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

ERIN P. GALL,

a Justice of the Supreme Court,
Fifth Judicial District, Oneida County.

REPLY MEMORANDUM BY COUNSEL TO THE COMMISSION

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PRELIMINARY STATEMENT

Commission Counsel files this brief in reply to Respondent's memorandum of May 6, 2024.

ARGUMENT

POINT I

RESPONDENT FAILS TO APPRECIATE THAT EVEN THE APPEARANCE OF RACIAL BIAS UNDERMINES PUBLIC CONFIDENCE IN A JUDGE'S ABILITY TO SERVE AS AN IMPARTIAL ARBITER.

Respondent spends much of her brief arguing that despite her admission that her statements to and about the Black teenagers "created at least the appearance of racial bias" (ASF ¶75[D]),[1] she should not be removed because she did not exhibit actual explicit or implicit racial bias (Resp Br 3, 11, 16-21).[2] In doing so, she demonstrates a fundamental lack of appreciation for the Court of Appeals' holding that the harm caused by the appearance of racial bias is just as devastating to the

[1] "ASF" refers to the Agreed Statement of Facts and "Ex" refers to the exhibits annexed thereto. "Resp Br" refers to the "Memorandum in Support of Respondent Erin P. Gall, J.S.C.", dated May 6, 2024.

[2] Respondent's claim that the Commission "did not charge [her] with racial bias" (Resp Br 16) is disingenuous at best. The only Rule Governing Judicial Conduct ("Rule") that specifically mentions racial bias is Rule 100.3(B)(4), which is inapplicable here because Respondent's conduct did not implicate her adjudicative responsibilities. The Commission did, however, charge Respondent with violating Rule 100.4(A)(1), "in that she failed to conduct her extrajudicial activities so that they do not cast reasonable doubt on her capacity to act impartially as a judge." Rule 100.0(R) defines "impartiality" to mean "the absence of bias or prejudice in favor of, or against, particular parties or classes of parties" (emphasis added). Rule 100.4(A)(1) clearly encompasses the racially biased statements that Respondent has stipulated "created at least the appearance of racial bias" (ASF ¶75[D]). Those statements were set out explicitly in paragraphs 5(D) and (E), 38 and 43 of the Formal Written Complaint.

integrity of the judiciary as actual racial bias. *See Matter of Putorti*, 40 NY3d 359, 366 (2023).

As Respondent stipulated, on July 2, 2022, she (1) stated that the Black teenagers did not look "that smart" and, unlike her white son, were "not going to business school, that's for sure," (2) threatened to "shoot" the Black youths if they returned to search for their missing car key, and (3) assured a deputy at the scene that she would protect the police in court should the Black teenagers file a civil rights lawsuit, proclaiming, "the good part is I'm always on your side. You know I'd take anyone down for you guys" (ASF ¶¶49-50, 62, 68).

All of these statements are deeply troubling and sufficient on their own for a finding that Respondent created the appearance of racial bias. The Commission need not rely on inference; Respondent specifically admitted in the ASF that her statements "created at least the appearance of racial bias" in violation of the Rules. This admission is "conclusive," and the Commission is "bound" by Judiciary Law §44(5) to accept it. *Putorti*, 40 NY3d at 366.[3]

By now insisting that, despite those concessions, she acted without any "actual or implicit racial bias" (Resp Br 3, 11, 16-21), Respondent minimizes the

[3] The Commission should disregard Respondent's odd assertion that she stipulated to the appearance of racial bias because "she believed that she could reasonably refute that the appearance was based on [her] trauma reaction . . . and not racial bias", and that the appearance was "refutable." (Resp Br 17, 18) (emphases added). To the extent Respondent is attempting to retreat from the plain language of her stipulation, the Commission should find it "troubling" that she is now denying "facts to which [s]he previously stipulated." *Putorti*, 40 NY3d at 368.

damage her misconduct has done to the perception of her ability to administer justice fairly. As the Court of Appeals held over a quarter-century ago, the public's "perception of impartiality is as important as [the] actual impartiality . . . of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property." *Matter of Duckman*, 92 NY2d 141, 153 (1998) (citing *Matter of Sardino*, 58 NY2d 286, 290-91 [1983]). Just last year, the Court made clear that when it comes to the specter of racial bias, "the appearance of . . . impropriety is no less to be condemned than is the impropriety itself." *Putorti*, 40 NY3d at 366. Given these Court of Appeals' holdings, Respondent's misconduct would warrant removal whether she displayed "actual" racial bias (Resp Br 17) or only the appearance thereof.

Respondent greatly compounded her misconduct when she told police that she is "always on [their] side" (Ex 3d), a statement she conceded "created at least the appearance of bias in favor of law enforcement" (ASF ¶75[F]). Any litigant appearing in Respondent's court opposite a police officer might reasonably question whether Respondent could truly be impartial. Her comment was all the worse, however, because it came in direct response to Deputy Lyke's suggestion that he might "end up in front of [Respondent's] court for a civil rights violation" arising from this very confrontation (ASF ¶¶ 49, 50; Ex 3d). It is simply

unconscionable for a judge to suggest that officers who violate a citizen's civil rights need not worry if the case came before her.

Put simply, Respondent has created a circumstance where the public will have "irretrievably lost 'confidence in [her] ability to properly carry out [her]' constitutionally-mandated responsibilities in a fair and just manner." *Matter of Restaino*, 10 NY3d 577, 590 (2008) (quoting *Matter of Aldrich*, 58 NY2d 279, 283 [1983]). In such a circumstance, removal is the only appropriate sanction.

Moreover, though Respondent repeatedly insists that she did not harbor "actual or implicit racial bias" (Resp Br 17), the facts to which she stipulated and the video evidence suggest otherwise. By stating that Mr. Carter and his friends "look[ed]" unintelligent and incapable of getting into business school and suggesting that they appeared to be unable to afford cocaine (ASF ¶¶62, 64; Exs 5c, 5d, 6e, 6f), Respondent invoked common racist stereotypes that Black men are poorer and less intelligent than whites (*see* Commission Counsel's Memorandum, pp 27-28, and accompanying citations). Although Respondent argues that her "insulting language could have been directed toward any interloper regardless of race," and that "impressions of people can be made on the basis of appearance and demeanor apart from skin color" (Resp Br 17-18), it is significant that Respondent says nothing about what in their appearance, other than race, led to her snide remarks and assumptions about their financial means and intelligence.

Furthermore, Respondent can offer no reasonable explanation for her abusive conduct toward Ms. Mezza, the sister of Mr. Valladares, who appeared at the scene to help her brother leave (ASF ¶¶46, 64-68). Respondent's vitriol could not have been driven solely by her perception of the youths' so-called "interloper" status, given that Ms. Mezza was – by Respondent's own admission – nothing more than "an uninvolved relative" (Resp Br 10). On these facts, their skin color is the only reasonable explanation for Respondent's comments about them.

Respondent's statement about shooting the Black teens and her subsequent interaction with Officer McCormick are equally illuminating. When Respondent encouraged the police to "shoot" Mr. Carter and his friends if they returned to look for the missing car keys, and then said she would shoot them herself, McCormick recognized and confronted Respondent on the racist implications, asking her, "Do you hear what you're saying? You're all white, privileged people with high-power jobs." (ASF ¶69). Far from regretting any actual or apparent racial bias in her words, however, Respondent's sole reaction was to berate McCormick for not addressing her as "judge" (ASF ¶70).

Her protestations aside, Respondent unwittingly concedes having exhibited implicit racial bias by claiming that she "resort[ed] to stereotypes" in speaking to and about the Black teenagers "out of fear and stress" (Resp Br 20). The presence of fear and stress do not mitigate a supreme court justice's invocation of racial

stereotypes. Sensitivity and self-control are "vital to the demands of" a judgeship (*Matter of Kuehnel*, 49 NY2d 465, 469 [1980]), and Respondent demonstrated during this incident that she lacks both. Supreme court judgeships are demanding and stressful positions. The Commission and the public can have no confidence that Respondent will never again resort to racial stereotypes when exposed to other stressors, on or off the bench.

Nor is it mitigating that Respondent did not use explicit "racial descriptors" when referring to the Black teenagers, or worse, a "racial slur" (Resp Br 12, 17). Had she done so, the case for removal, compelling as it is here, would be automatic. It is noteworthy, however, that Respondent apparently disagrees. Citing the 40-year-old *Matter of Agresta*, 1985 Ann Rep of NY Commn on Jud Conduct at 109, Respondent suggests that even had she used the vilest racist slur in the English language, she would be subject to no more than a censure (Resp Br 12). The *Agresta* censure may be explained by his having been on the verge of retirement at the end of a long career when sanction was imposed.[4] Otherwise, judges who inserted race in off-the-bench confrontations have been removed from office. *See Matter of Cerbone*, 61 NY2d 93 (1984); *Matter of Kuehnel, supra. See also Matter of Fabrizio*, 65 NY2d 275 (1985) (judge used racial epithets, including

[4] In addition to the Commission's reference to Agresta's "age and his long" career, the Court of Appeals, on review, noted that he was now a "former" judge. 64 NY2d 327 (1985).

the "N" word); *Matter of Pennington*, 2006 Ann Rep of NY Commn on Jud Conduct at 224 (judge *inter alia* referred to "colored people"); c*f Matter of Senzer*, 35 NY3d 216 (2020) (judge's single off-the-bench use of the word "cunt" warranted removal).

Notwithstanding this precedential record, Respondent apparently believes only censure would be warranted even if she had used the N-word. She shows no recognition that an "enlightened society" has evolved to condemn words and practices that were once thought to be acceptable. *Matter of Dye*, 1999 Ann Rep of NY Commn on Jud Conduct at 93, 94.

Whether she acted out of actual or implicit racial bias or – as she concedes – created the appearance of racial bias, Respondent has irreparably damaged her reputation as a jurist and the integrity of the judiciary, and she should be removed from office.

POINT II

RESPONDENT'S CONTENTION THAT HER MISCONDUCT WAS CAUSED BY PAST TRAUMA IS UNSUPPORTED BY THE RECORD AND IS NOT MITIGATING UNDER THE CIRCUMSTANCES PRESENTED.

Commission Counsel acknowledges the profound and lasting effects that [redacted] assault has on its victims, Respondent among them. The record in this case, however, does not support Respondent's contention that all of her conduct on July 2, 2022, was the result of a "trauma reactive response" associated with [redacted]

[redacted] (Resp Br 3, 8-9), let alone that her trauma caused her to "compensate[] with an extreme over-reaction" when the police arrived by using "profane" language, repeatedly invoking her judicial office, being "disrespectful" to the police and the stranded Black teenagers, having an "inappropriate" conversation about ERPOs, and making "the utterly inappropriate comment" about shooting the Black teens (Resp Br 8-9).

In support of her argument, Respondent offers the opinions of (1) Joseph Lesswing, a psychologist who met with Respondent for the first time after the Formal Written Complaint had been filed and diagnosed her with [redacted] based on that one session (Resp Br 27-28; Ex B-1, pp 2, 7), and (2) Joanne Joseph, a psychologist who provided services to Respondent in 1990 and resumed providing services to her following Respondent's meeting with Lesswing (Resp Br 21-23; Ex B-4). Respondent offers the opinions of Lesswing and Joseph "not as an excuse but as an explanation" with a view toward mitigating her misconduct and avoiding removal from the bench (Resp Br 1, 2).

The "trauma reactive response" explanation is not mitigating because it does not satisfactorily explain the bulk of her misconduct, which was disconnected from the stress of the fight and reached beyond the individuals whom she assumed had attacked her husband and son. Lesswing's report suffers from suspect

methodology and evident bias. And Joseph's report makes no finding of any kind that Respondent's conduct was the result of her trauma.

In any event, Respondent's misconduct was "so inexcusable" that "no amount of mitigation can be sufficient to restore the public's trust in [her] ability to discharge the responsibilities of judicial office in a fair and just manner." *Putorti*, 40 NY3d at 367-68 (internal quotation marks and citation omitted).

A. Respondent's trauma does not explain or justify her racist comments.

Respondent's past trauma neither explains nor justifies her racist remarks. To begin, Respondent's claim that her "fear and stress" led her to "resort[ ] to stereotypes" based on race (Resp Br 20), cannot be reconciled with her argument that she harbors no implicit bias. Clearly, Respondent's past trauma could not have caused Respondent to suddenly harbor racial animus where none existed beforehand, and nothing in the reports of Lesswing or Joseph suggests that it did. Rather, the stress of the situation – influenced by Respondent's past trauma – exposed deep-seated biases that Respondent already held. Even if Respondent would not have expressed those racist sentiments in the absence of a trauma-based reaction to the July 2nd fight, neither the Commission nor the public can ignore what she said. Her comments disqualify her from continuing to hold judicial office (*see* Point I, *supra*).

Contrary to Lesswing's assertion that Respondent's July 2nd conduct was the result of an "overwrought" response (Ex B-1, pp 6, 8), the bodycam footage shows that Respondent appeared calm as she boasted about her son "put[ting] a smack down once he got hit" (ASF ¶55; Ex 3f) and as she mocked the four Black teenagers and sister of one of the youths (ASF ¶¶61-62, 64; Exs 5c, 5d, 6e, 6f). In fact, she evoked offensive racial stereotypes about their intelligence and financial means over an hour after police had de-escalated the situation and she had acknowledged that her family did not need medical attention.[5] Likewise, Respondent threatened to shoot the Black youths if they returned to the property in a calm tone of voice, long after any potential danger to her family had been neutralized (ASF ¶68; Ex 3g). Given those facts, it is hard to understand – and neither her psychologists nor Respondent have explained – how or why Respondent's cold and calm expressions of racial bias were related to her past trauma.

Crucially lacking from her psychologists' records is any indication that Respondent acknowledged any awareness of her apparent racial biases or that she

[5] Respondent's first interaction with an officer, to whom she immediately introduced herself as a "supreme court judge," occurred at 12:24 AM (Ex 4a). At 12:32 AM, she told another officer that no one in her family needed medical attention, before gratuitously repeating that she was a supreme court judge (Ex 3b). Respondent's comment that the teens did not "look that smart" and were "not going to business school" occurred at 1:27 AM (Exs 5c, 6e). Her suggestion that the teens and Ms. Mezza could not afford cocaine occurred at 1:36 AM (Exs 5d, 6f). The shooting comments occurred two minutes later, at 1:38 AM (Ex 3g).

regrets the harm caused by the appearance of racial bias that she admits occurred. Indeed, despite her bare assertion to the contrary (Resp Br 10), there is no evidence in the record that Respondent received any counseling after August 21, 2023 (Ex B-4, notes from August 21, 2023).

B. Respondent's trauma does not explain or justify her statements to and about the police.

There is no discernible connection between the "trauma response" and Respondent's disturbing statements that she would protect the police if they were sued for civil rights violations and that they should not pursue bringing ERPOs when dangerous situations arise. Respondent's stated willingness to "always" be on the police officers' "side" and "take anyone down for [them]" (ASF ¶¶49-50; Ex 3d) – in clear violation of her ethical duty to remain unbiased and impartial – was not caused by her past trauma, even if her trauma response exposed that existing, unacceptable prejudice. It is telling that Respondent's brief declines to address her assurances to law enforcement personnel that she was always on their side and instead characterizes her conduct on the night in question as "disrespectful to the police" (Resp Br 9) and "argumentative and critical with the police" (Resp Br 10).

It is even less clear how Respondent can blame her past trauma for her denigration of ERPOs (which had nothing at all to do with the July 2nd incident) and her dangerous suggestion that the police ignore their responsibilities to file

them so that she does not have to be inconvenienced in the middle of the night (*see* ASF ¶¶58-59; Ex 6d).

Pursuant to statute, police officers are required to seek an ERPO from a supreme court justice "upon the receipt of credible information that an individual is likely to engage in conduct that would result in serious harm to himself, herself or others" (ASF ¶58, n7). As a victim of [redacted] assault herself, Respondent would be expected to be more sensitive to the victims of gun violence. But her statement to deputies and officers was just the opposite – a cavalier[6] suggestion that they should ignore the law and the potential deadly consequences and should not "pay attention" to ERPOs (Ex 6d). It is a shocking and disgraceful statement from a judge who is required to adjudicate ERPO applications in her county.

Finally, Respondent does not explain how past trauma caused her to criticize the officers of the New Hartford police department again, in a conversation with Sergeant Langheinrich, Deputy Edmund Wiatr and Deputy Michael Baker, on July 14, 2022, twelve days after the graduation party occurred (ASF ¶73). After having nearly two weeks to calmly reflect, Respondent should have recognized that the police acted appropriately, as she does now in the Agreed Statement (ASF ¶76[B]). The fact that she was still complaining about the officers nearly two weeks later

[6] As the bodycam footage chillingly demonstrates, Respondent's tone of voice remains pleasant and conversational during an extended discussion about ERPOs in which she repeatedly suggests that police should avoid making ERPO applications (*see* Ex 6d).

suggests that her misconduct on July 2nd was not the result of a momentary, trauma-induced, lack of control, but was caused by a fundamental inability to conduct her extra-judicial activities in a manner that does "not cast reasonable doubt on [her] capacity to act impartially as a judge." Rule 100.4(A)(1).

Like her racial comments, Respondent made all these statements to and about police in moments of calm, long after the stress of the fighting had ended, which again undermines any notion that they were precipitated by stress or trauma.

C. Respondent's trauma does not explain or justify her repeated assertion of her judicial office.

There is no plausible connection between Respondent's diagnosis and her repeated invocation of her judgeship – particularly her gratuitous references to her judicial title in moments of calm. For instance, Respondent did not appear to be acting under stress when she calmly approached the first officer she saw on the scene and introduced herself as a "supreme court judge" (Ex 4a). Despite Lesswing's characterization, the video footage of that moment certainly does not depict an individual who was, as she told both Lesswing and Joseph, "out of control" (Ex B-1, p 5; Ex B-4, notes from June 29, 2023). Similarly, Lesswing's theory of a trauma-based response does not explain why Respondent replied to an officer's question about anyone needing medical attention by asserting, "No, honestly, I'm a supreme court judge" (Ex 3b).

These repeated assertions of judicial authority – which continued for over an hour after the police arrived and the fighting had ended – were conscious, deliberate, and calculated choices to invoke her judicial title for personal gain.

D. The psychologists' reports are seriously flawed and insufficient to support Respondent's defense.

For the reasons set forth above, the record in this case does not support Respondent's argument that a "trauma reactive response" explains her conduct on July 2nd. That is especially true here, where the psychologist reports that Respondent relies on are seriously flawed.

Respondent did not seek a psychological diagnosis or receive any counseling until after she was served with the Formal Written Complaint (Ex 11), and more than seven months after she claims she first recognized the connection between her [redacted] assault and her conduct at the graduation party (Ex B-1, pp 2-3, 5; Ex 9, p 4).[7]

Respondent's attorney scheduled her appointment with Lesswing (Ex B-1, p 2), leaving it unclear whether Respondent sought the appointment of her own initiative for a therapeutic purpose, or primarily as part of a litigation strategy.

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[7] Respondent made no mention of the [redacted] assault or trauma when she gave testimony during the Commission's investigation, well before meeting with Lesswing and Joseph, but after she now asserts that she recognized the connection between her inappropriate behavior on July 2nd and the prior [redacted] assault (Ex 9, p 4; Ex B-1, p 5). After she reviewed the transcript of her testimony with her attorney, Respondent co-signed a follow-up letter supplementing and clarifying parts of her testimony (Ex 10) in which, again, she made no mention of the [redacted] assault or associated trauma.

Lesswing diagnosed Respondent with [redacted] during his one and only session with her (Ex B-1, pp 3, 7-8). He based his diagnosis on a [redacted] (Ex B-3), a test that has been criticized within the scientific community for being "susceptible to bias and misinterpretation" due to factors that include the patient's "response bias, verbal intelligence estimates, self-rating errors, lack of opportunity to clarify symptoms, and difficulty differentiating distress associated with [redacted] symptoms from general distress." Bovin, M.J., & Marx, B.P. The Problem With Overreliance on the [redacted] as a Measure of [redacted] Diagnostic Status. CLINICAL PSYCHOLOGY: SCIENCE AND PRACTICE, 30(1), 122-25 (2023).[8]

Given the timing of the [redacted]'s administration (Ex 11; Ex B-3), Respondent had an obvious motivation, even if subliminal, to answer the test's subjective questions by self-reporting high numerical ratings that would lead to a diagnosis helpful to her defense in the Commission litigation.[9]

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[8] Available at https://www.[redacted].va.gov/professional/articles/article-pdf/id1618482.pdf (last accessed May 9, 2024).

[9] That is not to suggest that [redacted] cannot be reliably diagnosed. Unlike the [redacted] test, the Clinician Administered [redacted] ("[redacted]") is a diagnostic review that permits "a trained assessor in real time" to address and correct for subjectivity on the part of the patient. Bovin & Marks, *supra* at 122-23. For that reason, among others, "[t]he [redacted] is considered the gold standard for diagnosing [redacted] while the [redacted] should "be used as a screen or aid, to make a provisional diagnosis of [redacted] and . . . for research purposes." Bhargav Patel, Nagy A. Youssef, *Chapter 2 -* [redacted], EPIGENETICS OF STRESS AND STRESS DISORDERS at 19-26 (Academic Press, Vol 31, 2022), available at *https://www.sciencedirect.com/science/article/pii/B9780128230398000150* (last accessed May 9, 2024).

Moreover, Lesswing's extraneous and unsubstantiated attacks on the Commission suggest that his conclusions were primarily drafted with litigation strategy in mind. Lesswing did not, of course, interview members of this Commission or any of its staff, and he has no expertise in judicial misconduct (Ex B-5). Nevertheless, Lesswing opines that the "factual allegations" in the Formal Written Complaint were "constrained by an inherent investigatory assumption that [Respondent] exhibited 'bad behavior' for a judge," and were tainted by "prosecutorial confirmation bias" (Ex B-1, p 8). Lesswing seems unaware that all of the allegations set forth in the Formal Written Complaint were presented to the Commission at the close of the investigation and that the Formal Written Complaint was not authorized by Commission staff, but by this Commission itself, after review of the entire investigatory file including, *inter alia,* Respondent's sworn testimony, the bodycam footage, and the testimony of witnesses.[10] Lesswing's clumsy attempt to draw conclusions about the internal thought processes of Commission members or the Commission's staff – conclusions made without evidence and outside his area of expertise – makes it difficult to view the diagnostic aspects of his report without suspicion.

[10] The Commission's Annual Report clearly establishes that the Commission has no "prosecutorial confirmation bias." In 2023, the Commission reviewed 2,982 complaints and deemed that only 208 warranted formal investigation. There were only eight formal disciplinary determinations and nine resignation stipulations. The 2024 Annual Report is available: https://cjc.ny.gov/Publications/AnnualReports/nyscjc.2024Annualreport.pdf.

While Joseph's report is free of the suspect methodology and obvious bias in the Lesswing report, it is nonetheless insufficient to support Respondent's defense. Joseph's report is based entirely on Respondent's version of what happened on July 2, 2022. Joseph did not review the bodycam footage or read the statements of other witnesses (Ex B-4). Although Joseph was aware that Respondent's July 2nd conduct was "apparently . . . under judiciary review," she was asked by Respondent "to concentrate mostly on what she is feeling as recurrent [redacted] symptoms" (Ex B-4, notes to June 29, 2023, p 2). Joseph did not review the allegations in the Formal Written Complaint and she did not make any findings as to how Respondent's conduct was related to her trauma.

Any efforts Respondent has undertaken to use therapy as means of attempting to cope with and heal prior trauma should be lauded. However, given the serious infirmities in the Lesswing report, and the lack of any finding of causality in the Joseph report, the Commission should find that these reports are insufficient to support Respondent's defense.

POINT III

RESPONDENT HAS DEMONSTRATED HER FAILURE TO ACCEPT RESPONSIBILITY FOR HER MISCONDUCT BY CONTINUING TO PLACE BLAME ON THE STRANDED BLACK TEENAGERS.

In her brief, Respondent asserts that she has shown "forthright recognition of her own errors" and is "remorseful, apologetic, and accepting of responsibility"

(Resp Br 1). Those contentions are belied by her continuing insistence that her deplorable conduct was provoked by the stranded teenagers (Resp Br 17-18), despite agreeing to facts in the ASF that stipulate the opposite.

In agreeing to proceed on an ASF, Respondent stipulated – with the assistance of experienced counsel – "that the Commission shall make its determination" on the facts in the agreement and exhibits attached thereto, "which shall constitute the entire record in lieu of a hearing" (ASF, p 1). Yet, Respondent has reasserted prior self-serving statements that are contrary to the ASF. For example:

- Respondent and her counsel stipulated that the "evidence is insufficient to support any finding as to whether Havo and Dooley fought with or assaulted [her] son" (ASF ¶¶23, 24[A], [B]). Now, however, she says Dooley slapped, kicked and fought with her son and Havo engaged in the same conduct "assaulting and fighting with [her] son" (Resp Br 17-18).

- Respondent and her counsel stipulated that Mr. Carter and Mr. Valladares would testify they "attempted to avoid the fighting and leave the scene" but were "grabbed from behind by other unidentified individuals and swept into a fight," and, "[i]n the confusion, Respondent's husband, Mr. Carter and Mr. Valladares, became involved – *though not necessarily with one another* – in a physical altercation in or near a ditch along the road" (ASF ¶¶25-26) (emphasis added).[11] Now, however, she says Carter and Havo fought with her son, and all "four members of the Carter/Valladares group engaged in fighting with her husband" (Resp Br 18).

    - Though Respondent now goes to great lengths to paint the stranded Black teenagers as "aggressors," "assailants," and "provocateurs"

[11] There is no evidence in the agreed-upon record that Havo and Dooley fought with Respondent's husband.

(Resp Br 8, 10, 17), the stipulated record shows that Mr. Carter and his friends were, at worst, late arrivals to a party that attracted dozens of uninvited guests after it was advertised on social media, and which already had erupted into chaos by the time they arrived (Exs 15, 19).

- In addition, Respondent's assertion that "[s]he did not act in a way that demonstrated prejudice or any form of racial animus" (Resp Br 3) directly contradicts her concession of having made statements that "created at least the appearance of racial bias" (ASF ¶75 [D]).

Respondent's departures from the stipulated facts are more than "troubling" (*Putorti*, 40 NY3d at 368). They represent Respondent's inability to accept responsibility for her conduct, a significant aggravating factor when it comes to sanction. *See Matter of Ayres*, 30 NY3d 59, 65 (2017).

Finally, Respondent makes unavailing attempts to distinguish her own misconduct from that which is removable, and to align herself with judges who were reprimanded (Resp Br 11-16). Of course, it is well-settled that "[w]hat constitutes 'truly egregious' circumstances" warranting removal "is a fact-specific inquiry." *Matter of Putorti,* 40 NY3d at 367 (citation omitted). The Commission must "consider both the gravity of the wrongdoing and the 'effect of [Respondent's] conduct upon public confidence in [her] character and judicial temperament.'" *Id.*, quoting *Matter of Going*, 97 NY2d 121, 127 (2001). Although "removal is often reserved for a judge who engages in a pattern of misconduct, there are rare cases where the misconduct is so inexcusable that no amount of mitigation can be 'sufficient to restore the public's trust' in the judge's

ability to discharge the responsibilities of judicial office 'in a fair and just manner.'" *Putorti*, 40 NY3d at 367-68 (citations omitted). *See also Matter of Restaino*, 10 NY3d at 590. This is such a case.

CONCLUSION

By reason of the foregoing, and as more fully explicated in Commission Counsel's opening memorandum, it is respectfully submitted that the Commission should render a determination recommending Respondent's removal from office.

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Albany, New York

Respectfully submitted,

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