-81; DE:246-2, p.220; DE:246-6. p.184. FAU instructed Tracy to report his activity for Memory Hole Blog. DE:246-1, pp.87-88; DE:246-6. p.184. FAU never told Tracy that he could not speak, and it is undisputed that FAU did not restrict Tracy's speech in relation to his comments about Sandy Hook or any other

matter. DE:246-5, p.165; DE:246-7, p.68; T.Vol.6:120; Tr.V4:115. Tracy's Union representative advised Tracy to report his outside activities and then, if FAU took any action that he disagreed with, he could grieve his employer in accordance with the CBA. DE:246-10, p.44.

In March 2013, after Tracy failed to incorporate the appropriate disclaimer on his blog, FAU disciplined him for his failure to comply with his obligations under Article 5.3(d) of the CBA, which requires that "[w]hen speaking on any matter of public interest," the faculty member must "make clear when comments represent personal opinions and when they represent official University positions." DE:246-2, pp.152-55. Tracy grieved the discipline and reached a settlement agreement with FAU in September 2013 (the "Settlement Agreement"). DE:246-1, pp.81-82; DE:246-6, p.205. Under the Settlement Agreement, Tracy agreed not to use his work title in any of his public postings or communications unless the statements made were those of the University, and to publish a disclaimer to satisfy the provisions of Article 5.3(d) of the CBA. DE:246-6, p.205.

Tracy's Continued Employment

After the January 2013 meeting, Tracy continued to operate his Memory Hole Blog and to blog about other mass casualty events reported in the media, such as the 2013 Boston Marathon bombing. DE:246-3, pp.110-11,213; DE:250-2, p.1. As far as FAU was

concerned, the matter was resolved, and it was expected that Tracy would continue to speak about issues outside of work and would comply with the requirements of the CBA. Tr.Vol.5:49-50.

In 2014, Tracy again taught his course, "Culture of Conspiracy." DE:246-2, p.203; DE:246-3, p.140. Tracy's annual assignment in 2014 included his work for Project Censored, an organization educating students about investigative journalism and news censorship. DE:246-3, pp.164,168-69,170. Several of Tracy's scholarly articles for Project Censored relied on his own Global Research articles as resources. DE:246-3, pp.170-73,190-92.

Tracy's annual assignment in 2015 included his work editing a book titled "Governing by Crisis," which was anticipated to include articles by Tracy and others on the Sandy Hook Massacre. DE:246-3, pp.165-67.

Tracy's Refusal to Accept the Electronic Acknowledgment and Comply with his Obligations under the CBA

In 2014, FAU renewed its focus on outside activity reporting after conducting an internal audit of the process. Tr.Vol.5:73. FAU added an electronic reminder of the Policy that required all faculty, as part of accepting their annual assignment, to check "OK" in response to a computer prompt acknowledging their obligations to report outside activities and any related use of university resources. DE:246-1, pp.35-37; DE:246-6, p.22; DE:246-8, p.34; Tr.Vol.4:148.

Despite having done so in the past, in October 2015, Tracy refused, and refused multiple directives from his supervisor, to accept his annual assignment by clicking the electronic acknowledgment affirming his obligation to comply with the Policy. DE:246-2, pp.80,154; DE:246-12, p.1; DE:246-1, p.75; DE:246-6, pp.219-20. There was no evidence of any other FAU faculty member refusing to check the acknowledgement box to accept their assignment.

Tracy was also directed by his supervisor, among others, to submit Report of Outside Employment or Professional Activity forms in compliance with his obligations under the Policy. DE:246-6, pp.206-09. The president of Tracy's Union advised him, based upon the standard advice, to submit the required forms and comply with the Policy first so he would not be insubordinate, and then file a grievance if FAU took action against him based upon the information that was disclosed. DE:246-8, pp.43-44; DE:246-13, p.226; DE:246-14, pp.28-29. Nevertheless, Tracy refused.

Tracy's Discipline and Discharge for Insubordination

On November 10, 2015, FAU issued a Notice of Discipline-Reprimand, to Tracy for his insubordination. DE:246-6, pp.219-20. The Notice required Tracy to electronically accept his annual assignment and submit the required forms to comply with the CBA. *Id*. Tracy refused and chose, instead, to submit a lengthy response detailing why he, unlike any other professor

in the State University System, should be exempt from the requirements of the CBA. DE:447-24.

Tracy reached out to the Union to see if the Union would grieve the Notice of Discipline on his behalf. DE:246-3, pp.89-90; DE:246-6, p.272. Union officials declined to do so because they believed Tracy was in violation of the CBA. DE:246-8, pp.476, 55-56; Tr.Vol.5:82. In fact, the Union president testified that Tracy's blog was reportable because it contained topics that "were arguably an extension of what he did professionally." Tr.Vol.7:92, 94.

Although not required by the CBA, after Tracy's insubordination had continued for weeks, on December 11, 2015, FAU gave Tracy one last opportunity to comply with the simple obligation to file the required Report of Outside Employment or Professional Activity forms.[2] DE:246-1, p.313; DE:246-6, p.273; DE:447-22.

Tracy did not timely respond. DE:246-1, pp.236-37. Tracy's stated reason for thumbing his nose at his supervisors and his employer was that "he thought tenure would protect him." Tr.Vol.7:88. Tracy knew, and admitted privately, that his blog was reportable activity.[3] Tr.Vol.3:70.

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[2] Overall, Tracy was asked on six different occasions by three different administrators to check the acknowledgment and submit the requested report. DE:444-12, 13, 19.

[3] As the district court noted, "[N]ot only did [Tracy] agree to the terms of the collective bargaining agreement as a union employee, and not only were the terms bargained for, but [Tracy] actually served as the *president of the union*, voted to ratify the

FAU consulted with its General Counsel and ultimately decided to discharge Tracy for his repeated gross insubordination. DE:246-1, pp.20-23; DE:246-1, p.18. On December 16, 2015, FAU issued a Notice of Proposed Discipline-Termination, notifying Tracy of the decision to discharge him. DE:444-15. Had Tracy submitted the Report of Outside Employment or Professional Activity forms as required, he would not have been discharged. Tr.Vol.5:36,97-98; DE:246-6, p.283; DE:444-15. Tracy did not respond to the Notice of Proposed Discipline-Termination. DE:246-3, pp.102-04.

FAU subsequently learned that in addition to his refusal to disclose his outside activities related to his Memory Hole Blog, Tracy did not disclose his contribution to a book entitled "Nobody Died at Sandy Hook," for which he received an honorarium and which included his affiliation with FAU in the book's biographical information about its contributors without the disclaimer required by the Settlement Agreement. DE:246-1, pp.342-43; DE:246-6, pp.274-82; DE:246-3, pp.125-26. FAU sent Tracy a follow-up letter regarding this violation of the Settlement Agreement. DE:444-20; DE:246-1, p.9.

District Court Litigation

Under the CBA, Tracy had ten days to respond to the Notice of Proposed Discipline-Termination. DE:246-6, p.283; DE:444-15. The Union immediately

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collective bargaining agreement, and *signed* the agreement. App.70a (emphasis in original).

hired an independent attorney for Tracy to assist him with the grievance procedure. DE:246-6, p.290. Tracy fired his Union-appointed counsel and hired other counsel. DE:246-3, p.101-02; DE:246-6, pp.294-97; DE:246-7, pp.26-27.

Rather than file a grievance, Tracy filed the present lawsuit against FAU, individual FAU personnel, his Union, and certain individuals at his Union. DE:1. Tracy eventually settled with all Union defendants, leaving FAU and the individual FAU defendants in the case. DE:362, p.5.

As amended, the complaint requested a jury trial and included claims for civil rights retaliation pertaining to Tracy's right to free speech, facial and as-applied constitutional challenges with respect to the Policy, requests for declaratory relief, and a breach of contract claim. App.3a-4a. Tracy moved for partial summary judgment, while FAU moved for summary judgment on all counts of Tracy's complaint. App.4a. The district court denied Tracy's motion and granted FAU's motion on all claims except the retaliation claim, which the court submitted to a jury. *Id*.

The case was tried to a jury on the retaliation claim for nine days. DE:465-73. To establish the First Amendment retaliation claim, the jury had to find both that Tracy's blog speech was a motivating factor in FAU's decision to discharge him from employment, and that FAU would not have discharged Tracy from employment if it had not considered the blog speech. DE:437, p.1. The jury resolved the case by answering

"no" to the first question, finding that Tracy's blog speech was not a motivating factor in FAU's decision to discharge him from employment. DE:437; App.4a.

Tracy filed a renewed motion for a judgment as a matter of law, referring back to a similar motion made during trial, and an alternative motion for new trial. DE:450, 453; App.4a. The trial court wrote a 31-page opinion denying both motions. DE:484. The trial court discussed the substantial evidence that properly supported the jury's verdict, pointing out how Tracy's motion distorted much of the evidence in an effort to make the point. App.33a-49a.

Eleventh Circuit Appeal

Tracy appealed the district court's ruling on the post-trial motions and the final judgment, challenging both the sufficiency of the evidence to support the jury verdict and the district court's entry of summary judgment on the facial and as-applied constitutional claims. DE:486.

The Eleventh Circuit affirmed the judgment. The court found that there was "more than sufficient evidence" to support the jury's verdict. In support, the court pointed out that Tracy's characterization of FAU's supporting evidence was inaccurate; that he "cherry-picks" the evidence and ignores the substantial contradictory evidence; the multi-year battle FAU waged to get Tracy to comply with his obligation to report outside activities; and the several chances he was given to comply, including the final notice warning of

termination if he did not comply, as to which the court was "astonished" that Tracy did not respond. App.18a-22a. The court stated that in light of the multiple warnings Tracy received from FAU, there was little doubt that Tracy was insubordinate, even noting, as the district court had, that Tracy "privately confessed to his union president that his conduct was 'cut-and-dry' insubordination . . . " App.21a; App.38a-39a.

As to the facial constitutional claims, the Eleventh Circuit recited the existing law and then applied it to the language of the Policy. App.11a. The court analyzed the term "professional practice" in the definition of "Reportable Outside Activity" and determined that the term is not vague, especially when considered in context. App.11a. Relying upon the dictionary and related language in the Policy, itself, the court concluded that the plain meaning of "professional practice" is readily understandable and that its meaning is limited and does not encompass any and all outside activities, as Tracy contended. App.11a-12a. Finally, the court noted that the vagueness challenge failed for the additional reason that the reporting requirement "clearly applied to [Tracy's] own particular unreported activity," because the blog "closely mirrored" what he did professionally at FAU. App.13a.

On Tracy's overbreadth claim, the court recited the law and then applied it, observing that FAU's reporting requirement "does not punish or restrict any speech; it requires only that faculty report certain types of speech activities." App.13a-14a. Contrary to Tracy's argument, the court observed that the fact that

university officials must perform a cursory examination of the content to determine whether the activity complies with the policy does not transform the reporting requirement into a content-based regulation. App.14a. The court also rejected Tracy's argument that the Policy's definition of "conflict of interest" and its prohibition of such conflicts is a prior restraint on speech under the unbridled-discretion doctrine. App.14a. As the court noted, that doctrine usually applies to licensing or permitting schemes that require an individual to obtain permission before engaging in speech. App.14a. The court observed that Tracy, at most, identified a "hypothetical constitutional violation in the abstract", which should only be dealt with if a pattern of unlawful favoritism appears. App.15a-16a. Tracy submitted no evidence that FAU has prohibited *any* professor from engaging in speech activity, let alone relied on a "public interest" rationale in doing so. App.16a. Noting that the Policy's language has been part of the CBA for more than 10 years, the court stated that Tracy's claim was purely speculative and that Tracy had not satisfied his burden. App.16a. The court observed that Tracy essentially controlled the outcome of the present matter in that he could have tested the issues he now claims with the propriety of the Policy by reporting the activity in question and then responding based upon FAU's conflict determination. App.17a. As the court noted, it was solely Tracy's decision not to do so. App.17a. The court also agreed with the district court that, additionally, Tracy's as-applied challenge failed on the basis of ripeness because he did not report his blog,

depriving FAU of the opportunity to determine whether his reported activity would constitute a prohibited "conflict of interest" under the policy. App.17a.

Tracy petitioned the Eleventh Circuit for panel rehearing and rehearing *en banc*, which was denied. App.109a-110a. The Petition to this Court followed.

ARGUMENT

I. THE ELEVENTH CIRCUIT DECISION APPLIES EXISTING LAW AND DOES NOT CONFLICT WITH RELEVANT VAGUENESS DECISIONS OF THIS COURT

In his Petition, Tracy is relegated to criticizing and recharacterizing the reporting policy that, ironically, he approved and signed a few years earlier when he was the president of the Union. As both the district court and the Eleventh Circuit observed, Tracy is in this position for one reason: he obstinately refused, for reasons he has never cogently explained, to simply complete the required disclosure report. App.17a; App.69a. Had he done so, as his union representative advised him to do, and had FAU then responded by attempting to restrict his speech, his claim would be clear, whether he would have chosen to file a grievance under the CBA or an action in the district court. Because he did not complete the report, he has chosen to attack his previously-approved and agreed reporting policy and to argue that the reviewing courts have somehow applied

law contradicting the existing precedents of this Court and other circuit courts. And, to support the parade of hypothetical horribles that Tracy "foresees" from the reporting policy language, he continually pretends that FAU was found by the jury to have violated his rights by terminating him in retaliation for the content of his blog. Pet., e.g., 2,3,10, and 20. A major factual premise of Tracy's argument to this Court is wholly fictitious, as the jury found that Tracy's blog speech was not a motivating factor in FAU's decision to discharge him, and the sufficiency of the evidence to support that ruling was found easily to exist by both the district court and the Eleventh Circuit.[4] As part of the refusal to accept the jury's decision and the multiple courts' confirmations, Tracy continues to suggest that his blog speech was so "deeply offensive, hurtful, and hateful" that, in effect, no employer could resist terminating him for that reason, and no reasonable jury could find otherwise.[5] Pet.,2,3,4-5. The other tack Tracy takes, both previously on appeal and now in his jurisdictional effort before this Court, is to cite to bodies of case law that do not apply and then to generically assert that by the Eleventh Circuit's conclusions, it has incorrectly applied that law. Because, as will be discussed below,

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[4] The district court found that, in fact, the greater weight of the evidence supported FAU's position in the case, not Tracy's. App.49a.

[5] If Tracy were right about this proposed irrebuttable presumption, every public employee should be sure to communicate as offensively as possible about public issues so that they can never be constitutionally discharged, no matter what agreed tasks they refuse to do.

the Eleventh Circuit applied properly stated rules of law to analyze FAU's reporting policy, Tracy does not present any proper basis for review by this Court.

First, Tracy argues that the Eleventh Circuit decision conflicts with relevant vagueness decisions of this Court because the Policy is vague in certain ways, and the Eleventh Circuit did not agree with that. Pet.,14. However, the legal principles that Tracy argues should be applied are the ones that the Eleventh Circuit actually applied, such that there is no proper basis for review by this Court. Tracy cites the key principle of law from *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), as follows: 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." Pet.,15. Similarly, the Eleventh Circuit applied that principle, pointing out that "vagueness 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," citing *Mason v. Fla. Bar*, 28 F.3d 952, 959 (11th Cir. 2000). Tracy does not contend that the Eleventh Circuit applied the wrong law, and there is no argument to be made to that effect. Thus, he is complaining only about that which is not a proper basis for jurisdiction: whether the Eleventh Circuit, in its application of that law, should have ruled as it did. Tracy simply does not agree with the Eleventh Circuit's analysis and, in effect, would like this Court to function like another circuit court to substitute its view.

Even if this Court were to expand its jurisdiction to consider the substance of the Eleventh Circuit's conclusion, the Eleventh Circuit provided a cogent analysis of the portions of the Policy that Tracy, having opted not to submit the report, now complains about. App.10a-17a. As the court pointed out, the term "professional practice" is not vague, especially when considered in context. App.11a. The court explained that when a term is left undefined, "we normally construe it in accord with its ordinary or natural meaning," citing this Court's decisions in *Smith v. United States*, 508 U.S. 223, 228 (1993) and *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). App.11a. Applying the dictionary and pointing out that the term appears in a list of activities typically engaged in by academic professionals, such as "consulting," "teaching," and "research," the court concluded that the plain meaning of "professional practice" refers to engaging in an activity characteristic of one's profession. App.12a.

Recognizing that even if it may sometimes be difficult to determine whether an activity fits within the category, the court pointed out that this is not a basis for finding vagueness, nor should we require parties to attempt to discern in advance all possible factual scenarios that may fit a certain description or policy provision. As the court related, citing another decision of this Court, "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." App.13a, citing *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). This Court, in a case holding that the Hatch Act's prohibition of

government employee participation in political management is not unconstitutionally vague, used language that aptly captures the present circumstance. This Court stated:

> We see nothing impermissibly vague in 5 CFR s 733.122, which specifies in separate paragraphs the various activities deemed to be prohibited by s 7324(a)(2). There might be quibbles about the meaning of taking an 'active part in managing' or about 'actively participating in . . . fund-raising' or about the meaning of becoming a 'partisan' candidate for office; but *there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.*

See United States Civil Service Comm'n et al. v. Nat'l Ass'n of Letter Carriers AFL-CIO, et al., 413 U.S. 548, 577-78 (1973) (emphasis supplied).

Finally, the Eleventh Circuit pointed out that Tracy's vagueness challenge "fails for the additional reason that the reporting requirement clearly applied to his own particular unreported activity." App.13a. *See Doe v. Valencia College*, 903 F.3d 1220, 1233 (11th Cir. 2018) ("[A] plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim. . . ."). As Tracy's union president testified, the blog constituted

"professional practice" because Tracy was a media expert who taught courses including "The Culture of Conspiracy," and the blog closely mirrored what he was doing professionally. App.13a.

Tracy argues that the fact that the definition of "professional practice" includes not only compensated activity but uncompensated activity renders the term "even less clear," attempting to analogize this matter to *City of Chicago v. Morales*, an anti-loitering regulation case. Pet.,17. *See City of Chicago v. Morales*, 527 U.S. 41 (1999). That view ignores the obvious: whether an activity potentially creates a conflict of interest – such as, for example, by occupying an inordinate amount of time that may make it difficult for the employee to do his job – is not predicated on whether it is compensated or uncompensated. Highlighted again is that the main problem Tracy faces in this employment situation is the one he alone caused: the only logical (and proper) thing to do was to submit the report. As the Eleventh Circuit noted, it was Tracy's "astonishing" choice not to do so. App.17a,21a.

At this point, one other legal matter should be mentioned: while Tracy relies predominantly on case law like *Morales*, *supra*, governing situations where the government, as sovereign, is enforcing restrictions upon citizens, the present case involves a public employment relationship, wherein parties expressly agree to a business relationship. As this Court has frequently emphasized, "[C]onstitutional review of government employment decisions must rest on different principles than review of speech restraints imposed by

the government as sovereign." *See Waters v. Churchill*, 511 U.S. 661, 674 (1994). This Court has often recognized that "government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Enquist v. Oregon Department of Agriculture*, 553 U.S. 591, 599 (2008). This Court explained in *National Aeronautics and Space Administration v. Nelson*, 562 U.S. 134, 148-49 (2011):

> As an initial matter, judicial review of the Government's challenged inquiries must take into account the context in which they arise. When the Government asks respondents and the references to fill out SF-85 and Form 42, it does not exercise its sovereign power "to regulate or license." Rather, the Government conducts the challenged background checks in its capacity "as proprietor" and manager of its "internal operation." Time and again our cases have recognized that the Government has a much freer hand in dealing "with citizen employees than it does when it brings its sovereign power to bear on citizens at large." This distinction is grounded on the "common-sense realization" that if every "employment decision became a constitutional matter," the Government could not function."

(internal citations omitted). This body of law in the employment context provides even stronger support for the rulings of the district court and Eleventh Circuit.

In contrast, the vast majority of case authorities in Tracy's Petition involve the Government-as-sovereign

regulating non-employee citizens. And most of those regulatory cases involve prior restraints or immediate criminal consequences for a violation. The employment relationship, as historically recognized by this Court, is different for multiple reasons. As exemplified by the present case, one of those reasons is that parties to an employment relationship have chosen the relationship and whether to have the opportunity to negotiate regulations and behavioral requirements. That is what happened here, by way of the CBA that, ironically, Tracy, as president of the Union, approved and now seeks to avoid. Moreover, in this case, that CBA includes a grievance procedure that Tracy could have used (all the more effectively if he had simply filed the report, as his union representative recommended). By not following his own agreement, Tracy acted insubordinately, now seeking to escape the consequences by pretending away the jury verdict and arguing for the application of case law that has nothing to do with his circumstance.

Tracy next asserts that the Policy is vague on the issue of what constitutes a prohibited conflict of interest. Pet.,18-19. Tracy argues that the Policy does not provide enough detail about what would constitute "interference" with teaching or "full performance" of his job. Pet.,19. Tracy's failure to submit the report again has him putting the cart before the horse in his arguments. The reporting policy is a two-step process: step one is the fulfillment of the employee's duty to submit the report; step two is the school's opportunity to evaluate the report and then respond for the purposes set

forth in the CBA. This case ended at step one, when Tracy refused to honor his agreement. He never put FAU in a position to make the step-two decision that could thereafter be scrutinized under the CBA and the First Amendment. Tracy argues now as if he was entitled to know exactly how FAU would respond to his report if he submitted one, before he had to decide whether to report. Aside from the general standard in *Grayned*, the anti-noise ordinance case, Tracy cites no authority for this point, and the Eleventh Circuit carefully analyzed the Policy provision and found that it was constitutionally sound. Again, Tracy can take no issue with the Eleventh Circuit's statement of the rules of law, which, regardless, were properly stated.

Relying upon another anti-loitering case, Tracy briefly argues that the policy is vague because its alleged ambiguities allow it to be discriminatorily applied by FAU administrators "against speech activity with which they disagreed." Pet.,19-20, citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). Tracy's short argument suffers from at least two fatal flaws. First, the Eleventh Circuit applied properly stated rules of law in determining that the reporting policy is not ambiguous and complies with the requirement of giving fair notice to persons of ordinary intelligence as to what is required. App.11a-13a. Second, Tracy's main evidence that this is a real concern – as opposed to a hypothetical one – is his continued assertion that FAU used the policy "as a pretext to fire Tracy because they objected to the content of his personal blog." Pet.,20. Tracy again ignores, and invites this Court to ignore,

the jury's verdict and the numerous post-verdict reviews of the sufficiency of the evidence by two prior courts.

Tracy's next vagueness argument is that the Policy chills speech. Pet.,21. His primary example is that it is unclear whether the Policy applies to "*uncompensated* personal blogging, social media posting, or even article and op-ed writing." (emphasis supplied). The Eleventh Circuit analysis of the Policy language, discussed above, addresses this argument, and it is difficult to imagine that a professor of reasonable intelligence would have any difficulty determining whether the "blogging, social media posting, or article and op-ed writing" are or may be part of an outside "professional activity." Once again, as the Eleventh Circuit observed, if Tracy somehow did not know for sure that his blog-writing about media conspiracies may be an outside professional activity, he should have reported it rather than acting defiantly and insubordinately toward his employer. App.17a.

Reviewing the Eleventh Circuit's decision, there are, of course, even more weaknesses in Tracy's argument. To question whether the Policy applies to "uncompensated" activities is to ignore the Policy language that specifies that professional activities may be either "compensated or uncompensated" activities. App.10a. That Policy statement is merely common sense, for an activity that may create a conflict of interest need not have been one undertaken for compensation to have that effect. Moreover, Tracy's constant questioning of whether "blogging" should require a

separate regulation in the Policy, thus suggesting an ambiguity, is not a valid or logical concern. Pet.,3,7,21. Blogging is simply writing that is typically read on a monitor rather than a piece of paper (although those who prefer can print it and read it from a piece of paper). We only have two forms of communication by word: written words and spoken words. Blogging is but a variety of the former.

In making this vagueness argument, Tracy again relies upon case law that does not reflect the circumstance between Tracy and FAU. Each of the cases relied upon were decided in the realm of the second step in the process – that is, where speech has been identified and then a regulation applied. And the vast majority of the cited cases arise, once again, from government-as-sovereign regulating its citizens, typically with immediate criminal sanctions to be imposed for a violation. Tracy never addresses this Court's established principle that, as a practical necessity, "government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens a large." *Enquist*, *supra*, 553 U.S. at 599.

Tracy cites *Smith v. Goguen*, 415 U.S. 566 (1974) (involving a statute subjecting violators to criminal liability for publicly treating "contemptuously" the flag of the United States); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967) (one of the very few employment-related cases cited by Tracy, this case involved a New York statute that specifically regulated the content of teachers' speech, providing that

writings or other expressions teaching the doctrine of forcible overthrow of the government or otherwise treasonable or seditious words are grounds for termination); *Mahoney Area Sch. Dist. v. B.L.*, 141 S.Ct. 2038 (2021) (involving a school imposing consequences against a student directly based upon content, terminating a female student from the cheerleading squad for using vulgar language in social media, off-campus during the weekend); *Grayned*, *supra*, 408 U.S. at 109 (anti-noise ordinance case); *Reno v. Am. C.L. Union*, 521 U.S. 844 (1997) (case involving content-based restrictions on speech under the Communications Decency Act, which prohibited transmission of obscene or indecent communications by means of telecommunications devices to persons under 18, and related matters, providing for severe criminal sanctions including imprisonment); and *Baggett v. Bullitt*, 377 U.S. 360 (1964) (involving a content-based regulation requiring that, as a condition of employment, teachers had to take an oath to support the United States and its constitution and to not commit any act that would support the Communist Party).

Each of the cases relied upon by Tracy, most of which are government-as-sovereign regulating its citizens, are addressed to actual content-based restrictions on speech and were decided in the phase of the interaction where actual speech occurred or was being evaluated. Contrarily, as the Eleventh Circuit observed here, "[T]he reporting requirement does not punish or restrict any speech; it requires only that faculty report certain types of speech activities." App.14a.

Tracy's interaction with FAU never reached the point of the potential regulation of his speech. As the Eleventh Circuit emphasized, Tracy's conduct never reached that phase because he simply refused to perform step one, submitting a simple report to identify his outside professional activities. App.17a. Had he done so, he would have placed FAU, his employer, in the position of addressing with him whether it detected a conflict of interest. *Id*. Even had Tracy taken it that far, there is nothing in this record at all to suggest that FAU would have restricted his speech. In fact, Tracy and FAU had already sat, negotiated, and resolved FAU's concerns about Tracy's self-professed "deeply offensive" blog back in 2013, agreeing that FAU would not interfere with Tracy's blogging and that Tracy would remove FAU's name from his opinion pages to prevent the impression that Tracy's opinions were endorsed by FAU. DE:246-6, p.205. Moreover, as the Eleventh Circuit pointed out, "[Tracy] 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," even though "the Policy's language has been part of the CBA for well over a decade." App.16a. Tracy's assertion of a chilling effect is simply an after-the-fact excuse for his "cut and dry" insubordination in the refusal to submit the report after numerous directives and opportunities to do so.

In summary, just as with the other challenges raised by Tracy to the Policy language, he cannot assert that the Eleventh Circuit misstated a rule of law

but, instead, argues that the court should have reached a different conclusion. That is not a proper basis for review in this Court. Sup. Ct. R. 10; *Thompson*, *supra*, 141 S.Ct. at 978.

II. THE ELEVENTH CIRCUIT'S CONCLUSION THAT THE REPORTING REQUIREMENT DOES NOT OFFEND THE FIRST AMENDMENT IS CONSISTENT WITH EXISTING LAW

Still arguing about the impact of what Tracy labels ambiguous terms in the reporting policy, Tracy asserts that the Eleventh Circuit's conclusion that the policy does not violate the First Amendment conflicts with other decisions of this Court and of other circuit courts that have held that similar reporting requirements impermissibly chill speech. Pet.,23. However, Tracy does not point to any principle of law that was misstated by the Eleventh Circuit; rather, Tracy continues to express disagreement with the way the Eleventh Circuit applied that law.

The other decisions Tracy relies upon are *not* similar and are, once again, cases involving government-as-sovereign regulating its citizens, rather than cases from the employment context. Therefore, as discussed above, the Eleventh Circuit decision is even stronger when considered in view of this Court's decisions in the employment context. Nevertheless, the Eleventh Circuit's decision does not offend or improperly apply the

rules of the cases cited by Tracy, FAU, or the court itself.

First, Tracy cites *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812 (2000), for the principle that the Government's content-based burdens must satisfy the same standards as its content-based bans. Pet.,23. In *Playboy*, a federal statute restricted sexually explicit broadcasts by broadcasters of such content, requiring that they either be fully scrambled or otherwise fully blocked or limited to transmission at late-night hours. *Id*. at 811-13. This Court was concerned only that the statute was not the least restrictive alternative to accomplish the valid objective of regulating such content. *Id.* at 814. In contrast, in our case, the Policy requirement that Tracy refused to complete simply requested information, directed no action with respect to any activity that might be reported, and – if such analysis were relevant – was the least restrictive way to start the process of determining whether a conflict of interest existed. No one disputes that FAU, as a public employer, had the right to protect the public interest and its own business interests by avoiding conflicts of interest that may be brought to the relationship by an employee. Even if "government-as-sovereign" cases somehow applied to the exclusion of employment cases, there is no valid analogy between the minimal burden of a professor merely identifying his outside professional activities and a broadcaster having to scramble, block, or move its broadcasts to different time periods. Regardless, *Playboy* and cases like it, for the obvious reasons

expressed by this Court, do not govern employment situations.

Tracy also relies upon *Doe v. Harris*, a Ninth Circuit Court of Appeals decision, which Tracy claims to involve a reporting requirement "under similar conditions." Pet.,24. *See Doe v. Harris*, 772 F.3d 563 (9th Cir. 2014). *Harris* centers upon a sex offender registration statute that required convicted sex offenders, after their release, to continually provide a list of internet identifiers that they establish or use and to list internet service providers used. *Id*. at 568. Like most of Tracy's case authority, *Harris* involved the government-as-sovereign regulating citizens, subjecting them to significant criminal sanctions immediately upon the violation of a statute. It did not involve an employment situation subject to the exigencies of operating a business, negotiations between employment and employee, and, as here, a CBA that actually provided the negotiated regulation and a series of warnings, along with a grievance procedure.

Finally, Tracy cites *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, an Eighth Circuit decision wherein the State of Minnesota imposed onerous regulatory reporting burdens on entities that sought to contribute even small amounts to a political candidate or party. 692 F.3d 864, 874 (8th Cir. 2012). In fact, the statute necessitated such entities undertaking the expenditure of time and money to create separate entities through which to make the contributions. *Id*. at 873-74. Just like the other cases Tracy relies upon, *Swanson* involved the government unilaterally

imposing a burden on speech in a non-employment situation, with the court analyzing whether the burden was too severe. Such a case does not apply to the present employment situation, not only based upon the case precedents from this Court but also because, here, Tracy and other in-unit faculty members have a voice. (Tracy, in fact, used his voice as the president of the Union to approve the CBA, inclusive of the reporting requirement that he flouted and now attacks).

Once again, Tracy does not state a basis for jurisdiction in this Court because he cannot show that the Eleventh Circuit has misstated the applicable law but, rather, he just disagrees with the Eleventh Circuit's conclusions.

III. THE ELEVENTH CIRCUIT DID NOT PROHIBIT A FACIAL CHALLENGE BUT, RATHER, FOUND TRACY'S FACIAL CHALLENGE INVALID

Tracy argues that the conflict-of-interest provision in the Policy offends the "unbridled discretion" doctrine, hypothetically allowing FAU to target speech it doesn't like and to demand to review speech for approval, in effect operating as a prior restraint. Pet.,25. Tracy submits that the Eleventh Circuit ruled that he may not maintain his facial challenge without showing an abuse of FAU's discretion through a pattern of unlawful favoritism and because he did not test FAU's policy by reporting his own blog activity. Pet.,27. Once again, however, Tracy's objection does not describe an

improperly stated rule of law but, rather, constitutes a disagreement with the Eleventh Circuit's conclusion in applying the law. Therefore, Tracy does not raise a proper basis for review by this Court.

In addition to Tracy's argument being misplaced from a jurisdictional perspective, Tracy misapprehends the Eleventh Circuit's analysis and continues to rely upon case law from the "government-as-sovereign" arena without addressing principles arising from the employment context. First, the Eleventh Circuit did not prohibit Tracy's facial challenge; rather, the court stated the law and analyzed Tracy's claim, concluding that the challenge failed on this record. App.14a-17a. Applying the law, the Eleventh Circuit concluded that Tracy's unbridled-discretion claim fails because at most he has shown a "hypothetical constitutional violation [] in the abstract," citing *Granite State Outdoor Advertising, Inc. v. City of St. Petersburg*, 348 F.3d 1278, 1282 (11th Cir. 2003). App.15a. Tracy offered no showing that FAU has prohibited *any* professor from engaging in *any* speech activity, even though the CBA had included the Policy at issue for well over a decade. App.16a. Thus, Tracy did not show a realistic danger that the policy will significantly compromise First Amendment protections of persons not involved in the case. *Id*. While Tracy argues that he should not have to test the Policy by submitting his report before being entitled to challenge it from a constitutional perspective, the Eleventh Circuit did not say that a statute or policy necessarily had to be tested first by attempted compliance before challenging it. The Eleventh Circuit

only pointed out that, as part of Tracy's failure to show that the Policy was being used to restrict valid speech, Tracy missed one opportunity to test the Policy when he chose not to submit his report. App.17a.

Tracy's expressed concern that the Policy would allow FAU to review his speech and thereby create the possibility that the school might improperly attempt to restrain constitutionally-permitted speech is unavailing. Pet.,26. Tracy criticizes the Policy in a way that implies his employer has no business knowing what he is writing about in his outside professional activities or even what those activities are. There is no legal support for that proposition. Thus, an employer absolutely has the right to know what outside activities the employee is engaged in to protect the business from conflicts of interest. Such conflicts may occur in many forms: time-based conflicts preventing the employee from rendering the agreed performance to the employer; conflicts that may hurt the operation of the business from a competitive standpoint; and conflicts that may cause the business to incur liability or to expend funds to avoid incurring liability. The only way the employer can actually know if such a risk exists is to review the outside activity sufficiently to assess whether there is a concern about a conflict of interest. That is entirely appropriate under the law, notwithstanding Tracy's implication otherwise. As this Court has stated, "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." *See Hill v. Colorado*, 530

U.S. 703, 721-22 (2000) (cited by the Eleventh Circuit at App.14a).

As with most of his other arguments, Tracy relies exclusively on case law from the realm of government-as-sovereign regulating activities of citizens, requiring an approval in advance, with criminal sanctions to be assessed for non-compliance. Tracy "transitions" to such case authorities by asserting that the Policy gives discretion to FAU administrators to approve or disapprove and is "akin to licensing." From there, Tracy, ignoring the employment circumstance from which this matter arises, relies totally upon licensing/advance permit cases. Pet.,25-28. *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988) (challenge to local ordinance that vested the mayor with unbridled discretion over which newspaper publishers could place newsracks on public property and locations); *Forsyth County, Georgia, v. The Nationalist Movement*, 505 U.S. 123 (1992) (ordinance governing permits for private demonstrations); *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147 (1969) (city licensing ordinance relating to parades and other public demonstrations); and *Freedman v. State of Maryland*, 380 U.S. 51 (1965) (licensing statute requiring prior approval by board of censors before showing a motion picture).

Tracy equates his circumstance to the theater owner's in *Freedman*, claiming that he "feared that FAU wanted to use the Policy to censor him and his controversial and publicly reviled opinions." Pet.,28. Tracy ignores the practical needs and interests of the parties in the employment circumstance, well-recognized and

explained by this Court. *See National Aeronautics and Space Administration*, *supra*, 562 U.S. at 148-49. Moreover, in addition to Tracy showing no pattern of abuse of the First Amendment freedom of speech by FAU, his claimed "fear" can hardly be seen as objective. As explained above, Tracy and FAU met and discussed his blogging in 2013, even as numerous parents and members of the public were calling for Tracy's discharge. FAU insisted only that Tracy remove FAU's name from the opinions he was writing, and Tracy continued his blogging through that period and throughout his employment at FAU. In other words, not only did Tracy offer no showing that FAU abridged anyone's speech or ever retaliated against him, but the only available evidence tended to show that FAU *would not do that*. The jury agreed.

This lawsuit exists only because Tracy, for reasons of his own, acted insubordinately by not simply submitting the report – a report that he, as president of the Union, had agreed to as part of the CBA. Because Tracy does not assert and cannot show that the Eleventh Circuit misstated any applicable law, and because Tracy's assertions constitute only disagreements with how the Eleventh Circuit concluded after applying the law (as well as continued disagreements with the jury's adverse ruling and the multiple court reviews of the jury's findings), Tracy has not presented a valid basis for review in this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 26, 2021