THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0051

Clifford E. Avery

v.

Helen Hanks, Commissioner,
New Hampshire Department of Corrections

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE MERRIMACK COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

HELEN HANKS, COMMISSIONER,
N.H. DEPT. OF CORRECTIONS

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(15 minutes)

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I. RSA 491:8 waives sovereign immunity for suit in contract against the State and its agencies. The New Hampshire Supreme Court has held that the statute's waiver is limited to breach of contract actions seeking monetary damages. The New Hampshire Supreme Court has also held that the State's sovereign immunity may only be waived by an act of the legislature and may not be undermined by conduct or estoppel. Was it error for the trial court to dismiss the appellant's contractual specific-performance claims as barred by sovereign immunity?

II. The appellant's complaint alleges injury not to himself, but to the inmate population at large, and seeks specific performance, which RSA 491:8 bars, solely for their benefit. He initiated this action *pro se* as the sole member of a class of inmates who are third-party beneficiaries to the Laaman Settlement Agreement. Did the trial court err in dismissing the appellant's claims on the basis that he lacked standing to bring them?

STATEMENT OF THE CASE AND FACTS

A. The Historical Backdrop (1975-2017).

The early procedural history of this case is chronicled in *Laaman v. Helgemoe*, 437 F. Supp. 269, 275 (D.N.H. 1977), and *Laaman v. Warden*, 238 F.3d 14, 15 (1st Cir. 2001).

The appellant, who is currently incarcerated at the New Hampshire State Prison for Men ("NHSP"), was a member of a class of 12 prison inmates named in a civil rights suit filed against the New Hampshire Department of Corrections ("NHDOC") in 1975. *See Laaman*, 437 F.Supp. at 275. The suit, brought in the federal district court under 42 U.S.C. § 1983, challenged the living conditions and programs available at the prison. *Id.* The federal district court dismissed some of the inmates' claims, but with regard to others, found that prison conditions violated the inmates' Eighth Amendment rights. *Id.*; *Laaman*, 238 F.3d at 15. In an extensive 1977 opinion, the federal district court issued a sixteen-part order specifying required relief. *See Laaman*, 437 F.Supp. at 325-31.

The 1977 decision was implemented in an August 1978 consent decree, which was modified on May 22, 1990. *Laaman*, 238 F.3d at 15; App. 106, 145.[1] The amended consent decree provided that the federal district court's jurisdiction would terminate on July 1, 1993. *Laaman,* 238 F.3d at 15. That, however, did not occur. *Id.* After further litigation initiated

[1] References to the records are as follows:
"AB" refers to the appellant's brief, and
"App." refers to the appendix to the State's brief.

by the inmates' civil contempt motion, *see id.*, the parties resolved disputed issues about vocational training in a February 1994 stipulation. App. 208.

As of 1999, however, the federal district court still had not issued an order on the inmates' other claims. *Laaman,* 238 F.3d at 15. By that time, the federal Prison Litigation Reform Act ("PLRA"), which "sought to oust the federal judiciary from day-to-day prison management and serve as a last rite for many consent decrees," had been enacted. *Id.* at 15, n.1 (citation and internal quotation marks omitted). Cognizant of the general unfriendliness of the PLRA toward existing consent decrees, the federal district court ordered the inmates to show cause why the Laaman decree should not be terminated. *Id.* at 15. The federal district court terminated the decree on June 15, 1999, but on appeal, the First Circuit remanded for factual determinations that the federal district court had failed to make in a January 17, 2001 decision. *Id.* at 20. The First Circuit was mindful of the difficulty the inmates would have on remand, given the stringent conditions imposed by the PLRA for keeping existing consent decrees alive. *Id.* at 19 (noting that the district court's apparent assumption—"that no matter what the plaintiffs showed in an evidentiary hearing, nothing in that showing could in light of the new statutory requirements justify a continuation of *this* consent decree"—"may well be right" in light of the PLRA).

On April 23, 2001, the parties agreed to terminate federal jurisdiction over the matter and convert the consent decree, as modified by new terms, into "a settlement agreement enforceable by the courts of the State of New Hampshire." App. 212; *see also* 18 U.S.C. § 3626(c)(2) (PLRA section permitting private settlement agreements). New Hampshire Legal Assistance represented the inmates in the settlement, as that

organization had since the mid-1970s. *See, e.g.*, *Laaman*, 437 F. Supp. at 275; App. 144; App. 219. The federal district court approved the settlement agreement on July 6, 2001. App. 253. In January 2003, the parties amended the agreement in consideration of inmate complaints about the prison's Special Housing Unit. App. 221. Collectively, the consent decree and its subsequent iterations are known as the Laaman Settlement Agreement (hereinafter, the "settlement agreement" or "agreement").

B. The Current Litigation.

On July 9, 2018, the appellant filed a complaint in the Merrimack Superior Court entitled "Petition for Enforcement of a Settlement Agreement." App. 17. He alleged that the NHDOC had failed to comply with numerous settlement agreement terms. He asked the court to order the prison to, among other things, engage in health and sanitation inspections of its facilities, repair ceiling leaks and ventilation equipment, ensure proper food temperatures, serve more fruit, hire additional staff, and reinitiate discontinued programs such as Wood Shop, Building Trades, and Auto Body Shop. App. 19-43. In his petition and subsequent pleadings, the appellant made clear that he sought specific performance of the agreement's terms. *See, e.g.,* App. 44, 258, 266.

The NHDOC moved to dismiss on grounds which included sovereign immunity and standing. App. 71-75. The superior court (*Ruoff*, J.) granted the NHDOCs motion, finding that the appellant's claims were barred by sovereign immunity and that the appellant failed to articulate an

injury personal to himself that would confer standing on him to sue. App. 13, 15-16. This appeal followed.

SUMMARY OF THE ARGUMENT

I. The appellant's claims are barred by sovereign immunity. His arguments focus principally on issues which are not in dispute: that his suit is for specific performance of a contract, which he alleges the NHDOC has breached, and that plaintiffs suing the State for claims based on breach of contract do so under RSA 491:8. The legislature, however, has not consented to suit against the State and its agencies for breach-of-contract claims seeking equitable remedies like specific performance. In enacting RSA 491:8, the legislature provided for a limited waiver of immunity for actions in contract against the State, which this Court held in *Wiseman v. State*, 98 N.H. 393 (1953), applies only to suits for monetary damages. Federal courts interpreting the Tucker Act, RSA 491:8's federal equivalent, have reached the same conclusion. This Court relies on Tucker Act cases when analyzing the scope of RSA 491:8; those federal cases thus support the conclusion that the appellant's claims are barred.

State-agency action cannot confer subject matter jurisdiction on the courts where none exists in statute. The appellant has not identified another applicable statute which waives sovereign immunity. Without that waiver, the superior court does not have subject matter jurisdiction over his specific performance claims, and those claims cannot be adjudicated. Subject matter jurisdiction and sovereign immunity are two sides of the same coin. As this Court made clear in *Laroche v. Doe*, 134 N.H. 562 (1991), and *Lorenz v. New Hampshire Admin. Office of the Courts*, 152 N.H. 632 (2005), neither can be undermined by waiver or estoppel. The appellant's reliance on *New Hampshire v. Maine*, 532 U.S. 742 (2001), and *Kelleher v. Marvin Lumber*

& Cedar Co., 152 N.H. 813, 848 (2005) is unavailing, since neither concerns litigation by a private party against the sovereign.

This Court should reject the appellant's fraud claims because they are insufficiently developed and constitute separate causes of action that have not been pled in this case. Further, the appellant's constitutional argument is not developed and may be rejected on that basis. Alternatively, since he may file a new civil rights action under 42 U.S.C. § 1983 to vindicate his claims of constitutional harm, the application of RSA 491:8 to bar his suit in contract is not unconstitutional.

II. The trial court correctly determined that the appellant did not have standing to bring this case. The appellant does not allege injury to himself, instead speculating that the conditions he describes harm all prison inmates generally, and he seeks specific performance, which RSA 491:8 precludes, for their benefit. As a result, the appellant has not alleged a legal injury which the law was designed to protect. In addition, the appellant does not have the right to represent the interests of the class of inmates who are third-party beneficiaries to the Laaman Settlement Agreement, on which the appellant's claims are premised. For these reasons, the appellant does not have standing to bring suit in this case.

ARGUMENT

I. Sovereign Immunity Divests The Superior Court Of Jurisdiction And Bars The Appellant's Claims.

The appellant and the New Hampshire Department of Corrections are parties to a settlement agreement that arose out of a consent decree entered in a class-action lawsuit filed against the prison in the federal district court over 40 years ago. As explained above, the agreement consists of a series of documents known collectively as the Laaman Settlement Agreement.

In July 2018, the appellant filed a "Petition for Enforcement of a Settlement Agreement" in the Merrimack Superior Court, in which he alleged that NHDOC had failed to comply with certain provisions of the agreement. App. 17. He asked the court to order the State to undertake a number of corrective actions to address the alleged failures. App. 43-44. The superior court (*Ruoff*, J.) found that the appellant's complaint asserted a breach-of-contract claim and sought only equitable relief, not money damages. App. 12-13. Agreeing with the State that RSA 491:8 waived immunity only for suit in contract seeking monetary damages, the court concluded that it lacked subject matter jurisdiction over the appellant's claims, and dismissed them. App. 13.

This appeal requires this Court to determine whether sovereign immunity bars the appellant's claims. Sovereign immunity is a jurisdictional question subject to *de novo* review. *Conrad v. New Hampshire Dep't of Safety*, 167 N.H. 59, 70 (2014); *cf. Robinson v. N.H. Real Estate Comm'n*, 157 N.H. 729, 731, 958 A.2d 958 (2008) (jurisdictional challenge turning on statutory interpretation was question of

law subject to *de novo* review). Because the relevant facts are not in dispute and the law supports the trial court's conclusion, this Court should affirm.

A. Breach-of-Contract Claims Against The State May Only Be Brought Under RSA 491:8, But Then Only For Money Damages.

"It is axiomatic that the State is not subject to suit without its consent." *Wiseman v. State*, 98 N.H. 393, 395 (1953). "In New Hampshire courts, a state agency is immune from suit unless there is an applicable statute waiving the State's sovereign immunity." *Clark v. New Hampshire Dep't of Employment Sec.*, 171 N.H. 639, 658-59 (2019). "Any statutory waiver is limited to that which is articulated by the legislature." *Id.* (citation omitted). "[T]hus, New Hampshire courts lack subject matter jurisdiction over an action against the State unless the legislature has prescribed the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted." *Id.* (citation omitted); *see also John H. v. Brunelle*, 127 N.H. 40, 43 (1985) ("A waiver of sovereign immunity must be accomplished by legislative action.").

"The doctrine of sovereign immunity is deeply entrenched in this jurisdiction." *Conrad*, 167 N.H. at 78 (citation omitted). "Sovereign immunity rested on a common law basis until the enactment in 1978 of RSA chapter 99–D, which adopted sovereign immunity 'as the law of the state,' except where a statute might provide an exception." *Lorenz v. New Hampshire Admin. Office of the Courts*, 152 N.H. 632, 634 (2005), *as modified* (Feb. 16, 2006). In breach-of-contract cases, RSA 491:8 partially abrogates the State's sovereign immunity by conferring the superior court

with jurisdiction to decide contract claims against the State. *Morgenroth & Assocs., Inc. v. Town of Tilton*, 121 N.H. 511, 514-16 (1981). The statute provides:

> The superior court shall have jurisdiction to enter judgment against the state of New Hampshire founded upon any express or implied contract with the state. Any action brought under this section shall be instituted by bill of complaint and shall be tried by the court without a jury. The jurisdiction conferred upon the superior court by this section includes any set-off, claim or demand whatever on the part of the state against any plaintiff commencing an action under this section. The attorney general, upon the presentation of a claim founded upon a judgment against the state, shall submit the claim to the department or agency which entered into the contract, and said department or agency shall manifest said claim for payment from the appropriation under which the contract was entered into; provided, that if there is not sufficient balance in said appropriation, the attorney general shall present said claim to the general court for the requisite appropriation.

The Laaman Settlement Agreement is a contract. *See, e.g. Poland v. Twomey*, 156 N.H. 412, 414 (2007) ("Settlement agreements are contractual in nature and, therefore, are generally governed by principles of contract law."). The appellant's complaint alleged that the State had failed to comply with its obligations under the agreement, and he sought specific performance of its terms. Thus, his suit against the State was one for breach of contract. The applicable statute waiving the State's sovereign immunity for such an action is RSA 491:8. *See, e.g.*, *Chase Home for Children v. New Hampshire Div. for Children, Youth & Families*, 162 N.H. 720, 731 (2011) ("The clear intent of RSA 491:8 is to grant a right to sue the State for breach of contract.").

That waiver, however, is limited. In *Lorenz* and *Wiseman*, this Court held that RSA 491:8's immunity waiver extends only to suits against the State seeking money damages, and accordingly affirmed the dismissal of actions seeking other types of relief. *See Lorenz*, 152 N.H. at 635 ("As the trial court recognized in this case, '[t]he appropriate remedy ... is by way of an action for damages for breach of contract.' The plaintiffs, however, have not brought a suit seeking money damages for breach of contract and, therefore, the case does not fall within the limited waiver of immunity established by RSA 491:8."); *Wiseman*, 98 N.H. at 397 (breach of contract claim against state agency which did not seek money damages was properly dismissed as barred by the precursor to RSA 491:8). This limitation makes sense as a matter of policy, since, in the absence of a claim of constitutional harm,

> it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. … [T]he interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief.

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949) (holding that sovereign immunity barred suit against a government agency

for specific performance of contract terms (citation and internal quotation marks omitted)).

Wiseman concerned a Portsmouth property owner's conveyance of some of his land to the State. *Wiseman*, 98 N.H. at 394. The landowner retained nearby property, and his conveyance was made in consideration of the State's promise to construct improvements benefitting that property. *Id.* The conveyance terminated the landowner's right of access to a certain thoroughfare, but the State agreed, amongst other things, to build a new access road. *Id.* The landowner's heirs later sued, alleging that the State had breached its agreement to construct the road, obstructed their access to the thoroughfare, and failed to make good on other promises. *Id.* The heirs brought the suit in equity, seeking rescission of the landowner's release of his right to access the thoroughfare and enjoining the State from interfering with their use of it. *Id.*

Analyzing the language of Laws 1951, c. 243—the predecessor to RSA 491:8, *see XTL-NH, Inc. v. New Hampshire State Liquor Comm'n*, 170 N.H. 653, 657 (2018)—this Court found that the statute limited consent-to-suit for recovery in damages. *Wiseman*, 98 N.H. at 397. This Court based that conclusion on three grounds: first, the statute contained no reference to redress in equity; second, the statute referred explicitly to money payments for judgments against the State; and third, the statute had a federal equivalent, the Tucker Act (28 U.S.C. § 1346(a)(2)), which had been interpreted to limit relief to suits seeking money damages for breach of contract and had been relied on by proponents of the New Hampshire statute prior to its adoption in 1951. *Id.* Since the heirs sought only equitable and not monetary relief, this Court affirmed the trial court's

dismissal of their suit on jurisdictional grounds. *Id.* at 395, 398 ("[S]ince the State has given no consent to this action against it, the action may not be maintained.").

Wiseman was not the last time this Court relied on federal analysis of the Tucker Act to inform its determination of the degree to which sovereign immunity is abrogated by RSA 491:8. It did so again in *XTL-NH,* where, examining the scope of RSA 491:8, it found persuasive federal cases excluding promissory estoppel claims from Tucker Act jurisdiction. *XTL-NH*, 170 N.H. at 658.

The Tucker Act, like RSA 491:8 concerning contract claims against the State, exposes the United States to liability for claims founded "upon any express or implied contract with the United States…." 28 U.S.C. § 1346(a)(2). Plaintiffs suing the United States for claims based on breach of contract—including those based on settlement agreements—do so under the Act. *See, e.g.*, *Miami Tribe of Oklahoma v. United States*, 198 F. App'x 686, 691 (10th Cir. 2006) (unpublished). The federal courts have long construed the Tucker Act, enacted by Congress 1887, "as authorizing only actions for money judgments and not suits for equitable relief against the United States." *Bowen v. Massachusetts*, 487 U.S. 879, 914 (1988) (citing *United States v. Jones*, 131 U.S. 1 (1889)); *see also Richardson v. Morris*, 409 U.S. 464, 465 (1973) (*per curiam*) (same); *Lee v. Thornton*, 420 U.S. 139, 140 (1975) (*per curiam*) ("The Tucker Act empowers district courts to award damages but not to grant injunctive or declaratory relief."). The result is that federal courts hold that specific performance of settlement agreements with United States are barred by the Tucker Act's limited waiver of sovereign immunity. *See, e.g., Presidential Gardens Assocs. v.*

U.S. ex rel. Sec'y of Hous. & Urban Dev., 175 F.3d 132, 143 (2d Cir. 1999) (plaintiffs' claims seeking specific performance of their settlement agreement with the United States were barred under the Tucker Act); *Miami Tribe of Oklahoma*, 198 F. App'x at 691 (in suit for breach of a settlement agreement, the Tucker Act deprives the court of jurisdiction to compel specific performance); *Foxworth v. United States*, No. 3:10-CV-317, at *4 (E.D. Va. Oct. 6, 2010) (unpublished) (specific performance of settlement agreements is not a remedy available in Tucker Act claims).[2]

In his brief, the appellant relies on several cases which do not address the issues in dispute in this case. He cites *Poland v. Twomey*, 156 N.H. 412 (2007), for the proposition that "specific performance is an adequate remedy when one party is in breach of a settlement agreement." AB 7, 9. That case is substantively inapposite because it involved a contract dispute between private parties—not, as here, a suit against the sovereign. The appellant also claims that *State v. Brosseau*, 124 N.H. 184 (1983), means that the State has waived immunity under statutes which guaranteed certain civilly committed patients "a right to adequate and humane treatment." AB 11. But *Brosseau* dealt with the interpretation of RSA 135-B:43—since repealed—and RSA 171-A:13 (Supp. 1981), two statutes which "grante[d] to civilly committed mentally ill patients and 'developmentally impaired clients' of State mental health facilities 'a right

[2] Note that 28 U.S.C. § 1491, the Tucker Act statute conferring jurisdiction on the United States Court of Federal Claims, contains "strictly limited exceptions" to the rule that the Tucker Act precludes "equitable relief such as specific performance." *Ruttenberg v. United States*, 65 Fed. Cl. 43, 50 (Fed. Cir. 2005). Those exceptions, which are not relevant there, are found in 28 U.S.C. § 1491(b)(2), which permits the Court of Federal Claims to grant declaratory and injunctive relief in actions regarding government bid solicitations. *See Ruttenberg*, 65 Fed.Cl. at 50.

to adequate and humane treatment.'" *Brosseau*, 124 N.H. at 190. Those statutes have no bearing on the appellant's confinement or his claims, and *Brosseau* in any event held that the statutes impliedly waived sovereign immunity for suit against the State for *damages*, *see id.*, which the appellant does not seek.

Further, *Brosseau's* implicit-waiver analysis has no place here, since as already discussed, RSA 491:8 contains an *explicit* waiver of sovereign immunity for breach-of-contract suits. For the same reason, the appellant's reliance on *Pan-Am Tobacco Corp. v. Dep't of Corr.*, 471 So. 2d 4 (Fla. 1984) is misplaced. *See* AB13. That case involved a vendor's contract with a state agency to provide vending machines in several correctional facilities. *Pam-Am Tobacco Corp.*, 471 So.2d at 4-5. The contract, which the agency allegedly breached, provided for liquidated damages. *Id.* A Florida statute explicitly waived sovereign immunity in tort, but the state had no analogous law in contract. *Id.* at 5. Nonetheless, the Florida Supreme Court held that where the state has entered into a contract that is authorized by statute, the legislature does not intend immunity from suit for breach. *Id.* In New Hampshire, RSA 491:8 obviates that implicit-waiver analysis.

Nor does *Chase Home* advance the appellant's cause. *See* AB 11-12. That case held that RSA 491:8 "specifically authorized the courts to enter a monetary judgment against the State when it breaches a contract," *Chase Home,* 162 N.H. at 733, a general proposition with which the NHDOC does not disagree. The cases cited by the appellant incident to his discussion of *Chase Home*, all of which are cited in that opinion, suffer from the same inconsequence. *See* AB 11-12.

This Court strictly construes legislative consent to suit. *Chase Home*, 162 N.H. at 730; *Pub. Serv. Co. of N.H. v. State*, 102 N.H. 54, 56 (1959). The appellant does not dispute that his is a suit for breach of contract seeking not damages but specific performance of the contract terms. *See, e.g.*, AB 7-10 (advocating for specific performance of the settlement agreement); AB 9 (suggesting that the case is one for "breach of contract"); AB 10 (asserting that the settlement agreement is "an express contract"). RSA 491:8 is an explicit legislative waiver of sovereign immunity for suit in contract for money damages only. Because the appellant has identified no other statutory avenue by which to pursue his contractual specific performance claims, they are barred by sovereign immunity.

B. Because Sovereign Immunity Cannot Be Undermined by Waiver Or Estoppel, The Appellant's Estoppel Claims Fail As A Matter of Law.

The appellant argues that the State is "prohibited from raising sovereign immunity as a defense because [it] is prohibited from doing so under the principles of judicial and/or equitable estoppel." AB 3. In essence, his argument is that because in 2001 the NHDOC entered into the settlement agreement, in lieu of seeking absolute termination of the Laaman consent decree, the NHDOC is prohibited from raising immunity as a defense thereafter. *See* AB 5-6.

As a preliminary matter, the appellant did not raise his equitable estoppel claim in the superior court. It is not preserved, and should not be considered. *State v. Edic*, 169 N.H. 580, 583 (2017) (this Court will decline to review issues which are not raised in the trial court and are thus not

preserved). Further, the appellant has made no attempt to develop this claim on appeal, and this Court should reject it for that reason too. *State v. Blackmer*, 149 N.H. 47, 49 (2003) (appellate review is confined to those issues which the appellant has fully briefed).[3]

Neither the State nor the trial court addressed the appellant's judicial or equitable estoppel claims. Those claims are unavailing as a matter of law, however, and this Court must therefore reject them. As already discussed, only the legislature can waive sovereign immunity; state-agency action cannot confer subject matter jurisdiction on the courts where none exists in statute, and sovereign immunity may not be undermined by estoppel.

This Court made this clear in *Laroche v. Doe*, 134 N.H. 562 (1991), and *Lorenz*, decided in 2005. The plaintiff in *Laroche* brought a wrongful death action against the State, alleging that a state liquor store had sold alcohol to the intoxicated 17-year-old driver who killed the plaintiff's intestate. *Laroche*, 134 N.H. at 564. In response, the State asserted general defenses to the claims but did not defend on sovereign immunity grounds. *Id.* at 565. It finally did so just before trial, more than 20 months after the

[3] In any event, the doctrine is inapplicable on these facts. To establish a claim for equitable estoppel, the appellant would have to show, concerning the 2001 settlement agreement, that the State made a representation or concealment of material facts, the truth of which the inmates did not know. *See Cardinal Dev. Corp. v. Town of Winchester Zoning Bd. of Adjustment*, 157 N.H. 710, 715-16 (2008). At the time of the agreement, the appellant was represented by counsel, *see* App. 219, and as evidenced above, the law of sovereign immunity in the contract context was well-established as far back as *Wiseman*. The appellant was thus "bound to take notice of the limits of the [State's] authority," *Alexandropoulos v. State*, 103 N.H. 456, 458 (1961); the suggestion that he *failed* to do so cannot support an equitable estoppel claim.

plaintiff filed suit. *Id.* The trial court dismissed the plaintiff's complaint on grounds that the court did not have jurisdiction over his claims. *Id.* at 566.

On appeal, the plaintiff argued that the State had waived sovereign immunity when it failed to timely assert that defense. *Id.* This Court disagreed: Reaffirming that "the State's sovereign immunity may be waived only by the legislature," this Court held that "[s]overeign immunity is a jurisdictional question not to be waived by conduct or undermined by estoppel," and "is not a defense which must be affirmatively pled." *Id.* at 567 (citation and internal quotation marks omitted). Thus, the Court found, "[n]either improvident procedural choices, nor the tardiness of the State's attorney in raising sovereign immunity can be a proper basis for finding that immunity [is] waived." *Id.* at 567. The timing of the State's assertion of the issue "had no effect as a waiver of the State's basic immunity from suit." *Id.* at 568.

The *Lorenz* plaintiffs were judicial branch employees who brought suit against the New Hampshire Administrative Office of the Courts and the New Hampshire Supreme Court for specific performance of an alleged oral contract for continued employment. *Lorenz*, 152 N.H. at 633-34. The State did not raise sovereign immunity, and the superior court rejected the plaintiffs' claims on substantive grounds. *Id.* at 634. On appeal, this Court raised the issue of sovereign immunity. *Id.* at 634. After supplemental briefing on the issue, this Court, relying in large part on *Laroche*, concluded that it could not reach the merits of the plaintiffs' claims because they were barred by sovereign immunity. *Id.* Pursuant to that immunity, this Court held, "neither the superior court nor … [the supreme] court is vested

with subject matter jurisdiction." *Id.* This Court dismissed the plaintiffs' case. *Id.*

Federal cases are in accord with the principle that sovereign immunity cannot be waived or estopped. *See, e.g.*, *United States v. U. S. Fid. & Guar. Co.*, 309 U.S. 506, 513-14 (1940) (sovereign immunity may not be waived by the government's failure to object to jurisdiction; thus, a judgment is afforded no res judicata effect if the claim should have been dismissed on sovereign immunity grounds); *Wooten v. United States*, 825 F.2d 1039, 1045–46 (6th Cir. 1987) ("Absent a waiver of sovereign immunity by the United States, a court cannot apply the doctrine of judicial estoppel."); *Peacock v. United States*, 597 F.3d 654, 660 (5th Cir. 2010) ("[The United States may not be subject to estoppel as to matters that would establish jurisdiction in a suit to which the Government has not consented."); *Presidential Gardens Assocs.*, 175 F.3d at 140 (consent to jurisdiction does not waive sovereign immunity); *Metro. Sanitary Dist. of Greater Chicago v. U.S. Dep't of Navy*, 722 F. Supp. 1565, 1568 (N.D. Ill. 1989), *on reconsideration in part sub nom. Metro. Sanitary Dist. of Greater Chicago v. United States*, 737 F. Supp. 51 (N.D. Ill. 1990) ("The [plaintiff's] assertions of waiver and/or estoppel do nothing to combat the government's claim of sovereign immunity. Only an Act of Congress can validly waive the sovereign immunity of the United States.").

Thus, the language of the 2001 Laaman Settlement Agreement does not serve to confer jurisdiction on the superior court. The agreement provided that "[u]pon approval of the stipulation for dismissal, the [Laaman] Consent Decree …, as modified by this agreement, shall constitute a settlement agreement enforceable by the courts of the State of

New Hampshire." App. 212. The clause is essentially a forum-selection clause, which brings with it all of the benefits and disabilities of the chosen forum. In *Presidential Gardens*, a Tucker Act case on point, similar language in a settlement agreement was held not to disturb the government's immunity from suit.

The plaintiff housing builders in *Presidential Gardens* had entered into a settlement agreement with the U.S. Department of Housing and Urban Development (HUD). *Presidential Gardens*, 175 F.3d at 137. The agreement contained a "jurisdictional provision," which asserted that "[t]he parties … understand that the [Connecticut District Court] will retain jurisdiction to enforce the terms of this Agreement." *Id.*

Two years after the district court approved the settlement agreement, the plaintiffs filed suit in the Massachusetts District Court, alleging that HUD had breached the agreement. *Id.* at 137-38. Among other remedies in addition to damages, the plaintiffs sought declaratory relief and an injunction. *Id.* at 138. HUD moved to dismiss, or, relying on the settlement agreement's jurisdictional provision, transfer to the Connecticut District Court. *Id.* The Massachusetts District Court denied HUD's motion to dismiss but granted its request for a transfer of venue, noting that "[i]n signing the Settlement Agreement, the parties consented to the jurisdiction of the Connecticut District Court." *Id.* In the Connecticut District Court, HUD moved to dismiss the plaintiffs' equitable-relief claims on the grounds that they had not specified an appropriate waiver of immunity by the United States, and thus that the court lacked jurisdiction to adjudicate those claims. *Id.* The court granted HUD's motion, holding that the Tucker Act did not apply to claims for equitable relief. *Id.*

On appeal, the plaintiffs argued that the jurisdictional provision of the settlement agreement constituted a waiver of sovereign immunity. *Id.* at 139. The appellate court made short work of that argument, noting that "it is a well-settled principle that the federal government's sovereign immunity may only be waived by Congressional enactment, and that no contracting officer or other official is empowered to consent to suit against the United States." *Id.* at 140 (citation and internal quotation marks omitted). Further, with regard to the plaintiffs' complaint about the timing of which the United States raised sovereign immunity, the court held:

> nothing about the Government's actions in this litigation constitutes a forfeiture of the right to raise sovereign immunity as a defense. … [A] sovereign's consent to suit via Congressional enactment is a prerequisite for subject-matter jurisdiction. An argument that subject-matter jurisdiction is lacking may be raised at any time, by any party, or even sua sponte by the court. Therefore, the Government's past failure to raise the defense of sovereign immunity in no way prevents this Court from considering the issue now.

Id.

These cases leave no doubt that the appellant cannot prevail on his waiver and estoppel claims. Still, he argues that the failure to apply judicial estoppel here would violate the principles of *New Hampshire v. Maine*, 532 U.S. 742 (2001), and *Kelleher v. Marvin Lumber & Cedar Co.*, 152 N.H. 813, 848 (2005). AB 3, 6. The appellant relies on those cases, though, for the uncontroversial propositions that the doctrine of judicial estoppel exists and New Hampshire has adopted it. AB 3. Both are inapposite because neither involves litigation by a private party against the sovereign.

New Hampshire concerned this state's Unites States Supreme Court litigation with Maine over the location of the Piscataqua River boundary between the states. *New Hampshire*, 532 U.S. at 745-46. In the midst of litigation over the boundary in the 1970s, the states proposed a consent decree in which they agreed to a specific definition of the descriptive language that had defined the boundary since 1740. *Id.* at 747. The Supreme Court accepted the consent decree, entering it in 1977. *Id.*

In 2000, New Hampshire brought suit against Maine, this time asserting a more favorable definition of the boundary language. *Id.* at 751, 754. The Court, agreeing with Maine, held that judicial estoppel operated to prohibit New Hampshire's suit. *Id.* at 755. The Court rejected New Hampshire's position that the doctrine of estoppel is not ordinarily applied to the states, finding the argument inapplicable in "a case between two States, in which each owes the other a full measure of respect." *Id.* at 756. Because *New Hampshire* involves litigation between two sovereigns litigating in the United States Supreme Court, it does not aid the appellant's argument.

Nor does *Kelleher*, which involved a lawsuit by a homeowner against a window manufacturer, seeking damages related to its defective products. *Kelleher*, 152 N.H. at 820-21. In *Kelleher*, this Court adopted the doctrine of equitable estoppel, affirming the trial court's application of that doctrine to preclude the window maker from admitting certain evidence at trial. *Id.* at 847-49. *Kelleher* does not concern litigation against the State and sovereign immunity, and its embrace of equitable estoppel consequently has no application here.

The foregoing demonstrates that sovereign immunity may not be waived or estopped. It may be asserted at any time, just as the concomitant issue of a court's lack of subject matter jurisdiction may be. *See Hemenway v. Hemenway*, 159 N.H. 680, 684 (2010) ("A party may challenge subject matter jurisdiction at any time during the proceeding, including on appeal, and may not waive it." (Citation and internal quotation marks omitted.)). The trial court therefore correctly held that sovereign immunity bars the appellant's claims.

C. The Appellant's Fraud Claims Are Unavailing.

The appellant also contends that the State engaged in promissory fraud and fraud on the federal and state courts when it entered into the 2001 Laaman Settlement Agreement. AB 19-22. He asserts that "[t]here was no mention in April 2001 of sovereign immunity," AB 20, and says that this shows the State "committed promissory fraud by agreeing to honor the terms of the settlement agreement, knowing [it] would not keep [its] promise[s]…, simply by raising the defense of sovereign immunity." AB 19-20. The appellant argues that the State committed fraud on the federal court by "not informing the federal district court before [the court] relinquished federal jurisdiction over the Consent Decree, that [the State] … would raise sovereign immunity as a defense …." AB 21. He does not specify a theory of fraud on the New Hampshire courts.

In the trial court, the appellant raised these claims not in his July 2018 petition, in which he identified his cause of action, but in a November 2018 objection to a responsive pleading of the State's. *See* App. 293-95.

The State did not respond to that objection, and the trial court did not address the fraud claims in its order. *See* App. 11-16.

It is unclear what the appellant hopes to accomplish with these claims. If his "promissory fraud" claim is an attempt to establish a claim for "promissory estoppel," it is barred by sovereign immunity. *XTL-NH*, 170 N.H. at 659 ("[W]e decline to conclude that a claim against the State based upon promissory estoppel falls within the limited waiver of sovereign immunity set forth in RSA 491:8."). If his fraud claims are separate legal theories or causes of action for which he seeks relief other than specific performance of the settlement agreement, they have not been pled.

Regardless, the appellant's fraud claims give this Court no cause for reversal. First, the appellant has provided no authority for his promissory fraud argument, and this Court should reject it for that reason. *Blackmer*, 149 N.H. at 49; *Skinny Pancake-Hanover, LLC v. Crotix*, No. 2018-0648, slip op. at 8 (N.H. July 11, 2019) ("Complaints about adverse rulings without developed legal argument are insufficient to warrant appellate review."). Similarly, he does not say how the 2001 Laaman Settlement Agreement constituted a fraud on the New Hampshire courts, and so that argument also should not be considered. *Blackmer*, 149 N.H. at 49; *Skinny Pancake-Hanover*, slip op. at 8.

Second, the appellant's fraud claims appear, at best, to constitute causes of action distinct from the contract claim made in his petition. The trial court found, and a review of the appellant's extensive complaint reveals, that the appellant's claims in this case were for breach of contract, for which he sought specific performance. App. 12-13. The appellant does not dispute this. Yet, his promissory fraud claim sounds in tort, *see*, *e.g.,*

Munson v. Raudonis, 118 N.H. 474, 477 (1978) (claim of deceit in connection with a contract describes an intentional tort), and his court-related fraud claim asked the superior court, and asks this Court, "to vitiate the settlement agreement." App. 295; AB 21. Setting aside the want of recourse for the appellant should a New Hampshire court declare the settlement agreement a nullity—since the superior court could not reinstitute the federal *Laaman* suit—these claims suggest causes of action and relief distinct from the appellant's breach-of-contract claim.

The law gives the appellant no right to introduce entirely new causes of action through an objection to a motion to dismiss. *Cf.* RSA 514:9; *Dent v. Exeter Hosp*., 155 N.H. 787, 796 (2007) ("Under RSA 514:9, liberal amendment of pleadings is permitted unless the changes would surprise the opposing party, introduce an entirely new cause of action, or call for substantially different evidence."). It was thus not error for the trial court not to consider the appellant's allegations of fraud in ruling on the NHDOC's motion to dismiss. *Cf. Pesaturo v. Kinne*, 161 N.H. 550, 556 (2011) ("A substantive amendment that introduces an entirely new cause of action, or calls for substantially different evidence, may be properly denied.").

Third, this Court should affirm because even if the appellant's fraud claims were properly raised for the trial court's consideration, he failed to plead them with specificity. This Court will not credit a plaintiff's allegations that are not well-pleaded, "including the statement of conclusions of fact and principles of law." *ERG, Inc. v. Barnes*, 137 N.H. 186, 190 (1993). The Court "will uphold the granting of the motion to

dismiss if the facts pled do not constitute a basis for legal relief." *Beane v. Dana S. Beane & Co., P.C.*, 160 N.H. 708, 711 (2010).

It is unlikely that the appellant could rely on the State's invocation of sovereign immunity in 2018 to demonstrate fraudulent intent in 2001. *See, e.g., Tessier v. Rockefeller*, 162 N.H. 324, 332 (2011) ("The tort of intentional misrepresentation, or fraud, must be proved by showing that the representation was made with knowledge of its falsity or with conscious indifference to its truth and with the intention of causing another person to rely on the representation."); *Studwell v. Travelers Ins. Co*., 121 N.H. 1090, 1091 (1981) ("To prevail in an action for misrepresentation, fraud or deceit, the plaintiffs must prove that there was a misrepresentation of fact. The plaintiffs have the burden of proving fraud by clear and convincing proof." (Citations and internal quotations omitted.)). This is particularly so given, as previously noted, that the law on sovereign immunity and contract claims was clear in 2001, and the appellant was represented by counsel.

Regardless, reference to the purported tension between the fact of the 2001 settlement agreement and the State's 2018 sovereign-immunity defense is insufficient to establish a claim for fraud. "When alleging fraud, to withstand a motion to dismiss, the plaintiff must specify the essential details of the fraud, and specifically allege the facts of the defendant's fraudulent actions. It is not sufficient for the plaintiff merely to allege fraud in general terms." *Lamprey v. Britton Const., Inc.*, 163 N.H. 252, 262-63 (2012) (Citation and internal quotation marks omitted.)); *see also Tessier*, 162 N.H. at 332 (stating that fraud must be pleaded with specificity); *Mountain Springs Water Co. v. Mountain Lakes Vill. Dist.*, 126 N.H. 199, 201 (1985) (To survive a motion to dismiss, "[t]he plaintiff must … plead

sufficient facts to form a basis for the cause of action asserted."). Nor is it enough to allege mere breach of an agreement. *Munson*, 118 N.H. at 477. The appellant failed to recite his allegations with the specificity required for fraud. For this reason too, this Court should find that the trial court sustainably exercised its discretion in dismissing the plaintiff's case.

D. The Application of RSA 491:8 In The Appellant's Case Is Not Unconstitutional.

The appellant contends that the bar posed to his suit by RSA 491:8 is unconstitutional because it denies him due process of law, violates his right to equal protection under the law, and infringes on his right of access to the courts. AB 23. He asserts that "applying the State's immunity statutes against him … denies him due process of law by depriving him of any remedy to enforce the terms and provisions of the settlement agreement," AB 23, and argues that interpreting the statute to permit suit in contract only for damages "would only allow citizens of the State to seek enforcement of settlement agreements and/or contracts when asking for money and deny all others who do not seek money." AB 24. The appellant cites Part 1, Articles 1, 10, 12, and 14 of the New Hampshire Constitution, but fails to explain how those provisions are implicated and provides no authority for his claims.

"[O]ff-hand invocations of the State Constitution" that "are supported neither by argument nor by authority … warrant[] no extended consideration," *Keenan v. Fearon*, 130 N.H. 494, 499 (1988). Undeveloped constitutional claims are considered waived. *State v. Chick*, 141 N.H. 503, 504, 688 A.2d 553 (1996) ("In this case, passing reference to "due

process," without more, is not a substitute for valid constitutional argument."). Because the appellant has not developed his arguments, this Court should decline to review them.

Even if the Court does consider the appellant's constitutional claims, however, it should reject them. Sovereign immunity, while the exclusive province of our legislature, is "subject to certain constitutional constraints." *LaRoche*, 134 N.H. at 567. But, as relevant here, RSA 491:8 bars suit against the State only in contract for equitable remedies. It does not bar claims of constitutional wrong. *Cf. New Hampshire Water Res. Bd. v. Pera*, 108 N.H. 18, 18–20 (1967) ("[T]he doctrine of sovereign immunity does not apply to eminent domain proceedings because the constitutional requirement of 'just compensation' is self-executing and not dependent upon waiver of immunity.").

Thus, the appellant's suggestion that he has no other avenue to pursue his claims does not have merit. *See* AB 6. His primary complaint is that certain prison conditions are unconstitutional, and thus warrant appraisal and remedial action. To seek vindication of those claims, he may file a civil rights action under 42 U.S.C. § 1983 in the state or federal courts, if he can establish his standing to do so. *See, e.g.*, 42 U.S.C. § 1983 (establishing a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws' of the United States"); *Royer v. Adams*, 121 N.H. 1024, 1026 (1981) (jurisdiction to hear § 1983 suit also lies in State court).

That litigation would enable necessary judicial review, on constitutional grounds, of conditions-of-confinement claims first litigated in the 1970s, some of which may be antiquated or moot. This was the course

of action contemplated by the First Circuit Court of Appeals in this matter in 2001. That court observed then that if the federal district court were to determine after a hearing that an ongoing violation of the Laaman Consent Decree existed, "it should not be assumed that the district court is then automatically required to alter the consent decree and make the statutory findings that would permit the decree to continue." *Laaman*, 238 F.3d at 20. Instead, an evidentiary hearing might show that "few or limited violations … [which] could more appropriately be rendered by terminating the present case and allowing an individual to press a new suit in which a fresh decree could be addressed directly to those issues." *Id.*

"[I]n the absence of a claim of constitutional limitation, the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs the possible disadvantage to the citizen of being relegated to the recovery of money damages." *Larson*, 337 U.S. at 704. Subject to the standing considerations addressed below, the appellant may seek judicial review of conditions-of-confinement claims in a new suit. No litigant is absolutely barred from seeking judicial redress for allegations of constitutional harm. The limited waiver of immunity conferred by RSA 491:8 is therefore not unconstitutional as applied to the appellant's claims.

II. The Appellant Lacks Standing To Bring Suit Because His Claims Are Not Capable Of Judicial Redress And He Cannot Advance Claims Of Injury Which Are Not Personal To Him.

In the trial court, the NHDOC challenged the appellant's standing to bring suit. App. 83-86. The NHDOC argued that his complaint asserted "a series of generalized grievances that appear to be applicable to other inmates … that allege no personal, concrete harm or injury to the [appellant] himself." App. 84. The NHDOC also asserted that the settlement agreement permitted only the "named plaintiffs and their counsel"—that is, not any single, *pro se* class-member inmate—to file suit to enforce its terms. App. 87. Finally, the NHDOC posited that since the appellant sought only specific performance, a remedy barred by sovereign immunity, he lacked standing to maintain his suit because his claims were not amenable to judicial redress. App. 283-84. In response, the appellant maintained that the NHDOC's alleged breach of the settlement agreement caused him legal injury entitling him to suit for specific performance. App. 263-64.

The trial court agreed with the NHDOC. It found that "[w]hile [the appellant] has sufficiently alleged that a contract, to which he is a party, has been breached, he has failed to articulate how any breach has injured him personally." App. 14. In the absence of any allegation of personal harm, the court concluded that the appellant lacked standing to bring an action against the NHDOC. App. 15.

This Court should affirm. "Generally, in ruling upon a motion to dismiss, the trial court must determine whether the allegations contained in the plaintiff's pleading sufficiently establish a basis upon which relief may

be granted." *Atwater v. Town of Plainfield*, 160 N.H. 503, 507 (2010) (citation omitted). "[W]hen the motion to dismiss does not challenge the sufficiency of the plaintiff's legal claim but, instead, raises certain defenses, the trial court must look beyond the plaintiff's unsubstantiated allegations and determine, based on the facts, whether the plaintiff has sufficiently demonstrated his right to claim relief." *Id.* at 507 (citation omitted). A jurisdictional challenge based upon lack of standing is one such defense. *See Ossipee Auto Parts v. Ossipee Planning Board*, 134 N.H. 401, 403–04 (1991). When the underlying facts are not in dispute, this Court reviews the trial court's determination *de novo*. *Johnson v. Town of Wolfeboro Planning Bd*., 157 N.H. 94, 96 (2008).

"In evaluating whether a party has standing to sue, [this Court] focuses on whether the party suffered a legal injury against which the law was designed to protect." *Asmussen v. Comm'r, New Hampshire Dep't of Safety*, 145 N.H. 578, 587 (2000) (citation and internal brackets omitted). "[S]tanding under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another … with regard to an actual, not hypothetical, dispute … which is capable of judicial redress." *Duncan v. State*, 166 N.H. 630, 642-43 (2014) (citations omitted). "In this way, … the State Constitution, in practical effect, limits the judicial role, consistent with a system of separated powers, to addressing those matters that 'are traditionally thought to be capable of resolution through the judicial process.'" *Id.* (citing *Valley Forge College v. Americans United*, 454 U.S. 464, 472 (1982)).

Here, the appellant does not allege injury to himself; instead, he speculates that the conditions he describes harm all NHSP inmates. *See,*

e.g. App. 20 (appellant alleges that the prison ventilation system is inadequate, which he claims causes the inmates to breath "noxious and/or unhealthy air," which he theorizes "causes … illnesses to exacerbate and increase"). And he seeks not damages, but specific performance, which RSA 491:8 bars. He has thus brought a suit which is not capable of resolution through the courts. Consequently, he does not have standing to maintain it. *See Duncan*, 166 N.H. at 642-43; *Asmussen*, 145 N.H. at 587.

Further, the appellant does not have standing because he does not have the right to represent the interests of the class of Laaman inmates who were subject to the Laaman Decree and are third-party beneficiaries to the Laaman Settlement Agreement. Those inmates, if injured, are capable of bringing their own claims to court. In New Hampshire, litigants generally cannot advance the rights of third-parties not before the court. *See, e.g.*, *Hughes v. N.H. Div. Aeronautics*, 152 N.H. 30, 35 (2005) ("The plaintiffs lack standing because they cannot raise the constitutional claims of another."); *Silver Bros. Co. v. Wallin*, 122 N.H. 1138, 1140 (1982) ("These plaintiffs do not contend they were ever denied a wholesaler's permit for failure to satisfy the three-year residency requirement imposed by RSA 181:9-a. While it may be true that these plaintiffs have an economic stake in the statute possibly being ruled unconstitutional, given the present procedural posture of this case, we do not believe these plaintiffs have suffered the requisite injury in fact to entitle them to challenge the validity of RSA 181:9-a."). Consequently, absent an injury to himself, the appellant's claims fail for lack of standing.

Moreover, the appellant is not permitted to bring this case as a class action. New Hampshire has not addressed the issue of representation in

class actions, but federal courts have. Federal jurisprudence on the issue is instructive because New Hampshire's class-action rule is similar to its federal counterpart, and this Court relies upon federal cases interpreting the federal rule as analytic aids. *See In re Bayview Crematory, LLC*, 155 N.H. 781, 784 (2007); *compare N.H. R. Civ. P.* 16 *with Fed. R. Civ. P.* 23.

The plaintiff in *Oxendine v. Williams* brought a *pro se* class action under 42 U.S.C.§ 1983 for himself and all other inmates of a county correctional facility. *Oxendine v. Williams*, 509 F.2d 1405, 1406 (4th Cir. 1975) (*per curiam*). He alleged various constitutional violations, including claims that inmates were being denied medical treatment and were subject to crowded and unsanitary living conditions. *Id.* The federal district court granted summary judgment for the facility, and the plaintiff appealed. *Id.*

The Fourth Circuit Court of Appeals found that the plaintiff's request for an injunction against prison policies that affected all inmates qualified it as a Rule 23(b)(2) class action. *Id.* at 1407; *see Fed. R. Civ. P.* 23(b)(2) (involving class actions in which "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole"). The court of appeals held that despite the fact that the issue had not been raised, it was "plain error to permit this imprisoned litigant who is unassisted by counsel [to] represent his fellow inmates in a class action." *Id.* This was so because "[a] judgment against [the plaintiff] may prevent other inmates from later raising the same claims"; it followed that "unless [the plaintiff] could 'fairly and adequately protect the interest of the class,' he may not represent it." *Id.* (citing *Fed. R. Civ. P.* 23(a)(4) and 7 Wright & Miller Federal Practice and Procedure §

1765, at 617-22). The court reasoned that the "[a]bility to protect the interests of the class depends in part on the quality of counsel." *Id.* It concluded that "the competence of a layman representing himself [is] clearly too limited to allow him to risk the rights of others." *Id.*

Oxendine differs from this case in that it does not involve an action to enforce a settlement agreement, and because New Hampshire's class-action rule contemplates "non-attorney" class representatives, while the federal rules do not appear to do so. *Compare N.H. R. Civ. P.* 16(a)(6) *with Fed. R. Civ. P.* 23(g). But those are not distinctions which diminish the application of *Oxendine*'s rationale. The gist is the same: *pro se* prison inmates cannot litigate on behalf of a class because such representation risks diminishment of the rights of others in the class—for none of whom, incidentally, is there a record here of having consented to the appellant's acting as class representative. The appellant has no standing to assert the rights of others to demand performance of agreement terms for their benefit.

Because the appellant's claims are not justiciable and the fact of the settlement agreement does not confer on him—or any other inmate who was a member of the Laaman class—standing to act as class representative, this Court should affirm the trial court's dismissal of his claims.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a fifteen-minute oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Lisa L. Wolford, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,116, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

August 9, 2019 /s/*Lisa L. Wolford*
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CERTIFICATE OF SERVICE

I, Lisa L. Wolford, hereby certify that a copy of the State's brief and appendix shall be mailed to Clifford E. Avery, *pro se*, postage prepaid, at the following address:

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