

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

ANDREW P. FLEMING,

a Justice of the Hamburg Village Court,
Erie County.

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (John J. Postel and David M. Duguay, Of Counsel)
for the Commission

Daniel M. Killelea for the Respondent

The respondent, Andrew P. Fleming, a Justice of the Hamburg Village
Court, Erie County, was served with a Formal Written Complaint dated September 25,

2014, containing one charge. The Formal Written Complaint alleged that respondent engaged in prohibited political activity by making improper contributions to political organizations and candidates through his law firm and his spouse. Respondent filed a verified Answer dated October 18, 2014.

On May 8, 2015, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On June 18, 2015, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Hamburg Village Court, Erie County, since 2006. His current term expires on April 2, 2018. Respondent was admitted to the practice of law in New York in 1986.
2. Respondent is a partner in Chiacchia & Fleming, LLP, a law firm with offices in Hamburg, New York. Respondent has been a law partner with Daniel J. Chiacchia since 1990 and formed Chiacchia & Fleming, LLP, in August 1998.
3. As set forth below, from May 2006 through December 2013 respondent directly and/or indirectly engaged in prohibited political activity when (A) through his law firm Chiacchia & Fleming, LLP, he made 71 prohibited ticket purchases to politically sponsored dinners or other functions totaling \$11,960.55, (B) through his

law firm, Chiacchia & Fleming, LLP, he made 27 prohibited contributions to political organizations and candidates for elective office, totaling \$12,533.48, and (C) through his spouse, Mary Pat Fleming, he made two prohibited ticket purchases to politically sponsored dinners or other functions totaling \$400.

4. From January 2007 through April 2013, as set forth in Schedule A to the Agreed Statement, respondent was responsible for 71 prohibited ticket purchases made through Chiacchia & Fleming, LLP, to politically sponsored dinners or other functions, totaling \$11,960.55. None of these contributions were made during respondent's "window period" of permissible political activity on behalf of his own candidacy for elected judicial office, as defined in Section 100.0(Q) of the Rules Governing Judicial Conduct ("Rules").

5. From January 2007 through March 2013, as set forth in Schedule B to the Agreed Statement, respondent was responsible for 17 prohibited contributions made through Chiacchia & Fleming, LLP, to political organizations and candidates for elective office, totaling \$6,450. None of these contributions were made during respondent's "window period" of permissible political activity on behalf of his own candidacy for elected judicial office, as defined in Section 100.0(Q) of the Rules.

6. From May 2006 through December 2013, as set forth in Schedule C to the Agreed Statement, respondent was responsible for ten prohibited contributions made through Chiacchia & Fleming, LLP, to political organizations and candidates for elective office, totaling \$6,083.48. Although each of these contributions was made

during respondent's "window period," none were made to purchase tickets to politically sponsored dinners or other functions, as permitted by Section 100.5(A)(2)(v) of the Rules, or for any other purpose authorized in the Rules.

7. From February 2011 through April 2011, as set forth in Schedule D to the Agreed Statement, respondent was responsible for two contributions in the form of prohibited ticket purchases made by his wife, Mary Pat Fleming, using a bank account held jointly by her and respondent, to politically sponsored dinners or other functions, totaling \$400. None of these contributions were made during respondent's "window period" of permissible political activity on behalf of his own candidacy for elected judicial office, as defined in Section 100.0(Q) of the Rules.

Additional Factors

8. Respondent has been contrite and cooperative with the Commission throughout its inquiry.

9. Notwithstanding that many of the prohibited contributions and ticket purchases made through respondent's law firm were on checks signed by his law partner, respondent recognizes that it is his obligation as a part-time judge to ensure that his law firm acts in a manner consistent with the Rules, which prohibit such contributions and purchases as are at issue here.

10. Respondent regrets his failure to abide by the Rules with respect to political activity and pledges to conduct himself in accordance with the Rules for the remainder of his service as a judge.

11. Respondent's public admonition in 2013 – for acting as an attorney for a crime victim and the victim's family notwithstanding that he had presided over prior proceedings in the underlying criminal case – was unrelated to the instant matter.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.5(A)(1)(h) and 100.5(A)(1)(i) of the Rules and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Respondent has acknowledged that since becoming a judge in 2006, he was responsible for numerous prohibited contributions to political organizations and candidates, constituting political activity that is specifically barred by the ethical standards.

A judge or judicial candidate cannot “directly or indirectly” engage in partisan political activity except for certain limited activity during a prescribed “window period” in connection with the judge's campaign for judicial office (Rules, §§100.5, 100.0[Q]). These limitations have been carefully drawn to address “the State's compelling interest in preventing political bias or corruption, or the appearance of political bias or corruption, in its judiciary” (*Matter of Raab*, 100 NY2d 305, 316 [2003]). As the Court of Appeals has held, the ethical restrictions are not only constitutionally

sound, but fair and necessary to “preserv[e] the impartiality and independence of our state judiciary and maintain[] public confidence in New York State’s court system” (*Id.* at 312).

Among these restrictions, a judge or judicial candidate is specifically prohibited from “making a contribution to a political organization or candidate” or purchasing tickets to attend politically sponsored events (Rules, §§100.5[A][1][h], [i]), except that a candidate, during the prescribed “window period,” may with some restrictions purchase two tickets to attend politically sponsored functions (Rules, §100.5[A][2][v]). *See Matter of Raab, supra*; *Matter of Mullin*, 2001 NYSCJC Annual Report 117; *Matter of Laurino*, 1989 NYSCJC Annual Report 105; *see also, e.g., Adv Ops 99-18, 96-29, 94-66, 92-128, 92-97, 91-68*. Contributions and ticket purchases by a part-time judge’s law firm are subject to the same ethical restrictions, since judges “cannot do indirectly that which is forbidden explicitly” (*Adv Op 96-29*). As the Advisory Committee on Judicial Ethics (“Advisory Committee”) has stated:

When a law firm, whose members include a part-time judge, donates money to a political campaign, it is correctly presumed that a percentage of the donation comes from the judge. If the judge is an associate or a partner of the firm, such donations give the clear appearance that the judge has endorsed the donee’s candidacy. Such contributions, therefore, may not be made in the firm’s name. (*Adv Op 88-56*)

See Matter of Burke, 2015 NYSCJC Annual Report 78; *Matter of Kelly*, 2012 NYSCJC Annual Report 113; *Matter of DeVaul*, 1986 NYSCJC Annual Report 83.

From 2006 to 2013, respondent’s law firm, Chiacchia & Fleming, LLP,

made 98 improper political contributions totaling \$24,494. Of these, 71 contributions were for tickets to political events that were not within respondent's window periods for permissible political activity and thus were prohibited by Rule 100.5(A)(1)(i). The remaining 27 payments were contributions to political organizations and candidates; while 17 of these were made during respondent's window periods, such contributions are always impermissible under the ethical rules.

While many of these contributions and ticket purchases were through checks signed by respondent's law partner, the payments were improper regardless of who signed the checks (*see* Adv Op 96-29). Since the checks came from respondent's law firm, where he was a name partner, there was at least an appearance that he was responsible for or endorsed those donations, or that at least a portion of the funds was attributable to him. Respondent has acknowledged that it is his obligation as a part-time judge to ensure that his law firm acts in a manner consistent with the ethical limitations on political activity that are incumbent upon him.

Respondent has also acknowledged that he was also responsible for two prohibited political contributions totaling \$400 made by his spouse, using their joint bank account, to purchase tickets to political events. Since these contributions were not made within respondent's window periods, they were inconsistent with Rule 100.5(A)(1)(i). The Advisory Committee has stated that such contributions by a spouse from a joint account are inadvisable since, regardless of who writes the check, the payments can be viewed as coming from jointly held funds, and thus indirectly from the judge (*see* Adv

Ops 98-111, 96-29).

We note that respondent has acknowledged that all the contributions at issue were inconsistent with the ethical standards and that he has pledged to conduct himself in accordance with the Rules for the remainder of his service as a judge. In accepting the stipulated sanction of admonition, we remind every judge and judicial candidate of the obligation to know and abide by the ethical rules as interpreted and applied by the Commission and the Advisory Committee.

We are constrained to reply to our colleague Mr. Emery's opinion that the rule barring political contributions by a judge or judicial candidate impermissibly treads on First Amendment rights. In our view, nothing in the recent Supreme Court decision, *Williams-Yulee v. Florida Bar*, 575 US ___, 135 S Ct 1656, 191 L Ed2d 570 (2015), which upheld a Florida rule prohibiting judicial candidates from personally soliciting campaign contributions, permits a judge to make contributions to political candidates or organizations, as respondent did here, or otherwise undermines New York's rules limiting political activity by judges and judicial candidates. Indeed, in affirming that political speech by judicial candidates can be regulated by narrowly tailored restrictions that serve a compelling state interest, the Supreme Court in *Williams-Yulee* applied an analysis similar to that in *Matter of Raab*, *supra*, where this state's highest court in 2003 considered a vigorous constitutional challenge to New York's restrictions on political activity. In upholding the New York rules, the *Raab* court, applying a strict scrutiny analysis, noted the state's compelling interest in ensuring that its

judicial system “is fair and impartial for all litigants, free of the taint of political bias or corruption, or even the appearance of such bias or corruption” and concluded that the challenged restrictions were narrowly tailored to further those interests (*Raab, supra*, 100 NY2d at 315).

The *Raab* court specifically addressed the rule at issue in the matter before us, the ban on political contributions by judges and judicial candidates (§100.5[A][1][h]), concluding that such a limitation serves a valid state objective and is constitutionally permissible. While our dissenting colleague treats the *Raab* decision as though the Court of Appeals intended to limit application of the contributions ban to facts that are identical to the conduct in *Raab*, we find nothing in the Court’s rationale in *Raab* to support such a conclusion. Though the particular facts in *Raab* were different, there is no suggestion in the *Raab* decision that political contributions of the kind here would be permitted under the applicable rule.

In the wake of *Republican Party of Minn. v. White*, 536 US 765 (2002), some commentators, including our dissenting colleague, believed that the Supreme Court had greatly expanded a judge’s right to engage in traditional forms of political activity, including personally soliciting campaign funds (*see Weaver v. Bonner*, 309 F3d 1312 [11th Cir 2002]; *Matter of Chan*, 2010 NYSCJC Annual Report 124 [Emery Dissent]). Now the Supreme Court, applying the same standards, has upheld a rule barring judicial candidates from engaging in such solicitations, while underscoring that “judges are not politicians” and that judicial elections may be regulated differently from political

elections (*Williams-Yulee, supra*, 191 L Ed2d at 580, 585). While the particular conduct in the case before us is different than in *Raab* and *Williams-Yulee*, it is clearly prohibited by a rule in New York that has not been diminished or weakened by prior precedent.

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

As the Commission has previously stated, “the rules governing political activity for judges and judicial candidates seek to achieve a reasonable balance between the goals of prohibiting judges from being involved in politics and permitting judges to campaign effectively,” while respecting their First Amendment rights (*Matter of Campbell*, 2005 NYSCJC Annual Report 133).

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

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Cohen, Ms. Corngold, Mr. Stoloff and Judge Weinstein concur.

Mr. Emery dissents in an opinion and votes to reject the Agreed Statement of Facts.

Mr. Belluck and Mr. Harding did not participate.

CERTIFICATION

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

Dated: August 20, 2015

A handwritten signature in black ink, reading "Jean M. Savanyu", is written over a horizontal line. The signature is cursive and includes a stylized initial "J" and "S".

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

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DISSENTING OPINION
BY MR. EMERY

INTRODUCTION

A fundamental right of the American political system is the right to support political candidates who reflect one's view, hopes and dreams for a better future. We support these candidates with our votes, our voices and our money. The Supreme Court has jealously policed any government intrusions into the rights of citizens to participate in the political process. This right of political expression is the basic guarantee of the First Amendment on which our elective system – the system based on the consent of the governed – operates.

We start from this basic proposition when we evaluate any necessity to compromise or abridge the right to full political participation. The Supreme Court has repeatedly affirmed that a compelling governmental interest is the only basis on which to legitimately diminish the right to full political participation and, then, the method of diminution must be the least restrictive one available that achieves the government's

compelling need.

This is the simplified analysis of the Court in the recent case of *Williams-Yulee v. Florida Bar*, 575 US ___, 135 S Ct 1656, 191 L Ed2d 570 (2015), in which Chief Justice Roberts, in a 5-4 decision, concluded that a compelling governmental interest in a judiciary that does not appear corrupted supports a rule that prohibits judicial candidates from directly soliciting campaign donations from voters who will be appearing before the judge.

Regrettably, this cabined, well-reasoned Supreme Court decision appears to be interpreted by this Commission as a license to accelerate this Commission's proclivity to discipline judges for all manner of campaign activity that has no relationship to this narrowly defined compelling interest. The case before us, for example, is the exact opposite situation – a judge is deemed to have engaged in impermissible political activity because the judge's law firm and the judge's spouse made political contributions which the judge himself was prohibited from making – conduct that is vastly different, and quite benign, as compared to the corrupting perception of judges soliciting money. Ironically, the Commission agrees to discipline Judge Fleming for such conduct even though it cannot – because the New York rules allow it – discipline a New York judge whose campaign committee (with the knowledge of the judicial candidate) solicits contributions from people and parties who appear before the judge – almost the same conduct prohibited in *Williams-Yulee*.

I write separately, below, because I strongly believe that this is a road that the Commission should not travel. Campaign rule enforcement for judicial elections

should be handled by some other body as a discrete subset of enforcement of judicial conduct. If we are going to continue on this path, then we had better hew to the Constitution and the basic tenets of respect for the rights of judges to express themselves both at a personal level and in the judicial campaign context – a context that is complex bordering on byzantine – that neither candidates nor this Commission has the expertise to fathom given the feudal vagaries of City versus Long Island versus Upstate judicial selection gamesmanship. Put simply, we are in way over our heads and we are regularly drowning fundamental constitutional rights in our flailing attempts to make sense of the political realities of New York State regional political judicial selection mechanisms. Posturing itself as regulator of judicial elections in New York is a task this Commission has attempted and failed. We should quit this business or, at a minimum, exercise the restraint that the federal Constitution requires when governmental regulators tamper with precious First Amendment rights.¹

RESPONDENT'S CASE

The Agreed Statement of Facts accepted by the majority publicly disciplines Judge Fleming for “directly and/or indirectly” engaging in prohibited political activity by making political contributions “through his law firm” and “through his

¹ I recognize that each of my colleagues, in his or her own way, is a devotee of constitutional principles. But rather than wrestle with the commands of First Amendment analysis, the majority opts to pay lip service to *Raab* and the Supreme Court precedent without fulfilling our obligation to our oath to uphold constitutional doctrine by rigorous analysis of their reach and import. Any decision – the majority’s decision – that punishes a judge for core electoral speech and activity, without any analysis of the judge’s specific conduct in the context of a compelling governmental interest that is actually undermined by that speech activity, abdicates our basic obligation. Passive acquiescence, in the sheep’s clothing of the pretension that we are not a court, degrades our role as much as it fails fundamental First Amendment tests.

spouse,” notwithstanding that the Agreed Statement contains no facts indicating whether the judge was personally involved in, or was even aware of, any of the contributions at issue. Omitting those critical facts, the stipulation simply states that Judge Fleming “was responsible for” the contributions made by his law firm and his spouse, which are deemed to violate the rule barring judges from “making a contribution to a political organization or candidate” (Rule 100.5[A][1][h]). Because I believe, for reasons set forth below, that the rule itself is of doubtful constitutionality and that, in any case, the unclear, ambiguous facts before us are insufficient to support a finding that Judge Fleming violated the provision, I must dissent from accepting the Agreed Statement.

HISTORY AND BACKGROUND

In New York, every judge of the state unified court system is required to “refrain from inappropriate political activity,” as described in Section 100.5 of the Rules Governing Judicial Conduct. Essentially, judges are prohibited from “directly or indirectly” engaging in any partisan political activity, except – to a strictly limited extent – in connection with the judge’s own campaign for judicial office during a prescribed “window period” before and after a nominating convention, primary or general election. These rules and their interpretations are inordinately complex and only a cadre of sophisticated election practitioners even pretend to be able to apply them. They are also far more relevant in some parts of the State – outside of New York City – where there are many more contested elections than in the City where, for the most part, political leaders select judges.

Among other restrictions, a judge or judicial candidate may not endorse

other candidates or participate in their campaigns, make speeches on behalf of a political organization or candidate, attend political gatherings, or solicit funds for or make a contribution to a political organization or candidate (Rules, §§100.5[A][1][c], [d], [e], [f], [g], [h]). This particular combination of restrictions, the New York Court of Appeals has told us, is designed to ensure “that the judicial system is fair and impartial for all litigants, free of the taint of political bias or corruption, or even the appearance of such bias or corruption,” while simultaneously “respect[ing] the First Amendment rights of judicial candidates and voters” (*Matter of Raab*, 100 NY2d 305, 315 [2003]). Applying a strict scrutiny analysis and finding a compelling interest, the Court in *Raab* rejected a First Amendment challenge to the political activity restrictions at issue – including the ban on contributions.² *Raab* was decided after a Supreme Court decision invalidated a Minnesota rule prohibiting judicial candidates from “announcing” their views on disputed legal and political issues (*Republican Party of Minn. v. White*, 536 US 765 [2002]).

Buttressed by *Raab*, the Commission has ranged far and wide, punishing judges for political activity in contexts far beyond the limited, factually different scenarios of *Raab*, without engaging in any basic First Amendment analysis of whether a compelling governmental interest justified precluding the specific conduct at issue.³ And

² Prior to serving on this Commission, I represented the respondent-judge in *Raab* before the Commission and the Court of Appeals.

³ *E.g.*, *Matter of Burke*, 2015 NYSCJC Annual Report 78, and *Matter of Kelly*, 2012 NYSCJC Annual Report 113 (contributions by judge’s law firm); *Matter of Michels*, 2012 NYSCJC Annual Report 130 (misleading campaign literature); *Matter of McGrath*, 2011 NYSCJC Annual Report 120 (campaign literature conveyed bias); *Matter of Chan*, 2010 NYSCJC Annual Report 124 (personal solicitation of campaign contributions and campaign literature that was misleading and conveyed bias); *Matter of Herrmann*, 2010 NYSCJC Annual Report 172 (nominated a

the Advisory Committee on Judicial Ethics has issued opinions concluding that particular scenarios are inconsistent with the political activity rules and therefore prohibited, without providing even lip service to the First Amendment interests at issue.⁴

Essentially, for New York State, *Raab* opened a constitutionally bereft sluice gate of judicial campaign regulation by this Commission and the Advisory Committee that, in abandoning a First Amendment analytical framework, has descended to ad hoc, pure rational basis policy-making as opposed to the rigorous First Amendment compliance unquestionably required both by *Raab* itself, and by *Williams-Yulee* and *White*.

Though this Commission, and those who advocate for controlling unseemly

candidate at a caucus); *Matter of Yacknin*, 2009 NYSCJC Annual Report 176 (solicited political support in court from an attorney appearing before her); *Matter of King*, 2008 NYSCJC Annual Report 145 (served as a party chair, circulated petitions for and endorsed other candidates); *Matter of Kulkin*, 2007 NYSCJC Annual Report 115 (misrepresented facts about his opponent); *Matter of Spargo*, 2007 NYSCJC Annual Report 107 (spoke at a party fund-raiser and engaged in “unseemly” political activity including buying drinks for patrons at a bar when he was a candidate); *Matter of Farrell*, 2005 NYSCJC 159 (made phone calls supporting another candidate and made a prohibited payment to a political organization); *Matter of Campbell*, 2005 NYSCJC Annual Report 133 (endorsed other candidates); *Matter of Schneier*, 2004 NYSCJC Annual Report 153 (improper use of campaign funds).

⁴ To cite just a few examples: the Committee has opined that a judge who is not a candidate may not attend a fund-raiser for a local school board candidate (Adv Op 99-18) or purchase tickets to attend a social event sponsoring school board candidates (Adv Op 88-129); may not attend a party celebrating a neighbor’s election as a town board member even if the event is not sponsored by a political organization (Adv Op 00-113) or attend a picnic sponsored by a political party (Adv Op 90-11); may not award prizes in a high school essay contest at a political club (Adv Op 89-26) or speak at a political club about the function of the Family Court (Adv Op 88-136); may not introduce judicial candidates at a bar association-sponsored event (Adv Op 96-49); may not accompany a spouse who is a candidate for public office to political functions (Adv Op 92-129), march in a parade with his/her spouse-candidate, or appear at a political event held by the spouse in the marital home (Adv Op 06-147); further, a judge must advise his/her spouse not to place signs endorsing political candidates on the property where the judge and spouse reside, even if the spouse is the sole owner of the property (Adv Ops 99-118, 07-169), and may not attend a candlelight vigil on behalf of crime victims (Adv Op 04-91). The notion that any of these rulings could survive a First Amendment challenge is patently absurd.

election tactics, may like a Marquis of Queensbury approach to judicial contests, telling judges who are campaigning that they cannot hit below the belt is plainly unconstitutional. New York has chosen to select most of its judges using elections. Along with this choice comes the constitutional guarantees of free speech that allow for gloves off behavior even in judicial elections. And of course, in reality, New York judicial elections, even when purportedly regulated by this Commission and the Advisory Committee, are actually little better than cage fights. The hallucination that this Commission and the Advisory Committee are somehow civilizing these contests is magical thinking.⁵

THE SUPREME COURT'S RECENT RULING

Thirteen years after *White*, the Supreme Court in *Williams-Yulee v Florida Bar* upheld the application of a Florida rule that precluded otherwise protected speech (personal solicitation of campaign contributions) by judicial candidates. Accepting that strict scrutiny requires a compelling interest as a basis to regulate judicial speech in campaigns, the Court concluded that the rule was narrowly tailored to promote the State's

⁵ Instances of salacious and misleading campaign advertising by judicial candidates have persisted since the infamous 1968 commercial by Supreme Court candidate Sol Wachtler (later New York's Chief Judge), showing the candidate strolling through a jail and slamming a cell door while pledging to "get the thieves and muggers and murderers into these cells." See, e.g., *Matter of Polito*, 1999 NYSCJC Annual Report 129 (candidate ran graphic television ads portraying a masked man with a gun attacking a woman outside her car, while a voice declared the candidate would "crack down on crime" as a cell door slammed shut; another ad vowed that he would not "send convicted child molesters home for the weekend" and would "stick his foot in the revolving door of justice," with dramatic footage of a foot jammed in a door); *Matter of Hafner*, 2001 NYSCJC Annual Report 113 (candidate's campaign literature attacked the record of his opponent, the incumbent judge, in dismissing cases and said, "Soft judges make hard criminals!"); *Matter of Kulkin*, 2007 NYSCJC Annual Report 115 (candidate distorted and misrepresented facts about his opponent, falsely implying that she had refused to handle parking tickets and thereby deprived the City of \$400,000 in revenue).

compelling interest in a fair and impartial judiciary free from corruption and the appearance of corruption. Writing for the majority, Chief Justice Roberts applied a stringent First Amendment analysis to the rule at issue, carefully weighing the competing interests and issues at stake. While opining that judicial candidates may be treated differently from campaigners for political office since “the role of judges differs from the role of politicians,” he underscored the narrow scope of the Court’s ruling on the particular facts presented, stating: “We have emphasized that ‘it is the rare case’ in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest. . . . This is therefore one of the rare cases in which a speech restriction withstands strict scrutiny” (*supra*, 191 L Ed2d at 585, 584).

CONSTITUTIONAL ANALYSIS

Rather than read *Williams-Yulee* as an endorsement of any and all restrictions on political activity by judges and judicial candidates that appear to be “desirable” as a matter of preferred policy, we should respect the Court’s clear message: that judicial campaign speech and conduct are core First Amendment activity, that a compelling interest must be identified if a narrow rule is to be upheld, that personal solicitation of campaign contributions by judicial candidates is such an interest that cuts to the core of judicial integrity, that strict scrutiny requires analysis of the campaign activity at issue to determine whether the compelling governmental interest (appearance of corruption) legitimately requires restriction of that particular activity, and that the rule restricting judicial speech is the least restrictive available to support the compelling governmental interest at stake.

Plainly, *Williams-Yulee* did not address any campaign activity beyond judicial candidates directly soliciting funds. Notably, neither *Williams-Yulee* nor *Raab* addressed the New York common practice of judicial candidates and sitting judges soliciting money through committees, knowing who contributed, and soliciting funds through these same committees from lawyers and entities which will and do appear before the candidate for judicial office, though even this practice is mentioned and not criticized as raising constitutional questions in the *Williams-Yulee* decision (191 L Ed2 at 588). Of course, the ultimate hypocrisy in our campaign regulatory scheme is the failure to restrict these donations in a meaningful way.⁶ Until we do, we will have no moral or legal high ground to restrict far more mundane and benign political judicial behavior, as we do now. Of course, in a whisper we all acknowledge that donations from lawyers and entities to judges before whom they appear are the sanctified lifeblood of judicial campaigns even though such donations are plainly as corrupting as the solicitations in

⁶ An administrative rule adopted by the court system in 2011 to prevent judges from presiding over cases involving their largest contributors only mildly mitigates the problem. Rule 151.1 (22 NYCRR §151.1), which provides that “no case shall be assigned” to a judge when the lawyers or parties, within the prior two years, have donated \$2,500 or more, or collectively contributed \$3,500 or more, to the judge’s campaign, while no doubt well-intended, has significant loopholes and does far too little to address the problems inherent in our system of electing judges under the existing rules. Since the terms of full-time judges in this state range from six to 14 years, the two-year cut-off period is plainly inadequate. While contributions by an attorney’s law firm are included within the threshold limits, personal contributions by the attorney’s law partners, colleagues, friends and relatives are not included; nor are contributions by a party’s family members, friends, etc., or contributions by unnamed non-party entities that have may have a direct interest in litigation, such as banks, assignees, entities liable as guarantors or who buy an interest in litigation. If \$2,500 is a meaningful threshold for full-time judges, whose campaigns, at least in New York City, routinely cost \$100,000 or more, it should certainly be lower at the town and village level, where most of this state’s judges preside. To prevent judge-shopping, the rule includes a waiver provision that may be of little practical value. Nor, of course, does the rule bar judges from doling out lucrative assignments to the lawyers and law firms that routinely contribute to judicial campaigns.

Williams-Yulee. But, wink, wink, as long as we do not have public financing of campaigns, no one can handle the fundamental truth that New York cannot have judicial elections without such plainly corrupting contributions.

Beyond this glaring hypocrisy, which violates the First Amendment itself as a result of basic over- and underbreadth defects (*see Matter of Herrmann, supra*, Emery Dissent; *Matter of Yacknin, supra*, Emery Dissent; *Matter of King, supra*, Emery Concurrence; *Matter of Spargo, supra*, Emery Concurrence/Dissent; *Matter of Farrell, supra*, Emery Concurrence; *Matter of Campbell, supra*, Emery Concurrence), neither *Williams-Yulee* nor *Raab* addressed the myriad issues that lead to preclusion of judicial speech that the Advisory Committee and this Commission routinely and blithely prohibit. And those controlling cases certainly never addressed the issues now before the Commission in the cases here (*Fleming* and *Matter of Sakowski*, also issued today): contributions by a judge to national candidates and political organizations, political contributions by a judge's spouse, and contributions by the law firm of a part-time judge to local candidates and political organizations. Nothing in *Williams-Yulee* or *Raab* compels, let alone suggests, that the rule banning such conduct could withstand strict scrutiny. Nonetheless, in finding misconduct here, the Commission has chosen to ignore the Supreme Court's and *Raab*'s clear analytical framework for determining whether the particular political activity fits within the compelling interest these courts have set forth.

Contributions by Judge's Law Firm

With respect to the 98 contributions by Judge Fleming's law firm over seven years – 71 of which were for the purchase of tickets to attend political events that

were not within Judge Fleming’s “window period” – the majority accepts the stipulation that by virtue of these contributions, for which he “was responsible,” the judge “directly and/or indirectly” engaged in prohibited political activity by violating the ban on contributions, Rule 100.5(A)(1)(h). Critically, the majority provides no analysis as to why such conduct violates a compelling governmental interest and how the Court of Appeals’ stated rationale in *Raab* for upholding the ban – preventing a candidate from “buying” a judgeship, or the appearance of doing so⁷ – can justify applying the rule in such circumstances.

The Court in *Raab* had stated:

The contribution limitation is intended to ensure that political parties cannot extract contributions from persons seeking nomination for judicial office in exchange for a party endorsement. It achieves this necessary objective by preventing candidates from making contributions in an effort to buy – and parties attempting to sell – judicial nominations. It also diminishes the likelihood that a contribution, innocently made and received, will be perceived by the public as having had such an effect. Needless to say, the State’s interest in ensuring that judgeships are not – and do not appear to be – “for sale” is beyond compelling. The public would justifiably lose confidence in the court system were it otherwise and, without public confidence, the judicial branch could not function. (*Id.* at 315-16)

Ignoring that rationale, the majority here, in finding misconduct, cites several Advisory Opinions that are completely devoid of any First Amendment analysis and that ground their conclusions in speculation and conjuring, suggesting that personal

⁷ In *Raab*, the Court found that the candidate violated the rule by agreeing, prior to being nominated, to make a \$10,000 contribution to the Nassau County Democratic Committee, conveying the appearance that the payment was an effort to “buy” a judgeship (*supra*, 100 NY2d at 315-16).

involvement in such contributions is irrelevant since a judge is strictly liable under the Rules for the firm's expenditures, even if he was unaware of them, since they are prohibited "indirect" political contributions. This reasoning by the Advisory Committee, which our Commission adopts, tramples First Amendment principles and serves only to stifle protected speech and conduct rather than to support any realistic or legitimate ethical or governmental concern. It is government regulation of judicial speech run amok.

However doubtful the constitutionality of an absolute ban on political contributions by a judge, it is even more unlikely that such a ban could be upheld as applied to contributions by a judge's law firm, especially on the scant, ambiguous facts presented here. While it is stipulated that "many" of the checks for the firm's contributions were signed by the judge's law partner, the Agreed Statement contains no information indicating whether Judge Fleming himself signed *any* of the checks, whether he was otherwise involved in these expenditures or was even aware of them, or whether he attended any of the political events for which tickets were purchased (though since he was not charged with attending such events, we can assume he did not). Did he intentionally make the contributions "through his law firm," indirectly, in order to evade the contributions ban, or did he have no role in them whatsoever? The Agreed Statement does not tell us. Did he believe that the law firm was a separate entity from its individual members and therefore permitted to make such contributions? We do not know. On the facts before us, with no analysis of whether banning such activity treads on the free expression rights of the judge or others at his law firm – when it plainly does – we simply

cannot properly exercise our powers to sanction a judge.

According to the schedules included in the Agreed Statement, nearly half of the contributions at issue were made at least five years ago, as far back as 2006. Records of political contributions are now readily accessible and searchable online. Our purpose is, hopefully, more elevated than to scour the Internet to ferret out any and all political contributions by a judge or a judge's law firm over the past decade or more and impose discipline in such cases on the dubious premise that any contribution attached to a judge's name, or to any entity with a connection to a judge, warrants punishment.

Contributions by Judge's Spouse

Even more problematic, in my view, is a finding of misconduct based on two contributions by Judge Fleming's spouse, made from a joint checking account, for the purchase of tickets to political events. The facts presented, on their face, are not only unclear and conclusory, but highly patronizing. Whether Judge Fleming's wife made the purchases entirely on her own, or crossed out his name on the checks, or whether the judge was even aware of the expenditures, we do not know, and we are told it does not matter. (Since there is no charge that he engaged in misconduct by attending these events, we can assume he did not attend.) We are told that the judge "was responsible for" these contributions, but whether that means that his wife acted at his direction, or is simply a legal conclusion based on a strict liability standard, we are not told. We are also told that he "made" the contributions "through his spouse," but whether that reflects an attempt to evade the contributions ban or is another legal conclusion, we have no idea. In sum, we simply do not know whether the finding of misconduct is based on a strict

liability standard applied to Judge Fleming's responsibility for his spouse's conduct, although since the underlying facts presented are so sparse, we must assume that it is. To me, that is not only completely unacceptable and unfair to the judge, but an impingement on his spouse's First Amendment right to engage in political activity.

In finding misconduct, the majority cites opinions of the Advisory Committee opining that a spouse's contributions from a joint account "can be viewed as coming from jointly held funds, and thus indirectly from the judge." In fact, in numerous opinions the Committee has adopted a nuanced approach in trying to strike a balance between the principle that a judge cannot "directly or indirectly" engage in political activity and the recognition that a spouse has the right to engage in political activity independently from the judge. As the Committee has stated, the ethical rules "do not restrict the bona fide, independent political activity of a judge's spouse or any other member of the judge's family" (Adv Op 06-147), and plainly, neither the Committee nor this Commission has jurisdiction over the activities of a judge's spouse. The opinions also seem to recognize, as this Commission does not, that a judge's authority to prevent a spouse from engaging in any activity is not unfettered (*e.g.*, a judge should "strongly urge" a spouse not to post political signs on property where the judge resides, but "[o]nce the judge has done so, he/she is not required to take further action" [*see* Adv Ops 07-169, 99-118]). With respect to political contributions, the Committee has opined that since a judge "cannot do indirectly that which is forbidden explicitly," a judge "*may not allow*" the judge's law firm to make such contributions, but it is "*inadvisable*" for a judge's spouse to make political contributions from a joint bank account (Adv Ops 96-29, 88-56)

– pointedly avoiding stating that a judge “may not allow” such conduct by a spouse and applying a more lenient standard to such activity. Two years later, the Committee advised that a spouse with no independent income “should not” make a contribution from a joint checking account “even if the judge’s name is deleted from the check,” since that would not rectify the concern that it was, or could appear to be, an indirect contribution by the judge, but in the same opinion advised that such a spouse may contribute from a separate account in the spouse’s name, even if funded entirely by the judge (Adv Op 98-111). Critically, nothing in these opinions, or in the applicable rules, suggests that a judge is accountable for a spouse’s activities and is subject to discipline if the judge’s spouse engages in conduct that is “inadvisable.” And even to begin to apply the opinions to this case, we would have to know, at the very least, whether Judge Fleming was aware of the contributions or had told his spouse that such contributions are “inadvisable” – which the Agreed Statement does not tell us.

These rules and opinions read and sound like tax or disclosure regulations, not core First Amendment campaign activity. They may be desirable on a rational basis regulatory scheme, but that is not the world we live in when government regulates free expression especially in the electoral process. It is as if the Commission and the Advisory Committee are operating in a universe far away from any governed by the Constitution and are just doing what they think is best without any regard to protections for expressive activity. Who are these spouses who have no voice because their wives became judges? Who is this Commission or this Advisory Committee to tell them to shut up?

In sum, even this Commission, which has stated that “the onus is on the

judge” to ensure that a judge’s law firm does not make prohibited contributions, should recognize that the “strict liability” standard is inapplicable with respect to a spouse’s activity. Most importantly, as with contributions by the judge’s law firm, the finding of misconduct here is entirely devoid of any analysis, let alone seeming awareness of the First Amendment rights of the judge and, in this case, his spouse.

CONCLUSION

As I have previously stated, “too often the Commission has become a peripatetic watchdog of judicial campaign activity” (*Matter of Chan, supra*, Emery Dissent). See *Matter of Michels, supra*; *Matter of Kelly, supra*; *Matter of McGrath, supra*; *Matter of Chan, supra*; *Matter of Herrmann, supra*; *Matter of Yacknin, supra*; *Matter of King, supra*; *Matter of Spargo, supra*; *Matter of Farrell, supra*; *Matter of Campbell, supra*; *Matter of Schneier, supra*; *Matter of Crnkovich*, 2003 NYSCJC Annual Report 99; *Matter of Raab, supra*; *Matter of Watson*, 100 NY2d 290 (2003). In my view, our role should be hands off except in the clearest cases. Ideally, the Chief Judge would direct the Office of Court Administration or another entity to police these rules to the extent they are constitutional. At least then, some group could legitimately claim expertise in their application.

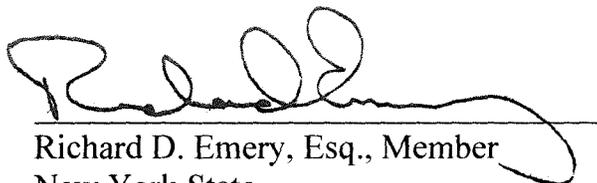
In any event, this is not a case that warrants the Commission’s intervention. This is a case involving constitutionally protected conduct. We should not accept such a result even if the judge, for pragmatic reasons, agrees.

In the past in cases in which I have differed from the majority’s view on judicial campaign issues, I have often concurred – feeling bound *by Raab* – rather than

dissented. This case leads me to dissent because I am voting to reject an Agreed Statement for the reason that I believe that public discipline of this judge is unwarranted in any event. In addition, I do not believe that Rule 100.5(A)(1)(h), notwithstanding its flat prohibition on political contributions by a judge, was intended to sweep within it contributions such as those in this case. Our duty is to interpret the Rules in a way that is consistent with constitutional strictures. No precedent of the Court of Appeals or any other influential court commands that the contributions at issue here be considered as equivalent to those in *Raab*. Thus, I do not here feel compelled to concur.

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

Dated: August 20, 2015

A handwritten signature in black ink, appearing to read "Richard D. Emery", written over a horizontal line.

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