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

COURT OF JUDICIAL DISCIPLINE
OF PENNSYLVANIA

JUDICIAL CONDUCT BOARD'S MEMORANDUM OF LAW IN SUPPORT OF REPLY TO OMNIBUS MOTION PURSUANT TO RULE 411 OF THE RULES OF PROCEDURE OF THE COURT OF JUDICIAL DISCIPLINE REQUESTING DISMISSAL OF THE CASE

I. ARGUMENT

a. Standard of review

Judge Cohen's omnibus motion requests to dismiss the Board Complaint, but he does not contest any of the operative facts of the Board Complaint. Indeed, Judge Cohen admits, tacitly, that he made the posts alleged in the Board Complaint and contends that he was entitled to do so on the basis of the rights guaranteed by the First Amendment to the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution. ***See, e.g.,*** Judge Cohen's Omnibus Motion, at 12, ¶ 21 ("Judge Cohen's posts are protected speech pursuant to the First Amendment [to] the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution."). In other words, Judge Cohen asserts that he is entitled to the entry of summary judgment as a matter of law in his favor on all counts charged in the Board Complaint due to the operation of the First Amendment and Article I, Section 7. ***See, e.g., In re Stoltzfus***, 29 A.3d 151, 152 (Pa.Ct.Jud.Disc. 2011) (where facts undisputed and stipulated, request to dismiss Board complaint by respondent judge treated by CJD as motion for summary judgment). This matter presents a case of first impression for this Court.

When a party requests summary judgment, courts apply the following standard to adjudicate the request:

> When a party seeks summary judgment, a court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. In considering the merits of a motion for summary judgment, a court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.

> Finally, the court may grant summary judgment only when the right to such a judgment is clear and free from doubt.

Gallagher v. GEICO Indem. Co., 201 A.3d 136-137 (Pa. 2019) (citations omitted).

However, to be clear, the nature of this case defies traditional summary judgment analysis in some important respects. This is because the question of whether certain speech, *i.e.*, Judge Cohen's Facebook posts, falls within First Amendment protection or is subject to state regulation presents a mixed question of law and fact. ***See, e.g., J.S. by M.S. v Manheim Township School District***, 263 A.3d 295, 305, at n. 11 (Pa. 2021). Generally, a mixed question of law and fact cannot be resolved at the summary judgment stage of a civil case, because the facts are to be viewed in the light most favorable to the non-moving party, in this case the Board, and questions of fact are to be weighed by the factfinder, in this case, this Court, on the basis of a developed record. ***See, e.g., Summers v. Certainteed Corp.***, 997 A.2d 1152, 1161 (Pa. 2010). On the other hand, the proper *analysis* to be employed as to whether or not certain speech falls within First Amendment protections or is subject to state regulation presents a pure question of law, which can be considered at this stage. ***Manheim Township School District***, 263 A.3d at 305, n. 11. (the question of the proper analysis to be used regarding the character of speech under the First Amendment is a question of pure law).

Ultimately, however, as a matter of practicality, the Board recognizes that this Court is both the arbiter of the facts and the law in all cases, unlike traditional civil matters where a trial by jury is a right retained by the parties in traditional litigation. As such, traditional notions of civil practice, while instructive, do not bind this Court in the execution of its mission, which is of far greater importance than traditional civil litigation. Further, and, more importantly, there is no question of fact presented in this case; Judge Cohen has admitted the essential facts of making the Facebook posts cited against him in the Board Complaint. Moreover, both the Board and Judge Cohen recognize that there is effectively no case precedent in the Commonwealth regarding the interplay between the First Amendment and Article I, Section 7 and the Code of Judicial Conduct. Indeed, Article I, Section 7, in some respects, offers even greater protection of expression than the First Amendment. ***See, e.g., S.B. v. S.S.***, 243 A.3d 90, 112, 113 (Pa. 2020) (Article I, Section 7 is an ancestor, not a stepchild, of the First Amendment; in certain circumstances, it offers greater protection of expression than the First Amendment). Accordingly, because there is no genuine factual dispute that Judge Cohen made the Facebook posts alleged in the Board Complaint and there is no jurisprudential underpinning to inform the Court's analysis of the issue following trial, the Board accepts that Judge Cohen's omnibus motion is ripe for decision, if for no other reason than to guide any further activity in this case (and beyond) that may follow.

b. <u>The Code of Judicial Conduct *vis-à-vis* the First Amendment to the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution:</u>

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

Throughout his omnibus motion, Judge Cohen 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*** Judge Cohen's omnibus motion, at 2, ¶ 1. Therefore, by explaining what his conduct is not, Judge Cohen 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, he claims the Board improperly applied the Code to charge him in this Court. Judge Cohen does not claim that the Code's prohibitions on certain types of judicial speech or expression are unconstitutional in all respects. Consequently, Judge Cohen's First Amendment/Article I, Section 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 Judge Cohen's imprecise and conclusory arguments regarding his First Amendment 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 Judge Cohen'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 1042 (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). 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 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 ***See 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 Judge Cohen.

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 (3rd Cir. 1991)[1], and found, subject to a narrow construction of the "announce" clause by the then-chief counsel of both

[1] 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 Judge Cohen's current view that he can talk about any issue not currently before him is informed, albeit, in the Board's view, wrongly, by ***Stretton***.

the 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 and 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[2] 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), the Court held the following:

> 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.

---

[2] 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.

> 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 judges to charges of Code violations levelled against them in disciplinary proceedings. These standards were first ennunciated 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).

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 it possesses 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 where 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 precisely 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 Judge Cohen'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 Judge Cohen'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 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 Complaint would survive Judge Cohen's constitutional challenge. ***See infra***, at 15-19.

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 Judge Cohen'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 Judge Cohen'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 15 (Judge Cohen's Facebook posts touched on matters that could present themselves in matters before him). Assuming that the posts were unmoored enough from Judge Cohen'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. 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 Judge Cohen'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 conduct as a partisan political actor in the Pennsylvania House of Representatives. Under these circumstances, a member of the public could easily conclude that Judge Cohen 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. And, this self-regulation 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 the Commonwealth and its agents employed by the Board to an extraordinary burden. Here, like ***Gentile***, the provisions challenged by Judge Cohen are content neutral in the sense that they do not favor a particular political point of view; they ban 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. ***See supra,***

at 10. 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***. Applying this balancing test reveals that the Board has properly charged Judge Cohen despite his rights to expression under the First Amendment, and his omnibus motion should be denied on this ground.

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 Judge Cohen 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 10. Accordingly, there is no need for this Court to apply a different standard for Judge Cohen'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 Judge Cohen derives from *Judicial Conduct and Ethics, 6th Ed.*, 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*** Judge Cohen's omnibus motion, at 7, ¶ 13. And 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 fashioned arguments and obtained evidence to address in this case. Obviously, some of Judge Cohen's posts regarding political issues favored by the Democratic Party and the political "left" generally may turn on both his past record (which he touts both now and in his Facebook posts) and admissions he has made thus far, as well as a contextual

analysis of American politics. The Board will present evidence on these points at trial, if necessary. Other of Judge Cohen's Facebook 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." Further, Judge Cohen 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*** Judge Cohen's omnibus motion, at 6-7, ¶ 11 (citation omitted). Later in his motion, Judge Cohen 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." This Court should reject this argument for the reasons provided hereafter.

ii. <u>Judge Cohen's Individualized Sufficiency of the Evidence Claims</u>:

Aside from his constitutional challenge, Judge Cohen makes a number of claims that could collectively be described as a challenge to the sufficiency of the Board's evidence or to the application of the Code to the content of his Facebook postings. Viewing the record in a light most favorable to the Board, these assertions are entirely without merit.

Judge Cohen contends the following: (1) his posts are mere discussions of legislation, political, and government leaders, and they do not support any particular party or political viewpoint; (2) his posts discuss matters of importance and do not endorse political candidates and do not discuss matters that would appear before him; (3) his posts are proper because they are not pornographic or obscene; (4) his posts are proper because they are not racist, sexist, or expressive of prejudice on other grounds (gender, sexual orientation, etc.); (5) his posts are proper because they do not discuss pending cases; (6) his posts are not political in nature; (7) his posts are neither improper nor denote the appearance of impropriety; (8) his posts do not advance his personal interests or the interests of others; (9) his posts do not undermine his impartiality, integrity, or independence; and (10) his posts do not detract from the dignity of his office or interfere with his judicial duties. Judge Cohen also claims that he did not violate Canon 1, Rule 1.1 and Article V, § 17(b) as derivative violations of the other cited Code provisions because he did not violate the Code.

At the outset, it is obvious that Judge Cohen's Facebook posts as cited in the Board are not pornographic, obscene, and they do not present messages that are prejudicial towards persons due to their inherent characteristics. Yet, merely because a judge's speech is not pornographic, obscene, or socially prejudicial does not mean that the speech is sanctioned by the Code; the Code has numerous speech-based prohibitions that ban judges from expressing themselves in other ways that are far less socially aberrant than obscenity or social prejudice. Therefore, Judge Cohen's

arguments in these respects are entirely beside the point and unpersuasive. Moreover, though somewhat obvious, it must also be noted that, as to judicial conduct, there is no distinction between a judge's online conduct and "real world" conduct. The propriety of all actions by a judge, whether online or not, and whether "pornographic" or otherwise licentious or not, or are perfectly lawful for other citizens, are viewed under the rubric of the Code and the Constitution. ***Compare Eakin, supra*** *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).

Judge Cohen's claims that his posts do not support a particular political party or a particular political viewpoint and do not appear to do so are entirely refuted by a simple examination of his Facebook posts. The Board begins its response to Judge Cohen's claims with an analysis of the Rules refining Canons 3 and 4, as they reach precisely to the content of Judge Cohen's Facebook postings.

Canon 3, Rule 3.1(C) states that

> [j]udges 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. . . participate in activities that would reasonably appear to undermine the judge's independence, integrity, or impartiality.

In pertinent part, Canon 3, Rule 3.7(A) states that

> [j]udges 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.

To any reasonable observer, Judge Cohen's postings either directly state or strongly imply his personal views (and expressions of support or opposition to) regarding a wide range of controversial 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. Generally speaking, Judge Cohen's personal views on these subjects and persons align with those of the Democratic Party or the broader notion of the political "left," and he made no attempt to obfuscate the fact that he is a judge on his Facebook page. ***See*** Board Complaint, at ¶ 6, 9, 9(i-lxvi). While it is true that, in the course of the Board's investigation, Judge Cohen removed a formerly-posted picture of himself in judicial robes seated at a Philadelphia bench from his Facebook pictures, he nonetheless identified himself as a judge in several postings cited in the Board Complaint and his friends and followers often address him as "Judge" in their Facebook commentary. Judge Cohen also made no attempt to hide his prior life as a Democratic state legislator and participant in prior Democratic

National Committee party conventions, and he notes same throughout his Facebook page. ***See, e.g., id.,*** at ¶¶ 9(xxi), (xxvii). Judge Cohen also informed assigned counsel in the investigation that he has approximately 5,000 Facebook friends and an additional 1,000 Facebook followers to whom he broadcasts his views on the aforementioned subjects. Further, Judge Cohen made posted that were clearly supportive of or sympathetic to President Joseph R. Biden, Philadelphia District Attorney Lawrence Krasner, Governor Josh Shapiro, and United States Senator John Fetterman, and other politicians of the legislative and executive branches of the state and federal government. ***See, e.g., id.***, at ¶¶ 9(iii), (iv), (v), (vi), (viii), (ix).

As to public policy matters embraced by the Democratic Party and the political "left," Judge Cohen's views were directly stated or implied to the point of direct statement. Regarding the subject of unions and organized labor, it is clear from a global view of Judge Cohen's posts on the matter that he endorses the organization of workers and collective bargaining and that he is opposed to workers crossing picket lines. ***See*** Board Complaint, at ¶ 9 (xxxiii) – (xlv) . Also, as to the subject of student loan cancellation, a global view of Judge Cohen's Facebook posts indicates that he clearly supports same. ***Id.***, at ¶ 9 (xlvi) – (xlix). This is where Judge Cohen's argument that the subject matter of his posts is not objectionable because such issues do not come before him falls flat. Matters involving labor contracts are certainly a class of subjects adjudicated at times in Philadelphia County civil court and benefits provided to workers by labor unions may impact decisions regarding those persons in Family Court, where Judge Cohen sits. Likewise, student loan debt, 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 gainsaid that some of the issues that Judge Cohen 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.

In addition to setting forth his personal views on these matters, Judge Cohen actually advocated for the passage of legislation regarding Democratically-supported or "left"-supported public policy initiatives in several postings. These were the 2022 Inflation Reduction Act, ***see*** Board Complaint, at ¶ 9(xxiii), and the need for the raising of the minimum wage, ***see id.***, ¶ 9(xxvii). Judge Cohen also criticized legislative activity that took place in other states with predominantly Republican legislatures. ***Id.***, ¶ 9 (xviii), (xix) (regarding "book banning" legislation). Conversely, the posts where Judge Cohen positively highlights an act by a Republican or conservative political figure are instances where that person stated a position apparently contrary to their political party or movement's interest and was more in line with the Democratic Party's or the political left's position on the particular subject. ***See, e.g., id.***, at ¶ 9(xv) (criticizing "hit job" against Liz Cheney, then a candidate for re-election); ***id.***, at ¶ 9(xxx) (praising the former Rev. Billy Graham for his opposition to "marriage" between religious fundamentalists and the "political right.").

Without doubt, the postings made by Judge Cohen regarding the aforementioned persons or subjects call into question both his independence, impartiality and undermine the dignity of his office. One of the most important

elements of proper judicial conduct is to remain free of partisan political influence and to remain above the rough-and-tumble fray of partisan politics that are part and parcel of the legislative and executive branches of government. ***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."). Here, a global view of Judge Cohen'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 his roughly 6000 Facebook friends and followers, and that he actively and openly supports legislation favored by the Democratic Party that has nothing to do with the advancement of the law or the legal system, *i.e.*, the Inflation Reduction Act and the raising of the minimum wage. These facts indicate that Judge Cohen does not display a public face of independence or impartiality. Likewise, such conduct detracts from the dignity of Judge Cohen's office because it places him in the thick of the partisan fray, a domain that he suffused himself in, as he notes in his omnibus motion, for some 42 years prior to being a judge.

Turning to Judge Cohen's conduct vis-à-vis Canon 4, the Board Complaint cites violations of Canon 4, Rules 4.1(A)(3) and 4.1(A)(11) by Judge Cohen.

Canon 4, Rule 4.1(A)(3) states that

> Except as permitted by Rules 4.2, 4.3, and 4.4, a judge or judicial candidate shall not [...] publicly endorse or publicly oppose a candidate for any public office.

Canon 4, Rule 4.1(A)(11) states that

> Except as permitted by Rules 4.2, 4.3, and 4.4, a judge or judicial candidate shall not [...] 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[.]

It is clear that Judge Cohen was not a candidate for re-election or for higher judicial office at the time that he made the Facebook postings noted in Board Complaint. Accordingly, none of 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) apply to shield Judge Cohen from the consequences of his Facebook postings.

Judge Cohen'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 approval or disapproval of their official actions, political philosophies, 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 <~ an idea>, esp: to express support or approval of publicly and definitely <~ a mayoral candidate>;" or "oppose," which in this context means "offer resistance to." **See** *Webster's Collegiate Dictionary, 10th Ed.*, 1995.

The question whether any of the present-day political figures Judge Cohen posted about were "candidates" within the meaning of the rule presents an interesting issue, in that most of the postings Judge Cohen 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 Judge Cohen 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 Complaint, at ¶ 9(xv) (criticizing "hit job" against Liz Cheney, then a candidate for re-election). This distinction, in the Board's view, renders a Rule 4.1(A)(3) violation to lie only regarding the Liz Cheney post. This is why the Board charged Judge Cohen with only one violation of Canon 4, Rule 4.1(A)(3).

Judge Cohen's argument to the contrary is that he disclaimed an endorsement of former Representative Cheney by posting, "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 Complaint, at ¶ 9(xv). This statement is internally contradictory and offers no shield for Judge Cohen's violation of Rule 4.1(A)(3). In layman's terms, Judge Cohen 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 likely reason for this "dislaimer," of course, is that Judge Cohen knew that his initial post could be taken to mean that he was endorsing former Representative Cheney. Board counsel agrees that Judge Cohen's language was awkward and 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." Moreover, and more importantly, Judge Cohen'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 Judge Cohen's disclaimer itself, a judge is a judge at all times, and it is precisely because Judge Cohen shared his political views in the manner that he did on his Facebook page that has led to these charges.

While the Board did not charge a violation of Canon 4, Rule 4.1(A)(3) for all of Judge Cohen's posts regarding political figures, this does not end the subject. This is because Judge Cohen was also charged with a violation of Rule 4.1(A)(11), which precludes a judge from engaging in "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 Judge Cohen's Facebook postings, which are political speech. 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. Social media has, in effect, become the "public square" of the modern age, where political debates and movements find their beginnings and endings. Obviously, the Democratic Party, the beneficiary of the majority of Judge Cohen'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 Judge Cohen's posts were not "candidates" at the time of Judge Cohen's postings.

The overwhelming majority of Judge Cohen's posts recounted in the Board Complaint are supportive of, or sympathetic to policy positions, legislation, and notable political figures of the Democratic Party (living and dead) or criticize opponents of its policy positions, legislation, and political figures. Judge Cohen made his Facebook postings to a potential audience of approximately 6000 Facebook friends and followers, which, by any measure, is a sizable audience, despite protestations he made to the contrary during the Board's investigation. A global view of the subject matter of Judge Cohen's postings and the size of his audience indicates that he is acting as a "cheerleader" for the Democratic Party and its constituent politicians, whether he is willing to admit it or not and whether or not the Democratic Party asked him to act as its "cheerleader."

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.

Judge Cohen attempts to sidestep this conclusion by asserting that comment 9 to Canon 4, Rule 4.1 allows judges to make statements or announcements regarding their personal views on political issues. Comment 9 to 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.

Thus, the text of the comment indicates that it expounds upon Canon 4, Rule 4.1(A)(12) (prohibiting 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 Judge Cohen was not charged. Practically speaking, this Code provision governs judges and judicial officers who are engaged in an election campaign, though the terms of the Rule are broad enough to encompass all judges at all times, and the reason for the Rule's election-centric nature is that an essentially identical Code provision for non-campaign conduct exists at Rule 2.10(B) (regarding public comment 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 Judge Cohen in his argument, makes 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 narrowly draft restrictions on political campaign activities of judicial candidates 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, inasmuch as Judge Cohen was not charged with a violation of Rule 4.1(A)(12), his argument is off point and unpersuasive. Moreover, Judge Cohen's argument overlooks the provisions of the Code regarding political conduct, *i.e.*, Rule 4.1(A)(3) and 4.1(A)(11), and his overarching responsibility under Canon 1, Rule 1.3 to avoid abusing the prestige of his judicial office to advance the interests of others. ***See*** Canon 4, Rule 4.1 *comment* at 4.

As reflected in the comment to Canon 4, the danger sought to be avoided is nearly identical to the dangers sought to be avoided by Canon 1, Rule 1.3, which the Board has also charged Judge Cohen.

Canon 1, Rule 1.3 states that

> [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.

Both Rule 4.1(A)(11) and Rule 1.3 focus 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.

Viewing Judge Cohen's Facebook posts in the light of Rule 4.1(A)(11) and Rule 1.3, there is no doubt that Judge Cohen identified himself as a judge in his postings and has continued to do so, regardless of whether his picture appears on his Facebook page or not. Judge Cohen also has consistently posted views that either advocate for or are sympathetic to causes embraced by the Democratic Party and advocate or are supportive of its constituent politicians. Thus, Judge Cohen has imbued his Facebook page with the prestige afforded to his judicial office and, necessarily, has done so for the views he advanced, violating the Rules. 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. Public speech and advocacy for policy positions are the traditional means by which political parties and politicians win elections. Further, to the significant extent that Judge Cohen's views align with the Democratic Party and its constituent politicians, his postings, made under the rubric of judicial authority with which he is cloaked at all times and restated on his Facebook page, necessarily advance his own personal interests. Although Judge Cohen's Facebook page has a "disclaimer" at the top stating that the views expressed on the page are his own, this, as stated above, provides no defense, and especially so regarding violations of Rule 1.3, which necessarily turns on a judge's own views. Therefore, the Board submits that Judge Cohen lent the prestige of his judicial office to advance his own personal interests and the personal interests of the Democratic Party writ large and the present-day political figures of that party for whom he expressed support in his Facebook postings. Accordingly, Judge Cohen's present arguments to the contrary are entirely without merit.

The remaining Code violations cited in the Board Complaint against Judge Cohen are Canon 1, Rule 1.1, Rule 1.2, and Article V, § 17(b) of the Pennsylvania Constitution. Canon 1, Rule 1.1 (violation of the law) and Article V, § 17(b) of the Pennsylvania Constitution (semble) are automatic, derivative violations that arise from Judge Cohen's violation of the other Code provisions cited against him and require no further elaboration other than to say that Judge Cohen's violation of any other Code provision, such as Canon 3 and 4 and their concomitant Rules, discussed above, demonstrates probable cause that he violated Canon 1, Rule 1.1 and Article V, § 17(b). Further, as will be discussed below, Judge Cohen violated Canon 1, Rule 1.2 by his Facebook postings. Therefore, for the reasons stated above and below, his contentions that he did not violate Canon 1, Rule 1.1 and Article V, § 17(b) of the Pennsylvania Constitution because he did not violate the other Code provisions cited against him is without merit.

Canon 1, Rule 1.2, like Rule 1.3, is a rule prohibiting general conduct by judges.

Canon 1, Rule 1.2 states that

> [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.

As stated above, Judge Cohen's Facebook behavior as a "cheerleader" for the Democratic Party, of necessity, lessens confidence in his own independence and impartiality. ***See supra***, at 18. Thus, Judge Cohen's failure to avoid that impropriety constitutes a violation of Canon 1, Rule 1.2, as well as a violation of Canon 3, Rule 3.1(C).

Additionally, Judge Cohen's posting behavior regarding the David DePape matter and the Philadelphia Inquirer article about Bruce Marks, Esquire, ***see*** Board Complaint, at ¶¶ 9(i), (ii), and (xxxi), constitutes violations of Canon 1, Rule 1.2 in that the postings constitute his failure to avoid "the appearance of impropriety." "The appearance of impropriety" is defined by the Code as "whether 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." ***See*** Code of Judicial Conduct, *terminology*.

At first blush, it would seem that the Board should have charged Judge Cohen with a violation of Canon 2, Rule 2.10(A), not Rule 1.2, for his posts regarding the DePape and Marks matters. The Board will explain the reason it did not do so for the benefit of this Court's understanding. 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.

Judge Cohen posted two items regarding 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, Judge Cohen 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, Judge Cohen 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 Complaint, at ¶¶ 9(i), (ii).

As to the Bruce Marks matter, on July 26, 2022, Judge Cohen 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 Complaint, at ¶ 9(xxxi). This posting led to Bruce Marks (Marks), who is a Facebook friend of Judge Cohen and was a subject of the article, engaging Judge Cohen 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 Judge Cohen to accuse Marks of criminal and ethical misconduct. ***See*** Board Complaint, Exhibit A, at (xxxi). After thanking one of Marks' accusers (Marc Stier) for "participating in the discussion" after he had accused Marks of criminal and ethical misconduct, Judge Cohen 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.***

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 Judge Cohen'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, Judge Cohen was not charged with a violation of Rule 2.10(A). Likewise, the Marks matter did not involve any matter pending or impending in any court. Nevertheless, due to the number of Judge Cohen's Facebook followers and friends, it cannot be gainsaid that his broadcasting of his views of David DePape's mental state and motivation could negatively affect those persons' and the public's perception of his impartiality and fairness in other matters in Pennsylvania.

To explain, while Judge Cohen's postings on the DePape case 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 Judge Cohen and his own posts could negatively affect his impartiality. 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 out-of-jurisdiction cases constituted, at a minimum, the appearance of impropriety because it would raise in reasonable minds a perception that the commenting judge committed an actual violation of the Code that the commentary would reflect adversely on the commenting judge's impartiality or temperament.

Such is also the case with Judge Cohen, although his commentary comes through different media (Facebook) and takes a different form (typed postings) than televised commentary. Here, whether or not Judge Cohen's conduct meets the technical requirements of a Rule 2.10(A) violation, in the course of the investigation, Judge Cohen admitted relishing being a commentator on Facebook and presenting his views to his Facebook friends and followers to generate discussion, and he claimed that his views are tremendously popular in the City of Philadelphia and tremendously popular in the suburban areas in Philadelphia where many lawyers come from, though, presumably, Attorney Marks is not among this number. Thus, the danger here, and the general violation of Canon 1, Rule 1.2, comes from the potential that Judge Cohen will 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, those that may involve Marks as an advocate in the future) that he would be less than impartial. Accordingly, Board Counsel submits that Judge Cohen's arguments that Canon 1, Rule 1.2 does not apply to his Facebook conduct are without merit.

II. CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny Judge Cohen's omnibus motion.

Respectfully submitted,

MELISSA L. NORTON
Chief Counsel

March 16, 2023 By: 

JAMES P. KLEMAN, JR.
Senior Deputy Counsel
Pa. Supreme Court ID No. 87637
Judicial Conduct Board
Pennsylvania Judicial Center
601 Commonwealth Avenue, Suite 3500
P.O. Box 62525
Harrisburg, PA 17106
(717) 234-7911

COURT OF JUDICIAL DISCIPLINE
OF PENNSYLVANIA

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

VERIFICATION

I, James P. Kleman, Jr., Deputy Counsel to the Judicial Conduct Board, verify that the facts set forth in the foregoing Reply and Memorandum of Law are true and correct to the best of my knowledge, information, and belief. I understand that the statements made in the foregoing Reply and attached memorandum are subject to the penalties of 18 Pa.C.S.A. § 4904, regarding unsworn falsification to authorities.

March 16, 2023

By: James P. Kleman, Jr.

JAMES P. KLEMAN, JR.
Senior Deputy Counsel
Pa. Supreme Court ID No. 87637
Judicial Conduct Board
Pennsylvania Judicial Center
601 Commonwealth Avenue, Suite 3500
P.O. Box 62525
Harrisburg, PA 17106
(717) 234-7911

COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE

IN RE:

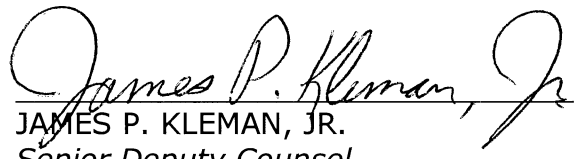
Judge Mark B. Cohen Court of Common Pleas 1st Judicial District Philadelphia County	:	1 JD 2023

PROOF OF SERVICE

In compliance with Rule 122 of the Court of Judicial Discipline Rules of Procedure, on March 16, 2023, a copy of the Board's Reply and Memorandum of Law was sent by UPS Overnight mail to Judge Cohen's counsel, Samuel C. Stretton, Esquire, at the following address:

Samuel C. Stretton, Esquire
103 South High Street
P.O. Box 3231
West Chester, PA 19381-3231

March 16, 2023

By: 

JAMES P. KLEMAN, JR.
Senior Deputy Counsel
Pa. Supreme Court ID No. 87637
Judicial Conduct Board
Pennsylvania Judicial Center
601 Commonwealth Avenue, Suite 3500
P.O. Box 62525
Harrisburg, PA 17106
(717) 234-7911

COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE

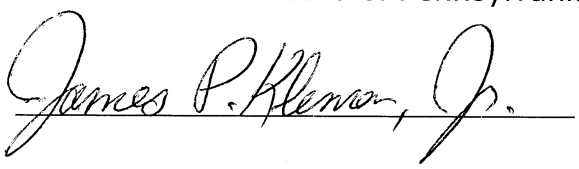
IN RE:

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* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Judicial Conduct Board of Pennsylvania

Signature: 

Name: James P. Kleman, Jr.
Senior Deputy Counsel

Attorney No: 87637