

District Court City and County of Denver, Colorado 1437 Bannock Street Denver, Colorado 80202	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Plaintiff:</p> <p>Ward Churchill, an individual, v.</p> <p>Defendant(s):</p> <p>University of Colorado, Regents of the University of Colorado, a Colorado body corporate</p>	
<p>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</p> <p>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</p>	<p>Case Number: 06 CV 11473</p> <p>Division: 6</p>
<p>PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR JUDGMENT AS MATTER OF LAW</p>	

PLEASE TAKE NOTICE that the Plaintiff, Ward Churchill, by and through his attorneys, David A. Lane and Qusair Mohamedbhai of the law firm Killmer, Lane & Newman, LLP, and Robert J. Bruce of the law firm Lawliss & Bruce, LLC, hereby files the following PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR

JUDGMENT AS MATTER OF LAW:

I. PROCEDURAL HISTORY

In December of 2008, the Defendants stipulated to an amendment to the complaint wherein Professor Churchill dismissed the Regents from this case in both their official and individual capacities. In exchange for this dismissal, the University of Colorado and the Regents of the University of Colorado, “a body corporate” agreed to be named defendants. On January 2, 2009, this Court so ordered. In undertaking this action, the State Defendants waived 11th Amendment immunity and agreed to be liable for damages if assessed by a jury. This action was undertaken by the Regents as they were then insulated from any personal liability in this matter. The only remaining defendants in this case are therefore governmental entities.

A trial commenced before this Court in March of 2009 which lasted approximately four weeks. At the conclusion of the trial, the jury found for Plaintiff and awarded him \$1 in damages.

The Defendants filed a motion seeking a dismissal based upon quasi-judicial immunity. The motion must be denied as quasi-judicial immunity applies only to individuals sued in their individual capacities and not governmental defendants.

II. ARGUMENT

A. QUASI-JUDICIAL IMMUNITY DOES NOT PROTECT ENTITIES, BUT ONLY APPLIES TO INDIVIDUALS.

The Supreme Court has held that persons who perform quasi-judicial functions are entitled to absolute immunity. *See Butz v. Economou*, 438 U.S. 478, 512-16 (1978). In *Moss v. Kopp*, 559 F.3d 1155, 1166 (10th Cir. 2009) the Tenth Circuit held:

Municipal entities and local governing bodies are not entitled to the traditional common law immunities for § 1983 claims. *Whitesel*, 222 F.3d at 870. That is, unlike various government officials, municipalities (e.g., local officials in their official capacity and counties, among others) do not enjoy absolute immunity from suit under § 1983. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 165-66 (1993).

This applies to quasi-judicial immunity as well as other forms of immunity.

Indeed, the case Defendants' rely upon most heavily is *Hulen v. Yates*, 322 F.3d 1229, 1236 (10th Cir. Colo. 2003). In that case the court acknowledged that the district court had granted President Yates "...quasi-judicial immunity for claims against him in his *individual capacity*..." (emphasis added) but there was never any quasi-judicial immunity granted to any party in an official capacity or institutional capacity.

The notion that quasi-judicial immunity does not apply to any party other than individuals being sued in their individual capacities has been reiterated time and again. In a case outlining the historical underpinnings of the notion that quasi-judicial immunity does not apply to governmental entities but only to individuals, the Eighth Circuit held in *VanHorn v. Oelschlager*, 502 F.3d 775, 779 (8th Cir. 2007):

We have previously indicated that immunity only extends to claims against government employees sued in their individual capacities. *Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 535 (8th Cir. 1999) ("Qualified immunity is not a defense available to governmental entities, but only to government employees sued in their individual capacity."); *Davis v. Hall*, 375 F.3d 703, 710 n.3 (8th Cir. 2004) (approving of the district court's conclusion that neither qualified immunity nor absolute immunity was available to a government employee sued in his official capacity). Furthermore, the Supreme Court has specifically stated that "[t]he only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment." *Graham*, 473 U.S. at 167.

Case law from our sister circuits also supports the conclusion that absolute, quasi-judicial immunity only extends to claims against defendants sued in their individual--not official--capacities. *See, e.g., Lonsetta Trucking & Excavating Co. v. Schan*, 144 Fed. Appx. 206, 210--211 (3d Cir. 2005) (unpublished) ("Therefore, it follows that the zoning officials . . . would be entitled to absolute immunity in

their individual capacities if they were performing 'quasi-judicial' functions. However, the zoning officials in their official capacities . . . are not entitled to absolute immunity." (emphasis in original); *Denton v. Bedinghaus*, 40 Fed. Appx. 974 (6th Cir. 2002) (unpublished) ("Of critical importance here is that plaintiffs sue defendants in only their official capacities. Yet, immunity defenses apply to individual capacity suits and they do not shield municipalities from § 1983 liability."); *Turner v. Houma Mun. Fire & Police Civil Serv. Bd.*, 229 F.3d 478, 483 (5th Cir. 2000) (rejecting municipal fire and police service board members' argument that the district court erred in not holding that the board and its members were entitled to absolute, quasi-judicial immunity in their "official capacities" because such an argument "misconstrues the distinction between immunities available for 'individual-capacity' and 'official capacity' suits under § 1983"); *Alkire v. Irving*, 330 F.3d 802, 810--11 (6th Cir. 2003) (holding that "as a result of being sued only in their official capacities, Sheriff Zimmerly and Judge Irving cannot claim any personal immunities, such as quasi-judicial or qualified immunity, to which they might be entitled if sued in their individual or personal capacities.").

We, like the Fifth Circuit, acknowledge that confusion can often arise in litigation when "[c]ourts discuss immunity defenses without clearly articulating to whom and in which capacity [immunity] defenses apply. . . ." *Turner*, 229 F.3d at 485. Nevertheless, this court's precedent, Supreme Court precedent, and case law from our sister circuits make clear that absolute, quasi-judicial immunity is not available for defendants sued in their official capacities. This court in *VanHorn I* . . . only extended absolute, quasi-judicial immunity to the defendants sued in their individual capacities.

VanHorn v. Oelschlager, 502 F.3d 775, 779 (8th Cir. 2007).

Because the *quid pro quo* for dismissing the Regents in their individual capacities was that the state institutional defendants waive the only immunity they were entitled to rely upon – 11th Amendment sovereign immunity – the defendants' motion to dismiss must be denied.¹

¹ This Court must keep in mind that this case involved a federal civil rights claim, and as such, federal law must be applied. The Colorado Supreme Court in *State v. Mason*, 724 P.2d 1289 (Colo. 1986) held that parole board members had quasi-judicial immunity from a state tort suit, as did the parole board itself as well as the State of Colorado. Certainly, the State can confer immunity upon itself when confronting non-constitutional state tort claims, but local/state entities cannot insulate themselves from the reach of a federal § 1983 suit. (*Felder v. Casey*, 487 U.S. 131, 138 (U.S. 1988)) ("federal right cannot be defeated by the forms of local practice." *Brown v. Western R. Co. of Alabama*, 338 U.S. 294, 296 (1949)).

B. EVEN IF QUASI-JUDICIAL IMMUNITY APPLIED, IT GOES ONLY TO THE \$1 DAMAGES AWARD AND NOT TO THE EQUITABLE RELIEF SOUGHT BY PLAINTIFF.

Defendants' Motion for Quasi-judicial Immunity in no way influences or precludes this Court's consideration of Plaintiff's Motion for Reinstatement which seeks the equitable and preferred remedy of reinstatement of employment. Judicial immunity does not bar claims for equitable relief under 42 U.S.C. § 1983. *See, Switzer v. Coan*, 261 F.3d 985, 990 (10th Cir. 2001). In fact, the case of *Hulen v. State Board of Agriculture*, heavily relied upon by Defendants', reinforces the well-settled legal tenet that judicial immunity does not preclude equitable relief in § 1983 actions. Specifically, the court in *Hulen* opined:

While quasi-judicial immunity prevents Dr. Hulen from receiving damages from these two Defendants, it does not prevent his suit against them so far as it requests equitable relief. *See Pulliam v. Allen* 466 U.S. 522 (1984)(judicial immunity does not insulate state judges from claims for equitable relief under 42 U.S.C. § 1983).

Hulen v. State Board of Agriculture, 98-B-2170, pg. 2 (Defendants' Exhibit F - Part 2); see also *Lewis v. Mikesic*, 195 Fed. Appx. 709, 710 (10th Cir. 2006); *Guttman v. Silverberg*, 167 Fed. Appx. 1, 4 (10th Cir. 2005) citing *Mireles v. Waco*, 502 U.S. 9, 10, n.1 (1991); *Schepp v. Fremont County*, 900 F.2d 1448, 1452 (10th Cir. 1990). The maximum relief that can be gained through Defendants' quasi-judicial immunity motion is the exemption of the one dollar damage award by the jury. However, even if the Court determines that the elected and politically active University of Colorado Board of Regents² need not pay the dollar awarded by the jury, quasi-judicial immunity does not

² Elected corporate bodies such as "[m]unicipal entities and local governing bodies are not entitled to the traditional common law immunities for section 1983 claims." *Whitesel v. Sengenberger*, 222 F.3d 861, 870 (10th Cir. 2000) citing *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166 (1993).

bar this Court's ability to grant prospective injunctive relief in this § 1983 action (reinstating Professor Churchill to his position as a fully tenured professor).

C. EVEN IF QUASI-JUDICIAL IMMUNITY APPLIED TO ENTITIES, IT WOULD NOT APPLY IN THIS CASE.

The Board of Regents is requesting the Court grant it quasi-judicial immunity, as opposed to absolute or qualified immunity. See, *Horwitz v. State Bd. of Medical Examiners*, 822 F.2d 1508, 1512 (10th Cir. 1987). Absolute immunity affords complete protection from liability for damages, and defeats suit at the outset. *Id.* Absolute immunity for judges (and others) has been deemed necessary to assure that those involved in the judicial process "can perform their respective functions without harassment or intimidation" by the parties to the dispute. *Butz v. Economou*, 438 U.S. 478, 512 (1978). However, even judges when acting in a non-judicial, administrative capacity do not enjoy any immunity. *Forrester v. White*, 484 U.S. 219, 229 (U.S. 1988) (sex discrimination suit against a judge).

On the other hand, "qualified immunity" is an affirmative defense to be asserted by a government official performing discretionary functions. *Horwitz*, at 1512. It is premised on the contention that the challenged conduct was undertaken in good faith or did not violate clearly established law or constitutional rights that a reasonable person would have known. *Id.*

The Defendants in this case, however, are seeking quasi-judicial immunity, which, as previously stated, does not apply to these non-individual state entities. Even if the Regents were being sued in their individual capacities, quasi-judicial immunity would still not apply. Quasi-judicial immunity has roots in the common law as Justice Scalia pointed out in two cases:

The common law recognized a "judicial" immunity, which protected judges, jurors and grand jurors, members of courts martial, private arbitrators, and various assessors and commissioners. That immunity was absolute, but it extended only to individuals who were charged with resolving disputes between other parties or authoritatively adjudicating private rights. When public officials made discretionary policy decisions that did not involve actual adjudication, they were protected by "quasi-judicial" immunity, which could be defeated by a showing of malice, and hence was more akin to what we now call "qualified," rather than absolute, immunity.

Kalina v. Fletcher, 522 U.S. 118, 132 (U.S. 1997)(Scalia concurring). Similarly he wrote:

(2) Quasi-judicial immunity. This, unlike judicial immunity, extended only to government servants, protecting their "quasi-judicial" acts -- that is, official acts involving policy discretion but not consisting of adjudication. Quasi-judicial immunity, however, was qualified, i.e., could be defeated by a showing of malice. *See, e. g., Billings v. Lafferty*, 31 Ill. 318, 322 (1863) (clerk of court); *Reed v. Conway*, 20 Mo. 22, 44-52 (1854) (surveyor-general); *Weeks, supra*, at 210, and n.8; J. Bishop, *Commentaries on Non-Contract Law* § 786, pp. 365-366, and n.1 (1889); *Cooley, supra*, at 411-413.

Burns v. Reed, 500 U.S. 478, 500 (U.S. 1991)(Scalia dissenting).

The modern manifestation of quasi-judicial immunity is generally relevant only in administrative law venues. As virtually all of the defendants' cited cases point out, when a professional administrative hearing officer, like a medical board officer, or a DMV officer makes a decision to suspend a license, sound public policy would militate against that officer suffering the risks associated with litigating every ruling he or she may make in the normal course of employment. Quasi-judicial immunity is designed to prevent professional hearing officers from having to be liable monetarily for every decision a disgruntled party complains of.

Whether an administrative official is afforded the protection of quasi-judicial immunity for conduct during an adversarial hearing generally depends on two factors: (1) whether or not the adjudication "contained procedural safeguards that sufficiently

resemble those afforded by judicial process," and (2) (what is of paramount importance to the case presently before this Court), whether the hearing officer "is sufficiently independent and free of political influence." 1b Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Claims And Defenses* 222, 240 (3d ed. 1997) (citing *Butz v. Economou*, 438 U.S. 478, 512 (1978)). *Camas v. Dickson-Witmer*, 2001 U.S. Dist. LEXIS 25597, 11-12 (D. Del. 2001).

It is entirely reasonable for any court to insist upon political independence by an administrative decision maker if any immunity is to be granted. When a DMV hearing officer suspends a driver's license due to an accumulation of points, a politically independent hearing officer should not be moved by the political affiliation of the driver, the driver's views on controversial issues of the day, or any other extraneous factor. If the hearing officer is in fact an independent entity not subject to political pressure to decide a case in any given way, immunity may indeed be appropriate. When, however, the converse is true, and the decision makers are professional politicians whose very careers are dependent upon their being accountable to the political winds swirling around any given decision, immunity is not warranted because the decision makers are not acting as independent administrative judges but as politicians responding to political pressure. Such is precisely what is occurring in the case presently before this Court. The Regents as a political body, are responsive to political pressures, and are therefore lacking the essential independence which is a prerequisite for quasi-judicial immunity. *See e.g., Langley v. Adams County*, 987 F.2d 1473, 1480 (an impartial tribunal is a requisite for due process). Indeed, Regent after Regent testified at trial to the effect that 'we have to be sensitive to our constituents' and 'CU was being threatened by the governor with

budget cuts and donations were drying up.’ These rank political considerations to which the Regents were responsive would alone be enough to defeat any claim of quasi-judicial immunity, if the concept applied in this matter.

In applying this standard, courts have overwhelmingly held that professional hearing officers who are members of medical or health boards involved in disciplinary proceedings were entitled to quasi-judicial immunity.³ In each of these cases, however, the decision maker was completely isolated from the political considerations rocking the Churchill case.

The Tenth Circuit has routinely granted quasi-judicial immunity to other similarly situated professional hearing officers who handle discipline cases for the professions. *See e.g. Mayes v. Honn*, 542 F.2d 822, 824 (10th Cir. 1976) (recognizing the quasi-judicial immunity enjoyed by a state Board of Law Examiners); *Verner v. State of Colorado* 533 F. Supp. 1109 (D. Colo. 1982), *affirmed*, 716 F.2d 1352 (10th Cir. 1983), *cert. denied*, 466 U.S. 960, 80 L. Ed. 2d 558, 104 S. Ct. 2175 (1981) (holding a 42 U.S.C. § 1983 damage claim against members of two state boards dealing with practice of law barred by doctrine of quasi-judicial immunity).

The Supreme Court stated in *Butz* that it is essential that judges remain insulated from political influence if they are to perform the essential functions of their job. *Id.* at

³ *Dunham v. Wadley*, 195 F.3d 1007, 1010-11 (8th Cir. 1999)(veterinary medical examining board); *O’Neal v. Mississippi Bd. of Nursing*, 113 F.3d 62, 65-67 (5th Cir. 1997) (board of nursing); *Wang v. New Hampshire Bd. of Registration in Med.*, 55 F.3d 698, 701 (1st Cir. 1995)(board of registration in medicine); *Watts v. Burkhardt*, 978 F.2d 269, 275-78 (6th Cir. 1992)(*en banc*)(board of medical examiners); *Duncan v. Mississippi Bd. of Nursing*, 982 F. Supp. 425, 433-34 (S.D. Miss. 1997)(board of nursing); *Alexander v. Margolis*, 921 F. Supp. 482, 486-87 (W.D. Mich. 1995)(board of medicine); *Howard v. Miller*, 870 F. Supp. 340, 343-45 (N.D. Ga. 1994)(board of medical examiners); *Kutilek v. Gannon*, 766 F. Supp. 967, 971-72 (D. Kan. 1991) (board of healing arts). *See also Stratford Nursing & Convalescent Ctr., Inc.*, 802 F. Supp. 1158, (D.N.J. 1991)(holding that the Director of the Division of Medical Assistance and Health Services had quasi-judicial immunity for incorrectly interpreting a regulation). *See e.g. Camas v. Dickson-Witmer*, 2001 U.S. Dist. LEXIS 25597, 13-14 (D. Del. 2001) (holding that medical board members who could only be removed for “cause for neglect of duty” or the like, were sufficiently independent to be entitled to quasi-judicial immunity).

512. Judicial immunity is not limited to appointed or elected judges but includes those performing roles "functionally comparable" to judges, such as hearing examiners and administrative law judges. *Id.*

The Tenth Circuit, as is true in virtually every jurisdiction, has extended quasi-judicial immunity to medical examiners, *Horwitz v. State Bd. of Medical Examiners*, 822 F.2d 1508, 1514-15 (10th Cir. 1987); parole boards, *Russ v. Uppah*, 972 F.2d 300, 303 (10th Cir. 1992); county administrative review boards, *Atiya v. Salt Lake County*, 988 F.2d 1013, 1017 (10th Cir. 1993); and municipal hearing officers, *Saavedra v. City of Albuquerque*, 73 F.3d 1525, 1529 (10th Cir. 1996). Each of these examples, many cited by the Defendants, involve professional hearing officers who are immune from the turbulence inherent in any political process. What is essential to understanding the Defendants' position, however, is that they have ignored the fact that the Regents of the University of Colorado are an inherently political body. Unlike professional hearing officers, the individual defendants actively campaign for office, stand for election and must answer to the electorate in their ultimate decision making. This is precisely where quasi-judicial immunity would *not* be appropriate.

This concept was best explained by United States District Court Judge Walker Miller of the District of Colorado in *Moore v. Gunnison Valley Hosp.*, 170 F. Supp. 2d 1080, 1083-1084 (D. Colo. 2001). The court looked to "whether or not the roles of the defendants were 'functionally comparable' to that of a judge, prosecutor or witness entitled to absolute immunity." Drawing from *Butz*, the court looked to see whether the circumstances confronting it provided the "hallmarks of the judicial process against which the procedures of the defendant Hospital can be compared." *Id.* The court relied

upon the prior decision of *Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985) which summarized the important characteristics of the judicial process to be considered in whether to grant quasi-judicial immunity. The court listed six nonexclusive factors of critical importance which this Court should consider in determining this issue. They are:

- (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 means of controlling unconstitutional conduct;
- (c) insulation from political influence;
- (d) the importance of precedent;
- (e) the adversary nature of the process; and
- (f) correctability of error on appeal.

Moore at 1084-1085. The *Moore* court ultimately denied quasi-judicial immunity to the Defendants on the ground that they were not sufficiently insulated from the political processes in the small town of Gunnison to warrant the granting of immunity. While they performed like many regulatory agencies, the fact that they were susceptible to small-town politics was sufficient to deny them quasi-judicial immunity. Certainly, the Board of Regents is far more susceptible to the corrupting influence of politics on the decision making process than virtually any non-elected administrative hearing officer would be.

The *Moore* court distinguished *Horwitz* in which quasi-judicial immunity was granted by noting that the Colorado Board of Medical Examiners is “appointed by the governor and includes individuals with no connection to the medical profession, presumably people who do not have a potential self-interest in the outcome.” The

independence of the body was the key to immunity in *Horwitz. Moore* at 1087.

The court went on to distinguish other cases cited to this Court by Defendants, such as *Atiya v. Salt Lake County*, 988 F.2d 1013 (10th Cir. 1993). In that case the Tenth Circuit concluded that the role of a County Career Services Council was "functionally comparable" to that of a judge and that the individual Council members were protected by absolute immunity. The court noted that the Council consisted of professional appointed officials who heard appeals concerning employee suspensions, demotions, dismissals or other grievances. It issued written decisions that were subject to an unbridged right of appeal to the district courts of Utah. *Id.* at 1017. The *Moore* court noted that this was "an established hearing body comprised of individuals serving set terms..." *Id.* at 1088-1089. Their sole function was to make these sorts of decisions away from the political process.

The court also distinguished *Saavedra v. City of Albuquerque*, 73 F.3d 1525 (10th Cir. 1996) in which the Court of Appeals concluded absolute judicial immunity was justified. In that case the defendant was a professional hearing officer who was independent and not considered an employee of the city. His decisions were insulated from the political process. *Moore* at 1089.

On appeal, the Tenth Circuit in *Moore* concurred with the district court's analysis. In *Moore v. Gunnison Valley Hosp.*, 310 F.3d 1315, 1317 (10th Cir. 2002), the Tenth Circuit set forth a framework for determining whether quasi-judicial immunity should be granted in any given case. In *Moore* the court affirmed the district court's denial of quasi-judicial immunity holding:

In examining the absolute immunity issue, we follow carefully the test established by the Supreme Court in *Cleavinger v. Saxner*, 474 U.S. 193, 202, 88 L. Ed. 2d

507, 106 S. Ct. 496 (1985). Citing *Butz v. Economou*, 438 U.S. 478, 512, 57 L. Ed. 2d 895, 98 S. Ct. 2894 (1978), the *Cleavinger* Court identified the following factors, among others, as characteristic of the judicial process and to be considered in determining absolute as contrasted from qualified immunity: (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.

Cleavinger, 474 U.S. at 202.

The first factor considered by the court was the harassment/intimidation factor with an eye toward "the need to assure that the individual can perform his functions without harassment or intimidation." *Id.* The court also noted a concern that harassment and intimidation worked as a two-way street. Indeed, in the *Churchill* case, a jury after hearing a month of testimony concluded that Professor Churchill was fired in retaliation for his free speech. The termination of Professor Churchill was nothing short of a character assassination and was simply designed to punish, harass and intimidate him. Indeed, given the rarity of the Regents ever being called upon to terminate a tenured professor, it is doubtful that they would feel harassed or intimidated in the future based upon the pendency of this one lawsuit.

The second factor considered by the Tenth Circuit was the presence or absence of procedural safeguards that reduce the need for private lawsuits. While in *Moore* there was no notice or right to a hearing, and Professor Churchill went through a hearing process, the outcome of the process was his termination. The fact that he was terminated even though the hearing body, the P&T Committee, recommended no termination, belied any semblance of actual fairness or effective procedural safeguards for Professor Churchill. The Privilege and Tenure Committee voted against his termination, the President of the University recommended termination and the ultimate decision was

made by the defendant politicians, the Regents. The fact that those members of the P&T committee who actually heard the evidence in the case recommended against termination yet the defendants terminated him show clearly that any “procedural safeguards” in the form of due process given to Professor Churchill were a sham.

The third (and most important) factor considered by the Tenth Circuit “...involves the presence of political influence in the decision-making process.” This factor is key in the Churchill case. In order to receive quasi-judicial immunity, the decision makers must be neutral and detached, much like judges, determining the outcome simply based upon the cold, hard factual record away from the din of public opinion. Administrative agencies which conduct administrative hearings on a daily basis are generally not perceived as politically influenced bodies. As previously argued, when the Department of Motor Vehicles suspends a driver’s license based upon the accumulation of too many points, the political process is not brought into play. That is why quasi-judicial immunity is customarily applied to professional hearing officers employed in administrative agencies who make these sorts of decisions on a daily basis.

The Regents, however, are absolutely immersed in the politics of the Churchill case. The Governor of the State of Colorado called for Churchill’s termination. The Colorado State Legislature passed a resolution condemning Churchill. The Regents themselves blasted Churchill when his 9/11 comments were brought to light. The Regents are themselves politicians and are elected by the voters of Colorado. To say that the termination process was not influenced by politics is to ignore the reality of one of the biggest media-covered controversies in the history of the State of Colorado. If for no other reason, the political nature of the decision should defeat any motion for quasi-

judicial immunity. As the Tenth Circuit noted in *Moore*, “[s]uch a situation lacks the kind of independence typical of judicial bodies.”

The fourth factor considered by the Tenth Circuit emphasizes the importance of precedent. The court was interested in determining whether other similarly situated parties had received similar treatment from the decision making body. In *Moore* the court was unable to determine that the decision makers had relied on any precedent from past similarly situated individuals before them, or that they searched for outside precedent regarding how to treat Moore. This is the case with Professor Churchill. No decision makers ever cited any examples either within or outside of the University of Colorado in support of the termination of Professor Churchill. Indeed, the case is *sui generis* as there are no precedents relied upon in the termination process. The court concluded that “[i]n the absence of such internal and external precedent, this factor adds little to the analysis.”

The court then looked to the adversarial nature of the proceedings in an attempt to determine whether quasi-judicial immunity should be conferred. Indeed, in the Churchill case, the proceedings before the P&T committee were adversarial in nature. Following the adversarial proceeding, however, the committee voted against terminating Professor Churchill. Despite that fact, the Defendant Regents ignored the result of the adversarial proceeding and terminated him. At the hearing before the Regents, counsel for Professor Churchill spoke as did counsel for the University. No witnesses were called, no testimony was taken. It was purely an oral argument lasting approximately one-half hour per side. Giving Professor Churchill the benefit of an adversarial hearing, and then ignoring the outcome of that proceeding, belies the “fairness” of the proceeding. The

actual decision to terminate came from the Regents despite the adversarial proceeding in the P&T Committee. There was no actual adversarial proceeding before the Regents, who were obviously not constrained by any notion that the results of the P&T adversarial proceeding were in any way binding upon them.

The sixth and last factor considered by the Tenth Circuit involves the appealability of the termination decision. In the case presently before this Court, the Regents were the decision makers and the decision of the Regents, according to their own Laws, is “final.” There is no appellate remedy from the termination decision.⁴ Trial testimony reiterated the Rules of the Regents which specifies that the Regents are the decision makers when it comes to termination. President Brown merely “recommended” termination to the Regents but it was the Regents who made the decision to terminate. The Rule also specifies that there is no appellate remedy once the Regents have decided as their decision “is final.”⁵

It is also of critical importance that this Court understand the distinctions between the two cases most heavily relied upon by the Defendants in their quest for quasi-judicial immunity; *Hulen v. State Board of Agriculture*⁶, 98-B-2170, and *Gressley v. Deutsch*, 890 F. Supp. 1474, 1490 (D. Wyo. 1994) and the case presently before this Court. Aside from the crucial distinction that the cases are both individual capacity suits against individuals, in the cases cited by Defendant involving CSU, (*Hulen*) as well as the one involving the University of Wyoming, (*Gressley*) the Regents in both cases were acting

⁴ Even a proceeding under C.R.C.P. 106 is limited to the narrow issues of whether the Regents acted without authority or abused their discretion, and thus cannot be deemed a true appellate remedy.

⁵ “For the foregoing reasons, it is my determination and *recommendation* to the Board of Regents that the good of the University requires that Professor Churchill be dismissed from the faculty.” (Defendants’ Exhibit E, President Hank Brown’s letter to Regents, p. 10)(emphasis added).

⁶ *Hulen* was appealed however the Tenth Circuit never addressed the issue of quasi-judicial immunity as it was never raised by the appellant. *Hulen v. Yates*, 322 F.3d 1229, 1236 (10th Cir. 2003).

as an appellate body from the termination decision previously made by others. Quasi-judicial immunity was given in *Hulen* specifically because it was an individual capacity suit and the Regents were acting as appellate judges.

This is precisely the opposite of what happened in the Churchill case. The Regents did in fact “make the determination to ... fire Plaintiff” and they were not sitting as an appellate body. In Churchill’s case, the Regents were the actual decision makers who terminated him. They were not acting in the capacity of an appellate body. Indeed, there are no appellate remedies in the laws of the Regents from a termination decision. The only available remedy is a lawsuit. The lack of any appellate remedies was important to the Tenth Circuit in denying quasi-judicial immunity in *Moore*. It should weigh heavily in this Court’s decision making as well.

The Defendants cite *Widder v. Durango Sch. Dist. No. 9-R*, 85 P.3d 518, 527 (Colo. 2004) as standing for the proposition that quasi-judicial immunity should apply in this case. In *Widder*, the issue was whether a school board which fired a non-tenured employee had any immunity from suit for purposes of an action pursuant to C.R.C.P. 106(a)(4). The Court concluded that quasi-judicial immunity would attach if:

(1) a state or local law requires that the body give adequate notice to the community before acting; (2) a state or local law requires that the body conduct a public hearing, pursuant to notice, at which time concerned citizens must be given an opportunity to be heard and present evidence; and (3) a state or local law requires the body to make a determination by applying the facts of a specific case to certain criteria established by law. *Id.* at 374.

The Colorado Supreme Court was not addressing *Widder* in the context of a § 1983 civil rights lawsuit. Furthermore, unlike in *Widder*, there was no requirement in the Laws of the Regents that the Regents give community notice before acting, there was no state or local law requiring a public hearing and there was no law requiring that the facts

of the Churchill case be applied to any certain criteria established by law. *Widder* is limited to quasi-judicial immunity *for purposes of C.R.C.P 106(a)(4)*. As previously noted, a state governmental entity cannot insulate itself from federal liability in a § 1983 law suit, thus making any and all decisions of the Colorado Supreme Court and all other state courts irrelevant to a determination of this issue.

The Defendants also cite this Court to *Gamow v. University of Colorado*, 06CA0736, recently decided by the Colorado Court of Appeals. It is unclear what relevance the Defendants believe that *Gamow* has to the case at bar, however it appears that Gamow never filed any civil rights claims under the United States Constitution and was proceeding under Rule 106. Quasi-judicial immunity was never mentioned anywhere in the *Gamow* opinion.

The Defendants have failed to cite this Court to a single case anywhere in the United States standing for the proposition that a political entity being sued in that capacity such as the Regents of any university have ever been given quasi-judicial immunity as the decision makers in a termination proceeding such as that confronting this Court. Indeed, there is no case standing for that proposition.

Quasi-judicial immunity generally acts in many instances to deny individuals access to justice. This great sacrifice, however, is the price society must pay in exchange for the political independence necessary for a quasi-judicial body to function. The United States Supreme Court has recognized the tension between providing an effective remedy for individuals injured by governmental officials' abuse of authority and subjecting such officials to the difficulties of litigation. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). In this case, no such sacrifice

should be made as the University of Colorado as an entity and the Regents of the University of Colorado, “a body corporate,” are not entitled to quasi-judicial immunity.

III. CONCLUSION

Because the Defendant Board of Regents, a body corporate, and the University of Colorado are not individuals being sued in their individual capacities but are instead a politically immersed governmental entity, not acting in an appellate capacity but as politicians making a political decision, quasi-judicial immunity should be denied. Defendants’ motion for quasi-judicial immunity does not preclude this Court’s ability to grant equitable relief.

WHEREFORE, Plaintiff respectfully requests that this Court deny this motion and for any other further relief which this Court deems just and proper.

Respectfully submitted this 18th day of May 2009.

KILLMER, LANE & NEWMAN LLP

S/ David A. Lane

David A. Lane, #16422
Qusair Mohamedbhai, #35390
1543 Champa St., Suite 400
Denver, Colorado 80202
(303) 571-1000
dlane@killmerlane.com

LAWLIS & BRUCE, L.L.C.

Robert J. Bruce

Robert J. Bruce, Atty. Reg. No. 17742
1875 Lawrence Street, Suite 750
Denver, CO 80202
Phone Number: (303) 573-5498
Fax Number: (303) 573-5537
E-mail: robertbruce@lawlisbruce.com
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2009, I electronically filed the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR JUDGMENT AS MATTER OF LAW** with the Clerk of Court using the electronic filing system, which will send notification of such filing to the following e-mail addresses

- Patrick.Orourke@cu.edu

KILLMER, LANE & NEWMAN, LLP

S/ Qusair Mohamedbhai
