
No. _____

In the
Supreme Court of the United States

Swift Transportation of Arizona, LLC
Applicant

v.

First Judicial District Court of Santa Fe County, New Mexico, *et al.*
Respondents

Pending petition for writ of certiorari to the
Supreme Court of New Mexico
Cause No. S-1-SC-41552

**Emergency Application for Stay Pending Timely Filing and
Disposition of Petition for Writ of Certiorari and Request for
Temporary Administrative Stay**

Kyle C. Steingreaber
Counsel of Record
**WRIGHT, CLOSE, BARGER
& GUZMAN, LLP**
700 Louisiana, Suite 3000
Houston, Texas 77002
(713) 572.4321
steingreaber@wcbglaw.com
*Attorneys for Applicant Swift
Transportation of Arizona, LLC*

INTRODUCTION

To the Honorable Neil M. Gorsuch, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit:

The Fourth Amendment “speaks . . . in concrete terms” about the limits it places on the sovereign’s power to search and seize property. *Chatrie v. United States*, 146 S. Ct. 2193, 2218 (2026) (Gorsuch, J., concurring). An instrument authorizing the search and seizure of a person’s “papers” or “effects” must, as an irreducible constitutional minimum, “particularly describ[e]” the “things to be seized.” U.S. Const. amend. 4. The order here shatters that guarantee.

Under the guise of investigating why Swift did not comply with a discovery order, the trial court appointed its own examiner and clothed him with the power to demand “all documents and information” he wants from Swift, including “passwords” to Swift systems and carte blanche “authoriz[ation]” to obtain that information from Swift’s agents. **EA App’x004**. It is structurally, functionally, and practically the type of “reviled” general warrant that the Framers intended the Fourth Amendment to proscribe — authorization to “rummage” in an “unrestrained search for evidence[.]” *Riley v. California*, 573 U.S. 373, 403 (2014).

Swift sought — and, on August 20, was summarily denied — writ relief from the Supreme Court of New Mexico, **EA App’x001–02**, an exercise of original jurisdiction that refused to correct a Star-Chamber-era view of sovereign power, *see Boyd v. United States*, 116 U.S. 616, 628–29, 634–35 (1886), incompatible with the Constitution.

Swift intends to seek certiorari relief from this Court under 28 U.S.C. § 1257(a). It so informed the trial court on September 21, explaining that it had not complied with the examination order and outlining its original plan to file both a certiorari petition and motion to stay by October 5, several weeks before a scheduled October 22 show-cause hearing. **EA App’x124–25**. Mid-afternoon on September 25, the trial court set a show-cause hearing for October 1. **EA App’x007–10**. Swift and its counsel must show cause why they should not be held in civil contempt, **EA App’x 007**, a “remedial” and “coercive” measure “to compel the contemnor to *comply*” with the examination order, *Matter of Marshall*, 528 P.3d 670, 675 (N.M. 2023) (emphasis added). That both accelerated the timeline for Swift to file this application and pushed back by a week Swift’s ability to file its petition, which it now intends to file

by October 12 (a little more than half the time Rule 13(1) ordinarily allows, Sup. Ct. R. 13(1)).

The Court should temporarily stay enforcement of the examination order, including the October 1 show-cause hearing. Swift could not comply with the examination order without potentially forfeiting its constitutional rights, *see Florida v. Jimeno*, 500 U.S. 248, 250–51 (1991), and, at minimum, forever “surrender[ing] the very protection” the Fourth Amendment provides, *cf. Maness v. Meyers*, 419 U.S. 449, 462 (1975), so, if the Court does not grant relief, Swift’s last resort is to raise the issue via a “familiar procedure[:]” appeal of a contempt order, *id.* at 463; *accord King v. Allstate Ins. Co.*, 86 P.3d 631, 634–35 (N.M. App. 2004). A temporary stay of the examination order and any enforcement of it is thus appropriate so Swift can properly invoke and the Court can properly consider whether to exercise its own independent certiorari jurisdiction.

PARTIES TO THE PROCEEDINGS

Swift Transportation of Arizona, LLC is the applicant. It was the petitioner below and is a defendant in the trial court.

There are two groups of respondents. The first group, the governmental respondents, are the First Judicial District Court of Santa Fe County, New Mexico and the Honorable Francis J. Mathew. As the trial court and presiding judge, they were the nominal respondents below.

The other respondents were the real parties in interest below and are the plaintiffs in the trial court:

- Barry Green, as personal representative of the wrongful death estate of Raymundo Cruz Herrera;
- Cynthia Guerrero Rodarte, individually and as parent and next friend of Gael Guerrero, Julian Flores, and Marisela Guerrero;
- Luciana Luerrero;
- Aradai Rodarte, individually and as parent and next friend of Malie Calderon, Isaac Calderon, Isaiah Calderon, and Emily Calderon;
- Peter Wirth, on behalf of the wrongful death estate of Abraham Calderon; and
- Cullen Hallmark, on behalf of the wrongful death estate of Jose Luis Guerrero.

RULE 29.6 STATEMENT

Swift Transportation of Arizona, LLC is a wholly owned subsidiary of Knight-Swift Transportation Holdings Inc. (NYSE: KNX).

RELATED PROCEEDINGS

Supreme Court of New Mexico: *Swift Transportation of Arizona, LLC v. Hon. Francis J. Mathew, et al.*, No. S-1-SC-41552 (N.M. Aug. 20, 2026) (unreported) (denying petition for writ of superintending control).

First Judicial District Court of Santa Fe County, New Mexico: *Barry Green, et al. v. Swift Transportation of Arizona, LLC, et al.*, D-101-CV-2023-01086 (N.M. June 24, 2026) (district court proceeding).

JURISDICTIONAL STATEMENT

The Court has certiorari jurisdiction under 28 U.S.C. § 1257(a). On July 30, 2026, Swift filed a petition for writ of superintending control with the Supreme Court of New Mexico, “initiat[ing]” an “extraordinary writ proceeding[]” in that court for the “exercise” of its “original jurisdiction[.]” Rule 12-504(B)(1) NMRA. That court denied Swift’s petition on August 20. “A judgment that terminates original proceedings in a state appellate court” is “final” for purposes of this Court’s jurisdiction. *Fisher v. Dist. Ct. of Sixteenth Jud. Dist.*, 424 U.S. 382, 385 n.7 (1976); *accord, e.g., Madruga v. Superior Ct.*, 346 U.S. 556, 557 n.1 (1954) (holding same when writ of prohibition denied). That judgment calls into question Swift’s rights under the Constitution.

TABLE OF CONTENTS

Introduction.....	ii
Parties to the Proceedings.....	v
Rule 29.6 Statement.....	vi
Related Proceedings	vii
Jurisdictional Statement.....	viii
Table of Contents	ix
Table of Authorities.....	xi
Statement of the Case	1
<i>Swift does not produce discrete vehicle location data in discovery.</i>	1
<i>The trial court makes the plaintiffs’ own expert a court officer, empowering him to investigate Swift and demand “all documents and information” he wants from the company.</i>	3
<i>The trial court rejects Swift’s challenge to the order’s constitutionality under the Fourth Amendment.</i>	4
<i>Swift seeks superintending control from the Supreme Court of New Mexico.</i>	4
<i>The Supreme Court of New Mexico denies Swift’s petition on August 20, 2026 and the trial court intends to enforce the examination order before and while Swift seeks certiorari review.</i>	6
Reasons for Granting the Application	7
I. The merits and the equities favor a stay of the examination order and any attempts to enforce it.....	7
A. The Court will probably grant certiorari to review and reverse an order that violates more than a century of this Court’s Fourth Amendment precedent.....	8

1.	The trial court clothed the examiner with State power subject to Fourth Amendment constraints, but explicitly removed those restrictions.	9
2.	At least four justices are likely to find that error worthy of certiorari review.	15
a.	The examination order judicially nullifies the Fourth Amendment and more than a century of this Court’s precedent.	15
b.	This case presents a prime vehicle for clarifying the Fourth Amendment’s contours in the civil business-search-and-seizure context.	17
B.	Swift will be irreparably harmed without a stay by having to be held in contempt for not complying with an unconstitutional order.	19
C.	The balanced equities favor interim relief.	22
II.	The Court should administratively stay the examination order and any attempts to enforce it.	23
	Conclusion	24

TABLE OF AUTHORITIES

Cases

<i>Ala. Ass’n of Realtors v. DHHS</i> , 594 U.S. 758 (2021).....	22
<i>Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surg. Ins. Plan</i> , 501 U.S. 1301 (1991).....	7, 22
<i>Boyd v. United States</i> , 116 U.S. 616 (1886).....	iii
<i>Carpenter v. United States</i> , 585 U.S. 296 (2018).....	15
<i>Case v. Montana</i> , 607 U.S. 107 (2026).....	17
<i>Chatrie v. United States</i> , 146 S. Ct. 2193 (2026).....	ii, 13, 17
<i>City of Los Angeles v. Patel</i> , 576 U.S. 409 (2015).....	18
<i>Collins v. Virginia</i> , 584 U.S. 586 (2018).....	17
<i>Cooper v. Aaron</i> , 358 U.S. 1 (1958).....	16
<i>Del. State Sportsmen’s Ass’n v. Del. DSHS</i> , 108 F.4th 194 (3d Cir. 2024).....	21
<i>District of Columbia v. R.W.</i> , 146 S. Ct. 1069 (2026) (per curiam).....	17
<i>Edmonson v. Leesville Concrete Co.</i> , 500 U.S. 614 (1991).....	9, 11
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976) (pl. op.).....	20
<i>Ex parte Young</i> , 209 U.S. 123 (1908).....	23
<i>Farrar v. Hobby</i> , 506 U.S. 103 (1992).....	21

<i>Fisher v. Dist. Ct. of Sixteenth Jud. Dist.</i> , 424 U.S. 382 (1976)	viii
<i>Florida v. Jardines</i> , 569 U.S. 1 (2013)	17
<i>Florida v. Jimeno</i> , 500 U.S. 248 (1991)	iv, 22
<i>G.M. Leasing Corp. v. United States</i> , 429 U.S. 338 (1977)	13
<i>Groh v. Ramirez</i> , 540 U.S. 551 (2004)	12, 14
<i>Hale v. Henkel</i> , 201 U.S. 43 (1906)	16
<i>Hollingsworth v. Perry</i> , 558 U.S. 183 (2010)	8, 15, 19, 22
<i>June Med. Servs., L.L.C. v. Gee</i> , 139 S. Ct. 661 (2019)	23
<i>June Med. Servs., L.L.C. v. Gee</i> , 586 U.S. 1135 (2019)	24
<i>Katz v. United States</i> , 389 U.S. 347 (1967)	18
<i>Ker v. California</i> , 374 U.S. 23 (1963)	14
<i>King v. Allstate Ins. Co.</i> , 86 P.3d 631 (N.M. App. 2004)	iv
<i>Labrador v. Poe</i> , 144 S. Ct. 921 (2024)	8
<i>Leaders of a Beautiful Struggle v. Baltimore Police Dep’t</i> , 2 F.4th 330 (4th Cir. 2021) (en banc)	20
<i>Lo-Ji Sales, Inc. v. New York</i> , 442 U.S. 319 (1979)	12
<i>Lugar v. Edmonson Oil Co.</i> , 457 U.S. 922 (1982)	9, 10

<i>Madruga v. Superior Ct.</i> , 346 U.S. 556 (1954)	viii
<i>Maness v. Meyers</i> , 419 U.S. 449 (1975)	iv
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961)	8, 15
<i>Marshall v. Barlow’s, Inc.</i> , 436 U.S. 307 (1978)	9, 18
<i>Maryland v. Garrison</i> , 480 U.S. 79 (1987)	14
<i>Matter of Marshall</i> , 528 P.3d 670 (N.M. 2023)	iv, 21
<i>Memphis Cmty. Sch. Dist. v. Stachura</i> , 477 U.S. 299 (1986)	20, 21
<i>Mills v. District of Columbia</i> , 571 F.3d 1304 (D.C. Cir. 2009)	20
<i>Mincey v. Arizona</i> , 437 U.S. 385 (1978)	14
<i>Mirabelli v. Bonta</i> , 607 U.S. 492 (2026) (per curiam)	20
<i>Montgomery v. Louisiana</i> , 577 U.S. 190 (2016)	16
<i>N.Y. State Rifle & Pistol Ass’n v. Bruen</i> , 597 U.S. 1 (2022)	20
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985)	9
<i>New York v. Burger</i> , 482 U.S. 691 (1987)	13, 14, 18
<i>Nken v. Holder</i> , 556 U.S. 418 (2009)	8
<i>Ok. Press Publ’g Co. v. Walling</i> , 327 U.S. 186 (1946)	11, 16

<i>Ramirez v. Collier</i> , 595 U.S. 411 (2022)	19
<i>Riley v. California</i> , 573 U.S. 373 (2014)	iii, 11, 24
<i>Roman Catholic Diocese of Brooklyn v. Cuomo</i> , 592 U.S. 14 (2020) (per curiam)	20
<i>Russo v. Byrne</i> , 409 U.S. 1219 (1972)	23
<i>Scott v. Harris</i> , 550 U.S. 372 (2007)	17, 19
<i>See v. City of Seattle</i> , 387 U.S. 541 (1967)	9, 11
<i>Skinner v. Ry. Labor Execs.’ Ass’n</i> , 489 U.S. 602 (1989)	10
<i>Soldal v. Cook Cty.</i> , 506 U.S. 56 (1992)	9
<i>United States v. Jones</i> , 565 U.S. 400 (2012)	13, 18
<i>United States v. Leon</i> , 468 U.S. 897 (1984)	19
<i>United States v. Morton Salt Co.</i> , 338 U.S. 632 (1950)	9
<i>United States v. Texas</i> , 144 S. Ct. 797(2024)	23
<i>Wolf v. Colorado</i> , 338 U.S. 25 (1949)	15
Rules	
Rule 11-706 NMRA	2, 12
Rule 12-504 NMRA	ix, 5, 7
Sup. Ct. R. 10	17
Sup. Ct. R. 13	iv, 6
Sup. Ct. R. 23	7, 27

Constitutional Provisions

U.S. Const. amend. 4.....	ii, 9
U.S. Const. amend. 14.....	9
U.S. Const. art. VI.....	18

STATEMENT OF THE CASE

The plaintiffs sued Swift in 2022, claiming that an unidentified Swift trailer caused a multi-fatality accident on a New Mexico highway. **EA App'x021**. The plaintiffs served discovery to identify what specific Swift equipment (if any at all) was involved in this singular accident, leading to issues that ultimately took the case out of its ordinary State-law trappings, divorced it from the merits, and brought the trial court into direct conflict with the Constitution and this Court's Fourth Amendment precedent.

Swift does not produce discrete vehicle location data in discovery.

In July 2025, the trial court ordered Swift to produce a broad but defined universe of information and documents reflecting the presence of Swift tractors and trailers in New Mexico between 12:01 p.m. on May 21, 2022 and 12:01 p.m. on May 22, 2022. **EA App'x021**. The plaintiffs ended up seeking sanctions against Swift, arguing that Swift had not complied with the order. **EA App'x021**. Swift opposed their motion for sanctions because it believed that it had produced all responsive material within its possession, custody, or control, and that any other responsive information had become unavailable before the July 2025 order was entered. **EA App'x021**.

That culminated in an evidentiary hearing in May 2026, at which the trial court decided sua sponte to appoint an examiner under Rule 11-706 NMRA (the state-law equivalent of Federal Rule of Evidence 706), which permitted the trial court to “order the parties to show cause why expert witnesses should not be appointed” to aid the court in resolving some factual dispute. *See* Rule 11-706(A) NMRA. The trial court memorialized that ruling in an order on June 1, 2026, leaving open the identity of the examiner, but explaining that the appointment was to help the trial court understand the data issues the case raised. **EA App’x022.**

Though the parties disagree about *why* and the motive behind Swift’s earlier statements to the trial court, *compare* **EA App’x021** *with* **EA App’x059–62**, Swift ultimately identified additional materials responsive to the July 2025 order, **EA App’x021**. Since any non-compliance with a discovery order amounts to a failure to comply under New Mexico law, Swift withdrew its opposition to the plaintiffs’ motion for sanctions and agreed to partially merits-preclusive sanctions (a deemed finding that Swift owned the trailer and that the trailer was a proximate cause of accident). **EA App’x022–23.**

The trial court makes the plaintiffs’ own expert a court officer, empowering him to investigate Swift and demand “all documents and information” he wants from the company.

Still, the trial court decided to move forward with the examination.

EA App’x022–23. The trial court amended the Rule 11-706 examination order on June 24, 2026 (we call it “the examination order” from here) and named Konstantinos Dimitrelos — a witness who testified for the plaintiffs in their bid for sanctions against Swift, *see EA App’x023* — as the examiner, **EA App’x003–06**. The trial court solicited his opinions on “[t]he maintenance and deletion of information” responsive to the July 2025 order, including the circumstances surrounding the loss, recoverability, and availability of responsive data, as well as “[a]ny other information” the trial court might later “consider relevant or necessary[.]” **EA App’x005**.

Consistent with examiner’s open-ended purpose, the trial court clothed the examiner with the unilateral power to demand any material from Swift that he wants:

The Rule 11-706 Expert shall be provided with all documents and information requested including, but not limited to, passwords, electronic data and policies within ten (10) days of such requests. The Parties shall take all steps to make sure such arrangements are made, including authorizing

and directing the release of such information from independent agents of Swift Transportation.

EA App’x004.

The trial court rejects Swift’s challenge to the order’s constitutionality under the Fourth Amendment.

Swift moved to vacate the examination order on July 10. As the company explained to the trial court, an instrument authorizing a person to wield State authority and demand “all” they want from a company violates the Fourth Amendment’s particularity requirement and the limits that cases like *Oklahoma Press Publishing Company v. Walling*, *United States v. Morton Salt Company*, and *See v. City of Seattle* place on the scope of non-warrant seizures. **EA App’x024.** The trial court rejected Swift’s Fourth Amendment challenge. **EA App’x024–25.**

Swift seeks superintending control from the Supreme Court of New Mexico.

In the interim, the examiner submitted his first invoice to Swift, demanding upfront payment of \$60,000 as a retainer. That triggered Swift’s deadline to pay or else, under the terms of the examination order, “be considered [in] contempt[.]” **EA App’x003.** On the last day of the payment period, July 30, 2026, Swift filed a petition for writ of superintending control with the Supreme Court of New Mexico and

simultaneously sought a stay of the examination order. **EA App’x011–50**. Filing that petition “initiated” “[e]xtraordinary writ proceedings” in that court “in the exercise of” its original jurisdiction, Rule 12-504(B)(1) NMRA, and brought the Fourth Amendment problem before that court, *see* **EA App’x026–32**.

It stayed the examination order and asked the plaintiffs to respond. The plaintiffs principally argued that, under *Katz*, Swift categorically lacks “a reasonable expectation of privacy in its vehicle tracking system” because it is a “highly-regulated” and “licensed interstate motor carrier” under federal law. **EA App’x0075–76**.

Swift conditionally replied — under New Mexico practice, replies are not allowed as a matter of right, *see* Rule 12-504(C)(1) NMRA — explaining that *Katz* did not supplant the traditional categories (papers and effects) that the Fourth Amendment protects, and that, in any event, this Court precedent establishes that government regulation does not extinguish Fourth Amendment rights per se. **EA App’x103–07**.

The Supreme Court of New Mexico denies Swift's petition on August 20, 2026 and the trial court intends to enforce the examination order before and while Swift seeks certiorari review.

On August 20, the Supreme Court of New Mexico summarily denied Swift's petition. **EA App'x001–02.** Swift intends to seek a writ of certiorari from this Court by October 12, 2026 (53 days post-denial instead of the default 90 days, *see* Sup. Ct. R. 13(1)). It told the trial court on September 21 that it originally planned to file both a certiorari petition and motion to stay by October 5, **EA App'x124–25**, several weeks before a scheduled October 22 show-cause hearing, **EA App'x008.** Mid-afternoon on September 25, the trial court issued a show-cause order and scheduled an October 1 hearing. **EA App'x007.** That both accelerated the timeline for Swift to file this application and pushed back by a week Swift's ability to file its petition. Per 28 U.S.C. § 2101(f), 28 U.S.C. § 1651(a), and Supreme Court Rule 23, Swift now seeks a stay of the examination order and any attempts to enforce that order pending the Court's disposition of Swift's anticipated October 12 petition. The Supreme Court of New Mexico's extraordinary writ rules contemplate stays only "pending disposition of the petition" in that court, Rule 12-504(D)(1) NMRA, and the trial court's acceleration of the show-cause

hearing demonstrates its intent to move forward with enforcing the examination order, so, for purposes of Supreme Court Rule 23(3), this relief is not available elsewhere.¹

REASONS FOR GRANTING THE APPLICATION

Issuing interlocutory relief to facilitate review is “nothing new or particularly remarkable” for this Court. *Labrador v. Poe*, 144 S. Ct. 921, 922 (2024) (Gorsuch, J., concurring). That power flows from a packed “toolkit[.]” *id.*, stocked to ensure that, in appropriate cases, the Court stays orders “for a reasonable time” so the challenger can obtain certiorari review from this Court, *e.g.*, 28 U.S.C. § 2101(f); *accord id.* § 1651(a).² The Court should exercise that power in this case.

I. The merits and the equities favor a stay of the examination order and any attempts to enforce it.

As the applicant seeking a stay pending the filing and disposition of a certiorari petition, Swift must show “a reasonable probability” that

¹ The plaintiffs have asked the trial court to proceed with holding Swift in contempt but that it “decline to impose any sanction, judgment, or sentence until the United States Supreme Court has rendered its final decision on Defendant Swift’s forthcoming Petition for Writ of Certiorari[.]” **EA App’x132**, so they are opposed to the relief this motion requests, which includes a stay of *any* enforcement of the examination order.

² Section 2101(f) and section 1651(a) authorize “similar action[.]” *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surg. Ins. Plan*, 501 U.S. 1301, 1302 (1991) (Scalia, J., Circuit Justice).

the Court will grant certiorari and “a fair prospect” that the Court will reverse, *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) — essentially, a “strong showing” of likely success, *Nken v. Holder*, 556 U.S. 418, 434 (2009) — a likelihood of irreparable harm without a stay, and that the balanced equities favor Swift, *e.g.*, *Hollingsworth*, 558 U.S. at 190. Here, the examination order facially violates the Fourth Amendment, and the pending show-cause hearing means that Swift will be held in contempt for not complying with that unconstitutional order before this Court can decide whether to exercise its own independent certiorari jurisdiction. Whatever interest the trial court and plaintiffs might have in the enforcement of an unconstitutional order, a stay will at worst delay vindication of that interest. A stay is appropriate.

A. The Court will probably grant certiorari to review and reverse an order that violates more than a century of this Court’s Fourth Amendment precedent.

Begin with the merits. The Fourth Amendment, incorporated against New Mexico via the Fourteenth Amendment, *see* U.S. Const. amend. 14; *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), guarantees “the right of the people to be secure in their . . . papers[] and effects” and to be free from “unreasonable searches and seizures,” while simultaneously

ensuring that any order compelling those intrusions “particularly describe[] the . . . things to be seized[,]” U.S. Const. amend. 4. Its protections apply in the civil context, *Soldal v. Cook Cty.*, 506 U.S. 56, 67 (1992), and to businesses, *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 311 (1978); accord *See v. City of Seattle*, 387 U.S. 541, 543 (1967). And it goes beyond “literal[] . . . searches and seizures” to “extend[]” to the government’s “orderly taking under compulsion of process[.]” *United States v. Morton Salt Co.*, 338 U.S. 632, 651–52 (1950). The examination order conflicts with those limitations by vesting a private actor with State authority and the uncabined power to compel “all documents and information” he wants from Swift.

1. The trial court clothed the examiner with State power subject to Fourth Amendment constraints, but explicitly removed those restrictions.

Since the Fourth Amendment generally restrains only “governmental action[,]” *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985), it proscribes the powers that the trial court can confer upon its own examiner and the examiner’s exercise of that power so long as they “may be fairly characterized as state action[,]” *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 924 (1982) (cleaned up). The trial court, as a “creature[]” of the

State, *T.L.O.*, 469 U.S. at 334, is a state actor “beyond all question[.]” *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991).

As is the trial court’s appointed examiner. *Lugar*’s two-part framework dictates when an ostensibly private party must abide by the Constitution’s prohibition against unreasonable searches and seizures. *See Lugar*, 457 U.S. at 939. The first question is whether the person “exercise[s]” some “right or privilege having its source in state authority[.]” like by availing themselves of a “procedural scheme” created by state law. *Id.* at 939 (first quote), 941 (second quote). The second question is whether the person is “appropriately characterized” as a “state actor[.]” *Id.* at 939. “[J]oint participation with state officials in the seizure of disputed property is sufficient to characterize” the otherwise private party “as a state actor[.]” *Id.* at 941 (cleaned up). Put a little differently: the Fourth Amendment governs “intrusions” by a “private party” while “act[ing] as an instrument or agent” of the State. *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 614 (1989). An examiner like the one here does so: their power derives solely and exclusively from an explicit delegation of authority from the State itself, *see* Rule 11-706(A) NMRA, and, much like a private litigant’s exercise of peremptory strikes,

their exercise of that delegated power hinges on the trial court’s “overt, significant assistance” and its “formal authority[.]” *Edmonson*, 500 U.S. at 624.

That subjects them to the Fourth Amendment’s “ultimate touchstone” — “reasonableness.” *Riley*, 573 U.S. at 381. Reasonableness imposes “rather minimal” but important limitations on any government search or seizure, requiring that it be based on an order “sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.” *See*, 387 U.S. at 544, 545. While the exact contours of those constitutional safeguards might vary case-by-case “in relation to the nature, purpose[.] and scope of the inquiry[.]” they ultimately require a “specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry.” *Ok. Press Publ’g Co. v. Walling*, 327 U.S. 186, 209 (1946). Yet the examination order approves a search and seizure that is the opposite of the targeted inquiry the Constitution demands — it vests the examiner with absolute discretion to demand “all” he wants. **EA App’x004.**

As cases like *Groh* and *Lo-Ji Sales* show, unchecked discretion like that does not pass constitutional muster. *Groh*’s warrant specified what

could be searched (a blue house) but “did not describe the items to be seized *at all*.” *Groh v. Ramirez*, 540 U.S. 551, 558 (2004). The warrant left that decision up to the executing officers and, in doing so, “was so obviously deficient” that it rendered the resulting search illegal. *Id.* at 558. So too the warrant in *Lo-Ji Sales* — it did not “purport to particularly describe” what officers could seize at the bookshop, instead leaving “it entirely to the discretion of the officials conducting the search to decide what items” they ought to take. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 325 (1979) (cleaned up). The examiner’s powers are of a kind, allowing him alone to decide on the fly what information to compel from Swift.

To avoid that result, the plaintiffs told the Supreme Court of New Mexico that, because Swift is a “highly-regulated” and “licensed interstate motor carrier” under federal law, it lacks “a reasonable expectation of privacy in its vehicle tracking system[.]” **EA App’x075**. But Fourth Amendment rights “do not rise or fall” with *Katz*’s “reasonable expectation of privacy” formulation — the Fourth Amendment protects against improper intrusions upon “the areas . . . it enumerates[.]” like papers and effects. *United States v. Jones*, 565 U.S.

400, 406 (2012). The Fourth Amendment’s text “reflects its close connection to property[.]” and, until *Katz* “deviated” from the classic approach in the 1960’s, *id.* at 405, with a test divorced from the Fourth Amendment’s text and history, *Chatrue*, 146 S. Ct. at 2218 (Gorsuch, J., concurring), the Fourth Amendment analysis focused on intrusions upon property, *Jones*, 565 U.S. at 406–07. *Katz* might recognize that those property rights are longer the “sole” constitutional metric, *id.* at 407, but *Katz* did not “snuff” out the original framework, *id.* at 407 (cleaned up). A business thus has an “expectation of privacy in commercial property” that the Constitution defends. *New York v. Burger*, 482 U.S. 691, 699 (1987).

Besides, even pervasive oversight does not extinguish a company’s protected right to be free from unreasonable government intrusion. The mere existence of a regulatory regime provides “no justification” for disparate treatment under the Fourth Amendment when government action “involves nothing more than the normal enforcement of the . . . law[.]” *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 354 (1977) (cleaned up). And even if a regulatory search of a closely regulated business does occur under the regulatory regime, it too must be “carefully

limited in time, place, and scope.” *Burger*, 482 U.S. at 703. It is thus no answer to the Fourth Amendment problem that the examination order poses to point to federal regulation of motor carriers.

The plaintiffs’ implication that the examiner might ask only for “vehicle tracking system” data, *see EA App’x075*, cannot salvage the examination order either. The question is whether the *order* passes constitutional muster; if it does not, even self-imposed restrictions by the examiner that might otherwise be reasonable cannot save it. *E.g., Groh*, 540 U.S. at 559–60.

At the end of the day, the Fourth Amendment “protects all, those suspected or known as to be offenders as well as the innocent[.]” *Ker v. California*, 374 U.S. 23, 33 (1963), and even “the discovery of contraband cannot validate a warrant invalid when issued[.]” *Maryland v. Garrison*, 480 U.S. 79, 85 (1987). Plus, “the mere fact that law enforcement may be made more efficient” by an intrusion “can never by itself justify disregard of the Fourth Amendment[;]” indeed, “the Fourth Amendment reflects the view of those who wrote the Bill of Rights that . . . privacy . . . may not be totally sacrificed in the name of maximum simplicity[.]” *Mincey v. Arizona*, 437 U.S. 385, 393 (1978). That holds true even when the

Constitution prevents access to “near perfect” answers. *Carpenter v. United States*, 585 U.S. 296, 312 (2018).

2. At least four justices are likely to find that error worthy of certiorari review.

Four justices, at least, will probably find the examination order worthy of certiorari review. *See generally Hollingsworth*, 558 U.S. at 190 “Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, to disregard the charter of its own existence[.]” *Mapp*, 367 U.S. at 659, and the examination order presents important structural issues that go to the heart of our federal system, *cf.* Sup. Ct. R. 10(c).

a. The examination order judicially nullifies the Fourth Amendment and more than a century of this Court’s precedent.

First, the examination order “conflicts with” essentially all “relevant decisions of this Court[.]” *id.*, that set the parameters of the Fourth Amendment’s particularly requirement, *see* section I.A.1 above. *Wolf* left no doubt that the Fourth Amendment’s “security” against “arbitrary intrusion” by the government is such a “basic” right, one so “implicit in the concept of ordered liberty[.]” that it binds the States. *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949). Our federal system demands that

States follow its “controlling, constitutional command[s]” in their own courts, faithfully adhering both to the amendment’s text and this Court’s interpretations of it. *Montgomery v. Louisiana*, 577 U.S. 190, 198 (2016); *accord* U.S. Const. art. VI, cl. 2. It does so precisely because the framers recognized the need to “preserve” its protections “in full force” and “guard against resistance to or evasion of its authority” by the States: whatever instrument of the sovereign acts and whatever “guise” it takes, the Constitution and this Court’s “exposition of the law” on it are “supreme[.]” *Cooper v. Aaron*, 358 U.S. 1, 17, 18 (1958).

The examination order guts that “permanent and indispensable feature of our constitutional system[.]” *Id.* at 18. Since at least *Hale*, this Court has instructed that the Fourth Amendment’s particularity requirement proscribes the government’s ability to compel the production of a business’s records with a “general” demand, *see Hale v. Henkel*, 201 U.S. 43, 77 (1906), and it requires *some* “specification of the documents to be produced” by the business, *Ok. Press Publ’g*, 327 U.S. at 209. But as it stands, the rule in New Mexico seems to be that a trial court can avoid those limits entirely so long as it does so via an examiner appointed under a state procedural rule.

b. This case presents a prime vehicle for clarifying the Fourth Amendment’s contours in the civil business-search-and-seizure context.

This is also a distinctive opportunity for the Court to address the Fourth Amendment’s applicability to businesses outside of the criminal context. Search-and-seizure cases are a fixture of this Court’s certiorari jurisdiction. Sometimes those cases invoke adrenaline-pumping, “Hollywood-style car chase[s] of the most frightening sort[.]” *Scott v. Harris*, 550 U.S. 372, 380 (2007). Others turn on less exciting facts — a dog on a porch, *Florida v. Jardines*, 569 U.S. 1, 4–5 (2013), or maybe a motorcycle in a driveway, *Collins v. Virginia*, 584 U.S. 586, 589 (2018). Whatever their genesis, they rarely test the particularity required of an instrument authorizing the non-warrant search and seizure of business property. *See, e.g., Case v. Montana*, 607 U.S. 107, 113–114 (2026) (search of home under emergency exception); *Chatrie*, 146 S. Ct. at 2119 (seizure of cellphone data with general geofence warrant); *District of Columbia v. R.W.*, 146 S. Ct. 1069, 1070–71 (2026) (per curiam) (reasonable suspicion for traffic stop “[i]n the wee hours of a winter morning”). *Patel* is the most recent case in the non-criminal business context, and it dealt with the necessity of pre-compliance review procedures for administrative

searches, *see City of Los Angeles v. Patel*, 576 U.S. 409, 412–13, 419–23 (2015), not particularity.

That infrequency means that the bases for business’s Fourth Amendment rights have not received the same treatment others. Some of the Court’s (relatively) recent non-warrant business-search-and-seizure cases cite *Katz*’s reasonable-expectation-of-privacy test for the proposition that “[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise.” *Marshall*, 436 U.S. at 313 (cleaned up); *accord Burger*, 482 U.S. at 700. The first-blush implication being — as the plaintiffs argued below — that government regulation can categorically foreclose the Fourth Amendment’s applicability for want of a reasonable expectation of privacy under *Katz*. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Yet as this Court has more recently explained, *Katz* did not upend the traditional Fourth Amendment analysis. *See, e.g., Jones*, 565 U.S. at 407. This case presents an opportunity for the Court to explicitly extend that principle to its business-search-and-seizure precedent.

B. Swift will be irreparably harmed without a stay by having to be held in contempt for not complying with an unconstitutional order.

The likelihood of irreparable harm to Swift without a stay favors one here too. *See Hollingsworth*, 558 U.S. at 190. Historically, this factor turns on whether damages or some other relief is a real “remedy” or adequate substitute for the harm likely to occur absent a stay. *Ramirez v. Collier*, 595 U.S. 411, 433 (2022). They are not here.

For starters, the pending contempt hearing forces Swift to choose between consenting to an irreparable injury via compliance or being penalized for not doing so. A State actor “fully accomplishe[s]” a Fourth Amendment violation by simply conducting an unlawful search or seizure. *United States v. Leon*, 468 U.S. 897, 906 (1984). The exclusionary rule — which the Court has “repeatedly declined to extend” to non-criminal cases anyway, *Pa. Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 363 (1998) — does not “cure the invasion” of those constitutional rights. *Leon*, 468 U.S. at 906. Nor does money. Actual damages are recoverable to compensate “for injuries that are *caused by*” constitutional violations, but not for the violations themselves, however “central” the infringed right may be “to our system of ordered liberty.” *Memphis Cmty.*

Sch. Dist. v. Stachura, 477 U.S. 299, 308, 309 (1986). That outcome makes enforcement of the examination order at this juncture untenable.

Indeed, this Court recognized in *Elrod* that “[t]he loss of” constitutionally guaranteed freedoms “for even minimal periods of time[] unquestionably constitutes” an enjoinable “irreparable injury[,]” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (pl. op.), a rule applied equally to stays pending appeal, e.g., *Mirabelli v. Bonta*, 607 U.S. 492, 497 (2026) (per curiam); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (per curiam). While it first emerged in the First Amendment context, that unremarkable principle has generally evolved — consistent with the admonition that none of the Bill of Rights guarantees are “second-class right[s,]” *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 70 (2022) — into a per-se-harm rule for interlocutory injunctive relief from likely Fourth Amendment violations: “[b]ecause there is a likely constitutional violation, the irreparable harm factor is satisfied.” *Leaders of a Beautiful Struggle v. Baltimore Police Dep’t*, 2 F.4th 330, 346 (4th Cir. 2021) (en banc); accord *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009).

Even under a more traditional harm analysis, though, *see Del. State Sportsmen’s Ass’n v. Del. DSHS*, 108 F.4th 194, 203–04 (3d Cir. 2024), a stay is appropriate. The trial court intends to enforce the examination order against Swift via civil contempt, **EA App’x 007**, a “remedial” and “coercive” measure “to compel the contemnor to *comply*” with the examination order, *Matter of Marshall*, 528 P.3d at 675 (emphasis added). Swift will thus be put to a choice between preservation of its constitutional rights and compliance. Plus, the core harm to Swift if the examination goes forward is not an injury “caused *by* the deprivation of constitutional rights[,]” *Stachura*, 477 U.S. at 306 (emphasis added), but the functional loss of those rights themselves. The former would be compensable, *id.*; the latter, not so much, except perhaps via nominal damages, which would “recognize[] the importance” of the right violated without really compensating for the injury, *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). Functionally, the only way to remedy the constitutional harm here is to prevent it from occurring at all.

And that all assumes that Swift would have *any* Fourth Amendment right left to vindicate if it complied with the examination order. Otherwise improper “state-initiated searches and seizures”

become reasonable with consent, and the “terms of the authorization” define its scope. *Jimeno*, 500 U.S. at 251. If Swift consented to the examination order by paying the examiner’s demanded fee, it would be acquiescing to his ostensible authority to demand “all documents and information” he wants, **EA App’x004**, vitiating the Fourth Amendment problem entirely. Swift ought not be punished with contempt for not doing so while this Court decides whether to exercise its jurisdiction.

C. The balanced equities favor interim relief.

Considering the harms to Swift and the respondents and the public’s own interests, the balanced equities favor a stay. *See generally Hollingsworth*, 558 U.S. at 190. Balancing proves “quite easy” when, as here, a stay would cause no irreparable harm to the respondents and prevent it from befalling the applicant. *Barnes*, 501 U.S. at 1305. The only harm to the respondents, at worst, is delayed enforcement of an order that, on its face, this Court’s precedent deems unconstitutional. And if the Court grants certiorari and rules for Swift on the merits, the respondents have lost nothing: “our system does not permit” the government “to act unlawfully even in pursuit of desirable ends[.]” *Ala. Ass’n of Realtors v. DHHS*, 594 U.S. 758, 766 (2021), so the lost

opportunity to commit or benefit from an “illegal” act that is “void because unconstitutional” is not a harm at all, *cf. Ex parte Young*, 209 U.S. 123, 159 (1908).

For similar reasons, the public interest favors a stay. Swift’s forthcoming petition will ask the Court to answer targeted federal constitutional questions “of transcending public importance” raised by a State-court order that is “out of harmony” with this Court’s Fourth Amendment precedent. *Russo v. Byrne*, 409 U.S. 1219, 1221 (1972) (Douglas, J., Circuit Justice).

II. The Court should administratively stay the examination order and any attempts to enforce it.

Whether a single justice or the full Court decides Swift’s motion on the merits, *see, e.g.*, 28 U.S.C. § 2101(f); Sup. Ct. R. 23(1), an administrative stay should issue to “freeze” the examination order until this Court reaches the merits of this motion, *see United States v. Texas*, 144 S. Ct. 797, 798 (2024) (Barret, J., concurring). “After receiving an emergency application” like Swift’s, “this Court frequently issues an administrative stay to permit time for briefing and deliberation” on merits-related issues that are “not always easy to evaluate in haste[.]” *Id.*; *accord, e.g., June Med. Servs., L.L.C. v. Gee*, 139 S. Ct. 661, 661 (2019)

(Alito, J.) (granting administrative stay so Court could review merits of stay application, a stay the Court granted six days later, 586 U.S. 1135 (2019)). Doing so here while the parties complete briefing on this application makes sense. Though Swift thinks the ultimate merits clear, the application does implicate profound constitutional principles woven into the fabric of American life as a direct response to “reviled” general warrants. *Riley*, 573 U.S. at 403. Neither the plaintiffs nor the trial court will be harmed by a short delay so that the Court can fully consider their significance in this context.

CONCLUSION

The Court should stay the examination order issued by the trial court on June 24, 2026 and any enforcement of that order via contempt or otherwise (including a stay of the October 1 show-cause hearing) pending Swift’s timely filing, by October 12, 2026, and this Court’s disposition of a petition for writ of certiorari.

Respectfully submitted,

/s/ Kyle C. Steingreaber

Kyle C. Steingreaber

Counsel of Record

**WRIGHT, CLOSE, BARGER
& GUZMAN, LLP**

700 Louisiana, Suite 3000

Houston, Texas 77002

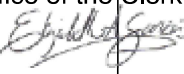
(713) 572.4321

steingreaber@wcbglaw.com

Attorneys for Applicant Swift

Transportation of Arizona, LLC

September 30, 2026

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO****August 20, 2026****NO. S-1-SC-41552****SWIFT TRANSPORTATION OF
ARIZONA, LLC,**

Petitioner,

v.

**HON. FRANCIS J. MATHEW,
District Court Judge,
First Judicial District,**

Respondent

and,

**BARRY GREEN, as personal
representative of the wrongful death
estate of RAYMOND CRUZ HERRERA;
CYNTHIA GUERRERO RODARTE,
individually and as parent and next friend of
GAEL GUERRERO, JULIANA FLORES,
and MARISELA GUERRERO;
LUCIANA GUERRERO; ARADAI RODARTE,
individually and as parent and next friend of
MALIE C., ISAAC C., ISAIAH C., and
EMILY C.; PETER WIRTH on behalf of the
wrongful death estate of ABRAHAM CALDERON;
and CULLEN HALLMARK, on behalf of the wrongful
death estate of JOSE LUIS GUERRERO,**

Real Parties in Interest.

ORDER

WHEREAS, this matter came on for consideration by the Court upon

1 *emergency petition for writ of superintending control, request for stay, response,*
 2 *motion for leave to file reply and conditionally filed reply, and the Court having*
 3 *considered the foregoing and being sufficiently advised; Chief Justice Julie J.*
 4 *Vargas, Justice Michael E. Vigil, Justice C. Shannon Bacon, Justice David K.*
 5 *Thomson, and Justice Briana H. Zamora concurring;*

6 NOW, THEREFORE, IT IS ORDERED that the motion for leave to file
 7 reply and conditionally filed reply is MOOT.

8 IT IS FURTHER ORDERED that the emergency petition for writ of
 9 superintending control is DENIED.

10 IT IS SO ORDERED.



WITNESS, the Honorable Julie J. Vargas, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 20th day of August, 2026.

Elizabeth A. Garcia, Clerk of Court
 Supreme Court of New Mexico

I CERTIFY AND ATTEST:
 A true copy was served on all parties
 or their counsel of record on date filed.

Mycole Vigil

Clerk of the Supreme Court
 of the State of New Mexico

By Mycole Vigil
 Deputy Clerk

FILED 1st JUDICIAL DISTRICT COURT
Santa Fe County
6/24/2026 10:51 AM
KATHLEEN VIGIL CLERK OF THE COURT
Miquella M Martinez

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

BARRY GREEN, as Personal Representative
of the Wrongful Death Estate of RAYMUNDO
CRUZ HERRERA, DECEASED, et al,

Plaintiffs,

vs.

Case No. D-101-CV-2023-01086

SWIFT TRANSPORTATION, et al,

Defendants.

AMENDED *SUA SPONTE* ORDER APPOINTING RULE 11-706 EXPERT

THIS MATTER COMES before the Court upon its own motion, acting *sua sponte*, the Parties have raised various claims by discovery motions and defenses to discovery motions, the resolution of which require technical expertise not possessed by the Court in the areas of computers, computer systems, electronic maintenance and retrieval of documents, document retention and related matters, including, without limitation, policies. The Court finds that it is necessary to appoint an expert pursuant to Rule 11-706 NMRA to assist in the Court's resolution of the above described matters and will appoint such expert in accordance with the needs of the Court as follows:

It Is Hereby Ordered as follows:

1. Swift Transportation shall be responsible for the payment of the fees, costs and retainers of the Rule 11-706 Expert described herein to assist the Court in the areas of computers, computer systems, electronic maintenance and retrieval of documents and related matters. During the pendency of this matter, such fees, costs and retainers shall be paid as follows:

a. All retainers, billed fees and costs shall be paid in full within thirty (30) days of the date of billing by the Rule 11-706 Expert.

b. The failure to pay such fees and costs within 30 days of billing and the failure to pay the retainer within 10 days will result in the immediate cessation of all work, and such failure shall be considered contempt of this Court's Order.

2. Status conferences may be held with the Parties and the Rule 11-706 Expert on a monthly basis, provided, however, that the Rule 11-706 Expert may call such conferences more often if such Expert deems the same necessary or helpful.

3. The Court may communicate with the Rule 11-706 Expert as often as the Court or the Rule 11-706 Expert requires. Such communications need not include any of the Parties to this proceeding. The Rule 11-706 Expert may communicate with the Parties, their employees and agents, including former employees and agents directly as often and in any manner as the Rule 11-706 Expert chooses, and shall not be required to notify the other Parties of such communication or the contents of such communications, provided, however, the Parties and their agents shall not initiate any communications with the Rule 11-706 Expert other than responsive communications to requests made by the Rule 11-706 Expert without copying all other Parties on written communications and first notifying the other parties and arranging for their participation, if so requested by them, on oral communications.

4. The Rule 11-706 Expert shall be provided with all documents and information requested including, but not limited to, passwords, electronic data and policies within ten (10) days of such requests. The Parties shall take all steps to make sure such arrangements are made, including authorizing and directing the release of such information from independent agents of Swift Transportation.

5. The Rule 11-706 Expert shall not be required to share any information received with the Parties other than by way of its final report made to the Court.

6. The Rule 11-706 Expert shall prepare a final report to the Court, providing the Court with the Rule 11-706 Expert's opinion concerning the following;

- a. The maintenance and deletion of information relevant to location of tractors or trailers used, owned by or leased in the operation of Swift Transportation in New Mexico, including but not limited to third parties using independently owned tractors pulling trailers owned, leased or used by Swift Transportation, from 12:01 pm May 21, 2022 to 1201 pm MT, May 22, 2022;
- b. When and how any such information was deleted, if information was deleted, and any policies related to the safeguarding, backup and deletion of information;
- c. Whether deleted information is retrievable and how such information may be retrieved;
- d. The storage of such information, its manner of storage and location of storage, including backups;
- e. A comprehensive listing all tractors and trailers described above in subpart (a) of this paragraph and their locations in New Mexico from 12:01 pm May 21, 2022 to 1201pm MT, May 22, 2022; and
- f. Any other information that the Court may consider relevant or necessary in the area of the Rule 11-706 Expert's expertise.

7. The Rule 11-706 Expert shall provide the Court a final report no later than September 30, 2026, with copies to all Parties. Following the delivery of the final report, a representative of the Rule 11-706 Expert may be subject to a deposition by any Party with the costs and fees of the Rule 11-706 Expert related to the deposition being paid by the party requesting such deposition, and the

11-706 Expert shall not be deposed more than one time unless the Court orders such additional deposition upon a motion by a Party.

8. A representative of the Rule 11-706 Expert may be called to testify by the Court or any Party at the trial in this matter and may be examined and cross-examined by any Party.

9. The Parties having failed to agree on the appointment of a Rule 11-706 Expert, the Court hereby appoints Konstantinos “Gus” Dimitrelos, Cyber Forensics, Inc., to serve as the Rule 11-706 Expert pursuant to the terms of this Order.


FRANCIS J. MATHEW
District Judge, Division I

xc: Counsel, e-served

FILED 1st JUDICIAL DISTRICT COURT
Santa Fe County
9/25/2026 2:26 PM
KATHLEEN VIGIL CLERK OF THE COURT
Dominique Z Garcia

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

BARRY GREEN, as Personal Representative
of the Wrongful Death Estate of RAYMUNDO
CRUZ HERRERA, DECEASED, et al,

Plaintiffs,

vs.

Case No. D-101-CV-2023-01086

SWIFT TRANSPORTATION, et al,

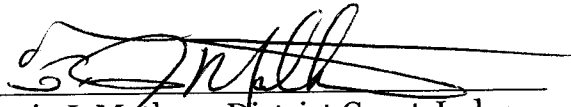
Defendants.

**ORDER TO SHOW CAUSE WHY SWIFT TRANSPORTATION AND IT'S
COUNSEL SHOULD NOT BE HELD IN CONTEMPT OF COURT**

This matter having come before the Court upon its own motion sue sponte; the Court having issued its Amended *Sua Sponte* Order Appointing Rule 11-706 Expert herein requiring that the Expert's retainer be paid by Swift Transportation within 10 days; the Court having been advised that the retainer was not paid as of September 25, 2026, in violation of the Court's Orders; good cause appears to exist that an Order should issue that Swift Transportation and its counsel should appear and show cause why they should not be held in civil contempt for the violation of the Court's Order.

It is hereby ORDERED that at 9:00 a.m. on October 1, 2026, Swift Transportation and its counsel shall appear before this Court and show cause why they should not be held in civil contempt for violation of this Court's Order.

IT IS SO ORDERED.


Francis J. Mathew, District Court Judge

xc: Counsel, e-served



Re: [sfeddiv1proposedtxt] D-101-CV-2023-01086, - Motion for Order to Show Cause and Request for Expedited Hearing

From Jamaica A. Gonzales <sfeddiv1proposedtxt@nmcourts.gov>

Date Fri 2026-09-04 3:01 PM

To Brian Grayson <brian@graysonlawoffice.net>

Cc Andrea Boyle <ABoyle@mayerllp.com>; Brian Fisher <BFisher@mayerllp.com>; Ryan Goodhue <RGoodhue@mayerllp.com>; TPelletier <TPelletier@mayerllp.com>; mscherr@scherrlawfirm.com <mscherr@scherrlawfirm.com>; jim@jamesescherrlaw.com <jim@jamesescherrlaw.com>; chip@jamesescherrlaw.com <chip@jamesescherrlaw.com>; mmurguia@scherrlawfirm.com <mmurguia@scherrlawfirm.com>; jonathan@jamesescherrlaw.com <jonathan@jamesescherrlaw.com>; jwearmouth@scherrlawfirm.com <jwearmouth@scherrlawfirm.com>; ktarin@scherrlawfirm.com <ktarin@scherrlawfirm.com>; bsalinas@scherrlawfirm.com <bsalinas@scherrlawfirm.com>; Paralegal@scherrlawfirm.com <Paralegal@scherrlawfirm.com>; norma@jamesescherrlaw.com <norma@jamesescherrlaw.com>; ivan@jamesescherrlaw.com <ivan@jamesescherrlaw.com>; Daniela@labinotilaw.com <Daniela@labinotilaw.com>; paralegalDL@labinotilaw.com <paralegalDL@labinotilaw.com>; sandra@labinotilaw.com <sandra@labinotilaw.com>; Kira Willis <kira@graysonlawoffice.net>; andy@andyraylaw.com <andy@andyraylaw.com>

[WARNING - This message did not originate from the Wright Close Barger & Guzman email server. DO NOT CLICK links or attachments unless you recognize the sender and know that the content is safe.]

Good afternoon, Counsel -

On behalf of Judge Mathew, we are unable to accommodate your request for an expedited setting. We are in trial for the next month and a half.

We are also unable to add this motion to October 15, 2026, as we currently have a stacked docket. This particular motion will be set on October 22, 2026.

Kind regards,

Jamaica

On Thu, Sep 3, 2026 at 5:05 PM Brian Grayson <brian@graysonlawoffice.net> wrote:

Dear Judge Mathew and Ms. Gonzales:

Attached are the court-endorsed Expedited Motion for Order to Show and Request for Expedited Hearing, along with a Notice of Hearing in Word format. Swift has willfully refused to comply with the Court's June 24, 2026 Amended Sua Sponte Order Appointing Rule 11-706 Expert and has otherwise completely abandoned its discovery obligations in this case. The only motion hearing currently scheduled is over a month from now, which is the hearing on Plaintiffs' Supplemental Motion for Sanctions scheduled for 11:00 am on October 15, 2026.

9a
Plaintiffs respectfully request that the Court expedite the hearing on both motions as the discovery deadline is November 4, 2026 and the trial is scheduled for January 4, 2027. If the Court grants the relief requested by the Plaintiffs in the Motions, then discovery can be completed on time and at substantially less expense. We believe this constitutes good cause for expediting the hearing on these motions.

We note that Plaintiffs' counsel are in separate trials from September 21, 2026 through October 1, 2026. Other matters have counsel unavailable on September 14 and September 16.

Thank you for your consideration.

Brian Grayson



Brian G. Grayson, Esq.

[3901 Georgia St. NE Suite A-2-A](#)

Albuquerque, NM 87110

[\(505\) 273-8570](#)

[\(505\) 214-5007](#) (fax)

www.graysonlawoffice.net

Licensed in New Mexico and Arizona

This email is for the use of the intended recipient(s) only. If you have received this email in error, please notify the sender immediately and then delete it. If you are not the intended recipient, you must not keep, use, disclose, copy or distribute this email without the author's prior permission. We have taken precautions to minimize the risk of transmitting software viruses, but we advise you to carry out your own virus checks on any attachment to this message. We cannot accept liability for any loss or damage caused by software viruses. The information contained in this communication may be confidential and may be subject to the attorney-client privilege. If you are the intended

10a

recipient and you do not wish to receive similar electronic messages from us in future then please respond to the sender to this effect.

--

You received this message because you are subscribed to the Google Groups "First Judicial District Court Division 1 Proposed Text" group.

To unsubscribe from this group and stop receiving emails from it, send an email to

sfeddiv1proposedtxt-grp+unsubscribe@nmcourts.gov.

To view this discussion visit

<https://groups.google.com/a/nmcourts.gov/d/msgid/sfeddiv1proposedtxt-grp/SA1P222MB01501A64696472D93DD3FD7CD8B62%40SA1P222MB0150.NAMP222.PROD.OUTLOOK.COM>.

--

*Trial Court Administrative Assistant for the
Honorable Francis J. Mathew - Division I
First Judicial District Court
225 Montezuma Avenue
Santa Fe, NM 87501
(505) 455-8155*



Docket No. _____

In the
Supreme Court of New Mexico

Santa Fe, New Mexico

S-1-SC-41552

Swift Transportation of Arizona, LLC

Petitioner

v.

Hon. Francis J. Mathew, District Court Judge, First Judicial District

Respondent

and

Barry Green, as personal representative of the wrongful death estate of Raymundo Cruz Herrera; Cynthia Guerrero Rodarte, individually and as parent and next friend of Gael Guerrero, Julian Flores, and Marisela Guerrero; Luciana Luerrero; Aradai Rodarte, individually and as parent and next friend of Malie Calderon, Isaac Calderon, Isaiah Calderon, and Emily Calderon; Peter Wirth, on behalf of the wrongful death estate of Abraham Calderon; and Cullen Hallmark, on behalf of the wrongful death estate of Jose Luis Guerrero

Real Parties in Interest

On petition for writ of superintending control to the
First Judicial District Court, County of Santa Fe, New Mexico
Cause No. D-101-CV-2023-01086

**Emergency Petition for Writ of Superintending Control and
Request to Stay**

Brian J. Fisher
Ryan T. Goodhue
MAYER LLP
4101 Indian School Road NE, Suite
301N
Albuquerque, New Mexico 87110
(505) 483.1840

Kyle C. Steingreaber (*pro hac vice*
pending)
WRIGHT, CLOSE, BARGER & GUZMAN,
LLP
700 Louisiana, Suite 3000
Houston, Texas 77002
(713) 572.4321

Counsel for Petitioner Swift Transportation of Arizona, LLC

TABLE OF CONTENTS

Table of Contents	2
Table of Authorities.....	4
Jurisdictional Statement.....	9
Identities of the Real Parties In Interest.....	10
Summary of Proceedings.....	11
Argument.....	15
I. Respondent erred by entering the appointment order under Rule 11-706 NMRA and then refusing to vacate the appointment order.....	15
A. A Rule 11-706 appointment authorizing compulsory seizure must meet the Fourth Amendment’s particularity requirement by specifying the materials to be seized, and the appointment order does not.....	16
1. The Fourth Amendment regulates the power of a Rule 11-706 appointee to compel production of information — the appointee becomes a State actor wielding State authority.....	17
2. The appointment order’s grant of unfettered power to Dimitrelos to demand “all documents and information” he wants amounts to the type of general warrant the Fourth Amendment proscribes.....	19
B. The appointment order violates procedural due process and exceeds Rule 11-706’s scope.....	22
1. Procedural due process forbids a Rule 11-706 appointment that allows the appointee to unilaterally disclose privileged or immune material to third parties without affording an opportunity to claim those protections	23

2.	The order improperly authorizes substantive, clandestine ex parte communications between Dimitrelos, the plaintiffs, and Respondent.	26
C.	Rule 11-706 does not allow Respondent to use the plaintiffs' own expert as a court-appointed expert.....	29
II.	The appointment order carries grave constitutional implications and poses profound procedural problems best corrected via superintending control.....	30
A.	This petition presents a prime vehicle for interpreting an important procedural rule that this Court has not construed once.....	30
B.	Promptly resolving the constitutional and other substantive questions that the order raises benefits the public interest.	33
C.	Swift has no adequate appellate remedy to correct this facially flawed order.....	34
III.	An immediate, ex parte stay is necessary to preserve the status quo and facilitate this Court's review.	35
	Relief Sought	38
	Verification	40
	Certificate of Service	40

Statement of Compliance. In accordance with Rule 12-504(G)(3) NMRA, this brief complies with the limitations of subparagraph (G)(3) of Rule 12-504 NMRA: the petition was prepared using a proportionally-spaced typeface (Century Schoolbook) and the body of the petition, as defined in subparagraph (G)(1) of that rule, contains 5,618 words.

TABLE OF AUTHORITIES

Cases (New Mexico)

<i>Aragon v. Martinez</i> , 2025-NMSC-046.....	23
<i>Chappell v. Cosgrove</i> , 1996-NMSC-020.....	30
<i>City of Roswell v. Sanchez-Gagne</i> , 2025-NMSC-039.....	28, 29, 30
<i>Concha v. Sanchez</i> , 2011-NMSC-031.....	30
<i>Estate of Romero ex rel. Romero v. City of Santa Fe</i> , 2006-NMSC-028.....	30
<i>Grisham v. Romero</i> , 2021-NMSC-009.....	31
<i>Grisham v. Van Soelen</i> , 2023-NMSC-027.....	32
<i>In re Guardianship of Patrick D.</i> , 2012-NMSC-017.....	29
<i>In re Pamela A.G.</i> , 2006-NMSC-019.....	25
<i>Jaramillo v. Jaramillo</i> , 1991-NMSC-101.....	29
<i>Johnson & Johnson v. Wilson</i> , 2025-NMSC-003.....	13, 31
<i>Maestas v. Hall</i> , 2012-NMSC-006.....	29
<i>New Energy Economy, Inc. v. Vanzi</i> , 2012-NMSC-005.....	32
<i>New Mexico ex rel. Brandenburg v. Blackmer</i> , 2005-NMSC-008.....	30
<i>Pacheco v. Hudson</i> , 2018-NMSC-022.....	30

<i>Pincheira v. Allstate Ins. Co.</i> , 2008-NMSC-049.....	29
<i>Ramirez v. Marsh</i> , 2025-NMSC-050.....	30
<i>Segal v. Goodman</i> , 1993-NMSC-018.....	33, 34, 35
<i>Shook, Hardy & Bacon LLP v. Wilson</i> , 2025-NMSC-022.....	32
<i>State ex rel. Torrez v. Whitaker</i> , 2018-NMSC-005.....	31
<i>State v. Attaway</i> , 1994-NMSC-011.....	13
<i>State v. Houdobre</i> , 2025-NMSC-007.....	13, 21, 22, 23
<i>State v. Melton</i> , 1977-NMSC-014.....	29
<i>State v. Romero</i> , 2011-NMSC-013.....	22
<i>State v. Sabeerin</i> , 2014-NMCA-110	18, 34
<i>State v. Santiago</i> , 2009-NMSC-045.....	15
<i>State v. Wilson</i> , 2021-NMSC-022.....	31
<i>Stewart v. Ramczyk</i> , 2025-NMSC-032.....	13, 28, 31
<i>United Nuclear Corp. v. Gen. Atomic Co.</i> , 1980-NMSC-094.....	12
<i>Warner v. Calbert</i> , 2011-NMCA-028	27
Cases (Other Jurisdictions)	
<i>Airbnb, Inc. v. City of New York</i> , 373 F. Supp. 3d 467 (S.D.N.Y. 2019)	19

<i>Bd. of Mgrs. of Bay Club Condo. v. Bay Club of Long Beach, Inc.,</i> 827 N.Y.S.2d 855 (N.Y. Sup. Ct. 2007)	24
<i>Bd. of Regents of State Colleges v. Roth,</i> 408 U.S. 564 (1972)	22
<i>Carpenter v. United States,</i> 585 U.S. 296 (2018)	19
<i>Cassady v. Goering,</i> 567 F.3d 628 (10th Cir. 2009)	18
<i>Coolidge v. New Hampshire,</i> 403 U.S. 443 (1971)	20
<i>Cty. of Santa Clara v. Trump,</i> 250 F. Supp. 3d 497 (N.D. Cal. 2017)	34
<i>Edgar v. K.L.,</i> 93 F.3d 256 (7th Cir. 1996)	25, 26
<i>Edmonson v. Leesville Concrete Co.,</i> 500 U.S. 614 (1991)	15, 16
<i>Elrod v. Burns,</i> 427 U.S. 347 (1976)	34
<i>G.K. Las Vegas LP v. Simon Prop. Grp., Inc.,</i> 671 F. Supp. 2d 1203 (D. Nev. 2009)	24, 27
<i>Groh v. Ramirez,</i> 540 U.S. 551 (2004)	17, 18, 19, 34
<i>Hollingsworth v. Perry,</i> 558 U.S. 183 (2010)	36
<i>Ker v. California,</i> 374 U.S. 23 (1963)	19
<i>Landgraf v. USI Film Prods.,</i> 511 U.S. 244 (1994)	22
<i>Lugar v. Edmonson Oil Co., Inc.,</i> 457 U.S. 922 (1982)	15, 16, 21
<i>Mapp v. Ohio,</i> 367 U.S. 643 (1961)	14

<i>Marshall v. Barlow’s, Inc.</i> , 436 U.S. 307 (1978)	14
<i>Maryland v. Garrison</i> , 480 U.S. 79 (1987)	19
<i>McClendon v. City of Albuquerque</i> , 79 F.3d 1014 (10th Cir. 1996)	33, 36
<i>Mincey v. Arizona</i> , 437 U.S. 385 (1978)	19
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985)	15, 20
<i>Ok. Press Pub’g Co. v. Walling</i> , 327 U.S. 186 (1946)	17
<i>Pro Ag Mgmt., Inc. v. AgriSompo N. Am., Inc.</i> , No. 26-2066-JWB-BGS, 2026 WL 1073918 (D. Kan. Apr. 21, 2026)	27
<i>Riley v. California</i> , 573 U.S. 373 (2014)	16, 20
<i>See v. City of Seattle</i> , 387 U.S. 541 (1967)	14, 17
<i>Skinner v. Ry. Labor Execs.’ Ass’n</i> , 489 U.S. 602 (1989)	16
<i>Soldal v. Cook Cty.</i> , 506 U.S. 56 (1992)	14
<i>Stanford v. Texas</i> , 379 U.S. 476 (1965)	20
<i>United States v. Craven</i> , 239 F.3d 91 (1st Cir. 2001)	25
<i>United States v. Fleet Mgm’t Ltd.</i> , 521 F. Supp. 2d 436 (E.D. Pa. 2007)	18
<i>United States v. Morton Salt Co.</i> , 338 U.S. 632 (1950)	14
<i>United States v. Stefonek</i> , 179 F.3d 1030 (7th Cir. 1999)	18

<i>Upjohn Co. v. United States</i> , 449 U.S. 383 (1981)	23
---	----

<i>Wolf v. Colorado</i> , 338 U.S. 25 (1949)	28
---	----

Rules

Rule 1-001 NMRA	25
Rule 1-026 NMRA	23, 24
Rule 1-088.1 NMRA	28
Rule 11-503 NMRA	24
Rule 11-706 NMRA	12, 26
Rule 11-1101 NMRA	33
Rule 12-504 NMRA	passim
Rule 21-211 NMRA	28

Constitutional Provisions

N.M. Const. art. 2, § 18	21
N.M. Const. art. 6, § 3	7, 28
N.M. Const. art. 6, § 29	7
U.S. Const. amend. 4	14, 31
U.S. Const. amend. 14	14, 21

JURISDICTIONAL STATEMENT

This Court has jurisdiction over Swift's petition because the Court's original jurisdiction includes the power of "superintending control over all inferior courts[.]" N.M. Const. art. 6, § 3, and Swift's petition invokes that power. Since only this Court possesses that jurisdiction, *compare* N.M. Const., art 6, § 3 *with id.* art. 6, § 29, Swift could not have "lawfully made" its petition to another court first, *see generally* Rule 12-504(B)(1)(b) NMRA.

IDENTITIES OF THE REAL PARTIES IN INTEREST

Since Respondent is a judge, Swift states, per Rule 12-504(B)(1)(c) NMRA, that the names of Real Parties in Interest (the plaintiffs below) are:

- Barry Green, as personal representative of the wrongful death estate of Raymundo Cruz Herrera;
- Cynthia Guerrero Rodarte, individually and as parent and next friend of Gael Guerrero, Juliano Flores, and Marisela Guerrero;
- Luciana Luerrero;
- Aradai Rodarte, individually and as parent and next friend of Malie Calderon, Isaac Calderon, Isaiah Calderon, and Emily Calderon;
- Peter Wirth, on behalf of the wrongful death estate of Abraham Calderon; and
- Cullen Hallmark, on behalf of the wrongful death estate of Jose Luis Guerrero

SUMMARY OF PROCEEDINGS

This petition challenges the constitutionality and propriety of an order issued under Rule 11-706 NMRA appointing Konstantinos Dimitrelos, the plaintiffs' former expert, as Respondent's own witness and vesting him with unbridled power to demand any material he wants from Swift.

The plaintiffs — Real Parties in Interest — sued Swift, claiming that an unidentified Swift trailer caused a multi-fatality accident in New Mexico. **App'x669–81**. In July 2025, the Respondent ordered Swift to produce a slew of information and documents reflecting the presence of Swift tractors and trailers in New Mexico between 12:01 p.m. on May 21, 2022 and 12:01 p.m. on May 22, 2022. **App'x118–20**. The plaintiffs ended up seeking sanctions against Swift, arguing that Swift had not complied with the order. **App'x121–36, 513–17**. Swift opposed the plaintiffs' motion for sanctions because it believed that it had produced all responsive material within its possession, custody, or control, and that any other responsive information had become unavailable before the July 2025 order was entered. *E.g.*, **App'x518–26**.

That culminated in an evidentiary hearing in May 2026, at which Respondent decided sua sponte to appoint an examiner under Rule 11-706 NMRA. *See App’x007–10*. That rule permits a district court to “order the parties to show cause why expert witnesses should not be appointed” to aid the court in resolving some factual dispute. *See* Rule 11-706(A) NMRA. Respondent memorialized that ruling in an order on June 1, 2026, leaving open the identity of the examiner, but explaining that their appointment was to help Respondent evaluate “[t]he maintenance and deletion of information” responsive to the Court’s order, including the circumstances surrounding the loss, recoverability, and availability of responsive information. **App’x007–10**.

Swift ultimately realized that it made serious mistake — materials that it believed were unavailable in July 2025 in fact were and continued to be in May 2026. **App’x527–32, 533–61**. Since any non-compliance with a discovery order amounts to a failure to comply, *see United Nuclear Corp. v. Gen. Atomic Co.*, 1980-NMSC-094, ¶¶ 201–03, Swift withdrew its opposition to the plaintiffs’ motion for sanctions and, in light of the seriousness of the issue, agreed to the partially merits

preclusive sanctions (a deemed finding that Swift owned the trailer and that the trailer was a proximate cause of accident). **App’x527–32.**

Swift then moved to vacate the original Rule 11-706 appointment as moot, which Respondent denied. **App’x533–61.** Respondent amended the Rule 11-706 appointment order on June 24, 2026 (we refer to it as “the appointment order” from here) and named Konstantinos Dimitrelos as the Rule 11-706 appointee. **App’x001–04.** He testified for the plaintiffs — against Swift — in support of their bid for sanctions. *See App’x574–607.*

The order granted Dimitrelos incredible latitude. Paragraph 3 allows him to conduct substantive, ex parte communications with Respondent and the parties:

The Court may communicate with the Rule 11-706 Expert as often as the Court or the Rule 11-706 Expert requires. Such communications need not include any of the Parties to this proceeding. The Rule 11-706 Expert may communicate with the Parties, their employees and agents, including former employees and agents[,] directly as often and in any manner as the Rule 11-706 Expert chooses, and shall not be required to notify the other Parties of such communication or the contents of such communication”

App’x002. And paragraph 4 gives him the unilateral ability to demand any material from Swift that he wants:

The Rule 11-706 Expert shall be provided with all documents and information requested including, but not limited to, passwords, electronic, data and policies within ten (10) days of such requests.

App’x002. Yet he ultimately has complete discretion, per paragraph 5, to choose what information he shares with the parties:

The Rule 11-706 Expert shall not be required to share any information received with the Parties other than by way of its final report made to the Court.

App’x003. Swift must pay his retainer within either 10 days of billing or else be in contempt:

All retainers, billed, fees and costs shall be paid in full within thirty (30) days of the date of billing by the Rule 11-706 Expert.

The failure to pay such fees and costs within 30 days of billing and the failure to pay the retainer within 10 days will result in the immediate cessation of all work, and such failure shall be considered contempt of this Court’s Order.

Swift moved to vacate the appointment order on July 10, identifying the same infirmities that it raises in this Court. **App’x562–607.** The plaintiffs responded on July 15. **App’x608–20.** On July 21, 2026, Dimitrelos submitted his retainer to Swift, demanding upfront

payment of \$60,000 for his work. Respondent then denied Swift's motion to vacate on July 27. **App'x005–06**. This petition for writ of superintending control followed.

ARGUMENT

Superintending control empowers this to “correct any specie of error” that a district court commits without the need for a direct appeal. *Stewart v. Ramczyk*, 2025-NMSC-032, ¶ 12. This case presents the “exceptional circumstances[,]” *id.* where immediate writ review is necessary to vindicate Swift's constitutional, procedural, and substantive rights and clarify the parameters of Rule 11-706's appointment power and its relationship to constitutional guarantees of privacy and due process, and the privileges that New Mexico law creates.

I. Respondent erred by entering the appointment order under Rule 11-706 NMRA and then refusing to vacate the appointment order.

While a district court's discovery order ordinarily enjoys some degree of deference, its resolution of the legal questions underlying those orders — statutory, rule, and constitutional interpretation — does not. *Johnson & Johnson v. Wilson*, 2025-NMSC-003, ¶ 12. Nor does a

district court's conclusion about the constitutionality of particular conduct. *State v. Houdobre*, 2025-NMSC-007, ¶ 7 (procedural due process); *State v. Attaway*, 1994-NMSC-011, ¶ 10 (Fourth Amendment). This Court reviews those issues de novo. *E.g.*, *ibid.* The appointment order fails under that review.

A. A Rule 11-706 appointment authorizing compulsory seizure must meet the Fourth Amendment's particularity requirement by specifying the materials to be seized, and the appointment order does not.

In the first place, the unlimited scope of information Dimitrelos can demand violates the Fourth Amendment. The Fourth Amendment, incorporated against New Mexico via the Fourteenth Amendment, *see* U.S. Const. amend. 14; *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), guarantees “the right of the people to be secure in their . . . papers” and to be free from “unreasonable searches and seizures,” while simultaneously ensuring that any order compelling a search or seizure “particularly describe[] the . . . things to be seized[,]” U.S. Const. amend. 4. Its “protection applies in the civil context,” *Soldal v. Cook Cty.*, 506 U.S. 56, 67 (1992), and extends to businesses, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978); *accord See v. City of Seattle*, 387 U.S. 541, 543 (1967). And it goes beyond “literal[] . . . searches and seizures”

to “extend[]” to the government’s “orderly taking under compulsion of process.” *United States v. Morton Salt Co.*, 338 U.S. 632, 651–52 (1950).

The order tramples on Swift’s Fourth Amendment rights.

1. The Fourth Amendment regulates the power of a Rule 11-706 appointee to compel production of information — the appointee becomes a State actor wielding State authority.

In the first place, the appointment cloaks Dimitrelos with investigative and seizure authority subject to constitutional restraints. Since the Fourth Amendment generally restrains only “governmental action[,]” *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985), it proscribes the powers that a district court can confer upon a Rule 11-706 examiner and the examiner’s exercise of that power so long as they “may be fairly characterized as state action[,]” *Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922, 924 (1982) (cleaned up); accord *State v. Santiago*, 2009-NMSC-045, ¶ 7. A district court, as a “creature[]” of the State, *T.L.O.*, 469 U.S. at 334, is a state actor “beyond all question[,]” *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991).

As is a Rule 11-706 appointee clothed with the power to compel production. *Lugar*’s two-part framework dictates when an ostensibly private party must comply with the Constitution’s prohibition against

unreasonable searches and seizures. *See Lugar*, 457 U.S. at 939; *Santiago*, 2009-NMSC-045, ¶ 7. The first question is whether the person “exercise[s]” some “right or privilege having its source in state authority[,]” like by availing themselves of a “procedural scheme” created by state law. *Lugar*, 457 U.S. at 939 (first quote), 941 (second quote). The second question is whether the person is “appropriately characterized” as a “state actor[.]” *Id.* at 939. “[J]oint participation with state officials in the seizure of disputed property is sufficient to characterize” the otherwise private party “as a state actor[.]” *Id.* at 941 (cleaned up). Put a little differently: the Fourth Amendment governs “intrusions” by a “private party” while “act[ing] as an instrument or agent” of the State. *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 614 (1989). A Rule 11-706 appointee like Dimitrelos does so: their power derives solely and exclusively from an explicit delegation of authority from the State itself, *see* Rule 11-706 NMRA, and, much like a private litigant’s exercise of peremptory strikes, their exercise of that delegated power hinges on the district court’s “overt, significant assistance” and its “formal authority[,]” *Edmonson*, 500 U.S. at 624.

2. The appointment order’s grant of unfettered power to Dimitrelos to demand “all documents and information” he wants amounts to the type of general warrant the Fourth Amendment proscribes.

“[T]he ultimate touchstone of the Fourth Amendment is reasonableness.” *Riley v. California*, 573 U.S. 373, 381 (2014) (cleaned up). That demand imposes “rather minimal” but important limitations on any government search or seizure, requiring that it be based on an order “sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.” *See*, 387 U.S. at 544. While the exact contours of those constitutional safeguards might vary case-by-case “in relation to the nature, purposes[,] and scope of the inquiry[,]” they ultimately require a “specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry.” *Ok. Press Pub’g Co. v. Walling*, 327 U.S. 186, 209 (1946). Yet the appointment order approves a search and seizure that is the opposite of the targeted inquiry the Constitution demands — it vests Dimitrelos with absolute discretion to demand “all documents” he wants. **App’x002.**

Groh and a slew of other federal cases well-illustrate the constitutional infirmities of an order that allows unlimited discretion.

In *Groh*, for example, the warrant specified what could be searched (a blue house) but “did not describe the items to be seized at all.” *Groh v. Ramirez*, 540 U.S. 551, 558 (2004). The warrant left that decision up to the executing officers and, in doing so, “was so obviously deficient” that it rendered the resulting search illegal. *Id.* at 558–59. *Stefonek* held similarly where the warrant allowed seizure of “evidence of crime.” *United States v. Stefonek*, 179 F.3d 1030, 1032–33 (7th Cir. 1999). *Cassady* too rejected the constitutionality of a warrant authorizing carte blanche seizure. *Cassady v. Goering*, 567 F.3d 628, 635 (10th Cir. 2009). And *Fleet Management Ltd.*, where the warrant covered “any and all data” that might exist on three computers. *United States v. Fleet Mgm’t Ltd.*, 521 F. Supp. 2d 436, 443 (E.D. Pa. 2007).

Also compare the appointment order to the warrant in *Sabeerin*, which the New Mexico court of appeals’ rejected as an improper general warrant. That warrant allowed investigators to search for and seize “any and all evidence which may lead” them to either witnesses to a crime or the criminals themselves. *State v. Sabeerin*, 2014-NMCA-110,

¶ 26. The constitution forbade such limitless discretion:

The problem is with the all encompassing
authorization given to law enforcement officers to

search for and seize everything and anything that *they* the officers themselves determine “may lead investigators to the offender(s) and or possible witnesses” in the case. This warrant is therefore invalid as an impermissible general warrant.

Id. ¶ 28. The same reasoning forecloses the appointment order.

Notions of expediency and expectations that an unbridled search might reveal *something* cannot salvage the order. The Fourth Amendment “protects all, those suspected or known as to be offenders as well as the innocent[,]” *Ker v. California*, 374 U.S. 23, 33 (1963), and even “the discovery of contraband cannot validate a warrant invalid when issued[,]” *Maryland v. Garrison*, 480 U.S. 79, 85 (1987). Plus, “the mere fact that law enforcement may be made more efficient” by an intrusion “can never by itself justify disregard of the Fourth Amendment[;]” indeed, “the Fourth Amendment reflects the view of those who wrote the Bill of Rights that . . . privacy . . . may not be totally sacrificed in the name of maximum simplicity[.]” *Mincey v. Arizona*, 437 U.S. 385, 393 (1978); *see also Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 492 (S.D.N.Y. 2019) (holding similarly and collecting cases “repeatedly disdain[ing]” expediency alone as justification for otherwise overbroad search). That holds true even when

the Constitution prevents access to “near perfect” answers. *Carpenter v. United States*, 585 U.S. 296, 312 (2018).

“We are not dealing with formalities” here, *Groh*, 540 U.S. at 558–59, nor standards applicable only to criminal proceedings. The Fourth Amendment regulates “the activities of civil as well as criminal authorities[.]” *T.L.O.*, 469 U.S. at 335. As part of the “founding generation’s response to the reviled ‘general warrants’ . . . of the colonial era” — an opposition that provided “one of the driving forces” for “the Revolution itself[.]” *Riley*, 573 U.S. at 403 — the Fourth Amendment’s particularity requirement prohibits “a specific evil” that the sovereign once employed: “a general exploratory rummaging” for information, *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971), that amounted to “the worst instrument of arbitrary power . . . that ever was found in an English law book[.]” *Stanford v. Texas*, 379 U.S. 476, 510 (1965). The appointment order *explicitly* authorizes exactly that.

B. The appointment order violates procedural due process and exceeds Rule 11-706’s scope.

The appointment order independently exceeds the scope of Rule 11-706 and constitutional restrictions by its failure to provide Swift with a mechanism for asserting privilege and immunity claims before

Dimitrelos discloses information to the plaintiffs or others, and in allowing Dimitrelos to engage in substantive, undiscoverable ex parte communications.

1. Procedural due process forbids a Rule 11-706 appointment that allows the appointee to unilaterally disclose privileged or immune material to third parties without affording an opportunity to claim those protections

The appointment order's failure to provide a mechanism for Swift to claim privileges and immunities consistent with Rule 1-026(B)(7) NMRA before Dimitrelos discloses that information to others violates the procedural due process guarantees of the federal and New Mexico constitutions. *See generally* U.S. Const. amend. 14; N.M. Const. art. 2, § 18. "Procedural due process requires the government to give notice and an opportunity to be heard before depriving an individual of liberty or property." *Houidobre*, 2025-NMSC-007, ¶ 8. The appointment order denies Swift that opportunity before Dimitrelos, as a State actor, *see Lugar*, 457 U.S. at 939, discloses to others privileged or immune materials that he might obtain from Swift.

First, New Mexico's attorney-client privilege and work-product doctrine create constitutionally protected liberty and property interests.

State law creates a protected liberty interest when it “plac[es] substantive limits on official discretion[,]” such as by “employ[ing] explicitly mandatory language such that if substantive predicates are present, a particular outcome must follow.” *Houidobre*, 2025-NMSC-007, ¶¶ 9 (first quote), 12 (second quote, cleaned up). A protected property interest exists when a person has “a legitimate claim of entitlement” to a right under State law. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). The attorney-client privilege does both, creating affirmative protections that, for example, entitle a person “to refuse to disclose . . . a confidential communication” made to facilitate the rendition of professional legal services to them. *See* Rule 11-503(B) NMRA. As does the work-product doctrine, which generally immunizes from discovery material and mental impressions in anticipation of litigation. *See* Rule 1-026(B)(5) NMRA.

That holds true notwithstanding this Court’s conclusion in *Romero* that “a defendant does not have a protected interest in procedural rules.” *See generally State v. Romero*, 2011-NMSC-013, ¶ 8. “Changes in procedural rules may often be applied in suits arising before their enactment” without triggering constitutional concerns,

Landgraf v. USI Film Prods., 511 U.S. 244, 275 (1994) (emphasis added), but the overriding rules here are unchanged — unless this Court abolishes them, Swift has a present entitlement under New Mexico law to the attorney-client privilege and work-product doctrine and the protections those laws afford.

Usually this Court uses the *Mathews* balancing test to determine the constitutionally required amount of pre-deprivation process.

Houidobre, 2025-NMSC-007, ¶ 27. That balancing “is unnecessary” when, as here, no process is provided for — it is simply unconstitutional. *Id.* And considering things like the private interests implicated (full and frank communication between attorneys and their clients[.]” the type of candor that ultimately “serves public ends[.]”

Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)) and the values and burdens of pre-deprivation procedural safeguards, *see Aragon v.*

Martinez, 2025-NMSC-046, ¶ 34, the due-process answer is easy: Swift must be given an opportunity to claim privileges and immunities via Rule 1-027(B)(7) and then prove them in an appropriate manner before any Rule 11-706 appointee discloses protected information to third parties. That default rule *from this Court* provides a settled, workable

standard that New Mexico district courts must already follow. *See* Rule 1-001(A) NMRA. It should apply here too.

2. The order improperly authorizes substantive, clandestine ex parte communications between Dimitrelos, the plaintiffs, and Respondent.

The permission that the appointment order grants the appointee to conduct substantive, undiscoverable ex parte communications with the parties and Respondent likewise exceeds Rule 11-706’s scope. *See* Rule 11-706(A) NMRA. “One of the principal reasons for the court to appoint an expert witness is to obtain *impartial* testimony to aid the court . . . in resolving a scientific issue.” *G.K. Las Vegas LP v. Simon Prop. Grp., Inc.*, 671 F. Supp. 2d 1203, 1224 (D. Nev. 2009) (emphasis added). Thus, “[a]s a safeguard against bias,” communications between the expert and the parties “should be conducted in a manner open to all[.]” *Id.* at 1225. Allowing clandestine communications, the substance of which the examiner “shall not be required to share[.]” **App’x003**, creates the opportunity for a party to “assert[] or attempt[] to assert unilateral influence and control” over the expert, *id.* at 1228, or otherwise inhibit the expert’s ability “to provide the court with . . .

unbiased information[.]” *Bd. of Mgrs. of Bay Club Condo. v. Bay Club of Long Beach, Inc.*, 827 N.Y.S.2d 855, 858 (N.Y. Sup. Ct. 2007).

The law generally “frowns upon ex parte communications between judges and court-appointed experts” too. *United States v. Craven*, 239 F.3d 91, 102 (1st Cir. 2001). The “reason[.]” as the First Circuit explains, “is obvious: most ex parte contacts between a trial judge and another participant in the proceedings risk harm, and ex parte communications with key witnesses (such as court-appointed experts) are no exception. To the contrary, such ex parte contacts can create situations pregnant with problematic possibilities.” *Id.* “Off the record briefings” between court-appointed experts and the Court “leave no trace in the record[.]” making it impossible to know “[w]hat information passe[s]” to the Court and “how reliable it may have been[.]” *Edgar v. K.L.*, 93 F.3d 256, 259 (7th Cir. 1996). The use of such a procedure here, when, again, Dimitrelos has complete discretion to choose what information he discloses about those communications, is likewise improper and deprives Swift of its constitutional right to procedural due process and its ability to reasonably respond to the claims against it and cross-examine Dimitrelos

before an impartial decisionmaker, *see generally In re Pamela A.G.*, 2006-NMSC-019, ¶¶ 12–13.

Indeed, substantive or merits-based *ex parte* discussions could stall the entire case. “No district judge shall sit in any action in which the judge’s impartiality may reasonably be questioned under . . . the Code of Judicial Conduct,” Rule 1-088.1(G) NMRA, and a “judge shall disqualify himself” if he “has . . . *personal knowledge* of facts that are in dispute in the proceeding[.]” Rule 21-211(A)(1) NMRA (emphasis added). One-on-one briefings between Respondent and an appointed examiner risk creating exactly that sort of disqualifying extrajudicial knowledge — knowledge that does not “enter[] the record” subject to “the tools of the adversary process[.]” *Edgar*, 93 F.3d at 259. As the Seventh Circuit explained when it encountered a similar situation in the context of the federal disqualification statute: “[t]his is ‘personal’ knowledge no less than if the judge had decided to take an undercover tour of a mental institution to see how the patients were treated. Instead of going himself, this judge appointed agents, who made a private report of how they investigated and what they had learned.

Mandatory disqualification under . . . [the federal statute] follows.” *Id.*

As with the State rule.

C. Rule 11-706 does not allow Respondent to use the plaintiffs’ own expert as a court-appointed expert.

Finally, Respondent’s choice of appointee in this case violates Rule 11-706. The rule authorizes Respondent “to appoint an *independent* expert *unaligned* with either party to assist the court[.]” *Warner v. Calbert*, 2011-NMCA-028, ¶ 30 (emphasis added). Dimitrelos’s prior service as *the plaintiffs’* own hired expert — including testimony *against* Swift in connection with the plaintiffs’ motion for sanctions — destroys any purported neutrality and disqualifies him from service as Respondent’s appointed expert. *Accord, e.g., Pro Ag Mgmt., Inc. v. AgriSompo N. Am., Inc.*, No. 26-2066-JWB-BGS, 2026 WL 1073918, at *3–6 (D. Kan. Apr. 21, 2026) (communications between expert and party about substantive issues and preexisting business relationship between them “sufficiently called into question” the expert’s impartiality); *G.K. Las Vegas*, 671 F. Supp. 2d at 1215 (same). Dimitrelos *actually served* as the plaintiffs’ expert in this very dispute, and he has already said, under oath, that he views Swift’s conduct in connection with the accident investigation as inadequate, **App’x575–78**, and has communicated with the plaintiffs’

counsel in connection with forming those opinions and on the exact issues for which the Court has appointed him, **App’x594–607**. He is disqualified.

II. The appointment order carries grave constitutional implications and poses profound procedural problems best corrected via superintending control.

By vesting this Court with “superintending control over all inferior courts[,]” N.M. Const. art. 6, § 3, the New Mexico Constitution confers “broad and extraordinary power” to correct the errors of inferior courts, *e.g.*, *City of Roswell v. Sanchez-Gagne*, 2025-NMSC-039, ¶ 5. The Court ought to exercise that power here.

A. This petition presents a prime vehicle for interpreting an important procedural rule that this Court has not construed once.

In the first place, this petition affords the Court to chance “to provide a clear answer under New Mexico law” to “constitutional question[s] of first impression.” *See generally Stewart*, 2025-NMSC-032, ¶ 13. The appointment order implicates privacy and due-process interests that are “basic to a free society” and “implicit in the concept of ordered liberty[,]” *e.g.*, *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), but this Court has never addressed the interplay between Rule 11-706, the

Fourth Amendment, and procedural due process. The profound exceptions to those fundamental protections that Respondent read into Rule 11-706 make clear this Court must do so now.

Constitutional dimensions aside, the questions presented here allow the Court to “offer guidance to lower courts on how to properly apply” one of the rules of “practice[] and procedure” that this Court exclusively regulates, *City of Roswell*, 2025-NMSC-039, ¶ 5, a rule this Court has *never* substantively construed. Indeed, since the enactment of Rule 11-706’s predecessor in the 1970s, it has only appeared in five of this Court’s cases. The Court cited it once years ago to acknowledge factually that a district court used the rule, *see In re Guardianship of Patrick D.*, 2012-NMSC-017, ¶ 5, and another time in 1977 to identify the rule as a method for obtaining testimony, *see State v. Melton*, 1977-NMSC-014, ¶ 7. The other cases merely reference Rule 11-706 as a tool available to district courts. *See Maestas v. Hall*, 2012-NMSC-006, ¶ 31 (doing same in context of redistricting); *Pincheira v. Allstate Ins. Co.*, 2008-NMSC-049, ¶ 35 n.2 (doing same in context of trade-secret determination); *Jaramillo v. Jaramillo*, 1991-NMSC-101, ¶ 25 (doing same in context of child-custody plan). Whatever the reason that the

specific substantive contours of Rule 11-706 have evaded this Court’s review, this petition puts those parameters in focus.

Using the writ to provide that clarity squares with this Court’s historic uses of it too. This Court often turns to superintending control when, as here, it can “resolve questions of privilege or other protections of information in a discovery dispute[,]” *Ramirez v. Marsh*, 2025-NMSC-050, ¶ 13, using it to answer questions about the scope of the work-product doctrine, *New Mexico ex rel. Brandenburg v. Blackmer*, 2005-NMSC-008, ¶ 7, the interplay between public-records laws and the deliberative privilege, *Pacheco v. Hudson*, 2018-NMSC-022, ¶¶ 37–53, and the relationship between statutory immunities and privilege rules, *Estate of Romero ex rel. Romero v. City of Santa Fe*, 2006-NMSC-028, ¶ 15. It also comes into play when a district court’s error implicates the practicalities of the “pleading, practice, and procedure” that this Court regulates, like the proper interpretation of venue statutes. *City of Roswell*, 2025-NMSC-039, ¶ 5. Or the due-process parameters of a district court’s contempt power. *Concha v. Sanchez*, 2011-NMSC-031, ¶ 46–47. Or the proper basis for disqualifying counsel. *Chappell v. Cosgrove*, 1996-NMSC-020, ¶ 6. Or the proper application of

constitutional legislative immunity. *Stewart*, 2025-NMSC-032, ¶ 13.

The questions here are functionally indistinguishable.

B. Promptly resolving the constitutional and other substantive questions that the order raises benefits the public interest.

It is also “in the public interest to settle the question[s] involved at the earliest moment.” *See generally State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶ 30. With some limited exceptions, Rule 11-706 applies in any litigation in New Mexico, civil, criminal, or otherwise. *See* Rule 11-1101(A) NMRA. The appointment order stands for the proposition that in any of those cases, the traditional, foundational restrictions on government power that undergird American law, *e.g.*, U.S. Const. amend. 4, do not apply *at all* so long as the sovereign acts through a Rule 11-706 appointee. Those are pure questions of law this Court reviews de novo, *e.g.*, *Grisham v. Romero*, 2021-NMSC-009, ¶ 16, and answering them now allows the Court to cut the strays threads before they entangle other cases, *accord, e.g., Johnson & Johnson*, 2025-NMSC-003, ¶ 11 (issuing writ to correct discovery issue when it was “reasonable to predict” it “arise” in other cases); *State v. Wilson*, 2021-NMSC-022, ¶ 15 (holding similarly). And the Court must ensure that

anyone haled into a New Mexico courthouse remains secure and confident in their basic entitlements to privacy and due process. *Accord*, e.g., *Grisham v. Van Soelen*, 2023-NMSC-027, ¶ 10 (issuing writ to protect constitutional right to vote). Delayed resolution only increases the danger that the problem spreads.

C. Swift has no adequate appellate remedy to correct this facially flawed order.

Finally, Swift has no *adequate* appellate remedy. If Swift complies with the appointment order, pays the appointee, and submits to his authority, eventual appellate review is nugatory — the constitutional harms flowing from the order’s existence will have already occurred. Or Swift could refuse to comply with a facially unconstitutional order, be held in contempt, and seek an interlocutory appeal on the same threshold legal issues that this Court can resolve now — the novelty and importance of the issues mean that “[j]udicial economy is promoted by considering the issues now rather than on any possible appeal.” *See Shook, Hardy & Bacon LLP v. Wilson*, 2025-NMSC-022, ¶ 13.

Interlocutory appeal via contempt also fails as “plain” and “speedy” relief, *see generally New Energy Economy, Inc. v. Vanzi*, 2012-NMSC-005, ¶ 23, since it could end up delaying resolution of this litigation by

potentially years simply to resolve a collateral issue. The Court should issue a writ instead.

III. An immediate, ex parte stay is necessary to preserve the status quo and facilitate this Court’s review.

The Court should immediately stay the appointment order and any proceedings thereon under Rule 12-504(D) NMRA. The “widely used” stay formula balances the petitioner’s likelihood of success on the merits, the risk of irreparable harm to the petitioner without a stay and the “prospect” of harm to others with a stay, and the public interest in granting a stay. *See Segal v. Goodman*, 1993-NMSC-018, ¶ 25 n.5. Under that rubric and Rule 12-504(D)(2) NMRA’s predicates for issuance without notice, an ex parte stay is appropriate is “preserve the status quo pending appellate determination.” *See McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996).

A likelihood of success on the merits contemplates the existence of “questions going to the merits so serious, substantial, difficult, and doubtful as to make the issues ripe for litigation and deserving of more deliberate investigation” by the Court. *Id.* at 1020. The Court need look no further than the Fourth Amendment problem: general warrants precipitated this country’s founding and proved so repugnant that the

Constitution explicitly forbids them, *e.g.*, *Sabeerin*, 2014-NMCA-110, ¶ 28. The appointment order explicitly compels Swift to provide “all” material the appointee, in his unilateral and uncabined discretion, demands. **App’x002**. It is facially invalid and unconstitutional. *E.g.*, *Groh*, 540 U.S. at 557.

There is thus not just a “risk” of irreparable harm if the order remains in effect, *see Segal*, 1993-NMSC-018, ¶ 25 n.5; the harm would be clear and immediate, *see* Rule 12-504(D)(2) NMRA. “The loss of” constitutionally guaranteed freedoms “for even minimal periods of time[] unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976). “A plaintiff can” likewise “suffer a constitutional injury by being forced to comply with an unconstitutional law or else face financial injury or enforcement action.” *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 537 (N.D. Cal. 2017). As here, where Swift’s options are comply with a plainly unconstitutional order or risk being held in contempt.

That harm will happen before full briefing on the stay issue. *See generally* Rule 12-504(D)(2)(a) NMRA. Though Respondent did not rule on Swift’s motion to vacate the appointment order until May 28, 2026,

App’x005–06, under the appointment order’s terms, it seems that Swift must pay the appointee’s retainer within 10 days of it being demanded or else be in contempt, **App’x002**. Dimitrelos demanded payment on July 21, 2026, so the payment deadline is **today**, July 31, 2026. Immediate harm to Swift is forthcoming.

On the other hand, the plaintiffs and Respondent can complain only of the *potential* for delayed enforcement. *See generally Segal*, 1993-NMSC-018, ¶ 25 n.5; Rule 12-504(D)(2) NMRA. A targeted stay of the appointment order and proceedings thereon will not prevent the plaintiffs from otherwise conducting discovery and working their case up for trial, nor will it otherwise impede Respondent’s docket control and case management. Beyond that possibility of delay — if Swift is wrong that an apparently facially unconstitutional order is in fact enforceable — neither the plaintiffs nor Respondent will suffer any tangible loss or damage.

The public interest favors a stay too. *See generally Segal*, 1993-NMSC-018. “By insisting that courts comply with the law, parties vindicate not only the rights they assert but also the law's own insistence on neutrality and fidelity to principle.” *Hollingsworth v.*

Perry, 558 U.S. 183, 196 (2010). Resolution of the constitutional and other issues this petition presents — and that a stay is appropriate to preserve — thus benefits the public and favors immediate relief.

Notice should not be required to the plaintiffs or Respondent before a stay issues. *See generally* Rule 12-504(D)(2)(c) NMRA. Swift previously pointed out to Respondent the appointment order’s constitutional infirmities, the plaintiffs had an opportunity to respond, and Respondent refused to vacate its order. “[I]t would serve little purpose” to delay given Respondent’s demonstrated “resolve” in moving forward. *Cf. McClendon*, 79 F.3d at 1020.

RELIEF SOUGHT

This Court should grant Swift’s petition for writ of superintending control and direct Respondent to vacate the June 24, 2026 appointment order. In the interim, the Court should immediately stay the June 24, 2026 appointment order and any proceedings thereon pending the Court’s resolution of this petition. Swift also asks for all other relief to which it is entitled at law and in equity.

Respectfully submitted,

/s/ Brian J. Fisher

Brian J. Fisher

Ryan T. Goodhue

Mayer LLP

4101 Indian School Road NE, Suite 301N

Albuquerque, New Mexico 87110

(505) 483.1840

bfisher@mayerllp.com

rgoodhue@mayerllp.com

and

Kyle C. Steingreaber (*pro hac vice pending*)

Wright, Close, Barger & Guzman, LLP

700 Louisiana, Suite 3000

Houston, Texas 77002

(713) 572.4321

steingreaber@wcbglaw.com

*Counsel for Petitioner Swift Transportation of
Arizona, LLC*

VERIFICATION

I declare under penalty of perjury under the law of New Mexico that I have read the petition and that the statements contained in the petition are true and correct to the best of my knowledge, information, and belief.

/s/ Brian J. Fisher

Brian J. Fisher

CERTIFICATE OF SERVICE

Per Rule 12-307.1(D) NMRA, I certify that on July 31, 2026, a true and correct copy of this document was served via the New Mexico Odyssey File & Serve system (along with courtesy copy via email) on all counsel of record for Real Parties in Interest and on Respondent:

James F. Scherr

jim@jamescherrlaw.com

Maxey M. Scherr

mscherr@scherrlawfirm.com

Daniela Labinoti

daniela@labinotilaw.com

Brian G. Grayson

brian@graysonlawoffice.net

Andy Ray

andy@andyraylaw.com

Counsel for Real Parties in Interest

Hon. Francis J. Mathew

sfeddiv1proposedtxt@nmcourts.gov

Respondent

/s/ Brian J. Fisher

Brian J. Fisher

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

SWIFT TRANSPORTATION OF ARIZONA, LLC,

Petitioner,

v.

No. S-1-SC-41552

THE HONORABLE FRANCIS J. MATHEW,
DISTRICT COURT JUDGE,
FIRST JUDICIAL DISTRICT COURT,

Respondent,

and

BARRY GREEN, as Personal Representative
of the Wrongful Death Estate of RAYMUNDO CRUZ HERRERA,
DECEASED, CYNTHIA GUERRERO RODARTE,
GAEL GUERRERO, JULIANA FLORES, MARISELA GUERRERO,
LUCIANA GUERRERO, ARADAI RODARTE, Individually and
as Parent and Next Friend of MALIE CALDERON,
ISAAC CALDERON, ISAIAH CALDERON
AND EMILY CALDERON, Minor Children,
PETER WIRTH, ON BEHALF OF THE WRONGFUL DEATH
ESTATE OF ABRAHAM CALDERON, DECEASED, and
CULLEN HALLMARK ON BEHALF OF THE WRONGFUL DEATH
ESTATE OF JOSE LUIS GUERRERO, DECEASED,

Real Parties in Interest.

**JOINT RESPONSE IN OPPOSITION BY REAL PARTIES IN
INTEREST TO SWIFT TRANSPORTATION OF ARIZONA,
LLC'S EMERGENCY PETITION FOR WRIT OF
SUPERINTENDING CONTROL AND REQUEST TO STAY**

GRAYSON LAW OFFICE, LLC Brian G. Grayson, Esq. 3901 Georgia St. NE Suite A-2-A Albuquerque, NM 87110 Telephone: (505) 273-8570 brian@graysonlawoffice.net ANDY RAY LAW, LLC Andy Ray, Esq. P.O. Box 640 Tijeras, NM 87059 (505) 847-3300 ph (505) 847-3360 fax andy@andyraylaw.com <i>Attorneys for Real Parties-in-Interest Barry Green, as Personal Representative of the Wrongful Death Estate of Raymundo Cruz Herrera, Cynthia Guerrero Rodarte, Gael Guerrero, Juliana Flores, and Marisela Guerrero</i>	SCHERR LAW FIRM, PLLC Maxey Scherr, Esq. 521 Texas Ave. El Paso, Texas 79901 (915) 881-4111 (915) 881-4119 Facsimile mscherr@scherrlawfirm.com James. F. Scherr, Esq. SCHERR LAW 1790 N Lee Trevino Dr., Ste. 601 El Paso, Texas 79936 (915) 544-0100 (915) 532-1759 Facsimile jim@jamesescherrlaw.com Daniela Labinoti, Esq. LAW FIRM OF DANIELA LABINOTI, P.C. 707 Myrtle Ave. El Paso, Texas 79901 (915) 581-4600 (915) 581-4605 Facsimile Daniela@labinotilaw.com <i>Attorneys for Real Parties-in-Interest Luciana Guerrero, Aradai Rodarte, Individually and as Parent and Next Friend of Malanie Calderon, Isacc Calderon, Isaiah Calderon and Emily Calderon, Minor Children, Peter Wirth, on Behalf of the Estate of Abraham Calderon, Deceased, and Cullen Hallmark on Behalf of the Estate of Jose Luis Guerrero, Deceased</i>
---	---

TABLE OF CONTENTS

STATEMENT OF COMPLIANCE	ii
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
SUMMARY OF PROCEEDINGS	2
APPLICABLE LAW	9
A. Extraordinary Writs	9
B. The Authority of the District Court to Manage Discovery, Preserve the Integrity of Both the Judicial Process and Its Orders	9
ARGUMENT AND AUTHORITIES	10
I. THE DISTRICT COURT ACTED WELL-WITHIN ITS DISCRETION IN APPOINTING A RULE 11-706 EXPERT	11
A. The Court’s Authority to Appoint a Rule 11-706 Expert, to Preserve the Integrity of Its Orders, and to Protect Judicial Authority	11
B. The Circumstances that Led to the Court's Entry of the Appointment Order	11
C. The Appointment Order Does Not Violate the Fourth Amendment .	18
D. Even if the Fourth Amendment is Implicated Here, the Cases Relied on by Swift Actually Support the Court's 11-706 Order	19
CONCLUSION	24

STATEMENT OF COMPLIANCE

As required by Rules 12-204(G) and (H) NMRA, undersigned counsel certifies this brief was prepared in 14-point Times typeface using Microsoft Word, and the body of the brief contains 5,984 words.

TABLE OF AUTHORITIES

NEW MEXICO CASES

<i>Brewer Oil Co. v. State</i> , 1995-NMCA-142, 121 N.M. 106	24
<i>Chappell v. Cosgrove</i> , 1996-NMSC-020, 121 N.M. 636	9
<i>DeTevis v. Aragon</i> , 1986-NMCA-105, 104 N.M. 793	9
<i>Grisham v. Romero</i> , 2021-NMSC-009	9
<i>Hartman v. Texaco Inc.</i> , 1997-NMCA-032, 123 N.M. 220	9
<i>In re Adoption of Stailey</i> , 1994-NMCA-015, 117 N.M. 199	11
<i>Khalsa v. Puri</i> , 2023-NMCA-018	16
<i>McCoy v. N.M. Real Estate Comm'n</i> , 1980-NMSC-081, 94 N.M. 602	22, 23
<i>Reed v. Furr's Supermarkets, Inc.</i> , 2000-NMCA-091, 129 N.M. 639.....	9
<i>Sandoval v. Martinez</i> , 1989-NMCA-042, 109 N.M. 5	10, 15
<i>State v. Crane</i> , 2014-NMSC-026, 329 P.3d 689	18
<i>State v. Le Mier</i> , 2017-NMSC-017	10

<i>State v. Yazzie</i> , 2019-NMSC-008, 437 P.3d 182	18
<i>United Nuclear Corp. v. Gen. Atomic Co.</i> , 1980-NMSC-094, 96 N.M. 155	10, 15, 16
<i>Warner v. Calvert</i> , 2011-NMCA-028, 150 N.M. 333	11
<i>Weiss v. THI of N.M. at Valle Norte, LLC</i> , 2013-NMCA-054, 301 P.3d 875	9, 10
<i>Wilson Corp. v. State ex rel. Udall</i> , 1996-NMCA-049, 121 N.M. 677	21, 23, 24
FEDERAL CASES	
<i>G.K. Las Vegas Ltd. Partnership v. Simon Property Group</i> , 671 F. Supp. 2d 1203 (D. Nev. 2009)	21
<i>Groh v. Ramirez</i> , 540 U.S. 551 (2004)	20
<i>Katz v. United States</i> , 389 U.S. 347 (1967)	18
<i>Oklahoma Press Pub. Co. v. Walling</i> , 327 U.S. 186, 208 (1946)	21, 23
<i>Pro Ag Mgmt., Inc. v. AgriSompo N. Am., Inc.</i> , 2026 WL 1073918 (D. Kan. Apr. 21, 2026)	20, 21
<i>United States v. Craven</i> , 239 F.3d 91 (1st Cir. 2001)	20
<i>United States v. Morton Salt Co.</i> , 338 U.S. 632 (1950)	19, 20

RULES

Rule 11-706 NMRA *passim*

CODE OF FEDERAL REGULATIONS

49 CFR 387.313(h) 19

49 CFR Appendix B to Part 390 18, 19

49 CFR 390.29(b) 19

49 CFR 395.8(j) 19

49 CFR 395.8(k) 19

NEW MEXICO CONSTITUTION

Article II, Section 10 18

UNITED STATES CONSTITUTION

Fourth Amendment *passim*

Fourteenth Amendment 23

COME NOW, Real Parties-in-Interest (hereafter “RPII” or “Plaintiffs”), by and through their counsel of record, and for their Joint Response in Opposition to Swift Transportation of Arizona, LLC’s Emergency Petition for Writ of Superintending Control and Request for Stay, state as follows:

INTRODUCTION

This case arises from the deaths of three individuals and injuries to others on May 21, 2022 that were caused by Petitioner Swift Transportation of Arizona, LLC (“Swift”). Swift now comes to this Court seeking to escape accountability for causing three deaths and other injuries, for engaging in years of misrepresentations and discovery abuse, and for willfully disobeying a Court order.

Swift’s constitutional arguments are red herrings, designed to deflect from the real issues in this case: the District Court’s authority to control its docket, to enforce compliance with the discovery rules to get to the truth of what occurred, and to maintain its judicial authority by preserving the integrity of its orders and the judicial system as a whole. The District Court was well-within its discretion to appoint a Rule 11-706 expert to aid the court in discharging its duties. Far from arbitrary or capricious, the appointment order followed naturally from Swift’s repeated misrepresentations to the District Court about its ability to produce data and information the Court ordered Swift to produce over a year ago. This Court should

affirm the District Court's proper exercise of its authority to protect the integrity of these proceedings and the judicial system generally.

SUMMARY OF PROCEEDINGS

The Petition's Summary of Proceedings omits crucial portions of the proceedings that are material to the issues before this Court. A complete summary of the proceedings that are relevant and material to the issues implicated in the Petition is provided herein.

1. On August 11, 2023, the RPII filed their Complaint against Swift, seeking damages that resulted from a three-fatality hit-and-run crash caused by a Swift vehicle. **RPII Appx. 000001-000013.**

2. On January 28, 2025, RPII filed a Motion to Compel after Swift failed to produce requested documents about its involvement in the crash. Swift produced documents and records for just nine tractors and five trailers and claimed that its investigation revealed no other Swift vehicle near the crash site at the time of the crash. Each of Swift's discovery responses objected to the request on the ground that "Plaintiffs have never identified any Swift driver or Swift vehicle involved in the subject accident, and Swift has no evidence that any Swift driver or Swift vehicle was involved in the subject accident." **RPII Appx. 000014-000066.**

3. Judge Mathew held a hearing on the Motion to Compel on March 24, 2025, where Swift's counsel represented to the court that Swift could track every

one of its tractors and trailers at all times, and that the documents Swift produced regarding just nine tractors and five trailers were all the documents in Swift's possession regarding the presence of Swift vehicles in New Mexico that could have been the one involved in the subject crash. **RPII Appx. 000067-000164.**

4. Judge Mathew ordered Swift to produce all information in its possession about Swift vehicles that were in New Mexico during the 24-hour period, while warning Swift that:

I'm going to order that information be provided, but I am going to allow Mr. Hernandez and his client to maintain their position. However, if that position is incorrect, it's going to be subject to sanctions. And I'm not talking about small sanctions.

RPII Appx. 000108 at 8-19.

5. Judge Mathew was even more direct later in this hearing:

I'm just going to tell -- I'm just warning that if I find out there has been less than an honest representation. And it doesn't have to be to me. It could be to the -- to the plaintiffs in saying, "Here is the 24-hour window." That could be sanctionable. Probably would be sanctionable.

RPII Appx. 000114 at 6-13.

5. On July 1, 2025, the Court issued an order partially granting the Motion to Compel and requiring Swift to produce all documents and data regarding the presences of every Swift vehicle in New Mexico during a 24-hour period at the time of the crash. **RPII Appx. 000165-000167.**

6. After Swift chose to stand on its prior production, on August 20, 2025, RPII filed a sanctions motion against Swift for failing to comply with the July 1, 2025 Order. **RPII Appx. 000168-000183.**

7. Swift filed a Response on September 4, 2025. **RPII Appx. 000184-000268.**

8. RPII's March 13, 2026 reply in support of that sanctions motion contained evidence of more Swift vehicles than Swift previously disclosed and a declaration from NMSP Sergeant Daniel Jacquez about his efforts to obtain information from Swift following the crash. **RPII Appx. 000269-000541.**

9. On April 30, 2026, Judge Mathew held a hearing on the sanctions motion and ordered an evidentiary hearing for May 26, 2026. Expressly recognizing Swift's due process rights, Judge Mathew also allowed Swift to file a sur-reply by May 11, 2026. **RPII Appx. 000542-000588.**

10. Swift's Sur-Reply marked the first time Swift claimed that evidence responsive to the District Court's order had been lost or destroyed because of what Swift called its "normal document retention practices." Swift filed this Sur-Reply knowing that the evidentiary hearing regarding its failure to comply with the Court's Order was happening just over two weeks later. **RPII Appx. 000589-000597.**

11. Judge Mathew held the evidentiary hearing as scheduled and the hearing lasted the entire day. Several witnesses testified, including forensic data

recovery expert Gus Dimitrelos, who testified that given access to Swift's databases, he or an expert like him could determine whether Swift ever had the data it now claimed was gone and, if so, whether and when it was deleted. **RPII Appx. 000599-000605.** Judge Mathew then informed the parties that he would appoint a Rule 11-706 expert to help him learn what documents Swift had that it should have produced and when those documents were deleted. **RPII Appx. 000598-000625.**

12. On June 1, 2026, the court entered a Sua Sponte Order Appointing Rule 11-706 expert. This order set out in detail the information Judge Mathew needed the expert to obtain, the procedures for the expert's work, and how the expert would be compensated. **RPII Appx. 000626-000629.**

13. Two days later, on June 3, 2026, Swift suddenly filed a Notice of Withdrawal of Opposition to Plaintiffs' Motion for Sanctions, admitting that it did not comply with the District Court's July 1, 2025 order, that a Swift trailer was involved in the crash, and that its representation in the May 11, 2026 Sur-Reply that evidence had been lost was false and the data actually still existed. Swift provided a list of sanctions that it would accept and informed the District Court in two footnotes that it would not accept any other sanctions. **RPII Appx. 000630-000635.**

14. Continuing its efforts to prevent the Court and RPIIs from learning the truth about Swift's involvement in the crash, on June 5, 2026 Swift filed an

emergency motion seeking to vacate the Rule 11-706 order, arguing that its admissions rendered the appointment order moot. **RPII Appx. 000636-000640.**

15. RPIIs' June 8, 2026 Response explained that the appointment order is what prompted Swift to admit that a Swift vehicle caused the crash and that Swift's representation in the Sur-Reply, filed just 25 days earlier, that all responsive data had been deleted, was false. **RPII Appx. 000641-000666.**

16. On June 12, 2026, RPIIs filed their Supplemental Motion for Sanctions for Discovery Abuse and Violation of a Court Order, explaining that the scope and magnitude of Swift's discovery abuse far exceeded its failure to comply with the court's July 1, 2025 order. There is compelling evidence that Swift has engaged in a cover-up of its involvement in this triple-fatality hit-and-run crash from the outset and that its conduct across the entirety of the litigation – making repeated misrepresentations to RPIIs and the Court – warrants severe sanctions. **RPII Appx. 000667-000727.**

17. The District Court held a hearing on Swift's motion to vacate the Rule 11-706 order on June 16, 2026. **RPII Appx. 000728-000751.** Swift's counsel argued that all of Swift's missteps in this case were "a mistake" and that Swift's admissions rendered its failure to comply with the court's July 1, 2025 moot. Judge Mathew's response explained why he rejected Swift's use of the word "mistake" to describe its acts and omissions:

I want you to think about something, and that is that this didn't happen during the course of a week, a month. It happened over the course of several months. And along with that, there were several conversations and hearings concerning this very issue. I'm looking not only at the integrity of my order, but the integrity of the – the judicial system in general.

RPII Appx. 000735 at 2-9.

18. Judge Mathew again emphasized the scope of Swift's conduct that he was considering, that the consequences for misrepresentations to the court would be serious, and that a Rule 11-706 expert is still needed:

This is a serious decision because of the seriousness of the acts that apparently took place. And as I said, this didn't happen over the course of a day, a week, a month. It happened over the course of many months and with admonitions that if misrepresentations were made, there would be serious consequences. And I believe that an 11-706 expert is still warranted because the Court still has questions about what was going on here.

RPII Appx. 000740 at 5-14.

19. On June 24, 2026, the Court entered an Amended Sua Sponte Order Appointing Rule 11-706 Expert ("appointment order"). This order is identical to the original order except this order appoints Mr. Dimitrelos as the court's Rule 11-706 expert. **RPII Appx. 000752-000755.**

20. On July 10, 2026, Swift filed its second motion to vacate the Rule 11-706 order. Even though nothing in the amended order changed any of the procedures outlined in the original order for how the expert will do his work, Swift for the first

time made Fourth Amendment and due process arguments. **RPII Appx. 000756-000801.**

21. RPIIs' July 15, 2026 response argued that Swift provided no basis for the court to reconsider any of the procedures set forth in the original Rule 11-706 order and that Swift's argument that the named expert could disclose privileged information to RPIIs was misplaced. **RPII Appx. 000802-000814.**

22. On July 15, 2026, Swift's counsel Daniel Hernandez and Jeramy Schmehl filed an Opposed Motion for Withdrawal and Substitution of Counsel. **RPII Appx. 000815-000819.**

23. The RPIIs' July 16, 2026 Response explained that Mr. Hernandez had been Swift's lead counsel since Swift first learned of the hit-and-run crash and that, in light of the developments in the litigation over the past few months, Mr. Hernandez is at least a fact witness to Swift's misconduct. **RPII Appx. 000820-000842.**

24. On July 24, 2026, the Court denied the withdrawal motion, stating that "no attorney should be allowed to withdraw from their representation in this case pending the Court's receipt and review of the Report of the Rule 11-706 Expert ordered by a prior order of this Court." **RPII Appx. 000843-000844.**

25. Judge Mathew entered an order on July 27, 2026 denying Swift's motion to vacate the amended Rule 11-706 order. **RPII Appx. 000845-000846.**

APPLICABLE LAW

A. Extraordinary Writs

“Matters entrusted to the [district] court’s discretion ordinarily are not matters over which [the Supreme] Court should exercise its jurisdiction to grant extraordinary relief” and a writ of superintending control “should [not] be used as a substitute for a decision on direct or interlocutory appeal.” *Grisham v. Romero*, 2021-NMSC-009, ¶ 16. “[N]either the writ of prohibition nor the writ of superintending control should be used as a substitute for a decision on direct or interlocutory appeal. *Chappell v. Cosgrove*, 1996-NMSC-020, ¶ 6, 121 N.M. 636.

B. The Authority of the District Court to Manage Discovery, Preserve the Integrity of Both the Judicial Process and Its Orders

District Courts have broad discretion to control discovery. *See e.g. Villalobos v. Bd. of County Comm’rs*, 2014-NMCA-044, ¶ 16; *Hartman v. Texaco Inc.*, 1997-NMCA-032, ¶ 20, 123 N.M. 220 (the standard of review for discovery orders is abuse of discretion); *DeTevis v. Aragon*, 1986-NMCA-105, ¶¶ 10-11, 104 N.M. 793 (A trial court has broad authority to manage pretrial discovery).

The district court exercises its discretion based upon the type of false information and its overall impact on the non-deceiving party's ability to prepare for trial. *Reed v. Furr’s Supermarkets, Inc.*, 2000-NMCA-091, 129 N.M. 639. A court “must be able to command the obedience of litigants and their attorneys if it is to perform its judicial functions. In these circumstances, a court is permitted to

vindicate its judicial authority and impose sanctions.” *Weiss v. THI of N.M. at Valle Norte, LLC*, 2013-NMCA-054, ¶ 22, 301 P.3d 875.

“[T]rial courts shoulder the significant and important responsibility of ensuring the efficient administration of justice” and to carry out that responsibility, “courts may impose meaningful sanctions to effectuate their inherent power and promote efficient judicial administration.” *State v. Le Mier*, 2017-NMSC-017, ¶¶ 18-19. Indeed, district courts “have a *duty* to enforce compliance with rules of discovery[.]” *See Sandoval v. Martinez*, 1989-NMCA-042, ¶ 18, 109 N.M. 5 (emphasis in original). “A party cannot approach its obligation to make good faith discovery however it chooses as to certain matters, and at the same time expect to have the case proceed in a normal fashion as to other issues. At stake is not only the appellees’ right to a fair trial on the merits, but also, the integrity of the orders of the court.” *United Nuclear Corp. v. Gen. Atomic Co.*, 1980-NMSC-094, ¶ 394. The refusal of a party to comply with an order of the court cuts substantially deeper than the question of prejudice to litigants and their attorneys. *Id.* A basic tenet of our government of law is that a party is required to obey a court order. *Id.*

ARGUMENT AND AUTHORITIES

Judge Mathew’s June 24, 2026 Amended Sua Sponte Order Appointing Rule 11-706 Expert was the natural result of years of Swift’s discovery abuse, misrepresentations to the District Court, and willful disobedience of the District

Court's July 1, 2025 order. The District Court's June 1, 2026 order appointing a Rule 11-706 expert was what caused Swift to confess that it never actually complied with the Court's July 1, 2025 order and that one of its trailers was involved in the fatal crash.

I. THE DISTRICT COURT ACTED WELL-WITHIN ITS DISCRETION IN APPOINTING A RULE 11-706 EXPERT

A. The Court's Authority to Appoint a Rule 11-706 Expert, to Preserve the Integrity of Its Orders, and to Protect Judicial Authority

The District Court's discretion to appoint an 11-706 expert is broad and the appointment is reviewed under an abuse of discretion standard. *Warner v. Calvert*, 2011-NMCA-028, ¶ 30, 150 N.M. 333; *In re Adoption of Stailey*, 1994-NMCA-015, ¶ 12, 117 N.M. 199 (An abuse of discretion is demonstrated when the court's action is clearly untenable or is contrary to logic and reason).

B. The Circumstances that Led to the Court's Entry of the Appointment Order

On May 21, 2022, three people died and others suffered injuries as a result of a hit-and-run crash that was caused by a Swift trailer. From the date of the crash until June 3, 2026, Swift denied any involvement in the crash. On June 3, 2026, however, Swift suddenly reversed course and finally admitted that it owned the trailer that was involved in the fatal hit-and-run crash four years prior. **RPII Appx. 000630-000635**. The evidence, much of it obtained by RPIIs despite Swift's obstructive tactics and discovery abuse throughout the litigation, supports a

reasonable inference that Swift knew of its involvement the entire time. Yet for four years, Swift told the New Mexico State Police, the RPII in sworn discovery responses, the District Court in hearings, in numerous motions, and in a full day evidentiary hearing, that Swift was not involved in the fatal crash and that the data needed to identify the tractor, the trailer, the driver, and the responsible entity no longer existed.

But just two days after the District Court entered the appointment order, Swift's position changed entirely. Suddenly, Swift was willing to admit that it never complied with the Court's July 1, 2025 order, to admit that a Swift-owned trailer caused the fatal hit-and-run crash four years earlier, and to admit that its representation in the Sur-Reply, filed just twenty-three days earlier, that data was lost was false. The appointment order is what made Swift tell the truth about its involvement in the fatal hit-and-run crash.

Swift could have told the truth about its involvement in the crash years earlier. It chose not to, even after being warned by the District Court that serious sanctions would be imposed on Swift should it fail to comply with the Court's orders and/or make misrepresentations to the Court. The District Court's warnings to Swift were clear and unambiguous. **RPII Appx. 000091-000093, 000107-000108, 000112-000114.**

The July 1, 2025 order memorializes what Swift was ordered to do the March 24, 2025. **RPII Appx. 000165-000167.** But instead of complying with this order, Swift hired an expert, Kristina Lombardi, to provide a letter and PowerPoint on the limited information Swift provided her about nine tractors and five trailers. **RPII Appx. 000228-000268.** Swift then tried to use Ms. Lombardi's letter to fool RPIIs and the District Court into believing that Swift complied with the July 1, 2025 order.

Because Swift failed to comply with this order, RPIIs filed a motion for sanctions. The Court held a hearing on that motion on April 30, 2026, where Swift's counsel professed to welcome an evidentiary hearing:

And an evidentiary hearing is a great idea, if the Court wants it. We're happy to bring our witnesses in here. I've seen preliminary results of what Swift has done. I think Swift's going to be -- Swift and the Court is going to be very proud of the steps Swift took immediately to see if they could have been involved in this accident. We're happy to have an evidentiary hearing, if it comes to that.

But what should happen now is that the motion needs to go away or be withdrawn, and it can be refiled at a later time, if necessary, by the plaintiffs.

...

But we will have responses to these allegations and these arguments. They're going to be good ones. The Court needs to see them before deciding a motion for sanctions; particularly, death penalty sanctions. Again, they don't have any evidence yet. They will get it. We are happy to give it to them. We want it out there, too. But it's not ready yet.

RPII Appx. 000566-000568.

Eleven days after Swift's counsel made these bold pronouncements, on May 11, 2026, Swift filed its Sur-Reply to the sanctions motion in which, for the first time, Swift claimed that evidence had been inadvertently lost, stating:

Pursuant to Swift's normal document retention practices, the GPS data that would have allowed Swift to find units anywhere in New Mexico during the 24-hour period of May 21, 2022, no longer existed by the time the Court issued its Order. This left Swift unable to determine whether there were any units within the scope of the Court's order, beyond of course the 14 units that Swift initially identified as having any potential involvement in the accident.

Swift had no reason to suspect or anticipate that it would be required to provide documentation of every unit that was anywhere in New Mexico at any time on May 21, 2022, until the Court's Order over three years after Swift's initial investigation.

RPII Appx 000594-000595.

Swift's claim here that it did not know until July 1, 2025 that it needed to preserve data regarding the presence of all Swift vehicles in New Mexico on the date of the crash is simply untrue. At the March 24, 2025 hearing, Judge Mathew told Swift exactly what it was being ordered to produce. **RPII Appx. 000107-000116.**

At the May 26, 2026 evidentiary, RPIIs presented testimony from three experts as well as other evidence, all of which raised significant questions about Swift's manipulation and destruction of evidence, and its failure to comply with the July 1, 2025 order. Swift then called one witness to testify, Ms. Lombardi, who did not offer any evidence that tended to show that Swift complied with the Court's July 1, 2025 order. The District Court then advised that it would appoint a Rule 11-706

expert to help the court with locating and obtaining information and data from Swift's databases concerning the presence of Swift vehicles in New Mexico on the day of the crash, including whether and when Swift deleted any such data.

Twenty-three days after filing the Sur-Reply claiming that the data was no longer accessible, eight days after the evidentiary hearing, and two days after the Court entered an order formalizing the appointment of the 11-706 expert, Swift suddenly admitted that data Swift "originally believed" had become inaccessible by June 1, 2025, can be accessed after all. **RPII Appx. 000630-000635**. Swift offered no justification for this sudden about-face. Given this sequence of events, judicial skepticism of Swift's credibility was not just warranted, it was required. *See e.g. United Nuclear*, 1980-NMSC-094 at ¶ 394 (emphasizing that in cases like this involving repeated and flagrant discovery abuse, district courts should focus not just on "appellees' right to a fair trial on the merits, but also, the integrity of the orders of the court"); *Sandoval*, 1989-NMCA-042 at ¶ 18 (stating that district courts "have a *duty* to enforce compliance with rules of discovery.")(emphasis in original).

Since Swift withdrew its opposition to RPIIs' sanctions motion, Swift has contended that its confession somehow renders the appointment order unnecessary. That argument would be remarkable in any case. Swift's sudden reversal and confession show why Judge Mathew was well-within his discretion to appoint a Rule 11-706 expert. Swift reversed positions it had maintained for years just two days

after the appointment of a Rule 11-706 expert. Swift represented in March 2025 that it could access the data the court ordered it to produce. Then when it became convenient for Swift to claim in May 2026 that the data no longer existed, Swift invoked “normal document retention practices” to claim the data was gone. But when the District Court appointed a forensic data recovery expert to access Swift’s databases to check on whether Swift is telling the truth, the story suddenly changed again – Swift had the data after all.

No Court should accept Swift’s word for what information its systems contain. That is the precise function Judge Mathew appointed a Rule 11-706 expert to serve. The District Court’s authority to vindicate its judicial authority and impose orders reasonably designed to get to the truth of what occurred is broader than any single party’s preferred resolution. *Khalsa v. Puri*, 2023-NMCA-018, ¶ 30. Swift should not get to determine the limits of the District Court’s inquiry into Swift’s own misconduct. *United Nuclear*, 1980-NMSC-094 at ¶ 394.

Swift is trying to have it all ways, wanting its admission that a Swift-owned trailer was involved in the fatal accident to be the justification for preventing further investigation into Swift’s discovery abuse, its failure to comply with the District Court’s order, and the veracity of prior representations made to the District Court. Swift’s admission that it owned the trailer involved in the fatal crash does not reveal who was driving, whether the driver was in the course and scope of employment, or

the driver's qualifications. It does not admit negligence or malicious, willful, reckless, wanton, fraudulent, and/or bad faith conduct. And it does not reveal whether Swift's efforts to deny its involvement involved the alteration, deletion, or concealment of data that would answer all of these questions and more.

The deemed finding on the trailer is just the beginning of the analysis. The Rule 11-706 expert's forensic access to Swift's vehicle tracking and telematics systems is the mechanism by which Judge Mathew can get his questions answered from the data itself, rather than from Swift's own self-selected production, particularly in the face of three years of falsities from Swift. The distinction matters here. Swift is the sole custodian of this evidence and has demonstrated that it finds the truth to be malleable. The Rule 11-706 expert's work is necessary to answer the questions the Court has about the extent of Swift's discovery abuse, without Swift being permitted to substitute its own curated production for the forensic inspection that would answer the questions that should be answered.

The appointment order comports with Rule 11-706 NMRA and the District Court's broad discretionary authority to manage pretrial discovery, it is a proper exercise of that discretion that is needed to protect integrity of both the court's orders and the judicial process, and it satisfies the Court's duty to enforce compliance with discovery rules. The appointment order is a valid exercise of the Court's authority

and should be left undisturbed. Vacating the Order would reward the conduct that made the order necessary in the first place.

C. The Appointment Order Does Not Violate the Fourth Amendment

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” Article II, Section 10 of the New Mexico Constitution similarly provides that “[t]he people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures.” These protections from governmental intrusion are conferred only when a person has a reasonable expectation of privacy in that which is searched or seized. *State v. Yazzie*, 2019-NMSC-008, ¶ 17 (citing *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring))). A person has such an expectation of privacy when, by his or her conduct, a person has exhibited an actual (subjective) expectation of privacy that society is prepared to recognize as reasonable. *State v. Crane*, 2014-NMSC-026, ¶ 18.

Swift cannot argue that it has a reasonable expectation of privacy in its vehicle tracking system. As a licensed interstate motor carrier, Swift is a highly-regulated entity whose records are subject to audit and review by the USDOT, FMCSA special agents, and authorized state enforcement partners. This includes, but is not limited to, logs, Electronic Logging Device records, video event data recorder footage, and CMV tracking/GPS data. *See e.g.* 49 CFR Appendix B to Part 390 (granting

sweeping authority to “enter upon, to inspect, and to examine any and all lands, buildings, and equipment of motor carriers” and to “inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents” of the carrier); 49 CFR 387.313(h); 49 CFR 395.8(j), (k); 49 CFR 390.29(b). There are no carve-outs or exceptions that shield Swift’s records from being accessed by the USDOT, FMCSA, or any authorized state enforcement agencies. As such, Swift has no reasonable expectation of privacy that would grant Fourth Amendment protection from the District Court’s authority to enter the appointment order.

This is a discovery issue, where the District Court has broad authority to manage pretrial discovery. By deflecting the real issues before the Court and raising unfounded constitutional questions, Swift is attempting to place a higher review standard on the District Court’s appointment order than Swift is entitled to. The proper standard of review here is for abuse of discretion.

D. Even if the Fourth Amendment is Implicated Here, the Cases Relied on by Swift Actually Support the Court’s 11-706 Order

The cases cited by Swift do not support its Fourth Amendment arguments and, in fact, actually support the RPII’s position. For example, in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), the United States Supreme Court held that “neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret.” *Id.* at 651. The Court further explained that “corporations can claim no equality with individuals in the enjoyment of a right to

privacy,” that “law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest,” and that “it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.” *Id.* at 651-53. The appointment order falls squarely within these parameters.

Groh v. Ramirez, 540 U.S. 551 (2004) does not apply here, as the warrant did not describe the items to be seized at all. *Id.* at 558. Here, the appointment order delineates exactly what the expert is to do in order to assist the District Court.

U.S. v. Craven, 239 F.3d 91 (1st Cir. 2001), supports the validity of the appointment order. In *Craven*, the trial court had an ex-parte conversation with a court-appointed expert, while the government did not have opportunity either to cross-examine the expert or to respond to his opinions. *Id.* at 101-02. The appellate court’s concerns in *Craven* are not applicable here, as the appointment order fully addresses those concerns.

The two cases Swift relies on in arguing that Mr. Dimitrelos will not be a neutral witness are readily distinguishable. In *Pro Ag Management*, the court based its determination that the expert was not neutral on two factors: (1) the defendant failed to disclose its pre-existing business relationship with the expert when negotiating the joint selection of the expert with the plaintiff, and (2) the defendant then engaged in post-appointment improper *ex parte* communications with the

expert about substantive matters including the parameters for forensic investigations of electronic media. *Pro Ag Mgmt., Inc. v. AgriSompo N. Am., Inc.*, 2026 WL 1073918 (D. Kan. Apr. 21, 2026). Here, both the parties and the Court were fully aware of Mr. Dimitrelos’s brief relationship with RPIIs before his appointment, and RPIIs have not engaged in any *ex parte* communication with him since his appointment.

In *G.K. Las Vegas*, the defendants violated the order appointing the Rule 706 expert by engaging in merits-based *ex parte* communications with the expert and “treat[ing] [the expert] as their own personal expert.” *G.K. Las Vegas Ltd. Partnership v. Simon Property Group*, 671 F. Supp. 2d 1203 (D. Nev. 2009). Here, Plaintiffs have not engaged in any communications with Mr. Dimitrelos since his appointment.

When Swift argued that Mr. Dimitrelos could not be neutral because he was Plaintiffs’ retained expert, this District Court’s response was clear and unequivocal: “Once I appoint him, he’s no longer a retained expert for the plaintiff.” **RPII Appx. 000741-000742**. Swift now complains that the Amended Order would allow Mr. Dimitrelos to disclose privileged information to Plaintiffs. It does no such thing. *See also RPII Appx. 000749* (Court advises Swift that Rule 11-706 expert is Court’s expert so Swift “will not waive any privilege by this expert seeing something”). Swift’s position would preclude appointment of any Rule 11-706 witness, as the risk

that such a witness might one day disclose Swift’s privileged information to RPIIs is not unique to Mr. Dimitrelos – it applies to any Rule 11-706 witness. That is not a reason to disallow Mr. Dimitrelos; it is an argument against the appointment of any Rule 11-706 expert witness, based on nothing more than speculation that any such expert might do something improper after his appointment.

Finally, Swift claims that this is a question of first impression in New Mexico. That is incorrect. *Wilson Corp. v. State ex rel. Udall*, 1996-NMCA-049, 121 N.M. 677, dealt with an analogous issue, where the Attorney General obtained approval from the District Court for civil investigative demands (“CIDs”) directed to a number of companies for information regarding the pricing and marketing of gasoline. *Id.* at ¶ 1. Some recipients raised Fourth Amendment challenges. *Id.* at ¶ 8. The *Wilson* court held the Fourth Amendment “does not require the government to show a likelihood of a violation of law before it can obtain compulsory process. The gist of the protection provided by the Fourth Amendment is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.” *Id.* (citing *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946)).

New Mexico’s appellate courts generally “leave to the sound discretion of the trial judge the procedure to be followed to resolve discovery disputes in civil litigation.” *Id.* at ¶ 17. Due process for Swift consists of reasonable notice and opportunity to be heard. *McCoy v. N.M. Real Estate Comm’n*, 1980-NMSC-081, ¶

10, 94 N.M. 602; U.S. Const. Amend. XIV. Judge Mathew ensured Swift has received due process throughout. He issued his first warning to Swift that discovery abuse would result in severe sanctions during the March 24, 2025 hearing on RPIIs' Motion to Compel. **RPII Appx. 000108, 000114.** He told Swift the same thing every step of the way. He explained what the Rule 11-706 expert was being appointed to do at the end of the evidentiary hearing on May 26, 2026, during which Swift raised numerous concerns about the appointment. **RPII Appx. 000611-000623.** Moreover, Swift has had numerous opportunities to be heard on the Rule 11-706 order. **RPII Appx. 000611-000623, 000636-000640, 000728-000751, 000756-000801.**

The proper question here, whether the appointment order was a reasonable exercise of the court's discretion, is controlled by *Wilson* and *Oklahoma Press*:

The short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure, but raise only the question whether orders of court for the production of specified records have been validly made; and no sufficient showing appears to justify setting them aside. No officer or other person has sought to enter [the subpoenaed parties'] premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections

Wilson, 1996-NMCA-049, ¶ 8 (citing *Oklahoma Press*, 327 U.S. at 195).

Swift has no reasonable expectation of privacy in the records identified in the appointment order. Like the issuance of an administrative subpoena, the

appointment order need only be within the authority of the District Court (it is), the order must not be too indefinite (it is not), and the information must be reasonably relevant to the purpose of the investigation (it is). *Id.* at ¶ 15. The District Court has properly exercised its authority to control pretrial discovery, to protect the integrity of its orders and the judicial system, and to vindicate its judicial authority. The appointment order delineates exactly what the 11-706 expert is authorized to do, what is required of the expert, and what the expert's limitations are. If necessary, and after the expert provides a report to the District Court, the court can issue a protective order to prohibit improper use of information acquired by the expert. *Id.* at ¶ 23 (*citing Brewer Oil Co. v. State*, 1995-NMCA-142, ¶ 6, 121 N.M. 106). Swift admitted to violating the Court's July 1, 2025 order, but only after realizing it had no other choice, and the District Court's investigation into the full extent of Swift's discovery abuse is relevant to the court's broad discretion to control discovery and to protect the integrity of the judicial system.

CONCLUSION

The appointment order comports with the Fourth Amendment and due process. It was well-within the District Court's discretion to enter the June 24, 2026 Amended Sua Sponte Order Appointing Rule 11-706 Expert. As a result, Swift is not entitled to the extraordinary relief it seeks. The Petition for Writ of Superintending Control should be denied.

WHEREFORE, the Real Parties-in-Interest respectfully request that the Court dismiss Swift Transportation of Arizona, LLC's Emergency Petition for Writ of Superintending Control and Request for Stay, award all attorney's fees and costs incurred in filing the Response pursuant to Rule 12-504(F), and grant such other and further relief that the Court deems just and proper.

DATED: August 11, 2026

Respectfully submitted,

GRAYSON LAW OFFICE, LLC

/s/ Brian G. Grayson
 Brian G. Grayson, Esq.
 3901 Georgia St. NE Suite A-2-A
 Albuquerque, NM 87110
 Tel:(505) 273-8570
 Fax: (505) 214-5007
brian@graysonlawoffice.net

and

ANDY RAY LAW, LLC

Andy Ray, Esq.
 P.O. Box 640
 Tijeras, NM 87059
 (505) 847-3300 ph
 (505) 847-3360 fax
andy@andyraylaw.com

*Attorneys for Plaintiffs Barry Green, as
 Personal Representative of the Wrongful
 Death Estate of Raymundo Cruz Herrera,
 Cynthia Guerrero Rodarte, Individually and
 as Parent and Next Friend of Gael Guerrero,
 Minor Child Juliana Flores, and Marisela
 Guerrero*

SCHERR LAW FIRM, PLLC
Maxey Scherr, Esq.
521 Texas Ave.
El Paso, Texas 79901
(915) 881-4111
(915) 881-4119 Facsimile
mscherr@scherrlawfirm.com

James. F. Scherr, Esq.
SCHERR LAW
1790 N Lee Trevino Dr., Ste. 601
El Paso, Texas 79936
(915) 544-0100
(915) 532-1759 Facsimile
jim@jamesescherrlaw.com

Daniela Labinoti, Esq.
LAW FIRM OF DANIELA LABINOTI,
P.C.
707 Myrtle Ave.
El Paso, Texas 79901
(915) 581-4600
(915) 581-4605 Facsimile
Daniela@labinotilaw.com

*Attorneys for Plaintiffs Luciana Guerrero,
Aradai Rodarte, Individually and as Parent
and Next Friend of Malanie Calderon, Isacc
Calderon, Isaiah Calderon and Emily
Calderon, Minor Children, Peter Wirth, on
Behalf of the Estate of Abraham Calderon,
Deceased, and Cullen Hallmark on Behalf of
the Estate of Jose Luis Guerrero, Deceased*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing
was e-filed through Odyssey and e-mailed to all parties
on this 11th day of August, 2026.

Honorable Francis J. Mathew
First Judicial District Court Judge
P.O. Box 2268
Santa Fe, NM 87504-2268
sfeddiv1proposedtxt@nmcourts.gov
Respondent

RAY | PEÑA | McCHRISTIAN, P.C.

Daniel H. Hernandez, Esq.
5822 Cromo Drive
El Paso, Texas 79912
(915) 832-7200 – phone
(915) 832-7333 – fax
dhernandez@raylaw.com

and

Clarice Spicker, Esq.
Allison M. Beaulieu, Esq.
Jones, Skelton & Hochuli, P.L.C.
8220 San Pedro Dr NE, Suite 420
Albuquerque, NM 87113
(505) 339-3517
ABeaulieu@JSHFIRM.COM
CSpicker@JSHFIRM.COM

and

WRIGHT CLOSE BARGER & GUZMAN, LLP

Kyle C. Steingreaber, Esq.
One Riverway, Suite 200
Houston, Texas 77056

(713) 572-4321
(713) 572-4320 Facsimile
steingreaber@wcbglaw.com

MAYER LLP

Brian J. Fisher, Esq.
Ryan T. Goodhue, Esq.
4101 Indian School Road NE, Suite 301N
Albuquerque, New Mexico 87110
Telephone: 505.483.1840
BFisher@mayerllp.com
RGoodhue@mayerllp.com
Attorneys for Defendant Swift Transportation Co. of Arizona, LLC

Attorney General Raul Torrez
408 Galisteo St.
Villagra Building
Santa Fe, New Mexico 87501

s/ Brian G. Grayson
Brian G. Grayson, Esq.



Docket No. S-1-SC-41552

In the
Supreme Court of New Mexico
 Santa Fe, New Mexico

Swift Transportation of Arizona, LLC
Petitioner

v.

Hon. Francis J. Mathew, District Court Judge, First Judicial District
Respondent

and

Barry Green, as personal representative of the wrongful death estate of Raymundo Cruz Herrera; Cynthia Guerrero Rodarte, individually and as parent and next friend of Gael Guerrero, Julian Flores, and Marisela Guerrero; Luciana Luerrero; Aradai Rodarte, individually and as parent and next friend of Malie Calderon, Isaac Calderon, Isaiah Calderon, and Emily Calderon; Peter Wirth, on behalf of the wrongful death estate of Abraham Calderon; and Cullen Hallmark, on behalf of the wrongful death estate of Jose Luis Guerrero
Real Parties in Interest

On petition for writ of superintending control to the
 First Judicial District Court, County of Santa Fe, New Mexico
 Cause No. D-101-CV-2023-01086

Motion for Leave to File Reply in Support of Petition for Writ of Superintending Control

Brian J. Fisher
 Ryan T. Goodhue
MAYER LLP
 4101 Indian School Road NE, Suite
 301N
 Albuquerque, New Mexico 87110
 (505) 483.1840

Kyle C. Steingreaber (*pro hac vice*)
WRIGHT, CLOSE, BARGER & GUZMAN,
LLP
 700 Louisiana, Suite 3000
 Houston, Texas 77002
 (713) 572.4321

Counsel for Petitioner Swift Transportation of Arizona, LLC

To the Honorable Supreme Court of New Mexico:

Petitioner Swift Transportation of Arizona, LLC seeks leave to file a reply, attached as **Exhibit 1**, under Rule 12-504(C)(1) NMRA. Good cause exists under that rule because, among other things, the plaintiffs' response disputes the proper standard of review for legal questions and additional briefing will help clarify that threshold question for the Court. *E.g.*, **Resp.**, at **19**. The plaintiffs also make a novel argument about the Fourth Amendment's applicability that they did not raise at the district court. **Resp.**, at **18**. Swift believes that briefing on that issue will likewise provide needed clarity for the Court and head off the wild-goose chase that argument portends. Also, the plaintiffs claim that a prior decision from the Court of Appeals about whether administrative subpoenas require probable cause somehow impacts the propriety of writ review here. *See Resp.*, at **22**. The Court ought to allow a reply to illustrate why that is not the case either.

ARGUMENT

I. The Interplay Between Legal Issues and Discovery Orders.

Most of the plaintiff's brief argues, explicitly or implicitly, that, because Respondent resolved legal questions of constitutional interpretation and application and rule construction in the context of a

discovery dispute, the Court must review those decisions merely “for an abuse of discretion” rather than de novo. *E.g.*, **Resp., at 19**. As the reply will explain, cases like *Ramirez v. Marsh*, 2025-NMSC-050 establish that, “[t]o the extent a trial court’s discretionary decision” depends on “a question of law” or application of law to fact, this Court reviews those issues de novo. *Id.* ¶ 14. Affixing the abuse-of-discretion label to an issue does not change that, as this Court “may characterize as an abuse of discretion a discretionary decision that is premised on a misapprehension of the law[.]” *Id.* (cleaned up).

The Fourth Amendment. Before the district court, the plaintiffs’ sole Fourth Amendment argument seemed to be that the Fourth Amendment provided only “standards applicable to criminal proceedings[.]” **App’x610**. The Fourth Amendment, however, “applies in the civil context” too, *Soldal v. Cook Cty.*, 506 U.S. 56, 67 (1992), and so the plaintiffs’ response in this Court tries a different tack. They say that because Swift is a “highly-regulated” and “licensed interstate motor carrier” under federal law, it lacks “a reasonable expectation of privacy in its vehicle tracking system[.]” **Resp., at 18**. Even if the appointment order were that limited and did not empower Dimitrelos to demand “all”

material he wants, **App’x002** — their argument confuses a few different Fourth Amendment issues that necessitate a reply.

United States v. Jones explains that Fourth Amendment rights “do not rise or fall” with *Katz v. United States*’s “reasonable expectation of privacy” formulation — the Fourth Amendment protects against improper intrusions upon “the areas . . . it enumerates[,]” like “papers” and “effects[.]” *United States v. Jones*, 565 U.S. 400, 406 (2012). *Katz* might recognize that “property rights are not the sole measure of Fourth Amendment violations,” but it did not “snuff” those rights out as a basis for Fourth Amendment privacy protections. *Id.* at 407.

Ours is one of those traditional property-rights cases. Long before *Katz* “deviated” from the classic “property-based approach” to the Fourth Amendment, *id.* at 405, the constitutional requirement for particularity proscribed the government’s ability to compel the production of a business’s records with a “general” demand, *e.g.*, *Hale v. Henkel*, 201 U.S. 43, 77 (1906). Post-*Katz* decisions too recognize a businessperson’s “constitutional right to go about his business free from unreasonable official entries upon his private commercial property[.]” *E.g.*, *See v. City of Seattle*, 387 U.S. 541, 543 (1967). This Court thus

does not have answer abstract questions about whether the appointment order invades some novel “private sphere[.]” *Cf. Chatric v. United States*, 146 S. Ct. 2193, 2205 (2026). The Supreme Court “long has recognized” the Fourth Amendment’s protection of commercial property, such that “[a]n owner or operator of a business . . . has an expectation of privacy in commercial property[.]” an expectation that the Constitution defends. *New York v. Burger*, 482 U.S. 691, 699 (1987).

Even pervasive government regulation does not extinguish those privacy interests. The mere existence of a regulatory regime provides “no justification” for disparate treatment under the Fourth Amendment when government action “involves nothing more than the normal enforcement of the . . . law[.]” *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 354 (1977). If a regulatory search of a “closely regulated” business does occur, it too must be “carefully limited in time, place, and scope.” *Burger*, 482 U.S. at 702, 703.

The plaintiffs gloss over all of those issues in their response. They cite no case applying the Fourth Amendment in the way they propose (*State v. Yazzie*, 2019-NMSC-008 involved the reasonableness of a home search under the emergency-circumstances doctrine, and *State v. Crane*,

2014-NMSC-026 is an interstitial analysis of article 2, § 10's applicability to garbage cans). They otherwise cite an appendix to a federal regulation which "has no application to the States[,]" 49 C.F.R. Part 390 App'x B, a subpart to another regulation that does not exist, *compare Resp., at 19* (citing subpart (h) to 49 C.F.R. § 387.313) *with* 49 C.F.R. § 387.313 (ending at subpart (f)), and regulatory policies for keeping certain duty-status information for drivers, *see* 49 C.F.R. § 395.8(j), (k), and providing that information to regulators, *see id.* 390.29(b). Their argument lacks any tether to the actual, appropriate analytical framework for the issue.

Novelty. Citing *Wilson Corporation v. State ex rel. Udall*, 1996-NMCA-049, the plaintiffs also claim that "this" is not "a question of first impression in New Mexico[,]" implicitly attacking the propriety of this Court's exercise of superintending control. *See Resp., at 22.* But *Wilson* involved the enforceability of administrative subpoenas issued without probable cause and for a potentially improper purpose. *Id.* ¶¶ 4–11. Swift believes that additional briefing in reply will aid the Court's understanding of why a random case focusing on those issues does not resolve any of the novel problems that this case actually presents about

the interplay between Rule 11-706 NMRA, the Fourth Amendment, and due process.

CONCLUSION

For these reasons, good cause exists for the Court to grant leave under Rule 12-504(C)(1) NMRA allowing Swift to file its reply in support of its petition for writ of superintending control. Swift also asks for all other relief to which it may be entitled at law and in equity.

Respectfully submitted,

/s/ Brian J. Fisher

Brian J. Fisher

Ryan T. Goodhue

Mayer LLP

4101 Indian School Road NE, Suite 301N

Albuquerque, New Mexico 87110

(505) 483.1840

bfisher@mayerllp.com

rgoodhue@mayerllp.com

and

/s/ Kyle C. Steingreaber

Kyle C. Steingreaber (*pro hac vice*)

Wright, Close, Barger & Guzman, LLP

700 Louisiana, Suite 3000

Houston, Texas 77002

(713) 572.4321

steingreaber@wcbglaw.com

*Counsel for Petitioner Swift Transportation
of Arizona, LLC*

CERTIFICATE OF CONFERENCE

Per Rule 12-309(C) NMRA, counsel for Swift has conferred with counsel for the plaintiff's — the Court did not request a responsive brief from Respondent — and the plaintiffs directed Swift to include the following statement in this certificate: "Real Parties in Interest take no position on this motion and defer to the Court's discretion."

/s/ Kyle C. Steingreaber

Kyle C. Steingreaber

CERTIFICATE OF SERVICE

Per Rule 12-307.1(D) NMRA, I certify that on August 18, 2026, a true and correct copy of this document was served via the New Mexico Odyssey File & Serve system (along with courtesy copy via email) on all counsel of record for Real Parties in Interest and on Respondent:

James F. Scherr

jim@jamescherrlaw.com

Maxey M. Scherr

mscherr@scherrlawfirm.com

Daniela Labinoti

daniela@labinotilaw.com

Brian G. Grayson

brian@graysonlawoffice.net

Andy Ray

andy@andyraylaw.com

Counsel for Real Parties in Interest

Hon. Francis J. Mathew

sfeddiv1proposedtxt@nmcourts.gov

Respondent

/s/ Brian J. Fisher

Brian J. Fisher

Docket No. S-1-SC-41552

In the
Supreme Court of New Mexico
 Santa Fe, New Mexico

Swift Transportation of Arizona, LLC
Petitioner

v.

Hon. Francis J. Mathew, District Court Judge, First Judicial District
Respondent

and

Barry Green, as personal representative of the wrongful death estate of Raymundo Cruz Herrera; Cynthia Guerrero Rodarte, individually and as parent and next friend of Gael Guerrero, Juliano Flores, and Marisela Guerrero; Luciana Luerrero; Aradai Rodarte, individually and as parent and next friend of Malie Calderon, Isaac Calderon, Isaiah Calderon, and Emily Calderon; Peter Wirth, on behalf of the wrongful death estate of Abraham Calderon; and Cullen Hallmark, on behalf of the wrongful death estate of Jose Luis Guerrero
Real Parties in Interest

On petition for writ of superintending control to the
 First Judicial District Court, County of Santa Fe, New Mexico
 Cause No. D-101-CV-2023-01086

**Reply in Support of Petition for
 Writ of Superintending Control**

Brian J. Fisher
 Ryan T. Goodhue
MAYER LLP
 4101 Indian School Road NE, Suite
 301N
 Albuquerque, New Mexico 87110
 (505) 483.1840

Kyle C. Steingreaber (*pro hac vice*)
WRIGHT, CLOSE, BARGER & GUZMAN,
LLP
 700 Louisiana, Suite 3000
 Houston, Texas 77002
 (713) 572.4321

Counsel for Petitioner Swift Transportation of Arizona, LLC



TABLE OF CONTENTS

Table of Contents	2
Table of Authorities.....	4
Argument.....	7
I. The resolution of legal issues via a discovery order does not insulate them from de novo review.	7
II. The appointment order is invalid.	8
A. The plaintiffs’ post-hac efforts to redefine the appointment order confirm its unconstitutionality under the Fourth Amendment.	8
1. The appointment order facially fails the Fourth Amendment’s particularity requirement.	9
2. Federal regulation does not circumvent Swift’s Fourth Amendment rights.	11
B. Fourth Amendment aside, the appointment order is improper.	14
1. The appointment order violates due process because it does not allow Swift to claim privileges or immunities before Dimitrelos discloses protected information to <i>others</i>	14
2. The appointment order exceeds Rule 11-706’s scope.	16
a. The appointment order could not authorize ex parte communications between the plaintiffs and Dimitrelos. ..	16
b. The appointment order does not “address[]” the problem of ex parte communications between Dimitrelos and Respondent.	17
c. Acknowledging that Dimitrelos served as the plaintiffs’ expert and now serves as Respondent’s does not magically make him impartial.	18
III. This case is a prime candidate for superintending control.	19

IV. The plaintiffs identify no grounds for cost-shifting or fee-shifting.	21
Conclusion	21
Certificate of Service	23

Statement of Compliance. In accordance with Rule 12-504(G)(3) NMRA, this brief complies with the limitations of subparagraph (G)(3) of Rule 12-504 NMRA and subparagraph (F)(3) of Rule 12-318 NMRA (to the extent applicable): the petition was prepared using a proportionally-spaced typeface (Century Schoolbook) and the body of the reply, as defined in subparagraph (G)(1) of that rule, contains 2,856 words.

TABLE OF AUTHORITIES

Cases (New Mexico)

<i>Ramirez v. Marsh</i> , 2025-NMSC-050.....	7
<i>State v. Clark</i> , 1991-NMCA-082	12
<i>State v. Couch</i> , 1967-NMSC-093.....	20
<i>State v. Crane</i> , 2014-NMSC-026.....	12
<i>State v. Sabeerin</i> , 2014-NMCA-110	9
<i>State v. Yazzie</i> , 2019-NMSC-008.....	12
<i>Warner v. Calbert</i> , 2011-NMCA-028	17
<i>Wilson Corporation v. State ex rel. Udall</i> , 1996-NMCA-049	19

Cases (Other Jurisdictions)

<i>Bd. of Mgrs. of Bay Club Condo. v. Bay Club of Long Beach</i> , <i>Inc.</i> , 827 N.Y.S.2d 855 (N.Y. Sup. Ct. 2007).....	16
<i>Chatrie v. United States</i> , 146 S. Ct. 2193 (2026).....	11
<i>Edgar v. K.L.</i> , 93 F.3d 256 (7th Cir. 1996).....	16
<i>G.M. Leasing Corp. v. United States</i> , 429 U.S. 338 (1977).....	11
<i>Groh v. Ramirez</i> , 540 U.S. 551 (2004).....	8, 9
<i>Hale v. Henkel</i> , 201 U.S. 43 (1906).....	10

<i>Massachusetts v. Sheppard</i> , 468 U.S. 981 (1984)	9
<i>New York v. Burger</i> , 482 U.S. 691 (1987)	10, 12
<i>Ok. Press Pub'g Co. v. Walling</i> , 327 U.S. 186 (1946)	8, 10
<i>Pro Ag Mgmt., Inc. v. AgriSompo N. Am., Inc.</i> , No. 26-2066-JWB-BGS, 2026 WL 1073918 (D. Kan. Apr. 21, 2026)	17
<i>Rose v. Mitchell</i> , 443 U.S. 545 (1979)	6
<i>Soldal v. Cook Cty.</i> , 506 U.S. 56 (1992)	8
<i>United States v. Craven</i> , 239 F.3d 91 (1st Cir. 2001)	16
<i>United States v. Jones</i> , 565 U.S. 400 (2012)	10, 11
<i>United States v. Stefonek</i> , 179 F.3d 1030 (7th Cir. 1999)	8
Rules	
Rule 1-001 NMRA	15
Rule 1-026 NMRA	14
Rule 11-503 NMRA	14
Rule 11-706 NMRA	passim
Rule 12-504 NMRA	3, 20
Regulations	
49 C.F.R. § 387.313	13
49 C.F.R. § 395.8	13
49 C.F.R. § 390.29	13
49 C.F.R. Part 390 App'x B	13
Constitutional Provisions	
U.S. Const. amend. 4	7

U.S. Const. amend. 14.....	13
----------------------------	----

ARGUMENT

The plaintiffs devote most of their response to castigating Petitioner Swift Transportation of Arizona, LLC for the discovery problem that precipitated Dimitrelos’s appointment as a Rule 11-706 NMRA examiner. *See Resp., at 1–18*. Swift has not shied away from that problem. As the petition explained, Swift made a “serious mistake” that culminated in the company *agreeing* to partially merits-preclusive sanctions. *Pet., at 12–13* (citing, e.g., *App’x527–32*). That mistake has nothing to do with the legal issues before this Court that invalidate the appointment order. In the wrong or not, “the least deserving” or “the most virtuous[.]” “every person may demand” the procedural protections that the Constitution creates. *Rose v. Mitchell*, 443 U.S. 545, 557 (1979). The appointment order does not “respect” those “command[s,]” *id.*, and the Court should use its superintending control to correct it.

I. The resolution of legal issues via a discovery order does not insulate them from de novo review.

The plaintiffs repeatedly try to insulate the appointment order by claiming that “[t]he proper standard of review” for a discovery order “is for abuse of discretion.” *E.g., Resp., at 19*. Under different circumstances, they might be right — Swift agrees that a district court’s

discovery order ordinarily enjoys some degree of deference. *Accord Pet.*, **at 12**. But not on these issues. “To the extent a trial court’s discretionary decision” depends on “a question of law” or application of law to fact, this Court reviews those issues de novo. *E.g.*, *Ramirez v. Marsh*, 2025-NMSC-050, ¶ 14. That holds true even when “discovery orders implicate questions of constitutional interpretation[.]” *Id.* The statutory, rule, and constitutional conclusions underlying the appointment order must withstand de novo review from this Court, and they cannot.

II. The appointment order is invalid.

A. The plaintiffs’ post-hac efforts to redefine the appointment order confirm its unconstitutionality under the Fourth Amendment.

The Fourth Amendment guarantees “the right of the people to be secure in their . . . papers” and to be free from “unreasonable searches and seizures,” while simultaneously ensuring that any order compelling a search or seizure “particularly describe[] the . . . things to be seized.” U.S. Const. amend. 4. At the district court, the plaintiffs’ only Fourth Amendment argument seemed to be that the Fourth Amendment provided only “standards applicable to criminal proceedings[.]”

App'x610. The Fourth Amendment, however, “applies in the civil context” too, *Soldal v. Cook Cty.*, 506 U.S. 56, 67 (1992), and so the plaintiffs’ response in this Court pivots to two points. First, that the appointment order “delineates exactly what the expert is to do” and provides the requisite particularity, *e.g.*, **Resp., at 20, 24**, and, second, that Swift categorically lacks “a reasonable expectation of privacy in its vehicle tracking system” because it is a “highly-regulated” and “licensed interstate motor carrier” under federal law, so the appointment order does not violate the Constitution. **Resp., at 18, 23.** Not so.

1. The appointment order facially fails the Fourth Amendment’s particularity requirement.

A constitutionally legitimate order compelling a company to turn records over to the government must include a “specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry.” *Ok. Press Pub’g Co. v. Walling*, 327 U.S. 186, 209 (1946); *accord Resp., at 19–20*. That means the Fourth Amendment invalidates orders that either do not describe “at all” the items to be seized, *Groh v. Ramirez*, 540 U.S. 551, 558 (2004), or that generically allow the seizure of “evidence[.]” *e.g.*, *United States v. Stefonek*, 179 F.3d 1030, 1032–33 (7th Cir. 1999). The appointment

order is of a kind: it vests Dimitrelos with unrestrained discretion to demand “all documents” he wants. **App’x002**.

Still, the plaintiffs declare the appointment order sacrosanct because it tells Dimitrelos “exactly what . . . to do.” **Resp., at 20**. As *Groh* itself illustrates, though, *contra Resp., at 20*, specificity about what is to be searched (a blue house) or why (to discover contraband) does not save an order that fails to specify the things to be seized. *Groh*, 540 U.S. at 554–55, 557; *accord State v. Sabeerin*, 2014-NMCA-110, ¶¶ 26–29 (rejecting warrant on similar grounds).

Nor can the plaintiffs self-limit the appointment order’s scope only to “vehicle tracking system[s]” to save it. *Contra Resp., at 18*. The plaintiffs cite nothing to support the idea that *their* proposed limits bind a court-appointed examiner. In any event, the question is whether the *order* passes constitutional muster; if it does not, even self-imposed restrictions by the examiner that might otherwise be reasonable cannot salvage it. *Groh*, 540 U.S. at 559–60; *Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984).

2. Federal regulation does not circumvent Swift's Fourth Amendment rights.

The Court need not dwell long either on the plaintiffs' argument that the Fourth Amendment does not apply to a specific subset of materials Dimitrelos might demand simply because the federal government regulates Swift. *Contra Resp., at 18–19*. From its inception, the Fourth Amendment has protected against improper intrusions upon “the areas . . . it enumerates[.]” things like “papers” and “effects[.]” *United States v. Jones*, 565 U.S. 400, 406 (2012). “An owner or operator of a business . . . has an expectation of privacy in commercial property” that the Constitution defends. *New York v. Burger*, 482 U.S. 691, 699 (1987). It is thus at this point an unremarkable, bedrock rule of constitutional law that the amendment's particularity requirement proscribes the government's ability to compel the production of a business's records with a “general” demand. *E.g., Hale v. Henkel*, 201 U.S. 43, 77 (1906). The sovereign must provide a “specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry.” *Ok. Press Pub'g Co.*, 327 U.S. at 209.

In arguing otherwise for certain records, the plaintiffs misunderstand the significance of the *Katz* “reasonable expectation of privacy” test. *Contra Resp., at 18*. The Fourth Amendment’s text “reflects its close connection to property[,]” and, until *Katz* “deviated” from the classic approach in the mid-1960’s, *Jones*, 565 U.S. at 405, the Fourth Amendment analysis focused exclusively on the privacy infringements caused by intrusion upon property, *id.* at 406–07. *Katz* might recognize that those property rights are longer the “sole” constitutional metric, *id.* at 407, and there might now be some “private spheres” the Fourth Amendment now protects, *Chatrie v. United States*, 146 S. Ct. 2193, 2205 (2026), *Katz* did not “snuff” out the original framework. *Jones*, 565 U.S. at 407 (cleaned up).

Nor do those protections evaporate in the face of government oversight. *Contra Resp., at 18*. The mere existence of a regulatory regime provides “no justification” for disparate treatment under the Fourth Amendment when government action “involves nothing more than the normal enforcement of the . . . law[.]” *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 354 (1977). And even if a regulatory search of a “closely regulated” business does occur under the regulatory

regime, it too must be “carefully limited in time, place, and scope.”

Burger, 482 U.S. at 702, 703.¹ It is thus no answer to the Fourth Amendment problem that the appointment order poses to point to federal regulation of motor carriers.

The plaintiffs cite no authority suggesting federally regulated motor carriers enjoy fewer constitutional protections than any other regulated entity involved in tangential civil litigation. *Contra Resp.*, at 18–19. They invoke *State v. Yazzie*, 2019-NMSC-008, but that case involved the reasonableness of a home search under the emergency-assistance doctrine. *Id.* ¶ 15. *State v. Crane*, 2014-NMSC-026 is an interstitial analysis of article 2, § 10’s applicability to garbage cans. *Id.* ¶ 18. The plaintiffs otherwise cite an appendix to a federal regulation

¹ The plaintiffs do *not* ask the Court to review the appointment order through the lens of the *Burger* test for warrantless searches of certain highly regulated industries. *See generally Burger*, 482 U.S. at 702–03. They agree with Swift that the general reasonableness test governs any Fourth Amendment analysis of the appointment order. *See Resp.*, at 19 (arguing that the appointment order “falls squarely within” reasonableness requirement). Rightly so. Since a valid *Burger* search requires an inspection “pursuant to” and “necessary to further” the regulatory regime, *Burger*, 482 U.S. at 702, a search or seizure, like the one the appointment order authorizes, “not made pursuant to the regulatory regime” does not fall into the *Burger* framework, e.g., *State v. Clark*, 1991-NMCA-082, ¶¶ 11–12.

which “has no application to the States[.]” 49 C.F.R. Part 390 App’x B, a subpart to another regulation that does not exist, *compare Resp., at 19* (citing subpart (h) to 49 C.F.R. § 387.313) *with* 49 C.F.R. § 387.313 (ending at subpart (f)), and regulatory policies for keeping certain duty-status information for drivers, *see* 49 C.F.R. § 395.8(j), (k), and providing that information to regulators, *see id.* 390.29(b). None of those authorities purports to authorize any kind of search or seizure by an examiner appointed under a state procedural rule in civil personal-injury litigation.

B. Fourth Amendment aside, the appointment order is improper.

Setting aside the Fourth Amendment, the appointment order offends traditional due-process limits and the text of Rule 11-706.

1. The appointment order violates due process because it does not allow Swift to claim privileges or immunities before Dimitrelos discloses protected information to *others*.

As Swift explained in its petition, the appointment order violates due process, *see* U.S. Const. amend. 14, because it lacks any mechanism by which Swift can claim any of the evidentiary privileges and immunities that New Mexico law affords it before Dimitrelos discloses that material to third parties, like the plaintiffs. **Pet., at 23–25.** The

plaintiffs do not dispute that Swift has constitutionally protected liberty and property interests in those privileges and immunities. *Compare Pet., at 23–24 with Resp., at 21–22.* They instead argue that no due-process issue exists because Swift “will [not] waive a[] privilege by th[e] *expert* seeing something[.]” *Contra Resp., at 21* (emphasis added).

That is not the issue at all.² Here, the constitutional problem is that the appointment order allows Dimitrelos to disclose to *others* exempt material without Swift having an opportunity to claim, for example, the attorney-client privilege, Rule 11-503(B) NMRA, or work-product doctrine, Rule 1-026(B)(5) NMRA. *Accord Pet., at 24.* It is that procedure-less deprivation of property and liberty interests, *see State v. Houdobre*, 2025-NMSC-007, ¶¶ 9, *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972), that offends due process. The plaintiffs ignore it completely. As critically, they do not *try* to explain why Rule 1-026(B)(7) NMRA’s default rule for claiming privileges and immunities

² In a similar vein, the plaintiffs’ most developed due-process argument looks backwards: they argue that Respondent “ensured Swift has received due process throughout” the case. *See Resp., at 23.* Swift is not arguing here that Respondent failed to give “notice and an opportunity to be heard” before *entering* the appointment order. *Cf. Houdobre*, 2025-NMSC-007, ¶ 8; *see also* Rule 11-706(A) NMRA. The order’s substance is the indefensible problem.

— which New Mexico district courts must already follow, Rule 1-001(A) NMRA — should not or cannot apply here.³

2. The appointment order exceeds Rule 11-706’s scope.

The plaintiffs’ limited attempts to justify the appointment order under Rule 11-706 do not save it either.

a. The appointment order could not authorize ex parte communications between the plaintiffs and Dimitrelos.

“As a safeguard against bias,” communications between a court-appointed expert and the parties “should be conducted in a manner open to all[.]” *G.K. Las Vegas LP v. Simon Prop. Grp., Inc.*, 671 F. Supp. 2d 1203, 1224 (D. Nev. 2009). The appointment order does the opposite. It *approves* clandestine communications, the substance of which Dimitrelos “shall not be required to share[.]” **App’x003**, and creates the opportunity for a party to “assert[] or attempt[] to assert unilateral influence and control” over the expert, *id.* at 1228, or otherwise inhibit the expert’s ability “to provide the court with . . . unbiased information[.]” *Bd. of Mgrs. of Bay Club Condo. v. Bay Club of Long*

³ The plaintiffs are right that this issue “is not unique” to Dimitrelos and would “appl[y] to any Rule 11-706 expert witness.” **Resp., at 22.** Respondent appointed Dimitrelos, though.

Beach, Inc., 827 N.Y.S.2d 855, 858 (N.Y. Sup. Ct. 2007). The plaintiffs' argument that the Court should blind itself to that reality because the plaintiffs have not had those communications with Dimitrelos *yet* does not salvage that procedure. **Resp., at 20–21.** That the order allows those communications at all taints it.

b. The appointment order does not “address[]” the problem of ex parte communications between Dimitrelos and Respondent.

Equally problematic: the appointment order allows those same communications between Dimitrelos and Respondent. *See Pet., at 26–29.* The law generally “frowns upon ex parte communications between judges and court-appointed experts” too. *United States v. Craven*, 239 F.3d 91, 102 (1st Cir. 2001). “Off the record briefings” between court-appointed experts and the Respondent “leave no trace in the record[,]” making it impossible to know “[w]hat information passe[s]” to the Court and “how reliable it may have been[.]” *Edgar v. K.L.*, 93 F.3d 256, 259 (7th Cir. 1996). The plaintiffs do not explain how the appointment order fixes those problems.

- c. **Acknowledging that Dimitrelos served as the plaintiffs' expert and now serves as Respondent's does not magically make him impartial.**

Rule 11-706 authorized Respondent “to appoint an *independent* expert *unaligned* with either party to assist the court[.]” *Warner v.*

Calbert, 2011-NMCA-028, ¶ 30 (emphasis added). Instead, he chose the plaintiffs' own expert, who had already testified *against* Swift in connection with an adversarial evidentiary hearing, *see App'x575–78*.

Respondent reasoned that the law countenanced that procedure because Dimitrelos ceased to be the plaintiffs' expert upon his appointment.

Resp., at 21. The plaintiffs offer no other justification. **Resp., at 21.**

That circular logic provides no defense.

As cases like *Pro Ag Management* illustrate, the preexisting relationship *is* the disqualifying problem. *Accord, e.g., Pro Ag Mgmt., Inc. v. AgriSompo N. Am., Inc.*, No. 26-2066-JWB-BGS, 2026 WL 1073918, at *3–6 (D. Kan. Apr. 21, 2026). Dimitrelos *actually served* as the plaintiffs' expert in this very dispute, and he has already said, under oath, that he views Swift's conduct in connection with the accident investigation as inadequate, **App'x575–78**, and has communicated with the plaintiffs' counsel in connection with forming

those opinions and on the exact issues for which the Court has appointed him, **App’x594–607**. He is disqualified.

III. This case is a prime candidate for superintending control.

The Court should use its power of superintending control to review and correct the appointment order. Heady legal questions about the constitutionality of government action and the proper meaning and interpretation of this Court’s rules appear time and again in the Court’s superintending-control jurisprudence. *E.g.*, *Stewart v. Ramczyk*, 2025-NMSC-032, ¶ 13, *City of Roswell v. Sanchez-Gagne*, 2025-NMSC-039, ¶ 5. They do so because those types of questions implicate more than one isolated case and beg for clarity for the public benefit. *See Stewart*, 2025-NMSC-032, ¶ 13. Swift’s petition asks the Court to answer those same questions.

Wilson Corporation v. State ex rel. Udall, which the plaintiffs cite to accuse Swift of mischaracterizing “this” — their nebulous phrase — as one of first impression here does not change that. **Resp., at 22.**

Wilson Corporation rejected the argument that a statutorily-authorized subpoena from the government to investigate potential antitrust violations did not require probable cause to believe an antitrust

violation had occurred. 1996-NMCA-049, ¶¶ 4–11 (citing cases *In re Investigation No. 2*, 1978-NMSC-022). Statutes, as the opinion explains, can empower agencies “to “investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not” without encroaching on constitutional protections. *Id.* ¶ 4. An unremarkable rule already settled under the bevy of federal and New Mexico law that the court analyzed. *See id.* ¶¶ 4–10.

It has nothing to do with the actual issues of first impression this petition presents. The plaintiffs do not identify *one* example of this Court addressing the interplay between Rule 11-706, the Fourth Amendment, and procedural due process, the true questions here. In fact, they do not identify *one* example of this Court ever substantively interpreting Rule 11-706 — in any context. *Accord Pet., at 31–32* (collecting the few cases from this Court ever citing rule). Swift’s petition provides a vehicle for first-of-its-kind guidance from this Court both on the powers and authority that a district court can clothe a Rule 11-706 appointee with and who may serve.

IV. The plaintiffs identify no grounds for cost-shifting or fee-shifting.

At the conclusion of their response, the plaintiffs ask the Court to cost-shift and fee-shift under Rule 12-504(F) NMRA. “A mere conclusion is not a sufficient basis for relief[,]” though, *State v. Couch*, 1967-NMSC-093, ¶ 10, the plaintiffs offer no reason why the Court should do so here.

CONCLUSION

This Court should grant Swift’s petition for writ of superintending control and direct Respondent to vacate the June 24, 2026 appointment order. Swift also asks for all other relief to which it is entitled at law and in equity.

Respectfully submitted,

/s/ Brian J. Fisher

Brian J. Fisher

Ryan T. Goodhue

Mayer LLP

4101 Indian School Road NE, Suite 301N

Albuquerque, New Mexico 87110

(505) 483.1840

bfisher@mayerllp.com

rgoodhue@mayerllp.com

and

/s/ Kyle C. Steingreaber

Kyle C. Steingreaber (*pro hac vice*)

Wright, Close, Barger & Guzman, LLP

700 Louisiana, Suite 3000

Houston, Texas 77002

(713) 572.4321

steingreaber@wcbglaw.com

*Counsel for Petitioner Swift Transportation of
Arizona, LLC*

CERTIFICATE OF SERVICE

Per Rule 12-307.1(D) NMRA, I certify that on August 18, 2026, a true and correct copy of this document was served via the New Mexico Odyssey File & Serve system (along with courtesy copy via email) on all counsel of record for Real Parties in Interest and on Respondent:

James F. Scherr

jim@jamescherrlaw.com

Maxey M. Scherr

mscherr@scherrlawfirm.com

Daniela Labinoti

daniela@labinotilaw.com

Brian G. Grayson

brian@graysonlawoffice.net

Andy Ray

andy@andyraylaw.com

Counsel for Real Parties in Interest

Hon. Francis J. Mathew

sfeddiv1proposedtxt@nmcourts.gov

Respondent

/s/ Brian J. Fisher

Brian J. Fisher

FILED 1st JUDICIAL DISTRICT COURT
Santa Fe County
8/31/2026 5:19 PM
KATHLEEN VIGIL CLERK OF THE COURT
Alitzah F Garcia

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

BARRY GREEN, as Personal Representative
of the Wrongful Death Estate of RAYMUNDO CRUZ HERRERA,
DECEASED, CYNTHIA GUERRERO RODARTE,
GAEL GUERRERO, JULIANA FLORES, and MARISELA GUERRERO,
LUCIANA GUERRERO, ARADAI RODARTE, Individually and
as Parent and Next Friend of MALIE CALDERON,
ISAAC CALDERON, ISAIAH CALDERON
AND EMILY CALDERON, Minor Children,
PETER WIRTH, ON BEHALF OF THE WRONGFUL DEATH
ESTATE OF ABRAHAM CALDERON, DECEASED, and
CULLEN HALLMARK ON BEHALF OF THE WRONGFUL DEATH
ESTATE OF JOSE LUIS GUERRERO, DECEASED,

Plaintiffs,

v.

Case No. D-101-CV-2023-01086

SWIFT TRANSPORTATION,
SWIFT TRANSPORTATION OF ARIZONA, LLC,
KNIGHT SWIFT TRANSPORTATION HOLDINGS, INC.,
RAFAEL RODARTE, and JOHN DOES 1-10,

Defendants.

**PLAINTIFFS' EXPEDITED MOTION
FOR ORDER TO SHOW CAUSE**

COME NOW, Plaintiffs, by and through their undersigned counsel of record, and
for their Expedited Motion for Order to Show Cause directed to Defendant Swift
Transportation of Arizona, LLC ("Swift"), state as follows:

1. On June 24, 2026, the Court entered an Amended Sua Sponte Order
Appointing Rule 11-706 Expert.
2. On July 10, 2026, Defendant Swift filed an Expedited Motion to Vacate
Amended Sua Sponte Order Appointing Rule 11-706 Expert.

3. On July 27, 2026, the Court enter an Order Denying Defendant Swift Transportation of Arizona, LLC's Expedited Motion to Vacate Amended Sua Sponte Order Appointing Rule 11-706 Expert.

4. On July 31, 2026, Defendant Swift filed an Emergency Petition for Writ of Superintending Control and Request for Stay in the Supreme Court of New Mexico, Case Number S-1-SC-41552.

5. On August 4, 2026, the Supreme Court stayed enforcement of the Amended Sua Sponte Order Appointing Rule 11-706 Expert until further order of the Court.

6. By Order of the Supreme Court on August 20, 2026, the Supreme Court denied Swift's Emergency Petition for Writ of Superintending Control, which necessarily dissolved the August 4, 2026 stay order.

7. The June 24, 2026 Amended Sua Sponte Order Appointing Rule 11-706 Expert required Swift to pay the expert Gus Dimitrelos' retainer within 10 days of billing.

8. Mr. Dimitrelos submitted his invoice to Defendant Swift on July 21, 2026.

9. On the day the retainer payment was originally due, Defendant Swift instead filed the Emergency Petition for Writ of Superintending Control.

10. After the Emergency Petition for Writ of Superintending Control was denied, Plaintiffs' counsel requested that Swift provide proof of payment of Mr. Dimitrelos' retainer.

11. At the time of the filing of this Motion for Order to Show Cause, proof of payment of Mr. Dimitrelos' retainer has not been provided to the Plaintiffs.

12. In light of Defendant Swift's failure to comply with this Court's June 24, 2026 Amended Sua Sponte Order Appointing Rule 11-706 Expert, the Court should require

Defendant Swift to show cause why it should not be sanctioned by the Court for the failure to comply with yet another court order in this case.

13. If Defendant Swift intends to refuse to comply with the order and seeks an order of contempt, then Defendant Swift should be required to have a corporate representative appear personally in court to confirm to the Court that Defendant Swift Transportation Co. of Arizona, LLC, has made a knowing and informed decision at the corporate level that it is willfully refusing to comply with the Court's June 24, 2026 Amended Sua Sponte Order Appointing Rule 11-706 Expert.

14. In light of Swift's firing of several of its attorneys in this case, its prior admitted failure to comply with a court order, and the likelihood that it intends to blame its prior attorneys for the failure to comply with a court order, there should be no ambiguity or doubt that Swift has made a corporate-level decision to willfully refuse to comply with the Court's June 24, 2026 Amended Sua Sponte Order Appointing Rule 11-706 Expert. Given the gravity of such a decision, the Court should not rely on the word of Swift's counsel but should require a Swift corporate representative to confirm the decision on the record in open court.

15. Defendant Swift has been provided with a copy of this Motion and has indicated that the Motion is opposed.

16. At the time of the filing of this Motion, the Court has scheduled a hearing on Plaintiffs' Supplemental Motion for Sanctions on October 15, 2026. In light of the Swift's refusal to comply with the Court's June 24, 2026 Amended Sua Sponte Order Appointing Rule 11-706 Expert, combined with its admitted failure to comply with the Court's July 1, 2025 order, should the Court grant Plaintiffs' request for sanctions the

remainder of discovery in this case would be limited and would allow the Plaintiffs' to avoid incurring unnecessary but significant expenses. As such, the Plaintiffs respectfully request that the Court grant the request for an expedited hearing and combine the hearing on this Motion with the currently-scheduled hearing on Plaintiffs' Supplemental Motion for Sanctions.

CONCLUSION

For the foregoing reasons, Defendant Swift Transportation Co. of Arizona, LLC, should be ordered to show cause as to why it failed to comply with the Court's June 24, 2026 Amended Sua Sponte Order Appointing Rule 11-706 Expert.

WHEREFORE, Plaintiffs pray that the Court grant this Motion for Order to Show Cause, schedule an expedited hearing, and grant such further and other relief as the Court deems just and proper.

Respectfully Submitted,

GRAYSON LAW OFFICE, LLC

/s/ Brian G. Grayson

Brian G. Grayson, Esq.
3901 Georgia St. NE Suite A-2-A
Albuquerque, NM 87110
Tel: (505) 273-8570; Fax: (505) 214-5007
brian@graysonlawoffice.net

and

ANDY RAY LAW, LLC

Andy Ray, Esq.
P.O. Box 640
Tijeras, NM 87059
(505) 847-3300 ph
(505) 847-3360 fax
andy@andyraylaw.com

*Attorneys for Plaintiffs Barry Green, as
Personal Representative of the Wrongful*

*Death Estate of Raymundo Cruz Herrera,
Cynthia Guerrero Rodarte, Gael Guerrero,
Juliana Flores, and Marisela Guerrero*

and

SCHERR LAW FIRM, PLLC
Maxey Scherr, Esq.
521 Texas Ave.
El Paso, Texas 79901
(915) 881-4111
(915) 881-4119 Facsimile
mscherr@scherrlawfirm.com

James. F. Scherr, Esq.
Chip Orr, Esq.
SCHERR LAW
1790 N Lee Trevino Dr., Ste. 601
El Paso, Texas 79936
(915) 544-0100
(915) 532-1759 Facsimile
jim@jamesescherrlaw.com

Daniela Labinoti, Esq.
LAW FIRM OF DANIELA LABINOTI,
P.C.
707 Myrtle Ave.
El Paso, Texas 79901
(915) 581-4600
(915) 581-4605 Facsimile
Daniela@labinotilaw.com

*Attorneys for Plaintiffs Luciana Guerrero,
Aradai Rodarte, Individually and as Parent
and Next Friend of Malanie Calderon, Isacc
Calderon, Isaiah Calderon and Emily
Calderon, Minor Children, Peter Wirth, on
Behalf of the Estate of Abraham Calderon,
Deceased, and Cullen Hallmark on Behalf of
the Estate of Jose Luis Guerrero, Deceased*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the
31st day of August, 2026 this Motion was
served on all counsel of record.

/s/ *Brian G. Grayson*
Brian G. Grayson, Esq.

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

FILED 1st JUDICIAL DISTRICT COURT
Santa Fe County
9/21/2026 12:43 PM
KATHLEEN VIGIL CLERK OF THE COURT
Bryanna A Collazo

BARRY GREEN, as Personal Representative of the
Wrongful Death ESTATE OF RAYMUNDO
CRUZ HERRERA, Deceased, CYNTHIA
GUERRERO RODARTE, Individually and as
Parent and Next Friend of GAEL GUERRERO,
JULIANA FLORES, MARISELA GUERRERO,
LUCIANA GUERRERO, ARADAI RODARTE,
Individually and as Parent and Next Friend of
MALIE CALDERON, ISAAC CALDERON,
ISAAH CALDERON, and EMILY CALDERON,
Minor Children, PETER WIRTH, on behalf of the
Wrongful Death ESTATE OF ABRAHAM
CALDERON, Deceased, and CULLEN
HALLMARK on behalf of the Wrongful Death
ESTATE OF JOSE LUIS GUERRERO, Deceased,

Plaintiffs,

v.

Case No. D-101-CV-2023-01086
Judge Francis J. Mathew

SWIFT TRANSPORTATION, SWIFT
TRANSPORTATION OF ARIZONA, LLC,
RAFAEL RODARTE and JOHN DOES 1-10,

Defendants.

**SWIFT DEFENDANTS' RESPONSE TO PLAINTIFFS'
MOTION FOR ORDER TO SHOW CAUSE**

Defendants Swift Transportation and Swift Transportation Co. of Arizona, LLC, incorrectly named as Swift Transportation of Arizona, LLC (collectively, the "Swift Defendants"), by and through their counsel of record, Mayer LLP (Brian J. Fisher and Ryan T. Goodhue), file this Response to Plaintiffs' Motion for Order to Show Cause and state the following:

Swift has not paid the \$60,000 retainer invoice submitted by Gus Dimitrelos. Particularly given the nature of its Constitutional objections to the Court's amended sua sponte order appointing Mr. Dimitrelos, Swift could not pay Mr. Dimitrelos's invoice without potentially

forfeiting its constitutional rights, *United States v. Mendenhall*, 446 U.S. 544, 557–58 (1980), and, at minimum, forever “surrender[ing] the very protection” that things like the Fourth Amendment provide, *cf. Maness v. Meyers*, 419 U.S. 449, 462 (1975).

Swift does intend to seek certiorari review of the Supreme Court of New Mexico’s August 20, 2026 denial of Swift’s petition for writ of superintending control. “A judgment that terminates original proceedings in a state appellate court” is “final” for purposes of the United States Supreme Court’s certiorari jurisdiction under 28 U.S.C. § 1257(a). *Fisher v. Dist. Ct. of Sixteenth Jud. Dist.*, 424 U.S. 382, 385 n.7 (1976); *accord Madruga v. Superior Ct. of California*, 346 U.S. 556, 557 (1954) (holding same when writ of prohibition denied). Given the pending hearing on Plaintiffs’ motion to show cause, Swift intends to file its petition by October 5 (about half the time ordinarily allowed for a certiorari petition. *See* U.S. Sup. Ct. R. 13(1).

Swift intends to seek a stay of the show-cause hearing and any enforcement of the appointment order when it files its petition.

Otherwise, Swift has availed itself of the procedure that New Mexico law directs it to follow to meaningfully preserve its objections to the appointment order. Swift sought and did not obtain a writ of superintending control and orders like the appointment order are not collateral orders reviewable by writ of error, so, under *King v. Allstate Insurance Company*, it has to seek interlocutory review by “refus[ing] to comply, be[ing] held in contempt” and then “fil[ing] an appeal as of right from both the contempt judgment” and the underlying order. 2004-NMCA-031, ¶ 19, 135 N.M. 206, 86 P.3d 631; *see* NMSA 1978, § 39-3-15(A).

Respectfully submitted,

MAYER LLP

By: /s/ Brian J. Fisher
Brian J. Fisher
Ryan T. Goodhue

4101 Indian School Road NE, Suite 301N
Albuquerque, New Mexico 87110
Telephone: 505.483.1840
Email: BFisher@mayerllp.com
RGoodhue@mayerllp.com

*Counsel for Defendants Swift Transportation
and Swift Transportation Co. of Arizona, LLC,
incorrectly named as Swift Transportation of
Arizona, LLC*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading was served via the New Mexico Odyssey File & Serve system (along with a courtesy copy via email) and pursuant to Rule 1-005.2 NMRA to all counsel of record on September 21, 2026.

By: /s/ Brian J. Fisher
Brian J. Fisher

FILED 1st JUDICIAL DISTRICT COURT
Santa Fe County
9/27/2026 3:10 PM
KATHLEEN VIGIL CLERK OF THE COURT
Tatiana V Huerta

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

BARRY GREEN, as Personal Representative
of the Wrongful Death Estate of RAYMUNDO CRUZ HERRERA,
DECEASED, CYNTHIA GUERRERO RODARTE,
GAEL GUERRERO, JULIANA FLORES, and MARISELA GUERRERO,
LUCIANA GUERRERO, ARADAI RODARTE, Individually and
as Parent and Next Friend of MALIE CALDERON,
ISAAC CALDERON, ISAIAH CALDERON
AND EMILY CALDERON, Minor Children,
PETER WIRTH, ON BEHALF OF THE WRONGFUL DEATH
ESTATE OF ABRAHAM CALDERON, DECEASED, and
CULLEN HALLMARK ON BEHALF OF THE WRONGFUL DEATH
ESTATE OF JOSE LUIS GUERRERO, DECEASED,

Plaintiffs,

v.

Case No. D-101-CV-2023-01086

SWIFT TRANSPORTATION,
SWIFT TRANSPORTATION OF ARIZONA, LLC,
KNIGHT SWIFT TRANSPORTATION HOLDINGS, INC.,
RAFAEL RODARTE, and JOHN DOES 1-10,

Defendants.

**PLAINTIFFS' REPLY TO SWIFT DEFENDANTS' RESPONSE TO
MOTION FOR ORDER TO SHOW CAUSE**

COME NOW, Plaintiffs, by and through their undersigned counsel of record, and
for their Reply to Swift Defendants' Response for Motion for Order to Show Cause, state
as follows:

REPLY ARGUMENT AND AUTHORITIES

When developing a litigation strategy, the calculated violation of one Court order,
let alone several, should never be part of the planning. Yet, in this case, not only have the
Swift Defendants used the violation of several court orders as part of their overall litigation
strategy, they have insisted that the Court acquiesce to Swift's demands that the Court only

implement the sanctions that Swift deems acceptable. More simply put, Swift believes it can name its own price for its utter disregard for the Court's orders.

On June 3, 2026, Swift filed its Notice of Withdrawal of its Opposition to Plaintiffs' Motion for Sanctions. In the Notice, Swift admitted that it violated the Court July 1, 2025 and that a Swift trailer was the proximate cause at issue in this lawsuit. Swift then named its own price as to what sanctions it would accept and, to make sure the Plaintiffs and the Court understood that it was naming its own price, stating in two different footnotes that "Swift does not consent to and opposes any request for or the ordering of any sanction other than the ones explicitly identified in this paragraph" and "[a]gain, for the avoidance of doubt: Swift does not consent to and opposes any request for or the ordering of any sanction other than the ones explicitly agreed to in this notice."

Swift filed this Notice of Withdrawal two days after the Court entered the Sua Sponte Order Appointing Rule 11-706 Expert and then used the admission that it was involved in the subject fatal crash as the basis for its position that the June 1, 2026 Sua Sponte Order Appointing Rule 11-706 Expert should be immediately vacated. At the June 16, 2026 hearing on Swift's Emergency Motion to Vacate Sua Sponte Order Appointing Rule 11-706 Expert ("appointment order"), Kyle Steingreaber, arguing for Swift, assured the Court that it would never hear him walk back from the stipulation that "deemed finding that Swift owned the trailer that was a proximate cause of the collision at issue in this lawsuit, and a prohibition on the introduction of contrary evidence." See **Exhibit 1**, June 16, 2026 Hearing Transcript at 11:24-25; 12:1-3; **Exhibit 2**, Swift's June 3, 2026 Notice of Withdrawal of its Opposition to Plaintiffs' Motion for Sanctions.

Mr. Steingreaber's assurance to the Court that it would never hear him walk back from those admissions, made in the attempt to have the Court rely on his representations and vacate the appointment order based on his representations, have now shown themselves in context to be just what the needs of Swift's case required at that moment. Since that time, Swift's counsel Brian Fisher has disavowed all of the admissions made in the June 3, 2026 notice, pretending as if they were never made because they did not work in convincing the Court to overlook Swift's admitted violation of the July 1, 2025 Order and did not work in convincing the Court to vacate the June 1, 2026 appointment order. So, what Mr. Steingreaber represented to the Court was true, from a certain point of view. Mr. Steingreaber has never walked back from the admissions made in the June 3, 2026 Notice of Withdrawal. His co-counsel, Mr. Fisher, walked them back for him. Swift disavowed the statements it made in the June 3, 2026 Notice of Withdrawal of its Opposition to Plaintiffs' Motion for Sanctions once the Court refused to vacate the appointment order.

This case is scheduled for a jury trial on the January 4, 2027 docket. Nothing would make the Swift Defendants happier than for its violation of two court orders to be rewarded with an opportunity to tie this case up for a year or more in the appellate courts. Swift would simply regard this as a cost of doing business. Meanwhile, the family members of the three people who lost their lives in the May 21, 2022 crash, along with the injured survivors, would continue to be denied their day in court.

As the Plaintiffs explained in the June 12, 2026 Supplemental Motion for Sanctions, Swift and its related entities have a long history of disdain for their discovery obligations and the authority of the Courts. Swift's actions in this case are just business as usual. *See e.g. Ashton v. Knight Transp., Inc.*, 772 F. Supp. 2d 772 (N.D. Tex. 2011); *Buck v. Swift*

Transp. Co., 2013 U.S. Dist. LEXIS 134091 (M.D. Pa. Sep. 19, 2013); *Swift Transp. Co. of Ariz., LLC v. Angulo*, 716 F.3d 1127 (8th Cir. 2013); *Piron v. Swift Transp. Co.*, 2018 Ariz. Super. LEXIS 1461; *Ewald v. Baweke, Pierre, Swift Transportation Co. of Arizona, et al*, 16-2018-CA-00343 (4th Jud. Cir. Fla.) (July 14, 2020).

For litigation advantage, Swift seeks to have this case delayed and moved to the court of appeals by passively-aggressively demanding to be held in contempt and have a contempt judgment pursuant to *King v. Allstate Ins. Co.*, 2004-NMCA-031, ¶ 19, 135 N.M. 206 and NMSA 1978, § 39-3-15(A). *King*, however, is not intended to be instructional, nor is it intended to provide cover for the outright refusal to comply with a court order. *King* does not endorse the procedure Swift wants to take here. It does not bless what Swift is trying to do as legitimate. It just says what the consequences are if a party deliberately refuses to comply with a court order when a party thinks the order is wrong. The fact that this is Swift's preferred tactic reinforces why the Court entered the 11-706 appointment order in the first place: Swift cannot refuse to comply with a court order and use that refusal to comply as both a sword and a shield.

Simultaneously, Swift has represented to the Court that it will file a Writ for Petition for Certiorari to the United States Supreme Court, seeking review of the Supreme Court of New Mexico's denial of its August 20, 2026 Petition for Writ of Superintending Control before October 5, 2026. While Swift represents to the Court this will be done pursuant to its intent to "to seek a stay of the show-cause hearing and any enforcement of the appointment order when it files its petition," *see* Response at 2, there is little doubt Swift will also seek to prevent the Court from holding the October 15, 2026 hearing on Plaintiff's Supplemental Motion for Sanctions and entering a ruling on that Motion. In fact, given

that Swift sought a stay of the appointment order and “any proceedings thereon” in its Petition to the Supreme Court of New Mexico, it is very likely that Swift will also seek a full stay of this case in its Petition for Writ of Certiorari to the United States Supreme Court, despite its current representation that it “intends to seek a stay of the show-cause hearing and any enforcement of the appointment order when it files its petition.” Given Swift’s history of malleability in this case, it is reasonable to believe that a representation made to this Court on September 21, 2026 will be different than what Swift will represent in the Petition it intends to file on or before October 5, 2026.

As this Court is aware, Swift has also admitted to violating the Court’s July 1, 2025 order, which is one of the primary bases for the sanctions requested in the Supplemental Motion for Sanctions that will be heard by the Court on October 15, 2026. A party openly violating a court order is rare. A party openly violating two court orders in one case should be unthinkable. Swift’s deliberate and confessed violation of at least two of this Court’s orders assuredly warrants a contempt finding.

But because a contempt judgment would reward Swift’s tactics with an immediate right of appeal before this Court resolves the issue of what sanctions against Swift are appropriate, just, and fundamentally fair, the Plaintiffs respectfully suggest that the Court should enter a finding, but not a judgment, against Swift for its admitted contempt of court for the failure to comply with the Court’s June 24, 2026 Amended Sua Sponte Order Appointing Rule 11-706 Expert. Any sanction, sentence, or judgment for Swift’s contempt of the Rule 11-706 order should be deferred until after the United States Supreme Court has disposed of Defendant Swift’s forthcoming Petition for Writ of Certiorari. *See e.g. Henderson v. Henderson*, 1979-NMSC-075, 93 N.M. 405 (a contempt finding, without

sentence, is not appealable under NMSA § 39-3-15). Meanwhile, the case should continue to move forward and be tried to a jury during the Court's January 4, 2027 docket consistent with the pre-trial order and any other orders that will be entered by the Court prior to the commencement of trial.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter a finding of contempt, but decline to impose any sanction, judgment, or sentence until the United States Supreme Court has rendered its final decision on Defendant Swift's forthcoming Petition for Writ of Certiorari, and grant such further and other relief as the Court deems just and proper.

Respectfully Submitted,

GRAYSON LAW OFFICE, LLC

/s/ Brian G. Grayson

Brian G. Grayson, Esq.

3901 Georgia St. NE Suite A-2-A

Albuquerque, NM 87110

Tel: (505) 273-8570; Fax: (505) 214-5007

brian@graysonlawoffice.net

and

ANDY RAY LAW, LLC

Andy Ray, Esq.

P.O. Box 640

Tijeras, NM 87059

(505) 847-3300 ph

(505) 847-3360 fax

andy@andyraylaw.com

*Attorneys for Plaintiffs Barry Green, as
Personal Representative of the Wrongful
Death Estate of Raymundo Cruz Herrera,
Cynthia Guerrero Rodarte, Gael Guerrero,
Juliana Flores, and Marisela Guerrero*

and

SCHERR LAW FIRM, PLLC
 Maxey Scherr, Esq.
 521 Texas Ave.
 El Paso, Texas 79901
 (915) 881-4111
 (915) 881-4119 Facsimile
mscherr@scherrlawfirm.com

James. F. Scherr, Esq.
 Chip Orr, Esq.
 SCHERR LAW
 1790 N Lee Trevino Dr., Ste. 601
 El Paso, Texas 79936
 (915) 544-0100
 (915) 532-1759 Facsimile
jim@jamesescherrlaw.com

Daniela Labinoti, Esq.
 LAW FIRM OF DANIELA LABINOTI,
 P.C.
 707 Myrtle Ave.
 El Paso, Texas 79901
 (915) 581-4600
 (915) 581-4605 Facsimile
Daniela@labinotilaw.com

*Attorneys for Plaintiffs Luciana Guerrero,
 Aradai Rodarte, Individually and as Parent
 and Next Friend of Malanie Calderon, Isacc
 Calderon, Isaiah Calderon and Emily
 Calderon, Minor Children, Peter Wirth, on
 Behalf of the Estate of Abraham Calderon,
 Deceased, and Cullen Hallmark on Behalf of
 the Estate of Jose Luis Guerrero, Deceased*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the
 27th day of September, 2026 this Reply
 was e-filed and served on all counsel of record.

/s/ Brian G. Grayson
 Brian G. Grayson, Esq.

1 MR. STEINGREABER: Yes, Your Honor.

2 THE COURT: Any reply?

3 MR. STEINGREABER: I agree absolutely,
4 unequivocally, Your Honor, that this is an issue, big
5 picture, about the integrity of not just the Court's
6 order and abeyance of the Court's order, but the
7 judicial system as a whole. You're -- you're not going
8 to hear me disagree with that today. You're not going
9 to hear me disagree with that tomorrow.

10 But the question we're here on today is not
11 the appointment of an 11-706 expert as a sanction. The
12 Court appointed the 11-706 expert to decide whether a
13 violation of the Court's order occurred. That discrete
14 issue isn't an issue.

15 If the plaintiffs want to advocate for some
16 more significant sanction than the ones that they asked
17 for in their original motion -- I emphasize that, Your
18 Honor, because the specific sanctions that we agreed to
19 I pulled out of plaintiffs' motion, their original
20 motion for sanctions.

21 That's not a question of 11-706
22 appointment. And it's not a question, Your Honor, of
23 Swift trying to act like nothing happened. Because,
24 Your Honor, as a matter of public record, Swift has
25 admitted that mistakes were made, and they were serious

1 mistakes.

2 You're never going to hear me walk back
3 from that, either, Your Honor. We have agreed to the
4 sanctions that the plaintiffs asked for in their motion.

5 And the plaintiffs have accepted Swift's money and
6 demanded Swift's money in connection with that
7 admission.

8 What we're really here for today, Your
9 Honor, is the much more discrete question of whether
10 there is a continued need for an 11-706 expert to aid
11 the Court in determining whether Swift complied or did
12 not comply with the Court's order.

13 Now, if Plaintiffs have a question -- or
14 question the veracity of a future discovery response, of
15 the doc- -- of the materials we're going to produce --
16 and, Judge, I know I can't press the reset button. I
17 know that everything I'm saying to you today, everything
18 I'm saying to Plaintiffs today, and everything that our
19 side of the room is going to say to you going forward in
20 this case is going to have the taint of this issue on
21 it.

22 So I know that there's going to be
23 skepticism going forward. But, again, we're focused on
24 the much more narrow issue of whether right now an
25 11-706 expert is appropriate. And as the case is

case, both a deemed finding that a Swift-owned trailer was a cause of the collision at issue in this lawsuit, plus a prohibition on the introduction of contrary evidence, and an award of the reasonable attorneys' fees and costs and expert fees Plaintiffs incurred in prosecuting their motion. Non-production of information Plaintiffs believe necessary to establish the predicate fact to their claims against Swift (that a Swift trailer was involved in the accident) delayed Plaintiffs' ability to prove their theory of the case, and, at this late juncture, it is not clear what information, if any, Swift could produce that would ameliorate that delay. Neither Plaintiffs nor the Court should have to longer or expend additional resources for that question to be answered. And Plaintiffs undoubtedly incurred expenses that would not otherwise have been incurred to pursue their motion to compel. As importantly, Swift recognizes the delay that resolution of this discovery issue has introduced into the case, as well as the judicial resources, including multiple hearings, spent on it.

Conclusion

Accordingly, Swift thinks it appropriate that the Court find Swift did not comply with the Court's July 1, 2025 order, and grant Plaintiffs' motion insofar as it seeks, as sanctions,

- (1) a finding that Swift violated the July 1, 2025 order;
- (2) a deemed finding that Swift owned the trailer that was a proximate cause of the collision at issue in this lawsuit, and a prohibition on the introduction of contrary evidence; and
- (3) an award of the reasonable attorneys' fees and costs Plaintiffs incurred in prosecuting their motion.

To the extent that "costs" would not otherwise include reasonable and necessary expert expenses Plaintiffs incurred in bringing their motion, Swift will pay those expenses too.