**IN THE SUPREME COURT**
**STATE OF WYOMING**

**OCTOBER TERM, A.D. 2015**

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| An Inquiry Concerning the Honorable Ruth Neely Municipal Court Judge and Circuit Court Magistrate, Ninth Judicial District, Pinedale, Sublette County, Wyoming<br><br>Judge Ruth Neely<br>Petitioner,<br><br>v.<br><br>Wyoming Commission on Judicial Conduct and Ethics<br>Respondent. | No. J-16-0001 |

# BRIEF OF *AMICI CURIAE* MAYOR AND TOWN COUNCIL MEMBERS OF THE TOWN OF PINEDALE AND SUTHERLAND INSTITUTE CENTER FOR FAMILY & SOCIETY IN SUPPORT OF THE HONORABLE RUTH NEELY

William H. Twichell, Esq.
Wyoming State Bar # 5-1896
P.O. Box 1219
128 W. Pine St.
Pinedale, WY 82941
307-367-2414 Office
307-367-2413 Fax
wtwichel@wyoming.com

*Counsel for Amici Curiae*

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The conclusion of the Commission on Judicial Conduct and Ethics in this case is that the cost of providing public service as a judge is to relinquish the ability to make "*statements*" (Order, p. 4) that the Commission considers (in its seemingly unbounded discretion) insufficiently supportive of same-sex marriage. This dichotomy, which posits that a judge cannot faithfully discharge the judicial function without bias if she expresses her religious beliefs about marriage, is a false one.

Indeed, it is contrary to the overwhelming and consistent practice in the United States of accommodating, wherever possible, the expression of religious views and the exercise of religious commitments. In this brief, *amici* summarize some of the many legal accommodations made to allow citizens to live out their faith in all aspects of their lives, which have been understood to be entirely consistent with the ability of governments to advance valid state interests. This recital will also make clear that government employees, state actors and public officials have been granted such exemptions so that the choice proposed by the Commission—relinquish rights or serve as a judge—will be unnecessary.

The constitutional principles outlined control the decision here, and the statutory examples demonstrate that accommodations of religious practice and expression are appropriate and workable, as they would be in this case. In sum, there is absolutely no reason that a judge like Judge Neely, who has never manifested improper bias in her decisions and official conduct, should not be free to speak and act in accordance with her deeply held convictions.

## I. The Longstanding Practice in the United States is to Accommodate as Broadly as Possible the Religious Exercise of Citizens.

The basic conceptual principles underlying the Constitutional command to accommodate religious expression and practice come from the text of the United States and Wyoming Constitutions. The U.S. Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., amdt. 1. Wyoming's Constitution provides: "Perfect toleration of religious sentiment shall be secured, and no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship." Wyo. Const. art. 21, sec. 25; *see also* Wyo. Const., art. 1, sec. 18.

As an eminent legal scholar of religious liberty has noted, the practice of accommodating religious speech, expression and practice goes back to colonial times: "The colonies exempted Quakers from swearing oaths and exempted dissenters from paying taxes to support the established church. They exempted members of pacifist faiths from bearing arms in person, although those conscientious objectors had to perform alternative service or pay extra taxes to support the war effort." Douglas Laycock, *The Religious Exemption Debate* 11 RUTGERS JOURNAL OF LAW & RELIGION 139, 140 (2009). As a recent historian's expert report in litigation from Washington explains, "even in areas of utmost significance, accommodations of religious citizens have not prevented the nation or individual states from meeting important policy goals." Mark David Hall, Expert Report, *Ingersoll v. Arlene's Flowers*, No. 13-2-00953-3 at 5

(Washington Superior Court 2014). Drawing on the expert report and other sources, this brief highlights significant examples.

Military Service. It is hard to imagine a government interest more compelling than its own military defense, and compulsory military service requirements are understood as a necessary part of that defense. Despite this undoubtedly valid interest, accommodations for conscientious objectors to military service are an accepted feature of the law. Like Professor Laycock, Dr. Hall explains that some form of exemption from compulsory military service was recognized as early as the 1670s in Rhode Island, North Carolina and Maryland. During the Revolutionary War, Congress expressly accepted this kind of accommodation. The Selective Draft Act of 1917 includes a combat exemption for members of "any well recognized religious sect or organization at present organized and existing whose creed or principles forbid its members to participate in war in any form." *United States v. Jakobson*, 325 F.2d 409, 413 (2d Cir. 1963), *aff'd sub nom. United States v. Seeger*, 380 U.S. 163 (1965); *see also* Expert Report at 15-18. The Supreme Court has approved this type of exemption. *Selective Draft Law Cases*, 245 U.S. 366, 390 (1918). The Wyoming Constitution contains a similar exemption for mandatory militia service, specifying that "all residents having scruples of conscience averse to bearing arms shall be excused therefrom upon conditions as shall be prescribed by law." Wyo. Const., art. 17, sec. 1.

Expressions of Allegiance. An analogous situation involves laws enacted many decades ago which required saluting the American flag and reciting the Pledge of Allegiance. In 1943, the U.S. Supreme Court required school officials to exempt students

with religious objection to participating in those observances, and the Court specifically disavowed "forc[ing] citizens to confess by word or act their faith" in government-mandated orthodoxy of any type. *West Virginia v. Barnette*, 319 U.S. 624 (1943).

School Attendance. It is widely understood that providing educational opportunities is an important function of state governments, at least in part because of the recognition that an educated citizenry is necessary to ordered liberty. Mandatory education laws have been enacted to advance this interest, but here too accommodations have been made to ensure school attendance requirements don't infringe religious practice. In 1925, the Supreme Court invalidated an Oregon law that banned all private schools, including parochial schools. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In 1972, the Court invalidated a Wisconsin requirement that Amish children attend school after the eighth grade as a violation of their religious freedom. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Carrying on this venerable tradition, Wyoming's compulsory attendance law specifically exempts students in private schools, Wyo. Stat. §21-4-102, which are defined to include "parochial and church or religious schools." Wyo. Stat. §21-4-101.

Prohibition of Controlled Substances. During Prohibition, Congress included in the Volstead Act a specific accommodation of sacramental or ceremonial uses of alcoholic beverages: "Nothing in this title shall be held to apply to the manufacture, sale, transportation, importation, possession, or distribution of wine for sacramental purposes, or like religious rites." National Prohibition Act, 41 Stat. 305-323, ch. 83. More recently, a unanimous U.S. Supreme Court has held that, under the federal Religious Freedom Restoration Act, a small religious sect could use a substance in their rituals that is

"exceptionally dangerous," despite its being classified as a controlled substance under federal law. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 US 418 (2006). In its decision, the Court pointed to a statutory exemption in drug laws for the use of peyote in Native American Churches. *Id.* at 433. This exemption was provided by Congress in 1994 in the American Indian Religious Freedom Act. 42 U.S.C. §1996a. Wyoming law recognizes the same exemption: "Nothing in this act shall be construed to prohibit the delivery, possession or use of peyote in natural form, when delivered, possessed or used for bona fide religious sacramental purposes by members of the Native American Church of Wyoming." Wyo. Stat. §35-7-1044.

Anti-Discrimination Provisions. Our society is appropriately concerned that individuals are not denied employment, housing and essential services because of invidious discrimination based on characteristics unrelated to fitness for these things, such as racial bias. Governments have enacted anti-discrimination laws in an attempt to address this concern. Yet, even in this important matter, statutes and court interpretations have often sought to ensure that general anti-discrimination principles not burden the free-exercise of religion and will accommodate conscientious objections.

At the federal level, Title VII of the Civil Rights Act of 1964 does not apply "to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. §2000e-1. Wyoming's employment discrimination law similarly does not apply to "religious organizations or associations." Wyo. Stat. §27-9-102.

Further, federal law constrains employers' ability to take adverse employment action because of religion, which is defined as "all aspects of religious observance and practice, as well as belief," unless "an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. §2000e.

Healthcare. After the U.S. Supreme Court held there was a constitutional right for a woman to have an abortion, Congress enacted conscience protections to ensure that medical personnel would not be forced to participate in abortions. 42 U.S.C. §300a-7(c)(1). Wyoming law similarly provides: "No private hospital, clinic, institution or other private facility in this state is required to admit any patient for the purpose of performing an abortion nor to allow the performance of an abortion therein." Wyo. Stat. §35-6-105. Also:

> No person shall, in any way, be required to perform or participate in any abortion or in any act or thing which accomplishes or performs or assists in accomplishing or performing a human miscarriage, euthanasia or any other death of a human fetus or human embryo. The refusal of any person to do so is not a basis for civil liability to any person. No hospital, governing board or any other person, firm, association or group shall terminate the employment of, alter the position of, prevent or impair the practice or occupation of, or impose any other sanction or otherwise discriminate against any person who refuses to perform or participate in any abortion or in any act or thing which accomplishes, performs or assists in accomplishing or performing a human miscarriage, euthanasia or any other death of a human fetus or embryo.

Wyo. Stat. §35-6-106. At least 44 other states include similar protections in their laws. *See Stormans, Inc. v. Wiesman*, No. 15-862 (U.S. S. Ct. 2016), Brief of *Amici Curiae* 43 Members of Congress in Support of Petitioners (statutes collected in appendix).

Abortion is only one example. Federal and state laws accommodate conscientious objections in the context of sterilization services, family planning services, provision of contraceptives, participation in assisted suicide, participation in capital punishment, provision of infertility treatment, stem cell research, cloning, hormone therapy, *in vitro* fertilization services, and other medical services. *Id.*

Other Provisions. Congress has also required that decisions about land use and even prison regulations that create a substantial burden on religious interests must be justified by compelling interest and be narrowly tailored to advance that interest. 42 U.S.C. §2000cc, *et seq*. The portion of this statute applicable to prisoners was challenged but unanimously upheld by the U.S. Supreme Court. *Cutter v. Wilkinson*, 544 U.S. 709 (2005). In a case involving animal sacrifice, the Court held that legitimate concerns about public health had to yield to the religious practices of a small church. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 538-539 (1993). When the Department of Health and Human Services mandated that employers provide no-copay insurance coverage for contraception, a closely-held business that objected on religious grounds to paying for some drugs that they believed had an abortifacient effect, challenged the requirement. The Court, applying the federal Religious Freedom Restoration Act, held that the employers' religious conflict had to be accommodated. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

In short, accommodations for the free exercise of religion, including protections of religious expression, are embedded throughout our statutory and common law. Indeed, the laws of the United States have consistently recognized that the "generous and sympathetic accommodation of religion is a crucial part of, not an obstacle to, the practice and promotion of civil rights." Richard W. Garnett, *Religious Accommodations And-And Among-Civil Rights: Separation, Toleration and Accommodation* 88 SOUTHERN CALIFORNIA LAW REVIEW 493 (2015).

Whatever the potential impact of Judge Neely's desire to defer to another official rather than perform same-sex marriages, the law is clear that accommodating religious expression and practice is appropriate even when doing so may have incidental effects on others who do not share the religious beliefs of those being accommodated. As Professor Michael McConnell has noted: "Religious accommodations often impose burdens on third parties." *Prof. Michael McConnell (Stanford) on the Hobby Lobby Arguments* WASHINGTON POST (March 27, 2014) at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/27/prof-michael-mcconnell-stanford-on-the-hobby-lobby-arguments/. These include such things as the burden placed on nonreligious employees when staffing around a religious employee's day of worship, a non-conscientious objector's increased possibility of being drafted into military service, a woman having to find alternative place to have an abortion if a religious hospital does not perform them, and potential health risks associated with animal sacrifice. *Id.* Many of these impacts involve significant state interests but that has not prevented courts and legislatures from approving the accommodations.

Of course, each of these examples arguably presents more of an actual burden than the one in this case since here anyone seeking to have a same-sex marriage solemnized could be accommodated by others willing to do so in the area. Absent tangible harm that could not be demonstrated in this case, all that is left is speculative dignitary harm that amounts to a claim that one experiences harm anytime someone disagrees with your view of marriage. That is hardly a legitimate reason to depart from the practice of accommodating alternative views by declining to compel government-approved expression.

In any event, people of faith have a right not to be stigmatized for their views just as do members of the LGBT community, and the rights of both can be easily accommodated by applying the common-sense principle that state laws will not compel an individual, even a public official, to personally participate in a ceremony that promotes an understanding of marriage with which they do not agree.

## II. Many Religious Accommodations Are Provided to Public Officials and Government Employees.

In addition to the general protections outlined above, the practice of the United States and many States has been to provide accommodations to protect the religious exercise and expression of public officials and government employees. This section outlines some examples.

Religious Tests. One of the most venerable Constitutional protections for the religious freedom of public officials, and one clearly implicated in this case, predates the First Amendment. It provides: "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. The Wyoming Constitution is also explicit on this point: "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, sec. 18. Such clear direction surely precludes the removal of a judge from office based solely on her statement of opinion about marriage informed by religious belief.

Mandatory Oaths. As the quote from Professor Laycock at the outset of the previous section indicates, some of the colonies acted to prevent religious objectors from mandatory oaths. These kinds of practices were continued after independence, and the U.S. Constitution itself contains an important religious accommodation, that notwithstanding the undoubted importance of ensuring that all officers of the United States support the Constitution, the requirement that they be "bound by oath" is qualified to allow for those who have religious objections to swearing oaths to affirm that duty instead. U.S. Const., art. VI. Wyoming's Constitution includes a similar provision. Wyo. Const., art 6, sec. 20.

Military Protections. In the highly regulated arena of the military, some of our most critical government employees are provided significant religious accommodations. Congress has directed the Armed Forces to "accommodate the conscience, moral principles, or religious beliefs of a member of the armed forces in so far as is practicable, and may not use such expression of belief as the basis of any adverse personnel action" (with exceptions for military readiness, unit cohesion, good order and discipline). Pub. L. No. 112-239; Pub. L. No. 113-66. Congress has also directed the military to allow

servicemembers to wear religious apparel while in uniform (assuming it does not interfere with the member's duties). 10 U.S.C. §774. And the Department of Defense allows a health care provider to transfer the care of a patient to another provider when the first provider disagrees with the patient's wishes as a matter of conscience. Department of Defense Directive No. 6000.14 (Sep. 26, 2011).

Other Workplace Accommodations. As previously noted, Title VII requires reasonable accommodations by employers of employees' religious practice and expression. 42 U.S.C. §2000e(j). Crucially, this applies to public employers. In one case, an Internal Revenue Service employee was allowed to decline to process certain tax exemption applications on religious grounds. *Haring v. Blumenthal*, 471 F. Supp. 1172 (D.D.C. 1979). In another, the Ninth Circuit held that the Postal Service needed to preserve the employment status of postal employees who objected to processing draft registrations for religious reasons. *American Postal Workers Union v. Postmaster General*, 781 F.2d 772 (9th Cir. 1986); *see also McGinnis v. U.S. Postal Service*, 512 F. Supp. 517 (N.D. Cal. 1980).

Marriage Solemnization. It is, of course, only very recently, with the mandate of same-sex marriage, that conflicts between the duties of marriage officiants and their religious convictions began to arise. Many states have addressed those conflicts. In 2013, when the Delaware legislature enacted a same-sex marriage law, it specifically exempted public officials from performing these marriages: "nothing in this section shall be construed to require any person, including any clergyperson or minister of any religion, authorized to solemnize a marriage to solemnize any marriage, and no such authorized

person who fails or refuses for any reason to solemnize a marriage shall be subject to any fine or other penalty for such failure or refusal." Del. Code, title 13, §106. The protection created by this law applies to "any person," which includes judges and justices of the peace. In 2015, when Utah was under court order to provide marriage licenses to same-sex couples, the legislature enacted a statute allowing county clerks to designate a "willing" officiant to perform marriages so as to avoid requiring objecting clerks or other employees to do so. Utah Code §17-20-4. More recently, North Carolina allowed magistrates and assistant and deputy registers of deeds to recuse themselves from having to perform any marriage "based upon any sincerely held religious objection," and the law prevents their being punished for any such recusal. N.C. Gen. Stat. §51-5.5. These laws demonstrate that states may accommodate public officials' religious concerns in a workable way without inhibiting the expression and practice of their beliefs or punishing them for their statements or actions.

Indeed, these common-sense provisions for recusal serve important government interests. By allowing such an accommodation in this instance, Wyoming would be acting consistently with state and federal law, would ensure that religious people are not excluded as public officials solely on the basis of their beliefs, would avoid punishing long-serving officials who could not have foreseen the conflict that arose when the definition of marriage was changed, and would ensure a large pool of officials to perform these functions. *See* Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exceptions to Same-Sex Marriage Laws*, 5 NORTHWESTERN JOURNAL OF LAW & SOCIAL POLICY 318, 327 note 44 (2010).

## III. Accommodating the Religious Exercise of Public Officials, State Actors, and Government Employees Does Not Violate Constitutional Principles.

It is also settled law that accommodating Judge Neely's religious beliefs would not transgress other constitutional provisions.

For instance, the U.S. Supreme Court has repeatedly held that accommodating religious expression and practices does not conflict with the Establishment Clause. For instance, three decades ago the Court "recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136, 144-145 (1987). This statement drew on the Court's earlier observation that the "limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 673 (1970). Later in 1987, the Court decided a direct challenge to the religious exemption of the 1964 Civil Rights Act. There, the Court said that the law was "neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987). The Court reiterated the principle that religious accommodations do not violate the Establishment Clause in *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

Allowing Judge Neely and other public officials to express their religious convictions and act consistently with them is also neutral between different sectarian claims and between religion and non-religion. It also furthers the purpose of preventing

government interference with religious exercise. Here, the Commission's proposed rule—removing a judge solely for religious expression (or even for possibly stepping back from solemnizing a marriage in favor of allowing another willing officiant to perform the wedding)—would be dramatically intrusive into religious expression and practice.

Accommodating Judge Neely's religion would not interfere with the right to same-sex marriage recently announced by the Supreme Court in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). As noted earlier, exemptions from the duty to provide abortions are commonplace, notwithstanding the U.S. Supreme Court having designated access to abortion a constitutional right. Nothing in *Obergefell* directs or even implies that particular officials must actually perform the marriages when the state provides full access to that right. In fact, the Court's opinion expressly credits the belief Judge Neely expressed about marriage as being held "in good faith by reasonable and sincere people here and throughout the world." *Id.* at 2594. Surely a belief treated so respectfully by the Court, as it announced its decision on the same-sex marriage question, could not be so repugnant as to justify removing a judge for expressing it.

## CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reject the recommendations of the Commission.

Respectfully submitted this 4th day of May, 2016.

William H. Twichell, Esq.
Wyoming State Bar # 5-1896
P.O. Box 1219
128 W. Pine St.
Pinedale, WY 82941
307-367-2414 Office
307-367-2413 Fax
wtwichel@wyoming.com

Counsel for Amici Curiae

**CERTIFICATE OF SERVICE**

I, William H. Twichell, certify that on May 6th, 2016, I served the foregoing Brief via U.S. mail, postage prepaid, on the following:

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

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

Timothy K. Newcomb, Esq.
P.O. Box 928
170 North Fifth
Laramie, WY 82073
newcomb@appellateconsultation.com
*Co-Counsel for Commission on Judicial Conduct and Ethics*

Herbert K. Doby, Esq.
P.O. Box 130
Torrington, WY 82240
dobylaw@embarqmail.com
*Attorney for the Honorable Ruth Neely*

James A. Campbell, Esq.
Kenneth J. Connelly, Esq.
Douglas G. Wardlow, Esq.
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
jcampbell@adflegal.org
kconnelly@adflegal.org
dwardlow@adflegal.org
*Attorneys for the Honorable Ruth Neely*