SUPREME COURT, STATE OF WYOMING

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

BRIEF OF AMICI CURIAE WYOMING STATE SENATORS PAUL BARNARD AND CURT MEIER AND CURRENT AND FORMER WYOMING STATE REPRESENTATIVES JIM BLACKBURN, ROBERT A. BRECHTEL, DONALD BURKHART, JR., SCOTT CLEM, AMY EDMONDS, HARLAN EDMONDS, ROY EDWARDS, GERALD GAY, MARTI HALVERSON, LYNN HUTCHINGS, MARK JENNINGS, KENDELL KROEKER, DAN LAURSEN, TYLER LINDHOLM, BUNKY LOUCKS, TROY MADER, ROBERT MCKIM, DAVID MILLER, DAVID NORTHRUP, GARY PIIPARINEN, BILL POWNALL, TOM REEDER, MARK SEMLEK, CHERI STEINMETZ, STEPHEN WATT, SUE WILSON, AND NATHAN WINTERS, AND PROFESSOR GERARD V. BRADLEY IN SUPPORT OF THE HONORABLE RUTH NEELY'S PETITION OBJECTING TO THE COMMISSION'S RECOMMENDATION

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Interest of Amici Curiae

Amici Curiae include the 29 current and former Wyoming State legislators listed on the cover of the Brief. Amici also include Gerard V. Bradley, Professor of Law, Notre Dame Law School. Professor Bradley is the author of *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 Case Western Res. L. Rev. 674 (1987) (hereinafter Bradley, *Machine*), and the "Religious Test" section in *The Heritage Guide to the Constitution* (2nd edition 2014). Professor Bradley's extensive scholarship on the religious test clauses in the federal and various state constitutions contributed greatly to the contents of this Brief.

Amici legislators have an interest in seeing this Court interpret the Wyoming Constitution to provide the broad protection for religious freedom that the framers intended. The people who drafted and ratified our State Constitution sought to ensure that no one would be excluded from public office on account of their religious beliefs. Despite this, the Wyoming Commission on Judicial Conduct and Ethics is attempting to remove Judge Neely from office because of her religious beliefs about marriage. Amici legislators want to make sure that such religion-based exclusions from public office do not occur in the Equality State.

Introduction

A panel of the Wyoming Commission on Judicial Conduct and Ethics recommends that Ruth Neely be removed from both her position as a circuit court magistrate and as a municipal judge, because she publicly expressed her religious opinion that marriage is the union of a man and a woman. Any such action must, however, conform to the requirements of the Wyoming Constitution, including Article I, section 18. This provision prohibits disqualifying anyone from public service "because of his opinion on any matter of religious belief whatsoever." Wyo. Const., art. I, § 18. Its language shows that Wyoming's Constitution is, and was intended to be, especially sweeping in scope, with regard to both the class of persons protected and the breadth of the "religious opinions" rendered immune from government disapproval. The history of its adoption at the 1889 constitutional convention confirms, moreover, that "religious opinions" about the nature of marriage were certainly within its scope. The Commission's recommended action therefore would violate the Wyoming Constitution.

This provision in the Wyoming Constitution stands within a long history of federal and state "religious tests" for officeholders. Our country's founders took the then-extraordinary step of banning such tests, in Article VI, section 3 of the Constitution: "[N]o religious test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S.

Const., art. VI, § 3. States were largely free, however, to maintain such barriers to *state* offices. In fact, all of the states did so when the national Constitution came into effect in 1789. This ambiguous but nonetheless formative moment in our history is treated in Part I of this Brief, to supply the context for appreciating Wyoming's remarkable achievement in 1890.

Part II describes developments in state constitutional law up to Wyoming's entry into the Union in 1890. Especially when it is compared to the religious-test bans in constitutions of other states which entered the Union after the Civil War, Wyoming appears to have enacted the most encompassing, and strictest, exclusion of religious impediments to public office in American history.

In Part III, a close look at Article I, section 18, as well as at its genesis in the Cheyenne convention of 1889, shows beyond doubt that even someone conscientiously committed to a religious view of marriage which *it would have been criminal to act upon* – namely, polygamy – had an equal constitutional right to hold public office. Thus the Commission's resolve to remove Judge Neely for adhering to what was until a couple of years ago the *only* lawful sort of marriage in Wyoming runs headlong into the Wyoming Constitution.

Part IV shows in more detail how removing Judge Neely from the bench due to her religious belief that marriage is the union of a man and

woman violates both the letter and the spirit of the Wyoming Constitution. It is therefore strictly prohibited.

It is important to note that while bans on religious tests are an invaluable benefit to those who seek or hold public office, they are not *principally* individual-rights protections, similar to, for example, free exercise clauses. Bans on religious tests are primarily structural limits upon the government, similar to non-establishment constitutional norms. No-test clauses like Wyoming's are really elements or specifications of non-establishment and thus contribute to a proper separation of church and state.

The implications of rightly understanding no-test clauses along these lines are several. They may not be waived by individuals. Courts may not "balance" them against other personal rights, as if it could be licit to compare Judge Neely's right not to be disqualified from public office against a same-sex couple's right to marry. Indeed, the fact that Article I, section 18 permits the government to continue to suppress licentious or dangerous *acts* makes clearer that religious *opinion* (as opposed to religiously motivated acts) is to be absolutely free. At bottom, then, Article I, section 18 of the Wyoming

Constitution describes something which Wyoming and all of its political subdivisions and departments simply must never do.[1]

Argument

I. Our Nation's Constitutional History Supports a Broad Interpretation of Wyoming's Test Clause.

A. An Overview of Religious Tests at the Nation's Founding[2]

In 1787 "non-Christians" could not hold public office anywhere in the United States, except perhaps in Virginia (and there is no record of *that* actually occurring). Bradley, *Machine* at 681. This exclusion of "non-Christians" was most simply articulated in the Maryland Constitution: only

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[1] The operation of Article I, section 18 must itself be consistent, of course, with overarching federal law, such as an Act of Congress and the federal Constitution. But the Commission does not allege that any federal constitutional or statutory provision or court decision justifies its Order removing Judge Neely. No such federal justification exists. Nothing in the Supreme Court's opinion in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), requires the removal of Judge Neely. The Commission does not suggest otherwise.

[2] Much of this section of the Brief is adapted from Bradley, *Machine*. A more detailed historical account, as well as supporting citations, can be found there.

"Christians" could hold office. *Id.* at 683. Delaware was carved out of Pennsylvania, and remained in some ways juridically subordinate to Pennsylvania until 1776. *Id.* Both required public officers to declare their faith in Scripture's "divine inspiration," with Delaware further demanding a Trinitarian affirmation. *Id.* Virginia was uniquely tolerant, setting up no doctrinal obstacle either by its Constitution of 1776 or by subsequent statutes. *Id.*

Catholics were the only non-Protestant Christians present in appreciable numbers at the founding. *Id.* at 681. They were clearly eligible to hold public office only in Pennsylvania, Delaware and Maryland. *Id.*

A few states – Georgia, New Hampshire, South Carolina – expressly provided that only "Protestants" could serve. *Id.* Rhode Island was a special case: the Protestant monopoly there flowed from an exclusion of Catholics and Jews from citizenship, and not, precisely, from political office. *Id.* In the remaining Protestant-only states, the law was more convoluted. *Id.* In theory, a Catholic (but not a non-Christian) could hold office in Vermont, Massachusetts, North Carolina, New Jersey, New York and Connecticut, but only by compromising or denying his Catholicism. *Id.* at 681-82. In Massachusetts, for instance, the Constitution prescribed an officeholder pledge reminiscent of the old English oath of supremacy: candidates had to swear "that no foreign prince, person, prelate, state, or potentate hath, or

ought to have, any jurisdiction, superiority, preeminence, authority, dispensing or other power, in any matter, civil, ecclesiastical, or spiritual, within this commonwealth." *Id.* at 682. The New York legislature in 1788 enacted a similar oath of abjuration for officeholders, but stopped short of disenfranchising Catholics. *Id.* North Carolina's Constitution evinced a perhaps unintended subtlety: only one who denied "the truth of the Protestant religion" (or the existence of God or his inspiration of both Old and New Testaments) was excluded. *Id.* New Jersey's constitution of 1776 simply turned North Carolina's approach around: "[A]ll persons, *professing* a belief in the faith of any Protestant sect, shall . . . be capable of being elected into any office of profit or trust." *Id.* at 682-83. Connecticut substituted Trinitarian orthodoxy for the truth of Protestantism in a statute otherwise identical to the North Carolina Constitution. *Id.* at 683.

This universal linkage of public service with religious conviction reflected much more than simple bias or wariness towards non-Christian religions. It manifested too the founders' understanding that, at least in their time and in their minds' eyes, political unity included a certain measure of religious commonality. This ubiquitous connection at the state level also indicates how dramatically the federal Constitution broke from prevailing form. As we shall see later, Wyoming eventually broke dramatically from not only the federal test clause, but from all extant state clauses as well.

B. The 1787 Constitutional Convention[3]

Some prominent members of the founding generation abhorred religious tests for office. Bradley, *Machine* at 687. They thought that such tests were wrong and unjust. *Id.* But these dissenters were few, and of all the organized religious groups, only the Baptists generally subscribed to this view. *Id.* Their leading spokesmen, Isaac Backus of Massachusetts and John Leland of Virginia, denounced such tests as a profane intervention in the sacred relationship between God and man. *Id.* They spied an infirmity in religious tests which amounted to a kind of sacrilege: man presumed to claim God as a witness, or to domesticate God for humanly-conceived, mundane purposes. *Id.* at 687-88. Like all Baptist critiques of the church-state practices of their contemporaries, this was chiefly a theological and not a political objection. *Id.* at 688. The prevailing belief in 1787 was that, in some important way, a man's religious convictions and especially his belief in a future state of rewards and punishments had to do with his suitability to hold public office. *Id.*

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[3] As with the prior section of the Brief, much of this section is adapted from Bradley, *Machine*. A more detailed historical account, as well as supporting citations, can be found there.

Very curiously, then, do the records of the Philadelphia Convention reveal that the no-test clause was (in the words of Luther Martin, a Maryland delegate) "adopted by a great majority of the convention, and without much debate." *Id.* On August 30th, what was then "Article 20," but soon to become article VI, clause 3 as we know it, was put together. *Id.* at 692. First, the words "or affirmation" were added to the oath required of all governmental officers. *Id.* A motion to join the test prohibition to the oath clause then passed unanimously. *Id.* Madison reports that Connecticut's Roger Sherman objected to the addition, observing that "the prevailing liberality" made it unnecessary. *Id.* However, after Gouverneur Morris voiced approval, the motion for addition passed without recorded dissent. *Id.* On "the whole Article," which was slightly reworded from August 20, Madison notes that North Carolina opposed it, and only Maryland was divided. *Id.* at 692-93. The *Convention Journal* shows that North Carolina voted against the test ban (meaning that both of its delegates present, Hugh Williamson and Richard Dobbs Spaight, were opposed), and that Connecticut and Maryland were divided (indicating an even split in the delegations). *Id.* at 689. All others present voted for the ban, *see id.*, which raises the obvious question: why did a group of men hailing from states which maintained religious tests vote, almost effortlessly, for banning them in the national arena?

C. Ratification of the United States Constitution from 1788 through 1789[4]

The answer to that question can be found by tracing the argument over the test-ban during the ratification debate surrounding the federal Constitution. Many objections were lodged against the inadequately "Christian" character of the proposed new government, and Article VI, section 3 was one major reason for them. Bradley, *Machine* at 695. Pennsylvanian Benjamin Rush stated the bare essentials of this complaint in a letter to John Adams: "Many pious people wish the name of the Supreme Being had been introduced somewhere in the new Constitution." *Id.* Rush hoped that some "acknowledgment may be made of his goodness or of his providence" in the amendments before Congress, proposals which eventuated in the Bill of Rights. *Id.*

The Constitution's defenders developed in response to this complaint a distinction between types of religious tests. *Id.* at 696. There were two kinds of tests, they said, and only one was outlawed. *Id.* Oliver Ellsworth, who attended the Convention as a Connecticut delegate and who would later be Chief Justice of the United States, described a *particular* oath in his

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[4] As with the prior sections of the Brief, much of this section is adapted from Bradley, *Machine*. A more detailed historical account, as well as supporting citations, can be found there.

"Landholder" series – an oath which discriminated among denominations of Christians as the tests in England did in favor of Anglicans. *Id.* Such a provision would, Ellsworth argued, be "to the last degree absurd" in the United States for it would necessarily exclude a majority of Protestants from office. *Id.* He rightly calculated that most Americans rejected this "indignity." *Id.* He was against it, and thought that the Constitution banned them.

Ellsworth then described a "general" oath requiring a belief in a Supreme Being, a future state of rewards and punishments, and perhaps agreement on the divine authenticity of Scriptures. *Id.* A test so defined resonated with popular wishes and, as we have seen, was common fare in the states. *Id.* The omission of such a "general" oath proved to be a hard sell for the Constitution's defenders. *Id.* at 697. This prompted some to reopen the door seemingly closed by the test ban, suggesting that an oath of office *implied* beliefs in God and a future state, and thus the ban was only upon a "particular" test oath. *Id.* at 698. This concession ripened into a formal amendment offered by the South Carolina ratifying convention that the word "other" be inserted between "no" and "religious" in article VI. *Id.* (So, no religious test *besides* the oath could be imposed.) This change was proposed in both the House and in the Senate during the First Congressional session which passed the Bill of Rights, but to no avail. *Id.*

Some other federalist defenders of the Constitution argued against all religious tests – "general" as well as "particular." *Id.* They argued that all such tests were useless, counterproductive, and unnecessary. *Id.* "Useless" because unprincipled men with no firm beliefs could pass them by faking the required piety. *Id.* "Counterproductive" because therefore only principled men scrupulous of the test—Baptists for instance, and perhaps even Catholics—would be excluded. *Id.* "Unnecessary" because in a pious, more or less democratic society, only "good" characters stood a chance of winning election anyway. *Id.* One Massachusetts delegate added that a "Christian" oath was undefinable in any case, an observation contradicted by the widespread use of such a device among his listeners. *Id.* In other words, the main argument in favor of Article VI, section 3 was pragmatic.

This whirlwind summary of how Article VI, section 3 of the federal Constitution came into being makes plain at least two of its limitations: first, the stock phrase – "religious test" – left open some possibilities for making religious beliefs a qualification for certain public office; second, the ban on religious tests applied only to public office and thus did not extend to many other civic services, including those provided by jurors, witnesses, and voters. It is against this backdrop that many states subsequently enacted their own constitutional provisions addressing religious tests for public office.

II. The Wyoming Framers Enacted the Broadest Test Clause Ever Seen in the United States.

The Wyoming constitutional prohibition upon religious disqualifications from public service is obviously broader – in both content and in reach – than the federal provision. It is also broader than all of the state constitutions extant in 1890. A few states then even retained constitutional religious tests for office. Many banned religious *tests* for *certain* government positions, just the way the national Constitution did (and does). Still others went further, and extended protection to more public stations, or broadened the scope of the banned litmus beyond "tests." A few state constitutions came very close to the standard set by Wyoming. But none quite enacted a measure as far reaching as Article I, section 18.

This Part describes the four groups of state constitutions and supplies appropriate illustrations, so that Wyoming's achievement can be better understood as the sweeping protection for religious beliefs of public officials that it is.

A. States Adhering to their Prior Test Clauses

Although judicial interpretation and political practice softened their practical effects, several states were still governed in 1890 by their early national era constitutions, with their traditional limitations of public office to

Protestants. Among these were Massachusetts, New Hampshire, Vermont, and Connecticut.

A few of the original thirteen which amended their founding-era constitutions scarcely liberalized their test clauses. Among the states which poured old wine into new wineskins was Maryland.

Its 1867 constitution stated, in the Declaration of Rights, Article 37, that "no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God." Md. Const. of 1867, Decl. of Rts., art. 37. Article 36 of the Maryland Constitution's Declaration of Rights read:

> [N]or shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; provided, he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come.

Id., Decl. of Rts., art. 36.

The Pennsylvania constitution of 1873 similarly stated that "[n]o person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit." Pa. Const. of 1873, art. I, § 4.

B. States Imitating the Federal Test Clause

Alabama's 1875 and 1901 constitutions stated that "[n]o religious test shall be required as a qualification to any office or public trust." Ala. Const. of 1875, art. I, § 4; Ala. Const. of 1901, art. III, § 3. Delaware's 1831 and 1897 constitutions said the same, *see* Del. Const. of 1831, art. I, § 2; Del. Const. of 1897, art. I, § 2; as did Maine's 1819 constitution, *see* Me. Const. of 1819, art. I, § 3; and Oregon's 1857 charter (in both cases minus the word "public"), *see* Or. Const. of 1857, art. I, § 4. The Mississippi constitution of 1890 economized a bit more: "No religious test as a qualification for office shall be required." Miss. Const. of 1890, art. 3, § 18. Tennessee's 1870 constitution affirmed the same proposition, in just a few more words: "[N]o political or religious test, other than an oath to support the Constitution of the United States and of this state, shall ever be required as a qualification to any office or public trust." Tenn. Const. of 1870, art. I, § 4. So, too, New Jersey in 1844: "[N]o religious test shall be required as a qualification for any office or public trust, and no person shall be denied the enjoyment of any civil right merely on account of his religious principles." N.J. Const. of 1844, art. I, § 4. Rhode Island's 1842 constitution said that "no man shall be . . . disqualified from holding any office nor otherwise suffer on account of his religious belief." R.I. Const. of 1842, art. I, § 3.

Some other states modestly enlarged upon the federal protection in their nineteenth-century constitutions. The 1877 Georgia constitution held that no one shall be "prohibited from holding any public office, or trust, on account of his religious *opinions*." Ga. Const. of 1877, art. I, § I, para. XIII (emphasis added). Arkansas in 1874 and Nebraska in 1875 modeled their language after what Ohio enacted in 1851: "[n]o religious test shall ever be required of any person as a qualification to vote or hold office*; nor shall any person be rendered incompetent to be a witness on account of his religious belief*; but nothing herein shall be construed to dispense with oaths or affirmations." Ark. Const. of 1874, art. 2, § 26; *see also* Ohio Const. of 1851, art. I, § 7 (emphasis added); Neb. Const. of 1875, art. I, § 4. And Illinois citizens ratified this constitutional protection: "[N]o person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions," but the people made it clear that this provision "shall not be construed to dispense with oaths or affirmations." Ill. Const., art. I, § 3.

C. States Adopting a Federal Test Clause "Plus"

Some of the state constitutions just mentioned ventured beyond protecting access to generically described "offices," and specified additional protected classes, such as witnesses. Indiana in 1859 ("No religious test shall be required, as a qualification for any office of trust or profit," Ind. Const. of 1859, art. I, § 5, and "No person shall be rendered incompetent as a witness,

in consequence of his opinions on matters of religion," *id.*, art. I, § 7), and Wisconsin in 1848 ("No religious tests shall ever be required as a qualification for any office of public trust," and "no person shall be rendered incompetent to give evidence in any court of law or equity in consequence of his opinions on the subject of religion," Wis. Const. of 1848, art. I, § 19) followed suit.[5] Kansas in 1859 added the franchise to this bundle of protections: "No religious test or property qualification shall be required for any office of public trust, nor for any vote at any election, nor shall any person be incompetent to testify on account of religious belief." Kan. Const. of 1859, Bill of Rts., § 7. Missouri in 1875 added jury service to the bundle: "[N]o person can, on account of his religious opinions, be rendered ineligible to any

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[5] As did these other states: California: "[N]o person shall be rendered incompetent to be a witness or a juror on account of his opinions on matters of religious belief," Cal. Const. of 1879, art. I, § 4; Florida: "[N]o person shall be rendered incompetent as a witness on account of his religious opinions," Fla. Const. of 1885, Decl. of Rts., § 5; New York: "[N]o person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief," N.Y. Const. of 1846, art. I, § 3; and Nevada: "[N]o person shall be rendered incompetent to be a witness on account of his opinions on matters of his religious belief," Nev. Const. of 1864, art. I, § 4.

office of trust or profit" nor be "disqualified from testifying, or from serving as a juror." Mo. Const. of 1875, art. II, § 5. In 1872 West Virginia further expanded the bundle: "No religious or political test oath shall be required as a prerequisite or qualification to vote, serve as a juror, sue, plead, appeal, or pursue any profession or employment." W. Va. Const. of 1872, art. III, § 11.

D. States Nearly Approximating the Breadth of Wyoming's Test Clause

Iowa's 1857 constitution approached the expansiveness of Wyoming's reach across the spectrum of civil opportunities, and partially abandoned the limiting phrase "tests" for the more inclusive term religious "opinion":

> No religious test shall be required as a qualification for any office, or public trust, and no person shall be deprived of any of his rights, privileges, or capacities, or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion."

Iowa Const. of 1857, art I, § 4. So, too, Washington in the year of the Cheyenne convention: "No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the

weight of his testimony."[6] Wash. Const., art. I, § 11. But neither entirely abandoned the restrictive phrase "religious test" or reached as far as protecting any religious opinion "whatever," like Wyoming would eventually do. *See* Wyo. Const., art. I, § 18.

III. Wyoming's Constitutional History Demonstrates that the Framers Intended to Foreclose What the Commission Attempts to Do to Judge Neely—Remove her from Office Because of her Religious Beliefs about Marriage.

Forty-nine men assembled in Cheyenne on September 2, 1889, to prepare the way for Wyoming into the Union. Before the month was out they produced a state constitution, which was subsequently ratified by the people and went into effect in 1890. The vast bulk of the forty-nine's labors concerned matters unrelated to religion and public service. But one candid exchange reveals in particular the extraordinary strength of their commitment to making religious belief – or its absence – compatible with public service. They considered with care whether belief in God ought to be a qualification for service as a juror or witness. John Riner, a lawyer from Laramie, defended the qualification. He was the only delegate who spoke in

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[6] Kentucky's 1891 constitution employed unique language: "[T]he civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma, or teaching." Ky. Const., Bill of Rts., § 5.

its favor. Riner was diffident about qualifications for witnesses, and limited his objection to unbelieving jurors to capital cases. Journal and Debates of the Constitutional Convention of the State of Wyoming at 720 (The Daily Sun 1893) (hereinafter "Wyoming Constitutional Convention").[7]

The delegates who spoke against Riner's proposal sounded roughly the same theme: truthfulness was found in persons who could not affirm the existence of God, and these persons' honesty was all that the relevant service required. A Laramie cattleman named George Baxter also pointed out that Riner's motion would disqualify from juries men who were surely eligible to "fill any position of trust or profit in the state," including that of governor. *Id.* at 720-21. And John Hoyt, President of the University of Wyoming, stated what appears from all the available evidence to have been the convention's aspiration: to include in the Constitution "the broadest declaration ever put before any people. I hope to be proud of our constitution in every particular, but especially proud of it on account of its breadth and freedom from all prejudice." *Id.* at 720. Riner's motion was defeated.

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[7] Riner argued, not quite clearly, that if non-believing juror sat in a capital case: "[W]hat is the effect upon it? Should he be competent? That is where the danger comes in, in that case, and I don't believe he ought to be allowed to sit in such a case." Wyoming Constitutional Convention, *supra*, at 720.

Indeed, even when it is compared to contemporary constitutions of northern plains states, Wyoming's protection of religious belief stands out as especially broad and deep. Colorado's 1876 Constitution is the starting point for comparing Wyoming to its neighboring new states. Colorado's document said in pertinent part that "no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion." Colo. Const. of 1876, art. II, § 4. The South Dakota Constitution of 1889 tracked closely this language,[8] as did Montana in its 1889 constitution.[9] In addition to omitting the important Wyoming amplifier "whatever," there is no specific reference in these state constitutions – as there was in the Wyoming constitution – to service as a juror or as a witness. And North Dakota strikingly *limited* its protection to service as a juror or witness.[10]

The Wyoming delegates took as one point of reference Idaho's provision:

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[8] "No person shall be denied any civil or political right, privilege or position on account of his religious opinions." S.D. Const. of 1889, art. VI, § 3.

[9] "[N]o person shall be denied any civil or political right or privilege on account of his opinions concerning religion." Mont. Const. of 1889, art. III, § 4.

[10] "[N]o person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief." N.D. Const., art. I, § 3.

> [N]o person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, or excuse acts of licentiousness or justify polygamous or other pernicious practices, inconsistent with morality or the peace or safety of the state; nor to permit any person, organization, or association to directly or indirectly aid or abet, counsel or advise any person to commit the crime of bigamy or polygamy, or any other crime.

Idaho Const., art. 1, § 4. The provision concluded that "[b]igamy and polygamy are forever prohibited in the state, and the legislature shall provide by law for the punishment of such crimes." *Id.*

On September 28, Charles Burritt, a young lawyer from Johnson County, submitted what he called a "proposition," one which seemed inspired by Idaho's example and which he expressly associated with the federal Edmonds-Tucker law. Burritt proposed to disqualify from voting, jury service, and "any civil office" anyone who is "a bigamist or polygamist, or is a believer in or enters into what is known as plural or celestial marriage." Wyoming Constitutional Convention, *supra*, at 837; *see also id.* at 110. He added that "I think it necessary that we incorporate it in our constitution." *Id.* at 837.

Burritt's "proposition," an obvious attempt to exclude followers of the Church of Jesus Christ of Latter-day Saints (LDS) from public life, was almost immediately referred to Committee. But that same afternoon (of the 28th), the Committee reported that it "ha[d] carefully considered this entire matter; ha[d] consulted eminent legal authority and [was] of the unanimous

opinion that the matters embraced" in Burritt's proposal were "fully covered by provisions already adopted in the constitution." *Id.* at 111. The Committee also noted that Burritt's proposal was "neither necessary [n]or expedient." *Id.*

The Convention records say that this report was adopted, and that Burritt's proposal was "indefinitely postponed." *Id.* Two days later, the Convention, without recorded negative vote, adopted the no-test clause that appears in the 1890 Wyoming Constitution. The decisive defeat of Burritt's attempt to disqualify LDS adherents from public service is unmistakable evidence that this sweeping protection surely includes opinions about marriage, and includes just as surely religious beliefs about marriage which do *not* conform to the prevailing civil law of marriage.

IV. Accepting the Commission's Recommendation Would Violate the Test Clause in Article I, Section 18 of the Wyoming Constitution.

As the foregoing demonstrates, no Wyoming public servant may be removed from his or her station because of an "opinion on any matter of religious belief whatsoever." Wyo. Const., art I, § 18. Judge Neely holds that marriage is the union of a man and a woman as a matter of her religious belief. No one has questioned that assertion, nor Judge Neely's sincerity in holding it. If any further support for the proposition that holding to traditional marriage counts as a religious belief, we can find it in the Supreme Court opinion recognizing same-sex marriage, *Obergefell v. Hodges*,

135 S. Ct. 2584 (2015). Justice Kennedy there wrote for the Court that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises." *Id.* at 2602.

The Commission admits in the "Conclusions of Law" section of its December 31, 2015 Order that it would remove Judge Neely because of her "statements" expressing her religious opinion about marriage. This is to say that she would be removed for her "religious opinion": Article I, section 18 is only operational where the "religious opinion" of an office-seeker or officeholder is known – that is, expressed or stated. An undisclosed belief cannot possibly lead to recriminatory action. A secret opinion needs no constitutional protection.

It might be said that Judge Neely would be removed for expressing not solely her "religious opinion," but for the additional statement that she would be unwilling to officiate at a same-sex wedding. But this possible suggestion that Judge Neely is to be removed not for her belief, but for her stated intention to act accordingly, utterly fails. It cannot explain, for example, why the Commission demands that Judge Neely be removed as Pinedale's municipal judge, a position in which she is not authorized to officiate a marriage ceremony. Moreover, Judge Neely has never been asked to perform a same-sex marriage and thus has never refused to do so. The Commission

does not allege anything to the contrary. Consequently, it is not necessary now – nor, likely, will it ever be – to consider a different situation, where a public servant's religious beliefs and unwillingness to act in violation of them would interfere so substantially with the performance of his or her duties that recusal-and-referral is no longer a feasible practical accommodation. Given that a very small percentage of the population indicates that it is attracted to people of the same sex, no one authorized to perform marriages (apart, perhaps, from a few especially cosmopolitan areas) would have cause to decline less than 5 percent of requests to officiate. In no imaginable situation could such a rate of recusal or referral constitute a *substantial* failure to perform one's job.

Little more than a glance at the Commission's "Analysis" is needed to see that *all* the grounds there adduced are either obviously false, or transparently violate Article I, section 18. Among the obviously false grounds are those which assert a violation of Rule 2.2, which requires a judge to "perform all duties" of the office "fairly and impartially." But the Commission does not allege – much less prove – any duty which Judge Neely failed to perform adequately. In fact, she is not required to perform weddings at all: as a magistrate she is authorized but not required to solemnize marriages, and as a municipal judge she is not even empowered to do that! *See* Wyo. Stat. 20-1-106(a).

The Commission refers to Comment 2 (to Rule 2.2), specifying that a judge must "interpret and apply" the law without regard for her personal opinion about the justness of the law. But nowhere does the Commission identify any violation of this provision. Judge Neely surely does not dispute that the law recognizes same-sex marriage. In fact, the Commission has distorted the obvious meaning of these provisions – which is that a judge must perform with integrity all the duties which she undertakes to perform – to mean instead that no judge may ever seek to recuse herself from performing a duty because of a conflict in conscience (at least where the judge holds a conscientious view of which the Commission disapproves). But no rule of judicial conduct in Wyoming – or anywhere else, for that matter – requires every judge to perform every task that comes across the transom.

Among those allegations which transparently violate Article I, section 18 is the Commission's claim that Judge Neely's religious opinion manifests "bias or prejudice." This appears to be another way for the Commission to say that it disapproves of Judge Neely's religion. The Commission emphasizes here "bias or prejudice" against people who want to marry someone of the same sex. But the Commission (again) alleges nothing in support of this grave charge other than Judge Neely's religious opinion.

The only other grounds for removing Judge Neely alleged by the Commission are that her statements could undermine public confidence in

the judiciary: they bear "the appearance of impropriety." These assertions are false; it is rather more likely that removing a judge because she is a professing Christian will lead to a widespread loss of faith in the judiciary. In any event, the only possible sense of these charges refers to a negative popular reaction to Judge Neely continuing in office. But this hypothesized reaction cannot lawfully supply the basis for removing Judge Neely.

Article I, section 18 is meant precisely to protect office-seekers and officeholders from a heckler's veto over "religious opinion." In 1890, many residents of Wyoming would have complained loudly about the "bias" of an LDS judge. Then and later, some would have declared that appointment or retention of a Catholic or Jewish judge would be "improper." Today, some residents of Wyoming might say the same of a Muslim judge. In all these instances (and more), it could be alleged by some that the targeted judge is the cause of public disrespect for the judiciary. But in all these instances (and more), the Wyoming Constitution stands as a bulwark against any government body's surrender to these popular prejudices.

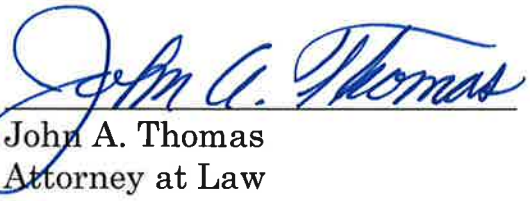
Conclusion

From the earliest colonial days until now, marriage has been *both* a civil *and* a religious institution. This intersection of the civil and the religious at what Americans have always judged to be a socially and politically important institution could have been divisive. But it has by and large been a

source of unity. Constitutional provisions against establishments of religion mean that civil marriage cannot be taken over by any particular church's understanding of it, *and* that the churches are free to hold views about marriage which are not the same as the civil definition of it. Constitutional provisions against religious tests for public office mean that the opportunity to exercise public authority shall not be restricted or abridged *at all* because of what any church's members believe about marriage.

Wyoming's constitutional provisions stand as a beacon of freedom and equality in this remarkably successful tradition. The people of Wyoming in 1890 erected an overarching protection of religious belief about all manner of divine things, specifically including religious views about the meaning and nature of marriage. If this remarkable provision means anything at all, it means that public offices and the opportunity to participate in the political life of Wyoming cannot be denied to *anyone* just because she abides her conscientious religious convictions about marriage.

Respectfully submitted this the 6th day of May, 2016.

By: 

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CERTIFICATE OF SERVICE

I certify that on May 6, 2016, I mailed this Brief (along with six copies) to the Clerk of Court for the Wyoming Supreme Court via FEDEX, and that I mailed a copy of this document via First-Class Mail, postage prepaid, to each of the following:

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