Spring 2015

Cole Ruiz, Best of Section D

Cole Ruiz

No. 12345

IN THE

Supreme Court of the United States

COLLEGE OF SOUTHERN PEMBERLEY,

Petitioners,

v.

ELIZABETH BENNET,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixteenth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

I. Are grades speech protected by the First Amendment?

II. If so, does the doctrine of academic freedom extend to the university or the professor?

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The Opinion and Order of the Sixteenth Circuit (R. at 19) is unreported. The United States District Court for the Southern District of Pemberley's Opinion and Order Granting Defendants' Motion to Dismiss (R. at 13) is unreported.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on June 5, 2014. (R. at 19). Petitioner filed his petition for writ of certiorari on June 24, 2014. (R. at 23). This Court granted the petition on October 15, 2014. (R. at 22). This Court's jurisdiction rests on 28 U.S.C. § 1254(1) (2012).

STANDARD OF REVIEW

A district court's fact findings and the reasonable inferences to be drawn from them are reviewed for clear error. Its legal conclusions are reviewed *de novo*.

CONSTITUTIONAL PROVISION INVOLVED

> The First Amendment to the United States Constitution provides, in relevant part: Congress shall make no law… abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. AMEND. I.

STATEMENT OF FACTS

The College of Southern Pemberley (CSP) employed Elizabeth Bennet as a professor of English Literature. Bennet began her duties at CSP in September of 2008. (R. at 3).

Student George Wickham enrolled at CSP in the fall semester of 2012. (R. at 3). Wickham, a transfer from New York University, is a highly touted student athlete. (R. at 3). Since his enrollment, Wickham has made vast contributions to the unprecedented success of CSP's basketball program. (R. at 3). CSP's basketball team defeated the University of Pemberley for the first time in the school's history in February of 2013. (R. at 3). Subsequently, CSP's basketball team won the State of Pemberley Championship, also for the first time in the school's history. (R. at 3). The team's success earned an offer to attend the National Invitational, a prestigious basketball tournament, the following fall. CSP's success, largely due to Wickham's contributions on the basketball court, resulted in positive media coverage and national recognition, never before experienced by the college. (R. at 3). The program's achievements resulted in coverage by *The New York Times* and *USA Today*. (R. at 3). Alumni donations increased, and interest among prospective students grew to unprecedented levels. (R. at 3).

Well into the grueling midseason of college basketball, during the spring semester of 2013, the *Southern Pemberley Daily News* reported that CSP gave Wickham special treatment, including senior-only housing, exemption from certain midterms, and excused absences at the request of CSP's dean. (R. at 3).

Wickham enrolled in Bennet's class, which focused on the author Jane Austen, in January 2013. (R. at 3). Throughout the course, Wickham did not attend fifteen of the twenty-eight class sessions in Bennet's class. (R. at 4). Wickham turned in a final paper on *Pride and Prejudice*, which – according to Bennet – was full of misspellings, poor grammar, and factual errors. (R. at 4). Bennet professed her belief that Wickham did not read the novel. (R. at 4). Accordingly, Bennet

gave Wickham an "F" for the course. (R. at 4).

Pemberley Division Athletic rules prohibit Wickham from competing in collegiate athletics if he received an "F" on his transcript the previous semester. (R. at 4). Under these circumstances, Wickham would not be allowed to participate in the national invitational the following fall semester. (R. at 4).

CSP's administration asked Bennet to re-grade Wickham's paper and change his grade to a "B." (R. at 4). After refusing to comply with administration's request, Bennet received a letter of termination from the college. (R. at 4).

Bennet brought action against the college on June 8, 2013, alleging that CSP violated 42 U.S.C § 1983 by terminating Bennet for refusing to assign a grade pursuant to the CSP's policy, a right that Bennet claims is unconditionally protected by the First Amendment. (R. at 4-5).

Consequently, on July 10, 2013, CSP moved for dismissal on grounds that Bennet failed to state a claim upon which the Court could grant relief. FED. R. CIV. P. 12. (R. at 6-8). Relying on precedent from a majority of circuits around the country, the United States District Court for the Southern District of Pemberley granted CSP's motion to dismiss on August 26, 2013. (R. at 9 -12). Bennet appealed to the United States Court of Appeals for the Sixteenth Circuit. (R. at 17).

Following the Sixth Circuit's reasoning in *Parate v Isibor*, 828 F.2d 821, 827 (6th Cir. 1989), the Sixteenth Circuit held the District Court erred in dismissing Bennet's claim. (R. at 21). Bennet petitioned for writ of certiorari on June 24, 2014. On October 15, 2014, this Court granted certiorari review. (R. at 24).

SUMMARY OF ARGUMENT

I.

The assignment of grades is not speech, but an action, which, when in conflict with CSP's instruction, rightly justifies reason for discharge. Bennet bore the burden to prove that her

insubordinate refusal to follow the grading instruction of CSP is protected by the narrowing margins of the First Amendment. Unable to prove that the First Amendment shelters her insubordinate conduct from employer oversight, CSP reserves the right to make decisions pursuant to their institution's mission, including the autonomy to discharge a non-compliant employee at-will.

The threshold question in determining if grades are speech is not whether the professor is communicating to the student, but whether disobeying the directive of CSP warrants judicial oversight. Such defiance is not speech, but an act of insubordination, and wholly within the core obligations of the university to rectify. Conceding that a professor's grading decisions are shielded from consequences when in conflict with that of the college would restrict academic institutions across the country from carrying out their academic mission.

II.

Even assuming grading is a form of symbolic speech protected by the First Amendment, it is the speech of the academic institution that is protected, not the instructor. Throughout *Sweezy* and its progeny, this Court has identified certain freedoms retained by academic institutions. These freedoms include the capacity to choose who teaches, and how the institution's curriculum is taught. Both of these freedoms, ascribed to the academic institution, are germane to this case.

In *Connick*, this Court ruled that if a public employee's expression does not reasonably relate to a public matter, the public employer has complete autonomy to address noncompliance without invasive judiciary oversight. In terms of grading, a message borne by the instructor to the student, is only meant to be received by the student, not the public. Such messages represent a form of communication between CSP and the student. Therefore, grading, being the speech of the institution, is only protected by the First Amendment insofar as ensuring CSP's academic freedom to choose how curriculum is taught. Moreover, as a public employer, CSP maintains the right to hire

and fire employees at-will, so long as their decision does not interfere with an employee's material constitutional rights. Without autonomy over grading procedure and the authority to choose who to employ as professors, the very integrity of CSP's mission, and the overall education structure in this country is at risk.

ARGUMENT

I. ASSIGNING AN ACADEMIC GRADE DOES NOT CONSTITUTE A FORM OF PROTECTED FREE SPEECH UNDER THE FIRST AMENDMENT.

A. Bennet's claim, that CSP violated her First Amendment rights when it fired her for refusing to obey the administration's directive, fails to satisfy the *Doyle* test.

This Court established the test for determining whether an academic institution's decision to discharge a teacher violated the teacher's First Amendment rights in *Mount Healthy City School Disrict Board of Education v. Doyle*, 429 U.S. 274, 285 (1977). *See Id.* (rejecting a teacher's complaint that a public school violated his First Amendment rights for discharging him after calling into radio station and criticizing the school). The *Doyle* test, places a burden on the plaintiff to prove (1) that the conduct for which he was fired is protected by the First Amendment, and (2) that his constitutionally protected conduct was a substantial motivating factor in his firing. *Id*. at 285. Once the first two elements in this type of case are satisfied, according to this Court, the trier of fact must then determine if the defendant can show a preponderance of evidence that it would have reached the same decision to discharge the public employee regardless of his protected conduct. *Id*. Unable to prove that grading is speech safeguarded by the First Amendment, Bennet's argument fails the first prong of the *Doyle* test.

Applying the *Doyle* test, the Fifth Circuit in *Hillis v. Stephen F. Austin St University* could not find justification or precedent that a teacher's refusal to assign a grade prescribed by the university was a constitutionally protected measure of speech. *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547, 553 (5th Cir. 1982) (citing *Keyishian v. Bd. of Regents of Univ. of State of N.*

Y., 385 U.S. 589, 603 (1967) (applying test in *Doyle*, 429 U.S. at 285)). Rather, the court ruled that such refusal was an act of insubordination – not symbolic expression – thereby failing the first prong of the *Doyle* test. *Doyle*, 429 U.S. at 285; *see also Hillis*, 665 F.2d at 553. Since grading is not constitutionally protected conduct, Bennet's First Amendment claim is insufficient to meet these standards. *Doyle*, 429 U.S. at 285; *see also Hillis*, 665 F.2d at 553.

B. Grading is not speech, but an action, which, when in conflict with CSP's directive, rightly justifies reason for discharge.

In *Lovelace v Southeastern Massachusetts University*, 793 F.2d 419, 425–26 (1st Cir. 1986), the First Circuit issued a per curium opinion on the very issue before this Court, stating that the threshold of discerning whether grades are speech does not sit with the professor's idiosyncratic grading policy, but with the action committed in defying the directive of the university. Such defiance is not speech, but an act of insubordination, and wholly within the core concerns of the university. *Lovelace,* 793 F.2d at 425 – 26. To acknowledge that a teacher's assignment of grades is protected by the Constitution, and that the First Amendment shields her from consequences when her grading policy clashes with that of the college, would restrict the college in carrying out its academic duty to its students and the community it serves. *Id.* at 426; *see also Palmer v. Bd. of Educ.*, 603 F.2d 1271 (7th Cir. 1979) (holding that the First Amendment rights of the teacher were not infringed by firing her for defying the school's directive to teach certain subjects); *Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972) (concluding that the university teacher lacks the First Amendment right to reject established curriculum content); *Hetrick v. Martin*, 480 F.2d 705, 709 (6th Cir. 1973) (ruling that the First Amendment does not bar a university from firing a teacher whose teaching style and philosophy did not adhere to that of the school)).

Furthermore, the Seventh Circuit has ruled similar to the courts mentioned herein, viewing a professor's refusal to assign a grade as behavior justifying discharge, rather than a form of speech

protected by the Constitution. *Wozniak v. Conry*, 236 F.3d 888, 891 (7th Cir. 2001). Courts around the country have continually rejected the notion that assigning grades is a form of constitutionally protected speech.

CSP is devoted to the current and future success of its academic and athletic programs, and has a duty to its alumni, students, and future students to strive for excellence in all departments under its name. Bennet's interest in straying from the instruction of CSP to assign a grade without regard for the college clearly conflicts with CSP's interest in fulfilling its duty to the community. By refusing to follow the instruction of her employer, Bennet could have reasonably foreseen the repercussions that followed. CSP fired Bennet for noncompliance, not for the sole act of assigning grades.

C. Bennet's case is distinguishable from cases where actions or displays were deemed symbolic speech, protected by the First Amendment

Bennet's gross misapplication of *Spence v. Washington*, 418 U.S. 405, 410 –11 (1974), this Court's seminal case addressing symbolic speech, threatens the very heart of the American education system. *Spence* held that the display of a flag bearing a peace symbol was a form a symbolic speech, protected by the First Amendment. *Id*. Bennet's grade does not qualify as symbolic speech.

The only speech that is guaranteed the protections of the First Amendment is pure speech or speech most analogous to pure speech. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 516 (1969) (holding that wearing an armband to convey a message is protected speech). In *Tinker*, this Court held that symbolic speech is akin to pure speech, and therefore warrants the protection of the First Amendment. *Id.* at 516. However, within the walls of an academic institution, a teacher's refusal to assign a grade under the directive of the school is no more akin to pure speech than a teacher's refusal to adhere to a school's dress code. *See E. Hartford Ed. Ass'n v. Bd. of Educ. of*

Town of E. Hartford, 562 F.2d 838, 849 (2d Cir. 1977) (reasoning that a teacher's refusal to wear a neck tie did not constitute symbolic speech). When conduct becomes less akin to pure speech, the requisite evidence of a governmental interest is significantly diminished. *Id*. at 849.

Additionally, this Court firmly held that not all actions, which are alleged to be symbolic speech, are guaranteed under the First Amendment. *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (refusing to extend First Amendment protection to the public mutilation of defendant's selective service registration certificate). In *O'Brien*, this Court declined to extend Constitutional protection to acts of symbolic expression where the state has a compelling interest outweighing the interest of the public. *Id*. at 376; *see also Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 49 (2006) (acknowledging that, though the Solomon Amendment does not regulate expression, any restriction it might place on expression would be constitutional under the *O'Brien* standard).

Where one's conduct contains ingredients of both speech and non-speech, the government, having a compelling interest in regulating the non-speech ingredient, may limit First Amendment freedoms incidentally. *O'Brien*, 391 U.S. at 376. CSP, as are all academic institutions, is afforded certain academic freedoms (see Section II (A) of this brief), which allow it to administer its academic mission, the very purpose of its existence. Therefore, CSP has a compelling interest to serve its students, its alumni, and all departments under its name, including the athletic department. Even if grading is symbolic speech and securely under the safeguards of the First Amendment, CSP's aforementioned interests significantly outweigh any incidental hindrance it might have on Bennet's grading procedure.

Bennet leans heavily on the Sixth Circuit's ruling in *Parate v Isibor,* 868 F.2d at 827. There, the court identified the act of grading as a form of symbolic communication. The court reasoned that by intending to send a specific message to the student via a grade, an instructor was permitted some

protection under the First Amendment. *Parate*, 868 F.2d at 827. However, the Sixth Circuit extended the standard in *Tinker*, *Spence*, and a number of symbolic speech cases where a public or political message was the crux of the intended speech, to a case where a teacher refused to follow the directive of the university's grading policy. *See Parate*, 868 F .2d at 827. The Sixth Circuit's view that grades are the teacher's speech is the minority view. Hence, the only substantial case supporting Bennet's claim is *Parate*. The line of cases under *Hillis*, *Lovelace*, *Wozniak*, and *O'brien* more accurately address the true relationship between grades and the academic institution contingent on the rapport between the institution and the instructor.

Contrary to *Parate*, this Court held that when a public employee speaks pursuant to his official duties within the scope of his employment, the First Amendment does not insulate him from employer discipline. *Garcetti v. Ceballos*, 547 U.S. 410, 416 (2006). If an employee, whether of the public or private sector, is speaking within his required employment responsibilities, he has no personal interest in its content that warrants a First Amendment claim. *Id.* at 416. To ignore years of court rulings addressing the issues surrounding the assignment of grades as symbolic speech would radically inhibit all academic institutions' ability to meet educational needs.

Bennet, acting wholly within her duties as an employee of CSP, assigns individual grades to students who sought out an education from CSP. Assume this Court accepts that the act of grading is not akin to pure speech, and that CSP's interest in administering a grading policy outweighs any incidental burden it might have on Bennet's grading procedure. Coupled with the fact that Bennet's assignment of grades are purely within her required responsibilities as an employee of CSP, the view that Bennet's grading is constitutionally protected is grossly injudicious. *Tinker*, 393 U.S. at 516; *but see Hartford*, 562 F.2d at 849; *O'Brien*, 391 U.S. at 376; *Garcetti*, 547 U.S. at 416.

II. IF THE ACT OF GRADING IS A FORM OF CONSTITUTIONALLY PROTECTED SPEECH, IT IS THE SPEECH OF THE COLLEGE GUARANTEED BY THE INDOCTRINATION OF ITS ACADEMIC FREEDOMS, NOT THE PROFESSOR WHO IS MERELY A PROXY OF THE COLLEGE.

A. The Supreme Court has identified four academic freedoms retained by academic institutions, including the authority to choose who teaches and to administer a grading policy, as essential to America's wellbeing.

CSP is cloaked with the freedom, enshrined by this Court, to administer its curriculum by determining who shall teach, what shall be taught, how it shall be taught, and who shall be admitted for study. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). This Court has repeatedly identified these four freedoms, belonging to the academic institution, as essential to the prolific innovation of thought; thus revealing truths, which can be attributed to the free flow of competing ideas. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (citing *Sweezy* 354 U.S. at 263). This Court continues to express an unwavering dialogue, safeguarding those freedoms because they are of a transcendent value to the current and future preparedness and overall wellness of this nation. *Id*. at 312. Therefore, such freedoms, being those of the academic institution, are of distinct importance, and are subject to protections of the First Amendment. *Id*.

Bennet's case against CSP concerns two of the freedoms initially identified by Justice Frankfurter in *Sweezy*: who may teach, and how the curriculum shall be taught.

i. CSP possesses the academic freedom to choose who may teach in its classrooms.

There is no question that a state institution, regardless of whether it is for academic purpose, enjoys the same authority to hire and fire an employee at-will that is afforded to private employers, so long as such decisions do not hinge on the employee's First Amendment interests. *Connick v. Myers*, 461 U.S. 138, 142 (1983), *Keyishian v. Board* of Regents, 385 U.S. 589, 605 – 06 (1967);

Pickering v. Board of Education, 391 U.S. 563, 571 (1968). This Court has long held that if a public employee's speech cannot be branded as speech concerning the public, it is not obligated to scrutinize the employer's reasons for discharge. *Brown v. Armenti*, 247 F.3d 69, 76 (3d Cir. 2001) (citing *Connick*, 461 U.S. at 146); *see also Pickering*, 391 U.S. at 571. Moreover, if the employee's expression cannot reasonably be construed as concerning a public matter, the government employer shall possess autonomy in handling insubordinate employees, without invasive judiciary supervision by way of the First Amendment. *Armenti*, 247 F.3d at 76 (citing *Connick*, 461 U.S. at 146); *see also Pickering*, 391 U.S. at 571.

Assuming *arguendo* that grading constitutes a mode of speech, it remains a communication between CSP and the student, and possesses no characteristics that could be construed as public concern. *See Armenti*, 247 F.3d at 76 (citing *Connick*, 461 U.S. at 146); *see also Pickering*, 391 U.S. at 571. Any message conveyed by the instructor to the student, is only meant to be received by the student, not the public. Indeed, the teacher, as a proxy for the academic institution, enjoys a degree of confidential privilege and privacy with the student. Individual grades are not released to the public without consent from the student. With Bennet not having satisfied the public concern requirement for judicial scrutiny, CSP maintains wide latitude in administering its curriculum, including the autonomy to choose personnel at will. *Armenti*, 247 F.3d at 76 (citing *Connick*, 461 U.S. at 146); *see also Pickering*, 391 U.S. at 571.

ii. <u>CSP possesses the academic freedom to oversee, check, and at times revise the grades assigned by its professors pursuant to CSP's overall mission.</u>

This Court has continuously acknowledged the right for academic institutions of the state to determine how its curriculum is taught. *Bakke*, 438 U.S at 312 (quoting *Sweezy*, 354 U.S. at 263); *see also Keyishian*, 385 U.S. at 603. There is a strong interest in safeguarding the freedoms of the academic institution to facilitate curriculum boundless from unreasonable legal restraints. *Bakke*,

438 U.S. at 312; *see also Sweezy*, 354 U.S. at 263; *accord Keyishian*, 385 U.S. at 603. It has been the mission of the Court to protect the classroom, which is the marketplace of free thoughts. *Bakke*, 438 U.S. at 312; *see also Sweezy*, 354 U.S. at 263; *accord Keyishian*, 385 U.S. at 603.

The academic institution possesses the responsibility, and therefore the authority to facilitate a constructive atmosphere in light of speculated theory, investigation, and creative thought. *Bakke*, 438 U.S. at 312. In *Sweezy*, Justice Frankfurter identified such as the atmosphere by which, the four essential freedoms of the academic institution triumphs, and owns the right to define for itself, *inter alia*, how academic subjects are to be taught. *Bakke*, 438 U.S. at 312 (quoting *Sweezy*, 354 U.S. at 263); *see also Keyishian*, 385 U.S. at 603. It is the business of the university – not the professor – to oversee, check, and at times revise the grades assigned by its professors pursuant to CSP's overall mission. *Bakke*, 438 U.S. at 312; *see also Sweezy*, 354 U.S. at 263; *accord Keyishian*, 385 U.S. at 603. Such a responsibility is a necessary tool in administering how a curriculum is taught, and without such autonomy, the very integrity of the institution's mission is at risk.

Likewise, the First Circuit held that a school may choose to entice only the top ranks among bright students, or gear its curriculum to the average – or below average – student. *Lovelace*, 793 F.2d at 425 (holding that the school did not violate the teacher's First Amendment rights when the school discharged the teacher for refusing to lower his grading standards). There is a need to educate all in this country, not just the best. Therefore, that administration of grades is a policy decision reserved for the school to make. Constricting CSP to Bennet's contention that her discharge – in light of her noncompliant grading procedure – violates her First Amendment rights prevents CSP from accomplishing its educational mission.

In *Brown v. Armenti*, 247 F.3d at 75, the Third Circuit of the United States Court of Appeals held that the a public school professor does not possess authority over the school when his

assignment of a grade conflicts with the school's standard. Additionally, the Third Circuit correctly distinguished its framework in *Armenti,* from the contrary analysis in *Parate v. Isibor*, indicating that the *Armenti* framework offers a realistic view of the relationship between the school and the instructor. *Id.* at 75. A student's transcript reflecting any variety of letter grades that indicate a degree of poor or excellent performance does not warrant invasive judicial oversight by way of the First Amendment. *Id.* at 75 (citing *Connick,* 461 U.S. at 146); *see also Wozniak,* 236 F.3d at 891. Rather, competition among educational systems, not the judiciary, shall give preference to which methodology is superior. *Armenti*, 247 F.3d at 75 (citing *Connick,* 461 U.S. at 146); *see also Wozniak,* 236 F.3d at 891.

Supposing a school policy where instructors enjoy more freedom in assigning grades is indeed well-founded, competition among differing theories in education is of the very academic freedoms that this Court has committed itself to protect in *Sweezy* and its progeny. In *Wozniak*, the Seventh Circuit addresses precisely that issue, declaring grades as the stock and trade of the academic institution. *Wozniak,* 236 F.3d at 891. The school, its students, and society at large have an imperious interest in the commonality of grade evaluations across all classes offered by an institution. *Wozniak,* 236 F.3d at 891. Absent some degree of grading uniformity across the courses offered by an academic institution, an inevitable vacuum would draw a race of students to the easy classes, or classes which promise a higher grade point average. *Id*. at 891. Such an imbalance in courses threatens the integrity of the diploma offered and the institution as a whole, affecting the institution's ability to offer challenging coursework, and leaving all aspects of education solely up to the instructor. *Id.*

Any student at CSP will receive a transcript and diploma (upon satisfactory completion of curriculum requirements) with the seal and stamp of approval from the College of Sothern Pemberley, a name branded by its own academic decisions and inscribed in writing on such a

document. It is the college's name– not Bennet's – that appears on the diploma, assuring future potential employers and graduate schools of a student's academic record. Without the authority to ensure grades are meeting the school's standards pursuant to its mission, the integrity of its diploma, the institution itself, and the school's academic mission is entirely lost. *Id.*

CSP maintains the responsibility, and therefore the freedom, to determine how its curriculum is taught. If establishing a uniform system to gauge the performance of its students, the modeling of its courses, and the effectiveness of its instructors does not fall within CSP's essential freedom to determine how its curriculum is taught, one would be hard-pressed to define exactly what such freedom entails. If freedoms are suddenly earmarked so intricately as to diminish its beneficiary's fundamental choice, the question ensues of whether that freedom exists at all. CSP owes a duty to its students, its alumni, and its community to preserve the value of the collegiate experience, the integrity of its diploma, and the school's academic mission. Without complete autonomy in administering its day-to-day operations, CSP will lose the freedoms hallowed by this Court, and the capacity to ensure its future.

B. CSP's COMPELLING INTEREST IN MAINTAINING ITS ACADEMIC FREEDOM TO ADMINISTER GRADES SUBSTANTIALLY OUTWEIGHS ANY HINDERANCE SUCH FREEDOMS MIGHT INCIDENTALLY HAVE ON BENNET'S FREEDOM TO COMMUNICATE WITH CSP STUDENTS.

In *Piarowski v. Illinois Community College District*, 759 F.2d 625, 629 (7th Cir. 1985), the Seventh Circuit held that instructors and their pupils must always remain unrestrained from forward communication, and maintain the capacity to question, investigate, and contribute to the ongoing evolution of knowledge. *Piarowski* held that individual professors are afforded similar academic freedoms to those reserved for the academic institution. *Id.* at 629; *see also Sweezy*, 354 U.S. at 250. We do not disagree. In fact, CSP has centered its argument precisely on its freedom to enable professors and students to trade and communicate freely in the marketplace of ideas. However, in

Piarowski, the court considered whether the college abridged the art instructor's First Amendment rights by ordering an offensive art piece to be relocated to a less trafficked area of campus. *Piarowski*, 759 F.2d at 629 – 32 (reasoning that relocation does not violate one's First Amendment rights because it offers a reasonable alternative). CSP provided an option to Bennet to re-grade an assignment. Rather than offering a counterproposal, Bennet blatantly refused to comply.

The edict set forth by the Seventh Circuit in *Piarowski* indicates both the freedom of the academic institution and the freedom of the instructor to act without interference from each other. *Id.* at 629. As previously mentioned, this Court adopted the *O'Brien* test to address situations where the freedoms of the state and the freedoms of the citizen are in conflict (see Section I(C) of this brief). *O'Brien*, 391 U.S. at 376. Where the state has a compelling interest outweighing that of the non-state party, any incidental burden imposed on that party's freedoms, is not protected by the First Amendment. *Id.* at 376. CSP's compelling academic interests in overseeing, and at times revising grades assigned by its professors, substantially outweigh any minor burden placed on Bennet's communication with students attending the college.

CONCLUSION

Our government, our communities, and colleges throughout this nation rely on an academic system boundless from unreasonable legal restraints. An institution without unnecessary limits on academic freedoms can better facilitate creative thought, and triumph in its mission to excel in all areas of academia, from the classroom to the athletic arena. Protecting the integrity and usefulness of the academic institution requires preserving the academic freedoms instituted by Justice Frankfurter in *Sweezy*, and continually acknowledged by this Court ever since. Conceding that grading is the protected speech of the instructor, rather than an academic freedom of the institution, would stand in the face of decades of progressive judicial review, and single handedly destroy the mechanism by which CSP, and colleges everywhere, define themselves. Thus, CSP's interests in

overseeing, and at times revising grades assigned by its professors, considerably outweigh any incidental burden placed on Bennet's capacity to communicate with students attending the college.

PRAYER

For the foregoing reasons, Petitioner CSP prays that this Court reverse the judgment of the Sixteenth Circuit Court of Appeals and render judgment in favor of Petitioner CSP.

Respectfully submitted,

/s/ Cole Ruiz

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March 6, 2015

CERTIFICATE OF COMPLIANCE

I certify that the Brief for Petitioners contains 4,159 words, starting from the beginning (first word) of the statement of the case section and ending with the end (last word) of the prayer.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Cole Ruiz

Cole Ruiz