DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street Denver, CO 80202 720-865-8301 **Plaintiff(s):** WARD CHURCHILL **Defendant(s):** UNIVERSITY OF COLORADO and BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO, a body corporate Patrick T. O'Rourke #26195 Special Assistant Attorney General Office of University Counsel 1800 Grant Street, Suite 700 Denver, Colorado 80203 303-860-5691 303-860-5650 – fax Patrick.orourke@cu.edu	Case Number: 06 CV 11473

UNIVERSITY'S FINAL REPLY BRIEF IN SUPPORT OF MOTION FOR JUDGMENT AS A MATTER OF LAW QUASI-JUDICIAL IMMUNITY

The University of Colorado and the Board of Regents of the University of Colorado hereby submit their final brief in support of their Motion for Judgment as a Matter of Law.

Introduction

The Court granted Professor Churchill one last opportunity to address the doctrine of quasi-judicial immunity and whether it applies to the Regents' decision to dismiss him. Professor Churchill's sur-reply restates many of the same arguments that he presented earlier, but it also continues to disregard the ordinary language of *42 U.S.C. §1983* and the controlling precedents. The Board of Regents performed an inherently judicial activity when it dismissed Professor Churchill, which precludes the Court from entering either a judgment for damages or an order granting prospective relief.

Argument

I. Nothing in the United States Supreme Court's Precedents Suggest that the Regents Do Not Possess Quasi-Judicial Immunity

At the outset of his sur-reply, Professor Churchill suggests that the Court should not recognize quasi-judicial immunity because the United States Supreme Court does not lightly grant immunities. While this may be true, the University is not asking the Court to recognize a new form of immunity. For decades, the United States Supreme Court and the Tenth Circuit Court of Appeals have extended absolute immunity to government officials performing quasi-judicial functions. *Butz v. Economou*, 448 U.S. 478, 481 (1978); *Horwitz v. Colorado State Board of Medical Examiners*, 822 F.2d 1508, 1510 (10th Cir. 1987). To fall within these precedents, the University must demonstrate only that the University's dismissal process "shares enough of the characteristics of the judicial process" to be considered judicial in nature. *Miller v. Davis,* 521 F.3d. 1142, 1145 (9th Cir. 2008).

On Pages 17 - 20 of its reply brief, the University demonstrated point-by-point how its dismissal process met every requirement for quasi-judicial action defined in *Butz* and *Horwitz*. Professor Churchill did not respond to any of those points and essentially conceded that the process was quasi-judicial in nature. It remains uncontested that Professor Churchill received every possible measure of due process and that he possessed a constitutionally adequate remedy under C.R.C.P. 106.

II. *The University May Claim Quasi-Judicial Immunity Against Professor Churchill's Award of Nominal Damages and His Request for Reinstatement*

Professor Churchill recognizes that he entered a Stipulation allowing the University to claim "the same defenses that would have been available to any of its officials acting in their official or individual capacities." There appears to be no dispute that this language allows the University to raise quasi-judicial immunity as a defense to the award of nominal damages, as such an award could normally enter only against the Regents in their individual capacities. *Kentucky v. Graham,* 473 U.S. 159, 166-67 (1985).

Turning to his ability to request reinstatement or other prospective relief, Professor Churchill proffers a confusing analysis of his ability to "retain[] all legal rights to defeat both individual and official capacity claims of immunity," but the Court does not need to engage in any mental gymnastics to resolve this issue. Even if the parties had not entered their Stipulation, prospective relief would remain unavailable to Professor Churchill as a matter of law under the 1996 amendment to *42 U.S.C. §1983.*

The 1996 amendment eliminated a plaintiff's right to seek prospective relief in a lawsuit brought against a "judicial officer for an act or omission taken in such officer's judicial capacity." Rather than merely constituting an affirmative defense that the University would need to preserve through its Stipulation, the 1996 amendment removes prospective relief as a remedy available under *42 U.S.C. §1983*. All the Court needs to do is determine whether the Professor Churchill's claim effectively lies "against a judicial officer for an act or omissions taken in such officer's judicial capacity." Under those circumstances, the ordinary language of the statute controls and "injunctive relief shall not be granted" in Professor Churchill's favor. *42 U.S.C. §1983*.

III. The 1996 Amendments Apply to Quasi-Judicial Actions

42 U.S.C. §1983 is a federal statute, and the Colorado courts rely upon federal decisions when construing federal statutes. *See e.g. Eason v. Board of County Commissioners of County of Boulder*, 70 P.3d 600, 611 (Colo. App 2003) (stating, "First, the court must look to federal law to determine whether a federal rule exists" and then applying Tenth Circuit precedent). As the University described in its reply brief, and Professor Churchill concedes in his sur-reply, <u>every</u> federal court considering the 1996 amendment to *42 U.S.C. §1983* has concluded that it applies to quasi-judicial actions.[1]

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[1] For some reason, Professor Churchill's citation to *Gilmore v. Bostic,* 2009 WL 890681 (S.D. W.Va. 2009) implies that this case refused to apply the 1996 amendment to quasi-judicial action. The actual holding of *Gilmore* was:

(footnote continues on next page)

Against this unbroken line of federal district and circuit court opinions, there is one case, *Simmons v. Fabian*, 743 N.W.2d 281 (Minn. Ct. App. 2007), that did not apply the 1996 amendment to quasi-judicial actions. The lynchpin of the *Simmons* decision, however, was the Minnesota Court of Appeals' erroneous conclusion that Congress did not intend to extend the statute's protections to officials acting in a quasi-judicial capacity. Less than a year later, the *Pelletier*[2] decision explained how *Simmons* misread the legislative history.

> However, importantly, the *Simmons* court failed to consider the legislative intent revealed by a reference in the Senate Judiciary Committee Report on the FCIA to *Butz,* a case in which the Supreme Court analyzed why judicial immunity protects quasi-judicial officials performing functions analogous to judges. *See* S. Rep. 104-366 at 37 (citing *Butz,* 438 U.S. at 478).

Pelletier v. Rhode Island, 2008 WL 5062162, *5-*6 (D. R.I. 2008).

> Neither the Supreme Court nor the Fourth Circuit has addressed whether section 1983 protects quasi-judicial actors, such as the West Virginia Parole Board members, from actions for injunctive relief, but the decided weight of authority has found that quasi-judicial actors are immune from such actions. *See Montero v. Travis*, 171 F.3d 757, 761 (2d Cir.1999); *Roth v. King*, 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 WL 5062162, at *5-6 (D.R.I. Nov. 26, 2008); *Cannon v. South Carolina Dept. of Corrections*, No. 07-3984, 2008 WL 269519, at *4 (D.S.C. Jan. 29, 2008); *Von Staich v. Schwarzenegger*, No. 04-2167, 2006 WL 2715276 (E.D.Cal. Sept. 22, 2006); contra *Simmons v. Fabian*, 743 N.W.2d 281 (Minn.Ct.App.2007). Inasmuch as the plaintiff has not alleged that a declaratory decree was violated or declaratory relief is unavailable, the court finds that the West Virginia Parole Board is a quasi-judicial entity that is entitled to absolute judicial immunity from the plaintiff's suit for both damages and prospective, non-monetary relief. Accordingly, the Board is dismissed from this action in its entirety

Gilmore, 2009 WL 890681 at *6-*7 (emphasis added).

[2] The University attached *Pellier* as Exhibit D to its reply brief.

The 1996 amendment to *42 U.S.C. §1983* "restore[d] the doctrine of judicial immunity to the status it occupied prior to the Supreme Court's decision in *Pulliam v. Allen*, 466 U.S. 522 (1984)." *Senate Report 104-366* at Page 37. Professor Churchill originally relied upon *Pulliam,* but Congress acted definitively to remove prospective relief as a remedy available under *42 U.S.C. §1983*. To give effect to Conresss' intent, the Court should adopt the unanimous conclusion of the federal courts and apply the 1996 amendment to quasi-judicial action.

IV. Elected Officials Can Claim Quasi-Judicial Immunity

On Pages 14-16 of its reply brief, the University demonstrated conclusively that elected officials may claim quasi-judicial immunity. Professor Churchill did not respond to any of the authorities that the University cited. It remains uncontroverted that elected officials, even a state governor, may claim quasi-judicial immunity when performing a judicial function. *Miller v. Davis,* 521 F.3d. 1142, 1145 (9th Cir. 2008); *Brown v. Greisenauer*, 970 F.2d 431, 439 (8th Cir. 1992).

No court has adopted Professor Churchill's proposed rule denying quasi-judicial immunity to elected officials who act in a judicial capacity, and the University demonstrated at Pages 17-20 of its reply brief that the Regents' dismissal of Professor Churchill in July 2007 was judicial in nature. It remains "hard to imagine a more true adjudicative function" than the dismissal of a tenured professor after notice and a full opportunity to be heard. *Gressley v. Deutsch*, 890 F.Supp. 1474, 1490 (D. Wyo. 1994).

In an effort to blur the distinction between the Regents' judicial and non-judicial functions, Professor Churchill cites fragments of the Regents' testimony where they discussed their reasons for calling a special meeting after Professor Churchill's essay first generated controversy in January 2005. Because the Court dismissed Professor Churchill's claim of unlawful investigation, however, Professor Churchill's citations are best seen as trying to revive a claim that the Court rejected as a matter of law.

The Regents must act in different capacities on different occasions. The proper inquiry is whether a Regent was acting "in an administrative role or serving in an adjudicatory capacity" at the time of the specific event giving rise to the claim. *Gressley v. Deutsch*, 890 F.Supp. at 1490. The nature of the Regents' responsibilities (as well as the composition of the Board) changed significantly between the special meeting in January 2005 and the dismissal proceedings in July 2007. Rather than acting in the heat of a controversy without any procedural safeguards or limitations, the Regents met in 2007 as part of a careful, deliberate, and judicial process. It is precisely these types of decisions that quasi-judicial immunity protects. *Hulen v. State Board of Agriculture*, 98-B-2170 (D. Colo. 2001); *Gressley v. Deutsch*, 890 F.Supp. 1474, 1480 (D. Wyo. 1994).

V. *Tonkovich Does Not Help Professor Churchill*

Professor Churchill cites a single case, *Tonkovich v. Kansas Board of Regents*, 1996 U.S. Dist. Lexis 18323 (D. Kan. 1996), for the proposition that Boards of Regents should not enjoy quasi-judicial immunity.

Notably, however, the Tenth Circuit Court of Appeals reversed the *Tonkovich* ruling, determined that the trial court erred in its analysis of other federal immunities, and dismissed the entire lawsuit against the University of Kansas and its officials. *Tonkovich v. Kansas Board of Regents*, 159 F.3d 504 (10th Cir. 1998). In light of the Tenth Circuit's complete reversal, *Tonkovich* is questionable authority on any point of law. Yet, even if the Court considers *Tonkovich*, it will find no meaningful guidance on the question of quasi-judicial immunity.

Professor Churchill correctly notes that *Tonkovich* denied quasi-judicial immunity because the Kansas legislature had not "specifically delegated [its] quasi-judicial role by statute" and "the Kansas Legislature did not provide the Kansas Board of Regents with "the same explicit delegation of quasi-judicial functions [that it afforded administrative agencies]." *Tonkovich*, 1996 U.S. Dist. Lexis 18323 at *40-41. In its two-page discussion of the Kanss Regents beginning on Page *39, *Tonkovich* denied quasi-judicial immunity solely because the Kansas legislature had not statutorily conferred quasi-judicial powers upon the Regents. *Tonkovich* never analyzed whether the Kansas Regents engaged in a form of judicial activity.

Professor Churchill suggests that "there is absolutely no meaningful distinction between the University of Kansas Board of Regents and the University of Colorado Board of Regents," but he is wrong. The Kansas Board of Regents receives its powers only through express legislative delegations. *Article 2, §6* of the *Kansas Constitution* provides:

> The legislature shall provide for a state board of regents and for its control and supervision of public institutions of higher education. Public institutions of higher education shall include universities and colleges granting baccalaureate or postbaccalaureate degrees and such other institutions and educational interests as may be provided by law. The state board of regents shall perform such other duties as may be prescribed by law.

(emphasis added)

The University of Colorado's Board of Regents is not limited to "such other duties as may be prescribed by law" and does not depend upon Colorado's General Assembly to grant it quasi-judicial authority. *Article IX, §13* of the *Colorado Constitution* first created the Board of Regents without any further legislative action. It states:

> 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. Said regents shall constitute a body corporate to be known by the name and style of "The Regents of the University of Colorado".

Not only does the Colorado Constitution create the Board of Regents independently of any legislative action, the Constitution also grants the Regents broad constitutional authority to manage the University's affairs. *Article VIII, § 5* of the *Colorado Constitution* states:

> 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 and the exclusive control and direction of all funds of and appropriations to their respective institutions, unless otherwise provided by law.

(emphasis added)

In contrast to the Kansas Constitution, which limits its Board of Regents to "such other duties as may be prescribed by law," Colorado's Constitution affirmatively states that the Board of Regents "shall have the general supervision of their respective institutions . . . unless otherwise provided by law." The difference is significant because the Kansas Regents can act only where the legislature has expressly conferred a certain power, but the Colorado Regents possess constitutional authority to act unless the General Assembly has properly acted to remove its exclusive powers to govern the University.

The Regents, "as a constitutional body, occupy a unique position in our governmental structure." *Subryan v. Regents of the University of Colorado*, 698 P.2d 1383, 1384 (Colo. App. 1984). Because of the unique and expansive language of *Article VIII, §5*, the Colorado Supreme Court has held that the Colorado Constitution "grants broad discretion to the Regents as a governing board." *Associated Students of the University of Colorado v. Regents of the University of Colorado*, 543 P.2d 59, 61 (Colo. 1975). The "specially granted authority of the Regents to govern the university and enact laws pursuant to that end can only be nullified by a legislative enactment (or constitutional amendment) expressly aimed at doing so." *Associated Students,* 543 P.2d at 62 (emphasis added). In no way has the General Assembly acted to constrain the University's exercise of quasi-judicial powers, which renders *Tonkovich* inapplicable to these proceedings.

Finally, to the extent that the Court believes the Board of Regents would need the General Assembly's permission to act in a quasi-judicial capacity, it already exists. *C.R.S. §23-20-112* states that the Board of Regents "shall remove any officer connected with the university when in its judgment the good of the institution requires it." (emphasis added) Because the University of Colorado's Board of Regents actually possesses both constitutional and statutory powers that Kansas Board of Regents lacked, *Tonkovich* sheds no light on the issues before the Court.

Conclusion

Over a series of briefs, Professor Churchill has raised every conceivable argument in an effort to avoid the fundamental question of whether the Board of Regents' role in the July 2007 decision to dismiss Professor Churchill was "functionally comparable" to the role of a judge. *Miller,* 521 F.3d. at 1145. Professor Churchill's efforts to dodge this question have failed, and, in the final analysis, the dismissal process "shares enough of the characteristics of the judicial process" to entitle the University to quasi-judicial immunity. *Miller,* 521 F.3d. at 1145. The University respectfully requests that the Court grant its Motion for Judgment as a Matter of Law.

Dated this 22nd day of June, 2009:

OFFICE OF UNIVERSITY COUNSEL

_/s/Patrick T. O'Rourke_____
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Certificate of Service

I certify that I served a true and correct copy of this pleading to Professor Churchill's counsel of record by electronic filing on this 22nd day of June 2009:

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