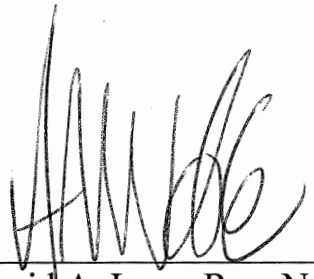
SUPREME COURT, STATE OF COLORADO 101 W. Colfax Avenue, Suite 800 Denver, CO 80202	
Court of Appeals No. 09CA1713 District Court for the City and County of Denver Case No. 06CV11473 Honorable Larry J. Naves, Judge	
PETITIONER: WARD CHURCHILL **RESPONDENT:** UNIVERSITY OF COLORADO	▲ COURT USE ONLY ▲
Attorneys for the Petitioner: David A. Lane, Reg. No. 16422 Lauren L. Fontana, Reg. No. 40234 Killmer, Lane & Newman, LLP 1543 Champa Street, Suite 400 Denver, CO 80202 Tel: (303) 571-1000 Robert J. Bruce, Reg. No. 17742 Lawlis & Bruce, LLC 1875 Lawrence Street, Suite 750 Denver, CO 80202 Tel: (303) 573-5498 Thomas K. Carberry, Reg. No. 19707 149 West Maple Avenue Denver, CO 80223 Tel: (303) 722-3929 Antony M. Noble, Reg. No. 33910 The Noble Law Firm, LLC 12600 W. Colfax Avenue, C-400 Lakewood, CO 80215 Tel: (303) 232-5160	Case No. 11SC25
REPLY 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 5,578 words.

C.A.R. 28(k) is not applicable to this brief. The Opening Brief 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.



David A. Lane, Reg. No. 16422
Lauren L. Fontana, Reg. No. 40234
Robert J. Bruce, Reg. No. 17742
Thomas K. Carberry, Reg. No. 19707
Antony M. Noble, Reg. No. 33910

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

SUMMARY OF ARGUMENT

Congress enacted 42 U.S.C. § 1983 to deter state officials from depriving individuals of their constitutional rights and to provide a remedy for such deprivations. *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). The University of Colorado's Response does not address these purposes and misconstrues federal law governing actions under section 1983.

Investigations likely to chill First Amendment rights are adverse employment actions under section 1983. The University mischaracterizes its investigation of Professor Churchill's speech and writings as a workplace misconduct inquiry and then invokes its right to conduct such inquiries. The University did not, however, utilize its established procedures for investigating misconduct. Instead, it launched a retaliatory *ad hoc* investigation into the content of Professor Churchill's speech. The jury should have been allowed to determine whether this was likely to have a chilling effect.

Absolute immunity undermines both the deterrent and remedial purposes of section 1983. The University must demonstrate the Regents have an immunity firmly established at common law *and* consistent with the history and purposes of section 1983. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993). Its Response fails to address these requirements.

The University now accepts the test for quasi-judicial action articulated in *Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985). However, in applying the *Cleavinger* factors, it emphasizes its internal faculty review committees whose recommendations were disregarded by the Regents. It also fails to apply the Court's analysis in *Wood v. Strickland*, 420 U.S. 308 (1975), *overruled on other grounds by Harlow v. Fitzgerald,* 457 U.S. 800 (1982). The *Wood* Court denied absolute immunity to school board members, and its opinion was relied upon in *Cleavinger.*

The University emphasizes its need to function efficiently but disregards the significance of the educational context which defines its functions. Unlike other public employers, universities are responsible not only for delivering services, but for protecting First Amendment rights. The University claims that "academic freedom" overrides a tenured professor's First Amendment rights. The Supreme Court precedent on which it relies, however, recognizes only that academic freedom protects universities from interference by the state. It does not shield universities from liability for violating constitutional rights. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

With respect to equitable remedies, the University's Response does not address the deterrent or remedial purposes of section 1983. Misconstruing the relevance of the jury verdict, it focuses on specific reasons to deny reinstatement and front pay. Professor Churchill contests the University's characterization of the law and the facts, and notes that most of the University's arguments address issues to be decided by the trial court should the jury verdict be reinstated. Federal law establishes that reinstatement is the presumptive remedy for wrongful discharge, that front pay should be awarded where reinstatement is infeasible, and that the denial of equitable relief for an established violation of constitutional rights contravenes the purposes of section 1983.

ARGUMENT

I. A public university's *ad hoc* investigation of speech can constitute an adverse employment action under 42 U.S.C. § 1983.

The University now acknowledges that *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) applies to this case. (Resp. Br., 23.) Under *Burlington*, an adverse employment action is one that "might have dissuaded a reasonable worker" from exercising rights protected by the Constitution or federal law. *Id.* at 68 (internal quotation marks omitted). The University misconstrues the term "material adversity;" conflates the investigation at issue with workplace

misconduct investigations; reimposes a subjective perspective on the objective "reasonable person" test; and incorrectly applies the functional balancing test of *Enquist v. Or. Dep't of Agric.*, 553 U.S. 591 (2008).

A. Investigations can deter reasonable persons from exercising their First Amendment rights.

The University's focus on cases in which particular investigations were not found actionable (Resp. Br., 23, 29, 34) obscures the point that federal courts have consistently recognized that investigations may constitute adverse employment actions. *Butz v. Economou*, 438 U.S. 478, 480 (1978), involved a "suit against a number of officials in the Department of Agriculture claiming that they had instituted an investigation and an administrative proceeding against [the Plaintiff] in retaliation for his criticism of that agency." Even "an objectively reasonable investigation that fails to convince the employer that the employee actually engaged in . . . unprotected speech does not inoculate the employer against constitutional liability." *Waters v. Churchill*, 511 U.S. 661, 683 (1994) (Souter, J., concurring).

Formation of "advisory" committees to investigate tenured professors because of controversial speech has been held unconstitutional. *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992); *see also Coszalter v. City of Salem*, 320 F.3d 968, 976-77 (9th Cir. 2003) (investigation may constitute actionable

retaliation); *Ulrich v. City and Cnty. of San Francisco*, 308 F.3d 968, 977 (9th Cir. 2002) (investigation potentially affecting physician's clinical privileges actionable).

The University attempts to reinsert a material change in conditions of employment requirement by emphasizing *Burlington*'s use of the phrase "material adversity." (Resp. Br., 24-26.) Under *Burlington*, however, courts eliminate trivial claims not by requiring evidence of changes in employment conditions, but by requiring that the contested action chill reasonable persons of "ordinary firmness." *Couch v. Bd. of Trs. of Mem'l Hosp.*, 587 F.3d 1223, 1238 (10th Cir. 2009) (internal quotation marks omitted). Persons of ordinary firmness are not deterred by trivial matters.

"*Any* form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, *bad faith investigation,* and legal harassment, constitutes an infringement of that freedom." *Worrell v. Henry,* 219 F.3d 1197, 1212 (10th Cir. 2000) (internal quotation marks omitted) (emphasis added); *see also Howards v. McLaughlin*, 634 F.3d 1131, 1144-45 (10th Cir. 2011) (citing *Worrell*, 219 F.3d at 1212); *Rutan v. Republican Party*, 497 U.S. 62, 75 n.8 (1990) ("[T]he First Amendment . . . protects . . . from 'even an act of retaliation as

trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights.'" (internal citation omitted)).

"[A] government act of retaliation need not be severe and it need not be of a certain kind." *Coszalter*, 320 F.3d at 975. Contrary to the assertion of *amici* Mountain States Employers Council, *et al.*, Professor Churchill has never argued that only investigations ultimately resulting in discharge are actionable. (MSEC *Amicus* Br., 11.)

B. This was not a misconduct investigation but an *ad hoc* investigation intended to chill speech.

Professor Churchill does not contest the University's right to investigate potential misconduct, as it claims. (Resp. Br., 38.) He contests its right to launch a highly publicized retaliatory investigation into constitutionally protected speech, initiated in response to political pressure and with intent to find cause to dismiss.

The University's arguments hinge on its right to conduct investigations into allegations of misconduct. In this investigation, however, the University did not utilize its procedures for investigating misconduct because there were no allegations of misconduct. This investigation was initiated solely in retaliation for speech protected by the First Amendment.

Having no precedent, acting Chancellor Philip DiStefano created an *ad hoc* process to review all of Professor Churchill's writings and public speeches. It did

not cover only five statements as now claimed by the University. (Resp. Br., 4-5.) The *ad hoc* committee examined *all* of Professor Churchill's publications and speeches, and its Report includes an extensive list of the publications investigated. (Defs' Ex. 1b, 3-4.)

The University argues that the availability of "multiple levels of process" would prevent a reasonable person from being deterred by this investigation. (Resp. Br., 32.) This is incorrect for several reasons.

First, none of these "levels of process" were employed in the initial *ad hoc* investigation. (Trial Tr., 2524:7-11, Mar. 23, 2009.) The University was unconstrained by the confidentiality rules attending faculty discipline, and the intense negative publicity attending this investigation increased its chilling effect. (Defs' Ex. 21f, 4.)

Second, a reasonable person could find any retaliatory investigation chilling, even—perhaps especially—if it involves years of hearings and appeals. In this case, these processes applied only to research misconduct charges brought after the *ad hoc* investigation and thus do not affect Professor Churchill's first claim for relief. The research misconduct allegations subsequently filed by Chancellor DiStefano did not simply "come to light." (Resp. Br., 6.) The University's selective focus on Thomas Brown (*Id.* at 5) ignores the evidence that *ad hoc*

committee member David Getches solicited allegations from John LaVelle, whom Dean Getches knew had long-standing animosity toward Professor Churchill. (Trial Tr., 778:17-787:14, Mar. 11, 2009.) That the University compounded the harm of the *ad hoc* investigation with a subsequent pretextual misconduct investigation should not preclude scrutiny of its initial violation of Professor Churchill's First Amendment rights.

Third, this *ad hoc* investigation was initiated to see if Professor Churchill could be fired. The University states the Regents did not say this at their February 2005 meeting. (Resp. Br., 3.) At that meeting, however, they unanimously approved Chancellor DiStefano's proposal to convene an investigation to determine if there was "cause for dismissal" based upon the content of Professor Churchill's speech. (Trial Tr., 459:5-460:9, 461:8-15, Mar. 10, 2009.) The existence and purpose of this investigation were made public, again compounding its chilling effect. (Defs' Ex. 21f, 4.)

Investigations in retaliation for protected speech are intended to chill speech and therefore violate the First Amendment. *See Sweezy*, 354 U.S. at 254-55 (legislative investigation of a professor's lectures unconstitutional); *Levin*, 966 F.2d at 89-90 (creation of *ad hoc* committee to investigate professor's speech had a chilling effect). Investigations convened to find cause to dismiss are particularly

chilling. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 601 (1967) ("It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living.").

The jury should have been allowed to decide whether this investigation would have deterred reasonable persons from exercising their First Amendment rights.

C. Professor Churchill introduced ample evidence for the jury to conclude that the *ad hoc* investigation was likely to deter others.

The University does not explain why a reasonable professor would not find an *ad hoc* investigation into her speech and writings chilling. Instead, it attempts to distance the adverse effects suffered by Professor Churchill from the investigation. It also attempts to reintroduce a subjective perspective by discounting evidence of its chilling effect. (Resp. Br., 34-38.)

Effects are necessarily subsequent to their cause. An investigation may constitute an adverse employment action despite a 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) (internal quotation marks omitted). The fact that this *ad hoc* investigation had effects long after its formal conclusion exacerbates its chilling effect.

The University's assertion that the investigation did not chill Professor Churchill's speech is irrelevant. (Resp. Br., 32.) Professor Churchill had no obligation to show actual deterrence, but only its likelihood. A 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." *Colombo v. O'Connell*, 310 F.3d 115, 117 (2d Cir. 2002), *cert. denied*, 538 U.S. 961 (2003).

Professor Churchill introduced evidence sufficient to allow a jury to determine that the *ad hoc* investigation into his speech and writings would likely have a deterrent effect on others. (*See, e.g.,* Trial Tr., 2628:8-25, 2632:14-20, Mar. 24, 2009 [Churchill]); 2875:9-2876:5, 2878:1-22, 2880:18-2882:2, Mar. 25, 2009 [Saito].)

D. The University suffered no judicially cognizable "adverse impact" to be balanced against Professor Churchill's constitutional rights.

There is no support for the University's claim that it had an "obligation" to determine whether Professor Churchill's speech was constitutionally protected, and to balance his First Amendment rights against workplace functions. (Resp. Br., 28-29.) If this were the case, employers would be constantly investigating employee speech. In *Enquist*, the question was whether the employee's speech

addressed "matters of public concern." 553 U.S. at 600. It has never been disputed that Professor Churchill's speech involved matters of public concern. An inquiry into the constitutionality of employee speech is necessary only when an employer otherwise intends to take disciplinary action related to that speech. The University has established disciplinary processes for such actions and did not need to invent an *ad hoc* process.

When functioning as employer rather than sovereign, the state has some leeway to limit speech based on factors such as workplace discipline. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568-73 (1968). However, a public employer must "show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). In this case, Professor Churchill's "unpopular viewpoint" was the sole motivation for the investigation.

The potential for "the chilling of individual thought and expression . . . is especially real in the University setting." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995). "Debate that might be viewed as disruptive in other public agencies is an accepted, and even necessary, part of the production of new knowledge and its dissemination." Judith Areen, *Government*

as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance, 97 GEO. L.J. 945, 990 (2009).

The Regents' own "laws" require the University to vigorously defend First Amendment rights against outside pressure. Board of Regents Laws, Art. 5.D.2. (Defs' Ex. 3a, 7.) In this case, it was not Professor Churchill's protected speech, but the University's highly publicized investigation of his speech, that had a chilling effect on the First Amendment and thus served to disrupt University functions.

II. The University's analysis of quasi-judicial immunity does not comport with federal law under 42 U.S.C. § 1983.

Professor Churchill's "fundamental premise" is that the Regents' termination of his employment was not quasi-judicial action under applicable federal law, and that granting them absolute immunity is contrary to the purposes of section 1983. His fundamental premise is *not* "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." (Resp. Br., 39.) It is uncontested that *if* the Regents' decision to fire Professor Churchill is shielded by absolute immunity, the jury verdict is unenforceable. Pursuant to federal law, the Regents are not entitled to immunity.

A. Section 1983 imposes specific constraints on immunity that the University does not address.

The University fails to meet its burden of establishing that the Regents have absolute immunity. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 (1993) ("The proponent of a claim to absolute immunity bears the burden of establishing the justification for such immunity."). Professor Churchill need not rely on the jury verdict because in determining immunity, the allegations of the complaining party are accepted as true. *Kalina v. Fletcher*, 522 U.S. 118, 122 (1997).

The jurors' determination that the Regents fired Professor Churchill because of his constitutionally protected speech, and that they would not have fired him in the absence of that speech, does establish the sufficiency of Professor Churchill's allegations. (Trial Tr., 4160:23-4161:19, Apr. 2, 2009; Jury Verdicts 1, 3.) The University's focus on nominal damages appears intended to obscure the fact that granting absolute immunity to the Regents will preclude judicial review of blatantly unconstitutional actions, undermining the deterrent and remedial purposes of section 1983.

The University has not demonstrated that absolute immunity was historically accorded university officials at common law, nor reconciled such immunity with the history or purposes of section 1983. Officials claiming immunity under section 1983 first must identify a well-established "common-law counterpart" to the

privilege asserted. *Malley v. Briggs*, 475 U.S. 335, 339-340 (1986). "If an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." *Tower v. Glover*, 467 U.S. 914, 920 (1984) (denying quasi-judicial immunity to public defenders). *See also Owen v. City of Independence*, 445 U.S. 622, 657-58 (1980) (finding municipal immunity inconsistent with the intent of section 1983).

Immunity cannot be accorded simply on the basis of the University's policy arguments. (Resp. Br., 43.) Even the Supreme Court "do[es] not have a license to establish immunities from § 1983 actions in the interests of what [it] judge[s] to be sound public policy." *Tower,* 467 U.S. at 922-23. "'[Its] role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice.'" *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (internal citation omitted).

The University waived Eleventh Amendment immunity in exchange for Professor Churchill's dismissal of claims against the Regents in their personal capacities. This lawsuit has proceeded against the University and its Regents in their official capacities, and personal immunities cannot shield them from the consequences of unconstitutional action. *Monell v. Dep't of Soc. Servs.*, 436 U.S.

658, 690 n.55 (1978) (individual defendants sued in their official capacities can be liable for damages when Eleventh Amendment immunity does not apply).

The University dismisses the holding of *Kentucky v. Graham*, 473 U.S. 159, 167 (1985), that personal immunities are available only in individual capacity actions by relying on a contested interpretation of the parties' stipulations. (Resp. Br., 16; *see also* State of Colorado *Amicus* Br., 47-48.) When the meaning of a stipulation is contested, it should be interpreted in light of the intention of the parties. *Mauran v. Bullus*, 41 U.S. 528, 534 (1842) ("In the construction of all instruments, to ascertain the intention of the parties is the great object of the court."). It defies reason to assert that Professor Churchill would have stipulated that the defendants could not be sued in any capacity at all.

B. The Regents' termination of Professor Churchill does not meet the Supreme Court's requirements for quasi-judicial action.

The University now acknowledges that claims of quasi-judicial immunity should be assessed in light of *Cleavinger*. However, it continues to rely heavily on state law and cases addressing regulatory agencies rather than educational institutions. (Resp. Br., 40-43.) *Cherry Hills Resort Dev. Co. v. Cherry Hills Vill.*, 757 P.2d 622 (Colo. 1988), does not address the purposes of section 1983 or the functions educational institutions. In *Howlett v. Rose*, 496 U.S. 356, 383 (1990),

the Supreme Court cautioned that, "as to persons that Congress subjected to liability, individual States may not exempt such persons from federal liability by relying on their own common-law heritage," because "States would then be free to nullify . . . the legislative decisions that Congress has made on behalf of all the People."

The University's Response disregards the importance of cases involving school boards, mischaracterizes the Supreme Court's jurisprudence on academic freedom, and relies improperly on internal faculty review procedures. (Resp. Br., 44-54.)

(1) The Supreme Court has ruled that school board members are not entitled to quasi-judicial immunity.

In *Wood v. Strickland*, the Supreme Court found no common law tradition or public policy reasons sufficient to grant quasi-judicial immunity to school board members. 420 U.S. at 320. It held immunity inappropriate where school board members reasonably should have known that their actions would violate constitutional rights, or maliciously intended such consequence. *Id.* at 322.

The University dismisses *Wood* as "predat[ing] the Supreme Court's modern requirements for quasi-judicial immunity in *Butz*." (Resp. Br., 45.) However, *Butz* cites *Wood* for its holding that school board members have only qualified, not

quasi-judicial, immunity. 438 U.S. at 498; *see also Procunier v. Navarette,* 434 U.S. 555, 561 (1978) (citing *Wood* for its limitation of immunity for school board members). In *Cleavinger*, the Supreme Court denied quasi-judicial immunity to a prison disciplinary committee by analogizing it "to the school board service the Court had under consideration in *Wood v. Strickland.*" 474 U.S. at 204. The Regents' functions in this case resemble those of the school board in *Wood* even more closely than did the functions of the prison disciplinary committee in *Cleavinger.*

Wood has been applied to deny quasi-judicial immunity to university trustees who fired professors, and is applicable to this case. *Skehan v. Bd. of Trs. of Bloomsburg State College*, 538 F.2d 53, 60 (3d Cir. 1976) ("Functionally, the school board members adjudicating a student discharge and the state college officials adjudicating a faculty termination are identically situated."), *cert. denied*, 429 U.S. 979 (1976); *see also Osteen v. Henley*, 13 F.3d 221, 224 (7th Cir. 1993) (absolute immunity for university officials "most unlikely given the Supreme Court's refusal to grant such immunity to members of school boards that adjudicate violations of school disciplinary regulations").

(2) The Regents failed to satisfy *Cleavinger*'s requirements for quasi-judicial action.

Cleavinger identified a non-exclusive list of factors "characteristic of the judicial process":

> (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 201-02 (citing *Butz*, 438 U.S. at 512). The University fails to meet its burden of proof under *Cleavinger*.

(a) Performance of functions without intimidation.

The University and its *amici* American Council on Education, *et al.,* claim that "academic freedom" gives the Regents *more* latitude than other officials to violate their faculty's constitutional rights. (Resp. Br., 46-47; ACE *Amicus* Br., 9-15.)

This argument is extraordinarily misleading. The University relies on Justice Powell's statement in *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978), taken entirely out of context, that a university has the freedom "to determine for itself on academic ground who may teach, what may be

taught, how it shall be taught, and who may be admitted to study." (Resp. Br., 46-47.) Justice Powell was quoting Justice Frankfurter's concurrence in *Sweezy,* 354 U.S. at 263. Justice Frankfurter, in turn, was quoting South African scholars resisting state-imposed apartheid to make the point that the state of New Hampshire did *not* have the right to investigate Professor Sweezy's political opinions. *Id. See also* Richard H. Hiers, *Institutional Academic Freedom v. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*, 29 J.C. & U.L. 35, 47-55 (2002).

The Supreme Court has never held that a university's prerogative to make decisions "on academic grounds" extends to violating fundamental constitutional rights. This is illustrated by *Bakke* itself, which refused to allow the California regents' interest in "who may be admitted to study" to override Allan Bakke's right to equal protection. 438 U.S. 265. "Justice Powell's opinion cannot be said to stand for the proposition that the federal courts should abstain from adjudicating First Amendment claims involving a university or college's policies and practices, or the idea that actions by university administrators that infringe faculty members' Constitutional rights should somehow be exempted from judicial review." Hiers, *supra*, at 63.

"Courts are competent to review, without infringing the academic freedom of a university, a professor's claim that a stated academic ground was a pretext for a university decision that violated his academic freedom." David M. Rabban, *Functional Analysis of 'Individual' and 'Institutional' Academic Freedom under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 300 (1990). Professor Churchill's claims are based squarely on the violation of his First Amendment rights. He does not invoke academic freedom to expand these rights, but to emphasize the First Amendment's heightened significance in educational settings. *See Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Sweezy*, 354 U.S. at 250; *Keyishian*, 385 U.S. at 603.

(b) Procedural safeguards.

The University claims that "the adversarial hearings that preceded Professor Churchill's discharge incorporated all of the adjudicative features . . . required when granting quasi-judicial immunity," and that its "multi-level review" is sufficiently "judicial in nature" to satisfy the second *Cleavinger* factor. (Resp. Br., 44, 48.) However, these procedures did not provide the requisite safeguard against unconstitutional conduct.

Only the Regents were authorized to terminate Professor Churchill's employment. Board of Regents Laws, Art. 5.C. (Defs' Ex. 3a, 6.) They reviewed

reports from the Standing Committee on Research Misconduct (SCRM) and the Privilege and Tenure (P&T) Committee, but were not bound by their findings or recommendations. The only internal entities that directly heard testimony were a SCRM Investigative Committee and a P&T panel. Just one of five members of the SCRM Investigative Committee and two of five P&T panel members recommended dismissing Professor Churchill. (Defs' Ex. 1h, 104; Defs' Ex. 21 f, 88.) These bodies' recommendations were disregarded by the Regents.

President Brown did not "generally agree" with the P&T Committee as the University asserts. (Resp. Br., 13.) Without having heard any direct evidence, President Brown reinstated charges the P&T Committee dismissed as inadequately supported by the evidence and overrode its recommendations regarding sanctions. (Trial Tr., 895:6-896:4, Mar. 12, 2009.) By accepting President Brown's recommendation, the Regents who voted for termination similarly disregarded the results of the University's internal processes. This problem was recognized by Regent Cindy Carlisle, who testified that she voted against dismissal because of the recommendation of the faculty committees. (Trial Tr., 3737:25-3739:10, Mar. 30, 2009.)

The mere existence of "process" does not render a decision functionally judicial if that process is disregarded by the decisionmakers, or if it is used

pretextually. Professor Churchill provided evidence sufficient for the jurors to determine that the Regents used the internal misconduct investigation pretextually to violate the Constitution. (Jury Verdicts 1, 3.) This evidence includes the testimony of expert witness Philo Hutcheson. Contrary to the University's implications (Resp. Br., 11), Professor Hutcheson testified that, based upon the P&T Committee conclusions, dismissal would not be the normal sanction. Instead, "loss of summer pay" would probably be considered appropriate. (Trial Tr., 2043: 12, 16-17, Mar. 19, 2009.) He accounted for the discrepancy between this penalty and Professor Churchill's dismissal by analogizing this case to those of professors dismissed for unpopular political views. (Trial Tr., 2038-2039, 2041-2042, Mar. 19, 2009.)

(c) Insulation from political influence.

The University claims the Regents were insulated from political influence because they are neither employees nor subordinates of the ultimate decisionmaker. (Resp. Br., 49.) What this actually means is that the Regents were answerable only to their political constituents. In this case, as several Regents testified, political pressure was sigificant. (*See, e.g.*, Trial Tr., p. 3066:18-25, Mar. 25, 2009; 3840:12-24, Mar. 31, 2009.)

Further, this argument undercuts the University's argument that constitutional safeguards were provided by their internal committee process. Those committees were composed of University employees directly subordinate to the Regents. As the *Cleavinger* Court stated, the "situational problem of the relationship between the keeper and the kept . . . hardly is conducive to a truly adjudicatory performance." 474 U.S. at 204.

(d) Precedent.

Compliance with precedent minimizes the likelihood of arbitrary or retaliatory action. The University provides no evidence of precedent relevant to this case. Instead it relies on "first of its kind" cases. (Resp. Br., 52.) Tellingly, however, it makes no claim that this was the first time the Regents fired a tenured professor.

(e) Adversarial Process.

Adversarial process ensures each party the opportunity to present evidence to a neutral decisionmaker. The Regents, as Professor Churchill's employer, were parties to the dispute and not objective adjudicators. *In re Murchison*, 349 U.S. 133, 136 (1955) ("[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.").

Furthermore, as the jury concluded, the Regents fired Professor Churchill because of his politically controversial statements, not because of research misconduct. Any adversarial process that did exist addressed only the misconduct allegations, not the actual reasons for the termination.

(f) Correctability on appeal.

Errors made in quasi-judicial processes must be correctable on appeal. The Regents were the sole decision-makers in this case and thus cannot be deemed an appellate tribunal. The University argues that Professor Churchill could have appealed the Regents' decision under the provisions of C.R.C.P. Rule 106. (Resp. Br., 53-54.) Inadequacies of the Rule 106 process aside, the existence of Rule 106 cannot transform a process into a quasi-judicial function. It is an avenue of limited appeal for functions that are *otherwise* quasi-judicial in nature.

III. Denial of equitable remedies for termination in violation of the Constitution undermines the purposes of 42 U.S.C. § 1983.

The University "agrees" that decisions about equitable remedies "are reviewed for an abuse of discretion." (Resp. Br., 55.) However, whether the trial court applied appropriate legal standards in denying reinstatement and front pay is a question of law subject to *de novo* review. (Opening Br., 39.)

The question certified by this Court is whether the denial of equitable remedies for termination in violation of the First Amendment undermines the purposes of section 1983. The University addresses these purposes only in passing. (Resp. Br., 58.)

A. The 1996 amendment to section 1983 does not preclude equitable relief in this case.

The University argues that the 1996 amendment to section 1983 limiting relief available from "judicial officers" applies to quasi-judicial action and thus precludes injunctive relief in this case. (Resp. Br., 55-56.) This interpretation has been rejected by federal courts. *Shmueli v. City of New York,* 424 F.3d 231, 239 (2d Cir. 2005); *Adibi v. Cal. State Bd. of Pharm.*, 393 F. Supp. 2d 999, 1006 (N.D. Cal. 2005); *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1051 n.1 (5th Cir. 1997); *Roe v. City & County of San Francisco*, 109 F.3d 578, 586 (9th Cir. 1997).

This issue is irrelevant, however, because if the Regents in their official capacity are entitled to quasi-judicial immunity, the jury verdict will not be reinstated and equitable remedies are not at issue. If they are not immune, the proper interpretation of the 1996 amendment is irrelevant. The debate surrounding the extension of the amendment to quasi-judicial officers arises only because of the rule, discussed above, that quasi-judicial immunity is available only to persons sued in their individual capacities.

B. The University conflates past damages and equitable relief.

The University's argument that the jury's nominal award precludes equitable relief confuses past damages with future relief. (Resp. Br., 56-58). The jury only considered damages from termination through date of trial. It did not, and could not, consider future relief. Nominal damage awards do not preclude equitable relief. *Fyfe v. Curlee*, 902 F.2d 401, 406 (5th Cir. 1990).

Some violations of constitutional rights cannot be redressed by substantial relief. Nonetheless, courts are obliged to place the injured party "'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) (internal citation omitted). In wrongful discharge cases, reinstatement is the presumptive remedy because "[w]hen 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 Cnty. Bd. of Educ.*, 685 F.2d 1302, 1306 (11th Cir. 1982).

C. Professor Churchill was entitled to reinstatement or front pay.

The question before this Court is not the precise nature of the relief appropriate to this case. Nonetheless the University argues that "Professor Churchill has not challenged" the trial court's findings on "hostility," compliance

with academic standards and "harm to others," or efforts to mitigate loss. (Resp. Br., 59-60.) Professor Churchill introduced considerable evidence contradicting each of these conclusions. (*See, e.g.*, Trial Tr., 2807:6-8, Mar. 24, 2009 [Churchill on mitigation]; Tr. of Reinstatement Hrg., 17:22-18:10, 20:4-13, 23:21-23, 28:21-29:21 [Perez]; 47:14-48:5, 49:10-50:14 [Mayer]; 163:8-10 [Churchill]; 200:10-14, 200:21-25 [Gleeson], July 1, 2009.)

Equitable remedies are only at issue if the jury verdict is reinstated. According to that verdict, Professor Churchill was fired in violation of the First Amendment and would not have been fired but for his protected speech. (Jury Verdicts 1, 3.) Because First Amendment rights are at the heart of academic functions, his reinstatement cannot interfere with any legitimate academic process. The only process reinstatement would disrupt is the *pretextual* use of internal disciplinary procedures to accomplish unconstitutional ends. Evidence was introduced that failing to reinstate Professor Churchill would increase the chilling effect of the University's unconstitutional conduct. (Tr. of Reinstatement Hrg., 82:19-83:7, July 1, 2009 [Mayer].)

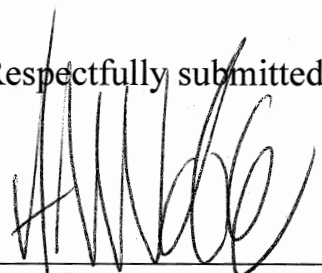
If reinstatement is not feasible for a constitutionally acceptable reason, federal law clearly establishes that Professor Churchill is entitled to front pay. *McInnis v. Fairfield Cmtys., Inc.*, 458 F.3d 1129, 1145 (10th Cir. 2006).

The University's Response focuses on specific aspects of Professor Churchill's request for equitable relief—matters to be decided by the trial court—rather than the question certified by this Court. That question is whether the denial of equitable remedies for termination in violation of the First Amendment undermines the purposes of section 1983, and it is clear that it does.

CONCLUSION

For these reasons Petitioner respectfully requests that this Court 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,



David A. Lane, Reg. No. 16422
Lauren L. Fontana, Reg. No. 40234
Robert J. Bruce, Reg. No. 17742
Thomas K. Carberry, Reg. No. 19707
Antony M. Noble, Reg. No. 33910

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of April 2012, a true and correct copy of the foregoing **REPLY BRIEF** was placed in the U.S. Mail, postage prepaid, and addressed as follows:

Patrick T. O'Rourke
Special Assistant Attorney General
Office of University Counsel
1800 Grant Street, Suite 700
Denver, Colorado 80203

Kari M. Hershey
1355 S. Colorado Blvd, Suite 600
Denver, Colorado 80222

Cheri J. Deatsch
Deatsch Law Office
1525 Josephine Street
Denver, Colorado 80206

C. R. Nuckolls
McKenna Long & Aldridge LLP
1900 K Street, N.W.
Washington, D.C. 20006

Douglas J. Cox
Office of Attorney General
1525 Sherman Street, 7th Floor
Denver, CO 80203

William C. Berger
Brownstein Hyatt Farber Schreck
410 17th Street, Suite 2200
Denver, CO 80202

Ada Meloy
American Counsel on Education
One Dupont Circle, N.W.
Washington, D.C. 20036

Alan K. Chen
University of Denver Sturm College
2255 E. Evans Avenue, Room 455e
Denver, CO 80208

Beth A. Dickhaus
Hall & Evans LLC
1125 17th Street, Suite 600
Denver, CO 80202

David R. Fine
Lino S. Lipinsky De Orlov
Mason J. Smith
McKenna Long & Aldridge
1400 Wewatta Street, Suite 700
Denver, CO 80202

Mark Silverstein
ACLU Foundation of Colorado
400 Corona
Denver, CO 80218