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To: The Judiciary Committee
Re: SB432

I do intend to provide public comment on April 9 at 1 p.m. on behalf of the Nevada Press Association ('NPA'), the Nevada Open Government Coalition ('NOGC'), and Our Nevada Judges, Inc. (ONJ). What follows are detailed concerns that cannot be summarized in two (2) minutes. While we support the repeal of the unconstitutional NRS 125.080 and NRS 125.110, we oppose the remainder of the bill.

It was not just the American Civil Liberties Union and the Las Vegas Review Journal that supported and ultimately prevailed[1] in nullification of this Legislature's close-on-demand laws; a legal aid coalition consisting of the Legal Aid Center of Southern Nevada, Northern Nevada Legal Aid, Nevada Legal Services, and Volunteer Attorneys of Rural Nevada, emphatically denounced the closed-door practices of the family court for:

> [C]reat[ing] a "clubby" atmosphere where the only "outsiders" are the litigants, especially unrepresented litigants, who are the ones with rights at stake. Moreover, "the professionals in the system are by and large well educated, middle-class, and predominately white. Meanwhile, many of the accused parents and their children are members of racial minority groups and virtually all are extremely poor with little formal education." Against this landscape, private or closed hearings and trials only exacerbate unfairness to pro se litigants because it allows this clubby system to exist behind closed doors.

[1] As mentioned in the text of the bill, the Supreme Court struck down the statute in *Falconi v. Eighth Jud. Dist. Ct.*, 140 Nev. Adv. Op. 8, 543 P.3d 92 (2024).

Media coverage of non-family court proceedings vastly outnumbers family court coverage, but several recent events have sharply increased the public interest in the operation of the family court, including the Houston-Prince case[2], the Scott MacDonald case[3], the Doug Crawford case[4], and the Gary Guymon case[5].

The Supreme Court has already instructed the judiciary on the strict scrutiny test. Treating family law cases differently than other criminal and civil cases is the first step in the wrong direction.

We urge the repeal of NRS 125.080, NRS 125.110, NRS 126.211, and NRS 128.090, because these laws bypass or unconstitutionally restrict the judiciary's obligation to consider First Amendment requirements of public access.

We urge the rejection of every section of the bill that contemplates sealing considerations because the Supreme Court Rules on Sealing and Redaction, which apply to all civil cases, provide the necessary procedure and guidance in a manner consistent with First Amendment requirements of public access. Indeed, a comparison of the bill's referenced NRS 205.4617 with SRCR 2(6) exposes serious issues with the proposed statutory scheme in that even publicly accessible documents would have to be redacted to exclude virtually all relevant information, automatically, with no exercise of judicial discretion.

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[2] A divorce lawyer, Joe Houston, shot dead his son's ex and opposing counsel, Dennis Prince. Family Court Judges Bill Henderson and Dawn Throne allowed comprehensive electronic coverage of the proceedings.

[3] John Scott MacDonald, a now disbarred divorce lawyer, stands accused of stealing money connected to interpleader actions. Justice of the Peace Amy Chelini and District Court Judge Michele Leavitt are allowing comprehensive electronic coverage of the proceedings.

[4] Doug Crawford, a divorce lawyer, stood accused of sexually exploiting clients and employees. He bargained dismissal of charges in exchange for his disbarment. The District and Justice Courts allowed comprehensive electronic coverage.

[5] Gary Guymon, a defense and family law attorney, stands accused of pimping his clients and solicitation of murder. Justices of the Peace Suzan Baucum and Noreen Demonte are allowing comprehensive electronic coverage of the proceedings, which are ongoing.

We especially urge the rejection of sections that conflate access principles with prior restraint. The criminalization of publication as a category C felony implicates conduct far beyond family court and fails to recognize the reality that members of the public and press routinely post "personal identifying information" listed under NRS 205.4617, the definition of which is so broad as to include a person's name.

First Amendment principles place the balancing test in the hands of our judges. The public has an interest in the operation of all of our courts, including family court.

Thank you,

Alexander M. Falconi

ADDENDUM

ADDENDUM

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALEXANDER FALCONI, PETITIONER, v. EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; and THE HONORABLE CHARLES HOSKINS, DISTRICT COURT JUDGE, RESPONDENTS. And TROY A. MINTER; JENNIFER R. EASLER, REAL PARTIES IN INTEREST.	**Supreme Court No.: 85195**

BRIEF OF AMICI CURIAE LEGAL AID CENTER OF SOUTHERN NEVADA, NEVADA LEGAL SERVICES, NORTHERN NEVADA LEGAL AID and VOLUNTEER ATTORNEYS FOR RURAL NEVADANS

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For Amici Curiae Attorneys

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. Legal Aid Center of Southern Nevada, Inc., Nevada Legal Services, Northern Nevada Legal and Volunteer Attorneys for Rural Nevadans are legal services organizations providing legal services to indigent clients throughout the State of Nevada. Amici do not have parent corporations and do not represent any party in this action.

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INTERESTS OF AMICI CURIAE

Amici Curiae, LEGAL AID OF SOUTHERN NEVADA, INC., NEVADA LEGAL SERVICES, NORTHERN NEVADA LEGAL AID and VOLUNTEER ATTORNEYS FOR RURAL NEVADANS, represent low income Nevadans in family court. Their advocates experience the issues facing economically disadvantaged parties and the unfairness of private trials and hearings. Amici also provide self-help assistance to pro se parties in family court and their specialized experience informs the opinions and arguments set forth below. These amici have been invited to submit this brief in this Court's August 23, 2022 Order, to address the court access issues raised in this matter. Doc. # 22-26230. These amici oppose private hearings and trials and support the position of Petitioner, ALEXANDER FALCONI.

SUMMARY OF ARGUMENT

In the Petition for Writ of Mandamus, Petitioner argues that Eighth Judicial District Court Judge Hoskin abused his discretion in ordering a case sealed, after granting a father's objection to Our Nevada Judges' request to provide electronic media coverage of a custody matter. In denying Our Nevada Judges' request, Judge Hoskin first sealed certain records pursuant to NRS 125.110(2) and then denied access to Our Nevada Judges by summarily citing the same provision and general privacy concerns under SCR 230(2)(b). Petitioner argued that 1) sealing a non-divorce action under NRS 125.110(2) was improper; 2) sealing certain filings in a case does not warrant closing all hearings in the same proceeding to the press and the public; and 3) generic privacy concerns, without specific findings, do not justify denial of a request for coverage based on SCR 230(2)(b). Judge Hoskin's ruling is not easily squared with case law and the historical presumption of openness of Nevada's courts.

While the right of access or open courts is not unfettered, a party seeking to close a hearing must adhere to Nevada's process to do so. The party demanding a private hearing or the sealing of records must show that there is a compelling privacy or safety reason that outweighs the public's interest in the open hearing. Yet, the rules at issue here do not require any showing of a compelling interest when a party demands a private hearing, completely extinguishing Nevada's well-settled presumption of openness.

Ensuring that courts are fairly run is critical, especially when pro se litigants are involved in the court process. Low income and pro se litigants already face extraordinary obstacles in accessing courts. In family court, studies show that the majority of parties are unrepresented. The odds are already stacked against poor and marginalized groups in family court just given how the system operates. Private or closed hearings, which allows the court system to operate in secrecy, only leads to more potential for abuse without any public oversight.

If a party can simply request to close a courtroom, with no showing of a compelling interest in doing so, then judicial abuse, bias, and unfairness is allowed to run unchecked. Public access ensures that justice is carried out fairly. It serves to "provide a means by which citizens scrutinize and check the use and possible abuse of judicial power…" *In re Marriage of Tamir*, 72 Cal. App. 5th 1068, 1085 (2021). For instance, press access in civil hearings are what led to the overhaul of the guardianship court system in Nevada in 2017. If not for media reporting, the abuses in guardianship would never have come to light. Public access serves to ensure "that courts are fairly run and judges are honest." *Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458, 461 (10th Cir. 1980). Access to the court and a free press are fundamental to maintaining trust and confidence in our justice system.

ARGUMENT

Nevada's private family hearings and trials laws stand alone in the United States. W. Thomas McGough, Jr., *Public Access to Divorce Proceedings*, 17 Am. Acad. Matrim. Law 29, 32(2001). Nevada is the only state that "requires divorce proceedings be private 'upon demand of either party.'" *Id.* (citing NRS 125.080). Nevada's outlier status in this regard disproportionately affects low-income Nevadans in family court cases. The desire of the rich and famous to avoid media exposure or gain a tactical advantage should not hold sway over the economically disadvantaged who may avoid court or feel compelled to give in to the tactical advantage of a closed hearing or trial.

I. HISTORICALLY, CIVIL CASES HAVE BEEN PRESUMPTIVELY OPEN TO THE PUBLIC AND THE MEDIA.

A. Presumption of Openness.

Civil and criminal proceedings are presumptively open. *See Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 580 n.17 (1980) (noting that while not the question presented, "historically both civil and criminal trials have been presumptively open."). Absent a compelling government interest that is narrowly tailored for that interest, the courts of this state should be open to any person at reasonable times. *Id.* at 577; *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 607, (1982); *Del Papa v. Steffen*, 112 Nev. 369, 374, 915 P2d 245, 248 (1996). "Openness promotes public understanding, confidence, and acceptance of judicial processes and results, while

secrecy encourages misunderstanding, distrust, and disrespect for the courts." *Del Papa* at 374 (citing *Richmond* 448 U.S at 569-73).

The Supreme Court has established a two-part test for determining whether the First Amendment right of access extends to family court hearings. First, the court must decide whether the type of proceeding at issue has traditionally been conducted in an open fashion. Second, the court must determine whether public access would serve as a curb on prosecutorial or judicial misconduct or would further the public's interest in understanding the proceeding. *Oregonian Publishing Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1465 (9th Cir. 1990).

In England and America, family courts, and even child custody disputes, have historically been open and public. Mary Gofen, *The Right of Access to Child Custody and Dependency Cases,* 62 U. Chi. L. Rev. 857, 867 (Spring, 1995). By 1931, nineteen states had statutes allowing public access to divorce proceedings. *Id.* And we have already seen how private hearings and trials invites judicial misconduct and mistrust in the legal system. *Del Papa*, 112 Nev. at 375, 915 P.2d at 249. Under the two-part *Oregonian* analysis, the First Amendment right to access family court hearings and trials has been well-established.

B. Weighing Privacy Interests and the Presumption of Openness.

This right of access may be overcome if private hearings and trials "preserve higher values and [are] narrowly tailored to serve that interest." *Courthouse News Service v. Planet,* 947 F.3d 581, 595 (9th Cir. 2020). Trust and confidence in the legal

system is almost always of the highest value. Thus, any exception to the presumption of openness must be narrowly tailored. For example, a compelling governmental interest that would allow for closure of a public hearing could be protecting the privacy of a sexual abuse victim or the victim of some other crime. A distinction should be made between embarrassment and safety, with the former providing no basis to seek a private hearing or trial.

Nevada already has recognized this safeguard through SRCR 3. SRCR 3 starts with the presumption that court records and court hearings and trials are open to the public, but closing a hearing is "justified by identified compelling privacy or safety interests that outweigh the public interest in access to the court record." SRCR 3(4); *see also Howard v. State,* 128 Nev 736, 744, 291 P.3d 137, 142 (2012) (stating that the presumption of openness "may be abridged only where the public right of access is outweighed by a significant competing interest").

Here, both EDCR 5.207 and EDCR 5.212 fail to meet this standard. Neither require the party invoking the rules to show cause for closing the court proceedings nor do they require the court to make any findings justifying the closure. In fact, under these rules, if any party simply demands the court close the proceedings, then the court must do so and has no discretion in addressing the demand. In essence, this rule is the exception that swallows the presumption of openness.

II. PRO SE PARTIES FACE DAUNTING ODDS IN ACCESSING COURT

A. Closed Hearings Exacerbate Already Existing Obstacles for Low-Income and Marginalized Litigants in Accessing Courts.

In 2017, the Legal Services Corporation found that 86% of those with legal problems experienced inadequate assistance or no assistance at all. Kathryn M. Kroeper et al., *Underestimating the Unrepresented: Cognitive Biases Disadvantage Pro Se Litigants in Family Law Cases*, 26 Psychol., Pub. Pol'y & L., No. 2, 198 at 198-199 (2020).[1] Access to the court constitutes a fundamental right, *Christopher v. Harbury,* 536 U.S. 403 (2002) and Nevada allows judges to make a "reasonable accommodation" so that a pro se litigant may be "fairly heard" to exercise their fundamental right. Judicial Canon 2.2, n.4

Yet, getting to court is only part of the battle. Researchers have found that judges evaluate pro se litigants as having less meritorious cases (despite identical case content). Kroeper, *supra* at 203. "[L]egal officials devalue the merit of pro se parties' cases and, in turn, this cognitive bias has consequences for how pro se litigants are expected to fare in the courtroom." *Id.* at 206. Studies show 87.1% of white judges "showed implicit preference for whites," and 44.2% of Black judges "showed implicit preference for blacks." Solangel Maldonado & Eleanor Bontecou, *Bias in the Family:*

[1] http://ncsc.org/_data/assets/pdf--_file/0023/42845/vdq-underestimating-the-unrepresented-072820.pdf.

Race, Ethnicity, and Culture in Custody Disputes, SFLAC Family Law Conference at 22 (2021).[2]

Many times the judges, attorneys, social workers, etc. who practice in specialized areas, such as guardianship and custody, routinely interact with each other on many different cases. This creates a "clubby" atmosphere where the only "outsiders" are the litigants, especially unrepresented litigants, who are the ones with rights at stake. Moreover, "the professionals in the system are by and large well-educated, middle-class, and predominately white. Meanwhile, many of the accused parents and their children are members of racial minority groups and virtually all are extremely poor with little formal education." Amy Sinden, *"Why Won't Mom Cooperate?" A Critique of Informality in Child Welfare Proceedings*, 11 Yale J.L. & Feminism 339 (1999). Against this landscape, private or closed hearings and trials only exacerbate unfairness to pro se litigants because it allows this clubby system to exist behind closed doors.

The odds are already stacked against low income and marginalized groups in accessing the courts and navigating the legal system. Allowing private hearings and trials to continue will only exacerbate already-existing barriers to fairness and justice,

[2] http://www.courts.oregon.gov/programs/family/sflac/Conference%20Materials/FLC.21.Keynote.Materials.pdf.

and discourage many individuals from even trying to access the courts. Secrecy and privacy in court leads to unjust decisions and denies access to court.

B. Barriers Imposed by These Rules in Accessing Courts Have Equal Protection Implications.

The majority of parties in family court are unrepresented. Tonya L. Brito et al., *Negotiating Race and Racial Inequality in Family Court*, 36 Inst. For Res. On Poverty, No. 4, at 1 (2020).[3] The majority of this unrepresented group "is disproportionately composed of people of color." *Id.* at 3.

In the 1970's, "nearly every litigant who brought or defended a matter in state court was represented by counsel." Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 Conn. L. Rev. 741, 743 (2015). Today, in family law, domestic violence, landlord-tenant, and small claims cases, "states report . . . seventy to ninety-eight percent involve at least one unrepresented litigant." *Id.* This lack of representation affects outcomes and fairness in that represented parties "achieve favorable outcomes two to ten times more often than pro se litigants." *Id.* at 744. In Philadelphia, eighty-nine percent of child custody litigants lack the assistance of counsel. *Id.* at 750. In Maryland, seventy-six percent of those seeking protective orders are unrepresented. *Id.* at 750-751. In California, eighty percent of family law cases have at least one unrepresented party. *Id.* at 751.

[3] https://irp.wisc.edu/wp/wp-content/uploads/2021/01/Focus-36-4b.pdf

A seminal study in Baltimore housing court found "systemic silencing of unrepresented tenants, who are primarily female and black, and who are often denied even a basic opportunity to present their side of the case." *Id.* at 756. In April of 2003, the Superior Courts of California prepared a report finding about half of the pro se parties wanted to avoid litigation. Superior Courts of California, *Action Plan to Assist Self-Represented Litigants* at 5 (April 2003).[4] The Honorable Nathan "Tod" Young pointed out unrepresented parties are "almost always people living under financial strain: yes, the poor." Nathan "Tod" Young, *The Bench, the Bar and the Unrepresented: One Judge's View*, Nevada Lawyer, September 2014, 11. Judge Young bemoaned the lack of knowledge of many pro se parties who do not understand the "laws and rules concerning their problems. One more feature applies to many . . .: they are anxious, sometimes flat-out scared." *Id.* at 13. Closed trials and hearings exclude support networks for the pro se parties, allowing secrecy to "encourage[] misunderstanding, distrust, and disrespect for the courts." *Del Papa,* 112 Nev. at 375, 915 P.2d at 249. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Oregonian Publishing Co.,* 920 F.2d at 1465.

When protected and marginalized groups compose the majority of these pro se litigants, the private hearing and trial rules arguably denies equal protection of law. An

[4] https://www.courts.ca.gov/partners/documents/nevada_sierra.pdf

equal protection violation treats members of one group differently than others. "The basis for a successful disparate impact claim involves a comparison between two groups — those affected and those unaffected by the facially neutral policy. . . . An appropriate statistical measure must therefore take into account the correct population base and its racial makeup." *Darensburg v. Metro. Transp. Comm'n,* 636 F.3d 511, 519-520 (9th Cir. 2011). Generally, when hearings and trials are private, the population bases are pro se and non-pro se. When pro se litigants delay or avoid filing because they know their legal matter will be private, this denies access to court. Since legal outcomes are worse for pro se parties, and pro se parties are disproportionately women and people of color, private hearings and trials will violate equal protection. While the rules allowing private hearings and trial predate the current case before the Court, sustaining these policies perpetuates unfairness and discrimination and chokes access to the court and vindication of fundamental issues.

III. PUBLIC ACCESS TO COURTS SHINES LIGHT ON ABUSES OF POWER, WHICH LEADS TO MEANINGFUL CHANGE.

Keeping the courtroom open to the public eye provides a crucial check to this otherwise biased system. *See Richmond*, 448 U.S. at 569 ("Open court proceedings assure that the proceedings are conducted fairly and discourage perjury, misconduct by participants, and biased decision making."). Shining light on the miscues and abuses in the system, through public access to the proceedings, has been the catalyst for significant changes in the past.

Take guardianship proceedings in Nevada as an example. While the proceeding may not have been closed or private per se, it was the lack of hearings and public eyes on the cases that allowed a broken system to persist for as long as it did. It became routine for the courts to rubber-stamp requests without a hearing or meaningful review, and many guardians abused their authority without any oversight for far too long. Local reporting from the press, like the case of April Parks, exposed the abuses occurring in the guardianship system, and created the momentum that led to the complete overhaul of the guardianship system. One is left to wonder what might have happened during that time if corrupt guardians had the luxury of these new rules through which they could have unilaterally demanded that hearings and trials be closed. The guardianship example, court access jurisprudence, and history generally have all shown that transparency in the court system exposes abuses and provides an important check to prevent arbitrary judicial decisions.

Private hearings and trials pose a real threat to pro se parties, who are overwhelmingly poor and from marginalized groups, having meaningful access to the court. The odds are already stacked against pro se litigants just given how the court system operates typically, so private hearings and trials simply add additional barriers to them accessing the court, and hides this reality from public view.

CONCLUSION

Nevada already provides a process, in SRCR 3, that allows private hearings and trials when a party's privacy interest outweighs the public's right of access. It bears repeating: "secret judicial proceedings" undermine "public confidence in this court and the judiciary"; while "[o]penness promotes public understanding, confidence, and acceptance of the judicial processes. . . ." *Del Papa,* 112 Nev. at 373-374, 915 P.2d. at 248. The Rules at issue here simply go too far in protecting privacy interests and would create unneccesary additional obstacles to pro se litigants access to court. This Court can reverse the trend of unfairness and inequity by limiting the application of private hearings and trials to cases of a compelling privacy or safety concern and not just on the whim of any party.

CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14 point Times New Roman.

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Finally, I hereby certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 2,825 words.

DATED this 3rd day of November 2022.

Respectfully submitted:
LEGAL AID CENTER OF SOUTHERN NEVADA, INC.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Legal Aid Center of Southern Nevada and that on this 3rd day of November 2022, I served a true and correct copy of the foregoing **BRIEF OF AMICI CURIAE LEGAL AID CENTER OF SOUTHERN NEVADA, NEVADA LEGAL SERVICES, NORTHERN NEVADA LEGAL AID and VOLUNTEER ATTORNEYS FOR RURAL NEVADANS** by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; addressed to the following:

NONE

Electronic service of the foregoing document shall be made in accordance with the Master Service List, pursuant to NEFCR 9, as follows:

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