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

January 21, 2014

President Lesley A. Di Mare
Colorado State University – Pueblo
Office of the President
2200 Bonforte Boulevard
Pueblo, Colorado 81001

Sent via U.S. Mail and Electronic Mail (presidents.office@colostate-pueblo.edu)

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.

FIRE is deeply concerned by the threat to freedom of expression at Colorado State University – Pueblo (CSU-Pueblo) in light of the university's deactivation of professor Tim McGettigan's email account after he sent an email to students and faculty criticizing the university system's leadership. By declaring McGettigan's email a violation of university policy and labeling him a threat to campus security, CSU-Pueblo has gravely violated his rights and deeply chilled expression.

The following is our understanding of the facts; please inform us if you believe we are in error. On January 17, 2014, at 10:45 a.m., McGettigan sent an email to the CSU-Pueblo student and faculty listservs announcing an on-campus rally against planned employee terminations taking place that afternoon. The email, titled "The Children of Ludlow," criticized Colorado State University System Chancellor Michael V. Martin, purposefully using imagery from the Ludlow Massacre, a 1914 incident resulting in the violent deaths of numerous striking mineworkers. McGettigan wrote, in relevant part:

> Today, the people of southern Colorado are still struggling to get their own little piece of the American Dream. They aren't looking for handouts, or special treatment. They just want to make a decent living and give their kids a chance at a brighter future.

> In recompense for this unpardonable sin, CSU Chancellor Michael Martin has assembled a hit list. Today, Michael Martin is traveling to CSU-Pueblo to terminate the 50 people who are on his hit list. In his own way, Michael Martin is putting a gun to the head of those 50 hard-working people while he also throws a burning match on the hopes and dreams of their helpless, defenseless families.

Later that day, McGettigan arrived at his campus office to find a letter from Deputy General Counsel Johnna Doyle, informing him that his email constituted the following prohibited conduct under CSU-Pueblo's Electronic Communications Policy:

> 4. Use of electronic communications to **intimidate, threaten, or harass other individuals**, or to interfere with the ability of others to conduct university business. [Emphasis added.]

Doyle's letter went on to state:

> Your email message today with the subject line "Children of Ludlow" is in violation of this policy. The computer Center staff in consultation with President Di Mare and the Office of General Counsel have a [sic] determined that the email as a violation of this policy is one in which immediate action must be taken to deactivate your account.

CSU-Pueblo is apparently justifying McGettigan's discipline by invoking the "Disciplinary Action" section of the Electronic Communications Policy. The section reads, in relevant part:

> If a condition exists where Computer Center personnel feel there is a need for immediate action, that action (account deactivation, etc.) will be taken, then the matter referred to the authorities listed above. **These cases will be limited to instances involving safety, security, or another matter of an emergency nature.** [Emphasis added.]

Because McGettigan's email account has been deactivated he is unable to access course materials on the Blackboard platform, which are necessary to his teaching. McGettigan reports that CSU-Pueblo has not indicated when, or if, his email access will be restored. CSU-Pueblo, meanwhile, publicly defended its disciplinary action against McGettigan in a statement released to *Inside Higher Ed*, which reported:

> On Monday afternoon, a spokeswoman for Colorado State-Pueblo sent an email to *Inside Higher Ed* saying that McGettigan had violated the policy on use of electronic communications. Further, she released a statement from President Lesley Di Mare, in which she invoked recent incidents of violence in education. "**Considering the lessons we've all learned from Columbine, Virginia Tech, and more recently Arapahoe High School, I can only say that the security of our students, faculty, and staff are our top priority**," Di Mare said. "CSU-Pueblo is facing some budget challenges right now, which

> has sparked impassioned criticism and debate across our campus community. That's entirely appropriate, and everyone on campus – no matter how you feel about the challenges at hand – **should be able to engage in that activity in an environment that is free of intimidation, harassment, and threats**. CSU-Pueblo has a wonderful and vibrant community, and the university has a bright future. I'm confident that we can solve our challenges with respectful debate and creative problem-solving so that we can focus on building that future together." [Emphases added.]

CSU-Pueblo's actions have severely violated McGettigan's First Amendment rights and impermissibly chilled faculty and student expression.

That the First Amendment is fully binding on public universities like CSU-Pueblo is settled law. *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) ("[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.'") (internal citation omitted).

The Supreme Court has also repeatedly held that speech may not be punished merely because many may find it to be offensive or disrespectful. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) ("[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.").

McGettigan's email fails entirely to meet the exacting legal definition of "threats" or "intimidation" unprotected by the First Amendment, as CSU-Pueblo alleges. The Supreme Court has defined "true threats," which are not protected by the First Amendment, as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). The Court further elaborated that speech may lose protection as "intimidation," a form of "true threat," when "a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id*. at 360.

McGettigan's email does not communicate any kind of "intent to commit an act of unlawful violence," nor does it "direct[] a threat to a person or group of persons with the intent of

placing the victim in fear of bodily harm or death." The entire focus of McGettigan's email, in fact, is on the damage he believes will be done to CSU-Pueblo faculty and staff members by the CSU System and Chancellor Martin.

As CSU's Electronic Communications Policy makes clear, the drastic disciplinary action CSU-Pueblo has taken is warranted only in "instances involving safety, security, or another matter of an emergency nature." McGettigan's email plainly fails to qualify under this standard. (Additionally, if CSU-Pueblo actually considered McGettigan to present an "emergency" threatening the "safety" or "security" of campus, then simply deactivating his email account while allowing him to continue teaching can only be described as grossly negligent.)

Any claim that McGettigan's email constituted unlawful harassment is equally meritless. We note the thresholds the Supreme Court has set for determining when an institution may be held liable in harassment cases by way of example. In the educational setting, the Supreme Court held that unprotected harassment must be *conduct* that is (1) unwelcome; (2) discriminatory; (3) on the basis of gender or another protected status, like race; (4) directed at an individual; and (5) "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999). McGettigan's lone email does not come at all close to this threshold, nor does it approach the less stringent threshold of actionable workplace harassment, in which the conduct in question must be "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986). A single email—which recipients are under no obligation to read—does not reach the threshold of severity or pervasiveness required for speech to constitute harassment. What's more, Chancellor Martin—one of Colorado's key public figures and the only figure referenced in the email—is not immune from criticism of this kind. It is important that the right to criticize public officials is protected, and public universities and their leaders may not abuse harassment rationales to shield themselves from criticism.

Finally, we note with particular concern the manner in which CSU-Pueblo has defended its own behavior. In publicly stating that "everyone on campus … should be able to engage in that activity in an environment that is free of intimidation, harassment, and threats," CSU-Pueblo has strongly suggested that McGettigan engaged in such unprotected conduct. Again, these allegations are wholly unsupported in law or in fact, and as of this writing, McGettigan has had no hearing in which to defend himself. Making matters even worse is the fact that CSU-Pueblo cited the shooting tragedies at Virginia Tech, Columbine High School, and Arapahoe High School as moral authority in its decision-making. This not only wholly overstates CSU-Pueblo's case against McGettigan, it also shows considerable disrespect to those who have *actually* been victimized by such tragedies.

To undo the wrongs it has committed to Professor McGettigan and to free expression as a whole in the campus community, CSU-Pueblo must immediately and unconditionally restore McGettigan's email account access, rescind its earlier charge that he violated CSU-Pueblo's

Electronic Communications Policy, and not use his email as the basis for any additional punishment.

FIRE is committed to using all resources at its disposal to ensure a just outcome in this case. Please spare CSU-Pueblo the continued embarrassment of a public fight on this matter of well-established First Amendment rights.

We request a response to this letter by January 31, 2014.

Sincerely,

Peter Bonilla
Director, Individual Rights Defense Program

cc:
Carl N. Wright, Provost
Johnna Doyle, Deputy General Counsel