IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS REVIEW-JOURNAL, INC.,

Petitioner,

vs.

CLARK COUNTY EIGHTH JUDICIAL DISTRICT COURT,

Respondent,

CASE NO.: 85228

REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION, OR IN THE ALTERNATIVE, MANDAMUS, AND COMPLAINT FOR DECLARATORY RELIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Petition centers around 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") that collectively allow for automatic or near automatic closure of all proceedings in family court. Petitioner/Plaintiff Las Vegas Review-Journal, Inc. (the "Review-Journal") seeks s a writ of prohibition restraining Respondent/Defendant, the Eighth Judicial District Court (the "EJDC") 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, and common law. The Review-Journal also seeks intrinsically intertwined declaratory relief finding the Family Court Restrictions and NRS Provisions facially unconstitutional.

The Petition details the myriad ways in which the Family Court Restrictions and NRS Provisions violate the United States and Nevada Constitutions. To summarize, the Constitutions require that a party seeking closure satisfy strict scrutiny. In particular, the party seeking closure must make a motion seeking closure and that party bears the burden of establishing an overriding interest that outweighs the First Amendment right of access. In addition, even if an overriding interest is

established and even if it is sufficient to overcome the First Amendment right of access, the party seeking closure must establish that closure is necessary to vindicate the asserted interest, that closure will vindicate that interest, and that closure is the least restrictive means available. Further, any closure must be narrowly tailored to close no more than necessary to vindicate the proven interest at stake. The Constitutions further require that the public be given notice and an opportunity to be heard before any decision on closure is made, though the burden remains even if no member of the public challenges closure. Finally, whether a challenge to closure is made or not, the court must make specific findings on the record setting forth the overriding interest, explaining why closure is necessary and sufficient to protect the asserted interest, finding that there are no less restrictive alternatives, and that closure is narrowly tailored to be no broader than necessary.

In contrast to the constitutional requirements, the Family Court Restrictions and NRS Provisions operate together to provide, with very limited exceptions, that any matter conducted in family court is automatically secret on demand by a litigant without meeting the constitutional requirements—or indeed, without making any showing at all. *See* EDCR 5.212(a) ("[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**.") (emphasis added). Simply put, the Family Court Restrictions and NRS Provisions—by permitting closure without a case-by-case analysis—can

never satisfy the United States or Nevada Constitutions. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609, 73 L. Ed. 2d 248, 102 S. Ct. 2613 (1982) (invalidating as a violation of the First Amendment right of access a Massachusetts statute that closed courtrooms during the testimony of minor victims of sexual offenses); *see also Oregonian Pub. Co. v. U.S. Dist. Court for Dist. of Oregon* ("*Oregonian*"), 920 F.2d 1462, 1464 (9th Cir. 1990) (court ordering closure must "make specific factual findings," rather than "basing its decision on conclusory assertions alone"). If—as the United States Supreme Court held in *Globe Newspaper*—the interest of "safeguarding the physical and psychological well-being of a minor" victim of a sexual offense is insufficiently compelling to justify automatic closure of criminal sex-offense trials during a minor victim's testimony (*Globe Newspaper*, 457 U.S. at 607-08), then surely no interest is sufficiently compelling to justify at-request closure of family court permitted by the Family Court Restrictions and NRS Provisions.

In its Answer, the EJDC fails to address the substance of those arguments and has thus conceded the merits of the Review-Journal's claims—*i.e.*, that the Family Court Restrictions and NRS Provisions are facially unconstitutional. Rather than address the merits of the Petition, the EJDC argues only that the petition fails to present a justiciable controversy. The EJDC's arguments fail because the Review-Journal followed the appropriate procedure (writ relief), properly presented a

justiciable claim for declaratory relief, and sought relief from the proper court. Thus, this Court should consider the Review-Journal's Petition. In any case, because the Family Court Restrictions and NRS Provisions are unconstitutional (and because the EJDC has conceded so), this Court should grant the Petition.

II. REPLY TO THE EJDC'S STATEMENT OF FACTS

The Family Court Restrictions and NRS Provisions **preclude** the family courts from applying the standards required by the United States and Nevada Constitutions. Even worse, the Family Court Restrictions and NRS Provisions allow for blanket closure without any of the constitutionally required procedural safeguards. Instead, they shift the burden to the public to challenge closure after-the-fact—and drastically limit the circumstances under which a member of the public can do so. *See* EDCR 5.212(d) (party challenging absolute secrecy has the heavy burden of establishing that access for the specific person is in "the interests of justice or the best interests of a child.");[1] NRS 125.080(1) ("[i]n 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"); NRS 126.211 (providing that proceedings "held under this chapter must be held in closed court without admittance of any person

[1] As noted in the Review-Journal's Petition, this exception can only be invoked if the family court matter involves a child. Presumably, this would allow any family court matter that does not pertain to a child to be made completely private, on demand of either litigant, without any recourse to the public.

other than those necessary to the action or proceeding" and that records may be disclosed only upon "consent of the court and all interested persons" or upon an "order of the court for good cause shown.").[2] Further, a written motion is not even required; any "demand" suffices. EDCR 5.212(a). No written order is required. *Id.* The sealed records are forever hidden from public view—and all persons are required to keep related records secret.

These Family Court Restrictions and NRS Provisions dictate how family court judges address requests for closure: the district court is bound to follow them. EDCR 1.10 (rules "govern the procedure and administration of the Eighth Judicial District Court and all actions or proceedings cognizable therein"); EDCR 1.11 (applying EDCR to family court proceedings).

In its Answering Brief, the EJDC ignores these pertinent facts while detailing irrelevant facts, such as the statutes' "origins" reaching back to 1931 and 1979 (RAB at 2), the EJDC's Rules Committee's development of the proposed amendments (*id*.), the EJDC's approval of the proposed amendments after they were circulated among the State Bar of Nevada's Family Law Section and Clark County Family Court Bench Bar (*id.* at 3), and that the court purportedly retains the authority to permit "a person to remain, observe and hear relevant portions of the proceedings

[2] EDCR 5.207 extends the broad automatic closure of all parentage proceedings to custody proceedings involving unmarried parties.

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. (*Id*. at 3.)

These facts are irrelevant to whether the Family Court Restrictions and NRS Provisions violate the First Amendment by permitting family court proceedings to occur in secret, which are the issues raised by the Review-Journal in its Petition.

III. LEGAL ARGUMENT

A. The EJDC Has Conceded the Underlying Merits of the Petition.

As discussed at length in the Petition, the public, including the media, has a presumptive right of contemporaneous access to *all* court proceedings and court records under the First Amendment. *Del Papa v. Steffen*, 112 Nev. 369, 374, 915 P.2d 245, 248 (1996) (noting that "historically both civil and criminal trials have been presumptively open"); *see also Courthouse News Serv. v. Planet*, 947 F.3d 581, 590 (9th Cir. 2020) ("[e]very circuit to consider the issue has uniformly concluded that the right applies to both civil and criminal proceedings"). A 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. *Del Papa*, 112 Nev. at 374 (citing *Globe Newspaper*, 457 U.S. at 607); *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). 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 the Family Court Restrictions are constitutionally infirm for multiple reasons. 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.

Respondent's Answer does not address any of the substantive constitutional arguments raised in the Review-Journal's Petition. By virtue of not addressing these arguments, Respondents have conceded them. *See Polk v. State,* 233 P.3d 357, 360

(Nev. 2010) (collecting cases in which "a party confessed error when that party's answering brief effectively failed to address a significant issue raised in the appeal"). *See also Salazar v. Stubbs*, 2018 Nev. App. Unpub. LEXIS 655, *3 ("[a]s Stubbs does not respond to Salazar's primary argument on appeal that a continuance should have been granted, he has conceded that argument").

B. The Petition Is Appropriate for Writ Relief and Presents a Live, Justiciable Controversy.

The EJDC claims the Petition is an improper effort to seek an advisory opinion. Its arguments ignore that that the Review-Journal meets all the requirements for writ relief and that there is a live controversy as to the constitutionality of the Family Court Restrictions and NRS Provisions. Where, as in the instant case, court rules or statutes are challenged on the grounds they facially violate the First Amendment, courts have consistently found them to be justiciable.

The EJDC also suggests that the Review-Journal should have filed suit earlier, which ignores that there is no deadline to challenge an unconstitutional rule or statute that remains in effect. The EJDC also argues that this matter cannot proceed because there is no "adverse party," while wholly ignoring that the EJDC itself is the adverse party in this constitutional challenge.

1. The Petition Is Appropriate for Writ Relief.

The EJDC's claim that the Review-Journal seeks a "disfavored advisory

opinion" (RAB at 4) ignores that a live, justiciable controversy exists as to the constitutionality of the Family Court Restrictions and NRS Provisions. Indeed, the Review-Journal's petition meets all requirements for writ relief. Under Nevada law, so long as a petitioner has "a 'beneficial interest' in obtaining writ relief," writ relief may issue either when petitioner has no plain, speedy, and adequate remedy in the ordinary course of law (*Heller v. Legislature of State of Nev.*, 120 Nev. 456, 461, 93 P.3d 746, 749 (2004) (citing NRS 34.170)) or when the petition seeks clarification of an important question of law such as those presented here, especially where doing so "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." *Cote H. v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 124 Nev. 36, 40, 175 P.3d 906, 908 (2008) (citation and internal quotation marks omitted).

It is beyond doubt that the Review-Journal, as the state's largest newspaper that frequently reports on all manner of court proceedings and has litigated extensively to obtain access to court proceedings and records, has a "beneficial interest" in its and its reporters' constitutional rights to access family court records and proceedings. As explained in *Heller*, 120 Nev. at 461, 93 P.3d at749:

> 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 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. (citations and internal quotation marks omitted). Indeed, the EJDC does not appear to contest the Review-Journal's standing.

Likewise, the Review-Journal also fits in both categories of cases where this Court has found writ relief to be appropriate. First, there is "no plain, speedy, and adequate remedy in the ordinary course of law." Due to the operation of the Family Court Restrictions and NRS Provisions, the public does not even get notice of closures in family court,[3] let alone the advance notice that is constitutionally required,[4] making it impossible to challenge denials of access in specific cases. Without the advance notice a motion provides, there is no opportunity to be heard. Additionally, it is not denial of access in a specific case that the Review-Journal challenges: instead, it challenges the Family Court Restrictions and NRS Provisions themselves. Where First Amendment harms such as the instant ones are at issue, there is no plain, speedy, or adequate remedy law and this Court has found that writ relief is appropriate. *See Weller v. Eighth Judicial Dist. Court of Nev.*, 473 P.3d 1021

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[3] *See* EDCR 5.212(a) (allowing closure based merely on a "demand" and failing to even require entry of a written order).

[4] *Compare Globe Newspaper*, 457 U.S. at 609 n. 25, 102 S.Ct. at 2621 n. 25 (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 401, 99 S.Ct. 2898, 2916, 61 L.Ed.2d 608 (1979) (Powell, J. concurring)) ("Of course, for a case-by-case approach to be meaningful, representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion'").

(Nev. 2020) (finding a writ challenge to a prior restraint on First Amendment grounds was properly before the Court); *Las Vegas Review-Journal v. Eighth Judicial Dist. Court of Nev.*, 134 Nev. 40, 46, 412 P.3d 23, 28 (2018) (same).

For the same reasons, the issues the Petition presents also present important questions of law that need clarification and "sound judicial economy and administration favor the granting of the petition." *Cote H.*, 124 Nev. at 39, 175 P. 3d. at 908. [5] Thus, writ relief would be appropriate even if the Review-Journal had a plain, adequate, and speedy remedy at law. *Id.* In *Aspen Fin. Servs. v. Eighth Judicial Dist. Court of State*, 129 Nev. 878, 882, 313 P.3d 875, 878 (2013), this Court exercised its discretion to consider a discovery order implicating the Nevada's news shield statute despite the availability of appellate review, explaining

> while extraordinary relief is generally unavailable to review discovery orders because such orders may be challenged in an appeal from an adverse final judgment…in certain cases, consideration of a writ petition raising a discovery issue may be appropriate if an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction, such as when the petition provides a unique opportunity to define the precise parameters of a statutory privilege that this court has not previously interpreted.

Id. (citing *Diaz v. Eighth Judicial Dist. Court*, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000)) (internal quotation marks omitted). Here, the Petition raises important issues concerning access to family court—and the Petition provides "a unique opportunity

[5] Likewise, the First Amendment harms presented also constitute "circumstances of urgency or strong necessity." *Id.*

to define the precise parameters" of when and how the public can be excluded from family court.

Indeed, while the cases addressed a less severe issue—denial by specific judges in specific cases—than the blanket barriers to access presented in this case—this Court has specifically recognized restriction of court access to the public presents an issue warranting writ relief on a number of occasions. *See, e.g.*, *Del Papa*, 112 Nev. at 383 (granting writ relief where a court order restricted the Review-Journal's access to court documents); *Stephens Media, Ltd. Liab. Co. v. Eighth Judicial Dist. Court*, 125 Nev. 849, 871, 221 P.3d 1240, 1255 (2009) (granting writ relief where a court order restricted press access to court documents in a criminal proceeding). While the EJDC tries to distinguish *Stephens Media* and *Del Papa* because those cases involved denials of access to specific proceedings, the EDJC's argument ignores that, unlike *Stephens Media* and *Del Papa*, this case is a facial challenge to the court rules and statutes that illegally permit closure of family court hearings and records and thus is ripe. *See, e.g., Jones v. Allen*, 483 F. Supp. 2d 1142, 1149 (M.D. Ala. 2007) ("[w]here, as here, the plaintiff challenges the constitutionality of an event that has not yet occurred, the claim may be ripe for adjudication without having accrued for statute-of-limitations purposes"); *Ex parte Bradshaw*, 501 S.W.3d 665, 669 (Tex. App. 2016) (defendant may file a pretrial application for a writ of habeas corpus to raise a facial challenge to the

constitutionality of a statute that defines the offense charged because a facial challenge attacks the statute itself rather than the statute's application to the defendant).

In short, *Stephens Media* and *Del Papa* challenged specific decisions that violated the public's right to access and were appropriate for writ relief; this Petition challenges court rules and statutes that violate the public's right to access and those challenges are just as appropriate for writ relief—indeed, the First Amendment harms at issue are even greater and, thus, are even more appropriate for writ relief. *See Heller*, 120 Nev. at 461, 93 P.3d at 749 (writ relief is appropriate where, *inter alia,* there is no adequate remedy at law).

Finally, it certainly furthers "sound judicial economy and administration" (*Cote H.*, 124 Nev. at 40, 175 P.3d at 908) for this Court to adjudicate this matter rather than in individual cases as the EJDC urges. First, again, challenging denials of access would not even be possible in many cases because the Family Court Restrictions and NRS Provisions do not provide the constitutionally required protections that are designed to allow such challenges to proceed, such as advance notice to the public before closure. Indeed, because the Family Court Restrictions and NRS Provisions similarly fail to require specific findings on the record, it is impossible to assess just how frequent and expansive unconstitutional closure is. This is the very reason the Review-Journal's Petition asks for relief as to both the

procedural and substantive flaws of the Family Court Restrictions and NRS Provisions.

Second, even if it were actually possible, challenging denials of access in each and every individual case where closure occurs would not be efficient. Even if the Review-Journal could (and did) wait for court orders based on each statute and family court rule at issue to file a writ petition, the scenario would be no different: the Review-Journal would be the petitioner, the EJDC would be the Respondent, and this Court would be the proper forum to seek relief. The only change would be that this inevitable conflict would be resolved months or years down the road, if at all, rather than now, thereby either delaying the proceedings to which the Review-Journal was seeking access or allowing them to continue in violation of the Review-Journal's rights while the Review-Journal's challenge was litigated. Not only would that be an unwarranted waste of judicial resources, it would allow the First Amendment harms created by the Family Court Restrictions and NRS Provisions to continue.

Likewise, while parties such as the Review-Journal and Our Nevada Judges could certainly challenge these matters in 42 U.S.C. § 1983 litigation in federal court, such litigation could not only be protracted (and expensive for the EJDC as 42 U.S.C. § 1988 entitles civil rights litigants to their fees and costs when they prevail, which would be likely) but it is likely that a federal court could certify

questions to this Court as to the state constitutional arguments made in the Petition. *See* NRAP 5(a); *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 137 P.3d 1161 (2006) (permitting the certification of questions for the Nevada Supreme Court where a question of law is at issue). Thus, again, the matter would likely just end up back before this Court at the end of the day, and therefore this Court's immediate adjudication of this petition would be a boon to judicial efficiency.

In *Cote H.*, this Court considered a challenge to the applicability of Nevada's delinquency statute to a criminal defendant. Although the petitioner "appear[ed] to ha[ve] a plain, speedy, and adequate remedy in the form of an appeal from any judgment adjudicating him a delinquent," this Court "consider[ed] this petition because the applicability of NRS 201.230(1) to minors under the age of 14 constitutes an important question of law that needs clarification" and "because [the] petition involves a question of first impression that arises with some frequency, the interests of sound judicial economy and administration favor[ed] consideration of the petition." *Cote H.*, 124 Nev. at 40, 175 P.3d at 908. Likewise, here, the Petition raises important policy questions that require clarification and sound judicial economy favors consideration.

2. A Party Seeking First Amendment Protection Need Not First Suffer Harm.

As detailed above, the Review-Journal meets Nevada's requirements for

obtaining writ relief. The crux of the EJDC's argument appears to be that the Review-Journal must wait for an exclusion order from a family court proceeding based on each individual court rule and state statute. (RAB at 7.) This not only ignores that the Family Court Restrictions and NRS Provisions are intertwined, it also flies in the face of one of the purposes behind writ relief: sound judicial economy. Again here, the Review-Journal's petition "raises an important legal issue in need of clarification, involving public policy, of which this court's review would promote sound judicial economy and administration." *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008). Thus, the Review-Journal need not wait until it is denied access to seek relief.

Federal courts apply more stringent justiciability requirements than Nevada applies in writ proceedings.[6] However, even under those more severe standards, federal courts routinely find First Amendment facial challenges are justiciable. Notably, while the EJDC claims the Review-Journal has not been denied access, a First Amendment plaintiff need not first suffer the First Amendment harm at issue to have standing. As the Ninth Circuit has explained, even under the more severe federal standard for justiciability, "[t]o escape the chilling effect of sweeping

[6] *See Kahn v. Dodds* (*In re Amerco Derivative Litigation*), 127 Nev. 196, 213, 252 P.3d 681, 694 (2011) (noting that state courts do not have constitutional "case and controversy" standing requirement stemming from Article III, Section 2 of the United States Constitution).

restrictions on speech, a plaintiff in a pre-enforcement First Amendment challenge may establish an injury in fact without first suffering a direct injury from the challenged restriction." *Inst. For Free Speech v. Jarrett*, No. 22-35112, 2022 U.S. App. LEXIS 29196, at *3 (9th Cir. Oct. 20, 2022) (citation and internal quotation omitted). Instead, a challenger need only "demonstrate that it faces a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Id.* (citation and internal quotation omitted). Here, the Review-Journal certainly faces a realistic danger of suffering direct injury—exclusion from family court—resulting from the operation of both the Family Court Restrictions and the NRS Provisions.

Nevertheless, the EJDC argues that the Review-Journal's claim is not ripe for review. It principally uses *Stephens Media* as its case-in-point, because there, the press petitioned for writ relief in response to a trial court order restricting their access to a criminal trial. (RAB at 7 (citing *Stephens Media*, 125 Nev. at 855).) In turn, the EJDC asserts that the Review-Journal must similarly wait for district court orders denying them access on the bases of all four of the rules and statutes at issue. Only then, the argument goes, will the Review-Journal have a ripe challenge.

However, on their face, the Review-Journal's claims are ripe for review. When determining the ripeness of a claim, this Court considers: "(1) the hardship to the parties of withholding judicial review," which does not require a party have already suffered harm; "and (2) the suitability of the issues for review." *In re T.R.*,

119 Nev. 646, 651, 80 P.3d 1276, 1279 (2003) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977)). As discussed below, the mass, summary closure of courts to the public presents grave harms and restricts the Review-Journal's constitutionally protected right to gather and report on the news. Indeed, First Amendment harm is presumed to be irreparable. *Las Vegas Review-Journal v. Eighth Judicial Dist. Court of Nev.*, 134 Nev. at 43, 412 P.3d at 26 (citing *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1304, 103 S. Ct. 3524, 77 L. Ed. 2d 1284 (1983)) ("[i]t is clear that even a short-lived 'gag' order in a case of widespread concern to the community constitutes a substantial prior restraint and causes irreparable injury to First Amendment interests as long as it remains in effect"); *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) ("[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury")

Furthermore, the constitutionality of the statutes and rules is suitable for review, as there is "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979). Indeed, "[o]ne does not have to await the consummation of a threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Id*. (quoting *Pennsylvania v. West*

Virginia, 262 U.S. 553, 593, 43 S. Ct. 658, 67 L. Ed. 1117, 1 Ohio Law Abs. 627 (1923)). Here, the threatened injury—wholesale denial of access to the public courtroom without any individualized assessment as to whether such denial is lawful—is certainly impending, as family court litigants and lawyers will doubtless attempt to keep their cases closed to the detriment of the public.

3. When the Legislature Enacted the NRS Provisions Is Irrelevant.

The EJDC also suggests the issues in the Petition are not justiciable because several of the provisions, namely NRS 125.080 and NRS 126.211, have been in effect for decades or that it means the Constitutional harm is not significant (RAB at 5.) This argument has no legitimate basis.

First and most importantly, the fact that two unconstitutional statutes have been in effect for decades does not diminish a challenge to their validity or diminish the harm presented—the EJDC cannot point to any authority supporting the putative argument that constitutional challenges are waived or constitutional harms are minimized if an unconstitutional statute remains on the books long enough. In fact, the opposite is true: courts have routinely held statutes unconstitutional (as applied or on their face) even though they have been in effect for decades. For example. In *Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516, 518, 522 (6th Cir. 1997), the court found the challenge was timely because the law "barred [the plaintiff] from

using the roads in question on an ongoing basis, and thus actively deprived [the] plaintiff] of its asserted constitutional rights every day that it remained in effect. The court explained:

> A law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within [the statute of limitations].

Id. at 522. The principle at play in *Kuhnle*—that challenges to ongoing constitutional harm are necessarily timely[7]—apply with even more force in the First Amendment context. *See Maldonado v. Harris*, 370 F.3d 945, 955 (9th Cir. 2004) ("[w]e join the Fourth Circuit in expressing serious doubts that a facial challenge under the First Amendment can ever be barred by a statute of limitations…"). Indeed, in **1983**, the United States Supreme Court found unconstitutional, as applied to newspaper, a law, enacted in **1923**[8] that closed sex offense trials during minor victim's testimony. *Globe Newspapers*, 457 U.S. at 610-11.

This Court should embrace the maxim "better late than never" with regard to

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[7] *See also Lawrence v. Texas*, 539 U.S. 558 (2003) (finding unconstitutional law prohibiting homosexual sexual contact which was enacted in the 1970s); *Sei Fujii v. State*, 38 Cal. 2d 718, 737-38 (Cal. 1952) (striking down Alien Land Law of 1913 as unconstitutional under the Fourteenth Amendment).; *Va. Hosp. Ass'n v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989) (noting "continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations" in challenge to Medicaid provisions) *Wallace v. New York*, 40 F. Supp. 3d 278, 302 (E.D.N.Y. 2014) (noting "the clock on any challenge to the constitutionality of a statute, whose continued application works an ongoing constitutional violation, starts to run anew, every day that the statute applies" in finding challenge to sex offender laws timely).
[8] *See* ALM GL ch. 278, § 16A.

correcting the infirmities embodied in unconstitutional statutes and should not accept the EJDC's invitation to ignore the ongoing serious First Amendment harm caused by the NRS Provisions because they have been on the books for some time.

4. It Is Irrelevant that Family Court Litigants Are Not Parties, and the EJDC Is the Adverse Party.

The EJDC erroneously contends the Review-Journal's petition raises no "justiciable controversy" because the case supposedly does not involve two parties with adverse interests. (RAB at 6.) In the same breath, though, the EJDC explains that it *does* have an interest in upholding the constitutionality of the NRS Provisions the Review-Journal challenges (RAB at 7, n.2.) The same is true for the district court rules. As the promulgator and the enforcer of the EDCR rules, the EJDC is necessarily the adverse party. Indeed, no individual party to a family court proceeding would be able to appropriately defend the constitutionality of a court order based in these statutes or rules. *See Diamond v. Charles*, 476 U.S. 54, 65 (1986) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972)) (holding that "only the State has the kind of 'direct stake' . . . in defending the standards embodied in [its] code.").

C. Advisory Mandamus Would Be Appropriate Here.

As detailed above, this matter presents a live, justiciable controversy. Even if the rulings sought were merely advisory, however, 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*, 124 Nev. at 197-98, 179 P.3d 556, 559)*; see also Debiparshad v. Eighth Judicial Dist. Court of Nev.*, 499 P.3d 597, 600 (Nev. 2021) (quoting *Walker v. Second Judicial Dist. Court*, 136 Nev. Adv. Rep. 80, 476 P.3d 1194, 1198 (2020)) ("[a]lternatively, we will consider mandamus relief where a petitioner present[s] legal issues of statewide importance requiring clarification, and our decision . . . promote[s] judicial economy and administration by assisting other jurists, parties, and lawyers").

Contrary to the arguments of the EJDC, those circumstances are indeed present here. The right of the public to access court proceedings in family court is an important issue that needs clarification. Each day that the Family Court Restrictions stay in place, the First Amendment rights of not only the Review-Journal but also Alexander Falconi (dba Our Nevada Judges) and other members of the public—such as pro se litigants—are harmed.

Likewise, addressing the constitutionality of the statutes and court rules at issue promote judicial economy and sound administration of justice. Rather than burdening the public with having to litigate these issues in each and every case in which the issues presented by the rules and statutes arise, this Court should address

them in this matter. Indeed, not only is it burdensome (and functionally impossible) for the public to have to assert its right to access in each and every family court matter, but the operation of the rules also makes it impossible to even determine which cases are being closed from the public's view, let alone why.

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.

D. This Court Is the Proper Court to Consider Declaratory Relief.

The EJDC also incorrectly argues that the Review Journal's request for declaratory relief is improper because the Review-Journal did not first present the matter to district court. (RAB at 4.) Despite the EJDC's insistence that the Review Journal first file its petition in district court, this Court has original jurisdiction over petitions for writ relief and, thus, related claims for declaratory relief.

The EJDC's reliance on *Beko v. Kelly*, 78 Nev. 489, 492, 376 P.2d 429, 431 (1962) for its proposition that "a petition for a declaratory judgment must be initially filed in the district court" (RAB at 9) is misplaced. That case was not a writ case, and declaratory relief is proper if it "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). Thus, because this Court has original jurisdiction over the writ relief sought, it can consider the intertwined request for declaratory relief.

Second, the EJDC claims that declaratory relief is unavailable because the Nevada Declaratory Judgements Act confers power to issue declaratory judgement only to "courts of record," not "courts of review." (RAB at 9.) While the Supreme Court may be a "court of review" in that it adjudicates appeals, the Supreme Court is a "court of record" as unambiguously defined by Nevada statute. NRS 1.020(1) ("[t]he following are courts of record: 1. The Supreme Court…"). Thus, this Court must reject the EJDC's argument that the language of NRS 30.030 prohibits this Court from retaining original jurisdiction over complaints for declaratory relief.

Finally, the EJDC argues that declaratory relief is inappropriate because there is no adverse party present. This likewise fails. For the same reasons discussed above, the EJDC is the adverse party because they are the promulgator of the Family Court Rules. *See generally Stephens Media*, 125 Nev. 849, 221 P.3d 1240 (granting a petition against the district court for an unconstitutional court order). As for the statutes, while the state is the only party with direct stake in defending the constitutionality of its statutes (*see Diamond*, 476 U.S. at 65) the state need not be a named party in the present proceedings. Rather, when a party seeks declaratory judgement that a statute is unconstitutional, it need only serve the Attorney General

with a copy of the petition and allow them to be heard. NRS 30.130. By and through its Deputy Solicitor General, the Attorney General was served with a copy of the Petition.

Thus, this Court can grant declaratory relief in addition to writ relief. In any event, as detailed above, this matter squarely falls within the types of matters appropriate for writ relief—and granting that relief will resolve the questions presented regarding the constitutionality of the Family Court Restrictions and the NRS Provisions.

IV. CONCLUSION

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 find them unconstitutional.

Specifically, 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, as detailed in the

Petition. (PTOB, pp. 28-29.)

DATED this 30th day of December, 2022.

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CERTIFICATE OF COMPLIANCE

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

I hereby certify that this REPLY IN SUPPORT OF 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 REPLY IN SUPPORT OF 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 REPLY IN 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 6,296 words.

Finally, I hereby certify that I have read this reply brief, 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 30th day of December, 2022.

Respectfully submitted:

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