LINA MARIE WILLSON, Petitioner, *v.* THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CARSON CITY; and THE HONORABLE JAMES E. WILSON, District Judge, Respondents, and THE STATE OF NEVADA, Real Party in Interest.

No. 84353-COA

February 8, 2024, as amended February 22, 2024 547 P.3d 122

Original petition for a writ of certiorari challenging an order of the district court denying an appeal from a judgment of conviction, entered pursuant to a bench trial, of obstructing a public officer.

Petition granted.

Charles H. Odgers, Public Defender, Carson City, for Petitioner.

Aaron D. Ford, Attorney General, Carson City; *Jason Woodbury*, District Attorney, and *Peter W. Smith* and *Sarah E. White*, Deputy District Attorneys, Carson City, for Real Party in Interest.

Before the Court of Appeals, Gibbons, C.J., and Bulla and Westbrook, JJ.

CORRECTED OPINION[1]

Per Curiam:

In this opinion, we consider constitutional challenges to NRS 197.190, which provides that a person may not "willfully hinder, delay or obstruct any public officer in the discharge of official powers or duties." Petitioner Lina Marie Willson was charged and convicted under NRS 197.190 after yelling from her front yard at several police officers, who were attending to a separate, potentially life-threatening matter involving a juvenile on the street near Willson's house. After the district court affirmed her misdemeanor conviction, Willson petitioned for a writ of certiorari, arguing that NRS 197.190 is unconstitutionally overbroad or vague. We conclude that (1) NRS 197.190 applies only to physical conduct or fighting words that are specifically intended to hinder, delay, or obstruct a public officer and, therefore, (2) NRS 197.190, as construed by this court, is not unconstitutionally overbroad or vague, either on its face or as applied to Willson.

Although we hold that Willson's as-applied claims fail, we recognize that Willson's claims implicate the sufficiency of the evidence in light of our interpretation of NRS 197.190. Since the district court

[1]This corrected opinion is issued in place of the opinion filed on February 8, 2024.

did not have the benefit of our interpretation of NRS 197.190 as applying only to physical conduct and fighting words, it did not consider whether there was sufficient evidence to support Willson's conviction. Accordingly, we grant the petition and direct the clerk of this court to issue a writ of certiorari upholding NRS 197.190's constitutionality and instructing the district court to reconsider Willson's direct appeal for the sole purpose of addressing whether, under this court's interpretation of NRS 197.190, sufficient evidence supported Willson's conviction.

FACTS AND PROCEDURAL HISTORY

On March 25, 2021, the Carson City Sheriff's Office responded to a call indicating a juvenile was contemplating suicide. Sergeant Mike Cullen was the first officer to arrive and saw the juvenile walking down a residential road with a knife in his hands. Sergeant Cullen followed the juvenile in his car and attempted to communicate with him. At some point, the juvenile stopped in the street, and Sergeant Cullen got out of his car and continued to communicate with the juvenile from a distance. The juvenile pressed the knife into his body a couple of times and stated he wanted to kill himself. In accord with his training, Sergeant Cullen attempted to build rapport with the juvenile to prevent the juvenile from committing suicide.

Shortly thereafter, more officers arrived on the scene. One officer, Deputy Nicholas Simpson, maintained a position with a beanbag shotgun while the other officers attempted to deescalate and control the scene. Deputy Simpson was to use the beanbag shotgun if the public or the officers became at risk. Approximately 15 minutes after the officers arrived on scene, the juvenile dropped the knife. Sergeant Cullen believed the situation was unstable up until that moment.

At some point during these 15 minutes, while the officers were interacting with the juvenile, Willson, who lived next door to where the incident was taking place, started yelling at the officers and the juvenile from the middle of her front lawn. Willson continued to yell at the officers even though two deputies had asked her to stop yelling several times.[2] The officers generally could not recall what Willson was yelling, although Sergeant Cullen heard Willson yell at some point that "she was a witness of some sort."

The officers testified that Willson did not leave her yard, did not threaten them with violence, and did not throw anything at them. Nevertheless, the officers testified that Willson's yelling was loud and disruptive and delayed their attempts to get the juvenile to drop the knife because it interfered with their ability to build rapport and

[2]Deputy Simpson testified that he asked Willson to stop yelling between three and five times.

interact with the juvenile. Deputy Simpson also testified that he had to put down the beanbag shotgun to address Willson because of her yelling, which put the officers at risk. Eventually, Willson's behavior "stopped enough" to where the officers were able to get the juvenile over to the curb, and the juvenile dropped the knife.

Thereafter, the State charged Willson with obstructing a public officer in violation of NRS 197.190, and Willson was convicted after a bench trial in Carson City Justice Court. Willson appealed her conviction to the district court, arguing that NRS 197.190 was unconstitutionally overbroad and vague both on its face and as applied to her. The district court denied the appeal, holding NRS 197.190 was not unconstitutionally overbroad or vague because the statute required both due notice and the specific intent to obstruct a public officer.[3] Wilson then filed this petition for a writ of certiorari.

ANALYSIS

In this petition, Willson challenges the constitutionality of NRS 197.190. This court is authorized to review a petition for a writ of certiorari in cases where a district court has passed upon the constitutionality of a statute on appeal from justice court. *See* Nev. Const. art. 6, § 4(1); NRS 34.020(3). "The constitutionality of a statute is a question of law that we review de novo." *Silvar v. Eighth Jud. Dist. Ct.*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006). "Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional." *Id.*

Willson argues NRS 197.190 is unconstitutionally overbroad and vague, both on its face and as applied to her. "The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" *Ford v. State*, 127 Nev. 608, 612, 262 P.3d 1123, 1125 (2011) (quoting *Chicago v. Morales*, 527 U.S. 41, 52 (1999)). The First Amendment of the United States Constitution prohibits the government from abridging an individual's freedom of speech.[4] U.S. Const. amend. I; *Busefink v. State*, 128 Nev. 525, 529, 286 P.3d 599, 602 (2012). "The vagueness doctrine holds that '[a] conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *Ford*, 127

[3]Respondent, the Honorable James E. Wilson, decided Willson's appeal and entered the challenged order. He has since retired, and the Honorable Kristin N. Luis has succeeded him in Department Two of the First Judicial District Court.

[4]The First Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

Nev. at 612, 262 P.3d at 1125 (alteration in original) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

To determine whether NRS 197.190 is overbroad or vague, we must first interpret NRS 197.190 to determine what the statute prohibits. *See id.* at 612, 262 P.3d at 1126 ("The first step in both overbreadth and vagueness analysis is to construe the challenged statute."); *see also United States v. Hansen*, 599 U.S. 762, 770 (2023) ("To judge whether a statute is overbroad, we must first determine what it covers."). After interpreting NRS 197.190, we determine whether NRS 197.190, as construed by this court, is overbroad or vague, either on its face or as applied to Willson.

NRS 197.190 prohibits physical conduct or fighting words that are specifically intended to hinder, delay, or obstruct a public officer in the discharge of official powers or duties

NRS 197.190 was enacted as part of the Crimes and Punishments Act of 1911, *reprinted in* Nev. Rev. Laws § 6805, at 1928 (1912), and has not been amended by the Legislature or interpreted in a published decision by the Nevada appellate courts since its enactment. The statute reads as follows:

> Every person who, after due notice, shall refuse or neglect to make or furnish any statement, report or information lawfully required of the person by any public officer, or who, in such statement, report or information shall make any willfully untrue, misleading or exaggerated statement, or who shall willfully hinder, delay or obstruct any public officer in the discharge of official powers or duties, shall, where no other provision of law applies, be guilty of a misdemeanor.

NRS 197.190.

When interpreting a statute, this court's "primary goal . . . is to give effect to the Legislature's intent in enacting it." *Ramos v. State*, 137 Nev. 721, 722, 499 P.3d 1178, 1180 (2021). "[W]e first look to the statute's plain language to determine its meaning, and we will enforce it as written if the language is clear and unambiguous." *Id.* In determining the plain meaning of a statute, we consider both "the particular statutory language at issue, as well as the language and design of the statute as a whole." *Reggio v. Eighth Jud. Dist. Ct.*, 139 Nev. 36, 39, 525 P.3d 350, 353 (2023) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). "We will look beyond the statute's language only if that language is ambiguous or its plain meaning was clearly not intended or would lead to an absurd or unreasonable result." *Ramos*, 137 Nev. at 722, 499 P.3d at 1180. "An ambiguity arises where the statutory language lends itself to two or more reasonable interpretations." *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004).

As an initial matter, we recognize that NRS 197.190 provides three alternative means by which a person may be guilty of obstructing a public officer, and each alternative is laid out in a clause that begins with "who." Willson only challenges the constitutionality of the final clause, which she was charged with violating: "[e]very person . . . who shall willfully hinder, delay or obstruct any public officer in the discharge of official powers or duties."[5] NRS 197.190.

Willson contends that NRS 197.190's scope is broad, prohibiting not only physical conduct but also protected speech. The State contends that NRS 197.190 is limited in its scope by due notice and specific intent requirements. As such, the parties raise three issues for this court's consideration: (1) whether NRS 197.190 requires that a person receive "due notice" that their behavior is hindering, delaying, or obstructing a public officer; (2) whether NRS 197.190 requires that a person have the specific intent to hinder, delay, or obstruct a public officer; and (3) whether NRS 197.190 prohibits speech that hinders, delays, or obstructs a public officer. We consider these issues in turn.

NRS 197.190 does not require that a person receive "due notice" that they are hindering, delaying, or obstructing a public officer

The State argues, and the district court held, that a person cannot be guilty of obstructing a public officer unless the person received due notice that their behavior was hindering, delaying, or obstructing a public officer. However, such an interpretation is at odds with the structure of the statute.

The phrase "after due notice" succeeds only the first "who" clause, which introduces the first alternative means of committing the offense. The phrase's placement within only the first clause indicates its application is limited to the category of persons described in that clause, i.e., those who "refuse or neglect to make or furnish any statement, report or information lawfully required of the person by any public officer." Indeed, interpreting NRS 197.190 as requiring due notice for each means of committing obstruction would lead to an absurd result, as it would require that a person convicted of obstruction under the second clause have received due notice that they were making a "willfully untrue, misleading or exaggerated statement."

Were we to follow the logic of the State and district court, to be consistent, we would also have to hold that the phrase following the second "who" clause—"in such statement, report or information"—would also have to apply to the other two clauses. However,

[5]As such, all references to obstruction in this opinion refer to an obstruction charge under this last clause, unless stated otherwise. We express no opinion regarding the constitutionality of the other provisions of NRS 197.190.

this would lead to a nonsensical construction, prohibiting every person who, "in such statement, report or information" from "willfully hinder[ing], delay[ing] or obstruct[ing] any public officer in the discharge of official powers or duties." An absurd construction such as this should always be avoided. *Sheriff, Clark Cnty. v. Burcham*, 124 Nev. 1247, 1253, 198 P.3d 326, 329 (2008). Therefore, we conclude that NRS 197.190 does not require that a person receive due notice that their behavior is hindering, delaying, or obstructing a public officer.

NRS 197.190 requires that a person have the specific intent to hinder, delay, or obstruct a public officer

The State also argues, and the district court held, that a person cannot be guilty of obstructing a public officer unless the person has the specific intent to hinder, delay, or obstruct a public officer.

"Specific intent" is "[t]he intent to accomplish the precise criminal act that one is later charged with." *Intent*, *Black's Law Dictionary* (11th ed. 2019); *accord Bolden v. State*, 121 Nev. 908, 923, 124 P.3d 191, 201 (2005), *receded from on other grounds by Cortinas v. State*, 124 Nev. 1013, 1026-27, 195 P.3d 315, 324 (2008). In contrast, "general intent" is "[t]he intent to perform an act even though the actor does not desire the consequences that result." *Intent*, *Black's Law Dictionary*; *see Bolden*, 121 Nev. at 923, 124 P.3d at 201. With respect to NRS 197.190, specific intent would require that a person intend for a public officer to be hindered, delayed, or obstructed by the person's act, whereas general intent would require only that a person intend to perform an act that results in the hinderance, delay, or obstruction of a public officer, regardless of whether the person desired such a result.

NRS 197.190 makes it unlawful to "willfully hinder, delay or obstruct any public officer in the discharge of official powers or duties." NRS 197.190 does not define the term "willfully"; therefore, we consider the term as it is commonly understood. *See Cornella v. Just. Ct. of New River Twp.*, 132 Nev. 587, 594, 377 P.3d 97, 102 (2016) ("When the Legislature does not specifically define a term, this court 'presume[s] that the Legislature intended to use words in their usual and natural meaning.'" (alteration in original) (quoting *Wyman v. State*, 125 Nev. 592, 607, 217 P.3d 572, 583 (2009))). Although the term is generally understood to mean "deliberately" or "intentional[ly]," *see Willful*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2020), the term may denote either that an act is "[v]oluntary and intentional, but not necessarily malicious" or that an act "involves [a] conscious wrong or evil purpose on the part of the actor," *see Willful*, *Black's Law Dictionary*.

Because the term "willfully" does not necessarily require malice, the phrase "willfully hinder, delay or obstruct any public officer"

may reasonably be interpreted as requiring only that a person intend to perform an act that resulted in the hinderance, delay, or obstruction of a public officer. *See Robey v. State*, 96 Nev. 459, 461, 611 P.2d 209, 210 (1980) (stating the term "'willful' when used in criminal statutes with respect to proscribed conduct relates to an act or omission which is done intentionally, deliberately or designedly, as distinguished from an act or omission done accidentally, inadvertently, or innocently"); *see also Moore v. State*, 136 Nev. 620, 624, 475 P.3d 33, 36 (2020) (recognizing "the term 'wil[l]fully' has been defined to refer to general intent" in the context of statutes aimed at the protection of infants (alteration in original) (quoting *Jenkins v. State*, 110 Nev. 865, 870, 877 P.2d 1063, 1066 (1994))).

However, because the term "willfully" may also suggest an evil or malicious purpose on the part of the actor, and the terms "hinder," "delay," and "obstruct" are transitive verbs that refer to a specific object, i.e., "any public officer," the phrase "willfully hinder, delay or obstruct any public officer" may also reasonably be interpreted as requiring that a person intend their act to hinder, delay, or obstruct a public officer. *See Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009) ("In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb . . . that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence."); *see also Byford v. State*, 116 Nev. 215, 234, 994 P.2d 700, 713 (2000) (holding "willful means intentional" and that "willful first-degree murder requires that the killer actually intend to kill"). Therefore, we conclude NRS 197.190 is ambiguous as to whether the offense is a general or specific intent crime.

"To interpret an ambiguous statute, we look to the legislative history and construe the statute in a manner that is consistent with reason and public policy." *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). We also consider "prior judicial interpretations of related or comparable statutes by this or other courts," *Castaneda v. State*, 132 Nev. 434, 439, 373 P.3d 108, 111 (2016), as well as definitions of the offense at common law, *see Adler v. Sheriff, Clark Cnty.*, 92 Nev. 641, 643, 556 P.2d 549, 550 (1976); *see also* NRS 193.050(3). Finally, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 552 (2010) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)); *see also United States v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.").

Unfortunately, there is neither legislative history to assist in discerning legislative intent, nor any Nevada caselaw discussing the

reasons for NRS 197.190's passage more than a century ago. *See City of Milwaukee v. Wroten*, 466 N.W.2d 861, 869, 871 (Wis. 1991) (declining to guess the original intent of the drafters in passing a 135-year-old ordinance that prohibited resisting an officer). Neither is there any Nevada caselaw discussing or recognizing the common law offense.

Other jurisdictions appear split on whether similar statutory offenses are general or specific intent crimes. *Compare People v. Roberts*, 182 Cal. Rptr. 757, 760-61 (App. Dep't Super. Ct. 1982) (holding a statute that made it a crime to "willfully resist[ ], delay[ ], or obstruct[ ] any public officer" required only a general intent to act), *and People v. Gleisner*, 320 N.W.2d 340, 341-42 (Mich. Ct. App. 1982) (holding a statute that made it a crime to "willfully obstruct, resist or oppose" an officer required "only an intent to do a certain physical act"), *with Harris v. State*, 726 S.E.2d 455, 457-58 (Ga. Ct. App. 2012) (recognizing a statute that made it a crime to knowingly and willfully obstruct or hinder an officer did not criminalize "any actions which incidentally hinder an officer" (quoting *Hudson v. State*, 218 S.E.2d 905, 907 (Ga. Ct. App. 1975))), *and State v. Singletary*, 327 S.E.2d 11, 13 (N.C. Ct. App. 1985) (holding a statute that made it a crime to "willfully and unlawfully resist, delay, or obstruct a police officer" did not proscribe innocent conduct but only conduct made with the intent to resist, delay, or obstruct).[6] A few state courts appear to have explicitly considered whether the common law offense requires a specific intent to obstruct, and those cases suggest the common law offense is a specific intent crime. *See, e.g.*, *Cover v. State*, 466 A.2d 1276, 1284 (Md. 1983) (holding the common law offense requires the "[i]ntent to obstruct or hinder the officer by the act"); *Commonwealth v. Adams*, 125 N.E.3d 39, 51 (Mass. 2019) (holding the common law offense requires "that the defendant intended his or her conduct, and intended 'the harmful consequences of the conduct—that is, the interference with, obstruction, or hindrance'" (quoting *Commonwealth v. Joyce*, 998 N.E.2d 1038, 1042 (Mass. App. Ct. 2013))).

Thus, to the extent there is guidance from other jurisdictions, it tends to lean toward interpreting the statute as requiring specific intent. Indeed, interpreting NRS 197.190 as requiring only a general intent to act would raise grave doubts as to the statute's constitutionality. In particular, such an interpretation would criminalize a significant amount of constitutionally protected activity. For example, "merely remonstrating with an officer in behalf of another, or

[6]We note that NRS 199.280, which prohibits a person from "willfully resist[ing], delay[ing] or obstruct[ing] a public officer in discharging or attempting to discharge any legal duty of his or her office" is similar, but not identical, to NRS 197.190. However, there is also no Nevada caselaw interpreting NRS 199.280 from which this court may draw guidance in this matter.

criticizing or questioning an officer while he is performing his duty" could constitute an unlawful act. *State v. Leigh*, 179 S.E.2d 708, 713 (N.C. 1971); *see also City of Houston v. Hill*, 482 U.S. 451, 461 (1987) (stating "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers").

Such an interpretation would also raise vagueness concerns because the statute would likely be violated with regular frequency but only few would be subject to prosecution. *See Scott v. First Jud. Dist. Ct.*, 131 Nev. 1015, 1022-23, 363 P.3d 1159, 1164-65 (2015) (holding an obstruction ordinance was impermissibly vague because its prohibitions were "violated scores of times daily, . . . yet only some individuals—those chosen by the police in their unguided discretion—are arrested" (quoting *Hill*, 482 U.S. at 466-67)). For example, a person could be charged with obstruction for intentionally walking in front of a police officer, even if the person was unaware that doing so would hinder, delay, or obstruct the officer.

In contrast, a specific intent requirement would mitigate overbreadth concerns by narrowing the scope of criminal proscriptions that could reach constitutionally protected activity. *See, e.g.*, *Ford v. State*, 127 Nev. 608, 619, 262 P.3d 1123, 1130 (2011) (holding a pandering of prostitution statute was not overbroad in part because the statute's intent requirement narrowed the statute's application); *see also Stubbs v. Las Vegas Metro. Police Dep't*, 792 F. App'x 441, 444-45 (9th Cir. 2019) (Tashima, J., dissenting) (stating NRS 197.190 must be construed as requiring specific intent in order to withstand constitutional scrutiny).

A specific intent requirement would also mitigate vagueness concerns by providing an objective standard for the statute's enforcement. *See Ford*, 127 Nev. at 621-22, 262 P.3d at 1132 (stating the determination of "[w]hether someone held a belief or had an intent is a true-or-false determination, not a subjective judgment such as whether conduct is 'annoying'" (quoting *United States v. Williams*, 553 U.S. 285, 306 (2008))). Therefore, we interpret NRS 197.190 as requiring that a person have the specific intent to hinder, delay, or obstruct a public officer in the discharge of official duties or powers.

NRS 197.190 only applies to physical conduct and fighting words

Willson argues that NRS 197.190 is unconstitutional because its prohibition against speech that hinders, delays, or obstructs a public officer includes speech protected by the First Amendment.

Although NRS 197.190 makes it unlawful to "hinder, delay or obstruct any public officer in the discharge of official powers or duties," the statute does not define the operative verbs "hinder,"

"delay," or "obstruct." These terms plainly indicate a "legislative intent to prohibit that which would interfere with law enforcement officers as they go about their duties," *Newton v. State*, 698 P.2d 1149, 1152 (Wyo. 1985), but they do not clearly indicate whether the statute encompasses mere speech, *see Hinder*, *Merriam-Webster's Collegiate Dictionary* ("to make slow or difficult the progress of: hamper" or "to hold back: check"); *Delay*, *Merriam-Webster's Collegiate Dictionary* (to "put off, postpone," "to stop, detain, or hinder for a time," or "to cause to be slower or to occur more slowly than normal"); *Obstruct*, *Merriam-Webster's Collegiate Dictionary* ("to block or close up by an obstacle" or "to hinder from passage, action, or operation: impede").

Strictly speaking, the spoken word may slow, hamper, prevent, or impede a public officer from performing their duties. *See DeFusco v. Brophy*, 311 A.2d 286, 288 (R.I. 1973) (stating "the spoken word can be just as effective in impeding an officer in the discharge of his duty as if the orater [sic] had grappled with the officer"); *see also Scott*, 131 Nev. at 1022, 363 P.3d at 1164 (stating a pedestrian may hinder or delay a deputy sheriff by asking the deputy for directions while the deputy is directing traffic at an intersection). As such, NRS 197.190 may reasonably be interpreted as prohibiting speech that hinders, delays, or obstructs a public officer.

However, the statute does not explicitly reference speech, and it does not contain all-encompassing language, such as "in any way" or "in any manner," that would suggest its provisions extend to speech. *Cf. Hill*, 482 U.S. at 455 (striking down an ordinance that made it a crime to "in any manner oppose, molest, abuse or interrupt any policeman" because it prohibited speech); *Wroten*, 466 N.W.2d at 870 ("Thus, if it were not apparent from the words themselves, the 'any way' language, as does the 'any manner' language of *Hill*, leads inexorably to the conclusion that the prohibited activity includes speech . . . ."). The terms "obstruct" and "hinder" may also connote some action (or inaction) apart from verbal expression. *See, e.g.*, *State v. Snodgrass*, 570 P.2d 1280, 1286 (Ariz. Ct. App. 1977) (stating the term "'obstructing' . . . impl[ies] . . . 'some physical act or exertion'" (third alteration in original) (quoting *State v. Tages*, 457 P.2d 289, 292 (Ariz. Ct. App. 1969))); *Wilkerson v. State*, 556 So. 2d 453, 455 (Fla. Dist. Ct. App. 1990) (stating the term "'obstruct' . . . contemplates acts or conduct apart from verbal expressions, which operate to physically hinder or impede another in doing something"); *Bennett v. St. Louis County*, 542 S.W.3d 392, 401 (Mo. Ct. App. 2017) (stating "[t]he term 'obstruct' . . . does not suggest speech" but rather "connotes purely physical action"). As such, NRS 197.190 may also reasonably be interpreted as applying only to physical conduct. Therefore, we conclude NRS 197.190 is ambiguous as to whether it prohibits speech.

In light of the constitutional concerns previously identified, the canon of constitutional avoidance obligates this court to further limit NRS 197.190's application to physical conduct and unprotected fighting words. *See Hill*, 482 U.S. at 463 n.12 (stating "'fighting words' which 'by their very utterance inflict injury or tend to incite an immediate breach of the peace' are not constitutionally protected" (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))). Although the specific intent requirement "narrow[s] and clarif[ies] the statute, so as to bring it at least closer to being within constitutional parameters," *Scott*, 131 Nev. at 1027 n.6, 363 P.3d at 1168 n.6 (Hardesty, C.J., concurring in part and dissenting in part), it is not clear that this requirement would wholly resolve the constitutional concerns presented by the statute.

Notably, the specific intent requirement would not prevent NRS 197.190's application to constitutionally protected speech. *See Hill*, 482 U.S. at 469 n.18 (stating "speech does not necessarily lose its constitutional protection because the speaker intends it to interrupt an officer"); *Long v. Valentino*, 265 Cal. Rptr. 96, 101 (Ct. App. 1989) (stating "speech is generally protected by the First Amendment, even if it is intended to interfere with the performance of an officer's duty, provided no physical interference results"). The specific intent requirement also may not, in itself, provide sufficient guidance to law enforcement in the statute's application. *See Hill*, 482 U.S. at 469 n.18 (stating an intent requirement would not "cabin the excessive discretion the ordinance provides to officers"); *Scott*, 131 Nev. at 1027 n.6, 363 P.3d at 1168 n.6 (Hardesty, C.J., concurring in part and dissenting in part) (stating "there is little doubt" an obstruction ordinance would survive constitutional scrutiny if interpreted to require both specific intent and physical conduct or fighting words).

Indeed, several courts have interpreted similar statutes as being limited to physical conduct, and sometimes fighting words, so as to ensure such statutes are constitutionally firm. *See, e.g.*, *Snodgrass*, 570 P.2d at 1286-87 (holding a statute that made it a crime to "willfully resist, delay or obstruct a public officer" required "the presence of some physical act or exertion against the officer"); *State v. Williams*, 534 A.2d 230, 236, 239 (Conn. 1987) (holding a statute that made it a crime to "obstruct[ ], resist[ ], hinder[ ] or endanger[ ] any peace officer" proscribed "only physical conduct and fighting words"); *Wilkerson*, 556 So. 2d at 454-56 (holding a statute that made it a crime to "*obstruct or oppose any such officer . . . without offering or doing violence to the person of the officer*" required some act or conduct apart from verbal expressions); *People v. Raby*, 240 N.E.2d 595, 597, 599 (Ill. 1968) (holding a statute that made it a crime to "knowingly resist[ ] or obstruct[ ] the performance by one known to the person to be a peace officer" proscribed only physical acts); *State v. Krawsky*, 426 N.W.2d 875, 876-77 (Minn.

1988) (holding a statute that made it a crime to "intentionally obstruct[ ], hinder[ ], or prevent[ ] the lawful execution of any legal process, . . . or [to] interfere[ ] with a peace officer" was "directed solely at physical acts"); *State v. Williams*, 251 P.3d 877, 879, 883 (Wash. 2011) (recognizing a statute that made it a crime to "willfully hinder[ ], delay[ ], or obstruct[ ] any law enforcement officer" required "conduct in addition to pure speech").

Therefore, we interpret NRS 197.190 as applying only to physical conduct and fighting words. We note that NRS 197.190 does not require the use of force or violence, and that a person's action (e.g., blocking the path of an officer) or inaction (e.g., refusing to obey a lawful order) may constitute physical conduct that hinders, delays, or obstructs an officer. *See State v. Hudson*, 784 P.2d 533, 537 (Wash. Ct. App. 1990) (recognizing that "nonaggressive behavior" may hinder, delay, or obstruct an officer just as "assaultive conduct"); *see also* Christopher Hall, Annotation, *What Constitutes Obstructing or Resisting Officer, in Absence of Actual Force*, 66 A.L.R.5th 397 (1999) (collecting cases where courts have determined what constitutes obstructing an officer in the absence of actual force). Of course, whether a person's physical conduct actually hinders, delays, or obstructs a public officer is a question to be resolved by the trier of fact in a given case.

NRS 197.190 is not facially overbroad

Having determined what NRS 197.190 prohibits, we now consider whether NRS 197.190 is facially overbroad. A statute is facially overbroad "if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" *Ford*, 127 Nev. at 612, 262 P.3d at 1125 (quoting *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999)). Because a determination that a statute is facially overbroad voids the statute in its entirety, "the overbreadth doctrine is strong medicine" that should not be employed casually. *Scott*, 131 Nev. at 1018, 363 P.3d at 1162 (quoting *Silvar v. Eighth Jud. Dist. Ct.*, 122 Nev. 289, 298, 129 P.3d 682, 688 (2006)); *see also United States v. Hansen*, 599 U.S. 762, 770 (2023).

Willson argues NRS 197.190 is facially overbroad because it allows protected speech to be made a crime. In support of this argument, Willson cites cases where ordinances were struck down as overbroad because of their application to protected speech. *See, e.g.*, *Hill*, 482 U.S. at 460-67 (holding an ordinance that made it unlawful for any person to "in any manner" oppose, molest, abuse, or interrupt a police officer was facially overbroad because it applied to speech and was not narrowly tailored to prohibit only disorderly conduct or fighting words); *Lewis v. City of New Orleans*, 415 U.S. 130, 132-34 (1974) (holding an ordinance that made it unlawful for

any person to curse or revile or to use obscene or opprobrious language toward a city police officer was facially overbroad because it applied to speech and was not narrowly tailored to prohibit only fighting words).

However, as construed by this court, NRS 197.190 does not apply to protected speech; it applies only to physical conduct and fighting words. This limitation positively distinguishes NRS 197.190 from the ordinances struck down in *Hill* and *Lewis*: "the statute does not apply to ordinary verbal criticism directed at a police officer even while the officer is performing his official duties and does not apply to the mere act of [verbally] interrupting an officer, even intentionally." *Krawsky*, 426 N.W.2d at 878.

This limitation and NRS 197.190's specific intent requirement also distinguishes NRS 197.190 from the ordinance deemed unconstitutional in *Scott*. There, the Nevada Supreme Court held an ordinance that made it unlawful for "any person to hinder, obstruct, resist, delay, molest *or threaten to hinder, obstruct, resist, delay or molest* any city officer . . . in the discharge of his official duties" was overbroad. *Scott*, 131 Nev. at 1018-21, 363 P.3d at 1161-63 (emphasis added). In so holding, the supreme court recognized that the ordinance did not contain a specific intent requirement,[7] *id.* at 1019, 363 P.3d at 1163, and that the ordinance applied to speech in light of its prohibition of "mere threats" to hinder, obstruct, resist, delay, or molest a police officer, *id.* at 1020, 363 P.3d at 1163.

Given our holdings that NRS 197.190 does not apply to protected speech and only prohibits physical conduct or fighting words that are specifically intended to hinder, delay, or obstruct a public officer, NRS 197.190 is distinguishable from the ordinances in *Hill*, *Lewis*, and *Scott*. Moreover, the mere fact that "a person's speech may at times be implicated incidentally in the enforcement of this statute" does not render the statute facially overbroad. *Wilkerson*, 556 So. 2d at 456. Therefore, Willson fails to demonstrate that NRS 197.190 is substantially overbroad relative to the scope of its plainly legitimate sweep, and we conclude that NRS 197.190 is not facially overbroad.

NRS 197.190 is not facially vague

Willson argues NRS 197.190 is unconstitutionally vague on its face because it fails to provide persons of ordinary intelligence fair notice of what is prohibited and it authorizes or encourages seriously discriminatory or arbitrary enforcement.

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[7]Although the supreme court noted that an intent requirement would not, in itself, save the ordinance, *Scott*, 131 Nev. at 1019 n.3, 363 P.3d at 1163 n.3, the supreme court also indicated that invalidating the ordinance would not affect NRS 199.280's validity, which is similar to NRS 197.190, because that statute was "explicitly limited by an intent requirement," *id.* at 1020 n.4, 363 P.3d at 1163 n.4; *see also supra* note 3.

"The void-for-vagueness doctrine is predicated upon a statute's repugnancy to the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *Scott*, 131 Nev. at 1021, 363 P.3d at 1163-64 (quoting *Silvar*, 122 Nev. at 293, 129 P.3d at 684-85). A statute is unconstitutionally vague "(1) if it 'fails to provide a person of ordinary intelligence fair notice of what is prohibited'; or (2) if it 'is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *Id.* at 1021, 363 P.3d at 1164 (quoting *State v. Castaneda*, 126 Nev. 478, 481-82, 245 P.3d 550, 553 (2010)). "The first prong is concerned with guiding those who may be subject to potentially vague statutes, while the second—and more important—prong is concerned with guiding the enforcers of statutes." *Silvar*, 122 Nev. at 293, 129 P.3d at 685. A statute involving criminal penalties or constitutionally protected rights is facially vague if "vagueness so permeates the text that the statute cannot meet these requirements in most applications." *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 512-13, 217 P.3d 546, 553-54 (2009).

NRS 197.190 provides sufficient notice of what is prohibited

Willson argues NRS 197.190 fails to provide persons of ordinary intelligence fair notice that they may be arrested for protected speech. However, as previously discussed, NRS 197.190 does not prohibit protected speech. Rather, NRS 197.190 prohibits only physical conduct and fighting words that hinder, delay, or obstruct a public officer, and the terms "hinder," "delay," and "obstruct" are words of recognized meaning that provide persons of ordinary intelligence fair notice that they may not interfere with or hamper the activities of a public officer. *See Newton v. State*, 698 P.2d 1149, 1152 (Wyo. 1985) (stating the terms "hinder," "delay," and "obstruct" are "words of recognized meaning by those of ordinary intelligence"); *see also Snodgrass*, 570 P.2d at 1286, 1289 (stating "a person of common intelligence can easily ascertain what acts are prohibited" under a statute that made it a crime to "willfully resist, delay or obstruct a public officer"); *Krawsky*, 426 N.W.2d at 876, 878 (stating "[p]ersons of common intelligence need not guess at whether their conduct violates" a statute that made it a crime to "intentionally obstruct[ ], hinder[ ], or prevent[ ] the lawful execution of any legal process, . . . or [to] interfere[ ] with a peace officer").

Moreover, NRS 197.190's specific intent requirement further ensures that persons of ordinary intelligence have fair notice of when their conduct constitutes a criminal offense. *See Ford*, 127 Nev. at 621, 262 P.3d at 1132 (stating "a law that requires specific intent to produce a prohibited result may avoid vagueness, both by giving the defendant notice of what is prohibited and by affording adequate law enforcement standards"); *see also Vill. of Hoffman*

Ests. v. Flipside, Hoffman Ests. Inc., 455 U.S. 489, 499 (1982) (recognizing "that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed"). Accordingly, we conclude NRS 197.190 does not fail to provide a person of ordinary intelligence sufficient notice of what is prohibited.

NRS 197.190 is not so standardless so as to authorize or encourage seriously discriminatory or arbitrary enforcement

Willson argues NRS 197.190 authorizes or encourages seriously discriminatory or arbitrary enforcement because it grants police officers unfettered discretion to arrest individuals based on their subjective belief that a citizen has obstructed an arrest or investigation.

Police officers must always exercise some judgment in determining whether a person has obstructed the performance of a public officer's duties. And "given the wide variety of circumstances in which the type of conduct [the statute] legitimately seeks to proscribe can occur," some degree of judgment must be permitted. *Krawsky*, 426 N.W.2d at 878-79. Indeed, "it seems unlikely that a substantially more precise standard could be formulated which would not risk nullification in practice because of easy evasion." *Id.* As the United States Supreme Court has similarly recognized,

> [t]here are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision. Control of the broad range of disorderly conduct that may inhibit a policeman in the performance of his official duties may be one such area, requiring as it does an on-the-spot assessment of the need to keep order.

Smith v. Goguen, 415 U.S. 566, 581 (1974).

NRS 197.190 does not provide those charged with enforcement of its provisions unfettered and unguided discretion. As construed by this court, NRS 197.190 prohibits only physical conduct and fighting words that hinder, delay, or obstruct a public officer in the discharge of official duties or powers. As such, law enforcement has no discretion to arrest persons for protected speech or for physical conduct that is merely annoying or offensive. *Cf. Scott*, 131 Nev. at 1022, 363 P.3d at 1164 (holding an obstruction ordinance was unconstitutionally vague because it was "worded so broadly that sheriffs [sic] deputies [were] given 'unfettered discretion to arrest individuals for words or conduct that annoy or offend them'" (quoting *Hill*, 482 U.S. at 465)).

Moreover, NRS 197.190's specific intent requirement prevents law enforcement from citing or arresting persons for innocent conduct that incidentally interferes with a public officer. *See Ford*,

127 Nev. at 622-23, 262 P.3d at 1132 (recognizing that a specific intent requirement curbs the amount of discretion a statute affords to law enforcement); *City of Las Vegas v. Eighth Jud. Dist. Ct.*, 122 Nev. 1041, 1051, 146 P.3d 240, 247 (2006) (holding an ordinance "provide[d] an adequate standard for law enforcement because officers will know that, in order to prosecute someone for violating the ordinance, the prosecutor must prove that the dancer or the patron fondled or caressed the other with the intent to sexually arouse or excite").

Accordingly, we conclude NRS 197.190 is not so standardless that it authorizes or encourages seriously discriminatory or arbitrary enforcement, and that NRS 197.190 is not so permeated by vagueness so as to render the statute facially vague.

NRS 197.190 is not unconstitutional as applied to Willson

Willson argues that NRS 197.190 is overbroad as applied to her because she was cited and convicted for her protected speech and that it is vague as applied to her because she "had no reason to believe that she would be cited or convicted for that speech."

In contrast to a facial constitutional challenge, which "seeks to invalidate a statute . . . itself," an as-applied constitutional challenge "concedes that a statute may be facially constitutional or constitutional in many of its applications but contends that it is not so under the particular circumstances of the case." *See* 16 C.J.S. *Constitutional Law* § 243 (2023). In light of our holding that NRS 197.190 does not apply to protected speech, Willson's claims that NRS 197.190 is unconstitutional as applied to her protected speech do not actually implicate the constitutionality of the statute.[8] Rather, the issue that remains is whether her actions and words in fact constitute protected speech: if they do constitute protected speech, then they are not punishable under the statute as construed by this court; but if they do not constitute protected speech, then they may be punishable under the statute. For this reason, Willson's as-applied claims are more properly viewed as claims challenging the sufficiency of the evidence to support her conviction. *See Ex parte Carter*, 514 S.W.3d 776, 780 (Tex. App. 2017) (recognizing the appellant's as-applied claim was actually a "veiled sufficiency challenge"); *see also In re Mental Commitment of K.E.K.*, 954 N.W.2d 366, 380 (Wis. 2021) (stating the petitioner's "dispute is with the sufficiency of the evidence, not with the constitutionality of" the statute).

[8]For this reason, Willson's "as-applied" claims necessarily fail. *See, e.g.*, *In re Mental Commitment of K.E.K.*, 954 N.W.2d 366, 379 (Wis. 2021) (rejecting a petitioner's claim that a statute was unconstitutional as applied to them because "[t]he statute ha[d] no application, constitutional or otherwise, against those" in the petitioner's position).

The district court did not have the benefit of our interpretation of NRS 197.190 as being limited to physical conduct and fighting words, and it therefore did not consider whether there was sufficient evidence that Willson engaged in physical conduct or uttered fighting words so as to support her conviction of violating NRS 197.190. Because Willson's as-applied constitutional challenges are more properly viewed as challenges to the sufficiency of the evidence, and because Willson raised these claims in the district court, we grant the petition and instruct the district court to reconsider Willson's direct appeal for the sole purpose of addressing whether sufficient evidence supported Willson's conviction under this court's interpretation of NRS 197.190.[9] *See Cornella v. Just. Ct. of New River Twp.*, 132 Nev. 587, 600, 377 P.3d 97, 106 (2016) (upholding the constitutionality of the challenged statute but granting the petition with instructions for the district court to reconsider the petitioner's direct appeal).

CONCLUSION

For the reasons discussed above, we conclude that NRS 197.190 only applies to physical conduct and fighting words that are specifically intended to hinder, delay, or obstruct a public officer and, thus, the statute is not unconstitutionally overbroad or vague, either on its face or as applied to Willson. However, in light of our interpretation of NRS 197.190, Willson's as-applied constitutional challenges are more properly viewed as challenges to the sufficiency of the evidence. Because the district court did not consider whether there was sufficient evidence to support Willson's conviction, we grant the petition and direct the clerk of this court to issue a writ of certiorari upholding NRS 197.190's constitutionality and instructing the district court to reconsider Willson's direct appeal for the sole purpose of addressing whether, under this court's interpretation of the statute, sufficient evidence supported Willson's conviction.

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[9]Because a sufficiency-of-the-evidence claim is outside the scope of a petition for a writ of certiorari filed pursuant to NRS 34.020(3), *see* NRS 34.020(3) (stating "the writ shall be granted . . . for the purpose of reviewing the constitutionality or validity of [a] statute or ordinance"), we do not address whether there is sufficient evidence to support Willson's conviction, *see Cornella v. Just. Ct. of New River Twp.*, 132 Nev. 587, 600 n.14, 377 P.3d 97, 106 n.14 (2016).

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.

No. 85195

February 15, 2024 543 P.3d 92

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

Petition granted.

[Rehearing denied May 13, 2024]

Stiglich, J., with whom Parraguirre and Bell, JJ., agreed, dissented.

Luke A. Busby, Reno, for Petitioner.

Page Law Firm and *Fred C. Page*, Las Vegas, for Real Party in Interest Troy A. Minter.

The Law Offices of Frank J. Toti, Esq., and *Frank J. Toti*, Las Vegas, for Real Party in Interest Jennifer R. Easler.

Legal Aid Center of Southern Nevada, Inc., and *Debra A. Bookout*, Las Vegas, for Amici Curiae Legal Aid Center of Southern Nevada, Inc.; Nevada Legal Services; Northern Nevada Legal Aid; and Volunteer Attorneys for Rural Nevadans.

Pecos Law Group and *Shann D. Winesett* and *Michelle A. Hauser*, Henderson, for Amicus Curiae State Bar of Nevada, Family Law Section.

Willick Law Group and *Marshal S. Willick*, Las Vegas, for Amicus Curiae National American Academy of Matrimonial Lawyers Committee.

Before the Supreme Court, En Banc.[1]

[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.

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 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.

[2]We note that this opinion only concerns the constitutionality of NRS 125.080, EDCR 5.207, 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.

Falconi 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 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. 874, 876, 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

[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.

hearing.[5] Lastly, we have recognized that direct 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.

[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 877, 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.

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.

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 (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 Serv. 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 Serv. 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

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

of the particular process in question.'" *Id.* at 1070 (quoting *Press-Enter. Co. v. Superior Ct.* (*Press-Enter. II*), 478 U.S. 1, 8 (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.

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 (1984), and *Richmond Newspapers*, 448 U.S. at 589 (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. 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.*, 980 P.2d 337, 359-61 (Cal. 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*, 37 Cal. Rptr. 3d 805, 816-17 (Ct. App. 2006) (recognizing that family law proceedings are presumptively open across the country); *In re Rajea T.*, 165 N.Y.S.3d 647, 651 (N.Y. App. Div. 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 & Fam. Servs. v. J.B.*, 576 A.2d 261, 269 (N.J. 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*, 705 S.E.2d 399, 408 (N.C. Ct. App. 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 (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)). Thus, because family law proceedings have been historically open nationwide, the first part of the experience and logic test has been met.[7]

[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

Next, we must consider the logic portion of the test, and we conclude that open family law proceedings play 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 (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). Thus, to overcome the presumption, one must show three things: (1) closure serves a compelling interest; (2) there is

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requisite experience and logic test and concluding that the historical evidence supports a tradition of open family court proceedings.

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.

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*, 37 Cal. Rptr. 3d 805, 807-18 (Ct. App. 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. 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. 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 Falconi'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.

Cadish, C.J., Pickering, J., and Silver, Sr. J., concur.

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

[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.

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 Court*, 980 P.2d 337 (Cal. 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.* 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.* 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 (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 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 565-66 (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 (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]

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; *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*, 54 A. 653, 655 (Md. 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

[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.

> 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.

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

[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.*, 283 Cal. Rptr. 332, 343 n.9 (Ct. App. 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*, 37 Cal. Rptr. 3d 805, 816-17 (Ct. App. 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.*, 165 N.Y.S.3d 647, 651 (App. Div. 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). *New Jersey Division of Youth & Family Services v. J.B.*, 576 A.2d 261, 269 (N.J. 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*, 705 S.E.2d 399, 408 (N.C. Ct. App. 2011), stated that a matter should not 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.

in divorce 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 (1978) (quoting *In re Caswell*, 29 A. 259 (R.I. 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*, 48 A. 1088, 1089 (N.H. 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 (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."). 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*, 118 N.E.2d 262, 266 (Ill. 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 (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*, 21 S.W. 1122, 1123 (Mo. 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*, 148 N.E. 624, 626 (N.Y. 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*, 33 So. 883, 884 (Ala. 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*, 41 N.W.2d 60, 70 (Iowa 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*, 39 N.Y.S. 690, 692 (App. Div. 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*, 9 Cal. Rptr. 3d 521, 533 (Ct. App. 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.*, 484 P.2d 981, 988 (Cal. 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.*, 283 Cal. Rptr. 332, 340 (Ct. App. 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.

CHRISTOPHER L. IGTIBEN, M.D.; DIGNITY HEALTH, DBA ST. ROSE DOMINICAN HOSPITAL-SAN MARTIN CAMPUS; DIGNITY HEALTH MEDICAL GROUP NEVADA, LLC; AND DIGNITY HEALTH HOLDING CORPORATION, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KATHLEEN E. DELANEY, DISTRICT JUDGE, RESPONDENTS, AND LINDA F. SMITH; THE ESTATE OF KAMARIO MANTRELL SMITH; EDWARD GAXIOLA PONS; LATOYA NICHOLE TURNER; K.M.S.; LAWANDA DENISE HARRIS; K.A.S.; AND K.A.S., REAL PARTIES IN INTEREST.

No. 86567-COA

February 22, 2024 545 P.3d 116

Original petition for a writ of mandamus challenging a district court order denying a motion to dismiss a complaint in a professional negligence and wrongful death action.

Petition granted.

John H. Cotton & Associates, Ltd., and *Adam Schneider* and *John H. Cotton*, Las Vegas, for Petitioner Christopher L. Igtiben, M.D.

Hutchison & Steffen, PLLC, and *Courtney Christopher* and *Brittany A. Lewis*, Las Vegas, for Petitioners Dignity Health, d/b/a St. Rose Dominican Hospital-San Martin Campus; Dignity Health Medical Group Nevada, LLC; and Dignity Health Holding Corporation.

Gallian Welker & Associates, L.C., and *Nathan E. Lawrence*, *Michael I. Welker*, and *Travis N. Barrick*, Las Vegas, for Real Parties in Interest.

Before the Court of Appeals, GIBBONS, C.J., and BULLA and WESTBROOK, JJ.

OPINION

By the Court, BULLA, J.:

In this original writ proceeding, we take the opportunity to address the accrual date of professional negligence and wrongful death claims under the applicable statute of limitations, NRS 41A.097(2).[1] We emphasize that, unless there is an impediment to

[1]We originally resolved this petition in an unpublished order granting the petition and issuing a writ of mandamus. Petitioners subsequently filed a

pursuing an action such as the concealment of medical records, once the plaintiff or the plaintiff's representative has received all necessary medical records documenting the relevant treatment and care at issue, inquiry notice of a claim commences. Here, real parties in interest were placed on inquiry notice when they received the decedent's medical records of Christopher Igtiben, M.D.'s treatment, which were in fact subsequently utilized by their expert to prepare his affidavit of merit. Because real parties in interest did not file their complaint until after the pertinent statute of limitations expired, the district court erred in failing to dismiss the complaint and writ relief is warranted.

FACTS AND PROCEDURAL HISTORY

Kamario Mantrell Smith, an inmate, collapsed twice in prison, three weeks after an unsuccessful heart surgery. Following his second collapse, Kamario was transported to the San Martin Campus of St. Rose Dominican Hospital (San Martin), where he was admitted for shortness of breath, chest pains, and a rapid heart rate. On admission, it was believed that Kamario had sickle cell trait (SCT), and a peripheral blood smear test showed that Kamario's blood contained sickled cells.[2] Shortly after, petitioner Dr. Igtiben, an internal medicine hospitalist, ordered a contrast CT angiograph of Kamario's chest, abdomen, and pelvis, which detected a blood clot in his lung, an enlarged heart, fluid in his chest, and bilateral pneumonia. Kamario was placed on an anticoagulant, which initially stabilized him. However, the next day, his hemoglobin decreased, and he became hypotensive. Kamario rapidly lost kidney function and experienced renal failure. At this time, a diagnostic hemoglobin electrophoresis test confirmed Kamario had sickle cell anemia,

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motion to publish the order as an opinion. We grant the motion and replace our earlier order with this opinion. *See* NRAP 36(f).

[2]A peripheral blood smear test provides health care providers with a microscopic view of red and white blood cells and platelets; while results from a peripheral smear test are not diagnostic, they may be used to assist health care providers in making diagnoses. *Peripheral Blood Smear*, Cleveland Clinic, https://my.clevelandclinic.org/health/diagnostics/22742-peripheral-blood-smear-test (last visited Feb. 1, 2024).

A person with SCT carries the sickle cell gene but generally experiences no complications from the condition. *Questions and Answers About Sickle Cell Trait*, Nat'l Heart, Lung, and Blood Inst. (Sept. 22, 2010), https://www.nhlbi.nih.gov/news/2010/questions-and-answers-about-sickle-cell-trait. In contrast, individuals with sickle cell anemia (also known as sickle cell disease or SCD) have low hemoglobin levels and their red blood cells become misshapen and take on the sickle shape. *Id.* Over time, sickle cell anemia can cause damage to organs, including the brain, bones, lungs, kidneys, liver, and heart. *Id.*

rather than SCT.[3] The next morning, November 25, 2019, Kamario's heart stopped, and resuscitation efforts were unsuccessful.

On January 6, 2020, following Kamario's death, Kamario's mother, real party in interest Linda F. Smith (RPII), received his medical records from San Martin, which documented all the treatment and care provided by Dr. Igtiben at issue here. RPII also obtained a copy of the death certificate at some point, as evidenced by her attaching it to her May 12, 2020, probate filings. The death certificate listed the cause of death as "pulmonary infarction caused by a pulmonary embolism," with other significant conditions listed as "acute renal [kidney] failure, [SCT], hypertension and recurrent atrial fibrillation and atrial flutter." Although not included in the record, the parties agree that the autopsy report notated Kamario's manner of death to be "natural."

At the time of his death, Kamario had a civil rights action pending against the Nevada Department of Corrections (NDOC) in federal court, alleging NDOC's ongoing and continuing failure to properly treat or accommodate his atrial fibrillation and irregular heartbeat. On April 2, 2020, RPII moved to substitute in for Kamario as a party in the federal case. In the handwritten motion, RPII wrote, "I understand; I have to submit my Negligence Claim[ ] of Kamario Smith['s] Death. I understand that I need to pursue them in state court." At or near this time, RPII retained counsel to assist her, and on April 20, the federal court granted her motion to substitute in as a party.

In May 2020, the probate court in the Eighth Judicial District appointed RPII as special administrator of Kamario's estate. RPII listed the assets of the estate as consisting solely of two lawsuits: the above-mentioned civil rights lawsuit in federal court and a prospective wrongful death claim to be purportedly brought against NDOC either in the ongoing federal action or in state court.

Around September 2021, in relation to the federal lawsuit, RPII retained Lary Simms, D.O., a pathologist, to review Kamario's medical records.[4] In February 2022, Dr. Simms opined that Kamario's death was caused by exposure to the intravenous contrast Dr. Igtiben had ordered for the CT scan, which caused kidney failure due to

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[3]"Hemoglobin electrophoresis uses electrical charges to separate hemoglobin types so healthcare providers can compare the level of each type with normal levels." *Hemoglobin Electrophoresis*, Cleveland Clinic, https://my.clevelandclinic.org/health/diagnostics/22420-hemoglobin-electrophoresis (last visited Feb. 1, 2024). This test is used to diagnose blood diseases such as sickle cell anemia. *Id.*

[4]The federal suit remained active until it apparently settled in or about February 2022.

Kamario's sickle cell anemia.[5] Approximately eight months later, on November 22, 2022, RPII filed a complaint in the Eighth Judicial District on behalf of Kamario's estate against petitioners Dignity Heath, d/b/a San Martin; Dignity Health Medical Group Nevada, LLC; Dignity Health Holding Corporation; and Dr. Igtiben, alleging professional negligence of a health care provider and wrongful death. The complaint, which was supported by a declaration of merit by Dr. Simms, alleged that Dr. Igtiben's actions, as well as those of other petitioners, fell below the standard of care in failing to recognize that Kamario suffered from sickle cell anemia before ordering a CT with contrast, which ultimately caused Kamario's kidneys to fail, resulting in his death.

Dr. Igtiben moved to dismiss RPII's complaint, arguing in part that, pursuant to NRS 41A.097(2), the statute of limitations on RPII's claims had expired. The other petitioners joined in the motion to dismiss. The district court denied the motion, stating in part that a finder of fact could determine that the one-year statute of limitations under NRS 41A.097(2) did not begin to run until February 2022 when Dr. Simms formed his opinions. Subsequently, Dr. Igtiben filed the instant writ petition challenging the district court's order denying dismissal of the complaint against him. Dignity Health, d/b/a San Martin; Dignity Health Medical Group Nevada, LLC; and Dignity Health Holding Corporation joined as petitioners.

ANALYSIS

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). This extraordinary relief may be available if the petitioner does not have a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170; *see also Smith v. Eighth Jud. Dist. Ct.*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991) (recognizing that whether a writ of mandamus will be considered is within the appellate court's sole discretion).

Generally, this court will not consider a writ petition challenging an order denying a motion to dismiss because an appeal from a final judgment is an adequate and speedy legal remedy. *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558. However, we will consider petitions that challenge orders denying motions to dismiss if "either (1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or

[5]An intravenous contrast is an iodine-based medium injected into an individual's body to increase the density of blood, which allows for blood vessels to be viewed during a CT exam. David C. Rodgers & Prassana Tadi, *Intravenous Contrast*, Nat'l Library of Med., https://www.ncbi.nlm.nih.gov/books/NBK557794/ (last updated Mar. 13, 2023).

rule, or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *Id*. at 197-98, 179 P.3d at 559. Because the facts relevant to the statute of limitations are not in dispute, and because the district court was obligated to dismiss the action pursuant to NRS 41A.097(2), we elect to exercise our discretion and entertain this writ petition.

NRS 41A.097(2) governs the limitations periods for professional negligence claims, stating in relevant part that "an action for injury or death against a provider of health care may not be commenced more than 3 years after the date of the injury or 1 year after the plaintiff discovers or through use of reasonable diligence should have discovered the injury, whichever occurs *first*."[6] (Emphasis added.) We recognize that, here, RPII's complaint was filed prior to the expiration of the three-year statutory period, but petitioners argue that the complaint was nonetheless barred by the earlier expiration of the one-year inquiry-notice limitations period.

The accrual date for NRS 41A.097(2)'s one-year limitations period is generally a question of fact that must be decided by a jury; however, courts may determine the date as a matter of law when the evidence irrefutably shows the plaintiff was placed on inquiry notice of a potential claim. *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 251-52, 277 P.3d 458, 462 (2012). "A plaintiff discovers [their] injury when [they] know[ ] or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on inquiry notice of [their] cause of action." *Id.* at 252, 277 P.3d at 462 (quoting *Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983)) (internal citation omitted). The Nevada Supreme Court has held that a plaintiff is placed on inquiry notice of potential claims for medical malpractice when they receive all relevant medical records because the plaintiff then has "access to facts that would have led an ordinarily prudent person to investigate further into whether [the patient's] injury may have been caused by someone's negligence." *Id.* at 253-54, 277 P.3d at 463; *see also Kushnir v. Eighth Jud. Dist. Ct.*, 137 Nev. 409, 410, 495 P.3d 137, 139 (Ct. App. 2021) ("Because the plaintiffs had all necessary medical records and were therefore on inquiry notice of the claim more than a year before filing the complaint, . . . we conclude that the one-year statute of limitations expired and extraordinary writ relief is appropriate.").

In this case, the district court erred in denying Dr. Igtiben's motion to dismiss, as it is undisputed that RPII received the relevant

[6]Recent amendments to NRS 41A.097 extend the statute of limitations for "injury to or wrongful death of a person" claims to two years after the plaintiff discovers or should have discovered the injury, but only for those claims arising on or after October 1, 2023. *See* NRS 41A.097(2)-(3) (2023). As the claims here arose before October 1, 2023, these amendments do not affect our analysis.

medical records in January 2020—placing her on inquiry notice of potential professional negligence and wrongful death claims against Dr. Igtiben at that time.[7] *See Kushnir*, 137 Nev. at 412-13, 495 P.3d at 141. Therefore, as of January 6, 2020, RPII had access to facts that would have led an ordinarily prudent person to investigate whether Dr. Igtiben's treatment and care led to Kamario's death. Indeed, RPII appears to have acknowledged that such claims may have existed as early as 2020 in the federal and probate actions. As a result, pursuant to NRS 41A.097(2), RPII was required to file any professional negligence or wrongful death action within one year from the date she received the medical records. RPII did not file the present action until November 22, 2022, or approximately two years and ten months later, well outside of the one-year statute of limitations based on inquiry notice.[8] Therefore, the applicable statute of limitations had long since expired when RPII filed her complaint for professional negligence in state court on November 22, 2022, and the district court should have dismissed the complaint as untimely.[9]

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[7]Because we conclude that the medical records provided RPII the information necessary to place her on inquiry notice regarding alleged deficiencies in Dr. Igtiben's treatment and trigger NRS 41A.097(2)'s limitations period, the fact that she may have received Kamario's death certificate and the autopsy report after receiving the medical records does not change our decision. We note that the record before us is not clear about when RPII received the January 8 death certificate, although it was attached to the probate filings in May 2020, or the autopsy report, which is not contained in the record.

[8]We note RPII conceded at oral argument that no impediment prevented Dr. Simms from reviewing the case earlier than September 2021. By way of example, RPII neither raised, nor do we consider, whether the statute of limitations was tolled due to concealment. *See* NRS 41A.097(3) (discussing tolling due to concealment); *Senjab v. Alhulaibi*, 137 Nev. 632, 633-34, 497 P.3d 618, 619 (2021) (stating that appellate courts will not supply an argument on a party's behalf).

[9]As we conclude that we must grant writ relief and direct the district court to dismiss the complaint because the relevant statute of limitations has expired, we need not consider Dr. Igtiben's alternative basis for dismissal, wherein he asserts that the affidavit of merit attached to the complaint failed to satisfy NRS 41A.071. *See Wheble v. Eighth Jud. Dist. Ct.*, 128 Nev. 119, 123 n.2, 272 P.3d 134, 137 n.2 (2012) (declining to consider the petitioner's alternative bases for writ relief because the court granted writ relief and directed the district court to dismiss a complaint due to the statute of limitations having expired).

Nevertheless, we encourage the Legislature to consider clarifying the ambiguity in NRS 41A.071(2) as to *when* a physician must have practiced in the same or substantially similar area of practice in relation to the alleged professional negligence at issue in order to provide an affidavit or declaration of merit setting forth opinions regarding that negligence. Currently, no specific time frame is set forth in the statute. In this case, we note that Dr. Simms had not practiced as a hospitalist, Dr. Igtiben's practice area, for over 30 years when he submitted his affidavit of merit opining as to the appropriate standard of care governing Dr. Igtiben's treatment.

CONCLUSION

After receiving medical records sufficient to place RPII on inquiry notice of potential professional negligence claims, she failed to file the complaint within the statute of limitations. As there was no impediment to RPII filing suit before the statute of limitations expired, the district court was required to dismiss her complaint as untimely. Because the district court failed to dismiss the complaint, we grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order denying petitioners' motion to dismiss and to dismiss the underlying complaint as untimely under NRS 41A.097(2).

Gibbons, C.J., and Westbrook, J., concur.

JOEY TERRALL CHADWICK, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 86161-COA

February 29, 2024 546 P.3d 215

Appeal from a judgment of conviction, pursuant to a jury verdict, of leaving the scene of an accident involving personal injury. Eighth Judicial District Court, Clark County; Bita Yeager, Judge.

Affirmed.

Steven S. Owens, Henderson, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Alexander G. Chen* and *Karen Mishler*, Chief Deputy District Attorneys, Clark County, for Respondent.

Before the Court of Appeals, Gibbons, C.J., and Bulla and Westbrook, JJ.

OPINION

By the Court, Westbrook, J.:

Appellant Joey Terrall Chadwick was convicted of one count of leaving the scene of an accident involving personal injury. On appeal, Chadwick contends that the district court abused its discretion in admitting other bad act evidence of his alcohol consumption and apparent intoxication prior to the accident in contravention of NRS 48.045(2).

Nevada's appellate courts have not previously addressed the admissibility of evidence of a defendant's alcohol consumption and apparent intoxication while driving in cases where the defendant is charged with leaving the scene of an accident in violation of NRS 484E.010. We conclude that the district court did not abuse its discretion by admitting this evidence because it was relevant to Chadwick's motive to flee, proven by clear and convincing evidence, and not unfairly prejudicial.

Chadwick also argues that the district court erred by failing to hold a *Petrocelli*[1] hearing and provide *Tavares*[2] limiting instructions prior to the admission of testimony that he threatened a witness and belonged to a gang. In addressing these arguments, we conclude

[1]*Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), *superseded in part by statute as stated in Thomas v. State*, 120 Nev. 37, 44-45, 83 P.3d 818, 823 (2004).

[2]*Tavares v. State*, 117 Nev. 725, 30 P.3d 1128 (2001), *holding modified on other grounds by Mclellan v. State*, 124 Nev. 263, 182 P.3d 106 (2008).

that when bad act evidence is directly elicited by the defendant, it is incumbent upon the defendant to request a limiting instruction, and if they do not do so, the district court is not obligated to raise the issue or provide one sua sponte. Because Chadwick directly elicited testimony about the threat and did not request a limiting instruction, the court did not err in failing to conduct a *Petrocelli* hearing or provide a *Tavares* instruction. Further, Chadwick has not established unfair prejudice from the admission of gang affiliation evidence. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

On October 31, 2021 (Halloween night), Chadwick accidentally ran over and injured three-year-old T.B., who was crossing the street while trick-or-treating, without stopping or returning to the scene. At the time of the accident, Chadwick was driving an older white van with his friend, Helen Henry, in the passenger seat. Chadwick and Henry were both members of the Bloods gang, and the accident occurred in a neighborhood where rival gang members lived.

The day after the accident, Henry returned to the scene and told T.B.'s family that Chadwick was the one who hit T.B., though she did not mention that she was also in the van at the time of the accident. The following day, Chadwick went to the police station and turned himself in. He denied drinking the night of the accident and wrote a voluntary statement indicating that he drove away because he thought he only hit a pothole. Chadwick was eventually charged with leaving the scene of an accident involving personal injury and reckless driving resulting in substantial bodily harm.

Prior to trial, the State filed a motion to admit evidence of Chadwick's intoxication to show his motive to flee from the scene of the accident and to impeach his claims to law enforcement that he did not consume alcohol that night or know he was in an accident. The district court held a *Petrocelli* hearing, where Henry testified about Chadwick's alcohol consumption and apparent intoxication prior to the accident. Henry testified that when Chadwick picked her up the night of the accident, his eyes were red and he smelled of alcohol. According to Henry, they went to a house party where Chadwick drank at least half a bottle of Hennessy cognac, and they shared a bottle of Barton vodka. Henry also testified that Chadwick snorted "powder."

After the *Petrocelli* hearing, the district court granted the State's motion in part and allowed Henry to testify about her direct observations, including Chadwick's alcohol consumption prior to the accident. However, the court precluded Henry from testifying that Chadwick snorted powder because Henry had no actual knowledge of what the powder was.

The matter proceeded to a jury trial. In its case-in-chief, the State introduced into evidence Chadwick's recorded interview with police and his voluntary statement. The State's key witness was Henry.

On direct examination, Henry testified that when Chadwick picked her up on the night of the accident, he smelled "[v]ery moderate[ly]" of alcohol, his eyes were "yellowish red like you can tell he was drinking," and he appeared to be a "little drunk." Henry also testified about their alcohol consumption at the house party with the aid of demonstrative exhibits depicting bottles of Hennessy and Barton liquor similar to what they consumed that evening. Henry testified that Chadwick drank "half" of a 750 ml bottle of Barton and "[t]hree red cups" of Hennessy.

According to Henry, the accident occurred after they left the party to get some food. Chadwick had slowed down at an intersection, waiting for a group of children to cross the street after an adult called them over. When Chadwick accelerated, Henry saw a little girl suddenly dart out in front of the van so fast that Chadwick could not avoid hitting her. Henry testified that it felt like "[a] speed bump" when the girl went under the driver's side of the vehicle. Henry looked back and saw a body in the street, then told Chadwick that he just hit a young girl. According to Henry, Chadwick denied hitting the girl and told Henry "to calm down" and "say nothing."

Henry testified that Chadwick sped away from the scene and did not slow down until they reached a nearby Dotty's Casino, where they inspected the van for damage. Henry saw a shattered left headlight with blood and pink barrettes in it. When Henry told Chadwick they needed to call the police, Chadwick allegedly told her, "You're the only witness and only person that knows I was driving." This comment made Henry feel unsafe, so she left and got a ride home.

On cross-examination, Chadwick asked Henry about her status as a gang member. Henry affirmed that she was in a gang, and when Chadwick asked which gang she belonged to, the State objected before Henry could answer. During a sidebar, the State argued that the question about Henry's gang affiliation was highly prejudicial and would open the door to questions about Chadwick's own gang affiliation. Chadwick responded that Henry's gang membership was relevant to why she did not report the accident to law enforcement because "if word got [out] on the street that she was" involved with the accident, she would face retaliation from the rival gang. The court determined that Chadwick's question would open the door to Chadwick's own gang affiliation because "[t]hat same motive, if he is a part of a gang, goes as to why he wouldn't stop when he's in a gang area[,] that they're the kids of gang members and he doesn't report it. I think it goes both ways." Following the sidebar, Chadwick proceeded to ask Henry what gang she was affiliated with, and she admitted to being a member of the Bloods. Chadwick then asked

Henry an open-ended question about why she did not report the accident, and Henry responded that Chadwick had "threatened" her.

During redirect examination, the State asked Henry follow-up questions about Chadwick's threat and how Chadwick's gang affiliation was related to that threat. In response, Henry testified that Chadwick was also in the Bloods and that, after the accident, he told her, "[d]on't snitch" because of "what happens to snitches." Chadwick did not object or move to strike Henry's testimony about his gang affiliation or the threat.

The State presented testimony from members of T.B.'s family, who witnessed the van speeding away from the scene. T.B.'s mother testified about T.B.'s injuries, including a gash on her forehead and scalp damage, which required a two-week hospital stay. The State also presented testimony from several individuals involved in the Las Vegas Metropolitan Police Department (LVMPD) investigation. Of note, LVMPD hit-and-run detective Michael Almaguer testified that when Chadwick's van was impounded, the van's left headlight was nonfunctional and had significant damage that appeared to be recent. Detective Almaguer also stated that there were no irregularities in the roadway, such as potholes, near the scene of the accident. On cross-examination, Almaguer confirmed that his initial investigation did not indicate that drugs or alcohol were involved, but he clarified that it was impossible to investigate and collect evidence of driving under the influence because the driver left the scene.

After the State rested, Chadwick testified in his own defense. Chadwick averred that when he drove himself and Henry to the house party, neither of them had consumed any alcohol. Shortly after getting to the party, Henry asked Chadwick to go to McDonald's. Chadwick testified that when they left the house party, he *still* had not consumed any alcohol.

Chadwick testified that, on their way to McDonald's, he heard a "thump" and believed he had hit a pothole in the street. Chadwick looked in his rearview mirror and did not see anything, so he proceeded to McDonald's. Chadwick testified that because the van often made similar noises and he did not see anything in his mirrors, he had no reason to think he was in an accident. He further testified that there were no kids at the intersection when he stopped, but in any event, he would not have been able to see T.B. cross the street due to the van's height, the van's side window tint, and the unlit streetlamps. Chadwick also testified that Henry was leaning back in the passenger chair at the time of the accident, so she could not have seen the accident, nor did she inform him that he hit a child.

Chadwick testified that when they got to McDonald's, Henry immediately asked him to take her home. From McDonald's, he drove to Dotty's Casino, where Chadwick stated he was looking for a friend. Chadwick did not find his friend at Dotty's but did

notice that the left headlight of the van was broken. He stated that the headlight still worked, so he assumed the damage was from a rock or debris. Chadwick testified that there was no blood or barrettes on the headlight. The two drove from Dotty's toward Henry's house and passed by Chadwick's friend's house. Chadwick said that he wanted to stop by quickly, at which point Henry became upset and got out of the van. Chadwick drove alone to his mother's house.

Chadwick testified that the next morning, people told him that a person was run over by a white van the night before in the area where Chadwick had been driving, and they asked Chadwick if he was involved. Chadwick "put two and two together" and felt compelled to "go up and clear my name when I seen that family on that street on the news that evening."

The jury ultimately found Chadwick guilty of leaving the scene of an accident involving personal injury, but acquitted him of the other filed charge, reckless driving resulting in substantial bodily harm. Chadwick received a sentence of 72-240 months in prison and timely appealed.

ANALYSIS

The district court did not err in admitting evidence of Chadwick's alcohol consumption and apparent intoxication while driving

Chadwick contends that the district court abused its discretion by admitting other bad act evidence of his alcohol consumption and "drunk driving." NRS 48.045(2) governs the admissibility of "[e]vidence of other crimes, wrongs or acts" and provides that such evidence may not be used to establish a defendant's propensity to commit the alleged act. Nevertheless, evidence of a defendant's other bad acts may be introduced for nonpropensity purposes, for instance, to establish "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." NRS 48.045(2). However, before a district court can admit other bad act evidence, it must first conduct a *Petrocelli* hearing outside the presence of the jury and determine that "(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997), *holding modified by Bigpond v. State*, 128 Nev. 108, 270 P.3d 1244 (2012); *Tavares v. State*, 117 Nev. 725, 731, 30 P.3d 1128, 1131 (2001), *holding modified on other grounds by Mclellan v. State*, 124 Nev. 263, 182 P.3d 106 (2008). This court reviews a district court's decision to admit other bad act evidence for an abuse of discretion. *Mclellan*, 124 Nev. at 269, 182 P.3d at 110.

Chadwick argues that the evidence of his alcohol consumption and apparent intoxication while driving did not satisfy the three

Tinch factors because it was irrelevant, unsupported by clear and convincing evidence, and unfairly prejudicial. We disagree.[3]

First, the evidence of Chadwick's alcohol consumption and apparent intoxication while driving was relevant to the charge of leaving the scene of an accident involving personal injury. As noted above, motive is a proper nonpropensity purpose for admitting bad act evidence. *See* NRS 48.045(2). In this case, evidence that Chadwick consumed copious amounts of alcohol and appeared to be intoxicated while driving was relevant because it provided a motive for him to flee after the accident. *See, e.g.*, *State v. Sutton*, No. 18CA0057-M, 2020 WL 2319311, ¶ 30 (Ohio Ct. App. May 11, 2020) (providing that, where a defendant was charged with the failure to stop after an accident, an officer's testimony that he "smelled the odor of alcohol on [the appellant's] breath had probative value with respect to [the appellant's] . . . possible motivation for leaving the scene"); *Gillum v. Commonwealth*, No. 2002-SC-0415-MR, 2004 WL 1907027, *3 (Ky. Aug. 26, 2004) (stating that an officer's "testimony as to Appellant's consumption of alcohol and state of intoxication appears to be relevant to the charge of leaving the scene of the accident . . . and was properly admitted"); *State v. Kovalik*, No. 92-2213-CR, 1993 WL 112024, *2 (Wis. Ct. App. Apr. 14, 1993) (concluding that evidence of driving while intoxicated was relevant to appellant's motive and intent to elude an officer).

Chadwick argues that his motive to flee "was only minimally relevant" because he admitted to leaving the scene of the accident, and therefore the element of flight was already established. *See* NRS 484E.010(1) (providing that "[t]he driver of any vehicle involved in a crash . . . resulting in bodily injury or death shall immediately stop his or her vehicle at the scene of the crash or as close thereto as possible, and shall forthwith return to and in every event shall remain at the scene of the crash until the driver has fulfilled the requirements of NRS 484E.030"). However, the State was also required to establish criminal intent by proving that Chadwick knew or should have known he was involved in an accident when he left the scene. *See Clancy v. State*, 129 Nev. 840, 847, 313 P.3d 226, 230-31 (2013). And

[3]The district court does not appear to have given *Tavares* limiting instructions in connection with this evidence; however, Chadwick did not raise this issue in his appellate briefs, and only mentioned it in passing for the first time at oral argument. Therefore, we do not consider it. *See State ex rel. Dep't of Highways v. Pinson*, 65 Nev. 510, 530, 199 P.2d 631, 648 (1948) ("The parties, in oral arguments, are confined to issues or matters properly before the court, and we can consider nothing else . . . ."); *see also State v. Eighth Jud. Dist. Ct. (Doane)*, 138 Nev. 896, 900, 521 P.3d 1215, 1221 (2022) ("[I]n both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decisions and assign to courts the role of neutral arbiter of matters the parties present." (alteration in original) (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008))).

Chadwick's motive to flee was relevant to this question of criminal intent. *See* NRS 48.015 (stating that evidence is relevant if it has any tendency to make a fact of consequence more or less probable).

In a similar case, the Wisconsin Supreme Court explained why evidence of driving under the influence would be relevant to establish that the appellant had a motive to flee and therefore "knowingly fle[d] or attempt[ed] to elude" an officer. *Kovalik*, No. 92-2213-CR, 1993 WL 112024, *2. Like Chadwick, the appellant argued that the evidence was irrelevant because "motive was not an element" of the crime and because "evidence of intoxicated driving does not make it more probable that he knowingly attempted to elude an officer." *Id*. In rejecting both arguments, the court explained,

> "Matters going to motive . . . are inextricably caught up with and bear upon considerations of intent . . . ." *State v. Johnson*, 121 Wis. 2d 237, 253, 358 N.W.2d 824, 832 (Ct. App. 1984). [Appellant] does not persuade us that the trial court erroneously exercised its discretion in holding that the evidence was admissible as being relevant. Although it cannot be said that drinking makes a person more likely to try to elude the police, it is generally well known that penalties for [operating a motor vehicle while intoxicated (OWI)] are severe. The evidence that [appellant] may have been drinking or was intoxicated could make it more probable that [appellant] intended to elude the police in order to avoid the OWI penalties.

Id. (first and second alterations in original).

We agree with the reasoning in *Kovalik*. "Even though motive is not an element of a crime and need not be proven, it has virtually always been an integral element of proof in a criminal trial." *Richmond v. State*, 118 Nev. 924, 942, 59 P.3d 1249, 1261 (2002) (Shearing, J., concurring in part and dissenting in part); *see also Shults v. State*, 96 Nev. 742, 748-49, 616 P.2d 388, 392-93 (1980) (holding that because "the prosecution is entitled to present a full and accurate account of the circumstances surrounding a crime," the district court did not abuse its discretion by admitting other crimes evidence that was relevant to motive (internal quotation marks omitted)). Motive has been described as the "reason that nudges the will and prods the mind to indulge the criminal intent." *United States v. Benton*, 637 F.2d 1052, 1056 (5th Cir. 1981). A motive thus operates as an "incentive for criminal behavior." *People v. McKinnon*, 259 P.3d 1186, 1224 (Cal. 2011).

Here, Chadwick's motive to flee was relevant to the knowledge element of the crime because it offered an alternative explanation for why he left the scene—that he *knew* he had hit a child but sought to avoid the criminal penalties associated with driving under the influence of alcohol. The State was entitled to present the jury

with this alternative to the explanation offered by Chadwick—that he failed to stop because he *did not know* about the accident. Had Chadwick remained at the scene after hitting T.B., officers may have determined that he was intoxicated. *See, e.g.*, *Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 499, 117 P.3d 193, 197 (2005) (concluding that a police officer had a reasonable belief that the appellant was intoxicated at the time of the accident where he "smelled strongly of alcohol, had watery bloodshot eyes, and slurred his speech when he spoke"). Because the crash resulted in an injury, Chadwick risked being arrested on a charge of driving under the influence causing substantial bodily harm, which carries a potential sentence of imprisonment of 2 to 20 years. *See* NRS 484C.430(1).[4] Instead, because Chadwick left the scene, investigators could not determine whether alcohol was involved in the accident, and he was not charged with that crime. Therefore, the evidence of Chadwick's alcohol consumption and apparent intoxication offered a motive for him to flee, making it less likely that he failed to stop simply because he was unaware of the accident.[5]

Second, Chadwick's alcohol consumption and apparent intoxication while driving were established by clear and convincing evidence through Henry's testimony at the *Petrocelli* hearing. Testimony alone can establish an act by clear and convincing evidence. *See Meek v. State*, 112 Nev. 1288, 1295, 930 P.2d 1104, 1108 (1996) (stating that "clear and convincing evidence can be provided by a victim's testimony alone"). However, personal knowledge on the part of the testifying witness is necessary. *See Randolph v. State*, 136 Nev. 659, 662, 477 P.3d 342, 347 (2020) (holding that "the district court erred in finding that the State proved the prior bad acts by clear and convincing evidence by [a witness's] testimony alone" where the testimony was not based on the witness's firsthand knowledge); *accord Lane v. Second Jud. Dist. Ct.*, 104 Nev. 427, 446, 760 P.2d 1245, 1257 (1988) ("[T]o be competent to testify, a witness must have personal knowledge of the subject of his testimony.").

Here, Henry's testimony was based on her direct observations of Chadwick and was rationally based on her perceptions. When Chadwick picked Henry up, she saw that Chadwick had red eyes and

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[4]At oral argument, Chadwick suggested that, because the penalty for leaving the scene of an accident resulting in injury was the same as the penalty for driving under the influence causing substantial bodily harm, he would not have had a motive to flee. However, by leaving the scene, Chadwick might have avoided *any* penalty, had his vehicle not been identified by others, which he testified prompted him to come forward two days later.

[5]Chadwick also suggests that the district court erred by overruling his relevance objection to the generic pictures of liquor bottles. However, the State utilized the photos for demonstrative purposes only to help Henry identify the type and amount of liquor that Chadwick drank on the night of the accident. This was not an abuse of discretion. *Mclellan*, 124 Nev. at 269, 182 P.3d at 110.

smelled alcohol on him. Henry also watched Chadwick consume large quantities of Hennessy and Barton at a party before getting behind the wheel of his vehicle. Because a proper foundation was laid in this case, Henry's eyewitness testimony about Chadwick's consumption and her lay opinion testimony regarding Chadwick's apparent intoxication were admissible. *See* NRS 50.265; *Dooley v. United States*, 577 F. Supp. 3d 229, 236 (S.D.N.Y. 2021) ("It is settled that a lay witness can offer an opinion as to a person's intoxication."); *Durant v. United States*, 551 A.2d 1318, 1324 (D.C. Cir. 1988) ("[B]ecause alcohol intoxication is considered to be a matter of common knowledge, lay witnesses may render opinion testimony regarding alcohol intoxication.").

To the extent that Chadwick argues Henry was not a credible witness because she was intoxicated herself on the night of the accident, the district court had an opportunity to observe Henry and determine her credibility, which we do not reweigh on appeal. *See Tinch*, 113 Nev. at 1175, 946 P.2d at 1064 ("It is not this court's prerogative to determine the credibility of witnesses below."). Indeed, the record reflects that the district court meaningfully analyzed the evidence presented and we perceive no abuse of discretion in its conclusion that Henry's testimony provided clear and convincing evidence of Chadwick's alcohol consumption and intoxication while driving.[6]

Third, evidence of Chadwick's alcohol consumption and intoxication was not "substantially outweighed by the danger of unfair prejudice." *Id.* at 1176, 946 P.2d at 1064-65. Though the evidence was prejudicial, "all evidence against a defendant will on some level 'prejudice' (*i.e.*, harm) the defense," and so the focus in NRS 48.045(2) is on "unfair" prejudice. *State v. Eighth Jud. Dist. Ct. (Armstrong)*, 127 Nev. 927, 933, 267 P.3d 777, 781 (2011). Unfair prejudice is defined as an appeal "to the emotional and sympathetic tendencies of a jury, rather than the jury's intellectual ability to evaluate evidence." *Krause Inc. v. Little*, 117 Nev. 929, 935, 34 P.3d 566, 570 (2001). In this case, the record does not reflect that the evidence of Chadwick's alcohol consumption and apparent intoxication prevented the jury from intellectually evaluating the evidence. To the contrary, the jury acquitted Chadwick of felony reckless driving, which implies that the jury was able to properly evaluate the evidence even after learning of Chadwick's alcohol consumption and apparent driving while intoxicated. Therefore, we conclude that the district court did not abuse its discretion in admitting evidence of Chadwick's alcohol consumption and apparent intoxication while driving.[7]

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[6]Notwithstanding the court's pretrial ruling, Chadwick was able to argue to the jury that Henry's testimony was not credible because of her own alcohol consumption.

[7]Because this evidence was admissible to establish Chadwick's motive to flee and, inferentially, his knowledge of the accident, we necessarily reject

Evidence of Chadwick's threat and gang affiliation

Chadwick argues that the district court abused its discretion by allowing Henry to testify that Chadwick was a gang member who threatened her after the accident not to "snitch" because of "what happens to snitches." Chadwick contends that this evidence was erroneously admitted without a *Petrocelli* hearing or *Tavares* limiting instructions.

Failure to conduct a Petrocelli *hearing*

When the State seeks to admit bad act evidence, it bears the burden of requesting a *Petrocelli* hearing outside the presence of the jury to determine its admissibility under *Tinch*'s three-part test. *See generally Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), *superseded in part by statute as stated in Thomas v. State*, 120 Nev. 37, 44-45, 83 P.3d 818, 823 (2004). However, the "failure to conduct a *Petrocelli* hearing is not reversible error when the record is sufficient to establish that the evidence is admissible under [*Tinch*] or the trial result would have been the same had the trial court excluded the evidence." *Diomampo v. State*, 124 Nev. 414, 430, 185 P.3d 1031, 1041 (2008). Additionally, if the defendant fails to object to the absence of a *Petrocelli* hearing, an appellate court may review only for plain error affecting the defendant's substantial rights. *Id.*

Assuming for the sake of argument that Chadwick's threat was a bad act that required a *Petrocelli* hearing,[8] Chadwick invited any error in its admission. The invited error doctrine "establish[es] that ordinarily inadmissible evidence may be rendered admissible when the complaining party is the party who first broached the issue." *Taylor*

Chadwick's claim that it was inadmissible in the State's case-in-chief "as preemptive impeachment" using extrinsic evidence of a collateral matter. *Cf. Jezdik v. State*, 121 Nev. 129, 136-37, 110 P.3d 1058, 1063 (2005) (discussing the collateral fact rule and stating, "[i]t is error to allow the State to impeach a defendant's credibility with extrinsic evidence relating to a collateral matter") (alteration in original) (internal quotation marks omitted)). To be "collateral," facts must be "outside the controversy, or . . . not directly connected with the principal matter or issue in dispute." *Id.* at 137, 110 P.3d at 1063 (quoting *Lobato v. State*, 120 Nev. 512, 518, 96 P.3d 765, 770 (2004)) (further internal quotation marks omitted)). Here, the evidence of Chadwick's consumption and intoxication was directly connected with an element of the charged crime—knowledge—and was not collateral.

[8]*Compare Evans v. State*, 117 Nev. 609, 628, 28 P.3d 498, 512 (2001) ("Evidence that after a crime a defendant threatened a witness with violence is directly relevant to the question of guilt. Therefore, evidence of such a threat is neither irrelevant character evidence nor evidence of collateral acts requiring a hearing before its admission." (footnote omitted)), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015), *with Bellon v. State*, 121 Nev. 436, 444-45, 117 P.3d 176, 181 (2005) (holding that a defendant's threat to officers during his arrest was "more reflective of his frustration at being arrested than demonstrative of his consciousness of guilt" and inadmissible under NRS 48.045(2)).

v. State, 109 Nev. 849, 856-67, 858 P.2d 843, 848 (1993) (Shearing, J., concurring in part and dissenting in part). Here, Chadwick directly elicited the testimony he complains of on cross-examination by asking Henry an open-ended question about why she did not report the accident. In response to Chadwick's questioning, Henry testified that he "threatened me that if I told, he was going to do something to me." Although the State asked follow-up questions about the substance of Chadwick's threat on redirect, Chadwick had already introduced the bad act into evidence. Under these circumstances, we conclude that Chadwick invited any error from the admission of the threat without a *Petrocelli* hearing. *See Carter v. State*, 121 Nev. 759, 769, 121 P.3d 592, 599 (2005) (holding that the defense elicited the bad act testimony and was "estopped from raising any objection on appeal"); *Taylor*, 109 Nev. at 856-57, 858 P.2d at 848.

As for the gang affiliation testimony, Chadwick did not object to its admission, and we conclude that the district court did not plainly err in admitting it without a *Petrocelli* hearing.[9] *See Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (holding that a defendant must show actual prejudice or a miscarriage of justice to establish plain error). There is no indication that the jury convicted Chadwick based on his gang affiliation. Neither the State nor Chadwick argued that the accident itself was gang-related or that Chadwick's gang affiliation went to any material element of the offense. Rather, the evidence was offered for the limited purpose of explaining *Henry's* conduct and substantiating why she did not report the accident to law enforcement. Although the evidence was used to illustrate the seriousness of Chadwick's threat, the State only made one brief

[9]The State argues that Chadwick invited any error by asking Henry questions about her gang affiliation after the district court warned him that doing so would open the door to evidence of his own gang affiliation. We disagree. The district court ruled that if Chadwick asked Henry about her gang affiliation to establish her fear of a rival gang as a motive for *her* actions, it would open the door to allow the State to ask about Chadwick's gang affiliation to establish a similar motive for *his* actions—e.g., that he fled the scene because he feared retaliation by the rival gang for running over one of their children. However, the State did not use the evidence for the limited purpose permitted by the court. Instead, during the State's redirect examination of Henry, it questioned Henry about Chadwick's gang affiliation to provide context for his *threat* about what would happen to Henry if she reported him to police.

Immediately after asking Henry about Chadwick's gang affiliation, the State asked Henry to describe how he threatened her. In this way, the State tied the evidence of Chadwick's gang affiliation to his threat about what happens to "snitches," to make his threat appear more serious because it carried the force of gang violence behind it. Because the evidence of Chadwick's gang affiliation was introduced for a purpose that was outside the scope of the district court's ruling, we cannot find that he invited this alleged error by opening the door. *Cf. Dickey v. State*, 140 Nev. 8, 16, 540 P.3d 442, 451 (2024) ("When admitting evidence for limited purposes under NRS 48.045(2), limiting instructions must instruct the jury to consider only those purposes for which the evidence was actually admitted.").

reference to it at trial. Chadwick's gang affiliation was also not mentioned by either party in closing argument. In light of the minimal testimony on the subject of Chadwick's gang affiliation and its collateral nature being in relation to a witness's conduct rather than his own, Chadwick cannot establish actual prejudice or a miscarriage of justice from the admission of his gang affiliation without a *Petrocelli* hearing, and therefore he cannot demonstrate plain error. *See Tinch*, 113 Nev. at 1176, 946 P.2d at 1065 ("Other state and federal courts have found gang-affiliation evidence relevant and not substantially outweighed by unfair prejudice when it tends to prove motive." (internal quotation marks omitted)).

Failure to give Tavares *instructions*

In *Tavares*, the Nevada Supreme Court imposed a burden on the State to request "that a limiting instruction be given both at the time the prosecutor introduces the [other bad act] evidence and in the final charge to the jury." 117 Nev. at 727, 30 P.3d at 1129. If the State fails to request the limiting instruction, the district court "should raise the issue" sua sponte, giving the defendant an opportunity to decide whether such an instruction is desirable. *Id.* at 731, 30 P.3d at 1132.

When the State introduces bad act evidence, the failure to give *Tavares* instructions is reviewed for harmless error, even if the defendant does not request one. *Id.* at 731-32, 30 P.3d at 1132 ("Because the defendant no longer has the burden of requesting a limiting instruction on the use of uncharged bad act evidence, we will no longer review cases involving the absence of the limiting instruction for plain error. Instead, we will review future cases for error under NRS 178.598."). The standard of review "is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.' Thus, unless [the court is] convinced that the accused suffered no prejudice . . . , the conviction must be reversed." *Id.* at 732, 30 P.3d at 1132 (footnote omitted) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

On the other hand, "a party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit." *Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) (quoting 5 Am. Jur. 2d *Appeal and Error* § 713 (1962)). Thus, under the invited error doctrine, an appellant is not entitled to relief if they "induced or provoked" the error in the trial court. *Id.*

As noted above, Chadwick introduced the threat into evidence while cross-examining Henry and failed to object when the State asked Henry follow-up questions about both the threat and his gang affiliation on redirect. Additionally, Chadwick did not request *Tavares* instructions in connection with either the threat (which he

first elicited) or the gang affiliation evidence (which the State first elicited).

Although the *Tavares* decision contains language suggesting that a defendant has no burden to request a limiting instruction, that case involved a situation where *the State* introduced the bad act into evidence, not the defendant. The reason the supreme court placed the burden on the State to request a limiting instruction had to do with the State's role in admitting the bad act evidence:

> Because the prosecutor is the one who must seek admission of uncharged bad act evidence and because the prosecutor must do so in his capacity as a servant to the law, we conclude that the prosecutor shall henceforth have the duty to request that the jury be instructed on the limited use of prior bad act evidence.

Tavares, 117 Nev. at 731, 30 P.3d at 1132.

By contrast, a defendant who introduces a bad act into evidence invites the error and is not automatically entitled to receive a *Tavares* instruction without request. *See LaChance v. State*, 130 Nev. 263, 276, 321 P.3d 919, 928 (2014); *Morton v. State*, No. 83884-COA, 2022 WL 4391751, at *4 (Nev. Ct. App. Sept. 22, 2022) (Order of Affirmance) (declining to reach the appellant's argument that the district court erred by failing to give a *Tavares* instruction where the defendant elicited the bad act evidence and failed to request a limiting instruction). Other jurisdictions with statutes similar to NRS 48.045(2) have also determined that trial courts are not obligated to sua sponte provide limiting instructions when the defendant introduces bad act evidence. *See, e.g.*, *State v. Benitez*, No. 96257, 2011 WL 5118418, at *7 (Ohio Ct. App. Oct. 27, 2011) (concluding that the trial court was not required to give a limiting instruction because the bad act evidence was initially raised by the defense on cross-examination); *State v. Elston*, No. 98,344, 2008 WL 4291518, at *1 (Kan. Ct. App. Sept. 19, 2008) ("The State did not present prior bad acts evidence requiring a limiting instruction; the defendant's presentation of such evidence and failure to request a limiting instruction constitutes invited error . . . .").

Therefore, we hold that a defendant bears the burden of requesting a limiting instruction when they directly elicit bad act evidence. In such circumstances, the general rule set forth in NRS 47.110 applies: "When evidence which is admissible . . . for one purpose but inadmissible . . . for another purpose is admitted, the judge, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly." NRS 47.110 (emphasis added). Further, when a defendant introduces a bad act and fails to request a limiting instruction, the district court is not obligated to raise the issue or provide a *Tavares* instruction sua sponte. In this case, Chadwick directly elicited Henry's testimony about his threat, and therefore it

was Chadwick's burden to request a *Tavares* limiting instruction, if he desired one, to reduce the risk of unfair prejudice in connection with the threat. *See* NRS 47.110. Because he did not request a limiting instruction in connection with the threat, Chadwick invited any alleged error regarding the absence of a *Tavares* instruction, and he is not entitled to relief.

Although Chadwick was not entitled to a *Tavares* instruction pertaining to the threat, he *was* entitled to a *Tavares* instruction to limit the jury's consideration of his gang affiliation, which the State elicited on redirect. Nevertheless, we conclude that the court's error in failing to give that instruction was harmless.

In *Tavares*, the supreme court determined that the absence of a limiting instruction was prejudicial and warranted reversal when the State introduced prior bad act evidence that the appellant had previously engaged in the *same behavior* underlying the charge for which he stood trial. 117 Nev. at 728-33, 30 P.3d at 1130-33. The appellant was charged with first-degree murder in the death of his three-month-old daughter. *Id.* at 728, 30 P.3d at 1130. The State's theory was that the appellant, who had a history of mishandling children, broke his daughter's ribs and asphyxiated her. *Id.* To prove its case, the State introduced evidence that the appellant had mishandled another child six years earlier and also squeezed his infant daughter and covered her mouth on prior occasions. *Id.* at 728-29, 30 P.3d at 1130. No limiting instruction was given regarding the use or purpose of this prior bad act testimony, which was admitted to establish Tavares's propensity to engage in similar conduct. *Id.* The supreme court noted that Tavares's conviction rested primarily on circumstantial evidence and prior bad acts, and the prior bad act evidence "impermissibly tainted the jury's verdict." *Id.* at 733, 30 P.3d at 1133.

In contrast, Chadwick's conviction in this case did not rest primarily on circumstantial evidence and prior bad acts. Chadwick did not dispute that he was in an accident or that he left the scene. Further, multiple witnesses, including Chadwick himself, testified to facts that would imply he knew or should have known he was in an accident. Henry testified as a direct eyewitness to Chadwick's actions and stated that she told him that he had struck a child with his van but he continued to flee the scene. She also testified that Chadwick had consumed a substantial amount of alcohol, which provided a motive for him to flee and inferentially established his knowledge of the accident. In addition, Chadwick testified that he was driving through the intersection and heard a "thump" outside his van. While Chadwick testified that he believed he hit a pothole, Detective Almaguer testified that there were no potholes or irregularities in the road near the accident site. Several members of T.B.'s family also testified that Chadwick drove away quickly after the accident.

Further, Chadwick's gang affiliation was not offered to show that he "acted in conformity therewith" to prove guilt of the underlying charges, which was central to the supreme court's prejudice analysis in *Tavares*. NRS 48.045(2). Therefore, we conclude that any error in failing to provide a *Tavares* instruction to limit the jury's consideration of Chadwick's gang affiliation was harmless and did not have a "substantial and injurious effect" on the jury's verdict. *Kotteakos*, 328 U.S. at 776; *see also Tinch*, 113 Nev. at 1176, 946 P.2d at 1065.

CONCLUSION

In summary, we conclude that the district court did not abuse its discretion in admitting evidence of Chadwick's alcohol consumption and apparent intoxication prior to the accident. This evidence was admissible to establish Chadwick's motive to flee and, inferentially, his knowledge that he had been in an accident when he fled the scene. We also hold that when a defendant directly elicits bad act evidence, it is the defendant's burden to request a *Tavares* limiting instruction in connection with that evidence. If the defendant fails to do so, the district court is not obligated to provide one sua sponte. Because Chadwick has not established any basis to reverse his conviction, we affirm the judgment of conviction.[10]

Gibbons, C.J., and Bulla, J., concur.

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[10]Chadwick also argues that (1) the district court plainly erred in admitting a 9-1-1 call; (2) the district court abused its discretion in sentencing; and (3) cumulative error warrants reversal. We have considered those arguments and conclude that they lack merit. Insofar as Chadwick has raised any other arguments that are not specifically addressed in this opinion, we have considered the same and similarly conclude that they do not present a basis for relief.