

1 **KRISTIN K. MAYES**
Attorney General
2 Firm Bar No. 14000
2005 North Central Avenue
3 Phoenix, AZ 85004-1592
4 Telephone: (602) 542-8099

5 *Attorney for Plaintiff*
6 *Additional Counsel on Signature Page*

7 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
8 IN AND FOR THE COUNTY OF MARICOPA

9 THE STATE OF ARIZONA, *ex rel.*
KRISTIN K. MAYES, Attorney General
of the State of Arizona

10 Plaintiff,

11 vs.

12 THE ARIZONA DEPARTMENT OF
13 ADMINISTRATION, a public entity, and
14 ELIZABETH ALVARADO-THORSON,
15 in her official capacity as its Cabinet
Executive Officer & Executive Deputy
16 Director,

17 Defendants.

No.

**PLAINTIFF'S MOTION FOR
EMERGENCY INJUNCTION
AND OTHER RELIEF**

18 Unless this Court acts *today*, \$75 million intended to help Arizona citizens recover
19 and rehab from opioid addiction will instead be used to plug a routine budget hole. In two
20 weeks, another \$40 million will similarly disappear, a total of \$115 million diverted from
21 opioid treatment to routine government expenses. This budget gimmick also jeopardizes
22 the State's right to future payments under the terms of the opioid settlements—an amount
23 currently totaling \$1.14 *billion*.

24 //

25 //

1 To prevent the imminent diversion of said funds, Plaintiff Kristin K. Mayes, in her
2 capacity as the Attorney General, by and through the undersigned hereby moves this Court
3 pursuant to A.R.S. § 35-212 and under Arizona Rule of Civil Procedure 65 for:

4 1. A Temporary Restraining Order¹ enjoining Defendants, and any and all other
5 persons in concert or participation with it, from transferring the sum of \$115,000,000 from
6 the consumer remediation subaccount of the consumer restitution and remediation
7 revolving fund to the State Department of Corrections; and

8 2. An Order setting a reasonable schedule for discovery and motion practice on
9 Plaintiff's forthcoming motion for preliminary injunction.

10 This Motion is supported by the following Memorandum of Points and Authorities,
11 the Complaint, and the Declaration of Arizona Attorney General Kristin K. Mayes.

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. STATEMENT OF FACTS**

14 The facts pertinent to this Motion are briefly set out below. A more detailed
15 recitation of the facts giving rise to this Motion can be found in Plaintiff's Complaint and
16 the Declaration of Attorney General Kristin K. Mayes.

17 **A. The Opioid Crisis in Arizona**

18 In June 2017, the then-Arizona Governor declared the opioid epidemic a statewide
19 health emergency.² The data at the time revealed that two Arizonans a day died from opioid

21 ¹ This is not a motion for a "temporary restraining order without notice," as contemplated
22 by Ariz. R. Civ. P. 65(b). Counsel is giving notice to defendants. However, like a TRO
23 without notice, it is a request for emergency preliminary injunctive to preserve the status
24 quo.

25 ² Press Release of Arizona Dep't of Health Servs., *Governor Doug Ducey Declares
Statewide Health Emergency in Opioid Epidemic* (June 5, 2017),
<https://www.azdhs.gov/director/public-information-office/index.php#news-release-060517>.

1 overdoses, a 74 percent increase over the previous four years.³ By 2021, more than five
2 Arizonans died every day from opioids.⁴ Two-thirds of those who died were people aged
3 15–44.⁵ Tragically, the number of opioid-related deaths remains stubbornly high in
4 Arizona, and for every death there are many more overdoses that require the deployment
5 of emergency services and other first responders, the administration of naloxone, and in-
6 patient stays at hospitals.⁶

7 **B. The Opioid Litigation**

8 States, counties, cities, and towns across the country have sued manufacturers,
9 distributors, and pharmacies for their role in fueling the opioid epidemic. As alleged in
10 those complaints, the epidemic could not have become as widespread as it did, or taken as
11 many lives as it did, but for: 1) manufacturers like Purdue, who knew about the significant
12 abuse of their drugs but concealed it; 2) distributors that failed to report grossly excessive
13 opioid shipments to federal authorities, as they were required to do; and 3) pharmacies
14 which turned a blind eye to the excessive use in their communities.

15 **C. Opioid Settlements and Funds**

16 Beginning in 2022, the companies that fueled this crisis began to settle. To date, the
17 State of Arizona and its political subdivisions have entered into settlements with twelve
18 defendants in the opioid supply chain: Cencora (f/k/a AmerisourceBergen), Cardinal
19 Health, McKesson, Janssen, Mallinckrodt, Walgreens, Walmart, CVS, Teva, Allergan,
20 Endo, and Purdue Pharma (pending bankruptcy). General Mayes’ Decl. ¶ 10. In total, the

21 ³ *Id.*

22 ⁴ Sheila Sjolander, *Understanding the Drug Crisis in the Age of Fentanyl, Meth and*
23 *Coronavirus: An ADHS Update*, Arizona Dep’t of Health at 2 (Sept. 27, 2021),
<https://www.azdhs.gov/opioid/documents/understanding-drug-crisis.pdf>.

24 ⁵ *Id.* at 6

25 ⁶ See generally Arizona Dep’t of Health Servs., *Opioid Dashboards*,
<https://www.azdhs.gov/opioid/dashboards/index.php#emergency-inpatient-visits> (last
accessed June 19, 2024).

1 State of Arizona and its political subdivisions stand to recover from these settlements more
2 than \$1.14 billion over 18 years (the “**Opioid Funds**”). General Mayes’ Decl. ¶ 12.

3 The settlements are uniquely structured to incentivize participation (and thereby the
4 resolution of claims and potential claims) by increasing the payments in relation to the
5 percentage of governmental entities who joined the settlements. This structure permitted
6 any state or local government that wished to share in the proceeds to be included in the
7 settlement, as long as it gave the defendant in question a release and abided by the
8 settlement terms. Procedurally the settlements were structured in the first instance as a (1)
9 settlement with the State, which was entered in a (2) consent order by a court, and then the
10 (3) state and the local governments within each state entered into an agreement allocating
11 those proceeds among themselves.

12 **1. Master Settlements with Opioid Manufacturers, Distributors, and**
13 **Pharmacies**

14 Each agreement between the State of Arizona and a settling defendant has three
15 things in common:

16 *First*, each requires a minimum percentage of the funds be spent on opioid
17 remediation. *See, e.g.*, General Mayes’ Decl. ¶ 14, Ex. 2 (Distributor Settlement), § V.B.1
18 (requiring that at least 85% of funds be spent on opioid remediation).⁷

19 *Second*, each enumerates the opioid remediation strategies funds can be spent on,
20 which are referred to as the “Approved Uses.” *See, e.g.*, General Mayes’ Decl., Ex. 2
21 (Distributor Settlement), § E-1 (approving, for example, the use of funds to “Provide
22 education to school-based and youth-focused programs that discourage or prevent
23 misuse”).

24 ⁷ Subsequent settlements are even more restrictive and require varying thresholds of opioid
25 remediation spending. General Mayes’ Decl. ¶ 16. The terms of those agreements are
available at: <https://nationalopioidsettlement.com/>.

1 *Third*, each permits settling defendants to reduce their payments to states who spend Opioid
2 Funds on un-Approved Uses. *See, e.g.*, General Mayes’ Decl., Ex. 2 (Distributor
3 Settlement), § VI.C.2 (permitting settling defendants to reduce payments to states that use
4 funds for unapproved purposes).

5 In sum, each settling defendant can reduce its future payments to Arizona if it does
6 not use at least 85% (and in some cases 95%) of the Opioid Funds it receives on Approved
7 Uses, and one settling defendant, Walmart, retains the right to claw back funds.⁸

8 **2. Consent Judgments**

9 As an active participant in the opioid settlement processes, the Arizona Attorney
10 General’s Office was mandated to file consent judgments in a court of competent
11 jurisdiction to effectuate each of the opioid settlements entered into outside of bankruptcy.⁹
12 General Mayes’ Decl. ¶ 18. Each consent judgment states: “with the advice and consent of
13 the Arizona Legislature, pursuant to A.R.S. § 44-1531.02(C), *the Attorney General shall*
14 *direct how and when these funds are used* consistent with the requirements” of the relevant
15 sections of the settlement agreement restricting the use of funds (as described above) and
16 the One Arizona Agreement’s restrictions on the use of funds, as described below. *See*
17 *generally* General Mayes’ Decl. § II.

18 //

22 ⁸ *See* Walmart Settlement Agreement § VI.C.2 (permitting it to obtain a reversion by no
23 more than five percent of its payout amount if less than 85% of funds are spent as agreed),
24 [https://nationalopioidsettlement.com/wp-content/uploads/2024/02/Walmart-Settlement-
Agreement-2024.01.03.pdf](https://nationalopioidsettlement.com/wp-content/uploads/2024/02/Walmart-Settlement-Agreement-2024.01.03.pdf).

25 ⁹ Settlements entered into outside of bankruptcy include the settlement agreements with
(1) the Distributors (Cencora f/k/a AmersourceBergen, Cardinal Health, McKesson) (2)
Janssen, (3) Walgreens, (4) Walmart, (5) CVS, (6) Teva, and (7) Allergan.

1 **3. One Arizona Agreement**

2 To effectuate the settlement agreements described above and allocate funds between
3 themselves, the State of Arizona, all 15 counties, and 91 cities and towns¹⁰ entered into the
4 One Arizona Agreement. General Mayes’ Decl. ¶¶ 5–7. Its aim is “to abate and alleviate
5 the impacts of the Pharmaceutical Supply Chain Participants’ misconduct throughout the
6 State of Arizona” and to establish “*binding terms* for the distribution and spending of funds
7 from Settlements with the Pharmaceutical Supply Chain Participants.” General Mayes’
8 Decl. ¶¶ 7, Ex. 1 (emphasis added). Critically, the One Arizona Agreement restricts more
9 than 90 percent of the opioid settlement funds for Approved Purposes.¹¹ General Mayes’
10 Decl. ¶ 8, Ex. 1.

11 **D. The Legislature’s Last-Minute Changes**

12 During the night on Saturday, June 15, 2024, the Legislature passed the General
13 Appropriations Act: 2024–25, House Bill 2897. Inserted into the bill only a few hours
14 before it was passed were two provisions, sections 139 and 140, which directed the
15 Department for Administration to transmit \$75,000,000 to the Department of Corrections
16 on June 20, 2024—that is, the date of this filing—and \$40,000,000 two weeks later on July
17 3, 2024. General Appropriations Act 2024–25, HB 2897 §§ 139–140; *see also* General
18 Mayes’ Decl. § III. All concede these are Opioid Funds (almost all the funds the State has
19 received to date) and must be used consistent with Approved Uses.

20
21
22 ¹⁰ A few cities and towns with smaller allocations entered into Implementation Agreements
23 with the counties that geographically embrace them so that their opioid funding could be
used to maximum effect.

24 ¹¹ One Arizona requires at least 92.02% of the total funds to Arizona and its political
25 subdivisions to be used only for Approved Purposes. Prior to One Arizona, the only two
states with announced MOU’s were Ohio and Texas. Ohio’s agreement earmarked 55%
for remediation. The Texas agreement earmarked 70%.

1 **A. Legal Standard for a TRO**

2 “Crafting a preliminary injunction is an exercise of discretion and judgment, often
3 dependent as much on the equities of a given case as the substance of the legal issues it
4 presents.” *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). The
5 purpose of interim relief “is not to conclusively determine the rights of the parties, but to
6 balance the equities as the litigation moves forward.” *Id.* (internal citation omitted). Courts
7 “must also ‘consider[r] . . . the overall public interest’” in awarding a preliminary injunction.
8 *Id.* (quoting *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 26 (2008)).

9 A plaintiff is entitled to a preliminary injunction when she establishes “1) A strong
10 likelihood that [s]he will succeed at trial on the merits; 2) The possibility of irreparable
11 injury to h[er] not remediable by damages if the requested relief is not granted; 3) A balance
12 of hardships favors h[er]self; and 4) Public policy favors the injunction.” *Shoen v. Shoen*,
13 167 Ariz. 58, 63 (App. 1990). In evaluating these factors, “[t]he scale is not absolute, but
14 sliding.” *Smith v. Ariz. Citizens Clean Elections*, 212 Ariz. 407, 410, ¶ 10 (2006); *Ariz.*
15 *Ass’n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, 12, ¶ 12 (App. 2009).

16 Based on this sliding scale, a plaintiff may receive a TRO upon showing of either
17 (1) a combination of probable success on the merits and the possibility of irreparable harm,
18 or (2) the presence of serious questions going to the merits and “the balance of hardships
19 tipped sharply” in the plaintiff’s favor. *See Shoen*, 167 Ariz. at 63; *see Smith*, 212 Ariz. at
20 411, ¶10 (“The greater and less reparable the harm, the less the showing of a strong
21 likelihood of success on the merits need be. Conversely, if the likelihood of success on the
22 merits is weak, the showing of irreparable harm must be stronger.”).

23 Injunctive relief is appropriate as a matter of law when a public official violates
24 Arizona law in a manner that exceeds his authority. *See McCluskey v. Sparks*, 80 Ariz. 15,
25 20–21 (1955) (holding injunction was appropriate where plaintiffs sought to require

1 “officials to comply with the statutes and constitutions of Arizona and of the United
2 States”); *Boruch v. State ex rel. Halikowski*, 242 Ariz. 611, 616, ¶ 16 (App. 2017)
3 (injunctive relief is appropriate “when a public officer enforces a public statute in a manner
4 that exceeds the officer’s power”).

5 **1. Plaintiff is Likely to Succeed on the Merits**

6 The Attorney General is authorized to “bring an action in the name of the state to: .
7 . . . Enjoin the illegal payment of public monies.” A.R.S. § 35-212(A). The State and
8 Attorney General’s Office are bound by contract and court order to use Opioid Funds for
9 the limited set of Approved Uses. *See supra* § I.C. Unless this Court acts, the Department
10 of Administration will transfer \$115 million of Opioid Funds to the Department of
11 Corrections. *See supra* § I.D. Because those funds would be used to back-fill a budget gap,
12 and not as the State is required to use them, such a transfer would be illegal.

13 The Legislature cannot abrogate those obligations by legislative decree. The U.S.
14 and Arizona Constitutions prohibit such a substantial impairment of contracts. U.S. Const.
15 art. I, § 10 (“[n]o State shall enter into any . . . Law impairing the Obligation of Contracts”);
16 Ariz. Const. art. II, § 25 (“[n]o . . . law impairing the obligation of a contract, shall ever be
17 enacted.”); *see also Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co.* (“*Energy*
18 *Reserves*”), 459 U.S. 400, 413 n.14 (1983) (“When a State itself enters into a contract, it
19 cannot simply walk away from its financial obligations.”).

20 Both federal and Arizona courts apply the same three-part inquiry to contract
21 impairment issues: The threshold inquiry is whether the state law operates as a “substantial
22 impairment” of a contractual relationship. *Energy Reserves*, 459 U.S. at 411. If so, the
23 legislature must have “a significant and legitimate public purpose . . . , such as the
24 remedying of a broad and general social or economic problem.” *Id.* at 411–12. If it has
25 such a purpose, the legislation must be “reasonable” and “necessary.” *Id.* Plaintiff bears

1 the burden on the first step of the inquiry, while Defendants bear the burden on the latter
2 two steps.

3 Here, the Legislature would divert \$115 million in Opioid Funds to fill a budget gap
4 at the Department of Corrections. *See* General Mayes’ Decl. ¶¶ 33–43, Ex. 4 (explaining it
5 as a “retroactive coding of the spending”). Doing so would exceed its authority under the
6 consent orders. *See, e.g.,* General Mayes’ Decl., Ex. 3, n.1 (consent order specifying that
7 “the Attorney General shall direct how and when these funds are used,” and permitting the
8 Legislature only to advise and consent). Moreover, the legislation would transfer nearly all
9 of the Opioid Funds the State has received to date to be used for something other than the
10 sole and express purpose for which they were received. If that alone is not enough to
11 constitute a substantial impairment (and it is), the risk that the settling defendants may claw
12 back these Opioid Funds and reduce payment of Opioid Funds in the future must be. *See,*
13 *e.g.,* General Mayes’ Decl., Exs. 2 (Distributor Settlement), § VI.C.2 (permitting settling
14 defendants to reduce payments to states that use funds for unapproved purposes).

15 The inquiry ends there as the Legislature articulated no significant or legitimate
16 public purpose for doing so. *See* General Mayes’ Decl. ¶¶ 33–43, Ex. 4. On the contrary,
17 instead of spending it on opioid remediation, as required, from what little Plaintiff knows
18 now, all \$115 million could end up being spent on beans, bullhorns, and buses with barred
19 windows, the daily grist of the DOC’s mill. That would doom Plaintiff and the whole state
20 of Arizona to possible loss of future payments, court actions seeking return of prior
21 payments, and nothing for the poor epidemic’s victims. That clearly is not what these
22 settlements were for and would contravene the State’s significant and important public
23 policy objectives as explained in the next section.

24
25

1 **2. Public Policy Factors and the Balance of Hardships Tip Sharply in**
2 **Plaintiff’s Favor and Arizona Citizens Will Suffer Irreparable Harm**
3 **Unless Defendants Are Enjoined**

4 The opioid epidemic continues to ravage communities throughout the State of
5 Arizona. *See supra* I.A. The Opioid Funds are intended to help “abate and alleviate the
6 impacts” of the epidemic. *See supra* I.C. Consistent with that purpose, the Attorney
7 General’s Office, in consultation with the Legislature, last year awarded on a re-
8 imbursement basis \$12 million of the Opioid Funds for child and family advocacy and
9 coordinated re-entry planning services. *See* General Mayes’ Decl. ¶¶ 40, Ex. 5. This year,
10 the Attorney General’s Office proposed a plan in consultation with stakeholders and based
11 on a needs assessment to expend \$72.1 million to fund, among other things, opioid
12 prevention training in schools, veterans service organizations to treat opioid use disorder,
13 rural detox centers, medication assisted treatment, and new prison re-entry programs for
14 those affected by the opioid crisis, all of which are Approved Uses. *See* General Mayes’
15 Decl. ¶ 44, Ex. 6.

16 If Defendants are not enjoined, those funds will instead be used to retroactively fill
17 a gap in the Department of Corrections’ budget, and the Attorney General’s Office will be
18 unable to honor its commitment to existing grantees or implement the needs-based plan to
19 address the opioids epidemic. *See* General Mayes’ Decl. ¶ 44. Defendants or the court
20 overseeing these settlements could also reduce—or eliminate—Arizona’s share of Opioid
21 Funds going forward. *See supra* I.C. Regardless, the diversion of these funds will
22 irreparably harm communities throughout the State as more people—many of whom are
23 youth—become addicted to opioids and overdose which, continues to kill on average five
24 Arizonans a day. *See supra* I.A.

1 **B. The State is Not Required to Post a Bond**

2 Pursuant to Rule 65(c)(2) of the Arizona Rules of Civil Procedure, the “State of
3 Arizona and its agencies, counties, municipalities, and other governmental entities—and
4 their respective officers—are not required to give security.”

5 **III. CONCLUSION**

6 For the foregoing reasons, Plaintiff respectfully requests that this Court issue a
7 temporary restraining order to enjoin Defendants from illegally diverting opioid funds and
8 setting a reasonable briefing schedule for Plaintiff’s forthcoming motion for preliminary
9 injunction and evidentiary hearing, as requested in the proposed order.

10
11 DATED this 20th day of June, 2024

12
13 **KRISTIN K. MAYES**
14 Attorney General
15 Firm Bar No. 14000

16 By *s/ Kristin K. Mayes* _____
17 Kristin K. Mayes
18 2005 North Central Avenue
19 Phoenix, AZ 85004-1592
20 Telephone: (602) 542-8099

21 **KELLER ROHRBACK L.L.P.**

22 By *s/ Mark D. Samson* _____
23 Mark D. Samson (011076)
24 Ron Kilgard (005902)
25 Gary A. Gotto (007401)
3101 North Central Avenue, Suite 1400
Phoenix, AZ 85012
Telephone: (602) 248-0088
msamson@kellerrohrback.com
rkilgard@kellerrohrback.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ggotto@kellerrohrback.com

LAW OFFICE OF JOSEPH C. TANN, PLLC

By s/ Joseph C. Tann
Joseph C. Tann (029254)
7735 N. Seventy-Eighth Street
Scottsdale, Arizona 85258
Telephone: (602) 432-4241
JosephTann@JosephTann.com

Attorneys for Plaintiff