No. 33-0619

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

STATE UNIVERSITY,

Petitioner,

- v. -

GEORGE BLUTH,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE MOOT CIRCUIT

BRIEF FOR RESPONDENT

Team 008
Counsel for Respondent

QUESTIONS PRESENTED

I. Whether the assignment of grades by a university professor constitutes speech under the First Amendment when the professor attempts to convey a thorough evaluation of a student's academic performance through the grade assignment by using a set of subjective qualitative factors that are tied to merit, and when the students are notified in advance of the professor's grading system.

II. Whether a public university professor possesses a First Amendment right to assign grades where the assignment of grades is part of the public concern surrounding university grading policies, and the university, which does not have an official grading policy, compelled the professor to change a grade against his professional judgment.

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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

Professor George Bluth ("Professor Bluth"), a revered scholar in the field of Art History, was employed as a tenure-track professor at State University, ("the University") for three years. (R. at 1). Professor Bluth is an expert in his field, and is well respected by both colleagues and students for his traditional teaching methods. (R. at 2). In an effort to ensure that his students develop a thorough understanding of his course material, Professor Bluth's grading scheme rewards three different components of the academic experience: test taking, writing, and class participation. (R. at 2). Having six or more unexcused absences from class results in a failing participation grade. The final is worth 40%, the writing assignments, 30% and class participation, 30%. (R. at 2). This merit-based method has proven successful throughout Professor Bluth's career, encouraging students to develop a well-balanced work ethic and true appreciation for academic discourse. (R. at 2).

Since the University has no official grading policy, students must rely on the course syllabus to determine each individual professor's expectations. (R. at 3). Students may consider the demands of the course in light of any other commitments when selecting courses. (R. at 3).

Student George Michael, a pre-law junior and the Student Body president, was a very visible presence on campus. (R. at 2). It was well known by his fellow students that Michael was a third-generation legacy student. (R. at 2). His father, a wealthy attorney, was one of the school's most generous donors. (R. at 2). His gifts had recently helped the school finance an expansion of its otherwise meager football stadium. (R. at 2). While the student body regarded Michael as arrogant and egocentric, it also recognized his father's unique and long running relationship with the University's administration. (R. at 2). Michael chose to take "The History of Vienna Art and Architecture" as his Spring semester elective, with Professor Bluth. (R. at 2).

Over the course of the semester, Michael accumulated four absences. Michael did not have a valid excuse for any of these absences. (R. at 3). During the classes he did attend, Michael's participation amounted to little more than mere "showboating." (R. at 3). From his comments, it was clear that Michael had simply failed to read or understand the assigned material. (R. at 3). Michael received a grade of 80% on the bi-weekly writing assignments, and a 95% on the multiple-choice final exam. (R. at 2). However, like the other students in his class, participation was also factored into his final grade. (R. at 3). His minimal efforts in this area earned him a grade of 10%. (R. at 3). Professor Bluth, adhering to his formula, as he did for all of his students, calculated Michael's final course grade to be a "D." (R. at 2).

Although Michael had been well aware of Professor Bluth's grading policy at the beginning of the semester, he was shocked to see his grade. (R. at 2). At a meeting with Professor Bluth, the Professor explained how Michael's grade had been calculated, and reiterated the importance of class participation. (R. at 2, 3). Professor Bluth also explained his strict policy on not changing final grades in the absence of a calculation error. (R. at 3). Since Michael's grade contained no such error, he left Professor Bluth's office and filed a grievance with the Office of the Dean. (R. at 3). Until this point, no student had ever filed a complaint against Professor Bluth. (R. at 2).

Within a week, Dean Tobias Funke met with Professor Bluth, demanding he immediately change Michael's grade from a "D" to a "B." (R. at 3). Professor Bluth had used his grading policy for years and was shocked to hear now that Dean Funke found his grade assignments "arbitrary" and "out of line." (R. at 3). Professor Bluth explained why he believed Michael's grade was a fair assessment of his performance, given his mediocre written assignments and poor class participation. (R. at 3). Dean Funke threatened Professor Bluth, warning him that "if he did

not cooperate with the administration, he would be hurting his chances of receiving tenure." (R. at 3). This discussion created a permanent rift between the two. (R. at 3).

At the meeting's conclusion, Professor Bluth refused to change Michael's grade and was confident in his decision. (R. at 3). Professor Bluth's confidence stemmed in part from the fact that he was well aware of the University's lack of an official grading policy, and knew that he was not violating any rules in preserving Michael's grade. (R. at 3). However, over the next week, the Professor could not help but fear his job safety, given the tenuous status of his annual contract. (R. at 3). Intimidated by Dean Funke's threats, Professor Bluth broke from his strict policy, and unwillingly changed Michael's grade to a "B." (R. at 3). Nonetheless, within a few days, Professor Bluth received a letter informing him that the administration had declined to renew his contract, and that he was being terminated. (R. at 3).

Professor Bluth brought suit against Dean Funke, pursuant to 42 U.S.C. § 1983, alleging that his termination amounts to a violation of his right to academic freedom under the First Amendment. (R. at 1). Professor Bluth sought preliminary and injunctive relief, and later moved for preliminary injunction. (R. at 1). Dean Funke moved to dismiss under Rule 12(b)(6). (R. at 1). The United States District Court for the Eastern District of Moot denied Professor Bluth's motion for preliminary injunction and granted Dean Funke's motion to dismiss. (R. at 1). Professor Bluth timely appealed to the United States Court of Appeals for the Moot Circuit, which reversed and remanded the matter. (J.A. at 8, 12). Subsequently, this Court granted certiorari. (J.A. at 13).

SUMMARY OF THE ARGUMENT

Respondent Professor Bluth's assignment of grades constitutes speech under the First Amendment, and as a public university professor he has a First Amendment right to assign

grades. Therefore, the University violated his First Amendment right to free speech when it forced him to change George Michael's grade from a "D" to a "B." By forcing Professor Bluth to change his assigned grade, the University compelled him to speak against his will, violating his right to free speech as guaranteed by the First Amendment.

The assignment of a grade constitutes "symbolic speech" under the First Amendment. Under *Spence v. Washington*, courts take into account three factors when determining whether conduct should be considered speech for First Amendment purposes: (1) the intent of the speaker to convey a particularized message; (2) the likelihood that the message would be understood by those who viewed it; and (3) the context in which the conduct alleged to be communicative takes place. Here, Professor Bluth clearly intended to communicate his evaluative priorities to his students through the assignment of a particular letter grade. As well, it is highly likely that the audience viewing Professor Bluth's assignment of grades – his students – would understand the message that Professor Bluth conveyed through his conduct. Thirdly, the context of an academic university setting further supports the proposition that Professor Bluth's assignment of a letter grade constitutes symbolic speech under the First Amendment. Additionally, Professor Bluth's assignment of grades is protected under the concept of "academic freedom." If the integrity of academia is to be preserved, Professor Bluth must be free to professionally evaluate his students and communicate his evaluations to them through the assignment of a letter grade.

As a public university professor, Professor Bluth possesses a First Amendment right to assign grades. Teachers do not relinquish the First Amendment rights they would enjoy as citizens to speak on matters of public concern. Under the *Pickering* test, which evaluates the speech of public employees, a court considers whether an employee's expression is speech on a matter of public concern, and if so, a court then balances the interests of the employee and the

government to determine whether the government is justified in limiting the employee's speech. Professor Bluth's assignment of grades is a matter of public concern when viewed in the context of the public concern surrounding grade policies at universities. His interest in commenting upon matters of public concern outweighs the university's interest in the efficiency of its operations. The assignment of one grade according to a professor's established grading policy does not affect the university's operations, particularly since the university does not have an official grading policy and no other student has filed a complaint about Professor Bluth. Furthermore, courts give deference to academic evaluations of students and Professor Bluth, who is in the best position to assign grades, assigned Michael's grade with sound professional judgment.

This Court's recent decision in *Garcetti v. Ceballos* does not limit Professor Bluth's right to assign grades because this dispute involves issues of scholarship and teaching. Furthermore, while *Garcetti* involved the speech of a deputy district attorney that conflicted with his employer's role as a prosecutor, Professor Bluth's assignment of Michael's grade does not affect the university's operations.

Regardless of whether Professor Bluth assigned Michael's grade as part of his official duties as a professor, the University may not compel him to change Michael's grade. Because Professor Bluth has a First Amendment right to assign grades, and because grades are by their very nature symbolic speech, any attempt by the University to compel Professor Bluth to issue Michael a new grade amounts to forced speech. Under *Parate v. Isibor*, the University's act of ordering Professor Bluth to change a grade, instead of changing it administratively, violates the First Amendment by forcing him to conform to a belief against his professional judgment.

ARGUMENT

In reviewing a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007). This Court must "make an independent examination of the whole record," *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)), to determine whether the United States Court of Appeals for the Moot Circuit properly denied Petitioner's motion to dismiss. Here, the Court of Appeal's decision reversing the District Court's grant of Petitioner's motion to dismiss for failure to state a claim should be affirmed because Respondent has adequately stated a claim upon which relief may be granted, through a showing of facts consistent with the allegations in the complaint.

I. THE APPELLATE COURT'S RULING SHOULD BE UPHELD BECAUSE PROFESSOR BLUTH'S ASSIGNMENT OF GRADES CONSTITUTES SPEECH UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The First Amendment to the United States Constitution protects an individual's right to freedom of speech. U.S. Const. amend. I. Implicit in this understanding is the idea that conduct that communicates, also known as "symbolic speech," is also protected under the First Amendment. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). Throughout history, society has used symbols and other forms of conduct to communicate its ideas and beliefs, and the Supreme Court has found that "[s]ymbolism is a primitive but effective way of communicating ideas." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943). Conduct such as marching, picketing, wearing of armbands, and displaying of peace signs have been found to constitute types of expressive conduct that fall within the First Amendment's freedom of speech protection. *See, e.g., Barnette*, 319 U.S. 624; *Spence v. Washington*, 418 U.S.

405 (1974); *Tinker*, 393 U.S. 503. This Court has recognized that "conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[].'" *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence*, 418 U.S. at 409).

Similarly, a state-sponsored university professor's assignment of grades is also protected under the concept of "academic freedom," as laid out in the landmark Supreme Court case *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). *Id.* at 262-63. In order to preserve the integrity and importance that our academic system contributes to society, a professor must "remain free to inquire, to study, and to evaluate." *Id.* at 250. This concept of academic freedom should apply not only to the freedom of a university, but more importantly to the freedom of a professor to effectively communicate to his students through the assignment of grades. The case presented today involves a prime example of conduct that should be considered "speech," affording the speaker the protections of the First Amendment.

Here, George Bluth, a professor at State University, a state-sponsored university, was compelled to speak in contravention of his First Amendment rights. By forcing Professor Bluth to change George Michael's grade to a "B," the University violated Professor Bluth's First Amendment speech rights to assign grades. A university professor's assignment of grades is a clear symbolic expression, intended to convey a message of feedback and evaluation to the students in his or her class. Furthermore, a university professor's assignment of grades is protected under the concept of "academic freedom." This form of expression should be afforded a great deal of protection under the First Amendment. Thus, the appellate court's ruling to defeat the University's motion to dismiss was proper and should be upheld.

A. The Act Of Assigning Grades By A University Professor Constitutes "Symbolic Speech" Under The First Amendment.

The Supreme Court has stated that "[i]t is possible to find some kernel of expression in almost every activity a person undertakes – for example, walking down the street, or meeting one's friends at a shopping mall – but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). However, the Court articulated guidelines in order to determine when conduct should be regarded as communicative, and thus "symbolic speech," in the case of *Spence v. Washington*, 418 U.S. at 410-11. When analyzing whether certain conduct constitutes speech under the First Amendment, a court will evaluate three factors: (1) the intent of the speaker to convey a particularized message; (2) the likelihood that the message would be understood by those who viewed it; and (3) the context in which the conduct alleged to be communicative takes place. *Id.* Here, the United States Court of Appeals for the Moot Circuit properly held that a professor's assignment of grades is a communicative act meriting First Amendment protection for the professor as symbolic speech. (J.A. at 9-10).

1. Professor Bluth clearly intended to convey a specific message to students through the assignment of a letter grade.

The first factor analyzed by courts when determining whether conduct constitutes speech under the First Amendment is the intent of the speaker to convey a particularized or specific message. *Id.* In prior cases dealing with this issue, this Court has found that a speaker or speakers intended to convey a particularized message when: (1) the speaker, a public high school student wore a black armband in protest of the Vietnam War, *Tinker*, 393 U.S. 503; (2) a speaker displayed a United States flag with a peace symbol fashioned with removable tape affixed to the flag, *Spence*, 418 U.S. 405; and (3) the speaker burned a United States Flag in protest of the policies of the United States government, *Johnson*, 491 U.S. 397.

In *Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir. 1989), the court found that by assigning a letter grade to a student, the professor sends a clear message to the recipient, and thus a final grade is considered to be speech under the First Amendment. "The message communicated by the letter grade 'A' is virtually indistinguishable from the message communicated by a formal written evaluation indicating 'excellent work.'" *Id.* The court properly stressed the importance of allowing a professor to retain the ability to use his or her professional judgment to evaluate a student's abilities and knowledge and then communicate a unique message to the student through a grade. *Id.* at 827-28. The assignment of grades, the court reasoned, is central to the professor's teaching method and allows the professor to evaluate the student properly in order to determine whether the student has or has not "absorbed the course material." *Id.* The court ultimately determined that the defendant university officials' act of ordering the plaintiff university professor to change a student's grade gave rise to a First Amendment violation. *Id.*

The Sixth Circuit Court of Appeals further found in *Perry v. McGinnis*, 209 F.3d 597 (6th Cir. 2000), that an employee-hearing officer's decision made in an inmate's disciplinary hearing constituted a communicative act entitled to First Amendment protection. The court in that case likened a guilty/not-guilty decision handed down by a public employee hearing officer in a disciplinary hearing to the letter grade given in *Parate*. *Id.* at 604. While the court understood that both cases dealt with different sectors of the state, it found that, like *Parate*, the state in *Perry* "entrusted one of its employees with the task of reviewing facts, evaluating a set of circumstances, and making a decision." *Id.* The court believed that a hearing officer's decision, like the decision of a public university professor to give a student a certain grade, is a communicative act "aimed squarely at the inmates in question with the goal of reemphasizing the parameters of acceptable behavior in prison." *Id.*

In the case at bar, this Court should find the Sixth Circuit's reasoning in *Parate* persuasive. By assigning a certain letter grade to his students, Professor Bluth is conveying the most important message provided in an academic setting – a thorough evaluation of a student's knowledge and intellectual abilities in a certain subject area. The fact that Professor Bluth uses a set of subjective qualitative factors when computing a student's final grade, including scores on exams as well as participation in class, clearly displays his intent to communicate his evaluative priorities to his class. (R. at 1). An assignment of a letter grade communicates a clear message of a student's academic performance intended to be a proper evaluation by a university professor.

2. The message conveyed by Professor Bluth through his assignment of grades was very likely understood by the students receiving the grades.

The second factor analyzed by courts when determining whether conduct constitutes speech under the First Amendment is the likelihood that the message would be understood by those who viewed it. *Spence*, 418 U.S. at 410-11. The Supreme Court has often confronted this issue when deciding cases dealing with contentious political issues present in the United States and abroad. *See Brown v. Louisiana*, 383 U.S. 131 (1966) (finding that a silent sit-in by black persons against a library's segregation policy had sufficient expressive qualities to be deemed speech); *Johnson*, 491 U.S. 397 (finding that the burning of a United States Flag outside of the Republican National Convention conveyed a message that the protestors were dissatisfied with the current political regime in the United States and that those who viewed it would understand this message). However, courts have also dealt with other societal issues when inquiring whether the given conduct's message would likely be understood by those viewing it.

In *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993), the Fourth Circuit Court of Appeals debated the issue of whether to nullify sanctions

brought by a university against a fraternity for holding an "ugly woman contest" on the ground that the sanctions were violative of the First Amendment. The fraternity had staged the contest in the cafeteria of the student union, with eighteen fraternity members dressed up as caricatures of different types of women. *Id.* at 387-88. After protests from groups of students who complained that the skit was objectionably sexist and racist, the university sanctioned the fraternity. *Id.* at 388-89. In determining whether the conduct of the fraternity was expressive enough to be considered speech, the court found that "at least some of the audience viewing the skit would understand the [f]raternity's message of satire and humor." *Id.* at 392.

Conversely, in *Young v. New York City Transit Auth.*, 903 F.2d 146 (2d Cir. 1990), the Second Circuit Court of Appeals denied First Amendment protection to the act of begging and panhandling in the New York City subway system. The court found that even if a subway beggar or panhandler was attempting to convey a particularized message such as "[g]overnment benefits are inadequate" or "I am homeless," it seemed highly unlikely that the people passing by "would be disposed to focus attention on any message, let alone a tacit and particularized one." *Id.* at 153-54. The court emphatically distinguished this case from others that had involved "burning a flag, wearing a black arm-band, [and] sitting or marching." *Id.* at 154.

Unlike *Young*, the instant case deals with a clearly communicated message that is fully coherent to those viewing it. The assignment of a letter grade clearly connotes a much more comprehensible message to its viewers than the mere act of begging a passerby for some spare change. As the Court of Appeals properly pointed out, Professor Bluth gave his students adequate notice of his grading policy and did not use an arbitrary or illogical grading system. (J.A. at 9-10). Professor Bluth provided a clear and understandable grading system in the syllabus distributed to his class, outlining grading breakdowns and the importance of certain

factors such as classroom attendance and participation. (R. at 2). Like *Iota Xi*, the conduct in question today clearly displays a message that is comprehensible by some, if not all, of the students in Professor Bluth's class. The argument that students would not understand the evaluative message conveyed by the assignment of a letter grade is also highly unavailing, since it is difficult to believe that any student within a university setting would not recognize that a letter grade is a professor's assessment of the student's performance in that class. The assignment of a letter grade to students at the conclusion of a semester is undoubtedly understood by those viewing it – the students – in that it displays the professor's intentional and clear evaluation of the students' performances.

3. The context of an academic university setting further supports the finding that the assignment of a letter grade is symbolic speech.

The third factor analyzed by courts when determining whether conduct constitutes speech under the First Amendment is the context in which the allegedly communicative conduct took place. *Spence*, 418 U.S. at 410-11. Throughout the past century, the Supreme Court has held that First Amendment rights, "applied in light of the special characteristics of the school environment, are available to teachers and students." *Tinker*, 393 U.S. at 506. This Court has continuously recognized the importance of First Amendment rights in the context of an academic setting, upholding the speech rights of various factions involved in a university system. *Id.* In this light, one could hardly imagine that a letter grade given to a public university student does not support the proposition that the assignment of the grade was a communicative act meriting First Amendment protection for the professor as symbolic speech.

In *Tinker*, this Court took into account the hostilities in Vietnam that were then taking place when determining that the "wearing of black armbands in a school environment conveyed an unmistakable message about a contemporaneous issue of intense public concern." *Spence*,

418 U.S. at 410 (citing *Tinker*, 393 U.S. at 505-14). The Second Circuit in *Young* found that the setting of a public subway system did not support the argument that begging and panhandling warranted the distinction of speech. *Young*, 903 F.2d at 154. While this Court may not have to look to overarching political or societal events in order to analyze the context of this case, as it had to do in cases such as *Tinker* and *Spence*, the academic setting involved here provides ample support to the proposition that the assignment of a letter grade should be considered speech. The assignment of a letter grade by a university professor has serious implications for the progress of a student's academic career. Further, the fact that the professor is given the responsibility to competently evaluate a student by distributing a proper grade at the end of the semester lends itself to the proposition that the act of giving grades does constitute speech under the First Amendment.

B. A University Professor's "Symbolic Speech" Rights Are Integrally Intertwined With The Rights Of Academic Freedom.

From early on, this Court has affirmed the fact that "the essentiality of freedom in the community of American universities is almost self-evident." *Sweezy*, 354 U.S. at 250. More importantly, "[t]eachers and students must always remain free to inquire, to study and to *evaluate*, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Id*. (emphasis added). In *Sweezy*, this Court divided the idea of "academic freedom" into "four essential freedoms": "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id*. at 263. While this Court has not laid out strict guidelines and standards regarding the theory of academic freedom, other courts have continued to emphasize its importance. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

While the Fourth Circuit has held that the right of "'academic freedom' . . . inheres in the University, [and] not in the individual professors," *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 593 (4th Cir. 2005) (citing *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000)), this Court should adopt the reasoning of the Seventh Circuit in *Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625 (7th Cir. 1985). The court in that case stated that the term academic freedom "is used to denote both the freedom of the academy to pursue its end without interference from the government . . . and the *freedom of the individual teacher . . . to pursue his ends without interference from the academy . . . .*" *Id.* at 629 (emphasis added). The communicative act of assigning a letter grade by a university professor constitutes symbolic speech that should fall under the concept of academic freedom. In order for an academic system to thrive and for professors to truly inform, assess, and improve a student's performance, professors must have the flexibility to convey an evaluative message to their pupils. Academic freedom should apply not only to the university but also to those figures that are responsible for maintaining the spread of knowledge and intellectual wealth to our students – teachers and professors.

II. A PUBLIC UNIVERSITY PROFESSOR, AS A CITIZEN, POSSESSES A FIRST AMENDMENT RIGHT TO ASSIGN GRADES.

A. Professor Bluth's Assignment Of Grades Is A Matter Of Public Concern, Subject To The *Pickering* Test, And His Interest In Commenting Upon Matters Of Public Concern Outweighs The University's Asserted Interest In Its Operations.

Professor Bluth, as a citizen, possesses a First Amendment right to assign grades. This Court recognizes that "a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142 (1983). Thus, "public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's

right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). Furthermore, this Court has acknowledged that "the decision of an individual professor as to the proper grade for a student in his course . . . requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978).

Determining whether the speech of a public employee is constitutionally protected requires striking "a balance between the interests of the 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 v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). "This balancing is necessary in order to accommodate 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). The *Pickering* test involves a two-part analysis to evaluate the speech of public employees. *Connick*, 461 U.S. at 150. First, a court is to examine whether an employee's expression constitutes "speech on a matter of public concern." *Id.* at 146. If a public employee speaks upon a matter of public concern, the *Pickering* test then requires a court to balance the competing interests of the employee and the government. *Id.* at 150. This second step calls for an examination of whether the government is justified in limiting the particular employee's speech to a different extent than "any member of the general public." *Pickering*, 391 U.S. at 573.

Courts look to the "content, form, and context of a given statement, as revealed by the whole record" to determine whether an employee's speech pertains to a matter of public concern.

Connick, 461 U.S. at 147-48. It is when an "expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community [that] government officials should enjoy wide latitude in managing their offices . . . ." *Connick*, 461 U.S. at 146. In *Pickering*, a board of education dismissed a teacher after the teacher sent a letter to a newspaper that was critical of the board's proposals to raise revenue for the schools. 391 U.S. at 564. The Court concluded that school funding was "a matter of legitimate public concern" and acknowledged that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions" regarding the matter. *Id.* at 571-72. The Court held that the teacher's free speech rights were violated and that "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.* at 565, 573.

Here, Professor Bluth's assignment of grades is a matter of public concern. Applying the principle from *Connick* that a court must view an expression in light of its context, 461 U.S. at 147-48, Professor Bluth's expression must be viewed in light of the context of public concern about grade policies. Grade policies at universities are an integral piece of the public concern about grade inflation and the possible misallocation of government funds. *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, 1576-77 (2003). Further, grades have important consequences on students' futures, in areas such as job searches, graduate school applications, and being permitted to remain at a particular school. *See* Sung at 1577-78. It is clear that the assignment of individual grades concerns the community, particularly here, when only one student's grade deviates from a professor's grading policy. Accordingly, Professor Bluth's right to assign grades pursuant to his grading policy is a matter of public concern.

Just as this Court stated in *Pickering* that the teacher's statements were "neither shown nor [could] be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally," 391 U.S. at 572-73, here, the University has made no showing that Professor Bluth's grading policy or assigned grade to Michael impeded Professor Bluth's performance in the classroom or interfered with the university's operations generally. In *Pickering*, this Court acknowledged that it was "not presented with a situation in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts." *Id.* at 572. The Court faces a similar situation here, since the University could have corrected any errors it perceived with Professor Bluth's grades. Professor Bluth's interests in academic freedom and the freedom of speech outweigh any purported interests of the University.

In *Connick*, a former assistant district attorney was discharged for distributing a questionnaire to her co-workers regarding workplace affairs. 461 U.S. at 140. While this Court concluded that one of the questions in the former assistant district attorney's questionnaire, which asked about pressure to work in political campaigns, related to a matter of public concern, the Court ultimately determined that the balance of interests favored the government. *Id.* at 149, 154. The Court in *Connick* nonetheless reiterated the principle set forth in *Pickering* that "[b]ecause of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to lay down a general standard against which all such statements may be judged." *Id.* at 154 (citing *Pickering*, 391 U.S. at 569).

The Court's reasoning in *Connick* emphasized that Connick, the District Attorney, did not have to "tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." *Id.* at 154. Furthermore, the Court characterized the employee's speech as "an employee grievance concerning internal office policy" and an "attempt to constitutionalize the employee grievance." *Id.* In contrast, here, the University showed no evidence that Professor Bluth's grading policy or the grade he assigned to Michael in any way undermined its authority. The University does not have an official grading policy and there is no evidence to suggest that Professor Bluth violated any rules by giving Michael a "D" or initially refusing to change Michael's grade. Additionally, Professor Bluth ultimately changed Michael's grade to a "B" after being warned by Dean Funke that "if he did not cooperate with the administration, he would be hurting his chances of receiving tenure." (R. at 3). Accordingly, the facts here are substantially different than those in *Connick*, and this case does not present the substantial government interests that were central to the *Connick* decision.

In *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 282 (1977), a school board did not rehire a teacher after he engaged in several incidents that the school board disapproved of, including the teacher's communication to a radio station of a memorandum issued by the school principal relating to teacher attire. This Court accepted the lower court's finding that the teacher's communication was protected, emphasizing that "[t]here is no suggestion by the Board that Doyle violated any established policy, or that its reaction to his communication to the radio station was anything more than an ad hoc response to Doyle's action in making the memorandum public." *Id.* at 284.

Just as there was no suggestion by the Board in *Mt. Healthy* that Doyle violated any established policy, there is no suggestion here that Professor Bluth violated any established

policy. On the contrary, Professor Bluth calculated Michael's grade by adhering to the formula he used to grade all his students. Professor Bluth taught at the University for three years, and no other student had ever filed an official complaint about Professor Bluth's grading system. (R. at 2). The circumstances that led to Michael's grade included Michael's failure to participate in class other than mere "showboating" and four unexcused absences, resulting in a class participation grade of 10%. (R. at 3). Furthermore, Michael received a grade of 80% on the writing assignments and a 95% on the final exam (R. at 2). Thus, under Professor Bluth's grading policy, Michael's final course grade was properly calculated to be a "D." (R. at 2).

The University is not justified in treating Professor Bluth's grading policy any differently than any other professor's grading policy. There is no evidence to suggest that Professor Bluth's grading policy violates any university policy or even that it is structured in a substantially different way than the grading policy of other professors. In fact, the University does not have any official grading policy. (R. at 3).

Within weeks of the grievance that Michael filed with the Office of the Dean, Professor Bluth received notice that his contract with the University would not be renewed. (R. at 3). Thus, it seems quite clear that Professor Bluth would not have been terminated by the University had he initially complied with its request to change Michael's grade.

In *Parate*, a university did not renew a professor's contract to teach after he initially refused to sign memoranda prepared by a university official that referred to a purported change in grading criteria, which resulted in a grade change for two of the professor's students. 868 F.2d at 823-24. The court concluded that "[a]lthough the individual professor does not escape the reasonable review of university officials in the assignment of grades, she should remain free to decide, according to her own professional judgment, what grades to assign and what grades

not to assign." *Id.* at 828. The *Parate* court acknowledged that "[i]t has long been recognized that the purpose of academic freedom is to preserve the 'free marketplace of ideas' and protect the individual professor's classroom method from the arbitrary interference of university officials." *Id.* at 830. The court held that "[t]he defendants' act of *ordering* [the professor] to change the grade, rather than the act of giving Student 'Y' a different grade than [the professor] desired, [gave] rise to the constitutional violation." *Id.* at 829.

Here, Professor Bluth initially refused to change Michael's grade from a "D" to a "B," and it was only out of fear for his job safety that Professor Bluth complied with the University's demand to change the grade. (R. at 3). This is the practical equivalent of the University ordering or compelling Professor Bluth to change Michael's grade. In sum, Professor Bluth, as a public university professor and a citizen, has a First Amendment right to assign grades.

B. Professor Bluth Should Be Free To Assign Grades Because Courts Give Deference To Academic Evaluations Of Students And Professor Bluth Is In The Best Position To Assign Grades.

Professor Bluth should be free to assign grades to the students in his class. Courts give deference to academic evaluations of students and Professor Bluth is in a better position than the University to assign grades. In reviewing academic decisions, this Court asserts that judges "should show great respect for the faculty's professional judgment," and that judges "may not override it 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 Mich. v. Ewing*, 474 U.S. 214, 225 (1985). Furthermore, the court in *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152, 155 (6th Cir. 1995), stated that "[s]o long as the teacher violates no positive law or school policy, the teacher has broad authority to base her grades for students on her view of the merits of the students' work."

This Court expressed the importance of freedom for teachers in *Sweezy*, stating that "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." 354 U.S. at 250. This Court said that "[t]eachers and students must always remain free to inquire, to study and to evaluate . . . ." *Id.* Here, Professor Bluth assigned Michael's grade based on his professional judgment, without violating any school policy. In line with this Court's view on the policy behind deference to teachers, Professor Bluth should be free to assign grades.

C. *Garcetti* Does Not Limit Professor Bluth's Right To Assign Grades Because This Dispute Involves Issues Of Scholarship And Teaching And Because Professor Bluth's Assignment Of Michael's Individual Grade Does Not Affect The University's Operations.

This Court's recent decision in *Garcetti* on public employee speech does not limit Professor Bluth's right to assign grades. In contrast with *Garcetti*, which involved the speech of a deputy district attorney, this dispute involves issues of scholarship and teaching, and this Court acknowledged that its analysis in *Garcetti* may not apply in the same way to a case involving scholarship or teaching. 547 U.S. at 413-14, 425. Furthermore, the University's restriction on Professor Bluth's speech does not affect the University's operations, which is required under *Garcetti*. *Id.* at 418.

1. *Garcetti* does not limit Professor Bluth's right to assign grades because this dispute involves issues of scholarship and teaching.

In *Garcetti*, a deputy district attorney claimed he was subject to retaliatory employment actions after preparing a memorandum recommending the dismissal of a case. *Id.* at 413-15. The Court held that the deputy district attorney made his statements pursuant to his official duties and that his communication was not protected from employer discipline. *Id.* at 421.

This Court recognized in *Garcetti* that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence." 547 U.S. at 425. Accordingly, this Court concluded, "[w]e need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." *Id.*

One way in which the academic sphere differs from the general public employment scheme lies in the unique role played by university professors. "Professors' immense involvement in the hiring, tenure, termination and promotion of other faculty members suggests that in many respects, professors are their own bosses. Calling them employees would be careless labeling." Alisa W. Chang, *Resuscitating the Constitutional Theory of Academic Freedom: A Search for a Standard beyond Pickering and Connick*, 53 Stan. L. Rev. 915, 938 (2001). This Court embraced this view of university professors in *N.L.R.B. v. Yeshiva Univ.*, 444 U.S. 672, 686 (1980), holding that university professors "resembled managers in an industry, entrusted to make high-level administrative decisions and whose authority is often 'absolute.'" Chang at 938 (citing *Yeshiva*, 418 U.S. at 686). For these reasons, it is inappropriate to blindly apply the *Garcetti* "public employee" exception to the "[n]ontraditional employer-employee relationship [found] in universities." Chang at 937.

While *Garcetti* involved public employee speech related to the disposition of a criminal case, this case involves public employee speech related to scholarship, teaching, and the assignment of grades. Therefore, the facts here are clearly distinguishable from the facts in *Garcetti*. Further, this Court specifically recognized in *Garcetti* the potential for different treatment of speech that relates to scholarship or teaching. 547 U.S. at 425. While Professor

Bluth is a public employee, and arguably assigns grades as part of his official duties as a professor, he nonetheless possesses a First Amendment right to assign grades because of this Court's unique treatment of academic speech. *See Wooley v. Maynard*, 430 U.S. 705, 705-06 (1977); *Ward v. Hickey*, 996 F.2d 448, 452-54 (1st Cir. 1993).

2. *Garcetti* does not limit Professor Bluth's right to assign grades because Professor Bluth's assignment of Michael's individual grade does not affect the University's operations.

While this Court recognized in *Garcetti* that "[a] government entity has broader discretion to restrict speech when it acts in its role as employer," this Court asserted that "the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." *Id.* at 418. The "official communications" in *Garcetti* had "official consequences, [and] creat[ed] a need for substantive consistency and clarity," since the deputy district attorney's memo recommending the dismissal of a pending criminal case conflicted with his employer's role as a prosecutor. *Id.* at 422-23. Here, Professor Bluth's assignment of Michael's grade could not feasibly be argued to have affected the University's operations. Michael's grade was consistent with Professor Bluth's grading policy and was an accurate reflection of Michael's class performance. The University's attempt to restrict Professor Bluth's speech, by requiring that he change Michael's grade, does not fall under the discretion *Garcetti* provides to the government because the assignment of Michael's grade does not affect the University's operations. Accordingly, Professor Bluth possesses a First Amendment right to assign grades and *Garcetti* does not limit this right.

D. The University's Mandate That Professor Bluth Change Michael's Grade Amounts To A Violation Of The First Amendment, Regardless Of Whether The Original Grade Was Assigned Pursuant To The Professor's Professional Capacity.

Any attempt by the University to compel a professor to change a student's grade contrary to his wishes amounts to a violation of the First Amendment. This Court has made clear that a state may not compel its citizens to speak where such speech would be afforded protections of the First Amendment. *Barnette*, 319 U.S. at 624. The court in *Parate* held that "[b]ecause the assignment of a letter grade is symbolic communication intended to send a specific message to the student, the individual professor's communicative act is entitled to some measure of First Amendment protection." 868 F.2d at 827. As such, the University may not compel Professor Bluth to reassign Michael's grade, since this would be tantamount to forced symbolic speech.

By forcing a professor to assign a grade against his professional judgment, the University is contravening the very essence of the First Amendment. While the First Amendment is predominantly directed at preventing the state from suppressing active expression, it is just as seriously implicated when the government attempts to compel expression. An important function of the First Amendment is to forbid the government from forcing a speaker to profess a belief against the speaker's will. *Barnette*, 319 U.S. at 641. This Court has stated that "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994). In *Barnette*, this Court held that the First Amendment protected students from being forced to salute the American flag and recite the Pledge of Allegiance in school. 319 U.S. at 624. This Court discussed the characterization of the American flag as a symbol. *Id.* at 631. In doing so, it stated that symbols are a "primitive but effective way of communicating ideas." *Id.* at 632. This Court reiterated the importance of treating symbols as protected speech, noting that one "gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." *Id.* at 633.

This Court went on to state that because of its symbolic nature, a "compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind." *Id*.

The fundamental notions presented in *Barnette* provide an appropriate framework for analysis in the case at bar. Like the flag in *Barnette*, any grade that Professor Bluth ultimately assigns will inevitably represent a concrete idea. It will convey his professional assessment of his student's test-taking and writing abilities, as well as the student's class participation. Moreover, it will convey a precise numerical calculation. The University, by compelling Professor Bluth to not only revoke his original grade, but *issue a different one in its place*, is effectively forcing the Professor to convey a message with which he clearly disagrees – an incorrect evaluation of his student's academic performance.

In *Barnette*, this Court noted that it was unclear "whether the regulation contemplate[d] that pupils forego any contrary convictions of their own." 319 U.S. at 633. The actions of the University in the case at hand go one step further than the conduct which this Court prohibited in *Barnette*. Here, it is undisputed over the fact that Professor Bluth disagrees with the University's grade change from a "D" to a "B." This change is a significant one, and is inconsistent with Professor Bluth's merit-based formula. Since this formula was made known to students at the start of the semester, there is no question that a reasonable student would find a "B" to mean something substantively and mathematically different than a "D." In light of Professor Bluth's established grading policy, a student who receives a "B" may very well feel that he has successfully met most of the professor's standards, and accordingly absorbed the necessary materials. It is clear from Professor Bluth's formulaic computation of Michael's grade that Michael has not in fact met these demands. For the University to command Professor Bluth to

issue Michael a "B" despite his raw score of 65% is to effectively compel Professor Bluth to lie. Under *Barnette*, this "compulsion . . . to declare a belief" is unconstitutional. 319 U.S. at 631.

While *Barnette* looked primarily at the issue of compelled speech involving students, the Court's holding is a broad one that has been subsequently adopted by other courts and applied to teachers. For example, the court in *Russo v. Cent. Sch. Dist. No. 1*, 469 F.2d 623, 630-32 (2d Cir. 1972), faced a similar issue in which a high school dismissed an art teacher for refusing to pledge allegiance to the flag. In holding her dismissal to be unconstitutional, the court assured that "[t]here is little room . . . for an interpretation of the First Amendment that would be more restrictive with respect to teachers than it is with respect to their students, where there has been no interference with the requirements of appropriate discipline in the operation of the school." *Id.* at 630. This holding supported a broad interpretation of public school teachers' rights to protections of the First Amendment, grounding itself in the essential purpose of the doctrine: "To compel a person to speak what is not in his mind offends the very principles of tolerance and understanding which so long have been the foundation of our great land." *Id.* at 634.

Accordingly, while a university professor's methodology is not immunized from review by the university's administration, the professor does not waive his general and fundamental protection against forced speech. *Parate*, 868 F.2d at 827-28. Even if this Court finds that a professor may not have a "constitutional interest in the grades…his students ultimately receive," *Id.* at 828, the University cannot compel the professor to become the speaker. The court examined this precise issue in *Parate*, where a professor assigned his student a grade of "B," based on that student's numerical score. *Id.* at 823. The student requested that his grade be changed to an "A," offering medical excuses to explain his poorer-than-expected performance. *Id.* at 824. The professor, in his professional capacity, determined that the excuses put forth by

the student lacked credibility, and that the grade the student had earned represented a fair assessment of his performance. *Id*. The student took the matter to the Dean of the university, who in turn ordered the professor to sign a memorandum which would effectively boost the student's numerical score to fall within the "A" range. *Id*. The University did not allow the professor to indicate his disagreement on the memorandum. *Id*. After several failed attempts at voicing his contention, the professor finally signed the memorandum to avoid losing his job. *Id*.

The court held that the university violated the professor's right to academic freedom when it ordered him to change the student's grade. *Id.* at 828. Of utmost importance was the court's subtle distinction between suppressing a professor's original grade and ordering that professor to assign a new one. The court stated that "[t]he defendants' act of *ordering* [the professor] to change the grade, rather than the act of giving Student 'Y' a different grade than [the professor] desired . . . [is what gave] rise to the constitutional violation." *Id*. The professor's "First Amendment right to academic freedom was violated by the defendants because they ordered [the professor] to change Student 'Y's' original grade," instead of doing it themselves. *Id.* at 829. As its rationale, the *Parate* court asserted that "the difference between compelled speech and compelled silence is without constitutional significance, for the First Amendment guarantees freedom of speech, a term necessarily comprising the decision of both what to say and what not to say." *Id*. (internal quotation marks omitted).

The facts of *Parate* bear striking similarity to the case at hand. Professor Bluth, like the professor in *Parate*, is a nontenured professor who was ordered by the University to change a student's grade. (R. at 1, 3). In both situations the University had every opportunity to change the grade through administrative procedures. Still, in both cases, each university declined to do so. Here, like in *Parate*, the University insisted that Professor Bluth personally change

Michael's grade, and thus compelled him to "conform to a belief and a communication to which he did not subscribe." *Parate*, 868 F.2d at 830. Both the professor in *Parate* and Professor Bluth had pre-established formulas that conflicted with the arbitrary grade changes demanded by each university. *Id.* at 823; (R. at 2). In the case at bar, the resulting numerical discrepancy between grade earned and grade received was even larger than in *Parate*. In each case, the professor clearly voiced his preference to refrain from actively changing the grade. Further, both *Parate* and the case at bar involve the use of threats of nonrenewal of contracts to compel the professors to obey. *Parate*, 868 F.2d at 824; (R. at 3). By essentially forcing him to submit, the University violated Professor Bluth's right to refrain from speaking.

This Court has acknowledged this right to remain silent, illustrating the consistency of the courts' application of the First Amendment to matters of both restricted and compelled speech. In *Wooley v. Maynard*, this Court held that the state of New Hampshire could not constitutionally require citizens to display the state motto, "Live Free or Die," upon their vehicle license plates. 430 U.S. at 705-06. This Court found that the state statute requiring individuals to display its motto effectively required them to "use their private property as a 'mobile billboard' for the State's ideological message." *Id.* at 715. This Court articulated the "proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Id.* at 714. The Court expanded its interpretation of First Amendment protections in holding that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind." *Id.* (internal quotation marks omitted).

The issue of compelled speech does not only arise in situations in which an individual must personally speak the government's message. A number of decisions have limited the

government's ability to force one speaker to accommodate another speaker's message. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257-58 (1974) (holding that a statute that compelled a newspaper to print an editorial amounted to unconstitutional content regulation of the press); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc*., 515 U.S. 557, 557 (1995) (holding that a state law could not constitutionally require a parade to include a group whose message the parade's organizer did not wish to convey); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal*., 475 U.S. 1, 9 (1986) (holding that a state agency cannot require a utility company to include a third-party newsletter in a billing envelope that is mailed to customers). These cases illustrate the Supreme Court's dedication to protecting not only freedom from suppression of speech, but also freedom from compulsion.

While *Lovelace v. Se. Mass. Univ.*, 793 F.2d 419 (1st Cir. 1986), may appear factually similar at first glance, it is clearly distinguishable from the case at bar. There, a nontenured professor claimed that the university had violated his First Amendment rights when it failed to renew his contract because he refused to agree to lower his grading standards. *Id.* at 425. The court upheld the termination, finding that the professor had in fact violated the university's established grading policy. *Id.* Whereas *Lovelace* involved conduct, the case at hand involves speech. The *Lovelace* court explained that "[i]t is important to note what plaintiff's [F]irst [A]mendment claim is and to separate speech from action." *Id.* at 426. The court went on to say that "[t]o accept . . . that an untenured teacher's grading policy is constitutionally protected and insulates him from discharge when his standards conflict with those of the university would be to constrict the university in defining and performing its educational mission." *Id.*

The claim in *Lovelace* differs sharply from Professor Bluth's in several respects. First, the university in the case at hand does not have an established grading policy. Consequently,

Professor Bluth cannot be found to have impeded the University's pedagogical mission. Rather, Professor Bluth's merit-based grading scheme likely enhanced the University's reputation as a competitive institution, facilitating its educational mission. Second, the University never directly challenged Professor Bluth's grading policy, as the university did in *Lovelace*. 793 F.2d at 425. Had the University directly challenged Professor Bluth's grading policy, his reluctance to change Michael's grade would also have involved conduct, making the University's discipline appropriate. *See generally Ward v. Hickey*, 996 F.2d at 452-54 (holding that a school board could not take action against a teacher for speech that it had never previously attempted to regulate). Instead, the University punished Professor Bluth for refusing to express coerced speech. Third, because no student had ever filed a formal complaint against Professor Bluth, the University had no prior grounds upon which to attack his approach. The fact that the University chose one student in particular as a vehicle to compel Professor Bluth to suddenly restructure his grading policy suggests that its motives were questionable. The benefit to the University in changing Michael's grade was nominal when compared to the educational advantages of allowing Professor Bluth to adhere to his traditional grading policy.

CONCLUSION

For the reasons set forth above, George Bluth, Respondent, respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Moot Circuit, defeating Petitioner's motion to dismiss.

Respectfully Submitted,

Team 008
Counsel for Respondent