The Association of the Bar of the City of New York (the "Association") respectfully submits this *amicus curiae* brief, with the consent of all of the parties, in support of the appellant, the New York State Commission on Judicial Conduct (the "Commission").

INTERESTS OF THE AMICUS CURIAE

As Justice Stewart put it in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848 (1978) (Stewart, J., concurring in the judgment), "[t]here could hardly be a higher governmental interest than a State's interest in the quality of its judiciary." The Association has a deep and longstanding interest in promoting and sustaining the highest standards of integrity among New York State judges. The Association's members include over 22,000 attorneys practicing in the New York State courts who share a profound interest in ensuring that the judges before whom they appear uphold the highest standards of the profession. As an institution, the Association plays an important role in ensuring that New York State judges comport with these high standards. The Association's Judiciary Committee, for example, has long played an institutional role in reviewing judicial candidates recommended for appointment and reappointment. Other committees of the Association, including the Council on Judicial Administration, the Committee on Professional and Judicial Ethics, and the Committee on Government Ethics have a strong interest in, and dedicate considerable effort and attention to, promoting the

highest standards of conduct among judges and judicial candidates.

PRELIMINARY STATEMENT

The New York State Code of Judicial Conduct declares in its first sentence the fundamental importance of an independent state judiciary: "An independent and honorable judiciary is indispensable to justice in our society." 22 N.Y.C.R.R. § 100.1. In furtherance of that principle, the Code demands that all judges and judicial candidates adhere to the highest standards of independence and integrity. *See id*. The Commission plays a critically important and constitutionally mandated role in ensuring that this principle is not merely an aspiration but a reality. N.Y. Const. Art. VI, § 22.

In its recent decision in *In re Raab*, 2003 N.Y. LEXIS 1411 (N.Y. June 10, 2003), the New York Court of Appeals underscored the State's concern in an independent judiciary. It observed that "the State has an overriding interest in the integrity and impartiality of the judiciary. There is hardly a higher governmental interest than a State's interest in the quality of its judiciary." *Id*. at *11 (quoting *Nicholson v. State Com. on Judicial Conduct*, 50 N.Y.2d 597, 607-08, 431 N.Y.S.2d 340, 344-45 (N.Y. 1980)). This theme, of course, is broadly embraced. *See, e.g., Republican Party v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) ("The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the

highest order.").

One of the acids most corrosive to the appearance of independence and integrity among public officials is their participation in partisan political activities. As the Supreme Court recognized in *United Public Workers v. Mitchell*, 330 U.S. 75, 97-98 (1947), prohibitions on partisan political activity by federal employees had been in force for decades before Congress broadly barred such conduct in the Hatch Act of 1939. Reaffirming that the government may constitutionally prohibit such activity in *United States Civil Service Comm'n v. National Ass'n of Letter Carriers,* 413 U.S. 548 (1973), the Supreme Court emphasized that these prohibitions are critical to ensuring that public officials will enforce the law "without bias or favoritism for or against any political party or group." *Id*. at 565.

This principle takes on greater importance in the context of elected state judgeships. As the Court of Appeals recently explained, "[p]recisely because the State has chosen election as one means of selecting judges, there is a heightened risk that the public, including litigants and the bar, might perceive judges as beholden to a particular political leader or party after they assume judicial duties." *In re Raab*, 2003 N.Y. LEXIS 1411, at *16. As a result, the court cautioned that "[c]harged with administering the law, Judges may not actually or appear to make the dispensation of justice turn on political concerns." *Id.* at *11.

The district court in this case failed to appreciate many important

distinctions between speech the Supreme Court held is protected in *Republican Party v. White*, 536 U.S. 765 (2002), and partisan political activities that may still be regulated under *Letter Carriers* and subsequent cases. In doing so, it permitted partisan political activity by judges and judicial candidates that the State has found to directly contravene its interests. Four errors by the district court are especially notable and require reversal here.

First, in light of the State's substantial interest in upholding the quality and integrity of its judiciary, challenges to the Commission's application of the State Code of Judicial Conduct – including constitutional challenges like this one – should be heard in the first instance by the New York state courts. Principles of federalism and comity should have compelled the district court to abstain from entertaining this constitutional challenge and to allow the matter to be heard in the first instance by the New York Court of Appeals.

Second, the district court should not have enjoined enforcement of Sections 100.1 and 100.2 as impermissibly vague on their face. Each charge should instead have been analyzed on an as-applied basis with an eye toward whether Sections 100.1 and 100.2 gave adequate warning that the conduct charged was prohibited. Because Charge 2 and the Supplemental Charge involve only non-expressive conduct clearly and unequivocally prohibited by those provisions, those charges

should not have been enjoined even on an as-applied basis.[1]

Third, several challenged subsections of Section 100.5(A)(1) – in particular, subsections (c), (d), and (g) – are "Hatch Act" prohibitions materially indistinguishable from those sustained in *Mitchell* and *Letter Carriers*. Insofar as they apply to speech or expressive conduct, those provisions should not have been analyzed under the compelling state interest test, but rather under the standards applicable to content-neutral prohibitions on speech. Their constitutionality should have been sustained because they serve a substantial governmental interest unrelated to the suppression of free expression and are narrowly tailored. Even if strict scrutiny were to be applied, these subsections would survive strict scrutiny review because of the compelling nature of the state interests involved.

Finally, the only content-based provisions of the Code at issue here are subsections (e) and (f) of Section 100.5(A)(1), which prohibit endorsements of and opposition to *other candidates*. Those provisions should have been sustained under the compelling state interest test because there is a compelling interest in prohibiting statements of endorsement or opposition by judicial candidates to *other candidates*, and because the prohibition is narrowly tailored to serve that interest. Nothing in *Republican Party v. White* bars prohibitions on speech *unrelated* to the

[1] As *amicus curiae*, the Association takes no position on the constitutionality of Sections 100.1 and 100.2 as applied to actions alleged in other charges by the Commission. The Association's determination not to address this and other aspects of the district court's decision should not be read as expressing a view as to the correctness of those aspects of the decision.

candidate's own election.

SUMMARY OF ARGUMENT

The district court's decision not to abstain was erroneous. Under *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), abstention is required if ongoing disciplinary proceedings implicate important state interests and there is an adequate opportunity in the state proceedings to raise constitutional challenges. The importance of the State's interest in regulating the conduct of state judges is unquestioned. The district court erroneously concluded that there was no opportunity to address constitutional arguments in the state courts and gave insufficient consideration to the importance of doing so.

In the event this Court reaches the merits, Sections 100.1 and 100.2 of the Code should not have been enjoined as impermissibly vague on their face. Nor should so much of Charge 2 and the Supplemental Charge as are based on those provisions have been enjoined on an as-applied basis. The actions at issue in these charges involve non-expressive conduct. No reasonable person could doubt that the actions challenged in Charge 2 and the Supplemental Charge violate Sections 100.1 and 100.2 of the Code.

Additionally, the district court's analysis of Section 100.5 was legally erroneous in several respects. Subsections (c), (d), and (g) should have been analyzed under the content-neutral standards of *Turner Broad. Sys., v. FCC*, 512

U.S. 622, 662 (1994), and *Hill v. Colorado*, 530 U.S. 703, 719-25 (2000). Those sections should have been upheld because they serve a substantial governmental interest, the interest is unrelated to the suppression of free expression, and the regulation is narrowly tailored. Although subsections (e) and (f) are properly subject to the strict scrutiny test, they satisfy that test because they apply exclusively to partisan political speech about other candidates. The State's interest in prohibiting partisan speech about other candidates is compelling and narrowly tailored.

ARGUMENT

I

THE DISTRICT COURT SHOULD HAVE ABSTAINED AND PERMITTED THE CONSTITUTIONAL ISSUES TO BE DECIDED IN THE FIRST INSTANCE BY THE NEW YORK COURT OF APPEALS

As the Supreme Court held in *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), abstention is required if ongoing state disciplinary proceedings implicate important state interests and if there exists adequate opportunity in the state proceedings to raise constitutional challenges against them. The State's paramount interest in promoting and ensuring the high quality of its judiciary – an interest even stronger than its "extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses," *Middlesex County*, 457 U.S. at 434 – makes *Middlesex County* fully

applicable to proceedings of the State Commission on Judicial Conduct.[2]

The State's preeminent interest in ensuring the highest quality of its judiciary is not in doubt. In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978), the Supreme Court noted that "[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern." Justice Stewart added that "[t]here could hardly be a higher governmental interest than a State's interest in the quality of its judiciary." *Id*. at 848 (Stewart, J., concurring in the judgment). As the Fifth Circuit held in *Morial v. Judiciary Com. of Louisiana*, 565 F.2d 295, 302 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978), the "state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect." *See also Nicholson v. State Com. on Judicial Conduct*, 50 N.Y.2d 597, 607, 431 N.Y.S.2d 340, 344 (1980) ("There can be no doubt that the State has an overriding interest in the integrity and impartiality of the judiciary.").

Accordingly, abstention is mandatory so long as a constitutional challenge to the Code of Judicial Conduct may be raised in state judicial proceedings.[3] That opportunity clearly exists. Indeed, the Court of Appeals recently reviewed two of

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[2] *Cf. Diamond D Constr. Corp. v. McGowan*, 282 F.3d 191 (2d Cir. 2002) (*Younger* abstention applicable to administrative proceedings brought by Department of Labor against contractor); *Kirschner v. Klemons*, 225 F.3d 227 (2d Cir. 2000) (*Younger* abstention applicable to professional misconduct charges against dentist).

[3] Whether constitutional claims may be raised the Commission is irrelevant, so long as those objections could have been aired in the New York Court of Appeals on review of any decision by the Commission. *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc*., 477 U.S. 619, 629 (1986) ("it is sufficient . . . that constitutional

the Commission's recent decisions in which constitutional defenses under *White* were raised. *In re Raab*, *supra*; *In re Watson*, 2003 N.Y. LEXIS 1415 (N.Y. June 10, 2003). There is no basis for presuming that Judge Spargo's defenses would not be similarly considered.

Moreover, under New York law, the Court of Appeals has clear authority to exercise constitutional review over determinations by the Commission. Judiciary Law Section 44 authorizes a judge who is aggrieved by a determination of the Commission to make a written request to the Chief Judge within 30 days for a review by the Court of Appeals. The filing of such a written request to the Chief Judge "shall commence the proceeding for review of the determination of the State Commission on Judicial Conduct." 22 N.Y.C.R.R. § 530.1(b). Accordingly, a proceeding for review automatically commences upon filing a timely written request to the Chief Judge. The Court of Appeals has held that a determination by the Commission "is reviewable as of right," *In re Raab*, *supra*, at *6; the scope of review in such an appeal is plenary. *In re Watson*, *supra*, at *8. There is no basis for finding or presuming that in such a proceeding for review, the Court of Appeals would decline to decide a properly presented constitutional question.

The district court erroneously concluded that "plaintiffs do not have an adequate opportunity to have their constitutional claims determined" because it

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claims may be raised in state-court judicial review of the administrative proceeding").

was skeptical whether review by the Court of Appeals was truly mandatory, *Spargo v. New York State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72, 83 (N.D.N.Y. 2003) (*Spargo I*) (describing the State's contention that review is mandatory as "debatable" and "not so clear that it could not be read to the contrary"), and because it believed that in no case had the Court of Appeals actually decided such a constitutional challenge.[4] This finding, and the district court's approach to the analysis, were deeply flawed.

Significantly, after the district court rendered its decisions in this case, the New York Court of Appeals explicitly held that the Commission's determinations are "reviewable as of right," *In re Raab*, *supra*, at *6. This subsequent development is to be considered when determining whether an adequate opportunity existed for plaintiffs to have their constitutional claims heard. *See Middlesex County*, 457 U.S. at 436. Moreover, absent clear evidence to the contrary, the right to judicial review should have been presumed. Courts employ a strong presumption in favor of the availability of judicial review over constitutional questions. "[W]hen constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to

[4] The district court regarded *Nicholson v. State Com. on Judicial Conduct*, 50 N.Y.2d 597, 431 N.Y.S.2d 340 (N.Y. 1980) (*per curiam*), as inapt because it "involved a challenge to the Commission's authority to investigate the conduct of a judicial candidate/judge" rather than a constitutional challenge to a disciplinary finding by the Commission. For purposes of the abstention doctrine, we see no material distinction between these types of

do so is manifested by 'clear and convincing' evidence." *Califano v. Sanders*, 430 U.S. 99, 109 (1977); *see Weinberger v. Salfi*, 422 U.S. 749, 762 (1975); *Abbott Labs v. Gardner*, 387 U.S. 136, 141 (1967) ("only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review"); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 671 (1986); *see generally* H. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1375-1378, 1388-1391 (1953).

By insisting that the Commission demonstrate clearly that review *is* available, the district court turned these principles on their head. The correct standard should have required the plaintiffs to demonstrate by clear and convincing evidence that judicial review in the Court of Appeals over Spargo's constitutional defenses is *not* available. Absent such evidence, the district court was obliged to conclude that the opportunity for review by the Court of Appeals is available. Under *Middlesex County*, that should have compelled the conclusion that abstention is mandatory.

A holding that aggrieved judges and judicial candidates may turn directly to the federal courts in cases like this one challenging the constitutionality of the Code could have unfortunate ramifications in future cases, and perhaps in this case.

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challenges.

The primary expositors of state law are, of course, the state courts. In general, "it is not within [the federal court's] power to construe and narrow state laws." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972); *see Gooding v. Wilson*, 405 U. S. 518, 520-521 (1972); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 369 (1971). The final word on interpreting the meaning and scope of each provision of the New York Code of Judicial Conduct therefore rests with the New York Court of Appeals. Moreover, where, as here, a facial challenge to a state law is commenced in federal court, the federal court "must … consider any limiting construction that a state court or enforcement agency has proffered." *Ward v. Rock against Racism*, 491 U.S. 781, 796 (1989); *see R. A. V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) ("In construing the St. Paul ordinance, we are bound by the construction given to it by the Minnesota court"); *Kolender v. Lawson*, 461 U. S. 352, 355 (1983); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982). Thus, in evaluating a facial challenge to the Code, the federal courts are obliged to consider any narrowing interpretations adopted by the Court of Appeals.

By declining to abstain, the district court usurped this role of the New York Court of Appeals. This action is particularly inappropriate in a case, like this one, challenging numerous provisions of the Code on vagueness grounds, where narrowing and clarifying constructions could be useful.

In summary, principles of federalism and comity should have compelled the district court to abstain from entertaining this constitutional challenge and to allow the matter to proceed in the first instance to the Court of Appeals for resolution.

II
THE DISTRICT COURT ERRONEOUSLY ENJOINED SECTIONS 100.1 AND 100.2 ON THEIR FACE AND ERRONEOUSLY ENJOINED CERTAIN CHARGES

Declaring almost cavalierly that "Spargo's challenge is, of course, grounded in the First Amendment," *Spargo I*, 244 F. Supp. 2d at 91, the district court enjoined Sections 100.1 and 100.2 of the Code of Judicial Conduct as impermissibly vague on their face. The district court's conclusion that these two provisions are facially invalid was legally erroneous and inconsistent with the Supreme Court's admonition that "the overbreadth doctrine is 'strong medicine'" and should be employed "with hesitation, and then 'only as a last resort.'" *New York v. Ferber*, 458 U.S. 747, 769 (1982) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). Each charge should instead have been analyzed on an as-applied basis. Further, with regard to at least several of the charges, Sections 100.1 and 100.2 should not have been enjoined even as applied.

In particular, Charge 2 alleges that Judge Spargo, presiding as Town Justice over criminal cases prosecuted by the Albany County District Attorney's Office, failed to disclose to the defense that he had represented the campaign of the District Attorney-elect and that the campaign owed him $10,000 for legal services

rendered. The Supplemental Charge alleges that Judge Spargo's judicial campaign committee paid $5,000 to Jane McNalley, who nominated Spargo for Supreme Court Justice, for "consulting services" incurred on the same date as McNally made the nomination, in apparent violation of Section 158(3) of the Election Law.

If true, these allegations involve serious breaches of integrity as to which no reasonable person – much less a sitting state judge – could have any doubt are barred by Sections 100.1 and 100.2 of the Code of Judicial Conduct. Section 100.1 demands that judges adhere to standards that preserve the integrity of the judiciary. Section 100.2(A) requires that "[a] judge shall respect and comply with the law" and "promote public confidence in the integrity" of the judiciary. No credible claim could exist that conduct in violation of Section 158(3) of the Election Law is not a breach of integrity under both provisions and a failure to "comply with the law" under Section 100.2. Equally serious is the allegation that Judge Spargo repeatedly failed to disclose to defense counsel in numerous cases that Spargo had served as attorney for the campaign of the District Attorney, and that the campaign was currently in debt to him for these services. No reasonable person could imagine that a judge's repeated failure to disclose the existence of a professional and financial relationship with one of the parties to a pending case would not constitute a serious breach of integrity under Sections 100.1 and 100.2.

At least with regard to the Supplemental Charge, the district court did not

appear to question that Section 100.2 clearly applied to and prohibited the conduct charged.[5] Nonetheless, voiding Sections 100.1 and 100.2 *on their face*, the court enjoined proceedings regarding the Supplemental Charge and other charges based on Sections 100.1 and 100.2. The court reasoned that "Spargo's challenge is, of course, grounded in the First Amendment," and application of these provisions to *other* actions and *other* judges might be less clear. This was a fundamental misapplication of the vagueness doctrine.

The correct methodology for analysis of Spargo's vagueness challenge is set forth in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489 (1982):

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.

Id. at 494-95 (footnotes omitted). Of particular moment is the Court's requirement that any overbreadth must be "substantial." *See Houston v. Hill*, 482 U.S. 451,

[5] *Spargo I*, 244 F. Supp. 2d at 91 ("A person of ordinary intelligence would undoubtedly know that this section forbids unlawful conduct").

458-59 (1987) ("Only a statute that is substantially overbroad may be invalidated on its face."); *New York v. Ferber*, 458 U.S. at 769 ("We have, in consequence, insisted that the overbreadth involved be 'substantial' before the statute involved will be invalidated on its face."). The Supreme Court has emphasized that "[w]e have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application." *Houston v. Hill*, 482 U.S. at 458.

Thus, the first question the district court should have addressed is whether Sections 100.1 and 100.2 reach a *substantial* amount of constitutionally protected conduct. The court's observation that Spargo raised claims under the First Amendment only initiates this inquiry; it does not answer it. In fact, while some judicial speech and/or expressive conduct protected by the First Amendment may occasionally lead to charges of breaches of integrity or non-compliance with law under Sections 100.1 and 100.2, the vast majority of cases under these provisions involve non-expressive conduct that is not constitutionally protected. Among over 30 reported cases in which the Court of Appeals sustained violations of Sections 100.1 and 100.2, the vast majority involved non-expressive and often unlawful conduct.[6] The occasional or possible application of these sections to public speech

[6] *E.g.*, *In re Mason*, __ N.Y.2d __, 2003 N.Y. LEXIS 899 (N.Y. May 1, 2003) (judge commingled personal funds with those held in trust for clients and used an escrow account to pay personal expenses); *In re Tamsen,* __ N.Y.2d __, 2003 N.Y. LEXIS 368 (N.Y. May 1, 2003) (judge misappropriated $2,300 in legal fees from his law firm employer on six separate occasions and altered a receipt book to disguise one theft); *In re Embser*, 90 N.Y.2d

or expressive conduct does not mean that those provisions reach a "substantial" amount of protected speech. Accordingly, the district court should not have enjoined Sections 100.1 and 100.2 as impermissibly vague on their face.

There remains the question whether those provisions are impermissibly vague as applied to Spargo's actions. As noted, at least with regard to Charge 2 and the Supplemental Charge, they clearly are not. Those charges should have been allowed to proceed. The remaining charges appear to involve either speech, expressive conduct, or the raising or spending of funds in connection with the Judge's own campaign. Whether Sections 100.1 and 100.2 gave adequate notice that those activities were prohibited should have been analyzed on an as-applied basis. We take no position here on those questions. It should be emphasized, however, that if the district court had abstained and permitted the Court of Appeals to address these questions, limiting interpretations by the State court might have avoided or obviated any vagueness difficulties. *Cf. In re Shanley*, 98 N.Y.2d 310, 746 N.Y.S.2d 670 (N.Y. 2002) (*per curiam*) (use of phrase "law and order" in judicial campaign literature does not amount to misconduct, obviating need to reach constitutional challenge to Section 100.5).

711, 665 N.Y.S.2d 382 (N.Y. 1997) (acting as executor under will, judge took money from estate's bank account for his personal and business expenses); *In re Backal*, 87 N.Y.2d 1, 637 N.Y.S.2d 325 (N.Y. 1995) (judge advised informant to conceal $700,000 in illegal drug proceeds in a "tin box" and to "lay low" until the FBI investigation was over, then accepted $1,500 as a gift); *In re Mazzei*, 81 N.Y.2d 568, 601 N.Y.S.2d 90 (N.Y. 1993) (judge fraudulently signed his deceased mother's name to pre-approved credit card application and gave false and misleading information to bank representatives who were inquiring into use of the credit card).

In summary, the district court should not have enjoined Sections 100.1 and 100.2 as impermissibly vague on their face. Further, the Commission should have been permitted to proceed under those provisions at least with regard to Charge 2 and the Supplemental Charge.

III
THE PROVISIONS OF SECTION 100.5(A)(1) APPLICABLE TO PARTISAN POLITICAL ACTIVITY ARE CONSTITUTIONALLY PERMISSIBLE

The district court erroneously struck down five subsections of Section 100.5(A)(1) as "prior restraints" on speech. In doing so, the court gave little consideration to whether all five provisions actually involve content-based prohibitions on speech. In fact, subsections (c), (d), and (g) do not involve content-based prohibitions on speech at all. Instead, insofar as they apply to speech, they are content-neutral, and therefore subject to analysis under a different constitutional standard. Tested under that standard, those provisions are constitutional.

Subsections (e) and (f), in contrast, are indeed content-based prohibitions on speech, and are therefore subject to the compelling State interest test. But contrary to the district court's assumption, because both of those provisions apply to endorsements of and opposition to *other candidates for office*, *Republican Party v. White* does not control the outcome of that analysis. Instead, the district court should have independently examined whether there is a compelling State interest in

prohibiting endorsements by judicial candidates during an election campaign of *other candidates* for office and, if so, whether subsections (e) and (f) are the least restrictive means of achieving that interest. Because both provisions survive strict scrutiny under that analysis, their constitutionality should have been sustained.

A. Insofar As They Apply to Speech, Subsections (c), (d), and (g) Are Permissible Content-Neutral Regulations

At the outset, it must be emphasized that on their face, subsections (c), (d), and (g) of Section 100.5(A)(1) do not address speech at all. Rather, like the provisions of the Hatch Act that were sustained in *Mitchell* and *Letter Carriers*, they address partisan political conduct. All three subsections apply only to "[i]ncumbent judges and others running for public election to judicial office." Subsection (c) prohibits engaging in any "partisan political activity" except "in his or her own campaign for elective judicial office." Subsection (d) prohibits "participating in any political campaign for any office or permitting his or her name to be used in connection with any activity of a political organization." Subsection (g) prohibits "attending political gatherings." These provisions are substantially similar to Hatch Act prohibitions that have been sustained as constitutional on their face, and which prohibit federal employees from taking "an active part in political management or in political campaigns." *See Letter Carriers*, 413 U.S. at 550.

Notably, the Supreme Court did not subject federal prohibitions on partisan

political activity to the compelling state interest test reserved for content-based prohibitions on speech. Indeed, the Court did not regard them as content-based prohibitions. As the Court in *Letter Carriers* held, "[t]he restrictions so far imposed on federal employees are not aimed at particular parties, groups, or points of view, but apply equally to all partisan activities of the type described. . . . Nor do they seek to control political opinions or beliefs, or to interfere with or influence anyone's vote at the polls." 413 U.S. at 564; *see also id.* at 556 ("The Act did not interfere with a 'wide range of public activities.' . . . It was 'only partisan political activity that is interdicted. . . . [Only] active participation in political management and political campaigns [is proscribed]. Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the government employee does not direct his activities toward party success.'").

Because prohibitions on partisan political activity were not regarded as content-based, the Court held that Congress could have gone substantially further in regulating partisan political activity than did the Hatch Act:

> So would it be [constitutional] if, in plain and understandable language, the statute forbade activities such as organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party; becoming a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate for public office; initiating or circulating a

> partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate or proxy to a political party convention. Our judgment is that neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees.

Id. at 556.

Here, the only question is whether any different outcome is required because subsections (c), (d), and (g) apply to candidates for elective judicial office. Because these subsections are not content-based prohibitions on speech – just as the similar prohibitions in *Letter Carriers* were also not content-based – the analysis of *Republican Party v. White* does not govern, and subsections (c), (d), and (g) are constitutionally permissible.

It is essential to understand why these provisions are in fact content-neutral. They apply to all speech – regardless of the type or viewpoint expressed – made in the context of partisan political activity. As in *Letter Carriers*, it is not speech itself that triggers the prohibitions, but rather participation in party activities. Indeed, it would not matter whether the candidate was engaging in political speech during such activities, or commercial speech, or no speech at all. The regulation of speech is purely incidental and not content-based.[7]

[7] The regulation of speech in this context should be contrasted with prohibitions on electioneering speech in *Burson v. Freeman*, 504 U.S. 191 (1992), in which prohibitions on electioneering speech at polling places was deemed to be content-based, and with prohibitions on campaigning on postal premises, which this Court deemed to be content-based in *Longo v. United States Postal Service*, 983 F.2d 9 (2d Cir. 1992). In those cases, only political

Accordingly, the district court erroneously assumed that these three provisions should be analyzed under *White* as "prior restraints" on speech, or that they should be subjected to the compelling State interest test. Under the correct standard, "content-neutral regulation will be sustained if 'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 662 (1994) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

Subsections (c), (d), and (g) satisfy these tests. Prohibitions on partisan political activity by judges and judicial candidates plainly serve substantial, and indeed compelling, governmental interests. *See* Point I *supra*. Indeed, even the district court accepted "the articulated purpose of judicial independence as a compelling state interest." *Spargo,* 244 F. Supp. 2d at 87.

Further, that compelling interest is unrelated to the suppression of free expression. "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys . . . . The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of

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or campaign speech was prohibited; other forms of speech were permissible. *See Burson*, 504 U.S. at 197 ("The statute does not reach other categories of speech, such as commercial solicitation, distribution, and display").

expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock against Racism*, 491 U.S. at 791 (citation omitted).

Applying this principle, courts have sustained many regulations of speech or expressive conduct that are unrelated to the message conveyed, and that have an incidental effect on some speakers or messages. For example, the Supreme Court sustained municipal regulations that prohibit adult motion picture theaters from locating within 1,000 feet of any residential zone, church, park, or school, finding that the regulations were "designed to prevent crime, protect the city's retail trade, maintain property values, and generally '[protect] and [preserve] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views." *Renton v. Playtime Theatres, Inc*., 475 U.S. 41, 48 (1986); *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 291 (2000) (sustaining ordinance making it an offense to knowingly or intentionally appear in public in a state of nudity because the ordinance "is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments . . . and not at suppressing the erotic message conveyed by . . . nude dancing").

Likewise, in *Hill v. Colorado*, 530 U.S. 703 (2000), the Court sustained a state statute that makes it unlawful, within 100 feet of the entrance to any health

care facility, to "knowingly approach" within eight feet of another person, without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." *Id* at 707. The Court reasoned that the statute "was not adopted 'because of disagreement with the message it conveys'; applies "equally to all demonstrators, regardless of viewpoint"; and "makes no reference to the content of the speech." *Id*. at 719.[8] So, too, in *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994), the Court sustained so-called "must carry provisions" that require cable television systems to devote a portion of their channels to the transmission of local broadcast television stations. "Congress' primary purpose in enacting must-carry was to restore competitive balance and assure a functional market in the distribution of video signals, whatever might be said with those signals." *Turner Broad. Sys. v. FCC*, 819 F. Supp. 32, 43 (D.D.C. 1993) (three-judge court), *aff'd*, 512 U.S. 622 (1994).

Prohibitions on partisan political activity by judges and judicial candidates – and indeed by government employees generally – are likewise justified by reasons unrelated to the message conveyed in any speech made as part of those activities. The involvement in partisan political activity is itself, independent of any speech,

[8] This Court has similarly upheld prohibitions on panhandling in the subway on the ground that the Transit Authority had no hostility to any particularized idea or message, and because the justification related to "significant dangers to the subway system" posed by panhandling. *Young v. New York City Transit Authority*, 903 F.2d 146, 157-59 (2d Cir. 1990).

corrosive of the appearance of judicial independence. At a minimum, judicial independence means disentanglement from the activities of political parties. Prohibitions on partisan political activity are justified by the substantial interest in disentanglement, and not by hostility to any particular message conveyed. The prohibitions therefore "serve[] purposes unrelated to the content of expression," and are deemed neutral despite the fact that they may have "an incidental effect on some speakers or messages but not others." *Ward v. Rock against Racism*, 491 U.S. at 791.

Finally, subsections (c), (d), and (g) are narrowly tailored to the substantial interests they serve. "Narrow tailoring in this context requires . . . that the means chosen do not "burden substantially more speech than is necessary to further the government's legitimate interests." *Turner Broad. Sys. v. FCC*, 512 U.S. at 662; *see Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 450 (2d Cir. 2001). Significantly, content-neutral regulations "need not be the least-restrictive or least-intrusive means of" regulating "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock against Racism*, 491 U.S. at 798-99; *see Young v. New York City Transit Authority*, 903 F.2d at 159-60.

Subsections (c), (d), and (g) are carefully crafted to inhibit entanglement in

political party activities, and apply specifically during campaigns for elective judicial office. They undoubtedly promote a "substantial government interest that would be achieved less effectively absent the regulation." *Ward,* 491 U.S. at 798-99. For these reasons, subsections (c), (d), and (g) of Section 100.5(A)(1) are constitutional.

B. Subsections (e) and (f) Are Constitutional Because They Are The Least Restrictive Means of Serving A Compelling State Interest

Subsections (e) and (f) prohibit a candidate for judicial office from "publicly endorsing or publicly opposing (other than by running against) another candidate for public office," and from "making speeches on behalf of a political organization or another candidate." These subsections are content-based restrictions on speech that apply only to endorsements of or opposition to *other candidates*. Because these prohibitions are the least restrictive means of serving a compelling state interest, they are constitutionally permissible.

Content-based restrictions on political speech are permissible if necessary to serve a compelling state interest and narrowly drawn to achieve that end. *E.g.*, *Burson v. Freeman*, 504 U.S. 191, 198 (1992); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Erroneously assuming that the application of this standard to provisions of the Code that are content-based is controlled by *Republican Party v. White*, the district court concluded that the restrictions are not narrowly tailored to serve a compelling state interest. The

district court's premise that analysis of this question is controlled by *White*, however, is fatally flawed.

The prohibition in *White*, directed toward a candidate's "announcement of views" on disputed issues, was underinclusive because "statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible." *White*, 536 U.S. at 779. The Court noted that judges have often committed themselves on legal issues on which they must later rule before they arrive on the bench, while on the bench, and outside the context of adjudication (for example, in classes they teach, and in books and speeches). *Id*. But endorsements of and statements of opposition to other candidates are of an entirely different character. Judges do not routinely endorse other candidates in any of these situations. Indeed, the *only* significant time that judges and judicial candidates make such endorsements or statements of opposition is during a judicial election. Accordingly, what was woefully underinclusive in *White* is exquisitely tailored in this case. *Cf. Burson v. Freeman*, 504 U.S. at 208-11 (restriction on solicitation of votes and display or distribution of campaign materials within 100 feet of the entrance to a polling place is narrowly tailored to serve a compelling state interest).

In summary, a prohibition on statements of view by a candidate during an

election for judicial office is underinclusive, and therefore not narrowly tailored to a compelling state interest. But the prohibition in subsections (e) and (f) on endorsements of and statements of opposition to *other candidates* during a judicial election is well-tailored to the state's interest in preserving integrity and judicial independence. Subsections (e) and (f) are therefore narrowly tailored to serve a compelling state interest, and accordingly survive strict scrutiny.

CONCLUSION

For the reasons set forth above, the district court should have abstained in favor of permitting the New York Court of Appeals to address the constitutional issues raised. If the Court reaches the merits, then Sections 100.1 and 100.2 should not have been enjoined as impermissibly vague on their face. Each charge should instead have been analyzed on an as-applied basis. Because Charge 2 and the Supplemental Charge involve only non-expressive conduct clearly prohibited by those provisions, those charges should not have been enjoined as applied. Finally, subsections (c), (d), and (g) of Section 100.5(A)(1) should have been upheld as content-neutral regulations of partisan political conduct. Subsection (e) and (f) should have been upheld as narrowly tailored to serve a compelling state interest.