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,

and

JOSEPH K. CERVANTES, in his capacity
as STATE SENATOR, DANIEL IVEY-SOTO,
in his capacity as STATE SENATOR,
GEORGE K. MUNOZ, in his capacity as
STATE SENATOR, and GERALD ORTIZ Y
PINO, in his capacity as STATE SENATOR,

Intervenors-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 TO INTERVENORS-PETITIONERS' BRIEF

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## INTRODUCTION

Just as the legislative branch has the prerogative to safeguard its constitutional powers, so too does the executive. That is all the Governor has done thus far—at all times in good faith based on her reasonable interpretation of the constitution, statutes, and case law. If the intervening Senators (or Petitioners or the Treasurer, for that matter) disagreed with the Governor's position, it was incumbent on them to seek judicial intervention the moment the Governor made her position clear—not sit idly by for months. Nonetheless, the Governor appreciates this opportunity to briefly respond to the intervening Senators' belated input. Not surprisingly, the Senators' brief does little more than parrot Petitioners' and the Treasurer's positions without meaningfully analyzing the issues before the Court or addressing the substantial authorities cited by the Governor in support of her position. Though the Governor disagrees with the Senators, she simply wishes to faithfully execute the laws and the constitution at the end of the day. What that ultimately means is now for this Court to decide, and the Governor will respect that decision and continue to faithfully serve the people of New Mexico regardless.

## DISCUSSION

### I. The plain language of Article IV, Section 30 is not decisive

The Senators first claim that the plain text of Article IV, Section 30 of the New Mexico Constitution unambiguously requires legislative appropriation of

federal funds. *See* Brief of Amici Joseph Cervantes, Daniel Ivey-Soto, George Munoz, and Gerald Ortiz y Pino in Their Capacities as State Senators at 1-4, filed on November 10, 2021 (the "Senators' Brief"). Yet courts must "exercise caution in relying only on the plain language of a [constitutional provision] because its beguiling simplicity may mask a host of reasons why [the provision], apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate (i.e., nonfrivolous) differences of opinion concerning the [provision]'s meaning." *Fowler v. Vista Care*, 2014-NMSC-019, ¶ 13, 329 P.3d 630 (alterations, internal quotation marks, and citation omitted). This is especially true with such broad constitutional provisions. *Cf. McAdoo Petroleum Corp. v. Pankey*, 1930-NMSC-100, ¶ 19, 35 N.M. 246, 294 P. 322 (acknowledging the "possibility that th[is] broad constitutional provision might require interpretation, to avoid hampering necessary and legitimate transactions, and still to prevent the evils the Constitution makers aimed at"). The Senators' plain language argument also fails to address how other states with identical (or nearly identical) constitutional provisions have reached contrary results. *See* Governor's Response at 31-32 (pointing out that Colorado, Oklahoma, Idaho, Arizona, Nebraska, and Massachusetts have held that their state legislatures do not have the authority to appropriate most, if not all, federal funds).[1]

[1] *Compare* N.M. Const. Art. IV, § 30, *with* Colo. Const. Art. V, § 33, *and* Id. Const. Art. VII, § 13, *and* Ariz. Const. Art. IX, § 5; *and* Neb. Const. Art. III § 25, *and* Mass. Const. Art. XI.

How could so many other states reach this conclusion if the plain language of identical (or nearly identical) constitutional provisions was so clear?

Rather than rely solely on the language of the constitution, the Court should consider the purpose behind Article IV, Section 30—to prevent the executive from unfettered spending of the State's funds, which belong to the people. *See 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[.]"). While the Senators may claim that allowing federal funds to be spent without their approval would run afoul of this purpose, they forget that another legislative body has already fulfilled it by appropriating the money (raised through *federal* tax dollars) and specifying how it may be spent: the United States Congress. Thus, it is unclear just what "taxation without representation," Senators' Brief at 6, the Senators believe would occur in the absence of having a second legislature appropriate federal funds. At bottom, the Senators simply desire more political power by controlling the spending of another

government's funds. But they do not, as the cannot, demonstrate that such control is required by our constitution.

## II. *Sego* does anything but support Petitioners' position

The Senators also blindly repeat Petitioners' and the Treasurer's contention that the Court's failure to strike down a provision appropriating federal funds to the state planning office in *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, 86 N.M. 359, 524 P.2d 975, demonstrates that the Court thought such an appropriation was proper. *See* Senators' Brief at 4-6. However, the Court explicitly stated that the appropriation of federal funds had not been questioned. *Sego*, 1974-NMSC-059, ¶ 20. As the Governor already pointed out, it would have been improper for the Court to strike down a provision neither the executive nor the legislative branch 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)); *see also Fernandez v. Farmers Ins. Co.*, 1993-NMSC-035, ¶ 15, 115 N.M. 622, 857 P.2d 22 ("[C]ases are not authority for propositions not considered." (internal quotation marks and citation omitted)). The Senators' reliance on this portion of *Sego* is therefore misplaced.

The Senators also summarily repeat Petitioners' and the Treasurer's argument that *Sego*'s logic must be confined to institutions of higher learning. *See* Amici Brief at 6. Yet again, the Senators do not even attempt to explain why that is in light of this Court's reliance on *MacManus v. Love*, 179 Colo. 218, 220, 499 P.2d 609 (1972), which was not cabined to such institutions. Nor do the Senators bother to explain why requiring appropriation of federal funds would not intrude on the Governor's constitutional executive managerial function. *See id.* at 221 (striking down the legislature's "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"); *cf. State ex rel. Coll v. Carruthers*, 1988-NMSC-057, ¶ 11, 107 N.M. 439, 759 P.2d 1380 (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").

Lastly, the Senators argue that *Sego* did "not overrule all the many cases in which the Court has upheld the appropriation authority of the Legislature." Senators' Brief at 6. While it is true that *Sego* did not overrule the Legislature's authority to appropriate *State* funds, it certainly held that such power did not extend to federal moneys given to the State's institutions of higher learning. And by relying on *MacManus*' broad holding, the Court strongly implied that its reasoning extended to

all federal funds. *Cf. Carruthers*, 1988-NMSC-057, ¶ 24 (recognizing that the Court rejected the Legislature's attempt "to appropriate federal funds or 'control the use thereof' by means of conditions or limitations imposed in the General Appropriation Act" in *Sego* without clarifying that its holding was limited to institutions of higher learning). None of the cases the Senators cite[2] lead this Court to a contrary conclusion, as none had anything to do with appropriating federal funds. Thus, it is unclear just what case law the Senators believe "provides clear answers about the appropriation power" in their favor. Senators' Brief at 9.

### III. The ARPA funds are in a suspense account by operation of law, which has historically been treated as outside of the State treasury

The Senators next attack the Governor's suspense account argument on the basis that such accounts are part of the State treasury given the first sentence of NMSA 1978, Section 6-10-3 (2011). *See* Amici Brief at 7-8. Yet again, they fail to even acknowledge this Court's clarification following *McAdoo Petroleum Corp.* that distinguished suspense accounts and suggested that "in many instances the proper test [for determining whether Art. IV, § 30 applies] may be whether the moneys sought to be paid out are the property of the state." 1930-NMSC-100, ¶¶ 18-20. Nor

[2] *See generally McAdoo Petroleum Corp. v. Pankey*, 1930-NMSC-100, 35 N.M. 246, 294 P. 322; *Gamble v. Velarde*, 1932-NMSC-048, 36 N.M. 262, 13 P.2d 559; *N.M. State Bd. of Pub. Accountancy v. Grant*, 1956-NMSC-068, 61 N.M. 287, 299 P.2d 464; *State ex rel. Schwartz v. Johnson*, 1995-NMSC-080, 120 N.M. 820, 907 P.2d 1001; *State ex rel. Smith v. Martinez*, 2011-NMSC-043, 150 N.M. 703, 265 P.3d 1276; *State ex rel. Cisneros v. Martinez*, 2015-NMSC-001, 340 P.3d 597.

do they acknowledge the numerous and longstanding opinions by the Attorney General concluding that such accounts are considered to be within the treasury. *See* Governor's Response at 16-21.

The Senators also misconstrue the Governor's position regarding suspense funds, arguing that "[o]fficials within the executive bureaucracy clearly have no power to override constitutional requirements simply by changing accounting classifications." Senators' Brief at 8. To be clear, the Governor agrees with this obvious statement. But this is not a situation in which an executive official improperly placed funds in a suspense account to avoid the appropriation requirement. As thoroughly explained in the Governor's initial response, the ARPA funds are properly in such an account because they "ha[ve] not yet been earned so as to become the absolute property of the state." Section 6-10-3(C). If the Senators do not like the effect of that provision, they alone have the power to repeal it.

## IV. Holding in favor of the Governor would not disrupt our State's system of checks and balances

As a final throwaway argument, the Senators point out that the Governor "already possess[es] significant powers as regards to appropriations, because governors can veto an appropriation in whole or in part (line item)." Senators' Brief at 10 (citing N.M. Const. Art IV, § 22). In other words, the Senators argue, holding in favor of the Governor would give the executive too much power. This argument is little more than scare tactics. Holding that federal funds appropriated by a federal

legislature that retains authority to ensure that they are spent for designated purposes would not disrupt our State's system of checks and balances. The Legislature will continue to have exclusive control over the State's funds, and the Governor will continue to exercise her executive managerial function and faithfully execute the laws. Accordingly, the Court need not be distracted by this argument.

## CONCLUSION

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

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with type-volume, font size, and word limitations set forth in Rule 12-504 NMRA. The body of this brief employs 14-point Times New Roman font and contains 1,813 words, counted using Microsoft Office Word.

*/s/ Holly Agajanian*
Holly Agajanian

## CERTIFICATE OF SERVICE

I hereby certify that on November 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