No. 17-195

In The
Supreme Court of the United States

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

Petitioner,

v.

WYOMING COMMISSION ON JUDICIAL CONDUCT AND ETHICS,

Respondent.

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

BRIEF OF *AMICI CURIAE* CHRISTIAN LEGAL SOCIETY, THE LUTHERAN CHURCH – MISSOURI SYNOD, AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Christian Legal Society ("CLS") is an association of Christian attorneys, law students, and law professors founded in 1963. Throughout its history, CLS has included attorneys serving as judges, as well as attorneys and law students who hope one day to serve their communities in a judicial capacity. The Wyoming Supreme Court's censure of a judge because of her religious beliefs is antithetical to the basic principles upon which this country was founded, embodied in the United States Constitution's absolute prohibition that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. Const. art. VI, cl. 3.

The Wyoming Supreme Court decision has given notice to every judge, as well as every attorney and law student who aspires to judicial office, that those who would decline, for reasons of religious conscience, to celebrate or otherwise solemnize a specific wedding ceremony may be deemed unfit to hold judicial office. CLS attorneys and law students will be directly affected by the decision below if it is allowed to stand.

The decision below is directly opposed to the pluralism that CLS has long supported as essential to a

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[1] Pursuant to Rule 37.2(a), *amici* gave all parties' counsel of record timely notice of their intent to file this brief. All parties gave written consent to its filing. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

free society, which prospers only when the First Amendment rights of all Americans are protected, regardless of the current popularity of their religious beliefs and speech. For that reason, CLS was instrumental in passage of the Equal Access Act, 20 U.S.C. §§ 4071-4074 ("EAA"), which has protected, for thirty years, both religious and LGBT student groups' right to meet on public secondary school campuses. *See* 128 Cong. Rec. 11784-85 (1982) (Senator Hatfield statement) (recognizing CLS's role in drafting EAA); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (EAA protects religious student group); *Straights and Gays for Equality v. Osseo Area Sch. No. 279*, 540 F.3d 911 (8th Cir. 2008) (EAA protects LGBT student group).

The Lutheran Church – Missouri Synod ("the Synod") has some 6,100 member congregations with 2,100,000 baptized members throughout the United States. The Synod has two seminaries, 10 universities, numerous related Synod-wide corporate entities, hundreds of recognized service organizations and the largest Protestant parochial school system in America. The Synod steadfastly adheres to orthodox Lutheran theology and practice, and among its beliefs are the Biblical teachings that marriage is a sacred union of one man and one woman (Gen. 2:24-25), and that God gave marriage as a picture of the relationship between Christ and His bride the Church (Eph. 5:32). As a Christian body in this country, the Synod believes it has the duty and responsibility to speak publicly in support of the religious liberty of all – including the right of judges such as Judge Neely – to express their religious belief

that marriage is a divinely created relationship between one man and one woman.

National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries and independent churches. NAE serves as the collective voice of evangelical churches and other religious ministries. It believes that God has ordained marriage as the most basic unit for the building of earthly societies, and that the union is alone reserved for the joining of one man and one woman.

INTRODUCTION AND SUMMARY OF ARGUMENT

Judge Neely held two judicial positions, as a municipal judge not authorized to solemnize weddings, and as a part-time circuit court magistrate who was authorized to perform wedding ceremonies for couples who independently contacted and paid her. Wyoming circuit court magistrates may decline to perform a wedding for personal reasons, no matter how trivial.

After same-sex marriage became legal in Wyoming, a local newspaper reporter asked Judge Neely whether she was "excited" about performing same-sex weddings. Judge Neely responded that her religious

beliefs would not allow her to perform a same-sex wedding ceremony, but that other magistrates were willing to do so.

The record shows that no same-sex couple had requested Judge Neely to perform a wedding ceremony, and that she was willing to refer any request to other magistrates willing to perform same-sex weddings. Nonetheless, the Wyoming Commission on Judicial Conduct and Ethics *sua sponte* brought disciplinary charges against Judge Neely and, after a hearing, recommended her removal from both judicial positions.

On appeal, by a 3-2 vote, the Wyoming Supreme Court upheld disciplining Judge Neely but reduced her punishment to a "public censure" and ordered her not to perform any wedding ceremonies unless she also performed same-sex wedding ceremonies. Judge Neely was censured because she publicly stated that her religious beliefs would not allow her to perform a same-sex wedding ceremony.

The Wyoming Supreme Court's ruling sends a chilling message to Wyoming attorneys and law students that they should not aspire to hold judicial office if their religious conscience prohibits them from performing a same-sex wedding ceremony. Its ruling disqualifies citizens who faithfully hold the religious beliefs of the Lutheran Church – Missouri Synod to which Judge Neely belongs, as well as other Wyoming citizens, including those who are faithful to the religious teachings of the Catholic, Orthodox Jewish, Southern Baptist, Mormon, Evangelical Christian, and

Muslim faiths.[2] At least half of Wyoming citizens identify as belonging to faiths that hold the traditional religious belief that marriage may occur only between a man and a woman.[3]

The Wyoming Supreme Court effectively created a religious test for persons seeking to hold the office of magistrate. But the Founders prohibited a religious test for federal office in the 1787 Constitution, and many states now include religious-test prohibitions in their state constitutions. Through the Religion Clauses of the First Amendment, this Court has prohibited

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[2] According to a Pew Forum survey regarding the religious composition of Wyoming's adult population, Wyoming adults identify with the following faiths, as follows: Evangelical Protestant (27%); Mainline Protestant (16%); Catholic (14%); Mormon (9%); Jehovah's Witnesses (3%); Native American Religions (1%); Buddhist (1%); Unitarians (1%); New Age (1%); Jewish (< 1%); Muslim (< 1%); Historically Black Protestant (< 1%); Orthodox Christian (< 1%); Hindu (<1%). "Religiously unaffiliated" adults account for approximately 26% of the population, but that number includes not only atheists (3%), agnostics (3%), and religiously unaffiliated for whom "religion is not important" (10%), but also religiously unaffiliated for whom "religion is important" (10%). Pew Research Center, *Religious Landscape Study: Religious Composition of Adults in Wyoming* (May 12, 2015), http://www.pewforum.org/religious-landscape-study/state/
wyoming/ (last visited Aug. 26, 2017).

[3] Evangelical Protestants, Catholics, and Mormons teach that marriage should occur only between a man and a woman, and the Pew study found that 50% of Wyoming's adult population belong to one of these three faiths. *Religious Landscape Study*, *supra* note 2. Of course, some of the other faiths in the survey likely hold this traditional religious understanding of marriage, too.

states from requiring religious tests for public officeholders. *Torcaso v. Watkins*, 367 U.S. 488 (1961) (state constitutional provision requiring public officeholders to affirm belief in God violated First Amendment); *cf., McDaniel v. Paty*, 435 U.S. 618 (1978) (state constitutional provision disqualifying clergy from holding state office violated First Amendment).

One type of religious test familiar to the Founders would have been a test that conditioned holding public office on participating in a religious ceremony, specifically, taking Communion in the Church of England at least once a year. Michael W. McConnell, Thomas C. Berg & Christopher C. Lund, *Religion and the Constitution* 14 (4th ed. 2016).[4] Centuries later the ceremonies may differ, but conditioning public office on participating in ceremonies that test religious beliefs remains just as wrong.

Requiring a judge to perform a same-sex wedding ceremony further violates the Religion Clauses because coerced participation in a religious ceremony represents a quintessential religious freedom violation. *See Cantwell v. Connecticut*, 310 U.S. 296, 303

[4] As Professors McConnell, Berg, and Lund explain:

> Pursuant to the Test Act, 25 Car. II, c.2, and the Corporation Act, 13 Car. II, st. 2, c.1, only those who had received communion in the Church of England in the preceding year and who swore that they did not believe in the Catholic doctrine of transubstantiation – the idea that the bread and wine of communion turn into the body and blood of Christ – could hold offices in government, including public corporations, military positions, and academic positions.

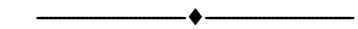
(1940) (free exercise); *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (establishment). The free exercise violation is compounded here because Wyoming allows magistrates to refuse to perform a wedding ceremony for various secular reasons but punishes magistrates who cannot perform a wedding ceremony for reasons of religious conscience. *See Employment Division v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

Judges should not be disqualified from public office because their faith prohibits them from performing same-sex wedding ceremonies. The routine mechanism of recusal serves any legitimate state interest that exists. Referral and recusal are time-tested less restrictive alternatives. This is particularly true given that performing wedding ceremonies is not a core judicial function. And it is particularly true when withholding an accommodation will result in the disqualification of broad swaths of citizens from judicial office based on their religious beliefs.

This Court's intervention is needed not only to protect Wyoming judges and attorneys, but also to protect judges and attorneys nationwide from disqualification because of their religious beliefs. The Supreme Court of Ohio Board of Professional Conduct issued an advisory opinion concluding that a judge who "discontinue[s] performing all marriages, in order to avoid marrying same-sex couples based on his or her personal, moral, or religious beliefs, may be interpreted as manifesting an improper bias or prejudice toward a particular class." Ohio Adv. Op. 15-1, 2015 WL

4875137, at *5. Several other states have issued advisory opinions insensitive to judges' religious beliefs. *See* Part III.A. *infra.*

Any whiff of a religious test is cause for alarm. Tests targeting religious dissenters for exclusion from public office represent a regressive embrace of religious intolerance. The Wyoming Supreme Court decision resuscitates a practice that the Founders long ago set on the road to well-deserved extinction.



ARGUMENT

I. The Decision Below Establishes a Prohibited Religious Test for Judicial Office and Thereby Violates the Federal Free Exercise and Establishment Clauses.

A. In their wisdom, the Founders absolutely prohibited religious tests for federal office.

At the Constitutional Convention, the Founders addressed a single religious freedom concern: Religious belief was not to disqualify any person from holding public office under the Constitution. To that end, the Founders took a two-pronged approach. First, they explicitly prohibited religious tests for public office in the Constitution, which states:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of

> the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

U.S. Const. art. VI, cl. 3.

The Founders took a further critical step to ensure that a citizen was not disqualified from holding public office because of his religious beliefs. Even though, on its face, the above requirement that public officers swear an oath to support the Constitution as a condition of holding public office is a neutral, generally applicable requirement, the Founders understood that this facially neutral requirement nonetheless would effectively disqualify certain religious citizens from holding public office because Quakers and other Anabaptist sects interpreted Jesus' words in *Matthew* 5:33-37 as a prohibition on swearing any oath.[5]

Because of their commitment to ensuring that religious citizens not be disqualified from holding public office, the Founders provided in three clauses in the Constitution what today we call "accommodations" or "exemptions." That is, citizens could "affirm," rather

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[5] "Again, ye have heard that it hath been said by them of old time, Thou shalt not forswear thyself, but shalt perform unto the Lord thine oaths: But I say unto you, Swear not at all; neither by heaven; for it is God's throne; Nor by the earth; for it is his footstool: neither by Jerusalem; for it is the city of the great King. Neither shalt thou swear by thy head, because thou canst not make one hair white or black. But let your communication be, Yea, yea; Nay, nay; for whatsoever is more than these cometh of evil." *Matthew* 5:33-37 (King James).

than "swear to," the oath of office. U.S. Const. art. I, § 3, cl. 6 (Senators "shall be on Oath or Affirmation" when sitting to try impeachments); *id.* art. II, § 1, cl. 8 (the President "shall take the following Oath or Affirmation: – 'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States' "); *id.* art. VI, cl. 3 (members of Congress, state legislatures, "and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution").

The Founders' two-layered protection for religious freedom explicitly prohibited a religious test and, perhaps more importantly, explicitly provided an exemption for citizens whose religious beliefs would not allow them to conform to the Constitution's facially neutral, generally applicable requirement that all public officeholders swear to support the Constitution.[6] These religious exemptions protected religious dissenters by preventing the government from forcing them to choose between obeying their religious conscience and performing an action that violated their religious beliefs – even the facially neutral, generally applicable act of swearing to support the Constitution. The Founders thus made clear that the Constitution did not ignore the real-world effect that a facially

[6] As noted in Part II.B *infra*, the requirement at issue in this case is neither neutral nor generally applicable and, therefore, is an additional violation of the Free Exercise Clause.

neutral, generally applicable requirement for public office had on religious citizens.

Although state constitutions in 1787 typically contained a religious test for office,[7] over time, many state constitutions came to prohibit religious tests for office. Since 1889, Article 1, Section 18 of the Wyoming Constitution has stated, in relevant part, that "no person shall be rendered incompetent to hold any office of trust or profit, or to serve as a witness or juror, because of his opinion on any matter of religious belief whatever." Wyo. Const. art. 1, § 18.

A ban on religious tests for public office has served the Republic well for 230 years. But the decision below breaches this ban. The decision below – and advisory opinions in several states – would establish a religious test that disqualifies citizens from serving as judges if they hold a religious belief that marriage may exist only between a man and a woman, a religious belief commonly held by traditional Catholics, Evangelical Protestants, Orthodox Jews, Mormons, traditional Muslims, and other Americans.

B. In *Torcaso v. Watkins*, this Court held that state religious tests violate the federal Free Exercise Clause.

Many state constitutions contain some variation on the federal Constitution's prohibition on a religious

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[7] Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Liberty: A Machine That Has Gone of Itself*, 37 Case W. Res. L. Rev. 674, 681-687 (1987).

test for federal officeholders. Through the Religion Clauses of the First Amendment, this Court prohibits states from requiring religious tests for state officeholders. *Torcaso v. Watkins*, 367 U.S. 488, 489 n.1 (1961) ("Because we are reversing the judgment on other grounds, we find it unnecessary to consider appellant's contention that [the religious test provision of art. VI, cl. 3] applies to state as well as federal offices."). *Cf.*, *McDaniel v. Paty*, 435 U.S. 618 (1978) (state constitutional provision disqualifying clergy from holding state office violated First Amendment).[8]

This Court concluded in *Torcaso* that the "Maryland religious test for public office unconstitutionally invades [Torcaso's] freedom of belief and religion and therefore cannot be enforced against him." *Id.* at 496. This Court specifically rejected the rationale of Maryland's highest court, which had upheld the religious test because Mr. Torcaso was not compelled to hold the office of notary public. *Id.* at 495. This Court declared that "[t]he fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria

[8] The plurality opinion in *McDaniel* found that *Torcaso* was not controlling because Maryland disqualified officeholders on the basis of religious *belief*, whereas Tennessee disqualified office holders on the basis of *status* as clergy. 435 U.S. at 627 (plurality op.). In his concurring opinion joined by Justice Marshall, Justice Brennan insisted that *Torcaso* controlled: "Because the challenged provision establishes as a condition of office the willingness to eschew certain protected religious practices, *Torcaso v. Watkins*, 367 U.S. 488 (1961), compels the conclusion that it violates the Free Exercise Clause." 435 U.S. at 632 (Brennan, J., concurring).

forbidden by the Constitution." *Id.* at 495-496 (citing *Wieman v. Updegraff*, 344 U.S. 183 (1952) (holding unconstitutional State of Oklahoma's requirement that public office holders take a loyalty oath that they have not been affiliated with a Communist organization)).

Relying on both free exercise and establishment values, this Court noted that "a great many of the early colonists left Europe and came here" in order "to escape religious test oaths and declarations." *Torcaso*, 367 U.S. at 490. Nonetheless, many of the colonies adopted test oaths of their own, which had the effect of "the formal or practical 'establishment' of particular religious faiths in most of the Colonies, with consequent burdens imposed on the free exercise of the faiths of nonfavored believers." *Id.* The Court reinforced its free exercise holding by noting that "[t]he 'establishment of religion' clause of the First Amendment means at least this: . . . No person can be punished for entertaining or professing religious beliefs or disbeliefs." *Id.* at 493 (quoting *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947)).

This Court "reaffirm[ed] that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.'" *Torcaso*, 367 U.S. at 495. This Court noted that one of its early justices, Justice James Iredell, advocated for the federal Constitution's prohibition on religious test oaths during the North Carolina Convention by pointedly asking: "'But how is it possible to exclude any set of men, without taking away that principle of religious

freedom which we ourselves so warmly contend for?'" *Id.* at n.10 (quoting 4 Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 194).

Just as Maryland's constitution did in *Torcaso*, the Wyoming Supreme Court has put "[t]he power and authority of the State . . . on the side of one particular sort of believers." 367 U.S. at 490. Candidates for judicial office whose religious beliefs allow them to perform same-sex wedding ceremonies are eligible for office; those candidates whose religious beliefs do not allow them to perform same-sex wedding ceremonies are disqualified. Such a religious test violates the federal Religion Clauses.

II. Compelling a Judge to Perform a Wedding Ceremony Violates the Free Exercise and Establishment Clauses.

A. The government may not compel citizens to participate in a religious ceremony.

It is axiomatic that the Free Exercise Clause "forestalls compulsion by law of . . . the practice of any form of worship." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Of course, the Establishment Clause reinforces this basic prohibition on government power because "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Lee v. Weisman*, 505 U.S. 577, 587 (1992)). *Cf., West Va. Bd. of*

Educ. v. Barnette, 319 U.S. 624, 634 (1943) (Free Speech Clause prohibits government from "forc[ing] an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one.").

As this Court understood when it ruled that states are constitutionally required to recognize same-sex marriages, the view that "[m]arriage . . . is by its nature a gender-differentiated union of man and woman . . . has been held – and continues to be held – in good faith by reasonable and sincere people." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015). Judge Neely belongs to this class of "reasonable and sincere people" whose religious conscience does not permit them to be the celebrant at a same-sex wedding ceremony. In *Obergefell*, this Court promised that "[t]he First Amendment ensures that religious . . . persons are given proper protection" so that "those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Id.* at 2607.

B. The Free Exercise Clause is independently violated because Wyoming punished a judge for refusing to perform a wedding ceremony for religious reasons that other magistrates could easily refuse to perform for secular reasons.

Under the Free Exercise Clause, government action triggers strict scrutiny if it fails to be both "neutral" and "generally applicable." *See Employment Div. v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi*

Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). Stated another way, even if the government's action is facially neutral, if it treats a substantial category of nonreligious conduct more favorably than similar religious conduct, then it is not generally applicable, and strict scrutiny is triggered. *Id.* at 546. *See also*, *e.g.*, *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (Alito, J.); *Ward v. Polite*, 667 F.3d 727, 738-40 (6th Cir. 2012); *Shrum v. City of Coweta*, 449 F.3d 1132 (10th Cir. 2006) (McConnell, J.); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004). Separately and independently, even if the government's action is facially neutral, if the government has acted in order to target religious conduct for adverse treatment or discrimination, then it is not neutral, and strict scrutiny is triggered. *Lukumi*, 508 U.S. at 534.

The government's censure of Judge Neely for her statement that her religious beliefs prohibit her from performing a same-sex wedding ceremony is neither neutral nor generally applicable. It therefore must be subject to strict scrutiny as to both the governmental interest and the existence of less restrictive alternatives.

The censure was not neutral because Judge Neely was targeted by the Wyoming Commission on Judicial Conduct and Ethics for punishment for her response to a reporter's question that her religious beliefs regarding marriage would not permit her to perform a same-sex wedding ceremony. Furthermore, language used by the Commission's attorney during the hearing indicate

bias against Judge Neely based on her religious beliefs regarding marriage. Pet. App. 196a; 144a.

The censure was not generally applicable. Even if Judge Neely's religious beliefs had not been targeted for discriminatory treatment, the government failed to apply the law in a generally applicable manner, as required by the Free Exercise Clause. Wyoming allows magistrates to refuse to perform a same-sex wedding for any reason, no matter how trivial. A magistrate can refuse to accept a request to perform a same-sex wedding ceremony because she is busy, watching a football game, running errands, or for no reason whatsoever. Given the unlimited menu of secular reasons that it finds acceptable for declining to perform a wedding ceremony, the government must accommodate religious reasons for refusing to perform a wedding ceremony.

The requirement of general applicability serves a vital function in protecting religious citizens. If a law used to penalize religious conduct is not scrutinized to ensure that it is truly generally applicable, a government is free to manipulate the application of facially neutral regulations in such a way as to prevent religious minorities from engaging in disfavored religious practices, while allowing citizens who adhere to popular religious faiths, or no faith, to continue their favored religious or secular practices. The government may not "devalue[] religious reasons . . . by judging them to be of lesser import than nonreligious reasons." *Lukumi*, 508 U.S. at 537.

At bottom, the government may not look the other way as magistrates opt out of performing wedding

ceremonies for trivial secular reasons, only to swoop down on a "reasonable and sincere" judge who opts out of performing wedding ceremonies because of her "utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Obergefell*, 135 S. Ct. at 2594, 2607.

C. The government's punishment of a judge for stating that her religious beliefs prevent her from performing same-sex wedding ceremonies does not survive strict scrutiny.

The government must demonstrate that it has a compelling interest, unachievable by a less restrictive alternative, for punishing Judge Neely because her religious beliefs prevent her from performing same-sex wedding ceremonies. *Amici* agree that the state does not have a compelling interest in this case, but even if it did, the government action here cannot survive strict scrutiny because less restrictive alternatives exist. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014) (finding it "unnecessary to adjudicate this issue [of compelling interest]", but instead would "assume that the interest . . . is compelling" and "proceed to consider" whether the government was using the least restrictive means of achieving that interest).

Of course, recusal is a time-tested means for judges to remove themselves from situations in which their personal beliefs, relationships, or pecuniary interests create a realistic doubt whether they will adjudicate a particular legal matter impartially. While

formal recusal is not necessary because magistrates simply decline to perform weddings for any and all reasons, Judge Neely is simply exercising an informal recusal due to her religious conscience. Furthermore, Judge Neely has consistently affirmed that she will readily refer to other magistrates who stand ready to perform same-sex wedding ceremonies. The supply of Wyoming magistrates far outpaces the demand for same-sex wedding ceremonies by orders of magnitude. For these reasons, less restrictive alternatives exist for achieving any legitimate state interest without punishing Judge Neely for holding religious beliefs that prevent her performing same-sex wedding ceremonies.

II. Without This Court's Intervention, the Decision Below Is Likely to Encourage Other State Entities to Punish Judges and Judicial Candidates for Their Religious Beliefs Regarding Marriage.

A. Other states are targeting judges whose religious beliefs prohibit their performing same-sex wedding ceremonies.

Several state judicial ethics boards have issued advisory opinions that judges who decline to officiate at same-sex wedding ceremonies for reasons of religious conscience may be subject to discipline, as follows[9]:

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[9] For a comparative discussion of these opinions, *see* Cynthia Gray, *Top Judicial Ethics Stories of 2015*, Judicial Conduct Reporter, Vol. 37, No. 4 (Winter 2016), 9-11, http://www.ncsc.org/~/media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/JCR/JCRWinter2016.ashx (last visited Aug. 30, 2017).

- The Supreme Court of Ohio Board of Professional Conduct stated that (1) "a judge who performs civil marriages may not refuse to perform same-sex marriages, while continuing to perform opposite-sex marriages, based upon his or her personal, moral, or religious beliefs"; and (2) a judge who discontinues performing all marriages to avoid marrying same-sex couples based on religious beliefs may be seen as manifesting bias and may be disqualified from cases presenting an issue involving sexual orientation. Ohio Adv. Op. 15-1, 2015 WL 4875137, at *5 (Aug. 7, 2015).

- The Arizona Supreme Court Judicial Ethics Advisory Committee stated that a judge may not decline to marry a same-sex couple unless he stopped marrying all couples, with the possible exception of family and friends. The advisory opinion specifically stated that this rule applied to judges "with sincerely held religious belief that marriage is the union of one man and one woman." Ariz. Jud. Adv. Op. 15-01, 2015 WL 1530659, *1 (Mar. 9, 2015).

- The Nebraska Judicial Ethics Committee stated that the judicial code does not permit a judge to refuse to perform same-sex marriages, "even if the judge states that the reason is based on sincerely held religious beliefs." Neb. Jud. Ethics Comm. Op. 15-1 (June 29, 2015), *available at* https://supremecourt.nebraska.gov/sites/default/files/ethics-opinions/Judicial/15-1_0.pdf (last visited August 30, 2017).

- The Deputy Counsel of the Pennsylvania Judicial Conduct Board has opined that "a judge who decides not to perform wedding ceremonies for same-sex couples must opt out of officiating at all wedding ceremonies." Furthermore, a judge who opts out of officiating all wedding ceremonies after previously publicly declaring her views about solemnizing weddings must disclose her "change in position about performing wedding ceremonies because it may be perceived as relevant to the judge's ability to rule impartially" in cases in which the judge knows that a party is gay or lesbian. The specific example given is when the judge is hearing a landlord-tenant dispute and knows the landlord is gay or lesbian, which necessitates that the judge must disclose her "change in position about performing wedding ceremonies." Elizabeth A. Flaherty, *Impartiality in Solemnizing Marriages, in Judicial Conduct Board of Pennsylvania Newsletter*, No. 3 (Summer 2014), http://judicialconductboardofpa.org/wp-content/uploads/JCB_Summer_2014_Newsletter.pdf (last visited August 30, 2017).

- The Wisconsin Supreme Court Judicial Conduct Advisory Committee has issued an advisory opinion that judges may not refuse to perform same-sex weddings if they perform opposite-sex weddings because of their religious beliefs, but that they may decline to perform all weddings. Wis. Sup. Ct. Jud. Cond. Adv. Comm. Op. 15-1, 2015 WL 5928528, at *1.

- The Louisiana Supreme Court Committee on Judicial Ethics has issued a similar opinion. Candace B. Ford, *Marriage, Religion, and the Art of Judging in Post-*Obergefell *Louisiana*, 43 S.U.L. Rev. 291, 314 (2016) (quoting La. Sup. Ct. Comm. on Jud. Ethics, Formal Op. 263 (2015)).

In addition to Wyoming, a judge has been disciplined, or has been recommended for discipline in two other states, in part, because he stated that he would not be able to perform a same-sex wedding ceremony for reasons of religious conscience.

- Washington State Judge Gary Tabor "during an administrative meeting attended only by judges and some court personnel" stated that he felt "uncomfortable" performing same-sex marriages and asked his fellow judges to officiate in his stead in the future. *In re The Honorable Gary Tabor*, Jud. Disp. Op. 7251-F-158, 2013 WL 5853965, at *1 (Wash. Comm'n on Jud. Conduct Oct. 4, 2013). His comment was leaked to the press to which he eventually responded. The Washington State Commission on Judicial Conduct investigated. Judge Tabor agreed to accept the least severe disciplinary measure of "admonishment" and not to perform any weddings in the future. *Id.* at *4.

- The Oregon Commission on Judicial Fitness and Disability recommended that Oregon State Judge Vance Day be removed from office because, as one of several charges, he indicated to his clerks that he would not perform same-sex weddings and told them to refer

> such requests to other judges. *Inquiry Concerning a Judge Re The Honorable Vance D. Day*, No. SO 63844 (Or. Sup. Ct., oral arg. June 14, 2017).

The message to judges and attorneys who share Judge Neely's religious beliefs regarding marriage is clear: Individuals who hold a religious belief that marriage is between a man and a woman need not apply for judicial office. Without this Court's intervention, more states will establish a religious test for judicial office as Wyoming has done.

B. Performing wedding ceremonies is not a judicial function.

Despite these advisory opinions to the contrary, solemnizing marriages is not a judicial function. A judge, therefore, has no duty to solemnize marriages and cannot be disciplined for refusing to do so.

The essence of the judicial function is the deciding of cases and controversies. By its nature, the judicial function is limited to controversies between adversarial parties. The judicial power can be exercised only by a judicial officer who is authorized by the state to act as a judge.

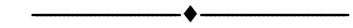
But the role of the officiant at a wedding is different in both form and purpose from the exercise of the judicial function. The Illinois Supreme Court, for example, long ago explained that performing marriages bears no relationship to the judicial function, when it wrote:

> Under our statute a judge of any court of record is included among those authorized to celebrate a marriage. There is no statute imposing that function upon him as a duty and no fee for such service is provided by law. He may, at his pleasure, perform such a ceremony or refuse to do so. If he officiates at a marriage it is his voluntary act. It is not a part of, nor in any way connected with, his judicial duties, but is merely the exercise of a privilege conferred by the statute.

Cummings v. Smith, 368 Ill. 94, 104, 13 N.E.2d 69, 74 (1937).

State laws expressly permit persons other than judges to bear witness on behalf of the state to the formation of a marriage contract. For example, clergy often officiate at a wedding. Persons other than judges are authorized to solemnize weddings because marriage is a contract between the parties, who are neither adversarial nor seeking to adjudicate a matter. The requirement that marriages be solemnized before a person authorized to officiate, and before two witnesses, is the means by which the state seeks to ensure that the parties have freely assented to the formation of the marriage contract, and it ensures that the necessary paperwork is delivered to the government for its recordkeeping.

In sum, the solemnization of marriage is not a "judicial duty." It is, rather, a discretionary authority or privilege conferred on – among other individuals – judicial officers and clergy.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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