No. _____

# In The
# Supreme Court of the United States

WARD CHURCHILL,

*Petitioner,*

v.

UNIVERSITY OF COLORADO AT BOULDER AND REGENTS OF THE UNIVERSITY OF COLORADO, a Colorado body corporate,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Colorado**

## PETITION FOR WRIT OF CERTIORARI


DAVID A. LANE
*Counsel of Record*
LAUREN L. FONTANA
KILLMER, LANE & NEWMAN, LLP
1543 Champa Street, Suite 400
Denver, Colorado 80202
Telephone: (303) 571-1000
Facsimile: (303) 571-1001
E-mail: dlane@kln-law.com

ANTONY M. NOBLE
THE NOBLE LAW FIRM, LLC
12600 W. Colfax Avenue, C-400
Lakewood, Colorado 80215
Telephone: (303) 232-5160
Facsimile: (303) 232-5161
E-mail: antony@noble-law.com

ROBERT J. BRUCE
LAWLIS & BRUCE, LLC
1875 Lawrence Street, Suite 750
Denver, Colorado 80202
Telephone: (303) 573-5498
Facsimile: (303) 573-5537
E-mail: BobBruce@lawlisbruce.com

THOMAS K. CARBERRY
149 West Maple Avenue
Denver, Colorado 80202
Telephone: (303) 722-3929
Facsimile: (303) 733-0723
E-mail: tom@carberrylaw.com

*Counsel for Petitioner Ward Churchill*



COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

I. Does a bad faith investigation of all of a tenured professor's writings and public speeches, undertaken by state university officials in retaliation for the exercise of constitutionally protected speech and with the stated purpose of finding grounds for termination, violate a clearly established right and create a free-standing First Amendment cause of action?

II. Should absolute, quasi-judicial immunity completely shield a state university and its board of regents' termination decisions, even when a jury has determined that these officials fired a tenured professor in retaliation for speech protected by the First Amendment and would not have fired him but for his exercise of free speech?

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the Supreme Court of the State of Colorado, whose judgment is sought to be reviewed, are:

Ward Churchill, plaintiff, appellant below, and petitioner here.

The University of Colorado at Boulder and the Regents of the University of Colorado, defendants, appellees below, and respondents here.

No corporations are involved in this proceeding.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ..... ii

TABLE OF AUTHORITIES ..... vii

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE ..... 2

STATEMENT OF THE CASE ..... 3

A. Professor Ward Churchill is a prolific, highly-acclaimed, and controversial scholar ..... 6

B. Responding to political pressure, the Regents authorized an investigation into all of Professor Churchill's voluminous publications and speeches to find grounds for termination ..... 8

C. Unable to fire Professor Churchill directly for his speech, University officials brought and prosecuted claims of research misconduct ..... 10

D. Disregarding the recommendations of their internal investigative and review committees, the Regents fired Professor Churchill ..... 12

E. Professor Churchill sued the University and Regents in Denver District Court under 42 U.S.C. § 1983 for violating his First Amendment rights ..... 14

TABLE OF CONTENTS – Continued

Page

1. The trial court granted the University a directed verdict on Professor Churchill's free speech investigation claim, holding that the investigation could not have been an adverse employment action..... 15

2. The jury decided that the Regents fired Professor Churchill in retaliation for his constitutionally protected speech and would not have fired him absent that speech..... 16

3. The trial judge vacated the jury verdicts on the grounds that the Regents were entitled to absolute, quasi-judicial immunity..... 16

F. The Colorado Court of Appeals upheld the District Court's orders and the Supreme Court of Colorado affirmed..... 17

REASONS FOR GRANTING THE PETITION..... 18

I. STATE OFFICIALS WHO RETALIATE AGAINST A PROFESSOR'S EXERCISE OF FIRST AMENDMENT RIGHTS BY INVESTIGATING ALL OF HIS PUBLIC SPEECH AND WRITINGS TO FIND GROUNDS FOR TERMINATION VIOLATE THE FIRST AMENDMENT BY CHILLING SPEECH AND SHOULD NOT BE SHIELDED BY QUALIFIED IMMUNITY..... 22

TABLE OF CONTENTS – Continued

Page

A. The First Amendment's protection of freedom of expression is vital to the core functions of American colleges and universities ..... 24

B. It is clearly established that retaliatory employment actions, including investigations, that deter or chill freedom of expression constitute actionable violations of the First Amendment ..... 26

C. A reasonable person would have known that a bad faith investigation into all of a professor's speech and writings, undertaken in retaliation for protected speech and with the stated intent of finding grounds for termination, would have a chilling effect on the exercise of First Amendment rights..... 30

II. QUALIFIED IMMUNITY IS SUFFICIENT TO PROTECT STATE UNIVERSITY REGENTS WHEN TERMINATING TENURED FACULTY; QUASI-JUDICIAL IMMUNITY IS INAPPROPRIATE UNDER *WOOD* AND *CLEAVINGER*..... 32

A. Decisions by university trustees or regents to terminate tenured faculty do not constitute quasi-judicial action under *Butz v. Economou* and *Cleavinger v. Saxner* ..... 34

TABLE OF CONTENTS – Continued

Page

B. Qualified immunity is sufficient to protect university trustees and regents making employment decisions in accordance with the rationale of *Wood v. Strickland* ..... 38

C. The dangers of expanding absolute immunity are illustrated by this case, in which quasi-judicial immunity was granted after a jury determined that state officials had fired a tenured professor in violation of the First Amendment ..... 40

CONCLUSION ..... 43

APPENDIX

Opinion, Supreme Court of Colorado, September 10, 2012 ..... App. 1

Order granting *certiorari*, Supreme Court of Colorado, May 31, 2011 ..... App. 63

Opinion, Colorado Court of Appeals, November 24, 2010 ..... App. 65

Order vacating jury verdict, District Court, City and County of Denver, Colorado, July 7, 2009 ..... App. 119

Jury verdict, District Court, City and County of Denver, Colorado, April 2, 2009 ..... App. 170

TABLE OF AUTHORITIES

Page

CASES

*Anderson v. Creighton*, 483 U.S. 635 (1987).....30, 31

*Baca v. Sklar*, 398 F.3d 1210 (10th Cir. 2005).....27

*Billings v. Town of Grafton*, 515 F.3d 39 (1st Cir. 2008).....29, 31

*Brown v. W. Conn. State Univ.*, 204 F. Supp. 2d 355 (D. Conn. 2002).....39

*Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).....20

*Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).....26, 27

*Burns v. Reed*, 500 U.S. 478 (1991).....34

*Butz v. Economou*, 438 U.S. 478 (1978)....33, 34, 35, 37

*Cleavinger v. Saxner*, 474 U.S. 193 (1985).....*passim*

*Couch v. Bd. of Trs. of the Mem. Hosp.,* 587 F.3d 1223 (10th Cir. 2009).....26, 27

*Dillon v. Morano*, 497 F.3d 247 (2d Cir. 2007).....27

*Finn v. New Mexico*, 249 F.3d 1241 (10th Cir. 2001).....31

*Forrester v. White*, 484 U.S. 219 (1988).....38, 40, 41

*Gressley v. Deutsch*, 890 F. Supp. 1474 (D. Wyo. 1994).....40

*Grutter v. Bollinger*, 539 U.S. 306 (2003).....21

*Harlow v. Fitzgerald*, 457 U.S. 800 (1982).....20

*Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216 (5th Cir. 1999).....38

TABLE OF AUTHORITIES – Continued

Page

*Hartman v. Moore*, 547 U.S. 250 (2006) .....26

*Karpel v. Inova Health Sys. Servs.*, 134 F.3d 1222 (4th Cir. 1998) .....29

*Kentucky v. Graham*, 473 U.S. 159 (1985).....18

*Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).....25

*Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992) ....28, 29

*McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).....24

*Morfin v. Albuquerque Pub. Sch.*, 906 F.2d 1434 (10th Cir. 1990) .....27

*Mullins v. City of New York*, 626 F.3d 47 (2d Cir. 2010).....29, 31

*Osteen v. Henley*, 13 F.3d 221 (7th Cir. 1993).....39

*Passer v. American Chemical Society*, 935 F.2d 322 (D.C. Cir. 1991).....28

*Patsy v. Bd. of Regents of the State of Florida,* 457 U.S. 496 (1982).....41

*Perry v. Sindermann*, 408 U.S. 593 (1972).....25

*Purish v. Tenn. Technological Univ.*, 76 F.3d 1414 (6th Cir. 1996) .....39

*Rattigan v. Holder*, 604 F. Supp. 2d 33 (D.D.C. 2009).....29, 30, 31

*Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990).....25, 28, 31

TABLE OF AUTHORITIES – Continued

Page

*Schuler v. City of Boulder*, 189 F.3d 1304 (10th Cir. 1999) .....27

*Sharpe v. Utica Mut. Ins. Co.*, 756 F. Supp. 2d 230 (N.D.N.Y. 2010) .....29

*Skehan v. Bd. of Trs. of Bloomsberg State College*, 538 F.2d 53 (3d Cir. 1976), *cert. denied*, 429 U.S. 979 (1976).....20, 39

*Smith v. Fruin*, 28 F.3d 646 (7th Cir. 1994).....27

*Smith v. Rector and Visitors of Univ. of Va.*, 78 F. Supp. 2d 533 (W.D. Va. 1999) .....40

*Stewart v. Baldwin Cnty. Bd. of Educ.*, 908 F.2d 1499 (11th Cir. 1990).....38

*Sweezy v. New Hampshire,* 354 U.S. 234 (1957) .....25

*Texas v. Johnson*, 491 U.S. 397 (1989).....24

*Thompson v. N. Am. Stainless, LP*, ___ U.S. ___, 131 S.Ct. 863 (2011).....26

*United States v. Alvarez*, ___ U.S. ___, 132 S.Ct. 2537 (2012).....24

*Wood v. Strickland,* 420 U.S. 308 (1975) .....*passim*

STATUTES

28 U.S.C. § 1257(a).....1

28 U.S.C. § 2000-3(a).....26, 27

42 U.S.C. § 1983 .....2, 5, 14, 27, 41

TABLE OF AUTHORITIES – Continued

Page

Colo. Rev. Stat. § 23-20-102(1) (2012) .....3, 13

Colo. Rev. Stat. § 23-20-112(1) (2012) .....3, 13

OTHER AUTHORITIES

U.S. Const. Amend. I .....*passim*

U.S. Const. Amend. XI.....14

U.S. Supreme Court Rule 13.....1

Colo. Const., art. VIII, sec. 5(2) .....2, 13

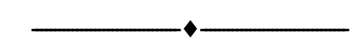
Colo. Const., art. IX, sec. 12 .....3, 13

Don Eron, Suzanne Hudson, and Myron Hulen, "Report on the Termination of Ward Churchill," *AAUP Journal of Academic Freedom*, Volume Three, 2012.....12

University of Colorado Board of Regents Laws, art. 5.C.....14

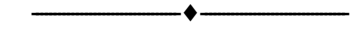
## OPINIONS BELOW

The Order of the Supreme Court of the State of Colorado was entered on September 10, 2012 and is reproduced in the Appendix ("App.") pages 1-62. *Churchill v. University of Colorado at Boulder*, 285 P.3d 986 (Colo. 2012). The Order of the Supreme Court of Colorado granting *certiorari* was entered on May 31, 2011, and is reproduced at App. 63-64. *Churchill v. University of Colorado at Boulder*, 2011 WL 2176390 (Colo. May 31, 2011). The opinion of the state court of appeals was announced on November 24, 2010, and is reproduced at App. 65-118. *Churchill v. University of Colorado at Boulder*, (not reported) 2010 WL 5099682 (Colo.App. Nov. 24, 2010). The trial court's order vacating the jury verdict was entered on July 7, 2009, and is reproduced at App. 119-69. *Churchill v. University of Colorado*, 2009 WL 2704509 (Trial Order) (Colo.Dist.Ct. July 7, 2009). The jury verdict for petitioner was rendered April 2, 2009, and is reproduced at App. 170-72.



## JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a). As required by Supreme Court Rule 13, this Petition is filed within ninety days of the issuance of the Supreme Court of Colorado's opinion filed on September 10, 2012. (App. 1.)



## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Petitioner brought the underlying action under 42 U.S.C. § 1983, which reads in relevant part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. . . ."

Petitioner's claims are based on the Free Speech clause of the First Amendment to the United States Constitution, which reads in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech. . . ."

Respondents operate under the authority of the constitution and statutes of the state of Colorado. The Colorado Constitution, art. VIII, sec. 5(2) reads in relevant part:

> "The governing boards of the state institutions of higher education, whether established

> by this constitution or by law, shall have the general supervision of their respective institutions. . . . unless otherwise provided by law."

Colorado Constitution, art. IX, sec. 12 reads in relevant part:

> "There shall be nine regents of the university of Colorado who shall be elected in the manner prescribed by law for terms of six years each. . . ."

Colorado Revised Statutes, § 23-20-102(1) (2012), reads in relevant part:

> "The university [of Colorado] shall be governed by a board of nine regents, who shall be elected for terms of six years each. . . ."

Colorado Revised Statutes, § 23-20-112(1) (2012), reads in relevant part:

> "The board of regents shall enact laws for the government of the university; appoint the requisite number of professors, tutors, and all other officers. . . . It shall remove any officer connected with the university when in its judgment the good of the institution requires it."

## STATEMENT OF THE CASE

Petitioner Ward Churchill was employed by the University of Colorado at Boulder (the "University")

for nearly thirty years. He was a prolific author and popular professor who received numerous awards for his teaching, scholarship, and service. (TT 381:1-385:20, 2503:4-2505:2.)[1] On September 12, 2001 his reflections on the attacks of September 11 were posted on an obscure website. Subsequently, that essay was expanded into a book that won a prestigious human rights award. (App. 5-6; TT 586:9-14, 657:4-9.)

By January 2005 Ward Churchill was a tenured full professor of American Indian Studies and chair of his department. That month his online essay concerning the September 11 attacks became the focus of a media firestorm and the University's Regents came under intense pressure to fire Professor Churchill for this controversial but constitutionally protected essay. (App. 5-6; TT 440:14-18, 451:20-452:3.)

Responding to this pressure, the Regents authorized a highly publicized *ad hoc* investigation into all of Professor Churchill's published writings, speeches, and other works. (App. 6-7, 67-68.) When this *ad hoc* speech investigation failed to produce grounds for termination, the acting chancellor personally lodged allegations of research misconduct against Professor Churchill, thereby initiating formal disciplinary proceedings. (App. 7.) In July 2007, the Regents fired Professor Churchill, purportedly on the basis of research misconduct. (App. 12.)

---

[1] "TT" refers to the trial transcript from the jury trial held in district court; page and line references follow.

Professor Churchill brought this lawsuit in state court, under 42 U.S.C. § 1983, against the University and its Regents. He alleged that (1) the University and its Regents had violated his right to freedom of speech by investigating all of his public speech and writings in order to find grounds to fire him in retaliation for speech protected by the First Amendment, and (2) the Regents had fired him not for research misconduct but in retaliation for his politically controversial but constitutionally protected speech. (App. 13.)

The trial court issued a directed verdict against Professor Churchill on his first claim, ruling that such an investigation could not constitute an adverse employment action. (App. 16.) After a month-long trial on the second claim, the jury agreed with Professor Churchill that the Regents had fired him in retaliation for exercising his right to free speech and would not have fired him absent such speech. (App. 170-71, 16.) Subsequently, the trial court granted the University's motion to vacate the jury verdicts on the grounds that the Regents were shielded by absolute, quasi-judicial immunity. (App. 134-49.)

The Colorado Court of Appeals and the Supreme Court of Colorado upheld these conclusions. (App. 66-67, 4-5.) In addition, the Supreme Court of Colorado held that even had the *ad hoc* investigation been an adverse employment action, University officials would have been protected by qualified immunity because they did not violate a clearly established constitutional right. (App. 5, 60.)

If allowed to stand, this decision has significant implications for freedom of speech in public universities throughout the United States. It allows state officials to retaliate against professors who express unpopular views – liberal or conservative, religious or secular – with impunity. This retaliation may take the form of an intense investigation combing through "every word" a professor has written or spoken in a public forum, searching for grounds for termination. In the alternative, university officials may simply employ their internal disciplinary processes pretextually, manipulating them to generate excuses to fire professors in retaliation for protected speech. In either case, the decision of the Supreme Court of Colorado provides no meaningful remedy for violations of the First Amendment, and no means of deterring future violations of constitutional rights by university officials.

The issues in this petition were fully presented to the state courts, including the Supreme Court of Colorado, and are therefore properly exhausted. No procedural bar prevents merits consideration of the issues by this Court.

### A. Professor Ward Churchill is a prolific, highly-acclaimed, and controversial scholar.

In January 2005, Ward Churchill was a full professor of American Indian Studies and Chair of the Ethnic Studies Department at the University of Colorado at Boulder. He had written, co-authored,

or edited more than twenty books and 120 articles. After rigorous review of his scholarship, Professor Churchill had been granted tenure and promoted to full professor. He was often asked to teach extra courses and frequently invited to speak at universities across the country. His detailed, scholarly analyses of controversial subjects such as the effect of genocidal policies on American Indians and the government's repression of political dissent led to human rights awards for several of Professor Churchill's books. In addition, he was consistently recognized as one of the University's best professors and received numerous awards for service to the University. (TT 381:1-385:20, 2503:4-2505:2.)

On September 12, 2001, Professor Churchill published an online essay entitled "'Some People Push Back': On the Justice of Roosting Chickens." The essay, which argued that the attacks of September 11 could well have been a response to U.S. foreign policy, was expanded into a book that was named runner-up for the 2004 Gustavus Myers Award for Best Writing on Human Rights. (TT 2514:16-18, 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 appearance by Professor Churchill at a New York college triggered national attention. (App. 5-6, TT 2514:15-2516:4.) 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. (TT 440:14-18, 451:20-452:3.)

### B. Responding to political pressure, the Regents authorized an investigation into all of Professor Churchill's voluminous publications and speeches to find grounds for termination.

University officials took retaliatory action against Professor Churchill in response to the intense political and media-driven public pressure concerning his essay on the attacks of September 11, 2001.

On January 28, 2005, Law School Dean David Getches responded to this pressure by urging acting Chancellor Philip 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." (TT 467:10-16, 470:3-19, 475:23-476:3.) Unaware of these discussions, Professor Churchill voluntarily stepped down as Chair of the Ethnic Studies Department.

Also reacting to the maelstrom of negative publicity, the Regents convened an "emergency" meeting on February 3, 2005, to discuss Professor Churchill's future at the University. At this meeting and elsewhere the Regents clearly expressed their desire to fire Professor Churchill. (App. 6-7.) Regent Patricia

Hayes told the faculty newspaper, "A majority of the board wanted some sort of discipline for Churchill" because of his essay about the September 11 attacks. (TT 3642:5-11.) Regent Michael Carrigan told the *New York Times* on February 2, "He can be fired, but not tomorrow." (TT 3281:19-3284:6.) During the meeting, Regents Tom Lucero and Jerry Rutledge stated their desire to fire Professor Churchill for his comments about September 11, 2001, and Regent Patricia Hayes read from a letter from Governor Owens condemning Professor Churchill. (TT 453:3-11, 454:2-8, 3927:17-3929:10; RMT 11.)[2]

At the February 3 meeting, Chancellor DiStefano denounced Professor Churchill's essay and proposed to "launch and oversee a thorough examination of Professor Churchill's writings, speeches, tape recordings and other works." He continued, "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. . . ." (RMT 5, App. 67-68.) 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. (App. 68.)

This *ad hoc* committee investigated the entire corpus of Professor Churchill's publications, including

[2] "RMT" refers to the transcript of the Regents' meeting held on February 3, 2005. Page numbers follow.

works published long before he had become a faculty member and those previously reviewed in the University's hiring, tenure, and promotion processes. The investigation was initiated directly in response to what University officials acknowledged to be speech protected by the First Amendment and with the explicit goal of finding a reason to fire Professor Churchill.

Professor Churchill was never formally notified nor consulted by the *ad hoc* committee, whose investigation was conducted entirely outside the University's established committee structure and faculty disciplinary procedures. (TT 2524:7-11.) At the conclusion of this investigation, the *ad hoc* committee acknowledged it had not found grounds to fire Professor Churchill. (TT 466:6-9; App. 68.)

### C. Unable to fire Professor Churchill directly for his speech, University officials brought and prosecuted claims of research misconduct.

On March 24, 2005, Chancellor DiStefano reported to the Regents and the press – although not to Professor Churchill – that the First Amendment protected all of Professor Churchill's writings and public speeches, including his essay concerning the September 11 attacks. Simultaneously and in furtherance of his previously declared purpose of finding grounds for termination, the Chancellor announced he was personally lodging a series of complaints against

Professor Churchill for alleged research misconduct. (TT 466:6-9, 491:2-9; App. 7.)

Professor Churchill spent the next two years defending various aspects of his scholarship against Chancellor DiStefano's accusations. (TT 2625:20-2626:3.) Numerous charges, some simply in the form of articles published by Denver newspapers hostile to Professor Churchill, were presented by the Chancellor to an internal faculty body, the Standing Committee on Research Misconduct (SCRM). (App. 7-9.) These charges resulted from combing through the more than 4,000 pages of text and some 12,000 footnotes published by Professor Churchill.

The allegations were first investigated by a SCRM subcommittee composed primarily of University of Colorado faculty members and chaired by a law professor who, well before her appointment as chair, had expressed extreme bias against Professor Churchill. This bias was not disclosed to Professor Churchill during the SCRM's activities. (TT 477:9-478:8.) This subcommittee's report and recommendations were reviewed by the full Standing Committee on Research Misconduct. Another faculty body, the Privilege and Tenure (P&T) Committee, then held evidentiary hearings and reviewed the SCRM's conclusions.

The P&T Committee's findings were sent to University President Hank Brown who, in turn, made recommendation to the Regents. Neither the Chancellor who brought the research misconduct allegations,

nor any of the faculty members, administrators, or Regents involved in the subsequent evaluation of Professor Churchill's scholarship was an expert in American Indian Studies, Professor Churchill's field of scholarship. With the exception of two members of the SCRM subcommittee, all the internal review bodies were composed of faculty members and administrators directly subordinate to the Regents.

### D. Disregarding the recommendations of their internal investigative and review committees, the Regents fired Professor Churchill.

In a report subsequently condemned as inaccurate and biased by scholars and experts inside and outside the University,[3] the SCRM subcommittee concluded that a handful of passages and footnotes extracted from Professor Churchill's voluminous body of work failed to meet their – unspecified – standards of scholarly integrity. Based on these findings, only one of the five subcommittee members recommended dismissal. (App. 8-9.) Nonetheless, a majority of the full

[3] The SCRM subcommittee's report as well as the University's process as a whole is thoroughly debunked in "Report on the Termination of Ward Churchill," written by Don Eron, Suzanne Hudson, and Myron Hulen and issued by a standing committee of the Colorado Conference of the American Association of University Professors ("AAUP"). It is reproduced in the *AAUP Journal of Academic Freedom*, Volume Three, 2012, available at http://www.academicfreedomjournal.org/VolumeThree/ConferenceReport.pdf (accessed December 5, 2012).

SCRM overrode the investigative committee's recommendation and recommended dismissal. (App. 9.)

Upon a full review, the P&T Committee dismissed some of the SCRM's findings and upheld others. A majority of the P&T Committee recommended sanctions less severe than termination. These recommendations were sent to the university president. (App. 10-12.)

President Brown, who did not participate in any of the evidentiary hearings, unilaterally reinstated charges dismissed by the P&T Committee, overrode its recommendations, and urged the Regents to fire Professor Churchill. (App. 12, TT 895:6-896:4.)

The Regents are elected officials with general supervisory authority over the University. *See* Colo. Const. arts. VIII, sec. 5(a) and IX, sec. 12; Colo. Rev. Stat. § 23-20-102(1) (2012). They enact rules, which they term "laws," governing the University. Colo. Rev. Stat. § 23-20-112(1) (2012). Under these rules, the Regents are the sole body authorized to terminate tenured faculty and may do so only for cause. They receive recommendations from the University President and may consider the results of faculty review processes, but are not bound by either. There is no

provision for appealing their decisions. *See* University of Colorado Board of Regents Laws, art. 5.C.[4]

In this case, the Regents did not independently hear evidence concerning the allegations of research misconduct. (TT 4000:11-4001:25.) Professor Churchill, his attorney, and university counsel were permitted to make short presentations in a closed-door meeting on July 24, 2007, but could not present witnesses directly. At this meeting the Regents, most of who had called for Professor Churchill's firing in early 2005, voted 8-to-1 to terminate his employment. (App. 12.)

### E. Professor Churchill sued the University and Regents in Denver District Court under 42 U.S.C. § 1983 for violating his First Amendment rights.

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. (App. 13-14.)

---

[4] These "laws" are available on the University's website, https://www.cu.edu/regents/Laws/article-05.html (accessed December 3, 2012).

At trial, Professor Churchill presented two claims for equitable and other relief. These were (1) 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 (2) 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). (App. 13.)

### 1. The trial court granted the University a directed verdict on Professor Churchill's free speech investigation claim, holding that the investigation could not have been an adverse employment action.

At the conclusion of evidence, the trial court granted a directed verdict on Professor Churchill's free speech investigation claim, refusing to allow the jury to decide it on the grounds that Professor Churchill had not lost his job or pay as a result of the investigation. (App. 16.) Despite evidence of a chilling effect introduced by Professor Churchill, the trial court also concluded that other employees had not been deterred by the investigation. (TT 2632:14-20, 2875:9-2876:5, 2878:1-22; App. 16.)

**2. The jury decided that the Regents fired Professor Churchill in retaliation for his constitutionally protected speech and would not have fired him absent that speech.**

The court instructed the jury on the pretextual dismissal claim involving the research misconduct allegations and submitted special interrogatories. The jury's unanimous verdict in favor of Professor Churchill stated 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 evidence that [Professor Churchill] would have been dismissed for other reasons" absent his protected speech activity. (App. 170-71.) Professor Churchill had testified that he was concerned with reinstatement rather than money damages, and the jury made a nominal award of past damages. (TT 2626:4-11, App. 16-18.)

**3. The trial judge vacated the jury verdicts on the grounds that the Regents were entitled to absolute, quasi-judicial immunity.**

The University filed for post-trial relief, claiming quasi-judicial immunity. Its officials 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. 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. (App. 149-69, 18-19.)

### F. The Colorado Court of Appeals upheld the District Court's orders and the Supreme Court of Colorado affirmed.

Professor Churchill appealed, seeking primarily (1) reversal of the directed verdict dismissing the free speech investigation claim and (2) reversal of the order vacating the jury verdicts on grounds of quasi-judicial immunity. He requested that the court reinstate the jury's verdicts and remand with instructions to either reinstate Professor Churchill as a tenured professor or award him front pay. (App. 19-20.) The court of appeals affirmed the trial court's decision and declined to reinstate the jury's verdicts. (App. 20-21, 118.)

The Supreme Court of Colorado granted *certiorari* review and, on September 10, 2012, affirmed the lower court's rulings. (App. 63-64, 1, 4-5.) It held that the free speech investigation was not an adverse employment action and that, even had it been, University officials enjoyed qualified immunity because their investigation had not violated a clearly established constitutional right. (App. 54-61.) The Supreme Court of Colorado also concluded that the

procedures used to fire Professor Churchill were comparable to a judicial proceeding, thereby affording absolute, quasi-judicial immunity to the Regents.[5] (App. 30-48.) Finally, the court denied Professor Churchill's right to any equitable relief, notwithstanding the jury's verdicts. (App. 48-54.)

## REASONS FOR GRANTING THE PETITION

The Petition in this case should be granted for two reasons. The first is to confirm that state university officials who deliberately retaliate against a tenured professor, solely for his exercise of constitutionally protected speech, by formally and publicly investigating all of that professor's speech and writings with the stated purpose of finding grounds for termination, have violated a clearly established

[5] Typically these immunity questions would arise only in individual capacity suits, as both qualified and quasi-judicial immunity are affirmative defenses available only to officials sued in their individual capacities. See *Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985) (holding that personal immunities are unavailable in official-capacity actions). In this case, however, the Supreme Court of Colorado allowed the University and its Regents, in their official capacities, the benefit of defenses to personal liability. It based this on the pretrial agreement under which Professor Churchill dropped his individual capacity claims in exchange for the University's waiver of sovereign immunity and stipulated that the University retained all defenses that would have been available to the Regents in their individual or official capacities. (App. 21-25.)

constitutional right and are not protected by qualified immunity.

The *ad hoc* investigation into all of Professor Churchill's writings and public speech was launched explicitly in retaliation for statements he made concerning the attacks of September 11, 2001. The University has never contested that these were statements on a matter of public concern, protected by the First Amendment. The investigation was conducted outside of established faculty disciplinary protocols, and the officials who authorized and conducted the investigation stated publicly that they intended to find grounds for terminating his employment.

As discussed below, when this investigation took place in 2005 there was ample precedent in this Court and lower federal courts that not only termination but a range of other adverse actions taken against public employees in retaliation for the exercise of free speech would have a chilling effect on other employees and that such a chilling effect violated the First Amendment. The fact that, in this case, University officials were unable to find grounds to terminate Professor Churchill based on this investigation, and had to resort instead to the pretextual use of research misconduct allegations, does not mitigate the chilling effect of the initial free speech investigation. Unless this Court clarifies that such retaliatory investigations violate a clearly established constitutional right, state officials will be free to use

bad faith investigations to deter the exercise of free speech.

The second reason for granting this Petition is to clarify whether absolute, quasi-judicial immunity should be granted to state university regents when terminating tenured faculty members. The likelihood that such absolute immunity will shield deliberate violations of constitutional rights is well-illustrated by this case, in which the jury concluded that Professor Churchill was fired in retaliation for constitutionally protected speech and, further, that he would not have been fired but for that speech. Allowing professors to be fired in retaliation for exercising their First Amendment rights will chill expression in one of the places freedom of expression is most needed – our public colleges and universities.

This Court has frequently noted that absolute immunity is the exception, not the norm. *See, e.g.*, *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993). Under *Wood v. Strickland,* 420 U.S. 308, 320 (1975), overruled on other grounds by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), qualified immunity is sufficient to protect school board members and absolute, quasi-judicial immunity is not justified. The year after *Wood* was decided, this Court directed the Third Circuit to reconsider a decision granting absolute immunity to state college trustees in light of *Wood,* and the circuit court concluded that "[f]unctionally, the school board members adjudicating a student discharge and the state college officials adjudicating a faculty termination are identically situated." *Skehan*

*v. Bd. of Trs. of Bloomsberg State College*, 538 F.2d 53, 60 (3d Cir. 1976), *cert. denied*, 429 U.S. 979 (1976). There is, nonetheless, disagreement among the lower courts as to whether absolute or qualified immunity shields university officials and, in this case, the Supreme Court of Colorado granted the Regents absolute immunity.

Regents and trustees of public universities are responsible not simply for the expeditious management of state institutions, but for ensuring that these institutions fulfill their educational purposes. These officials have a specific mandate to protect the First Amendment. As this Court observed in *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003), "universities occupy a special niche in our constitutional tradition" because of the "important purpose of public education and the expansive freedoms of speech and thought associated with the university environment."

The right to free speech is eviscerated and academic freedom jeopardized when absolute immunity is invoked to allow state officials to violate the First Amendment rights of tenured professors with impunity. In an era where ideological differences are becoming increasingly pronounced and professors feel mounting pressure to conform to the political views – whether "liberal" or "conservative" – espoused by university officials, this question will continue to be litigated until this Court clarifies the law.

These two reasons for granting this Petition are explained more fully below.

## I. STATE OFFICIALS WHO RETALIATE AGAINST A PROFESSOR'S EXERCISE OF FIRST AMENDMENT RIGHTS BY INVESTIGATING ALL OF HIS PUBLIC SPEECH AND WRITINGS TO FIND GROUNDS FOR TERMINATION VIOLATE THE FIRST AMENDMENT BY CHILLING SPEECH AND SHOULD NOT BE SHIELDED BY QUALIFIED IMMUNITY.

At issue in this case is whether an investigation of "every word" publicly spoken or published by a university professor, initiated directly in retaliation for speech and with the express intent of finding grounds for termination, violated a clearly established constitutional right. The Supreme Court of Colorado did not decide whether this investigation could have violated the First Amendment. Instead, it held that even had there been a constitutional violation, University officials would have been protected by qualified immunity because "[t]here is disagreement [among federal courts] about whether an alleged bad faith employment investigation, absent a punitive change in employment status, is adverse and actionable under Section 1983." (App. 58.)

The question, however, is not whether all retaliatory employment investigations violate the First Amendment – clearly some do not – but whether a reasonable person would have known that this investigation would do so. The Supreme Court of Colorado's conclusion that Professor Churchill has no right of action against the University is incompatible with the precedent established by this Court. It disregards this Court's rulings that adverse employment

actions are defined by their deterrent or chilling effect on the exercise of constitutional rights, not by material changes in employment status. It also fails to recognize that this Court has found that a wide range of employment actions short of termination can have a chilling effect on the exercise of rights protected by the First Amendment, and that many federal courts have found investigations to be adverse employment actions.

In light of this body of law, well-established at the time of this investigation, a reasonable person would have known that a bad faith investigation into all of a professor's speech and writing, undertaken in retaliation for protected speech and with the stated intent of finding grounds for termination would deter others from exercising their right to freedom of expression and, thus, violate the First Amendment. Petitioner urges this Court to grant certiorari to clarify that such investigations violate a clearly established constitutional right and may not be engaged in by state university officials in order to suppress controversial speech and impose a state-sanctioned orthodoxy upon faculty members at public institutions of higher education.

### A. The First Amendment's protection of freedom of expression is vital to the core functions of American colleges and universities.

"Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person." *United States v. Alvarez*, ___ U.S. ___, 132 S.Ct. 2537, 2550 (2012). "[T]he purpose behind the Bill of Rights, and of the First Amendment in particular [is] to protect unpopular individuals from retaliation – and their ideas from suppression – at the hands of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). As this Court observed in *Texas v. Johnson*, 491 U.S. 397, 414 (1989), "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

This is true even when society fears the impact of such speech. Ineffective speech, like uncontroversial speech, is unlikely to be suppressed and, therefore, needs less protection. "Urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed." *McIntyre*, 514 U.S. at 347.

These principles have particular significance in institutions of higher education where "[t]eachers and students must always remain free to inquire, to study

and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire,* 354 U.S. 234, 250 (1957). For these reasons,

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

*Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

In this case, state university administrators and Regents investigated *all* of a tenured professor's speech and writings, in retaliation for controversial but constitutionally protected speech that had generated public and political pressure on the institution. They acknowledged that Professor Churchill's controversial essay could not be their stated grounds for termination because it was protected by the First Amendment, but promised their constituents that they would comb through his every word in order to find some reason – *any* reason – to fire him. This was an explicit attempt to "produce a result which [they] could not command directly." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (internal quotation marks omitted); *see also Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77-78 (1990) ("What the First Amendment precludes the government from commanding

directly, it also precludes the government from accomplishing indirectly.").

### B. It is clearly established that retaliatory employment actions, including investigations, that deter or chill freedom of expression constitute actionable violations of the First Amendment.

"[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (citations omitted). The test for determining whether a state official should be granted qualified immunity for engaging in a retaliatory action is whether he or she knew or should have known that such action would likely "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) (internal quotation marks omitted).

In 2006, this Court held that a retaliatory employment action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), is one that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (internal quotation marks omitted). This Court refused to limit such actions to those affecting terms or conditions of employment. *Id.* at 64; *see also Thompson v. N. Am. Stainless, LP*, ___ U.S. ___, 131

S.Ct. 863, 868 (2011) (reiterating that Title VII's antiretaliation provision prohibits action that might dissuade a reasonable worker from engaging in protected activity).

Well before the investigation at issue here, the Tenth Circuit had "repeatedly concluded" that adverse employment actions in First Amendment retaliation cases were not limited to actual or constructive employment decisions. *See Baca v. Sklar*, 398 F.3d 1210, 1220-21 (10th Cir. 2005) (citing *Morfin v. Albuquerque Pub. Sch.*, 906 F.2d 1434, 1437 n.3 (10th Cir. 1990); *Schuler v. City of Boulder*, 189 F.3d 1304, 1310 (10th Cir. 1999)). While *Burlington* was decided in 2006, the Tenth Circuit has observed that its deterrence standard was "consonant with [its] First Amendment employment retaliation cases." *Couch,* 587 F.3d at 1238.

*Burlington*'s deterrence or chilling effect standard is consistent with other federal court decisions in First Amendment retaliation cases brought under 42 U.S.C. § 1983. According to the Second Circuit, the test is whether the alleged adverse action "would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights." *Dillon v. Morano*, 497 F.3d 247, 254 (2d Cir. 2007) (internal quotation marks omitted). The Seventh Circuit held in 1994 that "even 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). Other circuits had done

the same. *See, e.g., Passer v. American Chemical Society*, 935 F.2d 322, 331 (D.C. Cir. 1991) (finding 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" to be adverse).

The investigation at issue did not result in immediate changes to Professor Churchill's terms or conditions of employment. However, its stated purpose was to find grounds for termination. Fifteen years earlier, this Court had explicitly stated that a test limiting First Amendment violations to "employment decisions that are the 'substantial equivalent of a dismissal'" was "unduly restrictive because it fail[ed] to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees . . . to conform their beliefs and associations to some state-selected orthodoxy." *Rutan*, 497 U.S. at 75.

Bad faith investigations, undertaken in retaliation for speech protected by the First Amendment, can clearly pressure "state employees . . . to conform their beliefs and associations to some state-selected orthodoxy." *Id.* In *Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992), a case with many parallels to that of Professor Churchill's, a tenured professor accused of making racially denigrating statements outside the classroom was subjected to investigation by an *ad hoc* committee. The purpose of the investigation was to determine whether Professor Levin's speech both inside and outside the classroom "may go beyond the

protection of academic freedom or become conduct unbecoming a member of the faculty, or some other form of misconduct." *Id.* at 89 (internal quotation marks omitted). The Second Circuit found that the threat of discipline implicit in this investigation into speech "was sufficient to create a judicially cognizable chilling effect on Professor Levin's First Amendment rights." *Id.*

Since then, a wide range of federal courts have found that investigations can constitute actionable adverse employment actions. *See, e.g.*, *Mullins v. City of New York*, 626 F.3d 47, 55 (2d Cir. 2010) (holding that 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) (holding that formal investigation and reprimand including threat of discipline can constitute adverse employment action); *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) (noting that actions including investigation, discipline, reviews, and probation could be found "all to be materially adverse").

Moreover, 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) (internal quotation marks omitted). When an

investigation objectively stigmatizes an employee, or harms his reputation or future employment prospects, it constitutes an adverse employment action. *Id.* at 54.

Federal precedent thus clearly establishes that retaliatory investigations may constitute actionable adverse employment actions and that, in the context of the First Amendment, they do so if they might have a chilling effect on other employees. Therefore, the question in this case is whether University officials should have known that the investigation they instituted into all of Professor Churchill's speech and writings would likely deter others from exercising their First Amendment rights.

### C. A reasonable person would have known that a bad faith investigation into all of a professor's speech and writings, undertaken in retaliation for protected speech and with the stated intent of finding grounds for termination, would have a chilling effect on the exercise of First Amendment rights.

In order to find that a clearly established right has been violated, this Court has not required "the very action in question" to have been held unconstitutional; rather, "in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (citations omitted). In other words, "there need not be binding precedent on 'all fours' with the current case; instead, 'the contours of

the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Finn v. New Mexico*, 249 F.3d 1241, 1250 (10th Cir. 2001) (quoting *Creighton*, 483 U.S. at 635).

In *Rutan* this Court noted that "the First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power." 497 U.S. at 64. This principle applies equally to threats to discharge or discipline public employees who engage in politically controversial but constitutionally protected speech. *See Mullins*, 626 F.3d at 55; *Billings*, 515 F.3d at 54-55.

The fact that the University, in this case, failed to find grounds to terminate Professor Churchill's employment does not change the fact that the investigation into his speech was intended to produce a facially acceptable reason for firing him and, thus, constituted a threat of discharge. It was also clear at the time that the investigation would violate the First Amendment by stigmatizing Professor Churchill and harming his reputation. *See Rattigan*, 604 F. Supp. 2d at 54 (finding an investigation that objectively stigmatizes an employee, or harms his reputation or future employment prospects to be actionable).

It is difficult to imagine a reasonable faculty member at the University of Colorado, or any other college or university, who would not be deterred from expressing politically controversial views when faced

with the threat of an investigation into every word he or she has ever spoken or published, undertaken to find grounds for termination.

Faculty members are required to speak publicly and to publish; they do not have the option of remaining silent. As a result, unless this Court confirms that such investigations violate a clearly established constitutional right, state university officials will remain free to coerce their faculty members into ideological conformity, thus undermining academic freedom and a core purpose of the First Amendment.

## II. QUALIFIED IMMUNITY IS SUFFICIENT TO PROTECT STATE UNIVERSITY REGENTS WHEN TERMINATING TENURED FACULTY; QUASI-JUDICIAL IMMUNITY IS INAPPROPRIATE UNDER *WOOD* AND *CLEAVINGER*.

In this case a jury, after hearing extensive testimony from the University administrators and Regents, concluded that Professor Churchill had not been – and would not have been – fired for the reasons proffered by those officials, but was fired in retaliation for his constitutionally protected speech. In other words, the two years of "research misconduct investigations" to which Professor Churchill had been subjected merely provided a pretext for the Regents to fire him in violation of the First Amendment.

According to the Colorado courts, the University's internal processes that were manipulated to achieve this unconstitutional result bore enough hallmarks of judicial action to constitute quasi-judicial action. As a

result, its Regents are and will remain absolutely immune from liability for firing professors in retaliation for the exercise of their First Amendment rights – or for any other unconstitutional reason – as long as they go through the motions of an internal review process whose conclusions they are free to disregard.

As the jury recognized, the record in this case demonstrates that University officials set out to fire a controversial professor because he spoke out on a matter of public concern. When their initial investigation into all of his speech and publications failed to provide grounds for termination, they pretextually employed their research misconduct procedures to accomplish this unlawful purpose. Allowing officials who deliberately violate the First Amendment in this manner to claim the protection of quasi-judicial immunity places a formidable tool in the hands of those university administrators who wish to deter speech they disfavor or impose an ideological orthodoxy on their faculty members.

In *Wood v. Strickland*, 420 U.S. 308 (1975), this Court held that qualified immunity was sufficient to protect members of a school board with respect to their decisions in disciplinary matters. The *Wood* Court's analysis was discussed in *Butz v. Economou*, 438 U.S. 478, 498 (1978) (finding qualified immunity sufficient to protect executive officials in most cases), and relied upon in *Cleavinger v. Saxner*, 474 U.S. 193, 204-05 (1985) (denying quasi-judicial immunity to a prison's disciplinary review committee). As explained further below, termination decisions made by

university officials do not have the characteristics of quasi-judicial action articulated in *Butz* and *Cleavinger*, and several circuit courts have assumed that *Wood*'s holding applies to college and university regents and trustees as well as school board members.

Nonetheless, because this Court has not directly addressed the issue, some courts – including the Supreme Court of Colorado – have granted these officials quasi-judicial immunity. This case illustrates why it is important for this Court to clarify that qualified immunity provides sufficient protection to the trustees and regents of colleges and universities making decisions to terminate tenured faculty members.

### A. Decisions by university trustees or regents to terminate tenured faculty do not constitute quasi-judicial action under *Butz v. Economou* and *Cleavinger v. Saxner*.

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) (internal quotation marks omitted). In *Cleavinger*, this Court denied quasi-judicial immunity to a prison review board, analogizing its functions to those of the school board denied quasi-judicial immunity in *Wood*. 474 U.S. at 204-05. Citing *Butz*, the Court identified six

non-exclusive factors characteristic of quasi-judicial action:

> (a) the need to assure that the individual can perform his functions without harassment or intimidation;
>
> (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct;
>
> (c) insulation from political influence;
>
> (d) the importance of precedent;
>
> (e) the adversary nature of the process; and
>
> (f) the correctability of error on appeal.

474 U.S. at 202 (citing *Butz*, 438 U.S. at 512). As the record in this case illustrates, termination decisions made by university regents are unlikely to reflect these characteristics.

Regents and trustees are no more likely to be harassed or intimidated by the prospect of wrongful termination suits than any other employer. In this case, the University did not bother to raise its immunity defenses until after trial (App. at 18), illustrating that the time, expense, and effort involved in a month-long jury trial were not of particular concern to the Regents.

The procedural safeguards required to deter unconstitutional conduct do not exist when they consist of internal investigative and review processes

conducted by other employees of the same institution. *See Cleavinger*, 474 U.S. at 203-04 (finding disciplinary board composed of employees directly subordinate to the warden reviewing their decisions insufficiently independent to warrant absolute immunity). Further, internal investigative and review process cannot provide safeguards when their results are not binding on the final decisionmaker and when they inadequately guard against bias or pretextual use. The termination process employed by the Regents of the University of Colorado suffers from each of these inadequacies.

In Colorado, as in many states, the Regents are elected political officials. Whether trustees and regents are elected or appointed, they are inevitably subject to political pressure, threats to funding, and media scrutiny that prevent them from functioning as neutral and independent adjudicators.

The *Cleavinger* Court emphasized the importance of precedent to ensure that quasi-judicial decisionmakers are constrained by law. Employment decisions are by definition individualized and usually – although not in this case – protected by confidentiality. Here, the University provided no evidence of internal or external precedent constraining their discretion.

At the University of Colorado, like most institutions, the Regents were not constrained by an 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.

The Regents only allowed Professor Churchill to make a short statement and his attorney to summarily rebut the research misconduct allegations in a closed-door meeting. They did not hear evidence themselves, yet nonetheless rejected the recommendations of those who had. Throughout the process, Professor Churchill 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.

Finally, there are no provisions for appellate review. Only the Regents are authorized to terminate tenured professors and there are no avenues for appealing their decision within the University system.

For all of these reasons, trustees and regents of public colleges and universities do not meet this Court's standards for quasi-judicial action and it is inappropriate for their decisions to terminate tenured faculty to be shielded by absolute immunity.

### B. Qualified immunity is sufficient to protect university trustees and regents making employment decisions in accordance with the rationale of *Wood v. Strickland*.

In *Forrester v. White*, 484 U.S. 219, 224 (1988), this Court cautioned that 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 liability on those functions evaluated. *Wood v. Strickland* is this Court's only decision directly addressing claims for quasi-judicial immunity by school officials. There, this Court denied absolute immunity on the grounds that increasing school officials' discretion did not "warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." *Wood*, 420 U.S. at 320.

This reasoning has been extended by the courts of appeals to decisions about faculty terminations as well as student discipline. *See, e.g.*, *Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 224-25 (5th Cir. 1999) (denying quasi-judicial immunity to school trustees' employment decision); *Stewart v. Baldwin Cnty. Bd. of Educ.*, 908 F.2d 1499, 1508 (11th Cir. 1990) (denying quasi-judicial immunity to school board members discharging employee).

This Court has not explicitly extended *Wood*'s holding to college and university officials. Nonetheless, the functional analysis applied in *Wood*, and the

conclusions reached in that opinion, appear equally appropriate to institutions of higher education. *See Skehan,* 538 F.2d at 60 ("Functionally, the school board members adjudicating a student discharge and the state college officials adjudicating a faculty termination are identically situated.").

Chief Judge Richard Posner, writing for the Seventh Circuit, noted that "[c]onceivably, absolute immunity is available to the university's judicial officers, though this is most unlikely given the Supreme Court's refusal to grant such immunity to members of school boards that adjudicate violations of school disciplinary regulations, and to members of prison disciplinary committees." *Osteen v. Henley*, 13 F.3d 221, 224 (7th Cir. 1993) (citing *Wood*, 420 U.S. at 320 and *Cleavinger*, 474 U.S. at 204-06).

Other federal courts have agreed that qualified immunity sufficiently protects state university officials. In *Purish v. Tenn. Technological Univ.*, 76 F.3d 1414, 1421-22 (6th Cir. 1996), the Sixth Circuit granted qualified but not quasi-judicial immunity to state university officials who denied tenure to a faculty member because, among other reasons, the grievance committee that performed adjudicatory functions was composed of university employees subordinate to those officials.

Similarly, in *Brown v. W. Conn. State Univ.*, 204 F. Supp. 2d 355, 362-63 (D. Conn. 2002), the district court relied on *Wood* to conclude that the president and trustees of a state university were entitled only

to qualified rather than quasi-judicial immunity. In a case involving the suspension of a student, the state university president who had ultimate decision-making authority was denied quasi-judicial immunity because the district court found *Wood* to be "controlling." *Smith v. Rector and Visitors of Univ. of Va.*, 78 F. Supp. 2d 533, 539 (W.D. Va. 1999).

The Wyoming district court, however, has granted quasi-judicial immunity to the trustees of its state university in connection with the termination of a faculty member. *Gressley v. Deutsch*, 890 F. Supp. 1474 (D. Wyo. 1994). Like the ruling of the Supreme Court of Colorado in this case, the *Gressley* opinion does not acknowledge this Court's opinion and analysis in *Wood*. The discrepancy between the lower courts that consider *Wood* to be controlling with respect to institutions of higher education on the question of quasi-judicial immunity and those courts that do not consider it significant enough to warrant citation highlights the importance of clarification by this Court.

### C. The dangers of expanding absolute immunity are illustrated by this case, in which quasi-judicial immunity was granted after a jury determined that state officials had fired a tenured professor in violation of the First Amendment.

In *Forrester*, this Court denied a judge absolute immunity for firing a probation officer. 484 U.S. at 224. In making that decision, it 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." *Id.* at 223. This Court has also emphasized that the purpose of 42 U.S.C. § 1983 is to ensure the protection of "the basic federal rights of individuals against incursions by state power." *Patsy v. Bd. of Regents of the State of Florida,* 457 U.S. 496, 503 (1982). This purpose cannot be fulfilled when there is no meaningful restraint on state officials who fire tenured faculty members in retaliation for their exercise of rights guaranteed by the First Amendment.

As this Court noted in *Wood*, quasi-judicial immunity is appropriate only when necessary 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. 420 U.S. at 319-20. In this case, a jury was allowed to hear the evidence and unanimously agreed that the Regents of the University of Colorado had fired Professor Churchill in retaliation for speech protected by the First Amendment and would not have fired him absent that speech. The University chose not to raise the defense of quasi-judicial immunity until it had lost at trial. Quasi-judicial immunity was invoked not to ensure that the Regents could fulfill their lawful duties in a principled manner but to avoid liability for actions a jury had found to be unconstitutional.

Allowing the University to eschew responsibility for its violations of the Constitution in this case

makes a mockery of the rule of law. Further, if university trustees and regents in Colorado and other jurisdictions are allowed to shield their actions with absolute immunity, there will be no such opportunity to determine constitutional violations and those governing bodies will be allowed to violate the First Amendment rights of tenured faculty with impunity. State university officials will be free to fire any professor whose views happen to be unpopular at a given time, or in a given institution, in retaliation for expressing those views.

This case illustrates the perils of hasty and politically motivated extensions of absolute immunity and why it is important for this Court to clarify that procedures employed by university trustees and regents, including those used to fire Professor Churchill, do not meet this Court's functional analysis test for quasi-judicial action.

## CONCLUSION

For the foregoing reasons, Petitioner requests this Court to grant a Writ of Certiorari on the issues identified above.

Respectfully submitted,

David A. Lane
*Counsel of Record*
KILLMER, LANE & NEWMAN, LLP
1543 Champa Street, Suite 400
Denver, Colorado 80202
Telephone: (303) 571-1000
Facsimile: (303) 571-1001
E-mail: dlane@kln-law.com

*Counsel for Petitioner*
*Ward Churchill*