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 REPLY 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 and Rules

Other Authorities

INTRODUCTION

The Commission's brief sends two distinct messages to judges. In a chilling forecast, the Commission leaves no doubt that if it has its way, no judge who holds Judge Neely's religious beliefs about marriage can remain on the bench once the public learns of those beliefs. According to the Commission, any judge who believes as Judge Neely does must hide the very convictions that animate her life. But in a surprising twist, the Commission effectively concedes that its removal efforts violate the Wyoming and U.S. Constitutions. By admitting that strict scrutiny applies, and by making clear that it cannot satisfy narrow tailoring, the Commission has all but expressly declared that this Court cannot affirm its recommendation.

STATEMENT OF THE FACTS

The Commission inaccurately portrays the facts in a number of ways. First, contrary to the Commission's claim, *see* Resp't Br. at 23-24, the state does not pay Judge Neely or any other part-time circuit court magistrate when they solemnize marriages. Neely Dep. at 43 (C.R. 503). Second, Judge Haws did not testify that officiating at same-sex weddings was an "essential function" of Judge Neely's magisterial role. Resp't Br. at 4-5. Instead, his testimony—where he discussed his thoughts *if* solemnizing same-sex marriages "*turned out to be* a necessary essential function of the job," Haws Dep. at 86 (C.R. 367) (emphasis added)—showed that he never determined it was essential. *See also* Pet'r Br. at 12-13. Third, the Commission cites Judge Neely's deposition to support its claim that after Mr. Donovan published his initial article, stories about Judge Neely "appeared in three other publications in Sublette County and generated at least two subsequent editorials." Resp't Br. at 7. But Judge Neely's testimony expressly refutes that: she stated that the same article appeared in both the *Sublette Examiner* and the

Pinedale Roundup (newspapers owned and operated by the same company) and that Mr. Donovan wrote two subsequent editorials. Neely Dep. at 33-34 (C.R. 500-01); Pet'r Br. at 16-17.

STANDARD OF REVIEW

Most issues disputed in this case involve the interpretation of constitutional principles or the Code. The Commission admits that when this Court "interpret[s] its own rules" in the Code or resolves "[i]ssues of constitutionality," it does so under a "*de novo*" standard of review. Resp't Br. at 10. Nevertheless, the Commission asserts that its factual "findings and recommendations are entitled to a 'significant degree of deference.'" *Id.* at 9. But as Judge Neely has already explained, the Commission's factual findings are not entitled to deference because they arose out of summary judgment rather than an evidentiary hearing. *See* Pet'r Br. at 24. Moreover, the Commission's removal recommendation is not entitled to deference because it is based on an erroneous understanding of the law and it is not supported by *any explanation* purporting to justify removal. *See F.E.C. v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (noting that the "thoroughness" and "validity . . . of an agency's reasoning are factors that bear upon the amount of deference to be given [it]").

ARGUMENT

I. 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.

In her brief, Judge Neely established that she did not violate the Code as a municipal judge because municipal judges do not have any authority to solemnize marriages. Pet'r Br. at 28. The Commission does not deny this. It is thus established that Judge Neely did not violate the Code in her municipal judge position.

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

1. 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.

Judge Neely demonstrated that the Commission's efforts to remove her as a municipal judge violate Article 1, Section 18. Pet'r Br. at 31-34. The Commission's brief, either through silence or concession, confirms this. Notably, the Commission does not deny that removing Judge Neely from a municipal judge position in which she does not have authority to solemnize marriages would declare her unable to hold judicial office solely because of her religious beliefs. *See* Pet'r Br. at 31-32. Yet removal in this situation would violate Article 1, Section 18's prohibition on rendering 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. Because that section is "plain and unambiguous," and because the Commission does not argue (much less show) that it is ambiguous, the Court need not engage in further construction or entertain the Commission's "in pari materia" argument to conclude that Article 1, Section 18 protects Judge Neely. *See* Resp't Br. at 35 ("If the language is plain and unambiguous, there is no need for construction.") (quoting *Cathcart v. Meyer*, 2004 WY 49, ¶ 39, 88 P.3d 1050, 1065 (Wyo. 2004)).

Moreover, the Commission admits that "in construing the state constitution," this Court's "fundamental purpose is to ascertain the intent of the framers." Resp't Br. at 35 (quoting *Cathcart*, 2004 WY 49, ¶ 39, 88 P.3d at 1065). Judge Neely has shown, through her discussion of the constitutional debates about Wyoming's Mormon population, that the framers intended to forbid the state from invoking religious beliefs about marriage to disqualify their fellow citizens from public office (including the judiciary). Pet'r Br. at 32. Because the Commis-

sion does not deny this, this Court should conclude that the framers' intent confirms what the plain language says: that the state cannot remove Judge Neely from her municipal judge position because of her religious beliefs and expression about marriage.

In responding to Judge Neely's claim under Article 1, Section 18, the Commission's "in pari materia" argument is deeply flawed. *See* Resp't Br. at 33-42. Among other things, it would violate the doctrine of *expressio unius est exclusio alterius*. *See Cathcart*, 2004 WY 49, ¶ 40, 88 P.3d at 1066. The framers included only one limitation on the "liberty of conscience" guaranteed in Article 1, Section 18—that those rights cannot "excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state." Wyo. Const. art. 1, § 18. Reading in the general and amorphous exception that the Commission seeks would attribute to the framers a limitation on conscience rights that they clearly did not intend.

Finally, the Commission does not argue that Judge Neely's religious beliefs or her peaceful expression of them constitutes "licentiousness" or "practices inconsistent with the peace or safety of the state." *Id.* The Court should thus conclude that Article 1, Section 18 prohibits the state from removing Judge Neely.

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

Judge Neely has demonstrated that Article 1, Section 18 and Article 21, Section 25 of the Wyoming Constitution provide extremely broad protection for religious exercise. Pet'r Br. at 34-39. Again, the Commission does not deny this. It instead ignores Judge Neely's arguments and claims that under an "in pari materia" construction, the general equality provisions in the state constitution override Judge Neely's specific rights under the free-exercise provi-

sions. *See* Resp't Br. at 33-42. That thoroughly misguided argument, however, which is further examined below, *see infra* at 15-17, is particularly misplaced when discussing Judge Neely's removal as a municipal judge. Because Judge Neely does not solemnize marriages in that capacity, it is untenable to suggest that allowing her to continue as a municipal judge would violate the equality provisions of the Wyoming Constitution. If anything, the equality provision upon which the Commission primarily relies—Article 1, Section 3—further establishes that the Commission cannot remove Judge Neely as a municipal judge. That section forbids the state from making any "political rights [or] privileges" (such as the right to hold office) hinge on a "distinction of . . . any circumstance or condition whatsoever" (such as religious beliefs). *See Maxfield v. State*, 2013 WY 14, ¶ 35, 294 P.3d 895, 903 (Wyo. 2013) (concluding that Article 1, Section 3 protects the right to hold office).[1] It thus supports Judge Neely's position.

Judge Neely has also shown that the Court should apply a two-part test faithful to the state constitution's sweeping protection for religious exercise. Pet'r Br. at 34-41. The Commission does not attempt to explain why the Court should reject that test or why Judge Neely cannot satisfy it. The Court should thus apply that test and find that Judge Neely prevails under it. Regardless, the Commission concedes that its actions "are subject to strict scrutiny" under the state constitution and that they "must be justified by a compelling interest most narrowly drawn." Resp't Br. at 42. For the reasons explained in Judge Neely's opening brief and below, the Commission cannot satisfy that stringent standard. *See* Pet'r Br. at 44-49; *infra* at 6-8.

---

[1] Although that section allows distinctions based on "individual incompetency," the Commission has not shown that Judge Neely is incompetent to continue as a municipal judge.

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

Judge Neely has demonstrated four reasons why the Commission's removal recommendation is subject to strict scrutiny under the federal constitution: (1) lack of neutrality and general applicability; (2) an individualized governmental assessment; (3) a hybrid of constitutional rights; and (4) content-based discrimination on speech. *See* Pet'r Br. at 42-44, 49-51. The Commission does not respond to Judge Neely's arguments on the first two points, and it *expressly concedes* Judge Neely's position on the last two. Indeed, it admits that "strict scrutiny applies" because this application of the Code "raise[s] a hybrid of constitutional claims," Resp't Br. at 47, and because the Rules at issue "cannot be 'justified without reference to the content of the regulated speech'" and thus they discriminate based on content, *id.* (quoting *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015)). Strict scrutiny thus applies here.

The Commission claims that it has a compelling interest in "ensur[ing] . . . the appearance of justice and impartiality," Resp't Br. at 48, or stated differently, in "preserv[ing] public confidence in the integrity of Wyoming's judiciary," *id.* at 45-46. Ignoring Judge Neely's discussion of *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), *see* Pet'r Br. at 45, the Commission block-quotes from *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015), and suggests that the mere incantation of judicial impartiality or integrity as a concept establishes a compelling interest. Resp't Br. at 44-45. The Commission, however, is incorrect. Although the U.S. Supreme Court in *Williams-Yulee* held that an interest in protecting the appearance of impartiality is compelling when a judicial code forbids the direct solicitation of funds, *see* 135 S. Ct. at 1666-68, the Court in *White* held that such an interest is not compelling when a judicial

code prohibits expression about controversial legal matters, *see* 536 U.S. at 777-78. Because this case, which involves Judge Neely's expression about marriage and marriage solemnization, falls into the latter category, the Commission has not established a compelling interest here. *See* Pet'r Br. at 45. This is particularly true given that (1) the Commission has not produced any evidence indicating that public confidence in judicial impartiality will be harmed by allowing Judge Neely to remain on the bench and (2) all the evidence actually points in the other direction. *See* Pet'r Br. at 9-10, 59-61 (discussing relevant facts); Anderson Aff. ¶ 5 (C.R. 901-02) (LGBT citizen testifying: "it would be obscene and offensive to discipline Judge Neely").

Nor has the Commission satisfied the narrow-tailoring requirement. Judge Neely has shown that the Commission's actions are not narrowly tailored because they are substantially underinclusive, *see* Pet'r Br. at 45-48, and because existing recusal provisions already address the Commission's asserted concerns, *see id.* at 48-49. The Commission again ignores this and advances only one implausible argument unsupported by any case citation—that its actions are narrowly tailored because the Code regulates only "the conduct of . . . the judiciary." Resp't Br. at 47. If, however, this were sufficient to establish narrow tailoring, it would produce two untenable results: first, the state would *automatically* satisfy narrow tailoring when opposing *any* constitutional claim *ever* raised by a judge; and second, the state would have *nearly unlimited* power over the lives of judges and be able to ban any speech or conduct it pleases. Moreover, the Commission's argument misunderstands its burden under narrow tailoring—it must show that no "less restrictive alternative would serve the Government's purpose" as applied to Judge Neely. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). Simply observing that the Code applies only to judges does not even begin to satisfy that burden. Thus, the Court

should find, for the reasons that Judge Neely has explained, that the Commission has not satisfied the narrow-tailoring requirement. *See* Pet'r Br. at 45-49.

II. 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.

1. Judge Neely has no duty to solemnize marriages.

In arguing that Judge Neely and all other part-time circuit court magistrates have a mandatory duty to perform marriage ceremonies, *see* Resp't Br. at 11-12, the Commission directly contradicts what it has already 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); *see also* Soto Dep. at 153 (C.R. 438) (testifying that "Wyoming statutes don't require any judge" or magistrate "to perform any marriage").

Ignoring this, the Commission relies on the phrase "shall have the powers" in the statute that outlines the powers available to part-time circuit court magistrates, and argues that the word "shall" connotes a mandatory duty to "[p]erform marriage ceremonies." Wyo. Stat. § 5-9-212(a)(3). That argument, however, conflicts with the plain statutory language. Saying that a magistrate "shall have the power[]" to "[p]erform marriage ceremonies" is very different from saying that she "shall perform marriage ceremonies." The former, which is at issue here, does not require the magistrate to exercise her power and thus affords her *discretionary authority*, whereas the latter obligates the magistrate to act and thus creates a *mandatory duty*.

Widespread case law agrees that the phrase "shall have the power" imbues a public official with discretion. *See, e.g., Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 763 (Tenn. 1998) ("[T]he clear import of the statutory language, 'the authority shall have the power,' is that the

[government] has the power . . . if it chooses to exercise the authority. In other words, the language used by the [legislature] implies discretion. Importantly, the statute *does not* say that the [government] 'shall [perform the relevant action]' . . . . Such language would clearly describe a mandatory duty."); *Nimmer v. Strickland*, 249 S.E.2d 233, 234 (Ga. 1978) (concluding that the phrase "shall have authority" is "permissive and not mandatory language"); *Pac. Lighting Serv. Co. v. Fed. Power Comm'n*, 518 F.2d 718, 720 (9th Cir. 1975) (concluding that the phrase "shall have authority" means that the performance of the authorized function is "discretionary rather than mandatory"); *N.L.R.B. v. Barrett Co.*, 120 F.2d 583, 586 (7th Cir. 1941) ("'Power to issue' is different from 'shall issue.' The difference is important. In one the [government's] duty is mandatory. It has no discretion. In the other, the [government] has a discretion . . . ."); *State v. Beard*, 27 N.E.2d 184, 185 (Ohio Ct. App. 1939) (concluding that the word "shall" in the phrase "shall have power" "refers to the power or authority vested . . . and not the exercising thereof," and explaining that "[t]he use of this power is not . . . mandatory").

This interpretation is confirmed by related Wyoming statutes. *See Johnson v. City of Laramie*, 2008 WY 73, ¶ 7, 187 P.3d 355, 357 (Wyo. 2008) ("[A]ll statutes relating to the same subject . . . must be considered and construed in harmony."). The marriage-solemnization statute provides that "[e]very . . . circuit court . . . magistrate . . . *may* perform the ceremony of marriage." Wyo. Stat. § 20-1-106(a) (emphasis added). And the statute that prescribes the powers available to full-time circuit court magistrates similarly states that "a full-time magistrate of the circuit court . . . *may*" perform the listed functions, which include "[p]erform[ing] marriage ceremonies." Wyo. Stat. § 5-9-208(c)(iii). Because it is implausible that the legislature intended to afford discretion to full-time magistrates and impose a duty on part-time magistrates, that

statute reinforces the discretionary nature of marriage solemnization.

The Commission's "duty" argument not only conflicts with the statutory language, it also would produce absurd results. *See Rodriguez v. Casey*, 2002 WY 111, ¶ 10, 50 P.3d 323, 326 (Wyo. 2002) ("[Statutory] [i]nterpretation should not produce an absurd result."). It would mean, for example, that a part-time magistrate who receives no money from the state for solemnizing marriages, *see* Neely Dep. at 43 (C.R. 503), has a duty to perform them whenever asked. It would also mean that the many part-time magistrates who are uninterested in officiating marriages and flatly refuse to do so are, in the Commission's words, committing a "dereliction of duty." Resp't Br. at 12. And it would immediately outlaw the common practice of magistrates who perform some weddings declining to perform others. *See* Pet'r Br. at 6-7.

Unable to establish that all magistrates must solemnize all weddings, the Commission suggests that Judge Neely is unique because, it claims, she "was appointed as a Circuit Court Magistrate to perform civil marriage ceremonies." Resp't Br. at 11. But this attempt to single out Judge Neely fails to acknowledge that her most recent magisterial appointment gave her all available powers and therefore was not limited to marriage solemnization. *See* 2008 Magistrate Appointment Letter (C.R. 392). Nothing about that appointment purports to convert a power that the law considers discretionary into a mandatory duty.

In the end, the Commission's insistence that Judge Neely has a duty to solemnize marriages serves only to highlight that it is targeting her because of her religious beliefs. For if, as the Commission claims, it "is a dereliction of duty" for "a part-time magistrate to refuse to perform marriage ceremonies," Resp't Br. at 12, the Commission has indicted itself for failing to bring charges against Sublette County circuit court magistrate Stephen Smith (who refuses

to marry couples that are not his friends or family members, *see* Smith Dep. at 43-44 (C.R. 465)), or any of the other magistrates who decline to solemnize (all or some) marriages for myriad secular reasons, *see* Pet'r Br. at 6-7 (citing relevant evidence).

2. Judge Neely did not violate Rule 2.3.

The Commission contends that Judge Neely violated Rule 2.3 by manifesting bias based on sexual orientation. Resp't Br. at 21. But its arguments, which are based on inaccuracies and an open attack on Judge Neely's religious beliefs, miss the mark.

For instance, the Commission repeatedly states that Judge Neely has shown bias by denying same-sex couples "judicial services that she is paid by the State of Wyoming to administer equally to all." Resp't Br. at 23-24. This is not true. The state does not compensate part-time circuit court magistrates like Judge Neely for their time spent solemnizing marriages. Neely Dep. at 43 (C.R. 503). And Judge Neely never denied anything to anyone.

Moreover, the Commission attacks Judge Neely's religious beliefs as expressed in her letter seeking guidance from the Wyoming Judicial Ethics Advisory Committee. Resp't Br. at 23-24. But in assailing Judge Neely's convictions, the Commission has mischaracterized what she said and what she believes. Indeed, the Commission truncated Judge Neely's quote to the Advisory Committee, omitting the following sentences in which she affirms that she can and will be impartial to everyone that comes before her, including members of the LGBT community. 1/6/15 Letter at 1 (C.R. 873) ("Does that mean I cannot be impartial on the bench when [a] homosexual . . . comes before me with a speeding ticket? . . . No. Firmly, no."). And the Commission neglects to mention that Judge Neely dispelled any notion of prejudice against gays and lesbians when she testified that although "[h]omosexual conduct" is a "named sin[] in

the Bible," LGBT citizens "are no worse sinners than I am." Neely Dep. at 60-61 (C.R. 507).

The Commission's claim of sexual-orientation bias thus rests solely on Judge Neely's response to Mr. Donovan. But as Judge Neely has already explained, her respectful expression of her religious beliefs regarding marriage did not violate Rule 2.3. *See* Pet'r Br. at 55-57.[2]

3. Judge Neely did not violate Rule 2.2.

The Commission argues that Judge Neely violated Rule 2.2 because she failed to uphold *Guzzo v. Mead*, 2014 WL 5317797 (D. Wyo. Oct. 17, 2014), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). *See* Resp't Br. at 19. But Judge Neely has already refuted that argument as to *Guzzo*, *see* Pet'r Br. at 26-27, and the same reasoning applies to *Obergefell*. *See also infra* at 16.

As support for its claim that Judge Neely refused to follow the law, the Commission relies on Judge Neely's telling Mr. Donovan that "when law and religion conflict, choices have to be made." Resp't Br. at 22. Yet that vague comment, which did not state Judge Neely's opinion on what the law requires, does not come close to announcing an unwillingness to follow the law. When Judge Neely said that, she was not sure what the law required of her. She had previously sought guidance from Judge Haws, but he told her that they should wait for further instruction before making any determination. Neely Dep. at 77 (C.R. 511). She subsequently concluded that the law did not require her to solemnize marriages, particularly under circumstances that would violate her faith. Thus, the Commission's reliance on Judge Neely's "law and religion" comment fails to advance its arguments.

---

[2] The Commission also asserts that Judge Neely's response to Mr. Donovan manifested bias based on gender, sex, and religion. Resp't Br. at 23-24. But no evidence anywhere in the record suggests that Judge Neely has shown bias against men, women, or religious groups.

The Commission also asserts that Judge Neely violated Rule 2.2 because she did not "perform *all* duties fairly and impartially." Resp't Br. at 19. But marriage solemnization is not a required duty of part-time circuit court magistrates. Pet'r Br. at 56; *see also id.* at 25-27; *supra* at 8-10. Moreover, Judge Neely did not contravene the impartiality requirement because her actions do not constitute impermissible bias. Pet'r Br. at 57-58; *see also id.* at 56-57.

4. Judge Neely did not violate Rule 1.2.

The Commission tries to rebut Judge Neely's showing that "no 'fully informed reasonable person' would conclude that she acted improperly." Resp't Br. at 16. In doing so, the Commission first contends that its members are "collectively the very definition of the reasonable person" and implies that this Court should rubber-stamp their conclusions on appeal. *Id.* at 17. If that were a valid argument, however, all reasonableness determinations of the Commission would be conclusive and unassailable. No law supports that.

Furthermore, the Commission seeks to evade the facts that undermine its "appearance of impropriety" claim by denouncing the "fully informed reasonable person" standard, insisting that such a standard "has only been applied by the Mississippi Supreme Court and unfavored elsewhere." Resp't Br. at 17. That is patently false. *See, e.g., In re Larsen*, 616 A.2d 529, 582-83 (Pa. 1992) (per curiam) (rejecting as "untenable the suggestion that" courts should employ "a reasonable uninformed or misinformed person standard," and explaining that appearances must be gauged with "reference to the full and true facts"). When courts apply the "appearance of impropriety" language in provisions like Rule 1.2, "[t]he leading view is that [they] should review judicial behavior by its appearance to a reasonable person *following review of the totality of the circumstances.*" Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79

Marq. L. Rev. 949, 956 (1996) (quotation marks omitted; emphasis added); *see also* Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 Minn. L. Rev. 1914, 1944 (2010) ("The reasonable person employed by the judicial ethics community . . . possesses all the facts."). Even Alaska's case law, which the Commission touts, assesses "appearance of impropriety" by viewing "the cumulative effect of [the judge's] actions . . . in their totality." *In re Johnstone*, 2 P.3d 1226, 1236-37 (Alaska 2000).

The majority of courts also employ a fully informed reasonable person when evaluating whether a judge's impartiality might reasonably be questioned for purposes of disqualification under ethics provisions like Rule 2.11. *See, e.g., In re Jacobs*, 802 N.W.2d 748, 752-53 (Minn. 2011) (collecting cases indicating that the reasonable person has "full knowledge of the facts and circumstances"); *State v. Jacobson*, 747 N.W.2d 481, 485 (N.D. 2008) ("on the basis of all the facts"); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 659 (10th Cir. 2002) ("knowing all the relevant facts"). Notably, this Court, in the judicial-disqualification context, has recognized that the appropriate standard is the "reasonable person with knowledge of all the facts." *Story v. State*, 788 P.2d 617, 621 (Wyo. 1990). The same standard should apply when construing Rule 1.2, and that fully informed reasonable person would exonerate Judge Neely.

In pressing its Rule 1.2 arguments, the Commission also suggests that Judge Neely should be "sanctioned . . . for attempting to impose [her] personal religious and moral opinions on litigants." Resp't Br. at 16. This argument turns the facts on their head. By declining to preside over weddings that conflict with her religious beliefs, Judge Neely ensured that she would *not* impose her views on marrying couples. *See Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012) (concluding that a counseling student who, for religious reasons, referred clients seeking

same-sex relationship counseling "*avoid[ed]* imposing her values on gay and lesbian clients"). The Commission primarily relies on *State v. Pattno*, 579 N.W.2d 503 (Neb. 1998), to support its "imposing morality" argument, but that case is inapposite because the judge there, unlike Judge Neely, expressed his "religious views *from the bench*" and "rel[ied] upon [his] personal religious beliefs *as a basis for a sentencing decision*," *id.* at 509 (emphasis added).

Lastly, the Commission faults Judge Neely for not addressing whether she "act[ed] in a manner that promoted confidence in the impartiality of the judiciary." Resp't Br. at 18. But as Comment 1 to Rule 1.2 explains, determining whether a judge has "eroded" "[p]ublic confidence in the judiciary" hinges in large part on whether the judge engaged in "improper conduct [or] conduct that creates the appearance of impropriety." W.C.J.C., R. 1.2 cmt. 1. So by showing that she did not create an appearance of impropriety, *see* Pet'r Br. at 58-61, Judge Neely has already addressed the "public confidence" component of Rule 1.2.

5. Judge Neely did not violate Rule 1.1.

The Commission's arguments under Rule 1.1 do not add anything beyond the issues already addressed. So for the reasons explained above, Judge Neely did not violate Rule 1.1.

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

As previously mentioned, the Commission presses an "in pari materia" interpretation of the Wyoming Constitution, contending that the Constitution's general equality provisions trump Judge Neely's specific rights under the religious-liberty provisions. Resp't Br. at 33-42. For at least three reasons, that argument cannot justify Judge Neely's removal as a magistrate.

First, the equality provisions and the religious-liberty provisions point in the same direction in this case, together showing that the state cannot treat Judge Neely differently from

other magistrates because of her faith. Other magistrates may refuse to solemnize marriages, including same-sex marriages, for a host of secular reasons, *see* Pet'r Br. at 64 (summarizing those reasons); Haws Dep. at 109 (C.R. 372) (noting that Judge Haws declined to solemnize a same-sex marriage for a scheduling reason); but Judge Neely cannot do the very same thing because her motivation is religious. Religious-liberty and equality principles jointly condemn that sort of religious bigotry.

Second, protecting Judge Neely's constitutional rights by allowing her to remain a magistrate would not violate the Constitution's equality provisions. The U.S. Supreme Court's decision in *Obergefell* is instructive. *Obergefell* held that states must permit same-sex couples to access "civil marriage on the same terms and conditions as opposite-sex couples." 135 S. Ct. at 2605. Because judges and magistrates have discretion when exercising their marriage-solemnization authority, *see* Pet'r Br. at 25-26; *supra* at 8-10, no opposite-sex couple in Wyoming has a right to demand that a *particular* judge or magistrate serve as the celebrant for their wedding. Equality thus dictates that Wyoming's same-sex couples do not have that right either. Moreover, constitutional equality guarantees like those discussed in *Obergefell* require only that the state provide same-sex couples access to civil marriages, 135 S. Ct. at 2605; they do not mandate that the state infringe conscience rights of magistrates. Because the record here conclusively establishes (and the Commission does not dispute) that no same-sex couple will be hindered from marrying if Judge Neely is allowed to remain a magistrate, Pet'r Br. at 14-16, the Court may rule for Judge Neely without contravening the Constitution's equality provisions. Furthermore, the state has many options going forward that would allow both Judge Neely to remain a magistrate and the state to comply with the equality provisions. The Sublette County

circuit court, for example, could direct that all requests for its judge or magistrates to solemnize a marriage must be routed through the court clerk, who would arrange for the judge or a magistrate without a conflict (religious or otherwise) to serve as the wedding celebrant. Pet'r Br. at 67. There is thus no conflict between the equality guarantees of the Wyoming Constitution and a ruling that permits Judge Neely to continue as a magistrate.

Third, it would violate a basic canon of construction to read the Wyoming Constitution's *general* equality provisions to override its *specific* religious-freedom guarantees because it is well established that "[a] specific provision . . . controls over an inconsistent general provision pertaining to the same subject." *Thunderbasin Land, Livestock & Inv. Co. v. Cty. of Laramie Cty.*, 5 P.3d 774, 782 (Wyo. 2000).

Anticipating the demise of its "in pari materia" argument, the Commission then astonishingly argues that even if Judge Neely is protected by Article 1, Section 18 and Article 21, Section 25, those constitutional provisions do not prevail over the Code. Resp't Br. at 41. But it is axiomatic that state statutes and similar regulations like the Code are invalid to the extent that they are applied to "violate[] limitations imposed by the [Wyoming] Constitution." *Bd. of Cty. Com'rs of Carbon Cty. v. Union Pac. R. Co.*, 171 P. 668, 668-69 (Wyo. 1918). As part of this argument, the Commission relies on the state's "police power," but again, the exercise of that power "cannot come in direct conflict with constitutional provisions." *Cross v. State*, 370 P.2d 371, 374 (Wyo. 1962). Finally, the Commission's argument misunderstands Judge Neely's constitutional claims. Nothing about her argument claims that "the Court does not have the power to impose a code of judicial conduct." Resp't Br. at 42. Instead, she argues that applying the Code to remove her *under these circumstances* would violate her constitutional rights.

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

The Commission's federal free-exercise and free-speech arguments do not differ from the municipal judge context to the magistrate context. So for the reasons already explained, the state cannot remove Judge Neely from her magistrate position.

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

The Commission's vagueness arguments suffer from a foundational flaw: they fail to recognize that Judge Neely challenges the Code not on its face, but *only as applied* to her in this situation. The Commission also implies that vagueness violations occur in the criminal context, but never in the disciplinary context. Resp't Br. at 52. Yet in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1036, 1048-51 (1991), an attorney disciplinary case, the U.S. Supreme Court found an ethics provision vague as applied to a lawyer who, much like Judge Neely, considered the rules and "ma[de] a conscious effort at compliance," *id.* at 1051. Finally, the Commission wholly fails to explain how Judge Neely could possibly have known (1) that her inability to solemnize some newly recognized marriages in her voluntary magistrate position would cause her to lose her municipal job or (2) that the Commission would justify her removal as a magistrate by ignoring plain statutory language and accepted practice in a baseless attempt to transform the discretionary function of marriage solemnization into a mandatory duty.

IV. The advisory opinions that the Commission cites do not support removal.

The advisory opinions issued by judicial-ethics bodies in other states cannot bear the weight that the Commission places on them. *See* Resp't Br. at 24-31. To begin with, none of

those opinions considers any of the constitutional issues raised in this case, and as a result, they are of limited value. Moreover, contrary to the Commission's claim, none of those opinions "justifies [Judge Neely's] removal." Resp't Br. at 31. In fact, the Washington order—which involved a judge who, like Judge Neely, stated in response to a press inquiry that his religious beliefs prevent him from solemnizing same-sex marriages—imposed "the least severe disciplinary action available" because, among other reasons, the judge was trying to navigate an unclear situation "when longstanding law was just changed." *In re Tabor* at 8 (C.R. 217).

Even the Ohio opinion, which the Commission praises as "compelling," Resp't Br. at 30, and which is the most hostile toward judges who hold Judge Neely's religious beliefs, does not support removal. It states that a judge who is unable to solemnize same-sex marriages may need to disclose her beliefs and "disqualif[y] [herself] in [cases] where the sexual orientation of the parties is at issue," but nowhere does it say that she must be removed from office. Ohio Opinion 2015-1 at 5 (C.R. 239). Also, nearly all of the opinions implicitly denounce the Commission's efforts to remove Judge Neely from her municipal judge position (a position in which she cannot perform weddings) by recognizing that judges who face a religious conflict may decline to solemnize all marriages.

V. Article 5, Section 6 of the Wyoming Constitution does not support removing Judge Neely as a municipal judge.

The Commission seeks to justify Judge Neely's removal as a municipal judge by claiming that because "she is disqualified from her office as magistrate," Article 5, Section 6 of the Wyoming Constitution—which states that "[a] judicial officer removed from office is ineligible for any judicial office"—prohibits her from holding any other office. Resp't Br. at 12. This argument encounters four insurmountable roadblocks.

First, as already established, Judge Neely did not violate the Code as a magistrate; thus, the predicate for the Commission's argument fails. Second, Judge Neely has done nothing in her capacity as a magistrate to warrant removal; this too destroys the premise of the Commission's argument. "Removal is a drastic measure," appropriate only when a judge engages in misconduct that is "truly egregious," "flagrant and severe," or repeatedly violates the Code. Cynthia Gray, *A Study of State Judicial Discipline Sanctions*, Am. Judicature Society, at 4 (2002), *available at* http://bit.ly/29p0evE; *see also id.* at 8-23 (cataloguing removal cases). Neither Judge Neely's respectful disclosure of her religious beliefs in response to a reporter's question nor her efforts (after unsuccessfully seeking guidance) to maneuver through a novel ethical issue following a significant change in the law remotely approach that high standard. Third, because applying Article 5, Section 6 of the Wyoming Constitution to remove Judge Neely would violate the U.S. Constitution, *see* Pet'r Br. at 41-55, the federal Supremacy Clause forbids that application of the state constitution, *see* U.S. Const. art. VI, cl. 2. Fourth, the Court should conclude that Judge Neely's free-exercise and free-speech rights secured under Wyoming's liberally construed Declaration of Rights, *see Vasquez v. State*, 990 P.2d 476, 485 (Wyo. 1999), must prevail over Article 5, Section 6.

CONCLUSION

For the foregoing reasons, the Court should grant Judge Neely's Petition.

Respectfully submitted this the 7th day of July, 2016.

By: _____

Herbert K. Doby WSB#5-2252
Additional counsel listed on cover

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of July, 2016, the original and six copies of the foregoing brief were sent to the Wyoming Supreme Court via UPS and the foregoing brief was served by mailing a copy of it via United States mail, first class, postage prepaid, to the following:

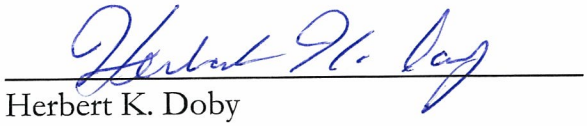
Patrick Dixon
Dixon & Dixon, LLP
104 South Wolcott, Suite 600
Casper, WY 82601
pdixn@aol.com
Counsel for the Commission on Judicial Conduct and Ethics

Tim Newcomb
P.O. Box 928
170 North Fifth
Laramie, WY 82073
newcomb@appellateconsultation.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

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

William H. Twichell
P.O. Box 1219
128 West Pine Street
Pinedale, WY 82941
wtwichel@wyoming.com
Counsel for Amici Curiae Mayor and Town Council Members of the Town of Pinedale and Sutherland Institute Center for Family and Society



Herbert K. Doby