

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the foregoing are persons and entities as described in NRAP 26.1(a), and must be disclosed:

1. Petitioner, David Degraw, is an individual.
2. Keith R. Pickard, Esq., of the Nevada Family Law Group represents David Degraw in the district court and has appeared in this Court.
3. Real party in interest, Misty Degraw, is an individual.
4. Nedda Ghandi, Esq., and Brian E. Blackham, Esq., of Ghandi Deeter Blackham represent Misty Degraw in the district court and have appeared in this Court.
5. No publicly traded company has any interest in this writ petition. These representations are made in order that the judges of this Court may evaluate possible disqualification of recusal.

DATED this 20 day of April, 2017.

GHANDI DEETER BLACKHAM

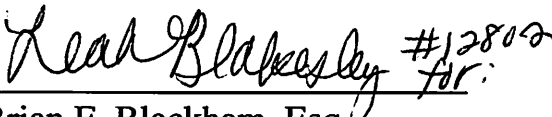

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POINTS AND AUTHORITIES

I. INTRODUCTION

The matter under review arises out of the marriage and current divorce proceedings of Petitioner David Degraw (David) and Real Party in Interest Misty Degraw (Misty). The parties were married on January 23, 2004, and have two minor children the issue of their marriage, to wit: Emma Jo Degraw, born August 31, 2005, and Adyson Mae Degraw, born August 6, 2008. Since the parties' separation in September 2016, David has unilaterally withheld the children from Misty, forcing Misty to file a Motion for Temporary Orders Re: Child Custody, Child Support, Attorney's Fees, and Related Relief, seeking an equal timeshare while the divorce is pending.

Shortly thereafter, David's attorney, Keith Pickard, Esq., requested a stay of proceedings pursuant to NRS 1.310 based on Mr. Pickard's participation in the Nevada State Assembly and the upcoming legislative session. Misty opposed David's request, arguing that the statute is unconstitutional as it violates the separation of powers clause of the Nevada Constitution, among other things.

The district court issued a minute order finding NRS 1.310 unconstitutional as written as it violates the separation of powers clause of the Nevada Constitution. The district court continued the majority of the divorce proceedings but set an evidentiary hearing "regarding the merits of Misty's Opposition to Mr. Pickard's

request to stay as it pertains to Misty's Motion for Temporary Custody and Temporary Support Orders pending the legislative session."

The instant Petition was filed on March 7, 2017, seeking extraordinary relief from this Court in the form of an order directing the District Court to vacate its order deeming NRS 1.310 unconstitutional, and further vacating its order to take testimony on the merits of Misty's allegations at the March 8, 2017 hearing. Misty's Answer follows.

II. PRELIMINARY STATEMENT REGARDING RECORD ON REVIEW

The parts of the record that may be essential to an understanding of the matters set forth in the instant "Answering Brief" that were not included in Petitioner's Appendix are being submitted to the court by way of the attached "Real Party In Interest's Appendix." In the following statement of facts and argument, reference to the relevant parts of the record will be in the form of PA XX and RA XX, where "PA" represents the Petitioner's Appendix, RA represents "Real Party In Interest's Appendix" and "XX" represents the page number within the Appendices upon which the relied upon matter may be found.

III. STATEMENT OF FACTS

Misty and David formally separated in September 2016, when Misty could no longer endure David's verbal abuse and manipulation. *PA: 18*. Throughout the marriage, David controlled every facet of the parties' life, which only became more

egregious as the years passed. *Id.* For eight years of the parties' 13-year marriage, David was the sole income-earner, while Misty stayed home and cared for their two young daughters. *Id.* Because of the time and dedication that Misty devoted to caring for Emma and Adyson, she and the girls developed a very close and loving bond. *PA: 19.*

David, a network engineer for Scientific Games, used his superior financial position as justification for disparaging Misty and as leverage to micromanage her activities, requiring Misty to provide receipts or otherwise account for all expenditures. *PA: 18.* David also demanded that Misty keep him apprised of her whereabouts. *Id.* Convinced that Misty was being unfaithful, David even placed a tracker on her phone during the marriage. *Id.* On more than one occasion, when Misty was spending time with family or friends, David conveyed disturbing lies to Misty to coerce her to return home, including falsely alleging that one of their daughters was in the hospital. *PA: 19.*

As the marriage continued to deteriorate, Misty sought certification as a physical therapy assistant so that she would have a means to support herself and the children in the event of divorce. *Id.* To this end, Misty attended school while continuing to be the children's primary caregiver. *Id.* After receiving her certification, Misty obtained a job in a physical therapy office, and using funds that she saved, she moved out of the marital residence in September 2016. *Id.* Prior to

moving out, the parties discussed sharing the children in an equal timeshare, which comforted Misty in leaving the marital residence. *Id.*

Misty knew that it would take a few days for the children's furniture to arrive at her new home, and thus, she agreed to the children remaining temporarily in the marital residence with David for a short period until her new home was ready for them. *PA: 19.* By late September 2016, the home was fully ready for the children to begin overnights at Misty's residence. *PA: 20.* Using the same approach that had served him so well throughout the parties' marriage, David bullied Misty into accepting three consecutive weekends per month, from Friday until Sunday, and every Wednesday evening, even though Misty desired an equal timeshare. *Id.* But despite his promises, David never allowed Misty to have the children overnight on Wednesdays. *Id.*

In late October 2016, David further hacked away at Misty's custodial time by demanding that the parties alternate weekend visitation with the children. *PA: 20-21.* And although David again promised to allow Misty overnights with the children on Mondays, Wednesdays, and Fridays during the interim weeks, he refused to honor his commitment. *PA: 21.* David's justification for denying Misty's custodial time during the week was that "the children need routine" and "being in another house during the week throws off their schedule." *PA: 21.* In making these arguments, David ignored the fact that Misty had been the children's

primary caregiver for the past eight years and was more familiar than David with the routines and schedules that she helped devise. *PA: 21.*

Moreover, it was evident to Misty that the children were not following their routines in David's care. *PA: 21.* Misty frequently receives the children wearing mismatched clothing, and without having brushed their hair or their teeth. *PA: 21.* Further, one of Adyson's teachers wrote Misty an email in early December stating that the child was crying in class because she was very hungry and had not eaten breakfast before going to school. *PA: 21.* These were not problems that the children had prior to Misty's departure and clearly demonstrated that the children were not following any routine or schedule that would preclude Misty from receiving an equal timeshare, let alone custodial time during the week. *PA: 21.* After solidifying his lopsided custodial schedule that afforded Misty just four days and eight hours per month with the children, David informed Misty that he would be required to work in the office, and was no longer able to work from home, further eroding David's alleged rationale for keeping the children on weekdays. *PA: 21.*

Misty filed her Complaint for Divorce on November 29, 2016. *PA: 1-6.*

Although David's attorney, Mr. Pickard, avers that he was retained by David "on October 5, 2016...to represent him in a domestic matter and to offer advice on related issues," Mr. Pickard did not file his Notice of Appearance as David's attorney of record in the district court action until December 19, 2016. *PA: 7-8.* Mr. Pickard

had been elected to the Nevada State Assembly more than a month earlier on November 8, 2016.

David filed an Answer and Counterclaim for Divorce on December 27, 2016.

PA: 9-14.

On January 23, 2017, Misty filed her Motion for Temporary Orders Re: Joint Legal and Joint Physical Custody, Child Support, Attorney's Fees and Costs and Related Relief ("Motion for Temporary Orders") requesting, among other things, that the district court award the parties joint legal custody and joint physical custody of the minor children, subject to a week-on/week-off timeshare, with custodial exchanges occurring each Sunday at 5:00 p.m., and with the parent not having the children in a given week receiving custodial time from Wednesday after school, until the following morning when school resumes, or at 9:00 a.m. if there is no school.

PA: 22. Misty's Motion was set for hearing on March 1, 2017 at 9:30 p.m.

On February 2, 2017, Mr. Pickard filed a Motion to Continue/Stay the case pursuant to NRS 1.310 ("Motion to Continue"), requesting that the district court "stay all litigation in this matter until he returns after the legislative session," which Mr. Pickard anticipated would be the week following the legislature's scheduled adjournment on June 6, 2017. *PA: 43.* The Motion to Continue was set for hearing on March 8, 2017 at 9:00 a.m. *Id.*

The 2017 Nevada legislative session began on February 6, 2017.

On February 16, 2017, Misty filed her Opposition to Mr. Pickard's Motion to Continue ("Opposition"), arguing that NRS 1.310 violates the separation of powers doctrine of the Nevada Constitution, and that Misty would suffer irreparable harm if the matter, as it pertains to child custody, were stayed pending the conclusion of the 2017 legislative session. *PA: 48-56.*

On February 17, 2017, the district court entered a minute order pursuant to EDCR 1.10, consolidating the hearing on Misty's Motion for Temporary Orders, Mr. Pickard's Motion to Continue, and the Case Management Conference, all to occur on March 8, 2017, at 9:00 a.m. *RA: 4-5.*

On February 27, 2017, Mr. Pickard filed an Ex Parte Application for an Order Shortening Time on the Motion to Continue/Stay ("Motion for OST"), seeking an expedited hearing on his Motion to Continue. *RA: 6-9.* In his affidavit in support of the Motion for OST, Mr. Pickard states:

I am informed, and therefore believe, that the parties are currently operating under a mutually-agreed-upon temporary joint legal and joint physical custody arrangement and that there is currently no emergency circumstances that would warrant challenging the mandatory nature of the continuance afforded under NRS 1.310.
RA: 7-9.

On March 2, 2017, the district court entered a minute order, noting the conflicting accounts of the prevailing child custody arrangement contained in Misty's Motion and Mr. Pickard's affidavit in support of his Motion for OST, and finding, in pertinent part:

NRS 1.310 appears on its face to merely postpone pending matters. Postponing adjudication of a dispute, generally, will not give rise to any injury, over and above any inconvenience associated with delay. However, the delay may inflict harm in certain situations that may not be able to be remedied at a later date. NRS 1.310 makes no provision for those cases in which delay will cause an injury that can only be prevented by immediate access to the court. NRS 1.310 mandates legislative continuance, eliminating any judicial discretion.

PA: 57-62.

Analyzing case law from other jurisdictions with similar legislative continuance statutes, the district court found 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.” *PA: 61.* The district court further found that courts must be allowed to exercise discretion “in instances in which postponement of an action would result in irreparable harm or defeat an existing right, and emergency relief is warranted.” *Id.*

The Court granted Mr. Pickard’s request for a stay in part, staying the majority of this case pending the legislative session. *Id.* However, based on Misty’s opposition and the persuasive authority cited therein, the district court set a brief evidentiary hearing regarding the merits of Misty’s Opposition to Mr. Pickard’s request to stay as it pertains to the temporary relief requested in Misty’s Motion, to occur on March 8, 2017 at 9:00 a.m., the same date and time set for the hearing of Misty’s Motion, David’s Motion to Continue, and the Case Management

Conference. *Id.* The district court granted Mr. Pickard leave to file the appropriate notice and appear by telephone or Skype. *Id.* The district court also affirmed that Mr. Pickard could have another one of the attorneys¹ in his firm appear on his behalf.² *Id.*

On March 7, 2017, less than 24 hours before the scheduled evidentiary hearing, Mr. Pickard filed the instant Emergency Petition under NRAP 21(6) for Writ of Mandamus and/or Prohibition Staying District Court's Order Requiring Evidentiary Hearing ("Petition"), asking this Court to stay the evidentiary hearing because there was allegedly "no prima facie showing of irreparable harm" and directing the district court to "take briefings on the matter in furtherance of making

¹ According to its website, Mr. Pickard's firm, Nevada Family Law Group, employs three attorneys—Mr. Pickard, Jordan M. Garcia, Esq., and Lisa Chamlee-Brainerd, Esq.—all of whom practice in diverse areas of Nevada family law, including "complex divorce and custody cases." <http://www.nevadafamilylaw.com/home.html>. Mr. Garcia has been licensed to practice law in Nevada since 2011 and served as a law clerk for two district court judges, including the Honorable Cynthia Giuliani of the Eighth Judicial District Court, Family Division. <http://www.nevadafamilylaw.com/jordan-m-garcia.html>. Ms. Chamlee-Brainerd has practiced primarily in the area of family law since her admission to the State Bar of Nevada in 2011, and is described as "a seasoned trial attorney" on the firm's website. <http://www.nevadafamilylaw.com/lisa-chamlee-brainerd.html>.

² In another active divorce case in which Mr. Pickard is attorney of record for the plaintiff and Nedda Ghandi is attorney of record for the defendant, no Motion to Continue pursuant to NRS 1.310 was ever filed. Rather, Mr. Garcia appeared for Mr. Pickard at the Case Management Conference on February 9, 2017, after the start of the 2017 legislative session. RA: 3. Mr. Garcia also appeared for Mr. Pickard at the Senior Judge Settlement Conference on April 18, 2017.

the decision as to emergency as needed.” *See* Petition: 4. Notably absent from the Petition is any claim that the parties were “operating under a mutually-agreed-upon temporary joint legal and joint physical custody arrangement,” as alleged in the affidavit in support of the Motion for OST. *See* Petition and *RA*: 6-9.

On March 7, 2017, this Court entered its Order Imposing Temporary Stay and Directing Answer within 30 days, staying the district court proceedings pending a decision on the Petition.

On March 17, 2017, the Nevada Legislature filed its Amicus Curiae Brief of the Nevada Legislature Supporting Petitioner’s Emergency Petition Regarding Proper Constitutional and Statutory Interpretation of Nevada’s Legislative Continuance State in NRS 1.310 (“Amicus Brief”).

In order to have sufficient time to address the arguments and authority included in the detailed Amicus Brief, on April 4, 2017, Misty sought an extension to file the instant Answer pursuant to NRAP 26(b)(1), which this Court granted by Order entered on April 7, 2017.

Since the parties’ separation, both Emma and Adyson have cried to Misty, asking why they are not allowed to spend more time with her, and stating that two nights is just not enough time with their mom. *PA*: 21. Misty asked David every week if the children could stay with her overnight on Mondays and Wednesdays as previously requested, to which David responded that “his lawyer” told him no. *PA*:

22. Misty avers that David is continuing to limit her custodial time with the children to just four days and eight hours per month, and is outright refusing her requests for additional time. David “allows” Misty to have visitation with the children from Friday evenings until Sunday evenings, every other week, and Mondays and Wednesdays in the interim weeks from 6:30 p.m. until 8:30 p.m. David generally refuses Misty’s requests for the children to stay overnight during the weekdays (despite the fact that Emma’s school is directly across the street from Misty’s residence) and he promptly shows up at 8:30 p.m., demanding that the children return to him.

IV. STATEMENT OF ISSUES

1. Whether the district court improperly set an evidentiary hearing regarding the merits of Misty’s Opposition to Mr. Pickard’s Motion to Continue as it pertains to Misty’s Motion for Temporary Orders?
2. Whether NRS 1.310 is unconstitutional on its face and/or as applied to the facts of this case, as it violates Article 3 of the Nevada Constitution?
3. Whether NRS 1.310 is unconstitutional as applied, as it infringes on Misty’s due process rights and fundamental liberty interest in the care, custody and control of the parties’ children?
4. Whether David has standing as a party with a “beneficial interest” in obtaining the relief requested in the Petition?

V. ARGUMENT

A. Legal Standards.

1. Petitions for Extraordinary Writs.

NRS 34.170 states the following:

This writ [of mandamus] shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It shall be issued upon affidavit, on the application of the party beneficially interested.

NRS 34.330 states as follows:

The writ [of prohibition] may be issued only by the Supreme Court, the Court of Appeals or a district court to an inferior tribunal, or to a corporation, board or person, in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested.

Mandamus is an extraordinary remedy, and it is within this court's discretion whether a petition will be considered. *Cote H. v. Dist. Ct.*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008). It is well settled that this court may review a petition if there is “an important issue of law [that] needs clarification.” *International Game Tech.*, 124 Nev. 193, 197, 179 P.3d 556, 559 (2008).

Writ relief is generally not available when an adequate and speedy legal remedy exists. *Pan v. Dist. Ct.*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004). The petitioner carries the burden of demonstrating that extraordinary relief is warranted. *Id.* at 228, 88 P.3d at 844. A writ petition must be in strict compliance with all applicable rules and must set forth a request sufficient to convince the reviewing

court that immediate intervention to provide extraordinary relief is warranted. *Id.* at 228-29, 88 P.3d at 844.

NRAP 21(a)(5) provides that a petition for an extraordinary writ shall be verified by the affidavit of the petitioner or, if the petitioner is unable to verify the petition or the facts stated therein are within the knowledge of the petitioner's attorney, by the affidavit of the attorney. The affidavit shall be filed with the petition. *See also* NRS 34.170; NRS 34.330.

To establish standing in a mandamus proceeding, the petitioner must demonstrate a “beneficial interest” in obtaining writ relief. *Heller v. Legislature of State of Nev.*, 120 Nev. 456, 460–61, 93 P.3d 746, 749 (2004). “To demonstrate a beneficial interest sufficient to pursue a mandamus action, a party must show a direct and substantial interest that falls within the zone of interests to be protected by the legal duty asserted.” *Id.* (quoting *Lindelli v. Town of San Anselmo*, 111 Cal.App.4th 1099, 4 Cal.Rptr.3d 453, 461 (2003)). “Stated differently, the writ must be denied if the petitioner will gain no direct benefit from its issuance and suffer no direct detriment if it is denied.” *Id.* (quoting *Waste Management v. County of Alameda*, 79 Cal.App.4th 1223, 94 Cal.Rptr.2d 740, 747 (2000)).

Here, Misty does not dispute that David has no plain, speedy, and adequate remedy in the ordinary course of law. Further, Misty agrees that this matter involves an important issue of law that requires the clarification of the constitutionality of

NRS 1.310. Nevertheless, as argued herein, David’s specific requests for relief fail on the merits.

Further, the instant Petition is procedurally defective as it is not supported by an affidavit or otherwise verified by the named Petitioner, David, nor by his attorney, Mr. Pickard. Given this Court’s mandate that writ petitions be in strict compliance with all applicable rules, this defect alone—which violates both NRS 34.170 and NRS 34.330, as well as NRAP 21(a)(5)—is sufficient to deny the Petition.

Moreover, the person “beneficially interested” in this matter is ambiguous at best. Although David is the named Petitioner, it appears to be the rights of Mr. Pickard as an attorney-legislator that are at issue in the underlying Petition, as well as in the Motion to Continue and Motion for OST filed below.³ *PA: 42-47, RA: 6-9*. This raises the question of whether David has standing to bring the present Petition. It does not appear that David has standing under this Petition, as he is not the person directly impacted by the district court’s refusal to summarily grant Mr. Pickard’s Motion to Continue without an evidentiary hearing; thus, any effect on David would be strictly incidental to the adjudication of Mr. Pickard’s rights, and David’s Petition should therefore be denied.

³ It is noteworthy that David did not execute an affidavit in support of either Motion.

Even if the Court were to find that David's incidental interest was sufficient to confer standing on him, certainly, whoever the interested person happens to be, that person is required to affirm the contents of the Petition under penalty of perjury. NRS 34.170; NRS 34.330; NRAP 21(a)(5); *see also State v. Wright*, 10 Nev. 167 (1875). As this foundational requirement was not met by either of the potential interested parties, the Petition should be denied.

2. 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, Inc. v. State ex rel. Dept. of Taxation*, 124 Nev. 159, 163, 179 P.3d 570, 573–74 (2008).

The Fourteenth Amendment of the United States Constitution provides that no State shall “deprive any person of life, liberty, or property, without due process of law.” *Troxel v. Granville*, 530 U.S. 57, 64 (2000). The Fourteenth Amendment's Due Process Clause, like its Fifth Amendment counterpart, “guarantees more than fair process.” *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 719, (1997)). The Clause also includes a substantive component that “provides heightened protection against government interference with certain fundamental rights and liberty interests.” *Id.* (quoting *Glucksberg*, 521 U.S. at 720). Our courts have recognized the fundamental right of parents to make decisions concerning the care,

custody, and control of their children. *Id.* at 66. *See also Blanco v. Blanco*, 129 Nev. Adv. Op. 77, 311 P.3d 1170, 1175 (2013).

This Court recognizes that “a parent's interest in raising his or her child is a fundamental right.” *In re Parental Rights as to D.R.H.*, 120 Nev. 422, 426–27, 92 P.3d 1230, 1233 (2004). This Court further recognizes that “substantive due process challenges to statutes impinging on fundamental constitutional rights [are analyzed] under a strict scrutiny standard” meaning that the statute must be narrowly tailored to serve a compelling [state] interest.” *Id.* at 427. In determining whether the statute is narrowly tailored to serve a compelling state interest, the Court first must look to the state interest involved. *Id.*

B. NRS 1.310 Is Unconstitutional on Its Face and As Applied to the Instant Facts, As It Violates the Separation of Powers Clause of the Nevada Constitution.

Article 3, Section 1 of the Nevada Constitution states, in pertinent part, as follows:

Three separate departments; separation of powers; legislative review of administrative regulations.

1. The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

...

Separation of powers “is probably the most important single principle of government declaring and guaranteeing the liberties of the people,” and it works by preventing the accumulation of power in any one branch of government. *Heller*, 120 Nev. At 466, 93 P.3d at 753 (quoting *Galloway v. Truesdell*, 83 Nev. 13, 18, 422 P.2d 237, 241 (1967)).

As coequal branches, each governmental department remains independent from influences by other branches of government, and each possesses inherent power to “administer its own affairs” and “perform its duties,” so as not to “become a subordinate branch of government.” *Halverson v. Hardcastle*, 123 Nev. 245, 260–61, 163 P.3d 428, 439 (2007); *see also Berkson v. LePome*, 126 Nev. 492, 245 P.3d 560 (2010). The judicial branch is vested with inherent authority to administrate its own procedures and to manage its own affairs, meaning that it may make rules and carry out other incidental powers when “ ‘reasonable and necessary’ ” for the administration of justice. *Id.* at 440, 163 P.3d at 261 (*Borger v. Dist. Ct.*, 120 Nev. 1021, 1029, 102 P.3d 600, 606 (2004) (emphasis in original) (quoting *Goldberg v. District Court*, 93 Nev. 614, 615, 572 P.2d 521, 522 (1977))); *see also State v. Dist. Ct.*, 116 Nev. 953, 959, 11 P.3d 1209, 1212–13 (2000) (recognizing that courts have inherent power to govern their own procedures and to make any and all necessary or desirable procedural rules)).

A motion for continuance is within the district court's sound discretion. *Hopper v. Hopper*, 79 Nev. 86, 88, 378 P.3d 875, 876 (1963) (citing *Benson v. Benson*, 66 Nev. 94, 204 P.2d 316 (1949)).

NRS 1.310, the legislative continuance statute, states the following:

NRS 1.310 Adjournment or continuance of action or proceeding during legislative session if party or attorney is member of Legislature or President of Senate.

1. If 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, that fact is sufficient cause for the adjournment or continuance of the action or proceeding, including, without limitation, any discovery or other pretrial or post trial matter involved in the action or proceeding, for the duration of any legislative session.

2. **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 post trial matter involved in the action or proceeding, for the duration of any legislative session.

3. **The adjournment or continuance provided for in subsections 1 and 2 must be granted without the imposition of terms.** (Emphasis supplied).

When reviewing the constitutionality of statutes, this Court presumes the statutes are constitutional, and in case of any doubt, every possible presumption will be made in favor of the constitutionality of the statute. *List v. Whisler*, 99 Nev. 133, 137, 660 P.2d 104 (1983). Nevertheless, when interpreting a constitutional or

statutory provision of plain and unambiguous language, this Court generally may not go beyond that language in construing the provision. *Sparks Nugget, Inc.*, 124 Nev. at 163, 179 P.3d at 574. When the provision's language is ambiguous, however, meaning that it can be reasonably construed in more than one manner, this Court may go beyond the language to adopt a construction that best reflects the intent behind the provision.

There is no ambiguity concerning NRS 1.310 in so far as its plain language affords the judiciary no discretion in reviewing requests for continuances of attorney-legislators who meet the minimal criteria identified in the statute. Rather, the statute clearly mandates that the continuance “must be granted without the imposition of terms.” NRS 1.310(3). Mr. Pickard emphasizes this point in his Motion to Continue, stating “because the fact of Attorney Pickard’s election is, on its face, sufficient cause for the continuance, NRS 1.310 is dispositive to the issue.” *PA: 44*. The instant Petition also concedes that the statute “does not allow for exceptions that an emergency might engender requiring action by the Court. Therefore it might be conceded that as applied to such a situation the statute may unconstitutionally interfere with a party’s right to access to the Courts.” *See* Petition: 6.

Misty asserts that NRS 1.310 is unconstitutional on its face and as applied to the specific facts of this case. When challenging a statute as unconstitutional on its

face, the challenger generally bears the burden of demonstrating that there is no set of circumstances under which the statute would be valid. *Deja Vu Showgirls v. State, Dept. of Tax*, 130 Nev. Adv. Op. 73, 334 P.3d 392, 398 (2014). But if a court concludes that a heightened level of scrutiny applies, the general presumption regarding a statute's constitutionality is reversed, and the State bears the burden of demonstrating the statute's constitutionality. *Id.* (citing *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 817, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000)).

Although this Court has not yet considered the constitutionality of NRS 1.310, as the Nevada Legislature concedes in its Amicus Brief, courts in other states have struck down continuance statutes as facially unconstitutional where their language requires mandatory continuances in all cases and fails to provide the opposing party with the means to show that some substantial existing right would be defeated or abridged by the continuance, resulting in substantial and immediate irreparable harm to the opposing party. *See* Amicus Brief: 18.

In *Booze v. Dist. Court of Lincoln County*, 365 P.2d 589, 592 (Okla. Crim. App. 1961), the Court of Criminal Appeals of Oklahoma upheld the trial court's denial of an attorney-legislator's motion for continuance under the recently amended legislative continuance statute, and specifically held:

We are of the opinion that [the Oklahoma legislative continuance statute] as amended by House Bill 903, in so far as it attempts to deprive the courts of the power to determine whether a continuance be granted or denied, is an attempt by the legislature to destroy the principle of

separation of powers, is an encroachment upon the powers of the courts of this state and thus violates Article IV section I of the Oklahoma Constitution. We hold that the District Court of Lincoln County acted in the exercise of a discretionary power and that the writ of prohibition should be denied.

See also Lemoine v. Martineau, 342 A.2d 616 (R.I.1975); *McConnell v. State*, 302 S.W.2d 805 (Ark.1957).

While the language in the continuance statutes of these states differs significantly from that of NRS 1.310, such language nevertheless permits no judicial discretion and therefore purports to divest courts of their inherent authority of the judiciary to administrate its own procedures, to manage its own affairs, and to ensure the public's access to justice. As such, while it is quite possible that district courts would find no substantial harm to the parties of a case or other injustice in granting a legislative continuance in the vast majority of instances, the complete absence of any semblance of judicial discretion from NRS 1.310 violates the separation of powers doctrine and renders it unconstitutional on its face. The appropriateness of this finding is especially evident in light of the heightened scrutiny required in matters involving the custody of minor children as is the case here. *Troxel*, 530 U.S. at 64; *Deja Vu Showgirls*, 130 Nev. Adv. Op. 73, 334 P.3d at 398.

Irrespective of whether the Court finds NRS 1.310 unconstitutional on its face, the statute is clearly unconstitutional as applied to the facts of this case. In its March 2, 2017 minute order, the district court noted that other states with similar legislative

continuance statutes found that the absence of judicial discretion rendered the statutes unconstitutional, violating the separation of powers doctrine. *PA*: 57-62. For example, in *A.B.C. Business Forms, Inc. v. Spaet*, 201 So.2d 890 (Fla. 1967), the trial court granted a legislative continuance believing that the statute left the court with no discretion to do otherwise, notwithstanding a showing of irreparable harm by the party opposing the continuance. In ordering the trial court to hold a hearing, the Florida Supreme Court stated the following:

Generally, in non-emergency cases [Florida's legislative continuance statute] is constitutional and should be liberally construed. But, as to litigation involving emergency relief and irreparable damage, we find the statute an invasion of the judicial field and violative of constitutional prohibition. . . . As a right guaranteed by the Constitution, the courts must be open to every person for relief against injury. Whether, in a given cause, the litigant may suffer irreparable injury in the application of the statute is one of sound judicial discretion, not subject to legislative control.
Id. at 892.

In *Thurmond v. Superior Court*, 66 Cal.2d 836 (1967), the California Supreme Court analyzed its legislative continuance statute in the context of a family law matter. In *Thurmond*, the trial court granted an attorney-legislator's ex parte request for a legislative continuance in an action against the father of an unborn child for support, maintenance, and medical expenses necessary for the child during the pendency of the paternity case. The court held:

The guardian [ad litem] in the present case points out that the right of the mother and child to apply for relief pendente lite will be materially impaired and perhaps destroyed by the imposition

of any substantial continuance; neither the birth of the child nor its need for care and support can be postponed. A similar result could follow in other cases in which a party has a right to invoke a provisional remedy, such as pendente lite support in domestic relations controversies, attachment and sale of perishable goods, receivership of a failing business, and temporary restraining orders or preliminary injunctions. . . . Situations other than those involving provisional remedies may also arise in which a substantial existing right would be defeated or abridged by extended continuances.

...

We are convinced that such a result, with the serious constitutional questions which would ensue, was not intended by the Legislature, and that the statutory provisions here involved are to be applied subject to the discretion of the court as to whether or not its process and order of business should be delayed....”

Id. at 775-76.

In *Waites v. Sondock*, 561 S.W.2d 772 (Texas 1977), the Supreme Court of Texas reviewed a statute with purported “mandatory” language similar to that of Nevada (i.e., “the court shall continue the cause” for attorneys who serve as legislators). In the action below, the trial court granted a legislative continuance in contempt proceedings stemming from the father’s failure to comply with a child support order. *Id.* In opposing the father’s attorney’s request for a continuance, the mother stated that she was in “dire need of support payments,” that the father had made no payments in the last 20 months and that over her physician’s objections she had been forced to take a second job in order to support her daughter. *Id.* at 772–73.

Citing to *A.B.C.* and *Thurmond*, *supra.*, the court in *Waites* held that a legislative continuance is mandatory except in those cases in which the party opposing the continuance alleges that a substantial existing right will be defeated or abridged by delay. *Id.* at 776. In cases of this type, the trial court has a duty to conduct a hearing on the allegations, and if the allegations are shown to be meritorious the court should deny the continuance. *Id.*

The facts of the present case most resemble those of *Thurmond* and *Waites*, where the unique and often pressing circumstances of a family law case collide with the inflexibility of a continuance statute. In those cases, as with *A.B.C.*, the remedy was to allow the district court to conduct a hearing to determine whether the exigency claimed by the party opposing the continuance justified a denial of the continuance. Interestingly, in both the Petition and the Amicus Brief, a similar process is endorsed, except that a puzzling emphasis is placed on the submission of affidavits and documents before any testimonial evidence may be taken. The emphasis is puzzling because it wholly ignores the fact that *both sides in the present case submitted affidavits sufficient to allow the Court to determine whether an evidentiary hearing was warranted.* PA: 42-47, RA: 6-9. And after reviewing the affidavit and legal arguments, the district court concluded that an evidentiary hearing *was* appropriate, and even allowed Mr. Pickard to appear remotely or send one of the two experienced attorneys in his office to the hearing in his place. PA: 61.

Yet rather than allow the proceedings to go forward, David and/or Mr. Pickard, brought the instant Petition and blocked Misty's access to the court pending this Court's decision or the conclusion of the 2017 legislative session.

The ongoing and unreasonable delay to a ruling on temporary orders renders the claim in the Petition that Misty "has not made a prima facie case that shows an emergency" especially offensive. *See* Petition: 4. Misty described in excruciating detail how David was using the absence of a temporary custodial order to whittle away at her custodial time with Emma and Adyson, how the children were regularly reduced to tears due to the unreasonable limitations placed on their time with their mom, and how the children's basic needs were not being consistently met in David's care. *PA: 15-41*. David ultimately reduced Misty's time with the children to just four days and eight hours per month, and there is presently no end in sight prior to the conclusion of the legislative session, at which point David will presumably demand time to file a written opposition to Misty's Motion, which could further delay the entry of any temporary orders to mitigate all the weeks and months lost. But the reality is that those weeks and months cannot be replaced. Children grow and change. Opportunities to prepare meals, to help with their homework, and even to hug them can be mathematically reallocated with compensatory time, but never come back. Misty respectfully submits that she has made a prima facie showing

that her fundamental right to the care, custody, and control of Emma and Adyson will continue to be defeated or abridged by further delay

Misty does not begrudge Mr. Pickard the right to serve in the legislature while practicing law. But should this right come at the expense of four and five months of the children's lives? Is there even any need for such a result when the attorney-legislator employs other family law practitioners and has even allowed them to appear on his behalf rather than seeking a continuance in at least one other case? *RA: 1-2, RA: 3*. The district court was poised to weigh the competing interests and answer these questions on March 8, 2017. Misty now asks that this Court deny the instant Petition so that the temporary custody proceedings may resume.

C. **NRS 1.310 Is Unconstitutional As Applied, As It Infringes on Misty's Due Process Rights and Fundamental Liberty Interest In the Care, Custody and Control of the Parties' Children.**

As stated above, this Court recognizes that “a parent's interest in raising his or her child is a fundamental right.” *In re Parental Rights as to D.R.H.*, 120 Nev. at 426–27, 92 P.3d at 1233. *See also Troxel*, 530 U.S. at 64; *Blanco*, 129 Nev. Adv. Op. 77, 311 P.3d at 1175. This Court further recognizes that “substantive due process challenges to statutes impinging on fundamental constitutional rights [are analyzed] under a strict scrutiny standard” meaning that the statute must be narrowly tailored to serve a compelling [state] interest.” *Id.* at 427. In determining whether the

statute is narrowly tailored to serve a compelling state interest, the Court first must look to the state interest involved. *Id.*

Here, David argues that the state interest behind NRS 1.310 is protecting litigants while ensuring that legislative duties could be carried out without interruption. *See* Petition: 6 (citing Minutes from March 1, 2001 Assembly Committee Judiciary, page 4). The goals attributed to NRS 1.310 by David are certainly a legitimate state interest, although it is not clear that it rises to the level of a compelling state interest.

Even if we were to assume that the described interest was compelling, it is clearly not narrowly tailored to serve that interest. Invoking the legislative continuance statute could impact a wide range of legal actions, including criminal prosecutions, civil litigation, and family law. But while the adverse impact of a lawyer invoking NRS 1.310(2) in a civil litigation case might be an inconvenient delay in the proceedings, as we have seen in the present case, the impact in a child custody matter could be an impermissible interference with the parent-child relationship. This is because NRS 1.310(2) affords the judiciary no discretion in whether to grant the continuance and provides no framework for evaluating whether a particular set of circumstances warrants a denial of the continuance. Accordingly, NRS 1.310 is unconstitutional as applied to the present case and is sufficient cause for denying the instant Petition.

D. Analysis of NRAP 8(d) Does Not Support Granting the Petition.

David cites to NRAP 8(d), which applies to requests for stay decisions on child custody matters pending an appeal, and is not applicable to the present case. But given the space devoted to this analysis in the Petition, Misty will briefly respond here.

(1) Whether the child(ren) will suffer hardship or harm if the stay is either granted or denied.

In *Sims v. Sims*, 109 Nev. 1146, 865 P.2d 328 (1993), a mother appealed a decision granting father primary physical custody based on mother's failure to comply with an Order requiring that the parties' 9 year -old child be within the purview of adult supervision at all times, and to never be left alone. Unfortunately, the order granting father primary physical custody was entered almost six months after the hearing in the matter. *Id.* at 1150. As to the delay, the district court made a specific finding of fact stating that the lengthy delay between the time of the hearing and the rendering of the decision "was not prejudicial, as the minor child was in school and thereafter on summer vacation, spending a substantial amount of time with her father over the summer." *Id.*

On appeal, this Court held that:

[The district court's] finding of fact suggests inadequate attention to the real impact that these decisions, and particularly the delay in these decisions, have on children's lives. The result of the delay in this case was that the child spent the summer with her father and then custody was changed so that she also spent

the school year with her father, thereby depriving the child from spending any significant time with her mother for a year—until the next summer. Time is more of the essence in these cases involving children than in any other cases and decisions should be made promptly after the close of evidence. Otherwise irreparable harm can be caused to the entire family, and especially the children. **Leaving children and their families in limbo for months without allowing them to make appropriate plans is in no one's best interests.** For adults, a few months may seem like a short time, but for children, a few months is a significant percentage of their lives. Top priority should be given to resolving their situations.”
Id. (Emphasis supplied).

This Court’s holding in *Sims* clearly demonstrates that David’s allegation that the children will not suffer hardship or harm from the delay of these proceedings and the resulting lopsided schedule with their parents until the adjournment of the legislature is without merit. In fact, the children stand to suffer the most.

(2) Whether the nonmoving party will suffer hardship or harm if the stay is granted.

Misty has detailed at length the hardship that she is facing and will continue to face if the district court proceedings do not resume immediately.

(3) Whether movant is likely to prevail on the merits in the appeal.

Misty is likely to prevail on the merits based on NRS 125C.0025, which codifies the state’s preference that parents share joint physical custody of their children, as well as the best interest factors set forth in NRS 125C.0035, and in particular NRS 125C.0035(4)(c), which requires the district court to consider which

parent is most likely to allow frequent associations and a continuing relationship with the other parent.

(4) Whether a determination of other existing equitable considerations, if any, is warranted.

Misty has previously identified multiple problems with the application of NRS 1.310 without judicial discretion. In addition, the Court should consider the need to dissuade “attorney shopping.” If a client is informed that their attorney will automatically be granted a stay in a potentially contentious or damaging legal action, the client may well select an attorney who is subject to the continuance as a means to delay the proceedings. In family law cases, the consequences for such delays may be dire, as parents might be prevented from participating in their children’s lives for months at a time, prevented from obtaining the necessary support for themselves or their children.

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VI. CONCLUSION

Based upon the foregoing, Misty requests that this Court deny the Petition for Writ of Mandamus or in the Alternative Prohibition in its entirety, find NRS 1.310 facially unconstitutional as it violates Article 3 of the Nevada Constitution in addition to Misty's due process rights, and direct the district court to resume custody proceedings in the instant case pursuant to the minute order entered March 2, 2017.

Dated this 20 day of April, 2017.

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VERIFICATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

MISTY DEGRAW being first duly sworn, deposes and says:

That she is the Real Party in Interest in the above and foregoing action; that she has read the foregoing Answer to Petition for Writ of Mandamus and/or Prohibition, and knows the contents thereof; that the same is true of her own knowledge, except for those matters therein stated on information and belief, and as to those matters, she believes the same to be true.



MISTY DEGRAW

SIGNED and SWORN to before
me this 20 day of April, 2017.



NOTARY PUBLIC



CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 28.2, undersigned counsel hereby certifies that this Petition for Writ of Mandamus and/or Prohibition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Answer to Writ of Mandamus and/or Prohibition has been prepared in a proportionally spaced typeface using Microsoft Word and a size 14 Times Regular font.

Undersigned counsel further certifies that this Answer to Writ of Mandamus and/or Prohibition complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the Writ of Mandamus and/or Prohibition exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 8801 words.

Finally, undersigned counsel certifies that I have read this Real Party in Interest's Answer to Writ of Mandamus and/or Prohibition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Answer to Writ of Mandamus and/or Prohibition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Answer Writ of Mandamus and/or Prohibition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter

relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity.

Dated this 20 day of April, 2017, by:

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CERTIFICATE OF SERVICE

The foregoing "Answering Brief to Writ of Mandamus and/or Prohibition" was served this date facsimile transmission and my mailing true and correct copies along with a copy of the "Petitioner's Appendix" thereof, via first class mail, postage prepaid and addressed as follows:

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An Employee of Ghandi Deeter Blackham