NO. 17-195

IN THE
Supreme Court of the United States

JUDGE RUTH NEELY,

Petitioner,

v.

WYOMING COMMISSION ON JUDICIAL CONDUCT AND ETHICS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Wyoming

REPLY BRIEF FOR PETITIONER

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This case is about the protection that the First Amendment provides when a state punishes a judge for stating her religious conflict with participating in ceremonies with "spiritual significance." *Turner v. Safley*, 482 U.S. 78, 96 (1987).

Respondent, however, strains to make this case about something else, suggesting that Judge Neely seeks a right for her and other judges to "apply the law in a partial or biased manner" when performing core judicial duties like adjudicating cases. BIO 11; *accord id.* at 25 (claiming that Judge Neely "refus[es] to apply the law equally"). Four brief points refute that narrative.

First, Judge Neely seeks no right to apply the law partially. Rather, she wants to refer requests to personally officiate weddings that conflict with her faith. That no more constitutes an impartial application of the law than a judge who recuses herself from a case because of a conflict of interest. *See* Pet.App.135a-140a (reprinting the judicial disqualification rule).

Second, judges apply the law when they adjudicate cases. But this case has nothing to do with adjudication. In fact, it is undisputed that Judge Neely will recognize same-sex marriages in her adjudicative role and that she has never manifested bias toward any litigant. Pet.App.174a-175a, 178a, 182a, 186a, 189a.

Third, performing weddings is unlike anything else that judges do. It is not a judicial duty but a discretionary authority widely bestowed upon both judges and non-judges, including not just clergy, Wyo. Stat. § 20-1-106(a), but virtually anyone who requests permission to perform a wedding, Pet.App.146a; *see also* Christian Legal Soc'y Am. Br. 23-24 ("CLS Br."). Furthermore, judges have practically limitless discretion when choosing whether to solemnize a marriage: they may decline a request for nearly any secular reason imaginable. *See* Pet. 6-7.

Fourth, neither Judge Neely's religious beliefs about marriage nor her limited religious conflict with performing same-sex weddings constitutes bias against a class of people. Her "decent and honorable" religious convictions, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015), are rooted solely in a view about the nature and definition of marriage—not in hostility toward LGBT individuals. This absence of bias is confirmed by the resounding support that Judge Neely has received from LGBT citizens in her community. Pet.App.185a-190a.

These four points demonstrate that affirming Judge Neely's narrow First Amendment claims would give no judge a license to ignore the law. It would merely ensure that judges cannot be punished for voicing an objection to "personally participat[ing] in celebrating" what their faith proscribes. Pet.App.74a n.17. The First Amendment guarantees them this right.

I. Judge Neely Raises a Strong Free-Exercise Claim.

A. The state has created a system of "individualized exemptions" for judges who perform weddings. Pet. 26-29. Respondent denies this, arguing that "judges may *never* act in a way that manifests partiality or bias." BIO 14. That argument ignores the breadth of the Code's ban on bias and the state's practice of allowing magistrate judges to decline all sorts of wedding requests. Rule 2.2 bans *all* forms of "[]partiality," Pet.App.132a, and Rule 2.3 prohibits "bias or prejudice" on *any* ground, Pet.App.133a (forbidding all bias "including but not limited to bias . . . based upon" twelve grounds listed). But the state permits magistrate judges (like Stephen Smith) to categorically refuse to marry strangers, Pet.App.6a, even though those refusals manifest bias by excluding "outsiders." And the state allows other magistrate judges to decline to marry people simply because they "don't feel like" performing their weddings, Pet.App.160a, even though those refusals exhibit partiality against requesters that judges do not want to help. The state thus unquestionably permits exemptions to the Code's unbounded prohibitions on partiality and bias.[1]

B. Insisting that the state has acted neutrally toward religion, Respondent suggests that only

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[1] The Wyoming Supreme Court's analogy to *Batson v. Kentucky*, 476 U.S. 79 (1986), is unavailing. BIO 15 n.3 (quoting Pet.App.63a). The *Batson* rule prohibits bias only on two specific grounds (race and sex), Pet.App.63a-64a, but Rule 2.3 forbids bias of any kind. Equating the two turns *Batson* on its head.

regulations adopted with the "object" of "suppress[ing] . . . religion" violate the Free Exercise Clause. BIO 14 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993)). But free-exercise protection equally "forbids subtle departures from neutrality, and covert suppression of particular religious beliefs." *Lukumi*, 508 U.S. at 534 (quotation marks and citations omitted). To unmask such religious hostility, courts consider "the effect of a law in its real operation," *id.* at 535, and "the interpretation given" it by the state, *id.* at 537.

Here, Judge Neely could tell any same-sex couple who might ask her to marry them that she "do[es]n't feel like" solemnizing their marriage. Pet.App.160a. Or she could say that she has a prior engagement. Pet.App.153 (indicating that Judge Haws declined to solemnize a same-sex marriage for that reason). It is only because Judge Neely disclosed her religious conflict that Respondent sought to discipline her. Yet the state may not "single[] out" her religious conflict "for discriminatory treatment," *Lukumi*, 508 U.S. at 538, or "devalue[] religious reasons" for declining wedding requests "by judging them to be of lesser import than nonreligious reasons," *id.* at 537. The state, however, has done that here and thereby failed to act neutrally toward religion.[2]

C. Respondent claims that the decision below "is consistent with every tribunal to confront the

[2] Other facts discussed in the petition (at 28) confirm that Respondent targeted Judge Neely because of her religious beliefs.

question" presented here. BIO 9. That is not true. Aside from the Wyoming Supreme Court, no tribunal "has considered whether the Free Exercise Clause forbids" states from "telling judges who perform weddings that they cannot decline to solemnize same-sex marriages for religious reasons." Pet. 22. The Wyoming Supreme Court's error on that important question is a matter of pressing national concern. Pet. 21-25; CLS Br. 19-23. Indeed, Respondent does not deny that the decision below has created much angst among Catholic, Protestant, Mormon, Jewish, and Muslim judges.[3]

Respondent also suggests that Judge Neely cannot prevail on her free-exercise claim because she is not "compelled to serve" as a magistrate judge. BIO 13 n.2 (quoting Pet.App.29a). This Court long ago disposed of that argument. "[T]hat a person is not compelled to hold public office cannot possibly be an excuse for barring [her] from office by state-imposed criteria forbidden by the Constitution." *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961).

II. Judge Neely Raises a Strong Free-Speech Claim.

A. Respondent argues that Judge Neely engaged not in speech but in "conduct" by "stat[ing] a policy" on performing weddings. BIO 16. The undisputed facts say otherwise. In response to a reporter's loaded

[3] The non-judicial religious-accommodation cases cited in the petition (at 29-30) are relevant because performing weddings is not judicial in nature. *See* Sutherland Institute Am. Br. 13-14 (discussing those cases in greater detail).

question whether she was "excited" to perform same-sex weddings, Judge Neely said that she would not be able to do that, and when asked why, she revealed her religious convictions about marriage. Pet.App.171a, 175a. At that time, Judge Neely was in a position of uncertainty, waiting for guidance on whether she must perform weddings that conflict with her faith. Pet.App.152a, 169a. She did not announce a policy merely by responding to a reporter's efforts to expose her religious beliefs.

Tellingly, Respondent does not cite any remotely relevant case to support this argument. It relies only on *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) ("*FAIR*"). BIO 17. But the law schools there had a clear policy of refusing to provide military recruiters with access to their campuses. And the schools claimed to "'express[]' their disagreement" with the military's hiring policies through their conduct of "treating military recruiters differently from other recruiters." *FAIR*, 547 U.S. at 66. That expressive-conduct claim is far afield from this case. Judge Neely engaged in speech by responding *through words* to a reporter's inquiry about a matter of public concern. Unlike the law schools in *FAIR*, she is not claiming to speak through conduct.

B. Respondent also contends that *Garcetti v. Ceballos*, 547 U.S. 410 (2006), precludes First Amendment protection for Judge Neely's response to the reporter because that speech "concern[ed] how she would perform her official duties." BIO 18. Respondent's reliance on the *Pickering-Garcetti* line

of cases, which involve the free-speech rights of public employees, is misplaced. Respondent did not act as Judge Neely's employer. It enforced rules that regulate all judges in the state, regardless of who employs them. Indeed, Respondent attempted to discipline Judge Neely not just as a magistrate judge of a state court but also as a municipal judge employed by a town. And the state punished her solely for mentioning a religious conflict with a function that *the state does not pay her to perform*. Pet.App.6a. Where, as here, the government acts not as an employer but as a regulator, the *Pickering-Garcetti* analysis does not apply.

Moreover, Judge Neely's response to the reporter is protected speech. Under the *Pickering-Garcetti* line of cases, this Court has distinguished between a public official's speech *while* performing work functions (which is unprotected) and her off-duty speech *about* work functions (which is protected). The unprotected speech in *Garcetti* was a lawyer's memorandum written while performing (i.e., "pursuant to") his "official duties." 547 U.S. at 421. In contrast, *Garcetti* itself recognized that protected speech includes off-duty "expressions related to the speaker's job," *id.*, a point illustrated by many of this Court's other cases, *see, e.g.*, *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 413-16 (1979) (finding protected a teacher's statements to the principal about her employment); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 569-73 (1968) (finding protected a teacher's letter to the school board discussing school funding).

Judge Neely's speech falls on the protected side of the line: she expressed her religious beliefs about the meaning of marriage—an undoubted matter of public concern—not while performing a judicial duty but while hanging Christmas lights at home. That she referenced her religious beliefs' effect on her ability to solemnize marriages does not strip her speech of constitutional protection.

C. Respondent additionally argues that the *Pickering* balance tips in its favor. BIO 19. That, however, requires Respondent to show that Judge Neely's punishment is "necessary for [the judiciary] to operate efficiently and effectively." *Garcetti*, 547 U.S. at 419. But the court below already concluded that "there is no evidence of injury to respect for the judiciary" or to "any person." Pet.App.62a. Thus, Respondent has not made the requisite showing to prevail under *Pickering*.

III. Strict Scrutiny Is Not Satisfied.

A. Respondent contends that punishing Judge Neely furthers a compelling government interest because "there would be a 'loss of public confidence in the judiciary if the public knows that its judges are at liberty to pick and choose whom to serve.'" BIO 21 (quoting Pet.App.26a). Yet "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (quotation marks and alterations omitted). Here, the state allows other magistrate judges "to pick and choose" whom they will marry—by, for example, categorically refusing to marry people who they do not

know. Pet.App.6a. Respondent's own conduct thus shows that its asserted interest is not compelling here.

Three additional factors undermine Respondent's attempt to invoke the state's interest in preserving public confidence in the judiciary. First, as mentioned above, the court below recognized that "there is no evidence of injury to respect for the judiciary" in this case. Pet.App.62a. Second, the state's interest in maintaining the public's confidence in the judiciary is significantly decreased—if not nonexistent—where, as here, the facts cast no doubt on the judge's fairness in adjudicating cases. *See Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666 (2015) (noting that the strength of that interest "stems from" the need to preserve "the public's willingness to respect and follow [the judiciary's] decisions"). Third, Judge Neely has not expressed bias against any class of people. Pet. 37.[4]

B. Turning to narrow tailoring, Respondent argues that the state has "no less restrictive alternative than discipline" for Judge Neely. BIO 25 (quoting Pet.App.30a). But recusal through referral—which is what Judge Neely proposed to do if ever asked to solemnize a same-sex marriage, Pet.App.167a-169a—provides a readily available less

[4] Respondent's attempt to recast the issue/party distinction in *Republican Party of Minnesota v. White*, 536 U.S. 765, 775-78 (2002), *see* Pet. 37-38, as a difference between the "equal application of the law" and an "equal chance to persuade the court," BIO 22 & n.8, is unprecedented and in conflict with the decision below, Pet.App.18a-20a.

restrictive alternative. CLS Br. 18-19. Indeed, this is what judges already do when they have secular reasons—even trivial ones, like they just "don't feel like" it, Pet.App.160a—for declining to officiate a person's wedding. This accommodation is particularly appropriate here because, as the court below acknowledged, it is "not likely" that Judge Neely will receive a request to perform a same-sex wedding. Pet.App.57a.[5]

Respondent counters that accommodating Judge Neely "would undermine the fundamental function of the position." BIO 25 (quoting Pet.App.29a). But again, other magistrate judges, including those like Stephen Smith who *only* perform weddings, refuse to marry certain people. Pet.App.6a. That the state allows others to do this illustrates that the state's reasons for not accommodating Judge Neely are exaggerated.

Respondent also argues that the Code provisions at issue are narrowly tailored because they apply only when judges "manifest bias or prejudice in the performance of judicial duties." BIO 23 (quotation marks omitted). That is incorrect. Rule 1.2 applies to what judges say and do in both their "professional and personal" capacities. Pet.App.131a. And the court below read Rules 2.2 and 2.3 to punish a judge's response to a reporter while hanging Christmas lights at home. The staggering breadth with which the state

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[5] *Cf. Williams-Yulee*, 135 S. Ct. at 1671-72 (rejecting recusal as a less restrictive alternative because under the circumstances of that case "a flood" of recusal requests would have "disable[d]" the courts).

has construed those rules is the antithesis of narrow tailoring.

Respondent lastly contends that the court below "ensure[d] narrow tailoring"—and in fact accommodated Judge Neely—by "allow[ing] her to perform all judicial functions *other* than marriage." BIO 23; *see also id.* at 9. But performing marriages, as Respondent acknowledges, is the "*raison d'être* for her appointment as a part-time magistrate." BIO 24. So by taking away her ability to do that, the court below guaranteed that she would lose that position. That hardly qualifies as an accommodation.

IV. This Case Is a Clean Vehicle.

Respondent argues that the Wyoming Supreme Court's application of strict scrutiny poses "problems for further review in this case." BIO 10. But if the court below was correct in concluding that strict scrutiny is satisfied, any lesser standard will be satisfied too. There is thus no good reason why the application of strict scrutiny below counsels against granting review now.

Respondent nevertheless insists that this case is a poor vehicle because the Wyoming Supreme Court considered itself bound by a party stipulation on the question whether strict scrutiny applies. *Id.* Yet the court below gave no indication that it was bound by a stipulation on that issue. Instead, the Wyoming Supreme Court correctly reasoned that the hybrid-rights doctrine and this Court's ruling in *White* "requir[ed]" it to apply strict scrutiny. Pet.App.14a. Regardless, it is the height of irony for Respondent

now to suggest that *its own concession* below that strict scrutiny applies somehow insulates this case from review.

Pressing that argument, Respondent claims that the court below was not presented with the *Pickering-Garcetti* arguments discussed above as reasons for bypassing strict scrutiny. BIO 10. But Respondent's decision in this case, which the Wyoming Supreme Court reviewed, expressly relied on *Garcetti* (and others in the *Pickering* line) when rejecting strict scrutiny. Pet.App.125a-126a. And on appeal to the Wyoming Supreme Court, Judge Neely explained why those cases are inapposite. *See* Addendum 3a-5a. That issue was thus undoubtedly before the Wyoming Supreme Court.

Respondent also claims that ambiguity about state-law questions like "[t]he scope of [Judge Neely's] public duties" cloud this Court's review. BIO 11. Not so. The only one of Judge Neely's functions at issue here is the solemnization of marriages, and no questions exist about the scope of that work. Moreover, the parties did in fact present substantial "evidence" on Judge Neely's duties. *Id*. Many pages of her deposition are devoted to that topic. *See* Pet.App.163a-167a.

CONCLUSION

For the foregoing reasons, the Court should grant review in this case. At a minimum, though, the Court should hold Judge Neely's petition pending the decision in *Masterpiece Cakeshop*.

Respondent resists a hold in this case, claiming that the coming ruling in *Masterpiece Cakeshop* is irrelevant. BIO 25-26. But that case raises free-exercise questions that focus on the state's anti-religious animus toward the petitioner there, *Masterpiece Cakeshop* Pet. Br. 38-46, a topic about which the Court showed great concern at oral argument, Oral Arg. Tr. 51-56, 58-60, 62, 69-71. Here, too, Respondent has exhibited similar hostility toward Judge Neely's faith, providing added support for her free-exercise claim. *See* Pet. 28 (recounting those facts); CLS Br. 16-17 (same).

The cases overlap in another way that is relevant to the strict-scrutiny analysis here. Whether punishing Judge Neely furthers the state's interest in judicial impartiality depends in part on whether a religious conflict with solemnizing same-sex marriages equates to bias against LGBT individuals. In *Masterpiece Cakeshop*, the parties similarly dispute whether a religious decision not to celebrate same-sex weddings constitutes identity-based discrimination against gays and lesbians—an issue that the Court raised repeatedly at oral argument, Oral Arg. Tr. 24-25, 86-87. This confirms that the Court should, at the very least, hold Judge Neely's petition pending the ruling in *Masterpiece Cakeshop*.

Respectfully submitted,

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December 19, 2017

ADDENDUM

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IN THE SUPREME COURT
STATE OF WYOMING

OCTOBER TERM, A.D. 2015

An Inquiry Concerning the Honorable Ruth Neely, Municipal Court Judge and Circuit Court Magistrate, Ninth Judicial District, Pinedale, Sublette County, Wyoming Judge Ruth Neely Petitioner, v. Wyoming Commission on Judicial Conduct and Ethics Respondent.	No. J-16-0001 IN THE SUPREME COURT STATE OF WYOMING FILED APR 29 2016 Carol Thompson CAROL THOMPSON, CLERK

THE HONORABLE RUTH NEELY'S BRIEF IN SUPPORT OF VERIFIED PETITION OBJECTING TO THE COMMISSION'S RECOMMENDATION

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2. The Commission erred in concluding that Judge Neely's speech is not constitutionally protected.

Apparently relying on *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Commission determined that "Judge Neely's speech was not entitled to First Amendment protections" because "she was not speaking as a private citizen on matters of public concern." Order at 6 (C.R. 1105). The Commission's conclusion is incorrect.

As an initial matter, the Commission's reliance on the *Pickering-Garcetti* line of cases, which involve the free-speech rights of public employees, is misplaced. The Commission is not acting as Judge Neely's employer. Rather, it is enforcing rules that regulate the conduct of all judges in the state, regardless of how or by whom they are employed. Indeed, the Commission is a state agency seeking to regulate Judge Neely as a municipal judge employed by the Town of Pinedale and as a circuit court magistrate appointed by a state court judge. When, as here, the government acts not as an employer but in its sovereign regulatory capacity, it is inappropriate to apply the public-employee-speech test of *Pickering-Garcetti*. Instead, this Court should follow the example of the U.S. Supreme Court in *Williams-Yulee*, 135 S. Ct. at 1665, and *White*, 536 U.S. at 774-75, and apply strict scrutiny to Judge Neely's free-

speech claim. *See also Wilkerson*, 876 So. 2d at 1013 (applying strict scrutiny when a state attempted to punish speech of a sitting judge); *Sanders*, 955 P.2d at 375 (same).

Moreover, Judge Neely should prevail even if this Court applies the two-prong *Pickering-Garcetti* test. The first prong asks whether the public employee was speaking as a private citizen on a matter of public concern. *Garcetti*, 547 U.S. at 418. Contrary to the Commission's conclusion, *see* Order at 6 (C.R. 1105), Judge Neely was speaking as a private citizen addressing an issue of public concern when she answered Mr. Donovan's question about marriage. Her response was an expression of her personal religious beliefs, regarding issues of public importance (marriage and religion), unrelated to any adjudicative proceeding before her, made off the bench, at home via telephone, while in the middle of hanging Christmas lights. Judge Neely was therefore speaking not as a judge, but as a private citizen addressing a matter of public concern. That Judge Neely's comments referenced marriage solemnization—a function that she may perform as a magistrate (but not as a municipal judge)—does not mean that she was speaking as a judge. The mere fact that a person discusses something that pertains to her role as a judge does not transform off-the-bench expression into judicial speech. *See In re Hey*, 452 S.E.2d 24, 33 (W. Va. 1994) (applying the First Amendment to protect a judge's "remarks during a radio interview in which he discussed his own [judicial] disciplinary proceeding").

The second prong of the *Pickering-Garcetti* test requires the court to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs." *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968); *see also Garcetti*, 547 U.S. at 419 (explaining that public employees "must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively"). The Commission, however, cannot establish that any asserted interest in efficiency outweighs Judge Neely's freedom to discuss her religious beliefs.

The *Pickering* case is instructive. There, the U.S. Supreme Court held that a public school could not punish a teacher for criticizing the school board because the school did not show that the speech "in any way . . . impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally." *Pickering*, 391 U.S. at 572-73. Similarly here, Judge Neely's expression of her religious beliefs about marriage in no way affects her ability to perform her duties as a municipal judge. Thus, like the *Pickering* Court, this Court should reject the Commission's attempt to punish Judge Neely's speech.

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