

No. 121A23

TWENTY-FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

ALVIN MITCHELL,)	
)	
)	
Petitioner-Appellant,)	
)	
v.)	<u>From Forsyth County</u>
)	
THE UNIVERSITY OF NORTH)	
CAROLINA BOARD OF)	
GOVERNORS,)	
)	
Respondent-Appellee.)	

**RESPONSE TO PETITION FOR DISCRETIONARY REVIEW AND
MOTION TO DISMISS THE CONSTITUTIONAL APPEAL**

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**RESPONSE TO PETITION FOR DISCRETIONARY REVIEW AND
MOTION TO DISMISS CONSTITUTIONAL APPEAL**

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA:

Respondent-Appellee the University of North Carolina Board of Governors respectfully submits this combined response to Petitioner-Appellant Alvin Mitchell's petition for discretionary review and motion to dismiss Mitchell's constitutional appeal.

INTRODUCTION

Alvin Mitchell has spent the last five years contesting his dismissal from employment as a professor at Winston-Salem State University ("the University"). This case involves a routine employee grievance, with Mitchell asserting that the process he received was erroneous and that his dismissal was impermissibly based on his protected speech. Based on the dissent in the Court of Appeals below, Mitchell's case is before this Court on the fact-specific issue of whether the University could base its termination decision in part on a letter Mitchell sent to his supervisor. This inflammatory letter accused his Black supervisor of being "a wanna be white, an international n****r, an international coon, and an International sambo." Around the same time Mitchell sent this letter, he also engaged in several other incidents of neglect and misconduct—including refusing to teach a course mere weeks

before the semester began and failing to respond to concerns about a student's grade. Attempts to resolve these concerns resulted in a heated verbal altercation with his supervisors that ended with the police being called to Mitchell's classroom. The Board of Governors looks forward to showing why this disturbing course of conduct appropriately justified Mitchell's dismissal.

As relevant here, Mitchell seeks to expand this Court's review through his petition for discretionary review and notice of appeal based on substantial constitutional questions. In his petition, Mitchell audaciously attempts to convert this case from a standard-issue employee grievance into a vehicle for resolving foundational issues of agency deference. This Court should reject that effort, for two reasons. First, Mitchell has failed to preserve the issue of agency deference raised in his Petition. Thus, allowing review would merely require this Court to issue a decision on an everyday question of waiver. Second, even if not waived, agency deference is irrelevant to the outcome of this case. As the Court of Appeals rightly held, the plain text of the relevant policies expressly authorized the University's actions. Deference was neither required nor applied by the Court of Appeals to reach the decision here.

Mitchell also seeks this Court's review based on three purportedly substantial constitutional questions. But two of those issues—the free-speech claim and the agency-deference issue—merely duplicate the issues raised in Mitchell's dissent-based appeal and his petition for discretionary review. There is thus no need for this Court to separately consider whether these issues also raise substantial constitutional questions.

Mitchell's third issue invokes three constitutional provisions—the state constitution's "fruits of their own labor" and "law of the land" clauses, and the federal constitution's due process clause. But any claim under the fruits of labor clause has not been preserved. And the procedural due process claim that Mitchell preserved below could not be less substantial. As the Court of Appeals unanimously held, Mitchell's procedural rights were fully protected. Mitchell received an evidentiary hearing before a committee of faculty members in full compliance with the procedural regulations developed by the University, as well as two appeals to the University's Board of Trustees and the system's Board of Governors. And in any event, whether a state agency fully complied with its own regulations in a single employee-grievance action does not raise constitutional questions that are sufficiently substantial to warrant this Court's review.

Accordingly, the Board of Governors respectfully requests that Mitchell's petition for discretionary review be denied, and his constitutional appeal be dismissed.

BACKGROUND

A. Mitchell's poor performance and misconduct result in his dismissal.

Alvin Mitchell was a tenured professor of Justice Studies in the Department of Social Sciences at Winston-Salem State University, a Historically Black University within the University of North Carolina system. Slip op. at 2. In 2017, he was dismissed from employment based on a pattern of poor performance and misconduct culminating in the fall of 2017. *Id.* at 2-5. The University's termination decision was based primarily on three separate incidents, which are described below.

1. Mitchell neglects his duties in a way that harms a student.

In December 2015, a student in Mitchell's Introduction to Corrections class submitted an optional research paper and received a failing grade. Slip op. at 2. Mitchell agreed to allow the student to resubmit the paper and entered a grade of "Incomplete" pending the revision. Slip op. at 2. In August 2016, the student sent Mitchell an email, detailing his attempts to

reach Mitchell to resolve the incomplete grade, and attached a copy of the revised paper. Slip op. at 2; Doc. Ex. 138. The student's academic counselor also sent Mitchell multiple communications in an attempt to discuss the incomplete grade. Slip op. at 2; Doc. Ex. 490. In March 2017, the student again emailed Mitchell to resubmit the paper. Slip op. at 2; Doc. Ex. 117.

Despite these communications, Mitchell never changed the grade from an "Incomplete." (Doc. Ex. 40) There is no evidence in the record that Mitchell ever responded to any communications he received regarding this issue, either from the student or from faculty members. Slip op. at 2. As a result of this lingering "Incomplete" assignment, the student's grade for the course reverted to an "F" in December 2016. *Id.* This failing grade negatively affected the student's GPA and, consequently, his ability to receive financial aid. (Doc. Ex. 40, 104)

In August 2017, the student's parents contacted Dean Doria Stitts in an attempt to resolve their concerns about the student's grade. Slip op. at 2; Doc. Ex. 40. Dr. Stitts asked the Co-Chairs of the Department of Social Science, Dr. Cynthia Villagomez and Dr. Denise Nation, to work with Mitchell to resolve the matter. Slip op. at 2; Doc. Ex. 40, 104. After receiving no response to emails they sent to Mitchell about the issue, Villagomez and

Nation attempted to speak with Mitchell in person while Mitchell was teaching a class. Slip op. at 2. A verbal altercation ensued, in which Mitchell informed his students that class was cancelled and repeatedly raised his voice to Villagomez and Nation. Slip op. at 2; Doc. Ex. 41. During the exchange, Mitchell said, among other things, “shut up, shut up” and “I don’t give a damn if you call the Dean or the President.” (Doc. Ex. 368-374) Ultimately, the police were called. Slip op. at 2. There is no evidence that Mitchell ever changed the “Incomplete” grade following this encounter.

2. Mitchell sends an abusive letter to his supervisor.

During the 2016-2017 school year, two students in Mitchell’s Research Methods I and II courses collected data on the effectiveness of juvenile rehabilitation centers and drafted a paper based on their findings. Slip op. 2-3; Doc. Ex. 130. The students applied for and were approved to present their paper at the Race, Gender & Class Conference in New Orleans. *Id.* They subsequently sought approval for funding from Nation to attend the conference. *Id.* Nation did not approve the funding. *Id.* The students reported that Nation had advised them to look into a different, “primarily Caucasian” conference hosted by the American Society of Criminology (“ASC”). *Id.*

Upon learning of this conversation, Mitchell sent Nation a letter expressing his consternation at what he believed Nation had told the students—namely, that the New Orleans conference had “no substance or standards,” and that the ASC was a “better conference and has a lot of substance.” Slip op. at 3. Mitchell then expressed his view that Nation (who is Black) was “promoting and praising those white folks who are associated with the ASC,” despite the fact that “[i]n their eyes [she would] never be equal to them.” *Id.* at 3-4. Mitchell then asserted: “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.” *Id.* at 4. Nation reported the letter to the provost and the dean. *Id.*

3. Mitchell fails to open an online class.

Around February 2017, Mitchell approved the schedule of courses he was to teach during the fall 2017 semester. His courses included Research Methods II—a course he had requested to teach and had been doing so for more than six years. *Id.* at 4. That spring, Nation informed Mitchell that she had removed his summer Constitutional Law class from his schedule because of concerns about the rigor of the course and Mitchell’s delay in providing a syllabus for the course upon request. Slip op. at 4. This led to a

lengthy disagreement between Mitchell and Nation that extended through the summer. (Doc. Ex. 95-98)

On August 15, 2017—approximately one week before the fall 2017 semester was to begin—Mitchell informed Nation that he did not feel “confident or comfortable to teach Research methods II” that fall. Slip op. at 4; Doc. Ex. 93. Nation responded by noting that Mitchell had long ago approved his fall schedule, and that it was his responsibility to show up and teach his assigned courses. (Doc. Ex. 92) It does not appear from the record that Mitchell responded to this communication. Moreover, Mitchell appears to have largely abandoned his classes in the first week of the fall semester. (Doc. Ex. 41, 63)

Consequently, one week later, after school had started, Nation informed Mitchell that several students had complained they could not access online course materials for one of Mitchell’s other courses, Corrections. Slip op. at 4; Doc. Ex. 430. She therefore asked if the course was available to students. Slip op. at 4; Doc. Ex. 101. In response, Mitchell complained that he thought his classes had been “taken away” because “they lacked integrity and challenge.” (Doc. Ex. 100) He stated that he no longer knew his schedule anymore and had informed the students in the

Corrections class that he would not be teaching the course that semester. Slip op. at 4; Doc. Ex. 100-01. Dr. Villagomez (Mitchell's other supervisor), responded to clarify the reasons why the summer Constitutional Law course had been removed from Mitchell's schedule and to express the University's expectation that Mitchell teach all the fall courses assigned to him. Slip op. at 4-5; Doc. Ex. 99-100. There is no evidence in the record that Mitchell ever opened the online Corrections course he was assigned to teach.

B. Mitchell receives notice of his dismissal and challenges it via multiple administrative appeals.

Following the above incidents, ProvostCarolynn Berry decided to dismiss Mitchell from his employment, pursuant to Section 603 of *The Code of the Board of Governors of the University of North Carolina* ("the Code"). Slip op. at 5. The Code provides that tenured professors may be discharged for "neglect of duty, including sustained failure to meet assigned classes or to perform other significant professional obligations" and for misconduct that includes "violations of professional ethics, mistreatment of students or other employees, . . . or other illegal, inappropriate or unethical conduct." *Id.* at 5; Doc. Ex. 9.

Dr. Berry concluded that Mitchell neglected his duty when he failed to open the online course for his students in August 2017 and failed to respond to the student's attempts to resolve his grading issue. (Doc. Ex. 26-27) Berry also concluded that Mitchell exhibited misconduct during his verbal altercation with Nation and Villagomez, as well as in his letter to Nation. (Doc. Ex. 26-27)

Mitchell appealed his dismissal under the procedures listed in the Code and the University's Faculty Handbook. (Doc. Ex. 278, 280-82) Both the Code and the Handbook provide a tenured faculty member facing "serious sanctions" with the option to request an evidentiary hearing before a Faculty Hearing committee. (Doc. Ex. 9, 28) The Handbook also requires the committee, after the University administration has presented its case-in-chief, to determine whether the administration has established a *prima facie* case. (Doc. Ex. 32) If the committee determines the administration has not done so, the hearing will end. (Doc. Ex. 32) However, the Handbook expressly states that the Chancellor may disagree with the committee's determination and send the matter back for a "full hearing." (Doc. Ex. 32)

Following the hearing, the committee must make "written recommendations" to the Chancellor based on the evidence presented at the

hearing. (Doc. Ex. 10, 29) The Chancellor may either concur in the committee's recommendations or decline to accept them, and shall issue a "final written opinion" within 30 days of receiving the hearing transcript. (Doc. Ex. 10, 29)

Mitchell received an evidentiary hearing in January 2018. Slip op. at 5. During the hearing, which occurred over approximately 4 ½ hours, Mitchell was represented by counsel, submitted documentary exhibits in his defense, and had the opportunity to cross-examine witnesses produced by the administration. (Doc. Ex. 34-91) At the end of the presentation of evidence by the University administration, the committee concluded that the administration had not met its *prima facie* burden, and concluded the hearing at that time. Slip op. at 5. The committee conveyed its decision to University Chancellor Elwood Robinson by formal letter. (Doc. Ex. 602-05)

However, the Chancellor disagreed with this determination. Slip op. at 5. Accordingly, per the regulations in the Handbook, the Chancellor remanded the case back to the committee to continue the hearing and allow Mitchell to provide evidence in his defense. *Id.*

Before the hearing could be reopened, Mitchell communicated to the committee that he had no additional evidence to present and stated that

“any attempt to reopen the hearing would not be beneficial to him.” Slip op. at 5-6; Doc. Ex. 609. Subsequently, the committee issued a letter accepting Mitchell’s waiver of presentation of further evidence and resubmitted its prior recommendation to the Chancellor. Slip op. at 6; Doc. Ex. 612-16.

In March 2018, the Chancellor issued his decision, upholding the Provost’s decision to discharge Mitchell. Slip op. at 6; Doc. Ex. 618-20. Specifically, the Chancellor concluded that Mitchell had neglected his duty by failing to open the online course and in failing to address the “Incomplete” grade given to a student. Slip op. at 6. The Chancellor further concluded that Mitchell had engaged in misconduct by virtue of his “racially charged” communication to Nation. Slip op. at 6; Doc. Ex. 619. The Chancellor also noted the verbal altercation with Mitchell and Villagomez in his decision but did not explicitly base his decision on this incident. (Doc. Ex. 619)

Mitchell appealed to the University’s Board of Trustees. Slip op. at 6. Under both the Code and the Handbook, the Board of Trustees may consider any appeal on the written transcript of the faculty hearing committee but may also hear other evidence as it deems necessary. (Doc. Ex. 10, 29) The Board upheld Mitchell’s dismissal, concluding that the University had

produced sufficient evidence of Mitchell's neglect of duty and misconduct. Slip op. at 6. The Board's decision was based on the same three incidents noted by the Chancellor: failing to open the online course, failing to address the grading issue, and sending a racially charged letter to his supervisor. (Doc. Ex. 636-37)

Mitchell then petitioned the Board of Governors for review of the University Board of Trustees' decision. Slip op. at 6. In his appeal, Mitchell made a number of fact-based and procedural arguments. He also claimed that the decision violated his free speech rights. He never identified any claim under the fruits of labor clause. (Doc. Ex. 4-6)

The Board of Governors issued a lengthy report affirming the Board of Trustees' decisions to dismiss Mitchell. Slip op. at 6; Doc. Ex. 239-263. Among other things, the Board of Governors concluded that all three incidents justified Mitchell's termination and that the University fully complied with the Code and Handbook's procedural requirements. It also concluded that Mitchell's speech rights were not violated. (Doc. Ex. 261).

While his appeal to the Board of Governors was pending, Mitchell filed a complaint in state court against the University and several University officials. *Mitchell v. Winston-Salem State Univ.*, No. 1:19-cv-00130, 2020 WL

1516537 (M.D.N.C. March 30, 2020). His complaint asserted a bevy of claims, including breach of contract and multiple tort claims; violations of multiple state statutes and state constitutional provisions; and violations of the federal constitution's First Amendment and Due Process Clause. *Id.* at *4. The defendants removed the case to federal court and moved to dismiss Mitchell's claims under Rule 12(b). *Id.* at *1. Judge Osteen granted the motion and dismissed Mitchell's federal claims. *Id.* at *16. Among other things, Judge Osteen held that Mitchell had failed to state a claim for violation of his speech or due process rights. *Id.* at *11-14. As for the state-law claims, Judge Osteen declined to exercise supplemental jurisdiction and dismissed them without prejudice. *Id.* at *16.

While this federal lawsuit was pending, Mitchell also filed a Petition for Judicial Review in Forsyth County Superior Court. Slip op. at 7. The PJR asserted another lengthy set of claims, including for violation of the First Amendment. (R p 2-10) The state trial court affirmed the decision of the Board of Governors upholding Mitchell's dismissal. Slip op. at 7; R pp 123-135. Applying whole-record review, the court concluded that Mitchell's termination for neglect of duty was supported by substantial evidence and was not arbitrary, capricious, or an abuse of discretion. Slip op. at 7. The

court also concluded, on *de novo* review, that Mitchell's dismissal did not violate his constitutional rights to free speech or procedural due process. Slip op. at 7; Doc. Ex. 134. Finally, the court concluded that the "administrative process Petitioner was provided to challenge" his dismissal was lawful. (Doc. Ex. 134)

C. The Court of Appeals affirms the superior court's denial of Mitchell's petition for judicial review.

On appeal to the Court of Appeals, Mitchell presented two issues in his brief: (1) whether the University failed to follow its administrative procedures when the Chancellor disagreed with the Faculty Hearing committee's recommendations, and (2) whether Mitchell's free speech rights were violated when he was dismissed based on his letter to Dr. Nation. Slip op. at 8; Petitioner-Appellant's Brief at 2, *Mitchell v. Univ. of N.C. Bd. of Govs.*, No. COA21-639 (January 3, 2022). Nowhere in his brief did Mitchell address or even mention the level of deference owed to the Board of Governors' interpretation of its rules and regulations. Moreover, Mitchell chose not to file a reply brief, even after the Board of Governors mentioned deference in its own brief on appeal.

The Court of Appeals affirmed on both issues. The panel was unanimous in rejecting his procedural arguments. The panel first concluded that “the decision to discharge ultimately remains with the Chancellor under the UNC Code.” Slip op. at 10. It noted that, although the committee “is tasked with providing ‘recommendations,’ . . . the Chancellor issues a ‘final written opinion’ based on those recommendations.” *Id.* at 12. Therefore, there was no error in the Chancellor serving as the final decision maker on Mitchell’s dismissal. *Id.* The panel next noted that Mitchell was represented by counsel throughout his dismissal proceedings and “made his own decision not to present further evidence after the prima facie determination was rejected by the Chancellor.” *Id.* at 12. This decision therefore did not render the procedure “afforded to him defective or violate his due process rights.” *Id.* at 13. The court then noted that Mitchell had presented no evidence in support of his contention that the Chancellor ignored the findings of fact reached by the committee. On the contrary, the court explained, “the Chancellor could have reached a different conclusion than the [committee] using the same set of facts.” *Id.* Based on all these holdings, the panel held that Mitchell’s procedural due process claim failed. *Id.* at 14.

The panel majority also rejected Mitchell's First Amendment claim. The majority concluded that Mitchell's letter did not implicate a matter of public concern because "[t]here [was] . . . no evidence that [Mitchell] intended his letter to be an effort to combat racism in academia or to advocate on the part of his students for funding to attend his preferred conference on that basis." *Id.* at 16. On the contrary, the letter reflected "nothing more than . . . his personal grievance towards Dr. Nation and "invoke[ed] his own racist epithets." *Id.* The court found that even ignoring these "racial invectives," the letter was "nothing more than criticism focused on [Mitchell]'s own work, broader disagreements with Dr. Nation and her criticism of him, and his displeasure with her decision not to provide funding." *Id.* at 17.

Judge Murphy dissented on this point. The dissent would have held that Mitchell's remarks "implicated a matter of public concern, therefore requiring the trial court to conduct a First Amendment balancing test." Slip op. (Murphy, J., concurring in part and dissenting in part) at 1. It therefore would have remanded the case to the trial court for additional proceedings on Mitchell's speech claim. *Id.* at 13.

Mitchell then filed in this Court a dissent-based notice of appeal; a constitutional-based appeal; and a petition for discretionary review.

The Board of Governors takes no issue with Mitchell's right to file the dissent-based appeal. It files this response and motion, however, to show that the petition should be denied and the constitutional appeal dismissed.

REASONS WHY CERTIFICATION SHOULD NOT ISSUE

Under Appellate Rule 14(a), parties may petition this Court to review "issues in addition to those set out as the basis for a dissenting opinion." N.C. R. App. P. 14(a). Discretionary review of additional issues, however, is appropriate only if those issues (i) have significant public interest, (ii) involve legal principles of major significance, or (iii) were resolved below in a way that conflicts with a decision of this Court. N.C. Gen. Stat. § 7A-31(c); *see also* N.C. R. App. P. 15(c).

Here, Mitchell asks this Court to review an additional issue that he claims has significant public interest and legal importance: "[W]hat level of deference, if any, should be given to an agency's interpretations of its rules" under North Carolina law? Pet. at 4, 11.

Review of that issue here, however, is inappropriate. Even if this issue did have public and jurisprudential importance, this case is an exceptionally

poor vehicle for addressing it, for two reasons. First, Mitchell has not preserved any argument on this issue. Second, resolution of the issue would have no effect on the outcome of this case. Mitchell's petition should therefore be denied.

I. Mitchell Failed to Preserve Any Argument About Agency Deference.

This Court has long recognized that “a contention not made” below is “not properly presented to the Court of Appeals” and thus also is “not properly before this Court” on further appeal. *Higgins v. Simmons*, 324 N.C. 100, 103, 376 S.E.2d 449, 452 (1989) (emphasis removed); *see also* N.C. R. App. P. 16(a). This Court has also held that when an issue is before this Court on a petition for discretionary review, whether that issue “has been properly preserved for purposes of appellate review is inherently intertwined with” its substance. *Piazza v. Kirkbride*, 372 N.C. 137, 166 n.13, 827 S.E.2d 479, 498 n.13 (2019). Thus, before this Court could address any issue about agency deference in this case, it would first need to resolve whether this issue has been properly preserved.

It was not. Below, Mitchell never asked the superior court what “level of deference, if any, should be given to an agency’s interpretations of its

rules.” Pet. at 11. He did not do so even after the Board of Governors argued in the superior court that an agency’s decision is presumed to be made in good faith and in accordance with governing law. (R pp 42-43) Nor did he ask the Court of Appeals to rule on this question, even after the Board of Governors argued that an agency’s reading “of its own policies ‘must be given controlling weight unless [its reading] is plainly erroneous or inconsistent with the [policies at issue].” Respondent-Appellee’s Br. at 14, *Mitchell*, No. COA21-639 (March 4, 2022) (quoting *Morrell v. Flaherty*, 338 N.C. 230, 238, 449 S.E.2d 175, 180 (1994)). Instead, *Mitchell* simply chose not to challenge the position taken by the Board of Governors on this issue. *See id.* at 14-21; Docket, *Mitchell*, No. COA21-639 (showing that no reply brief was filed below).

Mitchell’s failure to preserve this argument is decisive here. As this Court has repeatedly held, a party waives an argument “when he fail[s] to argue [the issue] in the Court of Appeals.” *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (Newby, J.). And as this Court has also repeatedly held, this rule applies to constitutional claims. *See In re J.N.*, 381 N.C. 131, 133, 871 S.E.2d 495, 497 (2022) (Berger, J.) (“[T]he existence of a constitutional protection does not obviate the requirement that arguments rooted in the

Constitution be preserved for appellate review.”); *State v. Jaynes*, 342 N.C. 249, 263, 464 S.E.2d 448, 457 (1995) (“Even alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court.”).

Thus, the reason that the panel, as Mitchell now complains, “never paused to address” any of his current arguments was not inattentiveness. Pet. at 26. It was rather due to Mitchell’s own failure to identify the issue for the panel to consider.

Given this failure, granting Mitchell’s petition would only result in a waste of this Court’s resources. If the petition were granted, the result would be a routine holding about preservation, not a ruling on the merits of Mitchell’s arguments on agency deference. For this reason alone, the petition should be denied.

II. The Issue Mitchell Asks This Court to Consider Does Not Affect the Outcome of This Case.

When this Court hears cases on discretionary review, it routinely declines to address issues that ultimately prove to have no bearing on a case’s outcome. *See, e.g., Gift Surplus, LLC v. State ex rel. Cooper*, 380 N.C. 1, 15, 868 S.E.2d 20, 30 (2022) (after disposing of the case by concluding that

the plaintiffs' conduct violated one aspect of North Carolina's criminal code, declining to address other arguments by the plaintiffs); *State v. Zuniga*, 336 N.C. 508, 511, 444 S.E.2d 443, 445 (1994) (after vacating the criminal defendant's sentence based on one argument, declining to address the defendant's other assignments of error). This practice makes good sense. It both conserves judicial economy and avoids unnecessary advisory opinions. Applying that principle here, if this Court granted Mitchell's petition, it would have no occasion to actually reach the deference issue he raises. That is so because, no matter the level of deference owed to the University's interpretation of its policies, those policies clearly allowed the University to terminate Mitchell.

In his petition, Mitchell implies that the Court of Appeals' ruling was based on its undue deference to the University's interpretation of its own procedures. Specifically, he argues that this deference caused the Court to conclude that those policies gave the Chancellor "the final say" over his discharge. Pet. at 24-25. In a similar vein, he argues that deference caused the Court to reject his argument that "the charges" against him had to be "dismissed" after a faculty committee reached a preliminary conclusion that there was not a *prima facie* case for his discharge. *Id.* at 25-26.

These arguments misunderstand both the Court of Appeals' decision and the policies themselves. The court below did not hold that the Handbook was ambiguous. *See, e.g.*, Pet. at 23 (citing *Kisor v. Wilkie*, 139 S Ct. 2400, 2414 (2019) (“[T]he possibility of deference can arise only if a regulation is *genuinely ambiguous* . . . even after a court has resorted to all the standard tools of interpretation. (emphasis added))). On the contrary, the court held that, under the Handbook's plain text, “the Chancellor is *expressly allowed* to ‘decline[] to accept a [FHC] recommendation that is favorable to the faculty member[.]’” Slip op. at 11 (emphasis added). Based on this reading of the policies, the court held that “the Chancellor and the FHC *clearly* have separate roles to play” and concluded that the “text” of the Handbook “align[ed] with the interpretation followed” by the University. Slip op. at 12. Accordingly, the Court of Appeals did not reach its interpretation of the Handbook based on any deference it believed it owed the University. It instead applied the Handbook's plain text.

That conclusion was correct. The Handbook, contrary to Mitchell's claims, does not say that if the faculty committee believes that a *prima facie* case for discharge is lacking, then “the charges [are] dismissed.” Pet. at 26. It rather states that if the committee “decides that the Administration has

not established his or her case, it will so notify Administration.” (Doc. Ex. 33) The Handbook goes on to provide that after receiving the record, “the chancellor shall issue a final written opinion,” which “shall be based on the recommendations and evidence received from the hearing committee.” (Doc. Ex. 33)

Thus, like the Court of Appeals observed, the Handbook leaves no doubt that the Chancellor can overrule the committee’s decisions: It unmistakably establishes that the committee “is tasked with providing ‘*recommendations*,’ while the Chancellor issues a ‘*final written opinion*’ based on those recommendations.” Slip op. at 12 (emphasis added). Indeed, when Mitchell advanced a similar due process claim in federal court, Judge Osteen read the Handbook the same way. Without mentioning any deference at all, he concluded that the Chancellor had the “right” under the Handbook to “overrule[]” the committee. *Mitchell*, No. 1:19-cv-130, 2020 WL 1516537, at *12. Below, the Court of Appeals simply reaffirmed this reading of the Handbook.

Because the outcome of this case does not depend on any issue of agency deference, the petition should be denied. Allowing review of that issue would only needlessly complicate this otherwise fact-specific appeal.

REASONS WHY THE CONSTITUTIONAL APPEAL SHOULD BE DISMISSED

Mitchell also claims that he has a right of appeal to this Court because the Court of Appeals' decision directly involves substantial constitutional questions. Mitchell presents three "substantial questions": (1) whether the Court of Appeals violated the separation of powers clause in the North Carolina Constitution when it supposedly deferred to the Board of Governors' interpretation of its own regulations; (2) whether the University violated Mitchell's speech rights when it dismissed him in part based on his letter to Dr. Nation; and (3) whether the Board of Governors' failure to follow its own procedures violated Mitchell's rights under the fruits of labor or law of the land clauses in the North Carolina Constitution or his due process rights under the Fourteenth Amendment. Not. at 3. None of these issues warrant this Court's review via a constitutional appeal.

The first constitutional question merely duplicates the question raised by Mitchell in his petition for discretionary review. There is therefore no need for this Court to determine whether it separately raises a substantial constitutional question. Moreover, as discussed above, Mitchell failed to preserve this issue, in any event.

The second constitutional question is similarly redundant: It merely duplicates the same issue that Mitchell raises in his dissent-based appeal. And again, the University takes no issue with Mitchell's right to seek this Court's review on that issue based on the dissent below. Because this issue will be heard by this Court regardless, there is no reason for this Court to separately allow a duplicative constitutional appeal.

Mitchell's third constitutional question also should be dismissed. At the outset, the precise nature of this question is not entirely clear. It cites three separate constitutional provisions and does not explain the reasons justifying this Court's review. Not. at 3. Given its breadth, this issue could conceivably include any number of claims and arguments. The unclear nature of Mitchell's constitutional appeal alone warrants this question's dismissal. *See State v. Colson*, 274 N.C. 295, 305, 163 S.E.2d 376, 383 (1968) (a constitutional appeal must be "real and substantial" and not merely "mouth[] . . . constitutional phrases").

Even if this Court were to attempt to parse the multitude of claims potentially implicated by this question, only one claim has been adequately preserved: a procedural due process claim under the state constitution. Below, Mitchell argued that the University "abandoned" its policies when the

Chancellor “circumvented” the faculty committee’s *prima facie* determination and when the Chancellor substituted his own findings of fact for those of the committee. Pet’r-Appellant Br. at 15-26, *Mitchell*, No. COA21-639. The Court of Appeals disagreed, noting that the Chancellor and the committee “clearly have separate roles to play in the discipline process” and finding that the University’s policies “expressly allowed” the Chancellor to decline to accept the faculty committee’s recommendation. Slip op. at 11, 12. Accordingly, the court ruled that “the procedure used to terminate [Mitchell]’s employment was not unlawful, defective, or in violation of his due process rights.” *Id.* at 14. This fact-specific ruling does not raise substantial constitutional questions.

To the extent Mitchell purports to raise other constitutional claims in this question, none are preserved. Although Mitchell refers to the fruits of labor clause, he has not preserved a claim under this clause. For example, nowhere in his appeal to the Board of Governors did Mitchell raise the fruits of labor clause, and as a result, the Board’s lengthy report makes no mention of such a claim. (Doc. Ex. 239-263). Moreover, in his briefing before the superior court, Mitchell did not even mention the fruits of labor clause, and so naturally the superior court did not mention it either. (R pp 105-135)

Once again on appeal, neither of Mitchell's questions presented before the Court of Appeals mentioned or referred to the fruits of labor clause. Pet'r-Appellant Br. at 2, *Mitchell*, No. COA21-639. Nor did the Court of Appeals consider any hypothetical claim under this clause. See Slip op. at 9-14.

Mitchell's failure to preserve any claim under the fruits of labor clause therefore bars him from seeking review of that claim for the first time in this Court.

It is true that, in his brief to the Court of Appeals, Mitchell briefly referenced the fruits of labor clause within the context of his procedural due process argument. See Pet'r-Appellant Br. at 16, *Mitchell*, No. COA21-639. But such an offhand mention, without any explanation or argument as to how that clause was violated under the facts here, does not preserve a claim under the clause. As this Court has held, preservation requires claims to be raised *in the trial court*, and they cannot be raised for the first time in the Court of Appeals. See *Jaynes*, 342 N.C. at 263, 464 S.E.2d at 457; see also *Barringer v. Caldwell Cty. Bd. of Educ.*, 123 N.C. App. 373, 377, 473 S.E.2d 435, 438 (1996) (applying this rule on appeal from a petition for judicial review from an agency decision); *Hope-A Women's Cancer Ctr., P.A. v. N.C. Dep't of Health & Hum. Servs.*, 203 N.C. App. 276, 286, 691 S.E.2d 421, 428 (2010) ("To

properly preserve a question for appellate review a party must request, and receive, a ruling on the question from the trial court.”).

And even aside from this fatal defect, Rule 28(b) requires that arguments “contain the contentions of the appellant with respect to *each issue presented*” and that “[i]ssues not presented in a party’s brief . . . will be taken as abandoned.” N.C. R. App. P. 28(b)(6) (emphasis added). It was thus Mitchell’s duty to properly present and preserve the *issues* upon which he seeks appellate review. *See Viar v. N.C. Dep’t of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (“It is not the role of the appellate courts . . . to create an appeal for an appellant.”). Stray references to a constitutional clause in a party’s brief, without additional explanation or argument, fall far short of this standard. *See, e.g., State v. Earls*, 234 N.C. App. 186, 192, 758 S.E.2d 654, 658 (2014) (defendant’s argument was not preserved by a single reference in his brief to his rights of confrontation under Sixth and Fourteenth Amendments).

CONCLUSION

The University respectfully requests that this Court deny Mitchell’s petition for discretionary review and dismiss his constitutional appeal.

This 22nd day of May, 2023.

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