No. 17-___

IN THE

Supreme Court of the United States

IN THE MATTER OF: THE HONORABLE STEPHEN O. CALLAGHAN, JUDGE-ELECT OF THE TWENTY-EIGHTH JUDICIAL CIRCUIT,

STEPHEN O. CALLAGHAN

Petitioner,

v.

WEST VIRGINIA JUDICIAL INVESTIGATION COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves First Amendment protection for a campaign flyer in a hotly contested judicial election. As the challenger, Petitioner approved a flyer connecting two independent facts: that the incumbent attended an event at the White House and that, at the same time, his county reportedly lost coal jobs due to President Obama's policies. On the flyer's front were pictures of President Obama and the incumbent superimposed on a black background, surrounded by computer-animated streamers.

West Virginia's Judicial Disciplinary Counsel contacted Petitioner, claiming that the flyer violated the rules for judicial and attorney conduct. Disciplinary Counsel proposed remedial measures to address any alleged violations, and Petitioner promptly took all of those measures.

Nevertheless, after he won the election, Petitioner was charged with rules violations. The West Virginia Supreme Court acknowledged that the statements in the flyer would be protected speech if read literally. Yet, it held that the flyer was unprotected as "false" speech, because of that court's subjective interpretation of the flyer in "context." Petitioner has been suspended from his judicial post for two-years, fined $15,000, and reprimanded.

This case implicates a growing split of authority in the federal courts of appeals and state courts of last resort over protected speech in judicial elections. Consistent with this Court's decisions, some courts protect speech when it can reasonably be interpreted as true, whether read literally or in-context. The West Virginia Supreme Court joined several courts

that flip that analysis on its head, holding that speech is unprotected when it could potentially be interpreted literally or in-context as "false." Other courts inconsistently apply variations of these rules.

The question presented is: Whether speech that is literally or substantially true can nonetheless be punished as "false speech" where a court determines that the context or "gist" of the communication could be interpreted as "false."

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PETITION FOR A WRIT OF CERTIORARI

Petitioner The Honorable Stephen O. Callaghan respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia in this case.

OPINION BELOW

The opinion of the Supreme Court of Appeals of West Virginia is reported at 796 S.E.2d 604. Pet. App. 1a–82a.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered on February 9, 2017. On May 2, 2017, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including July 9, 2017. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech."

West Virginia Code of Judicial Conduct 4.1 provides in pertinent part:

> (A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not: . . .
>
> > (9) knowingly, or with reckless disregard for the truth, make any false or misleading statement; . . .

> (B) A judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under paragraph (A).

West Virginia Code of Judicial Conduct 4.2 provides, in pertinent part:

> (A) A judge or candidate subject to public election shall:
>
> > (1) act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary; . . .
> >
> > (3) review and approve the content of all campaign statements and materials produced by the candidate or his or her campaign committee, as authorized by Rule 4.4, before their dissemination;
> >
> > (4) take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities, other than those described in Rule 4.4, that the candidate is prohibited from doing by Rule 4.1; and
> >
> > (5) take corrective action if he or she learns of any misrepresentations made in his or her campaign statements or materials.

West Virginia Rule of Professional Conduct 8.2 provides, in pertinent part:

> (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning

> the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.
>
> (b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

STATEMENT OF THE CASE

A. Challenger Stephen Callaghan and Incumbent Judge Gary Johnson

This case involves judicial campaign speech in the May 2016 election for West Virginia's 28th Judicial Circuit Court. That court serves the rural area of Nicholas County, West Virginia.

1. Judge Stephen O. Callaghan is a third-generation Nicholas County attorney. Hr'g Tr. 62:7-13. He lives in Summersville in Nicholas County with a population of 3,572, in the 2010 census.

For over 22 years, Judge Callaghan actively practiced law in Nicholas County. Pet. App. 144a. Judge Callaghan served as the municipal judge of Summersville for around seven years until 2015 and as the City Attorney for the Richwood in Nicholas County for several years until 2016. Hr'g Tr. 9:24-10:21. Yet, Judge Callaghan had never run for public office before the 2016 election. *Id.* 60:3-9.

2. Judge Gary L. Johnson was Judge of the 28th Judicial Circuit Court from January 1, 1993 until December 31, 2016, Pet. App. 146a, including serving on West Virginia's Judicial Hearing Board for six years. Hr'g Tr. 105:16-18. Starting in 2001, Judge Johnson was Chair of West Virginia's Court

Improvement Program ("CIP") Oversight Board. Pet. App. 8a-9a. In the summer of 2015, West Virginia's CIP was receiving three grants from the Administration for Children and Families ("ACF"), a federal executive agency. *Id.*

B. Judge Johnson Attends the Event "at the White House"

1. In June 2015, Judge Johnson attended a CIP meeting and Child Trafficking Conference in Washington, D.C. Pet. App. 8a. West Virginia was required to send at least three representatives to these events, one for each federal grant. *Id.* at 9a. ACF co-hosted the events and "encouraged the States to send their highest level representative." *Id.* Contemporaneous reports indicate that President Obama was in the White House that day but not whether he attended the conference. Hr'g Tr. 74:8-76:18; *Obama guidance, press schedule, June 10, 2015* (June 9, 2015), available at http://chicago.suntimes.com/news/obama-guidance-press-schedule-june-10-2015-biden-carter/.

The child trafficking event was "***at the White House***," as described on official government websites by Valerie Jarrett, then-Senior Advisor and Assistant to the President, and ACF's then-Acting Assistant Secretary.[1] The West Virginia Supreme Court's press release also said Judge Johnson "joined

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[1] Valerie Jarrett, Working Together to End Human Trafficking (June 11, 2015), available at https://obamawhitehouse.archives.gov/blog/2015/06/11/working-together-end-human-trafficking (emphasis added); Mark Greenberg, ACF Creates New Office on Trafficking in Persons (June 10, 2015) (available at http://www.nchcw.org/news.html (emphasis added)).

other West Virginia and national leaders ***at the White House*** on Wednesday, June 10." Pet. App 101a (emphasis added).

After that event, there was an open house for attendees a few blocks away that included "light hors d'oeuvres and refreshments" but not alcohol. Pet App. 150a. The record below indicates that neither Judge Johnson nor President Obama attended the open house. *Id.*

2. Separately in June 2015, media reported the loss of 558 coal jobs in Nicholas County between 2011 and 2015. Pet. App. 9a. Those lost coal jobs "had been widely associated with President Barack Obama's policies," who had a 72% percent disapproval rating in West Virginia in 2015. *Id.* at 8a & n.1.

C. Judge Callaghan's Campaign

1. After filing pre-candidacy papers in May 2015, Pet. App. 7a, Judge Callaghan read the Code of Judicial Conduct, and then strove to comply with it Hr'g Tr. 61:12-23. He campaigned vigorously, including posting on his personal and campaign Facebook pages, running a weekly newspaper ad, and attending community events. *Id.* 60:14-61:11.

2. In late January 2016, at his campaign consultant's recommendation, Judge Callaghan commissioned and approved an automated survey of potential voters. At the outset of the survey, the 485 respondents' intended votes were: 44.74 percent for Judge Johnson and 39.18 percent for Judge Callaghan. Pet. App. 157a-58a. The survey also sought reactions to a positive statement about Judge

Johnson's work with children that appealed to 64 percent of respondents. Pet. App. 159a.

Then, the survey sought reactions to a negative statement about Judge Callaghan and three about Judge Johnson, asking respondents whether each statement caused "major concern," "some concern," "no real concern," or "don't know." The first negative statement about Judge Johnson mentioned the county's drug crisis, that specialized drug courts were available for over six years and that Judge Johnson only recently established such a court. Pet. App. 157a-158a. Almost 70 percent of respondents had major or some concern regarding that statement. *Id.* at 160a.

The second negative statement about Judge Johnson was: "Gary Johnson is lockstep with Barack Obama's policies. While Nicholas County was losing coal jobs to Obama's policies, Johnson was the only West Virginia judge invited to the Obama White House to participate in a junket highlighting issues of importance to President Obama." Pet. App. 8a. Approximately 67% of the 149 respondents to this statement had major or some concern. *Id.*; Pet. App. 103a-104a.

The third negative statement about Judge Johnson related to a specialized teen court and "about 72 percent" of respondents had major or some concern. Pet. App. 160a. Concerns with the drug and teen court issues were higher than with the White House event.

Following participation in the survey, responding participants favored Judge Johnson only by "just about 2 percent." Pet. App. 161a. Judge Callaghan's

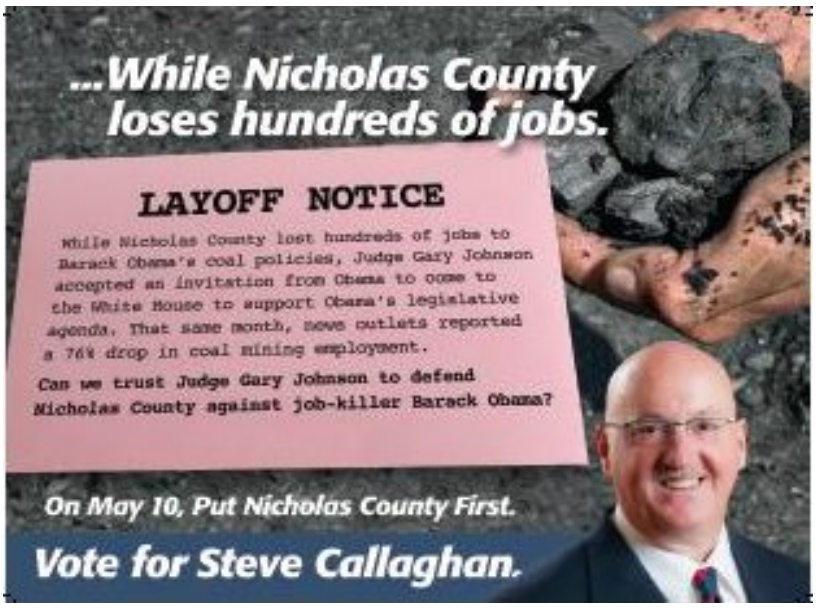
impression was that the "race is winnable" and that he should continue campaigning. Hr'g Tr. 31:24-32:4.

3. After that, Judge Callaghan approved five direct-mail flyers created by his consultant. Pet. App. 9a. The flyer at issue in this case—the "White House Mailer," pasted in-full on the next page—addressed the White House event. The front has a headshot of President Obama holding a glass of beer Photoshopped on a black background next to a smiling portrait of Judge Johnson, with a header stating Judge Johnson and President Obama "part[ied]" at the White House. Pet. App. 77a-78a. The back relays facts regarding the event at the White House and the simultaneous report of lost coal jobs in Nicholas County, including a mock "Layoff Notice" that says:

> While Nicholas County lost hundreds of jobs to Barack Obama's coal policies, Judge Gary Johnson accepted an invitation from Obama to come to the White House to support Obama's legislative agenda. That same month, news outlets reported a 76% drop in coal mining employment. **Can we trust Gary Johnson to defend Nicholas County against job-killer Barack Obama?**

Id.


Barack Obama & Gary Johnson
Party at the White House…


…While Nicholas County
loses hundreds of jobs.
LAYOFF NOTICE
While Nicholas County lost hundreds of jobs to Barack Obama's coal policies, Judge Gary Johnson accepted an invitation from Obama to come to the White House to support Obama's legislative agenda. That same month, news outlets reported a 76% drop in coal mining employment.
Can we trust Judge Gary Johnson to defend Nicholas County against job-killer Barack Obama?
On May 10, Put Nicholas County First.
Vote for Steve Callaghan.

The White House Mailer was mailed once to Nicholas County voters and received on or around May 5, 2016, five days before the election. Pet. App. 10a. As is common in such elections, Judge Callaghan sent all five flyers in the election's final days, sending the White House Mailer sent second to last. Hr'g Tr. 91:4-9. The other flyers addressed drug abuse, drug courts, and teen courts. Pet. App. 10a n.4.

Meanwhile, Judge Callaghan continued actively campaigning, including going door-to-door with volunteers. Hr'g Tr. 95:5-6.

D. West Virginia Judicial Disciplinary Counsel Contacts Judge Callaghan, Who Takes Every Requested Remedial Step

1. On the evening of May 5, 2016, West Virginia Judicial Disciplinary Counsel Teresa Tarr contacted Judge Callaghan, claiming that the White House Mailer was inappropriate and demanding that Judge Callaghan take remedial steps on Facebook and in radio ads. Pet. App. 10a-11a; *id.* at 150a; Hr'g Tr. 52:7-15, 53:5-14. Disciplinary Counsel stated that if Judge Callaghan complied, she would not initiate a judicial complaint. Pet. App. 10a n.5. The deadline to complete the remedial actions was 4:30 p.m. the next day.

Within hours, Judge Callaghan took every remedial step requested by Disciplinary Counsel. Hr'g Tr. 63:16-21. He replaced the Facebook posts on his personal and campaign pages with the following retraction and apology:

> My campaign committee recently produced a mail advertisement

> depicting a visit to the White House by Judge Gary Johnson. The specific characterization contained in the mail piece may be inaccurate and misleading. The mailer should not have been sent containing this inappropriate information. I apologize personally for any misunderstanding or inaccuracies.

Pet. App. 106a. Also within hours, Judge Callaghan arranged to run a substantially similar retraction and apology ad on local radio eight times over the three-day period before the election, Pet. App. 10a-11a; Hr'g Tr. 52:16-24, and emailed Disciplinary Counsel that her requested remedial actions had been completed.

E. Campaign Conclusion and Election

1. The Johnson campaign called Judge Callaghan a liar for the White House Mailer. Hr'g Tr. 65:3-6. Judge Johnson's campaign Facebook page also shared Judge Callaghan's retraction, and Judge Callaghan was criticized in the comments. *Id.* 65:6-12. Shortly before the election, Judge Johnson attended a "meet the candidate" forum, where he had the opportunity to address the White House Mailer. *Id.* 65:19-66:4.

A May 8, 2016 article in the regional newspaper, Charleston Gazette-Mail, criticized Judge Callaghan for the White House Mailer.[2] The article described

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[2] Phil Kabler, Statehouse Beat: Politics more unpredictable than usual this year (May 8, 2016), available at

several campaigns that connected opponents to President Obama. It criticized the White House Mailer at length, explaining that Judge Johnson had received "an invitation to a prestigious White House conference," on children and youth, "where Johnson was one of 50 judges from across the country invited to participate because of his national reputation for his work in addressing child abuse and neglect." *Id.* That article is the only cited source indicating that President Obama "was not in Washington during the conference." *Id.*

2. Judge Callaghan ultimately defeated Judge Johnson by 227 votes, receiving 3,472 to Judge Johnson's 3,245. Pet. App. 11a & n.6.

Judge Callaghan testified that, in hindsight, "I think I would've beat Judge Johnson by more votes without that flier because of the negative reaction that it got and the negative comments that were created from it." Hr'g Tr. 65:15-18. He expressed regret for causing Judge Johnson outrage. *Id.* 66:5-67:1.

F. Charges Against Judge Callaghan

1. In May 2016, Judge Johnson's son filed complaints against Judge Callaghan regarding the White House Mailer with the Lawyer Disciplinary Board and the Judicial Investigation Commission. Pet. App. 10a n.5; *id.* at 146a. He alleged that the Mailer violated West Virginia Rule of Professional Conduct ("Professional Rule") 8.2 and Code of

(continued…)

http://www.wvgazettemail.com/article-/20160508/statehouse-beat-politics-more-unpredictable-than-usual-this-year.

Judicial Conduct Rule ("Code Rule") 4.1(A)(9). N. Johnson Complaint, May 16, 2016. Although he challenged the accuracy of aspects of the Mailer, he acknowledged that "Judge Johnson did indeed ***visit the White House***." *Id.* (emphasis added).

2. In July 2016, the Judicial Investigation Committee issued a Formal Statement of Charges against Judge Callaghan. Pet. App. 11a; *id.* at 144a. The Statement alleged that Judge Callaghan violated eight rules of conduct, four of which are at issue here:[3]

- Code Rule 4.1(A)(9), which prohibits "knowingly, or with reckless disregard for the truth, mak[ing] any false or misleading statement;"
- Code Rule 4.2(A)(1), which requires "act[ing] at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary;"
- Code Rule 4.2(A)(4), which requires "reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities . . . that the candidate is prohibited from doing by Rule 4.1;" and
- Professional Rule 8.2(a), which prohibits "a statement that the lawyer knows to be

[3] The other four provisions are not at issue because Disciplinary Counsel "voluntarily dismissed" Code Rule 4.2(A)(3), the Board found Judge Callaghan did not violate Code Rule 4.2(A)(5), and the Board found Code Rule 4.1(b) and Professional Rule 8.2(b) were redundant. Pet. App. 113a, 114a & n.13, 127a.

> false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."

Id. at 11a n.7; *id.* at 147a. The only charged conduct was sending the White House Mailer. Pet. App. at 147a-50a.

G. Judicial Hearing Board Proceedings

The charges against Judge Callaghan were initially before West Virginia's Judicial Hearing Board, which "conducts hearings" on such formal complaints" and makes "recommendations to the Supreme Court of Appeals regarding [their] disposition." W.Va. Jud. Disciplinary R. 3.

1. Judge Callaghan moved to dismiss all charges. As relevant here, he challenged Code Rule 4.1(A)(9) and Professional Rule 8.2(a)—prohibiting "false or misleading" speech or false speech, respectively—as unconstitutional both "on their face and as applied" to the White House Mailer. Order re Constitutionality at 1 (Nov. 18, 2016).

The Board denied that motion, upholding the prohibitions on "false" statements. *Id.* at 5-6, 12-13. Although "the Board agree[d] that 'misleading' judicial campaign advertising which is not 'false' is clearly protected by the First Amendment," it did not strike down the prohibition on "false ***or*** misleading" statements, holding instead that the statements must be "both false ***and*** misleading (or, in other words, material)." *Id.* at 6-11 (emphasis added).

2. The evidence at the Board's hearing consisted of stipulations, 32 exhibits, and testimony from Judge Callaghan, his campaign consultant, and Judge Johnson. During closing arguments, Disciplinary Counsel said that "most of the charges except mitigation charges all piggyback on the violation of Code of Judicial Conduct, Rule 4.1(a)(9) and Rule of Professional Conduct 8.2(a) in that the Respondent knowingly made false statements. That's our position." Hr'g Tr. 123:14-19. Disciplinary Counsel requested a two-year suspension—one-year each for violating the Code Rules and the Professional Rules, to run consecutively. Pet. App. 12a.

3. The Board concluded that Judge Callaghan violated Code Rules 4.1(A)(9), 4.2(A)(1), and 4.2(A)(4) as well as Professional Rule 8.2(a). Pet. App. 12a. It recommended a one-year suspension from both serving as a judge and practicing as a lawyer for each of the four violations, to run concurrently, as well as a censure, a reprimand, a $5,000 fine per Judicial Code violation, and the payment of costs. *Id.*; Pet. App. 143a.

H. West Virginia Supreme Court Proceedings

Judge Callaghan objected to the West Virginia Supreme Court, arguing that the White House Mailer was constitutionally protected speech. Pet. App. 12a. Disciplinary Counsel objected to the one-year suspension, requesting a two-year suspension. *Id.*

1. The Court initially scheduled argument for January 10, 2017. On January 4, a majority of

Justices voted to hire Judge Johnson as the Court's interim Administrative Director. Pet. App. 88a. The next day, Justice Davis recused herself from the case. *Id.* Justice Davis had abstained from voting but believed she had to recuse, because "my impartiality in this case might reasonably be questioned" and "Judge Callaghan should have his fate decided by someone whose impartiality could not be questioned." *Id.*

The other Justices did not recuse themselves, claiming "no personal bias or prejudice against" Judge Callaghan, and that Judge Johnson's new position "is purely an administrative matter and [neither] he, nor any member of his family, will be affected by any outcome of this case." Disclosure (Jan. 5, 2017). Senior Justice Thomas McHugh was then assigned to the case. Administrative Order (Jan. 5, 2017).

On January 9, 2017, Judge Callaghan moved to disqualify the remaining Justices. Later that day, the remaining Justices voluntary disqualified themselves "out of an abundance of caution," even though they determined that disqualification was not required. Pet. App. 85a. Justice McHugh then assigned four circuit court judges to the case. Oral Argument was re-scheduled for, and held, on January 24, 2017.

2. On February 9, 2017, the Court issued its opinion finding four violations and increasing the suspension's length to two years. The Court quoted its Chief Justice's "book about West Virginia election corruption" that said West Virginia's judicial elections have included "lying about candidates as a matter of tradition and expected behavior." Pet.

App, 29a n.17 (quoting Allen H. Loughry, II, "Don't Buy Another Vote, I Won't Pay for a Landslide," 498 (McClain Printing Co. 2006)). The Court also said that it was issuing "substantial discipline" specifically to have a "devastatingly chilling effect on" similar speech. *Id.* at 72a.

3. The Court rejected Judge Callaghan's facial First Amendment challenge to the violations. It held that there was a compelling interest in restricting the speech of judicial candidates to protect the courts' integrity and that a prohibition on "false" statements is narrowly tailored because such statements do not have First Amendment protection. Pet. App. 28a-33a. The Court did not analyze Judge Callaghan's facial challenge to the ban on "misleading" speech, because Judge Callaghan "was not charged with, nor does the Board base its recommendation on, any alleged 'misleading' statement." *Id.* at 33a n.18. But, it "note[d] that such provisions in similar Rules have been widely found to be facially unconstitutional." *Id.* (citing cases).

4. The Court then analyzed Judge Callaghan's as-applied challenge. It rejected Judge Callaghan's contention that the White House Mailer's statement that "Barack Obama & Gary Johnson party at the White House" is protected hyperbole. Pet. App. 9a. The Court held that the statement could be interpreted as an actual fact—and therefore is not hyperbole—because it is possible that Judge Johnson "partied" with President Obama. *Id.*

The Court then analyzed the "falsity" of the White House Mailer. It acknowledged Judge Callaghan's argument that "each particular phrase in isolation"

was "either substantially or objectively true." Pet. App. 44a. It then went through Judge Callaghan's explanation for each statement: that the event was "while Nicholas County loses hundreds of jobs" is "substantially true"; that the job losses were due "to Barack Obama's coal policies" is protected "opinion"; that the event was to support President Obama's legislative agenda "is true because the conference occurred a couple of weeks after Obama signed the Justice for Victims of Trafficking Act of 2015, which was a part of Obama's legislative agenda"; that the statistics on job losses were "objectively true" based on the news reports from June 2015; and that the question about trusting Judge Johnson "is merely a rhetorical question." *Id.* at 45a. The Court did not dispute those arguments, except quibbling that the job losses had occurred over a period of time. *Id.* & n.22.

The Court also did not dispute that the White House Mailer would be protected if each statement were analyzed individually. *Id.* at 45a. Instead, the Court evaluated the White House Mailer's "context" or "gist" under the "converse of the substantial truth doctrine." *Id.* at 47a. The "substantial truth" doctrine protects inaccurate statements if "'the substance, the gist, the sting' of the communication, taken as a whole," is true. *Id.* The Court reversed that test, holding that true individual statements are unprotected when "'the substance, the gist, the sting' of the communication, taken as a whole, is patently false." *Id.* The Court concluded that the "gist" of the White House Mailer was "materially false," explaining that "Judge Johnson's attendance at the meeting and conference is exaggerated, repurposed

and mischaracterized to the point that it is rendered patently untrue." *Id.* at 48a-49a.

5. The Court modified the Board's recommended discipline to a suspension without pay from serving as a judge for two years of his eight year term and a $15,000 fine for the Code Rules violations. Pet. App. 7a. It reprimanded Judge Callaghan for the Professional Rule violation and ordered him to pay costs. *Id.*

This petition follows.

REASONS FOR GRANTING THE PETITION

The West Virginia Supreme Court's decision deepens an existing split among the circuits and state courts of last resort over First Amendment protection for false or misleading judicial campaign speech. It is also contrary to this Court's precedent on this fundamental issue.

1. Eleven circuit courts and state courts of last resort are split over the standard to determine what speech in judicial elections is unprotected as untrue, reaching irreconcilably inconsistent results.

In six courts, this split is outcome determinative for judicial candidate statements that are true individually but can be read as "false" in context. Such statements are protected from sanctions in the Sixth Circuit and Michigan. *Winter v. Wolnitzek*, 834 F.3d 681 (6th Cir. 2016) (Sutton, J.); *In re Chmura*, 608 N.W.2d 31 (Mich. 2000) ("*Chmura I*"); *In re Chmura*, 626 N.W.2d 876 (Mich. 2001) ("*Chmura II*"). Yet, West Virginia holds they are sanctionable, joining Florida, Ohio, and the

reasoning of the Indiana Supreme Court. *Matter of Callaghan*, 796 S.E.2d 604 (W.Va. 2017); *Inquiry Concerning a Judge (Kinsey)*, 842 So. 2d 77 (Fla. 2003) (per curiam); *Disciplinary Counsel v. Tamburrino*, __ N.E.3d ___, 2016 WL 7116096 (Ohio Dec. 7, 2016); *In re Bybee*, 716 N.E.2d 957, 959-60 (Ind. 1999) (per curiam).

In five other courts, there is greater uncertainty because the Justices are split over this issue, *Wisconsin Judicial Commission v. Gableman*, 784 N.W.2d 605 (Wis. 2010) (Abrahamson, C.J., Bradley and Crooks, JJ.) ("Abrahamson Justices"); *Wis. Judicial Comm'n v. Gableman*, 784 N.W.2d 631, 645-651 (Wis. 2010) (Prosser, Roggensack and Ziegler, JJ.) ("Prosser Justices"), or the court has not established the governing rule. *Butler v. State Judicial Inquiry Comm'n*, 802 So. 2d 207 (Ala. 2001); *Winter v. Wolnitzek*, 482 S.W.3d 768, 778-81 (Ky. 2016); *Att'y Grievance Comm'n v. Stanalonis*, 126 A.3d 6 (Md. 2015); *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

2. The decision below is inconsistent with this Court's precedent that the First Amendment bars punishment of a statement when there is a "rational interpretation" that is protected. *See, e.g. Air Wisconsin Airlines Corp. v. Hoeper*, 134 S. Ct. 852 (2014). Additionally, the decision below found speech unprotected as false without conducting the required "materiality" analysis. *See, e.g.*, *id.* at 863-67; *United States v. Alvarez*, 567 U.S. 709, 723 (2012).

3. These fundamental and recurring questions warrant this Court's attention. Increasingly restrictive regulations and a proliferation of charges threaten fundamental First Amendment rights in

judicial elections. That chills protected speech. The chilling is compounded by the lower courts' inconsistent and unpredictable tests. This Court's intervention is needed to clarify judicial candidates' Free Speech rights and prevent widespread chilling of protected speech.

I. THE WEST VIRGINIA SUPREME COURT'S DECISION DEEPENS A SPLIT OVER WHEN JUDICIAL CANDIDATE SPEECH IS UNPROTECTED

Thirty-six states select judges in contested elections that prescribe core political speech. Such speech is protected by the First Amendment, unless the states can satisfy strict scrutiny. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665 (2015).

Eleven circuits and state courts of last resort agree that "unprotected" speech can be regulated in judicial elections. But they are deeply divided over the standard to determine whether such speech is unprotected, reaching irreconcilable results.

A. The Sixth Circuit And Michigan Supreme Court Protect Speech That Is Reasonably Interpreted As True, Individually Or In-Context.

The Sixth Circuit and Michigan Supreme Court hold that judicial candidate speech is protected if reasonably interpreted as true, either "literally" or "substantially." *Winter*, 834 F.3d 681 (6th Cir. 2016); *Chmura I*, 608 N.W.2d 31 (Mich. 2000); *Chmura II*, 626 N.W.2d 876 (Mich. 2001).

1. The Sixth Circuit holds that judicial candidates' statements can be banned as "false" only when not "readily capable of a true interpretation." *Winter*,

834 F.3d at 693-94 (Sutton, J.). There, an appointed incumbent's campaign materials used the phrase "re-elect." The court held that Kentucky's prohibition on "materially false statements by judicial candidates survives strict scrutiny—at least facially." *Id.* at 693 (citing *Williams-Yulee*). But it found that the statement was not false, because it could be "readily" interpreted as true: "[a]pplied to a statement such as 're-elect,' readily capable of a true interpretation here, the ban outstrips the Commonwealth's interest in ensuring candidates don't tell knowing lies." *Id.*

Additionally, the Sixth Circuit held that "technically true" statements could not be false, even by implication or inference. Specifically, the court struck down, on its face, Kentucky's ban on misleading statements that prohibited "statements that, while technically true or ambiguous create false implications or give rise to false inferences." *Winter*, 834 F.3d at 694. It held that such statements are not false, and that "only a ban on conscious falsehoods satisfies strict scrutiny." *Id.* Allowing some "[e]rroneous statement[s]" in judicial campaigns is essential to "free debate" and to prevent "chilling" protected speech. *Id.*

2. The Michigan Supreme Court holds that a judicial candidate's statement is protected when either "literally true" (individually) or "substantially true" (in-context). *Chmura II*, 626 N.W.2d at 887. In *Chmura I*, the court re-interpreted the bar on false or misleading speech by judicial candidates to bar only "false" speech, holding that a broader prohibition would violate the First Amendment. 608 N.W.2d at 535-42.

In *Chmura II*, the court defined falsity, applying a two-part test. The first step analyzes each statement individually. 626 N.W.2d at 887. A statement that is "literally true," is protected and does not violate the ban on "false" speech. *Id.* At this step, the "substantial truth" doctrine does not apply. *Id.*

If the communication "conveys an inaccuracy," the second step analyzes the statement in context for "substantial truth." 626 N.W.2d at 887. Under this "substantial truth" test, the inaccurate communication is analyzed "as a whole . . . to determine whether 'the substance, the gist, the sting' of the communication is true despite the inaccuracy." *Id.* This step cannot punish literally true statements, so, "as is arguably true in the present case, even potentially misleading or distorting statements may be protected." *Id.* at 886.

3. In these courts, Judge Callaghan's White House Mailer would be protected from the sanctions issued here. First, the statements in the Mailer would be protected if read individually, as the West Virginia Supreme Court did not dispute. Pet. App. 46a-47a.

Second, the White House Mailer is substantially true. Judge Johnson was invited to attend an event at the White House that supported an agenda item of President Obama's Administration, and the Administration was separately, contemporaneously associated with coal policies that were credited with causing the loss of jobs in Nicholas County. All of that is true and could be significant to voters who support or oppose a President's policies, wholly independent of the event's content. Indeed, even champion athletes have recognized that mere

attendance at White House ceremonies can convey support for a President's other agenda priorities.

4. There is also a tangential split regarding whether misleading speech is protected. Eight courts hold that only false speech is unprotected but misleading speech is protected. *Winter*, 834 F.3d at 694; *Chmura I*, 626 N.W.2d at 887; *In re Judicial Campaign Complaint Against O'Toole*, 24 N.E.3d 1114, 1126 (Ohio 2014); *Gableman*, 784 N.W.2d at 611 (Abrahamson Justices); 784 N.W.2d at 650 (Prosser Justices); *Butler*, 802 So. 2d at 218; *Weaver*, 309 F.3d at 1319-22; *Winter*, 482 S.W.3d at 778-81; *Stanalonis*, 126 A.3d at 12-16. Only the Florida Supreme Court expressly holds that non-false speech is unprotected. *Inquiry Concerning a Judge No. 14-488 (Shepard)*, 217 So. 3d 71, 78-79 (Fla. 2017) (per curiam); *see also Bybee*, 716 N.E.2d at 959-60 ("believ[ing]" Florida is correct without deciding the issue). Because the White House Mailer is literally and substantially true, it should be protected in any jurisdiction that holds only false speech is unprotected. The standards below that do not protect the Mailer, however, expand the definition of falsity to include misleading speech.

B. The West Virginia And Florida Supreme Courts Hold And The Indiana Supreme Court "Believe[s]" That Context Or Implications Can Remove First Amendment Protection From Individually True Statements.

The West Virginia and Florida Supreme Courts hold that judicial campaign statements can be false from context or implication, even if there is a reasonable basis to interpret them as true. Pet. App.

1a; *Kinsey*, 842 So. 2d 77 (Fla. 2003). The Indiana Supreme Court agrees, but has not definitively reached the issue. *Bybee*, 716 N.E.2d 957 (Ind. 1999) (per curiam).

1. Here, the West Virginia Supreme Court held that context can render literally true speech unprotected. The Court did not dispute Judge Callaghan's argument that the White House Mailer is protected when reading each statement individually and that "[m]inor inaccuracies do not amount to falsity." Pet. App. 46a. Indeed, it recognized that its contextual analysis is outcome determinative. *Id.* at 47a.

Under that Court's so-called "converse of the substantial truth doctrine," the speech is unprotected, even when the individual statements are true, if "'the substance, the gist, the sting,' of the communication, taken, as a whole, is patently false." *Id.* at 47a. The Court specifically recognized that its test inverted the outcome: "[t]ypically this so-called 'substantial truth doctrine' inures to the benefit of the accused, *i.e.* if something is 'substantially' true in overall effect, minor inaccuracies or falsities will not create falsity. However, in this particular instance, it works to Judge-Elect Callaghan's detriment[.]" *Id.*

Applying that test, the Court concluded that the White House Mailer was unprotected as false. *Id.* at 48a. Without disputing that the statements would be protected if read individually, the Court found from the Mailer's context that, "Judge Johnson's attendance at the meeting and conference is exaggerated, repurposed and mischaracterized to the point that it is rendered patently untrue." *Id.* at 48a-49a. As a result, the Court held "that the First

Amendment does not serve to shield Judge-Elect Callaghan from discipline as a result of the subject flyer." *Id.* at 49a.

2. The Florida Supreme Court similarly allows punishment of judicial candidates' speech when it creates an "impression" or "implication" that is an "intentional misrepresentation." *Kinsey*, 842 So. 2d 77. There, the advertisement was factually accurate – a defendant attempted to strangle his wife, was ultimately charged with attempted murder, and the incumbent released him on bond. *Id.* The ad created an inaccurate "impression," however, because the incumbent released the defendant on bond without knowing about the attempted strangling and murder charge. *Id.* Based on that "implication," the court found a sanctionable "intentional misrepresentation." *Id.* at 90. The Court rejected a First Amendment challenge to that rule, though its analysis focused on other issues. *Id.* at 85-87; *see also Inquiry Concerning a Judge (Renke)*, 933 So. 2d 482, 488 (Fla. 2006) (per curiam) (judge removed from office entirely for, *inter alia*, "intentional misrepresentations," without the statements being found false).

This is consistent with the Florida Supreme Court's holding, regarding a separate Code provision, that "[t]he First Amendment does not protect . . . knowing misrepresentations of fact by candidates for judicial office." *Shepard*, 217 So. 3d at 80. The court did not protect the ad, even though it contained "four true statements," finding those facts "were distorted and misrepresented because they were taken out of context." *Id.* at 79.

3. The Indiana Supreme Court has indicated that it would agree with Florida, if presented with the issue. *Bybee*, 716 N.E.2d at 959-60. Although the issue was not squarely presented, the court said it "believe[s]" strict scrutiny is satisfied by its state rule barring a judicial candidate from "knowingly misrepresent[ing]" certain information about the candidate or opponent. *Id.*

4. These courts require an unprecedented level of accuracy for First Amendment protection. For example, the *Callaghan* Court quibbled that the White House Mailer inaccurately stated the event was "***at the White House***," finding that "while conference meetings were held at buildings within the White House compound, Judge Johnson ***did not actually go to the White House***." Pet. App. 10a (emphasis added); *id.* at 78a (Matish, J., concurring in part and dissenting in part) ("Judge Johnson ***did not go to the White House***.") (emphasis added)]. But everyone from Judge Johnson's son (in the Complaint) to Valerie Jarrett concedes that these events were "***at the White House***." *See supra* at 4. Even the West Virginia Supreme Court contemporaneously claimed this event was "***at the White House***." *See id.* at 4-5. No legitimate standard allows that same Court to hold this statement is unprotected as "false" when repeated by a judicial candidate during an election.

Such a flimsy test is particularly troubling here, because the *Callaghan* Court "sincerely expect[s]" that its decision will chill future speech. Pet. App. 72a. It took comfort that its decision would deter only "false" speech, *id.*, but its malleable test allows courts to turn true statements into unprotected false

speech and will chill substantial amounts of core, protected political speech. To deter false speech without also chilling protected speech, requires a clear, easily applied test that protects any statement that could reasonably be interpreted as true.

C. The Ohio Supreme Court Defines Truth Narrowly And Falsity Broadly.

The Ohio Supreme Court's approach pays lip service to the falsity requirement but construes falsity so broadly and truth so narrowly that it undermines First Amendment protection. *See Tamburrino*, 2016 WL 7116096.

1. The Ohio Supreme Court recognizes that true but misleading judicial campaign statements are protected. In 2014, it upheld a ban on false speech. *O'Toole*, 24 N.E.3d at 1126. It struck down, however, a ban on true but misleading judicial campaign speech, as facially "unconstitutional because it chills the exercise of legitimate First Amendment rights." *Id.* "This portion of the rule does not leave room for innocent misstatements or for honest, truthful statements made in good faith but that could deceive some listeners." *Id.*

2. In 2016, however, the Ohio Supreme Court undermined that ruling by expanding substantially the scope of unprotected "false" speech. *Tamburrino*, 2016 WL 7116096. Punishing two judicial campaign commercials, it analyzed context to find only falsity not truth, considered incomplete statements false, and construed the underlying facts narrowly.

First, the challenger's campaign commercial said the incumbent "won't disclose his Taxpayer Funded Travel Expenses." 2016 WL 7116096, at *1. The

dissent found this statement was protected as substantially true, because the incumbent omitted these expenses when posting others on the court's public website, while the challenger "was campaigning on the issue of posting judges' salaries and expenses on the court's website." *Id.* at *15 (French, J., dissenting).

Yet, the majority held that the statement, "by itself, is false," because "[a]n enormous amount of information would need to be added in order to make the statement true." *Id.* at *9. The court rejected the broader context that made the commercial substantially true and found that the term "disclose" could not mean to post the information on the public website, because "[g]iven the context of a public official, the most readily understandable definition of 'disclose' is to respond to a public-records request." *Id.* *9 n.2. In other words, it held that context can create falsity but not truth and that a statement's "most readily understandable definition" renders it false, even if it could be interpreted as true. *Id.*

Second, an ad claimed that the incumbent "doesn't think teenage drinking is a serious offense." *Tamburrino*, 2016 WL 7116096, at *2. The incumbent concurred in a case that held the misdemeanor of serving alcohol to minors was not an exigent circumstance justifying a warrantless home search. *State v. Andrews*, 895 N.E.2d 585 (Ohio Ct. App. 2008). That concurrence emphasized that this was "a misdemeanor charge," whereas officers could enter a home for "a serious misdemeanor offense." *Id.* at 594 (Cannon, J., concurring).

The ad's statement could reasonably be interpreted as true, because the incumbent's

concurrence specifically distinguished between the "misdemeanor charge" of underage drinking and "a ***serious*** misdemeanor offense." 2016 WL 7116096, at *15 (French, J. dissenting) (emphasis added). "A reasonable reader could conclude that [the incumbent] did not consider the charged offense to be a 'serious misdemeanor offense.'" *Id.* Although the ad did not disclose all of the relevant facts, it was substantially true. *Id.*

Yet, the majority found this commercial "patently false." *Tamburrino*, 2016 WL 7116096, at *7-8. It read the truth of the *Andrews* concurrence narrowly, that it: "indirectly" found no "emergency condition" and "implied that teenage drinking is not an emergency situation that requires immediate action," but "neither stated nor implied that it is not serious." *Id.* at *7. It then read the ad's falsity broadly, holding a full explanation was necessary for the ad to be true. *Id.*

3 The dissent also reiterated the reasons to protect such speech. The dissent "dislike[s] this type of political speech, particularly in a judicial campaign," yet it recognized that "[w]e must protect speech even when—and perhaps, especially when—we dislike it." *Tamburrino*, 2016 WL 7116096, at *16 (French, J., dissenting). For this "core political speech susceptible to a truthful interpretation, the better course is to let the candidates themselves publicly debate the truthfulness of the statement, rather than attempting to act as a truth-declaring forum and penalizing candidates for the exercise of their free-speech rights." *Id.*

D. The Wisconsin Supreme Court Splits 3-3 Over Analyzing Statements Individually Or In-Context.

The Wisconsin Supreme Court split 3-3 over whether to punish campaign statements by the seventh justice that were true individually but found to be false in-context. *Gableman*, 784 N.W.2d 605 (Abrahamson Justices); *Gableman*, 784 N.W.2d at 645-651 (Prosser Justices).

1. In the campaign for that court's seventh seat, the challenger's television commercial claimed that the incumbent had found a "loophole" for a criminal defendant who later committed criminal molestation, which was true. 784 N.W.2d at 610 (Abrahamson Justices). The ad implied incorrectly, however, that the "loophole" lead to an early release, when the defendant actually served his full sentence before committing the molestation. *Id.* at 612; 784 N.W.2d at 646 (Prosser Justices).

The challenger won that election and was charged with violating Wisconsin's false or misleading statement provision. All six justices agreed that the First Amendment would not protect "false" speech. 784 N.W.2d at 611 (Abrahamson Justices); 784 N.W.2d at 650 (Prosser Justices). They split 3-3, however, over whether this ad was rendered "false" based on the context.

2. The Prosser Justices would hold that individually, or "objectively," true statements cannot be punished under the First Amendment. *Gableman*, 784 N.W.2d at 645-651. Because each statement in the ad was objectively true, the statements were protected. *Id.* at 645-51. These

Justices repeatedly rejected a "falsity" standard that would look at the "context" or "the understanding of the hearer," because that "would violate the command of strict scrutiny that the regulation be narrowly construed and applied." *Id.* at 644-45, 653-54, 657. They recognized, though, that, together, the statements "implied" or were "intended to convey" a false impression. *Id.* at 651.

3. In contrast, the Abrahamson Justices would hold that the ad was "objectively false" based on its context. *Gableman*, 784 N.W.2d at 593, 608-09 (Abrahamson Justices). Those Justices analyzed the ad's "over-all meaning" in context, concluding that the only reasonable interpretation was that the incumbent's "loophole" led to the inmate's early release and subsequent crime. *Id.* at 614, 616.

E. The Eleventh Circuit, Alabama Supreme Court, Kentucky Supreme Court, And Court Of Appeals Of Maryland Hold False Speech Is Unprotected But Have Not Defined Falsity.

Deepening the split, four other courts have held that "false" judicial campaign speech can be regulated but have not established a clear standard for determining what speech is "false." *Butler*, 802 So. 2d at 218 (Ala. 2001) (upholding ban on false speech and striking down ban on true but misleading speech); *Weaver*, 309 F.3d at 1319-22 (11th Cir. 2002) (striking down ban on true but misleading speech and limiting restrictions to false statements with actual malice); *Winter*, 482 S.W.3d at 778-781 (Ky. 2016) (upholding restrictions on false statements); *Stanalonis*, 126 A.3d at 12-16 (Md. 2015)

(constitutional avoidance interpretation limiting restriction to false statements).

This Court's intervention would resolve the substantial uncertainty in these jurisdictions as well.

II. THE WEST VIRGINIA SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT HOLDING THAT STATEMENTS ARE PROTECTED BASED ON A RATIONAL INTERPRETATION OR WHEN IMMATERIAL

The decision below is inconsistent with this Court's precedent. Judicial campaign speech is a category of protected political speech that is entitled to great protection. *Williams-Yulee*, 135 S. Ct. at 1665-66; *Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002) (bans on judicial campaign speech "burden[] a category of speech that is at the core of our First Amendment freedoms—speech about the qualifications of candidates for public office"). The decision below recognized this but is inconsistent with this Court's applicable precedent.

1. This Court holds that speech susceptible to multiple interpretations cannot be proscribed if one rational interpretation is protected by the First Amendment.

In *Air Wisconsin*, 134 S. Ct. 852, the Court held that an allegedly false statement could not support a defamation action if a rational interpretation of that statement is substantially true. The majority found that a statement expressing concern about the plaintiff's "mental stability," was not a false accusation that the plaintiff was "suffering from serious mental illness[]" because "that is hardly the

only manner in which the label is used." *Id.* at 866. The dissent did not disagree with protecting ambiguous statements, rather, it found that there was no "materially accurate" interpretation of this statement. *Id.* at 869 (Scalia, J., dissenting).

Similarly, in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), the Court held that an author's imprecise description of sound coming from loudspeakers—as wandering "about the room" as opposed to "across" the wall between the two speakers—was protected by the First Amendment because "the language chosen was 'one of a number of possible rational interpretations'" of the listening experience. *Id.* at 512 (quoting *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971)). The Court held that even if the description was technically inaccurate or reflected a misconception, this choice of language did "not place the speech beyond the outer limits of the First Amendments broad protective umbrella." *Id.* at 513.

As the Court has explained, protecting any "rational interpretation serves First Amendment principles by allowing an author the interpretive license that is necessary when relying upon ambiguous sources." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 519 (1991).[4] In contrast, the "rational interpretation" standard does not apply to altered quotations, because quotation marks indicate that the statement is repeated

[4] The *Callaghan* Court cited this case for another proposition, Pet. App. 46a, but ignored the "rational interpretation" entirely.

verbatim, and is not the author's "interpretation." *Id.* at 520.

Here, each statement in the White House Mailer—individually or collectively—can be rationally interpreted as true or otherwise protected. For example, the statement that "Judge Gary Johnson accepted an invitation from Obama" can be readily and reasonably construed as meaning that Judge Johnson was invited by the Obama Administration—a true statement. Likewise, the Mailer's "gist" can rationally mean that Judge Johnson was invited to and willingly attended an event associated with the President's legislative agenda—also true—not only that "Judge Johnson was invited by and socialized with President Obama." Pet. App. 47a.

Similarly, the decision below erroneously held that the White House Mailer's front page—stating that Judge Johnson "part[ied]" with President Obama—is not hyperbole. The court correctly stated that hyperbole means the statement cannot "reasonably be interpreted as stating actual facts about the individual involved." Pet. App. 42a (quoting *Hustler*). But then it found no hyperbole based solely on the hypothetical possibility that President Obama "may choose to ***gather***, ***honor***, or ***entertain***" guests and that Judge Johnson "attend[ed] a ***function*** at the White House." *Id.* at 44a (emphasis added).

But a mere possibility is not a "reasonable" interpretation. This Court has repeatedly protected hyperbole that was theoretically possible *See, e.g.*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988) (affirming jury verdict that cartoon was not reasonably believable); *Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974) (calling non-union

employees "traitors"). Indeed, it was protected hyperbole to call a developer's business dealings "blackmail" even though his conflict of interest was clear and that crime possibly occurred. *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970). Here too, it is reasonable to interpret the While House Mailer as saying something other than that Judge Johnson actually "part[ied]" with President Obama, particularly in context of the clearly Photoshopped headshots and exaggerated streamers.

2. The decision below is also contrary to this Court's precedent holding that *immaterial* false statements are protected speech.

In *Alvarez*, the plurality opinion struck down the Stolen Valor Act, because it punished false speech without any showing of harm or materiality. 567 U.S. at 722-23 (it "suppress[ed] all false statements on this one subject in almost limitless times and settings"). The plurality rejected the view that "the interest in truthful discourse alone is sufficient to sustain a ban on speech." *Id.* at 723. Similarly, Justice Breyer's concurrence would hold that harmless falsehoods cannot be punished and that "materiality" provides appropriate protection. *See id.* at 738 (the statute could "insist upon a showing that the false statement caused specific harm or at least was material"); *see also Masson*, 501 U.S. at 516 ("If an author alters a speaker's words but effects no material change in meaning, including any meaning conveyed by the manner or fact of expression, the speaker suffers no injury to reputation that is compensable as a defamation.").

The Court also requires independent analysis of "materiality" before speech can be punished as

"false." Applying First Amendment principles, the Court in *Air Wisconsin*, considered "how to determine the materiality of a false statement" in the context of the Aviation and Transportation Security Act (ATSA). 134 S. Ct. at 864-867. The Court held that a falsehood was not material under the ATSA "absent a substantial likelihood that a reasonable security officer would consider it important in determining a response to the supposed threat." *Id.* at 864. It explained that courts should focus on whether the speech had the relevant negative effect on the mind of the relevant audience: for defamation a material statement "affects the subject's reputation in the community" and for ATSA it "affects the authorities' perception of and response to a given threat." *Id.* at 863.[5]

Here, like the statute in *Alvarez*, the disciplinary rules apply to *all* false statements, not just materially false statements. And while it concluded baldly that Callaghan's statements were "materially false," the court below did no analysis whatsoever, let alone of the *Air Wisconsin* factors, to reach that conclusion. Pet. App. 48a Instead, the court below implied that any falsehood by a judge or judicial candidate would be material, regardless of context or content. *Id.* at 38a ("[E]rosion of the public's

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[5] The Court echoed this approach recently in *Maslenjak v. United States*, __ S. Ct. __ [No. 16-309, 2017 WL 2674154, at *9] (U.S. June 22, 2017) (holding naturalized citizenship cannot be revoked for lying unless the lies were material to obtaining citizenship; "a jury must evaluate how knowledge of the real facts would have affected a reasonable government official properly applying naturalization law.").

confidence in the judicial system as an institution … occurs when its candidates spread falsehoods.").

For example, whether Judge Johnson was "invited" by President Obama personally or someone in his Administration, like whether they "part[ied]," is not material under this Court's precedent. If that language in the Mailer is imprecise, it still would not harm the integrity of the judiciary any more than the accurate statement that Judge Johnson was invited to and attended an event promoting President Obama's agenda. Indeed, survey respondents were less concerned with the White House event than with the drug court and teen court issues, which were addressed in campaign flyers that are not charged here. *Supra* at 6.

III. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT

The West Virginia Supreme Court's decision conflicts with this Court's precedent, with its sister state courts of last resort, and with the circuits. Without this Court's intervention, the resulting uncertainty and inconsistencies will continue to affect a substantial number of cases involving this fundamental First Amendment right.

1. The thirty-six states that hold contested judicial elections are increasingly adopting and applying restrictions on campaign speech. In 2001, the Alabama Supreme Court said that only Alabama, Michigan, Georgia, and Ohio had broad prohibitions on judicial campaign statements. *Butler*, 802 So. 2d at 216.

Now, thirty-two states ban judicial campaign speech that would be affected by resolving the Question Presented:

- 2 states have provisions that bar only "false" speech in judicial elections: Louisiana and Oregon. La. Code Jud. Conduct Canon 7(A)(9); Or. Code Jud. Conduct R. 5.1(D).
- 12 states prohibit misrepresentations in judicial elections: Florida, Illinois, Mississippi, New Mexico, New York, North Carolina, North Dakota, South Carolina, South Dakota, Texas, Vermont and Wisconsin.[6]
- 18 states prohibit false or misleading speech in judicial elections: Arizona, Arkansas, California, Connecticut, Idaho, Indiana, Kansas, Maine, Maryland, Minnesota, Missouri, Montana, Nevada, Oklahoma, Pennsylvania, Tennessee, Washington, and West Virginia.[7]

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[6] Fla. Code Jud. Conduct Canon 7(3)(e)(ii); Ill. Sup. Ct. R. 67 Canon 7(A)(3)(d)(ii); Miss. Code Jud. Conduct Canon 5(A)(3)(d)(iii); N.M. Code Jud. Conduct 21-402(A); N.Y. Comp. Codes R. & Regs. tit. 22, § 100.5(A)(4)(d)(iii); N.C. Code Jud. Conduct Canon 7(C)(3); N.D. Code Jud. Conduct R. 4.3(A)(3); S.C. App. Ct. R. 501, Canon 5(A)(3)(d)(iii); S.D. Codified Laws § 16-2-appx Canon 5(A)(3)(d)(ii); Tex. Code Jud. Conduct Canon 5(1)(ii); Vt. Sup. Ct. Admin. Order 10, Canon 5(B)(4)(c); Wis. Sup. Ct. R. 60.06(3)(c)

[7] Ariz. Code Jud. Conduct R. 4.3(A); Ark. Code Jud. Conduct R. 4.1(A)(11); Cal. Code Jud. Ethics Canon 5(B)(1)(b); Conn. Code Probate Jud. Conduct R. 4.1(b)(9); Idaho Code Jud. Conduct R.

These rules can easily be interpreted to ban core, protected political speech. Despite paying lip service to the majority view that only false speech is unprotected, West Virginia and Ohio still punish misleading speech by expanding the definition of falsity. *Supra* at 23-25, 27-29. That end-run around First Amendment protections for non-false speech will only expand to other courts that want to regulate speech harshly.

2. At the same time, the number of complaints, amount of litigation, and severity of punishments for judicial campaign statements are increasing.

There is widespread reporting that the number of complaints has increased drastically for judicial election statements. *See, e.g.*, Greg Moran, *Judge Kreep faces discipline from state judicial commission*, San Diego Union Tribune, Oct. 14, 2016. In one area, for example, more complaints had been filed with seven weeks remaining in the 2016 election than in the previous eight election cycles combined. Jane Musgrave, *Complaints about judicial candidates to Bar committee at record high*, Palm Beach Post, July 12, 2016.

(continued…)

4.1(A)(11); Ind. Code Jud. Conduct R. 4.1(A)(11); Kan. Sup. Ct. Rules Re Jud. Conduct, R. 4.1(A)(4); Me. Code Jud. Conduct R. 4.3(C)(3); Md. R. 18-104.4(d)(5); Minn. Code Jud. Conduct R. 4.1(A)(9); Mo. Sup. Ct. R. 2-4.2(A)(5); Mont. Code Jud. Conduct R. 4.1(A)(10); Revised Nev. Code Jud. Conduct R. 4.1(A)(11); Okla. Code Jud. Conduct R. 4.1(A)(11); Pa. Code Jud. Conduct R. 4.1(A)(9); Tenn. Sup. Ct. R. 10, Canon 4, R. 4.1(A)(11); Wash. Code Jud. Conduct R. 4.1(A)(10); W.Va. Code Jud. Conduct R. 4.1(A)(9)

Relatedly, courts are also facing a substantial number of cases litigating these issues. Numerous cases were decided in 2016 alone. *See, e.g.*, *Myers v. Thompson*, 192 F. Supp. 3d 1129, 1139 (D. Mont. 2016) (denying injunction regarding Montana false and/or misleading speech provision for lawyers and judicial candidates); *O'Toole v. O'Connor*, No. 2:15-CV-1446, 2016 WL 4394135 at *11 (S.D. Ohio Aug. 18, 2016) (denying dismissal regarding Ohio's "true but misleading" prohibition on judicial candidate speech). *See also Ponzio v. Biscaglio*, No. 14-3069, 2016 WL 2865187 (Ill. App. Ct. May 16, 2016) (affirming dismissal of defamation claim for protected statements by a judicial candidate).

At the same time, states are also increasing the penalties for these violations. For example, the *Callaghan* Court recognized that it had only issued fines, reprimands and censures for violating the judicial campaign rules from 1993 to 1999, yet it suspended Judge Callaghan for two years, plus a $15,000 fine, reprimand and costs. Pet. App. 65a, 69a, 74a. Similarly, a Florida judge was removed from the bench entirely in 2006, in part for violating a speech prohibition for which a different judge received only a reprimand in 1997. *Renke* 933 So. 2d at 494–95.

3. Finally, the split cases demonstrate that judicial review itself—particularly using malleable "context" based tests—may damage the integrity of the courts more than the campaign statements they are punishing. *See Williams-Yulee*, 135 S. Ct. at 1666 (emphasizing this "'vital state interest'"). When elected justices restrict the speech of their challengers and colleagues, their impartiality is

questioned.[8] The integrity of the Wisconsin Supreme Court, for example, was questioned severely when the Justices split along party lines over a dispute regarding how their colleague won the swing vote seat.[9] The reputational damage was reinforced by the Justices' refusal to follow their "normal" procedure of issuing a per curiam opinion for such a split decision. 784 N.W.2d at 605 (Abrahamson Justices) (calling this "a complete break from our usual practice").

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] Entanglements appear to be inherent in such litigation. Here, the West Virginia Supreme Court hired Judge Johnson while the case was pending. *Supra* at 15. Also, the disciplinary officers involved in this case, including Disciplinary Counsel, were represented in related litigation by the Bailey & Glasser firm, where Nicholas Johnson—Judge Johnson's son who filed the Complaint with those entities—practices law. *Callaghan v. Wilson*, Dkt. 2:16-cv-10169 (S.D. W.Va.); Attorney Bio, available at http://www.baileyglasser.com/attorneys/detail/biography/101/Nicholas%20S.%20Johnson (last accessed July 7, 2017).

[9] *See, e.g.*, Ryan Foley, *Supreme Court deadlocks in Gableman case*, Wis. State Journal, July 1, 2010 available at http://host.madison.com/wsj/news/local/govt_and_politics/supreme-court-deadlocks-in-gableman-ethics-case/article_059e2f86-8522-11df-83b6-001cc4c03286.html; Lisa Kaiser, *Is a Majority of the Wisconsin Supreme Court Corrupt?*, Shepherd Express, July 14, 2010, available at http://shepherdexpress.com/article-11571-is-a-majority-of-the-wisconsin-supreme-court-corrupt-.html.

Respectfully submitted,

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July 10, 2017

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2017 Term

No. 16-0670

In the Matter Of:

THE HONORABLE STEPHEN O. CALLAGHAN, JUDGE-ELECT OF THE TWENTY-EIGHTH JUDICIAL CIRCUIT

DISCIPLINARY PROCEEDING

SUSPENDED WITHOUT PAY AND OTHER SANCTIONS

Submitted: January 24, 2017
Filed: February 9, 2017

Teresa Tarr, Esq. Brian Lanham, Esq. Judicial Disciplinary Counsel Charleston, West Virginia Attorneys for West Virginia Judicial Investigation Commission	Lonnie C. Simmons, Esq. DiTrapano, Barrett, DiPiero, McGinley & Simmons, PLLC Charleston, West Virginia Attorney for Respondent

ACTING CHIEF JUSTICE THOMAS E. MCHUGH delivered the Opinion of the Court. JUDGE MATISH concurs in part and dissents in part and reserves the right to file a separate opinion.

CHIEF JUSTICE LOUGHRY, JUSTICE DAVIS, JUSTICE WORKMAN, JUSTICE KETCHUM, and JUSTICE WALKER, deeming themselves disqualified, did not participate in the decision of this case.

SENIOR STATUS JUSTICE THOMAS E. MCHUGH, JUDGE ROBERT A. WATERS, JUDGE JAMES A. MATISH, JUDGE H. CHARLES CARL, III, and JUDGE JOANNA I. TABIT, sitting by temporary assignment.

SYLLABUS BY THE COURT

1. "'The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings.' Syl. pt. 1, *W.Va. Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980)." Syl., *Matter of Hey*, 193 W.Va. 572, 457 S.E.2d 509 (1995).

2. "'"Under [Rule 4.5 of the West Virginia Rules of Disciplinary Procedure], the allegations of a complaint in a judicial disciplinary proceeding 'must be proved by clear and convincing evidence.'" Syllabus Point 4, *In Re Pauley*, 173 W.Va. 228, 235, 314 S.E.2d 391, 399 (1983).' Syllabus Point 1, *Matter of Hey*, 192 W.Va. 221, 452 S.E.2d 24 (1994)." Syl. Pt. 1, *Matter of Starcher*, 202 W.Va. 55, 501 S.E.2d 772 (1998).

3. "This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syl. Pt. 3, *Comm. on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984), *cert denied*, 470 U.S. 1028, 105 S. Ct. 1395, 84 L.Ed.2d 783 (1985).

4. "The purpose of judicial disciplinary proceedings is the preservation and enhancement of public confidence in the honor, integrity, dignity, and efficiency of the members of the judiciary and the system of justice." Syl., *In the Matter of Gorby*, 176 W.Va. 16, 339 S.E.2d 702 (1985).

5. The provisions of the West Virginia Rules of Judicial Disciplinary Procedure are applicable in their entirety to "judicial candidates" as defined in

the West Virginia Code of Judicial Conduct, and permit the exercise of authority over said candidates for all purposes articulated therein.

6. "The West Virginia Constitution confers on the West Virginia Supreme Court of Appeals, both expressly and by necessary implication, the power to protect the integrity of the judicial branch of government and the duty to regulate the political activities of all judicial officers." Syl. Pt. 6, *State ex rel. Carenbauer v. Hechler*, 208 W.Va. 584, 542 S.E.2d 405 (2000).

7. Insofar as West Virginia Code of Judicial Conduct Rule 4.1(A)(9) and West Virginia Rule of Professional Conduct 8.2(a) prohibit lawyers, judges and judicial candidates from knowingly, or with reckless disregard for the truth, making a false statement as more fully proscribed therein, they are facially constitutional under the First Amendment to the United States Constitution.

8. "The law . . . takes but one approach to the question of falsity, regardless of the form of the communication. It overlooks minor inaccuracies and concentrates upon substantial truth. Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the [] charge be justified. A statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced." Syl. Pt. 4, in part, *State ex rel. Suriano v. Gaughan*, 198 W.Va. 339, 480 S.E.2d 548 (1996).

9. "This Court has the inherent power to inquire into the conduct of justices, judges and magistrates, and to impose any disciplinary measures short of

impeachment that it deems necessary to preserve and enhance public confidence in the judiciary." Syl. Pt. 8, *In re Watkins*, 233 W.Va. 170, 757 S.E.2d 594 (2013).

10. "[I]t is clearly within this Court's power and discretion to impose multiple sanctions against any justice, judge or magistrate for separate and distinct violations of the Code of Judicial Conduct and to order that such sanctions be imposed consecutively." Syl. Pt. 7, in part, *In re Watkins*, 233 W.Va. 170, 757 S.E.2d 594 (2013).

11. "Pursuant to article VIII, section 8 of the *West Virginia Constitution*, this Court has the inherent and express authority to 'prescribe, adopt, promulgate and amend rules prescribing a judicial code of ethics, and a code of regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof[.]'" Syl. Pt. 5, *Comm. On Legal Ethics v. Karl*, 192 W.Va. 23, 449 S.E.2d 277 (1994).

12. "Always mindful of the primary consideration of protecting the honor, integrity, dignity, and efficiency of the judiciary and the justice system, this Court, in determining whether to suspend a judicial officer with or without pay, should consider various factors, including, but not limited to, (1) whether the charges of misconduct are directly related to the administration of justice or the public's perception of the administration of justice, (2) whether the circumstances underlying the charges of misconduct are entirely personal in nature or whether they relate to the judicial officer's public persona, (3) whether the

charges of misconduct involve violence or a callous disregard for our system of justice, (4) whether the judicial officer has been criminally indicted, and (5) any mitigating or compounding factors which might exist." Syl. Pt. 3, *In re Cruickshanks*, 220 W.Va. 513, 648 S.E.2d 19 (2007).

MCHUGH, Acting Chief Justice:

This matter arises from the recommendation of the West Virginia Judicial Hearing Board (hereinafter "the Board") that respondent Stephen O. Callaghan, Judge-Elect of the 28th Judicial Circuit (hereinafter "Judge-Elect Callaghan") be disciplined for three violations of the West Virginia Code of Judicial Conduct and one violation of the West Virginia Rules of Professional Conduct. These violations stem from allegedly false statements contained in a campaign-issued flyer disseminated while Judge-Elect Callaghan was a candidate for Judge of the 28th Judicial Circuit. He objects to the findings and sanctions recommended by the Board and before this Court asserts 1) that neither Judicial Disciplinary Counsel nor the Board had jurisdiction to prosecute and hear the charges asserted against him since he was not a judge at the time of the alleged violations; 2) that the statements are protected by the First Amendment; and 3) that the recommended discipline of a one-year suspension without pay and other sanctions is excessive. Judicial Disciplinary Counsel likewise objects to the recommended discipline, requesting a two-year suspension.

This Court has before it all matters of record, including the stipulations, exhibits and a transcript of the evidentiary hearing conducted by the Board, as

well as the briefs and argument of counsel. Based on this Court's independent review of the record, we find that clear and convincing evidence of improper conduct has been presented in support of each of the violations found by the Board and that Judge-Elect Callaghan's constitutional arguments afford him no relief. Further, we adopt the Board's recommended discipline, with modification, and find that, under the unique circumstances presented herein, it is appropriate to suspend Judge-Elect Callaghan from the judicial bench for a total of two years without pay, along with the recommended fine of $15,000.00, and reprimand as an attorney. The Court further directs Judge-Elect Callaghan to pay the costs of the proceedings.

I. FACTS AND PROCEDURAL HISTORY

On May 11, 2015, Judge-Elect Callaghan filed pre-candidacy papers to run for Judge of the 28th Judicial Circuit. On November 24 and December 30, 2015, the West Virginia Judicial Investigation Commission ("JIC") sent a letter to all candidates advising them of the applicability of Rule 4.1 of the West Virginia Code of Judicial Conduct, entitled "Political and Campaign Activities of Judges and Judicial Candidates in General." On January 14, 2016, Judge-Elect Callaghan filed his candidacy papers; his opponent was the incumbent Honorable Gary L. Johnson (hereinafter "Judge Johnson").

In late January 2016, upon the advice of his campaign consultant, Brad Heflin of Rainmaker, Inc., Judge-Elect Callaghan commissioned and approved an automated survey, in part, to test the effect of connecting Judge Johnson's attendance at a child

trafficking seminar in Washington, D.C. with the loss of coal jobs in Nicholas County, which losses had been widely associated with President Barack Obama's policies.[1] The specific survey question stated: "Gary Johnson is lockstep with Barack Obama's policies. While Nicholas County was losing coal jobs to Obama's policies, Johnson was the only West Virginia judge invited to the Obama White House to participate in a junket highlighting issues of importance to President Obama." The survey then asked the participant to rate whether this statement caused major concern, some concern, no real concern, or "don't know." Approximately 67% of those surveyed responded that this statement caused them "major concern" or "some concern."[2]

The genesis of the survey question is Judge Johnson's June 2015 attendance at a Court Improvement Program ("CIP") meeting and Child Trafficking Conference in Washington, D.C. As a

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[1] A 2015 Gallup poll revealed that President Obama had a 72% disapproval rating in West Virginia. *See* http://www.gallup.com/poll/189002/obama-rated-best-hawaii-2015-worst-west-virginia.aspx (last visited February 8, 2017). As stated in his response to the Statement of Charges: "To the extent some citizens of Nicholas County may have the opinion that *any* association between Judge Johnson and President Obama is completely unacceptable, regardless of the circumstances, Mr. Callaghan sought to create advertising consistent with that opinion. . . ." (emphasis in original).

[2] The polling results submitted into evidence demonstrate that when asked which candidate they were likely to vote for both before and after this statement, the number of individuals indicating they would likely vote for Judge Johnson was reduced by approximately 9%. Judge-Elect Callaghan's ultimate margin of victory against Judge Johnson was 3.38%. *See* n.6, *infra*.

recipient of three federal CIP grants, the State was required to send a representative for each such grant to the annual CIP Grantee meeting; Judge Johnson was the Chair of the West Virginia CIP. At the same time as the CIP Grantee Meeting, the Federal Administration for Children and Families held a seminar on child trafficking; the agency encouraged the States to send their highest level representatives. In an unrelated occurrence that same month, a press report was issued detailing the loss of 558 coal jobs in Nicholas County between 2011 and 2015.

Following the survey, Judge-Elect Callaghan approved a direct-mail flyer created by Mr. Heflin emblazoned with "photoshopped"[3] photographs of President Obama and Judge Johnson, along with the caption "Barack Obama & Gary Johnson Party at the White House . . . ." President Obama is depicted holding what appears to be an alcoholic beverage and party streamers form the background of the photographs. *See* Exhibit "A" attached to this opinion. The opposing side of the flyer concludes ". . . While Nicholas County loses hundreds of jobs." The opposing side also contains a mock-up of a "Layoff Notice" which states:

> While Nicholas County lost hundreds of jobs to Barack Obama's coal policies, Judge Gary Johnson *accepted an invitation from Obama* to come to the White House to support Obama's legislative agenda. That same month, news outlets reported a 76% drop in coal mining employment. **Can we trust Judge Gary**

[3] This was the term utilized by Mr. Heflin during his testimony before the Board.

Johnson to defend Nicholas County against job-killer Barack Obama?

(emphasis added). The flyer was mailed to voters in Nicholas County on or about May 5, 2016, five days before the May 10, 2016, election, as agreed by Judge-Elect Callaghan and Mr. Heflin.[4] The flyer was also posted on Judge-Elect Callaghan's personal and campaign Facebook pages.

It is undisputed herein that Judge Johnson was not "invited by" President Obama to attend the CIP meeting and Child Trafficking conference, did not meet President Obama, has never met President Obama, and did not attend a "party" or any social function, much less one involving alcohol, while at the meeting and seminar. It also appears that while conference meetings were held at buildings within the White House compound, Judge Johnson did not actually go to The White House.

Judicial Disciplinary Counsel contacted Judge-Elect Callaghan, advising him that the flyer was inappropriate and demanding remediation. The record demonstrates that Nicholas County's only newspaper is published and circulated only on Wednesdays, allowing no opportunity to run an ad addressing the flyer before the following Tuesday's election. Therefore, as a result of these discussions and in an effort to avoid the filing of a judicial ethics complaint,[5] Judge-Elect Callaghan agreed to remove

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[4] In addition to this flyer, Judge-Elect Callaghan also sent four additional flyers on various topics such as drug abuse, drug court, and a "teen court." *See infra*.

[5] Judicial Disciplinary Counsel indicated to Judge-Elect Callaghan that this action would be sufficient to deter her from

the flyer from his personal and campaign Facebook pages and run eight local radio ads over a three-day period stating:

> If you received a mail advertisement recently from Steve Callaghan, Candidate for Nicholas County Circuit Judge, showing Judge Gary Johnson visiting the White House, please understand that the specific characterization of the White House visit *may be inaccurate and misleading and should not have been sent* containing the *inappropriate* information. Candidate Callaghan apologizes for any misunderstanding or *inaccuracies*. . . ."

(emphasis added). On May 10, 2016, Judge-Elect Callaghan defeated Judge Johnson by 227 votes.[6]

On July 18, 2016, a Formal Statement of Charges was issued against Judge-Elect Callaghan by the JIC.[7] On November 29, 2016, after hearing evidence, the Board issued a Recommended Decision pursuant to Rule 4.8 of the West Virginia Rules of Judicial

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initiating a judicial complaint. The complaint filed in this matter was ultimately filed by Judge Johnson's son, Nicholas Johnson.

[6] Out of 6,717 votes cast, Judge-Elect Callaghan received 3,472 and Judge Johnson received 3,245.

[7] Judge-Elect Callaghan was originally charged under a single count with eight separate violations: Rule 4.1(A)(9) and (B), Rule 4.2(A)(1), (3), (4) and (5) of the West Virginia Code of Judicial Conduct (2015), as well as Rule 8.2(a) and (b) of the West Virginia Rules of Professional Conduct (2015). Judicial Disciplinary Counsel later voluntarily dismissed the violation of Rule 4.2(A)(3), requiring a candidate to review and approve all campaign statements and materials inasmuch as Judge-Elect Callaghan admitted he reviewed and approved the subject flyer.

Disciplinary Procedure, finding that he violated Rules 4.1(A)(9), 4.2(A)(1), 4.2(A)(4) of the Code of Judicial Conduct and Rule 8.2(a) of the Rules of Professional Conduct.[8] Disciplinary Counsel requested a one-year suspension for the Professional Conduct violation and a one-year suspension for the Judicial Code violations to run *consecutively*, for a total of a two-year suspension. Instead, the Board recommended a one-year suspension without pay for *each* of the four violations, to run *concurrently*, as well as censure, reprimand, a $5,000 fine per Judicial Code violation, and payment of costs. Judge-Elect Callaghan filed an objection to the recommended disposition pursuant to Rule of Judicial Disciplinary Procedure 4.11. As a result of the Board's one-year concurrent suspension, Disciplinary Counsel likewise objected to the recommended discipline, reiterating its request that a two-year suspension be ordered.

II. STANDARD OF REVIEW

With respect to discipline for violations of the West Virginia Code of Judicial Conduct, "'[t]he Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings.' Syl. pt. 1, *W.Va. Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980)." Syl., *Matter of Hey*, 193 W.Va. 572, 457 S.E.2d 509 (1995). "The independent evaluation of the Court shall

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[8] With respect to the remaining charged violations, the Board found that there was not clear and convincing evidence that Judge-Elect Callaghan violated Rule 4.2(A)(5) of the Code of Judicial Conduct, which requires a candidate to "take corrective action if he (continued . . .)

constitute a *de novo* or plenary review of the record." *Matter of Starcher*, 202 W.Va. 55, 60, 501 S.E.2d 772, 777 (1998). Moreover, ""'Under [Rule 4.5 of the West Virginia Rules of Disciplinary Procedure], the allegations of a complaint in a judicial disciplinary proceeding 'must be proved by clear and convincing evidence.'" Syllabus Point 4, *In Re Pauley*, 173 W.Va. 228, 235, 314 S.E.2d 391, 399 (1983).' Syllabus Point 1, *Matter of Hey*, 192 W.Va. 221, 452 S.E.2d 24 (1994)." Syl. Pt. 1, *Starcher*, 202 W.Va. 55, 501 S.E.2d 772.

Likewise, with respect to lawyer disciplinary matters, "[t]his Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syl. Pt. 3, *Comm. on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984), *cert denied*, 470 U.S. 1028, 105 S. Ct. 1395, 84 L.Ed.2d 783 (1985). A *de novo* standard similarly applies. Syl. Pt. 3, Comm. on *Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994).

Moreover, insofar as Judge-Elect Callaghan challenges the constitutionality, both facially and as-applied, of the Rules which he was charged with violating, our review is plenary. "Constitutional challenges . . . are reviewed pursuant to a *de novo* standard of review." *In re FELA Asbestos Cases*, 222 W.Va. 512, 514, 665 S.E.2d 687, 689 (2008). Standards for imposition of discipline are discussed in greater detail, *infra.* Therefore, with these standards in mind, we proceed to the substance of the presented objections.

III. DISCUSSION

The Board found that Judge-Elect Callaghan violated the following provisions of the West Virginia Code of Judicial Conduct:

> Rule 4.1(A)(9): ". . . [A] judge or a judicial candidate shall not . . . knowingly, or with reckless disregard for the truth, make any false or misleading statement[.]"
>
> Rule 4.2(A)(1): "A judge or candidate subject to public election shall . . . act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary[.]"
>
> Rule 4.2(A)(4): "A judge or candidate subject to public election shall . . . take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities . . . that the candidate is prohibited from doing by Rule 4.1[.]"

and the following provision of the West Virginia Rules of Professional Conduct:

> Rule 8.2(a): "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."

Judge-Elect Callaghan raises three objections to the Board's recommended decision, as follows: 1) Judicial Disciplinary Counsel has no authority to prosecute, nor does the Board have jurisdiction to hear, matters involving a judicial candidate who is

not a "judge" because the Rules of Judicial Disciplinary Procedure make no reference to "judicial candidates"; 2) the language in the subject flyer was speech protected by the First Amendment either because it is objectively or substantially true and/or rhetorical hyperbole or parody; and 3) the recommended discipline is excessive. We begin, as we must, with Judge-Elect Callaghan's jurisdictional challenge to Judicial Disciplinary Counsel's prosecution of the charges against him and the Board's authority to hear such charges and recommend discipline.

A. Jurisdiction of the Board and Judicial Disciplinary Counsel

The West Virginia Code of Judicial Conduct contains provisions expressly applicable to judicial candidates. *See* W.Va. Code of Jud. Cond., *Application*, Section I(B) ("All *judicial candidates* for judicial office shall comply with the applicable provisions of this Code." (emphasis added)); *Preamble* ("The West Virginia Code of Judicial Conduct establishes standards for the ethical conduct of judges and *judicial candidates*." (emphasis added)). In fact, Canon 4 deals exclusively with campaign activity by judges and "candidates." Rules 4.1 and 4.2 contain general prohibitions and affirmative obligations relative to "Political and Campaign Activities of Judges and *Judicial Candidates*." (emphasis added). The remaining Rules within this Canon deal with activities of candidates for appointive judicial office, candidates for non-judicial office, and campaign committees. *See* Rules 4.3, 4.4, and 4.5. As indicated above, each of the Judicial Rule violations found by the Board

expressly applies to "judicial candidates." Judge-Elect Callaghan does not dispute that he qualifies as a "judicial candidate" as defined by the Code of Judicial Conduct,[9] nor does he dispute that the Code properly governs the conduct of judicial candidates.

Rather, he argues that because the West Virginia Rules of Judicial Disciplinary Procedure make no express reference to "judicial candidates" and refer only to "judges" in outlining the disciplinary procedures, neither Judicial Disciplinary Counsel nor the Board have "jurisdiction" to prosecute and hear charges against a judicial candidate who is not a judge. Noting the absence of any reference in the entire collection of procedural rules to "judicial candidate," he specifically highlights the reference to and definition of "judge" contained in Rule of Judicial Disciplinary Procedure 2, which states:

> Any person may file a complaint against a "judge" with the Office of Disciplinary Counsel regarding a violation of the Code of Judicial Conduct. The term "judge" is defined in the

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[9] The *Terminology* section of the Code of Judicial Conduct defines "judicial candidate" as:

> any person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes or, where permitted, engages in solicitation or acceptance of contributions or support, or is nominated for election or appointment to office.

> Code of Judicial Conduct as "Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including but not limited to Justices of the Supreme Court of Appeals, Circuit Judges, family court judges, Magistrates, Mental Hygiene Commissioners Juvenile Referees, Special Commissioners and Special Masters."[10]

(footnote added). Judge-Elect Callaghan maintains that this incongruence between the Code of Judicial Conduct and the Rules of Judicial Disciplinary Procedure serves to strip Judicial Disciplinary Counsel and the Board of any authority to prosecute charges and/or recommend discipline against him.

The West Virginia Constitution article VIII, section eight provides that

> [u]nder its inherent rule-making power, which is hereby declared, the supreme court of appeals shall, from time to time, prescribe, adopt, promulgate and amend rules prescribing a judicial code of ethics, and a code of regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof, and the supreme court of appeals is authorized to censure or temporarily suspend any justice,

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[10] The Code of Judicial Conduct no longer contains a definition for "judge," given the substantial 2015 amendments, describing instead the "applicability" of the Code of Conduct. Moreover, as pertains to Canon 4's express reach over "judicial candidates," it appears simply that the procedural rules were not modified to comport with the specific language in the Code of Judicial Conduct.

> judge or magistrate having the judicial power of the state, including one of its own members, for any violation of any such code of ethics, code of regulations and standards[.]

In exercise of that authority, this Court has held that "[t]he purpose of judicial disciplinary proceedings is the preservation and enhancement of public confidence in the honor, integrity, dignity, and efficiency of the members of the judiciary and the system of justice." Syl., *In the Matter of Gorby*, 176 W.Va. 16, 339 S.E.2d 702 (1985). That such a goal must, at a minimum, begin by regulating the conduct of those who seek to become members of the judiciary hardly needs explication.[11]

Indeed as previously indicated, Judge-Elect Callaghan does not challenge this Court's authority, through the Code of Judicial Conduct, to regulate the

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[11] Accordingly, the various iterations of our judicial code of conduct have historically swept broadly enough to regulate the conduct of judicial candidates. Canon 7(B)(1)(c) of West Virginia's long-standing Judicial Code of Ethics (1977) provided that "[a] candidate, including an incumbent judge, for a judicial office that is to be filled by public election between competing candidates . . . should not . . . misrepresent his identity, qualifications, present position, or other fact." On January 1, 1993, the Code of Judicial Conduct superseded the Code of Ethics and the corollary of this provision then provided that a candidate shall not "knowingly misrepresent the identity, qualification, present position or other fact concerning the candidate or an opponent[.]" Canon 5A(3)(d)(iii) (2015). In November 2015, the Court adopted the current Code of Judicial Conduct, which substantially revised the prior Code and more closely mirrors the 2007 Model Code of Judicial Conduct promulgated by the American Bar Association, containing the provisions cited above.

activities of judicial candidates. Instead he argues that the disciplinary procedural rules do not expressly grant commensurate authority to Judicial Disciplinary Counsel or the Board to act upon or enforce such regulations against a non-incumbent, lawyer-candidate. Although this Court has not had occasion to specifically address the role of the Rules of Judicial Disciplinary Procedure, it has examined the import of our other rules of procedure.

In *Arlans Department Store of Huntington, Inc. v. Conaty*, 162 W.Va. 893, 897-98, 253 S.E.2d 522, 525 (1979), the Court observed as pertains to our functionally comparable Rules of Civil Procedure:

> The rules of civil procedure were designed to secure just, speedy and inexpensive determinations in every action. *Neither the West Virginia Rules of Civil Procedure nor the statutory rules of pleading, practice and procedure impermissibly restrict the jurisdiction of circuit courts in the constitutional sense. The rules of civil procedure do not restrict the original and general jurisdiction of courts of record in this State; they do not remove any class of cases or restrict the types of disputes which a circuit court has judicial jurisdiction to hear and adjudicate.* The rules do, however, establish procedures for the orderly process of civil cases as anticipated by W.Va. Const. Art. III, § 10. *They operate in aid of jurisdiction* and facilitate the public's interest in just, speedy and inexpensive determinations. They vindicate constitutional rights by providing for the administration of justice without denial or delay as required by W.Va. Const. Art. III, § 17.

(emphasis added). Accordingly, the *Arlan* Court tersely rejected a claim that procedural violations strip a court of jurisdiction: "Th[e] effect of noncompliance with the rules is not equivalent to impermissibly depriving the court of its constitutional power or jurisdiction, and to characterize it as such will not make it so." *Id.* at 898, 253 S.E.2d at 526. As more pointedly stated by the Ohio Supreme Court:

> It is well established that statutes establishing subject matter jurisdiction, which create and define the rights of parties to sue and be sued in certain jurisdictions, are substantive law. "If the statute is jurisdictional, it is a substantive law of this state, and cannot be abridged, enlarged, or modified by the Ohio Rules of Civil Procedure."

Proctor v. Kardassilaris, 873 N.E.2d 872, 876 (Ohio 2007) (quoting *Akron v. Gay*, 351 N.E.2d 475, 477 (Ohio 1976)).

Other courts take a similar view that procedural rules merely create a mechanism to vindicate the substantive law and therefore do not affect jurisdiction. "'[T]he basis for the exercise of judicial authority is normally found in jurisdictional statutes, not in the language of procedural rules.'" *Interest of Clinton*, 762 P.2d 1381, 1388 (Colo. 1988) (*en banc*) (quoting *White v. Dist. Court*, 695 P.2d 1133, 1135 (Colo. 1984)). In *Levin v. Anouna*, 990 P.2d 1136, 1138 (Colo. App. 1999), the Colorado Court of Appeals stated that "a procedural statute or a court rule normally does not address jurisdictional issues; restrictions upon a court's jurisdiction are generally to be found in statutes directly addressing that

subject." While acknowledging that a "procedural defect result[ing] from a failure to comply with an essential requirement . . . may constitute reversible error," the court found that such procedural requirements do not implicate its jurisdiction. *Id*.

The import of these decisions is that procedural rules are not designed to either establish or affect jurisdiction. Accordingly, it is clear that it is the Code of Judicial Conduct that provides the substantive, jurisdictional requirements for exercising discipline over Judge-Elect Callaghan; the rules of disciplinary procedure are merely that—procedural mechanisms for the exercise of that jurisdiction. Any technical deficiency in the verbiage of the procedural rules does not serve to eradicate the unmistakable grant of authority contained in the Code of Judicial Conduct to Judicial Disciplinary Counsel and the Board to investigate, prosecute, and hear matters involving violations thereof.

Moreover, even a hyper-technical reading of the Rules of Judicial Disciplinary Procedure reveals sufficient breadth in its description of the Board's authority to allow for the prosecution and discipline of non-incumbent lawyer-candidates for the judiciary. Both Rule 1.11 and 3.11 permit the JIC and Board to "engage in such other activities related to judicial discipline as it deems appropriate[.]" In fact, Rule 5.4 expressly directs Disciplinary Counsel to "prosecute violations of the Code of Judicial Conduct . . . before the . . . Judicial Hearing Board[.]" We therefore reject Judge-Elect Callaghan's contention that, as a non-incumbent, lawyer-candidate, neither Judicial Disciplinary Counsel nor the Board have authority or

jurisdiction over him for violations of the Code of Judicial Conduct, as set forth therein.

To find otherwise would, as the Board concluded, create an inequity where judicial candidates who are judges are held to the standards set forth in the Code of Judicial Conduct, but lawyer-candidates are not. The Oregon Supreme Court similarly noted and rejected the imbalance such an interpretation would make:

> It is equally clear that to apply the limitations of Canon 7B(7) to sitting judges, while allowing their as-yet-unelected opponents to campaign unfettered by Canon 7B(7), would create an advantage for the challenger. The legislature did not intend the Commission to have so little and so ineffective jurisdiction over judicial activity.

In re Fadeley, 802 P.2d 31, 36 (Ore. 1990). *See also Wolfson v. Concannon*, 811 F.3d 1176, 1191 (9th Cir. 2016) (Berzon, Cir. J., concurring) ("[S]tricter restrictions during judicial campaigns . . . for sitting judges than for nonincumbent candidates for judicial positions would create [] disparity[.]").[12] We

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[12] We find Judge-Elect Callaghan's passing assertion that this incongruity is resolved by construing the Rules to require violations of the Code of Judicial Conduct by lawyer-candidates to be "handled by the West Virginia Lawyer Disciplinary Board" unavailing. As he correctly notes, both Judicial Disciplinary Counsel and Lawyer Disciplinary Counsel have overlapping authority to investigate and prosecute violations of the Code of Judicial Conduct or Rules of Professional Conduct as per Rule 4 of the Rules of Lawyer Disciplinary Procedure. However, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board acts upon "formal charges filed by the Investigative Panel." W.

therefore expressly hold that the provisions of the West Virginia Rules of Judicial Disciplinary Procedure are applicable in their entirety to "judicial candidates" as defined in the West Virginia Code of Judicial Conduct, and permit the exercise of authority over said candidates for all purposes articulated therein.

Having concluded that Judicial Disciplinary Counsel and the Board permissibly exercised jurisdiction over Judge-Elect Callaghan in prosecuting, hearing, and acting upon the charges against him, we now proceed to examine his substantive objections to the Board's findings and recommended discipline.

B. First Amendment Challenge to Rule 4.1(A)(9) and Rule 8.2(a)

As discussed above, the Board concluded that the subject flyer violated Rule 4.1(A)(9) of the Code of Judicial Conduct which forbids judicial candidates from "knowingly, or with reckless disregard for the truth, mak[ing] any false or misleading statement[.]"

Va. R. L. Disc. Proc. 3. The Investigative Panel, concomitantly, has authority to find probable cause for "a violation of the Rules of Professional Conduct." W. Va. R. L. Disc. Proc. 2, 2.9(a) (emphasis added). Moreover, the Hearing Panel Subcommittee is granted authority to sanction for "a violation of the Rules of Professional Conduct." W. Va. R. L. Disc. Proc. 3.15. Therefore, the Hearing Panel Subcommittee has no authority to hear charges involving violations of the Code of Judicial Conduct. The Board's near-comprehensive authority over judges and conduct governed by the Code of Judicial Conduct is further demonstrated by Rule 3.12 which provides that even when judges are charged with violation of the Rules of Professional Conduct, the Board maintains exclusive jurisdiction over such discipline. W. Va. R. Jud. Disc. Proc. 3.12.

Commensurately, the Board found the subject flyer violated Rule 8.2(a) of the Rules of Professional Conduct which similarly prohibits a lawyer from making "a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . [or] a candidate for election . . . to judicial . . . office."[13] By authorizing the creation and mailing of the subject flyer by his campaign consultant, the Board concluded that Judge-Elect Callaghan also violated Rule 4.2(A)(4) which requires a candidate to take "reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities . . . that the candidate is prohibited from doing by Rule 4.1[.]" Finally, as a result of the foregoing, the Board further found that Judge-Elect Callaghan failed to "act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary," in violation of Rule 4.2(A)(1).

Judge-Elect Callaghan argues that the Board's recommended discipline, all of which is based upon

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[13] In the interest of brevity and given the similarity between the "false statement" prohibitions contained in Rule 4.1(A)(9) of the Code of Judicial Conduct and Rule 8.2(a) of the Rules of Professional Conduct, our analysis herein of the substance of Rule 4.1(A)(9) should be read as equally applicable to Rule 8.2(a). We expressly note that Judge-Elect Callaghan makes no separate constitutional challenge to Rule 8.2(a) that differs from that which he advances against Rule 4.1(A)(9). *See In re Chmura*, 608 N.W.2d 31, 43 n.11 (Mich. 2000) (summarily applying analysis of judicial canon restricting judicial candidate's speech to companion Rule of Professional Conduct similarly restricting lawyer's speech about judges and other public legal officers).

the statements made in the subject flyer, violates his right to free speech under the First Amendment to the United States Constitution.[14] He asserts that all of the statements contained in the subject flyer are either objectively true, "substantially true" or "rhetorical hyperbole/parody," all of which is protected speech. He argues that the flyer simply took two unrelated facts—Judge Johnson's attendance at a federal seminar and coal job losses in Nicholas County—and juxtaposed them, allowing the public to draw any inferences it saw fit. The Board concluded that the statements in the subject flyer were not entitled to First Amendment protection and were materially false in violation of the Rules set forth hereinabove.[15]

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[14] The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Although not referenced by Judge-Elect Callaghan, the West Virginia Constitution likewise provides:

> No law abridging the freedom of speech, or of the press, shall be passed; but the Legislature may, by suitable penalties, restrain the publication or sale of obscene books, papers, or pictures, and provide for the punishment of libel, and defamation of character, and for the recovery, in civil actions, by the aggrieved party, of suitable damages for such libel, or defamation.

W.Va. Const. art. III, § 7.

[15] The Board crafted a separate order entered in advance of the hearing denying Judge-Elect Callaghan's motion to dismiss the charges on constitutional grounds. Taking issue apparently

with the Board's refusal to seek an advisory opinion from this Court regarding the constitutionality of the Rule violations with which he was charged, he now urges this Court to address the "serious procedural question" of whether administrative agencies have the authority to address constitutional issues. Subsequent to oral argument, Judge-Elect Callaghan submitted a notice of additional authorities containing an additional citation to a case in support of this issue and further suggesting that remand may be necessary, depending on this Court's ruling on the constitutional issue presented.

First, we observe that Judge-Elect Callaghan forced the issues before the Board by raising them in the context of a motion to dismiss, which necessarily must be ruled upon before proceeding to disposition. Secondly, before this Court, he cites no authority suggesting that an agency must first seek a court ruling on the constitutionality of the rules it is charged with enforcing before acting. In fact, the cases he cites merely protect the right of one who *challenges* the constitutionality of a rule to seek declaratory judgment in the proper forum. Judge-Elect Callaghan apparently declined to do so in this case, preserving his constitutional challenge for presentation to this Court upon consideration of the recommended disposition.

Moreover, none of the cases cited suggest that the agency cannot act upon its rules in the face of a constitutional challenge; in fact, they demonstrate the opposite. In each case, the agency before which the constitutional challenge was raised acted with the presumption that its rules and actions were constitutional and reserved to the appropriate judicial forum the final resolution of constitutionality. That is precisely what has occurred in this case. In fact, the leading case cited in support of the proposition that the Board could not pass on the constitutionality of the Rules at issue states "although the general rule is that agencies do not have the authority to decide constitutional issues, agencies must consider and apply constitutional principles in determining procedures and rendering decisions in contested cases." *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 453 (Tenn. 1995). More specifically, "[w]hen the focus of an aggrieved party's claim is an 'as applied' challenge to the constitutionality of a statute or any

1. Facial Constitutionality of Code of Judicial Conduct Rule 4.1(A)(9) and Rule of Professional Conduct 8.2(a)

It is well-established that "speech about public issues and the qualifications of candidates for elected office commands the highest level of First Amendment protection." *Williams-Yulee v. The Fla. Bar*, 135 S. Ct. 1656, 1665 (2015). However, that being established, the United States Supreme Court has made clear that *judicial* candidates may be treated differently than political candidates for purposes of curtailing improper speech: "Judges are not politicians, even when they come to the bench by way of the ballot. And a State's decision to elect its judiciary does not compel it to treat judicial candidates like a campaigner for political office." *Id.* at 1662. In acknowledgment of this view, the commentary to our Rule 4.1 notes that "[t]he role of a judge is different from that of a legislator or executive branch official, even when the judge is subject to public election [and] [c]ampaigns for judicial office must be conducted differently from campaigns for other offices." W.Va. Code of Jud. Cond. 4.1 cmt. *See also* Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial*

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challenge to the constitutionality of an agency rule, the agency may initially rule on the challenge." *Id.* at 455. *See also Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 435 (1982) (criticizing disciplinary respondent for failing to raise constitutional challenge during disciplinary proceedings as there was nothing to indicate "the members of the Ethics Committee, the majority of whom are lawyers, would have refused to consider a claim that the rules which they were enforcing violated federal constitutional guarantees").

Ethics, 9 Geo. J. Legal Ethics 1059, 1067 (1996) ("The American tradition sets judges aside from the hurly-burly of sometimes unseemly political strife. We place courts and judges on a higher plateau and hope that in doing so they will act the part and ask us to do the same on matters of importance. Consignment of judges to regular rough-and-tumble politics makes the judiciary less capable of filling this role."). The *Williams-Yulee* Court explained further that since "the judiciary 'has no influence over either the sword or the purse; . . . neither force nor will but merely judgment[,]' . . . . [t]he judiciary's authority [] depends in large measure on the public's willingness to respect and follow its decisions." 135 S. Ct. at 1666 (citations omitted). In short, the bedrock of the public's submission to the judiciary's authority is the public's faith in its integrity, impartiality, and fairness.

With the critical understanding that "[s]tates may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians[,]" it is therefore incumbent upon this Court to determine if Rule 4.1(A)(9) of the Code of Judicial Conduct and Rule 8.2(a) of the Rules of Professional Conduct improperly infringe on the petitioner's First Amendment rights. *Id.* at 1667. The Supreme Court has explicitly held that "[a] State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest." *Id.* at 1665.

a. Existence of a Compelling State Interest

Without question, this Court has previously recognized that "[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." In the *Matter of Hey*, 192 W.Va. 221, 227, 452 S.E.2d 24, 30 (1994). The United States Supreme Court has agreed: "We have recognized the 'vital state interest' in safeguarding 'public confidence in the fairness and integrity of the nation's elected judges.'" *Williams-Yulee*, 135 S. Ct. at 1666 (quoting *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)).[16] While

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[16] Similarly, and as pertains to the lawyer disciplinary penalty, this Court has expressly held with respect to lawyers' asserted free speech rights:

> The Free Speech Clause of the First Amendment protects a lawyer's criticism of the legal system and its judges, but this protection is not absolute. A lawyer's speech that presents a serious and imminent threat to the fairness and integrity of the judicial system is not protected. When a personal attack is made upon a judge or other court official, such speech is not protected if it consists of *knowingly false statements or false statements made with a reckless disregard of the truth* . . . .

Syl. Pt. 1, in part, *Comm. on Legal Ethics v. Douglas*, 179 W.Va. 490, 370 S.E.2d 325 (1988) (emphasis added). More recently, the Court held:

> . . . [A] statement by an attorney that such attorney knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or

"[t]he concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record[,] . . . no one denies that it is genuine and compelling." *Williams-Yulee*, 135 S. Ct. at 1667.

Although it is fairly inarguable that states have a compelling state interest in maintaining public confidence in their judiciary, we pause briefly in our analysis to give proper treatment specifically to West Virginia's wide-ranging measures to uphold the integrity and impartiality of judicial officials and candidates.[17] The West Virginia Code of Judicial

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> integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office is not protected by the First Amendment as public speech on a matter of public concern where such statement is not supported by an objectively reasonable factual basis. The State's interest in protecting the public, the administration of justice, and the legal profession supports use of the objectively reasonable standard in attorney discipline proceedings involving disparagement of the credibility of the aforementioned judicial officers.

Syl. Pt. 5, in part, *Lawyer Disciplinary Bd. v. Hall*, 234 W.Va. 298, 765 S.E.2d 187, 190 (2014). *See also* n.13, *supra*.

[17] As explained by now-Chief Justice Loughry in his book about West Virginia election corruption:

> For too long, West Virginians have witnessed lying about candidates as a matter of tradition and expected behavior. The result, however, is that lying during a campaign erodes democracy, defames good people, and discourages others from even considering entering politics. There is simply no justification and no First Amendment right to lie and destroy someone's reputation and life. It

Conduct requires that those within the judiciary "respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system." *Preamble*, W.Va. Code of Jud. Cond. It critically mandates that the judiciary "maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety . . . [and] aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence." *Id.* While not naive enough to suggest that the public believes the judiciary to be infallible, judicial officers and candidates must minimally conduct themselves such as to preserve the institutional veneration with which the judiciary is historically imbued. We agree whole-heartedly that

> [t]he public at large is entitled to honesty and integrity in judicial officials elected to mete out justice, apportion equity, and adjudicate disputes. We cannot ask for more, but we should certainly not expect less, particularly when it is the robed arbiter who, when administering the oath to witnesses, cautions them to tell the truth, the whole truth, and nothing but the truth.

> amounts to obtaining a public office through stealth and deception and by robbing every voter of a fair election.

Allen H. Loughry, II, "Don't Buy Another Vote, I Won't Pay for a Landslide," 498 (McClain Printing Co. 2006). *See also Caperton*, 556 U.S. 868 (discussing effect of campaign contributions on obligation of West Virginia Supreme Court of Appeals justice to recuse himself).

In re Lowery, 999 S.W.2d 639, 663 (Tex. Rev. Trib. 1998).

That said, this Court is not blind to the "fundamental tension between the ideal character of the judicial office and the real world of electoral politics." *Chisom v. Roemer*, 501 U.S. 380, 400 (1991). *See In re Donohoe*, 580 P.2d 1093, 1097 (Wash. 1978) (*en banc*) (recognizing the "delicate balancing of rights involving the public, the incumbent judge, and the lawyer candidate for judicial office"). However, as this Court held in syllabus point six of *State ex rel. Carenbauer v. Hechler*, 208 W.Va. 584, 542 S.E.2d 405 (2000), "[t]he West Virginia Constitution confers on the West Virginia Supreme Court of Appeals, both expressly and by necessary implication, the *power* to protect the integrity of the judicial branch of government and the *duty* to regulate the *political activities* of all judicial officers." (emphasis added). Accordingly, the requirements and prohibitions contained in our Code of Judicial Conduct carry out this Court's mandate to ensure that "integrity and impartiality" are visible, demonstrable qualities of our judicial candidates and not merely a meaningless ethical talisman. Significantly, judicial candidates willingly submit themselves and their campaigns to these restrictions. *See* Shepard, *supra* at 1060 ("The notion that judges must sacrifice many of their personal interests to the interests of the system and the litigants that it serves is ancient and widespread.").

Not only is protecting the integrity of the judiciary the constitutional duty of this Court, but it has likewise been woven into the fabric of public policy as expressed by our Legislature. In a measure that

complements the Code of Judicial Conduct's distinguishing regulation of judicial campaigns, in 2015, the West Virginia Code was amended to make judicial elections non-partisan. *See* W.Va. Code §§ 3-5-6a through 6d (2015). This amendment represents an unmistakable Legislative mandate that West Virginia's judiciary must distance itself from the fray of partisan politics. These legislative and judicial constraints plainly seek to discourage—if not eradicate—within the judiciary, the type of distasteful and reckless campaign conduct which, quite unfortunately, is becoming increasingly more common with each passing election. "The citizenry cannot conceivably maintain faith in the judiciary's impartiality and integrity if it witnesses the slick, misleading advertisements and public mudslinging that candidates use to reach the bench every election year." Adam R. Long, *Keeping Mud Off the Bench: The First Amendment and Regulation of Candidates' False or Misleading Statements in Judicial Elections*, Duke Law Journal, 787, 791 (Nov. 2001). These measures plainly seek to preserve not only the personal integrity and impartiality of the judicial candidates themselves, but more importantly, that of the institution.

This discussion leads us inexorably to the conclusion that, in terms of Judge-Elect Callaghan's challenge to the facial constitutionality of Rule 4.1(A)(9) and Rule 8.2(a), there is plainly a compelling state interest which justifies restricting judicial candidates' speech, which is undertaken both in his or her role as a judicial candidate and lawyer. The issue that remains is whether our Rules, as

crafted, are sufficiently narrowly tailored to meet that compelling state interest.

b. Narrow Tailoring of Rule 4.1(A)(9) and 8.2(a)

Code of Judicial Conduct Rule 4.1(A)(9) prohibits a judicial candidate from "*knowingly,* or with *reckless disregard for the truth*, mak[ing] any *false* or misleading statement[.]" (emphasis added).[18] The commentary to this Rule augments this prohibition by explaining that "[j]udicial candidates must be scrupulously fair and accurate in all statements made by them and by their campaign committees." Rule of Professional Conduct 8.2(a) similarly prohibits a lawyer from making "a statement that the lawyer *knows to be false or with reckless disregard as to its truth or falsity* concerning the qualifications or

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[18] Insofar as Judge-Elect Callaghan was not charged with, nor does the Board base its recommendation on, any alleged "misleading" statement, the issue of whether the "misleading" portion of Rule 4.1(A)(9) is constitutional is not squarely before the Court. *Accord Disciplinary Counsel v. Tamburrino*, 2016 WL 7116096, *4 (Ohio, Dec. 7, 2016) (declining to address constitutionality of "misleading" campaign speech prohibition because candidate was not charged with such). Given our conclusion that the subject flyer was materially false, we see no occasion herein to resolve the constitutionality of that portion of Rule 4.1(A)(9) prohibiting such statements. We do, however, note that such provisions in similar Rules have been widely found to be facially unconstitutional. *See Winter v. Wolnitzek*, 834 F.3d 681, 694 (6th Cir. 2016) ("[O]nly a ban on conscious falsehoods satisfies strict scrutiny."); *Butler v. Ala. Judicial Inquiry Comm'n*, 802 So.2d 207 (Ala. 2001); *Chmura*, 608 N.W.2d 31 (amending rule to eliminate unconstitutional prohibition on misleading or deceptive speech, or which contains material misrepresentations or omissions); *In re O'Toole*, 24 N.E.3d 1114 (Ohio 2014).

integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office." (emphasis added).

With respect to false statements in general, Justice Alito has observed that the United States Supreme Court has repeatedly made clear that such statements "possess no intrinsic First Amendment value." *United States v. Alvarez*, 132 S. Ct. 2537, 2560-61 (2012) (Alito, J., dissenting).[19] Further, the

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[19] Citing *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 612, 123 S. Ct. 1829, 155 L.Ed.2d 793 (2003) ("Like other forms of public deception, fraudulent charitable solicitation is unprotected speech"); *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 531, 122 S. Ct. 2390, 153 L.Ed.2d 499 (2002) ("[F]alse statements may be unprotected for their own sake"); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52, 108 S. Ct. 876, 99 L.Ed.2d 41 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective"); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776, 104 S. Ct. 1473, 79 L.Ed.2d 790 (1984) ("There is 'no constitutional value in false statements of fact'" (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974))); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743, 103 S. Ct. 2161, 76 L.Ed.2d 277 (1983) ("[F]alse statements are not immunized by the First Amendment right to freedom of speech"); *Brown v. Hartlage*, 456 U.S. 45, 60, 102 S. Ct. 1523, 71 L.Ed.2d 732 (1982) ("Of course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements"); *Herbert v. Lando*, 441 U.S. 153, 171, 99 S. Ct. 1635, 60 L.Ed.2d 115 (1979) ("Spreading false information in and of itself carries no First Amendment credentials"); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S. Ct. 1817, 48 L.Ed.2d 346

United States Supreme Court has stated "[t]hat speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is . . . at odds with the premises of democratic government[.]" *Garrison*, 379 U.S. at 75. Nevertheless, prohibitions on false statements must still contain sufficient proof requirements to avoid infringing on protected speech:

> [I]n order to prevent the chilling of truthful speech on matters of public concern, we have held that liability for the defamation of a public official or figure *requires proof that defamatory statements were made with knowledge or reckless disregard of their falsity*. . . . All of these proof requirements inevitably have the effect of bringing some false factual statements within the protection of the First Amendment, but this is justified in order to prevent the chilling of other, valuable speech.

Alvarez, 132 S. Ct. at 2563-64 (emphasis added). Accordingly, prohibitions on knowingly or recklessly false statements by judicial candidates have been

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(1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake"); *Gertz*, *supra*, at 340, 94 S. Ct. 2997 ("[T]he erroneous statement of fact is not worthy of constitutional protection"); *Time, Inc. v. Hill*, 385 U.S. 374, 389, 87 S. Ct. 534, 17 L.Ed.2d 456 (1967) ("[T]he constitutional guarantees [of the First Amendment] can tolerate sanctions against calculated falsehood without significant impairment of their essential function"); *Garrison v. Louisiana*, 379 U.S. 64, 75, 85 S. Ct. 209, 13 L.Ed.2d 125 (1964) ("[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection").

universally upheld and found not to infringe on First Amendment rights. Most recently, in *Winter*, the Sixth Circuit found a false statement ban identically worded to our Rule 4.1(A)(9) to be constitutional on its face. 834 F.3d 681. The *Winter* court, citing Kentucky's interest in "preserving public confidence in the honesty and integrity of its judiciary," found that its ban on false statements was narrowly tailored to meet that compelling interest. *Id*. at 693. In reaching that conclusion, the court succinctly stated "[t]he narrowest way to keep judges honest during their campaigns is to prohibit them from consciously making false statements about matters material to the campaign. This canon does that, and does it clearly." *Id*.

Likewise, the Ohio Supreme Court reformulated its prohibition on false statements by judicial candidates to apply only to knowingly or recklessly made false statements such that it would not run afoul of the First Amendment. In *O'Toole*, the Ohio Supreme Court observed that banning false statements did not circumvent "free debate" because "intentional lying is *not* inevitable in free debate" and that "[l]ies do not contribute to a robust political atmosphere." 24 N.E.3d at 1126 (emphasis in original). The Court found that a rule with such narrow scope, applicable only to speech made

> during a specific time period (the campaign), conveyed by specific means (ads, sample ballots, etc.), disseminated with a specific mental state (knowingly or with reckless disregard) and with a specific mental state as to the information's accuracy (with knowledge of its falsity or with reckless disregard as to its truth or falsity)

was plainly constitutional. *Id.* *Accord Myers v. Thompson*, 192 F. Supp. 3d 1129 (D. Mont. 2016) (denying preliminary injunction because candidate unlikely to succeed on merits of constitutional challenge to Rule prohibiting judicial candidate from making false statement); *Butler*, 802 So.2d 207 (acknowledging constitutionality of restriction on judicial candidate speech where statements are made with knowing or reckless disregard of falsity); *In re Chmura*, 626 N.W.2d 876, 883 (Mich. 2001) ("[W]e believe that a rule . . . prohibiting a judicial candidate from only knowingly or recklessly making a false communication, strikes a reasonable constitutional balance between the candidate's First Amendment rights and the state's interest in preserving the integrity of the judicial system."); *Donohoe*, 580 P.2d at 1097 (rejecting First Amendment challenge to restriction on judicial candidate's speech where statement made with "knowledge of its falsity").

Moreover, in assessing the First Amendment's protections to the speech of a judicial candidate, courts have noted the categorical inapplicability of the adage that the "remedy for misleading speech is more speech, not less." *Winter v. Wolnitzek*, 56 F. Supp. 3d 884, 898 (E.D. Ky. 2014) (citing *Whitney v. California*, 274 U.S. 357, 377, (1927) (Brandeis, J., concurring)). As the court observed in *Myers*, "[w]hile counterspeech may be a strong alternative in the political election context, . . . [counterspeech] does not work to enhance the compelling State interest in judicial elections[.]" 192 F. Supp. 3d at 1140. The reason for this is obvious. While counterspeech may correct any misapprehensions about the subject of the false speech, *i.e.* the judicial opponent, it does

nothing to restore erosion of the public's confidence in the judicial system as an institution, which occurs when its candidates spread falsehoods. As well-stated by the *Myers* court:

> Counterspeech is the best argument to explore falsehoods in speech about ideas and beliefs. Counterspeech is the cure to hate speech, to subversive speech, or to disagreeable political ideas or policies. Counterspeech is not a remedy to a systemic challenge that is false and undermines the public's confidence in the third branch of government.

Id. at 1141.

Furthermore, judicial candidates may be unable to adequately respond to false attacks with "more speech" because of the very restrictions their opponent refused to honor—the Code of Judicial Conduct. "[B]ecause their conduct is governed by [the Code of Judicial Conduct] . . . . [j]udicial candidates cannot always use 'channels of effective communication' to rebut misleading statements made about them and should not be left in the vulnerable position of fighting a political battle with one hand tied behind their backs." Long, *supra* at 815 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974)). In this particular case, as the Board and Judge Johnson correctly noted, Judge Johnson "could not make public statements that, contrary to what was being represented by [Judge-Elect Callaghan], that he did not support policies which might have a negative impact on coal employment in Nicholas County, because the Code of Judicial Conduct would preclude such statements[.]" A judicial candidate

should not be left with the Hobson's choice of leaving false attacks unrequited or following his or her opponent into the ethical minefield of judicial counter-speech.

Therefore, as pertains to false speech made with knowledge of or reckless disregard as to its falsity, those portions of our Rules clearly pass constitutional muster. We therefore hold that insofar as West Virginia Code of Judicial Conduct Rule 4.1(A)(9) and West Virginia Rule of Professional Conduct 8.2(a) prohibit lawyers, judges and judicial candidates from knowingly, or with reckless disregard for the truth, making a false statement as more fully proscribed therein, they are facially constitutional under the First Amendment to the United States Constitution. Likely in view of the fact that our Rules mirror countless other such ethical prohibitions which have been found facially constitutional, we observe that the tenor of Judge-Elect Callaghan's argument focuses largely on his "as-applied" challenge.

2. Constitutionality of Rule 4.1(A)(9)and Rule 8.2(a) As-Applied

In that regard, Judge-Elect Callaghan maintains that Rule 4.1(A)(9) and Rule 8.2(a) are unconstitutional as applied to the speech contained in the flyer inasmuch as the flyer is objectively true, substantially true and/or contains rhetorical hyperbole or parody. In effect, he claims that the flyer is not actionably "false" in the first instance.[20]

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[20] Judge-Elect Callaghan does not challenge the Board's conclusion that the allegedly false statements were made "knowingly" or with "reckless disregard." We therefore find it unnecessary to discuss this aspect of the violations in any detail.

We now turn to the substance of the flyer to resolve these issues.

a. Rhetorical Hyperbole and Parody

Judge-Elect Callaghan first argues that the opening statement of the flyer—"Barack Obama & Gary Johnson Party at the White House . . ."—is merely a "colorful way" of saying that Judge Johnson attended an event at the White House and that it was "not intended to be taken literally." As such, he argues that the statement is rhetorical hyperbole or parody. With respect to such purported "colorful" speech, the First Amendment does in fact protect speech which contains

> parody, fantasy, rhetorical hyperbole, and imaginative expressions, "that cannot 'reasonably [be] interpreted as stating actual facts' about an individual[.]" Because no reasonable person would take these types of speech as true, they simply cannot impair one's good name. "This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation."

Mink v. Knox, 613 F.3d 995, 1005 (10th Cir. 2010) (internal citations omitted) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990)).

First, Judge-Elect Callaghan perfunctorily suggests that this aspect of the flyer is "parody." To

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We agree with the Board that the evidence demonstrates that he was fully aware of the information which was utilized to craft the flyer and admitted as much.

support this contention, he briefly refers to the flyer as "harken[ing] back to the 'beer summit' between Harvard University Professor Henry Louis Gates and Sergeant James Crowley[.]"[21] The United States Supreme Court has explained that

> [p]arody's humor, or in any event its comment, necessarily springs from *recognizable allusion* to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. *When parody takes aim at a particular original work, the parody must be able to "conjure up" at least enough of that original to make the object of its critical wit recognizable.*

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 588 (1994) (emphasis added) (quoting *Elsmere Music, Inc. v. Nat'l Broad. Co. Inc.*, 623 F.2d 252, 253 n.1 (2d Cir. 1980)); *see also Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Grp., Inc.*, 886 F.2d 490, 494 (2d Cir. 1989) ("A parody must convey two simultaneous—and contradictory— messages: that it is the original, but also that it is *not* the original and is instead a parody.").

We may dispense with this argument in short order. Under any common understanding of the concept of "parody," a parodist creates a facsimile of

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[21] In 2009, Harvard professor Henry Louis Gates, an African-American, was arrested for disorderly conduct by Sergeant James Crowley, a Caucasian police officer, upon Sergeant Crowley's belief that Mr. Gates was breaking and entering into what turned out to be his own home. In an attempt to address racial tensions heightened by this event, President Obama invited the men to the White House to meet in the White House garden in what was then characterized as a "beer summit."

an original image, event, person, etc. and alters it in a manner that distinguishes it from the original for the purpose of humor, commentary, etc. The *sine qua non* of parody is a recognition of that which it purports to parody. Using the language of the United States Supreme Court, the subject flyer lacks a "reasonable allusion" to *any* object, person, or event, much less the event posited by Judge-Elect Callaghan. There is nothing whatsoever in the flyer which can be fairly characterized as being reminiscent of the so-called "beer summit," nor does he explain in what manner it purports to parody it. The "beer summit" moniker was derived of a well-publicized photograph of President Obama, Vice President Biden, Mr. Gates, and Sergeant Crowley sitting around a table in the White House gardens, each with a mug of beer in front of them. Aside from what appears to be a pilsner glass of beer depicted near the image of President Obama on the flyer, there is literally no similarity between the events or depictions, much less a "recognizable allusion."

Turning now to Judge-Elect Callaghan's more substantial contention that this aspect of the flyer is mere "rhetorical hyperbole," the Supreme Court has instructed that rhetorical hyperbole results when the speaker offers speech which cannot "reasonably [be] interpreted as stating actual facts about the [individual] involved." *Hustler*, 485 U.S. 46, 50 (1988). Therefore, we must determine if that portion of the subject flyer indicating that Judge Johnson "part[ied]" with President Obama at the White House could reasonably be interpreted as stating actual facts about Judge Johnson; if so, it does not qualify as rhetorical hyperbole. *See also Milkovich*, 497 U.S. at

23-24 (Brennan, J., dissenting) ("[T]he 'statement' that the plaintiff must prove false . . . is not invariably the literal phrase published but rather what a reasonable reader would have understood the author to have said."); *Greenbelt Coop. Publg Ass'n, Inc., v. Bresler*, 398 U.S. 6, 14 (1970) (characterizing speech as rhetorical hyperbole where "even the most careless reader must have perceived" it as such). Moreover, "[c]ontext is crucial and can turn what, out of context, appears to be a statement of fact into 'rhetorical hyperbole,' which is not actionable." *Ollman v. Evans*, 750 F.2d 970, 1000 (D.C. Cir.1984) (*en banc*) (Bork, J., concurring). As further instruction, we are mindful that

> [a]lthough rhetorically hyperbolic statements may "at first blush appear to be factual[,] . . . they cannot reasonably be interpreted as stating actual facts about their target." Where rhetorical hyperbole is employed, the language itself "negate[s] the impression that the writer was seriously maintaining that [the plaintiff] committed the [particular act forming the basis of the alleged defamation]."

Fortson v. Colangelo, 434 F. Supp. 2d 1369, 1378–79 (S.D. Fla. 2006) (citations omitted).

In spite of Judge-Elect Callaghan's contention that "the idea that the President of the United States would 'party' with a Nicholas County Circuit Court Judge is ridiculous on its face," we can perceive of no reason why Judge Johnson *could not* have been invited to the White House by President Obama or on his behalf to what could be characterized as a "party" "in support of" the President's "legislative agenda" as

stated on the flyer. As explained above, Judge Johnson was involved in initiatives receiving federal funding and oversight, such as could theoretically come within the ambit of matters for which the President may choose to gather, honor, or entertain such individuals. Certainly individuals from all walks and of various repute are frequently visitors to The White House and/or guests of the President. The notion that those who do so are occasionally treated to receptions, cocktail parties, or the like is similarly not unheard of or incredible on its face. Quite the contrary, the idea of a long-time, distinguished sitting circuit judge attending a function at the White House at the invitation of the President–for whatever reason and however that may come about–is imminently reasonable and believable. Frankly, it is undoubtedly because it is so believable—and when viewed in connection with the purported hardships being experienced in Nicholas County, potentially incendiary—that Judge-Elect Callaghan and his campaign consultant found it compelling campaign fodder. In this instance, however, it simply did not occur. We therefore conclude that this statement could reasonably be perceived as stating actual facts about Judge Johnson and therefore reject Judge-Elect Callaghan's contention that this aspect of the subject flyer was mere hyperbole deserving of First Amendment protection.

b. The Objective and/or Substantial Truth of the Flyer

As to the remainder of the flyer, Judge-Elect Callaghan examines each particular phrase in isolation, arguing that each is either substantially or objectively true. First, he argues that the remainder

of the headlining statement regarding Obama and Johnson partying at the White House—"while Nicholas County loses hundreds of jobs"—is substantially true. He argues that Judge Johnson attended the conference at a time when Nicholas County was losing jobs.[22] As to the mock "Layoff Notice," he argues that the phrase "While Nicholas County lost hundreds of jobs to Barack Obama's coal policies . . ." is opinion. He argues that the remainder—"Judge Gary Johnson accepted an invitation from Obama to come to the White House to support Obama's legislative agenda"—is true because the conference occurred a couple of weeks after Obama signed the Justice for Victims of Trafficking Act of 2015, which was a part of Obama's legislative agenda. As to the remaining sentence stating "That same month, news outlets reported a 76% drop in coal mining employment" he argues that it is also objectively true given a June 17, 2015, article admitted into evidence which states that Nicholas County lost 558 jobs representing a 76% drop in coal mining employment. Finally, he argues that the last portion stating "Can we trust Judge Gary Johnson to defend Nicholas County against job-killer Barack Obama?" is merely a rhetorical question.

Despite Judge-Elect Callaghan's attempt to finely parse the flyer into discrete, palatable bits of objective or "substantial" truth, the United States Supreme Court has stated that this Court must examine "'the substance, the gist, the sting'" of the

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[22] As the Board noted, however, the job losses cited in the flyer occurred over a four-year period preceding Judge Johnson's attendance at the meeting and conference.

communication as a whole to determine falsity. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (quoting *Heuer v. Kee*, 59 P.2d 1063, 1064 (Cal. Dist. Ct. App. 1936)). Critically, the Supreme Court has instructed that a communication is considered false if it has "'*a different effect on the mind of the reader from that which the pleaded truth would have produced.*'" *Id*. (quoting R. Sack, Libel, Slander, and Related Problems 138 (1980)) (emphasis added). This Court long ago adopted precisely this standard as pertains to the concept of "falsity" in the parallel libel and defamation contexts:

> The law . . . takes but one approach to the question of falsity, regardless of the form of the communication. It overlooks minor inaccuracies and concentrates upon substantial truth. Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the [] charge be justified. A statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced.

Syl. Pt. 4, in part, *State ex rel. Suriano v. Gaughan*, 198 W.Va. 339, 480 S.E.2d 548 (1996). Other courts agree with and have utilized this analysis when assessing the falsity of a judicial candidate's speech. *See Chmura*, 626 N.W.2d at 887 ("The communication as a whole must be analyzed [and] . . . . [i]f 'the substance, the gist, the sting' of the communication is false, then it can be said that the judicial candidate 'used or participated in the use of a false communication.'").

Typically this so-called "substantial truth doctrine" inures to the benefit of the accused, *i.e.* if something is "substantially" true in overall effect, minor inaccuracies or falsities will not create falsity. However, in this particular instance, it works to Judge-Elect Callaghan's detriment because "the substance, the gist, the sting" of the communication, taken as a whole, is patently false. *See Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000) (collecting cases which "represent the converse of the substantial truth doctrine" because they "convey a substantially false and defamatory impression"). As the *Turner* court explained, "a publication can convey a false and defamatory meaning by omitting or juxtaposing facts[.]" *Id.* at 114.

We find that merely peppering the latter portion of the flyer with statistical facts about job losses in Nicholas County does not elevate the flyer as a whole to the level of "substantially true." Nor does the narrow fact that Judge Johnson did in fact attend a federal seminar and meeting make the statement that he "accepted an invitation from Obama to come to the White House" substantially true. There can be little question that the truth, *i.e.* that Judge Johnson merely attended a federally-required meeting and seminar, would produce a "different effect on the mind of the reader" than what the flyer conveys, *i.e.* that Judge Johnson was invited by and socialized with President Obama.[23]

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[23] In its recommended decision, the Board focuses its "falsity" discussion heavily on the fact that the job losses referenced in the flyer preceded Judge Johnson's attendance at the seminar

Distilled to its essence, the ultimate question presented to this Court is whether the flyer is "false" and therefore stripped of First Amendment protection, or, as Judge-Elect Callaghan insists, merely the juxtaposition of two attenuated occurrences— coal job losses in Nicholas County and Judge Johnson's attendance at a federal seminar in Washington, which was "hyperbolized" as "partying" at the White House. We conclude that the "gist" of the subject flyer conveys that Judge Johnson "partied with Obama" at his personal invitation and is therefore simply too far afield from the truth to be considered protected, hyperbolic free speech; it is, in every sense, materially false. Judge Johnson attended a federally-required meeting and conference in furtherance of his service to the State, which meeting and conference was utterly devoid of any meaningful connection to or interaction with the President. Judge Johnson's attendance at the meeting and conference is exaggerated, repurposed and mischaracterized to the point that it is rendered

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and the fact that the seminar had nothing to do with "coal-killing" legislative policies of President Obama. However, we find that the upshot of the flyer is, as Judge Johnson put it, that he was "fiddling while Rome burned," *i.e.* he was "partying" in Washington at the invitation of and with President Obama while Nicholas Countians were struggling with job losses. Collaterally, Judge-Elect Callaghan and Mr. Heflin may have hoped that recipients of the flyer would also presume that the "legislative agenda" that yielded the invitation and which Judge Johnson was "partying" in support of was related to the President's "coal-killing" policies and therefore was directly related to the job losses. That is certainly a reasonable implication from the text of the flyer. However, we find that the flyer is false on a more fundamental level as described herein.

patently untrue. When viewed in its entirety as instructed by various courts, we have little difficulty finding that the subject flyer contains knowingly, materially false statements in violation of the Code of Judicial Conduct and the Rules of Professional Conduct.

We therefore conclude that the First Amendment does not serve to shield Judge-Elect Callaghan from discipline as a result of the subject flyer. We further conclude, as did the Board, that the subject flyer contains a knowingly false statement and that Judge-Elect Callaghan's actions in approving and disseminating the flyer are therefore violative of Rule 4.1(A)(9), Rule 4.2(A)(1), Rule 4.2(A)(4) of the Code of Judicial Conduct and Rule 8.2(a) of the West Virginia Rules of Professional Conduct.

C. Discipline

In addition to his assertions regarding jurisdictional issues and First Amendment concerns, Judge-Elect Callaghan also contends that the sanctions recommended by the Judicial Hearing Board are excessive. As referenced above, "[t]he purpose of judicial disciplinary proceedings is the preservation and enhancement of public confidence in the honor, integrity, dignity, and efficiency of the members of the judiciary and the system of justice." *Gorby*, 176 W.Va. at 16, 339 S.E.2d at 702. The objective of any judicial disciplinary proceeding must be to "preserve public confidence in the integrity and impartiality of the judiciary." *In re Wilfong*, 234 W.Va. 394, 407, 765 S.E.2d 283, 296 (2014).

Consistent with that goal, "[t]his Court has the inherent power to inquire into the conduct of justices,

judges and magistrates, and to impose any disciplinary measures short of impeachment that it deems necessary to preserve and enhance public confidence in the judiciary." Syl. Pt. 8, *In re Watkins*, 233 W.Va. 170, 172, 757 S.E.2d 594, 596 (2013). In pertinent part of syllabus point seven of *Watkins*, this Court also explained "[i]t is clearly within this Court's power and discretion to impose *multiple sanctions* against any justice, judge or magistrate for *separate and distinct violations* of the Code of Judicial Conduct and to order that such sanctions be imposed consecutively." *Id*. (emphasis supplied). This authority, as referenced above, is derived from article VIII, section 8 of the West Virginia Constitution.

> Pursuant to article VIII, section 8 of the *West Virginia Constitution*, this Court has the inherent and express authority to "prescribe, adopt, promulgate and amend rules prescribing a judicial code of ethics, and a code of regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof[.]"

Syl. Pt. 5, *Committee On Legal Ethics v. Karl*, 192 W.Va. 23, 449 S.E.2d 277 (1994); *see also* Syl. Pt. 1, *West Virginia Judicial Inquiry Comm'n v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980) ("The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings.").

The parameters of potential discipline in this proceeding are governed by Rule 4.12 of the West Virginia Rules of Judicial Disciplinary Procedure.[24] Pursuant to Rule 4.12,

> [t]he Judicial Hearing Board may recommend or the Supreme Court of Appeals may impose any one or more of the following sanctions for a violation of the Code of Judicial Conduct: (1) admonishment; (2) reprimand; (3) censure; (4) suspension without pay for up to one year; (5) a fine of up to $5,000; or (6) involuntary retirement for a judge because of advancing years and attendant physical or mental incapacity and who is eligible to receive retirement benefits under the judges' retirement system or public employees retirement system . . . . Any period of suspension without pay shall not interfere with the accumulation of a judge's retirement credit and the State shall continue to pay into the appropriate retirement

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[24] We also emphasize the significance of Rule 1 of the West Virginia Rules of Judicial Disciplinary Procedure, providing:

> The ethical conduct of judges is of the highest importance to the people of the State of West Virginia and to the legal profession. Every judge shall observe the highest standards of judicial conduct. In furtherance of this goal, the Supreme Court of Appeals does hereby establish a Judicial Investigation Commission to determine whether probable cause exists to formally charge a judge with a violation of the Code of Judicial Conduct promulgated by the Supreme Court of Appeals to govern the ethical conduct of judges or that a judge because of advancing years and attendant physical and mental incapacity, should not continue to serve.

> fund the regular payments as if the judge were not under suspension without pay. . . .
>
> In addition, the Judicial Hearing Board may recommend or the Supreme Court of Appeals may impose any one or more of the following sanctions for a judge's violation of the Rules of Professional Conduct: (1) probation; (2) restitution; (3) limitation on the nature or extent of future practice; (4) supervised practice; (5) community service; (6) admonishment; (7) reprimand; (8) suspension; or (9) annulment.

See also In re Toler, 218 W.Va. 653, 625 S.E.2d 731 (2005).

In the matter sub judice, the Judicial Hearing Board concluded the evidence established three separate and distinct violations of the Code of Judicial Conduct, specifically Rules 4.1(A)(9), 4.2(A)(1), and 4.2(A)(4). The Board also found one violation of the Rules of Professional Conduct, specifically Rule 8.2(a). The Hearing Board recommended the following sanctions: (1) censure as a judicial candidate and as a lawyer; (2) concurrent suspension from serving as a judge and from practicing law for one year; (3) fine of $5,000 for each of the three Code of Judicial Conduct violations, for a total of $15,000; and (4) payment of costs related to the three violations of the Code of Judicial Conduct and one violation of the Rules of Professional Conduct.

Judge-Elect Callaghan objects to what he characterizes as excessive and unjustified recommended sanctions. He contends that the dissemination of the flyer played a very minor role in

his successful campaign and maintains that a suspension is not justified, arguing that admonishments, reprimands, censures, and fines have been deemed more appropriate in other cases of this nature. The Office of Disciplinary Counsel likewise disagrees with the Board's recommended sanctions and asserts that the severity of Judge-Elect Callaghan's violations warrants the attorney and judicial suspensions to be served consecutively, resulting in two years of suspension. Having thoroughly evaluated all arguments asserted in the briefs of this matter, the determinations of this Court are presented below.

1. Factors to be Examined in Determinations of Discipline

An extensive consideration of the appropriate discipline for Judge-Elect Callaghan's violations of both the Code of Judicial Conduct and the Rules of Professional Conduct requires this Court to examine the factors enunciated in syllabus point three of *In re Cruickshanks*, 220 W.Va. 513, 648 S.E.2d 19 (2007):

> Always mindful of the primary consideration of protecting the honor, integrity, dignity, and efficiency of the judiciary and the justice system, this Court, in determining whether to suspend a judicial officer with or without pay, should consider various factors, including, but not limited to, (1) whether the charges of misconduct are directly related to the administration of justice or the public's perception of the administration of justice, (2) whether the circumstances underlying the charges of misconduct are entirely personal in nature or

> whether they relate to the judicial officer's public persona, (3) whether the charges of misconduct involve violence or a callous disregard for our system of justice, (4) whether the judicial officer has been criminally indicted, and (5) any mitigating or compounding factors which might exist.

Utilizing the framework for analysis outlined in *Cruickshanks*, this Court first finds that Judge-Elect Callaghan's conduct relates directly to the administration of justice and negatively impacts the public's perception of the administration of justice. Second, the behavior certainly relates directly to his public persona, through his efforts to achieve professional gain by dissemination of false materials to the voting public. Third, his actions demonstrate profound disrespect and disregard for our system of justice; his intentional utilization of falsehoods subverts the very essence of the integrity of the judicial system and casts serious doubt upon his fitness for a judicial position established upon unbiased veracity and incorruptibility.[25]

Continuing in our examination of the *Cruikshanks* factors, while we recognize that Judge-Elect Callaghan has not been criminally indicted for his

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[25] The practice of intentional dissemination of false information to the public strikes the very essence of fundamental judicial principles. "[D]eception is antithetical to the role of a Judge who is sworn to uphold the law and seek the truth." *Matter of Collazo*, 691 N.E.2d 1021, 1023 (N.Y. 1998) (quotation omitted); *see also William P. Marshall, False Campaign Speech and the First Amendment*, 153 U. Pa. L. Rev. 285, 287 (2004) (arguing that effects of false campaign speech "can be as corrosive as the worst campaign finance abuses").

actions, we must also examine other issues which might be considered as mitigating or aggravating factors. The Hearing Board observed the following mitigating factors: Judge-Elect Callaghan has not been the subject of prior disciplinary complaints; Judge Johnson had referenced his seminar attendance on his campaign's Facebook page; Judge-Elect Callaghan acted quickly in taking corrective measures to address Disciplinary Counsel's concerns about the subject flyer; he expressed regret that the flyer had caused others consternation; and he cooperated with Disciplinary Counsel in the investigation.

Upon *de novo* review by this Court, we find somewhat limited mitigation in this case. A valid mitigating factor is Judge-Elect Callaghan's lack of a prior disciplinary record. Likewise, his cooperation with the investigation of the charges against him is a mitigating factor; his full and free disclosure is laudable.

With regard to his attempts at corrective measures and his level of regret, however, we find that although he removed the false assertions from his personal and campaign Facebook pages and ran radio advertisements ostensibly retracting the assertions contained in the flyer, the calculated and intentional timing of his mailings rendered it virtually impossible to engage in meaningful mitigation. As Judge Johnson testified, time constraints prevented him from taking meaningful action in response to the distribution of the flyer.[26] Nicholas County's only

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[26] A somewhat similar circumstance was remarked upon in *In re Hildebrandt*, 675 N.E.2d 889 (Ohio 1997), noting "the

newspaper was a weekly paper, and the timing of the mailing prevented inclusion of any response or countermeasure in that paper.[27] Thus, we find that the removal of the assertions from social media and the radio statements are entitled to limited weight in mitigation.[28]

The Hearing Board references extensive aggravating factors, asserting that Judge-Elect Callaghan acted with a selfish motive; some portion of the electorate may perceive his actions as "stealing the election;" the charges relate to his standing as a judicial officer who used false advertising to get elected and has implied that he will rule in a manner that may impact the local coal industry; he created a false reality and communicated it to the public

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record indicates that the advertisements in question were timed to appear on radio and television two to three weeks prior to the election, thus providing complainant little time to respond publicly to the misstatements or seek redress prior to the election. . . ." *Id*. at 891.

[27] We note the inherent difficulty of responding to false speech in any instance, even where time constraints are not present. False speech "interfere[s] with the truth-seeking function of the marketplace of ideas, and [it] cause[s] damage . . . that cannot easily be repaired by counterspeech, however persuasive or effective." *Hustler*, 485 U.S. at 52 (citing *Gertz*, 418 U.S. at 340, 344 n.9). It has also been observed that the "truth rarely catches up with a lie." *Gertz*, 418 U.S. at 344 n.9.

[28] We do not find the other factor mentioned by the Board to be worthy of appreciable consideration in mitigation of these violations. Judge Johnson's reference to his seminar attendance on his campaign's Facebook page, while indeed relevant in proving the truth of such attendance, in no manner reduces the impact of the violations at issue.

through polling and campaign flyers; he timed the release of the flyer in a manner which effectively eliminated Judge Johnson's ability to "undo the damage;" his remedial efforts used language that did not convey authentic regret; and he used other campaign materials to disseminate false or misleading information.

Upon review, this Court is compelled to conclude that the record is replete with examples of Judge-Elect Callaghan's extremely limited remorse. Even in his meager attempt at mitigation, his comments potentially qualifying as retraction demonstrated an absence of a thorough understanding of the inappropriateness of his actions. In the radio ads, as referenced above, the following statement was made: "[P]lease understand that the specific characterization of the White House visit *may* be inaccurate and misleading and should not have been sent containing inappropriate information. Candidate Callaghan apologizes for any *misunderstanding* or inaccuracies. . . ." (Emphasis added). As the Supreme Court of Arizona appropriately remarked in *In re Augenstein*, 871 P.2d 254 (Ariz. 1994), "[t]hose seeking mitigation relief based upon remorse must present a showing of more than having said they are sorry." *Id.* at 258 (quotation and alteration omitted).

Judge-Elect Callaghan's subsequent statements during his testimony continued to reveal a dismissive and cavalier attitude toward his behavior. He stated, "If I had to do it again, I probably would not approve the flier going out just because it's not enjoyable - politics is not enjoyable in a lot of different ways, but when you cause outrage in somebody, that, I regret."

Moreover, his written response to the initial complaint disingenuously urges that "[s]ome members of the public may have been duly impressed by the fact that Judge Johnson was honored by the White House for the good works he had performed[.]" He further suggested that Judge Johnson could have "easily . . . boycotted this meeting, based upon his disagreement with President Obama's policies, and he could have publicized such a boycott for political purposes." In his testimony before the Board, Judge-Elect Callaghan minimized his conduct, stating

> The Johnson campaign - I described before - they got their mileage out of this flier. . . . [W]hen the retraction came out, on Judge Johnson's campaign Facebook page they formed what I called the Callaghan lynch mob, and they called me a liar, dishonest, unethical, despicable, dirty politician -just anything you can think of. So they got their mileage, not only out of the flier but out of my retraction in calling me all those names. . . . I think I would've beat Judge Johnson by more votes without that flier because of the negative reaction that it got and the negative comments that were created from it.

(emphasis added). Flippantly attempting to dismiss the voter effect of the direct-mail flyer, he further testified "these fliers barely warrant a glance on the short trip from the mailbox to the trash can," allegedly quoting a local reporter.

As a further example of aggravating factors, the Hearing Board references the alleged falsities contained in other campaign materials disseminated by Judge-Elect Callaghan. The Board emphasizes

that after he presented these flyers during the hearing and sought to have them introduced into evidence, they were ultimately submitted as joint exhibits. He was not, however, charged with any ethical violation based upon those additional materials. Consequently, this Court does not base its determination of appropriate discipline on the existence of those materials, either as actual violations or as aggravating factors.[29] While the Board seeks consideration of these matters as indicative of a pattern of ethical misconduct, this Court finds it unnecessary to consider those uncharged alleged violations to support or enhance the discipline imposed in this case. Our conclusions are premised exclusively upon the four charges properly levied against Judge-Elect Callaghan and proven by clear and convincing evidence.[30]

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[29] The utilization of uncharged allegations of misconduct as an aggravating factor enhancing sanctions must be approached with caution, particularly in an arena in which First Amendment rights to freedom to engage in campaign speech are asserted. As the Supreme Court of Minnesota observed in *In re Disciplinary Action against Tayari-Garrett*, 866 N.W.2d 513 (Minn. 2015), due process protections are implicated and are weakened if the referee is permitted to consider uncharged violations of the Minnesota Rules of Professional Conduct under the guise of aggravating factors instead of requiring that allegations of additional misconduct be brought in a supplementary petition. However, we need not decide whether the referee clearly erred by finding either of these aggravating factors because their existence does not affect the discipline we impose in this case.

Id. at 520 n.4.

[30] If the Office of Disciplinary Counsel believes it is appropriate to formally charge Judge-Elect Callaghan for the

2. Precedential Analysis of Violations of Code of Judicial Conduct

Where violations of ethical rules occur, it is incumbent upon this Court to impose appropriate sanctions. This Court has recognized that a determination of discipline must be premised upon the unique facts of each individual case. *See* McCorkle, 192 W.Va. 286, 452 S.E.2d 377. Mindful of the interplay between the roles of lawyer and judge, this Court stated as follows in *Karl*:

> It is important for us to emphasize that a judge is first and foremost a lawyer. While acting as a lawyer, he or she is charged with the knowledge or the standards of conduct defined in the *West Virginia Rules of Professional Conduct*. While acting as a judge, he or she is charged with the knowledge of the standards of conduct in the *West Virginia Code of Judicial Conduct*. Any behavior that reveals the lack of integrity and character expected of lawyers and judges within these standards warrants discipline. The *West Virginia Rules of Professional Conduct* and the *West Virginia Code of Judicial Conduct* serve as a unified system of discipline within the legal profession to achieve a common goal and that is to uphold high standards of conduct to secure and enhance the public's trust and confidence in the entire judicial system.

192 W.Va. at 33, 449 S.E.2d at 287.

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violations allegedly committed by the dissemination of those additional materials, that office is competent to further investigate those matters, based upon the guidance provided by this opinion.

While this Court has not had occasion to evaluate ethical violations in a factual scenario identical to the present case, we have encountered violations demanding serious response. For purposes of our analysis of Judge-Elect Callaghan's violations of the Judicial Code of Conduct, our reasoning in prior judicial discipline cases is instructive. In *Watkins*, for instance, this Court suspended a judge without pay for four years "until his present term of office ends on December 31, 2016" for his repeated intemperance with litigants and disrespect for authority. 233 W.Va. at 183, 757 S.E.2d at 607. This Court expressed grave concerns with the behavior of judges and the resultant effect upon public perception of the judiciary.

> Citizens judge the law by what they see and hear in courts, and by the character and manners of judges and lawyers. "The law should provide an exemplar of correct behavior. When the judge presides in Court, he personifies the law, he represents the sovereign administering justice and his conduct must be worthy of the majesty and honor of that position." *Matter of Ross*, 428 A.2d 858, 866 (Maine 1981). Hence a judge must be more than independent and honest; equally important, a judge must be perceived by the public to be independent and honest. Not only must justice be done, it also must appear to be done.

Id. at 182, 757 S.E.2d at 606 (footnote omitted). Interestingly, in *Watkins*, this Court also noted that more extensive disciplinary measures could have been imposed, based upon the number of ethical violations committed. The Court observed:

> The Hearing Board concluded that Judge *Watkins* had committed 24 separate violations of nine separate Canons of the *Code of Judicial Conduct*. Under the *Rules of Judicial Disciplinary Procedure*, the Hearing Board noted that for each violation it could recommend that this Court impose a maximum penalty of suspension for one year and a fine of up to $5,000, and that it could impose the penalties consecutively. *See* Rule 4.12(4) and (5), *Rules of Judicial Disciplinary Procedure*; Syllabus Point 5, *In re Toler*, 218 W.Va. 653, 625 S.E.2d 731 (2005). Hence, the Board could have recommended a maximum sanction against Judge *Watkins* of a 24-year suspension without pay plus a fine of $120,000.

233 W.Va. at 173, 757 S.E.2d at 597.[31] Under the particular facts in *Watkins*, however, the Court determined that a four-year suspension was adequate discipline for the violations.

In *Toler*, this Court suspended a magistrate for four years for sexual misconduct in a prior term, thus suspending him beyond his term in office. 218 W.Va. at 662, 625 S.E.2d at 740. We found four separate and distinct acts and suspended the magistrate one

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[31] By way of hypothetical analogy, a reviewing body might consider the violations herein charged to be premised upon each separate action, *i.e.*, each posting and each item mailed. Similarly, charges possibly could have been calculated based upon the number of false assertions encompassed within the subject flyer. This Court addresses the charges as levied against Judge-Elect Callaghan by the Board and passes no judgment upon the efficacy or validity of alternate methods of calculation.

year for each, to run consecutively. Sanctioning the magistrate for each violation was deemed essential, based upon the following reasoning:

> Having found that Mr. Toler did, in fact, violate the Code of Judicial Conduct on at least four different occasions, in four completely separate and distinct situations, and against four separate individuals, it simply would make little or no sense to find in any other manner than to impose sanctions against Mr. Toler for each of the separate violations and to impose such sanctions consecutively. Given the nature and extent of the misconduct in this case, to rule otherwise would diminish public confidence in the judiciary, impugn the judicial disciplinary process, and would have a chilling effect on the willingness of victims of domestic violence to seek help from the judicial system.

Id. at 661, 625 S.E.2d at 739. "To hold a violator of the Code of Judicial Conduct who has committed only one offense to the same exact standard and subject that offender to the same sanctions as a violator who has committed four, five, or fifty separate acts of misconduct would suggest unreasonable disparate treatment. . . ." *Id.* The Court explained that it "must give proper consideration and weight to the severity of each of the independent acts of judicial misconduct when deciding appropriate sanctions." *Id.*

In *In re Wilfong*, 234 W.Va. 394, 765 S.E.2d 283 (2014), this Court imposed a two-year suspension, censure, and costs upon a judge who maintained an extra-marital affair with a corrections program

director who regularly appeared in her court. In ruling on that issue, this Court explained:

> [T]his Court adopts the Hearing Board's finding that the judge committed eleven violations of seven Canons. The judge demeaned her office, and significantly impaired public confidence in her personal integrity and in the integrity of her judicial office. As a sanction, we hold that the judge must be censured; suspended until the end of her term in December 2016; and required to pay the costs of investigating and prosecuting these proceedings.

234 W.Va. at 397, 765 S.E.2d at 286.

As argued by Judge-Elect Callaghan and acknowledged by the Hearing Board and Office of Disciplinary Counsel, judicial campaign ethical violations, in this and other jurisdictions, have often resulted in minimal disciplinary measures, sometimes consisting only of fines, reprimands, or censures. For instance, in *In the Matter of Codispoti*, 190 W.Va. 369, 438 S.E.2d 549 (1993), this Court censured a magistrate for his direct involvement in his wife's campaign and for misleading advertisements appearing in a local newspaper. This Court found, however, an absence of clear and convincing evidence that the magistrate caused the advertisement to be published and therefore found that censure was an adequate sanction. *Id*. at 373, 438 S.E.2d at 553; *see also Matter of Tennant*, 205 W.Va. 92, 516 S.E.2d 496 (1999) (admonishing candidate for magistrate for solicitation of campaign funds); *Starcher*, 202 W.Va. 55, 501 S.E.2d 772

(admonishing judge for personally soliciting campaign contributions).

In our review of cases involving multiple facets of judicial discipline, we find the rationales employed in those cases instructive on principles underlying disciplinary determinations. In *In re Renke*, 933 So.2d 482 (Fla. 2006), for example, a successful judicial candidate was removed from office for "knowingly and purposefully" making material misrepresentations in his campaign brochures, among other violations. *Id*. at 487. The Supreme Court of Florida reasoned:

> [T]o allow someone who has committed such misconduct during a campaign to attain office to then serve the term of the judgeship obtained by such means clearly sends the wrong message to future candidates; that is, the end justifies the means and, thus, all is fair so long as the candidate wins. . . . In our decision to remove Judge *Renke*, we have concluded that the series of blatant, knowing misrepresentations found in Judge *Renke*'s campaign literature and in his statements to the press amount to nothing short of fraud on the electorate in an effort to secure a seat on the bench. . . . [W]e hold that regardless of Judge *Renke*'s present abilities and reputation as a judge, one who obtains a position by fraud and other serious misconduct, as we have found Judge *Renke* did, is by definition unfit to hold that office. . . . [T]hose who seek to assume the mantle of administrators of justice cannot be seen to attain such a position of trust through such unjust means.

Id. at 495 (citations and internal quotations omitted);[32] *see also In re McMillan*, 797 So. 2d 560 (Fla. 2001) (successful judicial candidate removed, in part, for unfounded attacks on opponent and local court system).

In *Tamburrino*, the Ohio Supreme Court suspended an unsuccessful judicial candidate from the practice of law for one year, with six months stayed, based upon false television advertisements, emphasizing "[t]his case does not involve false statements to merely make *Tamburrino* appear as

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[32] In *Renke*, the Supreme Court of Florida also addressed a matter it had evaluated ten years prior to the *Renke* matter. Its discussion of that prior case is illuminating on the issue of progression of legal reasoning and sanctioning ability. In *In re Alley*, 699 So.2d 1369 (Fla. 1997), allegations of violations had been asserted against a candidate for judicial office, charging Judge Alley "with knowingly misrepresenting her qualifications and those of her opponent in her campaign literature, including mailers and newspaper advertisements." *Renke*, 933 So.2d at 494. The court, in a very brief *Alley* opinion, imposed only a public reprimand as discipline, based upon its limitations with regard to altering the recommendations of the Judicial Qualifications Commission. *Alley*, 699 So.2d at 1370. In *Renke*, the court took the opportunity to explain that it had been "constrained by the language . . . regarding our ability to modify the . . . proposed discipline" at the time of the *Alley* decision. 933 So.2d at 494. The court in *Renke* observed that, in *Alley*, it had expressed "our frustration with the recommended discipline in that case, regarding violations similar to the ones we face today, stating, [in *Alley*], 'we find it difficult to allow one guilty of such egregious conduct to retain the benefits of those violations and remain in office.'" *Renke*, 933 So.2d at 494 (quoting *Alley*, 699 So.2d at 1370). Thus, in *Renke*, the court stated: "Today we make clear that those warnings cannot be ignored by those who seek the trust of the public to place them in judicial office." *Renke*, 933 So.2d at 495.

though he had better credentials or more endorsements" as in several other arguably comparable judicial ethics cases. 2016 WL at *11. Rather, *Tamburrino*, similar to Judge-Elect Callaghan in the present situation, "used false statements to impugn the integrity of his opponent." *Id.* "*Tamburrino*'s misconduct impugned the integrity of his opponent as a jurist and as a public servant." *Id.* at *12; *see also In re Kinsey*, 842 So.2d 77 (Fla. 2003) (reprimanding and fining judicial candidate, in part, for attacking opponent's handling of cases and presenting herself as pro-police and anti-criminal); *In re Baker*, 542 P.2d 701 (Kan. 1975) (censuring judicial candidate for authorizing campaign flyer containing false assertions regarding opponent's retirement eligibility); *In re Freeman*, 995 So.2d 1197 (La. 2008) (suspending justice of the peace without pay for remainder of term for failing to resign judicial office before becoming candidate for non-judicial office); In *Matter of Fortinberry*, 708 N.W.2d 96 (Mich. 2006) (censuring judicial candidate for falsely accusing opponent of having illicit affair with law clerk and asserting that candidate's wife was thereafter found dead in home); *In re Burick*, 705 N.E.2d 422 (Ohio 1999) (reprimanding and fining judicial candidate, in part, for misrepresenting facts about opponent in campaign communications); *Hildebrandt*, 675 N.E.2d at 892 (suspending judicial candidate for six months, with suspension stayed, and placing on probation for six months subject to candidate's compliance with terms of order, including public apology, for falsely accusing opponent of running for judge and for Congress).

3. Precedential Analysis of Violations of Rules of Professional Conduct

Our analysis of Judge-Elect Callaghan's violation of the Rules of Professional Conduct is also guided by our prior decisions of appropriate discipline of attorneys for false statements. In Committee on *Legal Ethics of West Virginia State Bar v. Farber*, 185 W.Va. 522, 408 S.E.2d 274 (1991), this Court suspended an attorney for three months, with readmission conditioned upon having a supervising lawyer for a period of two years. The attorney had misrepresented facts in a motion to disqualify a circuit judge and had made false accusations against the judge. 185 W.Va. at 525, 408 S.E.2d at 277. Similarly, in *Lawyer Disciplinary Board v. Turgeon*, 210 W.Va. 181, 557 S.E.2d 235 (2000), this Court suspended a lawyer for two years, in part, for falsely accusing a judge of manufacturing evidence and cooperating with the prosecution against a client. In *Hall*, this Court suspended an attorney for three months for falsely accusing an Administrative Law Judge of racial bias and unethical behavior. 234 W.Va. 298, 765 S.E.2d 187.

The discussion of such violations by other jurisdictions is also instructive. *See In re Becker*, 620 N.E.2d 691 (Ind. 1993) (suspending attorney thirty days for false claims against judge); *In re Ireland*, 276 P.3d 762 (Kan. 2012) (suspending lawyer two years for accusing judge of improper sexual behavior during mediation); *Kentucky Bar Assoc. v. Waller*, 929 S.W.2d 181 (Ky. 1996) (suspending lawyer six months for calling judge lying incompetent—hole); *In re Mire*, 197 So.3d 656 (La. 2016) (suspending lawyer one year and one day with six months deferred by two years'

probation for saying judge was incompetent); *In re McCool*, 172 So.3d 1058 (La. 2015) (disbarring lawyer for orchestrating media campaign based on false or misleading information in effort to intimidate judge); *Disciplinary Action Against Graham*, 453 N.W.2d 313 (Minn. 1990) (suspending lawyer sixty days for accusing judge, magistrate, and attorneys of conspiracy); *Mississippi Bar v. Lumumba*, 912 So.2d 871 (Miss. 2005) (suspending lawyer six months for saying judge had temperament of barbarian); *Disciplinary Counsel v. Shimko*, 983 N.E.2d 1300 (Ohio 2012) (imposing one year stayed suspension on lawyer who repeatedly questioned judge's impartiality); *Moseley v. Virginia State Bar*, 694 S.E.2d 586 (Va. 2010) (suspending lawyer six months, in part, for making false comments about judge).

4. Sanctions for Judge-Elect Callaghan's Violations

In this Court's analysis of the present matter and our determination of appropriate sanction, we recognize the limited precisely comparable precedent. Based upon our review of numerous infractions involving assertions of false statements by judges and attorneys, however, we find it imperative to consider that Judge-Elect Callaghan did not simply misrepresent himself or issues such as his own qualifications or endorsements, his professional competence, or his campaign's monetary contributions. Rather, he directly and methodically targeted an opponent with fabricated material and disseminated it to the electorate. The perceived vulnerabilities in the opponent's campaign were exploited, based upon polls and research conducted on behalf of Judge-Elect Callaghan and with his

approval. As Mr. Heflin explained the strategy, the attempt was "to create a piece of - - something humorous and something that would help create the theatre of the mind we were looking for."

Subsequent to thorough evaluation of this matter, this Court finds clear and convincing evidence of the violations set forth by the Board and adopts its recommendations, with modification. For his violation of Rule 4.1(A)(9), Rule 4.2(A)(1), and Rule 4.2(A)(4) of the Code of Judicial Conduct, we find that Judge-Elect Callaghan should be suspended for two years, without pay, from his position as Judge of the 28th Judicial Circuit.[33] For his violation of Rule 8.2(a) of the Rules of Professional Conduct, we find that Judge-Elect Callaghan should be reprimanded.

The imposition of this discipline, both suspension as a judge and reprimand as an attorney, is warranted by the severity of Judge-Elect Callaghan's conduct. The Court acknowledges the obligation to "respect and observe the people's categorical right to choose their own judges, and to avoid interfering with that right except for manifest violations of the Code

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[33] The finding of three separate and distinct violations of the Code of Judicial Conduct could warrant a three-year suspension under Rule 4.12 of the West Virginia Rules of Judicial Disciplinary Procedure. Based upon our assessment of the various elements of Judge-Elect Callaghan's conduct, as well as aggravating and mitigating factors, we find a two-year suspension is adequate and warranted by the severity of the conduct. We also note that article VIII, section 7 of the West Virginia Constitution prohibits a circuit court judge from practicing law during his term. *See also McDowell v. Burnett*, 75 S.E. 873, 878 (S.C. 1912) (suspension is "the mere temporary withdrawal of the power to exercise the duties of an office.").

of Judicial Conduct." *Turco*, 970 P.2d at 740. However, we find manifest violations have been committed in this case.[34] We have also observed "it is sometimes appropriate to discipline a judge both as a judge and as a lawyer for the same misconduct." *Matter of Troisi*, 202 W.Va. 390, 397, 504 S.E.2d 625, 632 (1998). This precept is artfully explained in *In re Mattera*, 168 A.2d 38 (N.J. 1961): "A single act of misconduct may offend the public interest in a number of areas and call for an appropriate remedy as to each hurt. . . . The remedies are not cumulative to vindicate a single interest; rather each is designed to deal with a separate need." *Id*. at 42. As this Court has stated: "In cases of judicial misconduct, more than a single interest is implicated." *Troisi*, 202 W.Va. at 397, 504 S.E.2d at 632.[35]

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[34] The significance of the elevated public position of a judge cannot be overstated. "Because their misconduct is undeniably more harmful to the public's perception of both the legal profession and the judiciary as a whole, judges must maintain standards of personal and professional care beyond that of regular attorneys." *In re Coffey's Case*, 949 A.2d 102, 129 (N.H. 2008). "Without judges who follow the law themselves, the authority of the rule of law is compromised." *Id*. at 132 (Galway, J., dissenting). In disagreeing with the majority's decision to impose a three-year suspension for Coffey's fraudulent conveyances and arguing for imposition of an indefinite suspension, the dissent posits: "Simply put, when one whose job it is to enforce the law, instead interferes with and disregards the law to her own benefit, the public rightfully questions whether the judicial system itself is worthy of respect." *Id*. at 130 (Galway, J., dissenting).

[35] *See also* Frank D. Wagner, *Annotation, Misconduct In Capacity As Judge As Basis For Disciplinary Action Against Attorney*, 57 A.L.R.3d 1150 (1974).

Judge-Elect Callaghan's conduct violated fundamental and solemn principles regarding the integrity of the judiciary.[36] His egregious behavior warrants substantial discipline.[37] While this Court remains mindful that sanctions are not for the purpose of punishment, this Court must impose discipline in appropriate measure to "instruct the public and all judges, ourselves included, of the importance of the function performed by judges in a free society." *Karl*, 192 W.Va. at 34, 449 S.E.2d at 288 (internal quotations omitted). Moreover, "[a]ny sanction must be designed to announce publicly our recognition that there has been misconduct; it must be sufficient to deter the individual being sanctioned from again engaging in such conduct and to prevent others from engaging in similar misconduct in the future." *Id*. (internal quotations omitted). We acknowledge Judge-Elect Callaghan's contention that significant sanctions would have "a devastatingly chilling effect on lawyers pondering the idea of running for a judicial office." In that vein, we sincerely expect that these sanctions will indeed have a devastatingly chilling effect on lawyers pondering the idea of disseminating falsifications for the purpose of attaining an honored position of public trust.

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[36] "[H]onesty is the base line and mandatory requirement to serve in the legal profession." *Iowa Supreme Ct. Disciplinary Bd. v. McGinness*, 844 N.W.2d 456, 465 (Iowa 2014) (internal citations omitted).

[37] If Judge-Elect Callaghan had not been elected to the judicial seat, our consideration of the discipline to be imposed under the Rules of Professional Conduct may have differed.

IV. CONCLUSION

This Court imposes the following discipline upon Judge-Elect Callaghan:

1. Judge-Elect Callaghan is reprimanded for violation of Rule 8.2(a) of the Rules of Professional Conduct.

2. Judge-Elect Callaghan is forthwith suspended for two years, without pay, from his office as judge of the 28th Judicial Circuit, for his violations of Rules 4.1(A)(9), 4.2(A)(1), and 4.2(A)(4) of the Code of Judicial Conduct.

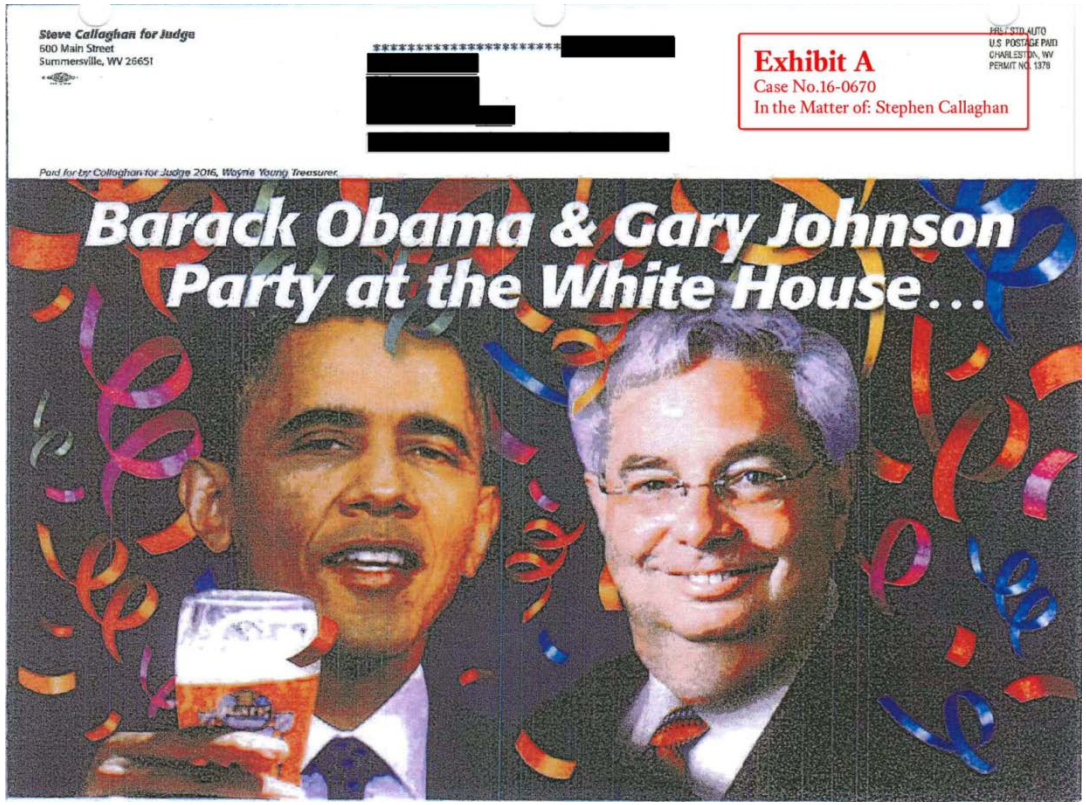
3. Judge-Elect Callaghan is ordered to pay a $5,000 fine per violation of the Code of Judicial Conduct, for a total of $15,000 fine.

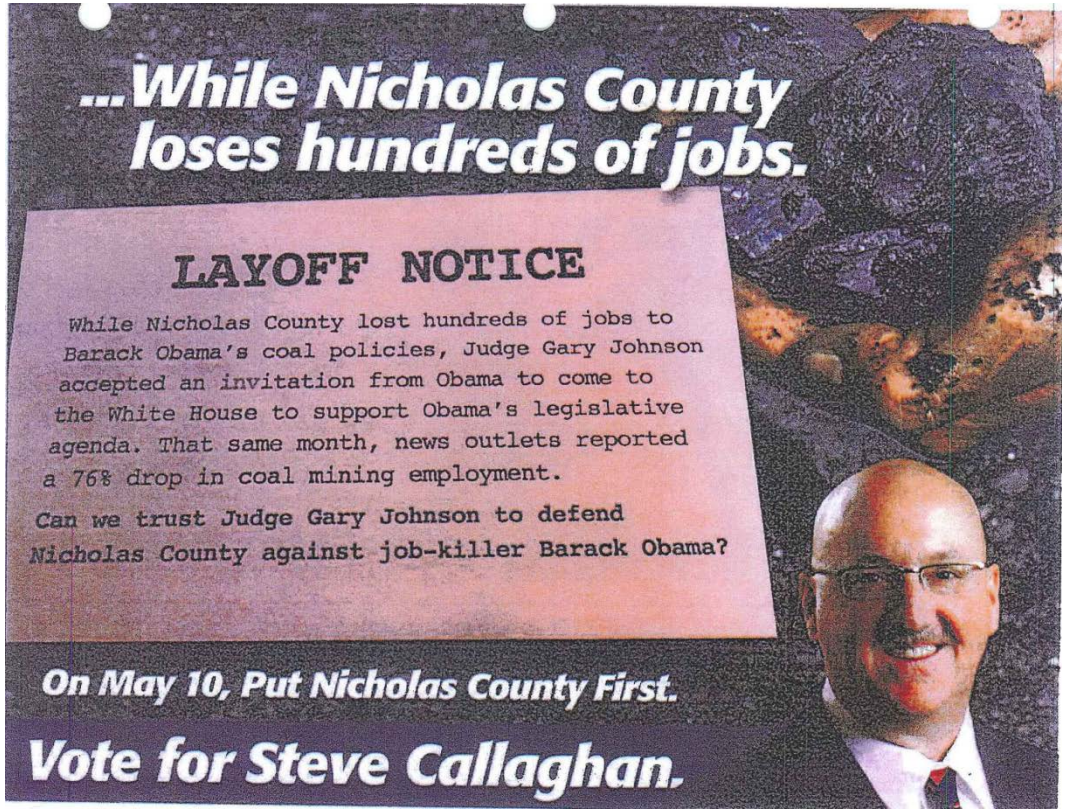
4. Judge-Elect Callaghan is ordered to pay all costs associated with the investigation, prosecution, and appeal of the violations proven in these proceedings.

The Clerk of this Court is ordered to issue the mandate forthwith.

Suspension without pay and other sanctions ordered.

It is so Ordered.


Steve Callaghan for Judge
600 Main Street
Summersville, WV 26651
[redacted]
Exhibit A
Case No.16-0670
In the Matter of: Stephen Callaghan
BRC STD AUTO
U.S. POSTAGE PAID
CHARLESTON, WV
PERMIT NO. 1379
Paid for by Callaghan for Judge 2016, Wayne Young Treasurer
Barack Obama & Gary Johnson
Party at the White House...


...While Nicholas County loses hundreds of jobs.
LAYOFF NOTICE
While Nicholas County lost hundreds of jobs to Barack Obama's coal policies, Judge Gary Johnson accepted an invitation from Obama to come to the White House to support Obama's legislative agenda. That same month, news outlets reported a 76% drop in coal mining employment.
Can we trust Judge Gary Johnson to defend Nicholas County against job-killer Barack Obama?
On May 10, Put Nicholas County First.
Vote for Steve Callaghan.

APPENDIX B

No. 16-0670 – *In re Callaghan* **FILED**

February 9, 2017
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Matish, Judge, concurring in part and dissenting in part:

The majority considers the recommendation[1] of the Judicial Hearing Board of two concurrent one-year periods of suspension without pay to be too lenient, instead ordering two consecutive one-year suspensions without pay be imposed, plus a $15,000 fine, costs, and a public reprimand. While I concur with the majority's reasoning as to the seriousness of this matter, I respectfully disagree as to the length of the suspension. The entire circumstance merits additional charges and punishment because, after reviewing the record presented and hearing oral argument, it is my opinion that the punishment is still not severe enough, because of the numerous violations that occurred with the so-called Obama flyer alone.

[1] Pursuant to Rule 4.8 of the Rules of Judicial Disciplinary Procedure, the Judicial Hearing Board "shall file a written recommended decision with the Clerk of the Supreme Court of Appeals."

Judge-elect Callaghan committed, at minimum, three violations of the Code of Judicial Conduct, Rules 4.1(A)(9), 4.2(A)(1), and 4.2(A)(4), and one violation of the Rules of Professional Conduct, Rule 8.2(a), and, there needs to be, at least, a one-year suspension for each violation.

The Formal Statement of Charges put him on notice, without any violation of his due process rights, of numerous violations that occurred for each so-called Obama flyer mailed (the exact number is unknown), to the voters of Nicholas County, and over 6,700 voted in the election. Additionally, Judge-elect Callaghan claimed that his best tool in advertising was his personal and/or separate campaign Facebook pages. He estimated that he attracted at least hundreds of people, which for each occurrence of someone accessing his personal and/or separate campaign Facebook pages, caused his campaign to knowingly distribute information with reckless disregard for its truth, making false statements with respect to each repeated publication.

This Court has previously discussed the issue of multiple offenses occurring within the same course of conduct. *In State v. McGilton, 229 W. Va. 554, 729 S.E.2d 876 (2012)*, the Court held a Defendant may be convicted of multiple offenses of malicious assault under West Virginia Code § 61-2-9(a) (2004) against the same victim even when the offenses were a part of the same course of conduct. *Syl. Pt. 9, Id.* The Court went on to explain such convictions do not violate the double jeopardy provisions contained in either the United States Constitution or the West Virginia Constitution as long as the facts

demonstrate separate and distinct violations of the statute. *Id*.

Additionally, the majority could have just as easily found violations for each untruthful statement of the so-called "Obama flyer," which included: (1) the photo-shopped pictures of President Obama and Judge Gary Johnson with the beer, since there was no party attended with President Obama where alcohol was served; (2) that Judge Johnson was not invited by the President; (3) that President Obama was not even present; (4) that Judge Johnson did not go to the White House; and (5) none of this had anything to do with Judge Johnson defending jobs in Nicholas County. Each of these violations, having occurred in the so-called "Obama flyer" that was mailed to the voters and having been placed upon two separate Facebook posts, would amount to a multiplier of, at a minimum, three separate postings or publications, for a minimum of fifteen violations, in and of itself, justifying as much as a fifteen-year suspension.

Furthermore, four of Judge-elect Callaghan's flyers make reference to a Juvenile Drug Court fee and a "Hidden Price to Justice in Nicholas County" with respect to the so-called Juvenile Drug Court fee of $5 which, by virtue of West Virginia Code § 49-4-716, does not and could not exist with respect to funds being collected for a Juvenile Drug Court, but rather only exist with respect to a Teen Court, a totally unrelated type of treatment court. While Judge-elect Callaghan testified that he used these terms interchangeably, a first year law student, in five minutes, reviewing West Virginia Code § 49-4-716 and § 62-15-4, could tell they are not the same, and,

in fact, Judge-elect Callaghan explained in his January 25, 2016, email to his media company that he knew the difference, yet he used untruthful information in these flyers.

Furthermore, one of Judge-elect Callaghan's flyers contains a color photocopy of a $100 bill, which appears to be a violation of 18 U.S.C.A. § 475, which prohibits using the likeness or similitude of any obligation of the United States in any notice, circular, handbill, or advertisement that is printed, distributed, circulated, or used. While there is an exception under 31 C.F.R. § 411.1 that authorizes color illustrations, they must be of a size less than three-fourths or more than one and one half in linear dimension of an actual $100 bill and one-sided. The exhibit provided to the Court is one-sided, however, it does not appear to be less than three-fourths, nor is it more than one and one half in linear dimension of an actual $100 United States currency bill, assuming that, the exhibit is an actual sized photocopy of the notice, circular, handbill, or advertisement that was printed, distributed, circulated, or used. All of these additional violations were apparently tried by the parties by consent, and should have also been cause for appropriate sanctions, or at least considered as aggravating circumstances justifying additional sanctions.

As a country, we have gone far astray from what is right and what is good. We have become the most connected nation with our cell phones, smart phones, tablets, computers, and social media, while simultaneously becoming the most disconnected nation because of our cell phones, smart phones, tablets, computers, and social media. In trying to one

up the next guy at his expense, we fail to realize that we harm ourselves in the process. Once you hit "Send," it is out there forever, and you cannot take it back.

As a judge or judicial candidate, you are expected to have a standard to live up to, not only in your personal life and how you conduct yourself on the bench, but how you run a campaign to secure the trust of the public in voting to elect you. It is disturbing to me that Judge-elect Callaghan admitted to reading the Code of Judicial Conduct when he decided to run. However, the Code of Judicial Conduct was later changed and adopted December 1, 2015, yet Judge-elect Callaghan, in his testimony, never admitted to stating specifically that he read the new Code of Judicial Conduct nor talked about any Code of Judicial Conduct to the media company he hired. Also, the media company admitted to not having talked with Judge-elect Callaghan about it either.

The falsity used by Judge-elect Callaghan in his campaign perpetrated a fraud upon the voters of Nicholas County, the 28th Judicial Circuit. By his own actions, he has shown that he is unfit to hold a judicial office, and, at the appropriate time, a new election should be held.

Judge-elect Callaghan may very well have won the election fair and square based upon other factors in Nicholas County, or the fact he pointed to in one of his other flyers that after a certain amount of time, things need changed, but instead he resorted to certain falsities, which definitely are not to be tolerated in a judicial election. We may now live in a

world of "fake news" and "alternate facts," but if we cannot trust, honor, and respect our Judges and Justices, who can we trust?

Since Judge-elect Callaghan was first an attorney running for a judicial office, I would give him a one-year suspension as an attorney, followed by a year for each violation of the Code of Judicial Conduct, for a total suspension of four years. However, the possibility exists under the facts of this case that the suspension could be for much longer, as stated above. Therefore, I respectfully dissent as to the length of punishment, and would order Judge-elect Callaghan to serve four one-year consecutive periods of suspension from the bench, without pay, in addition to the fines and costs imposed by the majority.

APPENDIX C

STATE OF WEST VIRGINIA

At the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on January 9, 2017, the following order was made and entered **in vacation**:

In the Matter of: The Honorable Stephen O. Callaghan, Judge-Elect of the 28th Judicial Circuit

No.) 16-0670

On this day, January 9, 2017, came the respondent, Stephen O. Callaghan, by counsel, Lonnie C. Simmons, Esq., and presented his motion to disqualify the Honorable Allen H. Loughry II, Chief Justice, the Honorable Margaret L. Workman, Justice, the Honorable Menis E. Ketchum, II, Justice, and the Honorable Elizabeth D. Walker, Justice, from participating in this case for the reasons set forth therein. Thereafter, the Honorable Allen H. Loughry II, Chief Justice, the Honorable Margaret L. Workman, Justice, the Honorable Menis E. Ketchum, II, Justice, and the Honorable Elizabeth D. Walker, Justice, of the Supreme Court of Appeals of West Virginia, notified the Clerk of this Court of their voluntary disqualification from participating in the above-captioned proceeding, pursuant to Canon 2, Rule 2.11 of the Code of Judicial Conduct.

A True Copy

Attest: //s// Rory L. Perry II
Clerk of Court

MEMORANDUM

To: Rory Perry, Clerk
Edythe Nash Gaiser, Deputy Clerk
Jordan Martin, Staff Attorney

From: Chief Justice Loughry
Justice Workman
Justice Ketchum
Justice Walker

Re: *In re: The Honorable Stephen O. Callaghan, Judge Elect of the 28th Judicial Circuit; No. 16-0670*

Date: January 9, 2016

We are in receipt of respondent's Motion to Disqualify in the above-referenced matter. Having reviewed same, it appears there are no demonstrable disqualifying factors necessitating recusal from the matter. However, out of an abundance of caution and in accordance with Canon 2, Rule 2.11(a) of the Code of Judicial Conduct, the remaining members of the Court recuse ourselves from this matter.

APPENDIX D

STATE OF WEST VIRGINIA

At the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on January 5, 2017, the following order was made and entered **in vacation**:

In the Matter of: The Honorable Stephen O. Callaghan
Judge-Elect of the 28th Judicial Circuit

No.) 16-0670

On this day, January 5, 2017, the Honorable Robin Jean Davis, Justice of the Supreme Court of Appeals of West Virginia, notified the Clerk of this Court of her voluntary disqualification from participating in the above-captioned proceeding, pursuant to Canon 2, Rule 2.11 of the Code of Judicial Conduct.

A True Copy

Attest: //s// Rory L. Perry II
Clerk of Court

Memorandum

To: Rory L. Perry, II, Clerk

From: Robin Jean Davis, Justice

Subject: *In the Matter of Stephen Callaghan*, No. 16-0670

Date: January 5, 2017

In this proceeding, the Court is being asked to consider whether or not the Honorable Stephen O. Callaghan should be sanctioned for conduct occurring during the 2016 judicial election for the 28th Judicial Circuit. As I explain below, while this case has been pending, events have occurred which compel me to recuse myself.

The record in this case shows that Judge Callaghan's opponent in the election was the Honorable Gary L. Johnson, former judge of the 28th Judicial Circuit. All the conduct that Judge Callaghan has been accused of engaging in was directed at undermining Judge Johnson's campaign for reelection. Judge Johnson was defeated and now the Court is being asked to sanction Judge Callaghan for alleged unethical conduct that may have contributed to Judge Johnson's election loss. I was fully prepared to uphold my constitutional duty and preside over this proceeding with other members of the Court, until the events of January 4, 2017.

On January 4, the Court held a conference at which, without prior notice, we were asked to vote on termination of our Administrative Director, Steve D. Canterbury. I voted to retain Mr. Canterbury. The

majority of the Court voted to terminate Mr. Canterbury. Immediately after that vote, the Court was asked to decide whether Judge Johnson should be appointed as the Interim Administrative Director. I **ABSTAINED** from voting on that question. The majority of the Court voted to appoint Judge Johnson as the Interim Administrative Director.

Rule 2.11(A) of the Code of Judicial Conduct states that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned[.]" I believe that as a result of the Court appointing Judge Johnson to be the interim Administrative Director, my impartiality in this case might reasonably be questioned. Whether I believe Judge Callaghan should be sanctioned is of no moment. The critical question is whether Judge Callaghan should have his fate decided by someone whose impartiality could not be questioned.

cc: Chief Justice Loughry
Justice Workman
Justice Ketchum
Justice Walker
Judge Gary Johnson, Interim Administrative Director
Bruce Kayuha, Chief Counsel
Shannon Green, Recusal Administrative Assistant

APPENDIX E

BEFORE THE JUDICIAL HEARING BOARD
OF WEST VIRGINIA

IN THE MATTER OF:

THE HONORABLE STEPHEN O. CALLAGHAN, JUDGE-ELECT OF THE TWENTY-EIGHTH JUDICIAL CIRCUIT

Supreme Court No. 16-0670

JIC Complaint No. 84-2016

RECOMMENDED DECISION

This matter came on for hearing on November 21, 2016, before the Judicial Hearing Board, at which time the parties presented stipulations, exhibits, witness testimony, and argument of counsel.

Upon consideration of the stipulations, exhibits, witness testimony, and argument of counsel, the Board makes the following Findings of Fact, Conclusions of Law, and Recommended Discipline:

Findings of Fact

1. On or about May 11, 2015, Respondent, Judge-Elect Stephen O. Callaghan ["Respondent"] filed his pre-candidacy papers with the West Virginia

Secretary of State's Office to run for Judge of the 28th Judicial Circuit. [Exhibit 18]

2. On or about November 24, 2015, according to a Stipulation in evidence, Mary Pamela Shaffer, Executive Assistant to the West Virginia Judicial Investigation Commission, sent a letter to all the non-judge candidates, including Respondent, who had filed pre-candidacy papers to run for Circuit Judge and Family Court Judge in West Virginia, advising them of the Supreme Court's adoption of Rule 4.1 of the Code of Judicial Conduct, and that it was to take effect on December 1, 2015. [Exhibit 23]

3. On or about January 14, 2016, Respondent filed his candidacy papers with the Secretary of State's Office to run for the same office. [Exhibit 18]

4. His opponent was the Honorable Gary L. Johnson, Judge of the 28th Judicial Circuit ["Judge Johnson"]. [Exhibit 19]

5. On May 10, 2016, Respondent defeated Judge Johnson 3,472 votes (51.69%) to 3,245 votes (48.31%), or a margin of 227 votes. [Id.]

6. On or about June 24, 2016, the Judicial Investigation Commission issued a formal Statement of Charges against Respondent. [Exhibit 2]

7. The Statement of Charges, which was filed with the Supreme Court of Appeals on July 15, 2016, focuses on a campaign flyer ["'Obama' flyer"] issued by Respondent, a copy of which is attached as Exhibit A to this Recommended Decision. [Exhibit 1]

8. Paragraph No. 13 of the Statement of Charges states:

> On or about May 5, 2016, Respondent mailed or caused to be mailed a two-page flyer to voters in Nicholas County. The front side of the flyer contained a wrongfully created photograph that was intended to deceive voters into believing that Judge Johnson and U.S. President Barack Obama were drinking beer and partying at the White House while conniving with one another to kill coal mining jobs in Nicholas County. The front of the flyer depicts the Judge standing amidst party streamers, with the President who was holding a beer, and the caption: "Barack Obama and Gary Johnson Party at the White House. . ." The caption continues at the top of page two by stating "While Nicholas County loses hundreds of jobs." Page two of the flyer also contains Respondent's picture superimposed over a picture of a hand holding mined coal. To the left is a pink slip which states "Layoff Notice" and below that:
>
> > While Nicholas County lost hundreds of jobs to Barack Obama's coal policies, Judge Gary Johnson accepted an invitation from Obama to come to the White House to support Obama's legislative agenda. That same month, news outlets, reported a 76% drop in coal mining employment. **Can we trust Judge Gary Johnson to defend Nicholas County against job-killer Barack Obama?**
>
> [Exhibit 2](Emphasis in original)

9. At the bottom of the page of the "Obama" flyer, the caption reads: "On May 10, Put Nicholas County First. Vote Steve Callaghan." [Exhibit 1]

10. In his August 15, 2016, verified Answer to the Statement of Charges, Respondent admitted to the contents of the flyer as set forth in Paragraph No. 13, but denied that it was "wrongful," "intended to deceive" or that it was designed to convey that Judge Johnson and Barack Obama were "conniving with one another to kill coal mining jobs in Nicholas County" [Exhibit 3]

11. Also, in his verified Answer, Respondent denied violating the Code of Judicial Conduct or Rules of Professional Conduct and asserted that the content of the flyer was speech that was protected by the First Amendment. [Id.]

12. Paragraph No. 14 of the Statement of Charges states: "[o]n or about May 5, 2016, Respondent also posted or caused to be posted the complete flyer on his personal and campaign Facebook pages." [Exhibit 2]

13. In his verified Answer to the Statement of Charges, Respondent admitted the allegations contained in this paragraph but denied any violations of the Code of Judicial Conduct or the Rules of Professional Conduct. [Exhibit 3]

14. Paragraph No. 15 of the Statement of Charges states:

> Respondent admits that the foundation for the contents of the flyer is based on Judge Johnson's June 2015 visit to Washington D.C. to attend a child trafficking seminar.[1] Respondent utilized

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[1] Additional record evidence regarding the seminar includes the following: (1) a Stipulation as to Sue Hage, who served as served as Deputy Commissioner for Programs and Resource

Development, West Virginia Bureau for Children and Families, and who also attended the conference, indicating that, "U.S. President Barack Obama did not attend the child sex trafficking conference. Ms. Hage also said she never heard Judge Johnson or Lt. Swiger mention meeting President Obama while at the annual CIP conference or the child sex trafficking seminar. She also never heard any discussion about coal while in attendance at the child sex trafficking seminar," [Exhibit 26]; (2) a Stipulation as to Lt. D.B. Swiger, who is head of the West Virginia State Police Crimes Against Children Unit, and who also attended the conference, indicating that, "U.S. President Barack Obama did not attend the Annual CIP conference or the child sex trafficking conference. The topic of coal was never discussed at either conference. At the conclusion of the child sex trafficking seminar, an open house was held at the National Human Trafficking Resource Center, located a few blocks from the White House. The open house consisted of light hors d'oeurves, refreshments and tours of the facility. Lt. Swiger and Cortney Simmons attended the open house. Lt. Swiger said Judge Johnson did not attend the open house. Lt. Swiger said that President Obama was not at the open house. Lastly, Lt. Swiger said that no alcohol was served at the open house," [Exhibit 24]; and (3) a Stipulation as to Courtney Simmons, who serves as a Victim Specialist with the Crimes Against Children Unit of the West Virginia State Police, indicating that, "U.S. President Barack Obama did not attend the annual CIP conference. Ms. Simmons also said she never heard Judge Johnson mention ever meeting President Obama. The topic of coal was never discussed at the conference. At the conclusion of the child sex trafficking seminar attended by other members of WVCIP, an open house was held at the National Human Trafficking Resource Center, located a few blocks from the White House. The open house consisted of light hors d'oeurves and refreshments and tours of the facility. Ms. Simmons and Lt. Swiger attended the open house. Ms. Simmons said Judge Johnson did not attend the open house. Ms. Simmons said that President Obama was not at the open house. Lastly, Ms, Simmons said that no alcohol was served at the open house," [Exhibit 25]

> Rainmaker Inc. to conduct research on Judge Johnson. Rainmaker found a July 2015 news story and a Supreme Court press release detailing Judge Johnson's attendance at the child-trafficking seminar. Both the news article and the press release make clear that the child trafficking seminar was sponsored by the Federal Administration for Children and Families and that the event "educated leaders on increased dangers vulnerable children in state care face of being trafficked. …." The press release and the news article made absolutely no mention of a party, alcohol or President Obama attending the event.[2]

[Exhibit 2]

15. Respondent admitted the contents of Paragraph No. 15, in his verified Answer to the Statement of Charges but denied any violation of the Code of Judicial Conduct or Rules of Professional Conduct, and stated that "while he used Rainmaker, Inc., to assist him in his campaign, Respondent personally is responsible for the content of all

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[2] Additional record evidence regarding the press release includes a Stipulation as to Jennifer Bundy, who serves as Public Information Office at the Supreme Court of Appeals, indicating that, "In June 2015, Ms. Bundy and Nikki Tennis co-authored the press release issued by the State Supreme Court entitled "Judge Johnson, other state leaders attend National Convening on Trafficking and Child Welfare." Shortly after the press release was written, it was placed on the Court website and disseminated to various media entities. Ms. Bundy has never spoken to anyone from Rainmaker, Inc. about the press release. She has never spoken to Brad Heflin about the press release. She also has never spoken to Stephen O. Callaghan or any member of his campaign committee about the press release." [Exhibit 22]

advertising materials paid for by his election committee." [Exhibit 3]

16. Paragraph No. 16 of the Statement of Charges states as follows:

> Judge Johnson has never met President Obama. Judge Johnson has never been invited to the White House by President Obama. As part of his judicial duties, Judge Johnson serves as Chair of the State Court Improvement Program ("WVCIP"). As Chair, Judge Johnson, along with four other WVCIP members, attended the annual weeklong National CIP Conference in Washington, DC. The conference was held during the week of June 8, 2015. At least three members of WVCIP were required to attend the National Conference in order to maintain federal grant status. Concomitantly, the Federal Administration for Children and Families held a two-day seminar on child trafficking beginning on June 10, 2015. The first day of the child trafficking seminar was at the White House Complex – in a building adjacent to the actual White House. Only three CIP members from each state could attend the White House portion of the child trafficking seminar. The determination of who could attend was left up to each State CIP. The WVCIP decided that Judge Johnson, Lieutenant D.B. Swiger of the West Virginia State Police and Sue Hage, Deputy Commissioner of the West Virginia Bureau of Children and Families would attend the seminar. At the conclusion of the seminar an open house was held at the National Human Trafficking Resource Center, located a few blocks from the White House. The open house consisted of light

hor d'oeurves and refreshments and tours of facility. No alcohol was served at the open house. Judge Johnson did not attend the open house. President Obama never attended the child trafficking seminar or the open house. Based upon information and belief, President Obama was not in Washington, D.C. on June 10, 2015.[3]

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[3] Additional record evidence regarding the WVCIP and the seminar includes a Stipulation as to Nikki Ann Tennis, who served the Supreme Court of Appeals as the Coordinator of Family Court Services from May 30, 2006, to September 2008, and the Director of Children's Services from September 2008, through September 30, 2016, stating as follows:

> In her capacity with the Supreme Court, Ms. Tennis oversaw three federal Court Improvement Program ("CIP") grants from the U.S. Department of Health and Human Services Administration for Children and Families. The highest State Court of each State can apply for a basic grant, a grant for data collection and analysis, and a training grant from the federal agency. The basic CIP grant is funded to enable State courts to conduct assessments of the role, responsibilities and effectiveness of State courts in carrying out State laws relating to foster care and adoption proceedings. Improvements made under the grant are required to provide for the safety, well-being and permanence of children in foster care and assist in the implementation of Program Improvement Plans.
>
> The Honorable Gary L. Johnson, Judge of the 28th Judicial Circuit is Chair of the WVCIP and has served continually in that capacity since 2001. Judge Johnson will continue to serve as Chair after he goes on Senior Status in January 2017. The WVCIP is made up of approximately 50 Board members and the representatives include but are not limited to representatives from the Court, DHHR, the West Virginia Division of Juvenile Services, and the West Virginia Department of Education,

attorneys, CASA advocates and domestic violence advocates.

In order to keep each of the three CIP grants, at least one representative per each CIP grant received with a maximum of six representatives per State must attend the annual CIP Grantee Meeting each year funding is received. During Ms. Tennis' tenure, the Court has received funding under each of the grants each and every year from 2006 through 2016. Each year a minimum of three CIP Board members has attended the annual conference. Both Ms. Tennis and Judge Johnson have attended the annual conference during each of those years with the exception that they did not attend the 2016 conference.

In 2015, the State Supreme Court received funding from each of the three CIP grants. Therefore, the State Supreme Court's CIP Board was required to send a minimum of three members and a maximum of six members to the annual conference held in Washington, D.C., on June 9-11, 2015. State CIP members who attended the annual conference were Ms. Tennis, Judge Johnson, WV State Police Lieutenant D.B. Swiger, and Cortney Simmons, Victim Specialist Crimes Against Children Unit, West Virginia State Police.

At the same time, the Federal Administration for Children and Families held a two-day seminar on child trafficking beginning on June 10, 2015. The first day of the child trafficking seminar was at the White House Complex – in a building adjacent to the actual White House. Only three CIP members from each state could attend the White House portion of the child trafficking seminar. The determination of who could attend was left up to each State CIP. However, Ms. Tennis said the federal agency strongly encouraged them to send their highest level representatives from the Court, law enforcement and DHHR. The WVCIP decided that Judge Johnson, Lieutenant Swiger, and Sue Hage, Deputy Commissioner for Programs and Resource Development, West Virginia

[Exhibit 2]

17. In his verified Answer to the Statement of Charges, Respondent stated that he was without sufficient information to admit or deny the allegations contained in Paragraph No. 16 and therefore denied them [Exhibit 3], but has since entered into stipulations regarding Paragraph No. 16.[4]

Bureau for Children and Families would attend the child trafficking seminar.

U.S. President Barack Obama did not attend the Annual CIP conference or the Child Trafficking Conference. According to Ms. Tennis, the CIP program was created as part of the Omnibus Reconciliation Act of 1993, Public Law 103-66, which among other things, provided Federal funds to State child welfare agencies and Tribes for preventive services and services to families at risk or in crisis. The Promoting Safe and Stable Families Amendments of 2001, Public Law 107-33, reauthorized the Court Improvement Program through FY 2006. The CIP program was again reauthorized in Section 438 of the Social Security Action and Section 7401 of the Deficit Reduction Act of 2005 (Public Law 109-171) and the Child and Family Services Improvement and Innovation Act (Public Law 112-34).

[Exhibit 21]

Ms. Tennis co-authored the press release issued by the State Supreme Court entitled "Judge Johnson, other state leaders attend National Convening on Trafficking and Child Welfare." She has never spoken to anyone from Rainmaker, Inc. about the press release. She also has never spoken to Stephen O. Callaghan or any member of his campaign committee about the press release.

[4] The Stipulations of Nikki Tennis, Jennifer Bundy, Lt. D.B. Swiger, Courtney Simmons, and Sue Hage [Exhibits 21, 22, 24,

18. Paragraph No. 17 of the Statement of Charges states as follows:

> Judge Johnson did not have any involvement in any loss of coal mining jobs in Nicholas County. As a judicial officer, Judge Johnson did not have any involvement in policymaking decisions by President Obama concerning coal. As a judicial officer, Judge Johnson must remain neutral and detached and would not be able to comment or take a position on such issues.

19. In his verified Answer, Respondent stated that he was without sufficient information to admit or deny the allegations contained in Paragraph No. 17 and therefore denied them, but at the hearing in this matter there was no evidence that Judge Johnson had any involvement in the loss of coal mining jobs in Nicholas County; that he had any involvement in policymaking decisions by President Obama concerning coal; or that Judge Johnson had ever taken any public position regarding any policies by President Obama having any impact on the coal industry and, moreover, there was evidence that any public support or opposition by Judge Johnson to any policies by President Obama may violate R. Jud. Cond. 2.10(B) which provides, "A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office."

25, and 26] support the allegations in Paragraph No. 16 of the Formal Complaint.

20. So, the thrust of the disciplinary complaint against Respondent is that his campaign advertisement falsely stated that Judge Johnson partied at the White House with President Obama who had invited him there to support President Obama's legislative agenda that had a negative impact on the coal industry resulting in the loss of jobs in Nicholas County.

21. With respect to the truth or falsehood of these statements, the evidence is that (a) Judge Johnson has never met President Obama let alone partied with the President at the White House; (b) the subject matter of the White House seminar attended by Judge Johnson was child trafficking, not climate change or other environmental matters having a negative impact on the coal industry; (c) Judge Johnson had never stated any public support or opposition to any policies of President Obama that may have had a negative impact on the coal industry generally or on the loss of jobs in the coal industry in Nicholas County; and (d) the Code of Judicial Conduct prohibited Judge Johnson from taking public positions over such matters as federal policy decisions regarding climate change or other environmental matters having any impact on the coal industry in Nicholas County.

22. The genesis of the campaign advertisement is the following press release issued by the Supreme Court of Appeals on June 12, 2015:

Judge Johnson, other state leaders attend National Convening on Trafficking and Child Welfare

For immediate release
Photo at https://www.flickr.com/photots/courtwv/

CHARLESTON, W.Va. – Twenty-Eighth Judicial Circuit (Nicholas County)

Judge Gary L. [Johnson] joined other West Virginia and national leaders at the White House on Wednesday, June 10, for a Convening on Trafficking and Child Welfare.

Actress/advocate Ashley Judd was one of the speakers who shared her personal experiences and introduced "Sex Trafficking in the USA," the first part of the film A Path Appears (http://apathappears.org/film/), which shares the stories of trafficking survivors.

Sponsored by the federal Administration for Children and Families, the event educated leaders on the increased dangers vulnerable children in state care face of being trafficked, which is when someone "uses force, fraud, or coercion to control another person for the purpose of engaging in commercial sex acts or soliciting labor or services against his or her will," according to the National Human Trafficking Resource Center (www.traffickingresourcecenter.org). State teams were encouraged to develop plans to prevent and treat child sex trafficking.

Lieutenant D.B. Swiger of the West Virginia State Police and Deputy Commissioner Sue Hage of the West Virginia Bureau for Children and Families also participated in the event. Lieutenant Swiger and Cortney Simmons run the Missing Children's Clearinghouse of the Center for Children's Justice of the West Virginia State Police.

> The state team decided that the trafficking workgroup of the Center for Children's Justice will partner with the West Virginia Court Improvement Program (www.wvcip.com), of which Judge Johnson is chairman, to implement legislation and protocols to protect children in the state's care from falling prey to sex trafficking and to treat children who have been trafficked.
>
> "It will take statewide collaboration to create a safety net for children at risk of being trafficked," Judge Johnson said. "I look forward to working with Lieutenant Swiger and other state leaders in this essential endeavor."
>
> The state team learned that children who have been removed from their homes and placed in the care of the state are more susceptible to being sex trafficked Nationally, an estimated 55 to 97 percent of child trafficking victims have had child welfare involvement, according to Crystal Duarte of the Child Welfare Capacity Building Center for Courts. Children who experience the "duality of care and abuse" and sense that their care is tied to funding may find similarities in sex trafficking. Red flags for trafficking include truancy, running away, homelessness, and tattooing or branding.
>
> Everyone can help child trafficking victims by being vigilant and reporting suspected trafficking to the National Human Trafficking Resource Center at 1-888-373-7888.

[Exhibit 21]

23. Participation in this seminar was required as a condition of federal grants received by the West Virginia Court Improvement Program Board created

by the Supreme Court of Appeals of West Virginia. [Id.]

24. During Respondent's campaign, it learned of Judge Johnson's attendance at this seminar in June 2015 and that, during the same month, there had been a press report regarding the loss of 558 coal jobs in Nicholas County between 2011 and 2015. [Exhibit 5]

25. Respondent's campaign then took these two wholly unrelated facts: (a) Judge Johnson's attendance at a child trafficking conference at the White House in June 2015 and (b) a press report regarding the loss of 558 coal jobs in Nicholas County between 2011 and 2015 and developed a telephone questionnaire to test how linking the two together might further Respondent's efforts to defeat Judge Johnson in the election. [Exhibit 6]

26. Not only did Respondent review this questionnaire before it was used, he made revisions to the draft. [Exhibits 13 and 14]

27. A total of over 22,000 telephone calls were made targeting Nicholas County residents. [Exhibit 6]

28. After asking the respondents generally about for whom they intended to vote in the judicial election, the questionnaire asked respondents a series of three negative questions about Judge Johnson to test their responses, including the following:

> Now I am going to mention a few reasons that OPPONENTS of Gary Johnson might give for why he should NOT be elected as Circuit Judge. Please tell me whether this gives you major concerns,

some concerns, or not real concerns about supporting Gary Johnson for Circuit Judge….

Gary Johnson is in lockstep with Barack Obama's policies. While Nicholas County was losing coal jobs to Obama's policies, Johnson was the only West Virginia judge invited by the Obama White House to participate in a junket highlighting issues of importance to President Obama.

Major Concerns.....	[PRESS 1]
Some Concerns.....	[PRESS 2]
No Real Concerns	[PRESS 3]
Don't Know.....	[PRESS 4]

[Exhibit 6]

29. Over 67 percent of the 149 respondents to this question indicated that they would have major concerns or some concerns about supporting Judge Johnson based upon the false representation that "Gary Johnson is in lockstep with Barack Obama's policies. While Nicholas County was losing coal jobs to Obama's policies, Johnson was the only West Virginia judge invited by the Obama White House to participate in a junket highlighting issues of importance to President Obama."[5]

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[5] Although Respondent's campaign adviser, Brad Heflin ["Mr. Heflin"] testified that the use of this question did not constitute the practice, illegal in West Virginia, called "push polling," W. Va. Code § 3-8-9(a)(10) provides, " No financial agent or treasurer of a political committee shall pay, give or lend, either directly or indirectly, any money or other thing of value for any election expenses, except for the following purposes . . . For conducting public opinion poll or polls. For the purpose of this section, the phrase 'conducting of public opinion

30. The results of the telephone questionnaire were reported to Respondent on February 4, 2016 [Exhibit 15] and were used by Respondent's

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poll or polls' shall mean and be limited to the gathering, collection, collation and evaluation of information reflecting public opinion, needs and preferences as to any candidate, group of candidates, party, issue or issues. **No such poll shall be deceptively designed or intentionally conducted in a manner calculated to advocate the election or defeat of any candidate** or group of candidates or calculated **to influence any person or persons so polled to vote for or against any candidate**, group of candidates, proposition or other matter to be voted on by the public at any election: Provided, That nothing herein shall prevent the use of the results of any such poll or polls to further, promote or enhance the election of any candidate or group of candidates or the approval or defeat of any proposition or other matter to be voted on by the public at any election." (Emphasis supplied). Here, based upon Respondent's and Mr. Heflin's testimony and evidence of record, Respondent's campaign had nothing to support because there is nothing to support the statement that, "Gary Johnson is in lockstep with Barack Obama's policies. While Nicholas County was losing coal jobs to Obama's policies, Johnson was the only West Virginia judge invited by the Obama White House to participate in a junket highlighting issues of importance to President Obama," and it appears not to have been designed to elicit an opinion regarding something truthful about Judge Johnson that would have had a potential positive or negative impact on the election, but appears to have been designed to create the false impression that Judge Johnson was in "lockstep" with President Obama's policies and that President Obama had rewarded Judge Johnson by inviting him on a "junket" to the White House in order to convince voters not to vote for Judge Johnson. The Board further notes that the use of the word "junket" in the questionnaire was inconsistent with Respondent's directive to Mr. Heflin to delete the phrase "expense paid" from the draft of Exhibit A because "I don't know about whether the event was 'expense paid.' I wouldn't want to say that if it is not true." [Exhibit 16]

campaign to develop the "Obama" campaign flyer attached as Exhibit A [Exhibit 16]

31. Significantly, in an email from Mr. Heflin to Respondent dated March 21, 2016, he stated, "This piece won't run until the very end of the campaign." [Exhibit 16]

32. Judge Johnson testified at the hearing that he received the "Obama" campaign flyer in his Post Office Box on Thursday, May 5, 2016, before the Tuesday, May 10, 2016, election, and in addition to the mailing of the flyer to Nicholas County voters for receipt at the middle or end of the week immediately preceding the election, it was also posted to Respondent's personal and campaign Facebook pages at the same time. [Exhibit 2]

33. According to the evidence, the Nicholas Chronicle, the weekly newspaper of Nicholas County, is published on Tuesdays and there is a reasonable inference that the timing of the mailing of the "Obama" flyer was designed to limit Judge Johnson's ability to effectively respond to it.

34. During the evening hours of May 5, 2016, Disciplinary Counsel contacted Respondent by telephone advising him of her belief that the "Obama" flyer violated the Code of Judicial Conduct. [Exhibit 2]

35. Thereafter, without admitting any violation, Respondent removed the "Obama" flyer from his personal and campaign Facebook pages and posted the following:

> My campaign committee recently produced a mail advertisement depicting a visit to the White House by Judge Gary Johnson. The specific

> characterization contained in the mail piece may be inaccurate and misleading. The mailer should not have been sent containing inappropriate information. I apologize personally for any misunderstanding or inaccuracies.

[Exhibit 6]

36. Respondent also ran advertisements on a local radio station on eight separate occasions between May 7 and May 9, 2016, which stated as follows:

> If you received a mail advertisement recently from Steve Callaghan, Candidate for Nicholas County Circuit Judge, showing Judge Gary Johnson visiting the White House, please understand that the specific characterization of the White House visit may be inaccurate and misleading and should not have been sent containing this inappropriate information. Candidate Callaghan apologizes for any misunderstanding or inaccuracies. This message paid for by Callaghan for Judge 2016, Wayne Young, Treasurer.

[Exhibits 2 and 17]

37. On May 26, 2016, after the election, a Complaint was filed with the Judicial Investigation Commission by Nicholas Johnson. [Exhibit 4]

38. On June 14, 2016, Respondent submitted a letter response to the Complaint, which he verified, in which he defended himself as follows:

> After being regained, Rainmaker conducted research on the public life of … Judge Johnson. In doing this research, Rainmaker found a July 2015 news story detailing Judge Johnson's visit to the White House on June 10, 2015. … A press release

publicizing this same event was issued by the West Virginia Supreme Court….

Since the event was held at the White House, the official residence and office of the President, it was reasonable for anyone to conclude this event was sanctioned and approved by President Obama. The event at the White House was sponsored by the federal Administration for Children and Families. … As a federal agency, President Obama is responsible for and directs its policies and projects.

News reports published about the event do not mention anything about whether or not President Obama as present or absent.[6] According to the Chicago Sun-Times, which published a news release from the White House press secretary, the President was at the White House on June 10, 2015. . . . Mr. Callaghan is now aware that the Chicago Sun-Times story is contradicted by a news story published in a Charleston Gazette-Mail editorial column. . . . The source for the Gazette-Mail story is not known to Mr. Callaghan….

Some members of the public may have been duly impressed by the fact that Judge Johnson was

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[6] The White House posted a video of the seminar on YouTube on June 10, 2015, which would have been available to Respondent and his campaign adviser on an after June 10, 2015, and nowhere during the video does President Obama appear. https://www.youtube.com/watch?v=9pp8tC8dDOw Rather, Valerie Jarrett, Senior Advisor to President Obama and Chair of the White House Council on Women & Girls, hosted the seminar on behalf of the White House. [Id.]

honored[7] by the White House for the good works he had performed while others may view this fact in a more negative fashion. In fact, some citizens may contend **any** association between Judge Johnson and President Obama, who has been blamed by many West Virginians and politicians for destroying the coal industry in this State, is a reason not to support Judge Johnson….

The same month that Judge Johnson attended the White House event, economic reports were published showing the loss in coal jobs across West Virginia. One of the hardest hit areas was Nicholas County, home of the Twenty-Eighth Judicial Circuit. . . . Upon review of this information available in the public domain, Rainmaker and Mr. Callaghan decided to illustrate Judge Johnson's visit to the White House.

To the extent some citizens of Nicholas County may have the opinion that **any** association between Judge Johnson and President Obama is completely unacceptable, regardless of the circumstances, Mr. Callaghan sought to create advertising consistent with that opinion….

The flyer was not created or executed to mislead the public or imply that Judge Johnson was

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[7] Again, there is no evidence that Judge Johnson was individually invited by President Obama or anyone else to attend the seminar at the White House or that his attendance was a result of some "honor" bestowed upon him by President Obama or the White House; rather, he attended as the highest ranking judicial member of West Virginia State Court Improvement Program under the terms of federal grants to that program.

personally responsible for the loss of Nicholas County jobs. The intended purpose of the advertisement was to illustrate voluntary actions by a public official that the electorate may find inconsistent with their expectations and desires….

The joining of the two as "partying" is a form of rhetorical hyperbole or parody meant to illustrate the fact that Judge Johnson and President Obama are together at the White House[8] focusing on issues that are inconsistent with alleviating the horrible employment conditions in Nicholas County.[9]

The flyer does not imply that Judge Johnson was at the White House to support any anti-coal legislative program. It does state that Judge Johnson was there to support President Obama's legislative agenda, which was the purpose of the conference ….[10]

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[8] Again, the evidence is undisputed that not only was President Obama not present at the seminar attended by Judge Johnson, but that Judge Johnson has never met President Obama.

[9] At the hearing, neither Respondent nor Mr. Heflin was able to explain how the issues at the June 10, 2015, involving the trafficking of children, are "inconsistent with alleviating the horrible employment conditions in Nicholas County," which is not based upon the trafficking of children.

[10] The Board rejects, as preposterous, the contention that the flyer did not imply that Judge Johnson supported the President's policies alleged to have a negative impact on the coal industry. The flyer begins, "Barack Obama & Gary Johnson Party at the White House … While Nicholas County loses hundreds of jobs." [Exhibit 1] Then, under a caption "LAYOFF NOTICE" printed on what appears to be a "pink slip," it states,

> Judge Johnson just as easily could have boycotted this meeting, based upon his disagreement with President Obama's policies, and he could have publicized such a boycott for political purposes. However, instead, he voluntarily chose to attend the White House event….[11]

"While Nicholas County lost hundreds of jobs to Barack Obama's coal policies, Judge Gary Johnson accepted an invitation from Obama to come to the White House to support Obama's legislative agenda. That some month, news outlets reported a 76% drop in coal mining employment." [Id.] The flyer then concludes, "Can we trust Judge Gary Johnson to defend Nicholas County against job-killer Barack Obama? On May 10, Put Nicholas County First. Vote for Steve Callaghan." [Id.] The import of this flyer is clear: (1) Judge Johnson is a close ally of President Obama; (2) Judge Johnson accepted a personal invitation from President Obama to come to the White House to support Obama's legislative agenda, including policies which had resulted in the loss of hundreds of coal jobs in Nicholas County; and (3) even though Judge Johnson could not be trusted to oppose the policies of President Obama, Respondent could be trusted to oppose those policies.

[11] If Judge Johnson had done as Respondent suggests and publicly boycotted a White House seminar on child trafficking in order to protest the impact that President Obama's policies were having on coal mining employment in Nicholas County, Judge Johnson would likely would have violated R. Jud. Cond. 2.4(B) ("A judge shall not permit. . . political... or other interests or relationships to influence the judge's judicial conduct or judgment"); R. Jud. Cond. 2.10(B)("A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office."); and/or R. Jud. Cond. 4.l(A)(ll)("Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge . .. shall not…. in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent

> Did President Obama and Judge Johnson, in the literal sense, actually "party" together and drink beer? Of course not, but simply because the flyer exercised some creativity, rhetorical hyperbole, and poetic license to get the voter's attention does not mean that Mr. Callaghan somehow ran afoul of Rule 4.1(A)(9) or Rule 8.2(a). Furthermore, the flyer does not include any false attack on Judge Johnson's qualifications or his integrity. The flyer leaves up to the reader to decide what inferences and what significance to give to the facts[12] provided.

[Exhibit 5]

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with the impartial performance of the adjudicative duties of judicial office.").

[12] The problem with this argument is that almost nothing in the "Obama" flyer is fact-based. First, President Obama and Judge Johnson did not party at the White House and, indeed, have never met. Second, President Obama and Judge Johnson did not party at the White House while Nicholas County lost hundreds of jobs because, as the news report relied upon by Respondent notes, the job loses had already occurred **before** the White House seminar and had occurred **over a four-year period**. Third, any legislative agenda of President Obama which was the subject of the White House seminar attended by Judge Johnson had absolutely nothing to do with coal mining employment in Nicholas County. Finally, a state court judge like Judge Johnson would not be in a position to ethically "defend Nicholas County against job-killer Obama." Making provably false statements of fact to voters about one's judicial election opponent or the proper role of judges in our system of government does not leave up to those voters to decide what inferences and what significance to give to facts, it does just the opposite, which is why it is prohibited by the Code of Judicial Conduct.

39. After considering Respondent's positions relative to the Complaint, the Judicial Investigation Commission filed its Formal Statement of Charges with the Supreme Court of Appeals on July 16, 2016. [Exhibit 2]

40. With the exception of R. Jud. Cond. 4.1(b), which has been withdrawn, the charge submitted to the Board for resolution are as follows "JUDGE-ELECT CALLAGHAN violated Rules 4.1(A)(9) and 4.1(B) (Political and Campaign Activities of Judges and Judicial Candidates in General), and Rules 4.2(A)(1), (3), (4) and (5) (Political and Campaign Activities of Judicial Candidates in Public Elections) of the Code of Judicial Conduct and Rules 8.2(a) and (b) (Judicial and Legal Officials) of the Rules of Professional Conduct…."

Conclusions of Law

1. R. Jud. Cond. 4.1 (A)(9) provides, "Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not … knowingly, or with reckless disregard for the truth, make any false or misleading statement." [Footnotes omitted]

2. The term "judicial candidate" is defined in the Code of Judicial Conduct as "any person … who is seeking selection for … judicial office by election or appointment."

3. In this case, the Board concludes that Respondent was a person seeking selection for judicial office.

4. The term "law" is defined in the Code of Judicial Conduct as "court rules as well as statutes, constitutional provisions, and decisional law."

5. The Board concludes that Rule 4.1(A)(9) must be read, interpreted, and applied to Respondent's conduct consistent with the First Amendment to the United States Constitution.

6. The term "knowingly" is defined in the Code of Judicial Conduct as "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."

7. The Board concludes that whether Respondent "knowingly" engaged in any prohibited conduct must be determined consistent with this definition.

8. The Board also concludes that "reckless disregard for the truth" may be inferred from the circumstances.

9. The Board incorporates by reference its separate order resolving Respondent's constitutional challenge to Rule 4.1(A)(9) and concludes that it must be read, interpreted, and applied as prohibiting only statements that were materially false and misleading made with knowledge of their falsehood or in reckless disregard for their truth.

10. R. Jud. Cond. 4.2(A)(1) provides, "A judge or candidate subject to public election shall … act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary."[13]

11. R. Jud. Cond. 4.2(A)(4) provides, "A judge or candidate subject to public election shall. . . take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities,

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[13] Initially, Respondent was also charged with a violation of R. Jud. Cond. 4.2(A)(3), but that charge has been voluntarily dismissed.

other than those described in Rule 4.4, that the candidate is prohibited from doing by Rule 4.1."

12. R. Jud. Cond. 4.2(A)(5) provides, "A judge or candidate subject to public election shall … take corrective action if he or she learns of any misrepresentations made in his or her campaign statements or materials."

13. R. Prof. Cond. 8.2(a) provides, "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."

14. With respect to the Board's jurisdiction over Respondent relative to the Rules of Professional Conduct, R. Jud. Disc. P. 3.12 provides, "The Judicial Hearing Board may recommend or the Supreme Court of Appeals may consider the discipline of a judge for conduct that constitutes a violation of the Rules of Professional Conduct. … The Judicial Hearing Board shall have exclusive jurisdiction to recommend discipline of a judge for conduct that constitutes a violation of the Rules of Professional Conduct for lawyer," and the Board incorporates by reference its separate order denying Respondent's motion to dismiss for lack of subject matter jurisdiction.

15. With respect to Respondent's separate motion to dismiss on federal constitutional grounds, the Board also incorporates by reference its separate order resolving Respondent's constitutional challenge to Rule 8.2(a) and concludes that it must be read,

interpreted, and applied, within the context of this case, involving political speech, as prohibiting only statements that were materially false and misleading made with knowledge of their falsity or with reckless disregard for their truth.

16. The Preamble to the Code of Judicial Conduct guides the Board's application of its rules to the evidence in this case and provides as follows:

> An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.
>
> Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.
>
> The West Virginia Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates. It is not intended as an exhaustive guide for the conduct of judges and judicial candidates, who are governed in their

> judicial and personal conduct by general ethical standards as well as by the Code. The Code is intended, however, to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies.

17. The Commentary to Rule 4.1 of the Code of Judicial Conduct further guides the Board in the application of its provisions to the evidence in this case:

> Even when subject to public election, a judge plays a role different from that of a legislator or executive branch official. **Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case**. Therefore, in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure. **This Canon imposes narrowly tailored restrictions upon the political and campaign activities of all judges and judicial candidates**, taking into account the various methods of selecting judges. …
>
> **Judicial candidates must be scrupulously fair and accurate in all statements made by them and by their campaign committees**. Paragraph (A)(9) obligates candidates and their committees to refrain from making statements that are false or misleading, or that omit facts necessary to make

> the communication considered as a while not materially misleading.

(Emphasis supplied)

18. "The purpose of judicial disciplinary proceedings is the preservation and enhancement of public confidence in the honor, integrity, dignity, and efficiency of the members of the judiciary and the system of justice." Syllabus, *In the Matter of Gorby*, 176 W.Va. 16, 339 S.E.2d 702 (1985).

19. With respect to the standard of proof of a violation of the Code of Judicial Conduct, R. Jud. Disc. P. 4.5 provides, "In order to recommend the imposition of discipline on any judge, the allegations of the formal charge must be proved by clear and convincing evidence."

20. "In a disciplinary proceeding against a judge, in which the burden of proof is by clear and convincing evidence, where the parties enter into stipulations of fact, the facts so stipulated will be considered to have been proven as if the party bearing the burden of proof has produced clear and convincing evidence to prove the facts so stipulated." Syl. pt. 4, *Matter of Starcher*, 202 W. Va. 55, 501 S.E.2d 772 (1998).

21. With respect to the standard of proof of a violation of the Rules of Professional Conduct, R. Law. Disc. P. 3.7 provides, "In order to recommend the imposition of discipline of any lawyer, the allegations of the formal charge must be proved by clear and convincing evidence."

22. With respect to each of the charges against Respondent, the Board concludes as follows:

23. With respect to the charge that Respondent violated R. Jud. Cond. 4.1(A)(9), the Board concludes that there is clear and convincing evidence that Respondent knowingly or with reckless disregard for the truth made materially false and misleading statements as follows:

a. The statement "Barack Obama & Gary Johnson Party at the White House" was materially false and misleading and was made knowingly and/or with reckless disregard for its truth as Respondent had no facts upon which to base this statement nor did Respondent reasonably do anything to verify this statement;

b. The statement "While Nicholas County loses hundreds of jobs" was materially false and misleading and was made knowingly and/or with reckless disregard for its truth as the facts upon which Respondent contends he relied indicate that (i) there was no connection between the subject matter of the White House seminar attended by Judge Johnson and coal employment in Nicholas County and (ii) the coal jobs lost in Nicholas County had already been lost over a four year period prior to the seminar; and

c. The statement, "While Nicholas County lost hundreds of jobs to Barack Obama's coal policies, Judge Gary Johnson accepted an invitation from Obama to come to the White House to support Obama's legislative agenda" was materially false and misleading and was made knowingly and/or with reckless

> disregard for its truth as the facts upon which Respondent contends he relied indicate that (i) the sole subject matter of the White House seminar attended by Judge Johnson was child trafficking; (ii) there was no connection between the subject matter of the White House seminar attended by Judge Johnson and coal employment in Nicholas County and (iii) the coal jobs lost in Nicholas County had already been lost over a four year period prior to the seminar.

24. The Board concludes that none of Respondent's defenses to the charge that he violated R. Jud. Cond. 4.1(A)(9) have merit.

25. First, individually and collectively, the statements in the "Obama" flyer were statements of fact, not expressions of opinion.

26. To evaluate the totality of circumstances to determine whether a statement is an expression of fact or opinion, which is a question of law not a question of fact, the four factors to be considered are " (1) the common usage or meaning of the specific language of the challenged statement itself; (2) the statement's verifiability; (3) the full context of the statement; and (4) the broader context or setting in which the statement appears." *Tipping v. Martin*, 2016 WL 397088 at *4 (N.D. Tex.)(Citation omitted); see also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21, (1990)(whether a statement asserts a fact or opinion turns on whether the statement "is sufficiently factual to be susceptible of being proved true or false.").

27. Importantly, "it is not the literal truth or falsity of each word or detail used in a statement" which determines whether it is a statement of fact; "rather, the determinative question is whether the 'gist or sting' of the statement is true or false, benign or defamatory, in substance." *Ringler Assocs. Inc. v. Md. Cas. Co.*, 80 Cal. App. 4th 1165, 96 Cal. Rptr.2d 136, 150 (2000) (emphasis omitted) (internal quotation omitted).

28. "The crucial difference between statement of fact and opinion depends upon whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact." *Salazar v. City of Albuquerque*, 2014 WL 6065603 at *26 (D. N.M.) (Quotation marks and citation omitted)

29. "If the material as a whole contains full disclosure of the facts upon which the publisher's opinion is based and which permits the reader to reach his own opinion, the court in most instances will be required to hold that it is a statement of opinion, and absolutely privileged." Id. at *27 (Quotation marks and citation omitted)

30. "Conversely, where there are implications in the statement 'that the writer has private, underlying knowledge to substantiate his comments about plaintiff,' and such knowledge implies the existence of defamatory facts, the statement is deemed to be factual and not privileged." Id. (Citation omitted).

31. Here, applying an objective standard, the Board concludes that when an ordinary person read

the "Obama" flyer, he or she would have perceived that it was not an expression of opinion, but a statement of facts that Judge Johnson had been invited to the White House by President Obama because Judge Johnson supported the President's legislative policies including those which had a negative impact on the coal industry and had resulted in the loss of hundreds of coal jobs.

32. This false statements of fact, which were clearly the gist and the sting of the flyer, withheld critical facts, particularly that the only purpose of Judge Johnson's attendance at the White House seminar related to child trafficking, not energy or environmental policy, and as this case demonstrates, was sufficiently factual to be proven false as (a) Judge Johnson did not party with President Obama; (b) Judge Johnson did not party with President Obama at the same time coal jobs were being lost in Nicholas County; and (c) the White House seminar that Judge Johnson attended had nothing to do with President Obama's energy or environmental policies.

33. Second, the "Obama" flyer enjoys no protection as "parody."

34. The purpose of "parody" is to "mimic an original to make its point." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580-581 (1994)(involving parody of Roy Orbison's song, "Oh, Pretty Woman."

35. The photo on the first page of the "Obama" flyer was not taken from another source in order to mimic it to make its point; rather, it was an original work of the artist used by Mr. Heflin to credit it.

36. Thus, as a matter of law, it is not protected as "parody."

37. Finally, the "Obama" flyer enjoys no protection as "rhetorical hyperbole."

38. The First Amendment provides protection for "rhetorical hyperbole" only for statements that "cannot reasonably be interpreted as stating actual facts about an individual." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1987)).

39. For example, characterizing someone's negotiating tactics as "blackmail" is rhetorical hyperbole - an exaggerated statement of opinion not susceptible of being proven or disproven. *Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 U.S. 6 (1970); see also *James v. San Jose Mercury News, Inc.*, 20 Cal. Rptr. 2d 890, 896-98 (Cal.Ct.App. 1993) (article describing lawyer as engaging in "sleazy, illegal, and unethical practice" fell into protected zone of "imaginative expression" or "rhetorical hyperbole").

40. On the other hand, a statement implying that a high school coach perjured himself in a judicial proceeding, which is susceptible of being proven or disproven, is not protected rhetorical hyperbole. *Milkovich*, supra.

41. "Can we trust Judge Gary Johnson to defend Nicholas County against job-killer Barack Obama?" may be rhetorical hyperbole, but affirmatively stating that Judge Johnson partied with President Obama at the White House to support the President's anti-coal agenda is not.

42. With respect to the charge that Respondent violated R. Jud. Cond. 4.2(A)(1), the Board concludes that there is clear and convincing evidence that

Respondent did not act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary as follows:

a. The term "independence" is defined in the Code as "a judge's freedom from influence or controls other than those established by law;"

b. The term "integrity" is defined in the Code as "probity, fairness, honesty, uprightness, and soundness of character;"

c. The term "impartiality" is defined in the Code as "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge;"

d. By falsely and unfairly impugning Judge Johnson's independence, integrity, and impartiality, implying that Judge Johnson would permit his alleged support for President Obama's legislative policies that had caused the loss of hundreds of jobs in Nicholas County, Respondent not only demeaned Judge Johnson, he demeaned himself and further has raised the specter that if, as a judge, he is presented with a case presenting an issue regarding President Obama's policies or those similar to President Obama's, he will "Put Nicholas County First" unlike Judge Johnson, and will rule against those policies, regardless of the law and the evidence;

e. As Judge Johnson powerfully testified at the hearing, what could he do consistent with the

Code of Judicial Ethics once he was falsely charged by Respondent of playing his fiddle while Rome burned?;

f. He could not make public statements that, contrary to what was being represented by Respondent, that he did not support policies which might have a negative impact on coal employment in Nicholas County, because the Code of Judicial Conduct would preclude such statements; and

g. Respondent's conduct has woefully fallen short of one of the objectives of the Code of Judicial Conduct as stated in its Preamble: "Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence."

43. With respect to the charge that Respondent violated R. Jud. Cond. 4.2(A)(4), the Board concludes that there is clear and convincing evidence that Respondent did not take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities, other than those described in Rule 4.4, that the candidate is prohibited from doing by Rule 4.1 as follows:

a. As previously discussed, the telephone questionnaire was false, deceptive, and Respondent did not take reasonable

measures to ensure that Mr. Heflin did not develop and use a questionnaire that was "limited to the gathering, collection, collation and evaluation of information reflecting public opinion, needs and preferences as to any candidate, group of candidates, party, issue or issues" and did was not "deceptively designed or intentionally conducted in a manner calculated to advocate the election or defeat of any candidate or group of candidates or calculated to influence any person or persons so polled to vote for or against any candidate" as provided under West Virginia law;

b. As previously discussed, the "Obama" flyer was materially false and misleading and Respondent did not take reasonable measures to ensure that Mr. Heflin did not develop and use campaign material that either knowingly or with reckless disregard for the truth make materially false and misleading statements of fact about Judge Johnson;

c. Respondent failed, either himself or through Mr. Heflin, to take reasonable measures to make certain that any material statement of fact about Judge Johnson be based in actual fact and not manufactured by making a sow's ear from a silk purse as was done in this matter where Respondent and Mr. Heflin took something positive about Judge Johnson and deliberately and cynically by adding material facts and innuendo that were untrue and by omitting material facts that were

true, particularly the actual subject matter of the White House seminar attended by Judge Johnson, in order to perpetrate the fraudulent representation of facts that Judge Johnson was invited to the White House and partied with President Obama as a result of Judge Johnson's support of the President's energy and environmental policies which had resulted in the loss of hundreds of jobs in Nicholas County; and

d. The evidence is clear and convincing that Respondent and Mr. Heflin fabricated a false reality; tested the false reality with potential voters to see if it might improve Respondent's election chances; and then deployed this false reality in a manner timed to impair Judge Johnson's ability to dispel this false reality.

44. With respect to the charge that Respondent violated R. Jud. Cond. 4.2(A)(5), the Board concludes that there is not clear and convincing evidence that Respondent failed take corrective action if he or she learns of any misrepresentations made in his or her campaign statements or materials as follows:

a. The term "corrective action" is not defined in the Code of Judicial Conduct and there was at least an attempt, however feeble, to rectify what Respondent himself described in his Facebook post and radio ads as possibly "inaccurate and misleading" characterizations of Judge Johnson and

b. Respondent may have relied upon representations by Disciplinary Counsel that she would not institute a formal complaint if

he took corrective action: "You indicated that unless this action is taken it would result in a formal complaint. I have tried in good faith to comply with your directives." [Exhibit 5]

45. With respect to the charge that Respondent violated R. Prof. Cond. 8.2(a), the Board concludes that there is clear and convincing evidence that Respondent made statements that Respondent knew to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of Judge Johnson as follows:

a. The statement "Barack Obama & Gary Johnson Party at the White House" was materially false and misleading and was made knowingly and/or with reckless disregard for its truth as Respondent had no facts upon which to base this statement nor did Respondent reasonably do anything to verify this statement;

b. The statement "While Nicholas County loses hundreds of jobs" was materially false and misleading and was made knowingly and/or with reckless disregard for its truth as the facts upon which Respondent contends he relied indicate that (i) there was no connection between the subject matter of the White House seminar attended by Judge Johnson and coal employment in Nicholas County and (ii) the coal jobs lost in Nicholas County had already been lost over a four year period prior to the seminar;

c. The statement, "While Nicholas County lost hundreds of jobs to Barack Obama's coal

policies, Judge Gary Johnson accepted an invitation from Obama to come to the White House to support Obama's legislative agenda" was materially false and misleading and was made knowingly and/or with reckless disregard for its truth as the facts upon which Respondent contends he relied indicate that (i) the sole subject matter of the White House seminar attended by Judge Johnson was child trafficking; (ii) there was no connection between the subject matter of the White House seminar attended by Judge Johnson and coal employment in Nicholas County and (iii) the coal jobs lost in Nicholas County had already been lost over a four year period prior to the seminar; and

d. By falsely and unfairly impugning Judge Johnson's integrity, implying that Judge Johnson would permit his alleged support for President Obama's legislative policies that had caused the loss of hundreds of jobs in Nicholas County, which not only demeaned and impugned Judge Johnson's integrity, but demeaned himself and further has raised the specter that if, as a judge, he is presented with a case presenting an issue regarding President Obama's policies or those similar to President Obama's, he will "Put Nicholas County First" unlike Judge Johnson, and will rule against those policies, regardless of the law and the evidence.

Recommended Discipline

1. R. Jud. Disc. P. 4.12 provides, "The Judicial Hearing Board may recommend or the Supreme Court of Appeals may impose any one or more of the following sanctions for a violation of the Code of Judicial Conduct: (1) admonishment; (2) reprimand; (3) censure; (4) suspension without pay for up to one year; (5) a fine of up to $5,000; or (6) involuntary retirement for a judge because of advancing years and attendant physical or mental incapacity and who is eligible to receive retirement benefits under the judges' retirement system or public employees retirement system."

2. R. Jud. Disc. P. 4.12 further provides, "In addition, the Judicial Hearing Board may recommend or the Supreme Court of Appeals may impose any one or more of the following sanctions for a judge's violation of the Rules of Professional Conduct: (1) probation; (2) restitution; (3) limitation on the nature or extent of future practice; (4) supervised practice; (5) community service; (6) admonishment; (7) reprimand; (8) suspension; or (9) annulment."

3. "Pursuant to Article VIII, Sections 3 and 8 of the West Virginia Constitution and Rule 4.12 of the Rules of Judicial Disciplinary Procedure, it is clearly within this Court's power and discretion to impose multiple sanctions against any justice, judge or magistrate for separate and distinct violations of the Code of Judicial Conduct and to order that such sanctions be imposed consecutively." Syl. pt. 5, *In re Toler*, 218 W. Va. 653, 625 S.E.2d 731 (2005).

4. "This Court has the inherent power to inquire into the conduct of justices, judges and magistrates,

and to impose any disciplinary measures short of impeachment that it deems necessary to preserve and enhance public confidence in the judiciary." Syl. pt. 8, *In re Watkins*, 233 W. Va. 170, 757 S.E.2d 594 (2013).

5. "Always mindful of the primary consideration of protecting the honor, integrity, dignity, and efficiency of the judiciary and the justice system, this Court, in determining whether to suspend a judicial officer with or without pay, should consider various factors, including, but not limited to, (1) whether the charges of misconduct are directly related to the administration of justice or the public's perception of the administration of justice, (2) whether the circumstances underlying the charges of misconduct are entirely personal in nature or whether they relate to the judicial officer's public persona, (3) whether the charges of misconduct involve violence or a callous disregard for our system of justice, (4) whether the judicial officer has been criminally indicted, and (5) any mitigating or compounding factors which might exist." Syl. pt. 3, *In re Cruickshanks*, 220 W. Va. 513, 648 S.E.2d 19 (2007)

6. R. Law. Disc. P. 3.15 provides, "A Hearing Panel Subcommittee may recommend or the Supreme Court of Appeals may impose any one or more of the following sanctions for a violation of the Rules of Professional Conduct or pursuant to Rule 3.14: (1) probation; (2) restitution; (3) limitation on the nature or extent of future practice; (4) supervised practice; (5) community service; (6) admonishment; (7) reprimand; (8) suspension; or (9) annulment."

7. With respect to the appropriate discipline for violations of R. Prof. Cond. 8(a), the authorities reflect a broad range of punishments generally ranging from suspensions of three months to two years based upon the individual circumstances of each case. [14]

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[14] See *Committee on Legal Ethics v. Faber*, 185 W. Va. 522, 408 S.E.2d 174 (1991) (lawyer suspended from practice of law for three months, in part, for falsely accusing a judge in open court of improperly issuing a capias against one of the lawyer's clients); *Lawyer Disciplinary Board v. Turgeon*, 210 W. Va. 181, 557 S.E.2d 235 (2000) (lawyer suspended for two years, in part, for falsely accusing a judge of manufacturing evidence and cooperating with the prosecution against a client); *Lawyer Disciplinary Board v. Hall*, 234 W. Va. 298, 765 S.E.2d 187 (2014) (lawyer suspended for three months for falsely accusing an Administrative Law Judge of racial bias and unethical behavior); *Moseley v. Virginia State Bar*, 694 S.E.2d 586 (Va, 2010) (lawyer suspended for six months, in part, for making false comments about a judge); *Disciplinary Action Against Graham*, 453 N.W.2d 313 (Minn. 1990) (lawyer suspended for six months for accusing judge, magistrate and attorneys of conspiracy to fix the outcome of a federal case); *In re Mire*, 197 So.3d 656 (La. 2016) (lawyer suspended for one year for saying judge was incompetent, corrupt and wanted to "cover up" actions of the trial court); *Disciplinary Counsel v. Shimko*, 134 Ohio St.3d 544, 2012-Ohio-5694, 983 N.E.2d 425 (2012) (lawyer who repeatedly questioned trial judge's ability to be impartial received one year stayed suspension); *Kentucky Bar Association v. Waller*, 929 S.W.2d 181 (Ky. 1996) (lawyer suspended for six months referring to judge in pleading as "lying incompetent ass-hole"); *In re Ireland*, 276 P.3d 762 (Kan. 2012) (lawyer suspended for two years for accusing a judge of masturbating during a mediation in the lawyer's divorce case); and *Mississippi Bar v. Lumumba*, 912 So.2d 871 (Miss. 2005) (lawyer suspended for six months for saying judge had the temperament of a barbarian).

8. With respect to the appropriate discipline for violations of R. Jud. Cond. 4.1(A)(9), R. Jud. Cond. 4.2(A)(1), and R. Jud. Cond. 4.2(A)(4), the authorities reflect a broad range of punishments from censures to suspensions of three months to removal from office.[15]

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[15] See *In the Matter of Codispoti*, 190 W. Va. 369, 438 S.E.2d 549 (1993)(public censure to magistrate who caused misleading advertisements to be published); *In re Renke*, 933 So.2d 482, 495 (Fl. 2006)("In our decision to remove Judge Renke, we have concluded that the series of blatant, knowing misrepresentations found in Judge Renke's campaign literature and in his statements to the press amount to nothing short of fraud on the electorate in an effort to secure a seat on the bench. … In essence, Judge Renke and his cohorts created a fictitious candidate, funded his candidacy in violation of Florida's election laws, and successfully perpetrated a fraud on the electorate in securing the candidate's election. … Those who seek to assume the mantle of administrators of justice cannot be seen to attain such a position of trust through such unjust means."); *In re McMillan*, 797 So. 2d 560 (Fla. 2001) (successful judicial candidate removed from office, in part, for making unfounded attacks on his incumbent opponent and on the local court system); *In re Chmura*, 626 N.W.2d 876 (Mich. 2001) (successful judicial candidate suspended for thirty days for false or misleading claims in a campaign flyer); *In re Baker*, 218 Kan. 209, 542 P.2d 701 (1975)(judicial candidate censured for misrepresenting opponent's eligibility for retirement benefits); *Matter of Fortinberry*, 474 Mich. 1203, 708 N.E.2d 96 (2006)(judicial candidate censured for publishing a letter accusing opponent of having affair with his law clerk); *In re Kinsey*, 842 So.2d 77 (Fla. 2003)(reprimand, $50,000 fine, and costs awarded against judicial candidate who represented herself as pro-police and anti-criminal, and misrepresented opponent's record); *In re Hein*, 95 Ohio Misc.2d 31, 706 N.E.2d 34 (1999)(reprimand, $2,500 fine, and costs awarded against judicial candidate who criticized his opponent's handling of a specific criminal case and accused opponent of being soft on

9. R. Law. Disc. P. 3.16 provides, "In imposing a sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the Court or Board shall consider the following factors: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors."

10. "Aggravating factors in a lawyer disciplinary proceeding are any considerations or factors that may justify an increase in the degree of discipline to be

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crime); *In re Carr*, 74 Ohio Misc.2d 81, 658 N.E.2d 1158 (1995)($1,000 fine and costs against judicial candidate who incorrectly accused opponent of never having tried a case in housing court); *In re Burick*, 95 Ohio Misc.2d 1, 705 N.E.2d 422 (1999)(reprimand, $7,500 fine, and costs against a judicial candidate who made false and misleading statements regarding a criminal case pending before her opponent, sent out a campaign letter claiming she held the position of judge, and falsely stating she had received certain endorsements); *In re Alley*, 699 So.2d 1369 (Fla. 1997) (public reprimand against judicial candidate misrepresented her qualifications and those of her opponent, injected party politics into a non-partisan election, and misrepresented the circumstances of opponent's defense of criminal defendant while serving as assistant public defender); *In re Kienzle*, 99 Ohio Misc.2d 31, 708 N.E.2d 800 (1999)(reprimand, $1,000 fine, and costs against judicial candidate who falsely accused his opponent of imposing a tax that was found by an appellate court to be an incorrect application of the law); *In re Hildebrandt*, 82 Ohio Mis.2d 1, 675 N.E.2d 889 (1997)(six-month suspended suspension, $15,000 fine, and costs against judicial candidate who falsely accused his opponent of running for judge, dropping out, running for Congress, and losing, and failed to take corrective action when falsehood brought to candidate's attention).

imposed." Syl. pt. 4, *Lawyer Disciplinary Bd. v. Scott*, 213 W. Va. 209, 579 S.E.2d 550 (2003).

11. "Mitigating factors in a lawyer disciplinary proceeding are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." Syl. pt. 2, *Lawyer Disciplinary Bd. v. Scott*, 213 W. Va. 209, 579 S.E.2d 550 (2003).

12. "Mitigating factors which may be considered in determining the appropriate sanction to be imposed against a lawyer for violating the Rules of Professional Conduct include: (1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or to rectify consequences of misconduct; (5) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8) physical or mental disability or impairment; (9) delay in disciplinary proceedings; (10) interim rehabilitation; (11) imposition of other penalties or sanctions; (12) remorse; and (13) remoteness of prior offenses." Syl. pt. 3, *Lawyer Disciplinary Bd. v. Scott*, 213 W. Va. 209, 579 S.E.2d 550 (2003).

13. "In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession." Syl. pt. 3, *Comm. on Legal*

Ethics v. Walker, 178 W. Va. 150, 358 S.E.2d 234 (1987).

14. In determining the appropriate discipline to recommend based upon its determination that Respondent violated R. Jud. Cond. 4.1(A)(9), R. Jud. Cond. 4.2(A)(1), R. Jud. Cond. 4.2(A)(4), and R. Prof. Cond. 8.2(a), the Board considered the following mitigation and aggravating circumstances:

Mitigating Circumstances

1. The evidence establishes that Respondent has not been the previous subject of a disciplinary complaint.

2. Judge Johnson referenced his attendance at the White House seminar on his campaign's Facebook page. [Exhibit 5]

3. Respondent acted quickly to take some measures to address Disciplinary Counsel's complaints about the "Obama" flyer.

4. Although Respondent expressed little contrition at the hearing, he did express regret that the "Obama" flyer had caused others consternation.

5. Respondent generally cooperated with Disciplinary Counsel in her investigation of the Complaint by Mr. Johnson.

Aggravating Circumstances

1. Respondent had a selfish motive, his desire to defeat Judge Johnson, which motivated the conduct which the Board has determined violated both the Code of Judicial Conduct and the Rules of Professional Conduct.

2. The charges under the Code of Judicial Conduct of which Respondent has been deemed

responsible are directly related to the public's perception of the administration of justice, with perhaps some portion of half of the Nicholas County electorate feeling that Respondent "stole the election," and perhaps some portion of those who voted for Respondent feeling that they have been "duped."

3. The charges under the Code of Judicial Conduct of which Respondent has been deemed responsible are not entirely personal, but relate to his standing in the public as a judicial officer who used materially false and misleading advertising in order to get elected, and who has implied that he will rule in cases involving governmental policies that may impact the local coal industry in a manner other than on the law and the evidence.

4. Some of the charges under the Code of Judicial Conduct of which Respondent has been deemed responsible involve knowing and/or reckless conduct, rather than merely negligent conduct.

5. Respondent appears to have approved the creation of a false reality from two disparate facts: (a) Judge Johnson's attendance at a White House child trafficking seminar and (b) President Obama's energy and environmental policies which some perceive to have had a negative impact on the coal industry generally and others may perceive as contributing to the layoffs in coal mines in Nicholas County.

6. Respondent then approved using a telephone questionnaire item that communicated this false reality to potential Nicholas County voters.

7. Respondent then took the results of the telephone questionnaire, indicating that participants

responded unfavorably when asked about this false reality.

8. Respondent then approved a campaign flyer that again repeated this false reality to Nicholas County voters, including the failure to disclose that the White House seminar referenced was on the topic of child trafficking and had nothing to do with energy or environmental policy.

9. Respondent then approved the timing of the release of this campaign flyer in a manner which effectively limited Judge Johnson's ability to undo the damage it might cause.

10. Finally, Respondent's efforts at rectifying what had occurred, using such language as "may be inaccurate and misleading," "any misunderstanding or inaccuracies," and "inappropriate information," without providing a single specific example of how the flyer may have been "inaccurate," "misleading," or "inappropriate," were feeble, at best.

11. In addition to the "Obama" flyer which is the subject of this proceeding, there was evidence of other campaigning advertising by Respondent.

12. First, in one of Respondent's campaign advertisements, it was stated, "Despite being a line item on court fees, the juvenile drug court has never been established." [Exhibit 27]

13. Second, in another of Respondent's campaign advertisements, it was stated, "Steve Callaghan will aggressively target drug abuse in Nicholas County by establishing a Drug Court." [Exhibit 28]

14. Third, in another of Respondent's campaign advertisements, it was stated, "Nicholas County

Courts are charging fees for programs that do not exist. Nicholas County does not have a juvenile drug court or a teen court and yet citizens have been charged a price tag of $5.00 on their court costs. Times are tough in Nicholas County, we cannot afford to pay for programs that we are not receiving." [Exhibit 30]

15. Finally, in another of Respondent's campaign advertisements, it was stated, "There's a HIDDEN PRICE to Justice in Nicholas County. Juvenile Drug Court $5. Nicholas County Courts are charging fees for programs that do not exist." [Exhibit 31]

16. Collectively, these campaign advertisements falsely implied that (a) no Drug Court had been established by Judge Johnson in Nicholas County; (b) a $5.00 fee was being charged for a program that did not exist; and (c) there was no teen court in Nicholas County, all of which the evidence clearly establishes were false.

17. The evidence is clear that a Drug Court had been established by Judge Johnson. See also Adult Drug Court Resources, http://www.courtswv.gov/lower-courts/adult-drug-courts/resources.html.

18. Thus, Respondent could not "establish" a Drug Court that already existed.

19. The evidence is clear that a Teen Court had been established in Nicholas County and that the $5.00 fee was initiated not by Judge Johnson, as Respondent's campaign advertisements implied, but

by county or municipal authorities.[16] Also, the evidence is clear that the non-judicial agency responsible for administering the Nicholas County Teen Court had not activated the program at the time of the election only because it was awaiting sufficient proceeds from the $5.00 fee to adequately staff the program.

20. Finally, the implication that the $5.00 fee being collecting was related to a non¬ existent Juvenile Drug Court was false and it appeared from his testimony that Respondent did not fully understand the difference between a Teen Court and a Juvenile Drug Court. Compare W. Va. Code § 49-5-13d with Juvenile Drug Court,

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[16] See W. Va. Code § 49-5-13d(d)("Each county or municipality that operates, or wishes to operate, a teen court program as provided in this section is hereby authorized to adopt a mandatory fee of up to five dollars to be assessed as provided in this subsection. Municipal courts may assess a fee pursuant to the provisions of this section upon authorization by the city council of the municipality. Assessments collected by the clerk of the court pursuant to this subsection shall be deposited into an account specifically for the operation and administration of a teen court program. The clerk of the court of conviction shall collect the fees established in this subsection and shall remit the fees to the teen court program. Any mandatory fee established by a county commission or city council in accordance with the provisions of this subsection shall be paid by the defendant on a judgment of guilty or a plea of nolo contendere for each violation committed in the county or municipality of any felony, misdemeanor or any local ordinance, including traffic violations and moving violations but excluding municipal parking ordinances. Municipalities operating teen courts are authorized to use fees assessed in municipal court pursuant to this subsection for operation of a teen court in their municipality."

http://www.courtswv.gov/lower-courts/juvenile-drug/juvenile-drug-court.html.

21. Again, the Code of Judicial Conduct clearly provides, "a judicial candidate shall not . . . knowingly, or with reckless disregard for the truth, make any false or misleading statement," R. Jud. Cond. 4.1(A)(9), and the evidence indicates that even though perhaps not "knowingly" or "with reckless disregard for the truth," Respondent was negligent in campaign statements that were materially false and misleading.

WHEREFORE, the Judicial Hearing Board recommends the following with respect to the charges in this matter:

1. With respect to Respondent's violation of Rule 4.1(A)(9) of the Code of Judicial Conduct, the Board recommends that Respondent be:

a. Censured;

b. Suspended for a period of one-year without pay to run concurrently with the suspensions from service as a judicial officer for violations of Rules 4.2(A)(1) and 4.2(A)(4) of the Code of Judicial Conduct;

c. Fined the sum of $5,000; and

d. Ordered to pay the costs of the proceeding.

2. With respect to Respondent's violation of 4.2(A)(1) of the Code of Judicial Conduct, the Board recommends that Respondent be:

a. Censured;

b. Suspended for a period of one-year without pay to run concurrently with the suspensions from service as a judicial office for violations

of Rules 4.1(A)(9) and 4.2(A)(4) of the Code of Judicial Conduct;

c. Fined the sum of $5,000; and

d. Ordered to pay the costs of the proceeding.

3. With respect to Respondent's violation of 4.2(A)(4) of the Code of Judicial Conduct, the Board recommends that Respondent be:

a. Censured;

b. Suspended for a period of one-year without pay to run concurrently with the suspensions from service as a judicial officer for violations of Rules 4.1(A)(9) and 4.2(A)(1) of the Code of Judicial Conduct;

c. Fined the sum of $5,000; and

d. Ordered to pay the costs of the proceeding.

4. With respect to Respondent's violation of 8.2(a) of the Rules of Professional Conduct, the Board recommends that Respondent be:

a. Reprimanded;

b. Suspended from the practice of law for one-year to run concurrently with the suspensions from service as a judicial officer without pay for violations of Rules 4.1(A)(9), 4.2(A)(1) and 4.2(A)(4) of the Code of Judicial Conduct, such that for a period of one-year Respondent not serve or be paid as the Circuit Judge of Nicholas County or be permitted to engage in the practice of law for that same one-year period; and

c. Ordered to pay the costs of the proceeding.

5. In summary, the Board recommends that Respondent be censured as a judicial candidate and reprimanded as a lawyer; that Respondent be suspended from serving as a judge and practicing as a lawyer for a concurrent period of one-year; that Respondent be fined a total of $15,000; and that Respondent be ordered to pay the costs of the proceedings for three (3) violations of the Code of Judicial Conduct and one (1) violation of the Rules of Professional Conduct which have been determined by the Board to have been established by clear and convincing evidence.

The foregoing Order having been considered and unanimously approved by the Judicial Hearing Board, it is hereby entered on the 29th day of November, 2016, by its Chairman as follows:

/s/ Lawrance S. Miller, Jr.
Hon. Lawrance S. Miller, Jr.,
Judge Chairperson,
Judicial Hearing Board

APPENDIX F

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN THE MATTER OF: THE HONORABLE STEPHEN O. CALLAGHAN JUDGE-ELECT OF THE 28TH JUDICIAL CIRCUIT	**SUPREME COURT No._____ JIC COMPLAINT No. 84-2016**

FORMAL STATEMENT OF CHARGES

The West Virginia Judicial Investigation Commission, pursuant to Rules 2.7(a) and (d) and 2.8 of the Rules of Judicial Disciplinary Procedure, has determined that probable cause does exist to formally charge Stephen O. Callaghan, Judge-Elect of the 28th Judicial Circuit ("Respondent") with violations of the Code of Judicial Conduct and that formal discipline is appropriate based upon the following probable cause findings:

1. Respondent received his Juris Doctorate from Western Michigan University Cooley Law School in 1994. He passed the July 1994 West Virginia Bar examination. Respondent became licensed to practice law in the State of West Virginia on or about October 3, 1994. At all times relevant to the proceedings set forth below, Respondent was actively

practicing law in and around Nicholas County, West Virginia. As such, Respondent is subject to the West Virginia Rules of Professional Conduct.

2. Application I(B) of the Code of Judicial Conduct states in pertinent part that "[a]ll judicial candidates for judicial office shall comply with the applicable provisions of this Code."

3. The Code of Judicial Conduct defines "judicial candidate" as:

> [A]ny person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes or, where permitted engages in solicitation or acceptance of contributions or support or is nominated for election or appointment to office.

4. Respondent filed pre-candidacy papers to run for Judge of the 28th Judicial Circuit in the May 2016 election with the West Virginia Secretary of State on or about May 14, 2015. Respondent became a judicial candidate upon filing his pre-candidacy papers. Respondent filed his certificate of candidacy with the Secretary of State's Office on or about January 14, 2016.

5. As a judicial candidate, Respondent was subject to Canon 4 of the Code of Judicial Conduct. *See generally* Rule 4.1, 4.2 and Rule 4.4. *See also* Comment 2, Rule 4.1 ("When a person becomes a

judicial candidate, this Canon becomes applicable to his or her conduct.").

6. On November 24 and December 30, 2015, Counsel for the Judicial Investigation Commission sent letters to all non-incumbent pre-candidates for Circuit and Family Court Judge, including Respondent. The letters notified the non-incumbent pre-candidates that they were bound by Canon 4 of the new Code of Judicial Conduct and advised them where they could find a copy online. The letter was mailed to Respondent at 820 Broad Street, Summersville, WV 26651.

7. On May 10, 2016, Respondent won election to the seat. Based upon information and belief, he will take office on or about January 1, 2017.

8. Respondent's sole opponent in the election was the Honorable Gary L. Johnson, incumbent Judge of the 28th Judicial Circuit. Judge Johnson first took office on January 1, 1993, and has served continually since that time. On May 10, 2016, Judge Johnson lost his re-election bid to Respondent. Based upon information and belief, Judge Johnson will vacate office on or about December 31, 2016.

9. Respondent received a total of 3,472 votes while Judge Johnson received 3,245 votes. Respondent garnered 51.69% of the vote while Judge Johnson received 48.31 % of the vote.

10. At all times relevant to the allegations set forth below, Respondent had an active personal Facebook page. At all times relevant to the allegations set forth below, Respondent's campaign committee also had an active campaign Facebook page styled "Steve Callaghan for Judge 2016."

11. By virtue of being a candidate for election to judicial office, Respondent subjected himself to Canon 4 of the Code of Judicial Conduct. Because he is a lawyer who was a candidate for judicial office he was also required to comply with Rule 8.2 of the Rules of Professional Conduct.

12. On May 26, 2016, Nicholas Johnson filed a judicial ethics complaint against Respondent. The complaint was given No. 84-2016.

After investigating and evaluating the Complaint, the Judicial Investigation Commission finds that there is probable cause to make the following **CHARGES** and **FINDINGS**:

CHARGE I

JUDGE-ELECT CALLAGHAN violated Rules 4.1(A)(9) and 4.1(B) (Political and Campaign Activities of Judges and Judicial Candidates in General), and Rules 4.2(A)(1), (3), (4) and (5) (Political and Campaign Activities of Judicial Candidates in Public Elections) of the Code of Judicial Conduct and Rules 8.2(a) and (b) (Judicial and Legal Officials) of the Rules of Professional Conduct as set forth in the attached Appendix when he committed the following acts:

13. On or about May 5, 2016, Respondent, while campaigning for judicial office, mailed or caused to be mailed a two-page political flyer to voters in Nicholas County. The front side of the flyer contained a wrongfully created photograph that was intended to deceive voters into believing that Judge Johnson and U.S. President Barack Obama were drinking beer and partying at the White House while conniving

with one another to kill coal mining jobs in Nicholas County. The front of the flyer depicts the Judge standing amidst party streamers with the President, who is holding a beer, and the caption: "Barack Obama and Gary Johnson Party at the White House. . . " The caption continues at the top of page two by stating ". . . While Nicholas County loses hundreds of jobs." Page two of the flyer also contains Respondent's picture superimposed over a picture of a hand holding mined coal. To the left is a pink slip which states "Layoff Notice" and below that:

> While Nicholas County lost hundreds of jobs to Barack Obama's coal policies, Judge Gary Johnson accepted an invitation from Obama to come to the White House to support Obama's legislative agenda. That same month, news outlets, reported a 76% drop in coal mining employment. **Can we trust Judge Gary Johnson to defend Nicholas County against job-killer Barack Obama?**

At the bottom of the page, the caption reads: "On May 10, Put Nicholas County First. Vote Steve Callaghan."

14. On or about May 5, 2016, Respondent also posted or caused to be posted the complete flyer on his personal and campaign Facebook pages.

15. Respondent admits that the foundation for the contents of the flyer is based on Judge Johnson's June 2015 visit to Washington D.C. to attend a child trafficking seminar. Respondent utilized Rainmaker Inc. to conduct research on Judge Johnson. Rainmaker found a July 2015 news story and a Supreme Court press release detailing Judge

Johnson's attendance at the child trafficking seminar. Both the news article and the press release make clear that the child trafficking seminar was sponsored by the federal Administration for Children and Families and that the event "educated leaders on the increased dangers vulnerable children in state care face of being trafficked. . . ." The press release and the news article made absolutely no mention of a party, alcohol or President Obama attending the event.

16. Judge Johnson has never met President Obama. Judge Johnson has never been invited to the White House by President Obama. As part of his judicial duties, Judge Johnson serves as Chair of the State Court Improvement Program ("WVCIP"). As Chair, Judge Johnson, along with four other WVCIP members, attended the annual weeklong National CIP Conference in Washington D.C. The conference was held during the week of June 8, 2015. At least three members of WVCIP were required to attend the National Conference in order to maintain federal grant status. Concomitantly, the Federal Administration for Children and Families held a two-day seminar on child trafficking beginning on June 10, 2015. The first day of the child trafficking seminar was at the White House Complex—in a building adjacent to the actual White House. Only three CIP members from each state could attend the White House portion of the child trafficking seminar. The determination of who could attend was left up to each State CIP. The WVCIP decided that Judge Johnson, Lieutenant D.B. Swiger of the West Virginia State Police and Sue Hage, Deputy Commissioner of the West Virginia Bureau of

Children and Families would attend the seminar. At the conclusion of the seminar, an open house was held at the National Human Trafficking Resource Center, located a few blocks from the White House. The open house consisted of light hors d'oeuvres and refreshments and tours of the facility. No alcohol was served at the open house. Judge Johnson did not attend the open house. President Obama never attended the child trafficking seminar or the open house. Based upon information and belief, President Obama was not in Washington, D.C. on June 10, 2015.

17. Judge Johnson did not have any involvement in any loss of coal mining jobs in Nicholas County. As a judicial officer, Judge Johnson did not have any involvement in policymaking decisions by President Obama concerning coal. As a judicial officer, Judge Johnson must remain neutral and detached and would not be able to comment or take a position on such issues.

Mitigation

18. After being notified by Disciplinary Counsel of potential violations of the Code of Judicial Conduct on or about May 5, 2016, and without admitting the same, Respondent removed or caused to be removed the flyers from his personal and campaign Facebook pages.[1] Respondent also placed the following post on the pages:

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[1] During the evening hours of May 5, 2016, Disciplinary Counsel contacted Respondent by telephone and informed him of her belief that the flyer violated Rule 4.1(A)(9) and parts of Rule 4.2 of the Code of Judicial Conduct. Disciplinary Counsel told Respondent that if he took down the Facebook posts and

> My campaign committee recently produced a mail advertisement depicting a visit to the White House by Judge Gary Johnson. The specific characterization contained in the mail piece may be inaccurate and misleading. The mailer should not have been sent containing inappropriate information. I apologize personally for any misunderstanding or inaccuracies.

19. Respondent also ran ads on the local radio station on eight separate occasions between May 7 and May 9, 2016 which stated the following:

> If you received a mail advertisement recently from Steve Callaghan, Candidate for Nicholas County Circuit Judge, showing Judge Gary Johnson visiting the White House, please understand that the specific characterization of the White House visit may be inaccurate and misleading and should not have been sent containing this inappropriate information. Candidate Callaghan apologizes for any misunderstanding or inaccuracies. This message

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ran radio ads to counter the negative effect of the flyer on voters, she personally would not file a complaint against him. However, Disciplinary Counsel also informed Respondent that if a member of the public subsequently filed a complaint it would be investigated and the Commission would be free to take whatever action it deemed appropriate but that evidence of his cooperation could be used as mitigation in any proceeding before the Judicial Hearing Board and the Court. Without admitting any wrongdoing, Respondent opted to remove the Facebook posts and run the radio ads.

paid for by Callaghan for Judge 2016, Wayne Young, Treasurer.

The ads aired between 10:00 a.m. and 3:00 p.m. or between 6:00 a.m. and 7:00 p.m.

* * *

Judge-Elect Callaghan is advised that he has the right to file responsive pleadings to the charges made against him not more than 30 days after service of the formal charges upon him by the Clerk of the Supreme Court of Appeals of West Virginia. Any such pleadings shall be filed with the Clerk of the Supreme Court of Appeals and the Office of Disciplinary Counsel. For good cause shown, the Office of Disciplinary Counsel may extend the time for filing such pleadings. *See* Rule 2.10 of the Rules of Judicial Disciplinary Procedure.

STATEMENT OF CHARGES issued this 11 day of July, 2016.

s/ Ronald E. Wilson
The Honorable Ronald E. Wilson,
Chairperson Judicial
Investigation Commission

APPENDIX

WEST VIRGINIA CODE OF JUDICIAL CONDUCT

Rule 4.1 Political and Campaign Activities of Judges and Judicial Candidates in General

(A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not: . . .

(9) knowingly, or with reckless disregard for the truth, make any false or misleading statement; . . .

(B) A judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under paragraph (A).

Rule 4.2 Political and Campaign Activities of Judicial Candidates in Public Elections

(A) A judge or candidate subject to public election shall:

(1) act at all times in a manner consistent with the independence, integrity and impartiality of the judiciary; . . .

(3) review and approve the content of all campaign statements and materials produced by the candidate or his or her campaign committee, as authorized by Rule 4.4, before their dissemination;

(4) take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities, other than those

described in Rule 4.4, that the candidate is prohibited from doing by Rule 4.1; and

(5) take corrective action if he or she learns of any misrepresentations made in his or her campaign statements or materials.

WEST VIRGINIA RULES OF PROFESSIONAL CONDUCT

Rule 8.2 Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN THE MATTER OF: THE HONORABLE STEPHEN O. CALLAGHAN JUDGE-ELECT OF THE 28TH JUDICIAL CIRCUIT	**SUPREME COURT NO._____ JIC COMPLAINT NO. 84-2016**

NOTICE OF FILING OF FORMAL STATEMENT OF CHARGES

Comes now Judicial Disciplinary Counsel pursuant to Rule 2.8 of the Rules of Judicial Disciplinary Procedure and on behalf of the Judicial Investigation Commission provides notice to the Honorable Stephen O. Callaghan, Judge-Elect of the 28th Judicial Circuit, by and through his Counsel, Lonnie C. Simmons, Esquire, by email, facsimile transmission and United States Mail that on the 18th day of July 2016, he duly filed the attached Formal Statement of Charges in the above-captioned matter with the Clerk of the Supreme Court of Appeals of West Virginia by hand delivering the original and ten copies to the Clerk's Office located at the Capitol Complex, Building One, Room E-317, 1900 Kanawha Boulevard East, Charleston, West Virginia 25305. Please be advised that Ms. Tarr also spoke with Mr. Simmons on Wednesday, July 13, 2016, via telephone at (304) 342-0133 and verbally advised him of the contents of the Statement of Charges and that the document would be filed with the Court no later than, Monday, July 18, 2016.

Respectfully submitted,

s/ Brian J. Lanham, Esquire
Teresa A. Tarr, Esquire
Brian J. Lanham, Esquire
Judicial Disciplinary Counsel
WV Bar I.D. Nos. 5631 & 7736
Judicial Investigation Commission
City Center East, Suite 1200A
4700 MacCorkle Avenue SE
Charleston, WV 25304
(304) 558-0169

APPENDIX G

JUDICIAL INVESTIGATION COMMISSION
SUPREME COURT CASE NO. 16-0671
JIC COMPLAINT NO. 84-2016

JUDICIAL INVESTIGATION COMMISSION,

Complainant,

v.

STEVEN O. CALLAGHAN,
JUDGE-ELECT
28th JUDICIAL CIRCUIT

Respondent.

HEARING

Transcript of the hearing had on the 21st day of November 2016, before the Honorable Lawrance S. Miller, Jr., Judge.

* * *

Q. Okay. 9A—Question 9A, was does that relate to?

A. "Drug abuse and drug-related crimes have reached a crisis point in Nicholas County.· Other West Virginia counties have taken action to combat rising drug activity by establishing drug courts to help reduce drug-related crime and help offenders get

off drugs. Despite being available for over six years, Gary Johnson has only recently begun to establish drug court." It's about drug courts.

Q. Where did the information for that question come from?

A. Brad and I talked about drug courts.

Q. Okay. Did the information come from you for that question?

A. Some of it probably. I don't know if he got other independent research about drug courts. I think he did because he Googled drug courts in West Virginia to see what other counties have done and have not done. He got the number of graduates from certain drug courts. And so he did research, and I knew about the Nicholas County drug courts also.

Q. And Question 9C, that has to do with the teen court, correct?

A. Correct.

Q. And where did that information come from?

A. I got that information.

Q. And where did you get that information from?

A. From Nicholas County Magistrate Court.

* * *

Q. Okay. Now, SP7 there were a total of 485 people that answered the questions, correct?

A. Yes.

Q. And the—so the answer to that question was Judge Johnson, if they—if the election for circuit judge would've been held that day, Judge Johnson

would've had 44.74 percent of the votes, while you would've only had 39.18 percent of the vote, correct?

A. Correct.

Q. Now, Question 7A on page 3 would be the same as SP No. 8, correct, on page 28?

A. Yes.

Q. Okay. And that was that positive question about children and truancy, correct?

A. Correct.

Q. And on that, that appealed to—that greatly appealed to or appealed to over 64 percent of the public, correct?

A. Yes.

* * *

Q. Now, Question 9B on page 4, which is the question about Barack Obama's policies and losing coal jobs to Obama's policies, that would be the same as SP No. 12 on page 29, correct?

A. Yes.

Q. And based on that question alone, 65 percent had concerns about that, correct? Either major concerns or some concerns, correct?

A. You on SP12?

Q. On SP12, yes. It would be about 65, 66 percent had either major or some concerns with Judge Johnson as a result of that, correct? That question, correct?

A. Which line on SP12 are you looking at?

Q. 1 is major concerns, and 2 is some concerns. You have to go back and look at 9B—the formulated

question where it says major concerns, some concerns, no real concerns or don't know. And then 1 is major concerns; 2 is some concerns. So that would be 66 percent had some concern with Judge Johnson following that—about that question.

A. I'm looking at SP12 on page 29, line 1, and it says 174 and 49.15.

Q. Okay. And No. 2 is some concern.

A. 59 and 16.67.

Q. So that would be about 65, 66 percent, correct? Either had some major or some concern—

A. Okay. I see what you're saying.

Q. You see what I'm saying now?

A. Yeah. Those numbers do make up about 65 percent.

Q. Okay. Now, Question 9A on the drug abuse question is the same as SP11, correct?

A. Yes.

Q. And based on that question, almost 70 percent had some concern about drug abuse—that drug abuse issue that you raised?

A. Yes.

Q. And then on teen court, which is 9C on page 4, is the equivalent to SP13 on page 29, correct?

A. Yes.

Q. And of that, about 72 percent had some major concern or some concern, correct?

A. Yes.

* * *

Q. And after raising those negative questions about Judge Johnson, the vote—the who you would vote for tightens up, correct, to just about 2 percent difference between you and Judge Johnson?

A. The numbers narrow, yes.

* * *