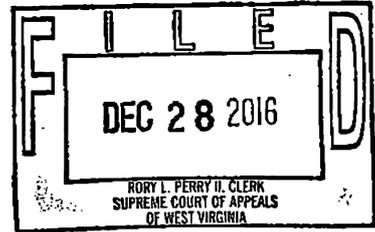


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No.: 16-0670

**IN THE MATTER OF:
THE HONORABLE STEPHEN O. CALLAGHAN
JUDGE-ELECT OF THE 28TH JUDICIAL CIRCUIT**



RESPONDENT'S BRIEF

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I. Questions presented

A.

Whether the Judicial Investigation Commission (JIC) and the Judicial Hearing Board (JHB), which only have jurisdiction to hear matters involving a "judge," as repeatedly stated throughout the West Virginia Rules of Judicial Disciplinary Procedure (WVRJDP), acted outside of their jurisdiction by proceeding against a "judicial candidate," who was not yet a judge?

B.

Whether the free expression of opinion and use of parody or rhetorical hyperbole in a campaign flyer as well as the truthfulness of the facts asserted therein is protected fully by the First Amendment, nullifying any attempt to punish a judicial candidate for alleged ethics violations for exercising this fundamental constitutional right?

C.

Alternatively, in the event some of the alleged ethics provisions survive constitutional strict scrutiny and some of the violations are found to be proven, whether the recommended sanctions are far in excess of the sanctions issued by this Court and by other jurisdictions in similar cases?

II. Statement of the case

On July 18, 2016, the JIC issued a **FORMAL STATEMENT OF CHARGES** against Respondent Stephen O. Callaghan, alleging as a result of one campaign flyer that was mailed once,

he had violated Rule 4.1(A)(9), Rule 4.1(B), Rule 4.2(A)(1), Rule 4.2(A)(3),¹ Rule 4.2(A)(4), and Rule 4.2(A)(5) of the West Virginia Code of Judicial Conduct (WVCJC) and Rule 8.2(a) and Rule 8.2(b) of the West Virginia Rules of Professional Conduct (WVRPC). (JOINT EXHIBIT No. 2). On August 15, 2016, Respondent filed his verified ANSWER denying he had violated any of the ethics rules cited. (JOINT EXHIBIT No. 3).

At the hearing held on November 21, 2016, Respondent, Brad Heflin, who is an account executive for Rainmaker, Inc., retained by Respondent to assist him in his campaign, and the Honorable Judge Gary L. Johnson testified. On November 29, 2016, the JHB issued a 42-page **RECOMMENDED DECISION**. In this **RECOMMENDED DECISION**, the JHB dismissed two of the counts—alleged violation of WVCJC Rule 4.1(B), and WVRPC Rule 8.2(b)—as redundant. *See* Order, November 30, 2016. After analyzing the facts and the applicable law, the JHB recommended that Respondent be censured as a judicial candidate, suspended from practicing as a lawyer and serving as a judge for a concurrent period of one year, fined \$15,000, and ordered to pay the costs of the proceeding for violating three provisions of the WVCPC and one provision of the WVRPC.²

¹On November 3, 2016, based upon the motion of Petitioner Judicial Disciplinary Counsel without objection from Respondent, the JHB entered an order dismissing the alleged violation of Rule 4.2(A)(3).

²In this **BRIEF**, Respondent will cite to certain factual and legal conclusions reached by the JHB in its **RECOMMENDED DECISION**. Respondent respects the JHB and recognizes the JHB is an entity created by this Court consisting of judges and lay people, whose main concern is making sure judges live up to the high standards required under the WVCJC. Respondent fully intends to abide by these standards and denies he has violated any of them. However, it is apparent the JHB, rightly or wrongly, took great offense to the campaign flyer at issue in this case and its findings and conclusions consistently are written in the harshest manner against Respondent.

The JHB's hypertechnical reading of the flyer, which, if the JHB had its way, should have been written as a press release for Judge Johnson touting his interest in helping to implement child

On November 30, 2016, Respondent filed his objections to this ruling, asserting the JIC and JHB lacked jurisdiction over a “judicial candidate” who was not a judge, challenging the constitutionality both facially and as applied of the ethics rules cited, and objecting to the harshness of the sanctions recommended, which are far in excess of any prior decisions from this Court as well as being inconsistent with case law from other jurisdictions.

In the November 21, 2016 hearing, the following relevant facts were developed, consisting of testimony and a JOINT EXHIBIT Notebook submitted by the parties.

Respondent graduated from West Virginia University in 1988, and from the Thomas M. Cooley Law School in 1994. (Hearing Tr. 7-8). After being admitted to the West Virginia State Bar in 1994, Respondent joined his small family run law firm with his wife Julia Callaghan, in Nicholas County, where they handle a variety of real estate, criminal, mineral rights, and civil issues. (Hearing

trafficking laws rather than a political ad for Respondent, and the tone of some of the JHB’s findings and conclusions reflect a very negative attitude against Respondent and in favor of Judge Johnson, who had a long and distinguished judicial career. For example, in Conclusion of Law No. 42(e), the JHB states, “**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?” (Emphasis added). The obvious answer is he could have made speeches, used social media, robocalls, and any other communication system to respond to the political speech contained in the flyer. Political speech is supposed to engender more, not less, political speech. In the Aggravating Circumstances section of the **RECOMMENDED DECISION**, the first aggravating factor cited by the JHB is “**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.” (Emphasis added). Are there any members of this Court who selfishly in their hearts sought to defeat their opponents instead of running for some more noble reason?

While Respondent respects the JHB and the considerable effort the JHB exerted in putting together its **RECOMMENDED DECISION**, in this **BRIEF**, Respondent is obligated to note where the JHB’s findings and conclusions were not supported by the facts or the law.

Tr. 8-9). In fact, Respondent is a third generation Nicholas County lawyer. (Hearing Tr. 62). Respondent also served as the municipal judge in Summersville and city attorney in Richwood. (Hearing Tr. 9-10). Prior to the present case, Respondent had never before been the subject of any legal ethics investigation. (Hearing Tr. 103).

In March or April of 2015, Respondent decided he was going to run to be elected as Nicholas County Circuit Court Judge. (Hearing Tr. 10). Prior to this election, Respondent had never before run for any elected office. (Hearing Tr. 60). His opponent was incumbent Judge Johnson. (Hearing Tr. 11). As anyone who has run for elected office knows, running a successful campaign involves a lot of work. Respondent explained how in May, 2015, prior to hiring Rainmaker, Inc., as a political consultant to assist with his campaign, he ran small ads in the newspaper, developed a social media campaign, attended many spaghetti or bean dinners, engaged in bluegrass picking sessions, participated in parades, and handed out footballs to meet as many Nicholas County voters as possible. (Hearing Tr. 60-61).

Some time in December, 2015, Respondent met and spoke with Brad Heflin, who is an account executive employed by Rainmaker to retain their services to assist him in this campaign. (Hearing Tr. 15). Mr. Heflin testified that in the course of his professional career, he had been involved in at least four judicial campaigns and was familiar with the WVCJC. (Hearing Tr. 69-70). Prior to creating any campaign materials for Respondent, Mr. Heflin explained his normal practice is to have a survey conducted "to ascertain the mood of the electorate and to test any issues that we think may come up." (Hearing Tr. 72).

Mr. Heflin explained how a market research survey helps to identify the issues and concerns of the voters that should be addressed in the campaign materials to be created:

Well, a survey is -- number one, we want to test the attitudes and opinions and the mood of the electorate. And we also want to determine what the level of investment the candidate may need to make if they have significant name identification issues, if there any issues out there regarding a particular thing that may have happened in the community. You want to know -- you might ascertain people's opinion on it.

You know, it's important to do that because, you know, if you don't -- if you don't have the resources to test your messaging, you know, you're just kind of flying blind. (Hearing Tr. 94).

Before putting the poll questions together, Mr. Heflin conducted research into what information he could find regarding Respondent and Judge Johnson. (Hearing Tr. 72-73). Once this research was completed and the questions were finalized, Mr. Heflin retained the services of a company to conduct an automated market research poll. (Hearing Tr. 79). "A market research poll is designed to study the opinions and attitudes" of the group being studied. (Hearing Tr. 79). Mr. Heflin specifically and unequivocally denied that this was a push poll, which is not designed to study the attitudes of people, but rather is designed to persuade.³ (Hearing Tr. 79). The response to

³The JHB did not appear to understand the differences between a market research poll and a "push poll." In fact, in footnote 5 of its **RECOMMENDED DECISION**, the JHB implies that the market research survey was a push poll, at least with respect to the question about President Obama. Because this implication came as a complete surprise to Respondent, attached to this **BRIEF** is an affidavit from Mark Mellman, who is the President of the American Association of Political Consultants (AAPC). Attached to his affidavit is the AAPC "Statement on Push Polling" and a Marketing Research Association paper entitled "Push polls'—Deceptive Advocacy/Persuasion Under the Guise of Legitimate Polling: MRA Position Paper." As Mr. Mellman explains, the AAPC refers to push polls as persuasion polls because they are not used to measure public opinion, but rather are intended to persuade the person called about a particular position. Although Petitioner does not assert that the survey conducted was a "push poll," Respondent wanted to make sure the Court had available to it this information so that the final decision issued does not repeat the same mistake made by the JHB.

Furthermore, while "push polls" are rejected by the members of the AAPC as improper and unethical and are illegal under W.Va.Code §3-8-9(a)(10), this Court has never addressed any convictions under this statute. Respondent was unable to find any "push poll" criminal conviction

Question No. 6--“If the election for Circuit Judge were held today, would you vote for Gary Johnson of Richwood or Steve Callaghan of Summersville?”--demonstrated Respondent had a chance of winning this election because the results were within the margin of error. (Joint Exhibit No. 6). According to Mr. Heflin, “[T]he race was a dead heat in the beginning.” (Hearing Tr. 88).

This automated survey was conducted January 28 through 30, 2016. (Joint Exhibit No. 6, at faxed page 9). A review of the questions reveals positive statements were made regarding Respondent and Judge Johnson as well as negative statements. After providing either a positive or negative statement, the same question about who the person would vote for would be repeated to see how the addition of positive or negative information impacted the person’s voting decision.

For the survey, 22,000 numbers were called, only 3,919 calls were answered by a human, and only 834 people actually answered the initial question. (*Id.*; at page 27). It is not disputed that Respondent had final approval for all of the survey questions. (Hearing Tr. 85-86). Question 9B in this survey stated and asked, “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 junket highlighting issues of importance to President Obama.” If the person taking this automated survey remained on the line for this question, such person was asked to state whether this assertion was a major concern, some concern, no real concern, or don’t know. Only 354 people answered this question. (Joint Exhibit No. 6, at faxed page 29).

in any other jurisdiction, most likely because this statute, as well as W.Va.Code §3-8-11(c), which criminalizes false political speech, are unconstitutional on their face. Similar statutes criminalizing false political speech around the country have been addressed and found to be unconstitutional and invalid. *Commonwealth v. Lucas*, 472 Mass. 387, 34 N.E.3d 1242 (Mass.Sup.J.Ct. 2015); *281 Care Comm. v. Arneson*, 766 F.3d 774, 785 (8th Cir.2014).; *Susan B. Anthony List v. Driehaus*, 574 Fed.Appx. 596 (6th Cir. 2014); *Susan B. Anthony List v. Driehaus*, ___ U.S. ___, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014); *Susan B. Anthony List v. Driehaus*, 45 F.Supp.3d 765, 771 (S.D. Ohio 2014); *Rickert v. State Public Disclosure Commission*, 161 Wash.2d 843, 168 P.3d 826 (2007); *Magda v. Ohio Elections Commission*, 58 N.E.3d 1188 (Ohio Ct.App. 2016).

Mr. Heflin explained why this question was included:

Well, I'm expressing an opinion here, and it's an editorial statement. The people of Nicholas County need to be aware of what their elected officials are doing in public office, and part of that is presenting that argument to the voters. (Hearing Tr. 81).

As a result of the research and the survey results, Rainmaker created five separate campaign flyers designed to address issues and concerns of the Nicholas County voters. All five flyers were approved by Respondent. (Hearing Tr. 40). The flyers were mailed after early voting started. There was no intent on the part of Respondent to delay the mailing of the flyers so that Judge Johnson would not have any opportunity to respond to them. (Hearing Tr. 42-43). One flyer entitled "Children are our most precious resource," introduced Respondent as a family man and a champion for children. (Joint Exhibit No. 27). Another flyer entitled "Sometimes, changes are necessary," discussed Respondent's plans to aggressively target drug abuse. (Joint Exhibit No. 28). A third flyer entitled "Drug courts are curbing drug crime and addiction," touted Respondent's plan to use the drug court, which had not yet had any graduates in Nicholas County, to help address drug abuse. (Joint Exhibit No. 29). A fourth flyer entitled "There's a hidden price to Justice in Nicholas County," criticized the imposition of fees for juvenile drug court.⁴ (Joint Exhibit No. 30).

⁴In Conclusions of Law Nos. 12 through 21, the JHB analyzed the content of these additional campaign flyers and found some of the assertions to be inaccurate. Respondent was never placed on notice prior to the hearing that the substance of these additional flyers was going to be included in the charges leveled against him. Respondent added these flyers to the record to demonstrate Respondent only referenced the President Obama flyer once and to place that flyer in the context of his overall campaign, which is the procedure followed in cases from other jurisdictions seeking to punish a judge or judicial candidate for political speech. However, ultimately, the JHB concluded while certain assertions in these other flyers may have been false and misleading, such assertions were the result of negligence and, therefore, cannot be the basis for any alleged violation of the WVCJC, which requires intentional acts.

It is in this context, where Respondent's campaign flyers were designed based upon the concerns reflected in the market research survey, that the campaign flyer at issue should be viewed.

This flyer, entitled "Barack Obama & Gary Johnson party at the White House..." on the front has a photoshopped image of President Barack Obama on the left, appearing to be holding a mug of beer, beside a photoshopped image of Judge Gary Johnson, with multi-colored streamers falling around their images. (Joint Exhibit No. 1). The back of this flyer is headed "While Nicholas County loses hundreds of jobs." Below that heading is the following in what appears to be a pink slip:

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. (Bold in original).

The front of this flyer is a colorful and humorous way of getting across the message that Judge Johnson attended an event at the White House. Clearly the photoshopped images, the fake streamers, the fake beer, and the use of the word "party" is intended as parody and not intended to be taken literally.⁵ The idea that the President of the United States would "party" with a Nicholas County Circuit Court Judge is ridiculous on its face. A boring way of saying the same thing would be "Judge

⁵In Conclusion of Law No. 23, the JHB found the alleged violation of WVCJC Rule 4.1(A)(9) was proven and later in Conclusion of Law No. 45, the JHB also found the redundant alleged violation of WVRPC Rule 8.2(a) similarly was established. In Conclusion of Law 45(a), the JHB took this photoshopped image literally and held it was materially false and misleading. In Conclusion of Law Nos. 33 and 37, the JHB simply asserts the front of the flyer cannot be considered as parody or rhetorical hyperbole. The JHB's analysis is inconsistent with the First Amendment cases cited later in this **BRIEF** and reflects an arbitrary notion of what parody and rhetorical hyperbole mean.

Johnson attended an event at the White House.” Thus, the fact that Respondent used poetic license, parody, or rhetorical or visual hyperbole to convey this message not only is protected by the First Amendment, but also is not a false statement because it is not intended to be taken literally.

The JHB in Finding of Fact No. 20 states this flyer “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.” Clearly the flyer speaks for itself and just as clearly it does not say what the JHB asserts. The flyer simply says Judge Johnson attended an event at the White House at a time when Nicholas County lost hundred’s of jobs due to President Obama’s coal policies.⁶ The fact that Judge Johnson attended an event at the White House is true, the fact that this meeting was held in connection with part of President Obama’s legislative agenda is true, the fact that this visit occurred at a time when Nicholas County was losing jobs is true, and the assertion that these jobs were being lost due to President Obama’s coal policies simply is a statement of opinion held by some people.⁷

⁶In Conclusion of Law No. 23(b), the JHB asserts the phrase “While Nicholas County lost hundreds of jobs” is materially false. The record fully supports the fact that Nicholas County has lost hundreds of jobs in recent times. (JOINT EXHIBIT No. 6, articles attached). The suggestion that this fact-based assertion is false is not supported by the record. The JHB further asserts there is no connection between Judge Johnson attending the event at the White House and the loss of Nicholas County jobs. Once again, the voters of Nicholas County, and not the JHB, are the people who have the right to decide whether Judge Johnson’s visit to the White House at a time when Nicholas County was losing jobs is relevant or of any significance. If it were up to the JHB, only the facts the JHB deems are connected could ever be asserted in a campaign flyer or ad. Thankfully, the First Amendment allows for much more breathing space than that suggested by the JHB.

⁷In Conclusion of Law No. 25, the JHB asserts all of the statements in the flyer are statements of fact, and not opinion. Respondent respectfully disagrees because whether or not Nicholas County lost jobs due to President Obama’s coal policies is a statement of opinion. Furthermore, voters are free to arrive at their own opinions on whether they liked or disliked Judge Johnson attending an event at the White House at a time when Nicholas County was losing jobs. Finally, in footnote 12, the JHB asserts “almost nothing in the ‘Obama’ flyer is fact-based.” This assertion simply is false,

The flyer does not say that Judge Johnson's support of President Obama's legislative agenda caused the loss of coal jobs in Nicholas County.⁸

Respondent provided the following testimony regarding this flyer:

For the purposes and intent of the flier, it's not -- it's just like me in bed with Hillary Clinton. It's not meant as true or false; it's meant as a parody/hyperbole....

The flier states an opinion that Judge Johnson was at the White House at a conference at a time when Nicholas County was hurting....

The opinion stated in the flier is that he is at a conference or an event or accepted an invitation from the White House -- was at the White House when Nicholas County was in bad shape. Some people might think that's a great thing; some people might not agree with that. But it's up to the voter to read the flier, if they do at all, and make up their own mind....

I saw it as I believe it was intended as Judge Johnson had touted his visit to the White House, so we just parodied that visit. And let the voters decide if they think it was a good time for him to be at the White House or not.

(Hearing Tr. 38, 44, 59, and 63).

as demonstrated by the undisputed facts stated above.

⁸In footnote 10 of the **RECOMMENDED DECISION**, the JHB rejects this common sense analysis of this flyer and claims the interpretation offered by Respondent is "preposterous." Respondent respectfully disagrees with the JHB's analysis on this point. Quite frankly, the JHB does not give any credit to the voters of Nicholas County, who are fully capable of considering all of the political speech available and conducting their own review of the relevant facts before making a final decision.

Even more ridiculous is the assertion in footnote 11 that Judge Johnson may have violated the WVCJC if he had turned down the visit to the White House. While little is gained by engaging in such a hypothetical discussion, Respondent respectfully submits there are no prohibitions in the WVCJC that would have prevented Judge Johnson from declining this visit to the White House.

Respondent further noted the public already had access, through news articles and Judge Johnson's own Facebook posts, of the specific reasons why Judge Johnson attended an event at the White House. (Hearing Tr. 58; *see also* Joint Exhibit No. 5 and the articles attached thereto). In fact, Judge Johnson touted his visit to the White House as part of his campaign. (Hearing Tr. 59). Mr. Heflin also concurred that any voter wanting more specific information on Judge Johnson's visit to the White House would have access to the same public materials he had found when he conducted his research. (Hearing Tr. 98-99).

Mr. Heflin explained his view of this campaign flyer:

Photoshopping was used to basically -- we were trying to create a parody -- to create a piece of -- something humorous and something that would help create the theatre of the mind we were looking for. And what we did is we took two images -- two separate images of these two individuals and created -- put them in what is obviously not a real background. This is not meant to be a depiction of an actual event. (Hearing Tr. 97).

Mr. Heflin denied that this campaign flyer violated any provision in the WVCJC and further stated if he had thought this flyer was in any way improper, he never would have used it. (Hearing Tr. 99).

The JHB asserts in Finding of Fact No. 25 that Respondent took these "two wholly unrelated events"--Judge Johnson attending a child trafficking seminar at the White House at a time when Nicholas County was losing jobs--and incorporated them as part of the market research survey. Respondent respectfully submits it is up to the voters to decide whether these "two wholly unrelated events" have any significance to them in making their decision on which candidate they decided to support. Moreover, the JHB consistently reads a more sinister purpose in to the flyer when the flyer, on its face, can be viewed as a criticism of Judge Johnson attending an event at the White House at

a time when Nicholas County was losing jobs attributed, in part, by some people to President Obama's coal policies. Whether Judge Johnson was attending a White House event to learn about child trafficking or any other policy agenda, the Nicholas County voters had the right to form their own opinions on whether he should have attended the White House event when Nicholas County was suffering so many jobs lost in the coal industry. Thus, it is up to the voters, not the JHB, to decide whether these two events are "wholly unrelated."

On May 5, 2016, on or about the day this particular campaign flyer was sent out, Respondent received a telephone call from Petitioner criticizing this flyer and demanding that Respondent take immediate action. That same day Petitioner and Respondent exchanged emails with each other. (JOINT EXHIBIT No. 6, Exhibits B, C, and D). Respondent complied with all of Petitioner's requests, including the removal of the flyer from Facebook and agreeing to run several radio ads a total of eight times over a three day period. (Hearing Tr. 52). The radio ads stated:

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. This message paid for by Callaghan for Judge 2016, Wayne Young, Treasurer." (Joint Exhibit No. 17).

Petitioner explained to Respondent in the email exchange:

You have also agreed to run four radio ads saying the same thing tomorrow and four on Saturday or Monday during prime listening times. You should provide me with the radio ad and a list of times when it is to run. **If the Facebook post and radio ads are sufficient I will not open a judicial ethics complaint against you.** If you fail to promptly take action or fail to take appropriate action I will pursue the violations contained in the Code and the Rules by initiating a

complaint against you. (Emphasis added). (JOINT EXHIBIT No. 6, Exhibit B).⁹

Thus, Petitioner specifically told Respondent if he took these immediate actions, which he did, Petitioner would not open a judicial ethics action against him. In other words, Petitioner believed these remedial measures were sufficient to address whatever concerns Petitioner had with this one campaign flyer. These initial assertions stand in sharp contrast to the position asserted in **PETITIONER'S BRIEF**, in which Petitioner now seeks to persuade this Court to suspend Respondent from earning any livelihood for two whole years.

In his May 5, 2016 email response to Petitioner, sent at 7:02 p.m., Respondent explained he already had taken the following actions:

1. Removed all images/tags of the advertisement from his campaign Facebook page;
2. Notified Rainmaker of the issue;
3. Issued a statement on his campaign Facebook page apologizing for any misunderstanding that may have been caused by the mailer and acknowledging the mailer was inappropriate; and
4. Arranged to run a radio spot prior to the election apologizing and admitting the mailer was inappropriate. The ad was placed on a station that covers Nicholas County and was scheduled to run four times per day, for two days. The radio station was

⁹Respondent did everything Petitioner asked him to do, and he did so very quickly. As a result of Respondent's corrective actions, the JHB found in Conclusion of Law No. 44 the alleged violation of WVCJC Rule 4.2(A)(5) was not proven. Despite this finding, the JHB nevertheless found in Conclusion of Law No. 43 that Respondent had violated WVCJC Rule 4.2(A)(4), for failing to take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities the candidate is prohibited from taking. Respondent took full responsibility for his campaign, the market research survey, and all of the campaign flyers. Respondent reviewed and approved everything. Mr. Heflin did not take any action that was not otherwise approved by Respondent. When Respondent received the call from Petitioner, he then quickly took all of the measures suggested and informed Mr. Heflin about what needed to be done. There simply is no evidence in this record remotely supporting the JHB's conclusion that Respondent somehow violated WVCJC Rule 4.2(A)(4).

instructed not to run these ads in the middle of the night. (JOINT EXHIBIT NO. 6, Exhibit C).¹⁰

Respondent also described what actions Judge Johnson and/or his supporters took in connection with this flyer:

The Johnson campaign -- I described before--they got their mileage out of this flier. When it came out, they called me a liar even though it's not intended as a lie or to be misleading. And then when 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.

But I'm thick-skinned. I can take that. I was just going to keep working until the day before the election. That's what I did. But they -- and, in fact, 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. (Hearing Tr. 65-66).

In addition to Respondent's quick actions to alleviate the concerns expressed by Petitioner, Respondent also testified at the hearing that he regrets all of the controversy generated by this one campaign flyer. (Hearing Tr. 66-67).

¹⁰In explaining why he acted so quickly, Respondent further noted in this email:

When we talked you indicated that these actions would be an acceptable manner to resolve this issue informally.
I am taking these actions [in] order to resolve this issue.
If a complaint is filed despite my corrective actions I do not intend these actions to be taken as any admissions and I reserve all defenses.
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 directions. (*Id.*)

III. Summary of argument

The WVRJDP, which are the rules adopted by this Court delegating what authority the JIC and JHB have, limits the jurisdiction of the JIC and JHB to “judges.” The WVCJC, which are the ethics rules adopted by this Court, applies to judges and judicial candidates. Based upon the language used by this Court in these rules, the JIC and the JHB have not been delegated jurisdiction to investigate and prosecute ethics actions against judicial candidates who are not judges. Jurisdiction cannot be based on the *in pari materia* rule of statutory construction because under these facts, this doctrine supports the conclusion that the JIC and JHB lack jurisdiction over judicial candidates who are not judges. Similarly, the various rules and cases from this Court cited do not provide a basis for jurisdiction in this case.

Under the strict-scrutiny test, respondents have the burden to prove that restriction on political speech is (1) narrowly tailored to serve (2) a compelling state interest. In order for respondents to show that an ethics rule is narrowly tailored, they must demonstrate that the rule does not unnecessarily circumscribe protected expression.

For WVCJC Rule 4.1(A)(9) and WVRPC Rule 8.2(a) to survive strict scrutiny in the context of political speech, the following general factors must be considered in narrowly tailoring these ethics rules:

1. Opinion, parody, and rhetorical hyperbole are protected by the First Amendment and cannot be used as the basis for seeking ethics sanctions against a judicial candidate or lawyer;
2. The assertion of multiple facts, which may or may not be related to each other and which may or may not be misleading or cause misleading inferences, are protected by the First Amendment and cannot be used as the basis for seeking ethics sanctions against a judicial candidate or lawyer;

3. The negligent assertion of a fact that objectively is false is protected by the First Amendment and cannot be used as the basis for seeking ethics sanctions against a judicial candidate or lawyer;
4. If the communication conveys an inaccuracy, the communication as a whole must be analyzed to determine whether the “the substance, the gist, the sting” of the communication is true despite the inaccuracy. If the gist or sting of the communication is true, then the communication is protected by the First Amendment and cannot be used as the basis for seeking ethics sanctions against a judicial candidate or lawyer; and
5. Only the assertion of material facts that knowingly are false or that are expressed with reckless disregard for the truth of such facts can be the basis for ethics sanctions against a judicial candidate or lawyer.

The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth. The more modern recitation of this longstanding and fundamental principle of American law was recently articulated by Frank Underwood in *House of Cards*: “There’s no better way to overpower a trickle of doubt than with a flood of naked truth.”

Based upon this narrow application of WVCJC Rule 4.1(A)(9) and WVRPC Rule 8.2(a), Respondent either has asserted statements protected by the First Amendment as opinion, parody, or rhetorical hyperbole or that are objectively true or that are substantially true. Similarly, because the alleged violations of WVCJC Rule 4.2(A)(1), and WVCJC Rule 4.2(A)(4), are based upon the same campaign flyer, these rules also were not violated. Thus, all of the charges levelled against Respondent must be dismissed as a matter of law.

The majority of similar judicial campaign code violation cases have resulted in fines, public reprimands, and/or censures against judicial candidates for engaging in materially false political speech. The recommendation of a one- or two-year suspension of Respondent’s law license, under

these facts, is far in excess of the sanctions imposed by this Court in other cases as well as the sanctions imposed in other jurisdictions and would have a devastatingly chilling effect on lawyers pondering the idea of running for a judicial office.

IV. Statement regarding oral argument and decision

The Court previously determined this case will be argued on January 10, 2017, pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure. Due to the serious constitutional issues raised, Respondent respectfully submits the decision should be authored by a Justice rather than being relegated to a memorandum decision.

V. Argument

A. The JIC and the JHB, which only have jurisdiction to hear matters involving a “judge,” as repeatedly stated throughout the WVRJDP, acted outside of their jurisdiction by proceeding against a “judicial candidate,” who was not yet a judge

The WVRJDP, which are the rules adopted by this Court delegating what authority the JIC and JHB have, limits the jurisdiction of the JIC and JHB to “judges.” The WVCJC, which are the ethics rules adopted by this Court, applies to judges and judicial candidates. Thus, the jurisdictional question presented is whether the JIC and the JHB have jurisdiction to pursue an ethics action against a judicial candidate when there is no dispute the WVRJDP clearly covers only judges. As will be discussed below, Respondent’s jurisdictional argument is identical to the jurisdictional argument asserted by the JIC in *In re: Edward Kouhout*, No. 15-1190. However, despite the lack of any amendment to the WVRJDP since the *Kouhout* decision, the JHB and the JIC in this case decided to adopt a contrary position to the argument they previously asserted.

Respondent initially raised this jurisdictional issue in a **PETITION FOR A WRIT OF PROHIBITION** filed on November 9, 2016. When the Court issued an order on November 15,

2016, refusing to grant the rule to show cause, Respondent then filed **RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION** before the JHB on that same date.

In the November 18, 2016 order, the JHB denied **RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION**, concluding the WVRJDP and the WVCPC had to be read *in pari materia* to conclude the JIC and JHB have jurisdiction over judges and judicial candidates. The JHB also based this decision on some published and unpublished decisions by this Court and finally asserted Respondent's argument would lead to the absurd result that one set of rules applies to judges while another set applies to judicial candidates. Respondent respectfully submits the assertion of jurisdiction in this case is contrary to the specific rules adopted by this Court, contrary to the case law cited, and does not lead to any absurd result.

The JHB relies heavily on *Manchin v. Dunfee*, 174 W.Va. 532, 327 S.E.2d 710 (1984), for the proposition that to fill in the blanks to stretch the jurisdictional authority of the JHB and the JIC to include judges and judicial candidates, the rule of statutory construction known as the doctrine of *in pari materia* must be applied. Stated simply, this argument would have the WVRJDP and the WVCJC read together to reach the conclusion that somehow the JHB and the JIC have jurisdiction over judicial candidates, despite the specific language in the WVRJDP to the contrary.

Actually, *Manchin* fully supports Respondent's argument that the JHB and the JIC lack jurisdiction. In Syllabus Point 3 of *Manchin*, this Court held:

In the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*; the express mention of one thing implies the exclusion of another, applies.

As applied in the present case, when this Court defined "judges" in WVRJDP Rule 2 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,” the failure to include “judicial candidate” in this definition must be deemed to be intentional. Furthermore, the definition chosen by the Court does not provide any general words that could be stretched to include “judicial candidates.”

Because the repeated use of the word “judges” throughout the WVRJDP is consistent, clear, and unambiguous, Syllabus Point 4 of *Manchin* similarly supports Respondent’s arguments:

“The rule that statutes which relate to the same subject should be read and construed together is a rule of statutory construction and does not apply to a statutory provision which is clear and unambiguous.” Syllabus Point 1, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951).

There is nothing ambiguous about the Court’s definition of “judges” in the WVRJDP. The Court could not have made it any clearer that although judicial candidates were included in the WVCJC, they were not covered by the WVRJDP, from which the JHB and the JIC obtain their jurisdictional authority.

Finally, in discussing the application of the *in pari materia* doctrine, this Court noted, “The rule is most applicable to those statutes relating to the same subject matter which are passed at the same time or refer to each other or amend each other. A diminished applicability may be found where statutes are self-contained and have been enacted at different periods of time.” 174 W.Va. at 536, 327 S.E.2d at 714. After applying this analysis, the Court in *Manchin* concluded the statutes at issue were self-contained and could not be read *in pari materia*.

According to this Court’s website, the WVCJC originally was adopted on October 21, 1992, effective January 1, 1993, and was extensively amended by order issued November 12, 2015. In contrast, the WVRJDP were adopted May 25, 1993, and became effective July 1, 1994. Significantly, the WVRJDP have never been amended since they were first adopted and, in particular, were not

amended in 2015, to be consistent with any changes made in the WVCJC. Because the WVRJDP and the WVCJC were adopted at separate times and each are self-contained, the doctrine of *in pari materia* simply is inapplicable under these facts.

The JHB also relied upon some decisions by this Court to support its jurisdictional ruling. In *Kouhout*, a lawyer who was not a judge, but was a candidate for a Monongalia County Circuit Court Judge position, was being investigated for certain alleged violations of the WVCJC. In a brief filed on December 9, 2015, with this Court entitled **JUDICIAL INVESTIGATION COMMISSION'S MOTION FOR INJUNCTIVE &/OR DECLARATORY RELIEF**, the JIC argued the word "candidate" was not included in the WVRJDP and, therefore, the JIC lacked any mechanism for seeking immediate relief. On December 21, 2015, this Court entered an unpublished order holding, without citing any authority, "The Judicial Investigation Commission is requesting that this Court make factual determinations in this matter on the basis that the Judicial Hearing Board has no jurisdiction to consider disciplinary charges against candidates for judicial office who are not presently sitting judges....Upon consideration, the Court is of the opinion that the Judicial Hearing Board does have jurisdiction to hear disciplinary charges against candidates for judicial office." How the Court reached this legal conclusion, based upon its own WVRJDP, is not made clear in this unpublished order.

The fact that the JHB and the JIC have exercised jurisdiction over a judicial candidate in *Kouhout*, a lawyer who committed unethical acts while he was still practicing law and before he was elected as a judge in *Matter of Karr*, 182 W.Va. 221, 387 S.E.2d 126 (1989), and a former judge who no longer was a judge by the time the JHB and the JIC acted in *West Virginia Judicial Hearing Board v. Romanello*, 175 W.Va. 577, 336 S.E.2d 540 (1985), does not answer the question raised in the present case. The cases cited do not provide anyone with a rational or reasoned explanation as to how

the JHB and the JIC have any jurisdiction over a judicial candidate. It is not clear from these cases whether or not the specific delegation of authority argument raised in the present case was ever briefed or argued in these other cases.

In denying Respondent's motion, the JHB cited Rule 1.11 of the WVRJDP. While Rule 1.11 certainly delegates general authority to the JHB and the JIC to investigate, prosecute, and make recommendations regarding possible sanctions against a judge, who violated the WVCJC, this general delegation of authority cannot be the basis for expanding jurisdiction over judicial candidates, who are not mentioned in the WVRJDP.¹¹

The problem with relying on the general language used in Rule 1.11 is that the WVRJDP otherwise repeatedly and consistently are unambiguous that the JHB and the JIC only have jurisdiction to investigate and prosecute ethics violations against "judges," defined in Rule 2 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." The reference only to a judge, and not a judicial candidate, is repeated in Article VIII, Section 8 of the West Virginia Constitution, and WVRJDP Rules 1, 1.10, 1.11, 2, 2.2, 2.3, 2.4, 2.6, 2.7, 2.8, 2.9, 2.10, 2.11, 2.13, 2.14, 3, 3.10, 3.12, 4.2, 4.5, 4.7, 4.8, 4.9, 4.12,

¹¹The attempt by this Court to place restrictions on the content of the political speech used by judges and judicial candidates makes judicial candidates sitting ducks for political action committees (PAC), which are not subject to these same restrictions and can say whatever they want about their judicial opponent with the millions of dollars in secret campaign funds from interests outside of this State. Thus, if the very general language in Rule 1.11 actually provides authority for the JHB and the JIC to expand their jurisdiction to include judicial candidates, then there would be nothing to prevent the JHB and the JIC from asserting it can sanction a PAC. If the JHB and the JIC used this logic to expand its jurisdiction over a PAC, then such action would be as *ultra vires* as the rationale used by the JHB and the JIC in asserting jurisdiction in the present case.

and 4.13. The repeated consistency with which this Court defined “judges,” omitting “judicial candidate” from the definition, is a clear and unambiguous statement by the Court that the JHB and the JIC do not have any jurisdiction over judicial candidates.

WVRJDP Rule 5.4, also relied upon by the JHB in its order, simply provides that Disciplinary Counsel, which consists of Lawyer Disciplinary Counsel and Judicial Disciplinary Counsel, both have the authority to prosecute violations of either the WVRPC or the WVCJC.

Respondent does not deny that the WVCJC specifically includes “judicial candidates” in several of its provisions. However, the JHB and the JIC do not obtain their jurisdictional authority from the WVCJC, but rather only have the jurisdiction delegated to them by this Court in the WVRJDP. The WVCJC spells out the ethical standards that must be met by judges and judicial candidates while the WVRJDP explain how alleged violations of the WVCJC are investigated and prosecuted. While judges and judicial candidates indeed are covered by the WVCJC, this inclusion does not mean the jurisdiction of the JHB and the JIC somehow is expanded similarly to cover judicial candidates, which are not included in the WVRJDP.

The suggestion in the order that Respondent’s argument would lead to an absurd result because there would be two classes of judicial candidates—judges who have to comply with the Code and judicial candidates who do not—is contradicted by the applicable rules and contrary to Respondent’s argument. A lawyer who is a judicial candidate absolutely would have to comply with the WVCJC, but any violation thereof would be handled by the West Virginia Lawyer Disciplinary Board. The Lawyer Disciplinary Counsel has the specific authority to investigate and prosecute violations of both the WVRPC and the WVCJC.

There could be a very rational reason why the Court left the investigation and prosecution of judicial candidates who are not judges to the Lawyer Disciplinary Board. While it is merely

speculation, perhaps the Court believed it was better having the Lawyer Disciplinary Board handle complaints about judicial candidates who are lawyers, but not judges, because the JHB and the JIC may have a tendency to favor incumbent judges and would not view very kindly political speech uttered by a judicial candidate against a fellow judge. Whether or not this was the rationale or if the Court simply forgot to amend the Rules when it amended the Code to add judicial candidates is very speculative and ultimately not very productive. All we can do is accept the unambiguous words actually used by the Court when it delegated authority to the JHB and the JIC, and clearly judicial candidates were not included.

B. The free expression of opinion and use of parody and rhetorical hyperbole in a campaign flyer as well as the truthfulness of the facts asserted therein is protected fully by the First Amendment, nullifying any attempt to punish a judicial candidate for alleged ethics violations for exercising this fundamental constitutional right

In the event the Court decides to stretch its rules somehow as delegating jurisdiction to the JIC and JHB over judicial candidates, then Respondent's next argument is two-fold. First, WVCJC Rule 4.1(A)(9), and WVRPC Rule 8.2(a) are unconstitutional on their face and as applied to these facts, where the campaign flyer contains First Amendment protected opinions and uses parody or rhetorical hyperbole. Because all of the charges levelled against Respondent are based upon this one campaign flyer, all of the charges must be dismissed once the Court determines Respondent's actions are protected by the First Amendment. Second, the record demonstrates the facts asserted in the campaign flyer are based upon research conducted prior to the flyer being mailed, all of the facts are true, and some of the assertions in the flyer either are protected by the First Amendment as opinion, parody, or rhetorical hyperbole.

By adopting WVCJC Rule 4.1(a)(9),¹² and WVRPC Rule 8.2(a), the Court has decided to engage in the very challenging task of deciding when political speech expressed by a judicial candidate is protected by the First Amendment and when such expression can be the basis for issuing sanctions. Before the JHB, Respondent challenged, based upon the First Amendment, the constitutionality, facially and as applied, of WVCJC Rule 4.1(A)(9), and WVRPC Rule 8.2(a). In the November 18, 2016 order, which order was issued the Friday **before** the Monday hearing and which order was incorporated by reference in the **RECOMMENDED DECISION**, the JHB concluded:

1. WVCJC Rule 4.1(A)(9) is constitutional on its face or as applied “to the extent that [this rule] prohibits a judicial candidate from making materially false statements with knowledge of their falsehood or with reckless disregard for their truth.”

¹²WVCJC Rule 4.1(A)(9) provides:

- (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.

WVRPC Rule 8.2(a), which closely mirrors and overlaps some of the language in WVCJC Rule 4.1(A)(9), provides:

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.

Despite the redundancy of these two charges, the JHB found Respondent guilty of violating both of them.

2. WVCJC Rule 4.1(A)(9) is unconstitutional in violation of the First Amendment on its face and as applied “to the extent [the rule] prohibits a judicial candidate from making misleading statements that are not materially false.” and
3. WVRPC Rule 8.2(a) is constitutional on its face and as applied “to the extent [this rule] prohibits a lawyer who is a candidate for judicial office from making a materially misleading¹³ statement the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a candidate for election or appointment to a judicial office.” (November 18, 2016 order at 6, 11, and 13).

In his final brief filed after the evidentiary hearing, Respondent requested the JHB to have these critical constitutional issues first resolved by this Court so the parties would know what rules were consistent with the First Amendment, what rules were unconstitutional, and what legal standards the Court deemed appropriate to avoid any constitutional infirmities. This is the approach followed by the Michigan Supreme Court in *In re Chmura*,¹⁴ 461 Mich. 517, 608 N.W.2d 31 (2000), which decision is cited by the JHB, where the case was remanded to the disciplinary board after the Michigan Supreme Court had applied strict scrutiny and narrowed the scope of the rules. *See also In re Chmura*,¹⁵ 464 Mich. 58, 626 N.W.2d 876 (2001) (All charges dismissed by Michigan Supreme Court following remand). However, rather than taking that approach, the JHB issued its **RECOMMENDED DECISION**, incorporating its previous constitutional analysis the very next morning after Respondent’s final brief was filed.

¹³Respondent respectfully submits the JHB should have tracked the language of Rule 8.2(a) in its conclusion, which rule does not use the word “misleading.” In light of the JHB’s acknowledgment that the word “misleading” in WVCJC Rule 4.1(A)(9), has caused several courts to find that provision to be a violation of the First Amendment, the word “misleading” should be replaced with “false.”

¹⁴This decision will be referred to as *Chmura I*.

¹⁵This decision will be referred to as *Chmura II*.

Although Respondent believed he had an obligation to raise this constitutional issue before the JHB, there is a serious procedural question whether the JHB has the authority to address constitutional issues. The JHB and the JIC are administrative bodies created by this Court to conduct investigations, issue charges, engage in factfinding, and ultimately make recommendations to the Court regarding alleged ethics violations committed by judges. As a general rule, administrative agencies do not have the authority to resolve constitutional issues. Although Respondent was unable to find any West Virginia decisions on point, clearly the majority rule in the country is that administrative agencies cannot decide constitutional issues.¹⁶ Because this issue may arise again in

¹⁶For example, in *Richardson v. Tennessee Board of Dentistry*, 913 S.W.2d 446, 452-53 (Tenn. 1995), the Court explained:

The general rule is that an administrative agency may not determine constitutional issues. An agency is not authorized to consider or question the constitutionality of a legislative act; nor may it declare unconstitutional the statutes which it was created to administer or enforce. This recognition of the limited authority of agencies to resolve constitutional issues has been widely recognized. *See e.g., Downen v. Warner*, 481 F.2d 642, 643 (9th Cir.1973) (resolving claim based on constitutional right is inappropriate for an administrative board); *Alleghany Corp. v. Pomeroy*, 698 F.Supp. 809, 813-14 (D.C.N.D.1988), *rev'd on other grounds*, 898 F.2d 1314 (8th Cir.1990) (agency without power to adjudicate constitutional issues); *Key Haven v. Board of Trustees of the Internal Impr'mt. Trust Fund*, 427 So.2d 153 (Fla.1982) (forum for consideration of constitutional question was in court upon judicial review); *Mobil Oil Corp. v. City of Rocky River*, 38 Ohio St.2d 23, 309 N.E.2d 900 (1974) (constitutionality of zoning ordinance is matter for the court); *Dow Jones & Co. v. State ex rel. Oklahoma Tax Comm'n*, 787 P.2d 843 (Okla.1990) (commissioner properly refused to address constitutional issues); *Belco Petroleum Corp. v. State Bd. of Equalization*, 587 P.2d 204, 213 (Wyo.1978) (agency does not determine facial constitutionality of statute or constitutionality of its application). *See also* 73 C.J.S., "Public Administrative Law and Procedure," § 65 at 536; 1 Am.Jur.2d, "Administrative Law," § 185 at 989-90.

See also Landmark Novelties, Inc. v. Arkansas State Board of Pharmacy, 2010 Ark. 40, 358

a future proceeding, Respondent respectfully asks the Court to address this issue so that future litigants may have constitutional issues first decided by this Court rather than by the JHB.

Overall, Respondent does not have any major disagreement with the JHB's constitutional analysis, other than the specific differences to be noted.¹⁷ The JHB recognized political speech is entitled to the broadest protection under the First Amendment, as explained by the United States Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 14-15, 96 S.Ct. 612, 632, 46 L.Ed.2d 659, ___ (1976):

Discussions of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. **The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."** *Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498 (1957). Although First Amendment protections are not confined to "the exposition of ideas," *Winters v. New York*, 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840 (1948), "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, ... of course includ[ing] discussions of candidates...." *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484 (1966). This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964). **In a republic where the people are sovereign,**

S.W.3d 890 (2010); *Florida Hospital v. State*, 823 So.2d 844 (Fla. Dist.Ct. 2002); *Millcreek Manor v. Department of Public Welfare*, 796 A.2d 1020 (Pa.Comm.Ct. 2002); *Doe v. Sex Offender Registry Board*, 459 Mass. 603, 947 N.E.2d 9 (2011); *S & P Lebos, Inc. v. Ohio Liquor Control Commission*, 163 Ohio App.3d 827, 840 N.E.2d 1108 (2005); *First Bank of Buffalo v. Conrad*, 350 N.W.2d 580 (1984); *HOH Corp. v. Motor Vehicle Industry Licensing Board*, 69 Haw. 135, 736 P.2d 1271 (1987).

¹⁷For example, in the context of analyzing the phrase "false or misleading," the JHB has a discussion about rules of statutory construction and how sometimes "and" and "or" may be interchangeable to harmonize a statute. It is not clear whether the JHB found it necessary to create this harmony through this rule. Presumably the Court will need to decide if such a construction is necessary or advisable.

the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed.2d 35 (1971), “it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office. (Emphasis added).

This Court has recognized the interaction between the judicial ethics rules and the First Amendment in Syllabus Point 2 of *Matter of Hey*, 192 W.Va. 221, 452 S.E.2d 24 (1994):

The State may accomplish its legitimate interests and restrain the public expression of its judges through narrowly tailored limitations where those interests outweigh the judges’ free speech interests.

Consequently, any attempt to restrict the content of political speech must be very narrowly construed in order for such restrictions to survive the freedom of speech afforded by the First Amendment. In *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002), a judicial candidate and party affiliated groups challenged the ethics rule prohibiting judicial candidates from announcing their views on disputed legal or political issues, asserting this prohibition violated the First Amendment. For this rule to be upheld, the United States Supreme Court concluded the strict scrutiny test was applicable, 536 U.S. at 774-75, 122 S.Ct. at 2534-35, 153 L.Ed.2d at ___:

Under the strict-scrutiny test, respondents have the burden to prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling state interest. *E.g., Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989). In order for respondents to show that the announce clause is narrowly tailored, they must demonstrate that it does not “unnecessarily circumscrib[e] protected expression.” *Brown v. Hartlage*, 456 U.S. 45, 54, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982).

The United States Supreme Court concluded this judicial ethics rule did not survive this analysis because it was not narrowly tailored to serve a compelling state interest and, therefore, was a violation of the First Amendment.

In *Williams-Yulee v. The Florida Bar*, ___ U.S. ___, 135 S.Ct. 1656, 1665, 191 L.Ed.2d 570, ___ (2015), a candidate for judicial office wrote letters to voters directly soliciting monetary contributions for her campaign. After losing the election, the Florida Bar brought charges against her for violating the rule prohibiting judicial candidates from personally soliciting campaign contributions. The candidate asserted this prohibition violated her First Amendment rights. In upholding the rule prohibiting judicial candidates from soliciting campaign contributions personally, the United States Supreme Court explained, ___ U.S.at ___, 135 S.Ct. at 1665-66, 191 L.Ed.2d at ___:

The Florida Bar faces a demanding task in defending Canon 7C(1) against Yulee's First Amendment challenge. 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. *Burson v. Freeman*, 504 U.S. 191, 211, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992) (plurality opinion). But those cases do arise. *See ibid.*; *Holder v. Humanitarian Law Project*, 561 U.S. 1, 25-39, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010); *McConnell*, 540 U.S., at 314, 124 S.Ct. 619 (opinion of KENNEDY, J.); *cf. Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) ("we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact' "). **Here, Canon 7C(1) advances the State's compelling interest in preserving public confidence in the integrity of the judiciary, and it does so through means narrowly tailored to avoid unnecessarily abridging speech. This is therefore one of the rare cases in which a speech restriction withstands strict scrutiny.** (Emphasis added).

Under *Williams-Yulee*, there is a compelling interest in preserving public confidence in the integrity of the judiciary. Thus, any speech restriction must be narrowly tailored to serve this compelling interest. As applied in the present case, the Court will have to decide how narrowly to

interpret and apply WVCJC Rule 4.1(A)(9) and WVRPC Rule 8.2(a) to survive First Amendment analysis.

The JHB does not explicitly state that expressions of opinions are protected by the First Amendment and are not subject to judicial or lawyer ethics rules. In *Winter v. Wolnitzek*, 482 S.W.3d 768 (Ky. 2016), various challenges were made to ethics rules applicable to judicial candidates, including the provision prohibiting misleading statements. In explaining how this rule is applied, the Kentucky Supreme Court, 482 S.W.3d at 779, distinguished between objectively false facts, which are covered by this rule, from statements of opinions, which are not:

The provision does not, however, cover expressions of opinion because expressions of an *opinion* do not implicate a statement that is not factually true. For example such statements as “Justice Stevens was the best Justice ever”; “*Citizens United* was the best decision ever”; or “my opponent is too liberal” are all expressions of opinion and not subject to Canon 5B(1)(c).

See also Carey v. Wolnitzek, 614 F.3d 189 (6th Cir. 2010)(Ethics rule prohibiting judicial candidates from disclosing their political party affiliations unconstitutional).

Similarly, the First Amendment broadly protects political speech and permits rhetorical hyperbole and potentially misleading or distorting statements. In applying a similar provision under Michigan law, the Michigan Supreme Court in *Chmura II*, 464 Mich. at 72-73, 626 N.W.2d at 886, explained:

When analyzing whether a judicial candidate has violated Canon 7(B)(1)(d), it is necessary that the communication be false. *Chmura I, supra* at 541, 608 N.W.2d 31. However, before a judicial candidate’s public communication is tested for falsity, the communication at issue must involve objectively factual matters. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). Speech that can reasonably be interpreted as communicating “rhetorical hyperbole,” “parody,” or “vigorous epithet” is constitutionally protected. *Id.* at 17, 110 S.Ct. 2695. Similarly, a statement of opinion is protected as long as the opinion “does not

contain a provably false factual connotation” *Id.* at 20, 110 S.Ct. 2695. We are mindful that in protecting hyperbole, parody, epithet, and expressions of opinion, some judicial candidates may inevitably engage in “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *New York Times Co, supra* at 270, 84 S.Ct. 710. As a result of these attacks, “political speech by its nature will sometimes have unpalatable consequences.” *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 357, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). Indeed, as is arguably true in the present case, even potentially misleading or distorting statements may be protected. However, we believe that these rules are necessary in light of our “profound national commitment to the principle that debate [by judicial candidates] on public issues should be uninhibited, robust, and wide-open” *New York Times Co, supra* at 270, 84 S.Ct. 710. Once it has been determined that a communication contains objectively factual matters, those matters must then be tested to determine whether they are true or false. (Emphasis added).¹⁸

See also In re O’Toole, 141 OhioSt.3d 355, 24 N.E.3d 1114 (2014).

Chmura II involves multiple examples of political flyers used by a judicial candidate, which strongly attacked other political figures. In recognizing the challenges in applying this judicial ethics rule, the Michigan Supreme Court, 464 Mich. at 756-76, 626 N.W.2d at 887-88, first noted its limited role in analyzing the content of the political advertisements being challenged:

Although legitimate questions might be raised about the seemliness of some of respondent’s communications, it is ultimately not our task to pass upon such matters because we have

¹⁸In *Butler v. Alabama Judicial Inquiry Commission*, 802 So.2d 207, 218 (Ala. 2001), the Alabama Supreme Court noted that not all factual errors would be actionable:

‘[E]rroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the “breathing space” that they “need to survive.” ’” *Brown, supra*, 456 U.S. at 60, 102 S.Ct. 1523 (citation omitted), quoting *New York Times*, 376 U.S. at 271-72, 84 S.Ct. 710, quoting, in turn, *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). (Emphasis added).

no greater competence in this regard than does the citizenry as a whole. Neither we, nor the JTC, are arbiters of propriety. Rather, that assignment belongs to “We the People.” This Court’s responsibility is the more narrow one of determining whether respondent’s campaign communications violated Canon 7(B)(1)(d). In doing so, we apply the aforementioned principles of falsity to determine whether respondent’s public communications were clearly shown by the JTC to be knowingly false or used with reckless disregard as to their truth or falsity. (Emphasis added).

After reviewing the flyers and advertisements, the Michigan Supreme Court held the judicial candidate had not violated any ethical rule.

In Syllabus Points 4 and 5 of *Lawyer Disciplinary Board v. Hall*, 234 W.Va. 298, 765 S.E.2d 187 (2014), the Court explained how it balances a lawyer’s First Amendment right to criticize a judge with the restriction imposed under Rule 8.2(a):

4. “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. Finally, statements that are outside of any community concern, and are merely designed to ridicule or exhibit contumacy toward the legal system, may not enjoy First Amendment protection.” Syl. Pt. 1, *Comm. on Legal Ethics v. Douglas*, 179 W.Va. 490, 370 S.E.2d 325 (1988).

5. Within the context of assessing an alleged violation of Rule 8.2(a) of the West Virginia Rules of Professional Conduct, 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 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.¹⁹

The JHB did agree with the cases holding an ethics rule prohibiting misleading political speech is unconstitutional in violation of the First Amendment. See *Winter v. Wolnitzek*, 2016 WL 4446081 at *9 (6th Cir. 2016); *Winter v. Wolnitzek*, 482 S.W.2d 768 (Ky. 2016); *In re Chmura*, 454 Mich. 58, 626 N.W.2d 876 (2001); *In re O'Toole*, 141 OhioSt.3d 355, 24 N.E.3d 1114 (2014); *Attorney Grievance Commission of Maryland v. Staloni*, 445 Md. 129, 126 A.3d 6, 15 (2015); *Rickert v. State, Public Disclosure Commission*, 161 Wash.2d 843, 168 P.3d 826 (2007); *Kishner v. Nevada Standing Committee on Judicial Ethics and Election Practices*, 2010 WL 4365951 (D.Nev. 2010).

The main rationale supporting the conclusion that prohibiting “misleading” political speech simply is too broad to survive First Amendment scrutiny is summarized by the Michigan Supreme Court in *Chmura I*, 461 Mich. at 540-41, 608 N.W.2d at 43, which was particularly concerned about the chilling effect such a broad rule might have on political speech:

The prohibition on misleading and deceptive statements quells the exchange of ideas because the safest response to the risk of disciplinary action may sometimes be to remain silent. The Supreme Court explained in *Brown, supra* at 61, 102 S.Ct. 1523, that the preferred First Amendment remedy for misstatements and misrepresentations during the campaign is to encourage speech, not stifle it. We conclude that Canon 7(B)(1)(d) fails to provide the necessary breathing space to satisfy the First Amendment.

In the **RECOMMENDED DECISION**, the JHB cites some cases to develop a test for falsity. The Michigan Supreme Court in *Chmura II*, 464 Mich. at 75, 626 N.W.2d at 887, adopted the

¹⁹See *Attorney Grievance Commission of Maryland v. Staloni*, 445 Md. 129, 145, 126 A.3d 6, 15 (2015) (“MLRPC 8.2(a) does not require absolute precision in the expression of political speech as part of an election campaign.”).

following test, referred to as the substantial truth doctrine, which is very similar to the one suggested by the JHB:

Accordingly, we conclude that in analyzing whether a judicial candidate has violated Canon 7(B)(1)(d), the public communication must be analyzed to determine whether the statements communicated are literally true. If so, the judicial candidate will not be in violation of Canon 7(B)(1)(d). However, if the communication conveys an inaccuracy, the communication as a whole must be analyzed to determine whether the “the substance, the gist, the sting” of the communication is true despite the inaccuracy. In other words, we must decide whether the communication is substantially true. If so, the judicial candidate will not be in violation of the canon. However, if “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.” Once this has been determined, the inquiry then turns to whether a judicial candidate’s communication was made knowingly or with reckless disregard. *Chmura I, supra* at 544, 608 N.W.2d 31. If it was, the candidate has acted in violation of Canon 7(B)(1)(d).

Finally, in *Susan B. Anthony List v. Ohio Elections Commission*, 45 F.Supp.3d 765, 769-70 (S.D. Ohio 2014), the District Court repeated and updated the often repeated notion that when it comes to political speech, the remedy for any allegedly false speech is more speech:

[T]he Supreme Court held flatly in 2012 that: “**The remedy for speech that is false is speech that is true.** This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; **to the straight-out lie, the simple truth.**” *United States v. Alvarez*, ___ U.S. ___, 132 S.Ct. 2537, 2550, 183 L.Ed.2d 574 (2012) (emphasis supplied). The more modern recitation of this longstanding and fundamental principle of American law was recently articulated by Frank Underwood in *House of Cards*: “**There’s no better way to overpower a trickle of doubt than with a flood of naked truth.**” (Emphasis added).

In light of the foregoing case law, Respondent respectfully submits for WVCJC Rule 4.1(A)(9) and WVRPC Rule 8.2(a) to survive strict scrutiny in the context of political speech, the following general factors must be considered in narrowly tailoring these ethics rules:

1. Opinion, parody, and rhetorical hyperbole are protected by the First Amendment and cannot be used as the basis for seeking ethics sanctions against a judicial candidate or lawyer;
2. The assertion of multiple facts, which may or may not be related to each other and which may or may not be misleading or cause misleading inferences, are protected by the First Amendment and cannot be used as the basis for seeking ethics sanctions against a judicial candidate or lawyer;
3. The negligent assertion of a fact that objectively is false is protected by the First Amendment and cannot be used as the basis for seeking ethics sanctions against a judicial candidate or lawyer;
4. If the communication conveys an inaccuracy, the communication as a whole must be analyzed to determine whether the “the substance, the gist, the sting” of the communication is true despite the inaccuracy. If the gist or sting of the communication is true, then the communication is protected by the First Amendment and cannot be used as the basis for seeking ethics sanctions against a judicial candidate or lawyer; and
5. Only the assertion of material facts that knowingly are false or that are expressed with reckless disregard for the truth of such facts can be the basis for ethics sanctions against a judicial candidate or lawyer.

In applying these general rules to the facts in this case, Respondent respectfully submits all of the statements contained in the campaign flyer at issue are truthful and protected by the First Amendment. The front of the flyer stating “Barack Obama & Gary Johnson Party at the White House...” is a more colorful way of saying Judge Johnson attended an event at the White House. The photoshopped image also harkens back to the “beer summit” between Harvard University Professor Henry Louis Gates and Sergeant James Crowley, who had arrested Mr. Gates for trying to break into his own house. This statement is protected under the First Amendment as parody or rhetorical hyperbole. Furthermore, even if this statement is taken at face value and is found literally to be false, the gist or the sting of the entire flyer is substantially true.

The back of the flyer stating “While Nicholas County loses hundreds of jobs” is true, based upon the evidence presented in the record. Again, when the sentence on the front of the flyer is read

with the continuing sentence on the back of the flyer, the point being made is Judge Johnson attended an event at the White House at a time when Nicholas County was losing jobs.

The pink slip on the back of the flyer with the heading "Layoff Notice," starts off by asserting an opinion: "While Nicholas County lost hundreds of jobs to Barack Obama's coal policies...." During the most recent election, many different politicians expressed the opinion that President Obama destroyed the coal industry in this State. The sentence then reads "Judge Gary Johnson accepted an invitation from Obama to come to the White House to support Obama's legislative agenda." This assertion is true because the meeting Judge Johnson attended occurred only a couple of weeks after President Obama signed the Justice for Victims of Trafficking Act of 2015, which clearly was part of President Obama's legislative agenda.

The next statement asserts "That same month, news outlets reported a 76% drop in coal mining employment." The source for this assertion, which is a June 17, 2015 article attached to JOINT EXHIBIT No. 5, specifically states, "Nicholas County's 558 job losses since the fourth quarter of 2011 represents a 76% drop in coal mining employment." For some reason, the JHB has challenged the truthfulness of this assertion, which is almost quoted verbatim from this article.

The final assertion is "Can we trust Judge Gary Johnson to defend Nicholas County against job-killer Barack Obama?" Clearly, this part of the flyer asks a question, which incorporates the opinion, held by some people, that President Obama is a job-killer. Thus, rather than being a statement of fact, this assertion simply asks a rhetorical question.

Based upon this narrow application of WVCJC Rule 4.1(A)(9) and WVRPC Rule 8.2(a), Respondent either has asserted statements protected by the First Amendment as opinion, parody, or rhetorical hyperbole or that are objectively true or that are substantially true. Consequently,

Respondent respectfully submits the JHB's recommendation regarding his alleged violations of these two rules must be rejected by the Court.

Once the Court reaches this conclusion, the remaining charges similarly must be dismissed. The alleged violations of WVCJC Rule 4.2(A)(1), and WVCJC Rule 4.2(A)(4), are premised on the JHB's conclusion that the campaign flyer contained materially false statements of fact. Consequently, Respondent respectfully asks the Court to issue a decision reject the JHB's conclusions that Respondent violated various provisions of the WVCJC and WVRPC.

C. Alternatively, in the event some of the alleged ethics provisions survive constitutional strict scrutiny and some of the violations are found to be proven, the recommended sanctions are far in excess of the sanctions issued by this Court and by other jurisdictions in similar cases

Because Respondent has no way of knowing how this Court is going to resolve the issues raised, he is forced to address the severity of the sanctions recommended, in the event the Court finds the JHB has jurisdiction over a judicial candidate and some of the ethics violations are found to be proven, despite the truthfulness of the assertions and the First Amendment analysis set out above. As noted earlier, the JHB recommends that Respondent be censured as a judicial candidate, suspended from practicing as a lawyer and serving as a judge for a concurrent period of one year, fined \$15,000, and ordered to pay the costs of the proceeding for violating three provisions of the WVCPC and one provision of the WVRPC. Upholding such a penalty or, even worse, adopting the two-year suspension sought by Petitioner would have a devastatingly chilling effect on lawyers pondering the idea of running for a judicial office.

While the JHB acknowledges Respondent's mitigating circumstances, particularly the immediate remedial actions he took when he received the telephone call and emails from Petitioner, the JHB never mentions what a small role this single campaign flyer played in the context of

Respondent's campaign. Respondent mailed a total of five flyers, including the one at issue. All five flyers, not just this particular flyer, were mailed after early voting began because that is when these flyers may have an impact on the voter. The substance of this flyer was never included in any other form of advertising, such as newspaper, radio, or television, other than a brief appearance on Respondent's Facebook page. When the cases from other jurisdictions involving similar political speech challenges are reviewed, not only do most of them involve judicial candidates who never took any remedial action, but many of them repeated the allegedly false political speech in several different types of advertising. Again, this case only involves the mailing of one campaign flyer.

The Aggravated Circumstances portion of the **RECOMMENDED DECISION** is full of highly speculative allegations. In Aggravating Circumstances No. 2, the JHB suggests "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.'" There is absolutely no evidence of any kind supporting this assertion. When an election is over, there is no way of determining why a particular voter decided to mark an X by Candidate A instead of Candidate B. This suggestion once again is a direct insult by the JHB to the voters of Nicholas County who elected Respondent to serve as their Circuit Court Judge.

In Aggravating Circumstances No. 3, the JHB somehow concludes Respondent "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." This assertion is outrageously preposterous and completely unsupported by the record. Throughout its **RECOMMENDED DECISION**, the JHB reads much more into the flyer than is actually there. Rather than focusing on the actual facts asserted, the JHB twists and misconstrues the flyer in an effort to make it appear to be misleading, which as conceded by the JHB cannot be the basis for any ethics sanction.

The JHB finds a sinister motive in the five flyers being mailed near the end of the campaign. Respondent supposes an incompetent politician could waste their time and money by mailing flyers before the early voting period, but the general practice and common sense is that these mailings always occur closer to the elections. As noted in footnote 3, it is not clear why the JHB cited what it believed to be negligent misstatements of fact by Respondent as part of the Aggravating Circumstances when negligent misstatements are not actionable under any of the ethics rules.

In footnote 15, the JHB dismissively string cites cases from this Court as well as other jurisdictions where judges were sanctioned for allegedly false political speech and asserts the range is from censures to suspensions to removal from office. Actually, even Petitioner admits in footnote 16 of **PETITIONER'S BRIEF** that "[T]he majority of similar judicial campaign code violation cases have issued fines, public reprimands and/or censures against judicial candidates for making false comments about their opposition. For example, *In the Matter of Codispoti*, 190 W. Va. 369, 438 S.E.2d 549 (1993), the State Supreme Court reduced a 1 month suspension recommendation from the Judicial Hearing board to a public censure for a Magistrate who caused misleading advertisements to be published in the local newspaper falsely claiming that a crime victim had paid them."

Because the cases persuasively demonstrate the excessiveness of the recommended sanctions, a quick review is instructive. In *Matter of Starcher*, 202 W.Va. 55, 501 S.E.2d 772 (1998), Justice Larry Starcher was accused of personally soliciting campaign contributions when he was a circuit court judge running for one of two positions open on this Court. For this clear violation of the WVCJC, this Court accepted the recommendation that Judge Starcher should be **admonished**. Similarly, in *Matter of Tennant*, 205 W.Va. 92, 516 S.E.2d 496 (1999), a person running to be elected as a magistrate directly solicited campaign donations from some lawyers. This Court accepted the

recommendation that this magistrate candidate should be **admonished and required to pay the costs of the proceeding.**

In *Matter of Karr*, 182 W.Va. 221, 387 S.E.2d 126 (1989), two candidates for circuit court failed to set up committees to gather campaign contributions. Instead, these candidates accepted contributions personally. This Court issued **admonishments** against both candidates.

During this litigation, Petitioner had suggested the case of *Disciplinary Counsel v. Tamburrino*, 2016 WL 7116096 (Ohio 2016), somehow was comparable to the facts in the present case. In *Tamburrino*, a lawyer running for a judicial position ran multiple television ads harshly critical of his opponent. Although this lawyer as advised some of the assertions were provably false, this lawyer insisted on continuing to run the commercials and never once took any remedial action. While the facts in *Tamburrino* are not in any way similar to the facts herein, the Ohio Supreme Court issued a one-year suspension of his law license, with six months of the suspension stayed as long as he did not violate any ethics rules during that time. Thus, the lawyer in *Tamburrino*, who was advised of the false information contained in his television ads, but who continued to run these ads, received a six months suspension, whereas in the present case, despite Respondent's immediate remedial actions at the request of Petitioner, Petitioner wants to elevate the mailing of one single solitary campaign flyer as the political crime of the century and is seeking a **two-year suspension** of Respondent's law license. None of the cases cited either by the JHB or Petitioner comes close to justifying such an extreme sanction.

In *In re Baker*, 218 Kan. 209, 542 P.2d 701 (1975), a judicial candidate authorized a campaign flyer asserting his opponent, who had suffered a heart attack, was eligible for disability retirement and calculated the amount of such benefits. The candidate failed to check on the rules governing

disability retirement nor did he consult with anyone to determine the correct amount of benefits. For these misrepresentations made in his campaign materials, the Kansas Supreme Court **censured this candidate and ordered him to pay the costs of the proceeding.**

In *Matter of Fortinberry*, 474 Mich. 1203, 708 N.E.2d 96 (2006), a judicial candidate sent a letter to a group that had endorsed his opponent by challenging the moral fiber of his opponent. The letter not only accused the opponent of having a sexual affair with his law clerk, but further asserted soon after the opponent's wife learned of the affair, she was found dead in their home and an investigation into this death had been sealed. The Michigan Supreme Court held these actions warranted a **public censure.**

In *In re Kinsey*, 842 So.2d 77 (Fla. 2003), a former prosecutor running for judicial office attacked her opponent for the manner in which he handled certain criminal cases, without providing all of the facts, and consistently presenting herself as the pro-police and anti-criminal defendant candidate. The Florida Supreme Court found the comments made during her campaign and in her advertising material violated various judicial ethics provisions and imposed a **public reprimand, a \$50,000 fine, and required this candidate to pay the costs of the proceeding.**

In *In re Hein*, 95 OhioMisc.2d 31, 706 N.E.2d 34 (1999), a prosecutor running for a judgeship criticized a specific criminal case handled by his opponent and also accused his opponent of being liberal and soft on crime. A committee appointed by the Ohio Supreme Court **fined this candidate \$2,500, required him to pay attorneys' fees and costs, and issued a public reprimand.**

In *In re Carr*, 74 OhioMisc.2d 81, 658 N.E.2d 1158 (1995), a judicial candidate incorrectly had accused her opponent of never trying a case in housing court and improperly sought campaign contributions directly. A commission appointed by the Ohio Supreme Court sustained these charges and **fined this candidate \$1,000 and ordered her to pay the costs of the proceeding.**

In *In re Burick*, 95 OhioMisc.2d 1, 705 N.E.2d 422 (1999), a judicial candidate misrepresented certain facts in campaign communications concerning her opponent, authorized her campaign committee or others working on her behalf to make 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. A commission appointed by the Ohio Supreme Court held these violations warranted a **public reprimand, a fine of \$7,500, and payment of attorneys' fees and costs.**

In *In re Alley*, 699 So.2d 1369 (Fla. 1997), a judicial candidate misrepresented her qualifications and those of her opponent, injected party politics into a non-partisan election, improperly included a photograph of her opponent sitting next to a criminal defendant noting that her opponent "defend[ed] convicted mass murderer, cop killer, William Cruse," when at the time of the photograph Cruse had not been convicted and her opponent was an assistant public defender observing a duty placed on her as a member of The Florida Bar, improperly included a portion of a newspaper editorial which falsely implied that she, not her opponent, had been endorsed by the newspaper. For the misrepresentations and misleading actions, the Florida Supreme Court issued a **public reprimand.**

In *In re Kienzle*, 99 OhioMisc.2d 31, 708 N.E.2d 800 (1999), a judicial candidate in his campaign materials falsely accused his opponent of imposing a tax that was found by an appellate court to be an incorrect application of the law. A commission appointed by the Ohio Supreme Court found these actions required the imposition of a **public reprimand, a fine of \$1,000, and the imposition of attorneys' fees and costs.**

In *In re Hildebrandt*, 82 OhioMis.2d 1, 675 N.E.2d 889 (1997), a judicial candidate falsely accused his opponent of running for judge, dropping out, running for Congress, and losing. Even

after the opponent sent a letter to this candidate about the inaccuracies in the candidate's advertising, no corrections were made. A commission appointed by the Ohio Supreme Court **suspended this candidate for six months, but that suspension was stayed on the condition that the candidate not commit any ethics violations during that six month period, fined this candidate \$15,000, and required this candidate to pay attorneys' fees and costs.**

In *Wisconsin Judicial Commission v. Gableman*, 325 Wis.2d 579, 784 N.W.2d 605 (2010), a judicial candidate ran some advertisements accusing his opponent of helping to free his criminal client based upon a loophole and after the client was released from prison, the client committed another similar sexual assault. Because the Wisconsin Supreme Court was split on whether this allegation was false, **no action was taken and the case was remanded for a jury trial** to determine the veracity of the allegation made in the campaign advertising.

In *Matter of McCormick*, 639 N.W.2d 12 (Iowa 2002), a judge gave permission to another candidate for a different position to put a political sign in the judge's yard. When the judge was asked about who authorized the placement of the sign in his yard, the judge initially told the authorities his wife had given permission for having the sign in their yard. Soon thereafter, the judge acknowledged he was the person who authorized the yard sign. For misleading authorities, the Iowa Supreme Court issued a **reprimand** against this judge.

In *In re Cascio*, 683 So.2d 1202 (1996), a judicial candidate who previously had served as an *ad hoc* judge was running for a judgeship. In his campaign materials, this candidate referred to himself as "THE Qualified JUDGE." When he was confronted about this statement in his campaign materials, this candidate added the words "Will Be" to some, but not all of his campaign literature. The Louisiana Supreme Court issued a **public censure** against this candidate.

In *In re Roberts*, 81 OhioMisc.2d 59, 675 N.E.2d 84 (1996), a judicial candidate falsely asserted in his campaign literature he was an incumbent judge and that he was the only candidate endorsed by all of the lawyer groups. A commission appointed by the Ohio Supreme Court rejected the recommended fine of \$250 and imposed instead a **fine of \$125 and ordered the candidate to pay the costs.**

In *In re Lily*, 131 OhioSt.3d 1515, 965 N.E.2d 315 (2012), a candidate for judicial office used language in her campaign advertising implying she was an incumbent judge. A commission appointed by the Ohio Supreme Court held this candidate should be **publicly reprimanded and ordered to pay the costs of the proceedings, including an earlier proceeding in which this candidate made similar misleading assertions in her campaign materials.**

In *In re Dempsey*, 29 So.3d 1030 (Fla. 2010), a judicial candidate falsely sought to be “reelected” when she had been appointed, and falsely asserted she had 20 years of legal experience when she had been admitted to the bar for only 14 years. The Florida Supreme Court found these misrepresentations warranted a **public reprimand.**

In *In re Davis*, 130 OhioSt.3d 1513, 959 N.E.2d 9 (2011), a judicial candidate misstated his college degrees in his campaign literature and advertising. A commission appointed by the Ohio Supreme Court found this misrepresentation warranted a **public reprimand, a fine of \$5,000, and the attorneys’ fees and costs incurred during this litigation.**

In *In re O’Toole*, 133 OhioSt.3d 1427, 976 N.E.2d 916 (2012), a judicial candidate referred to herself as “Judge” and implied she was an incumbent judge, when in fact she had served as a judge several years prior to this election. A commission appointed by the Ohio Supreme Court found these misrepresentations deserved the issuance of a **public reprimand, a fine of \$1,000, payment of attorneys’ fees and costs incurred in the proceeding.** The *O’Toole* decision was reviewed by the

Ohio Supreme Court in *In re O'Toole*, 141 OhioSt.3d 355, 24 N.E.3d 1114 (2014), where the same sanction was imposed, but a portion of an Ohio canon of ethics that is dissimilar to West Virginia's was declared unconstitutional.

In *In re Moll*, 132 OhioSt.3d 1505, 973 N.E.2d 273 (2012), a judicial candidate, who previously had served as a magistrate, used a photograph of herself wearing a judicial robe and failing to make it clear she was not an incumbent judge. A commission appointed by the Ohio Supreme Court sanctioned this candidate by imposing a **fine of \$1,000 and requiring this candidate to pay the attorneys' fees and costs of the proceeding.**

In *In re Kay*, 508 So.2d 329 (Fla. 1987), a judicial candidate participated with two other judicial candidates in the distribution of what appeared to be sample ballots, giving the appearance of a partisan political endorsement in this nonpartisan race. The Florida Supreme Court found this conduct warranted a **public reprimand.**

In *In re Michael*, 132 OhioSt.3d 1469, 970 N.E.2d 970 (2012), a judicial candidate improperly referred to herself as a "judge" in her advertising and committed two violations involving the receipt of campaign contributions. A commission appointed by the Ohio Supreme Court **fined this candidate \$2,500, and ordered her to pay attorneys's fees and costs associated with this proceeding.**

In *In re Kaiser*, 111 Wash.2d 275, 759 P.2d 392 (1988), a judicial candidate incorrectly stated most of his opponents' campaign contributions were from lawyers defending drunk drivers and also asserted he would be tough on crime. The Washington Supreme Court found these actions violated judicial ethics and **issued a censure against this candidate.**

In *Matter of Bybee*, 716 N.E.2d 957 (Ind. 1999), a judicial candidate included information in campaign materials designed to create the false impression that her opponent was causing needless

delays and holding large numbers of cases under advisement, despite the candidate's knowledge to the contrary. The Indiana Supreme Court held these ethical violations justified **a public reprimand and the assessment of costs.**

In *Matter of Shanley*, 98 N.Y.2d 310, 774 N.E.2d 735 (2002), a judicial candidate misrepresented her educational background in her campaign material. For this misrepresentation, the New York Court of Appeals issued **a public admonition.**

In *Disciplinary Counsel v. Kaup*, 102 OhioSt.3d 29, 806 N.E.2d 513 (2004), a judicial candidate named his committee "Neighborhood Protection Council" and distributed campaign material stating he had been endorsed by the "Neighborhood Protection Council." A commission appointed by the Ohio Supreme Court held this misleading conduct required this candidate **to have his law license suspended for six months, but that suspension was stayed on the condition that the candidate not commit any ethics violations during that six month period.**

In *Office of Disciplinary Counsel v. Evans*, 89 OhioSt.3d 497, 733 N.E.2d 609 (2000), a judicial candidate falsely asserted in his campaign materials that he had been endorsed by southern Ohio's top prosecutors and sheriffs, when actually he had been endorsed only by five of fourteen sheriffs and three of fourteen prosecutors, and this candidate also failed to control the actions of people working on his campaign. A commission appointed by the Ohio Supreme Court held **a stayed six month suspension and award of costs was appropriate.**

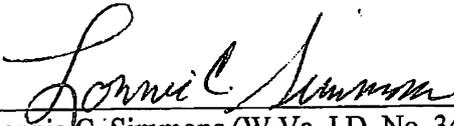
Clearly when the facts in this case are compared with the facts in all of the foregoing cases, the JHB's recommendation of a one-year suspension and Petitioner's recommendation of a two-year suspension is not justified by the facts, by the law, or by any of the policy concerns the Court may want to address in formulating an appropriate sanction.

VI. Conclusion

Respondent Stephen O. Callaghan respectfully asks this Court to rule that the JHB and the JIC lacked jurisdiction to take any action against Respondent, a judicial candidate, which would require this Court to reject the JHB's **RECOMMENDED DECISION** and its November 18, 2016 order. If the Court somehow finds the JHB and the JIC did have jurisdiction, Respondent respectfully asks this Court to reject the JHB's **RECOMMENDED DECISION** and to dismiss all of the charges levelled against him. Alternatively, Respondent respectfully asks the Court, if it finds the JHB and JIC have jurisdiction over judicial candidates and that Respondent violated some ethics provisions, to reject the JHB's and Petitioner's recommended sanctions and, if the Court believes it is necessary, to impose a sanction in line with the cases from this Court and other jurisdictions cited above.

**THE HONORABLE STEPHEN O. CALLAGHAN JUDGE-
ELECT OF THE 28TH JUDICIAL CIRCUIT, Respondent,**

-By Counsel-



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No.: 16-0670

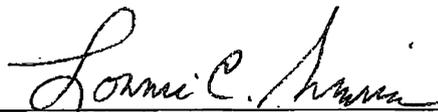
**IN THE MATTER OF:
THE HONORABLE STEPHEN O. CALLAGHAN
JUDGE-ELECT OF THE 28TH JUDICIAL CIRCUIT**

CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify that on December 28, 2016, a copy of the foregoing **RESPONDENT'S BRIEF** was emailed and mailed to counsel of record and to counsel for the West Virginia Judicial Hearing Board through the United States Postal Service, postage prepaid, to the following:

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