No. 84947

IN THE SUPREME COURT OF THE STATE OF NEVADA

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ALEXANDER M. FALCONI, D/B/A/ OUR NEVADA JUDGES,

Petitioner,

v.

CLARK COUNTY EIGHTH JUDICIAL DISTRICT COURT,

Respondents.

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

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I. Introduction

Petitioner Alexander Falconi D/B/A Our Nevada Judges seeks a determination that two newly adopted Family Court rules—Eighth Judicial District Rules (EDCR) 5.207 and 5.212—are facially unconstitutional under principles governing the public's First Amendment right to access court proceedings. But Falconi's claims for declaratory, writ, and injunctive relief are procedurally deficient for two reasons.

First, Falconi's complaint for declaratory relief is misplaced because a request for declaratory relief must be brought first in the district court. Second, Falconi seeks a disfavored advisory opinion and fails to present a ripe, justiciable controversy.

For those reasons, this Court should deny the petition.

II. Factual Background

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.

In particular, the petition included the following proposed rules:

> **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.

Res. App. at 12, 14.

Three months after submission of the petition, this Court approved the proposed amendments with minor modifications to the proposed amendments. In particular, the Court approved the proposed language for Rule 5.207 verbatim. Pet. App. at 39-40. And although the Court removed the words "for good cause shown" from proposed Rule 5.212(c), the Court maintained the 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 45-46.

Two months after this Court approved the petition presenting the proposed rule changes, Falconi filed an original writ petition and an alternative complaint seeking writ, declaratory, and injunctive relief from this Court. This Court issued an order calling for a response and acknowledging the potential relationship between this case and *Falconi v. Eighth Jud. Dist. Ct. (Minter)*, No. 85915—a matter Falconi filed involving a specific challenge to application of EDCR 5.207 and EDCR 5.212 in a custody case. Order Directing Answer, No. 84947 (Aug. 23, 2022) (Doc. 2022-29654).

III. Argument

The petition in this case is procedurally deficient. The request for declaratory relief is improper because Falconi needs to present that issue in the district court in the first instance. Additionally, the petition does not present a ripe, justiciable controversy and requests a disfavored advisory opinion, but Falconi has the means to present this Court with his First Amendment challenge in a procedural context that

avoids these issues. For those reasons, this Court should reject Falconi's petition without reaching the merits of claims for relief.

A. Falconi's request for declaratory relief is procedurally improper.

Respondents begin with the most obvious of the procedural problems with Falconi's requests for relief: his request for declaratory relief. "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); *see also* NRS 30.030 (establishing that the power to grant declaratory relief rests with Nevada's "[c]ourts of record," as opposed to its courts of review). Yet Falconi never sought declaratory relief in the district court. For this reason, this Court should summarily reject Falconi's request for declaratory relief.

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

The Petition in this case does not arise from any lower court proceeding wherein EDCR 5.207 or 5.212 is at issue. As a result, the Petition does not seek to resolve an existing case or controversy involving application of the challenged rules. Instead, the petition seeks an advisory opinion. And because the forms of relief the petition seeks

are all extraordinary remedies, this Court has "complete discretion to determine whether to consider them." *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.

And Falconi's reliance on federal standing principles involving First Amendment claims do not provide a basis for departure from this Court's traditional limitations on the availability of advisory mandamus. Pet. at 9-10. Falconi is correct that federal courts have relaxed standing requirements in the First Amendment context. But this case presents a different issue that triggers concerns about issuance of advisory opinions: the absence of a ripe, justiciable controversy. *Cf. Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 887-88, 141 P.3d 1224, 1230-31 (2006) (noting that standing and ripeness

resemble each other but address different issues). "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)).

As Falconi recognizes, the rules (and related statutes) at issue in this case involve protection of privacy interests of litigants involved in family court proceedings. Pet. at 7. But by seeking advisory mandamus,

rather than challenging an order enforcing the new rules, Falconi 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 due to the absence of adverse parties.[1]

Relatedly, the absence of adversity demonstrates that any controversy is not ripe for adjudication. The issues Falconi raises are not well suited for review in this context. Yet there is no hardship to Falconi if this Court denies the instant petition due to the absence of a ripe, justiciable controversy. Falconi currently has the means to assert his claim in a manner that would place a justiciable controversy with the necessary adversity before this Court. He is currently doing so through *Falconi v. Eighth Jud. Dist. Ct. (Minter)*, No. 85915.[2] In that

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[1] In his request for declaratory relief, Falconi asserts that this case presents a ripe, justiciable controversy. Pet. at 18-19. But his assertions are conclusory legal statements devoid of any factual support. Pet. at 18-19.

[2] Although this Court's order for a response in that case notes that mootness may be an issue, Falconi urged the Court to apply an exception to the mootness doctrine. Order Directing Supplement and Answer, *Falconi v. Eighth Jud. Dist. Ct. (Minter)*, No. 85195 (Aug. 23, 2022) (Doc. 2022-26230). Respondent takes no position on whether this Court should apply an exception to mootness. But this Court noted that

case, Falconi sought intervention in the district court, and the district court ordered his exclusion, citing EDCR 5.207 and 5.212. And Falconi is now challenging the district court's application of EDCR 5.207 and 5.212 by writ petition in this Court. Supplement to Petition for Writ of Mandamus, *Falconi v. Eighth Jud. Dist. Ct. (Minter)*, No. 85195 (Aug. 29, 2022) (Doc. 2022-26941).

For these reasons, even assuming his challenges to 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. Nothing is preventing Falconi from challenging application of the rules in an existing family law proceeding in the Eighth Judicial District Court. And assuming, without conceding, that the district court's denial of Falconi's challenge to application of EDCR 5.207 or 5.212 would constitute a violation of the First Amendment, he can raise that issue

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"it appears that such an exception might apply" before ordering briefing to proceed. Order Directing Supplement and Answer at 2, *Falconi v. Eighth Jud. Dist. Ct. (Minter)*, No. 85195 (Aug. 23, 2022) (Doc. 2022-26230) And even if this Court dismisses that proceeding based on mootness, Falconi will undoubtedly have an opportunity to seek intervention in other district court cases in a manner that will allow for proper consideration of his claims under the First Amendment.

before this Court through a writ petition challenging the district court's order.

IV. Conclusion

For the foregoing reasons, this Court should deny Falconi's request for writ, declaratory, and injunctive relief.

Submitted this 20th day of October 2022.

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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 2,115 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 recrd 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: October 20, 2022

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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 October 20, 2022. Registered participants will be served electronically.

Date: October 20, 2022

/s/ Sandra Geyer
An employee of the Office of the Attorney General