COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE

IN RE:	:	**DOCKET NO. 1 JD 2023**
	:	
JUDGE MARK B. COHEN	:	
COURT OF COMMON PLEAS	:	
1ST JUDICIAL DISTRICT	:	
PHILADELPHIA COUNTY	:	

EXCEPTIONS OF THE RESPONDENT, JUDGE MARK B. COHEN, PURSUANT TO RULES OF PROCEDURE OF THE COURT OF JUDICIAL DISCIPLINE, RULE 503(B)(2)

The Respondent, Judge Mark B. Cohen, by his counsel, Samuel C. Stretton, Esquire, respectfully objects and excepts to the Opinion of the Court of Judicial Discipline filed on May 3rd, 2024 in the captioned matter. Mr. Stretton received an extension of the ten (10) day Rule from the original due date of May 13th, 2024 until Friday, May 17th, 2024. Mr. Stretton will raise the following objections in numbered paragraph form.

1) Mr. Stretton objects and excepts to the finding of violations of the charged Rules of Code of Judicial Conduct of Pennsylvania. He contends his conduct and speech are consistent with his right under the First Amendment of the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution and Code of Conduct, Rule 4.1 (Comment 9). He contends his posts were permissible speech.

2) Mr. Stretton objects next to the Findings of Fact. Mr. Stretton contends that his proposed Findings of Fact set forth in this original Brief, are the correct findings. Attached and

marked as Exhibit "A" is the original Brief filed by Mr. Stretton with the Court of Judicial Discipline. Judge Cohen's Findings of Fact are numbered one through 117 and he incorporates them by reference into his Exceptions.

3) Mr. Stretton, on behalf of Judge Cohen, objects to the allowance of Dr. Allison Merrill as an expert witness. Mr. Stretton objects because her testimony did not provide any particular expertise and was just a discussion of politics. This Honorable Court was in a position to make those decisions and the allowance of an expert on the issue of political speech was error. Further, Mr. Stretton references in his proposed Findings of Fact, concerning Dr. Merrill's testimony, which are found at 84 through 111. The Court, in its decision, although referencing Dr. Merrill never addressed the issue as to why her testimony should have been allowed and further, never addressed the issues that her testimony was essentially of no constitutional or legal value since she testified repeatedly the statements of Judge Cohen were political communications because "the constitute political communication because they touch on political issues, political policies, political legislation, and political actors," (see Findings of Fact 93 of Exhibit "A", and N.T. 127). Dr. Merrill essentially found Judge Cohen was involved in political speech because he was critical of social policy and positions that were usually supported by liberals. In fact, that

is not correct. Judge Cohen discussed issues of importance, including issues involving right-wing interests and then issues of left-wing interests, (see Finding 98 in Exhibit "A" and N.T. 136). Dr. Merrill indicated she had never worked or was involved in actual politic activity and was only academically trained in political science, (see Findings of Fact 100-101, N.T. 147). Dr. Merrill testified that in essence, any discussion of a government issue is, in her mind, political in nature, and that politics is government, (N.T. 148). She testified that if there is a posting on issues of importance, legislative concerns then these postings would be political posts, (N.T. 148, 149, 150 see Findings of Fact 103). She then testified that partisan political speech is when a judge talks about issues of importance, (see Findings of Fact 104, N.T. 157). She testified that she was unaware that Judge Cohen, at many times, discussed right-wing positions and she agreed that she only looked at 66 posts and not his other posts, (see Findings of Fact 105, N.T. 158, 159). Dr. Merrill testified, when she was questioned about labor unions, that unions were supportive of the Democratic Party and the political left and this would have been political speech to mention them, (see Findings of Fact 106, N.T. 163, 164). In fact, that is not correct and anyone who is involved in modern politics, particularly in the last election, know that many labor unions have endorsed Republicans and many have

endorsed Donald Trump. The Court further ignored Dr. Merrill's testimony on cross-examination that even though Judge Cohen discussed both left and right-wing issues, she testified that they were still political since they were on the political spectrum, (see Findings of Fact 107, N.T. 166). Therefore, the Court erred in allowing her testimony which called any discussion of issues political in nature. The Court's Opinion seems to parrot much of her testimony. The Court appeared to accept her absurd conclusions and the Court emphasized Judge Cohen's discussion of issues that would be considered more liberal or on the left and therefore, the Court found this to be political improper speech. In fact, the Court ignored the fact that Judge Cohen's discussions also involved right-wing matters. The Court erred in calling this political speech. The posts were classic First Amendment speech commenting on issues of the day. The allowance of Dr. Merrill as an expert prejudiced this Court's fair review. The Findings of Fact set forth in Judge Cohens' Brief clearly show that Dr. Merrill's testimony had no merit and should not have been considered and the Court erred in its conclusion as to what is political speech.

4) The Court's Opinion ignored the fact that Judge Cohen's comments talks about middle road issues, left-wing issues, right-wing issues. The Court ignored the fact that Judge Cohen endorsed no political candidates. The Court ignored the

fact that Judge Cohen's comments were educational and rational discussions of major issues. The Court erred in concluding this was political speech and Rule violations and a new trial should be given.

5) The Court erred in its discussion that Judge Cohen was endorsing candidates such as Governor Shapiro or Representative Chaney. In fact, reviewing those findings, clearly suggest that Judge Cohen did not do any endorsements. He just mentioned or discussed issues raised by these individuals. The Court erred in concluding this was political speech.

6) The Court erred and failed to note and credit the number of excellent character witnesses presented by Judge Cohen by stipulation, (see N.T. 233, 239). These witnesses were people of substance including Todd Eachus, a former member of the House of Representatives, John Meyerson, a former Legislative Director of the Political Action Committee for United Food and Commercial Workers, attorney David Wilderman, a Commissioner on the Workman's Compensation Board, attorney Lyonel Ginzberg, an attorney from Philadelphia and the former attorney for Representative Joseph, attorney Sherri Cohen, the sister of Judge Cohen, Matthew Jackson, the Judicial Assistant to Judge Cohen and Nicholas Himebaugh, who is the Majority Executive Director of the Pennsylvania House of Government Committee, (see

Findings of Fact 63 and 64 in reference to the character testimony).

7) The Court erred in not given a fair and balanced view of the testimony of Judge Cohen. Judge Cohen's testimony is found at Findings of Fact 1 through 62 in Exhibit "A" of the Brief. Judge Cohen testified he believed his posts were sent to generally well-informed people who enjoyed discussing public affairs, (N.T. 315). This was ignored by the Court. Judge Cohen testified that his posts were societal views to be addressed by society, (N.T. 130). Judge Cohen testified that he learned from the posts and from the related discussions, (N.T. 307, 309). Judge Cohen testified that he wrote the posts and did so because "it dealt with opinions that I thought were important and relevant and in the public interest," N.T. 297. All of that was ignored by the Court of Judicial Discipline.

8) The Court of Judicial Discipline ignored the fact that none of Judge Cohen's posts never discussed any case or any issue that appeared before him. The Court just noted he was a Judge of general jurisdiction, but his entire tenure on the Court has been in Family Court. He was not in civil court, he was not in criminal court, he was not in statutory appeals, he was not in commerce court. The Court can show no comment that he made that in any way involved any case he had or anything that would appear before him. The suggestion that he was of general

jurisdiction and therefore, could not say anything about anything because some issue might appear somewhere in the Court of Common Pleas of Philadelphia County, does not fairly resolve this issue. Judge Cohen was very careful not to comment on matters coming before his Court or that may come before his Court and his Court was the specialized family division in Philadelphia Family Court.

9) The Court of Judicial Discipline erred in not finding a due process violation due to the vague Rules beginning on page 79 of its decision. There clearly was a due process violation under the Fourteenth Amendment of the United States Constitution. As the Court noted, this is a case of first impression. There was no guidance as to what could be said or not said. The Court's suggestion to just follow the rules is inadequate and fails to recognize that these Rules are vague and confusing and contradictory and the failure to give adequate guidance is a due process violation. Comment 9 to Rule 4.1, in the comment clearly allows the speech at issue. The Court erred in not finding a due process violation and not finding the conduct was consistent with Comment 9 to Rule 4.1.

10) The Court erred in suggesting that Judge Cohen should have sought an advisory opinion, (see page 82 of the Court's Opinion). On the contrary, the Judicial Ethics Advisory Board has only been existence for about a year and a half to two years

and was just starting. For many of the posts, the Judicial Advisory Board was not in existence. Only the trial judges of Pennsylvania had an Ethics Committee but that was informal and not binding. The Court of Judicial Discipline erred in finding failure to consult the nonexistent ethics commission or any former advising committee to be in error.

11) Even more importantly, the Court erred on page 82 when it said that Judge Cohen defied the Supervisory Judge and defied the Judicial Conduct Board. First, there is no defying here. Judge Cohen, at the advice of Samuel C. Stretton, Esquire, immediately removed his picture in a judicial robe. Mr. Stretton reviewed what Judge Cohen could and could not say. Mr. Stretton is known as someone who knows judicial ethics and in fact, has represented judges since the early 1980s, both before the Judicial Inquiry Review Board and many times before the Judicial Conduct Board and the Court of Judicial Discipline. Mr. Stretton is only one of a few lawyers in the Commonwealth of Pennsylvania who has been found to be an expert on judicial ethics by the Court of Judicial Discipline and that was found during Justice Eakin's trial, where Mr. Stretton was qualified as an expert on judicial ethics. Therefore, the suggestion that there was defiance is just wrong. Further, Judge Cohen did not defy Judge Murphey. He did what she said and talked to Mr. Stretton and followed his advice. Further, the Court erred in saying he

defied the Judicial Conduct Board. The Judicial Conduct Board is not a neutral advisory agency. They do not give advice. The Judicial Conduct Board is a prosecutorial agency. One can disagree and the disagreement is resolved in litigation in the Court of Judicial Discipline. To suggest that Judge Cohen was defiant is wrong and not supported by the record and raises some serious questions as to whether or not Judge Cohen was given a fair hearing since the conclusion of defiance is wrong. Further, Judge Cohen testified and Mr. Stretton argued this was a good faith challenge.

12) This Court, in its Opinion, failed to recognize that this was a good faith challenge. The Court stated that this was a case of first impression. Judge Cohen respectfully chose to raise a challenge to the Rules. He decided to pursue the issues of posting because he believed he was correct. This Honorable Court ignored the fact that Judge Cohen was a well-respected State Legislature for 42 years in the Pennsylvania General Assembly and now is an elected Judge. Judge Cohen comes from an extremely respected political family in Philadelphia. His father, Councilman David Cohen, was considered the conscience of Philadelphia City Council. The Court's decision and suggestion of defiance assumed Judge Cohen was an irresponsible person which is not the case and this Court erred in reaching that conclusion.

13) The Court erred in not explaining in proper detail why Judge Cohen's discussions discussing laws is not something that Judges are allowed to do under the Code of Judicial Conduct. Judges are permitted and urged to engage in discussing issues of law. There were 66 posts listed, 41 of them discussed the legal system and administration of justice, (see 1, 2, 4, 8, 11, 12, 13, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 38, 41, 46, 47, 48, 49, 50, 51, 52, 53, 54, 58, 59, 60, 61, 62, 65, and 66). They were discussions of statutory issues involving laws, (see Rules 3.1 and 3.7).

14) The Court ignored the fact that although Judge Cohen did discuss favorably Democratic political leaders such as Governor Wolf, President Biden, Senator Fetterman and Governor Shapiro, he also discussed favorably Republican Congressman Chaney who is a Republican. He never endorsed any of them, his posts involved informed discussions. The Code of Judicial Conduct in Pennsylvania allows Judges to write, speak, lecture, teach and participate in activities concerning the law, legal system and administration of justice, (see Rules 3.1 and 3.7). Judge Cohen, in 41 of these posts, did so. Yet, this Honorable Court gives him no credit for that. That is error.

15) This Court erred in defining political activity as along the lines of Dr. Merrill. The Court erred in its

suggestion that discussing left-wing issues or right-issues is political speech.

16) This Court erred in not realizing the damage its very harsh and restrictive decision is doing to judicial speech and the First Amendment since in essence, despite the Court's suggestion to the contrary, other than perhaps personal family issues, a judge can never comment on any matter of importance without it being called political speech and therefore, the subject of judicial discipline.

17) The Court erred in suggesting these issues have been considered and decided by other Courts, (see page 36 of the Decision). The Respondent objects to such statement. He will incorporate his original Brief which is marked as Exhibit "A". But more importantly, there was truly no real guidance in other jurisdictions other than a mixed bag of opinions, ethics opinions, and court decisions. There was no clear guidance on these issues of speech. This Court's suggestion that the Rules are clear and Cannon 4 is clear, and prohibits Judge Cohen's speech is incorrect.

18) The Court erred in suggesting the Court would apply a reasonable person standard to the postings. That is not the standard. The Court erred in its suggestion, on page 38, that the postings' volume and tone undermine the appearance of impartiality. The postings and its contents were serious,

dignified discussions of issues of importance. The Court erred in using this improper reasonable person standard, (see page 38).

19) The Court erred, on page 40 and other pages in its Opinion. The Court essentially said there can be no speech at all on any issues of importance and found all such discussions and postings to be partisan political activity. By making such an incorrect statement, the Court has misled the judiciary and crushed immediately First Amendment Speech. The Court erred in finding Judge Cohen abused his office, on pages 41 and 42 of the Opinion. The Court erred by saying that he infused his Facebook page with the prestige of his office. To the contrary, that is not the case. Judge Cohen did mention he was a Judge and some people addressed him as a judge. But he never abused the prestige of his judicial office. Judge Cohen never used his posts for any personal advantage. That was an error, (see pages 41 and 42).

20) The Court erred on pages 42-45 suggesting that Judge Cohen's posts set forth his personal political views. On the contrary, his posts do not talk about his political views. The posts talk about issues of importance at state, federal and local levels where he provides rational discussion. They are not his personal views. They are discussions on issues of importance in the community.

21) The Court erred on pages 46-47 by stating that Judge Cohen lacked impartiality. To the contrary, there is no suggestion that he was politically supporting one side or the other. The suggestion of Judge Cohen's "partisan political musings on Facebook" is wrong and a review shows to the contrary. His Court decisions have been fair and evidence based.

22) The Court was wrong on pages 47-48 suggesting and rejecting Judge Cohen's claim that he did not discuss issues that would come before him. As noted earlier, Judge Cohen rejects the Court's position that since he sits on the Court of general jurisdiction, he cannot talk about anything even though, none of those issues are going to come before him except family issues and there were no posts about Family Court or family issues. The Court erred.

23) The Court erred in finding violations of the comments about Paul Pelosi and Former State Senator Bruce Marks. Judge Cohen's comments were appropriate and did not undermine public perception of his impartiality. There was no evidence of that presented other than the expert witnesses, whose testimony should have been rejected by this Court for the reasons stated earlier.

24) The Court erred in suggestion that Judge Cohen's comments interfered with his judicial duties, (see pages 52-54 of the Opinion). Judge Cohen's comments on non-legal topics were

done in a proper and dignified and serious matter. They were not offensive to anyone and there was no evidence that they were offensive to anyone. The Court in suggesting that this was just pure partisan political activity and fell beneath the dignity of the judicial office, was wrong, (see page 53 of the Opinion). Judge Cohen's posts were serious discussions. They were not partisan political speech or activity. To say that means any speech is partisan political activity and that would be an impossible standard and a wrong conclusion.

25) The Court erred on pages 54-56 suggesting that Comment 9 to Rule 4.1 not be taken to mean what it says. That Comment says "pledges, promises or commitments must be contrasted with statements or announcements of personal views on legal, political or other issues which are not prohibited," see Comment 9. Therefore, what Judge Cohen said, discussing issues, was endorsed by the Comment. The Court's suggestion that comments cannot be accepted if they contradict other Rules is wrong. The Comments are to provide guidance as to what to do and say. Further, the Rules under 4.1 are confusing at best on posting. They contradict other Rules. Judge Cohen had a right to accept that and rely on Comment 9 to Rule 4.1. Judge Cohen had a right to reasonably rely on the clear language set forth in Comment 9 to Rule 4.1. Further, the Court erred in suggestion that the Rule had limited applicability for sitting judges, (see pages 56

and 57 of the Opinion). On the contrary, Rule 4.1, Comment 9 applies to all judges and can be followed and accepted.

26) The Court erred on pages 57 and 58 suggesting comments about Candidate Chaney were an endorsement. On the contrary, that was no such endorsement.

27) Judge Cohen objects to the statement by the Court, on page 60, that he was not acting to improve the law, legal system or administration of justice. Judge Cohen objects to the statement that he was endorsing the behavior of certain politicians of the Democratic Party, (see page 60 of the Opinion). To the contrary, that is not accurate and not correct. Further, Judge Cohen objects to the statement that he violated Cannon 4 because he consistently posted his positions on Facebook comments that were either advocating for or sympathetic to causes of the Democratic Party and its constituent politicians, (see page 61). That is not true. A view of his posts would show many discussions of more right-wing issues. He did not embrace any of these. He discussed all issues in an intelligent, informed fashion. He did not use the prestige of his office as the Court stated. The Court erred in concluding that Judge Cohen advanced the interests of the Democratic Party and political leaders of the party, (see page 61). That is just not correct. Judge Cohen emphatically objects to a finding of any violation and would incorporate his Brief, (Exhibit "A").

28) Further, Judge Cohen objects to the failure of the Court to adopt a strict scrutiny test, (see pages 65-66 when the Court appeared to reject that approach). Judge Cohen points to Rule 3.7 that allows judges to write, lecture and speak and it encourages that, (see Rule 3.7[a]).

29) Judge Cohen specifically objects to the failure of the Court to find his posts were protected speech. He contends his speech is protected through the First Amendment through the Fourteenth Amendment of the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution. Judge Cohen would adopt his discussion of the standard starting on page 56-62 of his Brief, which is attached and marked as Exhibit "A".

30) Judge Cohen contends that a strict scrutiny standard is the appropriate standard. His posts are on issues of importance and not on pending case nor on any case that would appear before him. The Board has not shown any reason to prohibit or not allow this speech using the strict scrutiny standard. The Court failed and ignored the fact that the Court is measuring the content of his speech and a strict scrutiny standard is warranted. The Board must demonstrate a compelling state interest in favor of the government to overcome the strict scrutiny standard. That has never been done. The testimony of the expert, as noted, was of no value. The Court erred in not

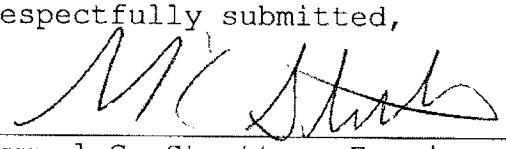
doing a detailed analysis. Without using a strict scrutiny standard in this context, there would be a chilling effect on judicial free speech. The interest of the impartiality and independence have to be balanced against a judge's right to express his or her personal view points on matters of importance. Further, under the Code of Conduct under Rule 3.1, in Comment 2 to that Rule, judges are encouraged to engage in extra judicial activities to further their understanding and respect for the law and the courts. Judge Cohen's posts do that and that fact was not recognized by the Court of Judicial Discipline.

31) Judge Cohen objects to the comments by the Court of Judicial Discipline that reject all tests, including the strict scrutiny test, (see page 78 of the Opinion), where the Court stated Judge Cohen's posts flunk all First Amendment tests set forth by the Court. The Court then erroneously erred by talking about a reasonable person standard, such a standard is not a proper standard for constitutional review. Judge Cohen objects this conclusion and contends the strict scrutiny test is the appropriate test to apply to his posts. These posts do not involve partisan activity and the Judicial Conduct Board failed to present any sound reasons to overcome the strict scrutiny test. Judge Cohen contends there was a serious error. The bottom line is the Court of Judicial Discipline has now seriously

restricted free Judicial speech on issues of importance and the decision should be reversed.

WHEREOFRE, the Respondent, the Honorable Mark B. Cohen, by his counsel, Samuel C. Stretton, Esquire, objects and excepts to the Report and Decision of the Court of Judicial Discipline and respectfully asks the Court's decision be overruled and dismissed for the reasons set forth in these Objections and the attached Brief that is incorporated and marked as Exhibit "A".

Respectfully submitted,



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COMMONWEALTH OF PENNSYLVANIA
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1ST JUDICIAL DISTRICT	:	
PHILADELPHIA COUNTY	:	

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,

May 16, 2024
Date

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CERTIFICATE OF SERVICE

I hereby certify I am this date serving a copy of the foregoing Exceptions in the captioned matter upon the following persons in the manner indicated below.

Service by electronic mail addressed as follows:

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Respectfully submitted,

5/16/24
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BRIEF OF THE RESPONDENT, JUDGE MARK B. COHEN

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Exhibit "A"

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TABLE OF CITATIONS

PENNSYLVANIA CODE OF JUDICIAL CONDUCT

PENNSYLVANIA CODE OF JUDICIAL CONDUCT 1974

PENNSYLVANIA CONSTITUTION

PENNSYLVANIA RULES OF EVIDENCE

UNITED STATES CONSTITUTION

I. HISTORY OF THE CASE

The Respondent, Mark B. Cohen, has brought a principled challenge to the Judicial Conduct Board's apparent prohibition of posting by a sitting Judge, even though, the posts do not discuss issues before his Court or do not discuss pending cases, and essentially discuss only issues of state, national and local importance. Judge Cohen respectfully contends that his conduct is permitted by the Code of Judicial Conduct and also consistent with protected speech pursuant to the First and Fourteenth Amendments of the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution. Therefore, Judge Cohen argues all of the alleged violations should be dismissed.

A Letter of Inquiry was sent to Judge Cohen, to which he timely responded. His deposition was taken. Subsequently, the Judicial Conduct Board filed a Complaint with the Court of Judicial Discipline on or about February 23rd, 2023. The Complaint was marked

during the trial as Exhibit "R-1". The Complaint, beginning in paragraph nine, listed a number of posts made by Judge Cohen in 2021 and 2022. Those posts are found in Exhibit "R-1" from pages three through fourteen and are summarized. Nowhere in these posts does Judge Cohen talk about political endorsements or political support. All post discussions involve state, national and local issues.

In paragraph ten of the Complaint, Judge Cohen is charged in Count One with violating Rule 1.1 of the Code of Judicial Conduct. Rule 1.1 is entitled *Compliance with the Law*, and notes "a judge shall comply with the law including the Code of Judicial Conduct," see Rule 1.1.

In Count Two, found in paragraphs fourteen through seventeen, Judge Cohen is charged with violating Code of Judicial Conduct, Rule 1.2, which discusses compliance with the law and states as follows:

> "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," see Rule 1.2.

In Count Three, found at paragraphs eighteen through twenty of the Complaint, Judge Cohen is charged with violating Code of Judicial Conduct, Rule 1.3, which is entitled *Avoiding Abuse of the Prestige of Judicial Office*. This Rule states as follows:

> "A judge shall not abuse the prestige of judicial office to advance their personal or economic interest of the judge or others or allow others to do so," see Rule 1.3.

Count Four, that appears in paragraphs twenty-one through twenty-three, alleges a violation of Rule 3.1(c) of the Code of Judicial Conduct. That section is entitled *Extra Judicial Activities in General*, and that Rule reads as follows:

> "A judge shall regulate their extra judicial activities to minimize the risk of conflict with their judicial duties and to comply with all the provisions of this canon. However, a judge shall not --- (c) participate in activities that would reasonably appear to undermine the judge's independence, integrity or impartiality," see Rule 3.1(c).

In Count Five of the Complaint, Judge Cohen in paragraphs twenty-four through twenty-six is charged

with violating Rule 3.7(a) of the Code of Judicial Conduct, which is entitled *Participation in Educational, Religious, Charitable, Fraternal or Civic Organizations and Activities.* That charge reads as follows:

> "Advocational activities. Judge's may write, lecture, teach and speak on non-legal subjects and engage in the arts, sports, and other social and recreational activities, if such advocational activities do not attract from the dignity of their office or interfere with their performance of their judicial duties," see Rule 3.7(a).

Judge Cohen then in Count Six, is charged with violating Code of Judicial Conduct, Rule 4.1(a)(3) in paragraphs twenty-seven to twenty-nine of the Complaint. That Rule is entitled *Political and Campaign Activities of Judges and Judicial Candidates in General*, and reads as follows:

> "Except as permitted by Rules 4.2, 4.3 and 4.4, a judge or a judicial candidate shall not --- publicly endorse or publicly oppose a candidate for any public office," see Rule 4.1(a)(3).

Judge Cohen was then charged in Count Seven, found in paragraphs thirty through thirty-two of the

Complaint, with violating Code of Judicial Conduct, Rule 4.1(a)(11), that Rule is entitled *Political and Campaign Activities and Judicial Candidates in General*, and reads as follows:

> "Except as permitted by Rules 4.2, 4.3 and 4.4, a judge or judicial candidate shall not --- (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," see Rule 4.1(a)(11).

Judge Cohen is then charged in Count Eight with violation of the Pennsylvania Constitution, Article V, Section 17(B). This alleged violation is found in paragraphs thirty-three through thirty-seven of the Complaint. This provision reads as follows:

> "Justices and judges shall not engage in any activity prohibited by law and shall not violate any cannon of legal or judicial ethics prescribed by the Supreme Court," see Article V, Section 17(B) of the Pennsylvania Constitution.

Judge Cohen retained present counsel, Samuel C. Stretton, Esquire, to represent him. The Judicial Conduct Board at all pertinent times was represented by

excellent Deputy Counsel, James P. Kleman, Jr., Esquire. Mr. Stretton, on behalf of Judge Cohen, filed an Answer and New Matter on April 19th, 2023. Judge Cohen in his Answer to paragraph nine, denied that any of the postings violated the Code of Judicial Conduct or the Pennsylvania Constitution. In the Answer, Judge Cohen noted the Complaint only referenced just a few of the thousands of posts that he has been making. He denied any posts endorsed any political candidate and denied any posts opposed any political candidate. As noted, he stated his posts did not talk about issues before his Court. Judge Cohen admitted that the posts listed in paragraph nine if the Complaint, I through LXVI, were his posts and he admitted that he wrote them. In essence, he stated that most of these posts involved discussions on issues of importance that did not appear before his Court. Judge Cohen emphatically denied in his Answer violating any of the Eight Counts. Judge Cohen then raised New Matter in his Answer. In his New Matter, he raised that the defense that his

conduct was protected speech under the First Amendment of the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution and he contended that he did not violate the Code of Judicial Conduct nor the Pennsylvania Constitution. He also contended that his speech was protected by Comment Nine to Rule 4.1 of the Code of Judicial Conduct, which allows those kinds of discussions and comments.

He further alleged the constitutional violation of due process under the Fourteenth Amendment of the United States Constitution since he argued that the Rules were too vague and he was not given adequate warning that his speech would violate the Code of Judicial Conduct. He also alleged the defense under Code of Judicial Conduct, Rule 3.7, that judges are encouraged to write, lecture, teach and speak on non-legal subjects. He then, in paragraph forty-four of his new matter, raised the Comment Nine of Rule 4.1, which reads as follows:

> "Pledges, promises or commitments must be contrasted with statements or announcements of

> personal views on legal, political or other issues which are not prohibited," see Comment Nine to Rule 4.1.

Judge Cohen raised Comment Nine to Rule 4.1 as a complete defense.

Judge Cohen filed an Omnibus Motion, which was marked as "R-3" in the Trial before the Court of Judicial Discipline. In his Omnibus Motion, he raised the issue that his comments were protected speech. He noted, he had been in the Pennsylvania legislature for 42 and a half years and then had been elected as Judge in Philadelphia County. In his Omnibus, he alleged he always had a blog, even before he became a Judge, and commented on matters of importance since 2007. He raised not only the First Amendment of the United States Constitution but also Article I, Section 7 of the Pennsylvania Constitution about communication, thoughts and opinions. In the Omnibus Motion, Judge Cohen also raised the First and Fourteenth Amendments of the United States Constitution and he further raised Comment Nine to Rule 4.1. The Court of Judicial

Discipline, without argument, denied Judge Cohen's Omnibus Motion.

Subsequently, Judge Cohen, through his counsel, Samuel C. Stretton, Esquire, filed his Pre-Trial Memorandum listing Exhibits and witnesses. The Judicial Conduct Board did the same. A trial was held before the Court of Judicial Discipline on July 24th, 2023 in the Commonwealth Courtroom at the Justice Center in Harrisburg, Pennsylvania. President Judge Ronald Marsico was present as was Judge Daniel Baranoski, Judge Thomas Flaherty, Judge Charles Becker and Judge Steven Irvin. Judge Flaherty, as the Conference Judge, chaired the Trial.

Mr. Stretton, pre-trial, on behalf of Judge Cohen, had also objected to the expert witness of the Judicial Conduct Board. The objection suggested there was no need for expert testimony and that the Judges on the Court of Judicial Discipline could determine whether the posts violated the Rules at issue and were

political in nature. That request was denied after the Pre-Trial Conference.

The trial took place on July 24th, 2023. One of the problems post-trial was the trial transcript had so many errors. As a result, a second transcript was ordered and that also contains many errors. Mr. Kleman and Mr. Stretton met with Joseph Metz, the counsel to the Court of Judicial Discipline and an agreement was reached to write the Briefs using the second transcription. The agreement decided the errors would be corrected later. A briefing schedule was set with both Briefs due on November 6th, 2023. Both parties, if they wish, have the right to file Reply Briefs by November 20th, 2023.

During the trial, the Judicial Conduct Board presented as witnesses, Judge Margaret Murphy the Administrative Judge of Family Court in the First Judicial District, Investigator Paul Fontanes and Expert Witness Allison Merrill. There was a stipulation as to the authenticity of the posts.

Mr. Stretton presented character witnesses Todd Eachus, John Meyerson, David Wilderman, Lyonel Artim Ginzberg, Sherrie Cohen, Matthew Jackson, and Nicholas Himebaugh. Judge Mark B. Cohen then testified on the substance of the Complaint.

This Brief is being submitted on behalf of Judge Cohen. Judge Cohen is respectfully requesting that these charges be dismissed since there were no Rule violations and his conduct was consistent with what is allowed as protected speech under the First and Fourteenth Amendments of the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution. His posts are also allowed speech under Comment Nine to Rule 4.1 of the Code of Judicial Conduct.

II. ISSUES PRESENTED FOR REVIEW

1) Did the Respondent, Judge Mark B. Cohen's, posts violate the charged sections under the Code of Judicial Conduct and the Pennsylvania Constitution or were his posts protected speech under Article I, Section 7 of the Pennsylvania Constitution and the First and Fourteenth Amendments of the United States Constitution? Further, were his posts speech allowed pursuant to Rule 4.1 of the Code of Judicial Conduct as set forth in Comment Nine, allowing such speech? Further, was due process violated since the Code of Judicial Conduct failed to provide warning to Judge Cohen that such conduct would be in violation and therefore, this prosecution would violate the due process clause of the Fourteenth Amendment of the United States Constitution? Should the charges of all of the Code violations and the Constitutional violation be discharged and dismissed since the evidence does not support any violations and these posts were protected speech under the First and Fourteenth Amendments of the

United States Constitution and Article I, Section 7 of the Pennsylvania Constitution?

III. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROPOSED FINDINGS OF FACT

1) Judge Mark Cohen, at the time of his testimony, was 74 years of age. He came from a family very much involved in Philadelphia government. His father was Councilman David Cohen who was also a member of the bar, (N.T. 241, 242).

2) Judge Cohen stated his father, David Cohen, was a very positive mentor for him and had him become involved in politics in Philadelphia. He noted he was elected 22 times to the State House of Representatives. He also ran for Congress in 1978 and was defeated for that office and ultimately lost his re-election after 42 years for the State House of Representatives in 2016, (N.T. 242, 243).

3) As an elected State Representative, he was Chairman of the Democratic Caucus for 19 years and he also served for two years as a Democratic Majority Whip. He noted his brother, Dennis Cohen, is also an

elected Common Pleas Judge in Philadelphia County, (N.T. 243).

4) Judge Cohen testified he began posting when Facebook was opened to the public which he believed was in 2007, when he was still an elected State Representative, (N.T. 243, 244).

5) Judge Cohen testified that he also attended law school while he was a State Representative and graduated from law school in 1993 and was admitted to practice law in Pennsylvania in 1994, (N.T. 244).

6) Judge Cohen testified that his purpose for posting, beginning in 2007, was to get people involved in the Democratic Party and also to inform people on important issues.

7) Judge Cohen testified that after he was elected as a Judge of the Court of Common Pleas, he continued posting but he changed the nature of his posts which were no longer political, (N.T. 245).

8) He stated that he followed the Rules of the Code of Judicial Conduct. He said he did not endorse

any candidates for election and he would not recommend any. Judge Cohen said his posting began solely about public policy and government. He noted his postings were many quotes from philosophers and most of his posts more and more became about life in general, (N.T. 245, 246).

9) Judge Cohen estimated that he has done between 7,000 to 10,000 posts since has been elected as a Judge of the Court of Common Pleas. He noted that in some of his early posts as a Judge, he had a picture of himself with a judicial robe because he was proud to be a judge. He testified that it was brought to his attention that he should not do that, he promptly removed those posts and he has not appeared again with a robe, (N.T. 246).

10) Judge Cohen testified that to his knowledge, there are no longer any posts by him in his judicial robe, (N.T. 247).

11) Judge Cohen testified that since he has been elected as a Judge in Philadelphia County, in 2018, he

served in the Family Court Division exclusively, (N.T. 248). He indicated that in Family Court he primarily sits on custody cases and relocation cases which are related to custody, (N.T. 248).

12) Judge Cohen testified that he hears up to 15 to 18 cases a day on custody related issues in his Courtroom in Philadelphia, (N.T. 249).

13) Judge Cohen said as to his posts, he tries to engage people in discussions. It enables him to learn things and also enables them to learn. He noted that most people are generally happy with his Facebook posts, (N.T. 249).

14) Judge Cohen also noted that as a Judge now, he has been more isolated since he does not get invited to events as he once did, nor does he hear from reporters or things of that nature. He said when he posts now, he has a chance to interact with people usually on the subject of news. He stated most of his posts are on issues of significance which people are interested in talking about, (N.T. 249, 250).

15) Judge Cohen testified he never posted about any of his cases, (N.T. 250).

16) Judge Cohen testified that his posts do not talk about Family Court. Judge Cohen stated he has not been asked to transfer out of Family Court, (N.T. 250, 251).

17) Judge Cohen testified that he can only continue to serve until December 31st, 2024 since he will be 75 years of age. He testified it is his intention to continue to sit until he reaches that mandatory retirement age, (N.T. 251, 252).

18) Judge Cohen testified he has never posted on any case before the Philadelphia Court of Common Pleas, (N.T. 252).

19) Judge Cohen reviewed Judicial Conduct Board's Exhibit "8" involving the posts he made. He indicated Exhibit "8" contained 66 posts when really, he had many, many other posts on issues of importance that were not referenced, (N.T. 253).

20) Judge Cohen in discussing his posts, noted he is strongly against crime and has said so. He has numerous posts about crime rates in Philadelphia and how it is bad for the city, (N.T. 253, 254).

21) Judge Cohen testified in his posts he never endorsed any Judge for election or never endorsed any political party or candidate since he became a judicial officer, (N.T. 253, 254).

22) Judge Cohen testified he reviewed all of the posts that he has been charged with and his other posts which he is not charged with, and none of them were partisan posts, (N.T. 255).

23) Judge Cohen made the following statement:

> "I just felt that there is something important here. Free speech is an important and fundamental right in America and my posts are not political in the sense of being partisan. I was not calling --- I was not urging anyone to take any action to do anything. --- there were discussions of issues which are being discussed widely in the media at the time," (N.T. 255, 256).

24) Judge Cohen testified that when he did his posts, he was aware of Comment Nine to the Pennsylvania

Code of Judicial Discipline Rule 4.1 which allows such posts. He indicated that he believed his posts fit within the guidance provided in Rule 4.1, (N.T. 256).

25) Judge Cohen was specific about his reliance on Comment Nine to Rule 4.1 and agreed that he does not make pledges, promises or commitments but he did announce his personal views on legal, political and other issues and that was not prohibited under the Rules or Comment Nine, (N.T. 256, 257)

26) Judge Cohen stated that in all of his posts, he has never held himself out as a political leader, and has never held himself out as holding a political office, (N.T. 257). Judge Cohen testified that since he has been elected as a Judge, he has not made any political speeches or speeches on behalf of an organization, (N.T. 257).

27) Judge Cohen testified that he has not endorsed or opposed any candidate for public office since being a Judge, (N.T. 258).

28) Judge Cohen was empathic that he has never solicited any funds or contributed to any political candidate since he has become a Judge in Philadelphia, (N.T. 258).

29) Judge Cohen testified that he has not purchased any tickets for donors or political fundraisers, (N.T. 258).

30) Judge Cohen testified that his wife is a member of the Democratic State Committee but that he does not accompany her to any of those political events, (N.T. 258, 259).

31) Judge Cohen testified that he has never used any campaign funds for his private benefit and he has never solicited any campaign funds as a judicial candidate, (N.T. 259).

32) Judge Cohen testified that he has never used any government office or his judicial office as part of any campaigns, (N.T. 259).

33) Judge Cohen stated he has never made a false or misleading statement as a Judge or as a candidate for judge to his knowledge, (N.T. 259).

34) Judge Cohen indicated he has never made any statement that could reasonably be expected to suggest the outcome of a case or impair the fairness of a matter in any court, (N.T. 260, 261).

35) Judge Cohen testified that he does not engage in any political activity or engage in any political organization or engage with any other candidate since being elected as a judicial officer, (N.T. 261).

36) Judge Cohen testified that in his posts, many of them would fit under the category to improve the law and the administration of justice, (N.T. 261).

37) Judge Cohen testified that he is not limiting his discussion to issues of the Democratic Party. He said he spoke about issues he thought were important such as crime, legislation, and other matters. He has spoken on inflation, (N.T. 262, 263).

38) Judge Cohen was questioned about his Facebook posts referencing a picture of Francis Perkins, who was the Secretary of Labor under President Rosevelt. He testified that was not a post supporting Democrats and that he was talking about labor unions supporting Republicans and women, (N.T. 263, 264).

39) Judge Cohen agreed that he had a post wishing President Trump a happy birthday.

40) Judge Cohen was then asked questions about the late Philadelphia Labor Leader, Wendell Young and his son, who now heads the local 1776 United Food and Commercial Workers. Judge Cohen said his purpose of posting this was because the Youngs had roots in the community and Mr. Young had a big impact on him personally in his active, political and civil life in Philadelphia, (N.T. 264, 265).

41) Judge Cohen was asked about his posts involving Liz Chaney and he noted he subscribes to the magazine *The Nation*, and there was an article in there which he thought was unfair to Chaney. He said he was offended

by the article and thought it was worthwhile to speak on her. He said he referenced the NY Yankee and Roger Maris when he broke Babe Ruth's homerun record and discussed that in, (N.T. 266).

42) He talked about a post on Batbette Joseph, who was very active in the past in the state legislature and in women's rights issues. He noted her birthday should be publicly celebrated. He said she was a good friend of his and he was in touch with her after her retirement and was just speaking about it, (N.T. 266, 267).

43) Judge Cohen was questioned about the District Attorney of Philadelphia, Larry Krasner. He was referencing Mr. Krasner's discussions about being subpoenaed in an impeachment proceeding. He said that as a former State Legislator, he believed people should cooperate with the State Legislature. He said he wanted to comment that he thought Mr. Krasner did a good thing by deciding to comply with the legislative process, (N.T. 267, 2668, 269).

44) Judge Cohen testified about Councilman Kenyetta Johnson when he was found not guilty of criminal charges. He noted that he was a friend of Johnson. Judge Cohen in his post said he was someone who he had known for a number of years and his post said the not guilty was a vindication. Judge Cohen stated that he was not commenting on the Court, he was commenting on the jury verdict, (N.T. 272).

45) Judge Cohen was shown a posting he made about the famous Chicago criminal and labor lawyer, Clarence Darrow. He said the post was made around Labor Day and there were a lot of posts and news articles about labor unions and that is why he mentioned Clarence Darrow, (N.T. 272).

46) Judge Cohen talked about his posts referencing immigrants and labor unions and noted the importance of labor unions in the United States, (N.T. 273).

47) Judge Cohen repeatedly testified Rule 4.1 of the Code of Judicial Conduct was his guiding point and

where he drew the line on what he said, (N.T. 273, 274). He referenced Comment Nine to Rule 4.1

48) Judge Cohen testified that he disagreed with expert witness, Dr. Merrill. He said her view is anything that deals with government policies is political and therefore prohibited. Judge Cohen testified if that was the case, he would never be able to say anything about public affairs, (N.T. 274).

49) Judge Cohen testified that he drew the line on material that deals directly with elected offices and candidacies for those offices. He would not post on those subjects as he believed that would violate the Code, (N.T. 275).

50) Judge Cohen testified he believes it is ok to talk about issues of importance. But he said he would not talk about specific court cases, (N.T. 276).

51) Judge Cohen testified that his challenge here was a good faith challenge. He is not being defiant. He said as follows:

> "I think I am acting in good faith. It is fully consistent with my life," (N.T. 276).

52) Judge Cohen when confronted on cross-examination about a fundraiser for the United States Holocaust Museums, testified he has been repeatedly solicited for donations and he finally donated. He said he was not soliciting funds for the organization, (N.T. 279, 280).

53) Judge Cohen, during his testimony, denied using the prestige of his office to advance anything for his personal or economic benefit, (N.T. 283).

54) Judge Cohen testified that in any comments about labor unions or others, he has no benefit, he is not a member of any labor union and has no economic interest, (N.T. 284).

55) Judge Cohen, pursuant to cross-examination, testified that he spoke about national and state issues and tries to do it in a dignified manner. He agreed that in some of his discussions he leans more toward a liberal side than to a conservative side. Judge Cohen testified that is true but he also discusses issues such as opposition to crime and inflation where he is

more on the right or Republican side. He said liberals are more likely to favor actions against crime, (N.T. 288).

56) Judge Cohen testified that many people think his posts are good and have no objection to them, (N.T. 291).

57) Judge Cohen testified that it is his decision when he made the posts. He said he made the posts because "it dealt with opinions that I thought were important and relevant and in the public interest," (N.T. 297).

58) Judge Cohen testified that he has not deleted any of his posts made as a Judge or posts made when he was in legislature, (N.T. 300, 301, 302).

59) Judge Cohen testified about his discussion about Build Back Better legislation and forgiveness of student loans. He said he was giving his judgement on those issues of importance, (N.T. 303, 304). He said Joe Biden was an excellent President and that was his judgement of Joe Biden's behavior and he respected that

other people could have disagreed with him, (N.T. 304, 305).

60) Judge Cohen testified that when he posts on subjects, he is interested in hearing what other people say and learning from their responses. He noted that he talked about student loans being a major problem in society today, (N.T. 307, 308, 309).

61) Judge Cohen testified that in his posts, he believes that societal views ought to be addressed by society, (N.T. 310).

62) Judge Cohen testified that he did not see any evidence that his posts led to any political activity. He stated he believed his posts are to "basically generally well-informed people who enjoy discussing public affairs," (N.T. 315).

63) Judge Cohen presented a number of character witnesses by stipulation, (N.T. 233 through 239). The witnesses were Todd Eachus, a former member of the House of Representatives, John Meyerson, a former director of legislation and political action committee

for the United Food and Commercial Workers' Union, Attorney David Wilderman, who is a Commissioner on the Workmans' Compensation Board of Appeals, Attorney Lyonel Artim Ginzberg, an attorney from Philadelphia and the former attorney for Representative Joseph, Attorney Sherrie Cohen, the sister of Judge Cohen, Matthew Jackson, the judicial assistant to Judge Mark Cohen and who also serves as a paralegal, and Nicholas Himebaugh, who is the majority executive director of the Pennsylvania House of Government Committee, (N.T. 233, 238).

64) The stipulation was that each of the above witnesses in paragraph 63 were individuals that would state that they knew Judge Cohen, they knew people in the community who know Judge Cohen and among these people they know in the community who know Judge Cohen, his reputation as a truthful and honest and peaceful and law-abiding person, was good, (N.T. 238, 239).

65) Judge Margaret Murphy testified and she has served since 2014 as the Administrative Judge of the

Family Court Division of Philadelphia County Court of Common Pleas, (N.T. 31, 32).

66) Judge Murphy testified that in the fall of 2021, a complaint was received about a post of Judge Cohen's. The complaint was sent to her by Judge Daniel Anders the Administrative Judge, (N.T. 34).

67) Judge Murphy, over objection, testified she had considered several of Judge Cohen's posts. One talked about the National Rifle Association and how Judge Cohen said he was very proud that he always received an F-Rating from that group. She said that there was some concern about that statement because there are people that come to Family Court who like the NRA and also police officers, (N.T. 37, 38).

68) Judge Murphy testified that she and President Judge Fox of Philadelphia County met with Judge Cohen on September 26th, 2021. She also told him he should not have pictures of himself in his judicial robe. There were objections to her testimony because none of the posts that she referenced were included in the

Complaint by the Judicial Conduct Board, (N.T. 40, 41, 42).

69) Judge Murphy testified that she suggested to Judge Cohen that he should consider self-reporting, (N.T. 44).

70) She said that she also suggested that he speak with an ethics expert, (N.T. 44, 45).

71) Judge Murphy testified that Judge Cohen said he would speak with present counsel, Samuel C. Stretton, Esquire, (N.T. 45). She testified that Mr. Stretton did speak to her on these issues.

72) Judge Murphy testified that after she had spoken to Mr. Stretton, she waited a month for Judge Cohen to take some action and then she reported the complaint to the Judicial Conduct Board, (N.T. 46, 47, 48).

73) Judge Murphy testified that Judge Cohen has continued his postings, (N.T. 49, 50).

74) Judge Murphy, on cross-examination, indicated that Judge Cohen, after the meeting, did make some

changes. She indicated that he did withdraw the posts which were the subject of the original complaint that had been made, (N.T. 51). She agreed that in her letter that she sent to the Judicial Conduct Board, she noted Judge Cohen did make changes in his Facebook pictures, (N.T. 53). She agreed that one of the complaints involved a post about American heritage that one could be either a Native American, slave, a refugee or an immigrant, and Judge Cohen said his ancestors were immigrants and he was the grandson of four immigrants. She stated the complaint suggested this was a racist post. She agreed there was nothing racist in the post, (N.T. 54, 55, 56).

75) Paul Fontanes, the Investigator for the Judicial Conduct Board, then testified, (N.T. 59 60). He testified that be became involved in the case after Judge Murphy's complaint, (N.T. 61, 62, 63). He testified that he could see the postings of Judge Cohen because it was a public Facebook. He testified there were no privacy settings, (N.T. 64). Mr. Fontanes

testified Judge Cohen was not a candidate for retention of for higher judicial office at the time he made the postings, (N.T. 67, 68).

76) Mr. Fontanes then testified the Judicial Conduct Board prepared a Full Notice of Investigation, which was sent to Judge Cohen on April 20th, 2022, (N.T. 70).

77) Mr. Fontanes testified that Judge Cohen had admitted that he made the posts at issue. He said Judge Cohen's defense was protected free speech, (N.T. 74).

78) Mr. Fontanes testified that Judge Cohen was deposed in Harrisburg on July 19th, 2022 and his deposition was presented, (N.T. 75).

79) The Judicial Conduct Board then read into the record some of Judge Cohen's posts which included his post about the Build Back Better Bill, which was then pending in Congress, (N.T. 79, 80).

80) Mr. Fontanes testified the Judicial Conduct Board then prepared a supplemental investigation notice, (N.T. 81, 82, 83, 84, 85). He stated that Judge

Cohen had over 5,000 friends and 1,000 Facebook followers, (N.T. 84).

81) Mr. Fontanes testified that Judge Cohen admitted to making the posts at issue and submitted a detailed response, (N.T. 88).

82) Mr. Fontanes then identified Judicial Conduct Board's Exhibit "8" which contained the Facebook postings Judge Cohen that are the subject of the current judicial Complaint, (N.T. 90, 91). These posts are incorporated by reference.

83) On cross-examination, Mr. Fontanes agreed one would have to have a Facebook account to access Judge Cohen's Facebook postings, (N.T. 92).

84) Over objection, Dr. Allison Merrill testified as an expert witness for the Judicial Conduct Board. Mr. Stretton agreed that she was an expert on political science, not ethics, but disagreed that her expert testimony was necessary on the subject of whether the posts were political. Mr. Stretton stipulated she was

an expert on political science and a respected professor in that area, (N.T. 96).

85) Dr. Merrill received her Ph.D. from Texas A&M University in 2018 and her fields of study were American politics and quantitative methodology, (N.T. 99). Mr. Stretton objected to her being an expert on the American legal system but had no objection to her expertise on political science, (N.T. 102). The Court ruled that Dr. Merrill was an expert in American politics and communication and political communication, (N.T. 102).

86) Exhibit "10" of the Judicial Conduct Board was Dr. Merrill's expert report, (N.T. 104).

87) In essence, Dr. Merrill testified that Judge Cohen's postings were supportive of positive views of political figures of the Democratic Party and for legislation embraced by the Democratic Party and the political left. She noted his posts were critical of political figures of the Republican Party and the political right, (N.T. 111).

88) Dr. Merrill testified that Judge Cohen had about 5,000 Facebook friends and they could be family members, friends or someone with a shared interest or anyone that is allowed to see the page, (N.T. 116). She stated that one gets to be a friend on Facebook after a request is sent, (N.T. 116).

89) Dr. Merrill testified that political communication comes down to sending and receiving politically relevant messages. She indicated that it can be something that touches on policy, political figures, political institutions, legislature, current events, historical events, (N.T. 119, 120).

90) Dr. Merrill testified that partisan political activity is a subsect of political communication, (N.T. 120).

91) Dr. Merrill stated since 2008, Facebook has been an important venue for political communication and provides a wider audience for political viewpoints, (N.T. 121, 122).

92) Dr. Merrill testified that Facebook allows anyone to share their political thoughts. On Facebook they can endorse candidates or support candidates, (N.T. 123, 124).

93) Dr. Merrill testified that Judge Cohen's Facebook constitutes political communications.

> "They constitute political communication because they touch on political issues, political policies, political legislation, political actors," (N.T. 127).

94) Over objection, Dr. Merrill testified that Judge Cohen's posts are partisan political activity, (N.T. 127).

95) Dr. Merrill stated the 66 posts constituted political commentary because they all commented on what were political issues, (N.T. 129). She did say just because the subject is a political speech or political thought, that does not mean it is a partisan political thought, (N.T. 130).

96) Dr. Merrill referenced the one post about President Obama where Judge Cohen said "when we vote, we win. Turn out to vote and get your voice out there,"

(N.T. 130, 131). She referenced a post regarding Governor Shapiro where the post said that "Governor Shapiro would do an excellent job as Governor," (N.T. 131).

97) Dr. Merrill testified about posts on the assailant of Congressman Pelosi's husband and spoke about the images and series of skulls. She then talked about the Build Back Better Bill and the comments on the post of this legislation happening in real time, (N.T. 133, 134, 135).

98) Dr. Merrill talked about the Labor Day posts and pro-union posts, (N.T. 135, 136). She said that when Judge Cohen was critical of social policy and positions that he was usually critical of were matters supported by conservatives, (N.T. 136).

99) Dr. Merrill was asked her opinion on whether Judge Cohen benefited from the post and whether they conveyed political messages. There were numerous objections made on this question, (N.T. 139, 143).

100) On cross-examination, Dr. Merrill stated that although her mother was a lawyer, Dr. Merrill did not go to law school. She teaches at Susquehanna University only in the under-graduate programs. She is not involved in political activity or running for government offices or supporting any candidates, (N.T. 146, 147). Dr. Merrill said she does vote, (N.T. 147).

101) Except in high school, Dr. Merrill said she has never worked at a polling place. She has not been involved locally in partisan politics, (N.T. 147).

102) On cross-examination, Dr. Merrill admitted that any discussion of government issues is political in her opinion. She said that politics is government, (N.T. 148).

103) Pursuant to cross-examination questions, Dr. Merrill agreed that if there is a posting on issues of importance, legislation, concerns, then those would be political posts, (N.T. 148, 149).

> "Question: So if a judge then discusses something online, an issue, whether it is a left issue, a right issue, a center issue, that would be political speech?

Answer: Yes.

Question: And you reach that conclusion because in your mind and through many of the people who are involved in the area of political science, they say all government discussions, all legislation is political in nature?

Answer: Well that's what the research tells us, yes.

Question: So if Judge Cohen was talking about right wing issues, you'd be reaching the same conclusion as you did after you talked about you consider left wing issues?

Answer: Absolutely. This has nothing to do with whether he was supportive of the Republican Party or supportive of the Democratic Party or the ideological right or the political left, this was looking purely at is this political communication," (N.T. 149, 150).

104) Dr. Merrill was then questioned about partisan political speech as follows:

"Question: Dr. Merrill is it your position that it is partisan political speech when a judge talks about issues of importance either legislation or of the day?

Answer: When they take a clear perspective on these issues, yes, either clearly or in support or clearly in opposition to," (N.T. 157).

105) Dr. Merrill was unaware that Judge Cohen has supported, in many other posts that she did not look

at, of right-wing positions. She said she was limited in her review to the 66 posts in the present Complaint, (N.T. 158, 159).

106) Dr. Merrill was then questioned extensively about labor unions and the important role they play in the United States and she again indicated that it would be supportive of the Democratic Party and the political left, (N.T. 163, 164).

107) Dr. Merrill when further questioned, indicated Judge Cohen has had a mix of things that lean left and then talk about issues that leaned right. Despite that, she testified that Judge Cohen's posts were still on the "political spectrum", (N.T. 166).

108) On cross-examination, Dr. Merrill said support of loan forgiveness for college loans was partisan political speech because it was supported by Democrats primarily, (N.T. 168). She said that even though the issue was an important issue it was still a partisan issue, (N.T. 168).

109) Dr. Merrill opinioned that wishing a President or political leaders a happy birthday was also political speech, (N.T. 171).

110) Dr. Merrill testified that she was not criticizing the contents of Judge Cohen's speech but she had only been asked to evaluate whether it was partisan and her conclusion was that it was partisan. She said she did not care if Judge Cohen was liberal or conservative but she was only commenting on what he said was political, (N.T. 174).

> "Question: It is political in terms of thoughts on issues that the government is working, correct?
>
> Answer: It is political because it is not just his thoughts on these issues, but it is him putting these issues and these preferences and these thoughts out there for other people to engage with. And that is the essence of communication, (N.T. 174).

111) When questioned by the Court, Dr. Merrill, testified that not all political discussion is partisan. If one is talking about the whole picture, not just one perspective, then it is not partisan, (N.T. 183, 184).

CONCLUSIONS OF LAW

112) The Court of Judicial Discipline finds that the Judicial Conduct Board has not proven by clear and convincing evidence that Judge Cohen's posts violated the charged Code of Judicial Conduct or the Pennsylvania Constitution.

113) The Court of Judicial Discipline concludes that Judge Cohen's comments are not political speech but discussions of issues of importance and issues that do not appear in his Courtroom.

114) The Court of Judicial Discipline finds that Judge Cohen's speech was protected by the First Amendment of the United States Constitution through the Fourteenth Amendment of the United States Constitution and by Article I, Section 7 of the Pennsylvania Constitution.

115) The Court of Judicial Discipline finds that Judge Cohen's speech was also protected by fundamental due process in that the Code of Judicial Conduct did

not clearly give warning that discussions on issues of importance would violate the Code.

116) The Court of Judicial Discipline concludes that Judge Cohen's speech is also protected by Comment Nine to Rule 4.1 since his posts discussing issues of importance clearly fits within what was allowed by comment Nine under Rule 4.1.

117) The Court of Judicial Discipline dismisses the case against Judge Cohen.

IV. ARGUMENT

A) Judge Cohen engaged in protected speech pursuant to the First Amendment of the United States Constitution through the Fourteenth Amendment of the United States Constitution and pursuant to Article I, Section 7 of the Pennsylvania Constitution. Further, his speech was also permitted by the Code of Judicial Conduct, particularly, Comment Nine to Rule 4.1 and Rule 3.7 involving participation in educational and civic activities. Further, there is a due process violation since the Code was vague enough that one would not know these posts would violate the provisions and therefore, there was no proper warning given resulting in a violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

This present case involves some 66 posts by Judge Mark B. Cohen of the Court of Common Pleas of Philadelphia County. This is a principled challenge by Judge Cohen since he believes he has the right to post

comments on issues of importance involving federal, state and local issues, as long as they do not involve issues in his courtroom or court.

There is no dispute that Judge Cohen has an excellent background. He is served 42 years in the Pennsylvania state legislature and for many years had a leadership role in the legislature in the Democratic Caucus. After he lost his State House election, after serving 42 years with the State Representatives, he ran for a position on the Court of Common Pleas of Philadelphia County and was elected. He has been serving in the Family Court Division, and will continue to serve, until his mandatory retirement when he reaches the age of 75, then his retirement will occur on December 31st, 2024. Judge Cohen comes from an extremely respected political family. His father was the late Councilman David Cohen, who served for many years on Philadelphia City Council until his death in 2004 and was known as the conscience of the council.

There were a number of character witnesses presented and their testimony was stipulated to by the Judicial Conduct Board. These witnesses and their stipulated testimony was referenced in the Proposed Findings of Fact and Conclusions of Law section of this Brief and will not be reiterated but will be incorporated by reference into this Argument section.

There is no dispute that Judge Cohen authored the 66 posts that were set forth in the present Complaint. Of interest is the fact that the posts made initially in the original complaint to Judge Murphy were not included in the present charges. Judge Cohen testified he had been posting since one could do so Facebook, beginning in 2007. He posted for many years as an elected State Representative. He has now continued to post as an elected Judge. He has a Facebook following of approximately 5,000 people per his testimony.

Judge Cohen's testimony has been summarized in detail in the Proposed Findings of Fact and Conclusions of Law section of this Brief and again will be

referenced in this Argument section. The Judicial Conduct Board's witnesses consisted of Philadelphia Administrative Judge for Family Court, Judge Murphy, who testified about making the complaint. The Board's Investigator, Paul Fontanes, who testified and authenticated the various posts. The Board then presented Dr. Allison Merrill as an expert witness. The Court will recall, Mr. Stretton objected to her being called as a witness since her testimony did not fit the qualifications under Rule 702 of Pennsylvania Rules of Evidence. She had no specialized knowledge different from this Honorable Court in terms of what posts were political and what posts were not. This Honorable Court, over objection, allowed her testimony. Mr. Stretton had objected pre-trial and then again at the time of the hearing. Dr. Merrill's background was not of law or ethics but of political science. Of interest, is her testimony that she had never been involved in running for office, or as a committee person, or in any hands-on political activity and her only involvement

was that in high school when she once handed out literature.

Her testimony in essence, was that any discussion of public issues is political and would be partisan in nature if the speech was liberal or if it was conservative. That is political speech. In other words, by her testimony, anything a Judge would say on a public issue would be considered by Dr. Merrill as political speech and then further considered partisan political speech depending if it was a leftist position or rightist position. Her testimony therefore, should be given little to no weight should be disregarded.

The burden of proof must be met by the Judicial Conduct Board and that burden is clear and convincing evidence, see In Re Eakin 150 A.3d 1042, 1046 (Pa. Court of Judicial Discipline, 2016).

As noted, there were stipulations that Judge Cohen posted the comments at issue. The dispute is not what he said, but the dispute is whether he engaged in

political partisan speech, which the Respondent contends he did not.

Judge Cohen's testimony as noted has been summarized in the Proposed Findings of Fact and Conclusions of Law section, and will be referenced in this Argument section. But there was no support or endorsement of any political candidate, campaign, or position in the posts. Judge Cohen would post on issues of state, national or local interest. At times, he would post on pending legislation such as student loans or the pay back legislation but he was not adopting a partisan view point, he was discussing the merits of the posts. At times, Judge Cohen would congratulate office holders for jobs being done but it was not in the political context. At times, he would wish a happy birthday to prominent political figures but again, they were elected officials and their birthday had nothing to do with a political position.

Also, in the New Matter to the Complaint for Discipline, briefly in the Statement of Issues section,

Mr. Stretton raised the due process issue based on lack of notice. One cannot be found in violation of a Rule if there is no clear warning that the conduct violates the Rules. Mr. Stretton contends the Rules of the Code of Judicial Conduct does not provide that clarity and, in fact, under Comment Nine to Rule 4.1 suggests to the contrary. The Code of Judicial Conduct Rule 3.7 also encourages judges to write and participate in activities. But without a clear understanding that the posting conduct was in violation of the Code of Judicial Conduct, there can be no finding of violation because that would lack the notice requirement necessary to satisfy fundamental due process under the Fourteenth Amendment of the United States Constitution, both procedural and substantiative.

In the case of Water Polo, L.P. v. West Hanover Township Sewer Authority 301 A.3d 1009 (Pa. Comm. Ct., 2023), the Commonwealth Court talked about the due process violation. Basic elements of procedural due process and substantive due process require adequate

notice, the opportunity to be heard, and a chance to defend one's self before a fair and impartial panel. Due process is a flexible concept that imposes only such procedural safeguards as a situation warrants, Id 1023. The Commonwealth Court then discussed substantive due process:

> "The substantive protections of due process are meant to protect citizens from arbitrary and irrational actions of the government --- like procedural due process "for substantive due process rights to attach there must first be a deprivation of an interest that is constitutionally protected," Id 1024.

In this case, the argument is that both substantive and procedural due process was violated due to the lack of notice that the posting was prohibited. The Code of Judicial Conduct does not define or deal with this issue of posting on issues of importance which is a constitutionally protected right. Without adequate notice, procedural due process and substantive due process would both be violated since Judge Cohen was not on notice that there was a violation.

The main argument of Judge Cohen is the First Amendment of the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution allow his posts since they allow constitutionally protected speech.

In evaluating Judge Cohen's speech, as noted, there is no misinformation, no false statements, no pornography, no obscenities, no inappropriate racial statements, etc. His posts go clearly to protected speech and he is being punished for the content of his speech which consists of comments on issues of importance. The balance for constitutionally protected speech for a judicial officer is discussed in the excellent book *Judicial Conduct in Ethics, Sixth Edition*, by Charles Gehy, James Alfina and James Sample, published in 2020 by Lexis Nexis.

> "The debate over whether and how far we can or should inquire into and regulate a Judge's private life and public life, takes on a whole new dimension with the advent of computer technology and the internet. Unlike traditional written communication that provides an opportunity for reflection between a time a message is written and the time it is sent out

> to be published, electronic communication is instantaneous; the opportunities for judges to engage in spontaneous and ill-considered communications that may reflect badly on the judiciary are thus corresponding greater," Id 9-37.

The authors of that book find statements that are prejudicial to or effect the expeditious administration of the business of the court to be prohibited, (see Id 9-51). In this case, none of the statements of Judge Cohen are prejudicial to the expeditious administration of Family Court in Philadelphia. The authors then ask if the statements "are ambiguous or mildly offensive" should not be considered to violate Rules of Judicial Conduct particularly, in the absence of aggravating factors such as reputation or personal views, (see Id 9-51).

The authors of the book discuss posts, such as Judge Cohen's:

> "Advisory opinions have also addressed the practice of maintaining a blog. Without flatly prohibiting the practice, these opinions have noted a number of concerns, including the judge's blog post may undermine public confidence in the impartiality of a judge and create an appearance of impropriety. Judges who

> do blogs must be careful not to run afoul of the rules prohibiting comments on pending cases, fundraising or impermissible political activity. They also must avoid commentary that would necessitate frequent disqualifications," Id 9-45, (emphasis added).

The authors then note as follows:

> "Statements of opinion on public issues may be controversial or offensive to certain groups while still falling within the ambit of protected discourse, particularly where the statements are ambiguous or context dependent," Id 9-49.

As noted, during the hearing this is a case of first impression. But even the authors of this very excellent book on judicial ethics note there must be caution in regulation of judicial speech that does not discuss existing cases or pending matters.

Further, in evaluating judicial speech, Rule 4.1 Comment Nine has to be noted and emphasized. Rule 4.1, which is one of the charged Rule violations, is entitled *Political and Campaign Activities of Judges and Judicial Candidates in General*. Comment Nine notes as follows:

> "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 overreaching judicial obligation to apply and uphold the law, without regard to his or her personal views," see Comment Nine to Code of Judicial Conduct, Rule 4.1, (emphasis added).

Also, in the Code of Judicial Conduct, Rule 3.1, allows judges to engage in extra judicial activities. It prohibits activities that would reasonably appear to undermine the judicial independence, integrity or impartiality of the Court but none of the posts here do that. Rule 3.7 of the Code of Judicial Conduct, encourages participation in educational and charitable 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 advocational activities do not detract from the dignity of their office of interfere with the performance of their judicial duties," see Rule 3.7(a) of the Code of Judicial Conduct.

Therefore, in evaluating the case here, it should be noted that the Code of Judicial Conduct itself, encourages extra-curricular activities including educational and writing and at the same time, does not prohibit personal opinions and speech as noted in Comment Nine to Rule 4.1.

In reality, this is protected speech, both protected by the First Amendment of the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution. The First Amendment through the Fourteenth Amendment of the United States Constitution provides that "congress shall make no law --- abridging the freedom of speech," Article I, Section 7 of the Pennsylvania Constitution provides a relevant part that "The free communication of thought and opinions is one of the invaluable rights of man, and every citizen may speak freely, write and print on any subject, being responsible for the abuse of the liberty."

Further, Article I, Section 7 and pursuant to the interpretations by the Pennsylvania Supreme Court provides broader protections than does the First Amendment in different context. But a review of the cases finds the broader protections at least has never been extended to the extra judicial speech of a sitting judge. The case of DePaul v. Commonwealth 969 A.2d 536 (Pa., 2009), involved a rule prohibiting those in horse racing business from making contributions to political candidates. The Pennsylvania Supreme Court found under Article I, Section 7 of the Pennsylvania Constitution that this banning of political contributions was impermissible. It noted the broad reading of Article I, Section 7. Subsequently, in the case of Pomicter v. Luzerne County Convention Center 568 F. Supp. 3rd 515 (M.D. Pa., 2021) the United States District Court for the Middle District of Pennsylvania discussed Article I, Section 7. The District Court asked whether or not the Pennsylvania Supreme Court, in interpreting the Pennsylvania Constitution "provides greater protection

than the reasonableness standard of the First Amendment for content neutral time, place and manner restriction in a nonpublic forum," Id 523. The Court then reviewed some Pennsylvania Supreme Court decisions. Those decisions did not suggest the broader protections of Article I, Section 7 of the Pennsylvania Constitution had been expanded by the Pennsylvania Supreme Court on the issue of extra judicial speech of a sitting judge, Id 523, 524.

In evaluating Judge Cohen's challenge, obviously the Respondent agrees that the Judicial Conduct Board has an interest in maintaining the integrity, interest and impartiality of the judicial system. In the case of Matter of Williams 887 S.E.2d 231 (Supreme Court of Appeals of West Virginia, 2023), was a case involving a judge's conduct of leaving a store without paying for merchandise with supposedly racial bias. The facts of this case are not relevant but the Court discussed statements of the judicial officer to the police and noted the following:

> "Judges do not lose all First Amendment protections when taking the robe. But, as we explained --- there are significant limitations to that free speech that come with being a member of the judiciary because a judge's speech may impugn the credibility, impartiality and integrity of the third branch," Id 247.

In this case, there are no issues of Judge Cohen impugning the credibility, impartiality or integrity of the third branch.

Similarly, in the case of In Re Inquiry of Broadbelt 683 A.2d 543 (NJ Sup. Ct., 1996) a judge appeared on television and made comments on a pending case. The New Jersey Supreme Court noted as follows:

> "A judge does not relinquish his or her First Amendment rights on ascending to the bench. In analyzing a judge's right to speak freely, courts have employed different constitutional standards; the Pickering public employee balancing test, the strict scrutiny test and the hybrid Pickering/strict scrutiny test," Id 551.

Judge Cohen's case presents a case of first impression, a novel legal issue unsettled under the law of Pennsylvania. Further, it appears that there is no precedent set by the United States Supreme Court on this issue.

The Respondent, Judge Cohen, contends that the appropriate analysis would be a strict scrutiny standard. In doing so, Judge Cohen has not taken the position that he should be allowed to give personal opinions on any proceeding before him or before his Court or anything that would disrupt, impair or undermine the independence or integrity or the public trust placed in him as a judge. But Judge Cohen's posts are on issues of importance and not on pending cases. There would be little, if nothing, left to the First Amendment right of a sitting judge if he or she could not speak out because of Dr. Merrill's feeling that any comment on public issues is political speech and is partisan political speech whether it is a right wing or left wing or leftist center, rightist center. If that is the case, judges would be bound and gagged once they leave the bench and go home and that is not acceptable and would be extremely unfair and unconstitutional to impose such a standard.

The argument of Judge Cohen is that restrictions on his extra judicial speech are content based restrictions warranting strict scrutiny. Under that standard, the Judicial Conduct Board must demonstrate a compelling state interest in favor of a party to satisfy the strict burden under the strict scrutiny standard. That was not done here. Further, the Judicial Conduct Board's attempts to unconstitutionality invade Judge Cohen's right to express his personal view on legal and political and other issues, which are not prohibited under the Pennsylvania Code of Judicial Conduct, is wrong. Rule 4.1, Comment Nine, as noted above, clearly allows a judge to express his or her personal opinions.

A meaningful case to consider is the Republican Party of Minnesota v. White 536 U.S. 765, 122 Sup. Ct. 2528 (2002). The White case, in an Opinion written by Justice Scalia on the issue as to whether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that state

from announcing their views on disputed legal and political issues. The Supreme Court of the United States said no. But the Opinion did not consider pledge or promise clause which separately prohibited judicial candidates from making pledges or promises. In the White case, though not involving an elected judge but a judicial candidate, is similar because both the White case and Judge Cohen's case involve the attempted suppression of personal opinion by a judge that does not reflect on pending cases or undermine the integrity of the Court. In his concurring Opinion, Justice Kennedy noted the Opinion did not extend to sitting judges, Id 2546.

The United States Supreme Court in White concluded that the Minnesota prohibition on the basis of his content and burdens a category of speech is at the core of the First Amendment freedoms, speech and the qualifications of candidates for public office, Id 2534, 2535.

In reviewing White, the candidate's literature criticizing past Minnesota Supreme Court decisions on issues of crime, abortion and welfare was allowed, Id 2532. Judge Cohen's Facebook posts do not get into judicial cases or issues that would appear in his Courtroom. He only discusses his personal views on legal, political or other issues. He does not endorse candidates or anything of that nature. His posts fit clearly within Rule 4.1, Comment Nine of the Pennsylvania Code of Judicial Conduct.

Obviously, if a judicial candidate under the White decision can criticize prior case law when he is running to be a Justice on the Minnesota Supreme Court, then obviously, the Respondent possesses the right to discuss, in a proper fashion, student loan debt legislation, relief, inflation, the January 6th Committee investigation and other matters of public concern. Judge Cohen's position is that his expression of his personal opinions on matters of public concern is similarly, a core First Amendment freedom and must

have the protection of the First Amendment of the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution. Judge Cohen is asking that his case be dismissed and that this Honorable Court provide this protection in its decision which is already set forth in Comment Nine to Rule 4.1 of the Code of Judicial Conduct.

In White, the Court found the restriction to be content-based discrimination and thereby, triggered a strict scrutiny approach. The Court first considered whether it was a compelling state interest. The Court identified three possible compelling state interests protected by the clause. The first was preserving the impartiality of the judicial system by removing bias for or against either party of the court proceeding. The second was preserving the impartiality of the judicial system by removing preconceptions in favor of or against a particular legal view. The third was preserving the impartiality of the judicial system by promoting open-mindedness by seeking to guarantee each

litigant not an equal chance to win a case but at least some chance of doing so, Id 2535, 2536, 2537 and 2538. The Court, in the issue of open-mindedness or justification, noted the following:

> "---when a case arises that turns a legal issue on which the judge (as a candidate) has taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party or favoritism against the other party. Any party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhanded" Id 2536.

The Court did not reach a strict scrutiny standard for open-mindedness since it found the Minnesota Supreme Court did not adopt that clause for this purpose. But the Supreme Court noted that judges and judicial candidates have often committed themselves on issues they must later rule on including prior decisions, public discussion, books or articles, etc.

Therefore, that issue was left open by the White case. Judge Cohen argues that issues of judicial open-mindedness and an impartial judge are generally compelling state interests and therefore, the strict

scrutiny standard should be used. Justice Scalia did not reach that in the aforementioned White case on those issues.

Judge Cohen's position is that strict scrutiny is warranted for extra judicial speech of a sitting judge, as well as for a judicial candidate. Without that, there would be a chilling effect on the First Amendment freedoms. The interest of impartiality and independence must be balanced against a judges' right to express his or her personal view points.

In reviewing the case law and Rule 4.1 of the Code of Judicial Conduct, Comment Nine clearly allows judges to lawfully express their personal opinion in full compliance with the Board's interest in independence and impartiality and fairness.

Rule 4.1, Comment Nine suggests that the drafts recognize that a judge's competence to fulfil his or her judicial duty of independence, integrity and impartiality, while at the same time, being able to express their private political views. Elected

officials play an important role in society and they should be allowed to express themselves on matters of current public importance.

> "The role that elected officials play in our society makes it all the more imperative that they be allowed to freely express themselves on matters of current public importance --- it is simply not the function of the government to select which issues are worth discussing or debating in the course of a political campaign --- we have never allowed the government to prohibit candidates from communicating relevant information to voters during an election," Id 2538, 2539.

Judge Cohen contends that although White case dealt with a candidacy, the rationale in White applies to his case. He further contends that this Honorable Court should adopt the strict scrutiny requirement in evaluating whether his speech is protected under the First Amendment of the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution.

In arguing for strict scrutiny, the old case of Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania 944 F.2d 1237 (3rd Cir., 1991) should be reviewed. The Stretton decision was 11 years before

White and it argued for the right of a judicial candidate to be able to speak on issues. It involved Canon 7 of the old 1974 Pennsylvania Code of Judicial Conduct. Canon 7 prohibited making pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce views on disputed legal or political issues; or misrepresent his identity, qualifications, present position or other fact (Canon 7 of the old Judicial Code of Pennsylvania). The Third Circuit did uphold Canon 7 at the time but precluded political speech. The Court noted as follows:

> "Because of the significant concerns implicated in restricting political speech, achieving a balance requires the state to establish a compelling interest and the restrictions to be narrowly tailored to serve that interest," Id 141.

The Court, though upholding Canon 7, avoided any First Amendment infringement by interpreting Canon 7 to avoid First Amendment friction. Canon 7 was interpreted to mean that disputed legal or political issues refer only to those issues that are likely to become before

the Court. By reading that in that narrow fashion, the Court noted as follows:

> "Read in this way, the restriction is narrowly tailored to serve the state's compelling interest in an impartial judiciary," Id 145.

If one steps back and looks at the White and Stretton cases, it is clear that impartiality, independence and fairness are not magic words that repeal federal constitutional protections. Judge Cohen argues that in his case, there must be a concrete showing that his personal opinions, as introduced during the hearing, prejudice, impair or undermine his ability to judge fairly. That cannot be shown and it is just not true. The evidence at the hearing did not show his posts undermined his ability to be fair.

As noted above, the Pennsylvania Code of Judicial Conduct encourages in its language for judges to announce their personal views on legal, political and other issues as seen in Comment Nine to Rule 4.1. In Rule 3.1 entitled *Extra Judicial Activities*, Comment One, notes as follows:

> "To the extent that time permits and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extra judicial activities. Judges are uniquely qualified to engage in extra judicial activities that concern the law, the legal system and the administration of justice, such as by speaking, writing or teaching or participating in scholarly research projects. In addition, judges are permitted and encourages to engage in educational, religious, charitable, fraternal or civic extra judicial activities not conducted for profit even when the activities do not involve the law," see Comment One to Rule 3.1 of the Code of Judicial Conduct.

When one reads Comment One to Rule 3.1, it is clear that judges are encouraged to express their personal opinions and to disseminate them. Comment Two to Rule 3.1 goes further.

> "Participation in both law related and other extra judicial activities helps integrate judges into their communities, and further public understanding of and respect for courts and the judicial system," see Comment Two to Rule 3.1 of the Code of Judicial Conduct.

Reviewing Judge Cohen's Facebook posting clearly suggests this aids in his involvement in the community and encourages further public understanding and respect for the courts and the judicial system. Further, these

comments, under Rule 3.1 Comments One and Two and under Rule 4.1 Comment Nine, support Judge Cohen's position that his Facebook posts are protected First Amendment speech. In fact, in the aforementioned White decision, Judge Scalia in his Opinion, referenced ABA Codes at the time with similar language to the above quoted Comments and references them with approval, Id 2537.

In evaluating this matter, one would have to reach the conclusion that Judge Cohen's posts are well within the acceptable bounds of extra judicial activities that are encouraged by the Code of Judicial Conduct. To rule otherwise would seriously infringe on his First Amendment right of speech and Article I, Section 7 of the Pennsylvania Constitution's right to speech.

A recent example of extra judicial speech, which has so far been found acceptable, involves Judge Mul Thapar who is a Judge on the United States Court of Appeals for the Sixth Circuit. He received a unanimous well-qualified rating by the American Bar Association at the time of his confirmation. Though he is a federal

judge, he has to abide by the Code of Conduct for United States Judges which has similar provisions as the Pennsylvania Code. Federal Judges are similarly encouraged to be involved in extra judicial activities. In June of 2023, Judge Thapar published a book called *The People's Justice: Clarence Thomas and the Constitutional Stories that Define Him in June 2023.* His book includes a defense of Justice Thomas' originalist philosophy. The time of the publishing of the book, was during the time that Justice Thomas and other Supreme Court Justices had been severely criticized for alleged ethical violations. If one purchased the book, they will note that it has the endorsements of many conservative and political people. Some of the people who have endorsed the book are Edwin Meese III, Megan Kelly, William Barr, among others. These are all people identified as conservative or on the political right. Judge Thapar then on a book tour, did interviews with Fox News and other organizations that are known to be conservative in nature.

It is difficult to see how a respected conservative jurist could publish such a book at such a controversial time and speak on it and receive praise, while Judge Cohen, who is only posting in proper way, his personal views on matters of public concern and his posts do not indicate any political association or endorsements, etc.

Strict scrutiny has been adopted by other jurisdictions in evaluating judicial conduct involving speech and/or political activity. One example is the case of Matter of Disciplinary Proceeding Against Sanders 955 P.2d 369 (Supreme Court of Washington, 1998). The facts of Sanders case are somewhat interesting. He was elected to the Washington Supreme Court. On the date of his swearing in ceremony, after he was sworn in, he walked and joined a march for a pro-life rally and ended up speaking briefly. Apparently, he had also carried a red rose in support of the cause. The Washington Supreme Court found that the evidence did not establish clear and convincing

evidence of a violation and found that he had a First Amendment right. The strict scrutiny standard was utilized, Id 376, 377.

> "Nothing in the record --- would permit us to construe Justice Sanders' conduct as an express or implied promise to decide particular issues in a particular way, or as an indication, that he would be unwilling or unable to be impartial and follow the law if faced with a case in which abortion issues were presented," Id 376.

White and Sanders suggest a central concern of courts is whether extra judicial speech constitutes prejudice or a failure to follow the law. Both of these cases suggest that would not be a concern.

Even if this Honorable Court should decide it was not a strict scrutiny standard, Judge Cohen should still prevail. The standard for a public employee and the balancing test is found in Pickering v. Board of Education 391 U.S. 563, 88 Sup. Ct. 731 (1968). In that case, the Court found public employees have a First Amendment right to speak on matters of public concern. The Court did not apply a strict scrutiny standard. The Court applied a balancing test. The Court found the

First Amendment protection extended only to employees' statement of public concern, not to private employment matters. Second, the protection is not to be extended to statements made in the course of the employee's official duties, even if there the statements involved public concern. Therefore, under Pickering, First Amendment protection extended only to employees' statements of public concern not to private employment matters. In this case, Judge Cohen's Facebook posts were matters of public concern. The posts were not made in the course of his official duties. Therefore, even without the strict scrutiny test, the balancing test would apply and he would prevail. The Judicial Conduct Board cannot penalize extra judicial speech that is not connected with a judge's duties or discussions about his employment.

Despite the above balancing test, Judge Cohen contends that the strict scrutiny would be the appropriate test for the reasons discussed above.

Therefore, Judge Cohen respectfully contends that the Judicial Conduct Board has not met its burden of proof. The charged Code Rules and constitutional rules, which were cited in the History of the Case section of this Brief, will be briefly reiterated now. In Count One, Judge Cohen is charged with violating Rule 1.1 of the Code and this Rule states that a judge shall comply with the law. Count Two involves Rule 1.2 that a judge is to promote public confidence and the independence and impartiality of the judiciary and shall avoid impropriety the appearance of impropriety. Count Three involves Rules 1.3 where a judge shall not abuse the prestige of the judicial office to advance personal or economic interest of the judge or others or allow others to do so. Count Four involves Rule 3.1(c) that a judge shall regulate extra judicial activities to minimize the risk of conflict with judicial duties and to comply with the provisions of the Code, although the judge shall not participate in activity that would reasonably appear to undermine the judge's

independence, integrity or impartiality. Count Five involves Rule 3.7 entitled *Advocational Activities.* That allows a judge to write and speak on non-legal subjects if they do not detract from the dignity of the office or interfere for the performance of judicial duties. Count Six involves Rule 4.1(a)(3) and that states that a judge or judicial candidate should not publicly endorse or publicly oppose a candidate for any public office. Count Seven involves 4.1(a)(11) that a judge shall not engage in any political activity on behalf of a political organization or candidate for public office except on behalf of measures to improve the law, the legal system or the administration of the law. Count Eight involves a constitutional violation of Article V, Section 17(b), which in essence says a judge violates the Constitution if they violate any of the Canons of Judicial Ethics.

A careful review of the above Rules and then a similar review of Judge Cohen's posts, suggests the Board has not met its burden of proof to show any

violation. Nothing has been proven that violates by the clear and convincing evidence standard. There was no endorsement of any candidates. There was no endorsement of political viewpoints. Instead, these posts are classic protected speech for all of the reasons stated above.

In conclusion, Judge Mark Cohen, the Respondent, should be commended for his desire to protect the First Amendment and protect his and other judge's right of free speech pursuant to the Article I, Section 7 of the Pennsylvania Constitution and the First Amendment of the United States Constitution through the Fourteenth Amendment. These charges should be dismissed. These posts are classic First Amendment comments on issues of importance. There are no political endorsements or political issues. The expert opinion of Dr. Merrill should be disregarded because it in essence would preclude any speech on any issue of importance by any judge anywhere since she would call all such speech political. That is an absurd position. Judge Cohen

respectfully requests this Honorable Court dismiss these charges with prejudice and clarify once and for all that posts of this nature are protected speech and cannot be prohibited.

V. CONCLUSION

The Respondent, the Honorable Mark B. Cohen, by his counsel, Samuel C. Stretton, Esquire, respectfully requests this Honorable Court to dismiss all of the charges for the reasons set for in this Brief and because this is protected speech under the First Amendment of the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution.

Respectfully submitted,

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COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE

IN RE:	:	**DOCKET NO. 1 JD 2023**
	:	
JUDGE MARK B. COHEN	:	
COURT OF COMMON PLEAS	:	
1ST JUDICIAL DISTRICT	:	
PHILADELPHIA COUNTY	:	

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,

November 3, 2023
Date

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JUDGE MARK B. COHEN	:	
COURT OF COMMON PLEAS	:	
1ST JUDICIAL DISTRICT	:	
PHILADELPHIA COUNTY	:	

CERTIFICATE OF SERVICE

I hereby certify I am this date serving a copy of the foregoing Brief of the Respondent in the captioned matter upon the following persons in the manner indicated below.

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Respectfully submitted,

November 3, 2023
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