IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID HARRISON DEGRAW,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE LINDA MARQUIS, DISTRICT JUDGE,

Respondents, and

MISTY JO DEGRAW,

Real Party in Interest.

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Supreme Court Case No. 72528

Original Action for Writ to
Eighth Judicial District Court,
Clark County, Nevada,
Case No. D-16-543167-D

AMICUS CURIAE BRIEF OF NEVADA LEGISLATURE SUPPORTING PETITIONER'S EMERGENCY PETITION REGARDING PROPER CONSTITUTIONAL AND STATUTORY INTERPRETATION OF NEVADA'S LEGISLATIVE CONTINUANCE STATUTE IN NRS 1.310

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INTRODUCTION

The Nevada Legislature (Legislature), by and through its counsel the Legal Division of the Legislative Counsel Bureau under NRS 218F.720, hereby files an amicus brief supporting Petitioner's Emergency Petition for Writ of Mandamus and/or Prohibition with regard to the proper constitutional and statutory interpretation of the legislative continuance statute in NRS 1.310.[1]

Under NRAP 29(a), as an agency of the State of Nevada, the Legislature "may file an amicus curiae brief without the consent of the parties or leave of court." Additionally, under NRS 218F.720(1), the Legislature may appear through its counsel in any action to protect its official interests. The determination of whether to appear is made by "the Legislative Commission, or the Chair of the Legislative Commission in cases where action is required before a meeting of the Legislative Commission is scheduled to be held." Id. In this case, because such action was required, the Chair authorized the filing of the Legislature's amicus brief to protect its official interests in the proper constitutional and statutory interpretation of the legislative continuance statute in NRS 1.310.

[1] The Legislature's amicus brief is limited solely to legal issues concerning the proper constitutional and statutory interpretation of the legislative continuance statute in NRS 1.310. This brief does not address any other issues arising from the particular facts of this case, and it does not support either party concerning such other issues.

The Legislature has an interest in this case because the district court, by finding NRS 1.310 "unconstitutional as written," seems to have determined that the statute is unconstitutional on its face, which would mean that "there is no set of circumstances under which the statute would be valid." Deja Vu Showgirls v. State Dep't of Tax'n, 130 Nev.Adv.Op. 73, 334 P.3d 392, 398 (2014). The Legislature objects to such an overly broad and wholly unnecessary facial invalidation of the statute because it would mean that a legislator-lawyer would never be entitled to a mandatory continuance during a legislative session under any set of circumstances, even though under most circumstances a mandatory continuance would not cause any irreparable harm or unreasonable delays.

The Legislature enacted the legislative continuance statute to draw a reasonable balance between: (1) the needs of the legislative branch to have all legislators present and available in Carson City and performing their legislative functions without interruption or distraction from litigation during the extremely limited timeframe of the 120-day regular session or any special session; and (2) the needs of the judicial branch to manage and control such litigation in order to facilitate the prompt administration of justice, prevent irreparable harm and discourage unreasonable delays. The statute provides in relevant part:

> If an attorney for a party to any action or proceeding in any court or before any administrative body, who was actually employed before the commencement of any legislative session, is a member of the Legislature of the State of Nevada, or is President of the Senate, *that fact is sufficient cause for the adjournment or continuance of the action or proceeding*, including, without limitation, any discovery or other pretrial or posttrial matter involved in the action or proceeding, *for the duration of any legislative session*.

NRS 1.310(2) (emphasis added).

To interpret NRS 1.310 properly, it must be read to balance the needs of the legislative branch and the needs of the judicial branch in a manner that is consistent with the State and Federal Constitutions. When properly interpreted in this manner, the statute provides that if any party's attorney in a case is a legislator who was actually employed before the commencement of any regular or special session, that fact—standing alone—is sufficient cause to grant a continuance for the duration of the legislative session. In most cases, the statute should be interpreted as requiring mandatory continuances to promote the needs of the legislative branch to have all legislators present and available in Carson City and performing their legislative functions without interruption or distraction from litigation during the extremely limited timeframe of any regular or special session.

However, in certain exceptional cases, Nevada's statute—like similar legislative continuance statutes from other states—should be given a reasonable construction to the fullest extent necessary to save it from any constitutional problems. Under such a construction, the statute should provide the opposing

party, in certain exceptional cases, with a reasonable opportunity to submit evidence which must satisfy the opposing party's heavy burden to prove that as a direct result of emergency or extraordinary circumstances, a substantial existing right will be defeated or abridged by the legislative continuance and the party will thereby suffer substantial and immediate irreparable harm.

In providing the opposing party with such a reasonable opportunity, the opposing party should not be entitled to an evidentiary hearing in every case because such a requirement would thwart the very purpose of the legislative continuance statute by requiring the legislator-lawyer to prepare for and appear at each such evidentiary hearing during the legislative session. This would clearly divert the legislator-lawyer's attention and focus from the legislative session and thereby defeat the underlying intent, benefits and policy of the legislative continuance statute. Instead of an evidentiary hearing, the parties initially should be entitled to submit evidence only through affidavits and other relevant documents, and the court should then determine whether it is able to resolve the motion for a legislative continuance based exclusively on the evidence submitted by the parties and the arguments in their briefs without the need for an evidentiary hearing that would interfere with the legislator-lawyer's legislative responsibilities.

Accordingly, when this Court interprets the legislative continuance statute in NRS 1.310, the Legislature respectfully asks this Court to give deference to the reasonable balance drawn by the Legislature between the needs of the legislative branch and the needs of the judicial branch and interpret NRS 1.310 to: (1) require mandatory continuances to the fullest extent permitted by the State and Federal Constitutions; and (2) in certain exceptional cases, provide the opposing party with a reasonable opportunity to submit evidence—only through affidavits and other relevant documents—which must satisfy the opposing party's heavy burden to prove that as a direct result of emergency or extraordinary circumstances, a substantial existing right will be defeated or abridged by the legislative continuance and the party will thereby suffer substantial and immediate irreparable harm.

BACKGROUND

At the general election on November 8, 2016, Keith F. Pickard, Esq., was elected as a member of the Nevada State Assembly, and his term of office began the day after the general election under Article 4, §3 of the Nevada Constitution. See Child v. Lomax, 124 Nev. 600, 611 (2008) ("a State Assembly member-elect begins serving in office on the day after the election, and his or her predecessor is no longer a member of the Legislature after that date.").

On February 6, 2017, which was the first day of the 2017 regular session, Mr. Pickard was found to be qualified for his legislative seat under the Constitution and laws of this state, and he was seated as a member of the Assembly under Article 4, §6 of the Nevada Constitution. Assembly Journal, 79th Reg. Sess., at 2-3 (Nev. Feb. 6, 2017).[2] As a sitting member of the Assembly, Mr. Pickard is currently performing his legislative functions during the 2017 regular session, which is limited to 120 consecutive calendar days and must adjourn sine die not later than midnight Pacific time at the end of June 5, 2017, under Article 4, §2 of the Nevada Constitution.

On or about October 5, 2016, before Mr. Pickard was elected to office, the petitioner, David Degraw, retained Mr. Pickard in his private capacity as a practicing family-law attorney to represent Mr. Degraw in the underlying family-law matter giving rise to this writ petition. (*PA:45*.)[3] For purposes of this writ

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[2] This Court may take judicial notice of the official acts and records of the Legislature, including legislative histories and journals. See Nev. Const. art. 4, §14; NRS 47.130-47.170; Fierle v. Perez, 125 Nev. 728, 737 n.6 (2009) ("[C]ourts generally may take judicial notice of legislative histories, which are public records."); French v. Senate of Cal., 80 P. 1031, 1033 (Cal. 1905) ("The courts take judicial notice of the public and private official acts of the legislative department of the state."); State ex rel. Snip v. Thatch, 195 S.W.2d 106, 107 (Mo.1946) ("The courts take judicial notice of the records of the general assembly.").

[3] Citations to "*PA*" are to page numbers of Petitioner's Appendix filed on March 7, 2017.

petition, the real party in interest is the petitioner's spouse, Misty Degraw, who filed a complaint for divorce against the petitioner in the Clark County District Court on November 29, 2016. (*PA:1-6*.) Among other matters, the complaint requested relief relating to joint legal custody, primary physical custody and visitation concerning the couple's two minor children. (*PA:1-6*.)

In responding to the divorce action on behalf of the petitioner, Mr. Pickard filed: (1) a notice of appearance on December 19, 2016; and (2) an answer and counter-claim to the complaint for divorce on December 27, 2016. (*PA:7-14*.) Among other matters, the answer and counter-claim requested relief relating to joint legal custody, primary physical custody and visitation concerning the couple's two minor children. (*PA:7-14*.)

On January 23, 2017, Ms. Degraw filed a motion for temporary custody and temporary support orders, and a hearing regarding that motion was noticed for March 1, 2017. (*PA:15-41*.) In response, on February 2, 2017, the petitioner filed a motion to continue the litigation under the legislative continuance statute asking the district court to "stay further litigation in this matter until after the end of the 2017 legislative session pursuant to NRS 1.310." (*PA:42*.)

The motion to continue was supported by Mr. Pickard's affidavit in which he stated that the 2017 regular session is "expected to adjourn sine die on June 6, 2017," and that "[u]nless a special session is called to continue the legislative

work, I expect to return to Henderson on or about June 12, 2017." (*PA:45*.) Additionally, Mr. Pickard asked the district court to grant the motion to continue without a hearing in a manner similar to EDCR 2.23.[4] (*PA:44*.)

On February 16, 2017, Ms. Degraw filed an opposition asking the district court to deny the motion to continue in its entirety. (*PA:44-56*.) Citing caselaw from other jurisdictions, the opposition argued that the legislative continuance statute could not be interpreted as mandatory under the separation-of-powers doctrine. (*PA:52-53*.) Instead, the opposition argued that the district court has the discretion to deny a legislative continuance based on the facts and circumstances of each case, including in cases involving emergency circumstances or irreparable harm. (*PA:52-53*.) The opposition also argued that any legislative continuance must be balanced against the fundamental rights of parents to parent their children and consider the best interests of the children and that those rights and interests prevail over the right of a person to serve in the Legislature. (*PA:52-53*.)

According to Ms. Degraw's allegations in the opposition, although the parties entered into a visitation agreement after they separated, her motion for temporary custody and temporary support orders was filed "due to David's unreasonable withholding of the children from her." (*PA:50-51*.) Ms. Degraw alleges that if a

[4] EDCR 2.23(c) states: "The judge may consider the motion on its merits at anytime with or without oral argument, and grant or deny it."

legislative continuance is granted for the duration of the 2017 regular session, or even longer if a special session is called after the regular session ends on June 5, 2017, the continuance "would be irreparably prejudicial to Misty" because she would be "deprived of reasonable time with the parties' children for an undetermined amount of time." (*PA:51-53*.)

On March 2, 2017, the district court entered an order holding that Nevada's legislative continuance statute is "unconstitutional as written." (*PA:61*.) Specifically, the district court stated:

> In the instant case, Plaintiff opposes the lawyer-legislator's request for legislative continuance and alleges that a substantial existing right will be defeated or abridged by the delay, that she will be irreparably damaged by the delay, and that emergency court intervention is warranted. Therefore, the Court FINDS *NRS 1.310 unconstitutional as written* as it violates the separation of powers doctrine of the Nevada Constitution by allowing the legislature to commandeer the inherent power of the judiciary to govern its own procedures, removing all discretion from the Court. There are instances in which the postponement of an action would result in irreparable harm or defeat an existing right, and emergency relief is warranted. In those instances, the Court must be able to [be] allowed to exercise discretion.

(*PA:61* (emphasis added)).

Based on its interpretation of the statute as being entirely discretionary in all cases, the district court exercised its discretion and granted, in part, the request for a legislative continuance and stayed "the majority of this litigation pending the legislative session." (*PA:61*.) However, the district court also held that:

> [B]ased upon the Plaintiff's opposition and the persuasive authority cited herein, the Court will hold a brief evidentiary hearing regarding the merits of Plaintiff's opposition to Mr. Pickard's request to stay as it pertains to the Plaintiff's Motion for Temporary Custody and Temporary Support Orders pending the legislative session on March 8, 2017, at 9:00 a.m.
>
> Mr. Pickard may file the appropriate notice and appear by telephone or skype. Mr. Pickard may also have another one of the attorneys in his firm appear on his behalf.

(*PA:61*.)

On March 7, 2017, the petitioner filed this writ petition asking this Court to stay the district court's order directing the evidentiary hearing. The petitioner argues that the district court erred in denying the motion for a legislative continuance and unnecessarily found the statute unconstitutional because Ms. Degraw did not make a prima facie showing of emergency circumstances or irreparable harm. (*Pet.:7-14.*) The petitioner also argues that the district court erred in ordering an evidentiary hearing to resolve the motion for a legislative continuance because the district court could have decided whether Ms. Degraw established emergency circumstances or irreparable harm based solely on the parties' motions and briefs without a hearing. (*Pet.:7-14.*)

On March 7, 2017, this Court entered an order imposing a temporary stay of the district court proceedings pending further order from this Court, and it also directed Ms. Degraw to file an answer, including authorities, against issuance of extraordinary writ relief.

ARGUMENT

I. Standards of review for extraordinary writ relief.

Because writ relief is an extraordinary remedy that invokes this Court's original jurisdiction, the decision whether to grant such relief lies within this Court's sole discretion. Aspen Fin. Servs. v. Dist. Ct., 129 Nev.Adv.Op. 93, 313 P.3d 875, 877-78 (2013). This Court may grant writ relief when the petitioner does not have a plain, speedy and adequate remedy in the ordinary course of the law to challenge the district court's decision. Id.

Under that standard, writ relief is generally unavailable to challenge the district court's procedural orders because, in most cases, such orders may be challenged in an appeal after final judgment. Id. However, if the district court's procedural orders deny statutory or constitutional rights that would be lost if the petitioner's challenge has to wait until an appeal after final judgment, then writ relief is warranted to vindicate the petitioner's rights before they are irretrievably lost. See Jones v. Nev. Comm'n on Jud. Discipline, 130 Nev.Adv.Op. 11, 318 P.3d 1078, 1082 (2014); Valley Health Sys. v. Dist. Ct., 127 Nev. 167, 172 (2011); Lowe Enters. Residential Partners v. Dist. Ct., 118 Nev. 92, 95-97 (2002). Based on this reasoning, courts in other jurisdictions have held that writ relief is warranted to review the denial of legislative continuances. Bottoms v. Super. Ct., 256 P. 422, 428 (Cal.Ct.App.1927); State ex rel. Johnson v. Indep. Sch. Dist., 109

N.W.2d 596, 599-600 (Minn.1961); Lemoine v. Martineau, 342 A.2d 616, 622 (R.I.1975); City of Valdez v. Valdez Dev. Co., 506 P.2d 1279, 1284 (Alaska1973); In re Ford Motor Co., 165 S.W.3d 315, 321-22 (Tex.2005).

In this case, writ relief is warranted because the petitioner does not have a plain, speedy and adequate remedy in the ordinary course of the law to challenge the district court's denial of the legislative continuance for all parts of the litigation during the 2017 regular session. First, because the district court's denial of the legislative continuance is an interlocutory procedural order, the petitioner does not have the right to an immediate appeal of the interlocutory procedural order under any statute or court rule. See Bergenfield v. BAC Home Loans Serv., 131 Nev.Adv.Op. 68, 354 P.3d 1282, 1283 (2015) ("This court's appellate jurisdiction is limited to appeals authorized by statute or court rule."). Therefore, in the ordinary course of the law, the petitioner can challenge the district court's denial of the legislative continuance only in an appeal after final judgment.

However, if the petitioner's challenge has to wait until an appeal after final judgment, the petitioner's statutory rights to a legislative continuance will be irretrievably lost because: (1) the legislative continuance was requested for the 2017 regular session and such a continuance can be useful only if granted during the 2017 regular session; and (2) it is highly unlikely that a final judgment will be entered in this case before the 2017 regular session is constitutionally required to

end on June 5, 2017, so it is highly unlikely that the petitioner will be able to appeal the district court's denial of the legislative continuance after a final judgment. Under such circumstances, writ relief is warranted because the petitioner does not have a plain, speedy and adequate remedy in the ordinary course of law.

Furthermore, regardless of whether the petitioner has a plain, speedy and adequate remedy in the ordinary course of the law, this Court may grant writ relief "where the circumstances reveal urgency or a strong necessity" or "where an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction." Bus. Computer Rentals v. State Treasurer, 114 Nev. 63, 67 (1998). For example, writ relief is warranted when the petition "raises pressing issues involving the Nevada Constitution and the public policy of this state." Id.

In this case, regardless of whether the petitioner has a plain, speedy and adequate remedy in the ordinary course of the law, writ relief is warranted because the circumstances reveal urgency and strong necessity given that there are important issues of constitutional and statutory law that need immediate clarification during the 2017 regular session and the public policy of this state would be best served by this Court's exercise of its original jurisdiction. In particular, the petition raises urgent and important issues of law involving: (1) the

proper balance of power between the legislative and judicial branches under the separation-of-powers provision of the Nevada Constitution; and (2) the public policy of this state which the Legislature has codified in the legislative continuance statute and which is intended to have all legislators present and available in Carson City and performing their legislative functions without interruption or distraction from litigation during the extremely limited timeframe of any regular or special session. Accordingly, in light of such urgency and strong necessity, this Court should exercise its original jurisdiction and resolve the merits of the important issues of constitutional and statutory law raised by the writ petition.

II. Standards of review for constitutional issues and issues of statutory construction.

This Court reviews constitutional issues and issues of statutory construction de novo "without deference to the district court's decision." Sparks Nugget v. State Dep't of Tax'n, 124 Nev. 159, 163 (2008). When reviewing the constitutionality of statutes, this Court presumes the statutes are constitutional, and "[i]n case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is clearly violated." List v. Whisler, 99 Nev. 133, 137 (1983). The presumption places a heavy burden on the challenger to make "a clear showing that the statute is unconstitutional." Id. at 138. As a result, this Court will not invalidate a statute on constitutional grounds unless the statute's invalidity appears "beyond a reasonable

doubt." Cauble v. Beemer, 64 Nev. 77, 101 (1947); State ex rel. Lewis v. Doron, 5 Nev. 399, 408 (1870) ("[E]very statute is to be upheld, unless plainly and without reasonable doubt in conflict with the Constitution.").

Furthermore, it is a fundamental rule of constitutional review that "the judiciary will not declare an act void because it disagrees with the wisdom of the Legislature." Anthony v. State, 94 Nev. 337, 341 (1978). Thus, in reviewing the constitutionality of statutes, this Court is not concerned with the wisdom or policy of the statutes because "matters of policy or convenience or right or justice or hardship or questions of whether the legislation is good or bad are solely matters for consideration of the legislature and not of the courts." King v. Bd. of Regents, 65 Nev. 533, 542 (1948).

III. To properly balance the needs of the legislative branch and the needs of the judicial branch, the legislative continuance statute in NRS 1.310 should be interpreted to: (1) require mandatory continuances to the fullest extent permitted by the State and Federal Constitutions; and (2) in certain exceptional cases, provide the opposing party with a reasonable opportunity to submit evidence—only through affidavits and other relevant documents—which must satisfy the opposing party's heavy burden to prove that as a direct result of emergency or extraordinary circumstances, a substantial existing right will be defeated or abridged by the continuance and the party will thereby suffer substantial and immediate irreparable harm.

In 1960, the Legislature enacted Nevada's legislative continuance statute in NRS 1.310. Since then, Nevada's appellate courts have not interpreted or applied NRS 1.310 in any reported cases. In the absence of any controlling Nevada

caselaw directly on point, it is appropriate to consider caselaw from other jurisdictions with legislative continuance statutes.

In addition to NRS 1.310, there are legislative continuance statutes currently in effect in at least 14 other states.[5] There also were legislative continuance statutes formerly in effect in several other states. Annotation, Counsel's Absence Because of Attendance on Legislature as Ground for Continuance, 49 A.L.R.2d 1073 (1956 & Supp. 2017). Taken together, the judicial decisions from these states form a significant body of caselaw interpreting various legislative continuance statutes. Id.

At common law, a legislator-lawyer's attendance at a legislative session was not a cause for a continuance which a court was bound to recognize, although a court was not precluded from doing so in the exercise of its discretion. Johnson v. Theodoron, 155 N.E. 481, 483 (Ill.1927). Since the 1800s, state legislatures have enacted legislative continuance statutes with the intent to abrogate the common-law rule and statutorily establish that a legislator-lawyer's attendance at a legislative session is a "sufficient cause" for a continuance which a court is bound

[5] Cal. Civ. Proc. Code §595; Fla. Stat. Ann. §11.111; Ga. Code Ann. §9-10-150; La. Stat. Ann. §13:4163; Minn. Stat. Ann. §3.16; Miss. Code. Ann. §11-1-9; Mo. Ann. Stat. §510.120; N.Y. Jud. Law §469; 12 Okl. St. Ann. §667; S.C. Code Ann. §2-1-150; Tenn. Code Ann. §20-7-106; Tex. Civ. Prac. & Rem. Code Ann. §30.003; W.Va. Code Ann. §4-1-17; Wis. Stat. Ann. §757.13.

to recognize when it is "made to appear by affidavit that all the conditions named in the statute exist." Id.; St. Louis & S.E. Ry. v. Teters, 68 Ill. 144, 146-47 (1873). Consequently, because state legislatures intended to abrogate the common-law rule, most early cases interpreted legislative continuance statutes as being mandatory when the statutory conditions were met. See e.g., Teters, 68 Ill. at 146-47; Bottoms v. Super. Ct., 256 P. 422, 424 (Cal.Ct.App.1927); Cox v. State, 40 S.W.2d 427, 428 (Ark.1931); Hudgins v. Hall, 32 S.E.2d 715, 718-19 (Va.1945); State ex rel. Snip v. Thatch, 195 S.W.2d 106, 106-08 (Mo.1946).

For example in Teters, the Illinois Supreme Court interpreted that state's 1872 legislative continuance statute, which contained language similar to Nevada's current statute, as being mandatory when the statutory conditions were met:

> [T]he act of the 22d of February, 1872, (Sess. Laws, 345) provides that it shall be sufficient cause for a continuance if it shall appear by affidavit that any party applying for a continuance, or any attorney or solicitor or counsel of such party is a member of either house of the General Assembly, and in actual attendance upon the sessions of the same, and that the presence of such attorney, solicitor or counsel in court, is necessary to a fair and proper trial of such suit; that, on filing such affidavit, the court may grant a continuance of such suit. This affidavit brings this case clearly within the statute.
>
> The only question which can arise is, whether the granting of the continuance is not a matter of discretion with the court. . . . Again, the first clause of the section declares that such an affidavit shall be sufficient cause for a continuance. Hence, the word "may," in the latter clause, must be construed to mean "shall." When all of the provisions on the subject are considered, we are clearly of opinion that it was not discretionary to grant or refuse the continuance.

Teters, 68 Ill. at 146-47.

However, in more recent cases, courts have subjected legislative continuance statutes to greater scrutiny to ensure that the statutes do not violate: (1) the separation-of-powers doctrine by invading the province of the judiciary to facilitate the prompt administration of justice, prevent irreparable harm and discourage unreasonable delays; and (2) the Due Process Clause by denying litigants timely access to the courts when a substantial existing right will be defeated or abridged by the continuance.

For example, some courts have struck down legislative continuance statutes as facially unconstitutional when the statutory language is not capable of a constitutional interpretation because the language requires mandatory continuances *in all cases* and fails to provide the opposing party, in certain exceptional cases, with a reasonable opportunity to prove that as a direct result of emergency or extraordinary circumstances, a substantial existing right will be defeated or abridged by the continuance and the party will thereby suffer substantial and immediate irreparable harm. See McConnell v. State, 302 S.W.2d 805, 807-09 (Ark.1957); Booze v. Dist. Ct., 365 P.2d 589, 591 (Okla.Crim.App.1961); Granai v. Witters, Longmoore, Akley & Brown, 194 A.2d 391, 392-93 (Vt.1963); Lemoine v. Martineau, 342 A.2d 616, 620-22 (R.I.1975); City of Valdez v. Valdez Dev. Co., 506 P.2d 1279, 1282-84 (Alaska1973).

By contrast, other courts have upheld legislative continuance statutes as facially constitutional when the statutory language is capable of a constitutional interpretation because, even though the language requires mandatory continuances *in most cases*, the language is nevertheless interpreted to provide the opposing party, in certain exceptional cases, with a reasonable opportunity to prove that as a direct result of emergency or extraordinary circumstances, a substantial existing right will be defeated or abridged by the continuance and the party will thereby suffer substantial and immediate irreparable harm. See Johnson v. Theodoron, 155 N.E. 481, 483 (Ill.1927); Kyger v. Koerper, 207 S.W.2d 46, 48-49 (Mo.1946) (Hyde, J., concurring opinion joined by majority of court); Nabholz Const. Corp. v. Patterson, 317 S.W.2d 9, 11-12 (Ark.1958); Thurmond v. Super. Ct., 427 P.2d 985, 986-88 (Cal.1967); A.B.C. Bus. Forms v. Spaet, 201 So.2d 890, 891-92 (Fla.1967); Waites v. Sondock, 561 S.W.2d 772, 774 (Tex.1977); Williams v. Bordon's, Inc., 262 S.E.2d 881, 883-84 (S.C.1980); Strickland v. State, 477 So.2d 1347, 1348 (Miss.1985); State v. Chvala, 673 N.W.2d 401, 404-08 (Wis.Ct.App.2003); Verio Healthcare v. Super. Ct., 208 Cal.Rptr.3d 436, 443-48 (Cal.Ct.App.2016), *review denied* (Dec. 21, 2016).

In this case, when Nevada's rules of constitutional and statutory construction are applied to NRS 1.310, the statute is facially constitutional because the statutory language is capable of a constitutional interpretation. Under the rules of

construction, this Court will construe statutes "with a view to promoting rather than defeating the legislative policy behind them." State Dep't of Mtr. Vehs. v. Brown, 104 Nev. 524, 526 (1988). As a result, this Court "will not construe statutes in a manner which will bring about an unreasonable result, or a result contrary to the legislature's purpose." NL Indus. v. Eisenman Chem., 98 Nev. 253, 260 (1982).

Based on the plain language of NRS 1.310, it is obvious that the Legislature's purpose in enacting the statute is to encourage and assist lawyers who are knowledgeable and experienced in the law to serve as citizen-legislators in the lawmaking body. By requiring mandatory continuances *in most cases*, the statute makes it less burdensome and more manageable for legislator-lawyers to step away temporarily from their law practices during legislative sessions, so they can better focus their attention and efforts on performing their legislative functions. Therefore, with a view to promoting rather than defeating the legislative policy behind NRS 1.310, the statute should be interpreted to require mandatory continuances to the fullest extent permitted by the State and Federal Constitutions.

Furthermore, when Nevada's statutory language is taken from other states like it was for NRS 1.310, the presumption is that the Legislature has done so with full knowledge of all judicial interpretations of that statutory language from those other states and the Legislature intends to adopt those judicial interpretations along with

the statutory language. Advanced Sports Info. v. Novotnak, 114 Nev. 336, 340 (1998). Thus, when the Legislature "patterns a statute upon a law of another state, the courts of [this] state usually follow the construction placed on the statute in the jurisdiction of its inception." Sec. Inv. Co. v. Donnelley, 89 Nev. 341, 347 n.6 (1973).

When the Legislature enacted NRS 1.310 in 1960, it used the following "sufficient cause" language as the standard for legislative continuances:

> If a party or an attorney for a party to any action or proceeding in any court or before any administrative body is a member of the legislature of the State of Nevada, or is president of the senate, such fact *shall be sufficient cause* for the adjournment or continuance of such action or proceeding for the duration of any legislative session, and such adjournment or continuance shall be granted without the imposition of terms.

1960 Nev.Stat., ch. 201, §1, at 365 (emphasis added). Although the statute was amended in 1963 and 2001 into its current form, the "sufficient cause" language has not changed. 1963 Nev.Stat., ch. 201, §1, at 313-14; 2001 Nev.Stat., ch. 61, §1, at 481.

Based on a comparison of statutory language from other states, the Legislature patterned the "sufficient cause" language after the Illinois statutes from the 1800s, which also served as the model for similar statutes in other states such as Missouri. Teters, 68 Ill. at 146-47; Thatch, 195 S.W.2d at 106-08. When NRS 1.310 was enacted in 1960, courts in Illinois and Missouri had already

interpreted the "sufficient cause" language as requiring mandatory continuances *in most cases* so long as the statutory conditions had been met. Id. However, those courts also recognized that the "sufficient cause" language should not be interpreted to require mandatory continuances in certain exceptional cases where it would produce unconstitutional results. Theodoron, 155 N.E. at 483; Kyger, 207 S.W.2d at 48-49. Therefore, when the Legislature first enacted NRS 1.310 in 1960, it must be presumed that the Legislature intended for Nevada's statute to be construed consistently with these prior judicial interpretations. This means that NRS 1.310 requires mandatory continuances *in most cases*, excluding only those exceptional cases where it would produce unconstitutional results.

Finally, even if NRS 1.310 is susceptible to conflicting interpretations, one rendering it constitutional, and the other unconstitutional, the judicial branch must adopt the constitutional interpretation. Sheriff v. Wu, 101 Nev. 687, 689-90 (1985). The U.S. Supreme Court has the explained the purpose of the rule which directs the judicial branch to adopt the constitutional interpretation as follows:

> [O]ne of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.

Clark v. Martinez, 543 U.S. 371, 381 (2005).

The rule which directs the judicial branch to adopt the constitutional interpretation is paramount to other rules of statutory interpretation because the duty of the judicial branch to save statutes from an unconstitutional interpretation is derived from the constitutional separation of powers which—out of respect for a coequal branch of government whose legislative members also take an oath to uphold the Constitution—requires the judicial branch to presume the legislative branch "legislates in the light of constitutional limitations." Rust v. Sullivan, 500 U.S. 173, 191 (1991); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 574-75 (1988); Illinois v. Krull, 480 U.S. 340, 351 (1987); Rostker v. Goldberg, 453 U.S. 57, 64 (1981). Therefore, based on the constitutional separation of powers, the judicial branch must adopt any reasonable construction which will save the statutes from unconstitutionality. Rust, 500 U.S. at 190 ("[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.))). As further explained by the High Court:

> As was stated in Hooper v. California, 155 U.S. 648, 657 (1895), "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe

> constitutionally protected liberties or usurp power constitutionally forbidden it.

DeBartolo Corp., 485 U.S. at 575.

Accordingly, even though NRS 1.310 does not contain any language expressly exempting exceptional cases from the scope of its provisions, the statute should be given a reasonable construction to the fullest extent necessary to save it from constitutional problems. Under such a construction, the statute should be interpreted to exclude only those exceptional cases in which the granting of a mandatory continuance would produce unconstitutional results. Therefore, like similar statutes from other states, NRS 1.310 should be interpreted in a constitutional manner to provide the opposing party, in certain exceptional cases, with a reasonable opportunity to prove that as a direct result of emergency or extraordinary circumstances, a substantial existing right will be defeated or abridged by the continuance and the party will thereby suffer substantial and immediate irreparable harm.

However, in providing the opposing party with such a reasonable opportunity, the opposing party should not be entitled to an evidentiary hearing in every case because such a requirement would thwart the very purpose of the legislative continuance statute by requiring the legislator-lawyer to prepare for and appear at each such evidentiary hearing during the legislative session. This would clearly divert the legislator-lawyer's attention and focus from the legislative session and

thereby defeat the underlying intent, benefits and policy of the legislative continuance statute. Instead of an evidentiary hearing, the parties initially should be entitled to submit evidence only through affidavits and other relevant documents, and the court should then determine whether it is able to resolve the motion for a legislative continuance based exclusively on the evidence submitted by the parties and the arguments in their briefs without the need for an evidentiary hearing that would interfere with the legislator-lawyer's legislative responsibilities.

It is well established that the due-process right to be heard in a meaningful manner does not in every instance require oral argument or an evidentiary hearing because such a right "as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations." FCC v. WJR, 337 U.S. 265, 276 (1949). Therefore, due process may be satisfied where the court's consideration and disposition of motions and oppositions is limited to the parties' documentary or evidentiary submissions only without the need for an evidentiary hearing. See Erco Indus. v. Seaboard Coast Line RR, 644 F.2d 424, 431 (5thCir.1981) ("Although Rule 56 requires notice to an adverse party and a hearing, the hearing need not be an oral or formal evidentiary hearing."); Greene v. WCI Holdings Corp., 136 F.3d 313, 315-16 (2dCir.1998) (collecting cases). As stated by the Ninth Circuit:

> Due process of law does not require oral argument upon every question of law. Oral argument is required under the Constitution only if, under the circumstances of a particular case, such argument is essential to a fair hearing. In other cases an opportunity to submit argument in writing is constitutionally sufficient.

In re Amendment of Rule 3, 440 F.2d 847, 849 (9thCir.1970).

In this case, the parties had a reasonable opportunity to submit evidence through affidavits and other relevant documents to the district court regarding the motion for a legislative continuance, and the district court should have resolved the motion for a legislative continuance based exclusively on the evidence submitted by the parties and the arguments in their briefs without the need for an evidentiary hearing that would interfere with the legislator-lawyer's legislative responsibilities. Therefore, this Court should grant the requested writ relief.

CONCLUSION

Based on the foregoing, when this Court interprets the legislative continuance statute in NRS 1.310, the Legislature respectfully asks this Court to give deference to the reasonable balance drawn by the Legislature between the needs of the legislative branch and the needs of the judicial branch and interpret NRS 1.310 to: (1) require mandatory continuances to the fullest extent permitted by the State and Federal Constitutions; and (2) in certain exceptional cases, provide the opposing party with a reasonable opportunity to submit evidence—only through affidavits and other relevant documents—which must satisfy the opposing party's heavy

burden to prove that as a direct result of emergency or extraordinary circumstances, a substantial existing right will be defeated or abridged by the legislative continuance and the party will thereby suffer substantial and immediate irreparable harm.

DATED: This **17th** day of March, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. We certify that the foregoing Amicus Brief complies with the formatting requirements of NRAP 29(d) and NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point font and Times New Roman type.

2. We certify that the foregoing Amicus Brief complies with the type-volume limitations of NRAP 29(e) and NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), the brief is proportionately spaced, has a typeface of 14 points or more, and contains **6,366** words, which is less than the type-volume limit of 7,000 words.

3. We certify that we have read the foregoing Amicus Brief, and to the best of our knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose. We further certify that the brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found. We understand that we may be subject to sanctions in the event that the brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: This **17th** day of March, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the **17th** day of March, 2017, pursuant to NRAP 25 and NEFCR 8 and 9, I filed and served a true and correct copy of the foregoing Amicus Brief of the Nevada Legislature, in the manner noted below, directed to the following:

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