SUPREME COURT, STATE OF COLORADO 101 W. Colfax Avenue, Suite 800 Denver, CO 80202	FILED IN THE SUPREME COURT SEP 12 2011 OF THE STATE OF COLORADO Christopher T. Ryan, Clerk
Court of Appeals No. 09CA1713 District Court for the City and County of Denver Case No. 06CV11473 Honorable Larry J. Naves, Judge	
PETITIONER: WARD CHURCHILL **RESPONDENT:** UNIVERSITY OF COLORADO	▲ COURT USE ONLY ▲
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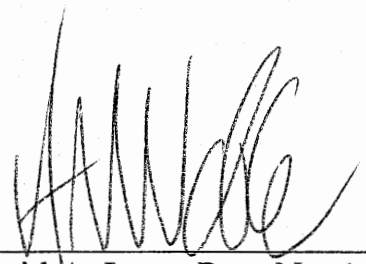
OPENING BRIEF	

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 these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g). It contains 9,455 words.

The brief complies with C.A.R. 28(k). It contains under a separate heading (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, not to an entire document, where the issue was raised and ruled on.



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2. Whether the granting of quasi-judicial immunity to the Regents of the University of Colorado for their termination of a tenured professor comports with federal law for actions brought under 42 U.S.C. § 1983.

3. Whether the denial of equitable remedies for termination in violation of the First Amendment undermines the purposes of 42 U.S.C. § 1983.

STATEMENT OF THE CASE AND FACTS

A. Professor Churchill's status as of January 2005.

In January 2005, Ward Churchill was a full professor of American Indian Studies and Chair of Ethnic Studies at the University of Colorado-Boulder. [Plaintiff's Exhibits 11, 16, 19]. During his nearly thirty years of employment at the University, he wrote or edited more than twenty books and 120 articles, and received numerous awards for teaching, scholarship and service to the University. [Trial Transcript, 3/10/09, pp. 381:1-385:20; 3/23/09, pp. 2503:4-2505:2;

Plaintiff's Exhibits 11, 24]. Professor Churchill had tenure and the University could fire him only for cause. [Defendants' Exhibit 1a, PDF pp. 8-9].

B. Professor Churchill's essay.

On September 12, 2001, Professor Churchill published an online essay entitled "'Some People Push Back': On the Justice of Roosting Chickens." [Plaintiff's Exhibit 38; Trial Transcript, 3/23/09, p. 2514:16-18]. The essay argued that the attacks of 9/11 could well have been a response to U.S. foreign policy. This essay was expanded into a book that received the 2003 Gustavus Myers Award for Outstanding Books on Human Rights. [Trial Transcript 3/11/09, pp. 586:9-14, 657:4-9].

Professor Churchill's essay generated little controversy until late January 2005, when a student's protest of a scheduled speech at an upstate New York college triggered national attention. [Trial Transcript, 3/23/09, pp. 2515:15-2516:4]. As a media-driven firestorm of criticism mounted, then Colorado Governor Bill Owens and the Colorado General Assembly, among others, pressured the University to fire Professor Churchill based on the content of his essay. [Trial Transcript, 3/10/09, pp. 440:14-18, 451:20-452:3; Defendants' Exhibit 45].

On January 28, 2005, Law School Dean David Getches urged acting Chancellor DiStefano to remove Professor Churchill as Chair of Ethnic Studies. Dean Getches advised suspending Professor Churchill "with pay pending review by committee of his competence and fitness to continue as a faculty member at CU" and questioned his "competence and integrity as a scholar." [Trial Transcript, 3/10/09, pp. 467:10-16, 470:3-19, 475:23-476:3; Plaintiff's Exhibit 41].

C. The Regents' *ad hoc* investigation.

On January 31, 2005, Professor Churchill stepped down as Chair of the Ethnic Studies Department. [Plaintiff's Exhibit 22]. The Regents called a February 3, 2005, "emergency" meeting to discuss Professor Churchill's future at the University. [Plaintiff's Exhibit 45, PDF pages 2-3; Trial Transcript, 3/10/09, p. 454:9-12]. Regent Patricia Hayes told the University's faculty newspaper, "A majority of the board wanted some sort of discipline for Churchill" because of his 9/11 essay. [Trial Transcript, 3/30/09, pp. 3642:5-11]. Regent Michael Carrigan told the New York Times, "He can be fired, but not tomorrow." [http://www.nytimes.com/2005/02/03/nyregion/03hamilton.htm; Trial Transcript, 3/27/09, pp. 3281:19-3284:6]. At the February 3 meeting, Regents Tom Lucero and Jerry Rutledge stated their desire to fire Professor Churchill for his 9/11 comments. [Trial Transcript, 3/10/2009, pp. 453:3-11, 454:2-8; 3/31/09, pp.

3927:17-3929:10]. Regent Patricia Hayes read from a letter from Governor Owens condemning Professor Churchill. [Transcript, 2/3/05, p. 11].

At this meeting, Chancellor DiStefano also condemned Professor Churchill's essay. [Trial Transcript, 3/10/09, p. 456:9-20]. The chancellor proposed to "launch and oversee a thorough examination of Professor Churchill's writings, speeches, tape recordings and other works. The purpose of this internal review is to determine whether Professor Churchill may have overstepped his bounds as a faculty member, showing cause for dismissal as outlined in the Laws of the Regents." [Transcript, 2/3/05, p. 5]. The Regents unanimously approved this proposal and authorized Chancellor DiStefano to form an *ad hoc* committee, with Dean Getches and Arts and Sciences Dean Todd Gleeson, to investigate Professor Churchill's speech. [Trial Transcript, 3/10/09, pp. 461:8-11, 463:12-465:1; Defendants' Exhibit 1b, PDF page 2].

This free speech investigation was conducted outside the University's established committee structure. [Defendants' Exhibit 1b, PDF page 2]. Professor Churchill was never formally notified, nor consulted by the *ad hoc* committee. [Trial Testimony, 3/23/09, p. 2524:7-11]. The chancellor and deans examined all of Professor Churchill's publications, including those previously reviewed in the

University's hiring, tenure and promotion processes. [Defendants' Exhibit 1b, PDF page 2].

On March 24, 2005, Chancellor DiStefano reported that the First Amendment protected all of Professor Churchill's writings and public speeches, including his essay concerning 9/11. [Trial Transcript, 3/10/09, p. 466:6-9]. Simultaneously, Chancellor DiStefano announced he was personally lodging a series of complaints against Professor Churchill for alleged research misconduct. [Trial Transcript, 3/10/09, p. 491:2-9].

D. The research investigation.

Professor Churchill spent the next two years defending various aspects of his scholarship against Chancellor DiStefano's charges. [Trial Transcript, 3/24/09, pp. 2625:20-2626:3]. The charges were initially presented to a subcommittee of an internal faculty body, the Standing Committee on Research Misconduct (SCRM). This subcommittee was chaired by law professor Miriam Wesson who, well before her appointment as chair, had expressed extreme bias against Professor Churchill. [Trial Transcript, 3/10/09, pp. 477:9-478:8; Plaintiff's Exhibit 52]. Ultimately, only one of the five subcommittee members recommended dismissal. [Defendants' Exhibit 1h, PDF page 104].

Another faculty body, the Privilege and Tenure (P&T) Committee, then held evidentiary hearings and reviewed the SCRM's conclusions. The P&T Committee dismissed some of the SCRM's findings, agreed with others, and sent a recommendation to University President Hank Brown. A majority of the P&T Committee recommended sanctions less severe than termination. [Defendants' Exhibit 21f, pp. 88-89]. President Brown did not participate in any of the evidentiary hearings in this case. Nonetheless, he unilaterally reinstated charges dismissed by the P&T Committee, overrode their recommendations, and advised the Regents to fire Professor Churchill. [Trial Transcript, 3/12/09, pp. 895:6-896:4].

G. The termination.

The Regents are elected officials with general supervisory authority over the University. *See* COLO. CONST. art. VIII, sec. 5. They must enact rules governing the University. § 23-20-112(1), C.R.S. (2011). Under these rules, which they term "laws," the Regents are the sole body authorized to terminate tenured faculty and may do so only for cause. In making termination decisions, the Regents receive recommendations from the University President, and may consider the results of faculty review processes, but are not bound by either. Board of Regents Laws, Art. 5.C. [Defendants' Exhibit 3a, PDF page 6].

In this case, the Regents did not independently hear evidence concerning the allegations of research misconduct. [*See, e.g.*, Trial Transcript, 3/31/09, pp. 4000:11-4001:25]. Professor Churchill's attorney was permitted to make a short presentation to them in a closed-door meeting, but could not present witnesses directly. [Defendants' Exhibit 21i, PDF page 10]. On July 24, 2007, the Regents, many of whom had already condemned Professor Churchill, voted 8-to-1 to terminate his employment. [Trial Transcript, 3/10/09, pp. 453:21-454:1].

H. Professor Churchill's lawsuit.

Professor Churchill initiated this action against the University and its Regents under 42 U.S.C. § 1983. Prior to trial, Professor Churchill dismissed his claims against the Regents in their individual capacities, and the University agreed to waive Eleventh Amendment immunity. The suit proceeded against the University and its Regents in their official capacities.

(1) The two claims.

At trial, Professor Churchill presented two claims for equitable and other relief. These were (a) that the University violated his First Amendment rights by launching an *ad hoc* investigation into the content of all of his public speech and writings (the free speech investigation claim); and (b) that the University fired him

not because of alleged research misconduct, but in retaliation for his protected speech in violation of the First Amendment (the pretextual dismissal claim).

(2) Directed verdict for the University on the free speech investigation claim.

At the conclusion of evidence, the trial court granted a directed verdict on Professor Churchill's free speech investigation claim and refused to allow the jury to decide it, because Professor Churchill did not lose his job or pay as a result of the investigation. [Trial Transcript, 3/31/09, p. 4025:4-16].

(3) Jury verdicts for Professor Churchill on the pretextual dismissal claim.

The court instructed the jury on the pretextual dismissal claim involving the formal investigation and submitted special interrogatories. The jury returned its verdict in favor of Professor Churchill and against the University of Colorado and the Regents in their official capacities (collectively, the "University") on the claim of retaliatory termination. The jury unanimously concluded that (a) Professor Churchill's "protected speech [was] a substantial or motivating factor in the decision to discharge" him from his tenured position at the University; (b) "the termination harm[ed] Plaintiff Churchill"; and (c) the University had not "shown by a preponderance of the evidence that [Professor Churchill] would have been

dismissed for other reasons" absent his protected speech activity. [Verdict Form, Q 1-3; Trial Transcript, 4/2/09, pp. 4160:16-4161:19].

In Professor Churchill's testimony to the jury, he specifically stated that he was not seeking money damages, but wanted his job back. [Trial Transcript, 3/24/09, p. 2626:4-11]. The jury awarded him nominal damages for harm incurred to date, leaving prospective equitable relief to be determined by the trial judge. [Trial Transcript, 4/2/09, p. 4162:5].

(4) Jury verdicts vacated.

The University then filed for post-trial relief, claiming absolute, quasi-judicial immunity from suit. The University also contested Professor Churchill's right to reinstatement despite the jury's verdict that Professor Churchill's termination violated the First Amendment. The trial judge vacated the jury verdicts on grounds of quasi-judicial immunity, and entered judgment in favor of the University. [Order, 7/7/09, pp. 9-26]. Despite having dismissed the case, the trial court entered an order containing numerous pages of dicta disapproving of the jury's verdict and stating that Professor Churchill should neither be reinstated nor receive front pay. [Order, 7/7/09, pp. 26-42].

(5) Court of Appeals.

Professor Churchill appealed, seeking (a) reversal of the trial court's directed verdict dismissing the free speech investigation claim, and (b) reversal of the trial court's order vacating the jury verdicts on grounds of quasi-judicial immunity, with directions to reinstate the jury's verdicts and reinstate Professor Churchill as a tenured professor at the University. The court of appeals affirmed. *Churchill v. University of Colorado*, __ P.3d __, 09CA1713 (Colo. App. Nov. 24, 2010).

SUMMARY OF ARGUMENT

42 U.S.C. § 1983 was enacted as section 1 of the Civil Rights Act of 1871, 17 Stat. 13 (1871), to ensure the protection of "the basic federal rights of individuals against incursions by state power." *Patsy v. Board of Regents of the State of Florida,* 457 U.S. 496, 503 (1982). It reflects Congress' concern that "state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights." *Id.* at 505.

Section 1983 protects state employees from retaliatory actions, including investigations, that would "deter a reasonable person from exercising his ... First Amendment rights." *Couch v. Bd. of Trs. of the Mem. Hosp.,* 587 F.3d 1223, 1238 (10th Cir. 2009). Investigations are independently actionable even when the employee is also terminated because claims for multiple adverse employment

actions are separate and independent. Although Professor Churchill was subsequently subjected to a retaliatory termination, the *ad hoc* investigation into his speech was independently actionable. He presented sufficient evidence to allow a jury to determine that this investigation would deter others from exercising their First Amendment rights.

Granting quasi-judicial immunity to the University and its Regents does not comport with federal law governing actions under 42 U.S.C. § 1983 because the process employed by the University to fire Professor Churchill did not meet the functional analysis test articulated in *Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985) and *Butz v. Economou*, 438 U.S. 478, 512 (1978). The University failed to demonstrate that absolute immunity would encourage the Regents to fulfill their lawful duties; that the termination process was adversarial and provided safeguards against unconstitutional conduct; that the Regents were insufficiently insulated from political influence; that decision was limited by precedent; or that unconstitutional action could be redressed on appeal. Moreover, quasi-judicial immunity shields officials from personal liability and is not available to entities sued in their official capacities.

The purpose of 42 U.S.C. § 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). It also "serve[s] as a deterrent against future constitutional deprivations." *Owen v. City of Independence, Mo.,* 445 U.S. 622, 651 (1980). Denial of equitable relief "reward[s] the employer for the very attitudes that precipitated his violation of the law, by giving him a choice of remedies." *Price v. Marshall Erdman & Associates, Inc.*, 966 F.2d 320, 325 (7th Cir. 1992). As such, it undermines both of the purposes of 42 U.S.C. § 1983.

ARGUMENT

I. A public university's investigation of a tenured professor's writings and public speech can constitute an adverse employment action under 42 U.S.C. § 1983 regardless of whether the professor is terminated.

A. Issue raised and ruled on.

At the close of evidence, the University moved for a directed verdict as to Professor Churchill's first claim for relief, arguing that its investigation into his writings and public speech was not an adverse employment action for purposes of a First Amendment retaliation claim. [Trial Transcript, 3/31/09, p. 4009:3-19]. Professor Churchill responded that this was a question for the jury to decide. [Trial Transcript, 3/31/09, pp. 4015:25-4016:6, 4016:13-4017:19]. The trial court held that as a matter of law the *ad hoc* investigation was not "an adverse employment

action that gives rise to a claim of First Amendment retaliation." [Trial Transcript, 3/31/09, p. 4025:4-7]. In support of this conclusion, it stated that Professor Churchill did not lose his job or his pay. [Trial Transcript, 3/31/09, p. 4025:8-15]. The court of appeals affirmed, stating, "Before an employment action can be considered adverse, it must materially alter the terms or conditions of employment." *Slip Op.* at 46.

B. Standard of review.

An appellate court reviews a directed verdict de novo. *Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry*, P.C., 186 P.3d 80, 82 (Colo. App. 2008). In evaluating a directed verdict, the court must view the evidence in the light most favorable to the nonmoving party and determine whether a reasonable jury could have found in favor of the nonmoving party. *Id.* An appellate court's application of an erroneous legal standard to the review of a directed verdict is also to be reviewed de novo. *See People v. Pacheco*, 175 P.3d 91, 94 (Colo. 2006).

C. Discussion.

(1) An adverse employment action is one that would dissuade a reasonable employee from engaging in protected conduct.

First Amendment retaliation claims under section 1983 require that "the public employer have taken some adverse employment action against the

employee." *Couch,* 587 F.3d at 1235-36. In 2006, the Supreme Court held that an adverse employment action under Title VII is one that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006). Since then, federal courts have consistently applied this standard to First Amendment retaliation claims brought under section 1983.

Thus, an adverse employment action is one in which the employer's "'specific actions would deter a reasonable person from exercising his ... First Amendment rights.'" *Couch*, 587 F.3d at 1238 (also noting that the test in *Burlington Northern* is "consonant with our First Amendment employment retaliation cases"); *see also Dillon v. Morano*, 497 F.3d 247, 254 (2nd Cir. 2007)(test is whether the alleged acts "would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights").

"[E]ven minor forms of retaliation can support a First Amendment claim, for they may have just as much of a chilling effect on speech as more drastic measures." *Smith v. Fruin*, 28 F.3d 646, 649 n.3 (7th Cir. 1994). Actions that "humiliated [the employee] before the assemblage of his professional associates and peers from across the nation, and made it more difficult for him to procure

future employment" have been found adverse. *Passer v. American Chemical Society*, 935 F.2d 322, 331 (D.C. Cir. 1991).

(2) Investigations can constitute adverse employment actions, regardless of whether they result in termination.

Numerous federal courts have concluded that investigations can constitute adverse employment actions. *See, e.g., Mullins v. City of New York*, 626 F.3d 47, 55 (2nd Cir. 2010)(internal investigation with possibility of termination can constitute adverse employment action); *Billings v. Town of Grafton*, 515 F.3d 39, 54-55 (1st Cir. 2008)(formal investigation and reprimand including threat of discipline can constitute adverse employment action). The employer's "conduct need not relate to the terms or conditions of employment to give rise to a retaliation claim." *Id.* at 54.

A disciplinary investigation may constitute an adverse employment action despite the defendant's claims that the plaintiff suffered no ill effects "during the pendency of the investigation." *Rattigan v. Holder*, 604 F.Supp.2d 33, 52 (D.D.C. 2009). When an investigation objectively stigmatizes an employee, or harms his reputation or future employment prospects, it constitutes an adverse employment action. *Id.* at 54.

After erroneously concluding that the investigation into Professor Churchill's speech could not have been an adverse employment action, the court of appeals stated that his first claim for relief also could have been dismissed "because it was duplicative of the second claim for relief which alleged retaliation by termination." *Slip Op.* at 62. This, too, was erroneous because when retaliation takes the form of multiple adverse employment actions, the claims are separate and independent. Termination following an investigation provides the basis for a separate claim. *See, e.g., Karpel v. Inova Health Sys. Servs.*, 134 F.3d 1222, 1229 (4th Cir. 1998)(assessing transfer, investigation, and termination as independent employment actions); *Sharpe v. Utica Mut. Ins.* Co., 756 F.Supp.2d 230, 245 (N.D.N.Y. 2010)(actions including investigation, discipline, reviews, and probation could be found "all to be materially adverse").

This case illustrates why such actions are independent and separate. The trial court granted the Regents absolute immunity on the wrongful discharge claim. For reasons discussed below, the Regents' termination of Professor Churchill does not meet the Supreme Court's test for quasi-judicial action. Nonetheless, *had* the Regents been acting in a quasi-judicial capacity, subsuming Professor Churchill's free speech investigation claim into his pretextual dismissal claim would preclude his investigation claim from being heard at all. Yet the *ad hoc* speech investigation

bears none of the hallmarks of quasi-judicial action. *See Cleavinger,* 474 U.S. at 202 (citing *Butz*, 438 U.S. at 512)(listing factors characteristic of quasi-judicial action). If state officials can avoid liability for retaliatory investigations by wrongfully terminating employees, they will have incentive to compound the constitutional violation. This is directly contrary to the deterrent purpose of section 1983.

(3) The jury had ample evidence to determine that the University's investigation into Professor Churchill's writings and public speech was an adverse employment action.

Professor Churchill did not need to establish that he was deterred from exercising his First Amendment rights, but only that others might have been. *Colombo v. O'Connell*, 310 F.3d 115, 117 (2nd Cir. 2002)(plaintiff "need not show that she was silenced ... the First Amendment protects the right to free speech so far as to prohibit state action that merely has a chilling effect on speech"); *Rattigan,* 604 F.Supp.2d at 52 ("[W]hether an action is 'materially adverse' is determined by whether it holds a deterrent prospect of harm, and not ... whether any effects are felt in the present.").

The evidence established that the purpose of the *ad hoc* investigation was to review all of Professor Churchill's writings and public speeches to find grounds for termination, and that this purpose was made public. Chancellor DiStefano testified

that his committee was trying to find "cause for dismissal" based upon the content of Professor Churchill's speech, and that the Regents unanimously approved this purpose. [Trial Transcript, 3/10/09, pp. 459:5-460:9, 461:8-15]. The P&T Committee found that the existence and purpose of the *ad hoc* investigation were publicly known. [Defendants' Exhibit 21f, p. 4].

This was sufficient to allow a jury to find that the free speech investigation constituted an adverse employment action. *See Williams v. Hansen*, 326 F.3d 569, 585 n.1 (4th Cir. 2003)(King, J., dissenting)(listing cases finding that an investigation initiated for an illegal purpose is actionable); *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992)("[T]he threat of discipline implicit in [the university president]'s actions was sufficient to create a judicially cognizable chilling effect on Professor Levin's First Amendment rights.").

The evidence, viewed in the light most favorable to Professor Churchill, also showed that the investigation injured Professor Churchill's professional reputation, affected his personal life, and had a chilling effect on other faculty members. While the investigation was being conducted, Regent Stephen Bosley publicly characterized Professor Churchill as "trying to poison the campuses with anti-American and anti-capitalist rhetoric." [Trial Transcript, 3/31/09, pp. 3841:22-3842:6]. Regent Peter Steinhauer described Professor Churchill as "the poster boy

for abolishing tenure." [Trial Transcript, 3/30/09, p. 3715:13-15].

As a consequence of the investigation, Professor Churchill missed deadlines, defaulted on book contracts, and had speaking engagements canceled. [Trial Transcript, 3/24/09, p. 2628:8-25; 3/25/09, pp. 2880:18-2881:7]. He was denied sabbatical and credit for "banked" courses, and was prevented from receiving a teaching award. [Defendants' Exhibit 14-1, pp. 24-26]. The investigation took an emotional toll on Professor Churchill. [Trial Transcript, 3/25/09, pp. 2881:8-2882:2].

Evidence of the investigation's chilling effect on others was introduced. Professor Churchill testified about University officials' attempt to "seal off a whole line of thinking and critical inquiry," scaring a number of junior scholars into saying, "If I'm going to have a career, I can't say things like this. I can't do things like this." [Trial Transcript, 3/24/09, p. 2632:14-20]. Professor Natsu Saito testified that faculty members who had known Professor Churchill for decades were abandoning him because they were afraid. [Trial Transcript, 3/25/09, pp. 2875:9-2876:5]. She described feeling "equally vulnerable to attack" and, shortly after the speech investigation, resigned from her tenured position at the University. [Trial Transcript, 3/25/09, p. 2878:1-22; Plaintiff's Exhibit 242].

Retaliatory investigations intended to find cause for dismissal are likely to

spawn additional investigations, thus increasing their chilling effect. The P&T Committee found that "but for his exercise of his First Amendment rights [and the investigation that followed], Professor Churchill would not have been subjected to the Research Misconduct and Enforcement Process or have received the Notice of Intent to Dismiss." [Defendants' Exhibit 21f, PDF page 18].

A jury could reasonably conclude that any or all of these consequences would have a deterrent effect. *See Rutan v. Republican Party*, 497 U.S. 62, 75 (1990)("[D]eprivations less harsh than dismissal [can] press state employees ... to conform their beliefs and associations to some state-selected orthodoxy."). For all of these reasons, the dismissal of Professor Churchill's first claim for relief should be reversed, and the case remanded for a new trial on that claim.

II. The granting of quasi-judicial immunity to the University and its Regents for the termination of Professor Churchill does not comport with federal law for actions brought under 42 U.S.C. § 1983.

A. Issue raised and ruled on.

After the jury returned its verdict in favor of Professor Churchill on his pretextual dismissal claim, the University moved for judgment as a matter of law, claiming the Regents had quasi-judicial immunity when they terminated Professor Churchill's employment. [Defendant's Motion for Judgment as a Matter of Law].

After the parties briefed the issue of quasi-judicial immunity, the trial court entered an order vacating the jury's verdict on that ground. [Order, 7/7/09, p. 26].

B. Standard of review.

A motion for judgment as a matter of law presents purely legal arguments. Therefore an appellate court reviews a trial court's disposition of such a motion de novo. *See Durango School District v. Thorpe*, 614 P.2d 880, 884-85 (Colo. 1980); *Manzanares v. Higdon*, 575 F.3d 1135, 1142 (10th Cir. 2009).

C. Discussion.

(1) State officials are rarely granted quasi-judicial immunity because it undermines the purposes of 42 U.S.C. § 1983.

Absolute immunity is the exception, not the norm. *Higgs v. District Court*, 713 P.2d 840, 852 (Colo. 1985); *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993). The Supreme Court has repeatedly emphasized that qualified, rather than absolute, immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Burns v. Reed*, 500 U.S. 478, 494-95 (1991). In this case the trial court did not consider whether qualified immunity would suffice before granting the University absolute quasi-judicial immunity.

"The purpose of §1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). Both of these purposes are undermined when state officials are granted absolute immunity from suit.

Section 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). Immunities are recognized in section 1983 actions only where "firmly rooted" in the common law or required by public policy. *See Richardson v. McKnight*, 521 U.S. 399, 404 (1997). Even when "a common-law tradition of absolute immunity for a given function" exists, the Court considers "whether §1983's history or purposes nonetheless counsel against recognizing the same immunity in §1983 actions." *Buckley*, 509 U.S. at 269. Public policy concerns are relevant but do not suffice. *Tower v. Glover*, 467 U.S. 914, 922-23 (1984)(denying public defenders quasi-judicial immunity because the Court does not have "license to establish immunities from §1983 actions in the interests of what we judge to be sound public policy").

There is no firmly rooted history in the common law that supports the Regents' claim of absolute immunity. Quasi-judicial immunity is not required by public policy in this case because it would undermine the purpose of section 1983

to provide relief for persons such as Professor Churchill who have been deprived of federally guaranteed rights by state actors. Further, it would undermine the deterrent function of section 1983.

The University has the burden of establishing that absolute immunity is necessary for performing the functions at issue. *See Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 (1993); *Burns*, 500 U.S. at 486. Even had the jury not determined that Professor Churchill's right to freedom of speech had been violated, Professor Churchill's allegations should have been accepted as true for the purpose of determining immunity. *See Kalina v. Fletcher*, 522 U.S. 118, 122 (1997).

(2) Quasi-judicial immunity is not available to the University or its Regents in their official capacities.

Quasi-judicial immunity is intended to ensure that the threat of personal liability does not deter governmental officials from exercising independent judgment while fulfilling their lawful duties in a principled manner. *See Wood v. Strickland*, 420 U.S. 308, 319-20 (1975). These considerations are "simply not implicated when the damages award comes not from the individual's pocket, but from the public treasury." *Owen*, 445 U.S. at 654.

Prior to trial, Professor Churchill dismissed his claims against the Regents in their individual capacities, stipulating that the University retained such defenses as

would have been available to the Regents. In return, the University waived Eleventh Amendment immunity. Thus, the suit was litigated against the University and its Regents in their official capacities.

A suit against government officers in their official capacities "is, in all respects, other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Furthermore, "[t]he only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment." *Id.* at 167.

Because "[t]he justifications for immunizing officials from personal liability have little force when suit is brought against the governmental entity itself," *Owen,* 445 U.S. at 653, personal immunities are not available in official-capacity actions. *Graham*, 473 U.S. at 167. *See also Board of County Comm'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 677n* (1996); *VanHorn v. Oelschlager*, 502 F.3d 775, 778-779 (8th Cir. 2007)(citing additional cases from Third, Fifth, and Sixth Circuits). Contrary to the trial court's holding, Professor Churchill's stipulation did not confer—and could not have conferred—upon the University, *qua* entity, a personal defense shielding it from official liability. *See Patsy,* 457 U.S. at 530 n.17 (Powell, J., dissenting)("[T]he State—or an agency of the State—

cannot act other than in its official state capacity."). The trial court's verdict should be reversed on this ground.

(3) Quasi-judicial immunity is properly analyzed pursuant to the factors identified by the U.S. Supreme Court in *Cleavinger v. Saxner.*

In *Forrester v. White* the Supreme Court noted "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." 484 U.S. 219, 223 (1988)(denying a judge absolute immunity for firing a probation officer). To "avoid[] unnecessarily extending the scope" of absolute immunity, the functions lawfully entrusted to particular officials must be identified, and the effect of exposure to personal liability on those functions evaluated. *Id.* at 224. Thus, if this Court determines that the University has individual capacity defenses available to it in an official capacity action, a functional analysis applies.

The Supreme Court has identified six non-exclusive factors characteristic of quasi-judicial functions:

> (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 (citing *Butz*, 438 U.S. at 512). These factors provide a benchmark for assessing whether absolute immunity should be extended to non-judicial officials because it will enhance their independence and impartiality while ensuring alternative protection of constitutional rights. *See Forrester*, 484 U.S. at 226-227.

In *Cleavinger* the Supreme Court denied quasi-judicial immunity to a prison review board, analogizing its functions to those of a school board denied quasi-judicial immunity in *Wood v. Strickland*, *supra*. *See Cleavinger*, 474 U.S. at 204-05. In *Wood*, the Court held that increasing school officials' discretion did not "warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." 420 U.S. at 320. *See also Harris v. Victoria Independent School Dist.*, 168 F.3d 216, 224-25 (5th Cir. 1999)(denying quasi-judicial immunity to school trustees' employment decision); *Stewart v. Baldwin County Board of Education*, 908 F.2d 1499, 1508 (11th Cir. 1990)(denying quasi-judicial immunity to school board members discharging employee).

While the United States Supreme Court has not explicitly extended *Wood*'s holding to universities, university officials are "unlikely" to have absolute immunity "given the Supreme Court's refusal to grant such immunity to members

of school boards that adjudicate violations of school disciplinary regulations." *Osteen v. Henley*, 13 F.3d 221, 224 (7th Cir. 1993).

The *Cleavinger* formulation has been "follow[ed] carefully" by federal courts in assessing claims of quasi-judicial immunity. *Moore v. Gunnison Valley Hosp.*, 310 F.3d 1315, 1317 (10th Cir. 2002). *See also Harris,* 168 F.3d at 224 (distinguishing case that "analyzed the procedure using different factors from the federal rule" and failed to apply *Cleavinger*); *Mee v. Ortega*, 967 F.2d 423, 428 (10th Cir. 1992)("Consideration of the factors outlined in *Cleavinger* necessarily informs our decision"); *Darnell v. Ford*, 903 F.2d 556, 560 (8th Cir. 1990)("Whether state … officials receive absolute immunity … is controlled by *Cleavinger.*").

The University need not prove that each *Cleavinger* factor favors immunity, but that the balance of all the factors does. *See Russell v. Town of Buena Vista, Colo.*, No. 10-cv-862-JLK-KMT, 2011 WL 288453 at *19-20 (D. Colo. Jan. 27, 2011)(also noting that the second and third factors are most important and may tip the balance). For the reasons summarized below, the University's termination of Professor Churchill fails to overcome the presumption that qualified immunity is sufficient.

(4) The University of Colorado is not entitled to quasi-judicial immunity under the *Cleavinger* factors.

(a) Performance of functions without harassment or intimidation

If judges were individually liable for erroneous decisions, they might avoid making principled decisions and "[t]he resulting timidity ... would manifestly detract from independent and impartial adjudication." *Forrester*, 484 U.S. at 226-227. Similarly, the threat of personal liability should not deter other public officials from properly fulfilling their responsibilities.

In this case, the University presented no evidence that its Regents would be unlikely to fulfill their functions in an independent and impartial manner if shielded only by qualified rather than absolute immunity. The Regents, sued in their official capacity, faced no threat of individual liability. The University raised its claim of quasi-judicial immunity only after a four-week trial, demonstrating it was not concerned about going to trial. Further, the court of appeals explicitly concluded that "[a]s an independent and elected board, the Regents are not part of the executive or legislative branches, which assures that they can conduct their functions without harassment or intimidation." *Slip Op.* at 23. Thus, this factor clearly weighs against immunity.

(b) Safeguards against unconstitutional conduct

Procedural safeguards are necessary to prevent unjust results when non-judicial officials receive absolute immunity. The University relies on the "procedure" accorded Professor Churchill before his termination, focusing on the two years he spent rebutting research misconduct charges before the University's SCRM and P&T committees. The question, however, is whether these procedures "reduce[d] the need for private damages actions as a means of controlling unconstitutional conduct." *Cleavinger,* 474 U.S. at 202. The record shows that they did not.

(i) The procedures were used pretextually, not as safeguards.

Professor Churchill claimed, and the jury agreed, that the Regents fired him for speech protected by the First Amendment, and that they would not have fired him absent that speech. [Trial Transcript, 4/2/09, pp. 4160:23-4161:19; Jury Verdicts 1, 3]. Thus, the SCRM and P&T procedures upon which the University relies were unrelated to the actual reasons for Professor Churchill's termination. These procedures merely provided the Regents with a pretext for engaging in unconstitutional conduct. Thus, they do not reduce the need for litigation to

control unconstitutional conduct, but illustrate why such litigation may be necessary.

(ii) The procedures were not binding upon the decisionmakers.

The University's procedures resulted in the recommendation of the P&T Committee majority *not* to fire Professor Churchill. That decision was overridden by the University president and disregarded by the Regents. Investigative procedures that can simply be ignored do not safeguard constitutional rights.

The only relevant procedures were those employed by the Regents. *See Moore*, 310 F.3d at 1317-18 (separately considering procedural safeguards provided at distinct stages of the decision-making process because "[i]n analyzing this factor, it is important to consider the appropriate scope of the inquiry"); *see also Krueger v. Lyng*, 4 F.3d 653, 656-57 (8th Cir. 1993)(denying absolute immunity to state officials who functioned as a "discharging authority" rather than a review board).

In *Butz*, federal hearing examiners received quasi-judicial immunity because of the extensive safeguards provided by the Administrative Procedure Act. 438 U.S. at 513. The Regents provide no comparable process. From the initial media furor concerning Professor Churchill's essay until their vote to fire him four years later, the Regents consulted continuously with University officials and engaged in

numerous other activities inconsistent with their duties as independent decisionmakers. *See id.*

Professor Churchill's only direct contact with the Regents occurred through his attorney in one closed-door meeting for which there is no record. At best, the Regents' functions were equivalent to those of the school board members in *Wood* who were to "'judge whether there have been violations of school regulations and, if so, the appropriate sanctions for the violations.'" *Cleavinger,* 474 U.S. at 204 (quoting *Wood*, 420 U.S. at 319).

(iii) The procedures were neither independent nor unbiased.

The procedures utilized to fire Professor Churchill were neither independent nor unbiased. Like the prison disciplinary committee in *Cleavinger*, internal University committees heard testimony and received documentary evidence, and evaluated the credibility and weight to be given that evidence. *See* 474 U.S. at 203. That was not sufficient to ensure independence in *Cleavinger* nor is it sufficient in this case.

Like the *Cleavinger* committee, the University's committees were not composed of independent, professional hearing officers, but composed primarily of institutional employees directly subordinate to the administrators who reviewed their decisions. As a result they were "under obvious pressure to resolve a

disciplinary dispute in favor of the institution." *Id.* at 204. *See also Moore,* 310 F.3d at 1318 (review committee composed of institutional employees "lack[ed] the kind of independence typical of judicial bodies"); *Purisch v. Tennessee Technological University*, 76 F.3d 1414, 1421-22 (6th Cir. 1996)(university officials on grievance committee lacked sufficient independence).

Moreover, the University failed to ensure against bias. Actors at all levels of the process expressed personal biases against Professor Churchill before rendering their decisions. Prior to her appointment as chair of the SCRM investigative committee, law professor Miriam Wesson had circulated an e-mail in which she compared Professor Churchill to "male celebrity wrongdoers" like OJ Simpson, Bill Clinton and Michael Jackson. President Hank Brown refused Professor Churchill's request that he recuse himself based on his conflicts of interest. [Trial Transcript, 3/12/09, pp. 944:24-945:25]. Most significantly, there were no safeguards to ensure that the numerous Regents who had expressed bias were disqualified from voting to fire Professor Churchill.

(c) Insulation from political influence.

The Regents are elected political officials. This does not necessarily disqualify them from performing quasi-judicial functions, but is a significant consideration. *See Wood,* 420 U.S. at 320 (denying elected board members

immunity); *Harris*, 168 F.3d at 224 ("[T]he school board members were elected, illustrating that they are not insulated from political forces as are appointed government officials."); *Brown v. Griesenauer*, 970 F.2d 431, 439 (8th Cir. 1992)("[E]lected officials … are not insulated from political influence.").

This factor ensures that officials exercise independent judgment, free from outside pressure. *See Butz*, 438 U.S. at 513. In this case, the Regents were under intense political pressure to fire Professor Churchill and acted in response. For example, Regent Bosley testified:

> Q. [D]oes it concern you when your constituents are saying that they're not going to support the University of Colorado [because of Professor Churchill's statements]?
>
> A. Absolutely.
>
> Q. Does it concern you when [] donors are saying, we're not going to support the university?
>
> A. Yes.
>
> Q. Does it concern you when you hear from legislators that they might not fund the university as well as they had previously because of their disgust over Professor Churchill?
>
> A. Yes.

[Trial Transcript, 3/31/09, pp. 3840:12-24].

Senator and former Regent Gail Schwartz testified:

> [W]e're the beneficiary of tremendous generosity from parents, alumni, national donors, businesses, institutions … But unfortunately, all of that was at stake as people would communicate their dissatisfaction with the issues at hand and threatened to withhold support from the institution as well.

[Trial Transcript, 3/25/09, p. 3066:18-25]. *See also* testimony of Regents Patricia Hayes [Trial Transcript, 3/30/09, pp. 3614:4-3616:13]; Cindy Carlisle [Trial Transcript, 3/30/09, p. 3735:5-20]; and Michael Carrigan [Trial Transcript, 3/26/09, pp. 3159:25-3160:23. Such political pressures prevented the Regents from functioning as independent adjudicators.

(d) Importance of precedent.

The rule of law requires judicial and quasi-judicial decisions to be made in accordance with extant laws and precedent. *Moore*, 310 F.3d at 1318; *see also Butz,* 438 U.S. at 512 (precedent serves as a "check[] on malicious action by judges"); *Keystone Redevelopment Partners, LLC v. Decker,* 631 F.3d 89, 98-99 (3rd Cir. 2011)(*Cleavinger* requires decisionmakers to be constrained by law); *Mee,* 967 F.2d at 429 (denying parole officers quasi-judicial immunity because they were not bound by legal precedent).

Chancellor DiStefano testified that the Regents' February 2005 "emergency meeting" was unprecedented. [Trial Transcript, 3/10/09, p. 454:13-18]. When the chancellor launched the formal investigation into his own allegations of research

misconduct, Professor Churchill repeatedly asked to be informed of the standards against which his scholarship would be assessed, but this information was never provided. [Trial Transcript, 3/24/09, pp. 2615:20-2618:1]. The University produced no evidence of precedent established in previous cases of the termination of tenured professors, and no evidence of any statutes or binding legal precedent constraining the Regents' discretion.

(e) Adversary nature of the process.

Adversarial process "enhance[s] the reliability of information and the impartiality of the decisionmaking process," resulting in "a less pressing need for individual suits to correct constitutional error." *Butz*, 438 U.S. at 512.

The decision to fire Professor Churchill was made outside the bounds of adversarial process. Any adversarial features of the faculty committee processes were rendered meaningless by the fact that the president and the Regents could—and did—override their conclusions. *See Moore*, 310 F.3d at 1318 (adversarial proceedings are irrelevant if the decision was not the result of those proceedings). The Regents only allowed Professor Churchill's attorney to summarily rebut the research misconduct allegations; he had no opportunity to challenge the real basis for their action, i.e., retaliation for his First Amendment-protected speech. This process had none of the hallmarks of adversarial process, in which parties'

assertions are "contested by their adversaries in open court," witnesses face cross-examination and the penalty of perjury, and decisionmakers "are carefully screened to remove all possibility of bias." *Butz*, 438 U.S. at 512.

(f) Correctability of error on appeal.

The final *Cleavinger* factor assesses whether the "self-correcting" features of judicial process are maintained. *Mitchell v. Forsyth*, 472 U.S. 511, 522-23 (1985). "A formal appellate procedure is probably the single most court-like feature a governmental body can have. Many of the safeguards [required of quasi-judicial action] exist largely to facilitate appellate review." *Dotzel v. Ashbridge*, 438 F.3d 320, 327 (3rd Cir. 2006).

Only the Regents are empowered to terminate tenured professors, and no review of their decision is available within the University system. The University contends that C.R.C.P. 106 provides sufficient appellate review. However, Rule 106 grants limited procedural rights, and no substantive avenue to challenge immunity or seek damages. *In re People ex rel. B.C.*, 981 P.2d 145, 149 n.4 (Colo. 1999). The decision of a quasi-judicial entity may be reversed only if there is *no* competent evidence to support it—i.e., if it is arbitrary and capricious. *See Widder v. Durango School Dist.*, 85 P.3d 518, 526-527 (Colo. 2004).

States may not impose procedural rules that restrict substantive federal rights in a section 1983 lawsuit. *See Felder v. Casey*, 487 U.S. 131, 139 (1988). This Court has recognized that although challenges to quasi-judicial action are usually limited by Rule 106(b):

> The analysis shifts[] when a complainant asserts a claim for money damages under §1983 because claims under §1983 exist as a "uniquely federal remedy" that "is to be accorded a sweep as broad as its language." *Felder v. Casey,* 487 U.S. 131, 139 [(1988)]. The United States Supreme Court has held that when a state places procedural barriers that deny or limit the remedy available under §1983, those barriers must give way or risk being preempted. *Felder,* 487 U.S. at 144-45.

Board of County Commissioners of Douglas County v. Sundheim, 926 P.2d 545, 548 (Colo. 1996). *See also State Bd. of Chiropractic Examiners v. Stjernholm*, 935 P.2d 959, 967 (Colo. 1997); *DiBlasio v. Novello*, 344 F.3d 292, 299 (2nd Cir. 2003)(finding a New York civil practice rule similar to C.R.C.P. 106 inadequate for "determining whether absolute immunity is appropriate" in a §1983 action).

For all of these reasons, granting quasi-judicial immunity to the University of Colorado and its Regents does not comport with federal law governing actions under 42 U.S.C. § 1983.

III. The denial of equitable remedies for termination in violation of the First Amendment undermines the purposes of 42 U.S.C. § 1983.

A. Issue raised and ruled on.

After the jury returned its verdict in favor of Professor Churchill, Professor Churchill filed a motion for reinstatement of his employment in which he argued, in part, that reinstatement is the preferred remedy in a wrongful discharge case brought under section 1983 and that reinstatement would most effectively redress the chilling effect to free speech caused by his wrongful termination. [Motion for Reinstatement of Employment, pp. 3-5]. The University filed a brief in opposition to the motion for reinstatement. [Brief in Opposition to Motion for Reinstatement].

After an evidentiary hearing, the trial court denied Professor Churchill's motion. [Order, 7/7/09]. It held that because the Regents were protected by quasi-judicial immunity, prospective equitable relief was precluded by an amendment to section 1983 passed by Congress in 1996. [Order, 7/7/09, pp. 23-25]. Further, the trial court ruled that the jury's award of nominal damages precluded an order of reinstatement and that, even if the jury had awarded actual damages, reinstatement would not be appropriate. [Order, pp. 28-31 and pp. 31-40]. It also ruled that front

pay was neither appropriate nor required as an alternative to reinstatement. [Order, pp. 41-42].

B. Standard of review.

The decision to order reinstatement or award front pay in a wrongful discharge case is a matter for the discretion of the trial court. *La Plata Med. Ctr. Assoc., Ltd. v. United Bank of Durango*, 857 P.2d 410, 420 (Colo. 1993); *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 997 (10th Cir. 1994). An appellate court reviews that decision for an abuse of discretion. *Id.*; *La Plata*, 857 P.2d at 420.

A court abuses its discretion when it applies the wrong legal standard and does not consider all the relevant factors. *Spann v.* People, 193 Colo. 53, 55-56, 561 P.2d 1268, 1269-70 (Colo. 1977)("Trial judges may exercise judicial discretion only according to law" and must "consider all the relevant information"). Whether the appropriate legal standards were applied by the trial court in denying reinstatement or front pay is a question of law subject to de novo review. Whether prospective equitable remedies were precluded by the 1996 amendment to section 1983 is also a question of law to be reviewed de novo. *Howlett v. Rose*, 496 U.S. 356, 366 (1990)(adequacy of state ground for precluding section 1983 claim reviewed de novo).

C. Discussion.

(1) Congress intended 42 U.S.C. § 1983 to provide a remedy for constitutional violations and to deter unconstitutional conduct by state officials.

The rule of law requires remedies for violations of vested legal rights. *See Marbury v. Madison*, 5 U.S. 137, 163 (1803). Congress passed the Civil Rights Act of 1871 to provide such a remedy and to ensure that state officials could not violate the federal Constitution with impunity. Section 1983 is intended to "give a remedy to parties deprived of constitutional rights," *Monroe*, 365 U.S. at 172, and "to serve as a deterrent against future constitutional deprivations." *Owen,* 445 U.S. at 651.

After a constitutional violation is proven the trial court is responsible for making the injured party whole. *Williams v. Valentec Kisco, Inc.,* 964 F.2d 723, 730 (8th Cir. 1992). He "'is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975)(quoting *Wicker v. Hoppock*, 73 U.S. 94, 99 (1867)).

To accomplish this purpose, "Section 1983 in effect authorizes the federal courts to protect rights 'secured by the Constitution and laws' by invoking any of the remedies known to the arsenal of the law." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 231 (1970)(Brennan, J., concurring in part and dissenting in part). *See*

also Bell v. Hood, 327 U.S. 678, 684 (1946)(where legal rights are violated and there is a statutory right to sue, "courts may use any available remedy to make good the wrong done"); *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)("Congress plainly authorized the federal courts to issue injunctions in §1983 actions, by expressly authorizing a 'suit in equity' as one of the means of redress."). The exclusion of equitable remedies from the "arsenal of law" undermines the purposes of 42 U.S.C. § 1983.

(2) Equitable remedies are not precluded by the 1996 amendments to 42 U.S.C. § 1983.

In 1996 Congress amended §1983 to preclude injunctive relief in actions brought against a "judicial officer for an act or omission taken in such officer's judicial capacity ... unless a declaratory decree was violated or declaratory relief was unavailable." Federal Courts Improvement Act of 1996, 110 Stat. 3847, 3853 (1996). "Judicial officer" is not defined, but "the legislative history of the amendment refers parenthetically to 'judicial officers' as '(justices, judges and magistrates).'" *Hili v. Sciarrotta*, 140 F.3d 210, 215 (2nd Cir. 1998)(quoting S.Rep. No. 104-366, at 37 (1996)). The Supreme Court has not determined whether this provision extends to state officials acting in quasi-judicial capacities. *See Phillips v. Conrad*, No. 10-40085-FDS, 2011 WL 309677 at *8 (D. Mass, Jan. 28, 2011).

This Court need not resolve this issue because the Regents were not acting in a quasi-judicial capacity when they fired Professor Churchill. Moreover, absolute immunity is available only to officials in their personal capacity. *See Graham*, 473 U.S. at 167. There is no evidence that Congress intended to preclude the availability equitable relief from governmental entities or individuals sued in their official capacity. *See Owen*, 445 U.S. at 653 n.37 ("[D]ifferent considerations come into play when governmental rather than personal liability is threatened."); *Wood*, 420 U.S. at 314 n.6 ("[I]mmunity from damages does not ordinarily bar equitable relief.").

Furthermore, this Court has held that even in cases of quasi-judicial action, "official immunity from damages does not equate to immunity from injunctive relief under section 1983." *Stjernholm*, 935 P.2d at 969. Several federal courts agree that the 1996 amendment does not bar claims for equitable relief. *See, e.g., Shmueli v. City of New York,* 424 F.3d 231, 239 (2nd Cir. 2005); *Adibi v. California State Bd. of Pharmacy*, 393 F.Supp.2d 999, 1006 (N.D. Cal. 2005). *See also Simmons v. Fabian*, 743 N.W.2d 281 (Minn. App. 2007)(amendment does not apply to officials acting in quasi-judicial capacity).

(3) Nominal damage awards do not preclude equitable relief.

The jury found that the University violated the First Amendment by terminating Professor Churchill and that Professor Churchill was harmed by the termination. [Trial Transcript, 4/2/09, pp. 4160:23-4161:12]. Despite this explicit finding of harm by the jury, the trial court refused to grant Professor Churchill reinstatement or front pay on the grounds that the jury's nominal damages award "implicitly" meant Professor Churchill had suffered no actual damages. [Order, 7/7/09, p. 31 (reinstatement), p. 41 (front pay)]. In considering equitable relief, a jury's findings of fact may not be disregarded, even when the elements of the claims are distinct from the legal issues decided by the jury. *See Ag. Svcs. of America, Inc. v. Nielsen*, 231 F.3d 726, 732 (10th Cir. 2000). Even if Professor Churchill had suffered no actual damages, equitable relief would not be precluded. *See Fyfe v. Curlee*, 902 F.2d 401, 406 (5th Cir. 1990)(awarding nominal damages and remanding on question of reinstatement). Equitable relief is not contingent upon proof of actual damages or the granting of monetary relief. *Reiter v. MTA New York City Transit Authority*, 457 F.3d 224, 230 (2nd Cir. 2006), *cert. denied*, 549 U.S. 1211 (2007). "When a person loses his job, it is at best disingenuous to say that money damages can suffice to make that person whole." *Allen v. Autauga County Bd. of Educ.*, 685 F.2d 1302, 1306 (11th Cir. 1982), *accord Reiter*, 457

F.3d at 230. "Nominal damage awards serve essentially the same function as declaratory judgments." *U.A.R.C. v. Salt Lake City Corp.*, 371 F.3d 1248, 1265 (10th Cir. 2002)(McConnell, J., concurring).

In this case the jury was only asked to consider damages Professor Churchill "has had to the present time." [Motion for Reinstatement, Exhibit One, Jury Instruction No. 8]. Reinstatement and front pay are equitable remedies for future loss of earnings. *See Feldman v. Phila. Hous. Auth.*, 43 F.3d 823, 831 (3rd Cir. 1994)(reinstatement is a remedy for future loss of earnings, not past damages). Where reinstatement is not feasible, a plaintiff is entitled to front pay. *Acrey v. American Sheep Industry Assoc.*, 981 F.2d 1569, 1576 (10th Cir. 1992); *see also McInnis v. Fairfield Cmtys., Inc.*, 458 F.3d 1129, 1145 (10th Cir. 2006). The award of prospective remedies must be based on section 1983's goals of making the plaintiff whole and deterring unconstitutional conduct, not on whether past damages were awarded.

(4) Equitable remedies are essential to the purposes of 42 U.S.C. § 1983.

"The purpose of §1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt*, 504 U.S. at 161. Equitable relief is essential to both of these goals, particularly in wrongful discharge cases. *See*

Reiter, 457 F.3d at 230.

In *Reiter*, the Second Circuit explained, "Under Title VII, the best choice is to reinstate the plaintiff, because this accomplishes the dual goals of providing make-whole relief for a prevailing plaintiff and deterring future unlawful conduct." *Id. See also Che v. Mass. Bay Transp. Auth.*, 342 F.3d 31, 43 (1st Cir. 2003)(reinstatement "most efficiently advances the goals of . . . making plaintiffs whole while also deterring future discriminatory conduct by employers"). "Because of [the] consonance of the underlying policy considerations, the framework of analysis governing reinstatement in Title VII actions also governs in §1983 actions implicating First Amendment concerns." *Squires v. Bonser*, 54 F.3d 168, 172 (3rd Cir. 1995)(also noting that "§1983 has always provided both legal and equitable relief").

In section 1983 wrongful discharge cases, "[r]einstatement advances the policy goals of make-whole relief and deterrence in a way which money damages cannot." *Id.* at 172-173. The underlying reasoning has been explained by the Eleventh Circuit:

> When a person loses his job, it is at best disingenuous to say that money damages can suffice to make that person whole. The psychological benefits of work are intangible, yet they are real and cannot be ignored.... We also note that reinstatement is an effective deterrent in preventing employer retaliation against employees who

exercise their constitutional rights.

Allen, 685 F.2d at 1306. *See also Jackson v. City of Albuquerque*, 890 F.2d 225, 234 (10th Cir. 1989)(noting that the psychological benefits of work cannot be ignored in determining relief)); *Reeves v. Claiborne County Bd. of Education*, 828 F.2d 1096, 1102 (5th Cir. 1987)(denial of reinstatement would nullify the deterrent effect of the remedy).

It was precisely for these reasons that Professor Churchill chose to emphasize his right to reinstatement rather than monetary damages in his testimony to the jury. To use the jury's subsequently award of nominal damages as a reason to deny reinstatement turns the remedial functions of section 1983 on their head.

The jury concluded that Professor Churchill's protected speech was a substantial or motivating factor in the University's decision to discharge him and that the University failed to show that Professor Churchill would have been dismissed for other reasons. [Trial Transcript, 04/02/09, pp. 4160:23-4161:19]. In considering reinstatement, a district court is bound by the jury's rejection of an employer's claimed reason for termination. *Price*, 966 F.2d at 324. Allowing the employer's wishes to preclude reinstatement enables state officials who discharge employees in violation of the Constitution to "accomplish[] their purpose." *Jackson,* 890 F.2d at 235.

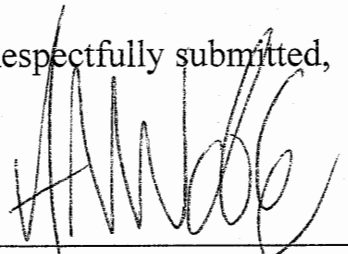
In this case, Dean Gleeson testified that denial of reinstatement would accomplish the mission of the University to fire Professor Churchill for his protected speech. [Transcript of Reinstatement Hearing, 7/1/09, pp. 218:23-219:4]. This sets a very dangerous precedent, particularly in the university setting, where the Supreme Court has emphasized that "impos[ing] any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

For all of these reasons, the trial court abused its discretion and undermined the purposes of section 1983 by denying Professor Churchill any equitable remedy for the violation of his constitutional rights, and its order denying reinstatement should be reversed.

CONCLUSION

Petitioner Ward Churchill respectfully asks this Court to reverse the trial court's directed verdict on the first claim for relief, reverse the trial court's order granting the University's motion for judgment as a matter of law on the second claim for relief, reverse the trial court's order denying Professor Churchill's motion for reinstatement, and remand this case for further proceedings.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of September 2011, a true and correct copy of the foregoing **OPENING BRIEF** was placed in the U.S. Mail, postage prepaid, and addressed as follows:

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