Word Count Certification: 6,737

COURT OF APPEALS, STATE OF COLORADO 2 E. 14th Avenue, 3rd Floor Denver, CO 80203 _____ District Court for the City and County of Denver Honorable Larry J. Naves, Judge Case No. 06CV11473 _____ **PLAINTIFF-APPELLANT**: WARD CHURCHILL **DEFENDANTS-APPELLEES**: THE UNIVERSITY OF COLORADO, THE REGENTS OF THE UNIVERSITY OF COLORADO, a Colorado body corporate. _____ Attorney for *Amici Curiae*: Cheri J. Deatsch Colo. Reg. No. 26011 Deatsch Law Office 1525 Josephine Street Denver, Colorado 80206 Tel: (303) 331-1111 Fax: (303) 331-1122 E-mail: deatschlaw@hotmail.com *Of counsel:* Heidi Elizabeth Boghosian NYS Atty. Reg. No. 4495099 National Lawyers Guild 132 Nassau Street #922 New York, NY 10038 Tel: (212) 679-5100, ext. 11 E-mail: director@nlg.org On the Brief for *Amici Curiae*	▲ COURT USE ONLY ▲ _____ Case Number: 09CA1713

BRIEF OF *AMICI CURIAE* NATIONAL LAWYERS GUILD, CENTER FOR CONSTITUTIONAL RIGHTS, SOCIETY OF AMERICAN LAW TEACHERS, LATINA/O CRITICAL LEGAL THEORY, AND LAW PROFESSORS AND ATTORNEYS IN SUPPORT OF REVERSAL OF THE JUDGMENT BELOW

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 6,737 words.

2. The brief complies with C.A.R. 28(k). It (1) incorporates by reference the Appellant's concise statement, under a separate heading, of the applicable standard of appellate review with citation to authority; and (2) incorporates by reference the Appellant's 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.

/s/ Cheri J. Deatsch

_____

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SUMMARY OF ARGUMENT

Academic freedom, a central component of the First Amendment and essential to a thriving democracy, is imperiled when state university officials succumb to political pressure to fire a tenured professor over constitutionally protected statements. Affording the shield of absolute immunity to university officials and vacating a jury finding of wrongful discharge in violation of the First Amendment threatens the fundamental rights of all faculty members. Fidelity to the rule of law requires a remedy for those deprived of their constitutional rights by state officials. Barring legal recourse for politically motivated investigations and terminations will have a chilling effect on professors, students, and citizens whose speech is unpopular but constitutionally protected. The resultant suppression of free inquiry and critical thinking vitiates the First Amendment and undermines the foundation of higher learning in this country.

STATEMENT OF INTERESTS OF *AMICI CURIAE*

The National Lawyers Guild, Inc. is a non-profit corporation formed in 1937 as the nation's first racially integrated voluntary bar association, with a mandate to advocate for fundamental principles of human and civil rights including the protection of rights guaranteed by the United States Constitution. Since then the Guild has been at the forefront of efforts to develop and ensure respect for the rule

of law and basic legal principles.

The Guild has championed the First Amendment right to unpopular speech for over seven decades. During the late 1940s to the 1950s the Guild defended individuals—including educators—accused by the government of being disloyal or subversive in hearings conducted by the House Committee on Un-American Activities. Since then, it has continued to represent thousands of Americans critical of government policies, from anti-war activists during the Vietnam era to current day anti-globalization and anti-war activists. The Guild has student members at over 100 U.S. law schools thus has a special interest in ensuring that the academic freedom of both students and their professors continues to flourish, especially during times of national crisis.

The Center for Constitutional Rights (CCR) is a national non-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. CCR has actively protected the rights of marginalized political activists for over 40 years and litigated historic First Amendment cases including *Dombrowski v. Pfister*, 380 U.S. 479 (1965), *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990).

The Society of American Law Teachers (SALT), incorporated in 1974, is an

independent organization of law teachers, deans, law librarians, and legal education professionals working to make the profession more inclusive, to enhance the quality of legal education, and to extend the power of legal representation to under-served individuals and communities. It joins this amicus brief because academic freedom is critical to the ability to speak out as individual faculty, and as an organization, in defense of the rule of law and to advocate for and promote the core values of SALT.

Latina/o Critical Legal Theory, Inc. (LatCrit) is a non-profit community of scholars with 503(c) status that seeks to further LatCrit theory, an "outsider jurisprudence" committed to the principle of anti-subordination and the promotion of social justice domestically and globally. Since 1995, LatCrit's basic twin goals have been: (1) to develop a critical, activist and inter-disciplinary discourse on law and policy towards Latinas/os, and (2) to foster both the development of coalitional theory and practice as well as the accessibility of this knowledge to agents of social and legal transformation. LatCrit joins the amicus brief to honor the fundamental importance of the constitutionally-derived free speech values necessary to support our anti-subordination, social justice objectives and to support the view that universities cannot be allowed to disregard the First Amendment with impunity when seeking to silence critical voices of outsider scholars.

Amici curiae Law Professors and Attorneys are legal scholars and practitioners from a diverse range of U.S. law schools, law firms and organizations whose scholarship, teaching, and/or practice involve the protection of legal and constitutional rights. *Amici* are aware that the protections of the First Amendment and academic freedom are often threatened in times of perceived national emergency, and that when constitutional rights are violated, access to the courts is essential to ensuring the rule of law. *Amici* are concerned that the preclusion of legal review for credible claims of retaliatory investigation and termination, particularly the granting of absolute immunity to university regents, will undermine the ability of 42 U.S.C. §1983 to ensure that state officials comply with the United States Constitution, and will allow state universities to violate with impunity the protections afforded faculty members under the First Amendment as well as the Constitution's guarantees of due process and equal protection.

STATEMENT OF FACTS

Amici hereby adopt and incorporate by reference the Statement of Facts, with citations to the record, set forth in the Opening Brief of the Appellant, as well as the Standards of Review set forth, under separate headings, in the Opening Brief of the Appellant. The following facts, as supported in the Opening Brief of the Appellant and by the record below, are particularly relevant to the concerns

expressed in this brief.

Professor Ward Churchill was employed by the University System of Colorado for nearly 30 years and, by January 2005, was a tenured full professor and chair of the Department of Ethnic Studies. Responding to public controversy over a 9/11 op-ed piece critical of the federal government's foreign policy, the Board of Regents of the University of Colorado approved an *ad hoc* investigation into all of Professor Churchill's writings and public statements to see if he had "crossed the line" of speech protected by the First Amendment.

After acknowledging that all of the speech at issue was constitutionally protected, University officials then began investigating Professor Churchill for alleged research misconduct. Most allegations did not withstand scrutiny, but based on some findings of misconduct, internal investigative bodies recommended sanctions less than termination. The University President overrode their conclusions and recommended dismissal, and the Board of Regents fired Professor Churchill in July 2007. [Defendants' Exhibit 21g, Bates # 06cv11473-21g:00001].

Professor Churchill filed claims, including several under 42 U.S.C. §1983, against the University of Colorado, the Regents as a body corporate, and against the Regents in their individual and official capacities. In accordance with a pretrial stipulation, claims against the individual Regents were dropped and the University

waived its Eleventh Amendment immunity with respect to the claims against the University and the Regents as a body corporate.

Professor Churchill's complaint alleged that (a) the initial *ad hoc* investigation authorized by the Regents into all of Professor Churchill's speech and (b) the Regents' termination of Professor Churchill's employment constituted retaliation for his exercise of First Amendment rights. The Denver District Court did not allow the jury to deliberate on the retaliatory investigation claim, but permitted the wrongful termination claim to be considered. In April 2009, at the conclusion of a four-week trial, the jury unanimously found that the Regents had fired Professor Churchill *not* for research misconduct, but in retaliation for his protected political speech.

Subsequently, the University asserted that the Regents had quasi-judicial immunity from suit and that the University as corporate entity was also shielded by this defense. The trial court agreed and vacated the jury verdict on that basis. The University then moved for reimbursement of its trial costs from Professor Churchill.

Professor Churchill has appealed the directed verdict dismissing his retaliatory investigation claim and the order vacating the jury's verdict on the wrongful termination claim.

ARGUMENT

I. Academic Freedom Is an Essential Component of First Amendment Rights.

The First Amendment protects *all* perspectives, not just those deemed acceptable at a given time in history. If universities can suppress speech in violation of the Constitution and be immune from the consequences of such action, academic freedom and constitutional protections in public universities will be empty promises and the chilling effect on speech and debate pervasive. From its initial *ad hoc* investigation of all of Ward Churchill's speeches and publications through his dismissal more than two years later, officials of the University of Colorado responded to media-driven political pressure focusing on statements made by Professor Churchill which addressed the attacks of September 11, 2001 in terms of the long-term effects of U.S. foreign policy.

The precedent that this case can create by immunizing from liability those who would fire a professor for unpopular speech on pre-textual grounds has implications far beyond the immediate case of Professor Churchill. It would erode in large measure the protections provided all faculty by the First Amendment and academic freedom.

The era of McCarthyism generated numerous attacks on university professors and, in response, the United States Supreme Court emphasized that protecting the First Amendment in higher education is vital to the national interest:

> No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

Ten years later, the Court reiterated this principle, observing that "[o]ur nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . ." *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589, 603 (1967); *see also Pickering v. Bd. of Educ*., 391 U.S. 563, 572 (1968) (public school employees may not be terminated for exercising their First Amendment rights). As recently as 2003 the Court noted that because of the "important purpose of public education and the expansive freedoms of speech and thought associated with the university environment," "universities occupy a special niche in our constitutional tradition." *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

Tenure is intended to ensure the protection of academic freedom in university settings. "The real concern is with arbitrary or retaliatory dismissals based on an administrator's or a trustee's distaste for the content of a professor's teaching or research, or even for positions taken completely outside the campus setting," and the purpose of tenure is "to eliminate the chilling effect which the threat of discretionary dismissal casts over academic pursuits." *Browzin v. Catholic University of America*, 527 F.2d 843, 846 (D.C. Cir. 1975) (citing the 1940 Statement of Principles on Academic Freedom and Tenure of the American Association of University Professors (AAUP)); *see also Otero-Burgos v. Inter American University*, 558 F.3d 1, 10 (1st Cir. 2009) (tenure is intended to protect academic freedom as well as economic security).

Tenure and academic freedom are inextricably entwined. Tenure is intended to encourage professors, and therefore their students, to think critically and to examine problems from all perspectives; without its protection, teachers are likely to short-change their students' education by only presenting only those views reflective of mainstream discourse. If university officials are allowed to engage in retaliatory investigations, or to fire professors for expressing politically unpopular opinions, the chilling effect will be long-lasting and potentially devastating to the intellectual growth of our youth—and, ultimately, to democratic government, for

freedom of speech, especially political speech, is a key component of a thriving democracy. *See generally* Cary Nelson, *No University Is an Island: Saving Academic Freedom* (2010); *Academic Freedom after September 11* (Beshara Doumani, ed., 2006).

A. The Rule of Law Requires a Remedy for Violations of Vested Rights.

After the jury returned its verdict in favor of Professor Churchill, the University moved for judgment as a matter of law, claiming that they had quasi-judicial immunity when they terminated Professor Churchill's employment. After the issue of quasi-judicial immunity was briefed by the parties, the trial court entered an order vacating the jury's verdict. Chief Justice John Marshall stated in *Marbury v. Madison*, "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." 5 U.S. (1 Cranch) 137, 163 (1803); *see also* Akil Reed Amar, "Of Sovereignty and Federalism," 96 *Yale L.J.* 1425, 1505 (1987) ("far from justifying a gap between constitutional right and remedy . . . federalism abhors a remedial vacuum").

Denying absolute immunity to governmental officials in 1904, the Supreme Court emphasized that "[c]ourts of justice are established not only to decide upon

the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government. . . .” *International Postal Supply Co. v. Bruce*, 194 U.S. 601, 609-610 (1904) (quoting *United States v. Lee*, 106 U.S. 196, 220 (1882). In *Lee* the Court explained why this is critical to the rule of law:

> the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the government. . . . There remains to him but the alternative of resistance, which may amount to crime.

106 U.S. at 218-219.

In keeping with these fundamental principles and, more specifically, to prevent state officials from violating the federal Constitution with impunity, Congress passed 42 U.S.C. §1983. Derived from § I of the Civil Rights Act of 1871, it provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at suit, suit in equity, or other proper proceeding for redress.

The primary purpose of §1983 is to “give a remedy to parties deprived of constitutional rights, privileges and immunities by an official’s abuse of his position,” *Monroe v. Pape*, 365 U.S. 167, 172 (1961), *overruled on other grounds*

by Monell v. Dep't of Soc. Services of New York, 436 U.S. 658, 663 (1978). This purpose cannot be fulfilled if there is no legal recourse for such violations. *See* Margaret Z. Johns, "A Black Robe is Not a Big Tent: The Improper Expansion of Absolute Judicial Immunity to Non-Judges in Civil-Rights Cases," 59 *SMU L. Rev.* 265, 268-269 (2006).

The trial court's rulings in this case implicate not only freedom of speech but all of the constitutional rights which §1983 was intended to protect, for if no remedy is available for First Amendment violations by state university officials, anyone deemed "undesirable" – because of their gender, race, ethnicity, religion, or any other characteristic – can be similarly subjected to punitive investigations and pre-textual dismissals.

B. The First Amendment Prohibits Retaliatory Investigations.

The Supreme Court has "clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." *Rankin v. McPherson*, 483 U.S. 378, 383 (1987) (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). Other retaliatory actions which violate the First Amendment, including investigations, are also prohibited. Thus,

> *Any* form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, *bad faith investigation*, and legal harassment, constitutes an infringement of that freedom.

Worrell v. Henry, 219 F.3d 1197, 1212 (10th Cir. 2000) (emphasis added) (quoting *Lackey v. County of Bernalillo*, 166 F.3d 1221, at *3 (10th Cir. 1999) (unpublished opinion)); *see also Schuler v. City of Boulder*, 189 F.3d 1304, 1310 (10th Cir. 1999) (reprimanding, transferring, or limiting duties may constitute adverse employment actions in First Amendment context).

For these reasons tenured professors cannot be threatened with discipline, even in the form of "advisory" committees created to investigate their work, on the basis of politically controversial speech. *See Levin v. Harleston*, 966 F.2d 85, 89-90 (2nd Cir. 1992) (creation of *ad hoc* committee to investigate professor's speech had a judicially cognizable chilling effect). If professors subjected to retaliatory investigations have no legal recourse, those considering taking controversial positions will think long and hard about risking their livelihoods and reputations, for few academics are likely to believe the entire corpus of their scholarly publications and public statements could withstand the kind of scrutiny to which Professor Churchill was subjected.

Internal investigations stemming from a professor's expression of politically controversial views must be closely scrutinized precisely because they readily provide pre-textual grounds for discipline. This problem, too, has been recognized by the Supreme Court. According to Justice Souter, concurring in *Waters v. Churchill*,

> A public employer violates the Free Speech Clause . . . by invoking a third-party report to penalize an employee when the employer . . . believes or genuinely suspects that the employee's speech was protected . . . or if the employer invokes the third-party report merely as pretext to shield disciplinary action taken because of protected speech . . . .

511 U.S. 661, 683 (1994) (requiring procedural and substantive protection of speech for a public hospital employee). Because of this potential for First Amendment violations, and the chilling effect attending such investigations, *Amici* urge this Court to recognize that retaliatory investigations as well as dismissals can violate the First Amendment, and to allow Professor Churchill's claim of retaliatory investigation to be decided by a jury.

II. Unconstitutional State Actions Should Not Be Shielded by Absolute Immunity.

Absolute immunity should not be extended to state university officials who take retaliatory employment actions in violation of the United States Constitution. To do so allows state officials to disregard the constitutional guarantees of free speech and equal protection with impunity and undermines the public policy

reasons for granting immunity.

A. Governmental Immunities Must Be Narrowly Construed.

1. Immunities Tend to Undermine the Rule of Law.

Immunizing those charged with upholding the law from personal liability for unconstitutional conduct by definition undermines the rule of law and, therefore, the Supreme Court has emphasized that immunities must be narrowly construed:

> Aware of the salutary effects that the threat of liability can have . . . as well as the undeniable tension between official immunities and the ideal of the rule of law, this Court has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court.

Forrester v. White, 484 U.S. 219, 223-224 (1988). Recognizing that "the threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties," *id*. at 223, the Court has determined that where the independence of these officials may be compromised by the threat of suit, immunity may be appropriate. However, "[o]fficials who seek exemption from personal liability have the burden of showing that such exemption is justified by *overriding considerations of public policy*." *Id.* at 224 (emphasis added).

There can be no "overriding considerations of public policy" important enough to authorize a grant of absolute immunity for officials who, in the course of firing tenured professors, are credibly alleged to have violated the Constitution.

Rather, these are cases in which the likelihood of judicial review "encourages officials to carry out their duties in a lawful and appropriate manner," thereby "accomplish[ing] exactly what it should." *Id.* at 223.

2. Qualified Immunity Is Presumed Sufficient in §1983 Suits.

Because absolute immunity is to be applied "sparingly," the Supreme Court has required those claiming such immunity to overcome the "presumption . . . that qualified rather than absolute immunity is sufficient." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432n4 (1993) (quoting *Burns v. Reed*, 500 U.S. 478, 486-487 (1991)); *see also Butz v. Economou*, 438 U.S. 478, 506 (1978). Under the qualified immunity standard, the plaintiff must show that the officials in question knew or should have known that their action violated the Constitution.

Thus, in denying the Attorney General absolute immunity against charges of illegal wiretapping, the Supreme Court reiterated that "'[w]here an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate. . . .'" *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)). Similarly, where state officials sworn to uphold the Constitution can be expected to know that their conduct is illegal or unconstitutional, sound public policy requires that they, too,

should at least "hesitate." Acknowledging the need to strike a balance between insulating governmental actors from frivolous or retaliatory lawsuits and deterring them from violating constitutional rights with impunity, the Court has held that *qualified*, not absolute, immunity, is most appropriate in §1983 suits. *See, e.g., Burns v. Reed*, 500 U.S. at 486-487; *Forrester*, 484 U.S. at 224.

B. Faculty Dismissal Processes Rarely, If Ever, Qualify for Absolute Immunity.

1. Immunities Tend to Undermine the Rule of Law.

Historically, judges have been given absolute immunity from personal liability in order to ensure the smooth functioning of the legal system, and absolute judicial immunity has been extended to a narrow class of "quasi-judicial" actors, such as prosecutors, when they engage in judicial functions. The Supreme Court has recognized, however, that immunity does not attach to the officials' positions, but to the particular functions performed. *Butz*, 438 U.S. at 514; *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993) (quoting *Forrester*, 484 U.S. at 229) (courts look to the "nature of the function performed, not the identity of the actor"). Thus,

> Judges are protected by absolute immunity in civil rights actions from liability based on their judicial actions. *Stump v. Sparkman*, 435 U.S. 349, 362-364 [] (1978). At the same time, only qualified immunity protects a judge's decision to fire a probation officer. *Forrester*, 484 U.S. at 229.

Mee v. Ortega, 967 F.2d 423, 425 (10th Cir. 1992) (refusing to grant parole officer quasi-judicial immunity in §1983 suit). *See also Snell v. Tunnell*, 920 F.2d 673, 686 (10th Cir. 1990) (relying on *Imbler v. Pachtman*, 424 U.S. 409, 430-431 (1976), to conclude that prosecutorial immunity does not extend to administrative or investigative activity).

"Given the sparing recognition of absolute immunity . . . one claiming such immunity must demonstrate clear entitlement." *Robinson v. Volkswagenwerk AG*, 940 F.2d 1369, 1370 (10th Cir. 1991), *cert. denied sub nom Herzfeld & Rubin v. Robinson*, 502 U.S. 1091 (1992). In assessing entitlement, the realities of the officials' conduct as well as their functions must be considered:

> [W]hen erosion of constitutional guarantees is an inevitable consequence of the governmental function, not only must applicable statutes and regulations be consulted as to the function of each particular governmental officer, but inquiry must be directed to the reality of custom and practice. See *Foley v. Alabama State Bar*, 648 F.2d 355, 360 (5th Cir. 1981); *Slavin v. Curry*, 574 F.2d 1256, 1262 (5th Cir. 1978).

Mason v. Melendez, 525 F. Supp. 270, 277 (W.D. Wis. 1981).

In *Cleavinger v. Saxner*, the Supreme Court concluded that members of a prison disciplinary committee were protected only by qualified, not quasi-judicial, immunity. 474 U.S. 193 (1985). Emphasizing that "immunity status is for the benefit of the public as well as for the individual concerned," *id.* at 203 (*citing Pierson v. Ray*, 386 U.S. 547, 554 (1967)), the Court identified

> the following factors, among others, as characteristic of the judicial process and to be considered in determining absolute as contrasted from 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.

474 U.S. at 202, *citing Butz v. Economou*, 438 U.S. at 512. *See also Moore v. Gunnison Valley Hosp.*, 310 F.3d 1315, 1317 (10th Cir. 2002) (denying quasi-judicial immunity to a medical peer-review committee).

Quasi-judicial immunity, an absolute immunity from suit, is inappropriate where a university does not provide the safeguards required by the Court for, without those safeguards, its officials have license to violate the First Amendment rights of professors with impunity. As discussed below, the Court's requirements are rarely, if ever, met in faculty dismissal proceedings and were not met in this case. For these reasons, the actions of the Regents of the University of Colorado should not be shielded from judicial scrutiny.

2. Absolute Immunity Rarely Protects School Officials.

Federal courts have rarely extended quasi-judicial immunity to school boards or trustees taking adverse action against students or faculty in public

institutions. Applying its functional analysis test, the Supreme Court related the prison disciplinary committee in *Cleavinger* to the school board in *Wood v. Strickland*, 420 U.S. 308 (1975). In *Wood*, where board members were to determine "whether there have been violations of school regulations and, if so, the appropriate sanctions for the violations," *id.* at 319, the Court concluded that "absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." *Cleavinger*, 474 U.S. at 204-205, quoting *Wood*, 420 U.S. at 320.

Similarly, in this case, any benefits derived from granting immunity to the Regents are outweighed by the absence of a remedy for professors subjected to inexcusable deprivations of fundamental constitutional rights. This conclusion has been reached in numerous cases involving faculty members. *See, e.g., Harris v. Victoria Independent School District*, 168 F.3d 216, 224 (5th Cir. 1999) (relying on *Wood* to deny trustees quasi-judicial immunity with respect to faculty member's §1983 claim of First Amendment violation); *Stewart v. Baldwin County Board of Education*, 908 F.2d 1499, 1508 (11th Cir. 1990) (*Wood* precluded extension of absolute immunity to school board members for discharge of employee in

retaliation for exercise of constitutional rights).

As cases brought during the Vietnam War era illustrate, it is during times of war or perceived national emergency that academic freedom, as well as freedom of speech generally, must be most diligently protected. In a case with many parallels to Professor Churchill's, an Arizona professor who engaged in anti-war and other controversial speech was subjected to numerous internal hearings on misconduct charges. *Starsky v. Williams*, 353 F. Supp. 900 (D. Ariz., 1975), *aff'd in relevant part, rev'd in part on other grounds*, 512 F.2d 109 (9th Cir. 1975). In *Starsky*, as in this case, the Arizona regents overrode an investigative committee's recommendations for lesser sanctions and dismissed the professor. The district court concluded that Professor Starsky had been fired not for the reasons claimed by the regents, but because he exercised "his First Amendment rights in expressing unpopular views." *Id.* at 927. Such a vindication would not have occurred had Professor Starsky had been denied access to a judicial forum.

Educational institutions rarely employ disciplinary processes which meet the stringent test of quasi-judicial action. Moreover, because freedom of speech is a critical component of their very mission, it is difficult to envision circumstances under which public policy could require that universities be absolutely immune from liability for First Amendment violations.

3. The Process Utilized to Fire Professor Churchill Was Not Quasi-Judicial.

In *Cleavinger* the Supreme Court identified six factors to be considered in determining whether absolute immunity is necessary to ensure that officials can carry out their lawful functions, making decisions which may be unpopular without fear of retaliatory litigation. Applying those factors to this case, it appears that neither the Regents' official functions nor the realities of their "custom and practice" are appropriately shielded by quasi-judicial immunity.

The first consideration is whether absolute immunity is necessary to "assure that the individual can perform his functions without harassment or intimidation." 474 U.S. at 202. In this case, immunity did not serve such a purpose. In fact, the Regents were under considerable pressure to fire Professor Churchill, and it appears that the prospect of being sued was a significant deterrent to their immediately terminating him in a blatantly unconstitutional manner. [Trial Transcript, 3/30/09, pp. 3808:6-10, 3811:6-10]. Moreover, the Regents chose to proceed to trial before raising their claim of absolute immunity, thus indicating that they felt neither harassed nor intimidated by the prospect of litigation.

Immunities cannot be allowed to serve as cover for willful violations of constitutional rights, and the preclusion of legal remedies for investigations and terminations in retaliation for the exercise of First Amendment rights poses a threat

that employees will be harassed or intimidated. Thus, in *Moore* the Tenth Circuit acknowledged that lawsuits inherently possess some potential for harassment but also stated that "it is important to note the potential for harassment in the opposite direction as well," *i.e.*, "the potential for peer reviewers to harass other members of their profession by initiating frivolous investigations and disciplinary proceedings." 310 F.3d at 1317.

Professor Churchill alleged—and the jury found—that he was subjected to such harassment by the Regents and other University officials in retaliation for his exercise of rights protected by the First Amendment and in violation of the principle of academic freedom. Immunity should be granted where it is necessary to ensure that decisionmakers are sufficiently insulated from political influence to deter malicious action; it should not function to insulate politically motivated malicious action from judicial review.

Where quasi-judicial immunity is claimed, the "independence of the adjudicators is essential" and the "level of potential political influence" on those claiming immunity must be assessed. *Moore*, 310 F.3d at 1318; *see also Butz*, 438 U.S. at 512. Professor Churchill's case illustrates the dangers posed by political influence, particularly on regents or trustees of public institutions. The Regents of the University of Colorado are elected officials. While this factor is not

dispositive—judges, too, may be elected—the potential for political influence must be more closely scrutinized when non-legal actors claim quasi-judicial immunity, for they are not bound by the legal or ethical rules applicable to judges. *See Harris*, 168 F.3d at 224 (denying quasi-judicial immunity to school board members because, among other reasons, they were elected).

At the University of Colorado only the Regents have authority to fire tenured professors. To disregard the political pressures on, and motivations of, these Regents would be to "ignore reality." *Cleavinger*, 474 U.S. at 203. It is uncontested that Professor Churchill's case was propelled by a politically-driven media firestorm and that strong pressure to fire him for his protected speech was placed on the Regents by the governor and state legislators as well as their constituents. [Trial Transcript, 03/37/09, p. 3284:11-17]. The Regents were not shielded from, but clearly responding to, political pressure. They accepted the recommendations of the University president who was under similar political pressure and was not screened for bias.

Politically charged misconduct investigations are best conducted by neutral, third party experts—external scholars or professional reviewers—for the same reason that changes of venue are granted in high-profile legal cases. In this case, University officials claimed to be relying on the recommendations of internal

investigative committees. However, in making his recommendations, the president overrode the recommendations of an internal investigative review panel regarding both substantive charges and sanctions. Furthermore, the majority of the committee members investigating Professor Churchill and all of those reviewing the investigative findings were employees of the University, not professional hearing officers. *See Saavedra v. City of Albuquerque*, 73 F.3d 1525, 1530 (10th Cir. 1996) (granting immunity where defendant was a "professional hearing officer" rather than a city employee).

Like the disciplinary committee members in *Cleavinger*, those responsible for the Churchill investigation were University administrators and employees, ultimately subordinate to the Regents, and therefore "under obvious pressure to resolve a disciplinary dispute in favor of the institution," 474 U.S. at 204. In a civil suit such a conflict of interest would clearly disqualify the participants from judging allegations of wrongdoing. As the Court observed in *Cleavinger*, "It is the old situational problem of the relationship between the keeper and the kept, a relationship that hardly is conducive to a truly adjudicatory performance." *Id.* at 204; *see also Moore*, 310 F.3d at 1318.

The Supreme Court explained in *Butz* that "the safeguards built into the judicial process tend to reduce the need for private damages actions as a means of

controlling unconstitutional conduct," 438 U.S. at 512, and those safeguards must attend quasi-judicial processes as well. In addition to the basic requirements of due process, as the Court noted in *Cleavinger*, other factors to be assessed include whether the decision makers' actions are constrained by precedent, whether the process is functionally adversarial, and whether errors are correctable on appeal. *Id.* In this case, the underlying investigations did not reflect such safeguards—the investigators were not shielded from political or institutional pressure, the process was not functionally adversarial, and the decision makers were not bound by precedent. [Defendants' Exhibit 1d, Bates # 06cv1473 – 1d:00008-00009]. Finally, there was no avenue of appeal from the Regent's decision.

For all of these reasons, professors fired by state universities are unlikely to find the protections required by the rule of law except in a court of law and, in this case, the actions of the Regents of the University of Colorado do not meet the functional analysis test mandated by the Supreme Court.

C. Absolute Immunity Is Appropriate Only When Required By Public Policy.

Absolute immunity is to be granted only when public policy requires it; it is not a personal right of officials to be protected from suit. *See Harlow,* 457 U.S. at 807-808; *see also Saxner v. Benson*, 727 F.2d 669, 675 (7th Cir. 1984) (J. Cudahy

concurring). In accordance with this principle, the Supreme Court "'has not fashioned a fixed, invariable rule of immunity but has advised a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens. . . .'" *Chavez v. Singer*, 698 F.2d 420, 422 (10th Cir. 1983) (quoting *Doe v. McMillan*, 412 U.S. 306, 320 (1973). It is, in other words, a balancing test. *See Harlow*, 457 U.S. at 817-818. As summarized by the Fifth Circuit, "If the functions are of a judicial nature *then* we must weigh the costs and benefits of denying or affording absolute immunity." *O'Neal v. Mississippi State Bd. of Nursing*, 113 F.3d 62, 65 (5th Cir. 1997) (emphasis added). Public policy, however, militates against the granting of absolute immunity to state officials who fire or otherwise penalize their employees in violation of the United States Constitution.

"The scope of immunity has always been tied to the 'scope . . . of authority,'" *Doe*, 412 U.S. at 320, citing *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963); *see also Chávez*, 698 F.2d at 422. For this reason, federal courts have consistently recognized that absolute immunity is limited to actions within "the sound exercise of discretionary authority," *Barr v. Matteo*, 360 U.S. 564, 575 (1959). Thus, for example, in *Martin v. Bd. of County Comm'rs of County of Pueblo*, the Tenth Circuit denied quasi-judicial immunity to law enforcement

officers executing otherwise valid court orders in an unlawful manner, noting, "Insofar as defendants have exceeded legal bounds in executing the warrant for arrest, defendants have *a fortiori* violated the very judicial order under which they seek the shelter of absolute immunity." 909 F.2d 402, 405 (10th Cir. 1990).

The Regents of the University of Colorado are the only officials authorized to dismiss a tenured professor for cause. To do so in direct response to political pressures from within and without the University, in violation of their oaths to uphold the Constitution as well as their own "laws,"[2] constitutes action well outside the scope of their authority. As the Supreme Court stated in *Imbler v. Pachtman*, while prosecutors may be immune from liability for submitting to the court information later shown to be false, "[i]t would stand this immunity rule on its head . . . to apply it to a suit based on a claim that the prosecutor unconstitutionally *withheld* information from the court" because that would

[2] The Laws of the Regents state that the "aims" for which "the University "was created and is maintained . . . can be achieved only in that atmosphere of free inquiry and discussion, which has become a tradition of universities and is called 'academic freedom.'" The efforts of faculty members to meet their responsibilities "should not be subjected to direct or indirect pressures or interference from within the university, and the university will resist to the utmost such pressure or interference when exerted from without." "A disciplinary action against a faculty member, including dismissal for cause of faculty, should not be influenced" by "[e]xtrinsic considerations as political, social, or religious views." Laws of the Regents of the University of Colorado as amended, 10/10/02, Arts. 5.D.1(A), 5.D.2(A), and 5.D.2.(B). [Defendants' Exhibit 3a, Bates # 06cv11473 – 3a:00007].

discourage the very conduct the immunity rule seeks to protect. 424 U.S. at 442-443.

Even judges are not immune from liability for terminating employees in violation of the Constitution, although their authority generally encompasses decisions to hire and fire personnel. In *Forrester v. White*, the Supreme Court refused to grant a judge immunity from claims that he fired a probation officer in violation of the Fourteenth Amendment's Equal Protection Clause, saying:

> As Judge Posner pointed out below, a judge who hires or fires a probation officer cannot meaningfully be distinguished from . . . any other Executive Branch official who is responsible for making such employment decisions. Such decisions . . . are often crucial to the efficient operation of pubic institutions . . . yet no one suggests that they give rise to absolute immunity from liability in damages under §1983.

484 U.S. 219, 229 (1988). The Court observed that to reach such a conclusion would be to "lift form above substance." *Id.* at 230.

It is equally untenable to conclude that the Regents of the University of Colorado, mandated to protect the First Amendment and the principles of academic freedom, are absolutely immune from liability for firing a tenured professor in violation of the Constitution and their own "laws." Such a finding would not only lift form above substance but turn the public policy considerations underlying the immunity doctrine on their head. Instead of protecting government officials from pressure to violate faculty members' constitutional rights, such immunity would

protect these officials from *liability* for *ceding* to such pressures.

Finally, the fact that the Regents waited until after trial to raise an absolute immunity defense indicates that they were not interested in furthering the purposes of immunity, but were holding the defense in reserve as a kind of insurance. Having lost the jury verdict on the merits, they invoked the immunity defense to vacate the verdict and to demand that Professor Churchill reimburse them for having gone to trial, effectively penalizing him for exercising his constitutional right to a remedy. As the Tenth Circuit has observed with respect to qualified immunity, "it is not a parachute to be deployed only when the plane has run out of fuel . . ." *Evans, v. Fogarty*, 241 Fed. Appx. 542, 550n (2007) (unpublished opinion). For governmental entities to be allowed to violate constitutional rights, intentionally gamble on a trial, and then claim immunity should they lose, undermines all of the stated policy justifications for absolute immunity.

CONCLUSION

For the foregoing reasons, *Amici curiae* believe the trial court's granting of absolute, quasi-judicial immunity to the Regents of the University of Colorado, as well as its refusal to allow Professor Churchill's claims of retaliatory investigation to be heard by the jury, undermine the protections of academic freedom and the First Amendment that the Supreme Court has deemed "vital" to democracy and

"the future of our Nation." *Sweezy v. New Hampshire*, 354 U.S. at 250. *Amici curiae* are concerned also that the trial court's decision sets a dangerous precedent by allowing state university officials to violate fundamental principles of the Constitution with impunity and, therefore, respectfully ask this Court to reverse the judgment below.

Respectfully submitted,

/s/ Cheri J. Deatsch

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Attorney for *Amici Curiae*

CERTIFICATE OF MAILING

I hereby certify that on the 18th day of February 2010, a true and correct copy of the foregoing **BRIEF OF *AMICI CURIAE* NATIONAL LAWYERS GUILD, CENTER FOR CONSTITUTIONAL RIGHTS, SOCIETY OF AMERICAN LAW TEACHERS, LATINA/O CRITICAL LEGAL THEORY, AND LAW PROFESSORS AND ATTORNEYS IN SUPPORT OF REVERSAL OF THE JUDGMENT BELOW** and a copy of the CD-ROM filed with the Court were placed in the U.S. Mail, postage prepaid, and addressed as follows:

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