.District Court City and County of Denver, Colorado 1437 Bannock Street Denver, Colorado 80202 **Plaintiff:** **Ward Churchill**, v. **Defendant(s):** **University of Colorado,** **Regents of the University of Colorado, a Colorado body corporate.**	 ▲ COURT USE ONLY ▲
Attorneys for Plaintiff: David A. Lane, Atty. Reg. No. 16422 Darold Killmer, Atty. Reg. No. 16056 Qusair Mohamedbhai, Atty. Reg. No. 35390 **KILLMER, LANE & NEWMAN, L.L.P.** 1543 Champa Street, Suite 400 The Odd Fellows' Hall Denver, CO 80202 Phone Number: (303) 571-1000 Fax Number: (303) 571-1001 E-mail: dlane@killmerlane.com Robert J. Bruce, Atty. Reg. No. 17742 **LAWLIS & BRUCE, L.L.C.** 1875 Lawrence Street, Suite 750 Denver, CO 80202 Phone Number: (303) 573-5498 Fax Number: (303) 573-5537 E-mail: robertbruce@lawlisbruce.com	Case Number: 06 CV 11473 Division: 6

PLAINTIFF'S SUR-REPLY TO DEFENDANT'S MOTION FOR JUDGMENT AS MATTER OF LAW

Plaintiff, Ward Churchill, by and through undersigned counsel hereby files the following PLAINTIFF'S SUR-REPLY TO DEFENDANT'S MOTION FOR JUDGMENT AS MATTER OF LAW:

I. INTRODUCTION

When Congress adopted the Civil Rights Act of 1866, the Fourteenth Amendment (ratified in 1868), and the Ku Klux Klan Act of 1871 (§ 1 of which is codified as 42 U.S.C. § 1983) one thing was made crystal clear: Congress was far more concerned with providing a robust federal response to -- and federal remedy for -- civil rights abuses than it was with preserving any then-existing common law tort immunities for some of the very same actors who were wreaking havoc in former slave states.

The United States Supreme Court has repeatedly held that § 1983 must be interpreted in light of the historical context (including the congressional intent) of 1871, the year that the 42nd Congress enacted the Ku Klux Klan Act. The undisputed purpose of § 1983 was to create liability for unlawful conduct of state officials, the Supreme Court has always stressed that it would confer absolute immunity sparingly. *See Imbler v. Pachtman*, 424 U.S. 409, 434 (1976) (White, J., concurring) ("[T]o extend absolute immunity to any [class] of state officials is to negate *pro tanto* the very remedy which it appears Congress sought to create.").

For these reasons, absolute immunity is recognized only sparingly, and non-judicial officials seeking quasi-judicial immunity bear the heavy burden of showing that their actions are entitled to such absolute protection. *See, Gilchrist v. Citty*, 71 Fed. Appx. 1, 5 (10th Cir. 2003) citing *Burns v. Reed*, 500 U.S. 478, 486-87 (1991). There is a presumption that qualified immunity (not quasi-judicial immunity) is generally sufficient to protect government officials. *Id.* Granting the Regents absolute immunity, and thereby impliedly conferring the same status upon hundreds of officials at state schools across Colorado, would fly directly in the face the purpose of 42 U.S.C. § 1983.

II. ARGUMENT

A. The Regents of the University of Colorado are Elected Politicians – Not Judges.

Because it "contravenes the basic tenet that individuals be held accountable for their wrongful conduct," *Westfall v. Erwin*, 484 U.S. 292, 295 (1988), absolute immunity is an extreme measure that should be invoked only sparingly and with great caution, especially without an express constitutional or statutory basis. *Forrester v. White*, 484 U.S 219, 223-24 (emphasis added). See also *Hafer v. Melo*, 112 S. Ct. 358, 363-64 (1991). "Officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy." *Forrester*, 484 U.S. at 224. *See Burns v. Reed*, 111 S. Ct. 1934, 1939 (1991); *Malley v. Briggs*, 475 U.S. 335, 340 (1986); *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982).

In Plaintiff's Response, *Moore v. Gunnison Valley Hosp*., 170 F. Supp. 2d 1080, 1083-1084 (D. Colo. 2001) was extensively briefed for this Court. The essential holding of *Moore* in denying quasi-judicial immunity to a medical board was that they were subject to political pressure that most neutral hearing officers were not subjected to. In this case, Regent after Regent testified both in trial and deposition (Exhibit 1) that, far from being the neutral and detached magistrates which judges are required to be, they were consistently and only responsive to the concerns of their constituents in proceeding in the Churchill matter. Judges, on the other hand, do not have constituents. Indeed, the hallmark of being a fair judge is to be a "detached and neutral magistrate." *United States v. Leon*, 468 U.S. 897 (1984). The Framers viewed independent judges as indispensable to a fair trial. *See, e.g., United States v. Hatter*, 532 U.S. 557, 568-569 (2001) (discussing the Framers' overriding concern for an independent Judiciary and quoting Chief Justice Marshall's statement that the "'greatest scourge . . . ever

inflicted'" "'was an ignorant, a corrupt, or a dependent Judiciary.'" *See also Gonzalez v. United States*, 128 S. Ct. 1765, 1780-1781 (U.S. 2008) (Thomas, J., dissenting).

Far from being "detached and neutral" the Regents in this case were admittedly politically motivated by being responsive to the concerns of their constituents. The attitude of *fiat justitia, ruat coelum* (let justice be done, though the heavens may fall) *Morrison v. Olson*, 487 U.S. 654, 732 (U.S. 1988) (Scalia, J., dissenting), while a touchstone for truly independent judges, is hardly a mantra adopted by most politicians, including the Regents of the University of Colorado.

The Regents in no way insulated themselves from public opinion, or otherwise rejected any outside influences during the Churchill controversy. In fact, most Regents sought out the opinions of their constituents – because they are elected officials, and entirely accountable to their constituents for their decisions. Improper influences from within and without the University of Colorado ultimately led to Churchill's unconstitutional termination. As the Court is aware, there was testimony from every Regent that described in detail the pressures each faced (and acquiesced to) from their constituents and donors to terminate Professor Churchill. Examples abound (see Exhibit 1):

- Regent Steven Bosley testified that independence was not important for a Regent, and he stressed the importance of answering directly to the people. He expressed grave concern about how his constituents reacted to Churchill's 9-11 essay;

- Regent Cindy Carlisle discussed on direct examination the world-wide external pressures of the Ward Churchill controversy and how it was important to show the world CU was doing something;

- Regent Michael Carrigan testified on direct examination of his inability to influence other Regents due to his lack of seniority and his registration as a Democrat. He spoke at length of his and other Regents' sensitivity to their constituents and the pressure all of the Regents were under to do something about Churchill;

- Regent Patricia Hayes on direct testified at length about the negative reactions of her constituents to the Churchill controversy, and how as an elected Regent, it was her duty to respond to it. She stated that they were "under siege" regarding Churchill and there was an overwhelming need to respond to the firestorm in order to appease alumni and donors. She also noted that as an elected official, she was required to be responsive to the concerns of her constituents;

- Regent Kyle Hybl testified on direct that he became a Regent because he was interested in the political process;

- Regent Tom Lucero stated on direct examination that it was important to be sensitive to his constituents' concerns;

- Regent Ludwig testified on direct examination of the issues of partisanship and politics, and the need to resist pressures from other Regents based on political affiliation;

- Regent Jerry Rutledge testified on direct that he was "very upset" because his constituents were threatening to not support the University because of Churchill controversy. He testified that as a public official he was very concerned about the Churchill situation.

- Regent Pete Steinhauer testified about his concerns about pressures from other branches of government during the Churchill controversy and the importance of the reputation of the University.

- Senator and former Regent Gail Swartz testified on direct examination of the Churchill controversy's negative influences on the funding to the University. On cross-examination she discussed her serious responsibility to be responsive to her constituents.

- Regent Tillman Bishop was a career politician before becoming a Regent. He further testified that he had obligations to his constituents and the citizens of Colorado when reviewing the P&T Committee's Churchill findings.

Attached are transcripts of deposition and trial testimony demonstrating, among other things, the pressures each Regent faced from their constituents and donors to terminate Professor Churchill. *Regents' Trial and Deposition Testimony* attached as Exhibit 1.

As discussed in detail in Plaintiff's response brief, just as Judge Walker Miller denied the Gunnison Valley Hospital's *ad hoc* committees request for quasi-judicial immunity on grounds of possible manipulation by elected officials, *Moore v. Gunnison Valley Hosp.*, 170 F.

Supp. 2d 1080, 1087 (D. Colo. 2001) this Court should reject Defendants' sweeping approach to absolute immunity, as it is at odds with precedent which rejects "a fixed, invariable rule of immunity [and instead] has advised a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens." *Doe v. McMillan*, 412 U.S. 306, 320 (1973).

One of the hallmark responsibilities of a Judge, as described in the Colorado Judicial Canons, is to be "faithful to the law and maintain professional competence in it. A judge should be unswayed by partisan interest, public clamor, or fear of criticism." *Colo. Code of Judicial Conduct CANON 3*(emphasis added). A judge should not allow family, social, or other relationships to influence the judge's judicial conduct or judgment. A judge should not lend the prestige of his or her office to advance the private interests of others. *Colo. Code of Judicial Conduct CANON 2*. Regent testimony such as **"**we answer directly to the people," or "we need to be listening to our constituents," or "my obligation and my responsibility as a regent are to my constituents" cannot be reconciled with the extraordinarily important functions and role of an independent judiciary. The overwhelming evidence in this case demonstrates that the Regents are, to the core, politicians. As politicians, the Regents of the University of Colorado are not the "functional equivalent of judges" and not entitled to quasi-judicial immunity. Additionally, as discussed in detail later, the Regents are not "judicial officers" within the meaning of 42 U.S.C. § 1983, thereby rendering the 1996 amendments to § 1983 inapplicable to this litigation.

B. The Agreement Between the Parties Does Not Confer Regent Immunity Defenses, in their Individual Capacities, upon the University of Colorado in its Official Capacity.

It is Plaintiff's contention, as previously argued, that quasi-judicial immunity does not apply in this case. If this Court determines that under any set of facts, the doctrine is not applicable in this case, no further analysis is necessary. The matter is slightly complicated by the fact that an agreement between the parties existed essentially as outlined in Defendant's Reply, stating:

> The University agrees and stipulates that it shall waive its immunity to claims for damages under the Eleventh Amendment to the United States Constitution to permit the same recovery from the University that might otherwise be had against any of its officials or employees acting in their official or individual capacities, reserving to the University the ability to present the same defenses that would have been applicable to any of its officials or employees acting in their official or individual capacities.

The intent of this agreement was that CU would waive 11th amendment immunity in exchange for Plaintiff dismissing the Regents individually, thereby saving them from personal liability. The benefit to Plaintiff was that the Regents would not hire nine separate individual lawyers to defend. We further agreed that the entity of CU would have all the same defenses and liabilities available to the Regents. What that means is that the parties have agreed to the legal fiction that CU is both an individual and an official capacity "person" for purposes of this lawsuit.[1] It was never Plaintiff's intent to give up any individual or official capacity defenses CU obtains by standing in the shoes of the Regents nor to eliminate CU as an entity from this case. Our intent was to take the individual Regents out of the mix, giving CU all immunities previously enjoyed by the Regents in both individual and official capacities and Plaintiff retaining all legal rights to defeat both individual and official capacity claims of immunity.

[1]CU as a legal "person" for purposes of a § 1983 lawsuit is similar to a municipal entity having "person" status under the statute. *See e.g. Monell v. Department of Soc. Servs.* 436 U.S. 658 (1978).

Indeed, CU was originally pled as a defendant entity in the case and continues to be a defendant entity in this case. Entities do not enjoy quasi-judicial immunity.

It is CU's position that quasi-judicial immunity should apply to CU in its individual capacity, however CU fails to address the issue previously briefed by Plaintiff, that quasi-judicial immunity only applies to *individual* capacity suits. As such, it would not apply to CU in its official capacity, thereby leaving the parties precisely in the same legal positions as previously briefed. From Plaintiff's perspective, that means that this Court should not apply the doctrine in any event, but even if it does, it only saves CU $1 in damages in its individual capacity, but not in its official capacity.

C. Based on *Tonkovich v. Kansas Bd. of Regents,* the University of Colorado Board of Regents, like the University of Kansas Board of Regents, are not "judicial officers" within the meaning of 42 U.S.C. § 1983.

In a case more closely on-point than any case previously briefed, the United States District Court for the District of Kansas examined a claim for quasi-judicial immunity brought by the Regents of the University of Kansas in a suit brought by a terminated law professor who was alleging a First Amendment motivation to his firing.

In *Tonkovich v. Kansas Bd. of Regents*, 1996 U.S. Dist. LEXIS 18323, 31-34 (D. Kan. Nov. 21, 1996)[2](*reversed on other grounds Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504 (10th Cir. Kan. 1998)) the court began the analysis noting that the Supreme Court has adopted a two-pronged approach to determine whether a government official has absolute immunity in a § 1983 action. *Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985). The first question is whether there is a historical or common-law basis for the immunity in question. *Id.; Urban v. Henley*, 654 F. Supp. 870, 874 (D. Kan. 1987). If there is no historical, common-law basis for immunity

[2] Unpublished case attached as Exhibit 2.

inquiry is expanded to determine whether the official in question functions in a manner comparable to officials shielded by immunity when § 1983 was passed. *Cleavinger v. Saxner*, 474 U.S. 193, 197 (1985) (immunity turns on whether function of official can be classified as "quasi-judicial" in nature); *Urban*, 654 F. Supp. at 874-75.

Tonkovich is strikingly factually and legally similar to the instant case. The court in *Tonkovich* held that the individual members of the Board of Regents of the University of Kansas "serve in a legislative capacity," and therefore they are not entitled to quasi-judicial immunity. *Id.* at *39. Emil Tonkovich, like Ward Churchill, was fully tenured professor at the University of Kansas. Professor Tonkovich brought claims mirroring Professor Churchill's original complaint, which included a claim for First Amendment retaliation. *See, generally, Tonkovich,* 1996 U.S. Dist. LEXIS 18323 *6-7. The named defendants in that litigation were the Kansas Board of Regents, the University of Kansas, and thirty-one individuals making up the committees that reviewed his case. *Id.* The Regents of the University of Kansas upheld the recommendation by the "Committee on Tenure and Related Problems" to terminate Professor Tonkovich's employment. *Id.* at *20.

Professor Tonkovich brought an action "against thirty-three defendants alleging various constitutional and state law violations in connection with his termination as a professor at the University of Kansas School Of Law." *Id.* at *6. Professor Tonkovich claimed that he was terminated for expressing political views, and the defendants alleged that Tonkovich was terminated for sexual harassment forbidden by Title VII and Title IX, and, therefore, a violation of the University of Kansas' moral turpitude provision of the Faculty Code. *Id.* *17-19. Professor Tonkovich's termination took place following a hearing conducted before the University of Kansas' faculty committee members. *Id.*

In the ensuing litigation, Professor Tonkovich alleged (as was similarly found by the jury in this case), that "defendants fired him for expressing his personal…political views…" *Id.* at *60. Identical to the current issue before this Court, in *Tonkovich,* the individual members of the Board of Regents of the University of Kansas argued they were absolutely immune from suit because of quasi-judicial immunity. *Id.* at *38-42.

The court in *Tonkovich* found that individual members of the Board of Regents of the University of Kansas were not entitled to quasi-judicial immunity because the "Kansas Board of Regents functions in both a legislative and adjudicatory capacity." *Id.* at * 39. Since "the Kansas Legislature did not provide the Kansas Board of Regents with the same explicit delegation of quasi-judicial functions…the individual members of the Kansas Board of Regents are not clothed with absolute immunity." *Id.* at *41. Furthermore, the *Tonkovich* court found that the members of the Kansas Board of Regents were not protected by quasi-judicial immunity because the Kansas legislature had not "specifically delegated [its] quasi-judicial role by statute." *Id.* * 40. The court in *Tonkovich* specifically concluded that "the Kansas Board of Regents is not an administrative board," thus not entitled to quasi-judicial immunity. *Id.* at *40.

There is absolutely no meaningful distinction between the University of Kansas Board of Regents and the University of Colorado Board of Regents. Indeed, under Kansas law, the Kansas Regents were appointed by the Governor and the mayor of the town where it is located, K.S.A. § 13-13a04 (2008), and thus not subject to the same political winds the Colorado Regents are subject to. Appointed Regents are more similar to hearing officers or quasi-judicial officers than are elected Regents. If anything, the Kansas Regents had a better argument for quasi-judicial immunity than do the Colorado Regents.

In denying quasi-judicial immunity (and similarly argued at length by Plaintiff in his Response brief), the court in *Tonkovich* found the University of Kansas Board of Regents functioned in a legislative capacity, and not in a judicial capacity, because the Kansas Regents have the power, by statute, to "control, operate, manage, and supervise the state educational institutions." *Id.* at *40 citing K.S.A. § 76-712. Just like the University of Kansas Board of Regents, the University of Colorado Board of Regents, by statute, engage in the "general supervision of the university and control and direction of all funds of and appropriations to the university." *C.R.S.* 23-20-111. In fact, the University of Colorado Board of Regents has greater legislative powers than do the University of Kansas Board of Regents, as the Colorado Regents have the specific statutory power to "enact laws for the government of the university…" *C.R.S. 23-20-112.*

In *Saavedra v. City of Albuquerque*, 73 F.3d 1525 (10th Cir. 1996), the Tenth Circuit noted:

> absolute immunity applies, therefore, where (1) the defendant's duties and the procedures employed are functionally comparable to those of a court of law; (2) maintenance of the impartiality and effectiveness of the adjudicatory process in question requires eliminating any threat of personal liability; (3) the defendant's actions are more likely than other governmental actions to result in disappointed parties' institution of lawsuits; and (4) procedural safeguards exist and are adequate to correct or prevent erroneous or intentional constitutional violations. *Id*. at 1530 (*citing Horwitz*, 822 F.2d at 1513); *see also Cleavinger*, 474 U.S. at 202; *Butz v. Economou*, 438 U.S. 478, 511, 57 L. Ed. 2d 895, 98 S. Ct. 2894 (1978). These four factors are known as the *Butz* test for absolute immunity.

Tonkovich, 1996 U.S. Dist. LEXIS 18323, 31-34. Just as the Defendants in the Churchill case, the defendants in *Tonkovich* argued that the dismissal process provided exhaustive, adversarial proceedings which were quasi-judicial in nature. The defendants in both cases liken their roles to that of state court judges. The United States District Court, however, disagreed and denied

quasi-judicial immunity to the hearing officers at the University of Kansas. Just as is the case in Churchill, the members of the various committees involved in the disciplinary process in Kansas were deemed not to be "independent" as they were merely professors from various departments pulled in for purposes of investigating misconduct allegations. The Court went so far as to say that to call them "independent" would be to "ignore reality."[3] The Court compared the Kansas situation to the United States Supreme Court's analysis denying quasi-judicial immunity to a prison disciplinary committee in *Cleavinger.* The court cited *Cleavinger's* analysis that:

> They are not professional hearing officers, as are administrative law judges. They are, instead, prison officials, albeit no longer of the rank and file, temporarily diverted from their usual duties. They are employees of the Bureau of Prisons and they are the direct subordinates of the warden who reviews their decision. They work with the fellow employee who lodges the charge against the inmate upon whom they sit in judgment. The credibility determination they make often is one between a co-worker and an inmate. They thus are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee. It is the old situational problem of the relationship between the keeper and the kept, a relationship that hardly is conducive to a truly adjudicatory performance.

Tonkovich, 1996 U.S. Dist. LEXIS 18323, *34-36.

The federal court held that "…one of the cornerstone factors for determining whether absolute immunity applies to a hearing officer is whether the adjudicator functions as a professional hearing officer rather than as an employee of the public agency involved in the action. *Ramirez*, 41 F.3d at 592 (employees of state agency acting as a disciplinary hearing committee were not entitled to absolute immunity); *see also Saavedra*, 73 F.3d at 1530 (defendant was a "professional hearing officer" instead of an employee of city). In *Ramirez*, the Court noted that a disciplinary committee composed of people who are employees of a state

[3] "Pet poodles" was the term applied to the various committee members in the Churchill trial. This is hardly an independent group of people as evidenced by the Jury's verdict.

agency, rather than independent, professional hearing officers, have "an inherent tendency to undermine the objectivity and impartiality required for absolute immunity to apply." 41 F.3d at 592. As demonstrated above, the Regents impartiality was compromised by their desires to please their constituents, which is at odds with objectivity and independence.

For these and all previously cited reasons, this Court should determine that quasi-judicial immunity does not apply in this case, however, even if it does apply, it does not apply to CU and the Regents in their official capacities. Furthermore, the members of the Colorado Board of Regents are not protected by quasi-judicial immunity because the Colorado legislature has not "specifically delegated [its] quasi-judicial role" by statute. The 1996 amendments to 42 U.S.C. § 1983 are inapplicable to this ligation because the University of Colorado Board of Regents, like the University of Kansas Board of Regents, act in a legislative capacity, and not an administrative capacity. Based on *Tonkovich*, the Regents are not "judicial officers" within the meaning of 42 U.S.C. § 1983. Since Defendants cannot prove that the Regents are "judicial officers" within the meaning of 42 U.S.C. § 1983, the 1996 amendments to 42 U.S.C. § 1983 are wholly inapplicable to this litigation.

D. Even if Quasi-Judicial Immunity is Granted, the FCIA Does Not Preclude Equitable Relief Under These Circumstances.

If this Court finds that the Regents should receive quasi-judicial immunity from damages, a very interesting issue arises regarding whether the 1996 amendments to § 1983, commonly known as the Federal Court Improvement Act (FCIA), limiting the availability of equitable relief against judicial officers, would apply to quasi-judicial officers.

There is a surprising paucity of cases defining this issue however there is authority supporting both sides of the argument. Neither the Supreme Court nor the Tenth Circuit has

addressed whether section 1983 protects quasi-judicial actors from actions for injunctive relief, but there is authority that quasi-judicial actors are immune from such actions. *See Montero v. Travis*, 171 F.3d 757, 761 (2d Cir. 1999); *Roth v. King*, 371 U.S. App. D.C. 254, 449 F.3d 1272, 1286-87 (D.C. Cir. 2006); *Gilbert v. Ferry*, 401 F.3d 411, 414 n.1 (6th Cir. 2005) (*dicta*); *Pelletier v. Rhode Island*, No. 07-186S, 2008 U.S. Dist. LEXIS 96720, 2008 WL 5062162, at *5-6 (D.R.I. Nov. 26, 2008); *Cannon v. South Carolina Dept. of Corrections*, No. 07-3984, 2008 U.S. Dist. LEXIS 6676, 2008 WL 269519, at *4 (D.S.C. Jan. 29, 2008); *Von Staich v. Schwarzenegger*, No. 04-2167, 2006 U.S. Dist. LEXIS 73105, 2006 WL 2715276 (E.D. Cal. Sept. 22, 2006); *But see contra. Simmons v. Fabian*, 743 N.W.2d 281 (Minn. Ct. App. 2007). *Gilmore v. Bostic*, 2009 U.S. Dist. LEXIS 25682 (S.D. W. Va. Mar. 27, 2009)

Having reviewed the applicable cases, not surprisingly, it appears to Plaintiff that the Minnesota Court of Appeals has the better argument as found in *Simmons,* (*supra.*) (*see attached*). The Court in *Simmons* was analyzing whether the statute must be narrowly construed to apply only to "judicial officers" as the plain language of the statute indicates. In a careful analysis of the legislative history behind the FCIA, the court held:

> There is no indication that Congress intended the FCIA to undermine its original goal for the Civil Rights Act of 1871. Congress did not purport to change the fact that section 1983 is a remedial statute specifically designed to provide plaintiffs with a broad remedy against state officials who violate their federal rights. The language of the FCIA restricting the availability of this remedy "in any action [for injunctive relief] brought against a judicial officer," therefore, must be interpreted narrowly. *See District of Columbia v. Carter*, 409 U.S. 418, 432-33 (1973) (quotation omitted) (discussing construction of section 1983). "We are not at liberty to seek ingenious analytical instruments to avoid giving a congressional enactment the broad scope its language and origins may require." *Id*. Without a reason to conclude that the FCIA affirmatively intended the term "judicial officer" to restrict the availability of injunctive relief beyond official members of the judiciary, we decline to "recast this [amended] statute to expand its application beyond the limited reach Congress gave it." *See id*. (quotation omitted).

Simmons v. Fabian, 743 N.W.2d 281, 290-291 (Minn. Ct. App. 2007).

The *Simmons* court further found that "…Congress did not even consider the possibility that it would be amending section 1983 to restrict the availability of injunctive relief against quasi-judicial officers." *Simmons*, 743 N.W.2d at 291 (Minn. Ct. App. 2007). The court held that there was not one word mentioned in the legislative history indicating that it was meant to apply to quasi-judicial officers. *Id.* at 293. Finding that immunity is the exception in the law, not the norm, absent a clear statement by Congress that quasi-judicial officers were immunized, the Minnesota Court of Appeals was "…unwilling to infer from this legislative silence that Congress intended to abrogate the availability of injunctive relief against a state official when entitlement to such protection is neither "well established at common law" nor "compatible with the purposes of the Civil Rights Act." *See Gomez*, 446 U.S. at 639 (quotation omitted).'" *Simmons*, at 294.

III. CONCLUSION

For all of the foregoing reasons, quasi-judicial immunity must be denied to the Defendants in the above-captioned matter.

Respectfully submitted this 19th day of June 2009.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing PLAINTIFF'S SUR-REPLY TO DEFENDANT'S MOTION FOR JUDGMENT AS MATTER OF LAW was filed with the Court and served via *LexisNexis File and Serve* on June 19, 2009 to the following:

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