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Supreme Court of New Mexico
1/11/2021 8:50 PM
Office of the Clerk

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-38570

TOBBY ANDERSON; BRYN ARNOLD; ANITA CARRILLO; AMANDA ELLER; SEAN GODKIN; PAMELA HOFFSCHNEIDER; HEIDI MACHACEK; EDUARDO TRISTE; NEW MEXICO CRIMINAL DEFENSE LAWYERS ASSOCIATION; and AMERICAN CIVIL LIBERTIES UNION OF NEW MEXICO,

Plaintiffs-Appellants,

v.

STATE OF NEW MEXICO; MICHELLE LUJAN GRISHAM, Governor, STATE OF NEW MEXICO; ALISHA TAFOYA LUCERO, Secretary, New Mexico Corrections Department; and MELANIE MARTINEZ, Director, New Mexico Probation and Parole,

Defendants-Appellees.

Original Appeal from the Santa Fe County, First Judicial District Court,
Honorable Judge Matthew Wilson, Presiding

PETITIONER'S OPENING BRIEF

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CERTIFICATE OF COMPLIANCE

The body of this brief exceeds the page limits (35 pages) set forth in Rule 12-213(F)(2) NMRA. Pursuant to Counsel used Georgia, a proportionally-spaced type style / type face. As required by Rule 12-210(F)(3) NMRA, I certify that the body of the brief contains **10,691** words, not to exceed 11,000. This brief was prepared using Microsoft Word, version 2016.

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I. SUMMARY OF THE PROCEEDINGS

By May and June 2020, COVID-19 infections had begun snaking their way through New Mexico's prisons. Yet, the New Mexico government failed to take any meaningful measures to stop it, which led to nothing short of a public health catastrophe. On August 24, 2020, Plaintiffs filed their Complaint seeking to protect the lives and constitutional rights of people incarcerated in New Mexico's prisons against COVID-19. [**1 RP 1-58**].[1] Plaintiffs include eight individuals[2] who are incarcerated in New Mexico's prisons (collectively, the "Named Plaintiffs") and two organizations whose mission is to protect the rights of and advocate on behalf of such individuals, the New Mexico Criminal Defense Lawyers Association ("NMCDLA") and the American Civil Liberties Union of New Mexico ("ACLU") (collectively, the "Institutional Plaintiffs").

Plaintiffs named as defendants to the Complaint the State of New Mexico; Michelle Lujan Grisham, Governor of the State of New Mexico (the "Governor"); Alisha Tafoya Lucero, Secretary of the New Mexico Corrections Department ("NMCD"); and Melanie Martinez, Director of New Mexico

[1] For ease of appellate review, citations to the record proper are by volume and page number, i.e., [1 RP 1-58].

[2] The original Complaint named ten individuals. Plaintiffs filed their Amended Complaint on August 24, 2020, naming only eight individuals.

Probation and Parole (collectively, the State of New Mexico, Ms. Lucero, and Ms. Martinez are referred to as the "Defendants" or the "government").

In the Complaint, and Amended Complaint [**1 RP 60-114**] filed shortly thereafter, Plaintiffs asserted claims for writs of habeas corpus pursuant to NMSA 1978, § 44-1-1 (1963) *et seq*., and for injunctive and declaratory relief pursuant to NMSA 1978, § 44-6-13 (1975), all premised on the government's violations of Plaintiffs' rights under the New Mexico Constitution to be free from cruel and unusual punishment, to substantive and procedural due process, and to freedom of speech. [**1 RP 97-105 ¶¶225-66**]. Plaintiffs brought the action on behalf of themselves and all others similarly situated pursuant to Rule 1-023(B)(2) NMRA (the "Class Members"). [**1 RP 92 ¶ 211**].

Many of the Named Plaintiffs and Class Members suffer from conditions making them especially vulnerable to severe COVID-19 symptoms, including a higher risk of death. [**1 RP 61 ¶¶ 3, 4; 62 ¶¶ 7, 8, 10; 68 ¶ 37; 90 ¶ 192; 93 ¶ 212**]. Further, Plaintiffs and Class Members are housed in congregate settings, and thus unable to social distance. [**1 RP 77 ¶ 72**]. Their day rooms and sleeping arrangements lend to spreading of the virus. [**1 RP 77 ¶¶ 74, 75**]. Prison staff are not tested each time they enter the facilities and move unrestricted throughout the facilities during the

course of their shift. [**1 RP 78 ¶ 88**]. And to date, Defendants have refused to enforce in the prisons their own, and other, mandates for social distancing, maskwearing, heightened hygiene practices, and safe quarantine and treatment. [**1 RP 60 ¶ 3; 79 ¶ 90; 86 ¶ 158; 87 ¶¶ 168, 169**]. As a result, COVID-19 is running rampant in New Mexico's prisons, leaving Plaintiffs and Class Members at urgent, severe, and permanent risk to their rights, health, and life.

Plaintiffs sought detailed injunctive relief from the district court, particularly, a population reduction by selective release of incarcerated individuals to alternative forms of confinement and appointment of a special master to oversee the release of incarcerated individuals. [**1 RP 108-13 §§ D-K**]. Plaintiffs also sought detailed declaratory relief from the district court, especially declarations holding that Defendants are violating the Named Plaintiffs' and Class Members' constitutional rights, that Defendants must reduce the number of incarcerated individuals in New Mexico prisons to safeguard the health of the Named Plaintiffs and Class Members, that individualized review processes are insufficient to protect the rights of Named Plaintiffs and Class Members, and that existing parole plan requirements are unduly restrictive in light of the pandemic. [**1 RP 105-07 § B**].

Plaintiffs submitted their Verified Petition for Temporary Restraining Order and Preliminary Injunction on August 24, 2020. [**1 RP 119-53**]. On September 8, 2020, Plaintiffs filed their Request for Expedited Hearing on Their Petition for Temporary Restraining Order and Preliminary Injunction, and on September 14, 2020, the district court set a two-day hearing for October 5-6, 2020. [**1 RP 213-17**]. On September 15, 2020, the Governor filed an Expedited Motion to Vacate Hearing on Plaintiffs' Petition for Temporary Restraining Order and Preliminary Injunction ("Motion to Vacate"), indicating that the Governor planned to file motions to dismiss and asking the district court to vacate the hearing until after the district court had decided her forthcoming motions to dismiss. [**1 RP 224-25**]. The district court granted Defendants' motion to vacate over Plaintiffs' objection. [**1 RP 225** ¶ 7; **4 RP 755-58**].

A. The Government's Motions to Dismiss

The Governor and State Defendants filed four separate motions to dismiss the Amended Complaint. [**1 RP 230-40; 243-55; 2 RP 342-49; 390-409**]. Two of the motions—the Governor's Motion to Dismiss Plaintiffs' Amended Complaint for Lack of Subject-Matter Jurisdiction [**1 RP 243-55**] and the State Defendants' Motion to Dismiss Plaintiffs' Amended Complaint [**2 RP 390-409**] ("Motions to Dismiss")—argued that the district court

should dismiss the Amended Complaint for lack of subject matter jurisdiction because Plaintiffs failed to exhaust their administrative remedies before filing the lawsuit. [**1 RP 254; 2 RP 391**]. Defendants relied upon NMSA 1978, § 33-2-11(B) (1990), which provides:

> No court of this state shall acquire subject-matter jurisdiction over any complaint, petition, grievance or civil action filed by any inmate of the corrections department with regard to any cause of action pursuant to state law that is substantially related to the inmate's incarceration by the corrections department until the inmate exhausts the corrections department's internal grievance procedure.

Defendants claimed that *U.S. Xpress v. N.M. Tax'n & Revenue Dept't*, 2006-NMSC-017, 139 N.M. 589, 136 P.3d 999 foreclosed any argument that the exhaustion requirement in Section 33-2-11(B) is subject to exceptions where exhaustion would be futile or unavailable. [2 **RP 392**]. Defendants also cited Rule 5-802(C)(2) NMRA governing habeas petitions in the district courts as an additional authority requiring exhaustion. *Id*.

Plaintiffs argued several points in their two briefs in response to the Motions to Dismiss. First, Plaintiffs argued that Section 33-2-11(B) is not applicable in the habeas corpus context because the district courts' original jurisdiction over petitions for writ of habeas corpus is enshrined in Article VI, § 13 of the New Mexico Constitution. [**4 RP 722-23; 784-85**]. Under *In re Forest*, 1941-NMSC-019, 45 N.M. 204, 113 P.2d 582, while the legislature

may add to the efficacy of the writ, it cannot curtail such rights. Thus, Section 33-2-11(B) cannot restrict Plaintiffs' writ of habeas corpus or the district court's original jurisdiction. Plaintiffs argued that the requirement of exhaustion of remedies is not a jurisdictional impediment, but rather a discretionary policy. [**4 RP 722-23; 784-85**]. Likewise, Plaintiffs argued the district court should refrain from interpreting or applying Rule 5-802(C)(2) in such a way that would deprive it of jurisdiction. [**4 RP 723**].

Second, Plaintiffs asserted that even if exhaustion was a precondition to the Court's jurisdiction, the NMCD's grievance procedure is futile and unavailable to Plaintiffs. [**4 RP 724-29; 803-05**]. Plaintiffs contended that, in *Cummings v. State*, 2007-NMSC-048, 142 N.M. 656, 168 P.3d 1080, the New Mexico Supreme Court recognized futility and unavailability as exceptions to the exhaustion of remedies requirement for petitions for writ of habeas corpus. [**4 RP 724-25; 785**]. Thus, Section 33-2-11(B) grants district courts the discretion to decide whether the NMCD grievance procedure would be futile. In this instance, the NMCD's grievance procedure, CD-150500, is futile and unavailable because Plaintiffs have raised matters that are expressly not grievable, such as release to non-carceral settings, but that do fall within the court's authority as a constitutional remedy. [**4 RP 725; 735-37; 784; 803; 847-48**].

Plaintiffs also argued that, practically speaking, the NMCD's grievance procedure is incapable of resolving their emergent complaints related to COVID-19 arising as a class. [**4 RP 728**]. Plaintiffs cited the burden on the administrative process that would arise if all the roughly 6,000 incarcerated individuals in New Mexico's prisons filed grievances for Defendants' persistent failures and requested remedies NMCD already stated it could not provide. [**4 RP 726**]. Plaintiffs also described the lengthy process of obtaining a final decision on an individual grievance. [**4 RP 726-28**]. Given the emergency nature of the Amended Complaint, Plaintiffs asserted that these realities rendered the grievance process unavailable and futile. [**4 RP 724-26; 728-29**].

Finally, Plaintiffs contended that the issue of exhaustion should not be resolved in the context of a motion to dismiss. [**4 RP 729; 785-86**]. Rather, Plaintiffs stated that they were entitled to an opportunity to offer evidence that the NMCD grievance procedure is unavailable and futile. [**4 RP 785-86; 809-10**]. Plaintiffs cited the example of at least one Class Member who had filed numerous emergency grievances seeking release to home confinement due to a preexisting medical condition over the past few months but had not received any response to her grievances. [**4 RP 785-86; 799-**

888]. Plaintiffs argued that the Motions to Dismiss were premature because they required factual determinations. [**4 RP 785-86**].

Defendants raised several additional arguments in their reply briefs in support of the Motions to Dismiss. [**4 RP 934-45 ;949-59**]. Defendants argued that the statutory directive of Section 33-2-11(B) is clear and unambiguous, and that each member of the putative class must meet the exhaustion requirement before the district court may exercise jurisdiction. [**4 RP 940; 943; 949-50**]. According to Defendants, there are no exceptions to the exhaustion requirement—not even in instances where exhaustion would be futile or unavailable. [**4 RP 939-41**].

In addition, Defendants contended that the Institutional Plaintiffs should also be dismissed for failure to exhaust, even though they are not inmates, because otherwise the legislature's intent in enacting Section 33-2-11(B) would be defeated. [**4 RP 942-43**]. Defendants argued that the exhaustion requirement applies to both the habeas claims and the declaratory judgment claims. [**4 RP 935-36; 952**]. Finally, Defendants stated that there is a distinction between the traditional and modern uses of the writ of habeas corpus, and that the exhaustion requirement is jurisdictional when the writ is used to challenge conditions of confinement. [**4 RP 951-52**].

B. Hearing and Oral Order on the Government's Motions to Dismiss

On October 15, 2020, the district court held a hearing on Defendants' motions to dismiss. Plaintiffs again urged that the case should not be dismissed for lack of jurisdiction because exhaustion would be futile and unavailable under the circumstances. [Tr.26:16-19].[3] Moreover, if there is no futility exception to the exhaustion of remedies requirement, then the requirement should be deemed unconstitutional because it amounts to a curtailment of the writ of habeas corpus forbidden by the New Mexico Constitution. Specifically, Plaintiffs noted further that the writ of habeas corpus is a flexible remedy, and that the district court has authority to issue declaratory relief to remedy unconstitutional conditions of confinement not dependent on its habeas authority. [Tr. 27:24-28:3]. With respect to the Institutional Plaintiffs, Plaintiffs argued that it would be impossible for the Institutional Plaintiffs to utilize the NMCD grievance procedure. [Tr. 28:21-29:4].

[3] On January 8, 2021, this Court granted Appellants' motion to supplement the record with a single-volume transcript of the audio recorded hearing held October 15, 2020. For ease of appellate review, citations to the October 15 hearing in this brief refer to the transcript and are cited by page and line number, i.e., [Tr. 12:10-22].

Plaintiffs also cited *Gzaskow v. Pub. Employees Ret. Bd.*, 2017-NMCA-064, 403 P.3d 694, which holds that the futility factor in the exhaustion of remedies analysis is a factual matter that requires evidence. [Tr. 29:10-14]. Plaintiffs proffered that they had evidence that Class Members had filed grievances, including grievances under the emergency grievance procedure, seeking to remedy their conditions of confinement in the midst of the COVID-19 pandemic, but had received no determination or correction for months. [Tr. 29:3-30:7]. Others had been transferred to other facilities in the middle of the grievance process, effectively compelling them to re-start the process all over again. *Id.* Plaintiffs stated that the district court needed to hold an evidentiary hearing in order to resolve the question of exhaustion of remedies. [Tr. 29:15-22].

After hearing argument from both Plaintiffs and Defendants on the Motions to Dismiss, the district court issued an oral ruling from the bench dismissing the action for lack of subject matter jurisdiction due to failure to exhaust the NMCD grievance procedure. [Tr. 37:10-40:4]. And it became the first and only New Mexico court to hold that there can be *no* exceptions to the exhaustion requirement. In its oral order, the district court did not address the whether the Institutional Plaintiffs were also subject to Section 33-2-11(B). *Id.*

C. District Court's Written Order on Motions to Dismiss

On October 20, 2020, the district court issued a written order dismissing the Amended Complaint for lack of subject matter jurisdiction ("Order"). [**5 RP 982-87**]. In the Order, the district court indicated that it had accepted the allegations of the Amended Complaint as true for purposes of the Motions to Dismiss, but that the allegations did not show that the Named Plaintiffs had exhausted or attempted to exhaust the NMCD's grievance procedure. [**5 RP 983**]. The district court held that the exhaustion requirement in Section 33-2-11(B) is jurisdictional and that the futility doctrine did not apply, citing *U.S. Xpress* and distinguishing *Cummings*. [**5 RP 983-84**]. Furthermore, the district court noted that exhaustion would not be futile because NMCD has authority to address conditions in New Mexico's prisons, which would resolve the majority of allegations in the Amended Complaint, and procedures were in place to effectuate that remedy. [**5 RP 984**]. Finally, the district court ruled that allowing the Institutional Plaintiffs to pursue their claims would frustrate the purpose of Section 33-2-11(B) and lead to an absurd result. [**5 RP 985**].

In the Order, the district court did not explain why the claims under the Declaratory Judgment Act should be dismissed or why requiring exhaustion, even if doing so would be futile or unavailable under the

circumstances, does not amount to an unconstitutional suspension of the writ of habeas corpus. [**5 RP 982-87**]. It did not explain why the exhaustion requirement could be applied to Institutional Plaintiffs who have no ability to file NMCD grievances. *Id.* In effect, the district court's order creates new law that allows Defendants to prevent any incarcerated individual from filing a lawsuit challenging conditions of confinement by rendering the grievance process impossible to follow or complete.

D. Plaintiffs' Appeal

On October 29, 2020, Plaintiffs filed a Notice of Appeal in the New Mexico Court of Appeals followed by a docketing statement on November 9, 2020. [**5 RP 990-1016**]. On November 17, 2020, the Court of Appeals ordered the appeal transferred to the New Mexico Supreme Court. On December 18, 2020, this Court accepted certification of this appeal under Rule 12-606 NMRA. Plaintiffs moved to supplement the record with a written transcript of the district court's hearing, which this Court granted on January 8, 2021.

II. LEGAL ARGUMENT

A. The district court erred by holding Section 33-2-11(B) is jurisdictional.

In New Mexico, cases alleging unlawful government interference with constitutionally protected rights must be decided on the merits. *Griego v.*

Oliver, 2014-NMSC-003, ¶ 1, 316 P.3d 865 ("[W]hen litigants allege that the government has unconstitutionally interfered with a right protected by the Bill of Rights, or has unconstitutionally discriminated against them, courts must decide the merits of the allegation"). If constitutional violations are proven, district courts must ensure the complainant's rights are protected and order an end to the government's unconstitutional treatment. *Id*.

In this case, Plaintiffs identified that their constitutional rights were (and continue to be) violated by Defendants' failure to take appropriate measures to protect them from COVID-19. [**1 RP 60; 95 ¶ 217; 100 ¶ 239; 104 ¶ 260; 105 § B; 4 RP 720**]. Over Plaintiffs' objection and without receiving evidence or addressing the merits, the district court dismissed the Amended Complaint for lack of subject matter jurisdiction for failure to exhaust administrative remedies under Section 33-2-11(B). [**R. 990-1013**]. In doing so, the court determined that no exceptions to the exhaustion requirement exist at all. *Id*. Because such a dismissal involves a question of law, the appropriate standard of review is *de novo*. *El Castillo Ret. Residences v. Martinez*, 2015-NMCA-041, ¶ 13, 346 P.3d 1164 ("Whether a court has jurisdiction to hear a particular matter is a question of law that we review de novo.").

The district court's holding expands the scope of the legislature's authority beyond what was contemplated by the framers of New Mexico's Constitution and impermissibly limits who may exercise their right to seek habeas relief. Unlike federal courts, New Mexico district courts are courts of general jurisdiction and the state Constitution imbues them with "original jurisdiction in all matters and causes not excepted in this constitution, and such jurisdiction of special cases and proceedings as provided by law." N.M. Const. art. VI, § 13. Under the Constitution, "[t]he district courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition and all other writs, remedial or otherwise, in the exercise of their jurisdiction; provided that no such writs shall issue directed to judges or courts of equal or superior jurisdiction." *Id*. Because district courts' habeas jurisdiction is constitutionally granted, it cannot "be circumscribed or restrained by the legislature." *Smith v. S. Union Gas Co.*, 1954-NMSC-033, ¶ 10, 58 N.M. 197.

Despite this prohibition, the district court held that its subject matter jurisdiction hinges on whether inmates have complied with Section 33-2-11(B)'s exhaustion requirement. [**5 RP 985 ¶ 12**]. But New Mexico law is clear: the legislature may add to the efficacy of the writ of habeas corpus (*In re Forest*, 1941-NMSC-019, ¶ 12), and it may even expand habeas rights (*id.*

at ¶ 15 (holding that the legislature may allow appeals from district court orders that discharge or remand relators in habeas actions)), but it "cannot curtail such rights" or use legislative action to abrogate the writ, curtail its efficiency, or place it beyond the Court's reach and remedial action. *Id.* at ¶ 12.[4]

Simply put, the ability to diminish habeas rights is "beyond the pale of legislative discretion," except in the interests of public safety, and then only in cases of rebellion or invasion. *In re Forest*, 1941-NMSC-019, ¶ 12 (citing N.M. Const. Art. II, § 7). Even under one of the enumerated exceptions (which do not apply here), nothing in New Mexico's Constitution authorizes the legislature to restrict the judiciary's subject matter jurisdiction to a limited subset of habeas cases. Indeed, the absence of any constitutional authority is telling, especially considering Article VI, § 13 expressly mandates that "[t]he district court shall have original jurisdiction in *all matters and causes not excepted in this constitution*… [t]he district courts, or any judge thereof, shall have power to issue writs of habeas corpus…in the exercise of their jurisdiction." (emphasis added); *see also State ex rel. Whitehead v.*

[4] *See State v. Edwards*, 207 La. 506, 511, 21 So. 2d 624, 625 (1945) ("the word curtail means to cut off the end, or any part, of; hence to shorten; abridge; diminish; lessen; reduce.") (internal quotes omitted); *see also McIntyre v. Nissan N. Am., Inc.*, 962 F.3d 833, 837 (5th Cir. 2020) ("Limit means to curtail") (internal quotes omitted).

Vescovi-Dial, 1997-NMCA-126, ¶ 15, 124 N.M. 375, 950 P.2d 818 ("when a power, together with the express means of its execution, are constitutionally granted and determined, it is reasonable to infer therefrom that other means of exercising this power were intentionally excluded and should not be permitted or allowed.").

At bottom, the right to seek habeas relief is a fundamental right enshrined in the Bill of Rights—not Article IV, which governs legislative powers. *See Morris v. Brandenburg*, 2015-NMCA-100, ¶ 31, 356 P.3d 564, *aff'd*, 2016-NMSC-027, ¶ 31, 376 P.3d 836 ("Fundamental constitutional rights are enumerated and specific freedoms protected by the Bill of Rights") (internal quotes omitted). Thus, the Constitution does not authorize the legislature (a political arm of government) to reduce district courts' habeas jurisdiction. *See Griego*, 2014-NMSC-003, ¶ 1 ("The very purpose of [the] Bill of Rights [i]s to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."); *see also In re Christopher K.*, 1999-NMCA-157, ¶ 11, 128 N.M. 406, 993 P.2d 120 ("[T]he inherent nature of a bill of rights which is to protect the most basic guarantees of individual liberty against the power of the state") (internal quotes omitted); *see also State ex rel. Clark v. Johnson*, 120 N.M.

562, 570, 904 P.2d 11, 19 (1995) ("[S]tate constitutions are not grants of power to the legislative, to the executive and to the judiciary, but are limitations on the powers of each.").

The district court's determination that Section 33-2-11(B)'s exhaustion of remedies requirement is jurisdictional thus grants the legislature constitutional authority it does not have, undermines long-established policy principles, and violates Plaintiffs' fundamental constitutional rights. *See Griego*, 2014-NMSC-003, ¶ 1 ("One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections"); *see also State v. Henry*, 1933-NMSC-080, ¶ 14, 37 N.M. 536, 25 P.2d 204 ("[A] Legislature's assumption of the power is not controlling as to its existence"). Accordingly, exhaustion of the grievance procedure cannot be a precondition to state courts' jurisdiction over the Plaintiffs' request for a writ of habeas corpus. The district court's ruling to the contrary was in error and should be reversed.

B. The district court erred when it held there are no exceptions to Section 33–2–11(B)'s exhaustion requirement.

Despite infection outbreaks sweeping through prisons and the Corrections Department's inability to remedy them through its grievance

procedure, the district court made an extraordinary holding that there can *never* be an exception to the exhaustion requirement under Section 33-2-11. [**5 RP 983 ¶¶ 6, 7**]. No court in New Mexico has ever held this. To the contrary, the few cases discussing futility in the context of Section 33-2-11 support the *opposite* conclusion. And the consequences of the district court's erroneous ruling are both dire and vast: it grants the New Mexico government limitless authority over redress for its own violations—including the ability to thwart incarcerated persons' constitutional right to relief, especially urgent relief, in habeas actions for such violations. The district court's holding thus contradicts the law and basic principles of separation of powers.

Whether a court has jurisdiction to hear a particular matter is a question of law that this Court reviews *de novo*. *El Castillo Ret. Residences*, 2015-NMCA-041, ¶ 13.

1. Standard of Review

2. Argument

Under Section 33-2-11(B), inmates must normally exhaust the Corrections Department's internal grievance procedure before filing an action in court. However, this Court has recognized that there are instances when requiring exhaustion would be futile because the remedy sought is not

available through the grievance procedure. *See supra, Cummings*, 2007-NMSC-048, ¶ 26. This is consistent with the Court's previous holdings that "rigid adherence to administrative exhaustion is not required in circumstances where the doctrine is inappropriate." *Lobato v. State Env't Dep't*, 2012-NMSC-002, ¶ 12, 267 P.3d 65; *Callahan v. N.M. Fed'n of Teachers-TVI*, 2006-NMSC-010, ¶ 24, 139 N.M. 201, 131 P.3d 51 (noting the general rule that exhaustion is not required if the administrative remedies are inadequate).

In this case, Plaintiffs sought habeas relief because New Mexico's government continued to ignore public health mandates, including its own, that were necessary to mitigate the risks of COVID-19. [**1 RP 97-105 ¶¶225-66**]. As a result, each incarcerated person's life and constitutional rights has been placed at urgent risk. [**1 RP 97-98 ¶¶ 226-37**]. Plaintiffs sought emergency relief in the district court, namely, the immediate release of targeted inmates, in order to protect the medically vulnerable and permit social distancing within the prisons. [**1 RP 108; 113-14**].

The Corrections Department's grievance procedure, CD-150500, recognizes that there are matters that fall outside of its scope and are "not grievable." [**4 RP 725; 735-37; 784; 803; 847-48**]. And the Corrections Department *expressly* lacks authority to grant the relief Plaintiffs seek,

which its grievance procedure communicates. *See Inmate Grievances,* [**4 RP 847-48**]. ("The following matters are ***not grievable*** by inmates: (a) ***Any matter over which the Corrections Department has no control, for example: parole decisions [and] sentences***"). Nor would it be possible, in any event, for the Corrections Department to quickly and adequately remedy widespread, institutional failures across every prison through processing 6,000 individual grievances. [**4 RP 724-29**]. Indeed, Plaintiffs alleged below that incarcerated persons who filed emergency grievances related to this case saw the grievances sit languishing for months, while conditions worsened each day. [**4 RP 785, 799-888**].

Despite outbreaks spreading across its prisons, the government moved to dismiss by arguing that each of the approximately 6,000 people represented in this lawsuit were obligated to file grievances. [**2 RP 393-95**]. Plaintiffs identified that given the nature of the relief requested, and the substantial and varied institutional violations, the Corrections Department's grievance procedure offered no remedy, rendering it unavailable. [**1** RP 91-92 ¶¶ 196-210]. Indeed, Plaintiffs noted that requiring them to exhaust an entirely futile procedure under the circumstances would only exacerbate the threat by delaying remediation of the government's violations and result in further illness and death. [**1RP 60 ¶ 3; 61 ¶¶ 3, 4; 62 ¶¶ 7, 8, 10; 68 ¶**

37; 77 ¶ 72; 77 ¶¶ 74, 75; 78 ¶ 88; 79 ¶ 90; 86 ¶ 158; 87 ¶¶ 168, 169; 90 ¶ 192; 93 ¶ 212].

The district court granted the government's motions to dismiss and made a sweeping ruling of first impression: the court held there can be *no* exception to Section 33-2-11(B)'s exhaustion requirement. [**5 RP 983-84 ¶¶ 6, 7, 8**]. Under the district court's interpretation, Section 33-2-11(B) imposes an absolute bar to relief absent exhaustion. [**5 RP 983-84 ¶¶ 6, 7, 8**]. In doing so, the district court committed legal error for the three following reasons.

a. The district court misconstrued New Mexico precedent recognizing a futility exception to Section 33-2-11(B).

The district court misconstrued case law showing futility is a recognized exception to Section 33-2-11's exhaustion requirement, including the New Mexico Supreme Court's decision in *Cummings*. [**5 RP 984 ¶ 8**]. In *Cummings*, this Court questioned the district court's conclusion that Cummings was first required to exhaust his administrative remedies pursuant to Section 33-2-11 before requesting relief in court. The court reasoned that "[r]equiring a prisoner to exhaust internal grievance procedures ensures that the Department has been given a full opportunity to undertake such an inquiry. Yet Cummings's allegation [i.e., that his right to

vote was wrongfully denied] has nothing to do with the correctional facilities where he is housed, nor does it have anything to do with his punishment and treatment." *Cummings*, 2007-NMSC-048, ¶ 26. So, because Cummings alleged that the court clerk wrongly denied him the right to vote, the Court concluded that "[f]orcing Cummings to pursue an administrative remedy would be futile simply because there is no administrative remedy for what he seeks." *Id.* (emphasis added).

Two years after *Cummings*, both a New Mexico district court and the New Mexico Court of Appeals similarly indicated that futility may excuse a litigant from Section 33-2-11's exhaustion requirement. *Garcia v. Guadalupe Cty. Corr. Facility*, No. 29,449, 2009 WL 6551756 (N.M. Ct. App. July 30, 2009) (unpublished). In *Garcia*, after the defendant prison raised a failure to exhaust defense to the district court on summary judgment, the plaintiff argued that exhaustion was futile because he lacked the mental competence to understand the prison's complex grievance procedures. *Id.* at *1. Although the court dismissed the matter, it analyzed the merits of the plaintiff's futility argument and found he could not establish that an inability to understand the grievance procedure constituted futility. *Id.* Then, on appeal, the plaintiff provided new grounds to support his futility argument to the Court of Appeals. *Id.* at *2. While the Court of Appeals could not consider that new

evidence on appeal for procedural reasons, it specifically acknowledged that the plaintiff had "provided information that might support the allegation that the grievance procedure was unavailable to him." *Id.*

Taken together, *Cummings* and *Garcia* demonstrate that Section 33-2-11's exhaustion requirement may, in limited circumstances, be excused when the grievance procedure cannot provide the relief sought or otherwise is not available to the person incarcerated. And here, like in *Cummings*, Plaintiffs allege government wrongs that, by their own admission, cannot be remedied by the Corrections Department. *See Inmate Grievances,* [**4 RP 847-48**].

Yet, the district court shrugged *Cummings* aside by noting that in *Cummings* "the petitioner's allegations had nothing to do with the petitioner's confinement or treatment." [**5 RP 984 ¶ 8**]. However, that observation was not critical to this Court's reasoning in *Cummings*. The district court ignored that in *Cummings*, this Court *expressly provided* its reasoning about why exhaustion may not be required: because Cummings' claim related to his right to vote rather than his confinement, "[f]orcing [him] to pursue an administrative remedy would be futile simply because there is no administrative remedy for what he seeks." *Cummings*, 2007-NMSC-048, ¶ 26.

And here, Plaintiffs' claims relate to their release, which the Corrections Department has no control over just the same as it has no control over an inmate's right to vote. [**1 RP 91 ¶ 202; 4 RP 724 § II**]. The Corrections Department admits as much in its grievance policy. *See Inmate Grievances*, [**4 RP 735-36; 847-48**]. The district court erred by misconstruing the case law and finding that, against *Cummings*' and *Garcia*'s language to the contrary, Section 33-2-11(B)'s exhaustion requirement may never be excused under any circumstances. [**5 RP 984-85 ¶¶ 8, 10, 11**].

b. The district court improperly relied on *U.S. Xpress* in reaching its conclusion.

The district court also erroneously relied on *U.S. Xpress v. N.M. Tax & Rev. Dept.*, 2006-NMSC-017, 139 N.M. 589, 136 P.3d 999 to reach its holding—a case that has no bearing on Section 33-2-11 and is, in fact, contradicted by *Cummings* and *Garcia*. [**1 RP 2-4**]. (finding that *U.S. Xpress* indicates Section 33-2-11(B)'s exhaustion requirement "applies without exception").

In *U.S. Xpress*, this Court considered whether the Tax Administration Act requires individual exhaustion of remedies before proceeding to challenge the constitutionality of a tax in court. *U.S. Xpress* at 591, 1001. The Court held that it does and found that the futility doctrine does not apply to

Section 7-1-22, which governs tax challenges. *U.S. Xpress* at 594, 1004. But in doing so, the Court specifically identified that its finding applied only "in the context of a claim for a tax refund and the exhaustion requirements of § 7-1-22;" and (2) that "exhaustion of the statutory remedies is not futile when the procedures of the Tax Administration Act provide a plain, adequate, and complete means of determining the constitutionality of the tax with ultimate resolution in the courts." *U.S. Xpress* at 593-594, 1003-1004.

Here, as demonstrated in *Cummings*, *Garcia*, and this case, the Corrections Department's grievance procedures—in contrast to the procedures under Section 7-1-22—*cannot* always provide "a plain, adequate, and complete means" of resolution. And this case involves an entirely different statute than Section 7-1-22, so *U.S. Xpress*' limited holding cannot govern writs of habeas corpus, which (unlike tax challenges) "cannot be abrogated, or its efficiency curtailed, by legislative action." *In re Forest*, 1941-NMSC-019, ¶ 12. Therefore, the district court's reliance on *U.S. Xpress* was entirely misplaced.

c. The district court empowered the Corrections Department with authority it does not have.

Finally, and most importantly, the district court gave short shrift to the serious constitutional violations that arise by imposing an absolute bar to

habeas relief without exhaustion. [**5 RP 984-85 ¶¶ 8, 10, 11**]. Without recognizing *any* exceptions to Section 33-2-11, the legislature would have impermissibly granted the Corrections Department authority to impose an absolute bar on the writ of habeas corpus, despite the Constitution's plain restriction against it. For example, the Corrections Department would be authorized to carry out grievance procedures so onerous and drawn out that they effectively squash an incarcerated person's ability to obtain relief—much less timely relief in an emergency—from government constitutional violations.[5] Or the Corrections Department could simply make grievance procedures entirely unavailable.

Providing the Corrections Department with authority to bar habeas relief could not possibly have been intended by the New Mexico legislature. For example, the Tenth Circuit has, in describing the purpose of Section 33-2-11's federal analogue, reasoned that "when an inmate foregoes administrative remedies because prison officials have made it irrational for

[5] This is more than a hypothetical: in *this* case, incarcerated persons who filed emergency grievances were transferred mid-process to other facilities that were committing the same institutional violations—thus mooting their initial grievances and requiring them to start the process over again, regardless of the emergency nature of the violations. *See* Tr. 23-25, 29-30. The district court's holding would enable the Corrections Department to do this in perpetuity, or erect whatever other barriers to relief it wishes to impose.

him to pursue them, the inmate loses a benefit that Congress intended to bestow on him." *Tuckel v. Grover*, 660 F.3d 1249, 1253 (10th Cir. 2011) (internal quotations omitted). "Without venturing into the realm of guesswork, we are confident that Congress did not intend the exhaustion requirement to summarily prevent inmates from vindicating their constitutional rights." *Id.*

The district court's decision in *Jaramillo v. State of New Mexico*, No. D-809-CV-220-00113 (Eighth Judicial Dist. Ct.) is illustrative. In that case, an incarcerated woman filed an emergency habeas petition because of the government's failure to protect her from the threat of COVID-19. *Id.* at ¶ 1. The government argued that the court lacked jurisdiction to hear the petition because the petitioner did not exhaust the Corrections Department procedures pursuant to Section 33-2-11(B) (*i.e.*, on the same grounds as in this case). *Id.* at ¶ 3.

However, the court concluded that Section 33-2-11(B)'s procedural limitations "do *not* operate as an absolute bar to the district court's original jurisdiction to issue writs of habeas corpus." *Id.* at ¶ 11 (emphasis added). The court identified that New Mexico law acknowledges "the district court's discretion to recognize that some exceptions may apply to exhaustion requirements in cases such as this, where the claim involves a common law

remedy (habeas corpus) apart from or in addition to the administrative remedy (internal grievance procedures)." *Id.* at ¶ 12.

Likewise, the court noted that the exhaustion requirement is meant to "aid in the rapid and accurate resolution of habeas petitions." *Id.* at ¶ 13. So, the court reasoned that to construe Section 33-2-11(B) as "an absolute bar to district court action without regard to whether exhaustion of internal grievance procedures is futile, inadequate, or impractical as applied to a particular set of circumstances does not further the intended design of the rule." *Id.*

The court concluded that "[a]t a minimum, there is a factual issue as to whether exhaustion is futile, inadequate, or impractical in this case due to the unique circumstances of the current public health emergency and whether this Court *should* exercise its original subject matter jurisdiction prior to completion of the internal grievance process." *Id.* at ¶ 15 (emphasis in original). The court thus ruled that the parties should be given an opportunity to present evidence about whether there was "a valid reason for judicial intervention prior to exhaustion of the internal grievance process or whether the remedies available are inadequate." *Id.* (citations and internal quotations omitted).

The same is equally true here. The New Mexico legislature could not have intended to endow the Corrections Department with such limitless authority that it may bar inmates from habeas relief for constitutional violations. To the contrary, the New Mexico Constitution dictates that the "privilege of the writ of habeas corpus shall ***never*** be suspended." N.M. Const. art. II, § 7 (emphasis added). So, as this Court has recognized, while the "legislature may ***add*** to the efficacy of the writ…it ***cannot curtail*** such rights." *In re Forest*, 1941-NMSC-019, ¶ 12 (emphasis added). Thus, remedies afforded under the writ of habeas corpus "is placed beyond the pale of legislative discretion." *Id.*; *see also Gusik v. Schilder*, 340 U.S. 128, 132 (1950), (U.S. Supreme Court indicating that exhaustion without a futility exception would amount to a suspension of the writ because exhaustion is "merely a deferment" but only until "corrective procedures are shown to be futile").

Accordingly, if the New Mexico legislature did intend to grant the Corrections Department the kind of blanket authority the district court says it did, Section 33-2-11(B)'s exhaustion requirement must be considered unconstitutional. Otherwise, the statute would permit precisely what the Constitution forbids.

C. The district court erred when it made a fact determination on futility at the motion to dismiss stage

without allowing Plaintiffs an opportunity to present evidence on the issue.

In its Order, the district court erroneously made a factual determination without first holding an evidentiary hearing. [**4 RP 755-57**]. Specifically, the district court claimed to accept as true Plaintiffs' allegation that exhaustion was futile, but then did the opposite and determined that "[e]xhaustion would not be futile in this case because the NMCD has the authority to address the conditions in the New Mexico correctional facilities, a remedy that would address the majority of the allegations in the Amended Complaint, and because the NMCD has procedures in place, including emergency procedures, to remedy conditions that pose a risk of harm to inmates." [**5 RP 983-84 ¶ ¶2, 9**]. That factual determination is both contrary to the legal standard upon which the court relied and unsupported.

Although Plaintiffs provided facts to the Court in the briefing and at argument to support their position that exhaustion was futile, Plaintiffs have had no opportunity to offer evidence on that issue at the motion to dismiss stage. [**4 RP 724-29; 735-37; 784-86; 803-05; 809-10; 847-48; Tr. 26:16-19**]. At minimum, there remains a material factual dispute as to whether exhaustion is futile. The district court's premature factual determination that exhaustion was not futile without first taking evidence

related to that issue should be reversed, and the issue should be remanded to the district court for an evidentiary hearing.

1. Standard of Review

In a facial motion to dismiss the Complaint, the district court must accept as true all well-pleaded facts and question only whether the Plaintiff might prevail under any state of facts provable under the claim. *South v. Lujan*, 2014-NMCA-109, ¶¶ 7-8, 336 P.3d 1000; *New Mexico Life Ins. Guar. Ass'n v. Quinn & Co.*, 1991-NMSC-036, ¶ 15, 111 N.M. 750, 809 P.2d 1278; *Gomez v. Bd. of Ed. of Dulce Indep. Sch. Dist. No. 21*, 1973-NMSC-116, ¶ 6, 85 N.M. 708, 516 P.2d 679. But for a factual attack to jurisdiction in a motion to dismiss, the district court had wide discretion to consider evidence and resolve as a factual determination the Plaintiffs' allegation that failure to exhaust administrative remedies is futile. *Gzaskow*, 2017-NMCA-064, ¶ 23. The district court's failure to do so, while relying on a factual determination nonetheless to dismiss the Complaint, is a question of law that this Court reviews de novo. *El Castillo Ret. Residences*, 2015-NMCA-041, ¶ 13 ("Whether a court has jurisdiction to hear a particular matter is a question of law that this Court reviews de novo."). In this instance, the district court's failure to take evidence while nevertheless making a factual determination constitutes reversible error.

2. Argument

The question of whether it would be futile for Plaintiffs to exhaust their administrative remedies is a disputed question of fact. *See Gzaskow*, 2017-NMCA-064, ¶ 23 (discussing that the futility factor in the exhaustion of remedies analysis is a factual matter that requires evidence). In a similar case last month, Eighth Judicial District Judge Melissa Kennelly determined as much on this very issue. *See* December 03, 2020, Order Reconsidering Summary Dismissal, Reinstating Case, and Setting Evidentiary Hearing, *Jaramillo v. State of New Mexico*, No. D-809-CV-220-00113 (Eighth Judicial Dist. Ct.), ¶ 15.[6]

Further, although the Defendants' position is that exhaustion is not futile, the Plaintiffs in this case have put forth facts in support of their position that it is futile. [**4 RP 724-29; 735-37; 784-86; 803-05; 809-10; 847-48; Tr. 26:16-19**]. The Plaintiffs have raised what happened to the plaintiff in *Jaramillo*. Plaintiffs have shown through Jaramillo's example that at least one incarcerated person filed numerous emergency grievances seeking release to home confinement due to a preexisting medical condition,

[6] This court may judicially notice the district court's order in *Jaramillo*. *See* Rule 11-201(B)(2) NMRA (notice for facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); *Miller v. Smith*, 1955-NMSC-021, ¶ 29, 59 N.M. 235, 282 P.2d 715 (notice of related case).

but had not received any responses to those grievances. [**4 RP 785-86; 799-888**].

At the hearing in this matter, Plaintiffs also referred to the existence of evidence that Class Members had filed grievances, including grievances under the emergency grievance procedure, seeking to remedy the government's constitutional violations in the midst of the COVID-19 pandemic, but had received no determination or remedy. [**Tr. 23:15-25:17, 29:23-30:6**]. Other Class Members had been transferred to other facilities in the middle of the grievance process, effectively compelling them to re-start the process all over again. *Id.*

Plaintiffs requested that the district court hold an evidentiary hearing in order to resolve the question of exhaustion of remedies. [**1 RP 213-14**; **Tr. 23:2-14, 29:15-22**]. It did not. That opportunity was foreclosed when the district court dismissed the case. But having not taken any evidence, the district court had to accept all facts – including the futility of exhaustion as true. *South*, 2014-NMCA-109, ¶¶ 7-8. It purported to do so, [**5 RP 983 ¶ 2**], but then made a factual determination contrary to the standard it adopted, [**5 RP 984 ¶ 9**].

If the district court was going to dismiss this case based on a factual attack to jurisdiction, the district court was obligated to take evidence on the

disputed issue. *South*, 2014-NMCA-109, ¶¶ 7-8; *Gomez*, 1973-NMSC-116, ¶ 20 (holding that the court erred where the dispositive issue required the development and evaluation of facts and, accordingly, the granting of the motion to dismiss was in error); *New Mexico Life Ins. Guar. Ass'n*, 1991-NMSC-036, ¶ 5 (holding that a motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint, not the factual allegations of the pleadings which, for purposes of ruling on the motion, the court must accept as true).

As a result, without first taking evidence, it was error for the district court to make a fact determination on a disputed issue in a motion to dismiss. And because that improper and premature factual determination was essential to the district court's ruling, this Court should remand the issue back to the district court for those findings. *See South*, 2014-NMCA-109, ¶ 11.

D. The district court erred in dismissing the Institutional Plaintiffs for failure to exhaust the internal prison grievance process, because the grievance process applies only to inmates.

The district court omitted any discussion of the Institutional Plaintiffs' standing at the hearing on the motion to dismiss. In its written Order, the district court dismissed this case for lack of subject-matter jurisdiction as to the *Institutional Plaintiffs* merely because the *Named Plaintiffs* had not

exhausted administrative remedies: "Because the inmate-Plaintiffs have not exhausted the NMCD's internal grievance procedures, the Court lacks subject matter jurisdiction over the claims raised in the *Amended Complaint* with respect to all Plaintiffs." [**5 RP 985 ¶ 12**]. The district court thus erred by conflating the concepts of exhaustion and standing, which are distinct issues that must be analyzed separately. *See, e.g., ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶¶ 30-32, 144 N.M. 471, 188 P.3d 1222 (analyzing third-party standing independent from the other issues raised); *see also Feminist Women's Health Ctr. v. Burgess*, 651 S.E.2d 36, 39 (Ga. 2007) (treating exhaustion and third-party standing as distinct issues).

The district court never addressed the issue of the Institutional Plaintiffs' standing. This, at a minimum, constitutes legal error requiring a remand. But because of the urgent nature of the claims asserted, and because standing is a purely legal issue, Plaintiffs respectfully request that this Court hold the Institutional Plaintiffs have standing.

1. Standard of Review

Whether a party has standing to pursue a claim and whether the court has jurisdiction to hear it are legal questions that are reviewed *de novo*. *See, e.g., ACLU of N.M.*, 2008-NMSC-045, ¶ 6 (standing); *El Castillo Ret. Residences*, 2015-NMCA-041, ¶ 14 (jurisdiction).

2. Argument

The district court erred by wrongfully conflating the concepts of standing and exhaustion, essentially requiring the Institutional Plaintiffs to exhaust remedies that they have no avenue to pursue. The plain language of Section 33-2-11(B) applies only to prisoners. ("No court of this state shall acquire subject-matter jurisdiction over any complaint . . . ***filed by any inmate*** of the corrections department . . . until ***the inmate*** exhausts the corrections department's internal grievance procedure.") (emphasis added). Applying this requirement to the Institutional Plaintiffs is not only impossible but also unsupported by precedent. *See, e.g., U.S. Xpress,* 2006-NMSC-017, ¶ 12 (requiring exhaustion of remedies as a prerequisite to bring suit, but only as to plaintiffs for whom exhaustion was possible and to whom the exhaustion requirement applied). Put simply, the exhaustion requirement does not apply to the Institutional Plaintiffs.

The district court purported to exercise judicial restraint by its ruling. *See* [**5 RP 985 ¶ 11**]. ("To allow the [Institutional Plaintiffs] to pursue the claims in the *Amended Complaint* when the inmate-Plaintiffs have not exhausted their administrative remedies would frustrate the legislative purpose of Section 33-2-11(B) and would lead to an absurd result."). But in apparently attempting to *avoid* judicial overreach, the district court in fact

committed it by expanding Section 33-2-11(B) beyond its written scope. This contradicts fundamental principles of separation of powers. *See State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 21, 125 N.M. 343, 961 P.2d 768 ("[O]nly the legislative branch is constitutionally established to create substantive law."); *State v. Fifth Judicial Dist. Court*, 1932-NMSC-023, ¶ 9, 36 N.M. 151, 9 P.2d 691 ("The Legislature makes . . . and the judiciary construes, the laws.").

The Institutional Plaintiffs are owed, at a minimum, a substantive analysis of their standing. *See, e.g., Deutsche Bank Nat'l Trust Co. v. Beneficial N.M. Inc.*, 2014-NMCA-090, ¶ 8, 335 P.3d 217 ("[S]tanding is a jurisdictional prerequisite for a cause of action and *must be established* at the time the complaint is filed.") (emphasis added). Remand would suffice for that purpose. However, because of the urgent and fundamental nature of the claims asserted, Plaintiffs respectfully request that this Court hold they have standing. There are at least three independent bases for standing here.

Associational Standing: First, the Institutional Plaintiffs have associational standing because "(a) [their] members would otherwise have standing to sue in their own right; (b) the interests [they] seek[] to protect are germane to the organization[s'] purpose[s]; and (c) neither the claim asserted nor the relief requested requires the participation of individual

members in the lawsuit." *ACLU of N.M.*, 2008-NMSC-045, ¶ 30 (quotation omitted). The Named Plaintiffs, constituents of the Institutional Plaintiffs, each have standing because they have alleged that exhaustion would be futile, and therefore their claims are not barred. *See Prot. & Advoc. Sys. v. City of Albuquerque*, 2008-NMCA-149, ¶ 34, 145 N.M. 156, 195 P.3d 1 (holding an advocacy organization may sue on behalf of its constituents). The Institutional Plaintiffs are organizations that advocate on behalf of incarcerated persons. Unlike a particularized money damages analysis, the declaratory and injunctive relief sought here does not require participation of the Named Plaintiffs. *See Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 187 (4th Cir. 2007) ("Unlike a suit for money damages, which would require examination of each member's unique injury, this action seeks a declaratory judgment and injunctive relief, the type of relief for which associational standing was originally recognized.").

Third-Party Standing: Second, the Institutional Plaintiffs have third-party standing, which holds:

> [t]he litigant must have suffered an injury in fact, thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests.

N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-005, ¶ 13, 126 N.M.

841, 975 P.2d 841 (citing *Powers v. Ohio*, 499 U.S. 400, 411 (1991)) (internal marks omitted). The difference between associational standing and third-party standing is that the organization is asserting its *own* rights, even though those rights are closely linked to those of its members.

The Institutional Plaintiffs are nonprofit public advocacy organizations seeking to assert rights on behalf of their constituents and accordingly have third-party standing. *Compare id.* at ¶¶ 11, 14 (explaining that that NARAL, "a non-profit public advocacy organization with members who are Medicaid-eligible women" met the third-party standing test "[i]nsofar as [it sought] to assert the rights of its members . . . [because it had] a sufficiently direct interest and a sufficiently close relationship" with them); *with* ACLU National Prison Project Homepage, https://www.aclu.org/other/aclu-national-prison-project (last visited January 3, 2020) ("Through litigation, advocacy, and public education, [the ACLU] work[s] to ensure that conditions of confinement are consistent with health, safety, and human dignity, and that prisoners retain all rights of free persons that are not inconsistent with incarceration."); *and* NMCDLA, About Us Homepage, https://nmcdla.org/about-us/ (last visited January 3, 2020) ("The [NMCDLA] mobilizes criminal defense professionals throughout the state . . . to partner with diverse coalitions advocating for systemic change [within

the New Mexico prison system].").

Moreover, the Named Plaintiffs are hindered in their ability to protect their constitutional liberties because they have alleged there is no administrative grievance procedure available to them that would address the government's misconduct. [**4 RP 772**]. Should this Court affirm the district court's dismissal of the Named Plaintiffs for failure to exhaust administrative remedies, the Institutional Plaintiffs must remain to represent the interests of their constituents. This lawsuit exemplifies the very reason why the third-party standing doctrine exists. *See Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.").

Great Public Importance Doctrine: Finally, the Institutional Plaintiffs have standing under "the great public importance doctrine [which] exists as an overarching exception to all of these general standing requirements, allowing this Court to reach the merits of a case even when the traditional criteria for standing are not met, either by an individual or an organizational plaintiff." *ACLU of N.M.*, 2008-NMSC-045, ¶ 12. This case implicates "clear threats to the essential nature of state government guaranteed to New Mexico citizens under their Constitution." *Id.* ¶ 33

(quotation omitted). A deadly pandemic is ravaging New Mexico's prisons. The pandemic has necessitated extraordinary measures by the Governor in order to protect the welfare of the state's non-inmate citizens. And there is little more fundamental, or of greater public importance, than how a government provides (or fails to provide) for the safety and welfare of the citizens it is expressly charged with protecting.

Defendants seek to avoid judicial review of their actions. But the judiciary has an important, constitutionally mandated role to play when the executive branch deprives those in its custody of individual liberties. *See Board of Educ. of Carlsbad Mun. Sch. v. Harrell*, 1994-NMSC-096, ¶ 45, 118 N.M. 470, 882 P.2d 511 ("The doctrine of separation of powers must . . . be viewed not as an end in itself, but as a general principle intended to be applied so as to maintain the balance between the three branches of government, preserve their respective independence and integrity, and prevent the concentration of *unchecked* power in the hands of any one branch.") (citation omitted) (emphasis in original). Even in times of emergency, the executive cannot rule by fiat—this Court has a duty to check the executive branch's unconstitutional actions. This fundamental issue of governance should fall squarely within the Great Public Importance doctrine, and this Court should accordingly conclude that the Institutional

Plaintiffs have standing to pursue their claims.

For these reasons, Plaintiffs respectfully submit that the district court erred by failing to address the issue of the Institutional Plaintiffs' standing, and that this Court should hold they indeed have standing to raise their claims.

E. The district court erred in dismissing Declaratory Judgment Act claims for failure to exhaust because the internal grievance process Cannot Provide the Requested Relief.

1. Standard of Review

A challenge to subject matter jurisdiction based on failure to exhaust administrative remedies presents a mixed standard of review. Where a jurisdictional challenge is factual, a court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts. *Gzaskow*, 2017-NMCA-064, ¶ 23. Where the challenge presented is purely facial or does not reveal a fact dispute—e.g. whether the administrative agency itself lacks jurisdiction, whether agency expertise would assist the agency in resolving the dispute, the exclusivity of the statutory scheme for review of administrative decisions, or other procedural or substantive limitations on review— the Court reviews *de novo*. *Id.* at 702-03; *see also El Castillo Ret. Residences*, 2015-NMCA-041, ¶ 13

(“Whether a court has jurisdiction to hear a particular matter is a question of law that we review de novo.”)

Here, Plaintiffs argue a pure legal issue: the NMCD inmate grievance procedure does not provide for the declaratory relief sought by Plaintiffs and therefore the district court erred by dismissing the Amended Complaint for failure to exhaust the available remedies.

2. Argument

The district court dismissed Plaintiffs’ Amended Complaint for lack of subject matter jurisdiction for failure to exhaust the New Mexico Corrections Department Inmate Grievance Procedure. [**5 RP 985 ¶ 12**]. But forcing Plaintiffs to pursue an administrative remedy is futile where no administrative remedy exists for the relief sought. *Cummings*, 2007-NMSC-048, ¶ 26 (calling into question whether statutory exhaustion applies if there is no administrative remedy for what the plaintiff seeks); *Lobato*, 2012-NMSC-002, ¶ 12 (“A rigid adherence to administrative exhaustion is not required in circumstances where the doctrine is inappropriate.”); *Callahan*, 2006-NMSC-010, ¶ 24 (“Of course, where there is no applicable statutory remedy, there is no need to exhaust administrative procedures.”); *McDowell v. Napolitano*, 1995-NMSC-029, ¶ 9, 119 N.M. 696, 895 P.2d 218 (holding that, where there is no statutory remedy available, the exhaustion of

remedies doctrine is not absolute); *Yepa v. State Taxation & Revenue Dep't*, 2015-NMCA-099, ¶ 26, 358 P.3d 268 ("[W]hen the matter at issue is purely legal and requires no specialized agency factfinding, and there is no exclusive statutory remedy, 'it is a proper matter for a declaratory judgment action and does not require exhaustion of administrative remedies'" (quoting *New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 12, 149 N.M. 42, 243 P.3d 746)).

Plaintiffs' Amended Complaint contains nine different detailed prayers for declaratory relief.[7] [**1 RP 105-07 § (B)(1)**]. The inmate grievance

[7] The requested declaratory relief is as follows: (1) Defendants are violating Named Plaintiffs' and Class Members' state constitutional rights by failing to adequately safeguard their health and safety in the midst of the COVID-19 pandemic; (2) the New Mexico Corrections Department's COVID-19-related policies which rely on extended periods of lockdown and/or solitary confinement and/or which unduly restrict incarcerated individuals' access to telephones violate incarcerated individuals' state constitutional rights; (3) Defendants must reduce the number of incarcerated individuals in New Mexico Corrections Department facilities to safeguard the health and safety of Named Plaintiffs and Class Members; (4) the current and ongoing COVID-19 pandemic constitutes an extraordinary change in circumstance for purposes of seeking a reduced sentence under Rule 5-801(A) NMRA for every currently-incarcerated individual in a New Mexico Corrections Department facility not serving a mandatory sentence; (5) each incarcerated individual held in each New Mexico Corrections Department facility is at a disproportionate risk of contracting COVID-19 as compared to the general population, and as compared to other corrections facilities in other states, due to the New Mexico Corrections Department's inadequate response to the COVID-19 pandemic; (6) the individualized review processes currently available to the named Plaintiffs and Class Members are insufficient in view of the rapid spread of COVID-19; (7) the State of New Mexico's Executive

procedure does not provide for declaratory relief sought by Plaintiffs. The grievance procedure sets forth four remedies, including (1) restoration of property or payment of fair market value, (2) change of policies, procedures or practices, (3) correction of departmental records, and (4) "other remedies as appropriate." New Mexico Corrections Department, *Inmate Grievances* (June 14, 2018), available at https://cd.nm.gov/wp-content/uploads/2019/06/CD-150500.pdf, at 6-7 (cited in Governor Grisham's Reply in Support of her Mot. to Dismiss for Lack of SMJ at 4) [**4 RP 937 ¶ 4**].

Clearly not enumerated among these available remedies is (1) the authority to make any determination or declaration as to Plaintiffs' constitutional rights; (2) the authority to declare that COVID-19 constitutes

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Order 2020-021 (the "Commutation Order") is arbitrary because it limits consideration of early release to persons whose release date is no more than thirty (30) days away, in contradiction to established New Mexico law (NMSA § 33-2A-6) providing for consideration for early release any person whose release date is 180 days or less; (8) the requirements for "any necessary parole plan" as referenced in the Commutation Order, New Mexico law, and/or all relevant policies of any Defendant, including that the "necessary parole plan" must be in place prior to release, are unduly burdensome and overly restrictive in view of the current pandemic; and (9) any requirement that a parole plan must include a release location within a specified physical distance of a medical treatment facility is arbitrary and unduly restrictive given the widespread nature of telemedicine and the ability to receive treatment in a remote or virtual setting.

an extraordinary change in circumstances for purposes of Rule 5-801(A) NMRA; (3) the authority to determine and declare that every incarcerated individual is at a higher risk for contracting COVID-19; (4) the authority to determine and declare that the individualized review process is insufficient due to the rapid spread of COVID-19; (5) the authority to determine and declare any Executive Order of State of New Mexico arbitrary and capricious; and (6) the authority to determine and declare New Mexico requirements for a parole plan unduly burdensome and overly restrictive in light of the pandemic. [1 RP 105-07 § B]. Because the declaratory relief requested is unavailable to Plaintiffs through the inmate grievance procedure, it is futile to require Plaintiffs to exhaust the inmate grievance procedure where the remedy they seek is unavailable.

Furthermore, the inmate grievance procedure includes several limitations on the availability of grievances that preclude Plaintiffs from obtaining the declaratory relief sought through the administrative process, including Sections E(2)(a), (d), (f), and (h). *Inmate Grievances* at 5-6 ("The following matters **are not grievable** by inmates: (a) Any matter over which the Corrections Department has no control, for example: parole decisions [and] sentences . . . .(d) Any matter involving a classification decision . . . . (f) Complaints on behalf of other inmates. . . . (h) Other matters beyond the

control of the Department." (emphasis added)). These restrictions on grievable offenses further eliminate Plaintiffs' ability to obtain the relief they seek and reveal the futility of requiring Plaintiffs to seek declaratory relief through the inmate grievance procedures.

In light of the unavailability of the declaratory relief sought through the inmate grievance procedures, the district court was in error to require Plaintiffs to fully exhaust administrative remedies prior to the court asserting primary jurisdiction. This Court has acknowledged the district court's discretion to hear cases prior to fully exhausting administrative remedies under the doctrine of primary jurisdiction. *See McDowell*, 1995-NMSC-029, ¶ 11 ("The court has original jurisdiction under the doctrine of primary jurisdiction . . . where there is an applicable common-law or legal remedy apart from or in addition to an administrative remedy. . . . Under the principle of comity, the court may choose to defer to the administrative agency where the interests of justice are best served by permitting the agency to resolve factual issues within its peculiar expertise. **Exhaustion of administrative remedies is not absolutely required under the doctrine of primary jurisdiction.**" (emphasis added)); *see also State ex rel. Norvell v. Ariz. Pub. Serv. Co.*, 85 N.M. 165, 510 P.2d 98, 1973-NMSC-051, ¶ 35 (acknowledging that "[t]he trial court should exercise its discretion

with an understanding that the legislature has created the agency in order to afford a systematic method of factfinding and policymaking and that the agency's jurisdiction should be given priority **in the absence of a valid reason for judicial intervention.**" (emphasis added) (quoting *Wis. Collectors Ass'n, Inc. v. Thorp Fin. Corp.*, 32 Wis. 2d 36, 145 N.W.2d 33)); *McDowell*, 1995-NMSC-029, ¶ 9 ("New Mexico law has long recognized that a party must exhaust all administrative remedies before applying to a court for relief **unless the legal or statutory remedies available are inadequate**." (emphasis added).")

These cases acknowledge the district court's inherent discretion to recognize that some exceptions apply to exhaustion requirements in cases such as this, where the claim involves a remedy (declaratory relief) apart from or in addition to the administrative remedy (inmate grievance procedures). A district court recently exercised its discretion to assert original jurisdiction in a case where it initially concluded that the plaintiff had not exhausted her administrative remedies. December 03, 2020, Order Reconsidering Summary Dismissal, Reinstating Case, and Setting Evidentiary Hearing, *Jaramillo*, No. D-809-CV-220-00113 (Eighth Judicial Dist. Ct.), ¶ 12. The court reconsidered its summary dismissal, reinstated the case, and set the case for an evidentiary hearing, holding that, because the

plaintiff's claim involved a common-law remedy in addition to the administrative remedy, the exhaustion of remedies was not required. *Id.* Similarly, the Court should reverse the district court's conclusion that exhaustion of administrative requirements was a pre-requisite of the district court asserting primary jurisdiction here because Plaintiffs seek declaratory relief in addition to an administrative remedy.

III. CONCLUSION

In the midst of a public health emergency, the district court made extraordinary rulings that ignore foundational separation of powers principles and empowered the Corrections Department, via the legislature, with authority neither have. The Court should reverse and remand this case for the following reasons:

- The district court erred by holding Section 33-2-11(B) is jurisdictional because legislation cannot be used to curtail the writ.

- The district court erred when it held there are no exceptions to Section 33–2–11(B)'s exhaustion requirement. Exhaustion is futile when the remedy sought is not available through the grievance procedure. Under such circumstances, exhaustion must be excused.

- The district court's factual determination that exhaustion was not futile without first taking evidence related to that issue was premature and erroneous. This issue of fact should be remanded to the district court for an evidentiary hearing.

- The district court erred by dismissing the Institutional Plaintiffs without considering their standing to pursue the claims raised. Either this Court should remand with instructions that the district court address this

issue, or, given the urgent nature of the claims raised here, this Court may analyze this legal question at this stage and conclude that the Institutional Plaintiffs indeed have standing.

- The district court erred by dismissing Plaintiffs' Amended Complaint for lack of subject matter jurisdiction for failure to exhaust the New Mexico Corrections Department Inmate Grievance Procedure. The declaratory relief requested is unavailable to Plaintiffs through the inmate grievance procedure, and it is futile to require Plaintiffs to exhaust the inmate grievance procedure where the remedy they seek is unavailable.

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Dated: January 11, 2021

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served upon all counsel of record via E-file on this 11th day of January, 2021.

By: */s/ Ryan J. Villa*
RYAN J. VILLA