SUPREME COURT, STATE OF COLORADO 101 W. Colfax Avenue, Suite 800 Denver, CO 80202	
Court of Appeals, State of Colorado No. 09CA1713 District Court for the City and County of Denver The Honorable Larry J. Naves, Judge Case No. 06-CV-11473	
Petitioner: WARD CHURCHILL, v. **Respondents:** THE UNIVERSITY OF COLORADO, THE REGENTS OF THE UNIVERSITY OF COLORADO, a Colorado body corporate.	**▲ COURT USE ONLY ▲** Case No. 11SC25
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***AMICI CURIAE* BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION (ACLU) AND ACLU OF COLORADO**	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

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☒It contains 8097 words.

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❑For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.____, p.____), not to an entire document, where the issue was raised and ruled on.

❑For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

As amici curiae, we are neither the party raising the issue nor the party responding to the issue.

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

The bottom line of this case is that after hearing all the evidence during a four-week trial, the jury concluded that the University of Colorado fired Professor Ward Churchill because of the controversial views he expressed in an essay about the victims of the 9/11 terrorist attacks. Just as important, the jury also found that the University would not have fired Churchill but for the content of his speech, notwithstanding the University's vigorous efforts to uncover a valid justification as a pretext for firing him after it reluctantly conceded that his essay was protected speech under the First Amendment. Despite the jury's finding, the trial court issued several rulings that completely undermined the jury's conclusions, and then threw out Churchill's entire case. The court of appeals affirmed each of the trial court's orders.

The ACLU submits this brief to raise serious constitutional and policy concerns implicated by the appellate court's multiple erroneous holdings. The appellate court's decision requiring an employee to show an "adverse employment action" unduly narrows the scope of constitutional protection for all public employees who suffer retaliation for engaging in protected speech on matters of public concern. Its decision broadly expanding common law quasi-judicial

immunity to the University's Board of Regents creates incentives for all public employers to restructure their employment decision-making process to foreclose employees from pursuing any claim that a public employer fired them for reasons of race, gender, religion, or any other category protected by the Constitution or anti-discrimination statutes. Finally, the decision extending Section 1983's bar on injunctive relief against "judicial officers" to the University's Board of Regents forecloses a fundamental and essential remedy for plaintiffs who, as did Ward Churchill, prove to a jury that they were fired because of their constitutionally protected speech. What is more, the policies underlying the 1996 amendments to Section 1983 are not even at issue in this case because the Board members are not, and will not ever be, subjected to liability for attorneys' fees.

But the implications of the latter two holdings extend well beyond free speech cases. Indeed, by broadening the scope of quasi-judicial immunity, and by holding that any quasi-judicial actor is also a "judicial officer" under Section 1983, the ruling below unjustifiably leaves public employees who suffer *any* constitutional violations without *any* remedy and completely insulates a vast range of administrative officials from legal accountability under Section 1983.

INTEREST OF *AMICI*

The American Civil Liberties Union and the American Civil Liberties Union of Colorado ("*Amici*") submit this brief urging this Court to reverse the court of appeals decision upholding the trial court's orders directing a verdict on Churchill's claim of retaliatory investigation and granting the University's motion for judgment as a matter of law on the grounds of quasi-judicial immunity and the unavailability of injunctive relief under 42 U.S.C. § 1983.

Amici represent organizations who believe strongly in the First Amendment and the principle that all speakers, no matter how offensive or unpopular some may find their speech to be, are protected by the First Amendment. Upholding that principle requires ensuring that meaningful remedies remain available when First Amendment rights are violated.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members, including members in Colorado, dedicated to the principles of liberty and equality embodied in the U.S. Constitution. The ACLU of Colorado, with over eight thousand members, is one of the ACLU's affiliates. Freedom of speech has been a central concern of the ACLU since the organization's founding in 1920. Over the last nine decades, the ACLU has repeatedly advocated and litigated to preserve the protections of the

First Amendment, including the First Amendment rights of public employees, at all levels of the federal and state judicial systems.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This Court granted certiorari on the following issues:

1. Whether a public university's investigation of a tenured professor's work product can constitute an adverse employment action for the purposes of a First Amendment claim brought under 42 U.S.C. § 1983 when, as a result of the investigation, the tenured professor also experiences adverse employment action in the form of termination.

2. Whether the granting of quasi-judicial immunity to the Regents of the University of Colorado for their termination of a tenured professor comports with federal law for actions brought under 42 U.S.C. § 1983.

3. Whether the denial of equitable remedies for termination in violation of the First Amendment undermines the purposes of 42 U.S.C. § 1983.

STATEMENT OF THE CASE[1]

The dispute in this case centers on a highly controversial essay published by Ward Churchill when he was a tenured professor at the University of Colorado. In that essay, Professor Churchill compared the victims of the 9/11 terrorist attacks to

[1] Because the factual and procedural background to this case will be discussed in greater detail by the parties, *Amici* detail only those background facts relevant to this brief.

"little Eichmanns," a reference to the notorious Nazi war criminal. Though the essay was first published three years before this controversy arose, the University of Colorado, where Churchill was employed, expressed no concern about its content or any other aspect of Churchill's performance. [Trial Transcript, 3/23/09, p. 2214-2215:11, 22-25.].

In 2005, after Churchill was invited to speak at Hamilton College, that school's newspaper published an article reporting about Churchill's 9/11 essay. This resulted in widespread publicity about the essay's controversial statements. In immediate proximity to the public outcry from media reports about Churchill's speech, the University's Board of Regents called a special meeting to discuss the matter. Though the expression that triggered the University's initial concern was the 9/11 essay, Interim Chancellor Phil DiStefano created an ad hoc committee to conduct "a thorough examination of Professor Churchill's writings, speeches, tape recordings and other works." [Trial Transcript, 3/10/09, p. 458:7-18].

At this point, numerous high-level decision-making officials in Colorado made statements revealing the University's animosity toward Churchill for the views expressed in his 9/11 essay as well as the desire to find a way to terminate his position with the University. The evidence admitted at trial showed, for example, that DiStefano's investigation was focused on the content of Churchill's

writing, and that the investigatory panel was trying to find "cause for dismissal." [Trial Transcript, 3/10/09, pp. 459:5-460:9]. The Regents unanimously approved the purpose of the ad hoc committee. [Trial Transcript, 3/10/09, p. 461:8-15 and Plaintiff's Exhibit 320]. Before the investigation even began, two members of the Board of Regents publicly stated their conclusions that Churchill would be subject to discipline or firing. [Trial Transcript, 3/31/09, p. 3942:15-21 (Regent Lucero); [Trial Transcript, 3/27/09, pp. 3281:3-3283:8 (Regent Carrigan)].

The initial investigation correctly concluded, however, that Churchill's 9/11 essay and other writings were protected by the First Amendment, thus thwarting the University's initial attempts to terminate him. At this point, DiStefano claimed that during the investigation into the content of Churchill's writings, the ad hoc committee had uncovered allegations of some research misconduct on Churchill's part. Well aware that taking direct action against Churchill for his speech would be a textbook violation of the First Amendment, the University then launched an investigative process that lasted over two full years. Leaving no stone unturned, the process eventually yielded evidence of some forms of academic misconduct that were completely unrelated to the essay that precipitated the investigation. For virtually every incident in which the University eventually found misconduct, the University had no evidence of such misconduct at the time the investigation began.

To the extent there had been any prior evidence, the University had ignored any concerns about Churchill's job performance until after publicity about his 9/11 essay surfaced. [Trial Transcript, 3/11/09, p. 783-785:11, 22-20, and 3/11/09, p. 928:11, 4-8]

Although the University did not fire Churchill or reduce his pay during the investigation, he suffered numerous other direct and indirect consequences associated with enduring the burdens of responding to multiple charges of research misconduct. First, the University's investigation affected Churchill's professional life in tangible ways. Evidence showed that as a consequence of the investigation, Churchill missed deadlines and defaulted on book contracts. [Trial Transcript, 3/24/09, p. 2628:8-25 and 3/25/09, pp. 2880:18-2881:1]. He also testified that speaking engagements he previously had been invited to were cancelled as a result of the investigation, and that the University denied him a sabbatical, forbade him to "unbank" courses that he was entitled to, and withheld a University teaching award from him. [Trial Transcript, 3/25/09, p. 2881:2-7; Defendants' Exhibit 14-1]. Second, he suffered personally, and testified that the investigation, unsurprisingly, took an emotional toll on him. [Trial Transcript, 3/25/09, pp. 2881:8-2882:2].

Churchill sued the University of Colorado and its Board of Regents (collectively, "the University) in state court under 42 U.S.C. § 1983, alleging that

the University violated the First Amendment by launching the investigation of his research misconduct ("investigation claim") and firing him at the conclusion of that investigation in retaliation for the content of his protected speech ("termination claim"). At the conclusion of the evidence, the judge granted the University's motion for a directed verdict on Churchill's investigation claim (as distinguished from his termination claim) on the ground that the investigation did not constitute unlawful retaliation under the First Amendment. After a four-week jury trial, the jury agreed with Churchill on his termination claim, concluding that the University fired him in retaliation for his speech. The jury also found that even though the University claimed it had other reasons for firing Churchill, the University would not have fired him for those reasons but for his protected speech. It then awarded Churchill nominal damages of one dollar.

After the verdict, Churchill filed a motion requesting an order requiring the University to reinstate him to his faculty position. The University filed post-verdict motions on two grounds. First, it asserted that the University was entitled to quasi-judicial immunity from damages.[2] Second, the University argued that

[2] Although immunity issues are typically raised at the outset of litigation, this claim had been reserved for argument until after trial under an agreement between the parties. In addition, official immunity defenses are unavailable to a government entity. *See Owen v. City of Independence*, 445 U.S. 622, 638 (1980). Accordingly, the University would not ordinarily be able to raise a personal immunity defense because the policies that official immunity is intended to advance do not even apply to an entity. *Id.* But under the terms of an agreement between the parties, the University waived its sovereign immunity from suit in exchange for Churchill's agreement to dismiss his suit against members of the Board of Regents in their individual capacity and to permit the University, as an entity, to

despite the verdict in Churchill's favor, the trial court could not order the University to reinstate Churchill. The trial court granted both of the University's motions, finding that the University was immune from a damages remedy and was not subject to injunctive relief under 42 U.S.C. § 1983, and therefore denied Churchill's motion for reinstatement. Having disposed of each of Churchill's possible avenues for a remedy for what the jury found was an intentional violation of the First Amendment, the trial court dismissed Churchill's suit.

On appeal, the Colorado Court of Appeals upheld the trial court's rulings on three grounds. First, it affirmed the trial court's directed verdict on Churchill's investigation claim, holding that the investigation itself did not constitute an "adverse employment action" in retaliation for Churchill's protected speech. (Slip op. at 50). Second, the appellate court upheld the trial court's ruling that the Regents were entitled to quasi-judicial immunity from Churchill's damages claim. (Slip op. at 12). Finally, the court of appeals affirmed the trial court's denial of Churchill's claim for equitable relief to reinstate him in his position at the University. The court agreed with the trial court that the Regents were "judicial officers" within the meaning of 42 U.S.C. § 1983, and injunctive relief was

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assert the *personal* defenses that would have been available to those Board members had they remained as defendants. Order Granting Defendants' Motion For Judgment As A Matter Of Law And Denying Plaintiff's Motion For Reinstatement Of Employment, ¶ 9.

therefore unavailable. (Slip op. at 42). This Court granted Churchill's petition for certiorari on May 31, 2011.[3]

ARGUMENT

I. THE APPELLATE COURT'S HOLDING THAT THE UNIVERSITY'S INVESTIGATION COULD NOT CONSTITUTE RETALIATION FOR CHURCHILL'S SPEECH CONFLICTS WITH BOTH THE PREVAILING LAW AND THE FIRST AMENDMENT'S BROAD PROTECTION OF ACADEMIC AND EXPRESSIVE FREEDOM.

This case involves the state government's aggressive and hostile public response to a tenured university professor's constitutionally protected speech. As the Supreme Court of the United States has long recognized, academic freedom is a "special concern of the First Amendment." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).[4] The Court has made it clear that First Amendment protections must especially be safeguarded in the unique context of a university setting. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust."). As a public employee and a university professor, Ward

[3] *Amici* do not include a separate statement of the standard of review because they are not the party raising such issues on appeal. COLO. APP. RULE 28(k).

[4] It has long been settled that the First Amendment's speech clause applies to state and local government actors through the Fourteenth Amendment's Due Process Clause. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

Churchill enjoyed First Amendment protection for the views expressed in his scholarly publications. The rejection of Churchill's retaliatory investigation claim threatens to undermine this basic freedom.

The trial court held, as a matter of law, that the University's conduct in launching a full-scale investigation of Churchill could not constitute First Amendment retaliation. The court of appeals agreed that the jury should not even get to decide the issue of whether the investigation was actionable under the First Amendment. In fact, however, there was more than sufficient evidence, read in the light most favorable to Churchill, from which a reasonable jury could conclude that the University's exhaustive investigatory actions constituted unconstitutional retaliation. Properly understood, the First Amendment standard focuses not on whether the employer took an "adverse employment action" against the employee, but on whether the employer's conduct could deter a person of reasonable firmness from engaging in speech.

A. The Standard For Establishing First Amendment Retaliation in Public Employee Speech Cases Is, and Should Be, Broader Than the Standard For Proving an Adverse Employment Action Under Title VII.

As with most First Amendment litigation, the implications of this case stretch far beyond the current parties. If upheld, the precedent established by the

court of appeals will severely diminish the ability of employees to establish First Amendment claims when they are punished for their speech through retaliatory employer conduct that does not neatly fall into pre-defined categories of "adverse employment actions." The court of appeals took an unduly narrow and categorical approach to defining what conduct constitutes retaliation. It stated that "Churchill's claim *requires* a determination that the investigation conducted under the auspices of the Regents was an adverse employment action." (Slip Op. at 48) (emphasis added)). "Adverse employment action" is a phrase that many courts have reflexively, but erroneously, invoked in public employee free speech cases. *See, e.g.*, *Jones v. Fitzgerald*, 285 F.3d 705, 713 (8th Cir. 2002). In defining an adverse employment action, these courts typically refer to a "material" or "tangible" change in the terms or conditions of employment. *Id*. It is clearly in this sense that the court of appeals understood the phrase. (Slip Op. at 45) ("The action taken must be sufficiently punitive or involve a change in employment to a new position which is "markedly less prestigious and less interesting than the old one.") (citation omitted).

But courts that require public employees to show a material or tangible change in the terms or conditions of employment in speech retaliation cases have done so without carefully tracing the evolution of the First Amendment retaliation

doctrine. In a broad range of contexts, the Supreme Court has established that the fundamental determination of when the First Amendment has been infringed in cases where the government retaliates against a person for engaging in protected speech is whether the government's conduct would likely deter or chill a speaker from engaging in such speech in the future. *See Rutan v. Republican Party*, 497 U.S. 62, 73 (1990) (rejecting government's claim that the denial of public employees' requests for promotion, transfer, or rehire because of their lack of support for political party in power was immune from First Amendment review because it did not adversely affect the terms of employment or chill the employees' speech); *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 674, 684-85 (1996) (extending First Amendment protection from retaliation to government contractors because of the chilling effect on speech that might be caused by government's refusal to renew contract).

Based on the Supreme Court's framework, government retaliation against a person for engaging in free speech should be evaluated by whether the government's response would deter or chill a person of ordinary firmness from engaging in the protected speech in the future. Several circuits have concluded that the Supreme Court's precedents command the application of this chilling effect standard to public employee speech cases. *See, e.g., Farmer v. Cleveland*

Pub. Power, 295 F.3d 593, 599 (6th Cir. 2002), *abrogated on other grounds, White v. Columbus Metro. Hous. Auth.*, 429 F.3d 232, 241 (6th Cir. 2005); *Burkybile v. Bd. of Educ. Of Hastings-On-Hudson Union Free School Dist.*, 411 F.3d 306, 313-14 (2d Cir. 2005); *Suppan v. Dadonna*, 203 F.3d 228, 235 (3d Cir. 2000). *See also* Rosalie Berger Levinson, *Superimposing Title VII's Adverse Action Requirement on First Amendment Retaliation Claims: A Chilling Prospect for Government Employee Speech*, 79 TUL. L. REV. 669 (2005); John Sanchez, *The Law of Retaliation After* Burlington Northern *And* Garcetti, 30 AM. J. TRIAL ADVOC. 539 (2007).

The Tenth Circuit has applied this chilling effect standard in multiple First Amendment contexts. *See, e.g.*, *Howards v. McLaughlin*, 634 F.3d 1131, 1144 (10th Cir. 2011) (First Amendment claim against law enforcement officer for arrest in retaliation for engaging on speech); *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000) (First Amendment claim against government for refusal to hire employment candidate in retaliation for speech). In *Worrell*, the court reaffirmed that "['a]ny form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, *bad faith investigation*, and legal harassment, constitutes an infringement of that freedom.'" *Id*. (citing *Lackey v.*

County of Bernalillo, No. 97-2265, 1999 WL 2461, at *3 (10th Cir. Jan.5, 1999)) (emphasis added).

The Tenth Circuit, too, has recently suggested that the chilling-effect standard should govern cases in which public employees assert that they have suffered retaliation for speech protected by the First Amendment. See *Couch v. Bd. of Trustees of Mem'l Hosp.*, 587 F.3d 1223, 1238 (10th Cir. 2009) (relevant legal question is whether the government's actions "would 'deter a reasonable person from exercising his . . . First Amendment rights.'") (citation omitted); *see also Maestas v. Segura*, 416 F.3d 1182, 1188 n.5 (10th Cir. 2005) (holding that "some forms of retaliation may be actionable under the First Amendment while insufficient to support a discrimination claim under Title VII").[5]

Some other circuits, however, have been reluctant to adopt the chilling effect standard. *See, e.g., Akins v. Fulton County, Ga.*, 420 F.3d 1293, 1300-01 & n.2 (11th Cir. 2005) (requiring public employee to show employer's conduct chills speech *and* alters an important condition of employment). Instead, like the court of

[5] In discussing the applicable test, *Couch* also invokes the phrases "adverse employment decision" and "detrimental employment decision." 587 F.3d at 1236, 1241. To the extent this causes any confusion, it is clear from a careful reading of the Tenth Circuit's decision that the court views employer conduct that would deter a reasonable employee from engaging in speech as sufficiently egregious to qualify as an "adverse employment action." *Id*. at 1238 ("in determining whether Dr. Couch's complaints of retaliation satisfy the fourth *Garcetti*-prong, we will consider whether the hospital's specific actions would 'deter a reasonable person from exercising his . . . First Amendment rights.'" (citation omitted). While *Amici* contend that this Court should discard the requirement of showing an "adverse employment action" in free speech cases, their First Amendment concerns are also satisfied if this Court were to hold, as the Tenth Circuit suggests, that an "adverse employment action" occurs whenever the employer's conduct would silence an employee of reasonable firmness.

appeals below, these courts have required that the plaintiff demonstrate that his employer subjected him to an "adverse employment action." To some degree, the decisions by these courts are overly narrow because they may have been unduly influenced by the standard for establishing unlawful employment discrimination in claims brought under Title VII of the 1964 Civil Rights Act. 42 U.S.C. § 2000 (2006).

As Professor Levinson thoughtfully has observed, the decisions of these circuits "send a dangerous message to government employers that they may penalize those who exercise their First Amendment rights provided their retaliatory conduct falls short of a 'material change' in the terms or conditions of employment." Levinson, *supra*, at 675; *see also* Elizabeth J. Bohn, Note, *Put On Your Coat, A Chill Wind Blows: Embracing the Expansion of the Adverse Employment Action Factor In Tenth Circuit First Amendment Retaliation Claims*, 83 DENV. U. L. REV. 867, 883 (2006) (criticizing courts that have imported Title VII adverse employment action standard to public employee free speech claims brought under § 1983). Further, these decisions extrapolate the Title VII adverse employment action standard without carefully considering the difference between statutory employment litigation and the broader concern of protecting speech under the First Amendment. Levinson, *supra*, at 675-76 ("superimposing federal

statutory restrictions on First Amendment speech doctrine has no legitimate rationale.”). A public employer may engage in a wide range of harassing conduct that does not change the terms or conditions of employment, but which may well chill or deter an employee from engaging in protected speech.

It is noteworthy that until recently, many lower federal courts made the same mistake of requiring an adverse employment action even within the context of Title VII retaliation claims. This error was corrected in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), where the Court examined the type of conduct that would constitute retaliation against an employee under Title VII. Title VII’s contains an antiretaliation provision, which makes it unlawful for an employer to “discriminate” against an employee because he or she has opposed an unlawful employment practice or assisted in a prosecuting a charge of employment discrimination. 42 U.S.C. § 2000e-3 (2006). The Court explained that the concept of the “adverse employment action” comes from Title VII’s *substantive* provisions, not from its antiretaliation provision. 548 U.S. at 61-63. Whereas those substantive provisions forbid an employer from discriminating against an employee in hiring, firing, and the “compensation, terms, and conditions of employment, or privileges” of employment, see 42 U.S.C. § 2000e-2(a) (2006), the

antiretaliation provision contains no such language. *Burlington Northern*, 548 U.S. at 62.

The Court went on to focus on the purpose of Title VII's antiretaliation provision, which is "to [prevent] an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Id*. at 63. Accordingly, the Court concluded, the antiretaliation provision, "unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." *Id*. at 64. Precisely the same is true under First Amendment retaliation doctrine in the context of public employment. The First Amendment is designed to promote freedom of expression to promote the marketplace of ideas and limiting retaliation claims to adverse employment actions "would not deter the many forms that effective retaliation can take." *Id*.

Other courts have expressed concern that a broader chilling-effect test might lead to First Amendment claims even for de minimis government action toward public employees. *See, e.g.*, *Couch*, 587 F.3d at 1237 (stating that the Tenth Circuit has never ruled that any employer conduct, no matter how trivial, can sustain retaliation claim). To be sure, public employers would be unreasonably limited in the oversight and management of their workplaces if any trivial or de

minimis action could prompt a legal claim. But the chilling effect test does not open the door to limitless First Amendment litigation by public employees, because it restricts actionable violations of the First Amendment to conduct that would chill a person of "ordinary firmness." This standard precludes lawsuits in cases where the government's actions would not deter a reasonable public employee from engaging in speech. *Id*. at 1238. Moreover, as Professor Levinson argues, while courts sometimes conclude that retaliatory conduct may be too trivial to chill speech, "this determination should not be based on whether an employee can meet some threshold mechanical standard of a tangible or substantially adverse harm to employment." Levinson, *supra*, at 695-96.

B. First Amendment Retaliation Claims Ought To Focus on the Impact That the Employer's Retaliatory Conduct Has on Speech Rather Than On Whether That Conduct Fits The Category of "Adverse Employment Action."

By directing its inquiry solely on whether the University's investigation of Churchill represented an adverse employment action, the court of appeals ignored the fact that employer conduct can sharply deter an employee from engaging in speech even without formally changing the terms or conditions of his employment. This type of categorical, legal formalistic reasoning is unsuitable for the protection of important First Amendment speech rights, for it ignores the reality of workplace

dynamics and instead assigns legal significance to actions with specific labels, such as termination and transfer. *See Coszalter v. City of Salem*, 320 F.3d 968, 975 (9th Cir. 2003) ("[A] government act of retaliation need not be severe and it *need not be of a certain kind*. Nor does it matter whether an act of retaliation is in the form of the removal of a benefit or the imposition of a burden.") (emphasis added).

The proper First Amendment inquiry should focus not on which category of formal employment action the government's conduct fits, but on the impact the retaliatory conduct has on an employee's willingness to speak. For example, some work transfers can have virtually no material effect on the day-to-day life of the transferred employee. In contrast, a full scale, multi-year investigation that requires the employee to spend substantial time responding to allegations, meeting with legal counsel, testifying, and otherwise appearing at various hearings, can have a substantial impact on that employee's ability to function in his job. Many types of government conduct that cannot be categorized as employment actions may nonetheless deter any reasonable employee from engaging in protected speech in the future.

Numerous federal courts have recognized that an employer's investigation of an employee is a form of retaliation that can be part of a targeted employee's valid First Amendment claim. *See, e.g.*, *Coszalter*, 320 F.3d at 976–77 (9th Cir. 2003);

Ulrich v. City and County of San Francisco, 308 F.3d 968, 977 (9th Cir. 2002); *Levin v. Harleston*, 966 F.2d 85, 89 (2nd Cir. 1992); *Rakovich v. Wade*, 819 F.2d 1393, 1397 (7th Cir. 1987), *vacated on other grounds on reh'g*, 850 F.2d 1180 (7th Cir. 1988). Although these cases also factored other employer conduct into the assessment of the retaliation claim, they clearly recognize that investigations can have a severe impact on an employee's willingness to speak. *Ulrich*, 308 F.3d at 977 (noting that investigation of physician that might result in loss of clinical privileges had "more than trivial" impact).

In the academic setting in particular, a university can make any number of decisions that serve to subtly punish an employee for his speech. For example, a university might saddle a professor with burdensome teaching loads or schedules or assign him undesirable or time-consuming administrative work. While such decisions may not reflect a formal change in employment status, they can cumulatively burden faculty members in ways that could deter them from again engaging in the type of expression that prompted the University to impose these types of burdens. *Cf. Burlington Northern*, 548 U.S. at 69 (2006) (observing in Title VII retaliation context that "[a] schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children.").

Failure to recognize that an extensive investigation can be actionable retaliation will lead to the under-deterrence of First Amendment violations by public employers. First, a public employer that wishes to fire an employee because of his speech might invoke an investigation as a form of harassment and use it to drive the employee to resign. Alternatively, the employer may use the investigation of an employee whom there is no basis to fire in order to search for some sort of information on which they could base a legitimate termination decision, even though this is simply a pretext for the actual reason the employer wishes to fire him – animosity toward his expression.

C. The Determination of Whether the University's Conduct Could Have Violated the First Amendment is a Fact- and Case-Specific Inquiry That Should Be Determined By the Jury Where There is Sufficient Evidence to Support the Plaintiff's Claim.

The only matter at issue on Churchill's investigation claim was whether the investigation could constitute retaliation in violation of the First Amendment. The adjudication of this issue is necessarily fact-based and context specific. Even the court of appeals in this case acknowledged that "context matters" in the evaluation of retaliation claim. (Slip Op. at 47) (citing *Burlington Northern*, 548 U.S. at 69). As the Court stated in *Burlington Northern*, "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances,

expectations, and relationships which are not fully captured by a simple recitation of the word used or the physical acts performed." 548 U.S. at 69 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998)).

Thus, the inquiry into whether a particular employer's actions are sufficient to establish retaliation under the First Amendment inherently must be conducted on a case-by-case basis. By directing a verdict on the retaliatory investigation claim, the trial court here foreclosed the jury's opportunity to consider all the facts in the context of Churchill's case, thus undermining the very context-specific inquiry that the law demands. *See Deutsch v. Jordan*, 618 F.3d 1093, 1097-98 (10th Cir. 2010) (determination of employer's motive and "detrimental" nature of conduct toward employee is a jury question); *accord Everitt v. DeMarco*, 704 F.Supp.2d 122, 134 (D. Conn. 2010) (concluding that because retaliation claims are highly fact specific, the court could not determine as a matter of law that an investigation would not be sufficient to establish First Amendment retaliation). Presented with the same evidence, the jury concluded that the University *fired* Churchill because of his protected speech. It is hardly a stretch to infer that it might have found the same evidence to support a finding that the University's conduct in launching a full-scale investigation of Churchill (an investigation that, on the firing claim, the jury implicitly found not to have produced sufficient reasons for firing Churchill

independent of his speech) was also retaliatory – that is, that it would have deterred a person of ordinary firmness from engaging in future speech and was motivated by antipathy toward the employee's past speech.

If any case could sustain a claim that an investigation constituted retaliation, it is this one. First, there is ample evidence in the record from which a reasonable jury could conclude that the investigation itself was launched in retaliation for Churchill's past speech. Indeed, as the record makes clear, the Regents launched the original investigation for the purpose of finding "cause for dismissal." [Trial Transcript, 3/10/09, pp. 459:5-460:9; Trial Transcript, 3/10/09, p. 461:8-15 and Plaintiff's Exhibit 320]. Moreover, before the investigation even began, at least two Regents apparently had already concluded that disciplinary action or firing were appropriate. [Trial Transcript, 3/31/09, p. 3942:15-21 (Regent Lucero stated on television that its initial meeting was called to determine "what [the Chancellor's] course of disciplinary action is."); [Trial Transcript, 3/27/09, pp. 3281:3-3283:8 (Regent Carrigan told newspaper reporter that, "We can fire Churchill. We just can't fire him tomorrow.")].

Second, there was more than sufficient evidence upon which a jury could have found that the retaliatory investigation would have chilled the speech of a person of "ordinary firmness." Surely a reasonable university employee would

think twice about engaging in speech that would result in a high-profile, nationally-publicized fishing expedition to uncover potential misconduct, even in the absence of any other specific change in employment circumstances. No reasonable person could believe that Ward Churchill's life was no different before the university launched its investigation than it was during and after the more than two-year-long process began. As recounted in the record, the investigation interfered with his ability to perform in his professional work environment as well as causing him emotional distress. Accordingly, the trial court's directed verdict ruling was in error and conflicts with the prevailing law.

II. THE COURT OF APPEALS DECISION VASTLY EXPANDS QUASI-JUDICIAL IMMUNITY TO PUBLIC EMPLOYERS IN A MANNER THAT IS BOTH INCONSISTENT WITH CURRENT LAW AND WILL UNDERMINE THE ENFORCEMENT OF IMPORTANT CONSTITUTIONAL RIGHTS.

The broad conferral of absolute "judicial" immunity to the University's Board of Regents in this case is both inconsistent with the law of official immunity and severely undermines the effectiveness of Section 1983 as a tool for enforcing constitutional remedies. Although the jury in this case found that Churchill proved that the University fired him in retaliation for his constitutionally-protected speech, the trial court entered judgment as a matter of law for the University on the issue of

remedies. The court threw out the jury's nominal damages award on the ground that the University was entitled to absolute quasi-judicial immunity from damages for the decision of the Board of Regents to fire Churchill.

A. The Regents Are Not Entitled to Common Law Absolute Immunity From Damages Because They Functioned In This Case Not As Quasi-Judicial Officers, But As An Employer.

Amici agree with Churchill that in firing him, the Regents were not carrying out the type of "quasi-judicial" function that entitles them to absolute immunity Under civil rights law, absolute immunity for public officials is the exception to the rule. The Supreme Court has consistently signaled that the recognition of absolute immunity is, and should be, "quite sparing" *Forrester v. White*, 484 U.S. 219, 224 (1988), because such immunity has the severe effect of completely precluding a damages remedy for constitutional violations – thus undermining a principal purpose of Section 1983. Accordingly, "[o]fficials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy . . . ." *Id.*

Although the Court has recognized that traditional judges are absolutely immune from damages claims for constitutional violations, *Pierson v. Ray*, 386 U.S. 547, 553-55 (1967), it has also extended such immunity to a narrow category

of officials who are not judges, but who carry out functions that are closely analogous to the conventional judicial process. *Butz v. Economou*, 438 U.S. 478 (1978). This does not mean, however, that all executive or administrative officials can cloak themselves with the protection of absolute immunity simply by characterizing their work as "judicial." As Churchill argues, the Court set forth relevant factors to consider in conducting this functional analysis in *Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985).

The *Cleavinger* factors are consistent with the Court's overall approach to absolute judicial immunity, which focuses on protecting the judicial *process* more so than on insulating individual judges from liability. *Id*. at 200. The integrity of the traditional judicial function would be severely compromised if disgruntled parties could simply use constitutional tort claims as a tool to essentially launch a collateral attack on an adverse decision produced by the judicial process. This protection is important in the case of the typical federal or state judge, who may adjudicate hundreds of claims involving multiple parties every year.

But the rationales for extending judicial immunity to non-judicial officials do not apply where, as here, the Board of Regents was at all times functioning as an employer, not a neutral quasi-judicial body. *See* Margaret Z. Zohns, *A Black Robe Is Not A Big Tent: The Improper Expansion of Absolute Judicial Immunity*

To Non-Judges in Civil-Rights Cases, 59 SMU L. REV. 265, 299-314 (2006) (criticizing the expansion of quasi-judicial immunity to a broad range of officials that do not truly carry out independent, adjudicative functions.). First, as a matter of Colorado law, the Regents are for all intents and purposes the *employer* of University faculty. The Colorado statute defining the Regents' responsibilities clearly states that "[t]he board of regents shall . . . appoint the requisite number of professors, tutors, and all other officers; and determine the salaries of such officers." COLO. REV. STAT. § 23-20-112. Moreover, the enabling statute confers on the Regents the discretionary authority to terminate employees. *Id*. (stating that the board of regents "shall remove any officer connected with the university when in its judgment the good of the institution requires it.").

Second, in every aspect of the dispute over Churchill's speech, the Regents functioned as an employer, not as an adjudicative body. In their capacity as his employer, they authorized the initial investigation of his publications and other speech. [Trial Transcript, 3/10/09, pp. 453:21-454:1, 461:8-11, 463:12-465:17]. Members of the Board made public comments about Churchill's speech before and during the course of the investigation they had authorized. After the multi-year investigation was completed, President Hank Brown "recommended" to the Regents that they terminate Churchill. [Plaintiff's Exhibit 185]. Judges do not

ordinarily initiate the claims that are brought before them, comment publicly on their pre-judgment of such disputes, or act as the implementer or one of the parties' recommendations.

It is not as if the Board of Regents sits as a neutral, state personnel board, reviewing disputes between *other* agencies and their employees. There was nothing neutral or "judicial" about the way they conducted themselves in this dispute. The fact that the Regents were reviewing several layers of processes required by the University's own regulations does not make them judges. They were Churchill's employer, and they fired him.

Nor would the denial of absolute immunity interfere with the Regents' decision-making ability. In their individual capacity, they would still be entitled to assert qualified immunity from damages claims. Though less protective than absolute immunity, qualified immunity is still highly protective of officials' discretion. Qualified immunity protects officials from suit unless their conduct violates clearly established constitutional rights of which a reasonable official would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Even in the absence of qualified immunity, state law indemnifies the Regents from liability for their official decisions, thus removing the inhibiting effect that being subject to suit might otherwise impose. *See* COLO. REV. STAT. § 24-10-110.

B. Extending Absolute Immunity To The Regents Would Create a Perverse Incentive For All Public Employers To Restructure Their Employment Decision-Making Processes By Creating "Judicial" Boards To Fire Employees, Thus Undermining the Enforcement Of A Wide Range Of Constitutional Rights.

If this Court upholds the appellate court's decision conferring absolute common law immunity on the Regents from suits for damages, there will be enormous ramifications in a vast range of public employment settings. Once absolute immunity is conferred on a class of public officials, those officials are categorically immune from suit, even in cases where they engaged in egregious, intentional violation of a person's constitutional rights. *See Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (applying absolute immunity to prosecutor who was accused of intentionally putting on perjured testimony at criminal trial); *Pierson*, 386 U.S. at 554 (stating that "immunity applies even when the judge is accused of acting maliciously and corruptly.").

If the court of appeals decision is upheld, public employers across the state will have a compelling incentive to artificially transform their employment termination processes, which have historically been understood as administrative functions, into quasi-judicial ones. For example, public employers will be encouraged to adopt features that superficially will disguise their termination

processes to appear to be "judicial" in nature. This restructuring of the public employment process will affect not only free speech cases such as this one, but all other constitutional claims where an employee asserts that his or her public employer engaged in unconstitutional discrimination. Such a sweeping transformation of the employment process would undermine enforcement in any case where a public employer is accused of unconstitutional discrimination, including race, national origin, and gender claims brought under the Fourteenth Amendment's Equal Protection Clause, religious discrimination claims brought under the First Amendment Free Exercise Clause, as well as free speech retaliation claims such as Churchill's. It would also preclude public employees from pursuing any number of statutory discrimination claims, such as those under the Age Discrimination in Employment Act, 29 U.S.C. § 621 (2006), and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2006). *See, e.g.*, *Fink v. Kitzman*, 881 F. Supp. 1347, 1398 (N.D. Iowa 1995) (rejecting county board of supervisors claim of entitlement to quasi-judicial immunity for ADEA and ADA claims).

III. ADDING A WIDE RANGE OF ADMINISTRATIVE, NON-JUDICIAL ACTORS TO THE NARROW CATEGORY OF "JUDICIAL OFFICERS" WHO ARE NOT SUBJECT TO INJUNCTIVE RELIEF IS UNSUPPORTED BY SECTION 1983'S STATUTORY LANGUAGE, DOES NOT ADVANCE THE OBJECTIVES OF THE 1996 AMENDMENTS TO SECTION 1983, AND UNDERMINES SECTION 1983'S BROAD REMEDIAL PURPOSE.

Though Section 1983 broadly confers on injured persons the ability to sue state actors for the violation of constitutional rights, it states 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." 42 U.S.C. § 1983 (2006). The court of appeals erroneously held that it could not order the University to reinstate Churchill to his faculty position, even though the jury found that the University fired him because of his speech, based on its view that the Regents are "judicial officers" within the meaning of this part of Section 1983. (Slip Op. at 40).

Only a strained reading of the plain meaning of "judicial officers" would suggest that the phrase extends to the Regents of a public university. The limit on injunctive relief against judicial officers was added to Section 1983 through the Federal Courts Improvement Act of 1996 (FCIA). 104 Pub. L. No. 317, § 401, 110 Stat. 3847, 3853 (codified at 42 U.S.C. § 1983 (2006)). It is widely understood that this amendment was intended to supersede *Pulliam v. Allen*, 466 U.S. 522,

541-42 (1984), where the Supreme Court held that while state judges are immune from damages actions, they were still subject to claims for injunctive relief. In that case, the plaintiff sued a state magistrate to enjoin her practice of holding persons arrested for non-jailable offenses on bail. The plaintiff not only prevailed in his injunctive relief claim, but also received an award of attorneys' fees against the judge under 42 U.S.C. § 1988. *Id*.

The 1996 amendment clearly was intended to protect state judges, not administrative officials like the members of the University's Board of Regents. In the absence of clear guidance from Congress, the amendment's limitations on equitable relief should be read to apply only to defendants who are traditional judicial officers, such as "justices, judges and magistrates." S. Rep. No. 104-366, at 37 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4202, 4217. *See also Simmons v. Fabian*, 743 N.W.2d 281, 291 (Minn. App. 2007) (observing the absence of any legislative history to suggest that Congress intended the amendments to protect quasi-judicial officials from injunctive relief).

Although some courts have applied the 1996 amendment to bar injunctive claims against officials who are entitled to quasi-judicial immunity from damages, those decisions (on which the court of appeals relied) lack any thoughtful discussion about whether such an extension of immunity is warranted by either the

statutory language or the policy underlying the 1996 amendment to Section 1983. *See, e.g.*, *Montero v. Travis*, 171 F.3d 757, 761 (2d Cir.1999) (concluding with no analysis that § 1983 bars injunctive relief against parole board members); *Gilmore v. Bostic*, 636 F.Supp.2d 496, 506 (S.D.W.Va.2009) (citing cases, but not analyzing statute or policy, in concluding that § 1983 bars injunctive relief against parole board members).

The only court to carefully analyze the scope of Section 1983's limit on injunctive relief against judicial officers is *Simmons*. 743 N.W.2d at 291-92. In *Simmons*, the Minnesota Court of Appeals conducted a thorough and thoughtful discussion of the applicability of the 1996 amendment to "quasi" judicial officials. The *Simmons* court pointed out that the driving force behind the amendment was the concern that exposing judges to attorneys' fees liability would be the functional equivalent of allowing damages actions against them. *Id*. Thus, prior to 1996, most of the proposed amendments introduced to overturn *Pulliam* focused only on amending Section 1988 to preclude such fee awards. *Id*. Though Congress ultimately amended *both* Section 1983 and Section 1988, thus precluding both

injunctive relief claims and attorneys' fee awards against state judges, the principal purpose was clear.[6]

None of the policy concerns underlying the FCIA are at issue in this case. First, as argued above, the Regents are not actually or functionally "judicial officers" within the meaning of Section 1983. They were Ward Churchill's employer, and they both investigated him and fired him because of the content of his speech. Moreover, no individual who served on the Board of Regents is exposed to any liability for damages or attorneys' fees in this case, even should Churchill prevail on all counts.

Finally, the appellate court's acceptance of a broad definition of "judicial officers" within the meaning of Section 1983 is troubling because it substantially dilutes an important piece of the nation's constitutional remedies scheme. Section 1983 is designed to provide remedies to persons whose constitutional rights have been violated by state officials and to deter such officials from future constitutional transgressions. *Owen v. City of Independence*, 445 U.S. 622, 651 (1980). A broad, undifferentiated expansion of protection from injunctive relief for administrative officials will undermine the important purposes of constitutional enforcement

[6] To the extent there was any rationale beyond protecting judges from fee awards, it was premised on federalism concerns regarding federal judges ordering injunctive relief against state judges. *Id.* at 292. But if the 1996 amendments were driven by principles of federalism or comity, those concerns do not arise where, as here, the suit was brought in state, not federal, court.

served by Section 1983. *See Simmons*, 743 N.W.2d at 290 (stating that in amending Section 1983 "Congress did not purport to change the fact that section 1983 is a remedial statute specifically designed to provide plaintiffs with a broad remedy against state officials who violate their federal rights."). Barring injunctive relief for a plaintiff whose constitutional rights were indisputably violated undermines Section 1983's broad and important remedial function while not advancing any legitimate government interest.

A broad reading of the term "judicial officers" is even more problematic should the Court find that Churchill's other claims for relief are precluded. A central feature of the American system of constitutional enforcement is that where one type of remedy is barred for policy reasons, the Court typically recognizes an alternative remedy to ensure that Section 1983 continues to serve its purposes – deterring unconstitutional conduct and providing a recourse and remedy for injured parties. *See* Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of* Monroe v. Pape, 78 UMKC L. REV. 889, 889 (2010) ("in most contexts, when the Supreme Court erects barriers to constitutional remedies, it expressly or implicitly recognizes an important and meaningful (though not necessarily equivalent) alternative for parties seeking relief."). If the court of appeals holding is upheld, Ward Churchill will have suffered an unequivocal violation of his First

Amendment right to freedom of speech, but will be left without any recourse, either in the form of damages or in the form of reinstatement.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed, and this case should be remanded to the trial court for proceedings consistent with such reversal.

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I certify that on September 12, 2011, I served a copy of the foregoing document to the following by:

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