IN THE SUPREME COURT
STATE OF WYOMING

OCTOBER TERM, A.D. 2015

An Inquiry Concerning the Honorable Ruth Neely, Municipal Court Judge and Circuit Court Magistrate, Ninth Judicial District, Pinedale, Sublette County, Wyoming Judge Ruth Neely Petitioner, v. Wyoming Commission on Judicial Conduct and Ethics Respondent.	No. J-16-0001

AMICUS BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF THE HONORABLE RUTH NEELY'S PETITION OBJECTING TO THE COMMISSION'S RECOMMENDATION

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SUMMARY OF ARGUMENT

After over twenty years of undisputedly sterling service, Judge Ruth Neely faces the loss of her judicial offices simply because she publicly expressed a "decent and honorable religious" belief about marriage which is shared by many state and federal judges across the country. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). Contrary to U.S. Supreme Court guidance on this issue, the Wyoming Commission on Judicial Conduct and Ethics has declared that Judge Neely's beliefs are so "repugnant" that any judge who publicly expresses them "cannot remain in office." That blatant hostility to traditional religious beliefs about marriage violates both the United States and Wyoming Constitutions.

Sex, marriage, and religion are deeply important issues about which Americans hold a variety of beliefs. The freedom to form one's own beliefs about these issues—and to express those beliefs—is protected by the U.S. Constitution as central to each citizen's own dignity and self-definition. *Obergefell*, 135 S. Ct. at 2593. For religious citizens, as Justice Kennedy recently explained, living according to their religion "is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts." *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). This freedom includes not just the right to privately hold religious beliefs, but also the right to express them—*i.e.*, to "establish one's religious . . . self-definition in the political, civic, and economic life of our larger community." *Id.*

The Supreme Court's *Obergefell* decision illustrates this principle. The Court recognized that marriage is a "transcendent" issue about which individuals should remain

free to make their own decisions, without government coercion. *Obergefell*, 135 S. Ct. at 2594, 2599-2604. The Court fully understood that, for millions of Americans, a marriage is also a fundamentally *religious* event—one that "is sacred" and forms "a keystone of our social order." *Id.* at 2594, 2601. The Court saw no problem with people and institutions holding the "decent and honorable religious or philosophical" belief that marriage is limited to opposite-sex unions and recognized that this belief is held "in good faith by reasonable and sincere people." *Id.* at 2602, 2594. Instead, it emphasized that the constitutional problem arises when the State itself makes citizens into "outlaw[s]" or "outcast[s]" for pursuing a less popular view of marriage. *Id.* at 2600.

The same pluralism that animates *Obergefell* is commanded by decades of First Amendment doctrine and by the terms of Wyoming's constitution. *See W. Va. St. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943); Wyo. Const. art. 1, § 18. The Commission is no more permitted to punish Judge Neely for living according to her view of marriage in Wyoming than Ohio was free to punish Mr. Obergefell for living according to his view of marriage in Ohio. Or, as one recently-married same-sex couple in Pinedale put it, "it would be obscene and offensive to discipline Judge Neely for her statement . . . about her religious beliefs regarding marriage." C.R. 902.

The Commission offers two reasons to depart from this principle. First, it argues that Judge Neely and those judges who share her beliefs suffer from an "inability to apply and follow the law," which is what "renders [them] incompetent to perform as a judge." Order at 6. But the law does not even authorize, much less require, Pinedale municipal judges to perform marriage ceremonies. Nor does the law require Sublette County magistrates to

perform marriage ceremonies; it merely allows them the discretion to do so and allows them to cite many reasons—including schedule, relationship, and convenience—for declining to perform particular ones. This poses no barrier to same-sex marriages because there are plenty of other individuals in Pinedale who will perform them. There is no evidence that anyone in Pinedale who has wanted a marriage of any type has failed to receive it promptly, courteously, and professionally.

Second, the Commission argues that banning Judge Neely and those with similar beliefs from the bench is necessary to avoid the perception of bias. But in two decades of serving as a judge, no one has ever complained that Judge Neely was biased. The only evidence is to the contrary: Judge Neely has been an exemplary judge who treats LGBT citizens, like all other citizens, with impartiality and fairness both inside and outside her courtroom. Further, Wyoming already has a means for addressing possible or perceived bias: recusal. Yet the Commission instead chooses a far more drastic, disproportionate punishment: complete removal from any judicial position, regardless of whether that position is authorized to perform marriages. Such overreach evinces the targeted and discriminatory nature of the Commission's actions.

If this Court were to sanction the Commission's extreme position, it would purge the Wyoming judiciary of people who hold and exercise "decent and honorable religious" beliefs about marriage. That is both unnecessary and unconstitutional.

ARGUMENT

I. The Commission's recommendation to remove Judge Neely from judicial office violates Article 1, section 18 of the Wyoming Constitution.

The Wyoming Constitution places unusually strong emphasis on religious liberty, both in its language and in its structure. The Constitution's preamble identifies religious liberty as an animating reason for establishing the Constitution in the first place. *See* Wyo. Const. preamble. Its main free exercise guarantee is not only very strong, it is also placed in the Declaration of Rights and must thus be construed liberally to protect individual liberty. *Id.* art. 1, § 18. Yet another free exercise guarantee broadly protects religious liberty in public schools. *Id.* art. 7, § 12. And the Constitution's final article once more re-affirms the right to religious liberty and places that guarantee among just a few others that can be repealed only with the express consent of the U.S. Congress. *Id.* art. 21, § 25. Simply put, Wyoming's constitution ensures religion receives the broadest possible protection from government encroachment.

That strong and repeatedly reinforced commitment to religious liberty in the text of the Constitution is reinforced by the history of the text's enactment. Indeed, the framers of the Constitution actually considered a closely analogous but *even harder* question than the one presented here: whether Wyomingites must be banned from public office for holding and expressing deeply unpopular religious views in favor of polygamous marriage. And the framers came down on the side of protecting religious liberty. This combination of text and history—particularly of Article 1, section 18—confirm that the Commission's recommendation cannot stand.

A. The text and history of Article 1, section 18 show that religious views on marriage do not render a judge incompetent to hold public office.

Article 1, section 18 of the Wyoming Constitution provides a robust, specific guarantee of religious liberty by stating that Wyoming citizens cannot be removed from public office because of their religious beliefs. And because that guarantee is located in the Declaration of Rights section of the constitution, it must be construed liberally to protect individual liberty. *Vasquez v. State*, 990 P.2d 476, 485 (Wyo. 1999) (quoting Robert B. Keiter and Tim Newcomb, *The Wyoming State Constitution, A Reference Guide* 11-12 (1993)).

Section 18 provides:

> The free exercise and enjoyment of religious profession and worship without discrimination or preference shall be forever guaranteed in this state, and no person shall be rendered incompetent to hold any office of trust or profit, or to serve as a witness or juror, because of his opinion on any matter of religious belief whatever; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state.

Wyo. Const. art. 1, § 18. This section begins generally, "forever guarantee[ing]" the "free exercise" of "religious profession and worship." Within this broad right, it defines a specific protection: any person can hold "any office of trust" regardless of "his opinion on any matter of religious belief whatever." Several aspects of this language are important.

First, by protecting "free exercise," the language protects not just religious *beliefs*, but the *exercise* of those beliefs through action and abstention. *In re LePage*, 18 P.3d 1177, 1181 (Wyo. 2001) (stating that Section 18 protects "the free exercise of religion" from "governmental interference"); *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) ("exercise of religion" includes "the performance of (or abstention from) physical acts").

Second, unlike the federal free exercise clause, which "simply attempts to restrain governmental action," Wyoming's language "is of a distinctively stronger character" and "expressly grants affirmative rights" to the free exercise of religion. *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990) (construing similarly strong language in the Minnesota constitution). The federal constitution restricts government from "prohibiting" religious exercise, U.S. Const. amend. I; Wyoming "forever guarantees" religious exercise. Wyo. Const. art. 1, § 18.

Third, the protection for service in public office in Section 18 is significantly more explicit than the guarantees in state and federal counterparts. While those constitutions ban "religious Test[s]" for public office, *see, e.g.*, U.S. Const. art. VI, Wyoming prohibited *any* government action that rendered *any* person incompetent from holding "*any* office of trust or profit" based on "*any* matter of religious belief *whatever*." Thus, Wyoming citizens are protected not just from the narrow test oaths often imposed at the time of the founding—such as questions about whether they are "presbyterians, episcopalians, baptists, or quakers"—but from any type of disqualification from office based on religion. *See Essays on the Constitution of the United States, Published During Its Discussion by the People 1797—1788* at 169 (Paul L. Ford ed., 1892) (reprinting essay by Oliver Ellsworth, later Chief Justice of the U.S. Supreme Court) (hereinafter *Essays on the Constitution*).

Finally, Wyoming's broad guarantees of religious freedom are limited only in that they cannot justify "acts of licentiousness" or a threat to "the peace or safety of the state." But even that limitation helps illuminate the breadth of the guarantees. If the framers had only meant to cover belief and expression, there would have been no need to place a limit on

only a particular specified set of "acts." And by specifying which "permissible countervailing interests of the government" may "outweigh religious liberty," the Wyoming Constitution forecloses the argument that *other* interests might also outweigh religious liberty. *Hershberger*, 462 N.W.2d at 397 (construing identical language); *Walters v. State ex rel. Wyo. Dep't of Transp.*, 300 P.3d 879, 884 (Wyo. 2013) (it is a "fundamental rule" that the "doctrine of *expressio unius est exclusio alterius* requires us to construe a statute 'that enumerates the subjects or things on which it is to operate . . . as excluding from its effect all those not expressly mentioned.'" (internal citation omitted)).

The history of Article 1, section 18 confirms its broad scope. *See Dworkin v. L.F.P., Inc.*, 839 P.2d 903, 910 (Wyo. 1992) (the "history" and "proceedings of our state constitutional convention" are "a valuable aid in interpreting the scope of a provision of the state constitution"). Before adopting its broad free exercise language, the Wyoming Constitutional convention considered much weaker language, which limited the protection of religious freedom to "matters of religious sentiment, belief, and worship," and which protected public officeholders solely from being forced to meet "religious qualification[s]." *Journal and Debates of the Constitutional Convention of the State of Wyoming* 168 (The Daily Sun, Book and Job Printing 1893) (hereinafter *Journal*). The convention's decision to reject that language is illuminating.

First, by protecting "free exercise" and "liberty of conscience" instead of mere "sentiment, belief, and worship," the convention again showed that it wasn't protecting merely thoughts and words, but religiously motivated conduct. Second, by rejecting language that would have forbidden only "religious qualification[s]" for public office, the

convention showed that it wanted to do more than merely ban test oaths. Federal and state provisions banning such oaths had a similar general aim as Wyoming—preventing government officials from "incapacitat[ing] more than three-fourths of the American citizens for any publick office" and "degrad[ing]" the excluded groups "from the rank of freemen," *Essays on the Constitution* at 169; and allowing "[t]he people [to] employ any wise or good citizen in the execution of the various duties of the government." *Pamphlets on the Constitution of the United States, Published During Its Discussion by the People, 1787—1788* at 146 (Paul L. Ford ed., 1888) (hereinafter *Pamphlets on the Constitution*). But Wyoming could hardly have been clearer that it wanted to do more—it wanted to remove every impediment to public office based on "*any* matter of religious belief *whatever*."

Two related convention debates concerning the scope of Section 18 are particularly revealing. First, the convention considered an amendment "aimed at the state's Mormon population," which would have limited Section 18's broad protections by "prohibit[ing] anyone who entered into or believed in polygamy from . . . holding public office." Robert B. Keiter & Tim Newcomb, *The Wyoming State Constitution* 69 (2011). The text of the amendment banned from "any civil office" anyone who "is a bigamist or polygamist, or is a believer in or enters into what is known as plural or celestial marriage." *Journal* at 837. When the language was offered at the convention, the proponents successfully moved to suspend the rules and immediately consider the language. *Id.* at 837.

Two delegates then rose in opposition to the amendment. Before addressing the substance of his objection, the first delegate noted that he did "not think it . . . right or just"

that the language was "offered now at this last day without any notice" and that while he expected that proponents of the language had a "pocketful of speeches prepared upon this question," he did not. *Id.* at 838. Shifting to the substance, he then argued that "the language of this section will have a bad effect upon a good many good citizens of Wyoming." *Id.* Further, he explained, the nature of their beliefs "make[] little difference" "if they are good, law abiding citizens," and he believed that it was clear that "while [Wyoming] may be populated with a good many of this class of people who believe this way, they have proved themselves to be law abiding citizens and peaceful citizens." *Id.* He also argued that the language inappropriately "point[ed] directly at one class of individuals" and showed "a lack of confidence"—a "weakness"—that "we are not going to be able to cope with these people in Wyoming" even though they "[n]ever caused any trouble in our territory." *Id.* He urged the convention to "do what is right" and reject the language. *Id.*

The second delegate emphasized that the language targeted Mormons, and he opposed it "not because I have any personal sympathy with the[ir] religious convictions," but because "I don't believe in selecting one class of crime, or in singling out a special religious sect in the territory." *Id.* at 839. The delegates then voted to rescind their prior vote to consider the language. *Id.* at 839-40. Afterwards, a proponent of the language admitted that the intended target was indeed Mormons, and that "[t]he percentage of Mormons is less than one percent of the population of Wyoming." *Id.* at 842.

This history shows that the broad protections of Section 18 were meant to powerfully insulate minority religious views on marriage that were contentious, unpopular, and contrary to established public policy. *The Wyoming State Constitution* 69 (2011) (rejecting

the amendment was a "[s]ignificant" move, since failing to do so "would have diminished the principle of religious tolerance").

The second related debate, this time over whether to subject jurors to a religious test to ensure their honesty, reinforces the same point. The convention rejected religious tests for jurors because the State "should take the man for what we know him to be without any reference to what he professes to believe." *Journal* at 720-21. Imposing a religious test would inappropriately counter the Constitution's desired "breadth and freedom from all prejudice." *Id.* at 720.

This debate helps illustrate why the convention was willing to keep public office open to individuals who held and expressed such a disfavored religious view of marriage as polygamy. In the mind of the framers, the important question was not what a person believed and expressed about marriage—or what the community thought about those beliefs—but rather simply whether the person could do the job.

B. The Commission's recommendation violates Article 1, section 18.

The Commission's recommendation violates both the text and spirit of Section 18. The "office of judge" is an "office of trust or profit" within the meaning of the Constitution, and the Commission does not argue otherwise. *See State v. Jefferis*, 178 P. 909, 915 (Wyo. 1919); *see also* Preamble, Wyo. Code of Judicial Conduct ("the judicial office [i]s a public trust"); Order at 6 (assuming judicial office qualifies as an "office of trust"). The Commission also ruled that Judge Neely is "incompetent to hold . . . office" because of her expression of her "opinion on . . . [a] matter of religious belief." Wyo. Const. art. 1, § 18. Both its final order and its theory of prosecution condemned Judge Neely for "express[ing]

. . . her inability to perform same sex marriages," which it admitted was her "opinion regarding same-sex marriage" and was based on "her honestly held religious belief." Order at 5. Thus, the Commission's recommendation strikes at the heart of Section 18.

The Commission tries to dissemble on this point and say its action is about her "inability to apply and follow the law" and not her religious "opinion on same-sex marriage." Order at 6. But that fails for three reasons. First, the Commission's dodge fails on its own terms: there is no evidence before this Court that Judge Neely has ever failed to apply or follow the law. No law requires her to perform marriage ceremonies. The Commission conceded at oral argument that a magistrate or circuit judge does *not* have a "duty to perform marriages" and that the power is "discretionary." C.R. Vol. 7, Part 1 at 42; *accord id.* ("I don't think that a magistrate or a circuit judge, just because someone comes into the office and asks them to do a marriage, has to do the marriage."). And the relevant statute which enables magistrates to choose to perform a marriage ceremony applies equally to, among others, "every licensed or ordained minister of the gospel, bishop, priest [and] rabbi." Wyo. Stat. § 20-1-106(a). Surely the Commission does not mean to suggest that this same statute likewise creates an obligation on clergy to personally perform wedding ceremonies for everyone who walks into their church, parish, synagogue, or mosque. Moreover, to the extent that Judge Neely does perform marriages, she does so voluntarily. Judge Neely receives no salary as a part-time magistrate and has never been paid by the State to perform marriages as a magistrate. C.R. 502-04; Wyo. Stat. § 5-9-213 (setting terms of payment for part-time magistrates). Rather, the only State payments for her service as a magistrate have been for activities such as holding a bail hearing or providing a warrant. *Id.*

Second, the Commission clearly admitted that it *does* hold Judge Neely's religious opinion about marriage in contempt. Most obviously, it concluded that expressing her religious belief about marriage "manifested a bias" that is "antithetical to the important role of judges in our democracy." Order at 5. The Commission likewise emphasized that "Judge Neely's inability to perform same sex marriages was not based upon her schedule, but on her religious beliefs." Order at 2. If Judge Neely's decision *had* been schedule-based (or based on any number of other criteria, such as geography, familiarity, friendship, or kinship), then she would not have been punished. C.R. 361-62, 372, 438, 465. Indeed, unlike Judge Neely—a part-time magistrate who is not paid by the State to do weddings and who was only asked about same-sex weddings as a hypothetical—her supervisor, full-time Circuit Court Judge Curt Haws, declined an *actual* request to officiate a same-sex wedding in the regular course of his paid judicial service. C.R. 372. He declined because of a scheduling conflict, and he is not facing punishment. *Id*. Thus, the Commission does not believe that declining to perform same-sex weddings for "scheduling" purposes is "antithetical" to a judge's role. Instead, it is precisely because Judge Neely said she would respectfully decline *based on her religious belief* that the Commission seeks to punish her. And, in fact, Commission representatives have repeatedly attacked Judge Neely's beliefs as "repugnant," "cast[ing] the Wyoming judiciary" into "disrepute," and as "tarnish[ing]" the reputation of the State. C.R. Vol. 7, Part 1 at 52, 73; C.R. 57.

Finally, Judge Neely has *two* relevant sincere religious opinions at issue: first, about the nature of marriage, and second, about her inability to personally perform marriages which violate that first belief. And it is precisely because of those two beliefs that the Commission

found her incompetent to perform as a judge. Order at 4 (condemning "announcing her position against same sex marriage and her decision not to perform said marriages"). Indeed, the Commission did not introduce evidence that Judge Neely was unable to do the basic functions of her job, such as adjudicate ordinance violations or hold bail hearings. Nor did it introduce actual evidence of bias or partiality by Judge Neely. In fact, a member of the Commission's Adjudicatory Panel conceded that, with the exception of her stated religious belief, "Judge Neely has served the community well" and that "there's been no evidence that she's done anything except be a well-recognized and respected judge in the community[.]" C.R. Vol. 7, Part 1 at 32. And the record shows that LGBT citizens in Pinedale have full confidence in Judge Neely's ability to adjudicate their cases regardless of her beliefs on marriage. C.R. 901 ("I consider [Judge Neely] to be a conscientious, fair, and impartial person. I have no doubt that she will continue to treat all individuals respectfully and fairly inside and outside her courtroom"); *see also* C.R. 884-902 (affidavits of Pinedale citizens affirming Judge Neely's impartiality).

Thus, the Commission has missed the lesson, and violated the rule, of Section 18. Instead of "tak[ing] the [Judge] for what we know h[er] to be without any reference to what [s]he professes to believe," *Journal* at 720-721, the Commission is disregarding her undisputedly sterling service record and punishing her for holding and expressing her opinions on a "matter of religious belief." Wyo. Const. art. 1, § 18.

Nor can punishing Judge Neely be excused on the ground that expressing her religious beliefs was an "act[] of licentiousness" or "inconsistent with the peace and safety of the state." *Id.* As the U.S. Supreme Court explained in *Obergefell*, her beliefs are "decent and

honorable," are held "in good faith by reasonable and sincere people," and are entitled to protection. 135 S. Ct. at 2602, 2594. That the Commission disagrees with them does not make them either "licentious" or a threat to "peace and safety."

It is not hard to see what is going on here. The Commission strongly disagrees with Judge Neely's religious beliefs about marriage. It considers such beliefs about marriage to be "the equivalent of thinking that "black students" must attend "segregated schools," and it thinks such beliefs must be consigned to "churches" and "coffee shops." C.R. Vol. 7, Part 1 at 36, 44. It is attempting to remove her from judicial office because of those beliefs. That is a textbook violation of Section 18.

The better course is the one the Wyoming framers adopted. Instead of marriage-viewpoint litmus tests on public service, which will have a "bad effect upon a good many good citizens of Wyoming" and "singl[e] out a special religious [belief]" for punishment, public office should be open to any "wise or good citizen" who can do the job. *Journal* at 838-839; *Pamphlets on the Constitution* at 146. Here, Judge Neely is not only capable of doing her job, but has been doing it very well for decades. C.R. 884-902. Her religious beliefs on marriage should not disqualify her from adjudicating traffic tickets.

II. The Commission's recommendation to remove Judge Neely from both of her judicial positions violates the Free Exercise Clause of the U.S. Constitution.

The Commission's recommendation also violates the federal Free Exercise Clause because it targets her religious beliefs, is not neutral or generally applicable, and fails strict scrutiny.

A. The Commission's recommendation impermissibly punishes Judge Neely for her religious beliefs.

The Free Exercise Clause, which was made applicable to the States by the Fourteenth Amendment, forbids any law "prohibiting the free exercise [of religion]." U.S. Const. amend. I. At a bare minimum, this means that the government cannot penalize "religious *beliefs* as such." *Sherbert v. Verner*, 374 U.S. 398, 402 (1963). Any attempt to "punish the expression of religious doctrines" or "impose special disabilities on the basis of religious views" is categorically forbidden, *Smith*, 494 U.S. at 877—meaning that the government does not even get to try to justify its actions under strict scrutiny. *See, e.g.*, *Torcaso v. Watkins*, 367 U.S. 488 (1961) (not applying strict scrutiny); *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) ("The freedom to hold religious beliefs and opinions is absolute.").

As explained above, punishing religious belief is precisely what the Commission has attempted to do here. Judge Neely is not required by her job to perform same-sex marriages and has never even been asked to do so. Instead, she is being punished for stating "her honestly held religious belief" and her "opinion regarding same-sex marriage." Order at 2, 5. Nor is it any answer to say that she is being punished for the "act" of stating her belief to others; the Free Exercise Clause categorically protects *both* "the *act* of declaring a belief in religion" and "the act of discussing that belief with others." *McDaniel v. Paty*, 435 U.S. 618, 635 (1978) (Brennan, J., concurring).

B. The Commission's recommendation is not neutral because it targets Judge Neely's religious conduct.

Even assuming the Commission was regulating only Judge Neely's *conduct*—not her beliefs—the Commission still violated the Free Exercise Clause. Under the Free Exercise

Clause, restrictions on religious conduct are subject to strict scrutiny unless they are both "neutral" and "generally applicable." *Smith*, 494 U.S. at 880. Here, the proposed punishment of Judge Neely is neither.

A government action is not "neutral" if its "object or purpose" is to "restrict practices because of their religious motivation." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993); *Smith*, 494 U.S. at 877 (government unconstitutionally restricts free exercise where it "sought to ban . . . acts or abstentions [from acting] only when they are engaged in for religious reasons, or only because of the religious belief that they display."). Although the Commission claims that its action was "facially neutral", Order at 5, the Supreme Court has held that "[f]acial neutrality is not determinative." *Lukumi*, 508 U.S. at 534. Rather, the Free Exercise Clause also forbids "covert suppression" of religion and "subtle departures from neutrality." *Id.*

Here, there is nothing "subtle" about the Commission's effort to punish Judge Neely because her conduct is religiously motivated. If Judge Neely had declined to perform a same-sex wedding for any number of *other* motivations—for example, because she wanted to perform marriages only for her friends and family, only at certain times or locations, or only when it didn't conflict with her "fishing," "football game[s]," or getting her "hair done"—or even because she "just d[id]n't feel like it"—that would be permissible. C.R. 361-62, 372, 438, 465. But because she expressed her religious motivation, the Commission seeks to punish her.

The Commission's own words confirm its intent to target Judge Neely's religious motivation. It specifically faulted her for "giv[ing] precedence to her *religious beliefs*."

C.R. 55 (emphasis added). It said that her beliefs constituted "a *discriminatory attitude* toward the LGBT community" that made her incapable of acting "impartially." *Id.* at 58 (emphasis added). It gratuitously invoked her religious denomination, stating that the Code "makes no exception for members of the Missouri Synod of the Lutheran church." *Id*. at 54. And it intimated that "*her opinions* [on marriage] were not judicially appropriate." *Id.* at 56.

The Commission's prosecutor—who acts on behalf of the Commission—went even further. He condemned Judge Neely's religious beliefs as "every bit as repugnant as I found the Mormon Church's position on black people." C.R. Vol. 7, Part 1 at 73-74. He impugned the sincerity of her "quote, sincere religious conviction." C.R. Vol. 7, Part 2, at 7. And he recommended sanctioning her $40,000 because of what he called her "holy war." C.R. Vol. 7, Part 2 at 7, 38.

The Commission's choice of the most draconian punishment available further confirms that its action was not religiously neutral. As the Supreme Court has said, "gratuitous restrictions" on religious conduct suggest that the government "seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation." *Lukumi,* 508 U.S. at 538. The same is true of gratuitous punishment. Here, the Commission acknowledged that the law was unsettled. This was "a very big issue that has not really been decided." C.R. Vol. 7, Part 1 at 17. "[T]here were no formal Wyoming ethics opinions out there." C.R. Vol. 7, Part 2 at 14. And even looking to *other* jurisdictions, there were "no decided cases . . . on th[is] question[]." C.R. Vol. 7, Part 1 at 72, 76. Yet of all the possible sanctions it could have chosen for a judge facing a novel and uncertain

situation—warning, censure, recusal, *etc.*—it chose the harshest: removal from office. And not just removal from the volunteer magistrate position where Judge Neely might perform marriages, but removal from a municipal judgeship where she cannot perform any marriages. If the Commission simply wanted to deter Judge Neely and others from voicing their religious beliefs about marriage publicly, a warning or censure would suffice. But the use of the harshest punishment available suggests that the Commission did not merely want to keep Judge Neely quiet, but to punish her because the Commission disapproved of her religious beliefs.

Finally, to determine whether a government action is neutral, courts should examine "the specific series of events leading to" the action. *Lukumi*, 508 U.S. at 540 (opinion of Kennedy, J.). Here, those events show that the investigation of Judge Neely was hardly neutral. The investigation was initiated by the Executive Director of the Commission, Wendy Soto, who had also served on the Board of Wyoming Equality, a leading LGBT-rights organization. C.R. 31. When Ms. Soto overheard the Chair of the Wyoming Democratic Party describing a newspaper article about Judge Neely's religious beliefs, she asked the Chair to send her the article and encouraged her to file a complaint. *Id.* at 75-78. On the same day she received the article, Ms. Soto selected an Investigatory Panel and initiated an "own motion" proceeding against Judge Neely—a rare type of proceeding that Ms. Soto had never initiated against any other judge. *Id.* at 55-56. Most importantly, Ms. Soto admitted that she would not have initiated an investigation if Judge Neely had offered a nonreligious reason for declining to perform same-sex marriages, such as that she only married friends or family, only performed marriages within a particular geographic area,

or simply "didn't feel like" performing a marriage. C.R. 438. This confirms that Judge Neely never would have been investigated, much less punished, but for her religious motivation.

C. The Commission's recommendation is not generally applicable because it favors nonreligious conduct.

The Commission's recommendation is also subject to strict scrutiny because it is not generally applicable. One way to show that a law is not generally applicable is to show that the government has discretion to make exceptions based on an "individualized governmental assessment of the reasons for the relevant conduct." *Smith*, 494 U.S. at 884. The reason for this rule is simple. When the government applies an "across-the-board" prohibition on all conduct, there is little risk that it is discriminating against religious conduct. *Id.* But when an open-ended law lets government officials grant exceptions on a case-by-case basis, there is a risk that the law will be "applied in practice in a way that discriminates against religiously motivated conduct." *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3rd Cir. 2004) (citing *Smith*). That risk justifies strict scrutiny. *Id.*

The Tenth Circuit's decision in *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004) is instructive. There, a former student in a state university acting program sued the university under the Free Exercise Clause, alleging that it had pressured her to say certain curse words or "take God's name in vain" in violation of her religious beliefs. *Id.* at 1280. In response, the university claimed that it was simply enforcing a neutral curricular requirement that all acting students recite their scripts as written. The Tenth Circuit, however, ruled against the university. Noting that the university had made exceptions to its

curricular requirement in the past, the Court held that there was a material dispute of fact over whether the university "maintained a discretionary system of making individualized case-by-case determinations regarding who should receive exemptions from curricular requirements." *Id.* at 1299.

Here, the Executive Director of the Commission, Ms. Soto, admitted that she had discretion to make case-by-case decisions about whether to initiate investigations. She said that she could decline to report a magistrate who refused to remarry individuals who had repeatedly been divorced, or even a magistrate who refused to conduct *any* marriages until same-sex marriage was legalized. C.R. 439-40. She also admitted that she would not have initiated an investigation if Judge Neely had expressed an unwillingness to perform same-sex marriages for various nonreligious reasons (she didn't feel like it, didn't like marrying strangers, didn't like traveling, etc.). C.R. 438. In other words, the initiation of an investigation by the Commission "just depends on what the specific circumstances were, or what the information was." C.R. 443. This is a textbook example of an "individualized governmental assessment of the reasons for the relevant conduct," and it therefore requires strict scrutiny. *Smith*, 494 U.S. at 884.

The Commission's action is also subject to strict scrutiny because it represents a "value judgment in favor of secular motivations, but not religious motivations." *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3rd Cir. 1999). In *Lukumi*, for example, the city argued that its ban on animal slaughter was a generally applicable rule designed to promote public health and prevent animal cruelty. But the Supreme Court rejected that argument, noting that the ordinances exempted a wide variety

of conduct that also undermined the government's interest in public health and preventing animal cruelty, such as hunting, pest control, and euthanasia. 508 U.S. at 543-44. Similarly, in *Fraternal Order*, the Third Circuit struck down a police department policy that prohibited police officers from growing beards for religious reasons, but allowed beards for medical reasons, concluding that this represented an unconstitutional "value judgment in favor of secular motivations, but not religious motivations." *Fraternal Order*, 170 F.3d at 366.

The same is true here. According to the Commission, magistrates can decline to perform marriages for a variety of nonreligious reasons—such as a desire to marry only friends and family, only at certain times or locations, or only when it doesn't conflict with their "fishing," "football game[s]," or "hair" appointments. C.R. 361-62. Judge Neely's own supervisor declined to perform a same-sex marriage in Pinedale because he was doing a "performance" in Jackson, and he obviously faced no punishment. C.R. 372. The Commission even admitted that magistrates can decline to perform same-sex weddings simply because they "don't feel like it." C.R. 438 (Soto admission). Yet when Judge Neely says that she would decline based on her religious beliefs, she is punished. This is a quintessential example of a "value judgment in favor of secular motivations, but not religious motivations." *Fraternal Order*, 170 F.3d at 366; *see also Lukumi*, 508 U.S. at 543. Accordingly, strict scrutiny is required.

D. The Commission's recommendation fails strict scrutiny.

Strict scrutiny is the "most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997); *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015)

(applying strict scrutiny to judicial ethics restrictions on a judicial candidate's speech); *Rep. Party of Minn. v. White*, 536 U.S. 765 (2002) (same). To pass this scrutiny, the Commission must prove that its recommendation to ban Judge Neely from judicial office is the "least restrictive means" of achieving a "compelling state interest." *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981); *accord Washakie Cnty. Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 333 (Wyo. 1980) (same). It cannot do so.

1. There is no compelling interest in requiring Judge Neely to perform wedding ceremonies that violate her faith.

As the unanimous U.S. Supreme Court explained, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (internal citation omitted); *Miller v. City of Laramie*, 880 P.2d 594, 597 (Wyo. 1994) (government has the "onerous burden of demonstrating clearly and precisely that the ordinance is, in fact, applied in a nondiscriminatory manner"). Here, there are three reasons the government does not have a compelling interest to force Judge Neely to violate her faith.

First, as shown above, Judge Neely is not required by law to perform *any* weddings, much less those that directly violate her faith. The law cannot treat as compelling what it does not even bother to require.

Second, as also shown above, the law does not have a compelling interest in privileging secular motivations over religious motivations. *Fraternal Order*, 170 F.3d at 366; *see also Lukumi*, 508 U.S. at 543. That is what the Commission seeks to do here. The Commission permits Judge Neely to tell same-sex couples, as Judge Haws did, that she will not do their

weddings because of scheduling conflicts. It likewise permits her to cite relational, geographical, or financial motivations. But it specifically bans her from relying on her religion. That "[]discriminatory manner" of enforcement is not even constitutional, much less compelling. *Miller*, 880 P.2d at 597.

Third, there is no compelling interest in requiring judges to adopt the government's views on marriage. The Commission argues that it has an interest in protecting same-sex couples from the perception of bias and partiality, and that this interest is implicated because of Judge Neely's beliefs on marriage and the public's awareness of that belief. Order at 5-6. But this fails for a number of reasons.

To begin with, it is too general. "[S]trict scrutiny" requires courts to "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006). This is a tall order, and the Commission failed to take the first necessary step: "offer[ing] evidence" *proving* that its interest was threatened by a judge who exercises her legal discretion to decline to perform certain marriages. *Id.* at 437.

Further, even if some found it offensive that Judge Neely said she would decline to personally perform a same-sex marriage and would refer inquiring same-sex couples to a different judge, there is no compelling interest in shielding individuals from offense. Rather, a "bedrock principle underlying the First Amendment" is that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011); *Sherbert*, 374 U.S. at 402

("Government may . . . [not] penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities"). That is particularly true here, where Judge Neely is expressing a "decent and honorable religious" belief held by "reasonable and sincere people" across Wyoming. *Obergefell*, 135 S. Ct. at 2594, 2602. The goal of non-offense would also directly threaten the ability of judges to participate in the religious communities that hold such "decent and honorable religious" beliefs. *But see* Cal. Comm. on Jud. Ethics Adv. Op. at 4 (Nov. 12, 2015), http://www.judicialethicsopinions.ca.gov/sites/default/files/CJEO%20Oral%20Advice%20Summary%202015-014.pdf (a judge may belong to a religious organization that discriminates on the basis of sexual orientation if the "organization [is] dedicated to the preservation of religious values of legitimate common interest" to the organization).

Moreover, it's hard to square the Commission's recommendation against Judge Neely with the fact that judges are allowed to make numerous other statements that could just as easily offend other members of the community. For instance, the Commission never complained that one of Judge Neely's fellow part-time circuit magistrates, Judge Stephen Smith, concurrently served as Pinedale's elected mayor for eight years, ran for office in three elections, and announced his party affiliation and his position on political issues. C.R. 574; Pinedale Online News, *Candidate Questions & Answers on KPIN* (Apr. 30, 2006), http://www.pinedaleonline.com/news/2006/04/CandidateQuestionsAn.htm.

Nor does the Commission's view square with the vehement statements that members and representatives of the Commission have made against Judge Neely's religious beliefs. For instance, the Commission's disciplinary counsel, Patrick Dixon, repeatedly branded

those beliefs as "repugnant" and the equivalent of racism and bigotry against disabled people. C.R. Vol. 7, Part 1 at 73-74. He also attacked the "Missouri Synod of the Lutheran Church" and "Mormon Church" by name. *Id.* These are deeply offensive comments to many religious Wyoming citizens. Thus, under the Commission's position, Mr. Dixon himself could never serve in judicial office. *Cf.* Rule 8.2, Wyo. Rules of Professional Conduct at Cmt. 3 ("A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon . . . religion . . . [commits misconduct] when such actions are prejudicial to the administration of justice").

Fortunately, the Commission's view is not the law. Officials cannot take sides on religious matters and wield government power to silence their opposition. *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 119 (2001) (rejecting "a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what" others perceive).

Of course, while a generalized interest in "impartiality" is not a "compelling state interest," there is compelling interest in preventing *actual* bias or partiality. *White*, 536 U.S. at 777. This arises when a judge is partial *toward specific parties*. *Id.* Here, the record before this Court shows Judge Neely is impartial and unbiased, and so the Commission has no interest in removing her. C.R. 898-901.

But although the State does *not* have a compelling interest in punishing Judge Neely, it *does* have a compelling interest in protecting her and others who share her beliefs by evaluating them based upon their abilities, not upon their religious beliefs. That interest is particularly compelling in the context of a marriage ceremony.

Wedding ceremonies themselves are inherently, and often religiously, expressive events. *Kaahumanu v. Hawaii*, 682 F.3d 789, 798-99 (9th Cir. 2012) ("The core of a wedding ceremony's 'particularized message' is easy to discern" and "convey[s] important messages about the couple, their beliefs, and their relationship to each other and to their community"). This Court has recognized marriage as "the most sacred of all contracts," one which has had "religious" components since at least "ancient Rome." *In re Roberts' Estate*, 133 P.2d 492, 493 (Wyo. 1943). Wyoming law recognizes that component's continued vitality today in the role that a "minister of the gospel, bishop, priest, or rabbi" plays in performing marriages "in accordance with" their faith. Wyo. Stat. § 20-1-106.

Thus, Wyoming rightly makes performing marriages discretionary. *Id.* Our nation does not even force people to bear governmental messages on their license plates or wear t-shirts bearing innocuous messages. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977); *Frudden v. Pilling*, 742 F.3d 1199, 1206 (9th Cir. 2014). It likewise cannot force people to personally participate in others' marriage ceremonies. *Wooley*, 430 U.S. at 707-08, 715 (government cannot "force[] an individual" to express a "point of view" that deeply violates her "moral [and] religious . . . beliefs."); Oral Arg. Tr. at 26:9-15, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), http://www.supremecourt.gov/oral_arguments_/argument_transcripts/14-556q1_7l48.pdf (Justice Kagan: "[T]here are many rabbis that will not conduct marriages between Jews and non-Jews, notwithstanding that we have a constitutional prohibition against religious discrimination. And those rabbis get all the powers and privileges of the State, even if they have that rule.").

Moreover, the Commission's recommendation "cannot help but to have a tremendous chilling effect on the exercise of First Amendment rights" by other current and future Wyoming judges. *Holloman v. Harland*, 370 F.3d 1252, 1269 (11th Cir. 2004); *see also Rep. Party of Minn. v. White*, 416 F.3d 738, 746 (8th Cir. 2005) (en banc) ("Wersal, fearful that other complaints might jeopardize his opportunity to practice law, withdrew from the race."); *Heffernan v. City of Paterson*, No. 14–1280, 2016 WL 1627953, at *5 (April 26, 2016) ("We also consider relevant the constitutional implications" of "discouraging [governmental] employees—both the employee discharged (or demoted) and his or her colleagues—from engaging in protected activities"). So there is a compelling interest at stake here, and it calls for rejecting the Commission's recommendation.

2. Removing Judge Neely is not the least restrictive means of furthering the Commission's stated interests.

Even if the Commission successfully proved that it had a compelling interest supporting its recommendation, it would have to further prove that banning Judge Neely from office is the least restrictive means of furthering that interest. This requirement is "exceptionally demanding." *Hobby Lobby*, 134 S. Ct. at 2780. If a less restrictive alternative would serve the government's purpose, "the legislature *must* use that alternative." *U.S. v. Playboy Ent'mt Grp., Inc.*, 529 U.S. 803, 813 (2000) (emphasis added). To make this showing, the government must "prove" that no other approach will work, *Id.* at 816, 826, and "must" "refute . . . alternative schemes suggested by the plaintiff." *Yellowbear v. Lampert*, 741 F.3d 48, 62 (10th Cir. 2014). The Commission has not done so.

a. Wyoming has other ways of ensuring full access to marriage ceremonies without punishing Judge Neely.

The Commission repeatedly argued below that this case is similar to a case concerning a county clerk who refused to issue *any* licenses because of her objection to same-sex marriage. C.R. Vol. 7, Part 1 at 72, 76, *citing Miller v. Davis*, 123 F. Supp. 3d 924 (E.D. Ky. 2015); *but see id.* at 72 (admitting this "truly is a different case"). The analogy fails on a number of levels. The most obvious reason is that the clerk's refusal to provide licenses created, at some level, a barrier to marital access. Not so here.

Wyoming provides an expansive list of who can "perform the ceremony of marriage": "*every* district or circuit court judge, district court commissioner, supreme court justice, [and] magistrate," along with "*every* licensed or ordained minister of the gospel, bishop, priest or rabbi," *and* all "other qualified person[s] acting in accordance with the traditions . . . of *any* religion, denomination or religious society." Wyo. Stat. § 20-1-106. Even *invalid* officiants can solemnize a wedding "if the parties believe in good faith that they have been lawfully married." *In re Roberts' Estate*, 133 P.2d at 500.

And, in fact, "[p]lenty of people in Sublette County . . . are willing to perform marriage ceremonies for same-sex couples." C.R. 901. Since same-sex marriage was recognized in Wyoming, "[n]o one's been denied the opportunity" to get married. C.R. 372. There are several officials in the area who will perform a same-sex ceremony, and Judge Haws will even make special one-day magisterial appointments for citizens who want to perform a marriage for a family member or a friend. C.R. 353. Given that only two same-sex

weddings have been performed in Pinedale since 2014, there is considerably more supply than demand when it comes to officiants. C.R. 372.

b. There are numerous less restrictive ways of addressing concerns about perceived bias or partiality.

To the extent the Commission is concerned about perceptions of bias or partiality, it can address that in numerous ways that do not require banning Judge Neely and those who share her beliefs from judicial office.

The easiest and most obvious solution is referral. The government could instruct magistrates with religious objections about personally performing certain marriages to handle marriage requests the same way they are already permitted to decline for secular reasons: politely and promptly refer the requesting party to another magistrate who can perform the marriage. Indeed, that magistrates are regularly permitted to decline to perform weddings for a variety of secular reasons shows that the government has less restrictive ways of providing for all applicants seeking a marriage ceremony. *Davila v. Gladden*, 777 F.3d 1198, 1207 (11th Cir. 2015) ("That the [government's] own policy contemplates exemptions . . . undercuts the Defendants' argument that a categorical prohibition on . . . religious objects is the least restrictive means of achieving their objectives").

Second, if the Commission somehow proved that such a referral system was unworkable only in the context of religious motivations, Wyoming could adopt North Carolina's approach: allow "[e]very magistrate" the "right to recuse from performing all lawful marriages" where required by "any sincerely held religious objection." N.C. Gen. Stat. § 51-5.5. Again, this recusal occurs behind-the-scenes and does not require informing

any inquiring party of a magistrate's religious objection. Notably, though, as explained above, such an all-or-nothing recusal system could not be targeted at religious recusals. If the State is willing to permit ad hoc recusal/referral based on non-religious motivations, it cannot penalize religious motivations. *Lukumi*, 508 U.S. at 538.

Finally, to the extent the Commission could prove a religiously neutral, compelling need to punish Judge Neely, it still had many far less drastic means of correction. The Commission could have issued a letter of correction; a private censure, reprimand, or admonishment; a monetary sanction; or some form of temporary discipline or interim suspension. *See* Rule 8(d) of the Rules Governing the Commission on Judicial Conduct and Ethics. If it wished to go further, it could have recommended that the Wyoming Supreme Court issue a longer-term suspension, a public censure, a reprimand, an admonishment, or retirement. *Id.* at Rule 18. While even these lesser punishments are unnecessary here, the Commission nonetheless chose the most severe punishment available: removal. On the novel facts before this Court, that is not just disproportionate, but vindictive. It is certainly not the least restrictive means of furthering any governmental interest, and it strongly suggests that the Commission was targeting Judge Neely because of her religious beliefs. *Lukumi*, 508 U.S. at 538.

CONCLUSION

In our pluralistic society, the law should not be used to coerce ideological conformity. Rather, on deeply contested moral issues, the law should "create a society in which both sides can live their own values." Douglas Laycock, *Religious Liberty and the Culture Wars*,

2014 U. Ill. L. Rev. 839, 877 (2014). That is precisely how Wyoming has approached this issue since its founding as a State.

The U.S. Supreme Court's *Obergefell* decision affirms this approach for the issue of marriage. That is why *Obergefell* emphasized that the constitutional problem arose not from the multiplicity of good faith views about marriage, but from the enshrining of a single view into law which excluded those who did not accept it as "outlaw[s]" and "outcast[s]." 135 S. Ct. at 2600, 2602.

Dignity is a two-way street. It would be at least as wrong for a government to make Judge Neely and all who share her beliefs outcasts for living and expressing their understanding of marriage as it was to make Mr. Obergefell an outcast for living and expressing his. Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. Cal. L. Rev. 619, 629-30 (2015) (noting the severe "burden" on individuals whose "religious beliefs really forbid" them to personally participate in "same-sex weddings," since they are forced to "abandon" their job). And it would profoundly misunderstand *Obergefell* to mandate such a course.

If this Court faithfully applies the Wyoming Constitution, the First Amendment, and *Obergefell,* everyone can win: Same-sex couples can have full access to the legal institution of marriage, and religious individuals can remain in public office if they hold a traditional religious view of marriage. There is room enough in our pluralistic democracy for both sides to live according to their respective views of sex, marriage, and religion. It is not the government's role to punish either side for their views on these subjects.

For all these reasons, this Court should reject the Commission's recommendation.

Respectfully submitted this 10th day of May, 2016.

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*Admission *pro hac vice* pending

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 2016, the original and six copies of the foregoing document were hand-delivered to the Wyoming Supreme Court and the foregoing document was served by mailing a copy of it via United States mail, first class, postage prepaid, to the following:

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