FILED FOR RECORD BY EMAIL
2025 AUG 11 PM02 57
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 DAVID KLEPPINGER IN HIS OFFICIAL CAPACITY AS CHARIMAN *Defendants*.	Docket No. 2025-CV-882-CI Type of Case: Civil Action Type of Pleading: Reply Brief in Opposition to Defendant's Preliminary Objections Filed on behalf of Plaintiff **OBERMAYER REBMANN MAXWELL & HIPPEL LLP** Terry L. Mutchler (Pa. ID No. 308052) Erika L. Silverbreit (Pa. ID No. 335018) Madison G. Melinek (Pa. ID No. 325721) Centre Square West 1500 Market Street, Suite 3400 Philadelphia, Pennsylvania 19102 (215) 665-3000 terry.mutchler@obermayer.com erika.silverbreit@obermayer.com

PLAINTIFF'S BRIEF IN OPPOSITION TO PRELIMINARY OBJECTIONS

AND NOW COMES, Plaintiff, Mr. Barry J. Fenchak, by and through his undersigned Transparency counsel, and hereby files this Brief in Opposition to Preliminary Objections filed by Defendant's The Pennsylvania State University (the "University")

Board of Trustees (the "Board"), and David Kleppinger, in his official capacity as Chair of the Board (collectively with the Board, "Defendants").

INTRODUCTION

Astonishingly, the Board of Trustees of the Pennsylvania State University ascribes a Trojan Horse analogy to the motives of former Trustee Barry Fenchak. This is a fascinating choice of advocacy by the Defendants because, in the context of that famous myth, the Trojans, not the Greeks were the aggressors. The Trojans stole Helen of Troy, triggering the decades-long war. The Greeks resorted to the famous trick wooden horse to retrieve what was stolen from *them*.

Here, "Helen" represents the Pennsylvania Constitution, the case law interpreting it, honesty, candor, and best practices of the Board that Mr. Fenchak has been attempting to obtain. Prince Paris might be Board President David Kepplinger, who testified in open court that once a vote is taken a Board member shall not speak against it—he said that they should not speak to journalists. Despite being a good literary curtain raiser on their Preliminary Objections, it is the Defendants, not Barry Fenchak, that have pretextual motives. They want to quiet anyone who questions their fiscal numbers, proposals brought forward by administrative leadership, and their care of the University. It is the Board that pretextually attempted to kick Mr. Fenchak off the Board, but this Court saw through that gossamer maneuver and issued an injunction preventing that pretextual action. *See* October

11, 2024 Amended Order, *Fenchak v. Pennsylvania State Board of Trustees and Matthew Schuyler in His Official Capacity as Chairman*, No. 2024-CV-1843-CI.

Mr. Fenchak has not now—or ever—hidden his motives to be a good Trustee, to meet his fiduciary duty, and to question financial discrepancies that exist. Mr. Fenchak brought a civil action, docketed at 2024-CV-1843-CI, against the Defendants for their failure to provide information necessary for Trustees to exercise their fiduciary duties pursuant to 15 Pa. C.S. § 5512(a). Mr. Fenchak was simply asking the Court to enforce a statutory obligation of the Defendant.

Of course, Mr. Fenchak also wanted to continue to be an elected Trustee of the Board and serve his *alma mater*, but that is not a motive that needs to be decoded here—yet the Defendants wants to portray this as some secret pretext. Quite the opposite to a hidden pretext, however, Mr. Fenchak has *openly* and proudly been fighting a lip-locked Board that prides secrecy, uniformity, and uninterrupted rubber-stamping. He has been *openly* fighting a Board that hid a billion-dollar contract from the Trustees whose duty it is to protect the University, but who would be on the legal hook for that contract if there were litigation. He has not pretextually attempted to hide his reasons for taking action—that there are deep and serious concerns regarding the University, and the Trustees are not provided the information necessary to fulfil their fiduciary duties.

COUNTER STATEMENT OF THE FACTS

Plaintiff, Barry J. Fenchak, was an elected member of the Board, having diligently served in that capacity since his election by the alumni of the University in June of 2022. Compl. ¶¶ 14-15. He was one of 36 voting members of the Board, and his term expired on June 30, 2025. Compl. ¶ 16.

The University's Board is the corporate body established by the University's Charter and delegates its day-to-day management of the University to the President, with certain powers set forth in the Bylaws. Compl. ¶¶ 12-13. The Board adopted Amended and Restated Bylaws (the "Amended Bylaws") on or about July 30, 2024. Compl. ¶ 23.

LEGAL ARGUMENT

The immediate legal issue and point that brings us before this Honorable Court is whether Mr. Fenchak raises a viable claim to withstand the Preliminary Objections of the Defendant. Plaintiff asserts a resounding yes, as detailed below. The Board's Amended Bylaws—and its application of those bylaws—are in direct contravention to the Pennsylvania Constitution and 15 Pa.C.S. § 5751, which the Board adopted in order to keep their secrets, at the expense of the well-being of this premier educational institution. The Defendants have cast a chilling shadow over any Trustee who places their duty to the University ahead of Board leadership. Mr. Fenchak has stated a viable claim and his assertions under the law must be accepted at true at this preliminary stage.

LEGAL STANDARD

At the preliminary objection stage, the Court must accept as true all well-pleaded allegations in the complaint and all inferences reasonably deduced therefrom. *Stone and Edwards Insurance Agency, Inc. v. Depart of Ins.*, 636 A.2d 293 (Pa. Cmwlth. Ct. 1994). The Defendant's Preliminary Objections are in the nature of a demurrer. The "standard of review for preliminary objections in the nature of a demurrer is *limited*; the question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible." *Penllyn Greene Associates, L.P. v. Clouser*, 890 A.2d 424, (Pa. Commw. Ct. 2005).

In reviewing preliminary objections, "all material facts averred in the complaint, and all reasonable inferences that can be drawn from them, are admitted as true." *Seitel Data, Ltd. v. Center Tp.*, 92 A.3d 851, (Pa. Commw. Ct. 2014) (re-argument denied, appeal dismissed, 111 A.3d 170). This Court need not accept as true Defendant's "conclusions of law, unwarranted inferences, argumentative allegations, or expressions of opinion." *Id.* In *Stone,* the Court held that a demurrer will not be sustained unless the face of the petition for review shows that the law will not permit recovery, and any doubts should be resolved against sustaining the demurrer. *Stone,* 636 A.2d 293. Critically and finally, "[w]here a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it." *Penllyn Greene Associates, L.P.*, 890 A.2d, at 424.

I. The Amended Bylaws are Unconstitutional Because They Restrict Trustee Freedom of Speech.

Plaintiff agrees with Defendant's statement at that "[i]n order to succeed on his facial challenge, Plaintiff would have to show that there are 'no circumstances' under which the Bylaws would be valid. *Germantown Cab Co. v. Phila. Parking Auth.,* 206 A.3d 1030, 1041 (Pa. 2019)." Defendants POs ¶ 23. Defendants further assert that "Mr. Fenchak cannot possibly show that there are 'no circumstances' under which Section 2.03(c) could be valid…" Defendants POs at 3. Defendants, however, are wrong. Plainly stated, no party would be permitted to obliterate fundamental rights granted by the Pennsylvania Constitution. Thus, Plaintiff can in fact establish that there are circumstances in which each individual amended bylaw would be valid, but most certainly not in their totality. Plaintiff would overcome these objections as explained below.

The Pennsylvania Constitution bestowed a concrete right on its people that they may "freely speak" on any topic, declaring it an invaluable right. CONST. OF PENN. § 7. The Defendants wish to rewrite this sacrosanct freedom by requiring that Trustees receive authorization to speak from the Board and by prohibiting Board Trustees from speaking in opposition to a vote after a vote has been taken. *See* Amended Bylaws § 2.03(c); § 2.04(b). Defendants purport that Board leadership supports that "Trustees shall speak openly, freely, and candidly within the Board" and that "because the University is a free marketplace of competing ideas and opinions, its governance mandates open communication as well as principled, civil, and respectful debate." *Id.* In practice,

however, this has amounted to a near prohibition on informed and inclusive discussion and deliberation.

Article XII of the Declaration of Rights of the Commonwealth's first Constitution stated "[t]hat the people have a right to freedom of speech, and of writing, and publishing their sentiments..." CONST. OF PENN. (1970). The Pennsylvania Constitution of 1790 further articulated this affirmative guarantee with language that is preserved in Article I, Section 7, of our present Constitution—"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..." CONST. OF PENN. § 7.

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). The progeny of this interpretation is profoundly elongated. Each of the cases have held that 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 (1980); *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967); *see generally* W.J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARVARD L. REV. 489, 503 (1977). 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*, 393 A.2d 1155 (Pa. 1978); *Commonwealth v. Triplett*, 341 A.2d 62 (Pa. 1975); *Commonwealth v. Knowles*, 327 A.2d 19, 20 n.3 (Pa. 1974); *Commonwealth v. Platou,* 312 A.2d 29 *170 (Pa. 1973), cert. denied, 417 U.S. 976 (1974); *Goldman Theatres, Inc. v. Dana*, 173 A.2d 59 (Pa. 1961), cert. denied, 368 U.S. 897 (1961).

Section 2.03 of the Amended Bylaws and its subsection (c), individually and when considered in the totality of the Amended Bylaws, are patently unconstitutional, and therefore Plaintiff has stated a viable claim that permit this Court to overrule Defendants Preliminary Objections.

Without doubt, Plaintiff agrees that Defendants have a right to establish their own blueprint for corporate governance. What they do not have a right to do, however, is to obliterate a fundamental right that is enshrined in the Commonwealth's Constitution. Astonishingly, Section 2.03(c) of the Amended Bylaws eliminates the right to dissent—it requires a Plaintiff to "support majority decisions" of the Board, and prohibits him or her from making public statements that are deemed "negative" or "critical" of the Board, the University, and others.

Section 2.03(c) is worse than just a draconian gag order. Enforcing silence is one thing, but the Amended Bylaws amount to a complete extinguishment of Trustees' fundamental right of free speech and expression guaranteed by Article I, § 7 of the

Pennsylvania Constitution. In practical terms, the Amended Bylaws take words out of Trustees' own mouths—they force Mr. Fenchak and others to either be silent or worse, to spew corporate-condoned words, sentiment, and language that the Board approves of. Unbelievably, this gets worse: if a Trustee speaks his or her mind, the Amended Bylaws dictate that this amounts to a breach of fiduciary duty. This violation of the Pennsylvania Constitution alone demonstrates that Plaintiff has averred a viable claim for redress and this litigation, and the Defendant's Preliminary Objections should be overturned if for no other reason that this point alone.

To be clear, Plaintiff does not disagree with the sentiment that Judge Marshall put forth in his April 14 Order, that Trustees accept certain restrictions on speech expected of a fiduciary. But that is not what occurred here. Defendants have stripped Mr. Fenchak and all similarly situated Trustees from speaking their mind and engaging in discourse.

In fact, as the Board Chair David Kleppinger testified at the April 11, 2025 hearing, in essence, that once a decision is reached, the Board must get in line publicly and not criticize a decision. That is far different from "reasonable, necessary and whole fully lawful standards." *See* Apr. 14, 2025 Opinion and Order at 15. Mr. Kleppinger testified at the hearing that the Board hired consultant Madeline Russell to examine bylaws of universities such as Rutgers, University of Wisconsin, Michigan State University, and Purdue University prior to making recommendations to the Board. Importantly, these schools do not have elected Trustees, such as Mr. Fenchak, nor do any

of those institutions have bylaws that allow for the removal of a Trustee for speaking with stakeholders about important university issues. Perhaps even more critically here is that none of these schools are subjected to the strong language of the Pennsylvania Constitution, and thus the boiler-plate bylaws language that emerged is, in Plaintiff's view, not able to withstand legal scrutiny.

Defendants note that Judge Marshall's April 14 Order said the restrictions on speech are not unreasonable, but the Order did not fully delve into the specifics of the Amended Bylaws or offer any analysis in the context of the Constitutional right to free speech. As such, Mr. Fenchak has stated a viable claim at this stage of the litigation.

II. The Unequal Treatment of Mr. Fenchak is Impermissible Under 15 Pa. C.S. §5751(a).

There is one area where the Board has been decidedly transparent and open: in their unequal treatment of Mr. Fenchak as a Trustee as opposed other members of the same class of Trustees as delineated below.

The Preliminary Objections filed by the Defendants are littered with distraction communications—some authored by Mr. Fenchak and some not—made prior to serving as an elected-Trustee of this Board. In their filing, Defendants employ dated, irrelevant communications by Mr. Fenchak as pretext to create a slight of hand. They want the Judge to see Mr. Fenchak' s "regrettable" communications, as Mr. Fenchak himself called them, and to divert the Court's attention from the fact that the Board adopted Bylaws in direct contravention of the Pennsylvania Constitution. None of these communications are

relevant to the legal issue at hand— did Mr. Fenchak state a viable claim in his April 1, 2025 Complaint such that this case can move forward? The answer is an unequivocal yes, and the Defendants' Preliminary Objections should be overruled.

At best, the irrelevant communications Defendants include in their filing are titillating and are used in an effort to avoid the substantive issues— blocking Trustee speech, refusing to provide information to Trustee's fulfilling their fiduciary duties, engaging in forced rubber-stamping in Board voting practices, and re-writing of the Bylaws to enforce all of the above. The Board is building, brick by brick, a fortress to protect whatever actions they wish to take and to insulate themselves from public comment and criticism. The Defendants are now targeting Mr. Fenchak because he threatens the walls of this fort by speaking up against the Board's actions that are harmful to the University.

It is quite simple—Mr. Fenchak is and has been fighting a Board that applies their rules unequally based on who they like and whom they don't like. He is fighting a Board that attacks, if not defames, those who threaten to expose financial and other discrepancies on this Board. They do not like him because he raises important questions, as any Trustee should. Mr. Fenchak has done nothing more than seek information to fulfil his fiduciary duties and meaningfully engage with other Trustees on critical issues facing the University, and the Board does not like his inquiries. He has asked for information, raised questions, or attempted to deliberate regarding:

- information related to dormitory renovation costs;
- a Beaver Stadium Punch List;

- the composition of the University's budget;
- governance issues related to the Bylaws and Amended Bylaws;
- the closing of certain University campuses in the Commonwealth;
- the veracity of the too-often limited financial information provided to Trustees.

Mr. Fenchak asked these questions and requested this information because it was his fiduciary duty to do so. But because of this, the Defendants wanted Mr. Fenchak out of the way and the Board accomplished this by adopting unconstitutional bylaws that not only gag Trustees, but also preclude trustees from criticizing or even thoroughly evaluating decisions.

"Membership in a nonprofit corporation shall be of the 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 or purposes of the corporation and equally enforced as to all members of the same class.* 15 Pa. C.S. §5751(a) (emphasis added). Sections 2.01(c), 2.02(c), 2.03(c), 2.03(e), 2.03(i), 2.04(c) and 2.05(c) of the Amended Bylaws are not reasonable and germane to the purposes of the University, and are not being equally enforced as to all members of the same class as described below.

While this is not an exhaustive list, consider the following examples of unequal treatment to Mr. Fenchak as compared to other Trustees. The Board instituted an investigation against Mr. Fenchak for making what they determined to be an off-color remark last Fall. They pursued this and left no stone unturned on characterizing Mr. Fenchak as a misogynist among other things. Yet the Defendants did not institute an

investigation—in fact, took no action at all—when physical threats that lead to requests for additional security at Board gatherings and accusations of racism were made against other Trustees; or when disparaging sexual innuendo laced remarks were made about a Trustee in a meeting, calling the Trustee a "whack job with mental issues;" or when someone with a criminal record regarding charges against a young woman is permitted to be a Trustee. Yet, repeatedly, this Board is obsessed with Mr. Fenchak and his actions, comments, and removal from the Board for one clear reason—he asks questions and took seriously his fiduciary duty to the Board.

Mr. Fenchak is a financial expert who understands the Board's books and what those numbers mean. Mr. Fenchak raised alarms on the Board's actions each time they swept inconvenient financial information under the rug. He is a nuisance to their "keep it in the family" club. They regularly cut him off from discussions during Board meetings. They do not want to hear from a Trustee who questions their approach, their "facts," or their financial numbers.

In the end, Mr. Fenchak is fighting the adoption of unconstitutional and retaliatory Bylaws designed to impede proper fiduciary governance, specifically targeting Trustees who raise concerns or opinions that differ from that of Board leadership, and thus has made a viable claim under the law to move forward. He is not fighting with a trick wooden horse, but rather, openly with a paper legal brief, clearly public, and clearly right.

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Plaintiff respectfully requests that the Court overrule Defendants' Preliminary Objections, and award the Plaintiff any other relief as the Court may deem just and proper. Plaintiff has presented a viable claim that must be viewed favorably to him.

Respectfully submitted,

OBERMAYER REBMANN MAXWELL
& HIPPEL LLP

/s/ Terry L. Mutchler
Terry L. Mutchler (Pa. I.D. 308052)
Erika L. Silverbreit (Pa. ID No. 335018)
Center Square West
1500 Market Street, Suite 3400
Philadelphia, PA 19102
Attorneys for Plaintiff Barry J. Fenchak

Dated: August 11, 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
Terry L. Mutchler (Pa. I.D. 308052)
Center Square West
1500 Market Street, Suite 3400
Philadelphia, PA 19102
Attorney for Plaintiff

Dated: August 11, 2025

CERTIFICATE OF SERVICE

I, Terry Mutchler, hereby certify that on this date a true and correct copy of the foregoing Reply Brief in Opposition to Defendant's Preliminary Objections was served upon the following counsel of record by email and U.S. first-class mail:

Andrew R. Stanton, Esq.
astanton@jonesday.com
500 Grant Street, Suite 4500
Pittsburgh, PA 15219-2514

Susan E. Kessler, Esq.
skessler@jonesday.com
500 Grant Street, Suite 4500
Pittsburgh, PA 15219-2514

Nathaniel G. Ecker
necker@jonesday.com
500 Grant Street, Suite 4500
Pittsburgh, PA 15219-2514

Respectfully submitted,

OBERMAYER REBMANN MAXWELL & HIPPEL LLP
/s/ Terry L. Mutchler
Terry L. Mutchler (Pa. I.D. 308052)
Center Square West
1500 Market Street, Suite 3400
Philadelphia, PA 19102
Attorney for Plaintiff

Dated: August 11, 2025