IN THE SUPREME COURT
OF FLORIDA

CASE NO. 96,629

INQUIRY CONCERNING A JUDGE NO. 99-09
RE: Patricia Kinsey

JUDICIAL QUALIFICATIONS COMMISSION'S REPLY BRIEF

On Review of the
Findings, Conclusions and Recommendations by the
Hearing Panel of the Judicial Qualifications Commission

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PREFACE

Petitioner, the Judicial Qualifications Commission, will be referred to as the "JQC" in this proceeding. Respondent, the Honorable Patricia Kinsey, was the Respondent below and will be referred to as "Respondent" or "Judge Kinsey" in this proceeding.

This matter is before this Court on review of the Findings, Conclusions, and Recommendations by the Hearing Panel of the JQC entered on October 18, 2000 (hereinafter referred to as "Findings at _____"). Judge Kinsey's Response to this Court's Order to Show Cause dated October 30, 2000, will hereinafter be referred to as "Kinsey Response at ____." All references to the official transcript of the hearing in this matter will be designated by the prefix "T," followed by the volume and page number within the transcript. For instance, (T:1-3) refers to Volume 1 of the official transcript at page 3.

SUMMARY OF HEARING PANEL'S FINDINGS

The Hearing Panel found Judge Kinsey guilty of Charges 1, 2, 3, 4 (in part), 5, 7 (in part), 9 (in part), 10, and 12 (in part). She was found not guilty of Charges 6, 8, and 11. Although Judge Kinsey has generally attacked all of the charges on constitutional grounds, she has attacked the *evidentiary basis* for the Hearing Panel's underlying findings of fact only as to Charges 7, 9, and 10. The JQC will respond to the evidentiary sufficiency of the Hearing Panel's findings underlying Charges 7, 9, and 10 in Parts II, III, and IV, respectively, of this Reply.[1]

Judge Kinsey has indirectly attacked the Hearing Panel's findings of guilt as to Charges 1, 2, 3, 4, and 5 on First Amendment grounds. *See* Kinsey Response at 12. The JQC has responded to Judge's Kinsey's constitutional challenges to the Hearing Panel's findings in Part V of this Reply. Judge Kinsey also contends that the Hearing should have dismissed those charges which are based, in part, on Canons 1, 2, and 3 because those canons are only applicable to candidates for judicial office who are article V judges at the time of their candidacy. The JQC has responded to that argument in Part I of this Reply.

Paragraph 12 of the Formal Charges, of which Judge Kinsey was also found guilty, generally alleges that she engaged in conduct unbecoming a member of the judiciary by committing the acts described in the previous eleven charges and that

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[1] Because Judge Kinsey has not raised any arguments challenging the propriety of the Hearing Panel's factual findings as to Charges 1, 2, 3, 4, and 5, any such arguments have been waived.

her campaign was inconsistent with the dignity appropriate to judicial office. Aside from the arguments she raises with respect to the other charges of which the Hearing Panel found her guilty, Judge Kinsey does not raise any separate and direct attacks on the Hearing Panel's finding of guilt as to Charge 12. Finally, in Part VI of this Reply, the JQC addresses the propriety of the discipline recommended by the Hearing Panel.

STATEMENT OF THE CASE

This case is before the court on the Findings, Conclusions and Recommendations by the Hearing Panel of the Judicial Qualifications Commission. On October 18, 2000, that body recommended that Judge Patricia Kinsey, currently a County Judge for Escambia County, Florida, be publicly reprimanded and fined $50,000 for conduct growing out of her 1998 election campaign for the judgeship she now holds. The background of this recommendation is as follows:

On September 27, 1999, the Investigative Panel of the JQC filed a Notice of Formal Charges against Judge Kinsey. There were originally eleven formal charges brought against Judge Kinsey. By Order dated March 2, 2000, the Hearing Panel granted the JQC leave to file an Amended Notice of Formal Charges ("Formal Charges") in which one additional charge was added. The gravamen of the charges for which the Hearing Panel found Judge Kinsey guilty, in whole or part, is summarized below:[2]

> 1. **CHARGE NO. 1** - In this Charge, the JQC alleged that in violation of Canon 1, Canon 2(A), Canon 3(b)(5), Canon 7(A)(3)(a), and Canons 7(A)(3)(d)(i) - (ii), candidate Kinsey distributed a piece of campaign literature entitled, "*Pat Kinsey: The Unanimous Choice of Law Enforcement For County Judge* " in which she stated that "police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals where they belong . . . behind bars," as opposed to simply pledging or promising the faithful and impartial performance of her duties in office.

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[2] Because the Hearing Panel found Judge Kinsey not guilty of Charges 6, 8, and 11, those charges have not been included in this summarization.

FINDING: GUILTY AS CHARGED.

2. **CHARGE NO. 2** - In this Charge, the JQC alleged that during her campaign, in violation of Canon 1, Canon 2(A), Canon 3(b)(5), Canon 7(A)(3)(a), and Canons 7(A)(3)(d)(i) - (ii), candidate Kinsey reiterated her commitment to the prosecution side of criminal cases by distributing a piece of campaign literature entitled, "*If You Are a Criminal, You Probably Won't Want to Read This*," in which she stated that "police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals where they belong . . . behind bars!," as opposed to simply pledging or promising the faithful and impartial performance of her duties in office.

FINDING: GUILTY AS CHARGED.

3. **CHARGE NO. 3** - In this Charge, the JQC alleged that during her campaign, in violation of Canon 1, Canon 2(A), Canon 3(b)(5), Canon 7(A)(3)(a), and Canons 7(A)(3)(d)(i) - (ii), candidate Kinsey distributed a piece of campaign literature entitled, "*Let's Elect 'Pat' Kinsey For County Judge*," in which she reiterated that "a judge should protect victims' rights," and that judges must support "hard-working law enforcement officers by putting criminals behind bars, not back on our streets," as opposed to simply pledging or promising the faithful and impartial performance of her duties in office.

FINDING: GUILTY AS CHARGED.

4. **CHARGE NO. 4** - In this Charge, the JQC alleged that during her campaign, in violation of Canon 1, Canon 2(a), Canon 7(A)(3)(a) and Canons 7(A)(3)(d)(i)-(ii), candidate Kinsey made statements during an interview on a local radio station which exhibited a hostility or apparent hostility towards defendants in criminal cases. By way of example, the Investigative Panel alleged that the following statements were illustrative of her efforts to inform voters that as a judicial officer, she would rule in a "prosecution mode" as opposed to "defensive mode.":

> Pat Kinsey: ***As a prosecutor, I am different from a defense attorney***. I am trained, and I am ethically obliged to look at a case, after an arrest has been made and make a determination, what is just? What is fair? What are the

appropriate charges? . . . ***This is something that is much different from what a defense attorney does. Much like Bill Green before he went on the bench, he was a defense attorney, that type of attorney. He is trained, and he is with ethically obliged at that time to zealously advocate for his client. That is, do whatever he could, under the law, to get his client free. And that is why I think we have such a philosophical difference, between us. I think, in my opinion, that Judge Green is still in that defense mode***. (emphasis added).

FINDING: GUILTY IN PART.

5. **CHARGE NO. 5** - In this Charge, the JQC alleged that during her campaign, in violation of Canon 1, Canon 2(a), Canon 7(A)(3)(a) and Canon 7(A)(3)(d)(i)-(ii), candidate Kinsey made a deliberate attempt to cloak her candidacy in an umbrella of law enforcement and portray herself as a "pro-prosecution/pro-law enforcement judge" by:

-- disseminating a brochure entitled "*Pat Kinsey: The Unanimous Choice of Law Enforcement For County Judge*," in which she was shown in a group photograph with ten law enforcement officers;

-- stating in a brochure entitled, "*A Vital Message From Law Enforcement*," that "victims have a right to ***expect judges to protect them*** by denying bond to potentially dangerous offenders" rather than stating that she would consider bond determinations fairly and impartially based on the circumstances of the particular case;

-- pledging in a brochure entitled "*The Alternative for County Judge,*" that she would "***bend over backward*** to ensure that honest, law-abiding citizens are not victimized a second time by the legal system that is supposed to protect them" (emphasis added);

-- highlighting in several of her campaign brochures, that she had the "unanimous support of law enforcement" and

that "area police officers [had] unanimously endorsed Pat Kinsey for County Judge," thereby further reinforcing her alliance with law enforcement;

-- emphasizing in a brochure entitled "*If You Are a Criminal, You Probably Won't Want to Read This*," that "***Above all else***, Pat Kinsey identifies with the victims of crime," and that "***Pat Kinsey believes a judge should protect the victims of crime***," rather than simply pledging the faithful and impartial performance of her duties without regard to holding defendants' or victims' interests of paramount importance (emphasis added);

-- referring to the defendant as a "**punk**" in her campaign brochure entitled "*A Shocking Story of Judicial Abuse,"* thereby evidencing a certain hostility or bias towards defendants generally.

FINDING: GUILTY AS CHARGED.

7. **CHARGE NO. 7** - In this Charge, the JQC alleged that during her campaign, in violation of Canon 1, Canon 2(A), Canon 7(A)(3)(a), and Canons 7(A)(3)(d)(i) - (iii), candidate Kinsey knowingly misrepresented in her campaign brochure entitled, "*A Shocking Story of Judicial Abuse*," that her opponent, the incumbent, Judge William Green, had not revoked a defendant's (Grover Heller's) bond at an emergency bond hearing when, in fact, Judge Green had revoked the defendant's bond.

FINDING: GUILTY IN PART.

9. **CHARGE NO. 9** - In this Charge, the JQC alleged that during her campaign, in violation of Canon 1, Canon 2(A), Canon 3(b)(9), Canon 7(A)(3)(a) and Canons 7(A)(3)(d)(i) - (iii), in her campaign brochure entitled, "*A Vital Message From Law Enforcement,*" candidate Kinsey knowingly misrepresented the nature and seriousness of criminal charges which were pending in *State v. Johnson*, by giving the false and misleading impression that the defendant had been charged with attempted murder and burglary at the time of his appearance for bond consideration when, in fact, no such charges were pending at the time. The Investigative Panel also alleged

that her campaign literature stated that in a restraining order in the case, the defendant is quoted as having told the victim, that he would kill her “just like I buried that bitch in Mississippi,” when, in fact, there was no such language in the restraining order.

FINDING: GUILTY IN PART.

10. **CHARGE NO. 10** - In this Charge, the JQC alleged that during her campaign, in violation of Canon 1, Canon 2(a), Canon 3(b)(5), Canon 3(b)(9), and Canon 7(A)(3)(d)(ii), in her campaign brochure entitled, “*A Vital Message From Law Enforcement*,” candidate Kinsey publicized the details of two pending criminal cases in a manner that could affect the outcome or impair the fairness and integrity of those proceedings.

FINDING: GUILTY.

12. **CHARGE NO. 12** - In this Charge, the JQC alleged that during her campaign, in violation of Canon 1, Canon 2(A) and Canon 7(A)(3)(a), candidate Kinsey engaged in conduct unbecoming a candidate for and lacking the dignity appropriate to judicial office, which had the effect of bringing the judiciary into disrepute, by disseminating the statements set forth in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, and affirmatively conveying the message that it was permissible for judges to rule in a predisposed manner in certain types of matters which may come before them. The Commission further alleged that Judge Kinsey’s statements inappropriately attacked the judicial system by conveying the false and misleading impression that a judge’s role is to combat crime rather than judge those who appear before the court as criminal defendants in a fair and impartial manner.

FINDING: GUILTY IN PART.

On March 15, 2000, Judge Kinsey filed her Answer to the Formal Charges. Although acknowledging that the campaign brochures attached to the Formal Charges were disseminated by her campaign, she denied that any of the campaign materials violated the cited canons. She generally contended that her campaign

literature was responsive to voters' needs to receive information concerning the candidates' job performance and philosophies. She further contended that her campaign statements did not attack or criticize the integrity or impartiality of the judiciary and that her questioning and criticism of the incumbent's performance was permissible as an exercise of her first amendment rights.

Thereafter, Judge Kinsey filed motions to dismiss the Formal Charges on several grounds, including the contentions that: i) her campaign statements were protected speech under the First Amendment; ii) the statements she made regarding two pending criminal cases were not of such a nature that they could reasonably be expected to "affect the outcome or impair the fairness and integrity of those proceedings;" (iii) her statements regarding the incumbent's actions and sentencing practices in criminal matters were protected speech under the First Amendment and relevant to how he performed his judicial duties; and iv) all references in the Formal Charges to Canons 1, 2, 3(B)(5) and 3(B)(9) should be dismissed because those canons do not apply to individuals who are not article V judges at the time of their candidacy. The Hearing Panel denied all of the motions, and the case proceeded to trial on June 12-13, 2000.

STATEMENT OF FACTS

Judge Kinsey was elected to the bench in September, 1998, having defeated the incumbent County Court judge, William Green. Judge Kinsey graduated from law school in 1991. Following graduation, she began working for the State Attorney's Office in Escambia County and remained there until she resigned to run for Judge Green's County Court seat. (T:1-74). As a young prosecutor, Judge Kinsey was assigned to Judge Green's county criminal division. She testified that she decided to run against Judge Green after coming to the realization that "there was no longer respect [for] his division" and that "victims were very upset having to appear before [him] because of his reputation" for leniency on defendants. (T:1-140-141).

After deciding to run for Judge Green's seat, Judge Kinsey hired a campaign consultant named Jim Spearing. (T:1-77). Mr. Spearing testified that in addition to managing political campaigns, he is the political consultant for the Florida Police Benevolent Association ("PBA"), a statewide association of approximately 30,000 law enforcement officers. (T:2-373). Mr. Spearing testified that he first became aware of the Kinseys after receiving a phone call from the local president of the PBA, complaining that there was a "bad situation [in Escambia County] with a particular judge and that a candidate [Patricia Kinsey] had surfaced that they wanted [Spearing] to come meet." (T:2-373). He testified that his role in the Kinsey campaign was to develop messages, interpret polling data, create ad designs, and

coordinate the overall preparation and dissemination of information to the general public. (T:2-373-74).

Mr. Spearing testified that "[t]he political cycle, although it seems a very long time, is actually only 18 days" because "18 days out from the election most people begin to focus on the candidates [and] begin to gather and accept information to be ready to make their choice." (T:2-379). He also testified that "flooding" voters' mailboxes with campaign literature in the last few days before an election is "standard practice in campaigning," (T:2-426), and that because of the clutter created by this last minute activity, "studies show that you have about 7-10 seconds from the time they [readers] pull it out of the [mail]box till the time it hits the trash if you don't grab them with something." (T:2-428-29). Thus, he testified, "big words," "lots of color," "oversize mail," "multiple folds" and "funny-size mail" are crucial in campaign literature because voters "take a piece and . . . scan the headlines . . . [to] get the gist of what [it is]." (T:2-427, 429).[3]

Against this backdrop, Mr. Spearing testified that the basic theme of the Kinsey campaign was that Judge Green had exercised bad judgment on the bench to the point where Mr. Spearing "was getting [complaint] calls from rank-and-file law

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[3] In response to a concern raised by one Hearing Panel member as to whether the last-minute release of campaign's literature would make it difficult for Judge Kinsey's opponent to respond, Mr. Spearing answered that her opponent's campaign operates under the "exact set of rules we do" and that "every campaign tool that's available to [Judge Kinsey] [is] available to [her opponent] or his consultant." (T:2-427-28).

enforcement officers." (T:2-376-77). He continued that there were no other significant themes besides Judge Green's job performance and that the Kinsey campaign "focused like a laser beam on a series of cases [in which] [the campaign] thought [Judge Green] exercised very poor judgment." (T:2- 383).

He also testified that he was in his thirteenth year of political campaigning in Florida and though the Kinsey campaign was his first judicial campaign as a "general consultant," he had been given a very "exhaustive briefing" on the limitations of judicial campaigns and knew, for instance, that candidates could not "actively raise money" or "state how [they] would rule on a particular case." (T:2-375). He continued that the Kinsey campaign felt as though it "had done its homework on what the . . . rules were and what the restrictions were" and that the campaign "felt comfortable about that." (T:2-375).[4]

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[4] Judge Kinsey was assisted in her campaign by her husband, Roy Kinsey, who is also a lawyer in Pensacola. (T:1-75). Mr. Kinsey played a significant role in Judge Kinsey's campaign. Among other things, Judge Kinsey testified that on her behalf, Mr. Kinsey attended a meeting conducted by Judge Charles Kahn of the First District Court of Appeal regarding appropriate conduct in judicial campaigns. (T:1-75-76).

<u>SUMMARY OF ARGUMENT</u>

The Hearing Panel's findings of guilt against Judge Kinsey are supported by clear and convincing evidence. "Clear and convincing" evidence is an intermediate standard of proof, which is more than a preponderance but less than beyond a reasonable doubt. *In re Graziano*, 696 So. 2d 744 (Fla. 1997). This standard may be satisfied even if the evidence is in conflict. *Fraser v. Security Inv. Corp.*, 615 So. 2d 841 (Fla. 4th DCA 1993).

Judge Kinsey has raised three primary attacks on the Hearing Panel's findings of guilt. First, she contends that she was improperly charged with violations of Canons 1, 2, and 3 because those canons only apply to candidates for judicial office who are incumbent judges as opposed to lawyer/candidates. Similar arguments have been raised numerous times and uniformly rejected by this Court. Judge Kinsey next claims that there was insufficient evidence to support the Hearing Panel's findings of guilt as to two of the charges (7 and 9) where she was found to have made knowing misrepresentations and one charge (10) where she was found to have improperly publicized the details of two pending criminal cases. As elaborated upon in Parts II, III, and IV of this Reply, the Hearing Panel's findings are supported by the admissions of Judge Kinsey and strong circumstantial evidence. Judge Kinsey's contention that the Hearing Panel took the language in her campaign brochures out of context is belied by her own testimony.

Judge Kinsey also argues that her campaign speech was constitutionally protected under the first amendment. This argument is without merit. The canons under which Judge Kinsey was tried are constitutional, both facially and as applied. Several courts which have construed canons such as Florida's present canons have recognized that judicial candidates are different from other political candidates and that first amendment protections, albeit compelling, must be balanced against the public's interest in judicial neutrality and independence. Moreover, there is no constitutional protection for knowingly false and misleading speech.

Finally, Judge Kinsey attacks the propriety of the Hearing Panel's recommended discipline of a public reprimand and $50,000 fine. This recommendation should be considered in light of the Hearing Panel's conclusion that Judge Kinsey was aware of the restrictions placed on candidates by the Code of Judicial Conduct and that she made a conscious decision to disregard those restrictions. "The purpose of removal proceedings, and all related aspects of those proceedings, is to regulate the judiciary, to protect the public from dishonest judges, to prevent dishonest judges from doing further damage, and above all to assure the public that the judiciary is worthy of its trust." *In re Shenberg*, 632 So. 2d 42, 47 (Fla. 1992). Aside from generalized assertions that the proposed fine is excessive, Judge Kinsey has cited no authority indicating how the Hearing Panel exceeded the authority granted it under Article V, section 12(a)(1) of the Florida Constitution to recommend appropriate discipline to this court.

ARGUMENT

I. CANONS 1, 2, AND 3 ARE APPLICABLE TO NON-JUDICIAL CANDIDATES FOR JUDICIAL OFFICE

Citing no supporting case law, Judge Kinsey contends that those portions of the Formal Charges relating to Canons 1, 2(A), 3(B)(5), and 3(B)(9) of the Code should be dismissed because those canons "are not applicable to a 'candidate' for judicial office who is not an article V judge at the time of his or her candidacy." *See* Kinsey Response at 5-6.

The relevance of this contention is questionable. Conspicuously absent from Judge Kinsey's argument is any mention of the fact that none of the formal charges sustained by the Hearing Panel is predicated alone on Canons 1 and 2 as an independent basis for guilt. Rather, Canon 7, which expressly applies to all judicial candidates, runs as a common thread through, and is the foundation for, all of the charges.[5] Moreover, as reflected by the charges themselves, Canons 1 and 2 are to be read in *pari materia* with Canon 7 so as to provide the conceptual framework in which to balance the competing interests of the right to free speech and the institutional interest in maintaining the integrity and independence of the judiciary. This balancing is nowhere more evident than in Canon 1's admonition that judges

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[5] Canon 7(E) states that "Canon 7 generally applies to all incumbent judges and judicial candidates" and that "[a] lawyer who is a candidate for judicial office is subject to Rule 4-8.2(b) of the Rules Regulating the Florida Bar." Rule 4-8.2(b) of the Rules Regulating the Florida Bar, in turn, provides that a Florida lawyer "who is a candidate for judicial office shall comply with the applicable provisions of Florida's Code of Judicial Conduct."

should participate in establishing, maintaining, and enforcing high standards of conduct and that "[t]he provisions of th[e] Code should be construed and applied to further that objective."[6]

Additionally, this Court has previously considered and rejected similar arguments concerning Canons' 1 and 2 inapplicability to pre-judicial acts. For example, in *In re Davey*, 645 So. 2d 398 (Fla. 1994), a case involving pre-judicial conduct, the respondent argued, similar to Judge Kinsey here, that the JQC's disciplinary authority did not extend to acts occurring before a judge actually assumed the bench. Rejecting such a narrow view of the constitutional provision creating the JQC, this court noted that:

> The language of [art. V] section 12 [of the Florida Constitution] is unambiguous on its face and we conclude that it means just what it says: The Commission may investigate and recommend the removal or reprimand of any judge whose conduct in or outside of office warrants such action. **This Court has consistently ruled that pre-judicial conduct may be used as a basis for removal or reprimand of a judge.**

Id. at 403 (emphasis added).

Notably, in *Davey*, the canons which the respondent was found to have violated were Canons 1 and 2(A). *Id.* at 400, 408. *See also id.* at 403 (citing collection of cases for proposition that "pre-judicial conduct may be used as a basis

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[6] Reflecting the principles embodied in Canon 1, Canon 7(A)(3)(a), in virtually identical language, provides that a *candidate* for judicial office "shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary."

for removal or reprimand of a judge"); *In re Ford-Kaus*, 730 So. 2d 269 (Fla. 1999) (affirming JQC's finding that judge's conduct which occurred both *before* and after she became a circuit judge violated Canons 1 and 2); *In re Alley*, 699 So. 2d 1369, 1370 (Fla. 1997) (disciplining judge for misstating her qualifications and those of her opponent in a judicial election campaign in violation of Canons 1 and 2).

Ironically, during the final hearing, Judge Kinsey testified that she studied this court's decision in *Alley* and considered it the "Bible" for her campaign concerning "what [she] could and could not do . . . ." (T:1-141). *Alley* actually belies her contention, however, that Canons 1 and 2 are not applicable to non-judicial candidates for judicial office. Although the specific canons are not referenced in the court's opinion, Alley was, in fact, charged with and found guilty of violating Canons 1 and 2.[7] Indeed, in publicly reprimanding Judge Alley, the Court unambiguously declared that Canons 1 and 2 apply to non-judicial candidates for judicial office:

> The Code of Judicial Conduct governs the activities of all members of the judiciary, ***even those seeking to become members***. The Code contains the essential principles by which our judiciary is governed. Canon 1 of the Code states that, "A judge should participate in establishing, maintaining, and enforcing higher standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary may be preserved." These concepts of integrity and independence were the cornerstone upon which our legal system was built. Canon 2 states that "A judge shall respect and comply with the law and act at all times in a

[7] *See* JQC Appendix in Support of Reply Brief at 11 (hereinafter "JQC Appendix"), Notice of Formal Charges in *In re Alley*, Inquiry No. 97-01.

> manner that promotes public confidence in the integrity and impartiality of the judiciary." We need judicial integrity in order for the public to be able to put their trust in our legal system. The public perception of judicial integrity must be upheld at all costs.

See JQC Appendix at 12, Public Reprimand of Judge Nancy F. Alley, November 3, 1997 ("*Alley* Reprimand").

The JQC also notes that Canon 3(B)(5), which Judge Kinsey is also found to have violated, provides that:

> A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . . .

Canon 3(B)(9), also at issue, provides that:

> A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing . . . .

Clearly, there is no less public interest in prohibiting attorney/candidates for judicial office, as opposed to incumbent judges only, from making public comments which manifest bias or prejudice or could otherwise be reasonably expected to affect the outcome of a proceeding or impair its fairness.[8] If Judge Kinsey's position relative

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[8] With respect to the applicability of Canons 3(B)(5) and (9), the commentary to Canon 7(A)(3)(d) is instructive. This particular commentary states that:

> "Section 7(A)(3)(d) prohibits a candidate for judicial office from making statements that appear to commit the candidate regarding cases, controversies or issues likely

to Canons 3(B)(5) and 3(B)(9) were accepted, she would be at liberty to make public comments which might affect the outcome of cases while her opponent (in this instance, an incumbent judge) could not. Aside from being repugnant to the notion of acting in a manner consistent with the integrity and independence of the judiciary, there is no public interest in creating one set of rules which restricts incumbents and another set of rules which permits lawyers to violate the canons with impunity.

There is admittedly no express language in the Code of Judicial Conduct which states that Canons 1, 2 and 3 (as distinguished from Canon 7) are specifically applicable to candidates. Nonetheless, as reflected in *Alley* and its progeny, the canons as a whole, and the fact that Canon 7 implicitly adopts all other canons relating to appropriate conduct as does the required statement for judicial candidates in Canon 7(F)[9], it would lead to an anomalous result if a lawyer/candidate could contend that the canons which embody the integrity and independence of the judiciary are not "applicable" to a candidate for judicial office.

II. THE HEARING PANEL PROPERLY FOUND JUDGE KINSEY GUILTY

> to come before the Court. As a corollary, the candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views. ***See also Section 3B(9), the general rule on public comment by judges.***

(emphasis added).

[9] Canon 7F required Judge Kinsey, like all judicial candidates, to acknowledge in writing that she had read and understood "the requirements of the Florida Code of Judicial Conduct."

OF CHARGE NO. 7 WHERE THE EVIDENCE DEMONSTRATED SHE MADE A KNOWING MISREPRESENTATION REGARDING HER OPPONENT

In Charge No. 7, the JQC alleged as follows:

> 7. During the campaign, in violation of Canon 1, Canon 2(A), Canon 7(A)(3)(a), and Canons 7(A)(3)(d)(i) - (iii), you knowingly misrepresented in your campaign brochure entitled, "*A Shocking Story of Judicial Abuse*," that your opponent, the incumbent, had not revoked Grover Heller's bond at an emergency bond hearing when, in fact, he had revoked the defendant's bond. You further implied that your opponent's role in that case was to protect "an elderly law-abiding couple" and that the incumbent's conduct represented a "shocking lack of compassion for the victims of violent crime."

As indicated, this charge was based on a multiple-fold brochure disseminated by the Kinsey campaign entitled, "*A Shocking Story of Judicial Abuse,*" which was admitted into evidence as JQC Exhibit 6.[10] The brochure criticized the incumbent's handling of the criminal case of a defendant named Grover Heller. On the inside of the brochure the following words appear:

WHAT KIND OF MAN WOULD BEAT UP HIS OWN MOTHER?

A photograph of Mr. Heller is then shown next to a summary of the facts in his case, including the fact that Judge Green had granted his pre-trial release. In the summary, Judge Kinsey referred to Mr. Heller as a "thug" and then describes how Mr. Heller's parents, who were allegedly afraid of him, "returned to Judge William Green, in a panic seeking to have their son returned to jail for their protection." The

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[10] *See* JQC Appendix at 9; (T:1-118). Jim Spearing, the campaign consultant for Judge Kinsey, testified that multiple-fold brochures are a reliable method of getting voters' attention.

following language is then prominently displayed in large white letters against a red background:

WHAT DID JUDGE WILLIAM GREEN DO?

As the reader opens the brochure, the question previously raised is answered as follows:

> **Judge William Green offered to jail the elderly couple instead!**
>
> That's right. **Instead of revoking Grover Heller's bond** and putting this abusive punk in jail, Judge William Green offered to put his elderly parents in jail! Incredible.

The Hearing Panel found, by clear and convincing evidence, that Judge Kinsey made a knowing misrepresentation concerning Mr. Heller's bond and that "[i]n fact, the Heller bond had been revoked and Judge Kinsey knew or should have known it." *See* Findings at 27; *see also* (T:1-121 -124).

Judge Kinsey does not contest the Hearing Panel's finding that she was aware Judge Green had revoked Mr. Heller's bond. She, in fact, admitted at trial that before disseminating the Heller brochure, she had researched and was aware of the facts in Mr. Heller's case. (T:1-119.). Moreover, during examination by Special Counsel, Judge Kinsey admitted that with respect to the language in the brochure that, "***Instead of*** *revoking Grover Heller's bond and putting this abusive punk in jail, Judge William Green offered to put his elderly parents in jail,*" the phrase "**instead**

of" in everyday parlance means "in place of," "as a substitute for," or "alternative to." (T:1-121).

Judge Kinsey instead argues that the Panel's finding of an intentional misrepresentation is unsupported by the evidence because "***[r]eading the entire brochure*** makes it obvious that while the headline of the inside section of the brochure reads, 'Judge William Green offered to jail the elderly couple instead!,' use of the word 'instead' was a reference to his initial offer to jail the parents rather than (or instead of) revoking Heller's bond." *See* Kinsey Response at 13 (emphasis added). Judge Kinsey further argues that excerpts from newspaper articles reprinted elsewhere in the brochure (albeit in a much smaller typeface) explained that Heller's bond was eventually revoked.

The fallacy in Judge Kinsey's reasoning is perhaps best understood by reference to the testimony of Jim Spearing, her own campaign consultant. In stark contrast to Judge Kinsey's testimony that her intent was for voters to read the entire brochure and understand that Heller's bond had been revoked, Mr. Spearing testified that voters rarely read campaign literature in full. Rather, as Mr. Spearing testified, the typical reader spends only:

> "7 to 10 seconds from the time they take it out of the [mail]box till they throw it in the trash. So you need to catch their attention. That's why I use oversize mail, lots of color; that sort of thing."

(T:2-427). Mr. Spearing further testified that because "people are desperate to break through the clutter of all the stuff that's sent to [them]," he uses "big words and multiple folds" because most readers will digest campaign literature by "scan[ning] the headlines to get the "gist" of what it is. (T:2-429).[11]

Even Judge Kinsey admitted that because of the smaller typeface used in the Heller brochure indicating that Heller's bond had been revoked, readers would not have focused on that fact had they simply scanned the headlines as the large typeface and bold colors of the brochure invited them to. (T:1-124). In light of this admission, coupled with the testimony of her own campaign consultant, the Hearing Panel properly found that there was clear and convincing evidence that Judge Kinsey made a knowing misrepresentation regarding Judge Green's conduct in the Heller case.

III. THE HEARING PANEL PROPERLY FOUND JUDGE KINSEY GUILTY OF CHARGE NO. 9 WHERE THE EVIDENCE DEMONSTRATED SHE MADE A KNOWING MISREPRESENTATION REGARDING THE FACTS OF A CRIMINAL CASE INVOLVING DEFENDANT STEPHEN JOHNSON

In Charge No. 9, the JQC alleged as follows:

> 9. During the campaign, in violation of Canon 1, Canon 2(A), Canon 3(B)(9), Canon 7(A)(3)(a) and Canons 7(A)(3)(d)(i) - (iii), in your campaign brochure entitled, "*A Vital Message From Law Enforcement,*"

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[11] It is also telling that Mr. Spearing, the individual who prepared the Heller brochure, did not himself understand that Judge Green had, in fact, revoked Mr. Heller's bond. (T:2-407). Mr. Spearing was under the impression that Judge Green had not Heller's revoked bond during Heller's bond revocation hearing and did not do so until "after a firestorm in the press." He was corrected of his misapprehension by Judge Kinsey's counsel. (T:2-393-94).

> you knowingly misrepresented the nature and seriousness of criminal charges which were pending in *State v. Johnson*, Case No. 97-4032, by giving the false and misleading impression that the defendant had been charged with attempted murder and burglary at the time of his appearance for bond consideration when, in fact, no such charges were pending at the time. Your campaign literature also stated that in a restraining order in the case, the defendant is quoted as having told the victim, that he would kill her "just like I buried that bitch in Mississippi," when, in fact, there is no such language in the restraining order.

The Hearing Panel found Judge Kinsey guilty of a misrepresentation as to the first allegation only in this charge; specifically, the nature of the charges that were pending against the defendant when he was arrested, "because the brochure left the clear impression that Johnson had been charged with attempted murder and burglary and no such charges were in fact pending at the time that he appeared at his bond hearing." *See* Findings at 27.

Judge Kinsey was aware of the facts in the *Johnson* case as she had been the assistant state attorney assigned to that case before she resigned that position to launch her campaign against Judge Green. (T:1-105). In her Response, Judge Kinsey admits that "Johnson had not been formally charged with murder at the time of his first appearance." *See* Kinsey Response at 16. She suggests that her misrepresentation should be excused, however, because "[t]he purpose of the brochure was to give voters information they could use to evaluate how Judge Green handled serious offenders that appeared before him," and an accurate description of the charges pending against Johnson was not germane to voter's evaluation of his record. *See* Kinsey Response at 16.

Just as the Hearing Panel did, this Court should reject Judge Kinsey's invitation to excuse her misrepresentations as "harmless error." As the assistant state attorney handling the Johnson case, Judge Kinsey was aware of the charges that were pending at the time of Johnson's arrest. She simply embellished those charges to advance her own personal or political agenda. Clearly, as the Hearing Panel found, Judge Kinsey should have accurately informed voters of the charges pending against Johnson, irrespective of what she felt the charges should have been. *See* Findings at 28-29.

IV. THE HEARING PANEL PROPERLY FOUND JUDGE KINSEY GUILTY OF CHARGE NO. 10 WHERE SHE MADE PUBLIC COMMENTS REGARDING TWO PENDING CRIMINAL MATTERS

In Charge No. 10 of the Formal Charges, the JQC alleged as follows:

> 10. During the campaign, in violation of Canon 1, Canon 2(a), Canon 3(B)(5), Canon 3(B)(9), and Canon 7(A)(3)(d)(ii), in your campaign brochure entitled, "*A Vital Message From Law Enforcement*," you publicized the details of the pending cases of two criminal defendants, Stephen Johnson and Gerard Alsdorf, to the public in a manner that could affect the outcome or impair the fairness and integrity of those proceedings.

In her *VITAL MESSAGE FROM LAW ENFORCEMENT* brochure,[12] which was received into evidence as JQC Exhibit 4, candidate Kinsey discussed the facts of two pending criminal cases (defendants Alsdorf and Johnson) as part of her efforts

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[12] *See* JQC Appendix at 7; (T:1-98).

to criticize the incumbent's handling of those matters.[13] The brochure includes photographs of the defendants beneath the caption:

> **"TAKE A LOOK AT SOME OF THE CHARACTERS JUDGE 'LET 'EM GO GREEN' HAS RELEASED INTO OUR COMMUNITY."**

The brochure then discusses the facts of Alsdorf's and Johnson's cases and criticizes Judge Green's decision to grant those defendants' pre-trial release under the circumstances presented. The brochure ends by stating:

> *Judge "Let 'em Go Green" has consistently ignored the pleas of police officers, prosecutors, and victims, to keep these potentially dangerous individuals off our streets.*
>
> *You **CAN** do something about it.*
>
> *Vote **NO** on Judge William Green on Tuesday, September 1st.*[14]

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[13] Judge Kinsey admitted that at the time this brochure was published, neither Alsdorf nor Johnson had been tried for the crimes she publicized in the brochure. (T:1-99).

[14] As reflected in the following colloquy during her examination at trial, Judge Kinsey was unapologetic regarding her decision to inform voters she would rule differently on pre-trial release matters if presented with the same set of circumstances, despite Canon 7(A)(3)(d)(ii)'s admonition that "[a] candidate for judicial office . . . shall not make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . . .":

> Q: And, Judge, were you encouraging them [voters] to say no [to Judge Green] because you wanted them to know that if these same facts appeared before you in a case, you wouldn't make the same decisions; you'd decide it differently? Is that the case?
>
> A: ***I believe that it's a fair statement to say that I would have found in each of these cases differently, yes.*** That's why I brought them up. That was the whole point of bringing them up.

See JQC Exhibit 6.

Canon 3(B)(9) provides that:

> A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing.

As reflected in her testimony at trial, Judge Kinsey candidly admitted that her motivation in publishing this brochure was to discredit the defendants in the public's view and criticize Judge Green's handling of their cases:

> Q. All right [sic]. Judge, by using the word "characters," wasn't it your intent to say to the public that these individuals – or characters, as you refer to them – were bad actors whom Judge Green should not have let go?
>
> A. **Yes. That was the ultimate issue in this brochure, certainly.**

(T:1-100-101) (emphasis added).

. . .

> Q. All right [sic]. Judge, having made the comments you did regarding the Johnson and Alsdorf cases, which were both pending, do you feel those defendants would have been justified in seeking your recusal if you had somehow been called upon to review their cases?
>
> A. **Oh, absolutely**. Although that would never happen. There was no way it would ever come

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(T:1-163).

> back before me or before Bill Green. It would never have happened.

(T:102-4-13) (emphasis added).

Despite acknowledging that her comments regarding Johnson and Alsdorf were such that they would have required her recusal had she been called upon to preside over their cases, Judge Kinsey now attacks the Hearing Panel's finding as legally insufficient because, as she contends, "there must be more than a possibility of [a public comment] affecting the outcome of a proceeding, there must be a reasonable expectation that it will." *See* Kinsey Response at 11.[15] The Hearing Panel, in fact, found that "the comments regarding defendants Stephen Johnson and Gerard Alsdorf should have been reasonably expected to affect the outcome of their future cases," not merely that there was a possibility that those comments could affect the outcome of those proceedings. *See* Findings at 28. Moreover, Judge Kinsey's admission that her comments would have required her disqualification, coupled with the inflammatory nature of those comments, is more than sufficient evidence to support the Panel's finding.

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[15] Arguments such as Judge Kinsey's suggestion that no harm was done because a jury was successfully picked in the Johnson case despite her statements have not been persuasive to this court in the past. (T:1-135). In *In re LaMotte*, 341 So. 2d 513, 518 (Fla. 1977), this court noted that:

> if a judge commits a grievous wrong which should erode confidence in the judiciary, but it does not appear that the public has lost confidence in the judiciary, the judge should nevertheless be removed.

Citing *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991), Judge Kinsey also argues that the evidence presented did not rise to the level required to limit her First Amendment rights. Such arguments have been specifically considered and rejected by cases such as *Broadman v. Commission on Judicial Performance*, 18 Cal. 4th 1079, 959 P.2d 715, 77 Cal. Rep. 2d 408 (1998), *cert. denied*, 525 U.S. 1070, 142 L. Ed. 2d 662 (1999). These cases uphold reasonable limitations on judicial speech relating to pending cases because such limitations further a substantial governmental interest unrelated to the suppression of expression.

These cases also conclude that avoiding material bias to an adjudicatory proceeding is a core governmental interest and that Canon 3(B)(9), or its predecessor, is a reasonable and appropriate way, both facially and as applied, to maintain the public's confidence in the integrity, impartiality, and independence of the judiciary. Certainly, that was the conclusion of this Court in *In re Code of Judicial Conduct (Canons 1, 2 and 7A(1)(b)*, 603 So. 2d 494 (Fla. 1992). Although Canon 3(B)(9) was not directly at issue there, the broad holding of that case that the impartiality and independence of the judiciary are compelling governmental interests, which justify reasonable limits on judicial speech, is equally applicable here.

V. NEITHER THE CANONS NOR THE CHARGES INFRINGE UPON JUDGE KINSEY'S CONSTITUTIONALLY PROTECTED SPEECH

The Hearing Panel held that the applicable judicial canons did not violate protected free speech and were correctly charged upon and applied. In so holding, the Panel noted that :

> The state of Florida has a compelling interest in maintaining the actual and apparent independence of the Florida judiciary. Judicial Canons have been held constitutional and proper restrictions on judicial elections throughout this country so long as there [sic] are narrowly tailored to accomplish the necessary compelling end.

See Findings at 31-32.

Judge Kinsey does not contest the sufficiency of the evidence which supports the underlying findings of guilt as to Charges 1 through 5; however, she does contend that her statements giving rise to those charges were constitutionally protected speech. *See* Kinsey Response at 11-12. Specifically, she asserts that "the information in the campaign brochures was used to give voters information about Judge Green's performance in office and the use of judicial discretion and is constitutionally protected speech under the first amendment." *See* Kinsey Response at 12. As reflected in the Findings, the statements which the Hearing Panel condemned in Charges 1 through 5 exhibited Judge Kinsey's apparent commitment to the cause of law enforcement in criminal cases, thereby violating Canons 7(A)(3)(d)(i) and (ii), which prohibit candidates for judicial office from making pledges of conduct in office, or committing or appearing to commit with respect to cases, controversies or issues likely to come before the court.

This argument of unconstitutionality is without merit. The current canons of Florida's Code of Judicial Conduct (adopted in *In re Code of Judicial Conduct*, 643 So. 2d 1037 (Fla. 1994) are constitutional facially and as applied here. The canons recognize the constitutional necessity that restrictions on judicial campaigns be narrowly tailored and serve compelling state interests. They balance First Amendment freedoms and the due process rights of litigants to an impartial tribunal that can and will fairly adjudicate each case on its own unique facts free of partisan political pressures or prior pledges of conduct.

The canons and the case law construing and applying them also recognize that judicial elections are and must remain very different from campaigns for mayor, sheriff or legislative bodies. The necessity for establishing and maintaining this fundamental difference is obvious. As this Court explained when it rejected a constitutional challenge to the prohibition against sitting judges publicly endorsing candidates for judicial office in *In re Code of Judicial Conduct (Canons 1, 2, and 7A(1)(b)*, 603 So. 2d 494, 497 (Fla. 1992) (relying on *Morial v. Judiciary Commission*, 565 F. 2d 295 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978)):

> Maintaining the impartiality, the independence from political influence, and the public image of the judiciary as impartial and independent is a compelling government interest . . . .

* * * *

> . . . Judges hold a unique position in our society that warrants distinguishing them and what they can do from the general citizenry.
>
> The Canons impose high standards and a heavy burden on those persons who accept judicial office. They are standards measuring fitness for judicial office and include tests of behavior relating to integrity and propriety that preclude judges from taking actions that the general public can engage in without consequence. In balancing our compelling interest in an independent, impartial judiciary against a judge's right to take a political stand that might destroy that independence and impartiality, we must conclude that the former outweighs the latter.

Likewise, in *In re Glickstein*, 620 So. 2d 1000, 1002 (Fla. 1993), this Court again upheld the constitutionality of Canons 1, 2 and 7, concluding that "[t]he Canons balance the public's interest in judicial neutrality against any restrictions on the judge's freedom's." *Glickstein*, 620 So. 2d at 1002. "When so applied, the Canons are necessary, reasonable, and constitutional." *Id.*

The rationale for restrictions on judicial races is compelling, both practically and constitutionally. Judges must be impartial since they deal with unique individual cases as opposed to broad programs or sweeping legislative schemes. When a judicial candidate makes a statement regarding his or her beliefs on an important issue likely to come before the court and is subsequently elected, there is an impermissible risk that the judge will no longer view that issue impartially. Indeed, even if a judge is not influenced by those campaign assertions, it is possible he or she will lean over backwards the other way to compensate for their perceived bias.

In either event, the judicial process, which must be perceived as fair and impartial, is irreparably tainted.

All parties who appear before a judge have a fundamental due process right to an impartial tribunal and fairness in all proceedings. This is particularly so in the case of criminal defendants. Judge Kinsey and others who have improperly campaigned on "Get Tough on Crime" platforms expressly or implicitly promising to favor law enforcement if elected -- as opposed to simply pledging the fair and impartial performance of the duties of the in office -- may find themselves unable or unwilling to be objective and impartial. *See, e.g., In the Matter of Haan*, 676 N.E. 2d 740 (Ind. 1997).

Thus, courts which have considered judicial canons written or construed similar to Florida's present canons have almost universally upheld them as constitutional. This is so both with respect to Canons 7(A)(3)(d)(i) and (ii) (which prohibits committing to a position on issues likely to come before the court) and Canon 7A(3)(d)(iii) (which prohibits knowing misrepresentations in judicial campaigns). In *Ackerson v. Kentucky Judicial Retirement and Removal Commission*, 776 F. Supp. 309 (W.D. Ky. 1991), *Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania*, 944 F. 2d 137 (3d Cir. 1991), and *Republican Party of Minnesota v. Kelly*, 63 F. Supp. 2d 967 (D. Minn. 1999), the courts all upheld the substantial equivalents of Canons 7(A)(3)(d)(i) and (ii). These decisions recognize that First Amendment concerns must be balanced against other equally compelling

considerations unique to the judiciary, including litigants' constitutional right to a fair and impartial tribunal. *See also Deters v. Judicial Retirement & Removal Commission*, 873 S.W. 2d 200 (Ky. 1994) and *Summe v. Judicial Retirement & Removal Commission*, 947 S.W. 2d 42 (Ky. 1997)

The rationale for prohibiting judicial candidates from knowingly misrepresenting the facts or purposefully misleading the public is equally compelling. False or misleading statements that cause the public to question the honesty or impartiality of the judiciary undermine the most fundamental principles upon which the judicial system depends for its legitimacy and effective functioning. Thus, any contention that Judge Kinsey had a First Amendment right to knowingly misrepresent the record of an incumbent judge is absurd. Knowingly false and misleading statements are not constitutionally protected speech. "[A] calculated lie about a public official, or a statement uttered out of reckless inattention to its falsity, is beyond the pale of constitutional protection." *Pierce v. Capital Cities Communications, Inc.*, 576 F. 2d 495, 506 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978).[16]

The decisions of sister courts that have confronted these same issues confirm the constitutional propriety and overriding necessity for maintaining and enforcing reasonable restrictions against false speech in judicial campaigns. For example, in

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[16] Although a knowingly false or misleading representation regarding an opponent's performance in office is political speech, it is not protected by the First Amendment. *Brown v. Hartlage*, 456 U.S. 45, 60 (1982).

In re Bybee, 716 N.E. 2d 957 (Ind. 1999) the Indiana Supreme Court held that a judicial candidate violated Indiana's canons (which are virtually identical to the Florida canons at issue here) by creating a "false impression" of the incumbent's conduct in office and using "campaign innuendo or equivocal statements designed to raise doubts about a judge," thereby "destroy[ing] public confidence in the judicial office." *Bybee*, 716 N.E. 2d at 963.

Although "[m]indful of the cherished place free and unfettered campaign speech holds in our constitutional order," the *Bybee* Court concluded that prohibiting misleading campaign conduct was essential to preserve and protect the impartiality, integrity and independence of the courts as well as public confidence in the judiciary. *Id.* at 959. The Court's reasoning is dispositive here and deserves quotation at some length:

> This difference [between campaigns for judicial office as opposed to legislative and executive offices] is fundamental and profound. For while officeholders in all three branches serve their constituents as voters, judges serve constituents in another, equally important way: as litigants and potential litigations . . . . As litigants and potential litigants, a judge's constituents are entitled to due process of law before they may be deprived of life, liberty or property.
>
> We firmly believe that the ability of judges to provide litigants due process and due course of law is directly and unavoidably affected by the way in which candidates campaign for judicial office . . . . [A] candidate . . . who makes certain promises in a campaign may feel an obligation to fulfill those promises . . . [A] candidate . . . attacked in an election may feel pressure to vindicate

> those attacks once elected . . . . [A]n incumbent judge . . . may feel pressure to make decisions that will make good or pre-empt bad campaign copy . . . . [and] the litigants who come before them may well believe that the judges will act in a way consistent with their campaign behavior rather than consistent with due process and due course of law.

Bybee, 716 N.E. 2d at 959-60.

Cases such as *American Civil Liberties Union of Florida, Inc., et al. v. The Florida Bar*, et al., 744 F. Supp. 1094 (N.D. Fla. 1990) and *American Civil Liberties Union, et al. v. The Florida Bar, et al.,* 999 F.2d 1486 (11th Cir. 1993) are not to the contrary. In the first case, the court was concerned with the "announce" clause of the former canons and held that the language of those canons which proscribed announcements on disputed illegal and political issues was too vague to be enforceable. That is not this case. The canon in question has since been amended to narrow its application to issues "likely" to come before the court. In the second case, the attack was on restrictions on truthful comments upon an incumbent's record. Again, that is not this case. The JQC has never attacked Judge Kinsey's right to truthfully comment.

Judge Kinsey contends she had an unbridled right to inform the electorate how she would rule in certain types of cases and certain matters. She asks that this Court "provide future candidates easily understood guidelines that will permit them to fully discuss issues relevant to the office they seek without fear of violating the Canons." *See* Kinsey Response at 19. She contends that in her campaign, she was

only committing with regard to her “use of judicial discretion,” which is allegedly constitutionally protected speech. *Id*. at 12. Because she and Judge Green had different philosophies on how to exercise discretion, she felt voters should be aware of the distinct differences between them. *Id*. at 4

A major theme of Judge Kinsey’s Response is that all of her statements are permissible since they were simply an effort to advise the public of the incumbent’s shortcomings. She refuses to acknowledge that by attacking specific rulings (*e.g.* the incumbent’s alleged failure to take law enforcement officers’ testimony seriously and hold criminals accountable by incarcerating them), she was implicitly promising to do the opposite, thereby committing to exercise her discretion in a pre-determined manner when those cases came before her. She further contends that the Hearing Panel wrongfully concluded that “voters will base their decision entirely on one possible interpretation of a single word in a headline and either can’t be relied on to read the entire brochure or don’t have sufficient intelligence to read the brochure in context.” *Id*. at 14. Several years ago, the United States Court of Appeals for the Sixth Circuit rejected a similar argument, reasoning:

> We have sufficiently reviewed the circular . . . . The argument that it is not libelous or is not untruthful depends upon the mistaken view that it cannot be condemned if skilled dialectitians can point out how each sentence or half sentence, standing alone, is not necessarily inconsistent with the facts. It is impossible to consider such a publication from that standpoint. It was drafted by Mr. Thatcher and his associates, skilled in the nice use of language and in the leaving of pegs whereon they might

> hang technical justifications; *it was prepared and published to be read by and to influence a class of the community not skilled in those things, and which would take it to mean what it seemed to mean; and it must be read against its composers with the same meaning which they intended its readers should draw.*

Thatcher v. United States, 212 F. 801, 810 (6th Cir. 1914) (emphasis added).

This Court's decision in *In re Code of Judicial Conduct* (Canons 1, 2 and 7(A)(1)(b), *supra*, identified as a compelling governmental interest the maintenance of the public image of the judiciary as "impartial and independent." That case and the decisions of other courts cited above demonstrate that the material provisions of the *Code of Judicial Conduct*, (as revised in 1990 by the American Bar Association and adopted by this court in 1994) are not overbroad. They balance judicial candidates' interest in free speech against a litigant's interest in due process. Such restrictions as applied here to Judge Kinsey are fully justified and constitutional.

VI. THE RECOMMENDED DISCIPLINE IS APPROPRIATE

Judge Kinsey contests the Hearing Panel's recommended discipline of a $50,000 fine in addition to a public reprimand. She contends (as did a dissenting member of the Hearing Panel) that the amount of the fine is excessive.[17] Apparently

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[17] In contrast, another member of the Hearing Panel is of the opinion that the recommended discipline of a $50,000 fine and public reprimand are insufficient and that the Panel should have recommended removal because of the inappropriateness of "allow[ing] one guilty of such egregious conduct to retain the benefits of those violations and remain in office." *See In re Alley,* 699 So. 2d 1369, 1370 (Fla. 1997).

assuming the propriety of her conduct that the Hearing Panel has disapproved, Judge Kinsey contends that the amount of the recommended penalty would have a "chilling effect" on candidates.

The recommended discipline should be measured against the Hearing Panel's finding that Judge Kinsey engaged in a calculated effort to inundate voters with inappropriate and misleading campaign materials, designed to build to a climax on the day prior to the election when the incumbent would have little or no chance of making an effective response. *See* Findings at 16-17. The Panel also concluded that Judge Kinsey was aware of the restrictions placed on candidates by the Code of Judicial Conduct, *id*. at 17, and that her campaign materials committed to a pro-law enforcement position on matters she knew were likely to come before the court. *Id*. at 20-22. Finally, the Panel determined that Judge Kinsey made several significant knowing misrepresentations relating to the incumbent and that she deliberately conveyed a false and misleading impression of the judiciary's role with respect to its independence and impartiality in handling criminal cases. *Id.* at 9 and 29.

Against the background of these findings, the Hearing Panel's recommendation of a significant monetary penalty is wholly appropriate. Article V, Section 12(a)(1), of the Florida Constitution, authorizes the JQC to recommend appropriate discipline to this Court, including a reprimand, fine, suspension with or without pay, and lawyer discipline. There is no evidence in this record that this fine

is penal in the sense that Judge Kinsey is unable to pay it or that payment would place her in the position of being forced off the bench. To the contrary, under the Hearing Panel's recommendation, Judge Kinsey is permitted to remain on the bench and earn the amount of the fine. The monetary impact of the fine is no greater than a suspension without pay, which would have been an equally appropriate disciplinary recommendation.

The argument that the penalty is disproportionate because of the lack of precedent for its size in Florida or foreign case law likewise misses the mark. Every disciplinary recommendation turns on its own facts as well as on the effect that the proposed sanction has on other matters, to the extent that it sets a standard. Clearly, a sanction here which made inappropriate judicial campaign conduct a mere cost of obtaining the office, similar to a filing fee, would be insufficient.

It is the firm belief of the Hearing Panel that leaving Judge Kinsey in office with no substantial penalty beyond a reprimand is entirely inappropriate inasmuch as "the penalty imposed here must be sufficient to strongly discourage others from violating the canons governing contested elections." *See* Findings at 33. The Hearing Panel believed that conduct such as that displayed by Judge Kinsey "simply cannot be tolerated in future elections." *Id*. at 34.

Finally, the Hearing Panel's objective of deterring similar improper conduct in future judicial elections is entirely appropriate. That objective finds support in the decisions of this Court in the analogous area of lawyer discipline. *See, e.g.*, *The*

Florida Bar v. Gersten, 707 So. 2d 711, 713 (Fla. 1998); *The Florida Bar v. Porter*, 684 So. 2d 810, 813 (Fla.1996); *The Florida Bar v. Charnock*, 661 So. 2d 1207, 1210 (Fla. 1995); and *The Florida Bar v. Lawless*, 640 So. 2d 1098, 1101 (Fla. 1994). In those cases, this Court has stated that disciplinary action "must be severe enough to deter other attorneys from similar misconduct." *Id.* No less is required where judicial discipline is at issue. The recommended discipline of a $50,000 fine, plus a public reprimand, is well within the authority delegated by the Constitution to the Hearing Panel of the JQC; is not clearly "off the mark;" and is reasonably supported by this Court's prior decisions in bar disciplinary matters as well as by the factual record in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Findings, Conclusions and Recommendations of the Hearing Panel of the Judicial Qualifications Commission should be approved.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF** has been furnished by U.S. Mail to **BROOKE S. KENNERLY,** Executive Director, Judicial Qualifications Commission, The Historic Capitol, Room 102, Tallahassee, FL 32399-6000; **THOMAS C. MacDONALD, JR., ESQ.**, General Counsel, 100 N. Tampa Street, Suite 2100, Tampa, FL 33602; **JOHN R. BERANEK, ESQ.,** Counsel, Hearing Panel, Ausley & McMullen, 227 South Calhoun St., P.O. Box 391, Tallahassee, FL 32301; **THE HONORABLE JAMES R. JORGENSON,** Chair, Hearing Panel, Third District Court of Appeal, 2001 SW 117th Avenue, Miami, FL 33175; and **ROY M. KINSEY, JR.**, Kinsey, Troxel, Johnson & Walborsky, P.A., 438 E. Government St., Pensacola, FL 32501, this _____ day of January, 2001.

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Attorney