

No. 25-

IN THE
Supreme Court of the United States

MARK B. COHEN,

Petitioner,

v.

JUDICIAL CONDUCT BOARD OF PENNSYLVANIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether content-based restrictions on the speech of sitting judges must satisfy strict scrutiny, such that the decision of the Supreme Court of Pennsylvania violates the First Amendment.

PARTIES TO THE PROCEEDING BELOW

Petitioner, Mark B. Cohen, was the appellant in the Supreme Court of Pennsylvania.

Respondent, the Judicial Conduct Board of Pennsylvania, was the appellee in the Supreme Court of Pennsylvania.

RELATED CASES

In re Judge Mark B. Cohen Court of Common Pleas 1st Judicial District Philadelphia County, No. 1 JD 23, Commonwealth of Pennsylvania Court of Judicial Discipline. Judgment entered May 3, 2024.

In re Judge Mark B. Cohen Court of Common Pleas 1st Judicial District Philadelphia County, No. 63 EAP 2024, the Supreme Court of Pennsylvania, Eastern District. Judgment entered January 21, 2026.

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Petitioner Mark B. Cohen (“Judge Cohen”) respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania (“Pennsylvania Supreme Court”).

INTRODUCTION

For forty-two years, Petitioner Mark B. Cohen served as a Democratic member of the Pennsylvania House of Representatives, during which time he expressed his political views to the public every single day. When he was elected to the Pennsylvania Court of Common Pleas in 2017, the voters of Philadelphia chose him with full knowledge of his political history and beliefs, and he ran in the partisan election as a Democrat. Yet when Judge Cohen continued to express his views on matters of public concern on his personal Facebook page, Pennsylvania’s Court of Judicial Conduct (“CJD”) suspended him without pay, and, as a result, the Commonwealth has stripped him of the pension he earned over a half-century of public service.

The Pennsylvania Supreme Court affirmed Judge Cohen’s suspension based on the court’s subjective perception that, collectively, the “volume” and “tone” of only 66 of Judge Cohen’s posts were partisan, even though it did not find any of Judge Cohen’s individual posts violated the Pennsylvania Rules of Judicial Conduct, and even though it did not consider these posts in the context of thousands of other Facebook posts Judge Cohen published during the same time period.

Having taken a microscopic view of Judge Cohen’s Facebook activity “[f]or brevity’s sake,” App. 5a, the Pennsylvania Supreme Court rejected Judge Cohen’s

First Amendment defense. The court held that restrictions on Judge Cohen’s speech, as a sitting judicial officer, are evaluated under the balancing test used for limits on government employee speech announced in *Pickering v. Board of Education*, 391 U.S. 563 (1968), rather than strict scrutiny, and concluded that the Commonwealth’s interest in protecting the impartiality of the judiciary outweighed Judge Cohen’s interest in publicly expressing his views.

The Pennsylvania Supreme Court’s application of the *Pickering* balancing test cannot be reconciled with this Court’s precedents or the First Amendment’s command prohibiting laws “abridging the freedom of speech.” U.S. Const. amend. I. Nor can the result here be sustained under strict scrutiny: The Pennsylvania Supreme Court’s amorphous standard for restricting what it deems to be “partisan” speech by elected judicial officers does not advance (and indeed risks undermining) the Commonwealth’s stated interest in judicial “independence, integrity, and impartiality.” App. 2a. And both the broad sweep of the court’s ill-defined speech limitations and the severe sanction of complete suspension are far from narrowly tailored to achieving those goals.

Against this backdrop, this case presents a recurring question of national importance—whether a state must satisfy strict scrutiny to restrict the speech of sitting judges on matters of public concern. Despite precedent from this Court applying strict scrutiny to restrictions on the political speech of judicial candidates in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), and *Williams-Yulee v. Florida Bar*, 575 U.S. 433 (2015), courts have struggled for nearly 25 years to determine whether those holdings also apply to sitting judges and

are now deeply divided on the applicable standard of First Amendment review. Further percolation of the issue is unlikely to resolve this important question, and this Court's immediate resolution is needed.

This case is an ideal vehicle for resolving the persistent and deepening split of authority on this issue. It presents a clear legal question that was expressly addressed and squarely decided by the Pennsylvania Supreme Court, which acknowledged the division of authority and invited this Court's clarification. This Court's guidance is sorely needed. If allowed to stand, the *Cohen* decision will have a chilling effect on judicial speech, invite political interference in the judicial branch, undermine the rule of law, and have the perverse effect of impugning the integrity of the judiciary. This Court should therefore grant the petition and resolve the split to restore fundamental First Amendment protection in this important context.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania (App. 1a-58a) is reported at 349 A.3d 865. The order of the Pennsylvania Court of Judicial Discipline (App. 59a-152a) is not reported but is available at 2024 Pa. Jud. Disc. LEXIS 5.

JURISDICTION

The final judgment of the Pennsylvania Supreme Court was entered on January 21, 2026. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment, as incorporated against the states by the Fourteenth Amendment, *see Gitlow v. New York*, 268 U.S. 652, 666 (1925), provides in relevant part that the states “shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I.

STATEMENT

A. Factual Background

1. Petitioner Mark B. Cohen enjoyed a distinguished five-decade career as a public servant, first as a state legislator and then as a judge who campaigned and was elected in 2017 to serve on the Court of Common Pleas of Philadelphia County beginning in January 2018. Less than three months before his mandatory retirement, the CJD permanently suspended Judge Cohen based on a collection of postings on Judge Cohen’s personal Facebook page that purportedly “express[ed] his political views.” App. 11a. The consequence of the judicial suspension order, by operation of Pennsylvania law, is not only the termination of Judge Cohen’s remaining months of judicial service, but also forfeiture of his entire judicial and prior public service pensions.¹

Judge Cohen was permanently suspended for his speech even though (1) not a single citizen or litigant before him ever complained about any of the social media

1. *See* Pa. Const. Art. V, § 16 (“[N]o salary, retirement benefit or other compensation . . . shall be paid to any . . . judge . . . who, under section 18 or under Article VI, is suspended, removed or barred from holding judicial office.”); 42 Pa. Cons. Stat. § 3352(a) (similar).

posts that led to his removal; (2) neither the CJD nor the Pennsylvania Supreme Court connected any post to any matter that had come before Judge Cohen or would ever likely come before the Family Division of the Court of Common Pleas, where Judge Cohen was assigned for his judicial tenure; (3) neither court considered the possibility or adequacy of alternative means of advancing the stated government interests, including consideration of any less-severe sanctions; and (4) neither court applied the Rules of Judicial Conduct to the text of the challenged social media posts.

2. Pennsylvania is one of at least 41 states that hold judicial elections for at least some level of the judiciary, and one of at least 21 states that hold partisan elections.² Judges of the Courts of Common Pleas—Pennsylvania’s trial courts of general jurisdiction—serve ten-year terms.³ They are elected first through competitive, partisan elections and then through retention elections thereafter. Judges may serve an unlimited number of terms but must retire at the end of the calendar year when they reach age 75.⁴ Because Judge Cohen was 67 years old when elected, his term was scheduled to end on December 31, 2024. Philadelphia Court of Common Pleas judges are assigned to the Civil Trial Division, Criminal Trial Division, Family

2. *See* Election Briefing Series: American Judicial Elections, U.S. Dept. of State (June 27, 2024), <https://2021-2025.state.gov/briefings-foreign-press-centers/2024-elections-fpc/judicial-elections/>; Judicial Elections, Ballotpedia, https://ballotpedia.org/Judicial_elections.

3. Pa. Const. Art. V, § 5; *see also* How Judges Are Elected, Unified Judicial System of Pennsylvania, <https://www.pacourts.us/learn/how-judges-are-elected>.

4. Pa. Const. Art. V, §§ 5, 15, 16.

Division, or Orphans' Division.⁵ Judge Cohen served in the Family Division, which handles domestic relations and juvenile delinquency matters. App. 3a.

3. During his tenure as a state legislator, Judge Cohen created a personal Facebook page, accessible to the public. App. 3a. He continued to post to this page after his election to judicial office to “engage people in discussion” on “issues which were being discussed widely in the media.” *Id.* at 11a (quoting testimony).

After receiving a meritless citizen complaint concerning one of Judge Cohen's Facebook posts, the then-Administrative Judge of the Family Division raised concerns with Judge Cohen about unrelated posts. *Id.* at 3a-4a. Even though the single citizen complaint “proved to be unfounded,” Judge Cohen voluntarily deleted that post (which was not alleged to be political). *Id.* As for the unrelated posts, Judge Cohen maintained that they did not violate the Code of Judicial Conduct and were protected by the First Amendment, but he, nevertheless, voluntarily consulted with an ethics expert, who later represented him before the CJD and Pennsylvania Supreme Court. *Id.* at 4a. Dissatisfied, the Administrative Judge reported Judge Cohen to the Judicial Conduct Board of Pennsylvania (“Board”) for the unrelated posts for which no citizen or litigant had ever complained. *Id.*

5. See 42 Pa. Cons. Stat. § 951; The Court of Common Pleas, Trial Division, <https://www.courts.phila.gov/common-pleas/trial>.

B. Proceedings Below

1. The Board filed a formal complaint with the CJD, alleging violations of several Code provisions and Article V § 17(b) of the Pennsylvania Constitution,⁶ based on 66 out of the thousands of Facebook posts Judge Cohen made during his time on the bench. App. 68a-93a (listing each challenged post). The Code provisions cited by the Board included general rules related to following the law (Rule 1.1⁷); promoting public confidence in the judiciary's independence, integrity, and impartiality and avoiding impropriety (Rule 1.2⁸); abusing the prestige of office to advance the personal or economic interests of others (Rule 1.3⁹); participating in extrajudicial activities that would appear to undermine the judge's independence, integrity, and impartiality (Rule 3.1(C)¹⁰); speaking on non-legal

6. Article 5, Section 17(b) of the Pennsylvania Constitution provides, in relevant part, that “judges . . . shall not violate any canon of legal or judicial ethics prescribed by the Supreme Court.”

7. “A judge shall comply with the law, including the Code of Judicial Conduct.” Pa. Code of Judicial Conduct, Canon 1, Rule 1.1.

8. “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.” Pa. Code of Judicial Conduct, Canon 1, Rule 1.2.

9. “A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.” Pa. Code of Judicial Conduct, Canon 1, Rule 1.3.

10. “Judges shall regulate their extrajudicial activities to minimize the risk of conflict with their judicial duties and to comply with all provisions of this Canon. However, a judge shall not: . . . participate in activities that would reasonably appear to undermine the judge's independence, integrity, or impartiality.” Pa. Code of Judicial Conduct, Canon 3, Rule 3.1(C).

subjects that detract from the dignity of the office (Rule 3.7(A)¹¹); engaging in certain political activities, including endorsing or opposing candidates for public office, (Rule 4.1(A)(3)¹²); and engaging in political activity on behalf of a political organization or candidate for public office (Rule 4.1(A)(11)¹³). *Id.* at 5a.

The CJD found that Judge Cohen’s posts collectively violated the Code because their overall “volume and their tone” advanced the interests of the Democratic Party and, in one case (a post about harsh media coverage of Republican Liz Cheney), impliedly endorsed Ms. Cheney’s candidacy even though Judge Cohen, in the posting, expressly disclaimed any intent to make an endorsement. *Id.* at 99a, 111a.

The CJD meanwhile did not find any single post, standing alone, violated the Code and instead rendered its decision based on the cherry-picked collection of

11. “Judges may write, lecture, teach, and speak on non-legal subjects and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of their office or interfere with the performance of their judicial duties.” Pa. Code of Judicial Conduct, Canon 3, Rule 3.7(A).

12. “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.” Pa. Code of Judicial Conduct, Canon 4, Rule 4.1(A)(3).

13. “Except as permitted by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not: . . . engage in any political activity on behalf of a political organization or candidate for public office except on behalf of measures to improve the law, the legal system, or the administration of justice.” Pa. Code of Judicial Conduct, Canon 4, Rule 4.1(A)(11).

posts. Despite acknowledging that it may be desirable or even necessary for judges to have a “continuous social media presence,” the CJD rejected Judge Cohen’s First Amendment defense. *Id.* at 128a-129a. Among Judge Cohen’s posts cited by the CJD were statements expressing agreement with satirical cartoons, such as one “with Lisa Simpson making a speech, with a projection screen behind her . . . bear[ing] the following text: ‘Trickle-down economics has never gotten Billionaires to spread the wealth. That’s what unions are for.’” *Id.* at 86a-87a. Another post the CJD cited was a lighthearted, rhyming poem about highly publicized federal legislation: “Good night, Kevin McCarthy. Good night moon. No matter how long Kevin talks, we’ll have House passage of Build Back Better soon.” *Id.* at 91. Other posts cited by the CJD commented on the qualifications of already-elected officials or the quality of service of prior public servants, such as, for example: “The victories of Governor-Elect Josh Shapiro & Senator-Elect John Fetterman show Gov Tom Wolf should be credited with improving public respect for P[A] state government. Fetterman first LG [Lieutenant Governor] to win statewide for other post since 1966.” *Id.* at 70a. Still others included birthday wishes and congratulatory messages to elected officials, including friends of Judge Cohen from his time in the legislature and from as far back as high school: “My friend and former House colleague Josh Shapiro, whose father Dr. Steve Shapiro was a classmate of mine at Central High has been elected P[A]’s Governor. I have no doubt he is up to the job.” *Id.*

At a sanctions hearing, two attorneys testified to Judge Cohen’s reputation for fairness and said he never expressed political views from the bench. *Id.* at 18a.

Nonetheless, the CJD “issued an order immediately suspending Judge Cohen without pay for the remainder of his term.” *Id.*

As a consequence of the suspension, by operation of Pennsylvania law, Judge Cohen lost his pensions to which he would otherwise have been entitled. *See* n.1, *supra*.

2. Judge Cohen appealed to the Pennsylvania Supreme Court, arguing that his posts did not violate the Code and were protected speech under the First Amendment. *See* App. 19a-21a. He also argued that, although the sanctions could not survive either strict scrutiny or a balancing test, the court should apply strict scrutiny, following *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). *Id.* at 21a.

In *White*, this Court applied strict scrutiny to evaluate the constitutionality of a judicial canon that prohibited judicial candidates from announcing their “views on disputed legal or political issues.” 536 U.S. at 768, 774-75 (2002); *see also Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015) (“[W]e hold today what we assumed in *White*: A State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest.” (announcing plurality opinion on requisite level of scrutiny, which was also applied by all four dissenters)).

Notwithstanding this Court’s precedent in *White*, the Pennsylvania Supreme Court applied the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and affirmed the CJD’s order. App. 2a. Although the Pennsylvania court acknowledged this Court’s holding in *White* “that Restrictions on a judicial candidate’s speech

must satisfy strict scrutiny,” it rejected that standard and held that only a lesser “balancing test” is required when a judge is not actively running for election. *Id.*

In conducting its analysis, the court discussed the split of authority concerning the appropriate level of scrutiny to apply to restrictions of a sitting judge’s speech and highlighted the need for this Court to “resolve[] this open question of law.” *Id.* at 33a-39a, 46a. In applying a balancing test, the Pennsylvania Supreme Court purported to rely on the Seventh Circuit’s “approach taken in *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010), *cert. denied*, 563 U.S. 983, 131 S.Ct. 2872, 179 L.Ed.2d 1203 (2011).” *Id.* at 39a.

In *Siefert*, the two-judge majority held that strict scrutiny applies to rules prohibiting judges and judicial candidates from expressing political views or party affiliation, but the *Pickering* balancing test applies to rules prohibiting incumbent judges from endorsing candidates in partisan elections. 608 F.3d at 981-84. That distinction was premised on the majority’s view that “[e]ndorsements are not simply a mode of announcing a judge’s views on an issue,” but “may be exchanged between political actors on a quid pro quo basis,” thereby potentially undermining due process. *Id.* at 984. The Pennsylvania Supreme Court expanded the holding of *Siefert* to find that the *Pickering* balancing test applies to evaluate restrictions of all speech by sitting judges on matters of public concern. App. 42a.

After settling on the *Pickering* balancing test as the applicable standard, despite acknowledging that it “is not a perfect fit,” the Pennsylvania Supreme Court explained its two-prong test. *Id.* at 43a, 46a. First, the

court determines “whether the speech addresses a matter of public concern.” *Id.* at 46a. If so, “then the second prong requires [the court] to ‘find the balance between the state’s interest and the judge’s.’” *Id.* at 47a. While the Pennsylvania Supreme Court stated that the balance “need not be so exact” as “narrow tailoring,” it did not affirmatively define the balance that must be satisfied to survive this test. *Id.* (quoting *Siefert*, 608 F.3d at 985).

In applying its test, the Pennsylvania Supreme Court proceeded directly to the second prong, finding no dispute that the challenged posts were on matters of public concern. *Id.* The court then devoted only a single paragraph to explaining what it found “troubling” about the challenged posts. *Id.* at 48a-50a. The court did not examine the text of a single post or explain how any of Judge Cohen’s posted statements violated the Code. *Id.* Instead, the court described a handful of the posts in its own words and concluded that it was not any specific statement, but rather, “their volume and their tone [that] undermine[d] the appearance of impartiality required of the judiciary.” *Id.* (internal quotation marks and citation omitted) (alterations in original).

The court then unilaterally posited Judge Cohen’s interest as “act[ing] as a spokesperson for the Democratic Party.” *Id.* at 51a. That interest, the court held, was outweighed by the Commonwealth’s interest in protecting “the independence, integrity, and impartiality of the judiciary.” *Id.* at 50a-51a. On that basis, the court affirmed the CJD’s order suspending Judge Cohen for the remainder of his term and did not consider any less-severe sanctions or other means of advancing the purported state interest. *Id.* at 51a-52a.

After affirming Judge Cohen’s permanent suspension, the court nevertheless “encouraged” sitting judges “to write or speak—even on social media—on ‘appropriate’ matters of public concern.” *Id.* at 52a. The court did not, however, provide any guidance as to what might be “appropriate” or how a sitting judge might engage in speech on public affairs without risking his job and pension. *See id.*

REASONS FOR GRANTING THE WRIT

I. The Pennsylvania Supreme Court’s Decision Departs from this Court’s Precedent, Expressly Conflicts with the Fifth and Seventh Circuits and at Least Six State Courts of Last Resort, and Exacerbates a Three-Way Split on the Level of Scrutiny Required to Restrict a Sitting Judge’s Speech.

While this Court has previously addressed the issue of First Amendment protections for judicial speech, this petition presents an acknowledged conflict among courts of appeals and state courts of last resort on an important and recurring question concerning whether strict scrutiny applies to content-based restrictions on the speech of sitting judges. In recognition of this split, the Pennsylvania Supreme Court rightly called for this Court’s guidance on “an open question neither this Court nor the United States Supreme Court has directly addressed.” App. 2a.

A. This Court’s precedents apply strict scrutiny to restrictions on judicial speech.

Nearly 25 years ago, this Court applied strict scrutiny to restrictions on political speech by judicial candidates,

holding that “[t]he Minnesota Supreme Court’s canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment.” *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002). Then, thirteen years later, this Court confirmed “what [it] assumed in *White*: A State may restrict the speech of a judicial candidate **only if the restriction is narrowly tailored to serve a compelling interest.**” *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015) (emphasis added) (stating opinion of four Justices in the five-Justice majority).

While the five-Justice majority in *Williams-Yulee* held that the challenged Florida judicial canon satisfied strict scrutiny, eight Justices, including all four dissenters who would have struck down the canon, agreed that strict scrutiny was unquestionably the required standard of review. *See id.* at 463 (Scalia, J., dissenting) (joined by Justice Thomas and explaining the challenged judicial canon could be upheld “only if the State meets its burden of showing that the Canon survives strict scrutiny”); *id.* at 478 (Kennedy, J., dissenting) (agreeing with Justice Scalia’s analysis and lamenting the majority’s opinion as “literally a casebook guide to eviscerating strict scrutiny any time the Court encounters speech it dislikes”); *id.* at 479 (Alito, J., dissenting) (“The Florida rule regulates that speech based on content and must therefore satisfy strict scrutiny.”).

Both before and in the two-and-a-half decades since this Court’s decision in *White*, even with the Court’s more recent guidance in *Williams-Yulee*, courts have struggled with the question of whether content-based restrictions on speech must satisfy strict scrutiny when the speaker is a

member of the judiciary. While at least eight courts have applied strict scrutiny to restrictions on judicial speech, at least seven courts, including the Pennsylvania Supreme Court, have relied on a less-demanding balancing test, and at least two courts have devised their own standards somewhere in between.¹⁴ The scope of First Amendment protections cannot be so mutable, and this Court's guidance is needed to resolve this question of national importance.

B. At least six state courts of last resort, the Fifth Circuit, and, in some circumstances, the Seventh Circuit apply strict scrutiny.

Since *White*, Ohio, Arkansas, Maine, Wyoming, and the Fifth Circuit have explicitly held that strict scrutiny is the proper analysis for restrictions on sitting judges' speech.¹⁵ The Seventh Circuit has reached the same conclusion when, as here, the speech at issue allegedly reveals a judge's views on legal or political issues. New York has also applied strict scrutiny without expressly deciding the issue.

Most recently, the Ohio Supreme Court found the First Amendment analysis straightforward. Relying on

14. Still other states have been inconsistent or unclear as to the standard. *See, e.g.*, n. 21, *infra*.

15. Even before *White*, the Washington Supreme Court recognized that, under the First Amendment, strict scrutiny applies to content-based restrictions on a sitting judge's speech. *See Matter of Disciplinary Proceeding Against Sanders*, 955 P.2d 369, 375 (Wash. 1998) ("If a person does not completely surrender his or her right to freedom of speech upon becoming a candidate, then we cannot expect the candidate to do so once elected to judicial office.").

White, the court concluded that “there is no special test for speech restrictions on judges”; rather the traditional First Amendment analysis applies. *Disciplinary Counsel v. Grendell*, ---N.E.3d---, 2025 Ohio 5239 (Nov. 21, 2025), *reconsideration denied*, 273 N.E.3d 687 (Jan. 20, 2026), at ¶ 24. Accordingly, the court applied strict scrutiny to content-based restrictions on speech and held it unconstitutional for a judge to be sanctioned for, as relevant here, voluntarily testifying before an Ohio House legislative committee about Covid-19 in support of a bill sponsored by his wife, and making remarks about a public feud with the county auditor’s office at a Tea Party meeting. *See id.* at ¶¶ 34-37 (finding rule prohibiting legislative testimony on subjects other than law not narrowly tailored to state’s interest in judicial impartiality); ¶¶ 80-89 (finding sanctions for Tea Party remarks, which were “core political speech” in a “political context,” unconstitutional as applied).

Similarly, the Arkansas Supreme Court found it “crystal clear from *White*” that strict scrutiny applied to a prohibition on legislative testimony like Ohio’s. *Griffen v. Arkansas Judicial Discipline and Disability Comm’n*, 130 S.W.3d 524, 535-36 (Ark. 2003). The Maine Supreme Court found that strict scrutiny applied to a rule prohibiting judges from soliciting funds for a “political organization or candidate” where the rule “burden[ed] a sitting judge’s ability to talk to potential political contributors and endorsers about their contributions and endorsements for any political cause.” *In re Dunleavy*, 838 A.2d 338, 342 n.2, 350-51 (Me. 2003), *cert. denied*, 541 U.S. 960 (2004). The New York Court of Appeals applied strict scrutiny to a set of rules restricting political speech, including the same rule at issue in the Maine case. *In re Raab*, 793 N.E.2d 1287, 1289-90 (N.Y. 2003).

The Fifth Circuit has also squarely addressed the question of which test to apply to prohibitions on a sitting judge's speech. In *Jenevein v. Willing*, the Fifth Circuit found that a censure order failed strict scrutiny to the extent it censured the content of a judge's speech, though it survived strict scrutiny to the extent it addressed his use of "the trappings of judicial office" to boost his message. 493 F.3d 551, 560 (5th Cir. 2007). The panel distinguished *Pickering v. Board of Education*, 391 U.S. 563 (1968), reasoning that a judge is not a mere employee, but rather, an elected public official speaking to constituents. See *Jenevein*, 493 F.3d at 557-58.¹⁶ Quoting *White*, the court stated that "[i]f the State chooses to tap the energy and the legitimizing power of the democratic process [in the election of judges], it must accord the participants in that process . . . the First Amendment rights that attach to their roles." *Id.* at 558 (brackets in original).

The Seventh Circuit has also found strict scrutiny to be the appropriate standard of review for a rule restricting judges and judicial candidates from speaking on their "political views and . . . qualifications for office." *Siefert*, 608 F.3d at 981.¹⁷

16. See *Jenevein*, 493 F.3d at 557-58 ("The parties hang their arguments on employee-speech doctrine, applying this court's content-form-context balancing test. Although this approach summons informing principles of free speech of employees, their categorical divisions of public and private speech fail to illuminate the state's interest in constraining speech by an elected public official, political speech at the core of the First Amendment, and its necessity. Our 'employee' is an elected official, about whom the public is obliged to inform itself, and the 'employer' is the public itself, at least in the practical sense, with the power to hire and fire.").

17. The same court, however, applied *Pickering* balancing to a rule prohibiting incumbent judges from expressly endorsing

Critically, not all jurisdictions applying strict scrutiny have framed their analysis in reference to a judge's role as an elected official or the context of a judicial campaign. *See, e.g., Griffen*, 130 S.W.3d at 524-38. In fact, at least one state has applied strict scrutiny to restrictions on the speech of an unelected sitting judge: Following *White* and *Williams-Yulee*, the Wyoming Supreme Court applied strict scrutiny to a recommended order of sanctions for an unelected magistrate judge who refused to perform same-sex marriages. *See Neely v. Wyoming Comm'n on Judicial Conduct and Ethics*, 390 P.3d 728, 736 (Wyo. 2017), *cert. denied*, 583 U.S. 1052 (2018).

C. Pennsylvania exacerbated the split of authority by joining at least five state courts of last resort and the Seventh Circuit in applying the *Pickering* balancing test.

The Pennsylvania Supreme Court expressly disagreed with the Fifth Circuit's conclusion in *Jenevein* that strict scrutiny must apply to prohibitions on sitting judges' speech. App. 45a-46a ("We are not persuaded by the Fifth Circuit's contrary decision in *Jenevein*."). In rejecting the Fifth Circuit's position and its application of this Court's reasoning in *White*, the Pennsylvania court concluded that "*White*'s interest in protecting the electorate's need for an open debate about the qualifications of judicial candidates plays no role in this case." *Id.* at 43a. Instead, the court held that "outside the context of an election, governmental restrictions on a sitting judge's speech must clear a lower hurdle: a balancing test." *Id.* at 2a.

candidates in partisan elections. *See Siefert*, 608 F.3d at 983-85; *see also* § I(C), *infra*.

In doing so, the Pennsylvania Supreme Court purportedly relied on the Seventh Circuit's analysis in *Siefert*. In *Siefert*, a pre-enforcement challenge brought by a sitting judge, the Seventh Circuit applied strict scrutiny to evaluate a ban on affiliating with a political party but applied *Pickering* to a ban on publicly “endors[ing]” or “speak[ing] on behalf of” a political party’s candidates or platform. 608 F.3d at 981-82, 983. Distinguishing the two approaches, the court reasoned that party affiliation is a means of announcing one’s views on legal and political issues “by proxy.” *Id.* at 982. An endorsement, however, “is less a judge’s communication about his qualifications and beliefs than an effort to affect a separate political campaign,” and “endorsements may be exchanged between political actors on a quid pro quo basis.” *Id.* at 984. These considerations, the court reasoned, justified a different standard of review. *See id.*

Notably, the rules at issue in *Siefert* applied to both judges and judicial candidates and, while the *Siefert* court limited its holding regarding restrictions on express endorsements to incumbent judges, it did not establish the judge-versus-candidate delineation that the Pennsylvania Supreme Court relies on. *Id.* at 987 (“This is not the appropriate case to address the issue of regulations for judicial candidates who are not judges.”).

Like Pennsylvania, California, New Mexico, and Oregon have applied *Pickering* to challenges brought by judges following disciplinary proceedings.¹⁸ *See*

18. Similarly, the Supreme Court of Missouri has applied a balancing test to determine whether a judge’s speech is protected under the state’s constitution. *See In re Hill*, 8 S.W.3d 578, 583 (Mo. 2000).

Broadman v. Comm'n on Judicial Performance, 959 P.2d 715, 727 (Cal. 1998), *cert. denied*, 525 U.S. 1070 (1999); *In re Vincent*, 172 P.3d 605, 608 (N.M. 2007); *In re Schenck*, 870 P.2d 185, 204 (Or. 1994), *cert. denied*, 513 U.S. 871 (1994); *see also In the Matter Concerning Judge James G. Bertoli*, 2024 Cal. Comm. Jud. Perform. LEXIS 4, at *5-7, 28 (Oct. 30, 2024).¹⁹ For these states, “evaluating the constitutionality of restrictions on the political speech of a judge ‘does not fit neatly into the existing analytical framework for First Amendment analysis.’” *In re Vincent*, 172 P.3d at 608 (quoting *In re Schenck*, 870 P.2d at 204). Indeed, the Supreme Court of New Mexico lamented that “[s]electing the appropriate framework for analysis has become even more difficult since *White*.” *Id.*

Underscoring the doctrinal confusion, the Mississippi Supreme Court has issued several conflicting opinions on the required standard. In 2004, the court applied strict scrutiny and declined to sanction a judge for expressing the view that “gays and lesbians should be put in some type of mental institute.” *Mississippi Comm'n on Jud. Performance v. Wilkerson*, 876 So. 2d 1006, 1013, 1015 (Miss. 2004).²⁰ Since then, however, the court has issued

19. Before *Jenevein*, Texas applied *Pickering* balancing in *In re Davis*, 82 S.W.3d 140 (Tex. Spec. Ct. Rev. 2002), but stopped the analysis at the first prong. A judge in a later case questioned the “viability” of applying *Pickering* to judges’ speech following *White*. *See In re Hecht*, 213 S.W.3d 547, 591-92 (Tex. Spec. Ct. Rev. 2006) (McClure, J., concurring).

20. The court reasoned that the state’s interest in judicial impartiality would in fact be harmed by prohibiting this speech. *See Wilkerson*, 876 So. 2d at 1015 (“Whatever state interest the Commission may find in preventing judges from announcing their private views on gay rights would conflict with, and be outweighed by, the more compelling state interest of providing an impartial court for all litigants, including gays and lesbians. Allowing—that

opinions in which it recited the strict scrutiny standard but then applied the *Pickering* balancing test. See *Mississippi Comm’n on Judicial Performance v. Moore*, 400 So.3d 410, 417 (Miss. 2025); *Miss. Comm’n on Judicial Performance v. Osborne*, 11 So.3d 107, 112-13 (Miss. 2009). These conflicting opinions are indicative of the confusion among the courts that requires this Court’s resolution.²¹

D. At least two states apply “in-between” tests, highlighting the need for this Court’s guidance.

A third set of jurisdictions, looking to judges’ “unique position,” in society, have developed tests in between strict scrutiny and *Pickering* balancing. *In re Inquiry of Broadbelt*, 683 A.2d 543, 559 (N.J. 1996), *cert. denied*, 520 U.S. 1118 (1997). For example, New Jersey, drawing on *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), which concerned restrictions on a lawyer’s speech during the pendency of a trial, will uphold a restriction on judges’ speech if it “furthers a substantial governmental interest unrelated to suppression of expression, and is no more restrictive than necessary.” *In re Broadbelt*, 683 A.2d at 552. West Virginia applies a similar standard, under which “the State may accomplish its legitimate interests and restrain the public expression of its judges through

is to say, forcing—judges to conceal their prejudice against gays and lesbians would surely lead to trials with unsuspecting gays or lesbians appearing before a partial judge. Unaware of the prejudice and not knowing that they should seek recusal, this surely would not work to provide a fair and impartial court to those litigants.”).

21. The Supreme Court of Florida has exhibited similar confusion, describing both “exacting scrutiny” and *Pickering* balancing without clearly identifying the applicable test. *In re Code of Jud. Conduct (Canons 1, 2, & 7A(1)(b))*, 603 So. 2d 494, 498 (Fla. 1992).

narrowly tailored limitations where those interests outweigh the judges' free speech interests." *Matter of Hey*, 452 S.E.2d 24, 31 (W. Va. 1994).

E. Courts have struggled with this issue for 25 years, and only this Court's intervention will resolve the conflict.

Two federal circuits and at least fourteen states have weighed in and reached differing conclusions on the First Amendment's application to sitting judges. The courts that have reached the issue have done so in reasoned opinions attempting to apply this Court's precedents. Plainly, this Court's decisions in *White* and *Williams-Yulee* have not resolved the matter, and it will not resolve without this Court's further guidance. For some courts (*e.g.*, Ohio), *White* and *Williams-Yulee* confirmed what already appeared clear: Strict scrutiny applies to content-based restrictions on core political speech—judges' or anyone else's. For others (*e.g.*, New Mexico) the law became less clear. For the Seventh Circuit, these cases suggested applying differing levels of scrutiny depending on whether a judge was stating his own political views or endorsing another partisan candidate. The Pennsylvania Supreme Court has now exacerbated the split.

These courts' rulings cannot be harmonized. In addition to applying different tests, these courts have articulated distinct visions of a judge's role in relation to the public. *Compare Jenevein*, 493 F.3d at 558, *with Siefert*, 608 F.3d at 984. Like the Seventh Circuit, the Pennsylvania Supreme Court expressly rejected *Jenevein's* reasoning that the same First Amendment rights attach to elected judges as to other elected officials. *See App. 45a-46a* ("Since the role of judges is fundamentally different from

that of politicians, the standard we adopt must reflect that unique role.”)

The Pennsylvania Supreme Court stated that it will continue to apply a balancing test to judicial speech “unless or until the United States Supreme Court resolves this open question of law.” *Id.* at 46a. There is no indication that courts applying strict scrutiny will revisit their approach: The Ohio Supreme Court applied strict scrutiny as recently as last year. Accordingly, under the current legal landscape, a judge’s First Amendment rights may hinge on the happenstance of a confluence of factors, including, for example, the state in which the judge sits on the bench, whether the judge is eligible to seek reelection, and whether the judge’s challenged speech is made just before or just after becoming a judge or entering a new election cycle. First Amendment rights cannot be so arbitrary. This Court’s intervention is needed to resolve the split and to restore First Amendment protections to all members of the judiciary.

II. This Case Is an Ideal Vehicle for Resolving a Question of Extreme Importance that Is Cleanly Presented Here.

This Court should grant the petition because it cleanly presents a question of importance concerning fundamental First Amendment protections for members of the judiciary.

1. There are more than 30,000 state and federal judges in the United States.²² As the Pennsylvania

22. Quality Judges Initiative, Institute for the Advancement of the American Legal System, University of Denver, https://iaals.du.edu/sites/default/files/documents/publications/judge_faq.pdf.

Supreme Court acknowledged, “[u]nquestionably, judges do not give up all First Amendment rights upon assuming the bench.” App. 26a (collecting cases for same). But what that means—and, in particular, what level of scrutiny applies to restrictions on judicial speech—currently depends on the state or federal jurisdiction in which a judge happens to take the bench. *See* § I, *supra* (discussing three-way split of authority).

As is clear from the split of authority on the question presented, judges routinely wish to speak on matters of public concern. Indeed, despite suspending Judge Cohen for his speech, the Pennsylvania Supreme Court recognized that “[j]udges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice,’ and are therefore encouraged to write or speak—even on social media—on ‘appropriate’ matters of public concern.” App. 52a (quoting Pa. Code of Judicial Conduct, Canon 3, Rule 3.1, cmt. 1). It is therefore unsurprising that the question of what is or is not appropriate judicial speech arises frequently, as does the question of what level of scrutiny applies to restrictions on such speech. The question presented here is thus one of recurring importance, which this Court should promptly resolve.

2. While the question of the appropriate level of scrutiny to apply to judicial speech arises often, it rarely presents itself so cleanly or directly as in this case. The question presented here is a purely legal one never before addressed by this Court: Whether content-based restrictions on the speech of sitting judges must satisfy strict scrutiny. App. 2a. This question was squarely raised, briefed, and decided below.

The Pennsylvania Supreme Court’s decision rested entirely on the First Amendment—the court expressly declined to rely on independent state constitutional grounds. *Id.* at 21a (noting Judge Cohen “does not argue Article I, Section 7 provides additional protections beyond what the First Amendment guarantees in this particular context”). There are no factual disputes, no procedural obstacles, and no alternative grounds that could complicate review.

III. This Court’s Immediate Resolution of the Important First Amendment Question Presented Is Necessary to Prevent States from Chilling Protected Speech and Undermining the Rule of Law.

This Court’s review and resolution of the question presented is particularly warranted here because the decision below is not only wrong, but unconscionable in a way that stands to have an in terrorem effect on judicial speech. Moreover, the malleability of the test fashioned by the Pennsylvania Supreme Court presents a vehicle for political interference that could have the perverse effect of undermining the rule of law in the name of enforcing judicial canons. This Court should intervene.

A. The Pennsylvania Supreme Court’s reliance on *Pickering* is fundamentally flawed.

The Pennsylvania Supreme Court arrived at its conclusion that “the *Pickering* balancing test is the appropriate standard to review restrictions on a sitting judge’s speech” through a series of analytical missteps and non sequiturs. App. 43a.

1. The Pennsylvania Supreme Court began its analysis by acknowledging that the restrictions on Judge Cohen’s speech are content-based and that “[r]estrictions on speech based on its content are ‘presumptively invalid’ and subject to strict scrutiny.” *Id.* at 27a (internal quotation marks and citations omitted). Having acknowledged that on-point and controlling precedent, the Pennsylvania Supreme Court then proceeded to eschew it.

2. The Pennsylvania Supreme Court relied heavily on *TikTok Inc. v. Garland*, for the proposition that lesser scrutiny may be warranted by some “special characteristic” of the speaker and offered *Pickering* as an example. *Id.* at 28a (quoting *TikTok Inc. v. Garland*, 604 U.S. 56, 72-73 (2025)). But the Pennsylvania Supreme Court’s reliance on *TikTok* and *Pickering* is misplaced.

In *TikTok*, this Court explained that “laws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content preference, [but] such scrutiny is unwarranted when the differential treatment is justified by some special characteristic of the particular speaker being regulated.” 604 U.S. at 72-73 (cleaned up). *TikTok*, however, involved a **content-neutral** law serving a **content-neutral** rationale: Severing an application from the control of a foreign adversary. *Id.* at 82. The Court had “no occasion” to apply strict scrutiny because the law “singled out [TikTok] for the purpose of addressing data-collection and foreign-manipulation concerns,” not because of any message the platform conveyed. *Id.* at 67.

No similar content-neutral rationale exists here. The Code of Judicial Conduct does not regulate judges

irrespective of what they say; it targets judges precisely because of what they say—punishing speech that is “partisan” while permitting speech the Commonwealth deems “appropriate.” App. 54a. That is “about as content-based as it gets.” *Barr v. Am. Assn. of Political Consultants, Inc.*, 591 U.S. 610, 619 (2020).

A judge who posts on Facebook about his weekend gardening hobby faces no sanction. A judge who posts about a pending election does. The difference is not who is speaking or where—it is what the judge is saying. That is the hallmark of a content-based restriction, which compels application of strict scrutiny. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015).

3. *Pickering* is similarly far afield. *Pickering* was designed for a narrowly defined context that this case does not present: The government as an employer disciplining its employee.²³ 391 U.S. at 568. The *Pickering* Court fashioned a balancing test for speech made by public employees involving a matter of public concern outside the individual’s official duties. *Id.* In such a case, a court must balance between the free speech interests of the individual, “as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Id.*

As the Pennsylvania Supreme Court acknowledged, “Judges . . . are not ‘employees’ of the government in the traditional sense,” and it is well settled that “[j]udicial candidates, like candidates for other elected offices, must

23. *Pickering* has also been limited by later cases from this Court. *See, e.g., Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006).

be afforded the right to communicate their qualifications and views.” App. 31a. Based solely on the fact that Judge Cohen “was not a candidate for any office at the time he made his Facebook posts,” the Pennsylvania Supreme Court determined that it was appropriate to treat him as a government employee under the *Pickering* balancing test. *Id.* at 33a, 42a.

B. The Pennsylvania Supreme Court’s decision violates the First Amendment.

The Code provisions, as applied to Judge Cohen’s challenged speech, could not survive strict scrutiny because the Commonwealth has no compelling interest in prohibiting the challenged speech and, even if it did, the sanctions imposed on Judge Cohen are not narrowly tailored to serve any such interest. Moreover, the Commonwealth’s stated interests were not consistent even with its own rules.

1. The Pennsylvania Supreme Court invoked a vague notion of preserving judicial impartiality without explaining its meaning, and instead simply concluding that “the Commonwealth’s interests in preserving the judiciary’s reputation for impartiality outweighed Judge Cohen’s interests, as a sitting judge who was not a candidate for judicial office,” as the court unilaterally framed it, “in publicly advocating for the Democratic Party on Facebook and espousing his partisan political views.” App. 2a.

But, as this Court explained in *White*, “[c]larity” regarding the meaning of impartiality “is essential before [a court] can decide whether impartiality is indeed a compelling state interest.” 536 U.S. at 775. Furthermore,

as this Court has instructed, “[b]efore considering the constitutionality of” a restriction on judicial speech, a court “must be clear about its meaning.” *Id.* at 770. The Pennsylvania Supreme Court’s decision failed to heed *White*’s demand for clarity.

Moreover, the Pennsylvania Supreme Court did not even attempt to construe the text of the provisions of the Code it purportedly sought to enforce. Indeed, the Pennsylvania Supreme Court did not specifically cite *any* Rules of Judicial Conduct it was enforcing, and, of the seven rules listed by the Board’s complaint, the Pennsylvania Supreme Court did no more than identify the rules, with only the briefest of comments in the course of the opinion. The Commonwealth’s interest can hardly be “compelling” when it fails to engage with the Rules it claims to enforce and where nothing else in Judge Cohen’s speech could otherwise be declared unlawful simply because his posts arguably revealed his political affiliation, which was already well-known because Judge Cohen was elected in a partisan election. A straightforward application of this Court’s precedent in *White* confirms as much. *See White*, 536 U.S. at 778 (“[S]ince avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the ‘appearance’ of that type of impartiality can hardly be a compelling state interest either.”).

2. Even if the Commonwealth’s interest in a vaguely defined concept of preserving judicial impartiality were compelling (and it is not), the provisions of the Code, as applied to Judge Cohen, are not narrowly tailored to serve that interest.

The sheer breadth of the Pennsylvania Supreme Court's holding, which would categorically bar judicial officers from speech perceived to reflect a party affiliation, cannot satisfy narrow tailoring. Party affiliation has little bearing on the vast majority of cases. As the Seventh Circuit explained in *Siefert*, "party membership is an association that could call into question the impartiality of a judge when sitting on a case involving that party, or perhaps that party's main rival." 608 F.3d at 982. Here, as in *Siefert*, "nothing in the record suggests that political parties themselves are such frequent litigants that it would be unworkable for a judge who chooses to affiliate with a political party to recuse himself when necessary." *Id.* Judge Cohen was assigned to the Family Division, which addresses narrowly defined matters involving custody, parental rights, or juvenile delinquency. Party affiliation is not fairly expected to have any bearing on the case-specific adjudication of these matters. No reason exists to apply a categorical bar on comments that reflect partisan affiliation so broadly as to encompass even Family Division trial judges; much less, to have failed to consider less-restrictive alternatives, such as recusal.

In addition, the punishment here confirms the lack of narrow tailoring. The Pennsylvania Supreme Court never examined whether applying the Code provisions to suspend Judge Cohen for the remainder of his term, thereby stripping him of his pension, was the least restrictive means of achieving the Commonwealth's purported interest in protecting impartiality. In fact, the Pennsylvania Supreme Court did not consider *any* alternative means of advancing their purported governmental interests or entertain any less-severe sanctions. Accordingly, there is no record as to whether

public censure or some other form of sanction would have achieved the Commonwealth's desired end.

Instead, the Pennsylvania Supreme Court affirmed Judge Cohen's suspension leading to forfeiture of his pension, following a distinguished 50-year career as a public servant, without regard to narrow tailoring. Such a decision does not pass constitutional muster. *See White*, 536 U.S. at 776 (finding a clause prohibiting judicial candidates announcing views on political issues "barely tailored to serve that interest *at all*, inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*.").

C. The threat of removal and being stripped of retirement benefits based on an ill-defined standard will undoubtedly silence judges and undermine the rule of law.

The penalty here is staggering. Judge Cohen devoted 50 years of his life and professional career to public service—42 as a legislator, the rest as a judge. For that, he earned a pension. The Commonwealth took all of it. Not because he ruled unfairly. Not because he was corrupt. Not because a single litigant was prejudiced, or even alleged as much. But because he posted his personal opinions on Facebook, and the Pennsylvania Supreme Court perceived their tone as partisan.

Even if Judge Cohen's challenged posts could be construed as misconduct, the decision is not a measured response. It is punishment for speaking that will undoubtedly chill the speech of sitting judges and deter qualified lawyers from choosing to serve in a judicial capacity.

These outcomes are unacceptable and detrimental to the integrity of the judiciary. As this Court has explained, “even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so.” *White*, 536 U.S. at 778. And, as the Pennsylvania Supreme Court acknowledged in the very same opinion in which it removed Judge Cohen from the bench, judges are “encouraged to write or speak—even on social media—on ‘appropriate’ matters of public concern.” App. 52a. But why would a judge take that risk when a court could remove him from his elected (or appointed) office and deprive him of his retirement benefits after five decades of service based on the perceived “volume” and “tone” of the judge’s post, based on a balancing test where the state’s interest is undefined impartiality, and where the court need not even consider the language of the provisions of the Judicial Code that the judge purportedly violated? And why would a qualified lawyer—who had previously “given opinions as to constitutional issues,” *White*, 536 U.S. at 778—risk entering the judiciary with such an in terrorem risk hanging overhead?

Furthermore, the Pennsylvania Supreme Court’s ill-defined standard could lead to political interference and undermine the rule of law under the guise of promoting judicial impartiality. The idea that a judge may be removed for the overall volume and tone of his personal social media posts—without reference to the text of any specific statement and without concern for any specific provision of the Judicial Code—means that judges could be targeted for removal based on disfavored political positions. This concern is heightened in a state like Pennsylvania, where judges run for election on a party ticket, proclaiming a party affiliation by necessity. And Pennsylvania is not

alone in this respect. At least 21 states conduct partisan judicial elections for at least one level of their judiciaries.²⁴

Allowing states to target and remove judges for their party affiliations will not preserve the impartiality of the judiciary; rather, it will promote political interference, harm the integrity of the judicial branch, and undermine the rule of law.

The consequences of allowing the Pennsylvania Supreme Court's decision and the existing split of authority to persist are significant. Thousands of sitting judges across the country face uncertainty about the scope of First Amendment protection that applies to their extrajudicial speech—on social media, in community settings, or in public commentary. The result is a patchwork that the First Amendment does not tolerate. A judge in Texas who comments on a matter of civic concern enjoys full-throated First Amendment protections reviewed under strict scrutiny. *See, e.g., Jenevein*, 493 F.3d at 557. A judge in Wisconsin who makes identical remarks will have strict scrutiny for some statements and a balancing test governing others. *See, e.g., Siefert*, 608 F.3d at 981, 984. And a judge in Pennsylvania—saying the very same words about the very same issues—receives only the weak balancing test reserved for government employees. App. 2a. The scope of a judge's constitutional rights should not depend on which side of a state line he happens to sit. This patchwork of standards is untenable and demands this Court's resolution.

24. *See* n.2, *supra*.

CONCLUSION

The First Amendment exists for cases like this one. The exceptionally important First Amendment issue presented in this case is cleanly raised by this petition. The question is purely legal; the split is deep and acknowledged; the state court has invited this Court's review; and the petitioner continues to suffer severe consequences from the decision below. This Court should grant the petition.

Respectfully submitted,

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APPENDIX

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**APPENDIX A — OPINION OF THE SUPREME
COURT OF PENNSYLVANIA, EASTERN
DISTRICT, FILED JANUARY 21, 2026**

[J-58-2025]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 63 EAP 2024

Appeal from the Order of the Court of Judicial
Discipline entered on October 7, 2024, at No. 1 JD 2023.

SUBMITTED: June 17, 2025

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

APPEAL OF: JUDGE MARK B. COHEN

TODD, C.J., DONOHUE, DOUGHERTY, WECHT,
MUNDY, BROBSON, McCAFFERY, JJ.

OPINION

JUSTICE DOUGHERTY
DECIDED: January 21, 2026

On October 7, 2024, the Court of Judicial Discipline (the “CJD”) suspended then-Judge Mark B. Cohen (“Judge Cohen”) for the remainder of his term of service as a result of his partisan political social media posts. In this appeal as of right under Pa. Const. art. V, § 18(c)(1) (a judge “shall

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have the right to appeal a final adverse order of discipline of the court . . . to the Supreme Court”), Judge Cohen claims his posts were protected speech under the First Amendment to the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution. This claim raises an open question neither this Court nor the United States Supreme Court has directly addressed: what standard applies when reviewing constitutional challenges to restrictions on a sitting judge’s speech? Restrictions on a judicial candidate’s speech must satisfy strict scrutiny, as required by the United States Supreme Court’s decision in *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002). However, the CJD concluded that, outside the context of an election, governmental restrictions on a sitting judge’s speech must clear a lower hurdle: a balancing test. We agree. Under the balancing test we adopt today, if a sitting judge speaks outside of his or her official duties on a matter of public concern, then courts must balance the Commonwealth’s interest in protecting the efficiency of the administration of justice, including the independence, integrity, and impartiality of the judiciary, against the judge’s interest in making the statement. Here, we hold the Commonwealth’s interests in preserving the judiciary’s reputation for impartiality outweighed Judge Cohen’s interests, as a sitting judge who was not a candidate for judicial office, in publicly advocating for the Democratic Party on Facebook and espousing his partisan political views. Therefore, we affirm the CJD’s order suspending him.

*Appendix A***I. Background**

Judge Cohen created a personal Facebook page in 2007, while he was a member of the Pennsylvania House of Representatives. He continued to post regularly on Facebook when he joined the bench in 2018 after being elected to the Philadelphia Court of Common Pleas. The “life events” section of his Facebook page identified him as a judge assigned to the Family Division of the Philadelphia Court of Common Pleas and detailed his years of service as a Democratic state legislator and a delegate to the Democratic National Convention. His Facebook page was publicly accessible,¹ with approximately 5,000 Facebook friends and 1,000 followers.

In 2021, the Honorable Margaret T. Murphy, the then-Administrative Judge of the Family Division, received a citizen complaint, through another judge, claiming one of Judge Cohen’s Facebook posts was racist. Although the complaint proved to be unfounded, Judge Murphy became concerned about some of Judge Cohen’s other Facebook posts. In particular, she flagged: (1) a photo Judge Cohen posted of himself in his judicial robes behind the bench; and (2) a post boasting he had consistently received an “F” rating from the National Rifle Association as a state legislator.

1. Facebook has privacy settings that allow users to limit who can see their posts. *See* Facebook, *Basic Privacy Settings & Tools*, <https://www.facebook.com/help/325807937506242/> (last visited Jan. 15, 2026). Judge Cohen had not used any privacy settings.

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On September 29, 2021, Judge Murphy and then-President Judge Idee Fox met with Judge Cohen to discuss his Facebook page. Judge Murphy later testified that Judge Cohen was not receptive to their concerns. He insisted his Facebook posts did not violate the Code of Judicial Conduct (the “Code”) and rebuffed Judge Murphy’s suggestion he report himself to the Judicial Conduct Board (the “JCB”) to mitigate any potential violation. However, he agreed to consult an ethics expert: his present counsel, Samuel C. Stretton, Esq. (“Attorney Stretton”). Attorney Stretton later told Judge Murphy that Judge Cohen had removed the photo of himself in his judicial robes as well as the post that triggered the citizen complaint. However, Judge Cohen continued to post regularly on Facebook. When it became apparent that Judge Cohen was not going to self-report, Judge Murphy reported the Facebook posts to the JCB.

A senior JCB investigator reviewed Judge Cohen’s Facebook page and saw the photo of Judge Cohen in his judicial robes, despite Attorney Stretton’s claim it had been removed.² After monitoring the Facebook page and preserving Judge Cohen’s posts, the JCB issued a Notice of Full Investigation (“NFI”) to Judge Cohen. In response, Judge Cohen admitted responsibility for the posts and claimed they were constitutionally protected free speech. He attended a deposition as part of the investigation in July 2022, but continued to post political content on Facebook, triggering a supplemental NFI from the JCB.

2. Judge Cohen later said the photo was unknowingly on his Facebook page twice and he simply neglected to delete the duplicate.

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Judge Cohen responded to the supplemental NFI and again invoked his constitutional right to free speech.

Soon after, the JCB filed formal charges against Judge Cohen, alleging he violated Article V, § 17(b) of the Pennsylvania Constitution³ and the following provisions of the Code: Canon 1, Rules 1.1, 1.2, and 1.3; Canon 3, Rules 3.1(C) and 3.7(A); and Canon 4, Rules 4.1(A)(3) and 4.1 (A)(11).⁴

At trial, Judge Murphy and the JCB’s senior investigator took the stand, and the JCB introduced copies of more than 60 of Judge Cohen’s Facebook posts. For brevity’s sake, only a few of the posts are reproduced below as examples:

3. November 20, 2022, time not listed – “Today is President Joe Biden’s Birthday. Many people his age is [sic] impaired. But he has proven to be an excellent President. His experience enables him, and does not wear him down. I look forward to many more achievements!” . . .
5. November 10, 2022, 6:40 p.m. – “The victories of Governor-Elect Josh Shapiro

3. Article V, § 17(b) provides, in relevant part, that “judges shall not engage in any activity prohibited by law and shall not violate any canon of legal or judicial ethics prescribed by the Supreme Court.” Pa. Const. art. V, § 17(b).

4. We reproduce the substance of these Code provisions *infra*.

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& Senator-Elect John Fetterman show Gov Tom Wolf should be credited with improving public respect for P[A] state government. Fetterman first LG to win statewide for other post since 1966.”

6. November 9, 2022, 3:22 a.m. – “My friend and former House colleague Josh Shapiro, whose father Dr. Steve Shapiro was a classmate of mine at Central High has been elected P[A]’s Governor. I have no doubt he is up to the job” . . .
8. November 2, 2022, 4:43 p.m. – “My former legislative colleague Kenyatta Johnson, now completing his 3rd term in the Philly City Council[,] has been found—along with his wife Dawn Chavous—to be not guilty on all charges in federal court today by a jury verdict. A vindication!” . . .
9. September 22, 2022, (approximate) – “Philly DA Krasner, in switch of tactics, now demands to testify before P[A] House Committee seeking evidence of wrongdoing to begin impeachment proceedings. Good move!” . . .
11. September 20, 2022 (approximate), time not listed – “Babette Josephs was the most public and persistent fighter for women’s rights in Post-*Roe* Pennsylvania. I would

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like to see her birthday, August 4, be publicly celebrated as Babette Josephs Day.” . . .

15. August 4, 2022, 2:51 a.m. – “As a young man, I remember journalistic anger at Roger Maris & Eugene McCarthy for becoming national heroes with heroic achievements. John Nichols’ hit job against Liz Cheney [sic] in [] The Nation is of the same sad kind.” In the midst of the exchange of posts that ensued from this post, [Judge Cohen] posted the following: “I believe from personal experience that people can and do change their views over time. As a judge, I am not permitted to endorse or otherwise back any candidate for anything. But I strongly disbelieve that good works by anyone should subject them to harsh criticism while those who do far fewer good things remain totally ignored.” . . .
22. August 5, 2022, 9:19 p.m. – “Inquirer: Unemployment falls to 3.5%, tying for the lowest since 1969. More people are employed in [the U.S.] than ever before, showing a very strong economy, and strengthening Social Security System. It’s time for critics to re-evaluate this Administration.”
23. August 3, 2022, 9:39 p.m. – “Senator Amy Klobuchar predicts Sen. Kirsten [sic]

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Sinema will be on board with Inflation Reduction Act next week, & it will pass Senate, lowering annual deficit, fighting climate change, & reducing prescription costs. A victory for fiscal responsibility.”

24. August 3, 2022, 1:13 a.m. – “By a 59% to 41% vote, Kansas voters rejected a constitutional amendment that would have allowed the legislature to ban abortion. High turnout took place on 100-degree day, and sent a message that even conservative states are not on board with US Supreme Court reversal of *Roe v. Wade*.” . . .
27. July 30, 2022, 6:06 p.m. – “Despite the support of [John] Baer, Gov. Tom Wolf, and many others, the legislature still has not raised the minimum wage above the current \$7.25 level. When P[A] raised the minimum wage to \$7.15 (10 cents less than the federal level which ultimately followed), under my leadership in 2006, I immediately advocated that it should soon go up to \$8.00. Even after 16 years, and a \$15.00 an hour minimum wage in NJ, NY, California and other states, the minimum wage in P[A] and the USA has remained stagnant.^[1] . . .
45. July 28, 2022, 6:44 p.m. – “A very good point!” The posting includes a reposting of a photograph of a cartoon with Lisa Simpson

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making a speech, with a projection screen behind her. The screen bears the following text: “Trickle-down economics has never gotten Billionaires to spread the wealth. That’s what unions are for.” . . .

46. August 30, 2022, 1:14 p.m. – “Still another take on the student loan debt repayment plan.” The posting includes a reposting of a cartoon of a man at a trolley track switch and five people tied to the tracks on one of the track branches where the[] trolley is headed. Behind the trolley are the bodies of a number of people who the trolley had already run over. The man at the train track switch states[,] “But if I divert the trolley now[,] that would be unfair to all the people it’s already killed.” . . .
51. August 25, 2022, 1:34 p.m. – “I agree with this!” The posting also includes a reposting of a photograph with the following text on it: “I worked hard to pay off my student loans, others should have too! I swam across that river, how dare they build a bridge!” . . .
55. November 6, 2021, 3:11 p.m. – “One year ago, our country voted for massive change. We are starting to get it, but more can be done.” . . .

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

In re Cohen, No. 1 J.D. 2023, 5/3/24, at 10-32, *quoting* JCB Ex. 8.⁵

Over Judge Cohen’s objection, the JCB also called Dr. Allison Merrill, a professor specializing in American politics and political communication, who opined Judge Cohen’s Facebook posts constituted partisan political activity. She explained an “overwhelming number” of the posts showed Judge Cohen’s support for “policies or political figures associated with the ideological left or the Democratic Party[,]” while other posts criticized policies of traditionally conservative states. N.T. Trial, 7/24/23, at 130.

Judge Cohen presented several character witnesses by stipulation. He then testified on his own behalf and

5. Comments in response to Judge Cohen’s posts also raised concerns. For instance, one of Judge Cohen’s posts led commenters to accuse a Pennsylvania attorney of “professional misconduct and criminal conduct.” *In re Cohen*, No. 1 J.D. 2023, 5/3/24, at 20-21, *quoting* JCB Ex. 8, ¶31. Although Judge Cohen eventually attempted to extricate himself from the conversation, *see id.* at 21 (“as a judge, I am limited in the degree to which I can comment on political actors, attorneys, or judges in court proceedings”), *quoting* JCB Ex. 8, ¶31, he did not delete his post or the inflammatory comments. Judge Cohen later claimed he did not need to delete the post because the attorney was “capable of defending himself.” N.T. Trial, 7/24/23, at 301.

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denied posting anything partisan. He acknowledged an original purpose of his Facebook page, as state representative, was “pushing the Democratic Party[,]” but claimed he was now just “trying to engage people in discussion” on topics of public importance. *Id.* at 244-45, 249.⁶ In his view, he was not “engaging in any political activity”; he was merely commenting on “issues which were being discussed widely in the media at the time.” *Id.* at 256. He said getting responses to his posts “made [him] feel good” and ameliorated the isolation he had felt since leaving the legislature. *Id.* at 250, 291. He also downplayed the impact of his posts, suggesting his Facebook page did not have “any significance other than a communication to a small group of people, only a fraction of whom pay any attention to any posts.” *Id.* at 307.

On May 3, 2024, the CJD issued an opinion concluding Judge Cohen violated Article V, § 17(b) of the Pennsylvania Constitution and all seven charged provisions of the Code. Specifically, the CJD determined Judge Cohen “infused his Facebook page and postings with the prestige of his office” by identifying himself on Facebook as a judge and then used his page to express his political views. *In re Cohen*, No. 1 J.D. 2023, 5/3/24, at 42. In doing so, Judge Cohen advanced the interests of the Democratic Party, the partisan political figures he touted (like President

6. Judge Cohen “never deleted any posts [he] made as a legislator.” N.T. Trial, 7/24/23, at 302. However, since the JCB did not charge Judge Cohen for misconduct based on any of his pre-2018 Facebook posts, we do not opine on whether persons elected to the bench have a duty to scrub their pre-existing social media accounts.

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Biden and Governor Shapiro), and the liberal causes promoted in his posts, in violation of Canon 4, Rule 4.1(A)(11) (prohibiting judges from “engag[ing] 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”). The CJD deemed irrelevant Judge Cohen’s subjective perception of the posts or belief in his own impartiality. As the CJD explained, the Code seeks to avoid not just partiality, but also the appearance of partiality or impropriety. The CJD concluded Judge Cohen’s posts had created an appearance of partiality and “call[ed] into question the independence of the judiciary[,]” *In re Cohen*, No. 1 J.D. 2023, 5/3/24, at 45, in violation of Canon 1, Rule 1.2 (“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.”), and Canon 3, Rule 3.1(C) (precluding judges from participating in extrajudicial “activities that would reasonably appear to undermine the judge’s independence, integrity, or impartiality”).

The CJD also concluded Judge Cohen detracted from the dignity of his office by touting his own partisan political activity as a state legislator, *see id.* at 16 (“I spearheaded Pennsylvania’s pioneering 2015 law against the Boycott, Divestment and Sanctions movement seeking [to] deprive Israel of foreign trade on a state-by-state basis”), *quoting* JCB Ex. 8, ¶21; *id.* at 19 (“under my leadership in 2006, I immediately advocated that [the minimum wage] should soon go up to \$8.00”), *quoting* JCB Ex. 8, ¶27, in violation

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of Canon 3, Rule 3.7(A) (“Judges may write, lecture, teach, and speak on non-legal subjects . . . if such avocational activities do not detract from the dignity of their office or interfere with the performance of their judicial duties.”).

The CJD rejected any argument Judge Cohen received no benefit from his posts. As the CJD noted, Judge Cohen “admitted relishing being a commentator on Facebook and presenting his views to his Facebook friends and followers to generate discussion[.]” *Id.* at 51. Therefore, the CJD concluded Judge Cohen “abuse[d] the prestige of his office to advance his own personal and political interests and the personal and political interests of others[.]” *id.* at 44, violating Canon 1, Rule 1.3 (“A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.”).

Judge Cohen’s post regarding then-United States Representative Liz Cheney drew particular censure from the CJD. Since Cheney was running for re-election at the time Judge Cohen “posted his criticism of her detractors[.]” *id.* at 58, the CJD concluded Judge Cohen effectively endorsed Cheney, in violation of Canon 4, Rule 4.1(A)(3) (prohibiting judges from “publicly endors[ing] or publicly oppos[ing] a candidate for any public office”). The CJD was not persuaded by Judge Cohen’s efforts in the comments section of his Facebook post to avoid an endorsement. In the CJD’s view, Judge Cohen “attempted to have it both ways by endorsing her and disclaiming the endorsement at the same time[.]” but “the point remain[ed]

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the same—he ‘express[ed] support or approval of’ then-Representative Cheney, who was then a candidate.” *Id.* at 58-59, *quoting* Canon 4, Rule 4.1(A)(3).⁷

The CJD rejected Judge Cohen’s argument that the Code precluded him from commenting only on issues he might encounter in Family Court. As the CJD explained, Judge Cohen sat on a court of general jurisdiction and could easily be assigned to another division of the Court of Common Pleas. “More importantly,” the CJD elaborated, as a jurist, he was a “representative of all judges in Pennsylvania” and therefore had a duty to avoid creating a perception of partiality, regardless of his present assignment. *Id.* at 47.⁸

7. The final two charges against Judge Cohen were “automatic, derivative violations of the previously discussed violations of the Code[.]” *In re Cohen*, No. 1 J.D. 2023, 5/3/24, at 62, *citing* Pa. Const. art. V, § 17(b) (“judges shall not . . . violate any canon of legal or judicial ethics prescribed by the Supreme Court”), and Canon 1, Rule 1.1 (“A judge shall comply with the law, including the Code of Judicial Conduct.”).

8. Judge Cohen also cited a comment to a rule permitting candidates for judicial office to express political views. *See* Canon 4, Rule 4.1, cmt. 9 (“The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine whether the candidate for judicial office has specifically undertaken to reach a particular result. Pledges, promises, or commitments must be contrasted with statements or announcements of personal views on legal, political, or other issues, which are not prohibited. When making such statements, a judge should acknowledge the overarching judicial obligation to apply and uphold the law, without regard to his or her personal

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The CJD also addressed Judge Cohen’s First Amendment defense. The CJD first acknowledged judges are free to have social media accounts, make speeches, and write articles. Indeed, the CJD acknowledged “[s]ocial media can be positive for a judge to use professionally” and is almost a necessity given that “about half of Pennsylvania’s judiciary has contested elections every six years[.]” *Id.* at 63-64. In the CJD’s view, it is the “content and context of the action which determines whether” a judge’s social media use becomes an ethical violation. *Id.* at 63.

Before reaching that question, however, the CJD had to decide what standard governed Judge Cohen’s First Amendment claim. The CJD noted content-based restrictions on speech are typically evaluated under a strict scrutiny test, requiring proof the restriction: (1) addresses a compelling state interest; and (2) is narrowly tailored to effectuate that interest. However, in the context of public employees, courts apply a more deferential balancing test—*i.e.*, the *Pickering*⁹ test. Under this balancing test, “[i]f the speech involves a matter of public concern and was not part of the individual’s official duties, then the

views.”). However, as the CJD pointed out, Judge Cohen was “not a candidate when he made the Facebook posts in question.” *In re Cohen*, No. 1 J.D. 2023, 5/3/24, at 57. Moreover, in the CJD’s view, “Judge Cohen’s conduct of being a ‘cheerleader’ for partisan political figures who occupy offices in the legislative and executive branches of government would be prohibited by the Code, even if he was a candidate.” *Id.* (emphasis omitted).

9. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

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deciding court weighs the interests of the employee, as a citizen, in commenting upon matters of public concern, and the state, as the employer, in promoting the efficiency of the public services it performs through its employees.” *Id.* at 76. The CJD acknowledged Pennsylvania courts have never directly addressed which standard applies to judicial speech, and other courts reviewing the issue have taken a “somewhat uneven approach.” *Id.* at 66. After reviewing some of the case law, the CJD concluded it previously “applie[d] a lesser standard of scrutiny in line with *Pickering* and *Gentile [v. State Bar of Nevada]*, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991)] without ever having expressly been presented with the issue.” *Id.* at 74. Specifically, in *In re Eakin*, 150 A.3d 1042 (Pa. CJD 2016), the CJD held former Pennsylvania Supreme Court Justice J. Michael Eakin violated the Code by sending emails that, “for the average citizen, would likely constitute First Amendment protected communications.” *In re Cohen*, No. 1 J.D. 2023, 5/3/24, at 74. But since Justice Eakin was not commenting on matters of public concern or acting within his official duties, the CJD concluded *Pickering* gave “the government, as employer, . . . a right to sanction [him] for the content of the emails regardless of the First Amendment.” *Id.*

Using *In re Eakin* as a guide, the CJD ultimately chose to apply a balancing test in Judge Cohen’s case. The CJD first noted his posts “commented on matters of public concern and . . . generally did not directly involve his official duties[.]” *Id.* at 76. The CJD then concluded Judge Cohen’s interest in freely speaking on Facebook did not outweigh the Commonwealth’s interests under these

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circumstances. Because “[h]is Facebook posts reflect a large degree of sympathy, support, and ideological affinity with members of the left[,]” the CJD believed “a member of the public might reasonably conclude that Judge Cohen would be swayed in his judicial conduct by his political views.” *Id.* at 77. Nevertheless, the CJD concluded that, even under a strict scrutiny standard, the charges against Judge Cohen would survive because the Code is narrowly tailored to prevent the perception of judicial partiality, “while, at the same time, allowing a judge the meaningful opportunity to participate in the election process to advance their own electoral prospects . . . or to take limited political action to advance the law, the legal system, or the administration of justice.” *Id.* at 75-76.¹⁰

10. The CJD also rejected Judge Cohen’s claim he had no warning his Facebook posts violated the Code. Although the Code does not specifically mention Facebook, the CJD reasoned Judge Cohen was “certainly on notice that he could not engage in impermissible political activity . . . on behalf of candidates or political organizations[,]” and “could not lend the prestige of his office to further his own personal interests or those of others[.]” *In re Cohen*, No. 1 J.D. 2023, 5/3/24, at 81. “The fact that his problematic speech took place online versus in person or the media is not relevant[,]” in the CJD’s view. *Id.* Indeed, the CJD pointed out it had “resolved several internet or electronic-speech cases” before Judge Cohen was charged, “which constructively put the entirety of the Commonwealth’s judges on notice that their speech in those domains could result in violations of the Code.” *Id.*

In his brief before this Court, Judge Cohen passingly argues “there was a violation of due process under the Fourteenth Amendment of the United States Constitution since the Code of Conduct did not give adequate notice” his conduct was prohibited. Appellant’s Brief at 49. However, we conclude this claim is “waived due to appellant’s failure to adequately develop it with argument,

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On September 25, 2024, Judge Cohen appeared before the CJD for a sanctions hearing. At the hearing, two attorneys testified to Judge Cohen’s reputation for fairness, and said he never expressed political views from the bench. The JCB also introduced new Facebook posts Judge Cohen had made since his trial, including some commenting on his disciplinary case. For instance, on September 2, 2024, Judge Cohen posted:

P[A] Court of Judicial Discipline to weigh censuring me for “political[,]” “Democratic” or “left wing” Facebook posts—on September 25th 9:30 a.m. . . . More letters in support of me needed ASAP. See below for information.

N.T. Sanctions Hearing, 9/25/24, at 18. When someone on Facebook asked who was behind the complaint, Judge Cohen responded: “Conservative people who want judges to be scared of their own shadow and completely silent on issues of societal improvements and social justice.” *Id.* The CJD later noted “no other case in [its] history . . . involved such defiance post decision.” Sanctions Order, 10/7/24, at 3.

On October 7, 2024, the CJD issued an order immediately suspending Judge Cohen without pay for the remainder of his term of service, ending on December 31, 2024 (the date of his mandatory retirement under 42 Pa.C.S. § 3351 (“Judges and magisterial district judges shall be retired upon attaining the age of 75 years.”)).

applicable authority, and pertinent analysis.” *Commonwealth v. Armolt*, 294 A.3d 364, 380 (Pa. 2023) (internal quotation marks and citation omitted).

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Judge Cohen appealed directly to this Court. *See In re Lokuta*, 11 A.3d 427, 434 (Pa. 2011) (“A judicial officer has the right to appeal a final adverse order of the Court of Judicial Discipline to this Court.”), *citing* PA. CONST. art. V, § 18(c)(2). On June 17, 2025, we denied Judge Cohen’s request for oral argument and submitted this matter on the briefs. *See* 210 Pa. Code § 101.6 (on direct appeal from the CJD, the “[r]eviewing [c]ourt may hear oral argument”).

II. Discussion

“This Court’s review of a decision by the CJD is governed by our Constitution[.]” *In re Merlo*, 58 A.3d 1, 8 (Pa. 2012). We “review the record of the proceedings of the [CJD] as follows: on the law, the scope of review is plenary; on the facts, the scope of review is clearly erroneous; and, as to sanctions, the scope of review is whether the sanctions imposed were lawful.” PA. CONST. art. V, § 18(c)(2). We “may revise or reject an order of the [CJD] upon a determination that the order did not sustain this standard of review; otherwise, [we] shall affirm the order the [CJD].” *Id.*

A. Arguments

Judge Cohen claims the CJD erred in finding his Facebook posts violated the Code and the Pennsylvania Constitution.¹¹ He argues his Facebook posts were

11. Judge Cohen also claims the CJD violated Pa.R.E. 702 (“A witness who is qualified as an expert by knowledge, skill,

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experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson; (b) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and (c) the expert’s methodology is generally accepted in the relevant field.”), by allowing Dr. Merrill to testify as an expert witness. He argues Dr. Merrill’s testimony was unnecessary because the CJD was qualified to determine whether the Facebook posts constituted partisan political speech. In response, the JCB argues Judge Cohen waived this claim. According to the JCB, he “stipulated to Dr. Merrill’s qualifications and all but one sentence of her report[,]” which was redacted. Appellee’s Brief at 72. In any event, the JCB claims it was appropriate for the CJD to permit Dr. Merrill’s testimony. *See id.* at 73-74 (“proving the subtleties of some of the messaging involved in Judge Cohen’s Facebook posts, such as their physical appearance, as well as their potential effect, in the [JCB]’s view, called for expert testimony in this case”) (emphasis omitted).

We disagree with the JCB’s waiver argument. Although Judge Cohen did stipulate in part to Dr. Merrill’s qualifications and report, *see* N.T. Trial, 7/24/23, at 96-97, 104-10, he did so only after the CJD overruled his objection that Dr. Merrill’s testimony was unnecessary, *see* Order Denying Mot. to Bar Testimony, 7/1/23, at 1 (unpaginated) (“Counsel for Judge Cohen argues . . . that [Dr. Merrill’s] testimony is unnecessary since the [c]ourt can decide whether Judge Cohen’s Facebook postings are political or not without any expert testimony.”). Therefore, Judge Cohen preserved his claim below. Nevertheless, we hold the claim is waived on appeal for lack of development. In his single-page argument, Judge Cohen fails to cite a single case supporting his position or offer any meaningful analysis. His bald assertion that the CJD was “perfectly in a position to decide whether this was political speech” is, by itself, inadequate to warrant review. Appellant’s Brief at 85; *see Armolt*, 294 A.3d at 379 (“This type of mere issue spotting without sufficient analysis or legal support

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protected speech under the First Amendment to the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution.¹²

Of course, that argument raises the question of what standard applies. Judge Cohen claims the CJD should have applied strict scrutiny because the restrictions on his Facebook posts are content based. However, he acknowledges this is a “novel legal issue unsettled” in this context under both Pennsylvania and federal law. Appellant’s Brief at 61. Accordingly, he cites two related cases as analogies: *White, supra*, and *Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania*, 944 F.2d 137 (3d Cir. 1991). We will discuss these cases further below. For now, we note the courts in

precludes appellate review.”). Accordingly, we will not address the merits of this waived claim.

12. Judge Cohen does not argue Article I, Section 7 provides additional protections beyond what the First Amendment guarantees in this particular context. On the contrary, he treats the two constitutions as coterminous, and he recognizes other courts have done the same. *See* Appellant’s Brief at 59 (noting the case law does “not suggest the broader protections of Article I, Section 7 of the Pennsylvania Constitution ha[ve] been expanded . . . [to] the issue of extra judicial speech of a sitting judge”). Consequently, we limit our analysis to the First Amendment. *See Commonwealth v. Bishop*, 217 A.3d 833, 841 (Pa. 2019) (this Court “treats parallel federal and state constitutional provisions as coterminous where the appellant has done nothing to distinguish between them”); *see id.* at 840 (“to raise claims for departure from federal constitutional jurisprudence on independent state grounds . . . some analysis explaining the grounds for departure is required”).

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both cases applied strict scrutiny to provisions precluding candidates for judicial office from announcing their views on “disputed legal or political issues” (*i.e.*, the “announce clause”). *White*, 536 U.S. at 768, 122 S.Ct. 2528 (citation omitted); *Stretton*, 944 F.2d at 141. In Judge Cohen’s view, both his case and *White* “involve the attempted suppression of personal opinion by a judge that does not reflect on pending cases or undermine the integrity of the Court.” Appellant’s Brief at 63. As such, he argues strict scrutiny should apply here. *See id.* at 67 (“strict scrutiny is warranted for extra judicial speech of a sitting judge, as well as for a judicial candidate”).

Regardless, Judge Cohen claims under either standard, the charges against him should be overturned. He acknowledges the JCB has an interest in maintaining judicial impartiality and integrity but claims his Facebook posts did not call either into question. On his telling, he posted only on issues of public importance and never endorsed candidates or commented on pending cases. Unlike the emails at issue in *In re Eakin, supra*, Judge Cohen asserts his Facebook posts “were discussions on serious issues[,]” with nothing “insensitive” or “inappropriate.” *Id.* at 53.¹³ He claims there would be “little,

13. Judge Cohen compares his Facebook posts to a book written by United States Circuit Court Judge Amul Thapar on Supreme Court Justice Clarence Thomas and originalism. He claims Judge Thapar participated in interviews on Fox News regarding his book and received book endorsements from “conservative and political people.” Appellant’s Brief at 74. The JCB responds that Judge Cohen waived this argument by raising it for the first time on appeal. The JCB also claims the book is a

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if nothing, left to the First Amendment right of a sitting judge if he or she could not speak out” on issues of public importance. *Id.* at 61. Indeed, in his view, the comments to the Code encourage judges to express their personal opinions and participate in extrajudicial activities. *See* Pa. Code of Judicial Conduct, Canon 3, Rule 3.1, cmt. 1 (“To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities.”).

In response, the JCB claims the evidence was sufficient to prove Judge Cohen violated the Code and the Constitution. After walking through each charge and explaining why it believes Judge Cohen’s Facebook posts were improper, the JCB disputes Judge Cohen’s claim that the Code improperly interferes with his constitutional right to free speech. The JCB first argues the applicable standard ultimately makes no difference here, because the CJD applied both strict scrutiny and the balancing

poor comparison. As the JCB sees it, “the writing of such a treatise clearly falls within a judge’s larger grant of authority to write and teach about legal subjects,” and “share their legal expertise with the public[.]” Appellee’s Brief at 51, *citing* Pa. Code of Judicial Conduct, Canon 3, Rule 3.1, cmt. 1 (“Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects.”), whereas Judge Cohen commented on “partisan political subjects and actors” to receive “his Facebook friends and followers[.] . . . adulation[.]” *Id.* To the extent the comparison is even remotely apt, we reject it outright based on the simple fact that Judge Thapar, as a jurist on the Sixth Circuit, is not subject to this Commonwealth’s Code of Judicial Conduct.

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test and concluded the charged Code provisions survived under both standards as applied to Judge Cohen’s conduct. To illustrate this point, the JCB compares this case to *In re Raab*, 100 N.Y.2d 305, 763 N.Y.S.2d 213, 793 N.E.2d 1287 (2003), where the New York Court of Appeals—New York’s court of last resort—upheld restrictions on judicial speech even under a strict scrutiny analysis. Unlike the broad “announce clause” at issue in *White*, New York’s “rules distinguish between conduct integral to a judicial candidate’s own campaign and activity in support of other candidates or party objectives.” *Raab*, 763 N.Y.S.2d 213, 793 N.E.2d at 1292. By way of example, judicial candidates can make speeches in support of their own campaigns but cannot endorse other candidates or make speeches on behalf of a political party. *See id.* Therefore, the *Raab* Court concluded New York’s rules were narrowly tailored to protect judicial candidates’ First Amendment rights and protect the integrity of the judiciary. Applying that logic here, the JCB believes Judge Cohen’s claim should be rejected even if we do adopt a strict scrutiny test. *See* Appellee’s Brief at 70 (Pennsylvania’s “Code does not work a ‘complete’ ban on political speech by judges. Under the Code, judges retain significant ability to engage in extrajudicial expressive conduct and in political conduct to further their own political prospects as well as to advance the law and the legal system[.]”).

Still, the JCB urges us to adopt a balancing test. Although “judges are not ‘employees’ of the government” in the strictest sense, the JCB believes “their position is analogous to a higher-level government employee who works with the public and whose fitness to serve in that

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position is measured by the sensitivity and accountability of their specific position in government.” *Id.* at 66. The JCB reasons judges, like government employees, “voluntarily assume the restrictions on their speech in the Code in exchange for the benefits of office[.]” *Id.* (emphasis omitted). Moreover, the JCB reiterates the CJD has previously applied a “lesser standard of scrutiny similar to *Pickering*” and argues this Court’s adoption of this test would recognize the government’s legitimate interest in ensuring the impartiality and integrity of the judiciary. *Id.* at 61-62, *citing In re Eakin, supra*. The JCB also claims “the right to trial in a fair, open, and impartial court is of the same constitutional magnitude as [Judge Cohen’s] right to free expression under both the federal and state constitutions.” *Id.* at 68.

Applying *Pickering*, the JCB argues “the First Amendment does not shield Judge Cohen’s posts from sanction because the posts reflect a large degree of sympathy, support, and ideological affinity with members of the Democratic Party” and “tout his own past partisan political conduct.” *Id.* at 69. Echoing the CJD’s opinion, the JCB argues a “member of the public would reasonably conclude that Judge Cohen’s independence, integrity, and impartiality could be swayed in his judicial conduct, which undermines the enterprise of the judiciary”—a problem that outweighs Judge Cohen’s interest in political speech. *Id.* at 69-70.

B. Analysis

Unquestionably, judges do not give up all First

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Amendment rights upon assuming the bench. *See Matter of Williams*, 248 W.Va. 106, 887 S.E.2d 231, 247 (2023) (“Judges do not lose all First Amendment protections when taking the robe.”); *In re Kendall*, 712 F.3d 814, 824 (3d Cir. 2013) (“federal and state courts have repeatedly held that a ‘judge does not check his First Amendment rights at the courthouse door, to be reclaimed at the expiration of his judicial tenure’”), *quoting In re Judicial Misconduct*, 632 F.3d 1289, 1289 (9th Cir. Jud. Council. 2011). However, judges do accept certain restrictions on their right to speak. “No one is compelled to serve as a judge, but once an individual offers himself or herself for service, that individual accepts the calling with full knowledge of certain limitations upon speech and actions in order to serve the greater good.” *Miss. Comm’n on Judicial Performance v. Osborne*, 11 So.3d 107, 114 (Miss. 2009); *see also Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006) (“When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.”).

In this appeal, we are tasked with deciding what standard applies when reviewing constitutional challenges to governmental restrictions imposed on a sitting judge’s speech.¹⁴ Judge Cohen asks us to apply strict scrutiny; the

14. The Pennsylvania Constitution explicitly vests this Court with “the supreme judicial power of the Commonwealth[.]” PA. CONST. art. V, § 2(a). Additionally, the state charter grants this Court exclusive “supervisory and administrative authority over all the courts” and judicial officers within the Commonwealth, *id.* at § 10(a), and “the power to prescribe general rules governing practice, procedure and the conduct of all courts,” including “the

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JCB advocates for a balancing test. We begin by more closely examining each proposed standard.

“To determine whether a law that regulates speech violates the First Amendment, [courts] consider both the nature of the burden imposed by the law and the nature of the speech at issue.” *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 470-71, 145 S.Ct. 2291, 222 L.Ed.2d 643 (2025). “Restrictions on speech based on its content are ‘presumptively invalid’ and subject to strict scrutiny.” *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 358, 129 S.Ct. 1093, 172 L.Ed.2d 770 (2009) (citation omitted). Generally, a restriction is content based if it “applies to particular speech because of the topic discussed or the idea or message expressed.” *TikTok Inc. v. Garland*, 604 U.S. 56, 70, 145 S.Ct. 57, 220 L.Ed.2d 319 (2025), quoting *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015). Speech restrictions based on the identity of the speaker often fall within this category. *See id.* at 72, 145 S.Ct. 57 (“speech restrictions

administration of all courts and supervision of all officers of the Judicial Branch,” *id.* at § 10(c). One way in which this Court has exercised this supervisory power is through the “adoption of the Code of Judicial Conduct and the Rules Governing Standards of Conduct of Magisterial District Judges[.]” *In re Bruno*, 101 A.3d 635, 684 n.27 (Pa. 2014), which serve as the exclusive means of regulating the conduct of judicial officers within the Commonwealth. Because this Court alone is “reposed [with] the supreme judicial power of the Commonwealth,” PA. CONST. art. V, § 2(a), including promulgation of the Code provisions challenged in this appeal, any references throughout this opinion to the “State,” the “Commonwealth,” or the “government,” should be understood in this context.

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based on the identity of the speaker are all too often simply a means to control content”) (brackets omitted), *quoting Citizens United v. FEC*, 558 U.S. 310, 340, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). However, “[strict] scrutiny is unwarranted when the differential treatment is justified by some special characteristic of the particular speaker being regulated[.]” *Id.* at 72-73, 145 S.Ct. 57, *quoting Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 660-61, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (cleaned up).

Pickering offers one example. In that case, a teacher sued the Board of Education for firing him based on a letter he sent to a newspaper criticizing the Board’s past proposals to raise revenue. On appeal, the United States Supreme Court acknowledged public employees retain their First Amendment right to speak on matters of public concern. Yet, the Court also acknowledged “the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.” *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731. Accordingly, courts must seek “a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Id.* The High Court implied this balance may change depending on the nature of the job, with “the need for confidentiality [being] so great” in certain positions that “even completely correct public statements might furnish a permissible

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ground for dismissal.” *Id.* at 570 n.3, 88 S.Ct. 1731.¹⁵

Courts have since interpreted *Pickering* as creating a two-prong balancing test.¹⁶ First, a reviewing court must decide whether the employee’s speech addressed “a matter of public concern.” *Rankin v. McPherson*, 483 U.S. 378, 384, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) (citation omitted). If the answer is no, then the State “enjoy[s] wide latitude in managing [its] offices, without intrusive oversight by the judiciary in the name of the First Amendment.” *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *see id.* at 147, 103 S.Ct. 1684 (“when a public employee speaks not as a

15. Ultimately, the *Pickering* Court ruled against the State on the facts, concluding “[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.” 391 U.S. at 572, 88 S.Ct. 1731; *see id.* at 574, 88 S.Ct. 1731 (“we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment”) (footnote omitted).

16. The *Pickering* test assumes the employee is speaking outside of his or her official duties. “[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” *Garcetti*, 547 U.S. at 421, 126 S.Ct. 1951. Since posting on a personal social media account clearly falls outside a judge’s official duties, *Garcetti* does not apply here, and the parties do not argue otherwise.

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citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, [courts are] not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior"). But, if the answer is yes, meaning the employee's speech does address a matter of public concern, then courts must "balance [the employee's] interest in making [the] statement against 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Rankin*, 483 U.S. at 388, 107 S.Ct. 2891, quoting *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731.

For instance, in *U.S. Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973), the United States Supreme Court applied the balancing test to a provision of the Hatch Act that prohibited "federal employees [from] taking 'an active part in political management or in political campaigns[.]'" *Id.* at 550, 93 S.Ct. 2880, quoting 5 U.S.C. § 7324(a)(2). Although the Court acknowledged Congress was "free to strike a different balance than it ha[d]," the Court "th[ought] the balance it ha[d] so far struck [wa]s sustainable by the obviously important interests sought to be served by the limitations on partisan political activities[.]" *Id.* at 564, 93 S.Ct. 2880. The High Court reasoned "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent."

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Id. at 565, 93 S.Ct. 2880.

A decade later, in *Connick*, the High Court applied the balancing test to an assistant district attorney who had circulated a questionnaire inquiring if her coworkers “ever feel pressured to work in political campaigns on behalf of office supported candidates.” 461 U.S. at 149, 103 S.Ct. 1684. Since the “questionnaire touched upon matters of public concern in only a most limited sense[,]” the Court concluded the balance weighed in favor of the government. *Id.* at 154, 103 S.Ct. 1684; *see id.* (“it would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment’s safeguarding of a public employee’s right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance that we see presented here”).

Judges, however, are not “employees” of the government in the traditional sense. In Pennsylvania and many other states, judges are constitutionally elected officials. *See* PA. CONST. art. V, § 13. Judicial candidates, like candidates for other elected offices, must be afforded the right to communicate their qualifications and views to voters while on the campaign trail to differentiate themselves from their opposing candidates.

Some courts have held this makes an elected judge more like a politician than a government employee. *See Jenevein v. Willing*, 493 F.3d 551, 557-58 (5th Cir. 2007) (declining to “draw directly upon the *Pickering-Garcetti* line of cases” when reviewing restrictions on a sitting

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judge’s speech to his constituency; “as an elected holder of state office, his relationship with his employer differs from that of an ordinary state employee”). Echoing this argument, Judge Cohen urges us to disregard *Pickering* and instead extend the High Court’s decision in *White*. In *White*, the Court addressed a provision of Minnesota’s “announce clause,” which precluded candidates for judicial office from announcing their views on “disputed legal or political issues.” *White*, 536 U.S. at 768, 122 S.Ct. 2528 (citation omitted). Since “the announce clause both prohibit[ed] speech on the basis of its content and burden[ed] a category of speech that is ‘at the core of our First Amendment freedoms’—speech about the qualifications of candidates for public office”—the Supreme Court applied strict scrutiny. *Id.* at 774, 122 S.Ct. 2528.¹⁷ “Under the strict-scrutiny test, respondents have the burden to prove [the speech restriction] is (1) narrowly tailored, to serve (2) a compelling state interest.” *Id.* at 774-75, 122 S.Ct. 2528. A restriction is narrowly tailored only if “it does not unnecessarily circumscribe protected expression.” *Id.* at 775, 122 S.Ct. 2528 (cleaned up).

The announce clause failed that test. Specifically,

17. The parties in *White* did not dispute that strict scrutiny applied, so the High Court discussed its choice to apply that standard only summarily. *See id.* at 774, 122 S.Ct. 2528. The Court formally adopted the strict scrutiny test twelve years later, in *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444, 135 S.Ct. 1656, 191 L.Ed.2d 570 (2015) (“[W]e hold today what we assumed in *White*: A State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest.”).

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the High Court held the announce clause was not narrowly tailored to serve Minnesota’s interest in judicial impartiality. The Court concluded any interest the State had in ensuring judicial candidates have no preconceptions about the law was not a compelling one. *See id.* at 778, 122 S.Ct. 2528 (“Proof that a Justice’s mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.”), quoting *Laird v. Tatum*, 409 U.S. 824, 835, 93 S.Ct. 7, 34 L.Ed.2d 50 (1972). The Court also noted the announce clause was, in practice, illogical. For example, it permitted judges to freely express an opinion on the constitutionality of same-sex marriage before declaring their candidacy and after their election. It was only during the campaign—the time their views are most relevant—that the announce clause restricted their speech. *See id.* at 779, 122 S.Ct. 2528.¹⁸

The problem for Judge Cohen, however, is that he was not a candidate for any office at the time he made his Facebook posts. *White* did not address speech restrictions

18. A decade earlier, the Third Circuit applied strict scrutiny to a materially identical announce clause. *See Stretton*, 944 F.2d at 138, 141 (applying strict scrutiny to a provision of Pennsylvania’s Code prohibiting “candidates for a judicial office in an election” from “announc[ing] their views on disputed legal or political issues”). *Stretton*, however, reached a different result than *White*, holding Pennsylvania had a compelling interest in the integrity of its judiciary and the challenged provision of the Code was narrowly tailored to serve that interest. *See Stretton*, 944 F.2d at 142-44. As the CJD observed below, “[t]he precedential or persuasive value of *Stretton* post-*White* is doubtful.” *In re Cohen*, No. 1 J.D. 2023, 5/3/24, at 67.

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on sitting judges; it spoke only to the special context of elections:

This case does not present the question whether a State may restrict the speech of judges because they are judges—for example, as part of a code of judicial conduct; the law at issue here regulates judges only when and because they are candidates. Whether the rationale of *Pickering* . . . could be extended to allow a general speech restriction on sitting judges—regardless of whether they are campaigning—in order to promote the efficient administration of justice, is not an issue raised here.

White, 536 U.S. at 796, 122 S.Ct. 2528 (Kennedy, J., concurring). The *White* Court explained “[d]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms,” making “it all the more imperative that [candidates] be allowed freely to express themselves on matters of current public importance.”¹⁹ *Id.* at 781-82, 122 S.Ct. 2528 (cleaned up and

19. Pennsylvania’s Code of Judicial Conduct reflects this principle by carving out added freedoms for judicial candidates. *See* Pa. Code of Judicial Conduct, Canon 4, Rule 4.2(B) (“A candidate for elective judicial office may, unless prohibited by law, and not earlier than immediately after the General Election in the year prior to the calendar year in which a person may become a candidate for such office: . . . (3) publicly endorse or speak on behalf of, or publicly oppose or speak in opposition to, candidates for the same judicial office for which he or she is a judicial candidate, or publicly endorse or speak on behalf of candidates for any other elective judicial office appearing on the same ballot; (4) attend

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citations omitted); *see also Eu v. S. F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) (“the First Amendment ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office”), *quoting Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971). Restricting a **candidate’s** speech would amount to the government “select[ing] which issues are worth discussing or debating in the course of a political campaign.” *White*, 536 U.S. at 782, 122 S.Ct. 2528, *quoting Brown v. Hartlage*, 456 U.S. 45, 60, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982); *see also Williams-Yulee*, 575 U.S. at 444, 135 S.Ct. 1656 (“A State may restrict the speech of a judicial **candidate** only if the restriction is narrowly tailored to serve a compelling interest.”) (emphasis added). For that reason, the High Court has “never allowed the government to prohibit candidates from communicating relevant information to voters during an election.” *White*, 536 U.S. at 782, 122 S.Ct. 2528. But we would be extending *White* beyond its tenets by applying it to restrictions on speech by a sitting judge made outside the context of a campaign.

or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office; (5) seek, accept, or use endorsements from any person or organization; (6) contribute to a political organization or candidate for public office; (7) identify himself or herself as a member or candidate of a political organization; and (8) use court facilities for the purpose of taking photographs, videos, or other visuals for campaign purposes to the extent such facilities are available on an equal basis to other candidates for such office.”).

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Indeed, courts applying strict scrutiny to judicial speech have overwhelmingly done so in the context of judicial elections. *See Wolfson v. Concannon*, 811 F.3d 1176, 1181 (9th Cir. 2016) (applying strict scrutiny to “Arizona’s Personal Solicitation Clause,” which prohibited Wolfson, “**while running for judicial office**, from personally soliciting funds for his own campaign”) (emphasis added); *Carey v. Wolnitzek*, 614 F.3d 189, 193 (6th Cir. 2010) (“When the government suppresses **election speech** based on its content . . . the most rigorous form of constitutional second-guessing applies, and no categorical exemption from the First Amendment spares the government from this burden. In modern America, judicial elections are no less relevant to the public policy concerns of the citizenry than legislative elections[.]”) (emphasis added); *Weaver v. Bonner*, 309 F.3d 1312, 1321 (11th Cir. 2002) (“the Supreme Court’s decision in *White* suggests that the standard for **judicial elections** should be the same as the standard for legislative and executive elections”) (emphasis added); *Earls v. N.C. Judicial Standards Comm’n*, 703 F.Supp.3d 701, 725 (M.D.N.C. 2023) (“A state may restrict the speech of a **judicial candidate** only if the restriction ‘further[s] a compelling interest and [is] narrowly tailored to that end.’”) (emphasis added), quoting *S.C. Freedom Caucus v. Jordan*, 677 F.Supp.3d 352, 371 (D.S.C. 2023); *In re Kinsey*, 842 So.2d 77, 85-86 (Fla. 2003) (applying strict scrutiny when reviewing restrictions on a judge’s “**campaign speech**”) (emphasis added).

Admittedly, some courts have gone the other way. As earlier noted, New York has applied strict scrutiny in the context of a sitting judge. *See In re Raab*, 763

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N.Y.S.2d 213, 793 N.E.2d at 1289 (considering rules that “generally prohibit judges and judicial candidates from engaging in certain political activities”). However, *Raab* did not express an opinion on whether strict scrutiny was the appropriate test. Rather, *Raab* simply assumed without deciding that strict scrutiny was the applicable standard. *See id.*, 763 N.Y.S.2d 213, 793 N.E.2d at 1290 (“we assume without deciding that strict scrutiny analysis is appropriate to review petitioner’s First Amendment claim”). Thus, *Raab* does not help us resolve the issue presented here.

The decision in *Matter of Disciplinary Proceeding Against Sanders*, 135 Wash.2d 175, 955 P.2d 369 (1998), offers another exception. There, the Washington Supreme Court acknowledged a judicial candidate’s speech carries more constitutional import than the speech of a sitting judge. *See id.* at 374 (“The distinction between a candidate for judicial office and a sitting judge is that the candidate has an additional attribute of free expression to weigh in the balance—that of the electorate’s right to be informed.”). Nevertheless, the court saw “no reason why the same principles should not apply to speech by a sitting judge, albeit with somewhat less force.” *Id.* at 375. Accordingly, citing the Third Circuit’s decision in *Stretton*, the court required the State to satisfy strict scrutiny. *See id.* Critically, however, *Sanders* did not mention the High Court’s decision in *Pickering*, much less explain why it found *Pickering* distinguishable. This limits *Sanders*’ persuasive value with respect to the issue before us.

We also observe some courts have held the proper

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test lies somewhere between *White* and *Pickering*. West Virginia, for one, adopted an amalgamated approach in *Matter of Hey*, 452 S.E.2d 24 (W. Va. 1994). The *Hey* Court reasoned “[t]he State has compelling interests in maintaining the integrity, independence, and impartiality of the judicial system—and in maintaining the appearance of the same—that justify unusually stringent restrictions on judicial expression, both on and off the bench.” *Id.* at 30; *see id.* (“a ‘state may restrict the speech of elected **judges** in ways that it may not restrict the speech of other elected officials’”) (emphasis in original), *quoting Scott v. Flowers*, 910 F.2d 201, 212 (5th Cir. 1990). Accordingly, *Hey* adopted a balancing test, with a twist. *See id.* (“the public employee-free speech cases provide an appropriate analogy in this case because the clash of interests requires us to engage in a similar balancing process”). “That is: the State may accomplish its legitimate interests and restrain the public expression of its judges through narrowly tailored limitations where those interests outweigh the judges’ free speech interests.” *Id.* at 31.

New Jersey has taken still another approach. *See In re Inquiry of Broadbelt*, 683 A.2d 543 (N.J. 1996) (*per curiam*). The *Broadbelt* Court noted “judges are in a unique position, and ‘must accept restrictions of their personal activities that other citizens might find burdensome and intrusive.’” *Id.* at 549, *quoting In re Blackman*, 591 A.2d 1339, 1341 (N.J. 1991) (*per curiam*). Thus, in New Jersey, “the regulation of a judge’s speech will be upheld if it furthers a substantial governmental interest unrelated to suppression of expression, and is no more restrictive than necessary.” *Id.* at 552. “Avoiding

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material prejudice to an adjudicatory proceeding is one example of a governmental interest sufficient to uphold restrictions on a judge's speech." *Id.* New Jersey borrowed its standard from the High Court's decision in *Gentile, supra*, which addressed restrictions on a lawyer's speech during the pendency of a trial. The *Gentile* Court deemed the "substantial likelihood of material prejudice" standard an appropriate balance between "the State's interest in the regulation of a specialized profession" and lawyers' First Amendment rights. 501 U.S. at 1073-75, 111 S.Ct. 2720; *see id.* at 1071, 111 S.Ct. 2720 ("in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed"); *id.* at 1073, 111 S.Ct. 2720 (even outside the courtroom, the High Court's "decisions dealing with a lawyer's right under the First Amendment to solicit business and advertise, contrary to promulgated rules of ethics, have not suggested that lawyers are protected by the First Amendment to the same extent as those engaged in other businesses").

Ultimately, we are most persuaded by the approach taken in *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010), *cert. denied*, 563 U.S. 983, 131 S.Ct. 2872, 179 L.Ed.2d 1203 (2011), where the Seventh Circuit "attempt[ed] to harmonize the[] two strains of First Amendment law" created by *White* and *Pickering*. *Id.* at 981. Like Judge Cohen, Judge Siefert was elected to the bench after years working in politics, including service as a delegate to the Democratic National Convention. Judge Siefert challenged provisions of Wisconsin's Code of Judicial Conduct barring him from: (1) identifying himself as an active member of the Democratic Party in response to candidate

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questionnaires; and (2) endorsing partisan candidates for executive office.²⁰ The Seventh Circuit applied *White* to the former and *Pickering* to the latter. In making that distinction, the Seventh Circuit drew “a dividing line between . . . speech about the judge’s own campaign” and “a judge’s entry into the political arena on behalf of his partisan comrades.” *Id.* at 984. The Seventh Circuit explained speech by candidates about their qualifications for public office is “at the core of our First Amendment freedoms[.]” *Id.* at 981, *quoting White*, 536 U.S. at 774, 122 S.Ct. 2528; *see also id.* at 982 (“The state does not have a compelling interest in preventing candidates from announcing their views on legal or political issues, let alone prohibiting them from announcing those views by proxy [of party membership].”). An endorsement, by contrast, “is less a judge’s communication about his qualifications and beliefs than an effort to affect a separate political campaign, or even more problematically, assume a role as political powerbroker.” *Id.* at 984; *see id.* at 987 (“[An endorsement] suggests that the political party of the endorsing judge is behind the candidate. In that sense, the judge becomes a spokesperson for the party.”). In the Seventh Circuit’s view, that difference “justifie[d] a more deferential approach to government prohibition of these endorsements.” *Id.* at 984; *see also Bauer v. Shepard*, 620 F.3d 704, 713 (7th Cir. 2010) (explaining that “[w]hen a state requires judges to stand for office, it cannot insist that candidates remain silent about why they rather

20. Judge Siefert also challenged a provision barring him from personally soliciting contributions for his judicial campaign. Since campaign finance regulation is not relevant to the issue presented here, we will not discuss it further.

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than someone else should be elected” but concluding this rationale does not extend to “political races other than the judge’s own”), *cert. denied*, 563 U.S. 974, 131 S.Ct. 2872, 179 L.Ed.2d 1187 (2011). “While . . . a judge who takes no side on legal issues is not desirable, a judge who takes no part in political machinations is.” *Siefert*, 608 F.3d at 986.

The Seventh Circuit rejected Judge Siefert’s argument that “[judges] are more akin to legislative actors” than public employees. *Id.* at 984. Although *Pickering* and its antecedents “all concern public employees,” the Seventh Circuit noted the government’s ability to regulate employees in those cases was “not solely dependent on its authority as an employer.” *Id.* at 985. *Pickering* also considered the government’s “duty to promote the efficiency of the public services it performs.” *Id.* In Judge Siefert’s case, the Seventh Circuit was “not concerned merely with the efficiency of [government] services, but that the work of the judiciary conforms with the due process requirements of the Constitution[.]” *Id.* In the Seventh Circuit’s view, the distinction “tip[ped] the balance even more firmly in favor of the government regulation.” *Id.* Notwithstanding the fact elected judges, like legislators, are accountable to voters,

[a] judge must also be accountable to [his or] her responsibilities under the Fourteenth Amendment. It is small comfort for a litigant who takes her case to state court to know that while her trial was unfair, the judge would eventually lose an election, especially if that litigant were unable to muster the resources to

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combat a well-financed, corrupt judge around election time.

Id. Accordingly, outside the context of a judge's own election, the Seventh Circuit adopted the balancing test.

We find *Siefert's* rationale compelling.²¹ Here, Judge Cohen was not campaigning for retention at the time he wrote his social media posts. Nor could he

21. We observe the Seventh Circuit is not alone in its approach. Indeed, three years prior, the Supreme Court of New Mexico applied the balancing test to New Mexico's version of the endorsement clause. *See In re Vincent*, 172 P.3d 605, 607 (N.M. 2007) ("While *White* is widely seen as changing the legal landscape regarding the free speech rights of judges, it is factually distinguishable from this case . . . *White* examined the free speech rights of a judicial candidate involved in his own election, whereas this case involves the free speech rights of a sitting judge to endorse another's political candidacy."). A handful of states have reached a similar result. *See Osborne*, 11 So.3d at 113 ("Traditionally, this Court, in assessing whether speech by a member of the judiciary is protected political speech, has applied the two-prong test promulgated in *Pickering*[.]"); *In re Davis*, 82 S.W.3d 140, 149 (Tex.Spec.Ct.Rev. 2002) (applying the *Pickering* test, but concluding a judge's comment to the media did not address a matter of public concern); *Broadman v. Comm'n on Judicial Performance*, 959 P.2d 715, 727 (Cal. 1998) ("Because the state's interests in protecting the integrity of the judiciary and in maintaining public confidence in the judiciary are at least as strong as its interest in promoting the efficiency of public services generally, we conclude that the First Amendment protection for public comment on pending cases by judges is no more protective of judges, who are also public employees, than the standard articulated by the United States Supreme Court for evaluating the regulation of public employee speech generally.").

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be, as Pennsylvania law required him to retire at the age of seventy-five, before his ten-year term in office expired. Consequently, *White*'s interest in protecting the electorate's need for an open debate about the qualifications of judicial candidates plays no role in this case. In this context, stripped of the heightened importance of an election, we believe the *Pickering* balancing test is the appropriate standard to review restrictions on a sitting judge's speech. Therefore, if a sitting judge speaks only on a matter of personal interest, and not a matter of public concern, then the Commonwealth has wide latitude in restricting its judge's speech.²² If, however, a sitting judge speaks on a matter of public concern, then the court must balance the Commonwealth's interest in preserving the efficient administration of justice against the judge's interest in making the statement.

To be sure, *Pickering* is not a perfect fit. The High Court in that case spoke specifically of government employees, and "[j]udges are not typical, run-of-the-bureaucracy employees[.]" *Hey*, 452 S.E.2d at 30. However, in some ways, "the State's interests in regulating judicial conduct are . . . of a greater weight than those implicated in the usual government employment case." *Id.*; see also *In re Bruno*, 101 A.3d at 684 n.27 ("In drafting the[Code of Judicial Conduct], we persist in the aspiration that the

22. The CJD's decision in *In re Eakin* offers one example. Former Justice Eakin sent emails on his government-supplied computer containing "nudity, gender stereotypes, and ethnic stereotypes"—paradigmatic representations of speech **not** addressing a matter of public concern. *In re Eakin*, 150 A.3d at 1057.

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judicial office summons in those who serve the highest quality of professionalism and personal comportment.”); *Raab*, 793 N.E.2d at 1219 (“There is hardly a higher governmental interest than a State’s interest in the quality of its judiciary.”), *quoting Matter of Nicholson v. State Comm’n on Judicial Conduct*, 409 N.E.2d 818, 822 (N.Y. 1980); *In re Code of Judicial Conduct*, 603 So.2d 494, 497 (Fla. 1992) (“Judges and judicial employees are treated differently from other public servants because there is ‘something special in the judicial role.’”), *quoting Allan Ashman et al., Judges in an Age of Mistrust: Morial and the Policy of Required Resignation*, 54 TUL. L. REV. 382, 414 (1980).

“An independent and honorable judiciary is indispensable to justice in our society.” *Williams-Yulee*, 575 U.S. at 439, 135 S.Ct. 1656 (citation omitted). The efficiency of the judiciary depends not only on the reality of impartiality, but also its reputation for impartiality. *See Williams v. Pennsylvania*, 579 U.S. 1, 16, 136 S.Ct. 1899, 195 L.Ed.2d 132 (2016) (“Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.”). “Unlike the executive or the legislature, the judiciary ‘has no influence over either the sword or the purse; . . . neither force nor will but merely judgment.’” *Williams-Yulee*, 575 U.S. at 445, 135 S.Ct. 1656, *quoting* The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). “The judiciary’s authority therefore depends in large measure on the public’s willingness to respect and follow its decisions.” *Id.* at 445-46, 135 S.Ct. 1656. Moreover, judges, unlike the

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average government employee, are bound by due process, which heightens the importance of a judge being cautious in his speech. *See Siefert*, 608 F.3d at 984 (“restrictions on judicial speech may, in some circumstances, be required by the Due Process Clause”). So even though a judge is not, strictly speaking, an “employee” of the Commonwealth, the Commonwealth arguably has a greater interest in regulating the speech of its sitting judges than the bureaucrats typically associated with *Pickering*, which justifies a deferential standard of review.²³

23. We are not persuaded by the Fifth Circuit’s contrary decision in *Jenevein*, *supra*. There, the court applied strict scrutiny when reviewing restrictions on a sitting judge’s speech to his constituency, reasoning that the judge was “an elected official, about whom the public is obliged to inform itself[.]” *Jenevein*, 493 F.3d at 557; *see id.* (“as an elected holder of state office, his relationship with his employer differs from that of an ordinary state employee”). In the Fifth Circuit’s view, “if the State chooses to tap the energy and the legitimizing power of the democratic process in the election of judges, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.” *Id.* at 558, *quoting White*, 536 U.S. at 788, 122 S.Ct. 2528 (brackets omitted). We agree with this statement. However, in our view, judges only enjoy “the First Amendment rights that attach to **their** roles” as part of the judiciary, *id.* (emphasis added), not the First Amendment rights that attach to a legislative or executive role. “Judges are not politicians, even when they come to the bench by way of the ballot.” *Williams-Yulee*, 575 U.S. at 437, 135 S.Ct. 1656; *see id.* at 437-38, 135 S.Ct. 1656 (“a State’s decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office”); Pa. Code of Judicial Conduct, Canon 4, Rule. 4.1, cmt. 7 (“The role of a judge is different from that of a legislator or executive branch official, even when the judge is subject to public election.”). Significantly, while politicians

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Therefore, unless or until the United States Supreme Court resolves this open question of law, we will apply a balancing test when reviewing First Amendment claims challenging restrictions on sitting judges' speech outside the context of their own election. The first prong of the balancing test asks whether the speech addresses a matter of public concern—a question that requires courts to consider “the content, form, and context” of the contested statement. *Connick*, 461 U.S. at 147, 103 S.Ct. 1684. Generally, speech addresses a matter of public concern “if it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community.’” *Green v. Phila. Hous. Auth.*, 105 F.3d 882, 886 (3d Cir. 1997), quoting *Connick*, 461 U.S. at 146, 103 S.Ct. 1684.

are expected to be “responsive to the preference of their supporters” after the election, judges are not. *Williams-Yulee*, 575 U.S. at 446, 135 S.Ct. 1656. A judge instead “striv[es] to be ‘perfectly and completely independent, with nothing to influence or controul him[.]’” *Id.* at 447, 135 S.Ct. 1656, quoting Address of John Marshall, in Proceedings and Debates of the Virginia State Convention of 1829-1830, 616 (1830). For that reason, “[c]ampaigns for judicial office must be conducted differently from campaigns for other offices.” Pa. Code of Judicial Conduct, Canon 4, Rule. 4.1, cmt. 7 In short, while the public has the right to be informed about a judge’s performance once he or she takes the bench, it does not have a right to hear the type of partisan political commentary from a judge that is expected today of a governor or state representative. See *Raab*, 793 N.E.2d at 1292-93 (noting “there is a heightened risk that the public, including litigants and the bar, might perceive [elected] judges as beholden to a particular political leader or party after they assume judicial duties”). Since the role of judges is fundamentally different than that of politicians, the standard we adopt must reflect the judiciary’s unique role.

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If the speech implicates a matter of public concern, thus satisfying the first prong, then the second prong requires us to “find the balance between the state’s interest and the judge’s.” *Siefert*, 608 F.3d at 985. However, “narrow tailoring is not the requirement; the fit between state interest and regulation need not be so exact.” *Id.* In this context, this means we must weigh the Commonwealth’s interest in protecting the efficiency of the administration of justice, including the independence, integrity, and impartiality of the judiciary, against the judge’s interest in speaking.

C. Application

With the test resolved, we move to application. Here, we need not dwell on the first prong because the JCB does not dispute that Judge Cohen’s partisan political social media posts “involved matters of public concern.” Appellee’s Brief at 69. This case hinges instead on the second prong of the balancing test.²⁴

24. Judge Cohen misconstrues the balancing test in his brief. He claims, “under *Pickering*, First Amendment protection extended only to employees’ statements of public concern not to private employment matters.” Appellant’s Brief at 77. Facially, that is correct. The problem is Judge Cohen stops there and omits the “balancing” portion of the balancing test. He believes as long as a judge is speaking on a matter of public concern, “[t]he Judicial Conduct Board cannot penalize extra judicial speech that is not connected with a judge’s duties or discussions about his employment.” *Id.* That is simply not the case. *See Rankin*, 483 U.S. at 387, 107 S.Ct. 2891 (if the “statement addressed a matter of public concern, *Pickering* next requires that we balance [the speaker]’s interest in making her statement against ‘the interest of

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To properly conduct that analysis, we must clarify what was troubling about Judge Cohen’s social media posts. The CJD’s concern was not just that Judge Cohen publicly posted his personal, political views, but that he posted so regularly and one-sidedly that he appeared to be “an advocate for the Democratic Party[.]” *In re Cohen*, No. 1 J.D. 2023, 5/3/24, at 52. It was not just the topics of the posts, but “their volume and their tone [that] undermine[d] the appearance of impartiality required of the judiciary.” *Id.* at 38. On his Facebook account, Judge Cohen advocated for legislation, such as the Build Back Better Bill that was then being promoted by the Democratic Party,²⁵ cheered on Democratic politicians,²⁶ impliedly endorsed

the State, as an employer, in promoting the efficiency of the public services it performs through its employees”), *quoting Pickering*, 391 U.S. at 568, 88 S.Ct. 1731.

25. *See In re Cohen*, No. 1 J.D. 2023, 5/3/24, at 30-31 (“Good night, Kevin McCarthy. Good night moon. No matter how long Kevin talks, we’ll have House passage of Build Back Better soon.”), *quoting* JCB Ex. 8, ¶60; *id.* at 31 (“At 8:00 a.m., [U.S.] House returns to session, delayed by Kevin McCarthy speech of record length, to pass Build Back Better bill and improve many, many American lives.”), *quoting* JCB Ex. 8, ¶61.

26. *See id.* at 10 (“Today is President Joe Biden’s Birthday. Many people his age is [sic] impaired. But he has proven to be an excellent President. His experience enables him, and does not wear him down. I look forward to many more achievements!”), *quoting* JCB Ex. 8, ¶3; *id.* at 11 (“My friend and former House colleague Josh Shapiro, whose father Dr. Steve Shapiro was a classmate of mine at Central High, has been elected P[A]’s Governor. I have no doubt he is up to the job.”), *quoting* JCB Ex. 8, ¶6; *id.* (“My former legislative colleague Kenyatta Johnson, now completing his 3rd term in the Philly City Council[,] has been found—along with his

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a candidate for congressional office,²⁷ touted his own legislative achievements as a Democrat,²⁸ and criticized the policies of predominately Republican legislatures.²⁹

wife Dawn Chavous—to be not guilty on all charges in federal court today by a jury verdict. . . . Friends and admirers can choose to contribute to a defense fund, if he has set one up.”), *quoting* JCB Ex. 8, ¶8; *id.* (“Philly DA Krasner, in switch of tactics, now demands to testify before P[A] House Committee seeking evidence of wrongdoing to begin impeachment proceedings. Good move!”), *quoting* JCB Ex. 8, ¶9; *id.* at 16-17 (“More people are employed in [the U.S.] than ever before, showing a very strong economy, and strengthening Social Security System. It’s time for critics to re-evaluate this Administration.”), *quoting* JCB Ex. 8, ¶22.

27. *See id.* at 13-14 (“I remember journalistic anger at Roger Maris & Eugene McCarthy for becoming national heroes with heroic achievements. John Nichols’ hit job against Liz Cheney [sic] in [] The Nation is of the same sad kind. . . . As a judge, I am not permitted to endorse or otherwise back any candidate for anything. But I strongly disbelieve that good works by anyone should subject them to harsh criticism while those who do far fewer good things remain totally ignored.”), *quoting* JCB Ex. 8, ¶15.

28. *See id.* at 16 (“With allies among the leaders of both parties, I spearheaded Pennsylvania’s pioneering 2015 law against the Boycott, Divestment and Sanctions movement seeking [to] deprive Israel of foreign trade on a state-by-state basis. A federal appeals court has recently ruled in favor of the constitutionality of a similar law in Arkansas.”), *quoting* JCB Ex. 8, ¶21; *id.* at 18-19 (“Despite the support of [John] Baer, Gov. Tom Wolf, and many others, the legislature still has not raised the minimum wage above the current \$7.25 level. When P[A] raised the minimum wage to \$7.15 (10 cents less than the federal level which ultimately followed), under my leadership in 2006, I immediately advocated that it should soon go up to \$8.00.”), *quoting* JCB Ex. 8, ¶27.

29. *See id.* at 19 (“Texas calls itself the Lone Star state, due to its brief experience as a separate country, after winning

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An ordinary citizen comparing Judge Cohen’s posts with the posts of our state politicians would likely see little distinction. Compounding the problem, Judge Cohen posted his political views on a page identifying himself—both in photo and text—as a judge, *see id.* at 41-42, erasing any chance readers would not connect the dots between his account and the judiciary.³⁰

When viewed in that light, the question before us is an easy one to resolve. The Commonwealth’s interest in protecting the efficiency of the administration of justice,

independence from Mexico. But in these days of five-star ratings, and Texas’ passage of a variety of dubious laws, being a one star takes on a new—and accurate—meaning.”), *quoting* JCB Ex. 8, ¶128; *id.* at 29 (“The state that gave us Estes Kefauver and two Al Gores is now trying to make knowledge of black history illegal. Shameless retrogression!”), *quoting* JCB Ex. 8, ¶154.

30. Judge Cohen claims if a state judicial candidate can criticize prior case law in an election, as permitted in *White*, “then obviously, Judge Cohen possesses the right to discuss, in a proper fashion, student loan debt legislation, relief [sic], inflation, the January 6th Committee investigation and other matters of public concern.” Appellant’s Brief at 65. But this analogy is inapt. If an individual is seeking elected judicial office, then his or her opinion of that court’s prior case law is precisely the type of information voters are seeking in evaluating his or her views and fitness for the role. *See White*, 536 U.S. at 778, 122 S.Ct. 2528 (“Proof that a Justice’s mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.”), *quoting Laird*, 409 U.S. at 835, 93 S.Ct. 7. Not only is the speech involved here of an entirely different kind, but, again, and critically, Judge Cohen was not running in an election or even eligible for retention at the time he made it.

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including the independence, integrity, and impartiality of the judiciary, outweighed Judge Cohen's interest in continuing to act as a spokesperson for the Democratic Party after he took the bench. As explained above, the efficiency of the administration of justice depends on both the reality **and appearance** of impartiality. *See Williams*, 579 U.S. at 16, 136 S.Ct. 1899. "[P]articipation in politics undermines the appearance of impartiality[.]" *Bauer*, 620 F.3d at 711. As the Florida Supreme Court eloquently explained:

The great mass of the people think that judges are different, that their special relationship to the law is what makes them different, that they are not merely political authorities, weighing and balancing interests, but legal authorities, guided and restrained by the law. It is this conviction, more than anything else, which compels the people to obey orders of the court. . . . [T]o the extent that judges are seen as political rather than judicial, to that extent they lose their authority and the power they now have to induce obedience to their orders. If judges are stripped of the robes of the law—or if, in the foolish pursuit of political power, they strip themselves of the robes of the law—the people will cease to accept the authority of court decisions, law enforcement officers will be less ready to enforce court orders, legislators will be more ready to curb judicial powers, and the judges will wonder where their power went.

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In re Code of Judicial Conduct, 603 So.2d at 497-98, quoting Robert A. Goldwin, *Comments to Chapter 1*, in *THE JUDICIARY IN A DEMOCRATIC SOCIETY*, 19-20 (Leonard J. Theberge ed., 1979). Thus, Judge Cohen did not put just his own reputation at risk. When, as here, a sitting judge adopts the persona of a political party spokesperson and abuses the prestige of his office to advance that party's interests, he detracts from the reputation of the entire judiciary. The Commonwealth has not just a right, but a duty, to regulate that behavior. Accordingly, we conclude the CJD properly balanced the interests of the Commonwealth and Judge Cohen in rejecting Judge Cohen's free speech claim. Although we respect Judge Cohen's desire, as a private citizen, to engage in politics and express his opinion on matters of public concern, once Judge Cohen assumed the bench, he bound himself to comply with the Pennsylvania Constitution and the Code, including the Code's restrictions on political activity.

To be clear, our holding does not mean judges will "be bound and gagged once they . . . go home" from work. Appellant's Brief at 62. Nor are we saying judges "can never comment on any matter of importance without it being called political speech[.]" *Id.* at 83. "Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice," and are therefore encouraged to write or speak—even on social media—on "appropriate" matters of public concern. Pa. Code of Judicial Conduct, Canon 3, Rule 3.1, cmt. 1 Indeed, as the CJD noted, "[s]ocial media can be positive for a judge to use professionally." *In re Cohen*, No. 1 J.D. 2023, 5/3/24, at 63. When employed mindfully,

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[social media] can be used to share information on the role of judges and the judicial system. It can provide insight into court procedures and encourage *pro bono* activities. It can also be used to show a judge's involvement in educational organizations along with civil and community activities. Judges can promote their activities and recognitions received.

Id. at 64. Social media can be used by judges for personal reasons as well. *See id.* (“Judges can post photos of themselves and their family at local restaurants, events or on vacations as long as such photos do not violate any judicial canons.”). Therefore, sitting judges, like many other citizens, must ensure their social media use comports with the rules of the position they have voluntarily attained or the organization they have voluntarily chosen to join. “A judge should weigh this before he [or she] accepts [] office.” *In re Troy*, 364 Mass. 15, 306 N.E.2d 203, 235 (1973).

III. Conclusion

In sum, although restrictions on a judicial candidate's speech must satisfy strict scrutiny, we hold restrictions on a sitting judge's speech, outside the context of his or her own election, need only satisfy a more deferential balancing test. Under this balancing test, a reviewing court must decide whether the judge's speech addressed a matter of public concern. If the answer is yes, then the court must balance the Commonwealth's interest in protecting the efficiency of the administration of justice, including the independence, integrity, and impartiality of the judiciary,

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against the judge's interest in making the statement. If, however, the answer is no, then the Commonwealth has wide latitude in managing the judiciary, without intrusive oversight in the name of the First Amendment. Here, the parties agree Judge Cohen's Facebook posts addressed matters of public concern. Nevertheless, we conclude the Commonwealth's interest in protecting the efficiency of the administration of justice outweighed Judge Cohen's interest in posting partisan political content on Facebook where the volume and tone of his posts cast him as little more than a spokesperson for the Democratic Party. Accordingly, we affirm the order of the CJD suspending Judge Cohen for the remainder of his term of service.

Chief Justice Todd and Justices Donohue, Wecht, Mundy, and Brobson join the opinion.

Justice Wecht files a concurring opinion.

Justice McCaffery did not participate in the consideration or decision of this matter.

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[J-58-2025] [MO: Dougherty, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 63 EAP 2024

Appeal from the Order of the Court of Judicial
Discipline entered on October 7, 2024, at No. 1 JD 2023.

SUBMITTED: June 17, 2025

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

APPEAL OF: JUDGE MARK B. COHEN

CONCURRING OPINION

JUSTICE WECHT **DECIDED: January 21, 2026**

I join the Court's opinion, which thoroughly and astutely addresses the issues in this case and articulates an appropriate standard for weighing claims involving judges' speech.

In an age of ubiquitous social media and heightened acrimony, it is imperative that jurists remain mindful and careful. They must avoid the type of partisan punditry and running online commentary on politics that poured forth continually from the keyboard of the judge involved in today's case. People are free to do this sort of thing, but judges are people with an asterisk. A person who chooses

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to become a judge must park some portion of his or her First Amendment rights at the courthouse curb for the duration in which that judge is serving on the bench. Upon retirement or resignation, all of those rights return in full to the jurist, who can then rejoin the madding crowd as much and as boisterously as the jurist wishes.

The Majority aptly distinguishes this case from those that have addressed challenges to the speech rights of judicial candidates. Pennsylvania judges, unlike their federal colleagues and their colleagues in many states, must climb down from the ivory tower and engage in the hurly burly of electoral campaigning every decade. These retention campaigns may strike some as unseemly, but they are mandated by our Constitution. If the people of this Commonwealth wish to imagine their judiciary to be as pure as the driven snow, and if the people are under some impression that elimination of judicial elections would advance such purity, they are free to alter their Constitution. But unless and until such a transformation occurs, the people (and the constitutionally created institutions that are our Court of Judicial Discipline and Judicial Conduct Board) must honor the bargain made in the amendment process nearly sixty years ago: judicial candidates are candidates. While judicial candidates operate under constraints inapplicable to other candidates,¹ they do enjoy a fuller quantum of their First

1. *See, e.g.*, CODE OF JUDICIAL CONDUCT Rule 4.2(C)(3) (“A judge who is a candidate for elective judicial office shall not . . . knowingly or with reckless disregard for the truth, make, or permit or encourage his or her campaign committee to make, any false or misleading statement[.]”).

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Amendment rights than judges who are not enmeshed in a retention election cycle (or an initial campaign for a judicial seat).² In the context of judicial elections, there is (and must be) play in the joints. This is a principle that our Constitution embraces and that all must respect.

A final note: I am hesitant to endorse—and I do not endorse—any suggestion that a jurist who formerly served as a legislator (or, for that matter, an executive branch official) may not in some appropriate fashion refer to (or even, to adopt the Majority’s usage, “tout[.]”³) his or her record of actions taken or accomplishments achieved while serving in a political branch of our government. I understand the Majority’s validation of the CJD’s and JCB’s concerns in this regard as focusing on the avidly and insistently partisan tilt of Judge Cohen’s “tout[ing]” of his legislative deeds, not on the “tout[ing]” itself. If a jurist speaks of laws passed or bills introduced during a prior legislative career, such speech is not categorically problematic. It may well be problematic in context. If the “tout[ing]” transgresses our Code of Judicial Conduct in some particular, it is fair ground for discipline. But the bare fact that a judge recites things that he or she did while serving as a legislator is not, by itself and without more, transgressive. Context is critical, as is detail.

2. *League of Women Voters v. Commonwealth of Pennsylvania*, 179 A.3d 1080, 1088 (Pa. 2018) (Wecht, J., single Justice order) (discussing the United States Supreme Court’s decision in *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002)).

3. Maj. Op. at 8, 35.

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Subject to that understanding, I join today's opinion, an opinion that advances the jurisprudence in the challenging terrain where expressive rights bump up against canonical precepts of judicial conduct.

**APPENDIX B — OPINION OF THE
COMMONWEALTH OF PENNSYLVANIA, COURT
OF JUDICIAL DISCIPLINE, FILED MAY 3, 2024**

COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE

No. 1 JD 23

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

May 3, 2024, Filed

OPINION

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

JUDGE FLAHERTY

PROCEDURAL BACKGROUND

On February 23, 2023, the Judicial Conduct Board (Board) filed a Complaint against Judge Mark B. Cohen asserting that certain posts he made to his personal Facebook page violated several provisions of the Code of Judicial Conduct and the Constitution of the Commonwealth. On March 9, 2023, Judge Cohen filed

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a discovery motion and an omnibus pre-trial motion that sought dismissal of this prosecution, *inter alia*, on the grounds that it was precluded by his rights to free expression under the First Amendment to the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution. This Court denied Judge Cohen's omnibus motion on April 4, 2023. Thereafter, on April 19, 2023, Judge Cohen filed an answer and new matter, which presented certain affirmative defenses, including Judge Cohen's First Amendment defense. The Board responded to Respondent's answer and new matter by reply and supporting memorandum of law on April 20, 2023. The parties then exchanged pre-trial memoranda on June 7, 2023, and June 29, 2023, respectively, and conducted a pre-trial conference on July 13, 2023. At the pre-trial conference, the parties reached stipulations regarding the majority of the factual allegations in the Board Complaint and proposed exhibits, and Judge Cohen presented argument regarding his contention that Alison H. Merrill, Ph.D., the Board's proffered expert witness, should not testify. This Court accepted the stipulations of the parties and, by order entered July 17, 2023, permitted Dr. Merrill to testify. This Court then conducted trial on the matter on July 24, 2023, before a five-judge panel consisting of Conference Judge Flaherty and Judges Marsico, Baranoski, Becker, and Irwin.

FINDINGS OF FACT

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

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

3. In 2007, while he was a member of the Pennsylvania House of Representatives, Judge Cohen created a personal Facebook page and has posted to it regularly and frequently since that time, including after he was elected to the office of judge. *See* Board Exhibit 5, NT., Deposition, 7/19/2022, at 32-33; *see also* NT., Trial, 7/24/2023, at 243-246.

4. Judge Cohen's Facebook page is "public" or in other words, "accessible" to any member of Facebook, which is to say that he does not utilize privacy settings on his page to exclude any member of Facebook from seeing his page. *See* Board Exhibit 5, NT., Deposition, 7/19/2022, at 41-42; *see also* Board pre-trial memorandum stipulation 18; Respondent pre-trial memorandum stipulation 2; *and* N.T., Trial, 7/24/2023, at 63-64.

5. Judge Cohen has approximately 5000 Facebook "friends" and 1000 Facebook "followers," who can easily access his Facebook page at any given time. *See* Board Exhibit 5, N.T., Deposition, 7/19/2022, at 42-43.

6. The "life events" section of Judge Cohen's Facebook page identifies his present status as a judge assigned to family court; his prior one-year employment as a private attorney from 2016-2017; his 42-year service as a Democratic state legislator from 1974-2016 (inclusive of his service as Democratic Caucus Chairman); and

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his service as a delegate at the Democratic National Conventions in 2004, 2008, 2012, and in 2016, as well as the Democratic Presidential candidates he supported at those conventions. *See* Board pre-trial memorandum stipulation 19; Respondent pre-trial memorandum stipulation 2; *see also* Board Exhibit 5, NT. Deposition, 7/19/2022, at 73-76.

7. At his deposition, Judge Cohen testified that one of his purposes in creating his Facebook page in 2007 was, in the context of his service as a legislator, to advocate for or to stake out positions on policy issues. *See* Board's Exhibit 5, NT., Deposition, 7/19/2022, at 33-34.

8. Regarding his continued Facebook posting after leaving legislative office and attaining judicial office, Judge Cohen testified that his purpose was to "engage people in discussion," which "enable[d him] to learn things and enable[d] others to learn things," which he considered a "positive good." *See* N.T., Trial, 7/24/2023, at 249.

9. The Board commenced an investigation of Judge Cohen's Facebook postings after it received a report from Philadelphia Family Court Administrative Judge Margaret Murphy (Judge Murphy). *See* N.T., Trial, 7/24/2023, at 46-49, 61-62; *see also* Board's Exhibit 1, November 16, 2021, letter from Judge Murphy to former Board Chief Counsel Richard Long; *and* Board pre-trial memorandum stipulation 15; Respondent pre-trial memorandum stipulation 2.

10. On September 26, 2021, through another judge, Judge Murphy received a complaint from a citizen

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regarding the content of one of Judge Cohn's Facebook posts about the heritage of American citizens, which the complaining citizen felt to be a racist post. *See* N.T., Trial, 7/24/2023, at 34, 40; *see also* Board's Exhibit 1.

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

12. Upon further review, Judge Murphy also became concerned about the content of several of Judge Cohn's other postings because, in her view, the content of the postings could negatively affect the perception of the impartiality of the Philadelphia judiciary in the eyes of persons who are litigants before it and, as such, may have violated the Code of Judicial Conduct. *See, e.g., id.*, at 37-38; *see also* Board's Exhibit 1.

13. At trial, Judge Murphy noted specifically her concerns about a picture of Judge Cohen posted that depicted him in judicial robes behind a bench in a Philadelphia courtroom to his Facebook page, *see* N.T., Trial, 7/24/2023, at 37-38, and a post Respondent made about having been proud that, as a state legislator, he consistently received an "F" rating from the National Rifle Association (NRA). *Id.*, at 38.

14. As a result of these concerns, Judge Murphy contacted Philadelphia Court of Common Pleas President Judge Idee Fox, and together they arranged to meet with Judge Cohen on September 29, 2021, regarding the

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content of his Facebook posts. *See* Board’s Exhibit 1, *see also* N.T., Trial, 7/24/2023, at 39-40.

15. After Judge Murphy revealed her concerns to Judge Cohen about the initial complaint and the other posts she saw, he disagreed with her analysis and a heated argument ensued wherein Judge Cohen contended, among other things, that his Facebook post regarding the NRA was not problematic because he did not do “gun cases” as a judge on family court. *See* N.T., Trial, 7/24/2023, at 43-44. Though Judge Murphy pointed out that Judge Cohen’s position was untenable because of the population served by family court as well as the volume and variety of cases that proceed through family court, Judge Cohen did not agree with the substance of Judge Murphy’s position regarding the content of his Facebook posts as being potential violations of the Code. *Id.*, 44. Judge Cohen likewise did not agree with Judge Murphy’s suggestion that Judge Cohen report himself to the Board to mitigate any potential violation, because, in his view, he did nothing impermissible, *id.*, but he did ultimately agree with her suggestion to consult with an ethics expert (later identified in the conversation by Judge Cohen and Attorney Stretton), about the content of his Facebook postings. *Id.*, at 45.

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

17. Attorney Stretton advised Judge Murphy that Judge Cohen removed the post that spurred the citizen’s

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complaint and the picture of him in a judicial robe seated behind a bench in a courtroom. *Id.*, at 51.

18. Nevertheless, Judge Murphy was aware that Judge Cohen had posted other concerning material to Facebook many times between the time she met with him and when spoke with Attorney Stretton, and she urged Attorney Stretton to look at Judge Cohen's Facebook postings for himself. *Id.*, at 46, 49-50.

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

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

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

22. Board Senior Investigator Paul Fontanes performed this initial review. *Id.*, at 62. Senior Investigator

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Fontanes was able to identify Judge Cohen on his Facebook page because, despite his claim of removal of the picture of him in a judicial robe from his Facebook page, the picture remained visible thereon, which he removed later in the course of the Board's investigation. *Id.*, at 62-63, 246; **see also generally** Board's Exhibit 5. Based on Senior Investigator Fontanes' initial review of Judge Cohen's Facebook page, former Chief Counsel Long opened a Confidential Request for Investigation about Judge Cohen based upon the authority given to the Board's Chief Counsel to do so. *Id.*, at 64; **see also** Board's Exhibit 2, December 1, 2021, Confidential Request for Investigation of Judge Cohen; **and** Board pre-trial memorandum stipulation 16; Judge Cohen pre-trial memorandum stipulation 2. Thereafter, Senior Investigator Fontanes continued investigating and monitoring the contents of Respondent's Facebook page, which revealed that Judge Cohen made posts of a political nature. *Id.*, at 68. Senior Investigator Fontanes preserved posts by Respondent that he and assigned Board counsel believed to be improper. *Id.*

23. Based on Senior Investigator Fontanes' investigation, assigned Board counsel requested and received authority from the Board to issue a Notice of Full Investigation (NOFI) to Judge Cohen regarding the posts determined by the Board at that point to potentially violate the Code of Judicial Conduct and the Pennsylvania Constitution. *See* NT., Trial, 7/24/2023, at 69-70; **see also** Board's Exhibit 3, April 20, 2021, NOFI to Judge Cohen, at 2-4, ¶11.

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24. Judge Cohen, through counsel, issued a verified response to the Board's NOFI by letter dated May 5, 2022. *See* N.T., Trial, 7/24/2023, at 74; *see also* Board's Exhibit 4, May 5, 2022, verified NOFI response by Judge Cohen.

25. Judge Cohen admitted making the posts identified in the Board's NOFI, yet he contended that his Facebook postings were not violations of the Code or the Pennsylvania Constitution because they were permissible speech under the First Amendment to the United States Constitution. *Id.* Assigned counsel then deposed Judge Cohen at the Board's offices in Harrisburg, wherein he presented testimony consistent with his NOFI response, *i.e.*, that he made the Facebook posts identified ultimately at trial in Board's Exhibit 3 and that they were permissible expressions of his First Amendment rights and not violations of the Code or the Pennsylvania Constitution. *Id.*, at 75; *see also generally* Board's Exhibit 5.

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

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bill, and to praise the delivery and content of President Biden's speech in the original posting, creating a forum for discussion. *Id.*, at 134-135.

27. Following the deposition, Judge Cohen continued to make posts to Facebook of a political nature. *See* NT., Trial, at 82, 86-88; *see also* Board's Exhibit 6, December 6, 2022, supplemental NOFI to Judge Cohen, at 2-14, ¶ 7.

28. Judge Cohen replied to the Board's supplemental NOFI through counsel, admitted making the Facebook postings in question, and again asserted that his Facebook posts could not be the subject of claims of misconduct because they were protected speech under the First Amendment. *See* Board's Exhibit 7, January 4, 2023, verified supplemental NOFI response by Judge Cohen.

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

30. The parties stipulated to the appearance and content of Judge Cohen's Facebook posts presented to support the charges against Respondent in the Board Complaint, prior to trial. *See* Board's Stipulated Exhibit 8; *see also* NT., Trial, 7/24/2023, at 89-91.

31. Judge Cohen's Facebook posts that are the subject of the present charges are summarized as follows,

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which, unless otherwise noted, were authored by him:

1. October 29, 2022, 12:28 p.m. – “David DePape, captured Pelosi assailant, continues to gain notoriety as more and more of his extremist posts come to light. It is clear that he is a failed and hateful man capable of many awful things.”
2. October 28, 2022, 9:16 p.m. – “CNN: David DePape, 42 accused attempted murderer of Paul and Nancy Pelosi, apparently made hateful, bigoted posts against LGBTQ people, Jews, the January 6 Committee, and other right-wing targets. Why am I not surprised?”
3. November 20, 2022, time not listed – “Today is President Joe Biden’s Birthday. Many people his age is impaired. But he has proven to be an excellent President. His experience enables him, and does not wear him down. I look forward to many more achievements!”
4. November 21, 2022, time not listed – “Philly DA Larry Krasner’s credibility gained when a federal jury voted to dismiss a claim by former ADA Carlos Vega that Krasner had discriminated against him by age when he fired him. Krasner saw him as flawed, the City said in defense.”

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5. November 10, 2022, 6:40 p.m. – “The victories of Governor-Elect Josh Shapiro & Senator-Elect John Fetterman show Gov Tom Wolf should be credited with improving public respect for Pa. state government. Fetterman first LG to win statewide for other post since 1966.”
6. November 9, 2022, 3:22 a.m. – “My friend and former House colleague Josh Shapiro, whose father Dr. Steve Shapiro was a classmate of mine at Central High, has been elected Pa’s Governor. I have no doubt he is up to the job.”
7. November 3, 2022, 7:10 p.m. – “MSNBC: Former President Barack Obama: When we vote, we win.”
8. November 2, 2022, 4:43 p.m. – “My former legislative colleague Kenyatta Johnson, now completing his 3rd term in the Philly City Council has been found – along with his wife Dawn Chavous – to be not guilty on all charges in federal court today by a jury verdict. A vindication!” In the subsequent posts to this posting, [Respondent] was asked the question if Councilman Johnson would have his legal bills paid, and [Respondent] provided the following response: “To the best of my knowledge, no. Friends and admirers can choose to contribute to a defense fund, if he has set one up.”

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9. September 22, 2022, (approximate) – “Philly DA Krasner, in switch of tactics, now demands to testify before Pa House Committee seeking evidence of wrongdoing to begin impeachment proceedings. Good move!”
10. September 21, 2022 (approximate), time not listed – “MSNBC: Presidential Press Secretary Kanine [sic] Jean-Pierre says Administration has reduced the severity of COVID with widespread vaccinations, but more efforts are needed. She’s right, but it’s wrong to say pandemic is over.”
11. September 20, 2022 (approximate), time not listed – “Babette Josephs was the most public and persistent fighter for women’s rights in Post-Roe Pennsylvania. I would like to see her birthday, August 4, be publicly celebrated as Babette Josephs Day.”
12. September 13, 2022, 5:50 p.m. – “Ken Starr, independent prosecutor of Bill Clinton, whose overzealousness led to issuing X-rated report on Clinton’s sex life, has died at 76. The report led to Clinton’s impeachment, but surprisingly led to increase of public support for him.”
13. September 5, 2022, 2:47 p.m. – “New Deal Labor Secretary Frances Perkins, the first

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

14. September 5, 2022, 11:04 a.m. – “Philadelphia/Tri-State Labor Day Parade brings back memories of Wendell Young, [III,] father of the current UFCW leader, Wendell Young[,] IV. Key early events in the union’s history happened in my original legislative district, in neighborhoods of East Oak Lane and Olney.” The posting also includes a photograph of Mr. Young reposted from the “Bob Ingram” Facebook page. The post includes the following text, originally posted to the “Bob Ingram” Facebook page: “Remembering my late friend the great labor leader Wendell Young 3rd on this

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Labor Day. He told me, ‘Life is all stories,’ which I’ve never forgotten.”

15. August 4, 2022, 2:51 a.m. – “As a young man, I remember journalistic anger at Roger Maris & Eugene McCarthy for becoming national heroes with heroic achievements. John Nichols’ hit job against Liz Cheney [sic] in the *The Nation* is of the same sad kind.” In the midst of the exchange of posts that ensued from this post, [Respondent] posted the following: “I believe from personal experience that people can and do change their views over time. As a judge, I am not permitted to endorse or otherwise back any candidate for anything. But I strongly disbelieve that good works by anyone should subject them to harsh criticism while those who do far fewer good things remain totally ignored.”
16. August 1, 2022, 9:26 a.m. – “The killing of Osama Ben [sic] Laden’s number two by drone in downtown Kabul at the age of 71 shows intense & nuanced focus of this Administration on the national interest. Withdrawing troops is clearly not the same as accepting terrorism.”
17. October 24, 4:20 p.m. – “A plea for more domestic spending and less military spending.” The posting reposts a photograph

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of a fighter jet, with the headline “Just in case you didn’t know what different parts of fighter jet [sic] are called.” There are lines to different parts of the fighter jet that indicate which domestic spending cuts allegedly paid for that part of the fighter jet. For example, the line to the nose of the fighter jet indicates that Medicare cuts paid for that part of the plane. This photograph was originally posted by the “Rebecca Hains, Author” Facebook page on September 8, 2022.

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

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the “Warner West” Facebook page that recounted Ms. Boismier’s story.

19. September 1, 2022, 7:20 a.m. – “An example of the madness of book banning.” The posting includes a reposting of a photograph of students in a classroom with the following text: “At George Dawson Middle School[,] an autobiography co-authored by George Dawson at 103 has been banned. Mr. Dawson was the grandson of a slave. He learned to read at 98. His book is an inspiration to all readers except it can’t be read at the school that bears his name.” This photograph was originally posted by the “Andi Cude” and “True Blue Party” Facebook pages on August 31, 2022.
20. August 30, 2022, 8:56 a.m. – “Canada requires a license to own firearms, and passing a test on firearm safety. Automatic weapons are prohibited. Murders in Canada (38.3 million people) are only about 50% higher than in Philadelphia (1.7 million).”
21. August 29, 2022, 8:55 p.m. – “With allies among the leaders of both parties, I spearheaded Pennsylvania’s pioneering 2015 law against the Boycott, Divestment and Sanctions movement seeking [to] deprive Israel of foreign trade on a state-by-state basis. A federal appeals court has recently

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ruled in favor of the constitutionality of a similar law in Arkansas.” The posting includes a link to an opinion article from the National Jewish Advocacy center bearing the following title: “A Federal Appeals Court Just Struck a Huge Blow to the BDS Movement.” The post contains a comment from the “Ed Doogan” Facebook page which states the following: “So take away from the Palestinians the only nonviolent way they have to pressure Israel and when they resort to violence[,] give Israel an excuse to kill more Palestinian men, women, and children. This is a terrible law and as a judge[,] you should be ashamed of yourself.”

22. August 5, 2022, 9:19 p.m. – “Inquirer: Unemployment falls to 3.5%, tying for the lowest since 1969. More people are employed in US than ever before, showing a very strong economy, and strengthening Social Security System. It’s time for critics to re-evaluate this Administration.”
23. August 3, 2022, 9:39 p.m. – “Senator Amy Klobuchar predicts Sen. Kirsten [sic] Sinema will be on board with Inflation Reduction Act next week, & it will pass Senate, lowering annual deficit, fighting climate change, & reducing prescription costs. A victory for fiscal responsibility.”

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24. August 3, 2022, 1:13 a.m. – “By a 59% to 41% vote, Kansas voters rejected a constitutional amendment that would have allowed the legislature to ban abortion. High turnout took place on 100-degree day, and sent a message that even conservative states are not on board with US Supreme Court reversal of *Roe v. Wade*.” The posting reposts an article from Apnews.com entitled “Kansas voters resoundingly protect their access to abortion.” This article was originally posted by the “Stephen Drachler” Facebook page on August 3, with the following statement from that page: “When Kansas speaks, the nation will be listening. Kansas voters repudiated the radical U.S. Supreme Court on Tuesday as they rejected a Constitutional amendment that would have opened to door [sic] to the Legislature banning abortion in the Jayhawk state. It wasn’t close 60-40 with a record turnout in 100-degree weather. Independent voters turned out in droves to vote in a primary election where they normally could not vote.”
25. August 2, 2022, 3:28 p.m. – “A plea for credit unions, which often offer lower fees, lower cost loans, higher interest rates and better customer service than commercial banks do.” The post also reposts a photograph that contains the following text: “Women

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should remove their money from banks. Seriously. Every penny. Use credit unions. Let's stop them from using our money to pay for lobbyists that take our rights away." This photograph was originally posted by the "Addicting Info" Facebook page on July 13, 2022.

26. August 2, 2022, 3:23 p.m. – "Truth!" This posting also contains a reposting of a photograph of a tweet made by Nina Turner, a former Democratic Ohio State Senator, which contains the following text: "There's nothing moderate about letting our planet burn, allowing our food air & water to be poisoned, or letting people go without food and shelter. These are not moderate positions." This photograph was originally posted by the "Corinna Bloom" Facebook page on July 19.
27. July 30, 2022, 6:06 p.m. – "Despite the support of Baer, Gov. Tom Wolf, and many others, the legislature still has not raised the minimum wage above the current \$7.25 level. When Pa. raised the minimum wage to \$7.15 (10 cents less than the federal level which ultimately followed), under my leadership in 2006, I immediately advocated that it should soon go up to \$8.00. Even after 16 years, and a \$15.00 an hour minimum wage in NJ, NY, California and other states, the minimum wage in Pa and the USA has

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remained stagnant. The posting includes a reposting of a photograph originally posted on July 30, 2021, on [Respondent's] Facebook page, that bears the text "Legislative critic John Baer endorses higher Pa minimum wage. He says it would be a big step for legislative credibility and help a million people."

28. July 28, 2022, 10:29 p.m. – "Texas calls itself the Lone Star state, due to its brief experience as a separate country, after winning independence from Mexico. But in these days of five-star ratings, and Texas' passage of a variety of dubious laws, being a one star takes on a new – and accurate – meaning." The post includes a reposting of a photograph of a cartoon depicting a highway and a billboard that reads: "Welcome to Texas, the Lone Star State – based on recent reviews" and a five-star rating system with only one star filled. This photograph was originally posted by the "Ava Levin Leas" Facebook page on July 27, 2022. In the comment discussion that follows, one commenter stated "I prefer originality. Texas should again become a one-star country." [Respondent] replied, "You are not alone!"
29. July 28, 2022, 7:09 p.m. – "Joe Manchin seems to be retreating a bit on opposition

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to legislation dealing with climate change and investing in human infrastructures for social services. We'll soon see if his possible change of heart leads anywhere."

30. July 27, 2022, 5:50 p.m. – "Prophetic words from the Rev. Billy Graham 41 years ago." The post includes a reposting of a photograph of the former Reverend Graham with the following quotation, attributed to him: "I don't want to see religious bigotry in any form. It would disturb me if there was a wedding between the religious fundamentalists and the political right. The hard right has no interest in religion except to manipulate it." The photograph was originally posted by the "Chester Hitchcock" Facebook page on July 26, 2022.
31. July 26, 2022, 5:20 p.m. – "NYT: Former Philadelphians Bruce Marks and Mike Roman were key players in alternate elector scheme. At least the poor records of Philly sports teams did not disqualify them. Marks is stepping up to defend his role, citing Hawaii in 1960." This posting led to an intense comment argument between Mr. Marks, who was, in fact, one of [Respondent's] Facebook friends, and other individuals who were his Facebook friends, including Marc Stier, who is a well-known progressive political figure. Some of

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these persons accused Mr. Marks, who is an attorney, of professional misconduct and criminal conduct. [Respondent] attempted to bow out of the conversation at one point, by stating the following: “And as a judge, I am limited in the degree to which I can comment on political actors, attorneys or judges in court proceedings.”

32. July 26, 2022, 8:13 a.m. – “Words of wise advice from Canada!” The posting includes reposting of a photograph of a tweet from “Aaron Hoyland,” which contains the following text: “In Canada, our schools have more than one door too. We have folks struggling with mental illness. We watch the same movies, listen to the same music, and play the same violent video games as Americans. And, since Columbine, the US had 200 school shootings. We had 3. It’s the guns.” This photograph was originally posted on June 2, 2022, by the “David Reid” Facebook page.
33. November 1, 2022, 10:08 a.m. – “Did you know that both Frankenstein and Dracula were played by union members? Neither did I.” The post includes a reposting of a photograph of the Boris Karloff-version of Frankenstein and the Bela Lugosi-version of Dracula, with the following text: “DID YOU KNOW? . . . Frankenstein & Dracula were

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union organizers. Boris Karloff, who played Frankenstein, along with Bela Lugosi who played Dracula, were founding members of the actor's union, Screen Actors Guild (SAG). Both men actively recruited Actors and Actresses to join the then unrecognized Union (between 1933 and 1937). It was not uncommon to see Karloff in full monster makeup, handing out applications to join the Screen Actors Guild." This photograph was originally posted by the "John Meyerson" Facebook page on November 1, 2022, with the following additional text: "Solidarity Forever!"

34. September 18, 2022 (approximate), time not listed – "Philadelphia Museum of Art stayed open yesterday during a one-day warning strike. Bad news for labor!"
35. September 14, 2022, 3:30 p.m. – "Record profits are undermining tough corporate bargaining stances." The post also includes a photo with the following statement posted from the "Labor 411" Facebook page: "BNSF is the largest rail company in the US. Last year they had a net income of \$8.8B. They have 35k workers. If they kept half of their profit and split the rest with all employees everyone could receive a \$125k RAISE. Instead, BNSF is cutting sick days. This is why they strike."

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36. September 14, 2022, 2:05 p.m. – “Bad news for Texas kids and school boards. Perhaps good news for Texas educators’ future pay raises and working conditions.” The post contains a photo of an article from the Houston Chronicle bearing the headline “Poll: 77% of Texas teachers want to quit” that was posted from the Facebook page of “Johnny Mitchell.”
37. September 11, 2022, 2:40 a.m. – “Bruce Springsteen is also a fan of unions, as are not about 60% of our country.” The posting also includes a photograph of Bruce Springsteen reposted from the “Jeff Rechenbach” Facebook page (originally posted on September 5, 2022), bearing the following quotation attributed to Springsteen: “Unions have been the only powerful and effective voice working people have ever had in the history of this country.” The post concludes with the following additional text reposted from the “Jeff Rechenbach” Facebook page: “The Boss understands the value of unions. On this day set aside for the recognition of workers, let’s remember it is the Labor Movement that built the middle class in our nation.”
38. September 11, 2022, 2:18 a.m. – “A strong endorsement of the labor movement of his time from famed defense attorney Clarence

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Darrow.” The posting also includes a photograph of Clarence Darrow reposted from the “Ron Klink” Facebook page (originally posted on September 10, 2022), bearing the following quotation attributed to Darrow: “With all their faults, trade-unions have done more for humanity than any other organization of men that ever existed. They have done more for decency, for honesty, for education, for the betterment of the race, for the developing of character in man, than any other association of men.” The post concludes with the following additional text reposted from the “Ron Klink” Facebook page: “I believe this with all my heart and soul.”

39. September 10, 2022, 4:27 p.m. – “Good news for empowering people. Too bad for Superman.” The posting also includes a cartoon reposted from the “Glen Williams” Facebook page, which depicts a child speaking to an obviously dejected Superman; the child states “Sorry Superman[.] My new heroes are union members. They’ve been fighting for me and my family our whole lives.”
40. September 5, 2022, 4:53 p.m. – “Farm workers are vital to our food supply. Thanks to Mary Rose Cunningham for sharing.” The posting also includes a photograph of

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a painting reposted from the “Jonathan Zasloff” Facebook page (originally posted September 4, 2022) depicting farm workers carrying bushels of food with the text “Honoring the immigrants on Labor Day who put food on our tables” on the photograph.

41. September 5, 2022, 11:30 a.m. – “Another good Labor Day Greeting!” The posting also includes a photograph reposted from the “Mike McDonough” Facebook page, which depicts men at an apparent labor organization meeting with the following text: “This long holiday weekend has been brought to you by the blood, sweat, and tears of the labor movement.”
42. September 5, 2022, 11:18 a.m. – “More well-thought-out Labor Day greetings!” The posting also includes a photograph reposted from the political Facebook page of Pennsylvania State Senator Tina Tartaglione (D-Philadelphia) (originally posted September 5, 2022), which depicts a cartoon of happy workers of various professions, i.e., a cook, a nurse, a fireman, with the following text from Senator Tartaglione: “During Labor Day we honor and celebrate the contributions of America’s workers and the fights that got us here. American was built by the middle class, and the middle class was built by unions.”

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43. September 4, 2022, 6:15 p.m. – “Tomorrow is Labor Day. As you enjoy it, remember why workers successfully fought to have it established during the Presidency of Grover Cleveland.” The posting includes a reposting of a photograph originally posted on the “John Meyerson” Facebook page that same day. The photograph depicts a wall with the graffiti “Never Cross a Picket Line. Class War,” painted on the wall. The post concludes with the following text originally posted to the “John Meyerson” Facebook page: “Happy Labor Day! We must never forget the reason we celebrate the sacrifices that workers have made in their fight for social and economic justice! We still have a long way to go!”
44. July 28, 2022, time not listed – “This speaks for the views of many workers.” The posting contains a reposting of a photograph of a tweet from “Blondie,” which contains the following text: “Jobs need to understand that the ONLY way to make me feel appreciated is to pay me what I’m worth, that’s it. No amount of ‘lunch is on me’, T Shirts or ‘team building’ is going to cut it.” The photograph was originally posted by the “More Perfect Union” Facebook page on July 21, 2022.
45. July 28, 2022, 6:44 p.m. – “A very good point!” The posting includes a reposting of a

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photograph of a cartoon with Lisa Simpson making a speech, with a projection screen behind her. The screen bears the following text: “Trickle-down economics has never gotten Billionaires to spread the wealth. That’s what unions are for.” This photograph was originally posted on the “Americans for Tax Fairness” Facebook page on July 26, 2022.

46. August 30, 2022, 1:14 p.m. – “Still another take on the student loan debt repayment plan.” The posting includes a reposting of a cartoon of a man at a trolley track switch and five people tied to the tracks on one of the track branches where they trolley is headed. Behind the trolley are the bodies of a number of people who the trolley had already run over. The man at the train track switch states “But if I divert the trolley now[,] that would be unfair to all the people it’s already killed.”
47. August 29, 2022, 11:10 a.m. – “Another take from a supporter of student debt cancellation!” The posting includes a reposting of a photograph bearing the following statement: “If you’re mad about student loan forgiveness, I feel bad for you son. I got 99 problems but being weirdly bitter that life is getting slightly easier for other people ain’t one.” This photograph was

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posted originally by the “Marti Murphy” Facebook page on August 28, 2022.

48. August 28, 2022, 7:46 a.m. – “My former colleague in Harrisburg wades into theology to support debt forgiveness for education loans.” The posting includes a reposting of a photograph bearing the following statement: “If you’re a Christian and you’re big mad about the possibility of student loan debt being cancelled, let me remind you that the entirety of your faith is built upon a debt you couldn’t pay that someone stepped in and paid for you.” This photograph was originally posted on August 27, 2022, by the “Brett Cott” Facebook page.
49. August 26, 2022, 2:09 p.m. – “One more way to say that reducing student loan debt makes a lot of sense.” The posting also includes a reposting of a photograph of a religious painting of Jesus miraculously distributing the loaves and fishes to the multitude with the following text: “Jesus’s [sic] miracle of the loaves and fishes was a slap in the face to all the people who brought their own lunch.” This photograph was originally posted on August 25, 2022, by the “Bob Kefauver” Facebook page.
50. August 26, 2022, 12:49 p.m. – “Another Facebook friend with a big [heart emoji]!”

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The post is a reposting of a post made by the “Kiernan Majerus-Collins” Facebook page on August 26, 2022, which states the following: “I paid off my relatively modest undergraduate student loans a few years ago, and I’m thrilled that at least some other people won’t have to do the same. Higher education – which benefits our whole society – should be free.”

51. August 25, 2022, 1:34 p.m. – “I agree with this!” The posting also includes a reposting of a photograph with the following text on it: “I worked hard to pay off my student loans, others should have too! I swam across that river, how dare they build a bridge!” The photograph was originally posted on August 25, 2022, by the “Warren Fretwell” Facebook page.
52. August 13, 2022, 6:40 p.m. – “Former US Secretary of Labor Robert Reich is absolutely right on this.” The post includes a reposting of a photograph of former Secretary Reich with the following quotation, attributed to him: “A decent society wouldn’t push millions of students into debt. It would recognize that higher education isn’t mainly a personal investment; it’s a public good.” This photograph was originally posted by the “Steve Sherman” Facebook page on August 12, 2022.

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53. October 15, 2021, time not listed – “Rick Wilson, MSNBC, urging more vigor on January 6 investigation: ‘Unpunished terrorism is just a practice run.’”
54. October 19, 2021, time not listed -”The state that gave us Estes Kefauver and two Al Gores is now trying to make knowledge of black history illegal. Shameless retrogression!” This posting includes a newspaper opinion piece that criticized the passage of an anti-Critical Race Theory bill in Tennessee.
55. November 6, 2021, 3:11 p.m. – “One year ago, our country voted for massive change. We are starting to get it, but more can be done.”
56. November 7, 2021, 11:01 p.m. – “Takeaways from Four Seasons doc: (1) The Trump Presidential campaign was out of money, and the Four Seasons was willing to host the press conference for free; (2) a flood of hate calls and ridicule led to company choice to develop PR campaign.”
57. November 14, 2021, 8:44 p.m. – “6.2% inflation hurts those with salaries or pensions. It encourages workers to unionize & those with pensions to seek gains.”
58. November 15, 2021, 3:14 p.m. – “Latest figures in contested court races of Philly

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judges show little change: Dumas up 18,801 for Commonwealth Court, McLaughlin down for Supreme Court by 28,252. Barring discovery of major error, Dumas & Kevin Brobson to win.” A person responded to this post, stating, “So sad for [McLaughlin] and Lane.”

59. November 17, 2021, 7:36 p.m. – “President Joe Biden eloquently advocates for his Build Back Better Plan.” In addition to [Respondent’s] commentary, he re-posted a post from President Joe Biden, part of which is immediately visible on his Facebook page, as follows: “I ran for president believing it was time to rebuild the backbone of this nation – working people and the middle class. To rebuild the economy from the botto...”
60. November 18, 2021, 11:33 p.m. – “Good night, Kevin McCarthy. Good night moon. No matter how long Kevin talks, we’ll have House passage of Build Back Better soon.”
61. November 19, 2021, 7:52 a.m. – “At 8:00 a.m., US House returns to session, delayed by Kevin McCarthy speech of record length, to pass Build Back Better bill and improve many, many American lives.”
62. November 19, 2021, 3:22 p.m. – “President Joe Biden’s [sic] Build Back Better Bill passed

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the US House this morning. Chuck Schumer says he wants passage by Christmas.”

63. November 20, 2021, 12:04 a.m. – “Joe Biden turns 79 today. Happy Birthday Mr. President! Enjoy your five days a week of workouts!”
64. November 23, 2021, 11:14 a.m. – “David Morrison [another poster] says the JFK assassination was a major transition for his life. In tribute, he posts this excerpt from a speech Kennedy was prepared to give in Dallas had he lived.” [Respondent] then re-posted David Morrison’s November 22, 2021, posting of the undelivered Kennedy speech, part of which is immediately visible on [Respondent’s] page as follows: “Neither the fanatics nor the faint-hearted are needed. And our duty as a Party is not to our Party alone, but to the nation, and, indeed, to all mankind. Our d...”
65. November 23, 2021, 4:00 p.m. – “Lori Dumas now leads for Commonwealth Court by 22,227. Her opponent Drew Compton conceded today. Congratulations to my fellow Philadelphia Common Pleas Judge! Her victory is well-deserved.”
66. November 26, 2021, 9:42 a.m. – “Organizing for progressive change can be very difficult.

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Longtime activist Marc Stier and his commenters discuss the reasons why.” In addition [Respondent’s] commentary, he re-posted a post from Marc Stier, part of which is immediately visible on his page, as follows: “Listening to a call about progressive messaging on taxes. Our problem is not that majority doesn’t agree with us. Our problem is mobilizing people and encou....”

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

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

33. Dr. Merrill opined that Judge Cohen’s Facebook posts constituted partisan political activity. *See* N.T., Trial, 7/24/2023, at 127-129; *see also* Board’s Exhibit 10. Dr. Merrill testified that “partisan political activity” constitutes a subset of the broader term “political communication,” which is the construction, sending, and receiving of politically relevant messages. *Id.*, at 119-

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

34. Dr. Merrill supported her conclusions by citing examples from Board’s Stipulated Exhibit 8, which showed the following: (1) Judge Cohen’s support for former President Barack Obama and Governor Josh Shapiro, both, *see* N.T., Trial, 7/24/2023, at 130-131; *see also* Board’s Stipulated Exhibit 8, at 5-7; (2) Judge Cohen’s support in real time for the federal Build Back Better Bill as it proceeded through debate and voting in the U.S. House of Representatives, *see* N.T., Trial, 7/24/2023, at

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134-135; *see also* Board's Stipulated Exhibit 8, at 59-62; and (3) Judge Cohen's support for policy and social positions favored by the Democratic Party, *see* N.T., Trial, 7/24/2023, at 135; *see also* Board's Stipulated Exhibit 8, at 40, 41, 42, 43; and (4) Judge Cohen's criticism for policy and social positions favored by the Republican Party, such as legislation in states that attempts to restrict access to books that can be in school libraries and anti-critical race theory bills. *See* N.T., Trial, 7/24/2023, at 136; *see also* Board's Stipulated Exhibit 8, at 18, 54.

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

36. As to the nature and reach of Facebook postings on political matters, Dr. Merrill testified that social media has changed who can be a political actor in the United States because anyone with access to social media can share messages that support or criticize legislation or policy *via* social media pages like Facebook, which are political communications, like someone putting a sign in their yard endorsing or criticizing a political candidate. *See* N.T., Trial, 7/24/2023, at 123-124. This is significant because the reach of Facebook is not limited to the persons that a Facebook user calls "friends." *Id.*, at 116-117. For

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example, Judge Cohen is connected to approximately 5,000 people as Facebook “friends.” *See* Board Exhibit 5, N.T., Deposition, 7/19/2022, at 42-43; *see also* N.T., Trial, 7/24/2023, at 117. Dr. Merrill testified that anybody who was Judge Cohen’s Facebook friend and who might like or comment on or share any posts that he had on his personal page would also then cause their friends and connections to be able to see his posts. *Id.* Then, those secondary individuals could, in turn, share that information beyond them to their friends if they liked or commented on Respondent’s posts. *Id.* Due to this expansive audience and the spread of information, social media has altered how political communication takes place between people in America. *Id.*, at 121-122.

37. In his defense, Judge Cohen presented the stipulated testimony of several persons from his community that knew him and would testify that he has a reputation for truthfulness and honesty in his community. Judge Cohen also testified in his own defense. *See* N.T., Trial, 7/24/2023, at 232-239, 240. Judge Cohen admitted making the posts set forth in Board’s Stipulated Exhibit, and, while acknowledging that others make partisan political posts to his Facebook page, he denied making partisan political posts to his page or joining others in doing so. *Id.*, at 253-255.

38. Judge Cohen testified that he did not cease making Facebook posts after speaking with Judge Murphy and President Judge Fox due to his belief in his rights to free expression, *id.*, at 255, and, among other reasons, because he did not believe that his posts were, themselves, political activity. *Id.*, at 256.

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39. Judge Cohen also claimed that he believed that comment 9 to Canon 4, Rule 4.1 of the Code of Judicial Conduct permitted his conduct, in that, according to Respondent, the comment specifically authorizes judges to state their personal views on political matters. *See* N.T., Trial, 7/24/2023, at 256.

40. However, upon cross examination, Judge Cohen acknowledged that his posts to his Facebook page after becoming a judicial officer made him “feel good,” as did the posts others made in reaction to the posts Respondent made on his Facebook page. *Id.*, at 290, 291, 311. The good feelings at Judge Cohen derived from his Facebook posts (and others’ reactions to them) and “positive good” he claimed that he contributed to by posting to foster discussion, *see id.*, 249, was counterposed against the isolation that he felt after he was elected to the bench, which was exemplified by his lack of regular communication with press reporters and his lack of invitations to events. *Id.*, at 249-250.

DISCUSSION

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

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**The Standard for Judicial Internet Postings –
the Reasonable Person Standard**

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

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

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

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

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

The impartiality required of a judge is exemplified by the statue of the Greek goddess Themis (aka Justitia

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in Roman tradition) who, while blindfolded, weighs the merits of the case before her. No favor or disfavor on any external grounds should even be implied by a judge's conduct. Impartiality is required of judges in all respects, not just politically. A Judge is not permitted to be partial for any reason.

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

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

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

The reasonable person standard has been a cornerstone of law in Pennsylvania for well over one hundred years (*Pennsylvania Railroad Co. v. Peters*, 116 Pa. 206, 9 A. 317 (1887) and of English law before that (*Vaughn v. Menlove*, 132 EK 490 (CP1837)). Requiring that a person,

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and in particular a judge, act in a prudent and reasonable manner is not a novel or vague concept in any way.

Rules Principally At Issue In This Case

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

Canon 1, Rule 1.2 – Promoting Confidence in the Judiciary.

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

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

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

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

A judge shall regulate their extrajudicial activities to minimize the risk of conflict with their judicial duties and to comply with all provisions of this Canon. However, a judge

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shall not participate in activities that would reasonably appear to undermine the judge's independence, integrity, and impartiality.

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

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

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

At the outset, it must be noted that there is no distinction between a judge's online conduct and "real world" conduct regarding this Court's application of the Code and the Constitution of this Commonwealth. The propriety of all actions by a judge, whether online or not, and whether "pornographic" or otherwise licentious or not, or whether the conduct constitutes legal conduct for non-judges or not, are considered under the restriction of the Code and the Constitution. *Compare In re Eakin*, 150 A.3d 1042, 1055 (Pa.Ct.Jud.Disc. 2016) (former Pennsylvania Supreme Court justice found in violation of former Canon 2(A) for emails exchanged among his associates privately using government-supplied computer equipment that

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raised the appearance of impropriety) *with In re Shaw*, 192 A.3d 350, 370-71 (Pa.Ct.Jud.Disc. 2018) (sending of salacious text messages and conducting clandestine sexual affair with the girlfriend of a treatment-court defendant constituted violation of Disrepute Clause). Accordingly, without considering any of Judge Cohen's constitutional claims the propriety of the content of his Facebook posts is a matter well within the jurisdiction of this Court. *Eakin*, 150 A.3d at 1057.

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

**The Rules Considered in the Circumstances Here
Perception of Impropriety**

Canon 1, Rule 1.2, Canon 3, Rule 3.1(C), and Rule 3.7(A) each bear a strong relationship to each other logically because they prevent a judge from engaging not only in substantive misconduct, but also in other conduct that creates a *perception* that the judge engaged in misconduct. (Emphasis added); *compare* Canon 1, Rule 1.2 ("A judge shall...avoid impropriety and the appearance of impropriety.") *with* Canon 3, Rule 3.1(C) ("[A] judge shall not. . . participate in [extrajudicial] activities that would reasonably appear to undermine the judge's independence, integrity, or impartiality) *and* Rule 3.7(A) ([A judge

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may engage in avocational activities], if such avocational activities do not detract from the dignity of their office...”).

Further, Canon 1, Rule 1.3 requires judges to avoid conduct that abuses the prestige of the judicial office by involving their own personal or economic interests or those of others. Therefore, as the prestige of the judicial office is intrinsically linked to the public’s perception of the nature of the judicial office, it can also, like the other Canons and Rules noted above, turn on this Court’s view of the public’s perception of proper judicial behavior. Because of their intertwined relationship to the facts of this case and their logical relationship, we will look at Canon 1, Rules 1.2, 1.3, and Canon 3, Rules 3.1(C) and 3.7(A) jointly, beginning with Canon 1, Rule 1.3.

Abuse of Office

Canon 1, Rule 1.3 directs a judge to refrain from abusing the prestige of their judicial office to advance their own personal or economic interests or those of others. Judge Cohen clearly made no attempt to limit access to his Facebook page to a close group of personal friends or to obscure that he is a judge on his Facebook page. *See* Board Pre-Trial Memorandum stipulation 18-19; Respondent Pre-Trial Memorandum stipulation 2; *see also* Board Exhibit 5, N.T. Deposition, 7/19/2022, at 41-42; 73-76. Judge Cohen advertised his judicial status on his Facebook page to his 5,000 Facebook friends and 1,000 Facebook followers, and his page was accessible to all Facebook users. *Id.*

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While it is true that, in the course of the Board's investigation, Judge Cohen removed a formerly posted picture of himself in judicial robes seated at a Philadelphia bench from his Facebook pictures, he has not addressed the other areas of his Facebook page that identified him as a judge. Moreover, Judge Cohen acknowledged at trial that some of the people with whom he interacted with on Facebook addressed him as "judge," *see* N.T., Trial, 7/24/2023, at 247, and it is clear he has identified himself as a judge in several of his Facebook postings. *See, e.g.*, Board's Stipulated Exhibit 8, at 15, 31. Therefore, as there is no doubt that Judge Cohen identified himself as a judge on his Facebook page and has continued to do so, it is also clear that he has infused his Facebook page and postings with the prestige of his office, regardless of his removal of the "robe" picture. *Cf. Eakin*, 150 A.3d at 1057 (factors that link a judge's judicial status to conduct that may have been committed in "off bench" hours, such as the use of government computer equipment for private emails, renders conduct subject to sanction).

Judge Cohen's Posts Set Forth His Personal Political Views

The content of Judge Cohen's Facebook posts state or strongly imply his personal views (and expressions of support or opposition to) regarding a wide range of political policy matters, as well as towards certain political figures elected through partisan elections in the executive and legislative branches of government at the national and state level. *See* N.T., Trial, 7/24/2023, at 127-131; 134-136.

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In addition to setting forth his personal views on these matters, Judge Cohen took his conduct a step further and advocated for the passage of legislation regarding progressively supported public policy legislative initiatives in several postings. Among these were the 2021 Build Back Better Act, *see* Board Stipulated Exhibit 8, at 59-62; Inflation Reduction Act, *see* Board Stipulated Exhibit 8, at 23, and the need for the raising of the minimum wage, *see id.*, at 27; *see also* N.T., Trial, 7/24/2023, 303-305.

Judge Cohen also criticized legislative activity that took place in other states with predominantly Republican legislatures. *See* Board Stipulated Exhibit 8, at 19, 28 (regarding “book banning” legislation); *see also* N.T., Trial, 7/24/2023, at 135-136. Thus, Judge Cohen’s Facebook postings espousing and broadcasting the aforementioned positions are, partisan political activity. *See* N.T., Trial, 7/24/2023, 127-130; *see also* Board’s Exhibit 10.

Judge Cohen testified that he wanted to further discussion with his Facebook posts, which he views as a “positive good,” so as to enable himself to learn as well as offer others the opportunity to learn from his posts. *See id.*, at 249. Judge Cohen’s own Facebook posts and the reaction of others to his posts admittedly made him “feel good.” *Id.*, at 290, 310-311. Further, Judge Cohen acknowledged that when he announced his judgment on an issue in a post it was his intention that his followers on Facebook discuss his judgment and take it into account. *See*, N.T., Trial, 7/24/2023, at 307-308.

Similarly, Judge Cohen acknowledged that at least two present-day politicians he discussed positively in his posts

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have an “interest,” or at least a preference, in maintaining their offices, *i.e.*, President Joe Biden and Governor Josh Shapiro. *Id.*, at 284-285, 306-307. Judge Cohen’s intentions about his Facebook postings and their content must be viewed in concert with his acknowledgement in his “life events” section of his Facebook page that he served previously as both a Democratic state legislator and participant in prior Democratic National Committee party conventions, *see* Board Exhibit 5, N.T. Deposition, 7/19/2022, at 74-76, and his embedded references to his service as a state legislator in his Facebook postings (which included discussion of legislation that he championed as a legislator). *See* Board’s Stipulated Exhibit 8, at 21, 27.

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

As explained by Dr. Merrill, Facebook has become an important venue for politicians campaigning for office because they can share content on social media that might not be accessible otherwise through traditional media outlets. *See*, N.T., Trial, 7/24/2023, at 121-122. Social media has affected political communication in the United States by providing expanded access to information and a much wider audience to the political actor using a social media platform, such as Facebook. *Id.*, at 121-122. Moreover, it is

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clear that public speech and advocacy for policy positions are the traditional means by which political parties and politicians win elections.

Accordingly, Judge Cohen's Facebook postings, made under the judicial authority with which he is cloaked at all times (which is, in fact, restated on his Facebook page), violated Canon 1, Rule 1.3 because they abuse the prestige of his office to advance his own personal and political interests and the personal and political interests of others.

Given the aforementioned facts, it is clear that Judge Cohen's posts violate Canon 1, Rule 1.2. Canon 1, Rule 1.2 requires that a judge act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and to avoid impropriety and the appearance of impropriety. The term "impropriety" is defined in the terminology section of the Code as follows: "Includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's independence, integrity, or impartiality." The term "appearance of impropriety" is defined by Comment 5 to Canon 1, Rule 1.2 as follows:

[The] conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

Judge Cohen's Facebook postings violate Canon 1, Rule 1.2 (1) by failing to promote public confidence in the

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independence and integrity of the judiciary; and (2) by creating the perception that he engaged in conduct that violated the Code.

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

Obviously, one of the most important elements of proper judicial conduct is to remain independent and free of partisan political influence. *See, e.g., Stilp v. Commonwealth*, 588 Pa. 539, 905 A.2d 918, 940 (Pa. 2006), quoting *U.S. v. Will*, 449 U.S. 200, 217-218, 101 S. Ct. 471, 66 L. Ed. 2d 392 (U.S. 1980) (“A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.”). This concept is stated in comment 3 to Canon 4, Rule 4.1, which provides “[p]ublic confidence in the independence and impartiality of the judiciary is eroded if judges...are *perceived* to be subject to political influence.” (emphasis added). The Pennsylvania Supreme Court took great pains in the Code to establish what is *permissible* political activity for judges during their own efforts to be elected or re-elected and what is not – for example, endorsing non-judicial candidates. *See, e.g.,* Canon 4, Rule 4.1(A)(3) and 4.2(B)(3).

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Judge Cohen's Lack of Impartiality

A review of Judge Cohen's postings shows he is partial to the political left on a variety of matters, that he shares his opinions of same with thousands of his Facebook friends and followers, and that he actively and openly supports leftward political figures and legislation that have nothing to do with the advancement of the law or the legal system. Judge Cohen does not display the public face of independence or impartiality expected of a judicial officer.

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

While Judge Cohen's partisan political musings on Facebook and his motivations therefore are in no way morally wrong in themselves, more is expected of one who holds judicial office than what was shown at trial. Judge Cohen's conduct both fails to promote public confidence in and undermines the independence and integrity of the judiciary. Consequently, Judge Cohen's Facebook posts violate Canon 1, Rule 1.2.

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

Judge Cohen claims that he did not hold forth on matters likely to come before him and also argues that because he does not adjudicate the subjects discussed in

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his Facebook posts and because the people mentioned in his posts are not litigants before him, then the Board's charges are without merit. In other words, Judge Cohen claims that his posts do not affect his impartiality or its perception by others. This claim is incorrect.

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

In addition to Judge Cohen's clearly political posts there is evidence that his Facebook postings also create the *perception* that he violated the Code in that the conduct appeared to endorse political candidates in violation of Canon 4, Rule 4.1(A)(3). Judge Cohen's posts regarding present day political figures of the legislative and executive branches of government (who were elected in partisan elections or appointed by persons so elected) are expressions of his judgments of approval or disapproval of their official actions, political philosophies, *see, e.g.*, N.T., Trial, 7/24/2023, at 304, and their personal characteristics, or constituted criticisms or attacks upon their detractors. Thus, the postings fit the simple definition of the term "endorse."

Most of the postings Judge Cohen made about these political figures were about already-elected officials,

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such as President Biden, newly elected candidates, like Governor Josh Shapiro, or were renowned political figures of the past such as Senator Eugene McCarthy not candidates actively running for office or for re-election.

In only one instance did Judge Cohen make a supportive posting about a then-candidate, i.e., former Representative Liz Cheney during her unsuccessful re-election campaign, which was a criticism of her detractors in the media. *See* Board Stipulated Exhibit 8, at 15 (criticizing “hit job” against Liz Cheney, then a candidate for re-election). While a violation of the “candidate endorsement” clause of Canon 4, Rule 4.1(A)(3) would not lie regarding most of Judge Cohen’s posts about partisan political figures, his commentary regarding these partisan political figures would create the *perception* that Judge Cohen was endorsing or opposing their efforts to hold or retain office. Furthermore, as some of those persons, like President Biden, are presently candidates for re-election, and Judge Cohen has not deleted any of the posts he made about these persons previously. *See, e.g.*, N.T., Trial, 7/24/2023, at 297-302, these posts, in fact, create an endorsement of these political figures (and others named in his posts) in perpetuity as they remain on his Facebook post.

**Judge Cohen’s Comments Concerning Paul Pelosi
and Bruce Marks**

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

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Judge Cohen posted two items to Facebook concerning the attack on Paul Pelosi, husband of former Speaker of the House Nancy Pelosi (D-CA), on October 28 and 29, 2022. On October 28, 2022, Judge Cohen posted “David DePape, 42, accused attempted murderer of Paul and Nancy Pelosi, apparently made hateful, bigoted posts against LGBTQ people, Jews, the January 6 Committee, and other right-wing targets. Why am I not surprised?” The following day, Judge Cohen posted “David DePape, captured Pelosi assailant, continues to gain notoriety as more and more of his extremist posts come to light. It is clear that he is a failed and hateful man capable of many awful things.” *See* Board Stipulated Exhibit 8, at 1-2.

As to the Bruce Marks matter, on July 26, 2022, Judge Cohen posted a “news report” that stated “NYT: Former Philadelphians Bruce Marks and Mike Roman were key players in alternate elector scheme. At least the poor records of Philly sports teams did not disqualify them. Marks is stepping up to defend his role, citing Hawaii in 1960.” *See* Board Stipulated Exhibit 8, at 31. This posting led to Bruce Marks (Marks), who is a Facebook friend of Judge Cohen and was a subject of the article, engaging Judge Cohen in a discussion about the article, the January 6 committee, and the propriety of the January 6 congressional inquiry, which led other Facebook friends of Judge Cohen to accuse Marks of criminal and ethical misconduct. *Id.* Judge Cohen did not delete the post, in fact, he engaged in the conversation.

After thanking one of Marks’ accusers (Marc Stier) for “participating in the discussion” accusing Marks of

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criminal and ethical misconduct, Judge Cohen attempted to bow out of the conversation by stating “And, as a judge I am limited in the degree to which I can comment on political actors, attorneys, or judges in court proceedings,” but he did not distance himself from any of the accusations and insults hurled at Marks by his other Facebook friends in the exchange of posts. *Id.* As with the other Facebook posts charged against him, Judge Cohen did not remove the post after the persons accused Marks of criminal and ethical misconduct nor did he distance himself from their accusations.

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

Judges Commenting in Media

The authors of *Judicial Conduct and Ethics, 6th Ed.* (*favorably cited by Judge Cohen*), write the following regarding judges commenting on public legal controversies in other jurisdictions on television:

The problem is not only that a judge’s statements concerning pending cases might influence outcomes in another state, although that possibility cannot be completely disregarded. The greater danger is that a judge’s own work

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will be influenced (or appear to be influenced) by a desire to maintain the status of a televised expert. Will the networks want a tough-as-nails judge, a flamboyant judge, an innovative judge, a weeping and compassionate judge, or perhaps even a poetic judge? What in-court persona might the judge adopt (or appear to adopt) in order to maintain media visibility? No matter; the very concept of judging is distorted once judges actually become performers (as opposed to speakers or educators) for outside audiences. That is the threat to the integrity of the judiciary.

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

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

This is also the case with Judge Cohen, although his commentary comes through different media (Facebook) and takes a different form (typed postings) than televised commentary. Here, whether or not Judge Cohen's conduct meets the technical requirements of a Rule 2.10(A) violation, in the course of the investigation and trial, he admitted relishing being a commentator on Facebook and presenting his views to his Facebook friends and followers to generate discussion, and he testified that "people are generally very happy with [his] Facebook posts," *see* N.T.,

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Trial, 7/24/2023, at 249. Presumably, Attorney Marks and similarly situated persons are not among this number.

One danger here, and a violation of Canon 1, Rule 1.2, comes from the potential that Judge Cohen will want to remain consistent with the perception of the Facebook persona that he adopted and that this desire will affect his judicial decision making, which would invariably lead to a concern in cases touching on the same issues raised in the DePape and Marks cases (or worse, involving Marks as an advocate) that he would be less than impartial. Accordingly, Judge Cohen violated Canon 1, Rule 1.2 by creating the perception that he violated Canon 4, Rule 4.1(A)(3) and Canon 2, Rule 2.10(A).

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

Judge Cohen also violated Canon 3, Rule 3.1(C), and Rule 3.7. Rule 3.1(C) directs judges not to participate in extrajudicial activities that would reasonably appear to undermine the judge's independence, integrity, or impartiality. Judge Cohen's Facebook posts and the content of his page underscore Judge Cohen's behavior as an advocate for the Democratic Party and its constituent partisan political figures. *See supra*, at 28-35. As a matter of course, such conduct lessens confidence in Respondent's independence, integrity, and impartiality. Thus, Judge Cohen's failure to avoid that impropriety constitutes not only a violation of Canon 1, Rule 1.2, but also of Canon 3, Rule 3.1(C). *Id.*

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Canon 3, Rule 3.7(A) permits a judge to write, lecture, teach, and speak on non-legal subjects and engage in the arts, sports, and other leisure activities, if such avocational activities do not detract from the dignity of their office or interfere with the performance of their judicial duties. This Court concluded “dignity” in a judicial context means “the presence of poise and self-respect in one’s deportment to a degree that inspires respect.” *See In re Singletary*, 967 A.2d 1094, 1099 (Pa.Ct.Jud.Disc. 2008).

A judge is required to maintain independence from influence or the appearance of influence by the partisan political branches of government, *see, e.g., Stilp*, 905 A.2d at 940. Any act by a judge which erodes that independence impugns that judge’s dignity as it casts that judge (and their office) into the area of partisan politics. *See, e.g., Williams-Yulee v. Florida Bar*, 575 U.S. 433, 437, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015) (judges are not politicians, though they may reach the bench through the ballot box). The conduct of an ordinary politician stands in stark contrast to that of a judge, whose purpose is to act as a neutral and contemplative arbiter of disputes, without fear or the expectation of favor. In this regard, it is indeed telling that, on two occasions, Judge Cohen averred to his own past legislative achievements in his Facebook posts. *See* Board Stipulated Exhibit 8, at 21, 27. Accordingly, because Respondent’s Facebook postings were about his own partisan political activity, *see* N.T., Trial, 7/24/2023, at 127-130, Judge Cohen violated Canon 3, Rule 3.7(A) by making his Facebook postings.

Judge Cohen’s response to this claim is that because his Facebook posts were “dignified” in the sense of not

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being offensive to the common person, they cannot violate Rule 3.7(A). The measure of “dignity” befitting a judicial officer is judged by the Code and by this Court, *see Singletary*, 967 A.2d at 1099, not by a judge’s own personal standards, whatever they may be, or by the yardstick of public approval or disapproval demonstrated by whatever means. *Cf. In re LeFever*, 7 JD 2020 (magisterial district judge elected by popular vote after engaging in acts of misconduct as a candidate nonetheless found in violation of Rules following election to judicial office).

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

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

Judge Cohen also defends himself by claiming that one lone phrase in Comment 9 to Canon 4, Rule 4.1 of the Code of Judicial Conduct authorized him to state his views on contested political issues and, as such, his Facebook posts were proper and permissible under the Code. This argument is incorrect from both the standpoint of basic precepts of rule construction and from the substantive content of the Code. Comment 9 to Canon 4, Rule 4.1 states the following:

The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of

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

(emphasis added).

First, as this Court recognized in *In re Miller*, 759 A.2d 455, 459 (Pa.Ct.Jud.Disc. 2000), “nothing in a ‘Comment’ can change what is clearly stated in the text of a statute, rule, or canon.” As was observed in *Miller*, to apply Comment 9 to Rule 4.1 to undercut what is actually prohibited in the Canons and Rules, such as engaging in conduct that undermines a judge’s independence, integrity, and impartiality (Canon 1, Rule 1.2) or that abuses the prestige of the judicial office to advance a judge’s personal interests (Canon 1, Rule 1.3), or that constitutes engaging in any political activity on behalf of a political organization or candidate for public office (Canon 4, Rule 4.1(A)(11) (emphasis added) would result in the “concomitant divestiture of any meaning of the words of [Article V, § 17(b)] of the Constitution [which references the Canons adopted by the Supreme Court

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and their governance of judicial conduct].” *Id.*, 759 A.2d at 460 (bracketed language supplied.). If it was our Supreme Court’s intention to craft such an encompassing exclusion as Judge Cohen now advances, it would have said so in the text of the Canons or Rules themselves, not in a comment.

Leaving aside the intricacies of statutory construction, the Rule referenced in Comment 9 is plainly Canon 4, Rule 4.1(A)(12) (prohibiting electoral pledges, promises, or commitments in connection with cases, controversies or issues that are likely to come before the court that are inconsistent with the impartial exercise of adjudicative duties of judicial office), for which Judge Cohen was not charged by the Board.

Practically speaking, this Code provision governs judges and judicial officers who are engaged in an election campaign and who, as a result, benefit from the “window period” permitting certain electoral political conduct by judges that is set forth at Canon 4, Rule 4.2. It is recognized, however, that the terms of the Rule 4.1(A)(12) are broad enough to encompass all judges at all times. For that reason, an essentially identical Code provision for non-campaign conduct exists at Rule 2.10(B) (regarding public comment by sitting judges on pending cases). *See, e.g.*, Canon 4, Rule 4.1, comment at 7, 8.

Comments 7 and 8 to Rule 4.1(A)(12), overlooked by Judge Cohen in his argument, make it clear that the purpose of Rule 4.1(A)(12) is (1) to differentiate the role of a judge from a legislator or executive branch official, even when the judge is subject to public election and

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to narrowly draft restrictions on political campaign activities of judicial candidates (who are non-judges) consistent with the Code's other provisions; and (2) to make applicable to both judges and judicial candidates the prohibition on pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office set forth at Rule 2.10(B). Accordingly, because Judge Cohen was not charged with a violation of Rule 4.1(A)(12) because he did not make a "pledge or promise" to anyone in his Facebook posts, his argument is textually unsupported regarding the present circumstance.

**Additionally, Comment 9 Has Limited Applicability
to Sitting Judges**

Finally, and most importantly, Judge Cohen's argument overlooks the interplay of the provisions of the Code that *prohibit* certain political conduct by sitting judges, *i.e.*, Rule 4.1(A)(3) (prohibition on publicly endorsing or publicly opposing a candidate for any public office) and 4.1(A)(11) (prohibition on engaging in any political activity on behalf of a political organization or candidate for public office except on measures to improve the law, the legal system, or the administration of justice), and those that *permit* certain political conduct during judicial elections which are nonetheless subject to a judge's overarching responsibilities under Canon 1, Rule 1.2 (avoid impropriety and the appearance of impropriety) and under Canon 1, Rule 1.3 (avoid abusing the prestige of his judicial office to advance the interests of others). *See* Canon 4, Rule 4.1 *comment* at 4 (referencing Canon

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1, Rule 1.3); *see also* Canon 4, Rule 4.2(A)(1) (a judicial candidate in a public election ***shall...act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary.***) (emphasis added). Of course, Judge Cohen is charged with violating Canon 1, Rules 1.2 and 1.3, and Canon 4, Rules 4.1(A)(3) and 4.1(A)(11), not Rule 4.1(A)(12).

Construed together, these rules prohibit sitting judges from engaging in most political activity. Even in the limited circumstances when permitted to engage in political activity by the Code, judges (and judicial candidates) must not do anything that would undermine the independence, integrity, and impartiality of the judiciary such as, for example, endorse non-judicial candidates for political office. ***Compare***, Canon 4, Rule 4.1(A)(3) ***with*** Canon 4, Rule 4.2(A)(3).

Here, Judge Cohen's Facebook conduct is not shielded by any of the Rules regarding judicial campaigns because he was not a candidate when he made the Facebook posts in question. Moreover, Judge Cohen's conduct of being a "cheerleader" for partisan political figures who occupy offices in the legislative and executive branches of government would be prohibited by the Code, *even if he was a candidate. Id.* (emphasis added). As such, Judge Cohen's attempt to use the Comment 9 to Rule 4.1, applicable to Rule 4.1(A)(12), as a shield to accusations that he violated other Rules) is inapposite.

*Appendix B***The Endorsement of Candidate Cheney****Canon 4, Rule 4.1(A)(3) and Rule 4.1(A)(11). Political and Campaign Activities of Judges and Judicial Candidates in General.**

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

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

As noted above, former Representative Liz Cheney was a candidate for re-election at the time that Judge Cohen posted his criticism of her detractors. *See* Board Stipulated Exhibit 8, at 15; *see also supra* at note 5. Criticizing a candidate's detractors is, effectively, an endorsement of the candidate, which Respondent himself

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recognizes in his commentary made after the post (“As a judge, I am not permitted to endorse or otherwise back any candidate for anything. But I strongly disbelieve that good works by anyone should subject them to harsh criticism while those who do far fewer good things remain totally ignored.”). *See* Board Stipulated Exhibit 8, at 15. Judge Cohen’s attempt to disclaim this endorsement is a *non-sequitur*.

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

Turning to Canon 4, Rule 4.1(A)(11), it is also clear that Judge Cohen’s Facebook conduct runs afoul of this Rule which prohibits judges from engaging in “any political activity on behalf of a political organization or candidate for public office.” (emphasis added). Given a fair reading, the term “political activity” would include Judge Cohen’s partisan political Facebook postings. *See* N.T., Trial, 7/24/2023, at 127-130; 133-136.

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Social media has, in effect, become the “public square” of the modern age, where political debates and movements find their beginnings and endings. *See* N.T., Trial, 7/24/2023, at 123-124. Indeed, social media has taken an outsized level of importance in political matters in recent years. Obviously, the Democratic Party, the beneficiary of the majority of Judge Cohen’s postings, is a “political organization” under the definition of that term in the Code of Judicial Conduct, even if its constituent political figures that were the subject of Judge Cohen’s posts may not have been “candidates” at the time of his postings. Further, as Dr. Merrill testified, those constituent political figures and the Democratic Party itself benefitted from being the subject of Respondent’s Facebook posts because the body of political science research on the subject demonstrates that such posting can sway people to think a certain way and to engage in action consistent with the posts. *See id.*, at 161-163.

The danger to be avoided by Rule 4.1(A)(11) is judges being seen as spokespeople for political organizations such as a Political Party and, thereby, lending the prestige of their office to the political organization’s interests such that the judiciary’s status as an independent branch of government erodes. *Compare* Canon 4, *comment* 4 (“Paragraphs (A)(2) and A(3) prohibit judges from making speeches on behalf of political organizations or publicly endorsing or opposing candidates for public office, respectively to prevent them from abusing the prestige of judicial office to advance the interests of others.”). Though the language of this comment refers to Rule 4.1(A)(2) and (A)(3), it is equally applicable to the broader prohibition in Rule 4.1(A)(11), which uses

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largely identical operative language as Rule 4.1(A)(3). This is no doubt why the drafters of the Code set forth a “carveout” allowing judges to engage in political activity for the purpose of “measures to improve the law, the legal system, or the administration of justice,” because, in such a case, the judge is not advancing his or the organization’s own interests, but the judicial system’s interests, thus preserving the judiciary’s independence while bettering its operation through policy initiatives.

However, here, Judge Cohen was not acting to “improve the law, the legal system, or the administration of justice.” Instead, he was endorsing the behavior of certain politicians of the Democratic Party, such as President Joe Biden, and supporting federal economic legislation advanced by the Democratic Party. *See* N.T., Trial, 7/24/2023, at 303-305. Judge Cohen’s other posts obviously advocated for or promoted causes and politicians endorsed by the Democratic Party. *Id.*, at 127-130; 133-136. Rule 4.1(A)(11), like Canon 1, Rule 1.3, focuses on the judge’s conduct and not whether the conduct was officially sanctioned by a political organization or any other organization or person. This is as it should be, otherwise, a judge could escape sanction for lending the prestige of their office based on whether or not their “assistance” was requested by the receiving party thereby improperly shifting the focus of the prohibition away from the offending judge’s conduct to something other than the offending judge’s conduct.

Judge Cohen violated Canon 4, Rule 4.1(A)(11) (as well as Canon 1, Rule 1.3) because he consistently posted

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

Derivative Violations**Canon 1, Rule 1.1 Derivative Violations.**

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

Article V, §17(b), Pa. Const.

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

Both Canon 1, Rule 1.1, and Article V, § 17(b) of the Pennsylvania Constitution constitute automatic, derivative violations of the previously discussed violations of the Code by Respondent. Because Judge Cohen violated Canon 1, Rules 1.2 and 1.3, Canon 3, Rules 3.1(C) and 3.7(A), and Canon 4, Rule 4.1(A)(3) and Rule 4.1(A)(11), he has also violated Canon 1, Rule 1.1, and Article V, § 17(b).

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

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

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

The Nature of Respondent’s Challenge and Standard to be Applied

A law (here a series of Canons and Rules) is presumed to be constitutional and may only be found to be unconstitutional if the party challenging it, Judge Cohen, can prove that it “clearly, palpably, and plainly” violates the Constitution. *See Nixon v. Dep’t of Pub. Welfare*, 576 Pa. 385, 839 A.2d 277, 286 (Pa. 2003). In so doing, a court may not substitute its judgment for the body that promulgated the law (or Rule), but rather is limited to examining the connections between the policy adopted and the law. *Id.* This is especially true here, as the Code, its Canons and their concomitant Rules were promulgated by our Supreme Court, the “supreme judicial power” of the Commonwealth which exercises “general supervisory and administrative authority” over all inferior tribunals. *In re Bruno*, 101 A.2d 635, 651 (Pa. 2014).

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Judge Cohen asserts that his Facebook posts were permissible under the First Amendment by expounding upon what they were not, *i.e.*, “[His] posts and comments do not support or recommend any political candidate. His posts do not endorse any political candidate or party. His posts do not discuss matters that would come before his Court. His posts consist of many informed and knowledgeable comments on state, national[,] and international affairs.” *See* Respondent’s omnibus motion, 3/9/2023, at 2, ¶ 1. Therefore, by explaining what his conduct is not, Judge Cohen impliedly concedes that there are circumstances where the Code, as written properly governs the speech and expressive conduct of the Commonwealth’s judges. He argues however that the Board improperly applied the Code to charge him.

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

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

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

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

Judge Cohen does not claim that the Code's prohibitions on certain types of judicial speech or expression are unconstitutional in all respects. Consequently, Judge Cohen's First Amendment/Article I, §7 claim is an "as applied" challenge to the Board's application of the Code in his case. *See, e.g., Commonwealth v. Muhammad*, 2020 PA Super 256, 241 A.3d 1149, 1155 (Pa. Super. 2020) (discussing distinction between a "facial" constitutional challenge, which claims that a law is unconstitutional based on its text alone, unmoored from factual circumstance of a case, and an "as applied" constitutional challenge, which claims that the application of a facially valid law to a particular person under particular circumstances deprives person of a constitutional right) (citations omitted). However, to

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

The Strict Scrutiny Test

It is clear that a prohibition in the Code on certain types of judicial speech and expressive conduct could be considered by this Court to constitute a prohibition on the content of Judge Cohen's speech, which, to the average citizen, would be subject to a "strict scrutiny" constitutional analysis. *See, James v. SEPTA*, 505 Pa. 137, 477 A.2d 1302, 1306 (Pa. 1984). This test requires the government to establish that the challenged law or regulation addresses "a compelling state interest" and that the law is "narrowly tailored to effectuate that interest." *See, Hiller v. Fausey*, 588 Pa. 342, 904 A.2d 875, 885-886 (Pa. 2006). Thus, as it has been remarked, the "strict scrutiny" test leaves few survivors in its wake. *See, City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 455, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002); *see also Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 165, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015) ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus towards the ideas contained' in the regulated speech.").

Importantly, no state court having direct precedential authority over the issue of a sitting judge's speech under the Pennsylvania Code of Judicial Conduct has addressed the issue of judicial speech or expressive conduct by

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applying the strict scrutiny standard, and this Court has not previously expounded its views upon the issue, though prior cases in this Court have touched upon a judge's non-criminal speech or expressive conduct. *See, e.g., In re Eakin*, 150 A.3d at 1055-57 (former Pennsylvania Supreme Court justice found in violation of former Canon 2(A) for emails exchanged among his associates privately using government-supplied computer equipment that raised the appearance of impropriety). In the federal courts having authority over or influence upon this Commonwealth's jurisprudence, a review of the case law demonstrates a somewhat uneven approach to the Code and the First Amendment.

Relevant Cases

The United States Supreme Court has considered the interplay of the Code of Judicial Conduct and the First Amendment on two occasions. First, the Court considered the applicability of Minnesota's version of the former Canon 7 prohibition on a judicial candidate "announc[ing their] views on disputed legal or political issues," and, applying strict scrutiny, found the clause to be unconstitutional as a violation of the First Amendment. *Republican Party of Minnesota v. White*, 536 U.S. 765, 775, 787, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002). In *White*, the parties agreed that strict scrutiny applied. *Id.*, at 774. Conversely, in *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015), the Court, also applying strict scrutiny by citing to *White*, *see id.*, at 443, *upheld* Florida's version of the prohibition on personal solicitation of campaign funds by a judicial

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candidate, which is codified in Pennsylvania at Canon 4, Rule 4.1(A)(7). *See, Williams-Yulee*, 575 U.S. at 457. However, *White* and *Williams-Yulee* involved judicial candidates, *i.e.*, private citizens using the political process to become a judge, not sitting judges, such as Judge Cohen.

Prior to the U.S. Supreme Court’s decision in *White*, the Third Circuit also addressed whether judicial candidates could be barred under prior iterations of the Code from “announcing their views on disputed legal or political issues” and personally soliciting campaign funds. *Stretton v. Disciplinary Bd. Of Supreme Court of Pennsylvania*, 944 F.2d 137 (1991)¹¹, and found, subject to a narrow construction of the “announce” clause by the

1. Interestingly, this decision arose from a federal suit instituted by Attorney Stretton, then a candidate for judge in Chester County, against the Disciplinary Board and the then-extant Judicial Inquiry and Review Board, the Board’s predecessor. *Stretton*, 944 F.2d at 138-139. Attorney Stretton sought an injunction from the federal court against enforcement of Canon 7(B)(1)(c) of the then-extant Pennsylvania Code, which, in pertinent part, then forbade judicial candidates “mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announc[ing their] views on disputed legal or political issues; or misrepresent[ing their] identity, qualifications, present position, or other fact[,]” and Canon 7(B)(2), which prohibited judicial candidates from personally soliciting campaign funds. *Id.* The federal district court enjoined enforcement of the “announce” clause, but it permitted enforcement of the “personal solicitation clause.” *Id.* On review, the Third Circuit reversed the district court as to the enjoinder of the enforcement of the “announce” clause but affirmed as to the decision regarding the “solicitation” clause. *Id.*, at 144, 146. Judge Cohen’s view that he can talk about any issue not currently before him is informed, albeit, wrongly, by *Stretton*.

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then-chief counsel of both the Judicial Inquiry and Review Board (JIRB) and the Disciplinary Board, that the clauses passed constitutional muster and were enforceable. *Id.*, at 144, 146. The precedential or persuasive value of *Stretton* post-**White** is doubtful.

However, post-**White**, the Eastern District of Pennsylvania considered whether the then-extant prohibition on a judicial candidate making “pledges, promises, or commitments of conduct in office other than the faithful and impartial performance of the duties of office,” *see* former Canon 7(B)(1)(c), constituted a violation of the First Amendment. *See, Pennsylvania Family Institute, Inc. v. Celluci*, 521 F.Supp.2d 351, 355 (2007). As was the case in *Stretton*, the then-Board Chief Counsel, attested that the Board construed the provision narrowly, *i.e.*, that it prevented judicial candidates from promising to rule in a particular way on an issue or case once elected, and that narrowing construction saved the Canon from an overbreadth challenge under the First Amendment. *Celluci*, 521 F.Supp at 380-381.

As to the First Amendment’s application to sitting judges, the Third Circuit considered whether a sitting judge in the U.S. Virgin Islands could be criminally punished with contempt for the content of an opinion which criticized a higher tribunal’s order. *See, In re Kendall*, 712 F.3d 814, 826-27, 58 V.I. 718 (2013). Upon analysis, the Third Circuit found that the judge could not be prosecuted with criminal contempt for his speech in the opinion. *Id.*

*Appendix B***Other State's Court Cases**

In other state courts, the question of a judge's speech and expressive content has been examined under the strict scrutiny standard, most pointedly in *In the Matter of Raab*, 100 N.Y.2d 305, 793 N.E. 2d 1287, 763 N.Y.S.2d 213 (N.Y. 2003). In *Raab*, the Court of Appeals of New York considered the First Amendment implications of disciplining a sitting judge for political activity. The New York Commission on Judicial Conduct sanctioned Judge Ira Raab for, *inter alia*, taking part in a Working Families' Party "phone bank" on behalf of a legislative candidate; and attending a Working Families' Party candidate screening meeting and asking questions of prospective candidates for judicial and nonjudicial office. *Id.*, at 1288, 1289. Judge Raab appealed, contending that, as to the charges regarding political conduct, his conduct was protected by the First Amendment, *i.e.*, that the rules in question were not sufficiently narrow in scope to serve a compelling state objective and would not withstand strict scrutiny under *White. Id.*, at 1290.

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

Here, petitioner concedes that New York's interests are compelling but contends that the

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

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

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materials supporting their campaign, and purchasing two tickets to and attending politically sponsored dinners and functions during the window period.

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

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

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

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

Analogous Caselaw

On the other hand, a number of other courts beyond Pennsylvania's borders have applied different, less strident constitutional standards to adjudicate First Amendment challenges brought by sitting judges to charges of Code violations levelled against them in disciplinary proceedings. These standards were first announced by the United States Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) and, thereafter, in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991), though these matters originally involved a non-judicial government employee, *see Pickering*, and a private attorney. *See Gentile*.

In *Pickering*, the plaintiff, a teacher, sued his former school district employer for firing him on the grounds of

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a letter he sent to a newspaper regarding a tax increase that was critical of the school district. After losing in state court, he sought *certiorari* review in the United States Supreme Court. *Id.*, at 564-565. The Supreme Court held that, while public employees have a First Amendment right to speak on matters of “public concern,” the government, as employer, has interests in regulating the speech of its employees that differs significantly from those interests it has in connection with the regulation of the speech of citizens in general. *Id.*, at 568. Thus, balancing the plaintiff’s interest to speak on a matter of public concern, the tax increase, versus the school’s generalized interest in orderly school administration, the Supreme Court reversed. *Id.*, at 574.

In subsequent years, the Court refined the *Pickering* test to identify the factors to be employed in the balancing test. *See, Rankin v. McPherson*, 483 U.S. 378, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987) (“In performing the balancing, the statement will not be considered in a vacuum; the manner, time, and place of the employee’s expression are relevant, as is the context in which the dispute arose. We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker’s duties or interferes with the regular operation of the enterprise.”). *Id.*, at 388. Other cases indicate that the government enjoys much wider latitude to sanction an employee for speaking about matters of *private* concern, *see Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983); and to sanction an

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employee about statements made during the course of their duties, *see, Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006); and has defined what matters of “public concern” actually means – a matter of legitimate news interest, *i.e.*, a subject of general interest and of value and concern to the public at the time. *See, City of San Diego v. Roe*, 543 U.S. 77, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004).

The *Gentile* case, arose from an attorney seeking *certiorari* from the imposition of discipline by the State Bar of Nevada regarding comments he made during a press conference that violated Nevada’s prohibition on lawyers making extrajudicial statements to the press that they know or reasonably should know would have a substantial likelihood of materially prejudicing an adjudicative proceeding. *Id.*, 501 U.S. 1030. Though a majority reversed the imposition of discipline, a second majority of the Court, led by then-Justice Rehnquist, held that, even beyond the courtroom, a lawyer’s right to freedom of speech must be balanced against their role as an instrument of justice and can be regulated under a less-demanding standard than for regulation of the press. *Id.*, at 1074. Thus, the Court held that a state government can regulate lawyers’ speech where the regulation is designed to protect the integrity and fairness of a state’s judicial system, and it imposes only narrow and necessary limitations on lawyer’s speech. *Id.*, at 1075. The Court noted that the regulation at issue was limited to materially prejudicial statements, it was neutral as to points of view, and merely postponed commentary about trials until after trial. *Id.*

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Several states bordering Pennsylvania that have wrestled with the issue, with the exception of New York, *Raab, supra*, have applied some amalgamation of *Pickering* and *Gentile*, leaning more heavily to one or the other, depending on the state. *See, e.g., Matter of Hey*, 192 W. Va. 221, 452 S.E.2d 24, 30-31 (W.Va. 1994) (“Judges are not typical, run-of-the-bureaucracy employees, nor does our oversight of judicial disciplinary proceedings present us with an employment context. Moreover, the State’s interests in regulating judicial conduct are both of a different nature and of a greater weight than those implicated in the usual government employment case. The State has compelling interests in maintaining the integrity, independence, and impartiality of the judicial system – and in maintaining the appearance of the same – that justify unusually stringent restrictions on judicial expression, both on and off the bench. [...]. Despite these differences, the “public employee” free speech cases provide an appropriate analogy in this case because the clash of interests requires us to engage in a similar balancing process.”) (citation and footnote omitted); *see also In re Inquiry of Broadbelt*, 146 N.J. 501, 683 A.2d 543, 551 (N.J. 1996) (discussing various analyses applied by states in proceedings regarding judicial speech and expression, including *Pickering*, and concluding that proper balancing test to be applied in New Jersey was “middle tier” scrutiny, as enunciated in *Gentile* and *In re Hinds*, 90 N.J. 604, 449 A.2d 483 (N.J. 1982), a New Jersey case similar to *Gentile*).

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

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Virginia, presents the most logical route for Pennsylvania courts that analyze the interplay between judicial speech and expression, the Code, and the First Amendment and Article I, Section 7. By recognizing that the state's interest in an impartial judiciary is a core element of other, equally important, constitutional interests to those protected by the First Amendment, such a balancing standard places those constitutional interests in their proper context in a judicial disciplinary proceeding.

As far as *non-political* non-criminal judicial speech and expression, such as the ban on *ex parte* communications, the ban on speaking about pending or impending matters, and the ban on speech that may lessen public confidence in the judiciary, this Court already applies a lesser standard of scrutiny in line with *Pickering* and *Gentile* without ever having expressly been presented with the issue. In *Eakin*, this Court concluded that former Justice Eakin violated former Canon 2(A) (judges should conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary) due to his conduct in sending emails that involved nudity, gender stereotypes, and ethnic stereotypes, all of which, for the average citizen, would likely constitute First Amendment protected communications. *Eakin*, 150 A.2d at 1057. However, former Justice Eakin's emails were obviously meant to be private and did not report on matters of "public concern," and did not have anything to do with his "official duties." Thus, under *Pickering* and its progeny, the government, as employer, had a right to sanction former Justice Eakin for the content of the emails regardless of the First Amendment. *See, e.g., Rankin*,

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483 U.S. at 388. In *Eakin* this Court has already applied a lesser tier of scrutiny to judicial speech and expression than strict scrutiny without pointed consideration of the issue.

With *Eakin* as an overall guide this Court applies a modified *Pickering* standard, as in the case in *Hey*, in recognizing and considering the interests protected by both the First Amendment (and Article I, Section 7) and the Code of Judicial Conduct. Obviously, as *Raab* and *Hey* noted, the First Amendment protects one's individual expression, and the Code ensures that the judicial system is fair and impartial for all litigants, free of the taint of political bias or corruption, or even the appearance of such bias or corruption. *Raab*, 793 N.E. 2d at 1291-1293; *see also Hey*, 192 W. Va. 221, 452 S.E.2d 24, 30-31. These are two compelling, equally weighted interests. *Raab*, 793 N.E. 2d at 1291-1293.

The two tests diverge at the second level of analysis. In a "strict scrutiny" analysis, as in *Raab*, the reviewing court asks whether the challenged statute is "narrowly tailored to effectuate [the government's interest in regulation]." *See, e.g., Hiller v. Fausey, supra*. Examining the similarities between New York's Code of Judicial Conduct and the Pennsylvania Code of Judicial Conduct, one concludes that, like New York's Code, Pennsylvania's Code, taken as a whole, meets the second prong of the test. Like New York's Code in *Raab*, the restrictions on ancillary political activity in Pennsylvania's Code are designed to prevent the perception (and the reality) that an elected judge is beholden to a particular political leader or party after they assume judicial duties, while, at the

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same time, allowing a judge the meaningful opportunity to participate in the election process to advance their own electoral prospects in re-election contests (which ***Raab*** referred to as the “window period”) and races for higher judicial office or to take limited political action to advance the law, the legal system, or the administration of justice. ***Compare the New York Code in Raab***, 793 N.E. 2d at 1288-1293 *with* Pennsylvania Code of Judicial Conduct, Canon 4, Rule 4.1(A) and 4.2. Thus, even applying ***Raab***, the Board’s charges against Respondent would survive Judge Cohen’s constitutional challenge. ***Raab***, 793 N.E. 2d at 1288-1293.

The ***Pickering/Hey*** standard requires, on the other hand, an answer to the following: (1) whether the speech involved a matter of public concern; and (2) whether the speech in question was part of Respondent’s official duties, or not. ***See, e.g., Garcetti***, 547 U.S. at 420-421. If the speech involves a matter of public concern and was not part of the individual’s official duties, then the deciding court weighs the interests of the employee, as a citizen, in commenting upon matters of public concern, and the state, as the employer, in promoting the efficiency of the public services it performs through its employees. ***Pickering***, 391 U.S. at 568. Here, Judge Cohen’s Facebook posts commented on matters of public concern and that, generally did not directly involve his official duties, ***but see infra***, at 34-35 (Judge Cohen’s Facebook posts touched on matters that could present themselves in matters before him).

Assuming that the posts were unmoored enough from Judge Cohen’s official duties as to require analysis of this

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prong an efficient judiciary also requires an *impartial* judiciary and a judiciary *perceived to be impartial*, which is the *sine qua non* of the American judicial system. Otherwise, if judges were allowed to participate in the give and take of partisan politics, recusal petitions would necessarily follow, as would complaints against judges, and the trust vested in the judicial system would collapse. ***Siefert v. Alexander***, 608 F.3d 974, 983-987 (7th Cir. 2010); ***Cf. Rankin***, 483 U.S. at 388 (“We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker’s duties or ***interferes with the regular operation of the enterprise.***”) (emphasis added). Obviously, a judge being seen as beholden to or swayed by or in the control of political interests interferes with the regular operation of the enterprise of the judiciary. A Pennsylvania judge who comments on Facebook in the manner that Respondent has done cannot avoid liability under the Code by couching his posts as efforts to encourage public debate. This was the view taken by the Seventh Circuit Court of Appeals in the matter of ***Siefert v. Alexander, supra***, when construing Wisconsin’s prohibition on sitting judges endorsing any partisan political candidate or platform. So, it is with Judge Cohen’s conduct. His Facebook posts reflect a large degree of sympathy, support, and ideological affinity with members of the left; indeed, his posts identify his past conduct as a partisan political actor in the Pennsylvania House of Representatives. Under these circumstances, a member of the public might reasonably conclude that

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Judge Cohen would be swayed in his judicial conduct by his political views.

**Judge Cohen’s Conduct Fails All of the First
Amendment Tests**

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

**Pennsylvania State Constitution Free Speech
Requirements**

Having resolved the First Amendment analysis issue, this Court notes that Article I, Section 7 of the Pennsylvania Constitution does not require an independent heightened level of analysis. Although the rights of freedom of the press and expression enjoy special status in this Commonwealth, owing in no small part to the experience of William Penn being prosecuted in England for the “crime” of preaching to an unlawful assembly, so too can it be said for a defendant’s (like Penn’s) right to a fair trial by an uncoerced jury, which right Penn also suffered persecution for raising in his own defense. *See, Commonwealth v. Tate*, 495 Pa. 158, 432 A.2d 1382, 1388 (Pa. 1981) (footnote omitted). Thus, the right to speak and express oneself in Pennsylvania and the right to a fair, open, and impartial judiciary, and the right to due process,

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are recognized in our constitution as universal inherent rights. As such, neither one nor the other should be seen as occupying a dominant role in this Commonwealth; if at all possible, these rights are to be balanced one to the other. *See, e.g., S.B.*, 243 A.3d at 112-113 (balancing Article I, Section 7 rights of parents in custody matter where trial court has made a specific finding that the intended speech harms the child's right to psychological and emotional well-being and privacy). For judicial officers, the Code of Judicial Conduct as adopted in Pennsylvania strikes that balance. *See supra*, at 63. Accordingly, there is no need for this Court to apply a different standard for Respondent's Article I, Section 7 claims because the First Amendment analysis of the issue is no more stringent than an Article I, Section 7 analysis. *S.B.*, 243 A.3d at 113.

Judge Cohen's Due Process Claims

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

Judge Cohen states that it is well settled that the Due Process Clause of the 14th Amendment to the United States Constitution is violated if a criminal statute is so vague that it fails to provide reasonable notice to a person who purportedly violates the statute in question. *See, Commonwealth v. Bunting*, 284 Pa. Super. 444, 426 A.2d

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130, 135 (Pa. Super. 1981). Generally, a criminal statute is “void for vagueness” when it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute or is so indefinite that it encourages arbitrary and erratic arrests and convictions. *Id.*, at 135. Conversely, where a statute’s literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the void-for-vagueness doctrine demands a showing of greater specificity than in other matters. *Id.*, at 136.

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

It has been urged that these provisions are hortatory in character and thus have no independent effect. Notwithstanding the aspirational quality of the canons, it should be clear that they describe the type of conduct to which a judicial officer will be required to conform and that a departure will occasion a censure. Nor should one who asserts his or her competency to hold judicial office have difficulty in understanding concepts such as “integrity”, “independence” and “impartiality.” An argument relying upon vagueness will not prevail. The specificity which is being urged is not only unnecessary, but also inappropriate for a code of this nature.

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It should not be necessary for those aspiring to hold the esteemed office of judge to be given specific examples where one's impartiality may be reasonably questioned. The judgment of a judicial officer should be sensitive to such situations. If not, there could be serious question as to the competency of that individual to hold judicial office. This Court has consistently held judicial officers to the standards set forth in the Code since its adoption. These belated complaints as to its clarity and binding effect ring hollow in this setting.

Matter of Cunningham, 517 Pa. 417, 538 A.2d 473, 482 (Pa. 1988) (footnotes omitted).

The Code does not specifically list blogging or posting to Facebook as a source of potential violations. It likewise does not delineate other potential methods of judicial communication that could be the source of violations. Judge Cohen's claim that the Code of Judicial Conduct does not address blogging or social media speech and thus, does not provide adequate notice of a violation, is incorrect. Our Supreme Court has held that "[where] one is on fair notice that his own conduct is within that prohibited by regulation, he cannot attack the regulation simply because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit." See ***Office of Disciplinary Counsel v. Campbell***, 463 Pa. 472, 345 A.2d 616, 621 (Pa. 1975), *cert. denied* 424 U.S. 926, 96 S. Ct. 1139, 47 L. Ed. 2d 336 (1976), *cited by Cunningham*, 538 A.2d at 482, n. 17.

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Here, Judge Cohen was certainly on notice that he could not engage in impermissible political activity (political speech being one such activity) on behalf of candidates or political organizations (Canon 4, Rule 4.1(A)(11)); he was on notice that he could not lend the prestige of his office to further his own personal interests or those of others (Canon 1, Rule 1.3); and he was on notice that he was required to adhere to all of the other Canons and Rules that he violated by his Facebook posts that resulted in the present charges. The fact that his problematic speech took place online versus in person or the media is not relevant for the application of the Code, nor does it render the present charges void for vagueness simply due to the medium of the speech. *See, e.g., Cunningham*, 538 A.2d at 482; *Campbell*, 345 A.2d at 621.

Finally, Judge Cohen has been serving as a judge since 2018, some four years after the present Code of Judicial Conduct took effect. In that time, and up to the time Judge Cohen was charged, this Court resolved several internet or electronic-speech cases which constructively put the entirety of the Commonwealth's judges on notice that their speech in those domains could result in violations of the Code. *See, e.g., In re Eakin*, 150 A.3d 1042 (Pa. Ct.Jud.Disc. 2016); *see, e.g., In re Shaw*, 192 A.3d 350 (Pa.Ct.Jud.Disc. 2018). Judge Cohen's claim of ignorance regarding his responsibilities to adhere to the Code and the Constitution in social media postings is without merit. *See, e.g., In Re Bruno*, 627 Pa. 505, 101 A.3d 635, 684 n. 27 (Pa. 2014) (“[We] note that not only the formal rules and the spirit in which they were drafted, but also each case of judicial wrongdoing and attendant disciplinary and

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supervisory actions puts judges on notice of the potential pitfalls and consequences of judicial wrongdoing.”) Judge Cohen has violated the Code of Judicial Conduct as set forth in the Conclusions of Law.

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

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

CONCLUSIONS OF LAW

1. At Count 1, the Board has established by clear and convincing evidence that Judge Cohen violated Rule 1.1 of the Code of Judicial Conduct by Judge Cohen’s failure to adhere to the requirements of Canon 1, Rule 1.2 and Rule 1.3, Canon 3, Rule 3.1(C), and Rule 3.7(A); and Canon 4, Rule 4.1(A)(3) and Rule 4.1(A)(11).

2. At Count 2, the Board has established by clear and convincing evidence that Judge Cohen violated Canon 1, Rule 1.2, in that his Facebook posts undermined public confidence in the independence and impartiality of the judiciary and caused the appearance of impropriety by

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causing the perception that Judge Cohen violated the Code.

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

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

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

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

7. At Count 7, the Board has established by clear and convincing evidence that Judge Cohen violated Canon 4,

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Rule 4.1(A)(11) by engaging in political activity favoring a political organization, namely, the Democratic Party, by making posts to Facebook that constituted partisan political activity on behalf of the Democratic Party.

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

The parties may file exceptions within 10 days.