No. 121A23 TWENTY-FIRST JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

ALVIN MITCHELL, *Petitioner-Appellant,* v. **THE UNIVERSITY OF NORTH CAROLINA BOARD OF GOVERNORS,** *Respondent-Appellee.*	From Forsyth County 19-CVS-3758 COA21-639

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BRIEF OF *AMICUS CURIAE* ALLIANCE DEFENDING FREEDOM

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BRIEF OF *AMICUS CURIAE* ALLIANCE DEFENDING FREEDOM

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INTERESTS OF *AMICUS CURIAE*

Under N.C. R. APP. P 28.1, Alliance Defending Freedom submits this brief as *amicus curiae* supporting Petitioner Alvin Mitchell.[1] ADF is a public-interest law firm dedicated to protecting religious freedom, free speech, and other constitutional rights. ADF has contributed to 74 Supreme Court victories and represented parties in 15.[2] In 2018, *Empiri-*

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[1] Counsel for *amicus* states that no person or entity other than *amicus*, its members, or its counsel directly or indirectly authored this brief in whole or in part or made a monetary contribution to the preparation or submission of this brief. N.C. R. APP. P. 28(b)(3)(c).

[2] *E.g.*, *303 Creative, LLC v. Elenis*, 600 U.S. 570 (2023); *Uzuegbunam v. Preczewski*, 592 U.S. 279 (2021).

cal SCOTUS ranked ADF first among "the top performing firms" litigating First Amendment cases.[3]

A "nationally respected civil rights organization[ ]," *Gonzales v. Trevino*, 60 F.4th 906, 913 n.4 (5th Cir. 2023) (Ho, J., dissenting from denial of rehearing *en banc*), ADF frequently represents students and student groups who seek to exercise their free speech rights on public university campuses, despite policies that curtail this freedom. *E.g.*, *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008); *OSU Student All. v. Ray*, 699 F.3d 1053 (9th Cir. 2012). But threats to free speech also endanger faculty, as numerous ADF clients can attest. *E.g.*, *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021); *Adams v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011); *Josephson v. Ganzel*, 2023 WL 2432024 (W.D. Ky. Mar. 9, 2023); *Hiers v. Bd. of Regents of Univ. of N. Tex. Sys.*, 2022 WL 748502 (E.D. Tex. Mar. 11, 2022); *Sheldon v. Dhillon*, 2009 WL 4282086 (N.D. Cal. Nov. 25, 2009).

Dissenting faculty often suffer unlawful censorship and retaliation because of their protected expression. University officials frequently rely on pretexts and legal arguments like those advanced here to justify this mistreatment. Thus, ADF and the thousands of students and faculty it represents have a particular interest in this case's outcome. As this Court's decision could adversely impact professors'—and even stu-

[3] Adam Feldman, *Supreme Court All-Stars 2013–2017*, EMPIRICAL SCOTUS (Sept. 13, 2018), https://bit.ly/2pm2NXn. (All links in this brief were last visited on May 28, 2023).

dents'—free speech rights, ADF submits this brief to ensure that universities do not obtain *carte blanche* authority to punish faculty speech and to chill free speech where it should be most protected.

STATEMENT OF ISSUES

This brief will address two questions:

1. Whether professors retain First Amendment protections for their speech that is related to scholarship and teaching in the wake of *Garcetti v. Ceballos*, 547 U.S. 410 (2006).
2. Whether Dr. Mitchell's letter to Dr. Nation qualifies for First Amendment protection under the *Pickering-Connick* analysis.

The answer to both is the same: "Yes."

INTRODUCTION

When Dr. Mitchell expressed his views on race in higher education, he delved into one of the most controversial issues of our day. Many disagree with him. Indeed, ADF takes no position on whether his views are correct or offensive. But everyone should agree that when government punishes people for expressing differing views, it violates the "fixed star in our constitutional constellation" that "no official, high or petty, can prescribe what shall be orthodox in ... matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Winston Salem State University officials and the lower court suggest this case is different, citing Dr. Mitchell's tone and terminology. But had officials agreed with him, they would have seen his vehemence as conviction, his vivid rhetoric as courage. They would have lauded him for "speaking truth to power." Plus, they and the lower court overlook how free speech "best serve[s] its high purpose when it induces a condition of unrest, creates dissatisfaction …, or even stirs people to anger." *Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949). Dr. Mitchell chose words that conveyed powerful "emotive," as well as "cognitive," "force" on an issue of undeniable public importance. *Cohen v. California*, 403 U.S. 15, 26 (1971). For 75 years or more, the First Amendment has protected that choice, especially on campus. So the lower court erred in dismissing his speech as a private personnel dispute.

The lower court rightly did not rule that professors lose their free speech rights at the campus gate thanks to the "official duties" test of *Garcetti v. Ceballos*, 547 U.S. 410 (2006). This Court should likewise decline the University's invitation to err. For this notion runs counter to decades of Supreme Court precedent on faculty speech, to *Garcetti's* own terms, and to Fourth Circuit precedent interpreting *Garcetti*, plus precedent from all other federal appellate courts to consider the issue.

It would also stifle the marketplace of ideas, stripping faculty of First Amendment freedoms when they research or teach. "If professors lacked free-speech protections when teaching, a university would wield alarming power to compel ideological conformity." *Meriwether*, 992 F.3d at 506. It "could require a pacifist to declare that war is just, a civil rights icon to condemn the Freedom Riders, a believer to deny the existence of God, or a Soviet émigré to address his students as 'comrades.'" *Id.* "That cannot be," a principle this Court should make clear. *Id.*

ARGUMENT

I. The Supreme Court has long ruled that the First Amendment protects faculty speech.

For over seven decades, the Supreme Court has recognized the special role that public school teachers—especially professors—play in our democratic system and the necessity of safeguarding their free speech rights. In 1952, Justice Frankfurter observed that to "regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole." *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J. concurring). To them we entrust "the special task" of "fostering those habits of open-mindedness and critical inquiry which alone make for responsible citizens." *Id.* (Frankfurter, J. concurring).

But teachers cannot perform this task without freedom: "They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom[.]" *Id.* at 196–97 (Frankfurter, J. concurring). And it is the Constitution, specifically the First Amendment, that safeguards that freedom "against infraction by … State government," including the University officials who fired Dr. Mitchell. *Id.* at 197 (Frankfurter, J. concurring).

In the 1950s, a professor was sentenced to jail for refusing to answer questions about his Marxist views. *Sweezy v. New Hampshire*, 354 U.S. 234, 238–45 (1957). The Supreme Court reversed, stating, "The essentiality of freedom in the community of American universities is almost self-evident." *Id.* at 250. This freedom rests on professors' free speech: "No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Id.* Any threat to this freedom poses dire consequences: "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Id.*

Ten years later, the Supreme Court struck down a statute prohibiting the employment of any person who "'advocates, advises or teaches the doctrine' of forceful overthrow of government" because it could "prohibit the employment of one who merely advocates the doctrine in the abstract," such as a "teacher who informs his class about the precepts of Marxism or the Declaration of Independence" or who "writ[es] articles" on the subject. *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 599–600, 602 (1967). The university conducted an "annual review of every teacher to determine whether any utterance or act of his, inside the classroom or out, came within the sanctions of the laws." *Id.* at 602.

The Court held that the law was unconstitutionally vague and that such vagueness would "stifle that free play of the spirit which all teachers ought especially to cultivate and practice," *id.* at 601 (cleaned up), and would create a "chilling effect upon the exercise of vital First Amendment rights," *id.* at 604. So the Court recognized that professors like Dr. Mitchell have First Amendment rights over their teaching and scholarship and that universities may not infringe these "precious freedoms"—even when evaluating job performance. *Id.* at 603 (cleaned up).

II. Faculty speech related to scholarship or teaching—like Dr. Mitchell's here—retains its First Amendment protections.

At the trial court, the University argued the First Amendment did not protect Dr. Mitchell's speech because he "wrote this letter in his role as a Professor at WSSU, not as a citizen." (R p 44.) It thus invited the court to adopt *Garcetti's* "official duties" test. Under that test, when public employees speak "pursuant to their official duties," they are "not speaking as citizens for First Amendment purposes" and have no free speech rights. *Garcetti*, 547 U.S. at 421.

The appellate court rightly declined this invitation. This Court should make clear that this test has no bearing on faculty speech related to teaching and scholarship, including Dr. Mitchell's. Such a ruling would align this Court with *Garcetti*, the Fourth Circuit, and every federal appellate court to consider this issue.

A. Dr. Mitchell's letter was not part of his official duties, rendering *Garcetti* inapplicable.

First, *Garcetti* only applies if Dr. Mitchell's letter to Dr. Nation was part of his "official duties." It was not.

Speech falls into this category only if it "owes its existence to [Dr. Mitchell's] professional responsibilities," is "commissioned or created" by the University, "is part of what [Dr. Mitchell] was employed to do"; is a task Dr. Mitchell "was paid to perform"; and "[has] no relevant analogue to speech by citizens who are not government employees." *Id*. at 421–24. But Dr. Mitchell wrote a private letter to a colleague on his own volition. The University did not commission him to write it, and it was not part of his professorial duties.

To be sure, the letter involved information Dr. Mitchell learned while on the job. But for the "official duties" test, "the critical question … is whether *the speech at issue is itself* ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Lane v. Franks*, 573 U.S. 228, 240 (2014) (emphasis added). Drafting letters to Dr. Nation about the impact of racism in academia is not ordinarily part of Dr. Mitchell's duties. So *Garcetti* does not apply.

B. The Supreme Court refused to extend *Garcetti* to faculty speech "related to scholarship or teaching."

The *Garcetti* Court itself refused to extend the "official duties" test to speech like Dr. Mitchell's. As the Supreme Court unveiled this test, Justice Souter sounded an alarm: "This ostensible domain beyond the

pale of the First Amendment is spacious enough to include even the teaching of a public university professor." *Garcetti*, 547 U.S. at 438 (Souter, J. dissenting). He hoped the majority "does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to … official duties.'" *Id.* (Souter, J. dissenting) (cleaned up).

The majority agreed that "expression related to academic scholarship or classroom instruction implicates additional constitutional interests." *Id.* at 425. So it declined to extend the new test to faculty: "We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." *Id.* Notably, these remarks are not limited to scholarship and teaching narrowly construed but cover any "speech *related to* scholarship or teaching." *Id.* (emphasis added).

Dr. Mitchell's letter easily falls into this spacious category. He spent half the letter defending the scholarly *bona fides* of an academic conference at which he and two students planned to present. (Doc.Ex. 437.) So this impacted not just his scholarship, but opportunities to mentor his students in these endeavors. In the second half, he critiqued the animus he perceives in academia towards scholars of his background, a bias that also would impede his scholarship and impact his students and their future careers. (Doc.Ex. 437.)

C. Federal appellate courts agree that *Garcetti's* "official duties" test does not apply to faculty speech.

Given the historical protections for faculty speech and *Garcetti's* refusal to erode them, federal appellate courts—including the Fourth Circuit—have refused to apply the "official duties" test to faculty engaged in teaching and scholarship. This Court should do likewise.

In 2006, Dr. Adams, a criminology professor, was denied a promotion when colleagues objected to the views he expressed in books, op-eds, media interviews, and free-speech activism. *Adams*, 640 F.3d at 553–55. Applying *Garcetti*, the district court ruled against him, concluding that when he referenced this expression in his application, it became speech "made pursuant to his official duties." *Id.* at 561.

The Fourth Circuit reversed, partly because the lower court "applied *Garcetti* without acknowledging, let alone addressing, the clear language in that opinion that casts doubt on whether the *Garcetti* analysis applies in the academic context of a public university." *Id.* The Fourth Circuit held that "*Garcetti* would not apply in the academic context of a public university as represented by the facts of this case" *Id.* at 562. The "official duties" test "may apply" to faculty when "declaring or administering university policy," but not when engaged in "teaching and scholarship." *Id.* at 563. Otherwise, "many forms of public speech or service a professor engaged in during his employment" would be "beyond the reach of First Amendment protection." *Id.* at 564. "That would not appear to be what *Garcetti* intended, nor is it consistent with our

long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment." *Id.*

Dr. Adams' speech did not occur in his classroom, was not aimed at his students, and had no "direct application to his UNCW duties." *Id.* at 563–64. But to the Fourth Circuit, it was still speech "related to teaching and scholarship." *Garcetti*, 547 U.S. at 425. Thus, *Pickering*—not the "official duties" test—applied. *Adams*, 640 F.3d at 564–65.

Since then, four more appellate courts have ruled likewise. When a professor suffered retaliation for distributing a proposed restructuring plan and draft chapters of a book, the Ninth Circuit ruled that "*Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher or professor." *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014). Rather, that speech is "protected under the First Amendment, using the analysis established in *Pickering [v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1868)]." *Id.*

When a university punished a professor for in-class speech, the Fifth Circuit ruled her claims must be analyzed under *Pickering*, not *Garcetti*. *Buchanan v. Alexander*, 919 F.3d 847, 852–53 (5th Cir. 2019).

When a university punished a philosophy professor for declining to use transgender terminology, the Sixth Circuit ruled that *Garcetti's* "official duties" test did not bar his free speech claims. *Meriwether*, 992 F.3d at 504. It grounded this holding in the Supreme Court's historic

protections for faculty speech, in *Garcetti's* reasoning, and in the rulings from sister circuits. *Id.* at 503–06. And like the Fourth Circuit, it ruled that *Garcetti's* exception for speech related to scholarship or teaching "covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not." *Id.* at 507. So Dr. Mitchell's out-of-class speech discussing a conference that impacted both his scholarship and his teaching also qualifies.

Last year, the Second Circuit followed suit, "holding that [it] must evaluate [faculty] claims founded on … speech [related to scholarship or teaching] outside of *Garcetti's* 'official duties' framework." *Heim v. Daniel*, 81 F.4th 212, 228 (2d Cir. 2023).

Dr. Mitchell's letter—comparing the scholarly merits of two academic conferences and highlighting how this impacted his scholarship and his ability to mentor students—is "related to scholarship and teaching." *Garcetti*, 547 U.S. at 425. Thus, whether it is official or private speech, this Court should apply the *Pickering-Connick* analysis.

III. The First Amendment protects Professor Mitchell's letter.

Because *Garcetti* does not apply, two other Supreme Court decisions do: *Pickering*, 391 U.S. at 571–74, and *Connick v. Myers*, 461 U.S. 138, 142–54 (1983). Under the *Pickering-Connick* analysis, Dr. Mitchell's speech is protected because (1) he addressed a matter of public concern, and (2) his interest in speaking outweighs the University's interest in promoting efficient public services. *Pickering*, 391 U.S. at 568;

Connick, 461 U.S. at 140. *Accord, e.g.*, *McVey v. Stacy*, 157 F.3d 271, 277–87 (4th Cir. 1998); *Adams*, 640 F.3d at 560–61, 565.

A. Dr. Mitchell's letter addressed issues of public concern.

The lower court rightly recognized that (1) "[a]n employee may not be discharged for expression of ideas on a matter of public concern," and (2) the employee's "expression need not be public but may be made in a private conversation." *Mitchell v. Univ. of N.C. Bd. of Govs.*, 288 N.C. App. 232, 241–42 (2023) (cleaned up).

But it erred in concluding that 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 Petitioner's preferred conference," and thus "did not implicate a matter of public concern." *Id.* at 243. This ignores the controversial issues of public debate the letter raised.

To determine whether a public employee spoke on matters of public concern, courts look to the "content, form, and context of a given statement." *Connick*, 461 U.S. at 147–48. The Supreme Court has a "broad conception of 'public concern,'" *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001), that encompasses any "issue of social, political, or other interest to a community." *Ridpath v. Bd. of Govs. Marshall Univ.*, 447 F.3d 292, 316 (4th Cir. 2006). This includes topics like "academic freedom, civil rights, campus culture, sex, feminism, abortion, homosexuality, religion, and morality." *Adams*, 640 F.3d at

564–65. It includes all but that "narrow spectrum" of speech that is purely of "personal concern," such as a "private personnel grievance." *Piver v. Pender Cnty. Bd. of Educ.*, 835 F.2d 1076, 1079 (4th Cir. 1987).

Reading Dr. Mitchell's letter in context, it addresses many matters of public concern:

1. The merits of one academic conference with more racial diversity over another with less;
2. The merits of student scholarship;
3. The state of racial issues in academia;
4. How students should consider their race in pursuing scholarship; and
5. How racial minorities should present themselves in academia.

Perhaps, the letter's tone and terminology prevented Dr. Nation and others from recognizing the public concerns it addressed, or perhaps they latched onto this to justify getting rid of someone they disliked. But even in the letter's most strident section, Dr. Mitchell did not denigrate Dr. Nation's race; he summarized how he thought other academics viewed her because of her race. (Doc.Ex. 437 ("In their eyes…. They still look at you….").) People can vigorously debate whether his perceptions are accurate. People can, as Judge Murphy did, conclude the letter "reads, simultaneously and inseparably, as a defense of the academic legitimacy of a conference, an expression of dissatisfaction on the state of racial diversity in academia, and a statement of frustration with Dr. Nation, both personally and with any potential unconscious biases." *Mitchell*, 288 N.C. App. at 249 (Murphy, J., concurring). But "pro-

testing race discrimination in a public school, [is] speaking out on a matter of public concern." *Love-Lane v. Martin*, 355 F.3d 766, 782 (4th Cir. 2004). And Dr. Mitchell just needs to show that some, not all, of his speech fell into this category. *Connick*, 461 U.S. at 149.

In short, the content, form, and context of Dr. Mitchell's speech confirm that he spoke on contentious issues of race in academia—quintessential issues of public concern.

B. Dr. Mitchell's interest in addressing public concerns outweighed any University interest.

Pickering's second prong balances Dr. Mitchell's interest in speaking against the "University's interest in the efficient provision of public services." *Ridpath*, 447 F.3d at 317; *accord Adams*, 640 F.3d at 560–61.

On Dr. Mitchell's side of the scale is "the robust tradition of academic freedom in our nation's post-secondary schools," which "alone offers a strong reason to protect [his] speech." *Meriwether*, 992 F.3d at 509 (cleaned up). Here, the University "must make a stronger showing of the potential for inefficiency or disruption" because Dr. Mitchell's "speech involves a 'more substantial[ ]' matter of public concern." *Love-Lane*, 355 F.3d at 778. Also in his favor is the fact that "the University community as a whole, is less likely to suffer a disruption in its provision of services as a result of a public conflict" than other public agencies. *Mills v. Steger*, 2003 WL 21089092, at *7 (4th Cir. May 14, 2003).

No University interest in fostering close relationships will outweigh Dr. Mitchell's interest in expressing his views. For "anyone who has spent time on college campuses knows that the vigorous exchange of ideas and resulting tension between an administration and its faculty is as much a part of college life as homecoming and final exams." *Bauer v. Sampson*, 261 F.3d 775, 785 (9th Cir. 2001).

The University offers no evidence that Dr. Mitchell's letter impacted his duties at all. It offended a few administrators. But the "mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of conventions of decency." *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973). Thus, the University's interest in limiting his speech is "not great," *Meriwether*, 992 F.3d at 511, and the First Amendment protects his speech. The lower court should be reversed.

CONCLUSION

Dr. Mitchell's speech on contentious issues of race and academia deserves First Amendment protection. Thus, this *amicus* respectfully requests that this Court reverse the ruling below.

Respectfully submitted the 29th day of May, 2024.

ALLIANCE DEFENDING FREEDOM

Electronically submitted

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of N.C. R. APP. P. 28.1 (b)3)(d) because this brief contains 3,750 words, excluding parts of the brief exempted by N.C. R. APP. P. 28(j)(1).

This brief complies with the typeface requirements of N.C. R. APP. P., App. B because this brief has been prepared in Word 365 using a proportionally spaced typeface, 14-point Century Schoolbook.

Respectfully submitted the 29th day of May, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the Supreme Court of North Carolina, thereby serving it on all counsel of record by email.

Respectfully submitted the 29th day of May, 2024.

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