No. 121A23 TWENTY-FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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

****

NEW BRIEF FOR APPELLEE
THE UNIVERSITY OF NORTH CAROLINA
BOARD OF GOVERNORS

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ISSUES PRESENTED

1. Did the Court of Appeals correctly hold that the University did not violate the First Amendment when it dismissed Dr. Mitchell?

2. Did the Court of Appeals correctly hold that the University properly followed its own regulations when it dismissed Dr. Mitchell?

INTRODUCTION

Petitioner Alvin Mitchell, a professor at Winston-Salem State University (WSSU), was dismissed from his position after he engaged in insubordination, neglected his duties, and wrote a letter with inflammatory and offensive statements to one of the co-chairs of his department. After the chancellor of WSSU dismissed him, Dr. Mitchell availed himself of appeals to WSSU's Board of Trustees and the Board of Governors of the University of North Carolina (the University). His dismissal was upheld.

Mitchell then sought judicial review of his dismissal, claiming violations of his free-speech rights under the First Amendment. He also claimed that the University's procedural regulations allowed a faculty committee at WSSU to prevent the chancellor from dismissing him. Both the Superior Court and the Court of Appeals upheld his dismissal.

Dr. Mitchell makes these same arguments before this Court. But they continue to be unpersuasive. First, Dr. Mitchell's letter attacking his

supervisor was not protected under the First Amendment. His letter involved a private disagreement with his co-chair, over matters within the scope of his duties as a professor at WSSU. And in any event, WSSU's interest in maintaining an efficient and productive workplace outweighed Dr. Mitchell's interest in using offensive language to attack a colleague.

Second, Dr. Mitchell's termination was consistent with the clear and unambiguous procedures outlined by WSSU's Faculty Handbook and the University's Code, which allow chancellors to overrule faculty committees with respect to whether tenured faculty members should be dismissed. Even if those procedures were ambiguous, however, it would be appropriate to afford some deference to the University's consistent and longstanding reading of its regulations and read them to give authority to university chancellors over these matters.

WSSU's Board of Trustees, the University's Board of Governors, the Superior Court, and the Court of Appeals all correctly upheld Dr. Mitchell's dismissal. This Court should do the same.

STATEMENT OF THE CASE

In 2019, Dr. Mitchell filed a petition for judicial review in Forsyth County Superior Court. In his petition, he challenged the decision of the

University's Board of Governors to affirm the decision of WSSU to dismiss him from his position as a tenured professor. (R pp 2-9) The Superior Court upheld Dr. Mitchell's dismissal. (R pp 123-35)

Dr. Mitchell appealed to the North Carolina Court of Appeals, which affirmed. *Mitchell v. Univ. of N.C. Bd. of. Govs.*, 288 N.C. App. 232, 243, 886 S.E.2d 523, 531 (2022). Judge Murphy dissented in part. *Id*. at 243-44, 886 S.E.2d at 531 (Murphy, J., concurring in part and dissenting in part).

Based on the dissent, Dr. Mitchell appealed the rejection of his First Amendment claim to this Court. Dr. Mitchell also appealed based on a purportedly substantial constitutional question relating to the procedures by which he was dismissed and filed an alternative petition for discretionary review. This Court dismissed Dr. Mitchell's constitutional appeal and granted his petition for discretionary review.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

This Court has appellate jurisdiction over issues that form the basis of a dissent in the Court of Appeals. *See* N.C. Gen. Stat. § 7A-30(2) (2022).[1]

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[1] The right to appeal based on a dissent has been repealed for all cases filed in the Court of Appeals on or after October 3, 2023. *See* Act of Oct. 3, 2023, S.L. No. 2023-134, §§ 16.21(d)-(e). This case was filed in the Court of Appeals before that date.

This Court also has jurisdiction over issues for which it has granted discretionary review. *See id.* § 7A-31(c).

STATEMENT OF THE FACTS

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

Dr. Mitchell was a tenured professor of Justice Studies in the Department of Social Sciences at WSSU, a historically Black university that is part of the University of North Carolina system. (R p 3) In 2017, he was dismissed from employment based on a pattern of poor performance and misconduct culminating in the fall of 2017. (Doc. Ex. 385-386) WSSU's termination decision was based primarily on three separate incidents, which are described below.

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

In December 2015, a student in Dr. Mitchell's Introduction to Corrections class submitted an optional research paper and received a failing grade. (Doc. Ex. 114, 184) Dr. Mitchell agreed to allow the student to resubmit the paper and entered a grade of "Incomplete" pending the revision. (Doc. Ex. 184) In August 2016, the student sent Dr. Mitchell an email, detailing his attempts to reach Dr. Mitchell to resolve the incomplete

grade, and attached a copy of the revised paper. (Doc. Ex. 138) The student's academic counselor also sent Dr. Mitchell multiple communications attempting to discuss the incomplete grade. (Doc. Ex. 490) In March 2017, the student again emailed Dr. Mitchell to resubmit the paper. (Doc. Ex. 117)

Despite these communications, Dr. Mitchell never changed the grade from an "Incomplete." (Doc. Ex. 40) The record suggests that Dr. Mitchell did not respond to communications he received regarding this issue, either from the student or from faculty members. (Doc. Ex. 60, 61, 72, 73, 138) Due to this "Incomplete" assignment, the student's grade for the course reverted to an "F" in December 2016. (Doc. Ex. 40) 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. (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 Dr. Mitchell to resolve the matter. (Doc. Ex. 40, 104) After receiving no response to emails they sent to Dr. Mitchell about the issue, Dr. Villagomez and Dr. Nation attempted to speak with Dr. Mitchell in person while he was teaching a class.

(Doc. Ex. 40-41) A verbal altercation ensued, in which Dr. Mitchell informed his students that class was cancelled and repeatedly raised his voice to Dr. Villagomez and Dr. Nation. (Doc. Ex. 41) During the exchange, Dr. 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. 41, 368-374) Ultimately, the police were called. (Doc. Ex. 41, 370, 372-73) There is no evidence that Dr. Mitchell ever changed the "Incomplete" grade following this encounter.

2. Dr. Mitchell sends an abusive letter to his supervisor.

During the 2016-2017 school year, two students in Dr. 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. (Doc. Ex. 130) The students applied for and were approved to present their paper at the Race, Gender & Class Conference in New Orleans. *Id*. One of the students subsequently approached Dr. Nation seeking funding for both students to attend the conference. *Id*. Dr. Nation did not approve the funding. *Id*. The student who spoke with Dr. Nation reported that Dr. Nation had advised them to look into a different, "primar[ily] Caucasian" conference hosted by the American Society of Criminology (ASC). *Id*.

Upon learning of this conversation, Dr. Mitchell sent Dr. Nation a letter expressing his consternation at what he believed Dr. 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." (Doc. Ex. 437, 1167) Dr. Mitchell then expressed his view that Dr. 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*. Dr. Mitchell then asserted that white people looked at Dr. Nation "as a wanna be white, an international n****r, an international coon, and an International sambo (lol) because [she] display[ed] that kind of behavior." *Id*. Dr. Nation reported the letter to the provost and the dean. (Doc. Ex. 78)

3. Dr. Mitchell fails to open an online class.

Around February 2017, Dr. Mitchell approved the schedule of courses he was to teach during the fall 2017 semester. (Doc. Ex. 62, 92) His courses included Research Methods II—a course he had requested to teach and had been doing so for more than six years. (Doc. Ex. 63) That spring, Dr. Nation informed Dr. 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. (Doc. Ex. 67, 95-98) This led to a lengthy disagreement between Dr. Mitchell and Dr. 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—Dr. Mitchell informed Dr. Nation that he did not feel "confident or comfortable to teach Research methods II" that fall. (Doc. Ex. 93) Dr. Nation responded by noting that Dr. 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 Dr. Mitchell responded to this communication. Moreover, Dr. Mitchell appears to have largely abandoned his classes in the first week of the fall semester. (Doc. Ex. 41, 63)

One week later, after the semester had begun, Dr. Nation informed Dr. Mitchell that several students had complained they could not access online course materials for one of Dr. Mitchell's other courses, Corrections. (Doc. Ex. 101) She therefore asked if the course was available to students. *Id*. In response, Dr. 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. (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 Dr. Mitchell's schedule and to express the University's expectation that Dr. Mitchell teach all the fall courses assigned to him. (Doc. Ex. 99-100) There is no evidence in the record that Dr. Mitchell ever opened the online Corrections course that he was assigned to teach.

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

Following these incidents, Provost Carolynn Berry decided to dismiss Dr. Mitchell from his employment under section 603 of the Code of the University's Board of Governors. (Doc. Ex. 26-27) 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 "violations of professional ethics, mistreatment of students or other employees, . . . or other illegal, inappropriate or unethical conduct." (Doc. Ex. 9)

The provost 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, 385-86) The provost also concluded that Dr. Mitchell exhibited misconduct during his verbal altercation with Dr. Nation and Dr. Villagomez, as well as in his letter to Dr. Nation. (Doc. Ex. 26-27, 385-86)

Dr. Mitchell appealed his dismissal under the procedures listed in the Code and WSSU's Faculty Handbook. (Doc. Ex. 278, 280-82) Both the Code and the Handbook allow a tenured faculty member facing "discharge or the imposition of serious sanctions" to request a hearing before a faculty committee. (Doc. Ex. 9, 28) The Handbook also requires the committee, after the provost has presented her case for dismissal, to determine whether she has established a *prima facie* case for dismissal. (Doc. Ex. 32) If the committee determines that the provost has not done so, the hearing ends. (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)

Dr. Mitchell received a hearing under these procedures. (Doc. Ex. 34) During the hearing, which lasted nearly six hours, Dr. Mitchell was

represented by counsel, submitted exhibits in his defense, and had the opportunity to cross-examine the provost's witnesses. (Doc. Ex. 34-91) At the end of the provost's presentation, the committee concluded that the administration had not met its *prima facie* burden and ended the hearing. (Doc. Ex. 90) The committee then informed Chancellor Elwood Robinson about its decision. (Doc. Ex. 602-05)

The chancellor disagreed with the committee's decision. (Doc. Ex. 607) Accordingly, the chancellor remanded the case back to the committee to continue the hearing and allow Dr. Mitchell to provide evidence in his defense. (Doc. Ex. 391, 607)

Before the hearing could be reopened, Dr. Mitchell informed the committee that he had no additional evidence to present. (Doc. Ex. 609) Subsequently, the committee issued a letter accepting Dr. Mitchell's waiver of his right to present evidence. It also recommended that Dr. Mitchell not be discharged. (Doc. Ex. 612-16)

Under the Code and the Handbook, the chancellor may either concur in the committee's recommendations or decline to accept them. (Doc. Ex. 10, 29) Here, the chancellor upheld the provost's decision to discharge Dr. Mitchell. (Doc. Ex. 618-20) Specifically, the chancellor concluded that Dr.

Mitchell had neglected his duty by failing to open the online course and in failing to address the "Incomplete" grade given to a student. (Doc. Ex. 618-19) The chancellor further concluded that Dr. Mitchell had engaged in misconduct by virtue of his "racially charged" communication to Dr. Nation. (Doc. Ex. 619) The chancellor also noted the verbal altercation with Dr. Mitchell and Dr. Villagomez in his decision, but did not explicitly base his decision on this incident. (Doc. Ex. 619)

Dr. Mitchell appealed to WSSU's Board of Trustees. (Doc. Ex. 622-34) The Board upheld Dr. Mitchell's dismissal, concluding that the provost had produced sufficient evidence of Dr. Mitchell's neglect of duty and misconduct. (Doc. Ex. 636-37) 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)

Dr. Mitchell petitioned the Board of Governors for review of the decision of the Board of Trustees. (Doc. Ex. 4-6) The Board of Governors affirmed Dr. Mitchell's dismissal. (Doc. Ex. 239-63) Among other things, the

Board of Governors concluded that all three incidents justified Dr. Mitchell's termination. (Doc. Ex. 262-63)[2]

Dr. Mitchell then filed a petition for judicial review in Forsyth County Superior Court, seeking review of the Board of Governors' decision. (R p 2) The court affirmed Dr. Mitchell's dismissal. (R pp 123-35) Applying whole-record review, it concluded that Mitchell's termination for neglect of duty was supported by substantial evidence. (R pp 133-34) The court also concluded that Dr. Mitchell's dismissal did not violate his constitutional rights to free speech or due process. (R p 134) Finally, the court concluded

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[2] While his appeal to the Board of Governors was pending, Dr. Mitchell filed a separate lawsuit in state court against WSSU and several of its officials. Complaint, *Mitchell v. Winston-Salem State Univ. Bd. of Trs*, No. 18-cvs-6089 (Forsyth Cnty. Sup. Ct. Nov. 28, 2018). He asserted claims for breach of contract, multiple tort claims, claims for alleged violations of state statutes and the state constitution, and violations of the First Amendment and Due Process Clause. *Id.* Defendants removed the case to federal court and moved to dismiss Dr. Mitchell's claims. *Mitchell v. Winston-Salem State Univ.*, No. 1:19-cv-00130, 2020 WL 1516537, at *1 (M.D.N.C. March 30, 2020). The district court dismissed Dr. Mitchell's federal claims. *Id.* at *16. Among other things, it held that Dr. Mitchell had failed to state claims for a violation of his speech or due-process rights. *Id.* at *11-14. As for the state-law claims, the court declined to exercise supplemental jurisdiction and dismissed them without prejudice. *Id.* at *16. Dr. Mitchell did not appeal from the district court's decision.

that the "administrative process" through which Dr. Mitchell had challenged his dismissal was lawful. (R p 134)

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

Dr. Mitchell then appealed to the Court of Appeals. Before that court, he argued that his dismissal was improper because the University's rules did not allow WSSU's chancellor to reject the recommendation of the faculty committee that he not be dismissed. *Mitchell*, 288 N.C. App. at 239, 886 S.E.2d at 529. He also argued that his dismissal on the basis of his letter to Dr. Nation violated his free-speech rights under the First Amendment. *Id.* at 237, 886 S.E.2d at 528.

The Court of Appeals rejected Dr. Mitchell's arguments and affirmed his dismissal. *Id.* at 243, 886 S.E.2d at 531.

The panel was unanimous in rejecting Dr. Mitchell's procedural arguments. It held that "the decision to discharge [faculty members] ultimately remains with the Chancellor under the UNC Code," not faculty committees. *Id*. at 239, 886 S.E.2d at 529. In doing so, it also recognized that the University's reading of its own procedural rules was entitled to deference. *Id*. at 240, 886 S.E.2d at 529.

The panel majority also rejected Dr. Mitchell's First Amendment claim. To start, the court recognized that the First Amendment does not allow a professor to "be discharged for expression of ideas on a matter of public concern." *Id.* at 242, 886 S.E.2d at 530 (citing *Pressman v. Univ. of N.C. at Charlotte*, 78 N.C. App. 296, 300, 337 S.E.2d 644, 647 (1985)). It also held, however, that Dr. Mitchell's letter to Dr. Nation did not implicate a matter of public concern. The letter reflected "nothing more than . . . [Dr. Mitchell's] personal grievance towards Dr. Nation." *Id*. at 242-43, 886 S.E.2d at 531. The panel accordingly concluded that Dr. Mitchell's statements in the letter were not entitled to First Amendment protection.

Judge Murphy wrote separately, concurring in part and dissenting in part. *Id.* at 243-252, 886 S.E.2d at 531-537. The dissent agreed with the court's determination that Dr. Mitchell "was afforded adequate process during the termination proceedings." *Id.* at 243, 886 S.E.2d at 531. But it disagreed with the court's determination that Dr. Mitchell's remarks did not implicate a matter of public concern. *Id.* at 243-44, 886 S.E.2d at 531. In the dissent's view, Dr. Mitchell's letter partly reflected an "expression of dissatisfaction on the state of racial diversity in academia." *Id.* at 249, 886 S.E.2d at 525. As a result, the dissent would have "reverse[d] the trial court's

determination that [Dr. Mitchell's] speech did not address a matter of public concern." *Id.* at 252, 886 S.E.2d at 536.

Dr. Mitchell appealed to this Court based on the dissent below. He also filed a petition for discretionary review, which this Court granted.

SUMMARY OF THE ARGUMENT

The Court of Appeals correctly affirmed the dismissal of both of Dr. Mitchell's claims.

First, Dr. Mitchell contends that his termination, based in part on his inflammatory and inappropriate letter to Dr. Nation, violated his right to free speech under the First Amendment. This argument cannot be squared with the test the U.S. Supreme Court has developed for evaluating First Amendment claims based on public-employee speech.

The Supreme Court has held that the First Amendment does not protect a government employee from discipline based on speech made within the scope of his employment. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Dr. Michell's letter was clearly sent to Dr. Nation within the scope of his role as a professor at WSSU. Although courts have recognized a limited exception to this rule for academic speech related to scholarship or teaching, that exception does not apply here. And Dr. Mitchell's attempt to

circumvent *Garcetti* and argue for a broader exception based on general principles of "academic freedom" is unpersuasive.

But even if Dr. Mitchell spoke as a "private citizen" and not as a government employee, the speech in his letter would not be entitled to First Amendment protection. To start, as the Court of Appeals correctly held, his speech did not implicate a "matter of public concern." *Mitchell,* 288 N.C. at 243, 886 S.E.2d at 531. Instead, his letter was merely an inflammatory personal attack on a colleague. And even if the letter did touch on matters of public concern, it would fail the balancing test established by *Garcetti*. Specifically, WSSU's interest in disciplining Dr. Mitchell for personal attacks on a colleague outweighed his interest in making those attacks.

Second, Dr. Mitchell contends that his termination violated the University's procedural regulations that govern how tenured faculty members may be dismissed. In doing so, he specifically argues that the Court of Appeals erred in affirming his dismissal because it deferred to the University's reading of its own regulations.

Dr. Mitchell fails to identify any error in that affirmance. As an initial matter, the issue of whether the University's reading of its own regulations is owed any deference arises only if its regulations were ambiguous. Here,

however, they unambiguously authorized Dr. Mitchell's dismissal. Dr. Mitchell maintains that the regulations did not allow for him to be dismissed because a faculty committee concluded that WSSU failed to make out a *prima facie* case for his dismissal. But the regulations at issue make clear that the committee did not get the final word. The regulations instead provide that that committee simply made recommendations, which WSSU's chancellor could decline to accept. The chancellor thus properly exercised his authority under the regulations to terminate Dr. Mitchell's employment.

Even if the regulations at issue here were ambiguous, moreover, it would be appropriate for this Court to afford some deference to the University's reading of those regulations in the circumstances of this case. This Court has long recognized that a state agency's readings of its own rules are owed some deference if the agency's reasoning is thorough, valid, and has remained consistent over time. Here, the University's determination that chancellors have decision-making authority on whether faculty are dismissed is supported by thorough and valid reasoning. It is also consistent with the positions that the University has taken—and our State's appellate courts have accepted—in many previous cases. Accordingly, if this Court concludes that the regulations at issue here are ambiguous, affording

limited, nonbinding deference to the University's reading of those regulations would be appropriate.

The decision below should be affirmed.

ARGUMENT

Standard of Review

In this case, Dr. Mitchell has sought judicial review of his dismissal from WSSU under the North Carolina Administrative Procedure Act. Under the APA, questions of law are reviewed de novo and questions of fact receive whole-record review. N.C. Gen. Stat. §§ 150B-51(b)-(c); *N.C. Dept. of Env't. & Nat. Res v. Carroll*, 358 N.C. 649, 658-59, 599 S.E.2d 888, 894 (2004).

Discussion of Law

I. Dr. Mitchell's Termination for Professional Misconduct Did Not Violate the First Amendment.

The First Amendment prohibits the government from "abridging the speech" of individual citizens. U.S. Const. amend. I. These protections extend to "teachers and students, neither of whom shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022) (internal quotation marks omitted). However, the rights of teachers, including university professors,

are not "so boundless that they may deliver any message to anyone anytime they wish." *Id.* In other words, there are important limits on university professors' speech in their roles as government employees.

"[T]o account for the complexity associated with the interplay between free speech rights and government employment," the U.S. Supreme Court has articulated a well-established framework for analyzing the speech of public employees. *Kennedy*, 597 U.S. at 527; *see Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Garcetti*, 547 U.S. 410.

The first step in this framework "involves a threshold inquiry into the nature of the speech at issue." *Kennedy*, 597 U.S. at 527. In that inquiry, a court must ask whether an employee speaks "pursuant to [his or her] official duties" or as "a citizen addressing a matter of public concern." *Id.* at 528 (citing *Garcetti*, 547 U.S. at 421, 423). If the employee speaks within the scope of his official duties, "the Constitution does not insulate [his] communications from employer discipline." *Garcetti*, 547 U.S. at 421.

If a court determines that an employee spoke as a "citizen"—and not within the scope of his employment—the court moves to the subsequent step in the analysis: Whether the employee's speech "address[ed] a matter of public concern." *Kennedy*, 597 U.S. at 528 (quoting *Garcetti*, 547 U.S. at 423).

If so, the court finally asks "whether [the] employee's speech interests are outweighed by the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employee." *Id.* (quoting *Garcetti*, 547 U.S. at 417 and *Pickering*, 391 U.S. at 568) (internal quotation marks omitted).[3]

Dr. Mitchell's letter to Dr. Nation is not entitled to First Amendment protection under any step of this analysis.

A. Dr. Mitchell's speech is unprotected because it arose within the scope of his official duties as a government employee.

As noted, the First Amendment does not protect speech by government employees that is made within the scope of their official duties. That is the case here.

In analyzing the "nature" of an employee's speech, a court must focus on the duties "an employee actually is expected to perform." *Garcetti*, 547 U.S. at 424–25. This inquiry "should be undertaken 'practical[ly],' rather

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[3] Dr. Mitchell treats the "public concern" inquiry as a "threshold matter," before discussing whether he spoke within the scope of his government duties. Br. at 19-22. But *Garcetti* made clear that this issue is only implicated when an employee spoke as a citizen and not within the scope of his duties. 547 U.S. at 419; *see also Kennedy,* 597 U.S. at 509. Regardless, as explained below, Dr. Mitchell cannot satisfy either step in the analysis.

than with a blinkered focus on the terms of some formal and capacious written job description." *Kennedy*, 597 U.S. at 529 (quoting *Garcetti*, 547 U.S. at 424). In other words, the "critical question . . . is whether the speech at issue is itself ordinarily within the scope of an employee's duties." *Lane v. Franks*, 573 U.S. 228, 134 (2014).

As a faculty member and professor at WSSU, Dr. Mitchell was responsible for teaching and advising students, conducting research, and performing service to the university. (Doc. Ex. 548) To fulfill these responsibilities, he regularly communicated with Dr. Nation regarding administrative matters, including student advising. *See, e.g.*, Doc. Ex. 403, 406-08, 413, 425-28. His letter to Dr. Nation thus fell firmly within the scope of these duties, as it centered on a disagreement over conference funding for two of his students and his belief that Dr. Nation's decision not to provide the funding was "not appropriate behavior as a chair" of the Department of Social Sciences. (Doc. Ex. 437, 1167)

Courts have determined that similar communications between a faculty member and a department chair fall within the professor's official duties. For instance, in *Renken v. Gregory*, the Seventh Circuit considered whether a letter written by the plaintiff professor to the chair of his

department, "call[ing] attention" to the misuse of grant funds, fell within the scope of the professor's official duties. 541 F.3d 769, 774 (7th Cir. 2008). The court concluded that in writing the letter, the professor "was speaking as a faculty employee" because administering grants "fell within the teaching and service duties that he was employed to perform." *Id.*; *see also Demers v. Austin*, 746 F.3d 402, 409 (9th Cir. 2014) (holding that a professor's plan for improving an academic department was written within the scope of the professor's official duties). Similarly here, Dr. Mitchell's letter was written in his capacity as a faculty employee, complaining to his chair about the chair's performance as an administrator.

In response, Dr. Mitchell cites the U.S. Supreme Court's recent decision in *Kennedy* to argue that his letter to Dr. Nation was not "a required part of [his] job." Br. at 27. But *Kennedy* is inapt here. That case involved a private prayer offered by a high school football coach at the end of a game. The speech was therefore made at a time when the school's "coaching staff was free to engage in all manner of private speech," a fact acknowledged by the school. *Kennedy*, 597 U.S. at 530. Moreover, as the Court emphasized in *Kennedy*, the coach's prayer did not "owe [its] existence" to his "responsibilities as a public employee." *Id.* The coach was not "instructing

players, discussing strategy, [or] encouraging better on-field performance" but rather was engaging in speech outside of what "the District paid him to produce as a coach." *Id.* at 529-30. By contrast, Dr. Mitchell's speech *did* "owe [its] existence" to his role as a faculty member at WSSU. His letter to Dr. Nation focused on a disagreement over an administrative decision to deny his students funding. This disagreement would never have arisen outside the context of his role as a faculty member in Dr. Nation's department.

Dr. Mitchell also argues that he did not speak pursuant to his official duties because his letter to Dr. Nation was not "specifically ordered by a direct supervisor." Br. at 27. But this has never been the test for determining whether speech arose within an employee's official duties. *See Renken*, 541 F.3d at 773-74 (rejecting plaintiff professor's argument that his discretionary, job-related tasks were outside his official duties). And Dr. Mitchell cites no case law to support this novel requirement.

Nor does Dr. Mitchell's speech fit within a narrow exception for academic speech related to scholarship or teaching. The Supreme Court has noted that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional

interests that are not fully accounted for by this Court's customary employee-speech jurisprudence." *Garcetti,* 547 U.S. at 425. The Court therefore declined to decide whether the rule in *Garcetti* "would apply in the same manner to a case involving speech related to scholarship or teaching." *Id.*

Federal appellate courts have subsequently concluded that the *Garcetti* rule—that public employees are not protected for speech made within the scope of their duties—does not apply to academic speech "related to scholarship or teaching." *Adams v. Trustees of the Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011); *see also Heim v. Daniel*, 81 F.4th 212 (2d Cir. 2023); *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021); *Demers*, 746 F.3d 402 (9th Cir. 2014). These courts reasoned that, although "teaching and academic writing are at the core of the official duties of teachers and professors," "[s]uch teaching and writing are 'a special concern of the First Amendment.'" *Demers*, 746 F.3d at 411 (quoting *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967)); *see also Heim*, 992 F.3d at 227-28. But all of these courts have applied the exception narrowly, limited to a professor's speech relating to actual teaching or scholarship.

Even if this Court were to recognize a "scholarship or teaching" exception to *Garcetti*'s rule, it would not apply here. Dr. Mitchell's letter was not directed at students in the classroom while teaching. Nor did the letter involve academic writings or publications. A page-long diatribe against Dr. Nation for an alleged insult to Dr. Mitchell's preferred conference does not qualify as "scholarship," no matter the topic.

Indeed, Dr. Mitchell does not seriously dispute that his letter does not constitute "scholarship or teaching." Instead, he claims that the letter falls within a broader protection for "academic freedom." Br. at 27-31. Specifically, Dr. Mitchell contends that "[u]niversity professors' academic freedom is not exclusively limited to words spoken in a classroom or written in a journal" but extends "to the freedom of faculty members to express their views to the administration concerning matters of academic governance." Br. at 27-28 (quoting *Minnesota State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 296-97 (1984) (Brennan, J., dissenting)).

This argument runs contrary to precedent. As discussed above, although some courts have allowed for a narrow exception to *Garcetti*'s rule for academic speech, that exception applies only to speech involving "scholarship or teaching." *Garcetti*, 547 U.S. at 425. Dr. Mitchell makes a

half-hearted attempt to argue that the letter qualifies for the exception because it was "*based on* his own research and experience." Br. at 28-29 (emphasis added). But courts have been clear that only actual scholarship or teaching qualifies for the exception. *See, e.g.*, *Porter v. Bd. of Trustees of N. Carolina State Univ.*, 72 F.4th 573, 583 (4th Cir. 2023) (rejecting a claim that a professor's technical critique of a student survey question was protected even though the professor was an expert in survey methodology), *cert. denied*, 144 S. Ct. 693 (2024).

Dr. Mitchell finally suggests that general principles of "academic freedom" protect *any* speech by a university professor on topics of public concern. Br. at 28-29. To accept this argument would expand the *Garcetti* exception beyond all recognition. In any event, any decision on whether to expand *Garcetti*'s First Amendment exception beyond "scholarship and teaching" should be directed to the U.S. Supreme Court. None of Dr. Mitchell's generalized arguments disturb the Supreme Court's controlling decision in *Garcetti*. 547 U.S. at 425.[4]

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[4] Even if this Court were inclined to disregard binding precedent and recognize a broader exception based on "academic freedom," this case is an exceptionally poor vehicle for doing so. Despite Dr. Mitchell's attempt to re-

In sum, Dr. Mitchell's speech is unprotected because it arose within the scope of his job responsibilities. And it does not fall within any exception for teaching or scholarship. The decision of the Court of Appeals rejecting Dr. Mitchell's First Amendment claim should be affirmed for this reason alone.

B. Even if Dr. Mitchell's speech falls outside the scope of *Garcetti*, his termination still would not violate the First Amendment.

Even if a public employee's speech is not excluded from First Amendment protection under *Garcetti*, that speech is still only protected if two additional requirements are satisfied. First, the subject of the speech must be on a "matter of public concern." *Connick*, 461 U.S. at 147. Second, the government employee's speech interests must outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it

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frame his letter to Dr. Nation as a "cry for academic freedom," the letter—and the language Dr. Mitchell used—speaks for itself. (Doc. Ex. 437, 1167) This Court, in particular, has declined to recognize that similar "abusive" and "tasteless language" is protected under the First Amendment. *See e.g.*, *In re Spivey*, 345 N.C. 404, 414, 480 S.E.2d 693, 698 (1997) (rejecting the contention that the First Amendment "protects the use of racial invective by a public official"). The Court should adhere to that position here.

performs." *Kennedy*, 597 U.S. at 528 (quoting *Garcetti* 547 U.S. at 417 and *Pickering*, 391 U.S. at 568).

Dr. Mitchell does not succeed on either prong of the analysis. His speech did not implicate a matter of public concern. But even if it did, WSSU's interest in maintaining an efficient workplace outweighed Dr. Mitchell's interest in making inflammatory and offensive remarks to his supervisor.

1. Dr. Mitchell's speech involved a private grievance, not a matter of public concern.

Not "all matters which transpire" within the context of public employment are of "public concern." *Connick*, 461 U.S. at 149. Speech involves a matter of public concern only when it "relat[es] to any matter of political, social, or other concern to the community." *Id*. at 146. But when an employee's speech is "solely in the individual interest of the speaker" or the speaker's "specific audience," that speech is not a matter of public concern. *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (quoting *Dun & Broadstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985)). An inquiry into the nature of an employee's speech turns on the "content, form, and context of a given statement." *Connick*, 461 U.S. at 147-48.

As the Court of Appeals noted below, mere personal complaints and grievances do not implicate a matter of public concern. *Mitchell,* 288 N.C. at 243, 886 S.E.2d at 531 (citing *Pressman,* 78 N.C. App. at 301–02, 337 S.E.2d at 648). For example, in *Pressman*, a plaintiff professor complained during a meeting about the lack of opportunity for personal development, a heavy workload, lack of guidance for grading, and other perceived administrative failures by the dean. 78 N.C. App. at 298, 337 S.E.2d at 646. The court held that the plaintiff's speech was not entitled to First Amendment protection because his "criticism [was] not based on public-spirited concern but more narrowly focused on his own personal work and personal displeasure with internal policies." *Id.* at 301-02, 337 S.E.2d at 648.

The Court of Appeals was correct when it determined that Dr. Mitchell's speech was similarly "personal." *Mitchell*, 288 N.C. at 243, 886 S.E.2d at 531. The context, form, and content of Dr. Mitchell's letter show that it was not "public-spirited" but rather an expression of his "personal displeasure" with Dr. Nation. *Id.*

First, Dr. Mitchell's letter arose within the context of his dispute with Dr. Nation regarding departmental funding for his students. Specifically, a student had requested funding from Dr. Nation to attend the Race, Gender &

Class Conference where Dr. Mitchell was also presenting. (Doc. Ex. 76, 130) Although Dr. Nation lacked the resources to provide the requested funding, Dr. Mitchell believed that Dr. Nation had denied the funding request because she considered the Race, Gender & Class conference to be without "substance or standards." (Doc. Ex. 76, 930) Dr. Mitchell's letter, which he wrote in response to this perceived snub, thus arose within his personal opposition to Dr. Nation's decision.

Second, both the form and content of Dr. Mitchell's letter demonstrate its intensely personal nature. In relaying his displeasure about the funding decision, Dr. Mitchell complained that Dr. Nation was "always try[ing] to debunk" his work. (Doc. Ex. 437, 1167 (full text of Dr. Mitchell's letter)) And like the plaintiff in *Pressman*, Dr. Mitchell complained that Dr. Nation lacked administrative competence in her role as a chair of the department, characterizing her actions as "not appropriate behavior as a chair." (Doc. Ex. 437, 1167) Finally, Dr. Mitchell's letter centered on a personal attack. He accused Dr. Nation of "think[ing] that anything white is better" and suggested that she was a "wanna be white, an international n*****, an international coon, and an international sambo." (Doc. Ex. 437, 1167) He

ended his letter by telling Dr. Nation that she "will never get it" and asked her to "[w]ake up." (Doc. Ex. 437, 1167)

In essence, as the Court of Appeals correctly concluded, Dr. Mitchell's letter was "nothing more than an expression of his personal grievance towards Dr. Nation and his displeasure with her administrative decision not to provide funding for [his] preferred conference," and, as such, did not implicate a public concern. *Mitchell*, 288 N.C. App. at 243, 886 S.E.2d at 531; *see also Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 398 (2011) (explaining that an "internal grievance" is generally not a matter of public concern because it does not seek to "advance" a perspective "beyond the employment context"); *Leiphart v. N.C. Sch. of the Arts*, 80 N.C. App. 339, 355, 342 S.E.2d 914, 925 (1986) (plaintiff's criticism of his supervisor did not implicate public concern because it "focused on his own personal displeasure" with internal policies).

Dr. Mitchell tries to resist this commonsense conclusion by characterizing his personal diatribe as a critique of "racial bias in academia." Br. at 20. But Dr. Mitchell's reframing grossly mischaracterizes the contents of his letter. (Doc. Ex. 437, 1167 (full text of Dr. Mitchell's letter)) As described above, the letter is narrowly focused on attacking Dr. Nation's

personal conduct and behavior. That Dr. Mitchell himself used offensive language as part of his personal attack on Dr. Nation's character does not transform the letter into a critique of racial bias in academia.

In sum, Dr. Mitchell's inflammatory, personal attack on Dr. Nation did not implicate a matter of public concern. Accordingly, this court "is not the appropriate forum in which to review the wisdom of a personnel decision taken by [the University] . . . in reaction to [Dr. Mitchell's] behavior." *Connick*, 461 U.S. at 147.

2. WSSU's interest in maintaining an efficient workplace outweighed Dr. Mitchell's interest in making inflammatory accusations.

Finally, even if Dr. Mitchell's speech did relate to a matter of public concern, it would still fail the balancing test established by the Supreme Court to determine whether government-employee speech is protected by the First Amendment. At this stage of the analysis, a court must weigh the "employee's speech interests" against the employer's interest "in promoting the efficiency of the public service it performs." *Kennedy*, 597 U.S. at 528 (quoting *Garcetti* 547 U.S. at 417 and *Pickering*, 391 U.S. at 568). This Court has held that when employee speech "interfere[s] with the regular operation of the University" the University's interest in an "efficient" workplace

outweighs an employee's speech interests. *Corum v. Univ. of N.C. Through Bd. of Governors*, 330 N.C. 761, 775-76, 413 S.E.2d 276, 286 (1992).

Speech interferes with the regular operation of a university when it "impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Id.* at 776, 413 S.E.2d at 286. Such "interference" can take many forms. For instance, in *Connick*, where the plaintiff employee distributed a questionnaire soliciting the views of her colleagues in response to her being transferred, the Supreme Court held that this "act of insubordination" was sufficient to "interfere[ ] with working relationships." 461 U.S. at 151.

The "context" of an employee's speech is crucial to this inquiry. *Id.* at 153; *Corum*, 330 N.C. at 776, 413 S.E.2d at 286. For example, courts may consider whether the speech was "directed towards any person with whom [the employee] would normally be in contact in the course of his daily work." *Pickering,* 391 U.S. at 569-70. Likewise, "the state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Connick*, 461 U.S. at 150. An employer need not "allow events to

unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Id*. at 152.

Courts have thus consistently concluded that a public employer's interest in taking disciplinary action against employees who used offensive language to attack or demean colleagues outweighed the employee's speech interests. For example, in *Bennett v. Metropolitan Government of Nashville & Davidson County,* the Sixth Circuit upheld the termination of an employee who used racially charged language in a "derogatory" Facebook post. 977 F.3d 530, 534 (6th Cir. 2020). Similarly, the Nebraska Supreme Court upheld discipline against an employee who used "an inflammatory and offensive slur" to refer to his supervisor. *Vinci v. Nebraska Dep't of Corr. Servs.*, 571 N.W.2d 53, 61 (Neb. 1997). Other courts have reached similar conclusions. *See Matter of Booras*, 500 P.3d 344, 349 (Co. 2019) (upholding discipline against a state judge who, among other things, directed an "inappropriate racial epithet . . . at one of her colleagues"); *Moser v. Las Vegas Metro. Police Dep't*, 984 F.3d 900, 910 n.8 (9th Cir. 2021) (noting that "[s]ome statements may be so patently offensive (e.g., racial slurs) that the government can reasonably predict they would cause workforce disruption and erode public trust").

The same logic holds in this case. Here, Dr. Mitchell's letter interfered with the regular operation of WSSU by disrupting "harmony" among co-workers and "impair[ing] discipline by [a] superior[ ]." *Corum*, 330 N.C. at 776, 413 S.E.2d at 286. Dr. Nation was Dr. Mitchell's direct supervisor, a person with whom he routinely interacted and communicated in the course of his ordinary responsibilities as a faculty member. (*See, e.g.*, Doc. Ex. 403, 406-08, 413, 425-28) Thus, Dr. Mitchell's personal attack on his supervisor clearly risked disrupting "harmony" and "discipline" in the department. And in the aftermath of the letter, Dr. Mitchell "offered no apology" and never "expressed regret" for his letter's offensive and inflammatory tone. (Doc. Ex. 619) It is thus no surprise that the letter had a "detrimental impact on [a] close working relationship[ ]" for which "confidence [was] necessary." *Corum*, 330 N.C. at 776, 413 S.E.2d at 286. For example, Dr. Nation testified that she became "afraid to speak to [Dr. Mitchell]" after the letter because every attempt was met with "continuous hostility." (Doc. Ex. 65)

Dr. Mitchell's arguments that his speech interests outweigh those of WSSU are unpersuasive. To start, Dr. Mitchell contends that his use of "strong" and "spirited" language is particularly protected by the First Amendment. Br. at 32-38, 29. But Dr. Mitchell largely relies on Supreme

Court cases involving political speech by members of the public—not speech by government employees criticizing their supervisors. Because these cases did not arise in the context of employee discipline, they did not apply the balancing test outlined in *Pickering* and *Connick*. None of these cases remotely suggest that government employees have a First Amendment right to personally attack their supervisors without consequence.

Dr. Mitchell also argues that the Sixth Circuit's recent decision in *Meriwether* demonstrates that "mere desire to avoid offense does not trump a professor's right to express a sincerely held view on a controversial subject, regardless of how offensive the administration finds the view or the professor's manner of expressing it." Br. at 36-37. But *Meriwether* is not at all on point for two distinct reasons. First, that case involved "potentially compelled speech"—in that the professor argued he was being forced to use the chosen pronouns of transgender students. 992 F.3d at 510. Courts apply a more "exacting scrutiny" to compelled speech than other speech in a First Amendment analysis. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 925 (2018). Here, by contrast, this case involves speech that Dr. Mitchell admits he wrote "of his own free will." Br. at 27. Second, the speech in *Meriwether* implicated the professor's "sincerely held

religious beliefs," which the Sixth Circuit weighed in measuring the strength of his interests against those of the university. 992 F.3d at 499. No such religious interest is present here.

Finally, Dr. Mitchell contends that WSSU's interests are minimal because his letter purportedly caused "no significant disturbance." Br. at 38-40. But the record is clear that Dr. Mitchell's letter *did* significantly affect his relationship with his direct supervisor, and thus disrupted the workings of their department. *Supra* 38. Moreover, this argument misunderstands the employer's burden at the balancing stage of the analysis. WSSU does not have to show a complete breakdown of the working relationships in the Department of Social Sciences for its interests to outweigh Dr. Mitchell's interests. *See Connick*, 461 U.S. at 152.

By writing a letter that personally attacked Dr. Nation in an inflammatory and offensive manner, Dr. Mitchell interfered with the ability of the department to function effectively. Thus, even if his speech did implicate the First Amendment, his interests in making that speech did not outweigh the University's interests in maintaining an efficient workplace. The Court of Appeals thus correctly concluded that his termination did not violate the First Amendment.

II. The University Properly Followed Its Regulations When It Dismissed Dr. Mitchell.

Dr. Mitchell next argues that the University erred when it dismissed him because, in doing so, it supposedly failed to follow its own rules that govern personnel matters. Br. at 40-58. In particular, he faults the Court of Appeals for reaffirming that an agency's readings of its own regulations are entitled to deference. *Mitchell*, 288 N.C. App. at 238, 886 S.E.2d at 528.

Dr. Mitchell fails to identify any error in the Court of Appeals. As an initial matter, the issue of agency deference is simply not implicated in this appeal. Whether the University's reading of its regulations merits deference is relevant only when the "language of [the] regulation[ ]" is "[ ]ambiguous." *Britt v. N.C. Sheriffs' Educ. & Training Standards Comm'n*, 348 N.C. 573, 576, 501 S.E.2d 75, 77 (1998); *see also Kisor v. Wilkie*, 588 U.S. 558, 559 (2019) (holding that the issue of deference only arises when "after exhausting all the 'traditional tools' of construction," "the regulation is genuinely ambiguous"). Here, the applicable regulations are clear and unambiguous. As a result, this Court need not reach Dr. Mitchell's arguments with respect to whether affording deference is appropriate.

Moreover, even if this Court were to reach the issue of deference, deferring to the University's reading of its own regulations would be warranted in the circumstances of this case.

A. The University's regulations unambiguously show that it followed its own rules in dismissing Dr. Mitchell.

To begin, the University followed its own regulations when it dismissed Dr. Mitchell. Dr. Mitchell disagrees. Specifically, he maintains that WSSU's chancellor lacked the authority to dismiss him after a faculty committee determined that a *prima facie* case for his dismissal had not first been made at a hearing before that committee. Br. at 49-58. As shown below, however, a review of the regulations at issue leaves no doubt that the chancellor had the power to dismiss Dr. Mitchell.

1. The University complied with the Handbook and the Code in dismissing Dr. Mitchell.

In dismissing Dr. Mitchell, the University complied with WSSU's Handbook. Relevant here, sections VIII and IX of the Handbook set out overlapping procedures that govern the imposition of serious sanctions on WSSU's tenured faculty members, including dismissal from their positions. (Doc. Ex. 28-33) The plain meaning of these procedures show that the University complied with them when it dismissed Dr. Mitchell.

Below, after WSSU's provost decided to dismiss Dr. Mitchell, Dr. Mitchell exercised his right to challenge that decision at a hearing before a committee of faculty members. (Doc. Ex. 26-28, 278 (§ VIII.D)) At that hearing, the Handbook's rules mandated that the provost first present her affirmative case for dismissal to the committee. (Doc. Ex. 31 (§ IX.F.5)) They also provided that after she did so, the committee would "recess the hearing and withdraw into closed session to determine whether [the provost had] established a prima facie case" for dismissal. (Doc. Ex. 32 (§ IX.F.6))

Here, it is undisputed that the University complied with these rules in particular. After the provost made her case for dismissal, the faculty committee withdrew for deliberations over whether the provost had made out a *prima facie* case. (Doc. Ex. 36-90) The committee then determined that the provost had not done so, and it notified WSSU's chancellor about its decision. (Doc. Ex. 90, 602-05)

The Handbook's rules then specified how this decision was to be treated. Section IX.F.6 of the Handbook provided that the committee's belief that the provost had "not established a prima facie case" would result "in a recommendation against the discharge." (Doc. Ex. 32) Given that this decision was a recommendation only, however, section IX.F.6 allowed the

chancellor to reject it: It provided that if the chancellor disagreed "with the committee's determination," then he could "send [the matter] back for a full hearing." (Doc. Ex. 32)

Here, again, the University complied with these rules. After the chancellor received the committee's decision, he informed the committee that he disagreed with its decision. He accordingly sent the matter back to the committee for it "to conclude the hearing." (Doc. Ex. 607) After he did so, Dr. Mitchell had the right to "present evidence" to establish that dismissal was inappropriate. (Doc. Ex. 32 (§ IX.F.7)) Dr. Mitchell, however, declined to exercise this right. (Doc. Ex. 609)

Because the submission of evidence was complete, the Handbook required the committee to "begin its deliberations" on whether to dismiss Dr. Mitchell. (Doc. Ex. 32 (§ IX.F.10)) One provision in its rules further required the committee, after its deliberations, to make "written recommendations to the chancellor." (Doc. Ex. 29 (§ VIII.F)) Echoing this provision, another stated that if the committee decided that the provost "ha[d] not established . . . her case," then it should provide "a written statement of its findings and decision." (Doc. Ex. 33 (§ IX.G)) In keeping

with these rules, the committee wrote to the chancellor and notified him that it still believed that dismissal was unwarranted. (Doc. Ex. 612-16)

After the committee made this "recommendation . . . that [was] favorable to the faculty member," the Handbook's rules again specified how this decision was to be treated. (Doc. Ex. 29) One provision stated that the chancellor had the right either to "concur[ ]" or "decline[ ] to accept" the committee's favorable "recommendation." (Doc. Ex. 29 (§ VIII.G)) Consistent with this provision, another confirmed that after the committee made its recommendation, the chancellor had the right to issue his own "final written opinion" based on the committee's "recommendations and evidence received." (Doc. Ex. 33 (§ IX.G))

The University once again complied with these rules. Exercising his authority under the rules, the chancellor issued his own final decision after the committee made its recommendation. He wrote Dr. Mitchell that after having reviewed "the transcript [of his hearing], the recommendation, and the evidence," he had decided to uphold the provost's "decision to discharge" him. (Doc. Ex. 618) The chancellor then notified Dr. Mitchell of his right to pursue further appeals, which Dr. Mitchell has exercised. (Doc. Ex. 620)

Thus, the Handbook's rules show that the University followed its own procedures in discharging Dr. Mitchell. The rules unmistakably allow the chancellor to overrule the committee's decisions. They repeatedly refer to the committee's decisions as mere "recommendation[s]." (Doc. Ex. 29 (§§ VIII.F, G), 32 (§ IX.6.F)) They also state that at the *prima facie* stage, the chancellor could "disagree" with the committee if it concluded that no *prima facie* case had been made and send the case "back for a full hearing." (Doc. Ex. 32 (§ IX.6.F)) And they establish that, after the hearing, the chancellor could "decline[ ] to accept" a favorable "recommendation" from the committee for the faculty member and issue his own "final written opinion" instead. (Doc. Ex. 29 (§ VIII.G), 33 (§ IX.G))

The University's Code that governs all seventeen of its institutions, including WSSU, further buttresses the conclusion that chancellors can overrule faculty committees. Section 603 of the Code governs the dismissal of tenured faculty members like Dr. Mitchell. (Doc Ex. 9-10) That section nowhere allows faculty committees to block chancellors from dismissing faculty. Rather, like WSSU's Handbook, it refers to the decisions of faculty committees as mere "recommendation[s]." (Doc Ex. 10) And again like the Handbook, it also allows chancellors to "decline[ ] to accept"

recommendations made by faculty committees after hearings held before those committees. (Doc Ex. 10)

In keeping with these provisions, the Code also confirms that only chancellors, not faculty committees, have final decision-making authority over whether faculty are discharged. Specifically, the Code confirms that "discharges or suspensions of faculty members . . . shall be effected by the chancellor," from whose "action" members of a university's faculty have "rights of appeal." UNC Policy Manuel & Code, ch. 100.1, App. 1 at 1-2, https://tinyurl.com/ycxmu3tc.[5]

For multiple reasons, the Handbook should be read consistently with the Code. Because the Code does not allow faculty committees to block the chancellor from dismissing faculty, neither can the Handbook.

The Handbook, for one thing, is clearly drafted to complement the Code. Section VIII of the Handbook largely mirrors section 603 of the Code, showing their interrelation. (*Compare* Doc. Ex. 28-29, *with* Doc. Ex. 9-10)

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[5] In 2023, this provision of the Code was amended to clarify that faculty members can also be discharged by "the chancellor's designee." Univ. of N.C. Sys., Transmittal Letter No. 149 (2023), https://tinyurl.com/3rstm3uw. This amendment, which underscores the chancellor's authority over these matters, was not in effect when Dr. Mitchell was dismissed.

When two laws such as these "are applicable to the same [subject] matter," it is well established that they should be "construed together." *Morris v. Rodeberg*, 385 N.C. 405, 409, 895 S.E.2d 328, 331 (2023) (quoting *Carver v. Carver*, 310 N.C. 669, 674, 314 S.E.2d 739, 742 (1984)).

More fundamentally, the Handbook necessarily would have to yield to the Code if any conflict between them existed. WSSU's authority to issue the Handbook derives from authority delegated to WSSU by the University, which is the only entity that the General Assembly has directly authorized to "adopt . . . regulations" like these. N.C. Gen. Stat. § 116-11(2). Section 603(1) of the Code, moreover, provides that dismissal of faculty "may be imposed *only* in accordance with the procedures prescribed *in this section*." (Doc. Ex. 9 (emphasis added)) Elsewhere, the Code further provides that "all discharges . . . of faculty members" must be "consistent" with the "policies of the Board of Governors," further confirming the Code's primacy. UNC Policy Manuel & Code, ch. 100.1, App. 1. Indeed, Dr. Mitchell has himself taken the position in this case that the Code's sections control over the Handbook's provisions. (Doc. Ex. 743)

For all these reasons, the "plain and definite meaning" of the Handbook and the Code allowed WSSU's chancellor to overrule the faculty

committee that heard Dr. Mitchell's case and dismiss him. *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) (quoting *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993)). This Court should give effect to this plain text.

2. Dr. Mitchell fails to show that the University did not comply with the Handbook and Code in dismissing him.

Although the text of the Handbook and Code show clearly that a chancellor may overrule a faculty committee's recommendation, Dr. Mitchell tries to show otherwise. Br. at 49-58. His arguments fail to persuade.

i. Dr. Mitchell's arguments about section IX.F.6 of the Handbook lack merit.

Dr. Mitchell's primary argument concerns section IX.F.6 of the Handbook. Br. at 49-50, 52-53. That provision, as noted, governs the faculty committee's deliberations on whether a *prima facie* case for dismissal has been made and what happens after its decision. Dr. Mitchell's argument focuses in particular on section IX.F.6's last sentence, italicized below:

> After the Administration concludes his or her presentation, the Committee will recess the hearing and withdraw into closed session to determine whether [the] Administration has established a prima facie case. . . . If the Committee determines that the Administration has not established a prima facie case, the chair will orally notify the parties of that decision and

> thereby end the hearing. That decision results in a recommendation against the discharge or other serious sanction decision and will be confirmed in writing to both parties. If the Chancellor disagrees with the committee's determination, he/she will send it back for a full hearing. *If the Committee determines that the Administration has established a prima facie case, it will resume the hearing.*

(Doc. Ex. 32 (§ IX.F.6) (emphasis added))

According to Dr. Mitchell, this final sentence allows the committee, if the chancellor sends a case back to it, to decline to resume the hearing if it still believes that no *prima facie* case has been made. This sentence allows the committee to do so, Dr. Mitchell claims, because the sentences in this section are "chronological" in nature. Br. at 53. In his view, the sentences in section IX.F.6 describe in a step-by-step manner what procedures apply in a sequential order. He therefore reads the section's final sentence to give the committee the authority to decide whether or not to "resume the hearing" *after* the chancellor has (under the section's penultimate sentence) sent a case "back for a full hearing." (Doc. Ex. 32)

Dr. Mitchell misreads this section. On its face, its sentences do not all flow chronologically. Rather, the section uses parallel text to specify what happens after the administration has finished its initial case for dismissal and the committee has "recess[ed] the hearing" to determine if a "prima facie

case" has been made. (Doc. Ex. 32) Because the committee can decide either that a *prima facie* case has or has not been made at this stage, the section needs to explain what happens after both of these eventualities.

To do so, the section first specifies what happens if "the Committee determines that the Administration has not established a prima facie case." (Doc. Ex. 32) In that situation, the section provides that the committee's recommendation goes to the chancellor for his review and possible reversal. *Supra* 42-43.

Then, several sentences later, the section's last sentence specifies what happens if, on the other hand, "the Committee determines that the Administration *has* established a prima facie case." (Doc. Ex. 32 (emphasis added)) In that eventuality, the section provides that the hearing simply "resume[s]." (Doc. Ex. 32)

Read correctly in this manner, the section's last sentence does not allow the committee to decline to resume a hearing after the chancellor has sent a case back for a full hearing. The last sentence instead simply provides that if the committee decides that a *prima facie* case *has* been made after it initially "recess[es] the hearing," then the committee will itself "resume the hearing" and allow the professor to present his own evidence. (Doc. Ex. 32)

Dr. Mitchell's contrary reading of the last sentence fails for a variety of reasons.

First, it is well established that when laws use "parallel text," that parallel text should be read "consistently." *Lawson v. FMR LLC*, 571 U.S. 429, 459 (2014). Given this rule, when section IX.F.6 refers in parallel to whether "the Administration has" or "has not established a prima facie case," this parallel text must refer to the same thing. (Doc. Ex. 32)

Dr. Mitchell's reading fails to honor this principle. Under his reading, this parallel text is not given parallel meaning. Rather, when this text appears the first time, it refers to whether the committee believes a *prima facie* case exists after it first goes into recess. But in Dr. Mitchell's view, when this text appears the second time, it refers to something different: whether the committee believes a *prima facie* case exists *after* the chancellor has returned a case to it. Dr. Mitchell's failure to give parallel meaning to these parallel terms shows that his reading cannot be correct.

Second, it is equally well understood that laws should be read so that each of their provisions can be "given full effect." *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981). Here, the second-to-last sentence of section IX.F.6 grants the chancellor a clear right

to "send [a case] back for a *full* hearing" if the committee believes that a *prima facie* case has not been made. (Doc. Ex. 32 (emphasis added))

Dr. Mitchell's reading of section IX.F.6, however, fails to give "full effect" to this sentence. *Porsh Builders*, 302 N.C. at 556, 276 S.E.2d at 447. Under his reading, the committee can deny the chancellor the authority to require a "full hearing." (Doc. Ex. 32) It can instead, under Dr. Mitchell's reading, choose to never "resume the hearing" at all. (Doc. Ex. 32) This reading thus fails because it does not give full effect to the clause of section IX.F.6 that lets the chancellor mandate a "full hearing." (Doc. Ex. 32)

Third, another common principle of textual interpretation is that "in ascertaining [the] intent" of the drafters of a text, courts should "consider the [text] as a whole." *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 81, 347 S.E.2d 824, 828 (1986). Here, as shown above, when the Handbook and Code are considered as a whole, they leave no doubt that chancellors can reject recommendations from faculty committees on whether to discharge faculty. *See supra* 41-48. Because Dr. Mitchell's reading of the last sentence of section IX.F.6 does not align with the rest of the Handbook and Code, his reading should be rejected for this final reason as well.

ii. Dr. Mitchell's other arguments also lack merit.

Dr. Mitchell makes several other arguments to try to show that the faculty committee has the power to block the chancellor from dismissing faculty members. These arguments are also meritless.

First, Dr. Mitchell maintains that the faculty committee can block the chancellor because section IX's provisions are "more specific" than section VIII's. Br. at 51 (quoting *LexisNexis Risk Data Mgmt. Inc. v. N.C. Admin. Off. of Cts.*, 368 N.C. 180, 187, 775 S.E.2d 651, 656 (2015)). He therefore argues that section IX's more-specific provisions, which he reads to give final say over the dismissal of faculty to the faculty committee, trump any "more general provision[s]" in section VIII that allow the chancellor to decline to accept its recommendations. *Id.*

This argument, for starters, fails because it misreads section IX. As explained above, section IX does not give the faculty committee the final say over these matters. It instead allows the chancellor to send a case back to the committee for a "full hearing" if the committee believes no *prima facie* case has been made. (Doc Ex. 32 (§ IX.F.6)) It recognizes that the committee can only make "recommendations." (Doc. Ex. 32 (§ IX.F.6), 33 (§ IX.G)) And it allows the chancellor, after a hearing concludes, to issue his

own "final written opinion" about whether to dismiss a faculty member. Doc. Ex. 33 (§ IX.G); *see also supra* 48-52.

Even accepting Dr. Mitchell's flawed reading of Section IX, however, his argument would still fail because section IX is not more specific than section VIII. These sections have clauses on many subjects that overlap, with section VIII sometimes providing specific rules not stated in section IX. (*Compare* Doc. Ex. 29 (§ VIII.G) (discussing appeal rights), *with* Doc. Ex. 33 (§ IX.H) (same)) Because these two overlapping sections "are applicable to the same [subject] matter," they should not be read to override each other, but rather should be "construed together" in a consistent manner. *Morris*, 385 N.C. at 409, 895 S.E.2d at 331 (quoting *Carver*, 310 N.C. at 674, 314 S.E.2d at 742). When done so, they clearly provide that the chancellor may choose not to accept committee recommendations. Indeed, Section VIII expressly provides that the chancellor may "decline[ ] to accept a committee recommendation" that faculty be retained. (Doc. Ex. 29 (§ VIII.G))

Second, Dr. Mitchell also argues that if the chancellor could overrule the faculty committee, then the hearing before the committee would become "meaningless," making all the rules that govern the hearing surplusage. Br. at 55. This argument fails as well. Like the Court of Appeals observed below,

the hearing is not "meaningless" merely because the chancellor can overrule the committee. *Mitchell*, 288 N.C. App. at 239, 886 S.E.2d at 529. The hearing serves a meaningful role, because it creates "a record" that is "used" by the parties and on appeal. *Id.* The rules that govern the hearing thus are hardly surplusage.

Third, Dr. Mitchell similarly argues that the chancellor cannot overrule the committee because the Handbook requires his decision to be "based on the recommendations and evidence received from the hearing committee." Br. at 57 (quoting Doc. Ex. 33) But the chancellor can base his decision on the committee's recommendation and evidence while still disagreeing with it. Indeed, that is what he did below: He "reviewed the transcript, the recommendation, and the evidence" and yet still decided to "discharge" Dr. Mitchell. (Doc. Ex. 618) He necessarily must have been able to do so, moreover. If he could not, after all, his review would serve no purpose.

Fourth, Dr. Mitchell maintains that the chancellor cannot himself, consistent with due process, decide whether faculty should be discharged. That is so, he claims, because the chancellor supposedly "plays a part in the initial decision to charge a professor." Br. at 56. He thus argues that the Handbook should be construed to give the faculty committee, which does

not bring charges against professors, final say over whether faculty are dismissed.

This argument fails both on the record and the law. Under the Handbook, while the chancellor can participate in hearings before the faculty committee, (*see* Doc. Ex. 29 (§ VIII.D)), he did not do so below. (Doc. Ex. 34-91) The rules, moreover, do not direct him to make charging decisions or to present the case against the faculty member during hearings. (Doc. Ex. 28-33) He thus did not do so below. (Doc. Ex. 34-91) That is rather the role of the provost. (Doc. Ex. 28 (§ VIII.B), 29 (§ VIII.E), 30 (§§ IX.A, IX.B, IX.C, IX.D), 31 (§§ IX.E, IX.F.4, IX.F.5) 32 (§§ IX.F.5, IX.F.6, IX.F.7, IX.F.8, IX.F.9, IX.F.10), 33 (§ IX.G)) Accordingly, the provost sought Dr. Mitchell's dismissal. (Doc. Ex. 26-27) And then, the provost's office "presented their case" against Dr. Mitchell at his hearing. (Doc. Ex. 38; *see also* Doc. Ex. 36, 40, 156, 162) The due-process argument advanced by Dr. Mitchell thus rests on a faulty premise. But even if that were not so, Dr. Mitchell's due-process arguments would still be meritless. The U.S. Supreme Court long ago rejected the argument that "members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications." *Withrow v. Larkin*, 421 U.S. 35, 53 (1975); *see*

also Farber v. N.C. Psych. Bd., 153 N.C. App. 1, 11-12, 569 S.E.2d 287, 295-96 (2002) (similar). The Handbook thus need not be construed to avoid a supposed violation of due process that is illusory.

For all these reasons, Dr. Mitchell fails to show that the chancellor did not follow the University's policies by overruling the faculty committee and dismissing him. On the contrary, the Code and Handbook unambiguously permit the chancellor to do so.[6]

B. If the University's regulations are ambiguous, deferring to the University's reading would be appropriate.

Because the Code and Handbook show unambiguously that the University followed its own procedures, no question of deference is implicated in this appeal. Should this Court conclude that the Code and

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[6] Dr. Mitchell suggests in passing that he chose "not to put on any more evidence" because he believed that under section IX.F.6, his case was over "unless the Committee chose to reopen the hearing." Br. at 53. This claim is contradicted by the record. At the time, Dr. Mitchell stated that he did not need to present more evidence because all of his evidence was already in the record. (Doc. Ex. 609) He also justified his decision with an argument that he no longer advances: He claimed that, once the committee found that no *prima facie* case had been made, the chancellor could not send the case back for further proceedings, but rather *immediately* had to decide whether to dismiss him. (Doc. Ex. 609; *see also* Doc. Ex. 166-67, 197-98) He did not maintain, as he does now, that the chancellor lacked the power to overrule the committee and dismiss him.

Handbook are ambiguous, however, it would be appropriate for this Court to afford deference to the University's reading of its internal regulations.

1. This Court has long held that an agency's reading of its own regulations merits some measure of deference.

Both this Court and the Court of Appeals have long recognized that an agency's reading of the statutes and regulations that it administers are entitled to deference in some circumstances.

In 1981, for instance, this Court held that "the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference." *Brooks v. McWhirter Grading Co., Inc.*, 303 N.C. 573, 581, 281 S.E.2d 24, 29 (1981) (citing *In re N.C. Sav. & Loan League*, 302 N.C. 458, 466, 276 S.E.2d 404, 410 (1981)). Interpretations adopted by an agency, this Court made clear, "are not binding" on courts. *Id.* Rather, their weight depends on "the thoroughness evident in [an agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if

lacking power to control." *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).[7]

At least as early as 1986, moreover, the Court of Appeals also recognized that similar principles govern agency readings of their own regulations. That year, the Court of Appeals held that when regulations are "ambiguous," "an administrative agency's interpretation of its own regulation is to be given due deference." *Pamlico Marine Co., Inc. v. N.C. Dep't of Nat. Res. & Cmty. Dev., Coastal Res. Comm'n Div.*, 80 N.C. App. 201, 206, 341 S.E.2d 108, 112 (1986).

A decade later, this Court reached a similar conclusion. Citing its cases on agency readings of statutes, it held that if regulations are ambiguous, then an "interpretation of a regulation by an agency created to administer that regulation" should be "accorded some deference." *Britt*, 348 N.C. at 576, 501 S.E.2d at 77 (citing *Brooks*, 303 N.C. at 580-81, 281 S.E.2d at 29).

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[7] Earlier this year, the U.S. Supreme Court abandoned the so-called *Chevron* doctrine, which rigidly "required" courts to defer to federal agencies' readings of statutes that they administer. *Loper-Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2254 (2024). In doing so, however, the Court recognized the wisdom of the more flexible deference of the sort that the courts of our State have long afforded to state agencies' readings of statutes. *See id.* at 2259, 2262 (reaffirming *Skidmore*).

This Court has since continued to hold that courts should, at least in some circumstances, defer to agencies when reviewing agencies' readings of their own regulations. For instance, in one case where this Court "defer[red] to [an agency's] interpretation of its regulations," *Jones v. Keller*, 364 N.C. 249, 255, 698 S.E.2d 49, 54 (2010), one member of this Court wrote separately to emphasize that that "agency's interpretation of its own regulations" were "worthy of deference." *Id.* at 261-62, 698 S.E.2d at 59 (Newby, J., concurring). That opinion emphasized that the agency litigating before this Court had always "read the relevant . . . regulations" consistently with the position it took in that case. *Id.* at 262, 698 S.E.2d at 59 (Newby, J., concurring).

Likewise, in a more recent case, this Court unanimously held that, given the circumstances in that case, an agency's reading of its own regulation should be afforded deference. *N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Exam'rs*, 371 N.C. 697, 704, 821 S.E.2d 376, 382 (2018). The Court emphasized that the agency's reading of its own regulation was "consistent with both the statute and the language of the rule" and was also "consistent with [the agency's] earlier statements." *Id.* at 703-04, 821 S.E.2d at 381-82.

It is therefore well established that courts should defer to an agency's reading of its own regulations in appropriate circumstances.

2. The University's reading of its regulations merits deference here.

As noted, the same principles that govern whether deference is owed to agency readings of statutes also govern deference for regulations. *See Britt*, 348 N.C. at 576, 501 S.E.2d at 77 (citing *Brooks*, 303 N.C. at 580-81, 281 S.E.2d at 29). As a result, in assessing whether deference is appropriate, courts should consider, among other things, "the thoroughness evident in [an agency's] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *Brooks*, 303 N.C. at 581, 281 S.E.2d at 29 (quoting *Skidmore*, 323 U.S. at 140).

Here, as shown above, *see supra* 41-48, the University's reading of the Code and Handbook to allow chancellors to reject a faculty committee's recommendation not to dismiss a professor is backed by "thorough[ ]" and "valid[ ]" reasoning. *Id.*

The University's reading, moreover, is also "consisten[t]" with the readings of the Code that it has advanced in "earlier" personnel cases. *Id.* In one case before the Court of Appeals fifteen years ago, for instance, the

University explained that chancellors have the power to conclude that faculty members should be "discharged from [their] positions" and "overrule[ ]" recommendations to the contrary from faculty committees. Appellee's Brief at 3, 19 n.6, *Bernold v. Bd. of Governors of Univ. of N.C.*, 200 N.C. App. 295, 683 S.E.2d 428 (2009), https://tinyurl.com/55u73wjr. In resolving the case, the Court of Appeals likewise observed that a chancellor's office had "reversed" a faculty committee's decision that a professor "was not incompetent" and discharged the professor against its recommendation. *Bernold*, 200 N.C. App. at 296, 683 S.E.2d at 429.

Similarly, in another case decided nearly a decade ago, the University again explained to the Court of Appeals that chancellors have the authority "not [to] accept" a faculty committee's "recommendation" on whether a professor should be subject to discipline. Defendant-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), https://tinyurl.com/4zsexty2. The Court of Appeals agreed, noting that the "recommendation" of a faculty committee "is advisory and not binding" on chancellors. *Frampton*, 241 N.C. App. at 403, 773 S.E.2d at 529.

Five years later, in another personnel case, the University yet again took the same position before the Court of Appeals that it takes here. There,

the University similarly explained that faculty committees only make "findings and recommendations" to chancellors, "who may choose to adopt or reject them." Respondents-Appellees' Brief at 14, *Semelka v. Univ. of N.C.*, 275 N.C. App. 662, 854 S.E.2d 34 (2020), https://tinyurl.com/2wty6fb9. Accepting this argument, the Court of Appeals again recognized that faculty committees only make "findings and recommendations" to chancellors, which are then subject to "adoption or rejection" by chancellors. *Semelka*, 275 N.C. App. at 667 n.3, 854 S.E.2d at 38 n.3.

The University's interpretation of the Code and Handbook is thus not only thorough and well-reasoned, but has been consistent over time. It therefore satisfies the conditions under which this Court has afforded a modest level of deference to an agency's interpretation of its own regulations.

3. Dr. Mitchell fails to show that the University's reading of its regulations should not be afforded deference.

Despite the considerable authority in support of affording deference in circumstances like these, Dr. Mitchell argues that affording deference here would be inappropriate. He fails to identify, however, any infirmity with this longstanding practice or its application here.

First, primarily relying on concurring and dissenting U.S. Supreme Court opinions discussing federal law, Dr. Mitchell argues that deference offends separation of powers. Br. at 40-46. He maintains that deference results in "the power to write a law and the power to interpret it" resting "in the same hands." *Id.* at 41-42 (citing *Decker v. Nw. Envt'l Def. Ctr.*, 568 U.S. 597, 619 (2013) (Scalia, J., concurring in part and dissenting in part)).

Dr. Mitchell's argument fails to appreciate the many differences between federal and state law in this area. As an initial matter, the deference afforded to agencies under state law is much less rigid than the deference that has historically been afforded to federal agencies under federal law. As noted, under state law, an agency reading of a regulation is never absolutely "binding" on courts and only warrants deference if an agency's reasoning is "thorough[ ]" and "consistent[ ]" with the agency's prior positions. *Brooks*, 303 N.C. at 581, 281 S.E.2d at 29 (quoting *Skidmore*, 323 U.S. at 140). At the federal level, similarly giving an agency's readings of its own rules "weight proportional to 'the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements'" is uncontroversial, even among critics of stronger forms of deference. *Kisor*, 588 U.S. at 596 (Gorsuch, J., dissenting) (quoting *Skidmore*, 323 U.S. at 140).

Deferring to agency readings of statutes and regulations, moreover, rests on particularly strong grounds in our State. That is so because it is well understood that the General Assembly has blessed the practice. In *Rainey v. North Carolina Department of Public Instruction*, this Court reviewed a decision of the Court of Appeals that had held that our State's Administrative Procedure Act barred courts from giving "weight to an Agency's demonstrated expertise and consistency" in reviewing agency readings of statutes. 361 N.C. 679, 681, 652 S.E.2d 251, 252 (2007) (per curiam). This Court unanimously reversed the decision. It did so because it held that our legislature had envisioned that when courts conducted "de novo review" under the APA, those courts would afford "some deference" to agency interpretations of the law where doing so was appropriate under prior precedent. *Id.* at 681-82, 652 S.E.2d at 252-53.[8] Given the legislative sanction of this practice, the limited deference that agencies enjoy when

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[8] This Court's decision in *Rainey* specifically concerned deference for statutes, not regulations. When this Court decided *Rainey* in 2007, however, it had already held a decade earlier that agency readings of regulations should be afforded the same deference as agency readings of statutes. *See Britt*, 348 N.C. at 576, 501 S.E.2d at 77. *Rainey*'s holding that the legislature has acted with the understanding that courts conducting judicial review under the APA would afford agencies deference thus applies equally to both statutes and regulations. 361 N.C. at 681, 652 S.E.2d at 252-53.

they offer readings of statutes and regulations is consistent with the General Assembly's intent in enacting the APA.

Furthermore, this deference does not deprive courts of their power to say what the law is, as Dr. Mitchell suggests. With respect to statutes, this Court has long given effect to "clarifying amendment[s]" enacted by the legislature that provide "insight into the way in which the legislature intended [a statute] to apply from its original enactment." *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 9, 727 S.E.2d 675, 681 (2012) (Newby, J.). Through this practice, this Court has afforded some deference to the legislature's views in interpreting its statutes, because doing so assists this Court in accurately interpreting their meaning. Just like this practice, giving weight to agencies' views in construing *their own regulations* helps this Court accurately interpret the law. It does not prevent it from doing so.

Indeed, granting some deference to longstanding, consistent agency readings of regulations is a particularly helpful tool for accurately interpreting the law. If an agency has consistently read its own regulation in a certain manner over a long period and the legislature has not enacted a statute supplanting the agency's reading, then that inaction is a sign that the legislature approves of how an agency has exercised its regulatory authority.

The legislature, after all, has "no need" to act when a policy has "already [become] well established" and the legislature agrees with the policy. *Wilder v. Amatex Corp.*, 314 N.C. 550, 560-61, 336 S.E.2d 66, 72 (1985).

Dr. Mitchell thus fails to show that the longstanding practice of granting some deference to an agency's reading of its own regulations—and only when that reading is thorough, well-reasoned, and consistent over time—runs afoul of separation of powers. It rather assists our State's courts in accurately interpreting the law.

Second, Dr. Mitchell also argues that deference is unwarranted here because the University's reading of its regulations was supposedly "first set forth in the University's appellate brief." Br. at 40 (emphasis removed). Dr. Mitchell's claim on this point is incorrect. The University has always taken the position that the chancellor had the authority to decline to accept the faculty committee's recommendation that Dr. Mitchell not be dismissed. (*See, e.g.*, Doc. Ex. 213-14, 261, 1062-63) That position, moreover, has also been consistent with the position that the University has taken—and the Court of Appeals has accepted—in many other cases over time. *See supra* 61-63. Dr. Mitchell thus fails to show that the University's position here is new or inconsistent with its prior positions.

Third, Dr. Mitchell argues that deference is inappropriate here based on this Court's recent decision in *Sound Rivers, Inc. v. North Carolina Department of Environmental Quality*. In that case, Dr. Mitchell notes, this Court "declined to give an agency 'deference in its interpretation'" of a regulation. Br. at 46 (quoting 385 N.C. 1, 8 n.6, 891 S.E.2d 83, 88 n.6 (2023)).

If Dr. Mitchell means to suggest that *Sound Rivers* shows that deference to agencies is never appropriate, that is incorrect. This Court, as noted, has recognized that deference is only appropriate if regulations are ambiguous. *See, e.g.*, *Britt*, 348 N.C. at 576, 501 S.E.2d at 77. In *Sound Rivers*, the "plain language" of the regulations at issue there *supported* the agency's reading of its own regulations. 385 N.C. at 8, 891 S.E.2d at 88. As a result, in that case, this Court did not need to reach the issue of whether deference was warranted. And as shown above, the same is true here. *See supra* 41-57.

Finally, Dr. Mitchell also argues that affording deference would be improper here under the rule of lenity. Br. at 47. Under that rule, this Court strictly construes laws that are "penal" in nature, only reading them to bar conduct that they unambiguously reach. *Elliott v. N.C. Psych. Bd.*, 348 N.C. 230, 235, 498 S.E.2d 616, 619 (1998). This rule has no bearing here. This case does not turn on whether Dr. Mitchell had notice that his conduct might

subject him to punishment. *See supra* 10-11. It instead turns on a disagreement over procedures. *See supra* 41-57. Because these procedural rules do not themselves punish Dr. Mitchell, they are not "penal" in nature and thus the rule of lenity does not apply.[9]

For all these reasons, therefore, if this Court reaches this issue at all, the University's reading of the Code and the Handbook should be "accorded some deference." *Britt*, 348 N.C. at 576, 501 S.E.2d at 77.

CONCLUSION

The University respectfully requests that this Court affirm the decision of the Court of Appeals.

This 14th day of August, 2024.

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N.C. R. App. P. 33(b) Certification:
I certify that the attorneys listed below

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[9] *See, e.g.*, *Jones*, 364 N.C. at 254-55, 698 S.E.2d at 54 ("defer[ring]" to the Department of Correction's reading of its own "[p]rocedures"); *United States v. Puentes*, 803 F.3d 597, 610 n.4 (11th Cir. 2015) (noting lack of authority for "applying the rule of lenity to . . . procedural provision[s]").

have authorized me to list their names on this brief as if they had personally signed it.

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