RESPONDENT'S MEMORANDUM IN REPLY TO CHARGING PARTY'S OPPOSITION AND IN FURTHER SUPPORT OF THE RELIEF SOUGHT IN HER AUGUST 31, 2022 MEMORANDUM

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Respondent Professor Amy L. Wax ("Prof. Wax" or the "Respondent"), by and through her attorneys the Shapiro Litigation Group PLLC, respectfully submits this memorandum in reply to the Charging Party's November 2, 2022 opposition memorandum (the "Nov. Memo") and in further support of the relief requested in her August 31, 2022 memorandum (the "Aug. Memo") including but not limited to a dismissal of Dean Ruger's March 2, 2022 Description of Written Charges (the "Charges").

PRELIMINARY STATEMENT

Prof. Wax demonstrated in the grievance she filed on against Dean Ruger (the "Grievance") with the Faculty Grievance Commission (the "Commission") (a copy of which was provided to the Hearing Board), that the Commission and the Senate Committee on Academic Freedom & Responsibility ("SCAFR") have exclusive jurisdiction over matters pertaining to faculty speech and expression, including an attack on a University Member's academic freedoms and tenure. The Charges are a direct attack on Prof. Wax's academic freedoms and therefore this tribunal does not have jurisdiction over the matter. Only the Commission and SCAFR can adjudicate the issues raised by the Charges. Therefore, these proceedings must be halted and formally terminated.

Moreover, the Respondent demonstrated in her Aug. Memo that the Americans with Disabilities Act (the "ADA") requires the reasonable accommodation of putting the process on hold until her cancer treatments are finished. That requirement was not met, causing Prof. Wax severe hardship, and compromising her ability to defend herself against the charges filed against her. Those negative effects continue to the present.

Prof. Wax also demonstrated that the Charges should be dismissed because, among other reasons, they are an attack on words spoken, speakers invited, and texts assigned by the

Respondent. Respondent's utterances and teaching choices are protected by principles of academic free expression and her tenure contract. That the Charging Party objects to Respondent's statements and curricular choices and finds them offensive cannot be grounds for a sanction. Prof. Wax also demonstrated that to ensure a fair and impartial hearing and to enable her to defend herself against the Charges, it was imperative to define with specificity critical terms used throughout the Charges such as "derogatory," "racist," "white supremacy," "crossing the line," and "mission, values and standards." It would also be impossible to hold a fair hearing until critical information is produced, including an examination of students' grades and academic performance by race as conducted by an outside forensic expert.

The Charging Party's opposition to the Respondent's requests do not withstand scrutiny. As Respondent has demonstrated, and as backed by her physicians, a reasonable accommodation under the ADA required relieving Respondent from non-mandatory, stressful, and onerous duties until her cancer treatment was completed and her side-effects abated. Accordingly, Respondent asked for a complete suspension of all proceedings during the Fall 2022 semester. That did not happen, as she was subject to several deadlines for submissions and other requirements during that period. The Charging Part and the University have not heretofore properly accommodated the Respondent under the ADA. The Charging Party asserts that the University can fulfill its ADA obligations by providing Prof. Wax with breaks during any future hearing and staggering the days. But that is too little too late. The University has already violated Prof. Wax's rights under the ADA, which has caused harm to her health and well-being, and made it difficult for her to defend herself properly. Since Prof. Wax's treatment and side effects are continuing, further accommodation to make up for these detriments will likely be necessary.

The Charging Party also asserts that he is bringing charges because of Prof. Wax's behavior, but that assertion is an egregious misuse of the term "behavior" to cover expression, statements, and teaching choices that are clearly protected. He is bringing charges because of her expressed opinions. He claims that she violated the University's policy on student information confidentiality when she offered her observations on Black law student performance, but that policy only covers "educational records" maintained by the University that identify individual students by name. She didn't do that.

He claims that his Charges are based on violations of University employment-related rules, but he quotes only from texts that are fatally vague and non-specific (for example, "at all times [Prof. Wax must] show respect for the opinions of others" and she must "advance" the "purposes" of the University). Such assertions offer no meaningful guidance to University Members like Prof. Wax about how they can ensure compliance with these amorphous policies. Worse still, invoking those vague standards as the basis for disciplinary action would permit selective, post-hoc, and arbitrary application to those such as Prof. Wax who express unpopular views on public and legal issues. They also permit the University to cite and rely on negative emotions and subjective reactions by Members and students as a basis for sanctioning professors for opinions and speech, which will inevitably result in serious and sustained incursions into a professor's right to free academic expression and inquiry. Indeed, citing the after-the-fact displeasure, upset, and objections of University Members and students as the test of which ideas a professor is permitted to express amounts to enshrining a heckler's veto over speech, which is directly contrary to basic principles of free expression and spells the death of academic freedom in the university. The Charging Party's Nov. Memo completely ignores this crucial argument (as

was set forth in the Aug. Memo) and makes no mention of the heckler's veto. That is a shoddy dereliction and omission.

Dean Ruger opposes retaining a forensic expert on the grounds that student grades and class standing based on race are irrelevant because Prof. Wax violated the policy of student confidentiality. But the policy he cites, which addresses individual student records, has nothing to do with Prof. Wax's observations. And the Nov. Memo completely ignores Dean Ruger's assertions in public statements and charging documents that Prof. Wax's statements were "false" and "inaccurate," which have been publicized and repeated in the media and elsewhere. The Charging Party's reliance on those assertions about the purported falsity of her statements is part of the indictment against the Respondent, and fundamental fairness dictates that she has access to the information necessary to refute those charges. Likewise, Dean Ruger objects to the production of information on how race is considered when selecting students for the Law Review, but he seeks to sanction Prof. Wax for suggesting that the Law School considers race when selecting students for the Law Review. He claims that knowing whether the Hearing Board Members attended or read the Anita Allen presentation is irrelevant, even though the relevant guidelines state that the hearing must not only be impartial, but it must also "appear" to be impartial. He doesn't discuss the exculpatory findings in Prof. Rodriguez's report. He doesn't properly address allegations that he has demonstrated bias against Prof. Wax that requires his disqualification; he simply points to the fact that, under the Handbook, he is allowed to be the Charging Party. And there are also many facts upon which Respondent sought relief in her Aug. Memo which the Charging Party just ignores (e.g., that the Charges paint a grossly distorted picture of Prof. Wax's statements and teaching choices based on one-sided and incomplete information).

The Charging Party's Nov. Memo in response to Respondent's Aug. Memo is wholly inadequate. For all the reasons Respondent specified, the Charges should be dismissed outright without the need for a hearing. At a minimum, the refusal to define critical terms in the Charges or provide the requested information makes it impossible for Respondent to get a fair hearing. Because these issues concern critical preliminary matters that go to the heart of how Respondent would prepare for any hearing and how a hearing would be conducted, the Charging Party's failure to adequately address and respond to Respondent's requests must be aired and rectified. In order to do that, it will be necessary to hold a preliminary hearing on the Aug. Memo and the Nov. Memo opposition. The Hearing Board must do that before it forces Prof. Wax to decide whether she will participate in a hearing before the Board on the merits – which, in any event, is barred for jurisdictional reasons as explained in this memorandum and the Grievance.

ARGUMENT

I. THE HEARING BOARD DOES NOT HAVE JURISDICTION TO ADJUDICATE DEAN RUGER'S ATTACK ON PROF. WAX'S ACADEMIC FREEDOMS.

The Hearing Board was copied on Prof. Wax's Grievance filed with the Commission. As the Grievance explains, this tribunal does not have jurisdiction to determine issues related to a tenured Member of the University's academic freedoms under a number of University and University-adopted policies. The only bodies with exclusive jurisdiction over such issues are the Commission and SCAFR, which have their own rules and procedures and, as discussed in the Grievance, are much better suited to determine the fundamental issues related to academic freedoms and tenure that the Charges entail.[1]

[1] The Respondent incorporates by reference the arguments contained in her Grievance regarding the Commission's exclusive jurisdiction over matters involving academic freedoms.

The Hearing Board, therefore, must immediately cease and desist from moving forward.[2]

II. THE HEARING BOARD VIOLATED PROF. WAX'S ADA RIGHTS BY MOVING FORWARD WITHOUT WAITING FOR HER CANCER TREATMENT TO CONCLUDE.

The University has been violating Prof. Wax's ADA rights since this process started. Every time a deadline was looming, Prof. Wax explained she could not comply because of the effects of her cancer treatment. And every time the University responded by saying no and insisting that she comply. And every time that the University did that it was violating the ADA.

Under the ADA, the University had a duty to provide reasonable accommodations to employees who, like Prof. Wax, have disabilities. *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 504-05 (3d Cir. 2010). The ADA provides that a qualifying disability includes: "(A) a physical . . . impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Watkins v. Shriners Hosps. for Children*, 2020 US Dist LEXIS 81077, at *14 (E.D. Ky. May 8, 2020) (quoting 42 U.S.C. § 12102(1)). Employers have been instructed that the ADA "should be construed 'in favor of broad coverage . . . to the maximum extent permitted by the [ADA's] terms.'" *Barlia v. MWI Veterinary Supply, Inc.*, 721 F. App'x 439, 445 (6th Cir. 2018) (quoting 42 U.S.C. § 12102(4)(A)). The regulations state that cancer "will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity" because "cancer substantially limits normal cell growth[.]" 42 U.S.C. § 1630.2(j)(3)(iii).

[2] Out of an abundance of caution, and without waiving her position that this tribunal does not have jurisdiction to adjudicate an attack on Prof. Wax's academic freedoms, the Respondent addresses the issues now before the Board. The Respondent also retains her right, once these issues have been resolved, to decide whether to participate in a hearing before the Board, if such a determination becomes relevant.

The University breached its duty under the ADA to Prof. Wax by failing to provide an accommodation that was reasonable during each step of this process. *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 317-18 (3d Cir. 1999). An accommodation is reasonable if it is tailored to the employee's "known physical or mental limitations of an otherwise qualified individual with a disability . . . unless [the] covered entity can demonstrate that the accommodation would place an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A).[3] And the regulations state that a "reasonable accommodation" includes "part-time or modified work schedules." 42 U.S.C. § 12111. Moreover, it was the University's burden, as this process moved forward, to explain why Prof. Wax's suggested accommodations would have created and imposed an undue hardship on it. *Hoffman v. Carefirst of Fort Wayne, Inc.*, 737 F Supp 2d 976, 986 (N.D. Ind. 2010). No explanation was forthcoming as there was no undue hardship.

Here, even though it was not her obligation to do so, Prof. Wax consistently proposed at every stage of these proceedings an objectively reasonable accommodation sanctioned by the regulations: a modified work schedule. She proposed to continue teaching her classes but requested that she not have to suffer through a debilitating, stressful, and time-consuming disciplinary process until her cancer treatment had concluded and its major side effects had sufficiently abated. Under this approach, Prof. Wax would have continued in the essential functions of her employment position (teaching) while being able to participate meaningfully in the process after she became able to do so.

[3] The employee has no obligation to unilaterally identify and propose a reasonable accommodation. *Taylor*, 184 F.3d at 315-17.

Pursuant to the statute and its regulations, Professor Wax asked that no action be taken in the Fall 2022 semester and that all proceedings and demands in connection with the Charges against her be put on hold until her treatment was largely concluded, and the effects of past and continuing treatment had subsided. The accommodation proposed was by definition objectively reasonable and should have been honored. *Haschmann v. Time Warner Entertainment Co.,* 151 F.3d 591, 601 (7th Cir. 1998) (reasonable jury could conclude that waiting for treatment to be completed was a reasonable accommodation of plaintiff's disability). This did not happen, despite the fact that a suspension of the proceedings would not have placed any burden on the University, let along an undue one.

Notwithstanding all of the above, the Charging Party asserts that Prof. Wax's ADA rights have not been violated and that her requested accommodation had to be rejected because Prof. Wax could have taken medical leave. Nov. Memo at 2. But that is not the law. Nothing in the ADA or the regulations state that the employee must take a complete medical leave from each and every aspect of her job as a reasonable accommodation especially if, as is the case here, the employee can perform the essential functions of her job (teaching). Rather, it was the University's responsibility to demonstrate that Prof. Wax's suggested accommodations (which, in this case, is found directly in the regulations) would have resulted in an undue burden. This it could not do. Much of the alleged conduct described in the Charges took place years ago, and Dean Ruger has been attacking Prof. Wax's academic freedoms for years. Even though Prof. Wax has continued to teach, write, and conduct research throughout this entire period, the Charging Party waited until March 2022 to file the Charges. Given the Charging Party's own extensive delays in initiating this proceeding, the University would have suffered no detriment and Prof. Wax would have benefitted greatly if the Hearing Board had granted a modest

postponement of further proceedings until her cancer treatment had been completed and its severe side effects had diminished.

Additionally, the Charging Party misrepresents the facts on Prof. Wax's ADA requests. Prof. Wax never requested an "indefinite" postponement and she never asked to "indefinitely delay" the hearing. *Id.* at 2. Per federal law on ADA claims, she was only asking for what courts have found to be reasonable: suspending the process until after the medical treatment and its side effects had passed or had sufficiently abated. *Haschmann*, 151 F.3d 591 at 601.

The Charging Party (and, respectfully, the Chair in her July 15, 2022 memorandum) is wrong and has misread the law when he argues that Prof. Wax has been "pick[ing] and choos[ing]" what she wants to do on campus. Nov. Memo at 2. That is an unfair and tendentious description of Prof. Wax's request. Rather, she was following the law: as a disabled employee, Prof. Wax could have fulfilled the essential functions of her job (teaching), but could not, at the same time, participate in the non-essential activities that negatively affected her health and recovery (dealing with a sanctions process under the Handbook). Again, there was no burden to the University, and it could not honestly articulate one. And it would warp both the text and purpose of the ADA for an employer to put a disabled employee to the choice of either (1) ceasing all job activities, or (2) receiving no accommodation whatsoever. Nothing in the ADA supports that all-or-nothing approach to a *reasonable* accommodation.

The Charging Party's reliance on the Handbook provision allowing the Respondent to refrain from participating in the hearing is unacceptable. Prof. Wax should not have to choose between her health and her right to actively defend herself from major sanctions by her employer. The University should not be telling a tenured Member, "Well . . . if you're too sick

to participate, I guess we'll just have to consider stripping you of your tenure without your participation. Oh well. Get better soon."

It is now January 2023, and the period during which Professor Wax asked for a complete suspension of proceedings on the Charges against her has formally ended. Nonetheless, the University's decision to go full steam ahead with the Charges during the fall semester when Prof. Wax was recovering from her cancer and its treatment effects was a clear violation of the ADA. That violation seriously compromised Professor Wax's health and well-being and caused her great harm, the effects of which she is still feeling today. She recently suffered a health crisis and setback brought on in part by the continuing pressure of the proceedings against her, as noted in communications in mid-November. Moreover, her request for the proceedings to be suspended until this month represented an approximation of how long Prof. Wax would need some form of accommodation for her condition. Prof. Wax continues to suffer from debilitation, exhaustion, and other systemic side effects of her cancer and its ongoing treatment. Therefore, she may continue to require some degree of accommodation of various kinds on a continuous basis and will not necessarily be able to stick to any deadlines or schedule Penn imposes. The relevance of the ADA to her situation is thus ongoing.[4]

III. THE CHARGES ARE AN ATTACK ON PROF. WAX'S ACADEMIC FREEDOM TO EXPRESS HER VIEWPOINTS ON MATTERS OF PUBLIC AND ACADEMIC IMPORTANCE: THEY DO NOT CONCERN HER CONDUCT.

As Prof. Wax demonstrated in her Grievance, the Charges deal exclusively with what she teaches, writes, says, and assigns. Her behavior is not being challenged and hence the issues

[4] The Charging Party's "compromise" of re-starting the process in January 2023 may not prove workable because Prof. Wax's treatment is continuing and, as reported in our letter dated November 16, 2022, she has experienced setbacks and bouts of severe side effects that have delayed her recovery. Those setbacks are consistent with the physicians' letters that she has previously submitted and that are part of the record in these proceedings.

related to the Charges must be adjudicated by the Commission. Moreover, it is the case that many of the statements, opinions, and assignments cited in the Charges represent points of view on a number of critical issues that are commonplace outside the University but are rarely heard on campus. It is well-documented that elite universities like Penn have an extreme dearth of people who represent positions and hold beliefs that depart from progressive orthodoxy, even if they tolerate some Members or visiting speakers who they deem "conservative." It is obvious that Penn is reserving the right to decide which opinions are acceptable and which are not. Because some of Prof. Wax's opinions apparently stray too far from left-leaning campus dogma, Dean Ruger has decided that she should be penalized for expressing them.

Moreover, as Prof. Wax discusses in her Grievance, she is the victim of selective prosecution. No liberal professor at the University has ever been charged with violating University "standards" by, for example, arguing that all white Americans are racists, that our country and society are afflicted with pervasive "systemic racism," or that designated minorities should get privileges or benefit from double standards that are clearly prohibited by our laws. There are many people, within the University and outside of it, who are upset, "hurt," "offended" and feel "unwelcome" by such views. Yet Penn takes no action against anyone expressing such positions.

The Charging Party states that "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." Nov. Memo at 3. That statement is belied by Dean Ruger's charges against Prof. Wax and his effort to seek sanctions against her. If the Law School was "deeply" committed to principles of academic freedom, then the Dean, instead of bringing the Charges, would have used her utterances as an occasion to publicly and resoundingly restate the

Law School's commitment to academic freedom principles, and to clearly point out that this would forbid the University from sanctioning Prof. Wax in any way. He would have invited Prof. Wax to publicly debate her positions. He would have used students' reactions, protests, and criticism of her remarks as an opportunity to reinforce and defend principles of academic freedom by firmly steering critics and students in a better direction; that is, helping them to understand the importance of allowing University Members to express a broad variety of opinion and to deal with disagreement by responding to her statements on the merits rather than seeking to silence her.

The Dean did not take any of these steps. This is not only an educational missed opportunity, but an egregious dereliction of duty. Instead, the Charging Party is using students' post hoc, personal, and subjective reactions as an occasion for charging and punishing Prof. Wax for her speech, opinions, and teachings. In responding to student emotions, upset, and offense by seeking sanctions against her, Dean Ruger is taking steps that are flatly inconsistent with the protection of the full range of opinions within the academy to which he and Penn Law School claim to be "deeply" committed. Dean Ruger's decision to charge the Respondent based on her speech flouts abundant sources and statements protecting freedom of expression in the university setting. *See e.g.,* 1940 AAUP Statement of Principles ("Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster" and "In pressing . . . charges [that the extramural utterances of the teacher have been such as to raise grave doubts concerning the teacher's fitness for his or her position] the administration should remember that teachers are citizens and should be accorded the freedom of citizens.").

The Charging Party also asserts that the Charges should not be dismissed because he is allegedly protecting students from "discriminatory and injurious conduct." Nov. Memo at 4.

This is inconsistent with the following dispositive facts: (1) Penn Law School uses *blind* grading in the first year classes and, therefore, it is impossible for any professor, let alone Prof. Wax, to "discriminate" or "injure" a student by assigning a low grade; (2) Prof. Daniel Rodriguez has already investigated these charges and he found *no* evidence of discriminatory conduct; and (3) there are simply no allegations in the Charges that Prof. Wax discriminated against anyone based on anything whatsoever. Prof. Wax is being charged for expressing words and ideas that the Dean and others in the University find offensive and with which they disagree. The Dean has even cited Prof. Wax's *assignment of texts* (an interview with Enoch Powell in a seminar on Conservative Thought) and an invitation to a speaker (Jared Taylor) to challenge the students with his thoughts and ideas, as warranting a major sanction. The charges are not about "conduct" in any honest, meaningful, and defensible sense of that term. The Charges are solely about the presentation of ideas and subsequent reactions to those ideas. Dean Ruger is seeking to enshrine a classic "heckler's veto" at Penn without addressing the claim that he is doing so. He resolutely ignores the highly destructive and corrosive effects on academic freedom at Penn Law of his attack on Professor Wax simply for her words and ideas.

In a further attempt to get around the fact that the Charges deal with speech, the Charging Party asserts that Prof. Wax violated the University's "behavioral standards." *Id.* There are several problems with this statement. First, it's not true. There is *nothing* in the Charges that deals with Prof. Wax's actions or behaviors, but only her speech, utterances, expression, and her attempt to expose students to a broad range of ideas, including those almost never heard in the present academy or at Penn.[5] The Charges do not allege that Prof. Wax discriminated against

[5] We do not understand the Dean to be accusing Prof. Wax of research misconduct, which she has obviously not committed. However, it is necessary to point out that Section III.B of the Faculty Handbook states that any charge of research misconduct requires convening a Research Misconduct Committee, which must conduct proceedings and issue a report. A final report of that Committee must be submitted to the Hearing Board before disciplinary

any liberal or minority student by assigning that student a lower grade based on identity or political views. There is not a shred of evidence that Prof. Wax has discriminated against any student inside or outside of class, or that she has "harassed" or "injured" any students on any reasonable application of those terms. To claim otherwise is to manipulate and misuse the concepts of "behavior," "harassment," "injury," and "harm." To express unpopular views or observations to which others object or with which they disagree – or even which they insist are false and find insulting – inflicts no injury and does not constitute "harassment." To indulge listeners' offense by asserting otherwise improperly enshrines subjective psychological reactions and political preferences as a veto over what ideas a tenured faculty member is allowed to express. To take these positions represents a fatal incursion into academic freedom to which the University claims to be "deeply" committed and violates myriad rules adopted by the University to protect academic speech. *See* Grievance, Ex. A.

Second, as demonstrated in the Aug. Memo, Faculty Members cannot receive a major sanction based on vague, amorphous, and ill-defined "standards," "mission," "norms," and "customs." Aug. Memo at 17-22. Doing that would violate Prof. Wax's basic rights which are protected in the Handbook. The thrust of the Charges is that Prof. Wax should have known that pursuing lines of academic inquiry that may upset some students on or off campus "crossed a line" (Charges at 2) and is therefore unacceptable even if the rules outlawing such behavior are vague or non-existent. But, as the United States Supreme Court teaches us in the related field of criminal law, "our holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson v.*

proceedings move past the preliminary stage. *See also* Handbook § II.E.16.4.C.1. The Dean has not pursued such procedures, indicating the absence of any allegation of research misconduct.

United States, 135 S. Ct. 2551, 2561 (2015). *At a minimum*, no discipline can be imposed, and no hearing can proceed until the Charging Party provides clear and specific definitions of critical terms used throughout the Charges such as "derogatory," "racist," "white supremacy," "crossing the line," and "mission, values and standards." To proceed in the absence of clear definitions of these terms in the Charges would flout the most basic principles of fair notice and due process.

Third, professors cannot and should not be sanctioned for expressing opposition to the University's so-called "values" or "mission" or "policies," however these are defined. Prof. Wax has been critical of the University's commitment to "diversity and inclusion" as independent priorities and has repeatedly explained why these commitments are undesirable, divisive, and destructive. Her critiques are reasonable, legitimate, cogent, and respectable, and they reflect an opposition to diversity initiatives and affirmative action practices that is widespread among American citizens and institutions. There is absolutely nothing in her tenure contract, in the Handbook, or in American Association of University Professors' statements that requires her to support initiatives that she sincerely believes are harmful to the University and its students (including the minority students). It is a violation of her academic freedom to force her to "toe the party line" on diversity and inclusion and to refrain from expressing her opinions on its myriad negative ramifications, including for the University and its Members.

Because Dean Ruger, after the Rodriguez Report, cannot plausibly allege that Prof. Wax treated anyone unfairly, he is forced to rely on an arbitrary and manipulative misuse of language to transform post hoc reactions, subjective displeasure, and political opposition into injury or harm. These are not "harm" in any coherent or defensible sense, and certainly not in any sense that is consistent with a genuine commitment to academic freedom of expression. He claims, for example, that Prof. Wax "exploited," "harassed," and "discriminated" against students (Nov.

Memo at 4), but Prof. Rodriguez has already determined that that never happened. He also claims that Prof. Wax created a "hostile or discriminatory classroom" (*id*.) but provides no evidence or facts other than allegations of hurt feelings. He fails to mention the blind grading system in first-year classes which is designed to eliminate bias in student evaluations. He further alleges lack of "respect [for] the confidential nature of the relationship between professor and student," but he can't name a single student whose confidential information was improperly released.[6] He claims as well that he must "ensur[e] equitable treatment" (*id.* at 5) but he can't point to a single student who received inequitable treatment. He charges Prof. Wax with not "show[ing] respect for . . . fellow faculty" (*id.*) but he provides no guidance whatsoever on what kinds of statement are to be regarded as disrespectful, and he fails to set forth any "disrespectful" comment allegedly made by Prof. Wax to any Member. And this doesn't even account for the absurd notion that "lack of respect" for a fellow faculty Member requires a major sanction. The term "lack of respect" is fatally vague, undefined, and open-ended. Moreover, withholding "respect" for another member of the faculty, in the sense of disagreeing with or criticizing that person's stated positions, is sometimes reasonable and arguably justified and is part and parcel of academic life. If a fellow faculty Member concludes that the Holocaust never happened, Prof. Wax is not mandated by University regulations to "respect" that professor. Prof. Wax is free to show "lack of respect" for those who say things she regards as absurd or false, or who take positions with which she adamantly disagrees. She is free to be critical of others within the University and to express criticism in a reasoned way – as is any University Member free to criticize her or others. What Members are not free to do is to take steps to cancel, sanction,

[6] To the extent this sentence refers to Prof. Wax's truthful statement that Black law students who are admitted based on affirmative action criteria do not perform as well as white students, there is no charge that Prof. Wax released any student's grades without permission (because she never did). Moreover, the data in the University's possession, which it should and must release so that Prof. Wax can defend herself, will prove that her statements are substantially accurate.

discipline, punish or fire anyone due to their criticisms or views, including those that some might label "disrespectful."

Because the Charging Party cannot point to any sanctionable behavior, he tries to turn speech into action by alleging that Prof. Wax has "repeatedly engaged in extreme group-based denigration, stereotyping, and non-scholarly attacks on individuals and groups." *Id.* This is not a valid basis for the Charges for several reasons. First, one person's "extreme group-based denigration" is another person's social-science based observation or experience-based generalization and, therefore, definitionally, is protected academic speech. Second, for a Charging Party who believes that the absence of particular words in the Handbook means that Prof. Wax has no right to due process or information essential to a proper defense, Dean Ruger has no trouble asking for sanctions for "stereotyping" even though the Handbook doesn't forbid stereotyping or even use that word. Third, although Prof. Wax's out-of-class opinions cut against the grain of accepted left-wing pieties and orthodoxies and are admittedly controversial, they find backing in mainstream social science research.

The Charging Party also asserts that he is not seeking to punish Prof. Wax for her thoughts, but, rather, because she has "wielded her stature as a tenured faculty member at the University of Pennsylvania as badge [sic] of influence and authority." Nov. Memo at 4. Guilty as charged: Having tenure gives Prof. Wax "influence," "authority," and "stature." That's the whole point of tenure, which must be acquired through a long process of study, learning, performance, scholarship, and academic pursuits: namely, to use the earned stature, influence, and authority of the position to put into the marketplace of ideas utterances, observations, and conclusions that the tenured professor believes to be valid, valuable, true or worth debating *without fear of retaliation* even if those statements are deemed offensive by some or many

people on campus or off. Professor Wax should not be punished for expressing controversial or unpopular views.

The Charging Party also seeks to get around the obvious point that sanctions are being sought based on speech by using the adjectives "extreme," "intentional," "pervasive," and "escalating." Again: guilty as charged. The whole point of academic freedom and tenure is to allow a professor to be "extreme," "intentional," "pervasive," and "escalating" without fear of retaliation, and without being the target of sanctions based on vague and subjective terms that are vulnerable to manipulative abuse and are highly partisan in their application. During the Jim Crow decades in the South, academics risked their *lives* by being "extreme," "intentional," "pervasive" and "escalating" in support of Civil Rights. During the McCarthy years, academics risked their *careers* by being "extreme," "intentional," "pervasive," and "escalating" in support of the First Amendment rights of communists and those on the left.[7]

Dean Ruger doesn't like Prof. Wax's expressed viewpoints regarding affirmative action, the country's current immigration policies, the prioritization of "diversity" in derogation of meritocratic principles, and the deliberate obfuscation of unpleasant realities about the characteristics, behavior, and performance of different groups in the United States based on substantial social science research and other documented facts. Like academics on the left from decades past and present, she *is* "extreme," "intentional," "pervasive," and "escalating" in support of the positions she holds and the conclusions she has reached. And she announces those opinions in a worthy cause: making the University a better place and improving students'

[7] https://www.nytimes.com/2017/11/27/obituaries/vera-shlakman-professor-fired-during-red-scare-dies-at-108.html

education by exposing them to a range of facts, positions, and ideas almost never heard in the "extreme" left-leaning progressive bubble that is the University and the Law School.

In opposing Prof. Wax's motion to dismiss the Charges, the Charging Party doubles down on the unsupportable foundation of those Charges. His complaint applies vague and undefined terms such as "racism," "sexism," "white supremacy," and "xenophobia" to a tenured Member for expressing views on social issues that sometimes implicate group characteristics. For example, Prof. Wax is accused of saying that it is "rational to be afraid of Black men in elevators." Charges at 9.[8] It is a misuse of the term "racist" to fault that statement because there is abundant social science evidence on the level of violence and criminal behavior by Blacks versus other groups. Similarly, Prof. Wax is accused of stating that there is "some evidence" for the proposition that "men and women differ in cognitive ability." *Id.* at 5. It is a misuse of the word "sexist" to attempt to sanction Prof. Wax for that assertion because social science evidence points to cognitive differences between men and women; Prof. Wax is entitled to comment on this matter of scientific debate. *Id.*[9] The point is not who will ultimately be proved empirically right or wrong about group or gender characteristics – that doesn't matter. The point is that applying incendiary and ambiguous labels like "racist" and "sexist" in this context without defining those terms precisely, let alone defining them at all, is intellectually bankrupt and is surely no basis to impose major sanctions on a tenured Faculty Member. Its purpose and effect are to encourage contempt towards the speaker, with the goal of silencing and intimidating her, rather than fostering the examination and rigorous exploration of important ideas and issues,

[8] The Faculty Member to whom this was allegedly said is the same Anita L. Allen who attacked Prof. Wax in her February 16, 2022 presentation. Prof. Wax denies that she ever made this statement to Prof. Allen, and there is no proof that she did.

[9] This is why the Charging Party's description of Respondent's statements as "insidious" (Nov. Memo at 3) is inapt. The truth can never be insidious just because it's disturbing.

including the validity of statements that generalize about groups and whether and when it is justified to use such observations as a basis for social decision making.

Because the Charging Party has no proof of discriminatory behavior, he is forced to rely on what he believes *might* happen if Prof. Wax is not sanctioned in some way, even to the point of being stripped of tenure and fired. He postulates, for example, that unless Prof. Wax is silenced and barred from expressing social science-backed insights on group characteristics, some students may feel that they don't' "belong," or are "unwelcome." Nov. Memo at 4. This argument (aside from lacking any systematic evidentiary backing or verifiable proof), overlooks the fact that under the University's academic freedom and tenure policies, tenured Members are free to state opinions, even if those make members of the community uncomfortable. 1915 AAUP Declaration ("Academic freedom [of the teacher includes the] freedom of extra-mural utterance[.]"). The inquiry is not, "How will challenging facts make students *feel*?" The inquiry is only, "Does the professor have the academic freedom to present challenging opinions and facts?" There is no statement in any of the AAUP principles or other University policies asserting that the *effect* of presenting opinions on students is a ground for any sanction, let alone revoking tenure and termination. Moreover, Prof. Wax teaches in a *law* school. These students are adults who are being trained to zealously represent clients within our legal system, which is adversarial and depends critically on the expression and consideration of a wide range of arguments, information, evidence, and viewpoints. If students disagree with Prof. Wax's positions, the gates to the marketplace of ideas are wide-open.

The Charging Party also asserts that his speech-based charges are grounds for dismissal because they might lead some students to conclude that Prof. Wax believes that they are "incapable of achieving excellence because of who they are." Nov. Memo at 3. Again, aside

from the impossibility of proving this assertion and the failure to adduce any justification for it, this accusation conflates Prof. Wax's empirical observations of group differences in America with the fallacious assertion that individual students are bounded by the groups with which they identify. Prof. Wax cannot be punished merely because some of her utterances cause some students to think thoughts, harbor fears, or reach conclusions that she has simply never stated. Prof. Wax's stand on affirmative action and her principled opposition to diversity and inclusion policies are protected academic speech under the AAUP principles and other Penn policies. Grievance, Ex. A.

Nor can she be punished for the effects her expressed positions have on a few hyper-sensitive students. In her decades long career at Penn Law, Prof. Wax has taught thousands of students. Based on her outstanding performance in the classroom and as a student mentor and advisor, she received the University-wide Lindback teaching prize in 2015, which has been awarded to fewer than a handful of Penn Law professors. The Dean's June 23, 2022 letter to the Hearing Board (the "Charging Letter") cites six (6) students who reported to Quinn Emanuel that Prof. Wax's statements upset them. The number of students she has helped and inspired far outweighs the six (6) students who have complained about Prof. Wax's opinions and point of view.

Moreover, stripping Prof. Wax of tenure or otherwise sanctioning her based on what might go on in a few students' minds because of facts and opinions she has stated would create havoc for the University and would potentially subject every professor's job to the whims and emotional ups and downs of a few complaining individuals. Under the theory behind the Dean's Charges, if a Black Penn professor stated that all white students are racists, or that white society (which includes all white students) is irredeemably racist, and a white student concluded that she

could not take that professor's class for fear of being mistreated based on the color of her skin, that Black Penn professor would have to be sanctioned or removed from the classroom. (Under the Dean's theory this *should* happen, even though the current tendentious climate of double standards on campus almost certainly ensures it never would.)

For the same reason, the Charging Party's statement that sanctions are warranted because a student might "wonder" if Prof. Wax would use them as an "unwitting participant in an unscientific study" (Nov. Memo at 4) cannot be a valid basis upon which to sanction Prof. Wax or any other Member for expressing fact-based, extra-mural opinions outside of the classroom. The University cannot function properly if it adopts a sanction system based on whether or not protected academic speech on legitimate questions of public interest will upset a student. In this regard, the Dean also writes that sanctions are appropriate because a student might "wonder" if her "classroom performance will influence [Prof. Wax's] perception of their entire race or gender." *Id*. Again, the academic freedoms guaranteed to Prof. Wax as a tenured Member of the University are not based on how her utterances will affect students' emotional responses, thought processes, or course selection. Any such system would not only be continually disruptive of university life and wholly unworkable, but it would ultimately spell the death of any meaningful system of academic free inquiry and expression on a large number of topics.

The Dean also writes that sanctioning Prof. Wax based on what she says and teaches is appropriate because continuing to let her teach "could likely embolden the dangerous individuals who seek reasons to blame, ostracize, and harm marginalized groups." *Id*. This claim, which is purely speculative and based on no evidence at all, has disturbing implications. It harkens back to the days at universities when professors were pressured to refrain from giving intellectual aid

and comfort to atheists, a situation that persists to this day.[10] There is *nothing* in the policies and procedures on academic freedom and tenure that requires tenured faculty members to refrain from making observations or statements that some people believe might encourage someone, somewhere, to criticize some group. A system of academic freedom and tenure based on such a principle would be untenable because the number of statements or observations that could be claimed to be potentially "emboldening" of negative reactions or thoughts about different groups is virtually unlimited. Such a notion would make it impossible to do any sociological or historical analysis or criticism and would interfere with significant areas of scholarship. For instance, it would bar discussing the history of racism, since that might tend to cast white people in a negative light. Such a stricture would quickly undermine any meaningful freedom of expression within the university.

The Charging Party also defends the Charges by asserting that a handful of conservative voices have been invited to the Law School. *Id.* at 4-5. This is a classic red herring. By allowing some conservatives to speak while trying to punish Prof. Wax for speaking, Penn is implicitly reserving the right to decide which views among the broad spectrum on the right are allowed on campus and which are not. Penn is not protecting freedom of thought; it is picking and choosing what is acceptable according to a dominant left-leaning orthodoxy. The fact that the Dean participated in the nomination process of Justice Gorsuch or Stephanos Bibas in no way undercuts the fact that the Charging Party is selectively prosecuting Prof. Wax. It is no accident that the *only* tenured Faculty Member who is facing sanctions is an unabashedly conservative thinker and scholar. It is no accident that the views, opinions, teachings, and assignments to

[10] https://www.insidehighered.com/quicktakes/2016/05/12/students-protest-professors-rumored-termination-over-atheist-speaker

which the Charging Party objects are all conservative points of view. It also doesn't matter that the Law School offers courses in conservative policy and thought. The only thing that matters is (a) *only* Prof. Wax is facing a sanctions procedure based on what she says; and (b) the University guidelines and the AAUP policies protect her right to free academic inquiry. Finally, since the Dean will not voluntarily produce his emails, texts, and other communications involving Prof. Wax in connection with her motion for his recusal, he can hide behind the fact that Judge Bibas teaches at the Law School without having to be honest about the political reasons he is seeking sanctions against her.

IV. THE CHARGES REMAIN DEFECTIVE DESPITE THE CHARGING PARTY'S ATTEMPT TO DEFEND THEM.

The Respondent demonstrated in her Aug. Memo that the charges failed to put her on adequate notice of what non-vague and non-amorphous rules she had allegedly breached that are the basis of Dean Ruger's request for sanctions. Aug. Memo at 17-22. Rather than address the issue, the Charging Party defends his Charges by pointing out that the Faculty Handbook, the Office of Affirmative Action and Equal Opportunity Policy, the Principles of Responsible Conduct, and the AAUP's Statement of Professional Ethics are either cited or quoted in the Charges or the Charging Letter. Listing the materials and publications cited in the Charges is no defense against the Charge's weaknesses. None of those sources stand for the proposition that stating social science-based observations on group characteristics or pointing to the ill effects of affirmative action at the Law School are grounds for termination.

On pages two to three of the Charges, the Charging Party asserts that sanctions are required because the Handbook advises tenured Members to "at all times show respect for the opinions of others" and to "advance" the "purposes" of the University. Charges at 2-3. The

Handbook then goes on to specify that "These purposes include teaching and scholarship." The problem with the Charges is that the Dean has decided that only *his* assessment of what "respect" means in the context of intellectual debate is worthy of consideration. It is only *his* assessment of the "purposes" of the University that apply. To the Dean, the "purpose" of the University is embodied in its "diversity and inclusion" initiatives above all. To Prof. Wax, the "purpose" of the University is to do exactly what she is accused of doing: "to seek and to state the truth as [she] see[s] it," even if that quest is disturbing to some people and hurts their feelings. AAUP Statement on Professional Ethics. That purpose, which is enshrined in the AAUP's principles of academic freedom and incorporated into her tenure contract, cannot form the basis for disciplinary proceedings.

The Charges do indeed quote the University's Equal Opportunity and Affirmative Action Policy by stating that the University has "prioritized inclusion and diversity 'as a central component.'" Charges at 3. But it is not a condition of Prof. Wax's employment that she too must also "prioritize" diversity and inclusion if, in her considered judgment, it is not in the students' or the University's best interests. Moreover, Dean Ruger utterly fails to explain or justify how the University's "priorities" allow penalizing a professor for observations about society and social reality.

Similarly, the Charges quote the Principles of Responsible Conduct as stating that the "mission" of the University is to "offer a world class education to our students, train future leaders of our country, expand and advance research and knowledge, [and] serve our community and society both at home and abroad." *Id.* at 3. The Charges utterly fail to explain or show how Prof. Wax violated those principles by observing that "groups have different levels of ability, demonstrated ability [and] different competencies"; by assigning Enoch Powell in her class; by

inviting Jared Taylor to guest lecture; or by saying anything else she is accused of saying. In fact, none of the Charges are coherently linked to any violation of these Principles. *See Id.* at 4-6.

The Charging Party defends his attack on Prof. Wax's protected right to invite guest speakers of her choice to participate in her Conservative Thought seminar by asserting that the University did not know the identity of the speaker at the lunch that it funded from her research stipend. Nov. Memo at 6. The AAUP principles, of course, do not require permission from a University before a guest speaker is invited, and the basic tenets of academic freedom protect Prof. Wax's right to invite challenging guest speakers whose presentations are pertinent to the subjects she is teaching.[11]

And the reason tenured Members must have freedom to teach in a manner that they believe is most effective (including inviting guest speakers) is because the failure to allow such freedom will discourage or bar the presentation of important alternative perspectives that will end up harming the University community and interfering with its truth-seeking and educational missions. As stated in *Kunda v. Muhlenberg Coll.*, 621 F.2d 532, 547 (3d Cir. 1980):

> Only when students and faculty are free to examine all options, no matter how unpopular or unorthodox, without concern that their careers will be indelibly marred by daring to think along nonconformist pathways, can we hope to insure an atmosphere in which intellectual pioneers will develop. Academic freedom prevents 'a pall of orthodoxy over the classroom'; it fosters 'that robust exchange of ideas which discovers truth.'

(quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

[11] Relatedly, no one at Penn Law Review has been sanctioned for accepting an essay by Dean Steven R. Smith Professor of Law at California Western School of Law, who argued that "Ours is a racist Constitution." Steven R. Smith, *Amending a Racist Constitution*, Vol. 170 Pa. L. Rev. Online 1 (2021).

In the same vein, the importance of protecting ideological diversity within the university was recently stressed by the Hearing Board's Co-Chair Prof. Sigal R. Ben-Porath in the publication *Penn Today* (July 31, 2020):

> When I was on the Committee on Open Expression, sometimes you do see that people—students and faculty—feel silenced or truly are silenced by the response of their peers or their professors, because of their perspective. These are not very common cases. I actually think that that's not what usually happens at Penn or anywhere, and portraying this as a common occurrence serves a purpose but is inaccurate. *But when it does happen, it is our responsibility to make sure that there is room for ideological diversity and for all other types of diversity in our classrooms and on our campuses. In this sense, the concern about 'cancel culture' can indeed be a matter of free speech*.[12]

The Charging Party states that the Charges do not rely on anonymous allegations. Memo at 6. That is simply not true. The Charges allege that Prof. Wax should be sanctioned because she allegedly referred to her "faculty colleagues who criticized her behavior by name as 'anti-role models' in a talk given to an audience of law students" (Charging Letter at 11), but the names of these faculty colleagues are not provided in the Charges, the Charging Letter, or the Rodriguez Report. The Charging Party also writes that, "The students were all previously identified in the Rodriguez Report or otherwise in interviews with Quinn Emanuel," but Prof. Wax has never been provided with any materials from Quinn Emanuel, including those that identify interviewed students or reveal their statements. By quoting from the Quinn Emanuel interviews the Charging Party has waived any attorney work product or attorney client privilege and *all* of the Quinn Emanuel materials must be produced.

[12] https://penntoday.upenn.edu/news/free-speech-advocate-discusses-growing-talk-cancel-culture (emphasis added).

A. <u>The Charging Party Misrepresented The Rodriguez Report In His Charges</u>.

The Respondent demonstrated in her Aug. Memo that the Charging Party blatantly misrepresented the Rodriguez Report in his Charges by failing to, among other things, acknowledge that Prof. Rodriguez *cleared* Prof. Wax of any charges of discriminatory or unequal treatment. Aug. Memo at 23-26. The Charging Party defends his action by asserting that the exculpatory portions of the Report could be left out because Prof. Rodriguez was not asked to determine what "harm, if any" could give rise to sanctions. Nov. Memo at 6 (quoting Rodriguez Report at 10, n. 4).[13] The fact that Prof. Rodriguez wasn't asked to investigate or determine the violation of university rules, or the appropriateness of any remedies does not take away from the fact that he found *no evidence* supporting allegations of harassment, discrimination, or exploitation. This is discussed at length in Prof. Wax's motion to disqualify Dean Ruger (Aug. Memo, Ex. 10), but the Charging Party (not surprisingly) elected not to address any of the substantive misrepresentations of the Rodriguez Report in his Nov. Memo.

Rather than focus on what Prof. Rodriguez did *not* find, it bears repeating what he *did* find:

- "There was certainly no evidence from these interviews to suggest that she graded minority students differently, denied them access to professional opportunities over which she had some modicum of control, or singled them out for special ridicule or disparagement."
- "I [stress] that no alum has offered credible evidence that Prof. Wax has discriminated against certain students, with respect to their identity as students of color, immigrants, or LGBTQ status, or on any other basis. There have been no verifiable allegations of discrimination in grading, nor in her assistance or hindrance to any students in professional opportunities."

[13] This did not stop Prof. Rodriguez from doing exactly that, however.

- "The comments made in and around the two 2009-10 panels on Professor Wax's book do not rise in my opinion to the level of harmful conduct, as alleged in the complaint."

- "[N]o alum I spoke with accused her of making statements that would be viewed by a reasonable observer as blatantly racist[.]"

- "[T]he limited ambit of the remark [about Hispanics] cuts against the larger complaint that this episode reveals derogatory comments that have a palpable harm on affected students in the Penn Law community."

- "I found it difficult to separate the consternation [of the students interviewed] with the expressed views themselves and the way these views affected her treatment of students. One alum colorfully described her affect and behavior as essentially 'weaponizing' her views and turning them against students of color, foreign students from certain countries, and LGBTQ students. I could not find sufficient evidence to support this strong claim."

Rodriguez Report at 32-45. The Hearing Board will not find any of these conclusions in the Charges or Charging Letter. And the Nov. Memo does not acknowledge or analyze any of these important and powerful statements. Instead, they are simply ignored.

V. THE SUBSTANTIVE AND PROCEDURAL GUARANTEES PROVIDED IN THE HANDBOOK MEAN THAT THE LAW SCHOOL MUST RETAIN AN OUTSIDE FORENSIC EXPERT TO EXAMINE THE LAW SCHOOL'S RECORDS ON STUDENTS' GRADES AND ACADEMIC PERFORMANCE BY RACE.

The Respondent demonstrated in her Aug. Memo that because the Handbook states that the University must provide her with "copies of *any* . . . University documents that are *relevant* to [her] *procedural and substantive rights*,"[14] it follows that the University must retain an outside forensic expert to examine the Law School's records on students' grades and academic performance by race.

The reason for this is straight forward: Dean Ruger is seeking to sanction Professor Wax based on her stated observation that (1) she didn't think she had ever seen a Black student

[14] Handbook, § II.E.16.4.D (emphasis added).

graduate in the top quarter of the Law School class and rarely in the top half; (2) she could only think of one or two students who had graduated in the top half of her required first-year Civil Procedure course; (3) Black students tend not to graduate at the top of the class; and (4) Black students' grades are not evenly distributed throughout the class. Charging Letter at 10. Those statements were made primarily from her personal experience as a teacher of a large first-year class in which she has seen all the data, and from observations during her years of service on the clerkship committee. Sanctions are also sought because Prof. Wax speculated that the Law Review has a diversity mandate in its confidential selection process. *Id.*[15] As documented in previous submissions in this case, Dean Ruger has repeated assertions about the alleged inaccuracy of Prof. Wax's statements about student performance and law review selection and has relied on them in his charging documents. It is critical to Prof. Wax's defense against these scurrilous charges of making false statements that the data relevant to student performance by race at Penn Law must be disclosed and objectively examined and analyzed. The Law School has the information necessary to conduct such an examination, and basic fairness dictates that the Law School allow and facilitate such an analysis. Prof. Wax self-evidently cannot be sanctioned for making "false" statements about student performance unless the Charging Party produces the information and data needed to substantiate his allegations.

Notwithstanding all of the above, the Charging Party urges the Hearing Board not to force him to produce information on grades and class standing by race. The arguments in

[15] It is a matter of public record that the Law Review had a formal "diversity policy" and it is a matter of dispute as to what extent race continues to be considered today, whether or not a formal policy exists. Adam Chilton, Justin Driver, Jonathan S. Masur & Kyle Rozema, *Assessing Affirmative Action's Diversity Rationale*, 122 Columbia L. Rev. 331, 365 n. 192 (2002) ("We corresponded extensively with the student editors who ran the University of Pennsylvania Law Review during the relevant time period. Leading student editors confirmed to us that a diversity policy existed in 1988, but they disagreed as to whether a policy existed in 1989 and 1990 or whether it had been repealed.")

support of that position, respectfully, make no sense and distort the record. Dean Ruger ignores his prior assertions about the alleged inaccuracy of Prof. Wax's statements entirely. Instead, his focus in the Nov. Memo is on confidentiality. He writes, for example, that professors must "protect the privacy interests of members of our community." Nov. Memo at 7 (quoting the Policy on the Confidentiality of Student Records (the "Policy")).

The Charging Party's reliance on the Policy is wholly misplaced and does not reflect the facts in the record, including the content of Prof. Wax's statements. The Policy is found on page 109 of the Handbook. Section II.A of the Policy states that "This policy pertains to *personally identifiable* information contained in *education records*" (emphasis added). "Personally identifiable" information means just that: a professor cannot distribute "educational records" that would identify a particular student. The Policy further explains that the term "education records" means "records that are *directly* related to a student and maintained by the University or a party acting for the University." *Id* (emphasis added). Prof. Wax is not accused of distributing "educational records" maintained by the University that are directly related to a student and that personally identify that student. The Charges do not allege that Prof. Wax disclosed or published the actual grades of students. Rather, she is accused of generalizing about patterns that she and other law professors (if they are honest) have observed over a period of years: Black law students at Penn Law have not, on average and over time, performed as well as their white peers. This pattern is pertinent to the merits and effects of racial affirmative action in law school admissions, which Penn Law School does not deny it has long practiced.

In any event, it is clear that Dean Ruger's attempt to sanction Prof. Wax is not based solely on her alleged breach of confidentiality; he has already sanctioned her for that by removing her from teaching a mandatory first year class. Dean Ruger now wants to penalize

Prof. Wax because he believes she made *false* assertions about the relative academic performance of Black students admitted to Penn Law under affirmative action policies. Unless he is willing to retract these allegations in the Charges, it is incumbent on him to back up those allegations by *proving* that Prof. Wax's statements were inaccurate. The Handbook's guarantee of substantive and procedural fairness requires that he produce the underlying data and retain a forensic examiner.

The Charging Party also asserts that Prof. Wax's "discussion of [Black students'] alleged performance" (Nov. Memo at 6) violates the Policy and, therefore, he is not required to produce information that proves that Prof. Wax was either lying or mistaken. As already noted, Prof. Wax did not violate the Policy, as the Policy is clear that it only covers "educational records" maintained by the University. In any event, the accusation of a violation cannot be used to rob her of the information that is both necessary to the Charging Party's case and her defense: the *truth* about Black student performance at Penn Law.

The Charging Party also defends his position by writing that the truthful observation that Prof. Wax offered to the media "reveals impressions and facts about identifiable individuals in her courses." *Id.* at 7. This is simply not accurate. Even if someone tracked down the names of Black students in Prof. Wax's classes (and we're not sure how that would even be possible), her general comments on overall Black student performance would not reveal an "impression" or "fact" about any "identifiable" student. And because her observations did not apply to every single student, but rather describes an overall pattern, her assertions could not possibly indicate whether a particular student did relatively well or badly. Thus, as noted, her observations do not qualify as the release of an "educational record" about any particular "identifiable" student.

The Charging Party also opposes the request for a forensic examination because, he asserts, the results would "justify [the] statements after the fact." *Id.* Two observations are in order here. First, since Prof. Wax did not violate the Policy or any other rule, there is nothing to "justify." Second, instead of the word "justify," the better word is "prove," as in, "prove that the statements were true, and Prof. Wax did not make false statements." If Dean Ruger wants Prof. Wax sanctioned because he claims that her observations about Black Law School performance were not accurate, then he has to provide her with the information underlying his assertion and give her an opportunity to show that her observations *were* accurate. The information requested, in other words, will demonstrate that the Respondent had good reason to believe her observations were accurate when she made them, which is evidence she needs to defend herself against an attempt to sanction her for making allegedly false or inaccurate statements.

It seems appropriate to wonder why the Dean of the *Law* School is so determined to resist disclosing information about Black student performance. If the forensic examination demonstrates that Prof. Wax's personal observations were statistically invalid, then the Dean's accusation of the inaccuracy of her statements is vindicated (although, we will argue, such vindication is still not grounds for sanctions as long as Prof. Wax's statements were made in good faith in the interests of academic discourse). Alternatively, if the forensic examination demonstrates that Prof. Wax's observations *are* an accurate description of the profile of student performance at Penn Law School, that would be pertinent to the advisability of Penn's affirmative action policy and diversity and inclusion initiatives. But it would also show that Dean Ruger's assertions about student performance, and his claims that Professor Wax spoke inaccurately, are themselves false. This is crucial to Prof. Wax's defense against the Charges. Due process requires that the Respondent be provided with the information necessary to defend

herself, information that only the Law School possesses. Because the Law School has the data to prove the truth or falsity of Prof. Wax's observations, which is central to the Dean's efforts to punish her, it must allow an examination of that data.

The Charging Party further opposes the forensic examination on the ground that the Respondent's observations were not "accurate" (thus reviving the allegation that Prof. Wax made false statements) but were instead "harmful" and "disparaging." *Id.* But if Prof. Wax's observations are *true*, then of course they are accurate. Nor is it plausible to regard truthful observations as harmful or disparaging, unless it is the Law School's position that Black students and everyone else at Penn Law must be shielded from information about the effects and outcomes of affirmative action. If that is the Law School's position, the Charging Party should state this openly and candidly instead of hiding behind disingenuous excuses and doublespeak. What the Dean's claims boil down to is an attempt to censor and hide information pertinent to important institutional and policy choices. Such censorship and lack of candor should be acknowledged as such. The Charging Party must either withdraw any accusations of "false" statements regarding student performance by race or else produce (in advance of any hearing) the data and analysis needed to substantiate those accusations.

VI. THE HEARING BOARD SHOULD NOT ALLOW THE CHARGING PARTY TO WITHHOLD CRITICAL INFORMATION NECESSARY FOR THE DEFENSE OF THIS ACTION.

The Charging Party's objections to Prof. Wax's demand for other information should also be rejected and his refusal to provide it rectified. The demands do not seek, as he suggests, "disproportionate" and "irrelevant" information. *Id.* at 8. The Handbook guarantees that all respondents will receive "*any* . . . University documents that are *relevant* to the respondent's. . . rights in this matter." Handbook, § II.E.16.4.D (emphasis added). If the Charging Party was not

prepared to provide the Respondent with "any" University document that is "relevant" to her rights, then he should not have filed the Charges.

Dean Ruger writes that Prof. Wax's information demands are not "proportional to the sanctions she may face." Nov. Memo at 8. That is absurd: Dean Ruger is asking for a "major" sanction that can include *loss of tenure and livelihood*. Given the stakes involved, Prof. Wax is entitled to "any" document that is "relevant" to the defense of this action. Everything that Prof. Wax has demanded is based *directly* on the Charges and is therefore *wholly relevant* to the defense of this action. This is demonstrated in the following table:

Charges or Charging Letter	University or University Agent Documents Necessary For the Defense of the Action	Relevance
"I am initiating this disciplinary action because for several years and in multiple instances Wax has [made] racist, sexist, xenophobic, and homophobic . . . statements."	All other statements by Penn members that have ever been found by Penn to be: racist, sexist, xenophobic, and homophobic. No. 12.	Demonstrates selective prosecution and lack of fair notice and highlights that the Charges fail to define relevant terms in the context of a tenured Member's observations on group characteristics or any other generalizations, statements, or criteria.
"I am initiating this disciplinary action because for several years and in multiple instances you have . . . undermine[d] the core values of our University."	The name of any University member who was sanctioned or terminated by the University for undermining the 'core values' of the University. No. 13.	Demonstrates selective prosecution and lack of fair notice and highlights that the Charges are based on vague, amorphous, and ill-defined "standards," "mission," "norms," and "customs."
"The Law School retained the law firm Quinn Emanuel in part to interview students, alumni, and faculty who stepped forward in support of	All records related to the Quinn Emanuel investigation, including amounts invoiced and paid, reports, memoranda, transcripts, and other	The Charging Party relies on statements made to Quinn Emanuel. He has therefore waived the attorney-client privilege

Charges or Charging Letter	University or University Agent Documents Necessary For the Defense of the Action	Relevance
its complaint against Wax. These interview statements have been incorporated below."	documents, as well as names and contact information for every person interviewed or consulted by the law firm in this matter. No. 15.	and work product doctrine. Prof. Wax has the right to determine if there are exculpatory statements made to Quinn Emanuel as there were to Prof. Rodriguez.
Same as above.	All letters and correspondence that Dean Ruger has ever received from students and other individuals that . . . have been submitted in support of her, her teaching, her role in the University, her right to free expression, her opinions, or are otherwise relevant to the charges against her. No. 17.	The Charging Letter alleges that six (6) minority students were upset by Prof. Wax's statements. If Dean Ruger received communications from minority students and others that indicated that they were *not* upset by these comments or any other statements made by Prof. Wax, or that otherwise contained positive statements about Prof. Wax, that is relevant information of which the Hearing Board should be aware.
"Prof. Wax "crosse[d] the line of what is acceptable in a University environment where principles of non-discrimination apply." "No member of our community should be made to feel like they do not belong, are unwelcome, or are incapable of achieving excellence because of who they are or from whence they come."	All letters and correspondence that Dean Ruger has ever received from students and other individuals that . . . that have been submitted in support of her, her teaching, her role in the University, her right to free expression, her opinions, or are otherwise relevant to the charges against her. No. 17	The Charges stand for the proposition that Prof. Wax is not fit to teach at the University, especially if there are minority students in her classes, because she allegedly "crossed a line" and violated "norms" and her academic speech is not protected by the academic freedoms granted to her as a tenured Member of the University. Documents from University members who

Charges or Charging Letter	University or University Agent Documents Necessary For the Defense of the Action	Relevance
Prof. Wax violated the University's "standards," "mission," "norms," and "customs."		are supportive of Prof. Wax and praise her teaching, research, and interactions with students will dramatically refute that charge and are exculpatory.
Same as above.	The complete file and materials relevant to Prof. Wax's 2015 Lindback Prize, including documents prepared, materials collected, and interviews conducted by Dean Gary Clinton as well as all communications, documents, and reports prepared by other University officials in connection with the decision to give the Lindback Award to Prof. Wax. No. 19.	This information is crucial to the Respondent's defense because Prof. Wax was thoroughly vetted before the award was given. If any of the student and alumni allegations and complaints cited in the Charging Letter failed to be reported as part of the investigation and vetting for the award, that will demonstrate that (a) their complaints are stale; and (b) Prof. Rodriguez's conclusion that the alleged remarks were either fabricated or mis-remembered was accurate. The information will also demonstrate that very old complaints were resurrected after the fact in light of the media publicity surrounding Prof. Wax's recent remarks and the accusations against her by the Dean and in the media.
"The Law School retained the law firm Quinn Emanuel in part to interview students, alumni, and faculty . . ."	A list identifying every individual who lodged complaints against Prof. Wax, their years attending Penn Law	Prof. Wax has the right to know who has complained about her but also who, at the same time, is not

Charges or Charging Letter	University or University Agent Documents Necessary For the Defense of the Action	Relevance
	School, if pertinent, and their current contact information. No. 3.	referenced in the Charging Letter so that she can determine, *inter alia*, whether some students were pressured to exaggerate their responses to Prof. Wax's comments.
Dean Ruger is the Charging Party.	All of Dean Ruger's communications, e-mails, texts, internet posts, talks, and speeches regarding Prof. Wax. Aug. Memo at 30.	This information is relevant because it will potentially further demonstrate Dean Ruger's bias which is a basis for his disqualification; this is necessary because a biased charging party violates the Handbook's commitment to a "fair" proceeding.
Dean Ruger is the Charging Party.	Any documents Dean Ruger helped to prepare at Penn that mention Prof. Wax and are related in any way to the charges against her.	This information will demonstrate that Dean Ruger filed the charges to placate a group of students and alumni based on politics and may further establish his bias.
Assigning an interview with Enoch Powell.	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. No. 24.	This exercise will highlight that the Charges improperly rely on vague, amorphous, and ill-defined "standards," "mission," "norms," and "customs," and thus violate basic principles of fairness and notice.
"Wax claimed that the University of Pennsylvania Law Review had a racial	All information on how members of the Law Review are chosen. Aug. Memo at 37.	This information is necessary for Prof. Wax's defense because it is relevant to the issue of

Charges or Charging Letter	University or University Agent Documents Necessary For the Defense of the Action	Relevance
diversity mandate when it does not."		whether she made false statements with respect to whether race is considered when admitting students to the Law Review.

The Charging Party asserts that Prof. Wax is not entitled to any of this information – and indeed to no information at all – because it would not be "expeditious" to force the University to produce it. Nov. Memo at 9. That is the wrong standard. Given what is at stake for Respondent and the University, maintaining a process that "protects the rights of faculty members" and ensures she has an adequate opportunity to prepare for the hearing (Handbook § I.E.16.4.G.) is more important than maintaining a process that is "expeditious" (especially since the Charging Party waited years to file the Charges).

Respondent also objects to the Charging Party's assertion that the Hearing Board should deny the information requests because they "impede upon other faculty members' and students' privacy rights." Nov. Memo at 9. This assertion is baseless. Prof. Wax is not asking individual students or faculty to produce privileged or confidential information. She is only asking for information necessary to defend herself against the Charging Party's own self-selected allegations. The Charging Party took umbrage at the analogy to Stalin show trials (*id.* at 8), but those words were chosen carefully: in the United States of America, a citizen whose livelihood and reputation are on the line should be provided with all of the information within the accuser's custody and control that is needed for that person's defense. Anything less would be a travesty and does not qualify as a fair procedure. The burden on the University in providing this information pales in comparison to the damage that Prof. Wax will suffer if she is not given

information that only the University possesses, and which will help exonerate her of all the charges against her. Alternatively, if the Charging Party refuses to produce the information discussed above and in the Aug. Memo, he must be ordered to withdraw any allegations or Charges that are premised on the withheld information.

VII. FAILURE TO PROVIDE INFORMATION ON WHETHER THE HEARING BOARD MEMBERS HAD ACCESS TO THE ALLEN PRESENTATION MEANS THAT THE HEARING BOARD WILL NEVER "APPEAR TO BE IMPARTIAL."

On February 10, 1997, SCAFR issued a "Special Report" entitled "Academic Freedom and Responsibility." The Committee wrote:

- "The purpose of a procedure for handling complaints of violations of academic freedom is to give all parties a fair, impartial hearing. There has long been a general consensus concerning the fundamental elements of such a procedure, a consensus that is reflected in the principles that follow."
- "The procedures should *assure* impartiality." (emphasis added).
- "[The body adjudicating the issues] must both be impartial *and appear to be impartial*." (emphasis added).

The Respondent demonstrated in her Aug. Memo that basic fairness, common sense and a fidelity to University rules and principles (as quoted above) requires that she be informed whether or not the Hearing Board members attended or read Anita L. Allen's February 16, 2022 presentation to the Faculty Senate, and especially the questions and answers that followed. That information is directly pertinent to her right to move to strike any member of the Board who might be biased in her case. Access to this information is guaranteed by both SCAFR's Special Report and the Handbook. *See* Handbook, § II.E.16.4.D (University must provide Respondent with "copies of any other University documents that are relevant to the respondent's *procedural* . . . rights in this matter") (emphasis added).

Notwithstanding the obviousness of the proposition that a Respondent should be allowed to know if the panel adjudicating her right to continued employment is biased, the Charging Party asserts that (a) the issue is moot; and (b) the Respondent is not entitled to this basic information, which he disingenuously refers to as "invasive" and "overbroad" "discovery." Nov. Memo at 3.

First, the issue is not moot. It is not too late. If Professors Ben-Porath, Rubin, Charles, Simmons, or Steiner attended or read the Allen presentation, which included an extensive post-presentation Q&A about *this very case,* they should so state. Surely Prof. Wax, the University community, and the watching public deserve to know. The Special Report states that not only must a body determining issues of academic freedom be impartial; it must also "*appear* to be impartial." If the Hearing Board members listened to the Allen presentation, the Hearing will never "appear" to be impartial.

Moreover, putting aside the mandates of the Special Report and the Handbook, as we have stated previously, the Charging Party and the Hearing Board should not be treating the charges against Prof. Wax as a run-of-the-mill disciplinary matter regarding issues that have come up before. This case is unprecedented and has the potential to radically narrow and even destroy the protections of tenure and freedom of thought and speech in the academy. It deals with the soul of the University, and it goes to its very mission. Respondent respectfully submits that the Chair should *want* the world to know that the Hearing Board is not just unbiased, but also that it does not *appear* to be unbiased. The only way to do that is by providing information

on whether or not the Hearing Board members had access to the Allen presentation, which may lead to their disqualification[16]

In denying the disclosure and information requested by Respondent in her Aug. Memo, the Charging Party relies heavily on the assertion that the Handbook does not use the word "discovery." Nov. Memo at 4. That is certainly true, but it is by no means persuasive or dispositive. There are many words not found in the Handbook, but no one would argue they are not applicable.[17] Other words that *do* appear in the Handbook, however, *are* dispositive: the University "must provide Respondent with copies of any other University documents that are relevant to the respondent's *procedural* . . . rights in this matter." Handbook, § II.E.16.4.D (emphasis added). And the words that appear in the Special Report are also dispositive: a tribunal determining issues related to a Member's academic freedom "must both be impartial *and appear to be impartial*." (emphasis added). By definition, a tribunal assigned to evaluate charges against a University Member cannot be impartial, or appear to be impartial, if the Member is deprived of materials critical to reaching a fair, unbiased, and fully informed decision. (This

[16] The fact that the Hearing Board refused to provide this information is another reason the Dean's attack on Prof. Wax's academic freedoms should be adjudicated by the Commission.

[17] The Handbook does not state, for example, that there will be bathroom breaks during the Hearing but certainly that does not mean that there won't be. *See also* https://youtu.be/N16YkjFVAyE

> KAFFEE: Corporal, would you turn to the page in this book that says where the enlisted men's mess hall is?
> HOWARD: Lt. Kaffee, that's not in the book, sir.
> KAFFEE: I don't understand, how did you know where the enlisted men's mess hall was if it's not in this book?
> HOWARD: I guess I just followed the crowd at chow time, sir.
> KAFFEE: No more questions.

A Few Good Men, screenplay by Aaron Sorkin (1992).

point applies with full force not just to Hearing Board members' exposure to the Allen presentation, but to all Respondent's requests.)

The Charging Party does not address the implications of the Anita Allen presentation at all. He simply states that because the word "discovery" does not appear in the Handbook, the Respondent has no right to know if any Hearing Board members attended or read it. Nov. Memo at 3. There is no attempt to grapple with what Prof. Allen argued to the Senate and its implications for this matter. If, as he should have, the Charging Party *did* address the argument that this information should be disclosed, he (as a Dean of a *law* school), would have to admit that the issue of whether the tribunal heard the Allen presentation is squarely pertinent to whether Respondent's procedural rights are being protected. The irony of the Charging Party's position is that he insists it was Prof. Wax's job to explain why any individual Hearing Board member should have been disqualified for bias but, at the same time, he insists that she had no right to the information that would have enabled her to so explain. At a minimum, each member of the Hearing Board should submit an affidavit stating under oath that he or she did not attend or read the Allen presentation. If the members refuse to do so, that will obviously be telling and of great interest to the Commission when it reviews Prof. Wax's Grievance.

VIII. DEAN RUGER'S BIAS REQUIRES THAT HE BE REPLACED AS THE CHARGING PARTY.

The Respondent demonstrated in her Aug. Memo, and earlier in her motion to disqualify, that Dean Ruger has expressed so much bias and hostility toward Prof. Wax that he should be disqualified. Aug. Memo at 30-31 and Ex. 10. The Handbook specifically recognizes the possibility of disqualification because it states that individuals other than a dean can be the Charging Party. Handbook, II.E.16.1.B.1 and II.E.16.4 (Charging Party can be Provost or a

Provost's designee). The Handbook also is clear that a respondent's "procedural" rights must be protected. *Id.* at § II.E.16.4.D. Moreover, "The purpose of a procedure for handling complaints of violations of academic freedom is to give all parties a fair, impartial hearing." SCAFR Special Report (Feb. 10, 1997).

The concept of "fairness" demands that the person bringing charges cannot be biased against the person being charged. This basic concept of fairness is found in the common law maxim that, in a criminal context, the lawyer prosecuting the case must be disqualified if he has demonstrated bias against the accused. *See, e.g., Working Families Party v. Fisher*, 23 N.Y.3d 539, 546, 992 N.Y.S.2d 172, 15 N.E.3d 1181 (2014) (a "demonstrated conflict of interest" requires the appointment of a special prosecutor); *State v. Juan New Mexico Supreme Court*, 148 N.M. 747 (2010) (prosecutor must be removed for a conflict of interest where his relationship to the defendant has created an "interfering personal interest or bias"). Although the Charging Party likes to emphasize that this is not a civil or criminal proceeding (Nov. Memo at 8), the fact that the Handbook states that a sanctions procedure "must be handled fairly" (Handbook, § II.16.1.A), means that the Hearing Board must rely on relevant sources that explain what a "fair" process is. And a process is not, by definition, "fair" if the Charging Party has demonstrated personal bias against the Respondent.

Notwithstanding these long-cherished principles of fairness, the Charging Party insists that he should not be disqualified because (1) he is allowed under the Handbook, along with others, to be the Charging Party; and (2) there is no "requirement" in the Handbook that he be disinterested, but only that he "believes" in the Charges. Nov. Memo at 7. Note that the Dean does not take issue with the *factual* assertion that he has a personal bias against Prof. Wax and that that personal bias is fueled by (1) his kowtowing to the demands of a small number of

politically disgruntled minority students and alumni; and (2) his expressed hostility towards Prof. Wax's politics. The fact that the Dean is allowed to be the Charging Party or that he "believes" in the Charges in no way addresses the substantive point that "fairness" in the context of a procedure seeking punishment requires an unbiased charging party. This is especially so because the Charging Party will be required to be present, answer questions, and defend the charges at the hearing. The Hearing Board, therefore, should disqualify Dean Ruger and replace him with either the Provost or the Provost's designee.

IX. FACTS WHICH THE CHARGING PARTY ELECTED NOT TO ADDRESS.

The Charging Party took three (3) months to submit his opposition memorandum. He had plenty of time to address every point that was included in the Respondent's Aug. Memo. Because he failed to do so the Nov. Memo is inadequate. Here are some of the critical issues and arguments that the Charging Party elected not to address at all:

1. The Charges do not contain a complete and final list of all statements and actions that are allegedly sanctionable.[18]

2. The Charges are not presented in an orderly, coherent, and intelligible manner.

3. The Charges unfairly exclude crucial contextual information.

4. The Charges fail to define critical terms and labels applied to Prof. Wax and her statements throughout the Charges such as "derogatory," "racist," "sexist," "white supremacy," "mission, values and standards," or explain how those labels justify the Charges against her.

5. By alleging that Prof. Wax "crossed a line," Dean Ruger utilized meaningless and empty jargon and invented a code of conduct that can nowhere be found in the University rules or requirements pertinent to Prof. Wax.

[18] Given the stakes involved, the Charging Party should not be allowed to wait just one month before providing a final set of charges, documents, and witness list. That provision of the Handbook was designed for run-of-the-mill disciplinary matters which this matter is certainly not.

6. The Charges paint a grossly distorted and misleading picture of Prof. Wax's alleged statements based on one-sided and incomplete information.

7. The file for Professor Wax's Lindback prize must be turned over for examination to see if student complaints post-date this prize award.

8. Dean Ruger must turn over all e-mails, letters, and communications that are supportive of Professor Wax.

9. The Charges omitted key, material facts.

10. The Charging party ignores crucial, favorable information and statements in the Rodriguez Report, including the lack of evidence of Wax's bias towards students and the finding that the blind grading mandate precludes bias.

11. The assertions about Jared Taylor in the Charges are unfounded and false.

12. Objections to the assignment of the Enoch Powell interview are baseless and inappropriate.

13. A neutral third-party should be retained to make all pre-hearing procedural decisions.

14. The Charging Party should consider and accept Professor Wax's offer to resolve the matter and dismiss the Charges.

X. THE PROCEEDINGS MUST BE HALTED PENDING GRIEVANCE PROCEDURES AND A HEARING ON THE MOTION TO DISMISS AND DENIAL OF REQUESTS FOR INFORMATION.

There should be no further proceedings on the Charges filed by Dean Ruger and referred to the Faculty Senate Hearing Board for two reasons. First, the Respondent has filed a Grievance, and the Commission has exclusive jurisdiction over matters pertaining to academic freedom.

Second, the inadequacies of the Charges and of the Dean's response to Respondent's requests for information and clarification must be discussed and rectified. In order to do that, it is necessary to hold a preliminary hearing on the Aug. Memo and the Nov. Memo opposition.

Whether the Charges should be dismissed and whether Prof. Wax's information requests should be honored must be resolved. In order for the Respondent to make a meaningful and informed decision on whether her participation at a hearing on the substance of the Charges would prove useful, she must have access to the information needed to defend herself. That is what must be determined in the preliminary hearing we propose. To borrow from the language of the courts, it's time for oral argument on Respondent's motion to dismiss and her motion to compel disclosures as set forth in her Aug. Memo and this reply. Only resolution of the issues raised in those documents will give Prof. Wax the information she needs to make an informed decision on whether to ask for a hearing before this tribunal.

In sum, the Faculty Senate Hearing Board proceedings should be halted, and Respondent's Grievance considered by the appropriate decision-making bodies. Apart from granting all Respondent's requests for disclosure, the Hearing Board should conduct no further proceedings.

CONCLUSION

For the foregoing reasons, the relief requested in the Respondent's Aug. Memo should be granted.

Dated: January 16, 2022

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