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No. 33-0619

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 2008

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STATE UNIVERSITY,  
*Petitioner,*

v.

GEORGE BLUTH,  
*Respondent.*

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*On Writ of Certiorari to the  
United States Court of Appeals  
for the Moot Circuit*

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**BRIEF FOR PETITIONER**

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**TEAM NO. 005**  
*Counsel for Petitioner*

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## **QUESTIONS PRESENTED**

- I. Whether the conduct of assigning a grade to a student constitutes speech under the First Amendment.
- II. Whether a nontenured professor, who is a public university employee, possesses a First Amendment right to assign grades.

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## **JURISDICTION STATEMENT**

A Formal Statement of Jurisdiction has been omitted in accordance with the rules of the Washington College of Law's Burton D. Wechsler First Amendment Moot Court Competition.

## STATEMENT OF THE CASE

This action arose after State University (“University”) refused to renew George Bluth’s annual employment contract as an Art History professor following his grading dispute with George Michael, a University student, and his related dispute with Dr. Tobias Funke, the University Dean. (R. at 2–3.) In his three years at the University, Professor Bluth earned a reputation as a “tough and demanding professor who rarely assigned high grades.” (R. at 2.) At the end of every semester, numerous students thought that they deserved higher grades in his course. (R. at 2.) When Michael enrolled in Professor Bluth’s course, “The History of Vienna Art and Architecture,” for the Spring 2007 semester, he was a junior carrying a 3.64 grade point average and “generally considered a top student by his peers.” (R. at 2.)

Despite earning a 95% on the final and an 80% on the minor writing assignments, Michael received a “D” in Professor Bluth’s course. (R. at 2.) The course’s syllabus stated that grades would be calculated as follows: 40% Final; 30% Minor Writing Assignment; and 30% Class Participation. (R. at 2.) Michael subsequently arranged a meeting with Professor Bluth to discuss his grade. (R. at 2.) At the meeting, Professor Bluth told Michael that he only received 10% out of a possible 30% for class participation because he had four absences and his “class remarks failed to reach the threshold necessary to be considered substantive comments that advanced class discussion.” (R. at 3.) Professor Bluth informed Michael that his “participation had been mere showboating and did not demonstrate that he had read or understood the material.” (R. at 3.) Professor Bluth refused to change Michael’s grade due to his “strict policy on not changing grades unless there was an error with the calculation.” (R. at 3.)

Subsequently, Dr. Funke instructed Professor Bluth to change Michael's grade from a "D" to a "B."<sup>1</sup> (R. at 3.) Dr. Funke explained to Professor Bluth that his 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." (R. at 3.) Once again, Professor Bluth refused to change Michael's grade, insisting that his grading was "a fair assessment." (R. at 3.) A "heated discussion" ensued, resulting in Dr. Funke's warning Professor Bluth that his chances of receiving tenure would be hurt if he did not cooperate with the administration. (R. at 3.)

Following the meeting, Professor Bluth continued to disobey Dr. Funke's direct instruction by refusing to change Michael's grade. (R. at 3.) It was not until the next week that Professor Bluth complied with Dr. Funke's instruction and changed Michael's grade to a "B." (R. at 3.) Shortly thereafter, the University informed the Professor that his contract would not be renewed. (R. at 3.)

Professor Bluth then brought this civil action against Dr. Funke under 42 U.S.C. § 1983, seeking money damages as well as preliminary and injunctive relief from the United States District Court for the Eastern District of Moot. (R. at 1, 3.) The Professor asserts that by "compelling" him to change Michael's grade, the University's interference with his assignment of grades violated his First Amendment speech right to academic freedom. (R. at 1, 4.)

The district court granted the University's motion to dismiss for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). (R. at 1.) Bluth appealed to the United States Court for the Moot Circuit, which reversed and remanded the matter. (J.A. at 12.) Subsequently, this Court granted certiorari. (R. at 13.)

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<sup>1</sup> Based on the percentages set forth in the course syllabus, if Michael had received a failing 60% for class participation, his final grade would have been "B" (80%).

## SUMMARY OF THE ARGUMENT

The First Amendment to the United States Constitution protects an individual's freedom of speech, which includes pure speech and symbolic speech. To prevail, plaintiffs must show a violation of a constitutionally protected speech right.

Professor Bluth's assignment of a grade to Michael does not constitute symbolic speech under this Court's test, articulated in *Spence v. Washington*, because he did not intend to convey a particularized message, and it was unlikely that Michael or another student would understand the message expressed by the letter grade. Also, the context of this case is materially different from other symbolic speech cases, as the conduct here contained a purely academic, not ideological message.

Even if Professor Bluth's conduct of assigning grades constitutes speech, it is not protected speech under the Constitution because this Court has never recognized a professor's individual right to academic freedom. If this Court extended that right to individuals, it would virtually destroy the structure of a university and force federal courts to entertain suits based on internal school disputes. Also, the grading process is not one of the four recognized academic freedoms.

Furthermore, Professor Bluth is a public employee and his allegations are against his employer, the State University Dean. Under this Court's public employee free speech test, set forth in *Pickering v. Board of Education*, Professor Bluth is not entitled to the same constitutional protections as citizens because a matter of public concern was not implicated when he assigned Michael's grade, and he was acting pursuant to his official duties. Even if Professor Bluth prevails and convinces this Court that his conduct concerned a constitutionally protected speech right, his speech rights were not violated because the University did not compel his speech.

## ARGUMENT

### STANDARD OF REVIEW:

A dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted is subject to *de novo* review. *Glen Holly Entm't, Inc. v. Tektronix*, 352 F.3d 367, 368 (9th Cir. 2003); *Anderson v. Pasadena Indep. Sch. Dist.*, 184 F.3d 439, 443 (5th Cir. 1999). When reviewing a decision granting a motion to dismiss, this Court “accept[s] as true all the factual allegations in the complaint.” *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993); *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488 (1986). This Court then asks “whether the allegations state a claim sufficient to survive a motion to dismiss.” *United States v. Gaubert*, 499 U.S. 315, 327 (1991).

### **I. THE ASSIGNMENT OF A GRADE TO GEORGE MICHAEL DOES NOT CONSTITUTE SPEECH UNDER THE FIRST AMENDMENT.**

The First Amendment to the United States Constitution guarantees the freedom of speech. U.S. Const. amend. I. Freedom of speech affords protection to actual speech and to symbolic conduct. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974). The party seeking First Amendment protection bears the burden of proving that his or her conduct constitutes an expressive act protected by the First Amendment. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 n.5 (1984) (stating that the party must present more than a mere “plausible contention” that the conduct is expressive). Here, Professor Bluth has not met his burden of proof and has failed to state a claim upon which relief can be granted. *See id.*

If a party engaging in conduct asserts that the conduct contained expressive elements, a court will first determine whether that conduct constitutes “symbolic speech,” requiring First Amendment protection. *Spence*, 418 U.S. at 410–11. In making this determination, courts

consider three factors: (1) the speaker's intent to convey a particularized message; (2) the likelihood that the message will be understood by the audience; and (3) the context of the conduct. *Id.*; *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

In *Spence*, a student challenged a state statute which prohibited flag misuse after he was convicted of improperly using the American flag. 418 U.S. at 406–07. The student hung the flag from his apartment window and used removable black tape to create a peace symbol. The student argued that the flag was hung to display his views on the Cambodian invasion. *Id.* at 408. This Court found that the student displayed the flag because he “wanted people to know that [he] thought America stood for peace.” *Id.* at 409. Thus, this Court held that the student's activity, “combined with the factual context and environment in which it was undertaken, lead[s] to the conclusion that he engaged in a form of protected expression.” *Id.* at 410.

Here, Professor Bluth did not assign the grade with the intent or purpose of expressing a message; the act was merely pursuant to his official duties. *See Fowler v. Bd. of Educ.*, 819 F.2d 657, 662–63 (6th Cir. 1987). Upon receiving the grade, the student remained confused about its message and had to schedule a meeting with the Professor to understand how the grade was calculated. (R. at 2.) Also, unlike other recognized symbolic speech cases, the context of this conduct was a purely academic setting. *See Spence*, 418 U.S. at 407.

#### **A. Professor Bluth Did Not Intend to Convey a Message When He Assigned Michael's Grade.**

Professor Bluth did not intend to express a message when he assigned Michael's grade, as he was merely acting pursuant to his duties as a professor. In assigning Michael's grade, Professor Bluth exercised a limited evaluative role and was not engaged in a teacher's pedagogical and communicative role. *Cf. Fowler*, 819 F.2d at 662–63 (declining to extend First Amendment protection to a teacher's conduct of showing a film because it was shown on a

noninstructional day, the teacher left the room while it was being shown, and she did not explain the message that the film conveyed).

Even if Professor Bluth intended to convey a message, it was merely incidental to the conduct of assigning a grade. *See City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (“[I]t is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.”); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (“[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed.”). While the flag and peace symbol in *Spence* represented peace in America, the letter grade in this case is merely the product the professor’s calculation of percentages. *See* 418 U.S. at 409.

**B. The Assignment of Michael’s Letter Grade Does Not Convey a Particularized Message, and It Is Unlikely that a Student Would Understand Its Meaning.**

In *Spence v. Washington*, this Court expressly required the message to be “particularized” because otherwise, “an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” 418 U.S. at 410–11 (quoting *United States v. O’Brien*, 391 U.S. 367, 376 (1968)); *see also Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 997 (3d Cir. 1993) (requiring a particularized message). In a subsequent case, however, this Court explained, in dictum, that to be “particularized,” the message did not have to be “narrow” or “succinctly articulable.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1996). This Court reasoned that if a

message had to be narrow, expressive conduct in art, music, and poetry would never receive constitutional protection, as it often does not convey a specific and distinct message. *Id.*

This relaxed interpretation of *Spence* should be limited to the artistic context and not be used in the instant case “because teaching is by definition an expressive activity [and] every dispute over the best method of classroom instruction would raise First Amendment issues calling for federal court intervention.” *Jones v. Kneller*, 482 F. Supp. 204, 209 (E.D.N.Y. 1979). For instance, the Second Circuit held that a teacher’s refusal to wear a tie was not symbolic speech even though the teacher claimed that it “symbolically indicate[d] to his students his association with the ideas of the generation to which those students belong.” *E. Hartford Educ. Ass’n v. Bd. of Educ.*, 562 F.2d 838, 857 (2d Cir. 1977). The court held that the teacher’s message was vague and not “closely akin to pure speech.” *Id.* at 849 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969)). The court explained that preference for one teaching technique over the other does not give rise to First Amendment claims. *Id.* at 857. Moreover, academic grades are different from abstract paintings and music in that grades reflect the quality of a student’s academic performance, but are not “sufficiently imbued with elements of communication.” *Spence*, 418 U.S. at 409. In the meeting with Michael, Professor Bluth was able to articulate exactly why Michael received a 10% for participation. (R. at 3.) In contrast, artists or musicians will often be unable and unwilling to assign a single, potentially stifling meaning to their work.

Despite recognizing the “liberalized” version of the *Spence* test, one court found that a student’s body piercing could have had a religious, political, cultural, or sociological message, but held that the plaintiff’s piercings did not represent symbolic speech because the conduct of wearing jewelry did not indicate “what message, if any, [the] *particular* [p]laintiff sought to

convey by her appearance.” *Bar-Navon v. Sch. Bd. of Brevard County*, No. 6:06-cv-1434-Orl-19KRS, 2007 WL 121342, at \*4 (M.D. Fla. Jan. 11, 2007). Similarly, the assignment of a “D” to a student, on its face, could potentially send many messages. However, the conduct of assigning a letter grade, by itself, does not convey which message the professor intended to express. *See id.* Here, the student must have suspected that his performance was below average when he received the grade, but until he met with Professor Bluth, he did not know that his absences and lack of quality class discussions were the cause of his low grade. (R. at 2, 3.)

### **C. The Conduct’s Academic Context Distinguishes This Case from Other Symbolic Speech Cases.**

Although this Court has frequently extended protection to expressive conduct, the context of those cases is materially different from the one here. First, unlike those cases, the conduct in this case occurred in an academic environment and carried a purely academic message. *See, e.g., Tinker*, 393 U.S. 503 (extending constitutional protection to students who wore black armbands to school to protest the Government’s policy in Vietnam); *Spence*, 418 U.S. at 415 (holding that a student’s conduct of hanging a flag from his apartment during the Cambodian invasion was protected symbolic speech that occurred in a “highly inflamed background”); *Johnson*, 491 U.S. at 397 (holding that the defendants act of burning a flag during a protest rally was expressive conduct).

Second, Professor Bluth’s assignment of the grade was not an expression that was self-motivated because the University instructed him to assign grades. *See Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) (finding that although teachers may *advocate* the use of a particular teaching method, they do not have a speech right in choosing the type of classroom management technique or curriculum). Third, even if the conduct conveyed a message, it was private conduct that only conveyed a message to one particular student. *See,*

*e.g.*, *Johnson*, 491 U.S. at 399; *Spence*, 418 U.S. at 408 (“He testified that he put a peace symbol on the flag and displayed it to public view.”). Finally, Michael’s grade was not a matter of public concern. *See Spence*, 418 U.S. at 410 (explaining that context gives meaning to the conduct and listing *Tinker* as an example of a message that was of “intense public concern”).

In erroneously concluding that the assignment of grades constitutes symbolic speech, the court of appeals relied solely on *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989). (J.A. at 9.) Not only is the *Parate* court the only court to have found that the assignment of grades constitutes symbolic speech, but it did so without actually applying the *Spence* test or citing any authority in its analysis. 868 F.2d at 827. Thus, the *Parate* decision is not supported by any precedent and should not be followed.

## **II. EVEN IF THE ASSIGNMENT OF GRADES CONSTITUTES SPEECH, PROFESSOR BLUTH DOES NOT POSSESS A FIRST AMENDMENT RIGHT TO ASSIGN GRADES.**

Even if the assignment of grades constitutes speech, this Court should grant the University’s motion to dismiss for failure to state a claim on which relief can be granted. While citizens do not relinquish constitutional rights by accepting public employment, “the state, as an employer, undoubtedly possesses greater authority to restrict the speech of its employees than it has as sovereign to restrict the speech of its citizenry as a whole.” *Urofsky v. Gilmore*, 216 F.3d 401, 406 (4th Cir. 2000) (citing *Waters v. Churchill*, 511 U.S. 661, 671 (1994)). When a public employee claims that his First Amendment rights have been violated, this Court balances the interests of the employer and employee to determine whether relief should be granted. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968). In *Garcetti v. Ceballos*, this Court left open the question of whether professors have more constitutional protection than other public employees. 547 U.S. 410, 425 (2006) (“We need not . . . decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”).

This Court should now find that public university professors do not have any greater constitutional protection than other public employees.

There is no merit to Professor Bluth's argument that he is entitled to additional constitutional protection by virtue of the right to academic freedom. Although courts frequently praise the benefits of academic freedom, this Court has not and should not extend constitutional protection to *individual* academic freedom. See *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957). If this Court strays from established precedent and recognizes a constitutional right to individual academic freedom, the federal judiciary will be inundated with suits every time individual professors disagree with university regulations. Also, every public university would be forced to relinquish central decision-making power to the individual preferences of professors, which would lead to inconsistent academic policies and ultimately impede the educational mission of public universities. See *E. Hartford*, 562 F.2d at 857; *Urofsky*, 216 F.3d at 412. Even if this Court were to extend constitutional protection to individual academic freedom, a professor's assignment of a grade would not benefit from that protection.

Instead, this Court should uphold sound judicial precedent by applying the *Pickering* test to the instant case, as it would in any other public employee free speech case. See *Pickering*, 391 U.S. at 564. Undeniably, in some instances, professors' roles are unique from other public employees because professors exercise a greater degree of freedom. The *Pickering* analysis permits courts to consider the facts of each individual case and balance the interests of both the university and the professor. Finally, even if this Court finds that the Professor had a constitutional right to academic freedom, the right was not violated because his speech was not compelled.

### **A. Professor Bluth Does Not Have a Constitutional Right to Academic Freedom.**

This Court has previously recognized four essential academic freedoms of a university: (1) who may teach; (2) what may be taught; (3) how it shall be taught; and (4) who may be admitted to study. *Sweezy*, 354 U.S. at 263. However, courts have never recognized the academic freedom of a *professor*. *See id.* Even if this Court concludes that a public university professor possesses a right to the four freedoms enumerated in *Sweezy*, the assignment of a grade does not correspond to any of those freedoms. *See Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547, 553 (5th Cir. 1982).

#### **1. This Court has never recognized academic freedom as a professor's constitutional right.**

Although this Court has praised academic freedom in numerous cases, it has not actually held that there is a constitutional right to academic freedom, let alone that professors possess such a right. *See, e.g., Sweezy*, 354 U.S. at 250; *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978). In fact, no court has ever “set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom.” *Urofsky*, 216 F.3d at 412. Specifically, in *Sweezy*, the New Hampshire Attorney General was conducting investigations of subversive activities, and Paul Sweezy, a professor, refused to answer certain questions about a guest lecture he gave at the University of New Hampshire. 354 U.S. at 254. This Court discussed, at great length, the importance of academic freedom, but the plurality did not vacate Sweezy’s conviction on First Amendment grounds. *Id.* at 250. Ultimately, this Court held that the Attorney General violated Sweezy’s due process rights because the government lacked the authority to investigate him. *Id.* at 254–55; *see Urofsky*, 216 F.3d at 412.

Although academic professionals have frequently discussed their desire for individual academic freedom, courts have only recognized academic freedom for universities, not individual professors. *Urofsky*, 216 F.3d at 410. In their concurring opinion in *Sweezy*, Justices Frankfurter and Harlan relied on academic freedom grounds to reverse the conviction, but the right that they recognized was an institutional right to academic freedom, not an individual right. 354 U.S. at 261 (Frankfurter, J., concurring) (recognizing the four essential freedoms of a university and explaining that grave harm would result from “governmental intrusion into the intellectual life of a university”).

Similarly, other courts that have recognized the importance of academic freedom have characterized the freedom as belonging to the university as an institution. *Keyishian*, 385 U.S. at 603 (recognizing that academic freedom was a special concern of the First Amendment, but focusing on the rights of schools as institutions and not the individual right of professors); *Bakke*, 438 U.S. at 312 (acknowledging “the freedom of a university to make its own judgments as to education”); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (describing academic freedom in the context of an institution). Even the *Parate* court held that a teacher does not have a constitutional interest in the grades that students ultimately receive. 868 F.2d at 829. Moreover, courts have consistently held that a teacher does not receive First Amendment protection to decide the content of the curriculum. *Palmer v. Bd. of Educ.*, 603 F.2d 1271 (7th Cir. 1979); *Hetrick v. Martin*, 480 F.2d 705 (6th Cir. 1973) (holding that a university may constitutionally terminate an untenured teacher whose teaching style and philosophy do not conform to the school’s administration).

Even when this Court had the opportunity to recognize individual academic freedom, it declined to do so. *Epperson v. Arkansas*, 393 U.S. 97, 113 (1968) (considering a teacher’s right

to teach evolution, but failing to invalidate the statute on grounds of individual academic freedom). In fact, in his concurring opinion in *Epperson*, Justice Black questioned “whether academic freedom permits a teacher to breach his contractual agreement to teach only the subjects designated by the school authorities who hired him.” *Id.* at 113–14 (Black, J., concurring); *see also Urofsky*, 216 F.3d at 425 (finding that “there is no constitutional right of free inquiry unique to professors . . . [because] the First Amendment protects the rights of all public employees equally”).

Accordingly, in *Edwards v. California University of Pennsylvania*, the Third Circuit found that because the university’s action concerned the “content of the education it provide[d],” “the [u]niversity was acting as [a] speaker and was entitled to make content-based choices in restricting [the professor’s] syllabus.” 156 F.3d 488, 492 (3d Cir. 1998) (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995)) (recognizing that when the government is the speaker or when it enlists private entities to convey its own message, it may regulate the content of the speech). Although the Third Circuit incorrectly presumed in *Brown v. Armenti* that grading falls under the academic freedom to determine how a course is taught, it correctly interpreted grading as the university’s speech, for the university is the speaker in classroom settings and the professor is the “agent of the university for First Amendment purposes.” 247 F.2d 69, 74 (3d Cir. 2001) (citing *Edwards*, 156 F.3d at 491).

In *Brown*, a professor assigned a “F” to a student because of deficient class attendance. The university president ordered him to change the grade to an “incomplete” but the professor refused and was subsequently terminated. 247 F.2d at 71. The court held that the university professor did not have a First Amendment right to assign a particular grade because it reasoned that assignment of grades is “subsumed under the university’s freedom to determine how a

course is to be taught.” *Id.* at 74; *see also Lovelace v. Se. Mass. Univ.*, 793 F.2d 419, 426 (1st Cir. 1986) (explaining that grading policies are “core university concerns”). Thus, even if the assignment of grades constitutes First Amendment speech and falls within the right to academic freedom, it is the speech of the university and affords a professor no constitutional protection.

This conclusion is strengthened by the fact that grades will be perceived as university speech, not personal speech. First, grades appear on student transcripts containing the university’s name and seal. *Wozniak v. Conry*, 236 F.3d 888, 891 (7th Cir. 2001) (“[T]ranscripts bear the university’s seal and imprimatur, so a university necessarily knows every student’s grade.”). Second, transcripts are issued by the university and not by professors. *Id.* Third, a student’s diploma has the university’s name, and future employers and graduate schools trust the university’s assessment of individual academic performance. *Id.* While the *Wozniak* court conceded that some universities grant their faculty more discretion than others when it comes the grading process, the court properly concluded that each university should be able to make that decision and the issue should not be left to federal judges. *Id.* As such, Michael’s grade represents university speech, and, therefore, Professor Bluth’s constitutional rights are not implicated in this case.

## **2. Recognizing a right to individual academic freedom of a professor would set a dangerous precedent.**

Most decisions involving academic freedom lack consistency and fail to set guidelines for analysis. J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 *Yale L.J.* 251, 253 (1989) (explaining that the doctrine of academic freedom lacks definition and often “floats in the law, picking up decisions as a hull does barnacles”). If professors were awarded individual academic freedom, a university would be powerless to challenge any professor’s actions, virtually eliminating the employer-employee relationship because almost any

act by a professor can be categorized as related to “academics.” Such a liberal standard would imperil public universities’ ability function by giving professors the same freedom that private citizens possess.

If a nontenured professor’s decision to assign a particular grade is constitutionally protected, a university would not be able to discharge professors even when their grades conflict with university standards. This would “constrict the university in defining and performing its educational mission.” *Lovelace*, 793 F.2d at 426 (explaining that the First Amendment does “not require that nontenured professor be made a sovereign unto himself”). One court briefly considered the consequences of a court’s recognizing of academic freedom as a First Amendment right for professors:

If . . . the First Amendment provides special protection to academic speakers, then a professor would be constitutionally entitled to conduct a research project on sexual fetishes while a state-employed psychologist could constitutionally be precluded from accessing the very same material. Such a result is manifestly at odds with a constitutional system premised on equality.

*Urofsky*, 216 F.3d at 412.

By allowing professors to hale a public university into court every time they encounter school regulations that do not conform to their personal beliefs, recognition of academic freedom as a right would also open the judicial floodgates to waves of suits. Even if a school’s policies appear unwise, federal courts should not interfere with the “decisions of school authorities.” *E. Hartford*, 562 F.2d at 857 (“[I]t is not the role of federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.”); *Urofsky*, 216 F.3d at 425 (“Academic freedom . . . is also paradigmatic of the truism that not all that we treasure is in need of constitutionalization.”).

Although Respondent may argue that judicial recognition of individual academic freedom is essential to preventing arbitrary restrictions by universities, a university's interest in maintaining its credibility and public image would prevent restrictions of "true academic freedom" rights. *Urofsky*, 216 F.3d at 425. True academic freedom is not and will not be unnecessarily suppressed by universities because if they did, they would lose their faculty and the public support necessary to maintain their existence. *Id.*

**3. Even if individual academic freedom is recognized as an individual right, Professor Bluth's right to grade students does not correspond with any of the four recognized freedoms.**

As stated above, the four recognized academic freedoms that this Court has articulated are the freedom to decide (1) who may teach, (2) what may be taught, (3) how it shall be taught, and (4) who may be admitted to study. *Sweezy*, 354 U.S. at 263. A professor's assignment of a student's grade does not fit within the scope of any of those freedoms. *Vance v. Bd. of Supervisors of S. Univ.*, No. Civ. A. 96-2196, 1996 WL 580905, at \*3 (E.D. La. Oct. 9, 1996) ("[T]he refusal to assign a certain grade at the direction of university administration does not constitute a 'teaching method' included in the concept of academic freedom, and rooted in the First Amendment."); *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1275 (7th Cir. 1982) (explaining that academic freedom is not absolute and "must on occasion be balanced against important competing interests"). The assignment of grades does not correspond with "how [a] [course] shall be taught" because, the teaching function of a professor has temporally terminated when a final grade is issued.

In *Garcetti*, the majority of this Court declined to address the issue of whether, by virtue of academic freedom, public university professors should be afforded some sort of different or additional constitutional protection than that which all other government employees possess.

547 U.S. at 425. Even if this Court were to extend special protection to “academic scholarship” and “classroom instruction,” a professor’s assignment of grades would not be protected because evaluation of students is not an example of either scholarship or teaching. *See id.* Grading is not a type of scholarship because it does not involve research or educational dialogue. Grading constitutes classroom *evaluation*, not instruction, as a grade is assigned after the completion of the course.

Moreover, courts that emphasize the importance of academic freedom focus on the value of the speech to society and democracy. *Sweezy*, 354 U.S. at 252; *Garcetti*, 547 U.S. at 438. A professor’s evaluative function of assigning a grade, however, does not further any of the basic goals of academic freedom. *See Keyishian*, 385 U.S. at 603 (explaining that a state may not take action that “casts a pall of orthodoxy over the classroom” because the classroom should be a “marketplace of ideas”); *Hillis*, 665 F.2d at 553 (holding that an administration which required a professor to assign a certain grade did not “cast a pall of orthodoxy” over the professor’s classes because the assignment of a grade is not a “teaching method”). Thus, Professor Bluth does not have a First Amendment right to assign a particular grade because grading is not a judicially recognized academic freedom.

#### **B. Professor Bluth, as a Public Employee, Does Not Have a Right to Assign Grades.**

Although public employees do not surrender all of their First Amendment rights by accepting employment, private speech that is pursuant to the public employees’ official duties is subject to certain restraints by the government. *Garcetti*, 547 U.S. at 417. In *Pickering v. Board of Education*, Marvin Pickering, a school teacher, was dismissed from his position after he wrote a letter to a local newspaper criticizing the Board of Education’s handling of past proposals to raise new revenue for schools. 391 U.S. at 564. Pickering attacked the handling of the bond

issue and the “allocation of financial resources between the schools’ educational and athletic programs.” *Id.* at 566. Pickering alleged that his letter was protected by the First Amendment, but the Board justified the dismissal by explaining that the letter was “detrimental to efficient operation and administration of the schools of the district.” *Id.* at 564, 567. To balance the two competing interests, this Court introduced a three-step analysis to determine whether public employee speech receives First Amendment protection. *Id.* at 568. Specifically, courts must determine: (1) whether the speech concerns a matter of public concern; (2) whether the speech was pursuant to an employee’s official duties; and (3) whether the speech interest of the employee outweighs the state’s interest in promoting the efficiency of its operations. *Id.*

**1. The *Pickering* balancing test should be used to determine Professor Bluth’s First Amendment speech rights.**

In this case, the *Pickering* analysis is appropriate because Professor Bluth was acting as a public employee when he assigned Michael’s grade. The *Pickering* test not only allows courts to protect the rights of public employees, but also reflects the courts’ understanding that “government offices could not function if every employment decision became a constitutional matter.” *Connick v. Myers*, 461 U.S. 138, 143 (1983). The *Pickering* balancing element also accommodates the “dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment.” *Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

Further, the balancing element of the *Pickering* test permits courts to account for the unique role of professors as employees. Although professors may exercise relatively more independence than other public employees, their roles in the university depend primarily on the type of task being performed. For instance, when professors engage in scholarly writing, they enjoy great independence and are usually uninhibited by university administrators. This

independence is protected under *Pickering* because a university's interest in efficiency would be minimal in that scenario. Conversely, professors speak as agents of the university when they design classroom policies or curriculum. *Brown*, 247 F.2d at 74. *Pickering*'s balancing test accounts for this circumstance by permitting courts to consider the university's interest in maintaining consistency and efficiency in its operations. 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, 1567 (2003) (“[T]he *Pickering* test is attuned to the fluid roles of both the professor and the university.”).

**2. Under *Pickering*, Professor Bluth does not have a First Amendment speech right to assign a particular student grade.**

Michael's grade is a private matter because he is the only recipient of the grade and the public does not have access to it. See *Pickering*, 391 U.S. at 572. Even if the public did have such access, it does not have any social or political interest in a particular student's grade. See *Connick*, 461 U.S. at 146. Moreover, Professor Bluth's conduct of assigning Michael's grade was not analogous to speech that ordinary citizens would make because the Professor was acting pursuant to his official duties. See *Garcetti*, 547 U.S. at 421. Even if there was public interest in the speech, the professor's interest is substantially outweighed by the university's interest in regulating conduct that may be contrary to the school's academic reputation and mission. See *Pickering*, 391 U.S. at 568.

**a. *The Professor's assignment of an individual student grade does not concern a matter of public concern.***

The threshold inquiry of the *Pickering* test is whether the employee's speech concerns a matter of public concern. *Id.* at 571. If speech does not relate to any matter of political, social, or other concern to the community, “government officials should enjoy wide latitude in

managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.” *Connick*, 461 U.S. at 146. To determine whether an employee’s speech concerns a matter of public concern, courts consider the content, form, and context of the speech. *Id.* at 147.

In *Pickering*, this Court found that issues relating to the adequacy of school funding concerned legitimate public concerns. 391 U.S. at 566. In contrast, the assignment of a single student’s grade is not a matter of public concern. In fact, Michael’s grade is entirely a private matter. Unlike in *Pickering*, where the amounts expended on athletics were part of the public record, Michael’s grade is shielded from public access unless he chooses to make it public. *See id.* at 572; *Rankin*, 483 U.S. at 389 (finding that a data-entry employee’s statement about the President’s life was made during a private conversation, took place in area where there was no public access, and did not demonstrate that the employee was unfit to perform the work she was employed to do).

Moreover, acts of insubordination such as Professor Bluth’s refusal to change Michael’s grade do not implicate matters of public concern. In *Connick*, for example, an Assistant District Attorney was informed that she was going to be transferred to a different department of the criminal court. 461 U.S. at 140. She expressed her reluctance and subsequently prepared a questionnaire to survey her fellow employees about various office policies.<sup>2</sup> *Id.* at 141. The District Attorney considered the distribution of the questionnaire to be an “act of insubordination.” *Id.* This Court held that the content of the questionnaire did not concern matters of public concern because if the questionnaire had been released to the public, it would

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<sup>2</sup> Specifically, the questions pertained to the “office transfer policy, [the] office morale, the need for a grievance committee, the level of confidence in superiors, and whether employees felt pressure to work in political campaigns.” *Connick*, 461 U.S. at 138.

only have conveyed the message that a single employee was unhappy with the policies in the office. *Id.* at 148. Moreover, this Court, looking at the context of the speech, found that the purpose of her speech was to “gather ammunition” against her superiors. *Id.* at 149 (“[T]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark . . . directed at a public official would plant the seed of a constitutional case.”). Therefore, this Court concluded that that the Assistant District Attorney did not act out of a purely academic interest to obtain useful research. *Id.* at 153.

Likewise, Professor Bluth’s initial refusal to change Michael’s grade also demonstrates an “act of insubordination.” *See id.* at 148. Even if members of the public were informed about the Dean’s request, it would not have been a matter of public concern because citizens would merely perceive it as an internal dispute between a single employee and his employer. *See id.*; *Jones*, 482 F. Supp. at 209 (finding that conflicts between faculty members amount to “nothing more than ‘bickering,’” and explaining that if such matters were recognized as First Amendment issues, “the door would be open for countless appeals” and courts are “particularly unadapted” to handling academic disputes).

Assuming that a professor attaches importance to the assignment of a grade, the public does not benefit from the reporting of a particular student’s grade. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975) (explaining that if there is no public benefit from reporting the matter, the topic is not a legitimate matter of public concern); *Brown*, 247 F.2d at 76; *Urofsky*, 216 F.3d at 407 (stating that the importance of the subject of an employee’s speech is not relevant to the inquiry of whether a matter is of public concern). *Compare Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998) (holding that a school play was part of the school curriculum and did not present a matter of public concern, and explaining that the school administration had

a legitimate pedagogical interest the school’s curriculum), *with Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036 (6th Cir. 2001) (holding that a teacher’s presentation about industrial hemp was a matter of public concern because it was the topic of frequent local news stories).

***b. Professor Bluth’s speech was pursuant to his official duties.***

Public employees cannot use the First Amendment to “insulate their communications from employer discipline” when they speak pursuant to their official duties. *Garcetti*, 547 U.S. at 421. Compare *Garcetti*, 547 U.S. at 421 (finding that the Assistant District Attorney was acting as a government employee when he wrote a memorandum about a pending criminal case), *with Pickering*, 391 U.S. at 574 (finding that the teacher was acting as a member of the general public when he submitted his letter because his position as a teacher was “only tangentially and insubstantially involved in the subject matter of the public communication made by . . . [him]”). The Fourth Circuit explained that restrictions on public employee speech are analogous to restrictions on government-funded speech because in both cases the government “purchases the speech through a financial grant or payment of salary.” *Urofsky*, 216 F.3d at 408 n.6 (citing *Rust v. Sullivan*, 500 U.S. 173 (1991)).

Here, Professor Bluth’s assignment of grades is pursuant to his official duties and is not an example of citizen speech because no other ordinary member of the public is able to issue grades to students. See *Garcetti*, 547 U.S. at 422 (distinguishing *Pickering* on the ground that the content of *Pickering*’s letters was similar to other letters submitted by regular citizens who were not employed by the government). Even if this Court finds that the Professor’s assignment of Michael’s grade was a matter of public concern, the Professor’s conduct may be regulated because he acted within the scope of his employment. *Urofsky*, 216 F.3d at 407–08 (explaining that if an assistant district attorney makes a statement to the press about an upcoming murder

trial, his employer may restrict the assistant's speech and regulate the content of the statement, even if the matter is of public concern, because the employee's speech was not made in his capacity as a private citizen). Undoubtedly, Professor Bluth was acting within the scope of his employment when he assigned Michael's grade.

***c. The University's interest in efficiency outweighs the interest of Professor Bluth in making the speech.***

If a court finds that speech is a matter of public concern and made by a citizen, it then balances the "interest of teacher, as a citizen, in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 150 ("[T]he *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public.").

When considering the interest of the teacher, courts examine the degree of public interest in the speech, the individual interest of the teacher, as well as the time, place, and manner of the speech. *Rankin*, 483 U.S. at 388; *Garcetti*, 547 U.S. at 420; *Bowman v. Pulaski County Special Sch. Dist.*, 723 F.2d 640, 644 (1983). The government's interest is evaluated based on factors such as "the need for harmony" in the workplace, and the need for a close working relationship between the speaker and the government. *Bowman*, 723 F.2d at 644; *Rankin*, 484 U.S. at 388 (recognizing that important considerations include "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties, or interferes with the regular operation of the enterprise").

i. **Professor Bluth does not have a constitutionally protected interest in assigning a particular grade.**

Professor Bluth's interest in assigning a particular grade is minimal. Although Professor Bluth may have an interest in informing Michael of his deficient class participation, the assignment of a particular grade is not the only or even the most effective means of fulfilling that interest. For instance, Professor Bluth could have verbally informed Michael of his poor participation and class commentary prior to assigning his grade.

Professor Bluth may argue that the Dean's instruction of changing the grade to a "B" was unfair. In the absence of a constitutional violation, however, the government's act is not subject to judicial review. *Connick*, 461 U.S. at 146 ("[O]rdinary dismissals from government service which violate no fixed tenure . . . are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable."). There was no constitutional violation here because, in addition to the reasons stated above, Professor Bluth did not have tenure. *See Parate*, 868 F.2d at 827 ("[A] nontenured professor does not escape reasonable supervision in the manner in which she conducts her classes or assigns her grades.").

He may also contend that the University did not have a school policy with specific grading guidelines and, thus, the restriction imposed on him was arbitrary and unforeseeable. This argument is without merit because government employee speech is not subject to the same procedural requirements as speech restrictions imposed on the general public. *Waters*, 511 U.S. at 673. For instance, an employer may prohibit employees from being "rude to customers." *Id.* Although that standard would be too vague to be applied constitutionally to the public, an employer may impose such a restriction without First Amendment constraints. *Id.*; *see also Edwards*, 156 F.3d at 491–92 (recognizing that public school teachers must abide by both official school policies and policies that the school "dictates").

ii. **The University has a substantial interest in regulating a professor's grades.**

Dean Funke and the University have a substantial interest in supervising professors' grading policies to maintain the reputation of the University. *See Wozniak*, 236 F.3d at 891 (“Universities are entitled to assure themselves that their evaluation systems have been followed; otherwise their credentials are meaningless.”). Universities are often compared by graduate schools and employers, and they are usually ranked based on the quality of the education they provide. If the University cannot set and maintain standards for student grades, employers will be unable to compare students within a university, as two students with the same level of competency, performance, and intellect could receive two very different grade point averages. *See Garcetti*, 547 U.S. at 422–23 (“[O]fficial communications have official consequences, creating a need for substantive consistency and clarity.”).

This Court should find that Professor Bluth is not entitled to constitutional protection because he “substantially interfere[d]” with the operation of his employer. *Connick*, 461 U.S. at 142. In *Connick*, this Court found that Connick’s questionnaire was causing a “mini-insurrection” and interfered with the working relationship because it was an act of insubordination. *Id.* at 151; *Garcetti*, 547 U.S. at 418 (recognizing that government employers need to exercise control over their employees’ speech to preserve the efficiency and effectiveness of their operations).

Even in situations where the speech involves a matter of public concern or is speech that is not disruptive, courts give “substantial weight to government employers’ reasonable predictions of disruption.” *Waters*, 511 U.S. at 674 (“[D]oubtless some such speech is sometimes nondisruptive . . . [and] sometimes of value to the speakers and the listeners . . . [b]ut we have declined to question government employers’ decision on such matters.”). Here, Professor

Bluth's arbitrary assessment of a "D" to Michael was likely to and did cause a disruption. Michael filed a grievance against Professor Bluth, who subsequently ignored the Dean's instruction to change Michael's grade for an entire week. (R. at 3.) Decisions of this sort impede a university's ability to regulate the conduct of its professors, and ultimately, promote the mission of the university.

Although nontenured professors exercise a great degree of independence, they are still employees and subject to the regulations imposed by their employer. If Professor Bluth gave Michael a failing participation grade of 60%, Michael would have received a "B," which is the grade that the Dean requested. (R. at 3.) Thus, the University afforded Professor Bluth the opportunity to assign Michael a failing grade for his class participation, giving deference to the expertise of the Professor. Professor Bluth could have explained his dispute to the public in an unofficial communication and that may have been protected by the First Amendment. Ultimately, however, as an employee, he was obligated to obey the orders of his superiors. *Garcetti*, 547 U.S. at 422–23 (“[S]upervisors must ensure that their employees’ official communications are accurate, demonstrate sound judgment, and promote the employer’s mission.”).<sup>3</sup>

### **C. Even if Professor Bluth Has a First Amendment Speech Right to Assign Grades, His Speech Was Not Compelled.**

The First Amendment protects citizens' rights to speak and to refrain from speaking. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). In this case, however, Professor Bluth never had a First Amendment *right* to assign a particular grade because he acted as a public employee rather than as a citizen. The Dean's

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<sup>3</sup> Although the *Garcetti* Court states that the same analysis may not apply to “scholarship or teaching,” as explained above, the instant case concerns evaluative rather than scholastic or pedagogical functions. 547 U.S. at 425.

instruction to Professor Bluth to change the grade, therefore, did not give rise to compelled speech. Moreover, even if the Professor had a constitutional right to assign a particular grade, the speech was not compelled here.

First, Professor Bluth changed the grade voluntarily. The record is silent as to why he made this choice. It is possible that the Professor changed the grade after he realized that his percentages for participation were arbitrary. Although the *Parate* court found that a university's act of ordering a plaintiff to change a grade constituted compelled speech, the facts in this case are materially different. 868 F.2d at 829.

In *Parate*, the professor was instructed to sign a memorandum that changed his official grade distribution. *Id.* at 824. The professor agreed to sign the memorandum but wanted to indicate that the official change was "as per instructions from [the] Dean." *Id.* The school refused to let him write that note on the memorandum. *Id.* The *Parate* court held that if the administrators had merely changed the student's grade, instead of *ordering* the professor to do so, there would have been no constitutional violation. *Id.* at 829.

Unlike the professor in *Parate*, Professor Bluth was not required to sign any official document in his own name that indicated the grade change. Furthermore, there was a time lapse of approximately one week between the time the Dean instructed the grade change and the time that Professor Bluth actually changed it. (R. at 3.) This fact creates questions as to the Professor's motivation for changing the grade. In contrast, the professor in *Parate* was confronted by the school administrator at three different times on the same day, with the administrator remaining in the room until he signed the memorandum. *Id.* at 824.

Second, unlike other compelled speech cases, the grade change does not represent "an affirmation of a belief and an attitude of mind." *Barnette*, 319 U.S. at 633 (finding that the

compulsory flag salute and pledge requires an affirmation of a belief); *Wooley*, 430 U.S. at 714 (finding that the state may not require an individual to “participate in the dissemination of an ideological message”). Additionally, because consistency and uniformity in grading standards are decided by the university, the assignment of a particular grade would not necessarily be associated with Professor Bluth’s personal ideology. *See Wooley*, 430 U.S. at 718 n.15 (noting that the national motto of “In God We Trust” is not compelled speech because it passes from hand to hand and is not “readily associated with its operator”). People who receive a student’s transcript recognize that professors often have to comply with certain grading curves and procedures. *See Troster v. Pa. State Dep’t of Corr.*, 65 F.3d 1086, 1096 (3d Cir. 1995) (finding that the plaintiff’s “conduct in wearing his correctional officer’s uniform without the flag patch, which is required and is in fact worn by all other guards, would not be protected speech”). As such, Professor Bluth’s allegations of compelled speech are without merit.

## **CONCLUSION**

In sum, the assignment of grades does not constitute speech under the First Amendment because a particularized expression is neither intended by a professor nor likely understood by a student. Even if the assignment of a grade constitutes speech, the conduct does not receive First Amendment protection because professors do not and should not enjoy an individual right to academic freedom. Moreover, a public university’s interest in maintaining the efficiency of its operations outweighs a professor’s interest in assigning a particular grade. Finally, Professor Bluth’s right was not violated because he was not compelled to speak.

For the foregoing reasons, Petitioner requests that this Court REVERSE the decision of the court of appeals and REINSTATE the district court's dismissal for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

Respectfully submitted,

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TEAM NO. 005  
COUNSEL FOR PETITIONER