STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

MARK J. GRISANTI,

A Justice of the Court of Claims and
an Acting Justice of the Supreme Court,
Erie County.

REPLY MEMORANDUM BY COUNSEL TO THE COMMISSION

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Dated: August 17, 2023

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PRELIMINARY STATEMENT

Commission Counsel respectfully submits this Reply Memorandum in response to Respondent's brief to the Commission, which unpersuasively takes issue with some aspects of the Referee's report and argues for a sanction less than removal. Commission Counsel reiterates that Respondent should be removed from office for his prolonged and egregious misconduct, both on and off the bench.

ARGUMENT

Respondent objects to (1) the Referee's conclusion that he violated the Rules by invoking familial and personal ties to Buffalo police personnel and Mayor Byron Brown to obtain preferential treatment from the police, and (2) the Referee's passing observation that extreme provocation may heighten, not vitiate, a judge's obligation to act with restraint and dignity. Those objections are without merit.

Respondent also unconvincingly argues that certain mitigation supports a sanction less than removal.

Respondent committed a combination of indefensible off-the-bench and on-the-bench misconduct. His prolonged and egregious misbehavior during and after the street brawl with the Meles, his failure to recuse or even disclose in multiple matters that a lawyer appearing before him owed him money, and his failure to file accurate financial disclosure statements compel his removal from judicial office.

POINT I

RESPONDENT'S TWO OBJECTIONS TO THE REFEREE'S REPORT LACK MERIT (Answering Respondent's Brief, pp 6-12).

On June 22, 2020, after getting nowhere despite pushing a police officer, telling the officer he "better" do as Respondent wanted, and saying the officer would "be sorry" if he refused (Comm Br: 9-15; Ref Rep: 15),[1] Respondent started dropping names. He told the officers that his son and daughter were Buffalo Police Department ("BPD") officers, that he knew and could call their lieutenants, that Deputy BPD Commissioner Gramaglia was his cousin, and that he was "good friends" with Buffalo Mayor Byron Brown (Comm Br: 15-17; Ref Rep: 8, 15-16). Based on those facts, the Referee found that Respondent's "invocation of familial connections with members of the BPD and Mayor Byron Brown" constituted an "unseemly" attempt "to obtain preferential treatment," which constituted judicial misconduct "even if this preferential treatment was not the result of Respondent's status as a sitting judge" (Ref Rep: 8, 10).

Respondent now challenges that conclusion, claiming that (1) he "did nothing inherently improper, or violative of any of the [Rules] by telling the police he had relatives in law enforcement and an acquaintance with the Mayor," (2) he "could not have known that mentioning his daughter, son-in-law, or Mayor Brown

[1] References to "Ex" and "Resp Ex" are to exhibits introduced into evidence at the hearing by the Commission and Respondent, respectively. "Comm Br" and "Resp Br" refer to the parties' memoranda to the Commission. "Ref Rep" refers to the Referee's Report. All other citations, unless noted, are to the hearing transcript.

in this context would be deemed judicial misconduct since it did not involve the assertion of his judicial position," and (3) the Referee's conclusion to the contrary is unsupported by precedent (Resp Br: 6-10, emphasis in original). Respondent is utterly wrong on all scores.

The Referee's finding was not premised on the judge's duty to refrain from lending the prestige of his judicial office for personal benefit or advantage.[2] It was based on the requirement of judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," to avoid even "the appearance of impropriety," and to conduct their "extra-judicial" affairs in a manner that neither "cast[s] reasonable doubt on the judge's capacity to act impartially as a judge" nor "detract[s] from the dignity of judicial office." Rules 100.2, 100.2(A), 100.4(A)(1) and (2) (emphasis added).

"Because judges carry the esteemed office with them wherever they go, they must always consider" how members of the public "will perceive their actions and statements" (*Matter of Senzer*, 35 NY3d 216, 220 [2020]), and they "are held to higher standards of conduct than members of the society at large," as even "relatively slight improprieties subject the judiciary as a whole to public criticism

[2] Respondent's objection appears to be premised on the mistaken assumption that the Referee found Respondent to have violated Rule 100.2(C) which prohibits a judge from lending the prestige of judicial office to advance his own interests. Instead, the Referee found Respondent to have violated Rule 100.2(A) which deals with Respondent's duty to avoid impropriety and the appearance of impropriety and Rules 100.4(A)(1) and 100.4(A)(2) which deal with Respondent's duty to conduct his extra-judicial activities so as to minimize the risk of conflict with judicial obligations (Ref Rep: 8, 10, 17).

and rebuke." *Matter of Aldrich*, 58 NY2d 279, 283 (1983); *see also Matter of Kuehnel*, 49 NY2d 465, 469 (1980) ("Standards of conduct on a plane much higher than for those of society as a whole, must be observed by judicial officers so that the integrity and independence of the judiciary will be preserved").

Judged by those standards, the Referee correctly found that Respondent violated the Rules by invoking his connections to law enforcement and Mayor Brown to obtain preferential treatment. That Respondent was seeking preferential treatment is evident from the record, and multiple officers recognized as much. Officer Muhammed understood Respondent's mention of Deputy Commissioner Gramaglia's name as an attempt to make "the situation to go well" or "to his preference" (Muhammad: 256), and Officer Hy observed that Respondent appeared to be "expecting special treatment" by "dropping everybody's name with a badge" and mentioning his relationship with "the Mayor" (Exs 11 at 00:11:13 – 00:11:41; 11-A, pp 25-27; 12 at 00:10:52 – 00:11:19; 12-A, pp 21-22).

Even if Respondent did not specifically announce, "I am a judge," his brazen attempt to get preferential police treatment was so lacking in integrity that it cannot be tolerated from those responsible for dispensing justice equitably and fairly. *See Matter of Aluzzi*, 2018 Ann Rep of NY Commn on Jud Conduct at 63, 70 ("the heart of our system of justice . . . is based on equal treatment for all"); *see generally Aldrich*, 58 NY2d at 283; *Kuehnel*, 49 NY2d at 469.

Respondent is wrong to suggest that it is mitigating that he did not explicitly invoke his status as a judge when dealing with the police (Resp Br: 7). Undoubtedly, it would have aggravated his already ample misconduct for him to throw around his judicial title, and indeed would have violated yet another Rule (100.2[C]). But it is absurd to say he should get credit for not having made his dreadful conduct even more egregious. Put simply, the absence of a particular aggravating factor is not mitigating.

In any event, by dropping names in a bid for special treatment outside his house, in front of his neighbors, passersby, and assorted police officers – some of whom knew he was a judge (Joseph Contino: 375, 379) or were likely to know he was a judge by virtue of his having run in the district (Respondent: 1136) – Respondent publicly communicated the belief that the scales of justice may be tipped by personal or political relationships, and that judges or others with the right connections should be treated more leniently than those without.[3] As the Commission has repeatedly held, such a belief is repugnant to the bedrock principle that everyone is equal before the law. *Cf Matter of Ramirez*, 2018 Ann Rep of NY Commn on Jud Conduct at 232, 241 (condemning conduct that suggests there are "two systems of justice, one for the average person and one for those with 'right' connections"); *see also Matter of Dixon*, 2017 Ann Rep of NY

[3] Once the video footage of Respondent's misconduct went viral on YouTube (*see* Comm Br: 66), many more people heard his inappropriate views on special treatment.

Commn on Jud Conduct at 100, 113 (condemning conduct suggesting "that those who have the right 'connections' can manipulate the system for their personal benefit").[4]

In sum, Respondent's willingness to assert familial and social ties in a transparent bid for special treatment by the police irreparably damaged public confidence in his ability to decide cases equitably and fairly. Combined with the significant additional misconduct found by the Referee and discussed in Commission Counsel's main brief, Respondent's misbehavior compels the sanction of removal.

Separately, Respondent inaccurately claims that the Referee found that "extreme provocation" on the part of the Meles "mitigates [his] conduct" (Resp Br: 11). On the contrary, the Referee correctly concluded that the nature and extent of the Meles' provocation "does not in any appreciable manner diminish Respondent's obligation, as a judge, to conduct himself in [a] restrained and dignified manner" (Ref Rep: 9). Moreover, the Referee explicitly said he did "not assess the mitigating effect, if any, that these facts have on the issue of sanction" (Ref Rep: 11). And, with respect to Respondent's "provocation" defense, the Referee reiterated his finding that such provocation "did not diminish

[4] Given these cases, Respondent is incorrect that there is "no legal precedent" (Resp Br: 6) that supports the Referee's finding of misconduct.

[Respondent's] obligation to comport himself with judicial restraint" (Ref Rep: 11).

Respondent also objects to the Referee's passing comment that "the provocation may even increase this obligation" (Ref Rep: 9). But that is ultimately irrelevant. Whatever the standard, Respondent's outrageous conduct clearly

> violated [his] obligation to comport himself in a manner that promotes the integrity and impartiality of the judiciary and further violated Respondent's obligation to conduct himself in a manner that does not detract from the "dignity of judicial office." His conduct thus constituted a violation of the above-noted sections of the Rules.

(Ref Rep: 8).

POINT II

FAR FROM EXPRESSING IMMEDIATE CONTRITION FOR BRAWLING WITH A NEIGHBOR AND SHOVING A POLICE OFFICER, RESPONDENT IMPROPERLY SOUGHT TO JUSTIFY HIS FLAGRANT MISCONDUCT AND LIE HIS WAY OUT OF TROUBLE (Answering Respondent's Brief, pp 35-37).

Contrary to the record, Respondent contends that he offered "immediate and unprompted contrition" following his bare-chested brawl with Joe Mele and physical altercation with Officer Gehr, and he argues that such contrition "is a mitigating factor" (Resp Br: 35). In fact, Respondent's actions after the brawl aggravated his already-egregious misconduct.

To hear Respondent tell it, "[o]n the night of the incident, he offered unprompted apologies to members of law enforcement, including Off[icer] Gehr"

(Resp Br: 35). In fact, immediately after he pushed Gehr, Respondent yelled aggressive and threatening directives at the police, including, "You better get off my fucking wife," "You arrest my fucking wife, you're going to be sorry," and "If you don't get the cuffs off her right now you're going to be sorry" (Ex 12-A, pp 4-6). Sometime later, Respondent uttered what he apparently considers an apology, insofar as he told Gehr, "I didn't mean to tackle you, but, I mean, you kind of threw my wife down on the ground pretty hard and I don't appreciate that. . . . [Y]ou need to chill out . . . [and take] a little constructive criticism, dude" (Exs 11 at 00:10:26 – 00: 11:02; 11-A, pp 23-25). In other words, Respondent's supposed "apology" to Officer Gehr began with a lie – that he "didn't mean" to physically push Gehr, when plainly it was no accident. It continued with his blaming Gehr for his own aggressive and violent conduct. That is not an "apology" for which Respondent deserves credit.

Moreover, at the hearing, Respondent continued to deflect blame upon Officer Gehr rather than accept it himself. Indeed, Respondent impugned Gehr's conduct by speculating that Gehr "had a fight with a girl" before coming to work, thus insinuating that Gehr's "bad day" was responsible for the injudicious behavior Respondent himself exhibited throughout the altercation (Respondent: 1217-18). Thus, on this record, there is no indication that Respondent accepted full responsibility for his actions, whatever Respondent said to his administrative judge about the matter after the fact (*see* Resp Br: 35).

When it might have mattered – and before he had seen the video that would conclusively contradict him – Respondent repeatedly lied to BPD personnel about how the brawl began and his role in it, in order to evade responsibility for his actions and deflect blame. Those are hardly the actions of a person who offered "immediate and unprompted contrition" (Resp Br: 35).[5] Indeed, when Officers Gehr and Muhammed asked Respondent for his side of the story, he told them that his wife had walked across the street first and was attacked by the Meles while he was still inside his house, and that he subsequently crossed the street to help her – a demonstrably untrue statement that was refuted by the video evidence (Exs 11 at 00:07:33 – 00:07:45; 00:08:52 – 00:09:04; 00:10:01 – 00:10:08; 11-A, pp 20-21, 23). Respondent repeated that falsehood twice more: to Detective Costantino when Respondent spoke with him over the phone from the back of a police car (Exs 12 at 00:43:10 – 00:43:36; 12-B, p 4), and later at the stationhouse while being questioned by Detective Moretti (Exs 13; 13-A, pp 9, 20). Respondent deserves no credit for acknowledging at the hearing that he had lied to those officers (Respondent: 1348-50, 1389), as by then, he had learned what the damning video evidence showed and thus had no other choice.

[5] As set forth in Commission Counsel's opening brief (Comm Br: 43-44), the Commission can and should consider the fact that Respondent made false statements to BPD personnel even though the false statements were not charged as separate misconduct in the Complaint. In the context that they were made, Respondent's false statements are relevant to the question of whether he accepted responsibility for his misconduct and are directly responsive to Respondent's current claims of immediate contrition.

Respondent told the police several other lies that evening, in the immediate aftermath of the brawl. While recounting what had transpired during the fight itself, Respondent downplayed his own part in escalating the violence, claiming that when Joe Mele taunted him, "You want to go, tough guy," he replied, "No, Joe," and sought only to "bring[ ] Maria back" (Exs 11 at 00:07:46 – 00:07:51; 11-A, p 20). Respondent further said that Mr. Mele "whack[ed]" him and "pushe[d]" him backward, which prompted Respondent to tell him to "calm down" (Exs 11 at 00:07:51 – 00:08:00;11-A, p 20). None of those words can be heard on the audio recording of the fight, and they are wholly inconsistent with audio that captured Respondent telling Joe Mele, "You want to go again, tough fucking guy . . . I'll fucking flatten your face again" (*see* Exs 2; 2-A). Additionally, while dropping names to curry favor with the police, Respondent told Officers Gehr and Muhammed that BPD Deputy Commissioner Joseph Gramaglia was his cousin (Exs 11 at 00:06:23 – 00:06:43; 11-A, p 18; 12 at 00:05:48 – 00:06:07; 12-A, pp 14-15. That, too, was a flat-out lie, as Respondent is not related to Deputy Gramaglia (Respondent: 1225, 1405).

All told, Respondent asserts that his "actions in the moments after the emotional incident concluded speak volumes about his character and ability to recognize the wrongfulness of his behavior" (Resp Br: 36), and Commission Counsel heartily agrees. Those actions firmly demonstrate Respondent's unwillingness to accept responsibility for his misconduct until faced with no other

choice, and his readiness to tell lie after lie – even to the police – to avoid the appropriate and expected consequences of his actions. Thus, his claim that "[t]he record firmly establishes that [he] recognized his wrongdoing immediately and sought to rectify any of his mistakes immediately thereafter" (Resp Br: 35) is a gross mischaracterization of the evidence.

Respondent's fictional assertion that he apologized to Officer Gehr, coupled with his persistent attempt to lie his way out of trouble when speaking with the police, constitute a "lack of contrition" that "exacerbate[s] his misconduct." *Matter of Going*, 97 NY2d 121, 126 (2001).

POINT III

RESPONDENT'S CHARACTER WITNESSES' AND THERAPISTS' TESTIMONY DO NOT MITIGATE OR OVERRIDE HIS EGREGIOUS MISCONDUCT (Answering Respondent's Brief, pp 14-35).

At the hearing, Respondent called three therapists who treated him in the two years between the Mele brawl and the hearing, as well as three judges and two attorneys as character witnesses. None of these witnesses provided persuasive mitigating testimony.

A. The therapists who testified on Respondent's behalf did not provide persuasive mitigating testimony.

Respondent called three therapists who treated him following the street brawl to testify at his hearing.

Jacob Smidt, a licensed social worker who began seeing Respondent over a year after the brawl (Smidt: 583), revealed that Respondent's initial and persistent concerns were fear of losing his judgeship and anxiety over the resultant loss of status and salary (Smidt: 618). Indeed, those professional and financial ramifications were a primary theme and focus in 13 of Respondent's 16 counseling sessions prior to the hearing (Smidt: 618-19, 636-51), which suggests his true motivation for seeing Smidt. Moreover, while Smidt "testified that the stressors in [Respondent's] life at the time of the incident were contributing factors in his behavior" (Resp Br: 31), he admittedly relied on Respondent's self-reported observations for this assessment, never attempted to corroborate Respondent's version of the brawl, and did not view any of the video footage until the day before he testified (Smidt: 590, 604, 609, 618, 622-23, 638) – all of which casts substantial doubt on his methodology and conclusions.

Christopher Frigon, a licensed social worker at Horizon Health Services ("Horizon"), performed a substance abuse and anger management evaluation of Respondent at the request of Respondent's attorney (Frigon: 814). Frigon evaluated Respondent for barely more than two hours over the course of two sessions – less time than he spent on the stand at Respondent's hearing (Frigon: 814, 841, 855, 877). Based on those brief interviews, Frigon concluded that Respondent "attempted to use conflict management skills during the incident on June 22, 2020" and did not "escalat[e]" the incident, but "felt compelled to

intervene because his wife's safety [was] threatened" (Resp Br: 34). But the video footage – which Frigon declined to watch until the night before his testimony, despite it having been available to him (Frigon: 812) – plainly contradicts each of those ill-formed conclusions. As set forth in the Commission Counsel's main brief (Comm Br: 8-9), Respondent marched across the street to confront the Meles rather than wait for police to respond to his 911 call and repeatedly escalated the verbal and physical altercation. Given Frigon's gross misunderstanding of the established facts, his testimony should be disregarded in its entirety. Moreover, as with Smidt, a focus of Respondent's sessions with Frigon was his anxiety related to the Commission's proceeding and the potential ramifications (Frigon: 856), which again calls into question Respondent's true purpose in seeking treatment.

Finally, Respondent was examined by Dr. Joshua Morra, a psychiatrist at Horizon, for a sum total of just 98 minutes (Morra: 917). Respondent recounts that Dr. Morra found him to have suffered from "complex grief and loss" related to "multiple illnesses and losses at the same time, including the illness and loss of his mother, the illness loss of his family dog, and other family members who were seriously ill," and that those stressors "caused [him] to move outside his 'window of tolerance'" during the Mele altercation (Resp Br: 33). However, Dr. Morra also determined that Respondent "felt fixated on all the embarrassment around the public incident of the altercation with his neighbor" (Morra: 911-12), again highlighting that his true purpose in seeking counseling may not have been to

address the issues which led to his behavior in June 2020. That is further reflected by Dr. Morra's notation that Respondent was "not fully adherent" with his medical recommendations, insofar as Respondent stopped taking a prescribed medication without consulting Dr. Morra and ultimately stopped seeing him entirely (Morra: 918, 922-23).

In sum, the therapists who testified on Respondent's behalf provided conclusions that are undermined by contradictory video evidence and undercut by the fact that Respondent's primary fixation was on the consequences of the Commission proceeding – not his conduct on June 22, 2020.

To the extent that personal stressors found by some of the therapists could be viewed as mitigating, the Court of Appeals has held that, "in rare cases 'no amount of [mitigation] will override inexcusable conduct' . . . sufficient to restore the public's trust in the judge's ability to faithfully execute his or her duties." *Matter of Restaino*, 10 NY3d 577, 587 (2008) (citing *Matter of Bauer*, 3 NY3d 158, 165 [2004] and *Matter of Blackburne*, 7 NY3d 213, 220, 221 [2006]) (removing judge for courtroom outburst resulting in the detention of 46 spectators, despite psychiatrist's characterization of judge's "eruption as the 'last straw' of suppressed frustration"). The Commission should reach the same conclusion here.

B. The testimony of the judges and attorneys who testified on Respondent's behalf should be given little weight.

The Commission should give little weight to the character testimony of the five judges and attorneys who took the stand in support of Respondent. None understood the full scope of the evidence against him, as they neither witnessed the brawl nor reviewed the entirety of the video evidence (*see* Pigott: 742-45; Schule: 762; Elmore: 789; Buscaglia: 887).

Two of the judges who testified seemed unaware of the well-settled rule that judges must observe high standards of conduct "on or off the bench." *See Kuehnel*, 49 NY2d at 479. Judge Pigott made the startling statement that although he "d[i]dn't know the whole circumstances" of Respondent's role in the brawl, that misconduct did not change his opinion of Respondent's fitness to serve "because he wasn't acting as a judge" at the time (Pigott: 745). After Judge Feroleto received a letter from Ms. Mele following the brawl, she wrote a response similarly defending Respondent by noting that his offending conduct had taken place outside of court. Her supervising judge admonished her for those inappropriate comments (Feroleto: 708-11; Ex 33). Considering that both Judges Pigott and Feroleto erroneously believed that off-the-bench conduct does not affect one's fitness to be a judge, their conclusory testimony that Respondent is fit to serve deserves little weight.

The laudatory testimony offered by attorneys John Elmore and Nelson Schule is particularly troubling. Both Elmore and Schule had civil cases worth $25,000 or more pending in front of Respondent at the time of the hearing (Schule: 763-64; Elmore: 781, 791-92). Given their obvious conflicts of interest, and their extremely limited knowledge of the misconduct at issue, these witnesses should not be credited. Their opinions of Respondent's effectiveness as a judge are irrelevant to the Commission's "mandate," which is to "protect the integrity of the courts . . . not to evaluate the effectiveness of a judge." *Matter of Miller*, 2021 Ann Rep of NY Commn on Jud Conduct at 197, 217, *aff'd* 35 NY3d 484 (2020). Thus, such opinions do not mitigate extrajudicial misconduct that renders a judge unfit to serve. *See id*.

POINT IV

RESPONDENT SHOULD BE REMOVED FROM JUDICIAL OFFICE, AND THE PRECEDENT HE CITES DOES NOT COMPEL A DIFFERENT CONCLUSION (Answering Respondent's Brief, pp 39-48).

Respondent's misconduct is egregious and varied. On June 22, 2020, he instigated and repeatedly escalated a public dispute with his neighbors, during which he screamed profanities and brawled bare-chested in the street despite several opportunities to avoid a violent confrontation by simply walking away. When the police arrived to investigate, he physically shoved an officer, threatened the police, insinuated that he should receive preferential treatment because he was friends with high-ranking BPD officials and the Mayor of Buffalo, and lied to the

police about his role in the brawl to minimize his culpability (*see* Comm Br: 6-19). The overwhelming evidence of his shocking and disgraceful conduct surrounding the brawl – much of which was captured on video – would compel Respondent's removal from office, even if there were no other misconduct in the record.

However, beyond the egregious behavior associated with the Mele brawl, Respondent committed additional serious misconduct, insofar as he: (1) permitted an attorney who purchased his former legal practice to appear before him in at least eight matters, awarding him thousands of dollars in fees while taking monthly payments from him, without addressing the issue of recusal or disclosing the relationship; (2) underreported the amount of money he made from the law-firm sale on his 2015 Financial Disclosure Statement to the Ethics Commission of the Unified Court System; and (3) from 2015 through 2019, failed to report his earnings from the sale of his law practice to the clerks of his courts, as required by law. For the totality of Respondent's misconduct, viewed "in the aggregate" as it must be (*Miller*, 35 NY3d at 490; *Matter of O'Connor*, 32 NY3d 121, 128-29 [2018]), no sanction other than removal is appropriate.

In arguing to the contrary, Respondent cites several cases in which a judge was censured or admonished for misconduct similar to <u>one</u> – or at best <u>some</u> – of the many indefensible acts Respondent committed (Resp Br: 39-49). But in none of those cases, and in no case of which Commission Counsel is aware, did a judge commit misconduct of a breadth and severity paralleling Respondent's

transgressions and remain on the bench. Indeed, the facts underlying Respondent's misconduct are so egregious that his memorandum entirely omits a factual recitation of what happened on June 22, 2020, which itself is telling. But the fact that no prior Commission matter perfectly incapsulates Respondents circumstances is not surprising; after all, "[j]udicial misconduct cases are, by their very nature, *sui generis*." *Blackburne*, 7 NY3d at 219-20; *see also Matter of Ayres*, 30 NY3d 59, 64 (2017).

In *Blackburne*, the Court of Appeals found that a single act of egregious misconduct in an otherwise unblemished judicial career warranted removal. Here, Respondent's multiple acts of egregious misconduct warrant no less. His indisputable and indefensible off-the-bench misconduct during and after the Mele brawl, the unjustifiable on-the-bench misconduct involving his serious financial conflicts with attorney Lazroe, and his various financial reporting failures, have combined to disqualify him from continued service on the bench. He should be removed from judicial office.

CONCLUSION

Counsel to the Commission respectfully requests that the Commission confirm all Findings of Fact and Conclusions of Law in the Referee's Report, find that Charges I, II and III are sustained and issue a determination recommending Respondent's removal from office.

Dated: August 17, 2023
Rochester, New York

Respectfully submitted,

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