SUPREME COURT, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, Colorado 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. 06CV11473	**▲ COURT USE ONLY ▲**
Petitioner: WARD CHURCHILL v. **Respondent:** UNIVERSITY OF COLORADO	Case No. 11SC25
ATTORNEYS FOR *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION, NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AND ASSOCIATION OF AMERICAN UNIVERSITIES: Ada Meloy, *pro hac vice* American Council on Education One Dupont Circle, N.W. Washington, DC 20036 Tel: (202) 939-9361 Fax: (202) 833-4762 C. Randall Nuckolls, *pro hac vice* McKenna Long & Aldridge LLP 1900 K Street, N.W. Washington, DC 20006 Tel: (202) 496-7176 Fax: (202) 496-7756 Lino S. Lipinsky de Orlov, #13339 David R. Fine, #16852 Mason J. Smith, #43852 McKenna Long & Aldridge LLP 1400 Wewatta Street, Suite 700 Denver, CO 80202-5556 Tel: (303) 634-4000 Fax: (303) 634-4400	
***AMICI CURIAE* BRIEF OF AMERICAN COUNCIL ON EDUCATION, NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AND ASSOCIATION OF AMERICAN UNIVERSITIES**	

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). Choose one:

☒ It contains 6,409 words.

☐ It does not exceed ____ pages.

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

☐ 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.

Lino S. Lipinsky de Orlov, #13339
David R. Fine, #16852
Mason J. Smith, #43852
McKenna Long & Aldridge LLP
1400 Wewatta Street, Suite 700
Denver, Colorado 80202-5556
Tel: (303) 634-4000
Fax: (303) 634-4400

Ada Meloy, *pro hac vice*
American Council on Education
One Dupont Circle, N.W.
Washington, DC 20036
Tel: (202) 939-9361
Fax: (202) 833-4762

C. Randall Nuckolls, *pro hac vice*
McKenna Long & Aldridge LLP
1900 K Street, N.W.
Washington, DC 20006
Tel: (202) 496-7176
Fax: (202) 496-7756

COUNSEL FOR PROPOSED *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION, NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AND ASSOCIATION OF AMERICAN UNIVERSITIES

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

A grant of quasi-judicial immunity to Respondent, the University of Colorado ("University"), and the University's Board of Regents in this appeal would not only reaffirm long-established legal principles; it would protect the academic freedom of institutions of higher education.

American Council on Education ("ACE"), National Association of Independent Colleges and Universities ("NAICU"), American Association of State Colleges and Universities ("AASCU"), and Association of American Universities ("AAU") submit this brief to underscore the critical role of academic freedom at our nation's universities. Courts have long recognized the unique niche universities occupy in constitutional jurisprudence. It is well established that they are entitled to academic freedom, just as Petitioner, Ward Churchill ("Churchill"), is entitled to the protections of the First Amendment. Because universities are the entities best suited to make decisions about their own faculties, they are entitled to autonomy in adjudicating claims regarding academic integrity.

Churchill would have this Court decline to apply quasi-judicial immunity to university determinations regarding research misconduct. Such a holding would expose these institutions to repeated claims by dissatisfied faculty members and would ignore the constitutional tradition of deference to universities. A ruling in

Churchill's favor on quasi-judicial immunity would not only infringe on the institutional autonomy that is the cornerstone of academic freedom, but would chill universities' motivation to promulgate robust internal processes for faculty misconduct proceedings. In short, there would be little incentive for academic institutions to provide enhanced administrative procedures to protect faculty members' due process rights if university decisions on academic integrity were subject to the courts' *post hoc* review.

Churchill ignores the strong procedural safeguards the University adopted to guarantee fair enforcement of academic integrity standards. The application of quasi-judicial immunity is particularly appropriate here because the University's thorough, multi-stage review process is analogous to a judicial function. The Court should apply the case authorities on university autonomy – and thereby honor the constitutional tradition of academic freedom – by granting quasi-judicial immunity to the University and its Board of Regents.

INTEREST OF *AMICI*

A. American Council on Education.

ACE has an interest in this matter as a representative of colleges and universities throughout the United States that may be affected by the outcome of this appeal. Founded in 1918, ACE is a non-profit association whose members include more than 1,800 public and private colleges, universities, and educational organizations. It is the chief coordinating body for the nation's institutions of higher education; as such, ACE seeks to provide leadership and a unifying voice on key issues impacting our nation's academies. ACE also strengthens the vitality and well-being of colleges and universities through advocacy, research, leadership, and program initiatives. As their representative, ACE has a strong interest in this Court's decision in this matter.

B. National Association of Independent Colleges and Universities.

NAICU is a non-profit national educational association representing approximately 1,000 independent, non-profit colleges and universities, as well as state-wide, denominational, and consortial associations of independent colleges and universities. NAICU focuses its activities on issues of federal policy that affect the independent sector of private education.

C. Association of American Universities.

AAU is a non-profit organization of sixty-one leading public and private research universities in the United States and Canada. AAU focuses on issues that are important to research-intensive universities.

D. American Association of State Colleges and Universities.

AASCU is a Washington-based higher education association of nearly 420 public colleges, universities, and systems whose members share a learning- and teaching-centered culture, a historic commitment to underserved student populations, and a dedication to research and creativity that advances their regions' economic progress and cultural development.

E. *Amici's* Interest in This Case.

This appeal addresses the ability of institutions of higher education to enforce standards of scholarship in their faculties. The issues presented concern the autonomy of colleges and universities to discipline their faculty members in accordance with recognized academic standards. Higher education institutions have a strong interest in protecting the integrity of their respective learning environments.

Amici's national perspective on the issues before the Court will provide a thorough exploration of the implications of the Court's decision on colleges and

universities in Colorado and throughout the United States. *Amici* will argue for affirmance of the decision of the Court of Appeals and, in particular, its determination that the Board of Regents and the University were entitled to quasi-judicial immunity in terminating Churchill's employment at the University. In acting as it did, the University carefully and correctly followed its own policies and the applicable law.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This Court granted certiorari on three separate issues. This brief discusses only the second: whether the Board of Regents and the University are entitled to quasi-judicial immunity. Specifically, this brief addresses whether, in actions brought under 42 U.S.C. § 1983, the granting of quasi-judicial immunity to the Board of Regents and the University for the termination of a professor who committed academic misconduct is consistent with the First Amendment principle of academic freedom.

STATEMENT OF THE CASE

Amici hereby incorporate by reference the Statement of the Case as set forth in the University's Answer Brief. (*See* Resp't's Answer Br. 15.)

ARGUMENT

I. A GRANT OF QUASI-JUDICIAL IMMUNITY TO THE BOARD OF REGENTS AND THE UNIVERSITY WOULD PRESERVE ACADEMIC FREEDOM AND RECOGNIZE THE SPECIAL ROLE OF THE UNIVERSITY IN OUR CONSTITUTIONAL JURISPRUDENCE.

The special role accorded to universities in American jurisprudence compels the application of quasi-judicial immunity to the Board of Regents and to the University. As explained further below, judicial restraint in the form of deference to a university's decision-making is solidly grounded in the principle that institutions of higher education possess the authority to determine on academic grounds who may teach on their campuses and the quality of faculty members' scholarship. The concept of institutional academic freedom is not only firmly rooted in our constitutional tradition, but also in applicable federal regulations, the American Association of University Professors' ("AAUP") recommended guidelines intended to protect faculty members' rights, and the University's own procedures addressing academic misconduct.

Protection of academic freedom requires that universities be granted autonomy to enforce their standards of scholarship without judicial interference, particularly where, as here, the institution has adopted and enforces robust procedural safeguards. Affording the Board of Regents and the University quasi-

judicial immunity provides the legal protection necessary to preserve the institution's independent decision-making regarding academic standards and professors' adherence to those standards, free from external pressure. A holding that the Board of Regents and the University are entitled to quasi-judicial immunity therefore would foster academic freedom, both for the individual faculty members – whose rights are protected through universities' rigorous internal safeguards – and for the university itself as an institution. For these reasons, the Court should affirm the Court of Appeals' grant of quasi-judicial immunity to the Board of Regents and to the University.

A. Central to Academic Freedom Is the University's Ability to Enforce Standards of Scholarship Without Judicial Interference.

Academic freedom is a long-recognized and long-cherished concept in American jurisprudence. More than a half-century ago, Justice Frankfurter expounded the "four essential freedoms" of institutions of higher education:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university *– to determine for itself on academic grounds who may teach*, what may be taught, how it shall be taught, and who may be admitted to study.

Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (emphasis added); *see Grutter v. Bollinger*, 539 U.S. 306, 325-33 (2003) (citing

Sweezy and recognizing scope of university autonomy in making determinations regarding student body). Universities "occupy a special niche in our constitutional tradition"; in keeping with this tradition, the courts have carved out a "constitutional dimension, grounded in the First Amendment, of educational autonomy." *See Grutter*, 539 U.S. at 329.

Critical to academic freedom is the authority of the university to define and to pursue its mission as an *institution*: "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on *autonomous decision making by the academy itself*." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (emphasis added); *see Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000) ("to the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors"); *Feldman v. Ho*, 171 F.3d 494, 495-96 (7th Cir. 1999) ("A university's academic independence is protected by the Constitution, just like a faculty member's own speech."); *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 492 (3d Cir. 1998) (the First Amendment does not restrict a university's academic freedom to set its curriculum).

Such academic autonomy encompasses decisions regarding the composition of a university's faculty and the integrity of the institution's scholarship. Academic freedom therefore requires universities to discipline faculty members who violate standards of scholarship. While Churchill is entitled to the protections of the First Amendment,

> the Constitution does not commit to decision by a jury every speech-related dispute. If it did, that would be the end of a university's ability to choose its faculty–for it is speech that lies at the core of scholarship, and every academic decision is in the end a decision about speech.

Feldman, 171 F.3d at 496. This traditional role of university administrators and faculty who make determinations involving academic integrity has prompted various courts to defer to these decision-makers. *See Univ. of Pa. v. EEOC*, 493 U.S. 182, 199 (1990) ("courts have stressed the importance of avoiding second-guessing of legitimate academic judgments"); *Ewing*, 474 U.S. at 225 ("When judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment. . . . Considerations of profound importance counsel restrained judicial review of the substance of academic decisions."); *Borden v. Sch. Dist. of E. Brunswick*, 523 F.3d 153, 172 (3d Cir. 2008); *Urofsky*, 216 F.3d at 432-33.

These self-governing academic decisions necessarily include determinations regarding standards of scholarship. A key part of a university's mission is to allow the faculty to judge – on academic grounds – the integrity of their colleagues' publications. The University expressly commits itself to "[p]romot[ing] exemplary ethical standards for research and scholarship . . . [and] ensur[ing] the integrity of all research, the rights and interests of research subjects and the public, and the observance of legal requirements or responsibilities." Administrative Policy Statement, Introduction (Dec. 31, 1998) (Ex. 1-e at 1). The University faculty sets these standards, as it is the faculty that has "the principal role for originating academic policy and standards." Laws of the Regents, Art. 5 § E.5(A) (Ex. 22-l § 5.E.5).

Affording quasi-judicial immunity in this case would enhance universities' autonomy to pursue the goals for which these institutions are best suited – discovery, experimentation, creation, and education – while at the same time guaranteeing high standards of professional conduct in the individuals who engage in such work. The Court of Appeals correctly examined the issue from this latter perspective: "That a university is zealous in policing the academic standards of its faculty does not demonstrate bias *against* a noncompliant faculty member so much as it demonstrates a bias *in favor of* compliance with the rules of academia."

Churchill v. Univ. of Colo., No. 09CA1713, 2010 WL 5099682, at *13 (Colo. App. Nov. 24, 2010) (emphasis added). University officials such as the Board of Regents can be expected to make unpopular decisions about research misconduct and therefore become subject to claims of unfairness. In order to preserve academic freedom, such officials, performing quasi-judicial functions, must be immune from suit, even against such claims. *See id.* at *11-12, 16.

Churchill and his *amici* incorrectly assert that the application of quasi-judicial immunity to the University and the Board of Regents would inequitably shield biased decision-makers. Such risk of liability, however, cannot be squared with principles of university autonomy and academic freedom. As the Court of Appeals explained,

> [t]he protection essential to independence and discretion by the University and the Regents would be gone if they were subject to the intimidation of a lawsuit seeking to undo every decision to terminate a faculty member. [Citation omitted.] One who asserts that he lost a suit because the judge was biased may have a remedy under C.R.C.P. 106 seeking to reverse an abuse of discretion, *but he does not have the right to sue the judge in a civil suit for damages*.
>
> Administrative officials like the Regents and the P & T Committee can be expected to make unpopular decisions regarding research misconduct by professors and therefore become subject to claims of bias. This ought not deprive investigating

> officials of immunity. Decisions to discipline professors who do not meet standards of integrity or scholarship will no doubt be unpopular and disputed. But such self-policing does not indicate bias and it ought not subject faculty and the Regents to liability for enforcement. *Otherwise academic freedom would not be preserved*.

Id. at *11 (emphasis added). The Court of Appeals accurately noted that the imposition of discipline for research misconduct is frequently controversial and, for that reason, is likely to subject the decision-makers to claims of bias. *See id.*

Academic freedom would be significantly harmed if universities' self-policing could give rise to such lawsuits. *Id.* Concerns about costly and time-consuming litigation, as well as the potential for personal liability, could result in compromised decisions regarding faculty members who engaged in plagiarism or other forms of academic misconduct. The fear of a lawsuit following a ruling on a violation of the institution's standards could therefore result in determinations that failed fully to protect the university's integrity.

Just as judges are shielded from liability for their unpopular rulings, so too should university administrators and faculty members who act in a judicial capacity in enforcing their school's "integrity and academic standards" be allowed to "perform [their] functions without harassment or intimidation." *Id.* (quoting *Cleavinger v. Saxner,* 474 U.S. 193, 202 (1985)). For this reason, exposing

university decision-makers to lawsuits filed by disgruntled faculty members would significantly erode universities' ability to protect academic standards.

Academic freedom, along with its associated benefits, would therefore suffer if courts and juries were permitted to overturn decisions fundamental to the operation of institutions of higher education, including determinations regarding academic misconduct. Universities' self-policing activities would become a nullity if the Court were to allow these decisions to be subject to threats of lawsuits. *See Gressley v. Deutsch*, 890 F. Supp. 1474, 1491 (D. Wyo. 1994) (finding that decisions to discharge a tenured professor "would frequently result in damage lawsuits by disappointed parties"). Furthermore, universities would have little incentive to enforce high standards of scholarship if their enforcement decisions were subject to frequent suits. "[T]he only way to preserve academic freedom is to keep claims of academic error out of the legal maw." *Feldman*, 171 F.3d at 497. Because quasi-judicial immunity furthers the liberty of universities in defining and enforcing their academic missions, the grant of such immunity is appropriate in this case.

B. Federal Law Recognizes the Academic Freedom of Universities.

Universities seeking federal research funds are required by law to adopt procedural safeguards for those charged with academic misconduct. *See* 42 C.F.R.

§§ 93.100-93.319. These regulations incorporate the principle of institutional academic freedom as a protection of the academy itself because the rules acknowledge several important concepts: the institutions' primary role in enforcing academic ethics requirements, universities' adjudicatory function in prosecuting violations of research policies, and their unique fitness for making determinations of academic misconduct. *See id.*

In 2000, the Office of Science and Technology Policy ("OSTP") issued a Federal Policy on Research Misconduct ("OSTP Policy"), which set forth guidelines for "fair and timely procedures" to be followed during the adjudication of research misconduct claims. *See* 65 Fed. Reg. 76,260, 76,263 (Dec. 6, 2000). The U.S. Department of Health and Human Services ("HHS") promulgated rules at 42 C.F.R. part 93 to implement the OSTP Policy. Pursuant to these regulations, institutions applying for research support from the Public Health Service ("PHS") are required to implement certain procedures for the "thorough, competent, objective, and fair response to allegations of research misconduct . . . ." 42 C.F.R. §§ 93.300-93.319. The government developed these policies to protect its interest in the accuracy and reliability of research, while at the same time safeguarding the procedural rights of those charged with research misconduct. *See* 65 Fed. Reg. at 76,263.

These federal requirements support the Court of Appeals' holding that the Board of Regents and the University are entitled to quasi-judicial immunity. First, the regulations expressly incorporate the concept that academic institutions must be free to enforce their own standards. While federal agencies have ultimate oversight authority for federally funded research, the "research institutions bear primary responsibility for prevention and detection of research misconduct and for the inquiry, investigation, and adjudication of research misconduct alleged to have occurred in association with their own institution." 65 Fed. Reg. at 76,263.

Second, the regulations recognize academic institutions' need to carry out their adjudicatory function effectively and fairly by requiring specific procedural protections. These include – but are not limited to – a clear burden of proof, an element of intent, and rules with indicia of procedural due process elements (*e.g.*, notice, an opportunity to provide written comments, witnesses and evidence, and an "impartial and unbiased investigation to the maximum extent practicable"). *See* 42 C.F.R. §§ 93.104, 93.304, 93.310; *see generally* 42 C.F.R. pt. 93. By requiring these procedural protections, federal law demands that institutions maintain a rigorous adjudicatory function. Indeed, the OSTP Policy contemplates that institutions will undertake three major actions: "inquiry, investigation, and *adjudication*." *See* 65 Fed. Reg. at 76,263 (emphasis added). Such a function is

quintessentially deserving of quasi-judicial immunity. *See Widder v. Durango Sch. Dist.*, 85 P.3d 518, 527 (Colo. 2004) (requiring that quasi-judicial immunity be applied only where the "decision making . . . bears similarities to the adjudicatory function performed by courts").

Finally, the regulations acknowledge the deference that should be afforded to institutions in their determination of whether research misconduct has occurred. In promulgating its policy, the OSTP noted that universities "are much closer to what is going on in their own institutions and are in a better position to conduct inquiries and investigations" than are outside sources such as federal agencies or the courts. *See* 65 Fed. Reg. at 76,262. The OSTP rejected the argument that the agencies themselves should exercise more direct control over research misconduct. Instead, the OSTP recognized the central role the university plays in defining and enforcing standards of scholarly ethics, and allowed this tradition to continue, while at the same time guaranteeing evenhanded enforcement of these ethical standards among faculties. These hallmarks of the research funding regulations reflect the federal government's desire to leave the adjudication of academic misconduct in the hands of universities.

Federal regulatory law applicable to research institutions such as the University acknowledges and specifically incorporates the tradition of – and

concepts inherent in – academic freedom and autonomy. This recognition of academic freedom in the federal regulatory scheme further supports the grant of quasi-judicial immunity to the Board of Regents and the University.

C. The University's Policies and Procedures Preserve Academic Freedom While Ensuring Fundamental Fairness.

In carrying out the federal mandate described above, the University developed various policies and procedures for handling allegations of academic misconduct. *See* Administrative Policy Statement, Introduction (noting the policies' "compl[iance] with current federal regulations regarding scientific misconduct . . . .").[1] (Ex. 1-e at 1.) Throughout the refinement of its processes, the University has instituted complex procedures that provide robust safeguards that substantially exceed the aspirational guidelines of the AAUP. The AAUP's website states that "[p]rotecting academic freedom is [its] core mission. For almost a century we have been developing standards for sound academic practice and in working for the acceptance of these standards by the community of higher education." Protecting Academic Freedom, AAUP.org, http://www.aaup.org/AAUP/programs/academicfreedom.

[1] These procedures are discussed in greater detail in the University's Answer Brief. (Resp't's Answer Br. 7-14.)

Institutions of higher education across the United States have adopted processes that implement a system of "shared governance." AAUP describes shared governance as a system in which the faculty has "primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, [and] faculty status . . . ." Statement on Government of Colleges and Universities, AAUP.org, http://www.aaup.org/NR/rdonlyres/431ABA0A-019B-4ECD-B067-14EE81F37ABA/0/StatementonGovernmentofCollegesand Universities.pdf. The University established a system of shared governance based on the "guiding principle . . . that the faculty and the administration shall collaborate in major decisions affecting the academic welfare of the [U]niversity." Laws of the Regents, Art. 5 § E.5 (Ex. 22-l § 5.E.5). Based upon the above standards, the "faculty takes the lead in decisions concerning selection of faculty, . . . academic ethics, and other academic matters." (*Id.*)

To evaluate claims of academic misconduct, the University adopted detailed procedures that parallel and often exceed the AAUP's recommendations. These procedures guarantee a quasi-judicial adjudicatory framework that allows the University to maintain high standards while ensuring fundamental fairness to faculty members accused of misconduct. The administration did not impose the University's dismissal for cause policy upon the faculty. In fact, the opposite is

true: dismissal policies are driven by the faculty, not the administration. A notice of motion for a policy change must be submitted to the Faculty Senate, which must approve it by a two-thirds majority of those voting at the meeting. *See* Regent Policy 5-I (Ex. 21-i § V.) The Board of Regents makes the final decision on adoption of new policies. *Id.*

The table below provides a comparison of the AAUP-suggested guidelines and the University's rules enumerated in Regent Policy 5.I. The table makes clear that the University not only has met, but has often exceeded, the very guidelines on which the AAUP insists to guarantee procedural fairness for its members.

For example, whereas prehearing meetings are optional under the AAUP guidelines, *see* Recommended Institutional Regulations on Academic Freedom and Tenure § 5(c)(2), AAUP Policy Document (2009), http://www.aaup.org/NR/ rdonlyres/ E45D7D3B-00F1-4BC0-9D0A-322DF63A1D07/0/RIR.pdf, a prehearing report *must* be developed under University procedures "at the earliest practicable time" to provide the faculty member with an opportunity to respond to the allegations at the hearing. The report must include several components, such as supporting evidence, a witness list, and witness order, which allow the respondent to respond more fully to the allegations (Ex. 21-i at § III(B)(2)(j)). University faculty may call expert witnesses at the hearing (*id.* at § III(B)(2)(o)), the hearing

officer may permit opening or closing arguments (*id.* at § III(B)(2)(r)), *ex parte* communications are prohibited with few exceptions (*id.* at § III(B)(2)(q)), and any reports from dissenting panel members must be appended to the panel report to provide for more complete review (*id.* at § III(C)(1)). Although the AAUP guidelines do not address any of these areas, the University has nonetheless elected to include them to guarantee procedural due process for its faculty.

PROCESS	AAUP RECOMMENDED REGULATIONS	UNIVERSITY REGENT POLICY 5-I (EX. 21-i)
Cause for Dismissal	"Adequate cause for dismissal will be related, directly and substantially, to the fitness of faculty members in their professional capacity as teachers or researchers." § 5(a).	"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." § I.
Notice	"Service of notice of hearing with specific charges in writing will be made at least twenty days prior to the hearing." § 5(c)(1).	"A faculty member whose dismissal for cause is contemplated shall be given written notification as far in advance as possible of the contemplated effective date of dismissal for cause and the reasons therefor." § I(B).

PROCESS	AAUP RECOMMENDED REGULATIONS	UNIVERSITY REGENT POLICY 5-I (EX. 21-i)
Conflicts of Interest	"Members deeming themselves disqualified for bias or interest will remove themselves from the case, either at the request of a party or on their own initiative." § 5(c).	"The faculty member may request that specific committee member(s) be excluded from the dismissal for cause panel and shall provide a rationale for the request The Committee Chair shall consider this information and may replace the dismissal for cause panel member(s)." § III(B)(2)(h). "The hearing officer or any panel member may recuse her/himself at any time by notifying the Committee Chair as to the reason for the recusal. Upon motion of a panel member, the panel may decide that the hearing officer or a panel member should not participate in the hearing." § III(B)(2)(b).
Pre-hearing Procedure	"The hearing committee may, with the consent of the parties concerned, hold joint prehearing meetings with the parties in order to (i) simplify the issues, (ii) effect stipulations of facts, (iii) provide for the exchange of documentary or other information, and (iv) achieve such other appropriate prehearing objectives as will make the hearing fair, effective, and expeditious." § 5(c)(2).	"In order to provide guidance for both informal and formal hearings, the hearing officer, in consultation with the Parties, shall develop a hearing order at the earliest practicable time," containing: a notice of intent to dismiss, supporting documentation, a statement of issues, list of evidence to be presented by each party, witness list and order, and additional information as appropriate. § III(B)(2)(j).
Expert Witnesses	No guideline.	"Each Party shall have the right to present witnesses, including expert witnesses, and to be present throughout the hearing." § III(B)(2)(o).

PROCESS	AAUP RECOMMENDED REGULATIONS	UNIVERSITY REGENT POLICY 5-I (EX. 21-i)
Evidence	"The hearing committee will not be bound by strict rules of legal evidence, and may admit any evidence which is of probative value in determining the issues involved. Every possible effort will be made to obtain the most reliable evidence available." § 5(c)(13).	"Evidence not ordinarily admissible in court may be admitted, at the discretion of the hearing officer, if he/she determines the evidence to be of such reliability and relevance that a reasonable person would base weighty decisions upon it." § III(B)(2)(k)(2).
Transcript	"A verbatim record of the hearing or hearings will be taken and a typewritten copy will be made available to the faculty member without cost, at the faculty member's request." § 5(c)(7).	**"**The hearing officer shall appoint a registered professional reporter to record the hearing. At the conclusion of the hearing, copies of the recordings shall be made available to the hearing panel as requested by panel members for their deliberations; they shall also be made available to a Party upon the Party's request to the hearing officer." § III(B)(2)(l).
Opening & Closing Arguments	No guideline.	"The hearing officer may permit opening, closing, and other oral arguments to be made to the panel." § III(B)(2)(r).
Ex Parte Communi-cations	No guideline.	"Neither Party shall discuss the case, except for matters relating to the coordination of the proceedings with the hearing officer, other members of the panel or the Committee advisory lawyer unless both Parties are present." § III(B)(2)(q).

PROCESS	AAUP RECOMMENDED REGULATIONS	UNIVERSITY REGENT POLICY 5-I (EX. 21-i)
Written Findings	Not explicitly required when hearing panel finds misconduct, but can be implied from the overall document.	"In due course, ordinarily within 30 business days after the conclusion of the hearing, the dismissal for cause panel shall issue a written report containing findings of fact, conclusions, and recommendations consistent with the laws and policies of the Board of Regents." § III(C)(1).
Dissenting Report	No guideline.	"Any member of the panel not in agreement with any aspect of this panel report may indicate disagreement, along with the reasons therefor, in a minority report, which shall be appended to the panel report." § III(C)(1).
Objections to Panel's Report	No guideline.	"The Parties may respond in writing to the dismissal for cause panel report(s), setting forth any objections to either the findings or recommendations contained in the report(s)." § III(C)(2).
Right to Hearing	"The individual concerned will have the right to be heard initially by the elected faculty hearing committee." § 5(c).	"In contemplated dismissal for cause cases, the Committee process begins with a hearing . . ." § III(A)(6).

PROCESS	AAUP RECOMMENDED REGULATIONS	UNIVERSITY REGENT POLICY 5-I (EX. 21-i)
Production of Witnesses and Documents	"The faculty member will be afforded an opportunity to obtain necessary evidence and documentary or other evidence. The administration will cooperate with the hearing committee in securing witnesses and making available documentary and other evidence." § 5(c)(11).	"In order to provide for the expeditious review of dismissals for cause, faculty members and administrators shall cooperate by providing current contact information, by making themselves available during hearings as requested by the Committee and by providing relevant documents as requested by the Committee and the other Party." § II(B)(4).
Right to Cross-Examine	"The faculty member and the administration will have the right to confront and cross-examine all witnesses." § 5(c)(11).	"The parties and the members of the panel shall have the opportunity to question witnesses, subject to such reasonable limitations as the hearing officer may impose." § III(B)(2)(p).
Right to Counsel	"During the proceedings the faculty member will be permitted to have an academic advisor and counsel of the faculty member's choice." § 5(c)(5).	"Each Party may be represented by counsel, who may act on the Party's behalf throughout the formal hearing proceeding." § III(B)(1)(b)(2)(i).
Burden of Proof	"The burden of proof that adequate cause exists rests with the institution and will be satisfied only by clear and convincing evidence in the record considered as a whole." § 5(c)(8).	"The administration shall bear the burden of proof by clear and convincing evidence and shall present its case first." § III(B)(2)(n).

As the above table demonstrates, the University's internal regulations for evaluating academic misconduct are at least as robust as the AAUP's own

guidelines. The University's procedures are the product of a significant level of agreement between the faculty and the administration on the issue of academic freedom. Indeed, the stated purpose of the AAUP guidelines is to "protect academic freedom . . . and to ensure academic due process." Recommended Institutional Regulations on Academic Freedom and Tenure, Foreword, AAUP Policy Document (2009), http://www.aaup.org/NR/rdonlyres /E45D7D3B-00F1-4BC0-9D0A-322DF63A1D07/0/RIR.pdf. The University shares this commitment. The Standing Committee on Research Misconduct ("SCRM") is required to "[e]nsure that an appropriate balance is struck between protecting the rights of the person accused of misconduct . . . and protecting the person making the allegation . . . from possible retaliation." Administrative Policy Statement, Implementation § B (Ex. 1-e at 3).

The Colorado Conference of the AAUP, *amicus curiae* in this appeal, argues against the grant of quasi-judicial immunity, despite the University's adoption of the very procedural safeguards that the AAUP recommends to protect faculty from the type of bias AAUP alleges here. (Br. of Amicus Curiae Nat'l Lawyers Guild 20-25.) The AAUP suggests that the University's process was procedurally inadequate, in that it failed to prevent an allegedly retaliatory discharge. But it ignores the fact that all of the procedures governing Churchill's proceedings at

least met – and often exceeded – the AAUP's own guidelines. Universities across the United States have strived to ensure fairness when adopting faculty-related procedures. While the AAUP purportedly advocates for academic freedom and stresses university independence, it implicitly argues in its brief that no process should be outside the reach of a jury.

Even Churchill's counsel recognized the centrality of both academic freedom and fairness in the University's procedures. Early in the academic review process, during Chancellor DiStefano's initial investigation, counsel for Churchill expressed his confidence that the charges would "be reviewed by professors, who are more inclined not to be swayed by politics, who believe in *academic freedom*, tenure and the First Amendment." *See* Dave Curtin, *Churchill Likely to Be at CU for Years: Any Proceedings Begun Against the Fiery Professor Would Be Protracted*, Denver Post, Mar. 15, 2005, http://www.denverpost.com/search/ci_0002762808 (emphasis added) (statement of David Lane, counsel for Churchill). Mr. Lane also commented on the unbiased nature of the University's review proceedings, noting that if they proceeded "all the way to a tenure-review committee, the [R]egents – the politicians – will be taken out of the loop." *See id.*

A finding of quasi-judicial immunity is warranted in this case because the Laws and Policies of the Board of Regents preserve academic freedom while ensuring procedural fairness. Members of the University's faculty receive greater procedural protection than even the AAUP – their own advocacy group – demands. Churchill took advantage of these protections throughout his hearing process. This Court should affirm the Court of Appeals' decision on the basis that such strong protection against bias and arbitrary decision-making requires judicial deference to the University through the application of quasi-judicial immunity.

II. ACADEMIC BODIES SUCH AS THE BOARD OF REGENTS ARE ENTITLED TO QUASI-JUDICIAL IMMUNITY WHEN THEY ACT IN A JUDICIAL CAPACITY.

Both the District Court and the Court of Appeals correctly determined that the Board of Regents had acted in a capacity analogous to that of a judge and, therefore, was entitled to quasi-judicial immunity. *See Churchill*, 2010 WL 5099682, at *8-11. This application of quasi-judicial immunity is essential to ensure that universities' disciplinary bodies functioning in a judicial role, like judges, are protected from litigation infringing on the institutions' academic freedom to protect the integrity of its faculty.

Under Colorado law, judges enjoy absolute immunity from liability arising from their decisions "to preserve their 'independent decision-making and to

prevent undue deflection of attention from public duties.'" *State Bd. of Chiropractic Exam'rs v. Stjernholm*, 935 P.2d 959, 968 (Colo. 1997) (quoting *Higgs v. Dist. Court*, 713 P.2d 840, 850 (Colo. 1985)). Persons acting as the functional equivalent of judges enjoy absolute immunity for claims arising from their quasi-judicial actions, which are defined as "[o]f, relating to, or involving an executive or administrative official's adjudicative acts." *Hoffler v. Colo. Dep't of Corrs*., 27 P.3d 371, 374 (Colo. 2001) (quoting Black's Law Dictionary 1258 (7th ed. 1999)).

The determination of whether a decision-maker is entitled to quasi-judicial immunity focuses on "the nature of the governmental decision and the process by which that decision is reached." *Id.* (quoting *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Vill*., 757 P.2d 622, 627 (Colo. 1988)). "When a governmental decision is likely to affect the rights and duties of specific individuals, and the government agents reach the decision by applying preexisting legal standards or policy considerations to present or past facts, the governmental body is generally acting in a quasi-judicial capacity." *Churchill*, 2010 WL 5099682, at *5 (citing *Sherman v. City of Colo. Springs Planning Comm'n*, 763 P.2d 292, 295-96 (Colo. 1988)).

In *Cherry Hills*, this Court set forth three factors that are prerequisites to a determination that a body acted in a quasi-judicial capacity:

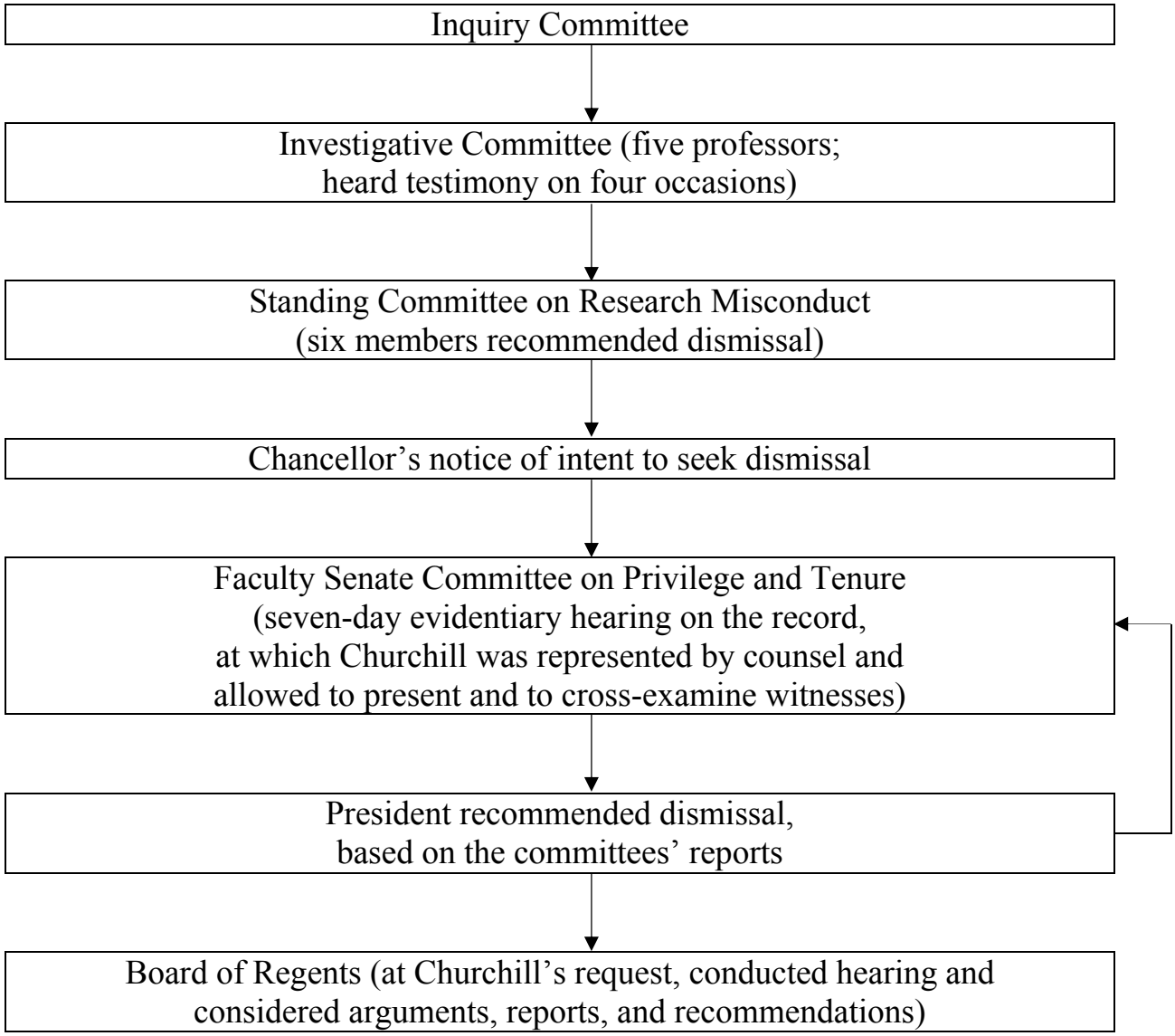
> (1) [A] state or local law requiring that the governmental body give adequate notice before acting on the matter; (2) a state or local law requiring the governmental body to conduct a public hearing, pursuant to notice, at which concerned citizens may be heard and present evidence; and (3) a state or local law requiring the governmental body to make a determination based upon an application of legal criteria to the particular facts before it.

Cherry Hills, 757 P.2d at 626; *see Butz v. Economou*, 438 U.S. 478, 508 (1978) (analyzing immunity of officials whose "special functions require a full exemption from liability").

Following these principles, this Court has found administrators entitled to quasi-judicial immunity when acting as the functional equivalent of judges. *See, e.g., Stjernholm*, 935 P.2d at 968 (members of Chiropractic Board); *State v. Mason*, 724 P.2d 1289, 1291 (Colo. 1986) (Parole Board members). Similarly, quasi-judicial immunity protects the decisions of university bodies regarding faculty members' research misconduct. *See Gressley,* 890 F. Supp. at 1491 (applying quasi-judicial immunity to university trustees who sat as appellate body in proceedings concerning termination of professor). As the *Gressley* court observed, it is "hard to imagine a more true adjudicative function" than the

dismissal of a tenured professor after notice and a full opportunity to be heard. *See id.* at 1490.

Quasi-judicial immunity is particularly appropriate here, where Churchill received the benefit of the same types of procedural safeguards afforded to litigants in a court of law. These protections included the creation of a "comprehensive record . . . available for review by the Regents" and the right "to make argument through counsel, citing evidence." *Churchill*, 2010 WL 5099682, at *9. Further, like appellate judges, the Regents made their decision only after an extensive review of the record and the recommendations of the Privilege and Tenure Committee. *See id.* Churchill had the right to retain, and in fact was represented by, his own counsel at each stage of the process. *Id.* at *10. As reflected in the below chart, the Churchill proceedings consisted of a "multi-step review which provided independent investigation and evaluation by peers, independent faculty members, and elected officials," *see id.* at *9:



Because the Board of Regents performed the role of an appellate tribunal, this Court should affirm the Court of Appeals' protection of academic freedom through the grant of quasi-judicial immunity to the Board of Regents and the University. Such a ruling would, in turn, preserve institutional academic freedom by protecting universities and their administrators from frequent litigation filed by

disciplined faculty members. The application of quasi-judicial immunity here would acknowledge the special niche universities occupy in our constitutional jurisprudence and afford them the autonomy that is the cornerstone of academic freedom.

CONCLUSION

Amici curiae American Council on Education, American Council on Education, National Association of Independent Colleges and Universities, American Association of State Colleges and Universities, and Association of American Universities respectfully request that this Court affirm the District Court's and the Court of Appeals' determination that the Board of Regents and the University are entitled to quasi-judicial immunity. Such a ruling would affirm the longstanding principle that academic freedom can best be protected when courts defer to universities' decisions regarding who may teach on their campuses and the quality of faculty members' scholarship.

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Lino S. Lipinsky de Orlov, # 13339
David R. Fine, #16852
Mason J. Smith, #43852
McKenna Long & Aldridge LLP
1400 Wewatta St, Suite 700
Denver, Colorado 80202-5556
Tel: (303) 634-4000
Fax: (303) 634-4400

Ada Meloy, *pro hac vice*
American Council on Education
One Dupont Circle, N.W.
Washington, DC 20036
Tel: (202) 939-9361
Fax: (202) 833-4762

C. Randall Nuckolls, *pro hac vice*
McKenna Long & Aldridge LLP
1900 K Street, N.W.
Washington, DC 20006
Tel: (202) 496-7176
Fax: (202) 496-7756

COUNSEL FOR *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION, NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AND ASSOCIATION OF AMERICAN UNIVERSITIES

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2012, a true and correct copy of the foregoing ***AMICI CURIAE*** **BRIEF OF AMERICAN COUNCIL ON EDUCATION, NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AND ASSOCIATION OF AMERICAN UNIVERSITIES** was served via first class U.S. Mail to the following:

Robert J. Bruce, Esq.
Lawlis & Bruce, LLC
1875 Lawrence Street, Suite 750
Denver, CO 80202

Kari M. Hershey, Esq.
Hershey Skinner, LLC
10463 Park Meadows Drive, Suite 209
Littleton, CO 80124

Patrick T. O'Rourke, Esq.
University of Colorado
Office of University Counsel
1800 Grant Street, Suite 700
Denver, CO 80203

David A. Lane, Esq.
Lauren L. Fontana, Esq.
Killmer, Lane & Newman, LLP
1543 Champa Street, Suite 400
Denver, CO 80202

Alan K. Chen, Esq.
University of Denver Sturm College of Law
2255 E. Evans Avenue, Room 455E
Denver, CO 80208

Antony M. Noble, Esq.
The Noble Law Firm, LLC
12600 W. Colfax Avenue, C-400
Lakewood, CO 80215

Douglas J. Cox, Esq.
Office of the Attorney General
1525 Sherman Street, 7th Floor
Denver, CO 80203

Cheri J. Deatsch, Esq.
Deatsch Law Office
1525 Josephine Street
Denver, CO 80206

Beth A. Dickhaus, Esq.
Hall & Evans, LLC
1125 17th Street, Suite 600
Denver, CO 80202

Heidi E. Boghosian, Esq.
National Lawyers Guild
132 Nassau Street, #922
New York, NY 10038

Thomas K. Carberry, Esq.
149 West Maple Avenue
Denver, CO 80223

Mark Silverstein, Esq.
ACLU Foundation of Colorado
303 Seventeenth Avenue, Suite 350
P.O. Box 18986
Denver, CO 80218-0986

DN:32220939.8