COURT OF APPEALS
STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203

APPEAL FROM LOWER COURT:
District Court, City and County of Denver
State of Colorado
Case No. 06 CV 11473
Honorable Larry J. Naves

PLAINTIFF-APPELLANT:
WARD CHURCHILL

v.

DEFENDANTS-APPELLEES:
THE UNIVERSITY OF COLORADO;
THE REGENTS OF THE UNIVERSITY OF COLORADO, a body corporate

▲ COURT USE ONLY ▲

Case No. 09 CA 1713

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DEFENDANTS'-APPELLEES' ANSWER BRIEF

Certificate of Compliance

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 the brief is printed in 14 point Century font and contains 9212 words, including headings and footnotes. The word count is exclusive of the certificate of compliance, table of contents, table of authorities, signature block, and certificate of mailing. The word count was obtained using the word processing features of Microsoft Word 2007.

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Statement of the Issues

I. Whether the trial court correctly determined that the University's investigation, by itself, was not an adverse action.

II. Whether the trial court correctly determined that the Board of Regents was entitled to quasi-judicial immunity when it reviewed the findings of a fully-contested, adversarial hearing.

III. Whether the trial court correctly refused to reinstate Professor Churchill after faculty committees unanimously determined that he engaged in deliberate research misconduct and he was unwilling to comply with accepted standards of scholarship.

Statement of the Facts

This lawsuit arises from the Regents of the University of Colorado's termination of Professor Churchill's employment. The extraordinary due process the University provides to a faculty member accused of professional misconduct forms the crux of this appeal.

I. The Board of Regents is a Constitutionally Created Body With Specific Non-Delegable Powers

The original state Constitution created the University of Colorado. *Colo. Const. Article VIII, §5.* The Constitution also created the Regents of the University of Colorado. *Colo. Const Article IX, §12.* The Board of Regents, "as a constitutional body, occup[ies] a unique position in our governmental structure." *Subryan v. Regents of the University of Colorado*, 698 P.2d 1383, 1384 (Colo. App. 1984). The Board of Regents has the exclusive authority to "enact laws for the government of the university . . . and remove any officer connected with the university when in its judgment the good of the institution requires it." *C.R.S. §23-20-112.* When the law requires the Board of Regents to perform a particular act, it cannot delegate that ultimate responsibility to another. *Subryan,* 698 P.2d at 1384.

II. The University of Colorado's Model of Shared Governance

Amicus Curiae American Association of University Professors endorses a model of governance where a university's faculty serves a primary role in defining its academic mission. The AAUP's *Statement on Government of Colleges and Universities* describes "shared governance" as a system where the faculty has "primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, [and] faculty status . . . ." http://www.aaup.org /AAUP/ pubsres /policydocs/contents /governancestatement.htm.

The Board of Regents implemented a system of shared governance based on the "guiding principle that the faculty and administration shall collaborate in major decisions affecting the academic welfare of the University."[1] As such, the "faculty takes the lead in decisions concerning selection of faculty . . . academic ethics, and other academic matters."[2] Under this system, when a professor faces dismissal for

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[1] Exhibit 22-l, Laws of the Regents, §5.E.5

[2] Exhibit 22-l, *Laws of the Regents*, §5.E.5
In this brief, all emphasis marks were added by the University, unless otherwise noted.

"conduct below minimum standards of professional integrity," the Faculty Senate Committee on Privilege and Tenure ("P&T Committee") determines whether the faculty member engaged in misconduct."[3] The President of the University and, ultimately, the Board of Regents then act in a judicial role to review the P&T Committee's findings and determine whether "the good of the university" requires dismissal.[4]

III. The Board of Regents Authorized The Chancellor to Determine Whether Professor Churchill Engaged in Conduct that Violated University of Colorado Policies

In February 2005, Professor Churchill was scheduled to speak at Hamilton College. As that speech approached, media outlets publicized an essay that he wrote after September 11, 2001, which compared victims in the World Trade Center to Nazi officer Adolf Eichmann. The media attention soon reached Colorado, with legislators, parents of CU students, and others demanding to know why the University employed Professor Churchill.

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[3] Exhibit 21-i, Regent Policy 5-I, §I, Page 2
In this brief, references to page number in exhibits, refers to the number of pages within the.pdf file, not to any page numbers printed on the documents themselves.

[4] Exhibit 21-i, Regent Policy 5-I, §III(C)(1) and §III(C)(5), Page 9

The Board of Regents called a special meeting, at which Interim Chancellor Philip DiStefano told the Regents he would answer two questions:

- "[D]oes Professor Churchill's conduct, including his speech, provide any grounds for dismissal for cause as described in the Regents' Laws?"
- "[I]f so, is this conduct or speech protected by the first amendment against university action."[5]

Contrary to Professor Churchill's assertions, Chancellor DiStefano was not "trying to find cause for dismissal" and the Board of Regents never voted for a resolution to "investigate every word ever published or spoken by him." The verbatim transcript of the meeting demonstrates that the "purpose of this internal review is to determine whether Professor Churchill may have overstepped his bounds as a faculty member, showing cause for dismissal as outlined in the Laws of the Regents."[6]

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5 Exhibit 250, Transcript of Meeting, Page 5

6 Exhibit 250, Transcript of Meeting, Page 5

IV. Chancellor DiStefano Determined that Professor Churchill's 9/11 Essay Was Protected, But Found that the Faculty Should Investigate Potential Research Misconduct

Rather than investigating "every word" Professor Churchill ever spoke to "find cause for dismissal," Chancellor DiStefano's report described five controversial statements attributed to Professor Churchill and concluded that each of these statements, including the 9/11 essay, was "political expression . . . constitutionally protected against government sanction on the grounds of disruption, in spite of the damage it may have caused."[7] Although noting that the law allows a public employer to discipline an employee whose speech disrupts the workplace,[8] Chancellor DiStefano erred on the side of protecting Professor Churchill's speech.[9] Had unrelated allegations of research misconduct not arisen against Professor Churchill during Chancellor DiStefano's investigation, the matter would have been closed.

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7 Exhibit 1-B, Chancellor DiStefano's Report, Page 6

8 Exhibit 1-B, Chancellor DiStefano's Report, Page 5

9 Exhibit 1-B, Chancellor DiStefano's Report, Page 6

At trial, Professor Thomas Brown of Lamar University testified that he "wanted to shift the public debate" and contacted newspapers during the pendency of Chancellor DiStefano's investigation to complain that Professor Churchill engaged in repeated acts of research misconduct,[10] quickly spawning a number of media reports that Professor Churchill engaged in widespread fabrication and plagiarism,[11] which Chancellor DiStefano followed-up.[12] Although these allegations came to light while he examined the constitutional protections that attached to the 9/11 essay, Chancellor DiStefano believed "the University should address misconduct uncovered in the course of a review such as this one, just as it should address alleged sexual harassment, sanctionable criminal activity, or other wrongdoing within its purview."[13]

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10 Trial Testimony of Thomas Brown (March 31 2009) at 3965:9-23

11 Exhibit 22-9, Denver Post – CU Prof's Writings Doubted; Exhibit 22-18, Rocky Mountain News – Scholarship Under Scrutiny Churchill's Essays Lack Originality Says N.M. Law Professor

12 Trial Testimony of Philip DiStefano (March 11, 2009) at 611:6 – 612:9

13 Exhibit 1-B, Chancellor DiStefano's Report, Page 5

V. Investigation and Recommendations of Standing Committee on Research Misconduct

The University of Colorado uses a Standing Committee on Research Misconduct, composed entirely of faculty members, to investigate research misconduct allegations.[14] The Standing Committee empanelled an Investigating Committee to determine whether Professor Churchill engaged in prohibited acts of fabrication, falsification, and plagiarism.[15]

The Investigating Committee consisted of tenured professors, from the University and other universities, specializing in the fields of Indian Studies, history, sociology, and law.[16] For almost six months, the Investigative Committee interviewed witnesses and reviewed hundreds of pages that Professor Churchill submitted in his defense.[17]

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14 Exhibit 1-e, Administrative Policy Statement -Research Misconduct, Page 4

15 Exhibit 1-f, Report of the Inquiry Subcommittee of the Standing Committee on Research Misconduct, Page 18

16 Exhibit 17-t, Appendices to Report of the Investigating Committee of Standing Committee on Research Misconduct, Page 2

17 Exhibit 17-t, Appendices to Report of the Investigating Committee of Standing Committee on Research Misconduct, Page 12

Even after construing the evidence in Professor Churchill's favor, no matter how remotely it supported his contentions, the Investigating Committee unanimously concluded that Professor Churchill engaged in multiple acts of fabrication, falsification, and plagiarism.[18] Each member recommended either that the University terminate Professor Churchill or suspend him for multiple years.[19]

The full Standing Committee reviewed the 102-page investigative report, as well as Professor Churchill's response, and reached its own unanimous conclusion that Professor Churchill engaged in conduct that fell below minimum standards of professional integrity.[20] The majority of the Standing Committee's members recommended that the University terminate Professor Churchill's employment.[21]

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18 Exhibit 1-h, Report of the Investigative Committee, Page 96

19 Exhibit 1-h, Report of the Investigative Committee, Page 104

20 Exhibit 1-k, Report of Standing Committee, Page 17

21 Exhibit 1-k, Report of Standing Committee, Page 17

VI. Adversarial P&T Committee Hearing

Chancellor DiStefano agreed with the Standing Committee's recommendation of dismissal,[22] thus triggering Professor Churchill's ability to request an adversarial hearing before the Faculty Senate Committee on Privilege and Tenure.

In the rare circumstances that the University contemplates dismissing a tenured professor, the process is governed by *Regent Policy 5-I.*[23] Professor Churchill was first entitled to a hearing where a panel of tenured professors would determine whether he engaged in conduct below "minimum standards of professional integrity" or other "grounds for dismissal."[24] If so, the hearing panel would recommend a sanction to the President of the University and, ultimately, the Board of Regents.[25]

The University's procedures mirror or exceed the AAUP's *Recommended Institutional Regulations on Academic Freedom and*

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22 Exhibit 22c, DiStefano Notice of Intent to Dismiss, Page 1

23 Exhibit 21-I, Regent Policy 5-I, Page 3

24 Exhibit 21-I, Regent Policy 5-I, §III(C)(3) and §III(C)(5), Page 9

25 Exhibit 21-I, Regent Policy 5-I, §III(C)(3) and §III(C)(5), Page 9

Tenure, found at http://www.aaup.org/AAUP/ pubsres/policydocs/ contents/RIR.htm. Among the requirements of *Regent Policy 5-I* are:

- Dismissal only for cause, including "conduct which falls below minimum standards of professional integrity." *§I*
- Written notification of the grounds for dismissal. *§III(A)(6)*
- Production of witnesses and documents. *§II(B)(4)*
- Exclusion of panel members with a conflict of interest. *§III(B)(2)(a)*
- Cross examination of all witnesses. *§III(B)(2)(j)*
- Right to counsel. *§III(B)(2)(i)*
- Standards of evidence. *§III(B)(2)(k)(2)*
- A verbatim transcript. *§III(B)(2)(l)*
- Right to present opening statements and closing arguments. *§III(B)(2)(r)*
- A burden of proof upon the University by clear and convincing evidence. *§III(B)(2)(n)*
- A prohibition on ex parte communications. *§III(B)(2)(q)*

- A written report containing findings of fact, conclusions and recommendations. *§III(C)(1)*
- A right to object to the P&T Committee's findings. *§III(C)(2)*

The hearing lasted seven full days, during which Professor Churchill presented expert witnesses,[26] cross-examined the University's witnesses (including Chancellor DiStefano and each member of the Investigating Committee),[27] and presented a voluminous post-hearing closing argument.[28]

Professor Churchill's expert on academic processes testified that the P&T Committee's procedures are absolutely appropriate[29] and that

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[26] The complete transcripts of the dismissal for cause hearing are located at Exhibits 23-a, 23-b, 23-c, 23-d, 23-e, 23-f, and 23-g. Professor Churchill's witnesses were Professor George Tinker, Exhibit 23-d, Professor Robert Williams, Exhibit 23-d, Professor Michael Yellow Bird, Exhibit 23-e, Professor Eric Cheyfitz, Exhibit 23-e, Professor Richard Delgado, Exhibit 23-e, and Mr. King Downing, Exhibit 23-f.

[27] The University's witnesses, all subject to cross-examination, were Professor Marianne Wesson, Exhibit 23-a; Professor Donald McCabe, Exhibit 23-a; Professor Robert Clinton, Exhibit 23-b; Professor Jose Limon, Exhibit 23-b; Dean Todd Gleeson, Exhibit 23-b; Professor Marjorie McIntosh, Exhibit 23-c; Chancellor Philip DiStefano, Exhibit 23-c; Dean David Getches, Exhibit 23-f; Professor Joseph Rosse, Exhibit 23-f; and Professor Michael Radelet, Exhibit 23-g.

[28] Exhibit 13, Churchill Closing Argument to P&T Panel, Page 1. Professor Churchill also submitted four binders of documents with his closing argument.

[29] Trial Testimony of Philo Hutcheson (March 19, 2009) at 2050:1 – 2051:15

he found no evidence that the committee members had been pressured to reach any particular conclusions.[30] Professor Hutcheson's testimony correlates with the P&T Committee members' testimony that they were not pressured to reach preordained outcomes and participated on the P&T Committee to protect faculty freedoms.[31]

Professor Hutcheson admitted that the concepts of academic freedom and tenure do not protect fabrication, falsification or plagiarism.[32] When a faculty member engages in this type of conduct, he engages in a serious offense that undermines the entire academic enterprise,[33] and the university has an obligation to impose discipline.[34]

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30 Trial Testimony of Philo Hutcheson (March 19, 2009) at 2047:11-16

31 Trial Testimony of Mary Ann Cutter (March 30, 2009) at 3533:19 – 3534:17; Testimony of Donald Morley (March 27, 2009) at 3412:22 – 3413:23

32 Trial Testimony of Philo Hutcheson (March 19, 2009) at 2055:22 – 2056:16

33 Trial Testimony of Philo Hutcheson (March 19 2009) at 2056:17-24

34 Trial Testimony of Philo Hutcheson (March 19 2009) at 2057:12-14

The P&T Committee members deliberated and produced a detailed report that addressed the entire investigative process,[35] as well as the substantive allegations. The P&T Committee unanimously found by clear and convincing evidence that Professor Churchill engaged in eight separate acts that fell below minimum standards of professional integrity, including fabricating historical details to support his theory that the U.S. Army deliberately infected the Mandan nation with smallpox, falsifying sources in support of the same theory, plagiarizing other scholars, and engaging in the unethical practice of writing essays under other scholars' names and then citing them as independent verification of his own theories.[36] The Committee found that "The Laws of the Regents provide that a faculty member who engages in such conduct may be dismissed."[37]

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35 Exhibit 21-f, P&T Committee Report, §4.2, Page 24

The P&T Committee considered and rejected Professor Churchill's assertion that one of the Investigative Committee members, Professor Marianne Wesson, was biased against him. "[E]xcept for some assertions by Professor Churchill, the evidence suggests that Professor Wesson's conduct of the process as it actually unfolded was generally fair. Exhibit 21-f, P&T Committee Report, §4.3, Page 43.

36 Exhibit 21-f, P&T Committee Report, §6.1.3, Page 83

37 Exhibit 21-f, P&T Committee Report, §6.2.1, Page 84

Despite unanimously stating that Professor Churchill's misconduct "requires severe sanctions," the P&T Committee did not reach a consensus regarding sanctions, with three members recommending a demotion coupled with a suspension of one year and two members recommending that the Board of Regents terminate Professor Churchill's employment. [38]

VII. President & Board of Regents

University President Hank Brown generally agreed with the P&T Committee's findings, but ultimately recommended dismissal. President Brown noted that the faculty committees had split almost evenly on the question of whether the University should dismiss Professor Churchill.[39] He recommended termination because the University could not expect students to observe standards of academic integrity while employing a professor who refused to observe them.[40]

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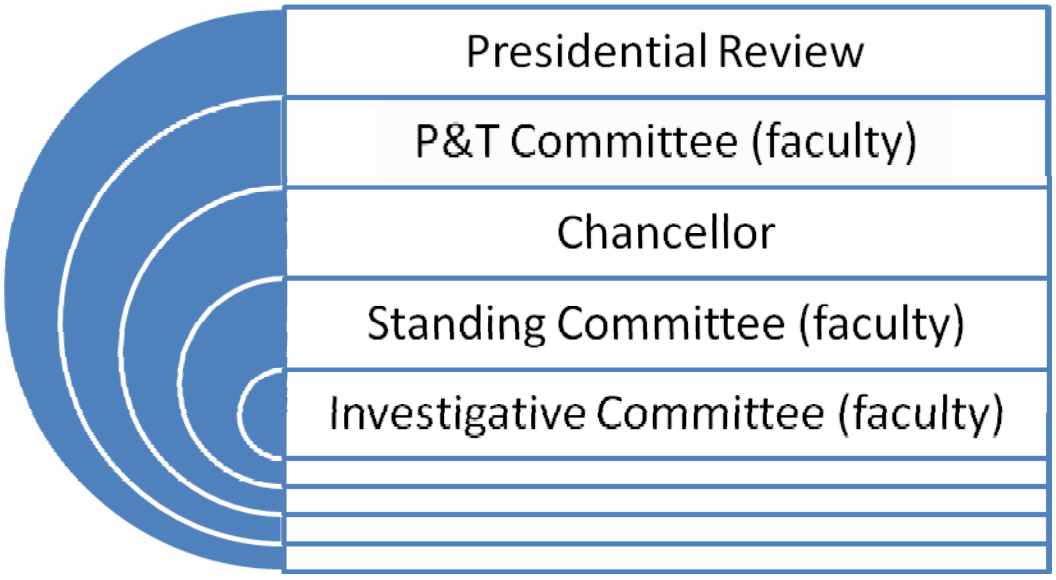
38 Exhibit 21-f, P&T Committee Report, §6.2.2, Page 88

39 Exhibit 21-g, President Brown Recommendation, Page 2

40 Trial Testimony of Hank Brown (March 12, 2009) at 952:4-9

When the case reached the Board of Regents, it had been through multiple levels of review, with each reviewing body unanimously determining that Professor Churchill had engaged in multiple acts of intentional research misconduct:



Under *Regent Policy 5-I*, the P&T Committee's report was presented to the Regents and Professor Churchill had an opportunity to argue that the P&T Committee's findings or President Brown's recommendation were wrong.[41] At the conclusion of this hearing, the Board of Regents accepted President Brown's recommendation and voted 8-1 to terminate Professor Churchill.

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41 Exhibit 21-i, Regent Policy 5-I, §IV, Page 10

Statement of the Case

I. Pretrial Proceedings

Professor Churchill brought claims against the University, the Board of Regents, and each Regent who served in 2005 and 2007.[42] Both the University and the Board of Regents enjoy Eleventh Amendment immunity from damage claims under *42 U.S.C. §1983*. *Rozek v. Topolnicki*, 865 F.2d 1154, 1158 (10th Cir. 1989). Individual defendants could not claim Eleventh Amendment immunity, but would be entitled to raise individual defenses, such as the quasi-judicial immunity that the Tenth Circuit extends to board members who review governmental employment decisions. *Atiya v. Salt Lake County*, 988 F.2d 1013, 1016-17 (10th Cir. 1993).

To prevent the complications that would ensue if Professor Churchill pursued claims against more than a dozen individuals, the University and Professor Churchill entered an agreement where: (1) Professor Churchill would dismiss his claims against the individuals;

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[42] Second Amended Complaint, ¶4

(2) the University and the Board of Regents would waive their Eleventh Amendment immunity; and (3) these entities could raise any defenses that would normally be available to individual defendants.[43] As Judge Naves observed, this agreement placed the parties in the same legal position that they would have otherwise occupied, but eliminated the legal fiction where Professor Churchill would sue multiple individuals to obtain a recovery from the University.[44]

Professor Churchill's brief makes a passing reference to the fact that quasi-judicial immunity is not available to governmental entities. The University did not seek to extend quasi-judicial immunity to governmental entities as a categorical defense. Judge Naves determined that University contractually acquired the right to present individual defenses in exchange for its waiver of Eleventh Amendment immunity.[45] Professor Churchill has not appealed this finding.

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43 Stipulation, Page 4

44 Order Granting Defendants' Motion for Judgment as a Matter of Law, ¶¶8-10, Pages 3-4

45 Order Granting Defendants' Motion for Judgment as a Matter of Law, ¶9-10, Page 4

II. Trial

The trial concerned two claims under *42 U.S.C. §1983*: (1) the Board of Regents retaliated against Professor Churchill when it allowed Chancellor DiStefano to investigate; and (2) the Board of Regents retaliated against Professor Churchill when it terminated him.

a. Directed Verdict

The University moved for a directed verdict on the unlawful investigation claim, arguing that an investigation is not an adverse action under *42 U.S.C. §1983*. Judge Naves granted the directed verdict, determining as a matter of law that an investigation is not an adverse action.[46]

b. Jury Questions and Verdict

The jury deliberated on the unlawful termination claim. Professor Churchill presented extensive evidence about his alleged economic and non-economic damages, including testimony that the termination had cost him in excess of $100,000.[47] His counsel argued that "in the great

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46 Trial Transcript (March 31, 2009) at 4025:.4-15.

47 Trial Testimony of Ward Churchill (March 24, 2009) at 2626:22 – 2628:6; Trial Testimony of Natsu Saito (March 25, 2009) at 2880:1 – 2881:9

American justice system . . . all pain and all human misery translates into money," before asking the jurors to send a message "in a big way" because an award of $5.72 is "really a win for CU."[48]

Judge Naves instructed that the jury could award damages for "any noneconomic losses or injuries" and "any economic losses or injuries. . . ."[49] After several hours of deliberations, the jury sent a written question and asked, "Is 0$ an option?" The Court instructed without objection, "If you find in favor of the plaintiff, but do not find any actual damages, you shall nonetheless award him nominal damages of one dollar."[50] The jury returned a $1 verdict.

c. Post-Verdict Rulings

The parties preserved immunity arguments until after trial, which was the University's prerogative. *See Cassady v. Goering,* 567 F.3d 628, 634 (10th Cir. 2009) (stating that a pre-trial immunity ruling is "a rule for the benefit of the [defendant]" and "we have never held" that an

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48 Transcript of Closing Argument (April 1, 2009) at 91:20 – 92:6

49 Transcript of Jury Instructions (April 1, 2009) at 13:17-25

50 Juror Questions and Court Response

immunity "is unreviewable following a trial"). The two post-trial motions were: (1) Professor Churchill's Motion for Reinstatement; and (2) the University's Motion for Judgment as a Matter of Law.

The University received judgment as a matter of law because the Board of Regents engaged in quasi-judicial action when it reviewed the P&T Committee's findings and terminated Professor Churchill's employment. "Professor Churchill received the full panoply of rights available in judicial proceedings,"[51] and "the Board of Regents engaged in an entirely judicial function when it reviewed the record and applied 'discretionary judgment.'"[52]

Judge Naves separately ruled that Professor Churchill was not entitled to reinstatement or front pay. Granting reinstatement would provide an unwarranted remedy where the jury found that Professor Churchill had not suffered "any actual damages."[53] Even more

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51 Order Granting Defendants' Motion for Judgment as a Matter of Law, ¶49, Pages 17-18

52 Order Granting Defendants' Motion for Judgment as a Matter of Law, ¶61, Page 22

53 Order Granting Defendants' Motion for Judgment as a Matter of Law, ¶88, Page 31

significantly, reinstatement was inappropriate because Professor Churchill had been judged by an impartial faculty panel as having engaged in multiple acts of research misconduct and was unwilling to change his practices.[54] Reinstatement had only a miniscule chance of success especially given Professor Churchill's statements "demonstrating his hostility to the University" and his filing of "retaliatory complaints against members of the committees that investigated him."[55]

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[54] Order Granting Defendants' Motion for Judgment as a Matter of Law, ¶¶100-101, Page 34

[55] Order Granting Defendants' Motion for Judgment as a Matter of Law, ¶¶106-108, Pages 37-38

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Summary of the Argument

There are three issues before the Court of Appeals, and Professor Churchill has failed to demonstrate that Judge Naves' ruling on any of them was erroneous.

On the first issue, whether Judge Naves appropriately granted a directed verdict on Professor Churchill's claim of unlawful investigation, his decision was consistent with precedent in the Tenth Circuit and around the country determining, as a matter of law, that "an investigation of potential misconduct . . . will generally not constitute an adverse employment action." *Couch v. Board of Trustees of Memorial Hospital of Carbon County*, 587 F.3d 1223, 1243 (10th Cir. 2009). Public employers have broad discretion to institute and carry out investigations of public employees without giving rise to claims under *42 U.S.C. §1983*.

On the second issue, whether Judge Naves appropriately granted the Board of Regents quasi-judicial immunity, Colorado law is clear that the Board of Regents' decision to dismiss Professor Churchill was quasi-judicial. *Widder v. Durango School District No. 9-R*, 85 P.3d 518

(Colo. 2004). Professor Churchill cannot avoid this conclusion and instead distorts the question before the Court of Appeals by cherry-picking and misstating testimony in an effort to demonstrate that the Board of Regents did not fairly consider his particular case. His efforts fail because quasi-judicial immunity does not turn on the facts of a particular litigant's case. Instead, "our cases clearly indicate that immunity analysis rests on functional categories." *Briscoe v. LaHue,* 460 U.S. 325, 342 (1983). Because the Board of Regents performed a duty that is "functionally comparable" to those performed by judges when it reviewed the P&T Committee's findings and imposed a sanction, quasi-judicial immunity applies. Professor Churchill's remedy, which he did not employ, was review under *C.R.C.P. 106.*

The third issue, whether Professor Churchill was entitled to reinstatement, was a question firmly committed to Judge Naves' discretion. In light of Professor Churchill's own statements demonstrating his hostility to the University and his unwillingness to comply with accepted academic standards, reinstatement was not an appropriate remedy.

Argument

I. An Investigation Is Not an Adverse Action

Standard of Review: Judge Naves determined as a matter of law that investigations of governmental employees are not adverse actions under *42 U.S.C. §1983*. *See Heil v. Santoro*, 147 F.3d 103, 110 (2nd Cir. 1998) (stating that "there being no First Amendment violation in investigating, the reason for the investigation created no material issue to be tried"). The Court of Appeals reviews questions of law *de novo*. *West Elk Ranch, L.L.C. v. United States*, 65 P.3d 479, 481 (Colo.2002).

Argument: No United States Supreme Court or Tenth Circuit opinion has held that an employer's investigation is an "adverse action." To the contrary, "an investigation of potential misconduct . . . will generally not constitute an adverse employment action." *Couch*, 587 F.3d at 1243. Some actions short of termination, such as "promotions, transfer, recalls after layoff and hiring decisions are actionable," but "we have never ruled that all [of an employer's acts], no matter how trivial, are sufficient to support a retaliation claim." *Couch,* 587 F.3d at 1243.

Attempting to avoid this body of law, Amicus Curiae National Lawyers Guild cited a Tenth Circuit case where "allegations [were] directed at a defendant who [was] not the plaintiff's employer" for the proposition that "prosecution, threatened prosecution, bad faith investigation, and legal harassment" can constitute unlawful retaliation. *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000). This argument overlooks the "crucial difference, with respect to constitutional analysis, between the government exercising the power to regulate or license, as lawmaker, and the government acting as proprietor to manage its internal operation." *Engquist v. Oregon Dept. of Agriculture,* 128 S.Ct. 2146, 2152 (U.S. 2008).

When the government is an employer, "the government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one. . . ." *Waters v. Churchill*, 511 U.S. 661, 675 (1994). The United States Supreme Court has recognized that the "government has significantly greater leeway in its dealings with citizen employees than when it brings its sovereign power to bear on citizens at large."

Engquist, 128 S.Ct. at 2151. "[A]lthough government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment contexts." *Engquist*, 128 S.Ct. at 2152.

One of those realities is that a public employee's speech (including political speech) can disrupt the workplace, and, when disruption occurs, the employer may terminate the employee. *Anderson v. McCotter*, 205 F.3d 1214, 1217-18 (10th Cir. 2000). The employer need only have a reasonable belief that the public employee's speech "impedes the performance of the speaker's duties or interferes with the regular operations of the enterprise." *Anderson*, 205 F.3d at 1218. In the higher education context, the Second Circuit upheld discipline against a professor whose anti-Semitic speech had the potential to disrupt a university's operations, even though it did not cause actual disruption. *Jeffries v. Harleston*, 52 F.3d 9, 12-13 (2nd Cir. 1995).

An employer's obligation to balance the employee's interests against the realities of the workplace necessarily allows the employer to undertake an investigation, even when that investigation stems from

an employee's otherwise protected speech. In its investigation, the employer may consider "the manner, time, and place of the employee's expression [and] the context in which the dispute arose." *Anderson*, 205 F.3d at 1218. The University weighed these factors and determined that Professor Churchill's 9/11 speech was protected. Nonetheless, he seeks to deny employers the ability to evaluate whether speech is protected and inquire into other misconduct that comes to its attention during such an evaluation. The courts are unwilling to handcuff government employers in this manner. *See Heil,* 147 F.3d at 103 (stating that "in light of the employer's duty. . . to make a reasonable investigation before imposing discipline on an employee for engaging in protected speech, it is clear that Heil's complaint that defendants conducted an investigation is not a valid First Amendment claim").

The Tenth Circuit recently considered a physician's claim that a public hospital engaged in a "campaign of retaliation" against him, including investigations of disruptive conduct and billing fraud, concluding that "an investigation of potential misconduct . . . will generally not constitute an adverse employment action." *Couch*, 587

F.3d at1223. In doing so, the Tenth Circuit joins other federal circuits and the Colorado federal trial courts. *See Bennington v. City of Houston*, 157 F.3d 369, 376 (5th Cir. 1998) (stating that "[the employee] maintains that she was subjected to an IAD investigation in retaliation for her First Amendment activity. Although a reprimand can constitute an adverse employment action, an investigation does not"); *Breaux v. City of Garland*, 205 F.3d 150, 158 (5th Cir. 2000) (stating that "investigating alleged violations of department policies and making purportedly false accusations are not adverse employment actions"); *Harrison v. City of Akron*, 43 Fed. Appx. 903, 905 (6th Cir. 2002) (stating that "psychological examinations and internal investigations are not adverse actions"); *Spagnuolo v. City of Longmont*, 2006 WL 2594484, *1 (D. Colo. 2006) (dismissing claims where an employee claimed that his employer "instigated and conducted an unwarranted investigation of [his] activities after [he] exercised his First Amendment free speech rights"); *Carrero v. Robinson*, 2007 WL 1655350, *10 (D. Colo. 2007) (finding an investigation was not an adverse action).

Although Professor Churchill claimed that the investigation and his termination were separate adverse employment actions, a plaintiff cannot advance such a theory:

> The few courts that have considered whether an investigation, by itself, can constitute an adverse employment action have answered that question in the negative. . .
>
> In attempting to distinguish *Benningfield,* he argues, "this is not an instance where the Plaintiff was simply investigated ... Plaintiff here was terminated as a result of this racially based and result oriented investigation. . . ." Plaintiff, however, has brought separate claims of disparate treatment related to his termination. . . . For Defendants' investigation of Plaintiff to give rise to an independent claim, Plaintiff would need to allege some employment injury caused by the investigation independent of his termination. . . . This, Plaintiff has not done.

Hoffman v. Baltimore Police Department, 379 F.Supp.2d 778, 792-93 (D. Md. 2005) (emphasis in original). Professor Churchill is similarly unable to show the investigation itself constituted "a significant change in employment status, such as firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Carrero,* 2007 WL 1655350 at *10.

Professor Churchill attempts to sidestep this law by arguing that the investigation caused him to miss deadlines and default on book contracts. He claimed third parties cancelled speaking engagements and that he did not receive an award from the alumni association.[56] The University did not take these actions, and Professor Churchill cites no law that makes non-governmental conduct actionable. *See Robbins v. Oklahoma*, 519 F.3d 1242, 1251 (10th Cir. 2008) (stating "in general, state actors may only be held liable for their own acts. . . ").

Professor Churchill argues that he was not allowed to take a sabbatical and was not allowed to "unbank" courses. Although Professor Churchill now cites an exhibit, neither he nor any other witness testified about *Exhibit 14-1* (one of several hundred exhibits). The words "sabbatical" and "unbank" do not appear in the witness testimony, appearing only in the directed verdict argument.[57] Professor Churchill never put on any evidence to demonstrate what these actions were, let alone how they could possibly constitute adverse employment

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56 Trial Testimony of Ward Churchill (March 24, 2009) at 2504:15 – 2505:9; Trial Testimony of Natsu Saito (March 25, 2009) at 2881:2 –9

57 Transcript of Directed Verdict Argument (March 31, 2009) at 4013:1-11

actions. *See Ortivez v. Davis*, 902 P.2d 905, 908 (Colo. App. 1995) (stating that "statements, remarks, arguments and objections by counsel are not evidence"); *Coopersmith v. Williams*, 468 P.2d 739, 742 (Colo. 1970) (upholding a directed verdict when "the plaintiff had absolutely no testimony on the subject. He relies on the contents of [an exhibit]. This is not sufficient"); *Kaltenbach v. Julesburg School Dist. RE-1*, 603 P.2d 955, 957 (Colo. App. 1979) (stating that "in order to withstand defendants' motion for a directed verdict, plaintiff had to present evidence from which the jury could have inferred [retaliation]").

II. The Board of Regents Appropriately Received Immunity Because it Engaged in Quasi-Judicial Action

Standard of Review: The University agrees that immunities are questions of law reviewed *de novo*. *Cortez v. McCauley*, 478 F.3d 1108, 1115 (10th Cir.2007).

Argument: Quasi-judicial immunity applies when government officials perform duties that are "functionally comparable" to those that judges perform. *Butz v. Economou,* 438 U.S. 478, 513 (1978). Quasi-judicial immunity exists because some government officials' "special functions require a full exemption from liability." *Butz*, 438 U.S. at 508.

It is the nature of the decision, not the official's conduct in a particular case, that confers "absolute immunity from damages liability." *Butz*, 438 U.S. at 513. "Even if [the plaintiff's] suit is meritorious . . . it cannot pierce the shield of absolute immunity because judicial officers are entitled to that immunity even when they act in error, maliciously, or in excess of their authority." *Tobin for Governor v. Illinois State Board of Elections*, 268 F.3d 517, 525 (7th Cir. 2001).

Professor Churchill cannot seek damages in this case any more than he could sue a judge who spoke out against his 9/11 essay, and should have recused himself under the Canons of Judicial Conduct, but then presided over a trial and convicted him of a criminal offense. *See Moss v. Kopp*, 559 F.3d 1155, 1163 (10th Cir. 2009) (finding that where quasi-judicial immunity applies, it prevents liability "even if the action he took was in error, was done maliciously, or was in excess of his authority"). Consequently, even a jury's verdict cannot render an official performing a judicial function liable in damages. *See Lerwill v. Joslin*, 712 F.2d 435, 437 (10th Cir. 1983) (reversing judgment following a jury verdict against prosecutor who enjoyed absolute immunity).

Contrary to the amici's suggestion, quasi-judicial immunity did not leave Professor Churchill without a potential remedy. The courts granting quasi-judicial immunity have done so even though it leaves the plaintiff without a claim for damages. Just as a litigant who possesses evidence that a judge was biased against him can appeal, "those who complain of error in [quasi-judicial] proceedings must seek agency or judicial review." *Butz*, 438 U.S. at 514. There is no doubt that Professor Churchill could have sought review under *C.R.C.P. 106*.

a. Colorado Law Regarding Quasi-Judicial Functions

When Judge Naves determined that the Board of Regents acted in a quasi-judicial capacity, his ruling was anchored in solid precedent, most notably *Widder v. Durango School District No. 9-R*, 85 P.3d 518 (Colo. 2004). The Colorado Supreme Court held a school district's board acted quasi-judicially when it reviewed an administrative decision terminating an employee. Because the school board performed a quasi-judicial function, the employee's potential relief was under *C.R.C.P. 106*, not an independent action. *Widder*, 85 P.3d at 526.

"It is the nature of the decision rendered by the governmental body . . . that is the predominant consideration in whether the government body has exercised a quasi-judicial function in rendering its decision." *Cherry Hills Resort Development. Co. v. City of Cherry Hills Village*, 757 P.2d 622, 626 (Colo.1988) . Where the governmental decision "is likely to adversely affect the specific interests of specific individuals" and "is to be reached through the application of preexisting legal standards," then "one can say with reasonable certainty that the governmental body is acting in a quasi-judicial capacity." *Cherry Hills,* 757 P.2d at 626. The Board of Regents' decision has the potential to adversely affect a faculty member and is reached through the application of preexisting legal standards. The *Laws of the Regents* specify that only certain misconduct can result in a tenured faculty member's termination, including "conduct that falls below minimum standards of professional integrity."

If the nature of the governmental decision is judicial, the Colorado Supreme Court next examines "the process by which that decision is reached." *Widder*, 85 P.3d at 527. "Quasi-judicial decision making, as

the name connotes, bears similarities to the adjudicatory function performed by courts." *Widder*, 85 P.3d at 527. In that case, the Board of Education "acted upon a [factfinder's] recommendation" reached "after conducting an adjudicatory hearing and considering the evidence presented at that hearing. [The employee] had advance notice of the hearing, and was given the opportunity to be represented by counsel." *Widder*, 85 P.3d at 528.

The processes employed in this case were entirely judicial, as a University professor potentially facing dismissal has the right to an adversarial hearing where the University bears the burden of proving ground for dismissal by clear and convincing evidence. Among other protections, the accused faculty member has the right: (1) to counsel; (2) to cross-examine witnesses; (3) to present opening statements and closing arguments; and (4) to written findings and recommendations. Assuming the P&T Committee finds that grounds for dismissal exist, the President of the University reviews that record and the Board of Regents provides a hearing, at which the professor may be represented by counsel, to challenge the P&T Committee's findings.

b. Rule 106 Provides a Sufficient Remedy

When a party "seeks oversight of the activities of . . . a governmental entity [exercising quasi-judicial authority] it is Rule 106 of the Colorado Rules of Civil Procedure that sets forth the framework of such review." *Widder*, 85 P.3d at 526. Specifically *C.R.C.P. 106(a)(4)* "provides judicial review of a decision of any governmental body . . . exercising judicial or quasi-judicial functions to determine whether the body or officer abused its discretion or exceeded its jurisdiction." *Widder*, 85 P.3d at 526.

It is true that that Rule 106(a)(4) "does not contemplate a new evidentiary hearing at the district court level," but that would not have limited Professor Churchill's ability to obtain meaningful review. *Widder,* 85 P.3d at 526. The P&T Committee did not limit its hearing to the allegations of misconduct, but expressly considered whether the University had selectively enforced those standards against Professor Churchill in retaliation for his 9/11 essay.[58] Professor Churchill presented expert testimony from law professors and the National

[58] Exhibit 21-f, P&T Committee Report, §3.4, Pages 23-24

Coordinator of Amicus Curiae's ACLU's Campaign Against Racial Profiling on selective enforcement.[59] Professor Churchill's written arguments and exhibits spanned hundreds of pages.

With this record, a district court could determine whether the Board of Regents' decision was "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Hellas Const., Inc. v. Rio Blanco County*, 192 P.3d 501, 506-07 (Colo. App. 2008). Such a situation would exist, for example:

- If the P&T Committee charged with "tak[ing] the lead in decisions concerning . . . academic ethics" determined that a faculty member had not violated the minimum standards of professional integrity, yet the Board of Regents terminated his employment.
- If the Board of Regents terminated a faculty member's employment after the P&T Committee found that he inadvertently engaged in an isolated act of misconduct.

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[59] Exhibit 23-e, P&T Testimony of Richard Delgado at 1742:11 – 1745:25, Pages 309-312; Exhibit 23-f, P&T Testimony of King Downing at 1974:8 – 1976:18, Pages 205-208

- If the Board of Regents terminated a faculty member's employment after the P&T Committee found intentional academic misconduct, yet also found signficant mitigating factors, and unanimously recommended that the Board of Regents continue the faculty member's employment.

As the Court of Appeals recognized, "obvious facts may indeed narrow the discretion inherent in a quasi-judicial action." *Hellas Const.*, 192 P.3d at 506-07. But this was not one of those cases. The Board of Regents terminated Professor Churchill's employment at the conclusion of a process where his fellow faculty members unanimously determined by clear and convincing evidence that: (1) he intentionally engaged in multiple acts below minimum standards of professional integrity; and (2) that his conduct required a "severe sanction."

The only dispute between the closely divided P&T Committee members was whether the Board of Regents should terminate Professor Churchill's employment for his deliberate acts of research misconduct. Where the Board of Regents exercised its discretion to conclude that the "good of the University" required it to terminate Professor Churchill's

employment in the face of a split recommendation on sanctions, it performed a quasi-judicial function. A district court could have reviewed that decision under Rule 106(a)(4) but Professor Churchill decided not to employ the remedy available to him.

c. Quasi-Judicial Immunity Applies

Professor Churchill and his amici do not seriously contend that the process leading to his termination was not quasi-judicial. This process vitiates the amici's implausible assertion that "the trial court decision impermissibly destroys the First Amendment protection of over 8,000 professors in the University of Colorado system." To the contrary, University faculty can rely upon the fact that they will be judged fairly by their peers, but will be called to account for unethical conduct.

When school officials take disciplinary action against a student, they may not be entitled to absolute immunity, *Wood v. Strickland*, 420 U.S. 308 (1975), but since *Butz,* the Tenth Circuit has regularly extended quasi-judicial immunity to government officials serving on boards that decide whether to terminate a government employee or revoke a professional license, even when the plaintiff claims that the

officials "improperly discharged [her] in retaliation for her exercise of free speech." *Atiya*, 988 F.2d at 1016-17 (10th Cir. 1993) (Salt Lake County Career Services Council); *See also Saavedra v. City of Albuquerque,* 73 F.3d 1525, 1529-1530 (10th Cir. 1996) (Albuquerque Personnel Board); *Horwitz v. State Board of Medical Examiners,* 822 F.2d 1508, 1513-14 (10th Cir. 1987) (Colorado Board of Medical Examiners). The relevant inquiry was not whether the defendant violated the plaintiff's rights, but whether "the Board members exercised adjudicative functions comparable to those exercised by a court of law." *Horwitz*, 822 F.2d at 1515. Professor Churchill provides no meaningful distinction between the "adjudicative function" that these entities perform and the function the Board of Regents' performs.

Trial courts in the Tenth Circuit recognize quasi-judicial immunity when faculty members claim that university officials violated their constitutional rights. *Hulen v. State Board of Agriculture*, 98-B-2170, Pages 1-3 (D. Colo. 2001); *Gressley v. Deutsch*, 890 F.Supp. 1474, 1480 (D. Wyo. 1994). Even though these decisions are the most analogous to his case, Professor Churchill did not address them.

Myron Hulen was a professor at Colorado State University who alleged that CSU involuntarily transferred him to another department in retaliation for his exercise of protected speech. Professor Hulen challenged the transfer through a faculty grievance process. The grievance committee found transfer was improper, but CSU's provost reversed the grievance committee's decision. CSU's president and governing board reviewed the record and upheld the transfer.

Judge Babcock granted CSU's Provost and President quasi-judicial immunity because their actions were "functionally comparable" to those of judges. *Hulen* at Page 19. He 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 Dr. Hulen's case, Provost Crabtree's and President Yates' involvement with the process was limited to this appellate function. I therefore conclude that [their] involvement with the process was as quasi-judicial officers and grant them immunity on that basis.

Hulen at Page 20. Judge Naves similarly found that the Board of Regents reviewed an adversarial process.[60]

Gene Gressley was a professor at the University of Wyoming. After the University of Wyoming's president initiated termination proceedings, a Faculty Hearing Committee heard two weeks of testimony before sustaining the charges. *Gressley*, 890 F.Supp. at 1481. Professor Gressley appealed to the Board of Trustees, which "after hearing oral arguments [and] reviewing the record before and findings of the Faculty Hearing Committee . . . sustained the Faculty Hearing Committee's recommendation that Dr. Gressley's employment be terminated for cause." *Gressley*, 890 F.Supp. at 1481. Professor Gressley brought claims that the Trustees unlawfully discharged him, but the Trustees received quasi-judicial immunity. *Gressley*, 890 F.Supp. at 1490. Judge Downes applied the following test:

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> 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 lawsuits by disappointed parties; and (c) there must be sufficient safeguards in the regulatory framework to control unconstitutional conduct.

Gressley, 890 F.Supp. at 1490-91. As to the first factor, Judge Downes stated that "it is hard to imagine a more adjudicative function" than reviewing the outcome of a faculty disciplinary process. *Gressley*, 890 F.Supp. at 1491. As to the second factor, he stated that decisions to discharge a tenured professor "would frequently result in damages lawsuits by disappointed parties." *Gressley*, 890 F.Supp. at 1491. As to the third factor, he concluded that "sufficient safeguards exist in the regulatory framework to control unconstitutional conduct." *Gressley*, 890 F.Supp. at 1491. He explained that the Board of Trustees' decision came at the end of a contested adversarial process and that Professor Gressley could seek judicial review. *Gressley*, 890 F.Supp. at 1491.

Professor Churchill contends that there were not sufficient safeguards to control unconstitutional conduct, using the jury's verdict as the lynchpin of his argument. What he overlooks is that immunity is a matter of law for the courts to resolve, not a matter for a jury's consideration. *Cortez*, 478 F.3d at 1115. A litigant cannot negate immunity by arguing to a jury that the judge prejudged his case, because "those who complain of error in [quasi-judicial] proceedings must seek agency or judicial review." *Butz*, 438 U.S. at 513. Professor Churchill simply failed to take advantage of the mechanism for review available under Colorado law.

Finally, the fact that the Regents are elected officials who participate in the political process is not a sufficient reason to deny quasi-judicial immunity when the Board of Regents performs a judicial function. In thirty-three states, judges must campaign for office and subsequently make decisions in high profile cases, but they are nonetheless entitled to judicial immunity. *Brown v. Greisenauer*, 970 F.2d 431, 439 (8th Cir. 1992). Disaffected litigants cannot sue those judges for damages, but must employ other legal remedies.

Elected city council members were entitled to absolute quasi-judicial immunity in their decision to impeach the city's mayor, even though "impeachment proceedings by their very nature are likely to be extremely controversial and fiercely political." *Brown*, 970 F.2d at 438. The impeachment was subject to "extensive procedural safeguards . . . [the proceedings] are adversarial in nature . . . the parties may be represented by attorneys [and] every decision must be in writing." *Brown*, 970 F.2d at 438. "In addition, the availability of judicial review means that any errors in the impeachment proceedings can be corrected on appeal, thus further reducing the need for a damages remedy." *Brown*, 970 F.2d at 438

In *Miller v. Davis,* 521 F.3d. 1142, 1145 (9th Cir. 2008), the Governor of California was entitled to quasi-judicial immunity when reviewing parole decisions of convicted inmates. The Ninth Circuit recognized that some factors potentially weighed against quasi-judicial immunity, such as "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, as Governor Davis' almost uniform denials of parole amply demonstrate." *Miller*, 521 F.3d at 1145. Notwithstanding these considerations, immunity was proper because the governor's decision "shares enough of the characteristics of the judicial process." *Miller,* 521 F.3d at 1145 (citing *Butz*, 438 U.S. at 513). Chief among these were the facts that "the courts properly can review a Governor's decision . . . and such review can include a determination of whether the factual basis of the decision is supported by some evidence in the record. . ." *Miller,* 521 F.3d at 1145. Professor Churchill provides no legally sufficient reason why the Court of Appeals should not adopt the same reasoning.

d. Quasi-Judicial Action is Not Subject to Injunctive Relief

Congress amended *42 U.S.C. §1983* in 1996 to modify the availability of prospective relief. It provides 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."

The 1996 amendment applies to actions "brought against a judicial officer," which might leave open the argument that it does not apply to quasi-judicial officers. The federal courts reject that argument:

> 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). Judge Naves correctly applied these precedents to determine that Professor Churchill could not seek injunctive relief under *42 U.S.C. §1983.*[61]

III. Professor Churchill Was Not Entitled to Reinstatement or Front Pay

Standard of Review: "[R]einstatement rests in the discretion of the trial court and this determination will not be set aside unless [the appellate court is] satisfied that it is clearly erroneous." *Bingman v. Natkin & Co.,* 937 F.2d 553, 558 (10th Cir.1991).

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Argument: If the Court of Appeals denies quasi-judicial immunity and reinstates Professor Churchill's $1 verdict, it must then determine whether Judge Naves erred in denying reinstatement. His decision was grounded in Tenth Circuit precedent, was not an abuse of discretion, and was not clearly erroneous.

a. Reinstatement Was Inconsistent with the Jury's Verdict

Judge Naves instructed the jury to award $1 in nominal damages if Professor Churchill suffered "no actual damages." "A jury is presumed to follow its instructions [and] to understand a judge's answer to its question." *Weeks v. Angelone,* 528 U.S. 225, 234 (2000).

A constitutional injury does not automatically entitle a litigant to any substantial form of relief. "Common-law courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money." *Carey v. Piphus*, 435 U.S. 247, 266 (1977). Stated more directly, "[N]ominal damages, and not damages based upon some undefinable 'value' of infringed rights, are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable

injury." *Memphis Community School District v. Stachura,* 477 U.S. 299, 308, n.11 (1986). Where the jury determined that Professor Churchill's injury was only nominal, even though he presented testimony that he lost $100,000 in income and suffered emotional distress because of his termination, his proper remedy was the award of nominal damages.

Judge Naves appropriately found that he could not grant reinstatement without an actual injury because "in fashioning equitable relief, a district court is bound both by a jury's explicit findings of fact and those findings that are necessarily implicit in the jury's verdict." *Bartee v. Michelin North America, Inc.,* 374 F.3d 906, 912-13 (10th Cir. 2006). Stated another way, when "the jury verdict by necessary implication reflects the resolution of a common factual issue . . . the district court may not ignore that determination, and it is immaterial whether, as here, the district court is considering equitable claims with elements different from those of the legal claims which the jury had decided (as may often be the case)." *Ag Services of America, Inc. v. Nielsen,* 231 F.3d 726, 732 (10th Cir. 2000).

The Tenth Circuit held that a trial court erred when it denied a successful litigant front pay after a jury awarded damages from the date of an employee's termination to the date of the verdict. *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 965 (10th Cir. 2002). The jury's verdict showed that the plaintiff sustained an ongoing economic harm that front pay would alleviate. Applying this reasoning, it would have been inappropriate for Judge Naves to reinstate Professor Churchill after the jury necessarily determined that Professor Churchill did not suffer an economic or reputational injury that either reinstatement or front pay would alleviate.

b. Professor Churchill's Conduct Made Reinstatement Unfeasible

Trial courts may deny reinstatement when, as "a practical matter, a productive and amicable working relationship would be impossible" or "the employer-employee relationship has been irreparably damaged by animosity caused by the lawsuit." *Abuan v. Level 3 Communications, Inc.*, 353 F.3d 1158, 1176 (10th Cir. 2003).

Reinstatement is not required when the relationship is "not viable because of continuing hostility between the plaintiff and the employer or its workers." *Pollard v. E.I. du Pont de Nemours & Co.,* 532 U.S. 843, 849-50 (2001). Most closely on point is a case arising from Metro State College, in which the lawsuit strained the relationship between the college and its professor. The trial court stated:

> After having had an opportunity to view the parties and observe them during motion hearing and trial, the Court believes that the relationships between the parties are so strained and that so much hostility exists that reinstatement is not a workable alternative.
>
> In this case, there appears to be a complete absence of mutual trust which would foster collegial relationships and the ability to participate in collaborative projects that are typical in the academic community. Furthermore, this Court believes that the actual remedy sought by plaintiff, reinstatement with tenure, would entangle this Court excessively in matters that are left best to academic professionals.

Thornton v. Kaplan, 961 F.Supp. 1433, 1439-40 (D. Colo. 1996).

Professor Churchill's post-verdict statements and filing of retaliatory complaints against faculty members who investigated him demonstrated a complete absence of "mutual trust."[62] Further disputes were likely, given that Professor Churchill had been found in violation of accepted academic standards, yet was unwilling to conform his future conduct to them.[63] Reinstatement would place the University in the no-win position of either facing another lawsuit or effectively immunizing Professor Churchill from complying with the standards of scholarship.

Judge Naves also relied upon the statements of the present and former Chairs of the Arts and Sciences Council, that "any external action to return Churchill to the faculty will inevitably weaken the capacity of University of Colorado faculty to hold errant or dishonest colleagues to account in future cases of academic misconduct" and "make it far more difficult to hold students to high standards of honesty

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63 Order Granting Defendants' Motion for Judgment as a Matter of Law, ¶¶100-101, Pages 35-35.

in research and writing."[64] In doing so, he rejected Professor Churchill's argument that reinstatement was necessary to prevent a "chilling effect" on the University of Colorado's campus, as there was "no credible evidence" that any faculty member refrained from academic activities as a result of the events related to Professor Churchill.[65]

c. Professor Churchill Was Not Entitled to Front Pay

For the first time, on appeal, Professor Churchill argues that Judge Naves should have ordered front pay. Not having raised this argument before the trial court, he may not claim now that Judge Naves' denial of front pay was error. *People v. Yascavage*, 80 P.3d 899, 901 (Colo. App. 2003). Even if this issue was raised properly, however, front pay "is not a mandatory remedy" when a court denies reinstatement. *Starrett v. Wadley*, 876 F.2d 808, 824 (10th Cir. 1989).

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Judge Naves appropriately denied Professor Churchill front pay on the grounds that he failed to mitigate his damages by seeking or accepting alternative employment.[66] *Denesha v. Farmers Ins. Exch.*, 161 F.3d 491, 502 (8th Cir.1998) (affirming denial of front pay and holding that "a plaintiff must make some sustained minimal attempt to obtain comparable employment").

Conclusion

Professor Churchill's appeal fails to demonstrate that Judge Naves made any errors requiring reversal. As such, the University respectfully requests that the Court of Appeals affirm the judgment in its favor.

Respectfully submitted on this 7th day of May, 2010:

Patrick T. O'Rourke, #26195
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CERTIFICATE OF SERVICE

I certify that on the7th day of May, 2010, true and accurate copies of the foregoing **DEFENDANTS'-APPELLEES' ANSWER BRIEF** was served on all other counsel of record through electronic filing or United States mail, including:

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