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13 *Governor of the State of Arizona*

14 IN THE UNITED STATES DISTRICT COURT  
15 FOR THE DISTRICT OF ARIZONA

17 Douglas A. Ducey, Governor of the State of  
18 Arizona, in his official capacity,

19 Plaintiff,

20 v.

21 Janet Yellen, Secretary of the Treasury, in  
22 her official capacity; Richard K. Delmar,  
Acting Inspector General of the Department  
23 of Treasury, in his official capacity; and  
U.S. Department of the Treasury,

24 Defendants.

No.

**Complaint for Declaratory and  
Injunctive Relief**

25  
26  
27  
28

**INTRODUCTION**

1  
2 “All legislative Powers herein granted shall be vested in a Congress of the United  
3 States...” *U.S. Const. art. I, § 1.*

4 1. The COVID-19 pandemic has created havoc in the lives of every citizen of  
5 our nation, and its biggest impact has been on our children. The loss of learning,  
6 socialization and opportunity has set our children back years, even with the great efforts  
7 made by parents and educators.

8 2. This is why the State of Arizona, through the Governor’s Office, implemented  
9 programs in accordance with federal law and regulations, using funds appropriated to it by  
10 Congress, to bridge the gaps, get our children back in school and get them back on track  
11 academically.

12 3. Yet, following implementation of these programs, Arizona has been put on  
13 notice that funding, along with the children and parents it assists, will be held hostage if  
14 Arizona fails to bend to the arbitrary and capricious authority of a federal regulatory agency.

15 4. Douglas A. Ducey, Governor of the State of Arizona, cannot allow this action  
16 to stand without protest. The work of mitigating COVID-19 “belongs to state and local  
17 governments across the country and the peoples elected representatives in Congress.” *Nat’l*  
18 *Fed’n of Indep. Bus. v. Dep’t of Labor, Occupational Safety & Health Admin.*, 2022 WL  
19 120952, at \*3 (U.S. Jan. 13, 2022) (Gorsuch, J., concurring).

20 5. This case arises out of the U.S. Department of the Treasury (“Treasury”)  
21 seeking to usurp Congressional power in the area of COVID-19 financial relief. Through  
22 its attempted legislative action, Treasury seeks to deprive the State of Arizona of millions  
23 of dollars in aid that Congress appropriated for the purpose of mitigating the negative  
24 economic impacts of the COVID-19 pandemic—monies that are critically needed to recover  
25 from the pandemic’s effects on education, including the remote learning that  
26 disproportionately impacted low-income students. If these effects are not addressed, they  
27 will have long-term economic, educational and social, consequences.

28 6. The genesis of the dispute is Congress’s passage of the American Rescue Plan

1 Act of 2021 (“ARPA”). Among other things, ARPA created the Coronavirus State and  
2 Local Fiscal Recovery Fund (the “SLFRF”). In the text of ARPA, Congress specifically  
3 described the permissible uses of SLFRF monies by States and also specifically described  
4 restrictions on such uses.

5 7. Initially, Treasury—which was tasked with distributing SLFRF monies and  
6 creating implementing regulations—correctly recognized that ARPA gave the States  
7 “*broad latitude* to choose whether and how to use the [SLFRF funds] to respond to and  
8 *address the negative economic impact*” of COVID-19. Coronavirus State and Local Fiscal  
9 Recovery Funds, 86 Fed. Reg. 26786, 26794 (May 17, 2021) (emphasis added). Treasury  
10 further recognized that one way for States to address the negative economic impact of  
11 COVID-19 would be through programs focused on the educational impacts of remote or  
12 hybrid learning, which disproportionately affected low-income and minority students.

13 8. In accordance with Treasury’s statements, as well as the text of ARPA,  
14 Governor Ducey used some of the SLFRF monies to create two grant programs that  
15 addressed the long-term, negative economic impacts on disadvantaged communities from  
16 school closures and overbearing mask mandates. The programs empower parents and  
17 students to exercise their freedom to make informed decisions regarding their health and  
18 educational needs.

19 9. More recently, however, Treasury arbitrarily changed its guidance, and  
20 through a clear abuse of discretion, is seeking to unilaterally amend ARPA by adding new  
21 health conditions on how SLFRF monies may be used. In particular, and even though  
22 Treasury has no background expertise in public health, Treasury recently issued a Final  
23 Rule that purports to prohibit SLFRF monies from being used in a manner that, in the  
24 subjective and ill-informed opinion of Treasury, would undermine efforts to stop the spread  
25 of COVID-19. Based on its policy objections to the two grant programs referenced above,  
26 Treasury has also indicated to Governor Ducey that, even though this Final Rule does not  
27 become effective until April 1, 2022, the Rule somehow authorizes Treasury to: (1) recoup  
28 SLFRF monies distributed to the State; and (2) withhold future SLFRF distributions.

1           10. Treasury's actions far exceed the statutory authority granted to it under  
2 ARPA. Nothing in that underlying statute authorizes Treasury to condition the use of  
3 SLFRF monies on following measures that, in the view of Treasury, stop the spread of  
4 COVID-19. If Congress had truly intended to give Treasury the power to dictate public  
5 health edicts to the States, and recoup or withhold SLFRF monies based on an alleged lack  
6 of compliance with such edicts, it would have spoken clearly on the matter. It did not.  
7 Moreover, even if Treasury were correct that ARPA conferred it the broad authority it now  
8 claims to attach new conditions on SLFRF monies, then the statute would violate the  
9 Spending Clause of the U.S. Constitution and the non-delegation doctrine. This Court  
10 should declare the Final Rule invalid, declare that Treasury has acted arbitrarily and  
11 capriciously and has abused its discretion, and enjoin Treasury's legislative overreach.

#### **PARTIES, JURISDICTION AND VENUE**

12  
13           11. Plaintiff Douglas A. Ducey is the Governor of the State of Arizona. Under  
14 Arizona law, Governor Ducey is the official authorized to accept and expend funds received  
15 from the federal government or any agency thereof. *See* Ariz. Rev. Stat. § 41-101.01(A).  
16 Pursuant to this authority, Governor Ducey has accepted and expended SLFRF monies.  
17 Additionally, Governor Ducey serves as the sole State official responsible for  
18 communications between the State of Arizona and the federal government. *See* Ariz. Rev.  
19 Stat. § 41-101(A)(4).

20           12. Defendant Janet L. Yellen is the Secretary of the Treasury of the United States  
21 and is named in her official capacity.

22           13. Defendant Richard K. Delmar is the Acting Inspector General of the  
23 Department of the Treasury and is named in his official capacity. On information and belief,  
24 the Inspector General is responsible for monitoring and oversight of COVID-19 relief funds  
25 that have been disbursed to the States, and is generally responsible for informing and  
26 advising the Secretary of the Treasury about programs administered by Treasury and the  
27 need for corrective action.

28           14. Defendant the U.S. Department of the Treasury is an agency of the United

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1 States. Treasury is not a public health agency and does not have expertise in this area.

2 Rather, on its website, Treasury describes its role as follows:

3 The Treasury Department is the executive agency responsible  
4 for promoting economic prosperity and ensuring the financial  
5 security of the United States. The Department is responsible for  
6 a wide range of activities such as advising the President on  
7 economic and financial issues, encouraging sustainable  
8 economic growth, and fostering improved governance in  
9 financial institutions. The Department of the Treasury operates  
10 and maintains systems that are critical to the nation's financial  
11 infrastructure, such as the production of coin and currency, the  
12 disbursement of payments to the American public, revenue  
13 collection, and the borrowing of funds necessary to run the  
14 federal government. The Department works with other federal  
15 agencies, foreign governments, and international financial  
16 institutions to encourage global economic growth, raise  
17 standards of living, and to the extent possible, predict and  
18 prevent economic and financial crises. The Treasury  
19 Department also performs a critical and far-reaching role in  
20 enhancing national security by implementing economic  
21 sanctions against foreign threats to the U.S., identifying and  
22 targeting the financial support networks of national security  
23 threats, and improving the safeguards of our financial systems.<sup>1</sup>

14 15. This Court has jurisdiction under 28 U.S.C. §§ 1331, and 2201-02.

15 16. Venue in the District of Arizona is proper under 28 U.S.C. § 1391(e) because:

16 (1) Governor Ducey resides in this district, is the State official responsible for  
17 communications between the State of Arizona and the federal government, and this case  
18 does not involve real property; and (2) “a substantial part of the events and omissions giving  
19 rise to the claim occurred” in this district—namely, the receipt and disbursement of SLFRF  
20 monies.

21 **GENERAL ALLEGATIONS**

22 **I. The Provisions of ARPA**

23 17. On March 11, 2021, President Joseph Biden signed ARPA into law.

24 18. Section 9901 of ARPA amends Title VI of the Social Security Act (42 U.S.C.  
25 § 801 *et seq.*) to establish the SLFRF.

26 19. The SLFRF appropriates \$219,800,000,000 to States, territories, and Tribal

27 <sup>1</sup> *Role of the Treasury*, U.S. Department of the Treasury (last visited Jan. 20, 2022),  
28 <https://home.treasury.gov/about/general-information/role-of-the-treasury>

1 governments “to mitigate the *fiscal* effects stemming from the public health emergency with  
2 respect to the Coronavirus Disease.” 42 U.S.C. § 802(a)(1) (emphasis added).

3 20. In Section 9901 of ARPA, Congress expanded on the permissible uses of  
4 SLFRF monies. 42 U.S.C. § 802(c)(1). In particular, Congress mandated in 42 U.S.C.  
5 § 802(c)(1) that the funds be used for one of four purposes:

6 (A) to respond to the public health emergency with respect to  
7 the Coronavirus Disease 2019 (COVID–19) or its negative  
8 economic impacts, including assistance to households, small  
9 businesses, and nonprofits, or aid to impacted industries such as  
10 tourism, travel, and hospitality;

11 (B) to respond to workers performing essential work during the  
12 COVID–19 public health emergency by providing premium  
13 pay to eligible workers of the State, territory, or Tribal  
14 government that are performing such essential work, or by  
15 providing grants to eligible employers that have eligible  
16 workers who perform essential work;

17 (C) for the provision of government services to the extent of the  
18 reduction in revenue of such State, territory, or Tribal  
19 government due to the COVID–19 public health emergency  
20 relative to revenues collected in the most recent full fiscal year  
21 of the State, territory, or Tribal government prior to the  
22 emergency; or

23 (D) to make necessary investments in water, sewer, or  
24 broadband infrastructure.

25 21. In 42 U.S.C. § 802(c)(2), Congress described two restrictions on the use of  
26 SLFRF monies:

27 (A) IN GENERAL.—A State or territory shall not use the  
28 funds provided under this section or transferred pursuant to  
section 803(c)(4) of this title 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 (by  
providing for a reduction in a rate, a rebate, a deduction, a  
credit, or otherwise) or delays the imposition of any tax or tax  
increase.

(B) PENSION FUNDS. —No State or territory may use funds  
made available under this section for deposit into any pension  
fund.

22 ARPA also provided that Treasury may provide SLFRF funds to States in  
separate installments with the only requirement for acceptance of each installment that the

1 State sign a certification stating that the funds will only be used for the purposes outlined  
2 in the statute. 42 U.S.C. § 802(b)(6)(A)(ii) and (d).

3 23. ARPA does *not* contain any provisions that prohibits State, local, or Tribal  
4 governments from using SLFRF monies on programs that according to Treasury  
5 “undermine” efforts to stop the spread of COVID-19 or that require compliance with CDC  
6 recommendations or guidance—notably such provisions would put Treasury responsible  
7 for determining public health protocols, for which it is not qualified or, more importantly,  
8 statutorily-authorized.

9 24. In discussing the recoupment remedy, Congress explained that “[a]ny State,  
10 territory, or Tribal government that has failed to comply with” 42 U.S.C. § 802(c) in its use  
11 of SLFRF monies “shall be required to repay to the Secretary [of the Treasury] an amount  
12 equal to the amount of funds used in violation of such subsection.” 42 U.S.C. § 802(e).

13 25. Congress also provided some authority to Treasury to withhold monies based  
14 on a lack of compliance with 42 U.S.C. § 802(c): “If a State or territory is required under  
15 [42 U.S.C. § 802(e)] to repay funds for failing to comply with [42 U.S.C. § 802(c)], the  
16 Secretary may reduce the amount otherwise payable to the State or territory. 42 U.S.C.  
17 § 802(b)(6)(ii)(III).

18 26. Congress also gave the Secretary of the Treasury “the authority to issue such  
19 regulations as may be necessary or appropriate to carry out this section.” 42 U.S.C. § 802(f).

## 20 **II. Treasury’s Interim Final Rule**

21 27. On May 17, 2021, Treasury published in the Federal Register an “Interim  
22 Final Rule” implementing the SLFRF. Coronavirus State and Local Fiscal Recovery Funds,  
23 86 Fed. Reg. 26786 (May 17, 2021). A copy of the Interim Final Rule is attached as Exhibit  
24 1.

25 28. The Interim Final Rule described how a state could use SLFRF in order to fall  
26 within one of the four categories of permissible uses described in 42 U.S.C. § 802(c)(1).

27 29. For instance, with respect to the first category of permissible use (42 U.S.C.  
28 § 802(c)(1)(A)), the Interim Final Rule described how a program could respond to the



1 COVID-19 public health emergency *or* the negative economic impacts of the pandemic. In  
2 fact, the Interim Final Rule addressed each of these two topics separately, under different  
3 headings—one section was titled “Responding to COVID–19,” while another was titled  
4 “Responding to Negative Economic Impacts.” The Interim Final Rule also explained:  
5 “While the COVID–19 public health emergency affected many aspects of American life,  
6 eligible uses under this category must be in response to the disease itself *or the harmful*  
7 *consequences of the economic disruptions resulting from or exacerbated by the COVID–19*  
8 *public health emergency.*” 86 Fed. Reg. at 26788 (emphasis added).

9 30. In the section addressing “Responding to Negative Economic Impacts,” the  
10 Interim Final Rule provided that “[w]here there has been a negative economic impact  
11 resulting from the public health emergency, States, local, and Tribal government *have broad*  
12 *latitude to choose whether and how to use the Fiscal Recovery Funds to Respond to and*  
13 *address the negative economic impact.*” 86 Fed. Reg. at 26794 (emphasis added).

14 31. The Interim Final Rule then detailed, on several occasions, how a state could  
15 respond to negative economic impacts of COVID-19 by addressing the educational impacts  
16 of the pandemic. For instance, the Interim Final Rule stated:

- 17 a. “The negative economic impacts of COVID-19 also include significant  
18 impacts to children in disproportionately affected families *and include*  
19 *impacts to education, health, and welfare, all of which contribute to long-term*  
20 *economic outcomes.*” 86 Fed. Reg. at 26793 (emphasis added).
- 21 b. “Many low-income and minority students, *who were disproportionately*  
22 *served by remote or hybrid education during the pandemic, lacked the*  
23 *resources to participate fully in remote schooling or live in households*  
24 *without adults available throughout the day to assist with online coursework.*”  
25 *Id.* (emphasis added).
- 26 c. “Given these trends, *the pandemic may widen educational disparities and*  
27 *worsen outcomes for low-income students, an effect that would substantially*  
28 *impact their long-term economic outcomes. Increased economic strain or*



1 material hardship due to the pandemic could also have a long-term impact on  
2 health, educational, and economic outcomes of young children.” *Id.*  
3 (emphasis added).

4 32. Accordingly, the Interim Final Rule stated that SLFRF monies may be used  
5 on: “Evidence-based educational services and practices to address the academic needs of  
6 students, including tutoring, summer, afterschool, and other extended learning and  
7 enrichment programs.” 86 Fed. Reg. at 26796. Other permissible uses of SLFRF monies  
8 include: “Evidence-based practices to address the social, emotional, and mental health  
9 needs of students.” *Id.*

10 33. Although Treasury included examples of allowable uses of SLFRF monies, it  
11 also noted that such examples were not exhaustive and provided the following guidelines  
12 for States to use to analyze whether programs complied with the statutory provisions: (1)  
13 “a recipient should first consider whether an economic harm exists;” and (2) whether use of  
14 the funds would “respond to” or address the harm. 86 Fed. Reg. at 26794.

15 34. Treasury also released a “Frequently Asked Questions” guidance document  
16 about the Interim Final Rule, which similarly explained that SLFRF monies may be used to  
17 “Address[] educational disparities exacerbated by COVID-19, including: early learning  
18 services, increasing resources for high-poverty school districts, educational services like  
19 tutoring or afterschool programs, and supports for students’ social, emotional, and mental  
20 health needs.” [Exhibit 2, *Coronavirus State and Local Fiscal Recover Funds Interim Final*  
21 *Rule: Frequently Asked Questions*, U.S. Department of the Treasury, at 7-8 (Jan. 2022),  
22 <https://home.treasury.gov/system/files/136/SLFRPFAQ.pdf>.]

23 35. The Interim Final Rule does *not* contain any provision that prohibits States  
24 from using SLFRF monies on programs that supposedly “undermine” efforts to mitigate the  
25 spread of COVID-19 or are inconsistent with any CDC guidance or recommendations  
26 relating to the spread of COVID-19.

### 27 **III. Arizona’s Use of SLFRF Monies**

28 36. With the Interim Final Rule in place, on May 21, 2021, Matthew Gress,

1 Director of the Governor’s Office of Strategic Planning and Budgeting (“OSPB”), signed a  
2 certification form issued by Treasury authorizing Treasury to make SLFRF payments to the  
3 State.

4 37. Subsequent to that certification, the State received the first “tranche” of  
5 SLFRF funding.

6 38. On August 17, 2021, Governor Ducey announced the Education Plus-Up  
7 Grant Program (“Plus-Up”). Plus-Up made \$163 million in ARPA funds available to  
8 Arizona school districts and charter schools that received less than \$1,800 per pupil under  
9 previous programs that were also intended to mitigate the economic impacts of COVID:  
10 namely, the Enrollment Stabilization Grant Program and/or the Elementary and Secondary  
11 School Emergency Relief Fund.

12 39. Governor Ducey’s announcement of Plus-Up explained that the program “is  
13 designed to further aid in the mitigation of the economic impacts of COVID-19 and further  
14 ensure financial stability to Arizona Local Education Agencies.” *State Fiscal Recovery*  
15 *Fund: Education Plus-Up (EPU)*, eCivis (last visited Jan. 20, 2022),  
16 [https://gn.ecivis.com/GO/gn\\_redir/T/1sdmeoc0bsnvo](https://gn.ecivis.com/GO/gn_redir/T/1sdmeoc0bsnvo).

17 40. Consistent with this purpose, Plus-Up funds must be used on expenses  
18 directly related to the mitigation of the impacts of the COVID-19 pandemic. *Id.* (under  
19 “Eligibility” tab). Expenditures not directly related to mitigating the impacts of the COVID-  
20 19 pandemic are prohibited. *Id.* (under “Eligibility” tab).

21 41. To be eligible for Plus-Up grants, districts and charters may not “requir[e] the  
22 use of face coverings during instructional hours and on school property (with the exception  
23 of CDC transportation guidelines);” though schools have every ability to encourage  
24 practices recommended by the CDC and students were not prohibited from doing so.  
25 District and charters must also “remain[] open for in-person instruction as of August 27,  
26 2021 and throughout the remainder of the school year.” *Id.* (under “Eligibility” tab).

27 42. Also on August 17, 2022, Governor Ducey announced the COVID-19  
28 Educational Recovery Benefit Program (“ERB”) program. The ERB program supplied \$10

1 million in ARPA monies for K-12 students and families facing financial and educational  
2 barriers due to school closures and mandates.

3 43. To be eligible for an ERB award, K-12 students and parents must demonstrate  
4 that: (1) their household income is at or below 350% of the Federal Poverty Level; and (2)  
5 their current school is requiring the use of face coverings during instructional hours and on  
6 school property (with the exception of CDC transportation guidelines). *Covid-19*  
7 *Educational Recovery Benefit*, FACTS (last visited Jan. 20, 2022),  
8 <https://online.factsmgt.com/grant-aid/inst/4NXJL/landing-page>. The ERB program  
9 provides funding of up to \$7,000 per student. *Id.* Among other things, ERB funds may be  
10 spent on school tuition, online tutoring, childcare, daycare fees, after-school care fees, and  
11 before-school care fees of Arizona Department of Economic Security-contracted providers.  
12 *Id.*

13 44. The application materials for Plus-Up and the ERB both state: “The Arizona  
14 Office of the Governor supports and encourages schools informing educators, parents and  
15 students of the CDC recommendations regarding COVID-19 Mitigation Policies.” *See*  
16 *Covid-19 Educational Recovery Benefit, supra; State Fiscal Recovery Fund: Education*  
17 *Plus-Up (EPU), supra.*

18 45. Plus-Up and the ERB both fall within the ARPA’s authorization to use  
19 SLFRF monies to address the “negative economic impacts” of COVID-19. 42 U.S.C.  
20 § 802(c)(1).

#### 21 **IV. The Governor’s Office Responds to Treasury’s Concerns about Plus-Up and** 22 **ERB**

23 46. On October 5, 2021, Treasury wrote a letter to the Governor’s Office of  
24 Strategic Planning and Budgeting (“OSPB”), asserting that Plus-Up and ERB “undermine  
25 evidence-based efforts to stop the spread of COVID-19.” [Exhibit 3, Oct. 5, 2021 Letter  
26 from U.S. Department of Treasury to Governor Ducey, at 1.]

27 47. More specifically, Treasury took issue with the Plus-Up program stating that  
28 the program conditions SLFRF funding on “the recipient school districts not requiring the

1 use of face coverings during instructional hours and on school property.” [*Id.*] Similarly,  
2 Treasury complained that the ERB program provides “up to \$7,000 per student to families  
3 for tuition or other educational costs at a new school that does not require face coverings if  
4 the student’s current school is requiring the use of face coverings during instructional hours  
5 and on school property.”<sup>2</sup> [*Id.*]

6 48. In the October 5 letter, Treasury, without asking for information to justify the  
7 State’s program, stated that “[a] program or service that imposes conditions on participation  
8 or acceptance of the service that would undermine efforts to stop the spread of COVID-19  
9 or discourage compliance with evidence-based solutions for stopping the spread of COVID-  
10 19 is not a permissible use of SLFRF funds.” [*Id.* at 2.] However, Treasury did not cite any  
11 text from ARPA to support its contention that Plus-Up or ERB were not permissible uses  
12 of SLFRF funds.

13 49. In support of its position that SLFRF funds may not be used on programs that,  
14 in Treasury’s view, “discourage compliance with evidence-based solutions for stopping the  
15 spread of COVID-19,” Treasury instead cited to pages 26786 and 26790 of the Interim Final  
16 Rule. But this language is not found on page 26786 or page 26790. *See* 86 Fed. Reg. 26786,  
17 26790. Indeed, nothing in page 26786 of the Interim Final Rule places constraints on the  
18 use of SLFRF monies. Rather, that page provides “background information” about the  
19 COVID-19 pandemic. *See* 86 Fed. Reg. at 26786.

20 50. Similarly, nothing on page 26790 of the Interim Final Rule places constraints  
21 on the use of SLFRF monies. Rather, that page sets forth certain “Eligible Public Health  
22 Uses” of SLFRF monies. *See* 86 Fed. Reg. at 26790.

23 51. In the October 5 letter, Treasury demanded that OSPB supply a “response  
24 describing how the State will remediate the issues identified” with Plus-Up and ERB. Citing  
25 31 C.F.R. § 35.10, Treasury stated that “[f]ailure to respond to or remediate may result in  
26 administrative or other action.” [Ex. 3 at 2.]

27 \_\_\_\_\_  
28 <sup>2</sup> Nothing in either the Plus-Up program or the ERB program prohibited students from wearing masks or taking other precautions against COVID.

1           52. The Governor’s Office responded on November 4, 2021 with a letter to  
2 Treasury detailing how these programs sought to address the negative economic impacts of  
3 COVID-19, as permitted by ARPA, and how the programs were consistent “with the  
4 guidance released by the Treasury governing the program, including the Interim Final Rule  
5 and all posted Frequently Asked Questions (FAQs).” [Exhibit 4, Nov. 4, 2022 Letter from  
6 OSPB to Treasury, at 3.]

7           53. Regarding Plus-Up, OSPB stated that this program “addresses educational  
8 disparities by ensuring schools have the funding necessary to effectively meet the needs of  
9 every student, regardless of their family’s income or socioeconomic status.<sup>3</sup> Moreover, by  
10 limiting funding to only schools that remain open for in-person instruction, the State is  
11 addressing the significant educational disparities caused by remote learning during the  
12 COVID-19 pandemic.” [*Id.*]

13           54. Regarding ERB, OSPB stated that this program “empowers parents to  
14 exercise their freedom to make informed decisions regarding their child’s educational  
15 needs. For parents who prioritize their child’s social, emotional, and mental health needs  
16 and believe a mask mandate would adversely impact their child, the program offers these  
17 parents the freedom and funding to enroll their student in a different program absent of a  
18 mask mandate. To reduce the spread of COVID-19 without the need for masks, Arizona  
19 already offers free COVID-19 testing for all residents.” [*Id.* at 3-4.]

20           55. The November 4 letter also cited specific provisions of the Interim Final Rule,  
21 and Treasury FAQs on that rule, further demonstrating that Plus-Up and ERB were  
22 permissible uses of SLFRF funds. [*Id.* at 3.]

23           56. Additionally, the November 4 letter provided other important background  
24 information supporting the two programs. For instance, the November 4 letter explained  
25 that students in the “poorest 20% of U.S. neighborhoods” are most damaged by the COVID-  
26 19 pandemic. [*Id.* at 1.] It also noted that, according to the CDC, COVID-19 “has a lower

27 \_\_\_\_\_  
28 <sup>3</sup> This funding was necessary because of the grossly disproportionate distribution of federal  
funding to some schools over others when all schools suffered effects from COVID-19.

1 likelihood of transmission among students.” [*Id.*] “Indeed, in the United Kingdom, frequent  
2 rapid testing was found to be effective at reducing the transmission of the Delta COVID-19  
3 variant amongst students, even if students did not wear masks.” [*Id.*] The November 4 letter  
4 further stated that “experts have warned that masks can be harmful to children's emotional  
5 development, as seeing faces and reading emotional queues are critical for school-aged  
6 children.” [*Id.* at 2.]

7 **V. Treasury Issues a Final Rule Attaching New, Unlawful Restrictions on the Use**  
8 **of SLFRF Funds.**

9 57. On January 6, 2022, Treasury issued a Final Rule that “adopt[ed] as final the  
10 interim final rule published on May 17, 2021 with amendments.” [Exhibit 5, Final Rule, at  
11 1.]

12 58. One such “amendment” added in the Final Rule, though, was a wholesale  
13 change to the previous provisions that is not supported by ARPA. That amendment is a  
14 purported prohibition on using SLFRF funds on a “program or service that imposes  
15 conditions on participation or acceptance of the service that would undermine efforts to stop  
16 the spread of COVID-19 or discourage compliance with recommendations and guidelines  
17 in CDC guidance for stopping the spread of COVID-19.” [*Id.* at 346 (also explaining that  
18 “recipients may not use funds for a program that undermines practices included in the  
19 CDC’s guidelines and recommendations for stopping the spread of COVID-19”); *see also*  
20 *id.* at 10, 58 (similar).]

21 59. Supposedly impermissible “programs or services” to be determined by  
22 Treasury include “programs that impose a condition to discourage compliance with  
23 practices in line with CDC guidance (e.g., paying off fines to businesses incurred for  
24 violation of COVID-19 vaccination or safety requirements), as well as programs that require  
25 households, businesses, nonprofits, or other entities not to use practices in line with CDC  
26 guidance as a condition of receiving funds (e.g., requiring that businesses abstain from  
27 requiring mask use or employee vaccination as a condition of receiving SLFRF funds).”  
28 [*Id.* at 346.]

1           60. The Final Rule does not cite any statutory text from ARPA to support this  
2 new prohibition. No such text exists.

3           61. The prohibition on using SLFRF funds for programs that allegedly  
4 “undermine” constantly changing CDC recommendations related to COVID-19 mitigation  
5 efforts is also not found in the Interim Final Rule.

6           62. Treasury is not a public health agency and does not have expertise in stopping  
7 the spread of COVID-19.

8           63. The effective date of the final rule is April 1, 2022. [*Id.* at 1.] Until the Final  
9 Rule becomes effective, the Interim Final Rule remains binding and effective. [*Id.* at 121.]

10 **VI. Citing the Final Rule, Treasury Demands Action by the Governor Within 60**  
11 **Days.**

12           64. On January 14, 2022, Treasury sent another letter to the Governor’s Office,  
13 once again raising concerns with Plus-Up and ERB. The letter re-iterated Treasury’s flawed  
14 position that SLFRF monies may not be used on programs that supposedly “undermine”  
15 efforts to stop the spread of COVID-19 and that Plus-Up and the ERB supposedly fail that  
16 test because of how they address school mask mandates. [Exhibit 6, Jan. 14 Letter from  
17 Treasury to OSPB, at 1-2.] Based on this, Treasury claimed that the Plus-Up program and  
18 the ERB program “as currently structured are ineligible uses of SLFRF funds.” [*Id.* at 2.]

19           65. Similar to its previous letter, Treasury did not point to any statutory text from  
20 ARPA to support its position. The January 14 letter does not even cite 42 U.S.C. § 802(c)  
21 or any other provision of the ARPA.

22           66. The January 14 letter instead makes the irrelevant point that “the Interim Final  
23 Rule permits SLFRF funds to be used for a range of COVID-19 mitigation strategies,  
24 including face coverings, vaccination programs, and improved ventilation.” [*Id.* at 1 n.1.]  
25 But this is simply one of the *non-exclusive*, possible uses of SLFRF monies. There is no  
26 mandate in ARPA, or the Interim Final Rule, that SLFRF monies be used on “COVID-19  
27 mitigation strategies.”

28           67. At different points, the January 14 letter also cites the Final Rule. Most



1 relevant here, the January 14 letter asserts: “[t]he Final Rule, which was issued on January  
2 6, 2022, further clarifies how SLFRF funds may be used, including that a recipient may not  
3 use SLFRF funds for a program, service, or capital expenditure that includes a term or  
4 condition that undermines efforts to stop the spread of COVID-19.” [Jan. 14 Letter at 1 n.1.]

5 68. The January 14 letter does not acknowledge that the Final Rule only becomes  
6 effective on April 1, 2022. Nor did Treasury provide any basis for giving the Final Rule  
7 retroactive effect to recoup previously distributed SLFRF monies. *See, e.g., Afanador v.*  
8 *Garland*, 11 F.4th 985, 991 (9th Cir. 2021) (“When an agency engages in formal  
9 rulemaking, the rules it promulgates are analogous to legislation and are construed to apply  
10 only prospectively (unless Congress has expressly authorized it to promulgate a  
11 retroactively applicable rule).”).

12 69. Nevertheless, the January 14 letter used that not-yet-effective Final Rule to  
13 demand action by the Governor. In particular, Treasury stated that the Governor must “(i)  
14 redirect SLFRF funds to eligible uses or (ii) remediate the issues with the Education Plus-  
15 Up Grant Program and the COVID-19 Educational Recovery Benefit Program by  
16 redesigning the programs to eliminate any elements that are inconsistent with the purpose  
17 and requirements of the SLFRF program.” [Ex. 6 at 2.]

18 70. Treasury described two consequences from a lack of compliance with its  
19 demands. First, it stated that “[f]ailure to take either step within sixty (60) calendar days  
20 may result in Treasury initiating an action to recoup SLFRF funds used in violation of the  
21 eligible uses.” [*Id.*] Second, Treasury stated that it “may also withhold funds from the State  
22 of Arizona’s second tranche installment of SLFRF funds until Treasury receives  
23 information that confirms that the issues described above have been adequately addressed.”  
24 [*Id.*]

25 71. In light of this history, there is no question that this controversy is ripe and  
26 that Governor Ducey has Article III standing. Treasury had no statutory authority to require  
27 the State to use SLFRF monies in a manner that, pursuant to Treasury’s sole discretion,  
28 would not undermine efforts to stop the spread of COVID-19. Instead, Treasury, in an

1 abuse of discretion, issued the Final Rule well in excess of its statutory authority. With the  
 2 recent issuance of the Final Rule, however, Treasury has demanded that Governor Ducey  
 3 either comply with the Rule—even though it far exceeds Treasury’s statutory authority—  
 4 or else face recoupment and withholding of SLFRF monies within 60 days.<sup>4</sup> The Governor’s  
 5 Office will not eliminate or change the Plus-Up and ERB programs to conform to  
 6 Treasury’s unlawful dictates. The concrete and particularized injury-in-fact to the Governor  
 7 is therefore actual or imminent, not conjectural or hypothetical. *See, e.g., Skyline Wesleyan*  
 8 *Church v. Cal. Dep’t of Managed Health Care*, 968 F.3d 738, 748 (9th Cir. 2020); *Bishop*  
 9 *Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1153-54 (9th Cir. 2017).

### FIRST CAUSE OF ACTION

#### **(Violation of the Administrative Procedure Act—Final Rule)**

12 72. Governor Ducey incorporates the allegations in the preceding paragraphs as  
 13 if fully set forth herein.

14 73. The Administrative Procedure Act (“APA”) authorizes the Court to hold  
 15 unlawful and set aside agency action that is “in excess of statutory jurisdiction, authority,  
 16 or limitations, or short of statutory right,” or is “arbitrary, capricious, an abuse of discretion,  
 17 or otherwise not in accordance with law.” 5 U.S.C. § 706(2).

18 74. The Final Rule is a final agency action within the meaning of the APA. 5  
 19 U.S.C. § 551(13).

20 75. Governor Ducey has suffered legal wrong and is adversely affected or  
 21 aggrieved by the Final Rule. 5 U.S.C. § 702. As stated, Governor Ducey is the party  
 22 authorized by Arizona law to accept and expend the SLFRF monies that Treasury seeks to  
 23 withhold and recoup. *See* A.R.S. § 41-101.01(A). The Final Rule seeks to impose new  
 24 conditions on how Governor Ducey may exercise this authority, and prohibit programs like  
 25 Plus-Up and ERB that were instituted before the issuance of the Final Rule. Indeed,

26 \_\_\_\_\_  
 27 <sup>4</sup> The Governor notes that Treasury further abused its authority by requiring the State of  
 28 Arizona to comply with the Final Rule before that rule ever goes into effect, since the  
 response would be due to Treasury on March 15, 2022 and the rule would not go into effect  
 until April 1, 2022.

1 Treasury specifically cited the Final Rule as grounds to demand that Governor Ducey  
2 change these programs within 60 days or else face recoupment and withholding of SLFRF  
3 monies.

4 76. It is axiomatic that a federal agency must have statutory authority for the  
5 regulations it issues. *See, e.g., Mexichem Fluor, Inc. v. Env't Protection Agency*, 866 F.3d  
6 451, 460 (D.C. Cir. 2017) (“The agency must have statutory authority for the regulations it  
7 wants to issue.”). “Merely because an agency has rulemaking power does not mean that it  
8 has delegated authority to adopt a particular regulation.” *N.Y. Stock Exch. LLC v. SEC*, 962  
9 F.3d 541, 554 (D.C. Cir. 2020).

10 77. Here, the Final Rule far exceeds the limited statutory authority granted to  
11 Treasury by ARPA. That statute did not confer Treasury with power to prohibit States from  
12 expending SLFRF monies in a manner that in Treasury’s subjective and extraordinary  
13 determination “would undermine efforts to stop the spread of COVID-19 or discourage  
14 compliance with recommendations and guidelines in CDC guidance for stopping the spread  
15 of COVID-19.” [Ex. 5 at 346].

16 78. To the contrary, Congress specifically described the permissible uses of  
17 SLFRF funds, as well as restrictions on such uses, in 42 U.S.C. § 802(c). In describing how  
18 the funds may be used, Congress did not prohibit States from expending SLFRF monies in  
19 a manner that Treasury subjectively believes will “undermine” COVID-19 mitigation  
20 efforts or require states to follow CDC guidance in implementing programs that expend  
21 SLFRF monies. Neither § 802(c), nor any other provision of ARPA, authorizes Treasury to  
22 create new restrictions that are untethered to and inconsistent with the text of the ARPA.

23 79. The first category of permissible use of SLFRF monies identified by Congress  
24 discussed is particularly instructive here. That category allows SLFRF monies to be used  
25 “to respond to the public health emergency with respect to the Coronavirus Disease 2019  
26 (COVID–19) *or* its negative economic impacts.” 42 U.S.C. § 802(c)(1)(A) (emphasis  
27 added). Congress used the word “or”—not “and.” At no point did Congress suggest that,  
28 in addressing “negative economic impacts,” States must structure programs to comply with

1 COVID-19 mitigation guidance.

2 80. Nor is the Final Rule’s extra-statutory restriction on SLFRF monies  
3 “necessary or appropriate to carry out” Section 802 of ARPA. *See* 42 U.S.C. § 802(f).

4 81. Although the plain language of ARPA is sufficient to conclude that the Final  
5 Rule exceeds Treasury’s statutory authority, this conclusion is buttressed by the “major  
6 questions” doctrine. Under this doctrine, and as recently affirmed by the U.S. Supreme  
7 Court, courts “expect Congress to speak clearly when authorizing an agency to exercise  
8 powers of vast economic and political significance.” *Ala. Assn. of Realtors v. Dep’t of*  
9 *Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (quotation omitted); *Nat’l Fed’n of*  
10 *Indep. Bus.*, 2022 WL 120952, at \*3 (same).

11 82. If Congress intended to give Treasury—which has absolutely no expertise in  
12 matters of public health—the authority to withhold or recoup tens of millions of dollars  
13 from States based on Treasury’s subjective assessment of whether a State program  
14 “undermines” COVID-19 mitigation efforts, Congress needed to “speak clearly.”

15 83. The need for Congress to “speak clearly” is particularly pressing where, as  
16 here, Treasury’s Final Rule would “intrude[] into . . . area[s] that [are] the particular domain  
17 of state law”—public health and education policy. *Ala. Assn. of Realtors*, 141 S. Ct. at 2489.  
18 By contrast, public-health policy is completely outside the domain of Treasury, which lacks  
19 the expertise required to assess whether a particular expenditure of SLFRF funds “would  
20 undermine efforts to stop the spread of COVID-19.”

21 84. Because Congress did not “speak clearly” (or, indeed, speak at all) on this  
22 issue of vast economic and political significance, the Final Rule exceeds Treasury’s  
23 statutory authority. It is also arbitrary, capricious, an abuse of discretion, and contrary to  
24 law. The Final Rule must therefore be held unlawful and set aside pursuant to 5 U.S.C. §  
25 702(2)(A) and (2)(C).

26 ...

27 ...

28 ...

**SECOND CAUSE OF ACTION**

**(Violation of the Administrative Procedure Act—January 14 Treasury Demand Letter)**

85. Governor Ducey incorporates the allegations in the preceding paragraphs as if fully set forth herein.

86. The January 14 letter is a final agency action within the meaning of the APA. 5 U.S.C. § 551(13).

87. Because Arizona law makes Governor Ducey responsible for accepting and expending the SLFRF monies that Treasury seeks to withhold and recoup, A.R.S. § 41-101.01(A), Governor Ducey has suffered legal wrong and is adversely affected or aggrieved by the January 14 letter. 5 U.S.C. § 702.

88. Treasury exceeded its statutory authority under 42 U.S.C. § 802, acted arbitrarily and capriciously, and abused its discretion, and acted contrary to law in demanding that Governor Ducey eliminate or modify the Plus-Up and ERB programs on the grounds that these programs allegedly “impose[] conditions on participation in or acceptance of the service that would undermine efforts to stop the spread of COVID-19 or discourage compliance with recommendations and guidelines in CDC guidance for stopping the spread of COVID-19.” [Ex. 5 at 346; *see also* Ex. 6 at 1.].

89. Nothing in ARPA authorizes Treasury to impose such conditions on SLFRF monies. None of the four categories of permissible use, or the two use restrictions, in 42 U.S.C. § 802(c) come close to prohibiting States from expending SLFRF monies in a manner that Treasury determines will “undermine” COVID-19 mitigation efforts or require compliance with CDC guidance or recommendations. Nor does anything in ARPA give Treasury authority to impose new conditions on how SLFRF monies are used that are not found anywhere in the statutory text.

90. Likewise, the Interim Final Rule fails to authorize Treasury’s action. That rule does not say anything about mask mandates in schools or any other measures that supposedly “undermine” COVID-19 mitigation efforts. Similarly, the Interim Final Rule

1 does not require States to abide secondhand, ever-changing CDC guidance in implementing  
2 programs that expend SLFRF monies.

3 91. The Final Rule also cannot provide any grounds for recoupment or  
4 withholding since that Rule exceeds Treasury’s authority and does not become effective  
5 until April 1, 2022.

6 92. Plus-Up and ERB are entirely consistent with 42 U.S.C. § 802(c) because they  
7 respond to the “negative economic impacts” of the COVID-19 pandemic by, among other  
8 things, providing economic assistance to households and schools to address the pandemic’s  
9 impact on education.

10 93. Because Treasury’s actions have no basis in statute or the currently effective  
11 regulation, Treasury has exceeded its authority, abused its discretion, and acted arbitrarily,  
12 capriciously, and contrary to law, all in violation of the APA. *See* 5 U.S.C. § 706(2). The  
13 January 14 letter must therefore be held unlawful and set aside pursuant to 5 U.S.C.  
14 § 702(2)(A) and (2)(C).

### 15 **THIRD CAUSE OF ACTION**

#### 16 **(Declaratory Judgment—Violation of the Spending Clause)**

17 94. Governor Ducey incorporates the allegations in the preceding paragraphs as  
18 if fully set forth herein.

19 95. Article I, § 8, cl. 1 of the U.S. Constitution (the Spending Clause) empowers  
20 Congress to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and  
21 provide for the common Defence and general Welfare of the United States.”

22 96. If, however, Congress “desires to condition the States’ receipt of federal  
23 funds,” then it “must do so unambiguously . . . enabl[ing] the States to exercise their choice  
24 knowingly, cognizant of the consequences of their participation.” *South Dakota v. Dole*,  
25 483 U.S. 203, 207 (1987) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S.  
26 1, 17 (1981)) (alteration in original).

27 97. If the Final Rule is authorized by statute (it is not), then it violates the  
28 Spending Clause because the enabling statute, 42 U.S.C. § 802, is ambiguous in the strings

1 it attaches to the use of SLFRF monies.

2 98. In particular, 42 U.S.C § 802 does not give States any notice that SLFRF  
3 monies could, at some future date, be withheld or recouped based on Treasury’s  
4 determination that the State’s use of the monies “undermine[s] efforts to stop the spread of  
5 COVID-19.” And § 802 certainly does not alert States to the possibility that their use of  
6 SLFRF monies must comport with the CDC’s ever-changing COVID-19 guidance.

7 99. Accordingly, even if the Final Rule is somehow authorized by statute, it  
8 violates the Spending Clause.

9 **FOURTH CAUSE OF ACTION**

10 **(Declaratory Judgment—Violation of the Non-Delegation Doctrine)**

11 100. Governor Ducey incorporates the allegations in the preceding paragraphs as  
12 if fully set forth herein.

13 101. Article I, § 1, of the U.S. Constitution vests “[a]ll legislative Powers herein  
14 granted ... in a Congress of the United States.”

15 102. Thus, “when Congress confers decisionmaking authority upon agencies  
16 Congress must ‘lay down by legislative act an intelligible principle to which the person or  
17 body authorized to [act] is directed to conform.’” *Whitman v. Am. Trucking Assoc.*, 531  
18 U.S. 457, 472-73 (2001) (quoting *J.W. Hampton, Jr. & Co v. United States*, 276 U.S. 394,  
19 409 (1928)) (emphasis in original omitted).

20 103. If the Final Rule is authorized by ARPA (again, it is not), then this means that  
21 the Act sets forth no “intelligible principle[s]” guiding Treasury’s decisions to withhold or  
22 recoup SLFRF monies.

23 104. Rather, if the Final Rule is authorized by ARPA, then this means Treasury  
24 has unfettered discretion to add new conditions on SLFRF funds, including conditions based  
25 on Treasury’s beliefs about what COVID-19 mitigation strategies are appropriate, despite  
26 the fact that Treasury is not a public health agency and does not have expertise in this area.

27 105. Accordingly, if the Final Rule falls within the authority granted to Treasury  
28 by ARPA, then the Act violates the non-delegation doctrine.



**PRAYER FOR RELIEF**

Wherefore, Governor Ducey requests that this Court:

A. Declare that the Final Rule is unlawful and must be set aside because the Final Rule exceeds Treasury’s statutory authority, is an abuse of discretion, is arbitrary and capricious, and is contrary to law;

B. Declare that Defendants have abused their discretion, exceeded their statutory authority, and acted arbitrarily, capriciously, and contrary to law by demanding that Governor Ducey eliminate or modify existing SLFRF programs;

C. Permanently enjoin Defendants from enforcing against Governor Ducey and the State of Arizona the Final Rule’s unlawful restriction on programs that allegedly undermine efforts to stop the spread of COVID-19 or discourage compliance with recommendations and guidelines in CDC guidance for stopping the spread of COVID-19.

D. Permanently enjoin Defendants from withholding or recouping SLFRF monies from the State of Arizona based on the conditions of the Plus-Up and ERB programs;

E. Awarding Plaintiff reasonable costs and expenses of this action, including attorneys’ fees; and

F. Grant other such relief as may be just and proper.

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DATED this 21st day of January, 2022.

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