No. 85228

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS REVIEW-JOURNAL,

Petitioner,

v.

CLARK COUNTY EIGHTH JUDICIAL DISTRICT COURT,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR WRIT OF PROHIBITION, OR IN THE ALTERNATIVE, MANDAMUS, AND COMPLAINT FOR DECLARATORY RELIEF

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I. Introduction

Petitioner Las Vegas Review-Journal challenges the constitutionality of two long-standing Nevada statutes—NRS 125.080 and NRS 126.211—and two newly adopted Family Court rules—Eighth Judicial District Rules (EDCR) 5.207 and 5.212—all of which, at least in some way, address confidentiality of various family law proceedings.[1] The Review-Journal's requests for relief through the instant petition are misplaced for at least two reasons.

First, the Review-Journal's petition is a disfavored request for an advisory opinion and fails to present a ripe, justiciable controversy due to the absence of (1) a lower court ruling applying the challenged rules and statutes, and (2) an adverse party with interests the challenges rules and statutes are intended to protect. Second, a request for declaratory relief must be made in the district court in the first instance.

For those reasons, this Court should deny the petition.

* * *

[1] The complete statutory language of the challenged rules and statutes can be found in an addendum to this brief.

II. Factual Background

The confidentiality provisions of NRS 125.080 and NRS 126.211 have governed divorce and parentage proceedings for decades. The Legislature adopted the most current version of NRS 125.080, which addresses confidentiality of divorce trials, in 2007. 2007 Nev. Stat. ch. 68, § 1 at 188. But that statute's origins reach back to at least 1931. 1931 Nev. Stat. ch. 222, § 3 at 412. And the Legislature adopted NRS 126.211, which addresses confidentiality of all hearings and trials in a parentage action, in 1979. 1979 Nev. Stat. ch. 599, § 22 at 1276.

In January of this year, the Rules Committee of the Eighth Judicial District Court submitted a petition for adoption of amendments to Part I and Part V of the Rules of Practice for the Eighth Judicial District Court. Res. App. at 001. "A committee consisting of several family law practitioners and several judges from the Family Division of the Eighth Judicial District Court" developed the proposed amendments through "a series of meetings" involving consideration of "comments, questions, suggestions, and complaints from attorneys, agencies, and the public about the current rules governing the family division." Res. App. at 001.

After circulation of the proposed rule changes to the State Bar of Nevada's Family Law Section and posting of the proposed changes on the Clark County Family Court Bench Bar website, the Rules Committee, and the judges of the Eighth Judicial District Court approved the proposed amendments. Res. App. at 001. Those changes included changes that "restored the ability of a party to demand closed hearings and trials," and addressed confidentiality of the record in sealed cases. Res. App. at 002.

Three months after submission of the petition, this Court approved the proposed amendments with minor modifications. In particular, the Court approved the proposed language for Rule 5.207 verbatim. Pet. App. at 36-37. And although the Court removed the words "for good cause shown" from proposed Rule 5.212(c), the Court maintained an exception in Rule 5.212(d) that gives the district court authority to permit "a person to remain, observe and hear relevant portions of the proceedings notwithstanding the demand of a party that the proceeding be private," upon the court's determination "that the interests of justice or the best interest of a child would be served" by allowing said person's presence at the proceeding. Pet. App. at 42-43.

The Review-Journal filed the instant writ petition challenging the new rules and NRS 125.080 and NRS 126.211. And this Court ordered a response to the petition.

III. Argument

This petition is procedurally deficient. It does not present a ripe, justiciable controversy. Instead, it requests a disfavored advisory opinion. But the Review-Journal has the means to present Nevada's courts with a First Amendment challenge to the rules and statutes at issue in a procedural context that avoids those problems. The request for declaratory relief is also improper because the Review-Journal needs to present that issue to a district court in the first instance. For those reasons, this Court should reject the Review-Journal's petition without reaching the merits of the claims for relief.

A. The Petition does not present a ripe, justiciable controversy warranting extraordinary relief.

The petition does not arise from any lower court proceeding in which NRS 125.080, NRS 126.211, EDCR 5.207, or 5.212 is at issue. The petition does not seek to resolve an existing case or controversy between adverse parties involving application of the challenged rules or statutes. Instead, the petition seeks an advisory opinion. And because

the Review-Journal's ability to prevail is dependent on this Court granting an extraordinary writ, this Court has "complete discretion to determine whether to consider" the petition. *Cote H. v Eighth Jud. Dist. Ct.*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008).

This Court has recognized that "[a]dvisory mandamus may be appropriate when 'an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition.'" *Archon Corp. v. Eighth Jud. Dist. Ct.*, 133 Nev. 816, 820-21, 407 P.3d 702, 706-707 (2017) (*quoting Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197-98, 179 P.3d 556, 559 (2008)). But those circumstances are not presented here.

First, the Review-Journal's arguments about the need for immediate consideration of this issue by original writ, and without first raising the issue in a lower court, ring hollow when the confidentially provisions of NRS 125.080 and NRS 126.211 have governed parentage actions and divorce trials for decades. 2007 Nev. Stat. ch. 68, § 1 at 188; 1979 Nev. Stat. ch. 599, § 22 at 1276; 1931 Nev. Stat. ch. 222, § 3 at 412. The Review-Journal's sudden interest in challenging the constitutionality of statutes and rules that make certain family law

proceedings confidential does not warrant the extraordinary relief sought here.

Second, there is no ripe, justiciable controversy. "Of course, the duty of every judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it." *NCAA v. Univ. of Nevada, Reno*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981).

To be justiciable, a controversy must involve the assertion of "a claim of right . . . against one who has an interest in contesting it" and "must be between persons whose interests are adverse." *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986) (quoting *Kress v. Corey*, 65 Nev. 1, 26, 189 P.2d 352, 364 (1948)). And determining whether a controversy is ripe involves an assessment of "(1) the hardship to the parties of withholding judicial review, and (2) the suitability of the issues for review." *Herbst Gaming, Inc.*, 122 Nev. at 888, 141 P.3d at 1231 (quoting *Matter of T.R.*, 119 Nev. 646, 651, 80 P.3d 1275, 1279-80 (2003)).

The statutes and rules at issue involve protection of privacy interests of litigants involved in family court proceedings. But by seeking advisory mandamus, rather than challenging an order enforcing the new rules, the Review-Journal presents the issue in a context where there is no party involved that possesses the sort of privacy interests that the challenged rules are intended to protect. As a result, contextually, this case does not present a justiciable controversy because of the lack of adverse parties.[2]

Relatedly, the lack of an adverse party shows that the petition does not present a ripe controversy. The Review-Journal's reliance on *Stephens Media v. Eighth Jud. Dist. Ct.*, 125 Nev. 849, 221 P.3d 1240 (2009), to support its theory for writ relief helps clarify this point. That case involved a challenge to an order denying a motion to intervene in a criminal proceeding, creating an actual controversy between adverse parties based on the application of the law to a particular set of facts. *Stephens Media*, 125 Nev. at 855, 221 P.3d at 1245. And although the conclusion of the criminal trial rendered that controversy moot, this

[2] This is not to say that the Attorney General has no interest in defending the constitutionality of the statutes challenged here. *Cf.* NRS 30.130; NRAP 44. But undersigned counsel's appearance here, as counsel of record for the Respondent, should not be a basis to find the presence of an adverse party in the case.

Court applied the mootness exception because the issue was capable of repetition yet evading review. *Id.* at 858-59, 221 P.3d at 1246-47.

Here, there is no lower court order to challenge because there was no lower court proceeding involving application of the challenged rules or statutes to a given set of facts. Thus, even if in the abstract the Review-Journal's challenges to NRS 125.080, NRS 126.211, EDCR 5.207, and 5.212 have merit—which Respondent does not concede—there is no need for this Court to issue the requested advisory opinion. There is no undue harm to the Review-Journal if this Court waits to address the constitutional issues the Review-Journal raises here—after all, the challenged statutes have made all parentage actions and some divorce proceedings confidential for decades without concern from the Review-Journal. Finally, the issues are not suitable for review when there is no adverse party on the other side that falls within the protections of the rules and statutes.

The Review-Journal can make the same arguments it makes here in a motion to intervene in a district court proceeding that is governed by the rules and statutes that the Review-Journal wants to challenge. And if the district court rules against the Review-Journal, it can

challenge that ruling with a writ petition, just as occurred in *Stephens Media.*[3] And that procedural vehicle creates a proper basis to address the challenged rules and statutes that avoids the procedural problems Respondent has identified above.

For those reasons, writ relief is not warranted here. This Court should deny the petition.

B. The Review-Journal's request for declaratory relief is procedurally improper.

"It is patent that a petition for a declaratory judgment must be initially filed in the district court." *Beko v. Kelly*, 78 Nev. 489, 492, 376 P.2d 429, 430 (1962). The plain language of NRS 30.030 allows "[c]ourts of record," not "courts of review," to grant declaratory relief. And the Review-Journal cites no other law that gives this Court the power to exercise original jurisdiction over a complaint for declaratory relief. This Court's holding from *Beko* and the plain language of NRS 30.030 control.

Even so, if this Court could consider a complaint for declaratory relief as part of a writ petition, for the reasons addressed above, writ

[3] There is already at least one challenge to the same statutes and rules that originated in the district court and is now pending before this Court in *Falconi v. Dist. Ct. (Minter),* No. 85195.

relief is improper here because there is no ripe, justiciable controversy before the Court. *Walker v. Munro*, 879 P.2d 920 (Wash. 1994)—the main case the Review-Journal cites for support—proves Respondents point. After recognizing that it lacked original jurisdiction over a request for declaratory judgment, the Washington Supreme Court stated, "The only grounds on which this court could render declaratory relief regarding a provision of the initiative is if such a declaration necessarily underlies a writ of mandate as to the duties under that particular provision. *We have already established the impropriety of mandamus in this case*." *Walker*, 879 P.2d at 926 (emphasis added). And the Review-Journal's added citation to *Johnson County Sports Authority v. Shanahan*, 499 P.2d 1090 (Kan. 1972), further drives home Respondent's overarching argument in this case. There, on top of rejecting declaratory relief because writ relief was unavailable, the Supreme Court of Kansas emphasized that declaratory relief is improper when "there is no justiciable controversy between adverse parties" because "[i]t is of course horn-book law that there must be at least two parties who can assert rights which have developed or will arise against each other before an actual controversy can exist which is

justiciable under our declaratory judgment act." *Johnson County Sports Authority*, 499 P.2d at 1095-96. So any suggestion that this Court has jurisdiction to grant declaratory relief must also fail.

This Court should deny the request for declaratory relief.

IV. Conclusion

For these reasons, this Court should deny the Review-Journal's request for writ and declaratory relief.

Submitted this 29th day of November 2022.

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NRAP 28(f) ADDENDUM

NRS 125.080 Trial of divorce action may be private.

1. In any action for divorce, the court shall, upon demand of either party, direct that the trial and issue or issues of fact joined therein be private.

2. Except as otherwise provided in subsection 3, upon such demand of either party, all persons must be excluded from the court or chambers wherein the action is tried, except:

(a) The officers of the court;
(b) The parties;
(c) The counsel for the parties;
(d) The witnesses for the parties;
(e) The parents or guardians of the parties; and
(f) The siblings of the parties.

3. The court may, upon oral or written motion of either party, order a hearing to determine whether to exclude the parents, guardians or siblings of either party, or witnesses for either party, from the court or chambers wherein the action is tried. If good cause is shown for the exclusion of any such person, the court shall exclude any such person from the court or chambers wherein the action is tried.

NRS 126.211 Hearings and records: Confidentiality.

Any hearing or trial held under this chapter must be held in closed court without admittance of any person other than those necessary to the action or proceeding. All 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.

Rule 5.207. Complaints for Custody.

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 a proceeding pursuant to chapter 126 of the Nevada Revised Statutes (Parentage) and the issue of parentage shall be addressed at the first hearing and in a written order in the case.

Rule 5.212. Trial and hearings may be private.

(a) Except as otherwise provided by another rule or statute, the Court shall, upon demand of either party, direct that the hearing or trial be private.

(b) Except as otherwise provided in subsection (c) or (d), upon such demand of either party, all persons must be excluded from the court or chambers where the action is tried, except:

(1) The officers of the court;
(2) The parties;
(3) The counsel for the parties and their staff;
(4) The witnesses (including experts);
(5) The parents or guardians of the parties; and
(6) The siblings of the parties.

(c) The court may, upon oral or written motion of either party, or on its own motion, for good cause shown exclude the parents, guardians, or siblings of either party, or witnesses for either party, from the court or chambers wherein the hearing is conducted.

(d) If the Court determines that the interests of justice or the best interest of a child would be served, the court may permit a person to remain, observe, and hear relevant

portions of the proceeding notwithstanding the demand of a party that the proceeding be private.

(e) The court shall retain supervisory power over its own records and files, including the electronic and video records of the proceedings. Unless otherwise ordered, 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. Parties, their attorneys, and such staff and experts as those attorneys seem necessary are permitted to retain, view, and copy the record of a private hearing for their own use in the representation. Except as otherwise provided by rule, statute, or court order, no party or agent shall distribute, copy, or facilitate the distribution or copying of the record of a private hearing or hearing in a sealed case (including electronic and video records of such a hearing). Any 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.

CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of NRAP 32(a)(7)(B) because this brief contains 2,048 words, excluding the parts of the brief exempted by NRAP 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word using Century Schoolbook 14-point font.

Finally, I hereby certify that I have read this answer, 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 brief complies with 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.

Date: November 29, 2022

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Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the Nevada Supreme Court by using the electronic filing system on November 29, 2022. Registered participants will be served electronically.

Date: November 29, 2022

/s/ *Jeffrey M. Conner*
An employee of the Office of the Attorney General