IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

ALEXANDER M. FALCONI, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE CHARLES J. HOSKIN, DISTRICT COURT JUDGE, Respondents, And TROY A. MINTER AND JENNIFER R. EASLER, Real Party in Interest.	S.C. No.: 85195 D.C. Case No.: D-08-402901-C

AMERICAN ACADEMY OF MATRIMONIAL LAWYERS AMICUS CURIAE

IN SUPPORT OF DENIAL OF WRIT

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None.

2. Names of all law firms whose attorneys have appeared for a party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

   a. Willick Law Group, PLLC/American Academy of Matrimonial Lawyers-National for Amicus AAML.

   b. Luke A. Busby, Esq.; Attorney for Petitioner, Alexander M. Falconi.

c. Rena G. Hughes, Esq.; Attorney for Real Party in Interest, Troy A. Minter.

d. Joshua Aronson, Esq.; Attorney for Real Party in Interest, Jennifer R. Easler.

e. Shann D. Winesett, Esq. and Michelle A. Hauser, Esq.; Attorneys for Amicus State Bar of Nevada Family Law Section.

f. Debra A. Bookout, Esq.; Attorney for Amicus legal aid organizations.

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3. If litigant is using a pseudonym, the litigant's true name: None known.

DATED this ___ day of November, 2022.

Respectfully Submitted By:
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INTEREST OF THE AMICUS CURIAE

The interest of Amicus Curiae AAML concerns the fundamental right of family law litigants to privacy. The AAML submits that decisions should respect fundamental rights that have been developed since the founding of the United States, because to do otherwise would call those rights into question, with harm falling disproportionately on minorities and the most vulnerable in our communities. The AAML opposes an interpretation of the Constitution and Bill of Rights which rejects or ignores the fundamental right of privacy.

The American Academy of Matrimonial Lawyers ("AAML") is a national organization of the most experienced and knowledgeable family law attorneys practicing in the United States.[1] The AAML was founded in 1962 by highly-regarded

[1] In its order entered October 3, 2022, this Court granted the AAML until November 21, 2022, to file and serve a motion for leave to file an amicus brief

family law attorneys "to encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be protected." The AAML has published numerous articles[2] in every aspect of family law practice including multiple aspects of the right to privacy,[3] and has adopted resolutions touching on the fundamental right of family law litigants

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accompanied by the proposed brief.

[2] The *Journal of the American Academy of Matrimonial Lawyers* is a scholarly law review published semiannually by the AAML in conjunction with the University of Missouri Kansas City School of Law, which is available at https://aaml.org/page/AAMLJournal.

[3] *See*, *e.g.*, Laura Morgan & Lewis Reich, *The Individual's Right of Privacy* ***in*** *a Marriage*, 23 J. Am. Acad. Matrim. Law. 111 (2010) ("Morgan").

to privacy as a bedrock right supporting other rights recognized during the past century.[4]

SUMMARY OF ARGUMENT

States have the authority to regulate public access to both family law hearings and documents filed in family law cases. All custody disputes between unmarried persons are parentage cases and Nevada has a deep history of respect for the right of the litigants in such disputes to privacy.

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[4] The most recent of which is entitled "Resolution on *Dobbs v. Jackson Women's Health Organization*," adopted by the Board of Governors on October 12, 2022, and posted at https://portal.aaml.org/global_engine/download.aspx?fileid =E1B43E48-7C4A-4E6D-BFC4-629D18B1106D&ext=pdf.

The Nevada Legislature established a reasonable balance between which documents are open to public inspection and which are not, although the statutes should be updated to reflect current technologies and procedure. The local rules at issue do so.

Both federal and state law require maintaining the privacy of information filed in every family court action, and at issue in virtually every family court motion hearing. There are ample safeguards to address misbehavior by either attorneys or judges in such hearings.

The Equal Protection Clause mandates treating married and unmarried parties equally. There is no compelling reason to treat any litigant in family court differently from another.

The practical realities of the internet age mandate retention of both the ability of litigants to close hearings and their ability to seal some documents from public inspection to protect those litigants' fundamental right to privacy.

ARGUMENT

The Falconi Writ Petition[5] flows from a number of flawed propositions, including that this is not a paternity case, that First Amendment rights are absolute, and that Mr. Falconi's rights trump those of other citizens. None of those propositions is correct.

Specifically, the *Petition* claims that no cases other than divorce cases may be sealed, that sealing files does not include a right to close hearings, and that the court

[5] It is in two parts: the original *Emergency Petition* filed August 19, 2022, and the *Supplement* filed August 29, referred to here as *Petition* and *Supplement*.

rules allowing both conflict with SCR 230. The *Supplement* argues that the local court rules classifying custody cases between unmarried persons as parentage cases, and the rule permitting closed hearings, are facially unconstitutional.

I. THIS IS A PATERNITY/PARENTAGE CASE

Unmarried parties cannot be "divorced." Since Nevada first enacted paternity statutes,[6] the parents of children seeking orders relating to custody, visitation, and support of those children were required to first file a paternity action to get into court at all, and then within the paternity case litigate the contested matters.

Beginning in the early 1990s, without either a statutory change or formal court rule, Clark County judges began allowing litigants to such cases to skip the filing of a formal suit for paternity, largely to avoid the expense and delay of the then-required

[6] Now more appropriately labeled as "parentage" actions.

appointment of a guardian ad litem and other procedural requirements of paternity cases. The informal policy recognized the fact that about half of those cases were between people who were not married to each other but had no dispute as to paternity of the child at issue.[7]

The judge-made allowance was to permit suits for "custody" between parties to parentage actions without first requiring a formal paternity order when the parties

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[7] *See*, *e.g.*, Marshal Willick, *The Evolving Concept of Marriage and Coming Convergence of Marital and Non-Marital Property and Support Law*, 19 NEV. LAW. 6 (May, 2011) (noting that "In modern America, countless millions of households consist of unmarried opposite-sex and same-sex cohabitants, either with or without children. According to the government, one-third of all children in the United States reside with only one biological parent" (internal citations omitted)).

stipulated to paternity. There is no specific statutory foundation for such actions, but they have been filed and resolved as "custody cases" for over 30 years.

This is such a case, which entered family court in 2008 on the expedited process under NRS chapter 126 (paternity) on the father's assertion that he acknowledged paternity and is on the birth certificate.

Judges coming to the bench in later years knew none of that history, and had difficulty applying the provisions of NRS chapters 123-130 to those actions because they were not "divorce" cases. To resolve any ambiguity, the rules committee clarified what has always been true: "custody" cases between unmarried parties are "paternity" cases under NRS chapter 126, with a judge-made allowance to skip procedural steps unnecessary because of the stipulation of the parties.[8]

[8] EDCR 5.207.

The *Supplement* (at 6) notes the existence of the rule, without any of the applicable history, and summarily announces it "unconstitutional" without explanation. It does not again mention NRS 126.211, but its complaints about the local rule are really an assault on the statute, since the rule simply identifies the cases affected as what they have always been.

II. STATES HAVE THE RIGHT TO REGULATE ACCESS TO COURT HEARINGS, AND TO COURT DOCUMENTS

A. There is No Absolute First Amendment Right to Access Family Court Hearings or Records

Few constitutional or other rights are "absolute,"[9] and it falls to legislatures and to courts to balance competing interests when one right conflicts with other rights.[10] Every state in the Union has some process or procedure, by statute, court rule, or

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[9] *See*, *e.g.*, Kathleen Buck, *The First Amendment - An Absolute Right*, 26 William and Mary L. Rev. 851 (1985) (summarizing cases holding that there is no absolute first amendment right).

[10] *See*, *e.g.*, *Galella v. Onassis*, 353 F. Supp. 196 (S.D.N.Y. 1972), *aff'd and modified*, 487 F.2d 986 (2d Cir. 1973); *Kapellas v. Kofman*, 459 P.2d 912 (Cal. 1969); *Dickson v. Dickson*, 529 P.2d 476 (Wash. Ct. App. 1974).

informal procedure, for both the sealing of some or all documents in particular family law case types and the closing of hearings in some types of family law cases.[11]

It seems extremely unlikely that all of the courts and legislatures in the United States that have done so have taken an "unconstitutional" stance toward closing hearings and sealing files. The issue is therefore not ***whether*** hearings can be closed and files can be sealed in Nevada, but whether the rules adopted by the Legislature and courts of Nevada have crossed some line of permissibility.

Space does not permit a discussion of every state's statutes and rules, but Nevada is hardly a singular outlier as Mr. Falconi protests (at 4). For example, the

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[11] Automatic sealing of both hearings and files in paternity cases is quite common; NRS 126.211 mirrors procedures in many other states. Anecdotal reports from those states without a formal sealing/closing process are of "ad hoc" determinations by trial courts upon motion.

Delaware standards are quite similar, and of about the same age, as explained in the seminal case of *C. v. C.*,[12] which concerned "the extent of the right of public access, here press access, to court records under our divorce law" in a request of the News Journal Company to examine the court file of a divorce action.

Examining two Delaware statutes dating from 1907, and examining history back to the Ecclesiastical Courts of England prior to founding of the United States, the court rebuffed both legal and constitutional attacks on the statute under which the trial was "closed to spectators . . . pursuant to the general practice under our statute."

The relevant statute originally provided for all divorce trials to be public. Two years later, a provision was added allowing a judge to close divorce hearings. And 18 years later it was amended to make all divorce hearings closed, unless the trial court elected to open it.

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[12] *C. v. C.*, 320 A.2d 717 (Del. 1974).

The Delaware court found ample policy grounds for the legislation, including "the special discretionary considerations to be made in divorce cases including the 'curbing a certain harmful practice that is sometimes manifest in those persons who are inclined to feed a private and morbid curiosity through the channels of a public right.'"

Noting that in Delaware (as in Nevada), "the public, of course, is always entitled to access to a decree of divorce," the court noted that Delaware went further to protect personal privacy, by adopting the policy of publishing those opinions in divorce cases anonymously.[13]

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[13] This is also the official policy of some other states and numerous countries around the world, including France and Israel. In the United States, in those places where anonymous designations are not automatic, they may be used when a judge determines that the risk of "harassment, injury, ridicule, or personal embarrassment"

The court noted that measures to protect the privacy of individual litigants were not limited to divorce cases, but included all "sensitive areas of human relationships," including termination of parental rights, adoptions, and all other matters in the Family Court.

The Delaware court carefully examined and rejected all constitutional arguments, noting that the federal constitution made a specific grant of the "right" to a "public trial" in criminal cases in Article 1, Section 7, and that by doing so, "[i]t appears that when such public trial right was intended, it was specifically granted."

As commentator Laura Morgan noted, that case is part of a large number of state court decisions holding that where a state has a tradition of privacy in divorce

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outweighs any public interest in knowing the identity of parties. *See*, *e.g.*, *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir. 2000).

cases, a "newspaper could obtain access only if it could demonstrate a legitimate interest for some useful purpose."[14]

The case has been widely cited in support of the position that "[t]he judiciary has exercised its supervisory power to prevent court records from being used for the gratification of private spite or the promotion of public scandal in divorce cases"[15] and to "prevent public scandal."[16]

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[14] Laura Morgan, *Strengthening the Lock on the Bedroom Door: The Case Against Access to Divorce Court Records on Line*, 17 J. Am. Acad. Matrim. Law. 45, 54 (2001) (footnotes omitted).

[15] Donna Moliere, *The Common Law Right of Public Access When Audio and Video Tape Evidence in A Court Record Is Sought for Purposes of Copying and Dissemination to the Public*, 28 Loy. L. Rev. 163, 187 (1982) (footnote omitted).

[16] Barry Orlow, *Records – an Ill-Advised Retreat from the Common Law Public Right of Access to Judicial Records – Littlejohn v. Bic Corporation, 851 F.2d 673 (3d*

On that last point, the Delaware holding is part of an even older line of authority cited hundreds of times throughout the country barring newspapers from accessing divorce records on the basis that:

> To publish broadcast the painful, and sometimes disgusting, details of a divorce case, not only fails to serve any useful purpose in the community, but, on the other hand, directly tends to the demoralization and corruption thereof, by catering to a morbid craving for that which is sensational and impure. The judicial records of the state should always be accessible to the people for all proper purposes, under reasonable restrictions as to the time and mode of examining the same;

Cir. 1988), 62 Temp. L. Rev. 1013, 1031 (1989); *accord*, Jamie Posey-Gelber, *Constitutional Law: Contemporaneous Access to Judicial Records in Civil Trials–In re Reporters Committee for Freedom of the Press, 773 F.2d 1325 (1985)*, 9 Whittier L. Rev. 67, 86 (1987).

but they should not be used to gratify private spite or promote public scandal.[17]

Caswell has been favorably cited in several Nevada opinions, both state and federal.[18] This Court's comment on the holding, deferring to legislative decision as to what records should be open to inspection, was that "Records of court proceedings concerning private affairs, the publication of which could only serve to satiate a thirst for scandal, constitute another class regarding which there are often stronger reasons for denying examination by disinterested persons, than of instruments pertaining to land."[19]

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[17] *In re Caswell's Request*, 29 A. 259 (R.I. 1893).

[18] *See*, *e.g.*, *Valley Broad. Co. v. U.S. Dist. Ct. for Dist. of Nevada*, 798 F.2d 1289, 1293 (9th Cir. 1986).

[19] *State v. Grimes*, 29 Nev. 50, 81, 84 P. 1061, 1071-72 (1906), citing to *Caswell* and multiple other cases and annotations.

Delaware is considerably more protective of privacy than Nevada, since there all hearings are presumptively closed and parties anonymous, whereas here names are posted on the public docket and all hearings are presumptively open unless a party moves to close them.

There are many other examples. For example, in Alabama, to seal a file a litigant must simply show that it "pertains to wholly private family matters, such as divorce, child custody, or adoption."[20] In Connecticut, Ohio, and several other states, both hearings and files may be closed in family relation matters in the discretion of the judge.[21] In Florida, Hawaii, Idaho, Mississippi, Montana, New Hampshire, New

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[20] *See Ex parte Barze*, 184 So. 3d 1012 (Ala. 2015).

[21] Conn. Gen. Stat. § 46b-11; Ohio Rev. Code Ann. § 149.43.

York, North Dakota, Rhode Island, and Vermont, various types of family law matters and papers are automatically sealed or confidential.[22]

Oregon requires both parties to agree to close hearings.[23] Other states require more proceedings or findings before hearings may be closed, or files may be sealed. Some states do not allow decrees or other final judgments to be accessed[24]; others, like Nevada, do.

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[22] Fla. R. Jud. Admin. § 2.420(d); HRS 571-84; I.C.A.R. 32; MS Rules of Justice Court Rule 5; MT Court Rules for Public Access and Privacy to Court Records § 4.50; N.H. Rules of Circuit Ct.-Family Division, *e.g.*, Rules 2.16 and 2.25; N.Y. Dom. Rel. Law § 235; N.D. Administrative Rule 41(5); R.I. Gen. Laws § 8-10-21; Vt. Pub. Acc. Ct. Recommendation. Rule 6.

[23] ORS 1.040.

[24] *See*, *e.g.*, Mo. S. Ct. Op. Rule 2.04(c)(2)(B).

Even states that proclaim a general policy of "open courts" for "transparency," require protecting personal identifying information filed in every family law case, and so provide special rules for family law cases so that filings are placed in a "nonpublic file."[25]

This Court did the same in establishing its rules governing electronic coverage, explicitly providing both that the "proceedings" at issue are those "held in open court

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[25] *See*, *e.g.*, Mich. Ct. R. 8.116, Mich Ct. R. 1.109(D), Mich Ct. R. 3.229 (list of automatically nonpublic documents); all adoption records are automatically sealed. Mich. Comp. Laws 710.67. *See also In re Suggested Amendments to Gr 22* (Wash., No. 25700-A-1358, July 1, 2021), delineating what records are automatically sealed, which require a court order to seal or open, what is required to be redacted before filing, etc.

which the public is entitled to attend,"[26] and that reporters "have no greater rights of access than the public."[27] The Nevada Legislature, and this Court's rules, delineate which hearings, and what documents, that entails.

Some court opinions have addressed legislative policy directions in those states mandating open court proceedings,[28] and while facially addressing the breadth of closure orders are actually more concerned with whether a judge has discretion to override the request of a litigant,[29] which issue does not exist under Nevada's well-

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[26] SCR 229(1)(b).

[27] SCR 242(2).

[28] For example, in California, the "open court" statute that is found in Code of Civil Procedure section 124 contains the caveat "subject to proceedings under the Family Code." *See NBC Subsid. v. Superior Court*, 980 P.2d 337 (Cal. 1997).

[29] *See*, *e.g.*, *In re Marriage of Burkle*, 135 Cal. App. 4th 104, 537 Cal. Rptr. 3d 805 (2006). Even there, the right of reporters to intervene in cases in which the trial

balanced statutes and rules providing for judicial discretion to open or close hearings and records.

The point is that ***each*** state has the right to – and has – restricted access to family court hearings and documents, usually per legislative direction, with each deciding where to place the balance and burdens of proceeding between protection of litigant privacy and having "open access." There is nothing odd, extreme, or suspect in Nevada's approach to either closing hearings or sealing parts of files.

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court seals records has been called into question. *See*, *e.g.*, *Overstock.com, Inc. v. Goldman Sachs Grp., Inc.*, 231 Cal. App. 4th 471, 488-89, 180 Cal. Rptr. 3d 234, 249-50 (2014) (civil action involving RICO allegations of public stock price manipulations, having nothing to do with privacy concerns of family law litigants).

B. Nevada has a Strong Historical Policy of Protecting Privacy in Family Law Matters

The salient question therefore becomes an inquiry into Nevada's historical policy regarding personal privacy in family law matters. Both the Nevada Legislature[30] and this Court[31] have explicitly recognized that litigants have a right to privacy under Nevada law which should be protected.

For well over 100 years, courts have observed that the right of privacy is a common law right having its "foundation in the instincts of nature" and is therefore

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[30] *See*, *e.g.*, NRS 125.080 (since 1865, right to close divorce trials); NRS 125.110 (since 1931, right to seal some divorce filings); NRS 126.211 (since 1979, in parentage actions, all hearings and trials are closed, and all records sealed except on motion for good cause shown).

[31] *See*, *e.g.*, SCR 230(2)(b), requiring judges to weigh the right of privacy of a party when considering a reporter's request to access court proceedings.

an "immutable" and "absolute" right "derived from natural law," and a necessary component of the well-established right to personal liberty.[32] The Nevada Constitution guarantees that liberty right as "inalienable."[33]

The right of privacy has long been considered an established federal right as well.[34] Federal recognition of a right of privacy stretches back to at least 1890,[35] and has long been held to be both an *individual* right,[36] and a *fundamental* right.[37]

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[32] *Pavesich v. New England Life Insurance Co*., 50 S.E. 68, 69-70 (Ga. 1905).

[33] Nevada Const. Art. 1, § 1 (1864).

[34] *See* Morgan, *supra* n.3, at 111-112.

[35] Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890) (detailing how the right to privacy is "the right to be let alone") ("Warren").

[36] *See*, *e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); Warren, *supra*, at 193.

[37] *See gen'ly* discussion of privacy cases in *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258 (1997).

Where an asserted right is "deeply rooted" in the tradition and history of a jurisdiction and so "implicit in the concept of ordered liberty" that "neither liberty nor justice would exist if [it] were sacrificed," the asserted right is a fundamental one.[38]

As detailed above, the right of privacy in parentage, custody, and divorce matters has been woven into Nevada law since the founding of the State and re-affirmed in legislative enactments and court decisions repeatedly since then. There can be no question that, in Nevada, the right to privacy in family law matters is "fundamental." This Court has held that intrusion upon such fundamental rights requires a showing of not just "a rational relationship to a legitimate state interest," but strict scrutiny.[39]

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[38] *Glucksberg*, *supra*.

[39] *State v. Eighth Jud. Dist. Ct. (Logan D.)*, 129 Nev. 492, 306 P.3d 369 (2013).

C. There is No Significant Countervailing Policy that Outweighs Protection of the Personal Privacy of Family Court Litigants

Mr. Falconi does not have a compelling interest to intrude upon the individual privacy rights of family law litigants. The Legislature has deemed certain hearings and documents as private from "public inspection," and "[i]t has generally been held that the First Amendment does not guarantee the press a constitutional right of access to information not available to the public generally."[40]

Nor does Mr. Falconi get freedom to invade the privacy of all family law litigants and their children merely because the records of the dispute are held in court files. "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to … sources of information within the government's control."[41]

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[40] *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972).

[41] *Houchins v. KQED Inc.*, 438 U.S. 1, 15 (1978) (J. Brennan, concurring).

As this Court noted in its single decision addressing the sealed file rule in *Johanson*[42] (which case was totally ignored by the pending writ petition), "[e]very court has supervisory power over its own records and files," and the decision to allow access to court records is best left to the sound discretion of the trial court").[43] EDCR 5.212(e) tracks that language precisely, and permits the court to open hearings to any person and open any part of the court files to public inspection.[44] Obviously, the

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[42] *Johanson v. Eighth Judicial Dist. Court of Nev.*, 124 Nev. 245, 182 P.3d 94 (2008) (a district court order sealing an entire file, including the documents required by the statute to remain open for inspection, and imposing a "gag order" to not discuss the case, was a manifest abuse of discretion).

[43] *Id*. at n.18, quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598-99 (1978).

[44] In his filings in a related case (*Falconi v. District Court*, Case No. 85228) Mr. Falconi attacked the language of EDCR 5.212 for not including the words "for

normal evidentiary rules regarding exclusion of witnesses prior to their testimony apply in family court as they do everywhere else.[45]

Nor does Mr. Falconi's self-description as a "reporter" give him access to anything not open to other members of the public, for purposes of "education" or otherwise. As eloquently explained by former Justice Brennan: "Prohibitions against unauthorized entry to the White House diminishes the citizen's opportunities to gather information that might be relevant to his opinion of the way the country is run

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good cause" next to "court order." However, those words *were* part of the rule as drafted and submitted to this Court, which deleted the phrase from 5.212(c), presumably because it considered "good cause" to be implicit for court orders and therefore found the words unnecessary and redundant.

[45] NRS 50.155; *Geders v. United States*, 425 U.S. 80, 87, 96 S. Ct. 1330, 1335 (1976) (judges have inherent authority to sequester witnesses).

but that does not make entry to the white house a First Amendment right. The right to speak and publish does not carry with it the right to gather information."[46] The interest of the judicial branch in safeguarding the personal privacy of litigants and their children in family law matters is no less important.

Every case relied upon by Mr. Falconi involved a public entity or an issue of public interest, mostly high-profile criminal or public corruption matters. However, As the California Supreme Court held in *Wilson v. Cable News*,[47] there just is no legitimate public interest in a "garden-variety dispute" – like a couple's divorce – because "Absent unusual circumstances, a garden-variety dispute concerning a nonpublic figure will implicate no public issue."

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[46] *Houchins*, *supra*, at 16-17.

[47] *Wilson v. Cable News*, 444 P.3d 706 (Cal. 2019).

And as detailed above, if a divorce case *was* ever alleged to implicate a "public issue," the district court judge could open the records or hearings accordingly. In fact, Mr. Falconi has moved to open records in cases making exactly that allegation.[48]

There is a deep-seated policy reason underlying the use of the term "private" in the relevant statutes and court rules. None of the authorities cited by Mr. Falconi involved a weighing of access requests against a countervailing fundamental right to privacy as is present here. Accordingly, most of the case law cited in the writ petition is essentially irrelevant. Because Mr. Falconi has no "fundamental constitutional right" to invade the privacy of family court litigants, no "narrowly tailored" inquiry

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[48] *See*, *e.g.*, *Order for Appointment of Senior Judge or Senior Justice as Master* in *Eggleston v. Dept. of Family Services*, No. 20 OC 00164 1B (First Judicial District Court, Carson City), Nov. 4, 2022.

is required,[49] only a "rational purpose" review of the statutes and rules, as detailed below.

The suggestion that the statutes and rules should be flipped to require a party to a divorce or parentage action to prove why hearings should be closed or records sealed should be rejected. One of the federal cases cited by Mr. Falconi—*Nixon*[50]—refers to the line of authority including *C. v. C.*, *supra*, and contains the caution that "[a]ccess has been denied where court files might have become a vehicle for improper purposes . . . for example used to gratify private spite or promote public scandal through the publication of the painful and sometimes

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[49] *See Kirkpatrick v. Eighth Judicial Dist. Court*, 119 Nev. 66, 64 P.3d 1056 (2003).

[50] *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598-99 (1978).

disgusting details of a divorce case."[51] As discussed below, that "gratification" is *exactly* what is being sought, and *why* it is being sought.

Another of Mr. Falconi's citations is relevant to this section. He cites *In re the Reporters Comm. for Freedom of the Press et al*.[52] for the proposition that his "right of access" cases all boil down to a two part test, which we agree may be applied here in denying his writ petition:

> (1) Whether the proceeding has historically been open and (2) whether the right of access plays an essential role in the proper functioning of the judicial process and the government as a whole.

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[51] *Id*. at 518.

[52] *In re the Reporters Committee. for Freedom of the Press et al*., 773 F.2d 1325 (D.C. Cir. 1985); *see also Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-9 (1986) (applying same test).

Notably, the court added the observation: "Both must be answered in the affirmative before a constitutional requirement of access can be imposed."[53] *Neither* can be so answered here.

First, the closed hearing and sealed file statutes underpinning the rules have been in place since Nevada was founded (with respect to closed hearings) and about 100 years (with respect to sealed files); the more recent statutes and rules were created as soon as the relevant causes of action (paternity, 1979) and institutions (family court, 1993) were created. Upon request, the hearings have been historically closed and the records historically private.

Second, as detailed below, unlimited voyeurism accomplishes nothing to prevent any of the suggested evils of incompetence, etc. The actual public policies

[53] *Id*. at 1332.

at issue, discussed below, are to the contrary. None of the cases he relies upon even considered a countervailing right of privacy.

In actuality, because of the nature of the claims and accusations routinely made in family law cases, the reality is that for family law hearings, like grand jury proceedings, "[i]f public, witnesses would be less likely to testify, or open to retribution as well as inducement."[54]

The courts of states with state constitutional guarantees of "freedom of the press," such as Delaware, have had no difficulty finding that "the state constitution guarantees of freedom of the press to examine the official conduct of those acting in a 'public capacity' is not abridged by a restriction of access in matters of divorce."[55]

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[54] *Douglas Oil Co. v. Petrol Stops North West*, 441 U.S. 211 at 218 (1979).

[55] *C. v. C.*, *supra*, at 728; *cf.* Nevada Const. Art. I, § 9 (1864).

In short, Nevada has a deep tradition of protecting the privacy of litigants in family law matters and their children,[56] and no superseding policy has been suggested justifying destruction of that protection.

III. THE STATUTES AND RULES AT ISSUE STRIKE A REASONABLE BALANCE BETWEEN PRIVACY AND PUBLIC ACCESS

A. The Rights Are Individual Rights

The entire thrust of Mr. Falconi's writ petition is that he is opposing rules by which "the government" closes courtrooms or seals files, but that is a false framing.

As detailed above, automatic closure of all proceedings ***is*** the case in various other jurisdictions, which have rebuffed claims of constitutional violation in doing

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[56] Mr. Falconi summarily dismisses (*Reply* at 9) 160 years of experience and history, terming NRS 125.080 "as arbitrary as it is ancient."

so. In *Nevada*, however, most proceedings are presumptively *open*, and Mr. Falconi's claim (*Supplement* at 9) that all family court proceedings "occur in secret by default" is false on its face.[57]

It is only when an *individual* perceives a need for personal privacy and files the appropriate motion that either cases are sealed or hearings are closed, and a judge can deny either request if it is deemed inappropriate. So the issues joined here are not actually "Mr Falconi vs. the State" but "Mr. Falconi vs. Mr. Minter," and the question is whether Mr. Falconi's right to invade Mr. Minter's privacy outweighs Mr. Minter's right to protect it.[58]

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[57] As detailed below, federal law requires presumptive closing of paternity cases as a condition of Nevada Title IV-D funding.

[58] The irony of Mr. Falconi's repeated and unsupported conspiracy-theory accusation that a cabal of attorneys has conspired to keep him out of courtrooms (*see*,

All of the authorities cited by Mr. Falconi (for example, *Petition* at 14; *Supplement* at 7) speaking to proceedings being closed "at the behest of the government" are not relevant – this is a balance of interests between two *individuals*, and as detailed above, Mr. Falconi simply has no rights superior to those of Mr. Minter.

In *Johanson*, this Court made clear that "gag orders" are extraordinary and disfavored. If either party to a private dispute *wants* to grant access to their sealed file to another person, they can do so.[59] If they wish to discuss the case with the

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e.g., *Reply* at 12) is that lawyers have everything to gain from the free advertising that would result from litigants being unable to protect their own privacy; the attorneys' obligation to value their clients' interest ahead of their own is the point. *See* NRPC 1.2, NRPC 1.6.

[59] EDCR 5.213.

press, do a video interview, etc., they are free to do so – what they are *not* entitled to do is compel the other party to participate.

What appears to outrage Mr. Falconi (*Reply* at 16-18) is that the Nevada legislature has made the policy choice to give the *parties* – as opposed to him – the right to determine the degree to which their private dispute should be made public.[60]

B. Federal and State Law Mandate Keeping Certain Information Confidential

Federal rights, co-extensive with or broader than state law, preemptively and presumptively protect the disclosure of broadly defined health information.[61] As of

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[60] He labels parties' control of their own personal information "unmitigated gall." *Reply* at 17, fn.19. The apparent motive for this umbrage is lack of profit, as detailed below.

[61] See Privacy Rule HIPAA-Final.pdf.

August 2002, new federal rules took effect requiring protection of the privacy of individuals' health information and medical records as contained in the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[62]

Among other "medical" records routinely detailed in family court filings and hearings are adult and minor sexual activity, pregnancy, HIV and other sexually transmitted diseases (STDs), substance abuse, and mental health.[63] In addition, there

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[62] *See* Federal Register, 2000, 65(250):82462-82829; Federal Register, 2002, 67(157):53182-53273; *see generally* Morgan Leigh Tendam, *The HIPAA-Pota-Mess: How HIPAA's Weak Enforcement Standards Have Led States To Create Confusing Medical Privacy Remedies*, 79 Ohio St. L.J. 411, 413 (2018) (detailing the congressional policy that medical privacy is an important right and the mandate to obtain consent before releasing personally identifiable health information).

[63] *See* Abigail English & Carol A. Ford, *The HIPAA Privacy Rule and*

are special provisions to protect substance abuse treatment for adults and children which are also commonly examined topics in family court proceedings.[64]

The Family and Educational Rights and Privacy Act (FERPA, 1974) has evolved into a large, complex, and rather confusing body of law which accords access rights to custodial and noncustodial parents but protects the confidentiality of

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Adolescents: Legal Questions and Clinical Challenges, 36 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 80 (2004).

[64] *See* Ike Vanden Eykel & Emily Miskel, *The Mental Health Privilege in Divorce and Custody Cases*, 25 J. AM. ACAD. MATRIMONIAL LAW. 453, 471 (2012) (requiring to be kept confidential all records relating to the "identity, diagnosis, prognosis, or treatment of any patient" relating to "substance abuse education, prevention, training, treatment, rehabilitation, or research." The disclosure of records that relate to alcohol or drug abuse treatment is governed by 42 C.F.R. Part 2").

educational records unless there is a court order or law to the contrary.[65] Again, any "personally identifiable information" in "educational records" may not be disclosed absent parental consent or specific court order.[66]

Such "information" and "records" are the subject of nearly every family court hearing and document relating to the schooling of a minor.

A host of federal laws including FERPA, HIPAA, and VAWA prohibit making "public" information relating to medical, disability, assault, and lots of other personal

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[65] *See Disability Law Ctr. of Alaska, Inc. v. Anchorage Sch. Dist.*, 581 F.3d 936, 939 (9th Cir. 2009) (citing required confidentiality under 20 U.S.C. § 1232g).

[66] 20 U.S.C. § 1232g(b)(1); see also 20 U.S.C. §§ 1412(a)(8), 1417(c); Lynn M. Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students*, 58 CATH. U.L. REV. 59 (2008).

information. Space does not permit listing all of the prohibited information, but it is present in virtually every family court motion filing.

Nevada law has numerous similar requirements. NRS 205.4605 (Unlawful acts regarding social security numbers) prohibits posting or displaying social security number of another person. Family law cases are full of paystubs, tax returns, real property purchase documents, medical records, health insurance records, and many more documents that have social security numbers throughout.

From NRS 205.461 through 205.4657, the statutes address "Unlawful acts regarding personal identifying information." Everything listed in NRS 205.4617 (Personal identifying information defined) can be found in family court files: current and former names, SSNs, account numbers, dates of birth, places of employment, mother's maiden names, medical record numbers, utility account numbers, etc.

Anyone can make a request for any records kept by the government under the Nevada Public Records Act (NPRA), codified in NRS chapter 239. In accordance with Section 239.001 *et seq.*, the presumption of publicly available information is not, and never has been absolute. Certain confidential records are already exempt: under Section 239.0105, any records containing "identifying information"; and under Section 239.014, any information that may potentially result in negative consequences, such as "financial loss, stigmatization, harm to reputation, anxiety, embarrassment, fear, and any other physical or emotional harm" for the individual involved.

This Court has noted the balance involved and rational reason why the person who hopes to invade such privacy has the burden of proving a "legitimate reason" for doing so.[67]

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[67] *Donrey of Nev. v. Bradshaw*, 106 Nev. 630, 798 P.2d 144, 147-48 (1990).

As noted by this Court just a couple years ago, there is even "a nontrivial privacy interest . . . at stake in the potential disclosure of juvenile autopsy reports" because those records contain "references to specific medical records, specific medical or health information and personal characteristics about the decedent" including "sexual orientation, preexisting medical conditions, drug or alcohol addiction, and various types of diseases or mental illness, as well as other personal information that the decedent or the decedent's family might wish to remain private."[68] Obviously, that is much more true of a case concerning a child who is still alive.

As this Court held two years ago, "The obligation to disclose . . . is not without limits" because the duty to do so "yields to more than 400 explicitly named statutes,

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[68] *Clark Cty. Office of the Coroner/Medical Exam'r v. Las Vegas Review-Journal*, 136 Nev. ___, 458 P.3d 1048, 1058 (2020).

many of which prohibit the disclosure of public records that contain confidential information, including NRS 62H.025 for confidential juvenile justice information."[69]

There are hundreds more examples of records and information required to be kept confidential, from records of mental health treatment[70] to child welfare records[71] to sex offense victims,[72] and much else. All of this comes up, every day, in family court filings and hearings.

Mr. Falconi's pretended assertion that confidentiality only applies to the family court in Washoe and Clark counties is false; just three years ago this Court approved

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[69] *Republican Attorneys. Gen. Assoc. v. Las Vegas Metro. Police Dep't*, 136 Nev. ___, 458 P.3d 328, 331 (2020).

[70] NRS 433.482(8).

[71] NRS 392.317.

[72] NRS 200.377.

rules mandating the automatic sealing without court order of multiple classes of family law filings and records in Churchill County.[73]

There is no better place than family court filings for a malefactor to harvest names, addresses, dates of birth, names of children, names of household pets, names of family members, prior addresses, employment history and current employers, earnings history and current earnings, spending patterns, medical providers, names of tax preparers, as well as the children's school, schedule, and extracurricular activity information, dates of birth, summary of schooling issues and IEPs, summary of medical issues, etc. The only protection family court litigants and their children have is in application of NRS 125.110 and EDCR 5.212.

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[73] *In re Repeal the Rules of Practice for the Tenth Judicial Dist. Court of Nev. & Approval of New Rules of Practice* (ADKT 0548, Nov. 27, 2019).

The statutes and rules at issue in this appeal highlight the sensitive need to restrict the distribution of and access to private information. Federal and state law clearly and currently recognize the harm to adults and minors of the disclosure of such information, and direct that it be kept confidential accordingly.[74] This Court should take no action that makes misuse of such confidential information any easier.

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[74] *See* Cynthia Southworth, *et al.*, *Intimate Partner Violence, Technology, and Stalking*, 13 VIOLENCE AGAINST WOMEN 842, 843 (2007) ("Corporations, courts, and government agencies are selling, sharing, and publishing sensitive information about citizens worldwide. Stalkers are using these publicly available free Web sites and paid information brokers to obtain personal information. In addition to the technology concerns survivors have about the activities of stalkers, survivors are also encountering technology policy barriers that compromise their safety and privacy").

In virtually every family court case, portions of W-2's, 1099's, tax returns, and other documents are embedded in filings or attached as exhibits. It is quite common for attorney staff to try to redact SSNs and other confidential information from documents only to later discover that one or more were missed.

In the absence of sealing of the case, a monumental expenditure of time and money would be required to try to scour records, strike filings, redact, re-serve, and re-file them. The technical skills required for such efforts are beyond those of virtually all *pro se* litigants and the majority of counsel and, even if it *could* be accomplished (which is dubious), would enormously increase the cost and time required for virtually every case on the family court docket.

C. The Statutes Are Within the Legislature's Discretion

The writ petition actually attacks the existence of NRS 126.211 (paternity action privacy), NRS 125.110 (sealed files), NRS 125.080 (closed hearings), and the local rules implementing and applying them.

As recounted above, dozens of states have made all hearings and records in paternity (and other) types of cases sealed, either automatically, or presumptively, or upon judicial order, and have rebuffed constitutional and other challenges to doing so.

We agree that normal rules of statutory construction apply to both statutes and court rules.[75] As this Court has repeatedly set out, "[s]tatutes are cloaked with a presumption of validity and the burden is on the challenger to demonstrate that a

[75] *Weddell v. Stewart*, 127 Nev. 645, 651, 261 P.3d 1080, 1084 (2011).

statute is unconstitutional."[76] When reviewing a statute alleged to be unconstitutional, "a statute that does not infringe upon a fundamental right will be upheld if it is rationally related to a legitimate government purpose."[77] There is a "legitimate purpose" to protecting the privacy of litigants and their children, and Mr. Falconi has no fundamental right to intrude on the privacy of any other citizen.

This Court has further declared that "[t]he Legislature need not articulate its purpose in enacting a statute; the statute will be upheld if any set of facts can reasonably be conceived of to justify it."[78] Here the legislative history of NRS

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[76] *State v. Eighth Jud. Dist. Ct. (Logan D.)*, 129 Nev. 492, 306 P.3d 369 (2013), *quoting State v. Hughes*, 127 Nev. 626, 628, 261 P.3d 1067, 1069 (2011), and citing *Gaines v. State*, 116 Nev. 359, 372, 998 P.2d 166, 174 (2000).

[77] *Logan D.*, *supra*, citing *Bowers v. Whitman*, 671 F.3d 905, 916-17 (9th Cir.), *cert. denied*, 568 U.S. ___, 133 S.Ct. 163, 184 L.Ed.2d 234 (2012).

[78] *Id.*, *citing FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315, 113 S.Ct.

126.211 suggests that Nevada adopted the bulk of the Uniform Parentage Act including, like many other jurisdictions, that paternity cases should be presumptively closed and sealed unless someone establishes a "legitimate purpose" to opening them. In fact, federal law ***requires*** the state paternity statutes to protect privacy in these cases.[79]

2096, 124 L.Ed.2d 211 (1993); *Sereika v. State*, 114 Nev. 142, 149, 955 P.2d 175, 179 (1998).

[79] *See* NRS 425.405, noting that Nevada's federal funding under Title IV of the Social Security Act (42 U.S.C. §§ 601 *et seq.*), requires the state to "protect the privacy of persons involved in any action or proceeding for the establishment of paternity or the establishment or enforcement of an obligation for the support of a child."

The legislative histories of what are now NRS 125.110 and NRS 125.080 are extremely limited as they date from 1865 and 1931, but it is easy to discern the legislative purpose of protecting the personal privacy of litigants and their families.[80]

It is not necessary to know exactly why the legislature prioritized protection of privacy over "open access" to the details of hearings and motion filings. A legislative choice "may be based on rational speculation unsupported by evidence or empirical data."[81] Nor is it necessary to know why pleadings, orders, and decrees remain open to inspection while motions, exhibits, and other records are not, since "the Legislature

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[80] Since enactment in 1931, NRS 125.100 was updated only once, in 1963, non-substantively to eliminate an irrelevant reference to "jury verdicts." NRS 125.080 has been tweaked as to the persons who may presumably remain despite closure, but its thrust has remained the same since 1865 in multiple legislative re-enactments.

[81] *Id*., citing FCC, 508 U.S. at 315, 113 S.Ct. 2096.

enjoys broad discretion to make reasonable distinctions when enacting legislation,"[82] facts which would support the legislative judgment are presumed,[83] and "[t]his is particularly true where the legislature must necessarily engage in a process of line-drawing."[84]

As the Florida Supreme Court pointed out, it is up to each state to decide which proceedings to presumptively close, and on whom to put the burden to close or open them.[85] The Nevada legislature has elected to automatically close and seal paternity

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[82] *Id*., citing *Allen v. State, Pub. Emps. Ret. Bd.*, 100 Nev. 130, 136-37, 676 P.2d 792, 796 (1984).

[83] *Allen*, 100 Nev. at 134, 676 P.2d at 795.

[84] *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 101 S. Ct. 453, 66 L. Ed. 2d 368 (1980).

[85] *See Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988), recounting that while Florida has elected to seal and close adoption, paternity,

cases, permit either party to seal divorce cases or close hearings, and put the burden of reversing those choices on the party seeking to open them. That legislative decision is entitled to deference.

D. Married and Unmarried Parties, and All Children of All Parents, Must Be Treated Equally

It is true that the statutes are written in language reflective of their era of enactment, 160 and 100 years ago, which is why bills have been proposed, but not yet taken up or acted upon, to update the terminology of the statutes to reflect modern procedure and technology.[86]

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and juvenile proceedings, and while "some states have enacted legislation limiting public access to divorce proceedings . . . the Florida Legislature has chosen not to do so."

[86] *See* explanation of SB 334 in Marshal Willick, Legal Note Vol. 73 (Aug. 16,

As this Court has observed, where there are gaps in the law, "attorneys must still advise their clients, public policy still favors settlement, and parties are still entitled to consistent and fair resolution of their disputes," so courts attempt to fill some of those gaps.[87]

When the statutes at issue were drafted, the Legislature did not consider the possibility that unmarried people would be in what is now family court, modern

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2021), *Closed Hearings, Sealed Files, Privacy, and Public Access: Why the Rules Are the Way They Are, and What They Should Be Going Forward* ("Closed Hearings"), posted at https://www.willicklawgroup.com/vol-73-closed-hearings-sealed-files-privacy-and-public-access-why-the-rules-are-the-way-they-are-and-what-they-should-be-going-forward/. Among other things, the pending amendments would provide a formal mechanism for unsealing a case if something was sealed improperly for any reason.

[87] *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009).

motion practice and domestic partnerships did not exist, and there was no such a thing as a video record or the internet. As various courts have observed, old statutes should be interpreted to reasonably encompass subjects within their intent even if the specifics did not exist at the time of enactment.[88] Until the legislature updates the terminology in the statutes it falls to courts to apply legislative policy fairly in light of modern practical realities.[89]

Federal authority has long held that there is no legitimate purpose in state laws that would treat married and unmarried persons dissimilarly, and that any such distinction would violate the Equal Protection Clause of the Constitution.[90] Nevada

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[88] *See*, *e.g.*, *C. v. C.*, *supra*, explaining that "divorce" necessarily included reference to what is now known as the separate cause of action for "annulment."

[89] "And he that will not apply New Remedies, Must expect New Evils; for Time is the greatest Innovator." Sir Francis Bacon, *Of Innovations* (1625).

[90] *Eisenstadt v. Baird*, *supra*, at 453.

law has long since followed suit, eliminating distinctions for custody, support, "legitimacy," or otherwise, for all children whether their parents are married or not.[91]

Since the founding of family court, this Court has approved sets of rules for procedure in "all domestic relations matters commenced under the provisions of Title 11 of NRS" except paternity and reciprocal support cases (which have their own specialized rules) – in other words, in essentially all family court cases.

Accordingly, the local rules give identical rights to married and unmarried parents, and equal protection to children regardless of their parents' marital status, whether the cases originate as "divorce" or "parentage" cases or otherwise,[92] with the

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[91] *See*, *e.g.*, NRS 125B.010; NRS 125C.0015(1).

[92] Status and causes of actions and decrees not yet invented in 1865 include separate maintenance, domestic partnership, and cohabitation, all of the parties to which deserve equal protection of the law. *See*, *e.g.*, *Landreth v. Malik*, 127 Nev.

rights applicable at "trial" extending equally to "hearings" in which "the issue or issues of fact joined therein" are litigated in modern practice.[93] Treating similarly-situated people equally was given a high priority in every facet of the revised rules.[94]

175, 251 P.3d 163 (2011).

[93] Quoting NRS 125.080. For decades, the local rules provided that ***all*** family court hearings would be "private" upon the request of either party, but allowed the court to deny such a request. It was accidentally deleted as redundant of a statute in 2016, and restored in 2021. *See* Willick, *Closed Hearings*, *supra*.

[94] *See* Marshal Willick, *Family Law New Rules: EDCR 5*, Clark County Communiqué, November, 2022, at 20.

E. Exposure of Children to Family Court Materials

Since its inception, family court has had a policy and rules precluding the exposure of minors to court proceedings.[95] In recent decades, this Court has tried to protect the privacy of minors who are the subject of family court matters by using initials rather than names in cases concerning them.[96] Mr. Falconi completely ignores that tradition, the court rule, and this Court's policy.

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[95] Now set out in EDCR 5.304, prohibiting anyone from exposing minors to the paper or video records of family court or "leaving such materials in a place where it is likely or foreseeable that any minor child will access those materials," absent agreement of the parties or a court order.

[96] *See*, *e.g.*, *In re D.R.G.*, 119 Nev. 32, 62 P.3d 1127 (2003). Many states do the same. *See*, *e.g.*, Tenn. Rev. Stat. 20-6-102 (mandating redactions and use of initials).

As noted above, Nevada court dockets, including family names, are public and posted. Anyone can figure out in minutes the identity of anyone who is the subject of any hearing in front of a particular judge on a particular date, whether or not their names or faces are blurred. It is ***impossible*** to comply with the duty to prevent the video of court proceedings being "where it is likely or foreseeable" that the subject minors will "access those materials" if it is posted on the internet.

Mr. Falconi's claims (*Petition* at 11, *Supplement* at 9) that children are "protected" by blurring and redacting are completely illusory, not only because anyone can easily identify all parties but because, as detailed below, if the proceedings cannot be kept private, they are open to those who would not act to "protect" the children in any way.

The same applies to the motions, affidavits, reports, productions, and other documents filed in essentially every family law case, containing information required

by other statutes to be kept confidential as detailed above, and required by this Court's rules to be filed and exchanged in every case.[97] If not for the ability to seal those documents pursuant to NRS 125.110 and EDCR 5.212, every litigant in every case would be in violation of multiple other federal and state laws regarding disclosure of confidential information, as well as EDCR 5.304 regarding exposing minor children to it.

It is for these reasons that when hearings are not closed and files are not sealed, litigants are required to redact information required to be kept confidential pursuant to other statutes, both in writing and orally.[98] Of course that direction is meaningless if stated in open court or broadcast.

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[97] *See*, *e.g.*, NRCP 16.2, NRCP 16.205.

[98] EDCR 5.214.

The potential, and actual, harm to children, who see their parent's private and most embarrassing topics plastered on the internet in documents and video, and often their own personal, private, and confidential information (schedules, grades, medical, psychological, and other information) shown to the world, is hard to overstate. This is especially so because, once posted, it is hard to ever actually purge such information from the internet. Several judges, in several cases, have made detailed findings of the psychological, emotional, and other harm suffered by children – and their parents – from such postings. That harm is the underlying reason for the legislative policy in Nevada statutory law and court rules protecting the privacy of litigants and their children.

In family court, purely personal and quite private and intimate disputes are resolved in that forum only because the Legislature has dictated that it is the only place where such claims may be heard. No other person has a legitimate interest in

the allegations about mom's affair, dad's drinking problem, or junior's medical, psychological, or other difficulties, or in the custody schedule for that child and, as discussed below, the quite predictable harm to both parties and their children if that information cannot be kept private is obvious.

F. There is No Conflict Between the Statutes and the Rules

Without cogent explanation, the *Petition* (at 10-12) suggests that there is some unspecified "conflict" between SCR 230-240, NRS 125.080 and 125.110, and the EDCRs. There is not.

SCR 230 refers to proceedings that are *open to the public* and SCR 240 notes on its face that "certain proceedings" are "made confidential by law." The interplay between the relevant statutes and rules is detailed above; at no point do any of them permit what any of the others forbid. We concur with Mr. Falconi (at 10-11) that

public policy is to harmonize rules and statutes whenever possible, and there is no difficulty in doing so here.

To the degree that any of the rules refer to actions and proceedings that did not exist when the statutes were written, this Court has stated that it will use the normal rules of statutory construction[99] and attempt to harmonize any potentially conflicting provisions.[100] If there is any "general prohibition contradicted by a specific permission," the specific provision is construed as an exception to the general one.[101] The inclusion of case types, causes of actions, and forms of proceedings in the rules not specifically mentioned in the older statutes is easily harmonized accordingly.

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[99] *Logan D.*, *supra*; *Williams v. Clark Cnty. Dist. Attorney*, 118 Nev. 473, 484, 50 P.3d 536, 543 (2002).

[100] *In re Eric L.*, 123 Nev. 26, 31, 153 P.3d 32, 35 (2007).

[101] *Logan D.*, *supra*, *citing RadLAX Gateway Hotel, L.L.C. v. Amalgamated Bank*, 566 U.S. 639, 645, 132 S.Ct. 2065, 2071, 182 L.Ed.2d 967 (2012).

G. There Are Adequate Safeguards to Potential Judicial or Attorney Misbehavior

The "boogeyman" argument pervading the writ petition is that preventing the publication of the private information of all family court litigants and their children will somehow allow some never-specified "corruption" to flourish.

The assertion is nonsense. Every hearing is recorded. The parties to these purely private disputes and their lawyers have full access, and there is *no one* more attuned to any possible abuse than the opposing party and his or her counsel. The Bar has full access if some lawyer's conduct is in question. So does Judicial Discipline if there is a question as to the actions of a judge.

In fact, hundreds of cases of alleged improprieties by lawyers and judges are reported to the Bar and Judicial Discipline every year, and investigated if they have

any indicia of substance. And the appellate courts of this state exist for the purpose of correcting legal error.

Mr. Falconi claims (*Reply* at 10-12) that the appellate and disciplinary mechanisms are somehow inadequate, without ever suggesting any means by which members of the public sitting at home watching personal and private disputes would in any way prevent "judicial incompetence, judicial corruption, and overzealous lawyers."

Correction of legal error by district court judges is the definition of the appellate process. Revealing the personal information of family court litigants to the internet will achieve nothing whatsoever in correcting substantive errors by district court judges.

The same is true with respect to any alleged "corruption." The only bodies that could actually ***do*** anything about any such "corruption," if actually shown, are the same bodies that Mr. Falconi complains are inadequate to the task.

The bottom line is that broadcasting the private disputes of family court litigants will do no good whatsoever regarding the alleged problems, but only serve to sensationalize the private travails of the litigants.

IV. IF YOU MUST ADMIT ALEX, YOU MUST ADMIT CHESTER

Ignored in the writ petition is the reality that if family court litigants cannot exclude everyone, they cannot exclude anyone. Mr. Falconi makes a point of saying that in his broadcasts he chooses to blur faces, bleep child names, etc., but if the courtroom cannot be closed, his choice of practices mean nothing, as others present may choose to do none of those things.

If the courtroom cannot be closed during hearings, then Chester the Molester from down the street – who will be ***very*** interested in little Susie's pick-up and drop-off times and when she is alone, will have free access to that information. If "reporters" from "Our Nevada Judges" must be admitted, so must the "reporters" (recruiters) from the North American Man-Boy Love Association, looking for potential recruits. Judges are not going to interrogate those present (or viewing virtually) to divine their intentions.

These examples are not hypothetical – all of these people and organizations (and many more) exist, and since all proceedings are being made available virtually, an individual in his living room can check in on dozens of hearings in a morning if they cannot be closed. There are hundreds of cases of prosecutions of attempted solicitation of minors in Nevada every year, and doing so should not be made any easier.

Even absent malefactors, the emotional trauma inflicted on children watching their parents in courtroom conflict is massive, and essentially universal. The cases are innumerable, but as one judge put it in one order, watching the video of a contested hearing between the parents "would clearly be disturbing emotionally and mentally to most any child who witnessed it" by watching their mother:

> struggling with divorce issues . . . who was very emotional and distraught during the hearing, to listen to financial and other matters being discussed in escalated tones, to hear accusations flying across the room, seeing their parents in conflict in a setting where children are not typically allowed to be present *for very good reasons*, to know their friends and relatives can access this same video material online at any time . . . .[102]

Mr. Falconi's pretense (*Reply* at 6) that he is doing all children a favor by making sure they can enjoy the show is an affront to experience, decency, and common sense.

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[102] *Brandon Saiter v. Tina Saiter*, Case No D-15-521372-D, Order filed March 21, 2017 (emphasis in original).

The concerns for both obvious emotional trauma and physical danger are hardly "theoretical" concerns as Mr. Falconi (*Reply* at 20) dismisses them; they are quite real, and omnipresent in modern society. There are thousands of cases of child physical, sexual, and emotional abuse in Nevada every year,[103] and broadcasting children's schedules, school performance, emotional difficulties, conflicts at home and school, and other failings cannot possibly do anything but increase their physical danger from strangers, not to mention cyber-bullying, ridicule by peers, and a host of other damages.

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[103] *See*, *e.g.*, Ramona Denby & Hanna Haran, "Child Maltreatment in Nevada," in THE SOCIAL HEALTH OF NEVADA: LEADING INDICATORS AND QUALITY OF LIFE IN THE SILVER STATE (2018), UNLV Center for Democratic Culture, posted at http://cdclv.unlv.edu.

V. THE ACTUAL BASIS FOR THE WRIT PETITION IS PROFIT

While the original writ petition claimed (at 9) that the purpose of forced entry into every family law hearing and document was to "educate and inform," it should be squarely addressed that the desired "coverage" is for the purpose of generating ad revenue by sensationalizing private disputes and trauma – in other words monetizing the misery of others. The more lurid and salacious the hearings broadcast, the more profit is generated by the increased clicks to those videos.

A hundred years ago, this Court stated that there are stronger reasons to deny public access to judicial records concerning private matters when public access "could only serve to satiate a thirst for scandal."[104] Broadcasting the allegations and emotions present in most contested family court hearings does exactly that. As a

[104] *State v. Grimes*, 29 Nev. 50, 81, 84 P. 1061, 1071 (1906).

court in Pennsylvania put it, "no legitimate purpose can be served by broadcasting the intimate details of a soured marital relationship."[105]

Mr. Falconi undercuts his own argument by listing (*Reply* at 9-10) the host of cases he has been permitted to attend, record, and broadcast. Obviously, "access" has not been "denied," as he posits. Rather, he protests that it is economically inefficient to the business of broadcasting litigants' private disputes for profit over their objection by having to ask and show some "legitimate interest for some useful purpose"[106] instead of just doing so at will.

There is a real and obvious harm to all family court litigants to broadcasting unsubstantiated allegations made against them. Mr. Falconi spends one sentence (*Reply* at 16) "sympathizing" about unsubstantiated allegations and then ignores the

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[105] *Katz v. Katz*, 514 A.2d 1374, 1379 (Pa. Super. Ct. 1986).

[106] Laura Morgan, *Strengthening the Lock on the Bedroom Door*, *supra.*

fact that lives can be ruined, careers ended, and families destroyed before the "wheat is separated from the chaff."

One hundred and fifty years ago, Mark Twain famously observed that "A lie can travel half way around the world while the truth is putting on its shoes." That is much more true in the internet age. The process of establishing the truth of allegations often takes many months, by which time accusations become fact in the eyes of the public. This is presumably part of the reason that the Nevada Legislature allowed orders and judgments—but not motions and hearings—to be "open to public inspection."

If there is a broadcast of a hearing in which John calls Mary a slut and Mary calls John a drunk, and both complain about the grades of little Junior, zero is achieved to improve, monitor, or police "the system" or any lawyer or judge in it. But Mary is now portrayed to the world wide web forever as a slut, John may face

unjustified scrutiny from his employer, and Junior can be bullied and embarrassed forever by his classmates. That damage is a poor trade-off to allow people the pleasure of watching, for profit, others who are hurting.

VI. THE RELATED CASES NOW PENDING

There appear to be at least three arguably inter-related writ petitions now pending, but our review has indicated that each contains issues, and arguments, not necessarily presented in the others. It is unknown whether this Court will consolidate the cases, but in any event if they move forward, the AAML has already approved an amicus response to those related petitions and would appreciate an opportunity to respond to them.

VII. OTHER FILINGS IN THIS CASE

An amicus brief was filed on November 3, 2022, ostensibly on behalf of legal aid organizations in Nevada. It was not submitted to nor approved by the Board of Directors of the Legal Aid Center of Southern Nevada. None of the hundreds of attorneys honored each year for serving the poor by representing them pro bono in the family courts of Nevada were consulted.

We sympathize with the concerns expressed in that filing, and the AAML has long sought improvements in family law for all litigants, rich and poor. The mission statement of the Academy includes the goal to "improve the quality of family law practice throughout the country" by demonstrating a professional and ethical commitment to not only our clients but also society at large in resolving what are

often intensely emotional and complex family problems.[107] Betraying the personal privacy of those clients does not serve that goal.

There are many technical and legal problems with the filing. For example, the brief (at 5) cites *Oregonian Publishing v. U.S. Dist. Ct.*,[108] for the proposition that the First Amendment extends to family law cases, but that case has nothing to do with family law, even in dicta, but actually concerned whether an indictment in a criminal case could be unsealed.

In the bigger picture, that filing vaguely attacks "the system" because some judges have racial and other biases and asserts (without evidence) that judges are "too chummy" with lawyers. We do not entirely disagree, but the solution to improving

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[107] *See* https://aaml.org/mission/.

[108] *Oregonian Publishing v. U.S. Dist. Ct.*, 920 F.2d 1462, 1465 (9th Cir. 1990).

the quality of the judiciary has to do with judicial selection, not in splashing litigants' private information across the internet.[109]

There would be a significant cost, to every litigant in every case, to have to prove, over and over, the obvious and identical compelling reasons for keeping family law matters private that the Nevada Legislature has already determined is appropriate, and it is unfair to burden parties – rich *or* poor – with having to do so.

As an aside, the "media reporting" that led to changes in guardianship had nothing whatsoever to do with open hearings, but was the result of the complaint of a litigant. Nothing in the rules regarding closed hearings or sealed files prevents such complaints.

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[109] *See*, *e.g.*, Marshal Willick, Legal Note Vol. 67 – Merit Selection of Judges (Oct. 17, 2019), posted at https://www.willicklawgroup.com/vol-67-merit-selection-of-judges/.

The filing is confused as to excluding "support systems" from the courtroom. As detailed above, there is a list of persons presumably not excluded, which *are* those "support systems," and judges can make additional inclusions or exclusions as appropriate; obviously, witness exclusion rules exist regardless of any such lists.

And as detailed above, the existing court rules permit *a party* to invite press coverage or to provide access to all documents, as desired; the issue at hand is whether third parties, including self-styled "reporters," can invade the privacy of litigants over their *objection*.

The California experience is illuminating. After a California court struck down some automatic protections for personal privacy, the rich immediately gravitated to a system of private judging and mediation. The poor have no such options. Similar trends have already appeared in Nevada.[110]

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[110] *See*, *e.g.*, Clark County Communiqué, November, 2022, listing ads for both

Eliminating the statutes and court rules in question would greatly harm the poor, perhaps even more than everyone else.

VIII. CONCLUSIONS

For a century, the statutes and court rules of Nevada have balanced the "transparency" of public review of judicial officers doing their duties and protection of the privacy of the litigants; that is why pleadings, judgments, findings, and conclusions are open to public inspection, but motions, hearing records (including video records), financial affidavits, and allegations are sealed upon request. That well-established balance is a good one.

JAMS (at 13) and ARM (at 15) offering several former members of this Court, and others, for "private judging" and private mediation, for a fee.

This particular case is a paternity case governed by NRS 126.211 and the local rules implementing the statute; in those statutes and rules, the legislature has adopted the model act language saying the hearings are presumptively closed and the records sealed, and put the burden of changing that status on those who would alter it. Nevada's Title IV federal funding requires maintaining existing confidentiality.

That statute, and the parallel statutes and rules governing divorce actions, follow the strong historical policy in Nevada of protecting privacy in family law matters; there is no policy consideration superior to Mr. Minter and Ms. Easler's privacy rights.

Mr. Falconi has no greater right to access closed hearings or sealed files than any other member of the public, and his rights are not superior to those of the parties. Federal and state law mandate keeping hundreds of kinds of information confidential that saturate all family court filings and hearings. Every state has the power to decide

how to balance these concerns, and Nevada's policy choices certainly have a rational basis, and appear intended to protect interests deemed fundamental.

The statutes have not been recently updated, and the local rules fill gaps that have developed given modern proceedings and technology. Married and unmarried parties, and all children of all parties, are entitled to equal protection of their privacy rights no matter which door through which they enter family court.

The Falconi petition asserts that "the public" must monitor the fairness and integrity of family court hearings and filings, but cites no cases involving a party's fundamental right to privacy. He also claims without evidence that public scrutiny will prevent perjury, but the opposite seems more likely to be true.

In fact, Mr. Falconi has not identified a single legitimate interest that the public has in any issue related to a divorce or in what sense the public has a legitimate

interest in the personal life of the parties to a divorce or their children. This is because there isn't any.

The reality reflected in the challenged statutes and rules is that persons and children involved in a family law proceeding have a high interest in the system protecting their fundamental constitutional right to privacy, which is a liberty interest under the Nevada Constitution and 14th amendment of the U.S. Constitution.

Since the founding of family court, measures were taken to prevent children from being exposed to case materials. That becomes impossible if hearings are broadcast and files are opened.

There is imminent and obvious danger of criminal and other mis-use of information common to nearly all family law filings and hearings, exacerbated by the magnified harm of the broad transmission and permanence of matters put on the internet, ranging from identity theft to fraud to children being needlessly harassed or

bullied. If hearings and documents must be open to "the press," they are likewise open to every reprobate with malicious intent.

The public has no legitimate interest in knowing how much dad or mom earn, what it costs each of them to live; the value of their assets; which parent got up at night to care for a crying child or more effectively imposed discipline; whether family members have mental health, drug, or alcohol dependency problems; whether domestic violence has allegedly been committed; who is alleged to have had an affair with whom; or any other issues common in family law proceedings.

The bottom line is that except for the people directly involved, none of that is anyone else's business. Each party and child involved has a fundamental right to privacy of that information.

Any "monitoring" of family court hearings and documents could only result in complaints being submitted to judicial discipline and the Bar, or appeals to this Court,

and those agencies and entities already have both full access to all materials and a party present in every hearing highly attuned to any suspected abuse or over-reaching.

Nevada has a lot of good reasons for its 160-year tradition of guarding personal privacy in family law cases. The writ petition seeking to invalidate all the statutes and rules requiring confidentiality of materials, and permitting closing hearings and sealing parts of files, should be denied.

Respectfully submitted,

WILLICK LAW GROUP

//s// Marshal S. Willick
Marshal S. Willick, Esq.

AMERICAN ACADEMY OF MATRIMONIAL LAWYERS

//s// Brent A. Cashatt
Brent A. Cashatt, Esq.

CERTIFICATE OF COMPLIANCE

1. I hereby 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:

[**X**] This brief has been prepared in a proportionally spaced typeface using Corel WordPerfect Office 2021, Standard Edition in font size 14, and the type style of Times New Roman; or

[ ] This brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[**X**] Proportionately spaced, has a typeface of 14 points or more and contains 12,100 words. This exceeds the type/volume limits; a motion requesting leave to exceed those limits has been filed contemporaneously with the Brief.

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed _____ pages.

3. Finally, I hereby certify that I have read this appellate 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 brief 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 21st day of November, 2022.

WILLICK LAW GROUP

//s//*Marshal S. Willick*
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VERIFICATION

Marshal S. Willick, Esq., being first duly sworn, deposes and says that:

I am an attorney duly licensed to practice law in the State of Nevada. I am an attorney at the Willick Law Group, and I am one of the attorneys representing Amicus American Academy of Matrimonial Lawyers. I have read the preceding filing, and it is true to the best of my knowledge, except those matters based on information and belief, and as to those matters, I believe them to be true.

DATED this 21st day of November, 2022.

/s/ Marshal S. Willick
MARSHAL S. WILLICK, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Willick Law Group and that on 21st day of November, 2022, I served a true and correct copy of the Amicus Brief above electronically through the Clerk of the Nevada Supreme Court, to the following:

Luke A. Busby

Rena G. Hughes

Joshua Aronson

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Debra A. Bookout

/ss/ Justin K. Johnson

Employee of WILLICK LAW GROUP