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

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 reply brief in support of their Motion for Judgment as a Matter of Law.

Introduction

The University filed its Motion for Judgment as a Matter of Law on the grounds that the Regents are entitled to quasi-judicial immunity when performing the adjudicative function of dismissing a faculty member who has violated the minimum standards of professional integrity. In response, Professor Churchill relies upon a series of legal and factual arguments that do not, in any way, strip the Regents of quasi-judicial immunity. Quasi-judicial immunity precludes the Court from granting either monetary damages or injunctive relief in Professor Churchill's favor.

Argument

I. Professor Churchill Confuses Eleventh Amendment Immunity and Quasi-Judicial Immunity

Professor Churchill first argues that the University is not entitled to quasi-judicial immunity because the University has waived its Eleventh Amendment immunity. The University concedes that it has waived its Eleventh Amendment immunity, but Professor Churchill's response mistakenly assumes that Eleventh Amendment immunity is the same thing as quasi-judicial immunity. They are separate immunities.

As its very name implies, Eleventh Amendment immunity stems from the Eleventh Amendment to the United States Constitution. The Eleventh Amendment to the United States Constitution reads:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment represented the national response to the United States Supreme Court's decision in *Chisholm v. Georgia,* 2 Dall. 419, 1 L.Ed. 440 (1793), which allowed a non-consenting state to be sued under the diversity jurisdiction of federal courts. Because allowing such suits was antagonistic to the balance of power between the states and the federal government, the states ratified the Eleventh Amendment shortly after *Chisolm* to restore their sovereign immunity. *Hans v. Louisiana,* 134 U.S. 1, 10 (1890). For more than a century, the Supreme Court has reaffirmed that federal jurisdiction over suits against non-consenting States "was not contemplated by the Constitution when establishing the judicial power of the United States." *Hans,* 134 U.S. at 10; *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996).

Notably, however, the Eleventh Amendment prohibits only suits against the states themselves, while still allowing suits against state officials acting in their individual capacities and lesser governmental authorities, such as counties and municipalities. *See Kentucky v. Graham,* 473 U.S. 159, 166-67 (1985) (determining that Eleventh Amendment immunity does not apply to state officials sued in their individual capacities); *Monell v. New York City Department of Social Services,* 436 U.S.658, 691 (1978) (determining that municipalities are not "arms of the State" entitled to claim Eleventh Amendment immunity).

At its core, the Eleventh Amendment proscribes **who may be sued** in federal court or subjected to federal claims - - with the answer being that "arms of the State" enjoy Eleventh Amendment immunity. Because the University of Colorado and its Board of Regents are "arms of the State," they may claim the Eleventh Amendment's protections against federal claims. *Hartman v. Regents of the University of Colorado*, 22 P.3d 524, 527-29 (Colo. App. 2000); *Rozek v. Topolnicki*, 865 F.2d 1154, 1158 (10th Cir. 1989); *Smith v. Plati*, 258 F.3d 1167, 1171 (10th Cir. 2001). Eleventh Amendment immunity does not depend upon the nature of a governmental official's actions, it turns entirely on whether the suit is lodged against an "arm of the State."

In contrast, judicial or quasi-judicial immunity does not ask whether the suit is directed against an "arm of the State." Instead, quasi-judicial immunity examines **the type of action** giving rise to the claim. If the government official performs a judicial action, he is immune from liability, even if he cannot claim Eleventh Amendment immunity. *See e.g. Williams v. Valencia County Sheriff's Office,* 33 Fed. Appx. 929, 2002 WL 532426, *3 (10th Cir. 2002) (determining that a county court clerk was entitled to quasi-judicial immunity for carrying out duties of office); *Harrison v. Gilbert*, 148 Fed. Appx. 718, 2005 WL 2284266. *2 (10th Cir. 2005) (determining that a county attorney was entitled to claim judicial immunity); *Boyce v. County of Maricopa*, 144 Fed. Appx. 653, 2005 WL 1939919, *1 (9th Cir. 2005) (determining that county probation officers preparing pretrial reports were entitled to judicial immunity).

The United States Supreme Court's leading cases extending judicial and quasi-judicial immunity did not conduct any type of Eleventh Amendment analysis. *Pierson v. Ray,* 386 U.S. 547, 554 (1967) (recognizing that judicial immunity is a product of the common law, not the Eleventh Amendment); *Butz v. Economou*, 438 U.S. 478, 511 (1978) (determining that administrative law judges were entitled to quasi-judicial immunity "not because of their particular location within the Government but because of the special nature of their responsibilities"). The Colorado Supreme Court similarly recognizes judicial immunity and quasi-judicial immunity as a matter of state law separate and apart from Eleventh Amendment considerations. *State v. Mason*, 724 P.2d 1289, 1290-91 (Colo. 1986) (determining that state parole board members are entitled to judicial immunity); *State Board of Chiropractic Examiners v. Stjernholm,* 935 P.2d 959, 969 (Colo. 1987) (determining that members of the Board of Chiropractic Examiners are entitled to quasi-judicial immunity for licensing decisions made in adjudicative capacity).

II. The University and Board of Regents are Entitled to Claim Quasi-Judicial Immunity

Professor Churchill next asserts that quasi-judicial immunity is a defense available to individuals, not a defense available to the University or the Board of Regents. Ordinarily, he'd be correct in his assertion, but he misses the mark because of a pre-trial agreement between the parties. Professor Churchill agreed that the University would be able to raise defenses that would normally be available only to individuals.

Early in the lawsuit, Professor Churchill brought claims not only against the University and the Board of Regents, but also against each of the individual Regents who served in 2005 (when the University examined whether his speech was constitutionally protected) and in 2007 (when the Board of Regents dismissed him). Litigants normally file claims in this manner because public officials sued in their individual capacities cannot claim Eleventh Amendment immunity. *Graham,* 473 U.S. at 166-67.

Under the Colorado Governmental Immunity Act, however, the University is required to defend and indemnify the Regents for claims arising within the scope of their service. *C.R.S. §24-10-103(4)(a)* (stating that a "public employee" means "an officer, employee, servant, or authorized volunteer of the public entity, whether or not compensated, elected, or appointed"); *C.R.S. §24-10-110(1)(a-b)* (stating that a public entity shall be responsible for the defense and payment of claims arising against public employees). Under these circumstances, allowing the case to proceed against each individual Regent would only increase the cost of the case (because each Regent could hire separate counsel) and add to the complexity of the case (because any judgment could be entered only against an individual Regent subject to reimbursement by the University). In an already complicated case, asserting Eleventh Amendment immunity would not change the parties' ultimate position, but would delay Professor Churchill's ability to have his claims resolved in a timely and efficient manner.

To avoid this unnecessary cost and complexity, the University agreed to waive its Eleventh Amendment immunity, thus allowing direct claims to be brought against the University and the Board of Regents. In return for the ability to bring direct claims, however, Professor Churchill agreed that the University acquired the ability to assert any defenses that would be available to individual Regents. The parties' Stipulation provides:

> 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.[1]

Because quasi-judicial immunity was a "defense that would have been applicable to any of its officials or employees," it is a defense available to the University and the Board of Regents. If Professor Churchill continues to assert that quasi-judicial immunity is a defense available only to the individual Regents, the University and the Board of Regents will affirmatively assert the protections of the Eleventh Amendment as "arms of the State." *See Edelman v. Jordan,* 415 U.S. 651, 677-78 (1974); *Archuleta v. Lacuesta*, 131 F.3d 1359, 1362 (10th Cir. 1997) (both determining that a state entity can raise Eleventh Amendment immunity at any time).

---

[1] A copy of the parties' Stipulation is attached as Exhibit A. A shorter Stipulation to accomplish the dismissals anticipated by the Stipulation was previously submitted to the Court, but Exhibit A constitutes the agreement leading to that filing with the Court.

III. Quasi-Judicial Immunity Applies to Professor Churchill's Request for Reinstatement

Professor Churchill next suggests that quasi-judicial immunity applies only to the $1 award of nominal damages, but not to any type of prospective relief, such as reinstatement, that the Court could grant to Professor Churchill. He relies upon a line of cases having their origin in *Ex Parte Young*, 209 U.S. 123 (1908), which determined that a federal court has the power to enjoin a state official's prospective enforcement of state statute that conflicted with federal law.

What *Ex Parte Young* did not create, however, was a substantive right to seek remedial measures for a state official's past constitutional violation. That right of action exists only pursuant to the federal statute under which Professor Churchill asserted his claims, *42 U.S.C. §1983*. *See Arpin v. Santa Clara Valley Transportation Agency,* 261 F.3d 912, 925 (9th Cir. 2001) (stating that "a litigant complaining of a violation of a constitutional right does not have a direct cause of action under the United States Constitution but must use *42 U.S.C. §1983*"). As it existed before 1996, *§1983* stated:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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. . . .[2]

[2] The text of 42 U.S.C. §1983, as it existed between 1979 and 1996, is attached as Exhibit B.

Interpreting this language, the United States Supreme Court determined that "Congress plainly authorized the federal courts to issue injunctions in §1983 actions, by expressly authorizing a 'suit in equity' as one of the means of redress." *Mitchum v. Foster,* 407 U.S. 225, 242 (1972). The Supreme Court later determined that judicial officers could not raise judicial immunity as a means of avoiding prospective relief awarded under §1983, even if judges were immune from claims for monetary damages. *Pulliam v. Allen,* 466 U.S. 522, 538-540 (1984). In doing so, the Supreme Court determined that "nothing in the legislative history of §1983 or in this Court's subsequent interpretations of that statute supports a conclusion that Congress intended to insulate judges from prospective collateral injunctive relief." *Pulliam*, 466 U.S. at 540. With *Pulliam* as guidance, the lower courts decided each of the cases that Professor Churchill cited for the proposition that judicial immunity does not prevent prospective equitable relief.[3]

What Professor Churchill overlooks, however, is that Congress amended *42 U.S.C. §1983* in 1996 to modify the availability of prospective relief available to successful litigants. As amended, the statute now reads:

---

[3] Professor Churchill cited one case, *Switzer v. Coan*, 261 F.3d 985 (10th Cir. 2001), that was not based upon *Pulliam. Switzer* does state that judicial immunity would not preclude prospective relief, but *Switzer* was brought against federal judges. *42 U.S.C. §1983* applies only to action undertaken "under color of state law" and has no effect upon federal officials. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 456 F.2d 1339, 1346 (2d Cir.1972). The 1996 amendments to *42 U.S.C. §1983* would not apply to a *Bivens* action against federal judges, but Professor Churchill has not brought a *Bivens* action subject to the *Switzer* opinion.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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. . . .[4]

Consequently, the Court is unable to grant prospective relief of the type that Professor Churchill seeks unless either: (1) the University violated a declaratory decree; or (2) declaratory relief was unavailable. Professor Churchill has never claimed that the University violated a declaratory decree, so that argument is unavailable to him. He also cannot demonstrate that declaratory relief was unavailable to him. *C.R.C.P. 57* states that "district and superior courts within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Moreover, *C.R.C.P. 106* allows an action in the district court "where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law." Where these avenues were available to him, the plain language of *42 U.S.C. §1983* now prohibits the form of relief that Professor Churchill seeks to obtain from the University.

---

[4] The text of *42 U.S.C. §1983*, as it has existed since the 1996 amendments, is attached as Exhibit C.

Finally, the 1996 amendment to *42 U.S.C. §1983* applies to "actions against a judicial officer," which might leave open the argument that it does not apply to quasi-judicial officers, such Regents acting in a quasi-judicial capacity. That argument has, however, been soundly rejected by the federal courts:

> Although neither the Supreme Court nor the First Circuit have addressed whether the statute protects quasi-judicial actors . . . performing tasks functionally equivalent to judges from actions for injunctive relief, circuit and district courts in the Second, Sixth, Seventh, Ninth, and District of Columbia have answered in the affirmative.

Pelletier v. Rhode Island, 2008 WL 5062162, *5-*6 (D. R.I. 2008).[5] *See also Montero v. Travis*, 171 F.3d 757, 761 (2nd Cir. 1999) (applying the 1996 amendments when dismissing claims for prospective relief against quasi-judicial officers); *Roth v. King*, 449 F.3d 1272, 1286-87 (D.C. Cir. 2006) (stating that attorneys acting on administrative panels are entitled to immunity because "there is no reason to believe that the Federal Courts Improvement Act of 1996 is restricted to 'judges'"). In ruling, Judge Smith surveyed all of the cases applying the 1996 amendment to quasi-judicial officers and found only one did not grant immunity for prospective relief, but observed that this case: (1) failed to acknowledge the legislative history demonstrating that the amendment was intended to apply to quasi-judicial officers; and (2) was contrary to the existing body of law on the subject. *Pelletier*, 2008 WL 5062162 at *6. Professor Churchill provides no reason why the Court should not adopt the reasoning of the courts that regularly apply the 1996 amendment to quasi-judicial officers.

---

[5] For the Court's ease of reference, a copy of the *Pelletier* opinion is attached as Exhibit D.

IV. Quasi-Judicial Immunity Applies to the Regents' Dismissal of Professor Churchill

After raising a series of arguments designed to prevent the Court from considering the merits of quasi-judicial immunity, Professor Churchill turned to the substance of the argument. Before addressing his particular arguments, the University notes: (1) Professor Churchill has not cited a single case in which a university administrator acting similarly to the Regents has been denied quasi-judicial immunity; and (2) Professor Churchill artificially attempts to limit the *Hulen* and *Gressley* cases, which apply United States Supreme Court and Tenth Circuit precedent to conclude that college administrators enjoy quasi-judicial immunity under nearly identical circumstances. Professor Churchill's inability to illustrate any meaningful distinction between his case and *Hulen* or *Gressley* strongly favors granting the University quasi-judicial immunity.

A. Professor Churchill Misstates the Types of Proceedings Subject to Quasi-Judicial Immunity

Professor Churchill initially argues that the Regents are not acting in a quasi-judicial capacity because "the modern manifestation of quasi-judicial immunity is generally relevant only in administrative law venues,"[6] such as when "a DMV hearing officer suspends a driver's license due to an accumulation of points." Because he argues "the political affiliation of the driver" or "the driver's views on a controversial issue of the day" is not likely to affect a license revocation proceeding, that quasi-judicial immunity most naturally applies to

[6] *Plaintiff's Response to Defendants' Motion for Judgment as a Matter of Law* at Page 7.

decisions of a similar nature.[7] He cites little or no authority to support his narrow construction of quasi-judicial immunity, which actually protects a broad range of activities where governmental officials act in an adjudicative capacity.

Although Professor Churchill attempts to focus upon acts of a merely ministerial nature, many of the cases in which the United States Supreme Court and Tenth Circuit granted quasi-judicial immunity arose from situations where the plaintiff alleged that he had been singled out in retaliation for political activity. For example, in *Butz v. Economou*, 438 U.S. 478, 481 (1978) the plaintiff alleged that the Department of Agriculture had "instituted an investigation and an administrative proceeding against him in retaliation for his criticism of that agency." The Supreme Court noted that granting immunity to those involved in the adjudicative process was especially appropriate because "the controversy involves questions affecting large amounts of property or relates to a matter of general public concern, or touches the interests of numerous parties." *Butz*, 438 U.S. at 513 (emphasis added). As the Court noted, because "the conflicts which federal hearing examiners seek to resolve are every bit as fractious as those which come to court," the "disappointment occasioned by an adverse decision, often finds vent in imputations of malice." *Butz*, 438 U.S. at 513.

[7] *Plaintiff's Response to Defendants' Motion for Judgment as a Matter of Law* at Page 8.

Similarly, in *Russ v. Uppah*, 972 F.2d 300, 302 (10th Cir. 1987) the plaintiff claimed that his parole decision was unconstitutionally motivated by "the constant problem of racial discrimination being undertaken by the Parole Board, Parole Officers and the whole Department of Corrections." The plaintiff alleged that the parole officer and the parole board manufactured false allegations against him and that "racial animus spurred these actions." *Russ,* 972 F.2d at 302. These allegations of bias and prejudice are just as divisive and serious as the claims that Professor Churchill alleges, but the fact that a dissatisfied person can always claim that a decision was biased or politically motivated does not serve as a basis for denying quasi-judicial immunity.

B. Elected Officials Can Claim Quasi-Judicial Immunity

Professor Churchill next argues that quasi-judicial immunity should not apply because the Regents are elected into office. In doing so, he disregards the cases extending quasi-judicial immunity to elected officials, such as *Miller v. Davis,* 521 F.3d. 1142, 1145 (9th Cir. 2008). In *Miller*, the Ninth Circuit Court of Appeals determined that the Governor of California was entitled to quasi-judicial immunity in reviewing parole decisions of inmates convicted of murder. Following the United States Supreme Court's guidance that quasi-judicial immunity "flows not from rank or title … but from the nature of the responsibilities of the individual official," the Ninth Circuit granted the governor immunity because that function of his office was "functionally comparable" to that of a judge. *Miller,* 521 F.3d at 1145 (citing *Cleavinger v. Saxner,* 474 U.S. 192, 201 (1985)).

The Ninth Circuit recognized that there were some factors that potentially weighed against granting the governor quasi-judicial immunity, such as that "the Governor's review is not adversarial in nature, there is no requirement that the Governor consider precedent in making his determination, and the Governor is, by definition as an elected official, not insulated from political influence." *Miller*, 521 F.3d at 1145. Yet, nothwithstanding the governor's "almost uniform denials of parole," quasi-judicial immunity was proper because the governor's review of parole decisions "shares enough of the characteristics of the judicial process" to be considered judicial in nature. *Miller,* 521 F.3d at 1145 (citing *Butz*, 438 U.S. at 513). The proper focus is upon the function that the governmental official performs, not the means by which he acquired his office.

Professor Churchill makes much of the argument that the Regents were subject to political pressure, including pressure from former Governor Owens. If a governor's influence was sufficient to defeat quasi-judicial immunity, however, the Tenth Circuit would not have granted it to the Colorado Board of Medical Examiners, a "statutory body whose eleven members are appointed by the governor." *Horwitz v. Colorado State Board of Medical Examiners*, 822 F.2d 1508, 1510 (10th Cir. 1987). The Seventh Circuit recognized the reality of political pressure upon such political appointees when granted quasi-judicial immunity to an election board, recognizing that "although the board members are appointed to the ISBE by the governor, whose decision may include political considerations, political or electoral pressure alone cannot deprive government officials of absolute immunity."

Tobin for Governor v. Illinois State Board of Elections, 268 F.3d 517, 526 (7th Cir. 2001). In contrast to these officials who are appointed by the governor, the Board of Regents, "as a constitutional body, occup[ies] a unique position in our governmental structure" and enjoys autonomy and independence from both the legislative and executive branches. *Subryan v. Regents of the University of Colorado*, 698 P.2d 1383, 1384 (Colo. App. 1984).

Finally, Professor Churchill's argument mistakenly assumes that everyone performing a judicial function is free from any sort of political pressure. Certainly, this would not be true of elected judges, such as those in many states, who campaign for office and must subsequently make decisions in high profile cases, but are nonetheless entitled to judicial immunity. *See Brown v. Greisenauer*, 970 F.2d 431, 439 (8th Cir. 1992) (stating that "for purposes of immunity analysis, the insulation-from-political-influence factor does not refer to the independence of the governmental official from the political or electoral process"). Indeed, even judges in the State of Colorado are subject to retention elections, but these elections do not cause them to lose judicial immunity.

C. Dismissal of a Tenured Faculty Member is a Judicial Function

When the Ninth Circuit granted quasi-judicial immunity to the governor for his parole decisions, the driving factor in its decision was that the process "shares enough of the characteristics of the judicial process" to be considered judicial in nature. *Miller,* 521 F.3d at 1145. Chief among these were the fact that the governor was limited in the "evidence and factors he may consider" and the fact that "the courts properly can review a Governor's

decision . . . and such review can include a determination of whether the factual basis of the decision is supported by some evidence in the record. . ." *Miller,* 521 F.3d at 1145. Judged in this light, the process afforded to Professor Churchill more than exceeds the requirements for quasi-judicial action:

- As the Colorado Supreme Court has observed, the hallmark of quasi-judicial activity is "a determination of the rights, duties, or obligations of specific individuals on the basis of the application of presently existing legal standards or policy considerations to past or present facts developed at a hearing conducted for the purpose of resolving the particular interests in question." *State Farm Mutual Automobile Insurance Company v. City of Lakewood*, 788 P.2d 808, 813 (Colo. 1990).

- Just as a judge must apply the applicable legal standards to determine "the rights, duties, or obligations of specific individuals," the *Laws of the Regents* allow the dismissal of a tenured faculty member only for very limited reasons. Specifically, "the grounds for dismissal shall be demonstrable professional incompetence, neglect of duty, insubordination, conviction of a felony or any offense involving moral turpitude upon a plea or verdict of guilty or following a plea of *nolo contendere,* or sexual harassment or other conduct which falls below minimum standards of professional integrity." [8]

- "The existence of a statute or ordinance mandating notice and a hearing is evidence that the governmental decision is to be regarded as quasi-judicial." *State Farm*, 788 P.2d at 813. The *Laws of the Regents* fulfill this requirement as require "no member of the faculty shall be dismissed except for cause and after being given an opportunity to be heard as provided in this section."[9]

---

[8] Trial Exhibit 1-A, *Laws of the Regents, Article 5*. The University attached the relevant provisions of the *Laws of the Regents* as Exhibit A to its Motion for Judgment as a Matter of Law.

[9] Trial Exhibit 1-A, *Laws of the Regents, Article 5*.

- One of the safeguards available in the judicial system is that "the proceedings are adversary in nature." *Butz*, 438 U.S. at 513. *Horwitz*, 822 F.2d at 1514. Under the *Laws of the Regents*, "the individual concerned shall be permitted to have counsel and the opportunity to question witnesses as provided in the rules of procedure governing faculty dismissal proceedings."[10]

- Quasi-judicial immunity applies when proceedings are "conducted by a trier of facts insulated by political influence." *Butz*, 438 U.S. at 513. *Horwitz*, 822 F.2d at 1514. In this case, the Privilege and Tenure Hearings Panel of the Faculty Senate was the "trier of fact" that determined whether the grounds for dismissal had been demonstrated against Professor Churchill. That "trier of fact" unanimously determined that Professor Churchill engaged in "conduct below the minimum standards of professional integrity," which is one of the permissible grounds for dismissal.[11] Even Professor Hutcheson, the expert on the tenure processes, acknowledged that there was no evidence that that Hearings Panel was affected by political considerations.[12]

- In civil judicial proceedings, the party seeking relief must bear a burden of proof. *Kaiser Foundational Health Plan of Colorado v. Sharp*, 741 P.2d 714, 719. Under the *Laws of the Regents*, "the burden of proof shall be on the university administration" in dismissal proceedings.[13]

- In civil proceedings, the burden of proof is normally only by a preponderance of the evidence. Under *Regent Policy 5-I*, the burden of proof on the university administration is to demonstrate grounds for dismissal by clear and convincing evidence.[14] This higher burden of proof, where a fact is only proven where the trier of fact finds it to be "highly probable" and has "no serious or substantial doubt," counsel in favor of quasi-judicial immunity. *C.J.I. Civ. 3.2.*

---

[10] Trial Exhibit 1-A, *Laws of the Regents, Article 5*

[11] Trial Exhibit 21-F, *Panel Report Regarding Dismissal for Cause of Ward Churchill* at Page 76. The University attached the report to its Motion for Judgment as a Matter of Law as Exhibit C.

[12] Exhibit E, Trial Testimony of Philo Hutcheson at 25:20-26:4. The testimony cited here is the rough transcript of Professor Hutcheson's testimony. The final transcript has been ordered and will be submitted to the Court.

[13] Trial Exhibit 1-A, *Laws of the Regents, Article 5*

[14] Trial Exhibit 21-I, *Regent Policy 5-I.*

- Quasi-judicial immunity is appropriate where "a party is entitled to present his case by oral or documentary evidence." *Butz*, 438 U.S. at 513. *Horwitz*, 822 F.2d at 1514. Under the *Laws of the Regents*, the faculty member has the "opportunity to question witnesses" and present evidence.[15] Again, Professor Hutcheson testified that it was appropriate that the Hearings Panel heard Professor Churchill's witnesses, received any exhibits he wished to introduce, and had the opportunity to submit whatever written arguments he wanted."[16]

- Quasi-judicial immunity is appropriate where "the transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision." *Butz*, 438 U.S. at 513. *Horwitz*, 822 F.2d at 1514. Under *Regent Policy 5-1*, "the hearing officer shall appoint a registered professional reporter to record the hearing" [17] and "all presentations shall be based on the record in the case, including the transcript of the proceedings before the Panel."[18] At the hearing, "the members of the Board shall have an opportunity ask questions of the faculty member, the administration, and the hearing officer, but, ordinarily, the Board will not receive additional evidence." [19]

- In quasi-judicial proceedings, "the parties are entitled to know the findings and conclusions on all issues of fact, law or discretion presented on the record." *Butz*, 438 U.S. at 513. *Horwitz*, 822 F.2d at 1514. Under *Regent Policy 5-I,* the dismissal for cause panel first issues a written report containing "findings of fact, conclusions, and recommendations consistent with the policies of the Board of Regents."[20]

---

[15] Trial Exhibit 1-A, *Laws of the Regents, Article 5.*

[16] Exhibit E, Trial Testimony of Philo Hutcheson at 27:13-28:25.

[17] Trial Exhibit 21-I, *Regent Policy 5-I.* The University attached this policy as Exhibit B to its Motion for Judgment as a Matter of Law.

[18] Trial Exhibit 21-I, *Regent Policy 5-I.*

[19] Trial Exhibit 21-I, *Regent Policy 5-I.*

[20] Trial Exhibit 21-I, *Regent Policy 5-I.*

- If the President of the University does not concur with the panel, "the President's recommendation shall include the President's disagreement with the Panel."[21] The Board of Regents must take final action in a public meeting,[22] and the Board of Regents adopted an extensive resolution detailing its reasons for adopting the President's recommendation.

- In quasi-judicial proceedings, the decision is subject to further judicial review. *Miller,* 521 F.3d at 1145; *Butz*, 438 U.S. at 513. *Horwitz*, 822 F.2d at 1514. The purpose of such a review is to determine of whether the factual basis of the decision is supported by some evidence in the record. . ." *Miller,* 521 F.3d at 1145.

- Although Professor Churchill asserts that quasi-judicial immunity would leave him without a remedy, he is mistaken. The remedy available to him is the same remedy available to every litigant subject to a quasi-judicial decision, which is to seek judicial review of that decision. *C.R.C.P. 106(a)(4)(I)* allows a district court to overturn a quasi-judicial action that constitutes an "abuse of discretion." Under this standard, a district court might set aside any decision that is "clearly erroneous, without evidentiary support in the record, or contrary to law." *Leichliter v. State Liquor Licensing Authority*, 9 P.3d 1153, 1154 (Colo. App. 2000). If the Board of Regents, for example, overturned faculty findings that there were no "grounds for dismissal," or even overturned a unanimous faculty recommendation for discipline other than dismissal, the district court might properly determine that the decision clearly was erroneous or an abuse of discretion. Those clearly are not the facts of this case.

In sum, the evidence is overwhelming that the Board of Regents' decision was judicial in nature. Quasi-judicial immunity should apply.

---

[21] Trial Exhibit 21-I, *Regent Policy 5-I.*

[22] Trial Exhibit 21-I, *Regent Policy 5-I.*

D. *Hulen* and *Gressley* Provide Authoritative Guidance

The University supplied the Court with two cases that grant quasi-judicial immunity to university administrators and trustees who made disciplinary decisions affecting tenured faculty members. *Hulen v. State Board of Agriculture*, 98-B-2170 (D. Colo. 2001); *Gressley v. Deutsch*, 890 F.Supp. 1474, 1480 (D. Wyo. 1994). Professor Churchill provides the Court with no comparable authorities denying university administrators quasi-judicial immunity. Instead, Professor Churchill offers two distinctions that are neither persuasive nor determinative.

Professor Churchill first argues that the Board of Regents did not act as an appellate body. In doing so, he disregards the procedural posture of both *Hulen* and *Gressley*. In each cases, the university administrators or trustees reviewed the decisions of faculty panels. *See Hulen*, 98-B-2170 at Page 20 (stating that "the Faculty Manual provides that review of the grievance committee decision may be appealed through the administrative ranks, first to the Provost, then to the President, and finally to the State Board of Agriculture"); *Gressley*, 890 F.Supp at 1491 (stating that "the Board of Trustees sustained the Faculty Hearing Committee's determination that Plaintiff be dismissed for cause"). The Board Regents acted in a nearly identical manner when it reviewed the reports and recommendations generated during weeks of adversarial hearings without taking additional evidence.

Even more significantly, however, there is nothing that limits quasi-judicial immunity to officials acting in a purely appellate role. If Professor Churchill was correct, the Tenth Circuit could not have granted immunity to the Colorado Board of Medical Examiners, which "refers the [disciplinary] matter to an appointed hearing officer for an evidentiary hearing, subject to the hearing panel's review." *Horwitz*, 822 F.2d at 1511. Of course, Professor Churchill's argument is also contrary to the fact that quasi-judicial immunity protects all types of officials who perform judicial functions, not just appellate functions. *See Butz*, 438 U.S. at 513 (applying quasi-judicial immunity to a hearing officer and noting that "those who complain of error in such proceedings must seek agency or judicial review").

Professor Churchill finally argues that the Board of Regents did not act in a quasi-judicial capacity because it did not reach the same result as the faculty panel. Perhaps this argument might be interesting (even if not legally correct) where the faculty panel was unanimous in finding no grounds for discipline or no basis for dismissal, but the faculty panel found unanimously that Professor Churchill engaged in conduct that met the grounds for dismissal. Moreover, the faculty panel split 3-2 as to whether dismissal was the appropriate remedy.[23] Under those circumstances, the Board of Regents engaged in an entirely judicial function when reviewed the record and applied "discretionary judgment." *Hulen,* 98-B-2170 at Page 20.

---

[23] Trial Exhibit 21-F, *Panel Report Regarding Dismissal for Cause of Ward Churchill* at Page76.

Applying the same logic, Professor Churchill would deny judicial immunity whenever an appellate court reached the same outcome as a trial court, which is certainly not the case. In the final analysis, he cannot meaningfully distinguish either *Hulen* or *Gressley*, and the University respectfully requests that the Court recognize that quasi-judicial immunity bars his Second Claim for Relief.

Dated this 4th day of June, 2009:

OFFICE OF UNIVERSITY COUNSEL

_/s/Patrick T. O'Rourke_____
Patrick T. O'Rourke

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 4th day of June 2009:

Robert J. Bruce, Esq.
1875 Lawrence Street
Suite 750
Denver, Colorado 80202

David A. Lane, Esq.
Killmer Lane & Newman, LLP
1543 Champa Street
Suite 400
Denver, Colorado 80202

/s/ *Shirleen Jahraus*