No. 121A23 TWENTY-FIRST JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

ALVIN MITCHELL,

Petitioner-Appellant,

v.

THE UNIVERSITY OF NORTH CAROLINA BOARD OF GOVERNORS,

Respondent-Appellee.

From Forsyth County

****

NEW BRIEF OF PETITIONER-APPELLANT

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INDEX

TABLE OF CASES AND AUTHORITIES

Cases:

Constitutional Provisions:

Statutes:

Rules:

Other Authorities:

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INTRODUCTION

This case presents two issues of fundamental importance to our constitutional system: freedom of speech and the separation of powers. How this Court resolves these two issues will guide lower courts across the state for decades to come.

Freedom of speech is under attack in universities and schools across America. In Ohio, a Christian philosophy professor was issued a written warning threatening suspension and termination for refusing to use a student's preferred pronouns. *Meriwether v. Hartop*, 992 F.3d 492, 498-501 (6th Cir. 2021). In Texas, a math professor was denied a contract extension when he referred

to a pamphlet about microaggressions as "garbage." *Hiers v. Bd. of Regents of the Univ. of N. Tex. Sys.*, No. 20-CV-321, 2022 WL 748502, at *2-3 (E.D. Tex. Mar. 11, 2022). And in Washington, a teacher faced disciplinary action for wearing a "MAGA" hat to his school's cultural sensitivity and racial bias training. *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 773-75 (9th Cir. 2022). Each time, the schools were found to have violated the professors' First Amendment rights. *Meriwether*, 992 F.3d at 511-12; *Hiers*, 2022 WL 748502, at *11; *Dodge*, 56 F.4th at 788.

Yet, attacks on free speech continue. Just last year, the North Carolina Governor's School fired Dr. David Phillips for speaking out against the school's increasing adoption of critical-race theory. *NC Governor's School Fires Professor for Speaking About Harms of Racially Divisive Ideology*, Alliance Defending Freedom (Dec. 19, 2022), https://adflegal.org/press-release/nc-governors-school-fires-professor-speaking-about-harms-racially-divisive-ideology. With this case, this Court has an opportunity to stem the tide of these violations. By holding that Professor Mitchell's termination violated his free speech rights, this Court can clarify that freedom of speech protections extend to North Carolina's universities and schools including—if not especially—to viewpoints that administrators might find disfavored.

This case also presents a gross violation of the separation of powers required by the North Carolina Constitution. Below, Professor Mitchell argued

that his termination violated the procedures contained in regulations promulgated by Winston-Salem State University and the UNC Board of Governors. The University disagreed and provided a different proposed interpretation *in its appellate briefing*. There had been no official announcements or other publications providing clarity as to the meaning of the rules before that. Nevertheless, the Court of Appeals applied the federal *Auer* deference standard, rubber-stamping the interpretation of the regulations provided by the University's brief. Such blind deference represents an abrogation of the courts' responsibility to exercise independent judicial judgment. Instead, it hands the executive branch the power of both judge and executioner. Our constitutional order does not permit this concentration of power. Under an independent interpretation of the regulations, Professor Mitchell's termination violated the applicable procedures.

This Court should reverse the Court of Appeals and remand to the trial court with instructions to order Professor Mitchell's reinstatement.

ISSUES PRESENTED

I. The First Amendment's academic freedom doctrine protects public university professors' speech on matters of public concern falling within the scope of their academic activities. Here, the University terminated Professor Mitchell, a justice studies professor, for commenting on racial bias in academia

and its effect on students' academic conference options. Was that speech protected by the First Amendment?

II. The North Carolina Constitution's separation of powers clause prohibits one branch from wielding authority designated to another. The authority to interpret law is a judicial power vested in the judicial branch. Did the Court of Appeals err when, rather than exercising its own independent analysis, it deferred to an executive entity's interpretation of the meaning of a regulation?

STATEMENT OF THE CASE

After exhausting the University's internal appeal process, Professor Mitchell petitioned the Superior Court for judicial review of the UNC Board of Governors' decision upholding his termination. (R pp 105-22). On 26 July 2021, the Honorable Martin B. McGee, Forsyth County Superior Court Judge presiding, affirmed the agency's decision. (R pp 134-35).

Professor Mitchell appealed. (R pp 136-38). The Court of Appeals issued an opinion on 4 April 2023 affirming the superior court's decision. *Mitchell v. Univ. of N.C. Bd. of Governors*, 288 N.C. App. 232, 243, 886 S.E.2d 523, 531 (2023). Judge Murphy issued a separate opinion concurring in part and dissenting in part. *Id.* at 243-44, 886 S.E.2d at 531 (Murphy, J., concurring in part and dissenting in part).

Professor Mitchell timely noticed an appeal of right based on the dissenting opinion to this Court. Professor Mitchell also noticed an appeal based on a

substantial constitutional question and, in the alternative, petitioned for discretionary review. On 20 March 2024, this Court dismissed the notice of appeal based on a substantial constitutional question and allowed review of the first issue presented in Professor Mitchell's petition for discretionary review.

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

The Court of Appeals had jurisdiction over this appeal because it arose from a final judgment—the trial court's 26 July 2021 order upholding the University's termination of Professor Mitchell. *See* N.C. Gen. Stat. § 7A-27(b)(1).

This Court has jurisdiction of this appeal because there was a dissenting opinion in the Court of Appeals and this appeal was filed before 3 October 2023. *See* N.C. Gen. Stat. § 7A-30(2) (2023); N.C. R. App. P. 16(a)-(b) (2023); *see also* 2023 Appropriations Act, S.L. No. 2023-134, §§ 16.21(d)-(e), 43.8 (to be codified at N.C. Gen. Stat. § 7A-30). This Court also has jurisdiction because it partially allowed Professor Mitchell's petition for discretionary review. *See* N.C. Gen. Sat. § 7A-31(c); N.C. R. App. P. 15.

STATEMENT OF FACTS

Plaintiff Alvin Mitchell, PhD, has served as a tenured professor at Winston Salem State University since 2008. (R p 124 ¶ 1). He taught in the justice studies program, where he also assisted as a coordinator. (Doc.Ex. 580). Within the justice studies program, Professor Mitchell taught numerous courses, including Constitutional Law, Introduction to Corrections, Introduction to

Justice Studies, Research I, Research II, and the internship program. (Doc.Ex. 45, 67, 97, 134-35). This case involves an attempt by two of Professor Mitchell's coworkers—Denise Nation and Cynthia Villagomez, co-chairs of his department—to get him fired for supporting his students, calling out racial bias in academia, and arguing in favor of a particular school of scholarship.

I. A leadership change causes strife within the department.

In 2015, Professors Nation and Villagomez became co-department chairs of "history, politics, and social justice." (R p 124, ¶ 2; Doc.Ex. 36). Professor Mitchell's justice studies program fell under their supervision. (R p 124 ¶ 2). Trouble started soon after they took over.

Professor Mitchell and the rest of the department chafed under the new co-chairs' leadership. (Doc.Ex. 1126 (noting "[i]t was not just [Professor Mitchell"). One faculty member described their time in charge of the department as "a fascist state." (Doc.Ex. 1126). Two others found the co-chairs "rude, unprofessional[,] and un-collegial." (Doc.Ex. 172). The co-chairs instituted highly unpopular "classroom visits" where they dropped in to monitor faculty's "teaching pedagogy" and implementation of learning objectives. (Doc.Ex. 943). They silenced faculty members in the middle of department meetings. (DocEx. 943). In return, faculty expressed significant complaints about the co-chairs' administration and disciplinary practices. (Doc.Ex. 172-74).

The professors were not alone in their displeasure with the co-chairs. Students, too, lodged complaints about their "teaching style and treatment." (Doc.Ex. 444).

Like many other faculty, Professor Mitchell had conflicts with the co-chairs as well. Professor Nation supplanted Professor Mitchell as "coordinator of justice studies." (Doc.Ex. 45). She also took more desirable courses away from him and assigned them to herself. (Doc.Ex. 1136). Professor Nation then took to demeaning Professor Mitchell behind his back. (Doc.Ex. 507, 513). Professors Villagomez and Nation further denied Professor Mitchell the opportunity to teach any online classes in summer 2017. (Doc.Ex. 1136).

Professor Mitchell tried resolve these conflicts amicably. He even asked his colleagues to help mediate the issues between him and the co-chairs. (Doc.Ex. 329). Professor Nation, however, refused to participate. (Doc.Ex. 329).

II. The co-chairs execute their plan to remove Professor Mitchell.

Between March and August of 2017, the co-chairs assembled a list of four grievances in an attempt to fire Professor Mitchell. They alleged that Professor Mitchell (1) had made racially charged remarks, (2) had allowed a student's grade to lapse, (3) had failed to open the online portal for a course he was assigned to teach, and (4) had been disruptive when confronted during a meeting with the co-chairs. Yet when given the opportunity to prove their allegations to a factfinder of peers, the co-chairs' allegations fell flat. The summary below

reflects the factual findings made by the Committee on Discharge and Nonreappointment—the only factfinders to hear live testimony in this case.

The first accusation involved a letter Professor Mitchell sent to Professor Nation in March 2017 concerning a dispute over academic conferences. The incident arose during the 2016-2017 academic year, when two students drafted a research paper as part of a class Professor Mitchell was teaching. (R p 128 ¶ 23). The students submitted the paper to the Race, Gender, & Class Conference ("RGC Conference") in New Orleans, where Professor Mitchell was also presenting. (R p 128 ¶ 23; Doc.Ex. 437). The conference selected the students to present on their paper. (R p 128 ¶¶ 23-24). The students just needed Professor Nation to sign off on funding for the trip. (R pp 128-29 ¶ 24; Doc.Ex. 505).

Janay Smith, one of the students, visited Professor Nation's office to obtain approval. (Doc.Ex. 505-06). But Professor Nation would not approve the funding. (Doc.Ex. 505). Professor Nation told Ms. Smith that the RGC Conference was "not a big . . . deal," that anyone could present at the conference, and that the students should present their research at the University's Scholarship Day instead. (Doc.Ex. 505). Professor Nation further told Ms. Smith to apply to the American Society of Criminology Conference ("ASC Conference"), which was being held "up north." (Doc.Ex. 505). Ms. Smith believed that Professor Nation favored the ASC Conference because its attendees were primarily Caucasian, unlike the RGC Conference. (R p 129 ¶ 27; Doc.Ex. 437, 505).

Ms. Smith was "devastated" that she was denied approval to attend a conference because of its racial composition. (Doc.Ex. 505-06). Ms. Smith shared what happened with Professor Mitchell. (Doc.Ex. 437). Professor Mitchell was also upset and determined to confront Professor Nation.

In March 2017, Professor Mitchell wrote Professor Nation a letter. (Doc.Ex. 431). The letter began by challenging Professor Nation's characterization of the RGC Conference as unreputable. (Doc.Ex. 437). Professor Mitchell rebutted Professor Nation's claims, sharing that the RGC Conference is "locally, regionally, and internationally known" and has "scholars from around the world presenting." (Doc.Ex. 437). The RGC Conference has been around for more than 20 years and will not just "take anyone." (Doc.Ex. 437). Professor Mitchell observed that Professor Nation should have simply told Ms. Smith that she did not want to fund her, rather than "telling her falsehoods about the RGC conference." (Doc.Ex. 437). Such conduct, he noted, was "not appropriate behavior as a chair." (Doc.Ex. 437).

Professor Mitchell next addressed his concern that Professor Nation would show preference for the ASC Conference. Professor Mitchell noted that the ASC Conference is attended by "nothing but a bunch of white men (some white women)." (Doc.Ex. 437). Professor Mitchell then highlighted what he perceived as a bias toward Caucasian academics by Professor Nation:

> You can graduate from and praise their schools, come up with a great theory, hangout with them, praise Latessa and other European professors (you need to ask them about their civil rights record), wear their European style weaves, walk with their bounce, hire them, present at their conferences, and even publish in their journals. In their eyes you will never be equal to them. They still look at you as a wanna be white, an international n[****]r, an international coon, and an international sambo (lol) because you display that kind of behavior. You will never get it. Wake up.

(Doc.Ex. 437). Nowhere did Professor Mitchell himself call Professor Nation the derogatory names that appear in the letter; instead, he used them to emphasize the vile nature of the bias that other academics held toward both of them as Black professors. (Doc.Ex. 437). As a whole, the letter comprised a passionate expression of Professor Mitchell's views on the merits of the academic conferences and racial bias in the academy more generally. (Doc.Ex. 131 ¶ 34). The letter resulted in no immediate reprimand, formal complaint, or action by the Dean of the University. (Doc.Ex. 340). Indeed, no action was taken in response to the letter at all, until it was listed as a ground for terminating Professor Mitchell several months later. (Doc.Ex. 340).

The second accusation involved a grade dispute between Professor Mitchell and a student in one of his classes. In November 2015, the student submitted a research paper that did not meet the minimum page count, was 34% plagiarized, did not discuss the assigned criteria, and did not cite a single scholarly source (even though ten were required). (R p 125 ¶ 4; Doc.Ex. 321).

Professor Mitchell graded the paper as 45/100, but gave the student a chance to resubmit it. (R p 124 ¶ 4). The student agreed, so the assignment was marked incomplete. (Doc.Ex. 321). The student waited nine months to resubmit the paper—until August 2016—which caused his total grade to drop to an F due to the outstanding "incomplete." (Doc.Ex. 321). When the student finally did resubmit the paper, it was identical to the original submission. (Doc.Ex. 321). Professor Mitchell gave the student one final chance. The student waited again, this time until March 2017, to turn in a final draft. (Doc.Ex. 321, 340). Thirty-four percent of the paper was still plagiarized, and again there were no scholarly sources. (Doc.Ex. 321-22, 340). Professor Mitchell opted not to change the student's grade from F. (Doc.Ex. 321-22, 340). He did "not have [an] obligation to change" it. (Doc.Ex. 340).

The third incident involved a mix-up on one of the many courses Professor Mitchell was assigned to teach each semester. (Doc.Ex. 312). During the fall 2017 semester, students complained that Professor Mitchell had forgotten to open the online portal for one of his classes. (Doc.Ex. 26). Professor Mitchell, for his part, did not believe that he was supposed to be teaching that class. (Doc.Ex. 1139). The day after the semester started, Professor Nation emailed Professor Mitchell and demanded he open the portal for the class. (Doc.Ex. 316). When Professor Mitchell expressed his confusion as to the class and requested to meet with the Dean about the situation, Professor Nation refused.

(Doc.Ex. 318-19, 340). She did not even alert the Dean to Professor Mitchell's request. (Doc.Ex. 340). That decision violated the applicable procedure in the faculty handbook for resolving disputes. (Doc.Ex. 318-19, 340, 603).

The fourth incident occurred when Professors Nation and Villagomez decided to interrupt Professor Mitchell's class to discuss opening the online portal and the student grade issue. (Doc.Ex. 320). The Dean had sent Professor Mitchell an email at 9:36 AM requesting he take action by the end of the day. (Doc.Ex. 1143). But rather than wait until the end of the day, the co-chairs decided to interrupt Professor Mitchell's 11:00 AM class ten minutes after it started. (Doc.Ex. 312).

There are several versions of what happened next. Per Professor Nation, Professor Mitchell started screaming, so Professor Nation left and called campus police. (Doc.Ex. 312). According to non-interested staff and students, after the co-chairs interrupted him, Professor Mitchell told them that he would meet with them after class. (Doc.Ex. 323). Professor Nation refused and asked to speak immediately. (Doc.Ex. 323). Professor Mitchell raised his voice and again requested that the co-chairs not disrupt his class, but he made no threats and used no profanity. (Doc.Ex. 323). But the co-chairs would not wait so Professor Mitchell ended class for the day to talk with them. (Doc.Ex. 323).

Following a brief discussion, Professor Mitchell "exited the hallway into another hallway." (Doc.Ex. 324). The co-chairs followed him "right on his

heels[,] hollering at" him while Professor Mitchell completed almost an entire lap of the building. (Doc.Ex. 324). Professor Mitchell then turned and asked the co-chairs "why are you following me, stop following me." (Doc.Ex. 324). At that point one of the co-chairs "continued with her ranting" while the other "walked off saying I don't care, you can tell the President of the United States for all I care." (Doc.Ex. 324). The factfinders found there was no "clear picture of what really happened that day" but found it telling that "there was no investigation of the incident" thereafter. (Doc.Ex. 340).

III. The University terminates Professor Mitchell despite the factfinders' determination that the University failed to prove a prima facie case.

On 31 August 2017, the University sent Professor Mitchell a letter indicating its intent to discharge him. (Doc.Ex. 26). The University listed the four previously described incidents as the grounds for termination. (Doc.Ex. 26-27). Following the process laid out in the Handbook, Professor Mitchell requested a hearing on the charges. (Doc.Ex. 278, 280-82).

At the hearing, the faculty affairs manager presented the University's case against Professor Mitchell on behalf of the provost's office. (Doc.Ex. 286). The Handbook limited the hearing to the allegations in the notice and prohibited the Committee from considering any grounds for dismissing Professor Mitchell that did not appear therein. (Doc.Ex. 28). Professors Nation and

Villagomez testified at the hearing in support of the allegations in the notice. (Doc.Ex. 290, 310).

Despite their vehement accusations, the co-chairs were unable to prove their case. Under the Handbook's procedure, after the provost finishes presenting her case, the Committee excuses itself to consider whether the University established a "prima facie case." (Doc.Ex. 32). In this case, when the Committee returned, it announced: "So after careful deliberation, it is the [C]ommittee's decision that at this time the administration has not met prima facie case requirements based upon the -- what is outlined in the letter." (Doc.Ex. 340).

The Committee went on to outline each of the University's evidentiary failures for the individual allegations. Starting with the online portal, the Committee found "that's not proved as only one online course was in contention and [Professor Mitchell] had requested to have a meeting with the dean to discuss it, and that had not been forwarded to the dean's attention." (Doc.Ex. 340). The Committee also found the letter about the RGC and ACS Conferences did not constitute a terminable offense because there "was no reprimand," no "complaint made to EEO," and "no follow through at the dean's level." (Doc.Ex. 340). As for the grade dispute, "university policy" required the grade to "have automatically turned into an F" because the "paper was not submitted until March 17," so Professor Mitchell had no "obligation to change the grade." (Doc.Ex. 340). Finally, regarding the classroom confrontation, the University failed to

provide "a clear picture of what really happened that day." Still, the Committee found compelling that "there was no investigation of the incident after the fact nor a mediation to resolve it before serious sanctions were issued." (Doc.Ex. 340). Accordingly, the Committee "voted unanimously" that the University did "not meet the case." (Doc.Ex. 340).

The Committee entered a written confirmation of its findings, (Doc.Ex. 602-05), in accordance with the Handbook's procedures. (Doc.Ex. 32). The Chancellor reviewed the Committee's decision and, as permitted by the Handbook, (Doc.Ex. 32), opted to send back the matter for the Committee to reconsider whether the University had established a prima facie case. (Doc.Ex. 607). However, the Chancellor's letter did not identify what grounds or evidence he believed established a prima facie case or give any further reason why he rejected the Committee's findings and recommendation. (Doc.Ex. 607).

Upon receiving the Chancellor's request, the Handbook states that the Committee needed to "resume the hearing" only if, after reconsideration, the Committee "determine[d] that the Administration has established a prima facie case." (Doc.Ex. 32). Professor Mitchell wrote the Committee to express his hope that the Committee would reaffirm its previous decision that the University had failed to meet the prima facie case, but also to inform the Committee that he would "make himself available" should the Committee decide "that the hearing should be reconvened for additional evidence." (Doc.Ex. 609). Upon

reconsideration, the Committee remained convinced that the University failed to establish a prima facie case. (Doc.Ex. 612-15).

At that point, the Handbook does not provide any further steps for the Chancellor to take. (Doc.Ex. 32). Disregarding the Handbook's plain text, the Chancellor decided to terminate Professor Mitchell anyway. (Doc.Ex. 618-20). The Chancellor issued a letter that purported to terminate Professor Mitchell and issued findings against him that faulted Professor Mitchell for not disproving the allegations against him, (Doc.Ex. 619), despite the Handbook explicitly requiring the University to bear the burden of proof, (Doc.Ex. 29).

The Chancellor—who did not hear any live testimony—made numerous factual mistakes in his letter. He claimed that Professor Mitchell "refuse[d] to issue a grade for approximately one year," (Doc.Ex. 619), when it was the student who waited until March 2017 to turn in a corrected paper, (Doc.Ex. 479). The Chancellor also ignored that Professor Mitchell was denied his meeting with the Dean despite the Handbook requiring it. (Doc.Ex. 456, 613, 619). And his assessment of the letter ignored that Professor Mitchell used the racially charged language only to express his disagreement with those who held such views, not to apply those noxious labels to Professor Nation. (Doc.Ex. 437).

IV. Professor Mitchell unsuccessfully appeals the Chancellors' decision.

Following the Chancellor's decision, Professor Mitchell exercised his right to appeal his termination to the University's Board of Trustees. (R p 131 ¶ 36). The Board of Trustees, however, affirmed the Chancellor's decision. (R p 131 ¶ 36). So, Professor Mitchell appealed to the UNC Board of Governors, but it too upheld his termination. (R pp 131-32 ¶ 37).

Having exhausted his administrative remedies, Professor Mitchell petitioned the Superior Court, Forsyth County, for judicial review. (R p 2). On 26 July 2021, the superior court issued a decision affirming Professor Mitchell's discharge. (R p 34)

Professor Mitchell then appealed the superior court's decision to the Court of Appeals. (R p 136). Professor Mitchell explained to the Court of Appeals that his termination violated the applicable portions of the Handbook and his right to free speech under the First Amendment. (Pet.-Appellant's COA Br. at 2).

In a divided decision, the Court of Appeals rejected Professor Mitchell's arguments. *Mitchell*, 288 N.C. App. at 243, 886 S.E.2d at 531. First, the majority rejected Professor Mitchell's plain-text interpretation of the Handbook, ruling that it "must . . . defer" to the University's interpretation of the Handbook. *Id.* at 240, 886 S.E.2d at 529. Unsurprisingly, once the Court of Appeals

adopted the University's interpretation of the Handbook, it found no issues with the University's compliance. *Id.* at 241, 886 S.E.2d at 530. As for the free speech issue, the majority concluded that Professor Mitchell's letter to Professor Nation "did not implicate a matter of public concern," and so was not protected by the First Amendment. *Id.* at 243, 886 S.E.2d at 531. The dissent, while agreeing with majority that the University complied with the Handbook, disagreed as to the First Amendment, recognizing that the use of racially charged language was to communicate a particular message rather than to harass a colleague. *Id.* at 250-52, 886 S.E.2d at 535-36 (Murphy, J., concurring in part and dissenting in part)

Professor Mitchell's appeal is now before this Court to correct the errors that occurred below.

ARGUMENT

I. Terminating Professor Mitchell for Calling Out Racism in Academia and Taking a Certain Academic Position Violated the First Amendment.

"It can hardly be argued that . . . teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Nor do professors "surrender their First Amendment rights by accepting public employment" at a public university. *Lane v. Franks*, 573 U.S. 228, 231 (2014). Rather, "[t]he essentiality of freedom in the community of American universities is almost

self-evident." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). And the benefit of a public employee's speech "is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." *San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam). After all, "[g]overnment employees are often in the best position to know what ails the agencies for which they work." *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion).

This situation is even more pronounced in the university environment. "[A]cademic freedom," the U.S. Supreme Court observed, "is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). The doctrine of academic freedom "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id.* Instead, it recognizes that the "classroom is peculiarly the 'marketplace of ideas,'" and that our country's "future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection." *Id.* (cleaned up); *see also Sweezy*, 354 U.S. at 250 ("Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.").

Accordingly, the First Amendment protects the speech of government employees on matters of public concern, particularly when those employees are university professors. To qualify for these protections, a professor must show

that he spoke on a matter of public concern either (a) in his capacity as a private citizen or (b) in furtherance of his teaching and scholarship. If either of those standards are met, a court must then balance the professor's interest in speaking against whatever interests the university may have.

A. Professor Mitchell's Speech About Racism in Academia Addressed a Matter of Public Concern.

As a threshold matter, a public employee's speech qualifies for First Amendment protection if it addresses a matter of public concern. Professor Mitchell's letter discussed racial bias in academia, a topic discussed everywhere from the mainstream media to niche technical journals. By any measure, it is a matter of public concern. Thus, Professor Mitchell's letter meets the threshold for First Amendment protection.

"[O]nly speech on a matter 'of public concern' is constitutionally protected." *Corum v. Univ. of N.C.*, 330 N.C. 761, 775, 413 S.E.2d 276, 285 (1992) (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). In accordance with this doctrine, North Carolina has faithfully protected the ability of teachers to address matters of public concern. *See, e.g.*, *id.* at 776, 413 S.E.2d at 286; *Warren v. New Hanover Cnty. Bd. of Educ.*, 104 N.C. App. 522, 526, 410 S.E.2d 232, 234 (1991). The landmark *Corum* decision revolved around an Appalachian State University professor's right to "publicly debate[]" "what to do with the Appalachian Collection"—a matter this Court found to be "of public

concern" and thus protected by the First Amendment. 330 N.C. at 776, 413 S.E.2d at 286. And in *Warren*, the Court of Appeals protected the ability of public school teachers to engage in the debate surrounding a new pilot policy. 104 N.C. App. at 526, 410 S.E.2d at 234.

Professor Mitchell's speech addressed a matter of much greater public concern than those examples—namely, racial bias in academia. "Speech involves matters of public concern 'when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'" *Lane*, 573 U.S. at 241 (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)). The U.S. Supreme Court has recognized that "racial discrimination" is "a matter inherently of public concern." *Connick v. Myers*, 461 U.S. 138, 148 n.8 (1983). Courts across the country agree. *See, e.g.*, *Rosado-Quinones v. Toledo*, 528 F.3d 1, 7 (1st Cir. 2008) ("[R]ace discrimination . . . was plainly a matter of public concern."); *Fenico v. City of Philadelphia*, 70 F.4th 151, 165 (3d Cir. 2023) ("While it carries the potential to be inflammatory, speech touching on race relations is 'inherently of public concern.'" (quoting *Connick*, 461 U.S. at 148 n.8)); *Love-Lane v. Martin*, 355 F.3d 766, 776 (4th Cir. 2004) ("[S]peech about racially discriminatory practices . . . involves a matter of public concern."); *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001) ("[R]ace, gender, and power conflicts in our society" are "matters

of overwhelming public concern."); *Richardson v. Sugg*, 448 F.3d 1046, 1062 (8th Cir. 2006) ("[M]atters of racial discrimination are 'inherently of public concern.'" (quoting *Connick*, 461 U.S. at 148 n.8)).

Here, Professor Mitchell was addressing racial bias in academia. In particular, Professor Mitchell was accusing the ASC Conference, and Caucasian academics in general, of thinking Black academics were not "equal to them." (Doc.Ex. 437). A brief internet search,[1] perusal of recent scholarship,[2] or review of prime-time cable news[3] only confirms the public's interest in racism in academia. If an intra-departmental dispute about where to physically keep an Appalachian collection involved a matter of public concern, *see Corum*, 330 N.C. at 776, 413 S.E.2d at 286, then the racial bias of a national academic conference, or the racial bias of academics as a whole, is certainly one as well.

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[1] A search for "racial bias in academia" returned approximately "4,120,000 results." Google, https://www.google.com/search?q=racial+bias+in+academia, (last searched May 22, 2024).

[2] *See, e.g.*, Renee Nicole Allen, *Get Out: Structural Racism and Academic Terror*, 29 Wm. & Mary J. Race, Gender, & Soc. Just. 599 (2023); Audrey K. Bowden & Cullen R. Buie, *Anti-Black Racism in Academia and What You Can Do About It*, 6 Nature Revs. Materials 760, (2021); Barry A. Farber, *Campus Diversity, Jewishness, and Antisemitism*, 75 J. Clinical Psych. 2034 (2019).

[3] *See, e.g.*, *White Professor Accuses University of Race Discrimination*, Fox News (June 26, 2023), https://www.foxnews.com/video/6330150979112; *Rutgers Professor Doubles Down on Anti-White Rant*, Fox News (Oct. 30, 2021), https://www.foxnews.com/video/6279507465001.

B. Whether Written in His Private Capacity or Official Role, Professor Mitchell's Letter Is Protected.

Because Professor Mitchell's letter addressed a matter of public concern, this Court must next examine whether it was written in Professor Mitchell's role as a private citizen or university professor. Regardless of characterization, Professor Mitchell's speech should receive First Amendment protection.

Years after *Corum* and *Warren*, the U.S. Supreme Court added an additional requirement to its First Amendment jurisprudence. *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Under *Garcetti*, the First Amendment does not apply to every situation in which a public employee addresses a matter of public concern. Instead, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.*

Notably, no North Carolina court has had the opportunity to apply *Garcetti*. Thus, the standard set by the Court in this case will govern all government employee free speech cases going forward.

Under *Garcetti*, analysis of public employee speech "proceed[s] in two steps." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 508 (2022). First, the court determines whether the "public employee speaks 'pursuant to [his or her] official duties.'" *Id.* (quoting *Garcetti*, 547 U.S. at 421). If the answer is "yes,"

then the First Amendment does not apply, and the inquiry is over. But if the answer is "no," and the employee is *not* speaking pursuant to his official duties, then the court moves to the "second step": "whether an employee's speech interests are outweighed by the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 528 (cleaned up). This second step is commonly referred to as "the *Pickering* balancing test." *See, e.g.*, *Corum*, 330 N.C. at 776, 413 S.E.2d at 286 (citing *Pickering*, 391 U.S. at 568).

But there is an important caveat to *Garcetti*'s "first step." *Garcetti* explicitly declined to decide whether the First Amendment applied "in the same manner to a case involving speech related to scholarship or teaching." 547 U.S. at 425. This is still an open question at the Supreme Court. *See Kennedy*, 597 U.S. at 528 (noting that the doctrine of "academic freedom . . . *may or may not* involve 'additional' First Amendment 'interests' beyond those captured by [*Garcetti*]" (emphasis added)).

In the meantime, however, federal circuit courts have uniformly held that "*Garcetti* does not apply 'in the academic context of a public university.'" *Meriwether*, 992 F.3d at 505 (quoting *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011)) (collecting cases); *see also Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, 641 F. Supp. 3d 1218, 1241 (N.D. Fla. 2022) (noting no contrary authority). To the contrary, applying *Garcetti* to

university professors' speech would conflict with longstanding and consistent Supreme Court precedent protecting professors' unique right to academic freedom.[4] *See Meriwether*, 992 F.3d at 505 (citing *Sweezy*, 354 U.S. at 249-50; *Keyishian*, 385 U.S. at 603; *Tinker*, 393 U.S. at 506; *Healy v. James*, 408 U.S. 169, 180-81 (1972)). Because the Supreme Court has never extended *Garcetti* to overrule these prior cases, lower courts across the country have refused to do so either. This Court should follow their example.

Protecting public university professors' speech means that this Court will reach the *Pickering* balancing test regardless of the nature of Professor Mitchell's letter.[5] If the speech was in Professor Mitchell's private capacity, then this Court applies the *Pickering* balancing test, and *Garcetti* is inapplicable. *See Kennedy*, 597 U.S. at 529. Conversely, if Professor Mitchell's speech was pursuant to his employment duties, then it would be covered by the doctrine of academic freedom, and the *Pickering* balancing test would still apply.

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[4] Expanding *Garcetti* would also contradict the historical understanding of the First Amendment. "[P]rominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps.*, 585 U.S. 878, 905 & n.8 (2018).

[5] Notably, in resolving this case, this Court need not decide what level of academic freedom applies at every level of public education. The Supreme Court has consistently recognized that public universities possess the highest degree of academic freedom. *See, e.g.*, *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 750 (1976). Whether the same or some lesser degree of academic freedom exists in primary and secondary schools is a matter for a different day.

E.g., *Meriwether*, 992 F.3d at 507 (noting that courts typically apply *Pickering* to academic freedom claims); *Adams*, 640 F.3d at 564 (applying *Pickering*). Ultimately, no matter the route taken, all roads lead to *Pickering*.

Nevertheless, for completeness, the following sub-sections explain why the better route is to construe Professor Mitchell's speech as falling outside his employment responsibilities.

1. Professor Mitchell did not speak pursuant to his employment responsibilities.

Professor Mitchell's letter to Professor Nation is best characterized as speech in his private capacity. The Supreme Court has defined private speech to mean speech that is not "ordinarily within the scope of an employee's duties." *Kennedy*, 597 U.S. at 529 (quoting *Lane*, 573 U.S. at 240). Accordingly, private speech does not include speech that "the government 'itself ha[s] commissioned or created' [or] speech the employee was expected to deliver in the course of carrying out his job." *Id.* (quoting *Garcetti*, 547 U.S. at 422). But "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech." *Lane*, 573 U.S. at 240.

The contrast between *Garcetti* and *Kennedy* provides a helpful guide in determining which bucket an employee's speech falls into. In *Garcetti*, the Supreme Court held that an employee could not use the First Amendment to

prohibit his employer "from evaluating his performance," where the employees' job was to write memos. *Garcetti*, 547 U.S. at 422. But in *Kennedy*, the Supreme Court held that a football coach's personal prayer following football games was private speech even though he was still on the job. *Kennedy*, 597 U.S. at 529-30. The distinction: praying was not "a responsibility imposed by his employment." *Id.* at 2425.

Here, Professor Mitchell drafted a personal letter, expressing his private views, and shared it exclusively with a single colleague. (Doc.Ex. 250). Just because it involved information acquired as part of his employment did not make it official speech. *Lane*, 573 U.S. at 240. The message was not sent from Professor Mitchell's official email account and was not specifically ordered by a direct supervisor. There is no indication that anyone, whether Professor Mitchell or the University, understood that composing the letter was a required part of Professor Mitchell's job; rather, he wrote it of his own free will. Accordingly, the letter is best viewed as Professor Mitchell's private speech.

2. To the extent Professor Mitchell's letter fell within his duties, it comprised protected academic speech.

Were this Court, in the alternative, to view the letter as part of Professor Mitchell's job responsibilities, it would still be protected because it would be covered by academic freedom. University professors' academic freedom is not exclusively limited to words spoken in a classroom or written in a journal

article. *See Cary v. Bd. of Educ.*, 598 F.2d 535, 539 n.2 (10th Cir. 1979) ("The term 'academic freedom,' of course, encompasses much more than teaching-related speech rights of teachers."). *Keyishian*, for instance, did not involve a teacher's lecturing or scholarship, but rather an administrative regulation requiring professors to affirm they were not a communist. 385 U.S. at 592.

"To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Sweezy*, 354 U.S. at 250. Thus, the "First Amendment freedom to explore novel or controversial ideas in the classroom is closely linked to the freedom of faculty members to express their views to the administration concerning matters of academic governance." *Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 296-97 (1984) (Brennan, J., dissenting) (citing *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

Consider, for example, an administrative push to begin implementing new "diversity, equity, and inclusion" requirements in all courses taught at a university. The university is within its rights to advance whatever initiatives it wishes, but professors are equally within their rights to express disagreement with them. If universities can terminate professors who speak out against such curriculum changes, the right to lecture freely in a classroom itself won't mean much. Academic freedom must extend to discussions concerning curricula, student activities, and related administrative matters. And that

is particularly true when a professor takes a position based on his own research and experience. *Accord Waters*, 511 U.S. at 674 ("Government employees are often in the best position to know what ails the agencies for which they work."); *Lane*, 573 U.S. at 240 ("[S]peech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment. . . . '[I]t is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.'" (quoting *Pickering*, 391 U.S. at 572)).

Because of the special role that academic freedom plays in our educational system, Professor Mitchell's letter is protected even if this Court finds that it fell within the scope of his professional responsibilities. Professor Mitchell's speech criticized an administrative decision based on the academic merits of the RGC Conference versus the ACS Conference. (Doc.Ex. 437). In refuting a fellow professor's assessment of the RGC Conference, and resulting administrative action, Professor Mitchell offered a spirited argument that the ACS Conference was not "better" than the RGC Conference. (Doc.Ex. 437). In making this assertion, Professor Mitchell noted the professional reputation of the RGC Conference, its history, and its exclusivity. (Doc.Ex. 437). He then criticized the ASC Conference for reflecting what he believed was a racial bias among Caucasian American academics and Europeans. (Doc.Ex. 437).

At its core, Professor Mitchell's letter was itself a cry for academic freedom. Professor Mitchell was worried that his students' chosen scholastic conference was being silenced because Professor Nation preferred a different academic school of thought. And when Professor Mitchell expressed that sentiment, he was punished for it.

Professor Mitchell was also attempting to help his colleague consider whether such bias had influenced her reasoning as well. It's important to recognize how that letter ties directly into the larger national conversation over race happening in America right now. At universities across the nation, professors are questioning how implicit biases (of themselves and their colleagues) might be affecting teaching decisions. Meanwhile, other professors are pushing back on the concept of implicit bias and speaking out against what they view as race-based assumptions and categorizations. The university is the perfect setting for these disputes to be explored and debated. Under the First Amendment, the solution to such disputes is "more speech, not enforced silence." *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

In short, Professor Mitchell's letter made an argument to refute a fellow professor's opinion on the scholarly merits of an academic conference and the ultimate administrative decision that resulted. To the extent that speech was

pursuant to Professor Mitchell's official duties, it falls squarely within the protections of academic freedom.

* * *

Professor Mitchell's letter was either speech in his private capacity or speech covered by the academic freedom doctrine. Either way, it deserves First Amendment protection.

C. Professor Mitchell's Letter—Calling Out Racism and Its Effect on Student Scholarship—Outweighed the University's Asserted Interests.

Since Professor Mitchell's letter satisfies the first step under *Garcetti*, it constitutes protected speech unless the government can overcome the *Pickering* balancing test. The *Pickering* balancing test compares the value of the speech with the university's interest in suppressing it. Speech addressing a controversial issue has high value, especially when strongly expressed. Under these circumstances, it outweighs the discomfort expressed by a single professor who did not appreciate the phrasing of the letter or the viewpoint it conveyed. Free speech wins.

Once a court reaches the *Pickering* balancing test, the burden shifts to "the government . . . to prove that its interests as employer outweigh even an employee's private speech on a matter of public concern" or speech protected by academic freedom. *Kennedy*, 597 U.S. at 531-32. The University has not met its burden in this case.

Below, the University asserted that Professor Mitchell's speech interfered with its interests in "institutional efficiency," maintaining a workplace free of disruption and discrimination, and "the functioning of [the] office." (Respondent-Appellee's COA Br. at 25-26 (quoting *Connick*, 461 U.S. at 153)). Professor Mitchell does not disagree that, as a general matter, those are valid interests. Here, however, those interests are not strongly implicated—and certainly do not trump the First Amendment's protections.

1. This case does not strongly implicate the University's interest in prohibiting discrimination.

The letter was not discriminatory. While Professor Mitchell used strong language, that language did not racially target Professor Nation or harass her. To the contrary, the entire point of Professor Mitchell's letter was to communicate that he *did not* harbor a racist view of Professor Nation and to call out other people who wrongly held such racist views. The letter did not say, "In *my* eyes you will never be equal." (Doc.Ex. 437). No, it said, "In *their* eyes you will never be equal to them." (Doc.Ex. 437 (emphasis added)). And it went on to talk about the hateful views that Professor Mitchell believed *others* held, not himself: "*They* still look at you as a wanna be white, an international n[****]r, an international coon, and an international sambo." (Doc.Ex. 437 (emphasis added)).

The mere fact that Professor Mitchell used strong language to communicate this point does not mean that the speech is unprotected. Our First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Watts v. United States*, 394 U.S. 705, 708 (1969) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)) (protecting statement of individual who threatened to shoot the president). "[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." *New York Times*, 376 U.S. at 269 (quoting *Bridges v. State of Cal.*, 314 U.S. 252, 270 (1941)). Even speech that is "vituperative, abusive, and inexact" is protected when used to discuss a matter of public importance, such as "the political arena" or "labor disputes." *Watts*, 394 U.S. at 708. "[S]o long as the means" of communication "are peaceful, the communication need not meet standards of acceptability." *Cohen v. California*, 403 U.S. 15, 25 (1971) (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971)) (protecting message on jacket that read "F[**]k the draft"). Were this Court to adopt a different rule, perhaps holding that any epithet is per se unprotected regardless of context, it would contravene *Cohen*'s admonition that "government power" cannot "force persons who wish to

ventilate their dissident views into avoiding particular forms of expression." 403 U.S. at 23.[6]

For this reason, sometimes strong language must be used to communicate a particular message in a particular way:

> [L]inguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.

Cohen, 403 U.S. at 26.

That was the situation here. The language used was strong because Professor Mitchell's previous attempts to communicate his message to Professor Mitchell had not been successful. The letter itself remarked that Professor Mitchell had "told [Professor Nation] before" of his concerns that certain Caucasian academics viewed them as less than equal. (Doc.Ex. 437). Yet despite previously sharing this information, Professor Mitchell was disappointed to see that Professor Nation continued to "promot[e] and prais[e]" those who viewed them as less than equal, as well as change her behavior to curry their

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[6] A categorical prohibition against the use of certain words would also constitute a prior restraint on future speech, which is plainly unconstitutional. *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

approval—a strategy Professor Mitchell explicitly called out because he did not believe it would work. (Doc.Ex. 437). Ultimately, Professor Mitchell decided that the only way to communicate to Professor Nation the true reprehensibility of the views that others had was to describe those views in their basest form.

These comments also need to be considered in the context of the academic disagreement unfolding between Professor Mitchell and Professor Nation. Professor Nation's views had led her to deny funding to students attempting to participate at an academic conference that Professor Mitchell viewed as valuable and Professor Nation viewed as worthless. Yet Professor Nation had "no proof" to support her opinion. (Doc.Ex. 437). Accordingly, in addition to defending the academic credentials of the RGC Conference, Professor Mitchell also tried to respond to a misperception that he feared had driven Professor Nation's decision. Since previous attempts to address that misperception had been unsuccessful, he used striking language to drive home his point.

Finally, the close correspondence between the two professors' academic disagreement and the letter's strong language is what distinguishes this case from others involving insults and slurs. A public university absolutely can (and should) take disciplinary action if employees use racial slurs to insult others. *See, e.g.*, *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1180, 1190-91 (6th Cir. 1995) (upholding disciplinary action against white coach who told his players "we need to have more n[****]rs on our team"); *Martin v. Parrish*, 805 F.2d

583, 585-86 (5th Cir. 1986) (upholding professor's termination for using "highly derogatory and indecent terms" to insult his students over their poor academic performance); *accord Cox v. Civ. Serv. Comm'n of Douglas Cnty.*, 614 N.W.2d 273, 285 (Neb. 2000) (observing that "referring to [a coworker] using an inflammatory and offensive slur" is not protected). But when the strong language is not used to personally insult but merely to express a viewpoint, it receives First Amendment protection. *See, e.g.*, *Levin v. Harleston*, 966 F.2d 85, 87 (2d Cir. 1992) (protecting professors' right to publish academic materials, even when they contained distasteful "denigrating comments concerning the intelligence and social characteristics of blacks"); *Hiers*, 2022 WL 748502, at *2, *8 (professor's rejection of a flyer on microaggressions as "garbage" was "perhaps rude or even offensive," but that did not mean the university's interest in avoiding offense outweighed the professor's right to express his view on the subject).

For instance, in *Meriwether*, a university professor referred to a student multiple times as "Mr." 992 F.3d at 499-500. The student, who identified as female, found this manner of address deeply insulting. *Id.* The university agreed and took disciplinary action against the professor. *Id.* at 500-01. Writing for the Sixth Circuit, Judge Thapar recognized that the professor used a masculine pronoun due to "his sincerely held religious beliefs . . . about gender identity" and to express his views in the ongoing public discourse concerning pronoun usage and gender identity. *Id.* at 499, 508-09. Still, under *Pickering*,

the university argued that it had a superseding interest in preventing "discrimination against transgender students." *Id.* at 510. Balancing both interests, the Sixth Circuit held that "allow[ing] universities to discipline professors, students, and staff any time their speech might cause offense" would "transform institutions of higher learning into 'enclaves of totalitarianism.'" *Id.* (quoting *Tinker*, 393 U.S. at 511). The mere desire to avoid offense does not trump a professor's right to express a sincerely held view on a controversial subject, regardless of how offensive the administration finds the view or the professor's manner of expressing it. *Accord Hiers*, 2022 WL 748502, at *8.

Meriwether was a closer case than this. There, the language the student found insulting reflected the professor's personal view of the student. Here, in contrast, the racially charged language did not represent Professor Mitchell's own view of Professor Nation, but rather called out the distasteful views of others. Because the letter did not actually insult or demean his coworker, the University's interest in stifling Professor Mitchells' speech for the purpose of avoiding discrimination is low. "[T]he mere dissemination of ideas . . . on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) (per curiam). Were this Court to adopt the University's position, it would allow our public universities to "mandate[] orthodoxy, not anti-discrimination,"

and grant them "alarming power to compel ideological conformity." *Meriwether*, 992 F.3d at 506, 511.

2. The University could not show that this letter caused meaningful disruption.

The University's remaining interests—which boil down to avoiding disruption—do not outweigh the speech either. Here, the speech was a letter delivered to a single individual. It did not cause the kind of public outcry that would meaningfully interfere with "the efficiency of the public services [the University] performs through its employees." *See Connick*, 461 U.S. at 142. At most, it caused one person offense. That alone cannot outweigh the interest of professors to freely express controversial viewpoints.

The fact that a single professor takes offense to protected speech cannot mean that a university's interests automatically outweigh the First Amendment's. If "a majority" may not "silence dissidents simply as a matter of personal predilections," then certainly a single offended individual cannot rely on her personal offense to "curtail[] all speech capable of giving offense." *Cohen*, 403 U.S. at 21. To hold otherwise would effectively permit a heckler's veto to triumph over academic freedom in public universities.

Indeed, even when several teachers are upset, an individual's free speech rights should still prevail. *Dodge*, 56 F.4th at 783. In *Dodge*, for example, one middle school teacher's speech caused a coworker to feel "intimidated and

traumatized," another to "cr[y]," another to feel "threaten[ed]," and still others to be "'shock[ed],' 'upset,' 'angry,' 'scared,' 'frustrated,' and '[not] feel safe.'" *Id.* at 773, 782. What speech caused this disturbance? A "MAGA" hat which the teacher wore to "a cultural sensitivity and racial bias training." *Id.* at 773. The teacher was threatened with discipline for this speech. *Id.* at 775. In the resulting lawsuit, the school asserted that the disturbance caused by the hat—which had upset numerous teachers, impaired "harmony among co-workers," and had "a detrimental impact on close working relationships"—outweighed the teacher's interest in free speech. *Id.* at 782 (quoting *Nunez v. Davis*, 169 F.3d 1222, 1228 (9th Cir. 1999)). But the Ninth Circuit disagreed. Because the teacher's hat had neither "interfered with his ability to perform his job or the regular operation of the school," nor "injured any of the school's legitimate interests beyond the disruption that necessarily accompanies controversial speech," the school's interests did not outweigh those of the teacher's. *Id.* (cleaned up).

So too here. Professor Mitchell's letter to Professor Nation caused no significant disturbance. While Professor Nation reported that she didn't "like" the letter and found it "disrespectful," the only action she took was to "sen[d] [the letter] to the provost and the dean." (Doc.Ex. 77-78). She considered filing an EEOC complaint but decided not to. (Doc.Ex. 78). That was the extent of the disruption caused by Professor Mitchell's speech. It doesn't come close to the

emotional distress experienced by the teachers in *Dodge*, or the hurt caused by the professor's speech in *Meriwether*. It caused no more than "the disruption that necessarily accompanies controversial speech." *Dodge*, 56 F.4th at 782 (cleaned up). The University's interest in punishing it, therefore, was low and did not outweigh Professor Mitchell's interest in presenting his viewpoint.

In sum, under *Pickering*, the University has asserted two interests: eliminating discrimination and avoiding disruption. On the record, however, the University could not show that either interest was strongly implicated under these facts. In comparison, Professor Mitchell's right to speak about racial discrimination, an issue of quintessential public interest, is significant. Based on this record, it outweighs the University's asserted interests.

II. The Court of Appeals Erred by Deferring to the University's Interpretation of the Handbook Instead of Exercising Independent Judgment.

The Court of Appeals did not base its decision on the plain text of the Handbook. Instead, it deferred to the interpretation of those regulations *first set forth in the University's appellate brief* to conclude that the University had not violated them. Such administrative deference is error and violates the separation of powers enumerated in our Constitution.

A. Separation of Powers Prohibits Courts from Deferring to Agencies' Interpretations of Regulations.

> Enough is enough. For decades, and for no good reason, we have been giving agencies the authority to say what their

> rules mean, under the harmless-sounding banner of deferring to an agency's interpretation of its own regulations. . . . [Any] beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation.

Decker v. Nw. Envt'l Def. Ctr., 568 U.S. 597, 616, 621 (2013) (Scalia, J., concurring in part and dissenting in part) (cleaned up).

The North Carolina Constitution expressly mandates that government powers remain separate within this State: "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. "This clear and unambiguous principle 'is the rock upon which rests the fabric of our government.'" *Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 477, 879 S.E.2d 193, 250 (2022) (Berger, J., dissenting) (quoting *Person v. Bd. of State Tax Comm'rs*, 184 N.C. 499, 502, 115 S.E. 336, 339 (1922)). It "protects the people" of North Carolina "by limiting overall governmental power." *Cooper v. Berger*, 370 N.C. 392, 432, 809 S.E.2d 98, 123 (2018) (Newby, J., concurring in part and dissenting in part). Under this clause, "each branch is directed to perform its assigned duties and avoid encroaching on the duties of another branch." *Harper v. Hall*, 384 N.C. 292, 297, 886 S.E.2d 393, 399 (2023).

"[F]undamental" to the separation of powers is that "the power to write a law and the power to interpret it cannot rest in the same hands." *Decker*, 568

U.S. at 619 (Scalia, J., concurring in part and dissenting in part). When a court allows an administrative agency to interpret an agency regulation, it violates that principle. After all, "[t]o declare what the law is or has been is a judicial power . . . ." *Rodwell v. Harrison*, 132 N.C. 45, 49, 43 S.E. 540, 541 (1903). And "Article IV, Section 1, vests *all* judicial power in the judicial branch of our government." *Advisory Opinion In re Separation of Powers*, 305 N.C. 767, 774, 295 S.E.2d 589, 593 (1982) (citing N.C. Const. art. IV, § 1) (emphasis added). Thus, under the separation of powers clause, North Carolina Courts possess the exclusive authority to determine a law's meaning within this State. *Id.*; *see also Houston v. Bogle*, 32 N.C. 496, 503-04 (1849) ("[The] right to decide what the law is and what it was is vested in the Supreme Court.").

Against that backdrop, deferring to an agency's interpretation of a regulation "directly conflicts with the constitutional duty of a judge to faithfully and independently interpret the law." *VF Jeanswear LP v. EEOC*, 140 S. Ct. 1202, 1204 (2020) (Thomas, J., dissenting from the denial of certiorari). Such deference permits the administrative agency to "exercise[] power that the constitution vests exclusively in another branch"—the "clearest violation of the separation of powers clause." *State v. Berger*, 368 N.C. 633, 645, 781 S.E.2d 248, 256 (2016).

This Court has never explicitly declared that North Carolina courts must defer to an agency's interpretation of its own regulations. But past decisions

could be viewed as suggesting such deference. *See N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Examiners*, 371 N.C. 697, 707, 821 S.E.2d 376, 383 (2018) ("[W]e defer to the Physical Therapy Board's interpretations of those same statutes and rules in reaching the conclusion that dry needling is a part of the practice of physical therapy."). The Court of Appeals, meanwhile, has shown no qualms in asserting that such an obligation exists. *See, e.g.*, *Total Renal Care of N.C., LLC v. N.C. DHHS*, 242 N.C. App. 666, 674, 776 S.E.2d 322, 327 (2015) ("An administrative agency's interpretation of its own regulations is entitled to deference . . . ."); *Blackburn v. N.C. Dep't of Pub. Safety*, 246 N.C. App. 196, 207, 784 S.E.2d 509, 518 (2016) (similar); *York Oil Co. v. N.C. Dep't of Env't, Health & Nat. Res.*, 164 N.C. App. 550, 554, 596 S.E.2d 270, 273 (2004) (similar).

The majority opinion below serves as just one more example of this concerning trend. Multiple times, the majority stated that deference to "an agency's construction of its own regulations" is "well established" in North Carolina. *Mitchell*, 288 N.C. App. at 238, 240, 886 S.E.2d at 528-29 (quoting *Morrell v. Flaherty*, 338 N.C. 230, 237, 449 S.E.2d 175, 179-80 (1994)). For support, the majority quoted *Morrell*. But *Morrell* involved deference to a federal agency's interpretation of its own federal regulations at a time when federal law clearly required courts to apply such deference. 338 N.C. at 237, 449 S.E.2d at 179. Specifically, the Supreme Court of the United States had established

that an agency's interpretations of its "own regulations . . . is, under our jurisprudence, controlling." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

But federal courts' deference to federal agencies—frequently called "*Auer* deference"—has steadily deteriorated in the years since *Morrell*. Most recently, a plurality of the Supreme Court announced that *Auer* was "cabined in its scope." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019). Meanwhile, four justices voted "to say goodbye to *Auer*" altogether. *Id.* at 2425 (Gorsuch, J., concurring in the judgment). After all, as one dissenting justice memorably noted, "[u]mpires in games at Wrigley Field do not defer to the Cubs manager's in-game interpretation of Wrigley's ground rules." *Id*. at 2448 (Kavanaugh, J., concurring in the judgment).

But that's exactly what happens with *Auer* deference.[7] *Auer* deference can result in an agency's interpretation prevailing even though that interpretation "appears for the first time in a legal brief in the very litigation at issue." *United States v. Phifer*, 909 F.3d 372, 383 (11th Cir. 2018); *see also Christopher*

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[7] While similar, *Auer* deference is different than *Chevron* deference. Under *Chevron* deference, courts defer to agencies' interpretations of federal *statutes*. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Meanwhile, *Auer* deference involves deferring to agencies' interpretations of federal *regulations*. *Auer*, 519 U.S. at 461. As Justice Scalia persuasively reasoned, *Auer* involves even *more* separation-of-powers concerns than *Chevron*. *See Decker*, 568 U.S. at 619-20 (Scalia, J., concurring in part and dissenting in part).

v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166-67 (2012). Worse still, the agency's interpretation in a given case need not be consistent with past interpretations. The agency can contradict its prior position, and *Auer* will still require deference. *See, e.g.*, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515-517 (1994) (observing that an agency "is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation").

Perhaps unsurprisingly, then, the Court in *Kisor* couldn't "muster even five votes to say that *Auer* is lawful or wise." 588 U.S. at 592 (Gorsuch, J., concurring in the judgment). Since *Kisor*, the Supreme Court has taken additional steps to minimize agency deference. At present, administrative deference appears poised for elimination or reduction, leaving *Auer*'s future dubious at best. *See* Amy Howe, *Supreme Court likely to discard* Chevron, SCOTUSblog (Jan. 17, 2024), https://www.scotusblog.com/2024/01/supreme-court-likely-to-discard-chevron/.

But even were the federal courts to retain *Auer* in some form, that would impose no obligation on this Court to adopt an identical interpretive rule for state regulations promulgated by state agencies. This Court is "not compelled to follow the method of statutory interpretation preferred by the Supreme Court of the United States when [it is] interpreting state law." *Nissan Div. of Nissan Motor Corp. v. Fred Anderson Nissan*, 337 N.C. 424, 429, 445 S.E.2d 600, 603 (1994); *accord Libertarian Party of N.C. v. State*, 365 N.C. 41, 47, 707

S.E.2d 199, 203 (2011) (recognizing that interpretations of the unique provisions in the North Carolina Constitution can produce different results than federal case law). Indeed, just recently, this Court explicitly declined to give an agency "deference in its interpretation of [an administrative regulation]." *Sound Rivers, Inc. v. N.C. Dep't of Env't Quality*, 385 N.C. 1, 8 n.6, 891 S.E.2d 83, 88 n.6 (2023). Instead, "[c]onstrained by [the] Constitutional duty to apply the rule of law and to comply with the legal standard of review," this Court interpreted the law without any deference. *Id.*

That was the correct approach. As outlined above, this Court does indeed have a "Constitutional duty to apply the rule of law," *id.*, rather than simply defer to agency interpretations. This Court should take this opportunity to eliminate any confusion in the lower courts and expressly hold that agency interpretations are entitled to zero deference.

B. Under the Applicable Regulations, Professor Mitchell Should Not Have Been Terminated.

Professor Mitchell's termination was governed by the Handbook—an administrative regulation that provides significant due process protections to the University's tenured professors. Only by disregarding the Handbook's text and structure could the Court of Appeals affirm Professor Mitchell's termination.

If this Court disregards administrative deference, then the proper interpretive method becomes clear: "[C]ourts must give the regulations their plain

meaning." *Britt v. N.C. Sheriffs' Educ. & Training Standards Comm'n*, 348 N.C. 573, 576, 501 S.E.2d 75, 77 (1998). This Court has long recognized that textual provisions should be accorded their plain meaning. *See, e.g.*, *Falk v. Fannie Mae*, 367 N.C. 594, 602, 766 S.E.2d 271, 277 (2014) ("In interpreting this statute, we are guided by our obligation to give effect to the plain meaning of its terms."). After all, the text is a citizen's primary guide to align his or her conduct with the law. Applying a non-plain meaning would "upset[] reliance interests by subjecting people today to different rules then they enjoyed when the statute was passed." *New Prime Inc. v. Oliveira*, 586 U.S. 105, 106 (2019). These concerns in the statutory context apply with equal force to administrative regulations which, due to their extra specificity, often impose harsher restrictions on citizens' everyday lives.

Moreover, to the extent this Court finds the Handbook ambiguous, the rule of lenity requires the ambiguity be resolved in Professor Mitchell's favor. The rule of lenity requires that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Bittner v. United States*, 598 U.S. 85, 101-02 (2023) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). When a regulation results in a civil penalty, the rule of lenity resolves the ambiguity in favor of the individual. *Id*; *see also Phifer*, 909 F.3d at 384-85 (holding that the rule of lenity defeats *Auer* deference).

Accordingly, this Court should interpret the regulations at issue in this case in accordance with the plain meaning of the words and resolve any ambiguities in favor of Professor Mitchell.

Here, the regulations that governed Professor Mitchell's termination were contained in the Handbook. The text states that termination "may be imposed *only* in accordance with the procedures" that are described therein. (Doc.Ex. 28 (emphasis added)). It then goes on to thoroughly lay out what those procedures are.

They begin with the provost sending a written notice to the faculty member announcing "the [U]niversity's intention to discharge" him and listing the allegations that justify termination. (Doc.Ex. 28-29). After the faculty member receives the notice, he can request a hearing before "the Hearing Committee on Discharge and Nonreappointment," which is comprised of at least five faculty members. (Doc.Ex. 28, 30). The Committee then convenes the hearing, at which the University goes first and presents evidence supporting the allegations. (Doc.Ex. 29, 31). The scope of the evidence is limited to "the written specifications of reasons for the intended discharge." (Doc.Ex. 28). The Handbook specifically prohibits the Committee from considering evidence other than what was "presented at the hearing." (Doc.Ex. 29).

The Handbook makes clear that the burden of meeting this evidentiary standard "rests with the [University] and not with the faculty member."

(Doc.Ex. 30). There is also an evidentiary standard—"clear and convincing"—meaning "the reasons for the discharge are more *highly* probably than not." (Doc.Ex. 29 (emphasis added)).

Since the burden is on the University, there is no need to continue the hearing if the University fails to prove the allegations. Instead, after the University finishes its case in chief, the Handbook requires the Committee to "recess the hearing and withdraw into closed session to determine whether [the University] has established a prima facie case." (Doc.Ex. 32). "If the Committee determines that the [University] has not established a prima facie case," the hearing concludes and the Committee issues a written decision confirming its determination. (Doc.Ex. 32).

At that point, "[i]f the Chancellor disagrees with the [C]ommittee's determination, he/she will send it back for a full hearing." (Doc.Ex. 32). Importantly, that's all the Chancellor can do. There are no other procedures outlined in the Handbook or other steps the Chancellor can take if he disagrees with the Committee on the prima facie case. (Doc.Ex. 32). The Chancellor's only option is to ask the Committee to reconsider its decision.

This limitation on the Chancellor's authority is confirmed by the very next sentence of the Handbook, which makes clear that the Committee need only "resume the hearing" if, after reconsideration, the Committee "determines that the Administration has established a prima facie case." (Doc.Ex. 32). In

other words, whether to reopen the hearing, following the Chancellor's request for reconsideration, is left entirely to the Committee's discretion. If the Committee reconsiders and still finds that the University did not demonstrate a prima facie case, then that is the end of the action.

The Court of Appeals' confusion appears to arise from a separate section of the Handbook. Section VIII states that "[i]f the chancellor . . . declines to accept a committee recommendation that is favorable to the Faculty Member . . . the Faculty Member may appeal the chancellor's decision to the Board of Trustees." (Doc.Ex. 29). Below, the University argued that this language provides the Chancellor unfettered power to terminate a tenured professor regardless of the Committee's conclusion. The Court of Appeals rubber-stamped that interpretation through its application of improper deference.

But that is not the best interpretation of the Handbook as a whole. When dealing with text, whether a contract, a statute, or in this case the Handbook, a specific provision "must be interpreted in context with the rest of the [document]." *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962); *see also City of Asheville v. Frost*, 370 N.C. 590, 592, 811 S.E.2d 560, 562 (2018) ("[A] court must consider the statute as a whole and determine its meaning by reading it in its proper context and giving its words their ordinary meaning."); Antonin Scalia & Brian Garner, *Reading Law* 128 (2012) ("The text must be construed as a whole.").

Here, the language relied on by the University and Court of Appeals came from Section VIII of the Handbook (which is a general summary of the overall termination process) not Section IX (the specific section dealing with the hearing itself). (Doc.Ex. 28-29). Section VIII is titled "Due Process Before Discharge or the Imposition of Serious Sanctions" and is focused on ensuring that a faculty member receives due process no matter what stage of the termination process he is in. (*See* Doc.Ex. 28-29). It describes the overall termination and appeals process, but it does not provide step-by-step instructions for the hearing itself. (*See* Doc.Ex. 28-29). Those details are contained in Section IX, which is titled "Hearing for Discharge or Imposition of Serious Sanctions," and is focused on the hearing's nitty gritty particulars. (*See* Doc.Ex. 29-32).

The Handbook as a whole, then, reveals that there are two different sections—a general one dealing with the overall proceeding and a specific one dealing with just the hearing itself. In that situation, just "as a more specific statute will prevail over a general one, a specific provision of a statute ordinarily will prevail over a more general provision in that same statute." *LexisNexis Risk Data Mgmt. Inc. v. N.C. Admin. Off. of Cts.*, 368 N.C. 180, 187, 775 S.E.2d 651, 656 (2015). This rule resolves even direct conflicts between two governing provisions, with the more specific provision controlling. *See Nat'l Food Stores v. N.C. Bd. of Alcoholic Control*, 268 N.C. 624, 629, 151 S.E.2d 582, 586 (1966); Scalia & Garner, *supra*, at 141 ("If there is a conflict between a general

provision and a specific provision, the specific provision prevails."). Here, the specific procedures for what happens if the Committee finds that the University failed to make a prima facie case are contained in Section IX. That specific language should prevail over the general language in Section VIII.

Subsection IX.F.6 is the hyper-specific subsection that deals with the exact situation that occurred here. Below, the Committee found that the provost had failed to make out a prima facie case, the Committee alerted the Chancellor to its findings, and the Chancellor disagreed. (Doc.Ex. 600-07). That placed this case directly within Subsection IX.F.6. (Doc.Ex. 32). Under Subsection IX.F.6, if the Committee finds that there is no prima facie case, all the Chancellor can do is send the matter "back for a full hearing." (Doc.Ex. 32). Once that happens, the Chancellor is granted no more authority by Subsection IX.F.6. Instead, Subsection IX.F.6 passes the disciplinary authority back into the hands of the Committee, enabling it to look back over the evidence and reassess whether to proceed with another hearing, but *only* "[i]f the Committee determines that the [University] has established a prima facie case." (Doc.Ex. 32). That is the last sentence of Subsection IX.F.6. No additional procedures are detailed. Thus, to put it plainly, if the Committee remains convinced the University failed to establish a prima facie case, then there is no further procedure or recourse. The proceeding is over.

That interpretation makes even more sense given that Subsection IX.F.6 is the sixth step in a series of chronological steps detailed in Subsection IX.F. (Doc.Ex. 31-32). Subsection IX.F's chronological nature means that one does not move on to the next step until the prior step is completed. It also explains why Professor Mitchell opted not to put on any more evidence (Step 7). Everyone assumed that there was no need unless the Committee chose to reopen the hearing (Step 6).

To be sure, the Handbook certainly contemplates that there may be some situations where the Chancellor can "decline[] to accept a committee recommendation that is favorable to the faculty member." (Doc.Ex. 29). But again, that language is in the general procedures of Subsection VIII.G, and Subsection VIII.G never goes into specific details about when such a situation might arise. (Doc.Ex. 29). Indeed, that is not even the focus of Subsection VIII.G. Subsection VIII.G's focus is ensuring that terminated faculty members receive an adequate appeal process no matter what. In other words, Subsection VIII.G does not say that chancellors must be able to reject committees' recommendations; it says that if there is ever a situation where a chancellor can reject a committee's recommendation, then the faculty member is still entitled to a full appeal process. That is why Subsection VIII.G mentions the only two hypothetical routes that could result in a faculty member receiving a termination decision (the chancellor agreeing with Committee's decision to terminate or the

chancellor disagreeing and the faculty member ending up terminated). (Doc.Ex. 29). Subsection VIII.G does not contain proscriptive language specifically instituting these routes or describing the individual procedures for each one. It's simply acknowledging them as possibilities to ensure that a faculty member's due process rights are protected, no matter the path to termination.

Indeed, it contravenes the entire context of Section VIII to read into Subsection VIII.G a provision that decreases faculty members' due process protections. The Handbook, and Section VIII in particular, are replete with structural protections for faculty members:

- The right to request a hearing upon notice of intent to discharge. (Doc.Ex. 28).
- The right to a hearing before a panel of—at a minimum—five non-interested peers. (Doc.Ex. 30).
- The right to challenge and remove any Committee member due to a conflict of interest. (Doc.Ex. 31).
- The right to limit the hearing to evidence concerning the reasons for discharge provided in the notice. (Doc.Ex. 28).
- The right to adequate time to prepare a defense for the hearing. (Doc.Ex. 28).
- The right to counsel. (Doc.Ex. 28).

- The right to present the testimony of witnesses and other evidence. (Doc.Ex. 28).
- The right to confront and cross-examine adverse witnesses and evidence. (Doc.Ex. 28-29).
- Imposing the burden of proof on the University. (Doc.Ex. 29).
- Requiring the University meet the clear and convincing evidence standard to prove its case. (Doc.Ex. 29).
- The right to an appeal of an adverse determination. (Doc.Ex. 29).

Each of these protections contemplates a live, adversarial proceeding, judged by a panel of factfinders who are able to determine what occurred by hearing the testimony for themselves and judging the facial expressions, vocal tones, and other nonverbal cues of all the witnesses and the faculty member. This Court has long recognized that a fact-finder who is in the room is "more favorabl[y] position[ed] to "discover[] the truth" than one who later pours over "only a cold, written record." *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601 (1971) (remarking that it is the fact-finder who "sees the witnesses" and "observes their demeanor as they testify"). If the University's interpretation were correct, it would mean that the chancellor holds omnipotent authority to override all aspects of the Committee's termination decision despite never observing any of the live testimony for himself. It would also render that long list of protections surrounding the live hearing meaningless.

Such a construction is further suspect given that the chancellor plays a part in the initial decision to charge a professor. (*See* Doc.Ex. 29 (guaranteeing "the chancellor . . . be allowed to have counsel to participate in the hearing," and noting that it is "the [U]niversity" that forms the "intention to discharge the faculty member"); Doc.Ex. 30-33 (referring to the party bringing the charges as "the Administration")). The chancellor can also adjudicate a professor's case despite having "conflicts of interest"; something no member of the Committee is allowed to do. (Doc.Ex. 31). Given that a chancellorship is an inherently political position, chancellors—particularly in free speech cases—may reach termination decisions that do not represent a disinterested analysis under tenure standards. That is why the disinterested factfinders are needed to make sure that, if nothing else, the University at least proves a prima facie case before a professor can be at jeopardy of unilateral termination.

It is otherwise impossible for a faculty member to receive legitimate due process when one of the very individuals who is moving for termination—the chancellor—reserves to himself the power to terminate the faculty member in his discretion. Adopting the University's interpretation would render the bulk of the Handbook's due process procedures meaningless. Textual canons demand such an interpretation be rejected. *See State v. Morgan*, 372 N.C. 609, 614, 831 S.E.2d 254, 258 (2019) (forbidding courts from interpreting "an individual section in a manner that renders another provision of the same statute

meaningless" (quoting *State v. Coffey*, 336 N.C. 412, 417, 444 S.E.2d 431, 434 (1994)); *State v. Humphries*, 210 N.C. 406, 186 S.E. 473, 477 (1936) ("Where words in a statute are susceptible of two constructions, one of which will lead to an absurdity, the other not, the latter is to be adopted." (cleaned up)); Scalia & Garner, *supra,* at 53 ("A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored.").

The limitations on the chancellor's ability to deviate from the Committee's recommendation are confirmed in the portion of the Handbook discussing "Post-Hearing Procedures." (Doc.Ex. 33). It states: "The [C]hancellor's decision *shall be based on the recommendations* and evidence received *from the hearing committee* including the Transcript of the hearing." (Doc.Ex. 33). It is well established that "the word 'shall' is generally imperative or mandatory." *Multiple Claimants v. N.C. DHHS*, 361 N.C. 372, 378, 646 S.E.2d 356, 360 (2007) (quoting *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979)). The Handbook's use of the word "shall" means that the chancellor must "base[]" his or her ultimate termination decision on the Committee's recommendation. (Doc.Ex. 29); *see also* Scalia & Garner, *supra,* at 86 ("Mandatory words impose a duty; permissive words grant discretion."). Deviation from that recommendation is not permitted by any of the relevant subsections.

Whatever circumstance may exist in which the chancellor can override the Committee, they do not arise when the Committee determines that no

prima facie case exists against a faculty member. Other than asking the Committee to reconsider that decision, the chancellor lacks unilateral authority to find new facts from a cold record to unilaterally effect a termination. After all, if the Committee again determines that no prima facie case has been met—as here—then the faculty member will never get the chance to put on evidence to rebut to the University's case. And yet under the University's interpretation, the chancellor can still rule against the faculty member, despite only hearing the University's half of the story.

Ironically, the University's proposed interpretation repackages the same fundamental issue as *Auer* deference. The chancellor already serves as the University's executor, effectuating the termination. He should not also be able to also serve as the judge—particularly in cases where he has a conflict of interest. Adopting that interpretation contradicts the plain text of the Handbook as a whole and should be rejected.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeals and remand to the trial court with instructions to order Professor Mitchell's reinstatement.

Respectfully submitted this the 22nd day of May, 2024.

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