IN THE SUPREME COURT OF THE STATE OF NEVADA

ALEXANDER FALCONI D/B/A OUR NEVADA JUDGES,

Petitioner,

vs.

CLARK COUNTY EIGHTH JUDICIAL DISTRICT COURT,

Respondent.

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Case No.: 84947

PETITIONER'S REPLY BRIEF

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ARGUMENT

As a preliminary matter, Respondent has not provided any argument to refute Petitioner's position that the rules in question, specifically EDCR 5.207 and EDCR 5.212, are unconstitutional on their face. Such a failure is considered a concession under Nevada law.

The petition for writ of mandamus, or alternatively, a writ of prohibition and complaint for declaratory relief is the proper vehicle in this matter as Mr. Falconi will directly benefit from the issuance of a writ, which can issue upon a declaration that EDCR 5.207 and EDCR 5.212 are unconstitutional. Despite Respondent's assertions to the contrary,[1] Petitioner is not seeking an "advisory mandamus" but rather a substantive ruling on a facial challenge to the rules in question.[2] Additionally, given that there are no less than three pending matters[3] regarding a similar, if not the same, question of law, it is also within the

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[1] Resp't. Answering Brief at 1, 5, 6, 7, 8, and 10.

[2] To reiterate, Petitioner's position is that any blanket rule which allows the closure of court proceedings to the public at the request of one party, without first conducting a case-by-case analysis, using the appropriate level of scrutiny, weighing the public's First Amendment right to observe and assess the judicial system, is facially unconstitutional.

[3] NSC Case Nos: 84947, 85195, and 85228.

power of this Court to "exercise its discretion to consider an extraordinary writ where an important legal issue that needs clarification is raised or to promote judicial economy and administration" in this matter.[4]

Finally, Respondent references a related matter in its brief: *Falconi v. Eighth Judicial District Court (Minter)*, Docket No. 85195.[5] As the Court has also indicated that that matter is related,[6] Petitioner briefly responds to arguments not otherwise addressed.

I. Petitioner's substantive arguments regarding the First Amendment facial challenge to the rules in question are uncontested by Respondent and are therefore considered conceded under Nevada law

Respondent's Answer fails to address the constitutional issues

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[4] *State Office of the Attorney General v. Justice Court of Las Vegas Township*, 133 Nev. 78, 80, 392 P.3d 170, 172 (2017).

[5] Resp't. Answering Br. at 5, 9, and 10.

[6] August 23, 2022, Order, *Falconi v. Eighth Judicial District Court (Minter)*, Docket No. 85195, Doc No.: 22-26230 ("This matter raises issues similar to those asserted in Falconi v. Eighth Judicial District Court, Docket No. 84947, and thus, upon completion of briefing, these cases may be clustered to ensure that they are resolved in a consistent and efficient manner."). *See also*, August 23, 2022, Order, *Falconi v. Eighth Judicial District Court*, Docket No. 84947, Doc No.: 22-26231("This matter raises issues similar to those asserted in Falconi v. Eighth Judicial District Court (Minter), Docket No. 85195, and thus, upon completion of briefing, these cases may be clustered to ensure that they are resolved in a consistent and efficient manner.").

raised by the Petition, specifically Petitioner's challenge to EDCR 5.207 and EDCR 5.212 so far as they authorize the closure of courts at the request of one party without first conducting a case-by-case analysis under the appropriate level of scrutiny, as is required by the First Amendment.

When an argument is not addressed, it is conceded.[7] Here, Petitioner's substantive arguments have not been addressed by Respondent.[8] Because Respondent has not provided any case law or

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[7] "We have also determined that a party confessed error when that party's answering brief effectively failed to address a significant issue raised in the appeal. *See Bates v. Chronister,* 100 Nev. 675, 681-82, 691 P.2d 865, 870 (1984) (treating the respondent's failure to respond to the appellant's argument as a confession of error); *A Minor v. Mineral Co. Juv. Dep't,* 95 Nev. 248, 249, 592 P.2d 172, 173 (1979) (determining that the answering brief was silent on the issue in question, resulting in a confession of error); *Moore v. State,* 93 Nev. 645, 647, 572 P.2d 216, 217 (1977) (concluding that even though the State acknowledged the issue on appeal, it failed to supply any analysis, legal or otherwise, to support its position and "effect[ively] filed no brief at all," which constituted confession of error), *overruled on other grounds by Miller v. State,* 121 Nev. 92, 95-96, 110 P.3d 53, 56 (2005)." *Polk v. State*, 126 Nev. Adv. Rep. 19, 233 P.3d 357, 360 (Nev. 2010). *See also Salazar v. Stubbs*, 2018 Nev. App. Unpub. LEXIS 655, *3 (As Stubbs does not respond to Salazar's primary argument on appeal that a continuance should have been granted, he has conceded that argument.)

[8] *See* Resp't. Answering Brief, generally.

argument adverse to Petitioner's position regarding the constitutionality of EDCR 5.207 and EDCR 5.212, the argument as to constitutionality, or rather the lack thereof, has been conceded.

II. The Petition for Writ of Mandamus, or alternatively Prohibition, and Request for Declaratory Relief is the proper vehicle in this matter, the issues in which are ripe for determination.

Respondent is incorrect when stating that Mr. Falconi's request for declaratory relief is procedurally improper[9] or that the petition "does not present a ripe justiciable controversy."[10]

In the confusion over "advisory opinions," Respondent claims that there is a meaningful difference between standing and "ripeness."[11] If such a difference exists, it is *de minimis* in the context of a First Amendment facial challenge to a court rule. The appropriate standard for standing to request writ relief in Nevada is "beneficial interest", which Petitioner clearly has in this matter. However, even if the Court applies the factors to determine ripeness offered by Respondent, this matter is

[9] Resp't Answering Br. at 6, subsection "A."

[10] Resp't Answering Br. at 6 - 11, subsection "B."

[11] *Id*. at 7, ln 14-18.

still ripe for adjudication.

Finally, clear precedent establishes that this Court may issue declaratory relief in matters where the Court has original jurisdiction, especially where it underlies the requested writ relief.

A. Petitioner has met the requirements for both standing and ripeness as he has a beneficial interest in writ relief, and he is currently being denied access to family court based upon the rules in question.

Respondent correctly acknowledges that Petitioner has standing but errs in suggesting that "ripeness" is meaningfully different than standing in this matter.[12] In the context of facial challenges based on the First Amendment, "the ripeness inquiry is 'largely the same' as the one for standing." *Fitzgerald v. County of Orange*, 570 Fed. Appx. 653, 656 (9th Cir. 2014) (quoting *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010).

1. *Petitioner has a beneficial interest in the granting of the writ relief sought in this matter.*

While Petitioner would satisfy even the federal standard for

[12] "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." Resp't Answer, at 7, ln 14-18.

standing, which derive from the case or controversy component of the United States Constitution, state courts are not bound by federal standing principles when evaluating a petitioner's standing in a mandamus proceeding.[13] Because the Nevada Constitution does not contain a "case or controversy" clause, the doctrine of standing is not a constitutional command but rather merely a judicially-created doctrine of convenience.[14] Nevada courts have consistently held that to establish standing in a mandamus proceeding, the petitioner must demonstrate a beneficial interest in obtaining writ relief.[15] A party has a beneficial interest sufficient to pursue a mandamus action if the petitioner will gain a direct benefit from its issuance and suffer direct detriment if it is

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[13] *Heller v. Legislature of Nev.*, 120 Nev. 456, 460-61, 93 P.3d 746, 749 (2004). ("To establish standing in a mandamus proceeding, the petitioner must demonstrate a 'beneficial interest' in obtaining writ relief.")

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

[15] *See Heller,* 120 Nev. at 460-61; *State Bd. of Parole Comm'rs*, 451 P.3d 73.

denied.[16]

Petitioner has a beneficial interest in having access to court proceedings because the purpose of "Our Nevada Judges" is to "bridge the gap" between the public and the judiciary. Petitioner is currently being denied access to family law proceedings based upon EDCR 5.207 and EDCR 5.212, making this petition ripe for determination. *See Falconi v. Eighth Judicial District Court (Minter)*, Docket No. 85195.

Contrary to Respondent's contentions,[17] Petitioner is not seeking an "advisory opinion" but rather is seeking relief from the blanket ban on court observation under EDCR 5.207 and EDCR 5.212. Here, as evidenced by his declaration, Petitioner is a member of the public who has created a news outlet that covers family law cases. Because of EDCR 5.207 and EDCR 5.212, Petitioner's ability to observe and cover these family law matters has been impeded. If the family courts are prohibited from enforcing EDCR 5.207 and EDCR 5.212, Petitioner will be able to

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[16] *Heller*, 120 Nev. at 461 ("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").

[17] Resp't Answering Brief, "advisory mandamus" or "advisory opinion" at 1, 5, 6, 7, 8 and 10.

continue his viewing of these important legal matters, conferring upon him a beneficial interest.

2. The matter here is ripe for review.

"[R]ipeness focuses on the timing of the action rather than on the party bringing the brief." *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 887, 141 P.3d 1224, 1230-31 (2006) (internal quotation omitted). "The factors to be weighed in deciding whether a case is ripe for judicial review include (1) the hardship to the parties of withholding judicial review and (2) the suitability of the issues for review." *Id.* The fundamental question is whether "the harm alleged by the party seeking review is sufficiently concrete, rather than remote or hypothetical, to yield a justiciable controversy." *Id.* Finally, Respondent fails to note that the "*harm need, not already been suffered*" to be ripe for review; rather the harm must only be "probable for the issue to be ripe for judicial review." *Herbst Gaming*, *Inc.*, 122 Nev. at 887, 141 P.3d at 1231. (Emphasis added.)

The matter here is ripe for review. The harm that EDCR 5.207 and EDCR 5.212 threatens is concrete: the rules have been enacted, their contours set, and on their face, they violate the First Amendment. This Court need not wait until a district court judge in fact harms Petitioner's

First Amendment rights to grant relief.[18] Implementation of those rules has and will impact Petitioner's ability to access family court proceedings to provide public coverage in violation of the First Amendment.

The Respondent claims that there is an absence of adverse parties because "there is no party involved that possesses the sort of privacy interest that the challenged rules are intended to protect".[19] The Respondent fails to appreciate that with a facial challenge, *the promulgator of the rule is the adverse party*.[20] Here there are two parties sufficiently adverse to satisfy the case in controversy requirement: the Respondent, who enacted EDCR 5.207 and EDCR 5.212, and the Petitioner, whose activities will necessarily be governed by and whose First Amendment rights will be impacted by the same. Finally, a private party would not have standing to defend the constitutionality of

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[18] Mr. Falconi has already been denied access, which is the basis for *Falconi v. Eighth Judicial District Court (Minter)*, Docket No. 85195.

[19] Resp't Answer, at 9.

[20] Additionally, because the rules in this matter were enacted upon order of this Court, the highest court in this state, there is an argument to be made that a writ before is the only avenue of relief for Petitioner, as no other plain, speedy or adequate remedy exists at law. *See Del Papa*, 112 Nev. at 372-73, 915 P.2d at 247.

Respondent's rules, only the Respondent, the rules' promulgator, does. *See Diamond v. Charles*, 476 U.S. 54, 65 (1986) ("Because the State alone is entitled to create a legal code, only the State has the kind of direct stake . . . in defending the standards embodied in that code.").

B. Declaratory relief is proper in this matter.

This Court has original jurisdiction to grant declaratory relief in this matter. In *Halverson v. Miller*,[21] this Court considered an "original petition for a writ of mandamus or prohibition and request for declaratory relief" together. The UDJA "provides a form of relief that a court within its jurisdiction can provide to parties." *Best v. Best*, 2015 WY 133, ¶ 19, 357 P.3d 1149, 1153–54 (Wy. 2015). In the context of a petition for writ relief, the court may render declaratory relief "if such a declaration necessarily underlies a writ of mandate." *Walker v. Munro*, 124 Wash. 2d 402, 879 P.2d 920 (1994); *see also In re State ex rel. Attorney Gen.*, 220 Wis. 25, 264 N.W. 633 (1936); *Johnson Cty. Sports Auth. v. Shanahan*, 210 Kan. 253, 259, 499 P.2d 1090, 1095 (1972); *Vista Health Plan, Inc. v. Tex. HHS Comm'n*, No. 03-03-00216-CV, 2004 Tex. App. LEXIS 4529, at *19 (Tex. App. May 20, 2004).

[21] 124 Nev. 484, 487, 186 P.3d 893, 896 (2008).

Here, Petitioner has sought necessary declaratory relief (requesting EDCR 5.207 and EDCR 5.212 be declared unconstitutional) in connection with his Petition for Writ of Mandamus, or alternatively, Writ for Prohibition (stopping the Family Court from applying EDCR 5.207 and EDCR 5.212), as has been previously entertained by this court.

III. To the extent, if any, the Court is considering this matter in conjunction with NSC Case No. 85195, Petitioner responds to arguments not otherwise addressed.

Respondent, in its answering brief, referenced this Court's acknowledgment of a potential relationship between this case *Falconi v. Eighth Jud. Dist. Ct. (Minter)*, No. 85915.[22] To the extent that the Court is considering the totality of briefing prior to issuing a ruling,[23] Petitioner briefly replies to those arguments that may be relevant to the Court's ruling here.

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[22] *See* Resp't Answering Br. at 5 ("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…. Order Directing Answer, No. 84947 (Aug. 23, 2022) (Doc. 2022-29654)").

[23] "This matter raises issues similar to those asserted in *Falconi v. Eighth Judicial District Court (Minter)*, Docket No. 85195, and thus, upon completion of briefing, these cases may be clustered to ensure that they are resolved in a consistent and efficient manner." Order Directing Answer, No. 84947 (Aug. 23, 2022) (Doc. 22-26231).

"'Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional.' The presumption, however, is rebutted when the challenger clearly shows the statute's invalidity." *Halverson*, 124 Nev. at 487-88, 186 P.3d at 896 (citing *Nevadans for Nevada v. Beers*, 122 Nev. 930, 939, 142 P.3d 339, 345 (2006)). Here the constitutionality of court rules, rather than statute,[24] are in question, but it is analogous. EDCR 5.207 and EDCR 5.212 amount to near total closure of the family court to the public. This Court has already held that, "confidentiality orders implicate First Amendment concerns." *Del Papa v. Steffen*, 112 Nev. 369, 374, 915 P.2d 245, 248 (1996).

1. *The First Amendment right of access to the courts is not limited to criminal cases and family law matters are not exempt.*

In *Richmond Newspapers*,[25] the Supreme Court noted, "[w]hether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open." "First Amendment does not distinguish

[24] Petitioner maintains that NRS § 126.211 and NRS § 125.080 are also unconstitutional, though the statutes are not at issue in this matter.

[25] *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580, n. 17 (1980).

between criminal and civil proceedings, but rather protects the public against the government's arbitrary interference with access to important information." *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.* ("*NYCTA*"), 684 F.3d 286, 298 (2d Cir. 2012). "Indeed, every circuit to consider the issue has uniformly concluded that the right applies to both civil and criminal proceedings." *Courthouse News Serv. v. Planet*, 947 F.3d 581, 590 (9th Cir. 2020).

This Court has itself recognized the importance of the public's access to civil matters.

> 'The operations of the courts and the judicial conduct of judges are matters of utmost public concern.' Furthermore, open court proceedings assure that proceedings are conducted fairly and discourage perjury, misconduct by participants, and biased decision making. Openness promotes public understanding, confidence, and acceptance of judicial processes and results, while secrecy encourages misunderstanding, distrust, and disrespect for the courts.

Del Papa v. Steffen, 112 Nev. at 374, 915 P.2d at 249 (internal citations omitted).[26] The court acknowledged that courts are traditional public

[26] "Respondent Justices decided that the state public policy favoring confidentiality in initial judicial discipline proceedings is so strong that it prevails over any countervailing public policies to keep government

forums ("…avails himself of the traditionally public forum of this court…" *Id.* at 373, 248) and the "First Amendment guarantees the public access to places traditionally open to the public…." *Id.* at 374, 248.

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

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open and the public informed, even when a judge avails himself of the traditionally public forum of this court and seeks to have all proceedings against him by the Commission on Judicial Discipline dismissed. This view disregards not only the right and need of the public to know of such an extraordinary dispute in governmental affairs but also the threat that secret judicial proceedings pose to public confidence in this court and the judiciary." *Del Papa v. Steffen*, 112 Nev. at 373-74, 915 P.2d at 248.

First Amendment and common law presumptive right of access to family law records). The California Court of Appeals has also recognized the right to access in family law matters.

> A strong presumption exists in favor of public access to court records in ordinary civil trials. That is because the public has an interest, in *all* civil cases, in observing and assessing the performance of its public judicial system, and that interest strongly supports a general right of access in ordinary civil cases. Because orders to seal court records implicate the public's right of access under the First Amendment, such orders are subject to ongoing judicial scrutiny, including at the trial court level.

In re Marriage of Tamir, 72 Cal. App. 5th 1068, 1078, 288 Cal. Rptr. 3d 48, 56 (2021) (emphasis in original).

In *Falconi v. Eighth Judicial District Court (Minter)*, Docket No. 85195, both Mr. Minter, the Real Party in Interest,[27] and the Family Law Section of the State Bar of Nevada ("FLS")[28] refer to several cases where media was kept out of the courtroom, which only illustrates the point:

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[27] Real Party in Interest, Troy A. Minter's Answer to Petition for Writ, *Falconi v. Eighth Judicial District Court (Minter)*, Docket No. 85195, October 19, 2022. Doc no: 22-32984.

[28] Amicus Curiae Brief, Family Law Section of the Nevada State Bar, *Falconi v. Eighth Judicial District Court (Minter)*, Docket No. 85195, October 21, 2022, doc no: 22-33246, at 19-26.

these matters were deemed closed ***after*** an analysis was done by the court. None of the cases, cited by either Mr. Minter or by the FLS discusses a blanket ban on access to the courts, but rather were subjected to judicial review.

Based upon the above, the First Amendment is necessarily implicated in civil family law cases and as such an appropriate level of scrutiny must be applied.

2. The court must conduct a case-by-case analysis under the appropriate level of scrutiny prior to ordering a court proceeding to be closed.

In *Falconi v. Eighth Judicial District Court (Minter)*, both Mr. Minter and FLS list a litany of privacy concerns that might possibly compel a party to request their proceeding be closed.[29] However, this misses the point of the action. The First Amendment argument is not that a court can ***never*** close a family law proceeding, but rather that a case-by-case analysis under the appropriate level of scrutiny must be

[29] Real Party in Interest, Troy A. Minter's Answer to Petition for Writ, *Falconi v. Eighth Judicial District Court (Minter)*, Docket No. 85195, October 19, 2022. Doc no: 22-32984 at 9 – 20 and Amicus Curiae Brief, Family Law Section of the Nevada State Bar, *Falconi v. Eighth Judicial District Court (Minter)*, Docket No. 85195, October 21, 2022, doc no: 22-33246, at 19-26.

done prior to any closure.[30]

CONCLUSION

Because EDCR 5.207 and EDCR 5.212 do not provide for any type of case-by-case analysis under the appropriate level of scrutiny weighing the First Amendment implications that flow from denying access to court proceedings, and instead allow closure of the courts as a matter of course at the request of even only ***one*** party in the matter, they are unconstitutional on their face.

DATED this 17th day of November 2022.

Respectfully submitted:

AMERICAN CIVIL LIBERTIES UNION OF NEVADA

/s/ Sophia A. Romero
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[30] Petitioner points out that, even in criminal cases involving the rape of minors, an analysis must be done on a case-by-case basis. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609, 102 S. Ct. 2613, 2621 (1982) (On appeal, the Court held that § 16A's mandatory closure rule did violate the First Amendment because it was not drawn narrowly enough to meet the state's interests. The Court held that as compelling as the interest in safeguarding the well-being of a minor was, it did not justify a mandatory closure rule, because the circumstances of the particular case could affect the significance of the interest.)

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this petition, and to the best of my knowledge, information, and belief it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e), which requires that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the 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.

I further 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 Microsoft Word for Office 365 in 14 point Century Schoolbook.

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Finally, I hereby 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 proportionately spaced, has a typeface of 14 points or more and contains 3,786 words.

DATED this 17th day of November 2022.

Respectfully submitted:

AMERICAN CIVIL LIBERTIES UNION OF NEVADA

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November 2022, I caused a true and correct copy of the foregoing **PETITIONER'S REPLY BRIEF** to be served via the court's electronic filing system.

/s/ Sophia A. Romero
An employee of ACLU of Nevada