

SENATE COMMITTEE ON ACADEMIC  
FREEDOM AND RESPONSIBILITY

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Theodore Ruger, :  
Dean and Bernard G. Segal Professor of Law, :  
 :  
*Charging Party* :  
 :  
-versus- :  
 :  
Amy L. Wax, :  
Robert Mundheim Professor of Law, :  
 :  
*Respondent.* :  
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**RESPONDENT'S WRITTEN STATEMENT OF APPEAL**

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Respondent Prof. Amy L. Wax (“Prof. Wax” or the “Respondent”), respectfully submits this written statement of appeal of the President’s August 11, 2023 Decision (the “Dec.”), to the Senate Committee on Academic Freedom & Responsibility (“SCAFR”), through her attorneys Shapiro Litigation Group PLLC, pursuant to Section II.E.16.J of the Handbook for Faculty and Academic Administrators (the “Handbook”).

### **PRELIMINARY STATEMENT**

The Handbook provides that, following a decision by the President imposing major sanctions as recommended by a hearing board, the Respondent may appeal to SCAFR on the ground that there “has been a significant defect in procedure.” Handbook, § II.E.16.J. The Handbook also provides that SCAFR “shall have power to make investigations, reports, and recommendations on any matter relating to academic freedom and responsibility within the school that may affect one or more faculty members.” Handbook, § II.A at 17. There were several procedural defects, which we discuss below, and which are discussed in detail in the Respondent’s Objections to the Hearing Board’s Report (the “Objections”), a copy of which is attached hereto as Exhibit A and incorporated by reference. The procedural defects require the investigation, report, and recommendations outlined in Section II.A of the Handbook.

### **ARGUMENT**

#### **A. ONLY SCAFR HAS THE AUTHORITY TO MAKE DETERMINATIONS OR POLICY ON THE SCOPE OF ACADEMIC FREEDOM.**

The most significant defect in the procedure below was that the Hearing Board (and then the President) made determinations about the breadth and extent of a tenured professor’s contractually guaranteed right to academic freedom, especially in the context of extramural statements made on podcasts and in other media contexts. This was a significant procedural

defect because, under University policy, only SCAFR has the authority to determine whether a professor's speech is protected by academic freedom.

Dean Ruger's March 2, 2022 Written Statement of Charges (the "Charges") (Ex. 36), the Hearing Board's June 21, 2023 Report (the "Report") (Ex. B), and the President's Decision (Ex. C) all deal with allegations that directly implicate core principles of academic freedom: words said about controversial issues by a tenured professor, mostly on social media, expressed in ways that angered some segments of the University community. *See, e.g.*, Dec. at 6-7; Report at 1 n.2. The University's policy on academic freedom regarding a tenured professor, however, can only be decided by SCAFR; a hearing board cannot recommend major sanctions based on its determination that the professor's speech is not protected by the University's academic freedom policies. Nor can the President. Neither the Hearing Board nor the President has the authority to make determinations on University policy when it comes to academic freedom. The University made the decision years ago that that responsibility rests solely with SCAFR. Section II.A of the Handbook makes this clear.

Based on resolutions that date back to 1953, the University created SCAFR in 2014. Under the rules that govern SCAFR, a committee of ten members is instructed to advise and consult each faculty's Committee on Academic Freedom and Responsibility. Its mandate includes establishing the appropriate procedures to be followed "in the event of a claim of violation of academic freedom or responsibility." Handbook, § II.A at 17. It must annually distribute the "Procedural Principles for Handling Complaints Concerning Academic Freedom and Responsibility." *Id.* As its name suggests, and as the Handbook's rules make clear, SCAFR was designed to be the *only* body that deals with issues related to academic freedom. (A "just cause" hearing board, on the other hand, was designed to deal with the types of conduct

discussed in the Handbook’s definition of a “Major infraction of University *behavioral* standards”: plagiarism, misuse of University funds, etc. Handbook, § II.E.15.B.7 (emphasis added).) Despite the “behavioral” label carelessly attached to them, the Charges against Respondent relate solely to her words and utterances and do not properly fall within this definition.

Most significantly, the Handbook makes clear that when a faculty member is “affected” by a decision related to academic freedom and responsibility, SCAFR must investigate, issue a report, and make recommendations. Section II.A states: ***“The committee shall have power to make investigations, reports, and recommendations on any matter relating to academic freedom and responsibility within the school that may affect one or more faculty members.”*** Handbook, § II.A at 17 (emphasis added).<sup>1</sup> The President’s Decision approving major sanctions based on what Prof. Wax said in the media or, in a few cases, what she was alleged to have said at school, is a “matter” “relating to academic freedom and responsibility” that “affected” Prof. Wax. SCAFR must therefore investigate how the Charges came to be filed, investigate how the Hearing Board was constituted, review its Report and the President’s Decision, and make recommendations as to whether the University’s policies on academic freedom protected Prof. Wax’s speech. Because of its mandate, SCAFR should do what the President did not: a *de novo* review of the record.

Both the President and the Hearing Board based their conclusions on their view that the University’s policies on academic freedom did not protect Prof. Wax from a major sanction based on what she said, wrote, and taught. Section C of the Decision is devoted to a discussion

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<sup>1</sup> The Handbook doubles down on SCAFR’s exclusive role when it reiterates that “[t]he Committee [*i.e.*, SCAFR] shall have power to make investigations, reports, and recommendations on *any* matter relating to academic freedom and responsibility within the University.” Handbook, § II.A at 17 (emphasis added).

of the scope of a tenured professor's contractual right to academic freedom. *See* Dec. at 6-7.

The President directly addresses the applicability of Article 11 of the Statutes of the University of Pennsylvania. *Id.* at 6. Throughout her Decision, the President makes clear that she believes principles of academic freedom are central to this case, but that she was nonetheless unwilling to disturb the Hearing Board's recommendations of sanctions due to the deferential standard that she concluded governed her review. *See, e.g., id.* at 2 ("both sides presented reports from expert witnesses they engaged to address questions concerning . . . the scope of academic freedom"); *id.* at 3 (the Report "makes clear that [the Hearing Board] evaluated the arguments of counsel and the testimony of witnesses concerning . . . the issue of academic freedom").

Because it is SCAFR's exclusive mandate to determine University policy on academic freedom and how that policy "affects" a faculty member, it was a significant procedural defect to impose major sanctions on Prof. Wax without SCAFR's input on the core academic freedom issues presented here. This procedural defect can be corrected only through SCAFR's investigation, report, and recommendation. Thus, SCAFR should answer the critical academic freedom questions presented, conclude that the expression at issue is protected, and remand the matter to the Hearing Board to proceed consistent with that conclusion.

**B. THE LAW SCHOOL FACULTY WAS NOT REPRESENTED AT THE HEARING BY ITS COMMITTEE ON ACADEMIC FREEDOM AND RESPONSIBILITY.**

There was another glaring procedural defect below. The Handbook states that:

Each faculty shall have a standing Committee on Academic Freedom and Responsibility that shall be elected annually. Each faculty's Committee on Academic Freedom and Responsibility *shall . . . represent the faculty in all proceedings that involve . . . imposition of a major sanction on a faculty member; suspension . . . of the appointment of a faculty member, . . . or other questions concerning an individual faculty member's claim of violation of his or her academic freedom.*

Handbook, § II.A at 17 (emphasis added).

The Law School Faculty's Committee on Academic Freedom and Responsibility ("CAFR") was not at the hearing.<sup>2</sup> This is no minor oversight; representation is not discretionary and there is a reason for this requirement:

It is the policy of the University of Pennsylvania to maintain and encourage freedom of inquiry, discourse, teaching, research, and publication and to protect any member of the academic staff against influences, from within or without the University, which would restrict him or her in the exercise of these freedoms in his or her area of scholarly interest. The teacher is entitled to freedom in research and in the publication of results, subject to the adequate performance of his or her other academic duties, and to the institutional policies and procedures as set forth in the research policies of the University.

Handbook, § II.A at 17.

Because the requirements mandating the participation of the CAFR in these proceedings were violated, the sanctions imposed on Respondent are procedurally invalid and must be reversed.<sup>3</sup>

**C. THE HEARING BOARD CREATED, AND THE PRESIDENT APPROVED, A NEW AND INCOHERENT SPEECH STANDARD THAT HAD NEVER BEFORE BEEN PUBLISHED OR APPLIED: "INEQUITABLY TARGETED DISRESPECT."**

Section II of Respondent's Objections (Ex. A) demonstrated that Prof. Wax was punished under an *ex post facto* policy: The sanctions imposed by the President hinged on Respondent's purported violations of an unprecedented, vague, undefined, and incoherent standard, never before articulated, or applied to any Penn faculty member, that appears nowhere in the Handbook, and that gives zero meaningful notice on how to comply, either to Respondent or to

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<sup>2</sup> The law school's CAFR includes Anita Allen, Claire Finkelstein, and Polk Wagner. Although Professor Allen testified at the proceedings, she did not do so in her capacity as a member of the CAFR. And, in any event, there would have been a conflict of interest preventing Professor Allen from participating in that capacity.

<sup>3</sup> Because CAFR was not at the hearing and must be present if this matter is remanded by SCAFR back to a hearing board for a new hearing, Respondent is copying Prof. Claire Finkelstein, CAFR's current chair.



any other member of the Penn community. The Hearing Board created an entirely novel rule (tenured professors may not show “inequitably targeted disrespect” in utterances on social media or within the University), and the President approved the rule. This is a grievous procedural defect.

Sanctioning Respondent under a novel and vague rule, which the Board invented but never defined, is fundamentally unfair to Respondent. The President claims that this objection “is not a procedural objection to the Board’s action” but “a substantive criticism of the Board’s application of the relevant standards.” Dec. at 5. But this objection is plainly procedural because it involves bedrock concerns of due *process*. *Cf. United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (“Our doctrine prohibiting the enforcement of vague laws rests on the twin constitutional pillars of due process and separation of powers. Vague laws contravene the ‘first essential of due process of law’ that statutes must give people ‘of common intelligence’ fair notice of what the law demands of them.” (citation omitted)). The Hearing Board (and the President) applied a brand-new and undefined standard. The University, therefore, did not provide Prof. Wax with fair notice in what the President accurately described as the “critical” area of academic freedom. Dec. at 7. This is a significant procedural defect that warrants SCAFR’s intervention.

The Hearing Board also concluded that “the process resulting in this report is one important way to draw . . . a line” between protected and unprotected academic expression. Report at 1 n.2. That is a remarkable statement—remarkably wrong. And it is one that makes a mockery of the most basic notions of *procedural* fairness. It should not take a yearlong exhaustive disciplinary process—at great personal cost to Respondent in time, attention, and resources—to determine how the University defines what professors can and cannot say. That is

especially true when the line drawn is the vague standard of “inequitably targeted disrespect”—a standard proposed by no expert, not even the Charging Party’s. Because the Hearing Board could not define with specificity the rule that Prof. Wax allegedly violated, and because she had no prior notice of what would constitute a violation of that newly minted standard, the proceedings were hopelessly tainted by a core procedural defect.

The President did not defend or adopt the Hearing Board’s statement that the 3-day hearing was the proper place for the University to start drawing this “line” or that “inequitably targeted disrespect” is the standard by which academic speech at Penn can be judged. Instead, she avoided the issue based on her view that only a hearing board comprised of Prof. Wax’s peers can decide if sanctions are warranted for behavioral infractions. She wrote: “A core protection of faculty rights in our tenure system [is] that we assign to faculty peers the primary responsibility for determining whether there has been a major infraction of behavioral standards and, if so, whether forfeiture of tenure or some other major sanction is appropriate.” Dec. at 5. In so concluding, the President did not affirm or approve the Hearing Board’s “standard”; she merely concluded that, as President, she had no authority to second-guess the Hearing Board when it comes to recommended sanctions for “behavioral” infractions. This is a procedural defect for at least three reasons.

First, the President’s extreme deference to the Hearing Board flouts the existence of SCAFR. As the Handbook makes clear, *this* committee, and not a hearing board or the President, was created to answer *this* question of academic freedom. When it comes to issues of academic freedom, the President is instructed by the Handbook to defer to SCAFR, and not a hearing board. The President’s failure to do so is a grievous procedural defect. In other words, if the President wants to defer to someone about the scope of academic freedom at Penn, she must

(pursuant to the Handbook) defer to SCAFR and not to an advisory report by a hearing board with no particular expertise on matters of academic freedom. This is all the more so where, as here, the Hearing Board was set up to address allegedly *behavioral* violations in a just cause proceeding.

Second, along with failing to ask SCAFR for its recommendation, the President showed too much deference to the Hearing Board and, in so doing, she dodged the key issue. The Handbook required the Hearing Board to issue a report with recommendations for the President to review. The Handbook does not say, however, that the President must blindly defer to the Hearing Board's non-binding recommendation. Rather, the Handbook provides that where there are "exceptional circumstances" the President should depart from the Hearing Board's recommendations. Here, there are "exceptional circumstances" because the Respondent is being sanctioned for speech, and speech alone. Regardless of labeling, every single allegation in this case involves a faculty member's speech and expression. The President erred in failing to acknowledge that there are "exceptional circumstances" in this case which require departing from the Hearing Board's Report.

Third, the President quoted from the University's Guidelines on Open Expression, which appear in the Handbook as Section V.A: "The University of Pennsylvania, as a community of scholars, affirms, supports and cherishes the concepts of freedom of thought, inquiry, speech, and lawful assembly." The President then wrote that "I embrace these principles. They are essential to the vigorous pursuit of the University's missions of research, scholarship, and teaching." Dec. at 6. She also wrote that "Faculty members rightly enjoy broad academic freedom in their scholarly inquiry and in their teaching." *Id.* The procedural defect here is this: deferring to the Hearing Board is not an "embrace" of the principle that faculty members "rightly enjoy broad

academic freedom.” Rather, the President’s Decision eviscerates that principle. If academic freedom means anything, it means not being punished for extramural speech or alleged oral remarks based on a vague, novel, unpublished, undefined, and incoherent standard after a year of proceedings and a three-day trial. SCAFR should thus decide the academic freedom issue at the center of these proceedings anew and conclude that Prof. Wax’s statements are protected and sanctions unwarranted.

Moreover, each and every statement that was allegedly “inequitably targeted disrespect” was protected by the University’s policies on academic freedom. Indeed, the vast majority of words upon which the President imposed major sanctions were out-of-class statements based on social science evidence and addressing topics of robust debate by scholars, policy analysts and intellectuals that are protected by basic principles of academic free expression. As pointed out in our Objections, except for Respondent’s remarks about Penn Law students’ patterns of performance (which the Charging Party several times called “false,” without any supporting evidence), the Charging Party has never once contested the substance of any of the statements Respondent made on social media or elsewhere. Nor could he. The statements to which he, the Hearing Board, and now the Presidents objects—solely because they “upset” some people—are supported by substantial social science and empirical evidence. *See* Ex. 67. In effect, the Charging Party sought, and the Hearing Board and President agreed, to punish Respondent for making statements no different from those that have routinely been advanced by others in both scholarly literature and the press, including factual statements backed by overwhelming evidence

which the Charging Party has never contested, let alone refuted. That result is absurdly at odds with established and widely accepted precepts of academic free expression.<sup>4</sup>

In addition, as elaborated below, the few and isolated statements the Charging Party alleges Respondent made to students or in class are unsupported by clear and convincing evidence, represent egregious distortions of her actual words, or frankly were never spoken. That is a glaring procedural defect.

As for the words that Respondent actually *did* say, they all fall within the category of protected academic expression. Respondent incorporates by reference the facts, laws, policies, and arguments in her Objections. In that document, Respondent explains, in comprehensive detail, why (and based on expert witness testimony and reports) the words upon which the President imposed major sanctions cannot be the basis for such sanctions because they are protected academic speech. *See* Objections at 44-87. There is only one way to determine whether there was a procedural error below in allowing a new and vague rule to be the basis of major sanctions: test the merits of the arguments. If it is the case, as Respondent and her experts assert, that her extramural speech and other alleged remarks cited by the Hearing Board are protected academic speech, then it was a significant procedural error to sanction her based on a speech rule that had never before been published. In other words, there is no way around reaching the merits of the academic freedom issues that were litigated over three days in front of the Hearing Board.

It is no answer to say, as the President seems to suggest in her Appendix A, that SCAFR need concern itself only with due process. That is because (i) procedurally, SCAFR *must*

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<sup>4</sup> And even if some of those statements about hotly contested questions of social science could somehow be “proven” false, they would still be protected! Academic freedom surely includes protection for those who voice opinions or theories that are later shown to be “wrong.” Any other rule would be anathema to core principles of scholarly inquiry and the scientific method.

investigate, report, and make recommendations on any matter that affects a tenured professor's academic freedom of expression; and (ii) procedurally, it was an error to approve sanctions based on a novel, undefined, *ex post facto* rule, never before articulated or applied, when, in fact, the actual rules (the University's policies on academic speech) protect Prof. Wax from being punished for what she said or how she said it.

**D. PROF. WAX CANNOT BE SANCTIONED BASED ON THE WORDS SHE SAID OR HOW SHE SAID THEM.**

Respondent's Objections discuss in great detail the testimony of her expert witnesses on academic freedom. The Hearing Board did not acknowledge, address, or analyze the expert testimony because it wrongly concluded that the hearing was about behavior and not protected forms of speech. *See* Report at 1 ("We regard this to be a case not of free speech, which is broadly protected by University policy . . . , but rather of . . . conduct."); *id.* at 1-2 ("[W]e focus in this report on widely acknowledged standards of our profession, which recognize a difference between professional conduct and protected free speech."). The President, however, acknowledged that the Hearing Board *had* heard evidence on the topic of free expression policies in general and as applied to Respondent's speech. And, based on her personal reading of just one of the University's policies, she concluded that Prof. Wax can be punished for what she characterized as "sweeping, blithe, and derogatory generalizations." Dec. at 2.

While acknowledging that academic freedom issues were central to the Charges against the Respondent, the President nonetheless elected not to address the expert reports or testimony of the leading scholars on academic freedom who strongly opposed any sanctions against Respondent. This is a major procedural defect in the proceedings below. The Hearing Board members said they were not passing judgment based on academic freedom and so did not

address the issue, Report at 1 n.2; the President said that that is exactly what they did, but she completely ignored the Hearing Board's failure even to consider the substance of the issues presented.

And, beyond that, the President and the Hearing Board just got it wrong for all the reasons set forth in the Objections. (And, as noted above, getting it wrong on the merits is, in this situation, a significant procedural defect because the President allowed the wrong rule to govern Prof. Wax's situation.) Prof. Wax will, in this document, highlight just three glaring errors.

First, neither the Hearing Board nor the President referred to or discussed the Hecklers Veto problem, which lies at the heart of academic freedom protections. By recommending and approving the sanctions, the Hearing Board and the President officially elevated personal offense and hurt feelings to "harm," which, as our experts demonstrated, eviscerates academic freedom. Simply put, the Hearing Board defined a listener's reaction to speech as "harm" and then, for the first time ever, allowed that to serve as the basis for sanctioning a tenured faculty member—and the President refused to correct this manifest disregard of basic, established principles of academic free expression.

Second, both the Hearing Board and the President determined that major sanctions were appropriate because of the manner in which Respondent spoke outside the University. She was blunt, sarcastic, and, at times, cutting. There is no rule in any AAUP policy, however, that a tenured professor cannot express herself as Respondent sometimes chose to do when addressing controversial issues of the day with passion and sometimes sharp words. Extremely liberal tenured professors who appear on social media regularly engage in similar tactics with impunity.

Third, the Hearing Board recommended, and the President imposed major sanctions, based on their opinion that what Prof. Wax said outside the University on social media and elsewhere “created an unequal learning environment.” Dec. at 6. This conclusion rests on their description of Prof. Wax’s speech as “derogatory” and her statements about certain groups as “disrespectful.” *Id.* As we explain in detail in our Objections, however, and as the expert witnesses testified, Respondent’s observations about certain groups—all of which echo prior research and statements by others in both academic literature and the press and are backed by substantial evidence—cannot be the basis of major sanctions. Academically protected speech outside the classroom does not create an “unequal learning environment” inside the classroom. If the listener finds the speech offensive and accordingly elects not to take certain classes taught by the speaker, that does not negate the speaker’s contractually protected academic freedom rights.

This is the most closely watched case of academic freedom in the country. All eyes are on the University. Either Prof. Wax can or cannot be punished for the statements on which the sanctions have been imposed as set forth in the Hearing Board’s Report and detailed in Respondent’s Objections. And only SCAFR has the authority to make that call. Prof. Wax urges the Committee to do so.<sup>5</sup>

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<sup>5</sup> The nonpartisan Foundation for Individual Rights and Expression (FIRE) recently released a report finding the University ranked 247th out of 248 surveyed universities and that rated the University “very poor” on the metric of “the student experience of free speech on their campuses.” See *2024 College Free Speech Rankings*, FIRE, <https://rankings.thefire.org/rank/school/university-of-pennsylvania>. A decision punishing Prof. Wax for her expression would only further entrench the pervasive view among students that certain viewpoints, opinions, or theories are off-limits if they might cause others to take offense. The hostility that conservative students experience at the Law School from the administration and their professors was dramatically recounted in the testimony of students from Respondent’s Conservative Thought seminar. Objections at 20-28.



**E. THERE WAS NO CLEAR AND CONVINCING EVIDENCE OF MAJOR INFRACTIONS OF UNIVERSITY POLICY AND THE HEARING BOARD AND THE PRESIDENT WRONGLY DISCOUNTED RESPONDENT’S WITNESSES.**

The Handbook directed the Hearing Board to “investigate” the Written Charges and, via a hearing where both the Charging Party and Respondent introduce evidence, “determine whether or not the charging party has established by clear and convincing evidence that a major infraction has occurred.” Handbook, § II.E.16.4.G & H. The Hearing Board was supposed to be the fact finder. It was supposed to evaluate each party’s evidence. The procedural defect below is that the Hearing Board didn’t do that—it totally disregarded the testimony of Respondent’s witnesses and mentioned none of Respondent’s arguments based on that testimony and other submissions in the case. By failing to conduct a proper fact-finding exercise, the Hearing Board erred in determining that the Charging Party had met his burden of proof. He did not. The Hearing Board, therefore, ended up sanctioning Respondent on less than clear and convincing evidence. This is a crucial procedural error: the Hearing Board convicted Prof. Wax on a lesser standard, or on most charges no proper fact-finding at all (and the President affirmed), which the Handbook does not allow. This is why SCAFR, in order to determine if there were procedural defects, should conduct a *de novo* review of the entire record upon which the Hearing Board relied in issuing its Report, and investigate, report, and recommend as it is instructed to do in Section II.A of the Handbook.

Both the Hearing Board and the President improperly discounted the overwhelming evidence of Respondent’s bona fides as an outstanding Lindback Award winning professor. This too was a significant procedural defect because a just cause hearing board must consider and weigh all relevant evidence in recommending sanctions. So too must the President in reviewing those recommendations. There is no indication that they have fulfilled this obligation. Here, the

Hearing Board also ludicrously concluded that Prof. Wax was engaging in “shoddy science” and was derelict in her scholarly duties because she did not give equal time to opposing views in her Conservative Thought seminar or in her extramural statements. The President did not address this aspect of the Hearing Board’s Report, which lacked any valid foundation.

And the Hearing Board and the President made the procedural error of not even mentioning, let alone considering, the overwhelming evidence from students who had taken her Conservative Thought seminar and who testified that she is the most outstanding teacher they ever had. Both the President and the Hearing Board concluded that how Prof. Wax interacts with students in her Conservative Thought seminar (not all of whom are conservative) is irrelevant. That was a significant procedural error. The testimony of her students shows that the basis of the Hearing Board’s Report, which the President affirmed, was significantly flawed.

As we point out in the Objections, there was no “clear and convincing” evidence that Prof. Wax harmed anyone, let alone via her extramural statements, which are fully protected. Objections at 68-87. Nor was there anything close to clear and convincing evidence for the few statements that the Hearing Board cites in its Report that Respondent allegedly made to students or in class. Rather, these were credibly refuted or fatally undermined by Respondent’s arguments, filings, and hearing testimony, which the Hearing Board completely ignored and did not even acknowledge, and which in any event formed no proper basis for sanctions. *See* Report at 5 (admitting there were “significant factual disputes”).

For instance, the Report asserts that Respondent stated in class that “Mexican men harass women, the way Germans are punctual.” Report at 8. As the testimony at the hearing definitively established, and our Objections explain, that assertion was unsupported by any credible evidence, let alone clear and convincing. Objections at 71-73. As Respondent averred,

she used those phrases as examples for a didactic point about a civil procedure case, not as *her own* positive assertions. But the Hearing Board completely disregarded the evidence for that fact, which no testimony or evidence presented by the Charging Party or his witnesses ever refuted. Likewise, the Hearing Board fully credits a student's claim that Respondent stated in response to students giving their name at a social gathering, "At last an American." As Respondent explained at the hearing, that quote is inaccurate. Rather she recalls saying, "Ah, an American name." Respondent often mangled foreign names, as she explained to students on multiple occasions. Respondent's more plausible account and evidence were completely ignored by the Hearing Board, which is a clear procedural defect. Objections at 73-74.

Additionally, there was no testimony or credible evidence presented that Respondent stated *in class* that "people of color needed to stop acting entitled to remedies, to stop getting pregnant, to get better jobs, etc." Objections at 74. The contention that Respondent emphasized "loudly" in class that a witness referenced in an assigned case was a black man, and then called a black male student in class by the name of that black witness, was not presented by any witness at the hearing. Nor was it corroborated by anyone else in the class. In any event, this trivial professorial slip, even if it occurred (which is far from proven by "clear and convincing" evidence) did not violate any applicable rule or standard and thus provides no support for any sanction, let alone a major one. Objections at 70-71.

**F. THE ALLEGATIONS SET FORTH IN THE HEARING BOARD'S APPENDICES MUST BE TREATED AS THE EXCLUSIVE GROUNDS ON WHICH RESPONDENT WAS SANCTIONED.**

The Hearing Board attached to its Report three appendices: "Examples of inequitably targeted disrespect" (Appendix 1); "Incidents recalled by alumni" (Appendix 2); and "Incidents recalled by Professor Wax's former students" (Appendix 3). These three appendices explicitly

set out a limited set of Respondent's statements and the Charging Party's Charges. Of note are Charges and allegations that the Hearing Board chose *not* to include in the appendices, even though they were set forth in the charging documents or addressed at the hearing. These include, but are not limited to, the charge that Respondent supposedly told a student that she was a "double Ivy" only because of affirmative action, that Respondent assigned readings authored by Charles Murray and Enoch Powell, that she invited Jared Taylor to speak to her Conservative Thought class, and that she "lied" about racial mandates for admission to the Penn Law Review. The omission of these allegations, and others, not listed in the Hearing Board's appendices, should make clear that these spurious allegations were not the basis for any recommended sanctions and should therefore be irrelevant to SCAFR's review as well.

As a matter of due process, the statements listed in Appendices 1 to 3 must be taken as the complete and exclusive statements upon which the Hearing Board relied for recommending major sanctions and upon which the President based her Decision. To do otherwise would mean that Respondent, other tenured professors, and SCAFR would have no way to know which speech, assignments, and invitations were worthy of major sanctions. Accordingly, SCAFR should proceed on the assumption that the Hearing Board did not base its recommendations to impose sanctions on any of Respondent's alleged remarks, teachings, assignments, or invitations that are omitted from the appendices, including but not limited to those noted in the paragraph above. In determining whether Prof. Wax's speech is protected by the University's policies on academic freedom, SCAFR's review should be restricted to a review of the statements expressly listed in the three appendices.

The fact that the Hearing Board introduced the statements in Appendix 1 with the words "examples of" is irrelevant because considering Charges or allegations outside the statements

listed in the appendices would be an intolerable and egregious violation of the Faculty Handbook procedures as well as of due process generally, for at least two reasons.

First, any reliance by the Hearing Board on unidentified or unspecified Charges or alleged statements not included in Appendices 1 to 3 to impose sanctions would fail to inform Respondent, other students and faculty at Penn, SCAFR, or a court adjudicating a future action by Respondent for breach of her tenure contract as to what speech, comments, or forms of expression are protected or subject to sanctions under the University's rules. The Hearing Board and the President should not be permitted to keep everyone guessing about what statements and teaching methods will or will not elicit charges and punishment at Penn. Yet this is precisely the effect of the Hearing Board's and the President's decisions. The resulting lack of notice and guidance violates basic principles of fairness and due process guaranteed by the Handbook as well as by Respondent's tenure contract, and hence is a significant procedural defect in the proceedings below.

Second, SCAFR's consideration on appeal of statements, assignments, teachings, or invitations outside the appendices would not cure this defect, but rather would compound it. Respondent, SCAFR, and other members of the Penn Community would still be unable to determine which specific statements the Hearing Board and the President relied upon, and which statements were or were not supported by clear and convincing evidence. Respondent was entitled to that determination via the Handbook, and the Hearing Board was obligated to make it. Thus, considering on appeal any allegations that do not appear in Appendices 1 to 3 would violate basic principles of adjudication and appellate review. In order to preserve Respondent's right to be treated "fairly" as guaranteed by the Handbook (Handbook § II.E.16.1.A at 52),

SCAFR must take the position that the only statements for which Prof. Wax is being sanctioned are those that are explicitly found in Appendices 1 to 3.

**G. ALLOWING PROF. BEN-PORATH TO BE CO-CHAIR AFTER HAVING ATTENDED THE ANITA ALLEN PRESENTATION AND REFUSING TO PRODUCE INFORMATION ON GRADES OF MINORITY STUDENTS WERE PROCEDURAL DEFECTS.**

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The President erred in concluding that there was no procedural defect when Prof. Ben-Porath was appointed Co-Chair of the Hearing Board despite the fact that she attended a presentation by Anita Allen, one of the Charging Party's witnesses, who explained why in her view (and without anyone representing Prof. Wax) Prof. Wax should receive a major sanction. This is discussed in detail in Respondent's Objections. Objections at 7-12.

The President's defense of this procedural flaw was curt and unpersuasive. She writes that such encounters are "commonplace" and do not suggest "an appearance or actual conflict." Dec. at 5. Respectfully, of course, there is a clear conflict. And there is nothing "commonplace" about a Charging Party seeking major sanctions for speech. Anita Allen, a key expert witness on academic freedom at the hearing, provided a road map of how to impose major sanctions to the soon-to-be Co-Chair of the Hearing Board without notice to Respondent and without according her the opportunity to present the other side. That creates an outright conflict, both in appearance and in actuality.

The Hearing Board also refused to provide Respondent with the evidence required to prove that the Charging Party was lying to the University and the watching world when he asserted on multiple occasions that Prof. Wax's comments on minority law students' grades and class standing were untrue. As explained in Prof. Wax's Objections, those records should have been produced. Objections at 12-14.

## **H. RESPONDENT DID NOT VIOLATE THE UNIVERSITY'S PRIVACY RULES ON GRADES.**

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We explain in detail in the Objections why both the Hearing Board and the President made the significant procedural error of disregarding the actual words of the University's privacy policies on student grades. Objections at 87-95. The Hearing Board was required to read and apply the actual words of the policy, which prohibits the release of personally identifiable information but does not forbid general observations about grades by groups. *Ke v. Drexel Univ.*, No. 11-6708, 2014 U.S. Dist. LEXIS 36531 at \*18 (E.D. Pa. Mar. 20, 2014) (the Family Educational Rights and Privacy Act, upon which the Penn policy is based, only forbids disclosures that reveal a student's identity with "reasonable certainty" and it therefore does not prohibit disclosure of academic performance data "in statistical, summary form") (citing *Naglak v. Pa. State Univ.*, 133 F.R.D. 18 (M.D. Pa. 1990), and 34 C.F.R. § 99.3).

Moreover, Respondent's remarks are protected academic speech because the pros and cons of affirmative action cannot be fully aired without reference to the academic performance of the groups that benefit from, or are burdened by, these policies. *See, e.g., Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2197-99 & n.8 (2023) (Thomas, J., concurring) (discussing the "mismatch theory" and noting that "if universities wish to refute the mismatch theory, they need only release the data necessary to test its accuracy"). Indeed, Respondent's expert witness Prof. McConnell of Stanford University explained why Prof. Wax's discussion of student performance by groups *both* was protected by academic freedom *and* did not violate student privacy rules. Objections at 90-91.

The Hearing Board and President ignored all of this. (And, as noted above, failure to address the academic freedom issues was a procedural error because Prof. Wax ended up being punished for her remarks based on the wrong standard.)

## CONCLUSION

For the foregoing reasons, SCAFR should, pursuant to Section II.A of the Handbook, investigate, report, and make recommendations on whether the speech on which the Hearing Board and the President imposed major sanctions is protected by the University's policies on academic expression, and it should remand to the Hearing Board with its recommendations.

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