STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

MICHAEL H. PLASS,

a Justice of the Hyde Park Town Court,
Dutchess County.

RESPONDENT'S BRIEF

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Respondent, Hon. Michael H. Plass, by his attorneys, Leventhal, Mullaney & Blinkoff, LLP, respectfully submits this Brief to serve as his motion to confirm the findings and conclusions of the Referee in part, and to disaffirm them in part.

STATEMENT OF FACTS

The facts are more fully set forth in report of Referee Steven E. North, dated July 30, 2025.

Justice Plass engaged in a single campaign violation. He distributed a campaign flyer that stated "As your Town Justice, I pledge to keep drug dealers off the street and out of our hotels, incarcerate offenders and protect victims of domestic violence, and assure repeat offenders are sentenced to the full extent of the law."

Justice Plass is a high school graduate without prior electoral or judicial experience. At the time of his campaign for judicial office, Justice Plass was unaware of the rule against making pledges or promises of conduct in judicial office that are inconsistent with the impartial performance of adjudicative duties, nor did he initially appreciate that the statements made in his campaign flyer would give reason to question his impartiality. He now fully appreciates the paramount importance of impartiality both in reality and in appearance, and understands that the statements made in his campaign flyer violated this fundamental precept.

Justice Plass has not demonstrated any bias in the performance of his adjudicative duties.

Justice Plass learned of the rule against pledges and promises from a lecture presented at the Taking the Bench training program that is required of newly elected judges. He approached the program speaker, described his campaign flyer, and asked what he should do. The speaker recommended that he seek guidance from the Advisory Committee on Judicial Ethics. The Advisory Committee opined that the statements made in the campaign flyer disqualified him from presiding over (1) criminal cases, (2) cases involving allegations of domestic violence, (3) vehicle and traffic cases, and (4) cases involving purported drug dealers.

The respective caseloads of Justice Plass and Justice McArthur are distinct from their workloads. Referee North properly found that Justice McArthur's estimate of the increase in her workload was "unreliable and overestimated", and that, other than Justice McArthur's on-call duties, the workload between the two justices "is not grossly unbalanced and is workable". (Findings of Fact, p. 25, par. 45, 47).[1] Justice McArthur herself testified that:

[1] In his summary of the hearing testimony, Referee North noted that "on cross-examination, Justice McArthur was confronted with the timesheets that she filed with the New York State and Local Pension Retirement System in connection with her pension fund work time verification. The workhours that she claimed on the timesheet when she was working with Respondent were compared with the timesheets she filed when she was working with his predecessor, Justice Petito. These records reflected that Justice McArthur reported less work time while

> Judge Plass does the civil stuff which helps… The big real issue for me is the on-call. I put in the extra time to do it, and I know he [Justice Plass] does what he can within his realm of what he's allowed to do. So, it works, but it has its moments, especially the on-call is really, really my sticking point…the main thing that I'm unhappy about is the on-call stuff.

(Findings of Fact, p. 25, par. 47).

I.
THE RECUSALS BY JUSTICE PLASS ARE PRESUMED PROPER FOR THE PURPOSES OF THIS INVESTIGATION BY THE STATE COMMISSION ON JUDICIAL CONDUCT

The Advisory Committee on Judicial Ethics was established pursuant to Judiciary Law § 212(2)(l) which provides, in pertinent part, that:

> (iv) Actions of any judge or justice of the uniform court system taken in accordance with findings or recommendations contained in an advisory opinion issued by the panel shall be presumed proper for the purposes of any subsequent investigation by the state commission on judicial conduct.

See also, Spargo v. New York State Comm'n on Judicial Conduct, 2004 NYLJ LEXIS 5606 (Sup. Ct. Albany County 2004) ("An action taken in accordance with such advisory opinion is presumed proper for the purposes of any subsequent investigation by the state commission on judicial conduct (Judiciary Law Section 212[2][l][iv])", aff'd 23 A.D.3d 808 (3d Dept. 2005). Accordingly, the

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working with Justice Plass than she did when she was working with Justice Petito. Her explanation was that the timesheets did not reflect the actual time that she worked but rather the threshold number of hours necessary to comply with New York State pension regulations. She did not know what that threshold number was." (Summary of the Testimony, p. 9).

recusals by Justice Plass made in accordance with Advisory Opinion 23-158 are presumed proper for the purposes of this investigation.

Referee North properly found that the single occasion on which Justice Plass spent three hours at home finalizing the disposition of mailed-in guilty pleas was a mitigating factor, rather than an aggravating factor as the Commission argued. A backlog of 180 unprocessed guilty pleas had accumulated due to the refusal of Justice McArthur to process them in the absence of an increase in her salary. The unprocessed guilty pleas were an obstacle to some of the defendants' employment opportunities and eligibility for military service. Justice Plass had no personal contact with the defendants, and no complaint was made, nor evidence presented that he demonstrated bias in his processing of the pleas by mail. Referee North found that the processing of the accumulated tickets by Justice Plass was a reasonable exercise of judicial discretion that put the needs of the community above his own self-interest. (Findings of Fact, p. 26-27, par. 51-53, 55, 57).

After-hour arraignments have declined dramatically since the enactment of bail reform, and now are few in number. Coverage by judges of neighboring jurisdictions is available upon request. Justice McArthur delegated the task of requesting coverage to the court clerk. Requests for coverage were made twice in 2024. On one of those occasions, Justice McArthur obtained coverage. On the

other of the two occasions, the lone judge that was contacted on her behalf was unavailable. Former court clerk Sarah Jensen testified as follows:

> Q. And did it ever come to pass, while you were clerking for Judge McArthur, that a request was made for another Judge to cover for her?
>
> A. Yes.
>
> Q. How did that occur?
>
> A. She wanted to possibly go on a short weekend vacation or something. She would ask me to email her surrounding towns to see if they would cover after hours.
>
> Q. So the request was made by you through email?
>
> A. Yes.
>
> Q. And how often –
>
> A. On behalf of her, yes.
>
> Q. Sure. How often did that occur?
>
> A. Probably twice this year. Or I'm sorry, 2024, probably twice. Yeah.
>
> Q. And what occurred? What, if any, response did you get from those emails?
>
> A. The first request we had a judge from – I don't know if it was Rhinebeck or Red Hook, which are adjoining towns, and he agreed. He gave us his availability, too. And we made sure that the police agencies were aware of who to call and, you know, what hours. And the second request, I believe they just weren't available.
>
> Q. Did they respond and tell you they weren't available?
>
> A. Yes.
>
> Q. Okay. So you actually – each time you sent out –
>
> A. Yes.

Q. – an email on behalf of Judge McArthur requesting coverage, you got a response?

A. Yes.

Q. And one of the two times someone was available to cover for her?

A. Yes.

Q. And the other, no one was available, but they responded?

A. Yes. And let me – there may have – one of those times may have been a phone call request rather than an email. We were very close with the Judges surrounding our towns. They often helped out, you know, even prior to this. So one of those, I recall a conversation on the telephone with Judge Triebwasser. So an email –

Q. Was that a call between Judge Triebwasser and You?

A. Yes.

Q. Okay. And you placed that call?

A. Yes.

(Hearing Tr., March 24, 2025, p. 127, ln. 17 – p. 129, ln. 5).

Nevertheless, because the recusals of Justice Plass made pursuant to the advisory opinion are protected by Judiciary Law § 212(2)(l)(iv), all testimonial and documentary evidence of the allocation of judicial duties between Justice Plass and Justice McArthur should be disregarded. This investigation is, and should be, about a single campaign ethics violation only. It is not about the protected recusals that Justice Plass made in accordance with Advisory Opinion 23-158, nor is it about the uncharged processing of pleas by mail in August 2024.

II.
INAPPLICABILITY OF RULE 100.1 AND 100.2A

As noted by Referee North, Rules 100.1 and 100.2A relate to the proscribed activities of judges. Unlike Rules 100.3 and 100.5, they do not relate to the proscribed activities of non-incumbent candidates for judicial office. Justice Plass was not charged with misconduct following his election to judicial office. Rather, "[d]uring the time that Respondent has served on the bench he has done so in a fair, industrious, conscientious and impartial manner without exhibiting any evidence of bias." (Conclusions of Law, p. 30, par. 6). Therefore, the Commission has not met its burden of proving by a preponderance of the evidence[2] that Justice Plass violated Rules 100.1 and 100.2A, notwithstanding that he erroneously admitted that he did so.

As stated in the preamble to the Rules of Judicial Conduct, "[t]he rules governing judicial conduct are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances." Here, the Commission should find that the campaign flyer distributed by Justice Plass before the commencement of his judicial service did not violate Rules 100.1 or 100.2A.

[2] Misconduct must be established by a preponderance of the evidence. *See,* In re Mogil, 88 N.Y.2d 749, 752 (1996).

III.
MITIGATING FACTORS

As further stated in the preamble to the Rules of Judicial Conduct:

> Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

1. Seriousness of the Transgression

The reality and the appearance of impartiality in the administration of justice are essential to public confidence in the justice system. Justice Plass has repeatedly acknowledged that the improper statements made in his campaign flyer gave rise to the appearance that he would not impartially preside in matters involving accused drug dealers, allegations of domestic violence, or matters involving repeat offenders. Justice Plass does not dispute the seriousness of his transgression.

It should be noted, however, that Justice Plass was not accused of moral turpitude or of knowing disregard of the law. His isolated campaign violation did not involve the misuse of his judicial office or bias in the administration of justice.

2. Ignorance of the Law

In his testimony, Justice Plass acknowledge that his ignorance of the law was not a defense:

> First and foremost, I must take the time to express how upset I am with myself and how truly sorry I am for making this mistake. As we all know, ignorance is no defense.

(Tr. 3/25/25, p. 125, ln. 9-1). Nor is his ignorance of the law offered as an excuse. Rather, it is offered as a reasonable consideration in determining what sanction may be warranted. Justice Plass is not a lawyer, and was a first-time candidate for judicial office when the violation occurred. Prior to his judicial term, Justice Plass had no training in judicial campaign ethics, and was unaware of the rule against pledges or promises.

The requirement that judicial candidates complete a training program in judicial campaign ethics before engaging in campaign activities applies to "all candidates for elective judicial office in the Unified Court System except for town and village justices." 22 NYCRR 100.5(A)(4)(f). And yet, according to data published by the Commission on Judicial Conduct, of the roughly 1,830 town and village justices presently in office, approximately 700 have gone to law school. *See,* https://cjc.ny.gov/Policy.Statements/town_&_village_courts.html. 70% of the disciplinary decisions rendered by the Commission involve town and village justices, and 80% or more of those involve lay justices. *Id.* Of the 120 public decisions rendered against town and village justices in the past decade, 90 (*i.e.* 75%) were against lay justices. *Id.*

The Rules of Judicial Conduct do not serve their salutary purposes of promoting judicial integrity and public confidence in the justice system when they operate as a trap for the unwary. The same judicial ethics training program that is

required of all other candidates for elective judicial office should be made available to non-incumbent candidates for town and village justice.

3. <u>Remorse</u>

Referee North properly found that Justice Plass "evinced a reasonable sense of remorse and contrition for his conduct":

> He acknowledged that he "was sorry" and that he "deeply regretted" his conduct, that he was "truly sorry for making this mistake", that the language that he used was inappropriate and reflected an inappropriate bias, that he sees the language that he used "in a different light now, and that he has "learned a lesson", that he is learning about "impartiality", "appearances" and the integrity of the judicial system.

(Discussion, p. 18, par. (d)).

> Throughout his testimony, Justice Plass expressed his apologies, sorrow, deep regret, negligence, carelessness and acknowledged the inappropriateness of the language in the Mailer and his failure to take steps to ascertain the campaign rules.

(Findings of Fact, p. 27, par. 56). Justice Plass repeatedly expressed remorse in his testimony at the hearing:

> A. I've learned the error of my ways and how a Judge is supposed to act. If I had this to do over again, Mr. Arnone, I would never write that.
>
> Q. Why wouldn't you write it?
>
> A. Because it's not allowed. You've showed that you're not capable – you wait, that's – I misspoke – It could give the appearance that I'm not capable of being fair to Judge you.

(Tr. 3/25/25, p. 98, ln. 6 – 12).

A. First and foremost, I must take the time to express how upset I am with myself and how truly sorry I am for making this mistake. As we all know, ignorance is no defense.

(Tr. 3/25/25, p. 125, ln. 9-1).

At the preliminary hearing conducted on April 3, 2024, Justice Plass stated that:

A. Could I have done it better? Yes. Did I make a mistake? 100 percent. I never thought that someone would think by these things that I am a horrible person and am biased against every person that's on here. That was not my intention. However, I do realize that, you know, there are some people that probably would question and look at it. And one person is probably too many, according the rules of the Judicial system. I do get it. I understand. I mean, I can't take them back.

(Tr. 3/25/25, p. 62, ln. 18-25).

Q. And you recognize the pledge was inconsistent with your Judicial obligation, even as a candidate, of impartiality?

A. Yeah. Again, that's one of those – that's one of those things that was a little confusing to me. But yes. I do understand what the rules are now. And clearly, it's a mistake that – like I said, I turned myself in for this card. I clearly knew that after listening to – I think her name was Laura something – I clearly knew that I had made an error in judgment and a mistake. I mean, I used the word "pledge". That's the dumbest thing to write out of the whole card. Right? So that's clear it's a bad mistake. And I'm sorry.

(Tr. 3/25/25, p. 67, ln. 11- 23). Referee North misconstrued a piece of testimony by Justice Plass, erroneously interpreting it to mean that Justice Plass believed that the Rules of Judicial Conduct prohibit the mere use in campaign literature of the word "pledge", rather than prohibit pledges that could reasonably be interpreted as

demonstrating a bias. (Discussion, p. 17, fn. 10). However, a closer reading of the hearing transcript indicates that Justice Plass intended by his testimony to underscore his utter ignorance of the rule at the time he prepared the inappropriate flyer, and his subsequently gained understanding that the statements made in the flyer were a clear violation of that rule. On cross-examination by the Commission's counsel, Justice Plass testified that:

> Q. Judge, as you sit here today under oath, your testimony its not reasonable for a reader to think that you meant that you would jail drug dealers where you had said, keep them off our streets and out of our hotels?
>
> Q. Is that your testimony, Judge? It's not reasonable –
>
> A. It's the same as when we were here on last March. It's the same things I'm telling you –
>
> Q. Judge, forget when we were here last March –
>
> A. I'm not going to change what I told you last March. Yes, these things that are on here – look, the word says pledge. That's the death of the thing right there. You can't make pledges and promises. Now, I have learned – I have learned –
>
> Q. Judge, hold on – hold – Judge –
>
> MR. NORTH: Let him finish his answer.
>
> A. I have learned through – I have learned through my mistake that it can give the appearance to an individual, individuals, groups – however you may want to say – someone may view that as I would lock people up, and I have stated that to you. Yes, I do convey that.

(Tr. 3/25/25, p. 90, ln. 16 – p. 91, ln. 18).

4. No Pattern of Improper Activity

As Referee North properly found:

> There is no evidence that the production and distribution of the errant Mailer was other than an isolated event that was promptly recognized, immediately self-reported, and attempted to be mollified. There was no pattern of improper activity.

(Discussion, p. 15, par. (B)(2)).

5. Effect of Improper Activity on Others

Referee North found that, other than Justice McArthur's on-call duties, the workload between the two justices "is not grossly unbalanced and is workable". After-hour arraignments have declined dramatically since the enactment of bail reform, and now are few in number. Coverage by judges of neighboring jurisdictions is available upon request. Justice McArthur delegated the task of requesting coverage to the court clerk. Requests for coverage were made twice in 2024. On one of those occasions, Justice McArthur obtained coverage. On the other of the two occasions, the lone judge that was contacted on her behalf was unavailable.

The allocation of on-call duties to Justice McArthur is not a result of the inappropriate statements by Justice Plass made in his campaign flyer. Rather, it is a result of recusals by Justice Plass that were recommended by the Advisory Committee on Judicial Ethics, and that are protected by Judiciary Law § 212(2)(l). The recusals by Justice Plass made in accordance with Advisory Opinion 23-158

are presumed proper for the purposes of this investigation by the State Commission on Judicial Conduct.

6. <u>Effect of Improper Activity on the Judicial System</u>

An appearance of bias can have the effect of undermining public confidence in the justice system. However, there was no evidence that the improper statements made by Justice Plass in the campaign flyer had that effect here, or that they had any effect upon court operations, other than the reallocation of work between Justice Plass and Justice McArthur based on the opinion of the Advisory Committee on Judicial Ethics. That very allocation has provided assurance that any perceived bias of Justice Plass has not manifested itself in his official conduct. It is reasonable to assume that Justice Plass' conduct on the bench (see Mitigating Factor "5" below) will cause any lingering appearance of bias to abate over time, if it has not already done so.

The court has no backlog of cases. As Referee North found:

> Aside from the on-call responsibility of Justice McArthur, there exists at least a slight workload imbalance reflecting a greater amount of time spent by Justice McArthur than by Justic Plass in the performance of their respective duties due to Justice Plass' compliance with the ACJE's opinion that precludes him from handling certain cases. … Other than the onerous on-call responsibility, the relative workload is not grossly unbalanced and is workable. The traffic calendar was merged from two into one which helps. As per Justice McArthur, "Judge Plass does the civil stuff which helps… The big real issue for me is the on-call. I put in the extra time to do it, and I know he [Justice Plass] does what he can within his realm of what he's allowed to do. So, it works, but is has its moments, especially the on-call is

> really, really my sticking point…the main thing that I'm unhappy about is the on-call stuff."

(Findings of Fact, p. 25, par. 44, 47). The temporary backlog of unprocessed guilty pleas by mail resulted from the conduct of Justice McArthur, not that of Justice Plass. As Referee North found:

> There had been a backlog of 180 vehicle and traffic tickets that had been pled guilty and were awaiting the imposition of a fine. The unassailed testimony is that these tickets had accumulated for five months from April to August 2024 because Justice McArthur was "outright refusing" to handle them in protest over repeated requests for a salary raise, claiming that she was "doing all the work". The unresolved tickets were creating a problem because complaints were made by people who needed final dispositions to complete job applications for military service and otherwise.

(Mitigating Factors, p. 26, par. 51).

7. <u>Self-Reporting</u>

Justice Plass self-reported his campaign ethics violation to the Deputy Administrator of the Commission's New York office, Chief Counsel, NYS Advisory Committee on Judicial Ethics, and Special Counsel for Town and Village Matters, 9th Judicial District; and sought advice from the Advisory Committee on Judicial Conduct.

Referee North's discounting of the self-reporting by Justice Plass because it was "open and notorious" and the subject of a newspaper report does not credit the good faith efforts by Justice Plass to bring the matter to the attention of the authorities that would provide him with guidance, lead him to seek an opinion of

the Advisory Committee on Judicial Ethics and, ultimately, assist him in better fulfilling his duties under the Rules of Judicial Conduct. These actions by Justice Plass should be considered in determining what sanction may be warranted.

8. <u>Conduct on the Bench</u>

The single campaign violation occurred before Justice Plass commenced his judicial service. No complaints have been made of misconduct by Justice Plass while in office. Reviewing the evidence adduced at the hearing, Referee North found that:

> During the time that Respondent has been serving on the bench he has performed in an exemplary fashion. Justice McArthur described Respondent, while on the bench, as performing "very well", that he treated the public and the court personnel "very well" and that he was "very thorough". Clerk Sarah Jensen testified that she found Respondent to be a "kind and generous person", that he "worked hard", that he came in to fulfill duties that weren't even required of him". She described him on the bench as being professional, fair, courteous without demonstrating any bias or prejudice. He treated court personnel "great".
>
> Clerk Pamela Lucia testified that she has been Judge Plass' clerk since January 1, 2024. She described him as "spending a lot of time researching" to make sure that he was "doing everything correctly" and "never made a rash decision". She testified that she has been a clerk for 10 years and that Respondent was the fifth judge that she has worked for. She indicated that Respondent "will go above and beyond" in his duties and is available anytime that he is needed. When he is sitting on the bench Respondent's demeanor is "fair" and "extremely courteous to the public" and that she has not observed him to "display any bias or prejudice".
>
> …

> Although Justice Plass obviously recognizes that his conduct on the bench at this time is under the microscope and he is presumably on his best behavior, it appears that from having observed Respondent's testimony and the testimony of the witnesses, Respondent has indeed learned a lesson from this experience and in fact would be fair and equitable in his administration of justice.

(Discussion 5, Mitigating Circumstances (e) Activity on the Bench, p. 18-19).

> Throughout his tenure, Respondent has served with integrity and fairness and demonstrated a hard-working ethic. He is well-liked, respected by court personnel and integrates very well with the public. He has learned his lesson from this experience "that the most important role is to listen to both sides" and has demonstrated that he would make an excellent judge. At the hearing he appeared to be intelligent, personable, articulate and credible.

(Mitigating Factors, p. 27, par. 58).

> During the time that Respondent has served on the bench he has done so in a fair, industrious, conscientious and impartial manner without exhibiting any evidence of bias.

(Conclusions of Law, p. 30, par. 6).

9. <u>Public Minded Processing of Pleas by Mail</u>

As Referee North found, the unselfish processing by Justice Plass of a backlog of mailed-in guilty pleas on vehicle and traffic tickets was a mitigating factor, not an aggravating factor.

> Justice Plass, while recognizing that his conduct was under scrutiny, put the needs of the community above his own self-interest, and undertook to rectify community complaints regarding a significant backlog in the disposition of vehicle and traffic tickets by imposing the fines on the outstanding tickets with the assistance of Magill's book. He had nothing to gain personally and undertook this task to relieve an unacceptable backlog and appease community complaints obviously knowing that he would probably be called to task for his conduct.

(Mitigating Factors, p. 27, par. 55).

> The conduct of Justice Plass in spending three hours at home on one occasion in adjudicating the fines on the vehicle and traffic tickets is understandable. A problem was developing. Justice Plass was the only other Hyde Park Town Justice who could perform that duty. The Opinion of the ACJE was advisory. The judicial discretion employed by Respondent under the circumstances was reasonable and at a personal sacrifice.

(Mitigating Factors, p. 27, par. 57).

IV.
REMOVAL IS NOT WARRANTED

A review of previous matters decided by the Commission and the Court demonstrates that removal is not warranted here.

Respondent	Misconduct	Citation	Discipline
Hafner, Walter W.	Campaign literature conveyed appearance of pro-prosecution bias.	2001 Ann. Rept.	Admonition
Kulkin Peter M.	Misrep'd. facts about opponent during campaign.	2007 Ann. Rept.	Censure
LaCava, John R.	Improper campaign statement to Right-to-Life Party & newspaper.	2000 Ann. Rept.	Admonition
Maislin, Samuel	Comments on pending cases; inappropriate advertisements.	1999 Ann. Rept.	Admonition
McGrath, Patrick J.	Campaign letter to fellow pistol permit holders conveyed bias.	2011 Ann. Rept.	Admonition
Mullin, John N.	Campaign literature implied incumbency & made political statements; improper political contributions.	2001 Ann. Rept.	Admonition
Polito, William	Campaign TV and print ads were graphic & sensational & portrayed bias vs. crim. defendants.	1999 Ann. Rept.	Admonition

Shanley, Eliz. A.	Campaign literature described as "law and order" candidate & misrep'd qualifications.	98 NY2d 310 (2002) accepted (except as to "law and order").	Admonition
VanWoeart, Michelle	Improper statements in campaign materials about court revenue; approved of crude social media.	2021 Ann. Rept.	Censure
Watson, William	Improper campaign statements, including pro-prosecutorial statements and misleading use of arrest statistics.	100 NY2d 290 (2003) modified to censure.	Censure
Birnbaum, Arthur	Campaign literature, identified him as tenant and quoted tenants whose cases he handled favorably.	1998 Annual Rept.	Censure
Chan, Margaret	Campaign literature has pro-tenant bias and misrep'd. that she was endorsed by *Times*; personally solicited contributions.	2010 Ann. Rept.	Admonition

Removal of an elected judge has the effect of disenfranchising voters and should be invoked only when necessary to prevent further misconduct or to restore public confidence in the justice system.

In the Matter of William Watson, 100 N.Y.2d 290 (2003), a candidate for city court wrote directly to law enforcement personnel asking them to elect him and "put a real prosecutor on the bench." He asserted in the correspondence that "we are in desperate need of a Judge who will work with the police, not against them. We need a judge who will assist our law enforcement officers as they aggressively work towards cleaning up our city streets." In letters to the editor of the local newspaper, the judicial candidate denounced what he viewed as an

increase in drug crime in the city. He said that the city was attracting criminals from neighboring municipalities "to come into our city to peddle their drugs and commit their crimes" stated that, as a prosecutor, he had "sent a message that this type of conduct would not be tolerated", and urged voters to elect him so that the city could begin to send the same message. In a newspaper advertisement, he blamed the incumbents for an increase in arrest statistics. The candidate made similar statements in newspaper articles and correspondence published in the newspaper. In one article, he stated that "[w]e need a city court judge who will work together with out local police department to help return… [this] to the city that it once was.", and suggested that a judge could use bail and sentencing to "make it very unattractive for a person to be committing a crime in the city…"

Upon review of these facts, the Watson Court stated that:

> The purpose of judicial disciplinary proceedings is not punishment but the imposition of sanctions where necessary to safeguard the bench from unfit incumbents. In this case, petitioner expressed remorse and acknowledged before the Commission that he exercised extremely poor judgment in the conduct of his campaign. He attributed his misconduct in part to his inexperience as a candidate, and his failure to enlist aid from people knowledgeable in the conduct of judicial campaigns. While this is no excuse, we find it relevant in weighing the appropriate sanction. We also note that the Commission makes no claim of inappropriate behavior in the performance of petitioner's judicial duties.
>
> Although petitioner's transgressions are serious, we are unpersuaded that his continued performance in judicial office presently threatens the proper administration of justice or that he has irredeemably damaged public confidence in his own impartiality or that of the state judiciary as a whole.

> We determine that the appropriate sanction is censure. Despite the fact that no judge has been removed for campaign misconduct in the past, our decision in this case should not be interpreted to suggest that violation of the campaign rules can never rise to a level warranting removal.

100 N.Y.2d 290, 304.

Now, nearly 25 years after the decision in Watson, there is still no reported decision removing a judge for an isolated act of campaign misconduct.[3] Unlike the candidate in Watson, Justice Plass did not engage in pattern of campaign misconduct. His improper statements appeared in a single flyer, and were removed from a new flyer that he distributed immediately after his campaign flyer was criticized in a newspaper article that he may have violated the Rules of Judicial Conduct. He never made any other similar statements.

As Referee North concluded, Justice Plass has indeed learned a lesson from this experience and in fact would be fair and equitable in his administration of justice. The evidence adduced at the hearing established that Justice Plass' continued performance in judicial office would not threaten the proper administration of justice or that he has irredeemably damaged public confidence in his own impartiality or that of the state judiciary as a whole.

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[3] By contrast, in Matter of Thomas J. Spargo, 2007 Annual Report, a State Supreme Court Justice was removed for having been involved in soliciting contributions to his legal defense fund; having given away $5.00 coupons and bought drinks for bar patrons during his campaign; having improperly accepted the district attorney as his legal client; and having spoken at a political organization's fundraiser.

In Matter of Hafner, *supra*, the respondent was admonished for publishing a campaign advertisement that stated, "Are you tired of seeing career criminals get a 'slap' on the wrist? So am I ….”; approving campaign literature that attacked his opponent's record in dismissing cases and stated: "Soft judges make hard criminals!".

Here, based on all of the facts and circumstances, if the Commission determines that a sanction is warranted, the appropriate sanction should be admonition as it was in the Hafner matter among others, and not the more severe sanction of censure as was imposed in the more egregious Watson matter, nor the most severe sanction of removal.

V.
FINDINGS AND CONCLUSIONS THAT SHOULD BE DISAFFIRMED

It is respectfully urged that the findings and conclusions of Referee North should be confirmed, except with respect to the following enumerated findings and conclusions, which should be disaffirmed.

1. Findings of Fact

Findings Par. 8 provides that Justice Plass has been sitting as a Town Justice for the Town of New Hyde Park since January 1, 2024. However, Justice Plass did not start to preside until February 2024, when he received the opinion of the Advisory Committee on Judicial Ethics. (Tr., March 24, 2025, p. 25, ln. 6-15).

Findings Pars. 48-50 overstate the burden imposed on Justice McArthur by her on-call duties, and inappropriately assign blame for that burden on Justice Plass. On-call coverage is available from judges of neighboring jurisdictions. Justice McArthur made minimal efforts to obtain coverage. The recusals by Justice Plass based on the advice that he received from the Advisory Committee on Judicial Ethics are protected by Judiciary Law § 212(2)(l)(iv), and are presumed proper for the purposes of this investigation.

Findings Pars. 59-63 cast blame on Justice Plass for not searching for, and finding a rule of which he was unaware. Simply stated, Justice Plass did not know that the rule against pledges and promises existed, and could not have known to look for it.

Finding Par. 69 erroneously states that Justice Plass failed to take appropriate action to determine whether he had engaged in misconduct after reading the newspaper article criticizing his flyer. To the contrary, he called the Judicial Conduct Commission and inquired whether he was the subject of a complaint. Learning that he was not, Justice Plass concluded that the article was a political gambit. Moreover, he revised the flyer at significant cost and reissued hit with the improper statements deleted. (Summary of the testimony, p. 12).

Finding 70 erroneously states that due to the limitations imposed by the opinion of the Advisory Committee, Justice Plass is unable to fulfill the duties of

his office. However, Referee North found that other than Justice McArthur's on-call duties, the respective workloads of the two judges are not grossly unbalanced, and the arrangement is workable. (Finding par. 47). Furthermore, the recusals by Justice Plass based on the advice that he received from the Advisory Committee on Judicial Ethics are protected by Judiciary Law § 212(2)(I)(iv), and are presumed proper for the purposes of this investigation.

Finding 72 erroneously states that if Justice Plass were to preside over the proscribed matters, there would be a "built-in defense" by any defendant. To the contrary, the defenses available to a defendant in a particular case would depend on the facts and circumstances of that case. Moreover, the danger perceived by Referee North does not exist – Justice Plass has recused himself in those matters and, instead, has assumed other judicial responsibilities, including the handling of all civil cases and administrative functions.

Finding 73 states that the improper statements made by Justice Plass in the flyer created an adverse public perception of the judiciary. While Justice Plass has learned that the statements created a risk that public confidence in the justice system would be undermined, there is no evidence that this risk was actually realized. This "finding of fact" is more in the nature of an assumption.

2. Conclusions of Law

Conclusion 4 reiterates the claims that the conduct of Justice Plass has had a substantial adverse effect on Justice McArthur and on the judicial system.

Referee North found that, other than Justice McArthur's on-call duties, the workload between the two justices "is not grossly unbalanced and is workable". After-hour arraignments have declined dramatically since the enactment of bail reform, and now are few in number. Coverage by judges of neighboring jurisdictions is available upon request. Justice McArthur delegated the task of requesting coverage to the court clerk. Requests for coverage were made twice in 2024. On one of those occasions, Justice McArthur obtained coverage. On the other of the two occasions, the lone judge that was contacted on her behalf was unavailable.

The allocation of on-call duties to Justice McArthur is not a result of the inappropriate statements by Justice Plass made in his campaign flyer. Rather, it is a result of recusals by Justice Plass that were recommended by the Advisory Committee on Judicial Ethics, and that are protected by Judiciary Law § 212(2)(l). The recusals by Justice Plass made in accordance with Advisory Opinion 23-158 are presumed proper for the purposes of this investigation by the State Commission on Judicial Conduct.

An appearance of bias can have the effect of undermining public confidence in the justice system. However, there was no evidence that the improper statements made by Justice Plass in the campaign flyer had that effect here, or that they had any effect upon court operations, other than the reallocation of work between Justice Plass and Justice McArthur pursuant to the opinion of the Advisory Committee on Judicial Ethics. That very allocation has provided assurance that any perceived bias of Justice Plass has not manifested itself in his official conduct. It is reasonable to assume that Justice Plass' conduct on the bench will cause any lingering appearance of bias to abate over time, if it has not already done so.

The court has no backlog of cases. As Referee North found:

> Aside from the on-call responsibility of Justice McArthur, there exists at least a slight workload imbalance reflecting a greater amount of time spent by Justice McArthur than by Justic Plass in the performance of their respective duties due to Justice Plass' compliance with the ACJE's opinion that precludes him from handling certain cases. … Other than the onerous on-call responsibility, the relative workload is not grossly unbalanced and is workable. The traffic calendar was merged from two into one which helps. As per Justice McArthur, "Judge Plass does the civil stuff which helps… The big real issue for me is the on-call. I put in the extra time to do it, and I know he [Justice Plass] does what he can within his realm of what he's allowed to do. So, it works, but is has its moments, especially the on-call is really, really my sticking point…the main thing that I'm unhappy about is the on-call stuff."

(Findings of Fact, p. 25, par. 44, 47). The temporary backlog of unprocessed guilty pleas by mail resulted from the conduct of Justice McArthur, not that of Justice Plass. As Referee North found:

> There had been a backlog of 180 vehicle and traffic tickets that had been pled guilty and were awaiting the imposition of a fine. The unassailed testimony is that these tickets had accumulated for five months from April to August 2024 because Justice McArthur was "outright refusing" to handle them in protest over repeated requests for a salary raise, claiming that she was "doing all the work". The unresolved tickets were creating a problem because complaints were made by people who needed final dispositions to complete job applications for military service and otherwise.

(Mitigating Factors, p. 26, par. 51).

Conclusion 5 reiterates that Justice Plass is unable to fulfill the responsibilities of the position to which he was elected. However, Referee North found that other than Justice McArthur's on-call duties, the respective workloads of the two judges are not grossly unbalanced, and the arrangement is workable. (Finding par. 47). Furthermore, the recusals by Justice Plass based on the advice that he received from the Advisory Committee on Judicial Ethics are protected by Judiciary Law § 212(2)(I)(iv), and are presumed proper for the purposes of this investigation.

Conclusion 7 states that Justice Plass violated Rules 100.1 and 100.2A. However, as noted by Referee North, Rules 100.1 and 100.2A relate to the proscribed activities of judges. Unlike Rules 100.3 and 100.5, they do not relate to the proscribed activities of non-incumbent candidates for judicial office. Justice Plass was not charged with misconduct following his election to judicial office. Rather, "[d]uring the time that Respondent has served on the bench he has done so

in a fair, industrious, conscientious and impartial manner without exhibiting any evidence of bias." (Conclusions of Law, p. 30, par. 6). Therefore, the Commission has not met its burden of proving by a preponderance of the evidence that Justice Plass violated Rules 100.1 and 100.2A, notwithstanding that he erroneously admitted that he did so.

As stated in the preamble to the Rules of Judicial Conduct, "[t]he rules governing judicial conduct are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances." Here, the Commission should find that the campaign flyer distributed by Justice Plass before the commencement of his judicial service did not violate Rules 100.1 or 100.2A.

CONCLUSION

For the foregoing reasons, if the Commission determines that a sanction is warranted, it is respectfully requested that the sanction of admonishment be imposed.

Dated: Roslyn, New York
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