

**IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION**

BENJAMIN DOUGLAS,	§	
	§	
<i>Plaintiff-Appellant,</i>	§	
	§	
<i>v.</i>	§	W2024-00753-COA-R3-CV
	§	
FRANK STRADA,	§	Hardeman County Chancery Court
COMMISSIONER OF THE	§	Case No.: 19991
TENNESSEE DEPARTMENT	§	
OF CORRECTION, <i>et al.</i>	§	
	§	
<i>Defendants-Appellees.</i>	§	

APPELLANT’S REPLY BRIEF

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III. INTRODUCTION

The last time the Tennessee Department of Correction and its counsel behaved this badly, a federal court “warn[ed]” them that “there may be repercussions for future blatant factual misrepresentations presented to it.” *Friedmann v. Parker*, 573 F. Supp. 3d 1221, 1226 n.2 (M.D. Tenn. 2021). Unfortunately, their behavior has not improved. Thus, this Court should not only reverse; it also should exercise its inherent power to sanction the Government for its misrepresentations.

IV. ARGUMENT

Mr. Douglas has asked this Court to reverse the trial court based on six errors. *See* Appellant’s Principal Br. at 19–35. In Response, the Government has not competently defended any of them.

A. THE TRIAL COURT FAILED TO TREAT THE ALLEGATIONS IN MR. DOUGLAS’S COMPLAINT AS TRUE.

Mr. Douglas has complained that, notwithstanding the trial court’s obligation to treat the allegations in his Complaint as true, the trial court failed to do so. *See* Appellant’s Principal Br. at 19–21. In Response, the Government does not dispute that the facts alleged in Mr. Douglas’s Complaint must be treated as true. *See* Government’s Br. at 17. Instead, as to exhaustion, the Government insists that “Douglas’s complaint had no such allegations of fact.” *Id.* at 18.

The Government’s position is unserious. Mr. Douglas’s Complaint alleges that “[t]he Plaintiff not only exhausted the administrative remedies available to him; his facility ***actually agreed to transfer him*** after he did so. The Defendants alone have refused.” R. (Vol. 1) at 7, ¶ 41. It alleged that Mr. Douglas’s complaints are “non-grievable[.]” *Id.* at

8, ¶ 42. And it alleged—with supporting evidence—that, “[i]n addition to being non-grievable, the Defendants’ counsel-communicated position regarding Mr. Douglas’ transfer also makes clear that any further attempt to remedy the Plaintiff’s harm through administrative remedies will be futile.” *Id.*; *see also* at *id.* at 37 (TDOC counsel stating, unrelated to exhaustion, that the TDOC “will not agree to” transfer Mr. Douglas “[u]nless circumstances change[.]”).

Notwithstanding the Government’s inaccurate contrary position (which misrepresents the authority the Government cites¹), these well-pleaded allegations are not a “legal theory[.]” Government’s Br. at 17. Instead, they are facts. Nor did the trial court credit the Government’s argument that Mr. Douglas’s well-pleaded factual allegations do not allege facts. *Compare* R. (Vol. 2) at 222 (making that argument), *with id.* at 297–98 (not adopting it). The Government also has not raised, in its Statement of the Issues, any issue about the fact-based nature of Mr. Douglas’s allegations, *see* Government’s Br. at 6, thereby waiving any such claim here, *see Hodge v. Craig*, 382 S.W.3d 325, 335 (Tenn. 2012).

Based on the facts pleaded in Mr. Douglas’s Complaint—which the

¹ As Mr. Douglas has argued, exhaustion is an evidence-based “affirmative defense” that *defendants* must plead and prove at an evidentiary stage. *See* Appellant’s Principal Br. at 26–27. *Bailey v. Blount Cty. Bd. of Educ.*, 303 S.W.3d 216, 238 (Tenn. 2010), recognizes as much. *Id.* (“That *motion* posited that *Defendants* were entitled to *summary judgment* as a matter of law on the sole legal theory that Bailey had failed to exhaust his administrative remedies.”) (emphases added). The Government nevertheless cites *Bailey* to support its claim that *Mr. Douglas*—the Plaintiff here—did not adequately establish exhaustion in his *Complaint*. *See* Government’s Br. at 17.

trial court was obliged to “uncritically accept” as true but did not, *see Staats v. McKinnon*, 206 S.W.3d 532, 542–43 (Tenn. Ct. App. 2006)—the trial court had jurisdiction over Mr. Douglas’s Complaint. Mr. Douglas’s well-pleaded facts also precluded any attempt to resolve the Government’s exhaustion defense at the motion to dismiss stage. The reason is simple: the exhaustion requirement at issue applies only to “a claim that is subject to review by the grievance committee established by the department[.]” *See* Tenn. Code Ann. § 41-21-806(a). Thus, when—as here—an inmate has pleaded that his complaints are “non-grievable,” *see* R. (Vol. 1) at 8, ¶ 42, Section 41-21-806(a) is not implicated.

For these reasons, Mr. Douglas competently alleged facts that “warrant[ed] the exercise of the trial court’s jurisdiction.” *Campbell v. Tennessee Dep’t of Correction*, No. M2001-00507-COA-R3-CV, 2002 WL 598547, at *2 (Tenn. Ct. App. Apr. 19, 2002), *on reh’g in part*, No. M2001-00507-COA-R3-CV, 2002 WL 992387 (Tenn. Ct. App. May 16, 2002). Thus, the trial court’s order below—which improperly failed to treat the allegations in Mr. Douglas’s Complaint as true—should be reversed.

B. THE TRIAL COURT IMPROPERLY ADJUDICATED A CLAIM THAT WAS NOT RAISED IN THE GOVERNMENT’S MOTION TO DISMISS.

The terms “exhaustion” and “failure to exhaust administrative remedies” were never mentioned in the Government’s motion to dismiss. R. (Vol. 1) at 60. The Government’s failure to raise an exhaustion defense in its motion to dismiss—which is inarguable here—also ends the inquiry as to whether the defense was raised below. *See Shomo v. City of Franklin*, No. M2006-00319-COA-R3-CV, 2008 WL 490646, at *4 (Tenn. Ct. App. Feb. 22, 2008) (“The party moving for dismissal must state the

particular grounds for the motion in the motion itself. Merely moving for dismissal based on the failure to state a claim and stating the grounds in an accompanying memorandum does not fulfill the requirement.”) (quoting *Ralph v. Pipkin*, 183 S.W.3d 362, 366 n.1 (Tenn. Ct. App. 2005)); see also *Justice v. Nelson*, No. E2018-02020-COA-R3-CV, 2019 WL 6716300, at *3 (Tenn. Ct. App. Dec. 10, 2019) (citing *Willis v. Tenn. Dept. of Corr.*, 113 S.W.3d 706, 709 n.2 (Tenn. 2003)). At any rate, the Government did not raise an exhaustion argument in its supporting Memorandum, either, see R. (Vol. 1) at 63–79, and Mr. Douglas objected to the Government’s improper attempt to do so in reply. See R. (Vol. 2) at 291–95.

Contrary to the Government’s newfangled position on appeal, see Government’s Br. at 16 (misrepresenting that “Appellees’ motion to dismiss raised exhaustion”), the claim in the Government’s Memorandum concerning Tennessee Code Annotated § 1-3-121 was not an exhaustion defense, and it did not purport to be. See R. (Vol. 1) at 73–75. Instead, it was an argument that Section 1-3-121—a statutory cause of action—cannot be used to challenge the TDOC’s refusal to transfer an inmate because (the Government claimed) denying an inmate’s transfer request is not “governmental action.” *Id.*

Whatever the merits of this argument—which the Government has apparently abandoned—it was not a claim that Mr. Douglas’s Complaint should be dismissed for failure to exhaust administrative remedies. That very different argument was one that the Government saved for its reply brief below. See R. (Vol. 2) at 219–89. There, the Government argued at

length that Mr. Douglas had not exhausted his administrative remedies, and it attempted—for the first time just two days before hearing in a filing to which Mr. Douglas could not respond—to support an administrative exhaustion defense using newly appended, unauthenticated evidence. *Id.*

“A reply brief cannot be used to raise new issues.” *Gentry v. Former Speaker of House Glen Casada*, No. M2019-02230-COA-R3-CV, 2020 WL 5587720, at *6 (Tenn. Ct. App. Sept. 17, 2020) (citing Tenn. R. Civ. P. 7.02(1); *Regions Fin. Corp. v. Marsh USA, Inc.*, 310 S.W.3d 382, 392 (Tenn. Ct. App. 2009)). Thus, “[i]ssues raised for the first time in a reply brief are waived.” *Hughes v. Tennessee Bd. of Prob. & Parole*, 514 S.W.3d 707, 724 (Tenn. 2017).

Here, although the trial court *recognized* that the Government had not properly raised an exhaustion defense in its motion to dismiss, the trial court declined to apply waiver. As justification, the trial court maintained that exhaustion is “jurisdictional and jurisdiction can’t be waived[.]” *See* R. (Vol. 3) at Tr. 17:19–20. But a plaintiff’s failure to exhaust administrative remedies is *not* a jurisdictional defect. *See, e.g., Nat’l Coll. Of Bus. & Tech. v. Tennessee Higher Educ. Comm’n*, No. M2009-00137-COA-R3-CV, 2010 WL 987161, at *8 (Tenn. Ct. App. Mar. 18, 2010) (“as held in *Campbell* and *Coe*, the failure to exhaust administrative remedies does not leave the trial court without subject matter jurisdiction over a complaint for declaratory judgment.”). The reason the trial court concluded otherwise is because it uncritically accepted the incorrect positions the Government advocated below, and

misbehaving members of the Attorney General's Office keep presenting that "flawed" argument despite this Court having repeatedly admonished them to stop doing so starting more than two decades ago. *See Campbell*, 2002 WL 598547, at *2 ("This case presents yet another example of the Attorney General's remarkable determination to assert this 'lack of subject matter jurisdiction' defense in circumstances where it is not warranted.").

For these reasons, the Government's exhaustion defense should have been deemed waived, and the trial court erred by ignoring the Government's waiver on the ground that the issue presented a subject matter jurisdiction defect. Accordingly, this Court should reverse.

C. THE TRIAL COURT IMPROPERLY CONSIDERED EVIDENCE AT THE MOTION TO DISMISS STAGE.

Elementary procedural rules instruct that trial courts are forbidden from considering evidence outside the pleadings at the motion to dismiss stage. *See* Appellant's Principal Br. at 24–25; *see also Webb v. Nashville Area Habitat for Hum., Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011) ("The resolution of a 12.02(6) motion to dismiss is determined by an examination of the pleadings alone."). Thus, when a trial court adjudicates a motion to dismiss, an "extraneous matter may not be considered if the court excludes it, but if the court does not exclude such material the motion Shall be treated as a motion for summary judgment and disposed of as provided in Rule 56[.]" *Hixson v. Stickley*, 493 S.W.2d 471, 473 (Tenn. 1973).

Here, the Government acknowledges having submitted evidence outside the pleadings in connection with its motion to dismiss. *See*

Government's Br. at 16. And the trial court's order leaves no doubt that it considered that evidence over Mr. Douglas's objection. *See* R. (Vol. 2) at 291–95 (objecting); *id.* at 297–98 (finding, as a factual matter, “that the Plaintiff has not properly exhausted his administrative remedies” after it “reviewed the . . . briefings associated with the motion”). In doing so, though, the trial court did not treat the Government's motion as one for summary judgment and resolve it under Rule 56 standards. *Id.* at 297–98.

This was error. The Government also makes no attempt to defend that error, presumably because it cannot come up with a straight-faced argument for doing so. Indeed, the Government's Brief does not even *mention* Mr. Douglas's argument on the point. The closest the Government comes is simply declaring, without support, that “Douglas plainly had adequate notice of the exhaustion issue, and he had a full opportunity to respond.” *See* Government's Br. at 16.

The Government is wrong in every way. To begin, Mr. Douglas did *not* have “a full opportunity to respond” to the Government's reply brief, which raised a new, evidence-laden exhaustion argument at 3:30 p.m. just two days before hearing. *See* R. (Vol. 2) at 219–89. Mr. Douglas immediately objected. *Id.* at 292 (noting that “[t]his deliberate impropriety is sanction-worthy, as it has forced the Plaintiff to rush out a hasty objection on a single day's notice to prevent prejudice.”). Further, sur-replies are not permitted, either under the trial court's Local Rules, *see* Tenn. R. 25 Dist. Ch. Ct. Rule 4.01 (permitting motions and responses), or under Rule 56—the only rule under which the evidence

could lawfully have been considered, *see Lacy v. Meharry Gen. Hosp.*, No. M2021-00632-COA-R3-CV, 2022 WL 2981508, at *5 (Tenn. Ct. App. July 28, 2022) (“Rule 56 does not anticipate or provide for a sur-reply in . . . opposition to summary judgment.”).

Apart from the fact that Mr. Douglas was deprived of a fair opportunity to respond, though, an “opportunity to respond” is not the issue. The issue is that Rule 12 forbids trial courts from considering evidence outside the pleadings, while Rule 56 mandates an orderly, deliberate, and precise process for adjudicating parties’ evidentiary disputes. That process requires movants to specify the material facts that they contend are undisputed, *see* Tenn. R. Civ. P. 56.03; it enables responding parties to demonstrate otherwise, *id.*; and it assures respondents (among other things) “at least thirty (30) days before the time fixed for the hearing” to do so, *see* Tenn. R. Civ. P. 56.04.

At the Government’s insistence, however, the trial court followed neither rule. Instead, it received and credited the Government’s untimely submitted, unauthenticated, and disputed evidence; it disregarded the contrary allegations in Mr. Douglas’s Complaint; and it dismissed Mr. Douglas’s case. *See* R. (Vol 2) at 297–98. There is no defending that error. The Government’s attorneys—who “may strike hard blows, [but are] not at liberty to strike foul ones[.]” *cf. Berger v. United States*, 295 U.S. 78, 88 (1935)—also should not have invited it. *See* Tenn. S. Ct. Rule 8, RPC 3.3, cmt. 4 (“Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal.”). Thus, the trial court’s illicit judgment should be reversed.

D. THE TRIAL COURT IMPROPERLY ADJUDICATED A NEVER-PLEADED AND FACT-BASED AFFIRMATIVE DEFENSE AT THE MOTION TO DISMISS STAGE.

Mr. Douglas has demonstrated, with supporting authorities, that a claim that a plaintiff has failed to exhaust administrative remedies is a fact-based affirmative defense. *See* Appellant’s Principal Br. at 25–26. Thus, it need not be rebutted in a plaintiff’s complaint; instead, it must be pleaded *by a defendant* in its answer and then proven with evidence at a later stage in proceedings. *Id.* at 26–28 (citing *Chambers v. Tennessee Bd. of Prob. & Parole*, No. M2007-00042-COA-R3-CV, 2008 WL 204111, at *2 (Tenn. Ct. App. Jan. 24, 2008) (recognizing that “exhaustion . . . is an affirmative defense to be raised by the respondent and [federal courts] may not by rule require an inmate to plead exhaustion before the matter may proceed.”) (citing *Jones v. Bock*, 549 U.S. 199, 211–13 (2007)). As such, Mr. Douglas has observed that the Government’s exhaustion defense not only should not be but *cannot* be adjudicated at the motion to dismiss stage. *Id.*

The Government does not respond to Mr. Douglas’s well-developed, well-supported argument. *See generally* Government’s Br. The Government’s failure to respond to the argument thus waives opposition to it. *Cf. Dominy v. Davidson Cnty. Election Comm’n*, No. M2022-00427-COA-R3-CV, 2023 WL 3729863, at *1 (Tenn. Ct. App. May 31, 2023) (“Because the Election Commission presented a well-developed and well-supported argument in favor of mootness and because the Plaintiffs have failed to respond to that argument, we conclude that opposition to the Election Commission’s mootness argument has been waived.”).

Like the other arguments presented in Mr. Douglas’s briefing, this error requires reversal by itself. In particular, given that the Government was required to plead exhaustion as an affirmative defense in its answer—something it did not do—and then prove that defense with evidence at a later stage in proceedings, the trial court necessarily erred by adjudicating the Government’s never-pleaded, fact-based exhaustion defense at the motion to dismiss stage. *See* Appellant’s Principal Br. at 27–28. Thus, this Court should reverse.

E. THE TRIAL COURT IMPROPERLY FAILED TO ADDRESS FUTILITY.

Although the trial court could not, at *any* stage, lawfully dismiss Mr. Douglas’s Complaint on exhaustion grounds without first addressing his futility arguments, the trial court’s order below never mentioned futility. *See* R. (Vol 2) at 297–98. Even so, the Government argues that this Court should address the issue in the first instance and affirm because “Douglas’s administrative remedies were not futile.” Government’s Br. at 13–15.

The Government’s position should be rejected for three reasons:

First, “[t]he jurisdiction of this Court is appellate only; [it] cannot hear proof and decide the merits of the parties’ allegations in the first instance.” *Reid v. Reid*, 388 S.W.3d 292, 294 (Tenn. Ct. App. 2012). Thus, this Court is “constrained to only review those issues that have been decided by the trial court in the first instance.” *Whalum v. Shelby Cnty. Election Comm’n*, No. W2013-02076-COA-R3-CV, 2014 WL 4919601, at *3, n.3 (Tenn. Ct. App. Sept. 30, 2014). As a consequence, because Mr. Douglas’s futility argument was not considered below, the appropriate

remedy is to vacate the trial court's ruling and remand. *See Mid-S. Maint. Inc. v. Paychex Inc.*, No. W2014-02329-COA-R3-CV, 2015 WL 4880855, at *14 (Tenn. Ct. App. Aug. 14, 2015) (“when the trial court fails to address an issue in the first instance, this Court will not consider the issue, but will instead remand for the trial court to make a determination in the first instance.”). Mr. Douglas also notes that this Court applies that rule even when its review is de novo, *see, e.g., Johnson v. Rutherford Cnty.*, No. M2017-00618-COA-R3-CV, 2018 WL 369774, at *9 (Tenn. Ct. App. Jan. 11, 2018): something that cannot be said of an evidence-based affirmative defense that the trial court itself was precluded from adjudicating at the present stage in proceedings.

Second, the Government's position on appeal is markedly different from the position it advocated below. In the trial court, the Government acknowledged that, “[b]ecause Core Civic prison officials do not have authority to transfer inmates to TDOC facilities, the prison officials would not have responded to the grievance by transferring Plaintiff.” R. (Vol. 2) at 221. That concession precluded any exhaustion requirement by itself, because the exhaustion requirement at issue here applies only to “a claim that is subject to review by the grievance committee established by the department[.]” Tenn. Code Ann. § 41-21-806(a). Nevertheless, the Government argued below that Mr. Douglas should have pursued two layers of purposeless pre-suit grievance review—first, to his prison's grievance committee, and then, to his warden, even though neither of whom was empowered to give him the relief he wanted—anyway. *See* R. (Vol. 2) at 221–22.

On appeal, the Government has adopted a different position: that

Mr. Douglas’s claim was “grievable” and that “CoreCivic could have responded accordingly and, if necessary, requested TDOC’s approval for a prison transfer.” *See* Government’s Br. at 13–14. The Government is forbidden from changing its position between the trial court and appeal, though. *Lowe v. Smith*, No. M2015-02472-COA-R3-CV, 2016 WL 5210874, at *13 (Tenn. Ct. App. Sept. 19, 2016) (“Tennessee law is well-settled that it is inappropriate to allow a party to take one position regarding an issue in the trial court, and then ‘change its strategy or theory in midstream, and advocate a different ground or reason in this Court.’”) (cleaned up; collecting cases). Thus, this Court should reject the Government’s new argument as improper, particularly because the Government’s position is: (a) wrong, *see* R. (Vol. II) at 234 (“classification matters such as institutional placement” are non-grievable), *id.* at 246 (“Classification matters/institutional placement are Inappropriate to Grievance Procedure.”); and (b) contrary to the way that prison officials actually adjudicate such grievances.

Third, the Government’s argument *proves* Mr. Douglas’s futility claim. As Mr. Douglas explained in his Complaint, he did file grievances and “exhaust[] the administrative remedies available to him.” R. (Vol. 1) at 7, ¶ 41. Further, “his facility ***actually agreed to transfer him*** after he did so.” *Id.* “The Defendants alone have refused.” *Id.*

In particular, after Mr. Douglas grieved, CoreCivic informed Mr. Douglas’s counsel that it had requested that the TDOC transfer him, and CoreCivic communicated its transfer request to the TDOC. *Id.* at 4, ¶¶ 18–19. In response, the TDOC claimed—“false[ly]”—that it had never

been contacted. *Id.* at ¶ 20. The TDOC then “formally reject[ed]” Mr. Douglas’s transfer. *Id.* at 5, ¶ 22.

Put another way: the Government’s response to Mr. Douglas’s futility claim here—that Mr. Douglas should have filed a grievance, and that “CoreCivic could have responded accordingly and, if necessary, requested TDOC’s approval for a prison transfer[.]” *see* Government’s Br. at 13–15—is exactly what happened. All that’s missing from the Government’s claim about what Mr. Douglas should have done is the reality of what happened next: “the TDOC blocked Mr. Douglas’s transfer.” *See* R. (Vol. 1) at 1, ¶ 1. Thus, the exact process that the Government says in its Brief that Mr. Douglas should have followed is what led him to file a post-grievance lawsuit that he now has a right to have adjudicated. That is because “[t]he Defendants alone” denied him relief after he “exhausted the administrative remedies available to him[.]” *See* R. (Vol. 1) at 7, ¶ 41. Additionally, leaving no doubt about the futility of further administrative review, the TDOC’s counsel has asserted—unrelated to exhaustion—that the TDOC “will not agree to” transfer Mr. Douglas “[u]nless circumstances change[.]” *Id.* at 37.

For all of these reasons, this Court cannot credit the Government’s argument that “Douglas’s administrative remedies were not futile.” *See* Government’s Br. at 13. Nor is there any evidence in this record to support the factual assertions that the Government tries to pass off as being established here.

The Government recites—as ostensible fact—that Mr. Douglas “did not ‘avail[] [himself] of’” the grievance process. *See* Government’s Br. at

14. But Mr. Douglas’s Complaint alleges the opposite, *see* R. (Vol. 1) at 7, ¶ 41, and the factual allegations in his Complaint control. In any case, exhaustion is an affirmative defense that *the Government* must prove with evidence. *See supra* at 15–16.

Though the Government believes itself unconstrained by procedural rules governing when evidence can be introduced and the process for evaluating it, the Government also appears to believe that it proved what it needed to prove here by attaching to its reply brief below an unauthenticated copy of what it asserts is the “TDOC’s record of Douglas’s lacking grievance history.” *See* Government’s Br. at 16. But such evidence “may not be considered” and must be “exclude[d]” at the motion to dismiss stage, so the Government may not cite it. *See supra* at 12–14 (quoting *Hixson*, 493 S.W.2d at 473). Nor does the furnished document reflect prison-level grievances that were returned to an inmate or otherwise were not appealed to the TDOC’s Commissioner. *See* R. (Vol. 2) at 222 (asserting that the “Plaintiff’s grievance history with TDOC shows *that he has never appealed any grievance* while incarcerated at Whiteville Correctional Facility.”) (emphasis added).

For these reasons, in addition to reversing the trial court’s decision, the Government and its misbehaving lawyers should have to answer for something that all involved in this litigation know to be true: Mr. Douglas *did* grieve—several times—pre-suit, three non-exhaustive examples of which are attached here as **Collective Ex. 1**. Even so, because Mr. Douglas’s grievances were deemed non-grievable by his prison’s grievance committee and returned to him, *inter alia*, because

institutional placement matters “are inappropriate to [the] Grievance Procedure[.]” *see id.* at 1; *id.* at 6, the TDOC *did not record them in Mr. Douglas’s grievance chart.* The Government has nevertheless misrepresented to this Court that Mr. Douglas “failed to engage in [the grievance] process” and “lack[s] grievance history.” *See* Government’s Br. at 11; *id.* at 16. It also has claimed here that Mr. Douglas’s complaints about the incidents that led him to seek protection and transfer would be deemed grievable, *id.* at 11–12, even though Mr. Douglas’s pre-suit grievances were repeatedly returned to him because they were not grievable. *See Ex. 1* at 1; *id.* at 4; *id.* at 6. For these reasons, this Court should not merely reverse; instead, under its inherent power to sanction, *see Andrews v. Bible*, 812 S.W.2d 284, 291 (Tenn. 1991) (“under the inherent power to supervise and control their own proceedings, the authority to sanction attorneys, but only for pursuing matters in bad faith or conducting themselves in a reckless manner.”), this Court should sanction the TDOC for its latest “blatant factual misrepresentations[.]” which are a pattern. *See Friedmann*, 573 F. Supp. 3d at 1226 n.2.

F. THE GOVERNMENT HAS CONCEDED THAT THE RELEVANT EXHAUSTION STATUTE DOES NOT APPLY TO MR. DOUGLAS.

In his Principal Brief, Mr. Douglas observed that “[t]he sixth problem with the trial court’s order below is that dismissal was not even an available remedy under the circumstances presented here.” *See* Appellant’s Principal Br. at 31–33. In support of that claim, Mr. Douglas noted that: “In prison litigation cases that—unlike this one—are based on ‘a claim that is subject to review by the grievance committee established by the department[.]’ the administrative exhaustion

requirement emanates from Tenn. Code Ann. § 41-21-806(a).” *See id.* at 32 (citing Tenn. Code Ann. § 41-21-806(a); *Sweatt v. Campbell*, No. 02A01-9808-CV-00227, 1999 WL 95978, at *3 (Tenn. Ct. App. Feb. 25, 1999)). But as Mr. Douglas explained, “[e]ven then, the exhaustion requirement only apparently applies to cases where an inmate has asserted an “inability to pay costs[.]” *See id.* (citing Tenn. Code Ann. § 41-21-802). Here, though, “Mr. Douglas never sought relief from cost payments, and his court costs were pre-paid by counsel, his surety.” *Id.*; *see also* Supp. R. (Vol. 4) at 305–06.

The Government’s response to this argument spans just three sentences. It asserts:

[T]he parties agree that this statute only applies to inmates who have asserted an “inability to pay costs.” Tenn. Code Ann. § 41-21-802; (Br. at 32; III, 36.) Since Douglas never filed an affidavit of indigence (IV, 301, 305), the statute’s stay provision does not apply to Douglas, and the trial court was under no duty to stay the proceeding. Thus, dismissal without prejudice was proper.

Government’s Br. at 18.

The Government’s position makes no sense. The administrative exhaustion requirement at issue here arises from a statute—Tenn. Code Ann. § 41-21-802, *et seq.*—that the Government now concedes “only applies to inmates who have asserted an ‘inability to pay costs.’” *Id.* That does not merely mean that “the statute’s *stay provision* does not apply to Douglas.” *Id.* (emphasis added). Instead, it means that Mr. Douglas *had no obligation to grieve before filing suit at all*, even though he did so. *Compare* Tenn. Code Ann. § 41-21-806(a)–(b) (establishing the

exhaustion requirement), *with* Tenn. Code Ann. § 41-21-802 (“This part applies only to a claim brought by an inmate in general sessions or a trial level court of record in which an affidavit of inability to pay costs is filed with the claim by the inmate.”).

It is not the judiciary’s role to question the wisdom of a statute that only requires indigent inmates to exhaust administrative remedies pre-suit, though there are reasonable grounds for enacting one.² Instead, this Court “must simply enforce [the statute] as written.” *Knox Cnty. ex rel. Env’t Termite & Pest Control, Inc. v. Arrow Exterminators, Inc.*, 350 S.W.3d 511, 524 (Tenn. 2011). “[A]s Justice William Reese observed one hundred and seventy years ago, ‘[w]here a statute is plain and explicit in its meaning, and its enactment within the legislative competency, the duty of the courts is simple and obvious, namely, to say *sic lex scripta*, and obey it.’” *Id.* (cleaned up).

Here, given that “the parties agree that [the prisoner litigation exhaustion] statute only applies to inmates who have asserted an ‘inability to pay costs[,]’” Government’s Br. at 18, this appeal is easy. The Government’s concession means that, because Mr. Douglas paid costs rather than asserting indigence, *see* Supp. R. (Vol. 4) at 305–06, he was not required to grieve under Tenn. Code Ann. § 41-21-806(a) before filing suit. Thus, the trial court’s decision dismissing Mr. Douglas’s Complaint

² For instance, such a statutory scheme protects the State from having to bear the expense of uncompensated costs when an inmate chooses to go directly to court. It also enables public interest lawyers—like the undersigned—to assist inmates who have meritorious claims immediately, without administrative delay, by acting as their surety.

for failure to exhaust administrative remedies must be reversed, because “this statute only applies to inmates who have asserted an ‘inability to pay costs.’” *See* Government’s Br. at 18 (quoting Tenn. Code. Ann. § 41-21-802).

G. REVERSING AND REMANDING IS THE APPROPRIATE REMEDY, AND THIS COURT’S REMAND ORDER SHOULD INCLUDE INSTRUCTIONS TO RESPECT MR. DOUGLAS’S RIGHTS.

Mr. Douglas has observed that because: (1) the trial court “did not actually adjudicate Mr. Douglas’s declaratory judgment claim[,]” (2) the trial court “did not issue a declaration addressing the actual controversy presented here,” and (3) the Defendants have not answered, reversing and remanding is appropriate. *See* Appellant’s Principal Br. at 33–35. On appeal, the Government has not responded to this well-developed and well-supported argument. *See generally* Government’s Br. Thus, this Court should deem opposition waived and reverse. *Cf. Dominy*, 2023 WL 3729863, at *1.

Mr. Douglas has separately complained that “[t]he six errors identified above—most of which are elementary—are sufficiently obvious that they reasonably call into question the trial court’s capacity to adjudicate this case fairly or competently.” *See* Appellant’s Principal Br. at 36. He also has expressed concern that Chancellor Cole’s statements—notably, that he would have to “hear[] a lot of petitions from inmates who want to go for a ride, you know, go out to the country for a little while” if he “jump[ed] in based on factual allegations” and treated Mr. Douglas’s allegations as true—suggest that he “views prisoner litigation as a personal inconvenience.” *Id.* (quoting R. (Vol. 3) at Tr. 23:15–21). Thus,

Mr. Douglas has asked this Court to “caution Chancellor Cole to respect Mr. Douglas’s rights going forward.” *See* Appellant’s Principal Br. at 36.

Under its “inherent power to administer the system of appeals and remand[,]” *Culbertson v. Culbertson*, 455 S.W.3d 107, 158 (Tenn. Ct. App. 2014) (quoting 5 Am.Jur.2d Appellate Review § 754 (2007)), this Court has authority to include such instructions. And once more, the Government does not respond to Mr. Douglas’s claim. Thus, to ensure that the trial court respects Mr. Douglas’s rights going forward, this Court’s opinion should include the requested admonition. *Cf. Stokes v. State*, No. W2023-00421-CCA-R3-ECN, 2024 WL 1636604, at *12 (Tenn. Crim. App. Apr. 16, 2024) (admonishing a trial court to “be mindful” of a litigant’s rights).

V. CONCLUSION

The trial court’s judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Under Tennessee Supreme Court Rule 46, § 3.02, the relevant sections of this brief contain 4,998 words, as calculated by Microsoft Word, and under § 3.02(a)(3), it was prepared using 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 3rd of November, 2024, a copy of the foregoing was served via the Court's electronic filing system, via email, and/or via USPS mail, postage prepaid, to the following parties:

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