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IN THE SUPREME COURT OF THE STATE OF NEVADA

ALEXANDER M FALCONI,
Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND
FOR THE COUNTY OF CLARK; AND
THE HONORABLE CHARLES
HOSKIN, DISTRICT COURT JUDGE,
Respondents,

TROY A MINTER, JENNIFER R
EASLER,
Real-Parties in Interest.

Case No.: 85195

SUPPLEMENT TO PETITION FOR WRIT OF MANDAMUS

COMES NOW, Alexander Falconi d/b/a/ Our Nevada Judges, by and through the undersigned counsel, and hereby files the following Supplement to the August 19, 2022 *Petition for Writ of Mandamus* in

accordance with this Court's August 23, 2022 *Order Directing Supplement and Answer and Inviting Amici Curiae Participation*.

a. Issues Presented

The issue presented in this supplement is whether a Court may deny open access to court proceedings under Eighth Judicial District Court Rule ("EDCR") 5.207 and EDCR 5.212, and whether these provisions are unconstitutional and/or conflict with other controlling law requiring access.

b. Standard of Review

This Court reviews questions of law *de novo*, including questions of statutory interpretation. *Jackson v. Groenendyke*, 132 Nev. Adv. Op. 25, 369 P.3d 362, 365, 2016 WL 1381495 (2016). This Court reviews a district court's interpretation of a statute or court rule *de novo*, even in the context of a writ petition. *Marquis & Aurbach v. Eighth Judicial Dist. Court*, 122 Nev. 1147, 1156, 146 P.3d 1130, 1136 (2006). Whether a Court may deny open access to Court proceedings under EDCR 5.207 and EDCR 5.212 is a question of law.

Where there is no plain, speedy, and adequate remedy at law, extraordinary writ relief is justified. Nevada Revised Statutes ("NRS") 34.170 and NRS 34.330. The Court may consider a petition for a writ

when an important issue of law needs clarification. *Double Diamond v. Second Jud. Dist. Ct.*, 131 Nev. Adv. Op. 57, 354 P.3d 641, 643, 2015 WL 4598332 (2015). Whether the Eighth Judicial District Court may prevent public access to court proceedings is an important issue of law that relates to the right of the presumption that all Court proceedings are open to the public. See also SCR 243.

c. Summary of the Argument

The right to access court proceedings is guaranteed under the First Amendment. See *Oregonian Publ'g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1465 (9th Cir. 1990). EDCR 5.207 and 5.212 are facially unconstitutional.

EDCR 5.207 and 5.212 also conflict with and undermine the Supreme Court Rules (“SCR”). SCR 240(1). The EDCR do not supersede the SCR.

d. Facts

On August 19, 2022, Our Nevada Judges filed a Petition for Writ of Mandamus. Our Nevada Judges is seeking a writ to the Honorable Judge Charles Hoskin of the Eighth Judicial District Court in Clark County Nevada to reverse his August 19, 2022 Order (PA-0009) denying Our

Nevada Judges' August 17, 2022 media request in District Court Case No. D-08-402901-C, PA-0001.

The substance of the District Court's Order at PA-0009 is as follows:

This case is sealed pursuant to NRS 125.110(2). EDCR 5.207 and EDCR 5.212 require the matter to be private. As the matter is private SCR 229, SCR 239 and SCR 242 limit the media access. The Court is also considering SCR 230(2)(b) as it relates to the child.

On August 23, 2022 this Court issued its Order Directing Supplement and Answer and Inviting Amici Curiae Participation and directed Our Nevada Judges to file and serve a supplement to the Petition addressing the District Court's reliance on local rules, including EDCR 5.207 and 5.212, as a basis for denying Our Nevada Judges' media request.

e. Argument

i. EDCR 5.207 and 5.212

Under the provisions of EDCR 5.10(b), the rules in part V of the EDCR, including EDCR 5.207 and 5.212, govern practice and procedure in cases heard in the family division of the Eighth Judicial District.

EDCR 5.207, effective June 10, 2022¹, provides the following:

¹ Recent approval of a district court rule by the Supreme Court is not a basis for denying the right to challenge its constitutionality. *Lippis v. Peters*, 112 Nev. 1008, 1010, 921 P.2d 1248, 1249 (1996).

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.

EDCR 5.212, Effective June 10, 2022, provides the following:

- (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 subsections (c) or (d), upon such demand of either party, all persons must be excluded from the court or chambers wherein 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, exclude the parents, guardians, or siblings of either party, or witnesses for either party, from the court or chambers wherein the hearing or trial 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 proceedings 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 proceedings, and possesses inherent authority to deny public access when justified. Unless 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. Parties, their attorneys, and such staff and experts as those attorneys deem 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.

ii. EDCR 5.207 and 5.212 are facially unconstitutional and unconstitutional as applied

EDCR 5.207 subsumes custody and child support cases under the rules that apply in paternity cases under NRS Chapter 126, having the practical effect of closing all such proceedings by operation of law under the provisions of NRS 126.211. Under NRS 126.211 a proceeding may be opened to public access only (1) if the parties and the court consent; or (2) “in exceptional cases only upon an order of the court for good cause shown.”

EDCR 5.212 permits a single party to a family law case the option to require that all papers and proceedings be private and order the exclusion of any person not directly involved in the case.

Confidentiality orders closing judicial proceedings to the press “implicate First Amendment concerns.” *Del Papa v. Steffen*, 112 Nev. 369, 374, 915 P.2d 245, 248 (1996).

Our Nevada Judges has a well established right under existing Nevada jurisprudence to access judicial proceedings. *Stephens Media, LLC v. Eighth Judicial Dist. Court*, 125 Nev. at 860, (2016). “Public access inherently promotes public scrutiny of the judicial process, which enhances both the fairness of criminal proceedings and the public confidence in the criminal justice system.” *Id.* citing *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 104 S. Ct. 819 (1984) (primacy of presumptive right to an open trial prevails over the government's interest in denying deny the right of access to inhibit the disclosure of sensitive information). “The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness.” *Press-Enterprise Co.* at 7. Proceedings can be closed at the behest of the government only if there is an overriding interest due process interest, based on findings that closure is essential to preserve higher values, and that is narrowly tailored to serve that specific interest. *Id.*

These same principles also expressly apply to civil cases in Nevada. The free speech protections in 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). “[T]he First Amendment guarantees of speech and press, standing alone, prohibit [the] government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted.” *Richmond Newspapers v. Virginia*, 448 U.S. 555, 576 (1980). This same holding applies to both criminal and civil cases. *Id.* at 580, n.17 “A state may deny this right of public access only if it shows that ‘the denial is necessitated by a compelling government interest, and is narrowly tailored to serve that interest.’” *Del Papa v. Steffen*, 112 Nev. 369, 374, 915 P.2d 245, 248 (1996) quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607, 73 L. Ed. 2d 248, 102 S. Ct. 2613 (1982).

**1. EDCR 5.207 and 5.212 are facially
unconstitutional**

In First Amendment facial challenges, the question is whether the statute or rule at issue is substantially overbroad in relation to the State’s interests, such that it risks deterring protected speech. See *United States v. Stevens*, 559 U.S. 460, 473 (2010). When a party attacks a state statute or regulation with a facial challenge, it seeks “to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question.” *City of Chicago v. Morales*, 527 U.S. 41, 55-56 n.22 (1999). The right to speak and to publish concerning what happens in

court proceedings is protected by the First Amendment and would lose any meaning if access to observe court proceedings is foreclosed. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 576-77, 100 S. Ct. 2814, 2827 (1980).

On their face, EDCR 5.207 and 5.212 broadly and categorically undermine the right to access and observe proceedings. EDCR 5.207 and 5.212 permit proceedings in the family courts to occur in secret by default, and as such deter any ability for the public to know about or scrutinize what occurs before these courts. See also *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110,126-27 (2d Cir. 2006) (In public access cases the importance of immediate access where a right of access is found is emphasized).

Our Nevada Judges' policies protect the identities of children by blurring imagery and redacting mentions, both audible and written. Under the language of the EDCR 5.207 and 5.212, a litigant's mere demand closes the proceedings, depriving the court of the discretion to consider protective mechanisms like this in any reporting and/or electronic coverage.

As such, any interest that the state may have in protecting the identities of children or other protected persons who participate in court proceedings can be accomplished by much less restrictive means. Simply

banning by default any observation of such proceedings under EDCR 5.207 and 5.212 is facially unconstitutional.

Even in a case involving the testimony of minor victims of child abuse, the United States Supreme Court ruled that such “compelling” interest in nondisclosure did not justify across-the-board closure rules of the case. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-0873 L. Ed. 2d 248, 102 S. Ct. 2613, 2620-21(1982). The same reasoning also applies to rejecting closure based on claims that exposure of intimate family details may be harmful to children. *In Anonymous v. Anonymous*, 263 A.D.2d 341, 345-46, 705 N.Y.S.2d 339, 342-43 (App. Div. 2000).

2. EDCR 5.207 and 5.212 are unconstitutional as applied

Not only are EDCR 5.207 and 5.212 facially unconstitutional, in this case, they have operated unconstitutionally as to Our Nevada Judges because they were used as a basis in Judge Hoskin’s Order at PA-0009 to deny public, press, and camera access to a proceeding. Thus, in this matter Our Nevada Judges is not seeking that the Court make a theoretical ruling about potential constitutional abuses that might occur under EDCR 5.207 and 5.212. A case and controversy exists in this case because Our Nevada Judges has been denied the exercise of their rights under the First Amendment to gather and disseminate records of court

proceedings. The underlying analysis of a constitutional issue is the same in “as-applied” and “facial” challenges. However, “as-applied” cases remove any categorical line that would bar a court from making broad pronouncements of constitutional invalidity that might apply in a case brought solely as a facial challenge. *Citizens United v. FEC*, 558 U.S. 310, 310, 130 S. Ct. 876, 880 (2010).

f. EDCR 5.207 and 5.212 conflict with the SCR

"The judiciary, of course, has the inherent power to govern its own procedures; and that power includes the right to adopt and promulgate rules of procedure." *Whitlock v. Salmon*, 104 Nev. 24, 26, 752 P.2d 210, 211 (1988). See also *State v. Second Judicial Dist. Court*, 116 Nev. 953, 11 P.3d 1209 (2000). There is a presumption under SCR 230(2) that “all courtroom proceedings” that are open to the public are subject to electronic coverage. The EDCR are inferior to, and are subject to, the SCR. However, EDCR 5.207 and EDCR 5.212 effectively bypass the presumption that proceedings are open to the public. In so far as the newly promulgated EDCR 5.207 and EDCR 5.212 allow proceedings to be summarily closed by the Court, without considering the factors to

determine whether a electronic coverage should be permitted under SCR 230(2)(a-f), they should be overruled.

Under SCR 229(1)(b), a “proceeding” means “any trial, hearing, motion, hearing on an order to show cause or petition, or any other matter held in open court which the public is entitled to attend.” The provisions of SCR 230 codify the First Amendment right of the press to record proceedings in Nevada courts. SCR 230(2) provides that “...there is a presumption that all courtroom proceedings that are open to the public are subject to electronic coverage.” The rule further provides that, “A judge shall make particularized findings on the record when determining whether electronic coverage will be allowed at a proceeding, in whole or in part.”

Under SCR 230(2)(a-f), a Court is required to consider the following factors in deciding whether to permit electronic coverage:

- (a) The impact of coverage upon the right of any party to a fair trial;
- (b) The impact of coverage upon the right of privacy of any party or witness;
- (c) The impact of coverage upon the safety and well-being of any party, witness or juror;
- (d) The likelihood that coverage would distract participants or would detract from the dignity of the proceedings;
- (e) The adequacy of the physical facilities of the court for coverage; and
- (f) Any other factor affecting the fair administration of justice.

Thus, if a request to provide coverage is submitted in accordance with SCR 230(1), the requirement for a written order on the request is triggered. Although a written order was issued in this case (See PA-0009) no particularized findings were made. EDCR 5.207 and EDCR 5.212 essentially allow an end run around the provisions of SCR 230 *et seq.*

g. Mootness

Our Nevada Judges was seeking to provide camera coverage of the proceeding in the underlying case that took place on August 22, 2022. Therefore, the issue before the Court in the Petition is arguably moot. Generally, the Nevada Supreme Court decides only actual controversies and does not give opinions on moot questions or abstract propositions which cannot affect the matter at issue. *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004) quoting *NCAA v. University of Nevada*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981).

However, where an issue is arguably moot, Courts should still consider such an issue “[i]f it involves a matter of widespread importance that is capable of repetition, yet evading review.” *Solid v. Eighth Judicial Dist. Court*, 133 Nev. at 120 (2017), quoting *Personhood Nev. v. Bristol*,

126 Nev. 599, 602, 245 P.3d 572, 574 (2010), citing *Traffic Control Servs. v. United Rentals*, 120 Nev. 168, 171-72, 87 P.3d 1054, 1057 (2004).

As a practical matter, a request to provide media coverage of a proceeding under the Supreme Court rules is typically provided four or five days before the hearing actually occurs. In this case the request was made on August 17th 2022, five days before the hearing was to occur on August 22nd 2022. See PA-0001 and PA-0009. In cases where such a request is denied the appropriate remedy is a writ petition. See SCR 243. Also, as non-party, Our Nevada Judges has no right to seek a stay in a pending case. However, given the caseload of this court and others expecting the court to act on a writ petition within the two or so days required to overturn a denial of a request to provide coverage is impracticable. First Amendment concerns are of the highest importance as they involve fundamental rights established under the Constitution. Because the time frame in which to file for Relief is so short, such instances are capable of repetition yet may evade review entirely.

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WHEREFORE, Our Nevada Judges requests that the Court grant its
petition.

DATED this Aug 29, 2022

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VERIFICATION OF ALEXANDER FALCONI

I, Alexander M. Falconi, state that I have read this *Supplement* and that the contents are true and correct of my own personal knowledge, except for those matters I have stated that are not of my own personal knowledge, but that I only believe them to be true, and as for those matters, I do believe they are true.

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

EXECUTED this Aug 29, 2022



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CERTIFICATE OF COMPLIANCE

I, Luke Busby, declare and certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Google Docs in 14-point Helvetica. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 3450 words.

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NRAP 25(5)(c)(1)(B) Certificate of Service

I, Luke Busby, do hereby declare that I am over the age of 18 and not a party to this action and that I personally served a true and correct copy of this *Supplement* by placing it into a sealed envelope and mailing it, postage prepaid, *via* United States Postal Service, addressed as follows:

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