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12 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
13 IN AND FOR THE COUNTY OF WASHOE**

14 In the Matter of THE DOE 1 TRUST,
15 _____/

16 CASE NO: PR23-00813
17 DEPT NO: PR

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19 **OBJECTION TO PROBATE COMMISSIONER’S RECOMMENDATION**

20 COMES NOW, Our Nevada Judges, Inc., a Nevada non-profit corporation
21 (“ONJ”), by and through the undersigned counsel, and hereby files an objection to
22 the Probate Commissioner’s Recommendation¹ filed August 19, 2024.

23 This objection is based upon the following memorandum of points and
24 authorities.

25
26 **MEMORANDUM OF POINTS AND AUTHORITIES**

27 **The Proceedings Have Been Unconstitutionally Closed**

28 The press has a constitutional right of access to civil proceedings, and such
proceedings are *presumed* open to the public. *Falconi v. Eighth Jud. Dist. Ct.*, 140
Nev., Adv. Op. 8, 543 P.3d 92, 97 (2024).

¹ Although the order in question is titled *Request and Order re Electronic Coverage of Court Proceedings*, it is signed by the Probate Commissioner and subject to review by the Probate Judge in accordance with WDCR 57.3.

1 The Probate Commissioner cites an existing order in this case closing all
2 hearings filed January 26, 2024 as justification for denial of camera access. In
3 essence, the Commissioner cites the same rationale considered and rejected by the
4 *Falconi Court* in the context of domestic relations matters; that a statute may permit
5 the automatic closure of court proceedings without a requirement for a party
6 seeking closure to show a compelling interest and that closure be narrowly tailored
7 to serve that compelling interest. The aforementioned order, which ONJ has not
8 seen because the order itself is also sealed², according to the Probate
9 Commissioner's recommendation, relies upon NRS 164.041 and NRS 669A.256.
10 These statutes, however, do not trump overriding First Amendment issues anymore
11 than NRS 125.080 did in the *Falconi* matter; statutes categorically and arbitrarily³
12 barring physical access to domestic relations matters are as unavailing as a basis to
13 categorically and arbitrarily bar physical access to trust proceedings.
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17 We take this opportunity to expand our discussion in *Stephens*
18 *Media*, which concluded that there is a right to access criminal
19 proceedings, and hold that the right to access also applies in civil
20 proceedings, including family law proceedings.

21 *Falconi v. Eighth Jud. Dist. Ct., Id* at 97.

22 The *Falconi Court* reiterated “there is no reason to distinguish family law
23 proceedings from civil proceedings[.]” *Id.* The Probate Commissioners concern
24 about potentially exposing the identities and financial information of beneficiaries
25

26 ² The Supreme Court Rules prohibit the paradoxical practice of sealing a sealing order.
27 SRCR 3(5)(c)(vi).

28 ³ A statute or rule providing that a party’s mere invocation or demand would trigger
closure of the court was categorically rejected by the *Falconi Court*. The same analysis
applies to NRS 164.041 and NRS 669A.256.

1 and other family members is just as baseless in family law situations as it is in this
2 particular trust-related case - both are simply civil cases which are not exempt from
3 constitutional requirements.

4
5 [T]here is an interest in protecting litigants' privacy rights in family law
6 proceedings as those proceedings apply wholly to their private lives,
7 as is the case here." See, e.g., *In re Marriage of Burkle*, 37 Cal. Rptr. 3d
8 805, 807-18 (Ct. App. 2006). However, a litigant's privacy interests do
9 not automatically overcome the press's and the public's right to
10 access court proceedings under the First Amendment. In fact, the
11 majority of jurisdictions to have considered this issue have concluded
12 that when there are no extraordinary circumstances present, the
13 public's right to access family law proceedings outweighs the litigants'
14 privacy interests.

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16 *Falconi v. Eighth Judicial Dist. Court, Id.* at 98.

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18 [E]very federal circuit court that has considered the issue has
19 concluded that the constitutional right applies in both criminal and civil
20 proceedings. *Courthouse News Serv. v. Planet (Planet III)*, 947 F.3d 581,
21 590 (9th Cir. 2020) (citing to multiple cases, including cases that
22 recognize the same).

23
24 *Falconi v. Eighth Judicial Dist. Court, Id.* at 96.

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26 The Probate Commissioner's Recommendation does not make particularized
27 findings on the nebulous safety and confidentiality concerns raised, and does not
28 conduct the "strict scrutiny" analysis⁴ mandated by the *Falconi Court*. The
Legislature's intentions in closing cases involving trusts, however, is no more
relevant than its intentions in codifying NRS 125.080 closing certain family law
proceedings, which was found to be unconstitutional by the *Falconi* court as the

⁴ Statutes and rules are unconstitutional that "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[.]" *Falconi v. Eighth Judicial District Court, Id.* at 96.

1 United States Constitution is the supreme Law of the Land. U.S. Const. art. VI, § 2
2 that may not be circumvented by the Nevada Legislature.

3 The Nevada Supreme Court did not strike down NRS 125.080 lightly. There are
4 profound reasons that go far beyond the interests of Parties that serve as a
5 counterweight in favor of public access. The *Falconi Court* cited *Press-Enterprise*
6 *Co. v. Superior Ct.*, 478 U.S. 1, 8 (1986) in referencing the two-pronged First
7 Amendment analysis, within which are a number of important observations, the
8 most relevant of which is the lack of a jury. The *Press-Enterprise Court* recognized
9 efforts to rely on the lack of a jury to distinguish from other precedents allowing
10 public access; however, in doing so, the majority not only soundly rejected the basis
11 but countered that “the absence of a jury...makes the importance of public access
12 to a preliminary hearing even more significant” because the jury is “an inestimable
13 safeguard against the corrupt or overzealous prosecutor and against the complaint,
14 biased, or eccentric judge.” Public complaints of “compliant” and “biased” judges
15 can be weighed when the public and press have access to Court proceedings, and
16 “one of the important means of assuring a fair trial is that the process be open to
17 neutral observers” because the “interests [of parties’ and the public] are not
18 necessarily inconsistent.” The *Falconi Court* also relied upon *Del Papa v. Steffen*,
19 112 Nev. 369, 374, 915 P.2d 245, 249 (1996), in pointing out not only the positive
20 benefits of “open court proceedings” but conversely “the threat that secret judicial
21 proceedings pose to public confidence in this court and the judiciary.” Namely, that
22 “secrecy encourages misunderstanding, distrust, and disrespect for the courts.” *Id.*
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1 Even if this Court came to the conclusion that NRS 164.041 and NRS
2 669A.256 conferred the discretion to close these proceedings, NRS 164.041(3) and
3 NRS 669A.256(2) can also confer discretion enabling the *Falconi Court's* strict
4 scrutiny analysis to occur. Compare *Falconi v. Sec'y of Nev.*, 129 Nev. 260, 299 P.3d
5 378 (2013) (relying upon NRS 217.464(2)(b) to shoehorn in the constitutional
6 principles necessary to save the statutory scheme.) Even if this Court does not
7 strike down the statutes relied upon to close the Court, it would still be compelled to
8 interpret the law in a way that would allow for the Constitutional analysis to occur.
9 This is because “[w]hen the language of a statute admits of two constructions, one
10 of which would render it constitutional and valid and the other unconstitutional and
11 void, that construction should be adopted which will save the statute.” *State v.*
12 *Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 553 (2010).

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15 This Court should reject the Probate Commissioner’s recommendations
16 categorically refusing to open the court to the public absent an identified
17 compelling interest in closure and narrowly tailored restrictions that serve that
18 particular interest.
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20 **The Probate Commissioner Exceeded His Discretion In Analyzing the Camera**
21 **Access Rules**
22

23 From the courtroom to the living room, public access and press coverage
24 builds legal literacy and judicial trust: "It is not unrealistic even in this day to believe
25 that public inclusion affords citizens a form of legal education and hopefully
26 promotes confidence in the fair administration of justice." *State v. Schmit*, 273 Minn.
27 78, 87-88, 139 N. W. 2d 800, 807 (1966). "Instead of acquiring information about
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1 trials by firsthand observation or by word of mouth from those who attended, people
2 now acquire it chiefly through the print and electronic media. In a sense, this
3 validates the media claim of functioning as surrogates for the public.” *Richmond*
4 *Newspapers*, 448 U. S. 525, 573 (1980).
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6 Nevada’s Supreme Court has bravely and fully embraced transparency, court
7 access, and freedom of the press in its rules directing how Nevada courts are to be
8 administered and in its cases interpreting the law. “[T]here is a presumption that all
9 courtroom proceedings that are open to the public are subject to electronic
10 coverage.” SCR 230(2). “This is especially important in a state where citizens elect
11 their judges because it ensures that the public has the necessary knowledge to
12 serve as a check on the judicial branch on election day.” *Falconi v. Eighth Judicial*
13 *Dist. Court*, *Id.* at 98.
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15 The Probate Commissioner’s reliance on SCR 230(2)(b) is reasonable but,
16 misapplied and in excess of his discretion. This is because the rules of electronic
17 coverage concern the use of a camera. In other words, the mere information or
18 knowledge that certain persons will appear at the hearing do not serve as a
19 justification to deny camera access, and instead are properly before a probate
20 commissioner under the strict scrutiny analysis required by the *Falconi Court*.
21 Instead, SCR 230(2)(b) concerns itself with the video and audio footage recorded by
22 the camera itself. It would certainly be within the discretion of a court to bar
23 electronic coverage of certain persons apparently in some unusual danger due to
24 being recorded, but the same camera could and should still be used to record
25 arguments between counsel and the judge or commissioner himself. This is
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CERTIFICATE OF SERVICE

I certify that on the date shown below, I caused service to be completed of a true and correct copy of the foregoing document by:

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NAMES OF COUNSEL WITHHELD FROM COURT DOCKET

DATED this Aug 21, 2024

By: /s/ Luke Busby