SUPREME COURT, STATE OF COLORADO

101 W. Colfax Avenue, Suite 800
Denver, CO 80202

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Court of Appeals No. 09CA1713
District Court for the City and County of Denver
Honorable Larry J. Naves, Judge
Case No. 06CV11473

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**PETITIONER:** WARD CHURCHILL

**RESPONDENT**: UNIVERSITY OF COLORADO

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Case Number: 11SC25

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# BRIEF OF *AMICI CURIAE* NATIONAL LAWYERS GUILD, CENTER FOR CONSTITUTIONAL RIGHTS, COLORADO CONFERENCE OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, LATINA/O CRITICAL LEGAL THEORY, NATIONAL CONFERENCE OF BLACK LAWYERS, SOCIETY OF AMERICAN LAW TEACHERS, AND LAW PROFESSORS AND ATTORNEYS IN SUPPORT OF REVERSAL OF THE JUDGMENT BELOW

## 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:

1. The brief complies with C.A.R. 28(g). It contains 6,~~143~~ 223 words.

2. The brief complies with C.A.R. 28(k). It (1) incorporates by reference the Petitioner's concise statement, under a separate heading, of the applicable standard of appellate review with citation to authority; and (2) incorporates by reference the Petitioner's citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on or provides an independent citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

Attorney for *Amici Curiae*

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Center for Constitutional Rights

Colorado Conference of the American Association of University Professors

Latina/o Critical Legal Theory

National Conference of Black Lawyers

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## SUMMARY OF ARGUMENT

The purpose of 42 U.S.C. § 1983, Section 1 of the Civil Rights Act of 1871, is undermined when a jury is precluded from considering whether an employer's investigation into all of a professor's writings and public speech constitutes an adverse employment action, the University is given absolute immunity from liability for firing a professor in retaliation for First Amendment protected expression, and all equitable remedies are denied.

For nearly half a century, §1983 has shaped civil rights litigation and ensured the protection of constitutional rights in the United States. The specifics of §1983 practice have evolved over time, yet its significance to the protection of fundamental constitutional rights is firmly rooted and continues to be recognized by courts around the country. The Civil Rights Act was enacted with the express purpose of empowering the federal courts to respond to unlawful abuse of African Americans in the South; it now serves to expose and redress a host of civil rights violations spanning a broad spectrum of issues and touching the lives of diverse groups of people.

One such group is employees of public academic institutions, whose First Amendment activities may provoke disagreements and even retaliatory action by state university officials. Allowing a state university to conduct retaliatory

investigations or terminate employees for exercising their First Amendment rights tarnishes the Act's record of protecting fundamental rights from overreaching state action. It also represents a resounding reversal of efforts to move forward from an era in this nation's history when constitutional rights were violated with impunity.

It is axiomatic that state officials sworn to uphold the United States Constitution must answer for their actions under the time-cherished protections of §1983. This Court has the opportunity to restore these protections and to send a cautionary message to those who would intentionally violate fundamental rights.

## STATEMENTS OF INTEREST OF *AMICI CURIAE*

The National Lawyers Guild, Inc. is a non-profit corporation formed in 1937 as the nation's first racially integrated voluntary bar association, with a mandate to advocate for human and civil rights, including those guaranteed by the United States Constitution. Since then the Guild has been at the forefront of efforts to develop and ensure respect for the rule of law and basic legal principles.

The Guild has championed the First Amendment right to unpopular speech for over seven decades. During the late 1940s to 1950s the Guild defended individuals—including educators—accused by the government of being disloyal or subversive in hearings conducted by the House Un-American Activities

Committee. Since then, it has represented thousands of Americans critical of government policies, from anti-war activists during the Vietnam era to current anti-globalization and anti-war activists. The Guild has student members at over 100 U.S. law schools and thus has a special interest in ensuring that the academic freedom of both students and their professors continues to flourish, especially during times of national crisis.

The Center for Constitutional Rights (CCR) is a national non-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. CCR has actively protected the rights of marginalized political activists for over 40 years and litigated historic First Amendment cases including *Dombrowski v. Pfister*, 380 U.S. 479 (1965), *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990).

Since 1915 the American Association of University Professors (AAUP) has assumed the responsibility of protecting the freedom of university professors to teach, research, and speak without fear of retaliation. Academic freedom ensures that universities remain havens for the expression of ideas, even controversial ones, and as such is necessary for the very preservation of democracy. The AAUP's 1915 Declaration of Principles on Academic Freedom and Academic Tenure states

that trustees of public institutions

> cannot be permitted to assume the proprietary attitude and privilege, if they are appealing to the general public for support. Trustees of such universities or colleges have no moral right to bind the reason or the conscience of any professor. All claim to such right is waived by the appeal to the general public for contributions and for moral support in the maintenance, not of a propaganda, but of a non-partisan institution of learning.

The Colorado Conference of the AAUP joins this brief because if faculty have no viable recourse to challenge decisions of trustees, academic freedom—including the tenure system on which it rests—will be no stronger than a university's will to protect it in the face of political pressure from trustees, legislators, and the public who may not understand the necessity of the free exchange of ideas in sustaining a vital democracy.

Latina/o Critical Legal Theory, Inc. (LatCrit) is a non-profit community of scholars with 503(c) status that seeks to further LatCrit theory, an "outsider jurisprudence" committed to the principle of anti-subordination and the promotion of social justice domestically and globally. Since 1995, LatCrit's basic twin goals have been: (1) to develop a critical, activist and inter-disciplinary discourse on law and policy towards Latinas/os, and (2) to foster both the development of coalitional theory and practice as well as the accessibility of this knowledge to agents of social and legal transformation. LatCrit joins the amicus brief to honor the fundamental importance of the constitutionally-derived free speech values necessary to support

our anti-subordination, social justice objectives and to support the view that universities cannot be allowed to disregard the First Amendment with impunity when seeking to silence critical voices of outsider scholars.

The National Conference of Black Lawyers is an association of lawyers, scholars, judges, legal workers, law students and legal activists. Its mission is to serve as the legal arm of the movement for Black Liberation, to protect human rights, to achieve self-determination of Africa and African Communities in the Diaspora and to work in coalition to assist in ending oppression of all peoples.

The Society of American Law Teachers (SALT), incorporated in 1974, is an independent organization of law teachers, deans, law librarians, and legal education professionals working to make the profession more inclusive, to enhance the quality of legal education, and to extend the power of legal representation to underserved individuals and communities. It joins this amicus brief because academic freedom is critical to the ability to speak out as individual faculty, and as an organization, in defense of the rule of law and to advocate for and promote the core values of SALT.

*Amici curiae* Law Professors and Attorneys are legal scholars and practitioners from a diverse range of U.S. law schools, law firms and organizations whose scholarship, teaching, and/or practice involve the protection of legal and

constitutional rights. *Amici* are aware that the protections of the First Amendment and academic freedom are often threatened in times of perceived national emergency and that, when constitutional rights are violated, access to the courts is essential to ensuring the rule of law. *Amici* are concerned that the preclusion of legal review for credible claims of retaliatory investigation and termination, particularly the granting of absolute immunity to university regents, will undermine the ability of 42 U.S.C. § 1983 to ensure that state officials comply with the United States Constitution, and will allow state universities to violate with impunity the protections afforded faculty members under the First Amendment as well as the Constitution's guarantees of due process and equal protection.

## STATEMENT OF FACTS

*Amici* hereby adopt and incorporate by reference the Statement of Facts, with citations to the record, set forth in the Opening Brief of the Petitioner, as well as the Standards of Review set forth, under separate headings, in the Opening Brief of the Petitioner. The following facts, as supported in the Opening Brief of the Petitioner and by the record below, are particularly relevant to the concerns expressed by *Amici curiae* in this brief.

In late January 2005, in response to belated media coverage of an essay written by Professor Ward Churchill about the events of September 11, 2001, the University of Colorado—his employer of almost 30 years—came under intense political pressure to fire Professor Churchill. On January 31, 2005, Professor Churchill stepped down as Chair of the Ethnic Studies Department; at an emergency meeting four days later, several Regents demanded that the University discharge Professor Churchill and they unanimously called for an investigation of all of his writings and public speeches.

In March 2005, University officials concluded that all of Professor Churchill's writings and public speech were protected by the First Amendment. The acting chancellor then brought allegations of research misconduct against Professor Churchill. After two years of internal investigations, the investigative committees did not recommend dismissal. Nonetheless, on July 24, 2007, the Regents voted 8-to-1 to fire Professor Churchill from his position as a tenured full professor of Ethnic Studies.

Professor Churchill filed this action under 42 U.S.C. § 1983, claiming that (1) the investigation into his writings and public speech violated the First Amendment and (2) he was fired in retaliation for the exercise of his First Amendment rights. The trial court entered a directed verdict dismissing Professor

Churchill's first claim on the grounds that the investigation into his writings and speech was not an adverse employment action.

On April 2, 2009, after a month of trial, the jury returned a verdict against the University of Colorado and its Regents (collectively, the "University") and in favor of Professor Churchill on his claim of retaliatory termination. The jury unanimously agreed that Professor Churchill's protected speech activity was a substantial or motivating factor in the decision to fire him and that he would not have been dismissed but for his protected speech.

The University then moved for judgment as a matter of law, claiming that the Regents had quasi-judicial immunity when they terminated Professor Churchill's employment. The trial court vacated the jury's verdict on that ground. The court of appeals affirmed the decision.

## ARGUMENT

### I. The Purpose of 42 U.S.C. § 1983 Is to Deter Violations of Constitutional Rights by Providing Effective Remedies

#### A. Congress Intended §1983 to Preserve the Rule of Law

The purpose of 42 U.S.C. § 1983 is to ensure the rule of law throughout the United States by providing legal redress for those whose constitutional rights have

been violated by state officials. As Chief Justice John Marshall stated in *Marbury v. Madison*, "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." 5 U.S. (1 Cranch) 137, 163 (1803); *see also* Akil Reed Amar, "Of Sovereignty and Federalism," 96 Yale L.J. 1425, 1505 (1987) ("far from justifying a gap between constitutional right and remedy . . . federalism abhors a remedial vacuum").

As Justice Harlan emphasized in 1904, the "[c]ourts of justice are established not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government. . . ." *International Postal Supply Co. v. Bruce*, 194 U.S. 601, 609-610 (1904) (quoting *United States v. Lee*, 106 U.S. 196, 220 (1882) (Harlan, J., dissenting). In *Lee* the Court explained why this is critical to the rule of law:

> [T]he rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government. . . . There remains to him but the alternative of resistance, which may amount to crime.

106 U.S. at 218-219.

In keeping with these fundamental principles and, more specifically, to prevent state officials from violating the federal Constitution with impunity,

Congress passed 42 U.S.C. § 1983.[2] Justice William Brennan noted that §1983 provides private citizens with "'a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and the laws of the Nation.'" *Aldinger v. Howard*, 427 U.S. 1, 33 (1976) (Brennan, J., dissenting) (quoting *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972)). Thus, "'[t]he very purpose of §1983 was . . . to protect the people from unconstitutional acts under color of state law, "whether that action be executive, legislative or judicial."'" *Id.* at 34 (quoting *Mitchum,* 407 U.S. at 242 (quoting Ex Parte *Virginia*, 100 U.S. 339, 346 (1879))).

A primary purpose of §1983 is to "give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe v. Pape*, 365 U.S. 167, 172 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Services of New York*, 436 U.S. 658, 663 (1978).

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[2] Derived from Section 1 of the Civil Rights Act of 1871, Section 1983 says:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any ...person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (2010).

Further, §1983 is intended "to serve as a deterrent against future constitutional deprivations." *Owen v. City of Independence, Mo.*, 445 U.S. 622, 651 (1980) (citing *Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978), *Carey v. Piphus*, 435 U.S. 247, 256-57 (1978)). Thus, the Court has identified "two of the principle policies embodied in §1983 as deterrence and compensation." *Board of Regents of University of State of New York v. Tomanio*, 446 U.S. 478, 488 (1980). The purpose of §1983 cannot be fulfilled without legal recourse against state officials for those denied equal protection of the laws or the right to freedom of expression.

In this case the lower courts ruled that the investigation into Professor Churchill's speech was not independently actionable under §1983; that he had no recourse for wrongful termination because the Regents of the University of Colorado are shielded by absolute, quasi-judicial immunity; and that, even if the jury verdict had not been vacated, Professor Churchill should not be awarded any equitable remedies. Each of these holdings expands the ability of state officials to violate the constitutional rights of all persons under their jurisdiction, in direct contravention of the purpose of §1983. In turn, the lack of legal recourse for such abuses of state power undermines the rule of law.

### B. §1983 Protections Are Particularly Significant in Public Schools and Universities

The need to protect free speech from state control is perhaps nowhere as important, both for practical and symbolic purposes, as in academic institutions. *See Healy v. James*, 408 U.S. 169, 180-181 (1972) (noting the heightened importance of First Amendment protections in state colleges and universities). The interest of justice and a long line of cases brought under §1983 require that state officials who engage in retaliatory investigations or terminations in violation of the First Amendment "be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. Thus, preventing a jury from deciding Professor Churchill's claim of retaliatory investigation and shielding the University from liability for firing him in violation of the First Amendment undermines the purpose of §1983 in a setting where freedom of expression is of paramount importance.

Responding to McCarthy era attempts to limit academic freedom, the United States Supreme Court declared:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.

*Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). *See generally* William W. Van Alstyne, "Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review," 53 *Law & Contemp. Probs.* 79 (1990).

In the late 1960s—a decade informed by activism and criticism of governmental policies on campuses around the country—the Supreme Court reiterated: "Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

Just a few years later, at the apex of student protests against the Vietnam War, the Supreme Court again emphasized the importance of free speech on college campuses: "'[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Healy,* 408 U.S. at 180 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). *See also Widmar v. Vincent,* 454 U.S. 263, 268-269 (1981) ("our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities").

The bulk of §1983 cases defining academic freedom have involved administrators limiting or retaliating against students' and professors' expressive

activities. In *Monell,* where the New York City Board of Education was sued, the Court cited "a score of cases brought under §1983 in which the principal defendant was a school board." 436 U.S. at 663; *see also id.* at 663n.5 (citing *Brown v. Board of Education*, 347 U.S. 483 (1954), and 22 other cases involving school officials).

More recent §1983 cases include *Rosenberger v. Rector and Visitors of University of Virginia*, where the Court noted that in a university setting, "the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." 515 U.S. 819, 835 (1995). *See also Christian Legal Soc. Chapter of the University of California, Hastings College of Law*, 561 U.S. __, 130 S.Ct. 2971 (2010) (holding university's anti-discrimination policies did not violate the First or Fourteenth Amendment).

Federal courts have recognized that the purpose of tenure is to ensure the protection of academic freedom. "The real concern is with arbitrary or retaliatory dismissals based on an administrator's or a trustee's distaste for the content of a professor's teaching or research, or even for positions taken completely outside the campus setting," and the purpose of tenure is "to eliminate the chilling effect which the threat of discretionary dismissal casts over academic pursuits." *Browzin v. Catholic University of America*, 527 F.2d 843, 846 (D.C. Cir. 1975) (citing the American Association of University Professors' 1940 Statement of Principles on

Academic Freedom and Tenure); *see also Otero-Burgos v. Inter American University*, 558 F.3d 1, 10 (1st Cir. 2009) (tenure is intended to protect academic freedom as well as economic security).

Academic freedom encourages teachers, and therefore their students, to think critically and to examine problems from all perspectives; without its protection, teachers are more likely to limit students' education by presenting only those views reflective of mainstream discourse. If university officials are allowed to engage in retaliatory investigations or fire professors for expressing politically unpopular opinions, the chilling effect will be long-lasting and potentially devastating to the intellectual growth of our youth—and, ultimately, to democratic government. *See generally* Cary Nelson, *No University Is an Island: Saving Academic Freedom* (2010); *Academic Freedom after September 11* (Beshara Doumani, ed., 2006).

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton*, 364 U.S. at 487. As a general rule, public education is controlled by state rather than federal officials. *See Brown*, 347 U.S. at 493 ("education is perhaps the most important function of state and local governments"). Thus, the vigilance emphasized by the Court requires that §1983 continue to be available to enforce the constitutional rights of

employees of public universities, especially with respect to investigations and terminations implicating First Amendment rights.

## II. Investigations in Retaliation for Protected Speech Are Actionable Under §1983

The purpose of 42 U.S.C. § 1983 is to deter unconstitutional action by state officials, and to provide remedies for those whose rights have been violated. Investigations launched in retaliation for the exercise of First Amendment rights can constitute such violations and are therefore actionable under §1983. "The public employee surely can associate, and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so." *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 286 (1984) (internal citations omitted).

"The threat of sanctions may deter the exercise [of First Amendment freedoms] almost as potently as the actual application of sanctions." *National Association for the Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963). As a result, "[a]ny form of official retaliation for exercising one's freedom of speech, including . . . bad faith investigation, . . . constitutes an infringement of that freedom." *Worrell v. Henry,* 219 F.3d 1197, 1212 (10th Cir. 2000), *cert. denied*, 533 U.S. 916 (2001) (internal citation omitted).

As Justice Souter noted in *Waters v. Churchill*, even "an objectively reasonable investigation that fails to convince the employer that the employee actually engaged in . . . unprotected speech does not inoculate the employer against constitutional liability." 511 U.S. 661, 683 (1994) (Souter, J., concurring). Thus, a jury should have been allowed to consider whether the University of Colorado's investigation into all of Professor Churchill's writings and public speech violated the First Amendment.

An employer's conduct—even if it does not relate to the terms and conditions of employment—is actionable under Title VII if it might dissuade an employee from bringing a discrimination complaint. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68-70 (2006). Federal courts have consistently applied this standard to First Amendment retaliation claims. *See, e.g., Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 227 (2nd Cir. 2006), *cert. denied*, 549 U.S. 1342 (2007); *Nair v. Oakland County Cmty. Mental Health Auth.*, 443 F.3d 469, 478 (6th Cir. 2006); *Matrisciano v. Randle*, 569 F.3d 723, 730 (7th Cir. 2009); *Couch v. Board of Trustees of the Mem. Hosp.*, 587 F.3d 1223, 1238 (10th Cir. 2009).

Whether an investigation would have a chilling effect on the exercise of constitutional rights is a "contextual determination." *Zelnik*, 464 F.3d at 226. The

employee need not show that it actually had a chilling effect, but that it would deter similarly situated persons of ordinary firmness. *Id.* at 226n.2. Except in cases of clearly trivial claims, this is a question for the jury. *See Burlington*, 548 U.S. at 71 (finding sufficient facts for jury to reasonably conclude that reassignment of duties could have been materially adverse); *Williams v. W.D. Sports, N.M., Inc.*, 497 F.3d 1079, 1090 (10th Cir. 2007) (to warrant trial, plaintiff need only show that a jury could conclude that the employer's conduct would dissuade a reasonable employee from bringing a discrimination claim).

The Supreme Court has recognized that the danger of "the chilling of individual thought and expression" is "especially real in the University setting." *Rosenberger*, 515 U.S. at 835. Moreover,

> [a] public employer violates the Free Speech Clause . . . by invoking a third-party report to penalize an employee when the employer . . . believes or genuinely suspects that the employee's speech was protected . . . or if the employer invokes the third-party report merely as pretext to shield disciplinary action taken because of protected speech.

*Waters*, 511 U.S. at 683 (Souter, J., concurring). Internal investigations stemming from a professor's expression of politically controversial views must be closely scrutinized precisely because they readily provide this kind of pretext for discipline.

Investigations undertaken in retaliation for speech protected by the First Amendment are likely to dissuade reasonable university employees from engaging in speech that may be unpopular but is protected by the First Amendment. *See Sweezy,* 354 U.S. 234 (finding legislative investigation of a professor's lectures unconstitutional). The First Circuit has noted that formal investigations, particularly those entailing threats of further disciplinary action, could "'well dissuade a reasonable [employee] from making or supporting a charge of discrimination.'" *Billings v. Town of Grafton*, 515 F.3d 39, 54 (1st Cir. 2008) (quoting *Burlington*). Such investigations can reasonably be expected to deter the exercise of free speech in other settings as well.

Highly publicized investigations of professors' controversial or politically unpopular speech have chilling effects on their colleagues. For this reason, the Constitution protects tenured professors from the threat of discipline, even in the form of "advisory" committees created to investigate their work, based on their politically controversial speech. *See Levin v. Harleston*, 966 F.2d 85, 89-90 (2nd Cir. 1992) (creation of *ad hoc* committee to investigate professor's speech had a judicially cognizable chilling effect).

If professors subjected to retaliatory investigations have no legal recourse except after they are terminated, those considering taking controversial positions

will think long and hard before risking their livelihoods and reputations. Few scholars are likely to believe the entire corpus of their publications and public statements could withstand the scrutiny of a politically-motivated investigation. *See Keyishian,* 385 U.S. at 683 ("[i]t would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living"); *Shelton*, 364 U.S. at 487 (the "'inhibition of freedom of thought, and of action upon thought, in the case of teachers . . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice'") (quoting *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952)(Frankfurter, J., concurring)).

Because of this chilling effect, *Amici* urge this Court to recognize that retaliatory investigations, regardless of whether they lead to termination, can constitute adverse employment actions that violate the First Amendment, and to allow Professor Churchill's §1983 claim of retaliatory investigation to be decided by a jury.

## III. Absolute Immunities Undermine the Purpose of §1983

Congress enacted 42 U.S.C. § 1983 to ensure that state officials could not violate the United States Constitution with impunity. Immunizing these officials from liability for unconstitutional conduct directly contravenes this purpose and

undermines the rule of law. The granting of absolute, quasi-judicial immunity to the University of Colorado for firing a tenured professor in violation of the First Amendment sets a dangerous precedent with implications far beyond Professor Churchill's case.

The Supreme Court has "clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." *Rankin v. McPherson*, 483 U.S. 378, 383 (1987) (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). Neither public nor private employers may discriminate on the basis of race, ancestry or ethnic characteristics. *See Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 609-613 (1987). Granting a state university absolute immunity from liability for knowingly violating the First Amendment's guarantee of freedom of expression, or the Fourteenth Amendment's equal protection clause, renders these constitutional protections meaningless in the context of public employment and education. Thus, for example, in 1950 the Supreme Court laid the foundation for its landmark decision in *Brown v. Board of Education* by prohibiting the University of Texas and its regents from discriminating on the basis of race in law school admissions. *Sweatt v. Painter*, 339 U.S. 629 (1950). Had the University of Texas and its regents been granted quasi-judicial immunity, this decision would not have been possible.

It is for these reasons that the Supreme Court has emphasized that immunities must be narrowly construed:

> Aware of the salutary effects that the threat of liability can have . . . as well as the undeniable tension between official immunities and the ideal of the rule of law, this Court has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court.

*Forrester v. White*, 484 U.S. 219, 223-224 (1988).

Where the independence of officials may be compromised by the prospect of personal liability, immunity may be appropriate because "the threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties." *Id.* at 223. However, when university officials are credibly alleged to have deliberately violated the Constitution in order to fire a tenured professor, the possibility of judicial review does not inhibit but "encourages these officials to carry out their duties in a lawful and appropriate manner," thereby "accomplish[ing] exactly what it should." *Id.*

Because of the importance of protecting constitutional rights, federal courts have rarely extended quasi-judicial immunity to school boards or trustees taking adverse action against students or faculty in public institutions. *Wood v. Strickland* involved claims of quasi-judicial immunity by school board members responsible for determining whether school regulations had been violated and, if so, what

sanctions would be imposed. 420 U.S. 308 (1975). The Supreme Court concluded that "absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." *Id.* at 320; *see also Cleavinger v. Saxner,* 474 U.S. 193, 204-205 (1985).

Similarly, if there are benefits to granting absolute immunity to the University and its Regents in this case, their value is dwarfed by the absence of a remedy for professors subjected to intentional deprivations of fundamental constitutional rights. This conclusion has been reached in numerous cases involving faculty members. *See, e.g., Harris v. Victoria Independent School District*, 168 F.3d 216, 224 (5th Cir. 1999), *cert. denied*, 528 U.S. 1022 (1999) (relying on *Wood* to deny trustees quasi-judicial immunity with respect to faculty member's §1983 claim of First Amendment violation); *Stewart v. Baldwin County Board of Education*, 908 F.2d 1499, 1508 (11th Cir. 1990) (*Wood* precluded extension of absolute immunity to school board members for discharge of employee in retaliation for exercise of constitutional rights).

Absolute immunity is to be granted only when public policy requires it. *See Harlow v. Fitzgerald,* 457 U.S. 800, 807-808 (1982). "Officials who seek

exemption from personal liability have the burden of showing that such exemption is justified by overriding considerations of public policy." *Forrester*, 484 U.S. at 224.

Generally, the public interest in vigorous exercise of official authority is satisfied by qualified immunity, which shields officials from liability when "'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Harlow*, 457 U.S. at 818). Even where a common law tradition of absolute immunity for a given function may not be sufficient if "'§1983's history or purposes nonetheless counsel against recognizing the same immunity in §1983 actions.'" *Id.* at 269 (quoting *Tower v. Glover*, 467 U.S. 914, 920 (1984)).

In this case no overriding considerations of public policy justify providing absolute immunity to university officials who "violate clearly established . . . constitutional rights of which a reasonable person would have known." *Buckley,* 509 U.S. at 268. Public policy considerations and Congress' intent in enacting 42 U.S.C. § 1983 require that there be some recourse for intentional violations of fundamental constitutional rights. *See* Margaret Z. Johns, "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, 268-269 (2006). If officials of the University of Colorado can intentionally fire a tenured professor in violation of the First Amendment without incurring any liability, they will similarly be empowered to fire professors because of their race, ethnicity, religion, or gender. Moreover, this precedent may well encourage other state actors to employ similar processes to terminate employees in violation of the most fundamental constitutional protections.

## IV. Denying Equitable Remedies for Unconstitutional State Action Undermines the Purpose of §1983

After a jury finds that a constitutional deprivation has occurred, the trial court must make the injured party whole and may not reconsider the existence of the violation, even when determining the appropriate equitable remedy. *Squires v. Bonser*, 54 F.3d 168, 174 (3rd Cir. 1995). *See also Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 730 (8th Cir. 1992), *cert. denied*, 506 U.S. 1014 (1992). In this case a jury found that Professor Churchill was fired in retaliation for speech protected by the First Amendment, and that he would not have been fired in the absence of that protected speech. To deny him any equitable remedy under these circumstances violates both the compensation and deterrence purposes of 42 U.S.C. § 1983.

It is a venerated premise that "where federally protected rights have been invaded, . . . courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U.S. 678, 684 (1946) (citing *Marbury,* 5 U.S. at 162). Injured parties should be placed, to the extent possible, in the same situation they would have been had the violation not occurred. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975). Federal circuits "have repeatedly emphasized the importance of equitable relief in employment cases." *Reiter v. MTA New York City Transit Authority*, 457 F.3d 224, 230 (2nd Cir. 2006), *cert. denied*, 549 U.S. 1211 (2007) (citing cases from the First, Second, Tenth and Eleventh Circuits).

It is "clearly established" that state employees may not be terminated for reasons infringing upon the First Amendment. *Rankin,* 483 U.S. at 383. Even a probationary employee who "could have been discharged for any reason or for no reason at all . . . [may] be entitled to reinstatement if she was discharged for exercising her constitutional right to freedom of expression." *Id.* at 383-384 (1987) (citing *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 284-285 (1977); *Perry v. Sindermann,* 408 U.S. 593, 597-598 (1972)). The trial court's ruling, if allowed to stand, would afford such probationary employees, or non-tenured professors who have no property interest in their employment, greater access to the courts for redress of First Amendment violations than tenured faculty

fired by the Regents of the University of Colorado. Such a result is irrational on its face, and undermines the protections of academic freedom that tenure is intended to protect.

In wrongful termination cases, reinstatement is the preferred remedy. *See Jackson v. City of Albuquerque*, 890 F.2d 225, 233 (10th Cir. 1989). A party found to have violated the constitution, in this case by terminating employment in retaliation for the exercise of First Amendment-protected activity, cannot be allowed to dictate the remedy for his or her unconstitutional conduct. To allow the "employer's dislike of the employee's returning" to preclude reinstatement "reward[s] the employer for the very attitudes that precipitated his violation of the law." *Price v. Marshall Erdman & Associates, Inc.*, 966 F.2d 320, 325 (7th Cir. 1992).

As the Tenth Circuit noted with respect to the defendants in *Jackson*, denying reinstatement to Professor Churchill would permit the University officials who deliberately violated the Constitution to "accomplish their purpose." 890 F.2d at 235. However, as the Supreme Court noted in *Rutan v. Republican Party of Illinois*, "To the victor belong only those spoils that may be constitutionally obtained." 497 U.S. 62, 64 (1990). In this case, the "spoils" were

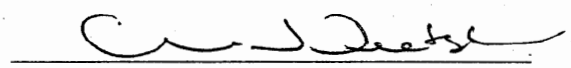
unconstitutionally obtained and §1983 requires that the constitutional violation be remedied.

The importance of reinstatement has been recognized in Title VII cases "because it 'most efficiently' advances the goals of Title VII by making plaintiffs whole while also deterring future discriminatory conduct by employers." *Che v. Mass. Bay Transp. Auth.*, 342 F.3d 31, 43 (1st Cir. 2003) (citations omitted). The same is true with respect to advancing the goals of §1983. Reinstatement is the preferred remedy because it places the party whose rights have been violated, "as near as may be, in the situation he would have occupied" had the violation not occurred. *Albemarle*, 422 U.S. at 418-19. Moreover, it is acknowledged to be the remedy most likely to deter state officials from willful violations of federally guaranteed rights. *Reeves v. Claiborne County Bd. of Education*, 828 F.2d 1096, 1102 (5th Cir. 1987) (denial of reinstatement would render the deterrent effect of the remedy a nullity). Both of these reasons comport with Congress' intent to ensure that §1983 provide a remedy that both makes the injured party whole and deters state officials from violating federally guaranteed rights.

## CONCLUSION

For the foregoing reasons, *Amici curiae* believe the trial court's refusal to allow Professor Ward Churchill's claims of retaliatory investigation to be heard by the jury, its granting of quasi-judicial immunity to the Regents of the University of Colorado, and its denial of equitable relief for wrongful termination undermine the protection of all fundamental rights under 42 U.S.C. § 1983. The trial court's rulings in this case are particularly detrimental to academic freedom and the First Amendment tenets that the Supreme Court has deemed "vital" to democracy and "the future of our Nation." *Sweezy,* 354 U.S. at 250. *Amici curiae* are concerned also that the trial court's decision sets a perilous precedent by allowing state university officials to violate fundamental principles of the United States Constitution with impunity. This precedent will apply not only to the First Amendment, but to all of the Constitution's guarantees of fundamental rights, including equal protection. Therefore, we ask this court to reverse the judgment below.

Respectfully submitted,



Attorney for *Amici Curiae*

## CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of September 2011, a true and correct copy of the foregoing **BRIEF OF *AMICI CURIAE* NATIONAL LAWYERS GUILD, CENTER FOR CONSTITUTIONAL RIGHTS, COLORADO CONFERENCE OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, NATIONAL CONFERENCE OF BLACK LAWYERS, LATINA/O CRITICAL LEGAL THEORY, SOCIETY OF AMERICAN LAW TEACHERS, AND LAW PROFESSORS AND ATTORNEYS IN SUPPORT OF REVERSAL OF THE JUDGMENT BELOW** was placed in the U.S. Mail, postage prepaid, and addressed as follows:

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