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

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REPLY BRIEF OF PETITIONER-APPELLANT

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INTRODUCTION

The University's brief leaves no doubt about what is at stake in this appeal. This case presents the Court with the choice between two paths that will define academic freedom and the separation of powers in this State for decades to come.

On the one side, the University asks this Court to expand executive power. Under its approach, universities can fire professors for expressing viewpoints that faculty or students find offensive, as long as that viewpoint was not expressed in the classroom or an academic journal. This will cripple

viewpoint diversity in our public universities, forcing professors to self-censor in conversations with colleagues, students, and administrators.

The University also attempts to seize judicial authority for the executive branch. Under its view, the executive branch should play a role in the interpretation of law—an exclusively judicial function. That position places a thumb on the scale in favor of the executive branch, disadvantaging citizens by putting them on an unequal footing in any regulatory lawsuit going forward.

Professor Mitchell presents a different path. Under his approach, the First Amendment protects professors' conversations, letters, and opposition to administrators' ideological initiatives. Adopting that approach would ensure that North Carolina's public universities function as a marketplace of ideas, where truth is discovered through debate and discussion, not dictated by administrative fiat.

Professor Mitchell also rejects the University's attempt to bypass the separation of powers clause. Our Constitution requires that each branch's power remain separate and distinct, leaving the executive branch no ability to reserve judicial authority for itself. Its protections ensure that citizens have an equal opportunity to persuade the court that their view is correct.

The Court of Appeals' majority adopted the University's approach, limiting academic freedom and eroding the separation of powers in North Carolina. This Court should reverse that decision.

RESPONSE TO THE UNIVERSITY'S STATEMENT OF THE FACTS

The University disputes Professor Mitchell's version of the facts, accusing him of various acts of "misconduct." (Resp. at 5). However, should Professor Mitchell prevail on either of his two legal arguments, then these factual disputes become irrelevant. If the letter is protected by the First Amendment, then Professor Mitchell's termination must be reversed regardless of whether the other alleged actions amounted to "misconduct." Likewise, if the Handbook is properly interpreted, then the Committee's findings—that no misconduct occurred—would control. Notably, the University has not argued otherwise.

Still, the University's version of the facts illustrates the importance of correctly interpreting the Handbook. The Handbook delegates factfinding responsibilities to the Committee, the only disinterested factfinder to hear live testimony in this case. *See In re J.A.M.*, 372 N.C. 1, 11, 822 S.E.2d 693, 700 (2019) ("[A]n important aspect of the . . . finder of fact is assessing the demeanor and credibility of witnesses, often in light of inconsistencies or contradictory evidence."). The differences between Professor Mitchell's and the University's recitations of the facts demonstrate the problems with allowing the Chancellor to override the Committee's factual determinations and decide Professor Mitchell's fate based on a cold record alone.

ARGUMENT

Each of the University's two primary arguments advance dangerous interpretations of critical constitutional provisions.

First, the University asks this Court to severely limit academic freedom in North Carolina. Under its interpretation of the First Amendment, public universities can fire any professor who expresses a disfavored viewpoint simply because that viewpoint was expressed in a forum other than the classroom or a scholarly article. That approach contradicts the reasoning underpinning the Supreme Court's academic freedom jurisprudence and should be rejected.

Second, the University disregards the constitutional text to argue that some deference should be afforded to agencies' interpretations of their own regulations. But the North Carolina Constitution leaves the executive branch no room to reserve the judicial power of interpretation for itself. While the University claims deference should only be afforded to thorough and longstanding interpretations, this case demonstrates the danger of such a muddy standard. Below, the Court of Appeals deferred to an interpretation that was advanced for the first time in the University's brief. Such deference eviscerates the separation of powers, and the University fails to show otherwise.

I. Case Law Confirms that Professor Mitchell's Letter Was Protected by the First Amendment.

Contrary to the University's assertions, the First Amendment protects Professor Mitchell's discussion of the academic merits of two scholarly conferences and the presence of racial bias in academia.

A. If the letter was part of Professor Mitchell's official duties, then it must be protected by academic freedom.

The University's conception of academic freedom is far too narrow—protecting only the words a professor speaks inside a classroom or writes in a scholastic journal. (Resp. at 25-26). Administrators today often advance initiatives on topics that generate intense public controversy, such as critical race theory, gender identity, or diversity, equity, and inclusion. Courts across the country have recognized that when professors speak out for or against these ideas, their speech is protected. *See, e.g.*, *Josephson v. Ganzel*, No. 23-5293, 2024 WL 4132233, at *9 (6th Cir. Sept. 10, 2024) (publication forthcoming) (professor's Heritage Foundation presentation about gender dysphoria was protected by academic freedom); *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 554-55, 563-65 (4th Cir. 2011) (professor's writings and speeches in support of "conservative issues" were protected).

But under the University's approach, should a professor push back on these ideas in a faculty meeting, a conversation with a supervisor, or in any of the other innumerable professorial activities that do not occur in the

classroom—office hours, student counseling, peer evaluations, grant applications, news interviews, outside speaking engagement, etc.—the University can take adverse action against them for expressing a disfavored viewpoint.

That is a brazen position, one that gives public universities tremendous power to compel ideological uniformity and quell dissident voices. It cannot be reconciled with *Garcetti*, which—contrary to the University's conception (Resp. at 26)—did not limit academic freedom solely to "academic scholarship and classroom instruction." *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006). Instead, *Garcetti* carved out protection for any "expression," even if it was only "*related to* academic scholarship and classroom instruction." *Id.* (emphasis added).

Nor is it consistent with *Keyishian*. There, a public university terminated a professor for refusing to check a box stating that he was not a communist. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 592 (1967). The Supreme Court held that such a condition violated academic freedom, even though it had nothing to do with scholarship or classroom instruction. *Id.* at 603-04.

The University's position further conflicts with the Supreme Court's reasons for recognizing academic freedom; namely, to prevent the threat of termination from having a "chilling effect upon the exercise of vital First Amendment rights." *Id.* It is unrealistic to believe that professors will speak freely in the classroom or write freely in their scholarship if expressing even

the slightest nonconforming viewpoint outside those realms would permit their immediate dismissal. *See Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 296-97 (1984) (Brennan, J., dissenting). The only way to achieve true academic freedom—"which is of transcendent value to all of us"—is to ensure that professors' speech about issues affecting the university and its administration are protected, just like speech published in journals or spoken in a classroom. *Keyishian*. 385 U.S. at 603.[1]

In arguing otherwise, it is the University that finds itself "contrary to precedent." (Resp. at 27). Its argument that academic freedom does not protect a professor's communications to administrators about matters of academic governance is directly contradicted by its own case law. *See Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014). In *Demers*, the speech at issue was a pamphlet on how to restructure a university department—a matter of academic governance—which the professor submitted to the provost and president—university administrators. 746 F.3d at 407. Under the University's view, then, this speech would be unprotected. (Resp. at 23, 27). *Demers*, however, rejected the University's narrow position, recognizing instead that "a proposal" that

[1] Notably, *Keyishian*'s arguments in support of academic freedom can be traced back to the founding. *See, e.g.*, 15 *The Writings of Thomas Jefferson* 302, 303 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904) (writing that the University of Virginia would be founded on "the illimitable freedom of the human mind. For here we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it.").

"would have substantially altered the nature of what was taught at the school" fell squarely within the protections of academic freedom. *Id.* at 415.

Other cases further illustrate the dangers of the University's position. Take, for instance, Professor Hiers, who left a comment in the faculty lounge that criticized pamphlets about microaggressions. *Hiers*, 2022 WL 748502, at *2. In *Hiers*, unlike here, no party disputed that the speech was outside the professor's official duties, so the Court did not reach the issue of academic freedom. *Id.* at *6 n.2. Yet under the University's narrow view, Professor Hiers could have been fired for expressing a disfavored view in the faculty lounge, solely because it was not expressed while teaching in the classroom or writing in a scholarly journal. The danger of such a position is self-evident.

The University's embrace of a recent Fourth Circuit majority analysis is similarly concerning. *See Porter v. Bd. of Trustees of N.C. State Univ.*, 72 F.4th 573 (4th Cir. 2023), *cert. denied*, 144 S. Ct. 693 (2024). In *Porter*, Judge Stephanie Thacker, joined by Judge James Wynn, ruled that academic freedom did not cover a professor's pushback against a diversity question on student evaluations or the professor's vocal concern that the administration "cut corners" to hire a scholar focused "on racial issues." *Id.* at 578, 584.

That analysis has incurred significant critique. Start with Judge Julius Richardson's dissent—"The majority's threadbare analysis willfully abandons both our precedent and the facts in search of its desired result." *Id.* at 597

(Richardson, J., dissenting). The Second Circuit, likewise, declined to apply *Porter*'s "hesitant" approach to academic freedom. *See Heim v. Daniel*, 81 F.4th 212, 225-26 & n.10 (2d Cir. 2023). A leading First Amendment scholar described *Porter* as rejecting "free speech protections beyond the confines of even the narrowest view of academic freedom." Jonathan Turley, *The Unfinished Masterpiece: Compulsion and the Evolving Jurisprudence over Free Speech*, 83 Md. L. Rev. 145, 147, 177 (2023) (arguing that *Porter* conflicts with recent Supreme Court precedent). And other commentators expressed similar concerns. *See* George Leef, *Faculty Free Speech Loses in the Fourth Circuit*, James G. Martin Center for Academic Renewal, (Aug. 21, 2023), https://tinyurl.com/LeefArticle (describing *Porter* as a "shaky (and transparently political) ruling"); Alex Morey et al., *In Hit to Academic Freedom, Fourth Circuit Holds Public Universities Can Punish Faculty for 'Lack of Collegiality*," FIRE (July 7, 2023), https://tinyurl.com/MoreyArticle (calling *Porter* a "troubling decision").

This Court should reject *Porter*'s mistaken analysis. To avoid "chilling" free speech in the university context, professors must have the freedom to push back on administrative and curricular decisions without worrying about adverse action. *Keyishian*, 385 U.S. at 603-04; *see also Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always

remain free to inquire, to study and to evaluate . . . ."). Robust debate on controversial topics, even between colleagues, is a feature of our constitutional system, not a flaw. *See Meriwether v. Hartop*, 992 F.3d 492, 503 (6th Cir. 2021) ("Without genuine freedom of speech . . . the ideas and debates necessary for the continuous improvement of our republic cannot flourish.").

Under a proper understanding of academic freedom, Professor Mitchell's letter is protected. For starters, Professor Mitchell's letter was no different than the pamphlet in *Demers*, which incorporated the professor's research and scholarship to argue that a university department should be restructured. *See Demers*, 746 F.3d at 414-15. Similarly, here, Professor Mitchell's letter made an explicitly academic argument—looking to the ACS Conference's selectivity, recognition, and duration—to argue that it was not "better" than the RGC Conference. (Doc.Ex. 437). The fact that Professor Mitchell made that argument against the backdrop of an administrative funding decision does not remove the protections of academic freedom, any more than in *Demers*, where the professor's pamphlet advocated for specific administrative changes.

Nor do the portions of the letter that might be viewed as self-serving change this analysis. It would not be the first time, after all, that a professor's scholarly arguments just so happened to align with their personal interests. *See Demers*, 746 F.3d at 407 (noting that the proposal advanced the professor's

own interests by recommending "prominent roles" be given to faculty members who had his qualifications).

The letter's "limited circulation," likewise, "is not, in itself, determinative." *Id.* at 416. It would make no sense to hold that a scholarly writing shared privately with another professor for feedback does not fall within academic freedom, but would have been protected if published on SSRN. To provide meaningful protection, academic freedom must cover debates that happen privately between two professors, not merely those that occur publicly in front of a live audience.

Finally, the letter's use of language that the recipient found insulting should not place it outside of the protections of academic freedom either. In *Meriwether*, the student viewed the professor's refusal to use preferred pronouns as a significant insult. *See* 992 F.3d at 499. Similarly, in *Adams*, the professor's colleagues viewed his writings as "caustic." 640 F.3d at 553. Yet both Professors Meriwether and Adams' speech was protected by academic freedom. *Meriwether*, 992 F.3d at 506-07; *Adams*, 640 F.3d at 563-64.

And that makes sense. The issues that society views as most pressing are the very issues most likely to involve passionate language and cause offense. Professor Mitchell's comments about racial bias in academia touched on deep social issues, just like the professors' speech in *Meriwether* and *Adams*. If offense was all it took to remove a disfavored viewpoint on these subjects

from the protections of academic freedom, then academic freedom would not mean much. Instead, academic freedom extends to these expressions, despite the discomfort they may cause. *See Meriwether*, 992 F.3d at 506, 514 ("By forbidding Meriwether from describing his views on gender identity even in his syllabus, Shawnee State silenced a viewpoint that could have catalyzed a robust and insightful in-class discussion.").

For all these reasons, the letter was protected by academic freedom.

B. The University's view of official duties is overly broad.

Additionally, because Professor Mitchell's letter was not part of his official duties, it qualifies for First Amendment protection regardless of whether it falls within the scope of academic freedom.

The University "read[s] *Garcetti* far too broadly." *See Lane v. Franks*, 573 U.S. 228, 239 (2014). According to the University, any speech "aris[ing]" out of Professor Mitchell's "role as a faculty member" is unprotected. (Resp. at 25). But the same could be said of Mr. Kennedy's prayer of "gratitude for 'what the players had accomplished,'" which arose out of his role as a coach. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 515 (2022). Just because speech occurs "inside [the] office, rather than publicly" and "concern[s] the subject matter" of the plaintiff's employment does not mean that it rises to the level of official duties. *Garcetti*, 547 U.S. at 411.

Rather, the speech must be that which "an employee actually is expected to perform." *Id.* at 424-25. For instance, no supervisor expected Mr. Kennedy to pray at the 50-yard line. 597 U.S. at 515-16. Compare that to *Renken*, however, where the employer could have expected the professor in charge of administering grant funds to write about how those funds should be distributed. *Renken v. Gregory*, 541 F.3d 769, 771-72, 774 (7th Cir. 2008). Likewise, in *Demers*, it was not unexpected for a professor tasked with planning how to separate two departments to come up with a plan on how to separate those two departments. 746 F.3d at 407.

Professor Mitchell's letter, in contrast, was more like the memos filed by the plaintiff in *DeLuzio*. Those memos included recommendations "for other caseworkers' clients, or operating procedures," which the plaintiff's "supervisors felt were not within [his] purview" of duties. *DeLuzio v. Monroe County*, 271 F. App'x 193, 196 (3d Cir. 2008). Likewise, here, the record contains no evidence that Professor Mitchell's supervisors expected him to draft a letter to Professor Nation attempting to change her beliefs on racial issues, the RGC Conference, or how she talked to students. Instead, like the supervisors in *DeLuzio*, the University appears to believe that such matters were not within Professor Mitchell's purview. The mere fact that these matters related to work, therefore, does not render them part of Professor Mitchell's

duties, any more than the plaintiff's recommendations in *DeLuzio* which likewise included suggestions for his coworkers.

Professor Mitchell's letter fell outside his official duties, providing an additional ground for holding that it is protected by the First Amendment.

C. A letter discussing racial bias and debating the scholarly merits of an academic conference addresses matters of public concern, even if written as part of a personal dispute.

The University and Professor Mitchell agree on one thing—his letter "speaks for itself." (Resp. at 29 n.4). On its face, the letter addresses a matter of public concern.

The University never argues that a scholarly dispute over the merits of two academic conferences or racial bias in academia are not matters of public concern. To the contrary, its argument appears to be that because Professor Mitchell spoke about those issues in the context of a personal dispute that the topics somehow exited the zone of public concern. (Resp. at 31-34). Not so.

Start with Professor Mitchell's comments on racial bias. As courts have "repeatedly recognized," a "public employee's speech about racially discriminatory practices, particularly in public schools, involves a matter of public concern." *Love-Lane v. Martin*, 355 F.3d 766, 776 (4th Cir. 2004). True, Professor Mitchell's speech about racial bias arose in the context of a personal

dispute. (Doc.Ex. 437). But that does not change the fact that racial bias is still a matter of public concern. *See Tao v. Freeh*, 27 F.3d 635, 640 (D.C. Cir. 1994).

The exposure of racial bias in public employment, for example is often made by an employee who is being personally discriminated against. Naturally, that employee's speech will be in "personal opposition" to the racial bias. (Resp. at 32). "A mere element of personal concern, however, does not prevent finding that an employee's speech as a whole includes a matter of public concern." *Buchanan v. Alexander*, 919 F.3d 847, 853 (5th Cir. 2019). For instance, the employee in *Tao* sent a private letter to a supervisor complaining of racial bias against workers of Chinese dissent. 27 F.3d at 640. Even though the speech was focused on the employee's personal interest—she was being discriminated against—it still addressed a matter of public concern because the employee's personal interest involved the issue of racial bias. *Id.*

To hold otherwise would disincentivize employees from exposing government misconduct. Often it is "only because" the employee "himself became a victim of the misconduct" that the employee receives the necessary motivation to bring into the light information the public needs but would not have learned about otherwise. *Durham v. Jones*, 737 F.3d 291, 300 (4th Cir. 2013). Such speech still involves matters of public concern even though it expresses the employee's "personal displeasure." (Resp. at 31). If speech by employees with "a personal stake in the controversy" were left unprotected, it

would "fetter[] public debate on an important issue because it muzzles an affected public employee from speaking out." *Tao*, 27 F.3d at 640 (quoting *Rode v. Dellarciprete*, 845 F.2d 1195, 1202 (3d Cir. 1988)). Accordingly, the fact that Professor Mitchell's speech about racial bias occurred in the context of a workplace dispute does not remove it from the realm of public concern any more than the employee's speech about racial bias in *Tao*.

Nor does it matter that Professor Mitchell's letter was a private communication between two individuals. The Supreme Court has already established that "First Amendment protection applies when a public employee arranges to communicate privately with his employer rather than to express his views publicly." *Connick v. Myers*, 461 U.S. 138, 146 (1983). The speech in *Tao*, for instance, was "not made public." *Tao*, 27 F.3d at 640. Likewise, a private memo sent only to a supervisor can address a matter of public concern, despite its limited circulation. *See, e.g.*, *O'Donnell v. Barry*, 148 F.3d 1126, 1131, 1133 (D.C. Cir. 1998) (protecting police officer's memo to supervisor discussing how to solve departmental issues). So too can "a private conversation with another employee." *Rankin v. McPherson*, 483 U.S. 378, 389 (1987). Therefore, just because Professor Mitchell's letter was sent only to Professor Nation, does not mean it was not about matters of public concern.

Indeed, courts have specifically found that a professor's private speech can still be on a matter of public concern despite its limited circulation. In

Corum, for instance, the speech at issue was spoken privately to two other colleagues as part of a dispute between two professors. *Corum v. Univ. of N.C.*, 330 N.C. 761, 769, 413 S.E.2d 276, 281-82 (1992). Though the university argued that the speech did not involve a matter of public concern, this Court held otherwise. *Id.* at 776, 413 S.E.2d at 285-86. Because the underlying issue—the removal of the Appalachian collection—was a matter of public concern, it did not matter that the discussion occurred in a private setting. *Id.*

Similarly, in *Mumford*, the university argued that the professor's speech was not on a matter of public concern because it was spoken privately to other professors. *Mumford v. Godfried*, 52 F.3d 756, 761 (8th Cir. 1995). There, the professor was attempting to persuade his colleagues that the university was improperly prioritizing the business community over academic pursuits. *Id.* at 758. Like Professor Mitchell, Professor Mumford contended that this was not "appropriate behavior" by the administrators. (*See* Resp. at 32). Nonetheless, because the university's educational focus was a matter of community interest, Professor Mumford's attempts to influence his colleagues' views on that subject addressed a matter of public concern. *Id.* at 761-62.

True, when speech involves a personal complaint that has *no* relation to matters of public concern, then it is not protected. *See Pressman v. Univ. of N.C. at Charlotte*, 78 N.C. App. 296, 301-02, 337 S.E.2d 644, 648 (1985). In *Pressman*, the plaintiff's speech was focused exclusively on criticizing the

dean's performance as a manager. *Id.* at 298, 337 S.E.2d at 646. There is no indication that the plaintiff's critique included any discussion of racial bias, scholarly debates, or any other political, social, or academic issues. *Id.* Accordingly, the Court of Appeals had little trouble determining that the speech was not on a matter of public concern. *Id.* at 301-02, 337 S.E.2d at 648.

But this case is not *Pressman*. Here, Professor Mitchell explicitly discussed two "matter[s] of political, social, or other concern to the community"—an academic dispute between the RCG and ACS Conferences and racial bias in academia—matters of public concern. *See Connick*, 461 U.S. at 146. As illustrated by *Corum*, *Mumford*, and *Tao*, the number or identity of recipients does not change that analysis.

The University is left to mischaracterize Professor Mitchell's letter as name-calling. (Resp. at 32-33). But Professor Mitchell himself did not call Professor Nation the racial slurs in the letter. (*See* Doc.Ex. 437). Instead, he included those words in the letter to highlight the distasteful views of racists as starkly as possible. (*See* Opening Br. at 32-35). And besides, the "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Rankin*, 483 U.S. at 387. The University's attack is therefore misplaced.

Regardless, speech that mixes public and personal concerns is still protected. As the Fourth Circuit explained, it is "improper" for courts to

"divide[]" a "letter into discrete components to conduct a constitutional analysis" on each part. *Stroman v. Colleton Cnty. Sch. Dist.*, 981 F.2d 152, 157 (4th Cir. 1992). Provided part of a letter addresses issues of public concern, then it is protected, even if "most of the letter is devoted to personal grievances." *Campbell v. Galloway*, 483 F.3d 258, 267 (4th Cir. 2007)

Here, Professor Mitchell's letter argued for the academic merits of the RGC Conference and declaimed racial bias in academia—two issues that are matters of public concern. Accordingly, even if the letter also discussed personal concerns, it still survives this step of the *Garcetti* inquiry.

D. The University fails to demonstrate the significant harm necessary to outweigh Professor Mitchell's free speech rights.

The final step in the *Garcetti* analysis requires this Court to weigh Professor Mitchell's interest in speaking freely on an issue of public concern against the University's interest in the efficient operation of its functions. Because the University fails to show how Professor Mitchell's speech caused it any meaningful disruption, it cannot succeed on this step either.

Case law does not support the University's argument that Professor Mitchell "interfere[d] with the regular operation of" the University. (Resp. at 35). *Connick*, for instance, is distinguishable from this case because there, the plaintiff was soliciting coworkers to join her in resisting their work assignments. *Connick*, 461 U.S. at 141. In holding that the employer's interests

outweighed the plaintiff's speech, *Connick* issued a commonsense rule that an employee cannot actively recruit others to try and stop work from happening in a government office, particularly where the employee's speech only minimally touches on a matter of public concern. *Id.* at 154.

That is also why the Sixth Circuit found that the interest of effective collaboration in a 911 call center outweighed the employee's interest in a single Facebook comment, which likewise did not receive a "high level of protection." *See Bennett v. Metro. Gov't of Nashville & Davidson Cnty.*, 977 F.3d 530, 545 (6th Cir. 2020). In *Bennett*, the call center demonstrated that the employee's Facebook comment had become a topic of controversy and complaint within the office, impacting productivity and disrupting collaboration. *Id.* at 535. The employee's comments also led to an erosion in community trust, which further impeded the call center's mission. *Id.* at 543.

But that is not the case here. Professor Mitchell's letter was not trying to persuade other employees to reject assigned responsibilities. Indeed, he never actually advocated for Professor Nation to change her funding decision. (*See* Doc.Ex. 437). Rather, the letter expressed Professor Mitchell's concerns about the personal beliefs that lay beneath Professor Nation's funding decision. (Doc.Ex. 437). Regardless, there was no evidence that the letter disrupted employee meetings, encouraged people to stop working, or negatively affected public perception as in *Connick* and *Bennett*. (Doc.Ex. 77-78). At most, the

letter caused Professor Nation to send a single email to the provost and the dean. (Doc.Ex. 77-78). But that was it. The letter caused no further disruption.

In arguing otherwise, the University misconstrues the letter. The University references cases where an employee called another employee a racial slur. (Resp. at 36). But one employee was just trying to insult his boss. *See Vinci v. Nebraska Dep't of Corr. Servs.*, 571 N.W.2d 53, 60-61 (Neb. 1997). There was no evidence that his statement included a discussion of any larger social issues. *Id.* And the other used the slur in the context of disclosing a confidential judicial vote. *See In re Booras*, 500 P.3d 344, 349 (Co. 2019).[2]

Those examples are materially different from Professor Mitchell's letter. That letter, again, did not refer to Professor Nation using the slur but rather used the slur to emphasize Professor Mitchell's disgust of racist views. (Doc.Ex. 437). In doing so, Professor Mitchell raised a matter of public concern—racism in academia—which is the sort of deep cultural issue that was absent from the plaintiff's comments in *Vinci*. Nor did the substance of Professor Mitchell's letter constitute the disclosure of confidential information as in *Booras*. In short, neither case is applicable.

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[2] The University's third case does not involve racial slurs at all. *See Moser v. Las Vegas Metropolitan Police Department*, 984 F.3d 900, 903 (9th Cir. 2021). Its unspecific speculation that some uses of racial slurs might be "so patently offensive" as to outweigh free speech interests is therefore dicta. *Id.* at 910 n.8.

Next the University tries to downplay the weight of First Amendment precedent protecting strong and spirited language by arguing that such cases involve "political speech by members of the public." (Resp. at 38). But that overlooks Supreme Court precedent that harsh language in the public employment context is protected. *See Rankin*, 483 U.S. at 387, 392. Per *Renkin*, "inappropriate," "caustic," and even "unpleasantly sharp" statements by public employees—such as hyperbolically wishing for the President's assassination—can prevail over the employer's interests. *See id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). True, the employee in *Rankin* spoke about politics, while Professor Mitchell wrote about racial issues. But that is not a meaningful distinction when speech about racial issues, like politics, "almost always involves matters of public concern." *Charles v. Grief*, 522 F.3d 508, 514 (5th Cir. 2008).

Further, *Rankin* held that the employee's speech interests outweighed those of the employer because there was "no evidence" that her speech interfered with the efficient functioning of the office." *Rankin*, 483 U.S. at 389. Only a couple of employees even knew about Rankin's speech, and the work of the office continued unaffected after it was spoken. *Id.* at 389-91.

This Court employed a similar analysis in *Corum*. 330 N.C. at 776-77, 413 S.E.2d at 286. Because Corum's speech neither "impeded Corum's duties or interfered with the regular operation of the University," nor "affect[ed]

Durham's decision to move the Appalachian collection," this Court concluded that the speech had caused no disruption and so the university had only a negligible interest in discouraging it. *Id.*

Here, too, the University fails to identify how Professor Mitchell's letter impaired the University's functions. The University asserts that the letter "disrupted the workings of [Professor Mitchell's] department," but identifies no specific disruptions, other than the impaired relationship between Professor Mitchell and his supervisor. (Resp. at 39). Yet Professor Mitchell and Professor Nation's relationship had been strained for years, so much so that by the time Professor Mitchell wrote that letter, he had already been transferred out from "under [Professor Nation's] purview." (Doc.Ex. 64). Indeed, when Professor Nation received the letter, she did not "write anything" about it down in Professor Mitchell's file because she viewed it as just another one of the various negative "interactions" they had had "over the years." (Doc.Ex. 64).

More importantly, however, harm to the relationship between an employee and supervisor is insufficient on its own unless the university's functions themselves are also meaningfully impacted. Professor Corum's speech, for instance "affronted Dr. Durham," but that alone did not outweigh Professor Corum's interests in speaking on a matter of public concern. *Corum*, 330 N.C. at 776-77, 413 S.E.2d at 286. So too here. Professor Mitchell's speech "may have affronted" Professor Nation, but as in *Corum*, the work of the

University continued uninterrupted. *See id.* And as in *Rankin*, the fact that only a few people even saw the letter further lessoned the likelihood that it meaningfully disrupted university functions. 483 U.S. at 389-91.

Ultimately, the University asks this Court to give colleagues' offense too much weight when applying the *Pickering* balancing test. Like the MAGA hat in *Dodge v. Evergreen School District #114*, 56 F.4th 767, 783 (9th Cir. 2022); the Heritage Foundation presentation in *Josephson*, 2024 WL 4132233, at *8-9; the quip about microaggressions in *Hiers*, 2022 WL 748502, at *11; and the writings about "conservative issues" in *Adams*, 640 F.3d at 554, certain ideological positions are going to offend faculty and administrators. But if North Carolina's universities are going to be "peculiarly the marketplace of ideas," then offense cannot be enough to silence disfavored viewpoints. *See Keyishian*, 385 U.S. at 603 (cleaned up). When a professor's speech causes no meaningful disruption to the function of a university, then offense alone cannot be enough to outweigh the professor's right to free speech. To hold otherwise would enshrine a heckler's veto into this state's First Amendment jurisprudence and allow universities to punish a professor anytime he breaks away from the University's preferred ideological conformity. *See Meriwether*, 992 F.3d at 503, 511.

If the right to academic freedom does not protect professors' ability to express disfavored viewpoints to their administrators, then it will not mean

much. The University has failed to show that Professor Mitchell's letter caused a meaningful disruption to the University's functions. Accordingly, terminating Professor Mitchell for the views he expressed in the letter violated the First Amendment.

II. The University's Interpretation of the Handbook is Contradicted by the Text and the Record, Warranting No Deference.

The Handbook's plain text requires the Chancellor's decision be based on the Committee's recommendation. Only by splicing provisions into a different order than they appear and arguing for improper deference can the University maintain that Professor Mitchell's termination complied with the Handbook.

A. The University fails to show how the Handbook's plain text authorizes the Chancellor to disregard the Committee's recommendation and findings.

The parties' interpretive dispute boils down to one question: if the Committee determines that the administration has not established a prima facie case for terminating a professor, can the Chancellor override it? The University says yes, but uses a flawed interpretation to reach that answer.

First, the University places too much weight on Subsection IX.F.6's description of the Committee's conclusion as a "recommendation" to argue that the Chancellor need not follow it. (Resp. at 42-43). The rest of Subsection IX.F.6, however, refers to the Committee's conclusion as a "decision" and a "determination." (Doc.Ex. 32). Meanwhile, even when referring to the

Committee's conclusion as a recommendation, the Handbook still makes clear that the "[C]hancellor's decision *shall be based on* th[at] recommendation[]." (Doc.Ex. 33 (emphasis added)). Context therefore shows that the Committee's "recommendation" is not some optional guidance that the Chancellor can disregard at his or her sole discretion.

Second, the University pulls portions of the code out of context to achieve its desired outcome. In describing the order of events in a termination hearing, the University begins by following the steps in Subsection IX.F, (Resp. at 42-43), which are listed in chronological order, (*see* Opening Br. at 53). Yet upon reaching the critical juncture in this case—what happens when the Committee determines that the administration has failed to make a prima facie case—the University suddenly departs from the specific instructions in Subsection IX and instead looks to "[o]ne provision" that is outside the chronological order, Subsection VIII.G. (Resp. at 44). In doing so, the University inserts a *general* provision, one describing the due process protections available to a professor's later appeal to the Board of Trustees, into the *specific* steps outlining how the initial Committee hearing should occur. (*See* Opening Br. at 53-54).

The University points to no textual canons that justify such an insertion. Its only argument—that Subsection VIII overlaps with Subsection IX—actually contradicts its desired interpretation. (Resp. at 54). The specificity canon, after all, is only needed when two provisions overlap. *See* Antonin Scalia

& Brian Garner, *Reading Law* 141 (2012). And under the specificity canon, the more specific provision controls. *Nat'l Food Stores v. N.C. Bd. of Alcoholic Control*, 268 N.C. 624, 629, 151 S.E.2d 582, 586 (1966). Thus the University's own argument supports application of the specificity canon to these subsections.

To escape the specificity canon, the University asserts that "section IX is not more specific than section VIII." (*See* Resp. at 54). But the text does not back that up. For example, Section VIII does not contain a single reference to what happens if the Committee concludes that the administration failed to establish a prima facie case. (Doc.Ex. 28-29). Section IX (at F.6), in contrast, sets forth a distinct set of procedures on that exact subject. (Doc.Ex. 32).

As a remaining argument, the University contends that its interpretation of the Handbook is justified by the Code. (Resp. at 45-47). But the Code section the University relies upon simply repeats the same language as Subsection VIII.G, adding no new meaning to support the University's textual analysis. (Doc.Ex. 10, 29). Moreover, that Code provision also sits in a general subsection outlining due process protections. It does not detail the specific steps the Committee must follow during the hearing. (Doc.Ex. 9-10). Thus, the University's reliance on this identical provision from a different, general subsection does not meaningfully advance its argument.

The only other subsection of the Code cited by the University—one plucked from the appendix—merely states that discharges are generally "effected by the Chancellor." (Resp. at 46 (quoting UNC Policy Manual & Code, ch. 100.1, App. 1 at 1-2, https://tinyurl.com/ycxmu3tc)). That's true, as far as it goes. The Chancellor is tasked with carrying out the administrative procedures to terminate a faculty member, should the Committee find that the administration proved its case. But the fact that the final *administrative* step lies with the Chancellor does not mean that that he has unfettered discretion to make the underlying decision. To the contrary, the Code itself notes that the Chancellor's decision "shall be based" on the Committee's determination. (Doc.Ex. 10). If the Code truly intended for the Chancellor to have unbridled authority, one would have expected the University to be able to identify a provision of the Code clearly stating so. Its inability to do so here is telling.

The University's final textual argument is that the seven sentences in Section IX.F.6 must be read "in parallel," not chronologically. (Resp. at 51-52). But the University's description of the disciplinary process reveals that it also reads the first *six* sentences chronologically. (*See* Resp. at 42-43, 49-50). It is only the seventh sentence that the University argues is somehow "parallel." This sudden departure from the rest of the subsection's structure renders the University's "parallel" interpretation dubious from the outset.

Not only that, but the University's case law does not support its argument. *See Lawson v. FMR LLC*, 571 U.S. 429 (2014). *Lawson* does not discuss when text within a paragraph uses parallel structure as opposed to chronological steps. Instead, *Lawson* illustrates a different textual canon: when text in one statutory provision is similar to text in a separate statutory provision, this court should interpret those provisions similarly. *See id.* at 457-59 (applying the Court's previous interpretation of section 42121 to section 1514A because the two sections were similar). *Lawson* would be relevant if this Court had previously interpreted language similar to Subsection IX.F.6's text, as that prior interpretation could guide this Court's interpretation here. But that is not the argument that the University is making.

Looking to the full provision—as the University concedes this Court should—refutes the parallel text argument. (*See* Resp. at 51). Specifically, the last three sentences of Subsection IX.F.6 begin with "If." (Doc.Ex. 32). The University does not contest that the first two of these sentences are chronological. But the last sentence, according to the University, suddenly breaks from that mold and goes back in time. That clashes with the overall context of the paragraph, which has sentences proceeding chronologically. It is also inconsistent with the structure of Subsection IX.F as a whole, which details in numbered steps each part of the hearing process in chronological

order. (Doc.Ex. 28-33). The better reading is that the last sentence of Subsection IX.F.6 is chronological, just like the rest of the subsection.

Still, the University argues that by reading Subsection IX.6.F chronologically, Professor Mitchell fails to give effect to the sixth sentence, which "lets the chancellor *mandate* a 'full hearing.'" (Resp. at 52) (emphasis added). But the word "mandate" is not in Section IX.F.6. (Doc.Ex. 32). Instead, it makes just as much sense to read that sentence as permitting the Chancellor to ask the Committee to reconsider its previous determination. Indeed, since the Chancellor's decision "shall be based" on the Committee's recommendation, (Doc.Ex. 33), it is the University who deprives the text of its full effect by arguing that the Chancellor need not actually base its decision on the Committee's recommendation.

Nor does the University explain how its reading is consistent with the numerous protections in place to ensure a fair hearing. The University argues that these procedures are purely to create a record for appeal. (Resp. at 55). But that ignores several provisions which focus exclusively on ensuring the accuracy of the Committee's factual determinations. They include the following: Committee members cannot have any conflicts of interest, (Doc.Ex. 30-31); the University bears the burden of proof at the hearing, (Doc.Ex. 29); and faculty members have the right to be represented by counsel and cross-examine witnesses, (Doc.Ex. 28). These protections are of minimal use to the

reader of the cold record, who need not be an interested party, is unable to observe the witness's body language and reactions to questions, and can apply whatever burden of proof he or she wishes. That is why it makes no sense for the Chancellor—who is operating off the cold record—to be able to overrule the Committee. The Handbook's protections become meaningless if the true decisionmaker can be biased, have no first-hand assessment of witness credibility, and ignore the burden of proof. The University's attempt to interpret the Handbook in such a way should be rejected.

The University also mistakes Professor Mitchell's argument on this point as one grounded in due process. (*See* Resp. at 56-57). But that is not what Professor Mitchell is arguing. Regardless of whether due process requires these protections, the University promised these protections to faculty members when it put them in the Handbook. All Professor Mitchell asks is that the Handbook not be misinterpreted to deny him the protections that he was expressly guaranteed.

That is particularly true of the provision guaranteeing that Professor Mitchell be adjudged by unbiased factfinders. As the Handbook itself notes, the Chancellor is an interested party. Specifically, "the chancellor or his/her designee" is "allowed to have counsel to participate in the hearing to present evidence, cross examine witnesses, and make argument." (Doc.Ex. 29). There is no way for the Chancellor to "present evidence" and "make argument"

without being interested in the outcome of the proceeding. The Chancellor's interest in the proceeding only makes the Handbook's guarantee of an unbiased factfinder that much more important.

Finally, the University is wrong to suggest that if the Chancellor is bound to the Committee's recommendation, his review would serve no purpose. (Resp. at 55). Under Professor Mitchell's reading, the Chancellor can ask for reconsideration if he identifies a mistake in the Committee's analysis. The Chancellor also possesses a quasi-"veto" power, the ability to reverse an improper faculty termination. This additional protection is completely consistent with the other provisions in the Handbook, which ensure faculty members receive protection against improper termination at each step in the process. It also is consistent with the rule of lenity by resolving ambiguities in favor of the professor and his property interest in continued employment. *See Bittner v. United States*, 598 U.S. 85, 101-02 (2023).

True, the University attempts to escape the rule of lenity, implying that lenity turns on nothing but notice and assuming that the regulations are not "penal" in nature. (*See* Resp. at 68-69). Yet the University's citations support the rule of lenity's application here. *See Elliott v. N.C. Psych. Bd.*, 348 N.C. 230, 498 S.E.2d 619 (1998). Under *Elliott*, laws "which are in derogation of the common law and which are penal in nature are to be strictly construed." *Id*. at 235, 498 S.E.2d at 619. Because "North Carolina common law did not" regulate

psychology, *Elliot* held that the agency regulations at issue derogated from the common law and had to be strictly construed. *Id*. The same is true here; North Carolina common law did not regulate university employment thus the Handbook should be strictly construed in favor of Professor Mitchell. *See id*. And since the Handbook grants the University "the authority" to "discipline" or "place [the plaintiff] on probation," it too is penal in nature. *Elliott*, 348 N.C. at 235, 498 S.E.2d at 619 (cleaned up). Accordingly, the rule of lenity applies to the Handbook. *See Vogel v. Reed Supply Co.*, 277 N.C. 119, 131, 177 S.E.2d 273, 281 (1970) (clarifying that text must be construed strictly "in favor of the plaintiff," not the agency).

Applying the rule of lenity bolsters Professor Mitchell's argument that the strict, chronological interpretation of Section IX.F.6 is the correct one. Under that chronological reading, the Chancellor lacks any power to overrule the Committee's unanimous determination that no prima facie case existed for terminating Professor Mitchell. Holding otherwise would render numerous provisions meaningless, denying faculty members the protections they relied on when they accepted tenure.

B. The University's arguments for deference are atextual and unpersuasive.

The University ignores the State Constitution's plain meaning to argue that this Court should defer to agency's interpretations of their own

regulations. But none of the proffered reasons justify this dangerous departure from the constitutional text.

Allowing executive agencies to interpret the law—specifically, regulations that they wrote—is incompatible with North Carolina's separation of powers clause. While the University asserts that deference in North Carolina is "much less rigid" than federal deference and has been blessed by the General Assembly, that does not solve the constitutional problem. (Resp. at 64-65). Article I, section 6 states that 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. If each branch's power must be "separate," then there is no room for executive agencies to take judicial authority to "declare what the law is" and appropriate it to themselves. *Rodwell v. Harrison*, 132 N.C. 45, 49, 43 S.E. 540, 541 (1903). "[T]he meaning of the language of Article I, Section []6 is plain," and this Court should "follow it." *Coley v. State*, 360 N.C. 493, 498, 631 S.E.2d 121, 125 (2006).

None of the older cases the University cites conflict with the plain meaning of the separation of powers clause. While the word "deference" appears one time in *Brooks*, the immediately preceding sentence states: "When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court *may freely substitute its judgment for that of the agency* and *employ de novo review*." *Brooks v. McWhirter Grading Co.*, 303 N.C.

573, 581, 281 S.E.2d 24, 29 (1981) (emphasis added) (quoting *Appeal of N.C. Sav. & Loan League*, 302 N.C. 458, 465, 276 S.E.2d 404, 410 (1981)). Likewise, in *Britt*, this Court followed the regulations' "clear and unambiguous" text and reversed the lower courts for ruling otherwise. *See Britt v. N.C. Sheriffs' Educ. & Training Standards Comm'n*, 348 N.C. 573, 576-77, 501 S.E.2d 75, 77-78 (1998). As for *Rainey*, it explicitly noted that agencies interpretations are "not binding." *Rainey v. N.C. Dep't of Pub. Instruction*, 361 N.C. 679, 681, 652 S.E.2d 251, 252 (2007). None of these cases mandate deference to an agency's preferred interpretation, even if that interpretation is "thorough and consistent" with the agency's prior positions. (Resp. at 64 (cleaned up)). And besides, to the extent any of these older cases are in conflict with the Constitution, the Constitution's plain meaning controls as "the supreme law of the land." *In re Martin*, 295 N.C. 291, 299, 245 S.E.2d 766, 771 (1978).

Notably, the "critic[] of stronger forms of deference" did not adopt the University's preferred standard either. (Resp. at 64). Instead, he explained why deference is improper: "When we defer to an agency interpretation that differs from what we believe to be the best interpretation of the law, we compromise our judicial independence and deny the people who come before us the impartial judgment that the Constitution guarantees them." *Kisor v. Wilkie*, 588 U.S. 558, 598 (2019) (Gorsuch, J., concurring). True, cases like *Brooks*, *Brit*, and *Rainey* allow an agency to attempt to "persuade the court of

its interpretation of the law's demands." *Id.* at 593. But in doing so, the agency must be on "equal" footing with every other party. *Id.* Our Constitution does not permit the executive branch preferential interpretive treatment, particularly where such special treatment would mean the usurpation judicial power.

Moreover, even if the University's theory of deference to consistent interpretations were accepted, it would not apply here. (*See* Resp. at 61-63). The University has not shown a long-standing interpretation of the Handbook.

Specifically, in *Bernold*, "the committee did not make a recommendation as to petitioner's discharge." *See Bernold v. Bd. of Governors of Univ. of N.C.*, 200 N.C. App. 295, 296, 683 S.E.2d 428, 429 (2009). Since there was no recommendation for the chancellor to override, the University's position in the case was irrelevant. Likewise in *Frampton*, the chancellor chose not to proceed with disciplinary action, rendering the University's position in that case irrelevant as well. *See* Appellee's Brief at 7, *Frampton v. Univ. of N.C. at Chapel Hill*, 241 N.C. App. 401, 773 S.E.2d 526 (2015). Finally, in *Semelka*, the Committee unanimously determined that grounds for discharge *existed*. *See* Respondents-Appellees' Brief at 15, *Semelka v. Univ. of N.C.*, 275 N.C. App. 662, 854 S.E.2d 34 (2020). None of these cases, then, required the University

to take the position that the chancellor can overrule a committee finding in *favor* of a faculty member. [3]

As a result, the University has not shown a consistent position that the chancellor can unilaterally usurp the committee's decision that no prima facie case exists. And that means that the concurrence in *Jones* does not aid the University either. *See Jones v. Keller*, 364 N.C. 249, 262, 698 S.E.2d 49, 59 (2010) (Newby, J., concurring). While that concurrence found the agency's consistent interpretation persuasive in interpretating the regulation at issue, the University has failed to show similar consistency here.

More concerningly, none of these cases were brought to the Court of Appeal's attention. *See* Brief of Appellee, *Mitchell v. Univ. of N.C. Bd. of Governors*, 288 N.C. App. 232, 886 S.E.2d 523 (2023). That means the Court of Appeals believed it should defer to the University's interpretation of the Handbook even though that interpretation—as far as the Court of Appeals was aware—appeared for the first time in a brief. And that is why deference is so dangerous. If courts can rubber stamp whatever interpretation is offered for the first time in the agency's brief, then citizens will have no certainty that they are complying with the law. *Accord Loper Bright Enters. v. Raimondo*, 144

[3]It's also unclear what language was in the Handbook when each of these cases was decided. Since 2009, the Handbook has been revised eight times. (*See* Errata, *Faculty Handbook*, Winston-Salem State Univ., available at https://tinyurl.com/TheHandbookWSSU) (last visited September 18, 2024).

S. Ct. 2244, 2285 (2024) (Gorsuch, J., concurring) ("If a judge could discard an old meaning and assign a new one to a law's terms, all without any legislative revision, how could people ever be sure of the rules that bind them?").

As illustrated in this case, deference to the legal interpretations of executive agencies upsets the balance of power enshrined in our constitution. When courts abdicate their judicial role of saying what the law is, they remove an important "limit[ation on] 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).

Consistent with the text of the North Carolina Constitution, this Court should hold that courts cannot defer to agency interpretations. And under a non-deferential interpretation of the Handbook, the Committee's determination that the University failed to prove a prima facie case is binding. The Chancellor's unilateral overruling of the Committee's determination should be reversed.

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 8th day of October, 2024.

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