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

THE HONORABLE RUTH NEELY'S BRIEF IN SUPPORT OF VERIFIED PETITION OBJECTING TO THE COMMISSION'S RECOMMENDATION

Herbert K. Doby
WSB#5-2252
P.O. Box 130
Torrington, WY 82240
dobylaw@embarqmail.com
(307) 532-2700 Fax: (307) 532-2706

James A. Campbell*
Kenneth J. Connelly*
Douglas G. Wardlow*
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
jcampbell@ADFlegal.org
kconnelly@ADFlegal.org
dwardlow@ADFlegal.org
(480) 444-0020 Fax: (480) 444-0028

Attorneys for the Honorable Ruth Neely
*Admitted *Pro Hac Vice*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes, Rules, and Ordinances

Other Authorities

INTRODUCTION

Ruth Neely has been the municipal judge in the Town of Pinedale for over 21 years. During that time, she has built a career, faithfully served the community, bettered the lives of countless people who have passed through her courtroom, and earned the respect of Pinedale citizens of all creeds and backgrounds. Her work as a municipal judge has been admirable and above reproach.

Years after becoming Pinedale's judge, Judge Neely agreed to assist Sublette County's circuit court judge as a part-time magistrate. For over a decade, she exercised her discretionary authority as a magistrate to solemnize weddings. Then, in late 2014, a federal court decision changed Wyoming's law on marriage, and a Pinedale reporter who suspected that Judge Neely's religious beliefs precluded her from solemnizing same-sex marriages asked her if she was "excited" to begin performing those weddings. She answered honestly, expressing her religious conviction that marriage is the union of one man and one woman—a belief that, as the U.S. Supreme Court recently recognized, is "based on decent and honorable . . . premises," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015)—and she indicated that she would be unable to serve as a celebrant for same-sex weddings.

Now the Commission on Judicial Conduct and Ethics (the "Commission"), in its recommendation to this Court, insists that Judge Neely violated the Code of Judicial Conduct (the "Code") and cannot remain a judge—even a municipal judge who has no authority to perform weddings. By adopting this extreme position, the Commission has effectively said that no one who holds Judge Neely's widely shared beliefs about marriage can remain a judge in Wyoming. As soon as the public learns that a judge ascribes to those

beliefs, the Commission will seek to bring that judge's career to an end.

By the Commission's logic, jurists like Chief Justice John G. Roberts and Associate Justices Clarence Thomas and Samuel A. Alito, Jr., of the United States Supreme Court could not sit on the bench in Wyoming. Not only have they written opinions explaining their view that the U.S. Constitution does not include a right to same-sex marriage, *see id.* at 2611-2643, but also they (like Judge Neely) ascribe to a religious tradition that precludes them from celebrating a same-sex marriage.

More disconcerting still, the Commission's far-reaching position extends beyond the marriage context entirely. The Commission insists that Judge Neely expressed a refusal to "follow the law" when she indicated how her religious beliefs affect her ability to solemnize marriages. But the Commission can say the very same thing about a judge who, for conscience reasons, needs to recuse from death-penalty cases or a judge who, after personally experiencing the horrors of sexual assault, cannot preside over rape cases. Yet no legal authority suggests that any of these understandable sentiments could bar a judge from office.

Most unsettling of all, because the Commission insists that Judge Neely cannot remain a municipal judge who lacks authority to solemnize marriages, this case threatens any judge who holds and communicates views about numerous potentially controversial topics. Under the Commission's argument, a judge who criticizes tax exemptions for religious organizations or another state's regulation protecting religious liberty is in danger of removal for expressing prejudice against religion. Also, judges might jeopardize their careers by discussing their pro-life (or pro-choice) beliefs, explaining their views on gun control,

dialoguing about terrorism, or stating their skepticism of female soldiers serving in combat.

But just as no judge should be removed for expressing views on these topics, the Wyoming and U.S. Constitutions guarantee that Judge Neely cannot lose her career simply because she communicated her religious beliefs about marriage. The fundamental principle that no judge should be expelled from office because of her core convictions unites a diverse group of Wyoming's citizens, including members of the LGBT community who have expressed dismay at the Commission's actions here. Most notably, Kathryn Anderson of Pinedale said that "it would be obscene and offensive to discipline Judge Neely for her statement . . . about her religious beliefs regarding marriage." Anderson Aff. ¶ 5 (C.R. 901-02).[1] Judge Neely asks this Court to heed Ms. Anderson's words, reject the Commission's recommendation to expel her from her profession, and allow her to continue serving her community with excellence as she has done for more than two decades.

STATEMENT OF THE ISSUES

1. Whether Judge Neely violated the Code in her position as a municipal judge.

2. Whether removing Judge Neely as a municipal judge violates the protection for public officeholders in Article 1, Section 18 of the Wyoming Constitution, which prohibits the state from rendering a person "incompetent to hold any office of trust . . . because of his opinion on any matter of religious belief whatever."

3. Whether removing Judge Neely as a municipal judge violates the general protection for religious exercise in Article 1, Section 18 and Article 21, Section 25 of the Wyoming Constitution.

---

[1] Citations to C.R. refer to the page numbers in the Certified Record filed with this Court.

4. Whether removing Judge Neely as a municipal judge violates the protection for religious exercise in the U.S. Constitution.

5. Whether removing Judge Neely as a municipal judge violates the protection for free speech in the Wyoming and U.S. Constitutions.

6. Whether the Code provisions at issue, as applied to Judge Neely's removal as a municipal judge, are impermissibly vague in violation of the Wyoming and U.S. Constitutions.

7. Whether Judge Neely violated the Code in her position as a part-time circuit court magistrate.

8. Whether removing Judge Neely as a magistrate violates the protection for public officeholders in Article 1, Section 18 of the Wyoming Constitution, which prohibits the state from rendering a person "incompetent to hold any office of trust . . . because of his opinion on any matter of religious belief whatever."

9. Whether removing Judge Neely as a magistrate violates the general protection for religious exercise in Article 1, Section 18 and Article 21, Section 25 of the Wyoming Constitution.

10. Whether removing Judge Neely as a magistrate violates the protection for religious exercise in the U.S. Constitution.

11. Whether removing Judge Neely as a magistrate violates the protection for free speech in the Wyoming and U.S. Constitutions.

12. Whether the Code provisions at issue, as applied to Judge Neely's removal as a magistrate, are impermissibly vague in violation of the Wyoming and U.S. Constitutions.

STATEMENT OF THE CASE

I. Statement of the Facts

A. Judge Neely's Two Judicial Positions

Judge Neely has served as the municipal judge in Pinedale for over 21 years. Neely Aff. ¶ 3 (C.R. 827); Neely Dep. at 20-21 (C.R. 497). That is Judge Neely's job—her longtime profession—and the Town of Pinedale pays her a salary that helps support her family. *See* Neely Dep. 48-49 (C.R. 504); Pinedale Mun. Code § 23-1(E) (C.R. 338). As a municipal judge, Judge Neely hears cases arising under the Pinedale ordinances—cases involving traffic and parking violations; animal-control issues; criminal misdemeanors like public intoxication, underage drinking, and shoplifting; and similar matters. Neely Aff. ¶ 4 (C.R. 827); Pinedale Mun. Code § 23-1(A) (C.R. 338); Town of Pinedale, Municipal Court & Judge, Duties (C.R. 342). Pinedale's municipal judge is a local government official who is appointed by the mayor with the consent of the town council. Neely Dep. at 16 (C.R. 496). A municipal judge has no legal authority to solemnize marriages. *See* Wyo. Stat. § 20-1-106(a) (omitting municipal judges from the list of authorized marriage celebrants); Jones Aff. ¶ 7 (C.R. 885).

Around 2001, approximately seven years after she became the municipal judge in Pinedale, Judge Neely agreed to serve the circuit court judge in Sublette County as a part-time magistrate. Neely Aff. ¶ 5 (C.R. 828). She was most recently reappointed as a circuit court magistrate in 2008 by Sublette County Circuit Court Judge Curt Haws; that appointment included all the powers afforded to magistrates under state law. Neely Aff. ¶ 5 (C.R. 828); Haws Dep. at 42-45, 125-26 (C.R. 356, 376-77); 2008 Circuit Court Magistrate Appointment Letter for Judge Neely (C.R. 392). These powers include adjudicative duties

like issuing subpoenas, presiding over bond hearings, and issuing search and arrest warrants. Wyo. Stat. § 5-9-212(a). They also include non-adjudicative functions like administering oaths, taking acknowledgments of deeds or other writings, and serving as a celebrant for weddings. *Id.* During her time as a magistrate, Judge Neely not only solemnized weddings, she also presided over multiple bond hearings and administered oaths on various occasions. Neely Dep. 40-41, 45-48 (C.R. 502-04).

B. Magistrates and Marriage Solemnization

Part-time circuit court magistrates like Judge Neely have discretion when deciding whether to serve as celebrants for weddings. Neely Aff. ¶ 6 (C.R. 828). Wyoming law provides that a magistrate, just like a "minister of the gospel, bishop, priest or rabbi, or other qualified person acting in accordance with the traditions or rites for the solemnization of marriage of any religion, . . . *may* perform the ceremony of marriage." Wyo. Stat. § 20-1-106(a) (emphasis added). The law thus does not require part-time magistrates to celebrate marriages, and the Commission admitted this during discovery. *See* Soto Dep. at 153 (C.R. 438) (acknowledging that judges are not "required to perform marriages"); Comm'n Resp. to Judge Neely's Reqs. for Admis. No. 4 (C.R. 487).

Practice confirms that magistrates in Wyoming have discretion when choosing to solemnize marriages. In fact, part-time magistrates and other judges decline to solemnize marriages for a host of reasons: (1) if a magistrate limits herself to solemnizing marriages only for friends and family members (and thus refuses to officiate a stranger's wedding), Soto Dep. at 152-54 (C.R. 438-39); Smith Dep. at 43-44 (C.R. 465); (2) if a magistrate arbitrarily decides that she "just . . . do[es]n't feel like" solemnizing a particular wedding,

Soto Dep. at 152 (C.R. 438); (3) if a magistrate refuses to travel more than a certain distance for a wedding, *id.* at 153 (C.R. 438); (4) if a judge refuses to perform a wedding scheduled outside of business hours, Haws Dep. at 60-62 (C.R. 360-61); (5) or if a magistrate "is too busy" for a wedding, Soto Dep. at 151 (C.R. 438); Haws Dep. 66-67 (C.R. 362).

Serving as a marriage celebrant is very different from the other functions that part-time circuit court magistrates perform. While most magisterial functions involve adjudicatory assignments or rote administrative tasks, a magistrate who solemnizes a marriage is "personally involved" in celebrating a private event that often occurs outside of the courthouse. Neely Aff. ¶¶ 8, 9, 24 (C.R. 828, 831-32). That personal participation in the wedding ceremony includes expressing "support for" the couple's union and declaring them to be married. *See id.* at ¶ 24 (C.R. 831-32); Wedding Script at 1-5 (C.R. 854-58).

The marriage-solemnization function is unique in other ways. For instance, the state allows circuit court magistrates to use their marriage-celebrant authority for their own private purposes. Illustrating this, Judge Neely's fellow Sublette County circuit court magistrate Stephen Smith—who has been appointed as a magistrate solely to solemnize marriages, *see* Smith Dep. at 36-37 (C.R. 463)—testified that he is "happy to marry people that [he] know[s]," but that he is not "in the business of marrying people" that he does not know, *id.* at 43-44 (C.R. 465); *see also* Haws Dep. at 30-31 (C.R. 353) (testifying that he will appoint any "upstanding citizen" to a temporary magisterial position in order to marry a family member or friend). Moreover, the state allows circuit court magistrates to request payment from the couples that they marry, further demonstrating the unique nature of the marriage-celebration function. Haws Dep. at 68 (C.R. 362). Indeed, each individual magistrate has unilateral

discretion to set the amount of any fee that she chooses to charge couples for solemnizing their marriages, and the state provides no guidelines. *Id.* at 68-69 (C.R. 362).

C. Exemplary Judicial Service to the Pinedale Community

Judge Neely truly cares about the people who appear in her court, and when deciding their cases, she seeks not only to ensure that justice is achieved, but also to help them "better themselves and the local community." Neely Aff. ¶ 17 (C.R. 830). Because of her caring approach, Judge Neely's judicial service has improved the lives of many. As Ralph "Ed" Wood (Pinedale's town attorney for the last 17 years) testified, "[m]any young people . . . are now better for having come through her courtroom." Wood Aff. ¶ 6 (C.R. 892); *see also* Jones Aff. ¶ 10 (C.R. 885) (affirming that Judge Neely's "handling of juvenile cases is notable, commendable, and well known in the community"). On one occasion, when sentencing two young men named Trent and Brad on a charge of underage possession of alcohol, Judge Neely discovered that Trent could not read. Neely Aff. ¶ 20 (C.R. 830-31). So she arranged for Brad, with the help of reading specialists, to teach Trent while they served their time. *Id.* (C.R. 830-31). Trent made considerable progress, and Judge Neely released them early, on the condition that they continue in the reading program. *Id.* (C.R. 830-31). Trent later authored a story about this experience, and in it, he wrote: "Most of all, I would like to thank Judge Ruth Neely for forcing me to take the initiative I needed to learn how to read." Trent Kynaston, *A Bad Situation Turned Good* (C.R. 851-52). This dedication to improving the lives of those who pass through her courtroom shows that Judge Neely (in the words of Pinedale Mayor Bob Jones) "is a tremendous asset to the community." Jones Aff. ¶ 12 (C.R. 886).

After years of faithful judicial service and countless lives changed, Judge Neely is widely respected by the citizens of Pinedale, including members of the LGBT community. In fact, during these proceedings, Sharon Stevens, one of Pinedale's LGBT citizens, declared that "Ruth Neely is one of the best people [she has] ever met." Stevens Aff. ¶ 5 (C.R. 898-99). And Mayor Jones testified that Judge Neely "has a sterling reputation in the community as a person of unswerving character and as an honest, careful, and fair judge." Jones Aff. ¶ 5 (C.R. 884-85). Even the Adjudicatory Panel acknowledged that Judge Neely is "a well-recognized and respected judge in the community." 12/4/2015 Transcript at 32 (C.R. Vol. 7).

Judge Neely has never been biased or prejudiced against, or otherwise treated unfairly, any individual who has appeared before her in court. Pinedale's town attorney (Mr. Wood), who for the last 17 years has observed Judge Neely's courtroom demeanor more than anyone else has, testified that "every party who appears before [Judge Neely] gets a fair shake, and [that] she has never exhibited even the slightest hint of bias, prejudice, or partiality toward anyone." Wood Aff. ¶ 5 (C.R. 892); *see also* Jones Aff. ¶ 6 (C.R. 885) ("I can say without reservation that [Judge Neely] always . . . gives each person who appears before her fair and equal treatment."). And Ms. Stevens (who, again, is a member of Pinedale's LGBT community) similarly stated that Judge Neely "has always treated all individuals respectfully and fairly inside and outside her courtroom, regardless of their sexual orientation." Stevens Aff. ¶ 5 (C.R. 898-99); *see also* Anderson Aff. ¶ 5 (C.R. 901-02) (expressing, as a member of the LGBT community, "no doubt that [Judge Neely] will continue to treat all individuals respectfully and fairly inside and outside her courtroom,

regardless of their sexual orientation"). It is thus no surprise that in all Judge Neely's years on the bench, she has never had a complaint filed against her with the Commission, been disciplined by the Commission, or been accused of harboring or exhibiting bias, prejudice, or partiality by anyone who has appeared before her in court. *See* Comm'n Resp. to Judge Neely's Req. for Admis. Nos. 5, 6, & 9 (C.R. 487-89); Neely Aff. ¶ 11 (C.R. 829); Haws Dep. at 59 (C.R. 360).

D. Judge Neely's Religious Beliefs and Practices

Judge Neely is a longtime member of the Lutheran Church, Missouri Synod ("LCMS")—a Christian denomination—and has been an active member of her local LCMS congregation, Our Savior's Lutheran Church in Pinedale, for over 38 years. Neely Aff. ¶ 21 (C.R. 831). She has been a Sunday School teacher for 36 years and the church's Tone Chime Choir director for 24 years. *Id.* (C.R. 831).

As a Christian and member of the LCMS, Judge Neely believes the teachings of the Bible and the doctrines of her denomination. Neely Aff. ¶ 22 (C.R. 831). She also seeks to conform her conduct in all areas of her life to those teachings and doctrines. *Id.* (C.R. 831). One of the core tenets of her faith is that God instituted marriage as a sacred union that joins together one man and one woman. *See* Neely Aff. ¶ 23 (C.R. 831); Rose Aff. ¶ 4 (C.R. 904); Lutheran Church, Missouri Synod, *News and Information—Upholding Marriage: God's Plan and Gift* (C.R. 534) ("As Christians, we believe and confess that God Himself instituted marriage as the life-long union of one man and one woman.").

When Judge Neely presides over a wedding, she personally participates in celebrating the couple's nuptials and affirms their union as a marriage. Neely Aff. ¶ 24 (C.R. 831-32);

Wedding Script at 4-5 (C.R. 857-58). During the ceremony, for example, she leads the couple in reciting their vows of love and commitment for each other, and declares them to be married in the presence of their family and friends. *See* Wedding Script at 3-5 (C.R. 856-58). Given Judge Neely's direct participation in these solemn and celebratory events, she sincerely believes that if she were to serve as a celebrant for a wedding that does not reflect her belief that marriage is the union of one man and one woman, she would be violating the tenets of her faith. Neely Aff. ¶ 23 (C.R. 831).

Even still, if Judge Neely were asked to serve as a celebrant for a same-sex wedding (which has never happened), she would ensure that the couple could get married by connecting them to another magistrate who could solemnize their union. Neely Dep. at 71-72 (C.R. 510); Neely Aff. ¶ 31 (C.R. 833). This is consistent with her church's teaching that she must treat all people with dignity and respect. Rose Aff. ¶¶ 4-5 (C.R. 904-05).

Although Judge Neely's religious beliefs about marriage prevent her from personally acting as a celebrant for some weddings, those beliefs do not in any way affect how she decides cases. Neely Aff. ¶ 32 (C.R. 833). The Pinedale mayors who have appointed her as municipal judge all confirm that her religion does not interfere with her work. Jones Aff. ¶ 8 (C.R. 885) (stating that Judge Neely's religious beliefs have "[n]ever affected in any way her ability to be fair and impartial as a judge"); Smith Dep. at 54 (C.R. 468) (testifying that Judge Neely does not "bring her religion into the courtroom"); Carlson Aff. ¶¶ 5-6 (C.R. 888-89). In particular, if a litigant in a case before Judge Neely ever asked her to recognize or afford rights based on a same-sex marriage, it is undisputed that she would recognize that marriage and afford the litigant all the rights that flow from it. Neely Aff. ¶ 32 (C.R. 833). So, for

example, if a witness with a same-sex spouse asserted a spousal privilege, Judge Neely would recognize that privilege just as she would for a person whose spouse is of the opposite sex.

E. Seeking Guidance after a Federal Court Invalidates Wyoming's Laws Defining Marriage

Approximately 15 years ago, when Judge Neely first agreed to solemnize marriages as a part-time circuit court magistrate, same-sex marriage was not recognized anywhere in the nation. So when in late October 2014, a federal district court in *Guzzo v. Mead*, 2014 WL 5317797 (D. Wyo. Oct. 17, 2014), ordered the State of Wyoming to begin licensing and recognizing same-sex marriages, Judge Neely was not sure how to exercise her discretion to solemnize marriages consistent with her religious beliefs. Neely Aff. ¶ 25 (C.R. 832). Within weeks, she sought guidance from her circuit court judge (Judge Haws), telling him that her religious belief that marriage is the union of one man and one woman would not permit her to solemnize same-sex marriages. Neely Dep. 76-77 (C.R. 511); Haws Dep. at 83-85 (C.R. 366); Neely Aff. ¶ 25 (C.R. 832).

Judge Haws recognized that Judge Neely was in a "very difficult position." Haws Dep. at 84 (C.R. 366). He realized that this issue was new and that no judicial officials in Wyoming had received any guidance on it. *Id.* at 85, 91-92 (C.R. 366, 368). So he advised Judge Neely to avoid discussing the issue and indicated that they would make a decision about her future as a magistrate once they received some guidance. *Id.* at 85 (C.R. 366); Neely Dep. at 77-78, 97 (C.R. 511-12, 516).

Contrary to the Adjudicatory Panel's finding, Judge Haws did not tell Judge Neely that "performing [same-sex] ceremonies was an essential function of her job" as a magistrate. Summ. J. Order at 2 ¶ 9 (C.R. 1101) (hereinafter "Order"). Judge Haws testified

that he did not specifically recall saying those words to Judge Neely. Haws Dep. at 110-11 (C.R. 373). And his testimony reveals that he never made that determination. *See id.* at 86 (C.R. 367) (testifying that he told Judge Neely that he "respected her for . . . taking th[e] position" she did, that he "would never ask her to compromise her personal beliefs," and that "if [performing same-sex marriages] *turned out to be a necessary essential function of the job* and she was unable to perform that function, that that would be a problem") (emphasis added).

F. *Pinedale Roundup* Reporter Ned Donovan's Inquiry

Pinedale Roundup reporter Ned Donovan suspected that Judge Neely "would not perform a ceremony for [a same-sex] couple," so he contacted her on December 5, 2014, "to learn about her position on same sex marriage." Comm'n Suppl. Rule 11(b) Disclosures ¶ A.2 (C.R. 593). When he called her, Judge Neely was hanging Christmas lights outside her home. Neely Dep. at 94-95 (C.R. 516); Neely Aff. ¶ 34 (C.R. 834). Frustrated with the project, she came inside to untangle lights, checked her cell phone, saw that she missed a call from an unknown number, and returned the call. Neely Dep. at 82-83, 94-95 (C.R. 513, 516); Neely Aff. ¶ 34 (C.R. 834).

Mr. Donovan picked up the call from Judge Neely, told her that he was a reporter for the *Pinedale Roundup*, and asked if she was "excited" to be able to start performing same-sex marriages. Neely Dep. at 82-83, 87 (C.R. 513-14); Neely Aff. ¶ 35 (C.R. 834). Not immediately recalling Judge Haws's advice to avoid discussing same-sex marriage, *see* Neely Aff. ¶ 36 (C.R. 834), Judge Neely answered truthfully, indicating that her religious belief that marriage is the union of one man and one woman precludes her from performing same-sex weddings. Neely Dep. at 87-88 (C.R. 514); Neely Aff. ¶ 37 (C.R. 834). Judge Neely also said

that other local officials were willing to perform those weddings and that she had never been asked to perform one. Neely Dep. at 91-92 (C.R. 515); Neely Aff. ¶ 39 (C.R. 834).

After the conversation with Mr. Donovan, Judge Neely attempted to tell Judge Haws what transpired, but was unable to reach him and had to leave a message. Neely Aff. ¶ 41 (C.R. 835); Haws Dep. at 90-91 (C.R. 368). Meanwhile, Judge Neely suspected that Mr. Donovan may have known her religious beliefs beforehand and was attempting to expose them. Neely Dep. at 96-98 (C.R. 516-17). So she called Mr. Donovan back about twenty minutes later and requested that he print only this general response: "When law and religion conflict, choices have to be made. I have not yet been asked to perform a same-sex marriage." Neely Dep. at 96-98 (C.R. 516-17); Neely Aff. ¶ 42 (C.R. 835). Mr. Donovan told Judge Neely that he would consider her request and get back to her. Neely Dep. at 98 (C.R. 517).

Later that day, Mr. Donovan called Judge Neely back and attempted to ask more questions. Neely Aff. ¶ 43 (C.R. 835). He also offered not to publish a story if she would agree to perform same-sex marriages. Neely Dep. at 99 (C.R. 517). Judge Neely, however, could not agree to violate her religious convictions in exchange for Mr. Donovan's promise not to publish. Neely Aff. ¶ 43 (C.R. 835); Neely Dep. at 99 (C.R. 517). So she repeatedly declined comment on his follow-up questions. Neely Dep. at 99 (C.R. 517).

G. Same-Sex Marriage in Pinedale and Sublette County

The "demand for same-sex marriage" is not high in Pinedale or Sublette County. Haws Dep. at 109 (C.R. 372). This is not surprising considering that Pinedale (Sublette County's largest town) has an approximate population of 1,977 people, *see* Neely Aff. ¶ 2

(C.R. 827), that (according to information published by the Centers for Disease Control and Prevention) only 1.6 percent of the population identifies as gay or lesbian and 0.7 percent identifies as bisexual, *see* Brian W. Ward et al., *Sexual Orientation and Health Among U.S. Adults: National Health Interview Survey, 2013*, National Health Statistics Reports (July 2014), *available at* http://www.cdc.gov/nchs/data/nhsr/nhsr077.pdf, and that (according to these statistics) Pinedale likely has less than 50 citizens who identify as gay, lesbian, or bisexual.

It was not until December 5, 2014, more than a month after the *Guzzo* decision legalized same-sex marriage in Wyoming, that circuit court magistrate (and Pinedale's town attorney) Ed Wood performed Sublette County's first same-sex marriage ceremony. Wood Aff. ¶ 8 (C.R. 892). The next day, circuit court magistrate (and former Pinedale Mayor) Stephen Smith performed the county's second same-sex wedding. Smith Dep. at 39-41 (C.R. 464); Anderson Aff. ¶ 3 (C.R. 901); Stevens Aff. ¶ 3 (C.R. 898). The undisputed evidence in the record shows that since December 2014, no other same-sex marriages have been solemnized in Sublette County. Neely Aff. ¶ 27 (C.R. 832); Haws Dep. at 109 (C.R. 372); Wood Aff. ¶ 8 (C.R. 892).

There is a large pool of authorized marriage celebrants in Sublette County. At least nine public officials in the county are permitted to solemnize marriages. *See* Wyo. Stat. § 20-1-106(a); Neely Aff. ¶¶ 28-30 (C.R. 833); Current Magistrates and Contact Information List (C.R. 862); Haws Dep. at 33-34 (C.R. 353-54). All members of the clergy are able to perform weddings. *See* Wyo. Stat. § 20-1-106(a); Artery Dep. at 37 (C.R. 620) (noting that "there are plenty of churches, clergy . . . willing to officiate same-sex marriage"). And Judge Haws makes temporary magisterial appointments for any "upstanding" citizen who wants to

perform a marriage for a family member or friend. Haws Dep. at 30-31 (C.R. 353).

Out of this large pool of marriage celebrants, many are happy to solemnize same-sex marriages. Kathryn Anderson, a member of Pinedale's LGBT community, has affirmed that "[t]here are plenty of people in Sublette County who are willing to perform marriage ceremonies for same-sex couples." Anderson Aff. ¶ 4 (C.R. 901); *see also* Haws Dep. at 109 (C.R. 372) (testifying that he will perform same-sex weddings); Wood Aff. ¶ 8 (C.R. 892) (affirming that he "remain[s] willing to officiate same-sex marriages"); Artery Dep. at 37 (C.R. 620) (noting that "there are plenty of . . . officiants that are willing to officiate same-sex marriage"). And Ed Wood has similarly stated that "[t]here is no shortage of public officials in Pinedale or Sublette County willing to officiate at same-sex wedding ceremonies." Wood Aff. ¶ 8 (C.R. 892). Because of this, "[n]o one's been denied [the] opportunity" to marry in Sublette County since the state began to recognize same-sex marriage. Haws Dep. at 109 (C.R. 372).

H. Ned Donovan's Articles

On December 9, 2014, the *Sublette Examiner* published Mr. Donovan's article about Judge Neely and same-sex marriage. 12/9/14 Sublette Examiner Article (C.R. 864). The article was entitled "Pinedale Slow to Adapt to New Law." *Id.* Mr. Donovan quoted Judge Neely as stating that she would "not be able to do" same-sex marriages because of her religious beliefs, that she had "not yet been asked to perform a same-sex marriage," that "[w]hen law and religion conflict, choices have to be made," and that there is "at least one magistrate" in Pinedale "who will do same-sex marriages." *Id.* Mr. Donovan also included a quote from Mayor Jones indicating that Judge Neely "does not perform marriages" in her

role "[a]s the town judge." *Id.*

Two days later, on December 11, 2014, the *Sublette Examiner* published the same article in its online edition, but with the new title "Pinedale Judge Will Not Marry Same-Sex Couples." 12/11/2014 Online Sublette Examiner Article (C.R. 866). That same day, a reporter with the *Casper Star Tribune* called Judge Neely and asked her to confirm the comments published in the *Sublette Examiner.* Neely Aff. ¶ 46 (C.R. 836). Judge Neely declined comment, and when the reporter called back, she declined comment again. *Id.*

After reading Mr. Donovan's article, Judge Haws met with Judge Neely. Because Judge Haws still had not received guidance on the issue of same-sex marriage, he told Judge Neely that he intended to seek an advisory opinion from the Wyoming Judicial Ethics Advisory Committee ("Advisory Committee"). Haws Dep. at 95-97 (C.R. 369). After that meeting, Judge Haws sought advice from a few trusted colleagues, *id.* at 97-98 (C.R. 369-70); but because "[e]vents overtook" him, he never requested an opinion from the Advisory Committee, *id.* at 96-97 (C.R. 369).

During the next few months, Mr. Donovan published two op-ed pieces criticizing Judge Neely for her religious beliefs about marriage and indicating that he did not want her to remain in office. *See* 12/23/14 Sublette Examiner Article (C.R. 869) (writing that her inability to solemnize same-sex marriages "cannot be accepted"); 1/30/15 Pinedale Roundup Article (C.R. 878) ("It is sad that Judge Ruth Neely is still in an office of responsibility"). And since his departure from Wyoming in early 2015, Mr. Donovan continues to communicate with people in Pinedale—including Stephen Crane, the current editor of the *Sublette Examiner* and *Pinedale Roundup*—about this case. *See* Crane Aff. ¶¶ 1-3

(C.R. 907); Smith Depo. at 14-17 (C.R. 458). In those discussions, Mr. Donovan has urged Mr. Crane to continue publishing stories about this case and candidly stated that he wanted "to see [Judge Neely] sacked." Crane Aff. ¶¶ 3-4 (C.R. 907).

I. The Origin of this Proceeding

Shortly after Mr. Donovan's article was published, the Chair of the Wyoming Democratic Party, Ana Cuprill, read it in the paper. Cuprill Dep. at 30, 64-66 (C.R. 560, 568-69). Soon thereafter, she traveled from Pinedale to Cheyenne to attend a Christmas party at the home of Wendy Soto, the Executive Director of the Commission. *Id.* at 69-72 (C.R. 569-70); Soto Dep. at 77-78 (C.R. 419-20); Artery Dep. at 57-58 (C.R.625-26).

Jeran Artery also attended the party at Ms. Soto's house. Artery Dep. at 56-57 (C.R. 625). He is the President of Wyoming Equality, *see id.* at 18-22 (C.R. 616-17), an organization that advocates for LGBT issues, including the legalization of same-sex marriage, *see* Wyoming Equality Mission Statement (C.R. 632); Artery Dep. at 19-20, 46-47 (C.R. 616, 623). Ms. Soto served on the Board of Wyoming Equality from March 2011 to approximately October 2013. Soto Dep. at 31 (C.R. 408). She did so at the behest of Mr. Artery, who considers Ms. Soto dedicated to LGBT advocacy. Artery Dep. at 54-55 (C.R. 625). Ms. Soto's official role with Wyoming Equality overlapped with her tenure at the Commission (which began in June 2012) by over a year. Soto Dep. at 31-33 (C.R. 408).

While at Ms. Soto's party, Ms. Cuprill and Mr. Artery discussed Ned Donovan's article and Judge Neely. Cuprill Dep. at 75-76, 79 (C.R. 571-72). After Ms. Soto overheard their conversation, she approached Ms. Cuprill, asked her, "Do you know what I do for a living?," handed her a business card, and told her how to file a complaint with the

Commission. *Id.* at 75-78 (C.R. 571-72). Ms. Soto suggested that Ms. Cuprill file a complaint and requested that Ms. Cuprill email her the article. Soto Dep. at 83-86 (C.R. 421-22).

J. The Commission's Investigation and Judge Neely's Additional Request for Guidance

On December 22, 2014, Ms. Cuprill emailed Ms. Soto a copy of Mr. Donovan's article as Ms. Soto had requested. *See* 12/22/14 Email from Ana Cuprill to Wendy Soto (C.R. 660-61). Later that day, Ms. Soto selected an Investigatory Panel to review the article, *see* Soto Dep. at 110 (C.R. 428); Tiedeken Dep. at 46 (C.R. 683); emailed those panel members a copy of the article, *see* 12/22/14 Email from Wendy Soto to Investigatory Panel Members (C.R. 708); and labeled the matter an "own motion" proceeding with a case number, *see id.* (C.R. 708). This was the first time that Ms. Soto ever forwarded information regarding a potential "own motion" matter to an Investigatory Panel. Soto Dep. at 55-56, 113 (C.R. 414, 428). A few weeks later, on January 6, 2015, the Investigatory Panel decided to commence an investigation by sending inquiry letters requesting information from Judge Neely and Judge Haws. *See* 1/6/15 Transcript at 5-11 (C.R. 714-720).

That same day, without knowing of the Commission's decision to initiate an investigation, Judge Neely asked the Advisory Committee for an opinion addressing her marriage-solemnization question. Neely Aff. ¶ 48 (C.R. 836); Neely Dep. at 57-58 (C.R. 506-07). This request for guidance illustrates Judge Neely's deep concern for ethical compliance, which is demonstrated by her unblemished judicial record and her volunteer service on the committee that helped revise the Code in 2008. Neely Aff. ¶ 15 (C.R. 829-30); Neely Dep. at 50-52 (C.R. 505). On January 29, 2015, Professor John Burman, Chair of the Advisory Committee, responded to Judge Neely's request and informed her that the Committee was

"prohibited from issuing an opinion" because the Commission had already commenced an investigation. 1/29/15 Letter from John Burman to Judge Neely (C.R. 876).

Meanwhile, on or about January 15, 2015, Judge Haws met with Judge Neely to discuss the Commission's inquiry letter. Neely Aff. ¶ 49 (C.R. 836). Because of the Commission's investigation, Judge Haws decided to suspend Judge Neely as a magistrate. Haws Dep. at 103-107 (C.R. 371-72). Since that time, Judge Neely has not solemnized marriages or performed any other functions in her role as a circuit court magistrate.

Both Judge Haws and Judge Neely subsequently sent letters responding to the Commission's inquiry. *See* 1/17/15 Email from Judge Haws to Wendy Soto with Letter Attachment (C.R. 548-50); 2/7/15 Letter from Judge Neely to Comm'n (C.R. 880-82). In her letter, Judge Neely specifically addressed the Commission's question whether she violated Rule 2.3 of the Code, stating that her "inability to solemnize same-sex unions does not arise from any prejudice or bias *against people*, but rather from [her] sincerely held religious beliefs *about marriage*." 2/7/15 Letter from Judge Neely to Comm'n at 2-3 (C.R. 880-81) (emphasis added).

On February 18, 2015, during a teleconference of the Investigatory Panel, one of the Panel members criticized Judge Neely for failing to "respond[] to Rule 2.3." 2/18/15 Transcript at 4 (C.R. 732). Another member of the Panel said that she was reluctant to allow Judge Neely "to resign as a settlement" now that her views were published in the newspaper. *Id.* at 6-7 (C.R. 734-35). The Investigatory Panel then decided to appoint an Adjudicatory Panel and hire an attorney to institute formal proceedings. *Id.* at 7-9 (C.R. 735-37).

II. Statement of the Proceedings Below

On March 4, 2015, the Commission filed its Notice of Commencement of Formal Proceedings against Judge Neely. *See* Notice of Commencement of Formal Proceedings (C.R. 764-70) (hereinafter "Notice"). In its Notice, the Commission alleged that "Judge Neely's stated position with respect to same sex marriage precludes her from discharging the obligations of [the Code] . . . not just with respect to the performance of marriage ceremonies, but with respect to her general duties as Municipal Court Judge." *Id.* at 5 ¶ B.2. (C.R. 768). In other words, the Commission asserted that Judge Neely can no longer be a judge now that she has stated her religious beliefs about marriage. And the Commission seeks removal—the most drastic sanction available—even though it admits that it has very rarely pursued that most extreme form of discipline. *See* Tiedeken Dep. at 103-04 (C.R. 697).

Early in these proceedings, the Commission's attorney told Judge Neely that the Commission would forego its prosecution if she would agree to resign both of her judicial positions, never again seek judicial office in Wyoming, admit wrongdoing, and allow the Commission to publicly state that she had decided to resign in response to a charge of judicial misconduct. *See* Neely Sanctions Mem. at 11 (C.R. 1300). Faced with such an unreasonable demand, Judge Neely had only one option to defend her compliance with the Code and her constitutional liberties: litigate against the Commission's claims.

On August 28, 2015, over five months after these proceedings began, the Commission filed an Amended Notice of Commencement of Formal Proceedings. *See* Amended Notice of Commencement of Formal Proceedings (C.R. 782-89) (hereinafter "Amended Notice"). In that Amended Notice, the Commission alleged that Judge Neely

violated two additional Code provisions by retaining counsel from Alliance Defending Freedom—a religious, pro-bono, public-interest legal organization—to defend her in this case. *Id.* at 3-6 ¶¶ A.9, A.10, B.2 (C.R. 784-87). The Commission stated that "Alliance Defending Freedom . . . is an organization that . . . advocates for discrimination" because it "actively pursues [an] agenda" that promotes marriage as a unique union between husband and wife. *Id.* at 4 ¶ A.10. (C.R. 785). The Commission also claimed that Judge Neely's "engagement of" Alliance Defending Freedom attorneys and "her affiliation with [that group] . . . precludes her from discharging the obligations of [the Code]" or remaining in either of her judicial positions. *Id.* at 6 ¶ B.2. (C.R. 787).

On September 16, 2015, Judge Neely filed a Motion to Dismiss the New Claims in the Amended Notice. *See* Motion to Dismiss (C.R. 791-805). Judge Neely argued that the Commission's Amended Notice threatened her constitutional rights, including her right to retain the counsel of her choice, her right to free association, and her right to freely exercise her religion. *Id.* at 3-10 (C.R. 793-800). On September 28, 2015, the Commission "concede[d]" Judge Neely's Motion to Dismiss. *See* Notice of Confession of Motion to Dismiss (C.R. 807-08). Then, having been "advised that the parties [were] in substantial agreement with regard to the motion," the Presiding Officer of the Adjudicatory Panel dismissed the new claims. *See* Order Dismissing Amended Claims (C.R. 810).

On October 30, 2015, the parties filed cross-motions for summary judgment. *See* Neely Motion for Summ. J. (C.R. 249-50); Comm'n Motion for Partial Summ. J. (C.R. 180-81). On December 4, 2015, the Adjudicatory Panel held a hearing on those motions. *See* 12/4/2015 Transcript (C.R. Vol. 7). On December 31, 2015, the Adjudicatory Panel issued

an order granting the Commission's motion, denying Judge Neely's motion, concluding that Judge Neely violated the Code, rejecting Judge Neely's constitutional defenses, and referring the case to the full Commission to select a sanction. *See* Order at 4-8 (C.R. 1103-07).

On February 19, 2016, the full Commission heard argument on the sanctions issue. *See* 2/19/2016 Transcript (C.R. Vol. 7). At the conclusion of that hearing, the Commission asked Judge Neely if she would "publicly apologize" and "agree to perform same-sex marriages." *Id.* at 45. In response, Judge Neely reiterated that she "cannot agree to perform same-sex marriages because that would violate her religious convictions." *Id.* at 47. On February 26, 2016, the Commission "adopted . . . the findings of fact and conclusions of law" in the Adjudicatory Panel's December 31, 2015 Order, and recommended (without further explanation) that "Judge Neely be removed from her position as Municipal Court Judge and Circuit Court Magistrate." Comm'n Recommendation at 1 (C.R. 1308).

The Commission also recommended that "the assessment of costs and fees in this matter be left to the discretion of [this] Court." *Id.* (C.R. 1308). Judge Neely requests that this Court defer the issue of costs and fees until after it decides whether to reject, modify, or adopt the Commission's recommendation to remove her. She asks for the opportunity to brief that issue separately if there is still a need to do so once this Court resolves the substantive questions that this case raises.

STANDARD OF REVIEW

Wyoming law does not appear to prescribe any specific standard of review when this Court evaluates a recommendation from the Commission. In this context, though, where the Commission resolved this matter on cross-motions for summary judgment, the appropriate

standard of review is that which this Court applies in the typical summary-judgment context.

"[S]ummary judgment is appropriate when the only issue is the resolution of a question of law based upon a settled set of facts." *Iberlin v. TCI Cablevision of Wyo., Inc.*, 855 P.2d 716, 719 (Wyo. 1993). Here, the parties have agreed that there are no genuine issues of material fact and that summary judgment is the proper mechanism for resolving this matter.

On appeal, summary-judgments motions are treated "as though [they had] been presented originally" to this Court. *Bangs v. Schroth*, 2009 WY 20, ¶ 20, 201 P.3d 442, 452 (Wyo. 2009). Accordingly, this Court reviews questions of law and questions of fact "*de novo* without giving any deference" to the conclusions reached below. *Id.* (discussing questions of law); *Linton v. E.C. Cates Agency, Inc.*, 2005 WY 63, ¶ 7, 113 P.3d 26, 28 (Wyo. 2005) (stating that this Court "examine[s] *de novo* the record").

ARGUMENT

I. The lynchpin of the Commission's analysis—that Judge Neely expressed an unwillingness to follow the law—is incorrect.

The Commission's legal analysis hinges on one faulty premise—that "[w]hen Judge Neely stated that she could not perform same sex weddings" because of her religious beliefs about marriage, she in effect "stated that she would not follow the law." Order at 3 ¶ 12 (C.R. 1102). Illustrating the centrality of this point, the Commission, in its few pages of legal analysis, discusses the need "to follow the law," or Judge Neely's supposed unwillingness to do so, no less than ten times. *Id.* at 3-7 (C.R. 1102-06). Yet it is simply incorrect to suggest that Judge Neely expressed an unwillingness to follow the law by indicating that her religious beliefs preclude her from personally performing same-sex marriages.

To begin with, it is undisputed that Judge Neely did not express an unwillingness to

follow the law as a municipal judge, because municipal judges have no authority to solemnize marriages. *See* Wyo. Stat. § 20-1-106(a) (omitting municipal judges from the list of authorized marriage celebrants); Jones Aff. ¶ 7 (C.R. 885).

Nor did Judge Neely state a refusal to follow the law as a part-time circuit court magistrate. Wyoming statutes do not require magistrates to solemnize marriages. *See* Wyo. Stat. § 20-1-106(a) (providing that "[e]very . . . circuit court . . . magistrate . . . *may* perform the ceremony of marriage") (emphasis added); Wyo. Stat. § 5-9-212(a)(iii) (giving part-time circuit court magistrates the "power[]" but not the duty to "[p]erform marriage ceremonies"). Indeed, the Commission conceded during discovery that magistrates are not required to serve as celebrants for weddings. *See* Soto Dep. at 153 (C.R. 438); Comm'n Resp. to Judge Neely's Reqs. for Admis. No. 4 (C.R. 487). And of particular note, the Commission admitted that it subjects Judge Neely to a double-standard on this point, stating that "Circuit Court Magistrates in general" "are not required to perform any marriage ceremonies under Wyoming law," but that somehow the law is different for Judge Neely. Comm'n Resp. to Judge Neely's Reqs. for Admis. No. 4 (C.R. 487).

Even if a part-time circuit court magistrate decides to solemnize some marriages, she has discretion when exercising that authority, meaning that a magistrate who solemnizes some marriages need not solemnize them all. The record confirms this, showing that part-time magistrates and other judges who serve as celebrants for some weddings do in fact decline to solemnize other lawful marriages. *See* Smith Dep. at 36-37, 43-44 (C.R. 463, 465) (testifying that even though he is a circuit court magistrate appointed solely to solemnize weddings, he does not marry strangers); *see also supra* at 6-7 (collecting relevant evidence).

Sound policy reasons support why part-time circuit court magistrates have discretion when exercising their marriage-celebrant authority. Unlike other functions that a magistrate may perform, which involve adjudicatory assignments or rote administrative tasks, a judge who solemnizes a marriage personally participates in celebrating a private event. Neely Aff. ¶ 24 (C.R. 831-32); Wedding Script at 1-5 (C.R. 854-858). Because ample marriage celebrants are available to the public, the state need not force magistrates to participate in weddings that they cannot in good conscience celebrate. Wyoming's marriage-solemnization statute recognizes this by giving magistrates discretion.

The discretionary nature of marriage solemnization is further underscored by the one-of-a-kind nature of that magisterial function. For example, the state permits magistrates to use marriage-celebrant authority for their own private purposes—like when a circuit court judge appoints a magistrate solely to solemnize marriages for friends and family. *See* Smith Dep. at 36-37, 43-44 (C.R. 463, 465); Haws Dep. at 30-31 (C.R. 353). Also, the state allows magistrates to charge a marriage-celebrant fee and thus to use their marriage-solemnization authority to benefit financially from the public. Haws Dep. at 68-69 (C.R. 362). And the state, through its marriage-solemnization statute, treats magistrates just like clergy when instructing them that they "may perform the ceremony of marriage." Wyo. Stat. § 20-1-106(a).

In order to justify its claim that Judge Neely refused to comply with the law, the Commission suggests that she announced a refusal to follow the *Guzzo* ruling (which legalized same-sex marriage in Wyoming). *See* Order at 5 (C.R. 1104). But that is not correct. *Guzzo* requires the state to ensure that same-sex couples may enter into a state-recognized

marriage. *See* 2014 WL 5317797 at *9. It simply does not address whether an individual circuit court magistrate (or any other judge) with discretionary authority to solemnize marriages must personally serve as a celebrant for weddings that conflict with her religious beliefs. Once the state ensures that same-sex couples have access to marriage licenses and authorized marriage celebrants (which is unquestionably true in Sublette County, *see supra* at 14-16), it has satisfied its obligations under *Guzzo*.

Continuing to pursue its "follow the law" theme, the Commission implies that Judge Neely defiantly insisted on exercising her marriage-solemnization power however she pleases, no matter what the law requires. But nothing could be further from the truth. Judge Neely proactively sought guidance on what to do after same-sex marriage was legalized in Wyoming. Within weeks of the *Guzzo* decision, Judge Neely approached Judge Haws, and he told her that the two of them should wait for guidance before making any decisions about her future as a magistrate. Haws Dep. at 85 (C.R. 366); Neely Dep. at 77 (C.R. 511). Then a few months later, after no guidance had come, Judge Neely requested an opinion from the Advisory Committee—an effort thwarted by the commencement of these proceedings. *See* 1/29/15 Letter from John Burman to Judge Neely (C.R. 876). These undisputed facts show that Judge Neely did not recklessly disregard the law, but rather repeatedly and reasonably sought guidance.

In short, the Commission erred in finding that Judge Neely stated an unwillingness to follow the law. Given that this is the lynchpin of the Commission's analysis, its recommendation to remove Judge Neely from the bench should be rejected.

II. The government cannot remove Judge Neely from her municipal judge position.

A. Judge Neely did not violate the Code in her position as a municipal judge.

The Commission concluded that Judge Neely violated Rules 1.1, 1.2, 2.2, and 2.3 of the Code. *See* Order at 4-5 (C.R. 1103-04). Yet nothing in the Commission's logic even suggests, let alone establishes, that Judge Neely violated any of those Rules *in her position as a municipal judge* who has no authority to solemnize weddings. *See* Wyo. Stat. § 20-1-106(a) (omitting municipal judges from the list of authorized marriage celebrants); Jones Aff. ¶ 7 (C.R. 885).

Rules 2.2 and 2.3 apply only when a judge is performing the "duties" of judicial office. *See* Wyo. Code of Judicial Conduct, Rule 2.2 (hereinafter "W.C.J.C., R.") (requiring judges to "perform all duties of judicial office fairly and impartially"); W.C.J.C., R. 2.3(B) (governing judges "in the performance of judicial duties"). But because a municipal judge is not permitted to solemnize marriages, that judge's statement of her religious beliefs and how they affect marriage solemnization cannot possibly violate those Rules.

Nor did Judge Neely violate Rule 1.1 or 1.2 in her capacity as a municipal judge. The Commission claims that Judge Neely violated those Rules because when she indicated that her religious beliefs preclude her from solemnizing same-sex marriages, she "stat[ed] her unwillingness to follow Wyoming law" (under Rule 1.1) and "announced [that] she would not follow the law" (under Rule 1.2). Order at 4 (C.R. 1103). Yet given that a municipal judge is not allowed to perform weddings, her statement that her faith prevents her from solemnizing some marriages cannot possibly indicate an unwillingness to follow the law.

B. Removing Judge Neely from her municipal judge position would violate her religious liberty under the Wyoming Constitution.

1. The Commission seeks to punish Judge Neely for her religious beliefs and manifests hostility toward those beliefs.

The only plausible reason for the Commission's recommendation to remove Judge Neely as a municipal judge is her religious beliefs about marriage. In its decision, the Commission implies that Judge Neely should be removed because she allegedly expressed an unwillingness to follow the law and supposedly violated the Code. But because, as explained above, those purported justifications clearly do not apply to Judge Neely's role as a municipal judge, *see supra* at 24-25 & 28, it is obvious that the only basis for removing her from that position is her religious beliefs about marriage.

Nor can the Commission claim that Judge Neely's conduct—as opposed to her professed religious beliefs about marriage—justifies her removal as a municipal judge. Judge Neely's inability to solemnize same-sex marriages (which she merely stated and never acted on) does not affect her work as a municipal judge because she does not perform weddings in that role. Furthermore, her religious beliefs about marriage do not otherwise affect her municipal duties, which include adjudicating traffic violations, animal-control issues, and criminal misdemeanors, because it is undisputed that Judge Neely will recognize the legality of same-sex marriages when adjudicating cases. Neely Aff. ¶ 32 (C.R. 833).

Evidence in the record confirms that the Commission has acted against Judge Neely because of her religious beliefs about marriage. Most notably, during discovery in this case, the Commission amended its Notice to claim that Judge Neely violated additional Code provisions *simply* by her "engagement of" and "affiliation with" a religious, pro-bono, public-

interest legal organization, *see* Amended Notice at 6 ¶ B.2 (C.R. 787), that "actively" promotes marriage as the union of one man and one woman, *see id.* at 4 ¶ A.10. (C.R. 785). The Commission went further, alleging that Judge Neely's mere association with a religious legal organization that holds and expresses her religious beliefs about marriage "precludes her from discharging the obligations of [the Code]" or remaining in either of her judicial positions. *Id.* at 6 ¶ B.2. (C.R. 787). The only explanation for adding these charges is sheer animus toward the religious convictions of Judge Neely and her attorneys. And the Commission appears to have admitted as much when it "concede[d]" Judge Neely's Motion to Dismiss, *see* Notice of Confession at 1 (C.R. 807), which argued that these claims exhibited "unabashed hostility toward, and targeting of, [Judge Neely's] religion," Motion to Dismiss at 10 (C.R. 800).

Other evidence further exposes the Commission's religious bias. During oral argument, for example, the Commission's attorney referred to Judge Neely's church's beliefs about marriage as "repugnant." 12/4/15 Transcript at 73 (C.R. Vol. 7). And after questioning Judge Neely about the nature of her religious beliefs at her deposition, *see* Neely Dep. at 59-61 (C.R. 507), the Commission's attorney cited them as one of the "[t]wo things that compel removal in this case" because, the argument went, "[a] person with that type of" religious conviction "cannot remain in office," Comm'n Mem. on Sanctions at 13 (C.R. 1188). Moreover, the Commission's Executive Director, who was a board member of an advocacy group that opposes Judge Neely's religious views on marriage, *see* Soto Dep. at 31 (C.R. 408); Artery Dep. at 19-20, 46-47 (C.R. 616, 623), invited a member of the public to send her the article discussing Judge Neely's beliefs, *see* Soto Dep. at 83-86 (C.R. 421-22),

and took the unusual step of sending that information to an Investigatory Panel for consideration on the Commission's own motion, *see id.* at 55-56, 113 (C.R. 414, 428).

If all this were not enough, the Commission has steadfastly pursued the rarely used sanction of removal, *see* Tiedeken Dep. at 103-04 (C.R. 697), pausing only once to propose an extremely unreasonable offer that would have required Judge Neely to publicly admit wrongdoing, forfeit both of her judicial positions, and agree to never again seek judicial office in Wyoming, *see* Neely Sanctions Mem. at 11 (C.R. 1300). Worse yet, the Commission's questions to Judge Neely at the sanctions hearing showed that her unwillingness to violate her faith or "publicly apologize" for her beliefs contributed to the Commission's decision to recommend her removal. *See* 2/19/2016 Transcript at 45 (C.R. Vol. 7) (asking if Judge Neely would "publicly apologize" and "agree to perform same-sex marriages"). The evidence thus conclusively demonstrates that expelling Judge Neely from the judiciary is part of a brazen effort to target and penalize her for her beliefs.

2. Removing Judge Neely from her municipal judge position would violate Article 1, Section 18's mandate that no person be removed from office because of her religious beliefs.

Article 1, Section 18 of the Wyoming Constitution states that "no person shall be rendered incompetent to hold any office of trust . . . because of his opinion on *any matter of religious belief whatever.*" Wyo. Const. art. 1, § 18 (emphasis added). Judge Neely holds sincere religious beliefs on a matter of profound religious significance: the issue of marriage. She believes that marriage is the union of a man and a woman and that she cannot personally solemnize any other union as a marriage. By seeking to remove Judge Neely as a municipal judge who does not have authority to solemnize marriages, the Commission has made clear

that it objects to Judge Neely's beliefs about marriage rather than how those beliefs affect her ability to solemnize weddings. Thus, if this Court were to adopt the Commission's recommendation and remove Judge Neely from her municipal judge position, it would effectively declare that no one who shares Judge Neely's beliefs about marriage may remain a judge in this state (even a judge who has no authority to solemnize marriages). This violates the clear language and purpose of Article 1, Section 18's protection for public officeholders.

Although this Court has never construed Article 1, Section 18, Wyoming's constitutional history leaves no doubt that this provision forbids the government from invoking beliefs about marriage—an issue inextricably intertwined with religion—to disqualify an official from public office. During the debates on the Wyoming Constitution, "the delegates defeated a proposed amendment, aimed at the state's Mormon population, that would have prohibited anyone who entered into or believed in polygamy from voting, holding public office, or serving as a juror." Robert B. Keiter & Tim Newcomb, *The Wyoming State Constitution* 69 (2011). Therefore, just as a Mormon judge who believes in polygamy cannot be excluded from judicial office because of her beliefs about marriage, neither may Judge Neely or others be expelled as municipal judges because of their sincere beliefs about that issue. *See Journal and Debates of the Constitutional Convention of the State of Wyoming* 721 (The Daily Sun, Book and Job Printing 1893) (hereinafter "*Journal and Debates*") (observing that Article 1, Section 18's protection for officeholders includes judges—that is, people who "may pass upon the rights, nay, even the lives, of other men, in our courts").

The implications of this Court's ruling extend far beyond Judge Neely. Affirming the Commission's recommendation would exclude from the judiciary not only members of the

LCMS church like Judge Neely, but also many adherents of other Protestant denominations, Roman Catholicism, Mormonism, Judaism, and Islam—groups that collectively constitute more than 65 percent of the state's adult population. *See Religious Composition of Adults in Wyoming*, Pew Research Center, http://www.pewforum.org/religious-landscape-study/state/wyoming/ (last visited Apr. 27, 2016). It would relegate those citizens to second-class status—people unfit for judicial office—and stigmatize their beliefs in the public square. The framers included Article 1, Section 18 in the Wyoming Constitution to ensure that that would not happen.

It is important to note that Article 1, Section 18's protection for public officeholders is exceedingly broad, particularly when compared to similar provisions in other constitutions. While other constitutions prohibit the government from establishing a "religious test" as a "qualification" for office, *see, e.g.*, U.S. Const. art. VI, cl. 3; Utah Const. art. 1, § 4; Neb. Const. art. I, § 4, the Wyoming Constitution broadly prohibits the state from "render[ing]" a person "incompetent to hold any office of trust . . . because of his opinion on *any matter of religious belief whatever.*" Wyo. Const. art. 1, § 18 (emphasis added). The framers were aware of the breadth of this provision. As John Hoyt, President of the University of Wyoming, stated during the constitutional convention: "This is the broadest declaration ever put before any people. I hope to be proud of our constitution in every particular, but especially proud of it on account of its breadth and freedom from all prejudice." *Journal and Debates*, *supra*, at 720. It is thus impossible to read Article 1, Section 18 (as the Commission did) to apply only when the state expressly requires a judge "to pass a religious test in order to perform her job as a judge." Order at 6 (C.R. 1105). The plain language of Article 1, Section 18 shows that its

reach is far broader than that.

The only limitation on Article 1, Section 18's protection for officeholders is that it does not permit a public official to "excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state." Wyo. Const. art. 1, § 18. But no evidence remotely suggests, and no credible argument can establish, that Judge Neely's religious beliefs or her peaceful and respectful expression of those beliefs fosters licentiousness or jeopardizes public safety. Consequently, the state constitution forecloses the Commission's attempt to remove Judge Neely from her municipal judge position.

3. Removing Judge Neely from her municipal judge position would violate the Wyoming Constitution's general protection for the free exercise of religion.

a. The Wyoming Constitution guarantees broad protection for religious exercise.

Two provisions in the Wyoming Constitution guarantee broad protection for the free exercise of religion. First, Article 1, Section 18, part of which was discussed above, declares:

> 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. Second, Article 21, Section 25 states that "[p]erfect toleration of religious sentiment shall be secured, and no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship." Wyo. Const. art. 21, § 25. Although this Court has yet to interpret these provisions, *see* Keiter & Newcomb, *supra*, at 69 ("Remarkably, [Article 1, Section 18] has not been subject to judicial interpretation"), it

should conclude that they guarantee broader protection for the free exercise of religion than the already expansive protection afforded under the U.S. Constitution.

The Wyoming Constitution "provides protection of individual rights separate and independent from the protection afforded by the U.S. Constitution." *O'Boyle v. State*, 2005 WY 83, ¶ 23, 117 P.3d 401, 408 (Wyo. 2005). "[W]hen advancing an argument to independently interpret the state constitution," "a litigant must provide a precise, analytically sound approach." *Vasquez v. State*, 990 P.2d 476, 484 (Wyo. 1999). That analysis may include the six nonexclusive factors that originated with the Supreme Court of Washington in *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986), and were first brought to Wyoming by Justice Golden's concurring opinion in *Saldana v. State*, 846 P.2d 604, 622 (Wyo. 1993). *See Norgaard v. State*, 2014 WY 157, ¶ 26, 339 P.3d 267, 275 (Wyo. 2014). Those factors include: "1) the textual language of the provisions; 2) differences in the texts; 3) constitutional history; 4) preexisting state law; 5) structural differences; and 6) matters of particular state or local concern." *Id.*[2]

In addition to these factors, this Court also "look[s] to other jurisdictions for guidance" when deciding state constitutional "matter[s] of first impression in Wyoming." *Hageman v. Goshen Cty. Sch. Dist. No. 1*, 2011 WY 91, ¶ 9, 256 P.3d 487, 492 (Wyo. 2011) (quotation marks omitted). A number of courts in states that have similarly broad religious-freedom language in their constitutions (states like Washington, Minnesota, Wisconsin, and Ohio, to name a few) have adopted greater free-exercise protection than that afforded by the U.S. Constitution. *See, e.g., State v. Hershberger*, 462 N.W.2d 393, 397-99 (Minn. 1990)

[2] In this brief, Judge Neely discusses only the factors that shed light on the analysis here.

(concluding that the free-exercise language in the Minnesota Constitution "is of a distinctively stronger character than the federal counterpart" and thus provides greater protection); *State v. Miller*, 549 N.W.2d 235, 239-40 (Wis. 1996) (concluding that the Wisconsin Constitution provides an "independent" and more robust basis for protecting religious freedom); *Humphrey v. Lane*, 728 N.E.2d 1039, 1044-45 (Ohio 2000) (concluding that "the Ohio Constitution's free exercise protection is broader" than the federal protection).

Washington's case law is of particular interest because its courts apply the same six nonexclusive factors that this Court does and its constitutional language is similar to Wyoming's (likely because Washington's framers finished their draft constitution approximately two weeks before Wyoming began its constitutional convention). *See First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 186 (Wash. 1992) (concluding that the free-exercise language in the Washington Constitution—which, similar to the Wyoming Constitution, says that "no one shall be molested or disturbed in person or property on account of religion"—is "significantly . . . stronger than the federal constitution"). For the reasons discussed below, this Court should follow the reasoning of the Washington courts that have interpreted their state's free-exercise provision and declare that the Wyoming Constitution similarly provides robust protection for religious exercise.

Textual Language and Textual Differences. Wyoming's constitutional text confirms three notable features of its protection for religious liberty. First, it safeguards both religious beliefs *and* the exercise of those beliefs. *See* Wyo. Const. art. 1, § 18 (protecting the "free exercise" of religion and "religious . . . worship"); *First Covenant Church*, 840 P.2d at 186

(explaining that the similar language in the Washington Constitution "clearly protects both belief and conduct"). The exclusion of protection for "acts of licentiousness or . . . practices inconsistent with the peace or safety of the state," Wyo. Const. art. 1, § 18, "confirm[s] that the free exercise right was not understood to be confined to beliefs" because "[b]eliefs without more do not have the capacity to disturb the public peace and safety." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1462 (1990). Second, the state constitution provides explicit protection for the expression of religious beliefs and opinions. *See* Wyo. Const. art. 1, § 18 (protecting "religious profession"); Wyo. Const. art. 21, § 25 (guaranteeing "[p]erfect toleration of religious sentiment"). Third, Wyoming's conscience protections expressly include public officials within their scope. *See* Wyo. Const. art. 1, § 18 (safeguarding people who "hold any office of trust"); Wyo. Const. art. 21, § 25 (protecting every "inhabitant of this state").

These broadly worded provisions extend beyond the already expansive free-exercise protection guaranteed by the federal constitution. While the U.S. Constitution bans the government from "*prohibiting* the free exercise [of religion]," U.S. Const. amend. I (emphasis added), the state constitution forbids the government from merely *disturbing* (i.e., "molest[ing]") a citizen on account of her religious exercise, *see* Wyo. Const. art. 21, § 25; *First Covenant Church*, 840 P.2d at 186; *Hershberger*, 462 N.W.2d at 397; *Humphrey*, 728 N.E.2d at 1044. Moreover, the Wyoming Constitution "expressly limits the governmental interests that may outweigh religious liberty" to only interests in avoiding "licentiousness" or preserving "the peace or safety of the state." *Hershberger*, 462 N.W.2d at 397; Wyo. Const. art. 1, § 18. Finally, Wyoming's framers infused sweeping phraseology—like the promise of

"[p]erfect toleration of religious sentiment," Wyo. Const. art. 21, § 25—throughout these constitutional provisions, thereby showing their desire to create vast protection for religious liberty. *See also* Wyo. Const. art. 1, § 18 (noting that religious freedom "without discrimination or preference shall be forever guaranteed").

Constitutional History. Wyoming's constitutional history also demonstrates that the state constitution affords exceedingly broad protection for religious liberty. In particular, the Preamble confirms that protecting religious freedom was an overriding goal of the framers: "We, the people of the State of Wyoming, grateful to God for our civil, political and *religious liberties*, and *desiring to secure them* to ourselves and perpetuate them to our posterity, do ordain and establish this Constitution." Wyo. Const. Preamble (emphasis added). The Preamble also shows that the framers recognized religious liberty as "coequal" with civil and political liberties. *See Hershberger*, 462 N.W.2d at 398.

Furthermore, the framers' discussions about the state's Mormon citizens (mentioned above) demonstrate that they intended the religious protections in the Wyoming Constitution to ensure that people of a particular faith will not be excluded from public life—from voting, holding office, or serving as jurors—simply because of their beliefs and practices concerning marriage. *See* Keiter & Newcomb, *supra*, at 69. This history is salient here, where the Commission attempts to expel Judge Neely from office because of her religious beliefs about marriage. It shows that the framers wanted to provide a bulwark against precisely what the Commission endeavors to do in this case.

In addition, two other historical notes call for a broad reading of Wyoming's free-exercise protections. First, Wyoming's constitutional history shows that the framers intended

the courts to interpret the Declaration of Rights—which includes the religious-liberty guarantees in Article 1, Section 18—using a "principle of liberal construction" that broadly protects individual liberties. *Vasquez*, 990 P.2d at 485 (quotation marks omitted). Second, the framers built in an additional safeguard for religious freedom by providing that Article 21, Section 25—which guarantees "[p]erfect toleration of religious sentiment"—cannot be revoked "without the consent of the United States." Wyo. Const. art. 21, § 25. Wyoming's constitutional history thus demonstrates that the framers intended to create particularly sweeping and durable safeguards for religious freedom.

For the foregoing reasons, this Court should conclude that the Wyoming Constitution ensures more robust religious freedom than its federal counterpart.

b. Removing Judge Neely from her municipal judge position burdens her religious exercise without sufficient justification.

A state constitution that broadly protects religious freedom requires an analytical framework that reflects the sweeping nature of the state's protection. Therefore, when deciding this question of first impression, this Court should adopt the following two-part test for evaluating state free-exercise claims. First, a person who claims that the government has violated her state free-exercise rights must show a burden on or interference with religious exercise. *See First Covenant Church*, 840 P.2d at 187 (discussing the "burdens on [the party's] free exercise of religion"). Second, after the first step is satisfied, the government has the burden to establish that respecting the person's religious exercise would "excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state." Wyo. Const. art. 1, § 18; *see also Hershberger*, 462 N.W.2d at 397 (construing identical language in the

Minnesota Constitution and concluding that "[o]nly the government's interest in peace or safety or against acts of licentiousness will excuse an imposition on religious freedom"); *First Covenant Church*, 840 P.2d at 187 (explaining that the government must demonstrate a "justification . . . that prevents a clear and present, grave and immediate danger to public health, peace, and welfare") (quotation marks and citations omitted). That test should apply in all cases regardless of whether the state invokes a neutral and generally applicable law to justify its actions. *See First Covenant Church*, 840 P.2d at 187; *Humphrey*, 728 N.E.2d at 1045.

Applying that two-part test, this Court should conclude that removing Judge Neely as a municipal judge violates her free-exercise rights under the state constitution. First, there is a substantial burden on religious freedom. Because Judge Neely has no authority to solemnize marriages as a municipal judge, the basis for removing her from that position is not her inability to serve as a celebrant for same-sex marriages, but rather her religious beliefs about marriage. *See supra* at 29-31. Yet Judge Neely surely has a right under the state constitution to hold and profess those beliefs. *See* Wyo. Const. art. 1, § 18 (safeguarding "religious profession" and "opinion[s] on any matter of religious belief whatever"); Wyo. Const. art. 21, § 25 (securing "[p]erfect toleration of religious sentiment"). And ending her judicial career because of those beliefs—and thereby eliminating the means by which she helps support her family—substantially burdens her religious exercise. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (finding an impermissible burden on religion when a woman's loss of her job and unemployment benefits "derive[d] solely from the practice of her religion").

Second, the Commission cannot make the showing necessary to override Judge Neely's religious exercise. As mentioned above, no evidence remotely suggests, and no

plausible argument can establish, that Judge Neely's religious beliefs about marriage foster licentiousness or jeopardize public peace or safety. Wyoming's free-exercise guarantees thus prohibit the government from removing Judge Neely as a municipal judge.

C. Removing Judge Neely from her municipal judge position would violate her free-exercise rights under the U.S. Constitution.

1. The U.S. Constitution forbids the state from punishing citizens or expelling public officials because of their religious beliefs.

The Commission's attempt to remove Judge Neely from her municipal judge position contravenes two bedrock principles of federal free-exercise jurisprudence. First, government efforts to penalize citizens because of their religious beliefs are strictly forbidden under the federal constitution. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). The U.S. Supreme Court has therefore recognized that the state cannot "impose special disabilities on the basis of religious views," *id.*, and that "targeting religious beliefs" by punishing citizens for holding or expressing them "is never permissible," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). Yet here, as shown above, the only basis for removing Judge Neely as a municipal judge is her beliefs about marriage. *See supra* at 29-31. The federal constitution thus prohibits removal in this case.

Second, the U.S. Constitution forbids states from excluding citizens from public office because of their religious beliefs or exercise. *See McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (plurality) (holding that a state cannot forbid a minister from holding a legislative office because of his religious exercise); *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961) (holding

that a state cannot withhold the office of notary public because of a person's unwillingness to declare a particular religious belief); U.S. Const. art. VI, cl. 3. Because such religious bigotry is "abhorrent to our tradition[s]," *Torcaso*, 367 U.S. at 491 (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)), the U.S. Supreme Court has declined "to open up the way for government, state or federal, to restore the historically and constitutionally discredited policy" of foreclosing "public offices to persons who have . . . a belief in some particular kind of religious concept," *id.* at 494. Adopting the Commission's recommendation would violate this principle by effectively declaring that no person who shares Judge Neely's religious beliefs about marriage can be a judge in this state (even in a position that lacks authority to solemnize marriages).

2. Strict scrutiny applies to the Commission's attempt to remove Judge Neely from her municipal judge position.

Judge Neely's federal free-exercise claim is subject to strict scrutiny for three independent reasons. First, state action "that is not neutral [toward religion] or not of general application must undergo the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546. The government "is not neutral" toward religion when its "object . . . is to infringe upon" or penalize religious beliefs, *id.* at 533, and state action is not generally applicable when religious beliefs are targeted for adverse treatment, *id.* at 542-43. Whenever the state excludes people from office or otherwise punishes citizens because of their religious beliefs—which, as explained above, is the case here, *see supra* at 41-42—the state is not acting neutrally or in a generally applicable manner. Highlighting the lack of neutrality in this case is the abundant evidence (discussed above) showing that the Commission is hostile toward Judge Neely's religious beliefs about marriage. *See supra* at 29-31. Because the state's conduct is neither

neutral nor generally applicable, strict scrutiny applies to Judge Neely's federal free-exercise claim.

Second, strict scrutiny is the appropriate standard whenever a state administrative process affords government officials significant discretion to engage in an "individualized governmental assessment of the reasons" for the allegedly impermissible speech or conduct. *See Smith*, 494 U.S. at 884 (concluding that strict scrutiny applies to the denial of unemployment benefits because the "eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment"); *Lukumi*, 508 U.S. at 537 (concluding that laws regulating the killing of animals create "a system of individualized governmental assessment" by "requir[ing] an evaluation of the particular justification for the killing") (quotation marks omitted). Here, the state's judicial disciplinary process constitutes a system of individualized governmental assessment. As this case shows, the Commission must individually assess a judge's speech or conduct, as well as the judge's motivation for her speech or conduct, to determine whether she has acted "impartially," W.C.J.C., R. 2.2, or manifested "bias or prejudice," W.C.J.C., R. 2.3(B). And once a Code violation is found, the Commission members have nearly limitless discretion to determine which punishment to recommend. *See* Rules Governing the Comm'n on Judicial Conduct and Ethics, Rule 8(d)(2) (noting that the "disposition" rendered by the Commission "may include, but is not limited to," five types of discipline, and providing that the Commission "may consider" a list of "nonexclusive factors"). Given that the attempt to punish Judge Neely arose out of this system of individualized governmental assessment, this Court must apply strict scrutiny.

Third, strict scrutiny applies when the state threatens to violate a "hybrid" of

constitutional rights—that is, when free-exercise rights are combined "with other constitutional protections, such as freedom of speech." *Smith*, 494 U.S. at 881-82. Thus, government action that "attempt[s] to regulate . . . the communication of religious beliefs" must undergo the most rigorous scrutiny. *Id.* at 882. Here, the Commission seeks to expel Judge Neely for expressing religious beliefs that have nothing to do with her ability to carry out her responsibilities as a municipal judge. That Judge Neely's free-exercise rights and her free-speech rights are both implicated here requires the application of strict scrutiny.

3. The Commission cannot satisfy strict scrutiny.

Strict scrutiny requires the state to show (1) that its actions are necessary to further "a compelling governmental interest" and (2) that they are "narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531-32. This is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The Commission cannot satisfy it.

No Compelling Interest. In its ruling below, the Commission primarily relied upon "the State's interest in upholding the rule of law." Order at 5 (C.R. 1104). But as discussed above, Judge Neely did not express an unwillingness to follow the law. *See supra* at 24-27. Therefore, this interest is not furthered by removing Judge Neely.

The Commission's ruling also makes passing reference to another set of state interests, which are best characterized as maintaining the "impartiality" of the judiciary. Order at 5 (C.R. 1104). But when applying strict scrutiny to analyze that asserted goal, this Court must "look[] beyond broadly formulated interests" and scrutinize the state's specific interest in applying the Code to Judge Neely under the circumstances in this case. *Gonzales v.*

O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431 (2006). Using that particularized analysis, this Court should find that the Commission's interest in maintaining impartiality is not compelling here.

In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the U.S. Supreme Court recognized that the word "impartiality" is often a "vague" concept when used by state judicial commissions. *Id.* at 775. To the extent that "impartiality" means "the lack of bias for or against either *party* to [a] proceeding," preserving impartiality may be compelling. *Id.* at 775-76. But to the extent that "impartiality" means the "lack of preconception" on contentious issues (even legal issues), the *White* Court held that maintaining impartiality "is not a *compelling* state interest." *Id.* at 777.

Here, as LGBT citizens and others in Pinedale have affirmed, Judge Neely has never been biased against, or otherwise treated unfairly, any party who has appeared before her in a judicial proceeding. *See supra* at 9-10 (discussing the relevant evidence). Judge Neely merely communicated her reasonable beliefs about an issue—the issue of marriage. But as *White* establishes, any asserted interest in ensuring that judges lack preconceptions on potentially divisive legal, social, and religious issues like the meaning of marriage is not only a "virtually impossible" goal (because most if not all judges have some opinions about those matters), it is decidedly not a compelling state interest. 536 U.S. at 777-78. Thus, the Commission cannot establish that removing Judge Neely as a municipal judge furthers a compelling governmental interest.

No Narrow Tailoring. Nor can the Commission demonstrate that its attempt to remove Judge Neely is narrowly tailored to its asserted interest in maintaining judicial

impartiality. State action fails the narrow-tailoring requirement when it is substantially "underinclusive." *Lukumi*, 508 U.S. at 546; *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231-32 (2015). That occurs when the asserted governmental interests "are not pursued with respect to analogous" speech or conduct. *Lukumi*, 508 U.S. at 546. Here, the Commission's attempt to maintain judicial impartiality by removing Judge Neely for her religious beliefs and expression about marriage is fatally underinclusive.

In particular, the Code allows judges to hold similar nonreligious views and engage in similar nonreligious speech or expressive conduct. For example, the Code encourages judges to "engage in extrajudicial activities that concern the law" such as "speaking" or "writing." W.C.J.C., R. 3.1 cmt. 1. Therefore, a municipal judge may critique or praise (in speech or print) the *Guzzo* decision that brought same-sex marriage to Wyoming. *See White*, 536 U.S. at 779-80 (indicating that a judge may discuss the issue of same-sex marriage). The Code also permits judges to "participat[e] in a caucus-type election procedure" and thereby to publicly disclose their views on controversial political issues. W.C.J.C., R. 4.1 cmt. 4. Thus, a municipal judge may attend her local precinct caucuses and discuss scores of divisive political issues, including whether the *Guzzo* decision may be limited or expanded through legislation. To allow a municipal judge to engage in these sorts of nonreligious expression, while removing Judge Neely for communicating her religious beliefs about essentially the same topic, is so underinclusive that it lays bare the Commission's desire to "disfavor[] a particular speaker" (Judge Neely) and her "viewpoint." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011).

Of course, those examples merely scratch the surface of the many instances in which

the Code allows a judge to engage in speech or expressive conduct that might cause some people to think that the judge would be inclined to rule against them. For instance, a judge may undoubtedly discuss her atheist views even though people of faith might suspect that the judge will rule against them in a case involving their religious freedom. And a judge may join or participate in environmental groups, *see* W.C.J.C., R. 3.7(A), even though that will likely cause some oil-company executives to question the judge's impartiality toward their businesses. That the Code allows all this (and much more) speech and expressive conduct that could be characterized as undermining judicial impartiality further illustrates the underinclusiveness of the Commission's attempt to remove Judge Neely from the bench.

Additional examples of underinclusiveness show that punishing Judge Neely for expressing her religious beliefs would be utterly ineffectual because other judges who hold and profess the very same beliefs will remain on the bench. *See Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015) ("Underinclusiveness can also reveal that a law does not actually advance a compelling interest."). As the Commission's attorney has acknowledged, judges may express their religious beliefs about marriage, including the belief that marriage is the union of one man and one woman, in a coffee shop or in a church. 12/4/15 Transcript at 44 (C.R. Vol. 7). And the Code similarly permits judges to be members of, and to participate in, religious organizations that adhere to a belief in man-woman marriage (or any other belief about marriage). W.C.J.C., R. 3.6 cmt. 4. Because the Code permits other judges to profess (through words and expressive conduct) the same religious beliefs that Judge Neely stated, removing her will not effectively advance the Commission's asserted interest in impartiality.

This raises an important practical consideration. All that separates Judge Neely from

other judges who hold views on myriad potentially contentious issues is a meddling reporter that suspected her beliefs and set out to expose them. Allowing that to justify removal would invite others who want to create trouble for judges to surprise them with questions, post their answers on the internet (a "no comment" response to a loaded question will often suffice to create controversy), and let the Commission take it from there. This Court surely does not want to encourage such witch hunts throughout the judiciary.

Finally, state action is not narrowly tailored when the government's supposed concerns "can readily be addressed through existing [laws]." *McCullen v. Coakley*, 134 S. Ct. 2518, 2537-38 (2014). Here, the Commission's attorney sought to justify Judge Neely's removal by speculating (without evidence) that LGBT citizens in Pinedale would reasonably question her impartiality when adjudicating their traffic tickets and misdemeanor charges. *See* Comm'n Answer to Interrog. No. 2 (C.R. 647). As an initial matter, that argument cannot move beyond its flawed premises, for it is entirely unreasonable (as explained below) to question Judge Neely's fairness when adjudicating traffic tickets and misdemeanors simply because of her beliefs about marriage, *see infra* at 59-61, and the actual testimony from Pinedale's LGBT citizens confirms that they have no doubts about Judge Neely's impartiality in court, *see* Stevens Aff. ¶ 5 (C.R. 898-99); Anderson Aff. ¶ 5 (C.R. 901-02). But more to the point here, removal is an extremely overbroad reaction to the Commission's asserted concern—the state is using a chainsaw when a scalpel would do. If one of the few LGBT citizens in Pinedale were to appear in court before Judge Neely and if that litigant could reasonably question Judge Neely's impartiality in that specific case, existing laws would permit Judge Neely's disqualification from that proceeding (thus undermining the

Commission's claim that Judge Neely must be expelled from the bench altogether). *See* Pinedale Mun. Code § 23-1(B) (providing for an alternate judge to "determine all cases when the Municipal Judge has recused or been disqualified"); W.C.J.C., R. 2.11(A) (discussing disqualification). This already-existing means of addressing the Commission's concerns confirms that the state cannot satisfy strict scrutiny's narrow-tailoring requirement.

D. Removing Judge Neely from her municipal judge position would violate her free-speech rights under the Wyoming and U.S. Constitutions.

Judges enjoy the free-speech protections of the First Amendment to the U.S. Constitution and the correlative provisions of the Wyoming Constitution. *See* U.S. Const. amend. I; Wyo. Const. art. 1, § 20; *White*, 536 U.S. at 788 (holding that a regulation prohibiting judicial candidates from announcing their views on disputed legal or political issues violated the First Amendment); *In re Sanders*, 955 P.2d 369, 375 (Wash. 1998) (stating that "[a] judge does not surrender First Amendment rights upon becoming a member of the judiciary"). Those constitutional protections prohibit the government from removing Judge Neely from her municipal judge position for expressing her religious beliefs about marriage.

1. Removing Judge Neely from her municipal judge position would discriminate based on the content and viewpoint of her speech.

"Government regulation of speech is content based if a law . . . defin[es] regulated speech by its function or purpose." *Reed*, 135 S. Ct. at 2227. Here, Rule 2.3 defines prohibited speech as "words" that "manifest bias or prejudice." W.C.J.C., R. 2.3(B). And Rules 1.2 and 2.2 prohibit conduct that undermines "impartiality." *See* W.C.J.C., R. 1.2 (requiring "impartiality"); W.C.J.C., R. 2.2 (requiring "impartial[]" performance). Because the Commission must review the content of a judge's speech to decide if its function or purpose

violates those Rules, this Court should conclude that they discriminate based on content.

Those Code provisions also discriminate based on viewpoint. When Mr. Donovan asked Judge Neely if she was excited to start performing same-sex marriages, she stated that she believes marriage is the union of one man and one woman, and that those beliefs prevent her from solemnizing same-sex marriages. But if another judge faced with the same question said that she supports same-sex marriage and would gladly perform those weddings, the Commission surely would not have instituted a disciplinary proceeding. Because the Commission seeks to remove a judge who expresses one view on a matter of public concern while permitting speech that expresses a contrary view, it discriminates based on viewpoint and thus engages in an especially egregious form of content-based discrimination. *See Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (explaining that the state is forbidden "from regulating speech when . . . the opinion or perspective of the speaker is the rationale for the restriction").

Content-based restrictions on judicial speech are subject to strict scrutiny. *See Williams-Yulee*, 135 S. Ct. at 1665 (applying strict scrutiny when a state attempted to punish speech of a judicial candidate); *White*, 536 U.S. at 774-75 (same); *Miss. Comm'n on Judicial Performance v. Wilkerson*, 876 So. 2d 1006, 1013 (Miss. 2004) (applying strict scrutiny when a state attempted to punish speech of a sitting judge); *Sanders*, 955 P.2d at 375 (same). Because, as explained above, the Commission cannot satisfy strict scrutiny, this Court should reject the Commission's recommendation for removal. *See supra* at 44-49; *Mesa v. White*, 197 F.3d 1041, 1047 (10th Cir. 1999) (explaining that "[v]iewpoint discrimination is an egregious form of content discrimination" that "is almost universally condemned and rarely passes

constitutional scrutiny").

2. The Commission erred in concluding that Judge Neely's speech is not constitutionally protected.

Apparently relying on *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Commission determined that "Judge Neely's speech was not entitled to First Amendment protections" because "she was not speaking as a private citizen on matters of public concern." Order at 6 (C.R. 1105). The Commission's conclusion is incorrect.

As an initial matter, the Commission's reliance on the *Pickering-Garcetti* line of cases, which involve the free-speech rights of public employees, is misplaced. The Commission is not acting as Judge Neely's employer. Rather, it is enforcing rules that regulate the conduct of all judges in the state, regardless of how or by whom they are employed. Indeed, the Commission is a state agency seeking to regulate Judge Neely as a municipal judge employed by the Town of Pinedale and as a circuit court magistrate appointed by a state court judge. When, as here, the government acts not as an employer but in its sovereign regulatory capacity, it is inappropriate to apply the public-employee-speech test of *Pickering-Garcetti.* Instead, this Court should follow the example of the U.S. Supreme Court in *Williams-Yulee*, 135 S. Ct. at 1665, and *White*, 536 U.S. at 774-75, and apply strict scrutiny to Judge Neely's free-speech claim. *See also Wilkerson*, 876 So. 2d at 1013 (applying strict scrutiny when a state attempted to punish speech of a sitting judge); *Sanders*, 955 P.2d at 375 (same).

Moreover, Judge Neely should prevail even if this Court applies the two-prong *Pickering-Garcetti* test. The first prong asks whether the public employee was speaking as a private citizen on a matter of public concern. *Garcetti*, 547 U.S. at 418. Contrary to the Commission's conclusion, *see* Order at 6 (C.R. 1105), Judge Neely was speaking as a private

citizen addressing an issue of public concern when she answered Mr. Donovan's question about marriage. Her response was an expression of her personal religious beliefs, regarding issues of public importance (marriage and religion), unrelated to any adjudicative proceeding before her, made off the bench, at home via telephone, while in the middle of hanging Christmas lights. Judge Neely was therefore speaking not as a judge, but as a private citizen addressing a matter of public concern. That Judge Neely's comments referenced marriage solemnization—a function that she may perform as a magistrate (but not as a municipal judge)—does not mean that she was speaking as a judge. The mere fact that a person discusses something that pertains to her role as a judge does not transform off-the-bench expression into judicial speech. *See In re Hey*, 452 S.E.2d 24, 33 (W. Va. 1994) (applying the First Amendment to protect a judge's "remarks during a radio interview in which he discussed his own [judicial] disciplinary proceeding").

The second prong of the *Pickering-Garcetti* test requires the court to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs." *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968); *see also Garcetti*, 547 U.S. at 419 (explaining that public employees "must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively"). The Commission, however, cannot establish that any asserted interest in efficiency outweighs Judge Neely's freedom to discuss her religious beliefs.

The *Pickering* case is instructive. There, the U.S. Supreme Court held that a public school could not punish a teacher for criticizing the school board because the school did not

show that the speech "in any way . . . impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally." *Pickering*, 391 U.S. at 572-73. Similarly here, Judge Neely's expression of her religious beliefs about marriage in no way affects her ability to perform her duties as a municipal judge. Thus, like the *Pickering* Court, this Court should reject the Commission's attempt to punish Judge Neely's speech.

E. The Code provisions at issue, as applied to Judge Neely's removal as a municipal judge, are impermissibly vague in violation of the Wyoming and U.S. Constitutions.

Both the Wyoming and U.S. Constitutions forbid the government from adopting vague regulations, particularly when those regulations ban expression. *See* U.S. Const. amends. I & XIV; Wyo. Const. art. 1, §§ 6, 7, 20. A disciplinary rule is impermissibly vague as applied if it "fails to provide fair notice to those to whom it is directed." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048 (1991) (quotation marks and alterations omitted). Courts apply "a more stringent vagueness test" when a regulation "interferes with the right of free speech." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010) (quotation marks omitted). That stringent "prohibition against vague regulations of speech" in a disciplinary context like this one is based "on the need to eliminate the impermissible risk of discriminatory enforcement," *Gentile*, 501 U.S. at 1051, and to ensure that a person need not "guess what . . . utterance may lose him his [job]," *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 604 (1967).

Here, the Commission has applied multiple vague Code provisions to justify removing Judge Neely as a municipal judge because she stated that her religious beliefs limit

her ability to exercise a discretionary authority *that she possesses in an entirely separate judicial position*. No municipal judge could have reasonably known that honestly conveying her religious beliefs about a topic irrelevant to her work as a municipal judge would cost her that job. The Code thus failed to provide Judge Neely with fair notice.

Furthermore, a cursory review of the Code provisions at issue shows just how standardless they are. Rule 1.2 subjects judges to punishment for creating an "appearance of impropriety" whether acting in a "professional [or] personal" capacity. W.C.J.C., R. 1.2 & cmt. 1. Such broad language, which Comment 3 admits is "cast in general terms," *id.* at cmt. 3, is "fraught with subjectivity and elasticity" that "create problems when applied to expression," *Hey*, 452 S.E.2d at 33; *see also In re Larsen*, 616 A.2d 529, 580-81 (Pa. 1992) (per curiam) ("[D]isciplinary rules expressed in terms of 'propriety' . . . place *ipse dixit* powers, antithetical to rule of law, in the hands of disciplinary boards and courts applying such rules."). For example, the Commission could use Rule 1.2's vague language to punish a judge who expresses her moral belief that human life begins at conception, claiming that such fanciful ideas "reflect[] adversely on the judge's . . . fitness to serve." W.C.J.C., R. 1.2 cmt. 5. Or the Commission could similarly invoke this Rule to discipline a judge who expresses moral reservations concerning the death penalty or other severe forms of criminal punishment. As these examples show, Rule 1.2's broad and imprecise wording impermissibly empowers the Commission to target judges whose views it considers improper.

Rule 2.3 is a similarly vague tool. By its express terms, that Rule targets "words" that "manifest bias" on any basis. W.C.J.C., R. 2.3(B) (including a *non-exhaustive* list that specifies some prohibited kinds of bias but not confining the Rule to those listed). This enables the

Commission to punish the expression of any opinion that it dislikes and may characterize as "biased." In this case, that means an attempt to penalize Judge Neely for her religious beliefs about marriage. But it could just as easily result in punishment (for supposedly manifesting bias based on religion) if a judge criticizes tax exemptions for religious organizations or another state's regulation protecting religious liberty. Or the Commission could invoke Rule 2.3's prohibition on disability-based bias to discipline a judge who, in discussing our nation's crisis with mass shootings, suggests that one solution is to keep guns away from people experiencing certain mental illnesses. Quite literally, no judge who expresses any view that the Commission might brand as "biased" is safe if the Commission has the power it asserts here.

* * * * * *

For the foregoing reasons, the state cannot remove Judge Neely from her municipal judge position. Nor, as explained below, can the state remove her as a part-time circuit court magistrate.

III. The government cannot remove Judge Neely from her position as a part-time circuit court magistrate.

A. Judge Neely did not violate the Code in her magistrate position.

The Commission asserts that Judge Neely violated four Rules in the Code. *See* Order at 4-5 (C.R. 1103-04). But none of those charges can withstand scrutiny.

1. Judge Neely did not violate Rule 2.3 because her stated religious beliefs about marriage do not relate to a required magisterial duty or manifest prejudice based on sexual orientation.

Rule 2.3 provides that a "judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice," and that a "judge shall not, in the

performance of judicial duties, by words or conduct manifest bias or prejudice . . . including but not limited to bias [or] prejudice . . . based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation." W.C.J.C., R. 2.3(A) & (B).

Judge Neely did not violate this Rule as a part-time circuit court magistrate because solemnizing marriages is not a "judicial dut[y]" of magistrates. A "duty" is "[a] legal obligation that is . . . due to another"—something that a person "is bound to do." Black's Law Dictionary (10th ed. 2014). But Wyoming law does not obligate part-time circuit court magistrates to solemnize marriages; instead, it provides that they "*may* perform the ceremony of marriage." Wyo. Stat. § 20-1-106(a); *see also supra* at 25-27 (explaining that the law and the evidence demonstrate that magistrates do not have a required duty to perform marriages).

Moreover, Judge Neely's honest and respectful response to Mr. Donovan's question about same-sex marriage did not manifest "bias or prejudice" based upon "sexual orientation." Black's Law Dictionary defines "bias" as "prejudice," and it defines "prejudice" as "a strong and *unreasonable dislike*" or "[a] preconceived judgment or opinion formed with *little or no factual basis*." Black's Law Dictionary (10th ed. 2014) (emphasis added). Here, however, Judge Neely's response to Mr. Donovan did not reflect any dislike of LGBT *individuals*; rather, it showed her reasonable beliefs about the nature and meaning of *marriage*. Nor do those beliefs reflect an unreasonable "opinion formed with little or no factual basis." On the contrary, as the U.S. Supreme Court has recognized, those beliefs are "based on *decent and honorable* . . . premises" and are "held[] in good faith by *reasonable and sincere people*." *Obergefell*, 135 S. Ct. at 2594, 2602 (emphasis added). Stating a decent and honorable belief

about an issue cannot possibly qualify as expressing a baseless and unreasonable dislike of a class of people.

A number of additional facts confirm that Judge Neely has not manifested prejudice toward LGBT citizens. First, she would gladly perform for gays and lesbians any other function (such as administering oaths) that she has authority to do as a circuit court magistrate. Second, if Judge Neely were asked to serve as a celebrant for a same-sex wedding, she would ensure that the couple could get married by connecting them to another magistrate who could solemnize their marriage. Neely Dep. at 71-72 (C.R. 510); Neely Aff. ¶ 31 (C.R. 833). Third, Judge Neely's beliefs about marriage do not target LGBT individuals. She believes that marriage is the union of one man and one woman, and that she cannot perform a wedding for any union falling outside that understanding of marriage (whether a same-sex marriage, which is legally recognized now, or a polyamorous marriage, which might be legally recognized in the future). Neely Aff. ¶ 23 (C.R. 831). Her response to Mr. Donovan addressed same-sex marriage simply because that was the topic he raised.

2. Judge Neely did not violate Rule 2.2 because she has not refused to uphold the law or to impartially perform a required magisterial duty.

Rule 2.2 provides that "[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." W.C.J.C., R. 2.2. Judge Neely did not violate that Rule for three reasons that have already been explained above. First, the statement that Judge Neely cannot in good conscience serve as a celebrant for a same-sex marriage does not constitute a refusal to follow the law. *See supra* at 24-27. Second, marriage solemnization is not a required "duty" of part-time circuit court magistrates. *See supra* at 56. Third, the Rule's

requirement that judges must perform all duties "impartially" means that they must act without "bias or prejudice in favor of, or against, . . . parties." W.C.J.C., Terminology. But as previously shown, Judge Neely's comments about marriage did not manifest "bias or prejudice" against any individual or group of individuals. *See supra* at 56-57. For these reasons, this Court should conclude that Judge Neely did not violate Rule 2.2.

3. Judge Neely did not violate Rule 1.2 because no fully informed, reasonable person would conclude that she acted improperly.

Rule 1.2 provides that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." W.C.J.C., R. 1.2. The Commission determined that Judge Neely created an "appearance of impropriety" because she "announced [that] she would not follow the law" and gave "the impression to the public" that judges and the public "may refuse to follow the law." Order at 4 (C.R. 1103). This Court should not affirm that flawed conclusion.

Analysis under Rule 1.2 asks whether Judge Neely "create[d] in reasonable minds a perception that [she] violated th[e] Code" or otherwise acted improperly. W.C.J.C., R. 1.2 cmt. 5. This test is "an objective one." Arthur Garwin et al., *Annotated Model Code of Judicial Conduct* 61-62 (2d ed. 2011) (citing cases). It is analyzed from the perspective of a "reasonable person knowing all the circumstances," including all relevant facts, rules, and laws. *Miss. Comm'n on Judicial Performance v. Boland*, 975 So. 2d 882, 895 (Miss. 2008). "[I]f appearances were gauged without reference to the full and true facts, then false appearances of impropriety could be manufactured with ease by anyone with personal or political *animus* toward a judge." *Larsen*, 616 A.2d at 583; *see also Cheney v. U.S. Dist. Court for D.C.*, 541 U.S.

913, 914 (2004) (Scalia, J., mem.) ("The decision whether a judge's impartiality can reasonably be questioned is to be made in light of the facts as they existed, and not as they were surmised or reported.") (quotation marks omitted). This concern is amply illustrated by Mr. Donovan's unyielding efforts to bring about Judge Neely's removal from the bench. *See supra* at 13-14, 17-18.

Applying this objective standard, this Court should reject the Commission's analysis under Rule 1.2 and instead conclude that no reasonable person fully informed of the relevant facts would think that Judge Neely refused to follow the law or that she encouraged the public to do likewise. On this point, Judge Neely incorporates her prior arguments explaining why the Commission is wrong when it insists that she refused to follow the law. *See supra* at 24-27. For those reasons, this Court should expressly reject the Commission's analysis under Rule 1.2.

In the proceedings below, the Commission's attorney also argued that Judge Neely violated Rule 1.2 because a "reasonable member of society" would think that she could not be impartial to LGBT litigants in adjudicative proceedings. Comm'n Answer to Interrog. No. 2 (C.R. 647). If the Commission's attorney raises that theory again on appeal, this Court should reject it because no reasonable person knowing the following facts would conclude that Judge Neely's religious beliefs about marriage render her incapable of fairly adjudicating legal matters for LGBT citizens:

1. Part-time circuit court magistrates like Judge Neely have a discretionary power to solemnize marriages, but no legal duty to do so. *See* Wyo. Stat. § 20-1-106(a); *supra* at 25-26.

2. Magistrates and other judges may decline to perform marriage ceremonies for a host of reasons, including if they do not want to perform weddings for strangers. *See* Smith Dep. at 43-44 (C.R. 465); Soto Dep. at 152-54 (C.R. 438-39); *supra* at 6-7 (discussing other relevant deposition testimony).

3. Solemnizing a marriage, unlike other magisterial functions, involves personally participating in, celebrating, and expressing support for a marital union, *see* Neely Aff. ¶ 24 (C.R. 831-32); Wedding Script at 1-5 (C.R. 854-58); thus, Judge Neely reasonably considers that function different from everything else she does as a magistrate.

4. Judge Neely would gladly perform other magisterial functions (such as administering oaths) for gays and lesbians.

5. If Judge Neely were asked to solemnize a same-sex wedding, she would ensure that the couple could get married by connecting them to another magistrate who could perform their wedding. Neely Dep. at 71-72 (C.R. 510); Neely Aff. ¶ 31 (C.R. 833).

6. Judge Neely has never questioned the legality of same-sex marriage in Wyoming. Neely Aff. ¶ 33 (C.R. 833).

7. Judge Neely would recognize same-sex marriages in her role as an adjudicator (for example, if a litigant asserted a spousal testimonial privilege). Neely Aff. ¶ 32 (C.R. 833).

8. LGBT citizens in Pinedale who are aware of Judge Neely's religious beliefs about marriage do not question her impartiality as a judge. Stevens Aff. ¶ 5

(C.R. 898-99); Anderson Aff. ¶ 5 (C.R. 901-02).

No reasonable person aware of these facts could reasonably conclude that Judge Neely is biased against LGBT litigants. This Court should thus hold that Judge Neely did not violate Rule 1.2.

4. Judge Neely did not violate Rule 1.1 because she has not refused to comply with the law.

Rule 1.1 provides that "[a] judge shall comply with the law, including the Code." W.C.J.C., R. 1.1. That Rule "addresses the judge's duty to comply with the law in his or her daily life," Garwin, *supra*, at 93, and focuses on "judges who commit criminal acts," Charles Gardner Geyh et al., *Judicial Conduct and Ethics* 2-7 (5th ed. 2013). The Commission, however, has not alleged (nor could it) that Judge Neely fails to follow the law in her personal life. Nor, as discussed above, has the Commission shown that Judge Neely expressed a refusal to comply with the law by stating that her faith precludes her from solemnizing same-sex weddings. *See supra* at 24-27. Therefore, Judge Neely did not contravene Rule 1.1.

B. Removing Judge Neely from her magistrate position would violate her religious liberty under the Wyoming Constitution.

1. Removing Judge Neely from her magistrate position would violate Article 1, Section 18's mandate that no person be removed from office because of her religious beliefs.

As previously mentioned, Article 1, Section 18 of the Wyoming Constitution forbids the state from disqualifying a person from public office "because of his opinion on any matter of religious belief whatever." Wyo. Const. art. 1, § 18. Here, the Commission asserts that Judge Neely must be removed as a part-time circuit court magistrate because she stated that her religious convictions do not allow her to solemnize same-sex marriages. But as

explained above, marriage solemnization is a discretionary function of magistrates; it is not a required duty. *See supra* at 25-26. The Commission has thus sought to justify Judge Neely's expulsion from her magistrate position by arbitrarily transforming a discretionary function into a mandatory duty. In so doing, the Commission has effectively disqualified her as a magistrate because of her religious beliefs on the issue of marriage. But Article 1, Section 18 plainly forbids that.

2. Removing Judge Neely from her magistrate position would violate the Wyoming Constitution's general protection for the free exercise of religion.

As previously shown, the Wyoming Constitution guarantees broad protection for religious exercise. *See supra* at 34-39. This Court should thus apply the two-prong test discussed above for analyzing free-exercise claims under the state constitution, *see supra* at 39-40, and reject the Commission's attempt to remove Judge Neely as a magistrate.

Burden on Religious Exercise. Expelling Judge Neely from her magistrate position imposes a substantial burden on her religious exercise in at least two ways. First, a substantial burden exists where the government requires a person to "engage in conduct that seriously violates [her] religious beliefs." *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (quotation marks omitted). In this case, there is no question that compelling Judge Neely to solemnize—and thus personally participate in, celebrate, and express affirmation for—a same-sex marriage would seriously violate her religious beliefs. *See* Neely Aff. ¶ 23-24 (C.R. 831-32).

Second, a substantial burden on free exercise exists when "the state conditions" a right, job, or benefit "upon conduct proscribed by a religious faith . . . , thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*

v. Review Bd. of Ind. Empl't Sec. Div., 450 U.S. 707, 717-18 (1981). The U.S. Supreme Court has applied that principle to a public official's free-exercise claim, concluding that the state "effectively penalizes the free exercise" of religion by conditioning access to public office on a person's "willingness to violate a cardinal principle of his religious faith." *McDaniel*, 435 U.S. at 626 (quotation marks and alterations omitted). Here, the Commission has insisted that unless Judge Neely solemnizes marriages that conflict with her faith, she cannot remain a magistrate. This overtly pressures Judge Neely, upon pain of losing her office, to violate her beliefs and thereby imposes a substantial burden on her religious exercise.

No Licentiousness or Threat to Peace or Safety. The Commission cannot justify inflicting this substantial burden on Judge Neely's religious exercise because she has not engaged in licentiousness or otherwise jeopardized public peace or safety. *See* Wyo. Const. art. 1, § 18. Accordingly, Wyoming's free-exercise protections forbid the government from removing Judge Neely as a magistrate.

C. Removing Judge Neely from her magistrate position would violate her free-exercise rights under the U.S. Constitution.

1. Strict scrutiny applies to the Commission's attempt to remove Judge Neely from her magistrate position.

Strict scrutiny applies here in the circuit court magistrate context for the same three reasons it applied in the municipal judge context: (1) the Commission is not acting in a neutral or generally applicable manner; (2) the state is administering a system of individualized governmental assessment; and (3) the state threatens to violate a hybrid of Judge Neely's rights. *See supra* at 42-44. Judge Neely incorporates that prior analysis here.

A few additional points demonstrate that the Commission's actions are not neutral or

generally applicable in seeking to remove Judge Neely from her magistrate position. Most notably, while the Commission asserts that Judge Neely cannot decline to personally solemnize a wedding because of her religious convictions, other magistrates and judges may refuse to solemnize marriages, including same-sex marriages, for a host of secular reasons, which include: (1) because the magistrate does not know the couple getting married, Soto Dep. at 152-54 (C.R. 438-39); Smith Dep. at 43-44 (C.R. 465); (2) because the magistrate arbitrarily decides that she "just . . . do[es]n't feel like" solemnizing a particular wedding, Soto Dep. at 152 (C.R. 438); (3) because the magistrate refuses to travel more than a certain distance for a wedding, *id.* at 153 (C.R. 438); (4) because the magistrate refuses to perform a wedding scheduled outside of business hours, Haws Dep. at 60-62 (C.R. 360-61); or (5) because the magistrate says that she "is too busy" for a wedding, Soto Dep. at 151 (C.R. 438); Haws Dep. 66-67 (C.R. 362).

The testimony of Stephen Smith, Judge Neely's fellow part-time circuit court magistrate in Sublette County, demonstrates this disparate treatment. Mr. Smith—who has been appointed a magistrate solely to solemnize marriages, *see* Smith Dep. at 36-37 (C.R. 463)—testified that he is "happy to marry people that [he] know[s]," but that he is not "in the business of marrying people" that he does not know, *id.* at 43-44 (C.R. 465). Thus, he may decline to solemnize a same-sex marriage because he does not know the couple, but Judge Neely may not state that she would be unable to solemnize a same-sex marriage because of her religious convictions. Relegating Judge Neely's religious motives to a lesser status than the secular motives of others shows that the state is not acting in a neutral or generally applicable manner. *See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*,

170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.) (concluding that government action that permits exemptions for secular medical reasons "while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny"). Therefore, the Commission's efforts to remove Judge Neely as a magistrate must satisfy the demands of strict scrutiny. *See Lukumi*, 508 U.S. at 546.

2. The Commission cannot satisfy strict scrutiny.

The Commission cannot show that removing Judge Neely from her magistrate position is necessary to further "a compelling governmental interest" or that such drastic action is "narrowly tailored to advance that interest." *See Lukumi*, 508 U.S. at 531-32. In its ruling, the Commission almost exclusively relied on "the State's interest in upholding the rule of law." Order at 5 (C.R. 1104). But as shown above, Judge Neely did not express an unwillingness to follow the law. *See supra* at 24-27. Therefore, this interest is not furthered by removing Judge Neely from her magistrate position.

In its decision, the Commission also referenced, without elaboration, a state interest in maintaining the "impartiality" of the judiciary. Order at 5 (C.R. 1104). If the Commission means that it has an interest in eliminating magistrates who hold or express religious beliefs about marriage that are similar to Judge Neely's, Judge Neely has already shown that the Commission cannot rely on any such interest to satisfy strict scrutiny. *See supra* at 44-49. But if the Commission means that it has a governmental interest in getting rid of magistrates who will not solemnize all weddings, neither can that interest satisfy strict scrutiny.

No Compelling Interest. The Commission itself has shown that it does not consider compelling its alleged interest in maintaining judicial impartiality by removing

magistrates who will not solemnize all weddings. The state "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 (quotation marks and alterations omitted). Here, the Commission has admitted that circuit court magistrates "are not required to perform any marriage ceremonies under Wyoming law." Comm'n Resp. to Judge Neely's Reqs. for Admis. No. 4 (C.R. 487). And the undisputed evidence shows that other magistrates solemnize some but not all marriages. *See supra* at 6-7 (summarizing many reasons that magistrates may decline to solemnize marriages). The state thus cannot show a compelling interest in forcing Judge Neely to solemnize all marriages when it does not require that of any other part-time circuit court magistrate.

No Narrow Tailoring. Nor can the Commission satisfy strict scrutiny's narrow-tailoring requirement. To begin with, the state's efforts are substantially "underinclusive" because it does not pursue its asserted interest in maintaining impartiality "with respect to analogous" conduct. *See Lukumi*, 508 U.S. at 546. For example, the Code permits judges to recuse when they have a "bias or prejudice" related to a specific proceeding. W.C.J.C., R. 2.11(A)(1). The Code thus allows judges to remain on the bench even though they have biases that affect (and limit their ability to perform) their *mandatory* adjudicative duties. But the Commission seeks to remove Judge Neely because she stated that she is unable to exercise her *discretionary* authority to perform some marriages. Affording judges more leeway for recusal when they perform mandatory adjudicative duties than when they perform a discretionary function demonstrates that the Commission does not consistently pursue its asserted interest in maintaining impartiality.

Furthermore, state action is not narrowly tailored "[i]f a less restrictive alternative would serve the [g]overnment's purpose." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). There are at least two less restrictive alternatives that would allow Judge Neely to keep her magistrate position without being required to violate her religious beliefs. First, the state could allow Judge Neely to refer requests to solemnize marriages that would violate her religious convictions, *see* Neely Dep. at 71-72 (C.R. 510); Neely Aff. ¶ 31 (C.R. 833), much like other magistrates may decline to perform weddings for secular reasons, *see supra* at 6-7, and other judges may disqualify themselves from adjudicative proceedings because of their strongly held views or beliefs, *see* W.C.J.C., R. 2.11(A)(1). Indeed, just as the state could easily accommodate a judge who, for conscience reasons, needs to recuse from death-penalty cases or a judge who, after experiencing sexual assault, cannot preside over rape cases, the state could readily accommodate Judge Neely here. Second, the circuit court could direct its magistrates to route all marriage-solemnization requests through the circuit court clerk, who would ask the couple about their wedding plans, find a willing and available magistrate, and connect the couple to that magistrate. *See* Haws Dep. at 60-61 (C.R. 360) (noting that many wedding requests are already presented to the circuit court clerk). These readily available less restrictive alternatives illustrate that the Commission has not narrowly tailored its efforts to achieve its asserted goals.

D. Removing Judge Neely from her magistrate position would violate her free-speech rights under the Wyoming and U.S. Constitutions.

Judge Neely has already shown that it would violate her free-speech rights under the state and federal constitutions to remove her as a municipal judge. *See supra* at 49-53. For those same reasons, it would violate her free-speech rights to remove her as a magistrate.

Therefore, Judge Neely incorporates that analysis here.

E. The Code provisions at issue, as applied to Judge Neely's removal as a magistrate, are impermissibly vague in violation of the Wyoming and U.S. Constitutions.

As explained above, the Code provisions that the Commission has applied in this case are hopelessly vague in violation of the Wyoming and U.S. Constitutions. *See supra* at 53-55. Judge Neely incorporates that analysis here because it equally applies to the Commission's attempt to expel her from her magistrate position.

* * * * * *

In sum, for all the reasons discussed above, the government cannot remove Judge Neely from her position as a part-time circuit court magistrate.

CONCLUSION

Our society asks a lot of judges, but we do not ask them to abandon their convictions, whether religious or secular. Removing Judge Neely from the bench would send a clear message that anyone who shares her honorable and widely held religious beliefs about marriage is not fit for the judiciary (even for a position without authority to solemnize marriages). Worse yet, it would jeopardize the career of any judge who holds a belief about any potentially divisive issue, because once the Commission learns that a judge holds a view it does not like, it can invoke the machinery of the state to pursue that judge's demise. Thus, a ruling for Judge Neely would protect not just her conscience rights, but those of every judge in Wyoming. For this reason (and the many others explained in this brief), Judge Neely respectfully requests that this Court reject the Commission's recommendation and dismiss the Commission's Notice of Commencement of Formal Proceedings.

Respectfully submitted this the 29th day of April, 2016.

By: _____

Herbert K. Doby
WSB#5-2252
P.O. Box 130
Torrington, WY 82240
dobylaw@embarqmail.com
(307) 532-2700 Fax: (307) 532-2706

James A. Campbell*
Kenneth J. Connelly*
Douglas G. Wardlow*
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
jcampbell@ADFlegal.org
kconnelly@ADFlegal.org
dwardlow@ADFlegal.org
(480) 444-0020 Fax: (480) 444-0028

Attorneys for the Honorable Ruth Neely
*Admitted *Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of April, 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:

Patrick Dixon
Dixon & Dixon, LLP
104 South Wolcott, Suite 600
Casper, WY 82601
pdixn@aol.com
Counsel for the Commission on Judicial Conduct and Ethics

Wendy J. Soto
Commission on Judicial Conduct & Ethics
P.O. Box 2645
Cheyenne, WY 82003
wendy.soto@wyoboards.gov
Executive Director of the Commission on Judicial Conduct & Ethics

Tim Newcomb
P.O. Box 928
170 North Fifth
Laramie, WY 82073
newcomb@appellateconsultation.com
Counsel for the Commission on Judicial Conduct and Ethics

Peter J. Michael
Wyoming Attorney General
123 Capitol Building
Cheyenne, WY 82002
peter.michael@wyo.gov
Attorney General for the State of Wyoming

Herbert K. Doby