

No. 25-1215

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Pennsylvania courts violated the First Amendment by sanctioning a judge for engaging in partisan political activity and other violations of the Pennsylvania Code of Judicial Conduct on a Facebook page that advertised his status as a judge and featured a picture of him in his judicial robe.

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INTRODUCTION

Petitioner Mark B. Cohen engaged in partisan political activity on a Facebook page that advertised his status as a sitting judge and featured a picture of him sitting behind the bench in his judicial robe. Among other things, Judge Cohen implicitly endorsed a congressional candidate, championed Democratic politicians and legislative initiatives, attacked Republicans, and commented on matters that could come before other courts. The Pennsylvania Court of Judicial Discipline unanimously found that those posts violated the Pennsylvania Code of Judicial Conduct, and the Supreme Court of Pennsylvania unanimously affirmed. There is no reason for this Court to review that straightforward application of familiar rules that judges around the country have followed for decades.

Judge Cohen asserts that the Pennsylvania Supreme Court departed from the decisions of a few other courts by analyzing his First Amendment challenge under *Pickering v. Board of Education*, 391 U.S. 563 (1968), rather than strict scrutiny. But Judge Cohen exaggerates the extent of any disagreement. And he does not cite any decision, by any court, holding that the First Amendment compels states to allow their judges to engage in the sort of partisan activity at issue here—much less to imbue that activity with the prestige of their judicial office.

Even if the methodological question presented in the petition warranted review, this idiosyncratic case would not be an appropriate vehicle for reviewing it. Judge Cohen relies heavily on his status as an elected official, but unlike most elected judges he was legally barred from running again. This case also involved varied and pervasive violations of multiple provisions

of the Code, which would complicate any First Amendment analysis. And as the Court of Judicial Discipline has already held, Judge Cohen’s challenge would fail even under strict scrutiny.

Finally, although the question is academic here, the Pennsylvania Supreme Court correctly rejected strict scrutiny in favor of the *Pickering* test that governs First Amendment claims by other public employees. That balancing test provides substantial protection against unnecessary restrictions on speech. *See Garcetti v. Ceballos*, 547 U.S. 410, 417-18 (2006). But it also recognizes that, like any employer, the government must be able to regulate speech that would interfere with a public official’s duties—and thus that when citizens choose to “enter[] government service,” they “by necessity must accept certain limitations on [their] freedom.” *Id.* at 418.

Judge Cohen emphasizes that judges are not ordinary employees. True enough. But if anything, a state has a stronger interest in the integrity of its judiciary than in the efficiency of its bureaucracy. And like other public servants, judges voluntarily accept the restrictions that come with their offices. Judge Cohen also notes that this Court applied strict scrutiny in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), and *Williams-Yulee v. Florida Bar*, 575 U.S. 433 (2015). But those cases were about limits on speech by *candidates* for judicial office, and the Court’s decisions were explicitly grounded in “the special context of elections.” Pet. App. 34a. *White* and *Williams-Yulee* thus provide no reason to doubt that *Pickering* governs “restrictions on speech by a sitting judge made outside the context of a campaign”—which is the only kind of speech at issue here. *Id.* 35a

STATEMENT OF THE CASE

1. Like their colleagues in every other state and the federal system, Pennsylvania judges are bound by a code of conduct based on the American Bar Association’s Model Code of Judicial Conduct. *See* Charles Gardner Geyh et al., *Judicial Conduct and Ethics* § 1.03 (6th ed. 2020). Pennsylvania’s Code is specifically authorized by the Commonwealth’s Constitution and was adopted by its Supreme Court. Pa. Const. art. V, § 17(b). The preamble explains that the Code reflects Pennsylvania’s judgment that “[a]n independent, fair, honorable and impartial judiciary is indispensable to our system of justice.”¹

This case involves six provisions of the Code. Rule 1.2 provides that “[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.” Rule 1.3 provides that “[a] judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others.” Rule 3.1(C) prohibits “activities that would reasonably appear to undermine [a] judge’s independence, integrity, or impartiality.” Rule 3.7(A) prohibits judges from engaging in extrajudicial activities that “detract from the dignity of their office or interfere with the performance of their judicial duties.” Rule 4.1(A)(3) provides that a judge may not “publicly endorse or publicly oppose a candidate for any public office.” And Rule 4.1(A)(11) generally forbids “political activity on behalf of a political organization or candidate for public office.”

¹ The full text of the Pennsylvania Code is available at <https://judicialconductboardofpa.org/code-of-judicial-conduct>.

2. In 2018, Judge Cohen was elected to the Philadelphia Court of Common Pleas. Pet. App. 3a. Before becoming a judge, he had served in the state legislature for 42 years. *Id.* 61a. After taking the bench, Judge Cohen “continued to post regularly” on a Facebook page he had created while he was a legislator and a leader in the Democratic Party. *Id.* 3a. The page “was publicly accessible,” and Judge Cohen had “approximately 5,000 Facebook friends and 1,000 followers.” *Id.* The page identified him “as a judge assigned to the Family Division of the Philadelphia Court of Common Pleas” and featured a picture of him “in his judicial robes behind the bench.” *Id.*

In 2021, the Administrative Judge for the Family Division received a complaint that “one of Judge Cohen’s Facebook posts was racist.” Pet. App. 3a. That complaint “proved to be unfounded,” but the Administrative Judge “became concerned about some of Judge Cohen’s other Facebook posts” because they appeared to constitute improper partisan activity. *Id.* The Administrative Judge and the President Judge of the Court of Common Pleas met with Judge Cohen to urge him to remove the posts, but he was “not receptive to their concerns.” *Id.* 4a. In a “heated argument,” Judge Cohen also rebuffed the suggestion that he self-report to the Judicial Conduct Board. *Id.* 64a.

“When it became apparent that Judge Cohen was not going to self-report,” the Administrative Judge reported him to the Board. Pet. App. 4a. The Board reviewed Judge Cohen’s Facebook posts and found a pattern of partisan activity. “Judge Cohen advocated for legislation, such as the Build Back Better Bill that was then being promoted by the Democratic Party, cheered on Democratic politicians, impliedly endorsed

a candidate for congressional office, touted his own legislative achievements as a Democrat, and criticized the policies of predominantly Republican legislatures.” *Id.* 48a-49a (footnotes omitted); *see id.* 5a-10a (collecting examples). He also “continued to post political content” during the Board’s investigation. *Id.* 4a.

3. The Board filed charges alleging that Judge Cohen’s Facebook posts violated the six Code provisions quoted above—Rules 1.2, 1.3, 3.1(C), 3.7(A), 4.1(A)(3), and 4.1(A)(11)—as well as Rule 1.1 and the Pennsylvania Constitution, which require judges to adhere to the Code. Pet. App. 5a. The case proceeded to a trial before a five-judge panel of the Court of Judicial Discipline, which unanimously held that the Board had proved the charged violations by clear and convincing evidence. *Id.* 59a-152a.

The court explained that even after removing the picture of himself in his judicial robe, Judge Cohen had “infused his Facebook page and postings with the prestige of his office” by, among other things, using his official title. Pet. App. 104a. The court therefore found that Judge Cohen violated Rule 1.3 by “abus[ing] the prestige of his office to advance his own personal and political interests and the personal and political interests of others,” including the Democratic Party and the political figures he supported. *Id.* 107a. The court also found that Judge Cohen violated Rules 1.2, 3.1(C), and 3.7(A) because the “context,” “volume,” and “tone” of his partisan posts “undermine[d] the appearance of impartiality required of the judiciary.” *Id.* 99a; *see id.* 104a-13a. For similar reasons, the court found that Judge Cohen violated Rule 4.1(A)(11) by acting as a “cheerleader” for the Democratic Party. *Id.* 121a (citation omitted); *see id.* 123a-26a.

The court also found violations based on specific posts. It concluded that Judge Cohen violated Rule 1.2 by posting about the assault on then-Speaker Nancy Pelosi's husband "[w]ithout regard for the fact that it would be a future court case." Pet. App. 111a-12a. For similar reasons, the court found that he violated Rule 1.2 by posting about the "alternate elector scheme" in the wake of the 2020 election and by participating in an exchange in which commenters accused one of his Facebook friends of "criminal and ethical misconduct." *Id.* 112a. And the court found that Judge Cohen violated Rule 4.1(A)(3)'s bar on endorsing political candidates by impliedly endorsing Liz Cheney, who was then running for Congress. *Id.* 122a-23a.

Finally, the court rejected Judge Cohen's First Amendment challenge to the relevant rules. Pet. App. 127a-45a. The court stated that *Pickering* balancing was the "most logical" standard for evaluating such a challenge. *Id.* 141a. But it added that Judge Cohen's challenge would "flunk all the First Amendment tests," including strict scrutiny. *Id.* 145a. The court explained that Pennsylvania has a compelling interest in safeguarding the actual and perceived impartiality of its judiciary. *Id.* 142a. And the court reasoned that prohibiting the sort of partisan activity at issue here is narrowly tailored to serve that interest because 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." *Id.* 145a.

4. In October 2024, the Court of Judicial Discipline issued a sanctions order suspending Judge Cohen without pay for the three months remaining

before his mandatory retirement on December 31, 2024. Sanctions Order 3. In explaining its choice of sanction, the court stated that this case was “exceptional” in that Judge Cohen had “posted dozens of political posts over the warnings of his supervisory judge and others”—and had continued to do so even after the court held that he was violating Code. *Id.* The court noted that “no other case in history of the Court of Judicial Discipline has involved such defiance.” *Id.*²

5. The Supreme Court of Pennsylvania unanimously affirmed. Pet. App. 1a-58a.

a. The court first held that Judge Cohen’s challenge is governed by the *Pickering* test that applies to First Amendment claims by other public servants. Pet. App. 25a-47a. The court recognized that “judges are not typical, run-of-the-bureaucracy employees.” *Id.* 43a (brackets and citation omitted). But it explained that, if anything, “the State’s interests in regulating judicial conduct are of a greater weight than those implicated in the usual government employment case.” *Id.* (citation and ellipsis omitted). And “judges, unlike the average government employee, are bound by due process, which heightens the importance of a judge being cautious in his speech.” *Id.* 44a-45a.

The court rejected Judge Cohen’s attempt to invoke *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), which applied strict scrutiny to a restriction on speech by candidates for judicial office. The court explained that “*White* did not address speech restrictions on sitting judges; it spoke only to the special context of elections.” Pet. App. 32a-33a.

² The court’s sanctions order is not reproduced in the petition appendix, but is available at <https://perma.cc/8LA7-5PY9>.

“Here, Judge Cohen was not campaigning for retention at the time he wrote his social media posts.” *Id.* 42a. And he would *never* campaign again “because Pennsylvania law required him to retire at the age of seventy-five, before his ten-year term in office expired.” *Id.* 43a; *see* Pa. Const. art. V, § 16(b) (judges “shall be retired on the last day of the calendar year in which they attain the age of 75 years”). As a result, “*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.” Pet. App. 43a.

b. Under *Pickering*, if a 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.” Pet. App. 43a. Here, the court emphasized that Judge Cohen had engaged in partisan activity “on a page identifying himself—both in photo and text—as a judge.” *Id.* 50a. “When viewed in that light,” the court continued, the *Pickering* balancing is “easy”: Pennsylvania’s interest in “the independence, integrity, and impartiality of the judiciary” far outweighs “Judge Cohen’s interest in continuing to act as a spokesperson for the Democratic Party after he took the bench.” *Id.* 50a-51a.

Finally, the court rejected Judge Cohen’s assertion that prohibiting the sort of conduct at issue here would mean that judges “can never comment on any matter of importance.” Pet. App. 52a (citation omitted). The court emphasized that Judge Cohen violated the Code not merely because he spoke about politically salient issues, but because “he posted so regularly and one-sidedly that he appeared to be ‘an advocate for the Democratic Party.’” *Id.* 48a (citation omitted).

c. Justice Wecht concurred, emphasizing that “[a] person who chooses to become a judge” also chooses to accept some limits on his speech. Pet. App. 55a-56a.

REASONS FOR DENYING THE WRIT

I. This case does not implicate any conflict warranting this Court’s review.

Judge Cohen asserts that lower courts disagree about the standard governing First Amendment challenges to restrictions on speech by sitting judges and that the purported conflict urgently requires this Court’s attention. But he exaggerates both the extent of any disagreement and the need for this Court’s review. And he does not cite any decision, by any court, suggesting that a sitting judge has a First Amendment right to engage in the sort of partisan cheerleading at issue here.

1. Judge Cohen asserts that the decision below conflicts with decisions in Maine, Wyoming, Arkansas, Ohio, and the Fifth Circuit purportedly holding that “strict scrutiny is the proper analysis for restrictions on sitting judges’ speech.” Pet. 15. But those decisions involved different conduct subject to different rules. Most of them did not even consider *Pickering v. Board of Education*, 391 U.S. 563 (1968). And none of them suggest that states must allow their judges to lend the prestige of their offices to partisan advocacy.

Maine. The Maine Supreme Court’s decision in *In re Dunleavy*, 838 A.2d 338 (2003), involved a probate judge who “solicit[ed] contributions in support of his candidacy” for state senate. *Id.* at 342. The judge was charged with violating a rule prohibiting judges from soliciting funds for political campaigns. *Id.* Although the court upheld the rule, it applied strict scrutiny

because the rule “burdens a sitting judge’s ability to talk to potential political contributors and endorsers.” *Id.* at 350-51. That election-specific holding has no bearing restrictions that apply outside “the special context of elections.” Pet. App. 34a.

Wyoming. The Wyoming Supreme Court’s decision in *In re Neely*, 390 P.3d 728 (2017), is likewise far afield. There, a judge violated the applicable code of conduct by declaring that she would not perform same-sex weddings. *Id.* at 732-35. As in *Dunleavy*, the court upheld the relevant rules under strict scrutiny. *Id.* at 735-41. But it applied that standard because the judge “raised both free exercise of religion and freedom of speech claims.” *Id.* at 736; *see Employment Div. v. Smith*, 494 U.S. 872, 881 (1990) (discussing such “hybrid” claims). The court thus did not address *Pickering* or decide the standard that would govern a pure speech claim like the one at issue here.

Arkansas and Ohio. The decisions from Arkansas and Ohio both invalidated rules prohibiting judges from testifying before legislative bodies. *See Griffen v. Arkansas Judicial Discipline Comm’n*, 130 S.W.3d 524, 535-36 (Ark. 2003); *Disciplinary Counsel v. Grendell*, 2025 WL 3247152, at *4-12 (Ohio Nov. 21, 2025). Neither decision even mentioned *Pickering*, much less explained why it did not apply—indeed, it appears that the issue simply was not litigated. *See Griffen*, 130 S.W.3d at 536 (noting that the parties “agree[d] that strict scrutiny is the proper analysis”). And neither decision involved the sort of abuse of the prestige of the judicial office at issue here. *See*

Grendell, 2025 WL 3247152, at *3 (finding no violation of the rule against such abuse).³

Fifth Circuit. Finally, in *Jenevein v. Willing*, 493 F.3d 551 (2007), a panel of the Fifth Circuit held that a judge could not be disciplined merely for publicly responding to accusations of misconduct. *Id.* at 559-60. With a single paragraph of discussion, the panel rejected *Pickering* in favor of strict scrutiny. *Id.* at 557-58. But in *Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990), a prior panel had already held that *Pickering* governs restrictions on “the speech of elected judges.” *Id.* at 212 (emphasis omitted). In the Fifth Circuit, “the earlier panel decision controls” in the event of such a conflict. *Nivelo Cardenas v. Garland*, 70 F.4th 232, 242 n.7 (5th Cir. 2023). A later panel cannot depart from an earlier panel’s holding unless an intervening change in law “unequivocally direct[s]” a different result. *Bravo v. Dallas Indep. Sch. Dist.*, 177 F.4th 604, 606-07 (5th Cir. 2026) (citation omitted). If the issue arose again, a court in the Fifth Circuit would thus be bound to follow *Scott*, not *Jenevein*.

In any event, *Jenevein* itself makes clear that the Fifth Circuit would uphold the sanction at issue here.

³ Although the petition does not cite it, a subsequent decision by the Ohio Supreme Court relied on *Grendell* to sustain a First Amendment challenge by a judge who was sanctioned for endorsing his son’s candidacy for office on Facebook. *Disciplinary Counsel v. Rudduck*, 2026 WL 926911, at *1 (Ohio Apr. 2, 2026). But again, *Rudduck* did not involve a judge’s abuse of “the prestige of his judicial office.” *Id.* at *14. And as in *Grendell*, the court did not even mention *Pickering*—perhaps because it raised and decided the First Amendment issue “without any input from, or notice to, the parties.” *Id.* at *16 (Fischer, J., dissenting).

The court held that the censure order in *Jenevein* “survive[d] strict scrutiny to the extent that it [wa]s directed at Judge Jenevein’s use of the trappings of judicial office to boost his message,” including holding a press conference in a courtroom “while wearing his judicial robe.” 493 F.3d at 560. The court reasoned that a state has “a compelling interest in preserving the integrity of the courtroom” and “judicial use of the robe.” *Id.* As the Pennsylvania Supreme Court emphasized, this case involves the same compelling interest in preventing a judge from abusing the trappings of his office. Pet. App. 50a-51a.⁴

2. Judge Cohen acknowledges that the Pennsylvania Supreme Court joined the Seventh Circuit and several state courts of last resort in holding that regulations on a sitting judge’s non-campaign speech are subject to *Pickering* balancing. Pet. 18-21. But he briefly asserts that West Virginia and New Jersey apply different tests that lie “in between *Pickering* and strict scrutiny.” Pet. 21. That is incorrect.

In fact, the West Virginia Supreme Court explicitly grounded its approach in *Pickering*, holding that

⁴ Judge Cohen notes in passing that the Washington Supreme Court applied strict scrutiny in *In re Sanders*, 955 P.2d 369 (1998). Pet. 15 n.15. But he appears to acknowledge that *Sanders* could not establish any conflict warranting this Court’s review because it was decided “before *White*”—and, for that matter, before *Williams-Yulee* and some of this Court’s key decisions developing the *Pickering* test. *Id.*; see *Lane v. Franks*, 573 U.S. 228 (2014); *Garcetti v. Ceballos*, 547 U.S. 410 (2006). In any event, *Sanders* did not discuss *Pickering* and involved speech closely connected to a campaign: Immediately after being sworn in, a newly elected judge “briefly appeared] at a rally to thank supporters and to express a belief in the sanctity of human life.” 955 P.2d at 377.

“the public employee-free speech cases provide an appropriate analogy” and adopting “a similar balancing process.” *In re Hey*, 452 S.E.2d 24, 30 (1994). The New Jersey Supreme Court has not formally adopted *Pickering*, but it has applied *Pickering*-style reasoning to uphold rules like those at issue here. The court explained that the similar restrictions on a judge’s speech are “no greater than necessary” to preserve the “integrity of the judiciary.” *In re Mathesius*, 910 A.2d 594, 611 (N.J. 2006) (citation omitted). And the court emphasized that, “by his own choice,” a judge accepts restrictions that would “otherwise abridge a private person’s free speech rights.” *Id.* Judge Cohen provides no reason to think that the balancing tests adopted by West Virginia and New Jersey would produce different results than *Pickering*.

3. Despite the absence of any developed split, Judge Cohen insists that this Court’s intervention is urgently needed because the decision below subjects judges to novel requirements. Pet. 25. Experience shows otherwise.

In fact, as the Court of Judicial Discipline noted, disciplinary authorities “have, on many occasions, considered social media posts by judges on controversial or political matters, with near unanimous disapproval.” Pet. App. 97a (citations omitted). A compilation prepared for the National Center for State Courts found many examples from just the last few years, including decisions and opinions imposing discipline for or warning judges against:

- “posting tweets, re-tweeting content, and liking tweets by others that expressed partisan viewpoints on controversial issues” (California),

- “us[ing] social media ‘to express support for or to protest current political issues’” (Colorado),
- “posts, comments, or reactions that involve pending cases” or “political activity” (Colorado),
- “posts that amounted to statements of public support for certain political positions” (Georgia),
- “posts on [a] Facebook account that expressed views on political candidates” and “political figures” (Massachusetts),
- “publicly endorses[ing] a candidate for non-judicial office” (Michigan),
- “endorsing or opposing candidates for public office on [a] Facebook page” (Minnesota),
- “publicly endorsing 2 partisan candidates for non-judicial offices on [a] personal Facebook page” (Montana),
- “publicly endorses[ing] political candidates and ma[king] public political statements on a social media website” (New Mexico),
- “comments on Facebook criticizing public officials and a state gun regulation” (New York), and
- “sharing partisan posts on Facebook on issues such as the credibility of certain federal agencies” and “the Democratic party platform” (Tennessee).

Cynthia Gray, *Social Media and Judicial Ethics Update* 17-24 (Jan. 2024), <https://perma.cc/8HVK-W3ER> (brackets and citations omitted).

Although those prohibitions are routinely enforced, it appears that judges seldom try to argue that such conduct is protected by the First Amendment.

Indeed, although Judge Cohen asserts that the constitutional question presented arises “frequently” (Pet. 24), the petition relies primarily on decades-old decisions—none of which addressed the sort of partisan activity at issue here. *See* Pet. 13-22.

For similar reasons, Judge Cohen goes badly astray in asserting that the decision below creates some sort of novel “in terrorem effect,” much less an “unconscionable” one. Pet. 24, 32. The Pennsylvania Supreme Court broke no new ground by upholding established rules that judges around the country have followed for decades—and that disciplinary bodies have routinely and uncontroversially enforced. It is Judge Cohen whose position is wholly novel: He does not cite any authority suggesting that he had a First Amendment right to “continu[e] to act as a spokesperson for the Democratic Party after he took the bench”—much less to do so on a Facebook page giving that partisan activity the imprimatur of his judicial office “both in photo and text.” Pet. App. 50a.

II. This case would not be an appropriate vehicle for considering the question presented.

Even if this Court were inclined to consider the standard governing First Amendment challenges to restrictions on speech by sitting judges, this idiosyncratic case would not be an appropriate vehicle in which to do it.

1. To begin with, Judge Cohen’s status was unusual: Although he had been elected to his position, he was legally barred from running again because of Pennsylvania’s mandatory retirement age. Pet. App. 43a. The Pennsylvania Supreme Court emphasized that uncommon circumstance, which meant that “the

electorate’s need for an open debate about the qualifications of judicial candidates plays no role in this case.” *Id.* In contrast, some courts that have applied strict scrutiny have stressed the importance of an “elected official’s” speech to the “constituency” that will decide whether to retain him at the next election. *Jenevein*, 493 F.3d at 558. This case would provide no occasion for considering that argument or otherwise addressing the more typical situation of an elected judge who may run again.

2. In addition, the unusually extensive and varied conduct at issue here would complicate this Court’s First Amendment analysis. Each of the Court’s past decisions addressing a First Amendment challenge to a judicial code of conduct considered a single, discrete rule. In *Williams-Yulee v. Florida Bar*, 575 U.S. 433 (2015), the court upheld a rule prohibiting judicial candidates from personally soliciting campaign funds. *Id.* at 437-38. And in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the Court struck down a rule barring candidates from “announcing their views on disputed legal and political issues.” *Id.* at 768. Here, in contrast, Judge Cohen was sanctioned for violating six different rules of conduct. *See supra* at 5. And the underlying conduct was likewise extensive and varied, including not just general partisan activity but also the endorsement of a specific candidate, commentary on potential cases, and improper use of his robe and title. *See supra* at 4-6. The Court might conclude that different rules governing different aspects of that activity call for different First Amendment analysis—but because of Judge Cohen’s litigation choices, those potential differences are not explored in either the petition or the decision below.

3. Finally, the choice of standards will not affect the outcome of this case because Judge Cohen’s as-applied First Amendment challenge would fail even under strict scrutiny—as the Court of Judicial Discipline has already held. Pet. App. 145a. Most obviously, even courts applying strict scrutiny have recognized that states may bar judges from using the “judicial robe” to lend the prestige of their office to their extra-judicial speech. *Jenevein*, 493 F.3d at 560. That is exactly what Pennsylvania did here. Pet. App. 50a-51a. Tellingly, the petition does not even acknowledge that critical aspect of the decision below.

Even setting aside Judge Cohen’s abuse of his robe and title, the Court of Judicial Discipline found, as a factual matter, that “[a] reasonable person holding views opposed to those expressed in Judge Cohen’s posts would be far from confident of receiving fair treatment” in his courtroom. Pet. App. 145a. Properly framed, therefore, Judge Cohen’s as-applied challenge asks whether a state can prohibit a judge from engaging in activities that give rise to a reasonable perception that the judge cannot be fair to anyone with views held by half the population. Barring such activities is the least restrictive means of protecting Pennsylvania’s compelling interest in “maintaining the public’s confidence in an impartial judiciary.” *Williams-Yulee*, 575 U.S. at 445 (citation omitted).

Judge Cohen does not seriously argue otherwise. Instead, he attacks a caricature of the decision below, suggesting that he was sanctioned “simply because his posts arguably revealed his political affiliation.” Pet. 29. In fact, the Pennsylvania Supreme Court emphasized that the problem was *not* merely “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.’” Pet. App. 48a (citation omitted). Judge Cohen also faults the decision below for failing “to construe the text” of the relevant “provisions of the Code.” Pet. 29. But that is because Judge Cohen failed to raise the issue: His briefing focused almost exclusively on his First Amendment argument, Cohen Pa. S. Ct. Br. 48-78, and included only a conclusory challenge to the Court of Judicial Discipline’s detailed findings on the various ways his posts violated the Code, *id.* 78-80.

Judge Cohen also asserts that the sanction imposed here—a three-month suspension—was not “the least restrictive means” of protecting the Commonwealth’s interests because a “public censure” would have sufficed. Pet. 30-31. That misunderstands the constitutional analysis. Strict scrutiny is a standard for judging the *substance* of a rule governing speech—not a basis for second-guessing the choice of sanction after a violation is established in a particular case. *Cf. Williams-Yulee*, 575 U.S. at 444-57. In any event, Judge Cohen’s suspension appropriately reflected his “exceptional” defiance of both “his supervisory judge” and the Court of Judicial Discipline itself, which was unlike any “other case in the history” of the court. Sanctions Order 3.⁵

⁵ The petition repeatedly invokes Judge Cohen’s loss of his pension. Pet. 1, 4, 10, 13, 30, 31. But that was not a sanction imposed by the Court of Judicial Discipline or addressed by the decisions below. Instead, it was a decision made by a separate agency, the State Employee Retirement System, pursuant to Pennsylvania law. *See* Pa. Const. art. V, § 16(b); 42 Pa. C.S. § 3252(a). Judge Cohen has appealed that decision to the State

III. The Pennsylvania Supreme Court correctly applied *Pickering* rather than strict scrutiny.

Although the result would have been the same under any standard, the Pennsylvania Supreme Court correctly held that Judge Cohen’s First Amendment challenge was subject to *Pickering* balancing rather than strict scrutiny.

1. The *Pickering* test reflects the need to balance two competing interests. On the one hand, “public employees do not surrender all their First Amendment rights by reason of their employment.” *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). On the other hand, “[g]overnment employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services.” *Id.* at 418. Accordingly, “[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.” *Id.*

Under *Pickering*, the threshold question is “whether the employee spoke as a citizen on a matter of public concern.” *Lane v. Franks*, 573 U.S. 228, 237 (2014) (citation omitted). “[W]hen public employees make statements pursuant to their official duties,” they are “not speaking as citizens” and the First Amendment “does not insulate their communications from employer discipline.” *Id.* (citation omitted). Similarly, the First Amendment generally does not restrict a public employer’s ability to regulate speech

Employees’ Retirement Board, and if he is dissatisfied with the Board’s decision he may seek review in the Pennsylvania courts. See, e.g., *Berkhimer v. State Employees’ Ret. Bd.*, 60 A.3d 873, 878 (Pa. Commw. Ct. 2013).

on “matters only of personal interest.” *Connick v. Myers*, 461 U.S. 138, 147 (1983).

If, however, an employee speaks as a citizen on a matter of public concern, this Court applies a balancing test that asks “whether the government had ‘an adequate justification for treating the employee differently from any other member of the public’ based on the government’s needs as an employer.” *Lane*, 573 U.S. at 242 (citation omitted). The Court has often held that the balance tips in favor of employee speech. *See, e.g., id.*; *Rankin v. McPherson*, 483 U.S. 378, 388-92 (1987); *Pickering*, 391 U.S. at 574-75. But it has also upheld restrictions on speech that would threaten “the government’s interest in the effective and efficient fulfillment of its responsibilities to the public.” *Connick*, 461 U.S. at 150.

As particularly relevant here, this Court has recognized that the government has a vital interest in ensuring that employees “enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof.” *U.S. Civ. Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 565 (1973) (*Letter Carriers*). And the Court has held that this interest in avoiding the appearance or reality of “political justice” amply justifies the longstanding federal and state laws prohibiting civil servants from engaging in various forms of political activity. *Id.*; *see Broadrick v. Oklahoma*, 413 U.S. 601, 618 (1973).

2. Of course, judges are not ordinary civil servants. But “judges, no less than [civil servants] must be seen as impartial if judicial decisions are to be accepted by the public.” *Bauer v. Shepard*, 620 F.3d 704, 711 (7th Cir. 2010). And judges, no less than civil

servants, voluntarily accept the limits on their personal freedoms that are necessary to the performance of their official duties. If anything, the Pennsylvania Supreme Court correctly recognized that *Pickering*'s justifications apply with even greater force here. Pet. App. 43a-45a. Because "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship," the government has an especially powerful interest in safeguarding that reputation. *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

3. Judge Cohen offers no persuasive response to that careful analysis. In fact, the petition devotes less than a page of discussion to the standard-of-scrutiny question it asks this Court to decide. Pet. 27-28. And aside from labels, the petition's only basis for distinguishing *Pickering* is the observation that "judicial candidates, like candidates for other elected offices, must be afforded the right to communicate their qualifications and views." *Id.* (quoting Pet. App. 31a). But the Pennsylvania Supreme Court wholeheartedly agreed—which is why it expressly limited *Pickering* to "claims challenging restrictions on sitting judges' speech *outside the context of their own election*." *Id.* 46a (emphasis added).

That narrow holding is entirely consistent with this Court's decisions in *White* and *Williams-Yulee*. In *White*, the Court assumed that strict scrutiny applied to a rule "prohibit[ing] candidates from communicating relevant information to voters during an election." 536 U.S. at 782. In *Williams-Yulee*, the Court likewise applied strict scrutiny because the challenged rule "restrict[ed] the speech of a judicial candidate." 575 U.S. at 444 (plurality opinion). Those decisions reflect

the principle that “[j]udicial candidates have a First Amendment right to speak in support of their campaigns.” *Id.* at 457 (opinion of the Court). Or, as Judge Easterbrook put it, if a state “requires judges to stand for office, it cannot insist that candidates remain silent about why they rather than someone else should be elected.” *Bauer*, 620 F.3d at 713. But “the rationale of *Letter Carriers* remains, and is not undercut by *White*,” in other contexts—including “political races other than the judge’s own.” *Id.*⁶

Unlike *White* and *Williams-Yulee*, this case involves speech by a sitting judge who was not running for reelection—and, indeed, could not have done so under state law. Pet. App. 43a. All of that speech appeared on a Facebook page the judge had imbued with “the prestige of [his] office (which after all belongs to the people, not to the temporary occupant).” *Bauer*, 620 F.3d at 711; *see* Pet. App. 50-51a. Judge Cohen offers no basis in law or logic to support his assertion that a state must surmount strict scrutiny to regulate such speech by its public officials.

⁶ In fact, Justice Kennedy explained that *White* did not decide “[w]hether the rationale of *Pickering*” would govern a challenge to a “general restriction on sitting judges” even if that restriction applied “while they are campaigning.” *White*, 536 U.S. at 796 (Kennedy, J., concurring). The Pennsylvania Supreme Court did not go that far, limiting its holding to non-campaign speech.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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