Case No. _____

In the Supreme Court of Nevada

ELAINE P. WYNN, an individual,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark; and THE HONORABLE ELIZABETH GONZALEZ, District Judge,

Respondent,

and

WYNN RESORTS, LIMITED, a Nevada Corporation,

Real Party in Interest.

District Court
No. A-12-656710-B

PETITION FOR WRIT OF PROHIBITION
OR, IN THE ALTERNATIVE, MANDAMUS

With Supporting Points and Authorities

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PETITION FOR WRIT OF PROHIBITION
OR, IN THE ALTERNATIVE, MANDAMUS

Petitioner Elaine P. Wynn seeks a writ of prohibition preventing the district court from enforcing its September 20 and 27, 2016 orders. These orders (1) denied petitioner's motion for a protective order to prevent compelled disclosure of her whistleblower activity, which violates her privileges and protections provided by federal law; (2) held that Ms. Wynn's reporting of Wynn Resorts Limited's potential violations of federal securities laws to Ernst & Young, Wynn Resorts' independent auditor, is not protected activity under the Dodd-Frank Wall Street Reform and Consumer Protection Act, a ruling that flouts the regulations of the Securities and Exchange Commission ("SEC") and represents the minority view in a federal circuit split; (3) held that Ms. Wynn is not a protected person under the Sarbanes-Oxley Act of 2002, which ignores the only evidence in the record showing she was an employee and director of the company for over a decade; and (4) denied Ms. Wynn leave to take any discovery from Wynn Resorts regarding her protected status or Wynn Resorts' retaliatory conduct.

These rulings cannot be squared with the privileges and protections accorded to whistleblowers under federal law. The district

court's decisions are at odds with Dodd-Frank, Sarbanes-Oxley, federal regulations, the SEC's interpretative guidance and public policy. Not only are the decisions contrary to the majority rule, but this Court itself has confirmed that federal statutory privileges must be recognized and enforced in Nevada.

In the alternative, petitioner seeks a writ of *mandamus* directing the district court to (1) vacate and expunge its September 20 and 27, 2016 orders, (2) hold that Ms. Wynn's communications with Ernst & Young are protected under Dodd-Frank and that she is a protected person under Sarbanes-Oxley, (3) grant Ms. Wynn leave to take discovery from Wynn Resorts regarding her protected status and Wynn Resorts' retaliation, and (4) grant Ms. Wynn's motion for protective order.

Dated this 5th day of October 2016.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel Polsenberg*
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VERIFICATION

DANIEL F. POLSENBERG, being first duly sworn, deposes and says:

Pursuant to NRS 15.010, NRS 34.030, and NRS 34.170, and under penalty of perjury, I declare that I am counsel for Elaine P. Wynn and know the contents of this writ petition. The pleading is true of my own knowledge, or based on information and my belief. I, rather than Ms. Wynn, make this verification because the relevant facts are procedural and are thus within my knowledge as petitioner's attorney.

Dated this 5th day of October, 2016.

DANIEL F. POLSENBERG

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

Subscribed and sworn to before me
this 5th day of October, 2016

NOTARY PUBLIC

GABRIELA MERCADO
Notary Public, State of Nevada
Appointment No. 12-8423-1
My Appt. Expires Feb 24, 2020

NRAP 26.1 DISCLOSURE

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

Appellant ELAINE P. WYNN is an individual.

Appellant has been represented in this litigation by Daniel F. Polsenberg, Marla Hudgens, Joel Henriod and Abraham Smith of LEWIS ROCA ROTHERGERBER CHRISTIE LLP; William R. Urga and David J. Malley of JOLLEY URGA WOODBURY & LITTLE; and John B. Quinn, Michael T. Zeller, Susan R. Estrich, Michael L. Fazio and Ian S. Shelton of QUINN EMANUEL URQUHART & SULLIVAN, LLP.

Dated this 5th day of October 2016.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding because it stems from a case "originating in the Business Court." NRAP 17(a)(1). In addition, this case presents issues of first impression on matters of statewide importance. NRAP 17 (1)(a)(13)–(14). This Court should also retain this matter because two other writ proceedings involving the same case are presently pending before it, Case Nos. 70050, 70452.

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ISSUES PRESENTED

1. Did the district court err as a matter of law when it ruled, contrary to SEC guidance and the majority of courts, that Ms. Wynn's communications with Ernst & Young are not protected under Dodd-Frank because the statute only applies to communications with the SEC?

2. Did the district court err when it ruled, contrary to the evidence as applied to the correct legal standard, that Ms. Wynn is not a protected employee under Sarbanes-Oxley, and did the district court further abuse its discretion in denying Ms. Wynn discovery regarding this issue?

MEMORANDUM OF POINTS AND AUTHORITIES

Elaine Wynn has raised serious questions concerning Wynn Resorts' potential violations of federal securities laws. She did so privately, to Wynn Resorts' audit committee and its outside auditors, Ernst & Young. Rather than investigate such significant issues, Wynn Resorts dismissed them, impeded an investigation by Ernst & Young, and engaged in a retaliatory attack against Ms. Wynn to silence and intimidate her.

Specifically, Wynn Resorts threatened to muzzle her with unlawful confidentiality obligations, exposed her as a whistleblower, and demanded sanctions, a temporary restraining order, and a preliminary injunction against her. It then pursued oppressive discovery against Ms. Wynn to uncover Ms. Wynn's confidential sources and the communications she had made as a whistleblower. Because this information is protected under Dodd-Frank and Sarbanes-Oxley, and fearing further retaliation against herself and others, Ms. Wynn declined to disclose the identity of her sources and sought a protective order barring the discovery.

The plain language of Dodd-Frank and Sarbanes-Oxley protects all whistleblowers, from the lowest-level employees to the highest-level executives. There are no exceptions. Because Ms. Wynn worked at Wynn Resorts for over a decade as both a director and employee, she is protected. The fact that she is also the co-founder and third largest shareholder of the company does not change that. Encouraging whistleblowers with supervisory or managerial responsibilities—who will often possess unique knowledge of corporate malfeasance—to come forward and disclose potential violations of federal securities laws is one of the central purposes of these statutes. Ms. Wynn also was justified in reporting those potential violations to Ernst & Young as the company's auditor. Her concerns go to the integrity of the company's management and its SEC filings, and Ms. Wynn reported her concerns to those with authority to investigate these matters because she believed a full and independent investigation was warranted. In this situation, more than any other, the public auditor's role is critical. Indeed, both Congress and the SEC have emphasized the trusted watchdog function that outside auditors perform in safeguarding against misconduct by publicly traded companies.

All personnel from top to bottom should be encouraged to be forthcoming, and the "tone at the top" should be a message of openness and transparency, not retaliation and disparagement against the messenger.

The district court nevertheless refused to grant protection on two erroneous grounds. It ruled that (1) Dodd-Frank protects only communications with agencies such as the SEC and Ms. Wynn's communications with Ernst & Young therefore are not protected under Dodd-Frank; and (2) Ms. Wynn is not an "employee" and accordingly not protected under Sarbanes-Oxley. These rulings are wrong. They conflict with the SEC'S regulations and interpretations of Dodd-Frank, are inconsistent with the majority of court opinions, and contrary to the evidence. The district court deprived Ms. Wynn of the federal privileges and protections to which she is entitled. Those legal errors were compounded by its refusal to allow Ms. Wynn any discovery from Wynn Resorts on the issues.

These are not small mistakes. Dodd-Frank and Sarbanes-Oxley protect whistleblowers from rank-and-file employees to high-level executives. But the district court eviscerated these protections, and

very few will have the resources Ms. Wynn does to fight. The protection of all Nevadans depends on correcting these serious errors.

BACKGROUND

A. Procedural History

Ms. Wynn is a co-founder and third-largest shareholder of Wynn Resorts. (5 App. 1161.) She was a director and employee of the company for over a decade, from 2002 until 2015. (5 App. 1161.)

The complex litigation in the underlying district court action involves multiple parties, claims, counterclaims, and crossclaims, and concerns billions of dollars' worth of Wynn Resorts stock.[1] Within this framework, Wynn Resorts initiated an ancillary proceeding to seek injunctive relief and sanctions against Ms. Wynn for allegedly violating a protective order entered February 2013 by reporting potential

[1] The case began in February 2012 when Wynn Resorts sued to confirm the validity of its redemption of stock held by Aruze USA, Inc., a company controlled by former director Kazuo Okada and the Wynn Resorts' largest individual shareholder at the time (the "Okada parties"). Ms. Wynn was brought into the litigation as a defendant when the Okada parties asserted claims against her as a director. Ms. Wynn subsequently asserted her own claims to challenge, among other things, the validity and enforceability of a stockholders agreement between herself, Stephen Wynn and Aruze.

violations of federal securities laws to Wynn Resorts' independent auditor, Ernst & Young. (3 App 414.)

B. Ms. Wynn Reports Potential Violations of Federal Securities Laws to Wynn Resorts' Independent Auditors, and Wynn Resorts Dismisses Them

1. Ms. Wynn's Private Letter Raises Concerns

On July 12, 2016, Ms. Wynn sent a letter to Wynn Resorts' audit committee, raising questions about the conduct of Wynn Resorts and its management that she reasonably believed violated federal securities laws. (3 App. 630.) She also included as recipients five people who worked at Wynn Resorts' independent auditor, Ernst & Young, which has the obligation to investigate such conduct. (*Id.*) The letter was otherwise private and not disseminated by Ms. Wynn to third parties or to the public. Ms. Wynn attached two documents to her letter that were not designated "confidential" or "highly confidential" under a protective order entered by the district court in February 2013.[2] (*Id.*)

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[2] *See* 1 App. 1; *see also* 2 App. 396. Deposition transcripts are automatically designated "highly confidential" for 20 days after receipt of the certified transcript. 2 App. 398. During that 20-day period, each party has the opportunity to designate information that the party contends is "confidential" or "highly confidential," as those terms are defined in the protective order. Section 10(b). Any party may object to

2. The Audit Committee Dismisses Ms. Wynn's Concerns

Rather than investigate Ms. Wynn's concerns, the audit committee dismissed them and threatened to silence Ms. Wynn based on "duties of confidentiality imposed upon you as a result of your tenure on the Board of Directors of Wynn Resorts, or by any court." (3 App. 644.) The audit committee did not provide Ernst & Young with a copy of its response. (*Id.*)

Wynn Resorts made clear it did not intend to investigate the issues raised by Ms. Wynn. Instead, in a move that would intimidate and deter her from further disclosure to Ernst & Young and regulators, it demanded "specific evidence and authority [Ms. Wynn] relied upon in preparing [her] letter." (*Id.*) As for her request for a fair, complete investigation, the letter dismissed it as something that was a "matter of serious concern" to *her* alone, not them. (*Id.*) Treating her like a suspect, the audit committee further demanded a recorded interview of Ms. Wynn with all counsel for Wynn Resorts present. (*Id.*) Nowhere

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the designations, the parties must meet and confer regarding such objections, and if the parties cannot resolve the matter, the party challenging the designation may file a motion with the district court to resolve the dispute. Section 18.

did the letter suggest the audit committee intended to investigate any of the issues, at all.

C. Wynn Resorts Seeks an *Ex Parte* Restraining Order

One day after the audit committee threatened Ms. Wynn, Wynn Resorts filed an application for temporary restraining order, motion for preliminary injunction, and motion for sanctions for the alleged violation of the protective order. (3 App. 414.) In its publicly filed application, Wynn Resorts exposed Ms. Wynn as a whistleblower.[3] Wynn Resorts claimed that "[a]lthough Ernst & Young is employed as independent auditors for Wynn Resorts, *they are not entitled to this protected information*." (3 App. 443 (emphasis added).)

D. Wynn Resorts Threatens Ms. Wynn and Seeks Discovery that is Protected under Sarbanes-Oxley and Dodd-Frank

At a hearing on its application, Wynn Resorts repeatedly threatened to retaliate against Ms. Wynn, to have her sanctioned, and to silence her by invoking confidentiality obligations she purportedly

[3] Wynn Resorts redacted all information about Wynn Resorts' potential wrongdoing that Ms. Wynn provided to Ernst & Young, but did not redact her name or the disparaging comments it made about her.

owes to the company. (See 3 App. 414-553.) The sanctions sought were among the most draconian and included case-terminating, evidentiary and monetary sanctions. (3 App. 434.)

As an example of the efforts to castigate Ms. Wynn, Wynn Resorts' counsel stated:

> We're not going to run from anything that Ernst & Young needs to hear or see from us. *But that is not to say that we're going to tolerate this type of behavior from Elaine Wynn and whoever assisted her.* If whoever this person is that made these phone calls or phone call, whoever this person is that actually drafted this letter has nothing to do with this case and is not subject to order, then *this process will be focused solely on Elaine Wynn and what should be the appropriate remedy for what she is doing with her disregard of your order in the same way she disregards our company policy.*

(1 App. 66:5–16 (emphasis added).) Wynn Resorts conceded that Ms. Wynn did not disclose information to any third parties or the public, but instead to "our auditors from Ernst & Young, starting with the partner in charge at the top, and moving down to those *who are charged with auditing and basically keeping an eye on this publicly traded company*." (1 App. 60:16–20 (emphasis added).) For its part, Ernst & Young has confirmed the legitimacy of Ms. Wynn's concerns and rejected Wynn Resorts' view that Ernst & Young was "not entitled"

to the information in Ms. Wynn's letter, as shown by Ernst & Young's decision to investigate Ms. Wynn's allegations. (1 App. 65:16–22.)

At the hearing, Wynn Resorts argued for the first time that Ms. Wynn's July 12 letter "was preceded by a phone call from a person who asked to remain anonymous" and that "the first person of interest" regarding the identity of the anonymous caller "would be the lawyers for Ms. Elaine Wynn." (1 App. 64:11–24.) Wynn Resorts' counsel speculated that the anonymous caller must be Ms. Wynn's attorneys, "someone associated with their company," or "a surrogate for their company." (1 App. 65:1–7.) Wynn Resorts' counsel posited that these disclosures by the anonymous caller were a violation of the protective order and vowed to "get to the bottom of it through this process," a further threat that any whistleblower will be publicly exposed and punished. (1 App. 65:7–10.) Wynn Resorts sought discovery to support its unsubstantiated belief that Ms. Wynn violated the protective order.

E. The District Court Allows Limited Discovery

The district court allowed discovery on "two limited issues" related to the alleged violation, namely: (1) "the limited issues contained in [Ms. Wynn's July 12, 2016 letter to the Audit Committee and Ernst &

Young] and [2] this anonymous phone call that you've referred to[,] to Ernst & Young." (1 App. 80:16–24.) The district court also ordered an evidentiary hearing to decide Wynn Resorts' motion and granted the company's request to serve limited document requests. (1 App. 80:9–20.)

On July 25, Wynn Resorts served document requests on Ms. Wynn. (3 App. 646.) Five requests sought information related to her protected whistleblower activity, including her communications with Ernst & Young and third parties such as the SEC and other regulators:

> RFP No. 7: All Documents and Communications with third parties regarding the contents of the [July 12, 2016] Letter.
>
> RFP No. 8: All Documents and Communications between Elaine Wynn and/or her agents on the one hand, and any other person, the subject of which relates to Wynn Resorts and Ernst & Young from June 1, 2016 to the present.
>
> RFP No. 9: To the extent not covered by previous requests, any and all Documents and Communications related to the [July 12, 2016] Letter.
>
> RFP No. 10: All Documents and Communications relating to phone calls and communications between Ms. Wynn, her agents or representatives, or any other person or entity, on the one hand, and Ernst & Young and/or any officer, director, agent or representative thereof, on the

other hand, regarding Wynn Resorts, the[July 12, 2016] Letter, and/or this Action from June 1, 2016 to the present.

RFP No. 11: All Documents and Communications related to, referring to, and/or reflecting Communications between Ms. Wynn, her agents or representatives, or any other person or entity, on the one hand, and Ernst & Young and/or any officer, director, agent or representative thereof, on the other hand, regarding Wynn Resorts, the [July 12, 2016] Letter, and/or this Action from June 1, 2016 to the present.

(3 App. 651-52.) On July 27, 2016, Wynn Resorts also noticed Ms. Wynn's limited deposition for August 15, 2016. (3 App. 656.)

F. Elaine Wynn's Motion for Protective Order under Dodd-Frank and Sarbanes-Oxley

Before responding and prior to her deposition, Ms. Wynn moved for her own protective order under Dodd-Frank and Sarbanes-Oxley. (3 App. 597.) Ms. Wynn asked the district court to bar Wynn Resorts from seeking discovery regarding her protected whistleblower activities, including any communications with Ernst & Young and "third parties" such as the SEC, the United States Department of Justice, or the Nevada Gaming Control Board, as these matters are privileged and protected under Dodd-Frank, Sarbanes-Oxley and state law. (3 App. 620-25.)

On August 11, the district court deferred ruling on Ms. Wynn's objections until after the parties both conducted Ms. Wynn's deposition and completed full briefing on the issues. (1 App. 195:23–196:3.) The district court specifically declined to give advance guidance or categorical rulings with regard to the subject matters for which Ms. Wynn claimed protection. The district court declined to make any rulings regarding whistleblower protections before the deposition. (1 App. 187:18–188:23.)

G. Ms. Wynn's Deposition

On August 15, Ms. Wynn sat for her deposition. (4 App. 765.) Wynn Resorts did not limit its inquiry to the scope defined by the district court, however. Rather than confining its questions to whether Ms. Wynn's July 12 letter included information designated under the protective order, Wynn Resorts' interrogation was irrelevant to any protective order violation. (4 App. 835-36.) It was also retaliatory under federal law because it sought to compel disclosure of Ms. Wynn's confidential sources and her whistleblower communications. Nonetheless, Ms. Wynn's testimony conclusively established that (1) she

did not violate the protective order, and (2) she is a protected whistleblower under federal law.

1. Ms. Wynn's Testimony that she did not Violate the Protective Order

Ms. Wynn testified that nothing referenced in her July 12 letter to Ernst & Young was based on "confidential" or "highly confidential" documents designated under the protective order. Instead, her letter derived from other sources: (1) *public* testimony of former Wynn Resorts executive to the Nevada Gaming Control Board, (2) the two *non-designated* attachments to the July 12 letter, and (3) trusted colleagues who corroborated the information in her disclosures to Ernst & Young and the audit committee. (6 App. 1166-67, ¶¶ 12–14 ; *see generally* 4 App. 783:18-785:6, 855:11–24, 858:15–25; 5 App. 919:10–23, 920:7–14.) As for the anonymous caller to Ernst & Young, Ms. Wynn has no knowledge on that subject. (5 App. 943:2-17.)

2. Ms. Wynn Could not Disclose her Confidential Sources for Fear of Further Reprisal

Ms. Wynn declined to identify the individuals who provided her with information "for fear of further reprisal and intimidation" against

her and others. (4 App. 882:3–13.)[4] Not only were their identities outside the scope of the limited discovery allowed by the district court, but Ms. Wynn's colleagues had provided this corroborating information in confidence; they had an expectation that their accounts and their identities would remain anonymous, certainly from the company. (4 App. 835:6–21.) Wynn Resorts nevertheless continued to press, continued to question Ms. Wynn regarding the identities of her sources, and made clear that it intended to retaliate against those sources as well. (4 App. 836.)

3. Ms. Wynn Established Her Role as an Employee at Wynn Resorts

Ms. Wynn also established that she was an employee of the company for more than a decade. (5 App. 1161 – 6 App. 1166, ¶¶ 1–11; *see also generally* 4 App. 817:3–10, 822:10–15.) She testified that she

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[4] *See also id.* at 4 App. 814:9–11 (concerned with retaliation by Mr. Wynn); 4 App. 831:14–20 ("there has been a pattern and a history of people being accused, attacked, and retaliated against for their interaction with me, which could be totally innocent"); 4 App. 832:24-833:8 (concern of "harassment or retaliation" that happened in the past); 4 App. 841:19-842:2 (fearful of retaliation against "[m]e and other individuals that might be included in the observation"); 4 App. 848:14–23 (noting "lengthy list" of employees subject to retaliation and harassment).

had an employer-employee relationship with Wynn Resorts. (5 App. 1161 – 6 App. 1166, ¶¶ 3–11; *see also generally* 4 App. 818:19–25, 819:1–6, 820:20–821:3.) As an employee, she reported to Mr. Wynn (4 App. 822:21–23), worked with other employees, and issued directions to them to complete various tasks (4 App. 822:24–823:3). Ms. Wynn testified that other employees believed she was an employee and that she performed daily work for the company that could only be characterized as employment-related (4 App. 826:15–18, 628:21–629:1). She requested additional compensation for that work, but Mr. Wynn explained that the compensation he received from the company was considered a "two for one," meaning that the company was compensating Mr. Wynn for the services of both Mr. Wynn and Ms. Wynn. (4 App. 821:17–822:20). None of this work was of the type performed by any other directors. (5 App. 1161, ¶ 3; 6 App. 1164, ¶ 6.)

Wynn Resorts did not introduce any exhibits in connection with Ms. Wynn's employment status. Nor, to date, has Wynn Resorts produced discovery on these issues.

4. Ms. Wynn Testified to her Whistleblower Status

Ms. Wynn testified to her status as a whistleblower (4 App. 851:5–11) and that she made protected, private disclosures to the audit committee and Ernst & Young without any intent to share that information publicly (6 App. 1166, ¶ 13; *see also generally* 4 App. 853:19-854:9.) Among other things, Ms. Wynn identified Wynn Resorts' abusive and harassing litigation conduct in this case as retaliation that has impeded her communications with the audit committee and Ernst & Young. (6 App. 1167-68, ¶¶ 15–16; *see also generally* 4 App. 895:11–23, 911:13–18.)

H. Wynn Resorts' Motion to Compel the Deposition of Ms. Wynn and the Parties' Supplemental Briefing

On August 29, 2016, Wynn Resorts asked the district court to deny Ms. Wynn's motion for protective order and compel Ms. Wynn to identity her confidential sources. (4 App. 741, 748-49, 761.) In opposition, Ms. Wynn argued, among other things, that disclosure of her trusted colleagues' identities directly implicated the federal privileges raised in her motion. (5 App. 956–58, 970-72.)

The district court ordered supplemental briefing regarding the federal privilege issues. (2 App. 323:20-324:1.) In its supplemental

brief, Wynn Resorts contended for the first time that Ms. Wynn "was not an 'employee' of Wynn Resorts for the purposes of [Sarbanes-Oxley]." (5 App. 993-96.)

Ms. Wynn replied, supporting her claim of employee status with her deposition testimony as well as a declaration regarding her employment at Wynn Resorts. (5 App. 1090 (citing 4 App. 817, 822, 5 App. 1161-6 App. 1166.) Ms. Wynn further argued that the Court could grant the motion for protective order without reaching the issue of her protected whistleblower status, because Wynn Resorts had failed to establish a *prima facie* violation of the protective order.[5] (5 App. 1103-06.)

[5] Following the district court's limited grant of discovery, Wynn Resorts apparently established a new board "special committee" to investigate Ms. Wynn's allegations. Ms. Wynn and the special committee exchanged further correspondence in August and early September. The special committee consisted of Mr. Hagenbuch and Patricia Mulroy and was "aided by outside counsel." (3 App. 662.) Wynn Resorts has refused to identify this "outside counsel" or to confirm its independence. Nonetheless, this special committee later acknowledged—in contrast to the positions taken by the company's lawyers—that "[a]s always, you are also free to meet with Ernst & Young to discuss these matters." (5 App. 1160.)

I. The District Court Denies the Protective Order

Without conducting discovery or even holding an evidentiary hearing, the district court denied protection to Ms. Wynn. Addressing Dodd-Frank, the district court concluded that because the information was not provided to the SEC, Ms. Wynn was not entitled to protection at this time:

> And with respect to Dodd-Frank she is not providing information to agencies that would fall within the Dodd-Frank. Therefore there is no protection for her at this time.

(2 App. 362:11–13.)[6] On the Sarbanes-Oxley issue, the district court summarily concluded that Ms. Wynn was not an employee and not entitled to any relief:

> So Elaine Wynn is not an employee, therefore there's no potential retaliation. Therefore there's no protection under Sarbanes-Oxley.

(2 App. 362:7–10.)

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[6] Even while opposing Ms. Wynn's request for protection, Wynn Resorts continued its threatening statements, voicing its intent to depose Ms. Wynn's confidential sources, claiming Ms. Wynn perjured herself in her deposition and "fabricated" her sources, comparing Ms. Wynn to Gordon Liddy, and stating that Ms. Wynn cannot avail herself of federal privileges or protections in state court, but instead must bring a federal action. (2 App. 351:22-352:25, 355:14-358:3.)

J. The Court Denies Discovery

On September 20, 2016, the district court denied Ms. Wynn's request to take discovery from Wynn Resorts regarding her protected status or Wynn Resorts' retaliation. (2 App. 369:7–8.)

WHY THE WRIT SHOULD ISSUE: PROHIBITION AND *MANDAMUS* ARE APPROPRIATE IN THIS CASE

This petition raises issues of law necessary to vindicate Ms. Wynn's federal privileges and protections, including whether Ms. Wynn's communications with Wynn Resorts' auditors, Ernst & Young, are protected under Dodd-Frank, and whether she is a protected person under Sarbanes-Oxley.[7] Resolving these issues is a matter of importance not just for the parties, but for all Nevadans who seek federal protection for their whistleblowing activities.

Extraordinary review is appropriate because the claim is destroyed by delay. The district court has ordered discovery despite a claim of privilege and protection by federal laws. In such a

[7] This Court recently confirmed that a "statutory privilege" provided by federal law must be recognized and enforced in Nevada. *Johnson v. Wells Fargo Bank, NA*, 132 Nev. Adv. Op. 70, ___ P.3d ___ (Sep. 29, 2016) (addressing the scope of the Suspicious Activity Report discovery privilege under the Bank Secrecy Act, 31 U.S.C. § 5311 *et seq*.).

circumstance, an appeal at the conclusion of the case is "not a plain, speedy and adequate remedy in the ordinary course of law." *See* NRS 34.330. An order requiring disclosure of privileged information "is likely to cause irreparable harm" if review is not available on an interlocutory basis. *See, e.g.*, *Club Vista Fin. Servs. v. Eighth Judicial Dist. Court*, 128 Nev., Adv. Op. 21, 276 P.3d 246, 249 (2012) (en banc). In such cases, a writ of prohibition is the appropriate avenue for relief because, if "the discovery permitted by the district court's order is inappropriate, a later appeal would not effectively remedy any improper disclosure of information." *Id.* at 249; *see also Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 350–51, 891 P.2d 1180, 1183–84 (1995) (per curiam) ("If improper discovery were allowed, the assertedly privileged information would irretrievably lose its confidential and privileged quality and petitioners would have no effective remedy, even by a later appeal.").

The importance of the issues also supports writ relief. *See Savage v. Third Judicial Dist. Court*, 125 Nev. 9, 16, 200 P.3d 77, 81 (2009) (en banc) (granting petition where it "raised important questions of law that require clarification and because public policy interests militate in

favor of resolving these questions"). The district court rulings conflict with the majority rule followed by federal courts and the SEC's regulations and interpretative guidance, creating a split with those authorities and leaving Nevadans with less protection than residents of other states on critical issues of privilege. "[T]his court may exercise its discretion to grant mandamus relief where an important issue of law requires clarification . . . ." *Redeker v. Eighth Judicial Dist. Court,* 122 Nev. 164, 167, 127 P.3d 520, 522 (2006). Delay is not a concern, either, as the district court has stayed the challenged orders until October 20, 2016 pending the filing of this petition. Ms. Wynn respectfully requests that this Court hear this petition.

STANDARD OF REVIEW

Questions concerning the proper scope of a statutory privilege under federal law are reviewed *de novo*. *Johnson*, 132 Nev., Adv. Op. 70, slip op. at 6 (citing *Las Vegas Sands Corp. v. Eighth Judicial Dist. Court*, 130 Nev., Adv. Op. 69, 331 P.3d 905, 910 (2014)). Questions of statutory construction related to federal privileges too are reviewed *de novo*. *Id.* (citing *Kay v. Nunez,* 122 Nev. 1100, 1104, 146 P.3d 801, 804 (2006)). Similarly, "[q]uestions of law are reviewed *de novo*." *State*

Indus. Ins. Sys. v. United Exposition Servs. Co., 109 Nev. 28, 30, 846 P.2d 294, 295 (1993). As this Court has noted, "'deference is not owed to legal error.'" *Bayerische Motoren Werke AG v. Roth*, 127 Nev. 122, 134, 252 P.3d 649, 657 (2011) (quoting *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 590, 245 P.3d 1190, 1197 (2010)).

ARGUMENT

Under the district court's rulings, a whistleblower who reports potential violations of federal securities laws to a public company's independent auditor is not protected by laws designed to protect her. According to the district court, such communications are not protected unless she has reported to the SEC, and the company is free to attack and punish the whistleblower for talking to the independent auditor. That view turns federal protections for Nevadans on their head.

I.

DISCLOSURES OF POTENTIAL SECURITIES LAW VIOLATIONS TO A PUBLIC COMPANY'S INDEPENDENT AUDITOR ARE PROTECTED UNDER DODD-FRANK

The district court denied Dodd-Frank protection to Ms. Wynn, holding that "with respect to Dodd-Frank she is not providing information to agencies that would fall within the Dodd-Frank.

Therefore there is no protection for her at this time." (2 App. 362:11–13.). In doing so, the district court adopted the minority position in a federal circuit split that Dodd-Frank's whistleblower protections extend only to disclosures made directly to the SEC.[8] This holding is contrary to both the SEC's regulations and the decisions of the majority of federal courts.

A. Congress Enacted Dodd-Frank to Address the Corporate "Code of Silence"

Congress enacted the whistleblower protections of Sarbanes-Oxley in 2002 and Dodd-Frank in 2010[9] to dismantle the "corporate code of silence" that discouraged and sought to "quiet" whistleblowers "from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally." *Lawson v. FMR LLC*, ___ U.S. ___, 134 S. Ct. 1158, 1162 (2014).

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[8] The district court's reference to "at this time" suggests that the court was contemplating that future communications with the SEC would be protected under Dodd-Frank.

[9] Because the legislative history of Dodd-Frank contains "only fleeting references to the anti-retaliation provision," *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719, 731 (D. Neb. 2014), the legislative history of Sarbanes-Oxley is helpful. *Id.*

Congress enacted Sarbanes-Oxley in response to corporate financial scandals involving Enron and other companies. Introducing the original whistleblower protections of Sarbanes-Oxley, Senator Patrick Leahy addressed the need to provide robust federal protections to corporate whistleblowers, even where the revelations were made internal to the company, rather than to federal agencies:

> In a variety of instances when corporate employees at both Enron and [Arthur] Andersen attempted to report or "blow the whistle" on fraud, [ ] they were discouraged at nearly every turn. . . .
> According to media accounts, this was not an isolated example of whistleblowing associated with the Enron case . . . . These examples further expose ***a culture, supported by law, that discourage employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally***. This "corporate code of silence" not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. . . .

148 Cong. Rec. S1783–01, 2002 WL 384616; S. Rep. 107–146, 2002 WL 863249, at 4–5, 10, 20 (emphasis added). Other portions of the

legislative history confirm Congress' focus on eradicating the "corporate code of silence."[10]

Auditors of public companies are required by federal law to report misconduct, illegality and unethical behavior by top management, including to regulators and others, and to correct false or misleading

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[10] *See* 148 Cong. Rec. S6436–02, S6437, 2002 WL 1466715 (July 9, 2002) (statement of Sen. Daschle) ("People like Sherron Watkins of Enron will be protected from reprisal for the first time under federal law. This bill is going to help prosecutors gain important insider testimony on fraud and put a permanent dent in the 'corporate code of silence.'"); 148 Cong. Rec. S6734–02, S6761, 2002 WL 1532280 (July 15, 2002) (statement of Sen. Snowe) ("[T]he Leahy amendment grants important whistleblower protections to company employees—like Enron's Sherron Watkins—who bravely report wrongdoing occurring within their own corporation."); 148 Cong. Rec. S7350–04, S7358, 2002 WL 1724193 (July 25, 2002) (statement of Sen. Leahy) ("[W]e include meaningful protections for corporate whistleblowers, as passed by the Senate. We learned from Sherron Watkins of Enron that these corporate insiders are the key witnesses that need to be encouraged to report fraud and help prove it in court."); 148 Cong. Rec. H5462–02, H5473, 2002 WL 1724141 (July 25, 2002) (statement of Rep. Jackson–Lee) ("S.2673 extends whistleblower protections to corporate employees.... Whistleblowers in the private sector, like Sh[e]rron Watkins, should be afforded the same protections as government whistleblowers."); 149 Cong. Rec. S1725–01, S1725, 2003 WL 193278 (Jan. 29, 2003) (statement of Sen. Leahy) ("We had both seen enough cases where corporate employees who possessed the courage to stand up and 'do the right thing' found out the hard way that there is a severe penalty for breaking the 'corporate code of silence.'").

SEC filings.[11] As the court explained in *SEC v. WorldCom*, No. 02 Civ. 4963(JSR), 2003 WL 22004827, at *17 (S.D.N.Y. Aug. 26, 2003): "[B]oards of directors, outside auditors and outside counsel are the gatekeepers of behavior standards who are able to prevent damage before it occurs if they are alert, and above all if they are willing to act when necessary. A common denominator in many of the major frauds has been the failure of these gatekeepers to stop improper practices at the outset." Further confirming the critical role that auditors play in corporate governance, enforcement chief Andrew Ceresney recently

[11] Auditors are subject to Section 78j–1 of the Exchange Act, 15 U.S.C. § 78j–1, which is one of the provisions of SOX expressly cross-referenced by subdivision (iii) of the DFA. Section 78j–1(b)(1)(B) requires an auditor of a public company, under certain circumstances, to "inform the appropriate level of the management" of illegal acts that it becomes aware of, including through disclosures by whistleblowers like Ms. Wynn. 15 U.S.C. § 78j–1(b)(1)(B). SOX requires outside auditors receiving such information to take a series of actions designed to cause recalcitrant companies like Wynn Resorts to engage in remedial actions. In particular, subsection 78j–1(b)(2) requires an auditor to report to the board of directors if the company does not take reasonable remedial action after the auditor's report to management. Section 78j–1(b)(3)(B) requires an auditor to either resign or report the illegal acts to the Commission if the board or management fails to take appropriate remedial action and fails to self-report to the SEC.

reaffirmed, in connection with SEC enforcement proceedings, that "[i]ndependent auditors serve as critically important gatekeepers."[12]

The SEC has long recognized that "[i]ndependent auditors have an important public trust. . . . It is the auditor's opinion that furnishes investors with critical assurance that the financial statements have been subjected to a rigorous examination by an objective, impartial, and skilled professional, and that investors, therefore, can rely on them." *Revision of the Commission's Auditor Independence Requirements*, Exchange Act Rel. No. 43,602, 2000 WL 1726933, at *2 (Nov. 21, 2000). Likewise, SEC Chair Mary Jo White has repeatedly emphasized the critical role of public auditors as "gatekeepers," the need to ensure the appropriate "tone at the top," the necessity of fair and impartial internal investigations when corporate wrongdoing is disclosed, and the prohibition of retaliation against whistleblowers. *A Few Things Directors Should Know About the SEC,* Speech by SEC Chair Mary Jo White, Stanford University Rock Center for Corporate Governance,

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[12] Suzanne Barlyn, Reuters, Ernst & Young pays $9.3 million settlement after charges that an auditor was "romantically involved" with a client (Sept. 19, 2016), *available at* http://www.businessinsider.com/r-ernst-young-settles-charges-that-two-auditors-got-too-close-to-clients-sec-2016-9.

Twentieth Annual Stanford Directors' Collection, Stanford, California (June 23, 2014) at 2, 3, 5.

In the wake of the 2008 financial crisis, Congress enacted Dodd-Frank to further strengthen accountability and transparency in the financial system. Pub. L. No. 111–203, 124 Stat. 1376 (2010). S. Rep. 111-176, at 2 (2010). Among its key provisions were new and expanded protections for whistleblowers. 15 U.S.C. § 78u–6(h)(1)(A)(iii). Dodd-Frank forbids employers from retaliating against whistleblowers, and sets forth specific prohibitions:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; *or*
>
> (iii) *in making disclosures that are required or protected under the Sarbanes–Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter [i.e., the Exchange Act], including section 78j–1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or*

> *regulation subject to the jurisdiction of the Commission.*

15 U.S.C. § 78u–6(h)(1)(A)(i)–(iii) (emphasis added). Subsection (h)(1)(A)(iii) of Dodd-Frank incorporates and builds upon the protections of Sarbanes-Oxley. *See Kramer v. Trans-Lux Corp.*, No. 3:11cv1424 (SRU), 2012 WL 4444820, at *5 (D. Conn. Sept. 25, 2012) ("the Dodd–Frank Act appears to have been intended to expand upon the protections of Sarbanes–Oxley").

Dodd-Frank's protections are intentionally broader. They extend to all "whistleblowers"[13] who

> possess a reasonable belief that the information [the whistleblowers] are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in 18 U.S.C. 1514A(a) [the Sarbanes-Oxley whistleblower retaliation statute]) that has occurred, in ongoing, or is about to occur.

17 C.F.R. § 240.21F-2(b)(1)(i).

[13] The term "whistleblower" is construed expansively for purposes of Dodd-Frank's anti-retaliation provision and is not limited to "employees." *See Bussing*, 20 F. Supp. 3d at 729 ("the term 'whistleblower' is given its ordinary meaning for purposes of this anti-retaliation provision"); 17 C.F.R. § 240.21F–2(b)(1).

Ms. Wynn falls under this definition. She is a "whistleblower" who made "disclosures . . . protected under the Sarbanes-Oxley Act" when she reported potential violations of federal securities laws to the audit committee and Ernst & Young. *See* 15 U.S.C. § 78u-6(h)(1)(A)(iii).

B. Dodd-Frank Protects Disclosures to a Public Company's Independent Auditor as a Matter of Law

1. SEC Regulation

The district court's conclusion limiting Dodd-Frank to communications with federal agencies is inconsistent with the broad remedial purposes of the Act. The SEC's implementing regulation under Dodd-Frank makes clear that "[t]he anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award." 17 C.F.R. § 240.21F-2(b)(1)(iii). The SEC's definition of whistleblower thus does not require reporting to the SEC. A complainant may report internally to an audit committee, a compliance official, or an independent auditor.

In recent interpretive guidance, the SEC confirmed that Dodd-Frank protections apply to internal whistleblowers:

> Under our interpretation, ***an individual who reports internally*** and suffers employment retaliation ***will be no less protected than an***

> ***individual who comes immediately to the Commission***. Providing equivalent employment retaliation protection for both situations removes a potentially serious disincentive to internal reporting by employees in appropriate circumstances. A contrary interpretation would undermine the other incentives that were put in place through the Commission's whistleblower rules in order to encourage internal reporting.

(5 App. 1046 (emphasis added).) The SEC explained that "Rule 21F-2(b)(1) alone governs the procedures that an individual must follow to qualify as a whistleblower eligible for Section 21F's employment retaliation protections." (5 App. 1041.)

This rule makes sense. Internal reporting processes "play an important role in achieving compliance with the securities laws." *See* Securities Whistleblower Incentives and Protections 76 Fed. Reg. 34300, 34325 (June 13, 2011). The contrary approach adopted by the district court here—mandating that whistleblowers go straight to the SEC in every instance—threatens the "effectiveness of a company's existing compliance, legal, audit and similar internal processes for investigating and responding to potential violations of the Federal securities laws," which in turn weakens corporate compliance with the securities laws. Proposed Rules for Implementing the Whistleblower

Provisions of Section 21F of the Securities Exchange Act of 1934 ("Proposing Release"), 75 Fed. Reg. 70488, 70488 (Nov. 17, 2010).

Protecting those who first report internally effectuates the purpose behind Dodd-Frank. Securities regulations should not "discourage whistleblowers who work for companies that have robust compliance programs [from] *first* report[ing] the violation to appropriate company personnel." Proposing Release at 70488 (emphasis added). Any other interpretation would create a two-tiered structure of anti-retaliation protection that would discourage internal reporting. *See generally* Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245, 1250 (2009) ("[I]nternal protections are particularly crucial in view of research findings that . . . employees are more likely to choose internal reporting systems."). That was not Congress's intent.

The SEC's regulation, 17 C.F.R. § 21F-2(b)(1), and its interpretation contemplate Dodd-Frank whistleblower protection to disclosures to persons other than the SEC, including independent auditors. That interpretation is entitled to *Chevron* deference. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467

U.S. 837, 843-44 & n.11 (1984) (if the statute is silent or ambiguous with respect to the specific issue, the court should determine whether the agency's interpretation is reasonable, which means the interpretation is rational and not inconsistent with the statute); *cf. City of Las Vegas Downtown Redev. Agency v. Crockett*, 117 Nev. 816, 831, 34 P.3d 553, 563 (2001) (similar standard under Nevada law: "The construction placed on a statute by the agency charged with the duty of administering it is entitled to deference." (quoting *SIIS v. Miller*, 112 Nev. 1112, 1118, 923 P.2d 577, 581 (1996))).

2. Judicial Acceptance of the SEC Rule

As the Second Circuit recently explained, applying Dodd-Frank protections to internal whistleblowing is the proper interpretation in light of the "realities" of the Exchange Act, because key players in the compliance process—auditors and attorneys, for example—"cannot report wrongdoing to the Commission until after they have reported the wrongdoing to their employer." *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 151-52 (2d Cir. 2015). Leaving internal reporting unprotected would expose reporters to retaliation, which cannot have been Congress's intention. *Id.* Ensuring a protected path of internal

reporting also fosters more efficient compliance with securities laws. "[R]eporting only to their employer offers the prospect of having the wrongdoing ended, with little chance of retaliation, whereas reporting to a government agency creates a substantial risk of retaliation." *Id.* at 151.

3. This Court Should Reject the Minority View

In contrast, denying Dodd-Frank protection to internal whistleblowing upsets the balance struck by Congress and the SEC in enacting and regulating these statutes. It also undermines the policies Dodd-Frank seeks to advance. This Court should reject this minority view.

Although a panel of the Fifth Circuit interpreted Dodd-Frank to protect only communications with the SEC, *Asadi v. G.E. Energy (U.S.A.), LLC*, 720 F.3d 620, 630 (5th Cir. 2013), this is a minority view that was subsequently rejected by the SEC's 2015 guidance. It since has also been rejected by the Second Circuit and several district courts

in this circuit.[14] It also has been rejected in at least four amicus briefs filed by the SEC in the Second, Sixth, and Ninth Circuits.[15]

As the SEC explained in its recent Ninth Circuit amicus brief, a ruling that Dodd-Frank whistleblower anti-retaliation provisions protects only disclosures to the SEC would result in a "reduction in the 'effectiveness of a company's existing compliance, legal, *audit* and

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[14] *See Berman*, 801 F.3d at 155 ("Under SEC Rule 21F–2(b)(1), [the whistleblower] is entitled to pursue Dodd–Frank remedies for alleged retaliation after his report of wrongdoing to his employer, despite not having reported to the Commission before his termination."); *Wadler v. Bio-Rad Labs., Inc.*, 141 F. Supp. 3d 1005, 1024 (N.D. Cal. 2015) (affording *Chevron* deference to the SEC's regulations and holding that Dodd-Frank whistleblower protections apply to internal reporting), *Somers v. Digital Realty Trust, Inc.*, 119 F. Supp. 3d 1088, 1108 (N.D. Cal. 2015) (same); *Connolly v. Remkes*, No. 5:14-CV-01344-LHK, 2014 WL 5473144, at *6 (N.D. Cal. Oct. 28, 2014) (same). The Ninth Circuit granted a petition for interlocutory appeal of a district court decision that deferred to the Commission's rule. *Somers*, 2015 WL 4483955, at *3-12, *interlocutory appeal certified*, 2015 WL 4481987 (N.D. Cal. July 22, 2015), *and docketed*, No. 15-80136 (9th Cir. July 31, 2015). The Ninth Circuit will hear argument in that case on November 16 and has granted the SEC leave to argue. *See* Ninth Circuit Case No. 15-17352, Dkt. 55 (Sept. 21, 2016).

[15] *See* https://www.sec.gov/about/offices/owb/owb-resources.shtml (collecting SEC amicus briefs filed in the Second and Sixth Circuits); *see also Somers v. Digital Realty Trust Inc.*, Brief of the Securities and Exchange Commission, *Amicus Curiae* in Support of the Appellee, Case No. 15-17352, Dkt. 30 (9th Cir. May 25, 2016). The Sixth Circuit heard argument in *Verble v. Morgan Stanley* on September 14 of this year.

similar internal processes for investigating and responding to potential violations of the Federal securities laws,' which in turn could weaken corporate compliance with the securities laws."[16]

The district court's ruling here, if allowed to stand, would discourage internal reporting to the board and independent auditors, which would defeat the public policies and remedial purposes underlying Dodd-Frank. This court should grant this petition and correct that ruling.

II.

THE DISTRICT COURT ERRED IN RULING THAT ELAINE WYNN IS NOT A PROTECTED PERSON UNDER SARBANES-OXLEY

The district court erroneously ruled that "Elaine Wynn is not an employee, therefore there's no potential retaliation. Therefore there's no protection under Sarbanes-Oxley." (2 App. 362:7–10.) The decision is contrary to the undisputed evidence as applied under the correct legal

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[16] *Somers v. Digital Realty Trust Inc.*, Brief of the Securities and Exchange Commission, *Amicus Curiae* in Support of the Appellee, Case No. 15-17352, Dkt. 30 at 10 (9th Cir. May 25, 2016) (citing Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70,488, 70,488 (Nov. 17, 2010)) (emphasis added).

standard. This Court should grant the petition on this issue. *See Kay*, 146 P.3d at 804; *see also Vinick v. United States*, 205 F.3d 1, 6 (1st Cir. 2000) (reversing and remanding based on the district court's "application of an improper standard to the facts") (quoting *United States v. Singer Mfg. Co.*, 374 U.S. 174, 194 n.9 (1963)).

A. Sarbanes-Oxley is Designed to Protect Whistleblowers like Ms. Wynn

"To safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation, Congress enacted the Sarbanes–Oxley Act of 2002, 116 Stat. 745." *Lawson*, ___ U.S. at ___, 134 S. Ct. at 1161 (citing S. Rep. No. 107-146, pp. 2-11 (2002)). "The Sarbanes–Oxley Act itself is a major piece of legislation bundling together a large number of diverse and independent statutes, all designed to improve the quality of and transparency in financial reporting and auditing of public companies." *Carnero v. Boston Sci. Corp.*, 433 F.3d 1, 9 (1st Cir. 2006).

Sarbanes-Oxley was designed, in part, to protect of whistleblowers. Sarbanes-Oxley provides that:

> [No publicly traded company] or any officer, employee, contractor, subcontractor, or agent of such company . . . may discharge, demote, suspend,

threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) *a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)*; or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C. § 1514A(a) (emphasis added). Subsection (a)(1)(C) protects *internal reporting* of misconduct to the board members or to an independent auditor.[17]

B. Ms. Wynn is an "Employee" Under Sarbanes-Oxley

The term "employee" is construed broadly to implement the remedial purposes of Sarbanes-Oxley.[18] Ms. Wynn qualifies as an employee for purposes of federal discrimination laws under *Clackamas Gastroenterology Assocs. P.C. v. Wells*, 538 U.S. 440 (2003).[19]

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[17] *See Ellington v. Giacoumakis*, 977 F. Supp. 2d 42, 45 (D. Mass. 2013) ("It is apparent from the wording and positioning of § 78u–6(h)(1)(B)(i) that Congress intended that an employee terminated for reporting Sarbanes–Oxley violations to a supervisor *or an outside compliance officer*, and ultimately to the SEC, have a private right of action under Dodd–Frank whether or not the employer wins the race to the SEC's door with a termination notice.") (emphasis added).

[18] *See Lawson*, ___ U.S. at ___, 134 S. Ct. at 1161 ("We hold, based on the text of § 1514A, the mischief to which Congress was responding, and earlier legislation Congress drew upon, that the provision shelters employees of private contractors and subcontractors, just as it shelters employees of the public company served by the contractors and subcontractors.").

[19] Although the district court did not identify any legal standard applied to its conclusion that Ms. Wynn is not an "employee" under Sarbanes-Oxley, the parties do not dispute that *Clackamas* controls, rather than varying state laws. Nevertheless, even if Nevada law on "employee" status controls, the undisputed evidence shows she satisfies those standards. (6 App. 1166); *Terry v. Sapphire Gentlemen's Club*,

In *Clackamas,* the U.S. Supreme Court articulated six factors relevant to determining whether an individual is an employee for federal anti-retaliation laws:

> (1) whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
>
> (2) whether, and if so to what extent, the organization supervises the individual's work;
>
> (3) whether the individual reports to someone higher in the organization;
>
> (4) whether, and if so to what extent, the individual is able to influence the organization;
>
> (5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and
>
> (6) whether the individual shares in the profits, losses, and liabilities of the organization.

Id. at 449-50. The undisputed evidence shows Ms. Wynn is an employee under the *Clackamas* standard.

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130 Nev. Adv. Op. 87, 336 P.3d 951 (2014) (addressing "employee" status for purposes of Nevada's wage and hour laws); NRS 612.085 (Nevada Unemployment Compensation Law); *Hays Home Delivery, Inc. v. Emp'rs Ins. Co. of Nev.*, 117 Nev. 678, 682, 31 P.3d 367, 369-70 (2001) (Nevada Industrial Insurance Act).

1. Ms. Wynn's Undisputed Deposition and Declaration Testimony Demonstrates she was an Employee Under Sarbanes-Oxley

Ms. Wynn Reported to Mr. Wynn

Ms. Wynn worked as an employee of Wynn Resorts and exercised managerial and supervisory authority from 2002 until 2015. (5 App. 1161.) She received her authority as an employee from Steve Wynn, to whom she reported, and this authority was different from, and did not arise from, her duties as a director. (*Id.*) As she explains:

> The work that I performed for Wynn Resorts was comparable to the work of other officers and employees in managerial and supervisory positions at the Company. Among other things, I played a substantial and ongoing role in developing the branding of the various properties of Wynn Resorts, including helping to develop the distinctive look, feel and culture of our properties. I played a critical role, on a daily basis, in building the Company and supporting and creating its iconic brand. I was also involved in various issues of operational importance to the Company on a regular basis as the Company grew.

(5 App. 1162.)

Ms. Wynn Influenced the Company by Working With Others

Ms. Wynn's employee duties included her work in various operational and management roles within the company, including Hospitality; Employee Relations; Political, Educational and Community

Engagement; Retail; Entertainment; Hotel Design; *Wynn Magazine*; Property Review; Public Relations and Special Events; and Hostess Functions. (5 App. 1162.) As the *New York Times* put it: "As just about anyone in the Company will tell you, [Ms. Wynn] was involved in virtually every detail of Wynn Las Vegas, from the staff's uniforms and the spa's amenities to the choice of luxury shops." (6 App. 1164, 1170.)

By way of example, Ms. Wynn helped design, develop and review hotel interiors and amenities, uniforms, and logo designs and apparel. (5 App. 1162-6 App. 1164.) She reviewed daily VIP arrivals and sent special welcomes and amenities. *Id.* She interacted with and supervised employees on a daily basis, assisted in recruiting employees, and prepared and approved periodic messages as Wynn Resorts' voice. *Id.* She served as the face of the company in the community, which enhanced the company's reputation. *Id.* She identified and recruited retail partners for Wynn Resorts. *Id.* She conducted costume review and revisions for Wynn Resorts' production show, *Le Rêve – the Dream*, consulted with the creative teams related to other entertainment offerings (*e.g.*, the *Lake of Dreams* shows), and worked with the *CEO to devel*op the entertainment. *Id.* She was responsible for the planning

and oversight of Wynn Resorts' major special events including openings, holiday events, charitable events, and special casino marketing parties. *Id. Non-employee directors were not involved in any operational duties to this extent or of this nature.* (6 App. 1164.)

Mr. Wynn Regulated Ms. Wynn's Work

Once Ms. Wynn contemplated divorce from Mr. Wynn, her employee duties gradually decreased as a result, but she still performed many employee functions, including public relations, special events, community affairs, uniform design, hosting, and informal advising until 2015. (6 App. 1164.)

Wynn Resorts Recognized her as an Employee

In publicly filed documents, Wynn Resorts itself recognized Ms. Wynn's "on-going operational involvement with the Company" and activities "comparable to those of management." (6 App. 1177.) No other director, with the exception of Mr. Wynn acting as an officer, did these sorts of traditional employee duties. (5 App. 1161; 6 App. 1164.) As Ms. Wynn explained, if she was not functioning as an employee, then she is not sure what she was doing nearly every day when she was working on company property for 13 years. (6 App. 1164-65.) For these

reasons, Ms. Wynn qualifies as an employee for purposes of federal discrimination laws under *Clackamas*.

Wynn Resorts' argument, and the district court's conclusion, that Ms. Wynn was not an employee is also inconsistent with company records. In an SEC filing on March 24, 2015, Wynn Resorts stated that Ms. Wynn did not qualify as an "independent director" because "Ms. Wynn maintains her office at the Company's headquarters and repeatedly describes her activities as being comparable to those of management." (6 App. 1164, 1181.) Wynn Resorts has also said:

> we believe that the foregoing statements [by Ms. Wynn regarding her activities as an employee] demonstrate Ms. Wynn's perspective on her on-going operational involvement with the Company. Rather than demonstrating the objectivity and oversight roles of an independent director, we believe that Ms. Wynn's statements show that Ms. Wynn is not an 'independent' director and instead is and has been an inside director since 2002.

(6 App. 1181.)

2. Wynn Resorts is Judicially Estopped from Arguing that Ms. Wynn is Not an Employee

Wynn Resorts is also judicially estopped from arguing that Ms. Wynn is not an employee based on a prior successful argument it made before the district court. *S. California Edison v. First Judicial*

Dist. Court, 127 Nev. 276, 285-87, 255 P.3d 231, 237 (2011). In arguing that Ms. Wynn waived privilege as to certain communications on her work computer, Wynn Resorts claimed that Ms. Wynn was, and remains, subject to Wynn Resorts' policies applicable by their terms to its "employees." Relying on this argument, the district court found that Wynn Resorts' policy on computer usage—which by its express language only applies to "employees"—applies to Ms. Wynn. (*See* 1 App. 27:15–18.) Wynn Resorts cannot change course now and argue that Ms. Wynn is not an employee.

3. Wynn Resorts' Retort Offers Only Argument Without Evidence

The district court did not identify the evidence upon which it concluded that Ms. Wynn was not an employee. It could not do so because the *only* evidence—Ms. Wynn's declaration and deposition testimony—showed that she was. Indeed, Wynn Resorts offered no evidence to the district court to dispute Ms. Wynn's status as an employee. Rather, it offered argument only, stating that Ms. Wynn could not be an employee because she previously identified herself as a director.

It is axiomatic that legal argument is not evidence.[20] Since the only evidence in the record demonstrates that Ms. Wynn was an employee under Sarbanes-Oxley, the district court's conclusion is reversible error.

4. Wynn Resorts' Argument that Ms. Wynn Cannot be both a Director and an Employee is Wrong

The district court seemingly adopted Wynn Resorts' argument that Ms. Wynn could not be both a director and an employee. This was legal error.

Under *Clackamas*, a corporate director who is delegated managerial or supervisory authority can qualify as an employee.[21] Federal law protects high-level executives and managers from retaliation just as it protects rank-and-file employees. As shown above, Ms. Wynn satisfies these standards. That Ms. Wynn is a former

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[20] *See, e.g.*, Nevada Civil Jury Instructions 2EV.3 ("Statements, arguments, and opinions of counsel are not evidence.").

[21] *De Jesús v. LTT Card Servs., Inc.*, 474 F.3d 16, 24 (1st Cir. 2007); *Smith v. Castaways Family Diner*, 453 F.3d 971, 985-86 (7th Cir. 2006); *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 986-87 (10th Cir. 2002).

director and substantial shareholder does not preclude her from also being an employee for purposes of Sarbanes-Oxley.[22]

Citing a single administrative law judge decision, Wynn Resorts argued that Sarbanes-Oxley whistleblower protections do not apply to a "former director." (5 App. 994 (citing *Cunningham v. LiveDeal, Inc.*, 2011-Sarbanes-Oxley-4 (ALJ Apr. 1, 2011). However, *Cunningham* is inapposite. The ruling does not hold that a former director can never be an employee. The administrative law judge merely concluded that *that* complainant "cannot claim to be both an 'employee' subject to corporations [*sic*] control and an '*independent* director' for the purposes of NASDAQ regulations. *Independent directors* have a special role under the Sarbanes-Oxley and NASDAQ regulatory scheme." Slip op. at 10 (emphases added).

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[22] *See Trainor*, 318 F.3d at 983 ("It is undisputed that Mr. Pilgrim and his wife currently own in equal shares all the stock of Apollo, that Mr. Pilgrim performed services for Apollo, and that Apollo paid him a salary for those services. Mr. Pilgrim was thus both an owner of Apollo and a participant in a traditional employment relationship with the corporation."); *EEOC v. First Catholic Slovak Ladies Ass'n*, 694 F.2d 1068, 1070 (6th Cir. 1982) (finding that individuals "performed traditional employee duties" and "[t]heir participation on the policy-making Board of Directors does not detract from their primary role as employees").

In contrast to the *independent* director in *Cunningham* who was retaliated against *before* his departure from the board, Wynn Resorts has repeatedly emphasized in its proxy statements that Ms. Wynn "has been an inside director since 2002" and her duties do not demonstrate "the objectivity and oversight roles of an independent director":

> At the Board meeting on February 26, 2015, after the Board had voted not to re-nominate Elaine Wynn to serve as one of the Company's directors, and after a review of the definition of "independent director," Ms. Wynn voted with the Board's unanimous determination that the Company has six directors who qualify as independent: Governor Miller, Dr. Irani and Messrs. Hagenbuch, Shoemaker, Virtue, and Wayson. As she has done for over a dozen years, Ms. Wynn, acting in her role as a director, voted without objection in determining that she and the Company's chief executive officer, Stephen A. Wynn, do not qualify as independent.

(5 App. 1053 (emphases in original)). Inside directors like Ms. Wynn are entitled to Sarbanes-Oxley protection because their roles and work within the company are substantively different from those of independent directors. Furthermore, *all directors* are entitled to federal whistleblower protection where, as here, the retaliatory acts occurred *after* the whistleblower was no longer a director.

Thus, this Court should grant the petition, reversing the district court's ruling because Ms. Wynn is an "employee" under Sarbanes-

Oxley as demonstrated by the undisputed evidence and because, as a director, she is also entitled to protection.

C. At a Minimum, the Court should Remand with Instructions to Allow Discovery regarding Ms. Wynn's Protected Status under Sarbanes-Oxley

Wynn Resorts failed to introduce any evidence to show that Ms. Wynn was not an employee, and the district court failed to make any factual findings on this issue. These failures constitute reversible error. Indeed, the district court did not conduct an evidentiary hearing or make any factual findings regarding this issue, instead ruling in one sentence that "Ms. Wynn is not an employee." (2 App. 362.)

Accordingly, if Ms. Wynn's evidence on her employee status is not sufficiently conclusive to establish Sarbanes-Oxley protection under *Clackamas*, this Court should vacate the order and remand the case to allow discovery and an evidentiary hearing. Wynn Resorts is uniquely in possession of information pertaining to Ms. Wynn's role, responsibilities and duties during her 13-year tenure at the company. This includes, for example, its internal classification and treatment of Ms. Wynn as an employee, its internal communications showing how management and other employees considered Ms. Wynn's role and its

retaliatory conduct. As shown, Wynn Resorts publicly described Ms. Wynn's role as including employment-type duties. Not only does the company undoubtedly have internal documentation relating to those statements, but there is ample reason to believe it made other internal admissions it has not disclosed. Wynn Resorts had an opportunity to take discovery from Ms. Wynn. It would be fundamentally unfair to disallow Ms. Wynn the opportunity to conduct her own discovery on these issues.

Authority disfavors such a result. *See Foresta v. Centerlight Capital Mgmt., LLC*, 379 F. App'x 44, 45 (2d Cir. 2010). In *Foresta*, the district court summarily disposed of an ADA claim based on a finding that some employees were actually independent contractors. *Id.* The Second Circuit reversed and remanded, holding that "it was error" to grant summary judgment before "the parties engaged in full discovery." *Id. See also Ali v. Trimac Transp. Servs. (Western), Inc.*, 417 F. App'x 706 (9th Cir. 2011) (reversing and remanding summary judgment against plaintiff because the parties "dispute[d] the employment status" of the plaintiff, but plaintiff had been given "no discovery and no

opportunity to develop adequately the record"). This Court should reach the same conclusion here.[23]

III.

THE DISTRICT COURT ERRED IN ABROGATING MS. WYNN'S FEDERAL PRIVILEGES AND PROTECTIONS

Since Ms. Wynn is a whistleblower under Dodd-Frank and Sarbanes-Oxley, the information sought by Wynn Resorts is privileged and protected under federal law. Wynn Resorts' actions cannot abrogate these privileges. To ward off retaliatory litigation tactics, these privileges must be enforced broadly. The burden should not be on whistleblowers to prove on a case-by-case basis that such discovery is

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[23] The district court's erroneous conclusion that Ms. Wynn is not a protected employee under Sarbanes-Oxley is akin to summary judgment without allowing discovery. Construing NRCP 56(f), this Court has repeatedly held that a district court abuses its discretion by denying discovery to a moving party and granting summary judgment instead, where the requested discovery would likely produce genuine issues of material fact. *See, e.g., Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 119, 110 P.3d 59, 63 (2005) (denial of discovery was abuse of discretion under Rule 56(f)); *Ameritrade, Inc. v. First Interstate Bank of Nev.*, 105 Nev. 696, 700, 782 P.2d 1318, 1320 (1989) (same); *Halimi v. Blacketor*, 105 Nev. 105, 106, 770 P.2d 531, 532 (1989); *Harrison v. Falcon Prod., Inc.*, 103 Nev. 558, 560, 746 P.2d 642, 643 (1987) (same); *Mininni v. Wynn Las Vegas, LLC*, 126 Nev. 739, 367 P.3d 800 (2010) (same); *Gruber v. Shvachko*, 126 Nev. 716, 367 P.3d 775 (2010) (same).

retaliatory, as that burden would dissuade reasonable people from making protected disclosures. Many whistleblowers simply do not have the capacity to stand up to powerful public companies that threaten legal action against those who report potential securities violations to an independent auditor. By denying Ms. Wynn's motion for protective order and abrogating her privileges, the district court gave its imprimatur to such abusive practices. That ruling is contrary to the federal law and the policies underlying Dodd-Frank and Sarbanes-Oxley.

A. Federal Privileges Bar Disclosure of Ms. Wynn's Whistleblower Activity

Ms. Wynn declined to identify the individuals who provided her with information in confidence "for fear of further reprisals, harassment, intimidation and retaliation" against her and others by Wynn Resorts. (6 App. 1168, ¶ 16; *see also generally* 4 App. 882:9–11, 814:14–20, 831:24-833:8, 835:6–21, 841:19-842:2, 848:14–23, 905:13–21.) Ms. Wynn also declined to disclose whistleblower communications

with confidential sources. Both categories of information are protected from disclosure by federal law.[24]

1. A Whistleblower's Communications and Sources are Protected by Federal Regulations

Federal statutes and regulations protect a whistleblower's confidential communications with independent auditors.[25] Specifically, SEC regulations protect "confidential, anonymous submissions," which

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[24] Nevada enforces federal privileges. *See Johnson*, 132 Nev. Adv. Op. 70, slip op. at 6; *see also* NRS 49.015 (instructing courts to recognize a "privilege to . . . [r]efuse to disclose any matter . . . [when] required by the Constitution of the United States").

[25] *See Carnero*, 433 F.3d at 9-10 ("Section 301 of the Act requires the audit committees of issuers (which include foreign issuers) to implement internal procedures that facilitate and encourage 'anonymous' whistleblowing by employees concerning 'questionable accounting or auditing matters.'") (citing 15 U.S.C. § 78j-1(m)(4)) ("Complaints.—Each audit committee *shall establish* procedures for—(A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and (B) *the confidential, anonymous submission* by employees of the issuer of concerns regarding questionable accounting or auditing matters.") (emphases added); 17 C.F.R. § 240.10A-3(b)(3)(ii) ("Each audit committee *must establish* procedures for: . . . .[t]he *confidential, anonymous submission* by employees of the listed issuer of concerns regarding questionable accounting or auditing matters."); 15 U.S.C. § 78u–6(h)(2)(A) (describing how "the Commission *shall not disclose* any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower" except in narrow circumstances) (emphasis added); 17 C.F.R. § 240.21F-7 (similar).

includes the substance of Ms. Wynn's protected communications. If there were any doubt, federal regulations prohibit "any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation." 17 CFR § 240.21F-17. The compelled disclosure of a whistleblower's communications and sources would qualify as an "action" that would dissuade that whistleblower from making protected disclosures.

2. A Whistleblower's Communications and Sources are Protected by Federal Statutes and Public Policy

Federal law and policy likewise bar disclosure of a whistleblower's identity and the nature of the protected communications. Just as revealing a whistleblower would "dissuade a reasonable employee from making protected disclosures" and therefore constitute retaliation, *see Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 262 (5th Cir. 2014) (per curiam), so too would the compelled disclosure of that whistleblower's sources and confidential communications to third parties. Retaliatory conduct under Dodd-Frank and Sarbanes-Oxley refers to any actions "that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged."

Guitron v. Wells Fargo Bank, NA, 2012 WL 2708517, at *16 (N.D. Cal. July 6, 2012), *aff'd*, 619 F. App'x 590 (9th Cir. 2015). To now require Ms. Wynn to identify her confidential sources is itself a form of retaliation that is not protected by any state-law litigation privilege.

B. The Stipulation and Protective Order's Objective of Maintaining Confidentiality Does not Override Federal Policy Protecting Whistleblowers

The purported purpose of this ancillary proceeding in the district court is to discover whether Ms. Wynn violated the February 2013 protective order, which was designed to maintain the confidentiality of certain documents. This proceeding should not even be looking into these matters. Ms. Wynn has made clear she did not utilize confidential documents to report to Ernst & Young. But even if she had, the federal policy underlying the protection of whistleblowers overrides the objective of maintaining confidentiality under a stipulation and order.[26]

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[26] Paragraph 21 of the protective order provides that "this Stipulation shall not limit or circumscribe in any manner any rights the Parties (or their respective counsel) may have under common law, or pursuant to any state, federal, or foreign statute or regulation, and/or ethical rule." (3 App. 450.)

Even agreements that attempt to maintain confidentiality "cannot trump" the federal policy protecting whistleblowers. *See United States v. Cancer Treatment Centers of Am.*, 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004); *see also United States ex rel. Ruhe v. Masimo Corp.*, 929 F. Supp. 2d 1033, 1039 (C.D. Cal. 2012) (finding whistleblowers to be "exempt" from confidentiality agreements, because "[o]bviously, the strong public policy would be thwarted if [employers] could silence whistleblowers"). Courts have refused to enforce confidentiality agreements that purport to restrict whistleblower rights on federal public policy grounds, where the disclosure of the information was reasonably necessary for protected whistleblowing activities. *See McGrane v. Reader's Digest Ass 'n, Inc.*, 822 F. Supp. 1044, 1052 (S.D.N.Y. 1993); *In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127, 1136 (N.D. Cal. 2002); *see also Cafasso, U.S. ex rel. v. General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1062 (9th Cir. 2011) (discussing public policy exception). The Department of Labor has also ruled that providing documents marked "confidential" is protected activity under Dodd-Frank and Sarbanes-Oxley, notwithstanding their designation. *Vannoy v. Celanese Corp.*, 2008-Sarbanes-Oxley-00064, slip op. at 21 (ALJ Jul. 24, 2013).

The valid purpose behind confidentiality agreements and protective orders is to protect trade secret and similar information, not to hide potential violations of federal securities laws from a company's own auditors and regulators. Sarbanes-Oxley's and Dodd-Frank's policy of protecting whistleblowers overrides any interest in discovering the breach of a protective order. In any event, Ms. Wynn testified that she did not provide any designated information to Ernst & Young and so could not have violated the protective order.

C. State-Law Litigation Privilege does not Override a Whistleblower's Federal Privileges and Protections

Wynn Resorts argued that its demand for Ms. Wynn's confidential sources does not violate federal law under Nevada's state-law litigation privilege. This is not true. Federal anti-retaliation laws supersede state litigation privileges under the Supremacy Clause. *See Pardi v. Kaiser Found. Hospitals*, 389 F.3d 840, 851-52 (9th Cir. 2004) ("Kaiser was not entitled to claim the protection of California Civil Code § 47(b) as a shield from liability for retaliatory acts committed after the settlement."); *Troyer v. Shrider*, No. CV 08-5042 PSG (JWJx), 2008 WL 4291450, at *3 (C.D. Cal. Sept. 15, 2008) ("[U]nder the Supremacy Clause, a state absolute litigation privilege purporting to confer

immunity from suit cannot defeat a federal cause of action.") (collecting cases).

But there is a more fundamental misconception in Wynn Resorts' argument. Even if it applied, a litigation privilege is a defense to a claim, not a license to affirmatively seek protected information protected by federal law. Such a defense acts only as a shield from liability arising from "communications uttered or published in the course of judicial proceedings." *Greenberg Traurig, LLP v. Frias Holding Co.*, 130 Nev. ___, ___, 331 P.3d 901, 903 (2014). It is not as a sword.

Finally, if this petition is granted, Ms. Wynn respectfully asks this Court to instruct the district court to apply Ms. Wynn's federal privileges on remand to any other issues implicated Ms. Wynn's protected whistleblower activities.

CONCLUSION

Federal privileges and protections bar disclosure of Ms. Wynn's protected whistleblower activity to those who retaliated against her (the company), her litigation adversaries (the Okada parties), and the public. This Court should instruct the district court to grant Ms.

Wynn's motion for protective order and to enforce these privileges and protections on remand.

Dated this 5th day of October 2016.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point, double-spaced Century Schoolbook font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 11,638 words.

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

the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of October 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of October 2016, I caused to be delivered a copy of the foregoing **PETITION FOR WRIT OF PROHIBITION OR IN THE ALTERNATIVE, MANDAMUS** by United States Postal Service, postage prepaid, at Las Vegas, Nevada, addressed as follows:

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