RESPONDENT'S CLOSING STATEMENT

Let's end where we began.

What is a racist? What is a white nationalist? What is a white supremacist? What is a xenophobe? What is a homophobe? What is a sexist?

To hear the Charging Party's witnesses tell the story, we are dealing with a racial monster. The Grand Wizard of the Penn Law Chapter of the Klu Klux Klan. But the evidence does not support the Charging Party's allegations. There was no credible evidence submitted that she was biased or committed any negative act based on the color of a student's skin. None. No grade reduced. No refusal to assist. Never was the N word spoken. No nooses were found hanging from a colleague's office. No burning crosses. Instead, we heard disparate stories over an almost twenty-year period. One about a young man with headphones and the use of the word "Negro" in discussing *Denman v. Spain* from 1961. You can't fire her based on that. There was one very tearful episode regarding the words "affirmative action" after the Derbyshire panel. The witness testified that Prof. Wax said she *only* got into Yale and Penn because of affirmative action. The charges use the phrase "double Ivy," but the witness didn't. And Prof. Wax told you she didn't say that and would never speak that way. The incident hangs on a word uttered thirteen years ago. An incident in isolation and not repeated before or since. It doesn't deserve the weight that has been placed upon it.

And consider [redacted] testimony and documents. Her contemporaneous notes state that Prof. Wax said in her Civ Prof class that "generalizing about Mexicans has nothing to [do] with race." The Dean's charging document claims that Prof. Wax said, "Mexican men are more likely to assault women" and remarking that such a stereotype was accurate in the same

way as "Germans are punctual." Taking words out of context. Making up words Prof. Wax never said. That's what the Dean's charges are based on. That manipulation of her remarks tells you a story – we saw it through the Charging Party's opening statement – cherry picking the most provocative words they could find to paint her as poorly as possible. And consider this: *almost none of it was in his Charging Documents*. That is part and parcel of how my client has been treated.

I respectfully submit that a fair, rational, and professional assessment of the testimony of the Charging Party's witnesses adds up to this: to use Prof. Wolff's numbers, maybe 24 minority students over several years came to complain almost exclusively about something that Prof. Wax said in the media. There was not one credible story of personal racial animus. Not one. I submit that the very few stories about race being discussed in her Civ Pro class are not credible. You heard from her witnesses that she never discussed race and politics in Civ Pro. Why would she? There was a tremendous amount of material to get through. And, most devastating for the Charging Party's case, is the glaring factual error made by [redacted] – Prof. Wax's book on race and remedies didn't come out until 2009, but [redacted] was in her class in 2007, and Prof. Wax didn't start working on her book until after that. She didn't receive a request to write it until the end of 2007. It's simply impossible to believe that two years before her book came out, and one year before she was asked to write it, Prof. Wax would talk daily about her views on race and the thesis of her book in a Civ Pro class, and especially in a way that would upset anyone.

Let me carefully and respectfully suggest to you another narrative – as Dean Rodriguez reported, many of the students he interviewed confused Prof. Wax's out-of-class statements with her in-class statements. Many, for a variety of reasons, including their objections to her expressed views, heard words in such a way that it left them very upset. As I said in my opening,

I do not doubt the veracity of their feelings. Yes – these students walked away from their interactions with Prof. Wax with their feelings hurt and convinced that they were the victims of racial animus. The word "victim" was used a lot by the Charging Party's witnesses. But please remember what the Handbook tells us: "The charging party has the burden of proving by clear and convincing evidence that there is just cause for imposition of a major sanction against the respondent." You don't need to be a lawyer or even to play one on TV to know what the phrase "clear and convincing" evidence means. Just that – you must be convinced by "clear" evidence that Prof. Wax mistreated students so badly, so viciously, and so racially, and for so long that she must be penalized or shown the door.

The Charging Party has failed to carry his burden of proof. He brought into this room less than a dozen students who couldn't tell you one instance of racial bias. Not one.

Likewise with Prof. Wolff – an alleged "personal attack" at an academic panel? That should be the basis of a "major sanction" under the Handbook? Respectfully, I don't think so. As you heard, Prof. Wax was invited to present the secular arguments against same sex marriage years before the Supreme Court decided *Obergefell v. Hodges*. She did what she was asked to do. The University cannot have a policy which says that tenured members of the faculty must first get clearance from a fellow faculty member who is also on the panel before she can present her arguments. Surely that cannot be open to debate.

So - what *does* the Charging Party have? You heard it in the opening – yes – he has a great many remarks which some would regard as insensitive about the differences between cultures and groups, and the differences between Blacks and whites when it comes to intelligence testing and IQ. Prof. Rock's word was "obnoxious." (And I'm sure I'll hear from my client

about that.) But the problem with the Charging Party's case is this: These are all statements made outside the classroom. **Statements made *outside* the classroom do not create a hostile environment *in* the classroom**. That's illogical. That doesn't make any sense. That is not a workable way to run a university. No matter how upsetting it is for a student to read these words, it can't be grounds for a major sanction. Remember what Prof. Katz taught us – academic freedom doesn't end with the tears of a student. You can't run a university that way. Or as Prof. Rock put it, you can't replace the word "harm" with "hurt feelings." That enshrines the Heckler's veto. That would shut down the university. Or at the very least turn it into a site for orthodoxy dictated by student reactions.

Several of the Charging Party's witnesses would you have you believe – and this was especially true of Prof. Allen – that this is *only* about Amy Wax, and it doesn't affect anyone else down the road. Respectfully, that rings hollow. Of course this is more than about one professor. That's why not one but two observers from academic freedom organizations are with us. This is what Professors Rock, Katz, Robinson, and Klick explained – if you shut down Prof. Wax because, over many many years, several Black students were incensed or felt unwelcome because of the words spoken or views expressed outside of the classroom, then of course you open the door for censorship without limits. Jews who are hurt by pro-Palestinian teachers. Liberals who are hurt by professors who don't support same sex marriage as a policy. The list goes on.

So – let's return to the question. What is a racist? It is not somebody who looks outside of the academy and sees differences between Blacks and whites and other groups. Facts aren't racists. A racist is not somebody who looks outside of the academy and says that certain liberal values about race relations are wrongheaded and are hurting the people they are trying to help.

That's not a racist. That's a professor who goes *outside* of the university – because she certainly can't do it *in* the university – to express these observations. And they're hurtful. But if they are part of the debate, they are allowed. And if they "hurt" some students - if they make them feel uncomfortable, angry, or unwelcome - the answer is not to fire the professor, surely.

You heard Dean Ruger talk about how off the reservation Prof. Wax is because – *in his view* – she's not a "real" conservative; she's some wild white nationalist who maybe is or maybe isn't spurring on violence. But it is not the job of the Charging Party to decide if one of the faculty is no longer within the accepted circle of conservatism and thus should be allowed to stay. And as you consider your recommendation, I implore you not to make the same mistake. Any major sanction will set university policy, and that policy will be new. It won't be found in the charter. It won't be found in the AAUP statements that the university has adopted. It will be a novel policy, and it will read, "If your Dean determines, based on student complaints, that your out of class statements upset faculty or students, or is hurtful to them, or brought them harm, then you have to go." That's unworkable. That can't be University policy.

Amy Wax is not a racist. You heard that from Prof. Klick. A racist is someone who discriminates against a minority based on the color of his skin. It is not an academic who talks about the differences between groups.

And do you know who else testified that Prof. Wax is not racist? A Hispanic man, Mr. [redacted] who loved her and her class. A Sri Lankan gentleman, [redacted], who audited her class and never saw a moment of unkindness. Consider her first witness, [redacted] who never experienced anything negative when he announced his engagement to a Punjabi woman. This is a good a time as any to pause for a minute and reflect on the testimony

of students from Amy Wax's Civ Pro and Conservative Thought Seminar. Wasn't that remarkable? Have you ever heard so many students lavish so much praise on a teacher? The superlatives were breathtaking. When I was preparing them, they would go on with these superlatives and I reminded them – jurors don't like over the top. And so many said, "But I thought I'm under oath."

And what did we learn from them? The Respondent's teaching did exactly what a legal education is supposed to do. It opened them up to new ideas. It widened their horizons. It challenged them. It helped them to grow as people and as lawyers. The Civ Pro students all testified that politics and race was never discussed in Prof. Wax's Civ Pro class. And that makes sense to me – there's a lot to cover. And so I suppose you have two stories – on the one hand, a very small number of students who said they remembered something political that upset them. The use of the word Negro, for example. All of the rest said that politics was never discussed. You know what that means in the law? There is no "clear and convincing" evidence. There's no equivalent here to a videotape of Prof. Wax stealing from the university. There are competing stories about her character, her class, and her conduct. And the Charging Party's story is based on recollections from very long ago - recollections that could easily be inaccurate. That means – logically – that you cannot recommend a major sanction. There is no clear and convincing evidence that she deserves one.

What else did we learn from these witnesses? Well, unfortunately, we learned that Dean Ruger committed perjury. He said he wanted to be under oath. And what did he say? The Law Review does not have a racial diversity mandate. That was a lie. It must certainly does. Witness after witness after witness – some on Law Review and some not – told you that Prof. Wax was telling the truth. There is a diversity mandate, and the Law Review uses the personal statement –

known as well as the diversity statement – to enforce it. The personal/diversity statement marked as an exhibit during the direct of [redacted] is not ashamed to tell the minority applicant exactly what the Law Review wants him or her to write about:

> The success of a legal journal depends not only on the editing and analytical skills of editors but also on the . . . *backgrounds* . . . that make its editors who they are. We firmly believe that in an endeavor to produce a collection of scholarship and approaches that assesses the law in varied and *diverse* manners, a journal should seek editors who will bring . . . *diverse* perspectives to bear on the task of engaging with that scholarship.
>
> To that end, please write an original essay describing how your *background* and *experiences* have equipped you to make a *unique* contribution to a legal journal.
>
> Some examples of potentially relevant topic areas include . . . *personal* experiences that have contributed to your growth or world view. . . .
>
> While you cannot identify yourself by name, you can of course include details about your life and experience that you believe make you a *diverse* individual.

This is another example of how the charges are based on a lie. Another example: "I don't think I've ever seen a black student graduate in the top quarter of the [Law School] class and rarely, rarely in the top half" and "I can think of one or two students who've graduated in the top half of my required first-year course." This is a statement based on the Respondent's observations. And she never violated the university's policy on student confidentiality or federal law.

The University's 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*." Prof. Wax did not hack into the Law School's computers, pull out names and grades of Black students, and publish them. She provided a general personal observation. If Penn had allowed a forensic specialist to review its records, as it should have, those observations would

have been revealed as substantially accurate. And Dean Ruger also observed that what Prof. Wax said was “false” and if she violated any University or federal statutory ban on releasing confidential student records, then so did he.

Professor Wax did not violate the Handbook, let alone federal law, by saying she "thinks" she hadn't "seen a Black student graduate in the top quarter of the class." For starters, those were her impressions--not actual grading data. But even if impressions could count as educational records, the Respondent is not barred from speaking publicly about academic performance so long as no students' identities or records are disclosed. FERPA does not bar such speech. As a federal statute, it must comply with the First Amendment. The Handbook's confidentiality policy only prohibits what FERPA does. And FERPA does not prohibit Professor Wax's statement. The federal court here in Philadelphia held in a case called *Lei Ke v. Drexel University* that disclosing academic performance data in "statistical, summary form" that includes the students' "ethnic background" does not violate FERPA. The Dean’s interpretation was wrong. FERPA does not bar what Respondent said and therefore neither does the Handbook. There is no basis for recommending a major sanction based on these remarks.

But wait, the Charging Party says, people could still figure out who the Black students in her classroom were and then know their grades, and isn’t that just as bad? No, that is not the same thing as violating confidentiality.

On this point, you will receive on Friday an expert statement from Michael W. McConnell, the Richard & Frances Mallery Professor of Law at Stanford University, Director of Stanford’s Constitutional Law Center, Senior Fellow at the Hoover Institution, and former federal judge for the U.S. Court of Appeals for the Tenth Circuit. He writes that:

> [I]t is true that professors should not reveal personal information about individual students, especially of an unflattering nature. But this cannot be extended to broad statements about demographic groups, when the academic performance of those groups is relevant to public policies like admission standards.
>
> It is not possible to discuss certain topics, like affirmative action with respect to university admissions, without making some statements about empirical reality – where even the facts are in dispute and can be interpreted in different ways. ***Good-faith misstatements of fact are not grounds for discharge, let alone factual assertions that may well be true.*** Legitimate points of view on contentious subjects, however unpopular among the majority of the university community, must not be suppressed on the pretext that individual students are personally involved.
>
> This principle cannot survive if the university determines that discussing group performance is not allowed because someone could, if he wanted to, research the professor's class and determine which members of that group were in the professor's class or if the public learns that the student attended the law school in question. ***The fact that a student is in the group being discussed does not violate that student's right to confidentiality***. Moreover, defining the school's rule on student confidentiality, or the federal laws on protecting student confidentiality, would gut the professor's right to discuss the reality of grades within broad demographic groups.

The Charging Party claims that Prof. Wax was using her Black students as laboratory rats. That's not true. She was presenting accurate information from personal observations. That's not a sanctionable offense. As Prof. Rock explained, the correct response to Prof. Wax's comments should have been exactly what the Dean testified to, "I don't care. Grades are not important." He should have said, "Let's look at what our Black graduates go on to do." And here's the irony – his very witnesses are exhibits to that proposition. They are all flourishing. When you read our expert reports, you'll see that everything that Prof. Wax said about grades by race was accurate and, as Prof. Katz testified, just plain common sense.

What else did we learn from Prof. Wax's witnesses? It sure is tough to be a FedSoc or conservative person at U Penn law. The stories of how the administration and the students treat FedSoc members were disturbing. And to whom do they turn when they need a mentor or

pastoral-like counseling? They turn to Amy Wax. That was another mistake that the Dean made. He said that there are others to whom FedSoc members can turn. But you heard from first-hand witnesses that that's not the case. There is only one go-to person for them, and that is the Respondent. And if you strip her of tenure and fire her, there will be nobody they trust to help them and guide them.

You heard from the witnesses who provided you with various factual allegations. On the Charging Party's side, you heard very emotional testimony from very few minority students who had a terrible response to Prof. Wax. You heard hearsay evidence from Prof. Wolff, but even he said two dozen at the most. And isn't Prof. Katz right? Yes – the Handbook allows for hearsay, but is this Hearing Board prepared to fire a professor because of what a colleague says some students said to him? The Charging Party doesn't come forward with affidavits from those students. There are no specifics from those students. There are no dates. There is no context. And what was the vast majority of it? Hurt feelings and indignation because Prof. Wax went to the only place that would listen to her – the outside world. Because of the monolithic culture that you heard about from Prof. Robinson, that's the only place she could go to. She shouldn't get a major sanction because it caused some alumni and students to complain. There's nothing in the Handbook or the academic freedom principles that would allow for that.

And now, at the 11th hour, the Charging Party submits affidavits from students and a professor with no opportunity for cross. The Handbook says that, "The respondent and the charging party shall have the right to confront any witnesses . . . and to question them . . . through counsel." Prof. Wax wasn't afforded that right on these witnesses. Sanctions should never be based on accusations from accusers the Respondent did not have the opportunity to confront.

The Experts

You've heard from the fact witnesses. What do the experts have to say? On Friday you will receive an expert statement from Keith E. Whittington, the William Nelson Cromwell Professor of Politics at Princeton University, and a founding member of the Academic Freedom Alliance, one of our observers at this proceeding. He writes:

> Indeed, it is critical that [extramural] speech is robustly protected by universities. Social media has created enormous new pressures on universities to punish faculty for saying controversial things in public. Professors across the country are now routinely targeted by outside activists, politicians, alumni, students, and even their fellow professors for controversial personal opinions that have been expressed in public. I***f we narrow the scope of protection for extramural speech, the consequences for faculty in our current polarized political climate will be dire. Extramural speech should enjoy near absolute protection from reprisal by university employers.***
>
> A serious university should provide shelter to such professors rather than yield to such student demands for enforcing intellectual orthodoxies on campus, even if those orthodoxies are ones that we might ourselves find appealing. Professors might reasonably be sanctioned for their extramural speech when such speech demonstrates professional incompetence, but the AAUP has long warned that extramural speech should never be taken as the sole or even primary basis.

Or consider these words from Peter Wood, President of the National Association of Scholars. He writes,

> Academic freedom does not mean that a faculty member can or should be shielded from the strongly worded objections of the public to statements made to that public.
>
> But it does mean that the university as an institution will defend the faculty member's right to make those statements. And generally it means that defense will be stout and ungrudging. ***Academic freedom, rightly understood, invites a certain degree of intellectual, emotional, and rhetorical turmoil, overseen by administrators who look on with calm disregard of everything except the need to maintain civil order and respect for the free exchange of ideas***.

In Professor McConnell's expert statement, he makes the necessary observation that:

> [T]here is no exception for statements that make students or colleagues feel uncomfortable or even "unwelcome."
>
> ***The purpose of education is not to reassure students of their worthiness or identity but to challenge them with information, ideas, and perspectives that may be unfamiliar or disquieting.*** In the discipline of law more than any other, important topics of research, teaching, litigation, and contention often touch on sensitive aspects of identity – including religious freedom, race and affirmative action, immigration law, criminal justice, disability law, sexuality, abortion rights, divorce and child-rearing, sexual assault, and many others.
>
> Legitimate discussion of any of these issues may be uncomfortable for people with particular experiences and backgrounds. That is no reason for universities to police or limit the candid and robust exchange of opinions – even if, as I believe, professors have a moral and professional responsibility to take care that discussions do not veer into personal insult.

The Charging Party's witnesses couldn't stop using words like racist and white supremacist. They said that Black students felt unwelcomed and demeaned because Prof. Wax said words that they interpreted as meaning that Blacks are inherently and intellectually inferior. But that is nonsense. Prof. Wax was drawing from bedrock psychological data that goes back hundreds of years. You will receive a report from Dr. Russell Warne. He writes:

> For over 100 years, there have been differences in average IQ scores among racial groups. In the United States, Asian examinees have a mean that is approximately 103-105. The mean White American IQ is about 100. The mean Hispanic American IQ is about 90-95, and the average Black American IQ is 85-90. ***This is one of the most consistent findings in all of the social sciences.***

"[O]ne of the most consistent findings in all of the social sciences." Remember: facts aren't racist. Yes, Prof. Anita Allen is very angry, and the Black law students at U Penn were very angry to read that one of their law professors was pulling from this social science research. And if that makes them feel inferior or unwelcome, that can't be a basis for imposing a major sanction.

And consider the expert statement as well from Gail Heriot, Professor of Law at the University of San Diego, and a member of the U.S. Commission on Civil Rights. Everything Respondent said about grade distribution by race was accurate. She writes,

> [Respondent's] statements [about grade distribution by race] are consistent with the evidence.
>
> At elite law schools (like the University of Pennsylvania), 51.6 percent of African American students had first-year GPAs in the bottom 10 percent of their class (as opposed to only 5.6% of white students).
>
> Overall, with disappointingly few exceptions, African American students were grouped toward the bottom of their law school class.
>
> I am not aware of anyone who disputes those figures.

The Charging Party and his witnesses also referred to Prof. Wax as a racist and xenophobe because, from where they sit, her words about certain immigrant groups were disturbing. But consider the expert report of Dr. Jason Richwine, who writes:

> The reality of cultural persistence is especially striking when analyzing the descendants of European immigrants in the United States, as most of the . . . studies do.
>
> ***Despite generations of opportunity to dissipate, cultural differences . . . are still evident in the data. If such apparently similar groups retain key aspects of their ancestors' cultures, then it is practically certain that today's immigrants (who are mostly non-European) will also change the culture of the U.S. over the long term***.
>
> Given cultural persistence among past immigrant groups, it is perfectly reasonable for anyone, including Professor Wax, to be concerned about the impact of today's immigration – especially immigration from countries that do not embrace Western values. One danger that Garett Jones sees is that mass immigration could result in the importation of cultures that are not conducive to prosperity.

The Charging Party also seeks a major sanction because, where he sits, she is homophobic. Homophobia, however, is not presenting arguments, facts, and data which support secular objections to same sex marriage, as the Respondent was invited to do at the panel with

Prof. Wolff. You will read in Peter Sprigg's expert report that being against same sex marriage, or not supporting parenthood or adoption by same sex couples, does not make you a gay-hating homophobe who has no business teaching at a university. He writes,

> [T]here is no question that the issue generally of whether children with gay parents suffer relative to children with straight parents, and more specifically whether children raised by their own married biological mother and father have better outcomes than those raised by same-sex couples, was a lively subject of contention in the context of the same-sex marriage debates, and remains a subject of debate even after the Supreme Court's decision mandating a nationwide redefinition of marriage in *Obergefell v. Hodges* (2015).
>
> ***There is an abundance of evidence that, as the Institute for American Values has put it, "The intact, biological, married family remains the gold standard for family life in the United States, insofar as children are most likely to thrive—economically, socially, and psychologically— in this family form"*** (Institute for American Values, 2011).
>
> ***[F]ederal survey data [shows] that "children living with two biological parents" (which by definition includes a mother and father, not two people of the same sex) are fifteen times less likely "to have had four or more adverse experiences" than children in any other living situation*** (Bramlett & Radel, 2014).
>
> ***[T]he data show rather clearly that children raised by gay or lesbian parents on average are at a significant disadvantage when compared to children raised by the intact family of their married, biological mother and father*** (Regnerus, 2012).

The Charging Party suggested in his opening that Mr. Sprigg was a gay-hating activist whose ideas are beyond the pale, and seemed to suggest that if the Respondent was relying upon him, she too must be a homophobic monster who has no place at the University. I respectfully disagree. This report is rational and scholarly even if the expert's conclusions and positions are not to the reader's liking. But, more important, Mr. Sprigg's report (like those of other experts) demonstrates that the words with which the Charging Party wants to hang Prof. Wax are words, facts, and ideas that were stated out of the class, are based on social science, are the topic of

robust debate by scholars, policy analysts and intellectuals, and are therefore protected by basic principles of academic freedom.

The Hearing Board's Questions

The questions posed to the Respondent at the end of her testimony and cross examination zeroed in on several of the principles animating the proceedings against the Respondent.

Several Hearing Board members wanted to know if Prof. Wax had chosen the "appropriate" forum or the "appropriate" way to present to the public the facts or "simplistic facts" (as opposed to ideas or arguments) that are found, not in the marketplace of ideas, but in the "marketplace of facts." Relatedly, one Hearing Board member wanted to know if Prof. Wax had adequately addressed "data generation" or had sufficiently "kicked the tires" of an empirical claim before asserting it in public or in class and whether she had invited speakers to offer a different factual perspective. One Hearing Board member seemed to misunderstand or question the Respondent's observation that children of same-sex couples are not raised by both biological parents. One question implied that the Respondent's "understanding" of race might not be supportable or adequate given the complexity of the issues she addresses.

These inquiries raise the question of whether a "major sanction" is appropriate if the professor failed to provide all of the facts, counter-facts, or non-simplistic facts, whether she had sufficient data, or whether her understanding of a concept was sufficiently mature or accepted by the right authorities or experts, when the issue being debated is highly charged (as in, for example, differences between groups or same sex parents of children). The answer, respectfully, is no.

The Handbook defines a "major infraction of University behavioral standards" as:

> An action involving flagrant disregard of the standards, rules, or mission of the University or the customs of scholarly communities, including, but not limited to, serious cases of the following:
>
> - plagiarism;
> - misuse of University funds;
> - misconduct in research;
> - repeated failure to meet classes or carry out major assigned duties;
> - harassment of, improperly providing controlled substances to, or physical assault upon, a member of the University community;
> - the bringing of charges of major or minor infractions of University standards against a member of the University community, knowing these charges to be false or recklessly indifferent to their truth or falsity;
> - flagrant or knowing violation of the University's conflict of interest policy or
> - commission of serious crimes such as, but not limited to, murder, sexual assault or rape.

Not listed among these examples is failure to present facts in the "marketplace of facts" in an "appropriate" manner, or a failure to have all of the data necessary to justify a position, or not adopting a definition of a concept like "race" that is accepted by the right authorities. And that makes sense because, as academics, the Hearing Board members know that a university cannot function if its tenured faculty members are sanctioned for failure to present all relevant facts on a given topic in an appropriate way, or failure to embrace an acceptable definition of a term (either in or out of the classroom) that will not upset or offend the listeners.

One Hearing Board member wanted to know if the Respondent had done any "outreach" to the minority students at Penn to assure them, proactively, that they need not fear any bias based on her books, articles, podcast statements or op-eds. As the Respondent testified, she is certainly open to hearing about how that can be done. For purposes of making a recommendation of a "major" sanction, however, failure to reach out to segments of the

university community who need reassurance is not a "major infraction of University behavioral standards."

The question was posed if Respondent believes that her classroom work and her media appearances are "separate spheres" or if her media work is a "continuation" of her university teaching duties. The question raises a key issue in these proceedings: if a professor's media appearances *are* a "continuation" of her teaching, is she allowed to say things grounded in accepted social science but which, at the same time, are perceived by some as racist or as fitting other epithetical categories, and which may deter a student from taking her classes? The answer is found in the literature on academic freedom discussed by the Respondent's experts. Student objections, whatever form they take, amount to a Heckler's veto. They are an attempt to shut down a speaker based on the reactions of those who hear the speech. Heckler's vetoes strike at the very heart of academic freedom that universities, including Penn, have pledged to uphold. Allowing professors to be penalized or ejected for offending students turns the university into a politically inflected popularity contest, a transformation completely at odds with the university's core function of creating knowledge and seeking truth.

One Hearing Board member wanted to know what investigation, if any, Respondent did before she sent an email to students whom she was told were members of the National Lawyers Guild and who may have been responsible for downloading and listening to an unapproved recording of her class. It may very well be that, with the benefit of hindsight and no longer consumed with concern for her students to whom she promised privacy, a more thorough investigation into the identity of the email recipients was required. In fact – and Respondent failed to point this out to the Hearing Board at the hearing – Respondent *did* ask Associate Dean Schuldiner to try to figure out who downloaded the recording. He refused to investigate further.

But the failure of Respondent to investigate herself before sending an email to a group of students is at most a trifling omission or error in judgment. It is not an example provided in the Handbook for a "major infraction of University behavioral standards" for obvious reasons. It is not equivalent to plagiarism, misuse of University funds, misconduct in research, or the like.

A Hearing Board member wanted to know, rightly, how the Respondent could make a generalized statement about corruption in African cultures. It was a pertinent question because so many of the Charging Party's witnesses testified that Prof. Wax should be sanctioned because she made sweeping (and in their view hateful) observations about cultures and groups without the requisite facts. Putting aside whether a tenured professor can receive a major sanction for expressing views without adequate proof (not an example in the Handbook of a "major infraction of University behavioral standards"), Prof. Wax's observation was in fact accurate.

The not-for-profit Transparency International describes itself as "a global movement with one vision: a world in which government, business, civil society and the daily lives of people are free of corruption. With more than 100 chapters worldwide and an international secretariat in Berlin, we are leading the fight against corruption to turn this vision into reality." In their 2022 report, Transparency International explains that their index "ranks 180 countries and territories by their perceived levels of public-sector corruption according to experts and businesspeople." They continue, "Countries with strong institutions and well-functioning democracies often find themselves at the top of the Index." They write, "On the flip side, countries experiencing conflict or where basic personal and political freedoms are highly restricted tend to earn the lowest marks." The report concludes as Prof. Wax testified: Sub-Sahara Africa is the "lowest scoring region" with an average regional score of only 32/100. The charts in the report show that

virtually the entire continent of Africa receives substantially lower scores than most of Europe and the Anglosphere.

It was a brilliant question with which to end the Hearing Board's examination of the Respondent. She, as she does in the media, said something discomfiting. On first blush, her words could be heard by a certain listener as a racist condemnation of an entire group of people. But, upon a rational and non-emotional reading of information readily available, she was accurate. I respectfully submit that a tenured professor cannot receive a major sanction for saving accurate things which, unfortunately, upon first blush, appear to be hurtful and prejudiced.

Conclusion

Professor Wax has taught law at this institution for 22 years. Approximately 2,500 students. The students who complained about her are drops in the ocean of students who either adore her or have no complaints about her. And that is because, far from the monster the Charging Party tries to paint her to be, she is the opposite. You heard that from our witnesses. The only argument the Charging Party has is that her views outside of the classroom make her unfit inside the classroom. But that's not how tenure and academic freedom work. The Charging Party has not carried his burden of proof by "clear and convincing" evidence that the Respondent is unfit to teach at Penn Law. The evidence over these last several days

demonstrates that she is a gifted, inspiring teacher who gives her students exactly what a legal education is supposed to give them: the introduction of new and challenging ideas to produce outstanding attorneys and individuals. Do not recommend a major sanction.

Thank you.

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Philadelphia, Pennsylvania

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