STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

DETERMINATION

CAROL A. RUMENAPP,

a Justice of the Milford Town Court,
Otsego County.

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THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Honorable Rolando T. Acosta
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Honorable Thomas A. Klonick
Honorable Leslie G. Leach
Richard A. Stoloff, Esq.
Honorable David A. Weinstein
Akosua Garcia Yeboah[1]

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci and Thea Hoeth, Of Counsel) for the Commission

Rothermel & Wilson, PLLC (by Richard A. Rothermel, Esq.) for the Respondent

The respondent, Carol A. Rumenapp, a Justice of the Milford Town Court,

[1] Ms. Yeboah was appointed to the Commission on November 29, 2016. The vote in this matter was taken on October 20, 2016.

Otsego County, was served with a Formal Written Complaint dated August 9, 2016, containing one charge. The Formal Written Complaint alleged that respondent (i) engaged in prohibited political activity by circulating a designating petition for another candidate for elective office and (ii) improperly attested to the signatures on two other designating petitions. Respondent filed a Verified Answer dated August 18, 2016, in which she admitted all of the allegations in the Formal Written Complaint.

On September 28, 2016, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On October 20, 2016, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Milford Town Court, Otsego County, since January 1, 2004. Her current term expires on December 31, 2019. Respondent is not an attorney, a notary public or a commissioner of deeds.

2. As set forth below, in July 2015 respondent lent the prestige of judicial office to advance her private interests as a candidate for judicial office and the private interests of two other candidates for elective office, engaged in prohibited partisan political activity and failed to respect and comply with the law in that:

A. Respondent carried and/or circulated a Republican Party designating

petition for Robert E. Moore, Sr., a candidate for election as Milford Town Supervisor, and requested and/or collected up to 20 signatures in support of Mr. Moore's candidacy;

B. Respondent attested as "Town Justice" to the signatures on a Conservative Party designating petition for her own town justice candidacy and for that of Timothy Knapp as candidate for town tax collector, notwithstanding that the law and the petition itself require attestation by a "Notary Public or Commissioner of Deeds," and respondent is neither; and

C. Respondent attested as "Town Justice" to the signatures on an Independence Party designating petition for her own town justice candidacy and for that of Timothy Knapp as candidate for town tax collector, notwithstanding that the law and the petition itself require attestation by a "Notary Public or Commissioner of Deeds," and respondent is neither.

3. Respondent and Robert E. Moore have known each other for many years. In the 1980's, Mr. Moore was a town justice and asked respondent to be his court clerk. She served in that capacity for approximately ten years. Respondent and Mr. Moore were also co-judges in the Milford Town Court for approximately nine years before he retired as a judge in 2013.

4. In July 2015 Mr. Moore was seeking election to the position of Milford Town Supervisor. In 2015 respondent was a candidate for re-election as Milford Town Justice, whose judicial salary is set by the town supervisor and members of the town board.

5. On July 3, 2015, at the request of Mr. Moore, respondent carried Mr.

Moore's designating petitions to the homes of numerous Town of Milford residents who were listed as registered members of the Republican Party, and obtained the signatures of 20 individuals on the designating petitions. Respondent was accompanied to these homes by Timothy Knapp, who was then a candidate for re-election as the Milford Town Tax Collector.

6. On July 3, 2015, respondent signed the "Statement of Witness" portions of Mr. Moore's designating petitions, indicating that she witnessed all of the signatures on the petitions. Mr. Knapp had also witnessed the signatures being placed on the petitions, but he did not sign the petitions as a witness. Respondent gave the designating petitions to Mr. Moore, who filed or caused them to be filed with the Otsego County Board of Elections.

7. On July 6, 2015, respondent attested to the signatures on a Conservative Party designating petition for herself as candidate for town justice and for Timothy Knapp as candidate for Milford Town Tax Collector, in the portion of the form designated "Notary Public or Commissioner of Deeds," notwithstanding that respondent is neither a notary public nor a commissioner of deeds. Instead, respondent wrote her title as "Town Justice, Town of Milford" and that her "Commission expires 12/31/15," when in fact it was her term as town justice that was due to expire on that date.

8. On July 6, 2015, respondent attested to the signatures on an Independence Party designating petition for her own town justice candidacy and for that of Timothy Knapp as candidate for Milford Town Tax Collector, in the portion of the form designated "Notary Public or Commissioner of Deeds," notwithstanding that

respondent is neither a notary public nor a commissioner of deeds. Instead, respondent wrote her title as "Town Justice, Town of Milford" and that her "Comm. expires 12/31/15," when in fact it was her term as town justice that was due to expire on that date.

Additional Factors

9. Respondent has been cooperative throughout the Commission's inquiry.

10. Respondent acknowledges that, having previously run for election and re-election to judicial office, she knew or should have known that her political activity on behalf of other candidates in 2015 was prohibited under the Rules. She assures the Commission that she will not repeat this conduct.

11. Respondent also acknowledges that, although she believed her judicial status authorized her to witness certain documents in her judicial capacity, any such authority did not apply to the facts herein, in that she knew she was not acting in her judicial capacity when she signed the Conservative and Independence party petitions. Moreover, respondent is not a notary or a commissioner of deeds and was not legally authorized to sign the candidates' designating petitions as such. She assures the Commission that she will not repeat this conduct.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C), 100.5(A)(1)(c), 100.5(A)(1)(d) and 100.5(A)(1)(e) of the Rules Governing Judicial Conduct ("Rules")

and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Judges and judicial candidates are strictly prohibited from engaging in political activity except for certain, limited activity in connection with a candidate's own campaign for judicial office during a prescribed "window period" (Rules, §§100.5[A][1], 100.0[Q]). Even during a candidate's "window period" of permitted political activity, he or she may not, under the ethical standards, engage in partisan political activity, participate in another candidate's campaign for office or publicly endorse another candidate for public office (Rules, §100.5[A][1][c], [d], [e]). Respondent has acknowledged that by carrying a designating petition on behalf of a candidate for town supervisor while she was a candidate for re-election as town justice, she engaged in conduct that was inconsistent with these ethical mandates.

Although there is no specific provision in the Rules addressing nominating or designating petitions, the Advisory Committee on Judicial Ethics has stated that circulating a petition for another candidate "is tantamount to an endorsement of that person" and is, therefore, prohibited, unless the judge's name also appears on the petition as a candidate (Adv Ops 09-148, 98-99, 97-75, 91-96). Collecting signatures on a designating petition for another candidate clearly constitutes partisan political activity and "participating in" the campaign of the candidate, conduct that is explicitly barred by

the ethical rules (Rules, §100.5[A][1][c], [d]). Such conduct may warrant public discipline, especially where the judge also engaged in other improper activity (*see Matter of King*, 2008 NYSCJC Annual Report 145 [disciplining a judge who circulated a nominating petition for another candidate and engaged in additional prohibited political activity]). Moreover, a judge's political activity in support of a candidate for town supervisor, a public official who, along with the members of the town board, determines the judge's salary, necessarily creates an appearance of impropriety.

Respondent has also acknowledged that three days later, she failed to comply with the law by improperly attesting to signatures on two other designating petitions, which listed both herself and a candidate for another office. By law, signatures on a designating petition must be either witnessed by "a witness who is a duly qualified voter of the state and an enrolled voter of the same political party," or authenticated by a notary or commissioner of deeds, who must administer an oath to the signatories (Election Law §6-132[2] and [3]). Witnessing a petition under the first option requires a sworn statement that the subscribing witness is an enrolled voter in the same party for which signatures are being sought. Because of that requirement, respondent, who had affirmed that she was an enrolled member of the Republican Party in witnessing the petition for a town supervisor candidate, could not similarly witness the signatures on petitions of other political parties. Instead, she signed the joint petitions on the portion of the form requiring attestation by a "Notary Public or Commissioner of Deeds," notwithstanding that she holds neither qualification. Above a line stating "Signature and Official Title of Officer Administering Oath," she signed as "Carol A. Rumenapp, Town

Justice, Town of Milford," and wrote beneath that: "My Commission expires 12/31/15," which was the expiration date of her term as town justice. The statement she signed attested that the signatories had signed in her presence and were "duly sworn" by her.

A town or village justice is not a notary public simply by virtue of holding judicial office, although such judges have limited powers to administer an oath, make an acknowledgment and take a deposition (*see* Real Property Law §298; CPLR 2309[a], 3113[a][1]). Thus, respondent's attestation on the petitions as "Town Justice" did not comply with the statutory requirements. *See Russell v. Board of Elections*, 45 NY2d 800, 802 (1978) (holding that a town justice's authentication of a nominating petition was invalid because of the "unambiguous" language of the Election Law provision limiting officials who can sign such statements). On the facts presented, we cannot conclude that respondent, who is not a lawyer, acted with an intent to mislead or engage in fraud; rather, the stipulated facts suggest that she acted in the mistaken belief that she had authority to authenticate the signatures in this fashion since her judicial status authorized her to administer oaths and witness certain documents in her judicial capacity. We note that if respondent were a notary, she could properly have authenticated the signatures on a petition of any political party during her applicable window period as a candidate (*see* Adv Ops 15-145, 03-42, 98-99).

Respondent has stipulated that she will not repeat this conduct and has acknowledged that, as a judge for eleven years at the time of these events, she knew or should have known that her political activity on behalf of other candidates was prohibited under the Rules. In admonishing respondent, we remind every judge and judicial

candidate of the obligation to know and abide by the ethical rules as interpreted and applied by the Commission and the Advisory Committee.

We are constrained to reply to our colleague Mr. Emery's opinion that the ethical rules barring such activity impermissibly tread on First Amendment rights. This state's highest court has held that New York's restrictions on political activity by judges and judicial candidates – including the specific rules cited in the instant case – are constitutionally permissible because they are "narrowly tailored to further a number of compelling state interests, including preserving the impartiality and independence of our state judiciary and maintaining public confidence in New York State's court system" (*Matter of Raab*, 100 NY2d 305, 312 [2003]). In our view, nothing in the recent Supreme Court decision cited by the dissent, *Williams-Yulee v. Fla. Bar*, 135 S Ct 1656, 191 L Ed2d 570 (2015), permits a judge to circulate a designating petition for another candidate, as respondent did here, or otherwise weakens or diminishes the Court of Appeals' holding in *Raab*. Indeed, in upholding a Florida rule prohibiting judicial candidates from personally soliciting campaign contributions, the Supreme Court in *Williams-Yulee* applied an analysis similar to that in *Raab* while affirming that political speech by judicial candidates can be regulated by narrowly tailored restrictions that serve a compelling state interest.

While our dissenting colleague treats the *Raab* decision as though the Court of Appeals intended to limit application of the challenged restrictions to the particular political activities in *Raab*, we find nothing in the Court's rationale in *Raab* to support such a conclusion or to suggest that circulating a petition for another candidate would be

permitted under the applicable rules. Though the judge's conduct in *Raab* was different, the rationale for these restrictions is the same: to further the state's interests in preserving the impartiality and independence of our state judiciary and maintaining public confidence in the state's court system. These mandatory limitations on political activity not only serve to promote the public's confidence that judges are free of even the appearance of bias, favoritism or corruption that might arise from political entanglements, but to protect judges themselves from pressures by party leaders or others to engage in partisan activity on behalf of a political organization or candidate.

The Commission is not a court, and it is our role to interpret and apply the ethical rules, not to make broad constitutional pronouncements. To the extent that any aspect of the rules is constitutionally challenged, we believe that the courts are in the best position to make such a determination.

Guided by *Raab* and in the absence of contrary controlling precedent, we believe, as the Commission has previously stated, that "the rules governing political activity for judges and judicial candidates seek to achieve a reasonable balance between the goals of prohibiting judges from being involved in politics and permitting judges to campaign effectively," while respecting their First Amendment rights (*Matter of Campbell*, 2005 NYSCJC Annual Report 133).

By reason of the foregoing, the Commission determines that the appropriate disposition is admonition.

Mr. Belluck, Mr. Harding, Judge Acosta, Mr. Cohen, Ms. Corngold, Judge

Klonick, Judge Leach and Mr. Stoloff concur.

Mr. Emery and Judge Weinstein vote to reject the Agreed Statement of Facts and file dissenting opinions.

Ms. Yeboah did not participate.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: December 30, 2016

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

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In the Matter of the Proceeding
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DISSENTING OPINION
BY MR. EMERY

- -

INTRODUCTION

This case coalesces two issues of vital importance to this Commission that I have frequently addressed during my 13 years as a member: first, the right of a judge or judicial candidate to participate in political expression guaranteed by the First Amendment, fettered only to the extent compelled by the state interest in integrity of the judiciary, and second, our responsibility as an independent Commission to reject a negotiated *proposed* disposition if the result is inconsistent with precedent or otherwise unacceptable.

In this case, the majority finds that a single act of political activity having little or no connection to maintaining the integrity of the judiciary – collecting signatures on a petition for another candidate – constitutes misconduct. Because I believe that respondent's "political" activity is constitutionally protected expression that does not even run afoul of ethical prohibitions and, certainly, does not threaten judicial integrity, I vote to reject the Agreed Statement of Facts. I do so even though the respondent has

agreed with Commission staff to accept a public sanction in order to avoid further proceedings in her case. This charge against her should be dismissed.

I. A JUDGE HAS A RIGHT TO ENGAGE IN POLITICAL EXPRESSION AND ASSOCIATION WITHIN CONSTITUTIONAL STRICTURES

Our duty is to interpret the Rules Governing Judicial Conduct ("Rules") in a way that is consistent with constitutional strictures. No precedent of the Supreme Court, the Court of Appeals or any other influential court permits the conduct in this case to be deemed sanctionable misconduct.

The Supreme Court has jealously policed any government intrusions into the rights of citizens to participate in the political process. The Court has repeatedly affirmed that a compelling governmental interest is the only basis on which to legitimately diminish the right to full political participation, and then the method of any such diminution must be the least restrictive one available that achieves the government's compelling need. We start from this basic proposition when we evaluate any compromise or abridgement of the right to full political participation.

A. HISTORY AND BACKGROUND

Every judge of this state's unified court system is required to "refrain from inappropriate political activity," as described in Section 100.5 of the Rules. Essentially, judges are prohibited from "directly or indirectly" engaging in any political activity except, to a strictly limited extent, activity in connection with the judge's own campaign for judicial office during a prescribed "window period" before and after a nominating convention, primary or general election (Rule 100.5[A][1] and [2]). These rules and their

interpretations are complex and only sophisticated election practitioners even pretend to be able to apply them.

Among other restrictions, a judge or judicial candidate may not endorse other candidates or participate in their campaigns, make speeches on behalf of a political organization or candidate, attend political gatherings, or solicit funds for or make a contribution to a political organization or candidate (Rule 100.5[A][1][c], [d], [e], [f], [g], [h]). This particular combination of restrictions, the New York Court of Appeals has told us, is designed to ensure "that the judicial system is fair and impartial for all litigants, free of the taint of political bias or corruption, or even the appearance of such bias or corruption," while simultaneously "respect[ing] the First Amendment rights of judicial candidates and voters" (*Matter of Raab*, 100 NY2d 305, 315 [2003]). Applying a strict scrutiny analysis and finding a compelling state interest, the Court in *Raab* rejected a First Amendment challenge to the political activity restrictions at issue set forth above.[1] *Raab* was decided shortly after a Supreme Court decision invalidated a Minnesota rule prohibiting judicial candidates from "announcing" their views on disputed legal and political issues (*Republican Party of Minn. v. White*, 536 US 765 [2002]).

Last year the Supreme Court addressed the constitutionality of another restriction on political activity by judicial candidates, upholding the application of a Florida rule that precluded otherwise protected speech (personal solicitation of campaign contributions). *Williams-Yulee v. Fla. Bar*, 135 S Ct 1656, 191 L Ed2d 570 (2015).

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[1] Prior to serving on this Commission, I represented the respondent-judge in *Raab* before the Commission and the Court of Appeals.

Once again, accepting the basic proposition that strict scrutiny requires a compelling interest as a basis to regulate judicial speech in campaigns, the Court concluded that the rule in Florida was narrowly tailored to promote the state's compelling interest in a fair and impartial judiciary free from corruption and the appearance of corruption. Writing for the majority, Chief Justice Roberts applied a stringent First Amendment analysis to the rule at issue, carefully weighing the competing interests and issues at stake.

While opining that judicial candidates may be treated differently from campaigners for political office since "the role of judges differs from the role of politicians," he underscored the narrow scope of the Court's ruling on the particular facts presented, stating: "We have emphasized that 'it is the rare case' in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest. ... This is therefore one of the rare cases in which a speech restriction withstands strict scrutiny" (*supra*, 191 L Ed2d at 585, 584).[2]

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[2] In the wake of *White* and now *Williams-Yulee*, states facing constitutional challenges to restrictions on political activity by judges and aspiring judges have applied a rigorous First Amendment analysis in grappling with these issues. A recent case, illustrating the difficulty of navigating these cross-currents, is *Winter v. Wolnitzek*, 834 F3d 681 (6th Cir 2016), where the Sixth Circuit, considering challenges to eight separate provisions in Kentucky's Code of Judicial Conduct, provided a thorough and thoughtful analysis of the constitutional merits of each provision. Ultimately, the court struck down three of the challenged provisions (regarding campaigning, speeches and misleading statements) as facially invalid, upheld three others, upheld one provision as constitutionally valid on its face but not as applied, and remanded one for further consideration. Among other recent cases, s*ee, e.g.*, *Wolfson v. Concannon*, 811 F3d 1176 (9th Cir 2016), *cert den*, 2016 LEXIS 6222 (10/11/16) (Ninth Circuit, sitting en banc, held that the challenged provisions in Arizona's Code of Judicial Conduct were neither constitutionally underinclusive or overbroad [including, *inter alia*, bans on soliciting funds or making speeches for a political organization or candidate, making contributions to a candidate or political organization in excess of permitted amounts, publicly endorsing or opposing other candidates, and actively taking part in any political campaign other than his/her campaign for judicial office]); *In re Judicial Campaign Complaint Against O'Toole*, 24 NE3d 1114 (Ohio

Buttressed by *Raab* and *Williams-Yulee*, the Commission has continued to punish judges for political activity in contexts far beyond the limited, factually different scenarios of those cases, without engaging in any analysis of whether a compelling governmental interest justified precluding the specific conduct at issue.[3] And in finding misconduct, the Commission continues in many cases – as here – to rely on *ad hoc* opinions by the Advisory Committee on Judicial Ethics that conclude, without providing

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2014) (applying strict scrutiny, Ohio Supreme Court held that a provision banning campaign statements that, "if true, ...would be deceiving or misleading to a reasonable person" is unconstitutional because it chills the exercise of legitimate First Amendment rights); *Siefert v. Alexander*, 608 F3d 974, *petition for re-hearing en banc den*, 619 F3d 776 (7th Cir 2010), *cert den*, 131 S Ct 2872 (2011) (applying strict scrutiny, Seventh Circuit upheld bans in the Wisconsin Code of Judicial Conduct on endorsements and solicitation of contributions but held that prohibiting judges and judicial candidates from belonging to a political party and announcing their party affiliation was unconstitutional); *Bauer v. Shepard*, 620 F3d 704 (7th Cir 2010) (rejecting challenges to provisions in Indiana's Code of Judicial Conduct prohibiting judges and judicial candidates from holding leadership roles in political parties and making speeches on behalf of a political organization).

[3] *E.g.*, *Matter of Fleming*, 2016 NYSCJC Annual Report 83 (contributions by judge's law firm and spouse); *Matter of Sakowski*, 2016 NYSCJC Annual Report 178 (contributions by judge and his law firm); *Matter of Burke*, 2015 NYSCJC Annual Report 78 (contributions by judge's law firm); *Matter of Kelly*, 2012 NYSCJC Annual Report 113 (contributions by judge's law firm); *Matter of Michels*, 2012 NYSCJC Annual Report 130 (misleading campaign literature); *Matter of McGrath*, 2011 NYSCJC Annual Report 120 (campaign literature conveyed bias); *Matter of Chan*, 2010 NYSCJC Annual Report 124 (personal solicitation of campaign contributions and campaign literature that was misleading and conveyed bias); *Matter of Herrmann*, 2010 NYSCJC Annual Report 172 (nominated a candidate at a caucus); *Matter of Yacknin*, 2009 NYSCJC Annual Report 176 (solicited political support in court from an attorney appearing before her); *Matter of King*, 2008 NYSCJC Annual Report 145 (served as a party chair, circulated petition for another candidate and displayed signs on his property endorsing other candidates); *Matter of Kulkin*, 2007 NYSCJC Annual Report 115 (misrepresented facts about his opponent); *Matter of Spargo*, 2007 NYSCJC Annual Report 127 (spoke at party fund-raiser and engaged in "unseemly" political activity including distributing gift certificates while campaigning and buying drinks for patrons at a bar when he was a candidate); *Matter of Farrell*, 2005 NYSCJC Annual Report 159 (made phone calls supporting another candidate and made a prohibited payment to a political organization); *Matter of Campbell*, 2005 NYSCJC Annual Report 133 (endorsed other candidates); *Matter of Schneier*, 2004 NYSCJC Annual Report 153 (improper use of campaign funds).

even lip service to the First Amendment interests at issue, that particular scenarios are inconsistent with the political activity rules and therefore prohibited (my recent dissents in *Matter of Fleming* and *Matter of Sakowski*, *supra* n. 3, cite numerous examples). Without the rigorous First Amendment compliance required both by *Raab* itself and by *White* and *Williams-Yulee*, the Commission continues to view *Raab* and *Williams-Yulee* as a blanket endorsement of every pre-existing judicial campaign restriction imposed by New York's rules and interpreted by the Advisory Committee, no matter how picayune, as a license to inflict public misconduct penalties on judges who engage in any activity that has a whiff of politics.

B. CONSTITUTIONAL ANALYSIS

Rather than read *Williams-Yulee* as a sledgehammer that allows the Commission to crush virtually any political activity that appears "desirable" as a matter of preferred judicial policy, we must view these precedents as a scalpel that carves respect for the Court's clear message: that judicial campaign speech and conduct are core First Amendment activity, that a compelling interest must be identified if a narrow restriction is to be upheld, that strict scrutiny requires analysis of the campaign activity at issue to determine whether the compelling governmental interest (integrity of the judiciary) legitimately requires restriction of that particular activity, and that the rule restricting judicial speech is the least restrictive available to support the compelling governmental interest at stake.

Plainly, *Williams-Yulee* did not address any campaign activity beyond judicial candidates directly soliciting funds. Notably, neither *Williams-Yulee* nor *Raab*

addressed the New York common practice of judicial candidates and sitting judges soliciting money through committees, knowing exactly who contributed, and soliciting funds through these same committees from lawyers who appear before the judge once elected.

Of course, the ultimate hypocrisy in our campaign regulatory scheme is the failure to restrict these donations in a meaningful way. Until we do, we will have no moral or legal high ground to restrict far more mundane and benign political judicial behavior, as we do now. Of course, privately we all acknowledge that donations from lawyers and entities to judges before whom they appear are the sanctified lifeblood of judicial campaigns even though such donations are plainly as corrupting as the solicitations in *Williams-Yulee*. But as long as we do not have public financing of campaigns, and despite recent limitations on the size of contributions, no one can handle the fundamental truth that New York cannot have judicial elections without such plainly corrupting contributions.

Beyond this glaring hypocrisy, which crystallizes the First Amendment over- and underbreadth defects of prohibiting far less corrosive campaign practices (*see Matter of Fleming*, *supra*, Emery Dissent; *Matter of Sakowski*, *supra*, Emery Dissent; *Matter of Herrmann*, *supra*, Emery Dissent; *Matter of Yacknin*, *supra*, Emery Dissent; *Matter of Spargo*, *supra*, Emery Concurrence/Dissent; *Matter of King*, *supra*, Emery Concurrence; *Matter of Farrell*, *supra*, Emery Concurrence; *Matter of Campbell*, *supra*, Emery Concurrence), neither *Williams-Yulee* nor *Raab* addresses the myriad campaign issues that the Advisory Committee and this Commission routinely prohibit. And those

controlling cases certainly never addressed the issue now before the Commission: carrying a petition to support a person's attempt to get on the ballot. Nothing in *Williams-Yulee* or *Raab* compels, let alone suggests, that strict scrutiny would uphold a broadly-worded ban on "partisan political activity" that was applied to prohibit ballot access petitioning.

This reasoning by the Commission tramples basic First Amendment principles. It clearly treads on the free expression and associational rights of the judge and does not serve any compelling interest, let alone a fair and impartial judiciary free from corruption or the appearance of corruption.

C. JUDGE RUMENAPP'S CONDUCT

Accepting an Agreed Statement of Facts, the majority publicly disciplines Judge Rumenapp for *circulating a petition* for a candidate for Town Supervisor, concluding that such conduct violates the ethical rules prohibiting a judge from engaging in "any partisan political activity" except for certain limited activity permitted in connection with his or her own campaign for judicial office (Rule 100.5[A][1][c]), "participating in" any other political campaign (Rule 100.5[A][1][d]) and "publicly endorsing" another candidate for public office (Rule 100.5[A][1][e]).

In the absence of any specific ethical rule addressing designating or nominating petitions, the majority bolsters its argument for misconduct by relying on language contained in a brief Advisory Committee letter-opinion, devoid of any probative analysis, opining that circulating petitions for another candidate "is tantamount to an endorsement of that person" and is therefore prohibited (Adv Op 09-148) (Determination,

p 6). Yet, only three months earlier the Committee had concluded that publicly voting for a candidate at a political caucus is permissible under the ethical rules (Adv Op 09-180). The Committee offers no explanation (and it would be difficult to contrive a reasonable one) why the former conduct – which could well be motivated by a desire to give voters a choice of candidates – constitutes an impermissible "endorsement" of a candidate while the latter conduct, which undeniably conveys a direct and public preference for a particular candidate, does not.

Collecting signatures to allow someone's name to be placed on a ballot is a fundamental part of our political system – as is signing such a petition, which a judge is permitted to do under present guidelines whether or not the judge is a candidate at the time (*see* Adv Ops 89-89, 99-125). It is debatable whether carrying such a petition constitutes an "endorsement" of that individual. Carrying a petition only supports a person's right to run for public office by being on the ballot, and neither circulating nor signing such a petition commits an individual to vote for the candidate. But unquestionably, it is core political expression that cannot be infringed by restrictions that bear no relationship to a narrowly defined compelling state interest in the integrity of the judiciary. In concluding that circulating petitions for another candidate falls under the broad category of prohibited "partisan political activity" (*e.g.*, Adv Ops 09-148, 15-145), the Advisory Committee does not even attempt to analyze the expressive and associational interests at stake.

Nor does the Committee – or the determination in this case – explain why such conduct is prohibited, even during a judge's window period of permitted political

activity, during which it is perfectly proper for a judicial candidate to circulate a joint nominating or designating petition that includes her own name as a nominee along with the names of other candidates (Adv Op 97-75; *see also* Ops 91-94, 91-96, 98-99, 02-64, 09-148, 10-83). That advice, and other opinions permitting various political activities with and on behalf of other candidates on the same "slate" or "team" which are not deemed "an impermissible 'endorsement'"[4] (Adv Ops 15-121, 13-137/13-152/13-153), may well be based on a pragmatic recognition of the realities of a system that requires judges to run for office. But such *ad hoc*, byzantine interpretations of the ethical standards (as set forth in approximately 4000 Advisory Opinions that we expect judges to be familiar with) create a minefield for a well-intentioned judge attempting to avoid running afoul of the guidelines, not to mention serious over-breadth and under-inclusiveness defects.

Based on the Advisory Committee's tortured guidelines, if Judge Rumenapp, a registered Republican who at the time of these events was seeking re-election as Town Justice and gathering signatures for her own candidacy, had been listed as a judicial candidate on the Republican Party petition for the Town Supervisor candidate, she could have carried the petition and collected signatures with impunity.

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[4] *E.g.*, a candidate may openly support other candidates at a political caucus (Adv Ops 09-180), may campaign door to door with and attend forums with other candidates on the same "slate" (Adv Ops 90-166, 91-94), may be on campaign literature and advertisements with such candidates, including literature that characterizes the slate as a "team" (Adv Ops 13-137/13-152/13-153, 90-166, 91-94, 91-107), may attend fund-raisers for such candidates (Adv Op 91-94), and may permit his or her campaign committee to establish Facebook connections with the campaign committees of other candidates on the same slate (Adv Op 15-121).

This is a sophistic distinction that bears little relationship to common sense let alone constitutional analysis. But because she was not listed on the petition as a candidate, the awesome machinery of this Commission geared up to prosecute her, and now holds her up to public opprobrium for conduct that she now has to allocute was wrong and promise never to repeat. This is like shooting a cannon to kill sparrows, especially since there is no indication that respondent engaged in any other activity in support of the candidate (such as carrying his campaign literature, wearing a campaign button, or urging voters to support him) while carrying the petition.[5]

At a time when this Commission's inadequate budget has strained our resources and led to an increasing backlog and growing delays in the timely completion of pending matters, the expenditure of our resources in pursuing this case with the zeal and effort necessary to impose public discipline is, in my view, particularly misguided. It sends the wrong message about the Commission's priorities and ability to differentiate between serious misconduct and hyper-technical, constitutionally doubtful transgressions.

II. OUR RESPONSIBILITY AS A COMMISSION

As an independent constitutionally consecrated Commission, our core

[5] The other misconduct in the record before us relates to respondent's authentication of the signatures on two joint petitions that she properly carried three days later, conduct that seems to have been based on a mistaken, and not entirely unreasonable, belief about her authority. It is noteworthy that in *Russell v. Board of Elections*, 45 NY2d 800, 802 (1978), which invalidated signatures on a nominating petition because authentication by a town justice did not satisfy the statutory requirement of authentication by a notary public or commissioner of deeds (Election Law §6-132), two judges – Chief Judge Breitel and his soon-to-be successor Judge Cooke – strongly dissented, criticizing the majority for its "blind adherence to a rather vague statute," noting that such justices have statutory authority to administer oaths and affirmations, and stating that "in any other context the authentication would be accepted."

responsibility is protecting the public from judicial misconduct. To do so, we must determine the appropriate discipline in cases before us, without regard to public clamor or other extrinsic or pragmatic considerations unrelated to the merits of each particular case. While the Commission, in exercising that responsibility, has occasionally rejected negotiated stipulations for various reasons, in my view the Commission has too often abdicated its authority by accepting stipulations simply because the parties agreed. Of course the parties' agreement is a weighty factor in favor of acceptance; however, overarching values can and should trump that interest when the precedent does not serve our core function. I have expressed that view in dissenting from Commission determinations in numerous cases[6] and do so again here.

Unlike courts and prosecutors whose functions and responsibilities are defined by concepts of separation of powers – executive contrasted with judicial functions – we are an administrative disciplinary agency that has final and ultimate constitutional responsibility for protecting the public from wayward jurists. By the same token, we are duty bound to protect judges from overreaching when staff pursues unsupportable charges, notwithstanding that we may have initially authorized such charges based on a staff report. We must not accept pragmatic dispositions when misconduct has not occurred.

As distinct from courts that are bound by separation of powers restraints

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[6] *Matter of Lustyik*, 2015 NYSCJC Annual Report 128; *Matter of Ridsdale*, 2012 NYSCJC Annual Report 148; *Matter of Valcich*, 2008 NYSCJC Annual Report 221; *Matter of Honorof*, 2008 NYSCJC Annual Report 133; *Matter of Clark*, 2007 NYSCJC Annual Report 93.

and the correlative deference to an independent public official – the prosecutor, our role, as an administrative disciplinary agency, gives us the ultimate responsibility over all aspects of the matters that come before us: unlike a judge, we are empowered, *inter alia*, to authorize investigations, to initiate investigations on our own motion, to authorize investigative testimony by a judge, to exercise guidance and oversight when our staff (led by an administrator whom we appoint) reports to us during investigations, to initiate formal proceedings by authorizing charges, and, only then, to determine the ultimate disposition and sanction.

A court cannot direct that a case be prosecuted; we can and do. Our institutional procedural safeguards ensure that once the Commission has authorized formal charges, the staff independently prosecutes those matters without our participation. But, having sole responsibility for the ultimate disposition, we properly exercise our authority throughout such proceedings when we appoint referees, decide motions and review stipulations. A sanction imposed pursuant to a stipulation containing a joint recommendation by the staff and the respondent-judge is just as much *our* responsibility and *our* decision as a disposition and sanction after a full adversary process.

Our authority to reject stipulations is not only inherent in the Commission's structure, but codified in the Judiciary Law, which, in providing for an agreed statement of facts in lieu of a hearing, spells out that such a stipulation is "[s]ubject to the approval

of the Commission" (Jud Law §44[5][7]). Moreover, the plain language of the Agreed Statement itself underscores that the agreement is a recommendation subject to Commission approval and that it may be rejected. The Agreed Statement states that the parties "recommend" the disposition and that "if the Commission accepts" the stipulation, the sanction will be imposed without further submissions but "[i]f the Commission rejects" it, "the matter shall proceed to a hearing."[8]

The Commission's own determinations indicate that on numerous occasions Agreed Statements have been rejected. Notably, in several instances after an Agreed Statement was rejected, the Commission ultimately imposed a harsher sanction or more lenient sanction after a hearing was held. In one recent case where the Commission had rejected an Agreed Statement containing a recommendation of censure, the staff subsequently recommended the judge's removal after a hearing was held. And even if the ultimate disposition after a hearing is the same sanction recommended previously by stipulation, the disposition is supported by a fuller record that adds credibility to the

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[7] The statute states: "Subject to the approval of the commission, the administrator and the judge may agree on a statement of facts and may stipulate in writing that the hearing shall be waived. In such a case, the commission shall make its determination upon the pleadings and the agreed statement of facts."

[8] In *Matter of Abramson*, 2011 NYSCJC Annual Report 62, the administrator defended the Commission's authority to reject a negotiated stipulation. In that case, the Commission rejected a stipulation recommending that the matter be closed in view of the judge's resignation and proceeded to remove the judge; when the judge later argued that the stipulation should be enforced because the administrator, as "the Commission's lawyer," had signed it, the administrator argued that the stipulation was only "a joint recommendation," underscored in his argument the separate and distinct roles of the administrator and the Commission at that stage of the proceedings, and stated that absent Commission approval, the stipulation was "a nullity." The Court of Appeals denied the judge's motion to enforce the stipulation on jurisdictional grounds (*Matter of Abramson*, 15 NY3d 936 [2010]).

result. These results show that rejecting a stipulation has value in ensuring that the ultimate result is fair and credible.

Facing the pressure of Commission proceedings, the significant expense of defending against misconduct charges at a hearing[9] and the uncertain outcome if charges are contested, it is hardly surprising that a judge charged with misconduct might agree to any sanction that concludes the proceedings expeditiously and allows the judge to remain in office, even if the Commission might have imposed a more lenient disposition. It is sometimes the case that the Commission would dismiss or opt for a confidential caution even though staff exacted an agreement from a respondent that imposes a public finding of misconduct. Conversely, if the staff agrees to a sanction less than removal when removal might be required, it is our duty to the public to refuse to accede to such a negotiated result. As Commission members, we should be vigilant about such considerations and not rationalize a disposition simply because the judge and the staff have agreed to it. Again, agreement that produces a negotiated disposition is a weighty factor in favor of its acceptance. But it does not relieve us of our responsibility to assure that the ultimate result constitutes a fair and proper resolution.

Additionally, apart from the consequences to the particular judge, accepting a negotiated sanction that appears too harsh simply because the parties have jointly recommended it "undermines the significance of [the] sanction when it is appropriately imposed and undermines public confidence in the Commission's ability to properly

[9] For a modestly compensated part-time judge, these pressures may be particularly acute. According to the Town of Milford's website, Judge Rumenapp's salary in 2013 was $8,325.

distinguish between serious wrongdoing and less serious misbehavior" (*Matter of Ridgeway*, 2010 NYSCJC Annual Report 205 [Belluck Dissent]). Accepting a questionable sanction "has the potential to unbalance the structure of penalties the Commission imposes [and] muddies our guidance as to the relative severity of different forms of misconduct" (*Matter of Williams*, 2016 NYSCJC Annual Report 231 [Weinstein Dissent]). Every public sanction imposed on particular facts becomes "precedent" that can be used to support an argument for a similar disposition in future cases, to the detriment of a respondent-judge.

The jurisprudence of this Commission is its bedrock, its claim to integrity. It should be jealously guarded and nurtured.

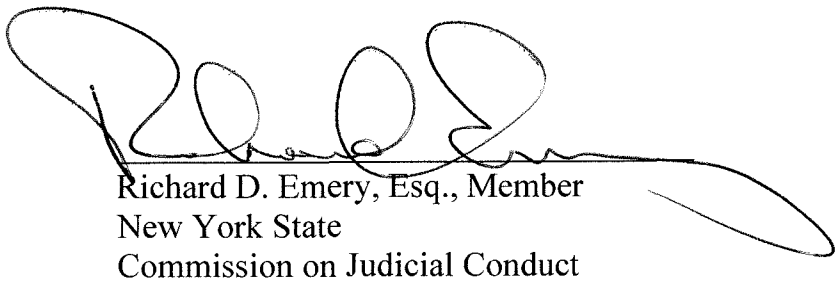
CONCLUSION

As I have previously stated, "too often the Commission has become a peripatetic watchdog of judicial campaign activity" (*Matter of Sakowski*, *supra*; *Matter of Fleming*, *supra*; *Matter of Chan*, *supra*, Emery Dissents). *See Matter of Michels*, *supra*; *Matter of Kelly*, *supra*; *Matter of McGrath*, *supra*; *Matter of Chan*, *supra*; *Matter of Herrmann*, *supra*; *Matter of Yacknin*, *supra*; *Matter of King*, *supra*; *Matter of Spargo*, *supra*; *Matter of Farrell*, *supra*; *Matter of Campbell*, *supra*; *Matter of Schneier*, *supra*; *Matter of Crnkovich*, 2003 NYSCJC Annual Report 99; *Matter of Raab*, *supra*; *Matter of Watson*, 100 NY2d 290 [2003]), and, in my view, our role should be hands off except in the clearest cases of profoundly corrosive political activity. This case, involving constitutionally protected conduct that poses little or no threat to public confidence in the

integrity of its judiciary, is not a case that warrants the Commission's intervention. We should not accept such a result even if the judge agrees.

For these reasons, I vote to reject the Agreed Statement and, respectfully, dissent.

Dated: December 30, 2016



Richard D. Emery, Esq., Member
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

CAROL A. RUMENAPP,

a Justice of the Milford Town Court,
Otsego County.

DISSENTING OPINION
BY JUDGE WEINSTEIN

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I express no view on the constitutional arguments made by Mr. Emery, which I believe concern matters outside the authority of this Commission. I agree with my dissenting colleague, however, that the Commission should give careful and independent scrutiny to the sanction imposed pursuant to an Agreed Statement of Facts. For the reasons well stated in Mr. Emery's opinion, I think the violations in this case are based on hyper-technical distinctions that do not impact in any material way the public's confidence in the judiciary. I believe they would have better been addressed via a private letter of caution.

Dated: December 30, 2016

Honorable David A. Weinstein, Member
New York State
Commission on Judicial Conduct