No. 33-0619

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

TOBIAS FUNKE, IN HIS OFFICIAL CAPACITY AS DEAN, STATE UNIVERSITY,
PETITIONER

v.

GEORGE BLUTH,
RESPONDENT

RECORD ON APPEAL
2008 BURTON WECHSLER FIRST AMENDMENT COMPETITION
AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW
MOOT COURT HONOR SOCIETY
WASHINGTON, D.C.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MOOT

GEORGE BLUTH,	)	
	)	
Plaintiff	)	
	)	
	)	
v.	)	**Civil Action No. Moot 5108-08**
	)	
TOBIAS FUNKE, in his official capacity as Dean, STATE UNIVERSITY	)	
	)	
Defendant	)	

Filed: January 10, 2008
Decided: January 19, 2008

MEMORANDUM AND ORDER

THOMAS, Chief Judge:

The instant matter before the Court is Defendant's motion for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). On January 10, 2008, Plaintiff George Bluth, Professor of Art History at State University, brought this civil action pursuant to 42 U.S.C. § 1983 against Dr. Funke, in his official capacity as Dean of State University. Plaintiff asserted causes of action for violations of his right to academic freedom under the First Amendment.[1] Plaintiff seeks preliminary and injunctive relief, as well as an award of damages.

On January 15, 2008, Plaintiff moved for preliminary injunction. In response, Defendant filed the motion before the Court for failure to state a claim. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, and has resolved all issues as to standing and ripeness. For the reasons below, Defendant's motion for failure to state a claim under Fed R. Civ. P. 12(b)(6) is **AFFIRMED**.

BACKGROUND

State University ("the University") employed George Bluth as a tenure-track Professor of Art History for three years. The terms of his contract stipulated that his employment was subject to renewal on an annual basis. Professor Bluth, a respected

[1] The First Amendment states that "Congress shall make no law … abridging the freedom of speech…" The Fourteenth Amendment applies this provision of the Bill of Rights to the States. *Gitlow v. People of State of New York*, 268 U.S. 252 (1925). In *Monroe v. Pape*, 365 U.S. 167 (1961), the Supreme Court held that 42 U.S.C. § 1983 creates a remedy for violations of rights secured by the Constitution or the laws of the United States.

scholar in his field who was extensively published in peer-reviewed journals, had earned the respect of his colleagues at the University. Students generally considered Professor Bluth to be a skillful and intelligent professor, an endearing "curmudgeon" at the University who had soon become well-known amongst the students. However, Professor Bluth also earned a reputation as a tough and demanding professor who rarely awarded high grades. Bluth believed firmly in assigning grades based on merit, and challenged his students to meet his demanding standards in his courses. Each semester, numerous students walked away from his course expressing their sense that they should have received a higher grade. Nevertheless, these disappointments usually amounted to no more than grumbling; until recently, no student had filed an official complaint about Professor Bluth.

George Michael enrolled in Professor Bluth's course, "The History of Vienna Art and Architecture" for the Spring 2007 semester. Michael, then a junior at the University, carried a 3.64 grade point average and was generally considered a top student by his peers. Michael, the Student Body President, was well-known at the University but was reputed to have an arrogant and self-important personality. Michael had enrolled at the University as a third-generation legacy student, who planned to follow in the footsteps of his father, a highly successful attorney who donated generously to the school. In 2006, a generous gift from Michael's father made possible the expansion of the University's football stadium. Michael's father has a collegial and extensive relationship with the University's administration and has distantly assisted in his son's legal defense thus far.

The grading portion of the syllabus for the class read as follows:

Final 40%

Minor Writing Assignments 30%

Class Participation 30%

> *The final will be an in-class comprehensive exam that will consist of 60 multiple choice questions.*
>
> *The minor writing assignments include 2-4 page assignments every other week on topics ranging from Gustav Klimpt to Egon Schiele to the history of the Ringstrasse.*
>
> *The final 30% of your grade is a combination of your contribution to class discussion and class attendance. Student conversation must further class discussion in order to count as participation. Any student who has more than five unexcused absences from class will receive a zero for class participation. Any absence, excused or not, may hurt your class participation grade.*

At the conclusion of the semester, George Michael received a "D" in the course. Michael was dismayed over his grade as he had earned a "95%" on the final and an "80%" on the minor writing assignments. He arranged a meeting with Professor Bluth to discuss his grade. At the meeting, Professor Bluth explained that

participation is an important element of the class and it allows him to gauge whether or not students did the reading. Professor Bluth explained that George Michael received only a "10%" on participation because he had four unexplained absences and that, in his opinion, George Michael's class remarks failed to reach the threshold necessary to be considered substantive comments that advanced class discussion. Bluth explained that when Michael did attend class, his participation had been mere showboating and did not demonstrate that he had read or understood the material. Professor Bluth then explained that he had a strict policy on not changing grades unless there was an error with the calculations and that the computation of Michael's grade contained no such error. Frustrated and upset, George Michael left Professor Bluth's office and promptly filed a grievance with the Office of the Dean.

The following week, Professor Bluth received a note from the Dean, Dr. Tobias Funke, requesting that the professor meet him in his office. During the meeting, Dr. Funke instructed Professor Bluth to change George Michael's grade from a "D" to a "B." Dr. Funke expressed concern that Professor's Bluth's grades appeared arbitrary and that, although the University had no official grading policy, his grades were not in line with the grading practices of his fellow faculty. Professor Bluth refused to change George Michael's grade, stating that his grading was a fair assessment of the student's performance in his class. The two educators then engaged in a heated discussion culminating with Dr. Funke warning Professor Bluth that if he did not cooperate with the administration, he would be hurting his chances of receiving tenure. Though the exact details of the discussion are disputed, it is certain that the discussion created a permanent rift between the two.

In the aftermath of the meeting, Professor Bluth initially resolved not to change George Michael's grade. However, the following week, in fear of his job safety because of the tenuous status of his annual contract, Bluth complied with Dr. Funke's demands and changed Michael's grade to a "B". Several days later, Professor Bluth received a letter informing him that his contract would not be renewed.

Following his termination, Professor Bluth brought this civil action pursuant to 42 U.S.C. § 1983 against Dr. Funke, asserting causes of action for violations of his right to academic freedom under the First Amendment.

STANDARD OF REVIEW

In reviewing a motion to dismiss under Rule 12(b)(6), we must construe the facts in the light most favorable to the plaintiff. *Held v. Allied Pilots Ass'n*, 497 F. Supp. 2d 922, 924 (N.D. Ill. 2007).

Even considering the facts favorably to the Plaintiff, we must affirm Defendant's motion to dismiss, for two reasons. First, Plaintiff's claim under the First Amendment cannot stand because the assignment of grades does not constitute "speech" meriting First Amendment review. Second, even assuming the nature of a grade assignment to be protected "speech", the University is insulated from a stringent review by this court because the Supreme Court has afforded employers wide latitude in disciplining their employees' speech within the workplace.

ANALYSIS

I. A University's Professor's Assignment of Grades Does Not Constitute "Speech" Under the First Amendment.

Plaintiff claims that by "compelling" him to change his student's grade, the University has violated his First Amendment speech right to assign grades. However, Plaintiff's argument is premised on the belief that a state-sponsored university professor's assignment of grades is truly individual "speech" affording the "speaker" the protections of the First Amendment. We find the Third Circuit's reasoning in *Brown v. Armenti,* 247 F.3d 69 (3d Cir. 2001), persuasive on this point. *See also Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998) (finding that a "a public university professor does not have a First Amendment right to decide what will be taught in the classroom").

In *Brown*, a tenured university professor was ordered to change one of his student's grades from an "F" to an incomplete. When the professor refused, he was suspended from teaching the course, prompting his vocal criticism of the university's president. That professor was terminated two years later. In analyzing the professor's First Amendment claims, the Third Circuit noted that the assignment of grades is subsumed under the university's freedom to determine how a course is to be taught and, therefore, individual professors do not possess First Amendment rights independent of those of the university. *See Brown*, 247 F.3d at 75; *see also Lovelace v. Se. Mass. Univ*., 793 F.2d 419 (1st Cir. 1986). While we recognize that professors pursue an important individual academic mission, this mission is tied directly to the larger educational directives of their respective institutions. Professors are not free agents, but are instead virtual agents for the school. Therefore, they possess little freedom to overrule their superiors on issues of university-wide pedagogy.

Further, we are persuaded by *Brown*'s holding that a court's scrutiny of university grading procedures is a matter that does not "warrant the intrusive oversight by the judiciary in the name of the First Amendment." *See Brown*, 247 F.3d at 75. As *Brown* noted, state universities' grading procedures and the amount of power they have allocated between administrators and individual professors vary significantly. Courts of law are ill-equipped to make factual determinations concerning the merits of different universities' approaches. So long as the university does not blatantly intrude on constitutionally-protected rights, their actions are entitled to a significant degree of judicial deference.

Alternatively, Plaintiff urges this Court to treat his grades as "symbolic speech" under the Supreme Court's three-pronged analysis in *Spence v. Washington*, 418 U.S. 405 (1974). Under the *Spence* test, a reviewing court will consider three factors: (1) the speaker's subjective intent to convey a particularized message (2) the objective likelihood that the message would be understood by those who viewed it; and (3) the context of the conduct asserted to be speech. *Id.* This test has been applied to characterize certain actions otherwise not considered speech as communicative acts meriting First Amendment protection. A primary example of this sort of "symbolic speech" can be found in the seminal case of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (recognizing that a student in a public high school wearing a black armband in protestation of the Vietnam War was communicating speech through the symbolism of the armband, and therefore applying First Amendment protection to the act). *See also United States v. O'Brien*, 391 U.S. 367 (1968); *Cohen v. California*, 403 U.S. 15 (1971); *Texas v. Johnson*, 491 U.S. 397 (1989).

Plaintiff's actions, however, differ substantially from the communicative act at issue in *Tinker*. Here, Plaintiff is an

employee of the University, and his assignment of grades is subject to the review and scrutiny of his employer. Though the University granted Plaintiff some freedom to determine his methodology of grade calculation, this methodology is not immunized from review by the University administration. Thus, the Plaintiff's act in choosing grades for his students does not reflect the Plaintiff's own independent "speech", a stark contrast to Tinker's armband representing individual student views on the Vietnam War. Furthermore, the *Tinker* armbands conveyed a unique and creative message; Plaintiff here merely assigned his students' grades by rote calculation.

We must next address Plaintiff's strategic couching of his claim within the esoteric doctrine of "academic freedom." Such a concept can hardly be considered a binding "doctrine," because the Supreme Court has yet to define its bounds. *See Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (recognizing four "academic freedoms" enshrined in the university setting). Though the Court has recognized First Amendment protection concerning "classroom content and methodology," the case law concerning academic freedom is sparse and inconsistent. *See Keyishian v. Board of Regents of Univ. of State N.Y.*, 385 U.S. 589, 603 (1967); *see, e.g*., Elizabeth Mertz, Comment, *The Burden of Proof and Academic Freedom: Protection for Institution or Individual*? 82 NW. U. L. REV. 492, 493 (1988). We therefore agree with the Fifth Circuit that "the concept of academic freedom is 'an amorphous field about which a great deal has been said in esoteric law journal articles . . . but little determined in concrete judicial opinions.'" *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547 (5th Cir. 1982). As *Brown* suggests, any such concept of academic freedom is enjoyed by the public university, and not by its individual agents, the professors.

Therefore, this Court does not find that Plaintiff's actions in assigning a grade to student George Michael constituted "speech" protected by the First Amendment. Further, until directed by the United States Supreme Court, this court declines to adopt Plaintiff's theory of "academic freedom."

II. Even if the Assignment of Grades Does Constitute Speech, Professors would not be Afforded Protection Under the First Amendment

Even if the assignment of grades does constitute speech, the First Amendment would have very limited practical effect on the grade a professor assigns a student. We find that the First Amendment clearly does not protect a public university professor from discipline based solely on the grade he gave to a student.

A. A Professor's Assignment of a Grade Is Not Protected by Either Prong of the *Pickering* Balancing Test.

In the cases that have grappled with the right of a public university professor to assign grades, the majority of circuits have employed a balancing test, like the ones established in the canonical cases of *Pickering v. Board of Education*, 391 U.S. 563, 571-72 (1969), and *Connick v. Myers*, 461 U.S. 138, 147 (1983). *See Brown,* 247 F.3d at 69; *see also Edwards,* 156 F.3d at 488. The *Pickering* test sets out a two-part inquiry: first, the reviewing court must determine whether a public employee's speech is a "matter of public concern." *Id*. at 147. If not, then the employee has no First Amendment cause of action based on his or her employer's reaction to speech that is

merely a matter of private interest to the government entity. *Pickering*, 391 U.S. at 571-72. If the court determines that the speech at issue is on a matter of public concern, the next question is whether the entity possessed an adequate justification for treating the employee's speech differently from that of any other member of the general public. *Id*. Under this inquiry, the government has the broadest discretion to restrict its employees' speech when the employee's interest in expressing herself is outweighed by the injury that the speech could cause to the interest of the government employer's operations. *Rankin v. McPherson*, 483 U.S. 378, 387 (1987).

Assuming that the assignment of grades does constitute speech, the first inquiry is whether the employee's speech is a "matter of public concern." *Pickering*, 391 U.S. at 571. It is unclear what matters of public concern are implicated by the grade Plaintiff assigned his student George Michael; conversely, a student's grades are definitively a private matter between the student and the school. *Cf. Connick*, 461 U.S. at 103 (finding that government did not violate an employee's First Amendment rights when it discharged her for distributing a questionnaire discussing strictly internal administrative procedures to her fellow assistant attorneys in the office). Even if this Court were to determine that George Michael's grade in an obscure art history class were to implicate matters pertinent to public policy, such a finding would still not be dispositive, as the second step of the analysis is the critical prong of the *Pickering* test.

Evaluating the rubric of assigning grades under the *Pickering* balancing requirement, we are next required to balance the Plaintiff's alleged right to academic freedom and the Defendant's administrative efficiency concerns. *Keen*, 970 F.2d at 258. We would find, as have the majority of circuits, that a grade is a message from the university speaking as a whole, rather than from an individual professor. *See, e.g., Lovelace v. Se. Mass. Univ*., 793 F.2d 419 (1st Cir. 1986); *Wozniak v. Conry*, 236 F.3d 888 (7th Cir. 2000); *Brown v. Armenti,* 247 F.3d at 69.

While the interest a professor has in the grade a student receives is nominal, *Wozniak*, 236 F.3d at 891, the interest of the university in establishing fair and consistent grading policies is substantial and definitive. *Keen*, 970 F.2d at 258; *Lovelace*, 793 F.3d at 425-26. Plaintiff argues that his freedom to grade as he sees fit has an impact on his teaching style and the education of his students. However, the assignment of a grade after the class is completed has little effect on a professor's performance during the term. Moreover, the government's interest is overwhelming because the university must maintain standard grading practices for the purpose of preserving the integrity and consistency of its academic procedures and the overall fairness of the grading system. *Lovelace*, 793 F.3d at 425-26. It is ultimately the university's name emblazoned on a student's diploma, not that of a particular professor. Consequently, the assignment of grades is, in the deepest sense, the statement—or "speech"-- of the university and cannot be vested constitutionally in this or that professor.

In this case, Plaintiff argues that by forcing him to change the grade he assigned the student George Michael, Defendant compelled him to speak against his will. However, because the ultimate "speech" right was never the professor's to begin with, the University did not violate Plaintiff's First Amendment rights.

B. Any Speech Made in a Public Employee's Official Capacity is Unprotected

This reasoning is bolstered by the recent decision in *Garcetti v. Ceballos*, which altered significantly the degree of constitutional protection afforded to speech made in a public employee's official capacity. 126 S.Ct at 1960. In *Garcetti*, the Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* Therefore, public employees may be disciplined for speech made in their official capacity, without any First Amendment scrutiny, and without regard to whether it touches on matters of "public concern." *See Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 147; *Rankin*, 483 U.S. at 384; *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 466 (1995).

In *Garcetti*, the controlling factor in deciding whether to apply First Amendment protection was whether the employee's expressions were made pursuant to his duties as a calendar deputy. *Garcetti,* 126 S.Ct at 1959-60. The controlling factor in this case is whether Plaintiff's expression was made pursuant to an administrative task the university required of its professors in their roles as employees. It is incontestable that Plaintiff's power to assign grades exists solely because of his position as a teacher employed by the University. Accordingly, Plaintiff is speaking in the course of performing his official duty and is not engaged in the type of activity undertaken by a private citizen as was the case in *Pickering*, 391 U.S. at 563, and *Rankin*, 483 U.S. at 378. Therefore, because Plaintiff acted as an administrator rather than as an individual when he assigned George Michael's grade, he is not shielded from discipline by the University.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss under 12(b)(6) is **AFFIRMED**.

IN THE UNITED STATES COURT OF APPEALS
FOR THE MOOT CIRCUIT

GEORGE BLUTH,	)	
	)	
Appellant,	)	
	)	**No. Moot APP-5108-08**
v.	)	
	)	
TOBIAS FUNKE, in his official capacity	)	
As Dean of State University	)	
	)	
Appellee.	)	

Opinion Delivered: May 22, 2008

MEMORANDUM AND ORDER

Before Judge Overturf, Judge Qaqundah, and Chief Judge Patterson, Circuit Judges.

PATTERSON, Chief Judge.

INTRODUCTION

On January 10, 2008, Plaintiff brought this civil action pursuant to 42 U.S.C. § 1983 against Dr. Funke in his official capacity as Dean of State University. In his complaint, Professor Bluth asserted causes of action for violations of his right to academic freedom under the First Amendment. Professor Bluth then sought preliminary and injunctive relief, as well as an award of damages. On January 15, 2008, Professor Bluth filed a motion for preliminary injunction. In an order entered on January 19, 2008 the United States District Court for the Eastern District of Moot denied Professor Bluth's motion for preliminary injunction and granted a 12(b)(6) motion for the Defendant. Professor Bluth filed a timely notice of appeal on March 20, 2008. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291. The facts as stated in the district court's opinion are hereby incorporated by reference. The following question is before this Court: (1) whether the district court erred in dismissing Bluth's First Amendment claims resulting from the incident involving the grade awarded to student George Michael.

This Court reviews a district court's dismissal for failure to state a claim *de novo*. *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1031-32 (D.C. Cir. 2004). Upon review of the district court's order, this Court departs from the court's assessment of Appellant's First Amendment claims. As an issue of first impression, this Court acknowledges a broad protective right of academic freedom and recognizes symbolic speech value in a university professor's assignment of grades under the First Amendment. Therefore, the district court's order is **REVERSED** and

REMANDED for relief not inconsistent with this opinion.

ANALYSIS

I. A University's Professor's Assignment of Grades Constitutes "Symbolic Speech" Under the First Amendment.

While a university possesses wide latitude concerning the renewal of yearly employment contracts, "a nontenured teacher may be fired for any reason or no reasons at all but not for the exercise of constitutionally protected rights." *Perry v. Sinderman*, 408 U.S. 593, 597-98 (1972). Here, the University violated Plaintiff's constitutional rights by compelling him to speak in contravention of the First Amendment.

While the district court quickly dispensed with the Supreme Court's test for symbolic speech articulated in *Spence v. Washington*, we believe that the *Spence* test is the proper starting point in analyzing Plaintiff's claim. 418 U.S. 405 (1974). Under *Spence*, we determine whether or not conduct constitutes "symbolic speech" by analyzing three factors: (1) the intent of the speaker to convey a particularized message, (2) the likelihood that the message would be understood as communicative by those who viewed it; and (3) the context of the conduct alleged to be communicative. A professor's assignment of grades fits squarely within the *Spence* framework because the assignment of a grade is a communicative act, understood by those who view it as such in the context of an academic setting.

As the Sixth Circuit found in *Parate v. Isidor*, 868 F.2d 821 (6th Cir. 1989), the assignment of a grade sends a clear message to the recipient. The message communicated by the letter grade "A" is virtually indistinguishable from the message communicated by a formal written evaluation indicating "excellent work." *Parate*, 868 F.2d at 827. Indeed, the very purpose of grading is communicative: to provide relevant, understandable information on the student's intellectual capabilities or overall competence in a particular subject matter to interested persons, including students themselves, potential employers, or admissions committees at graduate or professional schools. While modern grading is now uniformly memorialized using "letters," the history of the teaching profession indicates that such letters evolved from older oral and written evaluations more suited to particular small groups of students. *See* Evelyn Sung, Note, *Mending The Federal Circuit Split on the First Amendment Right of Public University Professors to Assign Grades*, 78 N.Y.U. L. REV. 1550 (2003). Such evaluations undoubtedly would be viewed as speech; it is doubtful that the evolution of such speech into a standardized system suddenly renders the same evaluation non-communicative and therefore beyond the reach of the First Amendment.

As the *Parate* court recognized, grades are not the "rote calculations" that the district court has characterized. In fact, many subjective qualitative factors contribute to the final creation of a letter grade including considerations of attendance, class participation, timely submission of assignments, completion of extra credit, and scores on quizzes, tests, papers, and projects. These considerations indicate that professors are communicating their subjective priorities through individualized speech in assigning a final grade to a student. In the case at bar, Plaintiff was within his pedagogical purview in deciding how to calculate his grade, placing personal emphasis on classroom participation. Plaintiff afforded his students adequate notice of his grading policy and

did not act improperly in making his final calculations, unlike the "arbitrary" grading procedure discredited in *Eisen v. Temple Univ.*, No. CIV.A. 01-4165, 2002 WL 1565331 (E.D. Pa. July 9, 2002).

Further, the Plaintiff's First Amendment symbolic speech rights are integrally intertwined with the rights of academic freedom, which the district court gave short shrift. Although the Supreme Court has only enunciated broad standards for academic freedom since *Sweezy v. New Hampshire*, it has steadfastly emphasized the importance of the doctrine. 354 U.S. 234 (1957); *see also Regents of the Univ. of Cal. v. Bakke,* 438 U.S. 265, 312 (1978). Academic freedom may be subdivided into "four essential freedoms": the right to determine on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study. *See Sweezy*, 354 U.S. at 261. Because the assignment of a letter grade is symbolic communication intended to send a specified message to the student, the communicative act also falls under the umbrella of First Amendment protection. *See Tinker v. Des Moines Indep. Cmty. School Dist*., 393 U.S. 503, 505-06 (1969) (finding that the symbolic act of wearing an armband to protest the Vietnam War was "closely akin to pure speech").

We therefore reject the reasoning of the district court and find that a professor's assignment of grades is a communicative act meriting First Amendment protection for the professor as symbolic speech.

II. Although the Individual Professor Does Not Escape a Reasonable Review of University Officials in the Assignment of Grades, He Should Remain Free to Decide What Grades to Assign.

A. A Professor's Communicative Act of Assigning A Grade is Entitled to Some Measure of First Amendment Protection.

The Supreme Court has recognized that academic freedom is of special concern to the First Amendment and is worthy of constitutional protection. *See Garcetti v. Ceballos*, 126 S.Ct. 1951, 1960 (2006); *see also Pickering v. Board of Educ.*, 391 U.S. 563, 571-72 (1969); *Keyishian v. Board of Regents of the State Univ. of N.Y.*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire,* 354 U.S. 234, 250 (1957).

While a number of courts have expressed concern for the academic freedom of the *university*, the Supreme Court has confirmed that First Amendment rights flow through individual professors, not their institutions. *Sweezy*, 354 U.S. at 250. Indeed, "the nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Keyishian*, 385 U.S. at 603. Therefore, under certain circumstances, it is undeniable that professors possess First Amendment protection. *Parate*, 868 F.2d at 827.

The assignment of grades is one such circumstance. While the Supreme Court has never directly addressed the issue of whether the right to assign grades is protected under academic freedom, it has provided some guidance. *Garcetti*, 126 S.Ct. at 1962. The Supreme Court has held that professors should retain wide discretion over their evaluation of the academic performance of their students in order to determine whether students are entitled to promotion or graduation. *Board of Curators of the Univ.*

of Missouri v. Horowitz, 435 U.S. 78 (1978). The Supreme Court's position was articulated by the Sixth Circuit's finding that the "assignment of a letter grade . . . is a symbolic communication intended to send a specific message to the student . . . [and] is entitled to some measure of First Amendment protection." *Parate*, 868 F.2d at 827; *see also Tinker v. Des Moines Indep. Cmty. School Dist*., 393 U.S. 503, 505-06, (1969); *Brown v. Louisiana*, 383, U.S. 131, 141-42 (1966).

Courts have supported the concept of judicial deference to academic decisions primarily due to the faculty's unique expertise on the particular subject matter. The Supreme Court has held that the judiciary should show "great respect for the faculty's professional judgment," and not disregard an educator's decision unless it is "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 225 (1985); *see also Settle v. Dickson County School Board*, 53 F.3d 152 (6th Cir. 1995); *Horowitz*, 435 U.S. at 78.

Furthermore, the assignment of grades is part of a professor's core academic responsibilities and does not fall into the sphere of administrative prerogatives. The evaluation of student academic performance, which springs from a professor's freedom to determine classroom content, logically includes the assignment of grades. *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547, 553 (5th Cir. 1982). As teachers, professors set the requirements for the class and provide guidance to students to assist them in reaching the highest academic standards. *Parate*, 868 F.2d at 827-28. To effectively accomplish their pedagogical objectives, professors must initially evaluate the student's skills, abilities, and knowledge. The professor must then determine whether students have absorbed the course material, whether new material can be introduced, or whether a review of past material must be undertaken. *Id*. Subsequently, the professor's evaluation of his students is central to the professor's teaching method and the professor is in the best position to ensure that their evaluations reflect each student's true performance. *Id*.

In this case, Appellant reasonably and deliberately tailored his teaching and grading style around class participation and weighted his grading scale accordingly. Through grades, Appellant was able to express his approval or disapproval over a student's performance in his class to encourage participation in order to improve the educative quality of his lesson for the class as a whole. Thus, the grade Appellant assigned to George Michael constitutes individual symbolic speech protected by the First Amendment.

B. A University Cannot Compel a Professor to Speak Against His or Her Will Where Such Speech Is Afforded First Amendment Protection.

Now we turn to the question of whether Appellee can force Appellant to change the grade of his student, George Michael, against his will. The government is unable to compel a citizen to speak, in contradiction to their wishes or intentions, where the citizen possesses the prerogative to speak independently. *W. Va. State Board of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). In *Wooley v. Maynard,* the Supreme Court affirmed the unconstitutionality of a state compelling the speech of its citizens. 430 U.S. 705, 714 (1977). In so holding, the Court relied on the concept that "the right to speak and the right to refrain from speaking are complementary components of the

broader concept of 'individual freedom of mind." *Id.*

In the context of academia, a professor may not be forced, by university officials, to change a grade that the professor previously assigned to her student. *Parate*, 868 F.2d at 827. A professor's original grade is protected speech, and consequently, a university's action to change the grade in a way that clearly departs from the professor's pre-established grading procedure would force an individual professor to represent a position to which she does not adhere. *Id*.

In the instant case, we are presented a situation substantially similar to *Parate*. Appellant assigned George Michael a "D" letter grade and Appellee, in his capacity as a representative of the State University, forced Appellant to alter his original grade. Appellant possesses a First Amendment right to academic freedom, which includes the right to be free from institutional coercion of his pedagogical prerogatives. More to the point, the entire enterprise of higher education depends on the integrity of the grading system, including the professors' commitment to implement their preestablished standards. Just as Appellant possesses a First Amendment right to be free from any efforts by the University to coerce and compel his speech, the university itself may not override academic grading practices to promote other institutional agendas.

Therefore, because the Appellee forced Appellant to change George Michael's grade, against his professional judgment, we find that Appellee violated Appellant's First Amendment rights.

III. CONCLUSION

In summary, Appellant has met the requirements necessary to defeat a motion to dismiss. We accordingly **REVERSE**.

No. 33-0619

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

STATE UNIVERSITY,

Petitioner

v.

GEORGE BLUTH,

Respondent.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES IS **GRANTED**

QUESTIONS ON APPEAL:

(1) Whether the assignment of grades constitutes *speech* under the First Amendment

(2) Whether a public university professor possesses a First Amendment *right* to assign grades