Case No. 74184

In the Supreme Court of Nevada

ELAINE P. WYNN,

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,

Respondents,

and

STEPHEN A. WYNN; WYNN RESORTS, LIMITED; LINDA CHEN; RUSSELL GOLDSMITH; RAY R. IRANI; ROBERT J. MILLER; JOHN A. MORAN; MARC D. SCHORR; ALVIN V. SHOEMAKER; KIMMARIE SINATRA; D. BOONE WAYSON; and ALLAN ZEMAN,

Real Parties in Interest.



District Court
No. A656710

**REPLY BRIEF ON MOTION TO STRIKE APPENDIX**
***(Filed Under Seal)***

The Wynn parties' opposition is a model for why appellate review of district-court rulings via writ petition should be limited to the record in the district court. The Wynn parties ask this Court to weigh several assertions of fact and witness credibility—that Ms. Wynn's recent deposition [redacted] (Opp. 2); that Mr. Nathan's recent deposition demonstrates that [redacted]



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[redacted] (Opp. 5); and that [redacted] (Opp. 7–9). They ask *this* Court to determine these facts in the first instance because the district court never had a chance to; the materials on which the assertions are based are not part of the district-court record. That request illustrates – perhaps even better than the legal argument in Ms. Wynn's motion – the fallout of eliminating restrictions on the appendix.

### A. A Writ Petition from a District-Court Ruling is Like an Appeal

Jurisdiction and the standard of review are separate questions. Writ petitions from district-court rulings fall within the Court's original jurisdiction, but that does not make this Court a court of first instance on all of the issues raised in the petition. Once this Court agrees to hear the petition, this Court reviews the district court's actions in the same manner as in an appeal. *See Dep't of Transp. v. Eighth Judicial Dist. Court (Nassiri)*, 133 Nev., Adv. Op. 70, ___ P.3d ___, ___ (Sept. 27, 2017) ("Even in a writ petition, this court reviews de novo issues of law, such as contract and statutory interpretation.").

### B. In a Challenge to District-Court Action, this Court Reviews the Record

Thus, in several petitions from district-court rulings, including an earlier petition in this litigation, this Court applied the concept of "the record on appeal"—and its attendant limitations on what the parties may present or argue to this Court.[1] The Wynn parties sneer at *Yellow Cab of Reno, Inc. v. Second Judicial District Court* as "inapposite" (Opp. 6), but *Yellow Cab* is the sole case discussing evidence outside the district-court record: initially, this Court relied on that evidence (state demographer's statistics); on rehearing, the Court went back and took judicial notice of different evidence (census figures). 127 Nev. 583, 589, 591 n.4, 262 P.3d 699, 702, 703 n.4 (2011). Were it true that this Court can deny or sustain a challenge to a district court's ruling merely by reference to "any . . . original document" outside the district-court record, judicial notice would have been a fussy supernumerary.

### C. NRAP 21(a)(4) Does Not Enlarge the Scope of Review

Repairing to principles of appellate review makes sense when the writ petition seeks appellate review, and NRAP 21(a)(4) does not over-

[1] *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev., Adv. Op. 52, 399 P.3d 334, 340 n.3 (2017); *Alper v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 43, 352 P.3d 28, 29 n.2 (2015).

ride that sensible approach.

### *1. The Rule Accommodates Petitions without a Record*

The general rule is that the parties must submit "an appendix that complies with Rule 30." NRAP 21(a)(4). But because not every extraordinary writ *has* the district-court record that Rule 30 requires, Rule 21(a)(4) is worded broadly to apply in those situations—such as a direct challenge to action by a "corporation, commission, board or officer," or other official acts that are reflected only in an "original document" rather than an official record—where resort to such documents "may be essential."

### *2. For Appellate Review, Only the Record is Essential*

This is not one of those unusual situations. This is a plain-vanilla petition challenging a discovery ruling entered on the record. It is the kind of thing that, but for the irreversible harm of disclosure, would be reviewable in an appeal. *See Mitchell v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 21, 359 P.3d 1096, 1099 (2015). And the standard of review is the same as that on appeal. *Club Vista Fin. Servs. v. Eighth Judicial Dist. Court*, 128 Nev., Adv. Op. 21, 276 P.3d 246, 249 (2012)

(writ petition citing an appeal, *Matter of Adoption of Minor Child*, 118 Nev. 962, 968, 60 P.3d 485, 489 (2002), for the standard of review for discovery matters). To the extent possible, therefore, this Court engrafts the rules of *appellate* procedure—including the preparation of the appendix—to these kinds of writ petitions.

The Wynn parties, with their single-minded focus on "any other original document that may be essential," miss this point. In a proceeding subject to the standards of appellate review, *only* the district-court record is "essential."

To hold otherwise would open the floodgates. Parties who made an anemic record to the district court will answer NRAP 21(a)(4)'s beck to have this Court consider their "original document[s]" in the first instance. And apart from the absence of a file stamp, the new documents could mingle among the filed documents without detection.

## CONCLUSION

A writ petition that seeks appellate review is subject to the principles of appellate review, including the concept of the record on appeal. Because the Wynn parties' appendix contains documents that could not be considered on appeal, it should be stricken.

Dated this 30th day of November, 2017.

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## CERTIFICATE OF SERVICE

I certify that on November 30, 2017, I served the foregoing "Reply Brief on Motion to Strike Appendix" by United States mail, postage pre-paid, to the following:

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