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Senator Jacob Candelaria, Senator Greg Baca
File Suit Against Governor Michelle Lujan Grisham
New Mexico Supreme Court petitioned to halt
Governor’s unconstitutional spending

ALBUQUERQUE – Senator Jacob Candelaria (D-Bernalillo) and Senator Greg Baca (R-Bernalillo & Valencia) have filed suit against Governor Michelle Lujan Grisham, petitioning the New Mexico Supreme Court to halt the Governor’s unconstitutional spending of federal American Recovery Plan Act (“ARPA”) funds without legislative authorization.

“When I became a senator almost a decade ago, I took an oath to defend the Constitution and laws of the state of New Mexico,” said Senator Candelaria. **“We have filed this petition to halt the Governor’s unconstitutional efforts to usurp the Legislature’s appropriations power by claiming that she, and she alone, has the power to decide how billions of dollars in federal grant funds are spent. In our country, no one is above the law and no one person should ever have the power to decide, unilaterally, how much people are taxed or how public money is spent.”**

Under Article IV, Section 30 of the New Mexico Constitution, “money shall be paid out of the treasury only upon appropriations made by the Legislature.” State law, meanwhile, dictates that expenditures from the general fund “shall be made only in accordance with appropriations authorized by the Legislature” (NMSA 1978, § 6-4-2).

“As legislators, we must preserve our appropriating authority and affirm the separation and balance of powers enshrined in our Constitution,” added Senator Baca. **“The bipartisan opposition to the Governor’s unlawful spending is evidence that this is not a political contest—but rather, a constitutional crisis. The fundamental question before us is whether or not a governor can usurp the legislative process and unilaterally control public money. The Constitution and state law are perfectly clear and we trust that our state’s highest court will rule accordingly.”**

During the 2021 Legislative Session, the Legislature exercised its appropriating authority by directing that New Mexico’s share of ARPA funds be deposited into a contingency fund. The Governor subsequently vetoed the appropriation and language, asserting that in her opinion, the Legislature lacked the authority to direct her administration of federal funds.

As of August 23, 2021, the Governor had already unlawfully appropriated over \$600 million in ARPA funds, with approximately \$1.08 billion dollars remaining on deposit in the state treasury. The suit does not request that the already unlawfully appropriated funds be returned, but that the court enter an order prohibiting the Governor from expending any additional ARPA funds without a legislative appropriation.

The court document is attached.

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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' 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**

Petitioners requests Oral Argument

The Court has original jurisdiction over this Emergency Petition

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I. NATURE OF THE CASE

Petitioners State Senators Jacob R. Candelaria and Gregory Baca brings this *Verified Emergency Petition* for a writ of mandamus and request for stay to prohibit respondent, Michelle Lujan Grisham, named in her capacity as Governor of the State of New Mexico, and all state officials under her control, from transferring, encumbering, committing, expending or appropriating any additional funds out of the state American Recovery Plan Act account (balance approximately \$1.08 billion) in the state treasury (“ARPA account”) absent express legislative authorization and appropriation. Tim Eichenberg administers the ARPA account in the state treasury in his capacity as State Treasurer, and is responsible for depositing and transferring funds in and out of the ARPA account. Treasurer Eichenberg is therefore a real party in interest to these proceedings. Petitioners bring this action pursuant to Rule 12-504 NMRA.

This case presents a constitutional emergency of generational importance. Absent a stay and writ of mandamus by this Court, the Governor will continue to unlawfully appropriate funds from the ARPA account in violation of the separation of powers doctrine enshrined in our state constitution and in violation of the Legislature's power to appropriate public money granted to the state by the federal government. In addition to the request for mandamus, Petitioner asks the Court to enter a stay prohibiting the Governor and State Treasurer from transferring,

encumbering, committing, expending or appropriating any additional funds out of the ARPA account pending a determination on this *Verified Emergency Petition*.

II. ORIGINAL JURISDICTION AND STANDING

1. This case is properly before the Court in an original proceeding. Our state Constitution provides that this Court will “have original jurisdiction in quo warranto and mandamus against all state officers, boards, and commissions.” N.M. Const. Art. VI, § 3. NMSA 1978, Section 44-2-3, however, also conveys jurisdiction to decide mandamus actions to the district court.
2. This Court has “regularly exercised original jurisdiction..by requiring that an original petition which could have been brought in a lower court must set forth the circumstances necessary or proper to seek the writ in the Supreme Court.” State ex rel. Clark v. Johnson, 1995-NMSC-048, ¶¶ 16-17, 120 N.M. 562, 904 P.2d 11 (internal citation and quotation omitted). Such “circumstances” which justify bringing an original mandamus proceeding in this Court include the “incapacity of other remedies and the necessity of an early decision on this [a] question of great public importance.” Id. (internal citation and quotation omitted).
3. This proceeding implicates fundamental constitutional questions of great public importance, including the separation of powers, the balance of

powers, and the Legislature's power to appropriate federal grant funds. The nature and gravity of these questions warrant this Court exercising its original jurisdiction. *See* N.M. Bldg. & Constr. Trades Council v. Dean, 2015-NMSC-023, ¶7, 353 P.3d 1212 (“It is duly established that the legislative branch makes the laws, the executive branch executes the laws, and the New Mexico Constitution prohibits any branch of government from usurping the power of another branch. The balance and maintenance of governmental power is of great public concern.”).

4. Furthermore, an early and expeditious resolution of these constitutional questions is in the public interest as the answers will determine which branch of government, Executive or Legislative, has the authority to appropriate over a billion dollars in public money. This case also presents pure questions of law that do not require any additional factual development before the district court. As such, it is proper for the Court to exercise original jurisdiction over this mandamus action.
5. Political efforts to resolve these disputes have also proven futile. Attempts to convene an Extraordinary Session of the Legislature in recent months have failed in light of overwhelming political pressure from the Governor to consolidate her unilateral power to appropriate and spend public money. For the same reason, it would be unreasonable to expect the Governor to call the

Legislature into a Special Session for the purpose of appropriating these funds. *See* Daniel J. Chacón, *GOP effort to convene New Mexico Legislature for extraordinary session fails, but dispute rages on*, Santa Fe New Mexican (July 8, 2021),

https://www.santafenewmexican.com/news/local_news/gop-effort-to-convene-new-mexico-legislature-for-extraordinary-session-fails-but-dispute-rages-on/article_323a6478-e016-11eb-99f9-e31cd6060174.html.

6. Nor should the Court defer these important constitutional questions to the next Regular Legislative Session, to convene in January of 2022, as the Governor has made clear that she will veto *any* Legislative appropriation of these funds. Something that she has *already* done.
7. The General Appropriations Act of 2021 (“HB2”), as passed by the Legislature earlier this year, directed that the state’s share of ARPA funds (estimated then at \$1.6 billion of \$350 billion nationwide) would be deposited in an “Appropriation Contingency Fund” of the General Fund. Section 11 of HB2 appropriated \$660.5 million of these ARPA funds for various purposes, the largest being a \$600 million appropriation to stabilize and replenish the state’s unemployment trust fund.
8. The Governor subsequently exercised her partial veto authority and struck the entirety of Section 11 from HB2, and with it all Legislative

appropriations of ARPA funds asserting that the Legislature categorically “lacks the authority to direct the Executive’s administration of federal funds.” See H. B. 2, §11, 55th Leg., 1st Sess. (N.M. 2021), *available at* <https://nmlegis.gov/Sessions/21%20Regular/final/HB0002.pdf>; *see also* Michelle Lujan Grisham, *House Executive Message No. 21*, New Mexico Legislature (Apr. 9, 2021), <https://nmlegis.gov/Sessions/21%20Regular/ExecMessages/house/HB0002GovMsg.pdf>.

9. Petitioners have standing to bring this mandamus action and request for stay because it involves matters of great public importance.
10. Petitioners assert that the Governor has exercised the Legislature’s appropriations authority unlawfully with respect to these ARPA funds, and that the Governor will continue to do so unless enjoined by this Court. This assertion presents issues of constitutional and fundamental importance upon which the Court may, and should, confer standing. *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 15, 120 N.M. 562, 904 P.2d 11 (the Court conferred standing upon a state senator in mandamus action to prohibit enforcement of gaming compact agreements entered into by the Governor with several Indian tribes as case implicated matters of great public

importance; noting that the “matter of great public importance” doctrine provides a wholly independent basis for the Court to confer standing).

11. The amount of federal grant funds implicated by this mandamus action and request for stay underscores the practical importance that these constitutional questions have to the people of New Mexico. As of August 23, 2021, approximately \$1.08 billion dollars in ARPA funds remain on deposit in the state treasury. The Governor has already appropriated over \$600 million dollars of the State’s original ARPA distribution (approximately \$1.73 billion), in violation of the constitutional balance of powers. The remaining \$1.08 billion in ARPA funds is equivalent to approximately 14.5% of the State’s recurring general fund appropriations for fiscal year 2022. *See* Legislative Finance Committee, *Fiscal Impact Report*, New Mexico Legislature (Feb. 23, 2021), nmlegis.gov/Sessions/21%20Regular/firs/HB0002.PDF.

12. Petitioners do not ask the Court to order that the funds already unlawfully appropriated by the Governor be returned to the ARPA account in the state treasury. Rather, Petitioners only ask the Court to enter an order prohibiting the Governor and the State Treasurer, as a real party in interest, from transferring any additional funds out of the state’s ARPA account in the state treasury absent a Legislative appropriation.

13.Senator Candelaria (D-Bernalillo) and Senator Baca (R-Bernalillo & Valencia) further have standing to bring this *Verified Emergency Petition* as members of the state senate. Senator Baca is the duly elected Senate Minority Floor Leader. Senator Candelaria is a member of the New Mexico State Senate, and as a member of the Senate Finance Committee which has jurisdiction over all state revenues, expenditures, investments, and indebtedness.

III. ARGUMENT

MANDAMUS IS A NECESSARY AND PROPER REMEDY TO PREVENT THE GOVERNOR FROM FURTHER USURPING THE LEGISLATURE’S POWER TO APPROPRIATE PUBLIC MONEY

14.Mandamus is a proper remedy to enjoin a constitutional officer such as the Governor, acting within the scope of their official duties as is the case here, from engaging in an unlawful action. State ex rel. Clark v. Johnson, 1995-NMSC-048, ¶ 18 (internal citation omitted). This Court has never "insisted upon . . . a technical approach [to the application of mandamus] where there is involved a question of great public import" and where other remedies might be inadequate to address that question. Id.

15.Mandamus is the only adequate remedy to prevent the Governor from appropriating any additional ARPA funds and thereby protect the

constitutional balance of powers and the Legislature's power to appropriate federal grant funds.

16. With certain exceptions¹, “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.” NMSA 1978, § 6-10-3 (2003). The State Treasurer is obligated to “credit all revenues not otherwise allocated by law” to the general fund, and expenditures from the fund “shall be made only in accordance with appropriations authorized by the Legislature.” NMSA 1978, § 6-4-2 (1957).

17. “Public money” is money from any source intended for public use received by or otherwise made available to a state government officer, employee or entity. *See State v. Hearne*, 1991-NMCA-046, ¶ 12, 112 N.M. 208 (“funds made available to the University [of New Mexico] become public funds to be expended consistently with all of the regents applicable legal duties, regardless of the original source of the funds”), *cert. denied*, 112 N.M. 77, 811 P.2d 575 (1991); N.M. Att’y Gen. Op. No. 67-128 (1967); N.M. Att’y Gen. Op. No. 62-09 (1962).

18. The federal ARPA funds appropriated in HB 2 are made available to the state generally and are thus “public money” subject to Legislative

¹ Educational, charitable and penal institutions of the state are exempt from the requirement to pay public money into the state treasury. NMSA 1978, § 6-10-54 (1925).

appropriation. Congress did not designate these funds for use by any specific state program or state agency under the Governor's control. While ARPA designates some funding specifically for state governors to allocate, none of those funds were appropriated in HB 2.

19. Although a proper exercise of her partial veto authority, the Governor's vetoes of the appropriations of ARPA funds in HB 2 have no effect on the State Treasurer's legal obligations regarding these funds. ARPA makes the funds available to the state generally; they are not designated by law for any specific program, agency or fund. Consequently, state law directs that the State Treasurer deposit those funds into an account in the general fund (i.e. the ARPA fund at issue here), and prohibits their expenditure without an appropriation by the Legislature.

20. Under Article IV, Section 30 of the New Mexico Constitution, "money shall be paid out of the treasury only upon appropriations made by the Legislature." The purpose of the provision "is to [ensure] legislative control, and to exclude executive control, over the purse strings." Gamble v. Velarde, 1932-NMSC-048, ¶ 15, 36 N.M. 262. The only exception to the Legislature's authority to appropriate public money in Article IV, Section 30 is "interest or other payments on the public debt." Laws "making an

appropriation shall distinctly specify the sum appropriated and the object to which it is to be applied.” Id.

21. The Governor has already usurped the Legislature’s appropriation authority by directing the expenditure of approximately \$600 million of these ARPA funds. This *Verified Emergency Petition* is not premature as the harms to the Legislature’s appropriations power have already accrued and will most certainly continue to occur absent an order of mandamus from this Court.

22. Respondent Governor Lujan Grisham has been less than forthcoming with respect to the legal basis upon which she claims the constitutional authority to unilaterally and categorically appropriate *all* federal grant funds made from Congress to the State of New Mexico.

23. The Governor’s veto message related to the ARPA appropriations contends that “the Legislature lacks the authority to direct the Executive’s administration of federal funds.” Michelle Lujan Grisham, *House Executive Message No. 21*, New Mexico Legislature (Apr. 9, 2021) at 9, <https://nmlegis.gov/Sessions/21%20Regular/ExecMessages/house/HB0002GovMsg.pdf>. Although the Governor did not state the legal basis for this broad assertion, it likely is based on the New Mexico Supreme Court’s decision in State ex rel. Segó v. Kirkpatrick. That case, in addition to being one of the leading cases on the parameters of the Governor’s partial veto

authority, stands for the limited proposition that the Legislature lacks authority to appropriate federal funds appropriated directly by Congress to state education institutions created by Article XII, Section 11 of the state constitution. 1974-NMSC-059, ¶ 51.

24. The Court's decision in Sego was based on the unique status that certain state educational institutions have under the New Mexico Constitution. Specifically, the Court pointed to the "powers of control and management" vested in each institution's board of regents under Article XII, Section 13. *See also Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶ 50, 125 N.M. 401 (observing that state universities governed by boards of regents under Art. XII, § 13 possess "a very real, though somewhat ill-defined, independence from outside control"). Because of this constitutional authority, the Court concluded that federal funds granted by Congress directly to constitutional created education institutions belonged to the institutions, and that control over the expenditure of the funds rested with the boards regent of those institutions and not the Legislature.

25. In reaching its decision, the Court relied on language from a Colorado case holding that the Colorado Legislature did not have authority to appropriate federal funds and its "attempt to do so was '[constitutionally] void as an

infringement upon the executive function of administration.” 1974-NMSC-059, ¶ 50 (quoting MacManus v. Love, 499 P.2d 609 (Colo. 1972)). In the context of the Sego decision, it is clear that the Court relied on the quoted language to support its conclusion that the New Mexico Legislature was precluded from using its powers of appropriation to control federal funds granted to state educational institutions whose boards of regents are vested by the state constitution with authority to control and administer those funds.

26. The Colorado Supreme Court’s decision in MacManus and subsequent cases addressing the Colorado Legislature’s authority to appropriate federal grant money are based on the view that federal funds are categorically “custodial funds” not subject to legislative appropriation. *See* MacManus, 499 P.2d at 610; Colorado General Assembly v. Lamm, 738 P.2d 1156, 1169-1170 (Colo. 1987). New Mexico’s appellate courts have not made the same distinction for purposes of the Legislature’s appropriation authority. *See* Lamm, 738 P.2d at 1169 (noting that “Congress has left the issue of state legislative appropriation of federal block grants for each state to determine”).

27. Nothing in Sego suggests that the Court intended to hold that the Legislature was categorically without authority to appropriate *any* federal grant funds

received by the state, or that federal grant funds received by the state are distinguishable from other public money that must be deposited into the state treasury and which is subject to appropriation by the Legislature.

28. To the contrary, before its discussion in Sego regarding the Legislature's attempt to appropriate federal funds granted to state educational institutions, the Court reviewed an appropriation of state and federal funds to the state planning office. 1974-NMSC-059, ¶ 20. The Court found invalid the Governor's attempt to veto a related contingent appropriation, but did not strike down the Legislature's appropriation of federal funds to the planning office. In light of the Court's previous decisions upholding the Legislature's exclusive authority over appropriations, it seems likely that, had the Court believed the Legislature generally lacked the power to appropriate federal funds, it would have invalidated the entire appropriation. *See State ex rel. Coll v. Carruthers*, 1988-NMSC-057, ¶ 36, 107 N.M. 439 ("Specifically, courts have upheld vetoes of improper conditions...that the courts view as an improper intrusion into the executive managerial function.").

29. Sego does not, therefore, provide the Governor with unilateral and categorical authority to appropriate all federal funds granted to the state, nor does it provide the Governor a legal basis to justify the appropriations that she has already made out of the ARPA fund in the state treasury.

30. The New Mexico Attorney General, in an opinion issued the year before the Sego decision, concluded that the Governor was not authorized to spend general federal revenue-sharing funds without a legislative appropriation. N.M. Att’y Gen. Op. No. 73-09 (1973). According to the opinion, the final authority over the method by which federal grant money is distributed by a state is the Congressional legislation making the funds available. The federal legislation at issue required the state, among other things, to “provide for the expenditure of amounts received ... only in accordance with the laws and procedures applicable to the expenditure of its own revenues.” Based on this direction, the Attorney General opinion determined that the expenditure of the federal funds were subject to the Legislature’s appropriation authority under the state constitution.

31. Consistent with the 1973 Attorney General’s Opinion, courts outside New Mexico addressing the issue under their states’ laws generally conclude that their legislative bodies are authorized to appropriate federal funds in the same manner as other public money, absent any specific state restrictions. For example, the Pennsylvania Supreme Court held that federal funds allocated to the state were to be deposited into the state treasury and appropriated by the General Assembly in the same manner as other funds in the treasury. Shapp v. Sloan, 391 A.2d 595 (Pa. 1978). According to the

opinion, “[t]he framers gave to the General Assembly the exclusive power to pay money out of the state treasury without regard to the source of the funds. In contrast, nowhere in our Constitution is the executive branch given any right or authority to appropriate public monies for any purpose.” *Id.* at 603. Notably, the Pennsylvania Supreme Court distinguished Sego on the grounds that it involved grantees who were not “officials or agencies of the state government,” and found the Colorado Supreme Court’s decision in MacManus “completely unpersuasive.” *Id.* at 603-604. *See also Cooper v. Berger*, 852 S.E.2d 46 (N.C. 2020) (holding that federal block grant funds received by North Carolina were properly paid into the state treasury and subject to the general assembly’s constitutional appropriation authority); Anderson v. Regan, 425 N.E.2d 792 (N.Y. 1981) (holding that federal funds received by the state and placed in the state treasury must be appropriated by the Legislature before they may be disbursed by the executive department).

32. The reasoning expressed by the supreme courts of our several sister states is compelling, and consistent with this Court’s jurisprudence that has long recognized the supremacy of the Legislature when it comes to the appropriation of public money.

33. This Court has not adopted and should not adopt the general rule--advocated by the Governor and adopted by the Colorado Supreme

Court in MacManus--that all federal funds are categorically subject to appropriation by the *Executive* and not the *Legislature*. Such a holding would be an anathema to the fundamental public policy of this state which vests the Legislature, the peoples' elected representatives, with the power to appropriate public money. N.M. cont. Art. IV, Section 30 (““money shall be paid out of the treasury only upon appropriations made by the Legislature.”); State ex rel. Schwartz v. Johnson, 1995-NMSC-080, 907 P.2d 1001) (“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.”).

34. The Court must now act to rebalance the scales of power and protect the Legislature's important yet fragile power over the pursestrings of state government. State ex rel. Coll v. Carruthers, 1988-NMSC-057, 759 P.2d 1380 (“The very concept of such absolute and unrestrained power is inconsistent with the concept of checks and balances, which is basic to the form and structure of state government created by the people of New Mexico in their constitution, and is inconsistent with the fundamental principle that under our system of government no man [or woman] is completely above the law.”).

IV. MANDAMUS RELIEF AND REQUEST FOR STAY

35. Petitioners therefore respectfully ask the Court to enter a writ of prohibition and 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.
36. Petitioners further respectfully request the Court enter a stay prohibiting the Governor and the State Treasurer, as well as all state officials under their control, from transferring, encumbering, committing, expending or appropriating any additional funds out of the state ARPA account in the state treasury pending disposition of this *Verified Emergency Petition*.
37. Granting a stay is appropriate without prior notice to Respondent, Governor Michelle Lujan Grisham, because the Governor has actual notice of the claims made herein, by virtue of its enacting the original version of HB2, that the Legislature alone has the constitutional authority to appropriate the federal ARPA grant funds on deposit in the state treasury. Similarly, the Governor, by virtue of her line item vetoes to the sections of HB 2 appropriating ARPA funds, has been clear in her belief that the Executive has the exclusive power to appropriate *all* federal funds granted to the state

by Congress. Further notice to the Governor of the basis for this stay, at this point, would be superfluous as the parties are well aware of their mutual positions on the law.

38. Further irreparable injury will occur to the Legislature's constitutional power to appropriate public money if the Court does not grant this stay, as the Governor has been clear in her intent to spend these funds without any legislative appropriation or delegation of authority. No loss or damage will accrue to the Governor or to the State Treasurer, as a real party in interest, if the Court grants this stay.

Respectfully submitted,

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CERTIFICATION

Pursuant to Rule 12-504 NMRA, I hereby certify under oath that I have read the foregoing *Verified Emergency Petition* and that the statements contained therein are true and correct to the best of my knowledge, information, and belief.

/s/ Jacob R. Candelaria

Jacob R. Candelaria

/s/ Gregory Baca

Gregory Baca

STATEMENT OF COMPLIANCE

I hereby certify that this *Verified Emergency Petition* uses a proportionally-spaced type style, Times New Roman, and contains 3,500 words.

/s/ Jacob R. Candelaria

Jacob R. Candelaria

/s/ Gregory Baca

Gregory Baca