CERTIFICATION OF WORD COUNT: 2,608

COURT OF APPEALS, STATE OF COLORADO 101 W. Colfax, # 800 Denver, CO 80202 On Appeal for the DISTRICT COURT, DENVER COUNTY, COLORADO The Honorable Larry J. Naves, Judge Case No. 06-CV-11473	
Plaintiff- Appellant: WARD CHURCHILL, **Defendants-Appellees:** THE UNIVERSITY OF COLORADO, THE REGENTS OF THE UNIVERSITY OF COLORADO, a Colorado Body Corporate. Attorney for *Amicus Curiae* Name: BETH A. DICKHAUS, #32055 HALL & EVANS, L.L.C. Address: 1125 17th Street, S- 600 Denver, CO 80202 Phone: 303-628-3376 E-mail: dickhausb@hallevans.com	**▲COURT USE ONLY▲** Case Number: 09-CA-1713

BRIEF OF *AMICUS CURIAE* COLORADO COUNTIES, INC.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and that all other aspects of the brief such as typeface, font and line spacing comply with the requirements of C.A.R. 32. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose One:

_X_ It contains 2,608 words.

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____ For the party raising the issue: It contains under a separate hearing (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. __, p.__) not to an entire document, where the issue was raised and ruled on.

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The brief complies with C.A.R. 32:

_x_ The undersigned counsel certifies that this Answer Brief complies with all the requirements as to typeface, font and line spacing, pursuant to C.A.R. 32.

Original signature on paper document filed with the clerk.

s/Beth A. Dickhaus

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I.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Colorado Counties, Inc. appears solely to address the issue presented as to whether the doctrine of quasi-judicial immunity was properly granted to the University of Colorado and the Regents of the University of Colorado.

II.

STATEMENT OF THE CASE

Colorado Counties, Inc. adopts and incorporates by reference the statement of the case as stated in the Answer Brief of the Appellees the University of Colorado and the Regents of The University of Colorado.

III.

SUMMARY OF ARGUMENT AND INTEREST OF AMICUS

Colorado Counties, Inc. ("CCI") is a non-profit corporation founded by the state's county commissioners in 1907 to further county government cooperation and efficiency. Using discussion and cooperative action, CCI works to solve the many financial, legal, administrative and legislative problems confronting county governments throughout Colorado. As the voice for county governments in Colorado collectively, CCI is interested in preserving the ability of local

government officials to engage in adjudicatory functions, in order to protect the best interests of their citizens, without fear of facing personal liability.

Local government officials engage in quasi-judicial determinations on a regular basis in areas such as land use proceedings, liquor license application reviews and in employment review proceedings for certain government employees. In such situations, immunity is justified to insure that these officials may perform their adjudicatory function without harassment or intimidation. Local government officials must have the freedom to engage in such quasi-judicial determinations without fear of civil lawsuits being brought by those who are disappointed by government decisions. Exposure to personal liability may interfere with local government officials' ability to make decisions respecting highly contested issues.

Local government officials also engage in legislative functions in their role as policymakers. The fact that these officials may take on different roles when performing their duties does not preclude them from receiving the protection of absolute immunity when they participate in an adjudicatory proceeding. Furthermore, local government officials are not excluded from the protections of absolute immunity merely because they are elected officials.

Colorado's Counties are alarmed by the possibility that local government officials may be subject to civil damages for unpopular decisions made in

adjudicatory proceedings. A determination by this Court, that quasi-judicial immunity does not protect local government officials when acting in a judicial capacity, could generate civil lawsuits based on past proceedings and may inhibit officials from protecting in the best interests of the citizenry in future proceedings. Additionally, the possibility of exposure to monetary damages may dissuade citizens from serving the public as government officials.

Immunity does not mean that the disappointed party to a proceeding is left without recourse for what he perceives to be error (or for that matter, bias) on the part of the local government official. This recourse is in the form of an appeal to state court under Colo. R. Civ .Pro. 106(a)(4) ("Rule 106(a)(4"). A Rule 106(a)(4) proceeding provides an adequate method for appealing determinations made by a governmental body exercising judicial or quasi-judicial functions.

For all such reasons CCI urges this court to uphold the decision of the District Court. That decision correctly interprets and applies the doctrine of quasi-judicial immunity. The District Court properly determined that that the plaintiff's claim for relief alleging First Amendment retaliation was, as a matter of law, barred by the doctrine of quasi-judicial immunity.

ARGUMENT

I. Public Policy Concerns Favor Upholding The Integrity Of Absolute Immunity For Local Governments' Quasi-Judicial Determinations

In the interest of brevity CCI adopts the arguments advanced in the Answer Brief of Appellees the University of Colorado and the Regents of the University of Colorado and in the briefs of other amici curiae submitted in support of Appellees the University of Colorado and the Regents of the University of Colorado that address the Issue on Appeal outlined above.

A. It Is Settled Law That Government Officials Are Entitled To Absolute Immunity When Performing Adjudicatory Functions

Immunity for government officials is justified in order to insure that they can perform their adjudicatory function without harassment or intimidation. Like all government officials, local government officials must have the freedom to engage in quasi-judicial determinations without fear of civil lawsuits being brought by those who are disappointed by their decisions. The doctrine of qusi-judicial immunity must be applied uniformly to protect those who act as decisionmakers in adjudicatory proceedings.

The United States Supreme Court and the Tenth Circuit Court of Appeals hold that absolute immunity is provided to government officials performing quasi-judicial functions. *Butz v. Economou*, 438 U.S. 478, 481 (1978); *Horwitz v.*

Colorado State Board of Medical Examiners, 822 F.2d 1508, 1510 (10th Cir. 1987) (holding that judicial immunity applies to actions under 42 U.S.C. § 1983).

The Colorado Supreme Court also holds that "administrative officials acting in a quasi-judicial role are entitled to absolute immunity." *Stepanek v. Delta County*, 940 P.2d 364, 368 (Colo. 1997). "Absolute immunity for judges (and others) has been deemed necessary to assure that those involved in the judicial process 'can perform their respective functions without harassment or intimidation' by the parties to the dispute." *Moore v. Gunnison Valley Hosp.*, 170 F. Supp. 2d 1080, 1083 (D. Colo. 2001) *quoting Butz v. Economou*, 438 U.S. at 512. Individual county commissioners are constitutional officers, with executive, legislative and quasi-judicial responsibilities. *Beacom v. Board of County Comm'rs*, 657 P.2d 440, 445 (Colo. 1983); Colo. Const. Art. XIV, Sec. 6. "Absolute judicial immunity has been extended to local officials when they act in a quasi-judicial capacity." *B St. Commons v. Board of County Comm'rs*, 835 F. Supp. 1266, 1270 (D. Colo. 1993) (El Paso County commissioners entitled to absolute immunity when they acted in a quasi-judicial capacity in reviewing zoning permit applications.)

Immunity "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be

at liberty to exercise their functions with independence and without fear of consequences." *Bradley v. Fisher*, 80 U.S. 335, 348 FN 16 (1872), *quoting Scott v. Stansfield*, 3 L.R.-Ex. 220, 223 (1868); *See also Anderson v. Worden*, 1991 U.S. Dist. LEXIS 10904. *10 (D. Kan. July 12, 1991) ("[T]he Supreme Court has specifically recognized the viability of the judicial immunity doctrine in the context of suits brought pursuant to 42 U.S.C. § 1983.").

Local government officials participate in adjudicatory proceedings covering a wide-range of subjects. In all such matters, officials require protection from harassing lawsuits to appropriately exercise unfettered judgment for the benefit of the citizens in their jurisdictions.

B. Quasi-Judicial Immunity Is Dependent On The Nature Of The Proceeding, Not On The Underlying Claim

It is not the subject matter of the proceedings that determines applicability of the doctrine of quasi-judicial immunity, it is the type of government action. The Colorado Supreme Court holds that the central focus is "on the nature of the governmental decision and the process by which that decision is reached." *Cherry Hills Resort Development Co. v. City of Cherry Hills Village*, 757 P.2d 622, 627 (Colo. 1988). In *Cherry Hills Resort* the Supreme Court states:

> If, for example, the governmental decision is likely to adversely affect the protected interests of specific individuals, and if a decision is to be reached through the application of preexisting legal standards or

> policy considerations to present or past facts presented to the governmental body, then one can say with reasonable certainty that the governmental body is acting in a quasi-judicial capacity in making its determination.

Thus, when deciding whether absolute immunity is warranted, the focus must be in on the nature of the proceeding, not on the underlying claim. In the instant case, the Board of Regents should not lose their immunity protection simply because plaintiff alleges he was dismissed for engaging in free speech. The subject of the allegation is not the proper focus for determining whether the Regents were acting in an adjudicatory role. There is no First Amendment exception to the doctrine of quasi-judicial immunity

The District Court engaged in an extensive review and analysis of the proceeding undertaken by the defendants in this matter and correctly determined that the action satisfied the criteria for an adjudicatory proceeding and thus entitled the defendants to absolute immunity. The protection provided to defendants in this case is necessary for all government officials who participate in similar adjudicatory proceedings. Immunity from monetary damages is especially important in highly contested actions where there is sure to be a dissatisfied party.

C. Rule 106(A)(4) Provides An Adequate Appeal Procedure

The appeal process provided under Rule 106(a)(4) is sufficient to address plaintiff's claims alleging the defendants pre-judged his claim, were biased

in their decisionmaking or somehow acted outside the scope of their authority. Review under Rule 106(a)(4) is explicitly directed to the "determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record." The reviewing court considers whether an erroneous legal standard was applied by the governmental body. Rule 106(a)(4) permits a district court to reverse a decision of an inferior tribunal only if there is 'no competent evidence' to support the decision. The Colorado Supreme Court in *City of Colorado Springs v. Givan*, 897 P.2d 753, 756 (Colo. 1995) provides the following standards for Rule 106 review:

> [F]or purposes of judicial review 'competent evidence is the same as substantial evidence.' Substantial evidence . . . 'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' . . . and must be enough to justify, if the trial were before a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. Under C.R.C.P. 106, the appropriate consideration for an appellate court is 'whether there is sufficient evidentiary support for the [decision reached by the] administrative tribunal,' not whether there is adequate evidentiary support for the lower court's decision on reviewing the record."
>
> (citations omitted).

In addition to reviewing for sufficiency of evidence, a review under Rule 106(a)(4) provides the court with the ability to determine whether the decisionmaker was biased in his decisionmaking. The Colorado Court of Appeals holds in *Kiewit W. Co. v. City & County of Denver*, 902 P.2d 421, 425 (Colo. App.

1994) that "demonstrated bias would constitute grounds for judicial reversal of the decision pursuant to C.R.C.P. 106(a)(4)."

Government officials are not deprived of absolute immunity simply because they are elected and face political pressure. As long as the official is acting in an administrative role or serving in an adjudicatory capacity at the time of the decision giving rise to the claim, the doctrine can apply. *See Brown v. Griesenauer*, 970 F.2d 431, 439 (8th Cir. Mo. 1992) ("[F]or purposes of immunity analysis, the insulation-from-political-influence factor does not refer to the independence of the government official from the political or electoral process, but instead to the independence of the government official as a decision-maker.") "There is a presumption of integrity, honesty, and impartiality in favor of those serving in quasi-judicial capacities, which must be rebutted in order to establish a due process violation." *Mountain States Telephone & Telegraph Co. v. Public Utilities Commission*, 763 P.2d 1020 (Colo. 1988). If a party objects to a participant in the proceeding the proper response is to request recusal of that party from the proceeding

If a frustrated party is allowed to circumvent an official's ruling merely by alleging political bias, local government officials will be inhibited in carrying out their adjudicatory roles for fear of facing civil damages.

Colorado's local government officials, including elected officials, engage in adjudicatory decisionmaking involving a wide-range of subjects on a regular basis. These proceedings decide matters of importance involving various citizens' competing interests and involving internal governmental affairs. All such officials require protection from harassing lawsuits to appropriately exercise unfettered judgment.

In many cases the adjudicatory proceeding relates to land use determinations. "A rezoning procedure is quasi-judicial in nature." *Western Paving Construction Co. v. Board of County Commissioners*, 689 P.2d 703 (Colo. 1984); *See also Hale O Kaula Church v. Maui Planning Comm'n*, 229 F. Supp. 2d 1056 (D. Haw. 2002). (County planning commissioners and hearings officer who denied religious organization's request for special use permit were protected by quasi-judicial immunity from organization's § 1983 speech, assembly, religious freedom, due process, and equal protection claims and Religious Land Use and Institutionalized Persons Act (RLUIPA) individual capacity claims.)

Review of a development plan is a quasi-judicial function. *See Cherry Hills Resort Dev. Co. v. Cherry Hills Village,* 757 P.2d 622, 628 (Colo. 1988) ("[C]ity exercised a quasi-judicial function in approving the development plan while

imposing several restrictions thereon and that the city's action satisfied the jurisdictional prerequisites for judicial review under C.R.C.P. 106(a)(4).")

A determination by a County Board of Adjustment applying provisions of County Land Use Code to a special use permit is a quasi-judicial function reviewable under Rule 106(a)(4). *See Sierra Club v. Billingsley*, 166 P.3d 309, 312 (Colo. App. 2007).

Local government officials are also involved in hearings to determine whether an employee may be appropriately discharged. Such decisions to terminate employment of local government employees can be quasi-judicial determinations. For example, the Colorado Supreme Court held that a school district's termination of an employee after a contested hearing is a quasi-judicial function. *Widder v. Durango School Dist. No. 9-R*, 85 P.3d 518, 527-28 (Colo. 2004) (holding Rule 106(a)(4) was the appropriate means for obtaining judicial review of decision, as ultimately upheld by the School Board.); S*ee also Atiya v. Salt Lake County*, 988 F.2d 1013 (10th Cir. Utah 1993) (Salt Lake City County Career Services Council members entitled to quasi-judicial immunity after affirming discharge of physician employee who alleged her discharge was in retaliation for her exercise of her right of free speech.)

Licensing review matters subject to public hearings can also quasi-judicial proceedings. Decision of local liquor licensing authority is reviewable under Rule 106(a)(4) *Brass Monkey, Inc. v. Louisville City Council*, 870 P.2d 636, 639 (Colo. App. 1994); *Norris v. Grimsley*, 585 P.2d 925 (Colo. App. 1978) (Residents of an affected neighborhood, by virtue of that fact alone, have a strong interest in insuring that a liquor licensing procedure is fairly and properly administered, and are persons who may seek judicial review of liquor licensing decisions under Rule 106(a)(4).)

These are but a few examples of the various adjudicatory situations that local government officials are involved with. When these officials participate in judicial activities they must have the protection afforded by the doctrine of quasi-judicial immunity so that they may make their decisions without fear of facing civil damage lawsuits. This protection must be afforded all government officials acting in a quasi-judicial role. It should not be applied in a piece-meal fashion depending on the underlying context of an individual matter. It must be applied uniformly to all government adjudicatory proceedings to maintain its benefit to the public, who the doctrine is designed to protect.

CONCLUSION

The District Court correctly interpreted and applied the doctrine of quasi-judicial immunity. Public policy concerns weigh in favor of providing quasi-judicial immunity to government officials when they participate in adjudicatory proceedings. For all such reasons, and for those reasons stated in the Answer Brief of Appellee Appellees the University of Colorado and the Regents of The University of Colorado, CCI urges the Court of Appeals to affirm the District Court's decision.

Respectfully submitted this 7th day of May, 2010.

Original signature on paper document filed with the clerk.

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CERTIFICATE OF MAILING

I hereby certify that on the 7th day of May, 2010, I have placed a true and correct copy of the foregoing **BRIEF of *AMICUS CURIAE* COLORADO COUNTIES, INC.** in the U.S. Mail, postage prepaid, addressed to the following:

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