STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

MARK J. GRISANTI,

a Judge of the Court of Claims and an
Acting Justice of the Supreme Court,
Erie County.

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REPLY MEMORANDUM

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Preliminary Statement

As he has done throughout this matter, Judge Grisanti accepts responsibility for his inappropriate conduct and language on June 22, 2020. Similarly, he accepts the findings of Referee William Easton ("Referee") and his Report, including the findings of judicial misconduct for Charges II and III. Judge Grisanti acknowledges the substantial deference afforded to the Referee and does not seek to disturb any of his factual or credibility findings. Instead, Judge Grisanti simply disagrees with two of the Referee's conclusions of law, which were not supported by legal precedent and are not entitled to deference.

In stark contrast, Commission Counsel asks the Commission to reject the Referee's credibility findings, invites the Commission to adopt facts not established during the hearing nor found by the Referee, ignores Commission and Court of Appeals precedent both as to sanction and mitigation, and resorts to hyperbole to embellish Judge Grisanti's culpability.

Respectfully, Commission Counsel's position regarding the Referee's Report is unjustified, and its removal recommendation is unsupported by facts or precedent.

I. COMMISSION COUNSEL ASKS THIS COMMISSION TO REJECT, ALTER, OR IGNORE SEVERAL OF THE REFEREE'S FINDINGS WITHOUT JUSTIFICATION.

A. The Referee's Factual and Credibility Determinations are Entitled to Substantial Deference.

It is well settled that a referee's findings "may rest on credibility determinations" and are entitled to due deference. *See In re Going*, 97 N.Y.2d 121, 124 (2001); *see also Matter of Mogil*, 88 N.Y.2d 749, 753 (1993); *Matter of Assini*, 94 N.Y.2d 26, 29 (1999). As trier of fact, the Referee is best positioned to "hear[] the witness, observe[] their demeanor on the stand and weigh[] their explanations." *Matter of Menard*, 1996 NYSCJC Annual Report 93, 96 (1995) (Mr. Berger, dissenting). "Except in unusual circumstances, the Commission should not overturn credibility findings of the referee based on its reading of the cold record out of context." *Id.* Indeed, a referee's factual and credibility findings are entitled to great weight and deference as they are "largely unreviewable by the courts, who are disadvantaged in such matter because their review is confined to a lifeless record." *See, e.g., Berenhaus v. Ward*, 70 N.Y.2d 436, 443 (1987).

Commission Counsel ignores these bedrock principles by imploring this Commission to overturn, alter, or ignore the Referee's

factual findings, made after a nine-day hearing. For the reasons set forth herein, the Referee's factual and credibility findings should be upheld in their entirety.

B. The Credibility Finding That Respondent Did Not "Lie" During the Incident Should Not Be Overturned.

Central to Commission Counsel's narrative regarding Judge Grisanti's culpability on June 22, 2020, is the unfounded assertion that he intentionally "lied" during the incident on June 22, 2020. Comm. Br. 1; 7; 15; 18; 19; 24; 25; 43; 44; 46; 47; 49; 53; 57; 68; 69. Commission Counsel even goes so far as to say that Judge Grisanti aggravated his misconduct when he "invent[ed] a bogus parking dispute where none existed," "refused to concede" that his driveway was not blocked, "invented a fictitious familial relationship," and attempted to "lie his way out of trouble." Comm. Br. 44; 46; 49; 53; 56; 57; 68; 69. However, these facts were not found by the Referee nor established at the hearing.

Indeed, Commission Counsel's narrative was categorically rejected by the Referee. Specifically, the Referee determined that:

> The expansion of the charges alleged in the complaint to include "lying" to the 911 operator and to police officers at the scene on June 22,

> 2020 is unwarranted and violates Respondent's right to notice. Thus, I do not consider these acts as an independent basis for finding a violation. Moreover, I do not find that the Commission established that these accounts, even if inaccurate, were deliberately false and not merely indicative of Respondent's perception of the event.

R. 9 (emphasis added).

The unrebutted facts developed at the hearing demonstrated that when Judge Grisanti and his wife returned home after going out for dinner and running errands, they found a large, four-door truck parked some feet away from the curb directly in front of their house and at the edge of their driveway, thereby obstructing their ability to turn into their driveway from that direction. Tr. 1163. This followed a familiar pattern on the street whereby the Meles, for years, intentionally blocked or crowded the driveways of the Grisantis and multiple other neighbors. Tr. 430-31; 497-99; 502; 969-71; 973; 1164-65. The Meles had ignored prior requests not to block or crowd the other driveways on the street, and often responded with profanity or threats. Tr. 1166.

Judge Grisanti and his wife both testified that it was difficult for Judge Grisanti to pull his car in the driveway that night, and he had to take a wider turn to avoid one of the two Mele trucks (the one belonging

to Theresa Dantonio). Tr. 994; 1163. The truck was not only crowding the Grisanti's driveway apron (with ample room to pull forward), but it was also parked two or three feet away from the curb, thus providing even more obstruction for the Grisantis as they turned into their driveway. *See* Exhibit LLL (Mele truck with Respondent's driveway pictured bottom-left).

On the night in question, Judge Grisanti decided not to confront the Meles, but to ignore them. Tr. 1223; Exhibits 11, 11-A, 22. Instead, Judge Grisanti called his local police precinct. Tr. 1180. He was advised that he needed to call 9-1-1. Tr. 1180. He did so and explained the situation to the 9-1-1 operator. Tr. 1181-82; Exhibits 1 and 1-A. He

asked the 9-1-1 operator to send a police car to inspect the vehicle and requested that they be ticketed. Exhibits 1, 1-A, 1-2.

Officer Gehr testified that the truck's placement "block[ed] the entrance of the [Grisanti's] driveway" from the direction that the Grisantis were traveling. Tr. 199. Lt. Muhammad testified that he and Officer Richard Hy agreed that it appeared to him that the Meles parked the truck that way to annoy and "fuck with the Grisantis." Tr. 198-99; 274; Exhibit 12 at 20:44.

Based upon the testimony and exhibits, it is reasonable to conclude that the Grisanti driveway was blocked, or, at least, that it was Judge Grisanti's perception that it was blocked. Thus, there is substantial support for the Referee's credibility determination that Judge Grisanti's account of events to the 9-1-1- operator and to the officers at the scene was not "deliberately false" but was "merely indicative of [his] perception of the event. R. 9.

Simply put, Commission Counsel offers no argument so compelling as to overcome the deference afforded to the Referee's credibility findings in this regard. *See Collins*, 38 N.Y.2d at 270.

C. The Credibility Finding That Respondent Did Not "Threaten" Police Officers Should Not Be Overturned.

The Referee determined that Judge Grisanti did not threaten, nor intend to threaten, Buffalo Police Department ("BPD") officers on June 22, 2020. R. 9-10. Commission Counsel asks this Commission to reject this finding but fails to address, much less overcome, the weight and deference that should be afforded to a referee's credibility finding. *See Collins v. Codd*, 38 N.Y.2d 269, 270 (1976) ("The testimony posed a clear-cut issue as to the veracity of the witnesses; and where substantial evidence exists, as it clearly does here . . . that determination must be sustained, irrespective of whether a similar quantum of evidence is available to support other varying conclusions.").

At the hearing, Judge Grisanti testified that in the heat of emotion, he was trying to express to Officer Gehr that there was no justification to handcuff Maria, his wife, or charge her with any crime. Tr. 1217-19. Officer Gehr, who had arrived at the scene mere minutes before, had spoken only to the Meles. Tr. 208. He had heard nothing from the Grisantis nor the independent witnesses who would have advised that the Meles were the instigators, and that Maria had been

violently assaulted and choked around the neck to the point of nearly passing out. Tr. 89; 363-64; 366; 418; 462; 999; 1198. Officer Gehr also had not heard that Maria and Judge Grisanti had retreated to their property, and it was the Meles who came onto the Grisantis property multiple times, despite direction to leave their property. Tr. 420-22; 463; 1203; 1206; Exhibit 2.

Knowing none of this information, Officer Gehr decided to abruptly stop his interview of the Meles, run across the street shouting profanities and confront, tackle, and handcuff a 5-foot 1 inch, 110 lb. woman standing on her own property. Ex. 2. He did this despite hearing his partner, Lt. Muhammad, say repeatedly "[s]he's good" to indicate that he had her under control. Tr. 209-210, 262-64. Officer Gehr admitted at the hearing that he did not employ any of the de-escalation techniques required by the Buffalo Police Department policy manual. Tr. 210-14. Under these circumstances, the Referee made the credibility determination that Judge Grisanti had an "ardent belief that his wife was improperly detained and further detention would lead to controversy." R. 10. Therefore, the Referee determined that Judge

Grisanti's comments were not intended to threaten the BPD officers. *Id.*

Commission Counsel disregards these unrebutted facts and argues that Judge Grisanti's "motivation does not categorically make the words unthreatening[,]" but "[t]he issue is . . . whether Respondent intended to influence the officers' conduct." Comm. Br. 52. Of course, as the hearing evidence demonstrated: (1) Judge Grisanti did not intend his remarks to be threats; and (2) his remarks did not have a threatening effect. R. 10. Indeed, the Referee found that "neither recipient of these remarks testified that he was intimidated or threatened by these comments." *Id.* The Referee made these credibility findings after hearing the witnesses, observing their demeanor, and weighing their explanations.

Where substantial evidence exists to support a referee's credibility determination, as it clearly does here, this Commission should not overturn that credibility finding. *See Berenhaus*, 70 N.Y.2d at 443; *c.f., Matter of Marshall*, 2008 NYSCJC Annual Report 161 (2007) (referee's findings were "unclear" and inconsistent on their face).

D. Commission Counsel Asks This Commission to Adopt Additional Facts Not Found by the Referee nor Established During the Hearing with Respect to Respondent's Role in the Physical Confrontation with the Meles.

The facts established at the hearing and found by the Referee regarding Judge Grisanti's role in the physical confrontation bear no resemblance to the oftentimes cartoonish portrait of Judge Grisanti painted by Commission Counsel in its Opening Brief. *See* Comm. Br. 69 ("deranged"); Comm. Br. 2 ("half-naked"); Comm. Br. 56 ("parading shirtless"); Comm. Br. 67 ("disgraceful").

Counter to Commission Counsel's attempts to characterize Judge Grisanti as "deranged," the Referee declined to find that Judge Grisanti "initiated" or "repeatedly escalated" the physical altercation with the Meles, or that Judge Grisanti "knocked" down or "wrestled" Joseph Mele to the ground.[1]

The hearing evidence, including video and audio recordings as well as the live testimony, demonstrated that Gina Mele initiated the

[1] During the hearing, Commission Counsel chose not to call Joseph Mele as a witness, even though he was on Commission Counsel's witness list and "central to the narrative of the nature of the altercation." R. 8-9. The Referee acknowledged this omission by invoking the adverse inference doctrine as applied to him (and as to Theresa Dantonio, the other participant in the physical confrontation). R. 8-9. Commission Counsel presumably concedes that the adverse inference doctrine was correctly applied as it did not address the issue in its Opening Brief.

verbal confrontation, and Joseph Mele initiated the physical confrontation. Exhibits 2 and 2-A. Judge Grisanti, who believed that one of the Mele vehicles was again obstructing his access to his driveway, had called the police rather than confront or engage with the Meles. Tr. 994. After the call, the Grisantis were standing on their own property, looking at the Mele truck and waiting for the police, when the Meles began yelling at them from across the street. Tr. 995-97. It is clear from the audio and the transcript (Exhibits 2 and 2-A) Judge Grisanti responded to the Meles by attempting to explain his issue with the location of the truck. He used no profanity, issued no challenges, and did not invite any physical confrontation. *Id.* In response, Gina Mele began profanely insulting Maria Grisanti. Exhibit 2-A, 1. Specifically, Gina Mele testified that – within the first minutes of the incident – she said, "fuck you" several times to Maria Grisanti, called her a "motherfucker," a "fucking cunt," and a "bitch," and instructed her sister, Theresa Dantonio, to "fucking choke" Maria Grisanti. Tr. 96-97.

As Judge Grisanti continued to try to explain the parking problem, Joseph Mele told him to "shut up" and called him an "asshole." Exhibit 2-A, 1-3. Joseph Mele then began provoking Judge Grisanti,

repeatedly saying in an aggressive tone, "Come on Mark!" and calling Judge Grisanti a "cocksucker" (Tr. at 96), followed by Gina Mele joining in and calling Judge Grisanti "chicken shit." *Id.* at 3. Other neighbors who witnessed the events testified that the Meles were the instigators. Tr. 363-65; 421-22; 462-63; 467-68.

Commission Counsel incorrectly asserts that Judge Grisanti "repeatedly escalated" the physical confrontation and "knocked" Joseph Mele to the ground. Comm. Br. 1; 48; 50; 57; 68. Neither the video nor any witness support either assertion. Tr. 998-1000; 1194; Exhibit 2 at 2:10; 2:33). After Maria Grisanti – who was rendered almost unconscious as a result of being choked – broke free, the Grisantis retreated to their own driveway. Tr. 420-22; 463; 1203; 1206; Exhibit 2. As demonstrated in the video, the Meles and Dantonio pursued them to the Grisanti property to continue the confrontation, despite Judge Grisanti's demands that they leave his property. Ex. 2 at 5:45; 6:49; 7:05; Tr. 420-22. The unrebutted testimony from Judge Grisanti, Gina Mele, and the neighbors who witnessed the confrontation also contradicts the notion that Judge Grisanti "knocked" or "wrestled" Joseph Mele to the ground. Tr. 128; 366; 464; 1202. Rather, Joseph

Mele tripped and fell to the ground when attempting to grab Judge Grisanti. Tr. 128; 366; 464; 1202. Judge Grisanti simply backed away and did not re-engage with the prone Joseph Mele. Tr. 466; 1202. Moreover, during the confrontation, Judge Grisanti did not strike or attempt to strike Joseph Mele. Tr. 364; 468; 1002; 1021; 1201.

Based upon a preponderance of the evidence, the Referee declined to find that Judge Grisanti "initiated" and "repeatedly" escalated the physical confrontation with the Meles or that Judge Grisanti "knocked" down or "wrestled" Joseph Mele to the ground. Because Commission Counsel failed to meet its burden, this Commission should not alter the findings of the Referee. *See In re Going*, 97 N.Y.2d at 124.

II. COMMISSION COUNSEL URGES THE ADOPTION OF TWO CONCLUSIONS OF LAW UNSUPPORTED BY FACTUAL OR LEGAL AUTHORITY.

Commission Counsel asks the Commission to adopt the Referee's conclusion of law that Judge Grisanti committed judicial misconduct by an "attempt to obtain preferential treatment" (R. 10) that unquestionably had no relation to his judicial status. In addition, Commission Counsel urges the Commission to hold that the Mele's "extreme provocation" of Judge Grisanti is an aggravating, rather than

mitigating, factor. Because both of these conclusions of law are unsupported factually and legally, Respondent asks the Commission to reject them.

A. Neither Commission Counsel nor the Referee Provide Any Legal Authority to Support the Conclusion That It Was Judicial Misconduct for Respondent to Mention the Names of His Daughter, Son-in-Law, or Mayor Byron Brown Without Invoking His Judicial Position.

As detailed in Judge Grisanti's Opening Brief (Resp. Br. 6-11), there is no legal precedent to support the Referee's conclusion of law that Judge Grisanti violated the Rules Governing Judicial Conduct by mentioning the names of his daughter, son-in-law, or Buffalo Mayor Byron Brown without invoking his judicial position. The Referee did not explain how the Rules were violated, which Rule was violated, nor provide any authority to support his conclusion. R. 10. Commission Counsel's argument is likewise devoid of legal authority or analysis. Comm. Br. 54-55. The position of Commission Counsel and the Referee improperly conflate "unseemly" conduct with judicial misconduct. Obviously, only the latter is relevant in this judicial disciplinary setting.

It is not judicial misconduct *per se* for a person who happens to hold judicial office to seek preferential treatment. The appearance of

impropriety created by a judge's request for preferential treatment is inextricably tethered to the person's judicial position. *See Matter of Lonschein*, 50 N.Y.2d 569, 571-72 (1980) (judicial misconduct may be found when a request for preferential treatment is "backed by the power and prestige of judicial office"); *Matter of Werner*, 2003 NYSCJC Annual Report 198, 199 (2002) ("Judges must be particularly careful to avoid any conduct that may create an appearance of seeking special consideration simply because of their judicial status."); *Matter of Landicino*, 2015 NYSCJC Annual Report 129, 140 (judicial misconduct found where judge made a "specific request for special treatment based on his judicial status"); *Matter of Pennington*, 2004 NYSCJC Annual Report 139, 141 (2003) (judicial misconduct found, absent request for "special treatment," based on the "mere fact of [the judge's] judicial status"); *Matter of Maney*, 2011 NYSCJC Annual Report 106, 113 (2010) (judicial misconduct found where "judge repeatedly asked for special consideration and courtesy and referred to his judicial office").

A judge is free to seek favorable treatment based on factors unrelated to their judicial office. For example, it would not be judicial misconduct for a person holding judicial office to request admittance

into a sold-out concert because her sister is the drummer in the band. But it would be judicial misconduct for that same person to demand admittance into the sold-out concert solely based on her status as a sitting judge. Similarly, a judge could seek immediate seating or a better table at a busy restaurant by offering a tip to the host, but could not do so by invoking their judicial status.

In arguing for a finding of misconduct based on Judge Grisanti's purported request for preferential treatment, Commission Counsel cites two cases, *Matter of Dixon*, 2007 NYSCJC Annual Report 100 (2006), and *Matter of Schilling*, 2013 NYSCJC Annual Report 286 (2012). But both of these cases involved requests for special treatment linked specifically to the judicial status of the respondents.

In *Matter of Dixon*, the respondent-judge was the plaintiff in a personal injury action. 2007 NYSCJC Annual Report at 102. The respondent-judge personally and professionally knew the judge who was assigned to her case. *Id.* at 103. The respondent-judge contacted the judge presiding over her personal injury case identifying herself as "Judge Dixon." *Id.* at 109. She attempted to discuss the case with the judge, and made requests regarding the handling of the case. *Id.* The

Commission determined that the respondent-judge committed judicial misconduct by "asserting judicial influence to advance private interests." *Id.* (emphasis added).

In *Matter of Schilling*, the respondent-judge learned that the spouse of a judge received a speeding ticket before the respondent-judge's co-justice. 2013 NYSCJC Annual Report at 295. The respondent-judge intervened in that matter and "engaged in a substantial effort to accord favoritism." *Id.* Based on the respondent-judge and co-justice's professional relationship, the respondent-judge implicitly asserted her judicial position. *Id.* The Commission rebuked the respondent-judge for her "scheme to circumvent the normal judicial process" and attempt to use her "judicial office to influence the disposition of traffic violations." *Id.* at 299, n. 3.

Here, it is uncontested that Judge Grisanti never mentioned his judicial role before or after speaking to the officers. Indeed, it is undisputed that the police officers did not learn that Judge Grisanti held judicial office until long after the incident concluded, when they learned from another source. Tr. 208; 270; R. 10.

Accordingly, this Commission should disaffirm the Referee's finding that it was judicial misconduct for Judge Grisanti to mention the names of his daughter, son-in-law, or Mayor Byron Brown, because those comments were not requests for special treatment "backed by the power and prestige of judicial office." *See Matter of Lonschein*, 50 N.Y.2d at 571-72.

B. Commission Counsel Does Not Provide Any Legal Authority to Support Its Assertion That the Mele's "Extreme Provocation" of Respondent Is an Aggravating Factor.

The Referee correctly determined that the "extreme provocation" Judge Grisanti faced on June 22, 2020, was a mitigating factor. R. 11. In its Opening Brief, Commission Counsel asserts that: "Given what he knew about the Meles, Respondent should have been especially mindful of his ethical obligations in the face of instigation, and the fact that he crossed the street to confront Joe Mele anyway aggravates rather than mitigates his misconduct." Comm. Br. 50 (emphasis added). Commission Counsel did not cite to any legal authority to support its contention that provocation is an aggravating factor. *See id.*

In fact, provocation has consistently been found to be a factor that mitigates, rather than aggravates, potential discipline. Indeed, the

absence of provocation of misconduct is commonly found to be an aggravating factor. *See, e.g., Matter of Mahon,* 1997 NYSCJC Annual Report 104 (1996) (judge's inappropriate verbal outburst was "[w]ithout provocation"); *Matter of Cerbone*, 1984 NYSCJC Annual Report 76 (1983) (noting that Judge's misconduct was not in the heat of passion or "in response to a personal attack"). Commission and Court of Appeals precedent confirms that the "extreme provocation" Judge Grisanti faced should apply only in mitigation, not aggravation.

III. REMOVAL IS NOT THE APPROPRIATE SANCTION.

In determining the appropriate sanction, the Commission traditionally considers whether the misconduct "has irreparably damaged [the judge's] effectiveness as a judge and whether the public interest is served by permitting [the judge] to remain on the bench[.] *See, e.g., Matter of Landicino*, 2016 NYSCJC Annual Report at 141. Indeed, as this Commission and the Court of Appeals have stated many times, the purpose of the sanction of removal is <u>not punishment, but protection</u>: Removal is warranted only to protect the public by taking <u>unfit</u> incumbents off the bench. *See generally Matter of Duckman*, 92 N.Y.2d 141, 152 (1998); *Matter of Esworthy*, 77 N.Y.2d 280, 283 (1991).

Removal has consistently been described as "an extreme sanction [that] should be imposed only in the event of truly egregious circumstances" and "should not be ordered for conduct that amounts simply to poor judgment, or even extremely poor judgment." *Matter of Cunningham*, 57 N.Y.2d 270, 275 (1982); *see also Matter of Kiley*, 74 N.Y.2d 364, 369-370 (1989) (characterizing removal as the "ultimate sanction" that should be imposed "only in the event of truly egregious circumstances"). Indeed, because of the final and permanent nature of the removal sanction, it has been called "judicial beheading." *Shilling v. State Comm'n on Judicial Conduct*, 51 N.Y.2d 397, 405 (1980) (Fuchsberg, J., dissenting).

"The actual levels of discipline to be imposed by the court for judicial misconduct are, in the end, institutional and collective judgment calls. They rest on our assessment of the individual facts of each case, as measured against the Code and Rules of Judicial Conduct and the prior precedents of this Court." *Matter of Duckman*, 92 N.Y.2d at 152, 677 N.Y.S.2d at 254 (citations omitted).

As explained here and in Judge Grisanti's Opening Brief, the individual facts of this case and prior precedents of this Commission

and the Court compel the conclusion that, despite Judge Grisanti's poor judgment, he is fit to remain on the bench and has not irreparably damaged his effectiveness as a judge.

A. Respondent Accepts Responsibility for Exercising Poor Judgment on June 22, 2020.

With respect to Charge I, the Referee determined that Judge Grisanti violated the Rules for three reasons: (1) his excessive use of profanity during his public interaction with the Meles and members of BPD; (2) his initiation of physical contact with a BPD officer; and (3) his invocation of familial connections with members of the BPD and Mayor Byron Brown. R. 8. Judge Grisanti concedes that he exercised poor judgment with respect to his inappropriate conduct and language on June 22, 2020. Judge Grisanti understands the principle that "[a] judge, although off the bench remain[s] cloaked figuratively with his black robe of office devolving upon him standards of conduct more stringent than those acceptable for others." *Matter of Abbott*, 1989 NYSCJC Annual Report 69, 71 (1988). With this understanding, Judge Grisanti vows that similar misconduct will not be repeated.

In its sanction recommendation, Commission Counsel inaccurately compares Judge Grisanti's physical contact with Officer Gehr to the actions of the judge in *Matter of Blackburne*.

In *Matter of Blackburne*, a detective went to the judge's courtroom to arrest a defendant who the detective believed committed a serious robbery and assault. 7 N.Y.3d 213, 216 (2006). The judge mistakenly believed that the detective merely wanted to question the defendant, rather than arrest him. *Id.* Upon speaking with the detective, the judge learned that the detective intended to arrest the defendant. *Id.* Acting out of hostility for what the judge perceived was deceptive conduct by the detective, the judge advised a courtroom police sergeant to take the defendant out through the back stairwell, a secured area used only by judges and court staff. *Id.* The police sergeant felt uneasy about the request, but he eventually acquiesced to the judge's orders. *Id.* at 216-17.

When the defendant's case was called, the judge, in open court, stated that she "resent[ed] the fact" that a detective entered her court under the "ruse of wanting to ask questions," when, in fact, he wanted to arrest the defendant. *Id.* at 217. The Court of Appeals admonished

the judge for "act[ing] out of anger and pique[,]" failing to reconsider her position despite "at least two chances[,]" and "refusing to take seriously [the police sergeant's] concern that he would be committing an obstruction of justice if he followed her directive." *Id.* at 220. The Court of Appeals explained that, "by helping a wanted robbery suspect to avoid arrest[,]" the judge violated the Rules. *Id.* 221.

Although Judge Grisanti's physical contact with Officer Gehr was admittedly inappropriate, it is far less severe than the judge's misconduct in *Blackburne* for several reasons. First, unlike the judge in *Blackburne,* Judge Grisanti's conduct was entirely unrelated to his judicial role. Judge Blackburne abused her judicial authority by directing a law enforcement officer to obstruct justice in her courtroom. Judge Grisanti, on the other hand, was involved in a neighborhood dispute off the bench. Second, the Commission determined that Judge Blackburne acted out of pique and ignored multiple opportunities to reconsider her position and avoid misconduct. Judge Grisanti, on the other hand, acted reflexively and emotionally while watching his wife get taken to the ground aggressively under what he believed were unjustified circumstances. Tr. 1216. Indeed, even Officer Gehr

admitted to violating Buffalo Police policy and procedure. Tr. 212-14. Third, Judge Grisanti did not "thwart" the detention of his wife. In fact, Officer Gehr testified that he "did not initially notice Judge Grisanti making physical contact" with him, and he was able to detain and handcuff Maria Grisanti. Tr. 206. Simply put, Commission Counsel's comparison to *Blackburne* is misplaced.

The Referee determined that Judge Grisanti committed judicial misconduct for the three reasons outlined above, but Commission Counsel bases its sanction recommendation, in part, on the unfounded allegations of "lying," "entering the Meles property," "threatening" police officers, and his "deranged display of violence and aggression."[2] Comm Br. 69. This account of events inaccurately represents the Referee's findings and the evidence established at the hearing and should not be considered in this Commission's sanction calculus.

[2] Commission Counsel also purports to identify the media coverage of this matter as an aggravating factor. However, there is no Commission or Court precedent to support the legal conclusion that the amount of media publicity a matter receives is considered an aggravating factor. Establishing such a precedent would be fundamentally unfair to judges because the amount of media attention is independent of their misconduct. And, importantly, the media publicity this matter received was largely driven by Gina Mele's attempts to contact news outlets to relay her fictional account of events. In fact, Gina Mele testified that the District Attorney of Erie County, the Hon. John Flynn, said that she could have been prosecuted for a false statement for claiming that Mark Grisanti said he was a judge at any point during the incident. Tr. 102, 111.

Commission Counsel further contends that Judge Grisanti aggravated his misconduct by "refusing to concede facts clearly established in the video," "refusing to acknowledge he was wrong and accepting responsibility," and refusing "to accept full responsibility" for his actions. Comm Br. 56-57; 71.

However, long before this Commission's investigation commenced, Judge Grisanti apologized, expressed sincere remorse, and sought extensive voluntary counseling to understand the role he played in his conduct. Even on the very day of the incident, he recognized his wrongdoing and apologized to several law enforcement members for his actions. Tr. 217-18; 223; 254-56; 261; 275-76; 1228; 1449. During the hearing, Judge Grisanti repeatedly acknowledged and accepted that he committed judicial misconduct, describing the events of June 22, 2020, as the "worst mistake of his life." Tr. 1107; Tr. 1360; Tr. 1437; *see Matter of LaCava,* 1999 NYSCJC Annual Report 123, 124 (1998) ("In mitigation, respondent has acknowledged his wrongdoing and has been cooperative and contrite in this proceeding."); *c.f., Matter of Ayres,* 30 N.Y.3d 59, 66 (2017) (judge failed to appreciate his ethical breaches by continuing his assertion during the hearing that he acted lawfully,

claiming that judges should be allowed to "express their own individuality" to justify *ex parte* communications where he disparaged counsel, and "exhibited no insight into the impropriety of his conduct"); *Matter of Astacio*, 32 N.Y.3d 131, 135, 136-37 (2018) (judge failed to accept responsibility for her actions when she accused the Chair of the Commission of bias which she contended "tainted the Commission's decision to remove her," and ignored "multiple warnings about the consequences of her continued drinking and fail[ed] to comply with her conditional discharge").

Judge Grisanti accepts responsibility for his poor judgment on June 22, 2020, and understands that he must be disciplined by this Commission. But, based on the facts developed at the hearing and Commission and Court precedent, this Commission should determine that his conduct was not "truly egregious," and that this single incident has not irreparably damaged his effectiveness as a judge. *See Matter of Landicino*, 2016 NYSCJC Annual Report at 141.

B. Respondent Accepts Responsibility for His Misconduct with Respect to Charge II.

The Referee determined that Judge Grisanti violated the Rules by failing to "provide the litigants and attorneys notice of his continuing receipt of payments from [Matthew] Lazroe." R. 18. Judge Grisanti accepts this finding.

In support of its sanction recommendation, Commission Counsel cites to three matters involving significantly more severe misconduct than the instant case. *See Matter of LaBombard*, 11 N.Y.3d 294 (2008); *Matter of George*, 22 N.Y.3d 323 (2013); *Matter of Doyle*, 993 N.Y.S.2d 531 (2014). These cases are inapplicable here.

Matter of LaBombard

In *Matter of LaBombard*, the judge: (1) presided over a criminal case involving a member of his immediate family without disclosing the relationship to the prosecutor, and did not enforce his family member's community service requirement; (2) invoked his judicial position and intervened in a separate criminal proceeding involving the same member of his immediate family in an effort to reduce the criminal charges; (3) presided at the arraignment and bail proceeding of a former coworker's son, for which he should have recused himself; and (4)

invoked his judicial status in an effort to receive favorable treatment in the wake of a motor vehicle accident that he was involved in. 11 N.Y.3d at 296.

The Court explained that "[f]ew principles are more fundamental to the integrity, fair-mindedness and impartiality of the judiciary than the requirement that judges do not preside over or otherwise intervene in judicial matters involving relatives." *Id.* at 297. The judge compounded his misconduct by not imposing the community service requirement that was agreed to as part of his relative's adjournment in contemplation of dismissal. *Id.* With respect to the second charge, the Court further explained that the "same is true of intervention of a judge in proceedings involving family members pending in another court, particularly when that intervention takes the form of *ex parte* contact with the judge presiding over the relative's case." *Id.*

With respect to the third charge, by presiding over the arraignment and bail proceeding of a former coworker's son, the judge should have either disqualified himself or provided notice to all interested parties. *Id.* at 298. His misconduct was "compounded by his participation in *ex parte* communications with . . . his former

coworker[.]" *Id.* The Court also found misconduct for the judge's "repeated invocation of his judicial status after the motor vehicle accident . . . as it appears to have been an attempt to use the prestige associated with judicial office to intimidate the other motorist." *Id.*

Matter of George

In *Matter of George*, the judge presided over a traffic infraction case involving a close personal friend, who was also his former employer – a "relationship that spanned several decades." 22 N.Y.3d at 325. During the proceeding, the judge cited a purported defect in the vehicle information listed on the traffic ticket. *Id.* at 326. The judge dismissed the ticket *sua sponte*, without notifying the prosecutor or State Trooper. *Id.* The State Trooper who issued the ticket and the prosecutor assigned to that court were not present that day. *Id.* As a result, the District Attorney's office was not represented. *Id.*

In determining sanction, the Court noted the "significant aggravating factor" of the judge receiving a prior Letter of Caution with respect to his decision to preside over four cases involving the daughter-in-law of the same close personal friend involved in the instant proceeding. *Id.* at 329. The Court explained that "[d]espite the Letter

of Caution" regarding his friend's daughter-in-law, the judge did not even consider recusing himself with respect to his friend. *Id.* at 330.

The judge also admitted to having *ex parte* conversations with a prospective litigant in an unrelated matter in which the judge discussed the merits of the case in a manner that discouraged the litigant from commencing a small claims action in his court. *Id.* at 326-27. The Court explained that "[s]uch conduct is antithetical to the role of a judge" and such conduct compounded the concerns of his "ability or willingness to conform his behavior to the requirements of the Rules Governing Judicial Conduct." *Id.* 330. In determining sanction, the Court again noted the judge's "failure to heed a prior warning from the Commission" "significantly aggravated" his misconduct. *Id.* at 331.

Here, Judge Grisanti's conduct more closely resembles the judge's prior misconduct, where he presided over four cases involving the daughter-in-law of his close personal friend, and for which the judge received a Confidential Letter of Dismissal and Caution.

Matter of Doyle

In *Matter of Doyle*, the judge failed to disqualify herself from matters involving three people that she had close personal relationships with: (1) Mr. Spargo, her close friend and personal attorney; (2) Mr. Kelly, her former campaign manager; and (3) Mr. Cade, a second personal attorney. 993 N.Y.S.2d at 532. The Court determined that the judge was required to recuse herself with respect to all three parties. *Id.* at 535. Critically, the judge was censured for related misconduct less than a year prior. *Id.* at 536.

In determining sanction, the Court explained that the judge "discount[ed] the significance of her prior censure." *Id.* at 535. The Court admonished the judge for failing to have a "heightened awareness of and sensitivity to any and all ethical obligations" after receiving a public censure "a short time before the events under consideration." *Id.* at 535-36. The prior censure was determined to be a "significant aggravating factor" in support of the level of sanction. *Id.* at 536.

Unlike the judges in the previous cases, where the judges all failed to recuse themselves with respect to family members or multiple close personal friends, Judge Grisanti was not personal friends with Mr.

Lazroe. Tr. 306; 1241. Moreover, unlike the judges in *Doyle* and *George*, Judge Grisanti does not lack sensitivity to the special ethical obligations of judges. Indeed, he has not faced judicial discipline prior to the instant proceeding and has enjoyed an otherwise unblemished record in his 30-year career as a judge, attorney, and public servant. *C.f., Matter of Huttner*, 2006 NYSCJC Annual Report 193, 195 (2005) (judge's disciplinary history, including previous censure, demonstrated judge's lack of sensitivity to ethical obligations of judges and warranted the "severe sanction" of another public censure).

Based on the precedent of this Commission and the Court, if Charge II were standing alone, a Confidential Letter of Dismissal and Caution would be reasonable under the totality of the circumstances. Indeed, as the Referee found in mitigation: (1) Judge Grisanti's misconduct was not venal in nature; (2) the cash amounts received by Mr. Lazroe for the few assignments by Judge Grisanti's part were modest; (3) Mr. Lazroe was an experienced attorney who was qualified and eligible for the assignments; and (4) Judge Grisanti did not exert any favoritism towards Mr. Lazroe. R. 18.

C. Respondent Accepts Responsibility for His Misconduct with Respect to Charge III.

The Referee determined that Judge Grisanti violated the Rules for failing to report part of his income from the sale of his law practice on his 2016 Financial Disclosure Statement.[3] R. 22. In support of its sanction recommendation, Commission Counsel cites to *Matter of Miller*, which includes far more severe misconduct than established here.

In *Matter of Miller*, the following charges were sustained: (1) the judge engaged in a pattern of inappropriate behavior, including making sexualized comments, toward certain staff members; (2) the judge both lent the prestige of his judicial office to advance his private interests and failed to conduct his extra-judicial activities so as to minimize the risk of conflict with his judicial obligations when he had his court secretary perform services unrelated to her official duties; (3) the judge

[3] The Referee did not find that Judge Grisanti violated Rule 100.4(H)(2), which was recently rescinded by the Office of Court Administration. The payments in question were for the sale of Judge Grisanti's law practice pursuant to a contract entered into before he became a judge. Since Rule 100.4(H)(2) required disclosure of compensation for any "activity" by the judge during the year, this Rule was not applicable to the income related to the sale of Judge Grisanti's law practice. Moreover, the Advisory Committee determined that Rule 100.4(H)(2) did not apply to compensation received for legal services rendered prior to taking the bench.

failed to timely and accurately disclose income from his extra-judicial activities, as required, to the Internal Revenue Service, the New York State Department of Taxation and Finance, the Ethics Commission for the Unified Court System, and the Clerk of the Broome County Family Court. 35 N.Y.3d 484, 486-87 (2020). Significantly, the judge had also been previously censured for judicial misconduct. *Id.* at 486.

The Court strongly rebuked the judge for the inappropriate sexualized comments he made towards his staff, and for asserting the prestige of his judicial office to advance his private interests. *Id.* With respect to the financial disclosure charge, the Court determined that the judge's "conduct suggest[ed] deliberate deceptive conduct" regarding financial reporting to multiple agencies, including the state and federal government, as well as the Commission. *Id.* at 491 (emphasis added). In determining sanction, the Court noted that the judge's "inability to recognize the seriousness of his misconduct" and his prior censure for similar misconduct were "significant aggravating factors." *Id.* at 486.

As noted by the Court of Appeals: "Judges must complete their financial disclosure forms with diligence, making every effort to provide complete and accurate information." *Matter of Alessandro*, 13 N.Y.3d

238, 249 (2009). But in cases where the Commission seeks to discipline a judge for an issue relating to financial disclosure, the Court and the Commission have considered the circumstances surrounding the disclosure, including the judge's scienter. *Id.*

Here, the Referee made the credibility finding that Judge Grisanti's failure to accurately report the sale of his law practice in 2016 was inadvertent. R. 22 (emphasis added). The Referee also recognized that Judge Grisanti wrote a letter to the Executive Director of the New York State Ethics Commission acknowledging his incorrect financial disclosure reporting upon being made aware of the missing $15,000 entry. R. 22; 24. And, unlike the judge in *Miller*, Judge Grisanti has not been subject to judicial discipline prior to the instant proceeding.

This Commission indicated in its 2019 Annual Report that discipline is not imposed for failing to file Annual Statements when there is a "valid excuse," and that even in the absence of a persuasive excuse, first-time oversights promptly corrected may receive a Confidential Letter of Dismissal and Caution. *See* 2019 NYSCJC Annual Report at 22. Because the time period is a relevant

consideration, this Commission should note that the omission was only in one year's filing (2016), and it was corrected by Judge Grisanti promptly upon receiving notice. *C.f., Matter of Russell*, 2001 NYSCJC Annual Report 121 (2000) (judge failed to file disclosure forms for seven years, despite receiving multiple notices and warnings).

Under the totality of the circumstances, if Charge III were standing alone, a Confidential Letter of Dismissal and Caution would be reasonable, especially given the inadvertent nature of his violation and prompt correction upon receiving notice.

Conclusion

Long before the Commission investigation began, Judge Grisanti realized his conduct on June 22, 2020 was inappropriate. He expressed sincere remorse, and sought counseling and treatment to understand his actions, and ensure they would not recur. Judge Grisanti's record, before and after the events in question, is otherwise unblemished. He has a well-deserved reputation as an excellent judge with exceptional judicial temperament.

Judge Grisanti accepts the Referee's Report and his findings, and realizes he must face discipline for his misconduct. But he asks the Commission to reject the hyperbole of Commission Counsel and its overreaching suggestion of removal as unsupported legally or factually.

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