STATE OF MICHIGAN

BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

HON. TRACY E. GREEN
3rd Circuit Court
Detroit, Michigan

Docket No. 162260
Formal Complaint No. 103

THE JUDICIAL TENURE COMMISSION'S REPLY TO RESPONDENT'S PETITION FOR REVIEW

ORAL ARGUMENT REQUESTED

Pursuant to MCR 9.251(C), the Michigan Judicial Tenure Commission (the "Commission" or "JTC"), by Commission counsel, hereby replies to the Petition for Review (the "Petition," cited as "Pet") by respondent Hon. Tracy E. Green ("Respondent"). For the reasons stated below and in the accompanying brief, and as set forth more fully in the Commission's July 18, 2022 (filed July 29, 2022) Decision and Recommendation for Discipline (the "Decision"), the Commission asks this Court to: (1) deny Respondent's Petition; and (2) adopt the Commission's recommendation to remove Respondent from the office of judge of the 3rd Circuit Court.

The Amended Formal Complaint ("FC") charged Respondent with three counts of misconduct. Count I charged that Respondent, as an attorney, covered up evidence of child abuse committed by Respondent's son against Respondent's grandchildren. Count II charged that Respondent, as a judge, made false statements under oath at a juvenile court hearing while testifying as a witness on behalf of her son, and to the Commission in these proceedings in her responses to the Commission's requests for comment about

her knowledge of her son's child abuse against Respondent's grandchildren. Count III, as added by amendment to the FC, charged that Respondent made knowingly false statements to the Commission in her Answer.

The Commission unanimously accepted and adopted the master's findings of fact and conclusions of law that Respondent committed the misconduct alleged in Counts I and II of the FC and that disciplinary counsel did not satisfy its burden of proving the allegations of Count III of the FC by a preponderance of the evidence. The Commission reviewed the entire record, including the transcripts of the twelve public hearing days (collectively, the "Hearing"), the Hearing exhibits, the master's report (the "Master's Report"), disciplinary counsel's objections to the Master's Report, Respondent's objections to the Master's Report, Respondent's response to disciplinary counsel's objections to the Master's Report, and disciplinary counsel's response to Respondent's objections to the Master's Report, and considered the oral arguments of counsel.

The Commission unanimously accepted and adopted the Master's conclusions of law that Respondent's misconduct in Counts I and II violated MCR 9.104(1) and MRPC 8.4(c), by engaging in conduct prejudicial to the proper administration of justice; MCR 9.104(2), by engaging in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach; MCR 9.104(3), by engaging in conduct that is contrary to justice, ethics, honesty, or good morals; former MCR 9.202(B), which prohibited false or misleading statements to the Commission (*see also* MCR 9.202(B)(1)(f) ("failure to cooperate with a reasonable request made by the commission in its investigation of a respondent"); and MRPC 8.4(b), which prohibits a lawyer from

conduct involving dishonesty, deceit, or misrepresentation, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.

Additionally, the Commission, upon de novo review of the entire record, found additional facts of misconduct supported by the record that were not referenced in the Master's Report but which supported the Commission's findings of misconduct as to Counts I and II of the FC and its recommendation for discipline. The Commission concluded that, in addition to the violations that the Master found and the Commission adopted, Respondent's misconduct in Count II also constituted violations of MCJC Canon 2(A), which requires that a judge avoid all impropriety and appearance of impropriety, and MCJC Canon 2(B), which requires a judge to act in a way that promotes confidence in the integrity of the judiciary.

Therefore, on July 29, 2022, the Commission filed its Decision unanimously recommending that this Court remove Respondent from the office of judge of the 3rd Circuit Court on the basis of her misconduct.

WHEREFORE, for the foregoing reasons, and based on the supporting facts and argument in the accompanying reply brief and in the Commission's July 29, 2022 Decision, the Commission asks that this Court reject Respondent's Petition, and accept in full the Commission's recommendation of removal.

DYKEMA GOSSETT PLLC

Dated: November 3, 2022

By: /s/ *William B. Murphy*

William B. Murphy (P18118)
Mark J. Magyar (P75090)
Commission Counsel for the Michigan Judicial Tenure Commission
201 Townsend St, Suite 900
Lansing, Michigan 48933
Telephone: (517) 374-9100
WMurphy@dykema.com
MMagyar@dykema.com

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HON. TRACY E. GREEN
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BRIEF IN SUPPORT OF THE JUDICIAL TENURE COMMISSION'S REPLY TO RESPONDENT'S PETITION FOR REVIEW

ORAL ARGUMENT REQUESTED

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By: /s/ *William B. Murphy*

William B. Murphy (P18118)
Mark J. Magyar (P75090)
Commission Counsel for the Michigan Judicial Tenure Commission
201 Townsend St., Suite 900
Lansing, Michigan 48933
Telephone: (517) 374-9100
WMurphy@dykema.com
MMagyar@dykema.com

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JURISDICTION

At all material times Hon. Tracy E. Green ("Respondent") was a practicing attorney licensed to practice as a member of the State Bar of Michigan or a judge of the 3rd Circuit Court in Wayne County, Michigan, subject to all the duties and responsibilities imposed on her by this Court, the canons of the Michigan Code of Judicial Conduct ("MCJC" and the "Canons"), and is subject to the standards for discipline set forth in MCR 9.104 and MCR 9.202. As an attorney licensed by the State of Michigan, Respondent was, and still is, subject to the standards of conduct applicable to an attorney under MCR 9.103(A) and the Michigan Rules of Professional Conduct (MRPC). Pursuant to MCR 9.202(B)(2), the Judicial Tenure Commission has jurisdiction over Respondent's pre-bench conduct. Pursuant to Article 6, § 30 of the Michigan Constitution of 1963, as amended, and MCR 9.202(B)(2) and MCR 9.211, the Judicial Tenure Commission (the "Commission" or "JTC") had and has jurisdiction over Respondent's conduct. This Court has authority to act upon the recommendation of the Commission. Const. 1963, Art 6, §30; MCR 9.251 through 9.253; *In re Chrzanowski*, 465 Mich 468, 483-86; 636 NW2d 758 (2001); *In re Del Rio*, 400 Mich 665, 682-84; 256 NW2d 727 (1977); *In re Mikesell*, 396 Mich 517, 527-531; 243 NW2d 86 (1976); *In re Morrow*, 508 Mich 490, 503 & n3; 976 NW2d 644 (2022).

STANDARD OF PROOF

The standard of proof in judicial disciplinary proceedings is the preponderance of the evidence. *In re Haley,* 476 Mich 180, 189; 720 NW2d 246 (2006); *In re Morrow,* 496 Mich 291, 298; 854 NW2d 89 (2014); Const. 1963, Art 6, §30(2); MCR 9.233(A).

STANDARD OF REVIEW

This Court reviews ***the Commission's*** findings of fact and recommendation de novo.[1] *In re Jenkins,* 437 Mich 15, 18; 465 NW2d 317 (1991); *In re Hathaway,* 464 Mich 672, 684; 630 NW2d 850 (2001). "Although [this Court] review[s] the JTC's recommendations de novo, this Court generally will defer to the JTC's recommendations when they are adequately supported." *In re Haley,* 476 Mich at 189.

COUNTER-STATEMENT OF PROCEEDINGS

On November 10, 2020, the Commission filed Formal Complaint (the "Original FC") 103. Respondent filed her answer and affirmative defenses on December 31, 2020, in which she "categorically denie[d] as untrue" the material allegations of misconduct of the Original FC. On March 5, 2021, this Court appointed Hon. Betty R. Widgeon as the master ("Master"). On October 28, 2021, the Master granted disciplinary counsel leave to amend the Original FC, which asserted three counts of misconduct (as amended, the "FC"), including adding Count III alleging that Respondent made intentionally false statements to the Commission in her answer to the Original FC. On November 17, 2021, Respondent filed her answer and affirmative defenses to the FC, ("Answer," cited as "R's Ans"), again categorically denying misconduct.

A total of twelve public hearing days were held (collectively, the "Hearing"). The first nine hearing days and the final hearing day were held via the ZOOM video

[1] The Commission emphasizes that this Court reviews the Commission's – not the Master's – findings of fact and recommendation de novo because Respondent's Petition repeatedly takes aim at *the Master's findings* as assertedly lacking record citations and other alleged defects. *See, eg*, Pet pp 3, 4, 24-26, 28-30, 34-37, 42, 43, 47, 49. As the Commission set forth in the Decision, the Commission reviewed the entire record de

platform with live-streaming on YouTube. Hearing days ten and eleven were held in-person at the Washtenaw County Trial Court. The parties filed Proposed Findings of Fact and Conclusions of Law and responses. On February 28, 2022, the Master issued a report containing her findings of fact and conclusions of law (the "Master's Report", cited as "MR"). On June 13, 2022, the Commission held an in-person public hearing on the parties' objections to the Master's Report pursuant to MCR 9.241 in Courtroom B of the Michigan Court of Appeals' Detroit, Michigan location. The Commission filed its Decision pursuant to MCR 9.244 on July 29, 2022. After several stipulations extending Respondent's time to file her Petition, Respondent filed her Petition on October 14, 2022. The Commission hereby replies.

COUNTER-STATEMENT OF ISSUES PRESENTED

1. Was the Commission's finding that Respondent committed the misconduct charged in Count I of the FC adequately supported by a preponderance of the evidence that Respondent covered up evidence of her son's physical abuse of her grandchildren?

The Commission answers: Yes.

Respondent answers: No.

This Court should answer: Yes.

2. Was the Commission's finding that Respondent committed the misconduct charged in Count II of the FC adequately supported by a preponderance of the evidence that Respondent made intentionally false statements under oath about her knowledge of her son's physical abuse of her grandchildren?

The Commission answers: Yes.

Respondent answers: No.

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novo and provided detailed record support for *its* Decision, which is what this Court reviews. Decision p 8.

This Court should answer: Yes.

3. Is the Commission's disciplinary recommendation of removal reasonably proportionate to the conduct of the Respondent, including her false testimony and answers under oath, and reasonably equivalent to the action that has been taken previously in equivalent cases?

The Commission answers: Yes.

Respondent answers: No.

This Court should answer: Yes.

4. Do Respondent's challenges to the constitutionality and conduct of these proceedings virtually lack merit because she received due process and there was no miscarriage of justice that resulted from ten of the twelve hearing days being held remotely via the ZOOM video platform with live-streaming on YouTube?

The Commission answers: Yes.

Respondent answers: No.

This Court should answer: Yes.

INTRODUCTION

Respondent's sole merits-based defense is that the Commission should have: (a) believed her implausible explanations when she "categorically denied" committing misconduct; and (b) accepted her position that at least three other key witnesses, including her own minor grandchildren and a CPS worker (all three of whom provided testimony consistent with each other) who testified contrary to Respondent's testimony should all have been deemed liars. Respondent speciously contends that, by not believing her and finding the other witnesses more credible, the Commission improperly "foisted upon her" the "burden of self-defense" without providing a "citation to the record as to why [her] testimony was not credible." Pet pp 2, 27. Contrary to Respondent's generalizations and conclusory arguments, the Commission appropriately held disciplinary counsel to its burden to prove misconduct by a preponderance of the evidence and amply supported its findings with citations to record evidence.

Because Respondent rests her entire defense on her own implausible testimony and "categorical denial" of the allegations of misconduct, she conspicuously provides *no analysis* of the *Brown* factors, Pet p 51, including that she does not dispute the Commission's analysis of the *Brown* factors and other relevant disciplinary considerations, *see* Decision pp 23-33, in the event this Court finds misconduct. As set forth in the Commission's Decision and discussed below, the recommended discipline of removal is proportionate to the misconduct of the Respondent and reasonably equivalent to the action that has been taken previously in equivalent cases, and should be ordered by this Court.

Finally, because Respondent's position hinges solely on her request that this Court flip the Commission's credibility determinations entirely in her favor, and she does not dispute the Commission's disciplinary analysis in the event this Court does not adopt her position, Respondent focuses her Petition on arguing that the *proceedings* were unfair. She argues that she was denied due process because Michigan's judicial disciplinary system in unconstitutional, that other aspects of the Hearing, including a purported conflict of interest and other alleged improper conduct by disciplinary counsel, made the risk of unfairness intolerably high, and that she was entitled to an in-person hearing rather than a virtual hearing for the ten of the twelve hearing days that were conducted via ZOOM and live-streamed to YouTube.

Respondent's attacks on the proceedings lack merit. This Court has repeatedly – including most recently earlier this year – reaffirmed the constitutionality of Michigan's judicial disciplinary system. Nothing specific to these proceedings did anything to undercut the due process she received. Nor do Respondent's generalizations and conclusions about remote proceedings demonstrate with any concrete facts or evidence that there was any miscarriage of justice that resulted from most of the Hearing being held remotely, which there was not. Therefore, in this reply brief, the Commission addresses the issues in an order different than presented by Respondent in her Petition. The Commission maintains its focus on the facts, Respondent's misconduct, the *Brown* factors, and the proportionality of the Commission's recommendation of removal, while addressing at the end of this brief Respondent's unfounded legal attacks upon the proceedings.

FACTS AND PROCEDURAL HISTORY

The Commission set forth detailed facts and the procedural history in its July 29, 2022 Decision, Decision pp 3-23, which is fully incorporated herein and which the Commission will not repeat, except that the Commission will reiterate certain evidence cited in its Decision in the below Argument section as necessary to address Respondent's arguments. The Commission objects to Respondent's statement of "Facts" and Procedural History, Pet pp 2-5, to the extent it is argumentative, selectively includes only information Respondent deems helpful to her positions, cites nothing from the Hearing record, and/or omits evidence the Commission expressly relied upon in its Decision in concluding that Respondent committed misconduct as alleged in Counts I and II of the FC.

ARGUMENT

I. Respondent Committed Misconduct Under Counts I & II of the FC.

Respondent contends: "The decision and recommendation of the Commission lack both factual and legal bases." Pet p 1. Respondent is incorrect. Accordingly, it is necessary to repeat herein at least some of the facts, as supported by record citations, set forth in the Decision which Respondent fails to address in her Petition.

A. Respondent Covered Up Evidence Of Her Son's Physical Abuse Of Her Grandchildren, as Charged in Count I.

The Commission set forth its findings of fact and conclusions of law as to Count I at pages 12 to 19 of its Decision. Respondent categorically denies that she covered up evidence of her son's child abuse of his sons and that all witnesses testifying to the contrary are lying. Pet 17, 24, 49. This is her sole defense to this charge, ie, that the

Commission should have believed her denials. Thus, based upon Respondent's assertions, particularly relevant to the Commission's finding of misconduct under Count I of the FC is the basis for the Commission's agreement with the Master as to credibility determinations, namely that CPS worker Ms. Apple, police officer Ms. Adams and Respondent's grandsons, Max and Russell, were all credible, and Respondent was not. Like the Commission's de novo review of the Master's Report, this Court's "power of review de novo does not prevent [it] from according proper deference to the master's ability to observe the witnesses' demeanor and comment on their credibility." *In re Noecker*, 472 Mich 1, 9-10; 691 NW2d 440 (2005), citing *In re Loyd*, 424 Mich 514, 535; 384 NW2d 9 (1986).

From April of 2015, when Respondent's son gained sole custody of his sons in his divorce proceeding (with an order prohibiting corporal punishment), to June 24, 2018, when Respondent's son committed felony child abuse of his sons for which he is now incarcerated, Respondent's grandsons, Max and Russell, lived with Respondent's son. Hearing Ex 48. Respondent saw them at least once a week during this more than three-year period. Hearing Ex 3, p 6. During those three years, Respondent's son physically abused the boys many times, and Respondent was aware that her son used court-prohibited corporal punishment on Max and Russell. Tr 310-312, 319, 321, 322, 432, 481, 1069, 1070; Hearing Ex 2, p 65; Hearing Ex 26, p 19; Hearing Ex 29, pp 87, 88, 101; Hearing Ex 30, pp. 16-18, 28; Hearing Ex 32, pp 41, 46-47, 87, 101; Hearing Ex 34, pp 17-18; Hearing Ex 46, 6-10-21, 16:18-16:32, 17:08-17:56. Russell also testified that Max told Respondent about the marks on his body every time Russell did. Tr 310-

312, 319, 321, 322, 432. Max has also said that Respondent knew about the beatings and abuse. Hearing Ex 32 pp 87, 101; Hearing Ex 29, p 88. Max's testimony was consistent with his prior statements about Respondent's knowledge that her son was slapping him. Tr pp 1069-1070; Hearing Ex 29, pp 107,109; Hearing Ex 34, pp 14-15, 19-22, 24-25; Hearing Ex 35, pp 91, 112; Tr pp 469-470 478, 480-481, 638, 652, 1006, 1010, 1011, 1016-1017.

On June 24, 2018, based upon suspicions and concerns of child abuse, CPS Investigator Leslie Apple ("Apple") and Police Officer Melissa Adams ("Officer Adams") spoke with Respondent's grandsons in the upstairs of their home while other officers spoke with Respondent's son outside the home. Tr 42-43. At that time, Max and Russell showed Apple and Officer Adams various marks on their bodies and stated that their father had inflicted the marks. Tr p 43, 1321. The boys did not want Respondent to take custody of them that day. Max told Apple and Officer Adams that he did not want to go with Respondent because "she knew about what the dad was doing to them, about the abuse," and would allow Respondent's son to get them back. Tr pp 62, 1322-1323. As Officer Adams testified:

> I've been a police officer for Detroit for 13 years, and there are certain runs or certain instances that do stick out throughout my time . . . Russell and Gary . . . the fear you could see in their eyes and through their actions when they thought their father was coming up the stairs or when they thought they had to go with their grandmother, those stick out in your memory.

Tr pp 107-108. Ultimately, CPS decided to place the boys with someone other than Respondent.

Within two days after the boys were finally rescued in late June 2018, Respondent told the CPS investigator, Ms. Apple, that Respondent had not realized that "it" (meaning the abuse) was "this bad." Tr pp 1305-1306. As a direct result of this June 24, 2018 child abuse committed by Respondent's son upon his sons, Respondent participated in a team meeting with CPS worker Ms. Apple, and testified at a juvenile court proceeding. In both instances, Respondent knew that the discussions, proceedings, and testimony directly regarded her son's recent physical abuse of her grandsons. Tr pp 1304, 1306, 1307; Hearing Ex 2, pp 52-53. In both instances, Respondent admitted to knowing about spankings, belt whippings, and general physical abuse by her son. None of her admissions or testimony at that time were qualified in any way when she was providing such information and sworn testimony.

Yet, *for these disciplinary proceedings*, Respondent suddenly made sworn "clarifications" for the Commission's investigators and the Master. Respondent now says that, when she told Ms. Apple and the juvenile court jury that she was aware of such abuse, she really meant that she was *only* aware of long ago abuse that took place in a completely different context three and four years before the June 2018 (which not so coincidentally was *before the 2015 order* of Judge Cox in the divorce case prohibiting corporal punishment). Respondent did not communicate these timeframe limitations or clarifications or qualifications back then when she provided the statements.

Thus, the totality of the evidence, much more of which is detailed in the Decision, showed well beyond a preponderance of the evidence that Respondent was aware that her grandsons were being physically abused by her son, she covered it up,

and she lied about it. Respondent merely denies the robust testimony of her grandsons and others, calls them liars, and uses implausible explanations to explain away her prior *admissions* of such knowledge of the abuse they suffered at the hands of her son. The Commission was not required to believe her, nor did the Commission violate her due process rights in deeming her not credible based upon the totality of the evidence. Thus, the Commission's finding that Respondent committed the misconduct alleged in Count I of the FC was adequately supported by a preponderance of the evidence.

B. Respondent Made Intentionally False Statements Under Oath About her Knowledge of Her Son's Physical Abuse Of Her Grandchildren, As Charged In Count II.

Count II charged that Respondent made false statements under oath at the juvenile court hearing while testifying as a witness on behalf of her son and to the Commission in these proceedings in her responses to the Commission's requests for comment about her knowledge of her son's child abuse against Respondent's grandchildren. Respondent's Hearing testimony establishes that she gave false testimony under oath to the Master, as well. The Commission's finding of misconduct as to Count II was more than adequately supported by the record as set forth in the Decision, and should be adopted by this Court. To summarize:

- Respondent told a CPS investigator that she knew her son was a "very stern disciplinarian" during an intervention specifically concerned with physical abuse, but later Respondent concocted an explanation (for the first time in this proceeding) that she was referring only to non-physical forms of discipline, which makes no sense in the context of the discussion with the CPS investigator. Hearing Ex 2, pp 64-65; Tr 1305, 1967-1968, 2034, 2075-2076.

- Respondent admitted to covering up a red slap mark on her grandson's face with make up (not a typical occurrence for most families where abuse is not present). Respondent strategically limited her admission of

knowledge to only a single instance of a "slap" to her grandson Max's face, which she admits left a hand print across his face but incredibly asserts she never considered this to be an instance or evidence of abuse. Her grandsons testified to the contrary, namely that they repeatedly told her about the abuse and/or she was present for it. Tr 310-312, 319, 321, 322, 432, 469-470, 480-481, 638, 652, 1006, 1010, 1011, 1016-1017, 1069, 1070; Hearing Ex 2, p 65; Hearing Ex 26, p 19; Hearing Ex 29, pp 87, 88, 101, 107, 109; Hearing Ex 30, pp. 16-18, 28; Hearing Ex 32, pp 41, 46-47, 87, 101; Hearing Ex 34, pp 14-15, 17-22, 24-25; Hearing Ex 35, pp 91, 112; Hearing Ex 46, 6-10-21, 16:18-16:32, 17:08-17:56.

- Respondent unconvincingly claimed that her only motivation for applying makeup to Max, which he vigorously opposed, was so that Max's brother, Russell, would not tease Max about the slap mark on his face. Hearing Ex 3, pp 13, 14, 20, 21; Tr p 1976. Max thoroughly rebutted this explanation, including that he and Russell would never tease each other for having marks that their father inflicted on them, as it was not funny to them, and Max was adamantly opposed to wearing the makeup. Hearing Ex 29, pp 107, 109; Hearing Ex 30, pp 10-13; Hearing Ex 34, pp 14-15, 19-22, 24-25; Hearing Ex 35, pp 91, 112; Hearing Ex 45, p 37; Hearing Ex 46, pp 40-41; TR pp. 312-313, 315, 469-470, 478, 480-482, 486, 638, 652, 996-997, 1006, 1010, 1011, 1016, 1017. Russell and Max also testified that Respondent used makeup on them to cover such marks on several occasions, whereas Respondent falsely testified to having done so only one time to only Max. MR 14; Tr 312-313, 478-481, 996-997, 1011, 1017.

- Respondent stated that none of her grandchildren had ever told her they had been abused. Hearing Ex 3, p 12.

- Respondent stated: "I was, and remain, unaware of any alleged 'abuse' of my grandchildren by my son." Hearing Ex 3, pp 13-14.

- Respondent stated: "I was never, under any circumstances or in any respect aware of, or told by anyone, the details of alleged abuse of my grandsons at the hand of their father. Specifically, I was never advised about alleged abuse by my grandsons." Hearing Ex 3, pp 19-20.

- "As related to being spanked, I have no recall of any specific occasion that this was mentioned by my grandsons. I was not, however, aware of any specific situation or complaint from my grandchildren concerning being spanked for misbehavior. Further, I never saw any signs that my grandchildren had been spanked by their father." Hearing Ex 3, pp. 19-20.

- Respondent denied she was made aware of "corporal punishment" her son administered to her grandsons, and claimed she was only told about one incident in which Max was slapped across the face, plus additional spankings. Hearing Ex 3, pp 10-12, 19-20.

- Respondent denied knowing that Max and Russell had been hit by their father. Hearing Ex 3, pp 9-10.

- Respondent stated that she did not see marks on her grandson's bodies, excluding the slap mark she once saw on Max's face. Hearing Ex 3, pp 7-8, 12-13, 19-20.

- Respondent stated she was not "advised" that her son had left any marks on her grandsons' bodies, excluding the slap mark that she saw on Max's face. Hearing Ex. 3, pp 7-8.

Ignoring the record, including the Decision's record citations and her grandsons' testimony, Respondent conclusorily argues that her "concise" answer "to a specific question without elaboration" does not equate to a misrepresentation. Pet p 34. The Commission addressed this thoroughly in the Decision, including agreeing with the Master's observation that "Respondent's careful use of language show[ed] an attempt to avoid admitting any knowledge that would lead to liability," which often included using "vague" and evasive language to avoid answering the Commission's questions, using her legal training and a "sophisticated mastery of language to mislead or misinform CPS, the Juvenile Court, and the Commission about her knowledge of [her son's] treatment of [her grandsons] while still attempting to preserve plausible deniability concerning false statements." Decision p 8, citing MR pp 9, 21, 23. Respondent's attempt at plausible deniability allowed her to avoid a finding of misconduct as to Count III regarding her carefully crafted answers to the FC, but she was not able to employ such strategy without lying in several other instances discussed above,

including under oath at the juvenile court hearing, in her sworn answers to the Commission's investigatory questions and in her sworn testimony to the Master.

Respondent tries to differentiate herself from the judges in numerous prior disciplinary cases who were removed by this Court for lying under oath, contending that "[a] close reading of the cases, however, reflect that they involved objective instances of lying under oath," and such "instances of removal were not based on subjective assessments of weight and credibility." Pet p 43. Respondent does not supply any actual analysis or discussion of, or citations to, those cases. Contrary to Respondent's unsupported contention, multiple prior cases of this Court involved similar findings of false statements and removal based upon conflicting testimony and credibility determinations, which directly support removal here.

In *In re James*, 492 Mich 553, 568-569; 821 NW2d 144 (2012), for example, respondent testified under oath that after appointing a magistrate she informed him that "he would have to become a registered elector as well as a resident of the city of Inkster." *Id*. The magistrate testified to the contrary, saying that he "never knew" that being a registered elector was a requirement of the position. *Id*. Respondent also testified that she received a letter from the magistrate confirming his qualifications and attaching a copy of his voter's registration card. *Id*. The magistrate testified that he did not provide such a letter. *Id*. Moreover, the magistrate said that he knew "for certain" that he had never provided a copy of his voter's registration card to respondent because he was never a registered voter in Inkster. *Id*. *Based solely on this conflicting testimony and deferring to the master's determination that that magistrate*

was more credible than respondent, this Court was "left with the conclusion that respondent lied under oath." *Id*.

In *In re Justin*, 490 Mich 394, 420; 809 NW2d 126 (2012), respondent testified that the reason he did not order a defendant to pay the costs of prosecution as part of a plea bargain was that such costs were not statutorily authorized. This was respondent's testimony of his purely subjective motivations, so no directly refuting evidence could possibly exist. Nevertheless, "the evidence adduced at the hearing established that this statement was a falsehood and that statutory authority was not respondent's motivating consideration in determining whether to order costs." *Id*. Such evidence of this falsehood included contrary testimony by the assistant city attorney for the city of Jackson and circumstantial data evidence that respondent had awarded costs in many prior cases where there was no statutory authority to order the payment of costs. *Id*. Such evidence "belie[d]" respondent's claim that statutory authorization was respondent's foremost consideration, and supported the finding that he gave false testimony. *Id*.

In re James and *In re Justin* are just two examples. Thus, contrary to Respondent's unsupported contention, the testimony from multiple witnesses that was contrary to her testimony was more than sufficient to determine that Respondent was lying under oath warranting removal. Respondent is simply incorrect in asserting that something more is needed. Under her position, no one could ever be found to have given false testimony without some sort of additional "smoking gun" email or document where the person admits to lying. No such requirement exists. Respondent's

statements were false based upon the totality of the evidence that included consistent, more credible testimony from *multiple other witnesses* with no incentive to lie. This is not a question of semantics, as Respondent contends. For just one example, Respondent stated that neither Max nor Russell had ever told her they had been abused. Hearing Ex 3, p 12. The boys both flatly contradicted her sworn answer in testifying that they repeatedly told her about the abuse they were suffering from their father. Respondent's and her grandsons' conflicting testimony cannot be reconciled. The Master and the Commission deemed the boys' testimony credible and concluded that Respondent was lying based upon a preponderance of the evidence in the record as a whole, as detailed in the Decision. The Commission summarized these multiple instances of lies by Respondent at pages 27-28 of the Decision:

> Here, Respondent deliberately lied about (but not limited to): (a) having knowledge of her son's use of corporal punishment on his sons only before Judge Cox's 2015 order in Respondent's son's divorce case prohibiting corporal punishment; (b) the scope of her 2019 testimony under oath in the Juvenile Court being limited to this pre-2015 order knowledge, but not testifying then about this limitation and only raising it in these proceedings; (c) the scope of her admission to the CPS investigator that she knew her son was a "stern disciplinarian" to being limited to only non-physical forms of discipline, which she did not clarify for the CPS investigator in real time when discussing physical abuse but asserted for the first time as an explanation in this proceeding; (d) the scope of her statement to the CPS investigator that she did not realize her son's treatment of his children was "this bad" being limited to non-physical discipline, which, again, she did not clarify for the CPS investigator in real time when discussing physical abuse but asserted for the first time as an explanation in this proceeding; (e) the scope of her knowledge of evidence of her son's abuse of his children being limited to a single instance of a slap to Max's face leaving a handprint; (f) being unaware that her son used belts on and spanked her grandchildren; (g) being unaware of bruises inflicted by her son on her grandchildren; (h) using makeup only "one time" on Max; and (i) her motivation for using makeup on Max was to curtail teasing by Russell.

Thus, the Commission respectfully submits that this Court should adopt its finding of misconduct as to Count II of the FC.

C. No Conviction For Criminal Child Abuse Was Necessary To Find Misconduct.

This is not a criminal proceeding, and Respondent was not on trial for committing child abuse. Yet, Respondent states: "The Commission accepted and adopted a foundationally flawed premise - - proof of the existence of child abuse prior to June 24, 2018. There is no such proof in the record of this case." Pet p 2. Yet, contrary to her assertion, the Commission agreed with the Master in expressly concluding that *it was not necessary* to find formally adjudicated convictions of child abuse for every instance of evidence of child abuse that Respondent knew about, concealed, and lied about to find that she committed the charged judicial misconduct:

> Respondent argued that none of the misconduct can be found against her without an underlying or 'foundational' finding of child abuse. The Commission agrees with the Master that Respondent is incorrect. (Master's Report p. 8.) Taken to its logical conclusion, Respondent's argument is that a person who successfully conceals evidence of child abuse (or any crime for that matter) has done nothing wrong, because there would never be a finding of the successfully concealed crime. As the Master stated, and the Commission adopts, '*evidence of abuse is not the same as incontrovertible proof of abuse*, *and Respondent need not have been fully convinced that Davis-Headd had abused the boys to be found liable under this charge*.

Decision p 12 n5 (emphasis added).

Thus, it is Respondent's foundational premise that is flawed. This is not a criminal case. Respondent is not accused of committing child abuse, corporal punishment, or any other variation of physical harm inflicted upon her grandsons. She

was charged with covering up "evidence of" her son's child abuse of her grandchildren and lying about her knowledge of the evidence of child abuse. Her son was convicted of felony child abuse following the June 2018 abuse. Respondent says there was no "foundational" adjudication of criminal child abuse prior to that date and, therefore, should could not have covered up or known about (or lied about) any abuse without that formal finding of abuse (which could only happen later after a trial) first occurring. Pet pp 2, 3, 4, 28, 29, 31, 51. Under her theory, every single instance of abuse that she knew about and hid would have to have been later formally adjudicated to a criminal conviction in order for her to be charged with knowledge of it, hiding it, and lying about it. Respondent's premise is wrong. The critical inquiries are what she knew, what the standards of judicial conduct required of her, and whether she lied about it.

The misconduct that the Commission found Respondent committed, as set forth at page 23 of the Decision, does not include any crime and has nothing to do with whether she or anyone else committed the crime of child abuse to an adjudicated conviction, but rather:

a. conduct prejudicial to the proper administration of justice, contrary to MCR 9.104(1) and MRPC 8.4(c);

b. conduct that exposes the legal profession or the courts to obloquy, contempt, censure or reproach, contrary to MCR 9.104(2);

c. conduct that is contrary to justice, ethics, honesty, or good morals, contrary to MCR 9.104(3);

d. false or misleading statements to the Commission's investigators, the Commission, and the Master, contrary to MCR 9.202(B);

e. failure to avoid all impropriety and appearance of impropriety, contrary to MCJC Canon 2(A);

f. failure to act in a way that promotes confidence in the integrity of the judiciary, contrary to MCJC Canon 2(B); and

g. conduct involving dishonesty, deceit, or misrepresentation, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, contrary to MRPC 8.4(b).

Respondent committed this misconduct by knowing that her son was physically abusing her grandsons, trying to hide it from authorities, and then lying about it.[2] The inquiry is whether she tried to hide "evidence of" child abuse. In other words, a question for the Commission was:

> *Given that the Commission found that Respondent knew her son was physically abusing her grandsons based upon the record evidence, and regardless of whether Respondent had a crystal ball to know to a legal certainty that her son's abuse would later be found out, charged, tried and he would be convicted of criminal child abuse after a formal legal proceeding, was her act of concealing the physical abuse that she knew was occurring and then lying about it, as the Commission found by a preponderance of the evidence, judicial misconduct?*

[2] Respondent herself gave answers to the Commission's questions about general "abuse," not criminally adjudicated "child abuse." As set forth in the Decision (p 20), Respondent's false answer to the Commission's questions during its investigation included: Respondent stated that none of her grandchildren had ever told her they had been abused, (Hearing Ex 3, p 12); "I was, and remain, unaware of any alleged 'abuse' of my grandchildren by my son," (Hearing Ex 3, pp 13-14) and "I was never, under any circumstances or in any respect aware of, or told by anyone, the details of alleged abuse of my grandsons at the hand of their father. Specifically, I was never advised about alleged abuse by my grandsons." (Hearing Ex 3, pp 19-20.)

The Commission held that it was, and respectfully submits that its Decision in this regard was correct, amply supported by a preponderance of the evidence, and should be adopted by this Court.

D. The Commission Considered All of the Evidence And Concluded That Respondent Committed The Misconduct As Charged.

Again, as set forth above, it is the Commission's Decision and Recommendation, not the Master's Report, that this Court reviews. Respondent argues that the Master reformulated the charges against her as involving her son's "corporal punishment" of her grandchildren instead of evidence of her son's child abuse against his sons. Pet pp 23-34. Respondent also argues that the Master failed to consider some of her evidence. Pet pp 29, 48. These arguments are red herrings. Even accepting Respondent's characterizations of the Master's Report, the Commission assessed the charges and made its conclusions explicitly based upon the charges of the FC and the record as a whole, as amply demonstrated in the Decision.[3]

Indeed, the Commission analyzed "**Count I: Covering Up Evidence of Child Abuse**," Decision p 12 (emphasis in original), at pages 12 to 19 of the Decision. The first sentence of that section provided: "Count I charged that Respondent, as an attorney before she took the bench, covered up ***evidence of child abuse*** committed by

[3] As the Commission set forth on page 11 of the Decision: "The Commission's ***de novo review of the entire record*** leaves it with the definite and firm conviction that Respondent lied as a judge, and she did so repeatedly in a host of forums under oath in the Juvenile Court, in responding to the Commission's investigation, and to the Master at the Hearing, which impeded the administration of justice in a manner that placed her grandsons in peril, ***whenever the subject was her knowledge of her son's physical abuse of her grandsons and her attempts to conceal it***." Decision p 11 (emphasis added).

Respondent's son against Respondent's grandchildren (the sons of her son)." Decision p 12 (emphasis added). Likewise, the Commission analyzed "**Count II: False Statements About Knowledge of Child Abuse**," Decision p 19 (emphasis in original), at pages 19 to 23 of the Decision. The first sentence of that section provided: "Count II charged that Respondent made false statements under oath at the Juvenile Court hearing while testifying as a witness on behalf of her son and to the Commission in these proceedings in her responses to the Commission's requests for comment issued September 17, 2019 and October 30, 2019 about her ***knowledge of her son's child abuse against Respondent's grandchildren***." Decision p 19 (emphasis added). The only times in the Decision that the Commission appropriately discussed "corporal punishment" was in the context of Judge Cox's 2015 Order in Respondent's son's divorce case prohibiting Respondent's son from using corporal punishment and Respondent's knowledge that her son was regularly violating that order.[4] Thus, regardless of what Respondent says about the Master's Report, the Commission undeniably assessed the charges against her ***as alleged in the FC*** based on the entire record.

[4] As set forth in the Commission's Decision at page 13 with record citations, Judge Cox ordered that neither parent use corporal punishment, Hearing Ex 48, Respondent was aware of this order, R's Ans ¶11; Tr p 2027, and Respondent knew that her son was physically abusing his sons in violation of Judge Cox's order based on the testimony of Respondent's grandsons. Tr 310-312, 319, 321, 322, 432, 481, 1069, 1070; Hearing Ex 2, p 65; Hearing Ex 26, p 19; Hearing Ex 29, pp 87, 88, 101; Hearing Ex 30, pp 16-18, 28; Hearing Ex 32, pp 41, 46-47, 87, 101; Hearing Ex 34, pp 17-18; Hearing Ex 46, 6-10-21, 16:18-16:32, 17:08-17:56.

In any event, Respondent's misguided attempt to shift the narrative from evidence of child abuse to corporal punishment is unavailing. Respondent cites the 1909 decision of this Court in *People v Green*, 155 Mich 524, 119 NW 1087 (1909) regarding what she calls the "highly controversial" and "sensitive" subject of corporal punishment. Pet p 1. These quoted words from Respondent's Petition cannot be found in the *Green* decision, where this Court held that "it is the unquestionable right of parents and those in loco parentis to administer such reasonable and timely punishment as may be necessary to correct growing faults in young children; but this right ***can never be used as a cloak for the exercise of malevolence or the exhibition of unbridled passion on the part of a parent***." *Id* at 533 (emphasis added). Thus, this holding has no relevance here.[5] Respondent's son is a convicted felon for the physical abuse he malevolently inflicted on his sons. But no one has accused Respondent of abusing or using corporal punishment on her grandchildren; rather the issue is what she did with her knowledge of evidence of her son's physical abuse of her grandsons. She concealed it to protect her son and lied about it to protect herself.

[5] For the same reason, Respondent's citation to *In re Rupert*, unpublished per curiam opinion of the Court of Appeals decided May 13, 2010 (Docket No 294873) and *Mich Ass'n of Intermediate Special Educ Adm'Rs v Dep't of Social Services*, 207 Mich App 491, 493; 526 NW2d 36 (1994), Pet p 1, are inapposite. *Rupert* regarded a purely jurisdictional issue, where the court concluded that "[t]he trial court did not clearly err in finding a preponderance of the evidence established a statutory ground for jurisdiction under MCL 712A.2(b)(2)." The *Mich Ass'n* case regarded "educational needs" rather than physical punishment. 207 Mich App at 493 ("At the heart of this matter is the petitioners' view that the parents' failure to act in conformity with petitioners opinions regarding the children's educational needs constitutes abuse or neglect.").

II. Disciplinary Analysis.

As set forth above, Respondent's Petition asserts only that her denials of covering up evidence of her son's physical abuse of her grandsons and making false statements under oath about her knowledge of such abuse should have been believed and deemed more credible than multiple other witnesses' contrary testimony. Respondent conducted no disciplinary analysis whatsoever and no rebuttal of the Commission's disciplinary analysis (not even in the alternative in the event this Court disagrees with her and finds misconduct).

Besides challenging the proceedings (discussed later in this reply), Respondent places all of her eggs in the credibility basket and maintains her "categorical denial" of the allegations. R's Ans ¶¶ 9, 10, 12, 13-15, 17, 27-29, 31-34, 38-41; Decision p 3; Pet p 24. Thus, rather than repeat its unrebutted conclusions of law and disciplinary analysis here, the Commission fully incorporates such disciplinary analysis from pages 23 through 33 of the Decision.

If this Court agrees with the Commission and concludes that Respondent committed the misconduct charged in Counts and I and II – and particularly the intentionally false statements of Count II – the Court should also consider Respondent's silence as to the disciplinary analysis as a tacit admission that removal is the appropriate sanction under the *Brown* and other pertinent factors set forth in the Commission's Decision. As the Commission set forth, removal is warranted when, as here, "a judge lies under oath" because "he or she has failed to internalize one of the central standards of justice and becomes unfit to sit in judgment of others." *In re Justin*, 490 Mich at 424. This Court "'has consistently imposed the most severe

sanction by removing judges for testifying falsely under oath.'" *In re Brennan*, 504 Mich 80, 85; 929 NW2d 290 (2019), quoting *In re Adams*, 494 Mich 162, 186; 833 NW2d 897 (2013), citing *In re Ryman,* 394 Mich 637, 642-643; 232 NW2d 178 (1975); *In re Loyd*, 424 Mich at 516; *In re Ferrara,* 458 Mich 350, 372-373; 582 NW2d 817 (1998); *In re Noecker*, 472 Mich at 12-13; *In re Nettles-Nickerson*, 481 Mich 321, 322; 750 NW2d 560 (2008); *In re Justin*, 490 Mich at 396-397; *In re James*, 492 Mich at 569.

III. Respondent's Challenges To The Proceedings Lack Merit.

Respondent argues that Michigan's judicial discipline system is unconstitutional, relying on Supreme Court of the United States' decision in *Williams v Pennsylvania*, 136 S Ct 1899 (2016). Pet pp 7-8. This is the same argument posited by the respondent and rejected by this Court earlier this year in *In re Morrow*, 508 Mich at 499-503. Respondent's attempt to differentiate her proceedings from the due process received by Judge Morrow by injecting assertions of conflict of interest and other improprieties by disciplinary counsel, *see* Pet pp 8, 15-23, lack merit and do not convert an otherwise constitutional process into unconstitutional proceedings in this case.

A. Michigan's Judicial Disciplinary Process is Constitutional.

"The Due Process Clause of the United States Constitution provides that '[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .'" *In re Morrow*, 508 Mich at 499, quoting US Const, Am XIV, § 1. As in *Morrow*, "Respondent rests h[er] argument primarily on *Williams v Pennsylvania*, 579 US 1; 136 S Ct 1899; 195 L Ed 2d 132 (2016)." 508 Mich at 499. In *Williams*, a justice on the Pennsylvania Supreme Court participated in a postconviction proceeding involving a case in which he had previously, in his supervisory role as district attorney,

approved the decision to seek the death penalty. *Id*. The United States Supreme Court held that "under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." *Id*, citing 136 S Ct at 1905. Applying that standard, the Supreme Court of the United States held that the justice's failure to recuse himself from the case violated the Due Process Clause. *Id* at 499-500, citing 136 S Ct at 1907. Furthermore, though the justice's vote was not decisive, the Court held "that an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote" because the justice might have influenced his colleagues. *Id* at 500, quoting 136 S Ct at 1909.

As this Court noted in *Morrow*, this Court has previously "addressed due-process challenges to our judicial disciplinary scheme *multiple times in the past*, and each time, [it has] *upheld the system*, *including the JTC's role, as constitutional*." *Id* at 500 (emphasis added), citing *In re Mikesell*, 396 Mich 517; *In re Del Rio*, 400 Mich 665; *In re Chrzanowski*, 465 Mich 468. This Court's prior decisions were rooted in the Supreme Court's holding in *Withrow v Larkin*, 421 US 35; 95 S Ct 1456 (1975), which "is still good law" and "*Williams* did not overrule it." *In re Morrow*, 508 Mich at 500. "*Withrow* still strongly supports the constitutionality of [Michigan's] judicial discipline scheme." *Id*. As the *Withrow* Court stated:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. *It must overcome a presumption of honesty and integrity in those serving as adjudicators*; and it must convince that, under a realistic appraisal of psychological tendencies and human

> weakness, *conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias* or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Id at 500-501, quoting *Withrow*, 421 US at 47 (emphasis added). The *Withrow* Court further explained that both federal and state caselaw "generally reject the idea that the combination of judging and investigating functions is a denial of due process . . . ." *Id* at 501, quoting *Withrow*, 421 US at 52 (quoting 2 Davis, Administrative Law Treatise (1958), § 13.02, p 175) (cleaned up). Specifically, past United States Supreme Court cases, though recognizing the potential problem of combining investigative and adjudicatory roles, "offer no support for the bald proposition . . . that agency members who participate in an investigation are disqualified from adjudicating." *Id* at 501, quoting *Withrow*, 421 US at 52.

This Court concluded that "*Withrow* supports the conclusion that generally an administrative body sharing investigative and adjudicatory roles is not a due-process violation" which is "still" the case for the JTC. *Id*. This Court "has instituted some degree of separation between the JTC's investigatory and prosecutorial functions versus its adjudicatory functions by requiring the appointment of a master." *Id* at 501, citing *Del Rio*, 400 Mich at 691 and MCR 9.231. Further, though the JTC does play an adjudicatory role, that role is, importantly, minimized, as it is not the JTC that provides a final adjudication and sanctions judges; that responsibility belongs only to this Court. *Morrow*, 508 Mich at 502, citing Const 1963, art 6, § 30; *Del Rio*, 400 Mich at 689; MCR 9.251 and 9.252. Thus, *Withrow*, rather than *Williams*, is the more applicable precedent because the system at issue in *Withrow* is more analogous to the

JTC. *Morrow*, 508 Mich at 502. Whereas *Williams* involved a postconviction proceeding in a criminal case, *Withrow* involved a professional administrative scheme, namely the Wisconsin Medical Examining Board. *Id*. As a body that regulates the conduct of licensed professionals, the JTC is clearly more akin to the latter. *Id*.

Thus, this Court should again reaffirm the holdings of its past opinions and "hold, once again, that [Michigan's] judicial disciplinary system, specifically the JTC's role, does not violate the Due Process Clause." *Id* at 503.

B. There Are No "Special Facts Or Circumstances" That Deprived Respondent of Due Process.

Respondent has seemingly used this Court's decision in *Morrow* and the precedent it cited as a playbook to ascribe sinister motives to otherwise benign circumstances from her case to try to manufacture a fact-specific due process violation. Her attempts fail. Specifically, this Court noted in *Morrow* that "*Withrow* remarked that there could be such 'special facts and circumstances present . . . that the risk of unfairness is intolerably high' in a particular matter[.]'" *Morrow*, 508 Mich at 501, quoting *Withrow*, 421 US at 58. This Court did not "see such special facts or circumstances in" *Morrow*, *id* at 501-502, and, contrary to Respondent's arguments, no such special facts or circumstances are present here, either.

Respondent argues that disciplinary co-counsel, Lora Weingarten, acted both as investigator and prosecutor. Pet p 9. Respondent fails to explain how this fact standing alone, even if accepted as true, is any violation at all. It is not. Under the long line of authority discussed above, Ms. Weingarten's role – even if accepted as Respondent argues – does not by itself create "an unconstitutional risk of bias in administrative

adjudication," which is a "much more difficult burden of persuasion to carry." *Morrow*, 508 Mich at 500-501, quoting *Withrow*, 421 US at 47. Even accepting Respondent's position, she fails to account for the three additional layers of independent decision makers – the Master, JTC, and this Court – culminating in this Court's *sole* province of making the final adjudication and issuing sanctions. *Morrow*, 508 Mich at 502.

i. Ms. Weingarten Did Not Have a Conflict of Interest.

Because Ms. Weingarten's role by itself does not result in any due process violation, Respondent next posits an absurd "conflict of interest" theory against Ms. Weingarten. Pet pp 15-16. According to Respondent, when Ms. Weingarten was an attorney in the Wayne County prosecutor's office she was tangentially involved in a criminal case where Respondent's relative was incorrectly charged with a felony as an adult even though the defendant was a minor. The case was "correctly" dismissed. Pet p 15. Respondent admits that she and Ms. Weingarten had no discussion or relationship in any way at that time. *Id*. Yet, Respondent's grandsons' mother, Ms. Bressler, unfoundedly speculated and made assertions that the case was dismissed solely because of Respondent's position, implicating Ms. Weingarten in the process. *Id*.

In other words, Respondent believes that, because Ms. Weingarten purportedly drew criticism from Respondent's grandsons' mother for alleged *favoritism* of Respondent in an earlier criminal case, Ms. Weingarten now *disfavors* Respondent to such degree that Ms. Weingarten would compromise her ethics and advance the most severe sanction of removal against Respondent in this administrative proceeding, all to avoid drawing the same criticism from civilian Ms. Bressler. This notion is

unsupported, and is as fanciful as Respondent's proffered explanations in these proceedings when she lied about her knowledge of her son's physical abuse of his sons.

In any event, Respondent's speculative theory falls far short of overcoming the "presumption of honesty and integrity" of disciplinary counsel. *See Morrow*, 508 Mich at 500-501, quoting *Withrow*, 421 US at 47. Disciplinary counsel fully and persuasively addressed the lack of conflict in its response to Respondent's objections to the Master's Report, dated April 29, 2022, at pages 19 to 22 of disciplinary counsel's response brief. The Commission agreed with disciplinary counsel's analysis and was satisfied that Ms. Weingarten was not operating under improper motive or conflict in this proceeding.

ii. <u>There Is No Evidence That Disciplinary Counsel Concealed Exculpatory Evidence Or That Such Alleged Evidence Would Have Changed the Commission's Decision</u>.

Respondent's assertion that Ms. Weingarten concealed exculpatory evidence, therefore depriving Respondent of due process, Pet pp 16-20, is equally farfetched and unavailing, representing yet another desperate grasp at anything to try to establish the extremely high bar necessary to show "special facts and circumstances . . . that the risk of unfairness is intolerably high' in a particular matter[.]'" *Morrow*, 508 Mich at 501, quoting *Withrow*, 421 US at 58. The supposedly "exculpatory evidence" is nothing more than a photograph which Respondent then extrapolates, with pure supposition and conjecture, to mean that the circumstances under which Respondent's grandson allegedly presented it to the witness (Ms. Linda Parker, interviewed at Respondent's request), supports a theory that her grandson was lying about the number of times he

saw his mother during the time period in question, and should therefore be disbelieved for all things.

Specifically, Respondent claims that Ms. Perkins – a witness whom disciplinary counsel interviewed at Respondent's request – advised disciplinary counsel that Respondent's grandson, Max, showed her a photo provided to him by his mother, Ms. Bressler, between December 26, 2017 and June 24, 2018. Respondent alleges that this photo and alleged hearsay proves that Max was not truthful (as opposed to recalling incorrectly) at the hearing when he testified about the limited contact he had with his mother during that period. Respondent further contends that disciplinary counsel violated *Brady v Maryland*, 373 US 83, 87 (1963) (an inapplicable criminal case), by not providing such evidence to her.

Yet, Respondent, who asked disciplinary counsel to interview Ms. Perkins, did not have Ms. Perkins testify about this alleged photo at the Hearing. Nor did she cross-examine Max about the photo allegedly sent to him by his mother. Disciplinary counsel represented in its April 29, 2022 response brief (p 23) that, contrary to Respondent's unsupported contention, "Ms. Perkins never mentioned such a photo to" disciplinary counsel. Even assuming the photo exists, nothing Respondent says about it is inconsistent with Max's testimony or establishes him as a "liar." Respondent contended that Max's mother, Ms. Bressler, *electronically* provided the photo to Max between December 26 of 2017 and June 24 of 2018. Max testified that he saw his mother on December 26 of 2017, which is within this timeframe. Further, since it was allegedly provided electronically, it could have been sent as an attachment to an email. Nothing

in Max's testimony precluded the circumstance that one of the very few emails he received from his mother included a picture as an attachment. There is, once again, no record to support Respondent's claim in this regard, and certainly nothing that rises to the level of overcoming the presumption of honesty and integrity of disciplinary counsel.

But even accepting Respondent's position entirely, including that Max presented the photo to Ms. Perkins as a result of an additional in-person meeting he had with his mother that he did not disclose and that Ms. Perkins told disciplinary counsel about it, Respondent fails to support her theory that disciplinary counsel should have understood or believed that one extra interaction between Max and his mother years earlier was relevant, let alone "exculpatory" for Respondent that needed to be disclosed under MCR 9.232(A)(1)(a), or that such facts meant Max must have been "lying" or would otherwise diminish Max's credibility as to his separate testimony about his father's physical abuse and Respondent's knowledge of it. Further, the Commission would not have deemed Respondent more credible and Max a "confirmed liar" merely on the possibility that he had one extra meeting with his mother years before this proceeding was filed.

iii. Interviews at Kids Talk Did Not Create a Due Process Violation.

Respondent's third attack upon Ms. Weingarten is that Ms. Weingarten was able to secure the "Kids Talk" physical space for interviewing Respondent's grandsons, and that using such space for the interviews created some kind of advantage for disciplinary counsel and incentive or likelihood for Respondent's grandsons to provide

testimony harmful to her. Pet pp 20-22. This attack is, again, based on pure speculation and falls woefully short of demonstrating a due process violation. There is no evidence that the boys had a rapport with their prior interviewer. There is no evidence that they transferred any rapport to disciplinary counsel. There is no evidence that the mere similarity of physical location of the interview would have any impact on the substance of the boys' answers or cause them to testify harmfully about their grandmother. Respondent repeats her argument from below that MCL 722.628(6) restricts the use of the Kids Talk facility to certain agencies and that other statutes precluded the manner in which disciplinary counsel interviewed the boys. Pet pp 20-22. None of the cited statutes provide what Respondent says and, even if they did, Respondent has not and cannot show how she was prejudiced by disciplinary counsel's use of the facility, let alone to such extreme as to constitute a due process violation.

Thus, this Court should hold that Respondent received due process and that she has not met her burden with her unsupported theories and supposition to show any miscarriage of justice from "special facts and circumstances" to overcome the presumptively constitutional process she received.

C. The Preponderance of the Evidence Standard Properly Applies.

Respondent also attacks the well-settled burden of proof applied in this matter. The standard of proof in judicial disciplinary proceedings is the preponderance of the evidence. *In re Haley*, 476 Mich at 189; *In re Morrow*, 496 Mich at 298; MCR 9.233(A). The Michigan Constitution vests the authority for promulgating such standard with this Court. Const. 1963, Art 6, §30(2). Contrary to Respondent's unsupported

argument, this Court's decision to use the preponderance of the evidence standard in judicial disciplinary proceedings is not a due process violation.

Other jurisdictions utilizing the same separation of powers system have similarly concluded that "[r]egulation of the conduct of attorneys [and judges] and disciplining members of the bar are functions entrusted to the judicial branch." *Swiller v. Commissioner of Pub. Health*, N. HHD CV 95-0705601, 1995 Conn Super LEXIS 2844, at *6 (Super Ct Conn Oct 10, 1995); *Graham v. State Bar Ass'n*, 86 Wn2d 624, 628; 548 P2d 310 (1976) (the "Washington State Bar Association . . . is responsible to the Supreme Court, not the legislature or an agency of the executive branch, for the delineation of its responsibilities in the admission, discipline, and enrollment of lawyers").

Respondent's argument (without authority) that, because her "livelihood" is at stake, Pet p 45, there must be a higher burden than the preponderance of the evidence, is directly contradicted by the Michigan Constitution, which expressly contemplates "removal" of judges among the discipline left to this Court to regulate. Const 1963, art 6, § 30. She is a civil servant who committed misconduct, included lying under oath. She is not entitled to more process than Michigan's judicial discipline system afforded her, which she received.

The respondent made the same unavailing argument that the preponderance of the evidence standard constituted a due process violation in *Tirrez v Commn for Lawyer Discipline*, No 03-16-00318-CV, 2018 Tex. App. LEXIS 433, at *11-12 (Tex Ct App Jan 12, 2018). In rejecting respondent's argument, the *Tirrez* court noted that, as

in Michigan, "the proper standard of proof for Commission disciplinary proceedings is preponderance of the evidence" under Texas precedent. *Id*. The respondent in *Tirrez* argued that "attorney disciplinary actions are quasi-criminal and must be proved by clear and convincing evidence pursuant to the Supreme Court's decision in" *In re Ruffalo*, 390 US 544, 88 S Ct 1222 (1968). *Id* at *7. Rejecting this argument, the *Tirrez* court noted that such disciplinary proceedings are not criminal proceedings. *Id* at *9. The same is true in Michigan. *In re Ferrara*, 458 Mich at 372 ("Judicial disciplinary proceedings are unique and 'fundamentally distinct' from all other criminal or civil legal proceedings."), *quoting In re Jenkins*, 437 Mich at 28. In *In re Mikesell*, 396 Mich at 527, the respondent argued that "proceedings for removal are quasi penal in nature," but this Court unequivocally held: "Such is not the case." "It is important to characterize properly the proceedings herein because [this Court is] concerned not with punishing criminality but with maintaining standards of judicial fitness." *Id*.

"'The two judicial systems of courts, the state judicatures and the federal judiciary, ***have autonomous control over the conduct of their officers***[.]'" *Tirrez*, 2018 Tex App LEXIS 433, at *7, quoting *Theard v United States*, 354 US 278, 281, 77 S Ct 1274 (1957) (emphasis added). "'Membership in the bar is a privilege burdened with conditions.'" *Theard*, 354 US at 281, quoting *Matter of Rouss*, 221 NY 81, 84, 116 NE 782, 783 (NY Ct App) (Cardozo, J). Respondent "was received into that ancient fellowship for something more than private gain. [Sh]e became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.'" *Theard*, 354 US at 281, quoting *People ex rel Karlin v Culkin*, 248 NY 465, 470-471, 162

NE 487, 489 (1928). "The power of disbarment," or, in this case, removal, "is necessary for the protection of the public in order to strip a [person] of the implied representation by courts that a [person] who is allowed to hold [themselves] out to practice before them is in 'good standing' so to do." *Theard*, 354 US at 281. Judicial discipline is similarly necessary for the protection of the public. As this Court held in *In re Ferrara*, 458 Mich at 372, "[t]he purpose of such proceedings is to 'protect the people from corruption and abuse on the part of those who wield judicial power.' [citation omitted] Our primary concern in determining the appropriate sanction is to restore and maintain the dignity and impartiality of the judiciary and to protect the public."

It is this Court's constitutional domain to set the standard of proof for this proceeding. Const 1963, art 6, § 30(2). It did so with the preponderance of the evidence standard, which has long been established and utilized, including for removal in many prior cases. Thus, there was no due process violation in applying that standard here. The Commission respectfully submits that this Court need not reconsider such burden of proof for judicial disciplinary proceedings.

D. Respondent Was Not Prejudiced By Having Virtual Hearing Days.

Respondent objected to the Master's decision to conduct the proceedings virtually rather than in person, and maintains her objection in her Petition. Pet pp 10-14. When the Master denied Respondent's motion to conduct the hearing in person via order dated April 2, 2021, and contrary to Respondent's contention that the Master did so for no apparent reason, the Master specifically stated her concern about COVID-19:

> The Master has reviewed and considered Respondent's Motion for In-Person Proceedings. She is aware that some Michigan Courts are holding

> some proceedings in person and is also aware that the state has experienced increased COVID cases since it has started reopening. The hearings days in this matter will last up to 8 hours each. Having contemplated Respondent['s] arguments and the attendant circumstances, the Master is not persuaded that the hearing should take place in person. Therefore, Respondent's motion is denied.

The Master later issued an order regarding hearing and witness protocol on May 25, 2021, which included certain safeguards for handling remote testimony by witnesses. Some of these measures of the Master's May 25, 2021 order included that counsel had to disclose whether they intended to examine a witness remotely or if the attorney would be in the same room with the witness during the examination and present during opposing counsel's cross-examination; witnesses had to certify that they were alone in the room where they testified or identify all individuals present during an examination; witnesses could not access or review any documents or other materials beyond the relevant trial exhibits, pleadings, or transcripts or police reports during their testimony; witnesses could not have a document within reach or sight; witnesses had to certify under oath that no one gave them information (by any means) to assist in testifying; and witnesses could not have access to cell phones, laptops, smartwatches, or similar devices in the room during their examination other than the device they used for their virtual testimony. No issues arose with remote witness testimony during the Hearing. Later, as the Master monitored the pandemic, two hearing dates of October 29 and November 19, 2021 were ordered to be and were held in person at the Washtenaw County court.

As with the due process issues discussed above, the respondent in *Morrow* made the same argument that Respondent makes here, namely that holding the hearing by

virtual means violated MCR 9.231(B). *Morrow*, 508 Mich at 503 n3. This Court noted that, at the time of the hearing in *Morrow*, Administrative Order (AO) No. 2020-19 was in place. *Id*. That same AO was in place when the Hearing in this matter started, including when the Master issued her April 2, 2021 and May 25, 2021 Orders discussed above, as well as through the first three Hearing days conducted in this matter. As this Court recognized in *Morrow*, AO 2020-19 (which was not rescinded until July 26, 2021), "encouraged courts to 'continue to expand the use of remote participation technology (video or telephone) as much as possible to reduce any backlog and to dispose of new cases efficiently and safely.'" *Id*.[6]

This Court continued, "[e]ven assuming, without deciding, that the court rule was violated, we are not convinced that such a violation would entitle respondent to a new hearing held in person, particularly when respondent largely admitted to the allegations against him and was able to thoroughly examine and cross-examine witnesses during the hearing." *Id*, citing MCR 9.211(D) ("An investigation or

[6] The Massachusetts and Texas courts, among others, have affirmed the use of virtual hearings during the pandemic even in criminal cases. *Vazquez Diaz v Commonwealth*, 487 Mass 336, 167 NE3d 822, 828 (Mass 2021) ("a virtual hearing is not a per se violation of the defendant's constitutional rights in the midst of the COVID-19 pandemic."); *Montgomery v State*, No 02-21-00002-CR & No 02-21-00003-CR, 2022 Tex App LEXIS 7440, at *12 (Tex Ct App Oct 6, 2022) ("After balancing the due process factors, it is clear that the State's interest in protecting the public health during the COVID-19 pandemic is significant, as is the State's interest in the timely disposition of cases. [ ] Accordingly, we conclude that the virtual hearing on the State's petition to proceed to adjudication—though not seamless—was not so inadequate that Montgomery was not permitted to participate in the hearing on the State's petition to proceed to adjudication."). The *Montgomery* court, citing the "dearth of Texas case law on the issue," surveyed cases from multiple jurisdictions, including Michigan, that reached similar results. *Montgomery*, 2022 Tex App LEXIS 7440, at *12 n4 (citing cases, including *In re Hudson*, unpublished per curiam opinion of the Court of Appeals

proceeding under this subchapter may not be held invalid by reason of a ***nonprejudicial irregularity*** or for an error ***not resulting in a miscarriage of justice***.") (emphasis added).

In *Morrow*, Justices Viviano and Bernstein concurred in this result. Justice Viviano would have held that MCR 9.231(B) was violated by not holding an in-person hearing, *id* at 514, but "[n]oncompliance with MCR 9.231(B) does not automatically render the proceedings invalid," and Judge Morrow was not entitled to relief because he had "not demonstrated any miscarriage of justice that resulted from his hearing being held remotely." *Id* at 514-515. The "pertinent facts in [*Morrow*] were undisputed," and Judge Morrow "was not deprived of the ability to put on a defense, and he was able to—and in fact did—examine and cross-examine witnesses." *Id* at 515, citing MCR 9.233(A) ("The public hearing must conform as nearly as possible to the rules of procedure and evidence governing the trial of civil actions in the circuit court."). Justice Bernstein concurred to express his continuing concern about the use of videoconferencing, but he considered the circumstances of that case to be unique, as the proceedings took place during a global pandemic and, importantly, the proceedings took place before any vaccinations had been developed and made widely available to the general public. *Id* at 516.

Thus, even considering the differing views of the justices on this topic, and acknowledging that this Court did not make a decision in *Morrow* as to whether MCR 9.231(B) was violated in that case, *see id* at 503 n3, it seems clear and unanimous that

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decided July 22, 2021 (Docket Nos 354381, 355855, 356057).

even a violation of the court rule will not invalidate the proceedings if the error did not result in a miscarriage of justice pursuant to MCR 9.211(D). *Id* at 503 n3 (majority) & at 515 (Viviano, J, concurring) & at 516 (Bernstein, J, concurring).

Respondent tries to differentiate herself from Judge Morrow because, unlike Judge Morrow, she denied the facts of her misconduct, making credibility determinations necessary because every other material witness gave testimony contrary to Respondent's testimony. Thus, it is no doubt true that, unlike in *Morrow*, material facts were disputed in this case since Respondent "categorically denied" everything. Respondent seizes upon this difference from *Morrow* in arguing that conducting virtual hearing days in this case constituted a miscarriage of justice rising to the level of invalidating her proceedings. She is wrong.

As in *Morrow*, Respondent "was able to thoroughly examine and cross-examine witnesses during the hearing." *Id* at 503. The Master included safeguards in her May 25, 2021 Order to aid in preventing improper conduct by remote witnesses, and the two most key witnesses (Respondent's grandsons) were minors who were not likely to be capable of utilizing documents or other improper external aids without being noticed doing so on the video. Respondent argues in generalities without explaining *how* she was actually prejudiced by the remote conduct of the proceedings, or *why* the Master could not sufficiently view Respondent's and her grandsons' respective testimony on the video screen to make credibility determinations.

Most glaringly absent from Respondent's argument is any acknowledgement of the *substance* of the witnesses' testimony. Respondent argues that credibility is "most

effectively" assessed in person, Pet p 12, but this generalized statement makes no assessment of the circumstances of this case. Viewing body language of a witness in person is not the only way to assess credibility. Ms. Apple, who had no motive to lie, gave logical testimony which was consistent not only with Respondent's grandsons' testimony but also with the result of Respondent's son's child abuse trial in which he was convicted of felony child abuse. Because Respondent denied everything, the Master and the Commission necessarily made credibility determinations in deeming Respondent's remarkable, newly-asserted explanations of her prior sworn testimony incredible while deeming CPS worker Ms. Apple and Respondent's grandsons to be extremely credible witnesses. Respondent does not account for her far-fetched, newly concocted explanations and justifications of prior sworn testimony she provided months and years earlier, which the Master and the Commission simply did not believe when rejecting them out of hand as being implausible and untruthful. The Master could see the witnesses on screen and, even on paper, Respondent's explanations strain credulity.

In *Schmitt v Dep't of Children & Families*, 2017 Conn Super LEXIS 557, at *21-22 (Super Ct Conn Mar 22, 2017), the court deferred to a hearing officer's credibility determination that a minor provided truthful testimony even though "[t]he hearing officer did not have an opportunity to make a 'firsthand observation' of [the minor's] conduct, demeanor and attitude because of the agency's regulation prohibiting testimony by a victim of abuse while that victim is a minor." Nevertheless, "substantial evidence supported the hearing officer's decision[.]" *Id*. And the hearing officer "did,

however, have the opportunity to observe the video of [the minor's] forensic interview, to read [the minor's] testimony from the criminal trial, and to hear direct testimony from the school social worker, the principal, teachers, and a private social worker, all of whom knew [the minor] and had formed opinions of her credibility." *Id.* The hearing officer also heard testimony from a department social worker who had interviewed the minor and had observed her forensic interview. *Id.* Most of those witnesses unequivocally testified to the minor's credibility, and the few witnesses who testified that the minor "sometimes lied" were colleagues of the accused abuser. *Id.* The court concluded that the hearing officer was entitled to weigh all of this conflicting testimony, including the minor's testimony even though the hearing officer was not able to observe the minor firsthand, and to make her own assessment of the credibility of these witnesses. *Id.* The hearing officer was also entitled to consider the voluminous documentary evidence submitted, which contained, among other things, testimony from the criminal trial and from the termination hearing. *Id.* Having reviewed the evidence that was before the hearing officer, the court could not conclude that the weight of the evidence contradicted the hearing officer's factual findings. *Id.*

In this case, the Commission considered the record as a whole, which included, among other things, the testimony of Ms. Apple, the testimony of officer Adams, Max's and Russell's testimony, Respondent's testimony from the juvenile court case, Respondent's written answers to the Commission's investigator's questions, and Respondent's new explanations under oath to the Master for her prior testimony and answers. The Master and the Commission were well-positioned to assess Respondent's

lack of credibility and the much more credible testimony of the witness she calls liars, including the abuse victims, her grandsons.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Commission's Decision, the Commission asks this Court to reject Respondent's Petition, and to instead accept in full the Commission's recommendation to remove Respondent.

DYKEMA GOSSETT PLLC

Dated: November 3, 2022

By: /s/ *William B. Murphy*

William B. Murphy (P18118)
Mark J. Magyar (P75090)
Commission Counsel for the Michigan Judicial Tenure Commission
201 Townsend St, Suite 900
Lansing, Michigan 48933
Telephone: (517) 374-9100
WMurphy@dykema.com
MMagyar@dykema.com

STATE OF MICHIGAN
MI Supreme Court

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Lora Weingarden Judicial Tenure Commission P37970	weingardenl@courts.mi.gov	e-Serve
Henry Saad Plunkett Cooney 24177	hsaad@plunkettcooney.com	e-Serve
William Murphy Dykema Gossett PLLC 18118	wmurphy@dykema.com	e-Serve
Glenn Page Judicial Tenure Commission P31703	pageg@courts.mi.gov	e-Serve
Michael Ashcraft Plunkett Cooney P46154	mashcraft@plunkettcooney.com	e-Serve
Julie Paas Dykema Gossett	jpaas@dykema.com	e-Serve
Monique Vanderhoff Plunkett Cooney	mvanderhoff@plunkettcooney.com	e-Serve
Debra Vacca Plunkett Cooney	dvacca@plunkettcooney.com	e-Serve

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