

Supreme Court of Pennsylvania

Court of Common Pleas Civil Cover Sheet

Centre

County

For Prothonotary Use Only:

Docket No:

2025-CV-882-CI

The information collected on this form is used solely for court administration purposes. This form does *not* supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

SECTION A

Commencement of Action:

- ☒ Complaint ☐ Writ of Summons ☐ Petition
☐ Transfer from Another Jurisdiction ☐ Declaration of Taking

Lead Plaintiff's Name:

Barry J. Fenchak

Lead Defendant's Name:

The Pennsylvania State University Board of Trustees

Are money damages requested? ☐ Yes ☒ No

Dollar Amount Requested: ☐ within arbitration limits
(check one) ☐ outside arbitration limits

Is this a *Class Action Suit*? ☐ Yes ☒ No

Is this an *MDJ Appeal*? ☐ Yes ☒ No

Name of Plaintiff/Appellant's Attorney: Terry L. Mutchler, Esquire (308052)/Justin J. Boehret, Esquire (307633)

☐ Check here if you have no attorney (are a Self-Represented [Pro Se] Litigant)

SECTION B

Nature of the Case: Place an "X" to the left of the ONE case category that most accurately describes your **PRIMARY CASE**. If you are making more than one type of claim, check the one that you consider most important.

TORT (do not include Mass Tort)

- ☐ Intentional
☐ Malicious Prosecution
☐ Motor Vehicle
☐ Nuisance
☐ Premises Liability
☐ Product Liability (does not include mass tort)
☐ Slander/Libel/ Defamation
☐ Other:

MASS TORT

- ☐ Asbestos
☐ Tobacco
☐ Toxic Tort - DES
☐ Toxic Tort - Implant
☐ Toxic Waste
☐ Other:

PROFESSIONAL LIABILITY

- ☐ Dental
☐ Legal
☐ Medical
☐ Other Professional:

CONTRACT (do not include Judgments)

- ☐ Buyer Plaintiff
☐ Debt Collection: Credit Card
☐ Debt Collection: Other

☐ Employment Dispute:
Discrimination
☐ Employment Dispute: Other

☐ Other:

REAL PROPERTY

- ☐ Ejectment
☐ Eminent Domain/Condemnation
☐ Ground Rent
☐ Landlord/Tenant Dispute
☐ Mortgage Foreclosure: Residential
☐ Mortgage Foreclosure: Commercial
☐ Partition
☐ Quiet Title
☐ Other:

CIVIL APPEALS

- Administrative Agencies
☐ Board of Assessment
☐ Board of Elections
☐ Dept. of Transportation
☐ Statutory Appeal: Other

- ☐ Zoning Board
☐ Other:

MISCELLANEOUS

- ☐ Common Law/Statutory Arbitration
☒ Declaratory Judgment
☐ Mandamus
☐ Non-Domestic Relations
Restraining Order
☐ Quo Warranto
☐ Replevin
☐ Other:

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
PENNSYLVANIA

BARRY J. FENCHAK

Plaintiff,

v.

THE PENNSYLVANIA STATE
UNIVERSITY BOARD OF TRUSTEES,
and MATTHEW SCHUYLER IN HIS
OFFICIAL CAPACITY AS CHARIMAN

Defendants.

Docket No. *2025-CV-882-CI*

Type of Case: Civil Action & Equity

Type of Pleading: **Complaint for
Declaratory Judgment**

Filed on Behalf of: Plaintiff

Counsel of Record for Plaintiff:

**OBERMAYER REBMANN MAXWELL
& HIPPEL LLP**

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IN THE COURT OF COMMON PLEAS OF
CENTRE COUNTY, PENNSYLVANIA

BARRY J. FENCHAK

Plaintiff,

v.

THE PENNSYLVANIA STATE
UNIVERSITY BOARD OF TRUSTEES,
and DAVID KLEPPINGER IN HIS
OFFICIAL CAPACITY AS CHAIRMAN

Defendants.

NO. 2025-CV-882-CI

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiffs. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE:

Centre County Bar Association
192 Match Factory Pl.
Bellefonte, PA 16823
814-548-0052

OBERMAYER REBMANN MAXWELL & HIPPEL LLP

By: Terry L. Mutchler, Esquire (Pa. ID No. 308052)
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Counsel for Plaintiff

BARRY J. FENCHAK

Plaintiff,

v.

UNIVERSITY BOARD OF TRUSTEES,
and DAVID M. KLEPPINGER IN HIS
OFFICIAL CAPACITY AS CHAIRMAN

Defendants.

NO. 2025-CV-882-CI

**COMPLAINT FOR DECLARATORY RELIEF PURSUANT TO
PENNSYLVANIA'S DECLARTORY JUDGMENTS ACT**

NOW COMES Plaintiff, Barry J. Fenchak, by and through his undersigned transparency counsel, Obermayer Rebmann Maxwell & Hippel LLP, and hereby files this Complaint seeking declaratory and injunctive relief, and in support thereof avers as follows:

PARTIES

1. Plaintiff, Barry J. Fenchak ("Plaintiff") is an adult individual residing at 596 Devonshire Drive, State College, PA 16803.

2. Defendant, Pennsylvania State University Board of Trustees (the "Board" or collectively, "Defendants") is the governing body of The Pennsylvania State University (the "University") with a principal place of business located at 201 Old Main, University Park, PA 16802.

3. Defendant, David Kleppinger (“Chairman Kleppinger” or collectively, “Defendants”), is sued solely in his official capacity as Chairman of the Board of Trustees.

JURISDICTION AND VENUE

4. This Honorable Court has subject matter jurisdiction in this matter pursuant to 42 Pa. C.S. § 931(a), and personal jurisdiction over the defendants pursuant to 42 Pa. C.S. § 5301(a).

5. Venue is proper in this Court pursuant to Pa. R. Civ. P 1006 and Pa. R. Civ. P. 2103.

FACTUAL BACKGROUND

6. The University is a public state-related land grant research university founded in 1855 with 24 campuses across the Commonwealth.

7. The University was originally chartered by an Act of the Pennsylvania Legislature on February 22, 1855 as the “Farmer’s High School of Pennsylvania.”

8. In 1862, Congress passed the Morrill Act, known as the Land Grant Act, and it was adopted by the Pennsylvania General Assembly a year later.

9. In 1863, Penn State was designated as a land grant institution obtaining all the benefits of the Morrill Act.

10. The University is governed by a Board of Trustees.

11. As stated in the bylaws, the purpose of the University is to educate students to improve the wellbeing and health of individuals and communicates through teaching, research, and service:

“The University was formed in 1855 as an institution for the education of youth in the various branches of science, learning and practical agriculture, as they relate to each other. The University currently exists as a multi-campus public research university that

educates students from Pennsylvania, the nation and the world, and improves the wellbeing and health of individuals and communities through integrated programs of teaching, research, and service.” *See* Section 1.03 of the Amended and Restated Bylaws of The Pennsylvania State University (the “Amended Bylaws”).

12. The University’s Board of Trustees is the corporate body established by the University’s Charter and serves as the governing body of the University.

13. The Board delegates day-to-day management of the University President with certain reserved powers set forth in the Bylaws.

14. Plaintiff, Barry J. Fenchak, is an elected member of the Board of Trustees of The Pennsylvania State University serving in that capacity since his election by the alumni in 2022.

15. Plaintiff is one of nine (9) voting members of the Board *elected* by the alumni serving on the thirty-six (36) member Board.

16. Plaintiff’s position on the Board is uncompensated and he is currently serving a three-year term, which is set to expire on June 30, 2025.

DEFENDANTS’ AUTHORITY TO AMEND THE BYLAWS

17. The Pennsylvania legislature has vested authority in members of a non-profit corporation entitled to vote, in this case the Defendants, with the authority to “adopt, amend and repeal the bylaws” of the corporation. 15 Pa. C.S. § 5504(a).

18. Importantly, this subpart of the statute places limits on the Defendants’ authority to amend their bylaws, and provides that the “bylaws may contain any provisions for managing the business and regulating the affairs of the corporation not inconsistent with law or the articles.” *Id.* (Emphasis added).

19. The statute further limits the Defendants’ authority to amend their bylaws and

provides that they “shall not have the authority to adopt or change a bylaw on any subject that is committed expressly to the members by any provisions of this subpart.” *Id.*, subsection (b). (Emphasis added).

20. This includes, among other sections, Section 5751 of Title 15. *Id.*

21. Section 5751 provides that membership in a nonprofit corporation “shall be of classes, and shall be governed by the rules of admission, retention, suspension and expulsion, prescribed in bylaws adopted by the members, *except that the rules shall be reasonable, germane to the purpose and purposes of the corporation and equally enforced as to all members of the same class.*” 15 Pa. C.S. § 5751(a). (Emphasis added).

22. This standard of reasonableness for bylaws (codified by the legislature in Section 5751) has long been recognized by the courts as the law in this Commonwealth and the courts will strike down any bylaw that is clearly unreasonable. *See Dugan v. Firemen’s Pension Fund of Philadelphia*, 94 A.2d 353, 355 (Pa. 1953) (“By-laws of a corporation must be reasonable and consistent with the corporate objectives expressed in its charter. The Courts will declare invalid any by-law that is clearly unreasonable.”).

THE AMENDED BYLAWS – CREATION OF THE NOMINATING SUBCOMMITTEE AND PERMANENT REMOVAL STANDARDS

23. On or about July 30, 2024, the Defendants adopted the Amended Bylaws.

24. Not coincidentally, this timeframe dovetailed with Plaintiff’s repeated attempts and complaints about not being able to garner information he needed to meet his fiduciary obligations as a voting member of the Board.

25. On or about February 26, 2025, Defendants, through their newly created “Nominating Subcommittee” established by the Amended Bylaws, voted that Plaintiff (a duly elected Trustee) was ineligible to be listed on the ballot in the 2025 alumni trustee election.

26. According to Daniel Delligatti, Vice Chair of the Nominating Subcommittee, the subcommittee's decision was based on Plaintiff's thoughtless recitation of a quote from "A League of Their Own" (the "Incident") for which the Defendants previously tried to remove Plaintiff from the board.

27. In his motion to deem Plaintiff "unqualified" and preclude him from the ballot, Vice Chair Delligatti commented:

"Based on this incident, candidate Fenchak's materials do not reflect alignment with Penn State's missions and values and for that reason, I move that candidate unqualified and not included in the ballot."¹

28. The Nominating Subcommittee also relied on Plaintiff's alleged violations of the Trustee Code Conduct – Section 2.03 of the Amended Bylaws – as a basis for deeming Plaintiff "unqualified" and keeping him off the ballot.

29. As detailed below, Section 2.03 of the Amended Bylaws are inconsistent with Pennsylvania Law in several aspects, and accordingly, they are unlawful and unenforceable.

30. Furthermore, Mr. Delligatti's comments leave no room for doubt that the Nominating Subcommittee's decision to exclude Plaintiff from the ballot was also based on the Incident.

31. The Defendants previously tried to remove Plaintiff from the board on the basis of this Incident, however, on October 9th, 2024 this Honorable Court entered a preliminary injunction enjoining the Defendants "from removing Plaintiff from the Board of Trustees by vote." See a true and correct copy of the Opinion and Injunction Order of this Honorable

¹ <https://www.centredaily.com/ozlo-inbys/login.html?code=QqdKQPKqICVqiVqVFfsSPNvy4h4YXpZRoimKKkHbpuVwQy&state=bbeda1acff56428fa22b262bc22582d3>

Court, attached hereto as Exhibit A.

32. In the face of this Court's preliminary injunction - which was active at all times material hereto - Defendants ignored this Court's preliminary injunction and utilized their Nominating Subcommittee to do what they were prohibited from doing by the Court's order: removing Plaintiff from the Board of Trustees.

33. Moreover, the Nominating Subcommittee and the policies and procedures that they utilized to preclude Plaintiff from the ballot, derive from provisions of the Amended Bylaws that are *inconsistent with Pennsylvania law* – specifically Sections 2.01(c), 2.02(c), 2.03(c)(e)(i), 2.04(c), and 2.05(c).

34. As detailed below, these sections of the Amended bylaws are all “inconsistent with law” as they violate statutory authority and/or well settled precedent of the Supreme Court of Pennsylvania.

35. 15 Pa. C.S. § 5504 prohibits the Defendants from adopting or amending bylaws that are “inconsistent with law.”

36. Accordingly, Defendants exceeded their authority when they passed these provisions of the Amended Bylaws, and they must be declared unlawful and unenforceable.

SECTION 2.01(C) OF THE AMENDED BYLAWS

37. Section 2.01(c) of the Amended Bylaws provides:

“The Board authorizes the Governance Committee of the Board and its Nominating Subcommittee to oversee the implementation of Board policies and procedures regarding the nomination, election and appointment of Trustees. The Committee and Subcommittee shall publish and maintain the Appendix to these Bylaws on Nomination, Election and Appointment of Trustees (including Emeriti). The

qualifications, requirements and procedures set forth in the Appendix are binding on all candidates, nominees or potential appointees.”

38. Section 2.01(c) of the Amended Bylaws is neither “reasonable” or “germane” to the stated purpose of the University, and therefore, violates the reasonableness standards developed by the Pennsylvania Supreme Court and codified by the legislature. *See Dugan v. Firemen’s Pension Fund of Philadelphia*, supra; 15 Pa. C.S. § 5751.

39. Likewise, the derivative policies and procedures adopted by the Nominating Sub Committee pursuant to Section 2.01(c) cannot be used to preclude Plaintiff from the election ballot as are neither “reasonable” or “germane” to the stated purpose of the University.

40. Furthermore, Section 2.01(c), and the policies and procedures deriving from it, have not been “equally enforced as to all members” of the alumni trustees – which violates 15 Pa. C.S. § 5751’s equal enforcement requirement.

41. To the contrary, the Defendants have engaged in longstanding retaliatory campaign against Plaintiff and have selectively enforced these provisions of the bylaws *against Plaintiff alone*.²

42. For instance, Defendants have repeatedly chosen to ignore serious misconduct by other trustees, including threats against other trustees - clear violations of the Trustee Code of Conduct - while simultaneously wielding the same Trustee Code of Conduct to punish Plaintiff for his free expression concerning policy disputes, or more troubling, his pursuit of critical information (which he is lawfully entitled to) concerning the assets, liabilities of the University.

² Plaintiff incorporates herein by reference the averments of his Amended Complaint in action No. 2024-CV-1843-CI, attached hereto as Exhibit B.

43. Section 2.01(c) of the Amended Bylaws violates 15 Pa. C.S. § 5504's prohibition against the adoption of bylaws that are "inconsistent with law" – specifically the "reasonableness" requirement articulated by the Pennsylvania Supreme Court and codified in 15 Pa. C.S. § 5751, and the equal enforcement requirement of 15 Pa. C.S. § 5751.

44. Accordingly, Section 2.01(c) of the Amended Bylaws, and the derivative policies and procedures adopted by the Nominating Subcommittee, are unlawful and unenforceable.

45. Additionally, while the Nominating Subcommittee was created by Section 2.01(c) of the Amended Bylaws, it relied on Section 2.03 as justification for deeming Plaintiff "unqualified" as a candidate and precluding him from the ballot.

46. As addressed below, Section 2.03 is unlawful by virtue of its unconstitutional restrictions of Playoff's fundamental rights and direct conflicts with statutory authority and well settled precedent of the Pennsylvania Supreme Court.

47. Therefore, not only is Section 2.01 in itself unlawful, but the Nominating Subcommittee's reliance on the unlawful provisions of Section 2.03 further invalidates their decision to deem Plaintiff unqualified as a candidate and precluding him from the ballot was unlawful.

48. In short, the actions of the Board to block any person but "yes men and yes women" from a seat on the Board of Trustees is unlawful.

49. For all these reasons, the Nominating Subcommittee's decision was unlawful and unenforceable and must be declared as such.

SECTION 2.02(c) OF THE AMENDED BYLAWS

50. Section 2.02(c) of the Amended Bylaws provides:

“No individual previously removed from the Board under Section 2.05 shall be eligible to stand for election or serve again as a Trustee; such prohibition is to be permanent.”

51. Section 2.02(c) is inextricably intertwined with Section 2.05 of the Amended Bylaws, as it has no operability unless a removal has occurred pursuant to Section 2.05 of the Amended Bylaws.

52. As addressed below, the provisions of Section 2.05 of the Amended Bylaws are unlawful as they violate: (a) 15 Pa. C.S. § 5504’s prohibition against the adoption of bylaws that are “inconsistent with law”; and (b) the “reasonableness” standard adopted by the Supreme Court and codified in 15 Pa. C.S. § 5751.

53. Section 2.02(c), by virtue of its intertwinement with Section 2.05, cannot be separated from the unlawful provisions of Section 205.

54. Accordingly, Section 2.02 is rendered unlawful and unenforceable as a result of this subsection.

SECTION 2.03 OF THE AMENDED BYLAWS – SUBSECTION (C), (E), (I)

55. Section 2.03 of the Amended Bylaws, titled “Trustee Code of Conduct” contains several provisions that are inconsistent with Pennsylvania Law.

56. First, subsection (c) provides:

“Meetings and Other Responsibilities. Trustees must prepare diligently, attend required meetings of the Board (as set forth in Section 2.04), and assigned committees, and participate constructively in all Board of Trustees meetings and

related activities by reading the agenda and supporting materials. Trustees shall speak openly, freely, and candidly within the Board, while being mindful that any public dissent from Board decisions must be done as trusted stewards of a public institution. Because a university is a free marketplace of competing ideas and opinions, its governance mandates open communication as well as principled, civil, and respectful debate. At the same time, Trustees must always protect and act in the best interest of the University, being cognizant that the tone and substance of their words whether in the board room or in public, including on social media platforms, reflect on the University that they are entrusted to serve and can adversely affect its wellbeing. While Trustees think independently and make informed individual decisions about what they feel is in the best interests of the University, *they shall support majority decisions of the Board and work cooperatively with fellow Board members and the Administration to advance the University's goals. Negative or critical public statements about the Board, the University or its students, alumni, community, faculty, staff, and other stakeholders do not serve the University's interests and are inconsistent with a Trustee's fiduciary obligation to act always in the best interests of the University.* Trustees shall extend goodwill to one another and to all members of the University community in board sessions and in public forums, including social media.”

57. In 1776, more than a decade before the adoption of the Federal Constitution, this Commonwealth of Pennsylvania set forth in Article XII of the Declaration of Rights of its first Constitution the principle “[t]hat the people have a right to freedom of speech, and of writing,

and publishing their sentiments. . . ."

58. Free speech provisions can be found in both Article I, Section 7, and Article I, Section 20 of the Pennsylvania Constitution.

59. The Pennsylvania Constitution of 1790 further articulated this affirmative guarantee in language which is preserved in Article I, section 7, of our present Constitution holding that "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. . . ."

60. Article I, Section 7(a), in pertinent part, states:

"The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

61. Article I – Section 7(b) further states:

"The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty."

62. Article I, § 7 has been "routinely recognized as providing broader freedom of expression than the federal constitution." Uniontown Newspapers, Inc. v. Roberts, 839 A.2d 185, 193 (Pa. 2003). *See also* Melvin v. Doe, 836 A.2d 42, n. 9 (Pa. 2003).

63. It is well settled that a state may provide through its constitution a basis for the rights and liberties of its citizens independent from that provided by the Federal Constitution,

and that the rights so guaranteed may be more expansive than their federal counterparts. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 80-82, 100 S. Ct. 2035, 2040-41, 64 L. Ed. 2d 741 (1980); see *Oregon v. Hass*, 420 U.S. 714, 719, 95 S. Ct. 1215, 1219, 43 L. Ed. 2d 570 (1975); *Cooper v. California*, 386 U.S. 58, 62, 87 S. Ct. 788, 791, 17 L. Ed. 2d 730 (1967). See also *Commonwealth v. Ware*, 446 Pa. 52, 284 A.2d 700 (1971), cert. granted sub nom. *Pennsylvania v. Ware*, 405 U.S. 987, 92 S. Ct. 1254, 31 L. Ed. 2d 453, subsequently vacated and denied, 406 U.S. 910, 92 S. Ct. 1606, 31 L. Ed. 2d 821 (1972) ("it appearing that the judgment below rests upon an adequate state ground"). See generally *Brennan, State Constitutions and the Protection of Individual Rights*, 90 Harv.L.Rev. 489, 503 (1977).

64. This Court has on numerous occasions recognized the Pennsylvania Constitution to be an alternative and independent source of individual rights. See, e.g., *Willing v. Mazzocone*, 482 Pa. 377, 393 A.2d 1155 (1978); *Commonwealth v. Triplett*, 462 Pa. 244, 341 A.2d 62 (1975); *Commonwealth v. Knowles*, 459 Pa. 70, 73 n.3, 327 A.2d 19, 20 n.3 (1974); *Commonwealth v. Platou*, 455 Pa. 258, 312 A.2d 29 *170 (1973), cert. denied, 417 U.S. 976, 94 S. Ct. 3183, 41 L. Ed. 2d 1146 (1974); *Goldman Theatres, Inc. v. Dana*, 405 Pa. 83, 173 A.2d 59, cert. denied, 368 U.S. 897, 82 S. Ct. 174, 7 L. Ed. 2d 93 (1961).

65. Section 2.03(c) of the Amended Bylaws is an impressible infringement of Plaintiff's (and every other similarly situated Trustee) fundamental right of free speech and expression as guaranteed in Article I – Section 7 of the Pennsylvania Constitution.

66. The Defendants may choose to pursue policy that turns corporate governance and oversight on its head, but in doing so they may not override fundamental rights enshrined in the Pennsylvania Constitution – which is precisely what Section 2.03(c) attempts to accomplish.

67. Section 2.03(c) of the Amended Bylaws not only eliminates the right to dissent by requiring Plaintiff to “support majority decisions” of the Board, but it goes a step further and prohibits him from making public statements that are deemed “negative” or “critical” of the Board, the University, and others.

68. In fact, Section 2.03(c) indicates that the making of any “negative or critical comments” about the Board amounts to a breach of Trustee’s fiduciary obligations to the University.

69. Section 2.03(c) not only precludes Plaintiff from expressing disagreement with, or otherwise being critical of, the majority decision of the Board, but it deems any such expression of his opinions and ideas to be a breach of his fiduciary duties and the best interests of the University.

70. Section 2.03(c) is draconian gag order that amounts to a complete extinguishment of Plaintiff’s fundamental right of free speech and expression guaranteed by Article I, § 7 of the Pennsylvania Constitution.

71. Accordingly, Section 2.03 of the Amended Bylaws is rendered unlawful and unenforceable as a result of subsection (c) and its patently unconstitutional provisions.

72. Next, Section 2.03(e) provides:

“Confidentiality, Privacy and Access to Information. Trustees shall respect University policies, including honoring the appropriate designated channels for making requests for information or communication. Trustees are entitled to information that is reasonably related to their duties as Trustees and shall be cognizant of the burden that their requests place on the Administration. The reasonableness of a Trustee’s request for information is assessed in light of the

Trustee's responsibilities as a member of the Board; anticipated Board actions/discussions; and/or the individual Trustee's duties as a member of a specific committee. The Board Chair and applicable committee chairs have authority to review the reasonableness of requests from individual Trustees for information or documents and may narrow or deny any request deemed to be beyond the reasonable scope of a Trustee's legitimate interest as a fiduciary of the university. The Chair of the Board serves as the final arbiter of disputes regarding Trustee requests for information or records. "Confidential information" includes nonpublic information concerning the University, including its finances, operations, and personnel, as well as nonpublic information about internal Board discussions and dynamics. The confidentiality of University information and data shall be maintained as a fundamental fiduciary responsibility of Trustees. The unauthorized release, use, access, or retention of confidential or proprietary information, regardless of intent, is strictly prohibited. All information furnished to Trustees may be used only for purposes consistent with such Trustee's fiduciary duties and responsibilities to the University. Other state and federal laws (including, for example, the Family Educational Rights and Privacy Act (FERPA) of 1974) as well as University policies establish privacy and confidentiality protections for data and information that may be received by Trustees in the course of their service. Trustees shall respect and abide by all such laws and policies." (Emphasis added).

73. In this subsection, Defendants once again attempt to do what the law does not entitle them to do: qualify Plaintiff's unqualified and absolute right to information.

74. Pennsylvania has a rich and robust tradition of transparency in matters of

corporate governance.

75. Both courts and the legislature have long recognized a trustee's unqualified right to obtain corporate records and information.

76. In 1912, the Supreme Court of Pennsylvania first held that a board member of a corporation had "unqualified" and unfettered access to corporate records as discussed in detail below. Moreover, the Court held that that assessment of records is solely held by the individual Trustee – not the Board as a whole. *Machen v. Machen & Mayer Electrical Mfg. Co.*, 85 A. 100 (Pa. 1912).

77. The courts have made it abundantly clear that a majority of a board of directors cannot deprive an individual director of the right to inspect its books and documents. *Machen v. Machen & Mayer Electrical Mfg. Co.*, 85 A. 100 (Pa. 1912).

78. The Supreme Court's rationale for this rule is as follows: "the duty to manage the corporation rests alike upon *each and every one of the directors*, and therefore *it is the right of each director* to inspect its books and documents." *Id.*, at 102 (Emphasis added).

79. Moreover, the Court recognized that a director's right to inspect the books is unqualified since "the duties of a director require him to be familiar with the affairs of the company in order that he may have sufficient information to enable him to join intelligently in the management of the concern. The protection of the interests of the company, therefore, require that *his right to an inspection of the books be absolute*." *Id.*, at 104 (Emphasis added).

80. The Pennsylvania Supreme Court has similarly held that a trustee's right to access information about trust property is "*absolutely beyond dispute*." *Wilson v. Bd. of Directors of City Trusts*, 188 A. 588, 594 (Pa. 1936).

81. As the Court has reasoned: "to withhold the means of knowledge concerning

that property is to withhold the power to exercise the duty of preservation.” *Id.* at 594 (citing its prior holding in *Brown v. Brancato*).

82. Similarly, the Commonwealth Court has held that a public board member “has the right to study, investigate, discuss, and argue problems and issues prior to the public meeting at which the [board member] may vote.” *Palm v. Center Twp.*, 415 A.2d 990, 992 (Pa. Commw. Ct. 1980).

83. The legislature codified these informational rights of a director in 15 Pa. C.S. § 5512 – which guarantees the informational rights of Plaintiff.

84. The statute grants trustees such Plaintiff the right to obtain any corporate information that that is reasonably related to the performance of his duties.

85. Here, Defendants attempt to give themselves the power to limit or narrow a trustee’s request for information:

“The Board Chair and applicable committee chairs have authority to review the reasonableness of requests from individual Trustees for information or documents and may narrow or deny any request deemed to be beyond the reasonable scope of a Trustee’s legitimate interest as a fiduciary of the university.”

86. The statute does not grant the Defendants this .

87. They do not get to determine to narrow or deny a trustee’s information requests or otherwise determined what is “reasonably related.”

88. Information is “reasonably related” to the performance of a trustee’s duties, or it is not. That is a legal standard that is decided by the Courts, not the Defendants.

89. To permit the Defendants to make this determination would amount to the proverbial fox guarding the henhouse.

90. Section 2.03(e) of the Amended Bylaws is not only an unlawful flip this statutory scheme on its head, it completely ignores the Supreme Court's decisions in *Machen* and its progeny.

91. The provisions of Section 2.03(e) are "inconsistent with law" as stated in 15 Pa. C.S. § 5504, for they violate the legislature's edicts in 15 Pa. C.S. § 5512 and the Supreme Court's precedent set forth in *Machen* and its progeny.

92. Accordingly, Section 2.03(e) is unlawful and unenforceable.

93. And lastly, subsection (i) provides:

"Enforcement. Failure to comply with this Code of Conduct is a serious breach and triggers the enforcement provisions reflected in Section 2.05 (Trustee Sanction or Removal)."

94. This enforcement mechanism in subsection (i) is unlawful as it attempts to provide Defendants with the power to sanction or remove trustees under Section 2.05, in this case Plaintiff, for violations of Section 2.03.

95. This is impermissible in light of the illegalities identified above in Section 2.03.

96. Accordingly, Section 2.03 of the Amended Bylaws is rendered unlawful as a result of subsection (i).

SECTION 2.04 OF THE AMENDED BYLAWS

97. Section 2.04(c) of the Amended Bylaws provides:

(c) In any interactions with students, faculty, staff, and university-affiliated groups, Trustees shall be cognizant of their special role and fiduciary responsibilities. Trustees shall recognize that communication of an individual Trustee's views can be assumed to be an expression of the Board's position as a whole and should make diligent efforts to avoid such misunderstandings. Trustees

shall coordinate all media and press statements, interviews and/or background discussions done in a Trustee capacity with the Board Office, who will engage Strategic Communications as needed.”

98. Section 2.04(c), like Section 2.03(c) is an impermissible infringement on Plaintiff’s fundamental right of free speech and expression guaranteed by Article I, § 7 of the Pennsylvania Constitution.

99. Accordingly, Section 2.03 is rendered unlawful and unenforceable as a result of the unlawfulness of the aforementioned subsections.

SECTION 2.05(c) OF THE AMENDED BYLAWS

100. Section 2.05(c) of the Amended Bylaws provides:

“Removal of a Trustee shall require a joint proposal to the Board by the Chair of the Board and the Chair of the Governance Committee that the Board take action to remove a Trustee on the basis that the Trustee has (i) breached their fiduciary duties to the University, ***(ii) failed to adhere to the Code of Conduct;*** (iii) committed a serious violation of any policy of the University; (iv) been convicted of any felony; or (v) engaged in other conduct that materially impairs the Trustee’s ability to fulfill their assigned duties or reflects adversely on the Trustee’s fitness to serve on the Board of Trustees. Such joint proposal shall be furnished in writing to each member of the Board of Trustees not less than ten (10) days prior to the meeting of the Board of Trustees at which such matter is to be considered. If the Trustee subject to removal proceedings is a gubernatorial appointee, a letter will be sent to the Governor and Senate leadership documenting the violations as part of the process. The Board’s factfinding, consideration of and initial deliberation regarding removal will occur in an Executive Session of the Board. The official action of taking a vote on removal will be taken at a public meeting of the Board. Removal shall require the affirmative vote of not less than two-thirds of the Trustees present at a duly called

meeting.” (Emphasis added).

101. 15 Pa. C.S. § 5504 prohibits the Defendants from adopting or bylaws that are “inconsistent with law.”

102. As outlined above, Section 2.03 of the Amended Bylaws (the Trustee Code of Conduct) is patently unlawful as it violates: (a) fundamental rights guaranteed by the Pennsylvania Constitution; (b) numerous statutes of the legislature; and (c) well settled precedent of the Pennsylvania Supreme Court.

103. Yet, Section 2.05(c) purports to grant the Defendants the right remove Plaintiff for violations of the Trustee Code of Conduct.

104. The Defendants may not use the enforcement mechanism of 2.05(c) to remove Plaintiff for violations of an unlawful provision of the bylaws (i.e. Section 2.03).

105. Section 2.05(c) is unlawful to the extent it grants Defendants the power to remove Plaintiff for violations of the Section 2.03 – which is precisely what Defendants seek to do here.

106. Section 2.03 is unlawful and unenforceable.

VIOLATION OF THE PRELIMINARY INJUNCTION

107. The Defendants attempt to keep Plaintiff off the ballot is unlawful not only because it was undertaken through unlawful provisions in their Amended Bylaws (*i.e.* Section 2.01), but the Defendants actions were also undertaken in violation of this Honorable Court’s Order of October 9, 2024, and amended on October 11, 2024 (collectively, the “Injunction Order”).

108. The Injunction Order clearly and unequivocally enjoined the Defendants from “removing Plaintiff from the Board of Trustees by vote.”

109. At all times relevant, the Injunction Order was in effect, and remains in effect.

110. The Defendants have violated the Injunction Order as their vote to deem him “unqualified” and keep him off the ballot is a de facto removal by vote.

111. That the Defendants chose to do this through their Nominating Subcommittee via Section 2.01, as opposed to removal proceedings via Section 2.05, is of no moment - the fact is Plaintiff has been permanently removed from Board of Trustees by vote.

112. In doing so the Defendants bypassed not only the will of the voters, but the very authority of this Court and the rule of law.

113. Accordingly, the Nominating Subcommittee’s vote must be immediately overturned and Plaintiff must be restored to the ballot.

COUNT I

CLAIM FOR DECLARATORY JUDGMENT PURSUANT TO PENNSYLVANIA’S DECLARATORY JUDGMENTS ACT - 42 Pa. C.S.A. § 7531 *et seq*

114. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein.

115. In deeming Plaintiff “unqualified” and precluding him from the election ballot, the Defendants, through their Nominating Subcommittee, acted under the authority of Section 2.01 of the Amended Bylaws.

116. Moreover, the basis for the Nominating Subcommittee’s vote were the alleged violations of Section 2.03 of the Amended Bylaws (Trustee Code of Conduct).

117. As stated above, Sections 2.01, 2.02, 2.03, 2.04 and 2.05 of the Amended Bylaws were all adopted or amended in violation of 15 Pa. C.S. § 5504, as they are “inconsistent with law.” *See* 15 Pa. C.S. § 5504.

118. As a result, these provisions of the Amended Bylaws are unlawful and unenforceable and the Defendants vote was not lawful.

119. The Defendants vote was also undertaken in violation of this Court's Preliminary Injunction Order.

120. Plaintiff's constitutional rights have been violated as a result of the Defendants' utilization of these unlawful provisions of the Amended Bylaws and the Court's authority has been undermined by the Defendants' actions.

121. Accordingly, an actual case or controversy exists between the parties.

122. Furthermore, this is a controversy capable of repetition yet evading judicial review to the extent the mootness doctrine applies at any time material to this action.

123. Pursuant to the Declaratory Judgments Act, Plaintiff is entitled to a declaration by this Court that: the aforementioned provisions of the Amended Bylaws are unlawful; the Nominating Subcommittees decision is null and void; and Plaintiff is "qualified" and shall be listed on the top of the ballot as an alumni candidate in the upcoming election for the Board of Trustees.

124. Defendant is also entitled to preliminary and injunctive relief enjoining the Defendants and their Nominating Subcommittee from precluding Plaintiff from the ballot.³

125. Furthermore, the actions of the Defendants' Nominating Subcommittee were committed in violation of this Honorable Court's Preliminary Injunction Order of October 9, 2024, and amended on October 11, 2024.

³ Plaintiff also files with this Court an Emergency Motion for Preliminary Injunction, which is attached hereto as Exhibit C and incorporated herein by reference.

WHEREFORE, Plaintiff, Barry J. Fenchak, demands a declaratory judgement is his favor and against the Defendants, as follows:

- (a) Sections 2.01, 2.02, 2.03, 2.04, and 2.05 of the Amended and Restated Bylaws of The Pennsylvania State University violate Pennsylvania law and are null and void;
- (b) The Nominating Subcommittee's vote of February 26, 2025, deeming Plaintiff "unqualified" as an alumni candidate and precluding him from election the ballot is hereby overturned;
- (c) Plaintiff is henceforth deemed "qualified" as an alumni candidate for the Pennsylvania State University Board of Trustees and shall be eligible to be on the ballot as an alumni candidate.

Respectfully submitted,

OBERMAYER REBMANN MAXWELL
& HIPPEL LLP

/s/ Terry L. Mutchler

/s/ Justin J. Boehret

Terry L. Mutchler (Pa. I.D. 308052)

Justin J. Boehret, Esquire (Pa. I.D. 307633)

Center Square West

1500 Market Street, Suite 3400

Philadelphia, PA 19102

Attorneys for Plaintiff

Barry J. Fenchak

Dated: April 1, 2025

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully submitted,

OBERMAYER REBMANN MAXWELL & HIPPEL LLP

/s/ Terry L. Mutchler

/s/ Justin J. Boehret

Terry L. Mutchler (Pa. I.D. 308052)

Justin J. Boehret, Esquire (Pa. I.D. 307633)

Center Square West

1500 Market Street, Suite 3400

Philadelphia, PA 19102

Attorneys for Plaintiff

Barry J. Fenchak

Dated: April 1, 2025

Exhibit A

FILED FOR RECORD
2024 OCT 09 PM 03:51
JEREMY S. BREON
PROthonotary
CENTRE COUNTY, PA

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION-LAW

BARRY J. FENCHAK,
Plaintiff,

v.

THE PENNSYLVANIA STATE
UNIVERSITY BOARD OF TRUSTEES,
and MATTHEW SCHUYLER IN HIS
OFFICIAL CAPACITY AS CHAIRMAN
Defendants.

No. 2024-CV-1843-CI

Attorney for Plaintiff: Justin J. Boehret, Esq.
Terry L. Mutchler, Esq.
Erika L. Silverbreit, Esq.

Attorney for Defendants: Scott E. Diamond, Esq.
Joe H. Tucker, Jr., Esq.

OPINION AND ORDER

Marshall, J.

Presently before the Court is the Emergency Motion for Preliminary Injunction, filed by Barry J. Fenchak ("Plaintiff") on September 23, 2024. In deciding Plaintiff's motion, this Court considered, among other things, (i) the aforementioned Motion, (ii) Plaintiff's Brief in Support thereof, filed on October 2, 2024, (iii) the Brief in Opposition to Plaintiff's Emergency Motion for Preliminary Injunction, filed by Pennsylvania State University ("PSU" and, together with the other individually named defendants, the "Defendants") on October 7, 2024, and (iv) Defendants' Response in Opposition to Plaintiff's Emergency Motion for Preliminary Injunction, filed October 7, 2024. An evidentiary hearing on the Motion was held on October 8, 2024. Upon consideration of the filings and arguments of the parties, as well as the testimony presented at the October 8, 2024 hearing, the Court finds as follows:

BACKGROUND

Plaintiff is one of 36 voting members of the Board of Trustees of the Pennsylvania State University. Plaintiff is one of nine Trustees elected by alumni of PSU, and Plaintiff assumed his position as a Trustee on or about July 1, 2022. The Board of Trustees is responsible for the governance and welfare of PSU and all the interests pertaining thereto. In the exercise of its responsibilities, the Board of Trustees delegates day-to-day management and control of PSU to the university President, with certain reserved powers as set forth in the PSU's bylaws. *See* Role of the Board of Trustees in University Governance, <https://trustees.psu.edu/purpose>.

On July 16, 2024, Plaintiff filed a *pro se* Complaint for Declaratory and Injunctive Relief (the "Complaint"), asking this Court to declare that Defendants have failed to provide information necessary for Plaintiff to exercise his role as Trustee pursuant to 15 Pa. C.S. §5512(a)¹. In that Complaint, Plaintiff also asked this Court to compel Defendants to provide the requested information and to permanently enjoin Defendants from committing further violations of 15 Pa. C.S. §5512(a) and to permanently enjoin Defendants from "committing further retaliatory acts against Plaintiff, including but not limited to removal from the Board." *See* Complaint, July 16, 2024. On August 27, 2024, Plaintiff filed a counseled Amended Complaint raising essentially the same arguments and prayers for relief as the original Complaint.

¹ § 5512. Informational rights of a director.

(a) General rule.--To the extent reasonably related to the performance of the duties of the director, including those arising from service as a member of a committee of the board of directors, a director of a nonprofit corporation is entitled:

- (1) in person or by any attorney or other agent, at any reasonable time, to inspect and copy corporate books, records and documents and, in addition, to inspect, and receive information regarding, the assets, liabilities and operations of the corporation and any subsidiaries of the corporation incorporated or otherwise organized or created under the laws of this Commonwealth that are controlled directly or indirectly by the corporation; and
- (2) to demand that the corporation exercise whatever rights it may have to obtain information regarding any other subsidiaries of the corporation.

15 Pa. C.S. §5512(a).

Since joining the Board in 2022, Plaintiff has made repeated requests for financial information related to the administrative fees that PSU pays investment managers to oversee PSU's endowment, estimated by Plaintiff to be valued at approximately \$4.5 billion. Specifically, Plaintiff alleges that, per PSU's IRS Forms 990 for the years 2008-2018, PSU paid industry-standard administrative fees on its endowment of about 0.75%², on average. Thereafter, in the 2018-2019 fiscal year, Plaintiff alleges that the administrative fees that were paid for the management of the endowment jumped to 2.49% -- well above industry-standard. From the 2018-2019 fiscal year to the present, the administrative fee paid was 2.23% (2019-2020), 1.95% (2020-2021), 1.86% (2021-2022) and 1.86% (2022-2023) -- still well above what PSU was paying prior to the 2018-2019 year. *See* Complaint, Ex. A-1.

As a result of this increase in endowment administration fees, following his election to the Board, on or around June 2022, Plaintiff requested "access to the specific data and items that totaled to the aggregated figures listed on the IRS Form 990s administrative fees paid reported by Penn State." *See* Amended Complaint, ¶57. Plaintiff was denied access to this information and, despite repeated requests for the information, Plaintiff has still not received it. Plaintiff avers that he requires this information "to vote in accordance with his fiduciary duties in his role as Trustee of the \$5 billion endowment" and that it is ultimately the Board of Trustees that "maintains ultimate oversight of the University's investment assets." Plaintiff notes that the endowment is the largest financial asset of PSU, and he argues that, as Trustee, he is entitled to review the requested information. *See generally* Amended Complaint, ¶1-12.

Additionally, on April 29, 2024, May 4, 2024 and May 6, 2024, Plaintiff requested information related to a potential 10-year contract between PSU and a vendor called Elevate.

² In all cases, administrative expenses are given as a percentage of Investment Fund Value.

Elevate was purportedly engaged with the goal of “generating a game day engagement, ticketing, and premium seating and experiences strategy reflective of the passionate Nittany Lion fanbase’s priorities, preferences, and needs...” See “Elevate and Penn State Athletics Announces Landmark Partnership for Ticketing Sales and Experiences”, Aug. 8, 2024, <https://gopsusports.com/news/2024/08/8/elevate-partnership>. The Plaintiff, one of the Trustees entrusted to oversee the operation of PSU as a whole, claims he is unable to provide this Court with any information regarding the Elevate contract because – despite being initially promised the information – he was repeatedly denied access to the details of the contract. On information and belief, Plaintiff testified that the contract with Elevate has been signed, the contract has a 10-year term and is worth approximately \$1 billion, and it is related to the \$700 million renovation to PSU’s football stadium. Plaintiff avers that, because this contract was touted as a “means to ensure the future economic stability of the athletics department,” he should have been given access to information regarding the contract so that he could faithfully vote in accordance with his fiduciary duties as Trustee. Instead, Defendants denied Plaintiff’s requests for information regarding the Elevate contract, writing to Plaintiff in an August 20, 2024 email from Board Chairman Schuyler and Trustee Kleppinger that the agreement with Elevate contains “commercially sensitive information” that Trustee Fenchak, an alumni-elected Trustee who was being asked to vote on the matter, will not get access to because “the University is not able to share due to legal obligations it has to Elevate.” See generally Amended Complaint, ¶¶84-108.

Although the Court heard background testimony from Plaintiff regarding the claims in the underlying lawsuit, that is not the matter immediately before the Court. On July 19, 2024, three days after Plaintiff filed this underlying lawsuit related to the aforementioned information requests, Plaintiff attended a Board of Trustees meeting at PSU’s Altoona campus. Following that meeting,

while making conversation with three members of the IT team that provided support for the Board, Plaintiff made a comment, in the context of a more expansive conversation, to the effect that his wife says that he cannot wear baseball hats because it makes him look like “a penis with a hat on.” Plaintiff made the remark because the Trustees were just provided with gift bags from the Altoona campus that included a Penn State baseball hat. Plaintiff explained at the hearing, but not in the conversation in Altoona, that his remark was an approximate quote from the 1992 PG-rated movie *A League of Their Own*, in which Tom Hank’s character told a baseball umpire “you look like a penis with that little ball cap on.”

Defendants launched an investigation on the basis of this July 19, 2024 interaction between Plaintiff and those members of the IT team, who were employees of PSU. Defendants, through the Trustee Removal process outlined in the PSU bylaws,³ have now recommended that Plaintiff be removed from the Board for violating the Trustee Code of Conduct as a result of the July 19, 2024 incident. There is a special meeting of the Board of Trustees scheduled for October 10, 2024, at which the Board will vote on whether Plaintiff violated his fiduciary duty as Trustee such that he should be removed from the Board. Plaintiff brought the instant Motion for Preliminary Injunction in response thereto and has asked this Court to enter a preliminary injunction enjoining the Defendants from removing Plaintiff from the Board.

DISCUSSION

A preliminary injunction is a temporary remedy that is granted until the parties' dispute can be fully resolved. *Cutler v. Chapman*, 289 A.3d 139 (Pa. Commw. Ct. 2023). The basic purpose of a preliminary injunction is to preserve the status quo as it exists or previously existed pending

³ PSU amended its bylaws on July 30, 2024, approximately 11 days after the incident at issue. PSU, in formulating its recommendation for removal, assessed Plaintiff’s conduct under the standard for removal in effect on the date of the conduct, but has used the purportedly more robust process contained in the amended bylaws that became effective on July 30, 2024 in affecting his removal.

final resolution of the underlying controversy between the parties. *Fischer v. Department of Public Welfare*, 497 Pa. 267, 439 A.2d 1172 (1982). A preliminary injunction has been described as an extraordinary remedy that, accordingly, is to be granted only in the most compelling cases where the plaintiff has established a clear right to the relief requested and the wrong to be remedied is manifest. *Ambrogi v. Reber*, 2007 PA Super 278, 932 A.3d 969 (Pa. Super. 2007).

To obtain a preliminary injunction, a petitioner must establish that: (1) relief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages; (2) greater injury will occur from refusing to grant the injunction than from granting it; (3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct; (4) the petitioner is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and (6) the public interest will not be harmed if the injunction is granted. *Shepherd v. Pittsburgh Glass Works, LLC*, 25 A.3d 1233, 1241 (Pa. Super. 2011). The Court now considers whether the Plaintiff has met his burden in establishing the need for a preliminary injunction.

i. Injunction is Necessary to Prevent Immediate and Irreparable Harm

In order to be granted a preliminary injunction, Plaintiff must demonstrate that the requested injunction is necessary to prevent an immediate and irreparable harm. The Court believes that Plaintiff has met his burden on this element. The Plaintiff has demonstrated that, if the October 10, 2024 meeting on Plaintiff's removal is allowed to continue, Plaintiff will almost assuredly be removed from the Board of Trustees. Indeed, the Governance Committee of the Board of Trustees has already made the recommendation to the Chair and Vice Chair of the Board that Plaintiff be removed. Upon his removal, Plaintiff will be divested of the position to which he was duly elected by alumni of PSU, and Plaintiff's ability to challenge his termination will be severely

weakened. Granting the injunction will serve to shield Plaintiff from the immediate and irreparable harm that will be caused by his removal from the Board, and will allow the parties more time to fully litigate the issues involved in this matter.

While this Court takes allegations of sexual harassment seriously, the Court cannot ignore the additional background existing between the parties as discussed herein, including the fact that Plaintiff filed this underlying lawsuit just three days before the alleged incident at the Altoona campus. Although Plaintiff's remark was thoughtlessly made, as Plaintiff himself concedes, and was undoubtedly made worse by Plaintiff's position as a Trustee vis-à-vis the IT staff member, the Court must note that the comment was only a small part of a longer, 5-minute conversation with the IT team. The offending remark was an approximate quote from a popular 1992 movie with which the person to whom the comment was directed (known to the Court only as "Person A") was apparently not familiar. The Court did not hear direct testimony from Person A, and instead only heard testimony from Person's A work supervisor (known to the Court only as "Person B") and testimony from Amber Grove, the head of Ethics and Compliance at PSU, who conducted PSU's investigation into the matter. While this Court does not condone Plaintiff's behavior, particularly coming from a person in a position of power such as Plaintiff toward a person of lesser power like Person A, the Court must consider this additional context as part of Plaintiff's broader argument that he is being retaliated against. With that context, the fact that the July 19, 2024 incident will form the basis for (according to Plaintiff) the first ever removal of a Trustee from the Board is more suspect. As such, this Court is of the belief that granting this injunction will prevent immediate and irreparable harm to Plaintiff in that, if it is not granted, he will be removed from his position on the Board and will be unable to effectively defend his claims related to July 19, 2024 and prosecute the underlying lawsuit in this case.

ii. Greater Injury Will Occur from Refusing to Grant the Injunction

For many of the same reasons as were listed above, this Court concludes that Plaintiff has met his burden on this element. Refusing to grant the injunction will result in Plaintiff's removal from the Board, and will allow the Defendants' alleged retaliatory behavior to go unchecked. Further, Plaintiff raises important claims in his underlying lawsuit that may be foreclosed once he is removed from the Board. On the other hand, the only harm that may result from not granting the injunction is that Person A may not feel vindicated in her complaint – yet. The Court is not suggesting that Plaintiff should not face repercussions for his actions on July 19, 2024, and the Court notes that steps have already been taken to reduce the chance of harm coming from Plaintiff's remaining on the Board, such as Plaintiff being required to attend Board meetings remotely via Zoom, rather than in person. This Court was not presented with evidence from which it can conclude that Plaintiff presently poses a meaningful risk to anybody, and denying the injunction will result in greater injury – permanent removal from the Board – to Plaintiff. Granting the injunction does not cause any meaningful injury to Defendants.

iii. The Injunction Will Restore the Parties to the Status Quo as it Existed Before the Alleged Wrongful Conduct

Plaintiff must establish that granting his injunction will restore the parties to the status quo as it existed prior to the alleged wrongful conduct. The parties disagree about the appropriate way to frame this element – Plaintiff argues that his permanent removal from the Board is the final and ultimate retaliatory act by Defendants, such that granting the injunction will restore the status quo as it existed prior to Defendants' invocation of removal proceedings. Defendants argue that, by granting the injunction, Plaintiff will not face consequences for his inappropriate interaction with Person A. The Court begins by noting that Plaintiff has already faced consequences for his inappropriate interaction with Person A; namely, Plaintiff is now required to attend Board

meetings via Zoom rather than in person, and Plaintiff has had his “social privileges” as Trustee revoked. Further, this Court is not suggesting that Plaintiff should not be sanctioned for his behavior on July 19, 2024, and the Court finds Defendants characterization that it will be “render[ed] ineffectual in its attempts to adjudicate its own Bylaws and determine whether a Trustee as breached his fiduciary duty” to be unconvincing. In granting this injunction, Defendants are not barred from adjudicating its bylaws and holding Trustees accountable. Rather, Defendants are barred from adjudicating their bylaws in a way that, at least at a prima facie level, is a retaliatory, pretextual termination of a Trustee. Granting this injunction will maintain the status quo in that Plaintiff will not be removed from the Board and will be permitted an opportunity to present the merits of this lawsuit – filed just three days before the Altoona incident – as well as the merits of his defense of the July 19, 2024 incident.

iv. Plaintiff is Likely To Prevail On The Merits

In addition to the foregoing background, Plaintiff has testified to and provided uncontradicted evidence of a broad pattern of retaliatory behavior that he has faced at the hands of Defendants since he joined the Board in July 2022. Since joining the Board, Plaintiff has made repeated requests for information that he has the right to request and likely has the right to receive as a Trustee pursuant to 15 Pa. C.S. §5512⁴ and the Pennsylvania Supreme Court in *Machen v. Machen & Mayer Electrical Mfg. Co.*, 85 A. 100 (Pa. 1912) (“[t]he right of a director to inspect the books of the corporation, like that of a stockholder, exists at common law; but the right of the former is unqualified, while the latter, to a certain extent, is a qualified right. The reason is that the duties of a director require him to be familiar with the affairs of the company in order that he may have sufficient information to enable him to join intelligently in the management of the concern.”).

⁴ *Supra*.

Rather than provide Plaintiff with the information that he has requested, Defendants repeatedly denied the requests and sought an opportunity like the July 19, 2024 interaction that would provide the basis to remove the Plaintiff and permanently end his probing inquiries into the health of the endowment and other university business for which he has a responsibility. Additionally, the courts of this Commonwealth have routinely ruled against defendants, and awarded attorney's fees, for the wrongful evasion of the mandates of 15 Pa. C.S. §5512. *See In re Nonprofit Corporation Trustees to Compel Inspection of Corporate Information*, 157 A.3d 995 (Pa. Commw. 2017). This Court concludes that Plaintiff has made an adequate showing that he is likely to prevail on the merits of his underlying lawsuit.

Conversely, Defendants argue that, for this element, Plaintiff must show a likelihood of succeeding on the merits of his *Board removal* (i.e., that Plaintiff will persuade the Trustees not to remove him on October 10, 2024), rather than succeeding on the underlying lawsuit. The Court does not agree with this characterization of the element. Plaintiff brought the instant Motion based on his credible belief that he will be removed from the board on October 10, 2024, so accepting Defendants' argument that the Board vote is the appropriate proceeding for this Court to analyze only serves to thwart Plaintiff's Motion. If Plaintiff expected that he would succeed on the merits of the Board vote, then he never would have filed the instant Motion to prevent his removal. This Court has been presented with credible and, in many instances uncontroverted, evidence that Plaintiff has been subject to ongoing incidents of retaliation by Defendants, so this Court will not deny Plaintiff's request for a preliminary injunction based on Defendants' averments that Plaintiff dispose of this preliminary injunction just because Defendants aver that Plaintiff will not succeed on the October 10, 2024 vote. Furthermore, Defendants' interpretation is inconsistent with precedent established by the appellate courts of this Commonwealth.

v. The Injunction is Reasonably Suited to Abate the Offending Activity

An injunction, although an extraordinary measure, is reasonably suited for the situation at hand. If anything, Plaintiff's prompt removal from Board is the extraordinary measure in this case. If the injunction were not granted, Plaintiff would be removed from the Board and his claims of misconduct by Defendants will become much harder, if not impossible, to prove. On the other hand, Plaintiff has already been barred from social activities as Trustee and Plaintiff is now required to attend Board meetings remotely via Zoom. Further, supportive measures have been implemented that ensure that Person A will not be required to interact with Plaintiff again.

In light of the Plaintiff's allegations of misconduct by Defendants that were caused by Plaintiff's information requests, an injunction is reasonably suited to abate the retaliatory action of removing Plaintiff from the Board. Further, because Defendants have already taken significant steps to separate Plaintiff from other members of the PSU community, this Court is not concerned about future potential harm coming to anyone as a result of Plaintiff's conduct.

vi. The Public Interest Will Not Be Harmed if the Injunction is Granted

Finally, it is clearly in the public interest to grant the preliminary injunction. PSU is a public state-related, state-supported, land-grant research university, whose largest financial asset is its endowment that is valued at over \$4 billion and consists, in significant part, of contributions from the public to PSU. In 2013-2014, the administrative expenses paid for the endowment fund were 0.62%. In 2018-2019, the fee jumped to 2.49% and has remained above 1.8% since. In light of the size of the endowment, the increase in administrative expenses represents millions of dollars paid out annually for the management of the endowment that were not being paid less than a decade ago. Plaintiff, as a Trustee that was voted into the position by alumni of PSU, is entitled to inquire about the administrative fees, to whom they were being paid, and how the cost of those fees impacts the operations of PSU. Granting this injunction serves the public interest by preventing

the potentially retaliatory termination of a Trustee based on that Trustees inquiries regarding the operation of the public university that he serves. Denying the injunction and allowing Plaintiff's removal would re-cast a shadow over the financial operations of Defendants, to the detriment of every PSU stakeholder except those at the very top of the PSU hierarchy. As stated previously, it appears that Plaintiff is entitled to this information and granting this injunction will prevent the pretextual termination of Plaintiff while these requests are outstanding.

ORDER

AND NOW, this 9th day of October, 2024, Plaintiff's Emergency Motion for Preliminary Injunction is hereby GRANTED. Defendants are hereby ENJOINED from removing Plaintiff from the Board of Trustees by vote. This Preliminary Injunction will remain in effect until the earliest of (i) its dissolution by the Court, (ii) the conclusion of the underlying litigation in this matter, or (iii) the conclusion of all terms for which Plaintiff has been duly elected to the Board.

BY THE COURT:

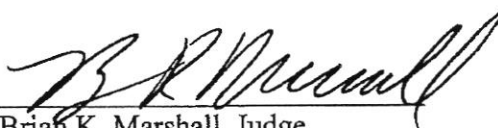

Brian K. Marshall, Judge

Exhibit B

FILED FOR RECORD BY EMAIL
2024 AUG 27 AM 11:04
JEREMY S. BREON
PROTHONOTARY
CENTRE COUNTY, PA

IN THE COURT OF COMMON PLEAS OF
CENTRE COUNTY, PENNSYLVANIA

BARRY J. FENCHAK

Plaintiff,

v.

THE PENNSYLVANIA STATE
UNIVERSITY BOARD OF TRUSTEES,
and MATTHEW SCHUYLER IN HIS
OFFICIAL CAPACITY AS CHAIRMAN

Defendants.

NO. 2024-CV-1843-CI

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiffs. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE:

Centre County Bar Association
192 Match Factory Pl.
Bellefonte, PA 16823
814-548-0052

OBERMAYER REBMANN MAXWELL & HIPPEL LLP

By: Terry L. Mutchler, Esquire (Pa. ID No. 308052)
Justin J. Boehret, Esquire (Pa. ID No. 307633)
Erika L. Silverbreit, Esquire (Pa. ID No. 335018)

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Philadelphia, Pennsylvania 19103
(215) 665-3000
Counsel for Plaintiff

BARRY J. FENCHAK

Plaintiff,

v.

THE PENNSYLVANIA STATE
UNIVERSITY BOARD OF TRUSTEES,
and MATTHEW SCHUYLER IN HIS
OFFICIAL CAPACITY AS CHARIMAN

Defendants.

NO. 2024-CV-1843-CI

AMENDED COMPLAINT

NOW COMES Plaintiff, Barry J. Fenchak, by and through his undersigned Transparency counsel, Obermayer Rebmann Maxwell & Hippel LLP, and hereby files this Amended Complaint against the above-captioned defendants, and in support thereof avers as follows:

INTRODUCTION

When an individual has the privilege of joining The Pennsylvania State University's Board of Trustees to oversee a nearly \$5 Billion endowment, that Board member is handed a copy of the bylaws, not a blindfold. Yet, here, the University asks that Trustee Plaintiff to take a "trust me" approach and refuses to provide critical information to consider and weigh. In essence, the University asks the Board members to vote on the welfare of this endowment wearing a blindfold. In this First Amended Complaint, Plaintiff rejects this approach and seeks relief as follows.

PARTIES

1. Plaintiff, Barry J. Fenchak ("Plaintiff") is an adult individual residing at 596 Devonshire Drive, State College, PA 16803.

2. Defendant, Pennsylvania State University Board of Trustees (the "Board of Trustees" or collectively, "Defendants") is a nonprofit corporate entity with a principal place of business located at 201 Old Main, University Park, PA 16802.

3. Defendant, Matthew Schuyler ("Chairman Schuyler" or collectively, "Defendants"), is sued solely in his official capacity as Chairman of the Board of Trustees.

JURISDICTION AND VENUE

4. This Honorable Court has subject matter jurisdiction in this matter pursuant to 42 Pa. C.S. § 931(a), and personal jurisdiction over the defendants pursuant to 42 Pa. C.S. § 5301(a).

5. Venue is proper in this Court pursuant to Pa. R. Civ. P 1006 and Pa. R. Civ. P. 2103.

STATEMENT OF FACTS

6. The Pennsylvania State University ("Penn State" or the "University"), is a public state-related land grant research university founded in 1855 with 24 campuses across the Commonwealth.

7. The University was originally chartered by an Act of the Pennsylvania Legislature on February 22, 1855 as the "Farmer's High School of Pennsylvania."

8. In 1862, Congress passed the Morrill Act, known as the Land Grant Act, and it was adopted by the Pennsylvania General Assembly a year later.

9. In 1863, Penn State was designated as a land grant institution obtaining all the benefits of the Morrill Act.

10. In 2023, the University's endowment was valued at \$4.57 Billion.
11. The student population is 87, 903 students in that same year.
12. The University is governed by a Board of Trustees.
13. The University's Board of Trustees is the corporate body established by the University's Charter and is responsible for overseeing, managing, and maximizing benefits of this endowment explained in detail below.
14. The Board delegates day-to-day management of the University President with certain reserved powers set forth in the Bylaws.
15. Plaintiff, Barry J. Fenchak, is an elected member of the Board of Trustees of The Pennsylvania State University serving in that capacity since his election by the alumni in 2022.
16. Plaintiff is currently serving a three-year term, which is set to expire on June 30, 2025.
17. Plaintiff is one of nine (9) voting members of the Board elected by the alumni serving on the thirty-six (36) member Board.
18. Plaintiff's position on the Board is uncompensated.
19. Plaintiff regularly attends Board meetings and is active in discussions, and speaks openly, freely, and candidly in accordance with the "expectations of membership" imposed by the Board's Standing Order VIII.¹
20. Defendant Board of Trustees is a nonprofit corporate body that serves as the governing body of Penn State.
21. According to the Board of Trustees, it's origin and purpose is summarized as

¹ <https://bpb-us-e1.wpmucdn.com/sites.psu.edu/dist/7/64540/files/2019/03/Standing-Orders-2020-September.pdf>

follows:

"The Pennsylvania State University was originally chartered by an Act of the Legislature of the Commonwealth of Pennsylvania on February 22, 1855 as the "Farmers' High School of Pennsylvania". The Morrill Act (also known as the Land Grant Act), passed by Congress in 1862, was accepted by the Pennsylvania Legislature in 1863 and Penn State was designated as the institution in Pennsylvania to receive the benefits of the Morrill Act. Today, the University, as the Commonwealth's land grant university, exists as a multi-campus public research university that educates students from Pennsylvania, the nation and the world, and improves the well-being and health of individuals and communities through integrated programs of teaching, research, and service.

*The Board of Trustees of the University is the corporate body established by the University's **Charter** with overall responsibility for the governance and welfare of the University and all the interests pertaining thereto. In the exercise of its responsibilities, the Board of Trustees delegates day-to-day management and control of the University to the President, with certain reserved powers as set forth in the University's **Bylaws**."*²

22. Moreover, the Board of Trustees claims to govern with a "holistic approach" and seeks to advance the institution while "acting in the best interests" of the University:

"As Penn State's governing body, the Board of Trustees takes a holistic approach to guiding goals, policies, and procedures as well as reviewing and approving University budgets. In partnership with the president, the board seeks to advance the institution while acting in the best interests of the University community. In the exercise of its responsibilities, the board delegates day-to-day management and control of the University to the president, with certain reserved powers as set forth in the University's bylaws.

*The board comprises thirty-six voting members and two ex-officio non-voting members—the President of the University and the Governor of the Commonwealth of Pennsylvania. Members represent various entities including, but not limited to, Pennsylvania county agricultural societies, business and industry, students, and faculty."*³

23. In this Commonwealth both the legislature and the courts have long favored liberal and open access of corporate records to directors.

24. In 1912, the Supreme Court of Pennsylvania recognized this by ruling that a board member had "absolute" and unfettered access to corporate records as discussed in detail below. Moreover, the Court held that that assessment of records is solely held by the individual Trustee – not the Board as a whole. *Machen v. Machen & Mayer Electrical Mfg. Co.*, 85 A.

² <https://trustees.psu.edu/purpose/>

³ <https://trustees.psu.edu/>

100 (Pa. 1912).

Scope of Powers

25. Decades ago, the legislature enacted legislation delineating the permissible scope of powers, duties, and safeguards for every nonprofit corporation in the Commonwealth of Pennsylvania. 15 Pa. C.S. § 5501 *et seq.*

26. The Defendants are unquestionably subject to the mandates of this law. *See In re Nonprofit Corporation Trustees to Compel Inspection of Corporate Information*, 157 A.3d 995 (Pa. Cmwlth. 2017).

27. Subsection 5512(a) of the statute grants Plaintiff, as Trustee, an explicit right to inspect the University's books, records and documents, and to receive information regarding the assets, liabilities and operations of the University:

*“(a) **General rule.**--To the extent reasonably related to the performance of the duties of the director, including those arising from service as a member of a committee of the board of directors, a director of a nonprofit corporation is entitled:*

*(1) in person or by any attorney or other agent, at any reasonable time, to inspect and copy corporate books, records and documents and, in addition, to inspect, and receive information regarding, the **assets, liabilities and operations** of the corporation and any subsidiaries of the corporation incorporated or otherwise organized or created under the laws of this Commonwealth that are controlled directly or indirectly by the corporation; and*

(2) to demand that the corporation exercise whatever rights it may have to obtain information regarding any other subsidiaries of the corporation.” 15 Pa. C.S. § 5512(a) (Emphasis added).

28. The courts of this Commonwealth have routinely viewed the disclosure requirements set forth in Section 5512 in a broad and expansive light. *See In re Nonprofit Corporation Trustees to Compel Inspection of Corporate Information*, *supra* (Holding that trustees were entitled to recover attorney's fees in enforcement action where trial court found that investigative and litigation materials fell within the scope of “assets, liabilities and

operations” of the University).

Supreme Court ruling Granting Unqualified Access of Corporate Records

29. For well over a century the courts of this Commonwealth have held that a board of directors cannot deprive an individual director of the right to inspect its books and documents. *Machen v. Machen & Mayer Electrical Mfg. Co.*, 85 A. 100 (Pa. 1912).

30. The Supreme Court’s rationale for this rule is as follows: “the duty to manage the corporation rests alike upon *each and every one of the directors*, and therefore *it is the right of each director* to inspect its books and documents.” *Id.*, at 102 (Emphasis added).

31. Moreover, the Court recognized that a director’s right to inspect the books is unqualified since “the duties of a director require him to be familiar with the affairs of the company in order that he may have sufficient information to enable him to join intelligently in the management of the concern. The protection of the interests of the company, therefore, require that *his right to an inspection of the books be absolute*.” *Id.*, at 104 (Emphasis added).

32. The Pennsylvania Supreme Court has similarly held that a trustee’s right to access information about trust property is “**absolutely beyond dispute**.” *Wilson v. Bd. of Directors of City Trusts*, 188 A. 588, 594 (Pa. 1936).

33. As the Court has reasoned: “to withhold the means of knowledge concerning that property is to withhold the power to exercise the duty of preservation.” *Id.* at 594 (citing its prior holding in *Brown v. Brancato*, 184 A. 89, 91).

34. Similarly, the Commonwealth Court has held that a public board member “has the right to study, investigate, discuss, and argue problems and issues prior to the public meeting at which the [board member] may vote.” *Palm v. Center Twp.*, 415 A.2d 990, 992 (Pa. Commw. Ct. 1980).

35. Since Plaintiff's election to the Board of Trustees he has requested certain information that he believes is necessary to: familiarize himself with important affairs of the University; intelligently render decisions necessary to manage the University; and otherwise faithfully discharge his duty as trustee to protect the interests of the University.

36. In plain language, Plaintiff needs this information to vote in accordance with this fiduciary duties in his role as Trustee of the \$5 billion endowment. He is entitled to all of it per *Machen* as well as bylaws and corporate code.

37. Plaintiff has made these requests for information in good faith and in accordance with his legal duty to act in the best interest of the University.

38. As discussed in further detail below, the information requested by Plaintiff concerns matters relating directly to the endowment, investment and spending policies, and other operations affecting critical interests of the University.

39. The endowment of the Pennsylvania State University is the largest asset the university owns and controls. It is valued at approximately \$5 billion dollars. The endowment provides funding for numerous university core missions, including scholarship, faculty retention, and financing of physical assets, and directly impacts those missions.

40. Accordingly, the requested information is of critical importance to a Trustee such as Plaintiff.

41. While the Board of Trustees has delegated various responsibilities and day-to-day operations concerning the University's investments, it is ultimately the Board of Trustees that "maintains ultimate oversight of the University's investment assets."⁴

42. "Day-to-day operations" does not mean ceding control or oversight of \$5 Billion to staff.

⁴ https://oim.psu.edu/sites/oim/files/2024-08/ltip-ips_0.pdf

43. The Board is responsible for oversight of the endowment and for setting the investment and spending policies of the endowment and other long-term investments of the University. Overseeing the efficacy and efficient operation of the endowment is the responsibility – and duty - of the Board.

44. The day-to-day operations of the endowment are administered by the Office of Investment management ("OIM").

45. The OIM is governed by the Board and submits policies and practices for achieving investment and spending objectives to the Penn State Investment Council ("PSIC") and to the Board for their approval.

46. The PSIC consists of fourteen (14) members, and they approve the investment managers who are paid administrative fees to invest the endowment funds.

47. The PSIC must meet at least once a year and report to the full Board of Trustees.

48. Their annual report is a broad-brush overview with little detail or contextual information. It provides headlines but not the full story.

49. Per official policy of the PSIC – and unlike the Board of Trustees – meetings of the PSIC are not subject to the state's Sunshine Act, 65 Pa.C.S. §§ 701-716, but rather "are only open to PSIC members and invited guests."⁵

50. Thus, the discussions, decisions and underlying financial information at these meetings is not generally available, nor it is provided to the Trustees in detail.

Requests for Information

51. Shortly after his election to the Board of Trustees in the summer of 2022, Plaintiff reviewed Penn State endowment IRS 990 filings from 2008 to 2023 to fully

⁵ https://oim.psu.edu/sites/oim/files/2024-08/ltip-ips_0.pdf

understand the scope of the endowment he was responsible for as a newly elected Trustee.

52. What he found was extremely concerning to him given his fiduciary duty as a Trustee.

53. Until recently, the PSIC website included a policy stating that endowment administrative expenses should be limited to no more than 75 basis points per year, which means 0.75% of the amount being invested.

54. Within the investment industry, 75 basis points would generally be considered within a reasonable limit. However, the steep tripling of the administrative expenses was cause for alarm and the need for further probing.

55. Prior to 2016, Penn State's administrative expenses averaged 0.73% (73 basis points) per year, or just under the guideline maximum.

56. However, Plaintiff's jaw dropped when he saw the jump in administrative fees paid during the 2016-2023 timeframe, as those expenses (as reported on Penn State's IRS Form 990) began to rise dramatically in 2017, more than tripling the rate within three years.

57. In light of such a significant jump in said expenses, in June of 2022 Plaintiff, through prescribed channels, requested: access to the specific data and items that totaled to the aggregated figures listed on the IRS Form 990s administrative fees paid reported by Penn State, and other related information concerning the net return (the "initial request").

58. Upon information and belief, the data and information requested by Plaintiff has been shared by the PSIC with other Trustees on the board.

59. Plaintiff's initial request was communicated to Trustees, Robert Fenza, vice chair of the Finance Business and Capital Planning Committee, and David Kleppinger, Vice-Chair of the Board.

60. Mr. Fenza verbally denied Plaintiff's initial request during the Board of Trustees

orientation session in June of 2022, stating that: "You don't need it. You need to mind your business and trust others."

61. Over the next two years, Plaintiff has repeatedly made renewed requests for the information sought in his initial request for without this information he is hamstrung from performing his duties as a Trustee

62. Plaintiff's requests were also communicated during numerous email exchanges by and between Plaintiff and fellow Trustees of the Board, including Shannon Harvey, Sara Thorndike, Robert Fenza, Chairman Schuyler, and Mary Lee Schneider.

Board Responses to Requests for Information

63. On or about February 16, 2024, during an in-person meeting at the Hintz Family Alumni Center, Trustee Mary Lee Schneider, then serving as the Vice Chair of the FBCP Committed, issued a verbal denial to Plaintiff's repeated requests for the information, stating that: *"you will never be given that information. That is my decision and I will make sure you will never get it."*

64. Plaintiff responded to Ms. Schneider's verbal denial by indicating that he wished to confirm their conversation by sending an email to her.

65. Ms. Schneider responded to Plaintiff by admitting that she *"won't get it. I've blocked your emails."*

66. Ms. Schneider's admission that she, as the decision maker for the Board, had blocked all emails from Plaintiff, demonstrates the Defendants' blatant disregard for their own bylaws, and more importantly, their lawful duties under 15 Pa. C.S. § 5512(a).

67. In response to Ms. Schneider's verbal denial, Plaintiff sent an email to Ms. Schneider, with copies to the entire Board, including Chairman Schuyler, memorializing the details of their conversation.

68. On or about March 5, 2024, Plaintiff submitted in writing, another follow-up request to the Board for the information.

69. On March 7, 2024, the Board's secretary, Shannon Harvey, acknowledged receipt of Plaintiff's written request for information and proposed a response to same by March 12, 2024.

70. Pursuant to 15 Pa. C.S. § 5512 required the Board to disclose the information to Plaintiff within two (2) days of his request.

71. The Board of Trustees, consistent with its prior pattern of delay and obfuscation, failed to disclose the information to Plaintiff by March 12th.

72. On March 18, 2024, having received no response from Defendants, Plaintiff sent another follow up email to Trustee Schuyler and President of the University.

73. Later in the day Trustee Fenchak received an email reply from Board Secretary Shannon Harvey which, once again, contained no substantive details but rather aggregated and therefore meaningless information.

74. Once again, the Board failed to provide requested information; Plaintiff did not request aggregated information.

75. Failure by the Board to comply with its statutory duties under 15 Pa. C.S. § 5512 prevents him from performing an assessment of any of the concerning issues relating to the endowment; asset selection; investment advisor performance; and/or investment advisor fees.

76. On or about April 29, 2024, Plaintiff sent follow up to Defendants in writing, reiterating his initial request for information and proposing a reasonable and simple format in which it could be provided to him.

77. Plaintiff's goal has been to receive information; not litigate. But the Board's action in repeatedly rebuffing and thwarting him left him no option.

78. On or about May 7, 2024, Plaintiff received correspondence from Defendants in

which they again denied his request for information.

79. In their response, Defendants throw a mixed bag of excuses at Plaintiff, including that the request is: “unreasonable”; “beyond that which objectively necessary”; “confidential”; and generally that other parties are responsible for oversight of the endowment.

"While we welcome all trustee's efforts to prepare for and meaningfully participate in Board proceedings and fulfil their oversight obligations to the University, your requests go well beyond that. They are unreasonable, beyond that which is objectively necessary for you to discharge your duties as a trustee, seek information that is not maintained/provided in the ordinary course by the University, and therefore overly burdensome to the University and its representatives.

With respect to your request for University endowment information, you have already been provided with aggregated reporting information from the University's Office of Investment Management (OIM). Many of the investments OIM makes on behalf of the University are in private investment funds offered to the University as a Qualified Institutional Buyer. Consistent with industry practice, these funds request that the University maintain confidentiality (aside from those exercising a fiduciary oversight role) of the funds' investments, operations, and processes, which is why the University has provided you and others with aggregate portfolio-level information. The Pennsylvania State Investment Council (PSIC), of which you are not a member, is charged with acting as the University's fiduciary for these purposes, providing oversight of the University's portfolio. In addition to PSIC's oversight role, the University's investment reporting is audited by an external auditor and each of the commingled fund investments held by the University are audited by an external auditor hired by the firms offering the funds. In light of the foregoing, it is our considered judgment that the further information you request is beyond that which is necessary to discharge your responsibilities as a trustee."

80. This response is direct contradiction not only to 15 Pa. C.S. § 5512 but to the Supreme Court of Pennsylvania decision in *Machen* that a Trustees right “to an inspection of the books be absolute.” *Machen v. Machen & Mayer Electrical Mfg. Co.*, 85 A. 100 (Pa. 1912).

81. *Machen* serves to eviscerate the Board’s position that it gets to spoon-feed pureed baby food to the 36-Member Board while hiding the meat of the financial and other workings from those same Members.

82. Moreover, common sense dictates that a Trustee of a \$5 billion endowment responsible for the education and welfare of 87,903 students as of 2023 be given **all** information

he or she believes necessary to perform their duties.

83. Subsequent to the Defendants' March 7th final denial to date of the initial request for information, Defendants denied yet another request for information made by Plaintiff (the "Elevate request").

Elevate Contract: Second Request for Information

84. The second request for information concerned the University's award of a massive contract to Elevate, a ticketing sales agency, relating ticketing sales for Penn State football games, and other university sports.⁶

85. The Plaintiff cannot provide specific and further details to this Court on the contract with Elevate (the "Elevate contract") because the Plaintiff, in his role as Trustee, does not have a copy of the Elevate contract, his requests to review the Elevate contract have been denied, and to date the Board has not voted on the Elevate contract.

86. According to reports, the Elevate contract, has the potential to generate up to \$1 billion in revenue over the course of the ten (10) year deal.⁷

87. The Elevate contract has been promoted by the University as a vehicle to fund, in part, a \$700 million renovation of Beaver Stadium.⁸

88. This revenue stream has also been trumpeted by University officials as a means to ensure the future economic stability of the athletics department.

89. Plaintiff's second request for information was first communicated to Defendants during a Board meeting on April 24, 2024.

⁶ <https://venuesnow.com/elevate-signs-massive-penn-state-ticketing-deal/#:~:text=Penn%20State%20University%20has%20signed,sources%20familiar%20with%20the%20project>.

⁷ *Id.*

⁸ <https://www.si.com/college/pennstate/football/penn-state-s-new-ticketing-contract-could-be-massive-report-says-01j4sc6tsy8t>

90. During discussions concerning the University's renovations of Beaver Stadium, Vice President of Athletics, Pat Kraft, and fellow board Trustee, Sara Thorndike, disclosed that an agreement was "pending" with Elevate for the ticketing arrangement.

91. Despite being a Trustee of the Board, Plaintiff was unaware of any negotiations and/or pending agreements with Elevate prior to this April 24th disclosure during the Board meeting.

92. In light of the enormity of this potential agreement with Elevate, Plaintiff requested information outlining the proposed terms of the Elevate agreement.

93. In response to Plaintiff's request for this information, Pat Kraft promised that Plaintiff would be provided with the information, stating: "you bet."

94. That same day, Plaintiff memorialized his request for the Elevate information by transmitting an email to Mr. Pat Kraft and Board Trustee, and Chair of the FBCP Committee, Robert Fenza.

95. On or about May 6, 2024, having received no response from Pat Kraft or Trustee Robert Fenza, Plaintiff sent another follow up email requesting "the contract parameters" of the Elevate deal.

96. On or about May 7, 2024, Plaintiff received correspondence from Chairman Schuyler and Trustee David Kleppinger, indicating that Plaintiff's request for the Elevate contract "is not objectively or reasonably related to your duties as a trustee. Additional information regarding Elevate will be provided to all trustees in the ordinary course."

97. On or about May 28, 2024, having received no update from Defendants on the Elevate contract, Plaintiff sent an email to Chairman Schuyler and Trustee Kleppinger inquiring when such information would be shared with the rest of the board.

98. On or about July 15, 2024, more than two (2) months since the Defendants'

promise to disclose the terms of the Elevate contract in the “ordinary course,” Plaintiff again wrote to Defendants and requested an update on the Elevate deal and a copy of any executed contract(s).

99. That same day, Trustee Mary Lee Schneider (now serving as Chair of the Finance Committee) acknowledged that the Elevate contract was executed, however, Plaintiff would not be receiving a copy of the contract as:

“The contract itself contains a confidentiality provision so that both Penn State and Elevate can safeguard the competitive terms and conditions contained therein. Given this, we will not be sharing copies of the executed contract. In addition, this level of detail is not reasonably or objectively necessary to your role as a trustee.”

100. The Board of Trustees acts as a whole. Therefore, one Trustee does not have authority or more weight than another in voting.

101. By refusing to share the details of a \$1 Billion contract, a few select Trustees have taken a “just trust us” approach and are, in essence, asking Trustees to vote blindly in direct contravention of their fiduciary duty.

102. On or about August 16, 2024, Plaintiff sent one last email to Defendants, renewing his request for the Elevate contract, which at this point in time was fully executed and binding on both parties.

103. On or about August 20, 2024, Chairman Schuyler and Trustee David Kleppinger sent written denial of Plaintiff’s Elevate request, stating:

“We write in response to your August 6, 2024 request for the University’s agreement with Elevate.

On multiple occasions, including April 18, 2024 and May 2, 2024, all trustees were provided with detailed information about the confidential financial guarantees and revenue share provision in the proposed arrangement with Elevate. Questions were posed by trustees and answered by University administrators regarding this information, as well as related to the reference checks conducted to confirm Elevate bona fides. As you know, the Board has received and will continue to receive regular updates on the Beaver Stadium renovation project including information on ticket/seat sales.

While we welcome trustees' efforts to prepare for an meaningfully participate in Board proceedings and fulfill their oversight obligations to the University, your request for this document is unreasonable, beyond that which is objectively necessary for you to discharge your duties as a trustee, and seeks information the University is not able to share due to legal obligations it has to Elevate. Furthermore, your repeated violations of your confidentiality obligations have created risk for the University that inform our decision not to provide the contract to you.

Under the terms of the University's agreement with Elevate, disclosure of the Agreement within the University is contractually restricted to those individuals who have a need to know such information in connection with the University's duties and obligations under the Agreement. In other words, disclosure of the Agreement within the University is limited to those persons tasked with carrying out the obligations in the Agreement including Penn State Finance operations that support those obligations.

Additionally, and despite your mischaracterization that such claims of confidentiality are "specious," the Elevate Agreement, and the framework of the Agreement itself, contains commercially sensitive information that Elevate has sought to protect. Your prior confidentiality breach related to Elevate – your disclosure of the existence of a confidential letter of intent between the University and Elevate in a public meeting of the Board in May 2024 – was raised by Elevate as a significant concern. Further sharing of confidential information by you could damage the University's relationship with Elevate.

We are available to discuss further should you wish to do so.

104. Chairman Schuyler's response is both split-tongued telling, and troublesome.

105. Telling, that on one hand Chairman Schuyler acknowledges Plaintiff's duties as Trustee to "meaningfully participate in Board meetings" and fulfill his "oversight obligations to the University," and yet on the other hand demonstrates his belief that Defendants have the authority to pick and choose which information Plaintiff can receive in his role as a Trustee.

106. The Penn State Board of Trustees - or any Board of Trustees in this Commonwealth – should not operate as a buffet-style of information; with only select information being given to certain Board Members. *Machen v. Machen & Mayer Electrical Mfg. Co.*, 85 A. 100 (Pa. 1912). Each Trustee, as dictated by the Supreme Court, has a right to all information THE TRUSTEE feels he needs – not what the Board says he needs.

107. When joining the Board of Trustees of this University, Board Members are handed Bylaws, not blindfolds.

108. Given the enormous amount of revenue at stake in the Elevate contract, and its direct ties to another substantial asset of the University (i.e. renovation of Beaver Stadium) it is inescapable that Plaintiff's second request for information implicates the keystones of 15 Pa. C.S. § 5512: the "assets, liabilities, and operations" of Penn State.

Retaliation for Seeking Necessary Information

107. Moreover, Plaintiff asserts that in response to his efforts to obtain even the most basic information of the Board, the Board has taken action to stem his efforts, and those of anyone who has the temerity to inject sunshine into the darkened decision rooms.

108. The most outstanding example of this rests with revised language inserted into to the bylaws by the Defendants on July 30, 2024.

109. The new language added to the bylaws gives the Board Chair and committee chairs authority beyond what is permissible under 15 Pa.C.S. § 5512 to restrict information available to Trustees. Section 2.03(e) of the bylaws states:

The Board Chair and applicable committee chairs have authority to review the reasonableness of requests from individual Trustees for information or documents and may narrow or deny any request deemed to be beyond the reasonable scope of a Trustee's legitimate interest as a fiduciary of the university. The Chair of the Board serves as the final arbiter of disputes regarding Trustee requests for information or records.

110. Defendants' make a thinly veiled excuse by attempting to blanket their actions under the phrases – that requested information is outside scope or not necessary.

111. Through the gossamer blanket of their excuses remains the clearly visible black-letter language of the law - 15 Pa. C.S. § 5512 - and their own acknowledgment that the Board of Trustees "maintains ultimate oversight of the University's investment assets."⁹

⁹ https://oim.psu.edu/sites/oim/files/2024-08/ltip-ips_0.pdf

112. They run afoul of the clear mandates set forth by the legislature in 15 Pa. C.S. § 5512, and longstanding precedent of the Pennsylvania Supreme Court that holds that Plaintiff's right "*to an inspection of the books be absolute.*" *Machen v. Machen & Mayer Electrical Mfg. Co.*, 85 A. 100 (Pa. 1912).

113. Admittedly, many factors which might lead to sub-optimal performance of the Penn State endowment, including but not limited to: asset selection, investment advisor performance, and investment advisor fees. But hiding information sought by Plaintiff in his initial request, it is impossible for this Trustee to identify or make informed decisions concerns the specific factors that may be impeding endowment performance.

114. Defendants cannot duck the fact that this information is **directly related to one of the core focuses** of 15 Pa. C.S. § 5512(a), as the endowment is the largest "asset" of the University.

Plaintiff's Qualifications

115. Given the plain language of the statute, the Supreme Court cases and the Bylaws, Plaintiff is entitled to this information even if he were a layman. The law does not hinge obtaining information to the bootstrap of a degree or degrees.

116. However, when the University responds to Plaintiff by saying his requests "*are unreasonable, beyond that which is objectively necessary for you to discharge your duties as a trustee*" his qualifications do come into play as an asset.

117. Plaintiff, through his knowledge, training and experience is well versed in the intricacies of finance and investment and related operations.

118. Plaintiff holds the following Pennsylvania professional licenses:

- a. Series 7 (General Securities Representative Exam);
- b. Series 24 (Securities Principal Exam);

- c. Series 63 (Uniform Securities Agent State Law Exam);
- d. Series 65 (Uniform Investment Adviser Law Exam);
- e. Financial Industry Regulatory Authority (FINRA) Central Registration Depository (CRD) # 2431018; and
- f. NPN Registration # 2025569.

119. He is also an Investment Advisor Representative registered in the state of Pennsylvania, and has securities licensed in Pennsylvania, California, Florida, Georgia, Massachusetts, North Carolina, New Jersey, New York, South Carolina, Virginia, Vermont, and Wisconsin.

120. Finally, Plaintiff also obtained a Masters of Business Administration (MBA) from Penn State.

121. Again, qualifications are not at all necessary to obtain information pursuant to 5512(a), yet Plaintiff's qualifications should be given weight as they underpin his sincere belief that the requested information is necessary in order to properly assess the health and wellbeing of the University's assets, liabilities and operations.

122. The information requested by Plaintiff relates directly to the University's largest asset: the endowment, and therefore falls squarely within the "assets, liabilities, and operations" of the University, as contemplated by 15 Pa. C.S. § 5512(a).

COUNT I - STATUTORY CLAIM
ENFORCEMENT OF INSPECTION PURSUANT TO 15 Pa. C.S. § 5512(b)

123. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein.

124. The Defendants are subject to mandates of 15 Pa. C.S. § 5512.

125. Pursuant to subsection (a) of the statute:

“To the extent reasonably related to the performance of the duties of the director, including those arising from service as a member of a committee of the board of directors, a director of a nonprofit corporation is entitled:

(1) in person or by any attorney or other agent, at any reasonable time, to inspect and copy corporate books, records and documents and, in addition, to inspect, and receive information regarding, the assets, liabilities and operations of the corporation and any subsidiaries of the corporation incorporated or otherwise organized or created under the laws of this Commonwealth that are controlled directly or indirectly by the corporation; and

(2) to demand that the corporation exercise whatever rights it may have to obtain information regarding any other subsidiaries of the corporation.” 15 Pa. C.S. § 5512(a).

126. Pursuant to the express terms of subsection (b) of the statute a director may commence an action to enforce inspection where:

“If the corporation, or an officer or agent thereof, refuses to permit an inspection or obtain or provide information sought by a director or attorney or other agent acting for the director pursuant to subsection (a) or does not reply to the request within two business days after the request has been made, the director may file an action in the court for an order to compel the inspection or the obtaining or providing of the information. The court shall summarily order the corporation to permit the requested inspection or to obtain the information unless the corporation establishes that information other than the bylaws to be obtained by the exercise of the right is not reasonably related to the performance of the duties of the director or that the director or the attorney or agent of the director is likely to use that information in a manner that would violate the duty of the director to the corporation. The order of the court may contain provisions protecting the corporation from undue burden or expense and prohibiting the director from using the information in a manner that would violate the duty of the director to the corporation.” 15 Pa. C.S. § 5512(b).

127. As stated above, Plaintiff has an *absolute* right to inspect, copy and obtain information relating to the assets, liabilities, and operations of the University.

128. By any reasonable interpretation, the information sought by Plaintiff here falls squarely within the “assets” or “operations” of the University.

129. Furthermore, the information is directly related to the endowment, for which Plaintiff has oversight duties as a Trustee on the Board.

130. The Defendants have no legal basis to continue withhold this information from Plaintiff.

131. Their continuing refusal to disclose this information to Plaintiff is a clear and unequivocal violation of 15 Pa. C.S. § 5512.

132. Moreover, the Defendants pattern of delay and obfuscation with regard to Plaintiff's lawful requests for information conduct is the very definition of dilatory, obdurate and vexatious conduct.

133. Accordingly, Plaintiff is entitled to all relief available under subsection (b) of the statute, in addition to an award of attorney's fees.

WHEREFORE, Plaintiff, Barry J. Fenchak, demands judgment in his favor and against, Defendants, and asks this Honorable Court to enter an Order compelling Defendants, Pennsylvania University Board of Trustees, and Matthew Schuyler, to permit Plaintiff to inspect or obtain the information he has requested and awarding reasonable Attorney's fees to Plaintiff.

COUNT II
REQUEST FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

134. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein.

135. Preliminary injunctive relief is appropriate where:

- a. the relief sought by plaintiff is necessary to prevent immediate and irreparable harm that cannot be adequately compensated with damages;
- b. plaintiff has a clear right to the relief requested;
- c. greater injury will result by refusing the injunction rather than by granting it;
- d. the injunction will restore the parties to their status as if it existed immediately prior to the alleged wrongful conduct;

- e. the injunction is reasonably suited to abate the offending activity; and
- f. the injunction will not adversely affect the public interest.

See *Warehime v. Warehime*, 860 A.2d 41, 46 (Pa. 2004).

136. “[T]o sustain a preliminary injunction, the plaintiff’s right to relief must be clear, the need for relief must be immediate, and the injury must be irreparable if the injunction is not granted.” *Sovereign Bank v. Harper*, 674 A.2d 1085, 1091 (Pa. Super. 1996).

137. Only “reasonable grounds” need exist for a court to grant injunctive relief. *Id.* (citing *William v. Childrens’ Hosp. of Pittsburgh*, 479 A.2d 452, 453 (Pa. 1984)).

138. Pennsylvania courts recognize harm to be irreparable when it cannot be adequately compensated in damages, either because of the nature of the right that is injured, or because there exist no certain pecuniary standards for measurements of damages. *SEIU Healthcare Pennsylvania v. Com.*, 104 A.3d 495, 508 (Pa. 2014).

139. Further, where the offending conduct sought to be restrained through a preliminary injunction violates a statutory mandate, irreparable injury will have been established. See *Commonwealth v. Coward*, 414 A.2d 91, 98-99 (Pa. 1980) (holding that where a statute prescribes certain activity, the court need only make a finding that the illegal activity occurred to conclude that there was irreparable injury for purposes of issuing a preliminary injunction); *Commonwealth ex rel. Corbett v. Snyder*, 977 A.2d 28 (Pa. Cmwlth. 2009) (affirming issuance of a preliminary injunction and finding that irreparable harm was presumed where there was a credible violation of the state consumer protection statute).

140. The First Amendment prohibits laws “abridging the freedom of speech.” One obvious implication of that rule is that the government usually may not impose prior restraints on speech. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 718–720 (1931). But other implications

follow too.

141. “As a general matter,” the First Amendment prohibits government officials from subjecting individuals to “retaliatory actions” after the fact for having engaged in protected speech. *Nieves v. Bartlett*, 587 U. S. ___, ___ (2019) (slip op., at 5) (*internal quotation marks omitted*); *see also Hartman v. Moore*, 547 U.S. 250, 256 (2006).

142. The United States Supreme Court has held that a plaintiff pursuing a First Amendment retaliation claim must show, among other things, that the government took an “adverse action” in response to his speech that “would not have been taken absent the retaliatory motive.” *Nieves*, 587 U. S., at ___ (slip op., at 5).

143. The courts put these actions into two main buckets: material adverse actions and immaterial adverse actions.

144. “[D]eprivations less harsh than dismissal” can sometimes qualify too. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990).

145. In the instant PSU case, the retaliation is material. The bylaw changes are specifically designed to suppress Plaintiff’s speech of any kind, and those of Board members who have the temerity to ask questions.

146. These bylaws impinge the First Amendment both as a matter of speech but also as a matter of retaliation.

147. Here, it is clear that the changes would affect Plaintiff’s rights immediately and also contain anticipatory retaliation in that if he speaks in the future about the Board’s handling of the \$5 Billion investment, he is forewarned that he will be removed.

148. The Court has discussed distinguishing material from immaterial adverse actions, and the lower courts holdings are diverse. Some courts have asked whether the government’s

challenged conduct would “chill a person of ordinary firmness” in the plaintiff’s position from engaging in “future First Amendment activity.” *Nieves*, 587 U. S., at ____ (slip op., at 4) (internal quotation marks omitted) – and that is what Plaintiff in the instant case characterize as anticipatory retaliation.

149. Other courts have inquired whether a retaliatory action “adversely affected the plaintiff’s . . . protected speech,” taking into account things like the relationship between speaker and retaliator and the nature of the government action in question. *Suarez Corp. Industries v. McGraw*, 202 F.3d 676, 686 (CA4 2000).

150. Under any analysis of a Board responsible for a \$5 Billion endowment, deny Plaintiff critical core information about investments and contracts is a material issue. Moreover, write bylaws that would preclude him speaking about that denial is equivalent to adding Gorilla glue (Trademark) to an already locked filing cabinet drawer.

151. Plaintiff as Trustee of a nonprofit University, is bound not only by the law, but also by the bylaws, and the standing orders of the Board, and has a legal duty to act in the best interests of the University and faithfully discharge his fiduciary duties and oversight of the assets, liabilities and operations of the University, including the endowment.

152. The Defendants refusal to provide Plaintiff with the requested information will result in immediate and irreparable harm, as it forces Plaintiff and other similarly situated Trustees to violate their fiduciary duties to the University, including their duties to act in the best interests of the University and provide oversight of the assets, liabilities and operations of the University, such as the endowment.

153. Without these documents, Plaintiff and other similarly situated cannot faithfully discharge these fiduciary duties to the University.

154. Furthermore, Plaintiff, like other similarly situated Board Members, may be exposed to liability for breach of his fiduciary duties if they on matters concerning financial matters such as the endowment and related investments, without having first conducted a thorough inspection of related records, and without educating himself on the context of those decisions. This constitutes immediate and irreparable harm.

155. This injunction will restore the parties to their status prior to the Board's wrongful conduct of refusing to provide Board members such as Plaintiff with the opportunity to inspect records.

156. This injunction will not adversely impact the public interest, in fact, it is in pursuit and in the protection of the public's best interest that this legal action is filed.

157. Without an injunction, the Board will continue to deny its membership of records necessary for them to make completely informed decisions.

158. Plaintiff is legally entitled to the information that he is requested, and immediate access must be granted to him before the Board votes on other significant financial decisions, such as the Elevate contract discussed above.

159. Plaintiff further seeks an injunction to enjoin the Board from committing retaliatory acts against the Plaintiff.

160. In response to Plaintiff's requests for information congruent with his fiduciary duties, Board Chair Schuyler has repeatedly imposed sanctions upon the Plaintiff.

161. Plaintiff has been censured by Board Chair Schuyler and the Plaintiff's Board social privileges have been revoked.

162. The Plaintiff is also prohibited from membership on Board committees, which severely limits his ability to discharge his fiduciary duties and serve the University.

163. Just days ago, the Board prohibited Plaintiff from attending any board meetings in person.

164. The Board has recently amended its bylaws in a clear attempt to give the Chair additional power to further restrict access to information by Trustees and to remove Plaintiff from the Board.

165. The amended bylaws give the Chair of the Board and the Vice Chair of the Board ultimate power over sanction and removal options.

166. Furthermore, the Board's amended bylaws amount to impermissible retaliation for Plaintiff's lawful exercise of his freedom of speech.

167. Plaintiff's removal from the Board will result in immediate and irreparable harm as it prevents Plaintiff from discharging his fiduciary duties to the University.

168. This injunction is in pursuit of the University's best interest and to protect an alumni elected member of the Board. It will not adversely impact the public interest.

169. Considering the amended bylaws, together with the existing sanctions imposed on Plaintiff, it is reasonable for this court to grant injunctive relief to prevent Plaintiff's removal from the Board.

WHEREFORE, Plaintiff requests that this Honorable Court grant relief ordering the Board of Trustees and Chairman Schuyler, and employees to immediately provide him with the information that he has requested; and that this Court permanently enjoin the Board of Trustees and Chairman Schuyler from withholding similar records from its membership; and that this Court enter a preliminary injunction prohibiting the Board from taking any further retaliatory action against Plaintiff, including but not limited to further censure, removal of board privileges and/or removal from the Board; and that this Court grant any further and additional relief that may be justified under

law and fact, and further relief that this Court deems necessary.

Respectfully submitted,

By: */s/ Justin J. Boehret*
/s/ Erika L. Silverbreit
/s/ Terry L. Mutchler
JUSTIN J. BOEHRET, ESQ.
ERIKA L. SILVERBREIT, ESQ.
TERRY L. MUTCHLER, ESQ.
Counsel for Plaintiff
Transparency Law and Public Data Team
OBERMAYER REBMANN MAXWELL
& HIPPEL LLP

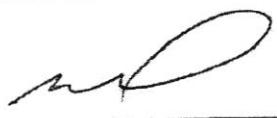
Dated: August 27, 2024

VERIFICATION

I, Barry J. Fenchak verify that I am the Plaintiff in the above-referenced action. I further verify that the statements set forth in this Amended Complaint are true and correct to the best of my knowledge, information and belief. I understand that the statements made herein are subject to the penalties of 18 Pa. C.S.A. § 4904, relating to unsworn falsification to authorities.

Date:

8/27/24



Barry J. Fenchak

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully submitted,

OBERMAYER REBMANN MAXWELL & HIPPEL LLP

/s/ Justin J. Boehret

Justin J. Boehret, Esquire

Pa. ID No. 307633

Center Square West

1500 Market Street, Suite 3400

Philadelphia, PA 19102

Attorney for Plaintiff

Dated: August 27, 2024

IN THE COURT OF COMMON PLEAS OF
CENTRE COUNTY, PENNSYLVANIA

BARRY J. FENCHAK

Plaintiff,

v.

THE PENNSYLVANIA STATE
UNIVERSITY BOARD OF TRUSTEES,
and MATTHEW SCHUYLER IN HIS
OFFICIAL CAPACITY AS CHARIMAN

Defendants.

NO. 2024-CV-1843-CI

CERTIFICATE OF SERVICE

I, Justin J. Boehret, hereby certify that on this date a true and correct copy of the foregoing document was served upon the following counsel for the Defendants, via email and regular mail:

Christopher J. Conrad, Esquire
Pa. ID No. 202348
200 Corporate Center Dr., Ste. 300
Camp Hill, PA 17011
cjconrad@mdwccg.com
Attorney for Defendants

OBERMAYER REBMANN MAXWELL & HIPPEL LLP

/s/ Justin J. Boehret
Justin J. Boehret, Esquire
Pa. ID No. 307633
Center Square West
1500 Market Street, Suite 3400
Philadelphia, PA 19102
Attorney for Plaintiff

Dated: August 27, 2024

Exhibit C

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
PENNSYLVANIA

BARRY J. FENCHAK

Plaintiff,

v.

THE PENNSYLVANIA STATE
UNIVERSITY BOARD OF TRUSTEES,
and DAVID KLEPPINGER IN HIS
OFFICIAL CAPACITY AS CHAIRMAN

Defendants.

Docket No. 2025-

Type of Case: Civil Action & Equity

Type of Pleading: **Emergency Motion for
Preliminary Injunction**

Filed on Behalf of: Plaintiff

Counsel of Record for Plaintiff:

**OBERMAYER REBMANN MAXWELL
& HIPPEL LLP**

Terry L. Mutchler, Esquire (Pa I.D. 308052)

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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

BARRY J. FENCHAK

Plaintiff,

v.

THE PENNSYLVANIA STATE
UNIVERSITY BOARD OF TRUSTEES,
and DAVID KLEPPINGER IN HIS
OFFICIAL CAPACITY AS CHAIRMAN

Defendants.

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NO. 2025-

ORDER

AND NOW, this ____ day of March 2025, upon consideration of Plaintiff's Emergency Motion for a Preliminary Injunction, it is hereby **ORDERED** that Plaintiff's Motion is **GRANTED**, and Defendants are hereby **ENJOINED** and **RESTRAINED** from precluding Plaintiff from the election ballot for the 2025 Alumni Trustee election. It is **FURTHER ORDERED** that:

1. Prior to the distribution of election ballots to voters on April 21, 2025, Defendants shall include Barry J. Fenchak as an alumni candidate on all election ballots for the 2025 alumni trustee election. Defendants shall not distribute to voters any election ballots that fail to include Barry J. Fenchak as an alumni candidate for the 2025 alumni trustee election;
2. Plaintiff shall be listed in the first position for alumni candidates on all such election ballots;
3. Bond in the amount of \$ _____ shall be posted by Barry J. Fenchak.

J.

PROCEDURAL AND FACTUAL BACKGROUND

1. Plaintiff, Barry J. Fenchak (“Plaintiff”), is an elected member of the Board of Trustees of The Pennsylvania State University serving in that capacity since his election by the alumni in 2022.

2. Plaintiff is one of nine (9) voting members of the Board *elected* by the alumni serving on the thirty-six (36) member Board.

3. Plaintiff’s position on the Board is uncompensated and he is currently serving a three-year term, which is set to expire on June 30, 2025.

4. Defendant, Pennsylvania State University Board of Trustees (the “Board” or collectively, “Defendants”) is the corporate body responsible for governing The Pennsylvania State University.

5. Defendant, David Kleppinger (“Chairman Kleppinger” or collectively, “Defendants”), is the Chairman of the Board of Trustees.

6. On or about July 30, 2024, the Defendants adopted the Amended and Restated Bylaws of the Pennsylvania State University (the “Amended Bylaws”).

7. Not coincidentally, this timeframe dovetailed with Plaintiff’s repeated attempts and complaints about not being able to garner information he needed to meet his fiduciary obligations as a voting member of the Board. Issues that are presently pending before this Court in a separate action (the “Prior Action”).

8. Nominations were accepted for Alumni candidates from January 21, 2025 through February 4, 2025.

9. During this period, Plaintiff received over 50 nominations, making him eligible for the alumni election process.

10. Election ballots are scheduled to be distributed to alumni of the University on April 21, 2025, with the last day to submit ballots being May 8, 2025

11. On or about February 26, 2025, Defendants, through their newly created “Nominating Subcommittee” established by Section 2.01 of the Amended Bylaws, voted that Plaintiff (a duly elected Trustee) was ineligible to be listed on the ballot in the 2025 alumni trustee election.

12. The vote of the Nominating Subcommittee was undertaken by Defendants during the pendency of the Prior Action, and importantly, was cast while this Court’s Preliminary Injunction Order of October 9, 2024, and amended on October 11, 2024, was in effect.

13. On or about April 1, 2025, in direct response to the Defendants’ unlawful conduct, Plaintiff, Barry F. Fenchak (“Plaintiff”), commenced this action. A true and correct copy of the Complaint is attached hereto as Exhibit A.

14. Plaintiff’s complaint seeks declaratory relief pursuant to Pennsylvania’s Declaratory Judgments Act. Id.

15. As set forth in the Complaint, numerous provisions of the Amended Bylaws, specifically - Sections 2.01, 2.02, 2.03, 2.04 and 2.05, were adopted by the Defendants in violation of 15 Pa. C.S. § 5504 - which prohibits nonprofit corporations from adopting, amending, or repealing provisions of bylaws that are “inconsistent with law.”

16. These sections of the Amended Bylaws contain numerous provisions that violate: statutory authority; well settled precedent of the Pennsylvania Supreme Court; and/or fundamental rights guaranteed by the Pennsylvania Constitution.

17. As a result of the unlawfulness of these provisions of the Amended Bylaws, the Nominating Subcommittee itself, and the standards they apply are unlawful.

18. Accordingly, Plaintiff has, and will continue to, suffer immediate and irreparable harm as a result of the Defendants unlawful actions precluding him from the election ballot.

INJUNCTIVE RELIEF

19. A preliminary injunction is a temporary remedy that is granted until the parties' dispute can be fully resolved. *Cutler v. Chapman*, 289 A.3d 139 (Pa. Commw. Ct. 2023).

20. The basic purpose of a preliminary injunction is to preserve the status quo as it exists or previously existed pending final resolution of the underlying controversy between the parties. *Fischer v. Department of Public Welfare*, 439 A.2d 1172 (Pa. 1982).

21. The requirements for the Court to consider before issuing a preliminary injunction are as follows:

(1) whether the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) whether greater injury would result from refusing the injunction than from granting it; (3) whether the injunction will restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) whether plaintiffs are likely to prevail on the merits; (5) whether the injunction is reasonably suited to abate the offending activity; and (6) whether the injunction will not adversely affect the public interest. *Free Speech LLC v. Philadelphia*, 884 A.2d 966, 970 (Pa. Commw. Ct. 2005); *Warehime v. Warehime*, 860 A.2d 41, 46 (Pa. 2004); *Kessler v. Broder, et al.*, 2004 PA Super 200, 851 A.2d 944, 946 (Pa. Super. Ct. 2004) (citing *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mt., Inc.*, 573 Pa. 637, 646, 828 A.2d 995, 1001 (Pa. 2003)).

22. “[T]o sustain a preliminary injunction, the plaintiff’s right to relief must be clear,

the need for relief must be immediate, and the injury must be irreparable if the injunction is not granted.” *Sovereign Bank v. Harper*, 674 A.2d 1085, 1091 (Pa. Super. 1996).

23. Only “reasonable grounds” need exist for a trial court to grant injunctive relief. *Id.* (citing *William v. Children’s Hosp. of Pittsburgh*, 479 A.2d 452, 453 (Pa. 1984)).

24. In this matter, Plaintiff meets all elements necessary for this Honorable Court to enter a preliminary injunction.

I. The Injunction Is Necessary To Prevent Immediate And Irreparable Harm That Cannot Be Adequately Compensated By Damages

25. First, an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages.

26. If the board is permitted to bulldoze ahead with precluding Plaintiff from the ballot in this election, the immediacy and irreparability of the harm is self-evident:

- a. He will be denied the exercise of his fundamental right to free speech and association as guaranteed by the Pennsylvania Constitution;
- b. He will be precluded from the ballot for a position that he is otherwise eligible for - but for the unlawful provisions of the Amended Bylaw;
- c. The Defendants will be permitted to flout statutory authority of the legislature;
- d. The Defendants will be permitted to ignore well settled precedent of the Pennsylvania Supreme Court.

27. Importantly, a preliminary injunction is the only remedy capable of preventing Plaintiff from suffering further harm and allowing him to be included on the ballot.

28. Plaintiff would not be adequately compensated for these deprivations by a mere award of damages.

II. Greater Injury Will Result From Refusing The Injunction Than From Granting It

29. Next, greater injury would result by denying this request for injunctive relief, than by granting it.

30. Furthermore, supportive alumni constituents, would be denied representation on the board by their preferred trustee.

31. Conversely, the only arguable harm to Defendants by the granting of this injunction would be that they cannot enforce the provisions of their Amended Bylaws that were unlawfully adopted in violation of Pa. C.S. § 5504 - as they are inconsistent with Pennsylvania law in more than one respect.

32. Simply put, the harm of not granting this injunction is far greater than any conceivable harm that could result from its entry.

III. Granting a Preliminary Injunction Will Restore and Preserve The Status Quo

33. Granting an injunction will restore the parties to the status that existed prior to the Defendants' adoption of the unlawful provisions of the Amended Bylaws and their Nominating Subcommittees attempt to preclude Plaintiff from the election ballot.

34. Granting this injunction will simply require Plaintiff to comply with the election requirements that existed prior to the unlawful changes to the bylaws, and conversely, it will only require the Defendants to comply with the Pennsylvania Constitution, Title 15, and the precedent of the Pennsylvania Supreme Court.

IV. Plaintiff is Likely to Prevail on the Merits

35. Next, as set forth in Plaintiff's Complaint, Plaintiff is likely to prevail on the merits of the claims asserted in this lawsuit.

36. The provisions of the Amended Bylaws challenged by Plaintiff in this action,

specifically - Sections 2.01, 2.02, 2.03, 2.04 and 2.05, were all adopted in violation of 15 Pa. C.S. § 5504 - which prohibits nonprofit corporations from adopting, amending, or repealing provisions of bylaws that are “inconsistent with law.”

37. These sections of the Amended Bylaws contain numerous provisions that violate: statutory authority; well settled precedent of the Pennsylvania Supreme Court; and/or fundamental rights guaranteed by the Pennsylvania Constitution.¹

38. Pursuant to Pennsylvania’s Declaratory Judgment Act, Plaintiff is entitled to a declaration that the challenged provisions of the Amended Bylaws are unlawful, null and void, and the vote case by the Nominating Subcommittee pursuant to those unlawful provisions of the Amended Bylaws was also unlawful.

39. Accordingly, he is likely to prevail on the claims raised in this lawsuit.

V. The Injunction is Reasonably Suited to Abate the Offending Activity

40. “A preliminary injunction must be reasonably suited to abate the offending activity.” *SEIU Healthcare Pennsylvania*, 104 A.3d at 509.

41. Without an injunction, the Defendants will achieve their ultimate goal of removing Plaintiff from the Board of Trustees – permanently.

42. An injunction is reasonably suited to stop the Defendants, and it will allow the merits of this lawsuit to be fairly and fully litigated, and a decision on the merits will be rendered by this Honorable Court.

VI. An Injunction will not Adversely Affect the Public Interest

43. An injunction will not adversely affect the public interest in this matter.

44. To the contrary, an injunction will serve the public interests of due process,

¹ Plaintiff incorporates herein by reference, the averments of his Complaint, attached as Exhibit A.

transparency, good governance, and faithful discharge of the laws of this Commonwealth.

CONCLUSION

45. For the foregoing reasons, it is respectfully suggests that this Honorable Court should enter a preliminary injunction enjoining the Defendants from precluding Plaintiff from the ballot and

WHEREFORE, Plaintiff respectfully requests that this Honorable Court enter the attached order granting this Emergency Motion for a Preliminary Injunction.

Respectfully submitted,

OBERMAYER REBMANN MAXWELL
& HIPPEL LLP

/s/ Terry L. Mutchler

/s/ Justin J. Boehret

Terry L. Mutchler (Pa. I.D. 308052)

Justin J. Boehret, Esquire (Pa. I.D. 307633)

Center Square West

1500 Market Street, Suite 3400

Philadelphia, PA 19102

Attorneys for Plaintiff

Barry J. Fenchak

Date: April 1, 2025

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully submitted,

OBERMAYER REBMANN MAXWELL & HIPPEL LLP

/s/ Justin J. Boehret

Justin J. Boehret, Esquire

Pa. ID No. 307633

Center Square West

1500 Market Street, Suite 3400

Philadelphia, PA 19102

Attorney for Plaintiff

Dated: April 1, 2025

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY

BARRY J. FENCHAK

Plaintiff,

v.

THE PENNSYLVANIA STATE
UNIVERSITY BOARD OF TRUSTEES,
and MATTHEW SCHUYLER IN HIS
OFFICIAL CAPACITY AS CHARIMAN

Defendants.

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NO. 2024-CV-1843-CI

CERTIFICATE OF GOOD FAITH EFFORT

Pursuant to Centre County Local Rule 208.2(e), undersigned counsel certify that we have previously conferred with Defendants in a good faith effort to resolve by agreement the issues raised by this application without intervention of the court and the requested relief was denied.

OBERMAYER REBMANN MAXWELL & HIPPEL LLP

/s/ Terry L. Mutchler

/s/ Justin J. Boehret

Terry L. Mutchler (Pa. I.D. 308052)

Justin J. Boehret, Esquire (Pa. I.D. 307633)

Center Square West

1500 Market Street, Suite 3400

Philadelphia, PA 19102

Attorneys for Plaintiff

Barry J. Fenchak

Date: April 1, 2025

CERTIFICATE OF SERVICE

I, Justin J. Boehret, hereby certify that on this date a true and correct copy of the foregoing document was served upon general counsel for the Defendants, via email and regular mail:

Tabitha R. Oman, Esquire
General Counsel

OBERMAYER REBMANN MAXWELL & HIPPEL LLP

/s/ Justin J. Boehret
Justin J. Boehret, Esquire
Pa. ID No. 307633
Center Square West
1500 Market Street, Suite 3400
Philadelphia, PA 19102
Attorney for Plaintiff

Dated: April 1, 2025