IN THE SUPREME COURT OF THE STATE OF NEVADA

ALEXANDER FALCONI D/B/A OUR NEVADA JUDGES, Petitioner, vs. CLARK COUNTY EIGHTH JUDICIAL DISTRICT COURT, Respondent.	Electronically Filed Jul 25 2022 08:37 p.m. Elizabeth A. Brown Clerk of Supreme Court CASE NO.: 84947

LAS VEGAS REVIEW-JOURNAL, INC.'S MOTION TO INTERVENE

Las Vegas Review-Journal, Inc. (the "Review-Journal") hereby moves to intervene in this original writ proceeding initiated by Alexander Falconi d/b/a Our Nevada Judges ("Falconi") for the purpose of enforcing the rights of the public (including the media) to access court proceedings as mandated by the First Amendment. This Motion is supported by the attached memorandum of points and authorities and the attached proposed Petition.

DATED this 25th day of July, 2022.

/s/ Margaret A. McLetchie

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The public, including the media, has a First Amendment right of access to court proceedings and court records. Summarily closing courts to the public without meeting the exacting substantive test and procedural requirements required by the First Amendment is inimical to America's and Nevada's long tradition of open courts, guaranteed by the First Amendment, the Nevada Constitution, and common law.

In this case, Petitioner Falconi's Writ centers on two Eighth Judicial District Court ("EJDC") Rules governing family court, EDCR 5.207 and EDCR 5.212 (the "Family Court Restrictions") that severely limit access to family court proceedings. Under EDCR 5.207, all hearings in custody and child support cases are held in closed court, and all documents in such cases are filed under seal unless the parties consent or if the party seeking access establishes that it is an "exceptional case" and obtains an "order of the court for good cause shown" under NRS § 126.211. Similarly, under EDCR 5.212, either party in a divorce case may unilaterally direct hearings or trials to be private and have the record filed under seal.

Falconi seeks an order declaring the Family Court Restrictions facially unconstitutional and writ relief directing respondent, the EJDC, to refrain from enforcing such rules. As Falconi points out, the Family Court Restrictions raise

serious constitutional issues. Indeed, the issues are even more acute than suggested in Falconi's Petition. For example, Falconi asserts that the Family Court Restrictions, which allow for the family court proceedings to be kept secret based on the whim of one of the litigants, are unconstitutional because the rules do not require a finding of "good cause" before restricting access. However, as more fully detailed in the Review-Journal's Petition, mere good cause is not a sufficient basis to close a courtroom; rather, strict scrutiny is the constitutionally mandated test. Moreover, in addition to mandating that strict scrutiny be met, the First Amendment demands that courts also follow procedural requirements, which the Family Court Restrictions entirely lack.

Accordingly, the Review-Journal now seeks to intervene in this matter for the purposes of maintaining its and the public's First Amendment right to access the courts. This Court has held that intervention is procedurally proper for news media to be heard on the issue of its exclusion from courts. Further, the Review-Journal meets the standards for both intervention of right and permissive intervention set forth by Nev. R. Civ. P 24.[1]

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[1] Petitioner Falconi consents to intervention, but Respondent, the EJDC, indicated it would not take a position until the instant motion is filed.

II. INTERESTS OF PROPOSED INTERVENOR

The Review-Journal publishes a daily newspaper, the *Las Vegas Review-Journal*, and other media publications in Las Vegas, Nevada, and beyond. The *Las Vegas Review-Journal* is the largest circulation daily newspaper in Nevada. The Review-Journal carries on the constitutionally protected business of reporting the news. The Review-Journal routinely reports on court proceedings in the state of Nevada and has consistently reported on matters of public interest in the courts, including family court matters.[2]

The right of access to courts is just as essential, if not more so, for news media than other members of the public since the news media are "surrogates for the public." *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012) (citation and internal quotation omitted). Indeed, "[t]he free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press." *Id.* As this Court has

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[2] *See, e..g.*, Blake Apgar, *Former Nevada Sen. John Ensign Divorces Wife*, Las Vegas Review-Journal (July 22, 2019), https://www.reviewjournal.com/news/politics-and-government/former-nevada-sen-john-ensign-divorces-wife-1808479/ (accessing the divorce case file of a former Nevada senator for a story); David Ferrara, *Case Focuses on Decision Over School, Child's Best Interests*, Las Vegas Review-Journal (Dec. 26, 2017), https://www.reviewjournal.com/local/local-nevada/case-focuses-on-decision-over-school-childs-best-interests/ (discussing a family court judge's determination in a divorce proceeding); Wesley Juhl & Rachel Crosby, *Woman Killed in Quadruple Homicide Filed for Divorce Last Month*, Las Vegas Review-Journal (June 20, 2016), https://www.reviewjournal.com/local/local-las-vegas/woman-killed-in-quadruple-homicide-filed-for-divorce-last-month/ (reviewing a couple's divorce case file for a story).

explained in deciding then-publisher of *the Las Vegas Review-Journal* should be permitted to pursue limited intervention in a criminal case to advance or argue constitutional claims concerning access to court proceedings, "the press often acts as a proxy for the public, advancing the public's understanding and awareness of the criminal justice system." *Stephens Media, Ltd. Liab. Co. v. Eighth Judicial Dist. Court*, 125 Nev. 849, 860, 221 P.3d 1240, 1248 (2009) (citing *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 508-09, 104 S. Ct. 819 (1984); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573, 575-76 (1980)).

Thus, as this Court, the United States Supreme Court, and Ninth Circuit have all emphasized, allowing the media to intervene to address court access issues thus allows the media to act as surrogate to protect the public's First Amendment right to access proceedings. Recognizing the Review-Journal's standing to object to court secrecy, state and federal courts have permitted the newspaper to intervene in a number of matters to protect the constitutional and common law rights of the media and the public to access court records and proceedings. For example, in *Stephens Media, LLC. v. Eighth Judicial Dist. Court*, this Court allowed the intervention of the then-publisher of the *Las Vegas Review-Journal* to address court access issues. 125 Nev. 849, 860, 221 P.3d 1240, 1248 (2009); *see also United States v. Bundy*, No. 2:16-cr-00046-GMN-PAL (D. Nev. July 1, 2016), 2016 U.S. Dist. LEXIS

86080, at *11 (granting the Review Journal, Battle Born Media, and the Associated Press intervention to challenge a protective order).

III. ARGUMENT

A. Intervention is Appropriate and Necessary to Facilitate the Media's Right to be Heard on the Mass Closing of Courts.

As detailed in the proposed Petition, the Family Court Restrictions impinge upon the Review-Journal's rights under the First Amendment, the Nevada Constitution, and common law to access the courts. The United States Supreme Court has held that when parties or the court seek to exclude news media from access to hearings or records, "representatives of the press… 'must be given an opportunity to be heard on the question of their exclusion.'" *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609, n.25 (1982) (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (Powell, J., concurring)).

Following this rationale, this Court has held that, when news media is excluded from access to hearings or records, intervention is procedurally appropriate. *Stephens Media*, 125 Nev. at 859, 221 P.3d at 1247 (granting the publisher of the *Las Vegas Review-Journal* the right to intervene where an order prohibited its access to court documents); *see also Chi. Tribune Co. v. Ladd*, 162 F.3d 503, 507 (7th Cir. 1998) ("we have intimated that the most appropriate procedural mechanism… is by permitting those who oppose the suppression of the

material to intervene"). While *Stephens Media* extended the civil ability to intervene to the media in criminal cases, the same rationale applies to civil cases, including the present family court proceedings. *See, e.g.*, *Del Papa v. Steffen*, 112 Nev. 369, 374, 915 P.2d 245, 248 (1996) (holding that the First Amendment right of the media's access to courts applies to civil matters); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580, n. 17 (1980) (holding that media's First Amendment right to access the courts is historically the same for both criminal and civil matters). ("Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.")

The importance of immediate public access to documents has also been recognized in cases providing the press with access to public records in court files. *See*, *e.g.*, *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110,126-27 (2d Cir. 2006) ("Our public access cases and those in other circuits emphasize the importance of immediate access where a right of access is found.") (emphasis added) (citations omitted)); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (public access to documents in court's file "should be immediate and contemporaneous").

Here, the Review-Journal should be allowed to intervene to protect its rights to access family courts. While the Review-Journal recognizes that this a matter

before the Nevada Supreme Court, not a district court, Nev. R Civ. P. 24 and case law regarding intervention is still appropriate to consider in evaluating this Motion,[3] and intervention is procedurally appropriate for several reasons, as argued below.

B. Intervention is Appropriate Under Rule 24.

Intervention is appropriate under the standard set forth by Nev. R. Civ. P. 24 ("Rule 24"). While this Court has original jurisdiction over this matter, in the absence of a procedural rule on point, appellate courts[4] generally follow trial court rules when considering motions to intervene. *See*, *e.g.*, *Int'l Union v. Scofield*, 382 U.S. 205, 216 n.10 (1965) (allowing intervention after reasoning that, while the Federal Rules of Civil Procedure apply only to district courts, "the policies underlying intervention" apply in appellate courts); *United States v. ABA*, 118 F.3d 776, 779 (D.C. Cir. 1997) (applying Fed. R. Civ. P. 24 because "intervention in the court of appeals is governed by the same standards as in the district court."). Here intervention is more than in an appellate matter as it is an original proceeding.

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[3] *See also* NRS § 34.300 (except as otherwise provided therein, "the provisions of NRS and Nevada Rules of Civil Procedure relative to civil actions in the district court are applicable to and constitute the rules of practice" in mandamus proceedings); NRS § 34.320 ("[t]he writ of prohibition is the counterpart of the writ of mandate."). Falconi's Petition seeks a writ of mandamus and writ of prohibition.

[4] Rule 24 of the Federal Rules of Civil Procedure is analogous to Rule 24 of the Nevada Rules of Civil Procedure. "[F]ederal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules." *Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005), as modified (Jan. 25, 2006).

The Review-Journal meets the standards for both intervention of right and permissive intervention in the present matter.

1. Intervention of Right

Pursuant to NRCP 24(a)(2), intervention of right is appropriate when a party "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." This Court has held that "an applicant for intervention of right must show '(1) that it has a sufficient interest in the litigation's subject matter, (2) that it could suffer an impairment of its ability to protect that interest if it does not intervene, (3) that its interest is not adequately represented by existing parties, and (4) that its application is timely.'" *Hairr v. First Judicial Dist. Court*, 132 Nev. 180, 184, 368 P.3d 1198, 1201 (2016) (quoting *Am. Home Assurance Co. v. Eighth Judicial Dist. Court,* 122 Nev. 1229, 1238, 147 P.3d 1120, 1126 (2006)).

Here, Proposed Intervenor's application is timely, and the First Amendment jurisprudence discussed above shows both that the Review-Journal has a sufficient interest in the litigation's subject matter and that it could suffer an impairment if it does not intervene. As for the third prong, Falconi's petition for writ of prohibition does not adequately represent the Review-Journal's interests for a number of

reasons. First, as explained in more detail in the attached proposed Petition, Falconi advocates for a good cause requirement, while the First Amendment requires strict scrutiny as well as additional procedural safeguards. *See. e.g., Del Papa v. Steffen*, 112 Nev. 369, 383, 915 P.2d 245, 254 (1996) (granting writ relief where a court order, *inter alia,* restricted media access to proceedings). Second, Falconi does not directly challenge the constitutionality of the statutes relating to the EJDC Family Court Restrictions in question, which, as discussed in the attached Petition, the Review-Journal is challenging the related statutory provisions.

2. Permissive Intervention

The Review-Journal also meets the standard for permissive intervention. Under NRCP 24(b)(1)(B), courts have discretion to permit intervention when a party has a claim or defense that shares with the main action a common question of law or fact. This is a wholly discretionary determination by the court that weighs potential delay or prejudice that could arise out of permitting intervention. *Hairr*, 132 Nev. at 187–88, 368 P.3d at 1202.

Here, the Review-Journal's claims as to the Family Court Restrictions are very similar to Falconi's: Falconi and the Review-Journal both seek writ relief (and related declaratory relief) and they both seek to stop enforcement of the same court rules. However, the Review-Journal seeks additionally to challenge the constitutionality of certain statutes, namely, those related to the Family Court

Restrictions challenged in both petitions. But, because the statutes the Review-Journal is challenging are also discussed in Falconi's petition, it promotes efficiency and justice to allow the Review-Journal to intervene so it can present its positions in this matter (rather than having potentially duplicative actions).

Finally, because the Review-Journal is bringing the present motion in a timely manner and has attached its proposed Petition, there is no reason to believe permitting intervention will cause any delay.

IV. CONCLUSION

For the foregoing reasons, the Review-Journal respectfully moves to intervene and to file the attached Petition for Writ of Mandamus on the issues.

DATED this the 25th day of July, 2022.

/s/ Margaret A, McLetchie

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Counsel for the Las Vegas Review-Journal, Inc.

DECLARATION

I, Margaret A. McLetchie, am an attorney of record in the above-captioned case.

The undersigned declares under penalty of perjury the factual representations set forth in the foregoing memorandum are true and correct.

DATED this the 25th day of July, 2022.

/s/ Margaret A, McLetchie

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CERTIFICATE OF SERVICE

I certify and affirm that I am an employee of McLetchie Law and that on this 25th day of July, 2022 the MOTION TO INTERVENE and attached proposed PETITION FOR WRIT OF PROHIBITION, OR IN THE ALTERNATIVE, MANDAMUS, AND COMPLAINT FOR DECLARATORY RELIEF was served by eservice to the following on the master service list:

Sophia A. Romero, Esq.
Christopher M. Peterson, Esq.
AMERICAN CIVIL LIBERTIES UNION OF NEVADA
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Counsel for Petitioner Alexander Falconi

And by e-mail and First Class United States Mail, postage fully prepaid to the following:

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/s/ Leo S. Wolpert
Employee, McLetchie Law

Proposed Intervenor Las Vegas Review-Journal Inc.'s Petition For Writ of Prohibition, Or in the Alternative, Mandamus, and Complaint for Declaratory Relief

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALEXANDER FALCONI D/B/A OUR NEVADA JUDGES, Petitioner, vs. CLARK COUNTY EIGHTH JUDICIAL DISTRICT COURT, Respondent, LAS VEGAS REVIEW-JOURNAL, INC. Petitioner in Intervention	CASE NO.: 84947 **PETITION FOR WRIT OF PROHIBITION, OR IN THE ALTERNATIVE, MANDAMUS, AND COMPLAINT FOR DECLARATORY RELIEF**

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Counsel for Las Vegas Review-Journal, Inc.

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

Las Vegas Review-Journal, Inc. submits the following corporate disclosure statement pursuant to NRAP 26.1: (1) Las Vegas Review-Journal, Inc. is a Delaware corporation registered in the State of Nevada as a foreign corporation; (2) the parent company of Las Vegas Review-Journal, Inc. is News + Media Capital Group, LLC; and (3) no publicly held corporation owns ten percent or more of Las Vegas Review-Journal, Inc.'s stock.

The law firm whose partners or associates have or are expected to appear for the Las Vegas Review-Journal, Inc. is MCLETCHIE LAW.

DATED this 25th day of July, 2022.

/s/ Margaret A. McLetchie
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Leo S. Wolpert, Nevada Bar No. 12658
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Counsel for Las Vegas Review-Journal, Inc.

ROUTING STATEMENT

This case is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(11) because it raises "as a principal issue a question of first impression involving the United States or Nevada Constitutions or common law," specifically whether two Eighth Judicial District Court Rules (EDCR 5.207 and EDCR 5.212) and two related state statues (NRS 126.211 and NRS 125.080) violate the Las Vegas Review-Journal, Inc.'s rights under the United States Constitution, the Nevada Constitution, and common law.

DATED this 25th day of July, 2022.

/s/ Margaret A. McLetchie
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I. ISSUES PRESENTED AND RELIEF SOUGHT.

Petitioner/Plaintiff Las Vegas Review-Journal, Inc. (the "Review-Journal"), hereby brings this Petition for Writ of Prohibition or, in the alternative, Writ of Mandamus (NRS Chapter 34) and Complaint for Declaratory Relief (NRS Chapter 30).

The Review-Journal seeks an order (1) declaring EDCR 5.207 and EDCR 5.212 (the "Family Court Restrictions") and related statutory provisions (NRS 126.211 and NRS 125.080, the "NRS Provisions"), which allow for automatic or near automatic closure of all proceedings in family court, facially unconstitutional; and (2) directing Respondent/Defendant, the Eighth Judicial District Court ("EJDC"), to refrain from (a) implementing the Family Court Restrictions and NRS Provisions and (b) allowing for the closure of court hearings and trials or the sealing of court records without satisfying the test required under the First Amendment, Nevada Constitution,[1] and common law.

The public, including the media, has a presumptive right of contemporaneous access to *all* court proceedings and court records under the First Amendment. A

[1] This Court has repeatedly found that free speech protections provided by Article 1, Section 9 of the Nevada Constitution are co-extensive with the First Amendment. *University Sys. v. Nevadans for Sound Gov't,* 120 Nev. 712, 722, 100 P.3d 179, 187 (2004); *Stephens Media Ltd. Liab. Co. v. Eighth Judicial Dist. Court*, 125 Nev. 849, 859, 221 P.3d 1240, 1247 (2009).

party seeking to close court proceedings to the public must show that: (1) there is a compelling need that outweighs the public's presumed right of access, (2) there are no alternatives to closure, and (3) closure is narrowly tailored to meet the compelling need. Moreover, before closing a proceeding, a court must ensure the public has notice and opportunity to be heard. Even if nobody objects to closure, courts are duty-bound to consider a request for secrecy on the facts of the case and make specific findings on the record showing that it applied strict scrutiny. The analysis must be conducted on a case-by-case basis for every hearing or trial a party seeks to close, and no more than is necessary may be closed. Statutes and rules that presumptively close entire classes of hearings (or permit closure based on a simple request or on good cause) are unconstitutional.

Family court is no exception to these rules of constitutional law, and Petitioner Alexander Falconi d/b/a Our Nevada Judges ("Falconi") is correct that the Family Court Restrictions violate the First Amendment. The Family Court Restrictions, however, are more problematic than described in Falconi's Petition. First, strict scrutiny—not good cause—is the applicable standard of analysis. Second, the Family Court Restrictions impermissibly assume family law matters can be closed, eradicating the constitutionally required case-by-case strict scrutiny analysis. Third, the Family Court Restrictions are devoid of the procedural requirements designed to protect the public's right to notice and an opportunity to be heard on access issues.

Finally, the NRS Provisions suffer from the same constitutional infirmities.

There is no speedy or adequate relief at law to address the constitutionality of the Family Court Restrictions other than writ review by this Court. Thus, this Petition presents a judicially efficient manner of addressing the intertwined issues regarding the Family Court Restrictions and the NRS Provisions.

II. PARTIES

Petitioner Review-Journal is a Delaware corporation licensed to do business in Nevada, with its principal place of business at 1111 W. Bonanza Road, Las Vegas, Nevada 89106. The Review-Journal publishes a daily newspaper, the *Las Vegas Review-Journal*, and other media products.

The *Las Vegas Review-Journal* is the largest circulation daily newspaper in Nevada. It carries on the constitutionally protected business of reporting the news. The Review-Journal routinely reports on court proceedings in Nevada and has consistently reported on matters of public interest in the courts, including family court.[2] This Court has recognized the appropriateness of Review-Journal litigating

[2] *See, e.g.*, Blake Apgar, *Former Nevada Sen. John Ensign Divorces Wife*, Las Vegas Review-Journal (July 22, 2019) https://www.reviewjournal.com/news/politics-and-government/former-nevada-sen-john-ensign-divorces-wife-1808479/ (accessing the divorce case file of former Nevada senator); David Ferrara, *Case Focuses on Decision Over School, Child's Best Interests*, Las Vegas Review-Journal (Dec. 26, 2017), https://www.reviewjournal.com/local/local-nevada/case-focuses-on-decision-over-school-childs-best-interests/ (discussing family court judge's determination in divorce proceeding); Wesley Juhl & Rachel Crosby, *Woman Killed*

court access issues on behalf of the public. *Stephens Media*, 125 Nev. at 860, 221 P.3d at 1248.

Respondent EJDC is an entity created by and operating under the Constitution and laws of the State of Nevada. The EJDC is responsible for applying the NRS Provisions, and promulgated and implements the Family Court Restrictions.

III. JURISDICTION

This Court has authority to grant the writ relief requested herein pursuant to Article 6, Section 4 of the Nevada Constitution, NRS 34.330, and NRS 34.160.

This Court has original subject matter jurisdiction over the included request for declaratory relief under Article 6, Section 4 of the Constitution of the State of Nevada and NRS 30.030 (Uniform Declaratory Judgements Act).

IV. REASONS WHY WRIT RELIEF (AND RELATED DECLARATORY RELIEF) IS APPROPRIATE.

A writ of prohibition may issue to arrest the exercise of judicial functions in excess of a court's jurisdiction. NRS 34.320. Such writ may be issued only if there is no "plain, speedy and adequate remedy in the ordinary course of law." *Id.* A writ of mandamus may issue to compel the performance of an act required by law or to

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in Quadruple Homicide Filed for Divorce Last Month, Las Vegas Review-Journal (June 20, 2016), https://www.reviewjournal.com/local/local-las-vegas/woman-killed-in-quadruple-homicide-filed-for-divorce-last-month/ (reviewing couple's divorce case file).

control an arbitrary or capricious exercise of discretion. NRS 34.160. Just like a writ of prohibition, a writ of mandamus likewise will only be issued if there is no plain, speedy, and adequate remedy at law, and is within the discretion of the court. NRS 34.170; *State ex. rel. Department of Transp. v. Thompson,* 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983).

Here, there is no plain, speedy, and adequate remedy at law to challenge the Family Court Restrictions or NRS Provisions. Courts have recognized the media's access to court proceedings presents an important issue of law warranting writ relief. *See, e.g.*, *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580–81 (1980) (granting writ relief when media challenged order excluding them from proceedings); *Del Papa v. Steffen*, 112 Nev. 369, 383, 915 P.2d 245, 254 (1996) (granting writ relief where court order restricted public access to judicial proceedings)[3]; *Stephens Media*, 125 Nev. at 871, 221 P.3d at 1255 (granting writ relief where a trial court refused to allow the publisher of the *Las Vegas Review-Journal* to intervene in a criminal trial to access court documents).

More generally, this Court has recognized that issues concerning the constitutionality of statutes can be appropriately raised in a writ proceeding. In *Halverson v. Miller*, 124 Nev. 484, 485-86, 186 P.3d 893, 895 (2008), a judicial candidate invoked this Court's original jurisdiction "seeking an extraordinary writ

[3] Quoted and cited in *Abrams v. Sanson*, 458 P.3d 1062, 1067 (Nev. 2020).

and declaratory relief that would prevent the Secretary of State and the Clark County Registrar of Voters from holding an election in 2008 for four judicial positions" in a purportedly unconstitutional manner. While the Court did not grant relief, it did determine the constitutionality of the statutes at issue. *Id*. at 491, 899.

"[E]ven when an arguable adequate remedy exists, this court may exercise its discretion to entertain a petition for mandamus under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition." *State v. Second Judicial Dist. Court*, 118 Nev. 609, 614, 55 P.3d 420, 423 (2002). In *W. Cab Co. v. Eighth Judicial Dist. Court of Nev.*, 133 Nev. 65, 67-68, 390 P.3d 662, 666-67 (2017), this Court considered a writ to interpret the state's minimum wage act, explaining "considering this petition would serve judicial economy and clarify an important issue of law."

This matter presents an important issue of First Amendment law: the public's, including the media's, access to family court matters is extensively foreclosed by the NRS Provisions and Family Court Restrictions. The issues are even more appropriate for writ relief than in *Stephens Media* or *Del Papa*, as they do not merely arise from a specific court's decision in a specific case. The Family Court Restrictions and NRS Provisions allow for the near-total closure of family court to everyone other than litigants, attorneys, and court personnel. Worse, they do so

without any meaningful procedure, leaving the public in the dark about what they are in the dark about.

In *Stephens Media,* this Court noted "that because the criminal trial has concluded, any relief afforded in this writ petition has no practical implications in the underlying case." 125 Nev. at 858, 221 P.3d at 1246. Nevertheless, this Court addressed the issues because "[i]t is exceedingly likely that the media will seek access to juror questionnaires and voir dire proceedings in future high-profile criminal trials" and "closure of voir dire proceedings and the conclusion of the underlying criminal trial are both likely to expire before the constitutional implications of the closure are properly considered." *Id.* at 858, 1246-47. Here, it is highly likely that the Review-Journal will seek access to a matter or record and be denied, or not even be able to discern what is being hidden from public view. And just like *Stephens Media*, the application of the Family Court Restrictions and NRS Provisions will evade review. Thus, just as in *Stephens Media*, this Court should conclude "that the press's petition presents an appropriate circumstance under which [we should] exercise our original jurisdiction." *Id.* at 858, 1247.

Relatedly and importantly, the right to access judicial proceedings (and records) recognized by this Court, the United States Supreme Court, and courts across the country, is a right of ***contemporaneous*** access. As the Supreme Court has observed, "[d]elays [to access] imposed by governmental authority" are inconsistent

with the news media's "traditional function of bringing news to the public promptly." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 560-61 (1976); *see also Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126-27 (2d Cir. 2006) ; *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (public access to documents in court's file "should be immediate and contemporaneous"). Thus, courts should promptly evaluate any alleged curtailment of the public's rights to access, making writ relief proper here.

In addition to issuing writ relief, this Court should provide declaratory relief, as it has original jurisdiction to do so. In *Halverson*, 124 Nev. at 487, 186 P.3d at 896, this Court considered an "original petition for a writ of mandamus or prohibition and request for declaratory relief" together. The UDJA "provides a form of relief that a court within its jurisdiction can provide to parties." *Best v. Best*, 2015 WY 133, ¶ 19, 357 P.3d 1149, 1153–54 (Wy. 2015). In the context of a petition for writ relief, the court may render declaratory relief "if such a declaration necessarily underlies a writ of mandate." *Walker v. Munro*, 124 Wash. 2d 402, 879 P.2d 920 (1994); *see also In re State ex rel. Attorney Gen.*, 220 Wis. 25, 264 N.W. 633 (1936); *Johnson Cty. Sports Auth. v. Shanahan*, 210 Kan. 253, 259, 499 P.2d 1090, 1095 (1972); *Vista Health Plan, Inc. v. Tex. HHS Comm'n*, No. 03-03-00216-CV, 2004 Tex. App. LEXIS 4529, at *19 (Tex. App. May 20, 2004).

V. NECESSARY FACTS

A. The Family Court Restrictions

The Family Court Restrictions pertain to family court[4], which includes an expansive scope of cases (including "divorce, annulment, child custody, visitation rights, child support, spousal support, community property division, name changes, adoption, and abuse and neglect"[5]).

1. EDCR 5.207

EDCR 5.207 extends the broad automatic closure of all parentage proceedings to custody proceedings involving unmarried parties. ("Unless otherwise ordered, a case involving a complaint for custody or similar pleading addressing child custody or support between unmarried parties shall be construed as proceeding pursuant to NRS Chapter 126 (Parentage), and the issue of parentage shall be addressed at the first hearing and in a written order in the case.")

2. EDCR 5.212[6]

Like NRS 125.080 (discussed below), EDCR 5.212(b) provides, with limited

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[4] EDCR 5.101(b) provides that "[u]nless otherwise ordered, the rules in Part V govern the practice and procedure in all matters heard in the family division, including claims normally heard in another division of the district court."

[5] http://www.clarkcountycourts.us/departments/judicial/family-division/ (last accessed July 24, 2022).

[6] Effective June 1, 2022, EDCR 5.212 replaced EDCR 5.210. Accordingly, EDCR 5.210 is not before this Court, but, like NRS 125.080, and EDCR 5.212, EDCR 5.210 was unconstitutional. Notably, EDCR 5.212, the new version, is even broader than EDCR 5.210 was.

exceptions, that a trial is secret on demand by a litigant but, unlike NRS 125.080, the rule generally applies to any trial conducted in family court.

EDCR 5.212(a) provides in pertinent part that "[e]xcept as otherwise provided by another rule or statute, the court shall, upon demand of either party, direct that the hearing or trial be private." Thus, EDCR 5.212(a) allows for on-demand secrecy of any family court hearing.

While EDCR 5.212(d) allows the court to "permit a person to remain, observe, and hear relevant portions of proceedings notwithstanding the demand of a party that the proceeding be private," privacy is the default upon simple request of a litigant and the court must find "the interests of justice or the best interest of a child would be served" to allow a person access.[7]

EDCR 5.212(e) likewise renders family court records presumptively secret, providing that "[u]nless otherwise ordered or required by rule or statute regarding the public's right of access to court records, the record of a private hearing, or record of a hearing in a sealed case, shall be treated as confidential and not open to public inspection."[8]

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[7] Oddly, it appears the exception allowing for limited access can only be invoked if the family court matter involves a child.

[8] It is unclear what "rule or statute regarding the public's right of access to court records" is being referenced. As detailed above, the public's right to access court records stems from, *inter alia*, the First Amendment, which the rule does not recognize.

EDCR 5.212(e) further prevents dissemination of family court records, stating, *inter alia*, "[a]ny person or entity that distributes or copies the record of a private hearing shall cease doing so and remove it from public access upon being put on notice that it is the record of a private hearing."

B. The NRS Provisions.[9]

The Family Court Restrictions apply the NRS Provision smore broadly than those statutes' stated scope. However, even though they are narrower, the NRS Provisions, like the Family Court Restrictions, unconstitutionally broadly allow for secrecy of court proceedings and related records.

1. NRS 126.211 (Parentage)

NRS 126.211, part of NRS Chapter 126 ("Parentage")[10], effectively always closes court proceedings and presumptively closes court records that the provision applies to (or is extended to), without exception. First, NRS 126.211 provides that "[a]ny hearing or trial held under this chapter must be held in closed court without

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[9] While it may not be necessary for the Court to specifically reach the issue in order to find the Family Court Restrictions unconstitutional, the NRS Provisions are plainly unconstitutional for the reasons set forth in this Petition. Moreover, to the extent that the Family Court Restrictions are based on the NRS Provisions, it promotes judicial efficiency to address the statutes at the same time as the Court considers the Family Court Restrictions.

[10] Chapter 126 provides for actions to determine paternity (NRS 126.071) and maternity (NRS 126.2910). It also addresses proceedings regarding gestational agreements, but NRS 126.730 addresses confidentiality of those proceedings (and also provides that the proceedings and related are confidential "except by order of the court."). NRS 126.730(1)-(2).

admittance of any person other than those necessary to the action or proceeding". Then, "[a]ll papers and records, other than the final judgment, pertaining to the action or proceeding, whether part of the permanent record of the court or of a file in the Division of Welfare and Supportive Services of the Department of Health and Human Services or elsewhere, are subject to inspection only upon consent of the court and all interested persons, or in exceptional cases only upon an order of the court for good cause shown." NRS 126.211.

2. NRS 125.080 (Divorce)

NRS 125.080 allows for divorce trials to be closed to the public upon simple request of a party. The statute provides that divorce trials are automatically closed to the public "upon the demand of either party." NRS 125.080(1).

VI. LEGAL ARGUMENT

A. There Is a Presumptive Right of Contemporaneous Access to Court Proceedings and Records that Applies to Family Court.

"The operations of the courts and the judicial conduct of judges are matters of utmost public concern." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978). "What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). Considering these principles, courts have consistently recognized the public and the media have a constitutional right of access to court trials, hearings, and records.

In *Richmond Newspapers v. Virginia*, 448 U.S. 555, 564-75 (1980), the Supreme Court examined at length the history of open courts and their importance to the public, which, as pointed out by the ACLU, is rooted in both common law and the First Amendment. The Court further held, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Id.* at 556-557. Thus, "the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that amendment was adopted." *Id.* at 576.

While *Richmond Newspapers* addressed access to a criminal trial, the Supreme Court recognized that the same rationale for open criminal proceedings applies to civil cases. *Id.* at 580, n.17 ("Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.")

This Court has recognized the important principles underlying the public's right to access proceedings and the resulting presumption that all stages of Nevada's court proceedings should be open to the public. In *Del Papa v. Steffen,* 112 Nev. 369, 374, 915 P.2d 245, 248 (1996), this Court found the First Amendment right of access applied to its review of judicial disciplinary proceedings. *Del Papa* recognized the broad First Amendment right of access to judicial proceedings, as

they are "traditionally open to the public." *Id*. *Del Papa* involved confidentiality orders issued in *Whitehead v. Comm'n on Jud. Discipline*, 111 Nev. 1459, 1461, 908 P.2d 219, 220 (1995) (the "Whitehead Proceedings"), in which Judge Whitehead had petitioned this Court in connection with disciplinary proceedings.[11] This Court made plain that while the case did not involve a trial (but rather a case at this Court concerning a judicial discipline proceeding), it was nonetheless a judicial proceeding which implicated "matters of great public concern." *Del Papa.,* 112 Nev. at 374, 915 P.2d at 249.[12] Importantly, this Court applied First Amendment strict scrutiny to the right to access civil judicial proceedings:

> The First Amendment guarantees public access to places traditionally open to the public, such as criminal trials. In *Richmond,* the Supreme Court noted that though the right to attend civil trials was not at issue before it, "historically both civil and criminal trials have been presumptively open." A state may deny this right of public access only if it shows that "the denial is necessitated by a compelling government

[11] Some of this Court's justices had issued orders cloaking the Whitehead Proceedings in confidentiality and "appointed a 'Special Master to investigate alleged leaks of information to the press.'" *Del Papa*, 112 Nev. at 371, 915 P.2d at 246-47. The Attorney General petitioned for extraordinary relief to challenge those orders. *Id.* In granting relief, this Court "conclude[d] that these orders mandating confidentiality were invalid and that Respondent Justices lack constitutional or legislative authority to appoint a special master to investigate the leaks of information to the media and the reason for this court's lost prestige." *Id.*

[12] This Court also found the secrecy orders ran afoul of NRS 1.090. *Del Papa*, 112 Nev. at 374, 915 P.2d at 248. That statute provides "The sitting of every court of justice shall be public except as otherwise provided by law; but the judge of any court may exclude any minor during any criminal trial therein except such minor be on trial, or when testifying as a witness, or when the minor shall be a law student preparing to apply for a license to practice law."

interest, and is narrowly tailored to serve that interest."

112 Nev. at 374, 915 P.2d at 248 (internal citations omitted). Thus, this Court made very clear that the public has a presumptive right to access all judicial proceedings and that strict scrutiny applies to efforts to close courtroom doors to the public.

Federal courts have widely agreed that the right to access extends to civil proceedings. As the Ninth Circuit has explained, "[e]very circuit to consider the issue has uniformly concluded that the right applies to both civil and criminal proceedings." *Courthouse News Serv. v. Planet* ("*Planet*"), 947 F.3d 581, 590 (9th Cir. 2020). In *Planet*, the Ninth Circuit held, "[t]he First Amendment secures a right of timely access to publicly available civil complaints that arises before any judicial action upon them." *Id.* at 600. While the Ninth Circuit subjected a delay in access to newly filed complaints to more relaxed scrutiny than strict scrutiny when considering time, place, and manner restrictions that are content neutral and only delay access, it also made clear that strict scrutiny applies to ***denials*** of access, which is what are at issue in this case. *Id.* at 595.[13]

[13] Access to filings is different from access to trial proceedings, which the Supreme Court has made clear the public has an immediate right to access. *Neb. Press Ass'n, 427* U.S. at 560-61. Moreover, the *Planet* court explained that while the right of access does not "demand[] immediate, pre-processing access to newly filed complaints[,]" "[a]t the same time, however, we recognize … that a necessary corollary of the right to access is a right to timely access, [because access must be timely] to be newsworthy and to allow for ample and meaningful public discussion regarding the functioning of our nation's court systems." *Planet*, 947 F.3d at 594 (citation omitted).

In *Stephens Media*, this Court again recognized the presumption in favor of access to courts that it previously applied in the civil context in *Del Papa*. This Court extended the media's right to intervene in civil matters to criminal matters to address access issues, reversing the district court's denial of the press's request to access court records (completed juror questionnaires) in a criminal proceeding. *Stephens Media*, 125 Nev. at 860-61, 221 P.3 at 1248-49.

The interest at stake in *Stephens Media w*as the defendant's "fundamental" Sixth Amendment right to a fair trial, and this Court still ruled in favor of access. *Id.* at 862, 1249. To balance the presumption in favor of access with the defendant's Sixth Amendment right, rather than assume that the Sixth Amendment always required closure, the Court adopted the balancing framework from *Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise II"*), 478 U.S. 1, 9, 106 S. Ct. 2735, 2741 (1986),[14] holding:

> A district court may refuse access to juror questionnaires only after it (1) makes specific findings, on the record, demonstrating that there is a substantial probability that the defendant would be deprived of a fair trial by the disclosure of the questionnaires and (2) considers whether alternatives to total suppression of the questionnaires would have protected the interest of the accused.

Stephens Media, 125 Nev. at 862, 221 P.3 at 1250. Thus, even where the competing

[14] In *Press Enterprise II,* 478 U.S. at 10, 106 S. Ct. at 2741, the United States Supreme Court extended to preliminary hearings the analysis adopted in *Press-Enterprise Co. v. Superior Court of Cal* ("*Press Enterprise I*"), 464 U.S. 501, 510, 104 S. Ct. 819, 824 (1984) with regard to criminal trials.

interest is the fundamental Sixth Amendment right to a fair trial, there is no shortcutting the constitutional analysis that must be conducted to ensure the public has as much access to a court hearing, trial, or record as possible.

B. Access Furthers the Public Interest and Family Court Is No Exception to the Presumption in Favor of Access.

In the jurisprudence concerning the public's (and media's) First Amendment right to access court proceedings and records, courts have repeatedly emphasized just how important the policies underpinning the public's rights to access are. The Supreme Court has explained that the right to access court proceedings is anchored in the value of keeping "a watchful eye on the workings of public agencies," and in publishing "information concerning the operation of government." *Nixon v. Warner Communications*, 425 U.S. 589, 597-98 (1978). In short, the courts, like other branches of government, are subject to public scrutiny. "Openness promotes public understanding, confidence, and acceptance of judicial processes and results, while secrecy encourages misunderstanding, distrust, and disrespect for the courts." *Del Pap*a, 112 Nev. at 374, 915 P.2d at 249 (internal citations and quotation marks omitted); *see also Stephens Media,* at 860, 1248 ("public access inherently promotes public scrutiny of the judicial process.").

Family court is no exception to the rule of access: this Court has specifically recognized the public's interest in access to family court proceedings. *Abrams v.*

Sanson, 458 P.3d 1062, 1066 (Nev. 2020). Although *Abrams* did not directly involve the right to access, this Court rejected the idea that family law matters were not a matter of public interest, holding "an attorney's behavior, especially toward judges and in judicial proceedings, implicates '[t]he operations of the courts' and ***is a 'matter of utmost public concern***.'" *Id.* at 1067 (citing *Del Papa*, 112 Nev. at 374, 915 P.2d at 249) (emphasis added); *see also Coan v. Dunne*, No. 3:15-cv-00050 (JAM), 2019 U.S. Dist. LEXIS 75797, at *6 (D. Conn. May 6, 2019) (recognizing the First Amendment and common law presumptive right of access to family law records).

C. Strict Scrutiny Applies to Efforts to Overcome this Presumptive Right of Access.

In light of the important First Amendment rights at stake, courts must meet extremely exacting requirements before closing judicial proceedings. Openness is the rule, and the public's right to contemporaneous access court proceedings is presumed. Any exclusion from court proceedings must satisfy both the substantive and procedural requirements of the First Amendment. *Oregonian Pub. Co. v. U.S. Dist. Court for Dist. of Oregon* ("*Oregonian*"), 920 F.2d 1462, 1466 (9th Cir. 1990).

Substantively, strict scrutiny applies. In addressing the confidentiality orders excluding the public from the Whitehead Proceeding, the *Del Papa* Court made clear that "the state may deny this right of public access only if it shows "the denial is

necessitated by a compelling government interest." *Del Papa*, 112 Nev. at 374, 915 P.2d at 248 (*citing Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607, 73 L. Ed. 2d 248, 102 S. Ct. 2613 (1982); *see also Planet*, 947 F 3d. at 595 (access "may be restricted only if closure is essential to preserve higher values and is narrowly tailored to serve those interests.") (internal citations and quotation marks omitted).

Even if there is a compelling interest that outweighs the First Amendment presumption in favor of access, the proponent of closure must establish that there are no alternatives to closure and any closure must be "narrowly tailored to serve [the compelling government] interest." *See, e.g., United States v. Brooklier*, 685 F.2d 1162, 1169 (9th Cir. 1982) (even when the interest at stake is protecting a defendant's rights to a fair trial, the burden rests upon the proponent of closure to establish that alternatives will not protect" the interest at stake.); *Del Papa*, 112 Nev. at 374, 915 P.2d at 248 (*citing Globe Newspaper Co.*, 457 U.S. at 607) (narrowly tailored).

D. Before Ordering a Closure, the Court Must Follow Multiple Procedural Requirements and Make Case-By-Case Determinations.

Procedurally, there are multiple steps a court must follow before making the exceptional decision to deny the public access. First, the public must be provided with sufficient notice and an opportunity to be heard prior to any decision regarding

closure. *Phoenix Newspapers, Inc. v. US. Dist. Ct.,* 156 F.3d 940, 949 (9th Cir.1998) ("[I]f a court contemplates sealing a document or transcript, it must provide sufficient notice to the public and press to afford them the opportunity to object or offer alternatives. If objections are made, a hearing on the objections must be held as soon as possible.").

Second, even if there are no objections to closure, routine exclusion is not permitted. Instead, the constitutional analysis must be performed on a case-by-case basis to determine whether the asserted interest is truly compelling on the facts of a particular case. *Globe Newspaper*, 457 U.S. at 609; *see also Oregonian*, 920 F.2d at 1464 (court ordering closure must "make specific factual findings," rather than "basing its decision on conclusory assertions alone.").

Third, a court finding that closure is warranted in a specific case—which, again, should be rare considering the presumption in favor of access and the fact that strict scrutiny and extensive procedural limitations apply—must articulate the reasons supporting closure in findings on the record and that no alternatives to closure exist. *See, e.g.*, *Brooklier*, 685 F.2d at 1168-69. The findings must be "specific enough that a reviewing court can determine whether the closure order was properly entered." *Press Enterprise I,* 464 U.S. at 510, 104 S. Ct. at 824; *see also Press Enterprise II,* 478 U.S. at 10, 106 S. Ct. at 2741.

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E. The NRS Provisions and Family Court Restrictions Are Unconstitutional Because They Blanketly Restrict Access.

The NRS Provisions and Family Court Restrictions are all unconstitutional. They run afoul of the substantive and procedural requirements of the First Amendment. Indeed, by allowing for almost everything that happens in family court to be secret either automatically or based on the whim of a party, the Family Court Restrictions and NRS Provisions entirely shortcut the process judges are constitutionally required to follow before allowing for closure, and do away with the constitutional requirement that a court must consider closure on a case-by-case basis. By providing for across-the-board secrecy either automatically in parentage (NRS 126.211) and custody proceedings between unmarried persons (EDCR 5.207) or based on the "demand" of a party and without court scrutiny in divorce (NRS 125.080, EDCR 5.212) and all other family court proceedings (EDCR 5.212), the Family Court Restrictions and NRS Provisions violate the Constitution.

Again, before allowing for closure, the court must find—on the specific facts of a specific case—that there is a compelling interest that outweighs the presumption in favor of access that attaches to all court proceedings, that there are no alternatives to closure and that closing the proceeding is narrowly tailored to meet that aim. *Del Papa*, 112 Nev. at 374 ("the state may deny [the] right of public access only if it shows the denial is necessitated by a compelling government interest, and is

narrowly tailored to serve that interest.") That showing is never made by operation of the Family Court Restrictions and NRS Provisions.

In *Globe Newpaper*, the United States Supreme Court similarly considered "Massachusetts' mandatory rule barring press and public access to criminal sex-offense trials during the testimony of minor victims." 457 U.S. at 607, 102 S. Ct. at 620. The Supreme Court found as a preliminary matter that "safeguarding the physical and psychological well-being of a minor" victim of a sexual offense to be a "compelling" interest. However, even that interest did not justify across-the-board closure rules. The Court explained:

> But as compelling as that interest is, it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim.

Id. at 607-08, 2620-21. It is hard to imagine a more compelling interest than protecting children who are victims of sex crimes (or even the Sixth Amendment right to a fair trial at issue in *Stephens Media*). If across-the-board closure rules could not stand in *Globe Newspaper*, the NRS Provisions and Family Court Restrictions cannot survive. Simply, courts must engage in the constitutional analysis that applies on a case-by-case basis.

Moreover, the decision to close court proceedings and records cannot be made without providing notice (*i.e.*, a motion) and an opportunity for any interested

member of the public to be heard before closing court records or courtroom doors. Finally, specific findings must be made on the record (even when no challenge is made at the time).

While there may at times be interests at stake in family court actions so compelling that they justify limited closure of the proceedings to the public, family courts cannot order such closures without adhering to their obligation to engage in the constitutional analysis and without following constitutionally mandated procedures. *Globe Newspapers* made clear any such analysis must be made on a case-by-case basis, even when the asserted interest is the most compelling one that can be imagined.

A New York case also illuminates just how exacting the case-by-case analysis must be. In *Anonymous v. Anonymous*, 263 A.D.2d 341, 345-46, 705 N.Y.S.2d 339, 342-43 (App. Div. 2000), the Supreme Court of New York, Appellate Division, First Department reversed a trial court decision to close a custody proceeding based only on generalized claim that publicity and exposure of intimate family details may be harmful to children in a celebrity divorce case. That court held,

> [i]f a custody trial can be closed to the public on the showing made here, then closure of the courtroom would be the rule, not the exception, in custody cases. The argument can always be made—in any case—that it is in the child's best interest to shield her life from public gaze.

Anonymous v. Anonymous, 263 A.D.2d 341, 344, 705 N.Y.S.2d 339, 342 (App. Div.

2000). Thus, the reviewing court rejected closure based only on conclusory information. This is consistent with the requirements set forth in *Del Papa*, and, of course, required when strict scrutiny is to be applied.

In addition to rejecting closure based only on conclusory information, the New York reviewing court also rejected "the trial court's suggestion that there is no public interest to be served by keeping the proceedings open and its conclusion that '[t]here is nothing but a prurient interest in this case.'" *Id.* at 342. The New York Court explained:

> It is not, in the first instance, for the courts to identify the interest to be served by a public proceeding; the presumption is that courtrooms be open to public scrutiny. The burden is on the party seeking closure to show a compelling interest which justifies that relief. In any event, there is an important societal interest to be served by conducting this proceeding in an open forum. Open hearings are more conducive to the ascertainment of truth. The presence of the public historically has been thought to enhance the integrity and quality of what takes place.
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> …
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> Moreover, even if this particular controversy did not implicate a public interest [i]t is desirable that the trial … take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

Id. at 342-346 (internal citations and quotation marks omitted). Thus, just as this Court did in *Del Papa*¸ the New York court applied First Amendment strict scrunty analysis to efforts to close family court custody proceedings.

Another case from New York also illustrates the overreach of the Family Court Restrictions and NRS Provisions. In *In re Doe*, No. 2875/06, 2007 N.Y. Misc. LEXIS 2979 (Sur. Ct. Mar. 26, 2007), a woman initiated an action to vacate the adoption of a four-year-old orphan. The court recognized that there are interests that often support sealing adoption records such as "[p]rotecting the identity of birth parents," "[p]rotecting the privacy of adoptive parents and their newly formed family," and "[p]rotecting the child from knowledge of his/her illegitimacy." (*id.* at *33-*34). The court also recognized the "fundamental rule of public access to judicial proceedings applies equally to matters heard in Family Court" but that "this right is not absolute and may be limited upon a finding that compelling interests justify closure or partial closure." *Id.* at *10. But, the court explained that, nevertheless,

> [a] court may find against the presumption only when evidence of that harm, or potential harm, is compelling. This in turn requires examination both of the severity of the harm and the quantum of evidence that is real, concrete and specific.

Id. at *11. The Court found speculative claims of harm—*e.g.*, publicity surrounding the fact that a child was adopted or an expert's generalized claims not specific to the individual child—were insufficiently compelling. *Id.* at *15-*16. It explained courts' obligations to carefully scrutinize "the kind of proof offered to demonstrate such harm, eschewing allegations that are speculative and/or not concretely grounded in personal (and often professional) observation of the child's situation

and response to prior publicity." *Id.* at *24. This reinforces the importance of case-by-case (really, hearing-by-hearing and even question-by-question) analysis and illustrates why across-the-board rules closing family court are untenable.

In *Anonymous,* the reviewing court found the trial court failed to hold the requesting party to the required test. Much more markedly, the NRS Provisions and Family Court Restrictions assume all family law matters are presumptively secret. They invert the burdens that apply to decisions to keep court records from the public—and then require anyone who has possession of related records to return them based only on "notice." They thus necessarily fail to comport with the constitutional requirements for closure of court proceedings and court records.

F. The Return Provision Is Also Unconstitutional.

In addition to presuming a whole swath of hearings are "private" and making related court records "private," the Family Court Restrictions provide for the "claw back" of records third parties nevertheless obtained. EDCR 5.212(e). This violates the presumption that all court records are public and is an unconstitutional prior restraint.

The media is permitted to report on information that is part of the court record. "Once government has placed such information in the public domain, 'reliance must rest upon the judgment of those who decide what to publish or broadcast.'" *The Florida Star v. B.J.F.*, 491 U.S. 524, 538, 105 L. Ed. 2d 443, 109 S. Ct. 2603 (1989)

(quoting *Cox Broadcasting v. Cohn*, 420 U.S. 469, 496, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975)). "[I]f a document becomes part of the public record, the public has access to it, and the press may report its contents." *Phoenix Newspapers*, 156 F.3d at 949. Any effort to restrict the dissemination or reporting of information legally obtained constitutes a presumptively invalid prior restraint. In *Las Vegas Review-Journal v. Eighth Judicial Dist. Court of Nev.*, 134 Nev. 40, 43, 412 P.3d 23, 26 (2018), this Court found "the district court's order enjoining the Review-Journal from reporting on the anonymized, redacted autopsy report it obtained from the Coroner pursuant to the order in the [Nevada Public Records Act] case constitutes an invalid prior restraint that violates the First Amendment." Likewise, the media is entitled to report on and disseminate legally obtained information.

VII. CONCLUSION

For the reasons set forth above, this Court should issue writ relief directing the Eighth Judicial Court to refrain from enforcing and applying the Family Court Restrictions and NRS Provisions and declare them unconstitutional.

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This Court should reiterate what it held in *Del Papa:* courts may only restrict access to judicial records and proceedings "if it shows that "the denial is necessitated by a compelling government interest, and is narrowly tailored to serve that interest." *Del Papa*,112 Nev. at 374, 915 P.2d at 248 (citing and quoting from *Globe Newspaper*, 457 U.S. at, 607). In short, strict scrutiny applies to denials of access to judicial records and proceedings.

This Court should also make clear the steps and process a court must follow before making the exceptional decision to deny a member of the public access to judicial records or proceedings:

1. The public must be provided with sufficient notice and an opportunity to be heard prior to any decision regarding closure. *Phoenix Newspapers*, 156 F.3d at 949.

2. Even if there are no objections to closure, routine exclusion is not permitted. Instead, the constitutional analysis must be performed on a case-by-case basis to determine whether the asserted interest is truly compelling on the facts of a particular case. *Globe Newspaper*, 457 U.S. at 609; *see also Oregonian*, 920 F.2d at 1464.

3. A court finding that closure is warranted in a specific case must articulate in findings on the record the reasons supporting closure and that no alternatives to closure exist. *Brooklier*, 685 F.2d at 1168-69. The findings must be "specific enough that a reviewing court can determine whether the closure order was properly entered." *Press Enterprise I,* 464 U.S. at 510, 104 S. Ct. at 824; *see also Press*

Enterprise II, 478 U.S. at 10, 106 S. Ct. at 2741. Further, any closure must be narrowly tailored. *Del Papa*, 112 Nev. at 374, 915 P.2d at 248.

DATED this 25th day of July, 2022.

/s/ Margaret A. McLetchie
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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 21(d) and (e):

I hereby certify that this PETITION FOR WRIT OF MANDAMUS (OR IN THE ALTERNATIVE, PROHIBITION) complies with the requirements of NRAP 32(c)(2), specifically 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 the FIRST AMENDMENT PETITION FOR WRIT OF MANDAMUS (OR IN THE ALTERNATIVE, PROHIBITION) has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point Times New Roman font.

I further certify that this PETITION FOR WRIT OF MANDAMUS (OR IN THE ALTERNATIVE, PROHIBITION) complies with the type-volume limitation of NRAP 21(d) is proportionally spaced, has a typeface of 14 points or more, and contains 6,992 words.

Finally, I hereby certify that I have read this petition, 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 petition 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 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 with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 25th day of July, 2022.

Respectfully submitted:

/s/ Margaret A. McLetchie
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Counsel for Las Vegas Review-Journal, Inc.

VERIFICATION OF GLENN COOK IN SUPPORT OF WRIT PETITION

I, Glenn Cook under penalty of perjury declare:

1. I am over the age of 18 and am competent to testify.

2. I am the Executive Editor and Senior Vice President for News of the Las Vegas Review-Journal, Inc.

3. I have personal knowledge of the facts set forth in this declaration and verify the facts herein.

4. I make this verification in support of the Petition for Writ of Prohibition or Mandamus and Complaint for Declaratory Relief.

5. Las Vegas Review-Journal, Inc. is a media entity that publishes the largest circulation newspaper in Nevada, the *Las Vegas Review-Journal.*

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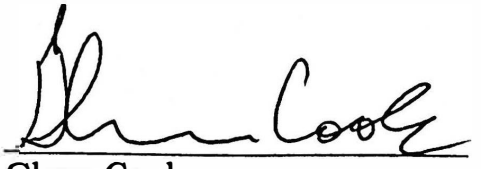
6. The *Las Vegas Review-Journal* often covers matters in the Eighth Judicial District Court Family Division and is concerned about accessing court documents and proceedings in family court, and further restrictions on its ability to access court documents and proceedings in family court.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 25, 2022.



Glenn Cook

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