No. 24-

IN THE

Supreme Court of the United States

TROY A. MINTER,

Petitioner,

v.

ALEXANDER M. FALCONI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state statute permitting the closing of a hearing in a divorce case upon the request of one party violates an implied First Amendment constitutional right of public access to family court proceedings, requiring a strict scrutiny, rather than rational basis, standard of review.

2. Whether the federal and state laws requiring that paternity, adoption, termination of parental rights, dependency, and similar proceedings be confidential violate an implied constitutional right of public access to family court proceedings.

PARTIES TO THE PROCEEDINGS

Petitioner, Troy A. Minter, was the Plaintiff in the District Court action concerning custody of a child born out of wedlock, and was Respondent in the Nevada Supreme Court action.

Respondent, Alexander M. Falconi, was a third party to the District Court action claiming access as a "member of the media," and was the Petitioner in the Nevada Supreme Court action.

Jennifer R. Easler is a party to the underlying District Court action as the mother of the child at issue, but did not appear in the Supreme Court action.

Various legal aid organizations, the State Bar of Nevada Family Law Section, and the National American Academy of Matrimonial Lawyers appeared in the Nevada Supreme Court action as amici.

There are no corporate parties and no other parties to the proceedings.

CORPORATE DISCLOSURE

There are no corporate parties involved in this proceeding.

RELATED PROCEEDINGS

This case arises from the following prior proceedings:

Falconi v. Eighth Jud. Dist. Ct., No. 85195, Nevada Supreme Court. Order granting petition filed Feb. 15, 2024.

Troy A. Minter v. Jennifer R. Easler, Case No. D-08-402901-C, Nev. Eighth Jud. Dist. Ct., Fam. Divn. Order to Seal Record Pursuant to NRS 125.110(2) filed August 18, 2022; Order denying Alexander M. Falconi's Media Request and Order for Camera Access to Court Proceedings filed August 19, 2022.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Troy A. Minter, petitions for a Writ of Certiorari to the Supreme Court of Nevada, which denied Petitioner's motion for a rehearing on May 13, 2024 (App. 40a – 41a).

OPINIONS BELOW

On August 18, 2022, the District Court entered its Order to Seal Record Pursuant to NRS 125.110(2). (App 36a – 39a)

On August 19, 2022, the District Court Judge entered its Order denying Alexander M. Falconi's Media Request and Order for Camera Access to Court Proceedings. (App. 33a – 35a)

On February 15, 2024, the Supreme Court of Nevada issued an opinion granting Alexander M. Falconi's Petition for a Writ of Mandamus in Falconi v. Eighth Jud. Dist. Ct., 140 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 8, Feb. 15, 2024)(App. 1a – 32a) and holding that one state statute and two local court rules violate a constitutional right to access court proceedings by permitting closure of those proceedings upon the request of a party to the proceeding.

The Supreme Court of Nevada then denied a motion for rehearing on May 13, 2024 (App. 40a – 41a).

These decisions comprise the substantive rulings from which Petitioner seeks a writ of certiorari.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C.S. § 1254(1).

The Nevada Supreme Court issued it opinion on February 15, 2024 (App. 1a – 32a). A Petition for rehearing was filed timely, but was ultimately denied on May 13, 2024 (App 40a – 41A). On August 9, 2024, the Application (24A188) to extend the time to file a petition for a writ of certiorari was granted by Justice Kagen. The time was extended until September 23, 2204.

PROVISIONS INVOLVED

Eighth Judicial District Court Rules 5.207 & 5.212; Nev. Rev. Stat. 125.080 (App 42a – 44a).

STATEMENT OF THE CASE

I. INTRODUCTION

The Sixth Amendment to the United States Constitution guarantees to an accused in a criminal prosecution "the right to a speedy and public trial." The First Amendment[1] addresses the general right of "freedom of speech." When this Court has considered the tradition of openness in criminal proceedings, it has examined the origins of the

1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

jury system in England before the Norman Conquest and observed that the public character of trials remained constant. *Press-Enter. Co. v. Superior Ct.*, 464 U.S. 501, 505 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 565-66 (1980) (Burger, C.J., plurality opinion).

The Nevada Supreme Court's analysis read broadly this Court's statement that "historically both civil and criminal trials have been presumptively open." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 & n.17 (1980). While acknowledging that this Court has never recognized a First Amendment right for the public to access civil proceedings, the Nevada Supreme Court concluded that multiple federal circuit courts have concluded that the constitutional right applies in both criminal and civil proceedings, without noting that family court cases are definitionally excluded from any federal court's discussion of "civil cases" under the abstention doctrine.

The Nevada Supreme Court found no meaningful distinction between criminal and civil cases, or between general civil cases and family court proceedings, despite the very different history of divorce being a matter of the ecclesiastical courts and child custody being a matter of the chancery courts, both outside the common law tradition of open public courts in existence at the founding of this country.

Since Nevada became a State in 1865, a provision now found in Nev. Rev. Stat. 125.080 has permitted closed hearings in divorce trials upon the demand of either party. Local rules expanded the right to all family court proceedings.

The question presented is whether this Court's commentary about "open proceedings" dictated a First Amendment right of access preempting the authority of state legislatures to balance openness and privacy concerns in family law matters.

II. BACKGROUND

The history of marriage, divorce, and regulation of child custody stretches back to the dawn of time. Even ancient societies needed a secure environment for the perpetuation of the species, a system of rules to handle the granting of property rights, and the protection of bloodlines.

After the fall of Rome, marital practices in the West devolved to the level of tribal or local custom, and the expansion of the Christian Church over the following centuries did little to change those practices. Most marriages were arranged by those in a position to secure economic partnerships, or by parents or clans.

During the Ninth and Tenth centuries, ecclesiastical (religious) courts throughout Europe gained exclusive jurisdiction over matters of marriage and divorce. For the next 300 years, administration of the mechanics of marriage was one of the societal functions altered by the struggles between the Catholic Church and the Protestant reformers, and the competing ecclesiastical and secular institutions evolving in the various nation-states, which began codifying and controlling the legality of marriage. By 1800, marriage was widely recognized in Europe as a legal contract between a husband and a wife, sanctioned and regulated by the State even if usually performed by the officials of a church.

In England, from a very remote period, the ecclesiastical tribunals had exclusive jurisdiction over marriage and divorce, except that divorces *a vinculo matrimonii* were occasionally granted by special acts of Parliament. While criminal matters invariably proceeded in open fora, divorce actions did not. The English tradition provided the context in which the United States Constitution was adopted and is instructive for interpreting principles of American organic law.[2]

When the U.S. Constitution was adopted, sole jurisdiction for divorce actions in England lay with ecclesiastical courts, where it remained until 1857.[3] The 1857 act of Parliament, made effective the following year, was known as the Matrimonial Causes Act. It established "The Court for Divorce and Matrimonial Causes" and transferred jurisdiction over divorce from the ecclesiastical courts to the new civil court.[4]

The point is that upon the founding of the United States, family law matters were within the exclusive province of the ecclesiastical courts, in which all

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2. *Richmond Newspapers*, 448 U.S. at 569; see *Worthington v. Dist. Ct. of Second Jud. Dist.*, 37 Nev. 212, 230, 142 P. 230, 237 (1914) (providing that "the law of divorce as it existed at and prior to the time of the adoption of the Constitution should be considered" in reviewing a constitutional challenge to a durational residence statute).

3. *Worthington*, 37 Nev. at 230-31, 142 P. at 237; *Morgan v. Foretich*, 521 A.2d 248, 252 (D.C. 1987).

4. 20 and 21 Vict. c. 85; *see State ex rel. Fowler v. Moore*, 46 Nev. 65, 207 P. 77 (1922).

proceedings were presumptively private.[5] As described by the dissent in this case (at 4-5), "The experience in ecclesiastical courts thus did not feature an abiding "public character" akin to that of criminal matters that led the Supreme Court to find a presumption of openness. *Press-Enter.*, 464 U.S. at 506-08."

The relevance of that history here lies in the framing of the Constitutional question by the four-Justice majority versus that of the three-Justice dissent, in performing the "experience and logic test" to determine whether there is a constitutional right of access to court proceedings because of the "constant tension between the interest in public disclosure and privacy concerns."[6]

Under this test, courts consider "whether a proposed right reflects a well developed tradition of access to a specific process and whether the right 'plays a significant role in the functioning of the particular process in question.'"[7]

The majority reviewed the matter in broad strokes, claiming that the English common law going back to the sixteenth century had a general "tradition of openness" that carried over to the American colonies and was

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5. *See,* e.g., *Scott v. Scott*, [1913] AC 417 (HL) 417, 433 (appeal taken from Eng.), https://www.iclr.co.uk/wp-content/uploads/media/vote/1865-1914/Scott_ac1913 – 1-417.pdf.

6. *Courthouse News Servs. v. Brown*, 908 F.3d 1063, 1069-70 (7th Cir. 2018).

7. Id. at 1070 (quoting *Press-Enter. Co. v. Superior Ct.* (*PressEnter II*), 478 U.S. 1, 8 (1986) (considering the right of access to preliminary hearings in criminal proceedings).

established before the Constitution.[8] The majority found that tradition extended to civil as well as criminal proceedings, and it found no reason to distinguish any kind of family law proceeding, based on its perfunctory review that traditionally family law proceedings have been presumptively open and 24 states have state constitutional guarantees of public access to courts.[9]

It disregarded Nevada's history since its founding as providing privacy protections to divorce litigants based on its conclusion that the "experience" test is not local but national, citing this Court's holding in *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150 (1993) (concluding that "the 'experience' test of *Globe Newspaper* does not look to the particular practice of any one jurisdiction, but instead to the experience in that *type* or *kind* of hearing throughout the United States" (internal quotation marks omitted)).[10]

It then found the "logic" test satisfied by the criminal law cases, finding that if allowing the public to observe criminal trial and jury selection is considered a good thing, the same good should result from allowing the public to observe family law proceedings.[11]

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8. Opinion at 9.

9. Opinion at 10, citing to W. Thomas McGough, Jr., *Public Access to Divorce Proceedings: A Media Lawyer's Perspective*, 17 J. Am. Acad. Matrim. Law, 29, 31 (2001) (citing to both 24 Am. Jur. 2d *Divorce and Separation* § 303 (1998), and constitutional provisions from 24 states that guarantee public access to courts), and to 24 Am. Jur. 2d *Divorce and Separation* § 283 (2023).

10. Opinion at 11.

11. Opinion at 12.

The dissent disagreed with every step of that analysis, starting (at 1) with the majority's "misstep of treating all family law cases as alike." The dissent argued that if the majority had done what it ***said*** it was doing, it would have found that reviewing the origins of the specific types of proceedings at issue here leads to the opposite conclusion.

The dissent noted (at 2) that even the cases relied upon by the majority include language stating that a presumption of openness does not apply to "particular proceedings governed by specific statutes" such as the Family Code.[12] It found the majority's lumping in of family law proceedings with all other civil matters to run afoul of this Court's direction to consider openness as to the *particular type* of hearing under *El Vocero de Puerto Rico (Caribbean Int'l News Corp.) v. Puerto Rico*, 508 U.S. 147, 150 (1993).

The dissent then reviewed the historical gulf between criminal and family law proceedings, noting (at 3-4) that at the time of the founding of the United States, sole jurisdiction for divorce actions in England lay with the presumptively closed and private ecclesiastical courts, utilizing procedures not even remotely akin to a regular "trial," whether private or public.

The dissent then assailed (at 5-6) the majority's lumping of all "family law" proceedings together noting that a host of them (*e.g*, juvenile proceedings, termination of parental rights, adoptions, etc.) are often closed by default, even in those states with a state constitutional

12. Dissent at 2, citing *NBC Subsidiary (KNBC-TV), Inc. v. Superior Ct.*, 980 P.2d 337 (Cal. 1999) at 361 & n.30.

guarantee of "public access to the courts," which Nevada does not have in any event. The states vary widely on what proceedings are and are not available to public access, usually depending on specific state legislation on the topic.

Since there has never been a "presumption of openness" in *divorce* proceedings specifically, the dissent (at 5-6) would have reviewed the state statute permitting either party to demand a closed hearing for a rational basis, and would have no problem finding one, observing that this Court decades ago held that "the common-law right of inspection has bowed before the power of a court to insure that its records are not 'used to gratify private spite or promote public scandal' through the publication of 'the painful and sometimes disgusting details of a divorce case.'"[13]

Delving into history, the dissent (at 6-7) chronicled how and why the ecclesiastical courts were not common law courts at all, but "administered the unwritten law of the realm" on matters within their jurisdiction.[14] And since there is no ecclesiastical court tradition in the United States, the entire structure of divorce law in this country has been a matter of state legislative enactments as recognized by this Court for over a century.[15]

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13. *Nixon v. Warner Comm'ns, Inc.*, 435 U.S. 589, 598 (1978) (quoting *In re Caswell*, 29 A. 259 (R.I. 1893)).

14. Citing *Foote v. Nickerson*, 48 A. 1088, 1089 (N.H. 1901).

15. Dissent at 6, citing *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States.").

Detailing that explanation, the dissent explained (at 7) how in early American experience, divorces were issued by legislatures directly since "divorce jurisdiction emanated solely from the act of the General Assembly and not from common law."[16] In later years, state legislatures empowered courts with jurisdiction to hear divorce proceedings, while retaining the power to delineate both procedural and substantive law.[17]

The dissent focused (at 7) on this Court's century-old exposition of state legislative control of divorce:

> [m]arriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

Based on that history, the dissent (at 8) would have found that "divorce is historically apart from the common law tradition and involves matters of elevated public policy significance," and would have deferred to the legislature' weighing of public policy in enacting a statute permitting parties to a divorce to close the proceedings at their discretion.

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16. Citing *C. v. C.*, 320 A.2d 717, 726 (Del. 1974).

17. Citing *Worthington*, *supra*, 37 Nev. at 234-35, 142 P. at 238 (collecting cases supporting the propositions that jurisdiction regarding divorce is purely statutory and that legislatures are empowered to enact controlling provisions).

Turning to child custody matters, the dissent (at 8) traced the entirely separate evolution of *that* area of "family law" cases, noting that in both England and America, they do not have a history or presumption of openness either, but for entirely different reasons stemming from their historical roots in chancery courts except when custody was resolved as incident to a divorce case. Otherwise, matters relating to child custody proceeded by application to a chancellor or by petition for writ of habeas corpus.[18]

The dissent cited cases from both countries from about the time of the American revolution, detailing (at 9) that the role of an assigned magistrate in such cases was not to be a public arbiter of a dispute between parties, but to be a representative of the sovereign acting as *parens patriae* "to do what is best for the interest of the child." The "character and purpose of the proceedings [involving child custody] are different from an action where only the rights of the parties litigating are involved."[19]

The dissent noted (at 9-10) that in all such decisions, courts have been little constrained by formal rules, and there is no historical tradition of openness to such proceedings because they may and often do include private proceedings including child interviews and withholding some matters discovered from the parents, so long as it

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18. Dissent at 8, citing *In re Morgan*, 21 S.W. 1122, 1123 (Mo. 1893); *Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. 1925) (Cardozo, J.); William Pinder Eversley, *The Law of the Domestic Relations* 545 (London, Stevens & Haynes 1885).

19. Dissent at 9, quoting *Pearce v. Pearce*, 33 So. 883, 884 (Ala. 1903).

serves the child's welfare, making such determinations "more of an inquisition than a trial."[20]

From the historical role of the courts and nature of the proceedings, the dissent found (at 10) that child custody determinations are distinguishable from "civil proceedings generally," and that the tradition of child custody proceedings does not "exhibit a custom of openness."

The dissent also would not find that "logic" militates toward opening such procedures to the public, finding (at 11) that any requirement of applying "strict scrutiny" review interferes with serving a child's best interest by presuming that openness serves the child and burdening "parties who are in a delicate and possibly traumatic situation with proving that privacy is a narrowly tailored means to attain a compelling state interest."

REASONS FOR GRANTING THE PETITION

I. A Finding of Federal Preemption is Unwarranted in Divorce, Paternity, and Custody Cases

Pre-emption of state domestic relations law is rare, and not favored. As this Court held in *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004):

> One of the principal areas in which this Court has customarily declined to intervene

20. Dissent at 10, citing *A Treatise on the Law Relating to the Custody of Infants* 70-71 (Baltimore, Harold B. Scrimger 3d ed. 1899).

> is the realm of domestic relations. Long ago we observed that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." See *In re Burrus*, 136 U. S. 586, 593-594 (1890). See also *Mansell v. Mansell*, 490 U.S. 581, 587 (1989) ("[D]omestic relations are preeminently matters of state law"); *Moore v. Sims*, 442 U. S. 415, 435 (1979) ("Family relations are a traditional area of state concern"). So strong is our deference to state law in this area that we have recognized a "domestic relations exception" that "divests the federal courts of power to issue divorce, alimony, and child custody decrees." *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992).
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> . . . .
>
> Thus, while rare instances arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue, see, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432-434 (1984), in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts.

Put otherwise, federal pre-emption is only to be found when it is "positively required by direct enactment" of Congress:

> Because domestic relations are preeminently matters of state law, we have consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area. Thus we have held that we will not find preemption absent evidence that it is "positively required by direct enactment."[21]
>
> On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be pre-empted. . . . Before a state law governing domestic relations will be overridden, it "must do 'major damage' to 'clear and substantial' federal interests."[22]

Congress has said nothing about alleged "openness" of family law proceedings; in fact, a host of federal laws requires that various kinds of information be kept confidential, as detailed below. The Nevada majority opinion has *implied* a constitutional right of access to family law proceedings of divorce and child custody from this Court's holdings relating to criminal law proceedings

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21. *Mansell v. Mansell*, 490 U.S. 581, 587, 109 S. Ct. 2023, 2028 (1989), *quoting Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S. Ct. 802, 808, 59 L. Ed. 2d 1 (1979) (*quoting Wetmore v. Markoe*, 196 U.S. 68, 77, 25 S. Ct. 172, 176, 49 L. Ed. 390 (1904)).

22. *Rose v. Rose*, 481 U.S. 619, 625, 107 S. Ct. 2029, 95 L. Ed.2d 599 (1987).

and general commentary as to civil law without reference to case types.

It was a mistake for the Nevada Supreme Court to impose a constitutional limitation on the actions of the Nevada Legislature as to subjects that were outside the scope of matters covered by the United States Constitution when it was ratified.

Matters relating to divorce, child custody, and other subjects of domestic relations ("family law") are not implicated in this Court's prior comments about presumptively open proceedings, and by history, experience, and logic not within the class of proceedings as to which there is or can be a "presumption of openness." There is a centuries-long history of privacy for such matters, and as adopted in this country they are strictly creations of the state legislative power. The Nevada Legislature was well within its authority to strike a public policy balance between openness and privacy.

The fundamental personal right to privacy present in every family law case has been found by this Court to be "vital."[23] Pages 2-3 of the majority opinion states that the Nevada Supreme Court believed that a "constitutional right of court access" is in conflict with that right to privacy. Another facial factual error of the majority ruling is the undeniable fact that until and unless a litigant invokes the right to close a hearing, family law cases are ***presumptively open***.

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23. *See gen'ly Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258 (1997).

This Court should clarify its prior pronouncements to state that it has not created a "presumption of openness" as to categories of proceedings that were not within the ambit of common law courts as of the founding of the United States. In other words, there is no presumption of openness as to family law proceedings relating to divorce or child custody.

II. Constitutional Evaluations of "Logic and Experience" Must Differentiate Between Types of Proceedings

It would be useful to the states to give greater clarity to the test to be applied to determine whether a given type of proceeding has a presumption of openness under *El Vocero de Puerto Rico (Caribbean Int'l News Corp.) v. Puerto Rico*, 508 U.S. 147, 150 (1993).

It was error for the Nevada majority to turn to general pronouncements of the lower federal courts and conclude that since they did not differentiate family law from other civil matters they must have not seen a distinction.

In actuality, all of those lower court pronouncements ***inherently*** excluded family law matters because, by conscious design and policy, the federal courts do not hear family law matters, under an explicit policy of abstaining from any such cases. This is why the federal courts repeatedly state that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."[24]

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24. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 124 S.Ct. 2301 (2004), quoting *In re Burrus*, 136 U. S. 586, 593-594 (1890).

This Court has announced that "So strong is our deference to state law in this area that we have recognized a 'domestic relations exception' that 'divests the federal courts of power to issue divorce, alimony, and child custody decrees.'"[25]

So it is simply wrong to conclude that federal court comments about a "right of access" to civil cases include family law matters. By conscious policy, all family law matters are ***excluded*** from federal court comments on court access in "civil matters."[26] Because of this reality,

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25. *Elk Grove*, *supra*, quoting *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992).

26. The law review literature in this area is vast but emphasizes that the domestic relations exception is well-settled. *See* Travis Grant, *The Domestic Relations Exception to Diversity Jurisdiction: Spousal Support Enforcement in the Federal Courts*, 14 J. CONTEMP. LEGAL ISSUES 15, 19 (2004) ("As both the Ankenbrandt majority and Justice Blackmun point out, the federal system lacks the elaborate legal infrastructure, the expertise, and the means of enforcement to intervene in matters of divorce, alimony, and child custody and support. Congress seems to have recognized as much in limiting its domestic-relations legislation to enforcement measures that would promote cooperation and uniformity among the states."); Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 432-33 (2007) ("At the same time, the Court supported the general authority of states to act on other family controversies that came before their courts. By distinguishing between the jurisdictional requirements for a divorce decree and the requirements for litigating financial and custodial questions, the Court treated marital status as a matter of personhood, a question of individual right, an aspect of citizenship worthy of protection by the Court and weighty enough to prevail over important state interests in marriage. By treating financial and custody matters as distinct from matters of status, the Court supported state efforts to develop public policies to protect dependent spouses and children.

this Court should explicitly hold that the "experience and logic" test should not apply to family law equally as to general civil matters. For many historical and practical reasons, there *is* "a reason to distinguish family law proceedings from civil proceedings." The majority opinion misapprehends that fact, and should be reversed accordingly.

III. This Court Should Protect Congress' and States' Public Policy Determinations as to What Classes of Proceedings Should be Private

Federal rights, co-extensive with or broader than state law, preemptively and presumptively protect the disclosure of broadly defined health information.[27] As of 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").[28]

Among other "medical" records routinely detailed in family court filings and hearings are adult and minor

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In the process of this transition, the Supreme Court set family law on a new course.").

27. See Privacy Rule HIPAA-Final.pdf.

28. *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).

sexual activity, pregnancy, HIV and other sexually transmitted diseases (STDs), substance abuse, and mental health.[29] In addition, there are special provisions to protect substance abuse treatment for adults and children which are also commonly examined topics in family court proceedings.[30]

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 educational records unless there is a court order or law to the contrary.[31] Again, any "personally identifiable information" in "educational records" may not be disclosed absent parental consent or specific court order.[32]

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29. *See* Abigail English & Carol A. Ford, *The HIPAA Privacy Rule and Adolescents: Legal Questions and Clinical Challenges*, 36 Perspectives on Sexual and Reproductive Health 80 (2004).

30. *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").

31. *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).

32. 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).

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 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.

In other contexts, the Nevada Supreme Court has noted the balance involved and why the person who hopes to invade such privacy has the burden of proving a "legitimate reason" for doing so.[33]

As noted by that 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."[34] Obviously, that is much more true of a case concerning a child who is still alive.

The Nevada Supreme 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, many of which prohibit the disclosure

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

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

of public records that contain confidential information, including NRS 62H.025 for confidential juvenile justice information."[35]

There are hundreds more examples of records and information required to be kept confidential, from records of mental health treatment[36] to child welfare records[37] to sex offense victims,[38] and much else. All of this comes up, every day, in family court filings and hearings.

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 the statutes and rules making that information private.

The statutes and rules at issue 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

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

36. NRS 433.482(8).

37. NRS 392.317.

38. NRS 200.377.

of such information, and direct that it be kept confidential accordingly.[39]

As to paternity cases, the legislative history of NRS 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.[40]

Every state in the Union has some process or procedure, by statute, court rule, or 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.[41]

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39. *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").

40. *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."

41. Automatic sealing of both hearings and files in paternity cases is quite common; NRS 126.211 mirrors procedures in many other states.

The right of privacy has long been considered an established federal right as well.[42] Federal recognition of a right of privacy stretches back to at least 1890,[43] and has long been held to be both an *individual* right,[44] and a *fundamental* right.[45]

Delaware standards are quite similar to those of Nevada, and of about the same age, as explained in the seminal case of *C. v. C.*,[46] 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

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42. *See* Morgan, *supra* n.3, at 111-112.

43. 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").

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

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

46. *C. v. C.*, 320 A.2d 717 (Del. 1974).

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.

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.[47]

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

47. 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" 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).

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 cases, a "newspaper could obtain access only if it could demonstrate a legitimate interest for some useful purpose."[48]

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"[49] and to "prevent public scandal."[50]

On that last point, the Delaware holding is part of

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48. 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).

49. 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).

50. 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 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).

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 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; but they should not be used to gratify private spite or promote public scandal.[51]

Caswell has been favorably cited in several Nevada opinions, both state and federal.[52] The Nevada Supreme 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."[53]

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

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

53. *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 in Nevada 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."[54] In Connecticut, Ohio, and several other states, both hearings and files may be closed in family relation matters in the discretion of the judge.[55] In Florida, Hawaii, Idaho, Mississippi, Montana, New Hampshire, New York, North Dakota, Rhode Island, and Vermont, various types of family law matters and papers are automatically sealed or confidential.[56]

Oregon requires both parties to agree to close hearings.[57] 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[58]; others, like Nevada, do.

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

55. Conn. Gen. Stat. § 46b-11; Ohio Rev. Code Ann. § 149.43.

56. 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.

57. ORS 1.040.

58. *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."[59]

The Nevada Supreme 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 which the public is entitled to attend,"[60] and that reporters "have no greater rights of access than the public."[61] The Nevada Legislature, and that 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,[62] and while facially addressing the breadth of closure orders are actually more concerned with whether a

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59. *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.

60. SCR 229(1)(b).

61. SCR 242(2).

62. 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).

judge has discretion to override the request of a litigant,[63] which issue does not exist under Nevada's well-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 which has just been struck down.

The United States Supreme Court has never found a federal right of court access to family matters, but it ***has*** repeatedly found a Constitutional right of privacy in all matters pertaining to marriage, sex, and child rearing, stemming from the 14th Amendment.[64]

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63. *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 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).

64. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the right to marital privacy predates the constitution); *Meyer v. State of Nebraska*, 262 U.S. 390 (1923) (parents have a protected right of privacy similarly to the protected right for parents to decide how to raise their children); *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029 (1972) (unmarried people have the same right of privacy as married parties as to matters of sex and contraception); *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584 (2015) (these privacy rights extend to all couples regardless of sexual orientation).

As to the Nevada statute at issue, the only child custody hearings "automatically" closed are those between parties who have never been married to one another, because ***those*** hearings are definitionally under NRS Chapter 126 (paternity/parentage cases), and a specific statute[65] ***requires*** them to be closed.

In other contexts, where specific statutes require certain information to "not be made a part of any public record," the Nevada court has deferred to the legislative direction.[66] Doing so for paternity matters is required by federal law.[67]

The *Feazell*[68] "overriding interests" are the same in every family law case that is required to be kept

65. NRS 126.211.

66. *See*, *e.g.*, NRS 176.156(5) addressing pre-sentence investigations in criminal matters; *Oliver v. State*, 417 P.3d 354 (Unpublished Order Dismissing Appeal, 2018) (directing detachment and holding that record under seal).

67. *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 loss of that funding would be catastrophic to state welfare and other budgets.

68. *Feazell v. State*, 111 Nev. 1446, 9906 P.2d 727 (1995).

private under federal law[69] and state law[70] in service to the Constitutional privacy interests found to exist by this Court. Declaring a "right of access" to those proceedings, which has ***not*** been found to exist by any federal court, should not be implied to exist at the cost of violating multiple statutes and imperiling Nevada's Title IV-D funding, which is the necessary result of declaring paternity and child support proceedings open to all comers.[71]

The same reality applies to the "compelling interests" discussion in *Press-Enter.*[72] Non-disclosure of information required by federal and state law to be kept confidential

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69. Those federal laws block any person from being identified as the recipient of mental health, drug or alcohol treatment, or any "personally identifiable information" of a minor in any "educational records," which may not be disclosed absent parental consent or specific court order. Some of that is stated in essentially *every* child custody hearing, because factors every court *must* consider and make findings on in *every* custody order under NRS 125C.0035 include the ability of the parents to cooperate to meet the needs of the child, the mental and physical health of the parents, the physical, developmental and emotional needs of the child, the nature of the relationship of the child with each parent (and what problems exist in that relationship), any history of parental abuse or neglect of the child or a sibling of the child, and whether either parent has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.

70. Personal identifying information is defined in NRS 205.4617 and some of the items listed as "protected" are recited in virtually every family law hearing.

71. NRS 425.405.

72. *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty.*, 478 U.S. 1, 106 S. Ct. 2735 (1986).

is *always* a "compelling interest," and the right to privacy regarding one's income, trade secrets, tax returns, health issues, children, etc., is "compelling" without any further showing.

As to the other *Feazell* factors, because no one outside the court, parties, and counsel are permitted to ***hear*** the information, closing the hearing ***is*** "no broader than necessary" to accomplish that result, and there are no "reasonable alternatives." The same factors will apply in every single such case.

CONCLUSION

For all the aforementioned reasons, the petition for writ of certiorari should be granted, and the majority opinion of the Nevada Supreme Court finding a constitutional mandate requiring divorce and child custody hearings to be open to the public should be reversed.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF NEVADA, FILED FEBRUARY 15, 2024

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 85195

ALEXANDER M. FALCONI,

Petitioner,

v.

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

Respondents,

and

TROY A. MINTER; AND JENNIFER R. EASLER,

Real Parties in Interest.

Filed February 15, 2024

Original petition for a writ of mandamus or, alternatively, prohibition challenging local rules and a statute concerning access to certain court proceedings.

Petition granted.

Appendix A

BEFORE THE SUPREME COURT, EN BANC.[1]

OPINION

By the Court, HERNDON, J.:

In June 2022, the Eighth Judicial District Court amended its local rules EDCR 5.207 and EDCR 5.212, partially based on NRS 125.080. Under this statute and the newly amended local rules, a child custody matter is automatically closed and a family court proceeding must be closed upon the request of a party. In practice, this means that a party has the right to prohibit the public's access to court proceedings without a judicial determination having been made that closure is necessary and appropriate. However, the public has a constitutional right of access to court proceedings. Because the local rules and the statute require the district court to close the proceeding, they eliminate the process by which a judge should evaluate and analyze the factors that should be considered in closure decisions, and by bypassing the exercise of judicial discretion, the closure cannot be narrowly tailored to serve a compelling interest. Thus, these local rules and NRS 125.080 violate the constitutional right of access to court proceedings. Accordingly, we hold that EDCR 5.207, EDCR 5.212, and NRS 125.080 are unconstitutional to

1. The Honorable Patricia Lee, Justice, did not participate in the decision in this matter. The Honorable Abbi Silver, Senior Justice, was appointed to sit in her place.

the extent they permit closed family court proceedings[2] without the exercise of judicial discretion.

FACTS AND PROCEDURAL HISTORY

On August 18, 2022, petitioner Alexander M. Falconi, who does business as the press organization Our Nevada Judges, filed a media request for camera access in a child custody proceeding between real parties in interest Troy Minter and Jennifer Easler. Easler did not oppose the media request, but Minter did. Minter argued that the parties' child was 15 years old and it was not in the child's best interest to have his personal information broadcasted to the general public or to be available for the child to access on the internet. Lastly, Minter asserted that the custody dispute should be considered private and confidential.

On the same day as Falconi's request, the district court entered an order sealing the record in the case. The next day, the district court denied Falconi's request because the case was sealed, so "EDCR 5.207 and EDCR 5.212 require the matter to be private" and Supreme Court Rules limit media access to private matters. Falconi

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2. We note that this opinion only concerns the constitutionality of NRS 125.080, EDCR 5.2072, and EDCR 5.212. When in this opinion we refer to family law and/or family court proceedings, those terms do not include juvenile proceedings under NRS Title 5—Juvenile Justice.

then filed the underlying writ petition, and this court invited amicus briefing.[3]

DISCUSSION

We exercise our discretion to entertain the writ petition

"This court has original jurisdiction to issue writs of mandamus."[4] *Gardner v. Eighth Jud. Dist. Ct.*, 133 Nev. 730, 732, 405 P.3d 651, 653 (2017) (internal quotation marks omitted). "A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); NRS 34.160. "Writ relief is an extraordinary remedy that is only available if a petitioner does not have a plain, speedy and adequate remedy in the ordinary course of law." *In re William J. Raggio Fam. Tr.*, 136 Nev. 172, 175, 460 P.3d 969, 972 (2020) (internal quotation marks omitted); *see also* NRS 34.170. "This court has considered writ petitions when

3. At oral argument, counsel for amicus curiae National American Academy of Matrimonial Lawyers Committee, Marshal S. Willick, represented that he was speaking on behalf of both real parties in interest. After argument, Falconi filed a motion requesting this court correct the record because Willick was not authorized to argue on Easler's behalf, as she does not oppose the writ petition. We grant that motion and caution counsel of the need to be accurate in representations made before this court. *See*, *e.g.*, RPC 3.3(a) (requiring veracity in statements made by a lawyer to a tribunal).

4. Falconi alternatively seeks a writ of prohibition. In light of Falconi's requested relief, we consider his petition as one for a writ of mandamus.

doing so will clarify a substantial issue of public policy or precedential value, and where the petition presents a matter of first impression and considerations of judicial economy support its review." *Washoe Cnty. Hum. Servs. Agency v. Second Jud. Dist. Ct.*, 138 Nev. —, —, 521 P.3d 1199, 1203 (2022) (internal citations and quotation marks omitted).

Whether EDCR 5.207, EDCR 5.212, and NRS 125.080 are constitutional is a matter of first impression, and our consideration of their constitutionality serves judicial economy. *See, e.g.*, *We the People Nev. v. Miller*, 124 Nev. 874, 878-88, 192 P.3d 1166, 1169-70 (2008) (exercising discretion to entertain a writ petition raising the question of whether a statute is constitutional); *Lyft, Inc. v. Eighth Jud. Dist. Ct.*, 137 Nev. 832, 834-40, 501 P.3d 994, 998-1002 (2021) (same). Additionally, the scope of the press's and public's access to courts is an important issue of law, as well as a substantial issue of public policy, warranting our extraordinary consideration. Further, issues of access to courts happen frequently but evade review because closed hearings often will have already occurred while the party denied access to the court challenges the closure of the hearing.[5] Lastly, we have recognized that direct

5. Both Falconi and real parties in interest agree that this issue is not moot even though the hearing to which Falconi sought access has already occurred because the capable-of-repetition-yet-evading-review exception to the mootness doctrine applies. *See Washoe Cnty. Hum. Servs.*, 138 Nev. at —, 521 P.3d at 1204 (providing that "cases involving moot controversies may still be considered by this court if they concern a matter of widespread importance capable of repetition, yet evading review" (internal quotation marks omitted)). We agree.

appellate review is often not available to the press, and thus, writs for extraordinary relief may be necessary to challenge a denial of access. *See* SCR 243 (providing that the press may "seek extraordinary relief by way of writ petition" concerning the interpretation or application of the Supreme Court Rules); *Stephens Media, LLC v. Eighth Jud. Dist. Ct.*, 125 Nev. 849, 858, 221 P.3d 1240, 1246 (2009) (providing that a petition for extraordinary writ relief was appropriate because "the press did not have an adequate remedy at law to challenge the district court's order denying its application to intervene"). Accordingly, we exercise our discretion to consider this petition.

NRS 125.080 and the newly amended EDCRs

NRS 125.080(1) provides that "[i]n any action for divorce, the court shall, upon demand of either party, direct that the trial and issue or issues of fact joined therein be private." NRS 125.080(2) provides that "upon such demand of either party, all persons must be excluded from the court or chambers wherein the action is tried, except" the parties, their counsel, witnesses, parents, or siblings. In order to exclude some of the people listed as exceptions to the closure, there must be a hearing where the requesting party shows good cause for the exclusion of that person. NRS 125.080(3).

As the parties acknowledge, the newly amended EDCR 5.212 was fashioned from the language in NRS 125.080. EDCR 5.212(a) provides that "the court shall upon demand of either party, direct that the hearing or trial be private." Subsection (b) of EDCR 5.212 then

copies the language from NRS 125.080(2), which lists people excluded from that closure. Subsections (c) and (d) address when the excepted people may still be excluded from the proceedings. EDCR 5.212(e) provides that "[u]nless otherwise ordered or required by rule or statute regarding the public's right of access to court records, the record of a private hearing, or record of a hearing in a sealed case, shall be treated as confidential and not open to public inspection." While EDCR 5.212 does not specify to what types of proceedings it applies, because Part V of the EDCR governs family division matters and guardianships, it appears to broaden NRS 125.080's application from divorce cases to all proceedings occurring in family court.

The newly adopted EDCR 5.207 provides that "a case involving a complaint for custody or similar pleading addressing child custody or support between unmarried parties shall be construed as proceeding pursuant to NRS Chapter 126," which deals with parentage. NRS 126.211 provides that "[a]ny hearing or trial held under this chapter must be held in closed court without admittance of any person other than those necessary to the action or proceeding."[6] Additionally, NRS 126.211 provides that "[a]ll papers and records, other than the final judgment . . . are subject to inspection only upon consent of the court and all interested persons, or in exceptional cases only upon an order of the court for good cause shown." Thus, under the newly adopted EDCR 5.207, all custody actions must be closed and the records sealed.

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6. Because no party asked us to consider the constitutionality of NRS 126.211, we do not do so here.

Appendix A

There is a constitutional right of access to family court proceedings

Falconi contends that the press and the public have a constitutional right of access to family court proceedings and that NRS 125.080, EDCR 5.207, and EDCR 5.212 cannot withstand strict scrutiny because they permit closure of family court proceedings without granting the district court discretion to determine whether the closure is narrowly tailored to serve a compelling interest. We agree.

The United States Supreme Court has held that the public has a constitutional right of access to criminal trials and noted that "historically both civil and criminal trials have been presumptively open." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 & n.17, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). Since that case, the Supreme Court has yet to explicitly recognize a First Amendment right to access civil proceedings, but every federal circuit court that has considered the issue has concluded that the constitutional right applies in both criminal and civil proceedings. *Courthouse News Servs. v. Planet* (*Planet III*), 947 F.3d 581, 590 (9th Cir. 2020) (citing to multiple cases, including cases that recognize the same). While this court has yet to have the opportunity to consider whether the constitutional right to access applies to civil proceedings, or even more specifically family law proceedings, we have followed the United States Supreme Court's precedent and held that it applies in criminal proceedings. *Stephens Media*, 125 Nev. at 860, 221 P.3d at 1248.

Given the "constant tension between the interest in public disclosure and privacy concerns," courts generally use the "experience and logic test" to determine whether there is a constitutional right of access. *Courthouse News Servs. v. Brown*, 908 F.3d 1063, 1069-70 (7th Cir. 2018). Under this test, courts consider "whether a proposed right reflects a well-developed tradition of access to a specific process and whether the right 'plays a significant role in the functioning of the particular process in question.'" *Id.* at 1070 (quoting *Press-Enter. Co. v. Superior Ct.* (*Press-Enter. II*), 478 U.S. 1, 8, 106 S.Ct. 2736, 92 L.Ed.2d 1 (1986) (considering the right of access to preliminary hearings in criminal proceedings)). Even if there is an affirmative answer to the experience and logic test, the presumption of a First Amendment right of access can be overcome when the closure is necessary to preserve a compelling interest and is narrowly tailored to serve that interest. *Press-Enter. II*, 478 U.S. at 13-14, 106 S.Ct. 2735.

Civil proceedings are presumptively open

We take this opportunity to expand our discussion in *Stephens Media*, which concluded that there is a right to access criminal proceedings, and hold that the right to access also applies in civil proceedings, including family law proceedings.

The presumption of open proceedings is grounded in both history and logic, as "the tradition of openness can be traced back to sixteenth-century English common law, which carried over to colonial America . . . [and] existed as common practice before the United States Constitution

was ratified." *Stephens Media*, 125 Nev. at 859, 221 P.3d at 1247 (citing *Press-Enter. Co. v. Superior Ct.* (*Press-Enter. I*), 464 U.S. 501, 505-08, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984), and *Richmond Newspapers*, 448 U.S. at 589, 100 S.Ct. 2814 (Brennan, J., concurring)); *see also Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1068 (3d Cir. 1984) (recognizing a tradition of openness for civil trials in English common law). "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known." *Press-Enter I*, 464 U.S. at 508, 104 S.Ct. 819. Thus, courts have recognized that "[o]penness in judicial proceedings enhances both the basic fairness of the proceeding and the appearance of fairness so essential to public confidence in the system, and forms an indispensable predicate to free expression about the workings of government." *Planet III*, 947 F.3d at 589 (internal citations and quotation marks omitted).

In light of the important role open court proceedings play, and in accordance with the jurisdictions that have considered this issue, we conclude there is a presumption that civil proceedings must be open, just like criminal proceedings. *See, e.g.*, *NBC Subsidiary (KNBC-TV), Inc. v. Superior Ct.*, 20 Cal.4th 1178, 86 Cal.Rptr.2d 778, 980 P.2d 337, 359-61 (1999) (concluding that "in general, the First Amendment provides a right of access to ordinary civil trials and proceedings" after recognizing that the United States Supreme Court "has not accepted review of any of the numerous lower court cases that have

found a general First Amendment right of access to civil proceedings" and providing that "we have not found a single lower court case holding that generally there is no First Amendment right of access to civil proceedings").

Further, we conclude there is no reason to distinguish family law proceedings from civil proceedings in this context. Traditionally, across the nation, family law proceedings are, and have been, presumptively open. *See* W. Thomas McGough, Jr., *Public Access to Divorce Proceedings: A Media Lawyer's Perspective*, 17 J. Am. Acad. Matrim. Law, 29, 31 (2001) (citing to both 24 Am. Jur. 2d *Divorce and Separation* § 303 (1998), and constitutional provisions from 24 states that guarantee public access to courts); 24 Am. Jur. 2d *Divorce and Separation* § 283 (2023); *see also*, *e.g.*, *In re Burkle*, 135 Cal.App.4th 1045, 37 Cal. Rptr. 3d 805, 816-17 (2006) (recognizing that family law proceedings are presumptively open across the country); *In re Rajea T.*, 203 A.D.3d 1714, 165 N.Y.S.3d 647, 651 (2022) ("This fundamental presumption of public access to judicial proceedings applies equally to matters heard in Family Court." (internal quotation marks and punctuation omitted)); *N.J. Div. of Youth and Fam. Servs. v. J.B.*, 120 N.J. 112, 576 A.2d 261, 269 (1990) (recognizing that while there may often be circumstances warranting a closure of parental rights termination proceedings, those proceedings cannot be automatically closed and the court must consider the circumstances of each individual case in determining if closure is appropriate); *Copeland v. Copeland*, 930 So. 2d 940, 941 (La. 2006) (explaining that, in light of the presumption of open proceedings, an action cannot be closed or sealed merely because it

involves the custody of minor children); *France v. France*, 209 N.C.App. 406, 705 S.E.2d 399, 408 (2011) (providing in a child custody action that "[w]hile a trial court may close proceedings to protect minors in certain situations . . . we can find no case supporting the closing of an entire proceeding merely because some evidence relating to a minor child would be admitted"). While Minter and two of the amici argue that this court need only consider whether family law proceedings in Nevada have been traditionally open, we conclude the constitutional question is not one of Nevada's history regarding family law proceedings, but one of whether family law proceedings have historically been open across the United States. *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150, 113 S.Ct. 2004, 124 L.Ed.2d 60 (1993) (concluding that "the 'experience' test of *Globe Newspaper* [*Co. v. Superior Court for Norfolk Cnty.*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982)] does not look to the particular practice of any one jurisdiction, but instead to the experience in that *type* or *kind* of hearing throughout the United States" (internal quotation marks omitted)). Thus, because family law proceedings have been historically open nationwide, the first part of the experience and logic test has been met.[7]

Next, we must consider the logic portion of the test, and we conclude that open family law proceedings play

7. While our dissenting colleagues provide an exhaustive history of early family law cases and tradition, they do not address the more recent family law precedent across the country and do not consider precedent applying the requisite experience and logic test and concluding that the historical evidence supports a tradition of open family court proceedings.

a significant role in the functioning of the family court, warranting a presumption of open access. *Press-Enter. II*, 478 U.S. at 8-12, 106 S.Ct. 2735 (describing the experience and logic test as applied to criminal preliminary hearings and noting with regard to the logic test "that public access to criminal trials and the selection of jurors is essential to the proper functioning of the criminal justice system"). As the Ninth Circuit has recognized, "[t]he right of access is . . . an essential part of the First Amendment's purpose to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Planet III*, 947 F.3d at 589 (internal citations and quotations omitted). And as described by the Second Circuit Court of Appeals, "public access to civil trials enhances the quality and safeguards the integrity of the factfinding process, fosters an appearance of fairness, and heightens public respect for the judicial process—an essential component in our structure of self government." *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984) (internal quotations and citations omitted); *see also Del Papa v. Steffen*, 112 Nev. 369, 374, 915 P.2d 245, 249 (1996) ("[O]pen court proceedings assure that proceedings are conducted fairly and discourage perjury, misconduct by participants, and biased decision making."). This is especially important in a state where citizens elect their judges because it ensures that the public has the necessary knowledge to serve as a check on the judicial branch on election day. *See Del Papa*, 112 Nev. at 374, 915 P.2d at 249 ("The operations of the courts and the judicial conduct of judges are matters of utmost public concern." (internal quotation marks omitted)). Further, as Falconi argues, and we agree, having open

family law proceedings is important because many family law parties appear pro se and open proceedings provide such litigants with examples of what they can expect in their own case. Accordingly, because both portions of the experience and logic test are met, we conclude that civil proceedings, and specifically family law proceedings, are presumptively open.

The presumption cannot be overcome because the rules and NRS 125.080 are not narrowly tailored

Once the presumption of a constitutional right of access attaches, that presumption can only be overcome "if 'closure is essential to preserve higher values and is narrowly tailored to serve those interests.'" *Planet III*, 947 F.3d at 595 (quoting *Press-Enter. II*, 478 U.S. at 13-14, 106 S.Ct. 2735). Thus, to overcome the presumption, one must show three things: (1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest could be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest. *Press-Enter. II*, 478 U.S. at 13-14, 106 S.Ct. 2735.

We acknowledge that there is an interest in protecting litigants' privacy rights in family law proceedings, as those proceedings apply wholly to their private lives. *See*, *e.g.*, *In re Marriage of Burkle*, 135 Cal. App.4th 1045, 37 Cal. Rptr. 3d 805, 807-18 (2006). However, a litigant's privacy interests do not automatically overcome the press's and the public's right to access court proceedings. In fact, the majority of jurisdictions to have considered this issue

have concluded that when there are no extraordinary circumstances present, the public's right to access family law proceedings outweighs the litigants' privacy interests. Laura W. Morgan, *Strengthening the Lock on the Bedroom Door: The Case Against Access to Divorce Records On Line*, 17 J. Am. Acad. Matrim. Law. 45, 59 (2001) ("[T]he trend in the case law has been clear: divorce court records are open to the public, and the privacy rights of the individual must yield to the First Amendment when all factors are equal.").

EDCR 5.207 automatically closes child custody actions, and NRS 125.080 and EDCR 5.212 require closure upon a party's request, eliminating the district court's discretion to weigh when a closure is warranted and when the public's right of access warrants keeping the proceeding open. Additionally, they prevent the district court from considering alternatives to closure that might protect the parties' privacy while still keeping the proceeding open. In any other proceedings in Nevada, before a district court can close those proceedings "(1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; (2) the closure must be no broader than necessary to protect the overriding interest; (3) the trial court must consider reasonable alternatives to closing the proceeding; and (4) the trial court must make findings adequate to support the closure." *Feazell v. State*, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995) (internal quotation marks omitted).

It should be noted that the closure of various family law proceedings can and will be warranted in various

instances. What we recognize today is the critical importance of the public's access to the courts and the role that thoughtful, reasoned judicial decision-making plays in identifying the compelling interests at stake and determining; (1) if and when to order closure in any proceeding, be it family, civil, or criminal in nature; and (2) to what extent such closure should apply. We conclude that family court parties' privacy interests do not warrant a different standard for closed proceedings. The test that district courts apply on a case-by-case basis in closing proceedings in all other matters in Nevada can and will sufficiently protect family court parties' privacy interests. Failure to consider whether to close a proceeding on a case-by-case basis, which is not a significantly high burden, falls short of the *Press-Enterprise II* requirement that closure is narrowly tailored to serve a compelling interest. 478 U.S. at 13-14, 106 S.Ct. 2735. Accordingly, because family law proceedings are presumptively open and NRS 125.080, EDCR 5.207, and EDCR 5.212 preclude the district court from applying the balancing test to overcome that presumption on a case-by-case basis, they are unconstitutional in this regard.[8]

CONCLUSION

NRS 125.080, EDCR 5.207, and EDCR 5.212 violate the constitutional right to access court proceedings.

8. Because we conclude that EDCR 5.207 and EDCR 5.212 are unconstitutional to the extent they permit closed court proceedings without the exercise of judicial discretion, we need not address Falconi's argument that SRCR 3(5)(c) and SCR 230 preempt them.

Family law proceedings are presumptively open, as they have been traditionally open across the country and the openness of the proceedings plays a significant role in the functioning of the family court. Because NRS 125.080, EDCR 5.207, and EDCR 5.212 preclude the district court's exercise of discretion in closing proceedings, they are not narrowly tailored to serve a compelling interest. Thus, we hold that NRS 125.080, EDCR 5.207, and EDCR 5.212 are unconstitutional to the extent they permit closed court proceedings without the exercise of judicial discretion. Accordingly, we grant Falcom's petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order denying media access in the underlying child custody case.

/s/_____
Herndon

We concur:

/s/_____, C.J.
Cadish

/s/_____, J.
Pickering, J.

/s/_____, Sr. J.
Silver

STIGLICH, J., with whom PARRAGUIRRE and BELL, JJ., agree, dissenting:

Today's disposition errs in treating all family law cases uniformly and in treating family law cases the same as all other civil proceedings. Family law encompasses many types of proceedings with disparate origins and traditions of openness and should be distinguished from other civil proceedings in these regards. As to divorce and child custody proceedings specifically, neither distinct traditions of openness nor logic support finding a First Amendment qualified right of public access. And as no right of access exists, strict scrutiny does not apply, and the controlling standards dictate that a different result should be reached.

Before inquiring into these traditions, it is important to note that the disposition renders an advisory opinion. This writ petition arises from a child custody proceeding, not a divorce proceeding. The disposition, however, invalidates an uninvolved divorce statute that is not at issue here. To reason that the divorce statute can be struck because rules pertaining to child custody proceedings are based on it is an improper way to evaluate a statute's constitutionality. *Cf. Echeverria v. State*, 137 Nev. 486, 489, 495 P.3d 471, 475 (2021) (rephrasing a certified question to avoid addressing a related but not presented issue because doing otherwise would render an advisory opinion); *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) ("This court's duty is not to render advisory opinions but, rather, to resolve actual controversies by an enforceable judgment."). This reflects another facet of the misstep of treating all family law cases as alike.

While the disposition correctly notes that the court must look to the historic experience of the type of hearing in determining the tradition of openness, the analysis does not do so, instead relying on a general assertion of traditional openness. Courts properly look to the origins of the specific type of proceeding in assessing its experience of openness. *See*, *e.g.*, *N.J. Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 201 (3d Cir. 2002) (noting the lack of a tradition of openness in deportation proceedings and concluding that there is no First Amendment right of access in such matters); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 11-12 (1st Cir. 1986) (considering the history of civil discovery proceedings and concluding that it does not exhibit a tradition of openness). The disposition takes the opposite approach, going so far as to state that civil proceedings, writ large, are presumptively open. This is incorrect. The majority's reliance on *NBC Subsidiary (KNBC-TV), Inc. v. Superior Ct.*, 20 Cal.4th 1178, 86 Cal.Rptr.2d 778, 980 P.2d 337 (1999), for the proposition that civil law proceedings must be open misapplies that decision. *NBC Subsidiary* stated that no court has held that the right of access, as a general matter, cannot be found to apply to a civil proceeding. *Id.*, 86 Cal.Rptr.2d 778, 980 P.2d at 358-59. This does not entail that the right of public access *does* apply to *all* civil proceedings. The most *NBC Subsidiary* stands for in this regard is a presumption of openness for "ordinary civil trials," and that court significantly provided that its holding did not apply to "particular proceedings governed by specific statutes" such as the Family Code. *Id.*, 88 Cal.Rptr.2d 778, 980 P.2d at 361 & n.30. To extend this reasoning to encompass all proceedings that may colorably be called "family law" proceedings conflicts with the Supreme

Court's direction to consider openness as to the *particular type* of hearing. *El Vocero de Puerto Rico (Caribbean Int'l News Corp.) v. Puerto Rico*, 508 U.S. 147, 150, 113 S.Ct. 2004, 124 L.Ed.2d 60 (1993).

When the United States Supreme Court has considered the tradition of openness in criminal proceedings, it has examined the origins of the jury system in England before the Norman Conquest and observed that the public character of trials remained constant. *Press-Enter. Co. v. Superior Ct.*, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 565-66, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (Burger, C.J., plurality opinion). As is obvious, this matter does not involve the right of public access to criminal proceedings at any stage. The opinion here strikes a statute concerning divorce proceedings, NRS 125.080, and rules concerning child custody and maintenance, EDCR 5.207, and proceedings in the family division, EDCR 5.212. In determining whether there is a right of public access, the court should look to the specific traditions of those types of proceedings. *El Vocero de Puerto Rico*, 508 U.S. at 150-51, 113 S.Ct. 2004 (providing that the "experience" test looks "to the experience in that *type* or *kind* of hearing" (internal quotation marks omitted)). The historical backdrop of each type of family proceeding radically departs from that of the criminal proceedings examined by the Supreme Court.[1]

1. The disposition's response to the ensuing analysis as not taking into account recent developments misapprehends the standard. As the hallmark Supreme Court analyses of this right show, what matters are the origins of the type of proceeding.

Appendix A

Let us begin with divorce. Historically, while criminal matters invariably proceeded in open fora, divorce actions did not. The English tradition provided the context in which the United States Constitution was adopted and is instructive for interpreting these principles of our organic law. *Richmond, Newspapers*, 448 U.S. at 569, 100 S.Ct. 2814; *see Worthington v. Dist. Ct. of Second Jud. Dist.*, 37 Nev. 212, 230, 142 P. 230, 237 (1914) (providing that "the law of divorce as it existed at and prior to the time of the adoption of the Constitution should be considered" in reviewing a constitutional challenge to a durational residence statute). When the Constitution was adopted, sole jurisdiction for divorce actions in England lay with ecclesiastical courts, where it remained until 1857. *Worthington*, 37 Nev. at 230-31, 142 P. at 237; *Morgan v. Foretich*, 521 A.2d 248, 252 (D.C. 1987).

Early American authorities recognized this tradition. *Schwab v. Schwab*, 96 Md. 592, 54 A. 653, 655 (1903) ("[O]ur predecessors said that the decisions of the English ecclesiastical courts have been uniformly cited and relied on as safe and authoritative guides for the courts of this state in disposing of divorce cases."). In *Scott v. Scott*, Viscount Haldane described to the House of Lords the closed practices of the ecclesiastical courts:

> [I]t was not their practice to take evidence viva voce in open Court. The evidence was taken in the form of depositions before commissioners, who conducted their proceedings in private. The parties were not represented at this stage in the fashion with which we are familiar. When a witness was tendered for examination the

> commissioners could, in the course of taking his deposition, put to him interrogatories delivered by the other side, but there was no cross-examination, or, for that matter, examination-in-chief, of the parties. Each side could tender witnesses, but until the evidence was complete neither side was allowed to see the depositions which had been taken. After the commissioners had finished their work, what was called publication took place. This did not mean that the evidence was published to the world, but only that the parties had access to it.

[1913] AC 417 (HL) 417, 433 (appeal taken from Eng.), https://www.iclr.co.uk/wp-content/uploads/media/vote/1865-1914/Scott_ac1913-1-417.pdf. The practice described in *Scott* is hardly what we would now describe as an open court. The experience in ecclesiastical courts thus did not feature an abiding "public character" akin to that of criminal matters that led the Supreme Court to find a presumption of openness. *Press-Enter.*, 464 U.S. at 506-08, 104 S.Ct. 819.

The disposition's statement that "family law" proceedings were traditionally open does not consider the tradition of divorce proceedings, conflates all family law proceedings as arising from the same tradition, and is mistaken.[2] Absent a presumption of openness in divorce

2. While the disposition cites a law journal article's observation that 24 state constitutions have open-court provisions, this proposition is of little use here, given that it neglects to differentiate between types of proceedings. *See San Bernardino Cnty. Dep't of Pub. Soc. Servs. v. Superior Ct.*, 232 Cal.App.3d

188, 283 Cal. Rptr. 332, 343 n.9 (1991) (rejecting that juvenile proceedings may be simplistically labeled "civil" or "criminal" without engaging with the unique attributes of that type of proceeding); *Morgan*, 521 A.2d at 252 n.11 ("Although technically classified as civil cases, family proceedings do not have the same historical presumption of openness as discussed above."). Moreover, these constitutional provisions have yielded disparate outcomes, as, for instance, Louisiana's open-court provision has been held to require open divorce proceedings, *Copeland v. Copeland*, 966 So. 2d 1040, 1045 (La. 2007), while Delaware's has not, *C. v. C.*, 320 A.2d 717, 728 (Del. 1974). And of course, the Nevada Constitution features no such provision. Other decisions relied on in this context also lack the force given to them. *In re Burkle*, 135 Cal. App.4th 1045, 37 Cal. Rptr. 3d 805, 816-17 (2006), does not recognize that family law proceedings were presumptively open across the country; rather, *Burkle* did not consider any nationwide practice but did "find nothing to suggest that, in general, civil trials in divorce cases have not historically been open to the public just as any other civil trial," *id.* at 814. *Burkle*, however, offered no supporting authorities for this bare statement and did not examine the tradition of divorce proceedings. As the discussion here shows *Burkle*'s factual proposition to be incorrect, *Burkle* is not persuasive in this regard. Similarly, *In re Rajea T.*, 203 A.D.3d 1714, 165 N.Y.S.3d 647, 651 (2022), is not instructive, considering that its presumption of openness rests on a New York rule providing "[t]he Family Court is open to the public," N.Y.C.R.R. § 205.4, consistent with a statutory right of openness, N.Y. Jud. § 4 (providing that court proceedings are public with certain exceptions stated). *N.J. Div. of Youth & Fam. Servs. v. J.B.*, 120 N.J. 112, 576 A.2d 261, 269 (1990), meanwhile presumes that termination-of-parental-rights proceedings *will be closed* to the public, not open. *Copeland v. Copeland*, 930 So. 2d 940, 941 (La. 2006), rests its openness determination on a controlling state constitutional provision, *cf.* La. Const. Art. 1, § 22 ("All courts shall be open. . . . "). And the court in *France v. France*, 209 N.C.App. 406, 705 S.E.2d 399, 408 (2011), stated that a matter should not

proceedings, NRS 125.080 should not be reviewed for strict scrutiny but rather for whether it has a rational basis. Finding a rational basis to permit parties to close divorce proceedings is not hard, and the Supreme Court has done so in a different context, observing that "the common-law right of inspection has bowed before the power of a court to insure that its records are not 'used to gratify private spite or promote public scandal' through the publication of 'the painful and sometimes disgusting details of a divorce case.'" *Nixon v. Warner Comm'ns, Inc.*, 435 U.S. 589, 598, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978) (quoting *In re Caswell*, 18 R.I. 835, 29 A. 259 (1893)).

The nature of divorce law establishes further the distance of its tradition from that of civil proceedings more generally. The ecclesiastical courts were not common law courts, but rather "administered the unwritten law of the realm" on matters within their jurisdiction, *Foote v. Nickerson*, 70 N.H. 496, 48 A. 1088, 1089 (1901). Given that there has not been an ecclesiastical-court tradition in the United States, adopting the common law did not incorporate a body of divorce law in the states of the United States, and states built their doctrines of divorce law by statutory enactment. *Worthington*, 37 Nev. at 231, 142 P. at 237; *cf. Ex parte Burrus*, 136 U.S. 586, 593-94, 10 S.Ct. 850, 34 L.Ed. 500 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws

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be closed unless a specific statutory mandate closing that type of proceeding applies, such as one closing adoption proceedings. *France* would support the constitutionality of the provisions invalidated here.

of the United States."). Two aspects warrant particular mention in this regard.

First, in early American practice, the legislature itself would issue a divorce as a "legislative declaration by special act." *People ex rel. Christiansen v. Connell*, 2 Ill.2d 332, 118 N.E.2d 262, 266 (1954); *see also C. v. C.*, 320 A.2d at 726 ("Since our first divorce statute in 1832, it has been recognized that divorce jurisdiction emanated solely from the act of the General Assembly and not from common law."); *cf. Crane v. Meginnis*, 1 G. & J. 463, 474 (Md. 1829) ("[D]ivorces in this State from the earliest times have emanated from the General Assembly, and can now be viewed in no other light, than as regular exertions of legislative power."). Legislatures ultimately granted courts jurisdiction over divorce proceedings but retained the paramount role in setting forth the procedure and substantive law regarding divorce. *Christiansen*, 118 N.E.2d at 266; *see also Worthington*, 37 Nev. at 234-35, 142 P. at 238 (collecting cases supporting the propositions that jurisdiction regarding divorce is purely statutory and that legislatures are empowered to enact controlling provisions).

Second, the central role of a legislature in this regard arises from the subject regulated itself. As the United States Supreme Court has recognized, "[m]arriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature." *Maynard v. Hill*, 125 U.S. 190, 205, 8 S.Ct. 723, 31 L.Ed. 654 (1888). The Florida Supreme

Court has relatedly observed that "[s]ince marriage is of vital interest to society and the state, it has frequently been said that in every divorce suit the state is a third party whose interests take precedence over the private interests of the spouses." *Posner v. Posner*, 233 So. 2d 381, 383 (Fla. 1970). A legislature has a heightened role in enacting statutes to implement a state's public policy regarding divorce, as divorce is historically apart from the common law tradition and involves matters of elevated public policy significance. The Nevada Legislature has enacted a statute permitting parties to a divorce to close the proceedings at their discretion. The court here should be reticent to overturn the Legislature's expression of public policy.

Just as family law cases cannot be treated as a monolith alongside other civil proceedings, matters now regarded collectively as family law proceedings do not emerge from like traditions of openness. And so I conclude that the tradition of child custody proceedings does not support a presumption of openness either, but for different reasons. Traditionally, courts have placed the best interests of the child as the paramount aim of custody proceedings and have not felt bound by strict procedural rules, tolerating closed proceedings where the circumstances warrant.

Unlike the strict ecclesiastical jurisdiction governing divorce proceedings, child custody matters were customarily placed within chancery courts. *In re Morgan*, 117 Mo. 249, 21 S.W. 1122, 1123 (1893). Except when resolved as incident to a separate action for divorce, a custody action would commence by application to the

chancellor or by petition for a writ of habeas corpus. *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624, 626 (1925) (Cardozo, J.); William Pinder Eversley, *The Law of the Domestic Relations* 545 (London, Stevens & Haynes 1885). This approach was well established in both American and English law. *State ex rel. Herrick v. Richardson*, 40 N.H. 272, 274 (1860).

Analogous to the special interest the legislature takes in matters of divorce, the court traditionally occupied a role distinct from that of more general litigation. In the seminal chancery court case *De Manneville v. De Manneville*, the court explained that it adjudicated custody matters as parens patriae, exercising power as the representative of the monarch in resolving the habeas petition however best served the child. *De Manneville v. De Manneville* (1804), 32 Eng. Rep. 762, 765. In describing the Anglo-American tradition in this regard, Judge Cardozo recognized that the chancellor here does not adjudicate a dispute between two parties but rather acts as parens patriae "to do what is best for the interest of the child," as though "in the position of a 'wise, affectionate, and careful parent,' . . . 'by virtue of the prerogative which belongs to the Crown as parens patriae.'" *Finlay*, 148 N.E. at 626 (quoting a Queen's Bench decision); *see also Pearce v. Pearce*, 136 Ala. 188, 33 So. 883, 884 (1903) ("The character and purpose of the proceedings [involving child custody] are different from an action where only the rights of the parties litigating are involved."). In the United States, the court stands in parens patriae as the representative of the people, duty bound to protect children and act in their best interests. *Helton v. Crawley*, 241 Iowa 296, 41 N.W.2d 60, 70 (1950).

This role—and its extreme delicacy—was deemed "indispensable to good order and the just protection of society" and is of a long provenance in our system of law. *People ex rel. Brooks v. Brooks*, 35 Barb. 85, 87-88 (N.Y. Gen. Term. 1861). And so, from this tradition, the court has had its own role in custody proceedings, as distinguishable from simply adjudicating a dispute between two parties.

In determining what best served a child's interest in custody adjudications, courts have traditionally been less constrained by formal rules, and a tradition of openness ascribable to civil cases cannot be extended to include custody proceedings. Courts have distinguished custody proceedings from those cases "proceed[ing] under the common-law system of procedure" to conclude that strict pleading rules do not apply. *People ex rel. Keator v. Moss*, 6 A.D. 414, 39 N.Y.S. 690, 692 (1896). A court in these matters traditionally "is not bound down by any particular form of proceeding," which may include proceedings in open court or resolving the matter "from its own knowledge alone," so long as it considers all of the circumstances. *Cowles v. Cowles*, 8 Ill. (3 Gilm.) 435, 438 (1846). The court may traverse beyond "ordinary modes of trial," examine a child privately, and withhold information concerning a parent's character, so long as the decision promotes the child's welfare. *Dumain v. Gwynne*, 92 Mass. (10 Allen) 270, 275 (1865). Simply, the court "may interfere at any time and in any way to protect and advance [the child's] welfare and interests." *In re Bort*, 25 Kan. 308, 310 (1881). An early treatise explained the procedure more fully, explaining that a custody hearing pursuant to a habeas petition proceeded without a jury,

characterizing it more as an inquisition than a trial. Lewis Hochheimer, *A Treatise on the Law Relating to the Custody of Infants* 70-71 (Baltimore, Harold B. Scrimger 3d ed. 1899). The outcome should not turn on any procedural technicality, and the court is not limited "to the ordinary modes of trial," should seek out "the exact truth," and "may examine the child privately." *Id.* at 71; *see also* Eversley at 526 (recognizing that private examination of a child may be warranted for sensitive questions regarding religion). Both the role of the court and the nature of the proceedings are distinguishable from those of civil proceedings generally, and the tradition of child custody proceedings does not exhibit a custom of openness. Therefore, I would not conclude that a First Amendment qualified right of public access is present in such matters.

Logic should militate against finding a presumption of openness as well. In presuming that custody proceedings be open, the disposition limits what rules may be enacted to facilitate proceedings to only what may survive strict scrutiny. This places an obstacle on the court's pursuit of the child's best interests, by presuming that openness rather than privacy best serves the child. It also burdens parties who are in a delicate and possibly traumatic situation with proving that privacy is a narrowly tailored means to attain a compelling state interest.

The Florida Supreme Court reached an analogous outcome in concluding that a statute mandating the closure of adoption proceedings was constitutional. *In re Adoption of H.Y.T.*, 458 So. 2d 1127, 1128 (Fla.

1984). It noted that the court in such proceedings had a different role than disinterestedly resolving claims from competing parties, given that the court must serve the best interests of the child. *Id.* The court declined to subject parties to an adoption to the burden of showing that their privacy interests should be protected where the legislature by statute enacted the public policy of protecting privacy rights in that context. *Id.* at 1128. Florida courts later upheld the constitutionality of statutes closing termination-of-parental-rights proceedings with the same reasoning, *Nat. Parents of J.B. v. Fla. Dep't of Child. & Fam. Servs.*, 780 So. 2d 6, 10-11 (Fla. 2001), and dependency proceedings by extension of *H.Y.T., Mayer v. State*, 523 So. 2d 1171, 1174-75 (Fla. Dist. Ct. App. 1988).

California decisions involving the law's treatment of children show how protecting their interests requires paying more heed to protecting their privacy. In the juvenile justice context, the California Court of Appeal upheld a confidential-records statute because privacy served protective and rehabilitative purposes, consistent with the aims of the juvenile justice system "to promote [the minor's] best interests, facilitate rehabilitation or family reunification, and protect the minor from present and future adverse consequences and unnecessary emotional harm." *People v. Connor*, 115 Cal.App.4th 669, 9 Cal. Rptr. 3d 521, 533 (2004). Similarly, the risk that third parties would obtain damaging information and deny future opportunities to minors posed an unjustifiable threat to the juvenile court's rehabilitative goals. *T.N.G. v. Superior Ct.*, 4 Cal.3d 767, 94 Cal.Rptr. 813, 484 P.2d 981, 988 (1971). This reasoning has been

carried over to dependency proceedings, where privacy serves the rehabilitative purpose of the proceedings. *San Bernardino Cnty. Dep't of Pub. Soc. Servs. v. Superior Ct.*, 282 Cal.App.3d 188, 283 Cal. Rptr. 332, 340 (1991). Neither experience nor logic support concluding that there is a qualified right of public access to custody proceedings. This is not to say that there is not considerable value to openness, but that interest should be balanced with relevant privacy interests as a matter of public policy.

Further, the public policy consequences of the disposition are concerning. By concluding—without any appropriate consideration of different types of proceedings—that family law proceedings are both traditionally open and logically should be publicly accessible, the analysis renders presumptively unconstitutional NRS 127.140(1) (making adoption proceedings confidential), NRS 128.090(5) (closing court for termination-of-parental-rights proceedings), and undoubtedly other comparable statutes. The opinion thus poses a significant risk to the enacted public policy that these and other statutes represent. The traditions of divorce and child custody demonstrate a long-standing recognition that public policy has an outsized role in these subjects. The Legislature's critical role in setting forth—with the input and participation of members of the community—what should be open and under what circumstances should not be lightly cast aside. Because today's disposition has misconstrued authority it critically relies upon, has invalidated a statute not properly at issue, has neglected to specifically consider the types of proceedings at issue and accordingly has not recognized

the relevant traditions of those proceedings, and has reached a broad holding that will upend large swathes of law, I respectfully dissent.

/s/_____
Stiglich

I concur:

/s/_____, J.
Parraguirre

/s/_____, J.
Bell

APPENDIX B — ORDER OF THE EIGHTH JUDICIAL DISTRICT COURT IN CLARK COUNTY, NEVADA, FILED AUGUST 19, 2022

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

Case No.: D-08-402901-C
Dept No.: E

TROY MINTER

VS.

JENNIFER EASLER

MEDIA REQUEST AND ORDER FOR CAMERA ACCESS TO COURT PROCEEDINGS

Alex Falconi of Our Nevada Judges, requests permission to broadcast, record, photograph or televise proceedings in the above-entitled case in the courtroom of Dept. No. E, the Honorable Judge Charles Hoskin commencing on the 23 day of August, 20. 22

I certify that I am familiar with the contents of Nevada Supreme Court Rules 229-249, inclusive, and understand this form MUST be submitted to the Court at least TWENTY-FOUR (24) hours before the proceedings commence, unless good cause can be shown. IT IS FURTHER UNDERSTOOD that approved media must arrange camera pooling prior to any hearing, without asking this Court to mediate disputes.

Appendix B

DATED this 17 day of August, 2022.

/s/ Alex Falconi
Alex Falconi
Media Representative

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

The Court determines camera access to proceedings, in compliance with the court's policy, ☐ WOULD ☐ WOULD NOT distract participants, impair the dignity of the court or otherwise materially interfere with the achievement of a fair trial or hearing herein;

Therefore, the Court hereby ☒ DENIES ☐ GRANTS permission for camera access to Alex Falconi of Our Nevada Judges, as requested for each and every hearing on the above-entitled case, at the discretion of the judge, and unless otherwise notified. This Order is in accordance with Nevada Supreme Court Rules 229-249, inclusive, and is subject to reconsideration upon motion of any party to the action.

IT IS FURTHER ORDERED that this entry shall be made a part of the record of the proceedings in this case.

Appendix B

DATED this 19th day of August, 2022.

/s/ Charles J. Hoskin
27B 618 7544 9E28
Charles J. Hoskin
District Court Judge

APPENDIX C — ORDER TO SEAL RECORDS OF THE EIGHTH JUDICIAL DISTRICT COURT, FAMILY DIVISION, CLARK COUNTY, NEVADA, FILED AUGUST 18, 2022

EIGHTH JUDICIAL DISTRICT COURT
FAMILY DIVISION
CLARK COUNTY, NEVADA

Case No.: D-08-402901-C
Department: E

TROY A. MINTER,

Plaintiff,

vs.

JENNIFER R. EASLER,

Defendant.

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08/18/2022 5:10 PM

/s/_____
CLERK OF THE COURT

Appendix C

OSFD
Rena G. Hughes, Esq.
Nevada State Bar Number: 3911
THE ABRAMS & MAYO LAW FIRM
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Attorney for Plaintiff

ORDER TO SEAL RECORDS
PURSUANT TO NRS 125.110(2)

Upon written request of Plaintiff, Troy A. Minter, by and through his attorney of record, Rena G. Hughes, Esq., of The Abrams & Mayo Law Firm, and pursuant to NRS 125.110(2), which states:

> 1. In any action for divorce, the following papers and pleadings in the action shall be open to public inspection in the clerk's office:
>
> (a) In case the complaint is not answered by the defendant, the summons, with the affidavit or proof of service; the complaint with memorandum endorsed thereon that the default of the defendant in not answering was entered, and the judgment; and in case where service is made by publication, the affidavit for publication of summons and the order directing the publication of summons.

(b) In all other cases, the pleadings, the finding of the court, any order made on motion as provided in Nevada Rules of Civil Procedure, and the judgment.

2. All other papers, records, proceedings and evidence, including exhibits and transcript of the testimony, shall, upon the written request of either party to the action, filed with the clerk, be sealed and shall not be open to inspection except to the parties or their attorneys, or when required as evidence in another action or proceeding.

THEREFORE, IT IS HEREBY ORDERED that all documents filed with the clerk in the above-entitled action except for pleadings, findings of the Court, Orders made on motion as provided in the Nevada Rules of Civil Procedure and any judgments, shall be and are hereby sealed.

Dated this 18th day of August, 2022

/s/_____

E2A 84E D6AD 279C
Charles J. Hoskin
District Court Judge

Appendix C

Respectfully submitted:

THE ABRAMS & MAYO LAW FIRM

/s/ Rena G. Hughes, Esq.
Rena G. Hughes, Esq. (3911)
6252 South Rainbow Blvd., Suite 100
Las Vegas, Nevada 89118
Attorney for Plaintiff

APPENDIX D — DENIAL OF REHEARING OF THE SUPREME COURT OF THE STATE OF NEVADA, FILED MAY 13, 2024

IN THE SUPREME COURT OF
THE STATE OF NEVADA

No. 85195

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 JUDGE,

Respondents,

and

TROY A. MINTER; AND JENNIFER R. EASLER,

Real Parties in Interest.

ORDER DENYING REHEARINGS

The rehearing petitions filed on March 18, 2024, and April 3, 2024, are denied. NRAP 40(c).

It is so ORDERED.[1]

1. Patricia Lee, Justice, and Abbi Silver, Justice (ret.) did not participate in the decision in this matter.

Appendix D

/s/ Cadish, C.J.
Cadish

/s/ Pickering, J.
Pickering

/s/ Herndon, J.
Herndon

STIGLICH, PARRAGUIRRE, and BELL, JJ., dissenting:

Pursuant to our previous dissent, we would grant rehearing in this matter. Therefore, we dissent.

/s/ Stiglich, J.
Stiglich

/s/ Parraguirre, J.
Parraguirre

/s/ Bell, J.
Bell

APPENDIX E — RELEVANT STATUTORY PROVISIONS

Rule 5.207. Complaints for custody.

Unless otherwise ordered, a case involving a complaint for custody or similar pleading addressing child custody or support between unmarried parties shall be construed as proceeding pursuant to chapter 126 of the Nevada Revised Statutes (Parentage) and the issue of parentage shall be addressed at the first hearing and in a written order in the case.

[Amended; effective June 11, 2022.]

Appendix E

EDCR Rule 5.212. Trial and hearings may be private.

(a) Except as otherwise provided by another rule or statute, the court shall, upon demand of either party, direct that the hearing or trial be private.

(b) Except as otherwise provided in subsections (c) or (d), upon such demand of either party, all persons must be excluded from the court or chambers wherein the action is tried, except:

(1) The officers of the court;

(2) The parties;

(3) The counsel for the parties and their staff;

(4) The witnesses (including experts);

(5) The parents or guardians of the parties; and

(6) The siblings of the parties.

(c) The court may, upon oral or written motion of either party or on its own motion, for good cause shown exclude the parents, guardians or siblings of either party, or witnesses for either party, from the court or chambers wherein the hearing or trial is conducted.

(d) If the court determines that the interests of justice or the best interest of a child would be served, the court may permit a person to remain, observe, and hear relevant

portions of proceedings notwithstanding the demand of a party that the proceeding be private.

(e) The court shall retain supervisory power over its own records and files, including the electronic and video records of proceedings. Unless otherwise ordered, the record of a private hearing, or record of a hearing in a sealed case, shall be treated as confidential and not open to public inspection. Parties, their attorneys, and such staff and experts as those attorneys deem necessary are permitted to retain, view, and copy the record of a private hearing for their own use in the representation. Except as otherwise provided by rule, statute, or court order, no party or agent shall distribute, copy, or facilitate the distribution or copying of the record of a private hearing or hearing in a sealed case (including electronic and video records of such a hearing). Any person or entity that distributes or copies the record of a private hearing shall cease doing so and remove it from public access upon being put on notice that it is the record of a private hearing.

[Added; effective June 11, 2022.]

Appendix E

NRS 125.080 Trial of divorce action may be private.

1. In any action for divorce, the court shall, upon demand of either party, direct that the trial and issue or issues of fact joined therein be private.

2. Except as otherwise provided in subsection 3, upon such demand of either party, all persons must be excluded from the court or chambers wherein the action is tried, except:

(a) The officers of the court;

(b) The parties;

(c) The counsel for the parties;

(d) The witnesses for the parties;

(e) The parents or guardians of the parties; and

(f) The siblings of the parties.

3. The court may, upon oral or written motion of either party, order a hearing to determine whether to exclude the parents, guardians or siblings of either party, or witnesses for either party, from the court or chambers wherein the action is tried. If good cause is shown for the exclusion of any such person, the court shall exclude any such person from the court or chambers wherein the action is tried.

[43:19:1865; B § 948; BH § 2462; C § 2543; RL § 4863; NCL § 8405] + [3:222:1931; 1931 NCL § 9467.05]—(NRS A 2007, 188)