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MEMORANDUM

August 31, 2022

Via Email and FedEx

TO: Dr. Vivian L. Gadsden, Chair of the Faculty Senate

FROM: David J. Shapiro

RE: Request That You (1) Postpone Further Proceedings Until Prof. Wax's Cancer Treatment Concludes; (2) Order The University To Produce Information Regarding The Proposed Hearing Board Members Pursuant To Section II.E.16.4.D Of The Faculty Handbook; (3) Dismiss The March 2, 2022 Written Charges Against Prof. Amy Wax; (4) Disqualify Dean Ruger As Charging Party; (5) Retain A Neutral Third-Party To Determine Pre-Hearing Issues; And (6) Order The University To Produce Information Relevant To Prof. Wax's Affirmative Defense, Among Others, That Her Comments On Black Law Student Performance Was Truthful And Accurate.

COPY TO: William W. Braham, Past Chair of the Faculty Senate
Tulia G. Falleti, Chair-Elect of the Faculty Senate
Wendy S. White, Senior Vice President and General Counsel
Sean V. Burke, Associate General Counsel
Dean Theodore W. Ruger
Sarah Hope Kagan, Ph. D. Chair, Faculty Grievance Commission
John Paul MacDuffie, Ph. D. Chair-Elect, Faculty Grievance Commission
Santosh S. Venkatesh, Ph. D. Past Chair, Faculty Grievance Commission

Table of Contents

Preliminary Statement..... 1

ARGUMENT 4

I. Prof. Wax Is Battling Cancer And Therefore Deserves A Reasonable Accommodation Of A Postponement Of These Proceedings..... 4

II. The University’s Refusal To Provide Information About Proposed Hearing Board Members Renders Meaningless Her Right To Move To Disqualify Them For Prejudice. 8

III. The Charges Should Be Dismissed And A New Charging Party Ordered To File A Revised Charging Document. 9

A. The Problems With The March 2, 2022 Charges And The Hearing Board Request. 10

1. The Charges Do Not Contain A Complete And Final List Of All Statements And Actions That Are Allegedly Sanctionable..... 10

2. The Charges Are Not Presented In A Coherent And Intelligible Manner. 11

3. The Charges Unfairly Exclude Crucial Contextual Information. 13

4. By Alleging That Prof. Wax “Crossed A Line,” Dean Ruger Is Inventing A Code Of Conduct That Is Nonexistent At The University. 14

5. Prof. Wax Cannot Be Sanctioned Based On Course Content..... 16

IV. The Charges Fail To Put Prof. Wax On Notice Of The Specific, Non-Vague Penn Rule, Regulation, Guideline, Mandate Or Condition Of Employment She Allegedly Violated... 17

V. The Charges Paint An Untrue Picture Of Prof. Wax Based On One-Sided And Incomplete Information. 22

A. The Misuse Of The Rodriguez Report..... 23

B. The Misuse Of Student Allegations..... 26

C. The Omission Of Key, Materials Facts..... 26

D. The Baseless And False Assertions About Jared Taylor. 27

E. The Misuse Of The Enoch Powell Interview..... 29

VI. Dean Ruger Must Be Disqualified As The Charging Party Based On His Demonstrated Bias Against The Respondent..... 30

VII. The Handbook’s Guarantee That Prof. Wax Will Be Treated Fairly Requires That A Neutral Third-Party Be Retained To Make All Pre-Hearing Procedural Decisions.....	31
VIII. The University Is Obligated By The Handbook To Provide Prof. Wax With Information Relevant To Her Procedural And Substantive Rights.....	32
A. An Independent Forensic Expert Must Be Retained To Study Student Performance At The Law School By Race.....	32
B. An Independent Forensic Examination Of Academic Performance By Race Is Needed To Test The Accuracy Of Dean Ruger’s Allegations That Prof. Wax’s Statements Were “False” Or “Inaccurate.”	35
C. An Independent Forensic Examination Of Class Performance By Race Will Also Demonstrate That Dean Ruger Breached The University’s Confidentiality Rules By Accusing Prof. Wax Of Making “False” Or “Inaccurate” Statements.	35
D. The Independent Forensic Expert Will Also Study Facts Relevant To Whether Professor Wax Is “Biased” Against Minority Students Relative To Other Professors.....	36
E. The Law School Must Produce All Information On How Members Of The Law Review Are Chosen And The Extent To Which Race Is A Factor.	37
F. What The Independent Forensic Analysis Will Entail.	38
G. Now Is The Time To Release Information About Grade Performance By Race At The Law School.	39
H. Ramifications Of Not Producing The Information Requested.....	41
IX. Other Information Which The University Must Provide Before Prof. Wax Can File An Answer.	42
X. Prof. Wax’s Offer To Resolve The Matter.	51
Conclusion	55

Preliminary Statement

I have reviewed the following materials from the University to Professor Amy Wax: (1) a complaint dated April 27, 2021 (Ex. 1);¹ (2) the August 3, 2021 report issued by Prof. Daniel Rodriguez (the “Rodriguez Report”) (Ex. 2); (3) the March 2, 2022 Written Description of Charges (the “Charges”) (Ex. 3); (4) materials related to the May 11, 2022 pre-Hearing meeting between Prof. Wax and Dean Ruger (the “May 11 Meeting”), including a request that Dean Ruger recuse himself as the Charging Party; and (5) the June 23, 2022 Request for Hearing Board Formation (the “Hearing Board Request”) (Ex. 4).

The substantive and procedural problems with the proceedings instituted by Dean Ruger are immense and require immediate rectification before any more harm is done to the University, the Law School, Professor Wax, and other University stakeholders. As Chair of the Faculty Senate, you are “the principal executive officer” of the Senate, and you have “such powers as are appropriate to the office.” Faculty Senate Rules, Rule 4 (“Duties of the Chair”). I therefore respectfully submit this memorandum in support of Prof. Wax’s request that you, as Chair:

1. Postpone further proceedings until Prof. Wax’s cancer treatment concludes;²
2. Order the University to produce information regarding the proposed Hearing Board Members pursuant to Section II.E.16.4.D of the Handbook for Faculty and Academic Administrators (the “Handbook”);
3. Dismiss the March 2, 2022 Written Charges;
4. Disqualify Dean Ruger as the Charging Party;

¹ Prof. Wax did not receive this complaint from the University’s General Counsel, despite several requests, until June 10, 2021. (This complaint has been designated in some previous correspondence as the “May 2021 complaint”). In February 2022, Dean Ruger notified Prof. Wax that this 2021 complaint has been “consolidated” with the March 2, 2022 Written Charges.

² The Chair, Past Chair, and Chair-Elect of the Faculty Grievance Commission are being copied because, absent a satisfactory resolution of the issues addressed in this memorandum, Prof. Wax will be forced to start a formal grievance procedure. At a minimum, the University’s refusal to provide Prof. Wax with an accommodation given her cancer treatment is arbitrary and capricious. Handbook, § II.E.12(1).

5. Retain, on behalf of the University and Prof. Wax, a neutral third-party to determine pre-hearing issues;
6. Order the University to produce information, pursuant to Section II.E.16.4.D of the Handbook, relevant to Prof. Wax's affirmative defense that her comments on Black law student performance was truthful and accurate; and
7. Provide additional information requested below on the various charges against Professor Wax.

As documented in letters from her physicians attached as exhibits to this memorandum, Professor Wax is too ill to meet arbitrary deadlines or participate in any proceedings and will be unable to do so until at least the end of the Fall semester 2022. As Chair, we implore you to use your office to postpone further proceedings, as an accommodation under the Americans With Disabilities Act (the "ADA"), until Prof. Wax's disabled state from cancer treatment has sufficiently abated. The Charging Party's continued refusal to provide this basic humanitarian accommodation is simply shocking and we turn to you.

As well as unnecessarily rushing these proceedings and putting Prof. Wax's health at risk, Dean Ruger's referral of the Charges to the Faculty Board is premature, unwarranted, and prejudicial to her. The rights afforded to Prof. Wax under the Handbook have not been honored. The University is contractually obligated to treat Professor Wax "fairly" and protect her "rights," but it has not done so.

This memorandum is not a comprehensive, charge-by-charge review and rebuttal of the allegations made against Prof. Wax in the Charges and other various documents. An Answer and Affirmative Defenses will be filed when we receive a revised set of charges from a new Charging Party that comports with, among other things, the University's obligation to provide Prof. Wax with adequate notice of which University rule, regulation, guideline, manual or

condition of employment she allegedly violated.³ Rather, this memorandum is in support of Prof. Wax's request that you, as Chair of the Faculty Senate, exercise your power to correct the many legal (and, frankly, ethical) problems that have infected these proceedings. The mistreatment of my client has resulted in Charges to which, for the reasons set forth below, Prof. Wax cannot adequately respond nor properly mount a defense.

I wish to emphasize at the outset the importance of our request for University materials necessary for Dr. Wax to respond to the Charges and prepare for the Hearing. One among many of the Charges against Prof. Wax is that she deserves a "major sanction" because she made statements regarding Black students' performance at the Law School in connection with its affirmative action policies. The school, on the one hand, contends that Prof. Wax made "false" and "inaccurate" statements on this topic which (i) allegedly makes her a white nationalist racist; (ii) means that minority students have a "legitimate" reason to fear that she will be biased against them; and (iii) requires that she must go. Prof. Wax contends, on the other hand, that her comments were accurate and therefore cannot be the basis for any sanction, nor for any compromise of her right, as a tenured professor, to discuss affirmative action without fear of being terminated. A key issue at the Hearing, therefore, will be whether Prof. Wax's statements were accurate. And there is only one party who has the information relevant to that issue, and that is the Law School.

³ We cannot wait until after the members of the Hearing Board have been finalized to receive the Charging Party's "written statement" pursuant to Section II.E.16.4.C.1 of the Handbook. It should be issued now. The allegations have been known for years; the Dean keeps adding charges every few months; and there have already been three charging documents in this action (the April 2021 complaint, the March 2, 2022 Written Charges, and the June 23, 2022 Request for Hearing Board Formation). Prof. Wax will need time and University documents to prepare her Answer and Affirmative Defenses and waiting until after the Hearing Board members have been finalized will not leave her with enough time, especially if we receive information which will require a motion to disqualify Hearing Board members for prejudice.

Given the obvious importance of this information to the proceedings and Prof. Wax's affirmative defenses, we ask that you order the University to appoint an outside forensic expert to examine the Law School's records on students' grades and academic performance by race.⁴ Only from that exercise will the Hearing Board know if Prof. Wax made accurate statements, and whether the Dean's contentions to the contrary are themselves incorrect. Access to this information is guaranteed by the Handbook. Handbook, § II.E.16.4.D. Prof. Wax's right to this information is discussed in greater detail below in Section VIII.

ARGUMENT

I. Prof. Wax Is Battling Cancer And Therefore Deserves A Reasonable Accommodation Of A Postponement Of These Proceedings.

Prof. Wax is currently undergoing active treatment for a life-threatening cancer, and she is recuperating from cancer treatment and other therapies. Per her treating physicians' conclusions and instructions (see letters from Dr. Gary Freedman (Ex. 5) and Dr. Amy Clark (Ex. 6)), Prof. Wax will be unable to meet deadlines, participate in proceedings, or respond adequately to charges against her until at least the end of 2022, and possibly longer. Threatening her with "major sanctions" under these circumstances is cruel and violates her rights under the ADA. It also guarantees that she will not have an adequate opportunity to defend herself against the Charges, which violates the fundamental fairness accorded to her under the Handbook.

This is not the first time that the University has refused to provide Prof. Wax with a medical accommodation. Dean Ruger disregarded Prof. Wax's request for more time before he insisted on having the Handbook-mandated pre-Hearing May 11 Meeting. He did this even though she told him that she did not have the time and capacity to prepare given her medical

⁴ Because of the time and effort it will take to produce this exculpatory evidence, we cannot wait until one month before the Hearing to receive it. Handbook, § II.E.16.4.D.

condition and treatment. He scheduled the meeting despite Prof. Wax's objections, and the meeting took place over her vociferous protests.

Dean Ruger also refused to provide Prof. Wax with any materials or information beyond the Charges themselves, and he continued to do so despite repeated requests. There was no rational basis for demanding the pre-Hearing meeting without an extension of time or without the information and documentation requested. As Prof. Wax explained, absent the information requested, there was no chance that the Handbook-mandated pre-Hearing meeting could be successful. Dean Ruger's behavior was a clear violation of the reasonable accommodation requirement of the ADA as well as the guarantees of fundamental fairness and the protection of Faculty members' rights as guaranteed in the Handbook.

I am aware that in a letter dated July 15, 2022 to Prof. Wax, you would not give her more time to move to disqualify proposed Hearing Board members. And, in his letter to me dated July 29, 2022 (Ex. 7), Associate General Counsel Burke gave me until the end of August to do so, but – as explained herein – Prof. Wax needs more time because of her medical condition. We urge you to reconsider and postpone these proceedings until Prof. Wax's treatment is complete. The medical evidence provided establishes that Prof. Wax cannot participate in a hearing that seeks major sanctions and will involve dozens of witnesses, extensive and detailed submissions from her and her attorney, and hundreds of pages of documents. Being forced to participate before she is sufficiently recovered from her cancer and its treatment will seriously compromise her health, impede her recuperation, and undermine her ability to defend herself. As a matter of federal law, failure to grant her enough time to recover will be a violation of the reasonable accommodation requirement of the ADA as well as the guarantee of fundamental fairness provided in the Handbook. I am flabbergasted that the University is treating a tenured professor

who has cancer this way, and I am confident that the Faculty Grievance Commission will feel the same.

In his letter of July 29, Associate General Counsel Burke wrote that, “It is not our position that Prof. Wax must take a continuous leave of absence to be entitled to an accommodation[.]” (Ex. 7) That is not true. When Prof. Wax asked for more time to prepare a defense to the Charges, the University offered her a leave. But a leave will not relieve Prof. Wax of the enormous ongoing burden of having to deal with the Charges. To the contrary, it would lead to the very opposite effect. The proceedings initiated by Dean Ruger, which threaten Prof. Wax’s job, livelihood, and reputation, and which require a constant and unrelenting investment of time and energy, are causing Prof. Wax the utmost in stress, and have already impeded her treatment and recuperation. These proceedings are not only detrimental to her health but also directly contrary to her doctor's advice and admonition, as detailed in the June 27, 2022 letter from her oncologist, Dr. Amy S. Clark (Ex. 6), and the April 15, 2022 letter from Dr. Gary Freedman (Ex. 5).

Dr. Wax’s physicians have concluded that the extra obligations entailed by these proceedings will compromise her physical and psychological health and will interfere with her treatment and recovery. That should be enough to grant her the accommodation for which she is asking. **The suggestion that Prof. Wax must take a leave from teaching in the next academic year as a *condition* of any postponement is itself a violation of the ADA. It is an inadequate response to Prof. Wax’s limitations and circumstances, and it is not the reasonable accommodation to which she is legally entitled under the ADA.**

As I explained in my July 20, 2022 letter to Associate General Counsel Burke (Ex. 8) (and he did not take issue with it), students, junior faculty, and fellows at Penn now regularly

contact Prof. Wax with requests to meet with her to voice their unhappiness with the dogmatic campus climate and the often one-sided education they are receiving, their disagreement with the prevalent ideas on campus, their desire to hear and debate unpopular views, and their dismay at the vendetta against her. They seek support and advice from Prof. Wax on how to deal with the oppressive and frightening conditions created by the “woke” orthodoxy now prevalent at Penn. Prof. Wax has devoted a significant amount of time and energy to responding to these requests and meeting and counseling students. According to many of these students Professor Wax is the *only* faculty member taking on this role and shouldering this responsibility at Penn. Students repeatedly tell her in private that she is the one faculty member to whom they can disclose their opposition to what is happening on campus.

Given her unique role at Penn, and the pleas of her students and supporters worldwide, Professor Wax has promised that she will not surrender to the speech police or abandon the people on campus who rely on her presence and advice. Prof. Wax views those promises as a sacred obligation which she is duty-bound to fulfill. It is essential to her mental and physical well-being that she continue to advise students in fulfillment of her pledges as well as teach her classes. Prof. Wax, therefore, cannot agree to take a leave of absence as a condition for getting more time to prepare to defend herself against the Charges. She cannot agree to a violation of the ADA.

II. The University's Refusal To Provide Information About Proposed Hearing Board Members Renders Meaningless Her Right To Move To Disqualify Them For Prejudice.

In his letter of July 29, 2022, Associate General Counsel Burke refused to provide me with the information necessary to determine whether Prof. Wax should move to have any of the proposed Hearing Board members disqualified for prejudice. (Ex. 7.) This information, which is *solely* within Penn's possession, custody, and control, is essential to my client's ability to assess the impartiality of the proposed members. Only the University has access to information which will determine whether the proposed Hearing Board members will be prejudiced against my client based on, among others, attendance at Anita L. Allen's February 16, 2022 presentation to the Faculty Senate. Access to this information is guaranteed by the Handbook. *See Handbook, § II.E.16.4.D (University must provide Respondent with "copies of any other University documents that are relevant to the respondent's procedural . . . rights in this matter") (emphasis added).*

Associate General Counsel Burke's position that the University is not obligated to provide this information because the word "discovery" does not appear in the Handbook is spurious, and it demonstrates the need for a pre-Hearing neutral third-party, which I discuss below in Section VII. First, this is not "discovery" – no one is going to depose the proposed members. If the proposed Hearing Board members have memorialized their pre-conceived conclusions, Prof. Wax has the right to that information. **Second, the Handbook gives the Respondent the "opportunity" to move to disqualify proposed Hearing Board members "for prejudice."** Handbook, II.E.16.4.B (emphasis added). That "opportunity" is meaningless if the University will not, at a minimum, provide emails from the proposed Members that discuss Prof. Wax or Prof. Allen's presentation. ***There is simply no way that Prof. Wax can know if the proposed Members are "prejudiced" if the University does not provide the information that***

only it has. And if the University does not provide the information that only it has, then the “opportunity” to move to disqualify for prejudice is meaningless. Third, Prof. Wax is contractually guaranteed the right to a “fair” hearing that protects her “rights,” and it is obviously grossly unfair if, on the one hand, the University gives her the right to move to disqualify proposed Hearing Board members for prejudice but, on the other hand, it refuses to provide her with the information necessary to do so. As Chair, you can correct this inequity. Fourth, this is information that as Chair you should want to know, too. If the University is interested in a fair and rights-based proceeding, we all need to know whether any of the proposed Hearing Board members will be going into the Hearing with prejudicial preconceptions or a pre-existing animus against Prof. Wax.

The only fair and rights-based way of reading this provision of the Handbook is to conclude that Prof. Wax is entitled to the information. The Handbook guarantees fairness and a protection of rights, and that is why it mandates access to University materials. Handbook, § II.E.16.4.D. The commitment to fair treatment means that Prof. Wax has a right to obtain materials relevant to the proceedings, including basic information about any pre-existing bias proposed Hearing Board members may have against her. Until the materials are received, Prof. Wax objects to all proposed Hearing Board members and does not consent to any further proceedings.

III. The Charges Should Be Dismissed And A New Charging Party Ordered To File A Revised Charging Document.

The Handbook contractually guarantees Prof. Wax a procedure that is fair and that protects her rights. Handbook § II.E.16. This means, in turn, that the charging document must, at a minimum, provide her with adequate notice of what exactly she is being charged with, and

which specific, non-vague Penn rule, regulation, guideline, manual or condition of employment she violated. The Charges do not do that. You should, therefore, as Chair, dismiss the current Charges and instruct a new Charging Party to submit a revised charging document that corrects these defects.⁵

A. The Problems With The March 2, 2022 Charges And The Hearing Board Request.

1. The Charges Do Not Contain A Complete And Final List Of All Statements And Actions That Are Allegedly Sanctionable.

The Charges use the phrase “including but not limited to” when discussing allegedly sanctionable statements by Prof. Wax. Charges at 5 (Ex. 3). Thus, by Dean Ruger’s own admission, the Charges are incomplete. We therefore do not know all the statements and actions that will be at play at the Hearing. That is obviously inadequate for a document which intends to be the basis for a major sanction against a tenured professor.

That same is true for the additional charges in the Hearing Board Request, some of which are based on events that post-date March 2, 2022.⁶ The continuous addition of new and unanticipated charges on an open-ended basis is unconscionable. It places a burden on Prof. Wax that is impossible to meet. The piling on of charges and accusations on a continuous, ongoing basis, and the failure to produce a complete and locked-in set of charges, violates the fundamental promise of fairness guaranteed in the Handbook, and makes it impossible for Prof. Wax to prepare an adequate defense.

⁵ As explained above, because of the importance of this matter, and the number of years that have transpired, a final set of written charges should be issued now. At a minimum, the final written charges to be submitted one month before the Hearing need to correct the errors in the current Charges.

⁶ The Hearing Board Request, for example, refers to an interview Prof. Wax gave to Tucker Carlson in January 2022, and released to the public in April 2022, one month after the Charges were filed; and it talks for the first time about an investigation by Quinn Emanuel.

The allegations in the Charges and the Hearing Board Request are also fragmentary, random, sketchy, and incomplete. Despite repeated requests, Prof. Wax has never received a final, comprehensive, and complete statement of all charges lodged against her. And she has never been provided with all the materials and evidence that the Hearing Board will consider in evaluating the Dean's request for "major sanctions."

This request is not new. Prof. Wax has already asked for a complete, comprehensive, and detailed account of the charges that will be presented against her and all the information that Dean Ruger possesses in support of them. She asked for this to prepare for the Handbook-mandated, May 11 Pre-Hearing Meeting. Dean Ruger refused. To this day, Dean Ruger continues to withhold those materials. He has yet to turn over a comprehensive list of *all* alleged statements, comments, and remarks that are the basis for his request for sanctions against Prof. Wax.

The fundamental fairness guaranteed by the Handbook requires that the Charging Party provide Prof. Wax with a complete and comprehensive list of charges, and all evidence it has in support of those charges.

2. The Charges Are Not Presented In A Coherent And Intelligible Manner.

The March 2, 2022 written description of charges is presented in a manner and form that makes it extremely difficult if not impossible for Prof. Wax adequately to respond to and defend herself against those charges. The document (written by the Dean of the *Law School*) is a thrown-together, disorderly, haphazard jumble of random allegations, fragments, isolated phrases, snippets, and stray remarks. (The same description applies to the Hearing Board Request.) The Charges should resemble an indictment or a complaint, containing a short and plain statement of the claim showing that the Charging Party is entitled to relief, but it does not.

Instead of presenting, in numbered paragraphs, allegations containing date, time, place, content and context of allegedly sanctions-worthy statements and actions, the Charges are a tangle of half-baked, deracinated accusations, in some cases lifted from sloppy, distorted, mangled, internet comments or stale student recollections. There is no coherent, intelligible, or chronological order one would expect in a professionally crafted statement of claims. In some instances, the allegations repeat fragmentary phrases and misleading sound bites that were lifted second-hand from sensationalistic media reports. The Charges do not reflect any careful review of original source materials, and frequently mischaracterize them. (One must be concerned if this is how Penn Law teaches students to draft complaints, indictments or even pre-litigation correspondence.) Moreover, General Counsel White has repeatedly promised that all anonymous allegations would be deleted from the Charges and from all documents filed by Dean Ruger in this case. This has not been done.

The Charges have created confusion and uncertainty as to what exactly Prof. Wax is being charged with. I can only conclude, therefore, that the document is part of a war of attrition designed to impose a maximally vexatious burden on Prof. Wax with the ultimate purpose of wearing her down and driving her from Penn.

The difficulties deliberately imposed on Prof. Wax are compounded by the fact that:

- The filings contain no cross-references to the initial April 2021 complaint or the Rodriguez Report;
- There is no indication of which allegations are from the April 2021 complaint and which are new to the 2022 filings; and
- There is no comprehensive list setting forth when or where Prof. Wax supposedly made the allegedly sanctions-worthy statements, who witnessed them, or other pertinent facts about the setting in which they were purportedly made.

Similarly, the Hearing Board Request repeats many previous charges, but also adds new ones. The document does not indicate which charges are old or new and it does not cross-reference to the previous March 2, 2022 charges or the April 2021 complaint. (Prof. Wax has also never been given a complete list of the complaining parties and the Charging Party's witnesses and their contact information.)

3. The Charges Unfairly Exclude Crucial Contextual Information.

Particularly egregious is the Charge's lack of crucial contextual information essential to a full and accurate picture of the statements or comments allegedly made by Professor Wax at Penn and elsewhere. This information is absolutely necessary to evaluate the alleged comments' accuracy, veracity, legitimacy, appropriateness, and status as protected academic expression. In the case of comments made in podcasts, speeches, interviews, articles, or other extramural contexts, the remarks included in the charging documents are routinely devoid of pertinent information on the questions under discussion, the policy issues being addressed, or the arguments being made. For remarks based on student recollections, which are mostly stale, fallacious and, for reasons explained in greater detail below, simply incredible, there is little or no information on the precise setting in which they were made, who witnessed them, their relevance to the lesson, subject, or topic under discussion, or whether or by whom they are corroborated. The overall result is a dishonest, partial, twisted, distorted, and misleading picture of Prof. Wax's actual words without proper checks on the trustworthiness and accuracy of the reports.

I will not elaborate in this memorandum on each instance of the distortions contained in the Charges and Hearing Board Notice. But here is one salient example of how the Charges mischaracterize and misrepresent Prof. Wax's words by lifting phrases out of context. In

referring to a speech Prof. Wax made at a National Conservatism convention in Washington DC, the Charges allege that Prof. Wax said that “our country would be better off with more whites and fewer nonwhites.” That fragmentary phrase, lifted entirely out of context, could not be more misleading.

If presented accurately, the Charge would have noted that Prof. Wax was criticizing conservatives for abandoning sound immigration policies because they were worried about being labeled racists. She was addressing immigration policies that have an *impact* on racial groups, not immigration policies that are *based* on membership in a racial group. She then noted that proponents of the policies she was advocating might nonetheless be criticized unfairly and inaccurately as believing that the United States “would be better off with more whites and fewer nonwhites.” Prof. Wax, in other words, never said that the United States would be better off with more whites and fewer nonwhites. Rather, she was criticizing conservatives for abandoning their principles because they were worried about distorted accusations of racism by liberal critics. It should be obvious that urging conservatives not to be intimidated by the misguided use of race-based accusations is not sanction-worthy speech. Rather, it is a legitimate point that an academic addressing immigration policy is entitled to make. In no way could Prof. Wax’s remarks be reasonably construed as endorsing so-called “white supremacy.” Yet that was the import of the dishonest media reports upon which Dean Ruger carelessly relies in the Charges.

4. By Alleging That Prof. Wax “Crossed A Line,” Dean Ruger Is Inventing A Code Of Conduct That Is Nonexistent At The University.

The allegations are also seriously unfair because they rest on a vague and undefined standard of what materials can be presented in class, and what speakers can be invited to speak at Penn Law. As a matter of fundamental fairness, it is incumbent on Penn to clarify these

standards. In faulting Prof. Wax's decision to invited Jared Taylor to speak to her seminar on Conservative Political and Legal Thought, for example, which is discussed in additional detail below in Section V.D., the Charges refer to a supposed "line" that has been "crossed." A "line" is not a rule, regulation, statute, or guideline that puts a tenured professor on notice as to whom she can or cannot invite. It is, instead, a meaningless, vacuous, and conclusory cliché. It provides no clear, principled notice or usable guidance as to what types of pedagogical choices are allowed or forbidden.

Dean Ruger does not connect this purported "line" to any Penn rule or regulation which, if violated, would result in a loss of tenure. The standard that Dean Ruger seeks to invoke here is entirely fabricated and made up for the purpose of punishing Prof. Wax for expressing and exposing students to unpopular views.

Dean Ruger's depiction of Prof. Wax's pedagogical choices as worthy of sanctions is not only incoherent but it is also downright dangerous. It is impossible for academics such as Prof. Wax, or anyone else, to know which readings, topics, or speakers will pass muster or will subject them to sanctions or penalties. Will a Black Studies professor be sanctioned if she invites a speaker who believes that all white Americans are racists? Would such a speaker cross Dean Ruger's fanciful "line"? To relegate such choices to the whims of students and University administrators, without an explicit definition and the citation of authority or applicable rules, is arbitrary and capricious and violates fundamental principles of fairness. Professors are entitled to clear prior notice of when and how they are deemed to transgress. Without a detailed, precise, and specific description of the supposed "lines" between acceptable and unacceptable speakers, readings, and class materials, professors face the constant danger of falling into traps for the unwary. Absent such information, every professor who deviates in the slightest from the rigid

orthodoxy of approved opinion prevalent at any moment on campus risks crossing this supposed “line” and potentially putting his or her job and career in jeopardy.

Under the regime announced in the Charges, teachers like Prof. Wax, who dare to teach a course in conservative thought in which students are informed and educated about dissident ideas and positions, would be in constant danger of falling afoul of Penn’s ad hoc and arbitrary restrictions. (And, of course, if the pendulum ever swings the other way, extreme feminist professors would face similar predicaments if, for example, they invited a speaker who believed that all consensual sex was rape.) Indeed, the proscription against “crossing the line,” whatever that means, has no limiting principle, and could potentially exclude a considerable chunk of the materials presented in many University courses. Anyone who teaches a class where students may encounter readings, authors or ideas that could conceivably be labelled “racist” or “white supremacist” or subject to other similar descriptions, however arbitrary, would be put in jeopardy. Assigning *Mein Kampf* or other writings by Nazis in a class on World War II would be potentially risky. Any assignment in a class on slavery that does not condemn the practice to a student’s satisfaction would risk offending or traumatizing that student. If the political orthodoxies on campus ever change, English professors may think twice before assigning the anti-Semitic writers T.S. Eliot and Ezra Pound or asking students to read Yeats’ *Leda and the Swan*, which deals with rape. The possibilities are endless.

5. Prof. Wax Cannot Be Sanctioned Based On Course Content.

Moreover, to provide basic fairness and adequate notice to Prof. Wax (and anyone else who will, one day, present course content to which some people at Penn will object), it is incumbent upon Penn to conduct a comprehensive review of the contents of Prof. Wax’s course on Conservative Thought, including all assigned readings and topics, before this case goes any

further. Dean Ruger's attempt to cite Jared Taylor's appearance and the assignment of an interview with Enoch Powell as reasons to sanction Prof. Wax raises the real possibility that she will be punished for *other* items on her syllabus that Penn now believes violate its standards of political correctness. Prof. Wax should not be left guessing if further charges will be brought against her based on her efforts to educate her students on the topic of her seminar and which items on her syllabus will next be used against her.

Penn's effort to sanction Prof. Wax for her course content presents the possibility for serious inequity. Prof. Wax is entitled to be treated no worse than other professors at Penn: white, Black, liberal, or conservative. It is entirely possible, and indeed likely, that other professors are committing, or have committed, infractions by presenting materials in their classes that violate Penn's supposed "standards" and which "cross" whatever (imaginary and arbitrary) "line" that Penn might choose to draw. To safeguard Prof. Wax's interest in consistent, evenhanded, and fair treatment compared to other University faculty, it is necessary for Penn to conduct a systematic and comprehensive review of all other courses, reading lists, assignments, and syllabi at Penn and the results of that review must be made available to Prof. Wax.

IV. The Charges Fail To Put Prof. Wax On Notice Of The Specific, Non-Vague Penn Rule, Regulation, Guideline, Mandate Or Condition Of Employment She Allegedly Violated.

The Charges, Hearing Board Request, and other documents filed by Dean Ruger make repeated use of subjective, vague, and undefined terms and labels, and they do not state which specific, non-vague Penn rule, regulation, guideline, mandate, or condition of employment has been violated. This makes it impossible for Prof. Wax to respond to and defend against the Charges.

Because the Charges do not state how Prof. Wax violated a specific, non-vague Penn rule or other source of authority when she made the statements alleged in the Charges, the Charges rely on character assassination and name-calling. The Charges slap labels on her political, cultural, and legal observations and, based on those labels, seek a major sanction. The use of subjective, vague, vacuous, and undefined terms to attack and disparage and penalize Prof. Wax violates fundamental standards of fairness and due process which are guaranteed by the Handbook. It offers her no notice of which utterances will subject her to the threat of sanctions at Penn. You should, therefore, as Chair, dismiss the Charges and instruct the new Charging Party to submit a revised charging document that does not rely on such tawdry smear tactics.

For example, Dean Ruger accuses Prof. Wax of making what he describes as “derogatory” statements against individuals at Penn. He then relies on these statements as grounds to impose “major sanctions” against her. But, at the same time, the Dean fails to allege under what authority Prof. Wax can be sanctioned for making such “derogatory” statements. The Charges do not state what rule, regulation, guideline, mandate, or condition of employment Prof. Wax allegedly violated by making allegedly “derogatory” statements.

Nor has Dean Ruger identified any basis for the supposed requirement to refrain from “derogatory” comments as a condition of serving as a faculty member at Penn. That is because there is none. There is no document at Penn that stands for the proposition that a tenured faculty member must refrain from derogatory comments about her colleagues or risk major sanctions. On the contrary, professors are fully entitled to express critical, pejorative, or negative judgments in their role as academics and intellectuals.⁷ Such judgments are a routine and legitimate part of

⁷ Imagine for a minute the number of charges that would be brought by the University against tenured professors for making derogatory comments about their colleagues if conversations at faculty get-togethers at the Penn Club were secretly recorded.

political, cultural, legal, and moral analysis. Basic principles of academic freedom protect such statements from penalty.

The request for sanctions based on supposed “derogatory” statements is entirely fabricated and made up for the purpose of penalizing Prof. Wax because she expressed views that are politically unpopular on campus, are critical of present University practices, and that elicit opposition from a vocal faction of left-leaning activist and minority students and outsiders who demand absolute deference and conformity. An imagined prohibition on “derogatory comments” is unjustified and illegitimate, and it cannot form the basis for any sanctions against Prof. Wax.

The Charges also use vague, open-ended, and abstract phrases like “mission,” “values” and “standards” without ever offering a precise definition of those terms or citing to any specific, pertinent, and relevant rule imposed on Penn faculty. Nor is there any attempt to explain how Prof. Wax’s allegedly sanctionable statements violate pertinent requirements. Likewise, Dean Ruger accuses Prof. Wax of running afoul of the “basic norms of civil and professional behavior.” But he never specifies or describes with any particularity the behaviors or norms to which he is referring. The Charges do not cite to any Penn regulation that Prof. Wax allegedly violated.

The Charges, in other words, are a classic example of the application of an *ex post facto* approach to my client’s legal rights. There are no rules, regulations, guidelines, mandates, or conditions of employment which put Prof. Wax on notice that she would be sanctioned if she uttered allegedly derogatory or critical comments about colleagues or members of the Penn community or made any of the other remarks cited in the charging documents. This makes

sanctioning her for these statements completely unfair and it deprives her of her rights, which is a violation of the Handbook.

The lack of definitions in the Charges also raises a host of questions about the nature of the standards imposed and how they are being applied. For instance,

1. Does Dean Ruger's characterization of Prof. Wax as "racist, sexist, and xenophobic" count as an example of "derogatory" statements by a Penn member that justify the imposition of sanctions?
2. Do Dean Ruger's statements to students at a secret town hall meeting in September 2019 that Prof. Wax's presence at Penn Law "makes me angry, it makes me pissed off," and that it "sucks" that Prof. Wax "still works here," count as examples of "derogatory" statements by a Penn member that justify the imposition of sanctions?
3. Is the accusation that Prof. Wax promotes "white supremacy" a derogatory statement forbidden by Penn rules? Which rules? What is "white supremacy" in the context of academic debate and how is it defined?
4. Do student accusations against Prof. Wax, including allegations of discrimination and bias, come within the prohibition of "derogatory" statements that justify sanctioning the speaker?
5. Do comments by Penn members and students on campus bashing President Trump and his supporters, or accusing conservatives or Republicans of promoting "fascist" or "undemocratic" policies and measures count as "derogatory"?
6. Do such statements violate Penn's "behavioral" standards?

All these questions must be answered. If not, the Charges violate Prof. Wax's right to be put on notice of what Penn rule she allegedly violated which would support a major sanction against her.

Instead of identifying and specifying the rules or regulations that Prof. Wax supposedly violated, and that are claimed to require or justify major sanction against her, Dean Ruger repeatedly uses open-ended and undefined terms and labels. The result is that Prof. Wax has not been provided with adequate notice of what exactly she must prepare to counter or refute at the

Hearing. Above all, it is never explained in the Charges which of Prof. Wax's remarks, comments, and statements warrant a penalty or sanction, and why they do. As a matter of fundamental fairness, which is guaranteed to Professor Wax as a Penn faculty member, penalties cannot be exacted upon a respondent when the rule allegedly violated is so vague. *See, e.g., Johnson v. United States*, 576 U.S. 591, 595 (2015) (“[T]he Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.”).

By using undefined terms – which creates a fuzzy moving target that no one can possibly comprehend or anticipate – the Charges are a cynical, thinly disguised attempt to punish Prof. Wax for her unorthodox positions. The accusations as stated violate basic guarantees of academic freedom of thought and expression and the protections afforded by her tenure contract at Penn. As Chair you should therefore dismiss the Charges and direct the new Charging Party to file a revised charging document which does not violate these basic legal principles guaranteed to Prof. Wax by the Handbook.

Others have noted that the Charges are not a valid legal document alleging forms of misconduct that require a major sanction. For example, in a July 18, 2022 letter from the Academic Freedom Alliance (the “AFA”) to Penn President Elizabeth Magill, the AFA noted that Penn had officially acknowledged “the importance of a system of tenure for faculty members as the preeminent means of fostering and protecting academic freedom in teaching and in scholarly inquiry.” (Ex. 9 at 1.) But, as the AFA concluded, the Charges are an attempt to undermine tenure “as an indispensable means of protecting academic freedom.” *Id.*

In accord with Penn's pledge of tenure protections, and the contractual obligations that the grant of tenure to Prof. Wax entails, Penn's ploy to punish Prof. Wax for her speech by applying and manipulating terms and deploying non-existent information should not be allowed to succeed. The Charging Party must either define his terms in a way that provides fair notice or drop the charges against Prof. Wax.

V. The Charges Paint An Untrue Picture Of Prof. Wax Based On One-Sided And Incomplete Information.

The University has been mistreating Prof. Wax and violating basic standards of decency for years in response to her unorthodox, conservative points of view, especially as they relate to affirmative action and immigration. At a student town hall meeting on September 19, 2019 (to which Prof. Wax was not invited), Dean Ruger told students that Prof. Wax's presence at Penn Law "makes me angry, it makes me pissed off" and also that it "sucks" that Prof. Wax "still works here."⁸ (Ex. 10 at 12.) The April 27, 2021 complaint filed against her was not given to her until June 10, 2021. She was not told about the submission of the Rodriguez Report and had to track it down herself. Dean Ruger has repeated the assertion that minority students can expect Prof. Wax to be biased against them even after Prof. Rodriguez found no evidence of any such bias. For the past two years, Dean Ruger has barred Prof. Wax from serving on any faculty committees at Penn Law. She was never told about the Quinn Emanuel investigation, discussed for the first time in Dean Ruger's Hearing Board Request (Ex. 4 at 2), and wasn't interviewed by that firm. She repeatedly asked for more time because of her health and was constantly rejected. Dean Ruger has failed to mention the many laudatory letters in Prof. Wax's support that have been submitted to him by present and former students, and he has not included those materials in

⁸ See <https://www.plannedman.com/lifestyle/professor-wax-vs-her-university/>, a story that accurately repeats remarks from a transcript of the meeting prepared by the Foundation for Individual Rights in Education from a student recording that was attached to the prior motion for Dean Ruger's recusal as a Charging Party (Ex. 10).

his charges or submissions to the Faculty Senate. Nor has he alluded to or discussed the University-wide Lindback teaching prize Prof. Wax received in 2015, which is an honor that has been awarded to less than a handful of Penn Law professors. The list goes on.

I am therefore not surprised by the incredibly one-sided, incomplete, and false picture of my client that the Charges paint. It is outrageous that the Dean of a law school has submitted such charges. The Charging Party turned what should have been an unbiased, straightforward charging document that fairly presented the facts and the rules that Prof. Wax allegedly violated into a laundry list of character assassination labels. It is worth noting the many ways the charging documents in this matter have grossly manipulated the facts, taken language out of context, and left unmentioned exculpatory evidence. Indeed, an impartial assessment of the Charges against Professor Wax leads to the inexorable conclusion that no charges should have been filed at all.

A. The Misuse Of The Rodriguez Report.

Dean Ruger states in his Hearing Board Request that the Rodriguez Report “credited many of the allegations made against Wax.” (Ex. 4 at 2.) He also states that the Report “revealed additional instances of inappropriate conduct” (*id.*), but he identifies no examples or details. The Dean’s description of the Rodriguez Report is inaccurate, to say the least, and it completely ignores findings that, in fact, *cast doubt* on the charges against Prof. Wax or state conclusions in her favor.

Attached to this memorandum as Exhibit 10 is Prof. Wax’s motion for the disqualification of Dean Ruger as Charging Party. In that document, Prof. Wax discusses in detail the many ways Dean Ruger manipulated the Rodriguez Report. For example, Dean Ruger does not mention or discuss Professor Rodriguez’s signal conclusion that his investigation

revealed *no instances of bias or discrimination* in Prof. Wax’s actual teaching and treatment of students. Specifically, the report states that “There was certainly *no evidence* from these interviews to suggest that [Prof. Wax] graded minority students differently, denied them access to professional opportunities over which she had some modicum of control, or singled them out for special ridicule or disparagement.” (Ex. 2 at 40-41) (emphasis added).

Dean Ruger also ignores important aspects of the Rodriguez Report by repeating accusations based on Prof. Wax’s alleged stray remarks that the investigator found to be inconsequential, ambiguous, potentially inaccurate, unsupported, or exaggerated. For example, the Charges cite anonymous student objections to a comment Prof. Wax made at a panel discussion at Penn Law held years ago that “you can have two plants that grow under the same conditions, and one will just grow higher than the other.” After analyzing the remark and its context, Prof. Rodriguez stated that he “cannot conclude that this statement was derogatory under the clear definition of that term.” (Ex. 2 at 15.) He added that, **“What I can say is the overall contours of Professor Wax’s scholarship on group difference and equality principles does not, on my best reading, support the assertion that she views Black individuals as biologically inferior to Whites.”** *Id.* (emphasis added).

Dean Ruger’s filings also disregard other observations in the Rodriguez Report that cast doubt on the seriousness or credibility of accusations made against Prof. Wax. For example, Professor Rodriguez states that “there is *no* basis to believe that Prof. Wax has in fact been discriminating against Black students in grading their exams,” and that the fears expressed by Black students that Prof. Wax “will not give them a fair shake” in her classes or her evaluations are **“largely unwarranted.”** *Id.* at 21 (emphasis added). In other words, Prof. Rodriguez found that Black students’ anxiety about whether Prof. Wax would evaluate them fairly had no

objective or reasonable basis whatsoever. This is hardly surprising. As explained more fully below, the fears of bias are contrary to the plain evidence and are irrational and illogical considering the *blind* grading protocol that is mandated in Prof. Wax's Civil Procedure and Remedies classes.

Dean Ruger fails to mention these critical facts. The Charges also simply ignore Prof. Rodriguez's important conclusion that there is *no* evidence that Prof. Wax is biased against minority students. Contrary to the report's findings, and with no justification whatsoever, the Charges nevertheless repeat the nefarious accusation that Prof. Wax's statements would "lead reasonable students to conclude that they will be judged and evaluated based on their race, ethnicity, gender, or sexual orientation rather than on their academic performance." (Ex. 3 at 7.)

Dean Ruger disregarded critical findings in the Rodriguez Report when he drafted his Charges and accused Prof. Wax of being biased against minority students. He failed to disclose the Rodriguez Report to Prof. Wax in a timely fashion, and she only found out about the report by asking Prof. Rodriguez directly. Dean Ruger attempted to hide the report from Prof. Wax, Penn students, and the Penn community for more than seven months. His attempt to hide and then blackwash the Rodriguez Report was dishonorable, dishonest, and an egregious violation of Penn's pledge of fundamental fairness towards accused University members.

So, on the one hand, Prof. Rodriguez concludes that Prof. Wax is *not* biased against minority students, but Dean Ruger, on the other hand, cites the Rodriguez Report as proof that Prof. Wax *is* biased against minority students. If we were in federal or state court, Dean Ruger would be sanctioned.

B. The Misuse Of Student Allegations.

The Charges and Hearing Board Request contain numerous claims that are distorted, misleading, stale, or just plain fanciful. Particularly egregious are remarks dating from years ago that students claim Prof. Wax made either inside or outside the classroom (it is often not clear). In many cases Prof. Wax never made the statements the students reported. Not surprisingly, those statements have never been verified, corroborated, or substantiated. Nor have relevant contextual details, including classroom or other setting, lessons presented, or topics under discussion, ever been revealed or explained. Without this additional information, the credibility of these accusations cannot be accurately assessed, which will make it impossible for Prof. Wax adequately to defend herself. Although this is not the place to refute or deal with each and every charge, Prof. Wax's need for the information requested in this memorandum in order to mount a full defense is obvious.

C. The Omission Of Key, Materials Facts.

You will not find in any of Dean Ruger's submissions a reference to the fact that many of the comments attributed to Prof. Wax were allegedly made *before* she received the Lindback Award for Distinguished Teaching in 2015. That University-wide prize for extraordinary and outstanding performance in the classroom, which is Penn's highest teaching honor, has been awarded to less than a handful of law professors at Penn. Prof. Wax's record was examined in detail and reviewed with a fine-tooth comb prior to presenting her with the award. The intense and exhaustive scrutiny of Prof. Wax's record that preceded her receiving the Lindback Award, and which was conducted by Dean of Students Gary Clinton and other officials at Penn Law and at Penn's central campus, included a comprehensive review of student evaluations, interviews with a range of students, and a careful solicitation of student comments. This thorough

examination of Prof. Wax's record did not uncover any evidence of the comments alleged in the Charges. No students objected, either before or after the fact, to Prof. Wax receiving this award.

The allegations of supposedly objectionable comments that predate the Lindback Award therefore simply lack credibility. They are most likely the product of faulty student recollections years after the fact, tainted and inspired by Dean Ruger's repeated criticisms, the hostility of activist students objecting to Prof. Wax's political views, and the relentless social media campaign against her. (As Prof. Rodriguez observed in his report, it is "difficult to separate the consternation with [Prof. Wax's] expressed views themselves and the way these views affected her treatment of students.") (Ex. 2 at 40.⁹)

D. The Baseless And False Assertions About Jared Taylor.

Dean Ruger is seeking a major sanction against Prof. Wax because she invited Jared Taylor to be a guest speaker in her Conservative Political and Legal Thought seminar, which the Dean claims, "cross[ed] [a] line." (Ex. 3 at 2.) Dean Ruger also alleges that Mr. Taylor's views have led to "violence towards minorities in this country." *Id.*

These assertions are meritless. The seminar on Conservative Political and Legal Thought in which Mr. Taylor spoke is designed to educate students on the full spectrum of conservative and right-of-center positions in the United States historically and at present, from moderate conservative to the far right. It should be obvious that the presentation of a speaker and the assignment of readings in the seminar are meant to inform and educate the students on these topics, and not to endorse a position. It is bizarre, ludicrous, and entirely antithetical to the

⁹ Despite the implausibility of accusations dating from before the 2015 Lindback Award, Prof. Wax is nonetheless entitled to inspect the record and files compiled by Penn Law and Gary Clinton in support of her Lindback Award, which are pertinent to the credibility of the accusations and essential to her defense in this case.

University's educational mission to suggest that students in a seminar addressing contemporary conservative thought should be barred from hearing from a leader of a sizeable conservative organization or from learning about that organization's activities and beliefs. It is equally outlandish to seek to sanction a professor for presenting this material. Are liberal professors treated this way when they invite speakers who espouse that all white Americans are inherently, systematically, and structurally racists? No.

The complaints about Mr. Taylor also fail to mention the relevant fact that Prof. Wax *sought and received permission* to invite Mr. Taylor to address her class and asked for and received *reimbursement from Penn Law* for the student lunch at which Mr. Taylor spoke. The Charges do not allege that the students in Prof. Wax's seminar objected to hearing Mr. Taylor or were disturbed, upset, "harmed," or "traumatized" by what he had to say. In fact, the session was extraordinarily successful and resulted in a lively discussion, with students and Prof. Wax challenging many of Mr. Taylor's assertions and ideas. But you won't read about that in the Charges.

Dean Ruger also fails to mention that Mr. Taylor has been invited to speak on many other college campuses and has also appeared frequently on numerous mainstream media programs and popular podcasts. He has appeared and debated Black scholar Wilfred Reilly at Kentucky State University, an Historically Black University. Professor Carol Swain, a Black professor, has invited him to address students at Vanderbilt University. More examples can be found here: <https://americanmind.org/salvo/brazen-falsehood/>. On September 2, 2022, Mr. Taylor is slated to speak at Arizona State University at the invitation of that university's chapter of the College Republicans.

Moreover, Dean Ruger has provided no evidence whatsoever to support the pejorative, groundless, and inflammatory accusation that Jared Taylor's views have led to "violence" toward minorities. This assertion is completely unproven and unsubstantiated. It is incumbent on Penn to produce facts and evidence to support this claim. Relying on animadversions directed at Mr. Taylor from the Southern Poverty Law Center (not an unbiased source) is simply inadequate. Professor Wax's ability to defend herself against the Charges based on Mr. Taylor's presentation and the contents of her course requires that Penn provide critical information relevant to this charge.

E. The Misuse Of The Enoch Powell Interview.

All the above objections apply with equal force to Dean Ruger's assertion that Prof. Wax should be sanctioned for assigning in her Conservative Thought Seminar an interview with Enoch Powell, a mid-20th century British politician and parliamentarian. Once again, the content of the reading was squarely within the ambit of the seminar and relevant to the subject matter being presented. This material was assigned to educate students about an historically important conservative figure's positions and thoughts on topics such as immigration and the continuity of Western societies. The notion that the assignment of this material constitutes an infraction against supposed University "rules" or "standards" is not only baseless and nonsensical, but it constitutes educational malpractice. What is next? Will tenured professors at the University of Pennsylvania be terminated if, in a seminar on European twentieth-century conservative thought, they assign the writings of Sir Oswald Mosley?

VI. Dean Ruger Must Be Disqualified As The Charging Party Based On His Demonstrated Bias Against The Respondent.

Dean Ruger should be disqualified as the Charging Party because he has demonstrated extreme bias and animus against Professor Wax. This bias fatally taints his allegations against her and requires his removal. A new Charging Party must be assigned before the process can continue.

On May 6, 2022, Prof. Wax moved for the disqualification of Dean Ruger as the Charging Party. (Ex. 10.) The motion explained in detail the myriad reasons why Dean Ruger cannot be the Charging Party, and why the Charges should be withdrawn; the evidence of his bias is overwhelming.

Not surprisingly, the Dean refused to disqualify himself. It is therefore now up to you, as Chair, to determine the matter. Because the evidence supports the disqualification of Dean Ruger as the Charging Party, the current Charges must be withdrawn, and a new Charging Party appointed.

Prof. Wax provided Dean Ruger with evidence of his bias. That should be enough. But, in doing so, she was at a disadvantage because she was denied access to additional facts, materials, documents, and communications regarding his bias and animus which are in the custody, possession, and control of Penn. Specifically, the University should provide Prof. Wax with all of Dean Ruger's communications, e-mails, texts, internet posts, talks, and speeches regarding Prof. Wax. The University should also produce any documents he helped to prepare at Penn that mention Prof. Wax and are related in any way to the charges against her.

VII. The Handbook's Guarantee That Prof. Wax Will Be Treated Fairly Requires That A Neutral Third-Party Be Retained To Make All Pre-Hearing Procedural Decisions.

Section II.E.16 of the Handbook states in relevant part that the procedures for sanctioning a member of the University “must be handled *fairly*” and that it is “essential to have a process that . . . protects the *rights* of faculty members” (emphasis added). The University is therefore contractually, legally, and morally obligated to provide Professor Wax with a process that is fair and protects her rights.

The University has not done so. It has denied Prof. Wax's multiple requests under the ADA for a postponement of these proceedings for a sufficient period that will allow her to fully recuperate from her cancer and recover from the effects of her cancer treatment. Dean Ruger refused to recuse himself as the Charging Party, notwithstanding his documented bias against her. And Associate General Counsel Burke, in his July 29 letter to me, refused to disclose basic information about whether the proposed Hearing Board members are impartial, which is the *only* way Prof. Wax could make an informed decision about whether to move to disqualify them for prejudice. (Ex. 7.)

The galling part of the process, of course, is that the University, *which is a party to the proceeding*, is the entity making these decisions. That does not a fair and rights-protecting procedure make. Penn cannot be both an interested party and the decisionmaker on procedural questions that are crucial to an impartial resolution of the Charges. The University is acting as prosecutor and judge with no checks or balances on its power to make decisions critical to the conduct of the process. The Hearing Board is both the factfinder and the tribunal determining sanctions. This situation violates Prof. Wax's contractual right to a fair proceeding that protects her rights.

Therefore, to ensure fairness and demonstrate to the watching world that the University and its *Law School* are committed to procedural fairness, the University should appoint a neutral third-party to decide all pre-hearing procedural questions, including what information must be provided to Professor Wax so she can defend herself against the Charges. Having a pre-hearing neutral third-party is the only way that the issue of whether Dean Ruger should be disqualified as the Charging Party can be fairly decided, especially since he is a colleague of the Hearing Board's members. Only a pre-hearing neutral third-party can fairly decide whether proposed Hearing Board members should be disqualified and what information is required to make that call. And it should be up to a neutral third-party whether Prof. Wax's requests for information, clarification, and forensic examination of student records, as detailed in this memorandum, must be granted so that she can properly defend herself against the Charges.

If Penn does not appoint a neutral third-party to decide pre-hearing procedural issues, the process will not be fair and Professor Wax's rights will not be protected, as guaranteed in the Handbook, and required by fundamental principles of fairness. Appointing a pre-hearing neutral third-party is therefore critical to ensuring a fair hearing that protects Prof. Wax's rights.

Without one, there should be no Hearing at all.

VIII. The University Is Obligated By The Handbook To Provide Prof. Wax With Information Relevant To Her Procedural And Substantive Rights.

A. An Independent Forensic Expert Must Be Retained To Study Student Performance At The Law School By Race.

Section II.E.16.4.D of the Handbook states that the University must provide a Respondent with "copies of any . . . University documents that are relevant to the respondent's *procedural* and *substantive* rights in this matter" (emphasis added).

The Charges accuse Prof. Wax of making “inaccurate statements . . . about the characteristics, attitudes, and abilities” of Penn Law students. They also allege that Prof. Wax “disseminated false information about segments of the University community.” These allegations are an obvious reference to Prof. Wax’s statements about Black law student performance during a discussion of the pros and cons of affirmative action with Professor Glenn Loury (misspelled as “Lowry” in the Charges) in a blogging heads podcast in 2017. Similarly, in his Hearing Board Request, Dean Ruger quotes Prof. Wax’s statement in that podcast that “I don’t think I’ve ever seen a Black student graduate in the top quarter of the [Penn Law School] class and rarely, rarely in the top half”; “I can think of one or two students who’ve graduated in the top half of my required first-year course”; and “the Law Review has a diversity mandate.” My client is also alleged to have said that “no law professor can honestly say [that] Blacks are evenly distributed throughout the class, top, middle, and bottom.”

The remarks to which Dean Ruger objects fall into two categories. First, Prof. Wax’s statement on Mr. Loury’s podcast about student rank in class at graduation relates to her personal observations regarding overall student performance (“I don’t think I’ve ever seen . . .”). This concededly is not an assertion intended to objectively reflect the overall situation at Penn Law, but only Prof. Wax’s experience. Any claim that Prof. Wax lied about her own observations is implausible. Prof. Wax has also made positive assertions of fact about actual student performance in her Civil Procedure class which are in line with previous findings, based on actual data, about Black student performance at elite law schools. Prof. Wax has also made statements about the Law Review’s selection procedures at Penn. Both these statements are subject to objective evaluation based on facts within the possession of Penn Law School.

Dean Ruger's repeated objections to these assertions, which he characterizes as false, are at the heart of his request for sanctions against Prof. Wax. Penn Law and Dean Ruger should not be allowed to smear and sanction Prof. Wax for allegedly speaking falsely without backing up these allegations. Fundamental fairness requires Penn to prove its allegations and to provide my client with the means to defend against such charges. Therefore, pursuant to the Handbook, Penn Law must provide Prof. Wax with statistics, facts, evidence, and information about the performance of Black students at the Law School. This is best done via a forensic analysis by an independent expert, chosen by both parties and paid for by Penn.¹⁰ Simply put: Penn Law has the evidence that will demonstrate that Prof. Wax's remarks were accurate and truthful, and production of this information must occur before any further proceedings in this case take place.

It bears repeating that the comments to which Dean Ruger objects are in line with facts reported by many others. As noted by Robert Verbruggen in a 2018 National Review article, Richard Sander at UCLA wrote in 2004 that, "among elite schools, fewer than 10 percent of Black students ranked in the top half in terms of first-year grades; at all schools, fewer than 15 percent of Blacks made the top half of third-year cumulative grades."

<https://www.nationalreview.com/corner/if-amy-wax-is-wrong-lets-see-the-data/>. An

independent forensic expert will be able to tell us if those patterns are also at work at Penn Law.

¹⁰ Individuals who can perform this analysis include economist Roland Fryer of Harvard, Peter Arcidiacano of Duke, law professor Richard Sander of UCLA, or Richard Hanania (Center for the Study of Partisanship and Ideology). An outside expert is necessary to guard against the manipulation of evidence of student grades as well as student racial identity that might obscure the actual profile of performance across groups.

B. An Independent Forensic Examination Of Class Performance By Race Is Needed To Test The Accuracy Of Dean Ruger’s Allegations That Prof. Wax’s Statements Were “False” Or “Inaccurate.”

Dean Ruger’s claims that Prof. Wax’s assertions are “false” or “inaccurate” are cited as a justification for sanctioning her. But Dean Ruger has never provided *any* data on Black student performance at Penn Law to back up his accusation. Indeed, he has stated on at least one occasion that the law school keeps no records by race of student performance – a statement that is entirely inconsistent with his insistence that Prof. Wax’s assertions are false and inaccurate!¹¹ If it is true that the law school does not keep records on student performance by race, then no Charging Party can sustain the burden of proving that Prof. Wax’s statements were “false” or “inaccurate.” If it is *not* true, and the law school *does* keep records on student performance by race (or they can be determined), then Dean Ruger has been lying and the school has the information necessary for Prof. Wax to mount a defense.

C. An Independent Forensic Examination Of Academic Performance By Race Will Also Demonstrate That Dean Ruger Breached The University’s Confidentiality Rules By Accusing Prof. Wax Of Making “False” Or “Inaccurate” Statements.

Dean Ruger also accuses Prof. Wax of breaching the University’s rules on confidentiality by making observations about Black student performance at Penn Law. If that is the case (and our position is to the contrary), then someone needs to bring charges against Dean Ruger because he is breaching those same confidentiality rules by stating that Prof. Wax’s statements are false. Those alleged rules make no distinction between types of assertions revealing information about student performance, whether positive or less so. The double standard here is manifest and glaring. Moreover, by commenting on the caliber of Black student performance at Penn Law

¹¹ See Email From Dean Ruger to Members of the Penn Law Community, dated March 13, 2018 (“Penn Law does not . . . collect, sort, or publicize grade performance by racial group.”). Even if it is accurate that Penn Law has not, in the past, collected and sorted performance by racial group, there is no barrier to gathering and analyzing the pertinent data now.

and asserting the inaccuracy of Prof. Wax's claims, Dean Ruger has waived any confidentiality objections to our requested independent expert and third-party examination and disclosure of the pattern of student grades by race in these proceedings.

D. The Independent Forensic Expert Will Also Study Facts Relevant To Whether Professor Wax Is "Biased" Against Minority Students Relative To Other Professors.

The Charges also allege that "reasonable" minority students harbor the fear that Prof. Wax is biased against them, and that she will not evaluate them objectively or fairly. (Ex. 3 at 5.) These contentions were used to strip Prof. Wax of her mandatory first year Civil Procedure class as well as to justify creating redundant parallel classes for other courses she teaches.

However, as already noted, Prof. Rodriguez reviewed the allegations from the April 27, 2021 complaint that Black students could not get a "fair shake" in Prof. Wax's class and found them "largely unwarranted." (Ex. 2 at 21.) He ultimately concluded that minority and Black students' fears that Prof. Wax would be biased against them were unreasonable and unfounded. First, there was absolutely no evidence of bias by Prof. Wax against anyone. *Id.* In addition, the law school uses a *blind grading policy* for first-year classes, which Prof. Rodriguez found that Prof. Wax had never breached. *Id.* at 21. Prof. Rodriguez concluded that "there is *no basis* to believe that Prof. Wax has in fact been discriminating against Black students in grading their exams." *Id.* (emphasis added). The degree of dishonesty shown by Dean Ruger's failure to mention the blind grading policy in any of his filings in this case is staggering.

The blind grading protocol, which is mandatory for all first-year classes, prevents professors from seeing the identity of students before submitting grades and permits minimal adjustment of grades thereafter. Because of this practice, Prof. Wax was never aware of the race of her Civil Procedure students when assigning grades in the course, which were based

exclusively on their final examination score. Moreover, Prof. Wax never adjusted grades up or down – even slightly – for class participation or other factors after the names were revealed. Therefore, it was simply impossible for Prof. Wax to have exercised any bias in her grading or evaluation of students. This was the conclusion of Prof. Rodriguez.

In sum, there is no basis whatsoever to conclude that Prof. Wax was biased against minority students in grading exams for the simple reason that Penn’s blind grading policy makes that impossible. Nonetheless, Dean Ruger continues to repeat, as a basis for sanctioning Prof. Wax, that “reasonable” minority students could conclude that she will be biased against them and will treat them unfairly. (Ex. 3 at 7.) To discredit these scurrilous claims and conclusively demonstrate their lack of any reasonable or objective basis, a forensic expert must be retained to study the grades handed out to Prof. Wax’s students by race or minority status. The expert will compare the grades assigned in Professor Wax’s classes to those assigned in other mandatory Civil Procedure classes, as well as in other first-year blind graded courses in other subjects.

E. The Law School Must Produce All Information On How Members Of The Law Review Are Chosen And The Extent To Which Race Is A Factor.

Dean Ruger has also faulted Prof. Wax for suggesting, allegedly falsely, that the Penn Law Review practices some form of racial affirmative action. The Dean’s accusation is puzzling given Penn Law Review’s own public admission that the Law Review has used race as a factor in choosing student members and leaders, as documented in a 1995 New York Times article. *See* <https://www.nytimes.com/1995/07/07/us/law-review-masks-diversity-in-a-new-admission-system.html?smid=em-share>.

No evidence has been offered that the Law Review’s policies or practices have changed since that admission. To clarify whether Penn Law Review continues to use affirmative action in

selecting members and editors, Prof. Wax is entitled to have evidence pertinent to that question made available for analysis and examination.

F. What The Independent Forensic Analysis Will Entail.

The analysis by an independent forensic expert will be based on a review of student grades, class rank, and class honors at Penn Law by race, with a focus on Black versus non-Black student performance for the years 2001-2022 (Prof. Wax's years teaching at Penn Law). Names will be redacted, and the focus will be on first-year, blind graded classes, but it will also include grades from upper years, both blind graded and not. Upper year classes that are not blind graded should be analyzed separately because they might be less probative of actual racial differences in academic achievement in light of trends in grade inflation and the potential efforts of instructors to try to create more racially equalized results. The analysis will also include Black versus non-Black student GPA and class rank at graduation.

Relevant information for the analysis can be gleaned in part from documents listing graduating students by class rank that have been prepared yearly for use by the Penn Law Clerkship committee on which Prof. Wax served for many years. Those rank lists can then be matched up with information on students' race from admissions files and other sources of information. (The outside forensic expert will apply his expertise to the question of how best to perform the analysis.) Other pertinent sources of information in Penn Law records must also be made available so that a complete and comprehensive analysis can be performed.

The forensic expert will also compare the academic records and credentials of Black versus non-Black law review members from 2001-2022. The analysis will focus on first year grades in blind-graded classes, which is the most important information available to the Law

Review at the time membership decisions are made. But it will also include scrutiny of the overall records of Law Review members by race for all three law school years.

The forensic analysis will also include (but will not be limited to) the following:

1. A statistical comparison of the grades of Black students versus non-Black students in all first-year blind graded classes from 2001-2022, including an analysis of whether Black students are uniformly represented throughout the grade distribution in each class on each subject and, if not, the extent to which their grades deviate from an expected uniform distribution of Black students for each class in each subject and overall. This should include specific information on the percentage of Black students' final grade rankings in each segment of each first-year class, including all deciles, the top half, and in the top quarter of each class.
2. An analysis of whether the distribution of Black student grades in Prof. Wax's first year Civil Procedure class from 2001-2018 (when the Dean stripped her of first-year teaching responsibility) differs or deviates from the distribution for classes taught by other Civil Procedure professors, and by other professors in other first-year subjects. This analysis is necessary to determine whether there is any objective evidence that Prof. Wax is "biased" in her evaluation of Black students compared to other first year professors in Civil Procedure and other subjects.
3. Data on the distribution from 2001-2022 of graduating Black students in the law school class, including their ranking compared to other students and the percentage of Black students who receive honors at graduation compared to their presence in the class overall. This would include, but would not be limited to, documents listing graduating students' class rank prepared yearly for the faculty Clerkship Committee at Penn Law.
4. The first-year grades and GPA, final all-year GPA, and final class rank of Black versus non-Black student editors and editorial board members of the Penn Law Review for 2001-2022.

G. Now Is The Time To Release Information About Grade Performance By Race At The Law School.

Prof. Wax's demand for a forensic analysis of class performance by race is an issue of fundamental fairness, the protection of rights, and fidelity to the Handbook which guarantees Prof. Wax access to information concerning her substantive rights. ***The University cannot seek to sanction Prof. Wax for her comments on Black student performance at Penn Law while, at the same time, refusing to provide information about Black student performance at Penn Law.***

As Robert Verbruggen bluntly puts it in his article: “if Penn Law is different” from the outcomes at elite schools like UCLA that also practice affirmative action, “let’s see some numbers.” Indeed. Let’s see some numbers. Those numbers are essential to my client’s defense; the production of those numbers is guaranteed by the Handbook; and the fairness guaranteed by the Handbook mandates their production.

It is also long past time for Penn to reveal the factual basis and underlying evidence pertinent to the accusation that Prof. Wax spoke inaccurately about the racial pattern of student performance at Penn Law, that “reasonable” minority students can expect her to be biased against them, and that Prof. Wax falsely asserted that Penn Law Review takes race into account in choosing its members and editors. The disclosure and examination of all materials pertinent to these allegations are essential to my client’s ability to defend herself against charges that are grievously injurious to her reputation and that the Dean is relying on in his request for “major sanctions” against her.

The evidence relevant to these claims and essential to Prof. Wax’s defense is solely in the possession, custody, and control of Penn Law. Therefore, the Law School and Dean Ruger must permit and arrange for a thorough and comprehensive forensic examination and analysis by an outside expert of the data, evidence, and facts pertinent to those accusations. A person agreed upon by both parties must be appointed at Penn’s expense.

In sum, fundamental fairness requires that Professor Wax be given evidence pertinent to her affirmative defenses to the Charges. That can only be done, in this case, by an independent forensic analysis approved by both parties. The University’s failure to provide the evidence requested would violate basic principles of justice and fairness. Fidelity to fairness and Prof. Wax’s rights are guaranteed by the Handbook. They are also Penn *Law* School values that it

pledges to honor and uphold, and that are essential to the standards that the Law School sets for its students. Without Penn's disclosure of the necessary data and information, Prof. Wax will be unable to mount a defense to the Charges. It would be as if a prosecutor refused to provide exculpatory *Brady* material but went full steam ahead with a trial. It's unconscionable. Under such circumstances, any hearing would be a show trial worthy of Stalin.

If Penn fails to either provide the information requested, or retain an agreed-upon forensic expert, Prof. Wax will continue to suffer from the unsubstantiated and unproven accusations that she spoke falsely about student performance and the Law Review admission process. Failure to provide the information means that the University will be keeping from her evidence that only it has and that will categorically rebut the charge that she is biased against minority students. And all of this will transpire while grievous damage is done to her academic and personal reputation. The situation must be rectified.

H. Ramifications Of Not Producing The Information Requested.

If the University refuses to provide Prof. Wax with information about grade performance at the Law School by race, then Dean Ruger must publicly retract his statement that Prof. Wax spoke falsely and inaccurately about Black Penn Law student performance. Failure to produce the material would also require that Dean Ruger publicly retract his statement that "reasonable" Black Penn Law students can expect and fear that Prof. Wax will be biased against them. He would also have to publicly retract his assertion that Prof. Wax spoke falsely about the Penn Law Review's use of race-conscious methods to select editors. Finally, he would have to restore Prof. Wax's prerogative to teach first year Civil Procedure and ensure that she has the option to do so in fulfillment of her teaching duties.

Conversely, if the data *is* made available and it *does* prove that Professor Wax's observations about Black Penn Law student performances were accurate and true (and not "inaccurate" and "false"), then, obviously, the Charges must be withdrawn, and the Dean must make the public statements outlined above. This is because accusing a professor of "racism" without proof or validation is not only unfair, unjust, and contrary to basic principles of due process, but it is also libelous. If Penn Law and the Dean fail to provide evidence requested or, in the alternative, fail publicly to retract the charges against Prof. Wax, then Penn Law and Dean Ruger will be subject to a libel claim.

IX. Other Information Which The University Must Provide Before Prof. Wax Can File An Answer.

Prior to any further proceedings in this case, Prof. Wax must be provided with complete, comprehensive, and detailed information and clarification on all the allegations against her, and the materials and documents pertinent to those allegations. These are absolutely necessary for Prof. Wax to provide an affirmative defense and to fulfill Penn's contractual guarantee of treating her fairly and protecting her rights, as memorialized in the Handbook. Prof. Wax must also be given ample time to investigate and prepare for any subsequent hearing.

Therefore, to streamline the process and create a useable record for the Hearing Board and any tribunal which may review the process, we also request that you, as Chair, instruct the University to provide the following:

1. A revised charging document that:
 - a. Presents the charges in an orderly, chronological, and accessible format to which we can provide an Answer;¹²
 - b. Includes the dates on which Prof. Wax’s alleged statements were made, provided in chronological order and with cross references between documents for each statement;
 - c. Contains a complete statement of all allegations, accusations, and charges that will be presented to the Hearing Board;
 - d. Includes an accurate and complete explanation of the context for the alleged remarks cited in the Charges and that honestly and accurately captures the content of the argument or point Prof. Wax was making or position she was stating; and
 - e. Attaches as exhibits all supporting materials and pertinent reports for each allegation.
2. All evidence upon which the new charges are based.
3. A list identifying every individual who lodged complaints against Prof. Wax, their years attending Penn Law School, if pertinent, and their current contact information.
4. All memoranda, transcripts, reports, and all other documents prepared by Professor Daniel Rodriguez in connection with his investigation.
5. Precise, specific, and particularized definitions of the terms “racist, sexist, xenophobic, and homophobic,” “white supremacist” and “white supremacy.”

¹² Ideally, a revised charging document would resemble a complaint or indictment with numbered paragraphs to enable Prof. Wax to prepare an answer and affirmative defenses.

6. A statement that, in connection with those terms, provides Prof. Wax with the following information:
 - a. Where those definitions are found in materials governing the speech and expression by University members;
 - b. The official policy, procedure, guideline, manual, or other written communication containing those definitions and forbidding statements meeting the definitions;
 - c. How and whether those definitions apply to each alleged statement, comment, or remark by Prof. Wax as set forth in the revised charging document; and
 - d. The reasons that those statements serve as justification for officially penalizing or sanctioning Prof. Wax, and the source of authority for such sanctions in the materials governing faculty speech.
7. A precise definition and explanation of the “mission, values and standards” of the University, and a statement of the official policy, procedure, guideline, manual, or other written communication setting forth those definitions.
8. A precise definition and explanation of the “basic norms of civil and professional behavior” which Professor Wax allegedly violated, and a copy of any University policy, procedure, guideline, manual, or other written communication which sets forth those “behavioral norms” in precise, particularized, and specific terms that provide ample and adequate notice to University members enabling them to determine which pronouncements violate those standards.
9. Based on the definitions provided in the items above, a precise and detailed explanation of why each of the alleged statements or remarks made by Prof. Wax, as

listed in the revised charging document, meets the definitions, and how, exactly, those statements violate the “missions, values and standards” of the University and the applicable “basic norms of civil and professional behavior.”

10. A definition of the term “derogatory” as applied to Prof. Wax’s statements; the source of the prohibition against making “derogatory” statements; an explanation of how the term, as defined, applies to her supposedly offending statements; and an explanation of whether the term, as defined, applies to and renders actionable statements by University members accusing Prof. Wax of “racism, sexism, xenophobia, homophobia” or otherwise criticizing her supposed remarks or statements, such as Dean Ruger’s comments at the September 19, 2019 secret Town Hall meeting with students. (Ex. 10 at 3.)
11. A precise definition and explication of the “core values” of the University and any official document, policy, guideline, memorandum, procedure, or other written communication which memorializes what the “core values” of the University are.
12. All other statements by Penn members that have ever been found by Penn to be:
 - a. “racist, sexist, xenophobic, and homophobic”;
 - b. “white supremacist”;
 - c. violative of the “mission, values and standards” of the University;
 - d. violative of the “basic norms of civil and professional behavior”;
 - e. violating a prohibition on “derogatory” comments that Penn has deemed actionable or the basis for sanctions against a Penn University member.
13. The name of any University member who was sanctioned or terminated by the University for undermining the “core values” of the University or for making “racist,

sexist, xenophobic, and homophobic,” or “white supremacist” statements, or who was found to have violated the “mission, values and standards” of the University, or the “basic norms of civil and professional behavior,” or to have made “derogatory” comments about Penn members or others.

14. In connection with any of the findings and violations listed in items 12 and 13 above, provide as well:

- a. The contact information for the individual(s);
- b. The charges in each instance;
- c. The evidence presented in each instance;
- d. Any written documents generated in connection with each instance; and
- e. The disposition of any charges and the sanction imposed, if any.

15. All records related to the Quinn Emanuel investigation, including amounts invoiced and paid, reports, memoranda, transcripts, and other documents, as well as names and contact information for every person interviewed or consulted by the law firm in this matter.¹³

16. All evidence that the Charging Party intends to introduce in support of the allegation that Jared Taylor’s views have led to violence towards minorities.

17. All letters and correspondence that Dean Ruger has ever received from students and other individuals that are critical of Penn’s treatment of Prof. Wax and that have been submitted in support of her, her teaching, her role in the University, her right to free expression, her opinions, or are otherwise relevant to the charges against her.

¹³ That Prof. Wax was never informed of the Quinn Emanuel investigation and never interviewed by that firm is shocking.

18. All evaluations, including student comments and ratings, in courses Prof. Wax has taught at Penn Law from 2001-2022.
19. The complete file and materials relevant to Prof. Wax's 2015 Lindback Award, including documents prepared, materials collected, and interviews conducted by Dean Gary Clinton as well as all communications, documents, and reports prepared by other University officials in connection with the decision to award the Lindback Award to Prof. Wax.
20. Any study, document, or analysis of which Penn or Dean Ruger is either aware or which is in their possession, custody, and control, which demonstrates or supports the claim that Jared Taylor's views have incited or caused "violence towards minorities in this country."
21. The name and contact information of any individual who was the victim of violence that Penn claims was caused by the views expressed by Jared Taylor when he was on campus; and any evidence that Mr. Taylor's appearance as a speaker in Prof. Wax's Conservative Thought seminar caused harm to any student or University member, including students in Prof. Wax's Conservative Thought class.
22. A comprehensive, point by point review addressing the statements, findings, and conclusions in the Rodriguez Report regarding the charges filed against Prof. Wax in April 2021, and an adjustment of charges in accordance with his findings on bias and other relevant matters.
23. A detailed, precise, and specific definition and description of the "line" that Professor Wax's invitation to Jared Taylor to speak to her Conservative Thought seminar allegedly "crossed," the source(s) in the Handbook or elsewhere for the definition and

description of that “line,” and the basis in the University’s rules or regulations for imposing on Penn members the obligation not to “cross” such a “line.”

24. The results of conducting an item-by-item review of Prof. Wax’s Conservative Thought seminar syllabus and reading lists for all the years she has taught the course at Penn, with a full evaluation and explanation of whether each item has or has not “crossed a line” as defined by Penn.
25. Complete information on whether and when other syllabi and courses at Penn and Penn Law have been examined and reviewed for “crossing the line” or for other infractions and offenses of supposed “standards” or “values” of the University. The information must include, but is not limited to, a comprehensive report on whether Penn has reviewed and evaluated other course syllabi for items or readings by individuals who, for example, have expressed any negative opinions of minority groups or have ever held views that Penn defines or characterizes as “racist,” “sexist,” “xenophobic,” “white supremacist,” “homophobic,” “derogatory” or in violation of Penn’s supposed “values,” “mission,” or “behavioral standards.”
26. For each statement, remark, or comment allegedly made by Prof. Wax as reported by a student, faculty member, or other person affiliated with Penn:
 - a. Whether the comment was made in class or out of class.
 - b. For alleged in-class comments:
 - i. In which course it was made, and on what date;
 - ii. What lesson was being presented in that session and what topic addressed;

- iii. How the supposed statement was relevant to the topic, and how it came up or was introduced in discussing the topic;
 - iv. Whether and when the student complaining of the remark reported the remark to Dean Gary Clinton or to any other staff member at Penn Law;
 - v. A list of all students and individuals who were present when the alleged remark was made;
 - vi. A list of other students who were present and who have corroborated the remark; and
 - vii. A list of the other students who were present and who reported the remark to Dean Gary Clinton or other staff members at Penn.
- c. For out of class remarks:
- i. The date of the supposed statement, remark, or comment;
 - ii. The occasion or context for the alleged remark – *e.g.*, a formal panel discussion, academic presentation, social gathering, meal or coffee with students, informal conversation in a Penn building or elsewhere, during Prof. Wax’s office hours. *etc.*;
 - iii. The topic or issue being addressed and how the remark related to those or came up in the proceeding or conversation;
 - iv. A list of students or others who heard or witnessed the supposed comment or remark;

- v. A list of other students or individuals present when Prof. Wax made the supposed remark or comment and who have corroborated them; and
 - vi. When or whether the other students or individuals present reported the comment or remark to Dean Gary Clinton or other staff at Penn.
- 27. All communications on whether Penn has ever imposed any type of sanction, including “major sanctions,” on any other professor or University member for engaging in speech or expression in or outside of class allegedly in violation of “university standards.”
- 28. All communications regarding whether other University members have been found to have committed a “major infraction” or to have evinced a “disregard” for the Penn Community, and whether any of those individuals have been sanctioned for their speech, opinions, or expression.
- 29. For the years 2000 to 2022:
 - a. The name of any individual who was alleged to have committed a major or minor infraction of “University standards” and, in connection therewith, provide as well:
 - i. The charges;
 - ii. The evidence presented against this individual; and
 - iii. Any documents generated in connection with the charges.
 - b. The name of any individual who was terminated by the University for committing a major infraction of “University standards” and, in connection therewith, provide as well:

- i. The charges;
- ii. The evidence presented against this individual; and
- iii. Any documents generated in connection with the charges.

X. Prof. Wax's Offer To Resolve The Matter.

Dean Ruger wrote to Prof. Wax that he intended to file charges with the Faculty Senate unless “a mutually agreed resolution of the issues presented” could be reached, as mandated by the Handbook. (Ex. 3 at 10.) But he has never made a concrete offer of settlement. Instead, he has simply informed Prof. Wax of the option of retiring on the same terms available to other Professors of her age and experience. That is not a settlement offer.

Professor Wax believes that a settlement in this matter is possible. The charges against her bring to the fore critical issues of academic freedom and expression. The crux of the dispute concerns alleged statements and comments that Dean Ruger and Penn tar as “racist, sexist, xenophobic, and homophobic” or otherwise find worthy of sanctions. Some of those allegations are simply false and some deliberately or carelessly misrepresent her remarks and positions, but others refer to Prof. Wax’s actual words. Prof. Wax considers the statements she actually made to be protected speech, fact-based opinions, and the expression of positions and views on sometimes controversial topics that were arrived at through research, teaching, reading, and observation. Under fundamental principles of academic freedom, Prof. Wax is fully entitled to say what she said without penalty or sanction.

The charges against Prof. Wax, and the University’s justifications for those charges, are also relevant to the adequate training of lawyers. Penn Law graduates must operate within an adversary system that requires them to hear and deal with a wide range of positions and opinions, including many with which they adamantly disagree. They must also operate within a free

society in which large numbers of citizens do not share their assumptions, attitudes, beliefs, or values. It is vital to the quality of education at Penn and Penn Law that the members of the University community be able to discuss a range of ideas pertinent to law and policy freely and openly without fear of discipline, punishment, or penalty.

Dean Ruger and members of the Penn Law community, including many students and alumni, have evinced a dismaying lack of understanding of the core axioms and tenets of free expression, the meaning of the University's declared commitments to freedom of thought and speech for faculty and other members, the obligation to show tolerance toward a wide range of dissenting ideas, and the contractual guarantees and protections afforded faculty by tenure. Instead of correcting this ignorance and these misunderstandings, Dean Ruger has reinforced and perpetuated them. On the Penn law website, Dean Ruger is quoted as stating that, "A great law school should reflect the diversity of opinion and background that exists in the outside world." In a presentation to the Faculty Senate in February 2022, Law Professor Anita Allen acknowledged that Penn is committed to upholding the principles and practices enshrined in the First Amendment of the Federal Constitution. However, in bringing charges against Prof. Wax for her expressed beliefs, opinions, and statements, Penn has ignored and contravened these commitments, to the distress and confusion of many Penn members and students.

A well-established tenet of First Amendment doctrine, designed to protect the expression of a "diversity of opinion" that the Dean states is a core principle of Penn Law School, is the oft-repeated precept that a listener's offense, upset, hurt, distress, or other negative emotional or psychological response, cannot be allowed to silence speakers or form the basis of any sanctions or formal penalty imposed on them. This is known as the "heckler's veto" principle. Penn Law School has egregiously failed to inform and instruct students that giving in to a "heckler's veto"

on campus is a grievous threat to free speech practices and academic values more generally. To the contrary, Penn Law and Dean Ruger have flouted this basic, central principle by encouraging and permitting students and others to exercise a “heckler’s veto” over Prof. Wax. By giving in to students’ untutored, uninformed, emotional reactions and whims, and by uncritically indulging indiscriminate claims of “offense,” “harm,” and emotional “trauma,” Dean Ruger and Penn Law are using a “heckler’s veto” to suppress unpopular ideas on campus by attempting to punish Prof. Wax for her unapproved opinions. By doing this, Dean Ruger and Penn Law have repudiated long-standing and vital protections for dissenting voices and betrayed fundamental principles of academic free speech and expression.

Penn Law’s abandonment of the responsibility to teach and enforce the basic democratic principles of free expression and tolerance calls out for correction. The mishandling of Professor Wax’s case represents a “teachable” moment for the students, faculty, Penn Law alumni, and the public. Prof. Wax therefore proposes that the Charges against her be withdrawn, and that Penn Law set up a series of tutorials and presentations on classic free speech principles, defenses, political roots, and educational and democratic benefits. These tutorials would look at past and present defenses of free expression on campus, including but not limited to the Yale Woodward Report, the Chicago Principles, the Kalven Report, and the American Association of University Professors’ statements defending professors’ expressive rights. *See, e.g.*, the 1994 AAUP statement On Freedom of Expression and Campus Speech Codes, stating that, “On a campus that is free and open, no idea can be banned or forbidden. No viewpoint or message may be deemed so hateful or disturbing that it may not be expressed.”

Some of the tutorials should present the positions put forward in a document posted on the Heterodox Academy website on August 5, 2022, entitled Merit, Fairness, and Equality by

Dorian Abbot, Ivan Marinovic, Richard Lowery, and Carlos Carvalho, which eloquently and candidly explains the basis for a principled opposition to current illiberal, “woke” practices on campus, and argues for an alternative approach centered on free expression and the search for truth.

Members of the Penn community and others would be invited to address and explore, among other things, the importance and benefits of a free and open exchange of ideas in the context of educating young people, with an emphasis on training attorneys to function within an adversary system in which they must hear, consider, and deal with all sides of important legal and policy questions.

The program would include presentations and seminars on substantive topics related to Prof. Wax’s statements and positions and conservative opinion generally. Such presentations would ensure that members of the Penn Law community hear conservative perspectives and points of view that are rarely if ever articulated or fully explored on campus today. Professor Wax’s course in Conservative Political and Legal Thought provides a usable blueprint for the topics and ideas to be covered by these presentations. Hearing those viewpoints is essential to the proper education of Penn Law students and students at Penn more generally.

Conclusion

I respectfully request that you postpone these proceedings until Prof. Wax's cancer treatment is completed. You are putting her health at danger.


I cannot know whether to move to disqualify proposed Hearing Board members if the University does not give me basic information about whether they have been compromised by, for example, the Anita Allen presentation. Please have the University provide that information.

A new charging document, filed by a new Charging Party who is not biased against my client and that corrects the defaults in the Charges, should be ordered. As Chair, it is your job to make sure that there is an even playing field for Prof. Wax. Given the severity of the charges, and the fact that the University is both charging party *and* investigative officer *and* judge, it is necessary that you retain a neutral third-party to determine pre-hearing issues. Please do so.

The University has in its possession, custody and control, access to information which demonstrates the falsity of some of the allegations against Prof. Wax. Especially important is the retention of an independent forensic expert to analyze law student performance by race. Likewise, the University must provide information and clarification relevant to its decision to seek sanctions for instances of speech and expression or for comments Prof. Wax has allegedly made. Please instruct the University to retain the requested expert and provide the other information requested.

Finally, I have presented a good-faith settlement proposal which will make the University of Pennsylvania the gold standard in how to deal with preserving academic freedom against claims of allegedly sanctionable speech. I encourage you to give it serious attention.

Dated: August 31, 2022

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