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PETITIONER: WARD CHURCHILL **RESPONDENTS:** THE UNIVERSITY OF COLORADO; THE REGENTS OF THE UNIVERSITY OF COLORADO, a body corporate	Case No. 11SC25
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RESPONSE BRIEF

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 those rules. Specifically, the undersigned certifies that:

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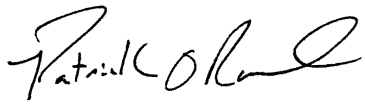

Patrick T. O'Rourke, #26195

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Statement of the Issues

The University responds to the issues set forth in the announcement of certiorari.

Statement of the Facts

Professor Churchill's Statement of the Facts is incomplete. The complete facts demonstrate that the lower courts' rulings were correct.

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

The original state Constitution created the University of Colorado and its governing board, the Regents. *Colo. Const. Article VIII, §5. Colo. Const. Article IX, §12.* As an independent and elected board, the Regents are not part of the executive and legislative branches, and the Board, "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).

As the Board of Regents is constitutionally charged with the University's "general supervision," the General Assembly vests certain powers with the Regents. *Colo. Const. Art. VIII, §5.* The Regents possess exclusive authority to "enact laws for the government of the

university" and to "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 an act, it cannot delegate that responsibility. *Subryan,* 698 P.2d at 1384.

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

Institutions of higher education are different from many workplaces, particularly in the relationship between the leadership and faculty. 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] Accordingly, the University's faculty "takes the lead in decisions concerning selection of faculty . . . academic ethics, and other academic matters."[2] The Regents cannot dismiss a tenured professor unless a panel of faculty members determines that the professor is guilty of professional misconduct.

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

2 Exhibit 22-1, *Laws of the Regents*, §5.E.5
In this brief, all emphasis marks were added by the University, unless otherwise noted.

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

In February 2005, the media publicized an essay in which Professor Churchill compared victims in the World Trade Center to Nazi officers. The Regents then called a special meeting, at which many of them apologized for Professor Churchill's statements and expressed their disagreement with his opinions. None of the Regents called for Professor Churchill's termination at the meeting, several noted the importance of political debate,[3] and Regent Michael Carrigan noted that the Regents "are sworn to uphold these consitutional rights and calls for us to do otherwise are irresponsible."[4]

Yet it was clear that the Regents did not possess sufficient information to determine the appropriate course of action. Consequently, Interim Chancellor Philip DiStefano told the Regents that he and two other admnistrators would answer two questions:

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3 Exhibit 250, Transcript of Meeting, Pages 10, 15, and 21

4 Exhibit 250, Transcript of Meeting, Page 14

- "[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]

The "purpose of this internal review [was] 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] And, in the event that Chancellor DiStefano believed that grounds for dismissal existed, Professor Churchill would have recourse before a "committee constituted entirely of faculty."[7]

IV. Chancellor DiStefano Determined that Professor Churchill's Statements Were Protected

The Opening Brief claims Chancellor DiStefano "examined all of Professor Churchill's publications, including those previously reviewed in the University's hiring, tenure, and promotion processes." But this

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5 Exhibit 250, Transcript of Meeting, Page 5

6 Exhibit 250, Transcript of Meeting, Page 5

7 Exhibit 250, Transcript of Meeting, Page 7

statement is untrue, and no testimony supports it. Instead, the report describes only five statements attributed to Professor Churchill. Chancellor DiStefano reviewed the applicable law and noted that Professor Churchill's statements might not be constitutionally protected if they engendered imminent violence or unduly interfered with the University's operations.[8] Neither of these First Amendment exceptions applied, however, and each statement was "political expression . . . constitutionally protected against government sanction on the grounds of disruption, in spite of the damage it may have caused."[9]

V. The University Must Investigate Research Misconduct

While Chancellor DiStefano investigated the First Amendment issues, Professor Thomas Brown of Lamar University "wanted to shift the public debate" and testified that he contacted newspapers to complain about Professor Churchill's research misconduct,[10] quickly spawning media reports that Professor Churchill engaged in fabrication

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8 Exhibit 1-B, Chancellor's Report, Page 4

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

10 Brown Testimony (March 31, 2009) at 3965:9-23

and plagiarism.[11] Federal regulations require research institutions to respond to allegations of research misconduct. *42 C.F.R. §93.100 – 42 C.F.R. §93.102.* Consequently, the University must "initiate an inquiry into any suspected or alleged misconduct."[12]

Professor Churchill's research misconduct came to light while Chancellor DiStefano considered the constitutional protections that attached to the 9/11 essay. Nonetheless, he 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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11 Exhibit 22-9, Denver Post Article; Exhibit 22-18, Rocky Mountain News Article

12 Exhibit 1-E, Administrative Policy Statement on Misconduct in Research and Authorship

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

VI. Research Misconduct Investigation

The University of Colorado uses a Standing Committee on Research Misconduct, composed entirely of faculty, to investigate research misconduct. After an initial review to determine if the allegations warranted a full investigation, the Standing Committee empanelled an Investigating Committee.[14] The investigation would "evaluate whether any or all of the allegations are substantiated by a preponderance of the evidence."[15] The Investigating Committee in Professor Churchill's case consisted of tenured professors, from the University and other universities, specializing in the fields of Indian studies, history, sociology, and law,[16] including professors that Professor Churchill recommended or approved.[17]

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14 Exhibit 1-f, Inquiry Subcommittee Report, Page 18

15 Exhibit 1-d, Research Misconduct Rules, Page 9

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

17 Exhibit 14-26, E-mail, Page 2 (suggesting Professor Radelet); Exhibit 17-1, E-Mail, Page 2 (accepting Professor Clinton)

For almost six months, the Investigating Committee interviewed witnesses and reviewed hundreds of pages that Professor Churchill submitted in his defense.[18] The Investigating Committee unanimously concluded that Professor Churchill engaged in multiple acts of fabrication, falsification, and plagiarism.[19] Each member recommended that the University terminate Professor Churchill or suspend him for at least a year.[20]

The full Standing Committee reviewed the 102-page investigative report, as well as Professor Churchill's response. The members unanimously concluded that "the severity of the infractions, their repeated and deliberate nature, their impact on the scholarly enterprise, and the apparent unwillingness of Professor Churchill to acknowledge the violations combine to exhibit 'conduct which falls below minimum standards of professional integrity,' as specified in the

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

19 Exhibit 1-h, Investigative Committee Report, Page 96

20 Exhibit 1-h, Investigative Committee Report, Page 104

Laws of the Regents."[21] The majority of the Standing Committee's members recommended that the University terminate Professor Churchill's employment.[22]

VII. Adversarial Privilege & Tenure ("P&T") Hearing

Chancellor DiStefano agreed with Standing Committee's recommendation and issued a notice of intent to dismiss.[23] In the rare circumstances that the University contemplates dismissing a tenured professor, *Regent Policy 5-I* (Exhibit 21-I) requires:

- 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)*

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21 Exhibit 1-k, Standing Committee Report, Page 16

22 Exhibit 1-k, Standing Committee Report, Page 17

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

- 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 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 days, during which Professor Churchill presented six expert witnesses, cross-examined the University's ten witnesses (including Chancellor DiStefano and each member of the Investigating Committee),[24] and presented a voluminous post-hearing closing argument.[25]

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[24] The complete transcripts of the dismissal for cause hearing are located at Exhibits 23-a – 23-g.

[25] Exhibit 13, Churchill Closing Argument to P&T Panel.

Professor Churchill's expert on academic processes, Philo Hutcheson, testified that the P&T Committee's procedures are appropriate[26] and that he found no evidence that the committee was pressured to reach particular conclusions.[27] His testimony correlates with the P&T Committee members' testimony that they participated in the P&T hearing to protect faculty freedoms and did not reach preordained outcomes.[28] Professor Hutcheson also admitted that academic freedom and tenure do not protect fabrication, falsification, or plagiarism.[29] A faculty member who engages in this misconduct undermines the academic enterprise, and the university must impose discipline.[30]

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26 Hutcheson Testimony (March 19, 2009) at 2050:1 – 2051:15

27 Hutcheson Testimony (March 19, 2009) at 2047:11-16

28 Cutter Testimony (March 30, 2009) at 3533:19 – 3534:17; Morley Testimony (March 27, 2009) at 3412:22 – 3413:23

29 Hutcheson Testimony (March 19, 2009) at 2055:22 – 2056:16

30 Hutcheson Testimony (March 19 2009) at 2057:12-14.

The P&T Committee deliberated and produced a report that addressed the entire investigative process,[31] 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, falsifying sources, plagiarism, and writing essays under other scholars' names and then citing them as independent verification of his own theories.[32] The P&T Committee found that "The Laws of the Regents provide that a faculty member who engages in such conduct may be dismissed."[33]

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

The P&T Committee 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.

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

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

Although explicitly recognizing that the ultimate decision upon sanctions would lie with the University President and Board of Regents, the P&T Committee was unanimous that Professor Churchill's misconduct "requires severe sanctions." Three members recommended a demotion coupled with a lengthy suspension and two members recommended termination.[34]

VIII. President & Board of Regents Review

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 or suspend him for years.[35] 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.[36]

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

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

36 Hank Brown Testimony (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 presented its report to the Regents, Professor Churchill submitted a detailed written argument against the P& T Committee's findings,[37] and his counsel appeared in person to argue that the P&T Committee's findings and President Brown's recommendation were wrong. 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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37 Exhibit 16, Churchill Submission to Regents.

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.[38] The University, the Board of Regents, and each Regent sued in his official capacity enjoys Eleventh Amendment immunity from damage claims under *42 U.S.C. §1983. Rozek v. Topolnicki*, 865 F.2d 1154, 1158 (10th Cir. 1989). Individual capacity defendants could not claim Eleventh Amendment immunity, but could raise personal immunity defenses. *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 individual Regents; (2) the University and the Board of Regents would waive their Eleventh Amendment immunity; and (3) these entities could raise any

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38 Second Amended Complaint, ¶4

defenses that would normally be available to the individual defendants.[39] This agreement placed the parties in the same position that they would have otherwise occupied.[40]

II. Trial

The trial concerned two claims: (1) the University retaliated against Professor Churchill through various investigations; and (2) the University unlawfully terminated him.

a. Directed Verdict

Judge Naves directed a verdict on the investigation claim, determining the investigation was not actionable as retaliation.[41]

b. Jury Questions and Verdict

Professor Churchill testified that his damages were in excess of $100,000.[42] His counsel asked the jurors to send a message "in a big way" because an award of $5.72 is "really a win for CU."[43]

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39 Stipulation, Page 4

40 Order, ¶¶8-10, Pages 3-4

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

42 Churchill Testimony (March 24, 2009) at 2626:22 – 2628:6.

Judge Naves instructed the jury that it could award damages for "any noneconomic losses or injuries" and "any economic losses or injuries."[44] 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."[45] The jury returned a $1 verdict, and Professor Churchill did not seek additur on the grounds that the jury's verdict was contrary to the evidence.

c. Post-Verdict Rulings

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

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

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

45 Juror Questions and Court Response

The parties preserved immunity arguments until after trial. *See Cassady v. Goering,* 567 F.3d 628, 634 (10th Cir. 2009) (stating "we have never held" that an immunity "is unreviewable following a trial"). The University was entitled to 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.[46]

Judge Naves also determined that granting reinstatement was inappropriate where Professor Churchill had not suffered "any actual damages."[47] Moreover, reinstatement would impose harm on others at the University and unduly interfere with academic processes.[48] Professor Churchill's hostility to the University also made his return impossible.[49] Professor Churchill was not entitled to front pay because he had failed to seek or accept alternative employment.[50]

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46 Order, ¶¶22-62, Pages 9-22

47 Order, ¶¶78-89, Pages 28-31

48 Order, ¶¶109-115, Pages 38-40; Order, ¶¶90-104, Pages 29-36

49 Order, ¶¶105-108, Pages 37-38

50 Order, ¶¶116-120, Pages 41-42

III. Court of Appeals' Ruling

The Court of Appeals unanimously affirmed the trial court's rulings. Specifically, the Court of Appeals found: (1) the University's investigation would not deter a reasonable person from exercising his First Amendment rights;[51] (2) Colorado law clearly defines the scope of quasi-judicial immunity, and the Board of Regents' termination of Professor Churchill's employment was both quasi-judicial in nature and deserving of immunity;[52] and (3) Judge Naves did not abuse his discretion in denying Professor Churchill reinstatement or front pay.[53]

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51 *Churchill v. University of Colorado*, 09 CA 1713 (Colo. App. 2010) at Page 56

52 *Churchill*, 09 CA 1713 at Page 19

53 *Churchill*, 09 CA 1713 at Page 43

Summary of the Argument

During a period of uncertainty, the Regents asked one of the University's officers to investigate whether Professor Churchill's conduct was permissible, which is a perfectly appropriate inquiry. Government employers owe obligations to their employees, but they also have the ability to ensure that the workplace operates effectively. At the conclusion of this investigation, the Chancellor determined that Professor Churchill's statements were within the boundaries of the First Amendment's protections.

Professor Churchill nonetheless argues that the investigation was retaliatory, but his argument fails on two levels. First, the law requires governmental employers to investigate when faced with a question of whether an employee's speech is constitutionally permissible. Second, there was no evidence that this investigation was materially adverse or that it would deter a reasonable faculty member from exercising his First Amendment rights. Employers must have the ability to investigate whether employees have engaged in misconduct without the specter of liability.

The University later disciplined Professor Churchill for research misconduct. He received multiple layers of due process, including an adversarial hearing before a jury of his fellow faculty members. Those faculty members unanimously determined that Professor Churchill had engaged in conduct that is anathema in higher education — falsification, fabrication, and plagiarism. These same faculty members determined that Professor Churchill's conduct required "severe sanction." The Board of Regents reviewed the record and determined that the good of the University required it to terminate Professor Churchill. Under well-established precedent from the Supreme Court, the federal Circuits, and this Court, the Regents are entitled to immunity when they engage in quasi-judicial action.

Finally, Professor Churchill has not demonstrated that Judge Naves abused his discretion by denying him reinstatement or front pay. Not only does an amendment to *42 U.S.C. §1983* bar these forms of relief, but granting reinstatement or front pay would be contrary to the jury's finding that Professor Churchill suffered no actual damages. Yet, even if Professor Churchill was otherwise eligible for reinstatement or

front pay, he has not challenged Judge Naves' findings that his own conduct made reinstatement unfeasible and that his failure to mitigate precludes front pay. Judge Naves appropriately exercised his discretion when determining that Professor Churchill was entitled to no prospective relief.

Argument

I. The Chancellor's Investigation Was Not Retaliatory

a. Standard of Review

The University agrees that standard of review is *de novo.*

b. Principles Governing Retaliation Claims

Any discussion of retaliation necessarily begins with the Supreme Court's recent decision in *Burlington Northern & Santa Fe Railway Company v. White*, 548 U.S. 53 (2006).

In *Burlington Northern*, an employer removed an employee's normal job duties and reassigned her arduous tasks. After she complained to the EEOC about the reassignment, her superiors suspended her without pay for insubordination. *Burlington Northern*, 548 U.S. at 58. Once a grievance panel ruled that the employee had not been insubordinate, the employer reinstated her and awarded backpay for the 37-day suspension. *Burlington Northern,* 548 U.S. at 58.

In response to the employer's argument that the employee could not present a retaliation claim because she had not ultimately lost any pay or benefits of employment, the Supreme Court determined that

potential acts of retaliation are not so limited. Such a view was too narrow, and the correct burden is that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse." *Burlington Northern*, 548 U.S. at 68. In the First Amendment context, the employer's action must dissuade a reasonable employee from exercising his First Amendment rights. *Couch v. Board of Trustees of Memorial Hospital of Carbon County*, 587 F.3d 1223, 1238 (10th Cir. 2009).

Burlington Northern contains two important requirements: (1) a "materially adverse" requirement because "it is important to separate significant from trivial harms"; and (2) a "reasonable employee" requirement because the standard "for judging harm must be objective." *Burlington Northern*, 548 U.S. at 68-69. The Supreme Court cautioned that "the significance of any given act of retaliation will often depend upon the particular circumstances" and "the real social impact of workplace behavior often depends upon a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or physical acts

performed." *Burlington Northern*, 548 U.S. at 59. "Context matters," and what might be retaliatory in one workplace might be permissible in another. *Burlington Northern*, 548 U.S. at 59.

With this background, it becomes easy to understand why an unpaid investigative suspension was retaliatory, even if the employee ultimately received backpay:

> [B]urlington argues that the 37-day suspension lacked statutory significance because Burlington ultimately reinstated White with backpay. Burlington says that "it defies reason to believe that Congress would have considered a rescinded investigatory suspension with full backpay" unlawful . . . But White and her family had to live for 37 days without income. They did not know during that time whether or when White could return to work. Many reasonable employees would find that a month without a paycheck to be a serious hardship.

Burlington, 548 U.S. at 71-72.

What is most significant about the Supreme Court's decision is that it nowhere intimated that an investigation itself is a "serious hardship" that would satisfy either the "materially adverse" or "reasonable employee" standards. The "investigatory suspension" was retaliatory because the employer suspended the employee without pay,

and "an indefinite suspension without pay could well act as a deterrent." *Burlington Northern*, 548 U.S. at 73. The Tenth Circuit later followed *Burlington's* "material adversity" and "reasonable employee" requirements when it held that "an investigation of potential misconduct . . . will generally not constitute an adverse employment action." *Couch*, 587 F.3d at 1243.

c. Application to Professor Churchill's Claims

In contrast to the arguments in the lower courts, where Professor Churchill argued that all of the University's investigations were retaliatory, the Opening Brief argues only that Chancellor's DiStefano's initial investigation was retaliatory. Because this Court will not consider arguments not advanced in the Opening Brief, the University accepts Professor Churchill's limitation of his claims. *People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990).

i. Employers Must Evaluate an Employee's Speech

In February of 2005, at the Regent meeting, Chancellor DiStefano accurately observed, "In the past week the University of Colorado has been at the center of a fierce debate that has raised a fundamental

question. What are the boundaries of free expression, academic freedom, and tenure protections?"[54] Questions of this nature are not ones that responsible public employers should answer casually, without determining the underlying facts, or without analyzing the law.

Consequently, Chancellor DiStefano told the Regents that he would investigate whether Professor Churchill may have overstepped his bounds as a faculty member, showing cause for dismissal as outlined in the Laws of the Regents."[55] Within weeks, Chancellor DiStefano determined each statement was "political expression . . . constitutionally protected against government sanction on the grounds of disruption, in spite of the damage it may have caused."[56] But the fact that the Chancellor determined that the speech was protected does not mean that the investigation was improper.

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54 Exhibit 250, Transcript of Meeting, Page 4

55 Exhibit 250, Transcript of Meeting, Page 5

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

As the Supreme Court has noted, there is a "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). 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 context." *Engquist*, 128 S.Ct. at 2152. One of those realities is that a public employee's 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.

An employer's obligation to balance the employee's interests against the realities of the workplace necessarily requires the employer to undertake an investigation. 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 courts are unwilling to preclude employers from undertaking this obligation. *See Heil v. Santoro*, 147 F.3d 103, 110 (2nd Cir. 1998) (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"). Professor Churchill's arguments are contrary to the law because they invite governmental employers to make snap decisions during times of uncertainty, forcing them to consider the disruptive effect of an employee's speech at precisely the moment the disruption is likely to be most acute. Determining that public employers bear potential liability for doing what the law requires of them is neither constitutionally sound nor constitutionally required.

ii. Professor Churchill Cannot Satisfy the "Materially Adverse" or "Reasonable Employee" Requirements

Nor did Professor Churchill provide any evidence that Chancellor DiStefano's investigation satisfies either the "materially adverse" or "reasonable employee" requirements. In contrast to the employee in *Burlington Northern* who lost pay during an investigation, Professor Churchill maintained the same pay, benefits, and seniority. He incurred no "serious hardship" that might deter a reasonable employee from speaking. *Burlington Northern*, 548 U.S. at 72.

While most employees would not invite an investigation, "not everything that makes an employee unhappy is actionable adverse action." *McKenzie v City and County of Denver*, 414 F.3d 1266, 1279 (10th Cir. 2005). "Context matters," and whether an act is potentially retaliatory depends upon the "surrounding circumstances, expectations, and relationships." *Burlington Northern*, 548 U.S. at 59. Because context matters, it stands to reason that the threat of a quasi-criminal investigation or an investigation that is unfettered in scope could potentially deter an employee from exercising his First Amendment rights. *See Rattigan v. Holder,* 604 F.Supp.2d 33, 52 (D.D.C. 2009)

(investigation by FBI Security Division); *Mullins v. City of New York,* 626 F.3d 47, 54 (2nd Cir. 2010) (internal police investigation). But those are not the facts here, and the Chancellor's investigation would not deter a reasonable faculty member from speaking because:

- Chancellor DiStefano would explicitly consider whether the First Amendment protected Professor Churchill;[57]
- "A tenured professor can be dismissed for cause only in accordance with regent Law and policy";[58]
- There are limited and narrow grounds for dismissal;[59] and
- The faculty member would be entitled to "review by the faculty senate committee on privilege and tenure."[60]
- The Chancellor determined within weeks that the speech was, in fact, protected.

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57 Exhibit 250, Transcript of Meeting, Page 5

58 Exhibit 250, Transcript of Meeting, Page 6

59 Exhibit 250, Transcript of Meeting, Pages 6-7

60 Exhibit 250, Transcript of Meeting, Page 7

Where the employer's ability to discharge is not unfettered, and an employee will receive multiple levels of process before any discipline is imposed, "a reasonable person would not be deterred from further speech." *Couch*, 587 F.3d at 1242. *See also Boandl v. Geithner*, 752 F.Supp.2d 540, 564 (E.D. Penn. 2010) (stating that "I do not believe an objective employee aware of the IRS guidelines [governing discipline] and the independent nature of TIGTA [disciplinary process] would have been chilled from pursuing his rights because of the initiation of a TIGTA investigation"); *Szeinbach v. Ohio State University*, 758 F.Supp.2d 448, 474 (S.D. Ohio. 2010) (stating that "other than harm to her pride or reputation, about which there is little evidence . . . [a university professor facing a research misconduct investigation] suffered little injury or harm from having OSU investigate the academic significance of conduct which she admitted having done").

Indeed, it was clear that Chancellor DiStefano's investigation did not chill Professor Churchill's speech, as his own website made clear:

> Ward Churchill continues to teach, speak and write books. In 2007, at student request, he taught a voluntary class at CU, much to the administration's dismay.

> Since the "controversy" began, he has given over 50 well-attended and highly praised lectures. He has written several articles on academic freedom, and is in the process of finishing several books.[61]

"The fact that an employee continues to be undeterred in his or her pursuit of a remedy, as here was the case, may shed light as to whether the actions are sufficiently material and adverse to be actionable." *Somoza v. University of Denver,* 513 F.3d 1206, 1214 (10th Cir. 2008). Professor Churchill's actions stand in stark contrast to his briefs.

iii. *Professor Churchill's "Evidence" Cannot Substitute for Evidence Satisfying the "Materially Adverse" and "Reasonable Employee" Standards*

Without any tangible effects stemming from the investigation itself, the Opening Brief presents a litany of unrelated actions in an effort to demonstrate harm. He defaults to this position because "he necessarily recognizes that an investigation must have some punishing or diminishing effects before it can be deemed an adverse employment action."[62]

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[61] Order, ¶¶113, Page 40

[62] *Churchill,* 09 CA 1713 at Page 59

First, Professor Churchill argues that the Regents publicly criticized him and "injured his professional reputation." There is no evidence, other than Professor Churchill's own belief, that any Regent's comments damaged his reputation. *See Rattigan*, 604 F.Supp.2d at 51 (stating that "purely subjective perceptions of stigma or loss of reputation are insufficient to make an employer's action 'materially adverse'"); *Brown v. Mills*, 675 F.Supp.2d 182, 192 (D.D.C. 2009) (stating that "although Ms. Brown may have believed that her co-employees were 'reluctant' to work with her or avoided her because of the investigation, she offered nothing to substantiate such a claim"). Professor Churchill also overlooks the fact that the Regents did not participate in Chancellor DiStefano's investigation and played no role in his determination that the First Amendment protected his speech.

Second, Professor Churchill claims that he was denied a sabbatical and not allowed to "unbank" courses. No evidence demonstrates these actions occurred as a result of Chancellor DiStefano's investigation. Professor Churchill's own words describe: (1) his sabbatical was delayed (not denied) in August 2005, five months

after Chancellor DiStefano's investigation ended;[63] and (2) he did not request the unbanking of his courses until September 2005, six months after Chancellor DiStefano's investigation ended.[64] Nowhere does he provide any causal connection to the Chancellor's investigation.

Just as significantly, the words "sabbatical" and "unbank" do not appear in trial testimony and were never brought to the jury's attention. Professor Churchill's attorneys also never brought Exhibit 14-I (the sole evidence upon which he now relies) to the jury's attention or Judge Naves' attention during the directed verdict argument. As the Court of Appeals observed, "Churchill presented no evidence by which a reasonable juror could conclude or make a reasonable inference"[65] that these events could deter a reasonable employee from exercising his First Amendment rights. Yet, it was Professor Churchill's burden to present evidence, and "counsel cannot raise a genuine issue simply by

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63 Exhibit 14-I, Churchill Grievance, Page 23

64 Exhibit 14-I, Churchill Grievance, Page 25

65 *Churchill*, 09 CA 1713 at Page 61

means of argument." *Bauer v. Southwest Denver Mental Health Center*, 701 P.2d 114, 117 (Colo. App. 1985).

Third, Professor Churchill claims that he "missed deadlines [and] defaulted on book contracts." The testimony cited in the Opening Brief makes clear that Professor Churchill is claiming that these defaults occurred during a "four year disruption" as he responded to the inquiries in the research misconduct investigation,[66] not the Chancellor's investigation, and Professor Churchill has not claimed that the research misconduct investigation was retaliatory. He cites no evidence that Chancellor DiStefano's investigation, which lasted only a few weeks, caused him to default upon his outside obligations.

Fourth, Professor Churchill claims that he had "speaking engagements cancelled" and that the alumni association withheld an award from him. Again, no one who cancelled a speech or withheld an award testified that the Chancellor's investigation prompted their actions. If we are to trust Professor Churchill's own words, the alumni association withheld the award "pending the outcome of the [research

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[66] Churchill Testimony, (March 24, 2009) at 2628:8 - 26:30:13

misconduct] investigation."[67] Yet, even if these events could somehow be linked to Chancellor DiStefano's investigation, the University can be held liable only for its own conduct, not the actions of third-parties. *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. . . ").

Fifth, Professor Churchill argued that his wife, Professor Natsu Saito, resigned from the University "shortly after the speech investigation." To the contrary, she resigned her position fifteen months after the Chancellor's investigation and did not mention it in her resignation.[68] She testified that the real reason she resigned was because she was "really, really upset" that "the university failed to take a principle[d] stand" against Professor Churchill's critics.[69]

Finally, the Opening Brief claims that Chancellor DiStefano's investigation had a "chilling effect on others." Not one person, other than Professor Churchill, testified about this chilling effect, and his own

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67 Exhibit 14-I, Churchill Grievance, Page 26

68 Exhibit 242, Saito Resignation Letter

69 Saito Testimony (March 25, 2009) at 2878:18 – 2879:23

subjective opinions do not create evidence that Chancellor DiStefano's investigation affected a single person's speech. This self-serving testimony also stands in stark contrast to Judge Naves' findings of fact:

> There was no credible evidence that any faculty member at the University of Colorado has refrained from academic or professional activities as a result of the events related to Professor Churchill. Professor Churchill's witnesses at the evidentiary hearing, including his most visible and consistent supporters could not identify any specific retaliation against them or any other controversial faculty members.[70]

Professor Churchill cannot demonstrate that Chancellor DiStefano's investigation was retaliatory. He seeks to preclude employers from investigating potential misconduct, but "persons who have engaged in protected conduct do not thereby become sacrosanct and immune from review or evaluation." *Szeinbach*, 758 F.Supp.2d at 474. As the Court of Appeals noted, "[A]n employer must be permitted to investigate the potential misconduct of an employee without fear of the investigation being interpreted as an adverse employment action."[71]

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[70] Order, ¶114, Page 40

[71] *Churchill*, 09 CA 1713 at Page 53

II. The Board of Regents Engaged in Quasi-Judicial Action

a. Standard of Review

The University agrees that immunities are reviewed *de novo.*

b. Quasi-Judicial Immunity Stems from the Nature of the Governmental Action, Not the Particular Controversy Giving Rise to a Lawsuit

Professor Churchill's fundamental premise seems to be that the University cannot claim quasi-judicial immunity because it would overturn the jury's findings and deny him the benefit of a $1 verdict. His error is that the availability of immunity does not turn on whether it affects a jury's verdict. *See Tobin for Governor v. Illinois State Board of Elections*, 268 F.3d 517, 525 (7th Cir. 2001) (stating that "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"); *Cleavinger v. Saxner*, 474 U.S. 193, 199-200 (1985) (stating that, where immunity applies, it precludes liability "however erroneous the act may have been, and however injurious it may have proved to the plaintiff").

Rather than deal with the vicissitudes of a particular case and whether a quasi-judicial officer acted with an improper motive, immunity analysis turns on the functions that government officials perform. 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). If a government official's duties "share enough of the characteristics of the judicial process," then "those who participate in such adjudication[s] should also be immune from suits for damages." *Butz,* 438 U.S. at 512-13.

c. The Regents Performed a Quasi-Judicial Function

This Court unqualifiedly states that "absolute immunity shields officials who engage in judicial or quasi-judicial functions from damages liability." *Hoffler v. Colorado Department of Corrections*, 27 P.3d 371, 374 (Colo. 2001). Thus, the true inquiry is whether the Regents performed a judicial function when it reviewed the P&T Committee's findings, considered President Brown's recommendation, and terminated Professor Churchill.

"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. Only certain misconduct can result in a tenured faculty member's termination, including "conduct that falls below minimum standards of professional integrity." One court considering similar facts concluded, "It is hard to imagine a more true adjudicative function" than reviewing the outcome of a faculty disciplinary process. *Gressley v. Deutsch*, 890 F.Supp. 1474, 1491 (D. Wyo. 1994).

If the nature of the governmental decision is judicial, this Court next examines "the process by which that decision is reached." *Widder v. Durango School District No. 9-R,* 85 P.3d 518, 527 (Colo. 2004).

"Quasi-judicial decision making, as the name connotes, bears similarities to the adjudicatory function performed by courts." *Widder*, 85 P.3d at 527. Accordingly, this Court grants quasi-judicial immunity to participants in a disciplinary process where "the hearing is adversarial in nature, the employee is entitled to be represented, to present oral and documentary evidence, and to cross examine witnesses." *Hoffler*, 27 P.3d at 374. Professor Churchill received these protections and far more.

When employers and licensing agencies engage in quasi-judicial action, this Court and the Tenth Circuit recognize quasi-judicial immunity, even when the plaintiff claims that the officials acted unconstitutionally. *State Board of Chiropractic Examiners v. Stjernholm*, 935 P.2d 959, 965 (Colo. 1997) (Colorado State Board of Chiropractic Examiners); *Hoffler,* 27 P.3d at 374 (Colorado Department of Corrections); *Atiya*, 988 F.2d at 1016-17 (Salt Lake County Career Services Council); *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). Professor Churchill provides no meaningful distinction between these adjudicative functions and the function the Board of Regents performed. Denying the Regents immunity for textbook quasi-judicial activity would create great uncertainty across Colorado.

Such a result is unwarranted, especially when the doctrine of quasi-judicial immunity is intended to remove uncertainty and foster "the discretion which executive officials exercise with respect to the initiation of administrative proceedings." *Butz*, 438 U.S. at 515. By allowing officials to make controversial decisions without fear of liability, judicial immunities ultimately are "for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Pierson v. Ray,* 386 U.S. 547, 554 (1967).

d. The P&T Processes "Share Enough Characteristics of the Judicial Process" for Immunity

The adversarial hearings that preceded Professor Churchill's discharge incorporated all of the adjudicative features that this Court has previously required when granting quasi-judicial immunity. *Stjernholm*, 935 P.2d at 965; *Hoffler*, 27 P.3d at 374. Nonetheless, Professor Churchill claims the University's adversarial process does not satisfy the requirements of *Cleavinger v. Saxner*. Curiously, he omitted the Supreme Court's discussion of why the prison's disciplinary processes were deficient and why its officials did not deserve immunity.

> The prisoner was afforded neither a lawyer nor an independent nonstaff representative. There was no right to compel the attendance of witnesses or to cross-examine. There was no right to discovery. There was no cognizable burden of proof. No verbatim transcript was afforded. Information presented was often hearsay or self-serving. The committee members were not truly independent. In sum, the members had no identification with the judicial process of the kind and depth that has occasioned absolute immunity.

Cleavinger, 474 U.S. at 206.

There is no correspondence between the University's extensive procedural safeguards and the faulty processes from *Cleavinger* and *Wood v. Strickland,* 420 U.S. 308 (1975) (which predated the Supreme Court's modern requirements for quasi-judicial immunity in *Butz).* The University nonetheless acknowledges that *Cleavinger* provides a list of factors that courts can consider, "among others" as "characteristic of the judicial process," including:

> (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.

Cleavinger, 474 U.S. at 202. The Supreme Court has never determined that each of the factors must weigh in favor of immunity, and this Court previously observed that "the essence of quasi-judicial action lies not so much in the specific characteristics of the decision-making body as in the nature of the decision itself and the process by which that decision is reached." *Cherry Hills,* 757 P.2d at 626.

Preventing Intimidation and Harassment – In *Butz,* the Supreme Court cited decades of precedent holding that judicial immunities are appropriate when an official's adjudicative decisions were "likely to provoke 'with some frequency' retaliatory suits by angry defendants." *Butz,* 438 U.S. at 510. Just as in this case, "the loser in one forum will frequently seek another, charging the first with unconstitutional animus." *Butz,* 438 U.S. at 510. Absolute immunity ensures that those who participate in adjudicative roles "can perform their respective functions without harassment or intimidation." *Butz,* 438 U.S. at 510. The termination of a tenured professor's employment is certainly likely to provoke retaliatory lawsuits.

In contrast to the Department of Agriculture officials in *Butz,* the Board of Chiropractic members in *Stjernholm,* and the prison employee in *Hoffler,* however, preventing intimidation and retaliation is especially important in decisions involving academic misconduct in higher education. The Supreme Court has recognized that "the four essential freedoms" of a university are "to determine for itself on academic grounds who may teach, what may be taught, how it shall be

taught, and who may be admitted to study. *Regents of the University of California v. Bakke,* 438 U.S. 265, 312 (1978). Consequently, these academic decisions receive a particular degree of deference not accorded to other government officials, and the Supreme Court has cautioned, "[W]hen judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment . . . Considerations of profound importance counsel restrained judicial review of the substance of academic decisions. *Regents of University of Michigan v. Ewing,* 474 U.S. 214, 225 (1985). Those considerations of profound importance favor granting the Regents immunity for a substantive academic decision.

Safeguards – *Cleavinger* described the "procedural safeguards" attendant to judicial processes as including things like a right to counsel, the ability to cross examine, and a cognizable burden of proof. *Cleavinger,* 474 U.S. at 206. The University provided every procedural safeguard recognized in the multitude of cases granting quasi-judicial immunity.

Because those safeguards existed, Professor Churchill argues that the process was not judicial because the Regents ultimately terminated his employment after receiving the P&T Committee's split recommendation. The P&T Committee had already unanimously found that Professor Churchill had engaged in repeated conduct below minimum standards of professional integrity, "that the Laws of the Regents provide that a faculty member who engages in such conduct may be dismissed," and that Professor Churchill's conduct "requires severe sanctions." At this point, Colorado law required the Regents to review the record and determine if "the good of the institution" required dismissal. *C.R.S. §23-20-112.* A multi-level review is judicial in nature and decreases the possibility that any particular person will act unlawfully. *See Couch*, 587 F.3d at 1244 (stating that "the Board's decision was reached after retaining and reviewing the report of an unbiased panel of reviewers, who heard four days of evidence. This independent, unbiased investigation of Dr. Couch's conduct removes any taint of bias that otherwise could have existed").

Insulation from Political Influence – One reason that *Cleavinger* denied immunity is because the prison officials were "employees of the Bureau of Prisons" and "direct subordinates of the warden who reviews their decision." *Cleavinger*, 474 U.S. at 204. They could be subject to "political pressure" into resolving a dispute in favor of their co-workers.

The term "political influence" is "somewhat of a misnomer," because "political or electoral pressure alone cannot deprive government officials" of quasi-judicial immunity. *Russell v. Town of Buena Vista*, 2011 WL 288453, *16 (D. Colo. 2011). Were the rule otherwise, judges who campaign for elected office in thirty-three states would not be entitled to immunity when they make decisions in high-profile cases. *Brown v. Greisenauer*, 970 F.2d 431, 439 (8th Cir. 1992). Disaffected litigants could sue those judges, but that is not the law.

"For the 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." *Brown,* 970 F.2d at 439. The Regents stand in a far different position

than subordinate employees or political appointees. Instead, they are duly-elected members of a governing board exclusively vested with the supervision of a state institution of higher education. As members of a constitutionally created board, the Regents cannot be removed from office by either the executive or legislative branches.

When this degree of independence exists, elected officials are immune from liability when they exercise adjudicatory authority. For example, elected city council members were entitled to 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. These safeguards reduc[e] the need for a damages remedy." *Brown*, 970 F.2d at 438.

Similarly, 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. Some factors weighed against 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's almost uniform denials of parole amply demonstrate." *Miller*, 521 F.3d at 1145. Nonetheless, immunity was proper because the governor's decision "shares enough of the characteristics of the judicial process." *Miller,* 521 F.3d at 1145. Moreover, "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 this Court should not use the same criteria when deciding this appeal.

Precedent –Precedent does not refer simply to a body of an entity's own prior decisions, which may not exist when the officials are rarely called upon to serve in an adjudicative capacity. *See Russell,* 2001 WL288453 at *18-19 (discussing that "the lack of internal precedent is more realistically the result of the rarity of removal proceedings"); *Keystone Development Partners, LLC v. Decker*, 631 F.3d 89, 98-99 (3rd Cir. 2011) (observing that a board's decision was "the first of its kind"). In those situations, precedent exists when there are external constraints upon an official's discretion, embodied here in the narrow grounds for termination under *Laws of the Regents*, the clear and convincing burden of proof, and the requirement that the proceedings be transcribed for judicial review under the applicable body of law. *Keystone*, 631 F.3d at 98-99.

Adversarial Nature of the Process – The process by which the University terminated Professor Churchill's employment was entirely adversarial. Although Professor Churchill claims that the final hearing before the Board of Regents was not adversarial, he submitted detailed written arguments to the Regents explaining the errors he believed

existed in the P&T Committee's report. His counsel appeared before the Regents and argued his position. By Professor Churchill's logic, the proceedings in this Court are non-adversarial because he will not receive a new evidentiary hearing.

Correctability of Error – The ability to seek judicial review is important because "those who complain of error in [quasi-judicial] proceedings must seek agency or judicial review," rather than sue for damages. *Butz*, 438 U.S. at 513. This Court has already held that a school district employee terminated through a quasi-judicial process may seek review under *C.R.C.P. 106*. 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.

Professor Churchill claims that Rule 106 is an inadequate form of review, but this Court has never interpreted Rule 106 as ineffectual and meaningless. To the contrary, Rule 106 provides the appropriate level of review, and a district court certainly possesses the power to review the

record and determine whether the 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). "Demonstrated bias" can also "constitute grounds for judicial reversal of the decision pursuant to *C.R.C.P. 106(a)(4)." Kiewit Western Co. v. City and County of Denver*, 902 P.2d 421, 425 (Colo. App. 1994).

Because absence of evidentiary support and demonstrated bias would both be reasons for reversal under Rule 106, Professor Churchill argues that Rule 106 abridges his rights under *42 U.S.C. §1983.* Rule 106 does not "deny or limit the remedy available under §1983," in the way that a state-imposed statute of limitations or damage cap might. *Board of County Commissioners of Douglas County v. Sundheim*, 926 P.2d 545, 548 (Colo. 1996). Rather than constituting a limit upon §1983's remedies, the availability of judicial review is one factor that the courts consider when determining whether to apply a federally-recognized immunity. Professor Churchill's strategic decision not to pursue the available remedy does not abridge §1983.

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

a. *Standard of Review*:

The University agrees that decisions about reinstatement and front pay are reviewed for an abuse of discretion.

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

As the Court of Appeals noted, in 1996 Congress amended *42 U.S.C. §1983* "to bar equitable remedies such as claims for injunctive relief."[72] The amended statute 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." Neither of these conditions was present, and the statute applies.

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 resoundingly reject that argument:

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[72] *Churchill*, 09 CA 1713 at Page 41.

> 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) (citing multiple authorities). The Court of Appeals correctly followed this line of precedent and rejected the single contrary authority.

c. 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).

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, even if the remedial purpose of §1983 is broad, it would have been inappropriate for Judge Naves to reinstate Professor Churchill. The jury's verdict necessarily determined that Professor Churchill did not suffer an injury that either reinstatement or front pay would alleviate.

d. 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). Professor Churchill has not challenged Judge Naves' finding that his own hostility made his return to the University of Colorado impossible.

e. Reinstatement Would Impose Harm on Others and Cause Undue Interference With Academic Processes

Judge Naves also denied reinstatement on the grounds that it would cause interference in the University's academic processes because Professor Churchill's unwillingness to conform his conduct to established academic standards would "effectively negate the principle of autonomous faculty control over standards of performance and membership."[73] Judge Naves also determined that reinstatement would impose harm upon the members of the Ethnic Studies department, as well as the students who graduated from that program.[74] Professor Churchill has not challenged these findings.

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[73] Order, ¶¶100-103, Pages 34-35

[74] Order, ¶¶109-112, Pages 38-39

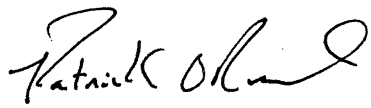
f. Professor Churchill Was Not Entitled to Front Pay

Judge Naves denied Professor Churchill front pay on the grounds that he failed to mitigate his damages by seeking or accepting alternative employment. *See 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"). Professor Churchill did not challenge this finding.

Conclusion

The University respectfully requests that this Court affirm the lower courts' orders.

Respectfully submitted on this 18th day of January, 2012:



Patrick T. O'Rourke, #26195

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2012, a true copy of the foregoing was sent by United States mail and electronic mail to the following:

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