IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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

Petitioners,

v. **Case No. S-1-SC-38996**

MICHELLE LUJAN GRISHAM, in her capacity as GOVERNOR,

Respondent,

and

TIM EICHENBERG, in his capacity as STATE TREASURER,

Real Party in Interest.

GOVERNOR MICHELLE LUJAN GRISHAM'S RESPONSE BRIEF

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INTRODUCTION

This original proceeding arises out of a disagreement between two legislators (collectively, "Petitioners") and the Governor over which branch of government should dictate the spending of hundreds of millions of dollars in federal funds pursuant to federal law. While the Governor agrees with Petitioners that the question of whether federal funds may be "paid out of the treasury" without legislative appropriation pursuant to Article IV, Section 30 of the New Mexico Constitution is of fundamental importance, the Court need not answer it here. Both Petitioners and the Treasurer fail to mention that the funds at issue are properly held in a suspense account pursuant to NMSA 1978, Section 6-10-3(C) (2003), and NMSA 1978, § 6-10-41 (1977), because they "ha[ve] not yet been earned so as to become the absolute property of the state." The Attorney General has previously concluded, and this Court has indicated, that these suspense accounts do not implicate Article IV, Section 30's appropriation requirement because they fall outside of the state treasury. Accordingly, the Court should not concern itself with the "constitutional emergency" Petitioners wish to incite.

However, even if the funds were not in a suspense account—thus placing them "in the treasury"—they are not subject to appropriation because the State is merely holding them as a custodian for the federal government. As this Court categorically acknowledged nearly fifty years ago, "federal contributions are not the subject of the

appropriative power of the legislature[.]" *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶ 50, 86 N.M. 359, 524 P.2d 975 (quoting *MacManus v. Love*, 179 Colo. 218, 222, 499 P.2d 609 (1972)). The Court should decline Petitioners' and the Treasurer's attempts to cabin *Sego*'s categorical holding to institutions of higher learning, as the logic applies equally to the Governor's constitutional role to faithfully execute the laws. Moreover, there are strong policy reasons for setting such a categorical rule, such as providing a clear delineation of powers over federal funds. Nor would requiring appropriation of federal funds serve the underlying purpose of Article IV, Section 30 (i.e., to assure that the Legislature is responsible for appropriate *state* funds) because they are *federal* funds appropriated by Congress and governed by *federal* law.

Alternatively, if the Court is inclined to move away from *Sego*'s categorical rule, it should adopt an ad hoc approach to determining whether federal funds are subject to appropriation similar to that of recent jurisprudence from Colorado. The Court should consider factors such as the nature of the funds and the degree of flexibility given to the State for the process of allocating the funds and the purposes for which the funds may be used. Using Colorado cases as guideposts under this framework, the Court should determine that the funds at issue are more akin to custodial funds than state funds requiring appropriation. They are federal funds for which Congress has not specifically mandated to be allocated according to state law

applicable to state funds. Congress set specific categories for which the funds may be used, and the U.S. Department of the Treasury has provided significant guidance on what purposes the funds can and cannot be used for. Lastly, the State is under a continuing obligation to report to the Treasury how the funds are being spent and is subject to repaying the funds to the federal government if they are used improperly. Thus, even under an ad hoc analysis, the funds should not be subject to appropriation.

BACKGROUND

I. The American Rescue Plan Act

On March 11, 2021, the American Rescue Plan Act ("ARPA"), Pub. L. No. 117-2, 135 Stat. 4 (2021), was signed into law. ARPA is an extensive piece of federal legislation allocating $1.9 trillion for the purpose of rescuing our country's economy that was devastated by a pandemic and continuing to fight against COVID-19.[1] ARPA seeks to achieve an equitable economic recovery from the COVID-19 crisis through numerous appropriations. *See generally* ARPA §§ 1001-11006. ARPA provides $350 billion dollars in emergency funding to state, local, and tribal governments to help offset the unprecedented strain from the COVID-19 pandemic

[1] Press Release, *President Biden Announces American Rescue Plan*, The White House (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/legislation/2021/01/20/president-biden-announces-american-rescue-plan/.

on their revenues.[2] ARPA § 9901 (codified at 42 U.S.C. §§ 802 *et seq.*). The state level allocation of these emergency funds is the Coronavirus State and Local Fiscal Recovery Fund ("SLFRF").[3] *See* § 802. A state shall only use SLFRF funds to cover costs incurred by the state by December 31, 2024:

> **(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.

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[2] *FACT SHEET: The American Rescue Plan Will Deliver Immediate Economic Relief to Families*, U.S. Dept. of the Treasury, March 18, 2021, https://home.treasury.gov/news/featured-stories/fact-sheet-the-american-rescue-plan-will-deliver-immediate-economic-relief-to-families.

[3] This brief refers to these funds interchangeably as either the "SLFRF funds" or "ARPA funds."

Section 802(c)(1). ARPA places additional restrictions on the SLFRF funds. A state shall not use SLFRF funds to "either directly or indirectly offset a reduction in the net tax revenue of such State or territory resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax . . . or delays the imposition of any tax or tax increase." Section 802(c)(2)(A). No state shall use SLFRF funds to deposit in any pension fund. Section 802(c)(2)(B).

ARPA contemplated further guidance for the use of SLFRF funds by authorizing the Secretary of the U.S. Department of the Treasury ("U.S. Treasury") to promulgate any necessary or appropriate regulations for the SLFRF program. Section 802(f). The U.S. Treasury quickly promulgated an Interim Final Rule (the "Rule") on May 17, 2021. *See* Coronavirus State and Local Fiscal Recovery Funds, 86 Fed. Reg. 26786 (May 17, 2021) (codified as 31 C.F.R. §§ 35.1-35.12 (2021). The U.S. Treasury also issued additional guidance in June providing clarification regarding each recipient's compliance and reporting responsibilities under the SLFRF program.[4] This guidance is to be read in concert with ARPA, the Rule, and any other regulatory requirements. *Id.* at 1. One of the reasons the U.S. Treasury has implemented regulations and guidance is because "SLFRF-funded projects respond

[4] *State and Local Fiscal Recovery Funds Compliance and Reporting Guidance* at 4, U.S. Dept. of the Treasury (June 24, 2021), https://home.treasury.gov/system/files/136/SLFRF-Compliance-and-Reporting-Guidance.pdf [hereinafter "Compliance Guidance"].

to the COVID-19 public health emergency and meet urgent community needs. Swift and effective implementation is vital, and recipients must balance facilitating simple and rapid program access widely across the community and maintaining a robust documentation and compliance regime." *Id.* at 3.

The Rule "details recipients' compliance responsibilities and provides additional information on eligible and restricted uses of SLFRF award funds and reporting requirements." *Id.* at 4. The Rule not only defines key terms used in each of the four eligible use categories for SLFRF funds but also "establishes a framework for determining whether a specific project would be eligible under the SLFRF program[.]" *Id.*; *see also* 31 C.F.R. §§ 35.3, 35.6 ("[A] recipient may use funds for one or more of the purposes described in paragraphs (b) through (e) of this section."). The Rule instructs states how to determine whether a project "responds" to a "negative economic impact" caused by the COVID-19 public health emergency by providing a list of eligible expenditures. *See* 31 C.F.R. § 35.6(b)(1-12). It also defines key terms for the eligible use of providing premium pay to eligible workers or grants to eligible employers. *See* § 802(c)(1)(B); 31 C.F.R. § 35.3. It defines "general revenue" and provides the formula to calculate revenue lost due to the COVID-19 public health emergency for expenditures for the third eligible use category for SLFRF funds. *See* § 802(c)(1)(C)); 31 C.F.R. §§ 35.3, 35.6(d)(2). The Rule also sets forth the criteria for eligible water, sewer, and broadband

infrastructure projects. 31 C.F.R. § 35.6(e). The Rule further clarifies the restrictions of SLFRF funds. 31 C.F.R. §§ 35.7, 35.8.

The U.S. Treasury regulates whether a state appropriately spends SLFRF funds by requiring frequent and detailed reporting. *See* § 802(d)(2); Compliance Guidance, *supra* note 4 at 12-33. States must first provide the U.S. Treasury with a certification signed by an authorized officer that the state requires the funds to carry out the ARPA eligible uses. Section 802(d)(1). After receiving the SLFRF funds, states must issue an initial Interim Report listing expenditures by their noted expenditure category pursuant to U.S. Treasury guidance and providing required programmatic data such as the revenue replacement calculation. *See* Compliance Guidance, *supra* note 4 at 12-15. States must then provide detailed quarterly "Project and Expenditure Reports" specifying the projects funded, expenditures, and contracts and subawards of the SLFRF funds. *Id.* at 12, 15-21. States must also provide an evidence based annual "Recovery Plan Performance Report" detailing how the projects being funded by the SLFRF funds will help support an effective, efficient, and equitable recovery. *Id.* at 23-30. If a state fails to comply with the four eligible use categories listed in ARPA for SLFRF funds, they must repay the U.S. Treasury the funds used for ineligible purposes. Section 802(e); 31 C.F.R. § 35.10. Absent an appeal by the state, the U.S. Treasury may order repayment within 120 days of issuing notice regarding the misused funds. *See* 31 C.F.R. § 35.10(f)(1).

II. The ARPA funds

A. The Legislature's attempt to control the ARPA funds

Anticipating the passage of ARPA, the Legislature passed the General Appropriation Act of 2021 ("H.B. 2") with provisions to control the use of the SLFRF funds.[5] While H.B. 2 did not directly appropriate the funds, it essentially sought to convert them to State moneys requiring appropriation. Specifically, H.B. 2 authorized various sums from the appropriation contingency fund ("ACF") of the general fund to state agencies for a variety of purposes contingent on the transfer of the ARPA funds into the appropriation contingency fund. *Id.* at 191, 216-221. H.B. 2 also required the Secretary of the Department of Finance and Administration (DFA) to transfer the ARPA funds in their entirety to the ACF. *Id.* at 218. Had this occurred, the ARPA funds could generally only be expended upon specific authorization by the Legislature pursuant to NMSA 1978, Section 6-4-2.3 (1991).

Although the Governor did not necessarily disagree with the Legislature's allocation of funds from the ACF, she recognized that accepting the appropriations would require her to cede her rightful authority over the ARPA funds in their entirety. She therefore exercised her constitutional authority to line-item veto the appropriation provisions, stating in her veto message:

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[5] H.B. 2, 55th Leg., 1st Sess. (N.M. 2021), https://www.nmlegis.gov/Sessions/21%20Regular/final/HB0002.pdf (last visited Oct. 6, 2021) [hereinafter H.B. 2].

> I have vetoed parts of the Act that impermissibly attempt to appropriate or control the allocation of federal funds to a New Mexico governmental entity. The Supreme Court of New Mexico has concluded that federal contributions are not a proper subject of the Legislature's appropriative power, and the Legislature's attempt to control the use of such funds infringes 'the executive function of administration.'"[6]

The Governor also pointed out that:

> Appropriating these funds in this manner is . . . premature. As of this writing, the state has yet to receive any portion of the state and local fiscal recovery fund, and the federal government may withhold up to 50% of the state's allocation for another year, putting in doubt when it will be available to spend. The United States Department of the Treasury also has yet to issue any guidance on the allowable uses of these funds and will require repayment of any improper expenditures. Finally, the uncertainty of the COVID-19 pandemic and the need to potentially repay these federal funds require a flexibility that the appropriation contingency fund does not allow.

Veto Message, *supra* note 6 at 7.

Following the conclusion of the 2021 legislative session and the Governor's line-item veto of H.B. 2, Representative Patricia Lundstrom and Senator George

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[6] *See* Gov. Michelle Lujan Grisham, *House Executive Message No. 21* at 2 (Apr. 9, 2021), https://www.governor.state.nm.us/wp-content/uploads/2021/04/House-Executive-Message-21-Partial-Veto-HB-2.pdf (quoting *Sego*, 1974-NMSC-059, ¶ 50, and citing *State ex rel. Coll v. Carruthers*, 1988-NMSC-057, ¶ 23, 107 N.M. 439, 759 P.2d 1380) [hereinafter Veto Message]. One need only look at the Governor's Veto Message to dispel Petitioners' assertion that the Governor has been "less than forthcoming" about her legal basis for vetoing the provisions and allocating the ARPA funds. *See* Petitioners' Verified Emergency Petition for Writ of Mandamus and Request for Stay on the Transfer of Additional Funds Out of the State's American Recovery and Reinvestment Account ("Petition") ¶¶ 22-23, filed Sept. 18, 2021.

Munoz, the chair and vice-chair of the Legislative Finance Committee, sent a letter to the State Treasurer, Tim Eichenberg. *See* May 4, 2021, Letter from Rep. Patricia Lundstrom & Sen. George Munoz to State Treasurer Tim Eichenberg, attached as Exhibit A ("Exh. A"). The legislators instructed the Treasurer to deposit the ARPA funds in the general fund, which they claimed was required by NMSA 1978, Section 6-4-2 (1957). *See* Exh. A. Further, the legislators contended that, once deposited, Article IV, Section 30 prohibited the funds from being spent without legislative appropriation. *See* Exh. A. In response, the Treasurer stated that while he "did not take a side" in the dispute over who should control the distribution of the ARPA funds, he "believe[d] that the interest of the State's citizens would not be best served by [his Office] taking action to stop the flow of these vital funds." May 12, 2021, Letter from State Treasurer Tim Eichenberg to Rep. Patricia Lundstrom & Sen. George Munoz, attached as Exhibit B ("Exh. B"). Ultimately, the Treasurer declined the legislators' request and stated, "Consistent with past practices, upon receipt, the State Treasurer's Office will deposit ARPA proceeds into the State General Fund Investment Pool." *Id.*[7]

[7] It is entirely unclear why Petitioners and the Treasurer neglected to inform the Court of this important interaction.

B. The receipt and use of the ARPA funds

On June 16, 2021, DFA received just under 1.8 billion in ARPA funds from the U.S. Treasury. *See* Affidavit of Secretary Deborah K. Romero, ¶¶ 6-7, attached as Exhibit C ("Exh. C").[8] The funds were deposited in "DFA fund 72090," which is contained in a Wells Fargo account maintained by the State Treasurer within a group of accounts known as the State General Fund Investment Pool.[9] The coding for DFA fund 72090 has at all relevant times indicated that the ARPA funds are "in suspense" or "unearned revenue" and are treated as liabilities for audit purposes. Exh. C ¶ 8. Accordingly, DFA understands the ARPA funds to be properly held in a suspense account. *See* Exh. C ¶¶ 14-16; § 6-10-3(C) (requiring funds that "ha[ve] not yet been earned so as to become the absolute property of the state" to be deposited in a "suspense account"); § 6-10-41 (requiring "[a]ll unearned moneys deposited in a suspense account with the state treasurer" to be transferred out of the account and

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[8] DFA also received just over 60 million to be allocated to "non-entitlement units of local government"—a term that applies to municipalities under 50,000 in population. Exh. C ¶ 6. These funds are not in dispute here, as they must be distributed to local governments, which must, in turn, comply with ARPA. *See* 42 U.S.C. § 803.

[9] The State General Fund Investment Pool, which is not specifically provided for in state law, is the group of various interest-bearing state and federal funds that the State Treasurer invests in accordance with its overall investment strategy. *See* Exh. C ¶ 10. While it includes some accounts that house general funds, the pool is not itself a component part of the general fund, nor can it be considered a fund of the state. *See id.*

into the proper fund by the warrant of the Secretary of DFA "as soon as the same shall become the absolute property of the state").[10]

Since the ARPA funds were deposited in the suspense account in June, the Governor has allocated and spent the following amounts in accordance with the mandates of ARPA and U.S. Treasury guidance:

- $15,802,247.58 from June through September 2021 for COVID-19 vaccination incentives and their implementation, including the $10,000,000 "Vax 2 the Max" lottery program and $100 cash incentives to individuals receiving their vaccines within certain date ranges.
- $656,571,532.63 in June 2021 to the Department of Workforce Solutions to replenish the Unemployment Insurance Trust Fund and to pay back a federal loan from the U.S. Department of Labor taken during the height of the COVID-19 pandemic.[11]

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[10] The Treasurer's response brief states only that he "received and deposited the funds in accordance with the provisions of [Section] 8-6-3" and deposited them into the General Fund Investment Pool but does not specify what type of account in which the funds were deposited—other than that they are interest bearing. Treasurer Eichenberg's Response Brief ("Treasurer's Response") at 6, 9, filed Oct. 12, 2021. The lack of detail provided to the Court on this important issue is troubling.

[11] Petitioners attempt to exaggerate the urgency of this action by including this amount in their Petition, claiming "the Governor has already usurped the Legislature's appropriation authority by directing the expenditure of approximately $600 million of these ARPA funds." Petition ¶ 21. Yet Petitioners fail to mention the Legislature sought to do the same thing through H.B. 2. *See* H.B. 2, *supra* note 5, at 220-21.

- $5,000,000.00 in September 2021 to the Department of Workforce Solutions to provide incentives for unemployed New Mexico residents to return to work.
- $5,000,000.00 in August 2021 for New Mexico State University's Chile Labor Incentive Program to ensure adequate labor for the chile harvest by raising the wages of chile pickers and processors to $19.50 per hour.[12]

See Exh. C ¶ 11. Aside from these moneys, the ARPA funds have remained in the suspense account in which they were originally deposited. *See* Exh. C ¶ 17.

III. The instant action

Against this factual backdrop, Petitioners brought the instant action to stop the Governor's spending of the ARPA funds without appropriation. *See generally* Petition. Although Petitioners do not dispute the propriety of the Governor's line-item vetoes, they claim she lacks the authority to spend the ARPA funds without legislative appropriation. *See id.* ¶ 19. Specifically, Petitioners incorrectly contend the Governor may not spend the ARPA funds without legislative appropriation because they are "in the state treasury" for purposes of Article VI, Section 30 of the New Mexico Constitution. *See* Petition ¶¶ 14-19. Ultimately, Petitioners seek a writ

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[12] Again, Petitioners fail to mention this use of the ARPA funds was done at the behest of lawmakers. *See* Courtney Allen, *Lawmaker calls for governor to allocate federal relief funds for chile farmers*, KRQE News (Aug. 3, 2021), https://www.krqe.com/news/politics-government/lawmaker-calls-for-governor-to-allocate-federal-relief-funds-for-chile-farmers/.

of mandamus "prohibiting the Governor and the State Treasurer and all other state officials subject to their authority from transferring, encumbering, committing, expending or appropriating any additional funds out of the state ARPA account in the state treasury absent legislative appropriation." Petition ¶ 35.

This Court requested responses from the Governor and the Treasurer by October 15, 2021. *See* Order, filed Sept. 30, 2021. Earlier this week, the Treasurer filed a response brief largely agreeing with Petitioners' position that the Governor cannot allocate the ARPA funds without legislative appropriation—apparently changing his mind that he "d[id] not take a side in this dispute." Exh. B; *see generally* Treasurer's Response. Unfortunately, the Treasurer's brief omits critical information—facts that demonstrate the propriety of the Governor's position—and fails to comprehend the applicable law such that its value is *de minimis* in determining the question in front of the Court in this case.

DISCUSSION

I. The Governor can direct the spending of ARPA funds without legislative appropriation

A. The Governor may spend the ARPA funds without legislative appropriation because they are not being "paid out of the treasury," nor are they required to be deposited into the treasury

Contrary to Petitioners' and the Treasurer's assertions, the funds at issue are not "in the state treasury" for purposes of Article IV, Section 30. Petition ¶¶ 11-12, 35-36. Petitioners claim—without any factual support—that the ARPA funds are

currently (or should be) deposited in the general fund of the state treasury by operation of law. *See id.* ¶¶ 16-19. Specifically, Petitioners contend that the state officials receiving the ARPA funds from the U.S. Treasury were obligated to pay them into the state treasury pursuant to Section 6-10-3. *See* Petition ¶ 16. Following this logic, Petitioners claim, the State Treasurer is obligated to credit the ARPA funds to the general fund pursuant to Section 6-4-2 because they constitute "revenues not otherwise allocated by law." *See* Petition ¶ 16. Petitioners are mistaken.

Petitioners' selective quoting of Section 6-10-3 conveniently leaves out Subsection (C), which provides an exception to the general rule requiring public moneys be paid into the treasury. When read in context, Subsection (C) provides:

> All public money in the custody or under the control of any state official or agency obtained or received by any official or agency from any source . . . shall be paid into the state treasury. It is the duty of every official or person in charge of any state agency receiving any money in cash or by check, draft or otherwise for or on behalf of the state or any agency thereof from any source . . . to forthwith and before the close of the next succeeding business day after the receipt of the money to deliver or remit it to the state treasurer; ***provided, however, that***:
>
> . . .
>
> C. every official or person in charge of any state agency receiving any money . . . in cash or by check or draft, on deposit, in escrow or in evidence of good faith to secure the performance of any contract or agreement with the state or with any department, institution or agency of the state, ***which money has not yet been earned so as to become the absolute property of the state***, shall deliver or remit to the state treasury within the times and in the manner as in this section provided, ***which money shall be deposited in a suspense account to the credit of the***

> ***proper official, person, board or bureau in charge of any state agency so receiving the money*[.]**

Section 6-10-3 (emphases added); *see also* § 6-10-41 ("All unearned moneys deposited in a suspense account with the state treasurer by any state officer or state agency shall, as soon as the same shall become the absolute property of the state of New Mexico, be transferred out of said suspense account to the proper fund by the warrant of the secretary of finance and administration based upon a voucher of the proper state official or agency, as the case may be.").

The ARPA funds fall squarely within Section 6-10-3(C)'s exception, as they have "not yet been earned so as to become the absolute property of the state." *Id.* If they were, the federal government would not have the ability to direct how the funds are spent or require their recoupment, if spent improperly. *Cf. Burwell's Ex'rs v. Anderson*, 30 Va. 348, 356 (1831) ("The power of absolute disposition is, indeed, the eminent quality of absolute property."). The funds are therefore properly held in a suspense account for which the State Treasurer is merely a custodian. It follows that Section 6-4-2 does not require the State Treasurer to deposit the funds into the general fund. *Cf.* N.M. Att'y Gen. Op. 86-02 at 9-10 (1986) (stating that "[t]he TAA suspense fund and PIT suspense fund are not part of the general fund because they contain revenues otherwise allocated by law").

The fact that the ARPA funds are properly held in a suspense account is dispositive for this case, as illustrated by *McAdoo Petroleum Corp. v. Pankey*, 1930-

NMSC-100, 35 N.M. 246, 294 P. 322, and the ensuing issues it raised. In *McAdoo*, the petitioner sought a writ of mandamus to compel the commissioner of public lands to refund the petitioner amounts it paid in excess of what it owed for rental on an oil and gas lease. *Id.* ¶¶ 1-2. Specifically, the petitioner sought to have the commissioner draw his vouchers upon the state auditor from several funds in the treasury pursuant to a statute that provided:

> Any money erroneously paid on account of any lease or sale of State lands shall be repaid by voucher drawn by the Commissioner presented to the State Auditor who shall draw his warrant upon the State Treasurer for the amount thereof, who shall pay same out of the fund to the credit of which said money was placed.

Id. ¶ 3 (quoting NMSA 1929, § 132-110 (1912)). In his defense, the commissioner claimed the statute was void because it required moneys to be withdrawn from the treasury without legislative appropriation, in violation of Article IV, Section 30. *McAdoo*, 1930-NMSC-100, ¶ 5. The petitioner, in turn, countered that the constitutional provision did not apply to the moneys because they were erroneously paid to the commissioner and therefore never belonged to the state. *See McAdoo*, 1930-NMSC-100, ¶ 4.

In deciding whether the moneys came within the scope of Article IV, Section 30, the Court observed:

> That the moneys claimed by [the petitioner] to have been erroneously paid to the commissioner have been received by the state treasurer and by him accredited to particular funds, and have become commingled

> with other moneys in said funds, so that they are not earmarked and cannot be distinguished from any other money, is not controverted.

McAdoo, 1930-NMSC-100, ¶ 9. Thus, the Court concluded, "the money [the petitioner] desires to be paid out under the section of the statute quoted . . . is money in the state treasury, or that, in order to get it out, it must be taken from the state treasury." *McAdoo*, 1930-NMSC-100, ¶ 10. Therefore, the Court held that the commissioner could not issue the refunds under the statute without legislative appropriation under Article IV, Section 30. *Id.* ¶¶ 16-17.

Shortly thereafter, the Attorney General was asked whether the Court's holding "applies in the case of suspense funds such as the suspense fund of the Supreme Court." N.M. Att'y Gen. Op. 30-66 at 1 (1930). The Court's suspense fund was governed by the predecessor statute to Section 6-10-41, "which provides that all unearned monies deposited in a suspense account with the State Treasurer by any state officer or state agency shall, 'as soon as the same shall become the absolute property of the State of New Mexico.'" N.M. Att'y Gen. Op. 30-66 at 1-2 (quoting NMSA 1929, § 112-122).

The Attorney General acknowledged, "[A]t first glance, that when these suspense funds have once been deposited with the State Treasurer they were in the treasury to stay until such time as the legislature appropriated them for some purpose" pursuant to Article IV, Section 30. N.M. Att'y Gen. Op. 30-66 at 2. However, the Attorney General recognized, "the real purpose of a 'suspense fund'

is simply to have a place where funds coming into the state, through its various agencies can be placed or held in abeyance, so to speak, until such time as it has been definitely determined whether the same belongs to the state[,]" and so "to hold that such portion of the money as did not belong to the state could not be taken out of the Treasury except upon appropriation of the legislature is manifestly absurd for the reason that the legislature could not very well appropriate money which did not belong to the State." *Id.* at 2-3. The Attorney General further observed:

> The mere fact that these suspense funds are turned over to the State Treasurer, and are in effect 'deposited' with him does not alter the situation, because in such a case these monies really do not go into the State Treasury, and become a part of the public monies of the State until such time as it has been determined by the proper authorities, as stated above, that they are 'the absolute property of the State of New Mexico' as provided in the [predecessor statute to Section 6-10-41].

N.M. Att'y Gen. Op. 30-66 at 3. Hence, the Attorney General concluded the requester could pay refunds out of suspense accounts without violating Article IV, Section 30. N.M. Att'y Gen. Op. 30-66 at 4.

The Court should give great weight to the Attorney General's opinion given its proximity in time to *McAdoo*, the adoption of the New Mexico constitution, and the enactment of the statute that was to become Section 6-10-41. *Cf. Landau v. N.M. AG Office*, 2019-NMCA-041, ¶ 23, 446 P.3d 1229 (Chavez, J.) (finding more persuasive an opinion of the Attorney General that was issued contemporaneously with the statute in question). The Attorney General's Office has also been consistent

on this position throughout the years. *See, e.g.*, N.M. Att'y Gen. Op. 67-07 at 10 (1967) ("[S]ince the moneys deposited in 'suspense accounts' are never deposited in our treasury, Article IV, Section 30 of the New Mexico Constitution prohibiting the payment of money out of the treasury unless by appropriation of the legislature is inapplicable."). The Court should find these longstanding opinions persuasive. *Cf. Martinez v. Research Park, Inc.*, 1965-NMSC-146, ¶ 26, 75 N.M. 672, 410 P.2d 200, *overruled on other grounds by Lakeview Inv., Inc. v. Alamogordo Lake Vill., Inc.*, 1974-NMSC-027, ¶ 8, 86 N.M. 151, 520 P.2d 1096 ("[L]ong-standing interpretations of a doubtful or uncertain statute by the administrative agency charged with administering the statute are persuasive and will not be lightly overturned by the courts.").

But the Court need not rely on the Attorney General's word alone: even this Court clarified that moneys could be removed from a suspense fund without legislative appropriation. A rehearing was urged following the Court's opinion in *McAdoo* on the basis that the Court "overlooked an important consideration, namely, that the constitutional inhibition applies only to the state's money; and that [the Court] applied it to money not the state's, though in its treasury." 1930-NMSC-100, ¶ 18.[13] The Court disagreed, stating, "Counsel are mistaken in assuming that we

[13] The Court's order regarding the petition for rehearing appears to have been appended to the end of the original opinion by the New Mexico Compilation

overlooked the possibility that the broad constitutional provision might require interpretation, to avoid hampering necessary and legitimate transactions, and still to prevent the evils the Constitution makers aimed at." *Id.* ¶ 19. The Court did not find that such an interpretation was necessary in *McAdoo* because it did not involve "moneys paid in to a state agency 'on deposit, in escrow, or in evidence of good faith not yet 'earned so as to become the absolute property of the state[.]'" *McAdoo*, 1930-NMSC-100, ¶ 18 (quoting § 112-122) (alterations omitted); *see also id.* ¶ 10 (distinguishing the refund statute from a tax statute providing that taxes claimed to have been erroneously paid be held in a suspense fund). Thus, the Court clarified that it did "not here deny that in many instances the proper test may be whether the moneys sought to be paid out are the property of the state[,]" it merely held that "where the proper administrative officer has received the money as the property of the state and has covered it into the treasury as such, it is thenceforth conclusively state property." *Id.* ¶ 20.

If the opinions of executive and judicial branches were not enough, even the Legislature's own actions indicate they understand Article IV, Section 30 does not apply to moneys properly held in suspense accounts. The Legislature, through H.B. 2, sought to require the Secretary of DFA to transfer the ARPA funds in their entirety

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Commission, as evidenced by the paragraph numbering. However, the legal research service available to the Governor's Office does not append the order to the opinion.

to the ACF. *See* H.B. 2, *supra* note 5, at 218. When that failed, they tried to force the State Treasurer to deposit the funds into the general fund. *See* Exh. A. But this begs the question: if the Legislature already had the absolute authority to control and appropriate *all* funds held at the state treasury, why was this even necessary? Clearly, even the Legislature did not believe they had the authority to appropriate the ARPA funds until they were transferred out of the suspense account and deposited in the general fund.

In short, the ARPA funds are not subject to appropriation because they are not "in the treasury." Unlike the funds at issue in *McAdoo*, the ARPA funds were not (as they could not be) received as the property of the state and covered into the treasury as such given the multitude of restrictions placed on the funds by Congress and the U.S. Treasury. Rather, they were properly placed in a suspense account pursuant to Sections 6-10-3(C) and 6-10-41. *See* Exh. C. Given the foregoing, the Court should reject Petitioners' and the Treasurer's conclusory assertions that the ARPA funds are being (or are required to be) "paid out of the treasury," and hold that Article IV, Section 30 is inapplicable as a result—thus negating any nondiscretionary duty to refrain from expending the ARPA funds without appropriation and avoiding the necessity of reaching any constitutional question regarding separation of powers. *See State ex rel. Riddle v. Oliver*, 2021-NMSC-018, ¶ 23, 487 P.3d 815 ("Mandamus may be used either to compel the performance of an affirmative act where the duty

to perform the act is clearly enjoined by law, or it may be used in a prohibitory manner to prohibit unconstitutional official action." (alteration, internal quotation marks, and citation omitted); *Schlieter v. Carlos*, 1989-NMSC-037, ¶ 13, 108 N.M. 507, 775 P.2d 709 ("It is an enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so.").

B. Requiring legislative appropriation of the ARPA funds would violate separation of powers

Even if the Court determines that the ARPA funds are technically being "paid out of the treasury" or that the funds must be deposited into the treasury (as opposed to a suspense fund) pursuant to Section 6-10-3, the Legislature has no authority to appropriate the funds or require their appropriation.

1. The Court has already determined that the Legislature has no authority to appropriate federal funds

The Legislature's inability to appropriate federal funds has been recognized by this Court for almost fifty years. In *Sego*, the Court was presented with challenges to several of the governor's line-item vetoes. 1974-NMSC-059. One such challenge was to the governor's striking of language authorizing additional appropriations to or expenditures by the State's higher education institutions in the event that the actual revenues exceeded the amounts appropriated from, *inter alia*, federal funds. *Id.* ¶¶ 41-42. Although the case arose out of challenges to the governor's veto power, the Court agreed that the question of the authority of the Legislature to appropriate

and control non-state funds available to the educational institutions was a question of great public importance that required an answer. *Id.* ¶ 45.

In addressing the question, the Court cited and discussed *MacManus*, 179 Colo. 218. In that case, the Colorado governor challenged, among other things, an appropriation provision that broadly provided, "Any federal or cash funds received by any agency in excess of the appropriation shall not be expended without additional legislative appropriation." *MacManus*, 179 Colo. at 220. The Colorado Supreme Court agreed the legislature had plenary authority over state monies. *Id.* at 221. However, such authority did not extend to federal funds in the state's custody because it was for the governor to administer the funds—not the legislature. *Id.* at 222. Additionally, the court noted that, as a practical matter, "such funds, to be received in the future, may often be unanticipated or even unknown at the time of the passage of the bill." *Id.* The court concluded that the provision violated separation of powers as "an attempt to limit the executive branch in its administration of federal funds to be received by it directly from agencies of the federal government and unconnected with any state appropriations." *Id.* at 221.

This Court agreed with the Colorado Supreme Court's general conclusion "'that federal contributions are not the subject of the appropriative power of the legislature' and the Legislature's attempt to do so was '[constitutionally] void as an infringement upon the executive function of administration.'" *Sego*, 1974-NMSC-

059, ¶ 50 (quoting *MacManus*, 179 Colo. at 222). Accordingly, the Court held that the Legislature "has no power to appropriate and thereby endeavor to control the manner and extent of the use or expenditure of [f]ederal funds made available to our institutions of higher learning." *Id.* ¶ 51.

2. *Sego*'s reasoning applies to the instant case

Recognizing this authority favoring the Governor's position, Petitioners and the Treasurer attempt to distinguish *Sego*. Specifically, the Treasurer attempts to distinguish *Sego* on this basis that the ARPA funds "were not allocated to specific public works, institutions, programs, or designated agencies." Treasurer's Response at 13-15. However, even the Treasurer agrees that "[f]ederal 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." *Id.* at 14-15 (citing *Sego*, 1974-NMSC-059, ¶¶ 41-49). It is undisputed that the ARPA funds are subject to such conditions. While they may be broader than the conditions on the funds at issue in *Sego*, they are conditions the Governor must abide by nonetheless. Therefore, even the Treasurer's own logic supports a conclusion that the ARPA funds are not subject to legislative appropriation.

Petitioners also attempt to cabin *Sego*'s holding to the State institutions of higher learning, arguing it "was based on the unique status that certain state

educational institutions have under the New Mexico Constitution." Petition ¶ 24.[14] But Petitioners appear to forget that the Governor, too, has a special role under the state constitution. She is vested with the "supreme executive power of the state" and required to "take care that the laws be faithfully executed." N.M. Const. Art. V, § 4. It would be just as much of a violation of separation of powers to intrude on the Governor's executive managerial function to administer federal funds in the State's custody. *Cf. Carruthers*, 1988-NMSC-057, ¶ 11 (stating that the Legislature's intrusion on the Governor's executive managerial function "is inappropriate under our constitutional form of government and comes into conflict with the separation of powers doctrine"). Rather, *Sego* was premised on the nature of the funds at issue (i.e., federal versus state) and the proper branch of government to administer such funds. Significantly, *MacManus*, which the *Sego* court "agree[d]" with, did not involve appropriations of federal funds to institutions of higher learning but rather

[14] In making this argument, both Petitioners and the Treasurer contend the *Sego* Court's failure to strike down another provision appropriating federal funds to the state planning office demonstrates that the Court thought such an appropriation was proper. *See* Petition ¶ 28 (citing *Sego*, 1974-NMSC-059, ¶ 20); Treasurer's Response at 19. However, the Court explicitly stated that the appropriation of federal funds had not been questioned. *Id.* ¶ 20. It would have been improper for the Court to interject itself to strike down a provision neither of the other coordinate branches challenged. *See State ex rel. Human Servs. Dep't v. Staples*, 1982-NMSC-099, ¶¶ 3, 5, 98 N.M. 540, 650 P.2d 824 (stating that "courts risk overlooking important facts or legal considerations when they take it upon themselves to raise, argue, and decide legal questions overlooked by the lawyers who tailor the case to fit within their legal theories" (alteration, internal quotation marks, and citation omitted)). Petitioners' and the Treasurer's reliance on this portion of *Sego* is, therefore, misguided.

an appropriation provision applying to *all* federal funds. Thus, Petitioners' attempts to improperly limit *Sego* should be rejected.

Indeed, this Court has already implicitly agreed that *Sego*'s categorical holding extends to all federal funds. In *Carruthers*, 1988-NMSC-057, ¶ 23, the governor line-item vetoed a provision that required appropriated state funds—which were to be matched by federal funds—for data processing services for the Human Services Department to be expended on a particular information processing system. Citing *Sego*, the governor reasoned that the Legislature "lacks authority to appropriate federal funds or control the use thereof." *Carruthers*, 1988-NMSC-057, ¶ 23. Although the Court found the appropriation at issue was distinguishable because the Legislature limited it to "matched" state funds,[15] the Court agreed that it "specifically rejected [an] attempt [to appropriate federal funds] in *Sego*." *Carruthers*, 1988-NMSC-057, ¶ 24. If the Court intended *Sego* to be limited to institutions of higher learning, it would have presumably mentioned this so the governor would not continue to rely on it more broadly.

[15] It appears the final sentence in paragraph 24 of *Carruthers* should begin with "Unlike" rather than "In," as the Legislature in *Sego* did not "actually limit[] its appropriation only to those funds 'matched' to federal funds." *Carruthers*, 1988-NMSC-057, ¶ 24; *see Sego*, 1974-NMSC-059, ¶ 41. In fact, the word "matched" does not appear in *Sego* and only appears in the appropriation at issue in *Carruthers*. *See Sego*, 1974-NMSC-059; *Carruthers*, 1988-NMSC-057, ¶ 23.

In sum, *Sego* should be read to stand for what it says (and how it has been historically treated): "federal contributions are not the subject of the appropriative power of the legislature." *Sego*, 1974-NMSC-059, ¶ 50 (quoting *MacManus*, 179 Colo. at 222). And such a categorical rule makes sense for New Mexico. First, it provides a clear delineation of powers over federal funds. Absent a categorical rule, the judiciary will forever be dragged into disputes between the executive and legislative branches over federal funds. *See In re Interrogatories Submitted on House Bill 04-1098*, 88 P.3d 1196, 1207 (Colo. 2004) (Coats, J., dissenting) ("[I]n answering the interrogatory, the majority carves out a greater role for the judiciary in the spending process. While the courts may not themselves distribute federal funds given to the state, they will henceforth, on a case-by-case basis, decide whether the executive or the legislative branch will be entitled to that privilege. . . . As a practical matter, I also fear that today's holding will . . . mak[e] it less rather than more clear whether future federal disbursements (except those using this identical formula) will be considered custodial moneys."). If not resolved promptly, such disputes could jeopardize the State's receipt of the funds or orderly administration of federally funded programs—hurting New Mexicans in the process.

Second, the Governor is in the best position to direct the spending of federal funds. Unlike other states, New Mexico does not have a fulltime legislature. *See* N.M. Const. Art. IV, § 5. Many federal funds—like those at issue—may need to be

expeditiously spent to achieve the federal government's objectives and help New Mexicans. Nor is there any guarantee that the Legislature could reach a decision on how to even spend the funds. *See, e.g.*, *Knoll v. White*, 141 Pa. Commw. 188, 595 A.2d 665 (1991) (addressing situation in which the state legislature was at an impasse on appropriating federal funds). It would, therefore, be expedient to leave the management of federal funds to the Governor, an elected official vested with the supreme executive power of the State who is duty-bound to "take care that the laws be faithfully executed." N.M. Const. Art. V, § 4; *see Op. of Justices to Senate*, 375 Mass. 851, 854-55, 378 N.E.2d 433 (1978) ("[L]egislation requiring that Federal funds, including those received in trust by officers and agencies of the executive branch, be paid into the State treasury and be expended only on appropriation by the legislative branch, would result in the Legislature's interfering with the right and obligation of the executive branch to decide the extent and manner of expending funds in performing its constitutional duty faithfully to execute and administer the laws."); *Interrogatories*, 88 P.3d at 1206 (Coats, J., dissenting) ("[I]f [federal funds] are accompanied by directions for their use, it is the responsibility of the executive to see that they are applied to the purposes for which they were directed.").

Lastly, requiring the Legislature to appropriate federal funds would serve no useful purpose. The purpose of Article IV, Section 30 is to give the Legislature the power over *the State's* purse strings so that the people may have a say in how their

tax dollars are spent through their representatives. *See Gamble v. Velarde*, 1932-NMSC-048, ¶ 15, 36 N.M. 262, 13 P.2d 559 ("[W]e have never encountered any other claim as to the purpose of [Article IV, Section 30] than that it is to insure legislative control, and to exclude executive control, over the purse strings."); *McAdoo*, 1930-NMSC-100, ¶ 20 (striking down statute that would "open the door to fraud and to the irresponsible and irregular dissipation of *the state's funds*—evils the Constitution makers obviously intended to prevent [with Article IV, Section 30]" (emphasis added)); *Dir. of Bureau of Legislative Research v. Mackrell*, 212 Ark. 40, 46, 204 S.W.2d 893 (1947) ("[T]he primary purpose of [a similar provision in the Arkansas constitution] is to prevent the expenditure of the people's tax money without having first procured their consent[.]"). However, that purpose is not served by requiring appropriation of *federal* funds raised through *federal* taxes sanctioned by the *federal* legislature and governed by *federal* law. *See Anderson v. Regan*, 53 N.Y.2d 356, 373-74, 442 N.Y.S.2d 404, 425 N.E.2d 792 (1981) (Cooke, C.J., dissenting) (discussing how the purpose of the New York constitution's appropriation provision would not be served when applied to federal funds). Such a requirement should be rejected, as it would serve only to unduly hamper the timely and effective administration of such funds. *See Gamble*, 1932-NMSC-048, ¶ 23 (avoiding unnecessarily strict interpretation of Article 4, Section 30 when it would "merely hamper legislation without promoting [its] constitutional purpose").

3. The Court should reaffirm *Sego*'s broad, categorical holding that the Legislature does not have the authority to appropriate federal funds

Petitioners—unhappy with *Sego*'s categorical holding—seek to have this Court disregard precedent and adopt a contrary position based on case law from other states with different constitutional provisions and traditions. This Court should decline such an invitation.

As an initial matter, it should be noted that New Mexico (and Colorado) are not alone in their recognition that legislatures do not have the authority to appropriate most, if not all, federal funds. *See, e.g.*, *In re Okla. ex rel. DOT*, 1982 OK 36, ¶ 10, 646 P.2d 605 ("Federal money deposited in the state treasury pursuant to some grant-in-aid program is held in trust for a specific purpose. Like other custodial funds, it retains its original legal character. The legislature wields *no* authority over such funds."); *State ex rel. Black v. State Bd. of Educ.*, 33 Idaho 415, 427, 196 P. 201 (1921) ("It is admitted by the attorney general, and we think correctly so, that the proceeds of federal land grants, direct federal appropriations, and private donations to the university, are trust funds, and are not subject to the constitutional requirement that money must be appropriated before it is paid out of the state treasury."); *Navajo Tribe v. Ariz. Dep't of Admin.*, 111 Ariz. 279, 281, 528 P.2d 623 (1974) ("It is within the power of the legislature to make appropriations relating to state funds, but funds from a purely federal source are not subject to the appropriative power of the

legislature."); *State ex rel. Ledwith v. Brian*, 84 Neb. 30, 38, 120 N.W. 916 (1909) ("We can see no reason for a biennial appropriation of these funds [derived from the rental of lands given to a state university by the federal government]. It was the pledged duty of the state to apply them to the use of the university and agricultural college, and the motives which prompted the makers of the constitution to hold the purse strings in the hands of the people cannot apply to the situation presented."); *Op. of Justices to Senate*, 375 Mass. at 854 ("If Federal funds are received by State officers or agencies subject to the condition that they be used only for objects specified by Federal statutes or regulations, the money is impressed with a trust and is not subject to appropriation by the Legislature.").

Petitioners instead point the Court to an inapplicable New Mexico Attorney General opinion and case law from Pennsylvania, New York, and North Carolina. *See* Petition ¶¶ 30-31. Petitioners' reliance on these authorities is misplaced. With regard to N.M. Att'y Gen. Op. No. 73-09 (1973), the Court should give the opinion little weight, as it was issued prior to *Sego*. More importantly, however, the federal law at issue in that opinion contained a specific provision requiring the State to "provide for the expenditure of amounts received . . . *only in accordance with the laws and procedures applicable to the expenditure of its own revenues*." N.M. Att'y Gen. Op. No. 73-09 at 16 (quoting State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, § 123(a), 86 Stat. 919 (1972)) (emphasis in original). The

Governor would not dispute the Legislature's authority to appropriate ARPA funds had the federal act contained a similar provision. However, the absence of a similar provision in ARPA renders the cited Attorney General opinion entirely distinguishable and actually suggests that the federal government did not intend their funds be subject to appropriation by state legislatures. *See State v. Ramirez*, 2018-NMSC-003, ¶ 53, 409 P.3d 902 (observing that when the Legislature knew how to include something, and did not, court assumes the choice was deliberate).

Petitioners' out-of-state case law is also unavailing. In *Shapp v. Sloan*, 480 Pa. 449, 391 A.2d 595 (1978), the Pennsylvania Supreme Court merely held that the legislature could enact a statute requiring federal funds to be deposited into the state treasury and remain there until they are appropriated. *See id.* at 460-63, 76. This example has no bearing on the situation at hand because no such statute exists in New Mexico. To the contrary, the ARPA funds at issue were properly placed in a suspense account outside of the treasury pursuant to Sections 6-10-3(C) and 6-10-41. *See* Exh. C ¶¶ 8-17; *see also* N.M. Att'y Gen. Op. 89-30 at 4-5 n.3 (1989) (distinguishing *Shapp* on the basis that "New Mexico law provides for the deposit of federal funds into suspense accounts, the state does not require that all federal funds be appropriated"). Moreover, the Pennsylvania legislature had exercised control over the federal funds for over nearly fifteen years without objection from the executive. *See Shapp*, 480 Pa. at 458-60. In contrast, New Mexico governors

have a long history of objecting to such control. *See Sego*, 1974-NMSC-059, ¶¶ 41-51; *Carruthers*, 1988-NMSC-057, ¶¶ 23-24.

Anderson, 53 N.Y.2d 356, is also distinguishable. The New York constitution provides that "[no] money shall ever be paid out of the state treasury or any of its funds, *or any of the funds under its management*, except in pursuance of an appropriation by law." NY Const. Art VII, § 7 (emphasis added). Relying on this plain language, the New York Court of Appeals concluded that "inasmuch as the Federal funds in issue . . . have, in fact, been deposited in the State treasury by the Comptroller, there can be no doubt that they are now within the literal mandate of the Constitution." *Anderson*, 53 N.Y.2d at 361; *see also id.* At 368-69 (Jasen, J., concurring) ("I concur in the result reached by the court today solely because I am impelled to do so by the clear wording of the Constitution. . . . Although the Constitution does not define the term 'treasury', it provides us with a clear direction that all funds under the 'management' of the treasury be appropriated by the Legislature. . . . The funds in issue here are under the same 'management'. That the source of these funds is the Federal Government cannot change this essential fact.").[16] The New Mexico constitution contains no such language, and therefore,

[16] The holding of *Anderson* is limited to Justice Jasen's concurring opinion, as only two justices concurred with Justice Gabrielli's majority opinion. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [a majority of the] Justices, the holding of the Court may be viewed as that position taken by those Members

any reliance on *Anderson* is misplaced. *Cf. Gamble v. Velarde*, 1932-NMSC-048, ¶¶ 13-19, 27, 36 N.M. 262, 13 P.2d 559 (discussing the variations of state constitutional appropriation provisions and observing that "[s]ome [unlike New Mexico] have made the provision applicable not only to payments from the treasury, *but from any fund owned or controlled by the state*" (emphasis added)).

With regard to North Carolina, it is true their supreme court recently held that their legislature may appropriate certain federal block grant funds—*as it had done so for over forty years without objection*. *See Cooper v. Berger*, 376 N.C. 22, 38, 852 S.E.2d 46 (2020). However, the court recognized that New Mexico (in *Sego*) and several other states had reached contrary results based on "constitutional provisions and traditions that differ from those that exist in North Carolina." *See id.* at 47. For the reasons discussed above, this Court should decline to overturn over fifty years of New Mexico precedent and tradition based on another state's constitution and traditions. *See Sego*, 1974-NMSC-059, ¶¶ 41-51; *Carruthers*, 1988-NMSC-057, ¶¶ 23-24.

Lastly, in addition to Petitioners' points, the Treasurer argues that federal funds should be subject to appropriation because the legislative process is the "only"

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who concurred in the judgments on the narrowest grounds[.]" (internal quotation marks and citation omitted)). Justice Jasen explicitly rejected the court's holding to the extent it was based on anything other than the plain language of the phrase "funds under its management." *Anderson*, 53 N.Y.2d at 370 (Jasen, J., concurring).

way to formulate public policy with public input as to how the funds will be spent. *See* Treasurer's Response at 17. The Treasurer ignores the fact that the Governor's constituents (including legislators) can and do exercise their right to give input as to the spending of the ARPA funds.[17] The Treasurer also argues that "[t]he federal government cannot, by allocation of funds, endow a Governor . . . with powers greater than those granted by the State Constitution." Treasurer's Response at 18. However, this is not a situation in which Congress allowed the Governor to spend *state* funds without legislative appropriation—only federal funds, which this Court has already held are not subject to appropriation, notwithstanding the language of Article IV, Section 30. *See Sego*, 1974-NMSC-059. Therefore, the Court need not be distracted by the Treasurer's arguments.

4. Should the Court overrule *Sego*'s categorical rule, it should adopt an analysis similar to Colorado's ad hoc approach to determining whether federal funds require appropriation

As explained above, the Court should reaffirm *Sego*'s categorical rule allowing the executive branch to faithfully and expeditiously administer all federal funds. Alternatively, should the Court be inclined to move away from such an

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[17] *See, e.g.*, *Theresa Davis, How can New Mexico pay for conservation?*, Albuquerque J. (Oct. 11, 2021), https://www.abqjournal.com/2436812/how-can-new-mexico-pay-for-conservation.html (reporting that conservation groups are asking the Governor to direct $65 million ARPA funds to conservation programs and projects).

approach, the Court adopt an ad hoc analysis similar to the one developed by the Colorado Supreme Court following its decision in *MacManus*.[18]

i. The development of Colorado's ad hoc approach

Following *MacManus*, the Colorado Supreme Court was asked to address, *inter alia*, the propriety of the governor's allocation of funds distributed pursuant to a federal consent order with Chevron. *See Colo. Gen. Assembly v. Lamm* (*Lamm I*), 700 P.2d 508, 524-25 (Colo. 1985). Importantly, the federal government provided a list of proposed acceptable uses for the fund, including general areas as "energy conservation or energy research," and "retained ultimate authority to approve any use of the funds proposed by eligible states." *Id.* at 525. In holding that the funds were custodial (and therefore not subject to appropriation), the court observed that they originated from outside Colorado and were required to be used for a purpose approved by non-Colorado authorities. *Id.* Further, while the governor retained some authority to determine "which specific purpose among several options should be benefited," the court noted that "the fact that a discretionary determination had to be made concerning the object for which those non-Colorado sums would be spent is not the controlling factor in assessing the nature of the fund." *Id.*

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[18] Ironically, Petitioners inaccurately represent that post-*MacManus* Colorado case law holds that "federal funds are categorically 'custodial funds' not subject to legislative appropriation." Petition ¶ 26. Although the Governor would prefer this to be the case, she takes her duty of candor to the court seriously—even when doing so may cut against her position.

Later, in *Colo. Gen. Assembly v. Lamm* (*Lamm II*), 738 P.2d 1156 (Colo. 1987), the Colorado Supreme Court determined whether the legislature could appropriate certain federal block grant moneys. In analyzing the issue, the court noted that federal block grants "were conceived as falling between the extensive federal control represented by categorical grants and the absence of federal control represented by revenue sharing"—the former being a means for furthering national priorities by authorizing grants for programs that met defined federal standards and the latter a general support payment program that required the funds be expended in the same manner as a state's own revenue. *Id.* at 1158-59. The court examined the provisions of each block grant program, which it observed essentially collected former categorical grants, bundled them together, and in some cases reduced the volume of federal regulations. *See id.* at 1161-67. The court also noted that the block grants allowed portions of the funds to be transferred to other block grant programs or were conditioned upon provision of state matching funds. *See id.* at 1161, 1167, 1172-73.

Ultimately, the court held that only the portions of the block grant funds that could be transferred between programs or were subject to state matching were subject to appropriation. *Id.* at 1156, 72-73. With regard to the federal funds dependent on state fund appropriation, the court held that the legislature's authority to appropriate state funds effectively extended to the federal funds. *Id.* at 1172. The

court also found that "the amount of flexibility allowed the state in determining the purposes for which the funds subject to transfer may be spent is inconsistent with a description of the governor's exercise of authority over the funds subject to transfer as essentially custodial in nature" and the transfers altered "the initial objectives of the federal government and affect the allocation of state funds for objectives similar to those affected by the transfer of block grant funds." *Id.* at 1173 (internal quotation marks and citation omitted). Conversely, the court observed, "[t]he executive power to allocate resources includes the determination of which specific purpose among several options should be benefited and is consistent with the role of the state in administering a fund that is essentially custodial in nature." *Id.* (internal quotation marks and citation omitted). Thus, the court held that the funds that could *not* be transferred were not subject to appropriation, noting that "[t]he federal statutes authorizing the grants specify the purposes the state is directed to accomplish with the money, the manner in which the purposes are to be accomplished and the restrictions placed on use of the funds by the federal government." *Id.*

In re Interrogatories Submitted on House Bill 04-1098, 88 P.3d 1196 (Colo. 2004), is perhaps the most useful case outlining and applying the Colorado framework. At issue in that case was a 2004 bill excluding from the definition of custodial funds (i.e., funds not subject to appropriation) funds granted by the federal government "for the support of general or essential state government services." *Id.*

at 1199. Significantly, this definition tracked the language of the federal Jobs and Growth Tax Reconciliation Act of 2003 ("the Jobs Act"), which allocated ten billion dollars in fiscal relief to the states. *Interrogatories*, 88 P.3d at 1198-99; 42 U.S.C. § 801(a). The Jobs Act had "minimal restrictions on the use of those state relief funds . . . , requiring that the funds be used only to 'provide essential government services' or to cover the costs of unfunded federal mandates." *Interrogatories*, 88 P.3d at 1198 (quoting 42 U.S.C. § 801(d)(1)). The Act further provided that "[a] State may only use funds provided under a payment made under this section for types of expenditures permitted under the most recently approved budget for the State[,]" § 801(d)(2), and required each state to certify to the Secretary of the Treasury that the "State's proposed uses of the funds are consistent with subsection (d)." 42 U.S.C. § 801(e). "Beyond these limited requirements, the Act provide[d] no guidance as to how each state should spend the money allotted, nor as to what appropriations process should be followed in making such decisions." *Interrogatories*, 88 P.3d at 1198.

After reviewing the development of its case law outlined above, the Colorado Supreme Court summarized the law as follows:

> In sum, when evaluating whether certain moneys constitute custodial funds, we have taken into account all the circumstances surrounding the funds, including, as pertinent here, the source of the funds, the degree of flexibility afforded to the state as to the process by which the funds should be allocated, and the degree of flexibility afforded to the state as to the funds' ultimate purposes. We have

> essentially distinguished between funds akin to state moneys, which allow the state broad flexibility in determining how such funds should be used, and therefore become part of the state's general fund, and custodial funds, which are to be used only in the manner specified and for the purposes designated by the federal government. While the former, as general fund moneys, are subject to the General Assembly's plenary power of appropriation, the latter fall outside the scope of legislative authority and instead are subject to executive control.

Interrogatories, 88 P.3d at 1202-03 (footnote omitted). Applying this framework to the Jobs Act, the Court noted that "the fact that the moneys come from the federal government cannot, without more, determine whether funds are custodial." *Id.* at 1203. The court next observed that the Jobs Act provided "virtually no guidance as to what process must be followed in allocating the funds at the state level"—requiring only that the state pre-certify that it will use the funds in compliance with the Act but no form of post-distribution regulation to ensure that the funds are in fact being used and distributed appropriately. *Id.* at 1203.

Finally, the court turned to the degree of flexibility that Congress has afforded the states in terms of what they could the funds for. The court found this factor determinative, concluding that "the broad category of 'essential government services' is not a 'particular purpose,' but rather allows each state to use the Jobs Act funds as it sees fit, based on its own budgetary needs." *Id.* at 1204. The court also found "particularly instructive the fact that the Jobs Act was altered from its original form in order to remove a list of specific governmental programs and activities which the funds should serve, and instead listed 'essential government

services' as the only guidance in directing states regarding use of the Jobs Act funds." *Id.* Finally, the court noted, "because once the state has received the Jobs Act funds it is no longer subject to any meaningful federal regulation regarding the use of the moneys, the State acts more in the role of an outright owner of those funds than as a guardian or custodian." *Id.* Accordingly, the court held that the Jobs Act funds could properly be excluded from the definition of "custodial funds"—thereby requiring them to be appropriated by the legislature. *Id.* at 1205.

ii. The ARPA funds are not subject to appropriation under Colorado's ad hoc approach

If the Court applies Colorado's framework and uses Colorado case law as guideposts, the Court should still conclude the SLFRF funds are custodial funds not subject to legislative appropriation. Like the Jobs Act funds, the SLFRF funds originated from the federal government—thus weighing in favor of the Governor. *See Interrogatories*, 88 P.3d at 1205; 42 U.S.C. § 802. With regard to the second factor, the Governor admits that neither Congress nor the U.S. Treasury has provided any explicit guidance as to the process on how to allocate the funds, similar to the Jobs Act funds in *Interrogatories*. However, as mentioned earlier, Congress's failure to specify that the funds must be expended "only in accordance with the laws and procedures applicable to the expenditure of its own revenues"—as they have done in the past—indicates that it did not intend that the ARPA funds be subject to appropriation like other state moneys. *See Ramirez*, 2018-NMSC-003, ¶ 53; *see e.g.*,

N.M. Att'y Gen. Op. No. 73-09. Accordingly, the first two factors weigh in favor of the Governor.

The third factor of degree of flexibility afforded to the state as to the funds' ultimate purposes similarly weighs against Petitioners. While ARPA provides states some discretion with how to award SLFRF funds, this does not automatically classify them as "general funds." Rather it is "the *degree of flexibility* afforded to the state as to the funds' ultimate purposes" that is pertinent to the evaluation of whether moneys constitute custodial funds. *Interrogatories*, 88 P.3d at 1202 (emphasis added)). ARPA specifies SLFRF funds must be spent in one of four enumerated eligible use categories. Section 802(c)(1); 31 C.F.R. § 35.6. The four distinct SLFRF eligible use categories demonstrate that the ARPA funds may be spent in a more limited fashion than the Jobs Act's broad requirement to merely use the funds "provide for essential government services." *Interrogatories*, 88 P.3d at 1198. In this sense, the funds are much more akin to the Chevron funds in *Lamm I* or some of the block grants in *Lamm II*. *See Lamm I*, 700 P.2d at 525 (holding that Chevron funds that could be used for a variety of purposes, including general areas such as "energy conservation or energy research" were custodial funds); *Lamm II*, 738 P.2d at 1165, 1173 (holding that community development block grant to small cities "to provide housing; assist economic development; upgrade community facilities,

including water and sewer facilities; increase employment through downtown revitalization; and enforce housing and sanitary codes" were custodial funds).

Additionally, ARPA provides clear restrictions on the use of funds—unlike the Jobs Act. *See* § 802(c)(2) (prohibiting states from using the SLFRF funds to offset a reduction in net tax revenue caused by a change in law and depositing the funds into any pension fund). Furthermore, the restrictions of SLFRF funds continue to evolve, as evidenced by the Rule adopted by the U.S. Treasury "to implement these eligible use categories and other restrictions on the use of funds under the SLFRF program." Compliance Guidance, *supra* note 4 at 4; *see also* 31 C.F.R. § 35.6. The Rule instructs states on how to determine whether a project "responds" to a "negative economic impact" caused by the COVID-19 public health emergency by listing 12 eligible expenditures. *See* 31 C.F.R. § 35.6(b)(1-12). It defines key terms for each of the eligible use categories and provides the necessary information for state officials to ensure they are complying with the restrictions set forth in ARPA. *See* 31 C.F.R. §§ 35.3, 35.6, 35.7, 35.8. In addition to the Rule, the Treasury has advised specific states on improper uses of the funds. For example, the Treasury recently warned Arizona that it could not use its ARPA funds to pay for programs

aimed at undermining face mask requirements in schools and would risk having to pay the funds back if the state did not reverse course.[19]

Significantly, ARPA also provides substantial post-distribution regulation of funds issued to states. States must comply with complex reporting requirements after receiving payment of SLFRF funds. *See* § 802(d)(2); Compliance Guidance, *supra* note 4 at 12-33. States must provide three different reports to the U.S. Treasury to ensure the SLFRF "program outcomes are achieved in an effective, efficient, and equitable manner." *Id.* at 23 Furthermore, ARPA requires any state that fails to comply with the statutory uses and restrictions for SLFRF funds to repay the U.S. Treasury "an amount equal to the amount of funds used in violation[.]" Section 802(e); 31 C.F.R. § 35.10. ARPA's recoupment provision clearly demonstrates SLFRF funds are custodial in nature, as the U.S. Treasury may order repayment within 120 days of issuing notice regarding the misused funds. *See* 31 C.F.R. § 35.10(f)(1); *Interrogatories*, 88 P.3d at 1203 (observing the Jobs Act "lacks any form of post-distribution regulation to ensure that the funds are in fact being used and distributed appropriately") This significant oversight by the U.S. Treasury over

[19] *See* Andrea Shalal, *Treasury warns Arizona it cannot use federal funds to undermine mask norms*, Reuters (Oct. 6, 2021), https://www.reuters.com/world/us/treasury-tells-arizona-it-cant-use-federal-funds-undermine-school-mask-2021-10-05/.

the SLFRF funds demonstrates the State is holding these funds in a custodial capacity in order to carry out the SLFRF program's designated purpose.

In sum, whether the Court applies *Sego*'s categorical rule or an analysis similar to Colorado's approach, the Legislature has no authority to appropriate the ARPA funds. It follows that Section 6-10-3 (or any other law) is unconstitutional to the extent it may be read to effectively impose an appropriation requirement on federal funds by requiring all funds to be deposited in the treasury. *Cf. Op. of Justices*, 375 Mass. at 855 ("[B]ecause the bills that gave rise to the question propounded would make *all* Federal grants and funds subject to appropriation and regulation by the Legislature, they would be constitutionally defective.").

CONCLUSION

For all the foregoing reasons, the Court should dismiss the Petition.

Respectfully submitted,

/s/ Holly Agajanian
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CERTIFICATE OF COMPLIANCE

I certify that, according to Rule 12-504 NMRA, this brief complies with type-volume, font size, and word limitations of the New Mexico Rules of Appellate Procedure and this Court's Order granting a word limit extension to 12,000 words. The body of this brief employs 14-point Times New Roman font and contains 11,771 words, counted using Microsoft Office Word.

/s/ Holly Agajanian
Holly Agajanian

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2021, I filed the foregoing through the New Mexico electronic filing system, which caused all parties and counsel of record to be served by electronic means.

/s/ Holly Agajanian
Holly Agajanian

State of New Mexico
LEGISLATIVE FINANCE COMMITTEE

David Abbey
Director
325 Don Gaspar, Suite 101 • Santa Fe, NM 87501
Phone (505) 986-4550 • Fax: (505) 986-4545

May 4, 2021

Tim Eichenberg, Treasurer
20255 S Pacheco Street
Santa Fe, NM 87505

Dear Treasurer Eichenberg,

State law (Section 6-4-2 NMSA 1978) requires the State Treasurer to credit all revenues not otherwise allocated by law (undesignated) to the general fund. Moreover, Article IV, § 30 of the State Constitution requires money shall be paid out of the state treasury only upon appropriations made by the Legislature. New Mexico is expecting $1.6 billion in undesignated revenues from the recently enacted federal American Rescue Plan Act (ARPA) through a new Coronavirus State Fiscal Recovery Fund (P.L. 117-2, Title IX, Part 8, Subtitle M) and over $134 million from a new Coronavirus Capital Projects Fund. We contend these ARPA state relief revenues should be deposited into the general fund and appropriated by the Legislature, and per your constitutional and statutory duties as Treasurer should ensure general fund revenue is not diverted or expended from the treasury without an appropriation from the Legislature.

Based on ARPA language, Section 11 of this year's General Appropriation Act (GAA) allocated $1.1 billion of the state fiscal recovery funding and related appropriations contingent on depositing the revenue in the general fund. The governor vetoed the entirety of Section 11 and related appropriations, noting in her veto message that she considered these appropriations an impermissible attempt by the Legislature to appropriate or control the allocation of federal funds, citing *State ex rel. Sego v. Kirkpatrick.*

While the vetoes were a valid exercise of executive power, expending these general revenues from the treasury, or not depositing them in the general fund, is not. The ARPA state fiscal recovery and capital projects funds are appropriated to the state generally, not to a specific program, higher education institution, or agency and thus are non-custodial funds. ARPA specifically designated other funding specifically for governors to allocate, but did not place that condition on the funds in question. In *Sego* the federal funds in question were specific custodial funds allocated directly to state institutions of higher education governed by boards of regents.

EXHIBIT A

Our understanding is that U.S. Treasury will begin transferring payments of the state relief funds next week. We expect the New Mexico Office of the State Treasurer to ensure these funds are deposited in the general fund. The Legislature and governor can then work together on a plan for appropriating the revenue and putting it to good use for the people of the State of New Mexico as we recover from the fall out of the COVID-19 pandemic.

Sincerely,

Representative Patricia A. Lundstrom
Legislative Finance Committee, Chair

Senator George Munoz
Legislative Finance Committee, Vice-chair

STATE OF NEW MEXICO
OFFICE OF THE TREASURER

The Honorable Tim Eichenberg
State Treasurer

Samuel K. Collins, Jr.
Deputy State Treasurer

Via e-mail to: Ismael.Torres@nmlegis.gov

May 12, 2021

Representative Patricia A. Lundstrom
Senator George K. Muñoz
Legislative Finance Committee
325 Don Gaspar Avenue, Suite 101
Santa Fe, NM 87501

Re: Federal American Rescue Plan Act (ARPA) funds

Dear Representative Lundstrom and Senator Muñoz,

The priority of the State Treasurer's Office is always to determine the actions that will best serve the interests of the State of New Mexico's citizens. The anticipated receipt of $1.75 billion in Federal funds will produce a positive impact on the State and its constituents when utilized appropriately, with sufficient forethought as to the most beneficial outcomes.

There is a difference of opinion between the Legislature and the Governor as to who should control the distribution of these funds. We do not take a side in this dispute. We believe that the interest of the State's citizens would not be best served by STO taking action to stop the flow of these vital funds. This is a legal interpretation issue that we hope the Legislature and the Governor can work together to resolve.

We acknowledge State law (Section 6-4-2 NMSA 1978) that requires the State Treasurer to credit all revenues not otherwise allocated by law (undesignated) to the General Fund; and Article IV, §30, of the State Constitution that requires money to be paid out of the State Treasury only upon appropriations made by the Legislature. The issue that we have is logistical, because of the unified PeopleSoft enterprise computer system known as SHARE.

Consistent with past practices, upon receipt, the State Treasurer's Office will deposit ARPA proceeds into the State General Fund Investment Pool. We look forward to continuing our work with legislative leadership and the Governor as we move New Mexico forward.

Sincerely,

Tim Eichenberg
State Treasurer

cc: Representatives Townsend, Montoya, and Dow via Rick May at Rick.May@nmlegis.gov
Matthew Garcia, Chief of Staff to Governor Lujan-Grisham, at Matt.Garcia@state.nm.us

EXHIBIT B

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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

Petitioners,

v.

Case No. S-1-SC-38996

MICHELLE LUJAN GRISHAM, in her capacity as GOVERNOR,

Respondent,

and

TIM EICHENBERG, in his capacity as STATE TREASURER,

Real Party in Interest.

AFFIDAVIT OF DEBORAH K. ROMERO

1. I am over the age of eighteen (18) years, I am of sound mind, and I am not otherwise disqualified from making this Affidavit. The matters stated below are based on my own personal knowledge.

2. I am currently the Cabinet Secretary for the New Mexico Department of Finance and Administration ("DFA").

3. In my official capacity, I am responsible for DFA's exercise of its statutory obligations. This includes procedures for making disbursements from

EXHIBIT C

accounts maintained by the State Treasurer's Office, including federal funds held in suspense accounts pursuant to state law, including NMSA 1978, Section 6-10-3(C) (2011), and NMSA 1978, Section 6-10-41 (1977).

4. I am able to testify as to how DFA's interpretation of its governing authority, including Sections 6-10-3(C) and 6-10-41, shapes the process by which federal funds can be paid out of suspense accounts.

5. In order for the State of New Mexico to receive its allocation of funds under the American Rescue Plan Act of 2021 ("ARPA"), Pub. L. No. 117-2, 135 Stat. 4 (2021) (codified at 42 U.S.C. §§ 802 *et seq.*). DFA was required to submit a request to the United States Department of the Treasury ("Treasury") through Treasury's online portal. *See* § 802(d). [1]

6. New Mexico received two allocations of funds under ARPA: (i) the state-level allocation of the Coronavirus State and Local Fiscal Recovery Fund in the amount of $1,751,542,835.00 ("SLFRF"); and (ii) an allocation for all "non-entitlement units of local government"—a term that applies to municipalities under 50,000 in population, *see* 42 U.S.C. § 803(g)(5), which in New Mexico are all but

[1] U.S. Dept. of the Treasury, *State and Local Fiscal Recovery Fund Request Funding*, https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/state-and-local-fiscal-recovery-fund/request-funding (last visited Oct. 6, 2021) (requiring all eligible state, territorial, metropolitan city, county, or tribal governments to use the Treasury Submission Portal to initiate the request process for SLFRF funds).

Albuquerque, Farmington, Las Cruces, Rio Rancho, and Santa Fe—in the State in the amount of $63,044,539.50 ("NEUF") (collectively, "ARPA Funds").

7. New Mexico received its SLFRF allocation on June 16, 2021, and it received the NEUF allocation on June 23, 2021. New Mexico is expected to receive another NEUF allocation of approximately $63 million in June of 2022.

8. The SLFRF allocation was deposited to DFA fund 72090, and the NEUF allocation was deposited to DFA fund 71940, both of which are within the Wells Fargo account ending 6970. Coding for these funds has at all relevant times indicated that the ARPA Funds are "in suspense" or "unearned revenue" and are treated as liabilities for audit purposes given the use and recapture restrictions of ARPA.

9. The above Wells Fargo account is maintained by the State Treasurer within the group of accounts known as the State General Fund Investment Pool ("SGFIP").

10. The SGFIP, which is not specifically provided for in state law, is the group of various interest-bearing state and federal funds that the State Treasurer invests in accordance with its overall investment strategy. While it includes some accounts that house general funds, the SGFIP is not itself a component part of the general fund, nor can it be considered a fund of the state.

11. As of October 14, 2021, the state has allocated the SLFRF as follows: (i) $15,802,247.58 from June through September 2021 for COVID-19 vaccination

incentives and their implementation, including the $10,000,000 Vax 2 the Max lottery program and $100 cash incentives to individuals receiving their vaccines within certain date ranges; (ii) $656,571,532.63 in June 2021 to the Department of Workforce Solutions to replenish the Unemployment Insurance Trust Fund and to pay back a federal loan from the U.S. Department of Labor taken during the height of the COVID-19 pandemic; (iii) $5,000,000.00 in September 2021 to the Department of Workforce Solutions to provide incentives for unemployed New Mexico residents to return to work; and (iv) $5,000,000.00 in August 2021 for New Mexico State University's Chile Labor Incentive Program to raise the wages of chile pickers and processors to $19.50 per hour to ensure adequate labor for the harvest.

12. As of October 14, 2021, the state has allocated $63,038,235.00 from the NEUF to the 99 individual non-entitlement units of government statewide in accordance with ARPA's requirements and guidance from Treasury.

13. The funds are withdrawn from the Wells Fargo bank account on warrants drawn by me and based upon vouchers of the proper state official or agency, as the case may be.

14. The Wells Fargo account described above is authorized by Section 6-10-3(C) and Section 6-10-41, under which unearned monies are deposited in suspense accounts maintained by the State Treasurer unless and until they become the "absolute property of the state," at which point the State Treasurer transfers them to the

appropriate state fund. Attorney General opinions have held that federal funds placed in these types of suspense accounts are not "state funds" subject to legislative appropriation, and DFA has consistently followed that guidance with federal funds. *See, e.g.*, N.M. Att'y Gen. Op. 67-07 at 10 (1967); N.M. Att'y Gen. Op. 30-66 at 1 (1930).

15. The ARPA SLFRF funds are subject to various use restrictions, audit, and eventual recapture by the federal government if it determines that they are not properly spent or allocated or if any remain unobligated by December 31, 2024, or unspent by December 31, 2026. The SLFRF funds are not traditional federal grant funds. The federal restrictions and guidance regarding proper use of the ARPA Funds have been evolving since ARPA's passage, which makes it difficult to predict what uses Treasury will allow going forward.

16. Given that the state is the conduit by which these funds flow to ARPA-approved purposes and a currently undetermined amount of the funds may be recaptured later, DFA does not consider them to be the "absolute property of the state," making a suspense account the proper place for them.

17. As of October 14, 2021, $6,304.50 of the NEUF is left, and $1,069,169,054.79 of the SLFRF is left in the account.

18. The DFA has been relying on and following the guidance publicly released by the Treasury in allocating the ARPA funds.

19. For the allocations of SLFRF described above, DFA has reported to Treasury the amounts allocated as well as the purpose for each respective allocation. For the NEUF allocations, DFA has reported to Treasury the non-entitlement units of government who received funds and the respective amount of each allocation.

Further, Affiant sayeth not.

Deborah K. Romero

STATE OF NEW MEXICO }
} ss.
COUNTY OF SANTA FE }

SUBSCRIBED AND SWORN TO before me this 15th day of OCTOBER, 2021 by Deborah K. Romero, Cabinet Secretary for the New Mexico Department of Finance and Administration.

NOTARY PUBLIC

My commission Expires:
6-12-24

OFFICIAL SEAL
Frances A. Lucero
NOTARY PUBLIC-State of New Mexico
My Commission Expires June 12, 2024