COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE

IN RE:	:	
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Judge Mark B. Cohen	:	
Court of Common Pleas	:	No. 1 JD 23
1st Judicial District	:	
Philadelphia County	:	

BEFORE: Honorable Ronald S. Marsico, P.J., Honorable Daniel E. Baranoski, J., Honorable Jill E. Rangos, J., Honorable Thomas E. Flaherty, J., Honorable Sonya M. Tilghman, J., Honorable Charles L. Becker, J., Honorable Steven D. Irwin, J., Honorable Carolyn H. Nichols, J.

OPINION BY JUDGE FLAHERTY FILED: May 3, 2024

Procedural Background

On February 23, 2023, the Judicial Conduct Board (Board) filed a Complaint against Judge Mark B. Cohen asserting that certain posts 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, Judge Cohen 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 Court denied Judge Cohen's omnibus motion on April 4, 2023. Thereafter, on April 19, 2023, Judge Cohen filed an answer and new matter, which presented certain affirmative defenses, including Judge Cohen'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 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 Judge Cohen 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.

Findings of Fact

1. Judge Cohen has served as a judge of the Court of Common Pleas in Philadelphia from January 2, 2018, until the present. ***See*** Board pre-trial memorandum Stipulation 14; Judge Cohen pre-trial memorandum stipulation 2.

2. For the entirety of his judicial service, with limited exceptions, Judge Cohen served in family court. ***See*** N.T., Trial, 7/24/2023, at 248.

3. In 2007, while he was a member of the Pennsylvania House of Representatives, Judge Cohen created a personal Facebook page and has 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.

4. Judge Cohen'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.

5. Judge Cohen 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.

6. The "life events" section of Judge Cohen'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.

7. At his deposition, Judge Cohen 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 for or to stake out positions on policy issues. ***See*** Board's Exhibit 5, N.T., Deposition, 7/19/2022, at 33-34.

8. Regarding his continued Facebook posting after leaving legislative office and attaining judicial office, Judge Cohen 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 he considered a "positive good." ***See*** N.T., Trial, 7/24/2023, at 249.

9. The Board commenced an investigation of Judge Cohen'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.

10. On September 26, 2021, through another judge, Judge Murphy received a complaint from a citizen regarding the content of one of Judge Cohn'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.

11. This complaint prompted Judge Murphy (with the assistance of her staff) to review Judge Cohen's Facebook postings and print hard copies of several of them. ***Id.***, at 35-36.

12. Upon further review, Judge Murphy also became concerned about the content of several of Judge Cohn'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.

13. At trial, Judge Murphy noted specifically her concerns about a picture of Judge Cohen 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.

14. 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 Judge Cohen 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.

15. After Judge Murphy revealed her concerns to Judge Cohen about the initial complaint and the other posts she saw, he disagreed with her analysis and a heated argument ensued wherein Judge Cohen 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 Judge Cohen'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, Judge Cohen 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. Judge Cohen likewise did not agree with Judge Murphy's suggestion that Judge Cohen 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 Judge Cohen and Attorney Stretton), about the content of his Facebook postings. ***Id.***, at 45.

16. Attorney Stretton contacted Judge Murphy about Judge Cohen's Facebook page approximately one week after Judge Cohen's meeting with Judge Murphy and President Judge Fox. ***See*** N.T., Trial, 7/24/2023, at 46.

17. Attorney Stretton advised Judge Murphy that Judge Cohen removed the post that spurred the citizen's complaint and the picture of him in a judicial robe seated behind a bench in a courtroom. ***Id.***, at 51.

18. Nevertheless, Judge Murphy was aware that Judge Cohen 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 Judge Cohen's Facebook postings for himself. ***Id.***, at 46, 49-50.

19. Believing that Judge Cohen would not report himself, even though Judge Murphy had mentioned that he should do so both to him directly and then to Attorney Stretton, Judge Murphy waited until November 16, 2021, and then reported Cohen's Facebook conduct to the Board by letter. ***Id.***, at 46-47; ***see also*** Board's Exhibit 1.

20. Judge Murphy took this action out of concern that she had become aware of a violation of the Code of Conduct regarding Judge Cohen's Facebook postings and was required to report it, as well as the fact that her attempts to counsel him about his Facebook postings and her urging to him to mitigate his conduct by self-reporting were "going nowhere." ***Id.***, at 49.

21. When the Board received Judge Murphy's letter, the matter was assigned to the Board's investigative staff for an initial review and preservation of Judge Cohen's Facebook postings. ***See*** N.T., Trial, 7/24/2023, at 61-62.

22. Board Senior Investigator Paul Fontanes performed this initial review. ***Id.***, at 62. Senior Investigator Fontanes was able to identify Judge Cohen 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 he 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 Judge Cohen's Facebook page, former Chief Counsel Long opened a Confidential Request for Investigation about Judge Cohen 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 Judge Cohen; ***and*** Board pre-trial memorandum stipulation 16; Judge Cohen pre-trial memorandum stipulation 2. Thereafter, Senior Investigator Fontanes continued investigating and monitoring the contents of Respondent's Facebook page, which revealed that Judge Cohen 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.***

23. Based on Senior Investigator Fontanes' investigation, assigned Board counsel requested and received authority from the Board to issue a Notice of Full Investigation (NOFI) to Judge Cohen 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 Judge Cohen, at 2-4, ¶11.

24. Judge Cohen, 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 Judge Cohen.

25. Judge Cohen 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 Judge Cohen 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.

26. When questioned at the deposition as to specific Facebook posts Judge Cohen made about the federal Build Back Better bill championed by President Biden in 2021, Judge Cohen 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.

27. Following the deposition, Judge Cohen continued to make posts to Facebook of a political nature. ***See*** N.T., Trial, at 82, 86-88; ***see also*** Board's Exhibit 6, December 6, 2022, supplemental NOFI to Judge Cohen, at 2-14, ¶ 7.

28. Judge Cohen 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 Judge Cohen.

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

30. The parties stipulated to the appearance and content of Judge Cohen'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.

31. Judge Cohen's Facebook posts that are the subject of the present charges are summarized as follows, which, unless otherwise noted, were authored by him:

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 is 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 it's 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 actor's 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 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 on 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.

32. Dr. Alison Merrill, assistant professor of political science, Susquehanna University, provided an opinion on the partisan political nature of Judge Cohen's Facebook. ***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.

33. Dr. Merrill opined that Judge Cohen'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 Judge Cohen'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 his 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 his 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.

34. Dr. Merrill supported her conclusions by citing examples from Board's Stipulated Exhibit 8, which showed the following: (1) Judge Cohen's support for former President Barack Obama and Governor Josh Shapiro,

both, ***see*** N.T., Trial, 7/24/2023, at 130-131; ***see also*** Board's Stipulated Exhibit 8, at 5-7; (2) Judge Cohen'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) Judge Cohen's support for policy and social positions favored by the Democratic Party, ***see*** N.T., Trial, 7/24/2023, at 135; ***see also*** Board's Stipulated Exhibit 8, at 40, 41, 42, 43; and (4) Judge Cohen'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.

35. Dr. Merrill also concluded that the physical appearance of some of Judge Cohen'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's shooter) and Governor Josh Shapiro).

36. 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, Judge Cohen 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 Judge Cohen'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 his 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.

37. In his defense, Judge Cohen 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. Judge Cohen also testified in his own defense. ***See*** N.T., Trial, 7/24/2023, at 232-239, 240. Judge Cohen 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.

38. Judge Cohen 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.

39. Judge Cohen 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.

40. However, upon cross examination, Judge Cohen 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 at Judge Cohen derived from his Facebook posts (and others' reactions to them) and "positive good" he 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.

Discussion

Although this is a case of first impression in Pennsylvania, other states have, on many occasions, considered social media posts by judges on controversial or political matters (see Judicial Conduct Reporter, Spring 2021, Vol. 43, No. 1, at 2-13 and Winter 2022, Vol. 43, No. 4 at 18-25) and Social Media and Judicial Ethics Update, Cynthia Gray, NCSC Jan. 2022, with near unanimous disapproval.

The Standard for Judicial Internet Postings – the Reasonable Person Standard

The parties have suggested that this Court set forth a standard for judges to observe in making any posts on the internet.

Such a standard is already contained in the Code of Judicial Conduct. The standard is whether or not a reasonable person would find the post in violation of the Code. If a reasonable person would find the post violates the Code, then the judge has committed a violation.

The Preamble to the Code of Judicial Conduct requires "a reasonable application" of the Code. This reasonable person standard is the cornerstone of the Code and the cases interpreting it. Code of Judicial Conduct Preamble at 6.

As this case centers on allegations about Judge Cohen's impartiality (and the public perception of his impartiality) this Court notes the definition in the Code of Judicial Conduct of that term as follows in the Terminology Section.

> **Impartial, Impartiality, impartially** – Absence of bias or prejudice in favor of, or against, particular parties of class of parties, as well as maintenance of an open mind in considering issues that may come before a judge.

The impartiality required of a judge is exemplified by the statue of the Greek goddess Themis (aka Justicia in Roman tradition) who, while blindfolded, weighs the merits of the case before her. No favor or disfavor on any external grounds should even be implied by a judge's conduct. Impartiality is required of judges in <u>all</u> respects, not just politically. A Judge is not permitted to be partial for <u>any</u> reason.

Comments or conduct by a judge indicating favoritism or antipathy towards any person, philosophy or group are also improper.

Applying the reasonable person standard to Judge Cohen's postings this Court finds that those postings show a lack of the impartiality required by the Code. The context of the postings, their volume and their tone undermine the appearance of impartiality required of the judiciary.

One might argue that a reasonable person standard is too vague for disciplinary enforcement. However, all people in Pennsylvania are required to comport their actions toward others to the reasonable person standard every day. For example, every driver in Pennsylvania is required to not drive "too fast for conditions" a standard widely variable based on weather conditions at any given moment. (75 Pa. C.S.A. 3361).

The reasonable person standard has been a cornerstone of law in Pennsylvania for well over one hundred years (*Pennsylvania Railroad Co. v. Peters*, 119 Pa. 206 (1887) and of English law before that (*Vaughn v. Menlove*, 132 EK 490 (CP1837). Requiring that a person, and in particular a judge, act in a prudent and reasonable manner is not a novel or vague concept in any way.

Rules Principally At Issue In This Case

The following Rules are best considered together as they are closely related and involve the same facts.

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 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 or their office or interfere with the performance of their judicial duties.

The Ethics Rules Are the Same for Internet Postings as for all Other Conduct

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 considered under the

restriction 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). Accordingly, without considering any of Judge Cohen's constitutional claims the propriety of the content of his Facebook posts is a matter well within the jurisdiction of this Court. ***Eakin***, 150 A.3d at 1057.

Certainly, a judge can engage in normal social discourse on the internet. It is only when a judge's social media expressions violate the ethical rules that an issue is presented. The same standards would apply to a speech or article by a judge. Judges must keep in mind that their posts on social media are subject to great dissemination which they may not be able to control.

The Rules Considered in the Circumstances Here
Perception of Impropriety

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 judges to avoid conduct that abuses the prestige of the judicial office by involving 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, we will look at 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.

Abuse of Office

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. Judge Cohen clearly made no attempt to limit access to his Facebook page to a close group of personal friends or to obscure 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. Judge Cohen 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. ***Id.***

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 has not addressed the other areas of his Facebook page that identified him as a judge. Moreover, Judge Cohen 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 Judge Cohen identified himself as a 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).

Judge Cohen's Posts Set Forth His Personal Political Views

The content of Judge Cohen's Facebook posts state or strongly imply his personal views (and expressions of support or opposition to) regarding a wide range of political policy matters, as well as 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.

In addition to setting forth his personal views on these matters, Judge Cohen took his conduct a step further and advocated for the passage of legislation regarding progressively supported public policy legislative initiatives in several postings. Among these were the 2021 Build Back Better Act, ***see*** Board Stipulated Exhibit 8, at 59-62; 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.

Judge Cohen 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, Judge Cohen's Facebook postings espousing and broadcasting the aforementioned positions are, partisan political activity. ***See*** N.T., Trial, 7/24/2023, 127-130; ***see also*** Board's Exhibit 10.

Judge Cohen testified that he wanted to further 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. Judge Cohen's own Facebook posts and the reaction of others to his posts admittedly made him "feel good." ***Id.***, at 290, 310-311. Further, Judge Cohen acknowledged that when he announced his judgment on an issue in a post it was his intention that his followers on Facebook discuss his judgment and take it into account. ***See***, N.T., Trial, 7/24/2023, at 307-308.

Similarly, Judge Cohen 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. Judge Cohen'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.

In addition to imbuing his Facebook page with his judicial status and prestige, Judge Cohen advanced his own interests by broadcasting his political views, learning, and teaching, and feeling good about the posts and feeling good about others' reactions to his posts. Judge Cohen also has advanced the interests of those partisan political figures, the political organization (the Democratic Party), and the causes he advocated for in his posts.

As explained by Dr. Merrill, 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. 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, Judge Cohen's Facebook postings, made under the 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.

Given the aforementioned facts, it is clear that Judge Cohen's posts violate Canon 1, Rule 1.2. Canon 1, Rule 1.2 requires that a judge 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.

Judge Cohen's Facebook postings violate Canon 1, Rule 1.2 (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.

The Facebook postings made by Judge Cohen regarding the aforementioned persons or subjects undermine both his independence and impartiality because the effect and, the perceived effect, of his partisan political posts (as well as the other contents of his page delineating his past political affiliations) diminishes his impartiality and calls into question the independence of the judiciary.

Obviously, one of the most important elements of proper judicial conduct is to remain independent and free of partisan political influence. ***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 concept is stated 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). The Pennsylvania 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).

Judge Cohen's Lack of Impartiality

A review of Judge Cohen's postings shows he is partial to the political left 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 leftward political figures and legislation that have nothing to do with the advancement of the law or the legal system. Judge Cohen does not display the public face of independence or impartiality expected of a judicial officer.

Rather, the conduct proven at trial shows that in exchange for his own satisfaction and the positive feedback he received from his posting Judge Cohen cast off the independence and impartiality expected of a judge.

While Judge Cohen's partisan political musings on Facebook and his motivations therefore are in no way morally wrong in themselves, more is expected of one who holds judicial office than what was shown at trial.

Judge Cohen's conduct both fails to promote public confidence in and undermines the independence and integrity of the judiciary. Consequently, Judge Cohen's Facebook posts violate Canon 1, Rule 1.2.

Judge Cohen's Claims That He Did Not Post on Matters Likely to Come Before Him

Judge Cohen claims that he did not hold forth on matters likely to come before him and also argues 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, Judge Cohen claims that his posts do not affect his impartiality or its perception by others. This claim is incorrect.

Judge Cohen sits on a court of general jurisdiction. Judge Cohen could be assigned to any division of the Court of Common Pleas and could be hearing a wide range of cases and issues. More importantly, Judge Cohen sits as a representative of all judges in Pennsylvania and has a duty to refrain from causing members of the public to question whether judges generally act on such strident beliefs as he expresses.

In addition to Judge Cohen's clearly political posts there is evidence that his 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). 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) are 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."

Most of the postings Judge Cohen made about these political figures were about already-elected officials, such as President Biden, newly elected candidates, like Governor Josh Shapiro, or were renowned political figures of the past such as Senator Eugene McCarthy not candidates 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 unsuccessful 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). While a violation of the "candidate endorsement" clause of Canon 4, Rule 4.1(A)(3) would not lie regarding most of Judge Cohen's posts about partisan political figures, his commentary regarding these partisan political figures would create the *perception* that Judge Cohen was endorsing or opposing their efforts to hold or retain office. Furthermore, as some of those persons, like President Biden, are presently candidates for re-election, and Judge Cohen 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) in perpetuity as they remain on his Facebook post.

Judge Cohen's Comments Concerning Paul Pelosi and Bruce Marks

Judge Cohen is charged with a violation of Canon 1, Rule 1.2 (Promoting Confidence in the Judiciary). Without regard for the fact that it would be a future court case, Judge Cohen 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, 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 Stipulated Exhibit 8, at 1-2.

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 Stipulated Exhibit 8, at 31. 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. ***Id***. Judge Cohen 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" accusing 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.*** As with the other Facebook posts charged against him, Judge Cohen did not remove the post after the persons accused Marks of criminal and ethical misconduct nor did he distance himself from their accusations.

Judge Cohen's Facebook postings about the DePape and Marks matters undermine the public's perception of his impartiality and fairness in other matters in Pennsylvania. Judge Cohen's posts and his own commentary on same negatively affect his impartiality in similar cases that could appear before him due to the performative aspect and messaging contained in those posts.

Judges Commenting in Media

The authors of *Judicial Conduct and Ethics, 6th Ed. (favorably cited by Judge Cohen)*, write 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.

Judges commenting on television about cases out-of-jurisdiction constitutes, at a minimum, the appearance of impropriety. Such commentary would raise, in reasonable minds, a perception that the commenting judge would not be capable of impartiality or exercising the proper temperament.

This 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 and trial, he 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. Presumably, Attorney Marks and similarly situated persons are not among this number.

One danger here, and a violation of Canon 1, Rule 1.2, comes from the potential that Judge Cohen 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, Judge Cohen 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).

Judges May Comment on Non-Legal Topics as Long as the Comments Don't Interfere With Judicial Duties

Judge Cohen 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. Judge Cohen's Facebook posts and the content of his page underscore Judge Cohen's behavior as an advocate 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, Judge Cohen'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 a judge 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).

A judge is required to maintain 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 which erodes that independence impugns that judge's dignity as it casts that judge (and their office) into the area of partisan politics. ***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, Judge Cohen averred 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 about his own partisan political activity, ***see*** N.T., Trial, 7/24/2023, at 127-130, Judge Cohen violated Canon 3, Rule 3.7(A) by making his Facebook postings.

Judge Cohen's response 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***, 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 Judge Cohen's Facebook postings may be expressed in more elevated terms than common partisan political discourse, they nonetheless constitute partisan political activity and fall beneath the dignity of the judicial office. ***Stilp***, 905 A.2d at 940.

Comment 9 to Rule 4.1 is Inapplicable and Does Not Absolve Judge Cohen of Responsibility for his Posts

Judge Cohen also defends himself 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 incorrect 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]." ***Id.***, 759 A.2d at 460 (bracketed language supplied.). If it was our Supreme Court's intention to craft such an encompassing exclusion as Judge Cohen now advances, it would have said so in the text of the Canons or Rules themselves, not in a comment.

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 Judge Cohen 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. For that reason, 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 Judge Cohen 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 Judge Cohen 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.

Additionally, Comment 9 Has Limited Applicability to Sitting Judges

Finally, and most importantly, Judge Cohen'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, Judge Cohen 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 prohibit sitting judges from engaging in most political activity. Even in the limited circumstances 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 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, Judge Cohen's attempt to use the Comment 9 to Rule 4.1, applicable to Rule 4.1(A)(12), as a shield to accusations that he violated other Rules) is inapposite.

The Endorsement of Candidate Cheney

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[.]

Judge Cohen 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 Judge Cohen from the consequences of his Facebook postings.

As noted above, former Representative Liz Cheney was a candidate for re-election at the time that Judge Cohen 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. Judge Cohen's attempt to disclaim this endorsement is a *non-sequitur*.

In broad terms, Judge Cohen effectively said, "While I can't endorse or back any candidate, I'm going to criticize this candidate's media detractor because this candidate did something I support." The reason for this is apparent from the context of the post – Judge Cohen knew that his initial post could be taken to mean that he was endorsing former Representative Cheney, and, as such, he attempted to have it both ways by endorsing her and disclaiming the endorsement at the same time. Though Judge Cohen's

language is illogical, the point remains the same – he "express[ed] support or approval of" then-Representative Cheney, who was then a candidate." Accordingly, Judge Cohen 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 Judge Cohen's Facebook conduct runs afoul of this Rule which prohibits judges from engaging in "any political activity on behalf of a political organization or candidate for public office." (emphasis added). Given a fair reading, the term "political activity" would include Judge Cohen'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 and movements find their beginnings and endings. ***See*** N.T., Trial, 7/24/2023, at 123-124. Indeed, social media has taken an outsized level of importance in political matters in recent years. 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 may not have been "candidates" at the time of his 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 posts. ***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 such as a Political Party and, thereby, lending the prestige of their office to 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, Judge Cohen was not acting to "improve the law, the legal system, or the administration of justice." Instead, he was endorsing the behavior of certain politicians of the Democratic Party, such as President Joe Biden, and supporting federal economic legislation advanced by the Democratic Party. ***See*** N.T., Trial, 7/24/2023, at 303-305. Judge Cohen's other posts obviously advocated for or promoted causes and politicians endorsed by the Democratic Party. ***Id.***, at 127-130; 133-136. 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 thereby improperly shifting the focus of the prohibition away from the offending judge's conduct to something other than the offending judge's conduct.

Judge Cohen 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 its constituent politicians. Judge Cohen lent the prestige of his judicial office to the views he advanced on his Facebook page. While cloaked in that prestige, Judge Cohen advanced the interests of the Democratic Party and the present-day political figures of that party. ***See, e.g.,*** N.T., Trial, 7/24/2023, at 161-162. Judge Cohen violated Canon 4, Rule 4.1(A)(11) by his Facebook posts.

Derivative Violations

Canon 1, Rule 1.1 Derivative Violations.

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 Judge Cohen 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).

The Code of Judicial Conduct, the First Amendment to The United States Constitution and Article I, § 7 of The Pennsylvania Constitution

In addition to his other defenses, Judge Cohen 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.

Although the standard for discipline in these matters is the reasonable person standard set forth earlier, we address the parties First Amendment concerns.

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 it, Judge Cohen, 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, the "supreme judicial power" of the Commonwealth which exercises "general supervisory and

administrative authority" over all inferior tribunals. ***In re Bruno***, 101 A.2d 635, 651 (Pa. 2014).

Judge Cohen asserts that his Facebook posts 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, Judge Cohen impliedly concedes that there are circumstances where the Code, as written properly governs the speech and expressive conduct of the Commonwealth's judges. He argues however that the Board improperly applied the Code to charge him.

Judges May Post on the Internet – They Just May Not Violate the Code of Judicial Discipline

Judges are free to make internet posts just as they are free to make speeches, or write articles: in any of these actions it is the content and context of the action which determines whether it is an ethical violation. Even a judge appearing on the internet in a robe is not, with nothing more, a violation in itself.

A judge can have and use a public social media account. A judge can be depicted in their official judicial robe as a judge is always a judge and therefore must be responsible for all postings published on their social media accounts whether they are identified as a judicial officer or not. Social media can be positive for a judge to use professionally. Because of social media's

broad reach, it is an ideal medium for judges to inform the public. (see The Judges' Journal", Volume 58, Number 3. Summer 2019). It can be used to share information on the role of judges and the judicial system. It can provide insight into court procedures and encourage *pro bono* activities. It can also be used to show a judge's involvement in educational organizations along with civil and community activities. Judges can promote their activities and recognitions received. ***Id.*** There is also no blanket prohibition against a judge using social media for personal reasons. Judges can post photos of themselves and their family at local restaurants, events or on vacations as long as such photos do not violate any judicial canons. It should be noted that about half of Pennsylvania's judiciary has contested elections every six years and a continuous social media presence may be desired or needed.

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, §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 claims regarding his First Amendment/Article I, §7 rights can be perceived as a "facial" challenge to the Code, the following is set forth.

The Strict Scrutiny Test

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, 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 under 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 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.

Relevant Cases

The United States Supreme Court has 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, such as Judge Cohen.

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

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***, the then-Board Chief Counsel, 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.

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[1] Interestingly, this decision arose from a federal suit instituted by Attorney Stretton, then a candidate for judge in 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. Judge Cohen's view that he can talk about any issue not currently before him is informed, albeit, wrongly, by ***Stretton***.

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.***

Other State's Court Cases

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 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 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:

> 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).

Analogous Caselaw

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-judicial government employee, ***see Pickering***, and a private attorney. ***See 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, 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.***

Several 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***).

This Court finds that a balancing test such as applied in, and influenced by ***Gentile***, as in the ***Hey*** case from West Virginia, presents the

most logical route for Pennsylvania courts that 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, such a balancing standard places those constitutional interests in their proper context in a judicial disciplinary proceeding.

As far as *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 been presented with the issue. 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 and did not report on matters of "public concern," and 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. In ***Eakin*** this

Court has already applied a lesser tier of scrutiny to judicial speech and expression than strict scrutiny without pointed consideration of the issue.

With ***Eakin*** as an overall guide this Court applies a modified ***Pickering*** standard, as in the case in ***Hey***, in recognizing and considering 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 one'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 the New York Code in 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 Judge Cohen's constitutional challenge. ***Raab***, 793 N.E. 2d at 1288-1293.

The ***Pickering/Hey*** standard requires, on the other hand, an answer to 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, Judge Cohen's Facebook posts commented on matters of public concern and that, generally did not directly involve his official duties, ***but see infra***, at 34-35 (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 an efficient judiciary also requires an *impartial* judiciary and a judiciary *perceived to be impartial*, which 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. A Pennsylvania judge who comments on Facebook in the manner that Respondent has done cannot avoid liability under the Code by couching his posts as efforts to encourage public debate. 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 reflect a large degree of sympathy, support, and ideological affinity with members of the left; 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 might reasonably conclude that Judge Cohen would be swayed in his judicial conduct by his political views.

Judge Cohen's Conduct Fails All of the First Amendment Tests

In any event, Judge Cohen's posts flunk all the First Amendment tests set forth by the courts. The posts also flunk the reasonable person test. A reasonable person holding views opposed to those expressed in Judge Cohen's posts would be far from confident of receiving fair treatment from a judge who so repeatedly, vehemently, and recently set forth his political views.

Pennsylvania State Constitution Free Speech Requirements

Having resolved the First Amendment analysis issue, this Court notes that Article I, Section 7 of the Pennsylvania Constitution does not require an independent heightened level of analysis. 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 role in this Commonwealth; if at all possible, these rights 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 no more stringent than an Article I, Section 7 analysis. ***S.B.***, 243 A.3d at 113.

Judge Cohen's Due Process Claims

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

Judge Cohen states that 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 inapt in judicial disciplinary matters. As our Supreme Court observed when speaking about former Canon 1 (now, 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, but 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).

The Code does not specifically list blogging or posting to Facebook as a source of potential violations. It likewise does not delineate other potential methods of judicial communication that could be the source of violations. Judge Cohen'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, is incorrect. 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." ***Se,e 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 the media 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, 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, and up to the time Judge Cohen was charged, 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). Judge Cohen's claim of ignorance regarding his

responsibilities to adhere to the Code and the Constitution in social media postings is 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.") Judge Cohen has violated the Code of Judicial Conduct as set forth in the Conclusions of Law.

Judge Cohen Could have Sought an Advisory Ruling But Did Not Do So

There was no need for Judge Cohen to commit these repeated violations; if he wanted to test the extent of the First Amendment, he could have consulted the Judicial Ethics Advisory Board or its predecessor, told the Board what he intended to do, received advice from the Board and pursued the issue without crossing any ethical lines. Instead, he defied his supervisory judge and eventually the Judicial Conduct Board. These are not the actions of a reasonable person seeking the solution to an ethical dilemma.

Conclusions of Law

1. At Count 1, the Board has established by clear and convincing evidence that Judge Cohen violated Rule 1.1 of the Code of Judicial Conduct by Judge Cohen's failure to adhere to the requirements of 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, the Board has established by clear and convincing evidence that Judge Cohen violated Canon 1, Rule 1.2, in that his Facebook posts undermined public confidence in the independence and impartiality of the judiciary and caused the appearance of impropriety by causing the perception that Judge Cohen violated the Code.

3. At Count 3, the Board has established by clear and convincing evidence that Judge Cohen 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 Judge Cohen 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 Judge Cohen 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 Judge Cohen 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 Judge Cohen violated Canon 4, Rule 4.1(A)(11) by engaging in political activity favoring 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 Judge Cohen violated Article V, §17(b) of the Pennsylvania Constitution by violating the provisions of the Code of Judicial Conduct set forth above.

The parties may file exceptions within 10 days.