COURT OF APPEALS STATE OF COLORADO 101 W. Colfax Avenue, Suite 800 Denver, CO 80202	
District Court for the City and County of Denver County Honorable Larry J. Naves, Judge Case No. 06-CV-11473	
WARD CHURCHILL, Plaintiff-Appellant, v. THE UNIVERSITY OF COLORADO, THE REGENTS OF THE UNIVERSITY OF COLORADO, A COLORADO BODY CORPORATE, Defendants-Appellees.	▲COURT USE ONLY▲ Case No. 09-CA-1713
JOHN W. SUTHERS, Attorney General DANIEL D. DOMENICO, Solicitor General DOUGLAS J. COX, Senior Assistant Attorney General* 1525 Sherman Street, 7th Floor Denver, CO 80203 Telephone: (303) 866-5241 FAX: (303) 866-5443 E-Mail: douglas.cox@state.co.us Registration Number: 15950 *Counsel of Record	

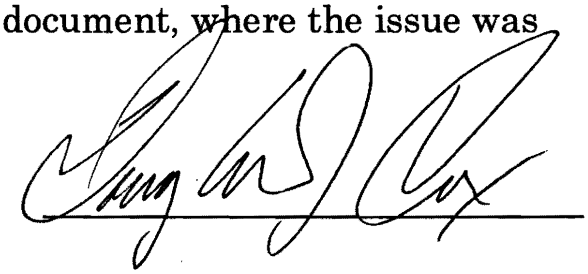
BRIEF OF AMICUS CURIAE STATE OF COLORADO

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

1. The brief complies with C.A.R. 28(g). It contains 8012 words.

2. The brief complies with C.A.R. 28(k). It (1) incorporates by reference the Appellees' concise statement, under a separate heading, of the applicable standard of appellate review with citation to authority; and (2) incorporates by reference the Appellees' citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on or provides an independent citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.



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Pursuant to C.A.R. 29, the State of Colorado, as amicus curiae, by and through the Colorado Attorney General, submits the following Brief in support of Defendants-Appellees, the University of Colorado, the Regents of the University of Colorado, a Colorado body corporate.

INTEREST OF AMICUS CURIAE

The State of Colorado and its departments, agencies, and political subdivisions are public entities whose officials regularly perform adjudicatory functions in the course of their official duties through various and numerous boards, commissions, and panels. These tribunals decide matters of significant public import, often utilize specialized knowledge and expertise, and regularly resolve disputes involving substantial pecuniary, professional, property, and liberty interests.

State agencies and boards performing adjudicatory functions include, among many examples, the Board of Medical Examiners, the Board of Nursing, the Board of Assessment Appeals, the Real Estate Commission, the Independent Ethics Commission, the Board of Real Estate Appraisers, the Board of Pharmacy, the Board of Dental

Examiners, the Motor Vehicle Dealer Board, the Racing Commission, the Department of Revenue, the State Board of Education, the Private Occupational School Board, the Colorado Water Conservation Board, the Ground Water Commission, the Oil and Gas Conservation Commission, the Wildlife Commission, the State Parks Board, the Water Quality Control Commission, the Air Quality Control Commission, the State Board of Health, the Banking Board, the Financial Services Board, the Board of Accountancy, the Board of Licensure for Architects, Professional Engineers, and Professional Land Surveyors, the Mined Land Reclamation Board, the Colorado State Board of Parole, the State Personnel Board, the Colorado Civil Rights Commission, the Division of Insurance, the Colorado Public Utilities Commission, and each of the governing boards of institutions of higher education, including the community college system, the four state colleges, Colorado State University System, the University of Northern Colorado, Fort Lewis College, and the Colorado School of Mines.

These adjudicatory bodies are widespread throughout State government for good reason. They are part of a legislatively prescribed administrative system, which provides the public with a cost-effective, thorough, and efficient process to resolve issues prior to judicial review. In making these decisions, it is essential that public officials work for the advancement of the public good. They may hesitate to advance what they believe to be in the public good if they know that such a course may subject them to personal liability. Thus, the threat of personal liability may, in a very real sense, color an official's judgment and weaken his or her ability to make difficult or unpopular decisions.

As *Amicus Curiae*, the State has an important interest in ensuring its officials performing quasi-judicial functions remain free to make well-reasoned and independent decisions in the interest of the public good without fear of retaliatory litigation. This interest may be substantially impacted by the outcome of this appeal.

STATEMENT OF CASE AND STATEMENT OF FACTS

Amicus, the State of Colorado, hereby adopts and incorporates by reference the Statement of Case and Statement of Facts set forth in Appellees' Answer Brief, as well as the Standards of Review set forth, under separate headings, in the Answer Brief. The following facts, as supported in the Answer Brief and by the record below, are particularly relevant to the issues addressed in this brief.

The Board of Regents of the University of Colorado has enacted the *Laws of the Regents.* These laws define both the grounds and the process for dismissing a tenured faculty member. Specifically, *Article 5. C.1* of the *Laws of the Regents* states:

> A faculty member may be dismissed when, in the judgment of the Board of Regents and subject to the Board of Regents' constitutional and statutory authority, the good of the University requires such action. The grounds for dismissal shall be demonstrable professional incompetence, neglect of duty, insubordination, conviction of a felony or any offense involving moral turpitude upon a plea or verdict of guilty or following a plead of non contendere, or sexual harassment or other conduct which falls below minimum standards of professional integrity.

Article 5.C.2 (A) (1) of the *Laws of the Regents* specifies that "no member of the faculty shall be dismissed except for cause and after being given an opportunity to be heard...." If the University's administration contemplates that it will dismiss a faculty member, the faculty member may request a hearing before the Faculty Senate Committee on Privilege and Tenure. *Laws of the Regents, Article 5.C.2 (B).* At any such hearing, the faculty member "shall be permitted to have counsel and the opportunity to question witnesses... [and] the burden of proof shall be on the University administration." *Laws of the Regents, Article 5.C.2 (B).* After the Faculty Senate Committee on Privilege and Tenure makes its findings, the President of the University issues a recommendation and transmits it to the Board of Regents for final action. *Laws of the Regents, Article 5.C.2.(C).*

To implement the *Laws of the Regents'* requirement that no faculty member be dismissed "except for cause and after being given an opportunity to be heard," as well as the faculty member's right to a hearing before the Faculty Committee on Privilege and Tenure, the

Regents enacted *Regent Policy 5-I.* The University followed *Regent Policy 5-I* in the weeks and months preceding its dismissal of Plaintiff, Ward Churchill.

Regent Policy 5-I, § III(A)(a) allows the Chancellor of the University of Colorado at Boulder to initiate the dismissal for cause process by issuing a written notice of intent to dismiss. On June 26, 2006, Interim Chancellor Philip DiStefano issued a Notice of Intent to Dismiss informing Churchill that the University intended to dismiss him as a tenured faculty member. The Notice of Intent to Dismiss occurred after the University of Colorado at Boulder's Standing Committee on Research Misconduct concluded that Churchill violated the University's Administrative Policy Statement on Misconduct in Research and Authorship. DiStefano informed Churchill that his "pattern of serious, repeated and deliberate research misconduct falls below minimum standards of professional integrity expected of University faculty and warrants your dismissal from the University of Colorado."

As permitted by *Regent Policy 5-I,* Churchill requested a formal hearing before a five-member panel of the Faculty Senate Committee on Privilege and Tenure. *Regent Policy 5-I, § III (B)(2)(b)* permitted Churchill to object to any of the panel members, but he did not do so. Although *5-I, § III (B)(2)(f-g)* normally contemplates that a dismissal hearing will last no more than two days, Churchill had months to prepare for his hearing, which began on January 8, 2007, and lasted for seven full days. Pursuant to *Regent Policy 5-I, § III(2)(l),* a professional court reporter, as well as a professional videographer, made a complete record of the proceedings.

Regent Policy 5-I, § III(B)(2)(k) requires the administration to establish grounds for dismissal by clear and convincing evidence. *Regent Policy 5-I, § III (B)(1)(b)(2)(i)* permitted Churchill to be represented by counsel. *Regent Policy 5-I, § III (B)(2)(o)* allowed Churchill and his counsel the right to examine each of the University's witnesses and the right to present his own witnesses. *Regent Policy 5-I, § III (B)(2)(r)* also provided Churchill and his counsel the right to

present opening statements. *Regent Policy 5-I, § III (B)(2)(r)* allowed Churchill to make both oral and written closing arguments to the panel. Churchill availed himself of each of these opportunities during the seven-day hearing.

After the conclusion of the hearing, the panel members were "unanimous in finding that Professor Churchill has demonstrated conduct which falls below minimum standards of professional integrity, and that this conduct requires severe sanctions." The panel split on what sanction it would recommend—two members recommended dismissal, while three panel members recommended a suspension coupled with demotion. *Regent Policy 5-I, § III (C)(2)* allowed Churchill to respond in writing to the panel's report and he did so.

The panel transmitted its report to the President of the University. President Brown, upon his review of the record, concurred with the panel's finding that Churchill had engaged in conduct that served as grounds for dismissal under *Article 5.C.1* of the *Law of the Regents*—conduct falling below minimum standards of professional

integrity. Because President Brown believed that his misconduct warranted dismissal, rather than some other sanction, Brown returned the case to the panel for reconsideration pursuant to *Regent Policy 5-I, § III (C)(7).* The panel did not modify its report, so Brown transmitted his recommendation and the panel report to the Board of Regents for final action.

After Brown made his recommendation, *Regent Policy 5-I, § IV* permitted Churchill to request a hearing before the Board of Regents. Before the hearing, *Regent Policy 5-I, § IV* allowed Churchill to submit extensive written arguments to the Board of Regents. Churchill availed himself of this opportunity.

Regent Policy 5-I, § IV permitted the University administration and Churchill to make presentations to the Board of Regents "based upon the record of the case, including the transcript of the proceedings before the Panel." After the parties' presentations, and "after consideration of all the information provided to it," the Board of Regents determined that Churchill engaged in conduct that fell below minimum

standards of professional integrity and dismissed him from his tenured faculty position.

SUMMARY OF ARGUMENT

The public interest is best served when governmental officials are at liberty to exercise their functions with independence and without fear of vexatious and costly litigation. Public policy requires absolute immunity for officials performing quasi-judicial functions because exposure to the constant threat of litigation could color an official's judgment, weaken his or her ability to make difficult or unpopular decisions, and dissuade officials from serving on adjudicatory tribunals.

Judicial immunity is extended to officials when their judgments are functionally comparable to those of judges. Public officials perform quasi-judicial functions when they apply preexisting legal standards or policy considerations to present or past facts. The Board of Regents acted in a role functionally comparable to the actions of appellate judges when it rendered its decision based solely upon the record generated from a full adversarial hearing before an impartial panel.

Quasi-judicial immunity is also recognized when the officials' actions will likely result in damages lawsuits and where there are sufficient safeguards in the regulatory framework to control unconstitutional conduct. These safeguards enhance the reliability of information and the impartiality of the decision-making process.

Sufficient procedural safeguards include the right to notice and hearing, the right to counsel, and the right to present evidence and cross-examine witnesses. Churchill received these rights and more, including the right to judicial review under C.R.C.P. 106(a)(4). C.R.C.P. 106(a)(4) permits a district court to set aside any decision that is "clearly erroneous, without evidentiary support in the record, or contrary to law."

Political or electoral pressure alone cannot deprive government officials of absolute immunity. Rather, the proper inquiry is whether the official was acting in an administrative role or serving in an adjudicatory capacity at the time of his or her decision. Where sufficient procedural safeguards exist enhancing the independence of

the official as a decision-maker, quasi-judicial immunity is recognized. If a disappointed party could avoid an official's ruling merely by alleging political bias, only the most resolute officials would agree to serve on adjudicatory boards because of the constant fear of retaliatory litigation.

The 1996 amendment to 42 U.S.C. § 1983 limiting the right to prospective injunctive relief applies to officials acting in a quasi-judicial capacity

The State of Colorado submits this brief to urge this Court to affirm the trial court's decision recognizing the quasi-judicial immunity of the Board of Regents. Doing so will preserve the important public interest in preserving the independence of the decision-making process engaged in by public officials.

ARGUMENT

I. Quasi-judicial immunity protects the public's interest in having public officials make independent decisions without fear of personal liability.

The doctrine of sovereign immunity is inherent in the status of the government as a sovereign. *Heller v. United States,* 776 F.2d 92, 98 (3d Cir. 1985), *cert. denied,* 476 U.S. 1105 (1986). Judicial immunity is a necessary extension of the doctrine of sovereign immunity, protecting officials sued as individuals for acts taken under the authority of the sovereign. *Hulen v. State Board of Agriculture,* 98-B-2170, p. 19 (D.Colo. October 12, 2001), citing *Watters v. Watters,* 1990 WL 97830, *4 (D.Colo. June 12, 1989). Legislatively and judicially crafted immunities have existed since well before the framing of the Constitution, have been extended and modified over time, and are firmly embedded in American law. *Brzak v. United Nations,* 2010 WL 698739 *5 (2d Cir. March 2, 2010). *See Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 347 (1871) (judicial immunity was "the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in

the courts of this country"). Accordingly, the common law doctrine of judicial immunity is constitutional. If applicable, the doctrine does not deny a plaintiff any rights guaranteed by the United States Constitution. *See Pierson v. Ray*, 386 U.S. 547 (1967), *reversed on other grounds in Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (holding that judicial immunity applies to actions under 42 U.S.C. § 1983).

Judicial officers are immune from suit because "the protection essential to judicial independence would be entirely swept away" if a lawsuit against judges could proceed upon the premise "that the acts of the judge were done with partiality, or maliciously, or corruptly...." *Bradley*, 80 U.S. at 348. "For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence

without which no judiciary can be either respectable or useful." *Id.* at 347. "[Judicial] immunity applies even when the judge is accused of acting maliciously and corruptly, and it is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Pierson v. Ray*, 386 U.S. at 554 (quoting *Bradley*, 80 U.S. at 349 n. 16). The Supreme Court has recognized not only the absolute civil immunity for judges for conduct within their judicial domain, but also the absolute immunity of prosecutors and grand jurors, *Imbler v. Pachtman*, 424 U.S. 409 (1976), witnesses, *Briscoe v. LaHue,* 460 U.S. 325 (1983), and agency officials. *Butz v. Economou*, 438 U.S. 478 (1978). These persons perform functions necessary to the functioning of the judicial process, and they receive what has been termed "quasi-judicial immunity." *Butz*, 438 U.S. at 512.

Quasi-judicial immunity is not limited to governmental officials who serve in the judicial branch of government. Rather, immunity

flows not from the rank or title or "location within the government," but from "the special nature of [the official's] responsibilities." *Id.* at 511. In determining the availability of quasi-judicial immunity, the Supreme Court has instructed that a functional approach is used to examine the nature of the function performed, not the identity of the actor who performed it. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993) (internal quotations omitted). "When judicial immunity is extended to officials other than judges, it is because their judgments are 'functional[ly] comparab[le]' to those of judges—that is, because they, too, 'exercise a discretionary judgment' as a part of their function." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436 (1993) (quoting *Imbler*, 424 U.S. at 423 n. 20). Absolute immunity is necessary to protect officials' judgments functionally comparable to those of judges because "the discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity arising from that decision was less than complete." *Butz*, 438 U.S. at 515.

Using the Supreme Court's functional approach, courts routinely confer quasi-judicial immunity upon government officials adjudicating disputes in administrative forums. *See e.g. Bettencourt v. Board of Registration In Medicine of Com. Of Mass.*, 904 F.2d 772 (1st. Cir. 1990) (members of state medical board protected by absolute immunity in revocation of physician's licenses); *Mylett v. Mullican,* 992 F.2d 1347 (5th Cir. 1993) (Civil Service Commissioners hearing employment termination proceedings were protected from plaintiff's free speech claim by quasi-judicial immunity); *Taylor v. Brentwood Union Free School Dist.*, 908 F.Supp. 1165 (E.D.N.Y. 1995) (disciplinary hearing panel members' action in suspending teacher for misconduct was judicial in character and panel members were entitled to absolute immunity from teacher's § 1983 claim); *Ambus v. Utah Board of Education,* 858 P.2d 1372 (Utah. 1993) (actions taken by Board of Education members in resolving teacher misconduct were adjudicatory in nature and were protected by quasi-judicial immunity).

The Tenth Circuit Court of Appeals has extended quasi-judicial immunity to officials serving on panels to determine whether to terminate a government employee or revoke a professional license, even when those officials allegedly violated plaintiff's constitutional rights. *Saavedra v. City of Albuquerque*, 73 F.3d 1525, 1529-30 (10th Cir. 1996); *Horowitz v. Colorado State Bd. of Medical Examiners*, 822 F.2d 1508, 1513-14 (10th Cir. 1987). In *Atiya v. Salt Lake County*, 988 F.2d 1013 (10th Cir. 1993), the Tenth Circuit found that members of a county career services council were protected by quasi-judicial immunity for their decision to discharge an employee, even though the employee claimed the council, 'improperly discharged [her] in retaliation for her exercise of her right to free speech." *Id.* at 1016-17.

The common thread running through these decisions is that the public interest is best served when government officials, engaging in actions functionally comparable to those of judges, are at liberty to exercise their functions with independence and without fear of the consequences. *Butz,* 438 U.S. at 514; *Horowitz,* 822 F.2d at 1508.

Public policy requires absolute immunity for officials performing quasi-judicial functions because the likelihood that exposure to "the burden of a trial and the inevitable danger of its outcome would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle,* 177 F.2d 579, 581 (2d. Cir. 1949).

II. The Board of Regents acted in an adjudicatory capacity and is entitled to absolute immunity.

In *Butz*, the Supreme Court mentioned the following factors as characteristic of the judicial process and to be considered in determining absolute as contrasted with qualified immunity: (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal. 438 U.S. at 512; *see also Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985). This list of factors is

nonexhaustive, however, and an official need not satisfy every factor to be entitled to absolute quasi-judicial immunity. *See Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 923 (9th Cir. 2004) (noting that the *Butz* factors are "nonexclusive").

Summarizing *Butz,* the Tenth Circuit Court of Appeals has stated:

> The *Butz* decision granted absolute immunity to administrative officials performing functions analogous to those of judges and prosecutors, if the following formula is satisfied: (a) the officials' functions must be similar to those involved in the judicial process, (b) the officials' actions must be likely to result in damages lawsuits by disappointed parties, and (c) there must be sufficient safeguards in the regulatory framework to control unconstitutional conduct.

Horowitz, 822 F.2d at 1513. *See also Bettencourt*, 904 F.2d at 783 (adopting three-part test for immunity); *Watts v. Burkhart*, 978 F.2d 269, 278 (6th Cir. 1992) (same). Under the *Horowitz* three-part test, the Board of Regents is entitled to absolute immunity.

A. Judicial function.

The Colorado Supreme Court has determined that a school district's termination of an employee after a contested hearing is a

quasi-judicial function. *Widder v. Durango School Dist. No. 9-R,* 85 P.3d 518, 527-28 (Colo. 2004). The Court stated:

> [I]n determining whether a school board is performing a quasi-judicial function, our inquiry must focus on the nature of the governmental decision and the process by which that decision is reached. Quasi-judicial decision making, as its name connotes, bears similarities to the adjudicatory function performed by courts.

Id. at 527 (internal citations omitted). Specifically, where an official applies "preexisting legal standards or policy considerations to present or past facts presented to the governmental body, then one can say with reasonable certainty that the governmental body is acting in a quasi-judicial capacity..." *Id.* This type of decision occurs when a school district decides whether it should terminate an employee who violates the district's code of conduct:

> A school district's decision about whether to terminate an employee who claims that he acted in good faith and in compliance with a conduct and discipline code certainly involves a determination of rights, duties, or obligations of specific individuals on the basis of the application of presently existing standards...to past or present facts.

Id.; see also Hellas Constr., Inc. v. Rio Blanco County, 192 P.3d 501, 504 (Colo. App. 2008) ("An action is quasi-judicial when it involves the determination of rights, duties, or obligations so as to adversely affect the protected interests of specific individuals, and it is reached by application of preexisting legal standards or policy considerations to past or present facts to resolve the particular interests in question").

Here, the Board of Regents performed a quasi-judicial function when it heard Churchill's case based on preexisting legal standards and past facts. The Board determined whether grounds for dismissal existed under the *Law of the Regents*. The presentation to the Board was limited to the arguments presented by counsel and "the record in the case, including the transcript of the proceedings before the [Faculty Senate Committee on Privilege and Tenure]." *Regent Policy 5-I, § IV.* The Board sat as an appellate body to resolve the dispute generated as a result of the faculty senate's determination that Churchill had "demonstrated conduct [falling] below minimum standards of

professional integrity" and President Brown's decision that this conduct warranted dismissal. This is an adjudicative function.

In a factually similar case, the United States District Court for the District of Colorado determined that University officials enjoy quasi-judicial immunity from claims brought after disciplinary hearings. In *Hulen v. State Board of Agriculture*, 98-B-2170 (D. Colo. 2001) (nsop), plaintiff, a tenured professor at Colorado State University, brought suit alleging that CSU involuntarily transferred him in retaliation for his exercise of protected speech. CSU's faculty manual allowed plaintiff to challenge the transfer through a faculty grievance process. The grievance committee found that CSU's administration improperly transferred the plaintiff, but CSU's provost reversed the grievance committee's decision. CSU's president and governing board upheld the transfer decision.

The *Hulen* Court found that the provost and president were entitled to quasi-judicial immunity. The court explained:

> Here, the Faculty manual provides that review of the grievance committee decision may be

> appealed through the administrative ranks, first to the Provost, then to the President, and finally to the State Board of Agriculture. Each of these entities is provided by the Manual with the appropriate standard of review. Each is functionally comparable to judges, as each is required to exercise a discretionary judgment. In [plaintiff's] case, Provost Crabtree's and President Yates' involvement in the process was limited to this appellate function. I therefore conclude that Defendants Crabtree's and Yates' involvement with the process was as quasi-judicial officers and grant them immunity on that basis.

Hulen at p. 20.

Similarly, in *Gressley v. Deutsch,* 890 F.Supp. 1474, 1480 (D. Wyo. 1994), plaintiff was a tenured professor at the University of Wyoming. After plaintiff was transferred to another department and he publically complained, a dispute arose as to whether plaintiff had been insubordinate and misused his position. Proceedings were initiated to terminate the plaintiff. Under the University's procedures, a Faculty Hearing Committee heard two weeks of testimony before sustaining the charges against the plaintiff. Plaintiff appealed the recommendation for dismissal to the University's Board of Trustees which "after hearing

oral arguments, reviewing the record before and findings of the Faculty Hearing Committee sustained the Faculty Hearing Committee's recommendation that [plaintiff's] employment with the University of Wyoming be terminated for cause." 890 F.Supp. at 1482. Plaintiff brought a lawsuit against each of the Trustees alleging he was discharged in retaliation for his exercise of free speech. The United States District Court for the District of Wyoming granted the Trustees quasi-judicial immunity stating that the Trustees' "sole purpose was to serve as an appellate body" and "[i]t is hard to imagine a more true adjudicative function." *Id.* at 1491.

Here, the Board of Regents performed a quasi-judicial function and acted in a quasi-judicial capacity when it heard Churchill's case and terminated his employment. The Board acted in an appellate role that was nearly identical to the role of the university administrators in *Hulen* and *Gressley*. The Board reviewed the reports and recommendations generated during weeks of adversarial hearings without taking additional evidence. Quasi-judicial immunity is

extended to officials acting in such an appellate capacity. *See Starr v. City of Lakewood,* 2009 WL 1120038 *4 (D. Colo. April 27, 2009) (the function of reviewing the findings of fact and conclusions of a hearing officer after a full adversarial hearing is clearly judicial in nature as appellate judges routinely review the record of prior proceedings to determine if there was an error).

The fact that the Board of Regents did not reach the same conclusion regarding the appropriate discipline as the faculty panel does not change the analysis. The faculty panel found unanimously that Churchill engaged in conduct that met the grounds for dismissal. Moreover, the faculty panel split 3-2 as to whether dismissal was the appropriate remedy. Under these circumstances, the Board engaged in an entirely judicial function when it reviewed the record and applied discretionary judgment. *Hulen,* 98-B-2170, p. 20.

B. Likelihood of litigation.

This case is ample proof that, in the absence of quasi-judicial immunity, adjudicative decisions made by governmental officials will

frequently result in lawsuits by disappointed parties. Churchill does not dispute that the Board of Regents' decision is of the kind likely to lead to litigation. Dismissal proceedings involve not only pecuniary interests, but also professional reputation. *Butz*, 438 U.S. at 509. This is exactly the type of quasi-judicial decision that the Supreme Court had in mind when it observed that "the loser in one forum will frequently seek another, charging participants in the first with unconstitutional animus." *Id.* at 512.

C. Procedural safeguards.

The Board of Regents' decision occurred after Churchill was afforded significant procedural safeguards more than adequate to protect against unconstitutional conduct. For example, Churchill had the right to notice of the charges against him and the right to request a hearing before the faculty committee. "The existence of a statute or ordinance mandating notice and a hearing is evidence that the governmental decision is to be regarded as quasi-judicial." *State Farm Mutual Automobile Ins. Co., v. City of Lakewood*, 788 P.2d 808, 813

(Colo. 1990). The *Law of the Regents* fulfills this requirement as it requires "no member of the faculty shall be dismissed except for cause and after being given an opportunity to be heard as provided in this section."

Under the *Laws of the Regents,* Churchill was afforded a process to fully develop his defense. He was represented by counsel and had the right to cross-examine witnesses. *Laws of the Regents, Article 5.C.2 (B).* His seven-day hearing was a full blown adversarial proceeding. One of the safeguards in the judicial system is "the adversary nature of the process." *Butz*, 438 U.S. at 512; *Horowitz*, 822 F.2d at 1514. "Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court." *Butz*, 438 U.S. at 512. "Because these features of the judicial process tend to enhance the reliability of information and the impartiality of the decision-making process, there is a less pressing need for individual suits to correct constitutional error." *Id.*

Quasi-judicial immunity is appropriate where a "party is entitled to present his case by oral or documentary evidence." *Butz*, 438 U.S. at 513; *Horowitz,* 822 F.2d at 1514. Under the *Laws of the Regents*, the faculty member has the "opportunity to question witnesses" and present evidence. *Regent Policy 5-I, § III (B)(2)(o).* The hearing panel heard Churchill's witnesses and received any exhibits he wished to introduce. He also had the opportunity to submit whatever written arguments he wished.

The University administration bore the burden of proof during the hearing and was required to demonstrate grounds for dismissal by clear and convincing evidence, rather than simply by the preponderance of the evidence. This higher burden of proof also acted as a check against unconstitutional conduct and supports a finding of quasi-judicial immunity.

Quasi-judicial immunity is appropriate where "the transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision." *Butz*, 438 U.S. at 513; *Horowitz,* 822 F.2d

at 1514. Under *Regent Policy 5-I, § III(2)(l)*, a professional court reporter, as well as a professional videographer, made a complete record of the proceedings. The Board of Regents' decision was based exclusively upon the record of the case, including the transcript of the proceedings before the hearing panel.

In quasi-judicial proceedings, "the parties are entitled to know the findings and conclusions on all issues of fact, law or discretion presented in the record." *Butz*, 438 U.S. at 513; *Horowitz*, 822 F.2d at 1514. Under *Regent Policy 5-I*, the dismissal for cause panel issued a written report containing "findings of fact, conclusions, and recommendations consistent with the policies of the Board of Regents."

Finally, in quasi-judicial proceedings, the decision is subject to further judicial review. *Butz,* 438 U.S. at 513; *Horowitz*, 822 F.2d at 1514; *Miller v. Davis*, 521 F.3d 1142, 1146 (9th Cir. 2008). The purpose of such a review is to determine whether the factual basis of the decision is supported by some evidence in the record. *Miller*, 521 F.3d at 1145. Here, Churchill had the opportunity for judicial review of the

Board of Regents' decision under C.R.C.P. 106(a)(4). This remedy is the same remedy available to every litigant subject to a quasi-judicial decision. By its terms, review under C.R.C.P 106(a)(4) is appropriate where any governmental body or officer has exercised "judicial or quasi-judicial immunity." *Hellas Constr.,*192 P.2d at 504; *see also Widder*, 85 P.2d at 528 (School Board's decision to terminate employee was a quasi-judicial decision that is properly reviewed under Rule 106(a)(4)). C.R.C.P. 106(a)(4) allows a district court to overturn a quasi-judicial action that constitutes an "abuse of discretion." Under this standard, a district court may set aside any decision that is "clearly erroneous, without evidentiary support in the record, or contrary to law." *Leichliter v. State Liquor Licensing Authority*, 9 P.3d 1153, 1154 (Colo. App. 2000).

Churchill cites to no authority disputing that C.R.C.P. 106(a)(4) is the proper method to seek judicial review of the Board of Regents' decision. The case of *Moore v. Gunnison Valley Hospital*, 310 F.3d 1315 (10th Cir. 2002) provides no useful guidance. There, the

physician/plaintiff brought a lawsuit against members of a hospital peer-review committee challenging their issuance of two letters of admonition and the temporary suspension of plaintiff's hospital privileges. The hospital bylaws contained no procedural methods to challenge temporary suspensions or the issuance of a letter of admonition. There was no internal method of appeal, nor any method, such as under C.R.C.P. 106(a)(4), to seek judicial review, and plaintiff had no recourse to challenge the decisions other than by a lawsuit. The Tenth Circuit commented that the defendants' identification of the right to file a lawsuit as a sufficient right of appeal "turns the right of appeal on its head." 310 F.3d at 1319. The *Moore* case is inapposite. Here, Churchill was afforded significant procedural safeguards, including the right to judicial review, and these safeguards reduce the need for a private lawsuit as a means of controlling unconstitutional conduct.

Churchill claims that these safeguards were insufficient because the jury returned a verdict in his favor, but the jury's verdict is not the test by which a court measures judicial immunity. Indeed, the usual

course is to resolve immunity issues early on precisely to preempt a trial. The courts have been clear that the question is whether there are safeguards in the judicial framework designed to control unlawful conduct, not whether the result pleases a plaintiff. *Gressley*, 890 F.Supp. at 1491. If the elements of quasi-judicial immunity exist, a court must grant that immunity as a matter of law independently of the jury's verdict.

In sum, the trial court properly recognized that the Board of Regents' decision is protected by absolute immunity. This decision occurred with sufficient procedural protections to grant quasi-judicial immunity, including: (1) the right to notice of charges; (2) the right to request a hearing before a faculty committee; (3) the right to challenge the participation of a member of the faculty committee; (4) the requirement that the University prove the grounds for dismissal exist by clear and convincing evidence; (5) the requirement that the University transcribe the hearing; (6) the right to representation by counsel; (7) the right to examine each University witness; (8) the right

to present witnesses and evidence; (9) the right to present oral and written closing arguments; (10) the right to respond to the faculty committee's findings; (11) the right to request a hearing before the Board of Regents; (12) the requirement that the Board of Regents consider only the evidence in the record; (13) the requirement that the Board of Regents take final action in a public meeting; and (14) the right of judicial review under C.R.C.P. 106(a)(4). Church received the full panoply of rights available in judicial proceedings.

III. The proceedings were conducted by the trier of fact insulated from political influence.

Quasi-judicial immunity applies when proceedings are "conducted by a trier of fact insulated from political influence." *Butz*, 438 U.S. at 513; *Horowitz*, 822 F.2d at 1514. In this case, the Privilege and Tenure Hearings Panel of the Faculty Senate was the "trier of fact" that determined whether the grounds for dismissal had been demonstrated against Churchill. This "trier of fact" unanimously determined that Churchill had engaged in "conduct below the minimum standards of professional integrity," which is a permissible ground for dismissal.

Churchill makes no credible claim that the decision of the hearing panel was influenced by political considerations. Indeed, *Regent Policy 5-I, § III (B)(2)(b)* permitted Churchill to object to any of the panel members, but he did not do so.

While Churchill does not contend that the hearing panel's decision was affected by political considerations, he argues that the Board of Regents' decision was tainted by political pressure from third parties, including the Governor and state legislators. Whatever the merits of these allegations as factual matters, however, political or electoral pressure alone cannot deprive government officials of absolute immunity. *Brown v. Griesenauer*, 970 F.2d 431, 439 (8th Cir. 1992). If a governor's influence was sufficient to defeat quasi-judicial immunity, the Tenth Circuit would not have granted it to the Colorado Board of Medical Examiners, a "statutory body whose eleven members are appointed by the governor." *Horowitz*, 822 F.2d at 1510 (10th Cir. 1987). The Seventh Circuit likewise acknowledged the reality of political pressure upon political appointees yet still recognized the

quasi-judicial immunity of an election board observing, "although the board members are appointed to the [election board] by the governor, whose decision may include political considerations, political or electoral pressure alone cannot deprive government officials of absolute immunity." *Tobin for Governor v. Illinois State Board of Elections*, 268 F.3d 517, 526 (7th Cir. 2001) (citing *Brown*, 970 F.2d at 439).

Churchill also argues that the Regents are elected officials and are thus not entitled to quasi-judicial immunity. The fact that the Regents are elected is not dispositive. Many state judges are elected. These judges campaign for office and must subsequently make decisions in high profile cases, but are nonetheless entitled to judicial immunity. *Brown,* 970 F.2d at 439. In Colorado, state judges are subject to retention elections, but these elections do not cause them to lose judicial immunity.

By definition, public officials sitting on agency or departmental hearing panels and boards are either elected or appointed. These tribunals decide issues on a great variety of topics often requiring

specialized expertise, they decide issues involving substantial pecuniary or property interests, and they routinely decide matters of public concern. As the Supreme Court observed well over 100 years ago, "When the controversy involves questions affecting large amounts of property or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision, often finds vent in imputations of [malice]." *Bradley*, 80 U.S. at 348. If a disappointed party could avoid a Board's ruling merely by alleging bias or malice, there would be no point in the doctrine and no point in governmental entities holding adversarial hearings. Without the protection of absolute immunity, good faith decisions based upon the evidence presented during these hearings would nearly always be challenged in court. It would be an onerous undertaking for all but the most resolute official to sit on a decision-making board if that person was required to live in constant fear of retaliatory litigation.

The proper focus is upon the function that the governmental official performs, not the means by which he acquired his office. The analysis of quasi-judicial immunity depends upon "the character of the act in question, not the character of the actor." *Forrester v. White*, 484 U.S. 219, 228 (1988). In *Miller*, 521 F.3d at 1145, the Ninth Circuit Court of Appeals determined that the Governor of California was entitled to quasi-judicial immunity in reviewing parole decisions of inmates convicted of murder. Following the Supreme Court's guidance that quasi-judicial immunity "flows not from rank or title...but from the nature of the responsibilities of the individual official," the Court granted the governor immunity because that function of his office was "functionally comparable" to that of a judge. *Id.* (citing *Cleavinger*, 474 U.S. at 201). The Court recognized that there were some factors that potentially weighed against granting quasi-judicial immunity, such as that "the Governor's review is not adversarial in nature, there is no requirement that the Governor consider precedent in making his determination, and the Governor is, by definition an elected official, not

insulated from political influence." *Miller,* 521 F.3d at 1145. Nevertheless, the Court concluded that quasi-judicial immunity was proper because the governor's review of parole decisions "shares enough of the characteristics of the judicial process" to be considered judicial in nature. *Id.*

Moreover, the insulation-from-political-influence factor does not refer to the independence of the governmental official from the political or electoral process, but instead to the independence of the government official as a decision-maker. *Brown*, 970 F.2d at 439. Governmental officials must often act in different capacities on different occasions. The proper inquiry is whether the official was acting "in an administrative role or serving in an adjudicatory capacity" at the time of the decision giving rise to the claim. Churchill cites fragments of the Regents' discussion of their reasons for calling a special meeting after Churchill's essay first generated controversy in January 2005. Appellant's Opening Brief, pp. 20-22. The nature of the Regents' responsibilities (as well as the composition of the Board) changed

significantly between January 2005 and the dismissal proceedings in July 2007. Rather than acting in the heat of a controversy without any procedural safeguards or limitations, the Regents met in 2007 as part of a careful, deliberate, and judicial process. The Regents' decision was strictly limited to "the record in the case, including the transcript of the proceedings before the Panel." *Regent Policy 5-I, § IV.* Thus, the Regents, in their roles as decision-makers, acted in an adjudicatory manner free from political influence.

IV. School officials are protected by absolute immunity for quasi-judicial decisions made when litigants are afforded sufficient procedural safeguards.

School officials can be covered by quasi-judicial immunity. The Colorado Supreme Court has stated when "determining whether a school board is performing a quasi-judicial function, our inquiry must focus on the nature of the governmental decision and the process by which that decision is reached." *Widder*, 85 P.2d at 527. Thus, as in all other cases addressing the issue, courts look to see whether the school officials' actions were "functionally comparable" to a judge's, and

whether their decision was accompanied by sufficient procedural safeguards to protect against unconstitutional conduct.

Accordingly, where school officials make decisions "functionally comparable" to those of judges and where these decisions are accompanied by sufficient procedural safeguards, these decisions are protected from suit by quasi-judicial immunity. *See e.g. Ambus,* 858 P.2d at 1379 (recognizing the quasi-judicial immunity of Board of Education members for their role in accepting a hearing panel's recommendation that plaintiff's teaching certificate be revoked when plaintiff was given full procedural safeguards); *Taylor v. Brentwood Union Free School Dist.,* 908 F.Supp. at 1174 (recognizing the quasi-judicial immunity of a teacher disciplinary hearing panel that resolved disputes between adverse parties and where plaintiff was given a reasonable opportunity to defend himself); *Hulen,* 98-B-2170 at p. 20; *Gressley,* 890 F.Supp. at 1491; *Widder,* 85 P.2d at 527. *See also Richardson v. Rhode Island Dept. of Education,* 947 A.2d 253, 258 (R.I. 2008) (Department of Education hearing officers act in an adjudicatory

capacity and enjoy qualified immunity from suit). By comparison, when school officials' adjudicative decisions are not accompanied by sufficient procedural safeguards, courts have not granted absolute immunity. *See e.g. Purisch v. Tennessee Technological University*, 76 F.3d 1414, 1422 (6th Cir. 1996) (decision-makers not entitled to quasi-judicial immunity where grievant had no right to counsel, no right to cross-examine or confront witnesses, and no right to judicial review). *See also Harris v. Victoria Independent School Dist.*, 168 F.3d 216 (5th Cir. 1999); *Stewart v. Baldwin County Bd. of Education,* 908 F.2d 1499 (11th Cir. 1990).

As discussed above, Churchill received the full panoply of rights which were more than sufficient to support quasi-judicial immunity in this case. The Board of Regents is not barred from this protection simply because they are University officials.

V. Quasi-judicial immunity applies to prospective injunctive relief.

The substantive right to seek remedial measures for a state official's past constitutional violation exists only pursuant to 42 U.S.C. § 1983. *See Arpin v. Santa Clara Valley Transportation Agency,*261

F.3d 912, 925 (9th Cir. 2001) ("a litigant complaining of a violation of constitutional rights does not have a direct cause of action under the United States Constitution but must use 42 U.S.C. § 1983").

In 1996, Congress amended 42 U.S.C. § 1983 to modify the availability of prospective relief to successful litigants. The statute now reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, *except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable...*

(emphasis added).

The 1996 amendment to 42 U.S.C. § 1983 is understood to apply to "actions against a judicial officer," which includes officers, such as the Board of Regents, acting in a quasi-judicial capacity:

> Although neither the Supreme Court nor the First Circuit have addressed whether the statute protects quasi-judicial actors...performing tasks functionally equivalent to judges from actions for injunctive relief, circuit and district courts in the Second, Sixth, Seventh, Ninth and District of Columbia have answered in the affirmative.

Pelletier v. Rhode Island, 2008 WL 5062162, *5-*6 (D.R.I. 2008). *See also Montero v. Travis,* 171 F.3d 757, 761 (2d Cir. 1999) (applying 1996 amendments when dismissing claims for prospective relief against quasi-judicial officers); *Roth v. King,* 449 F.3d 1272, 1286-87 (D.C. Cir. 2006) (stating that attorneys acting on administrative panels are entitled to immunity from injunctive relief because "there is no reason to believe that Federal Courts Improvement Act of 1996 is restricted to judges); *Gilbert v. Ferry,* 401 F.3d 411, 414 n. 1 (6th Cir. 2005) (state court administrator entitled to absolute quasi-judicial immunity against injunctive relief), *rev'd in part on other grounds,* 413 F.3d 578 (6th Cir.

2005); *Cannon v. South Carolina Dept. of Corrections,* 2008 WL 269519, *4 (D.S.C. 2008) (court clerk protected by quasi-judicial immunity against injunctive relief); *Von Staich v. Schwarzenegger*, 2006 WL 2715276 (E.D. Cal. 2006) (Board of Prisons Terms commissioners immune from claims for injunctive relief).

In *Pelletier*, the Court surveyed all of the cases applying the 1996 amendment to quasi-judicial officers and found only one, *Simmons v. Fabian*, 743 N.W. 2d 281 (Minn. App. 2007), that did not grant immunity for prospective relief. The Court observed, however, that the *Simmons* court failed to consider the legislative intent revealed by reference to the *Butz* case in the Senate Judiciary Committee Report demonstrating that the amendment was intended to apply to quasi-judicial officers. The Court also noted that the *Simmons* court acknowledged that its opinion was contrary to the existing body of law on the subject. *Pelletier,* 2008 WL 5062162 at *6.

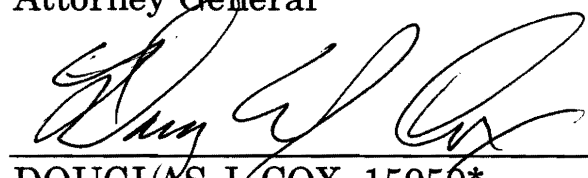
This Court should adopt the holdings of the overwhelming majority of those courts having addressed the issue, and apply the 1996 amendment to 42 U.S.C. § 1983 to quasi-judicial officers.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's decision recognizing the quasi-judicial immunity of the Board of Regents. Doing so will preserve the important public interest in preserving the independence of the decision-making process engaged in by public officials.

RESPECTFULLY SUBMITTED this 7th day of May 2010.

JOHN W. SUTHERS
Attorney General



DOUGLAS J. COX, 15950*
Senior Assistant Attorney General
Employment Tort
Civil Litigation and Employment Law Section
Attorneys for AMICUS CURIAE
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **BRIEF OF *AMICUS CURIAE* STATE OF COLORADO** upon all parties herein by depositing same in the United States mail, first class postage prepaid, at Denver, Colorado, this 7th day of May 2010 addressed as follows:

Mark Silverstein
ACLU Foundation of Colorado
400 Corona Street
Denver, CO 80218

Cheri J. Deatsch
Deatsch Law Office
1525 Josephine Street
Denver, CO 80206

Patrick T. O'Rourke
Special Assistant Attorney General
Office of University Counsel
1800 Grant Street, Suite 700
Denver, CO 80203

Thomas K. Carberry
149 West Maple Avenue
Denver, CO 80223

Antony M. Noble
The Noble Law Firm, LLC
12600 W. Colfax Avenue, C-400
Lakewood, CO 80215