FIRE

Foundation for Individual Rights in Education

601 Walnut Street, Suite 510 • Philadelphia, Pennsylvania 19106
T 215-717-3473 • **F** 215-717-3440 • fire@thefire.org • www.thefire.org

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Fred Logan
Chair, Kansas Board of Regents
1000 SW Jackson Street, Suite 520
Topeka, Kansas 66612-1368

URGENT

Sent via U.S. Mail and Facsimile (785-296-0983)

Dear Mr. Logan:

The Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on America's college campuses. Our website, thefire.org, will give you a greater sense of our identity and activities.

Joined by the National Coalition Against Censorship and the American Civil Liberties Union Foundation of Kansas, FIRE writes today to express our grave concern over the revision of Chapter II.C.6.b of the Board of Regents Policy Manual, approved and announced on Wednesday, December 18, 2013. That section now reads, in relevant part:

> b. Other
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> […]
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> The chief executive officer of a state university has the authority to suspend, dismiss or terminate from employment any faculty or staff member who makes improper use of social media. "Social media" means any facility for online publication and commentary, including but not limited to blogs, wikis, and social networking sites such as Facebook, LinkedIn, Twitter, Flickr, and YouTube. "Improper use of social media" means making a communication through social media that:
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> i. directly incites violence or other immediate breach of the peace;

ii. when made pursuant to (i.e. in furtherance of) the employee's official duties, is contrary to the best interest of the university;

iii. discloses without authority any confidential student information, protected health care information, personnel records, personal financial information, or confidential research data; or

iv. subject to the balancing analysis required by the following paragraph, impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker's official duties, interferes with the regular operation of the university, or otherwise adversely affects the university's ability to efficiently provide services.

In determining whether the employee's communication constitutes an improper use of social media under paragraph (iv), the chief executive officer shall balance the interest of the university in promoting the efficiency of the public services it performs through its employees against the employee's right as a citizen to speak on matters of public concern, and may consider the employee's position within the university and whether the employee used or publicized the university name, brands, website, official title or school/department/college or otherwise created the appearance of the communication being endorsed, approved or connected to the university in a manner that discredits the university. The chief executive officer may also consider whether the communication was made during the employee's working hours or the communication was transmitted utilizing university systems or equipment. This policy on improper use of social media shall apply prospectively from its date of adoption by the Kansas Board of Regents.

This policy poses an impermissible threat to the freedom of expression and academic freedom of faculty members employed by Kansas' public institutions of higher education.

As an initial matter, we remind you that the First Amendment is fully binding on public institutions like those governed by the Board of Regents. *See Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) ("With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."); *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'"). Further, the U.S. Supreme Court has made clear that academic freedom is a "special concern of the First Amendment," stating that "[o]ur nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

In light of these long-settled precedents from our nation's highest court—precedents by which the Board of Regents is both legally and morally bound—the restriction on faculty use of social media imposed by Chapter II.C.6.b is unacceptably broad and empowers university administrators to discipline faculty members for dissenting, unpopular, or even simply unwanted expression.

Specifically, Chapter II.C.6.b.iv permits the punishment of faculty members for a variety of vague and subjective reasons, including but not limited to the perceived impairment of "harmony" among faculty and the perceived loss of "loyalty and confidence" in a faculty member. In determining whether faculty expression may be subject to punishment for these reasons, Chapter II.C.6.b.iv instructs university administrators to apply an approximation of the balancing test articulated by the Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968). In *Pickering*, the Court held that while teachers as public employees do not enjoy the complete protection of the First Amendment because of the government's "interests as an employer in regulating the speech of its employees," a balance must be struck between "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id*. at 568.

However, the Court made clear in *Pickering* that the negative impact of the teacher's expression must be substantial and material. If the teacher's speech "neither [was] shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally," then "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public," and the teacher's speech enjoys First Amendment protection. *Id*. at 568, 573.

The grounds for punishment announced in Chapter II.C.6.b.iv fail to require the substantial and material impact required by the Court in *Pickering*. (Even the standard established in *Pickering*—a case concerning a high school teacher's expression—may fail to properly account for the necessity of protecting extramural, intramural, and expert expression from faculty members at institutions of higher education, which have markedly different missions from public high schools.) In analyzing a faculty member's expression on social media, a university administrator's subjective conclusion that the expression "impairs harmony among coworkers" is a far cry from *Pickering*'s requirement that the expression "impede[] the teacher's proper performance of his daily duties in the classroom" or "interfere[] with the regular operation of the schools generally." This dramatically lower threshold threatens clearly protected academic expression.

For example, under Chapter II.C.6.b.iv, a Twitter argument between two economics professors with competing theories on the efficacy of quantitative easing would provide grounds for punishment if, in the entirely subjective opinion of a university administrator, the discussion merely appeared to "impair harmony." This is an unacceptable result and cannot be squared with our nation's long-established commitment to protecting academic freedom. While the university,

as a government employer, may seek to ensure its efficient operation, it may not do so by violating the academic freedom rights of faculty members.

We also remind you that the Supreme Court has explicitly reserved the question of whether its most recent jurisprudence regarding the expressive rights of public employees is applicable to faculty expression concerning scholarship. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). In *Garcetti*, the Court observed "that expression related to academic scholarship or classroom instruction" may "implicate[] additional constitutional interests … not fully accounted for by this Court's customary employee-speech jurisprudence." *Id*. at 425. Lower courts have recognized *Garcetti*'s reservation with respect to faculty speech. *See Demers v. Austin*, 729 F.3d 1011, 1014 (9th Cir. 2013) ("We hold that *Garcetti* does not apply to teaching and writing on academic matters by teachers employed by the state."); *Adams v. Trs. Of the Univ. of N. Carolina-Wilmington*, 640 F.3d 550, 564 (4th Cir. 2011) ("Applying *Garcetti* to the academic work of a public university faculty member …. could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment."). *But see Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008) (applying *Garcetti* to a professor's complaints regarding proposed use of grant money, because grant administration fell within his teaching and service duties). Additionally, we remind you that *Garcetti* leaves intact the First Amendment rights of all public employees to speak as citizens on matters of public concern. By allowing for the punishment of faculty members for social media expression concerning scholarship or instruction, the Board of Regents has ignored the Court's caution in *Garcetti* and has threatened the First Amendment rights of its faculty.

Chapter II.C.6.b.ii's ban on statements that "when made pursuant to (i.e. in furtherance of) the employee's official duties, [are] contrary to the best interest of the university" is also problematic and makes possible scenarios in which professors might be punished for engaging in core academic expression pursuant to their official duties. For instance, social media comments by a faculty member about research conducted on the effectiveness of the University of Kansas (KU) in delivering an education to students would likely be considered "contrary to the best interest of the university" by KU administrators if that research suggested that KU was underperforming compared to other institutions. The same is true for research that might demonstrate that KU's attitude towards academic freedom was negatively affecting student outcomes and the quality of faculty teaching, since discussion of such research would be likely to dissuade students and faculty members from choosing KU. Again, this result is unacceptable. Faculty members are must be able to conduct research and teaching that pursues the truth as the highest value, rather than simply the advancement of governmental purposes.

The vagueness inherent in Chapter II.C.6.b.'s possible grounds for punishment of faculty expression also presents a threat to the First Amendment rights of faculty. As the Supreme Court has stated, regulations must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," or else they are unconstitutionally vague. *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). Because Chapter II.C.6.b permits punishment for subjective judgments by university administrators after assessing nebulous concepts like "harmony," "loyalty," and "confidence," it is impossible for faculty

members to reasonably determine what social media expression will constitute a violation of the policy. As a result, rational faculty members will simply refrain from exercising their First Amendment rights, lest they face censorship or punishment as a result of the reactions of their peers or the judgment of their superiors, however unreasonable or unfounded. The resulting chilling effect violates the First Amendment and betrays the Board of Regents' responsibility as stewards of public higher education.

Per the Board of Regents' December 18 press release, we understand that this policy revision was prompted by the controversy surrounding KU journalism professor David Guth, who was placed on indefinite suspension following a controversial, extramural post to his Twitter account this past September. Although the comments generated substantial controversy, they constituted expression protected by the First Amendment. As we reminded KU at the time, the university is free to speak out against Guth's comments, but it may not, consistent with its obligations under the First Amendment, punish him for the expression of his views. We enclose copies of our letters of September 22, 2013, and October 8, 2013, to KU Chancellor Bernadette Gray-Little for your reference.

FIRE is certainly not alone in our concern over the recent revisions to Chapter II.C.6.b. In addition to the National Coalition Against Censorship and the American Civil Liberties Union Foundation of Kansas, who have joined this letter, the American Association of University Professors (AAUP) has stated that it "condemns as a gross violation of the fundamental principles of academic freedom new Kansas Board of Regents rules under which faculty and other employees may be suspended, dismissed or terminated from employment for 'improper use of social media.'" AAUP Statement on the Kansas Board of Regents Social Media Policy, December 20, 2013, *available at* http://www.aaup.org/news/social-media-policy-violates-academic-freedom. *See also* AAUP Committee A Statement on Extramural Utterances, October 1964, *available at* http://www.aaup.org/report/committee-statement-extramural-utterances ("Extramural utterances rarely bear upon the faculty member's fitness for continuing service.").

We ask that the Board of Regents immediately rescind the recent revisions to Chapter II.C.6.b and publicly restate its recognition of the essentiality of freedom of expression and academic freedom on public university campuses, consistent with Supreme Court jurisprudence and the core tenets of higher education.

We request a response to this letter by January 15, 2014.

Sincerely,

Will Creeley
Director of Legal and Public Advocacy
Foundation for Individual Rights in Education

Joan Bertin
Executive Director
National Coalition Against Censorship

Doug Bonney
Chief Counsel and Legal Director
American Civil Liberties Union Foundation of Kansas

cc:
Kenny Wilk, Vice Chair, Kansas Board of Regents
Andy Tompkins, President and CEO, Kansas Board of Regents
Shane Bangerter, Kansas Board of Regents
Ann Brandau-Murguia, Kansas Board of Regents
Mildred Edwards, Kansas Board of Regents
Tim Emert, Kansas Board of Regents
Ed McKechnie, Kansas Board of Regents
Robba Moran, Kansas Board of Regents
Helen Van Etten, Kansas Board of Regents
Michael D. Shonrock, President, Emporia State University
Edward H. Hammond, President, Fort Hays State University
Kirk H. Schulz, President, Kansas State University
Steven A. Scott, President, Pittsburg State University
Bernadette Gray-Little, Chancellor, University of Kansas
John W. Bardo, President, Wichita State University
Jerry B. Farley, President, Washburn University