ALLIANCE DEFENDING
FREEDOM
FOR FAITH. FOR JUSTICE.

January 13, 2014

VIA U.S. Mail & Facsimile to (785) 296-0983

Fred Logan, Chair
Andy Tompkins, President/CEO
Kansas Board of Regents
1000 SW Jackson Street, Suite 520
Topeka, Kansas 66612-1368

Re: Policy Governing Improper Use of Social Media

Dear Members of the Board:

It has come to our attention that the Kansas Board of Regents recently adopted a new social media policy that threatens the First Amendment freedoms of faculty and staff. We write to inform you of these issues and urge you to rectify them as soon as possible.

By way of introduction, Alliance Defending Freedom is an alliance-building, non-profit legal organization that advocates for the right of people to freely live out their faith. We are dedicated to ensuring that religious and conservative faculty may exercise their rights to speak, teach, and research on an equal basis with all other faculty.

On December 18, 2013, the Board amended its faculty and staff policies to include language regarding improper use of social media.[1] The Board took these actions in light of the controversial tweet by University of Kansas professor David Guth earlier this year.[2] While Professor Guth's tweet was deplorable and offensive to many, the First Amendment protects offensive speech and the Board should not overreact to that situation by censoring the speech of all faculty and staff in the university system.

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1 Press Release, The Kansas Board of Regents, Board Amends Policy to Include Language Regarding Improper Use of Social Media (Dec. 18, 2013).

2 Mara Rose Williams, *In wake of KU Twitter controversy, Kansas regents approve new policy for faculty use of social media*, KANSAS CITY STAR, Dec. 18, 2013.

I. The Constitution Protects Faculty Speech.

Public university professors retain free speech and academic freedom rights in the classroom, in their research, and in the community. Nearly fifty years ago, the Supreme Court declared 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."[3] In fact, the First Amendment gives high priority to the liberty of faculty to expound on ideas, challenge students, and ask and answer questions – whether inside or outside the classroom. "[B]ecause of our mistrust of 'laws that cast a pall of orthodoxy' over educational institutions, the First Amendment protects the right of faculty members to engage in academic debates, pursuits, and inquiries and to discuss 'ideas, narratives, concepts, imagery, [and] opinions—scientific, political or aesthetic—[with] an audience whom the speaker seeks to inform, edify, or entertain.'"[4]

For these reasons, the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[5] Freedom to speak, teach, and research is essential in the community of American universities.[6] "To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[7]

It is also well settled that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression."[8] As the Supreme Court has made clear, "public employees do not surrender all their First Amendment rights by reason of their employment."[9] The

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3 *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

4 *Trejo v. Shoben*, 319 F.3d 878, 884 (7th Cir. 2003) (quoting *Keyishian*, 385 U.S. at 603; *Swank v. Smart*, 898 F.2d 1247, 1251 (7th Cir. 1990)). *See, e.g., Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1050-52 (6th Cir. 2001) (recognizing that classroom speech touching on a matter of public concern is constitutionally protected); *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679-82 (6th Cir. 2001) (noting college instructor's in-class speech relating to matters of public concern is constitutionally protected); *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 598 (2d Cir. 1990) (finding college officials not entitled to qualified immunity because punishment of professor based on classroom discourse would violate the First Amendment).

5 *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

6 *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

7 *Keyishain*, 385 U.S. at 603.

8 *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006).

9 *Id.* at 417.

First Amendment protects a public employee's right to speak as a citizen on matters of public concern.[10] Of course, when a normal public employee makes statements pursuant to his official job duties, that employee is not speaking as a citizen for First Amendment purposes and the Constitution may not insulate his comments from employer regulation.[11] But public university faculty are a different animal. They are employed for the purpose of independent thinking in teaching and scholarship, thus, they retain First Amendment rights whether on or off the job.[12]

A recent case illustrates this point. In *Adams v. Trustees of the University of North Carolina-Wilmington*, a public university refused to promote a criminology professor because of the views he expressed in an online column on the popular website Townhall.com, in books he wrote, and in speeches he gave around the country.[13] The U.S. Court of Appeals for the Fourth Circuit held that the professor's speech, even speech on the internet, was clearly that of a citizen speaking on a matter of public concern, and, thus, entitled to First Amendment protection.[14] In fact, the court concluded that faculty rights to free expression are so well-established that the university administrators sued as defendants were not entitled to any immunity from paying damages.[15]

To summarize: the First Amendment protects the rights of faculty to speak, whether that speech is in the classroom or uses modern technology like social media.

II. The Social Media Policy Violates the First Amendment Rights of Faculty.

The new social media policy prohibits "improper use of social media."[16] The policy defines this prohibition as making a communication that "is contrary to the best interests of the university" and "otherwise adversely affects the university's ability to efficiently provide services."[17] In applying the policy to faculty and staff, the chief executive officer of the university may consider whether the communication was made during the employee's working hours.

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10 *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.*, 205, 563 U.S. 563, 574 (1968).

11 *Garcetti*, 547 U.S. at 421.

12 *Id.* at 425.

13 *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 554-55 (4th Cir. 2012).

14 *Id.* at 565.

15 *Id.* at 566.

16 Kansas Board of Regents Policy Manual, ch. II, § C.6(b).

17 *Id.*

While the policy attempts to utilize the public employee speech doctrine articulated in *Pickering* and its progeny, the criteria it uses to balance free speech against university interests are hopelessly overbroad and vague.

A. **The Social Media Policy Is Overbroad.**

The "First Amendment needs breathing space and [policies] attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn."[18] Thus, "[a] regulation of speech may be struck down on its face if its prohibitions are sufficiently overbroad – that is, if it reaches too much expression that is protected by the Constitution."[19]

The social media policy violates these principles. It prohibits speech on social media deemed "improper," "contrary," "detrimental," and "adverse" to the university. It is well-settled that the "First Amendment generally prevents government from proscribing speech because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid."[20] And even "content-neutral restrictions are permissible only if they are reasonable time, place, and manner regulations that are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication."[21]

A mere "interest in an orderly administration of its campus and facilities in order to implement its educational mission does not trump the interest of its [faculty and staff], for whom the University is a community, in having adequate opportunities and venues available for free expression."[22] In addition, "[m]ere speculation that speech would disrupt campus activities is insufficient because 'undifferentiated fear or apprehension of a disturbance is not enough to overcome the right to freedom of expression on a college campus.'"[23] The Board is supposed to protect the rights of faculty and staff to speak freely on campus, not regulate such activity based on the content of speech.

The social media policy is also substantially overbroad under the First Amendment. Its operative terms encompass speech and behavior that is perfectly

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18 *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973).

19 *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008).

20 *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (internal citations omitted).

21 *Roberts v. Haragan*, 346 F. Supp. 2d 853, 862 (N.D. Tex. 2004).

22 *Id.* at 863.

23 *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, 2012 WL 2160969, at *6 (S.D. Ohio June 12, 2012) (quoting *Healy v. James*, 408 U.S. 169, 191 (1972)).

legal and innocuous, and the terms are subjective and mean different things to different people. Courts around the country have struck down similar policies that contain such overbroad language. The U.S. Court of Appeals for the Third Circuit struck down Temple University's anti-harassment policy due to the policy's overbreadth finding that

> the policy's use of "hostile," "offensive," and "gender-motivated" is, on its face, sufficiently broad and subjective that they "could conceivably be applied to cover any speech" of a "gender-motivated" nature "the content of which offends someone." This could include "core" political and religious speech, such as gender politics and sexual morality.[24]

Similarly, San Francisco State University's requirement that community members "be civil to one another" was struck down by a federal court because the university could not "proscribe speech or conduct that is 'merely offensive to good taste.'"[25] Many other courts have reached the same conclusion.[26]

The Board's ban on speech that is "improper," "contrary," "detrimental," and "adverse" to the university is unconstitutional because, as the Supreme Court has reiterated, "much political and religious speech might be perceived as offensive to some,"[27] but it is still protected speech.

B. **The Social Media Policy Is Vague.**

A college policy is unconstitutionally vague when "men of common intelligence must necessarily guess at its meaning."[28] The First Amendment requires that government policies be written with enough clarity so that citizens

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24 *DeJohn*, 537 F.3d at 317.

25 *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1010, 1013-21 (N.D. Cal. 2007) (quoting *Papish v. Bd. of Curator of Univ. of Mo.*, 410 U.S. 667, 670-71 (1973)).

26 *See Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 674 (7th Cir. 2008) ("This particular restriction [on "derogatory" comments], it is true, would not wash if it were being imposed on adults, because they can handle such remarks better than kids can and because adult debates on social issues are more valuable than debates among children.") (citing *R.A.V.*, 505 U.S. at 390; *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)); *Roberts*, 346 F. Supp. 2d at 872 (enjoining overbroad university speech code that prohibited "threats, insults, epithets, ridicule, or personal attacks" by students); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of overbroad "cultural diversity and racism" policy statement which prohibited "acts of intolerance" which "demonstrate malicious intent towards others"); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 856, 864 (E.D. Mich. 1989) (enjoining university policy prohibiting "stigmatizing or victimizing individuals or groups" in specified categories).

27 *Morse v. Frederick*, 551 U.S. 393, 409 (2007).

28 *Broadrick*, 413 U.S. at 607.

have fair warning about prohibited and permitted conduct.[29] Policies that lack such clarity have been routinely struck down by courts, because what is "derogatory" or "offensive" varies from one person to another.[30] To avoid being void for vagueness, speech policies must contain precise definitions of what speech is prohibited so that faculty and staff have sufficient notice of what expression is subject to the policies. The social media policy is so undefined that faculty and staff, let alone administrators charged with its enforcement, will differ as to what constitutes a violation. This chills free speech.

III. Conclusion.

We are aware that the Board is reconsidering its decision to implement this new social media policy and we urge you to consider the constitutional ramifications as you undertake that project. As currently written, however, the policy violates the First Amendment rights of faculty and if left in place will subject the Board to legal liability. We hope the information will assist you in correcting the policy. In fact, we are available to assist with these revisions if you so desire. If the Board is serious about reforming the policy and wishes to avoid litigation, please contact us by **January 27, 2014** about the revisions you intend to make.

Very truly yours,

David J. Hacker
Senior Legal Counsel
Director of University Project

Joel Oster
Senior Counsel
KU School of Law '97

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[29] *Id.*; *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1178 (E.D. Wis. 1991).

[30] *See, e.g., Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1184 (6th Cir. 1995) ("Though some statements might be seen as universally offensive, different people find different things offensive.").