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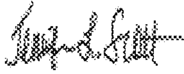

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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

Petitioners,

Case No.: S-1-SC-38996

v.

MICHELLE LUJAN GRISHAM, in her
capacity as GOVERNOR,

Respondent,

TIM EICHENBERG, in his capacity as
STATE TREASURER, as a real party in interest.

PETITIONERS' REPLY IN SUPPORT OF THE VERIFIED PETITION FOR WRIT OF MANDAMUS REGARDING THE APPROPRIATION OF CERTAIN STATE FUNDS

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I. ARGUMENT

A. THE ARPA FUNDS ARE THE PROPERTY OF THE STATE AND SUBJECT TO LEGISLATIVE APPROPRIATION PURSUANT TO ARTICLE IV, § SECTION 30.

1. The ARPA funds are the property of the state, and Article IV, Section § 30 and other applicable sections of state law requires that they, like all other public money, be deposited into the state treasury and spent only according to legislative appropriations. *See* N.M. Const. Art. IV, § 30.
2. Petitioners agree with Respondent that in the absence of a categorical rule making *all* federal grant funds subject to legislative appropriation pursuant to Article IV, Section § 30, the Court should adopt the ad hoc approach applied by Colorado Courts to determine if federal grant funds are the property of the state, and thus subject to legislative appropriation, or are rather custodial funds, held in trust by the state on behalf of the federal government, that are beyond the reach of the Legislature's appropriations power.
3. The test articulated in *In re Interrogatories Submitted on House Bill 04-1098*, 88 P.3d 1196 (Colo. 2004), when applied to the circumstances of this case, strongly suggests that the ARPA funds are the property of the state and should be deposited into the general fund and disposed of only in accordance with legislative appropriations.

4. Petitioners do not dispute that the ARPA funds come from a federal source.
5. However, as Respondent argues, the flexibility that Congress has granted the state with respect to appropriation of ARPA funds for particular purposes and objects, and the discretion that Respondent has in the manner that ARPA funds are disposed of once appropriated by the Legislature, is "determinative" in this analysis. [*Answer Brief* at 41]; *See* N.M. Att'y Gen. Op. 72-15 (1972) (Article IV, Section § 30 requires that the Legislature specify the particular purpose, object, and amount regarding each appropriation of public money); *See also* N.M. Att'y Gen. Op. 75-10 (1975) (Article IV, Section § 30 grants the legislature the power to appropriate public money for a particular purpose and object, but this power does not extend to the executive power to determine the manner by which funds will be disposed of).
6. The broad categories for which Congress has authorized the disposition of federal ARPA funds do not set forth or restrict state spending to a "particular purpose" or "object." *See* 42 U.S.C. 802 (C) (2).
7. States have substantial flexibility to decide, for example, which state agencies and programs should receive ARPA funds to further *general* federal purposes, including 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 business, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality." 42 U.S.C. 802 (C) (2) (a).

8. Similar to the federal statute at issue in *Interrogatories*, Congress also empowered the state to appropriate ARPA funds for the "provision of government services" generally. *See* Interrogatories, 88 P.3d at 1202-04; *See also* Section 802(c)(1)(C).

9. Also like the federal statute at issue in *Interrogatories*, Congress did not restrict the disposition of ARPA funds to a list of specific programs and activities. Instead, Congress left it to the states to decide how to allocate ARPA funds between their own state agencies and in light of their own budgetary priorities. Section 802(c)(1).

10. The plain language of ARPA Section 802 (c)(1) confirms that this was Congress' intent. State v. Trujillo , 2009-NMSC-012, ¶ 11, 146 N.M. 14, 206 P.3d 125 ("In interpreting a statute, our primary objective is to give effect to the Legislature's intent. In discerning legislative intent, we look first to the language used and the plain meaning of that language. Under the plain meaning rule, when a statute contains clear and unambiguous language, we will heed that language and refrain from further statutory interpretation.").

11. The absence of clarifying language in other parts 42 U.S.C. § 802, or Sections 801 or 803 of the federal act, to the effect that ARPA funds be spent "only in accordance with the laws and procedures applicable to the expenditure of its own revenues," does not, as Respondent argues, provide evidence that Congress intended ARPA funds to be custodial in nature. [*Answer Brief* at 32-33]; *See* Torrance Cty. Mental Health Program, Inc. v. N.M. Health & Env't Dep't , 1992-NMSC-026, ¶ 18, 113 N.M. 593, 830 P.2d 145 (The court should arduously avoid giving positive legal effect to bare legislative silence). To the contrary, Congress simply did not need to include such a clarifying instruction in light of the flexibility that the plain language of Section 802(C)(1) grants states to appropriate and dispose of ARPA funds.

12. The limited restrictions imposed by Congress at 42 U.S.C. Section 802(c)(2)(A) and Section 802(c)(2)(B) are not a meaningful intrusion, or limitation, on the Legislature's discretion to appropriate APRA funds for a virtually limitless range of particular public purposes, objects, and agency programs; including without limitation for government services generally.

13. The Legislature is also capable of exercising its appropriations power consistent with these limitations, a fact that Respondent ignores. The Legislature is also fully capable of exercising its appropriations power

consistent with compliance guidance issued by the U.S. Treasury with respect to the uses of ARPA funds.

14. The "framework" and expenditure criteria provided by the Treasury restrict the Governor's power over the manner (i.e. *how* appropriated funds are spent to achieve a particular purpose) that ARPA funds are spent. For example, administrative guidance that instructs states how to determine whether a "project" responds to a "negative economic impact" restricts the *manner* by which the executive spends ARPA funds appropriated to it by the Legislature to achieve a particular purpose. [*Answer Brief*, at 4-7].

15. These same rules do not, however, meaningfully restrict the Legislature's appropriations power to allocate the ARPA funds to particular purposes and objects that are consistent with Congressional intent expressed at Section 802 (c)(1).

16. The federal administrative rules and notices that Respondent cites also impose administrative reporting requirements upon the executive branch regarding the final disposition, or expenditure, of federal ARPA funds. [*Answer Brief*, at 7]. These reporting requirements, again, impose a duty upon the executive branch but do not infringe upon the Legislature's appropriations power.

17. Respondent also raises the spectre that the federal government has the authority to require that a state repay the U.S. Treasury for any ARPA funds used for "ineligible purposes." [*Answer Brief*, at 7]. Under the *Interrogatories* test advanced by Respondent, the mere existence of this clawback provision does not, on its own, mean that the ARPA funds are custodial in nature.

18. The Legislature is certainly competent and capable of appropriating the ARPA funds to particular purposes and objects that are consistent with the broad and far-reaching purposes articulated by Section 802 (C) (1) so as to avoid the risk of any federal clawbacks.[1]

19. Article IV, Section § 30 requires that the Legislature, and not the Governor, exercise the discretion that Congress has left to the states to allocate ARPA funds for particular purposes and objects. *See Id.* at 1204. Respondent fails to acknowledge that, even if the Court grants this writ, the Governor will continue to exercise significant constitutional and political influence over the

[1] Respondent's concern about federal clawbacks in 42 U.S.C. Section 802(e) is also pretextual. Legislative auditors recently released a public report documenting that the executive failed to submit a complete report to the U.S Department of the Treasury regarding disposition of ARPA funds through August 31, 2021. The auditors confirmed that the Department of Finance and Administration recently failed to submit information regarding 7 of 11 minimum reporting requirements to the federal government about the disposition of ARPA funds. Despite the executive's failure to comply with federal reporting requirements, auditors doubt that the state will see any real consequences for the lapse in adequate reporting. *See* McKay, Dan. "New Mexico Submits Incomplete Stimulus Info, report shows." The Albuquerque Journal, October 29, 2021. https://www.abqjournal.com/2441885/nm-submits-incomplete-stimulus-info-report-shows.html. Accessed November 1, 2021. If Respondent truly believes that the clawback provisions of ARPA present a real risk to the state, then she should already have taken steps to ensure that agencies under the Governor's control, including the Department of Finance and Administration, submit complete and accurate reports to the federal government. She did not.

legislative appropriations process and over the final disposition of federal funds. As Governor, Respondent may, as she has already done, exercise the executive veto or line item veto power on legislative ARPA fund appropriations. N. M. Const. Art. VI, § 22. The Legislature may then choose to override the Governor's veto. *Id.*

20. Respondent, however, asks this Court to cut the Legislature and the public out of the process our constitution requires and contemplates for appropriating public money entirely. Petitioners respectfully request that this Court deny Respondent's request to accumulate and consolidate power over the appropriation and the disposition of *all* federal grant funds.

B. RESPONDENT'S READING OF *SEGO* IS UNREASONABLE AND THIS COURT HAS NEVER ADOPTED A BROAD CATEGORICAL RULE THAT ALL FEDERAL GRANT FUNDS ARE CUSTODIAL FUNDS NOT SUBJECT TO LEGISLATIVE APPROPRIATION.

21. In *Sego* this Court adopted the reasoning of the Colorado Supreme Court in *MacManus v. Love*, that federal grant funds are typically not state funds subject to legislative appropriation, for the limited purpose of supporting the Court's ultimate ruling that federal grant funds appropriated by Congress directly to public institutions created by Article IX, Section § 13 of the state constitution were not the property of the state and not subject to legislative

appropriation under Article IV, Section § 30. State ex rel. Sego v. Kirkpatrick, 1974-NMSC-059, ¶¶ 48-51, 86 N.M. 359, 524 P.2d 975.

22. The *Sego* court was not asked to categorically decide if *all* federal grant funds are state funds or custodial funds. Nor was the Court concerned with announcing a categorical rule that would apply to *all* federal grant funds granted to the *state*, as opposed to those grant funds that congress grants to constitutionally created public institutions directly.[2]

23. Rather, the narrow legal issue before the *Sego* Court was limited to the status of federal grants that Congress makes *directly* to constitutionally created institutions of higher education. Respondent thus relies upon *Sego* in support of propositions that the case did not resolve. This is not appropriate. Morris v. Giant Four Corners, Inc. , No. S-1-SC-37997, 2021 N.M. LEXIS 33, at *50 (July 19, 2021) ("Our jurisprudence firmly establishes that cases are not authority for propositions not considered.") (internal citation omitted); *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 fact 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

[2] Respondent also acknowledges that to the extent *MacManus*, as cited by the *Sego* Court, adopted a categorical rule that all federal grant funds were custodial funds not subject to appropriation by the legislature, this rule has been supplanted by the Colorado Court's holding in *Interrogatories* which requires that the Court determine whether federal grant funds are property of the state or custodial funds, held in trust by the state on behalf of the federal government, on a case by case basis. [*Answer Brief*, at 36-42].

within their legal theories") (alteration, internal quotation marks, and citation omitted)). The ARPA funds at issue here are fundamentally different to those at issue in *Sego* because Congress has granted them to the state, and not to a specific state institution or agency.

24. Nor did this Court adopt such a categorical rule in *Carruthers*, 1988-NMSC-057. There, the Court merely observed that it had previously rejected an attempt by the Legislature to appropriate federal funds in *Sego* for the reasons discussed above. *Id.* at 24. The *Carruthers* Court upheld the Governor's veto of a legislative appropriation of federal grant funds because the Legislature, by providing excessive limiting details in its appropriation, had infringed upon the executive function to determine the manner by which appropriations are spent. *Id.*

25. The case-specific analysis that this Court engaged in in both *Sego* and *Carruthers* would not have been necessary if, as Respondent suggests, New Mexico law has followed a strict categorical rule that *all* federal grant funds are custodial in nature and not subject to legislative appropriation for the past fifty-years. The mere fact that the funds at issue in *Sego* and *Carruthers* were from a federal source was not, however, on its own determinative for the Court in either of these cases.

26. The Court should not adopt or apply such a broad categorical rule in this case because doing so would violate well-established public policy and the intent of Article IV, § Section 30.

27. Contrary to Respondent's arguments, the purpose of Article IV, § Section 30 is not limited to ensuring that the Legislature has the authority to appropriate "state" money alone.

28. The plain language of Article IV, § Section 30 requires that, except for interest or other payments on the public debt, the legislature must appropriate "all money" paid out of the state treasury, regardless if that "money" comes from a state or federal source. N.M. Const. Art. IV, § 30.

29. The constitutional convention and the people were certainly aware of the distinction between federal money and state money at the time that our constitution was first ratified on January 21, 1911.

30. In the 1880s, Congress began to significantly increase donations to the states in the form of grant funds. This represented a change from prior federal policy from prior decades during which Congress had focused on the donation of *land* to assist the states in achieving federal priorities in areas such as highway construction, public education, higher education, and agriculture. Maxwell, James. "Federal Grants and the Business Cycle" at 1-2. National Bureau of Economic Research, NBER 1952.

https://www.nber.org/system/files/chapters/c4900/c4900.pdf. Accessed November 1, 2021.

31. The 1910 constitutional convention chose to make no distinction in Article IV, § Section 30 between state money and federal grant money. As such, the scope and intent of Article IV, § Section 30 extends not only to state money, but to all " money" in the state treasury, regardless of its source.

32. Some of these early federal grant fund initiatives existing at the time of statehood also included provisions that restricted how states could dispose of federal grant funds, and others that required that states subject themselves to reporting and audit requirements regarding the expenditure of federal grant funds. In 1890, for example, Congress asserted the power to withhold federal grant funds from states for "failing to spend for the broad purposes specified [in the 1890 Morrill Act]." *Id.* Other federal grant funds even came with clawback provisions. *Id.*

33. Given this context, the framers could have chosen to include language in Article IV, Section § 30 categorically exempting federal grant money from legislative appropriation because of the restrictions, reporting requirements, and clawback provisions that Congress was already imposing upon this source of public funds. They chose not to. Instead, Article IV, § Section 30

adopts a much broader policy that all " money," regardless of its source, on deposit in the state treasury is subject to legislative appropriation.

34. Respondent's demand that this Court recognize for the first time a new constitutional principle that *all* federal grant funds are custodial in nature and exempt from legislative appropriation therefore directly contradicts the plain language and intent of Article IV, § Section 30.

35. Contrary to Respondent's arguments, appropriation of the ARPA funds by the Legislature would be consistent with and advance the purpose of Article IV, § Section 30 that all "money," regardless of its source, be appropriated by the Legislature.

36. Respondent also argues that adopting such a categorical rule would be in the best interest of the state because the legislative appropriation of the ARPA funds would serve no useful purpose. This is simply incorrect, and offensive to our state's system of representative democracy.

37. The Governor is no better positioned than the peoples' elected representatives meeting in the Legislature to determine how ARPA funds should be appropriated. Should the need arise for the Legislature to appropriate federal funds when it is not meeting in regular session, the Governor may call the Legislature into special session for the purpose of

appropriating federal grant funds or the legislature may convene itself in an extraordinary session for the same purpose.

38. Legislative appropriation of the ARPA funds would serve perhaps the most important purpose in our representative democracy: public control over the appropriation of public money.[3]

39. Article IV, § Section 30 requires that decisions about the appropriation of public money be made by the Legislature. The legislative appropriations process provides the people the best forum to participate in, and influence, the appropriation of public money. Legislative committee hearings, floor debates and floor votes are all conducted in public, which provides the people with an important accountability tool over elected officials wishing to appropriate public money.

40. The closed-door process Respondent advocates for is anathema to the transparent, public appropriations process that Article IV, § Section 30 requires as a precondition to the expenditure of public money. Respondent cannot satisfy this requirement by having closed door meetings with a group of unnamed legislators, who cannot act on behalf of the entire legislature, about how to spend ARPA funds. *See* [*Answer Brief*, at 36].

[3] *See* "Gov. needs to turn $1.1B from feds over to lawmakers." The Albuquerque Journal Editorial Board, published October 26, 2021. https://www.abqjournal.com/2440579/gov-needs-to-turn-11b-from-feds-over-to-lawmakers.html. Accessed Nov 1, 2021.

C. THE ARPA FUNDS SHOULD BE DEPOSITED INTO THE GENERAL FUND AND ARE CURRENTLY HELD IN A SUSPENSE FUND ONLY OUT OF NECESSITY.

41. Respondent also claims that the ARPA funds are conclusively not subject to Article IV, § Section 30 because they are *currently* held in a "suspense account" that is, according to Respondent, not part of the state treasury.[4]

42. Respondent, however, ignores that the ARPA funds were deposited into this account out of necessity, in light of the Governor's vetoes to H.B. 2, 55th Leg., 1st Sess. (N.M. 2021); *See also* [*Answer Brief,* at Exhibit A and B].

43. The the mere fact that Secretary Romero and Real party in interest Treasurer Eichenberg have made the administrative decision to deposit the ARPA funds into a suspense account pending resolution of this dispute regarding which branch of government has the power to appropriate the ARPA funds is not dispositive of whether the ARPA funds are the property of the state, or if Treasurer Eichenberg must transfer these funds to the general fund in accordance with state law.[5]

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[4] Ultimately, the Court need not decide if a "suspense account" is part of the state treasury to resolve this case. The real question before the Court is whether the ARPA funds are property of the state that must be deposited into the general fund. Whether a suspense account is part of the state treasury is irrelevant to this question.

[5] Respondent's *Answer Brief* unfortunately begins with an important factual misrepresentation. Respondent claims that this case involves a dispute between "two legislators" and the Governor. This is simply not true. Respondent's Exhibit A confirms that other top-legislative leaders, including State Rep. Antonio "Moe" Maestas, have publicly challenged the Governor's claim that she alone has the constitutional power to appropriate and dispose of the ARPA funds. While Respondent may wish to minimize the claims and arguments made by Petitioners and other legislators, she should not take such cavelier factual liberties in doing so.

44. It is up to this Court, and not Respondent, to decide if the ARPA funds are the property of the state and should therefore be transferred to the general fund or remain permanently in a non-general fund "suspense account."

45. As argued above, the flexibility that Congress has left the state to appropriate the ARPA funds to particular purposes and objects strongly suggests that they are the property of the state and must be deposited into the general fund pursuant to NMSA 1978, § 6-10-3 (requiring the State Treasurer to "credit all revenue not otherwise allocated by law" to the general fund) and NMSA 1978, § 6-4-2 (providing that expenditures from the general fund may only be made in accordance with appropriations made by the Legislature).[6]

II. PRAYER FOR RELIEF

46. Petitioners therefore respectfully request that the Court issue the writ of mandamus sought, and order that:

    a. Directs State Treasurer Tim Eichenberg to immediately transfer the balance of the state's ARPA allocation, including without limitation any funds meant for capital outlay projects, from the suspense account

[6] Petitioners did not address the fact that the ARPA funds are *currently* deposited in a "suspense" account in the *Verified Petition* because this fact is irrelevant to the ultimate question of whether the ARPA funds are state property that should be deposited into the general fund. To wit, the fact that Respondent unilaterally decided that the ARPA funds should be deposited into a suspense account (an administrative act) bears no weight on the *Interrogatories* analysis that Respondent asks the Court to adopt and reflects only Respondent's opinion that the ARPA funds are "custodial" funds.

where they are currently deposited and into the general fund, or account of the general fund, in the state treasury.

b. Prohibits the Governor and the State Treasurer and all other state officials subject to their authority from transferring, encumbering, committing, expending or appropriating any additional ARPA funds without legislative appropriation.

c. Grants Petitioners any other forms of relief the Court deems just and proper.

Respectfully submitted,

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STATEMENT OF COMPLIANCE

I hereby certify that this *Verified Emergency Petition* uses a proportionally-spaced type style, Times New Roman, and contains 3,072 words.

* /s/ Jacob R. Candelaria*	* /s/ Gregory Baca*
Jacob R. Candelaria	Gregory Baca

CERTIFICATE OF SERVICE

Pursuant to Rule 12-504(E), I hereby certify that Petitioners electronically filed a copy of this *Reply Brief* with the Court's Odyssey File and Serve System on November 1, 2021 which thereafter caused a true and correct copy of the same to be promptly and electronically served upon counsel for Respondent Governor Michelle Lujan Grisham and and Real party in interest State Treasurer Tim Eichenberg.

I further certify that I mailed a true and correct copy of the foregoing *Reply Brief* to the Office of the New Mexico Attorney General at the following address by First Class U.S. Mail sufficient postage prepaid, on November 1, 2021:

Hon. Hector Balderas
Attorney General of the State of New Mexico
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/s/ Jacob R. Candelaria	*/s/ Gregory Baca*
Jacob R. Candelaria	Gregory Baca