Filed
Supreme Court of New Mexico
2/11/2021 4:49 PM
Office of the Clerk
Joey D. Moya

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,

Petitioners,

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,

Respondents.

STATE DEFENDANTS' RESPONSE BRIEF

Neil R. Bell
Assistant Attorney General
Nicholas M. Sydow
Civil Appellate Chief
Office of the N.M. Attorney General
P.O. Drawer 1508
Santa Fe, NM 87504
nbell@nmag.gov
(505) 490-4859

TABLE OF CONTENTS

STATEMENT OF COMPLIANCE

I hereby certify as required by Rule 12-318(G) NMRA that the body of this Response Brief contains 10,953 words according to the word count tool for Microsoft Word 2016, and was prepared using Times New Roman, 14-point font.

/s/ Neil R. Bell

TABLE OF AUTHORITIES

NEW MEXICO CASES

NEW MEXICO STATUTES AND RULES

CONSTITUTIONAL PROVISIONS

CASES FROM OTHER JURISDICTIONS

STATUTES AND REGULATIONS FROM OTHER JURISDICTIONS

OTHER AUTHORITIES

I. INTRODUCTION

While the State has taken numerous actions to stop the spread of COVID-19 in its correctional facilities, the sufficiency of those actions is beyond the scope of this appeal. Rather, the question here is limited to whether the district court properly concluded that it lacked subject matter jurisdiction in this case based on a simple, categorical rule: a clear and unambiguous statutory duty to exhaust administrative remedies prior to judicial review is jurisdictional and is not subject to judicially created exceptions, including the futility exception advanced by Plaintiffs. *See In re Estate of McElveny*, 2017-NMSC-024, ¶ 24, 399 P.3d 919; *U.S. Xpress, Inc. v. N.M. Tax & Rev. Dept.*, 2006-NMSC-017, ¶ 12, 139 N.M. 589, 136 P.3d 999.

The statute at issue in this appeal, NMSA 1978, § 33-2-11(B) (1990), mandates exhaustion of the New Mexico Corrections Department's (NMCD's) internal grievance procedure as a precondition to subject matter jurisdiction over any cause of action substantially related to an inmate's incarceration:

> 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.

This Court has mandated an identical duty to exhaust as a precondition to subject matter jurisdiction for a habeas petition challenging the conditions of an inmate's confinement. Rule 5-802(C)(2) NMRA.

Section 33-2-11(B) and Rule 5-802(C)(2) control this case, in which Plaintiffs seek sweeping individual and class-based habeas, declaratory, and injunctive relief premised exclusively on the alleged conditions in NMCD correctional facilities during the COVID-19 pandemic. Despite the twin commands of Section 33-2-11(B) and Rule 5-802(C)(2), none of the individual Plaintiffs has exhausted—or has even attempted to exhaust—NMCD's internal grievance procedure, including NMCD's expedited, emergency grievance procedure. The district court therefore correctly applied Section 33-2-11(B) and *U.S. Xpress* to this case and dismissed the Amended Complaint for lack of subject matter jurisdiction. This Court should affirm.

II. SUMMARY OF THE PROCEEDINGS

A. Factual Background

Since its emergence just over a year ago, the virus that causes the novel coronavirus disease 2019 ("COVID-19") has spread across the globe, throughout the United States, and here in New Mexico. In the ten months since the first confirmed cases of COVID-19 in New Mexico, there are over 178,000 confirmed cases in the state and 3,430 related deaths.[1] The virus's rapid spread is attributable to the ease with which it transmits in certain situations. COVID-19 spreads easily through person-to-person contact, and the risk of transmission increases with the number of

[1] *See 2019 Novel Coronavirus Disease (COVID-19)*, N.M. Dep't of Health, https://cv.nmhealth.org/ (last visited Feb. 10, 2021).

people in a space, the proximity of those people, and the duration of time they spend together.[2] For these reasons, the Governor declared a public health emergency and issued complementary executive orders intended to promote social distancing, mitigate adverse impacts to the economy and the healthcare system, and aid relief efforts to fight the virus's spread.[3] In addition, the Department of Health entered a series of emergency orders directing New Mexicans to stay in their homes to the greatest extent possible and to take precautions when entering public spaces.[4]

The Governor's actions included measures designed to protect people who are incarcerated from COVID-19. On April 6, 2020, the Governor issued an executive order commuting the sentences of incarcerated individuals who meet certain criteria and instructing NMCD to release qualifying individuals from its facilities during the

---

[2] *How COVID-19 Spreads*, CDC (Oct. 28, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html; *Deciding to Go Out*, CDC (Sept. 11, 2020), https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/deciding-to-go-out.html#:~:text=COVID%2D19%20spreads%20easier%20between,People%20are%20wearing%20masks.

[3] Governor Michelle Lujan Grisham, *Executive Order 2020-004* (March 11, 2020), https://cv.nmhealth.org/wp-content/uploads/2020/03/Executive-Order-2020-004-r.pdf; *see generally Public Health Orders and Executive Orders*, N.M. Dep't of Health, https://cv.nmhealth.org/public-health-orders-and-executive-orders/ (last visited Jan. 30, 2021) (collecting PHOs and executive orders relating to COVID-19).

[4] *See generally* N.M. Dep't of Health, *supra* note 3.

pendency of the order.[5] NMCD Secretary Alisha Tafoya Lucero and New Mexico Probation and Parole Director Melanie Martinez (collectively, the "State Defendants") similarly took significant steps to minimize the risk of transmission of COVID-19 within state correctional facilities. NMCD implemented aggressive procedures to prevent the transmission of COVID-19 in its facilities, including: instituting comprehensive testing of inmates and staff members; setting up a COVlD-19 command center providing statistical data, guidance, updates, and coordination of efforts among state agencies; disinfecting common areas and commonly touched surfaces throughout each facility multiple times per day; instructing inmates and staff about proper handwashing and hygiene, COVID-19 symptoms, and reporting of symptoms and potential virus exposure; increasing distribution of personal hygiene and cleaning supplies; mandating universal masking and providing multiple masks to all inmates and staff; implementing social distancing protocols at all facilities whenever possible such as during meals, recreational activities, and in classrooms; and suspending in-person visitation at all facilities. **[3 RP 413-16, 440-621]**

Shortly after the Governor issued the executive order commuting the sentences of qualifying inmates, the New Mexico Law Offices of the Public

[5] Governor Michelle Lujan Grisham, *Executive Order 2020-021* (April 6, 2020), https://cv.nmhealth.org/wp-content/uploads/2020/04/2020-021.pdf.

Defender, along with Plaintiffs New Mexico Criminal Defense Lawyers Association and the American Civil Liberties Union of New Mexico (collectively, the "Institutional Plaintiffs"), requested this Court to issue a writ of mandamus and/or a writ of habeas corpus commanding Defendants to implement "dramatic reductions in the prison population" in response to the current pandemic. *See* Emergency Petition for Writ of Mandamus and/or Habeas Relief, at 1, *N.M. Law Offices of the Public Defender v. State (LOPD)*, No. S-1-SC-38252 (N.M. Sup. Ct. April 14, 2020). This Court unanimously denied the petition, holding that the petitioners had failed to demonstrate that Defendants were "deliberately indifferent" to the health and safety of the inmates. *See* Order, *id.*

Since this Court denied the petition, the circumstances surrounding the pandemic have continued to evolve. COVID-19 has continued its spread, including some outbreaks in NMCD facilities that were promptly addressed. However, the distribution of COVID-19 vaccinations in New Mexico is now underway, and the State's vaccination schedule prioritizes persons working and living in congregate settings such as correctional facilities.[6] Incarcerated persons and corrections facility staff are currently receiving COVID-19 vaccinations.[7] To date, 574 inmates in state

---

[6] *See State of New Mexico COVID-19 Vaccine Allocation Plan*, N.M. Dep't of Health (Jan. 22, 2021), https://cv.nmhealth.org/wp-content/uploads/2021/01/2021.1.22-DOH-Phase-Guidance.pdf.

[7] *See COVID-19 Vaccine*, N.M. Dep't of Health, https://cv.nmhealth.org/covid-

correctional facilities and 1,517 correctional facility staff and probation and parole staff have received their first of two vaccine doses. Defendants continue to take action to safeguard persons in correctional facilities from COVID-19 with the best available measures.

B. Procedural History

1. The Complaint and Petition for Temporary Restraining Order and Preliminary Injunction

The Institutional Plaintiffs, along with eight individuals presently incarcerated in four correctional facilities under NMCD's purview (the "Inmate Plaintiffs"),[8] filed this class action in late August 2020, seeking substantially the same relief denied by the Court in *LOPD*. *Compare* **[1 RP 59-116]** *with* Emergency Petition, *LOPD*, No. S-1-SC-38252. Plaintiffs claim that, due to the alleged conditions within New Mexico's correctional facilities during the COVID-19 pandemic, the continued detention of inmates during the pandemic constitutes cruel and unusual punishment and violates substantive due process under Article II, Sections 13 and 18 of the New

---

vaccine/ (last visited Jan. 30, 2021); Brandon Evans, *Inmates before the elderly: Anger over vaccine rollout*, KOAT (updated Jan. 14, 2021) https://www.koat.com/article/inmates-before-the-elderly-anger-over-vaccine-rollout/35208093.

[8] During the pendency of this appeal, Inmate Plaintiffs Pamela Hoffschneider and Heidi Machacek have been released from physical custody. Ms. Hoffschneider was the only named Plaintiff incarcerated at Springer Correctional Center. **[1 RP 62, ¶ 8]** The remaining Plaintiffs are incarcerated in three of the eleven facilities under NMCD's purview. **[*Id.* ¶¶ 3-10]**

Mexico Constitution. **[*Id.* at 97-105]** Plaintiffs also claim that Defendants are violating their freedom of speech under Article II, Section 17 of the New Mexico Constitution by allegedly prohibiting inmates from accessing telephones during the pandemic. **[1 RP 101-05]**

Plaintiffs filed their complaint, amended complaint, and petition for a TRO and preliminary injunction, requesting class and sub-class certification to include New Mexico's entire population of approximately 7,000 current inmates and all future inmates and seeking sweeping habeas, declaratory, and injunctive relief. **[1 RP 1-58, 59-116, 119-52]** Plaintiffs asked the district court to declare that the alleged conditions in New Mexico's correctional facilities are unconstitutional and to mandate a detailed list of protective measures for inmates confined within those facilities. **[1 RP 107-08, 113-15]** Plaintiffs also requested injunctive relief requiring the parole or home confinement of: (1) *all* current and future inmates during the course of the pandemic—*including violent offenders*—who have a variety of underlying conditions such as asthma and obesity, (2) *all* current and future inmates during the course of the pandemic serving sentences as a result of a probation or parole revocation, (3) *all* current and future inmates during the course of the pandemic who are past their scheduled parole date, and (4) *all* current and future inmates during the course of the pandemic serving time for non-violent offenses. **[1 RP 93-95, 107-11; *see also* 1 RP 119-52]**

2. Defendants' Motions to Dismiss

The Governor and the State Defendants filed separate motions to dismiss the Amended Complaint for lack of subject matter jurisdiction. **[1 RP 243-56; 2 RP 390-409, 4 RP 934-45, 949-59]** Defendants argued that the district court lacked subject matter jurisdiction because the Inmate Plaintiffs failed to exhaust NMCD's internal grievance procedures as required by Section 33-2-11(B) and Rule 5-802(C)(2). **[1 RP 250-54; 2 RP 391-95]** In particular, Defendants relied on the plain language of Section 33-2-11(B) and *U.S. Xpress*, 2006-NMSC-017, to demonstrate that the Amended Complaint improperly asserts that Plaintiffs may be excused from the exhaustion requirement based on the futility exception. **[1 RP 91-92; 2 RP 391-95; 4 RP 936-39, 949-52]**

Defendants further asserted that Plaintiffs' allegations of futility ignored that NMCD's grievance procedures allow inmates to file emergency grievances for matters involving a risk of serious harm. **[1 RP 253; Tr. 15:19-23, 16:11-15]** Under NMCD policy, emergency grievances "shall be forwarded without substantive review immediately to the Warden"; "shall receive an expedited response at every level . . . [and] in no event will the time for response exceed three (3) working days from the time the grievance is received by the Grievance Officer"; and "may be immediately appealed to the Statewide Grievance/Disciplinary Appeals Manager … if the emergency grievance after investigation and Warden's review cannot resolve

the issues presented at their facility level." **[1 RP 253; 4 RP 737-38]**

In separate motions, the Governor sought dismissal of the Institutional Plaintiffs for lack of standing and dismissal of the Governor as a party. **[2 RP 342-49; 1 RP 230-240]** The State Defendants also sought dismissal for improper venue, for res judicata and collateral estoppel, as an improper request for relief in a conditions of confinement challenge, and as a violation of separation of powers. **[2 RP 390-409]**

3. The Hearing and Order on the Motions to Dismiss for Lack of Subject Matter Jurisdiction

On October 15, 2020, the district court heard oral argument on the motions to dismiss for lack of subject matter jurisdiction and dismissed the Amended Complaint in its entirety. The court explained from the bench that Plaintiffs must pursue NMCD's grievance procedures, including at minimum NMCD's emergency grievance procedures, before invoking the court's jurisdiction, as required by Section 33-2-11(B). **[Tr. 40:2-4]** The court further stated that because NMCD has "the power and duty to inquire into all matters connected . . . [to] the punishment and treatment of the prisoners" **[Tr. 38:7-11]**, "[r]equiring a prisoner to exhaust internal grievance procedures ensures that [NMCD] has been given the full opportunity to undertake such an inquiry." **[Tr. 38:12-14]** The court also ruled that the "language in Section 33-2-11(B) leaves no discretion to conclude [the] futility doctrine applies." **[Tr. 38:19-21]** Even so, the court explicitly concluded that

because NMCD "indisputably has the authority to change the condition inside the facility, a remedy that could potentially address most of the Plaintiffs' Complaint, its internal grievance procedures are not futile." **[Tr. 39:2-6]**

The court's written order reflects its ruling from the bench. **[*Compare* 5 RP 974-79, *with* Tr. 37:2-40:25]** The order further concludes that the Inmate Plaintiffs' failure to exhaust their administrative remedies requires dismissal of the Institutional Plaintiffs' claims to avoid frustrating the legislative purpose of Section 33-2-11(B). **[5 RP 977, ¶¶ 11, 12; Tr. 34:12-25]** Because the court dismissed the entire complaint for lack of subject matter jurisdiction, it did not address Defendants' other motions to dismiss. **[5 RP 977, ¶ 13]** This appeal followed.

III. ARGUMENT

A. The Exhaustion Requirement in Section 33-2-11(B) Is Jurisdictional, Applies to Plaintiffs' Claims, and Is Not Subject to Judicially Created Exceptions.

1. The Duty To Exhaust Administrative Remedies Under Section 33-2-11(B) Is Jurisdictional.

When a statute creates a duty to exhaust administrative remedies, the Court has embraced a bright-line distinction: "Where the Legislature specifically mandates, exhaustion is required. Where the Legislature has not clearly required exhaustion, sound judicial discretion governs." *U.S. Xpress*, 2006-NMSC-017, ¶ 12 (internal quotation marks and citation omitted). The distinction turns on the specific statutory language requiring exhaustion and has significant implications for judicial

review. *See In re Estate of McElveny*, 2017-NMSC-024, ¶ 24. As a result, "exhaustion is best thought of as two distinct legal concepts." *Id.* ¶ 22 (internal quotation marks and citation omitted). Whether Section 33-2-11(B) sets forth a jurisdictional exhaustion requirement presents a question of statutory interpretation, which is reviewed de novo. *See U.S. Xpress*, 2006-NMSC-017, ¶ 6.

A jurisdictional duty to exhaust arises when "[a] statute . . . contains 'sweeping and direct' statutory language indicating that there is no jurisdiction prior to exhaustion." *Id.* ¶ 24 (quoting II Richard J. Pierce, Jr., *Administrative Law Treatise*, § 15.2, at 1219-20 (alterations omitted)). In that circumstance, the duty to exhaust is rigid and categorical, and judicially created exceptions to exhaustion, including futility, have "no force." *See U.S. Xpress*, 2006-NMSC-017, ¶ 12 ("[W]e are unable to find any circumstances where we have found futility of exhaustion to be an appropriate excuse for bypassing a clear statutory directive, such as found in this case."); *see also In re Estate of McElveny*, 2017-NMSC-024, ¶ 23.

By contrast, a non-jurisdictional duty to exhaust may arise when "'the statutory requirement of exclusivity is not so explicit.'" *In re Estate of McElveny*, 2017-NMSC-024, ¶ 25 (quoting *McKart v. United States*, 395 U.S. 185, 193 (1969)). "A mere reference to a duty to exhaust administrative remedies . . . is not enough to create a [jurisdictional] duty to exhaust particular remedies." *Id.* ¶ 24 (internal quotation marks and citation omitted). A non-jurisdictional duty to exhaust "is

flexible and pragmatic [and] is subject to several judge-made exceptions." *Id.* ¶ 23 (internal quotation marks and citation omitted); *see also id.* ¶¶ 30-31 (discussing exceptions to the common law duty to exhaust including "when the agency has clearly acted in excess of its statutory authority" and "if exhaustion would be futile").

Whether a duty to exhaust is jurisdictional thus defines the scope of the Court's inquiry when exhaustion is raised as a defense. When a duty to exhaust is *not* jurisdictional, a court has broad discretion to fashion relief. *See id.* ¶ 28 ("[B]ecause exhaustion is required in this case not for statutory, jurisdictional reasons but for prudential, non-jurisdictional reasons, we have discretion."). But when a statute clearly mandates exhaustion of administrative remedies as a prerequisite to jurisdiction, "[t]he courts have no jurisdiction to alter the statutory scheme, cumbersome as it may be." *U.S. Xpress*, 2006-NMSC-017, ¶ 15 (internal quotation marks and citation omitted).

The statute at issue in this appeal, repeated here for ease of reference, mandates exhaustion as a prerequisite to subject matter jurisdiction for any cause of action "substantially related to the inmate's incarceration" by NMCD:

> 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. Upon exhaustion of this administrative remedy, the first judicial proceeding shall be a de novo hearing, unless otherwise provided by law.

Section 33-2-11(B). This "'sweeping and direct' statutory language" conditioning subject matter jurisdiction on exhaustion of NMCD's internal grievance procedure establishes a duty to exhaust that is jurisdictional and not subject to judicially created exceptions. *See In re Estate of McElveny*, 2017-NMSC-024, ¶ 24.

2. The Futility Doctrine Does Not Apply to Section 33-2-11(B).

U.S. Xpress illustrates how a jurisdictional exhaustion requirement forecloses consideration of judicially created exceptions to exhaustion, including futility. The plaintiffs in *U.S. Xpress* were three interstate trucking companies that had filed administrative claims for tax refunds on the grounds that the taxes violated the Commerce Clause of the United States Constitution. *Id.* ¶ 2. After exhausting their administrative remedies, the trucking companies filed a class action complaint seeking return of taxes for themselves and all putative class members. *Id.* ¶ 3. Requesting class certification, the named plaintiffs argued that "vicarious" or "virtual" exhaustion should be permitted for the unnamed members of the proposed class who had not exhausted their administrative remedies. *See id.* ¶¶ 3-4. The district court denied certification, reasoning that it "lack[ed] jurisdiction over those members of the proposed class who have not exhausted their administrative remedies." *Id.* ¶ 4. The Court of Appeals reversed, holding that the uniform denial of the named plaintiffs' administrative refund requests satisfied the exhaustion

requirement for the putative class members because "further exhaustion of identical requests would be futile." *Id.* ¶ 5.

This Court granted certiorari and reversed. *Id.* ¶ 15. In determining whether the Tax Administration Act could permit vicarious or virtual exhaustion—or any other futility-based exception to the exhaustion requirement—the Court looked to the plain language of the exhaustion statute, NMSA 1978, § 7-1-22 (2006), which provides as follows:

> No court of this state has jurisdiction to entertain any proceeding by a taxpayer in which the taxpayer calls into question the taxpayer's liability for any tax or the application to the taxpayer of any provision of the Tax Administration Act, except as a consequence of the appeal by the taxpayer to the court of appeals from the action and order of the secretary, all as specified in Section 7-1-24 NMSA 1978, or except as consequence of a claim for refund as specified in Section 7-1-26 NMSA 1978.

U.S. Xpress, 2006-NMSC-017, ¶ 7. Considering this "clear and unambiguous" language, the Court reasoned that "Section 7-1-22 does not differentiate between instances when the purposes of exhaustion would be served and when it would not, but instead plainly insists that *no court will have jurisdiction* except as a consequence of an administrative appeal or a claim for a refund." *Id.* ¶ 11 (emphasis added). Accordingly, the Court "reject[ed] the concept of vicarious exhaustion under Section 7-1-22 because the plain meaning of the Tax Administration Act requires individual taxpayer exhaustion of administrative remedies before the constitutionality of a tax may be challenged in court." *Id.* The Court similarly

rejected the application of the futility exception, holding that it "has no force in the context of the Tax Administrative Act, in the face of the clear legislative command found in Section 7-1-22." *Id.* ¶ 12. And regarding class certification, the Court concluded that "only after individual exhaustion by each class member could the district court have jurisdiction over the class." *Id.* ¶ 13.

The rule and reasoning of *U.S. Xpress* control this appeal. Like the language in the Tax Administration Act, the exhaustion requirement in Section 33-2-11(B) is clear and emphatic: "*No court of this state shall acquire subject-matter jurisdiction* . . . until the inmate exhausts the corrections department's internal grievance procedure." (Emphasis added.) The exhaustion requirement therefore is jurisdictional for "any complaint, petition, grievance or civil action filed by any inmate . . . that is substantially related to the inmate's incarceration by [NMCD]." Section 33-2-11(B). Because all of Plaintiffs' claims arise from the alleged conditions within NMCD facilities during the COVID-19 pandemic, they plainly fall within the scope of Section 33-2-11(B). Thus, under the rule articulated in *U.S. Xpress*, exhaustion of NMCD's internal grievance procedures is a mandatory precondition to the courts' subject matter jurisdiction in this case.

It follows that Plaintiffs' numerous arguments regarding a futility exception to Section 33-2-11(B) have "no place . . . in the face of a clear legislative command that exhaustion is required." *U.S. Xpress*, 2006-NMSC-017, ¶ 12 (internal quotation

marks and citation omitted). **[BIC 17-34]** Plaintiffs argue, for example, that the futility exception should apply to Section 33-2-11(B) because the Tenth Circuit has excused compliance with the federal exhaustion statute, 42 U.S.C. § 1997e(a). *See Tuckel v. Grover*, 660 F.3d 1249, 1251 (10th Cir. 2011) (reversing summary judgment when the inmate averred that prison officials had encouraged other inmates to assault him in retaliation for filing a grievance). **[BIC 26-27]** But the exception recognized in *Tuckel* flows from the language of § 1997e(a) itself, which "requires that prisoners exhaust only *available* remedies." *Id.* at 1252; § 1997e(a) ("No action shall be brought with respect to prison conditions under Section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies *as are available* are exhausted." (emphasis added)); *see also Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016) (holding as a matter of statutory interpretation, that the exhaustion requirement set forth in § 1997e(a) is mandatory, except that "the remedies must indeed be 'available' to the prisoner").

Unlike the federal statute, Section 33-2-11(B) articulates an unqualified exhaustion requirement as a precondition to subject matter jurisdiction. Further, the district court in this case specifically concluded that "NMCD has the authority to address the conditions in New Mexico's correctional facilities, a remedy that would address the majority of the allegations in the Amended Complaint, and [that] NMCD

has procedures in place, including emergency procedures, to remedy conditions that pose a risk of harm to inmates." **[5 RP 976, ¶ 9]** Section 33-2-11(B)'s categorical exhaustion requirement, together with the adequacy and availability of NMCD's emergency grievance procedures to address Plaintiffs' allegations, precludes consideration of Plaintiffs' assertions of futility. *See U.S. Xpress*, 2006-NMSC-017, ¶ 14 ("[E]xhaustion 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."). Exhaustion is jurisdictional, and the Court may not "alter the statutory scheme, cumbersome as it may be." *U.S. Xpress*, 2006-NMSC-017, ¶ 15.

3. Section 33-2-11(B) Requires Exhaustion Regardless of the Forms of Plaintiffs' Requested Relief.

The categorical language of Section 33-2-11(B) similarly forecloses Plaintiffs' repeated assertions that the Court should excuse them from the exhaustion requirement because some of their requested relief is purportedly beyond the scope of NMCD's grievance procedures. Plaintiffs argue that exhaustion should not be required because NMCD cannot award, for example, declaratory and injunctive relief including Plaintiffs' request for the immediate release of thousands of inmates. **[BIC 19-20, 42-49]** The Court rejected a similar argument in *U.S. Xpress*, holding that individual taxpayer exhaustion was required even when "the dispute is over the constitutionality of the tax," a question beyond the agency's authority to adjudicate.

2006-NMSC-017, ¶¶ 10-11; *see also id.* ¶ 15 (noting that the "convenience" of a class action "does not change the clearly expressed intent of the legislature to require" exhaustion). That conclusion was compelled by the plain language of the statute—which, like Section 33-2-11(B), categorically requires exhaustion—and by respect for the separation of powers. *See id.* ¶ 11 ("If the meaning of a statute is truly clear, it is the responsibility of the judiciary to apply it as written and not second guess the legislature's policy choices." (alteration, internal quotation marks and citation omitted)).

Similarly, the United States Supreme Court has held that the unavailability of a particular remedy in administrative proceedings does not obviate the exhaustion requirement set forth in § 1997e(a). *See Booth v. Churner*, 532 U.S. 731, 739 (2001) ("Congress meant to require procedural exhaustion regardless of the fit between a prisoner's prayer for relief and the administrative remedies possible."). Otherwise, the exhaustion statute would provide "a strong inducement to skip the administrative process simply by limiting prayers for relief to money damages not offered through administrative grievance mechanisms." *Id.* at 741; *see also id.* at 739 ("It makes no sense to demand that someone exhaust 'such administrative [redress]' as is available; one 'exhausts' processes, not forms of relief, and [§ 1997e(a)] provides that one must.").

In this case, the plain language of Section 33-2-11(B) does not distinguish between particular causes of action or particular forms of relief; rather, it requires exhaustion as a jurisdictional prerequisite for any cause of action that is "substantially related to the inmate's incarceration by [NMCD]." That fundamental requirement effectuates the Legislature's intent to ensure that NMCD, as the agency charged with administering the State's correctional institutions, is alerted to perceived deficiencies in the "punishment and treatment of the prisoners" and given the first opportunity to correct such deficiencies when appropriate. NMSA 1978, § 33-2-11(A) (1990); *see Cummings v. State*, 2007-NMSC-048, ¶ 26, 142 N.M. 656, 168 P.3d 1080 ("Requiring a prisoner to exhaust internal grievance procedures ensures that the Department has been given a full opportunity to undertake such an inquiry.").

It bears re-emphasis that all of Plaintiffs' claims arise from their allegations about the conditions in NMCD facilities during the COVID-19 pandemic. **[1 RP 59-116]** Because these allegations fall within the scope of Section 33-2-11(B) and may be raised and addressed through NMCD's internal grievance procedures, the jurisdictional exhaustion requirement applies, regardless of the particular causes of action or forms of relief requested by Plaintiffs. *See Booth*, 532 U.S. at 739; *Birdo v. Rodriguez*, 1972-NMSC-062, ¶¶ 7-8, 84 N.M. 207, 501 P.2d 195 (holding under a previous, less explicit, version of Section 33-2-11 that the inmate's petition for a

writ of mandamus alleging that the conditions of his incarceration violated the Eighth Amendment was barred because the inmate had failed to exhaust NMCD's administrative procedures); *see also U.S. Xpress*, 2006-NMSC-017, ¶ 11.

4. *Cummings* Does Not Hold that the Futility Exception Applies to Section 33-2-11(B).

Despite the categorical language of Section 33-2-11(B) and the rule of *U.S. Xpress*, Plaintiffs rely on dicta in *Cummings* to argue that the Court has previously held that the futility exception applies to Section 33-2-11(B). **[BIC 21-24]** Plaintiffs' reliance on *Cummings* is misplaced.

In *Cummings*, the Court considered whether an inmate's right to vote could be restored via a writ of habeas corpus. *See* 2007-NMSC-048, ¶ 24. The petitioner alleged that, following his conviction of misdemeanor offenses, "the district court wrongly informed the county clerk that he was a convicted felon, and [he] was thus wrongly denied the right to vote." *Id.* The habeas court found that the petitioner had failed to exhaust his administrative remedies under Section 33-2-11(B) and denied the petition. *Id.* ¶¶ 3, 26. On certiorari, the Court held that the writ had properly been denied, but not because the petitioner had failed to exhaust. Instead, the Court held that the error sought to be remedied was beyond the scope of a writ of habeas corpus:

> Cummings is not alleging that his underlying conviction and sentence is illegal or that he is being denied a right that would hasten his release from custody, but only that the district court made a clerical error, which wrongly denied him the right to vote. Relief for such an error cannot be had by way of a writ of habeas corpus.

Id. ¶ 25.

Plaintiffs rely on the discussion that followed, in which the Court, *having affirmed the denial of the writ*, "[took] the opportunity to note that we question the district court's conclusion" that exhaustion was required under Section 33-2-11(B) for the petitioner's claim. *Id.* ¶ 26. The Court first explained that the purpose of the exhaustion requirement is to give NMCD "a full opportunity" to inquire into "'matters connected with the government, discipline and police of the corrections facilities and the punishment and treatment of prisoners.'" *Id.* ¶ 26 (quoting Section 33-2-11(A)). But according to the Court, "Cummings' allegation 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 is alleging that the *clerk of the court* denied him the right to vote, not the Corrections Department." 2007-NMSC-048, ¶ 26. The Court therefore opined that "[f]orcing Cummings to pursue an administrative remedy would be futile simply because there is no administrative remedy for what he seeks." *Id.*

Cummings does not support Plaintiffs' contention that the futility exception applies to Section 33-2-11(B), in this case or otherwise. Clearly, the offhand reference to futility was unnecessary to the resolution of the appeal and therefore is

not binding law.[9] *See, e.g.*, *Rocky Mt. Life Ins. Co. v. Reidy*, 1961-NMSC-100, ¶ 17, 69 N.M. 36, 363 P.2d 1031 (describing dicta as "unnecessary to the decision of the issues before the court . . . and, accordingly, not binding as a rule of law"). More importantly, unlike the claim in *Cummings*, "which has nothing to do" with the petitioner's incarceration by NMCD, Plaintiffs' claims in this case have *everything* to do with the correctional facilities where Plaintiffs are housed and with their punishment and treatment during the COVID-19 pandemic. Indeed, the essential factual predicate for every claim and form of relief sought by Plaintiffs is that the conditions in New Mexico's correctional facilities are allegedly unsafe or unduly restrictive due to COVID-19. **[1 RP 59-116]** The Legislature has charged NMCD with responsibility over such matters and mandated that challenges to prison conditions first must be raised and exhausted via NMCD's internal grievance procedures as a prerequisite to subject matter jurisdiction in the courts. *Cummings*' passing dicta mentioning futility—vis-à-vis a claim based on allegations that do not implicate NMCD or substantially relate to an inmate's incarceration by NMCD—does not compel a different conclusion.

[9] Plaintiffs' reliance on *Garcia v. Guadalupe Cty. Corr. Facility* is similarly misplaced. *See* No. 29,449 (N.M. Ct. App. July 30, 2009) (non-precedential) **[BIC 22-23]** The Court of Appeals in *Garcia* refused to consider the inmate's arguments that he should be excused from the exhaustion requirement. *Garcia* does not consider or hold that Section 33-2-11(B) is subject to the futility exception.

5. Section 33-2-11(B) Does Not Curtail the Rights Afforded by the Writ of Habeas Corpus.

Plaintiffs also seek to avoid the application of the plain language of Section 33-2-11(B) and *U.S. Xpress* by arguing that if Section 33-2-11(B) is jurisdictional, it places an unconstitutional limitation on the courts' habeas jurisdiction. **[BIC 14-15]** Applied to the claims in this case, Plaintiffs' argument sweeps too broadly. As explained below, Section 33-2-11(B) applies only to claims challenging conditions of confinement and therefore does not encroach on the courts' traditional habeas jurisdiction.

But as an initial matter, even if the Court accepts Plaintiffs' contention that Section 33-2-11(B) unconstitutionally limits the courts' habeas jurisdiction, the district court properly dismissed Plaintiffs' claims for declaratory relief. A declaratory judgment action is a statutory cause of action and therefore may be limited by the Legislature. *See, e.g.*, *AFSCME v. Bd. of Cty. Comm'rs of Bernalillo Cty.*, 2016-NMSC-017, ¶¶ 14-15, 373 P.3d 989 (holding that the Declaratory Judgment Act "establish[es] a right and predicat[es] a court's power of review" on satisfying the statutory requirements for exercising that right). As a result, the categorical rule of *U.S. Xpress* applies to Plaintiffs' claims for declaratory relief, which uniformly fall within the scope of Section 33-2-11(B). At minimum, the Court should affirm the district court's dismissal of Plaintiffs' claims for declaratory and

associated injunctive relief **[1 RP 102-15]** due to the Inmate Plaintiffs' failure to exhaust NMCD's internal grievance procedures.

In challenging the constitutionality of Section 33-2-11(B), Plaintiffs quote selectively from *In re Forest* to suggest that a legislative restriction on any form of habeas relief is "beyond the pale." **[BIC 15]** *See* 1941-NMSC-019, ¶ 12, 45 N.M. 204, 113 P.2d 582. But the actual language of *In re Forest* was far more specific: "The [L]egislature may add to the efficacy of the writ *as known to the common law and English statutes in force at the time of the separation of the Colonies from Great Britain*, as it has done in this state, but it cannot curtail such rights." 1941-NMSC-019, ¶ 12 (emphasis added). Thus, it is the core of habeas relief—as it existed "at the time of the separation of the Colonies from Great Britain"—that must be jealously guarded by the courts. Section 33-2-11(B) does not affect the core of habeas relief.

The writ of habeas corpus "was traditionally used to secure the release of a person unconstitutionally or otherwise lawfully held." *Lopez v. LeMaster*, 2003-NMSC-003, ¶ 12, 133 N.M. 59, 61 P.3d 185 (citing Thomas A. Donnelly & William T. MacPherson, *Habeas Corpus in New Mexico*, 11 N.M. L. Rev. 291, 292-99 (1981)). As the United States Supreme Court has explained,

> It is clear . . . from the common-law history of the writ, that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody.
>
> . . . .

> By the time the American Colonies achieved independence, the use of habeas corpus to secure release from unlawful physical confinement, whether judicially imposed or not, was thus an integral part of our common-law heritage. The writ was given explicit recognition in the Suspension Clause of the Constitution; was incorporated in the first congressional grant of jurisdiction to the federal courts; and was early recognized by this Court as a great constitutional privilege.

Preiser v. Rodriguez, 411 U.S. 475, 484-85 (1973) (alterations, internal quotation marks, footnotes, and citations omitted).

Thus, the essential function of the writ is to secure release from illegal custody or restraint:

> The writ is to be used when a petitioner is alleging that his or her "custody or restraint is, or will be, in violation of the constitution or laws of the State of New Mexico or of the United States; that the district court was without jurisdiction to impose such sentence; that the sentence was illegal or in excess of the maximum authorized by law or is otherwise subject to collateral attack."

Cummings, 2007-NMSC-048, ¶ 25 (quoting Rule 5-802(A)); *see also, e.g.*, *Muhammad v. Close*, 540 U.S. 749, 750 (2004) (per curiam) ("Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus[.]").

The claims in this case, which are based on the alleged conditions of Plaintiffs' confinement during the COVID-19 pandemic, fall outside the core of traditional habeas relief. *See, e.g.*, *Nelson v. Campbell*, 541 U.S. 637, 643 (2004) ("[C]onstitutional claims that merely challenge the conditions of a prisoner's

confinement, whether the inmate seeks monetary or injunctive relief, fall outside of that core [of habeas corpus] and may be brought pursuant to § 1983 in the first instance."). As such, they fall within an expansion of habeas relief that is not subject to the same constitutional protections as traditional uses of the writ. Indeed, this Court has recognized that courts have expanded the scope of traditional habeas relief to the point that "it may be time for our legislature to revise our habeas corpus statutes, which are now over 100 years old, in light of judicial developments." *Lopez*, 2003-NMSC-003, ¶ 23 n.1; *see also Cummings*, 2007-NMSC-048, ¶ 25 ("[T]he scope of relief afforded by the writ of habeas corpus has expanded over time[.]" (internal citation omitted)). Accordingly, Section 33-2-11(B) does not place an unconstitutional limitation on the courts' traditional habeas jurisdiction or on Plaintiffs' right to traditional habeas relief.

Similarly, Section 33-2-11(B) does not deprive the courts of its original jurisdiction **[BIC 14, 15-17]**; it merely postpones jurisdiction until NMCD has had the opportunity to pass on a grievance. *See Smith v. Southern Union Gas Co.*, 1954-NMSC-033, ¶ 10, 58 N.M. 197, 269 P.2d 745 ("[W]hat has been done in the Public Utility Act is not a deprivation of ouster of jurisdiction of the courts, but a postponement until the commission has passed upon the complaint."); *Gusik v. Schilder*, 340 U.S. 128, 132 (1950) ("[Requiring exhaustion of other corrective procedures] is in no sense a suspension of the writ of habeas corpus. It is merely a

deferment of resort to the writ until other corrective procedures are shown to be futile."); *see also Birdo*, 1972-NMSC-062, ¶¶ 7-8.

6. The 2014 Amendments to Rule 5-802 Impose an Independent, Jurisdictional Exhaustion Requirement for a Habeas Petitioner Challenging the Conditions of an Inmate's Confinement.

The 2014 amendments to Rule 5-802 remove any doubt that an inmate must exhaust NMCD's internal grievance procedures before seeking habeas relief for claims substantially related to the inmate's incarceration. The Court approved the 2014 amendments on recommendation of the Ad Hoc Committee on Habeas Corpus, which among other things, "unanimously propose[d] an exhaustion requirement *for all conditions of confinement cases* that mandates that prisoners exhaust internal prison grievance requirements before filing a habeas action." Professor Max Minzner, Chair, Ad Hoc Committee on Habeas Corpus, *Letter to Chief Justice Recommending Proposed Rule Changes*, at 4 (Aug. 26, 2013) (emphasis added).[10] According to the Committee, "the proposed exhaustion requirement is designed to ensure that habeas petitioners have tried to resolve their challenges to their conditions of confinement through the internal corrections procedure." *Id.* The recommendation also noted that "[t]he language proposed by the Committee already

[10] A copy of Professor Minzner's letter to the Chief Justice is available from undersigned counsel upon request. The letter was obtained upon written request to the Clerk of Court for information related to the 2014 amendments to Rule 5-802 NMRA.

exists in statutory form . . . [and] exactly duplicates" the language of Section 33-2-11(B). *Id.* at 4-5. The Committee based the proposed exhaustion requirement on the following "standard justifications":

> Ordinarily, [NMCD] is in the best position to determine initially whether the prisoner's claims have merit. Requiring exhaustion puts [NMCD] on notice, allows it to correct errors quickly, and may help prevent unnecessary habeas claims in district court. Furthermore, exhaustion ensures that the district court will have the most complete record possible when the petitioner seeks to challenge the determination.

Id. at 5 (internal citations omitted).

The Court approved the Committee's recommendation to amend Rule 5-802, to require exhaustion of NMCD's internal grievance procedures as a precondition to subject matter jurisdiction for a conditions of confinement challenge. Thus, since December 31, 2014, "[a]n inmate may file a [habeas] petition challenging any other condition of the inmate's confinement while incarcerated in a NMCD correctional facility, provided that *no court of this state shall acquire subject matter jurisdiction* . . . until the inmate exhausts the NMCD's internal grievance procedure." Rule 5-802(C)(2) (emphasis added). Significantly, the language recommended by the Committee and approved by the Court does not allow for equitable exceptions to the exhaustion requirement. Under the plain language of both Section 33-2-11(B) and Rule 5-802(C)(2), exhaustion is required for any cause of action substantially related

to an inmate's incarceration by NMCD, even when such a claim is clothed in a petition for habeas relief.[11]

B. The District Court Properly Concluded that Exhaustion of NMCD's Grievance Procedures, Including NMCD's Emergency Grievance Procedures, Would Not Be Futile.

If the Court concludes that the futility exception may apply to Section 33-2-11(B) and Rule 5-802(C)(2), the Court should affirm based on the district court's alternative grounds for its order of dismissal: exhaustion of NMCD's internal grievance procedures would not be futile. **[5 RP 976, ¶ 9]** Futility does not obviate the exhaustion requirement; it merely allows a court to excuse a party's duty to exhaust when the "administrative tribunal clearly lacks jurisdiction, or [when the administrative proceedings] are vain and futile."[12] *State ex rel. Norvell v. Credit*

---

[11] If the Court determines that it has subject matter jurisdiction over Plaintiffs' habeas claims, this proceeding is properly governed by the exclusive provisions of Rule 5-802 NMRA, rather than by the Rules of Civil Procedure for the District Courts. Accordingly, the Amended Complaint is subject to dismissal on procedural grounds, including (1) that venue is improper because none of the named Plaintiffs are "confined or restrained" in Santa Fe County, *see* Rule 5-802(E)(2); and (2) that the Amended Complaint fails to alert the Court to the substantially identical claims raised in *LOPD*, No. S-1-SC-38252 (denying petition for writ of mandamus and/or habeas relief), *see* Rule 5-802(B)(5) & *committee commentary* ("District courts should ordinarily dismiss petitions that do not comply with the provisions of Paragraph B(5).").

[12] The Court also has held that the futility exception applies to a question that, "even if properly determinable by an administrative tribunal, involves a question of law, rather than one of fact." *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 27, 142 N.M. 786, 171 P.3d 300 (holding that a challenge to the City's authority to regulate the drilling of domestic wells was a question of law and therefore did not require

Bureau of Albuquerque, Inc., 1973-NMSC-087, ¶ 29, 85 N.M. 521, 514 P.2d 40; *see also In re Estate of McElveny*, 2017-NMSC-024, ¶ 31 ("Futility, as an exception to exhaustion requirements, applies where 'the agency has deliberately placed an impediment in the path of a party, making an attempt at exhaustion a useless endeavor.'" (quoting 5 Jacob A. Stein et al., *Administrative Law* § 49.02[4], at 49-116 to 49-118 (2015))).

Here, the district court specifically concluded that "[e]xhaustion would not be futile." **[*Id.* ¶ 9]** In reaching that conclusion, the court relied on *Cummings*' discussion of NMCD's powers and duties to "inquire into all matters connected with the government, discipline and police of the corrections facilities and the punishment and treatment of the prisoners." **[*Id.* ¶ 10]** The court further relied on the existence and availability of NMCD's grievance procedures, including emergency procedures, which provide for expedited consideration of an emergency grievance "at every level as appropriate to the needs of the emergency situation, but in no event will the time

---

exhaustion of the City's administrative procedures). Further, the Court has held that as a general rule, "a party must exhaust administrative remedies unless those administrative remedies are inadequate." *Callahan v. N.M. Federation of Teachers-TVI*, 2006-NMSC-010, ¶ 24, 139 N.M. 201, 131 P.3d 51. Although Plaintiffs have not argued either of these exceptions to the exhaustion requirement, neither applies in this case. Whether the alleged conditions in NMCD facilities are unconstitutional as a result of the COVID-19 pandemic presents a factual question that must be decided by NMCD in the first instance. Similarly, because NMCD has a duty to reasonably ensure the health and safety of inmates under its supervision and has the ability to do so in a response to a grievance, the administrative remedy is plainly adequate to address the issues for which Plaintiffs seek relief.

for response exceed three (3) working days from the time the grievance is received by the Grievance Officer." **[*Id.* ¶ 9; 4 RP 737]** Given the adequacy and availability of emergency grievance procedures, which was undisputed **[Tr. 39:6-8]**, and the absence of any allegations that the Inmate Plaintiffs had exhausted or attempted to exhaust those procedures **[5 RP 975, ¶ 2]**, the court concluded that exhaustion would not be futile as a matter of law. **[*Id.* ¶ 9]**

Plaintiffs argue on appeal that the district court made a factual determination when it concluded that exhaustion would not be futile. Plaintiffs further represent that they "have put forth facts in support of their position that [exhaustion] is futile."[13] **[BIC 32]** These assertions are contradicted by the record before the district court on the motions to dismiss the Amended Complaint for lack of subject matter

[13] The record on the motions to dismiss did not include allegations that inmates "had filed grievances, including grievances under the emergency procedure, seeking to remedy the government's constitutional violations in the midst of the COVID-19 pandemic, but had received no determination or remedy." **[BIC 33]** Plaintiffs' citations to the record are to written and oral arguments in their responses to the motions to dismiss **[4 RP 724-29; 784-86; 803-05; Tr. 26:16-19]**, to copies of NMCD's grievance policy **[4 RP 735-37; 847-49]**, and to a copy of a motion filed in a separate habeas proceeding involving an inmate who is not a named Plaintiff in this case. **[4 RP 809-10]** That case, which is also cited extensively in Plaintiffs' Brief in Chief, has been dismissed for lack of subject matter jurisdiction during the pendency of this appeal due to the petitioner's failure to exhaust NMCD's internal grievance procedures. *See* Order of Dismissal of Petitioner's Emergency Petition for Writ of Habeas Corpus, *Jaramillo v. State*, No. D-809-CV-2020-00113 (8th Jud. Dist. Ct. Feb. 4, 2021).

jurisdiction. **[1 RP 243-56; 2 RP 391-95]** The Amended Complaint included only the following allegations that exhaustion would be futile:

- The NMCD grievance procedure states that it may take up to "90 working days" from the time the grievance is filed until the final decision on appeal";
- The process is lengthy and involves many decision-makers;
- All grievances must provide the specific relief being requested and will not be processed without that information;
- NMCD cannot grant release, the relief requested, on its own;
- Even if NMCD could grant release, the process would take months—time that the incarcerated individuals may not have given the rapid spread of COVID-19 through prison systems;
- Incarcerated individuals often face reprisal for submitting a grievance to the NMCD and are therefore hesitant to do so;
- [C]omplaints on behalf of other people who are incarcerated are not grievable under the NMCD grievance procedure. Therefore, no administrative remedy is available for this class action.

[1 RP 91, ¶¶ 196-202] The district court accepted these allegations as true and, for the reasons stated above, concluded as a matter of law that they were insufficient to support Plaintiffs' assertions of futility. **[5 RP 975-76, ¶¶ 2, 9]**

Plaintiffs' allegations do not establish that exhaustion of NMCD's administrative remedies would be futile in general, or for the Inmate Plaintiffs in particular.[14] Rather, these allegations demonstrate that the Inmate Plaintiffs, for

[14] If the Court is inclined to consider the unsubstantiated arguments of Plaintiffs' counsel or the anecdotal experiences of possibly three inmates who are not named Plaintiffs in this case **[Tr. 25:1-6; BIC 32]**, neither establishes that NMCD's grievance procedures would be futile for the named Plaintiffs. Whether the alleged conditions of NMCD facilities are unsafe for a particular inmate because of COVID-19 must be determined on a case-by-case basis, taking into account the specific circumstances of the inmate, including the conditions in the specific facility in which

whatever reason, made no attempt to exhaust—or even to initiate—NMCD's regular or emergency grievance procedures before filing suit. Under these circumstances, when NMED has the authority to address the conditions in New Mexico's correctional facilities through emergency grievance procedures, the district court properly concluded as a matter of law that Plaintiffs may not avail themselves of the futility exception in this case. **[5 RP 976, ¶ 9]**

The district court's conclusion about the adequacy and availability of NMCD's emergency grievance procedures also undermines Plaintiffs' argument that dismissal of the Amended Complaint gives NMCD "authority to impose an absolute bar on the writ of habeas corpus." **[BIC 26]** This would be a different case if Plaintiffs had any basis to allege that NMCD "deliberately placed an impediment in the path of [the Inmate Plaintiffs], making an attempt at exhaustion a useless endeavor." *In re Estate of McElveny*, 2017-NMSC-024, ¶ 31 (internal quotation marks and citation omitted). But the Inmate Plaintiffs' failure to make *any* attempt to exhaust NMCD's emergency grievance procedures undermines Plaintiffs'

---

the inmate is incarcerated. *See, e.g.*, *Martinez v. Chavez*, 2008-NMCA-071, ¶ 7, 144 N.M. 166, 184 P.3d 1060 ("Habeas corpus protects *an individual's* basic right of freedom from illegal restraint." (emphasis added)). Moreover, jurisdiction in a class action must be based on the named plaintiffs and cannot be established by absent class members. *See, e.g.*, *Al Haj v. Pfizer, Inc.*, 338 F. Supp. 3d 815, 820 (N.D. Ill. 2018) ("Precisely because absent class members are along for the ride, it makes sense that they are not parties for the purpose of constitutional and statutory doctrines governing whether a court has the power to adjudicate their claims.").

repeated, unfounded implications on appeal that NMCD improperly restricted or denied the Inmate Plaintiffs' access to the grievance process. **[BIC 25-27]**

In sum, the Inmate Plaintiffs' failure to exhaust NMCD's emergency grievance procedures cuts against excusing them from the mandatory requirements of Section 33-2-11(B) or Rule 5-802(C)(2). In an analogous case, the U.S. District Court for the District of Colorado noted the availability of grievance procedures that apply to a request "'of an emergency nature which threatens the inmate's immediate health or welfare'" and that require officials to "'respond not later than the third calendar day after filing.'" *Nellson v. Barnhart*, 454 F. Supp. 3d 1087, 1094 (D. Colo. Apr. 16, 2020) (quoting 28 C.F.R. § 542.18). Because the inmate "had an administrative remedy available that takes into account the speed and nature of the COVID-19 emergency," the court rejected the inmate's arguments that he should be excused from the federal exhaustion requirement. *Id.* So too in this case. The Inmate Plaintiffs' failure to exhaust NMCD's emergency grievance procedures, without any allegation to support a finding that an attempt to exhaust those procedures would be futile, forecloses their right to judicial relief.[15]

[15] The failure of a single named plaintiff to exhaust similarly forecloses any argument that Section 33-2-11(B) may be subject to virtual or vicarious exhaustion for any inmate who has not individually exhausted NMCD's internal grievance procedures. *See U.S. Xpress*, 2006-NMSC-017, ¶ 13.

C. The District Court Properly Dismissed the Entire Action Despite the Presence of the Institutional Plaintiffs.

1. The District Court Properly Dismissed the Lawsuit with Respect to all Plaintiffs.

Plaintiffs argue that the district court improperly dismissed the Institutional Plaintiffs' claims because Section 33-2-11(B)'s exhaustion requirement applies only to inmates and the Institutional Plaintiffs have standing to bring the claims on the inmates' behalf. **[BIC 34-35]** But contrary to Plaintiffs' argument, the district court did not "conflate the concepts of exhaustion and standing" in dismissing the Institutional Plaintiffs' claims. **[*Id.*]** While the Governor moved to dismiss the Institutional Plaintiffs for lack of standing, the district court never reached that argument. **[5 RP 977, ¶ 13]** Instead, the court dismissed the Institutional Plaintiffs' claims because "[t]o 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." **[*Id.* ¶ 11]** The court further concluded that the Inmate Plaintiffs' failure to exhaust their remedies precluded the court's subject matter jurisdiction over the Institutional Plaintiffs. **[*Id.* ¶ 12]**

Plaintiffs argue that the court's conclusion forces the Institutional Plaintiffs to "exhaust remedies that they have no avenue to pursue." **[BIC 36]** That argument misses the point. The Institutional Plaintiffs "are nonprofit public advocacy

organizations seeking to assert rights on behalf of their constituents." **[BIC 39]** As such, the Institutional Plaintiffs' claims are brought purely in a representative capacity and depend on the viability of the Inmate Plaintiffs' claims. Put simply, the Institutional Plaintiffs have no independent right to relief, so the lack of subject matter jurisdiction over the Inmate Plaintiffs' claims is dispositive. Plaintiffs' reliance on *U.S. Xpress* to support their argument is also misplaced **[BIC 36]**, as that case did not involve a third party that was bringing a claim on behalf of a party subject to an exhaustion requirement. *See* 2006-NMSC-017, ¶ 2; *see also Fernandez v. Farmers Ins. Co.*, 1993-NMSC-035, ¶ 15, 115 N.M. 622, 857 P.2d 22 ("[C]ases are not authority for propositions not considered[.]" (internal quotation marks and citation omitted)).

Plaintiffs do not otherwise explain how the court erred in looking beyond the plain language of Section 33-2-11(B), besides arguing the court's reading "expand[ed] Section 33-2-11(B) beyond its written scope." **[BIC 36-37]** To accept this conclusory argument would ignore decades of case law regarding courts' ability to look beyond the plain meaning of statutes to effectuate legislative intent. *See, e.g.*, *State ex rel. Brandenburg v. Sanchez*, 2014-NMSC-022, ¶ 4, 329 P.3d 654 ("We should not allow a literal plain reading of a statute to confound the legislative intent, and therefore, our inquiry does not end with the plain meaning of the words."); *see also Parent/Professional Advocacy League v. City of Springfield*, 934 F.3d 13, 34

(1st Cir. 2019) ("[I]t would not make sense to allow the organizations here to escape the exhaustion requirement for the students they are purportedly representing. Otherwise, associational standing in this type of suit would be inconsistent with the Congressional requirement of exhaustion in the IDEA, 20 U.S.C. § 1415(l), and indeed an easy way to circumvent it[.]").[16] The district court properly concluded that the strict requirements of Section 33-2-11(B) cannot be circumvented—nor jurisdiction conjured—by bringing claims through a representative entity.

2. Alternatively, the Court May Affirm Dismissal of the Institutional Plaintiffs' Claims for Lack of Standing.

In addition, this Court may affirm the district court's dismissal of the Institutional Plaintiffs because they lack standing. *See Freeman v. Fairchild*, 2018-NMSC-023, ¶ 30, 416 P.3d 264 (stating that appellate courts may affirm a district court's ruling if it is "right for any reason"). New Mexico courts "have long been guided by the traditional federal standing analysis" and therefore require "that a litigant demonstrate injury in fact, causation, and redressability to decide the merits of a case." *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 10, 144 N.M. 471, 188 P.3d 1222. Because the Institutional Plaintiffs do not allege injury to any concrete or particularized interests of their own **[*see generally* 1 RP 59-116]**, they

[16] Although the First Circuit discussed this issue in the context of standing, its reasoning applies regardless of whether the analysis is framed as one of statutory interpretation or standing.

must establish the elements of associational or third party standing, or they must demonstrate that the case falls within the narrow "great public importance" exception. *See id.* ¶¶ 11-12. The Institutional Plaintiffs fail on all fronts.

a) Associational standing

An association has standing to bring suit on behalf of its members 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 in the lawsuit." *ACLU of N.M.*, 2008-NMSC-045, ¶ 30 (internal quotation marks and citation omitted). The Institutional Plaintiffs fail to meet the first and third prongs in this case.

i) Plaintiffs Fail To Allege that any Member Has Standing To Sue.

"An organization's standing to sue is premised on the standing of its individual members." *Id.* ¶ 30. Thus, "[i]t is well established that an association is required to allege that at least one of its members is suffering immediate or threatened injury." *See N.M. Gamefowl Ass'n v. State ex rel. King*, 2009-NMCA-088, ¶ 31, 146 N.M. 758, 215 P.3d 67 (internal quotation marks and citation omitted). However, Plaintiffs failed to allege anywhere in their complaint that any inmate is a member of either of the Institutional Plaintiffs. **[*See generally* 1 RP 59-116]**

Instead, Plaintiffs rely on *Protection & Advocacy System v. City of Albuquerque (P&A)* to argue that this prong has been met because the Inmate Plaintiffs are their "constituents." 2008-NMCA-149, ¶ 29, 145 N.M. 156, 195 P.3d 1. **[BIC 38]** The Institutional Plaintiffs' reliance on *P&A* is misplaced, however, as *P&A*'s holding was specific to the special entity involved in that case: a "Protection and Advocacy System" (P&A system), which is a "unique organization," Congressionally defined and vested with "the authority to . . . pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State." *Id.* ¶¶ 1, 29 (quoting 42 U.S.C. § 10805(a)(1)(B)). Unlike a P&A system, the Institutional Plaintiffs are not statutorily created and vested with authority to pursue any remedies to ensure the protection of inmates.

This distinction is critical, as an entity seeking associational standing to represent non-members (in this case, constituents) must allege that the non-members "possess all of the indicia of membership in an organization." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 344 (1977); *see also P&A*, 2008-NMCA-149, ¶¶ 32-34. In *Hunt*, the Court found that the Washington Apple Advertising Commission demonstrated the indicia of membership because the represented individuals (apple growers and dealers) "alone elect[ed] the members of the commission; they alone serve[d] on the Commission; they alone finance[d] its

activities, including the costs of this lawsuit, through the assessments levied upon them." 432 U.S. at 344-45.

In contrast to a P&A system or the advertising commission in *Hunt*, neither of the Institutional Plaintiffs in this case has a unique statutory role, nor do they argue or allege (as they cannot) that the inmates "possess all of the indicia of membership" necessary to support associational standing. *Hunt*, 432 U.S. at 344-45. And even if the inmates were "members" for standing purposes, the inmates themselves lack standing under Section 33-2-11(B) because they have failed to exhaust their administrative remedies. *Cf. ACLU of N.M.*, 2008-NMSC-045, ¶ 9 n.1 ("[S]tanding may be a jurisdictional matter when a litigant asserts a cause of action created by statute.") Accordingly, the Institutional Plaintiffs fail to satisfy the first prong of associational standing. *See, e.g., United Food & Comm'l Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555 (1996) ("[A]n organization suing as representative [must] include at least one member with standing to present, in his or her own right, the claim (or the type of claim) pleaded by the association.").

ii) The Requested Relief Requires Participation of Individual Members.

Plaintiffs also fail to meet the third prong for associational standing because their requested relief "requires the participation of individual members in the lawsuit." *ACLU of N.M.*, 2008-NMSC-045, ¶ 30 (internal quotation marks and citation omitted). Plaintiffs argue this prong is satisfied because they seek injunctive

and declaratory relief, which "does not require participation of the Named Plaintiffs." **[BIC 38]** But Plaintiffs ask the district court[17] to oversee the release of thousands of inmates, which will necessarily involve individual determinations unique to almost every individual. **[1 RP 105-15]**; *Cf. Friends for Am. Free Enter. Ass'n v. Wal-Mart Stores, Inc.*, 284 F.3d 575, 577-78 (5th Cir. 2002) (holding that defining the scope of the requested injunctive relief would require the participation of the individual members). Unlike cases in which courts have found the third prong satisfied under this principle, *see, e.g.*, *N.M. Gamefowl Ass'n*, 2009-NMCA-088, ¶ 34; *P&A*, 2008-NMCA-149, ¶ 11, this case does not simply seek to declare a law unconstitutional and enjoin its enforcement; it requires, *at minimum*, ruling on whether inmates have a qualifying medical condition under the Medically Vulnerable Subclass, whether each inmate should be released, where that inmate should be released, and what the inmate's conditions of release should be. **[1 RP 105-15]**. To say these matters will not require the individual participation of the inmates blinkers reality. The Institutional Plaintiffs lack associational standing.

b. Third Party Standing

The Institutional Plaintiffs also argue they have third party standing. **[BIC 38-39]** "[A] litigant may bring an action on behalf of a third party if the litigant

[17] That Plaintiffs request the appointment of a special master to oversee this process does not negate that the relief requested will require the participation of individual inmates.

demonstrates the following three criteria: (1) the litigant has suffered an injury in fact, thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute; (2) the litigant has a close relation to the third party; and (3) there exists some hindrance to the third party's ability to protect his or her interests." *ACLU of N.M.*, 2008-NMSC-045, ¶ 12 (internal quotation marks and citation omitted)). Again, the Institutional Plaintiffs fail to meet the first and third prongs to demonstrate standing.

i) The Institutional Plaintiffs Have Not Suffered an Injury-in-Fact.

The Institutional Plaintiffs do not contend that they have suffered an injury-in-fact. Rather, they argue for third party standing because they "are nonprofit public advocacy organizations seeking to assert rights on behalf of their constituents." **[BIC 39]** Plaintiffs rely on *N.M. Right to Choose/Naral v. Johnson*, but the organization in that case had associational standing because it sought to assert the rights of its *members* who suffered an injury—something noticeably absent here. *See* 1999-NMSC-005, ¶¶ 11, 14, 126 N.M. 788, 975 P.2d 841 (parenthetically noting that an "organization may assert claim on behalf of its members"). Without associational standing, the Institutional Plaintiffs must demonstrate that they have *themselves* suffered an injury in fact. *See ACLU of N.M.*, 2008-NMSC-045, ¶ 12 (stating that the litigant must demonstrate that "*the litigant* has suffered an injury in fact, thus giving him or her a sufficiently concrete interest in the outcome of the issue in

dispute") (emphasis added). Because the Institutional Plaintiffs have not suffered an injury in fact, they fail to meet the first prong.

ii) Inmates Are Not Hindered from Protecting Their Own Rights.

Further, the Institutional Plaintiffs cannot demonstrate that they meet the third prong, as the inmates are not hindered from protecting their rights. Plaintiffs argue that the inmates' obligation to meet the exhaustion requirement of Section 33-2-11(B) is sufficient to meet this prong. **[BIC 40]** However, as discussed above, the inmates may utilize NMCD's internal grievance procedures, including NMCD's emergency grievance procedures, which may provide a speedier remedy than the instant lawsuit. And should the inmates prove dissatisfied with NMCD's ultimate response to their grievances, their presence here demonstrates that they are capable of instituting an action in the district court. *See, e.g.*, *Massey v. Wheeler*, 221 F.3d 1030, 1035 (7th Cir. 2000) (denying third party standing when "the only hindrance [the inmate] faces is the administrative exhaustion requirement" and the inmate is "quite expert" at asserting his own rights). Also, using Section 33-2-11(B)'s exhaustion requirement as justification for asserting third party standing would defeat the Legislature's intent in requiring exhaustion. *See Parent/Professional Advocacy League*, 934 F.3d at 34. Therefore, the Institutional Plaintiffs lack third party standing.

c. The Great Public Importance Exception

Finally, the Institutional Plaintiffs argue the Court should confer standing under the "great public importance" doctrine because "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." **[BIC 41]** As an initial matter, the doctrine should not be used as a means to allow Plaintiffs to avoid a jurisdictional requirement. *Cf. id.* But more importantly, applying the great public importance exception in this case would swallow the rule, as every civil rights case involves important questions of constitutional rights that the courts may be called on to answer.

Indeed, this Court has previously rejected such broad interpretations of the exception, holding "the fact that a case involves a duty that state officials owe to the general public as a whole is not sufficient to show that the case involves an issue of great public importance." *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 21, 128 N.M. 154, 990 P.2d 1277. Rather, "[c]ases in which 'great public importance' standing has been recognized involve 'clear threats to the essential nature of state government guaranteed to New Mexico citizens under their Constitution—a government in which the three distinct departments . . . legislative, executive, and judicial, remain within the bounds of their constitutional powers.'" *New Energy*

Econ., Inc. v. Martinez, 2011-NMSC-006, ¶ 13, 149 N.M. 207, 247 P.3d 286 (quoting *Johnson*, 1999-NMSC-036, ¶ 21).

Here, there is no "clear threat" to the judicial branch's "duty to check the executive branch's unconstitutional actions." **[BIC 41]** Section 33-2-11(B) does not remove Defendants' actions from judicial scrutiny; it temporarily postpones such scrutiny until NMCD has had an opportunity to correct any alleged issue. *See Smith*, 1954-NMSC-033, ¶ 10. Finally, and perhaps most importantly, there is no reason to confer standing on the Institutional Plaintiffs when the inmates themselves can advocate for their rights via NMCD's emergency internal grievance process and, if necessary, bring suit thereafter. *Cf. Parent/Prof. Advocacy League*, 934 F.3d at 34. Accordingly, the Court should affirm the dismissal of the Institutional Plaintiffs' claims, whether to avoid an absurd result under Section 33-2-11(B) or due to their lack of standing.

V. CONCLUSION

Under Section 33-2-11(B) and Rule 5-802(C)(2), exhaustion of NMCD's internal grievance procedures is a jurisdictional prerequisite to all of Plaintiffs' claims in this lawsuit. Further, NMCD has adopted emergency grievance procedures that provides expedited resolution of grievances that raise a serious risk of harm, including grievances that cannot be resolved at the facility level. Under these circumstances, the Inmate Plaintiffs' failure to exhaust their administrative remedies

before filing suit bars judicial review of all claims in this lawsuit. The same is true for the Institutional Plaintiffs, who should not be permitted to evade the exhaustion requirement and who lack standing to pursue the Inmate Plaintiffs' claims. The district court properly dismissed the Amended Complaint for lack of subject matter jurisdiction.

Respectfully submitted,

By: */s/ Neil R. Bell*

Neil R. Bell
Assistant Attorney General
Nicholas M. Sydow
Civil Appellate Chief
P.O. Drawer 1508
Santa Fe, NM 87504
(505) 490-4859
nbell@nmag.gov
nsydow@nmag.gov

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2021, I caused a copy of this Response Brief to be served on all counsel of record via the Odyssey File & Serve electronic filing system.

/s/ Neil R. Bell