

## Complaint Regarding Professor Amy Wax's Employment at the University of Pennsylvania Carey Law School

### I. INTRODUCTION

The University of Pennsylvania (“the University”) is committed to maintaining academic freedom, which includes freedom of inquiry, discourse, teaching, research, and publication.<sup>1</sup> The academic freedom extended to all members of this institution is essential to the creation of a robust intellectual environment. However, academic freedom does *not* give members of this institution carte blanche to harm one another. Moreover, consistent with University policies and procedures, the University of Pennsylvania has a duty of care to safeguard the safety, wellbeing, and dignity of its students.

Over the past several years, Professor Amy L. Wax<sup>2</sup> has repeatedly violated the Terms and Conditions of Faculty Employment at the University.<sup>3</sup> Her actions are much more than an unintentional mistake; rather, they amount to a flagrant disregard of University standards, rules, and the mission of the University. Accordingly, we request that the University impose a major sanction against Professor Wax, pursuant to Section II.E.16 of the Faculty Handbook.<sup>4</sup> We request that Professor Wax’s position as a faculty member be terminated. Alternatively, we request that Professor Wax’s tenure be revoked.

### II. STANDARD OF REVIEW

The University Faculty Handbook discusses the protocol for imposing sanctions against faculty members. Sanctions may be imposed against a faculty member who committed either a major infraction or a minor infraction. A “major infraction” includes any action “involving flagrant disregard of the standards, rules, or mission of the University or the customs of scholarly communities.”<sup>5</sup> When a member of the Faculty commits a major infraction, the University can take a wide variety of disciplinary actions, including termination.<sup>6</sup> Further, a “minor infraction” includes any action “involving disregard of the University’s standards, rules, or mission, or the customs of scholarly communities that is less serious than a major infraction.”<sup>7</sup>

Although the faculty members have considerable privileges and protections through tenure, they also have a “concomitant responsibility” to “use the opportunities thus provided for the advancement of the purposes of the University and of the communities it serves.”<sup>8</sup> While faculty members are entitled to “freedom in research and in the publication of results,” such

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<sup>1</sup> University of Pennsylvania Faculty Handbook, II.A.

<sup>2</sup> Professor Amy L. Wax is the Robert Mundheim Professor of Law at the University of Pennsylvania Carey Law School.

<sup>3</sup> Faculty Handbook, *supra* note 1, at II.E.

<sup>4</sup> *Id.* at II.E.16 (1)(B)(8) (“Major sanction: Serious penalties that include, but are not limited to, termination; suspension; reduction in academic base salary; zero salary increases stipulated in advance for a period of four or more years.”).

<sup>5</sup> *Id.* at II.E.16 (1)(B)(7).

<sup>6</sup> *Id.* at II.E.16(1)(B)(10).

<sup>7</sup> *Id.* at II.E.16(1)(B)(9).

<sup>8</sup> *Id.* at II.C.1.

liberties are subject to the adequate performance of their academic duties.<sup>9</sup> Moreover, faculty members are entitled to freedom of expression “in the classroom in **discussing his or her subject.**”<sup>10</sup> (emphasis added).

### III. ARGUMENT

The following discussion includes the accounts of current students and alumni who have had disturbing encounters with Professor Wax. Their identities will remain anonymous due to fear of retaliation.

#### A. Professor Wax’s derogatory remarks harm students both inside and outside of the classroom

##### 1. Statements regarding Black students’ academic competency

Professor Wax has repeatedly inflicted demonstrable harm at Penn Law; her statements over the years have created a learning environment that is hostile to students. Her recent bigoted statements, along with her history<sup>11</sup> of false and disparaging comments made against students of color, deny those students equal treatment in her classroom and thus at the Law School. This is an egregious violation of University policy that warrants a sanction.

Professor Wax has a long history of making racist statements in her capacity as a professor of the University. A Penn Law graduate who was a student during the 2009-2010 academic year recalls first hearing Professor Wax’s racist rhetoric in 2009 at a Penn Law panel discussion to promote Wax’s book, *Race, Wrongs, and Remedies: Group Justice in the 21st Century*. Although Penn Law professors were present, “no panelist or professor spoke up to truly challenge her blatant racism.” Penn BLSA organized a panel in 2010 to directly counter Professor Wax’s racist views that were offered at her book promotion panel. Professor Wax agreed to attend the Penn BLSA panel under the stipulation that she be allowed to invite one guest panelist. Professor Wax chose John Derbyshire as her guest panelist and Penn BLSA invited him. At the time, John Derbyshire was a columnist for the *National Review* (he was later fired in 2012 for racist, “indefensible” remarks about Black Americans).<sup>12</sup> At the Penn BLSA panel, Derbyshire argued that African Americans had lower cognitive ability than white Americans and said, “racial disparities in education and employment have their origin in biological differences between the human races.”<sup>13</sup> After the panel, the alum recalls going to Professor Wax’s office hours to ask if she agreed with Derbyshire’s statements that Black people were inherently inferior to white people. Professor Wax responded, “You can have two plants that grow under the same conditions, and one will just grow higher than the other.”

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<sup>9</sup> *Id.* at II.A.

<sup>10</sup> *Id.*

<sup>11</sup> See Joe Patrice, *Amy Wax Relieved of her 1L Teaching Duties After Bald-Face Lying About Black Students*, ABOVE THE LAW (Mar. 13, 2018), <https://abovethelaw.com/2018/03/amy-wax-relieved-of-her-1l-teaching-duties-after-bald-faced-lying-about-black-students/2/?fbclid=IwAR0mpVt1HtgEcSMg97UEaOkT7sWE0Ka27xA2ZgzBw4FKs7S16OHb7q1toNI>

<sup>12</sup> See Dylan Byers, *National Review Fires John Derbyshire*, POLITICO (Apr. 4, 2012), <https://www.politico.com/blogs/media/2012/04/national-review-fires-john-derbyshire-119887>.

<sup>13</sup> John Derbyshire, *Remarks at Panel Discussion University of Pennsylvania Law School April 5, 2010*, <https://www.johnderbyshire.com/Opinions/HumanSciences/upennlaw.html>

Not only does Professor Wax rely on questionable arguments in conversations with students, but she also comes to questionable conclusions in her academic scholarship in service of her racist beliefs. We matriculated into Penn Law to appropriately engage with perspectives unlike our own. To that end, many of us deliberately took courses with faculty members with whom we disagreed on a vast number of legal, cultural, and political issues. As a tenured faculty member of the University, Professor Wax certainly has the right to share her views, but not to degrade students with remarks based on her own white supremacist worldview and eugenics—an unfounded pseudoscience that has consistently been dismissed by the scientific community as lacking scientific value and propagating racial animus and discrimination.

Professor Wax also targets minority students by making false claims about their academic success. In a September 2017 interview with journalist Glenn Loury, Professor Wax claimed that she had never seen a Black student graduate in the top quarter of the class, and “rarely, rarely in the top half.” She also claimed that Black students were chosen to join the University of Pennsylvania Law Review due to a nonexistent “diversity mandate.” When these comments surfaced in March 2018, Dean Theodore Ruger corrected the record, stating that her claims were false. In the Loury interview, Professor Wax offered the supposed failure of students in her own Civil Procedure course as evidence that Black students did not belong at Penn Law. In his response, Dean Ruger noted that Professor Wax “is not free to transgress the policy that student grades are confidential, or to use her access to those Penn Law students who are required to be in her class to further her scholarly ends without students’ permission.”

Students of color are denied equal opportunity when they are forced to surmount challenges not faced by white students. Professor Wax’s previous statements lead students of color to reasonably assume that she has violated the anonymous grading policy—and may continue to violate it. When she made statements that Black students rarely score above the 50th% percentile, she raised the inherent possibility that she tries to look at minority students’ grades. Given that Professor Wax uses student anecdotes in her scholarly publications and public statements, her students reasonably assume that her prejudice affects their ability to receive equal opportunity in her classroom. Indeed, in the aftermath of the Loury interview, several Black students in Professor Wax’s Civil Procedure course deliberately “steered clear” of her in light of her inflammatory comments. They did not feel comfortable engaging her throughout the semester and did not trust that she was committed to creating a productive learning environment for all students. White students did not share this burden.

## **2. Xenophobic statements in social settings**

Professor Wax has repeatedly made racist statements to her students outside of class. One such gathering took place in the Spring of 2018 when Professor Wax made the following remark to a group of students, all of whom were enrolled in one of her classes at the time: “We like living where we do,” she said, in reference to the neighborhood where she lived with her family. “We wouldn’t want to live somewhere where people are being loud. But Hispanic people don’t seem to mind that.”

Within a couple of years of this incident, a separate, similar interaction took place. A few first-year law students taking Professor Wax's mandatory Civil Procedure course organized a meal to get to know her outside of class, as is common (and encouraged) with first-year students and their assigned professors. The students took turns introducing themselves, and, as it happened, some of the first students to do so were from outside of the United States, as well as American students of color. After these students introduced themselves, a white student from the United States began introducing himself when Professor Wax cut them off to say, "Oh finally, an American." When she noticed the discomfort of the student, she said "it's a good thing, trust me."

### **3. Impact of Professor Wax's statements on legal journal editors**

In 2014, Penn Law's Journal of Constitutional Law (JCL) hosted its annual symposium, titled: "Educational Equality and the Constitution in the Twenty-First Century." Professor Wax spoke on a panel entitled "*Fisher* and the Future." As is custom, she and other panelists were invited to submit written pieces for publication in JCL's annual symposium issue. One student said the following about her editing experience with Professor Wax:

I was a student editor in JCL during the 2014-2015 academic year and was part of a larger group of students managing Professor Wax's article toward publication. As a woman of color, it was naturally disruptive to me to work on an article alleging that people like me are generally unqualified to be in elite higher education institutions. But what was much more distressing was the fact that we endured an unusually difficult editing process with Professor Wax. Overall, Professor Wax rested much of her arguments on baseless assumptions; she simply argued that she did not need to find sources to support her conclusions because this was "just" a symposium issue. Also, after several rounds of contentious exchanges, Professor Wax made various threats to student editors that I do not feel comfortable sharing at this time. Her response was completely disproportionate to the issue at hand, and it was mostly targeted towards student editors of color. I felt extremely vulnerable and afraid throughout the entire process.

### **4. Impact of Professor Wax's statements on post-graduate professional opportunities for students of color**

During the Summer 2019 On-Campus Interviewing (OCI) process, multiple students of color reported having to spend significant portions of their interviews discussing Professor Wax's views with prospective employers. These students were placed in the uncomfortable position of having to discuss their views on Professor Wax in an inappropriate setting, and potentially be judged based on their beliefs (or those of their interviewer).

As any law student participating in OCI understands, preparing for interviews at the end of the summer is a difficult, time-consuming, and resource-intensive process. Many students research their prospective firms, schedule mock interviews, purchase new clothing, revise their writing samples and other application materials—all of which occurs often while still employed in summer legal internships. To our knowledge, only students of color had to manage the

prospect of having all of this preparation undermined by being asked to speak about Professor Wax.

Moreover, students of color have previously felt prohibited from leveraging resources and opportunities at the school due to Professor Wax's affiliation with them. In the past, Professor Wax's presence on the clerkship committee either discouraged minority students from applying for clerkships or made them question whether the committee would zealously advocate for them during the rigorous application process. Given the tremendous potential for professional advancement associated with clerkships, this was a significant loss for students of color and for Penn Law as an institution.

Professor Wax has discriminated against one student because of their race and cost them professional opportunities. One student of color, who did well in her required first-year Civil Procedure course in the Fall Semester between 2014 and 2017 (this span is being used to protect their anonymity), emailed Professor Wax to ask for a meeting to talk about summer internships. That student received a response declining to meet with the student, saying the matter could be handled over email. A white male student in the class at the same time, with the exact same grade, sent a virtually identical email requesting a meeting with Professor Wax to talk about summer internships. Professor Wax met with that student, discussed potential opportunities, and offered to call judges and lawyers on his behalf. The student of color, reflecting on this later, said "That's a letter of recommendation I could have had if I had been assigned a different professor." Instead, they were assigned a racist professor who would not bother to meet with them, while she did meet with and help advance the career of a white male student with identical credentials.

Within the law school, it is widely understood that first semester grades have a disproportionate impact on a student's job prospects and post-graduation trajectory. Students are assigned their professors in the first semester and have a limited pool of professors from whom to ask for recommendations as they apply for summer internships. Students of color who have been assigned Professor Wax by the law school have been significantly disadvantaged by having a racist professor, as was the student mentioned in the account above.

Finally, students of color currently enrolled at Penn Law have shouldered a significant burden in mitigating the harm Professor Wax has caused. While their white counterparts are studying or considering future professional opportunities, students of color are compelled to organize in response to her statements. For students of color, this activism is not optional: students were compelled to affirm their rightful place on campus, and humanity, in the face of attacks from one of their own faculty members.

#### **5. Threatening email to individual students not enrolled in her course**

Despite the Law School's March 2018 announcement revoking Professor Wax's access to students who do not affirmatively elect to take her classes, Professor Wax continues to target students of color and other students who do not share her political beliefs. In one example, Professor Wax specifically tracked down the emails of a select number of former National Lawyers' Guild members—most of whom are students of color or children of immigrants—to make baseless allegations.

On October 7, 2020, Professor Wax emailed five third-year law students:

Dear students,

I have heard allegations that some Penn Law students, possibly affiliated with the National Lawyers' Guild, have downloaded and reviewed the tape of the first class in my seminar, Conservative Political and Legal thought [sic], which was held on Sept. 8, 2020. I have verified with the Dean's office that students not enrolled in the class did in fact download and listen to the tape. Although I have not conclusively substantiated that it was anyone connected to your organization, I am writing to you as a precaution and to provide important information.

That tape was made in error. The Dean's office promised me and the students in the class, in writing, that the class would NOT be taped. Penn Law has taken the tape down off the website.

Because the tape was unauthorized, its contents are not to be disclosed, discussed, used, quoted, or publicized in any way. It is against school rules to do so, and arguably also in violation of the law in Pennsylvania, as it was made without permission or consent of the instructor and students being taped.

I hope you will publicize this to your members. Thank you for your attention and cooperation in this matter.<sup>14</sup>

The five students that Professor Wax emailed were former board members of the Penn Law Chapter of the National Lawyers' Guild (NLG). Professor Wax did not email the chapter-specific email address, the members of the then-current board, or the entire board of the previous year. The email addresses of the five students are not listed anywhere in affiliation with Penn Law NLG. These students have never taken a class with Professor Wax, and indeed, were not in the building because of the Law School instituting virtual classes during the ongoing pandemic, so they would not have crossed paths with her in the hallway as she was conducting in-person classes.

Furthermore, these allegations are unsubstantiated. As a matter of course, all classes are recorded during the Add/Drop period and available to stream on Canvas. After the end of Add/Drop, it is up to each professor as to whether, and when, they would like their classes to be recorded or streamed. Any classes that are recorded are only available two ways: 1) on Canvas to any of the students who are enrolled in the particular class, or 2) via a link specifically provided to any student who has been given ad hoc permission by a professor. Professor Wax tracked down the contact information of a handful of students, most of whom are students of color and

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<sup>14</sup> Email from Amy Wax, Oct. 7, 2020, 7:29 PM.

children of immigrants, to assert baseless allegations and veiled threats of retribution. On October 12, 2020, the five students forwarded this email to the Law School administration. On December 18, 2020, Dean Ruger emailed the students and confirmed that Professor Wax's email was both "inappropriate and inaccurate."

#### **IV. CONCLUSION**

For the foregoing reasons, we respectfully request that a major sanction be imposed against Professor Wax, either in the form of complete termination or tenure revocation. We offer further support for this sanction below in Appendix 1.

## Appendix 1: Comparative Rhetorical Analysis of Speech from University of Pennsylvania Law School Professor Amy Wax and former Georgetown Law Professor Sandra Sellers<sup>15</sup>

University of Pennsylvania Law School Professor Amy Wax in a video interview published on September 11, 2017 states “I don’t think I’ve ever seen a black student graduate in the top quarter of the class” at Penn Law, and “rarely, rarely in the top half” of the class.<sup>16</sup> She goes on to assert that only one or two black students have scored in the top half of her required first-year Civil Procedure course.<sup>17</sup>

Former Georgetown Law Professor Sandra Sellers said in a recorded Zoom conversation with former Georgetown Law Professor David Batson that “a lot of my lower ones [students] are Blacks, happens almost every semester.”<sup>18</sup> Professor Sellers then said that she does “get some really good ones [Black students], but there are also usually some that are just plain at the bottom.”<sup>19</sup> Professor Seller’s statements were made public around March 10, 2021.

The racist and degrading statements made by Professors Wax and Sellers are substantially similar. Both professors equated race with intelligence, skills, and academic performance, harkening back to our country’s deplorable history of eugenicist ideology and social policies.<sup>20</sup> Just as eugenics was a pseudoscience grounded in racism,<sup>21</sup> Professors Wax and Sellers made statements about academic performance with no statistical backing (and Professor Wax even gestured to a so-called “mismatch hypothesis”). For example, Professor Wax admitted that she has not “done a systematic study” on the topic but is instead relying on her anecdotal experiences; Sellers similarly drew upon her personal teaching experiences. However, subjective experiences are inherently racialized as revealed by copious studies on racial profiling, witness identification, evaluation of witness trustworthiness and competency, and bias expressed by judges and juries.<sup>22</sup> As law professors, both speakers were likely well aware of the impacts of

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<sup>15</sup> Prepared by a candidate at the Annenberg School for Communication.

<sup>16</sup> Bloggingheads.tv, *The downside to social uplift | Glenn Loury & Amy Wax [The Glenn Show]*, YOUTUBE (Sept. 11, 2017), [https://www.youtube.com/watch?v=cb9Ey-SsNsg&ab\\_channel=Bloggingheads.tv](https://www.youtube.com/watch?v=cb9Ey-SsNsg&ab_channel=Bloggingheads.tv).

<sup>17</sup> *Id.*

<sup>18</sup> Hassan Ahmad (@hahmad1996), TWITTER (Mar. 10, 2021) <https://twitter.com/hahmad1996/status/1369786323293310985?s=20>.

<sup>19</sup> *Id.*

<sup>20</sup> Nancy Ordover, *American eugenics: Race, queer anatomy, and the science of nationalism* (2003); Janet E. Helms, *A legacy of eugenics underlies racial-group comparisons in intelligence testing*, 5 *Indus. & Organizational Psychol.* 176-179 (2012).

<sup>21</sup> Steven Fraser, *The bell curve wars: Race, intelligence, and the future of America* 8 (2008); Aaron Gillette, *Eugenics and the nature-nurture debate in the twentieth century* 2 (2007).

<sup>22</sup> Albert W. Alschuler, *Racial Profiling and the Constitution The Scope of Equal Protection*, 2002 U. Chi. Legal F. 163 (2002); Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System Supreme Court Review: Foreword*, 93 *J. Crim. L. & Criminology* 827 (2002–2003); Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 *Minn. L. Rev.* 2243 (2016–2017); David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection The New Data: Over-Representation of Minorities in the Criminal Justice System*, 66 *Law & Contemp. Probs.* 71 (2003); Rene Perez, *From Threat to Victim: Why Stand Your Ground Laws Are Inherently Prejudiced and Do Nothing to Further Justice*, 18 *Hastings Race & Poverty L.J.* 67 (2021); Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal’s Effect on Claims of Race Discrimination*, 17 *Mich. J. Race & L.* 1 (2011–2012); Michael Selmi, *Why Are*



racism on subjective impressions, which is one of the motivating factors for blind grading in the first place.<sup>23</sup> Nevertheless, Professors Wax and Sellers made sweeping statements, and by referencing their longstanding roles as teachers, committed the logical fallacy of appealing to authority<sup>24</sup> while obscuring the fact that their arguments rested solely on racist assertions.

Beyond the content of the two speeches, there is a similarity in the language and tone of both expressions. Professors Wax and Sellers utilized casual language in an attempt to downplay the offensiveness of their statements. Both professors laughed when making racist assertions, reflecting a broader societal trend to justify racist and sexist sentiments as humorous exercises of free speech.<sup>25</sup> The jocular nature of these expressions belittles the experiences of students of color and reinforces underlying power dynamics. Further, the professors phrased their speeches as somehow beneficial to the very students they are maligning. Professor Sellers explained that she is filled with “angst every semester,” making it seem as if she worries for her students. Similarly, professor Wax declared: “You’re putting in front of this person a real uphill battle, and if they were better matched, uh, it might be a better environment for them.” In this manner, Professor Wax framed her racist sentiments as benevolent paternalism, a rhetorical strategy stemming back to slavery apologists in the Antebellum South.<sup>26</sup>

There is one rhetorical difference between the two speeches that is worth noting. Unlike Professor Sellers, professor Wax frequently repeated words and phrases in her speech. She repeated the words “demoralizing,” “rarely,” and “shouldn’t.” In context, each of these words was used to support professor Wax’s inaccurate statements about the academic performances of students of color. Therefore, her use of repetition dramatizes her statements and underscores that she conveyed her deeply held beliefs. Consequently, her repetition delivers an extra blow to students and makes her statements more reprehensible.

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*Employment Discrimination Cases So Hard to Win Employment Discrimination and the Problems of Proof*, 61 La. L. Rev. 555 (2000–2001); Reginald T. Shuford, *Any Way You Slice It: Why Racial Profiling Is Wrong Civil Rights in the Next Millennium*, 18 St. Louis U. Pub. L. Rev. 371 (1999).

<sup>23</sup> Wendy Leo Moore, *Reproducing racism: white space, elite law schools, and racial inequality* 169 (2007); Vikram David Amar, *Why “Blind” Grading Makes Good Sense, and Should Be Used More Extensively Outside of the Context of Law School Exams*, Verdict (Jan. 17, 2014), <https://verdict.justia.com/2014/01/17/blind-grading-makes-good-sense-used-extensively-outside-context-law-school-exams>.

<sup>24</sup> Frans Van Eemeren, Bart Garssen, & Bert Meuffels, *Fallacies and judgments of reasonableness: Empirical research concerning the pragma-dialectical discussion rules* (2009); Douglas Walton, *Appeal to expert opinion: Arguments from authority* (2010).

<sup>25</sup> Mari Matsuda, *Words that wound: Critical race theory, assaultive speech, and the First Amendment* (2018); Sarah T. Roberts, *Commercial Content Moderation: Digital Laborers’ Dirty Work*, in *The intersectional internet: Race, sex, class, and culture* online 147-160 (Safiya Umoja Noble & Brendesha M. Tynes eds., 2016); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. Rev. 61 (2009); Nicolas Suzor et al., *Human Rights by Design: The Responsibilities of Social Media Platforms to Address Gender-Based Violence Online*, 11 Pol’y & Internet 84 (2019); Pamela Turton-Turner, *Villainous Avatars: The Visual Semiotics of Misogyny and Free Speech in Cyberspace*, *Forum on Public Policy: A Journal of the Oxford Round Table* (2013).

<sup>26</sup> Drew Gilpin Faust, *The ideology of slavery: Proslavery thought in the Antebellum South, 1830–1860* (1981); Howard McGary & Bill E. Lawson, *Between slavery and freedom: Philosophy and American slavery* (1992); Jason A. Gillmer, *Poor Whites, Benevolent Masters, and the Ideologies of Slavery: The Local Trial of a Slave Accused of Rape*, 85 N.C. L. Rev., 489, 533 (2006).

Given the many structural and rhetorical similarities in the statements made by Professors Sellers and Wax, the disparate responses from Georgetown and Penn are revealing. Both institutions denounced the racist sentiments, but Georgetown was more communicative and decisive. Georgetown frequently updated students, provided resources and support, and removed Professor Sellers from her teaching post. In contrast, Penn blocked Professor Wax from teaching mandatory courses but allowed her to continue teaching electives. It appears that Georgetown took the racist expressions of one of its professors much more seriously and was more committed to ensuring student wellbeing and promoting a tolerant, diverse community. While Penn Law's Office of Equity & Inclusion "strive[s] to cultivate an environment where every member of our community can thrive with a sense of belonging," the school's refusal to sanction or remove Professor Wax (especially when compared to the actions of Georgetown) undermines its commitment to students and paves the way for additional incidents in the future.

Thank you for your urgent attention to this matter.

[REDACTED]

Dated: April 27, 2021