COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE

IN RE:

Judge Mark B. Cohen Court of Common Pleas 1st Judicial District Philadelphia County	:	1 JD 2023

JUDICIAL CONDUCT BOARD'S BRIEF IN SUPPORT OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW:

I. Procedural History

On February 23, 2023, the Judicial Conduct Board (Board) filed a Board Complaint against Judge Mark B. Cohen (Respondent) asserting that certain posts that he made to his personal Facebook page violated several provisions of the Code of Judicial Conduct and the Constitution of the Commonwealth. On March 9, 2023, Respondent filed a discovery motion and an omnibus pre-trial motion that sought dismissal of this prosecution, *inter alia*, on the grounds that it was precluded by his rights to free expression under the First Amendment to the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution. This Honorable Court denied Respondent's omnibus motion on April 4, 2023.[1] Thereafter, on April 19, 2023, Respondent filed an answer and new matter, which presented certain affirmative defenses, including Respondent's First Amendment defense. The Board responded to Respondent's answer and new matter by reply and supporting memorandum of law on April 20, 2023. The parties then exchanged pre-trial memoranda on June 7, 2023, and June 29, 2023, respectively, and conducted a pre-trial conference on July

[1] The Board provided Respondent with any and all discovery within its possession at the appointed time set forth by this Court's Rules of Procedure, and, consequently, Respondent's discovery motion was rendered moot.

13, 2023. At the pre-trial conference, the parties reached stipulations regarding the majority of the factual allegations in the Board Complaint and proposed exhibits, and Respondent presented argument regarding his contention that Alison H. Merrill, Ph.D., the Board's proffered expert witness, should not testify. This Court accepted the stipulations of the parties and, by order entered July 17, 2023, permitted Dr. Merrill to testify. This Court then conducted trial on the matter on July 24, 2023, before a five-judge panel consisting of Conference Judge Flaherty and Judges Marsico, Baranoski, Becker, and Irwin.[2] The following is the Board's proposed findings of fact, discussion, and conclusions of law of law and brief in support thereof.

II. Proposed Findings of Fact

Respondent served as a judge of the Court of Common Pleas of Philadelphia from January 2, 2018, until the present. ***See*** Board pre-trial memorandum Stipulation 14; Respondent pre-trial memorandum stipulation 2. For the entirety of his judicial service, with limited exceptions, Respondent served in family court. ***See*** N.T., Trial, 7/24/2023, at 248. In 2007, while he was a member of the Pennsylvania House of Representatives, Respondent created a personal Facebook page[3] and has

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[2] Prior to testimony at trial, Respondent sought reconsideration of this Court's order that permitted Dr. Merrill to testify. This Court denied reconsideration of the order. ***See*** N.T., Trial, 7/24/2023, at 8-10.

[3] According to Dr. Merrill, the Board's expert witness, Facebook is "a social media platform in which you can connect with a variety of individuals, organizations, groups, and you can share information both personal and that exists out in the world. You can share news stories, videos, memes or other things that you find amusing or informative or useful, but it is a way to connect you with people you know, people you know very well, people you do not know and just general interests." ***See*** N.T., Trial, 7/24/2023, at 114. One creates a Facebook page by supplying an email address, signing up, and agreeing to abide by Facebook's user code of conduct. ***Id.*** The Facebook social media platform is open to anyone that has access to the internet, *i.e.*, by computer or smart phone. ***Id.*** Facebook pages can be made "public," meaning accessible to anyone who has a Facebook account and, to some limited

posted to it regularly and frequently since that time, including after he was elected to the office of judge. ***See*** Board Exhibit 5, N.T., Deposition, 7/19/2022, at 32-33; ***see also*** N.T., Trial, 7/24/2023, at 243-246. Respondent's Facebook page is "public" or in other words, "accessible" to any member of Facebook, which is to say that he does not utilize privacy settings on his page to exclude any member of Facebook from seeing his page. ***See*** Board Exhibit 5, N.T., Deposition, 7/19/2022, at 41-42; ***see also*** Board pre-trial memorandum stipulation 18; Respondent pre-trial memorandum stipulation 2; ***and*** N.T., Trial, 7/24/2023, at 63-64. By his estimation, Respondent has approximately 5000 Facebook "friends" and 1000 Facebook "followers," who can easily access his Facebook page at any given time. ***See*** Board Exhibit 5, N.T., Deposition, 7/19/2022, at 42-43. The "life events" section of Respondent's Facebook page identifies his present status as a judge assigned to family court; his prior one-year employment as a private attorney from 2016-2017; his 42-year service as a Democratic state legislator from 1974-2016 (inclusive of his service as Democratic Caucus Chairman); and his service as a delegate at the Democratic National Conventions in 2004, 2008, 2012, and in 2016, as well as the Democratic Presidential candidates he supported at those conventions. ***See*** Board pre-trial memorandum stipulation 19; Respondent pre-trial memorandum stipulation 2; ***see also*** Board Exhibit 5, N.T. Deposition, 7/19/2022, at 73-76.

At his deposition, Respondent testified that one of his purposes in creating his Facebook page in 2007 was, in the context of his service as a legislator, to advocate

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degree, anyone who has access to an internet search engine, ***see*** N.T., Trial 7/24/2023, at 92, 114-115, or "private," which limits the content of a Facebook page only to those a user has allowed or accepted as a "friend." ***Id.***, at 115. As to the content of a Facebook page, the user supplies and decides any and all information about themselves that they wish to share on their respective Facebook page. ***Id.***

for or to stake out positions on policy issues. ***See*** Board's Exhibit 5, N.T., Deposition, 7/19/2022, at 33-34. Regarding his continued Facebook posting after leaving legislative office and attaining judicial office, Respondent testified that his purpose was to "engage people in discussion," which "enable[d him] to learn things and enable[d] others to learn things," which Respondent considered a "positive good." ***See*** N.T., Trial, 7/24/2023, at 249.

The Board commenced an investigation of Respondent's Facebook postings after it received a report from Philadelphia Family Court Administrative Judge Margaret Murphy (Judge Murphy). ***See*** N.T., Trial, 7/24/2023, at 46-49, 61-62; ***see also*** Board's Exhibit 1, November 16, 2021 letter from Judge Murphy to former Board Chief Counsel Richard Long; ***and*** Board pre-trial memorandum stipulation 15; Respondent pre-trial memorandum stipulation 2. On September 26, 2021, through another judge, Judge Murphy received a complaint from a citizen regarding the content of one of Respondent's Facebook posts about the heritage of American citizens, which the complaining citizen felt to be a racist post. ***See*** N.T., Trial, 7/24/2023, at 34, 40; ***see also*** Board's Exhibit 1. This complaint prompted Judge Murphy (with the assistance of her staff) to review Respondent's Facebook postings and print hard copies of several of them. ***Id.***, at 35-36. Upon further review, Judge Murphy also became concerned about the content of several of Respondent's other postings because, in her view, the content of the postings could negatively affect the perception of the impartiality of the Philadelphia judiciary in the eyes of persons who are litigants before it and, as such, may have violated the Code of Judicial Conduct. ***See, e.g., id.***, at 37-38; ***see also*** Board's Exhibit 1. At trial, Judge Murphy noted specifically her concerns about a picture of Respondent posted that depicted him in

judicial robes behind a bench in a Philadelphia courtroom to his Facebook page, ***see*** N.T., Trial, 7/24/2023, at 37-38, and a post Respondent made about having been proud that, as a state legislator, he consistently received an "F" rating from the National Rifle Association (NRA). ***Id.***, at 38.

As a result of these concerns, Judge Murphy contacted Philadelphia Court of Common Pleas President Judge Idee Fox, and together they arranged to meet with Respondent on September 29, 2021, regarding the content of his Facebook posts. ***See*** Board's Exhibit 1, ***see also*** N.T., Trial, 7/24/2023, at 39-40. After Judge Murphy revealed her concerns to Respondent about the initial complaint and the other posts she saw, he disagreed with her analysis and a heated argument ensued wherein Respondent contended, among other things, that his Facebook post regarding the NRA was not problematic because he did not do "gun cases" as a judge on family court. ***See*** N.T., Trial, 7/24/2023, at 43-44. Though Judge Murphy pointed out that Respondent's position was untenable because of the population served by family court as well as the volume and variety of cases that proceed through family court, Respondent did not agree with the substance of Judge Murphy's position regarding the content of his Facebook posts as being potential violations of the Code. ***Id.,*** 44. Respondent likewise did not agree with Judge Murphy's suggestion that Respondent report himself to the Board to mitigate any potential violation, because, in his view, he did nothing impermissible, ***id.***, but he did ultimately agree with her suggestion to consult with an ethics expert (later identified in the conversation by Respondent as Attorney Stretton), about the content of his Facebook postings. ***Id.***, at 45.

Attorney Stretton contacted Judge Murphy about Respondent's Facebook page approximately one week after Respondent's meeting with Judge Murphy and

President Judge Fox. ***See*** N.T., Trial, 7/24/2023, at 46. Attorney Stretton advised Judge Murphy that Respondent removed the post that spurred the citizen's complaint and the picture of Respondent in a judicial robe seated behind a bench in a courtroom. ***Id.***, at 51. Nevertheless, Judge Murphy was aware that Respondent had posted other concerning material to Facebook many times between the time she met with him and when spoke with Attorney Stretton, and she urged Attorney Stretton to look at Respondent's Facebook postings for himself. ***Id.***, at 46, 49-50. Believing that Respondent would not report himself, even though Judge Murphy had mentioned that Respondent should do so both to him directly and then to Attorney Stretton, Judge Murphy waited until November 16, 2021, and then reported Respondent's Facebook conduct to the Board by letter. ***Id.***, at 46-47; ***see also*** Board's Exhibit 1. Judge Murphy took this action out of concern that she had become aware of a violation of the Code of Conduct regarding Respondent's Facebook postings and was required to report it, as well as the fact that her attempts to counsel Respondent about his Facebook postings and her urging to him to mitigate his conduct by self-reporting were "going nowhere." ***Id.***, at 49.

When the Board received Judge Murphy's letter, former Board Chief Counsel Richard Long assigned the matter to the Board's investigative staff for an initial review and preservation of Respondent's Facebook postings. ***See*** N.T., Trial, 7/24/2023, at 61-62. Board Senior Investigator Paul Fontanes performed this initial review. ***Id.***, at 62. Senior Investigator Fontanes was able to identify Respondent on his Facebook page because, despite his claim of removal of the picture of him in a judicial robe from his Facebook page, the picture remained visible thereon, which Respondent removed later in the course of the Board's investigation. ***Id.***, at 62-63,

246; ***see also generally*** Board's Exhibit 5. Based on Senior Investigator Fontanes' initial review of Respondent's Facebook page, former Chief Counsel Long opened a Confidential Request for Investigation against Respondent based upon the authority given to the Board's Chief Counsel to do so. ***Id.***, at 64; ***see also*** Board's Exhibit 2, December 1, 2021 Confidential Request for Investigation of Respondent; ***and*** Board pre-trial memorandum stipulation 16; Respondent pre-trial memorandum stipulation 2. Thereafter, Senior Investigator Fontanes continued investigating and monitoring the contents of Respondent's Facebook page, which revealed that Respondent made posts of a political nature. ***Id.***, at 68. Senior Investigator Fontanes preserved posts by Respondent that he and assigned Board counsel believed to be improper. ***Id.***

Based on the fruits of Senior Investigator Fontanes' investigation, assigned Board counsel requested and received authority from the Board to issue a Notice of Full Investigation (NOFI) to Respondent regarding the posts determined by the Board at that point to potentially violate the Code of Judicial Conduct and the Pennsylvania Constitution. ***See*** N.T., Trial, 7/24/2023, at 69-70; ***see also*** Board's Exhibit 3, April 20, 2021 NOFI to Respondent, at 2-4, ¶11. Respondent, through counsel, issued a verified response to the Board's NOFI by letter dated May 5, 2022. ***See*** N.T., Trial, 7/24/2023, at 74; ***see also*** Board's Exhibit 4, May 5, 2022 verified NOFI response by Respondent. Respondent admitted making the posts identified in the Board's NOFI, yet he contended that his Facebook postings were not violations of the Code or the Pennsylvania Constitution because they were permissible speech under the First Amendment to the United States Constitution. ***Id.*** Assigned counsel then deposed Respondent at the Board's offices in Harrisburg, wherein he presented testimony consistent with his NOFI response, *i.e.*, that he made the Facebook posts

identified ultimately at trial in Board's Exhibit 3 and that they were permissible expressions of his First Amendment rights and not violations of the Code or the Pennsylvania Constitution. ***Id.,*** at 75; ***see also generally*** Board's Exhibit 5.

For example, when questioned at the deposition as to specific Facebook posts Respondent made about the federal Build Back Better bill championed by President Biden in 2021, Respondent freely admitted the content and purpose of his posts: (1) he criticized Representative Kevin McCarthy for his opposition to the bill, ***see*** Board's Exhibit 5, N.T., Deposition, 7/19/2022, at 131, 133; (2) he positively assessed President Biden's speech regarding the bill (which was posted originally to President Biden's Facebook page) and his legislative program generally, ***see id.***, at 135; (3) he re-posted President Biden's speech about Build Back Better in order to spread the post to his followers and friends on Facebook, generate discussion and thought about the bill, and to praise the delivery and content of President Biden's speech in the original posting, creating a forum for discussion. ***Id.***, at 134-135.

Following the deposition, Respondent continued to make posts to Facebook of a political nature, and, as a result, assigned counsel sought and obtained authorization from the Board to issue a supplemental NOFI to Respondent regarding the additional posts determined by the Board to potentially violate the Code of Judicial Conduct and the Pennsylvania Constitution. ***See*** N.T., Trial, at 82, 86-88; ***see also*** Board's Exhibit 6, December 6, 2022 supplemental NOFI to Respondent, at 2-14, ¶ 7. Respondent replied to the Board's supplemental NOFI through counsel, admitted making the Facebook postings in question, and again asserted that his Facebook posts could not be the subject of claims of misconduct because they were protected speech under the First Amendment. ***See*** Board's Exhibit 7, January 4, 2023 verified

supplemental NOFI response by Respondent. The Board rejected Respondent's First Amendment argument as a blanket defense for his misconduct, and it found probable cause existed to file formal charges against Respondent in this Court due to his postings to his personal Facebook page. ***See*** Board pre-trial memorandum stipulation 17; Respondent pre-trial memorandum stipulation 2.

The parties stipulated to the appearance and content of Respondent's Facebook posts presented to support the charges against Respondent in the Board Complaint, prior to trial. ***See*** Board's Stipulated Exhibit 8; ***see also*** N.T., Trial, 7/24/2023, at 89-91.

Respondent's Facebook posts that are the subject of the present charges are summarized as follows, which, unless otherwise noted, were authored by Respondent:

1. October 29, 2022, 12:28 p.m. – "David DePape, captured Pelosi assailant, continues to gain notoriety as more and more of his extremist posts come to light. It is clear that he is a failed and hateful man capable of many awful things."

2. October 28, 2022, 9:16 p.m. – "CNN: David DePape, 42 accused attempted murderer of Paul and Nancy Pelosi, apparently made hateful, bigoted posts against LGBTQ people, Jews, the January 6 Committee, and other right-wing targets. Why am I not surprised?"

3. November 20, 2022, time not listed – "Today is President Joe Biden's Birthday. Many people his age are impaired. But he has proven to be an excellent President. His experience enables him, and does not wear him down. I look forward to many more achievements!"

4. November 21, 2022, time not listed – "Philly DA Larry Krasner's credibility gained when a federal jury voted to dismiss a claim by former ADA Carlos Vega that Krasner had discriminated against him by age when he fired him. Krasner saw him as flawed, the City said in defense."

5. November 10, 2022, 6:40 p.m. – "The victories of Governor-Elect Josh Shapiro & Senator-Elect John Fetterman show Gov Tom Wolf should be credited with improving public respect for Pa. state government. Fetterman first LG to win statewide for other post since 1966."

6. November 9, 2022, 3:22 a.m. – "My friend and former House colleague Josh Shapiro, whose father Dr. Steve Shapiro was a classmate of mine at Central High, has been elected Pa's Governor. I have no doubt he is up to the job."

7. November 3, 2022, 7:10 p.m. – "MSNBC: Former President Barack Obama: When we vote, we win."

8. November 2, 2022, 4:43 p.m. – "My former legislative colleague Kenyatta Johnson, now completing his 3rd term in the Philly City Council has been found – along with his wife Dawn Chavous – to be not guilty on all charges in federal court today by a jury verdict. A vindication!" In the subsequent posts to this posting, [Respondent] was asked the question if Councilman Johnson would have his legal bills paid, and [Respondent] provided the following response: "To the best of my knowledge, no. Friends and admirers can choose to contribute to a defense fund, if he has set one up."

9. September 22, 2022, (approximate) - "Philly DA Krasner, in switch of tactics, now demands to testify before Pa House Committee seeking evidence of wrongdoing to begin impeachment proceedings. Good move!"

10. September 21, 2022 (approximate), time not listed – "MSNBC: Presidential Press Secretary Kanine [sic] Jean-Pierre says Administration has reduced the severity of COVID with widespread vaccinations, but more efforts are needed. She's right, but its wrong to say pandemic is over."

11. September 20, 2022 (approximate), time not listed – "Babette Josephs was the most public and persistent fighter for women's rights in Post-Roe Pennsylvania. I would like to see her birthday, August 4, be publicly celebrated as Babette Josephs Day."

12. September 13, 2022, 5:50 p.m. – "Ken Starr, independent prosecutor of Bill Clinton, whose overzealousness led to issuing X-rated report on Clinton's sex life, has died at 76. The report led to Clinton's impeachment, but surprisingly led to increase of public support for him."

13. September 5, 2022, 2:47 p.m. – "New Deal Labor Secretary Frances Perkins, the first woman to serve as a Cabinet Secretary, is a great leader to remember on Labor Day." The posting includes a photograph of former Secretary Perkins reposted from the "A Mighty Girl" Facebook page (originally posted September 5, 2022), which includes the following text: "FRANCES PERKINS[,] as U.S. Secretary of Labor and the first woman in the Cabinet, Perkins fought to establish a minimum wage, overtime pay, the 40-hour work week and to end child labor." The posting concludes with further text from the "A Mighty Girl" Facebook page noting that the page is honoring former Secretary Perkins as a labor rights pioneer and a New Deal champion.

14. September 5, 2022, 11:04 a.m. – "Philadelphia/Tri-State Labor Day Parade brings back memories of Wendell Young, [III,] father of the current UFCW leader, Wendell Young[,] IV. Key early events in the union's history happened in my original legislative district, in neighborhoods of East Oak Lane and Olney." The posting also includes a photograph of Mr. Young reposted from the "Bob Ingram" Facebook page. The post includes the following text, originally posted to the "Bob Ingram" Facebook page: "Remembering my late friend the great labor leader Wendell Young 3rd on this Labor Day. He told me, 'Life is all stories,' which I've never forgotten."

15. August 4, 2022, 2:51 a.m. – "As a young man, I remember journalistic anger at Roger Maris & Eugene McCarthy for becoming national heroes with heroic achievements. John Nichols' hit job against Liz Cheyney [sic] in the The Nation is of the same sad kind." In the midst of the exchange of posts that ensued from this post, [Respondent] posted the following: "I believe from personal experience that people can and do change their views over time. As a judge, I am not permitted to endorse or otherwise back any candidate for anything. But I strongly disbelieve that good works by anyone should subject them to harsh criticism while those who do far fewer good things remain totally ignored."

16. August 1, 2022, 9:26 a.m. – "The killing of Osama Ben [sic] Laden's number two by drone in downtown Kabul at the age of 71 shows intense & nuanced focus of this Administration on the national interest. Withdrawing troops is clearly not the same as accepting terrorism."

17. October 24, 4:20 p.m. – "A plea for more domestic spending and less military spending." The posting reposts a photograph of a fighter jet, with the headline "Just in case you didn't know what different parts of fighter jet [sic] are called." There are lines to

different parts of the fighter jet that indicate which domestic spending cuts allegedly paid for that part of the fighter jet. For example, the line to the nose of the fighter jet indicates that Medicare cuts paid for that part of the plane. This photograph was originally posted by the "Rebecca Hains, Author" Facebook page on September 8, 2022.

18. September 1, 2022, 5:59 p.m. – "There's a lot of anti-city, anti-NYC, and anti-intellectual people in this world. A teacher in Oklahoma is being threatened with loss of her teaching certification for giving her students the phone number for online books from the Brooklyn public library. A once famous book was titled 'A Tree Grows in Brooklyn;' minds grow there too." The posting includes a reposting of a photograph of a letter sent by Oklahoma Secretary of Education Ryan Walters regarding the firing of High School English Teacher Summer Boismier and his intent to request the Oklahoma State Board of Education to revoke Ms. Bosimier's teaching certificate. This photograph was originally posted to the "Warner West" Facebook page on August 31, 2022. The post concludes with text reposted from the "Warner West" Facebook page that recounted Ms. Boismier's story.

19. September 1, 2022, 7:20 a.m. – "An example of the madness of book banning." The posting includes a reposting of a photograph of students in a classroom with the following text: "At George Dawson Middle School[,] an autobiography co-authored by George Dawson at 103 has been banned. Mr. Dawson was the grandson of a slave. He learned to read at 98. His book is an inspiration to all readers except it can't be read at the school that bears his name." This photograph was originally posted by the "Andi Cude" and "True Blue Party" Facebook pages on August 31, 2022.

20. August 30, 2022, 8:56 a.m. – "Canada requires a license to own firearms, and passing a test on firearm safety. Automatic weapons are prohibited. Murders in Canada (38.3 million people) are only about 50% higher than in Philadelphia (1.7 million)."

21. August 29, 2022, 8:55 p.m. – "With allies among the leaders of both parties, I spearheaded Pennsylvania's pioneering 2015 law against the Boycott, Divestment and Sanctions movement seeking [to] deprive Israel of foreign trade on a state by state basis. A federal appeals court has recently ruled in favor of the constitutionality of a similar law in Arkansas." The posting includes a link to an opinion article from the National Jewish Advocacy center bearing the following title: "A Federal Appeals Court Just Struck a Huge Blow to the BDS Movement." The post

contains a comment from the "Ed Doogan" Facebook page which states the following: "So take away from the Palestinians the only nonviolent way they have to pressure Israel and when they resort to violence[,] give Israel an excuse to kill more Palestinian men, women, and children. This is a terrible law and as a judge[,] you should be ashamed of yourself."

22. August 5, 2022, 9:19 p.m. – "Inquirer: Unemployment falls to 3.5%, tying for the lowest since 1969. More people are employed in US than ever before, showing a very strong economy and strengthening Social Security System. It's time for critics to re-evaluate this Administration."

23. August 3, 2022, 9:39 p.m. – "Senator Amy Klobuchar predicts Sen. Kirsten [sic] Sinema will be on board with Inflation Reduction Act next week, & it will pass Senate, lowering annual deficit, fighting climate change, & reducing prescription costs. A victory for fiscal responsibility."

24. August 3, 2022, 1:13 a.m. – "By a 59% to 41% vote, Kansas voters rejected a constitutional amendment that would have allowed the legislature to ban abortion. High turnout took place on 100 degree day, and sent a message that even conservative states are not on board with US Supreme Court reversal of Roe v. Wade." The posting reposts an article from Apnews.com entitled "Kansas voters resoundingly protect their access to abortion." This article was originally posted by the "Stephen Drachler" Facebook page on August 3, with the following statement from that page: "When Kansas speaks, the nation will be listening. Kansas voters repudiated the radical U.S. Supreme Court on Tuesday as they rejected a Constitutional amendment that would have opened to door [sic] to the Legislature banning abortion in the Jayhawk state. It wasn't close 60-40 with a record turnout in 100 degree weather. Independent voters turned out in droves to vote in a primary election where they normally could not vote."

25. August 2, 2022, 3:28 p.m. – "A plea for credit unions, which often offer lower fees, lower cost loans, higher interest rates and better customer service than commercial banks do." The post also reposts a photograph that contains the following text: "Women should remove their money from banks. Seriously. Every penny. Use credit unions. Let's stop them from using our money to pay for lobbyists that take our rights away." This photograph was originally posted by the "Addicting Info" Facebook page on July 13, 2022.

26. August 2, 2022, 3:23 p.m. – "Truth!" This posting also contains a reposting of a photograph of a tweet made by Nina Turner, a former Democratic Ohio State Senator, which contains the following text: "There's nothing moderate about letting our planet burn, allowing our food air & water to be poisoned, or letting people go without food and shelter. These are not moderate positions." This photograph was originally posted by the "Corinna Bloom" Facebook page on July 19.

27. July 30, 2022, 6:06 p.m. – "Despite the support of Baer, Gov. Tom Wolf, and many others, the legislature still has not raised the minimum wage above the current $7.25 level. When Pa. raised the minimum wage to $7.15 (10 cents less than the federal level which ultimately followed), under my leadership in 2006, I immediately advocated that it should soon go up to $8.00. Even after 16 years, and a $15.00 an hour minimum wage in NJ, NY, California and other states, the minimum wage in Pa and the USA has remained stagnant. The posting includes a reposting of a photograph originally posted on July 30, 2021, on [Respondent's] Facebook page, that bears the text "Legislative critic John Baer endorses higher Pa minimum wage. He says it would be a big step for legislative credibility and help a million people."

28. July 28, 2022, 10:29 p.m. – "Texas calls itself the Lone Star state, due to its brief experience as a separate country, after winning independence from Mexico. But in these days of five star ratings, and Texas' passage of a variety of dubious laws, being a one star takes on a new – and accurate – meaning." The post includes a reposting of a photograph of a cartoon depicting a highway and a billboard that reads: "Welcome to Texas, the Lone Star State – based on recent reviews" and a five-star rating system with only one star filled. This photograph was originally posted by the "Ava Levin Leas" Facebook page on July 27, 2022. In the comment discussion that follows, one commenter stated "I prefer originality. Texas should again become a one star country." [Respondent] replied, "You are not alone!"

29. July 28, 2022, 7:09 p.m. – "Joe Manchin seems to be retreating a bit on opposition to legislation dealing with climate change and investing in human infrastructures for social services. We'll soon see if his possible change of heart leads anywhere."

30. July 27, 2022, 5:50 p.m. – "Prophetic words from the Rev. Billy Graham 41 years ago." The post includes a reposting of a photograph of the former Reverend Graham with the following quotation, attributed to him: "I don't want to see religious bigotry in any form. It would disturb me if there was a wedding between the religious fundamentalists and the political right. The hard

right has no interest in religion except to manipulate it." The photograph was originally posted by the "Chester Hitchcock" Facebook page on July 26, 2022.

31. July 26, 2022, 5:20 p.m. - "NYT: Former Philadelphians Bruce Marks and Mike Roman were key players in alternate elector scheme. At least the poor records of Philly sports teams did not disqualify them. Marks is stepping up to defend his role, citing Hawaii in 1960." This posting led to an intense comment argument between Mr. Marks, who was, in fact, one of [Respondent's] Facebook friends, and other individuals who were his Facebook friends, including Marc Stier, who is a well-known progressive political figure. Some of these persons accused Mr. Marks, who is an attorney, of professional misconduct and criminal conduct. [Respondent] attempted to bow out of the conversation at one point, by stating the following: "And as a judge, I am limited in the degree to which I can comment on political actors, attorneys or judges in court proceedings."

32. July 26, 2022, 8:13 a.m. - "Words of wise advice from Canada!" The posting includes reposting of a photograph of a tweet from "Aaron Hoyland," which contains the following text: "In Canada, our schools have more than one door too. We have folks struggling with mental illness. We watch the same movies, listen to the same music and play the same violent video games as Americans. And, since Columbine, the US had 200 school shootings. We had 3. It's the guns." This photograph was originally posted on June 2, 2022 by the "David Reid" Facebook page.

33. November 1, 2022, 10:08 a.m. - "Did you know that both Frankenstein and Dracula were played by union members? Neither did I." The post includes a reposting of a photograph of the Boris Karloff-version of Frankenstein and the Bela Lugosi-version of Dracula, with the following text: "DID YOU KNOW?.. Frankenstein & Dracula were union organizers? Boris Karloff, who played Frankenstein, along with Bela Lugosi who played Dracula, were founding members of the actors union, Screen Actors Guild (SAG). Both men actively recruited Actors and Actresses to join the then unrecognized Union (between 1933 and 1937). It was not uncommon to see Karloff in full monster makeup, handing out applications to join the Screen Actors Guild." This photograph was originally posted by the "John Meyerson" Facebook page on November 1, 2022, with the following additional text: "Solidarity Forever!"

34. September 18, 2022 (approximate), time not listed – "Philadelphia Museum of Art stayed open yesterday during a one-day warning strike. Bad news for labor!"

35. September 14, 2022, 3:30 p.m. – "Record profits are undermining tough corporate bargaining stances." The post also includes a photo with the following statement posted from the "Labor 411" Facebook page: "BNSF is the largest rail company in the US. Last year they had a net income of $8.8B. They have 35k workers. If they kept half of their profit and split the rest with all employees everyone could receive a $125k RAISE. Instead BNSF is cutting sick days. This is why they strike."

36. September 14, 2022, 2:05 p.m. – "Bad news for Texas kids and school boards. Perhaps good news for Texas educators' future pay raises and working conditions." The post contains a photo of an article from the Houston Chronicle bearing the headline "Poll: 77% of Texas teachers want to quit" that was posted from the Facebook page of "Johnny Mitchell."

37. September 11, 2022, 2:40 a.m. – "Bruce Springsteen is also a fan of unions, as are not about 60% of our country." The posting also includes a photograph of Bruce Springsteen reposted from the "Jeff Rechenbach" Facebook page (originally posted on September 5, 2022), bearing the following quotation attributed to Springsteen: "Unions have been the only powerful and effective voice working people have ever had in the history of this country." The post concludes with the following additional text reposted from the "Jeff Rechenbach" Facebook page: "The Boss understands the value of unions. On this day set aside for the recognition of workers, let's remember it is the Labor Movement that built the middle class in our nation."

38. September 11, 2022, 2:18 a.m. – "A strong endorsement of the labor movement of his time from famed defense attorney Clarence Darrow." The posting also includes a photograph of Clarence Darrow reposted from the "Ron Klink" Facebook page (originally posted on September 10, 2022), bearing the following quotation attributed to Darrow: "With all their faults, trade-unions have done more for humanity than any other organization of men that ever existed. They have done more for decency, for honesty, for education, for the betterment of the race, for the developing of character in man, than any other association of men." The post concludes with the following additional text reposted from the "Ron Klink" Facebook page: "I believe this with all my heart and soul."

39. September 10, 2022, 4:27 p.m. – "Good news for empowering people. Too bad for Superman." The posting also includes a cartoon reposted from the "Glen Williams" Facebook page, which depicts a child speaking to an obviously-dejected Superman; the child states "Sorry Superman[.] My new heroes are union members. They've been fighting for me and my family our whole lives."

40. September 5, 2022, 4:53 p.m. – "Farm workers are vital to our food supply. Thanks to Mary Rose Cunningham for sharing." The posting also includes a photograph of a painting reposted from the "Jonathan Zasloff" Facebook page (originally posted September 4, 2022) depicting farm workers carrying bushels of food with the text "Honoring the immigrants on Labor Day who put food on our tables" on the photograph.

41. September 5, 2022, 11:30 a.m. – "Another good Labor Day Greeting!" The posting also includes a photograph reposted from the "Mike McDonough" Facebook page, which depicts men at an apparent labor organization meeting with the following text: "This long holiday weekend has been brought to you by the blood, sweat, and tears of the labor movement."

42. September 5, 2022, 11:18 a.m. – "More well thought-out Labor Day greetings!" The posting also includes a photograph reposted from the political Facebook page of Pennsylvania State Senator Tina Tartaglione (D-Philadelphia) (originally posted September 5, 2022), which depicts a cartoon of happy workers of various professions, i.e., a cook, a nurse, a fireman, with the following text from Senator Tartaglione: "During Labor Day we honor and celebrate the contributions of America's workers and the fights that got us here. American was built by the middle class, and the middle class was built by unions."

43. September 4, 2022, 6:15 p.m. – "Tomorrow is Labor Day. As you enjoy it, remember why workers successfully fought to have it established during the Presidency of Grover Cleveland." The posting includes a reposting of a photograph originally posted on the "John Meyerson" Facebook page that same day. The photograph depicts a wall with the graffiti "Never Cross a Picket Line. Class War," painted on the wall. The post concludes with the following text originally posted to the "John Meyerson" Facebook page: "Happy Labor Day! We must never forget the reason we celebrate the sacrifices that workers have made in their fight for social and economic justice! We still have a long way to go!"

44. July 28, 2022, time not listed – "This speaks for the views of many workers." The posting contains a reposting of a photograph of a tweet from "Blondie," which contains the following text: "Jobs need to understand that the ONLY way to make me feel appreciated is to pay me what I'm worth, that's it. No amount of 'lunch is on me', T Shirts or 'team building' is going to cut it." The photograph was originally posted by the "More Perfect Union" Facebook page on July 21, 2022.

45. July 28, 2022, 6:44 p.m. – "A very good point!" The posting includes a reposting of a photograph of a cartoon with Lisa Simpson making a speech, with a projection screen behind her. The screen bears the following text: "Trickle down economics has never gotten Billionaires to spread the wealth. That's what unions are for." This photograph was originally posted on the "Americans for Tax Fairness" Facebook page on July 26, 2022.

46. August 30, 2022, 1:14 p.m. – "Still another take on the student loan debt repayment plan." The posting includes a reposting of a cartoon of a man at a trolley track switch and five people tied to the tracks on one of the track branches where they trolley is headed. Behind the trolley are the bodies of a number of people who the trolley had already run over. The man at the train track switch states "But if I divert the trolley now[,] that would be unfair to all the people it's already killed."

47. August 29, 2022, 11:10 a.m. – "Another take from a supporter of student debt cancellation!" The posting includes a reposting of a photograph bearing the following statement: "If you're mad about student loan forgiveness, I feel bad for you son. I got 99 problems but being weirdly bitter that life is getting slightly easier for other people ain't one." This photograph was posted originally by the "Marti Murphy" Facebook page on August 28, 2022.

48. August 28, 2022, 7:46 a.m. – "My former colleague in Harrisburg wades into theology to support debt forgiveness for education loans." The posting includes a reposting of a photograph bearing the following statement: "If you're a Christian and you're big mad about the possibility of student loan debt being cancelled, let me remind you that the entirety of your faith is built upon a debt you couldn't pay that someone stepped in and paid for you." This photograph was originally posted on August 27, 2022, by the "Brett Cott" Facebook page.

49. August 26, 2022, 2:09 p.m. – "One more way to say that reducing student loan debt makes a lot of sense." The posting also includes a reposting of a photograph of a religious painting of Jesus miraculously distributing the loaves and fishes to the multitude

with the following text: "Jesus's [sic] miracle of the loaves and fishes was a slap in the face to all the people who brought their own lunch." This photograph was originally posted on August 25, 2022, by the "Bob Kefauver" Facebook page.

50. August 26, 2022, 12:49 p.m. – "Another Facebook friend with a big [heart emoji]!" The post is a reposting of a post made by the "Kiernan Majerus-Collins" Facebook page on August 26, 2022, which states the following: "I paid off my relatively modest undergraduate student loans a few years ago, and I'm thrilled that at least some other people won't have to do the same. Higher education – which benefits our whole society – should be free."

51. August 25, 2022, 1:34 p.m. – "I agree with this!" The posting also includes a reposting of a photograph with the following text on it: "I worked hard to pay off my student loans, others should have to too! I swam across that river, how dare they build a bridge!" The photograph was originally posted on August 25, 2022 by the "Warren Fretwell" Facebook page.

52. August 13, 2022, 6:40 p.m. – "Former US Secretary of Labor Robert Reich is absolutely right on this." The post includes a reposting of a photograph of former Secretary Reich with the following quotation, attributed to him: "A decent society wouldn't push millions of students into debt. It would recognize that higher education isn't mainly a personal investment; it's a public good." This photograph was originally posted by the "Steve Sherman" Facebook page on August 12, 2022.

53. October 15, 2021, time not listed – "Rick Wilson, MSNBC, urging more vigor in January 6 investigation: 'Unpunished terrorism is just a practice run.'"

54. October 19, 2021, time not listed –"The state that gave us Estes Kefauver and two Al Gores is now trying to make knowledge of black history illegal. Shameless retrogression!" This posting includes a newspaper opinion piece that criticized the passage of an anti-Critical Race Theory bill in Tennessee.

55. November 6, 2021, 3:11 p.m. – "One year ago, our country voted for massive change. We are starting to get it, but more can be done."

56. November 7, 2021, 11:01 p.m. – "Takeaways from Four Seasons doc: (1) The Trump Presidential campaign was out of money, and the Four Seasons was willing to host the press conference for

free; (2) a flood of hate calls and ridicule led to company choice to develop PR campaign."

57. November 14, 2021, 8:44 p.m. – "6.2% inflation hurts those with salaries or pensions. It encourages workers to unionize & those with pensions to seek gains."

58. November 15, 2021, 3:14 p.m. – "Latest figures in contested court races of Philly judges show little change: Dumas up 18,801 for Commonwealth Court, McLaughlin down for Supreme Court by 28,252. Barring discovery of major error, Dumas & Kevin Brobson to win." A person responded to this post, stating, "So sad for [McLaughlin] and Lane."

59. November 17, 2021, 7:36 p.m. – "President Joe Biden eloquently advocates for his Build Back Better Plan." In addition to [Respondent's] commentary, he re-posted a post from President Joe Biden, part of which is immediately visible on his Facebook page, as follows: "I ran for president believing it was time to rebuild the backbone of this nation – working people and the middle class. To rebuild the economy from the botto....."

60. November 18, 2021, 11:33 p.m. – "Good night Kevin McCarthy. Good night moon. No matter how long Kevin talks, we'll have House passage of Build Back Better soon."

61. November 19, 2021, 7:52 a.m. – "At 8:00 a.m., US House returns to session, delayed by Kevin McCarthy speech of record length, to pass Build Back Better bill and improve many, many American lives."

62. November 19, 2021, 3:22 p.m. – "President Joe Biden's [sic] Build Back Better Bill passed the US House this morning. Chuck Schumer says he wants passage by Christmas."

63. November 20, 2021, 12:04 a.m. – "Joe Biden turns 79 today. Happy Birthday Mr. President! Enjoy your five days a week of workouts!"

64. November 23, 2021, 11:14 a.m. – "David Morrison [another poster] says the JFK assassination was a major transition for his life. In tribute, he posts this excerpt from a speech Kennedy was prepared to give in Dallas had he lived." [Respondent] then re-posted David Morrison's November 22, 2021 posting of the undelivered Kennedy speech, part of which is immediately visible on [Respondent's] page as follows: "Neither the fanatics nor the faint-hearted are needed. And our duty as a Party is not to our

Party alone, but to the nation, and, indeed, to all mankind. Our d...."

65. November 23, 2021, 4:00 p.m. - "Lori Dumas now leads for Commonwealth Court by 22,227. Her opponent Drew Compton conceded today. Congratulations to my fellow Philadelphia Common Pleas Judge! Her victory is well-deserved."

66. November 26, 2021, 9:42 a.m. - "Organizing for progressive change can be very difficult. Longtime activist Marc Stier and his commenters discuss the reasons why." In addition [Respondent's] commentary, he re-posted a post from Marc Stier, part of which is immediately visible on his page, as follows: "Listening to a call about progressive messaging on taxes. Our problem is not that majority doesn't agree with us. Our problem is mobilizing people and encou...."

See Board's Stipulated Exhibit 8, at 1-66.

Dr. Alison Merrill, assistant professor of political science, Susquehanna University, provided an opinion on the partisan political nature of Respondent's Facebook posts, supporting the allegations in the Board Complaint. ***See*** N.T., Trial, 7/24/2023, at 95-101; 104-111; ***see also*** Board's Exhibit 9, *curriculum vitae* of Alison Merrill, Ph.D.; ***and*** Board's Exhibit 10, April 20, 2023 Expert Report of Alison Merrill, Ph.D. Upon the Board's request, and following Respondent's belated stipulation, this Court deemed Dr. Merrill an expert witness in the fields of American politics and communication and political communication. ***See*** N.T., Trial, 7/24/2023, at 102.

Dr. Merrill opined that Respondent's Facebook posts constituted partisan political activity. ***See*** N.T., Trial, 7/24/2023, at 127-129; ***see also*** Board's Exhibit 10. Dr. Merrill testified that "partisan political activity" constitutes a subset of the broader term "political communication," which is the construction, sending, and receiving of politically relevant messages. ***Id.***, at 119-120. "Political communication" can constitute messages that touch on various subjects, such as political figures,

political institutions, legislation, and historical events, but the term essentially encapsulates anything that is politically relevant. ***Id.***, at 119-120. As a subset of "political communication," "partisan political activity" defines the topics that a political messenger is talking about, *i.e.*, their support of or opposition to messages, policies, legislation, initiatives, and elected officials that are affiliated with either the Republican Party or the Democratic Party. ***Id.***, at 120. As to Respondent's Facebook posts set forth in Board's Stipulated Exhibit 8, Dr. Merrill concluded that the posts constituted both "political communication" and, more specifically, "partisan political activity," because they constituted Respondent's personal commentary on current social issues, sharing images with and without text from other organizations, coupled with his own perspective on the information shared by other organizations, ***see id.***, at 129-130, and because an overwhelming number of Respondent's posts were in support of or show preferences for policies or political figures associated with the ideological left or the Democratic Party. ***Id.***, at 130.

Dr. Merrill supported her conclusions by citing examples from Board's Stipulated Exhibit 8, which showed the following: (1) Respondent's support for former President Barack Obama and Governor Josh Shapiro, both well-known figures of the Democratic Party, ***see*** N.T., Trial, 7/24/2023, at 130-131; ***see also*** Board's Stipulated Exhibit 8, at 5-7; (2) Respondent's support in real time for the federal Build Back Better Bill as it proceeded through debate and voting in the U.S. House of Representatives, ***see*** N.T., Trial, 7/24/2023, at 134-135; ***see also*** Board's Stipulated Exhibit 8, at 59-62; and (3) Respondent's support for policy and social positions favored by the Democratic Party, such as pro-union stances on labor issues, ***see*** N.T., Trial, 7/24/2023, at 135; ***see also*** Board's Stipulated Exhibit 8, at 40, 41, 42,

43; and (4) Respondent's criticism for policy and social positions favored by the Republican Party, such as legislation in states that attempts to restrict access to books that can be in school libraries and anti-critical race theory bills. ***See*** N.T., Trial, 7/24/2023, at 136; ***see also*** Board's Stipulated Exhibit 8, at 18, 54.

Dr. Merrill also concluded that the physical appearance of some of Respondent's Facebook posts contributed to her analysis in that, the posts demonstrated color schemes or graphics (like a "thumbs' up" sign) that showed visual approval or criticism of the subject of the posts. ***See*** N.T., Trial, 7/24/2023, at 131-134; ***see also*** Board's Stipulated Exhibit 8, at 1, 6 (Posts re: David DePape, Paul Pelosi shooter and Governor Josh Shapiro),

As to the nature and reach of Facebook postings on political matters, Dr. Merrill testified that social media has changed who can be a political actor in the United States because anyone with access to social media can share messages that support or criticize legislation or policy *via* social media pages like Facebook, which are political communications, like someone putting a sign in their yard endorsing or criticizing a political candidate. ***See*** N.T., Trial, 7/24/2023, at 123-124. This is significant because the reach of Facebook is not limited to the persons that a Facebook user calls "friends." ***Id.***, at 116-117. For example, Respondent is connected to approximately 5,000 people as Facebook "friends." ***See*** Board Exhibit 5, N.T., Deposition, 7/19/2022, at 42-43; ***see also*** N.T., Trial, 7/24/2023, at 117. Dr. Merrill testified that anybody who was Respondent's Facebook friend and who might like or comment on or share any posts that he had on his personal page would also then cause their friends and connections to be able to see Respondent's posts. ***Id.*** Then, those secondary individuals could, in turn, share that information beyond

them to their friends if they liked or commented on Respondent's posts. ***Id.*** Due to this expansive audience and the spread of information, social media has altered how political communication takes place between people in America. ***Id.***, at 121-122.

In defense, Respondent presented the stipulated testimony of several persons from his community that knew him and would testify that he has a reputation for truthfulness and honesty in his community, and Respondent testified in his own defense. ***See*** N.T., Trial, 7/24/2023, at 232-239, 240. Respondent admitted making the posts set forth in Board's Stipulated Exhibit, and, while acknowledging that others make partisan political posts to his Facebook page, he denied making partisan political posts to his page or joining others in doing so. ***Id.***, at 253-255. Respondent testified that he did not cease making Facebook posts after speaking with Judge Murphy and President Judge Fox due to his belief in his rights to free expression, ***id.***, at 255, and, among other reasons, because he did not believe that his posts were, themselves, political activity. ***Id.***, at 256.

Respondent also claimed that he believed that comment 9 to Canon 4, Rule 4.1 of the Code of Judicial Conduct permitted his conduct, in that, according to Respondent, the comment specifically authorizes judges to state their personal views on political matters. ***See*** N.T., Trial, 7/24/2023, at 256. Ultimately, however upon cross examination, Respondent acknowledged that his posts to his Facebook page after becoming a judicial officer made him "feel good," as did the posts others made in reaction to the posts Respondent made on his Facebook page. ***Id.***, at 290, 291, 311. The good feelings that Respondent had from his Facebook posts (and others' reactions to them) and "positive good" Respondent claimed that he contributed to by posting to foster discussion, ***see id.***, 249, was counterposed against the isolation

that he felt after he was elected to the bench, which was exemplified by his lack of regular communication with press reporters and his lack of invitations to events. ***Id.***, at 249-250.

III. Discussion

Canon 1, Rule 1.2 Promoting Confidence in the Judiciary.

> **A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.**

Canon 1, Rule 1.3 Avoiding Abuse of the Prestige of Judicial Office.

> **A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.**

Canon 3, Rule 3.1(C) Extrajudicial Activities in General.

> **A judge shall regulate their extrajudicial activities to minimize the risk of conflict with their judicial duties and to comply with all provisions of this Canon. However, a judge shall not [(C)...] participate in activities that would reasonably appear to undermine the judge's independence, integrity, and impartiality.**

Canon 3, Rule 3.7(A) Participation in Educational, Religious, Charitable, Fraternal or Civic Organizations and Activities.

> **Avocational activities. Judges may write, lecture, teach, and speak on non-legal subjects and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of their office or interfere with the performance of their judicial duties.**

At the outset, it must be noted that there is no distinction between a judge's online conduct and "real world" conduct regarding this Court's application of the Code and the Constitution of this Commonwealth. The propriety of all actions by a judge, whether online or not, and whether "pornographic" or otherwise licentious or not, or whether the conduct constitutes legal conduct for non-judges or not, are viewed under the rubric of the Code and the Constitution. ***Compare In re Eakin***, 150 A.3d 1042, 1055 (Pa.Ct.Jud.Disc. 2016) (former Pennsylvania Supreme Court justice

found in violation of former Canon 2(A) for emails exchanged among his associates privately using government-supplied computer equipment that raised the appearance of impropriety) *with* ***In re Shaw***, 192 A.3d 350, 370-71 (Pa.Ct.Jud.Disc. 2018) (sending of salacious text messages and conducting clandestine sexual affair with the girlfriend of a treatment-court defendant constituted violation of Disrepute Clause) (emphasis added). Accordingly, without considering any of Respondent's constitutional claims, ***see*** *infra* at 51, the propriety of the content of Respondent's Facebook posts is a matter well within the jurisdiction of this Court. ***Eakin***, 150 A.3d at 1057.

Canon 1, Rule 1.2, Canon 3, Rule 3.1(C) and Rule 3.7(A) each bear a strong relationship to each other logically because they prevent a judge from engaging not only in substantive misconduct, but also in other conduct that creates a *perception* that the judge engaged in misconduct. (Emphasis added); ***compare*** Canon 1, Rule 1.2 ("A judge shall...avoid impropriety and the appearance of impropriety.") *with* Canon 3, Rule 3.1(C) ("[A] judge shall not. . . participate in [extrajudicial] activities that would reasonably appear to undermine the judge's independence, integrity, or impartiality) *and* Rule 3.7(A) ([A judge may engage in avocational activities], if such avocational activities do not detract from the dignity of their office...."). Further, Canon 1, Rule 1.3 requires a judge to avoid conduct that abuses the prestige of the judicial office their own personal or economic interests or those of others. Therefore, as the prestige of the judicial office is intrinsically linked to the public's perception of the nature of the judicial office, it can also, like the other Canons and Rules noted above, turn on this Court's view of the public's perception of proper judicial behavior. Because of their intertwined relationship to the facts of this case and their logical

relationship, assigned Board counsel will analyze Canon 1, Rules 1.2, 1.3, and Canon 3, Rules 3.1(C) and 3.7(A) jointly, beginning with Canon 1, Rule 1.3.

Canon 1, Rule 1.3 directs a judge to refrain from abusing the prestige of their judicial office to advance their own personal or economic interests or those of others. First, and most importantly, Respondent clearly made no attempt to limit access to his Facebook page to a close group of personal friends or to obfuscate the fact that he is a judge on his Facebook page. ***See*** Board pre-trial memorandum stipulation 18-19; Respondent pre-trial memorandum stipulation 2; ***see also*** Board Exhibit 5, N.T. Deposition, 7/19/2022, at 41-42; 73-76. Quite to the contrary, Respondent advertised his judicial status on his Facebook page to his 5,000 Facebook friends and 1,000 Facebook followers, and his page was accessible to all Facebook users.[4] ***Id.*** While it is true that, in the course of the Board's investigation, Respondent removed a formerly-posted picture of himself in judicial robes seated at a Philadelphia bench from his Facebook pictures, he did nothing to address the other areas of his Facebook page that identified him as a judge. Moreover, Respondent acknowledged at trial that some of the people with whom he interacted with on Facebook addressed him as "judge," ***see*** N.T., Trial, 7/24/2023, at 247, and it is clear he has identified himself "as a judge" in several of his Facebook postings. ***See, e.g.,*** Board's Stipulated Exhibit 8, at 15, 31. Therefore, as there is no doubt that Respondent identified himself as a

[4] This observation is not made to imply that a judge who hides his identity as a judge on Facebook can escape liability under the Code for impropriety while using the social media platform. Indeed, ***Eakin*** stands for a contrary proposition. ***See, e.g., Eakin,*** 150 A.3d at 1058. Rather, assigned Board counsel notes this point to highlight that Respondent's conduct was both particularly tone-deaf and egregious due to the breath of his broadcasting of his views. ***See*** *infra*, at 30. Moreover, because Respondent's consciously and effectively made his Facebook posts to a broad swath of the public, any concerns about any privacy he may have had are non-existent.

judge on his Facebook page and has continued to do so, it is also clear that he has infused his Facebook page and postings with the prestige of his office, regardless of his removal of the "robe" picture. ***Cf. Eakin***, 150 A.3d at 1057 (factors that link a judge's judicial status to conduct that may have been committed in "off bench" hours, such as the use of government computer equipment for private emails, renders conduct subject to sanction).

To any reasonable observer, the content of Respondent's Facebook posts either directly state or strongly imply Respondent's personal views (and expressions of support or opposition to) regarding a wide range of national and state policy matters, as well as directly state or strongly imply his views towards certain political figures elected through partisan elections in the executive and legislative branches of government at the national and state level. ***See*** N.T., Trial, 7/24/2023, at 127-131; 134-136; ***see also*** Board's Exhibit 8, at 3, 4, 5, 6; *and* Board's Exhibit 10. Respondent's personal views on these subjects and persons align with those of the Democratic Party or the broader notion of the "political left." ***See*** N.T., Trial, 7/24/2023, at 130-31; 134-136. In addition to setting forth his personal views on these matters, Respondent took his conduct a step further on the political spectrum and advocated for the passage of legislation regarding Democratically supported or "left"-supported public policy legislative initiatives in several postings. These were the 2021 Build Back Better Act, ***see*** Board Stipulated Exhibit 8, at 59-62; the 2022 Inflation Reduction Act, ***see*** Board Stipulated Exhibit 8, at 23, and the need for the raising of the minimum wage, ***see id.***, at 27; ***see also*** N.T., Trial, 7/24/2023, 303-305. Respondent also criticized legislative activity that took place in other states with predominantly Republican legislatures. ***See*** Board Stipulated Exhibit 8, at 19, 28

(regarding "book banning" legislation); ***see also*** N.T., Trial, 7/24/2023, at 135-136. Thus, Respondent's Facebook postings espousing and broadcasting the aforementioned positions were, themselves, partisan political activity. ***See*** N.T., Trial, 7/24/2023, 127-130; ***see also*** Board's Exhibit 10.

Respondent himself testified that he wanted to engage discussion with his Facebook posts, which he views as a "positive good," so as to enable himself to learn as well as offer others the opportunity to learn from his posts. ***See id.***, at 249. Respondent's own Facebook posts and the reaction of others to his posts admittedly made him "feel good." ***Id.***, at 290, 310-311. Further, Respondent acknowledged that when he announced his judgment on an issue in a post that it was his intention and desire that his followers on Facebook will discuss his judgment and take it into account. ***See***, N.T., Trial, 7/24/2023, at 307-308. Similarly, Respondent acknowledged that at least two present-day politicians he discussed positively in his posts have an "interest," or at least a preference, in maintaining their offices, *i.e.*, President Joe Biden and Governor Josh Shapiro. ***Id.***, at 284-285, 306-307. Respondent's intentions about his Facebook postings and their content must be viewed in concert with his acknowledgement in his "life events" section of his Facebook page that he served previously as both a Democratic state legislator and participant in prior Democratic National Committee party conventions, ***see*** Board Exhibit 5, N.T. Deposition, 7/19/2022, at 74-76, and his embedded references to his service as a state legislator in his Facebook postings (which included discussion of legislation that he championed as a legislator). ***See*** Board's Stipulated Exhibit 8, at 21, 27.

The confluence of these facts, at the very least, leads inescapably to the conclusion that the Board has established by clear and convincing evidence that, in addition to imbuing his Facebook page with his judicial status and its concomitant prestige, ***see*** *supra*, at 27-28, Respondent has advanced both his own interests, *i.e.*, broadcasting his political views, learning and teaching, and feeling good about the posts and feeling good about others' reactions to his posts, and has advanced the interests of those partisan political figures, the political organization (the Democratic Party), and the causes he advocated for in his posts. Clearly, both the Democratic Party and its constituent politicians have significant political interests to be advanced by word-of-mouth and by all media, including Facebook. For example, as explained by Dr. Merrill, in today's age, Facebook has become an important venue for politicians campaigning for office because they can share content on social media that might not be accessible otherwise through traditional media outlets. ***See***, N.T., Trial, 7/24/2023, at 121-122. This is because the use of social media has affected political communication in the United States by providing expanded access to information and a much wider audience to the political actor using a social media platform, such as Facebook. ***Id.***, at 121-122. Moreover, it is clear that public speech and advocacy for policy positions are the traditional means by which political parties and politicians win elections. Accordingly, Respondent's Facebook postings, made under the rubric of judicial authority with which he is cloaked at all times (which is, in fact, restated on his Facebook page), violated Canon 1, Rule 1.3 because they abuse the prestige of his office to advance his own personal and political interests and the personal and political interests of others.

Respondent attempts to sidestep this finding by claiming that the Board is not utilizing the word "interest" in a way that has any real meaning. ***See*** N.T., Trial, 7/24/2023, at 306. This argument is a solipsism. Because the word "interest" is not defined in the terminology section of the Code, this Court must give the word "interest" in Canon 1, Rule 1.3 its plain, ordinary meaning. ***See, e.g.,*** 1 Pa.C.S.A. § 1903(a). In so doing, this Court may resort to the dictionary definition of the undefined term and can draw upon common sense and basic human experience. ***See, e.g., Sabatini v. Zoning Hearing Board of Fayette County***, 230 A.3d 514, 520-521 (Pa.Cmnwlth. 2020). The *Merriam-Webster Online Dictionary* defines "interest," a noun, as follows: (1) a: a feeling that accompanies or causes attention to something or someone: CONCERN; b: something or someone that arouses such attention; c: a quality in a thing or person arousing interest; (2) ADVANTAGE, BENEFIT *also*: SELF-INTEREST; (3) a: a charge for borrowed money[,] generally a percentage of the amount borrowed; b: the profit in goods or money that is made on invested capital; c: an excess above what is due or expected; (4) a (1) right, title, or legal share in something; (2) participation in advantage and responsibility; b: BUSINESS COMPANY; (5) SPECIAL INTEREST.

Obviously, the Supreme Court's use of the words "personal" and "economic" as qualifiers to the word "interest" in Canon 1, Rule 1.3 indicate its intent that the word "interest" should be used to its broadest extent, *i.e.*, to mean both a personal "advantage or benefit" (emphasis added) to a judge or others as well as the business and legal meanings of the word that are associated with making money and holding title in property. Consequently, the personal advantages or benefits accruing to a judge (including "feeling good" about their posts and the reaction to them by others)

or to others, like partisan politicians and political organizations (who require public goodwill to succeed in political activity) stemming from a judge broadcasting their partisan political views on these subjects, persons, and organizations on Facebook constitute "personal interests" held by the judge or others within the meaning of Canon 1, Rule 1.3. As such, Respondent's argument fails.

Given the aforementioned facts, it is also clear that Respondent's posts violate Canon 1, Rule 1.2. Canon 1, Rule 1.2 commands a judge to act at all times in in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and to avoid impropriety and the appearance of impropriety. The term "impropriety" is defined in the terminology section of the Code as follows: "Includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's independence, integrity, or impartiality." The term "appearance of impropriety" is defined by Comment 5 to Canon 1, Rule 1.2 as follows: "[The] conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge." Respondent's Facebook postings violated Canon 1, Rule 1.2 in the following ways: (1) by failing to promote public confidence in the independence and integrity of the judiciary; and (2) by creating the perception that he engaged in conduct that violated the Code.

To explain, the Facebook postings made by Respondent regarding the aforementioned persons or subjects undermine both his independence and impartiality because the effect or, at least, the perceived effect, of his partisan political posts (as well as the other contents of his page delineating his past political

affiliations) is to surrender the independence of the judiciary as the third branch of government to his own partisan political interests and the interests of the persons and organizations he supported through his posts. Obviously, one of the most important elements of proper judicial conduct is to remain independent and free of partisan political influence and to remain above the rough-and-tumble fray of partisan political activity that is part and parcel of the legislative and executive branches of government, an environment Respondent is familiar with from his previous career. ***See, e.g., Stilp v. Commonwealth***, 905 A.2d 918, 940 (Pa. 2006), *quoting* ***U.S. v. Will***, 449 U.S. 200, 217-218 (U.S. 1980) ("A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government."). This is stated explicitly in comment 3 to Canon 4, Rule 4.1, which provides "[p]ublic confidence in the independence and impartiality of the judiciary is eroded if judges...are *perceived* to be subject to political influence." (emphasis added). Perhaps this is why, in drafting the Code, our Supreme Court took great pains in the Code to establish what is *permissible* political activity for judges during their own efforts to be elected or re-elected and what is not - for example, endorsing non-judicial candidates. ***See, e.g.,*** Canon 4, Rule 4.1(A)(3) and 4.2(B)(3).

Here, a global view of Respondent's postings indicates that he marches in philosophical lockstep with the Democratic Party on a variety of matters, that he shares his opinions of same with thousands of his Facebook friends and followers, and that he actively and openly supports Democratic political figures and legislation favored by the Democratic Party that has nothing to do with the advancement of the law or the legal system, *i.e.*, the unsuccessful Build Back Better bill, the Inflation

Reduction Act, and the raising of the minimum wage. These facts demonstrate that Respondent does not display the public face of independence or impartiality expected of a judicial officer. Rather, the conduct proven at trial shows, in exchange for the positivity and satisfaction from the act of posting, Respondent was willing to cast off the independence and impartiality expected of a judge and to return to the partisan fray in which he suffused himself (and, in some respects, misses) for some 42 years prior to being a judge or, at least, give the appearance of having done so. While Respondent's partisan political musings on Facebook and his motivations therefore are not morally reprehensible of themselves, in terms of independence and integrity, more - much more - is expected of one who holds judicial office than what was shown at trial. This conduct both fails to promote public confidence in and undermines the independence and integrity of the judiciary. Consequently, Respondent's Facebook posts violate Canon 1, Rule 1.2.

Respondent also claims that, because he does not adjudicate the subjects discussed in his Facebook posts and because the people mentioned in his posts are not litigants before him, then the Board's charges are without merit. In other words, Respondent claims that his posts do not affect his impartiality or its perception by others. This claim is simply incorrect. Judge Murphy's testimony elucidates that the types of cases that confront a family judge in their daily work touches on and intersect with many different issues in today's society, including, for example, the "gun debate," which was a topic of some of Respondent's Facebook postings that led to his September 29, 2021 meeting with Judge Murphy and President Judge Fox. ***See, e.g.,*** N.T., Trial, 7/24/2023, at 43-44. Further, matters involving organized labor contracts, also a topic of Respondent's postings, are certainly a subject adjudicated

in Philadelphia County civil court and, in particular, benefits provided to workers may impact decisions regarding those persons in Family Court, where Respondent now sits. Likewise, student loan debt, another topic of Respondent's postings, like all debt, and the question of who is to pay the debt, certainly arises as an issue in Family Court. Thus, it cannot be denied that some of the issues that Respondent has weighed upon in his Facebook posting commentary touch on and intersect with his duties as a Family Court judge and a judge in the City of Philadelphia generally. Therefore, it also cannot be denied that one who observes Respondent's posts and holds contrary political views may feel that they would not get a "fair shake" in Judge Cohen's courtroom. Indeed, this was the entire danger that Judge Murphy sought to avoid by reporting the matter to the Board in the first place. Accordingly, the perception of Respondent's impartiality could reasonably be questioned in court as a result of his postings, and, therefore, his argument fails.

In addition to Respondent's blatant political posts there is evidence that Respondent's Facebook postings also create the *perception* that he violated the Code in that the conduct appeared to endorse political candidates in violation of Canon 4, Rule 4.1(A)(3). This is because Respondent's posts regarding present day political figures of the legislative and executive branches of government (who were elected in partisan elections or appointed by persons so elected) were, without doubt, expressions of his judgments of approval or disapproval of their official actions, political philosophies, ***see, e.g.,*** N.T., Trial, 7/24/2023, at 304, and their personal characteristics, or constituted criticisms or attacks upon their detractors. Thus, the postings fit the simple definition of the term "endorse," which, in a political context means simply to "approve openly <endorse an idea>, especially to express support

or approval of publicly and definitely <endorse a mayoral candidate>;" or "oppose," which in this context means "to place opposite or against something <oppose the enemy>; <oppose a congressional bill>; or to "offer resistance to." **See** *Merriam-Webster Online Dictionary*.

Curiously, however, most of the postings Respondent made about these political figures were about already-elected officials, like President Biden, newly-elected candidates, like Governor Josh Shapiro, or were partisan political figures of past times now deceased, like Senator Eugene McCarthy or the Reverend Billy Graham, not candidates then actively running for office or for re-election. In only one instance did Respondent make a supportive posting about a then-candidate, i.e., former Representative Liz Cheney during her doomed re-election campaign, which was a criticism of her detractors in the media. ***See*** Board Stipulated Exhibit 8, at 15 (criticizing "hit job" against Liz Cheney, then a candidate for re-election). This distinction, in the Board's view, rendered a Rule 4.1(A)(3) violation to lie only regarding the Liz Cheney post. This is why the Board charged Respondent with only one violation of Canon 4, Rule 4.1(A)(3).[5] However, while, as a technical matter, a violation of the "candidate endorsement" clause of Canon 4, Rule 4.1(A)(3) would

[5] At trial, assigned Board counsel misspoke by stating that former Representative Cheyney was not a candidate for office at the time Respondent made his post about her to Facebook in August 2022. ***See*** N.T., Trial, 7/24/2023, at 223-224. In fact, former Representative Cheyney was, at the time, a candidate for re-election and lost. This is an indisputable fact, of which this Court may take judicial notice. ***See In the Interest of D.S.***, 622 A.2d 954, 957 (Pa. Super. 1993). Moreover, Respondent's post indicates that former Representative Cheney was a candidate at the time. ***See*** Board Stipulated Exhibit 8, at 15 ("As a judge, I am not permitted to endorse or otherwise back any candidate for anything."). In any event, as noted *infra*, Respondent's open support of former Representative Cheyney creates the perception that he endorsed her, whether or not she was a candidate at the time, like the other partisan political figures he supported in his posts who were not technically candidates at the time of the postings.

not lie regarding most of Respondent's posts about partisan political figures, his commentary regarding these partisan political figures would create the *perception* that Respondent is endorsing or opposing their efforts to hold or retain office. This is especially true now, as some of those persons, like President Biden, are presently candidates for re-election, and Respondent has not deleted any of the posts he made about these persons previously. ***See, e.g.,*** N.T., Trial, 7/24/2023, at 297-302. These posts, in fact, create an endorsement of these political figures (and others named in his posts) his Facebook page, in perpetuity.

In addition, it would seem that the Board should have charged Respondent with a violation of Canon 2, Rule 2.10(A), not Rule 1.2, for his posts regarding the DePape and Marks matters. ***See*** Board Stipulated Exhibit 8, at 1-2, 31. However, upon review, assigned Board counsel felt the proper course was to charge Respondent with a violation of Canon 1, Rule 1.2 for these Facebook posts. To explain, Canon 2, Rule 2.10(A) states that

> [a] judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

Without apparent regard for the fact that it would be a future court case, Respondent posted two items to Facebook concerning the attack on Paul Pelosi, husband of former Speaker of the House Nancy Pelosi (D-CA), on October 28 and 29, 2022. On October 28, 2022, Respondent posted "David DePape, 42, accused attempted murderer of Paul and Nancy Pelosi, apparently made hateful, bigoted posts against LGBTQ people, Jews, the January 6 Committee, and other right-wing targets. Why am I not surprised?" The following day, Respondent posted "David DePape,

captured Pelosi assailant, continues to gain notoriety as more and more of his extremist posts come to light. It is clear that he is a failed and hateful man capable of many awful things." ***See*** Board Stipulated Exhibit 8, at 1-2.

As to the Bruce Marks matter, on July 26, 2022, Respondent posted a "news report" that stated "NYT: Former Philadelphians Bruce Marks and Mike Roman were key players in alternate elector scheme. At least the poor records of Philly sports teams did not disqualify them. Marks is stepping up to defend his role, citing Hawaii in 1960." ***See*** Board Stipulated Exhibit 8, at 31. This posting led to Bruce Marks (Marks), who is a Facebook friend of Respondent and was a subject of the article, engaging Respondent in a discussion about the article, the January 6 committee, and the propriety of the January 6 congressional inquiry, which led other Facebook friends of Respondent to accuse Marks of criminal and ethical misconduct. ***Id***. Respondent did not delete the post, in fact, he engaged in the conversation. After thanking one of Marks' accusers (Marc Stier) for "participating in the discussion" after he had accused Marks of criminal and ethical misconduct, Respondent attempted to bow out of the conversation by stating "And, as a judge I am limited in the degree to which I can comment on political actors, attorneys, or judges in court proceedings," but he did not distance himself from any of the accusations and insults hurled at Marks by his other Facebook friends in the exchange of posts. ***Id.*** As with the other Facebook posts charged against him, Respondent did not remove the post after the persons accused Marks of criminal and ethical misconduct nor did he distance himself from their accusations.

Board counsel concedes that a Rule 2.10(A) violation could not be made out in this case because it would be functionally impossible to demonstrate that

Respondent's Facebook postings about the assault on Paul Pelosi would "impair the fairness" of David DePape's criminal case in California, and, for this reason only, the Board did not charge Respondent with a violation of Rule 2.10(A). Likewise, the Marks post did not pertain any matter pending or impending in any court at that time. The technical limitations of Rule 2.10(A) therefore acted as a bar to prosecution under that Rule in this matter. However, as was the case with the matter of endorsements discussed above, the Board concludes that Respondent's Facebook postings about the DePape and Marks matters undermined the public's perception of Respondent's impartiality and fairness in other matters in Pennsylvania, and, thus, created the perception that he violated Rule 2.10(A). This is because, while Respondent's postings on the DePape and Marks matters may not meet the technical limitations of Rule 2.10(A), it is certainly reasonable that a viewer of his posts could conclude that both the media re-posted by Respondent and his own commentary on same could negatively affect his impartiality in similar cases that could appear before him due to the performative aspect and messaging contained in the posts. On this point, the authors of *Judicial Conduct and Ethics, 6th Ed.*, posit the following regarding judges commenting on public legal controversies in other jurisdictions on television:

> The problem is not only that a judge's statements concerning pending cases might influence outcomes in another state, although that possibility cannot be completely disregarded. The greater danger is that a judge's own work will be influenced (or appear to be influenced) by a desire to maintain the status of a televised expert. Will the networks want a tough-as-nails judge, a flamboyant judge, an innovative judge, a weeping and compassionate judge, or perhaps even a poetic judge? What in-court persona might the judge adopt (or appear to adopt) in order to maintain media visibility? No matter; the very concept of judging is distorted once judges actually become performers (as opposed to speakers or educators) for outside audiences. That is the threat to the integrity of the judiciary.

Id., at Section 9.06[5], 9-60, 9-61.

Stated more succinctly, the authors concluded that a judge commenting on television about cases out-of-jurisdiction constituted, at a minimum, the appearance of impropriety. This is because such commentary would raise, in reasonable minds, a perception that the commenting judge committed an actual violation of the Code because the judge's commentary alone would reflect adversely on the commenting judge's impartiality or temperament in future cases.

Such is also the case with Respondent, although his commentary comes through different media (Facebook) and takes a different form (typed postings) than televised commentary. Here, whether or not Respondent's conduct meets the technical requirements of a Rule 2.10(A) violation, in the course of the investigation and trial, Respondent admitted relishing being a commentator on Facebook and presenting his views to his Facebook friends and followers to generate discussion, and he testified that "people are generally very happy with [his] Facebook posts," ***see*** N.T., Trial, 7/24/2023, at 249, though, presumably, Attorney Marks is not among this number. Thus, the danger here, and the violation of Canon 1, Rule 1.2, comes from the potential that Respondent will want to remain consistent with the perception of the Facebook persona that he adopted and that this desire will affect his judicial decision making, which would invariably lead to a concern in cases touching on the same issues raised in the DePape and Marks cases (or worse, involving Marks as an advocate) that he would be less than impartial. Accordingly, Respondent violated Canon 1, Rule 1.2 by creating the perception that he violated Canon 4, Rule 4.1(A)(3) and Canon 2, Rule 2.10(A).

Respondent also violated Canon 3, Rule 3.1(c) and Rule 3.7. Rule 3.1(c) directs judges not to participate in extrajudicial activities that would reasonably

appear to undermine the judge's independence, integrity, or impartiality. Respondent's Facebook posts and the content of his page underscore Respondent's behavior as a "cheerleader" for the Democratic Party and its constituent partisan political figures. ***See*** *supra*, at 28-35. As a matter of course, such conduct lessens confidence in Respondent's independence, integrity, and impartiality. Thus, Respondent's failure to avoid that impropriety constitutes not only a violation of Canon 1, Rule 1.2, but also of Canon 3, Rule 3.1(C). ***Id.***

Canon 3, Rule 3.7(A) permits to write, lecture, teach, and speak on non-legal subjects and engage in the arts, sports, and other leisure activities, if such avocational activities do not detract from the dignity of their office or interfere with the performance of their judicial duties. This Court concluded "dignity" in a judicial context means "the presence of poise and self-respect in one's deportment to a degree that inspires respect." ***See In re Singletary***, 967 A.2d 1094, 1099 (Pa.Ct.Jud.Disc. 2008). Inasmuch as the entire judicial system of this Commonwealth expects and requires a judge to maintain their independence from influence or the appearance of influence by the partisan political branches of government, ***see, e.g., Stilp***, 905 A.2d at 940, any act by a judge that tends to erode that independence *ipso facto* impugns that judge's dignity because it casts that judge (and their office) into the lot of an ordinary politician, whose professional lives are an endless series of compromises and bargains with other politicians, as well as advertisements for their own political achievements and ends and for those of others. ***See, e.g., Williams-Yulee v. Florida Bar***, 575 U.S. 433, 437 (2015) (judges are not politicians, though they may reach the bench through the ballot box). The conduct of an ordinary politician stands in stark contrast to that of a judge, whose

purpose is to act as a neutral and contemplative arbiter of disputes, without fear or the expectation of favor. In this regard, it is indeed telling that, on two occasions, Respondent adverted to his own past legislative achievements in his Facebook posts. ***See*** Board Stipulated Exhibit 8, at 21, 27. Accordingly, because Respondent's Facebook postings were partisan political activity, ***see*** N.T., Trial, 7/24/2023, at 127-130, Respondent violated Canon 3, Rule 3.7(A) by making his Facebook postings.

Respondent's retort to this claim is that because his Facebook posts were "dignified" in the sense of not being offensive to the common person, they cannot violate Rule 3.7(A). The measure of "dignity" befitting a judicial officer is judged by the Code and by this Court, ***see Singletary***, 967 A.2d at 1099, not by a judge's own personal standards, whatever they may be, or by the yardstick of public approval or disapproval demonstrated by whatever means. ***Cf. In re LeFever***, ___ A.3d _____, 7 JD 2020 (magisterial district judge elected by popular vote after engaging in acts of misconduct as a candidate nonetheless found in violation of Rules following election to judicial office). Though some of Respondent's Facebook postings may be expressed in more elevated terms than common partisan political discourse in this country, they nonetheless constitute partisan political activity and fall beneath the dignity of the judicial office. ***Stilp***, 905 A.2d at 940.

Respondent also attempts to shirk all responsibility and defeat this entire prosecution by claiming that one lone phrase in Comment 9 to Canon 4, Rule 4.1 of the Code of Judicial Conduct authorized him to state his views on contested political issues and, as such, his Facebook posts were proper and permissible under the Code. This argument is nonsensical from both the standpoint of basic precepts of rule construction and from the substantive content of the Code.

Comment 9 to Canon 4, Rule 4.1 states the following:

> The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine whether the candidate for judicial office has specifically undertaken to reach a particular result. **Pledges, promises, or commitments must be contrasted with statements or announcements of personal views on legal, political, or other issues, which are not prohibited**. When making such statements, a judge should acknowledge the overarching judicial obligation to apply and uphold the law, without regard to his or her personal views.

(emphasis added).

First, as this Court recognized in ***In re Miller***, 759 A.2d 455, 459 (Pa.Ct.Jud.Disc. 2000), "nothing in a 'Comment' can change what is clearly stated in the text of a statute, rule, or canon." As was observed in ***Miller***, to apply Comment 9 to Rule 4.1 to undercut what is actually prohibited in the Canons and Rules, such as engaging in conduct that undermines a judge's independence, integrity, and impartiality (Canon 1, Rule 1.2) or that abuses the prestige of the judicial office to advance a judge's personal interests (Canon 1, Rule 1.3), or that constitutes engaging in <u>any</u> political activity on behalf of a political organization or candidate for public office (Canon 4, Rule 4.1(A)(11) (emphasis added) would result in the "concomitant divestiture of any meaning of the words of [Article V, § 17(b)] of the Constitution [which references the Canons adopted by the Supreme Court and their governance of judicial conduct], which would contravene basic canons of statutory construction." ***Id.***, 759 A.2d at 460 (bracketed language supplied.). If it was our Supreme Court's intention to craft such an encompassing exclusion as Respondent now advances, it would have put same in the text of the Canons or Rules themselves, not in a comment. ***Id.*** Thus, Respondent's argument fails for this reason.

Leaving aside the intricacies of statutory construction, the Rule referenced in Comment 9 is plainly Canon 4, Rule 4.1(A)(12) (prohibiting electoral pledges, promises, or commitments in connection with cases, controversies or issues that are likely to come before the court that are inconsistent with the impartial exercise of adjudicative duties of judicial office), for which Respondent was not charged by the Board. Practically speaking, this Code provision governs judges and judicial officers who are engaged in an election campaign and who, as a result, benefit from the "window period" permitting certain electoral political conduct by judges that is set forth at Canon 4, Rule 4.2. It is recognized, however, that the terms of the Rule 4.1(A)(12) are broad enough to encompass all judges at all times, and the reason for this is that an essentially identical Code provision for non-campaign conduct exists at Rule 2.10(B) (regarding public comment by sitting judges on pending cases). ***See, e.g.,*** Canon 4, Rule 4.1, comment at 7, 8. Comments 7 and 8 to Rule 4.1(A)(12), overlooked by Respondent in his argument, make it clear that the purpose of Rule 4.12(A)(12) is (1) to differentiate the role of a judge from a legislator or executive branch official, even when the judge is subject to public election and to narrowly draft restrictions on political campaign activities of judicial candidates (who are non-judges) consistent with the Code's other provisions; and (2) to make applicable to both judges and judicial candidates the prohibition on pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office set forth at Rule 2.10(B). Accordingly, because Respondent was not charged with a violation of Rule 4.1(A)(12) because he did not make a "pledge or promise" to anyone in his Facebook posts, his argument is textually unsupported regarding the present circumstance and, therefore, fails.

Finally, and most importantly, Respondent's argument overlooks the interplay of the provisions of the Code that *prohibit* certain political conduct by sitting judges, *i.e.*, Rule 4.1(A)(3) (prohibition on publicly endorsing or publicly opposing a candidate for any public office) and 4.1(A)(11) (prohibition on engaging in any political activity on behalf of a political organization or candidate for public office except on measures to improve the law, the legal system, or the administration of justice), and those that *permit* certain political conduct during judicial elections which are nonetheless subject to a judge's overarching responsibilities under Canon 1, Rule 1.2 (avoid impropriety and the appearance of impropriety) and under Canon 1, Rule 1.3 (avoid abusing the prestige of his judicial office to advance the interests of others). ***See*** Canon 4, Rule 4.1 *comment* at 4 (referencing Canon 1, Rule 1.3); ***see also*** Canon 4, Rule 4.2(A)(1) (a judicial candidate in a public election ***shall...act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary***.) (emphasis added). Of course, Respondent is charged with violating Canon 1, Rules 1.2 and 1.3, and Canon 4, Rules 4.1(A)(3) and 4.1(A)(11), not Rule 4.1(A)(12). Construed together, these rules indicate that sitting judges are generally prohibited from engaging in any political activity. However, even when permitted to engage in political activity by the Code, judges (and judicial candidates) must not do anything that would undermine the independence, integrity, and impartiality of the judiciary such as, for example, endorse non-judicial candidates for political office. ***Compare,*** Canon 4, Rule 4.1(A)(3) ***with*** Canon 4, Rule 4.2(B)(3). Here, Judge Cohen's Facebook conduct is not shielded by any of the Rules regarding judicial campaigns because he was not a candidate when he made the Facebook posts in question. Moreover, Judge Cohen's conduct of being a "cheerleader" for partisan

political figures of the Democratic party who occupy offices in the legislative and executive branches of government would be prohibited by the Code, *even if he was a candidate*. ***Id.*** (emphasis added). As such, Respondent's attempt to use comment 9 to Rule 4.1, applicable to Rule 4.1(A)(12), as some sort of a shield to accusations that he violated other Rules (which Rule 4.1 subsumes into itself for purposes of its own application) is sophistry in its purest form. Consequently, Respondent's argument fails.

Canon 4, Rule 4.1(A)(3) and Rule 4.1(A)(11). Political and Campaign Activities of Judges and Judicial Candidates in General.

> **Except as permitted by Rules 4.2, 4.3, and 4.4, a judge or judicial candidate shall not...(3) publicly endorse or publicly oppose a candidate for any public office; [and] (11) engage in any political activity on behalf of a political organization or candidate for public office except on behalf of measures to improve the law, the legal system, or the administration of justice[.]**

First, on this subject, it must be noted that Respondent was not a candidate for retention or for higher judicial office at the time that he made the Facebook postings at Board Stipulated Exhibit 8. ***See***, N.T., Trial, 7/24/2023, at 67-68. Accordingly, the exceptions set forth in Canon 4, Rule 4.2 (regarding political and campaign activities of judicial candidates), Rule 4.3 (regarding candidates for appointive judicial office), and Rule 4.4 (regarding judicial campaign committees) do not shield Respondent from the consequences of his Facebook postings.

As noted above, former Representative Liz Cheney was a candidate for re-election at the time that Respondent posted his criticism of her detractors. ***See*** Board Stipulated Exhibit 8, at 15; ***see also*** *supra*, at note 5. Criticizing a candidate's detractors is, effectively, an endorsement of the candidate, which Respondent himself recognizes in his commentary made after the post ("As a judge, I am not permitted

to endorse or otherwise back any candidate for anything. But I strongly disbelieve that good works by anyone should subject them to harsh criticism while those who do far fewer good things remain totally ignored."). ***See*** Board Stipulated Exhibit 8, at 15. Respondent's attempt to disclaim this endorsement is a *non-sequitur*.

In layman's terms, Respondent said, "While I can't endorse or back any candidate, I'm going to criticize this candidate's media detractor because this candidate did a good thing." The reason for this is apparent from the context of the post - Respondent knew that his initial post could be taken to mean that he was endorsing former Representative Cheney, and, as such, he awkwardly attempted to have it both ways by endorsing her and disclaiming the endorsement at the same time. Though Respondent's language facially illogical, the point remains the same – he "express[ed] support or approval of" then-Representative Cheney, who was then a candidate, "publicly and definitely.[6]" Accordingly, Respondent violated Canon 4, Rule 4.1(A)(3) by his post about former Representative Cheney.

Turning to Canon 4, Rule 4.1(A)(11), it is also clear that Respondent's Facebook conduct runs afoul of this Rule. judges from engaging in "any political activity on behalf of a political organization or candidate for public office." (emphasis added). The term "political activity" should be read in the Rule to encompass its broadest meaning, which would necessarily include Respondent's partisan political Facebook postings. ***See*** N.T., Trial, 7/24/2023, at 127-130; 133-136. Social media has, in effect, become the "public square" of the modern age, where political debates

[6] Additionally, Respondent's general "disclaimer" at the forefront of his Facebook page that all of the views shared are his own provides no shield for his violations of the Code. As implied by the disclaimer itself, a judge is a judge at all times, and it is precisely because Respondent shared his political views in the manner that he did on his Facebook page that has led to these charges.

and movements find their beginnings and endings. ***See*** N.T., Trial, 7/24/2023, at 123-124. Indeed, it can hardly be argued that social media has not taken an outsized level of importance in political matters over the last ten years. Obviously, the Democratic Party, the beneficiary of the majority of Respondent's postings, is a "political organization" under the definition of that term in the Code of Judicial Conduct, even if its constituent political figures that were the subject of Respondent's posts may not have been "candidates" at the time of Respondent's postings. Further, as Dr. Merrill testified, those constituent political figures and the Democratic Party itself benefitted from being the subject of Respondent's Facebook posts because the body of political science research on the subject demonstrates that such posting can sway people to think a certain way and to engage in action consistent with the post. ***See id.***, at 161-163.

The danger to be avoided by Rule 4.1(A)(11) is judges being seen as spokespeople for political organizations like the Democratic Party and, thereby, infuse the prestige of their office into the political organization's interests such that the judiciary's status as an independent branch of government erodes. ***Compare*** Canon 4, *comment* 4 ("Paragraphs (A)(2) and A(3) prohibit judges from making speeches on behalf of political organizations or publicly endorsing or opposing candidates for public office, respectively to prevent them from abusing the prestige of judicial office to advance the interests of others."). Though the language of this comment refers to Rule 4.1(A)(2) and (A)(3), it is equally applicable to the broader prohibition in Rule 4.1(A)(11), which uses largely identical operative language as Rule 4.1(A)(3). This is no doubt why the drafters of the Code set forth a "carveout" allowing judges to engage in political activity for the purpose of "measures to improve the law, the legal

system, or the administration of justice," because, in such a case, the judge is not advancing his or the organization's own interests, but the judicial system's interests, thus preserving the judiciary's independence while bettering its operation through policy initiatives.

However, here, Respondent, by his own admission, was not acting to "improve the law, the legal system, or the administration of justice." Instead, he was making positive judgments of the behavior of certain politicians of the Democratic Party, like President Joe Biden, and supporting federal economic legislation advanced by the Democratic Party. ***See*** N.T., Trial, 7/24/2023, at 303-305. Respondent's other posts obviously advocated for or promoted causes and politicians endorsed by the Democratic Party. ***Id.***, at 127-130; 133-136. Finally, while assigned Board counsel concedes that Respondent was not acting as an official agent of the Democratic Party when he made the posts that benefitted it, Rule 4.1(A)(11), like Canon 1, Rule 1.3, focuses on the judge's conduct and not whether the conduct was officially sanctioned by a political organization or any other organization or person. This is as it should be, otherwise, a judge could escape sanction for lending the prestige of their office based on whether or not their "assistance" was requested by the receiving party. This would improperly shift the focus of the prohibition to someone other than the offending judge's conduct.

Therefore, in summary, Respondent violated Canon 4, Rule 4.1(A)(11) (as well as Canon 1, Rule 1.3) because he consistently posted his positions on Facebook that either advocated for or were sympathetic to causes embraced by the Democratic Party and advocate for or are supportive of its constituent politicians. As discussed above, Respondent imbued his Facebook page with the prestige afforded to his

judicial office and, as a result, he did so for the views he advanced thereon. While cloaked in that prestige, Respondent advanced the interests of the Democratic Party writ large and the present-day political figures of that party his posts. ***See, e.g.,*** N.T., Trial, 7/24/2023, at 161-162. This demonstrates that Respondent violated Canon 4, Rule 4.1(A)(11) by his Facebook posts.

Canon 1, Rule 1.1 Compliance with the Law.

> **A judge shall comply with the law, including the Code of Judicial Conduct.**

Article V, §17(b), Pa. Const.

> **Justices and judges shall not engage in any activity prohibited by law and shall not violate any canon of legal or judicial ethics prescribed by the Supreme Court.**

Both Canon 1, Rule 1.1 and Article V, § 17(b) of the Pennsylvania Constitution constitute automatic, derivative violations of the previously-discussed violations of the Code by Respondent. Because Respondent violated Canon 1, Rules 1.2 and 1.3, Canon 3, Rules 3.1(C) and 3.7(A), and Canon 4, Rule 4.1(A)(3) and Rule 4.1(A)(11), he has also violated Canon 1, Rule 1.1 and Article V, § 17(b).[7] The Board's analysis does not end here, however.

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[7] Respondent also presented stipulated character testimony indicating that he had a reputation for peacefulness and law-abidingness in his community. ***See*** N.T., Trial, 7/24/2023, at 233-239. Assigned Board counsel acknowledges Respondent's reputation for such but disputes that it has any relevance in this case. To explain, the conduct charged against Respondent here is legal for all non-judge citizens and, indeed, is common conduct for partisan political figures. Inasmuch as several of Respondent's character witnesses were culled from the individuals he knew from his days as a legislator, *i.e.*, a partisan political actor, it is submitted that they would necessarily have no dispute with the propriety of Respondent's conduct, regardless of the dictates of the Code of Judicial Conduct. Further, the character testimony of Respondent's sister and his current judicial employee is also of limited relevance, as Respondent was not charged with conduct that breached the peace or violated the law applicable to all citizens.

In addition to his other defenses, Respondent also contends that his Facebook posts were permissible under the First Amendment to the United States Constitution and Article I, §7 of the Pennsylvania Constitution.

IV. The Code of Judicial Conduct *vis-à-vis* the First Amendment to the United States Constitution and Article I, § 7 of the Pennsylvania Constitution:

i. The Nature of Respondent's Challenge and Standard to Be Applied:

A law (here a series of Canons and Rules) is presumed to be constitutional and may only be found to be unconstitutional if the party challenging same, here, Respondent, can prove that it "clearly, palpably, and plainly" violates the Constitution. ***See Nixon v. Commonwealth, et al***, 839 A.2d 277, 286 (Pa. 2003). In so doing, a court may not substitute its judgment for the body that promulgated the law (or Rule), but rather is limited to examining the connections between the policy adopted and the law. ***Id.*** This is especially true here, as the Code, its Canons and their concomitant Rules were promulgated by our Supreme Court, in which is reposed the "supreme judicial power" of the Commonwealth and which exercises "general supervisory and administrative authority" over all inferior tribunals. ***See e.g., In re Bruno***, 101 A.2d 635, 651 (Pa. 2014).

Respondent asserts that his Facebook postings were permissible under the First Amendment by expounding upon what they were not, *i.e.*, "his posts and comments do not support or recommend any political candidate. His posts do not endorse any political candidate or party. His posts do not discuss matters that would come before his Court. His posts consist of many informed and knowledgeable comments on state, national[,] and international affairs." ***See*** Respondent's omnibus motion, 3/9/2023, at 2, ¶ 1. Therefore, by explaining what his conduct is not, Respondent impliedly concedes that there are circumstances that the Code, as

written, properly governs the speech and expressive conduct of the Commonwealth's judges in some factual circumstances, but, in his case, the Board improperly applied the Code to charge him in this Court. Respondent does not claim that the Code's prohibitions on certain types of judicial speech or expression are unconstitutional in all respects. Consequently, Respondent's First Amendment/Article I, § 7 claim is an "as applied" challenge to the Board's application of the Code in his case. ***See, e.g., Commonwealth v. Muhammad***, 241 A.3d 1149, 1155 (Pa. Super. 2020) (discussing distinction between a "facial" constitutional challenge, which claims that a law is unconstitutional based on its text alone, unmoored from factual circumstance of a case, and an "as applied" constitutional challenge, which claims that the application of a facially-valid law to a particular person under particular circumstances deprives person of a constitutional right) (citations omitted). However, to the extent that Respondent's claims regarding his First Amendment/Article I, § 7 rights can be perceived as a "facial" challenge to the Code, and out of necessity to achieve some identifiable standard for these cases, the Board offers the following analysis for this matter of first impression.

This case admittedly presents a crossroads for Pennsylvania judicial discipline jurisprudence. On one hand, it is clear that a prohibition in the Code on certain types of judicial speech and expressive conduct could be considered by this Court to constitute a prohibition on the content of Respondent's speech, which, as to the average citizen, would be subject to a "strict scrutiny" constitutional analysis. ***See James v. SEPTA***, 477 A.2d 1302, 1306 (Pa. 1984). This test requires the government to establish that the challenged law or regulation addresses "a compelling state interest" and that the law is "narrowly tailored to effectuate that

interest." ***See Hiller v. Fausey***, 904 A.2d 875, 885-886 (Pa. 2006). Thus, as it has been remarked, the "strict scrutiny" test leaves few survivors in its wake. ***See City of Los Angeles v. Alameda Books, Inc.***, 535 U.S. 425, 455 (2002); ***see also Reed v. Town of Gilbert, Ariz.***, 576 U.S. 155, 165 (2015) ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus towards the ideas contained' in the regulated speech.").

Importantly, no state court having direct precedential authority over the issue of a sitting judge's speech *vis-à-vis* the Pennsylvania Code of Judicial Conduct has addressed the issue of judicial speech or expressive conduct by applying the strict scrutiny standard, and this Court has not previously expounded its views upon the issue, though, to be sure, prior cases in this Court have touched upon a judge's non-criminal speech or expressive conduct. ***See, e.g., In re Eakin***, 150 A.3d at 1055-57 (former Pennsylvania Supreme Court justice found in violation of former Canon 2(A) for emails exchanged among his associates privately using government-supplied computer equipment that raised the appearance of impropriety). In the federal courts having authority over or influence upon this Commonwealth's jurisprudence, a review of the case law demonstrates a somewhat uneven approach to the Code and the First Amendment.

The United States Supreme Court has only considered the interplay of the Code of Judicial Conduct and the First Amendment on two occasions. First, the Court considered the applicability of Minnesota's version of the former Canon 7 prohibition on a judicial candidate "announc[ing their] views on disputed legal or political issues," and, applying strict scrutiny, found the clause to be unconstitutional as a violation of

the First Amendment. ***Republican Party of Minnesota v. White***, 536 U.S. 765, 775, 787 (2002). In ***White***, the parties agreed that strict scrutiny applied. ***Id.***, at 774. Conversely, in ***Williams-Yulee v. Florida Bar***, 575 U.S. 433 (2015), the Court, also applying strict scrutiny by citing to ***White***, ***see id.,*** at 443, *upheld* Florida's version of the prohibition on personal solicitation of campaign funds by a judicial candidate, which is codified in Pennsylvania at Canon 4, Rule 4.1(A)(7). ***See Williams-Yulee***, 575 U.S. at 457. However, ***White*** and ***Williams-Yulee*** involved judicial candidates, *i.e.*, private citizens using the political process to become a judge, not sitting judges, like Respondent.

Parenthetically, prior to the U.S. Supreme Court's decision in ***White***, the Third Circuit also addressed whether judicial candidates could be barred under prior iterations of the Code from "announcing their views on disputed legal or political issues" and personally soliciting campaign funds. ***Stretton v. Disciplinary Bd. Of Supreme Court of Pennsylvania***, 944 F.2d 137 (1991)[8], and found, subject to a narrow construction of the "announce" clause by the then-chief counsel of both the

[8] Interestingly, this decision arose from a federal suit instituted by Attorney Stretton, then a candidate for judge of Chester County, against the Disciplinary Board and the then-extant Judicial Inquiry and Review Board, the Board's predecessor. ***Stretton***, 944 F.2d at 138-139. Attorney Stretton sought an injunction from the federal court against enforcement of Canon 7(B)(1)(c) of the then-extant Pennsylvania Code, which, in pertinent part, then forbade judicial candidates "mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announc[ing their] views on disputed legal or political issues; or misrepresent[ing their] identity, qualifications, present position, or other fact[,]" and Canon 7(B)(2), which prohibited judicial candidates from personally soliciting campaign funds. ***Id.*** The federal district court enjoined enforcement of the "announce" clause, but it permitted enforcement of the "personal solicitation clause." ***Id.*** On review, the Third Circuit reversed the district court as to the enjoinment of the enforcement of the "announce" clause but affirmed as to the decision regarding the "solicitation" clause. ***Id.***, at 144, 146. No doubt Respondent's current absolutist view that he can talk about any issue not currently before him is informed, albeit, in the Board's view, wrongly, by ***Stretton***.

Judicial Inquiry and Review Board (JIRB) and the Disciplinary Board, that the clauses passed constitutional muster and were enforceable. ***Id.***, at 144, 146. The precedential or persuasive value of ***Stretton*** post-***White*** is dubious. However, post-***White***, the Eastern District of Pennsylvania considered whether the then-extant prohibition on a judicial candidate making "pledges, promises, or commitments of conduct in office other than the faithful and impartial performance of the duties of office," ***see*** former Canon 7(B)(1)(c), constituted a violation of the First Amendment. ***See Pennsylvania Family Institute, Inc. v. Celluci***, 521 F.Supp.2d 351, 355 (2007). As was the case in ***Stretton***, then-Board Chief Counsel Joseph A. Massa, Jr., attested that the Board construed the provision narrowly, *i.e.*, that it prevented judicial candidates from promising to rule in a particular way on an issue or case once elected, and that narrowing construction saved the Canon from an overbreadth challenge under the First Amendment. ***Celluci***, 521 F.Supp at 380-381.

As to the First Amendment's application to sitting judges, the Third Circuit considered whether a sitting judge in the U.S. Virgin Islands could be criminally punished with contempt for the content of an opinion which criticized a higher tribunal's order. ***See In re Kendall***, 712 F.3d 814, 826-27 (2013). Upon analysis, the Third Circuit found that the judge could not be prosecuted with criminal contempt for his speech in the opinion. ***Id.***

In other state courts, the question of a judge's speech and expressive content has been examined under the strict scrutiny standard, most pointedly in ***In the Matter of Raab***, 793 N.E. 2d 1287 (N.Y. 2003). In ***Raab***, the Court of Appeals of New York (its highest appellate tribunal) considered the First Amendment implications of disciplining a sitting judge for political activity. The New York

Commission on Judicial Conduct sanctioned Judge Ira Raab for, *inter alia*, taking part in a Working Families' Party "phone bank" on behalf of a legislative candidate; and attending a Working Families' Party candidate screening meeting and asking questions of prospective candidates for judicial and nonjudicial office. ***Id.***, at 1288, 1289. Judge Raab appealed, contending that, as to the charges regarding political conduct, his conduct was protected by the First Amendment, *i.e.*, that the rules in question were not sufficiently narrow in scope to serve a compelling state objective and would not withstand strict scrutiny under ***White***. ***Id.***, at 1290.

The Court of Appeals concluded that, even applying strict scrutiny, the challenged New York Rules[9] passed constitutional muster. Examining its version of the Code (which is similar to Pennsylvania's in that it provides a "window period" for political activity for a judge seeking re-election or election to higher office, ***see, e.g.,*** Canon 4, Rule 4.2), the Court held the following:

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[9] The challenged New York Rules were as follows: Neither a sitting judge nor a candidate for public election to judicial office shall directly or indirectly engage in any political activity except (i) as otherwise authorized by this section or by law, (ii) to vote and to identify himself or herself as a member of a political party, and (iii) on behalf of measures to improve the law, the legal system or the administration of justice. Prohibited political activity shall include:

* * *

(c) engaging in any partisan political activity, provided that nothing in this section shall prohibit a judge or candidate from participating in his or her own campaign for elective judicial office or shall restrict a non-judge holder of public office in the exercise of the functions of that office;
(d) participating in any political campaign for any office or permitting his or her name to be used in connection with any activity of a political organization;
(e) publicly endorsing or publicly opposing (other than by running against) another candidate for public office;
(f) making speeches on behalf of a political organization or another candidate;
(g) attending political gatherings;
(h) soliciting funds for, paying an assessment to, or making a contribution to a political organization or candidate.

Here, petitioner concedes that New York's interests are compelling but contends that the rules he violated are both underinclusive and overinclusive. He argues that the rules do not regulate all conduct that should be restricted to assure impartiality and unnecessarily bar particular political activities that, according to petitioner, are not indicative of bias or political corruption. We find petitioner's analysis unpersuasive because he fails to acknowledge that a number of competing interests are at stake, almost all of a constitutional magnitude. Not only must the State respect the First Amendment rights of judicial candidates and voters but also it must simultaneously ensure that the judicial system is fair and impartial for all litigants, free of the taint of political bias or corruption, or even the appearance of such bias or corruption. In our view, the rules at issue, when viewed in their totality, are narrowly drawn to achieve these goals.

Critically, the rules distinguish between conduct integral to a judicial candidate's own campaign and activity in support of other candidates or party objectives. [The Rules] establish what activity is permitted in a judicial campaign [and] describe the prohibited political conduct. Judicial candidates may participate in and contribute to their own campaigns during the "window period," beginning nine months before the primary election or nominating convention. Such participation may include attending political gatherings and speaking in support of their own campaigns, appearing in media advertisements and distributing promotional campaign materials supporting their campaign, and purchasing two tickets to and attending politically sponsored dinners and functions during the window period.

In contrast, the rules restrict ancillary political activity, such as participating in other candidates' campaigns (beyond appearing on a party's slate of candidates), publicly endorsing other candidates or publicly opposing any candidate other than an opponent for judicial office, making speeches on behalf of political organizations or other candidates, or making contributions to political organizations that support other candidates or general party objectives. [...]

The provisions allowing judicial candidates to engage in significant political activity in support of their own campaigns provide candidates a meaningful and realistic opportunity to fulfill their assigned role in the electoral process. Unlike other elected officials, however, judges do not serve particular constituencies but are sworn to apply the law impartially to any litigant appearing before the court. Once elected to the bench, a judge's role is significantly different from others who take part in the political process and, for this reason, conduct that would be appropriate in other types of campaigns is inappropriate in judicial elections. Precisely because the State has chosen election as one means of

> selecting judges, there is a heightened risk that the public, including litigants and the bar, might perceive judges as beholden to a particular political leader or party after they assume judicial duties. The political activity rules are carefully designed to alleviate this concern by limiting the degree of involvement of judicial candidates in political activities during the critical time frame when the public's attention is focused on their activities, without unduly burdening the candidates' ability to participate in their own campaigns.

Raab, 793 N.E. 2d at 1291-1293 (internal citations omitted; bracketed material supplied).

On the other hand, a number of other courts beyond Pennsylvania's borders have applied different, less strident constitutional standards to adjudicate First Amendment challenges brought by sitting judges to charges of Code violations levelled against them in disciplinary proceedings. These standards were first annunciated by the United States Supreme Court in in ***Pickering v. Board of Education***, 391 U.S. 563 (1968) and, thereafter, in ***Gentile v. State Bar of Nevada***, 501 U.S. 1030 (1991), though these matters originally involved a non-judge government employee, ***see generally Pickering***, and a private attorney. ***See generally Gentile***.

In ***Pickering***, the plaintiff, a teacher, sued his former school district employer for firing him on the grounds of a letter he sent to a newspaper regarding a tax increase that was critical of the school district, after losing in state court, he sought *certiorari* review in the United States Supreme Court. ***Id.***, at 564-565. The Supreme Court held that, while public employees have a First Amendment right to speak on matters of "public concern," the government, as employer, has interests in regulating the speech of its employees that differs significantly from those interests it has in connection with the regulation of the speech of citizens in general. ***Id.***, at 568. Thus, balancing the plaintiff's interest to speak on a matter of public concern, the tax

increase, versus the school's generalized interest in orderly school administration, the Supreme Court reversed. ***Id.***, at 574.

In subsequent years, the Court refined the ***Pickering*** test to identify the factors to be employed in the balancing test. ***See Rankin v. McPherson***, 483 U.S. 378 (1987) ("In performing the balancing, the statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose. We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."). ***Id.***, at 388. Other cases indicate that the government enjoys much wider latitude to sanction an employee for speaking about matters of *private* concern, ***see Connick v. Myers***, 461 U.S. 138 (1983); and to sanction an employee about statements made during the course of their duties, ***see Garcetti v. Ceballos***, 547 U.S. 410 (2006); and has defined what matters of "public concern" actually means – a matter of legitimate news interest, *i.e.*, a subject of general interest and of value and concern to the public at the time. ***See City of San Diego v. Roe***, 543 U.S. 77 (2004).

The ***Gentile*** case, conversely, arose from an attorney seeking *certiorari* from the imposition of discipline by the State Bar of Nevada regarding comments he made during a press conference that violated Nevada's prohibition on lawyers making extrajudicial statements to the press that they know or reasonably should know would have a substantial likelihood of materially prejudicing an adjudicative proceeding. ***Id.***, 501 U.S. 1030. Though a majority reversed the imposition of discipline, a second

majority of the Court, led by then-Justice Rehnquist, held that, even beyond the courtroom, a lawyer's right to freedom of speech must be balanced against their role as an instrument of justice and can be regulated under a less-demanding standard than for regulation of the press. ***Id.***, at 1074. Thus, the Court held that a state government can regulate lawyers' speech where the regulation is designed to protect the integrity and fairness of a state's judicial system, and it imposes only narrow and necessary limitations on lawyer's speech. ***Id.***, at 1075. The Court noted that the regulation at issue was limited to materially prejudicial statements, it was neutral as to points of view, and merely postponed commentary about trials until after trial. ***Id.***

States bordering Pennsylvania that have wrestled with the issue, with the exception of New York, ***Raab, supra***, have applied some amalgamation of ***Pickering*** and ***Gentile***, leaning more heavily to one or the other, depending on the state. ***See, e.g., Matter of Hey***, 452 S.E.2d 24, 30-31 (W.Va. 1994) ("Judges are not typical, run-of-the bureaucracy employees, nor does our oversight of judicial disciplinary proceedings present us with an employment context. Moreover, the State's interests in regulating judicial conduct are both of a different nature and of a greater weight than those implicated in the usual government employment case. The State has compelling interests in maintaining the integrity, independence, and impartiality of the judicial system – and in maintaining the appearance of the same – that justify unusually stringent restrictions on judicial expression, both on and off the bench. [...]. Despite these differences, the "public employee" free speech cases provide an appropriate analogy in this case because the clash of interests requires us to engage in a similar balancing process.") (citation and footnote omitted); ***see also In re Inquiry of Broadbelt***, 683 A.2d 543, 551 (N.J. 1996) (discussing various analyses

applied by states in proceedings regarding judicial speech and expression, including ***Pickering***, and concluding that proper balancing test to be applied in New Jersey was "middle tier" scrutiny, as enunciated in ***Gentile*** and ***In re Hinds***, 449 A.2d 483 (N.J. 1982), a New Jersey case similar to ***Gentile***).

Here, the Board submits that a balancing test under ***Pickering***, influenced by ***Gentile***, as in the ***Hey*** case from West Virginia, presents the most logical route for this Court and for other Pennsylvania courts that must analyze the interplay between judicial speech and expression, the Code, and the First Amendment and Article I, Section 7. By recognizing that the state's interest in an impartial judiciary is a core element of other, equally important, constitutional interests to those protected by the First Amendment, a modified ***Pickering*** standard places both of those constitutional interests in their proper context in a judicial disciplinary proceeding. Further, the adoption of such a standard by this Court would avoid manipulating the strict-scrutiny standard to an untenable degree, as was the case in ***Raab***. This is because, on due consideration, it is evident that ***Raab*** applied essentially the same balancing test as propagated by ***Hey***. ***Compare Raab***, at 793 N.E. 2d at 1291-1293, *with* ***Hey***, 452 S.E.2d 24, 30-31.

Indeed, it is fair to assert that, as to rules impacting *non-political* non-criminal judicial speech and expression, such as the ban on *ex parte* communications, the ban on speaking about pending or impending matters, and the ban on speech that may lessen public confidence in the judiciary, this Court already applies a lesser standard of scrutiny in line with ***Pickering*** and ***Gentile*** without ever having expressly considered the issue. For example, in ***Eakin***, this Court concluded that former Justice Eakin violated former Canon 2(A) (judges should conduct themselves at all times in

a manner that promotes public confidence in the integrity and impartiality of the judiciary) due to his conduct in sending emails that involved nudity, gender stereotypes, and ethnic stereotypes, all of which, for the average citizen, would likely constitute First Amendment protected communications. ***Eakin***, 150 A.2d at 1057. However, former Justice Eakin's emails were obviously meant to be private humor and did not report on matters of "public concern," and they did not have anything to do with his "official duties." Thus, under ***Pickering*** and its progeny, the government, as employer, had a right to sanction former Justice Eakin for the content of the emails regardless of the First Amendment. ***See, e.g., Rankin***, 483 U.S. at 388. Accordingly, the Board notes that ***Eakin*** is as an example that this Court has already applied a lesser tier of scrutiny to judicial speech and expression than strict scrutiny, albeit without pointed consideration of the issue.

With ***Eakin*** as an overall guide, if this Court were to apply either the modified ***Pickering*** standard, as in the case in ***Hey***, or the modified application of strict scrutiny, as in ***Raab***, to Respondent's case, its first consideration would be to recognize and consider the interests protected by both the First Amendment (and Article I, Section 7) and the Code of Judicial Conduct. Obviously, as ***Raab*** and ***Hey*** noted, the First Amendment protects Respondent's individual expression, and the Code ensures that the judicial system is fair and impartial for all litigants, free of the taint of political bias or corruption, or even the appearance of such bias or corruption. ***Raab***, 793 N.E. 2d at 1291-1293; ***see also Hey***, 452 S.E.2d 24, 30-31. These are two compelling, equally weighted interests. ***Raab***, 793 N.E. 2d at 1291-1293.

The two tests diverge at the second level of analysis. In a "strict scrutiny" analysis, as in ***Raab***, the reviewing court asks whether the challenged statute is

"narrowly tailored to effectuate [the government's interest in regulation]." ***See, e.g., Hiller v. Fausey, supra.*** Examining the similarities between New York's Code of Judicial Conduct and the Pennsylvania Code of Judicial Conduct, one concludes that, like New York's Code, Pennsylvania's Code, taken as a whole, meets the second prong of the test. Like New York's Code in ***Raab***, the restrictions on ancillary political activity in Pennsylvania's Code are designed to prevent the perception (and the reality) that an elected judge is beholden to a particular political leader or party after they assume judicial duties, while, at the same time, allowing a judge the meaningful opportunity to participate in the election process to advance their own electoral prospects in re-election contests (which ***Raab*** referred to as the "window period") and races for higher judicial office or to take limited political action to advance the law, the legal system, or the administration of justice. ***Compare Raab***, 793 N.E. 2d at 1288-1293 *with* Pennsylvania Code of Judicial Conduct, Canon 4, Rule 4.1(A) and 4.2. Thus, even applying ***Raab***, the Board's charges against Respondent would survive Respondent's constitutional challenge. ***Raab***, 793 N.E. 2d at 1288-1293.

The ***Pickering/Hey*** standard requires, on the other hand, the Board to answer the following: (1) whether the speech involved a matter of public concern; and (2) whether the speech in question was part of Respondent's official duties, or not. ***See, e.g., Garcetti***, 547 U.S. at 420-421. If the speech involves a matter of public concern and was not part of the individual's official duties, then the deciding court weighs the interests of the employee, as a citizen, in commenting upon matters of public concern, and the state, as the employer, in promoting the efficiency of the public services it performs through its employees. ***Pickering***, 391 U.S. at 568. Here, the Board concedes that Respondent's Facebook posts commented on matters of

public concern and that, in the main, they did not directly involve his official duties, ***but see infra***, at 34-35 (Respondent's Facebook posts touched on matters that could present themselves in matters before him). Assuming that the posts were unmoored enough from Respondent's official duties as to require analysis of this prong, in the case of the judiciary, an efficient judiciary also requires an *impartial* judiciary and a judiciary *perceived to be impartial*, this is the *sine qua non* of the American judicial system. Otherwise, if judges were allowed to participate in the give and take of partisan politics, recusal petitions would necessarily follow, as would complaints against judges, and the trust vested in the judicial system would collapse. ***Siefert v. Alexander***, 608 F.3d 974, 983-987 (7th Cir. 2010); ***Cf. Rankin***, 483 U.S. at 388 ("We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or ***interferes with the regular operation of the enterprise***.") (emphasis added). Obviously, a judge being seen as beholden to or swayed by or in the control of political interests interferes with the regular operation of the enterprise of the judiciary, therefore, a Pennsylvania judge who comments on Facebook in the manner that Respondent has done cannot avoid liability under the Code by presenting his views on subjects that are matters of public importance. ***Id.*** This was the view taken by the Seventh Circuit Court of Appeals in the matter of ***Siefert v. Alexander***, ***supra***, when construing Wisconsin's prohibition on sitting judges endorsing any partisan political candidate or platform. So it is with Respondent's conduct. His Facebook posts demonstrate an overwhelming degree of sympathy, support, and ideological affinity

with members of the Democratic Party and the Democratic Party itself; indeed, his posts identify his past conduct as a partisan political actor in the Pennsylvania House of Representatives. Under these circumstances, a member of the public could easily conclude that Respondent could be swayed in his judicial conduct by his political views.

The same holds true if the slightly more-exacting "middle tier scrutiny" ***Gentile*** standard would be utilized by this Court – if Pennsylvania (and every other state) has a compelling interest in regulating the legal profession, then it has all the greater interest in self-regulating its third branch of government. The reasonable standards the judiciary has established to maintain and promote its independence, integrity and impartiality should not come at the cost of the improper invasion of the concept of strict scrutiny measured against every ethics rule touching on judicial speech. To require otherwise would subject our Supreme Court, the Commonwealth government generally, and its agents employed by the Board to an extraordinary burden. Here, like ***Gentile***, the provisions challenged by Respondent are content neutral in the sense that they do not favor a particular political point of view; they ban all judicial expressions of political support of candidates and political organizations entirely, save for voting in contested elections, in order to avoid the perception that judges decide cases on the basis of political influence and pressure and to avoid the abuse of the prestige of judicial office to advance the judge's personal interests or those of others. ***See*** Canon 4, Rule 4.1(A)(11) and *comment* at 1, 4, and 6. As discussed above, when taken as a whole, the Code is narrowly tailored to achieve that interest, while allowing a judge to meaningfully participate in the political process to achieve re-election and election to higher office or to take steps to advance the legal system and

the administration of justice. ***See supra,*** at 63. Thus, although the Board contends that the Code as applied here meets the burden of strict scrutiny, as was the case in ***Raab***, the proper route for this Court to take is the balancing approach favored by ***Pickering, Hey,*** *and* ***Gentile***, as utilized most recently in the ***Siefert*** case. Applying this balancing test reveals that the Board has properly charged Respondent despite his rights to expression under the First Amendment, and Respondent's First Amendment argument should be denied on this ground. ***Siefert***, 608 F.3d at 983-987.

Having resolved the First Amendment analysis issue, the Board submits that Article I, Section 7 of the Pennsylvania Constitution does not require an independent heightened level of analysis, and Respondent provides no reason why it should, despite his bald conclusions that the Board's act of charging him for the cited Code provisions violates Article I, Section 7. To explain, although the rights of freedom of the press and expression enjoy special status in this Commonwealth, owing in no small part to the experience of William Penn being prosecuted in England for the "crime" of preaching to an unlawful assembly, so too can it be said for a defendant's (like Penn's) right to a fair trial by an uncoerced jury, which right Penn also suffered persecution for raising in his own defense. ***See Commonwealth v. Tate***, 432 A.2d 1382, 1388 (Pa. 1981) (footnote omitted). Thus, the right to speak and express oneself in Pennsylvania and the right to a fair, open, and impartial judiciary, and the right to due process, are recognized in our constitution as universal inherent rights. As such, neither one nor the other should be seen as occupying a dominant or submissive role in this Commonwealth; if at all possible, they are to be balanced one to the other. ***See, e.g., S.B.***, 243 A.3d at 112-113 (balancing Article I, Section 7

rights of parents in custody matter where trial court has made a specific finding that the intended speech harms the child's right to psychological and emotional well-being and privacy). For judicial officers, the Code of Judicial Conduct as adopted in Pennsylvania strikes that balance. ***See supra***, at 63. Accordingly, there is no need for this Court to apply a different standard for Respondent's Article I, Section 7 claims because the First Amendment analysis of the issue is coextensive with an Article I, Section 7 analysis. ***S.B.***, 243 A.3d at 113.

Conversely, the so-called "test" that Respondent derives from *Judicial Conduct and Ethics, 6th Ed.*, expressed in his omnibus motion is, in fact, no test at all, much less one of constitutional dimension. Whether or not an "offending statement" is prejudicial to the effective and expeditious administration of court business is merely a factor of a test, essentially encapsulated in those presented above, not a test in and of itself. ***See*** Respondent's omnibus motion, 3/9/2023, at 7, ¶ 13. Notably, the authors' comments that statements that are "ambiguous or mildly offensive [statements] should not be considered to violate Rules of Judicial Conduct particularly in the absence of aggravating factors such as reputation or *personal views*," ***id***. (emphasis added), merely states a truism, one for which the Board has resolved in its favor through the evidence presented at trial. ***See*** N.T., Trial, 7/24/2023, at 127-130 (Respondent's posts were partisan political activity). Indeed, considering some of Respondent's Facebook posts even without the benefit of Dr. Merrill's expert testimony and framework, reveals that some of the posts require little to no level of exegesis to divine their meaning, *i.e.*, "[President Biden] has proven to be an excellent President";" "I have no doubt [Governor Shapiro] is up to the job"; "Build Back Better [will pass] and improve, many, many American lives"; "It's time for critics

to re-evaluate this [the Biden] administration." Thus, it is evident that Respondent overlooked the warning of the authors of *Judicial Ethics* (which he quotes in his argument), which stated, in pertinent part, "Judges who do blogs must be careful not to run afoul of the rules prohibiting ... impermissible political activity." ***See*** Respondent's omnibus motion, 3/9/2023, at 6-7, ¶ 11 (citation omitted); *and* N.T., Trial, 7/24/2023, at 127-130. Unsatisfied with the consequences of his Facebook posting conduct, Respondent then proceeds to try to have the issue both ways by contending that his posts, despite some of the unambiguously political statements therein, are not "political." The record developed at trial has defeated this claim by establishing that, in fact, Respondent's Facebook posts were partisan political activity. ***See*** N.T., Trial, 7/24/2023, at 127-130.

Respondent also claims that the Board's prosecution of him runs afoul of the notions of substantive and procedural due process. Specifically, Respondent asserts that "[o]ne cannot be found in violation of a Rule of there is no clear warning that the conduct violates the Rules." ***See*** Respondent's proposed findings of fact, conclusions of law and brief, at 52. This legal precept has no application to Respondent's case.

As Respondent notes, it is well settled that the Due Process Clause of the 14th Amendment to the United States Constitution is violated if a criminal statute is so vague that it fails to provide reasonable notice to a person who purportedly violates the statute in question. ***See Commonwealth v. Bunting***, 426 A.2d 130, 135 (Pa. Super. 1981). Generally, a criminal statute is "void for vagueness" when it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute or is so indefinite that it encourages arbitrary and erratic

arrests and convictions. ***Id.***, at 135. Conversely, where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the void-for-vagueness doctrine demands a showing of greater specificity than in other matters. ***Id.***, at 136.

Like many other facets of the criminal law, this standard is somewhat inapt in judicial disciplinary matters. As our Supreme Court observed when speaking about former Canon 1 (now, effectively, Canon 1, Rule 1.2),

> It has been urged that these provisions are hortatory in character and thus have no independent effect. Notwithstanding the aspirational quality of the canons, it should be clear that they describe the type of conduct to which a judicial officer will be required to conform and that a departure will occasion a censure. Nor should one who asserts his or her competency to hold judicial office have difficulty in understanding concepts such as "integrity", "independence" and "impartiality." An argument relying upon vagueness will not prevail. The specificity which is being urged is not only unnecessary, it is also inappropriate for a code of this nature.
>
> It should not be necessary for those aspiring to hold the esteemed office of judge to be given specific examples where one's impartiality may be reasonably questioned. The judgment of a judicial officer should be sensitive to such situations. If not, there could be serious question as to the competency of that individual to hold judicial office. This Court has consistently held judicial officers to the standards set forth in the Code since its adoption. These belated complaints as to its clarity and binding effect ring hollow in this setting.

Matter of Cunningham, 538 A.2d 473, 482 (Pa. 1988) (footnotes omitted).

Put another way, while the Code does not specifically tout blogging or posting to Facebook as a font of potential violations, it likewise does not delineate other potential methods of judicial communication that could be the source of violations. To wit, in assigned counsel's experience most *ex parte* conversations take place *via* the telephone -- a judge needs no specific instruction that he or she cannot engage in an *ex parte* conversation *by telephone* in order for the prohibition to provide

sufficient notice that the judge cannot engage in an *ex parte* communication by telephone or, in fact, by any other means. Thus, Respondent's claim that the Code of Judicial Conduct does not address blogging or social media speech and thus, does not provide adequate notice of a violation, merely presents the age-old logical fallacy of "begging the question." Our Supreme Court has held that "[where] one is on fair notice that his own conduct is within that prohibited by regulation, he cannot attack the regulation simply because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit." ***See Office of Disciplinary Counsel v. Campbell***, 345 A.2d 616, 621 (Pa. 1975), *cert. denied* 424 U.S. 926 (1976), *cited by* ***Cunningham***, 538 A.2d at 482, n. 17. Here, Judge Cohen was certainly on notice that he could not engage in impermissible political activity (political speech being one such activity) on behalf of candidates or political organizations (Canon 4, Rule 4.1(A)(11)); he was on notice that he could not lend the prestige of his office to further his own personal interests or those of others (Canon 1, Rule 1.3); and he was on notice that he was required to adhere to all of the other Canons and Rules that he violated by his Facebook posts that resulted in the present charges. The fact that his problematic speech took place online versus in person or in print is not relevant for the application of the Code, nor does it render the present charges void for vagueness simply due to the medium of the speech. ***See, e.g., Cunningham***, 538 A.2d at 482; ***Campbell***, 345 A.2d at 621.

Finally, and most importantly, Judge Cohen has been serving as a judge since 2018, some four years after the present Code of Judicial Conduct took effect. In that time, up to the day Judge Cohen was charged by the Board, this Court resolved several internet or electronic-speech cases which constructively put the entirety of

the Commonwealth's judges on notice that their speech in those domains could result in violations of the Code. ***See, e.g., In re Eakin***, 150 A.3d 1042 (Pa.Ct.Jud.Disc. 2016); ***see, e.g., In re Shaw***, 192 A.3d 350 (Pa.Ct.Jud.Disc. 2018); ***see, e.g., In re LeFever***, ___ A.3d ____ (Pa.Ct.Jud.Disc. 2022), 7 JD 2020 (opinion filed 2/14/2022). Therefore, Judge Cohen's claim of ignorance regarding his responsibilities to adhere to the Code and the Constitution in social media postings is pointedly without merit. ***See, e.g., In Re Bruno***, 101 A.3d 635, 684 n. 27 (Pa. 2014) ("[We] note that not only the formal rules and the spirit in which they were drafted, but also each case of judicial wrongdoing and attendant disciplinary and supervisory actions puts judges on notice of the potential pitfalls and consequences of judicial wrongdoing.").

Therefore, the Board submits that, under a proper analysis of the First Amendment and Article I, § 7, and the due process clauses of both Constitutions, the charges levelled against Respondent by the Board, and the Canons and Rules that support those charges, were constitutionally sound.

V. Proposed Conclusions of Law

1. At Count 1, the Board has established by clear and convincing evidence that Respondent violated Rule 1.1 of the Code of Judicial Conduct by Respondent's failure to adhere to the requirements Canon 1, Rule 1.2 and Rule 1.3, Canon 3, Rule 3.1(C) and Rule 3.7(A); and Canon 4, Rule 4.1(A)(3) and Rule 4.1(A)(11).
2. At Count 2(a) and (b), the Board has established by clear and convincing evidence that Respondent violated Rule 1.2 of the Code of Judicial Conduct in that his Facebook posts undermined public confidence in the independence and

impartiality of the judiciary (Count 2(a)) and caused the appearance of impropriety by raising the perception that Respondent violated the Code (Count 2(b)).

3. At Count 3, the Board has established by clear and convincing evidence that Respondent violated Canon 1, Rule 1.3 by abusing the prestige of his judicial office to advance his own personal interests or the personal interests of others who are referenced in his Facebook postings.

4. At Count 4, the Board has established by clear and convincing evidence that Respondent violated Canon 3, Rule 3.1(C) by engaging in extrajudicial conduct that reasonably appeared to undermine his independence and impartiality; specifically, by making posts to Facebook that constituted partisan political activity.

5. At Count 5, the Board has established by clear and convincing evidence that Respondent violated Canon 3, Rule 3.7(A) by engaging in avocational activities that detracted from the dignity of his office; specifically, by making posts to Facebook that constituted partisan political activity.

6. At Count 6, the Board has established by clear and convincing evidence that Respondent violated Canon 4, Rule 4.1(A)(3) by publicly endorsing former Representative Liz Cheney, who was then a candidate for re-election, by his attempt to criticize her detractor in the media.

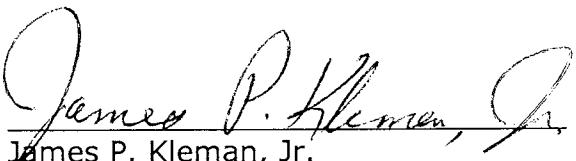
7. At Count 7, the Board has established by clear and convincing evidence that Respondent violated Canon 4, Rule 4.1(A)(11) by engaging in political activity on behalf of a political organization, namely, the Democratic Party, by making

posts to Facebook that constituted partisan political activity on behalf of the Democratic Party.

8. At Count 8, the Board has established by clear and convincing evidence that Respondent violated Article V, § 17(b) of the Pennsylvania Constitution by violating the provisions of the Code of Judicial Conduct set forth above.

Respectfully submitted,

MELISSA L. NORTON
Chief Counsel

DATE: November 6, 2023 By: 

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COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE

IN RE:

Judge Mark B. Cohen Court of Common Pleas 1st Judicial District Philadelphia County	:	1 JD 2023

CERTIFICATE OF COMPLIANCE

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

Submitted by: Judicial Conduct Board of Pennsylvania

Signature: James P. Kleman, Jr.

Name: JAMES P. KLEMAN, JR.

Deputy Counsel

Attorney No.: 87637

COMMONWEALTH OF PENNSYLVANIA
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IN RE:

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PROOF OF SERVICE

In compliance with Rule 122 of the Court of Judicial Discipline Rules of Procedure, a copy of the foregoing document was sent by UPS Overnight to Judge Cohen's counsel, Samuel C. Stretton, Esquire, at the following address:

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Respectfully submitted,

DATE: November 6, 2023 By: James P. Kleman, Jr.

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