**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

CREIG BUTLER,

Judgment Creditor-Respondent,

v.

S. Ct. No. S-1-SC-40215
Ct. App. No. A-1-CA-39546

MOTIVA PERFORMANCE ENGINEERING, LLC,

Judgment Debtor,

and

DEALERBANK FINANCIAL SERVICES, LTD., and ARMAGEDDON HIGH PERFORMANCE SOLUTIONS, LLC,

and

WILLIAM S. FERGUSON,

Relief Defendant-Petitioner.

---

On Writ of Certiorari to the Court of Appeals
The Honorable Victor Lopez, District Judge

---

# RELIEF DEFENDANT-PETITIONER'S BRIEF IN CHIEF

---

ORAL ARGUMENT REQUESTED

Paul J. Kennedy
Jessica M. Hernandez
Elizabeth A. Harrison
KENNEDY, HERNANDEZ & HARRISON, P.C.
201 Twelfth Street NW
Albuquerque, New Mexico 87102
Ph: (505) 842-8662
Fax: (505) 842-0653

*Attorneys for Relief Defendant-Petitioner*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

New Mexico Cases

Other Jurisdictions



Statutes



Rules and Orders



Constitutional Provisions

## INTRODUCTION

The Court of Appeals erred in at least three identified ways: (1) it affirmed a procedurally defective criminal contempt order under the less demanding standards for civil contempt, (2) it held that a motion to reconsider was necessary to preserve the argument that Relief Defendant-Petitioner Ferguson was not given the process that was due, and (3) it held that the District Court has the authority to compel a party to donate to non-party charities chosen by the court.

For these reasons, Petitioner respectfully requests that the Court reverse the decision of the Court of Appeals on these questions and vacate the District Court's Contempt Order.

## SUMMARY OF PROCEEDINGS

This Petition arises out of the Court of Appeals' Memorandum Opinion, filed on November 16, 2023. *Butler v. Motiva Performance Eng'g, LLC*, A-1-CA-39546, mem. op. (N.M. Ct. App. Nov. 16, 2023) (non-precedential) ("*Slip Op.*"). That appeal arose out of Second Judicial District Judge Victor Lopez's Order to Show Cause, filed November 6, 2020 [RP 2060-62], the Show Cause Hearing, held December 1, 2020 [12-1-20 10 Tr. 1-88], and the Court's Findings of Fact and Conclusions of Law on Order to Show Cause and Order of Civil Contempt and Sanctions Against Dealerbank, William S. Ferguson, and the Law Firm, filed

January 5, 2021 [RP 2104-26] ("Contempt Order"). The Relief Defendant-Petitioner ("Petitioner") in this Petition is William S. Ferguson.

**A. Factual and Procedural Background**

This appeal arises from Plaintiff's efforts to enforce a judgment against Motiva Performance Engineering, LLC ("Motiva"). At the time of the judgment, Motiva owned a Ferrari; Petitioner subsequently transferred title of the Ferrari to Dealerbank Financial Services, LLC ("Dealerbank"). Plaintiff asked the District Court to declare that Motiva owned the Ferrari, applying for a writ of attachment or a preliminary injunction to ensure that the Ferrari would be available to satisfy the judgment. The District Court orally granted the injunction on April 18, 2019, entering its written order on May 7, 2019. [RP 1229-31]. The injunction required title to the Ferrari to be kept in the name of Dealerbank, for the vehicle to be insured, and for it to remain in New Mexico. [RP 1230]. It did not prohibit the use of the vehicle as collateral. *See* [RP 1229-31].

Petitioner obtained a bank loan for Dealerbank using the Ferrari as collateral. On October 28, 2019, the District Court found that the Ferrari was the property of Motiva. Soon after, Motiva filed for bankruptcy. During the bankruptcy proceedings, Plaintiff learned about the loan, prompting it to initiate the contempt proceedings that are the subject of this appeal.

On October 2, 2020, Plaintiff filed a motion for order to show cause as to why the Defendants should not be held in contempt for violating the preliminary injunction. [RP 1995-2030]. Acknowledging that Petitioner had not violated the order, Plaintiff nevertheless asked for both civil and criminal contempt remedies for violating the *spirit* of the order. *Id.* The District Court granted Plaintiff's motion and issued an Order to Show Cause on November 6, 2020. [RP 2060-62]. After an evidentiary hearing, the District Court entered an order of civil contempt and sanctions. The order focused on the intent of its injunction, rather than the words of its order, relying on federal cases for the proposition that a party must comply with the "spirit" of an injunction. [RP 2116-17 COL 69-70]. The District Court found Petitioner to be in contempt by clear and convincing evidence, *id.* ¶ 93, and noted throughout that the proceedings were not for criminal contempt. *See generally* [RP 2104-26].

The operative portion of the order consisted of four paragraphs. Paragraph A sought to "place all parties in the position they would be had the contempt not occurred." [RP 2121]. Paragraph C was to "ensure that [Petitioner] complies with future orders of [the] Court" and stated that he could "purge the civil contempt as to him by . . . [paying] the Judgment in full, including payment of all interest and attorneys' fees incurred" and "giv[ing] $50,000 to Roadrunner Food Bank." [RP

2125]. The District Court recognized that its order "appears to be punitive" but reiterated that it believed this punishment to be necessary to compel Petitioner to "prospectively comply" with its "existing and future orders." *Id.* In a further effort to support its clearly punitive sanctions, the District Court stated that they were also appropriate under Rule 1-011. [RP 2126]. Defendants moved for reconsideration of the Contempt Order on February 2, 2021, [RP 2131-47], and that motion was denied on March 12, 2021, [RP 2278-79].

**B. Appeal and Memorandum Opinion**

Petitioner, along with Armageddon High Performance Solutions, LLC, and Dealerbank Financial Services, LTD., filed their Notice of Appeal of the Contempt Order on February 3, 2021. [RP 2150-74]. Appellants first presented their issues to the Court of Appeals in their Docketing Statement, filed May 7, 2021, in which they identified, *inter alia*, (1) whether the District Court abused its discretion by imposing criminal sanctions without providing criminal procedural or substantive safeguards, (2) whether a contemnor can be required to pay a civil judgment against a separate entity to purge his contempt, and (3) whether it violates a contemnor's rights to be required to make a contribution to a particular charitable entity in order to purge his contempt. [RP 2417-31]. Full briefing followed, and the Court of Appeals issued a divided Memorandum Opinion on November 16, 2023. *See Slip Op.*

In the Opinion, the majority affirmed the Contempt Order and held that (1) Appellants had not preserved either of the issues they presented on appeal, *i.e.*, whether the District Court, "imposed criminal contempt without satisfying due process" and whether it "lacked statutory authority to impose a $50,000 fine payable to a third party," and (2) the sanctions imposed by the District Court, including the $50,000 fine payable to a third party, "were appropriate under Rule 1-011 [NMRA] and the court's inherent powers." *Id.* ¶ 6.

In dissent, Judge Duffy pointed out several issues with the majority's reasoning: (1) the majority incorrectly found that the issue of whether the District Court imposed criminal contempt by imposing a $50,000 sanction was not preserved because Appellants were not required to raise the issue in a motion to reconsider and had no opportunity to do so prior to the issuing of the Contempt Order, (2) the majority inappropriately "relies on additional conduct that does not clearly seem to fall within the ambit of Rule 1-011 . . . as a basis to affirm the sanctions award under Rule 1-011," and (3) the majority's grounding of its affirmation on inherent powers grounds was inappropriate when the District Court "made no mention of inherent powers as a basis for the award." *Id.* ¶ 23-26.

## ARGUMENT

In its majority Opinion, the Court of Appeals erred in each of the three ways contemplated by the questions presented to the Court[1]: (1) it incorrectly affirmed the District Court's procedurally defective criminal contempt order under the less demanding standards for civil contempt, (2) it incorrectly held that a motion to reconsider was necessary to preserve Petitioner's argument that he was not given due process, and (3) it incorrectly held that the District Court had the authority to compel Petitioner to donate to a non-party charity chosen by the court. Each of these questions will be addressed in turn.

### A. A contempt order that rises to the level of criminal contempt cannot be affirmed under the standard for civil contempt.

The Court of Appeals erred in its application of civil contempt standards to what were clearly criminal contempt sanctions. This misclassification led to a significant due process violation, as the criminal sanctions were imposed without adherence to the procedural safeguards required for criminal contempt. The Court's review of this issue is *de novo*. *See State of New Mexico ex rel. Child., Youth &*

---

[1] "1. Whether the Court of Appeals erred by holding that a procedurally defective criminal contempt order may be affirmed under the less demanding standards for civil contempt?
2. Whether the Court of Appeals erred by holding that a motion to reconsider was necessary to preserve the argument that Ferguson was not given the process that was due?
3. Whether the Court of Appeals erred by holding that the district court has the authority to compel a party to donate to non-party charities chosen by the court?" Petition for Writ of Certiorari, *Butler v. Motiva Performance Eng'g, LLC*, S-1-SC-40215 (N.M. Dec. 15, 2023).

*Fams. Dep't v. Mercer-Smith*, 2019-NMSC-005, ¶ 19, 434 P.3d 930 ("Whether the district court exercised its contempt power consistent with the purposes of civil contempt is a mixed question of fact and law that we review de novo."). Further, the Court's review of the related due process question is also *de novo*. *See Cordova v. LeMaster*, 2004-NMSC-026, ¶ 10, 136 N.M. 217 ("Claims involving the denial of procedural due process are questions of law, which we review de novo.").

**i. The punitive purpose of the Contempt Order rendered it criminal in nature.**

The District Court's own statements in its Contempt Order indicate that it believed the sanctions it was imposing were at least partially criminal. In paragraph 93 of the Contempt Order, the District Court states that "[Petitioner] is in contempt of Court based on clear and convincing evidence." [RP 2121 COL 93]. That paragraph contains a footnote that states, "This holding based on clear and convincing evidence is not intended to be a conclusion that [Petitioner is] . . . not in contempt of court beyond a reasonable doubt, which may indeed be the case once the criminal contempt proceeding is prosecuted." [RP 2121 COL 93 n.2]. This statement by the District Court is confusing because it never referred any criminal contempt proceeding to prosecution. It may be the remnant of a prior draft in which the District Court intended to so refer before choosing to impose such contempt itself, thereby bypassing the prosecution process. Regardless of the reason, the

statement makes clear that the District Court knew that the sanctions it was imposing were criminal in nature.

Later in the Contempt Order, the District Court acknowledged that "this contempt order appears to be punitive" but insisted that it was not. It based that characterization on the justification that Petitioner's "role as an attorney in orchestrating personal and corporate assets within his ownership and control in this proceeding to keep them beyond the Court's reach . . . caused the problems." [RP 2125 ¶ C(b)].

Contrary to its stated intent to impose civil contempt, the Contempt Order's plain language betrays a punitive purpose consistent with criminal contempt. New Mexico courts have been clear that "'[t]he major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised.'" *Concha v. Sanchez*, 2011-NMSC-031, ¶ 24, 150 N.M. 268 (quoting *In re Klecan*, 1979-NMSC-094, ¶ 5, 93 N.M. 637); s*ee also Hall v. Hall*, 1992-NMCA-097, ¶¶ 30-31, 114 N.M. 378 ("[T]he purpose of civil contempt is to coerce compliance and provide a remedy, and the purpose of criminal contempt is to punish a violator and preserve the authority of the court."). Furthermore, "[c]riminal contempt proceedings vindicate the authority of the court by punishing 'completed acts of

disobedience.'" *Tue Thi Tran v. Bennett*, 2018-NMSC-009, ¶ 33, 411 P.3d 345 (quoting *Concha*, 2011-NMSC-031, ¶ 26).

In its Order to Show Cause, the District Court repeatedly referred to Petitioner's past, completed acts: in summoning the parties in the Order, it stated that it "has concerns" that Petitioner "violated this Court's Preliminary Injunction," [RP 2060 ¶ 1], and asked that he "show cause as to why [he] should not be held in contempt for violating the Preliminary Injunction," [RP 2061 ¶ A]. In its Contempt Order, the District Court found that Petitioner had "circumvent[ed] . . . the Court's authority" by transferring the Ferrari from Motiva's to Dealerbank's name after the jury's verdict, [RP 2110 FOF 39], intervened in the Bernalillo County Sheriff's Office's attempt to seize Motiva's landlord's assets, [RP 2110 FOF 40], and encumbered the Ferrari's title by pledging it as collateral for a loan of $120,000, [RP 2110 FOF 28]. These were inarguably "completed acts" when the District Court filed its Order to Show Cause.

The District Court expressed its displeasure with Petitioner's past, completed acts, emphasizing "the repetitiveness of his actions and previous actions." [RP 2125 ¶ C]. The District Court sought to vindicate its authority by imposing contempt for Petitioner's "repeated disregard of this Court's orders to the detriment of Butler, the public interest, and the integrity of this Court's authority, which threatens the dignity

of this Court." [RP 2124 ¶ B]. *See also* [RP 2110 FOF 42] (finding that Petitioner's "action of encumbering the Ferrari's title . . . undermined the authority of this Court"). The District Court's clear purpose in sanctioning Petitioner was to punish him for his past acts of alleged disobedience and vindicate its own authority. *See Tue Thi Tran*, 2018-NMSC-009, ¶ 33; *Hall*, 1992-NMCA-097, ¶¶ 30-31.

Based on the statements of the District Court and the nature of the sanctions imposed, the Contempt Order clearly imposes criminal contempt.

**ii. The sanctions imposed in paragraph C were not consistent with civil contempt.**

In addition to the Show Cause Proceedings' punitive purpose, the sanctions the District Court imposed in paragraph C of the Contempt Order—paying the judgment in full and paying a $50,000 fine to Roadrunner Food Bank—were not consistent with remedial civil contempt proceedings because they were neither compensatory nor coercive. *See Tue Thi Tran*, 2018-NMSC-009, ¶ 35 ("If the court finds civil contempt, there are two general categories of remedial sanctions that the court may impose: compensatory sanctions or coercive sanctions."); *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) ("Under traditional principles of equity practice, courts have long imposed civil contempt sanctions to 'coerce the defendant into compliance' with an injunction or 'compensate the complainant for losses'

stemming from the defendant's noncompliance with an injunction." (quoting *United States v. Mine Workers*, 330 U.S. 258, 303-04 (1947))).

First, the sanctions were not compensatory. The District Court's imposition of a fine paid to Roadrunner Food Bank—a third party not involved in this case—demonstrates that the sanction is not compensatory, and therefore not remedial in nature. "[C]ontempt is civil if the relief provided in a contempt proceeding is remedial and is paid to the complainant." *Rhinehart v. Nowlin*, 1990-NMCA-136, ¶ 28, 111 N.M. 319 (citing *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 631-32 (1988)). The fine is not payable to the Respondent, nor is it intended to compensate him or any other party for a loss.

Second, these sanctions are not coercive, except in their attempt to improperly enforce a civil judgment. While "coercive sanctions may include 'fines . . .' designed 'to compel the contemnor to comply in the future with an order of the court,'" such fines are conditional because they are "imposed to address the contemnor's continuing violation of a court order," *Tue Thi Tran*, 2018-NMSC-009, ¶ 37 (quoting *Concha*, 2011-NMSC-031, ¶ 25). Consequently, "an order imposing a coercive sanction should state the actions that the contemnor must take to purge the contempt." *Id.* "A contemnor subject to a coercive sanction has the power to discharge the civil contempt at any time 'by doing what [the contemnor] has

previously refused to do . . . Thus, the coercive sanctions 'end when the contemnor complies' with the underlying court order." *Id.*

Here, the sanctions imposed are definite, not conditional, because Petitioner is still required to satisfy them even if he were to perform the remedial acts specified in paragraph A, such as satisfying the lien against the vehicle. *See* [RP 2121-25 ¶¶ A-C]. Although "a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order," *Hicks on Behalf of Feiock*, 485 U.S. at 632, "a contempt sanction imposed after the contemnor disobeys a court order is criminal in nature if it does not 'undo or remedy what has been done, nor afford any compensation for the pecuniary injury caused by the disobedience,'" *Dartez v. Peters*, 759 F. App'x 684, 690 (10th Cir. 2018) (unpublished) (quoting *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911)). That the District Court did not present Petitioner with any "affirmative act" that he could perform to undo or remedy what he allegedly did and thereby avoid the additional sanctions means they are not properly characterized as coercive.

Any possible coercive aspects of paragraph C's sanctions—the payment of the judgment and $50,000 fine—relate to the underlying civil judgment or to future, unspecified court orders. *See* [RP 2125 ¶ C]. In general, civil contempt proceedings

are "'instituted to preserve and enforce the rights of private parties to suits and to compel obedience to the orders, writs, mandates and decrees of the court.'" *Tue Thi Tran*, 2018-NMSC-009, ¶ 33 (quoting *In re Klecan*, 1979-NMSC-094, ¶ 5). Nonetheless, there is no caselaw to support the proposition that district courts have the authority to impose civil contempt to ensure compliance with unspecified, yet-to-be-determined "future orders of [a] Court." [RP 2125 ¶ C]. To the contrary, "[t]o be held in contempt, 'a court must find the party violated a specific and definite court order and the party had notice of the order.'" *In re Lucre Mgmt. Grp., LLC*, 365 F.3d 874, 875 (10th Cir. 2004) (quoting *In re Nielsen*, 53 F.3d 342 (Table), 1995 WL 247461, at *1 (10th Cir. April 27, 1995)). Imposing contempt "to ensure that [Petitioner] complies with future orders of this Court" is, therefore, improper. [RP 2125 ¶ C]. As such, the sanctions imposed by the Contempt Order do not resemble civil contempt; as discussed in subsection (i) above, they impose criminal contempt.

**iii. The Order to Show Cause proceedings lacked the due process safeguards necessary for criminal contempt proceedings.**

Because the Contempt Order imposed criminal contempt, Petitioner is entitled to the due process afforded to criminal defendants under federal and New Mexico law. *See generally* U.S. Const. Amend. XIV § 1; N.M. Const. art. II, § 18; *State of New Mexico ex rel. Child., Youth & Fams. Dep't v. Mercer-Smith*, 2019-NMSC-

005, ¶ 21 ("'The court may not . . . impose criminal penalties on a person who has not been afforded the protections of the criminal law.'" (quoting *Concha*, 2011-NMSC-031, ¶ 26)). Because Petitioner's conduct did not occur in the presence of the District Judge, it qualifies as indirect contempt, and he is entitled to due process in line with any other criminal defendant. *See Matter of Contempt of Maestas*, 2022-NMCA-057, ¶ 16, 517 P.3d 942 ("[A] criminal contempt defendant is entitled to due process protections, the extent of which depend on whether the contempt charge is categorized as direct or indirect."); *Concha*, 2011-NMSC-031, ¶ 28 ("When the judge has not personally witnessed the defendant's contemptuous behavior in the course of a court proceeding, the contempt is classified as indirect criminal contempt and must be resolved through more traditional due process procedures.").

Petitioner was not afforded such due process. First, a disinterested prosecutor is required in order to press criminal contempt charges. *See State v. Villanueva*, 2021-NMCA-016, ¶ 43. This standard is also reflected in the Federal Rules of Criminal Procedure. *See* Fed. R. Crim. P. 42(a) ("The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney."). Here, no independent, disinterested prosecutor filed a criminal complaint or pressed the criminal contempt charges at the Show Cause Hearing, thereby violating Petitioner's constitutional due

process rights. *See* [12-1-2020 10 Tr. 1-88]. Although Butler's proposed findings and conclusions included text recommending that "[t]he Court will provide a copy of this Order to the Second Judicial District Attorney's office for preparation of a criminal complaint in accordance with Rule 1-093(D)(1) NMRA and another judge will hear the prosecution of such criminal contempt," [RP 2089-90], the District Court did not adopt this text or make a criminal referral, *see* [RP 2121-26].

Second, Petitioner was denied his constitutional due process right to a jury trial. The New Mexico Supreme Court has applied federal constitutional standards to determine that a fine of more than $1,000 affords the right to a jury trial. *See Seven Rivers Farm, Inc. v. Reynolds*, 1973-NMSC-039, ¶ 42, 84 N.M. 789; *Matter of Cherryhomes*, 1985-NMCA-108, ¶ 7, 103 N.M. 771 ("[S]ince Cherryhomes' fine exceeded $1,000, he had the right to a jury trial on the contempt charge."). New Mexico statute still provides that a misdemeanor may be punishable by a fine of up to $1,000. NMSA 1978, § 31-19-1. The District Court imposed a fine far exceeding the misdemeanor threshold. [RP 2125 ¶ C]. As such, Petitioner was entitled to a jury trial.

Third, the District Court violated Petitioner's due process rights when it did not make findings beyond a reasonable doubt. "[I]t is a 'fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded

the protections that the Constitution requires of such criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt." *Concha*, 2011-NMSC-031, ¶ 26 (quoting *Hicks on Behalf of Feiock*, 485 U.S. at 632). Here, the District Court imposed criminal contempt based only on "clear and convincing evidence." [RP 2121 COL 93-95]. Further, the District Court was plainly aware that its Contempt Order did not meet the due process standards for criminal contempt and that such process was required. *See* [RP 2121 COL 93 n.2].

#### iv. The Court of Appeals incorrectly applied civil contempt standards to affirm the Contempt Order.

In its Memorandum Opinion, the Court of Appeals deemed the District Court's sanctions "appropriate under Rule 1-011 and the court's inherent powers." *Slip Op.* ¶ 6. In doing so, it indicated that Petitioner had not preserved the due process issue, although an exception to preservation might exist under Rule 12-321(B) NMRA. *Id.* However, it indicated that it was not required to address whether a preservation exception applied, *i.e.*, whether the Contempt Order violated Petitioner's due process rights, because the sanctions were appropriate under Rule 1-011 NMRA. *Id.* ¶ 6, 8.

The Court of Appeals ignores the distinction between civil and criminal contempt and seemingly assumes that all sanctions imposed under Rule 1-011 are necessarily civil. It states that "the district court specifically invoked Rule 1-011(A)

as an alternative basis to civil contempt for the sanctions imposed on Appellant." *Slip Op.* ¶ 8. It does not address the possibility that the District Court may have been incorrect about the nature of its sanctions, regardless of the stated basis. The New Mexico Supreme Court addressed due process requirements for Rule 1-011 cases and stated that such cases "require[] an application of familiar principles of due process." *Rivera v. Brazos Lodge Corp.*, 1991-NMSC-030, ¶ 23, 111 N.M. 670. Sanctions under Rule 1-011 "should be imposed rarely, [and] they should be levied only if the mandates of procedural due process are obeyed." *Id.* Declining to address due process considerations solely because Rule 1-011 was invoked opens the door for arbitrary and erroneous application and stifles advocacy. *See id.* ¶ 24 (citing *Donaldson v. Clark*, 819 F.2d 1551, 1558 (11th Cir.1987)).

In his brief in the Court of Appeals, Petitioner challenged the overall imposition of the paragraph C sanctions. Nowhere did he draw a distinction between a sanction based solely on general civil contempt, Rule 1-011, or inherent powers.[2] This lack of distinction is intentional—the sanctions themselves are the focus, and their criminal nature is what triggers the due process requirement. The Court of

---

[2] Petitioner notes, as did Judge Duffy in her dissent, that the District Court did not invoke its inherent powers in its Contempt Order, making any requirement for Petitioner to have challenged that basis untenable. *See Slip Op.* ¶ 26. Regardless, Petitioner's argument that all criminal contempt requires sufficient due process is unaffected.

Appeals pointing to alternative justifications for the sanctions does not change this nature, and it was an error to hold otherwise. Therefore, the Court should recognize this error by reversing the Court of Appeals on this question and vacating the District Court's Contempt Order.

### B. It was not necessary for Petitioner to file a motion to reconsider in order to preserve the argument that he was not afforded sufficient due process.

In its Opinion, the Court of Appeals stated that Petitioner's due process argument was not preserved because he had not included the issue in his motion to reconsider. *Slip Op.* ¶ 7. As justification, it cited Rule 12-321(A): "'the absence of an objection does not thereafter prejudice the party' only '[i]f a party has *no opportunity* to object to a ruling or order at the time it is made.'" *Id.* (alteration and emphasis in original). It also refused to consider the exceptions to preservation, reasoning that doing so was unnecessary because it based its opinion on an alternative ground. *See id.* ¶ 8.

Judge Duffy, in dissent, noted that the majority's Opinion is contrary to *Jones v. City of Albuquerque Police Dep't*, 2020-NMSC-013, ¶ 24, 470 P.3d 252, which explains that a motion to reconsider is not required to preserve an issue and, in fact, is often disfavored. Relying on *Jones*, Judge Duffy stated that an appellant need not file discretionary motions to reconsider to preserve an argument. *See id.* ¶ 22. The

majority, however, distinguished its Opinion on the basis that *Jones* involved a non-final order. *See id.* ¶ 7 n.1.

There is no reason to distinguish *Jones* on the basis of finality. *Jones* rested on the premise that discretionary motions are not required when a ruling of the court has been invoked. *See* 2020-NMSC-013, ¶ 26. It embodied a policy that "courts should facilitate, rather than hinder, the right to appeal." *Id.* ¶ 24 (quoting *Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005, ¶ 27, 113 N.M. 231); *see also Gracia v. Bittner*, 1995-NMCA-064, ¶ 18, 120 N.M. 191 ("[T]he preservation requirement should be applied with its purposes in mind, and not in an unduly technical manner to avoid reaching issues that would otherwise result in reversal."). Here, the parties invoked the District Court's decision on contempt. The District Court made its decision, and that decision exceeded its authority. For the same reasons applied in *Jones*, invoking the decision was enough to preserve the issue. *See also Rio Grande Sun v. Jemez Mountains Pub. Sch. Dist.*, 2012-NMCA-091, ¶ 24, 287 P.3d 318 (holding that it was not necessary to move to reconsider a motion for fees and costs when the original motion had fairly invoked a ruling from the district court).

The dissent correctly noted that such a requirement creates uncertainty about what is required of litigants. *Slip Op.* ¶ 23. If, as the majority states, an issue is not preserved if it did not appear in a motion to reconsider, it would render such a motion

mandatory on most issues. Such a mandate would create unnecessary work for parties, attorneys, and courts. As such, the Court should make clear that preservation in such a form is not necessary by reversing the Opinion of the Court of Appeals on this question and vacating the District Court's Contempt Order.

### C. The District Court does not have the authority to compel a party to donate to non-party charities.

In response to Petitioner's argument that the District Court was not statutorily authorized to impose monetary sanctions that are paid to third parties, the Court of Appeals' majority stated that the District Court did not need such authorization, as "sanctions pursuant to Rule 1-011 and its inherent powers is not bestowed by the Legislature." *Slip Op.* ¶ 16. This justification ignores the various constitutional and policy problems involved in this question.

Article VI, Section 30 of the New Mexico Constitution requires that "[a]ll fees collected by the judicial department shall be paid into the state treasury." This provision, which the Court has not previously interpreted, leaves no room for fees to be paid to charity. As the dissent noted, this issue is currently before the Court in *In re Maestas*, S-1-SC-39901. While the plain language of the constitutional provision apparently forbids payment to a third party, which is not the state treasury, the majority does not address this apparent conflict at all.

The Anti-donation Clause contains a similar restriction. Under that clause, the State may not "make any donation to or in aid of any person, association, or public or private corporation." N.M. Const. art. IX, § 14; *cf. also id.* art. IV, § 31 (prohibiting the legislature from appropriating money to charity). That the charity serves a commendable public purpose is immaterial. *See State ex rel. Mechem v. Hannah*, 1957-NMSC-065, ¶ 37, 63 N.M. 110. There is no question that the District Court itself could not have donated state funds to the food bank. It may not sidestep the Anti-donation Clause by compelling others to make the donation in its stead.

Below, Petitioner demonstrated that the weight of authority across the United States prohibited the practice of directing parties to make charitable contributions. [BIC 36-38]. In New Mexico, in the related context of criminal sentences, the courts have rejected fines payable to charity as "unauthorized and therefore void." *State v. Dominguez*, 1993-NMCA-042, ¶ 50, 115 N.M. 445. That decision relied in part on *United States v. Wright Contracting Co.*, 728 F.2d 648, 653 (4th Cir. 1984), which observed that the practice "exposes [the court] to possibly justifiable and unanswerable criticisms both in respect of the particular beneficiaries selected and the specific sums awarded them." Another court found that the practice of directing contributions to specific charities violated several canons of the Code of Judicial Conduct. *See Matter of Davis*, 113 Nev. 1204, 1223, 976 P.2d 1033, 1037 & 1045

(1997). The majority rejected these arguments summarily, noting only that the legislature lacked the power to regulate what sanctions are permissible under Rule 1-011 or a court's inherent authority. *Slip Op.* ¶ 16. It did not address the problematic practical application of its espoused rule.

As the dissent noted, the Court of Appeals had already warned that such sanctions may be problematic even under Rule 1-011, and this Court accepted certification in that case. *Id.* ¶ 27 (citing Order of Certification to the New Mexico Supreme Court, *In re Maestas*, No. S-1-SC-39901, at *5 (filed May 4, 2023)). There, a district court ordered an attorney to donate money to the State Bar Foundation as part of a direct criminal contempt order. The majority is silent about why it did not identify a similar issue here.

Allowing courts to direct litigants to make donations to the courts' hand-picked charities invites abuse, creates the appearance of impropriety, and may violate the Code of Judicial Conduct. The Court should maintain the integrity of the judiciary and the New Mexico Constitution by reversing the Opinion of the Court of Appeals on this question and vacating the District Court's Contempt Order.

## CONCLUSION

In its Opinion, the Court of Appeals committed a variety of reversible errors. It incorrectly applied the standards for civil contempt to clearly criminal contempt

sanctions, incorrectly held that raising an issue in a motion to reconsider was necessary in order to preserve it, and incorrectly held that district courts have the authority to compel a party to donate to non-party charities of its choice. Because of these errors and for the reasons stated above, the Court should reverse the Opinion of the Court of Appeals and vacate the District Court's Contempt Order.

## STATEMENT REGARDING ORAL ARGUMENT

Oral argument would benefit the Court and the parties by allowing counsel to address the complex and detailed procedural history in this case as well as answer any questions the Court may have about New Mexico caselaw and persuasive authority from other jurisdictions.

Respectfully Submitted,

KENNEDY, HERNANDEZ & HARRISON, P.C.

*/s/ Paul J. Kennedy*
Paul J. Kennedy
Jessica M. Hernandez
Elizabeth A. Harrison
201 Twelfth Street Northwest
Albuquerque, New Mexico 87102
Ph: (505) 842-8662
Fax: (505) 842-0653

*Attorneys for Relief Defendant-Petitioner*

**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing document to the following counsel of record electronically through the Odyssey System on May 13, 2024, and by email to:

Spencer L. Edelman
Elizabeth A. Martinez
P.O. Box 2168
500 Fourth Street NW, Suite 1000
Albuquerque, NM 87103
(505) 848-1800
sle@modrall.com
eam@modrall.com

*/s/ Paul J. Kennedy*
Paul J. Kennedy