

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

**NO. S-1-SC-38996**

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

**Petitioners,**

**v.**

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

**Respondent,**

**and**

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

**Real Party in Interest.**

SUPREME COURT OF NEW MEXICO  
FILED

NOV 10 2021



**ORIGINAL PROCEEDING ON MANDAMUS  
BRIEF OF AMICI JOSEPH CERVANTES, DANIEL IVEY-SOTO,  
GEORGE MUNOZ, AND GERALD ORTIZ Y PINO  
IN THEIR CAPACITIES AS STATE SENATORS**

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JOSEPH CERVANTES, AND DANIEL IVEY-SOTO  
IN THEIR CAPACITIES AS STATE SENATORS <sup>1</sup>**

Amici respectfully submit this brief to bring to the Court's attention relevant authorities which have been overlooked or misapprehended in the briefs submitted by the parties. Amici generally concur with some but not all of the positions asserted by petitioners and Treasurer Eichenberg.

**1. The Questions Before This Court Are Clearly Answered by the Text of the Constitution, by the Decisions of This Court, and by Statutes.**

The text of the New Mexico Constitution is unambiguous:

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

N.M. Const. art. IV, § 30. This provision is derived from the parallel provision in the Constitution of the United States:

No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . .

U.S. Const. art. I, § 9, cl. 7.

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<sup>1</sup> Counsel for the parties have not authored this brief in whole or in part. No counsel or party has made a monetary contribution intended to fund the preparation or submission of this brief.

*Gamble v. Velarde*, 1932-NMSC-048, 36 N.M. 262, 13 P.2d 559 quotes the text of the state and federal constitutions, and holds that their purpose “is to insure legislative control, and to exclude executive control, over the purse strings.” 1932-NMSC-048, ¶ 15. This Court has ruled in the same manner in many other cases as well, including: *New Mexico Bd. of Pub. Accountancy v. Grant*, 1956-NMSC-068, ¶ 10, 61 N.M. 287, 299 P.2d 464; *McAdoo Petroleum Corp. v. Pankey*, 1930-NMSC-100, ¶13, 35 N.M. 246, 294 P. 322.

In *State ex rel. Schwartz v. Johnson*, this Court ruled that

the legislature cannot delegate its power to appropriate money unless specifically authorized by the state constitution [citing *Gamble*] . . . absent a proper delegation of authority from the state legislature, the executive branch is precluded from exercising any control over the expenditure of appropriated money in a manner that would affect the legislature’s choice of purpose. See *State ex rel. Holmes v. State Bd. of Fin.*, 69 N.M. 430, 437-42, 367 P.2d 925, 930-34 (1961).

*State ex rel. Schwartz v. Johnson*, 1995-NMSC-080, ¶ 3, 120 N.M. 820, 907 P.2d 1001 (Ransom, J. for a unanimous court).

When *Gamble* refers to “the purse strings,” it is echoing James Madison’s famous description of “the power over the purse,” as he described it in the Federalist Papers.

The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse, that powerful instrument by

which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

The Federalist No. 58 (James Madison).

In 1788, the readers of The Federalist understood very well the constitutional history described in this passage. The Federalist is summarizing centuries of struggle between Parliament and the King, a struggle that can be traced back as early as the Magna Carta of 1215. In the ensuing centuries Parliament exerted its “power over the purse” to curb the executive power of British kings and queens. <https://lordslibrary.parliament.uk/who-holds-purse-strings-financial-privilege-and-the-house-of-lords/>

This history was replicated in the American colonies during the pre-revolutionary era, as colonial legislatures repeatedly exacted concessions from royal governors in exchange for granting the revenues necessary to fund government. Our Founding Fathers lived this history while the United States formed itself into an independent nation. American colonists had struggled and then fought for the principle of “No taxation without representation,” so



they knew from direct experience that popular freedom could be gained only by controlling the revenues and expenditures of government. See Theodore Draper, *A Struggle for Power: The American Revolution* 36-37 (1996).

2. ***State ex rel. Sego v. Kirkpatrick Upholds the Legislative Power of Appropriation, and its Decision on One Appropriation Is Based on the Special Provisions in Article XII of the New Mexico Constitution about Institutions of Higher Learning.***

Counsel for the Governor misconstrue *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, 86 N.M. 359, 524 P.2d 975, as can be seen by actually reading the case rather than grabbing a few lines from it. *Sego* generally upholds the legislative power of appropriation against intrusion or distortion by gubernatorial detail. In *Sego*, the court ruled on six attempted vetoes relating to the State Planning Office, the Racing Commission, the Personnel Board, the Construction Industries Commission, the Department of Finance and Administration, and institutions of higher education. The court ruled in favor of the Legislature on four of the six attempted vetoes.

It is quite important to realize that *Sego* upheld the Legislature's appropriation of both state and federal money to the State Planning Office.

{20} The Legislature unconditionally appropriated for the State Planning Office the sum of \$324,800 from the State's general fund and \$712,800 from Federal funds. This appropriation of both State and Federal funds in the total amount of \$1,037,600 has not been questioned.

To cap the total expenditure of state and federal funds for the State Planning Office, the Legislature added a conditional appropriation of \$150,000, provided “that no funds shall be disbursed from this appropriation which would allow an operating budget greater than \$1,037,600.” The governor vetoed this provision, but this Court struck down the gubernatorial veto because the Legislature has the power to affix reasonable provisions or limitations on appropriations and expenditures, and the Governor may not distort, frustrate or defeat the legislative purpose through vetoes.

Later in *Sego*, this court explained why the Legislature must have the authority to plan for the future in setting fiscal budgets:

The Legislature, which has the power and is charged with the responsibility of appropriating State money, is certainly concerned with matters which would have a significant financial impact upon or require significant future appropriations of State funds, and may properly limit the expenditure of appropriated funds for uses which will have such impact or require such future appropriations.

*Sego*, 1974-NMSC-059, ¶ 31.

The combined funding of the State Planning Office in *Sego* illustrates the fact that many state programs are funded with a mixture of state and federal

money. Some federal programs requiring matching funds from the state, so the Legislature must take federal funds into account when it creates a budget, as it did in *Sego*.

*Sego* does uphold the veto of certain language concerning institutions of higher learning, such as the University of New Mexico or New Mexico State University. This particular ruling rests entirely on the text of the New Mexico Constitution which grants special status and autonomy to institutions of higher learning. See N.M. Const. art. XII, §§ 11-13.

*Sego* does not establish a categorical rule that all federal revenues are excluded from the appropriations process, as argued by the Governor's counsel. *Sego* actually upholds the Legislature's combined appropriation of state and federal funds to the State Planning Office, so counsels' argument is patently mistaken. *Sego* does not overrule all the many cases in which the Court has upheld the appropriation authority of the Legislature. For more recent examples, see *State ex rel. Smith v. Martinez*, 2011-NMSC-043, 150 N.M. 703, 265 P.3d 1276, and *State ex rel. Cisneros v. Martinez*, 2015-NMSC-001, 340 P.3d 597.

### 3. **Suspense Funds Are Part of the State Treasury.**

In the brief filed October 15, 2021, counsel for the governor advance a confusing and erroneous argument – that a suspense fund is somehow separate from the state treasury. This is counsels’ main argument for creating an unfettered spending power for this Governor and all future governors, Republican, Democrat, or DTS.

The “suspense” argument is disproved by the very statute that the governor quotes in the brief. The brief mistakenly asserts that NMSA 1978, § 6-10-3 creates “an exception to the general rule requiring public moneys be paid into the treasury.” Response Brief at 15. Actually, the statute does the opposite: it expressly requires public moneys to be remitted to the state treasury. The relevant portions of the statutory text are as follows:

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 . . . receiving any money . . . to forthwith deliver . . . it to the state treasurer; provided, however, that:

\* \* \*

C. every official . . . receiving any money, . . . which money has not yet been earned so as to become the absolute property of the state, shall deliver [the money] to the state treasury, which money shall be deposited in a suspense account . . .

How could the governor's counsel misread the plain text of this statute? The statute says that all public money shall be paid into the state treasury. If there are questions about the disposition of the money, the money is delivered to a suspense account within the state treasury, until the proper disposition can be ascertained.

There is nothing new about suspense accounts: they are a common accounting device to keep track of money until uncertainties are resolved. "The purpose of a suspense fund is to temporarily hold unclassified transactions while a decision is being made as to their classification." Office of the Washington State Auditor, <https://sao.wa.gov/bars> cash/accounting/revenues/suspense-funds/ Besides section 6-10-3, there are other statutes which create suspense accounts inside the state treasury. For example, see NMSA 1978, § 66-6-22.1 (motor vehicle suspense fund); § 7-1-6(D) (tax administration suspense fund); § 59A-6-5 (insurance department suspense fund); § 19-10-41 (oil and gas royalty suspense fund).

Officials within the executive bureaucracy clearly have no power to override constitutional requirements simply by changing accounting classifications.

**4. Because New Mexico Law Provides Clear Answers About the Appropriation Power, It Would Be Unwise To Import an “Ad Hoc” Approach from Other States.**

As a fall-back position, governor’s counsel invites the Court to adopt the “ad hoc” approach mentioned in cases from other jurisdictions. Response Brief at 36-42. The Court should decline that invitation.

First, ad hoc reasoning is rarely a good idea because it is recognized as a fallacious form of thinking. See <https://fallacyinlogic.com/ad-hoc-fallacy>. Second, an ad hoc approach leads to inconsistent results from case to case. Third, the laws in other jurisdictions may differ significantly from the law in New Mexico, and in any event decisions from other states are not binding on the courts in New Mexico. Finally, New Mexico’s Constitution, cases, and statutes already provide clear answers to the questions at bar, so there is no need to wander afield in search of answers.

On page 28, the Governor’s brief argues that governors are in a better position to direct the spending of federal funds because, “Unlike other states, New Mexico does not have a fulltime legislature.” Actually, there are only 4 states that have full-time legislatures: New York, California, Illinois, and Michigan. See National Conference of State Legislatures website at <https://www.ncls.org/>

research/about-state-legislatures/full-and-part-time-legislatures.aspx The New Mexico Constitution sets the length of the legislative sessions, and by setting short sessions the Constitution did not nullify the Legislature's appropriation power.

The Constitution vests the appropriation power in legislators from 112 districts across the state, because it is essential to have a diversity of interests represented when the Legislature sets spending priorities.<sup>2</sup> This representation of diverse views would be lost if the appropriation power were vested in one person.

**5. Under New Mexico's Constitutional System of Checks and Balances, Governors Already Participate in the Appropriations Process via the Veto Power.**


Amici would respectfully point out that governors already possess significant power as regards appropriations, because governors can veto an appropriation in whole or in part (line item). N.M. Const. art. IV, § 22. Our Constitution creates a separation of powers that vests the appropriation function primarily but not exclusively in the Legislature. Our Constitution

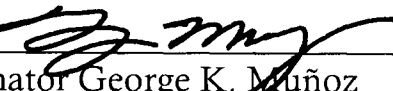
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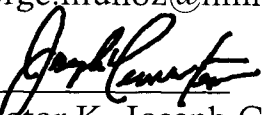
<sup>2</sup> This diversity is James Madison's theory of faction, put into practice. See The Federalist No. 10 (James Madison).

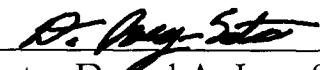
also creates checks and balances among all three branches of government, so that no one branch can attain disproportionate power.

Respectfully submitted,

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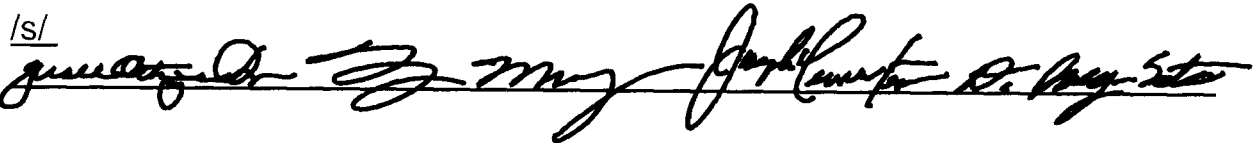
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We certify that this document was filed in the Supreme Court and hand delivered to Petitioners and to counsel for the Governor, and the Real Party in Interest on November 10, 2021.

/s/

A handwritten signature in black ink, written over a horizontal line. The signature is cursive and appears to read "Joseph Lawrence R. Meyer-Sitar".