

1 BEFORE THE COMMISSION ON JUDICIAL CONDUCT AND ETHICS

2 STATE OF WYOMING

3
4 An inquiry concerning)
5 The Honorable Ruth Neely)
6) No. 2014-27
7 Municipal Court Judge and)
8 Circuit Court Magistrate)
9 Ninth Judicial District)
10 Pinedale, Sublette County)

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12 TRANSCRIPT OF HEARING PROCEEDINGS

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15 Transcript of Hearing Proceedings on the
16 above-entitled matter held at 9:08 a.m. on the 4th day of
17 December 2015 in the Federal Courthouse, 111 South Wolcott,
18 Casper, Wyoming, with Hearing Officer Mel Orchard presiding;
19 and panel members Judge Wendy M. Bartlett and Barbara Dilts
20 in attendance.

A P P E A R A N C E S

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P R O C E E D I N G S

HEARING OFFICER ORCHARD: All right. Let's come to order. This is Case Number 2014-27. Can you hear me okay?

MR. CAMPBELL: Yes.

MS. TURNER: Yes.

MS. SOTO: Can't use the sound system.

HEARING OFFICER ORCHARD: Okay. All right. No sound system. If you can't hear me, let me know, but I'm not going to be saying much, hopefully, today.

So I'm Mel Orchard; Wendy Bartlett, Barbara Dilts. We're part of this panel. And would you please introduce yourselves?

MR. DOBY: Yes, sir. I'm Herb Doby. I'm local counsel for Judge Ruth Neely.

HEARING OFFICER ORCHARD: Morning.

MR. WARDLOW: Doug Wardlow, Counsel for Ruth Neely.

HEARING OFFICER ORCHARD: Good morning.

MR. CAMPBELL: Jim Campbell, counsel for Judge Neely. I'll just mention -- you're probably wondering why Ken Connely isn't here. He had a death in the family and that's why he's not here today.

So I'm assuming that maybe that would be a question, since he's the one you've primarily interacted

1 with, so I just wanted to let you know that.

2 HEARING OFFICER ORCHARD: Thank you. I'm
3 sorry.

4 MR. CAMPBELL: Thank you. We appreciate
5 that.

6 HEARING OFFICER ORCHARD: So we have Doug and
7 Herb --

8 MR. DOBY: Doby.

9 HEARING OFFICER ORCHARD: And your name
10 again?

11 MR. CAMPBELL: Jim.

12 HEARING OFFICER ORCHARD: And Jim. All
13 right. Wonderful. Thank you.

14 And Judge Neely?

15 JUDGE NEELY: Ruth Neely from Pinedale, yes.

16 HEARING OFFICER ORCHARD: Welcome.

17 JUDGE NEELY: Thank you.

18 HEARING OFFICER ORCHARD: Thank you for being
19 here.

20 JUDGE NEELY: Thank you.

21 HEARING OFFICER ORCHARD: And then Mr. Dixon?

22 MR. DIXON: Pat Dixon.

23 HEARING OFFICER ORCHARD: Yes, sir.

24 MR. DIXON: And my associate, Britney Turner.

25 HEARING OFFICER ORCHARD: Good morning,

1 Britney.

2 MS. TURNER: Good morning.

3 MR. DIXON: By default, I guess we'd be
4 representing the Commission.

5 HEARING OFFICER ORCHARD: Yes. All right.
6 We've set 30 minutes aside. Is that going to be adequate?
7 Given all the briefing, is this still okay?

8 MR. DIXON: I think we'll get there pretty
9 close.

10 HEARING OFFICER ORCHARD: Sounds good.
11 First movant was whom? Who filed first? Who goes
12 first?

13 MR. DIXON: I think they were filed
14 simultaneously. Let them go first. They're from out of
15 town. We've got home field advantage.

16 HEARING OFFICER ORCHARD: All right. All
17 right.

18 Would you like to go first?

19 MR. CAMPBELL: Sure.

20 HEARING OFFICER ORCHARD: Is that okay with
21 you?

22 MR. CAMPBELL: Yeah. Yeah.

23 HEARING OFFICER ORCHARD: All right. Go
24 ahead, Jim. Thank you.

25 MR. CAMPBELL: Thank you.

1 Good morning. Judge Neely has been the municipal
2 judge in the city of Pinedale for more than 21 years. In
3 addition, she's also served as a circuit court magistrate in
4 Sublette County for approximately 14 years.

5 In all that time, she's never had a complaint
6 filed against her, never been accused of bias by anyone.
7 The evidence in this case confirms that. Members of the
8 LGBT community in Pinedale, current and former Pinedale
9 mayors and the current town attorney in Pinedale all affirm
10 that Judge Neely is fair and impartial in all her dealings
11 with everyone, including folks in the LGBT community,
12 whether in court or outside of it.

13 The Commission has introduced no evidence showing
14 that Judge Neely is actually biased against any person or
15 class of persons. Instead, all the Commission has pointed
16 to is this: That in response to a question about same-sex
17 marriage from a reporter named Ned Donovan, Judge Neely
18 honestly shared her belief that marriage is the union of a
19 man and a woman and that she can't perform a wedding
20 ceremony for any other marriage.

21 In response to this, the Commission has acted
22 extremely, insisting that she must be removed from both of
23 her judicial positions, but Judge Neely does not even have
24 authority to perform marriages in her position as a
25 municipal judge. And even as a circuit court magistrate,

1 she has only discretionary authority to perform marriages.
2 She has no mandatory duty to do so.

3 With that background, we see that the Commission
4 has adopted an extreme position in this case. And that
5 position is this: That because the public knows that Judge
6 Neely believes marriage is the union of a man and woman, she
7 can no longer be a judge in the state of Wyoming, even a
8 judge that has no authority to perform marriages. And what
9 I'm referring to there is the fact that they're seeking to
10 remove her from her municipal judge position.

11 In concrete terms, the Commission's argument boils
12 down to this: That because the public now knows about Judge
13 Neely's beliefs, that no reasonable person could believe
14 that she could fairly adjudicate a traffic ticket and other
15 municipal matters involving LGBT citizens. And that simply
16 is not true.

17 This extreme position threatens to remove not only
18 Judge Neely from her position, but also other judges who
19 hold beliefs, whether religious or otherwise, about
20 countless other contentious issues.

21 For example, under the Commission's logic, if the
22 public knows that a judge is an atheist who considers
23 religious beliefs flawed, then it is reasonable to assume
24 that that judge cannot fairly adjudicate cases involving
25 people of faith, and thus, that judge must be removed, or if

1 the public knows that a judge participates in a local
2 Democratic party precinct caucus, as she's permitted to do
3 under Comment 4 to Rule 4.1, then that judge cannot fairly
4 decide cases involving Republicans, or if the public knows
5 that a judge opposes the death penalty and recuses from
6 cases involving that issue, then that judge can't fairly
7 decide cases brought by an attorney or litigant who supports
8 the death penalty.

9 And to give you one more example of the
10 implications of the Commission's position, the logic of that
11 position would establish that, if the public knows that a
12 judge supports Palestine in the Israeli-Palestinian
13 conflict, that that judge can't be fair and impartial to
14 Jewish litigants and, therefore, that judge must be removed.

15 These are the implications of the Commission's
16 position, but there's no support for it. Indeed, the
17 Commission admits on page 5, footnote 1 of its memorandum of
18 law in support of its motion, that all the cases it cites
19 are distinguishable and are not intended to be persuasive.

20 On the other hand, the Supreme Court, U.S. Supreme
21 Court in Republican Party versus White has rejected the
22 Commission's assumption that judges should not publically
23 hold beliefs about contentious issues.

24 In that case, the court said this: "A judge's
25 lack of predisposition regarding a relevant legal issue has

1 never been thought a necessary component of equal justice,"
2 because, as the court explained, it's virtually impossible
3 to find a judge who does not have preconceptions about
4 numerous legal and political and social issues; thus, the
5 Commission's far-reaching position should be rejected.

6 There's been a lot of briefing in this case.
7 There have been a number of arguments. So what I'd like to
8 do is boil everything down to what we believe are the three
9 points that most readily demonstrate that Judge Neely's
10 motion should be granted, her motion for summary judgment.

11 First, the adjudicatory panel must decide this
12 case on summary judgment. The parties agree that there are
13 no genuine issues of material fact that must be resolved
14 through an evidentiary hearing. And that alone is
15 sufficient reason to require -- to decide this case on
16 summary judgment.

17 Moreover, the submitted evidence is more than
18 sufficient to resolve the legal issues raised. There is,
19 thus, no useful purpose for holding an evidentiary hearing
20 in this case.

21 The Commission had ample opportunities, both in
22 filing its motion and in opposing Judge Neely's motion, to
23 put forth any evidence that it thought was critical. So at
24 this point, all that remains is for the panel to resolve the
25 legal issues that are raised in this case, and there's no

1 reason to wait on doing that; thus, this case should be
2 resolved on summary judgment.

3 This brings me to my second key point. Removing
4 Judge Neely from office as the Commission attempts to do
5 here would create an impermissible religious test for the
6 position of judge in Wyoming. Specifically, I would direct
7 the panel to Article 1, Section 18 of the State
8 Constitution. There it states that, No person shall be
9 rendered incompetent to hold any office of trust because of
10 his opinion on any matter of religious opinion -- or on any
11 matter of religious belief whatever. Very broad language.

12 Here Judge Neely believes that marriage is the
13 union of a man and a woman and that she cannot personally
14 solemnize any other marriages. And the Commission maintains
15 in response to that, that because of these beliefs, Judge
16 Neely can no longer be a judge, again, even a judge who has
17 no authority to perform marriages -- what I mean by that is
18 by going after her municipal position.

19 This position and this attempt to remove Judge
20 Neely entirely from the bench violates the clear language
21 and purpose of the prohibition on religious test, which I
22 just recited from Article 1, Section 18 of the State
23 Constitution.

24 The only limitation on this constitutional
25 protection is if a public official seeks to excuse acts of

1 licentiousness -- which is essentially a synonym for lude
2 behavior -- or to justify practices inconsistent with the
3 peace or safety of the state.

4 HEARING OFFICER ORCHARD: Can you say that
5 part again?

6 MR. CAMPBELL: Sure. The only limitation on
7 Article 1, Section 18's protection for Judge Neely in this
8 case is if the public official -- here, Judge Neely -- seeks
9 to excuse acts of licentiousness -- and acts of
10 licentiousness are essentially lude behavior --

11 HEARING OFFICER ORCHARD: Right.

12 MR. CAMPBELL: -- or to justify practices
13 inconsistent with the peace or safety of the state.

14 HEARING OFFICER ORCHARD: Thank you.

15 MR. CAMPBELL: We've raised that argument in
16 our motion papers, and the Commission has not responded to
17 it.

18 The Commission doesn't argue and no evidence in
19 the case remotely suggests that Judge Neely's religious
20 beliefs or accommodating those religious beliefs would
21 foster licentiousness or otherwise threaten the peace or
22 safety of the state. Consequently, the Constitution
23 forecloses the Commission's attempt to remove Judge Neely
24 from office.

25 And this brings me to my third key point, which is

1 that the Commission cannot prevail on its argument that
2 Judge Neely has violated the code of conduct.

3 Those arguments boil down to whether Judge Neely's
4 response to Mr. Donovan expressed bias or prejudice based on
5 sexual orientation, but that argument must fail in light of
6 binding U.S. Supreme Court precedent.

7 Bias and prejudice are defined as an unreasonable
8 dislike of an individual formed with little or no factual
9 basis. Yet, in Obergefell versus Hodges, the Supreme Court
10 recently said that the very belief about marriage that Judge
11 Neely holds is based on decent and honorable religious and
12 philosophical premises and it continues to be held in good
13 faith by reasonable and sincere people throughout the world.

14 Obviously, an honorable belief held by reasonable
15 and sincere people cannot be classified as bias or
16 prejudice. In other words, Judge Neely expressed a
17 reasonable opinion about an issue. She did not express bias
18 or prejudice against people.

19 Let me explain that a little bit further. Two
20 undisputed facts show this to be true, this distinction
21 between stating a belief about an issue and stating
22 prejudice against a class of people.

23 First, Judge Neely's beliefs about marriages do
24 not target LGBT citizens. She believes that marriage is the
25 union of a man and woman and that she cannot perform a

1 wedding ceremony for any union falling outside of that
2 understanding.

3 So today, the issue is same-sex marriage. That
4 was the nature of the question that Mr. Donovan gave to her.
5 But if years from now, the State were to recognize
6 polyamorous marriages between three or more people, Judge
7 Neely could not perform those unions either. So her beliefs
8 are not in any way targeted at LGBT individuals. Rather,
9 she holds a belief about the institution of marriage, and
10 anything that's outside of that belief is something that she
11 cannot personally participate in solemnizing the union.

12 And second -- this point is crucial -- Judge Neely
13 would gladly perform for gays and lesbians any other
14 function she has authority to perform as a circuit court
15 magistrate or a municipal judge. Those functions include
16 administering oaths or acknowledging deeds or other written
17 instruments. If she were asked to do that, she would gladly
18 do that for members of the LGBT community. That shows that
19 this is really about the issue of marriage, again, not about
20 bias or prejudice against a class of people.

21 And when I talk about this distinction between
22 reasonable beliefs about an issue and bias or prejudice
23 against a class of people, what I'm referring to is a
24 concept that the U.S. Supreme Court embraced in the decision
25 of Republican Party versus White. So this distinction that

1 we're drawing is not something we've pulled out whole cloth.
2 It's something that's grounded in U.S. Supreme Court
3 precedent.

4 A final point on this question of whether Judge
5 Neely manifests or has bias against a class of people, I'd
6 like to revisit briefly some of the earlier examples that I
7 mentioned to illustrate that Judge Neely's beliefs about
8 marriage do not mean she is biased against LGBT citizens.

9 She is no more biased against gays and lesbians
10 than the Democrat judge is biased against Republicans or the
11 atheist judge is biased against people of faith or the judge
12 who supports Palestine is biased against Jewish litigants.

13 The position that the Commission has maintained
14 here would require a conclusion that all of these folks are
15 biased and that none of them can be judges, but that simply
16 is not a proper construction of the Code of Judicial
17 Conduct.

18 Finally, it's also telling that the only members
19 of the LGBT community who might actually find their way into
20 Judge Neely's courtroom that have said anything on the
21 record in this case are two members of that community from
22 Pinedale who have said Judge Neely -- they know her beliefs
23 and they think she can be fair and impartial. They know her
24 and they know in all their dealings with her that she has
25 been and will continue to be fair and impartial regardless

1 of her beliefs about marriage. Thus, the Commission's claim
2 that Judge Neely violated the code must fail.

3 I'll ask the panel for their opinion on this.
4 Would the panel benefit from a brief discussion of the
5 facts, or is that something that would not be worth our
6 time?

7 HEARING OFFICER ORCHARD: I don't think so,
8 from my perspective, only because I don't think there really
9 is a dispute, besides the last little footnote in
10 Mr. Dixon's pleadings that maybe this might be better to
11 have as a full hearing. Really, truly, when you look at the
12 facts, they aren't in dispute; is that right?

13 Do you all agree with that?

14 MR. CAMPBELL: We certainly do.

15 MR. DIXON: I agree. I don't think there's
16 any issue of fact.

17 HEARING OFFICER ORCHARD: And so -- I mean
18 the recitation of fact here -- I mean, if you think it would
19 benefit your client to go through the facts --

20 MR. CAMPBELL: No.

21 HEARING OFFICER ORCHARD: -- I don't want to
22 interrupt that, but I don't think we need it, because I
23 think I understand the facts. They're really not in dispute
24 and it's very understandable from the submissions.

25 MR. CAMPBELL: Okay. Very good.

1 Just to briefly address the point you raised about
2 whether there are facts in dispute and whether this should
3 be decided on summary judgment, I briefly addressed that
4 issue, but let me raise one more point.

5 In the last page of the Commission's response to
6 Judge Neely's motion, it was a bit equivocal on the issue of
7 summary judgment. The first point to note is that the
8 Commission has not pointed to a genuine issue of material
9 fact. That, under the governing summary judgment standard,
10 is really the only way to refute summary judgment or oppose
11 summary judgment.

12 Now, the case that they cited -- I believe the
13 case was called Weaver -- it was a case that the court found
14 that summary judgment was inappropriate because the record
15 was incomplete, because more facts needed to develop. And
16 specifically in that case, when you read it, the case
17 involved contract issues. And there was a portion of the
18 contract missing from the record, so, of course, there was a
19 problem and summary judgment was inappropriate.

20 Here, there's nothing like that. Judge Neely had
21 submitted all the evidence in support of the facts she needs
22 to make the arguments that she's presented. The Commission,
23 as I mentioned before, has had ample opportunities to submit
24 any evidence that they want. And at this point, all that
25 remains is an issue of law.

1 HEARING OFFICER ORCHARD: I don't think
2 there's any disagreement with that. I think the -- I think
3 what was happening, I think Mr. Dixon was waxing and waning
4 kind of philosophical -- this is a very big issue that has
5 not really been decided, and if we're going to decide it, of
6 course, we're going to be, you know, looking to the Wyoming
7 Supreme Court and even perhaps the United States Supreme
8 Court in deciding this issue -- he wanted to make sure it
9 was fairly decided with a full hearing, but I really think
10 that, unless the parties disagree, that the facts submitted
11 now are the record that we'll be sending up.

12 MR. DIXON: I'll address that in my
13 discussion.

14 HEARING OFFICER ORCHARD: I'll let you
15 address that.

16 MR. CAMPBELL: We would agree with that.
17 Briefly -- let me ask this. Has anyone been keeping time?

18 HEARING OFFICER ORCHARD: Yes. You're at 15
19 minutes.

20 MR. CAMPBELL: 15 minutes?

21 Briefly, I'd just like to go through some of the
22 code arguments that the Commission has raised and explain
23 why Judge Neely hasn't violated the code.

24 I've explained briefly the one overarching reason
25 why we believe Judge Neely has not violated the code, but

1 let me briefly address each of the --

2 HEARING OFFICER ORCHARD: The canons are 2.3,
3 2.2, 1.2 and 1.1?

4 MR. CAMPBELL: Correct. Correct. Yep.

5 So 2.3 essentially boils down to what I talked
6 about before: Did what judge Neely said to Mr. Donovan --
7 did it manifest bias or prejudice based on sexual
8 orientation? And I've already explained that argument.
9 Based on what the U.S. Supreme Court just said in Obergefell
10 versus Hodges, that the beliefs held by Judge Neely are
11 based on decent and honorable religious and philosophical
12 grounds and are held by people in good faith, sincere and
13 honest people in good faith, that that cannot be -- a mere
14 statement of that cannot be bias or prejudice.

15 The other reason that the Commission cannot
16 prevail in its Rule 2.3 argument is because the rule only
17 applies, quote, in the performance of judicial duties. And
18 solemnizing marriages is not a judicial duty in Wyoming.

19 And what I mean by that is we focus on the word
20 "duty." The word "duty" is something that someone has a
21 legal obligation to perform, but Wyoming Statute 20-1-106
22 gives circuit court magistrates discretionary authority to
23 perform marriages. It imposes no obligation on them to do
24 so.

25 So because Judge Neely's response to Mr. Donovan

1 did not refer to the performance of a duty, she did not
2 violate Rule 2.3 for that additional reason.

3 Turning now to Rule 2.2 --

4 JUDGE BARTLETT: I've got one question.

5 MR. CAMPBELL: Sure.

6 JUDGE BARTLETT: So you're saying that,
7 unless the statutes say a judge shall do such and so, that
8 it's not a judicial duty?

9 MR. CAMPBELL: Correct. Correct. It would
10 be a discretionary function. There would be other rules
11 that -- other rules in the Code of Judicial Conduct that
12 could apply to those, but when the rules talk about judicial
13 duty, that those rules would not apply.

14 JUDGE BARTLETT: Okay. So under the Wyoming
15 Statutes giving district court judges authority to grant
16 divorces, it says the district court judge may sign a decree
17 of divorce, that's discretionary, according to you?

18 MR. CAMPBELL: I don't have the statute in
19 front of me, but I'm assuming that there is a statute saying
20 that divorce cases -- the court has jurisdiction over those;
21 therefore, the court must decide that case. The question of
22 whether they may or not is a question of whether the facts
23 warrant it. So it's really -- I think it's a
24 distinguishable situation.

25 But I would just emphasize in response to your

1 question that our 2.3 argument does not hinge on this duty
2 argument. Ultimately, even if the panel disagrees with
3 that, our position still is that Judge Neely does not
4 manifest bias based on sexual orientation.

5 Moving to Rule 2.2, nothing -- that's the rule
6 that states that a judge shall uphold and apply the law and
7 shall perform all duties of judicial office fairly and
8 impartially.

9 The key point here is that the Commission argues
10 that Judge Neely has expressed an unwillingness to uphold
11 the law because she's unwilling to comply with the decision
12 in Guzzo, which is the decision that legalized same-sex
13 marriage in Wyoming, or the decision in Obergefell, which is
14 the decision that legalized same-sex marriage for the whole
15 nation. But that position cannot be maintained, because
16 Judge Neely is in full compliance with the law.

17 And I'd like to address two different points to
18 hopefully illustrate this well. She's in full compliance
19 with Wyoming statutory law because that gives circuit court
20 magistrates discretionary authority to perform marriages.
21 It does not obligate them to do so, so she's not in
22 violation of Section 20-1-106.

23 Moreover, she has not refused to uphold or apply
24 Guzzo or Obergefell, because those rulings require the State
25 to recognize and license marriages between same-sex couples,

1 but Judge Neely has never denied the legality of same-sex
2 marriage in Wyoming.

3 In fact, she said that, if she's acting in her
4 adjudicative capacity and a case required her to recognize a
5 same-sex marriage, she would recognize it as a judge in a
6 case and she would grant all the rights and benefits that
7 would flow from that.

8 Obergefell and Guzzo simply don't say anything
9 about whether a particular judge with discretionary
10 authority to solemnize marriages must officiate at weddings
11 that conflict with their religious beliefs, nor does any
12 other binding authority.

13 Thus, to say that Judge Neely has refused to apply
14 the law here is simply not correct, because Obergefell and
15 Guzzo say nothing about whether Judge Neely or any other
16 specific judge must solemnize marriages in conflict with
17 their faith.

18 Rule 1.2 -- moving on to the next rule --
19 essentially boils down to whether the judge has created,
20 quote, an appearance of impropriety. And that analysis
21 focuses on what a reasonable person, an objective,
22 reasonable person who knows all the facts and all the law --
23 what they would conclude about whether Judge Neely's
24 statements to Mr. Donovan created an appearance of
25 impropriety.

1 HEARING OFFICER ORCHARD: Why is that the
2 standard? I was confused by that standard. Maybe Judge
3 Bartlett can help me on this, but I understood the
4 reasonable person -- objective person standard to apply
5 where, like me reading that statement, not knowing that
6 she's been a fine judge, as has been evidenced by the
7 record, in Pinedale for a long time, that that statement
8 alone being read by somebody might cause them to think, if
9 they were of this community, LGBT community, that they might
10 not get a fair shake in her courtroom.

11 MR. CAMPBELL: Sure.

12 HEARING OFFICER ORCHARD: So what is it about
13 this idea that seems foreign to me -- maybe it's just my
14 lack of knowledge -- that the objective person standard
15 includes everything that she's ever done in her career and
16 all the things that you've cited in support of that?

17 MR. CAMPBELL: Sure. There are -- when you
18 look at the official treatises that interpret this --
19 specifically, we've cited the Garwin treatise in our
20 brief -- in there, they say this is an objective test and
21 it's a test where the objective reasonable person knows all
22 the relevant facts and all the relevant law.

23 One of the reasons why that's important is because
24 we don't want someone with a misconception about something
25 based on what they heard to be able to remove a judge or

1 sanction a judge just based on misconceptions. We want that
2 objective reasonable person to know everything, and thus, to
3 come to the conclusion of whether the judge really should be
4 removed.

5 So we cited the case of the Boland case, which is
6 a case that says exactly what I said about the objective
7 reasonable person standard. This person knows all the facts
8 and all the law. We've also cited -- and this is page 15 of
9 our memorandum of law. We've also cited a -- footnote 4
10 there talks about other cases. So there are -- we're
11 dealing here with the Code of Judicial Conduct, but there
12 are a number of cases dealing with the qualification rules
13 for judges. And those also use a reasonable person
14 standard.

15 And when you look at all those cases, they talk
16 about how the reasonable person standard deals with the
17 reasonable person that is well informed, thoughtful and
18 understands all the relevant facts and has examined the
19 record and the law. So that's the standard that courts have
20 applied.

21 And again, the reason why they've applied that
22 standard is it makes good sense. It's to ensure that a
23 judge isn't removed just because one person in the community
24 or a few people in the community have a problem with what
25 they -- with what they know. It's to ensure that this

1 person knows everything, knows all the relevant facts and
2 law and thus will conclude that this judge should be
3 punished or should be removed. It shouldn't be based on
4 just what a few people think based on a few facts.

5 HEARING OFFICER ORCHARD: Is that the
6 standard still, though, when you're talking about the light
7 of impropriety, that overarching thing, where you're talking
8 about an average person who reads a paper who might believe,
9 not knowing all the facts -- I mean, an average, ordinary
10 reasonable objective person who reads the paper and sees
11 that statement and says, Gee, my cousin who is of this
12 community that's in question won't get a fair shake or might
13 not get a fair shake?

14 Is that -- is that -- does the analysis still
15 require that that one person that we're looking at who just
16 reads the paper, in the light of the impropriety standard,
17 would still be considered to know entirely everything about
18 her career and all the things you're talking about? We're
19 talking about that one issue --

20 MR. CAMPBELL: Sure. Sure.

21 HEARING OFFICER ORCHARD: -- in my question.

22 MR. CAMPBELL: Yeah. So would -- I guess the
23 analysis would still be the same. And that's, under this
24 appearance of impropriety, the analysis is, What would that
25 objective reasonable person know that knows all the facts

1 and law? What would they conclude? It's not what would the
2 person that just read the paper conclude. And there's no
3 legal support to say that that would be the proper standard.

4 HEARING OFFICER ORCHARD: All right. But
5 you're saying there's no precedent with regard to these
6 canons of ethics, but you're saying, in other disciplinary
7 proceedings with judges, this standard has been used?

8 MR. CAMPBELL: Yeah. Exactly. I'm saying --
9 so in the Boland case, I believe Boland was out of
10 Mississippi -- there, the Mississippi Supreme Court
11 interpreted their identical rule and said this standard is
12 the objective reasonable person that knows all the facts and
13 law.

14 HEARING OFFICER ORCHARD: Fine. All right.
15 Thank you.

16 MR. CAMPBELL: Sure. No problem.

17 So that person would know a lot of things. That
18 person would know that Judge Neely's been on the bench for
19 21 years and has never had complaints against her. That
20 person would know that members of the LGBT community in
21 Pinedale have said that she's fair and impartial in all her
22 dealings with them and they have no concern about her
23 fairness, even knowing her beliefs about marriage. That
24 person would know that she would gladly perform other
25 functions that she has authority to perform as a circuit

1 court magistrate or municipal judge for members of the LGBT
2 community. That person would know that Judge Neely would
3 recognize the legality of same-sex marriage and just simply
4 can't personally solemnize same-sex marriages themselves.
5 That reasonable person knowing, again, all the relevant
6 facts and law, knowing that circuit court magistrates do not
7 have a mandatory duty to solemnize marriage, but instead
8 just have a -- it's a discretionary function, that person
9 would conclude that Judge Neely fairly adjudicates all
10 matters in cases that come before her, including cases that
11 deal with LGBT litigants.

12 In contrast, I'll mention again something that I
13 said at the outset. The Commission's position is quite a
14 stretch. It believes that as soon as people learn that
15 Judge Neely's religious belief about marriage is that she
16 believes it's a union of a man and a woman and she can't
17 perform any other marriages, they would conclude that she
18 cannot impartially adjudicate traffic tickets and other
19 municipal matters involving LGBT citizens. But no
20 reasonable person would conclude that, because it's such an
21 inference. It's such a leap in logic to say that what one
22 person believes about the issue of marriage necessarily
23 means they can't be fair to LGBT people. It's a leap in
24 logic that we think cannot be maintained and that the
25 reasonable person would not agree with.

1 So in my few remaining minutes, I'd just like to
2 stress some critical points. First is the religious test
3 claim that I mentioned at the outset, so this protection in
4 Article 1, Section 18 of the State Constitution that says,
5 No person shall be rendered incompetent to hold any office
6 of public trust because of his opinion on any matter of
7 religious belief whatever. That provision prevents the
8 Commission from removing Judge Neely here.

9 Moreover, we've also raised free-exercise claims.
10 Those free-exercise claims are also under the State and
11 Federal Constitution. We believe that, under the State
12 Constitution, we have established that this would impose a
13 burden on Judge Neely's religious -- free exercise of faith,
14 and the Commission has not disputed that.

15 We also have shown that the protection for that
16 free exercise of religion is very broad. Again, the only
17 exception to it is if the judge is seeking to justify acts
18 of licentiousness, as I said before, or practices
19 inconsistent with the peace or safety of the state.

20 The Commission does not argue that it can meet
21 that standard here; thus, Judge Neely should prevail under
22 her religious test claim as well as her free-exercise claim.

23 Our free-exercise claim invokes what's called
24 strict scrutiny, which is the most heightened standard of
25 review that courts apply when engaging in constitutional

1 analysis, one that's rarely satisfied.

2 We've made a number of arguments under strict
3 scrutiny, but I'd just like to boil that down to one key
4 point. And that is, strict scrutiny is not satisfied if
5 there are other reasonably available alternatives for the
6 Commission to accomplish its assertive goals.

7 In here, there are. I'll mention just three of
8 them.

9 First, the Commission should allow the
10 disqualification rules to do the work of preserving judicial
11 impartiality. Rather than removing Judge Neely due to the
12 Commission's unfounded speculation that some people might
13 think she won't fairly adjudicate certain cases, an actual
14 party can replace Judge Neely in a particular case if that
15 party shows that Judge Neely's impartiality may reasonably
16 be questioned.

17 So if we just allow those rules to do the work
18 that they set out to do, Judge Neely can remain a judge and
19 other people, should they have a reasonable argument to
20 make, they can protect their interest as well, so everyone
21 wins.

22 Another way that everyone can win and that Judge
23 Neely can be accommodated is that the Government could
24 permit Judge Neely to recuse herself from performing
25 discretionary functions like weddings when she has a

1 conflict, just like other judges can do when they have a
2 conflict in a case before them.

3 Right now, under Rule 2.11, judges with biases
4 that affect their mandatory adjudicative duties to decide
5 cases may recuse from those cases when they have a conflict
6 and they're allowed to remain judges.

7 It's only logical to expand that same freedom to
8 Judge Neely when she is exercising her discretionary
9 authority.

10 And the third way that the Government can
11 accommodate Judge Neely here is it could establish in each
12 county one intake point, for example, the circuit court
13 clerk's office. And that person would take in all incoming
14 marriage requests. And that point of contact would require
15 all the relevant information from the member of the public
16 who wants to have a marriage solemnized, and that person
17 would then reach out to the circuit court magistrate, find
18 one who is willing and available and match the circuit court
19 magistrate with the member of the public who needs to have a
20 marriage solemnized.

21 Such an alternative is readily available. Indeed,
22 Judge Haws testified that currently the circuit court clerk
23 regularly gets these requests for marriages from the public.
24 So there are a number of ways to accommodate Judge Neely's
25 faith without removing her from office. And because those

1 are available, it would be unconstitutional to remove her.

2 HEARING OFFICER ORCHARD: Okay. You're out
3 of time.

4 I have a couple of questions. You've picked a
5 jury before?

6 MR. CAMPBELL: Correct.

7 HEARING OFFICER ORCHARD: And what you're
8 talking about in terms of -- jurors are judges of the fact,
9 the facts, and judges are judges of the law, right? And you
10 can strike a juror for cause because their opinions render
11 them legally incapable of being able to decide fairly like
12 you could do with a judge, strike a judge because their
13 relationship, whatever it is, with a particular party
14 renders them incapable of being able to decide fairly,
15 right?

16 MR. CAMPBELL: (Nodding head.)

17 HEARING OFFICER ORCHARD: So you also have
18 the right to exercise preemptory challenges. And you can
19 exercise preemptory challenges for any reason except, under
20 Batson, a discriminatory reason, right?

21 And aren't we talking about the difference between
22 a juror saying, "I have an opinion" and expressing that
23 opinion and then the secondary step of saying, "because of
24 that opinion," which we all have the right to have, "I can
25 no longer follow the law"? Because in that context, a juror

1 who says, "I have an opinion that's so strong I can't follow
2 the law" is recused, right?

3 MR. CAMPBELL: (Nodding head.)

4 HEARING OFFICER ORCHARD: So if this
5 Commission decides that this judge has the right to express
6 her opinion and has the right to have an opinion, but that
7 that opinion now goes to the point where she's saying, "I
8 can't follow the law," doesn't that then render her
9 incapable of being a judge?

10 MR. CAMPBELL: I don't believe so. The first
11 response is that she has not refused to follow the law.
12 There's no law that requires her to solemnize all marriages,
13 let alone marriages that would conflict with her religious
14 beliefs. So we would oppose that premise of the question.

15 But I also think that there's a critical point to
16 keep in mind here, in that judges have a presumption of
17 integrity and impartiality. And that's completely been
18 ignored in this case. In fact, the only time it's been
19 cited is when the Commission was engaging in some of the due
20 process arguments and it talked about how the Commission is
21 entitled to a presumption of fairness and impartiality.

22 Well, that same presumption applies to Judge
23 Neely. And that presumption says that Judge Neely should be
24 presumed to be fair and impartial and that we shouldn't be
25 removing her from office simply because of a belief about an

1 issue, again, a reasonable belief about an issue that the
2 Supreme Court just said is based on decent and honorable
3 grounds.

4 HEARING OFFICER ORCHARD: So I just want to
5 say -- and I think that my fellow adjudicatory panel members
6 agree -- I don't think that there's any dispute that Judge
7 Neely has served the community well up and to the point of
8 the statement that's in question right now.

9 And so I want to say that. Do you agree with
10 that, that there's been no evidence that she's done anything
11 except be a well-recognized and respected judge in the
12 community?

13 But the focus really is, again, on the statement
14 that she made and the statement, in my opinion, at least, on
15 whether she would follow the law as part of a job duty.

16 MR. CAMPBELL: And again, on that point, I
17 would just stress that what she stated was a belief about an
18 issue, one that the Supreme Court says is based on decent
19 and honorable grounds. So to equate that to bias and
20 prejudice, which is what the rule prohibits, simply cannot
21 be maintained in light of what the Supreme Court has said.

22 HEARING OFFICER ORCHARD: There was a -- I'll
23 stop asking questions in a second. Sorry. But there was a
24 Massachusetts Supreme Court statement that struck me. And
25 you said this presumption that judges are fair and

1 impartial -- and the last statement says, "Surely it is
2 arrogance for us to say to them that we may not seem
3 impartial but we know we are, and so they must submit."

4 I mean, in the face of a statement like that,
5 you're saying that somebody from the LGBT community must
6 just presume, despite the statement, that Judge Neely will
7 be fair and impartial?

8 MR. CAMPBELL: That's not what we're saying.
9 We're saying that the objective reasonable person would
10 conclude that she can be fair and impartial. And we're
11 saying that the only evidence in the record from members of
12 the LGBT community are the affidavits that we submitted from
13 Ms. Stevens and Ms. Anderson saying that they know Judge
14 Neely, they know her beliefs, and even knowing her beliefs
15 about marriage, they believe she will continue to be fair
16 and impartial to everyone, including members of the LGBT
17 community.

18 HEARING OFFICER ORCHARD: What if -- and I'm
19 not suggesting that Judge Neely has ever said this. But
20 what if she said, "My religion says that African American
21 people are not allowed to marry Caucasian people," just, "my
22 religion. It's weird, but it's what I believe"?

23 MR. CAMPBELL: It's a very different case and
24 I think it would likely be decided differently than this one
25 should be.

1 HEARING OFFICER ORCHARD: But why?

2 JUDGE BARTLETT: Why?

3 HEARING OFFICER ORCHARD: Why would it be
4 different?

5 MR. CAMPBELL: Let me explain why. I'd be
6 glad to do that.

7 So our arguments are that Judge Neely has a
8 religious belief and that she's being removed because of
9 those religious beliefs, and those invoke constitutional
10 protections. But at that point, whether we're under the
11 State Constitution or under the Federal Constitution, either
12 strict scrutiny comes into play or that standard I read
13 earlier about seeking to justify practices inconsistent with
14 the peace and safety of state. One of those two comes into
15 play.

16 And at that point, the burden shifts to the
17 Commission to show that it cannot accommodate this person
18 without running afoul of those standards.

19 We believe that, under those circumstances that
20 you raise, that the Commission could very well meet the
21 standard that it needs to meet. And here's why: The
22 Supreme Court has been very clear that there's a difference
23 between racist views about marriage and the view that
24 marriage is the union of a man and a woman, which Judge
25 Neely holds.

1 Here's what I would point the panel to. In Loving
2 versus Virginia, which involved racist views on marriage,
3 the court said that those were odious, those were based only
4 on notions of white supremacy and that they had no place in
5 society.

6 The Supreme Court said something very different in
7 Obergefell. It said that these are decent and honorable
8 beliefs and they are held in good faith by reasonable and
9 sincere people.

10 So the Government very well might have a
11 compelling interest in stamping out racist views on marriage
12 from the public square, but it does not have that same
13 interest in stamping out the reasonable decent belief that
14 marriage is the union of a man and woman.

15 Moreover, one other point -- well, I'll highlight
16 two other points in response to that question.

17 One is that the history of our country involving
18 race and racism is one that has time and time again
19 threatened the peace and safety of the state, which is the
20 standard under the State Constitution, so that's a
21 distinguishing factor that we have here.

22 And finally, another point that I would emphasize
23 is that the State itself treats distinctions based on race
24 different than distinctions based on sexual orientation.
25 What I'm referring to is the state nondiscrimination law.

1 If you look at the state nondiscrimination law, race is
2 included as a prohibitive form of discrimination, but sexual
3 orientation is not.

4 So the State itself on the whole has already
5 recognized that there's a difference between those two
6 things.

7 HEARING OFFICER ORCHARD: Do you have any
8 other questions?

9 (No response.)

10 HEARING OFFICER ORCHARD: Nice job on your
11 argument.

12 MR. DIXON: Mr. Orchard, Judge Bartlett,
13 Ms. Dilts, Counsel, I'm going to address the code issues.
14 I'm going to have Ms. Turner address the constitutional
15 issues.

16 I would submit to you, and I would put large money
17 on the bench up there that I'm correct, that we would not be
18 here, talking and having this conversation, had Judge Neely
19 said to the press, "I'm unwilling because of my religious
20 beliefs to marry a black person and a white person," or,
21 "I'm unwilling because of my religious beliefs to marry two
22 Hispanics or two people in a wheelchair or two Jewish people
23 because of my religious beliefs."

24 Had she said something like that, we wouldn't be
25 having this conversation.

1 I submit to you that the law of the State of
2 Wyoming holds persons, LGBT persons, in the same legal
3 status, at least with respect to marriage, as they do
4 blacks, Hispanics, Jewish people, any other protected
5 category. And I will tell you that under the Code of
6 Judicial Ethics, persons are expressly, explicitly protected
7 from discrimination because of sexual orientation.

8 So when we have -- when you listen to my argument
9 and when we hear more from the other side, I want you to
10 keep that in context.

11 We agree that there isn't a dispute as to facts,
12 but I want to very briefly address the facts and what I
13 think they mean, not what they are, but what I think they
14 mean. And based on that, I submit to you that Judge Neely,
15 based on these facts, has violated Rule 1.1, Rule 1.2, Rule
16 2.2 and Rule 2.3 of the Code of Judicial Ethics.

17 Judge Neely's status is a twofold status, as you
18 know: Circuit court magistrate, municipal court judge.
19 Guzzo v. Mead came down on I think it was October 2014. And
20 it said, Gay people have the same constitutional right to be
21 married as any other person.

22 After that, Judge Neely -- and this is important.
23 Judge Neely met with Judge Haws, her supervising judge --
24 and this is pretty critical, I think, in this case -- and
25 expressed her concerns about that decision. And Judge Haws

1 said, Keep your head down and your mouth shut. Don't go
2 public with this. Let's wait until we get some guidance.

3 Not two weeks after that meeting, she gets a call
4 from a newspaper reporter who so identifies himself. And
5 full well knowing that her comments were going to be
6 published, she gave what I think amounted to a press
7 conference on the subject of gay marriage. And she said
8 these things. She said, quote, I will not be able to do
9 them. We have at least one magistrate who will do same-sex
10 marriages, but I will not be able to.

11 Then -- this is the -- this is the crux of it.
12 She said, "When law and religion conflict" -- these are her
13 words, "When law and religion conflict, choices have to be
14 made."

15 In other words, what she said is, Because of my
16 religious beliefs, I'm not going to follow the law.

17 And to me, that disqualifies you, per se, as a
18 judge. A judge is obligated to follow the law. And I'll
19 get into that in a minute.

20 These comments didn't just affect those two nice
21 ladies that gave her an affidavit up in Pinedale. These
22 comments rippled across the state of Wyoming and they had an
23 effect on the entire LGBT community.

24 Now, can this case be resolved on summary
25 judgment? Let me address that. Even though both parties

1 have filed motions for summary judgment, I don't think the
2 motions are fully dispositive.

3 With respect to my motion for summary judgment,
4 because there is no material dispute as to the facts, as to
5 what she did and what she said, I think that this panel can
6 grant a partial summary judgment -- and note that's how I
7 characterize my motion -- on the question of violation of
8 the Code of Judicial Conduct.

9 Even if you do that, we still need a hearing on
10 sanctions. And let me say this. Throughout their briefs
11 and throughout the argument we just heard, Mr. Campbell and
12 Judge Neely's counsel have stated, "The Commission has taken
13 the position." Let me be clear. The Commission has taken
14 no position. What has happened is that the I Panel has
15 found reasonable cause to believe there's a violation of the
16 code and I, as disciplinary counsel, have taken the position
17 that she should be removed. And in so doing, I leave to
18 you, this panel and then the full Commission, the option to
19 impose whatever sanction you feel is appropriate. But we're
20 still going to need to have a hearing.

21 And there are a number of factors that go into
22 sanctions. And we're going to have to talk about that if
23 you believe that my motion is correct.

24 Secondly, I do not believe that it is appropriate
25 to grant a motion for summary judgment on Judge Neely's

1 motion. Now, you could do it if you go through these code
2 sections and conclude, "No, there's no violation. There's
3 no code violation." Then I think you can grant the motion.

4 I don't think -- and I say this to Judge Bartlett
5 and Ms. Dilts, who may or may not know me, I was a six-year,
6 two-term member of Commission and chair at one time. And so
7 I have a pretty good understanding of the purpose and
8 function of the Commission.

9 I don't believe that it is the prerogative of this
10 panel or the full Commission to decide and rule on
11 constitutional issues. That's not what the Commission is
12 set up to do. I think that's a Supreme Court question.

13 I understand they have to raise those in order to
14 argue them down the line, but I don't think it's appropriate
15 to decide those issues at this point.

16 Now, with regard to the important part of this
17 case, and that is the Code of Judicial Conduct, Rule 2.3 is
18 at the center of this dispute. It says two things. It
19 says, one, a judge -- well, it says a number of things, but
20 implicated in this proceeding, it says, "A judge shall
21 perform the duties of office, including administrative
22 duties, without bias or prejudice."

23 And this question of duties is a fairly important
24 one, as you've heard from the argument and from the briefs.

25 I think Judge Bartlett is exactly on track.

1 Because the statute says, "a judge shall" as opposed to "a
2 judge may" does not mean that whatever that function is is
3 not a judicial duty.

4 Subpart A, I think, is broader --

5 HEARING OFFICER ORCHARD: Want some water,
6 Pat?

7 MR. DIXON: That would help. I'm really
8 hoarse. Thank you.

9 HEARING OFFICER ORCHARD: You guys got some?

10 MR. CAMPBELL: Yeah. Thank you.

11 MR. DIXON: Subpart B to 2.3 says a judge in
12 the performance of those duties shall not by words or
13 conduct manifest bias or prejudice based on sexual
14 orientation. It's specifically included there.

15 This is pretty straightforward. I mean, it
16 doesn't take a lot of interpretation to understand what that
17 means.

18 And I want to cite you back to these judicial
19 advisory opinions. We found nine. They start off -- on
20 this topic, they start off with the New York opinion where
21 they just like completely duck the question, and then it
22 goes to Tabor and, you know, they kind of get a little
23 wishy-washy in Tabor, but they're pretty offended this judge
24 went to the press and made such a fuss over gay marriage and
25 so he gets sanctioned.

1 But then each one goes down the line and becomes
2 clearer and clearer until we get to the Ohio opinion. All
3 of them, every one of them, says the refusal to perform
4 same-sex marriage is a violation of Rule 2.3.

5 Ohio says -- it takes it then to the next logical
6 step by saying, No, you cannot avoid that problem by just
7 passing it off on another judge. What it says is, If you
8 refuse to perform all marriages, if you refuse to perform
9 all marriages, that's a showing of bias and prejudice under
10 2.3. And I think that's the right opinion to follow.

11 I forgot one other critical fact in this that's
12 not ever been discussed or talked about by Judge Neely in
13 the briefing. After -- after the opinion came out, after
14 the interview, she continued to perform gay -- or standard
15 marriages until she was suspended by Judge Haws.

16 She defends her position on this on four grounds.
17 First, she says, "I didn't have a duty to perform weddings.
18 It's discretionary in Wyoming."

19 And that's probably true. I don't think that a
20 magistrate or a circuit court judge, just because someone
21 comes into the office and asks them to do a marriage, has to
22 do the marriage. But that's not exactly her status.

23 Her status -- she was appointed and held the
24 position solely for the purpose of performing marriages.
25 Now, she did have -- Judge Haws explained this in the

1 deposition. She did have general powers because,
2 originally, the bond limited what she could do, and then
3 when they eliminated the bond, they just gave her a general
4 appointment.

5 But the fact is -- again, not ever discussed --
6 she never did anything. She did about three things in 2009
7 when nobody else was in town, the only thing she did, and
8 Judge Haws said her principal function was to do marriages.

9 And so I submit to you that she did have a
10 judicial duty if she was going to hold herself out as a
11 magistrate to do those ceremonies, and those including
12 same-sex marriages.

13 They say her comments were outside of the
14 adjudicated process. And I'll tell you, when they discussed
15 the rules, they want you to look at the binoculars through
16 the wrong end. They want you to take and see the smallest,
17 most narrow view of the rules and of the facts.

18 And I submit to you that this is a Code of Ethics
19 and you can't look at it like that. You have to look at it
20 in the broad context that it was written and intended.

21 Her position is, Well, because I didn't say this
22 in the courtroom, that's not a violation. But you know,
23 that's not what Tabor said. That's not what the Tabor
24 opinion said.

25 And I submit to you if she made those comments

1 even outside of the court about black students going to
2 segregated schools or -- nobody would even question this.
3 So there's no distinction here.

4 "Comments weren't malicious or inflammatory,"
5 well, put yourself in the position of a gay member in the
6 community who has a judge saying, "I'm not going to follow
7 the law with respect to performing my duties."

8 HEARING OFFICER ORCHARD: Pat, can I
9 interrupt you for a second?

10 MR. DIXON: You bet.

11 HEARING OFFICER ORCHARD: Are you saying that
12 a judge can't believe that a marriage must be between a man
13 and a woman?

14 MR. DIXON: Absolutely not. In fact, Judge
15 Haws said, "I have the same beliefs, but I'll do them. I'll
16 do the ceremonies. I'll perform my duties. And
17 furthermore, I won't go public and express my beliefs."

18 HEARING OFFICER ORCHARD: But shouldn't a
19 judge have the right to, not only have those beliefs, but
20 also express them?

21 MR. DIXON: Depends on the context. Depends
22 on the context. Yeah, I think the judge can go down to her
23 church. I think she can go down to coffee and talk to her
24 friends and express those beliefs.

25 The problem here -- the problem, that isn't what

1 happened. This Ned Donovan didn't call her up -- he didn't
2 see her at coffee. He didn't see her talking about it at
3 church. He called her because he knew she was the judge in
4 the county who performed those ceremonies. And that's the
5 context of the comments that she made.

6 And she might as well have been wearing a robe and
7 standing on the bench when she made those statements.

8 Now, I'll jump ahead. They talk about Republican
9 Party of Minnesota versus White. And that's a First
10 Amendment judge case, but you have to distinguish that case
11 because it's an election case. The comments the judge --
12 the judge in this case made were in the context of what his
13 position was in the election.

14 That's not what happened here. She doesn't have
15 those First Amendment rights to make those statements as a
16 judge. And Ms. Turner, I think, will address that in a
17 little greater detail.

18 She argues she didn't show any bias against an
19 individual member of the LGBT community. Well, she may not
20 have, but she expressed that bias or her comments could be
21 perceived as biased against the entire class of LGBT people.

22 So again, I refer you to what they said in Ohio,
23 the advisory opinion on Rule 2.3.

24 Rule 1.1 says a judge should comply with the law,
25 and -- including the Code of Judicial Conduct. The Code of

1 Judicial Conduct, again, no bias or prejudice against sexual
2 orientation.

3 And I've said this before. The judge has to apply
4 all of the law. They can't pick and choose. And you know,
5 Mr. Campbell made this statement, and I think it just proves
6 the point. He says Judge Neely would gladly perform any
7 other duties, any other duties -- that was his exact word --
8 of her position on behalf of gay members of the community,
9 but not this one. "I won't perform this duty. I'll do
10 anything else that a judge might do, but not that one"
11 because -- they want to put it as a religious thing. I
12 don't think it's a religious thing. The Commission -- I
13 have never taken the position -- the Commission has never
14 taken a position she's not entitled to her religious
15 beliefs. She's entitled to whatever beliefs she wants to
16 believe. She cannot make those affect the operation of her
17 court and her job as a judge.

18 I'll give you another one. I'll just move on.

19 1.2, promoting the confidence of the judiciary, it
20 speaks to integrity, independence, impartiality and
21 impropriety and the appearance of impropriety.

22 Mr. Orchard, I think you nailed that last one in
23 your question.

24 She raises two arguments. She argues, again,
25 looking through the back end of the binoculars that this

1 code, rule, regulates conduct and not speech, to which I
2 respond, since when is speech not a form of conduct?

3 But again, the reason we -- the complaint was
4 filed is because there was more than just her words. It was
5 her actions. It was her disregard of instructions from her
6 supervising judge.

7 So then their next argument is that the
8 reasonable-person-in-possession-of-all-the-facts standard.
9 I think I agree with what you think about that, Mr. Orchard.
10 I don't think that's the standard. I think they found that
11 in a federal case and dug some dicta out of that case. And
12 I don't think it's been applied in any other case that I've
13 read. And I've read a lot of cases. I think that the
14 standard has to be and is going to be a reasonable person,
15 what would a reasonable person perceive.

16 And the reason I say that is because I don't think
17 a reasonable person in possession of all of the facts and
18 all of the law exists. I don't think there is such. There
19 can't be. It has to be a reasonable person standard.

20 But again, ultimately under 1.2, there's more to
21 it. It's about the appearance. And the appearance of what
22 she said and what she did, I think, causes a violation of
23 1.2.

24 How much time do I have? I want to leave some for
25 Britney.

1 HEARING OFFICER ORCHARD: You are at 17
2 minutes of your 30.

3 MR. DIXON: Okay.

4 Rule 2.2 talks about impartiality and fairness. I
5 think those arguments have been made under 2.3, but I do
6 want to refresh your minds on Comment 2 to that rule. And
7 that, I think, addresses one of the questions you had.

8 Comment 2 says, "Although each judge comes to the
9 bench with a unique background and personal philosophy, a
10 judge must interpret and apply the law without regard to
11 whether the judge approves or disapproves of the law in
12 question."

13 Judge Neely did not do that. She didn't follow
14 that directive.

15 I was going to talk about the last two
16 constitutional issues that were raised which are due process
17 and vagueness, but that -- I don't think Mr. Campbell
18 addressed those, and I won't bring them up unless you have
19 questions.

20 Couple of real quick responsive comments and then
21 I'll turn it over to Ms. Turner. On page 4, footnote 2 of
22 their reply brief, they talk about a prior proceeding before
23 this Commission in which a member, an enrolled member of the
24 tribe, made an allegation that the judge had made derogatory
25 racial comments about him.

1 I was on that I Panel. And what they say is --
2 they make the statement that he made derogatory comments and
3 we ignored that and didn't sanction him. That's not true.
4 That's not true.

5 The allegation from the complainant was that
6 derogatory comments were made. We pulled the tapes, we
7 listened to them and none of the alleged comments were made.
8 What he said was something in frustration about finding bail
9 jumpers on the reservation.

10 We cautioned him as a result of that to be a
11 little more cautious about how he expressed himself in the
12 courtroom. That certainly was not on its face a violation
13 of Rule 2.3, so I just want to clear the record up on that.

14 Recusal and disqualification: They suggest that
15 she get out of this mess she has created either by recusing
16 herself or requiring litigants to come in and disqualify
17 her, but I submit to you that why should a litigant, a
18 member of the LGBT community, have to come in and challenge
19 the judge's integrity in court in order to get a fair
20 hearing? That's not how it should work.

21 The judge should and has to be fair and impartial
22 at every phase of the process inside and outside the
23 courtroom.

24 Ms. Turner.

25 MS. TURNER: Thank you. Good morning.

1 While Judge Neely certainly enjoys constitutional
2 rights, there is no such right to be a judge. In order to
3 exercise the privilege of judicial office, a judge must
4 adhere to the Wyoming Code of Judicial Conduct.

5 Despite this, Judge Neely has raised various
6 constitutional defenses. I will address the ones that were
7 raised today on oral argument.

8 Beginning with the religious test defense,
9 enforcing the Code of Judicial Conduct would not impose an
10 unconstitutional religious test. The State is not requiring
11 Judge Neely to express a particular religious belief as a
12 condition of public employment, nor is it forcing her to
13 surrender her free-exercise right as a condition of public
14 employment.

15 An analogy can be drawn here to the Miller v.
16 Davis case, where a county clerk defended her policy of
17 refusing to issue licenses, marriage licenses, because she
18 felt that to issue them to same-sex couples would violate
19 her religious beliefs.

20 The court in that case explained that issuing
21 marriages licenses is not a sign of religious or moral
22 approval; rather, it merely signifies that the couple has
23 met the legal requirements to marry.

24 Although Judge Neely attempts to distinguish the
25 Davis case based on the fact that issuing licenses is a duty

1 of the clerk and performing marriages is a discretionary
2 function of a judge, the point is that, on the
3 constitutional issues, they're directly on point.

4 And like issuing marriage licenses in the official
5 capacity of county clerks, performing marriage ceremonies in
6 her official capacity as circuit court magistrate merely
7 signifies a couple has met the legal requirements to marry.
8 It is not a sign of religious or moral approval. Thus,
9 enforcing the Code of Judicial Conduct does not impose a
10 religious test.

11 Turning now to Judge Neely's free-exercise
12 defense. Enforcing the Code of Judicial Conduct does not
13 violate Judge Neely's free-exercise rights, because there is
14 no evidence in the record to suggest that the Commission's
15 enforcement of the code provisions is anything but neutral
16 and of general applicability. And because the code
17 provisions themselves are neutral and of general
18 applicability, they are not subject to strict scrutiny.
19 Rather, lower courts have interpreted the Smith and Babalu
20 cases as imposing a similar standard of review, although
21 this term isn't explicitly used, as rational basis review.
22 Thus here, the enforcement of the code provision should be
23 upheld if it rationally relates to a legitimate government
24 purpose.

25 In this case, the government purpose is

1 legitimate. The Commission's enforcement of the code
2 provision certainly serves the State's interest in upholding
3 the role of law; however, enforcement of the code -- excuse
4 me -- enforcement of the code also serves several narrower
5 interests identified in the code. To name a few, it ensures
6 that the judiciary is not brought into disrepute; it
7 preserves the independent impartiality, integrity and
8 fairness of the judiciary; and it promotes public confidence
9 in the judiciary.

10 Therefore, the Commission's enforcement of the
11 code provisions do not infringe upon Judge Neely's
12 free-exercise rights.

13 Turning lastly to the First Amendment defense, the
14 judicial -- enforcing the Code of Judicial Conduct does not
15 violate Judge Neely's freedom of expression. Although
16 judges retain, albeit limited relative to a lay person,
17 First Amendment rights with respect to speech made in their
18 capacity as private citizens, courts have universally held
19 that judges possess no such First Amendment protection with
20 regard to writing, comments and other expressions made in
21 their official capacity as judges.

22 Thus, the first inquiry is whether Judge Neely
23 spoke as a judge in her official capacity when she gave what
24 amounted to a press release, stating her opposition to and
25 refusal to perform same-sex marriages. And then I would

1 submit, also, her continued action in performing marriages
2 after would also be that conduct.

3 The logical answer to this question is yes. Judge
4 Neely spoke in her official capacity as a judge, because she
5 is only able to perform wedding ceremonies because she is a
6 circuit court magistrate.

7 Ned Donovan did not call Judge Neely because she's
8 a member of the Lutheran Church. He did not call her
9 because she is a Democrat. He did not call her because
10 she's a Republican. Ned Donovan called her because she was
11 the go-to judge in Sublette County who performed these
12 marriages. For her to argue otherwise is disingenuous. And
13 because her speech is a product of her official duties
14 because it pertained to her job description as a judge, and
15 because the speech was made in her official capacity as a
16 judge, and because she continued performing these marriages,
17 it is not -- this speech is not entitled to First Amendment
18 protection. Thus, enforcing the Code of Judicial Conduct
19 does not violate her freedom of expression.

20 And I believe that was all that was raised on oral
21 arguments with respect to the constitutional claims. And I
22 would turn it back over to Mr. Dixon to take up any
23 questions.

24 HEARING OFFICER ORCHARD: Ms. Murphy [sic] --
25 and it depends on who wants to answer this question. But

1 what do you say to the argument that was made by Judge
2 Neely's counsel about the fact that sanctions against her in
3 this matter violates Article 1, Section 18 of the Wyoming
4 Constitution which states that no person shall be rendered
5 incompetent to hold any office of trust because of his
6 opinion on any matter of religious belief whatsoever?
7 What's your response to that particular argument? Either
8 one.

9 MS. TURNER: I would just respond that the
10 State is not requiring her to express a particular belief
11 and the State is not preventing her from exercising her
12 free-exercise rights. They're not preventing her from
13 exercising her religion, so I don't think that there's a
14 violation of that clause.

15 HEARING OFFICER ORCHARD: So you're saying
16 that she's not being held responsible because of her
17 opinion --

18 MS. TURNER: No.

19 HEARING OFFICER ORCHARD: -- on a religious
20 basis. She's being held responsible, if that's what
21 happens, because her opinion renders her incapable of
22 following the law?

23 MS. TURNER: Certainly. And her supervising
24 judge holds the same opinion. And he's entitled to that
25 private belief. He in fact told her to follow the law and

1 to keep her mouth shut before she ever was called by Ned
2 Donovan. So I don't see it as a religious test violation.

3 MR. DIXON: It's not because of her opinion
4 on same-sex marriage. It's because of her unwillingness to
5 follow the law of the jurisdiction.

6 HEARING OFFICER ORCHARD: That's how you
7 distinguish that particular article?

8 MR. DIXON: Yes.

9 HEARING OFFICER ORCHARD: Okay. Any other
10 questions for Ms. Murphy or Mr. Dixon?

11 (No response.)

12 HEARING OFFICER ORCHARD: You have more time.
13 You just want to reserve it in case there's more
14 back-and-forth?

15 I don't think we're going to have any problem
16 with -- take as much time in argument as you need to back
17 and forth. I mean, obviously not all day.

18 Thank you very much for your argument, Counsel.

19 Go ahead. Would you like rebuttal?

20 MR. CAMPBELL: Sure.

21 MR. DIXON: How long do we get in rebuttal?

22 HEARING OFFICER ORCHARD: You know, I want to
23 give you as much time -- you know, I think you should each
24 have at least 15 minutes to come back. If you need more,
25 take more time.

1 MR. DIXON: Okay.

2 HEARING OFFICER ORCHARD: I want you to have
3 your day, for sure.

4 MR. CAMPBELL: In the Commission's argument,
5 they talked a little bit about some of the facts. And I
6 just want to set them in context or correct them if we think
7 they were inaccurately stated in light of the record.

8 It is correct that, in October of 2014, the Guzzo
9 decision came down. And in the wake of the Guzzo decision,
10 Judge Neely went and spoke to her supervisor, Judge Haws,
11 about her religious beliefs and the conflict she had.

12 Now, Judge Haws recognized that she was in a very
13 difficult position and he realized this was a new issue and
14 he did tell her to not talk about the issue publicly.

15 More than a month later, five or six weeks later,
16 one day in December, she got the phone call from Mr.
17 Donovan. She testified that -- at her deposition and
18 through her affidavit -- she was in the middle of hanging
19 Christmas lights, she was distracted, and she did not
20 immediately recall the statement that Judge Haws had made to
21 her.

22 And so the Commission tries to argue that Judge
23 Neely had disregarded the instruction of Judge Haws. And
24 that simply is not supported by the record. She simply did
25 not recall it at the time and she honestly responded to a

1 very pointed question. The first words out of his mouth,
2 out of Mr. Donovan's mouth, "Are you excited about
3 performing same-sex marriages?" And she responded honestly
4 and shared her religious beliefs.

5 Also, the Commission talks about the fact that --
6 they claim after same-sex marriage became legal in Wyoming,
7 Judge Neely continued to do marriages for opposite-sex
8 couples. What the record shows is that, once Judge Neely
9 talked to her supervisor, Judge Haws, that at that point,
10 she never scheduled any more opposite-sex weddings.

11 What she did was she had one that was already on
12 the books for December 13th, and she did it, because Judge
13 Haws never told her that she didn't have to. And in
14 addition, she had one, last minute, pop up on December 31st.
15 And again, because she had not been told not to, she went
16 ahead and did that wedding, too, but she did not schedule
17 any more after that discussion with Judge Haws. In fact,
18 she turned down nine more. And her letter to the Commission
19 indicates that.

20 We don't think that any of these facts are
21 material to the ultimate outcome of this case, because the
22 Commission really doesn't argue -- they suggested today, but
23 I don't think the Commission argues that Judge Neely -- a
24 basis for punishing her is whether she -- what she did in
25 light of Judge Haws's statement. Their basis for seeking to

1 punish her is because of what she said to Mr. Donovan.
2 Whether or not Judge Haws told her to not address it
3 publicly, I don't think that's a basis for their claim. And
4 for them to imply it is now, I just -- I don't think it's an
5 issue that should preclude the panel from deciding this case
6 on summary judgment.

7 The Commission suggests that it's filed a partial
8 motion for summary judgment, and it encourages the panel to
9 rule on what I call the liability issue, in other words, did
10 Judge Neely violate the code.

11 I would just clarify that the Commission's
12 position is that the panel doesn't have the authority to
13 address constitutional issues. I would say there's no
14 authority for that. We've looked into it. There's no
15 authority to suggest that this panel doesn't. In fact, what
16 this panel must do is what it should do in all cases, and
17 that is, interpret the code in a constitutional manner. So
18 implicitly in doing that, you have to address the
19 constitutional questions. And thus, I don't think there's a
20 basis for this panel to ignore the constitutional issue.

21 Now, having said that, of course, whatever this
22 panel says about constitutional issues, should it see the
23 need to get there, that's ultimately going to be reviewed on
24 appeal and the State Supreme Court is going to tell us what
25 they think on that.

1 So I think it's very clear from the arguments on
2 both sides that there is no need for an evidentiary hearing
3 to resolve the question of whether Judge Neely violated the
4 code, which, as I've argued, involves the question of
5 whether the code can be constitutionally applied here. I
6 think that we all agree on that.

7 So if we do need an evidentiary hearing, it would
8 only be on the question of the appropriate punishment. And
9 I think that is a question that -- I don't see why we would
10 need to go forward with an evidentiary hearing on that. I
11 know the rule lays out a number of factors that the panel
12 and the Commission must consider in issuing a sanction, but
13 I think that all of those can be addressed based on the
14 record that's been built. So it would be -- our position is
15 we still don't need an evidentiary hearing in this case.

16 The Commission mentioned the advisory opinions
17 from other states on similar questions. And we have four
18 responses to that. One is, none of those address concrete
19 facts. They all address the hypothetical situations. This
20 case involves concrete facts.

21 None of them dealt with Wyoming law, specifically
22 the fact that Wyoming makes the performance of marriages a
23 discretionary duty and Wyoming has this robust free exercise
24 and religious test protection. None of them were
25 considered.

1 Moreover, none of those cases involve litigation,
2 which -- essentially what we're going through here,
3 adjudication, argument on both sides. So they did not have
4 the benefit of hearing the judge's position as presented
5 through litigation.

6 And finally, none of those opinions address
7 constitutional issues. So for that reason, we think they're
8 not very helpful here.

9 The Commission really stresses the Ohio opinion
10 and says that Ohio is the most logical and is the one that
11 should be followed. And I would just highlight that the
12 Ohio opinion is the most extreme and it highlights the
13 Commission's extreme position here. That opinion says, even
14 if a judge stops doing all weddings, doesn't do any
15 weddings, that they still need to be removed if the public
16 knows that the reason they can't do marriages is because
17 they can't do same-sex marriage consistent with their faith,
18 but that is in essence creating a religious test, because
19 it's removing someone from office because of their beliefs
20 about an issue, even if they're not doing marriages,
21 whatever. And again, that just shows the extreme nature of
22 the Commission's position.

23 The Commission emphasizes that Judge -- this case
24 would be different if Judge Neely didn't speak about it; we
25 wouldn't be here if Judge Neely didn't speak about it; she

1 can talk about this issue with someone over coffee and we
2 wouldn't be here.

3 I don't think the Commission can maintain that
4 position consistent with the arguments that it's made. The
5 first point in response to that is that Judge Neely can't be
6 punished for her -- expressing her beliefs. And she didn't
7 do it in her official capacity, and I'll address that later.
8 But the first point is she can't be punished for expressing
9 her beliefs.

10 The second point is this: That the logic of the
11 Commission's position would require Judge Neely to disclose
12 her beliefs about marriage to any LGBT litigant.

13 And let me explain what I mean by that. Again,
14 the Commission's position is that, if the reasonable person
15 knows that Judge Neely believes marriage is the union of a
16 man and a woman and can't perform any other marriages, then
17 that person would conclude that she can't be fair to LGBT
18 individuals, but Comment 5 to Rule 2.11 states that, quote,
19 A judge should disclose on the record information that the
20 judge believes the parties or their lawyers might reasonably
21 consider relevant to a possible motion for disqualification,
22 even if the judge believes there's no basis for
23 disqualification.

24 So what we see here is the Commission certainly
25 thinks that Judge Neely's beliefs are something that an LGBT

1 individual would consider relevant to disqualification and,
2 thus, something that she must disclose. So the Commission's
3 focus on the fact that Judge Neely said something about this
4 is irrelevant, because the logic of their position would
5 require her to disclose it to any litigant she knows to be a
6 member of the LGBT community. And that just, again, is
7 another way to show the extreme nature of the position that
8 the Commission has taken here.

9 Another point that's important is Judge Neely is
10 the municipal judge in Pinedale. The population of Pinedale
11 is 2,000 people. People know Judge Neely. They know her
12 beliefs. People -- they didn't need a newspaper article to
13 know Judge Neely's beliefs about these sorts of issues.

14 So again, it's another thing that shows it really
15 doesn't matter that Judge Neely spoke about these issues,
16 because people know what Judge Neely believes.

17 Moreover -- this is another significant point,
18 the --

19 JUDGE BARTLETT: I'm going to interrupt you.

20 MR. CAMPBELL: Sure.

21 JUDGE BARTLETT: But her statement came out
22 in the press. And so Pinedale is a small community. They
23 know Judge Neely, but what about -- you know, did her
24 comment bring about disrepute on the judiciary as a whole,
25 though?

1 MR. CAMPBELL: Sure. And our response to
2 that question is it didn't, because what she said was, as
3 the Supreme Court in Obergefell recognized -- she just
4 stated a reasonable -- a decent, honorable belief about
5 marriage, and that that can't be classified as prejudice.

6 Moreover, when the public understands, as the
7 reasonable person would, that performing marriages is not a
8 required duty of judges, then that shows even more that, oh,
9 if this judge has a religious objection to this and this
10 isn't even a required duty that she has to perform, okay --
11 well, a reasonable person could look at that and say, Oh,
12 that makes sense that a judge doesn't have to do something
13 that conflicts with their faith if it's a discretionary
14 duty.

15 JUDGE BARTLETT: Who is that reasonable
16 person? Because 99.99 percent of the people on the street
17 will not know that.

18 MR. CAMPBELL: And I guess it goes back to
19 what we argued before. And to address what Mr. Dixon said
20 on that point, you know, we have not pulled -- we have cited
21 a federal case in support of the proposition, but we've
22 cited state cases construing this exact rule, again, the
23 State Court -- State Supreme Court of Mississippi.

24 And there are others as well. We've also cited
25 the treatise. And the treatise, Garwin, collects a lot of

1 cases and they talk about this objective reasonable person
2 that knows all the facts and law.

3 Let me speed this up. Just briefly, to wrap up
4 that point, if Judge Neely was sitting in a coffee shop in
5 Pinedale, shared with one of her friends her belief about
6 marriage and someone overheard it, and then that person went
7 to the media, we would be in the same position that we're in
8 here. So I don't think the Commission's focus on whether
9 Judge Neely said something to the media is really
10 dispositive here, because ultimately the Commission's
11 position would hold true whether Judge Neely spoke in
12 private and someone overheard it or whether she spoke as she
13 did in honestly giving her reaction to a reporter's
14 question.

15 The Commission's cramped view of religious
16 exercise ignores the fact that the Constitution protects
17 religious exercise. Mr. Dixon said that Judge Neely is
18 entitled to her religious beliefs, and Ms. Turner said that
19 she's entitled to her private opinion or belief -- I forgot
20 which word she used. But that's not what the State or
21 Federal Constitution say. They say she's entitled to the
22 free exercise of her religion. She's entitled to live
23 consistent with her beliefs. And where, as here, the
24 Government can readily accommodate her -- again, we've given
25 three reasons. Mr. Dixon responded to one, but he didn't

1 respond to the others -- three ways that they can
2 accommodate her, her constitutional rights require that they
3 do that and that she be allowed to remain a judge.

4 The Commission talked about a footnote in our
5 reply where we mention a past disciplinary proceeding
6 involving Rule 2.3. We -- our footnote adheres very closely
7 to what the Commission said in Exhibit 57 that we attached.
8 So what we said -- I don't think we were misconstruing or
9 trying to misportray anything. We were just simply sticking
10 close to what the Commission said in its written
11 interrogatory response.

12 Ms. Turner opened her argument with the statement
13 that Judge Neely has no right to be a judge, but that's
14 irrelevant to the constitutional question. And we cited in
15 our response towards the end a case from the U.S. Supreme
16 Court that explains that, whether someone has a right to a
17 government benefit like public office is totally irrelevant
18 to the constitutional analysis, because the fact remains
19 that the Government can't take away that right for an
20 unconstitutional reason. And we cited specifically Perry
21 versus Sinderman, a case from the U.S. Supreme Court that
22 cited 16 other cases that stand for the proposition, that
23 that argument about whether she has a right to be a judge
24 and whether that undermines her constitutional right -- that
25 that argument doesn't hold any constitutional water.

1 HEARING OFFICER ORCHARD: What was that cite?

2 MR. CAMPBELL: Perry versus Sinderman. It's
3 right towards the end of the response that we filed. It's
4 in the last three or four pages.

5 I think the best way to address the Commission's
6 response to our constitutional argument is to start by what
7 they haven't responded to, which we've tried to call
8 attention to in the reply that we filed a few days ago.

9 They have not responded to the State religious
10 test claim, which, Mr. Orchard, you raised. And I don't
11 think the response adequately dealt with that claim, and
12 I'll explain why.

13 They have not responded to our state free-exercise
14 claim. They have not responded to three of the four reasons
15 why we believe strict scrutiny applies and the free
16 exercise -- the federal free-exercise claim.

17 So when you go through and look at all of those
18 omissions, you see that we have a very strong case still
19 sitting there that has yet to be refuted.

20 On the religious test point, the Commission claims
21 that there isn't a religious test here because no one is
22 forcing Judge Neely to violate her free-exercise rights. I
23 think that's flatly false, as we've demonstrated in the
24 free-exercise argument.

25 HEARING OFFICER ORCHARD: Can you sum up in

1 about three minutes?

2 MR. CAMPBELL: Yes. Be glad to do it. Yes.
3 Thank you.

4 They also say that there hasn't been -- they're
5 not requiring Judge Neely to affirm something in conflict
6 with her faith, her solemnizing marriage is not affirming
7 that union or anything like that. And I would just say that
8 that's not a required element of the religious test claim.
9 We've made an argument in our reply explaining that. The
10 Supreme Court decided a case, McDaniel versus Paty. And
11 that case makes it clear that the Government doesn't have to
12 make affirming a belief or denying a belief a condition of
13 office in order for it to be an impermissible religious
14 test. So I would just direct the Commission to our
15 discussion of McDaniel.

16 Finally -- well, probably finally, because I'm
17 running out of those three minutes. Just
18 briefly distinguish --

19 HEARING OFFICER ORCHARD: Sum up how you want
20 to.

21 MR. CAMPBELL: Sure.

22 HEARING OFFICER ORCHARD: I don't want to
23 limit you. Go ahead.

24 MR. CAMPBELL: To briefly distinguish the
25 Miller versus Davis case that the Commission has cited, that

1 case -- we've distinguished it on a few grounds, not just on
2 the grounds that the county clerk in Davis had a duty to
3 issue marriages licenses and Judge Neely does not have a
4 duty to solemnize marriages.

5 We've also pointed out the fact that what the
6 county clerk did in that Davis case is take a -- frankly, an
7 extreme position. She's a county clerk. She's the only one
8 that can issue marriage licenses. She shut down the entire
9 operation of issuing marriage licenses for an entire county,
10 both for opposite-sex and same-sex couples.

11 Judge Neely is not preventing anybody from getting
12 married, from accessing people to solemnize their marriages
13 or getting marriage licenses, so the reliance on that case
14 is misplaced, we would contend.

15 An important point on the free exercise -- I'm
16 sorry -- the free-speech claim, the Commission claims that
17 when Judge Neely responded to Mr. Donovan that she was
18 speaking in her official capacity. And we firmly oppose
19 that conclusion for a number of reasons.

20 As we've indicated in the reply we just filed, a
21 judge acting in his or her official capacity is a judge that
22 is on the bench, that is issuing a writing, an opinion or an
23 order or is otherwise in the course of actually performing a
24 judicial duty. And that's not what we have here.

25 Judge Neely was at home; she wasn't in the

1 courthouse; she wasn't on the bench. She was contacted.
2 She was in the middle of hanging Christmas lights and she
3 responded to a question.

4 Now, their position is that, here, the only reason
5 why she had a basis to speak on this issue is because she's
6 a circuit court magistrate and that thereby transforms her
7 speech into official capacity speech. But that argument, it
8 really doesn't make sense, because the same can be said
9 about a judge writing a law review article about the legal
10 process and what that judge has learned in their own course
11 of doing judicial duties.

12 But Rule 3.1, specifically Comment 1 to that rule,
13 calls the judge writing or speaking on the law in a law
14 review article, that's extrajudicial activity. And so here,
15 we think that, by the same logic, Judge Neely off the bench,
16 at home, putting up Christmas lights is not speaking in her
17 official capacity.

18 One of the other arguments that the Commission
19 makes -- and now I think I'm getting close to being almost
20 done -- is that the reason why she is speaking in her
21 official capacity is because Mr. Donovan -- the reason why
22 he contacted her is because she was a magistrate that did
23 marriages, but his intent cannot determine whether she was
24 operating in her official capacity.

25 The first thing is that there's no evidence

1 indicating why he called her, but that's not really
2 important, because if his intent alone could determine
3 whether she was acting in her official capacity, then any
4 time a lawyer is approached at a dinner party and asked a
5 legal question by someone that's seeking legal advice, then
6 that lawyer is thereby acting in their official capacity as
7 a lawyer.

8 So the argument doesn't hold water. Again, Judge
9 Neely was not speaking in her official capacity.

10 HEARING OFFICER ORCHARD: What do you say to
11 the Comment Number 3 in Rule 3.1 on extrajudicial activities
12 that says, "Discriminatory actions and expression of bias or
13 prejudice by a judge, even outside the judge's official or
14 judicial actions, are likely to appear to a reasonable
15 person to call into question the judge's integrity and
16 impartiality"?

17 MR. CAMPBELL: We would say what we said at
18 the outset, which is Judge Neely did not express bias or
19 prejudice against anyone. And I would also point out that
20 the Commission has not alleged a violation of Rule 3.1.

21 The last point I'd like to make is that the
22 Commission claims that our reliance on Republican Party
23 versus White, the U.S. Supreme Court decision, is misplaced
24 because that was involving the election context, and here,
25 we're not dealing with the election context.

1 That's a far too narrow reading of the White
2 decision. In fact, if you look at page 779 through 780 of
3 that decision, the court expressly assumes that these speech
4 rights apply, not only when someone is a candidate for
5 office, but also once they are elected to office. What the
6 court said is that someone could state their view on the
7 legal issue of same-sex marriage -- they specifically talked
8 about same-sex marriage, which I suppose is ironic for
9 purposes of this case -- but they said, A judge could state
10 their legal view on the issue of same-sex marriage before
11 they become a candidate. Under that rule, they were
12 prohibited from doing it while they were a candidate, and
13 the supreme court rejected that. But then the court went on
14 to say, And even after they're elected, they still would
15 have the right to communicate their view on the legal issue
16 of same-sex marriage.

17 Because the Supreme Court recognizes that there,
18 it logically follows that Judge Neely has the right to
19 communicate her view here.

20 HEARING OFFICER ORCHARD: Thank you.

21 MR. CAMPBELL: Thank you.

22 HEARING OFFICER ORCHARD: Questions? Any
23 questions?

24 (No response.)

25 HEARING OFFICER ORCHARD: Thank you.

1 MR. CAMPBELL: Thank you.

2 HEARING OFFICER ORCHARD: Great job on your
3 argument.

4 MR. DIXON: Very briefly, I agree absolutely
5 that 3.1 is directly on track. And I'm sorry that I -- in
6 fact, it's cited in all of these -- most of these judicial
7 advisory opinions as a -- in this context. And I probably
8 should have raised that in my original complaint, and I may
9 move to amend on that basis as well, although I'm not sure I
10 want to go down the road of delaying this procedure any
11 further.

12 The lawyer analogy, as you well know and it says
13 right there in your malpractice file, if somebody comes up
14 to you at dinner and asks you for legal advice and you give
15 it, you can be sued for malpractice because that person
16 expected you to answer in your capacity as a lawyer.

17 Miller versus Davis, it's a different case. It
18 truly is a different case. And I don't want to suggest
19 differently. It's postured differently. It's an injunctive
20 relief case, but it does address some of these
21 constitutional issues. And it's really the only authority
22 we've got. There's nothing out there. So I think that the
23 panel needs to look at that to understand what it says on
24 those points that bear on this issue.

25 Counsel says, Well, we didn't respond to their

1 State constitutional claims. We responded in our original
2 and reply briefs to the constitutional arguments that the
3 State constitutional provisions track very closely the
4 federal issues. I think we've adequately responded to
5 those, and, as I say, ultimately I think that's going to be
6 the Supreme Court that makes those decisions.

7 I don't make light of this panel's abilities to
8 come to decisions in this case.

9 Ms. Dilts, you may be the smartest layperson in
10 the world, but I for the life of me can't fathom how a
11 Commission which has to ultimately make this decision that
12 has three laypeople can pass on constitutional questions.
13 It wasn't designed to do that and probably shouldn't do
14 that. These aren't easy questions. I don't want to suggest
15 to anybody that they are.

16 The questions on the code of ethics,
17 constitutional questions, these are hard questions. These
18 guys make really good arguments, and I think we do as well.

19 Counsel says, Well, she's entitled to the free
20 exercise of her religion. We absolutely agree with that.
21 Personally, I find the position of the Missouri Synod of the
22 Lutheran Church, which is the opposite of the other synods
23 of the Lutheran Church -- I find that every bit as repugnant
24 as I found the Mormon Church's position on black people, but
25 we have not cited her for being a member of the Missouri

1 Synod of the Lutheran Church.

2 What we've cited her for is making comments in
3 public that demonstrate a bias and a prejudice and refusing
4 to apply and follow the law of the jurisdiction. That's the
5 issue. It's not what she believes. It's not even exactly
6 the words she said. It's what she put out there as a judge
7 for the general public of the state of Wyoming to perceive
8 relative to her impartiality.

9 I believe Judge Bartlett asked, Well, doesn't this
10 bring the judiciary into disrepute. I submit that it
11 absolutely does. I think it reflects poorly on the
12 judiciary. And I think if this Commission does not act in
13 response to that, then it will leave that bad taste out
14 there in the public that someone could come in and take a
15 position that would reflect bias against a major segment of
16 this population and have this Commission turn a blind eye.
17 I would hate to see that.

18 Now, we got ahold of these articles. And I think
19 they kind of illustrate -- these editorials by Ned Donovan,
20 who is, I guess, a British citizen. I think that was the
21 thrust of his editorials, is judges shouldn't do this. They
22 shouldn't say this. They shouldn't behave like this. And
23 it does reflect on the judiciary.

24 Their argument about her duty to disclose, solving
25 this problem, is circular logic. They said, Well, she can

1 fix it by -- if she's got a bias or prejudice, disclose it
2 and people can swear her off. But really, if a judge has a
3 bias to that degree, should they be on the bench?

4 Now, if I'm a judge and I come in and I say, Well,
5 Counsel, I know you're suing the tobacco company, and I own
6 a hundred thousand dollars of stock in R. J. Reynolds,
7 that's something that ought to be disclosed. This is
8 different. It doesn't even . . .

9 I've got to qualify the previous answer I gave to
10 you with regard to a judge's First-Amendment rights. And I
11 think the comment at 5 in 3.1 addresses that, but this was
12 the theme all the way through our briefing on this. And
13 that is -- all of the courts, all of the courts and the
14 judicial opinions are consistent on this point. Judges are
15 held to a higher standard. They are subject to a higher
16 level of scrutiny than members of the general public. They
17 have to be. They must be more circumspect in their comments
18 made in public, whether it's to a newspaper reporter or down
19 at the cafe. That's part of their duty as a judge.

20 You know, if they want to get on a soapbox and go
21 down to the park in Pinedale and rail against gay marriage,
22 perfect, they've got a First Amendment right to do that.
23 But do they have the right to do that as a judge? I would
24 hope not. I would hope not.

25 The judiciary opinions, I think, are right on

1 track. Again, we have no decided cases from court records
2 on these questions.

3 Counsel says, Well, they didn't -- these opinions
4 didn't consider that marriage might be a discretionary
5 function in Wyoming. Well, that's absolutely not true.
6 Every one of them specifically addressed that question.
7 Every one of them said the refusal to perform gay marriages
8 can be, under certain circumstances, a violation of Rule
9 2.3.

10 And Ohio says, If you refuse to perform all
11 marriages in order to avoid performing gay marriages, that's
12 also an expression of bias or prejudice.

13 You know, I think that's all the points that I
14 wanted to address raised in rebuttal. You know, there's
15 well over a hundred pages of briefing. We've submitted two
16 briefs. I think we did a decent job of covering the issues.
17 And I'd refer you to those. And if you have questions, I'll
18 be happy to answer them.

19 HEARING OFFICER ORCHARD: You filed a
20 motion -- thank you.

21 You filed a motion to strike the affidavit of
22 Stephen Crane -- you filed it on the 23rd of November. I
23 didn't see a response. Did you want to respond to that?

24 MR. DIXON: They filed a big response, yes.

25 MR. CAMPBELL: No. That was only a one-page

1 response.

2 MR. DIXON: Oh, really?

3 MR. CAMPBELL: That was short.

4 HEARING OFFICER ORCHARD: I didn't see it.
5 Do you want to address that?

6 MR. CAMPBELL: Sure. I think I have a copy
7 of it here. I'll be happy to --

8 HEARING OFFICER ORCHARD: I'll listen.

9 MR. CAMPBELL: Our basic position is, first
10 of all, the Commission does not indicate what portion of
11 that affidavit should be stricken. It says that there's
12 impermissible hearsay. And there's certainly -- if you take
13 a look at the affidavit of Mr. Crane, the whole thing is not
14 hearsay. But what we assume they mean is that they're
15 talking about the statement where he relates that Ned
16 Donovan, the reporter in question that had the conversation
17 with Judge Neely -- he called Mr. Crane. Mr. Crane is
18 the -- he's the current editor of the newspaper that
19 published the original story that started all of this. And
20 Mr. Donovan called him and asked if he was going to pursue
21 the story against Judge Neely and said -- he said that he
22 wanted to see her sacked, referring to Judge Neely. And I
23 suppose you have to understand he's from the UK to
24 understand his use of the term "sacked." But all that's to
25 say -- I'm assuming that's what they're referring to --

1 MR. DIXON: Yes.

2 MR. CAMPBELL: -- by the attempt to strike
3 his affidavit.

4 MR. DIXON: Correct.

5 MR. CAMPBELL: Our response is that that
6 falls into a hearsay exception, a statement of an existing
7 state of mind. Why we filed that affidavit is to show Ned
8 Donovan's state of mind is to get rid of Judge Neely, and
9 that has been his state of mind throughout the process.

10 Now, the main point here -- so we don't believe
11 that statement should be stricken, but if the panel
12 disagrees, the rest of the affidavit should remain.
13 Moreover, if the panel disagrees, it does not -- it doesn't
14 materially impact the outcome of this proceeding. So if the
15 Commission strikes it, we still think that the Commission
16 should rule based on the pending motions for summary
17 judgment and resolve the case that way.

18 HEARING OFFICER ORCHARD: I'm inclined, based
19 on what's been submitted, to deny the motion to strike the
20 affidavit of Stephen Crane insofar as there are statements
21 in there that are supportable. I'm not sure whether or
22 not -- in this context, whether he has an intent to have
23 Judge Neely sacked or not is relevant to our inquiry, but
24 I'm going to deny the motion to strike the affidavit.

25 We'll consider those portions that we're allowed

1 to consider under the rules.

2 MR. CAMPBELL: Okay. And just as a matter of
3 housekeeping, going forward, we obviously, I think, agree
4 that the question of whether this is a violation of the code
5 and whether the code can be constitutionally applied here,
6 that that's something that should be decided by the panel.
7 So does it make sense, given the immensity of everything
8 that's been filed, to allow you to have sufficient time to
9 do that and to put off the currently scheduled hearing or --
10 what we don't want -- we don't want you to have to rush and
11 we also don't want you to issue a ruling on January 4th that
12 then requires us to go forward with the hearing on
13 January 11th. So that's why we raised the issue.

14 HEARING OFFICER ORCHARD: Let me talk to my
15 colleagues about that question.

16 MR. CAMPBELL: Mr. Dixon might have an
17 opinion on that.

18 MR. DIXON: We'd object. This needs to get
19 done. I mean, as Kathleen said the other night, she was
20 getting in a report -- she said, The longer you have to work
21 on it, the more work you do on it.

22 I mean, it needs to get resolved.

23 HEARING OFFICER ORCHARD: I want to get it
24 resolved, but I also want to make sure Judge Neely has as
25 much due process as possible that we should be affording

1 her.

2 MR. CAMPBELL: And so if I can present one
3 thing that I think is critical. We have not thought about
4 how we would approach a hearing that just addresses the
5 issue of sanctions. So this is something -- again, that
6 seems to be what's contemplated. So we would just ask that
7 there be at least three or four weeks between whenever this
8 panel issues a ruling on the pending cross motions for
9 summary judgment for us to have -- you know, I would really
10 love a month just for us to figure out, okay, what are these
11 factors -- and you all are familiar that there are about
12 eight to twelve factors in the rules that determine what
13 kind of sanction is appropriate. And we would want to
14 determine who are the witnesses that we need for that and
15 how do we approach a hearing like that, because, again,
16 we've been focusing on the issue of liability more than the
17 issue of sanctions. By liability, I mean whether there is a
18 violation of code.

19 HEARING OFFICER ORCHARD: Yeah. I've
20 personally got a summary judgment response brief due on
21 December 31st, so -- and I know we'll be involved in
22 writing.

23 And you're sitting on the bench. And you're, of
24 course, busy, too.

25 We'll try to get you a decision as quickly as we

1 can. And then why don't we see when our decision comes out
2 as to whether or not then you still have enough time to
3 prepare for this hearing. And we'll cross that bridge then.

4 Is that acceptable to you, Judge?

5 JUDGE BARTLETT: Yes.

6 HEARING OFFICER ORCHARD: Is that okay?

7 Is that okay?

8 MR. DIXON: What can I say?

9 MR. CAMPBELL: Just to clarify, there
10 wouldn't need to be a hearing if you would rule in our
11 favor, right? It's only on the sanction question?

12 HEARING OFFICER ORCHARD: Right. If we rule
13 in your favor, there's no hearing.

14 MR. CAMPBELL: Okay. Excellent. Thank you.

15 HEARING OFFICER ORCHARD: Anything else from
16 the parties?

17 (No response.)

18 HEARING OFFICER ORCHARD: Thank you. The
19 arguments were really, really well done. The briefing has
20 been great. Thank you for that.

21 Thank you, Judge Neely, for being here.

22 That's all we have. We're adjourned.

23 (Hearing proceedings adjourned 10:52

24 a.m., December 4, 2015.)

C E R T I F I C A T E

I, Marilyn Walz, a Registered Professional Reporter, do hereby certify that I reported by machine shorthand the proceedings contained herein and that the foregoing 81 pages constitute a full, true and correct transcript.

Dated this 14th day of December, 2015.

Marilyn Walz
Registered Professional Reporter

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