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VIA EMAIL

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Re: *David Shapiro's August 31 Memo on Behalf of Professor Amy Wax*

Members of the Hearing Board,

We write as counsel to Charging Party Dean Ruger in response to David Shapiro's August 31, 2022 memorandum ("Memo") requesting to "(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."

We address a number of issues raised in the Memo, including misstatements of fact and misrepresentations about procedure. The focus on these issues should not be taken as an indication that we do not oppose the other aspects of the Memo; rather, we do not believe this is the appropriate juncture at which to address all of the issues the Memo raises and accordingly we reserve all rights to respond at the proper time.

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I. The Sanctions Process Does Not Violate Professor Wax’s Rights Under The ADA and The Hearing Should Be Scheduled Promptly

Professor Wax’s position that the University has violated her rights under the Americans with Disabilities Act (“ADA”) is not supported by law.

Dean Ruger has made clear to Professor Wax that she has available to her all of the same rights to medical leave or other accommodations as any other tenured faculty member. Dean Ruger, as the Charging Party, will of course cooperate with any reasonable accommodation this Board grants to Professor Wax in governing this process: for example, scheduling breaks during the proceedings or conducting the hearing over several days to provide more opportunities for rest. While the Charging Party will not object to Professor Wax being granted *reasonable* accommodations, an indefinite postponement is improper and unreasonable. A faculty member who is engaging in teaching on campus as well as public speaking—including appearing on numerous media programs—must answer charges of an infraction of University policy and cannot indefinitely delay a hearing. *Faculty Handbook, II.E.16.1.A* (noting that this process must be handled “expeditiously”).

Professor Wax may not alone pick and choose which parts of her job are “essential to her mental and physical well-being” and which are purportedly too stressful for her to participate. *Memo* at 7. Indeed, Chair Gadsden’s position on this was made clear in her July 15, 2022 letter: “if during the coming months, you are to remain actively employed as a faculty member, which includes fulfilling the essential functions of your role, we have no choice but to proceed, while providing reasonable accommodations with respect to the scheduling or conduct of the hearing.” *Memorandum dated July 15, 2022 from Vivian Gadsden to Amy Wax.*

If Professor Wax remains unable or unwilling to participate in a hearing altogether and wants to avoid taking medical leave, the Faculty Handbook does not require her participation in a hearing; it only permits it. *Faculty Handbook, II.E.16.4.D, E.* If she would rather forego her right to participate in a hearing, that is her prerogative and the Charging Party will not object.

In acknowledgement of the written statement that Professor Wax will be unable to participate in proceedings until the end of the Fall 2022 semester, the Charging Party is willing to agree that no proceeding requiring Professor Wax’s attendance will occur until after school resumes on January 9, 2023. This comports with the Faculty Handbook’s procedure. *Faculty Handbook, II.E.16.4.F* (“The hearing shall be held at the earliest date that is practicable to the respondent, charging party and Hearing Board, and ordinarily no more than three months from the notification date.”).

II. The Faculty Handbook Does Not Entitle Professor Wax The Discovery She Requests Regarding the Proposed Hearing Board Members

Professor Wax was informed on October 27 that the composition of the Hearing Board was finalized. As a result, Professor Wax’s insistence that she be provided with discovery related to the proposed members is now moot. Regardless, for the avoidance of doubt and to inform any other Hearing Board processes in the future, we would like to briefly address Professor Wax’s arguments to dispel any notion that she is entitled to such overbroad and invasive discovery.

Professor Wax argued she could only move to have any proposed Hearing Board members disqualified for prejudice upon reviewing, among other things, the members’ personal and professional emails, texts, chats, and other communications. Such discovery regarding proposed Hearing Board members is far beyond the scope of what the Faculty Handbook provides, which is addressed below in Section VII. Indeed, the Handbook does not provide for any production of any documents related to the proposed members. Her attempt to disqualify any proposed Hearing Board member who attended, listened to, or later discussed Professor Anita Allen’s presentation to the Faculty Senate is similarly unfounded. *Letter dated July 20, 2022 from David Shapiro to Dr. Gadsden, Dean Ruger, and Ms. White.*

The Hearing Board has the authority to determine whether any disqualification is proper. *Faculty Handbook, II.E.16.4.B.* The correct procedure was thus for Professor Wax to object to the proposed Hearing Board members by setting forth in writing her reasons by August 31, 2022 (a date that reflects an extension she received after not objecting properly by the original deadline of July 22, 2022). *Id.; Memorandum dated July 15, 2022 from Vivian Gadsden to Amy Wax.* In light of her failure to do so by the August 31 deadline, it was possible, and would have been justified, for the Hearing Board to conclude that Professor Wax waived her right to seek disqualification of any proposed Hearing Board members when she did not follow the stated procedure. We understand the Board’s position is that Professor Wax’s written submissions were “deemed to present a motion” and that the motion was denied.

III. The Request for Major Sanctions is Based on the Significant Harm Professor Wax’s Conduct Has Caused the University Community, Not on Her Conservative Viewpoint

Penn Carey Law School is deeply committed to principles of academic freedom and to protecting the rights of students, faculty, and staff to express a wide range of views. The Law School is similarly and simultaneously committed to principles of equal opportunity in education, and the idea that all University community members be afforded equal treatment free from discriminatory and injurious conduct from other members of the community. In upholding those principles, the Law School expects faculty members to meet behavioral standards—while carrying out their duties and responsibilities and representing themselves as scholars—in accordance with the “standards, rules, [and] mission of the University [and] the customs of scholarly communities.” *Faculty Handbook, II.E.16.1.B.7.* For teaching faculty, this includes (among other things) the mandate to avoid exploitation, harassment, and discriminatory

treatment of students; to avoid conducting themselves in a manner reasonably interpreted as creating a hostile or discriminatory classroom; to respect the confidential nature of the relationship between professor and student; and to show respect for others, including fellow faculty. The rules and norms make clear that there is a limit on the conduct that is acceptable in an academic community.

Professor Wax’s conduct shows a blatant and ongoing disregard for the rules and norms faculty must follow. In dozens of written and verbal statements over many years, both on and off campus, and involving students, staff, and faculty colleagues, Professor Wax has violated well-established standards and norms of professional conduct. She had repeatedly engaged in extreme group-based denigration, stereotyping, and non-scholarly attacks on individuals and groups comprising a majority of the law school community, and over time, this pattern has escalated in intensity and frequency. This conduct has taken place in classrooms, on campus, in conversations, and in the media where Professor Wax wielded her stature as a tenured faculty member at the University of Pennsylvania as badge of influence and authority.

On and off campus, in the classroom and otherwise, Professor Wax’s conduct is extreme, intentional, pervasive, and escalating—most importantly, it is harmful to the University community. She told a Black student that the student was only a double-Ivy because of affirmative action. She has stated that “women, on average, are less knowledgeable than men;” that Asians have an “indifference to liberty,” and that there are clear “group differences in talent, ability, and drive.” She has called University students “cowed benighted sheeples” who are “ignorant” and “know nothing.” She has engaged in harassing and discriminatory treatment of students, created a hostile classroom environment, consistently failed to show respect for other members of our University community, and raised serious questions about whether it would even be possible for her to evaluate each student’s true merit, particularly for those who are members of the racial, ethnic, gender, or other groups she has vilified.

The harm Professor Wax causes when she repeatedly attacks the inherent value of the University community members is real. No member of the community should be made to feel like they do not belong, are unwelcome, or are incapable of achieving excellence because of who they are. No student should have to wonder whether their professor will turn them into an unwitting participant in an unscientific study or whether their classroom performance will influence their instructor’s perception of their entire race or gender.

Professor Wax’s statements are a persistent and tangible reminder that racism, sexism, and xenophobia are not theoretical abstractions, but rather real and insidious beliefs in this country and on our campus. It is chilling to consider that her statements—amplified by the authority she holds as a University of Pennsylvania professor—could likely embolden the dangerous individuals who seek reasons to blame, ostracize, and harm marginalized groups.

To be clear, contrary to her claims, Professor Wax is not being punished for holding conservative views. *See Memo* at 16, 17. The law school has continually welcomed, supported, and promoted leaders in conservative thought, including Supreme Court Justice Neil Gorsuch and United States

Court of Appeals Judge Stephanos Bibas. In 2017, Dean Ruger led the Law School in advising the American Bar Association on the qualifications of Neil Gorsuch to serve on the Supreme Court. Dean Ruger convened a committee of faculty members who reported that Judge Gorsuch was “highly qualified.” That same year, the vast majority of faculty signed and sent a letter to the Senate Judiciary Committee strongly supporting their colleague—a Trump-appointee and Federalist Society member—Stephanos Bibas in his appointment to the Third Circuit. Once confirmed, and after Judge Bibas resigned his tenure at the University, the Law faculty unanimously voted to bring him back to the faculty to teach classes as a non-tenured Senior Fellow. Additionally, Penn Carey Law has offered other courses in conservative policy and law that have featured guest lectures by many prominent conservative thinkers, including Editor-in-Chief of the *National Review* Rich Lowry. A course on conservative and libertarian thought is again being offered for the upcoming Spring 2023 semester, and Penn has hired many non-tenured faculty from the Trump Administration, including Jay Clayton, Makan Delrahim, and Heath Tarbert. Moreover, there have been several on-campus events featuring prominent conservative speakers who were invited to share their views on panels and in debates, including well-known affirmative action opponents and law school professors Gail Heriot and Richard Sander. Over the last few years, the law school has also hosted events featuring numerous Trump- and Bush-appointed federal judges and several Republican senators and members of Congress, all of which took place without incident or protest. Any notion that Professor Wax is being punished merely for her conservative views fails to recognize the real and tangible harms she has wrought on the University community.

Dean Ruger is seeking sanctions because Professor Wax’s conduct has caused demonstrated harm and violated University behavioral standards. Those she attacks and belittles have reported negative impact on their feelings of self-worth and confidence.

In the daily work of educating and training brilliant young attorneys from the broadest possible range of backgrounds, ensuring equitable treatment in the classroom and throughout the institution is paramount. And, while the University is protective of the rights that faculty hold, one expression of that protection is the allocation to faculty peers the responsibility to define and apply behavioral standards for faculty. Those standards must recognize that a faculty member’s comportment toward students can cause harm.

IV. Professor Wax Makes Multiple Misstatements Regarding the Charges, Including Regarding the Rodriguez Report, Attributable Student Allegations, and Jared Taylor’s Invitation to Campus

Professor Wax’s claim that the Charges failed to provide her with notice of what rule, regulation, guideline, mandate, or condition of employment she violated is demonstrably false. *Memo* at 17, 18. In fact, the Charges outline each section of the Faculty Handbook, University Policy, or professional standard that Wax’s conduct violates. These include citations to—and quotes from—the Faculty Handbook, the Office of Affirmative Action and Equal Opportunity Policy,

the Principles of Responsible Conduct, and the American Association of University Professor's Statement of Professional Ethics.

Professor Wax's claim that anonymous allegations were included in the Charges is also incorrect. *Memo* at 24. The Charging Party has not relied—and does not intend to rely—on anonymous complaints in these proceedings. The students were all previously identified in the Rodriguez Report or otherwise in interviews with Quinn Emanuel. Their names were not included in the initial March 2, 2022 Written Description of Charges in part to protect their identities, in part out of concern that Professor Wax might leak letters to the media¹ or discuss the procedures publicly² despite the Faculty Handbook's admonition that “members of the University community shall avoid public statements about charges and proceedings that involve minor or major sanctions until the proceedings have been completed.” *Faculty Handbook, II.E.16.6.A*. In the subsequent June 23, 2022 Charge Letter, each allegation was indeed accompanied by a name or was a statement heard by multiple students who can be cross-referenced to the Rodriguez Report, which contains no anonymous claims. In fact, there were students who wished to remain anonymous whose stories and reports were not included in the Charges. Disturbingly, that means the Charge Letter only captures *some* of the harmful conduct by Professor Wax since there remain students who are unwilling to disclose their identities.

Professor Wax's description of Dean Rodriguez's Report from August 2021 is outdated and inapt. *Memo* at 23. The Rodriguez Report examined only a small fraction of the events and conduct that support the charges in this proceeding to date, and Dean Rodriguez “was not tasked with determining whether such ‘harm,’ if any, gives rise to a violation of any university policies [because t]hat is for the university to decide in accordance with their procedure and rules. *Report of Dean Rodriguez* at 10, n. 4; *see also id.* at 5 (“This was not a general and unlimited exploration of conduct and commentary by Professor Wax. Nor was it to be an inquiry into the merits or demerits of Professor Wax's suitability to continue as a tenured member of the faculty.”). Further, Dean Rodriguez did “conclude that Professor Wax has made a number of comments in class and a few outside of class which could reasonably be viewed as derogatory and harmful,” and that “the frequent expression of these views in many fora was positively harmful.” *Id.* at 38, 41.

Lastly, Professor Wax's claim that she received permission from the law school to invite Jared Taylor to class is inaccurate. Professor Wax seeks to use the fact that she received reimbursement for lunch costs from her own research funds as an implied permission by the school. In reality, when Professor Wax emailed a Law School employee who handles reimbursements asking for reimbursement for lunch costs for two guest speakers coming to her

¹ In fact, the Charge Letter was publicly posted on FIRE's website on June 23. <https://www.thefire.org/university-of-pennsylvania-law-deans-report-regarding-amy-wax-june-23-2022/>

² Professor Wax made statements about the charges and proceedings including on an episode of The American Mind. <https://www.youtube.com/watch?v=8XC-2FSr2vc>

class, she did not identify who those speakers would be. Nowhere in that email communication does she state her intention to invite white supremacist Jared Taylor to campus. She cannot now use that reimbursement to impute knowledge, notice, or permission to the University for a routine approval of lunch expenses.

V. Dean Ruger, As Law School Dean, Is The Appropriate Charging Party

The Faculty Handbook explicitly enumerates that only four persons may serve as charging party: “[t]he Provost, a dean of a school, or a Provost or dean’s designee who shall be a faculty member of the University, or a Group for Complaint.” *Faculty Handbook, II.E.16.1.B.1; id. at II.E.16.4.* Dean Ruger, as dean of the law school, is appropriately a charging party in this matter.

Further, there is no requirement that the charging party be disinterested or not have made public statements about the faculty member being charged. Indeed, the charging party is to request that the Chair of the Faculty Senate convene a Hearing Board only “if the charging party *believes* that a major infraction of University standards has occurred.” *Id. at II.E.16.4.A* (emphasis added). To claim that a “new Charging Party must be assigned before the process can continue” reveals a misunderstanding of the process itself. *Memo* at 30.

VI. Professor Wax’s Post-Hoc Request for Information Seeking to Legitimize Her Harmful Comments on Black Law Student Performance is Unwarranted

In what seems to be a deliberate confusion of the issues, Professor Wax requests that an “independent forensic expert” be retained to study student performance at the law school before the hearing can proceed. *Memo* at 32. This attempted distraction demands information to which Professor Wax is not entitled (see Section VII) while failing to acknowledge why her conduct was in violation of University policy.

As outlined plainly in the Description of Charges, “[f]aculty may be aware of confidential information as it relates to students and are expected to maintain the confidentiality of such information ‘so as to protect it from improper disclosure and to protect the privacy interests of members of our community.’” *Citing Principle Seven, Respect for Privacy and Confidentiality; see generally Faculty Handbook IV.J. Policy on the Confidentiality of Student Records.* The numbers of Black students in Professor Wax’s classes in any given year is limited and finite such that her discussion of their alleged performance reveals impressions and facts about identifiable individuals in her courses. It is no defense that these statements were “concededly [] not an assertion intended to objectively reflect the overall situation at Penn Law.” *Memo* at 33. Seeking data in a transparent effort to attempt to justify these statements after the fact will not absolve Professor Wax of the consequences of the underlying wrongdoing and resulting harm.

When Professor Wax made statements regarding the academic performance of Black students at the law school, she recklessly disregarded any possible accuracy of such claims, making them even more harmful and disparaging than they would have been if the remarks were based on research or investigation into actual student performance. Now, years later, she hopes that post-

hoc data will prove her statements credible. But, contrary to Professor Wax’s assertion that “[a] key issue at the Hearing . . . will be whether Prof. Wax’s statements were accurate,” (*Memo* at 3) such data would not be a defense in this case—Professor Wax has a duty to maintain student confidentiality and her comments about student performance were a gross violation of University policy.

VII. The Faculty Handbook Does Not Permit The Inquiries Professor Wax Seeks

The Charging Party encourages the Hearing Board to dismiss Professor Wax’s attempts to create an inquiry disproportionate and irrelevant to the issues at hand. Professor Wax agreed to abide by the terms of the Faculty Handbook when she joined the University faculty and must continue to do so through this process. Under the terms of the Faculty Handbook, a number of her demands are plainly impermissible. Professor Wax is attempting to assert rights beyond the scope of what the Faculty Handbook provides. Others are for you, the Hearing Board, to properly consider as the governing body in this process. *Faculty Handbook, II.E.16.4.G.*

Professor Wax will be provided a summary statement of the evidence to be presented by the Charging Party, including a list of witnesses, a detailed summary of the testimony expected from each witness, copies of relevant extracts from the Statutes and standing resolutions of the Trustees of the University of Pennsylvania, a copy of the Handbook procedures, and copies of any other University documents that are relevant to the respondent’s procedural and substantive rights in this matter. *Faculty Handbook, II.E.16.4.D.* As outlined in the Faculty Handbook, these items will be provided to Professor Wax **one month prior** to the hearing. *Id.* The Charging Party will abide by the discovery timeline as outlined in the Handbook and will provide Professor Wax with all of the above materials, including a list of the Charging Party’s witnesses.³ Professor Wax’s claim that materials have been withheld from her is misplaced, since under the timeline the Handbook provides, she is not yet entitled to such information.

Many of Professor Wax’s other demands are inappropriate. They seek irrelevant information, demand disproportionate disclosure, and invent duties owed to Professor Wax beyond a process that is “fair[] and expeditious[].” *Faculty Handbook, II.E.16.1.A.* Professor Wax’s inflammatory claim that the “hearing would be a show trial worthy of Stalin” analogous to a “prosecutor refus[ing] to provide exculpatory” evidence is inapt, including because Professor Wax is not on trial and is facing neither civil nor criminal charges. *Memo* at 41.

Professor Wax seeks broad categories of information that are not relevant to her conduct or proportional to the sanctions she may face. These requests include:

1. “All other statements by Penn members that have ever been found by Penn to be: racist, sexist, xenophobic, and homophobic,” (*id.* at 45);

³ Professor Wax is not entitled to contact information for these witnesses and there is no provision of the Handbook that would allow for disclosing such personal information.

2. “The name of any University member who was sanctioned or terminated by the University for undermining the ‘core values’ of the University” (*id.* at 45);
3. “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” (*id.* at 46);
4. “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” (*id.*);
5. “A list identifying every individual who lodged complaints against Prof. Wax;” (*id.* at 43);
6. “[A]ll of Dean Ruger’s communications, e-mails, texts, internet posts, talks, and speeches regarding Prof. Wax” (*id.* at 30);
7. “[A]ny documents [Dean Ruger] helped to prepare at Penn that mention Prof. Wax and are related in any way to the charges against her” (*id.*);
8. “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” (*id.* at 48);
9. “All information on how members of the law review are chosen” (*id.* at 37).

The Faculty Handbook leaves to the Hearing Board’s discretion certain decisions regarding procedural or substantive issues and the admissibility of evidence that are not already made explicit in the Handbook. *Faculty Handbook, II.E.16.4.G*. These decisions should be undertaken with the goal of maintaining a process that “both protects the rights of faculty members and addresses the legitimate concerns of the University.” *Faculty Handbook, II.E.16.1.A*. These proceedings must also be handled “fairly and expeditiously.” *Id.*

While the “extent of document production shall be determined by the Hearing Board” (*Faculty Handbook, II.E.16.4.G*), we urge you to consider the scope and timing of these proceedings. What Professor Wax demands is entirely unnecessary to conduct a fair and expeditious hearing, and many of the requests impede upon other faculty members’ and students’ privacy rights.

The procedure proposed by Professor Wax is simply not the procedure to which the parties are subject. Each of the above requests, and the others not listed here, are disproportionate to the procedures set forth in the Faculty Handbook. The Board is well within its rights to deny each of these requests. *Faculty Handbook, II.E.16.4.G*.

We are available to discuss any issue related to this matter and look forward to working under the Board’s guidance toward a resolution of the charges against Professor Wax.

Sincerely,

/s/ Crystal Nix-Hines
Crystal Nix-Hines

cc: Dr. Vivian L. Gadsden, Chair of the Faculty Senate
Faculty Senate of the University of Pennsylvania
Wendy S. White, Senior Vice President and General Counsel
Sean V. Burke, Associate General Counsel
David J. Shapiro, Counsel for Amy Wax
Theodore W. Ruger, Dean of Carey Law School and Bernard G. Segal Professor of Law