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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Wyoming Supreme Court violated the Free Exercise Clause or Free Speech Clause when it censured a judge after she announced her refusal to impartially perform her duties in accordance with governing law.

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RESPONDENT'S BRIEF IN OPPOSITION

The Wyoming Code of Judicial Conduct provides that a "judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice" including "based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation." Wyo. Code of Judicial Conduct ("Code") R. 2.3(b). Likewise, "[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." Code R. 2.2. This requires a judge to "apply the law without regard to whether the judge approves or disapproves of the law in question." Code R. 2.2, cmt. [2].

These are neutral rules of general applicability. And they are a cornerstone of an impartial judiciary.

Among petitioner Ruth Neely's judicial duties is the performance of marriages. Petitioner publicly announced that she will never perform a marriage ceremony for a same-sex couple.

The Wyoming Supreme Court held that this violated the Code's impartiality provisions, issued a public censure, and required petitioner to perform marriage ceremonies either impartially or not at all. The court did not remove petitioner from the bench, and she remains free to conduct all other judicial functions.

There is nothing surprising about this result. As the court below explained, if petitioner "had taken the position that her religion prevented her from conducting interracial marriages, a right which our society now generally accepts, there would be little controversy regarding her discipline." Pet. App. 42a n.12. Although "[i]t is quite likely that all judges dis-

agree with some aspect of the law for religious, personal, or moral reasons," "the judiciary plays a key role in preserving the principles of justice and the rule of the law * * * regardless of the judge's personal views." *Id.* at 21a.

In other words, the state may regulate a judge's public refusal to apply the law impartially. Review of this holding is not warranted.

To begin with, there is no conflict among the lower courts. As the Wyoming Supreme Court observed (Pet. App. 58a-59a) and petitioner appears to acknowledge (Pet. 21-22 & *n.4), every tribunal to reach the question has arrived at the same result.

This case, moreover, is a poor vehicle for review. The parties appear to have stipulated that strict scrutiny applies, which the state court accepted without careful consideration. Pet. App. 14a. But the free exercise claim in this case does not trigger strict scrutiny. Nor does any free speech claim. Here, to the extent that the state is regulating speech at all, it is the speech of a government employee about the performance of her official duties. The Court has long held that government employers have significant leeway to regulate the speech of their employees.

In any event, the Wyoming Supreme Court correctly held that strict scrutiny is satisfied here, even supposing that were the correct framework. As this Court has repeatedly recognized, states may assert a compelling interest in an impartial judiciary. And the Code's impartiality and anti-bias provisions are narrowly tailored.

The Court should deny the petition.

STATEMENT

A. Wyoming judicial ethics canons.

Wyoming has largely incorporated the ABA's Model Code of Judicial Conduct. The rules relevant here are adopted verbatim from the model code.

Rule 1.2, Promoting Confidence in the Judiciary, provides:

> A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Rule 2.2, Impartiality and Fairness, provides:

> A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

Rule 2.3, Bias, Prejudice, and Harassment, provides in relevant part:

> (A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.
>
> (B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

B. Factual background.

Wyoming has vested the authority to perform marriage ceremonies with, among others, "magistrate" judges. Wyo. Stat. § 20-1-106(a).

Petitioner Neely was appointed a municipal court judge for the Town of Pinedale. Pet. App. 5a. In that capacity, she "hears all cases arising from the town's ordinances, such as traffic and parking violations, animal control, public intoxication, underage drinking, breach of peace, nuisances, and similar matters." *Ibid.*

Because municipal court judges are not authorized by state law to officiate marriages, Judge Haws appointed petitioner to the additional position of part-time circuit court magistrate. Pet. App. 5a. Petitioner acknowledges that the performance of marriage was the "sole purpose" of this appointment. *Id.* at 163a. And the celebration of marriage remains her "primary function" as a magistrate. *Id.* at 6a.

Petitioner has presided over more than 100 wedding ceremonies. Pet. App. 6a.

It is "undisputed" that the Wyoming Code of Judicial Conduct applies to petitioner and that she is "subject to the disciplinary authority" of the Wyoming Supreme Court. Pet. App. 5a. When she became a magistrate, petitioner took an oath to "support, obey and defend the constitution of the United States, and the constitution of the state of Wyoming" and to "discharge the duties of [her] office with fidelity." *Id.* at 7a (quoting Wyo. Const. art. 6, § 20.2).

In 2014, the United States District Court for the District of Wyoming found that the state's ban on same-sex marriage violated the "due process and

equal protection guarantees of the United States Constitution." *Guzzo* v. *Mead*, 2014 WL 5317797, at *1 (D. Wyo. Oct. 17, 2014).

On December 5, 2014, petitioner had a roughly ten-minute phone call with a reporter. Pet. App. 8a, 171a. The reporter ultimately published a story that quoted petitioner's explanation for refusing to perform marriage ceremonies for same-sex couples:

> I will not be able to do them. … We have at least one magistrate who will do same-sex marriages, but I will not be able to.
>
> When law and religion conflict, choices have to be made. I have not yet been asked to perform a same-sex marriage.

Id. at 8a. Petitioner does not dispute the accuracy of these quotations. *Ibid.*

Petitioner subsequently wrote to the Wyoming Judicial Ethics Advisory Committee, explaining her belief that "homosexuality is a named sin," just like "drunkenness, thievery, lying, and the like." Pet. App. 9a. Petitioner stated that officiating the wedding of a same-sex couple would, in her view, be akin to her "buy[ing] beer for the alcoholic or aid[ing] in another person's deceit." *Ibid.*

Petitioner does not deny that she has publicly stated her policy of refusing to perform same-sex marriages. Pet. App. 8a. As a result, it is "not likely" that a same-sex couple will ask her to officiate at a wedding, "given her clear and public statement refusing to perform same-sex marriages." *Id.* at 57a.

C. Proceedings below.

1. Respondent is the Wyoming Commission on Judicial Conduct and Ethics, which enforces the

Code. Its Investigatory Panel commenced an investigation into petitioner's conduct. Pet. App. 9a. Concluding that there "was probable cause to find a code violation," the Investigatory Panel referred the matter to the Adjudicatory Panel. *Id.* at 11a.

The Commission's Adjudicatory Panel found multiple violations of the Code. Pet. App. 11a. The full Commission adopted these findings of a violation, and it recommended that the Wyoming Supreme Court remove petitioner from her positions as a municipal court judge and part-time circuit court magistrate. *Ibid.*

2. The matter proceeded to the Wyoming Supreme Court. Explaining that the issue is petitioner's "conduct as a judge"—not her "religious beliefs" (Pet. App. 12a)—the court adopted respondent's recommendation in part.

The court held that petitioner's conduct violated several provisions of the Code.

The court found, first, that she violated Rule 1.2, because "the fact that she has unequivocally stated her refusal to perform marriages for same-sex couples" "creates the perception in reasonable minds that she lacks independence and impartiality." Pet. App. 56a. It matters not, the court held, that "solemnizing marriages is a discretionary function." *Id.* at 53a. "In essence, this is an argument that bias or prejudice is acceptable if the judicial function is discretionary," but "[o]ur society requires a fair and impartial judiciary no matter how the judicial function is classified." *Ibid.*

The court found, second, that petitioner's conduct violated Rule 2.2 because "[s]he has taken the position that she is willing" to perform marriages "for

one class of people (opposite-sex couples), but not for another (same-sex couples), in spite of the fact that the law provides both classes are entitled to be married." Pet. App. 55a. This "is not fair and impartial performance by any measure." *Ibid.* As Comment 2 to Rule 2.2 instructs, "a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question." *Id.* at 56a.

Finally, the court found a violation of Rule 2.3. Petitioner did not merely express her religious belief; she "expressed her position that, in her performance of her judicial function, the law would have to yield to her religious beliefs." Pet. App. 57a. The issue is not whether petitioner is in fact biased, but whether "her conduct may reasonably be perceived as prejudiced or biased." *Id.* at 58a. And her "refusal to conduct marriages on the basis of the couple's sexual orientation can reasonably be perceived to be biased." *Ibid.*

In so holding, the court recognized that its conclusion was in harmony "with every other tribunal that has considered the question." Pet. App. 58a.

The court rejected petitioner's assertions that this application of the Code breached her First Amendment rights. Pet. App. 12a-30a. It concluded that her "refusal to perform marriage ceremonies for same-sex couples, in spite of the law recognizing their right to be married, implicates the compelling state interest in maintaining the integrity, independence, and impartiality of the judiciary." *Id.* at 30a.

The court issued a public censure and ordered petitioner to either perform marriage ceremonies for

couples regardless of their sexual orientation or to perform no marriage ceremonies at all. Pet. App. 64a. "[M]indful of [its] goal to narrowly tailor the remedy," the court declined to order petitioner removed from her position as a municipal court judge. *Ibid.* As to her part-time magistrate position, the court "defer[red] to the circuit court judge who appointed [petitioner] to determine whether she can continue to serve the essential functions of that position." *Ibid.*

Two justices dissented. Pet. App. 64a-110a

REASONS FOR DENYING THE PETITION

No feature of this case counsels in favor of further review. There is no conflict among the lower courts; indeed, petitioner acknowledges that every tribunal to consider the issue has reached the same result. This is a poor vehicle for review because the lower court assumed the application of strict scrutiny, but that assumption was wrong. Even if strict scrutiny did apply, it is satisfied in this case. Finally, the Court should not hold the petition pending its disposition of *Masterpiece Cakeshop*, No. 16-111.

A. There is no conflict.

Petitioner does not identify any split of authority on the issues presented in this case. That is unsurprising, because, as the court below recognized, the decision in this case "is in line with every other tribunal that has considered the question." Pet. App. 58a-59a (citing cases).

Petitioner does not see it differently—she does not cite any decision from any court that she believes in material conflict with the holding below. In fact, petitioner recognizes "the multiple judicial-discipline

proceedings * * * that have punished judges for declining to perform same-sex marriages." Pet. 21-22 & n.4 (identifying decisions in harmony with decision below). The decision below, by petitioner's own account, is consistent with every tribunal to confront the question.

The closest petitioner comes to identifying a conflict is to cite a series of cases—mainly from trial courts—purporting to establish the broad proposition that there is a "history of accommodating the religious exercise of our public officials." Pet. 29-30. But not one of the cases petitioner cites has anything to do with judicial ethics or the question presented. That is, in those cases, "there was no issue of public confidence in the neutrality" of the employees at issue. Pet. App. 27a.

Petitioner's "religious accommodation" cases are, in any event, consistent with the decision below because the Wyoming Supreme Court did accommodate her, permitting her to perform judicial functions other than marriage. Pet. App. 63a-64a. Whether petitioner may remain a magistrate is a decision the court left to Judge Haws, at whose pleasure petitioner serves. *Ibid.*[1]

B. This is a poor vehicle.

Not only is there no conflict on the question presented, but this case is a manifestly poor vehicle for resolution of the issues raised by petitioner.

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[1] Petitioner speculates that the decision below, if "taken to its logical end, *risks* driving [petitioner] off the bench completely." Pet. 24 (emphasis added). But the court held, expressly, that her conduct did not preclude petitioner from serving as a municipal court judge. Pet. App. 64a.

Below, the court understood the parties as having stipulated that strict scrutiny applies to petitioner's claims. Pet. App. 14a. Petitioner characterizes this as a concession by respondent. Pet. 33. But it is well settled that parties cannot stipulate to legal conclusions. See *Roberts* v. *Galen of Virginia, Inc.*, 525 U.S. 249, 253 (1999) ("[T]he concession of a point on appeal by respondent is by no means dispositive of a legal issue."); *The Anaconda* v. *Am. Sugar Refining Co.*, 322 U.S. 42, 46 (1944) (A party "can not stipulate away" what "the legislation declares."). Courts, instead, must independently evaluate the legal premises of their holdings in all cases, regardless of purported stipulations.

This poses two problems for further review in this case. First, apparently because of the asserted stipulation, the lower court did not consider the full range of arguments in favor of a standard other than strict scrutiny. See Pet. App. 14a. This Court, accordingly, would lack the benefit of considered analysis by the lower court on several critical issues.

In particular, petitioner is a government employee, and her statements—to the extent that they are speech at all—relate to the performance of her job duties. Accordingly, as we describe in more detail below (see, *infra*, 18-20), the First Amendment likely does not apply to her statements at all. Even if it does, the balancing test described in *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968), would apply, not strict scrutiny.

But, because of the framing of the issues below, the lower court considered none of this. The Court should not grant review when the critical doctrines were not so much as mentioned below.

That is especially so where, as here, the unaddressed issues likely contain embedded questions of state law. The scope of petitioner's public duties, for example, is an important consideration in the *Pickering* analysis, but the parties presented no evidence on that issue, and the lower court did not address it.

Second, the relative posture of the parties—and whether respondent is bound by any purported concession—is at best unclear.

C. The decision below is correct.

Review is also unwarranted because the decision below is correct. Strict scrutiny does not apply to the claim at issue here. Even if it did, the lower court's application of that standard was correct.

States may obligate their judges to apply the law impartially—notwithstanding any asserted conflict between the law and a judge's personal beliefs. Were it otherwise, states would be powerless to regulate judges who apply the law in a partial or biased manner, so long as those judges demonstrate that their partiality stems from a sincerely held religious belief. That is not the law; a judge's religious beliefs do not exempt her from anti-bias requirements.

As the court below elaborated, if petitioner "had taken the position that her religion prevented her from conducting interracial marriages, a right which our society now generally accepts, there would be little controversy regarding her discipline." Pet. App. 42a n.12. The authority exercised here is the same.

1. Because the Code is neutral and generally applicable, strict scrutiny does not apply.

Although the parties below appear to have stipulated to application of strict scrutiny, and the lower court accepted that stipulation without close analysis (Pet. App. 14a), there is substantial reason to conclude that strict scrutiny does not apply. Petitioner's free exercise claim does not trigger strict scrutiny. And that petitioner attempts to embed a free speech challenge does not alter the constitutional analysis.

a. Petitioner's free exercise claim (Pet. 20-31) does not trigger strict scrutiny.

In *Employment Division, Department of Human Resources of Oregon* v. *Smith*, the Court established that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" 494 U.S. 872, 879 (1990). The Court specifically rejected applying strict scrutiny analysis to such neutral laws of general applicability. *Id.* at 886-890.

At bottom, "[t]o make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself'—contradicts both constitutional tradition and common sense." *Smith*, 494 U.S. at 885 (quotation omitted).

Smith governs here. The Wyoming Code of Judicial Conduct—taken in relevant part verbatim from the ABA's Model Code of Judicial Conduct—does not "represent[] an attempt to regulate religious beliefs" nor "the communication of religious beliefs." *Smith*,

494 U.S. at 882. To the contrary, the Code presents a set of generally applicable rules; it "state[s] overarching principles of judicial ethics that *all* judges must observe." *Wyo. Code of Judicial Conduct*, Scope 2 (July 1, 2009) (emphasis added), https://goo.gl/33Dxiy. It aims to "assist judges in maintaining the highest standards of judicial and personal conduct," under the precept that "judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system." *Id.* at Preamble 1, 3.

The Code is also neutral. It does not prescribe or proscribe impartial behavior "only when [judges] are engaged in [such behavior] for religious reasons." *Smith*, 494 U.S. at 877-878. Indeed, it makes no differentiation between judges like petitioner who decline to carry out their official duties impartially because of religious reasons and those who decline to do so for other reasons. Similarly, the Code does not impose penalties on judges for holding certain religious beliefs; rather, it requires impartiality from judges acting in their official capacities. In other words, the Code merely requires that judges of *all* faiths dispense the law impartially, that they "discharge the duties of [their] office with fidelity"—as they have sworn to do. Wyo. Const. art. 6, § 20.[2]

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[2] Petitioner has abandoned her argument sounding in *Wisconsin* v. *Yoder*, 406 U.S. 205, 235 (1972)—and for good reason. "Unlike the Amish in *Yoder*," requiring petitioner to perform all marriages or none "does not threaten her very 'way of life.'" Pet. App. 29a. Nor is petitioner "compelled to serve as a part-time circuit court magistrate," and she "does not face criminal prosecution." *Ibid.*

b. Petitioner is incorrect to suggest (see Pet. 26-29) that the state allows "individualized exemptions," thus taking the law outside of *Smith*. In fact, the Code allows *no* exemptions: judges may *never* act in a way that manifests partiality or bias.

Petitioner's reliance on *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), confirms the point. There, city ordinances regulated the slaughter of animals *if* the slaughter was a component of a "sacrifice" or "ritual"—but not if the slaughter was for other purposes. *Id.* at 534. The religious nature of this regulation was confirmed by the fact that it had a carve-out for kosher slaughtering. *Id.* at 536. Because "the ordinances were enacted 'because of,' not merely 'in spite of,' their suppression of Santeria religious practice," they were non-neutral, and instead "had as their object the suppression of religion." *Id.* at 540, 542.

The Code is nothing of the sort. It does not have as its "object the suppression of religion." It instead contains neutral impartiality and anti-bias provisions.

Petitioner notes that judges have discretion as to whether to perform individual marriage ceremonies. In her view, magistrates may decline to perform a marriage for a wide variety of reasons, including if the ceremony conflicts with a football game that she would like to attend. Pet. 27.

Petitioner confuses two different laws. The law authorizing petitioner to conduct marriages, Wyoming Statute § 20-1-106(a), is discretionary; it holds that magistrates, among others, "may perform" marriages.

But the law being enforced here—the Wyoming Code of Judicial Conduct—is not at all discretionary. Rule 2.3(b), for example, provides that a "judge ***shall not***, in the performance of judicial duties, by words or conduct manifest bias or prejudice * * * including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation." Code R. 2.3(b) (emphasis added).

Taken together, the effect of Section 20-1-106(a) and the Code is clear. Magistrates have broad discretion as to when they will perform marriages. But magistrates may never exercise that discretion in a manner that "manifest[s] bias or prejudice," as defined by the Code.[3]

A magistrate who declines to officiate a marriage celebration because she would rather attend a football game has not violated the Code. But a judge may not decline to perform a marriage because she refuses to celebrate the marriage of Republicans (or Democrats), old people (or young people), the rich (or the poor), same-race couples (or interracial couples), straight couples (or same-sex couples), or for any other reason that "manifest[s] bias or prejudice" within the meaning of the Code. That is a law of gen-

[3] The lower court likened this restraint on the exercise of discretion to juror selection: while a party may generally "exercise the right to peremptory challenges of jurors for any reason," that discretion does not permit "challenging jurors on the basis of race or gender." Pet. App. 63a.

eral applicability, for which there are no individualized exceptions.[4]

c. Petitioner's putative free-speech claim does not trigger strict scrutiny. *Smith* acknowledged that in some "hybrid situation[s]," where a free-exercise claim intersects with another protected right, heightened scrutiny may apply. 494 U.S. at 882. This is not such a hybrid claim.

First, the disciplinary action at issue here rests on petitioner's conduct, not her speech.

As the lower court found, the State has regulated petitioner's "conduct as a judge," not her "speech as a private citizen." Pet. App. 59a. The basis of the regulatory action was not that petitioner "merely express[ed] her opinion about same-sex marriage," but rather that she "expressed how that opinion would impact her performance of her judicial functions." *Id.* at 62a.[5]

In this way, petitioner made forward-looking statements about how she would perform her official duties—that is, she stated a policy governing how she would exercise her authority to perform marriages. It makes no difference if that policy is com-

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[4] Petitioner points out that individuals may be temporarily authorized to perform a marriage ceremony. Pet. 28. The relevance of this observation is unclear. She does not show that such individuals have acted in a way that manifests bias. Nor does she show that such individuals are subject to the Code. She, on the other hand, is admittedly (and, given her concurrent judicial appointments, *doubly*) bound by it.

[5] See also *id.* at 23a ("She is not subject to discipline merely because she has expressed her religious beliefs. She has gone one or two critical steps farther than that to say that she will not impartially perform her judicial functions."); *id.* at 36a.

municated through spoken word, a sign posted on her office door, or written guidelines identifying the circumstances in which petitioner would perform marriages. It is a policy all the same. And just like a policy of refusing to host military recruiters, this policy is "not inherently expressive." *Rumsfeld* v. *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006). It is, as the lower court found, *conduct*. See, *e.g.*, Pet. App. 12a, 23a, 36a, 59a, 62a.

Petitioner is wrong to contend that she "*did* nothing." Pet. 32. She did not simply "voic[e]" her "religious conflict." *Ibid*. She stated a clear policy for how she would perform her official duties in the future: regardless of any other consideration, she will always refuse to solemnize same-sex marriages. *Ibid*.

This conduct has concrete implications: because of "her clear and public statement refusing to perform same-sex marriages," "no same-sex couple" is "likely" to ask her to perform a marriage. *Id*. at 57a. Moreover, "her conduct does undermine the public's respect for the judiciary." *Id*. at 62a.

This regulation contrasts starkly with *Republican Party of Minnesota* v. *White*, 536 U.S. 765 (2002). There, the Court held that limitations on opinion speech by candidates for elected judicial office violated the First Amendment. *Id*. at 788. The Court contrasted this speech regulation from a separate prohibition on "pledges or promises" that make forward-looking representations "of conduct in office other than the faithful and impartial performance of the duties of the office." *Id*. at 770. That law was "not challenged" and the Court expressed "no view" on it. *Ibid*.

Second, even if the regulation is a restriction of petitioner's speech, it was speech in her capacity as a public employee concerning how she would perform her official duties.

This Court has repeatedly held that, "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti* v. *Ceballos*, 547 U.S. 410, 418 (2006). That is, "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Ibid.*

Some speech by government employees is not entitled to any First Amendment protection. As the Court has explained, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421.[6]

That is the case here. As the lower court concluded, "the misconduct occurred in [petitioner's] official capacity." Pet. App. 62a. "She did not merely express her opinion about same-sex marriage, she expressed how that opinion would impact her performance of her judicial functions." *Ibid.*

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[6] Judicial candidates (such as those in *White* and *Williams-Yulee* v. *Florida Bar,* 135 S. Ct. 1656 (2015)) are not state employees.

The First Amendment therefore does not offer *any* protection to petitioner's statements regarding the performance of her official duties.[7]

And, *even if* petitioner had been "speaking as [a] citizen[] about matters of public concern," she still must "face * * * speech restrictions that are necessary for their employers to operate efficiently and effectively." *Garcetti*, 547 U.S. at 419.

In that context, the balancing test of *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968), would apply, providing the state significant leeway to restrict speech that is inconsistent with the employee's public function. Here, as we explain in more detail below, the state has well more than the necessary "adequate justification" (*Garcetti*, 547 U.S. at 418) so as to preclude judges from manifesting partiality or bias in the performance of their judicial functions. See, *infra*, 20-22.

* * *

For all of these reasons, strict scrutiny does not apply to petitioner's claim. And the Wyoming Code of Judicial Conduct is manifestly constitutional when

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[7] This answers petitioner's attempted reliance on the compelled-speech doctrine. See Pet. 35-36. Petitioner appears to suggest that she should be enabled to decline performing judicial functions that would require her "to express messages that she deems objectionable." *Ibid*. But this construction of the First Amendment would turn judging on its head. As petitioner sees it, a judge could claim a First Amendment right to defy *any* law. If a judge "deems objectionable" a state law penalizing individuals for distributing marijuana, petitioner apparently believes that a state judge can decline to enforce it. Not so. The First Amendment does not allow judges to privilege their personal beliefs over their obligation to faithfully apply the law.

judged against these less searching standards of review. Petitioner does not appear to disagree.

2. If strict scrutiny applies, the state court properly found it satisfied.

If strict scrutiny nonetheless applies, the decision below is entirely correct. Wyoming has a compelling interest in maintaining the integrity of its judiciary, and the Code is narrowly tailored to achieve that result.

a. Wyoming has a compelling interest in maintaining the integrity of its judiciary by precluding judges from performing their public functions in a manner that exhibits partiality or bias. See Pet. 14a-21a.

This Court has repeatedly held that "'[j]udicial integrity is * * * a state interest of the highest order.'" *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009). In *Williams-Yulee*, the Court recognized that "[t]he judiciary's authority * * * depends in large measure on the public's willingness to respect and follow its decisions." 135 S. Ct. at 1666. "It follows that public perception of judicial integrity is 'a state interest of the highest order.'" *Ibid.* See also *White*, 536 U.S. at 793 ("Judicial integrity is, in consequence, a state interest of the highest order." (Kennedy, J., concurring)).

In accord with these principles, the Wyoming Supreme Court below held that "the State of Wyoming has a compelling government interest in maintaining the integrity of the judiciary, in this case by enforcing Wyoming Rules of Judicial Conduct 1.2, 2.2, and 2.3." Pet. App. 16a.

The court was justified in reaching that conclusion. The Code's Preamble explains the nature of the state's interest: "An independent, fair and impartial judiciary is indispensable to our system of justice." Wyo. Code Preamble 1. Indeed, the Code recognizes that "[t]he United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society." *Ibid.*

The Wyoming Supreme Court was thus well within its authority to conclude that "the state has a compelling interest in maintaining public confidence in the judiciary by enforcing the rules requiring independence and impartiality." Pet. App. 21a. And "the principles of justice and the rule of law" "require[] the consistent application of the law regardless of the judge's personal views." *Ibid.* Indeed, these holdings follow directly from *Caperton* and *Williams-Yulee*.

In the context of this case, the court concluded that "[a]llowing [petitioner] to opt out of same-sex marriages is contrary to the compelling state interest in maintaining an independent and impartial judiciary." Pet. App. 26a. "[L]ike all judges," petitioner "has taken an oath to enforce all laws, and the public depends upon an impartial judiciary, regardless of religious sentiment." *Ibid.* Were it otherwise, 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." *Ibid.* (quotation & alteration omitted).

Contrary to petitioner's claims (Pet. 33, 37-38), *White* confirms the state's compelling interest in an impartial judiciary. There, the Court recognized the

"root meaning" of "impartiality" is "equal application of the law," which "guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party." *White*, 536 U.S. at 775-776. That is *precisely* the compelling interest the Wyoming Supreme Court identified here: ensuring that petitioner applies the marriage laws in the same way to same-sex couples as she applies them to any other party. See Pet. App. 18a-19a. In *White*, the Court held that the state law at issue there was "not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense"—not that the state lacked a compelling interest. 536 U.S. at 776.[8] See also Pet. App. 18a-19a.

b. The Wyoming regulations at issue are narrowly tailored to advance this compelling state interest. See Pet. 21a-30a.

To begin with, a "narrowly tailored" law need not "be 'perfectly tailored.'" *Williams-Yulee*, 135 S. Ct. at 1671. "The impossibility of perfect tailoring is especially apparent when the State's compelling interest is as intangible as public confidence in the integrity of the judiciary." *Ibid.*

The Code is narrowly tailored to address the precise ill at issue: judges who "by words or conduct

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[8] *White* separately held that "guaranteeing litigants" "an equal chance to persuade the court on the legal points in their case" "is not a *compelling* state interest." 536 U.S. at 777. But that is not at issue here. For one, the claims against petitioner turn on her statements describing how she will perform her official duties—not on her general views. See, *e.g.*, Pet. App. 12a, 23a, 36a, 59a, 62a. Additionally, there is no open legal question for petitioner to decide. The question is instead whether she will faithfully apply the law.

manifest bias or prejudice" "in the performance of judicial duties." Code R. 2.3(b). See also R. 2.2 ("A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."); R. 1.2 ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.").

A judge who violates these provisions has, by definition, called into question his or her impartiality—and has, at the very least, created an appearance of impropriety. Because these provisions are triggered by the very conduct that the state has an interest in regulating, they are—on their face—narrowly tailored.

The Wyoming Supreme Court explained that the Code creates a clear rule of conduct: "[N]o judge can turn down a request to perform a marriage for reasons that undermine the integrity of the judiciary by demonstrating a lack of independence and impartiality." Pet. App. 63a.

The Wyoming Supreme Court went yet further to ensure narrow tailoring. It declined to order petitioner removed from judicial office; instead, it allowed her to perform all judicial functions *other* than marriage, and it allowed her the choice to perform all marriages impartially or no marriages at all. See Pet. App. 63a-64a. It did so specifically "mindful of [its] goal to narrowly tailor the remedy." *Id.* at 64a.

Petitioner appears to make two principal counter-arguments. First, she contends that a "faith-based conflict with performing a solemn non-adjudicative function says nothing about a judge's

ability to fairly decide cases." Pet. 37. Related, she states that she will perform other judicial functions for gay individuals. *Id*. at 37-38. There are multiple problems with this argument.

The Code vindicates more than simply the public's confidence in the impartiality of adjudicative functions. The Rules instead extend to "the duties of judicial office" (Rule 2.3(a)) and "the performance of judicial duties" (Rule 2.3(b)). Rule 2.2 instructs that a judge "shall perform *all* duties of judicial office fairly and impartially." (Emphasis added). Petitioner cannot deny that performing marriage is one of the duties of her judicial office—indeed, it is the *raison d'être* for her appointment as a part-time magistrate. Pet. App. 6a, 10a, 163a.

To the extent that petitioner asserts that her conduct with respect to performance of marriage should not disqualify her from other aspects of judicial office, the Wyoming Supreme Court *agreed*. It declined to remove her from office specifically in order to narrowly tailor the remedy. Pet. App. 64a. Thus, it found her eligible to perform the other sort of judicial functions to which she points. Pet. 38.

Second, petitioner asserts that "a decent and honorable religious belief about the issue of marriage does not equate to prejudice against a class of people." Pet. 37. It appears that this is a veiled contention that petitioner did not, in fact, violate any aspect of the Code. But this Court does not have jurisdiction over that state law question; the Wyoming Supreme Court—the court with final authority over interpretation of the Code—held plainly that petitioner did violate it. See Pet. App. 46a-60a.

In all events, that analysis was correct. A "judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question." Pet. App. 56a (quoting Code R. 2.2, cmt. 2). Petitioner's acknowledged refusal to apply the law equally and impartially—as a result of her disagreement with it—is exactly the sort of conduct that a state may deem to undermine the public appearance of an impartial judiciary. As the court below put it, "[t]he objection is to the loss of public confidence in the judiciary if the public knows that its judges are at liberty to pick and choose whom to serve." Pet. App. 26a (quotation & alterations omitted).

The Wyoming Supreme Court was right to hold that "accommodation for religious beliefs" is not required in the public employment context "when the requested accommodation would undermine the fundamental function of the position." Pet. App. 29a. Ultimately, here, there "is no less restrictive alternative than discipline for [petitioner] that would serve the compelling state interest in judicial integrity." *Id.* at 30a.

D. The Court should not hold the petition pending *Masterpiece Cakeshop*.

Petitioner alternatively asks, without explanation (Pet. 20, 39), the Court to hold the petition pending the disposition of *Masterpiece Cakeshop* v. *Colorado Civil Rights Commission*, No. 16-111. Because the issues in that case differ dramatically from those here, a hold is not warranted.

First, the decision below turned on the Wyoming Supreme Court's conclusion that the state has a compelling interest in maintaining the impartiality of its judiciary—and that any restriction of petition-

er's speech rights was narrowly tailored against that interest. See Pet. App. 14a-30a. Nothing about *Masterpiece Cakeshop* has any bearing on that holding. Nor has petitioner even attempted to demonstrate that any other issue in *Masterpiece Cakeshop* has the capacity to cast doubt on the decision below.

Second, as we explained (see, *supra*, 18-20), there is a separate, independent basis to uphold the state's regulation of petitioner's conduct: petitioner is a state employee, and—to the extent she engaged in speech at all—it was speech about the performance of her public duties. The baker in *Masterpiece Cakeshop* is not a public employee.

Third, the central theory in *Masterpiece Cakeshop* is that "[e]xpressive freedom is central to human dignity." *Masterpiece Cakeshop*, Reply 1. According to petitioner there, this "requires that artists be free to make their own moral judgments about what to express through their works." *Ibid*. This case, by contrast, concerns the obligations of a state judge to apply the law impartially and equally to all.

CONCLUSION

The Court should deny the petition.

Respectfully submitted.

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