



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-38996

**STATE ex rel JACOB R. CANDELARIA,
in his capacity as STATE SENATOR, and
GREGORY BACA, in his capacity as STATE SENATOR,**

Petitioners,

v.

**MICHELLE LUJAN GRISHAM,
in her capacity as GOVERNOR,**

Respondent,

and

**TIM EICHENBERG, in his capacity as
STATE TREASURER,**

Real Party in Interest.

ORIGINAL PROCEEDING ON MANDAMUS

RESPONSE BRIEF

Respectfully submitted by:

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TABLE OF CONTENTS

Table of Contents..... 2

Table of Authorities..... 3

Statement of the Case 5

Basis for the Court's Jurisdiction 6

Propriety of Mandamus 8

Interest of the Real Party in Interest 8

Introduction and Summary of Argument..... 10

1. The Separation of Powers Doctrine in New Mexico 11

2. Application of the Separation of Powers Doctrine to ARPA Funds 13

Conclusion 20

Signature 21

Certificate of Service 21

STATEMENT OF PAGE/WORD COUNT COMPLIANCE:

Counsel used Microsoft Word for iMac with a proportionally spaced Times New Roman typeface in 14 point font. The body of the document consists of 3,775 words total.

TABLE OF AUTHORITIES

New Mexico Case Authority:

<i>Bank of New York v. Reg'l Hous. Auth. For Region Three</i> , 2005-NMCA-116, 138 N.M. 389	9
<i>Grisham v. Romero</i> , 2021-NMSC-009, 483 P.3d 545.....	7
<i>In re Sloan</i> , 1891-NMSC-011, 5 N.M. 590	8
<i>New Mexico Bldg. & Const. Trades Council v. Dean</i> , 2015-NMSC-023, 353 P.3d 1212	6, 9
<i>Mowrer v. Rusk</i> , 1980-NMSC-113, 95 N.M. 48	13
<i>State ex rel. Clark v. Johnson</i> , 1995-NMSC-048, 120 N.M. 562	6, 8, 13, 18, 19
<i>State ex rel. Holmes v. State Bd. of Fin.</i> , 1961-NMSC-172, 69 N.M. 430.....	13
<i>State ex rel. Schwartz v. Johnson</i> , 1995-NMSC-083, 120 N.M. 820	13
<i>State ex rel. Sego v. Kirkpatrick</i> , 1974-NMSC-059, 86 N.M. 359 ...	14, 15, 19
<i>State ex rel. State Corp. Comm'n v. Zinn</i> , 1963-NMSC-048, 72 N.M. 29	7
<i>State ex rel. Taylor v. Johnson</i> , 1998-NMSC-015, 125 N.M. 343	6, 11, 13
<i>State ex rel. Townsend v. Court of Appeals</i> , 1967-NMSC-128, 78 N.M. 71	7

New Mexico Statutes and Rules:

New Mexico Constitution, Art. III, § 1	5, 11, 13
New Mexico Constitution, Art. IV, § 1	11

New Mexico Constitution, Art. IV, § 22	12
New Mexico Constitution, Art. IV, § 30	5, 12, 17, 18, 20
New Mexico Constitution, Art. V, § 1	8
New Mexico Constitution, Art. V, § 4	12, 20
New Mexico Constitution, Article VI, § 1	20
NMSA 1978, § 6-10-10	9
NMSA 1978 § 8-6-1	8
NMSA 1978, § 8-6-3	8, 9, 17

Case Law Authority from Federal or Sister Jurisdictions:

<i>American Rescue Plan Act of 2021</i> , Pub. L. No. 117-2, § 9901 H.R. 1319, 117th Cong. (2021)	5
<i>Coronavirus Aid, Relief, and Economic Security Act of 2020</i> , Pub. L. No. 116-136, H.R. 748, 116th Cong. (2020)	5
42 U.S.C. § 802	5, 6, 14, 15, 16, 17, 19
<i>Gregory v. Ashcroft</i> , 501 U.S. 452, 111 S.Ct. 2395 (1991).....	11
<i>Nixon v. Administrator of Gen. Servs.</i> , 433 U.S. 425, 97 S.Ct. 2777 (1977)	13

Other Authority:

The Declaration of Independence (U.S. 1776)	10
The Federalist No. 10 (James Madison)	10
The Federalist No. 47 (James Madison)	11
The Federalist No. 51 (James Madison)	10

New Mexico State Treasurer Tim Eichenberg, Real Party in Interest, in compliance with this Court's September 30, 2021 Order requesting a response to the verified emergency petition for writ of mandamus and request for stay filed herein, responds as follows:

STATEMENT OF THE CASE

The issues raised by Petitioners implicate the constitutional doctrine of separation of powers. Petitioners allege that the Governor violated the New Mexico Constitution, Article III, § 1, and infringed upon the exclusive province of the Legislature provided in the New Mexico Constitution, Article IV, § 30, when she allegedly authorized payment of funds from the New Mexico State Treasury without appropriations made by the Legislature. The relevant federal program is H.R. 748: *Coronavirus Aid, Relief, and Economic Security Act of 2020*, Pub. L. No. 116-136, H.R. 748, 116th Cong. (2020) (the CARES Act); as amended by the *American Rescue Plan Act of 2021*, Pub. L. No. 117-2, § 9901 (codified at 42 U.S.C. §§ 802-805), H.R. 1319, 117th Cong. (2021) (ARPA), specifically 42 U.S.C. § 802 (the Coronavirus State Fiscal Recovery Fund).

42 U.S.C. § 802 allocates almost \$220 billion “for making payments [] to States, territories, and Tribal governments to mitigate the fiscal effects stemming from the public health emergency with respect to the Coronavirus Disease (COVID–19),” with \$195.3 billion reserved for the States and District of

Columbia. 42 U.S.C. § 802(a)(1). The funds are intended to support—but do not dictate—the States’ response to the COVID-19 public health emergency, to assist essential workers, to support government services, and for infrastructure investment. *See* 42 U.S.C. § 802(c)(1)(A) through (D).

New Mexico accepted the offer of ARPA funds and, to date, has received one billion seven hundred fifty one million five hundred forty two thousand eight hundred thirty five dollars (1,751,542,835). *See* 42 U.S.C. § 802(d)(1). The ARPA funds were deposited into New Mexico's General Fund Investment Pool, an interest-bearing account.

BASIS FOR THIS COURT'S JURISDICTION

This Court may exercise original jurisdiction to consider a case where: 1) the issue presents a fundamental question of great public concern; 2) the relevant facts are virtually undisputed; 3) the purely legal issue will eventually come before this Court; and 4) early resolution of the dispute is desirable. *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 17, 120 NM 562. Consideration of these questions reveals ample basis for this Court to exercise original jurisdiction in this case.

The balance and maintenance of governmental power is of great public concern, as is accountability in the proper expenditure of public funds. *See New Mexico Bldg. & Const. Trades Council v. Dean*, 2015-NMSC-023, ¶ 7, 353 P.3d 1212 (*citing State ex rel. Taylor*, 1998-NMSC-015, ¶ 17, 125 N.M. 343). No

factual issues require clarification. This dispute concerns a purely legal question—the limits upon executive and legislative power under the state constitution at the highest levels of state government. Because of these questions' significance to the balance of power among government branches under the circumstances, they eventually will reach this Court. Finally, early resolution of this case is necessary. Indeed, the public need created by the COVID-19 public health emergency means time is of the essence to resolve this dispute.

This Court has recently noted that extraordinary writs may be appropriate even if there would be a remedy by appeal, where the public interest implications of the question posed are significant. *Grisham v. Romero*, 2021-NMSC-009, ¶ 16, 483 P.3d 545 (citing *State ex rel. Townsend v. Court of Appeals*, 1967-NMSC-128, ¶ 10, 78 N.M. 71 (holding that “prohibition will lie even where there is a remedy by appeal, where it is deemed to be in the public interest to settle the question involved at the earliest moment”). Thus, “it is not absolutely essential that the inferior court have an opportunity to pass upon the question involved.” *Grisham*, 2021-NMSC-009, ¶ 16 (citing *Townsend*, 1967-NMSC-128, ¶ 11 and *State ex rel. State Corp. Comm'n v. Zinn*, 1963-NMSC-048, ¶¶ 13-14, 18, 72 N.M. 29, in which this Court granted a writ of prohibition against the district court prior to the court's hearing on a requested temporary injunction).

As New Mexico citizens continue to struggle with the financial effects of the COVID-19 public health emergency, and as decisions about funding priorities for recovery are made, it is critically important that the members of the legislative and executive branches clearly understand and abide by their constitutional obligations and limitations. The proper appropriation and expenditure of public funds at issue in this case affects every New Mexico citizen. It is necessary and proper for this Court to exercise original jurisdiction in this matter.

PROPRIETY OF MANDAMUS

Mandamus is a means to prohibit unlawful or unconstitutional official action. *State ex rel. Clark*, 1995-NMSC-048, ¶ 19. The authority to prohibit unlawful official conduct is implicit in the nature of mandamus. *See id.*, citing *In re Sloan*, 1891-NMSC-011, ¶ 11, 5 N.M. 590. Petitioners allege that Respondent infringed upon the legislative prerogative in the appropriation of ARPA funds. Mandamus is the necessary relief.

INTEREST OF THE REAL PARTY IN INTEREST

Real Party in Interest Tim Eichenberg is the duly elected New Mexico State Treasurer, a member of the executive department of the State of New Mexico, with an office at the seat of government of the state. N.M. Const. Art. V, § 1; NMSA 1978 § 8-6-1. The Treasurer has the statutory duty to "disburse the public money upon warrants drawn according to law and not otherwise[.]" NMSA 1978, § 8-6-3.

As set forth above, ARPA funds were allocated to the state of New Mexico. The Treasurer received and deposited the funds in accordance with the provisions of NMSA 1978, § 8-6-3 (providing that the state treasurer shall receive and keep all money of the state except when otherwise specially provided) and NMSA 1978, § 6-10-10 (providing that the state treasurer having on hand any public money by virtue of the office shall deposit that money in financial institutions designated and authorized to receive the deposits of all money received or collected by the treasurer).

As a member of the executive branch, the Treasurer is charged in the first instance to uphold the laws of New Mexico. *See New Mexico Bldg. & Const. Trades Council*, 2015-NMSC-023, ¶ 7 (noting that "[it] is duly established that the legislative branch makes the laws, the executive branch executes the laws, and our [Constitution prohibits any branch of government from usurping the power of [an]other branch[]" (citation omitted)). The Treasurer takes no position on the Petitioner's request for stay of proceedings and awaits this Court's decision regarding the proper disposition and disbursement of the contested funds. *See Bank of New York v. Reg'l Hous. Auth. For Region Three*, 2005-NMCA-116, ¶ 26, 138 N.M. 389 (holding that it is proper for a trustee faced with competing claims to invoke the remedy of interpleader as a neutral stakeholder).

INTRODUCTION AND SUMMARY OF ARGUMENT

People create governments to “secure [their] rights.” *The Declaration of Independence*, ¶ 2 (U.S. 1776). But governments are run by human beings who characteristically have a human tendency toward the pursuit of self-interest, making concentrated governmental power dangerous to liberty. *See The Federalist No. 51* (James Madison). The American political tradition therefore holds that essential liberty is safe only when governmental power is dispersed and divided by a system of “checks and balances” that sets different parts of government apart from—and occasionally against—others. As Madison famously stated:

It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

Id.; *see also The Federalist No. 10* (James Madison) (describing human tendency toward the pursuit of self-interest).

Like its federal counterpart, the New Mexico Constitution establishes three independent branches of government and prohibits any branch from usurping the power of the others:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no

person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others....

N.M. Const. Art. III, § 1. This provision articulates one of the cornerstones of democratic government: that the accumulation of too much power within one branch poses a threat to liberty. *State ex rel. Taylor*, 1998-NMSC-015, ¶¶ 19-20, citing *Gregory v. Ashcroft*, 501 U.S. 452, 458–59, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991); and citing *The Federalist No. 47* (James Madison).

The New Mexico Constitution, Article IV, § 30 and interpretive case law, mandate that money paid into the State treasury, whether derived from federal legislation, State taxation, or any other source, if not designated to a particular institution or to the administration and sustenance of a specific federal program, may be paid out of the State Treasury only by legislative action in the form of an appropriation or other statutory enactment. Legislative action—the power to make law and to appropriate money from the State Treasury—rests exclusively with the Legislature.

1. The Separation of Powers Doctrine in New Mexico

The role of the Legislature and its accountability for legislative action is provided in the New Mexico Constitution at Article IV, § 1:

The legislative power shall be vested in a senate and house of representatives which shall be designated the legislature of the state of New Mexico, and shall hold its sessions at the seat of government.

The people reserve the power to disapprove, suspend and annul any law enacted by the legislature, except general appropriation laws; laws providing for the preservation of the public peace, health or safety; for the payment of the public debt or interest thereon, or the creation or funding of the same, except as in this constitution otherwise provided; for the maintenance of the public schools or state institutions, and local or special laws.

The Legislature has the sole power to appropriate public money:

Except interest or other payments on the public debt, money shall be paid out of the treasury only upon appropriations made by the legislature. No money shall be paid therefrom except upon warrant drawn by the proper officer. Every law making an appropriation shall distinctly specify the sum appropriated and the object to which it is to be applied.

Art. IV, § 30.

In contrast, the Governor is empowered to "take care that the laws be faithfully executed." N.M. Const. Art. 5, § 4. As a critical check and balance to legislative action, the Governor has veto power over every bill passed by the Legislature before it becomes law and may approve or disapprove any part or parts of general appropriation bills. N.M. Const. Art. IV, § 22.

New Mexico's founders clearly intended to make the spending of public funds a matter of governmental action involving all three branches of the government. By providing that no money shall be paid out of the State Treasury except "upon appropriations made by the legislature[,] " New Mexico's founders forged links in the system of checks and balances of New Mexico's tripartite State government to ensure accountability and oversight of public spending. The

founders' clear intention was that legislative action is required before public funds can be spent.

This Court must give effect to the purpose and intent of Article III, § 1 of the New Mexico Constitution, and intervene where one branch of government encroaches upon the authority of another branch. *State ex rel. Clark*, 1995-NMSC-051, ¶ 32; *Mowrer v. Rusk*, 1980-NMSC-113, ¶ 28, 95 N.M. 48. Infringement occurs when the action by one branch prevents another branch from accomplishing its constitutionally assigned functions. *State ex rel. Clark*, 1995-NMSC-051, ¶ 34 (citing *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 433, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977)). A violation occurs when a branch other than the Legislature, determines “how, when, and for what purpose the public funds shall be applied in carrying on the government.” *State ex rel. Taylor*, 1998-NMSC-015, ¶ 24, citing *State ex rel. Schwartz v. Johnson*, 1995-NMSC-083, ¶ 14, 120 N.M. 820 (quoting *State ex rel. Holmes v. State Bd. of Fin.*, 1961-NMSC-172, ¶ 33, 69 N.M. 430).

2. Application of the Doctrine of Separation of Powers to the ARPA Funds

This constitutional struggle is between the executive and legislative branches of New Mexico's government over fiscal control of federal funds allocated to New Mexico under ARPA. The funds were reserved to broad categories of authorized expenditure:

(A) to respond to the public health emergency with respect to the Coronavirus Disease 2019 (COVID–19) or

its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality;

(B) to respond to workers performing essential work during the COVID–19 public health emergency by providing premium pay to eligible workers of the State, territory, or Tribal government that are performing such essential work, or by providing grants to eligible employers that have eligible workers who perform essential work;

(C) for the provision of government services to the extent of the reduction in revenue of such State, territory, or Tribal government due to the COVID–19 public health emergency relative to revenues collected in the most recent full fiscal year of the State, territory, or Tribal government prior to the emergency; or

(D) to make necessary investments in water, sewer, or broadband infrastructure.

42 U.S.C. § 802(c)(1)(A) through (D). The funds were not allocated to specific public works, institutions, programs, or designated agencies. *Compare and contrast State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶¶ 48-49, 86 N.M. 359. *State ex rel. Sego* held that, in the circumstances presented, the Legislature lacks authority to appropriate non-state funds "related solely to Higher Education" where the powers of control and management of these institutions was vested in constitutionally created boards of regents. *Id.* at ¶¶ 46-49. Requiring that federal funds—including those received in trust by officers and agencies of the executive branch—be paid into the State Treasury and expended by the Legislature would result in legislative interference with congressional mandates. *See id.* at ¶ 51. Federal funds received by State officers or institutions subject to conditions

specified by federal statutes or regulations are impressed with a trust and not subject to legislative appropriation. *See, e.g., id. at ¶¶ 41-49.* The recipient of such designated funds must comply with the requirements imposed by federal law. In contrast, federal funds put in the State Treasury without conditions are subject to the legislative power of appropriation.

The ARPA funds granted to New Mexico under 42 U.S.C. § 802(c) could have been allocated by congressionally enacted legislation creating specific programs to be implemented by the executive branches of the states or provided directly to the running of those programs. That is not the course that Congress chose. Instead, Congress gave the states authority to allocate the funds according to needs assessments made by state decision-makers, driven by state considerations, and priorities. *See* 42 U.S.C. § 802(c). Within the eligible use categories outlined in ARPA's funding provisions, New Mexico has flexibility to determine how best to use the funds to meet the needs of its communities and populations. *See* www.federalregister.gov/d/2021-10283/p-41 (last viewed 10/11/21).

The language in ARPA is permissive, not mandatory; ARPA funds were provided for discretionary spending by states within the broad categories established in 42 U.S.C. § 802(c)(1)(A) through (D). The funds are intended to provide significant resources and support to State governments in responding to the

impact of COVID-19 and in their efforts to contain COVID-19 on their communities, residents, and businesses, building upon and expanding previous support. *See* www.federalregister.gov/d/2021-10283/p-29 (last viewed 10/11/2021). "Implementation of the [funding] also reflects the importance of public input, transparency, and accountability." *See* www.federalregister.gov/d/2021-10283/p-42 (last viewed 10/11/2021). Disbursement of ARPA funds can properly be made only through the appropriation process required by Article IV, § 30.

The interim final rule implementing 42 U.S.C. § 802(c) emphasizes the discretionary nature of the funds, identifying a non-exclusive list of programs or services that may be funded as responding to COVID-19 or the negative economic impacts of the COVID-19 public health emergency, "along with considerations for evaluating other potential uses of the [funds] not explicitly listed." *See* www.federalregister.gov/d/2021-10283/p-47 (last viewed 10/11/21). The interim final rule stresses the "flexibility for recipients to use payments from the [funds] for programs or services that are not identified on these non-exclusive lists but that fall under the terms of section [802(c)(1)(A)] by responding to the COVID-19 public health emergency or its negative economic impacts." *Id.*

New Mexico may use the ARPA funds to provide assistance to households, small businesses, and nonprofits, or aid to impacted industries, including—but not

limited to—tourism, travel, and hospitality and to "meet the wide range of public health and economic impacts of the COVID-19 public health emergency." and to provide incentive pay to eligible workers. 42 U.S.C. § 802(c)(1)(A) and (B); see also <https://www.federalregister.gov/d/2021-10283/p-34> (last viewed 10/12/21). The funds can shore up shortfalls compared to 2019 or 2020 fiscal year revenues.¹ 42 U.S.C. § 802(c)(1)(C). Some or all funds may be used to make necessary investments in water, sewer, or broadband infrastructure (the only specification not specifically tied to the COVID-19 public health emergency). 42 U.S.C. § 802(c)(1)(D).

The Treasurer respectfully submits that the question of whether some or all funds should be used for any or all of these areas requires considerations of public policy and public priorities that must be conducted in the open with opportunity for public participation, which can and will only happen in a legislative process. The only reasonable interpretation of ARPA's broad granting language is that it allocates ARPA funds to State Treasuries and authorizes individual States, acting pursuant to authority granted under State law, to appropriate the ARPA funds to needs arising in any of these general areas. New Mexico state law is clear that money shall be paid out of the Treasury only upon appropriations made by the

¹ New Mexico cannot use the funds to directly or indirectly offset a reduction in the net State tax revenue resulting from a change in law, regulation, or administrative interpretation or to shore up pension funds. 42 U.S.C. § 802(c)(2)(A) and (B).

Legislature and warrants drawn by proper officers. N.M. Const., Art. IV, § 30. It follows that, without appropriations by the Legislature under Article IV, § 30, the Treasurer may not disburse public ARPA funds because warrants for spending drawn outside the legislative process are not "according to law." NMSA 1978, Section 8-6-3.

The federal government cannot, by allocation of funds, endow a Governor, even a well-intentioned Governor acting in the aftermath of a public health emergency, with powers greater than those granted by the State Constitution. In *State ex rel. Clark*, 1995-NMSC-048, this Court rejected the possibility that federal law could give a Governor the power to ignore contrary state law. The Governor had asserted that the federal Indian Gaming Regulatory Act (IGRA) gave him authority to form compacts with Indian tribes concerning gambling on reservations even if state law prohibited him from entering such compacts. This Court declared, "[t]he Governor has only such authority as is given to him by our state Constitution and statutes enacted pursuant to it." *Id.*, at ¶ 44. This Court doubted whether "Congress, in enacting the IGRA, sought to invest state governors with powers in excess of those that the governors possess under state law." *Id.* This Court was also "confident that the United States Supreme Court would reject any such attempt by Congress to enlarge state gubernatorial power." *Id.*

If ARPA funds had been designated to specific New Mexico state offices or agencies subject to the condition that they be used only for objects specified by federal statutes or regulations, the money would have been impressed with a trust and not subject to appropriation by the Legislature. The recipient(s) of such funds would have no choice but to comply with the requirements imposed by federal law, and the executive power to ensure compliance with the law would have been properly used to allocate such funds. As this Court held in *Sego*, federal funds dedicated to institutions headed by Boards of Regents or received in trust by officers and agencies of the executive branch are not subject to appropriation by the Legislature. *State ex rel. Sego*, 1974-NMSC-059, ¶ 48.

But not all federal money is received in trust. Indeed, *Sego* itself acknowledged federal funds that were subject to legislative appropriation. *State ex rel. Sego*, 1974-NMSC-059, ¶ 20. Federal disbursements and reimbursements may be made to a State without conditions imposed as to expenditure. This money is subject to the legislative power of appropriation. Because 42 U.S.C. § 802(c)(1)(A) through (D) allows money to be disbursed to New Mexico for expenditure within broad categories of public policy and need, it is subject to appropriation by the Legislature, which is then subject to gubernatorial veto, judicial oversight, and public referenda. *See* New Mexico Constitution Art. V, § 4;

Article VI, § 1; *and see* Art. IV, § 30, ¶ 2 (reserving to the people the power to disapprove, suspend, and annul any law (with exceptions)).

To hold otherwise will eliminate constitutionally sourced legislative authority from the appropriation equation, weaken the central role of the legislative branch in public spending, and allow disbursement of public funds without necessary oversight and public accountability. Unless this Court gives full weight to these essential principles and provisions of our Constitution, the Legislature will be excluded from its role in the appropriation of funds, with the regrettable result that ARPA funds will be disbursed in a manner contrary to the laws of New Mexico.

CONCLUSION

Governmental action or inaction as to any particular program, public policy initiative, or governmental interest must be subject to participation by New Mexico citizens through the legislative process in our participatory democracy.

Expenditure of ARPA funds without legislative appropriation subject to the Governor's veto and Judicial scrutiny cannot be countenanced in light of the clear mandate of Article IV, § 30. Recognition of the exclusive appropriation power constitutionally vested in the Legislature warrants the issuance of mandamus as requested by Petitioners.

Respectfully submitted,

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I certify that this document was electronically filed and served using the Odyssey file-and-serve platform on October 12, 2021.

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