No. 17-195

In The Supreme Court of the United States

RUTH NEELY, JUDGE, TOWN OF PINEDALE MUNICIPAL COURT, WYOMING,

Petitioner,

v.

WYOMING COMMISSION ON JUDICIAL CONDUCT AND ETHICS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Wyoming

AMICUS CURIAE BRIEF OF FREEDOM OF CONSCIENCE DEFENSE FUND AND PROFESSOR RONALD D. ROTUNDA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In response to a reporter's questioning, small-town municipal judge and Wyoming state circuit court magistrate, Ruth Neely, disclosed that she believes marriage is the union of a man and a woman, and that her faith would not allow her to perform same-sex weddings. The Wyoming Supreme Court publicly censured Judge Neely for that statement, forced her to stop solemnizing all marriages, and effectively drove her from her magistrate position.

The question presented is:

> Does a state violate the First Amendment's Free Exercise Clause or Free Speech Clause when it punishes a judge who has discretionary authority to solemnize marriages because she states that her religious beliefs preclude her from performing a same-sex wedding?

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INTEREST OF AMICI[1]

Freedom of Conscience Defense Fund ("FCDF") is a nonprofit, public-interest law firm that defends the conscience rights and religious freedom of those of all faiths and no faith. FCDF's mission is to defend religious freedom by providing protective legal services at the trial level to persons whose religious liberty and free speech rights have been attacked. Located in San Diego and led by experienced trial attorney Charles LiMandri, FCDF assists individuals and organizations nationwide with pro bono services.

Prof. Ronald D. Rotunda, The Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University, The Dale E. Fowler School of Law.[2] Professor Rotunda is a law professor who supports free speech and is very concerned that the State of Wyoming is imposing a religious test for public office.

SUMMARY OF ARGUMENT

The Wyoming Supreme Court, in affirming the rationale of Wyoming's Commission on Judicial Conduct and Ethics ("Commission"), has created a religious test

[1] This brief was prepared entirely by amici and their counsel. No other person made any financial contribution to its preparation or submission. Counsel of record received timely notice of the intent to file this brief and have consented to its filing.

[2] Institutional affiliation is given for purpose of identification only and does not indicate support by the institution.

for judicial office by invoking an improper and expansive interpretation of the rules prohibiting judges from creating an "appearance of impropriety." According to this new test, those with a religious conviction that does not permit them to personally solemnize a same-sex wedding ceremony are not qualified to be a full participant in the judiciary. No law mandates that interpretation, however, for the state does not force a judge to participate and officiate in any wedding. Judges have discretion whether to participate in and to solemnize marriages, and there are alternate solemnizers readily available. Nor does the state have an interest in forcing a particular judge to participate in a ceremony, because there is no burden on the same-sex couple who wants to marry. The result of the Wyoming decision is that there is a religious test for office: no person who has a conscientious objection to participating in gay marriage may fully participate in the Wyoming judiciary.

Given that judges have discretion when deciding whether to serve as a wedding celebrant, the Wyoming Supreme Court has singled out and attempted to constructively remove the Honorable Ruth Neely because the public knows about her views regarding marriage. However, judges have significant freedom to express their views and engage in conduct that discloses their views on controversial topics. If the government has the power to remove a judge in this case, then people who have the "wrong," albeit conscientiously held, beliefs are ineligible to be a judge: no judge's career is

safe because all judges hold beliefs on contentious issues.

Moreover, because Judge Neely would not merely be performing a ministerial duty, but actually participating in a same-sex wedding, the state cannot force her to participate in a same-sex wedding in violation of her free speech and free exercise rights. As discussed below, the state has singled out this particular belief for punishment; any other judge can refuse to participate in a wedding for a host of other reasons, but not this particular religious reason.

ARGUMENT

"We sometimes think, loosely, that ethics is good and therefore more is better. But 'more' is not better if 'more' exacts higher costs, measured in terms of vague rules that impose unnecessary disqualifications. Overly-broad ethics rules impose costs on the judicial system and litigants, which we must consider when determining whether 'impartiality might reasonably be questioned.'" Ronald D. Rotunda, *The Propriety of a Judge's Failure to Recuse When Being Considered for Another Position*, 19 GEO. J. LEGAL ETHICS 1187, 1195 (2006).

The high cost of such vague rules is squarely before this Court, as the Wyoming Supreme Court put its imprimatur on the Commission's singling out the religious belief of a judge for prejudicial treatment. It reached this result by construing the Wyoming Code of

Judicial Conduct ("Code") in such a sweeping sense so as to create a de facto religious test for office – a test that Judge Neely apparently failed. The Court should not accept the Wyoming Supreme Court's imposition of such an unconstitutional test. It should, however, accept Petitioner's petition for *certiorari* and reverse the Wyoming Supreme Court's public censure and the ultimatum it imposed on Judge Neely to either violate her conscience or leave her position as circuit court magistrate. The Wyoming Supreme Court claims that a judge with a religious objection to gay marriage can refuse to officiate and participate in a wedding for any reason or for no reason except the judge must officiate if the couple is gay. The court thus imposed a legal requirement on Judge Neely that is not a generally applicable law (it only applies to a particular religious objection) and hence violates the First Amendment.

I. WYOMING CANNOT FORCE JUDGE NEELY TO PARTICIPATE IN A SAME-SEX WEDDING, BECAUSE JUDGES ARE NOT OBLIGATED TO PARTICIPATE IN EVERY WEDDING AND THERE ARE OTHERS ABLE TO PARTICIPATE.

The Wyoming Supreme Court has taken the drastic step of censuring a sitting judge with a sterling record and imposing a career-ending ultimatum for not participating in a hypothetical wedding ceremony that she has neither been asked to officiate nor that she could be required to participate in even if she were

asked. The Court should not permit this unprecedented attempt to punish a jurist over her religious beliefs.

The State of Wyoming cannot force a judge to participate in a wedding ceremony, because judges are not obligated to participate in any wedding. Pursuant to Wyo. Stat. Sec. 20-1-106(a), the Wyoming Legislature expressly provides that the participation of judges is not required for the solemnization of marriages:

> Every district or circuit court judge, district court commissioner, supreme court justice, magistrate and every licensed or ordained 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, denomination or religious society, *may* perform the ceremony of marriage in this state.

Wyo. Stat. § 20-1-106(a) (emphasis added). Thus, the category of people authorized to perform marriage ceremonies far exceeds those occupying judicial office.

With the inclusion of so many potential solemnizers, Wyo. Stat. Sec. 20-1-106 is in accord "with states' moves in the early nineteenth century to empower more diverse personnel to perform marriages and to eliminate difficulties or fees associated with banns or licenses, [as part of] a shared public policy facilitating monogamous marriage." Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 39 (2002). In fact,

no state in the nation confines those authorized to solemnize civil marriages to those in judicial office.

Wyoming law does not compel any judge to perform any wedding ceremony. Merely identifying those parties eligible to solemnize marriages is not a statutory mandate that any such party must solemnize any and all marriages. Even if the focus is limited to the judicial offices identified in the statute, no mandate can be deduced.

If the Wyoming Legislature intended to deny a judge the discretion of whether to participate, it would not only have confined authorized solemnizers to those in judicial office, it would have also employed a duty-imposing term such as "shall" or "must," not the permissive or discretionary "may." But it did not, nor should it have, for merely being a judge does not require one to participate in the wedding ceremony of every requesting couple.

For instance, a judge is not obligated to participate in the wedding of his ex-wife to the man who cuckolded the judge. Nor is a judge obligated to participate in the wedding of a man who killed his daughter. In each of these examples, the notion of the state forcing those judges to participate in the marriage celebration is absurd. Yet, the Wyoming Supreme Court actually argues that every judge holding a traditional view of marriage *must* perform wedding ceremonies if the couple is gay. *See In re Neely*, 390 P.3d 728, 744 (Wyo. 2017) ("If we held that freedom of religious opinion meant no state official in Wyoming had to marry a same-sex couple if

it offended his or her religious belief, the right of same-sex couples to marry under the United States Constitution would be obviated.").

The Wyoming Supreme Court is applying this rule even when no same-sex couple even asked the judge to participate in the marriage: the Wyoming Supreme Court thereby effectively forbids all judges from merely expressing the belief that they do not endorse same-sex marriage. In so doing, it re-writes Wyo. Stat. Sec. 20-1-106(a) to read: "Every district or circuit court judge . . . supreme court justice, [and] magistrate [holding traditional views of marriage] . . . *may* perform the ceremony of marriage in this state [but *shall* perform the ceremony of marriage for any gay couple that requests such service]." Thus, the Wyoming Supreme Court singles out a particular religious belief and, in effect, announces that any judge who holds such a religious belief cannot hold judicial office.

Moreover, forcing judges to participate in these wedding ceremonies does not interfere with the right of any gay couple to marry. There is always someone else who can perform the ceremony, whether a judge or otherwise. Thus, given the other options, it makes Wyoming's singling out of Judge Neely because of her religious beliefs much more troubling, especially considering that there are no penalties for non-judicial celebrants who refuse to participate in certain weddings, e.g., a Catholic priest who declines to wed a Muslim couple, or a Catholic priest who will not officiate at the marriage ceremony of a gay couple. In each case, the Catholic priest is exercising the power of the state –

the power to solemnize a wedding – but the law imposes no such restrictions on those official acts. There are also no penalties for judicial celebrants who refuse to participate for any other reason except this one.

The expansion of the institution of marriage to same-sex couples entails the issuance of the marriage license, not the state's provision of a particular judge to solemnize the marriage. The Wyoming Supreme Court wrongly pronounced that, following *Guzzo v. Mead*, No. 14-CV-200-SWS, 2014 WL 5317797 (D. Wyo. Oct. 17, 2014), and *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015), Judge Neely has said "that she will not impartially perform her judicial functions with respect to parties the United States Supreme Court has held have a constitutional right to be treated equally." *In re Neely*, 390 P.3d at 739. On the contrary, Judge Neely's decision to not participate in a discretionary function of a circuit court magistrate does not amount to an inability to act impartially with respect to her judicial functions or any law.

It is instructive to consider the actual holdings of *Guzzo* and *Obergefell*:

> Defendants are hereby enjoined from enforcing or applying Wyoming Statute § 20-1-101, or any other state law, policy, or practice, as a basis to deny marriage to same-sex couples or to deny recognition of otherwise valid same-sex marriages entered into elsewhere. Marriage licenses may not be denied on the basis that the applicants are a same-sex couple.

Guzzo, 2014 WL 5317797, at * 7. Thus, *Guzzo* says nothing regarding solemnization, but only provides that no state official may refuse to issue marriage licenses to same-sex couples. So, too, in *Obergefell*, while holding the Fourteenth Amendment precludes States from denying same-sex couples a marriage license and from not recognizing lawful, out-of-state same-sex marriages, this Court was also silent regarding solemnization.

Marriage in Wyoming is "a civil contract" (Wyo. Stat. § 20-1-101) that requires three acts in order to be enforceable: licensure (§ 20-1-103); solemnization (§ 20-1-106); and certification (§ 20-1-107). Judge Neely's comment to the reporter potentially concerns the second act, though her choosing to participate in a wedding has no bearing upon either the legality of the contractual arrangement itself or the ability of the couple to satisfy the requisite conditions of marriage. Furthermore, given that the statute contemplates non-judicial parties capable of solemnizing a marriage, a judge's participation in the ceremony is not required in order for the contract to be enforceable. Accordingly, Judge Neely's exercise of her discretion to participate in a marriage ceremony, regardless of the sexual orientation of the couple involved, has no bearing on her partiality regarding any law.

II. WYOMING HAS NO INTEREST IN FORCING A PARTICULAR JUDGE TO PARTICIPATE IN A CEREMONY THAT VIOLATES HER RELIGIOUS BELIEFS BECAUSE THERE IS NO BURDEN ON THE SAME-SEX COUPLE WHO WANTS TO MARRY.

The Wyoming Supreme Court states that the law purportedly stemming from *Guzzo* and *Obergefell* and the enforcement of the Code are facially neutral and of general applicability. *See In re Neely*, 390 P.3d at 735-36. That is false. The state does not require every judge to participate in all weddings. The state is simply forcing Judge Neely to violate her religious beliefs.

The state has no interest in compelling Judge Neely to participate in a ceremony that violates her religious beliefs. The Wyoming Supreme Court claims that any burden on Judge Neely is justified, because "[t]he Wyoming Constitution does not give Judge Neely the prerogative to perform her judicial functions contingent upon the law's coincidence with her religious beliefs." *Id*. at 743. However, there is no evidence or reason to believe that Judge Neely will not follow the law, irrespective of her religious beliefs.

Many religious traditions refuse to solemnize or bless same-sex relationships. The teachings of the Catholic Church, the LDS Church, Islamic Law, Orthodox Judaism, and many Protestant Christian churches do not recognize same-sex relationships as marriages. The Wyoming Supreme Court is really saying that no judge who belongs to any of these religions is allowed

to be a judge who solemnizes marriages. But that cannot be squared with this Court's jurisprudence or with common sense. All Judge Neely did is articulate what she believes. Other judges may not say out loud what they believe, but they still believe it. Her belief does not interfere with any duty state law imposes on her.

Judge Neely is flouting no law, nor is she denying any same-sex couple from being married. Even assuming that a "hypothetical couple" asked Judge Neely to participate in their marriage ceremony, and she declined, this hypothetical couple would not have been harmed, because there would be another judge in line who would participate in their ceremony. Accordingly, given the lack of harm and the absence of a law requiring judges to participate in marriages, this is not like a judge who refuses to hear a case involving an auto accident because the judge does not like the plaintiff's sleeping arrangements.

Thus, it appears the true motivation of the Wyoming Supreme Court and the Commission is to either force Judge Neely to not express her religious beliefs and to violate them (if any couple ever asked her to participate), or punish her for holding fast to her convictions. If the Wyoming Supreme Court's opinion remains in force, full participation in judicial office in Wyoming will no longer be an option for anyone who embraces a religious belief that does not encompass gay marriage.

III. GIVEN THAT JUDGES ARE NOT REQUIRED TO PERFORM WEDDINGS AND THAT THEY HAVE DISCRETION WHEN DECIDING WHETHER TO SERVE AS A WEDDING CELEBRANT, THE WYOMING SUPREME COURT IS SINGLING OUT AND SANCTIONING JUDGE NEELY BECAUSE THE PUBLIC KNOWS ABOUT HER VIEWS REGARDING MARRIAGE.

The Wyoming Supreme Court agreed with the Commission's unsupported claim that Judge Neely's comment to the reporter "has given the impression to the public that judges, sworn to uphold the law, *may* refuse to follow the law of the land." *In re Neely*, 390 P.3d at 749. The court swept aside Judge Neely's vow to follow the law as applied to homosexuals, pronouncing that "[Judge Neely] has unequivocally stated her refusal to perform marriages for same-sex couples, which creates the perception in reasonable minds that she lacks independence and impartiality." *Id*. at 750. The Wyoming Supreme Court further deemed Judge Neely's comments ineligible for constitutional protection, because "[s]he did not merely express her opinion about same-sex marriage, she expressed how that opinion would impact her performance of her judicial functions." *Id*. at 752. The Wyoming Supreme Court thus affirmed the Commission's conclusion that Judge Neely violated Rules 2.2 and 2.3 of the Code, and in so doing, essentially declared that a judge espousing her religious views on an issue is a per se violation of the Code. This interpretation and enforcement of the Code is unconstitutional.

> In *R.A.V. v. City of St. Paul* [505 U.S. 377] (1992), the City of St. Paul charged R.A.V. (a juvenile) with violating a city ordinance prohibiting bias-motivated disorderly conduct. R.A.V. burned a cross on a black family's lawn. The Court held that the ordinance, on its face, violated the First Amendment because it imposed special prohibitions on speakers who express views on certain disfavored subjects, "race, color, creed, religion or gender," while not punishing displays containing abusive invective if they are not addressed to those topics. For example, under the law, one could hold up a sign saying, all "anti-Catholic bigots" are misbegotten, but not that all papists are because the former does not attack a religion while the latter does.

Ronald D. Rotunda, *Marriage Litigation in the Wake of* Obergefell v. Hodges, VERDICT: LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA (Aug. 15, 2017, 6:06 PM), https://verdict.justia.com/2015/09/28/marriage-litigation-in-the-wake-of-obergefell-v-hodges.

Here, a judge is permitted to not participate in a wedding for a variety of reasons – the judge is too busy; the people getting married are not willing to pay the judge's rate for her services; the groom-to-be ran over the judge's dog a decade earlier. Like the law in *R.A.V.*, only certain categories are within the Wyoming Supreme Court's prohibition. The court's mandate does not apply to a judge who refuses to participate in weddings that favor traditional marriage; it applies only to

judges who refuse to participate in a same-sex marriage. This distinction the Wyoming Supreme Court makes between favored and disfavored speech looks a lot like the law that *R.A.V.* invalidated because it drew distinctions between favored and disfavored speech.

The Wyoming Supreme Court claims that by expressing her religious convictions, Judge Neely created the impression of impropriety. *See In re Neely*, 390 P.3d at 749. The Wyoming Supreme Court does not support this inference with any basis in any decision that Judge Neely has ever made. This inference allows Wyoming to disqualify from full participation in the judiciary all judges who share Judge Neely's religious beliefs.

> [T]he vague "appearance of impropriety" standard . . . can easily lead to ad hoc and ex post facto analysis. Any allegation that a judge violated the ethics rules is a very serious matter, for it attacks his integrity and bona fides. . . .
>
> [C]onsider the American Bar Association's move away from the "appearance of impropriety" standard in the Model Rules of Professional Conduct. While the Model Rules govern lawyers, not judges, its cautions are still relevant. The Model Code of Professional Responsibility, which used to govern lawyer conduct, included the "appearance of impropriety" standard. The ABA ultimately concluded that the standard was "question-begging," and therefore rejected it in 1983 when it adopted the Model Rules. Even before that

date, the ABA warned, if the "appearance of impropriety" language were a disciplinary rule, "it is likely that the determination of whether particular conduct violated the rule would have degenerated ... into a determination on an instinctive, ad hoc or even ad hominem basis." Commentators, such as Professor Geoffrey C. Hazard, Jr., the reporter for the original Model Rules, referred to the old "appearance of impropriety" standard as "garbage."

The Second Circuit generally advised, over a quarter of a century ago: "When dealing with ethical principles . . . we cannot paint with broad strokes. The lines are fine and must be so marked. . . . [T]he conclusion in a particular case can be reached only after painstaking analysis of the facts and precise application of precedent." The Restatement (Third) of the Law Governing Lawyers has also cautioned us not to read too much into vague phrases like "appearance of impropriety":

> [T]he breadth [of vague, 'catch-all' provisions] creates the risk that a charge using only such language would fail to give fair warning of the nature of the charges to a lawyer respondent and that subjective and idiosyncratic considerations could influence a hearing panel or reviewing court in resolving a charge based only on it. That is particularly true of the 'appearance of impropriety' principle (stated generally as a canon in the 1969 ABA Model Code of Professional

> Responsibility but purposefully omitted as a standard for discipline from the 1983 ABA Model Rules of Professional Conduct). Tribunals accordingly should be circumspect in avoiding overbroad readings or resorting to standards other than those fairly encompassed within an applicable lawyer code.

Ronald D. Rotunda, *The Propriety of a Judge's Failure to Recuse When Being Considered for Another Position*, 19 GEO. J. LEGAL ETHICS, 1187, 1192-94 (2006) (footnotes omitted).

"Creating, after the fact, a rule that applies to only one case is simply a way of engaging in ad hoc, ex post facto, ad hominem attacks. . . . The advantage (and unfairness) of creating unique rules is that we no longer have to worry about precedent because we apply the rule to only one case." *Id.* at 1187. This is precisely what has occurred here.

Had the reporter asked Judge Neely if she was excited to conduct the wedding of paupers who could not pay her for her services, and she stated she would decline any such invitation, neither the Commission nor the Wyoming Supreme Court would have found her in violation of the Rules, despite paupers' clear right to marriage in Wyoming.

> Hurling the charge of "appearance of impropriety" . . . is like using a blunderbuss. Nowadays, we might describe a blunderbuss as a weapon of terror. It was not a very precise weapon, and marksmen never used it. Instead,

> it was good for crowd control, when the goal was to shoot multiple balls simultaneously in the hope of hitting something. The ABA has chosen to arm any lawyer or any pundit with the equivalent of a blunderbuss to attack a judge by giving its imprimatur to a charge of violating the "appearances of impropriety."

Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337 (2006), desktop publishing example p. 105, available at http://ssrn.com/abstract_id=926437. Tragically, the Wyoming Supreme Court's blunderbuss attack will not merely damage Judge Neely's reputation, but will destroy her career, as evidenced by her removal from her magistrate position following the court's order requiring her to either violate her conscience or cease being a magistrate.

IV. JUDGES HAVE GREAT LEEWAY TO EXPRESS THEIR VIEWS OR ENGAGE IN CONDUCT THAT DISCLOSES THEIR VIEWS ON CONTROVERSIAL TOPICS.

The Wyoming Supreme Court's statement that Judge Neely's comment "creates the perception in reasonable minds that she lacks independence and impartiality," *In re Neely*, 390 P.3d at 750, is sheer speculation and completely unsupported by the record. "As Justice Souter noted in the campaign-financing case of *Nixon v. Shrink Missouri Government PAC*, 'We have never accepted mere conjecture as adequate to carry a First Amendment burden....' [528 U.S. 377, 392

(2000).]" Ronald D. Rotunda, *Constitutionalizing Judicial Ethics: Judicial Elections after* Republican Party of Minnesota v. White, Caperton*, and* Citizens United," 64 ARK. L. REV. 1, 18 (2011).

The court's speculation is not excused merely because Judge Neely holds judicial office. "Judges are human beings who cannot divorce themselves from the real world, public discussions, newspapers, and the like." *Id.* at 31. Moreover, this Court has held that a state cannot prohibit a judge from speaking out on controversial issues.

> In *Republican Party of Minnesota v. White* [536 U.S. 765 (2002)], Justice Scalia, writing for five members of the Court, held that [a Minnesota rule of judicial ethics prohibiting judicial candidates from "announcing" a view on any disputed legal or political issue if the issue might come before a court] violates the First Amendment. In order for the announce clause to survive strict scrutiny, it must be narrowly tailored to serve a compelling state interest. And, in order to be narrowly tailored, it must not "unnecessarily circumscrib[e] protected expression." The Minnesota rule did not meet this rigorous test. The announce clause was not narrowly tailored to promote "impartiality," in the sense of no bias for or against any party to the proceeding because it did not restrict speech for or against particular parties, but rather speech for or against particular issues. If the state meant to promote "impartiality" in the sense of no preconception for or against a particular legal

> view, that is not a compelling state interest, the Court said, because it is both "virtually impossible," and also not desirable, to find a judge who does not have preconceptions about the law.

Id. at 36 (footnotes omitted).

> The Court not only acted as if it were applying a rigorous, strict-scrutiny test, as the summary of its reasoning shows, but *White* explicitly adopted that test with vigor, holding that those who seek to justify content-based restrictions of speech by candidates for public office have the burden to prove that any restriction is (1) narrowly tailored, to serve (2) a compelling state interest. The strict-scrutiny test represents very active judicial review, which is why the Court almost always invalidates laws when the Court evaluates them under strict scrutiny.

Id. at 37-38.

Despite the fact that the Wyoming Supreme Court did not apply the Code in a neutral and generally applicable fashion, the court nonetheless agreed that strict scrutiny applies. *See In re Neely*, 390 P.3d at 736. The Commission, however, did not carry its burden under that demanding standard, meaning that the court ultimately proscribed Judge Neely's First Amendment interests without warrant, and in so doing, in effect, created a religious test for public office: no individual can remain a state judge who performs weddings if he or she believes that marriage is a joining of man and

woman. Because the Justices of this Court can perform wedding ceremonies, the State of Wyoming is effectively stating that they should be censured if they will not perform a same-sex wedding.

Furthermore, Judge Neely's revelation of her convictions regarding a particular issue has no greater potential to give the public an impression of her fidelity to the law than activities which the Code expressly contemplates and encourages Wyoming judges to participate in, e.g., "speaking, writing, teaching, or participating in scholarly research projects. . . . [and] educational, religious, charitable, fraternal or civic extrajudicial activities," (Canon 3, Rule 3.1, Cmt. 1); "participat[ing] in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit," (Canon 3, Rule 3.7(A)); and attending local political caucuses (Canon 4, Rule 4.1, Cmt. 4). The Wyoming Supreme Court's opinion would render all such activities fodder for impeachment proceedings by judges' ideological opponents, and would force judges, out of concern for self-preservation, to become judicial automatons removed, hermit-like, from the very society they are entrusted to judge.

V. IF THE GOVERNMENT HAS THE POWER TO CENSURE A JUDGE SIMPLY BECAUSE THE PUBLIC IS AWARE OF HER VIEWS ABOUT A CONTROVERSIAL TOPIC, NO JUDGE'S CAREER IS SAFE BECAUSE ALL JUDGES HOLD BELIEFS ON CONTENTIOUS ISSUES.

"Unnecessarily imprecise ethics rules allow and tempt critics, with minimum effort, to levy a plausible and serious charge that the judge has violated the ethics rules. Overuse not only invites abuse with frivolous charges that have the patina of legitimacy, but also may eventually demean the seriousness of a charge of being unethical." Rotunda, *Judicial Ethics*, p. 102. The Wyoming Supreme Court's opinion sends a stark warning to Wyoming jurists: If your personal convictions do not align with those of an unelected panel of commissioners or justices, you will be labeled a discriminator and run off the bench. Conform, or else.

This is nothing less than an inside attack on judicial independence.

> The most prominent of those who fear the loss of judicial independence is Justice Sandra Day O'Connor. Since her retirement, she has repeatedly warned that "the breadth of the unhappiness being currently expressed, not only by public officials, but in public opinion polls in the nation" against federal judges is "certainly cause for great concern." She expressed alarm that some of these vocal critics would "strong-arm" the judiciary into adopting their policies.

Ronald D. Rotunda, *Judicial Transparency, Judicial Ethics, and a Judicial Solution: An Inspector General for the Courts*, 41 LOY. U. CHI. L.J. 301, 301-302 (2009) (footnotes omitted).

Here, the Wyoming Supreme Court concluded that Judge Neely violated Rule 2.3: "Judge Neely's refusal to conduct marriages on the basis of the couple's sexual orientation can reasonably be perceived to be biased." *In re Neely*, 390 P.3d at 751. However, Judge Neely's statement to the reporter did not run afoul of Rule 2.3's requirement that she perform the duties of judicial office without bias or prejudice. Indeed, the manifestation of bias or prejudice in the exercise of her judicial duties is wholly absent here, for Wyoming law allows her to refuse to participate in any wedding ceremony for any reason (except for the reason she asserted), and there is no judicial duty which mandates her participation in every wedding.

Threats to judicial independence typically concern how a judge is likely to rule in a given matter. What the Wyoming Supreme Court has done here transcends the confines of litigation and affects the private, deeply held religious beliefs of a judge – or judicial candidate for that matter. The Wyoming Supreme Court has thus positioned itself as an assembly of high priests, cloaked with inquisitional authority to define orthodoxy and excommunicate judicial heretics.

VI. JUDGE NEELY WILL NOT BE PERFORMING A MINISTERIAL DUTY. SHE WOULD BE PARTICIPATING IN THE SAME-SEX WEDDING.

No one is preventing the same-sex couple from marrying or securing a wedding license. Here, the judge is saying, "I choose not to participate in your wedding, but there are plenty of other judges or others who would be happy to help." This is a perfectly constitutional response.

In *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015), the Court did *not* rule that sexual orientation is a suspect class. Accordingly, the right to same-sex marriage that is implied in due process and equal protection cannot violate "what the First Amendment specifically guarantees – free expression and free exercise of religion." Ronald D. Rotunda, *Shooting a Wedding is Different than Taking a Passport Photo*, NATIONAL REVIEW (Jul. 9, 2015, 4:00 AM), http://www.nationalreview.com/article/420923/shooting-wedding-different-taking-passport-photo-ronald-rotunda.

> In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* [515 U.S. 557] (1995), gays, lesbians, and bisexuals sought to march as a group in the St. Patrick's Day parade. The parade's organizers refused, and the state courts ruled that this exclusion violated Massachusetts's public-accommodation law, prohibiting discrimination because of sexual orientation. Justice Souter, for a *unanimous* Court, ruled that requiring the defendants to

> alter any expressive content of their parade violated free speech. The Court noted that the parade organizers in *Hurley* did not exclude gays as individuals; they did exclude a gay-pride float, and the First Amendment protected that exclusion.
>
> *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* [508 U.S. 520] (1993) involved the Santerias, who engage in ritual sacrifice of animals such as doves. When a Santeria church planned a house of worship in Hialeah, the city passed several ordinances to forbid the animal-killing that would occur there. Justice Kennedy, for the Court, invalidated them. To survive a Free Exercise challenge, *the law must be neutral and of general applicability.* For example, a state law that forbids all murder applies to a religion that believes in child sacrifice. In contrast, the law in *Babalu* fails that test because, the Court explained, it allowed animal deaths for nonreligious reasons, such as fishing or *extermination of rats* in the home. . . . .
>
> These cases apply to those who, on free-speech or free-exercise grounds, do not want to participate in gay marriages. For example, the state could provide that a photographer cannot refuse to take a passport photo of a customer because the customer is gay. Taking passport photos is not a work of art, and neither is it a participation in anything.

Id. (emphasis added).

However, the passport photographer is different from a judge asked to solemnize a wedding ceremony, because solemnizing the wedding is more than taking a passport photo: the judge participates in the marriage. The Wyoming Supreme Court does not deny that its ruling would result in forcing a judge to actively participate in a wedding ceremony that violates her deeply held religious beliefs, but is untroubled by such governmental compulsion, for "Wyoming law does not require the person performing the ceremony to condone the union." *In re Neely*, 390 P.3d at 751. In other words, Judge Neely only needs to offer her "pinch of incense" and she can continue with life as usual. Yet "*Hurley* indicates that the state cannot force this participation," for refusing to participate in a wedding ceremony "is part of free expression, like a parade that excludes a gay-pride float." Ronald D. Rotunda, *Shooting a Wedding is Different than Taking a Passport Photo*, NATIONAL REVIEW (Jul. 9, 2015, 4:00 AM), http://www.nationalreview.com/article/420923/shooting-wedding-different-taking-passport-photo-ronald-rotunda.

"[I]n *Babalu*, the Court said that the law must be neutral and of general applicability to be valid under Free Exercise. The laws forbidding discrimination on the basis of sexual orientation are not neutral if they do not prohibit a [judge] from refusing participation in a wedding for other reasons. For example, 'You cuckolded me, and now you are marrying my ex-wife.' Or: 'I will not participate in your wedding by [solemnizing your marriage] because you intentionally ran over my dog yesterday.' *Hurley*, *Babalu*, and similar cases all

suggest that the state . . . could not force [a judge] to participate in gay weddings, because sexual orientation is not a suspect class." *Id*. Accordingly, the state cannot force Judge Neely to participate in a same-sex wedding in violation of her free speech and free exercise rights.

Finally, it is notable that the "No Religious Test" Clause in the U.S. Constitution (Art. VI, Sect. 3) is attributable to the efforts of Charles Carroll, the only Catholic signer of the Declaration of Independence. Michael Novak, *Religious Convictions Are Deep and Abiding*, N.Y. TIMES (Mar. 24, 2015, 6:45 AM), https://www.nytimes.com/roomfordebate/2015/03/24/the-pulpit-and-the-ballot-box/religious-convictions-are-deep-and-abiding). Carroll was inspired by Sir Thomas More, Lord Chancellor of England, who, following his refusal to attend the wedding of King Henry VIII to Anne Boelyn, was convicted of treason and beheaded in 1535, largely because he "would not bend to the marriage." Colin Hoch, Review of *A Man for All Seasons*, STEPHEN F. AUSTIN STATE UNIVERSITY, http://clioseye.sfasu.edu/Archives/Student%20Reviews%20Archives/amanforallseasons(Hoch).htm (last visited Aug. 25, 2017). Although the marriage was made legal by the State, it was not recognized by the Catholic Church; thus, More, a devout Catholic, was martyred for his convictions. Mark Zimmerman, *Relics of St. Thomas More invite pols to examination of conscience*, CRUX (Sep. 18, 2016), https://cruxnow.com/global-church/2016/09/18/relics-st-thomas-invite-pols-examination-conscience/.

Is not Judge Neely merely standing up for her religious convictions as did Saint Thomas More? It is truly ironic that the "No Religious Test" Clause, which should protect her, was inspired by another courageous judge's refusal to participate in a wedding.

CONCLUSION

Accordingly, the Court should grant Petitioner's petition for *certiorari* and reverse the Wyoming Supreme Court's opinion sanctioning Judge Neely.

Respectfully submitted,

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