Filed
Supreme Court of New Mexico
2/22/2021 9:44 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

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PETITIONER'S REPLY TO STATE DEFENDANTS' RESPONSE BRIEF

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The government has had every opportunity to cease its constitutional violations in passively permitting COVID-19 to rip through New Mexico's prison population but still refuses to act. Now the Court should exercise its authority to either provide relief directly or remand the matter to the district court with instructions that Plaintiffs' claims be addressed expeditiously and on their merits.

On April 14, 2020, over *ten months* ago, the New Mexico Public Defender, New Mexico Criminal Defense Lawyers' Association, and ACLU of New Mexico—as petitioners—filed an action against the State of New Mexico, the Governor, the Secretary of the Department of Corrections ("NMCD"), and the Director of Probation and Parole. The petitioners claimed the New Mexico government was deliberately indifferent to the health and safety of New Mexico inmates and failed to adequately respond to the threat of COVID-19 in the state's prison system. The petitioners chiefly requested reductions in the prison population sufficient to permit compliance with CDC and state guidelines on mitigating the spread of COVID-19.

On May 4, 2020, the Supreme Court held oral argument and denied the petition in a summary written and oral order. This Court expressed concern that the petitioners' claim was too broad, observing that deliberate indifference claims "are normally sent to the trial level and handled case-by-case." The Court also reasoned that there were "too many facts to be sorted out" and that the

petitioners were asking the Court to grant relief without the benefit of necessary findings of fact.

Plaintiffs took the Court at its word. First, they sought resolution on a case-by-case basis. But when the government refused to act, they brought the present action in the district court. Plaintiffs sought, and the district court initially granted, an immediate hearing on their motion for injunctive relief. That hearing was scheduled to include several Plaintiffs' and expert testimony. It would have allowed the district court to make the very findings of fact that this Court found lacking when it declined to grant relief in May 2020. But rather than engage on the urgent issues incarcerated persons were confronting, State Defendants sought delay and dismissal on spurious procedural grounds. In the meantime, COVID-19 spread unchecked throughout New Mexico's prisons. As a result, thousands of incarcerated persons were infected at alarming rates, and many died. Plaintiffs urge the Court to address the issues Plaintiffs are confronted with every day.

State Defendants' opposition only proves the district court erred in dismissing Plaintiffs' petition. Rather than identify authority that supports the constitutionality and procedural propriety of the district court's dismissal of this action, State Defendants grope for anything that may stick—but none of it does. They hang many of their contentions on inapposite cases or on propositions of law they create out of whole cloth. They refer to alleged facts that are inaccurate

or have no procedural relevance. And they attempt to distract from the core of this appeal—and their tragic failure to protect the lives of thousands of their charges—by littering their opposition with issues the district court did not decide (and which are not before this Court). The district court's dismissal should be reversed.

I. §33-2-11(B)'s exhaustion requirement cannot be applied to habeas actions without violating New Mexico's Constitution.

As this Court has held, "the district court gets its jurisdiction from the Constitution, and it is not to be circumscribed or restrained by the legislature." *Smith v. S. Union Gas Co.*, 1954-NMSC-033, ¶10, 58 N.M. 197. The district court's holding that §33-2-11(B) imposes a jurisdictional prerequisite in habeas suits expands the legislature's—and by extension NMCD's—authority beyond the limitations enshrined in New Mexico's Constitution. Notably, State Defendants have failed to offer any meaningful rebuttal to this argument. Even if §33-2-11(B) contains "sweeping and direct" jurisdictional language as State Defendants claim, Article II §7 of New Mexico's Constitution bars any attempt by the legislature to curtail or otherwise limit citizens' right to seek habeas relief that is not in response to a rebellion or invasion.

Rather than address these limitations, State Defendants contend that the relief Plaintiffs seek falls "within an expansion of habeas relief that is not subject to the same constitutional protections as traditional uses of the writ." (Opp. Br.

at 26). Apart from being untrue, as discussed more fully in Section II, this contention is undone by State Defendants' admissions. Plaintiffs seek the release of thousands of non-violent inmates to permit social distancing within Corrections Department prison facilities, which State Defendants admit. (*See* Opp. Br. at 17). And "[t]he writ of habeas corpus 'was traditionally used to secure the release of a person unconstitutionally or otherwise lawfully held.'" (*Id.* at 24) (quoting *Lopez v. LeMaster*, 2003-NMSC-003, ¶12, 133 N.M. 59)). So even under State Defendants' newly-crafted constitutional rule, there is no basis to diminish or revoke any of the protections granted by Article II §7. The "traditional" use of the writ is "to secure release from illegal custody or restraint" (*see id.* at 25) – and that is precisely what Plaintiffs have requested.

Moreover, State Defendants' reliance on *Smith v. Southern Union Gas Co.*, 1954-NMSC-033, ¶10, 58 N.M. 197 is misplaced. While the legislature may "postpone" courts' exercise of jurisdiction over claims brought under the Public Utility Act, the framers of New Mexico's Constitution saw fit to ***preclude*** such action in the habeas context.[1] *See* N.M. Const. Art. II, §7 ("The privilege of the

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[1] *Smith* is inapplicable because, unlike §33-2-11(B), the Public Utility Act's exhaustion requirement did not implicate a fundamental right and thus did not require the Court to strictly scrutinize the statute. *See Morris v. Brandenburg*, 2015-NMCA-100, ¶31, 356 P.3d 564, 576 ("Fundamental constitutional rights are enumerated and specific freedoms protected by the Bill of Rights"); *see also Cummings v. X-Ray Assocs. of New Mexico, P.C.*, 1996-NMSC-035, ¶18, 121 N.M. 821, 828 ("Strict scrutiny applies when the violated interest is a fundamental personal right or civil liberty—such as first amendment rights,

writ of habeas corpus *shall never be suspended*, unless, in case of rebellion or invasion, the public safety requires it.") (emphasis added); *see also* SUSPEND, Black's Law Dictionary (11th ed. 2019) ("To interrupt; *postpone*")[2] (emphasis added); *see also Tuscola Wind III, LLC v. Ellington Twp.*, 2018 WL 1291161, at *6 (E.D. Mich. Mar. 13, 2018) ("There is no meaningful legal distinction between these terms…The definition for 'suspend' includes the word '*postpone*.'") (emphasis added).

Simply put, the legislature may not remove writs of habeas corpus from the courts' purview—even for a second, except in cases of rebellion or invasion. *See In re Forest,* 1941-NMSC-019, ¶12, 45 N.M. 204 ("Cases within the relief afforded by [the writ] at common law cannot, until the people voluntarily surrender the right to this, the greatest of all writs, by an amendment of the organic law, be placed beyond its reach and remedial action. *The privilege of the writ cannot even be temporarily suspended*, except for the safety of the State, in cases of rebellion or invasion.") (emphasis added); *see also Morris v. Brandenburg*, *supra*. Article II §7 provides two conditions for suspending or

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freedom of association, voting, interstate travel, privacy, and fairness in the deprivation of life, liberty or property—which the Constitution explicitly or implicitly guarantees.").

[2] *See State v. Boyse*, 2013-NMSC-024, ¶9, 303 P.3d 830, 832 (holding that "[u]nder the rules of statutory construction, we first turn to the plain meaning of the words at issue, often using the dictionary for guidance.").

postponing the writ which do not apply here, and the fact that exhaustion was not included among them is both telling and cannot be ignored. *See State ex rel. Whitehead v. Vescovi-Dial*, 1997-NMCA-126, ¶15, 124 N.M. 375 ("[W]hen 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.").

If §33-2-11(B)'s exhaustion requirement is construed as a jurisdictional precondition to habeas relief, then the requirement (as applied to habeas) is unconstitutional, plain and simple. The district court's ruling that §33-2-11(B) is jurisdictional must be reversed. *See State ex rel. W. v. Thomas*, 1956-NMSC-124, ¶11, 62 N.M. 103, 107, ("When, however, a statute clearly violates the organic law as expressed in the Constitution, it is the plain duty of the Court to hold the statute unconstitutional, leaving the perfection of the statute to be brought about by proper constitutional amendment.").

II. There are, and must be, exceptions to §33-2-11(B)'s exhaustion requirement.

The Court has never held there are no exceptions to **§33-2-11(B)'s** exhaustion requirement—especially where, like here, such application would mean a party can be barred from habeas relief that the Constitution entitled them to. State Defendants make three arguments attempting to defend the

district court's unconstitutional ruling that there can *never* be an exception to §33-2-11(B)'s exhaustion requirement. They are unavailing.

First, State Defendants declare—without any authority—that the "rule and reasoning" of *U.S. Xpress v. N.M. Taxation & Revenue Dept.*, 2006-NMSC-017, 139 N.M. 589, controls §33-2-11(B). That is contrary to the plain language of the case. Instead, *U.S. Xpress* involved an interpretation only of §7-1-22, which governs tax challenges. It does not govern §33-2-11, habeas corpus, or any other fundamental constitutional right implicated by §33-2-11. To the contrary, as Plaintiffs identified in their Opening Brief, the Court in *U.S. Xpress* limited its decision explicitly to "the context of a claim for a tax refund and the exhaustion requirements of Section 7-1-22." *Id.* at 594.

State Defendants ignore that this Court's futility determination in *U.S. Xpress* regarding §7-1-22 hinged partly on the fact that "the procedures of the Tax Administration Act provide a plain, adequate, and complete means of relief." *Id.* at 959. NMCD's grievance procedures, by contrast, do not provide a "plain, adequate, and complete means of relief." NMCD admits and this case alone demonstrates this. *See* Inmate Grievances, [4 RP 847-48]. ("The following matters are not grievable by inmates: (a) Any matter over which NMCD has no control, for example: parole decisions [and] sentences"). Accordingly, State Defendants' attempt to pin the "rule and reasoning" of *U.S. Xpress* to §33-2-11(B) is entirely unsupported and is, in fact, contradicted by the decision itself.

Second, State Defendants contend that if a habeas petitioner's remedy sought is unavailable in administrative proceedings, it has no bearing on whether exhaustion may be excepted. But as noted above, this contradicts the Court's decision in *U.S. Xpress*, which *did* consider whether administrative remedies were "adequate" and "complete." And State Defendants' assertion that Plaintiffs' allegations "may be raised and addressed through NMCD's internal grievance process" is untrue. Not only does NMCD's grievance procedure make that expressly clear, so does the fact that here, individual grievances filed to address the government's constitutional violations have been denied *because they are not grievable*.

State Defendants' attempt to distinguish *Cummings* fails for the same reason. They note the Court in *Cummings* identified that the purpose of §33-2-11's exhaustion requirement is to give NMCD "a full opportunity" to inquire into matters connected with corrections facilities. They then argue that Plaintiffs' claims relate to corrections facilities and thus §33-2-11 is not futile. But that is a *factual* argument that—apart from their erroneous assumption NMCD would have a "full opportunity" in this case to address Plaintiffs' claims—acknowledges that courts do, in fact, consider whether the grievance process is unavailable or futile. And in relying on these purported facts, State Defendants undermine the district court's ruling (as well as their own contention) that such factual considerations are irrelevant.

The absurdity of State Defendants' position is underscored by their assertion that *Cummings* and *Garcia* have no bearing on the futility/unavailability analysis. They argue the Court should ignore *Cummings* and *Garcia* because—while the cases refer to exceptions to §33-2-11(B)—those cases do not contain express holdings about whether §33-2-11(B) is subject to exceptions. Of course, *U.S. Xpress* does not contain such holdings.

They cannot have it both ways. In the final analysis, both *Cummings* and *Garcia*, unlike *U.S. Xpress*, do address §33-2-11(B). And both of those cases identify that the exhaustion requirement in §33-2-11(B) may be excused when the grievance procedure is unavailable or futile. The inquiry should end there.

Third, State Defendants argue that §33-2-11(B)'s exhaustion requirement does not curtail habeas rights because it does not encroach on unlawful imprisonment habeas actions, as distinguished from conditions of confinement habeas actions. New Mexico's Constitution does not observe such a distinction. Yet, State Defendants boldly declare that habeas writs challenging conditions of confinement are "not subject to the same constitutional protections as traditional uses of the writ." They do not point to authority for such a proposition, nor can they. It would be unconstitutional if §33-2-11(B) granted NMCD limitless gatekeeping authority over habeas actions that the New Mexico Constitution says cannot be curtailed. So, State Defendants instead ask the Court to fix the constitutional infirmities in the district court's

interpretation of §33-2-11(B) by altering centuries of black letter constitutional law. The Court should decline this invitation.[3]

III. A determination of futility at the motion to dismiss stage in this case first requires the taking of evidence.

In denying the petitioners' April 2020 petition, this Court noted the lack of a developed factual record. Plaintiffs have since made every attempt to remedy that perceived need. If the Court affirms the district court's ruling, which cut off Plaintiffs' ability to establish that factual record, Plaintiffs will be in a Kafkaesque position of having no ability to develop the very record needed to obtain the relief they desperately seek. The district court was required to take evidence on the futility of exhaustion before making a factual determination that exhaustion was not futile. *See, e.g., South v. Lujan*, 2014-NMCA-109, ¶¶7-9, 336 P.3d 1000; *Gomez v. Bd. of Ed. of Dulce Indep. Sch. Dist. No. 21*, 1973-NMSC-116, ¶6, 20, 85 N.M. 708. The futility factor in the exhaustion of remedies analysis is a factual matter that requires evidence. *Gzaskow v. Pub. Employees*

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[3] State Defendants also argue that Rule 5-802 provides an independent jurisdictional exhaustion requirement. The district court made no ruling on Rule 5-802. Thus, State Defendants' discussion of any exhaustion requirement under Rule 5-802 is not properly before this Court. Nonetheless, the same constitutional problems would apply to the rule as they do §33-2-11(B). NMCD would be enabled with unlimited power to delay or block the grievance process (and thereby prevent a petitioner from seeking habeas relief)—which is exactly what has occurred here.

Ret. Bd., 2017-NMCA-064, 403 P.3d 694 ¶23.[4] Plaintiffs alleged "Exhaustion of NMCD Grievance Procedure is Futile and Unavailable" and supporting facts, including that NMCD cannot grant probation or release remedies and individual grievances for thousands of inmates would take months.[5] [1 RP 91-92, ¶¶196-210]. Defendants do not distinguish *Gzaskow*.[6] [Opp. Br., 29-34]. With disputed facts, the district court could not accept as true that exhaustion

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[4] The district court misapplied *Cummings* and did not correctly determine whether was futile. *See* **Opp. Br.**, 30-31. *Cummings* supports Plaintiffs' position that to pursue administrative remedies where there are none for what Plaintiffs seek *would* be futile. ***Cummings***, 2007-NMSC-048, ¶26. *McElveny* and *Nellson* do not change this result. *McElveny* does not address whether evidence should be taken when facts related to futility are disputed. *Nellson* is a federal Colorado case where Plaintiff did not seek release and which does not apply New Mexico constitutional rights or futility law in any event. ***Nellson v. Barnhart***, 454 F. Supp. 3d 1087, 1092, 1094 (D. Colo. Apr. 16, 2020). Meanwhile, Plaintiffs raised evidence of a "dead-end" and "impediment" to the grievance procedure. ***See id.***, at 1093-94 (discussing the federal "dead-end exception to exhaustion"); ***McElveny***, 2017-NMSC-024, ¶31 (exhaustion is futile where the "agency has deliberately placed an impediment in the path of a party").

[5] Some facts Plaintiffs raised were not in the Complaint (*i.e.*, incarcerated persons who filed emergency grievances were transferred mid-process, requiring them to restart the process, **[Tr. 23-25, 29-30]**; grievances languished for months, **[4 RP 785, 799-888]**), but where the attack to jurisdiction is factual, the court may go beyond the allegations of the complaint and consider additional evidence to resolve disputed jurisdictional facts. ***South***, 2014-NMCA-109, ¶¶8-9.

[6] Note 12 of State Defendant's opposition discusses the futility exception. **[Opp. Br., 29-30 n.12].** This underpins the error in the Order finding that exhaustion never applies, **[5 RP 983-84, pp 6-8]**, and is irrelevant to whether the district court erred in making a factual determination without first taking evidence on disputed facts.

is futile while simultaneously determining that it was not. *South*, 2014-NMCA-109, ¶¶8-9. The district court erred in doing so without first taking evidence. [4 RP 755-57].

Plaintiffs requested an evidentiary hearing on the factual dispute; State Defendants sought to foreclose this by arguing that the *facts* do not show that exhaustion would be futile.[7] The question of whether NMCD impeded Plaintiffs is a question of fact, one of many yet to be considered. Even *Jaramillo v. State of New Mexico*, No. D-809-CV-220-00113 (Eighth Judicial Dist. Ct.) was dismissed *after* an evidentiary hearing.

Without first taking evidence, it was error for the district court to rely on disputed facts. *South*, 2014-NMCA-109, ¶¶7-9. This Court should remand the issue back to the district court for adjudication of the disputed facts. *See South*, 2014-NMCA-109, ¶11.

IV. The district court erred by dismissing the Institutional Plaintiffs, which have standing under all three of the organizational standing doctrines.

Under State Defendants' heads-I-win-tails-you-lose logic, the Institutional Plaintiffs must be dismissed for failure to exhaust administrative remedies. In this way, State Defendants, like the district court, **[BIC 34–35]**,

[7] Defendants raise arguments on habeas corpus protections and jurisdiction of a class action. **[Opp. Br., 32-33 n.14].** These are not properly before the Court; they were not heard or ruled on by the district court.

conflate the concepts of standing and exhaustion. They ignore that the futility doctrine applies only to one of the three theories of organizational standing recognized by New Mexico law.

An organization may sue on behalf of others under any one of three theories: associational standing, third-party standing, and the Great Public Importance Doctrine. An organization may derive standing from that of its members or constituents—but only under associational standing. *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶30, 144 N.M. 471. In contrast, under the third-party standing doctrine, an organization asserts its own rights, even though these rights are closely linked to those of its members. *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶13, 126 N.M. 841 (hereinafter "NARAL"). Finally, the Great Public Importance Doctrine 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 are not met." *ACLU of N.M.*, 2008-NMSC-045, ¶12. State Defendants gloss over and confuse the differences in each doctrine.

The district court failed to analyze the Institutional Plaintiffs' standing under *any* of the three organizational standing doctrines. This was error. *See, e.g., Deutsche Bank Nat. Tr. Co. v. Beneficial N.M. Incl.*, 2014-NMCA-090, ¶8, 335 P.3d 217 ("[S]tanding . . . must be established at the time the complaint is

filed.”). This Court should conclude that Institutional Plaintiffs have organizational standing under each of the three theories.

Associational Standing: An organization has standing when: “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members ....” *ACLU*, 2008-NMSC-045, ¶30 (quotation omitted). State Defendants do not challenge that Plaintiffs satisfied the second prong but argue over the first and third elements. They are mistaken.

First prong: The Institutional Plaintiffs’ constituents include incarcerated individuals who have standing to sue on their own because they have alleged that exhaustion would be futile. *See Prot. & Advoc. Sys. v. City of Albuquerque*, 2008-NMCA-149, ¶36, 145 N.M. 156 (“[W]e see no bar . . . to allowing standing even though P & A is an organization with constituents rather than members.”) (hereinafter “P&A”). The Institutional Plaintiffs need not identify a specific member or constituent to satisfy this prong, because their relationship with the Named Plaintiffs is clear from the complaint. That is enough. *See id.* (“Here . . . it is clear from the complaint that the named individual Plaintiffs are constituents of P&A because of the allegations that each suffers from mental illness.”).

State Defendants attempt to distinguish the facts of P&A because the association there was statutorily created. But they do not identify the significance of this. The P&A Court instead focused on the organization's purpose to "pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness." *See P&A*, 2008-NMCA-149, ¶29. Similarly, the Institutional Defendants' purposes are to pursue legal channels to ensure incarcerated people's rights are protected. **[BIC. 39].**

State Defendants, citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 344 (1977), argue the only way for constituent-based organizations to satisfy the first prong is if the organization's constituents "possess all of the indicia of membership in an organization." **[Opp. Br. 39]**. They do not identify what type of "indicia of membership" can exist for a civil rights organization like the ACLU. Members of the ACLU donate money so that the organization may advocate for the rights of marginalized communities, including the Named Plaintiffs in this litigation. The ACLU would not sue on donors' behalf. In any event, the U.S. Supreme Court's in *Hunt* dictated that the *beneficiaries* of a constituent-based organization's actions govern the question of associational standing. *Hunt*, 432 U.S. at 344 (concluding that because the advertising commission "serves a specialized segment of the State's economic community, *which is the primary beneficiary of its activities*, including the prosecution of this kind of litigation," it had organizational standing) (emphasis added). Here,

the Named Plaintiffs, as constituents of the Institutional Plaintiffs, are the primary beneficiaries of their action. The first prong is satisfied.

Third prong: Institutional Plaintiffs have associational standing under the third prong too. The Institutional Plaintiffs seek declaratory and injunctive relief as to the conditions for people currently incarcerated in New Mexico prisons. *See, e.g., New Mexico Gamefowl Association, Inc. v. State ex rel. King*, 2009-NMCA-088, ¶34, 146 N.M. 758 (distinguishing a claim for injunctive relief from a prior ruling in which associational standing was defeated because the association had sought monetary damages); *see also, e.g., Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 187 (4th Cir. 2007).

Plaintiffs seek declaratory and injunctive relief based on the government's unconstitutional conduct. To the extent a special master will be involved, it will be to implement the relief only after the claims have been adjudicated and relief has been granted. None of Plaintiffs' claims or requests for relief require the participation of individual members in the lawsuit.

Third-Party Standing: For a party to have third-party standing,

> [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.

NARAL, 1999-NMSC-005, ¶13. State Defendants do not challenge the second element, alleging only that the first and third prongs of the third-party standing doctrine are not met. They are incorrect.

First prong: "In order to obtain standing for judicial review in New Mexico, litigants generally must allege that they are directly injured as a result of the action they seek to challenge in court. . . . [H]owever, this requirement is met even when . . . the allegation is made by an organization on behalf of its members." *NARAL*, 1999-NMSC-005, ¶12. This Court considered NARAL's standing: "Insofar as Plaintiff New Mexico Right to Choose/NARAL seeks to assert the rights of its members who are Medicaid-eligible women, this organization also has a sufficiently close direct interest and a sufficiently close relationship." *Id.* at ¶14. Thus, the Court concluded that a public advocacy organization suffers an injury that gives it a personal stake in the litigation virtue of bringing a claim on behalf of those it represents.

State Defendants try to parse the language of *NARAL* to argue that the first prong is satisfied only if the organization can bring a claim on behalf of its members rather than its constituents. [Resp. 42]. This Court has not recognized any distinction between the two. *See P&A*, 2008-NMCA-149, ¶34.

Third prong: Inmates are hindered in their ability to protect their constitutional liberties when there is no administrative grievance procedure available to them that would address the violations at issue. The Institutional

Plaintiffs cannot invoke NMCD's internal grievance procedure on behalf of themselves or the Named Plaintiffs. And the Named Plaintiffs have alleged that these procedures—even the emergency procedures—are futile and unavailable. For example, they have identified instances where emergency grievances were ignored. Yet, State Defendants claim that the emergency grievance procedures may provide "speedier" remedies than this lawsuit—without any support for such a notion. [**Opp. Br. at 43**]. This futility constitutes a hindrance. Because the Institutional Plaintiffs have met the *NARAL* test, they have third-party standing.

The Great Public Importance Doctrine: State Defendants would have Named Plaintiffs wait indefinitely for NMCD to address their constitutional claims (via futile administrative procedures) without the opportunity to pursue any judicial review. But under the Great Public Importance Doctrine, the Institutional Defendants have standing to pursue claims on Named Plaintiffs' behalf. State Defendants contend that "applying the great public importance exception in this case would swallow the rule," but fail to cite any authority to support this argument. [**Opp. Br. at 44**]. This is not "a case involv[ing] a duty that state officials owe to the general public as a whole." *Id.* (quoting *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶21, 128 N.M. 154). Rather, this case concerns a tragic failure by the government to protect the lives of thousands of its own citizens it assumed a duty to protect. State Defendants

should not be permitted to hide behind futile administrative procedures to avoid judicial review.

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CERTIFICATE OF COMPLIANCE

According to Rule 12-318(F) NMRA, this brief complies with type-volume, font size, and word limitations of the New Mexico Rules of Appellate Procedure. For the body of this brief, Counsel used Georgia, a proportionally-spaced type style / type face. As required by Rule 12-318(F) NMRA, I certify that the body of the brief contains **4,364** words, not to exceed 4,400. This brief was prepared using Microsoft Word, version 2016.

Dated: February 22, 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 22nd day of February, 2021.

By: *<u>/s/ Ryan J. Villa</u>*
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