**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**

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| JESSICA GLENDENING, as next friend of G.W. and C.R.; AUDRA ASHER, as next friend of L.P.; COLIN SHAW, as next friend of C.B. and N.K.; and LAURA VALACHOVIC, as next friend of E.K.,<br><br>*Plaintiffs*,<br>v.<br><br>LAURA HOWARD, Secretary of Kansas Department of Aging and Disability Services, in her official capacity, MIKE DIXON, State Hospitals Commissioner, in his official capacity, and LESIA DIPMAN, Larned State Hospital Superintendent, in her official capacity,<br><br>*Defendants*. | Civil Action No. 5:22-cv-04032TC-GEB |

**PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' SUPPLEMENTAL BRIEF REGARDING THEIR MOTION FOR A PRELIMINARY INJUNCTION**

Plaintiffs in the above-captioned case filed their supplemental brief of arguments and authorities on August 31, 2022. *See* Dkt. #22. Defendants filed their response to this supplemental briefing on September 19, 2022. *See* Dkt #25. In accordance with the Court's order, Plaintiffs hereby submit this reply to Defendants' response to Plaintiffs' supplemental brief.

## I. Plaintiffs' claims are not barred on comity or jurisdictional grounds.

Plaintiffs' claims are not barred on comity or jurisdictional grounds because no abstention doctrine applies. *See* Dkt. #22 at 2-8. Defendants' brief does not meaningfully engage with Plaintiffs' arguments that *Younger* abstention does not apply in this case, and instead focuses solely

on arguing that a state court habeas petition is the more appropriate remedy for resolving Plaintiffs' civil rights claims. Defendants' arguments are unavailing. *Younger* does not apply, and habeas petitions are an inappropriate, insufficient, and potentially unavailable procedural vehicle to address Plaintiffs' claims, including the claims of putative class members that Plaintiffs represent. Therefore, Plaintiffs' claims are not barred on comity or jurisdictional grounds.

**A. Younger abstention does not apply because this case does not challenge any state court prosecution.**

Plaintiffs maintain that no existing abstention doctrine precludes this Court's adjudication of Plaintiffs' constitutional claims. The only theoretically plausible abstention doctrine applicable in this case is *Younger* abstention: the Plaintiffs in this case are challenging their prolonged detainment awaiting a competency evaluation or restoration treatment, the origin of which is their pending state criminal court cases. Aside from the fact that Plaintiffs' injuries are a byproduct of their criminal cases (i.e., but for being accused of a crime, they would not be subject to the civil rights deprivations they experience), their constitutional claims do not otherwise relate to any state legal or administrative question or proceeding. Plaintiffs are not seeking to enjoin their state court cases, and are not otherwise asking the Court to interfere in state court administration. Nor are they seeking federal court intervention into the day-to-day operations of the *criminal courts*. Plaintiffs seek federal court intervention over Defendants, state agency employees responsible for running the mental health system, who have shirked their duty to provide timely, court-ordered competency evaluations and/or restorative treatment.

Defendants ignore these points in their response brief, stating without authority that "Younger abstention applies but plaintiffs' action is subject to an exception." Dkt. #23 at 2. In fact, Defendants appear to concede that the only relevant question is whether there is an adequate state court proceeding available to address Plaintiffs' claims. *Id.* at 2 ("Plaintiffs' hang-up is on the

Court's third question."). Plaintiffs do not believe there is a state procedural vehicle available to remedy their claims, *infra* Section I.B., but that is separate and apart from the other factors courts must weigh in considering whether *Younger* abstention should apply. *Crown Point I LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1215 (10th Cir. 2003). Defendants do not meaningfully contend with the other reasons Plaintiffs proffer for why abstention is inappropriate. For the reasons stated in Plaintiffs' supplemental brief, Dkt. #22 at 4-6, *Younger* is inapplicable.

**B. Habeas is not a proper procedural vehicle to address Plaintiffs' claims.**

Plaintiffs maintain that there is no adequate procedural vehicle through which they could raise their constitutional claims in their state criminal cases. Dkt. #22 at 6-8. Contrary to Defendants' assertions, habeas is not a proper procedural vehicle for Plaintiffs' claims. Plaintiffs are not challenging the fact or duration of their confinement or detention; they are challenging Defendants' failure to provide timely *medical evaluations and treatment* as ordered by a court.

Defendants go to great lengths to mischaracterize Plaintiffs' claims as "challenging the length of their jail time." Dkt. #25 at 3. Yet Plaintiffs do not "seek immediate release or a shortened period of confinement," as is appropriate for a habeas petition. *Palma-Salazar v. Davis*, 677 F.3d 1031, 1035 (10th Cir. 2012); *see also* Dkt. #25 at 3; Dkt. #5, Pls. Mem. in Supp. of Mot. for Prelim. Inj. 33. Plaintiffs are not challenging the fact nor the length of the jail time itself, but rather the unconstitutionally long delay in receiving competency evaluations and treatment that are the responsibility of Defendants. Neither are Plaintiffs asserting speedy trial claims, as Defendants suggest, or a "quantum change in the level of custody." Dkt. #25 at 5 (citing *Heath v. Hanks*, 433 F. Supp. 3d 221, 224-25 (D.N.H. 2019)). Plaintiffs' claims relate to substantive and procedural due process and cruel and unusual punishment.[1] Dkt. #5 at 2. Defendants' self-serving reframing

[1] Plaintiffs also bring a claim under the Americans with Disabilities Act, but that claim is not part of the Motion for Preliminary Injunction. Dkt. #1, Complaint at 34-36.

of this case is a transparent attempt to make Plaintiffs' claims seem like those for which habeas relief is available. This should be rejected. This case is not about speedy trial rights, or a change in custody level in a carceral setting, or a direct challenge to the duration of confinement. Habeas is not an appropriate vehicle for Plaintiffs' claims to be heard.[2]

The cases cited by Defendants to support their habeas argument are clearly distinguishable from this case. The individuals in *Preiser* were state prisoners deprived of good-conduct-time credits; their challenge seeking restoration of those credits was clearly a direct attack on the duration of their confinement. *Preiser v. Rodriguez*, 411 U.S. 475, 476 (1973). And unlike in *Robinson*, Plaintiffs are not seeking dismissal of their criminal charges and immediate release from custody. *Robinson v. Rice*, 772 Fed. Appx. 690 (10th Cir. 2019). Plaintiffs are also not arguing for a release from incarceration nor parole or pre-parole, as they have not been convicted, unlike the plaintiffs in *Boutwell v. Keating*. 399 F.3d 1203, 1210 (10th Cir. 2005). And unlike in *Heath* and *Garcia*, Plaintiffs are not requesting a transfer from a prison facility to a hospital as the location for them to serve their criminal sentences; rather Plaintiffs are challenging Defendants' delay in executing a transfer order already issued by the court (here, to LSH to receive a competency evaluation or competency restoration treatment). *See Heath v. Hanks*, 433 F. Supp. 3d, 221, 225 (D.N.H. 2019); *Garcia v. Spaulding*, 324 F. Supp. 3d 228, 229 (D. Mass. 2018). For this reason, *Gonzalez-Fuentes* is inapposite as well: Plaintiffs are not requesting a transfer from prison to a home release or electronic supervision program, and they are not seeking to change the quantum of their confinement for the duration of their sentence. *Gonzalez-Fuentes v. Molina*, 607 F.3d 864,

[2] Importantly, the State of Kansas has argued in other litigation that the writ of habeas corpus remedy outlined in K.S.A. 60-1501(a) was not originally intended "to extend to detentions pursuant to legal process by a court of competent jurisdiction, but rather, was intended to be limited to illegal executive detentions and detention by courts that lacked jurisdiction." Resp.' Resp. to the Court's Apr. 10, 2020 Or. and Mot. to Dismiss, *Hadley et al. v. Zmuda et al.*, No. 122760 (Kan. Apr. 14, 2020) (arguing that the relief requested by Plaintiffs in that habeas action was not "customarily understood as within the power of habeas relief").

870, 873-74 (1st 2010). Instead, Plaintiffs are seeking the services and treatment that Defendants have been court-ordered and are statutorily and constitutionally obligated to provide.

**C. Defendants ignore the class action nature of Plaintiffs' claims.**

Finally, Defendants brush past the claims of putative class members and the class action nature of this case. *See generally* Dkt. #1, Compl. 29-31. Even assuming habeas corpus is available for the individual Named Plaintiffs, it is not an appropriate or available procedural vehicle for the *plaintiff class*.

Habeas petitions are a procedural vehicle available in individual cases.[3] Generally speaking, habeas petitions under K.S.A. 60-1501(a) must be filed in the jurisdiction in which the person is incarcerated. K.S.A. 61-1501(a) (directing individuals to "prosecute a writ of habeas corpus in the supreme court, court of appeals or the district court of the county in which such restraint is taking place"). Putative class members are incarcerated in dozens of counties across the state. Named Plaintiffs themselves are incarcerated in different counties, including Shawnee, Russell, and Douglas. *See* Dkt. #1 at 6-11. There is not an appropriate vehicle to join all of their claims together in a single habeas proceeding; all 100+ individuals currently on the waitlist would have to file individual lawsuits and then petition the Kansas Supreme Court for joinder. *See* K.S.A. 60-242(a) (allowing for, but not requiring, consolidation of actions pending in different counties when there are common issues of law or fact). Forcing Plaintiffs—who, by the very nature of the claims in this case, are individuals experiencing significant mental health issues—to jump through various procedural hoops, which do not even guarantee fair adjudication of their claims, would

[3] Although there may be a hypothetical situation where a state court would grant a class-style habeas petition under K.S.A. 60-1501, it has yet to do so. Plaintiffs' counsel has not found a single example of a Kansas state court granting class-wide habeas relief. Prior attempts to pursue such relief were rejected on procedural grounds, on the merits, or both, and no published opinions exist where class certification under 60-1501 was even considered by a court, much less granted.

turn *Younger* on its head. *See Elena Sefcovic, LLC v. TEP Rocky Mt. LLC,* 953 .3d 660, 669-70 (10th Cir. 2020) (abstention is the exception, not the rule, and should apply only in exceptional circumstances). Even assuming that habeas corpus is a proper vehicle for Named Plaintiffs' claims—which it is not—Defendants do not provide any authority to support the idea that class-wide relief would be available for the putative class under K.S.A. 60-1501(a), and in fact, do not even recognize the need for such relief.

If a habeas petition is an inappropriate avenue for relief, as Plaintiffs contend, then Defendants' failure to address relief for the putative class is even more telling. Defendants assert without support that Plaintiffs could just raise their constitutional claims in their criminal cases (again ignoring the actual claims Plaintiffs are raising), and the trial court could issue one-off show cause orders. Dkt. #25 at 5. But Defendants do not meaningfully dispute the evidence or arguments offered by Plaintiffs demonstrating that such individual motion practice would lead to "a patchwork enforcement of civil rights," Dkt. 22 at 7, and that state court judges themselves are against it. *Id.* at 7-8. Defendants provide no support for their argument that there is an adequate remedy available in Plaintiffs' individual criminal cases that will vindicate the Defendants' ongoing constitutional violations.[4] The class-based nature of these claims weighs against

[4] Defendants' suggestion of pursuing a writ of habeas corpus is also illogical as a response to the question of abstention. Habeas corpus is not a remedy within Plaintiffs' criminal case. The writ of habeas corpus is a *civil proceeding* that is separate from an underlying criminal case. *Smith v. State*, No. 103,989, 2012 Kan. App. Unpub. LEXIS 40, at *35-36 (Kan. App. Jan. 20, 2012) (noting habeas motion "is a species of civil action to which the Kansas Code of Civil Procedure generally applies"). Nothing about *Younger* abstention requires that federal courts dismiss a federal civil rights action in order to force the plaintiff to pursue a different *civil* remedy in state court. Rather, abstention requires this court to avoid interfering with *ongoing criminal prosecutions* when the issues raised by Plaintiffs could be addressed in the *ongoing criminal prosecution itself*.

abstention, as there is no adequate state court remedy available to vindicate the rights of the full class.

## II. Case law demonstrates the need for the issuance of an injunction.

The Court asked the parties whether any other courts have granted a preliminary injunction to remedy similar allegations of constitutional violations. Plaintiffs supplied two examples of courts granting preliminary injunctions in like circumstances. *See* Dkt. #22 at 10-11. Defendants do not cite any decisions which denied preliminary injunctive relief in similar lawsuits. Instead, Defendants point to two cases in which state agencies did not abide by court orders in similar lawsuits. But the failure of these state agencies to abide by court orders in similar lawsuits does not mean that this Court is without jurisdiction to issue Plaintiffs' requested preliminary injunctive relief.

The Ninth Circuit affirmed a seven-day deadline to admit criminal defendants to an Oregon hospital for competency evaluation or treatment in *Oregon Advoc. Ctr. v. Mink*, 322 F.3d 1101 (9th Cir. 2003). Because the Oregon defendants consistently failed to meet this deadline, the district court later ruled that "Defendants are not in compliance with this Court's permanent injunction in *Mink* and ORDERS the following which is necessary to move Defendants towards compliance with that injunction[]." *Disability Rights Oregon v.* Allen, No. 3:02-cv-00339-MO, 2022 WL 4009060, *1 (D. Or. Sept. 1, 2022). A similar situation arose in *Ctr. for Legal Advoc. v. Bicha*, where the Colorado defendants entered into a settlement agreement in which they agreed to offer admission to pretrial detainees within 28 days of a court order requiring in-patient competency evaluations or restorative treatment, and to maintain a quarterly average of 24 days for both categories. No. 11-cv-02285-NYW, 2018 WL 6834597, at *1 (D. Colo. Dec. 28, 2018).

The Colorado defendants consistently failed to meet these standards despite agreeing to do so in several subsequent settlement agreements. *Id.* at *1-*3.

*Mink* and *Bicha* demonstrate the necessity for judicial oversight of state agencies that are either unable or unwilling to follow court orders requiring them to respect individuals' civil rights. Defendants essentially argue that the Court should avoid getting involved in a case where a state agency may be unwilling or unable to meet basic constitutional standards or remedy constitutional violations. But this is precisely the situation in which a court order is necessary to ensure that the state is fulfilling its constitutional obligations.

Although it is unclear why Defendants believe that *Mink* and *Bicha* support their opposition to an injunction, one reading of their argument is that they are warning the Court they will follow the example of the Oregon and Colorado defendants and fail to abide by a potential injunction. Defendants appear to be signaling that the Court should avoid the resulting protracted litigation and simply deny the requested injunctive relief now. But the threat of future protracted litigation should not deter this Court's ability to ensure that Plaintiffs' constitutional rights are protected.

Defendants also argue that a federal court should not try to control a state agency's affairs. Dkt. #25 at 9. Defendants overstate the holdings of the cases cited in their brief, which actually support the issuance of Plaintiffs' requested injunctive relief.

First, as a general matter, Defendants are not entitled to continue maintaining wait lists for admission to LSH in violation of Plaintiffs' constitutional rights simply because any remedy would require a state agency to change their operations. As stated by the Supreme Court, "state policy must give way when it operates to hinder vindication of federal constitutional guarantees." *Missouri v. Jenkins*, 495 U.S. 33, 57 (1990) (quotation omitted).

Second, Defendants mischaracterize Plaintiffs' requested injunctive relief. Plaintiffs have no interest in controlling the Defendants' operations or affairs. Instead, Plaintiffs seek a preliminary injunction enjoining Defendants from maintaining a wait list for LSH that subjects Plaintiffs to unconstitutionally long wait times for competency evaluations and restoration treatment. How that result is achieved is left to Defendants. Such injunctive relief is supported by the very cases cited by Defendants.

In *Missouri v. Jenkins*, 495 U.S. 33 (1990), the district court imposed an increase in local property taxes to ensure funding for the desegregation of public schools. On appeal, the Eighth Circuit ruled that the district court should not have set the property tax rate itself. Instead, the Eighth Circuit held that the district court should authorize the school district to submit a levy to the state tax collection authorities and should enjoin the operations of state laws hindering the school district from adequately funding the school desegregation remedy. *Id.* at 43. The Supreme Court affirmed the Eighth Circuit's decision, holding that "[a]uthorizing and directing local government institutions to devise and implement remedies not only protects the function of those institutions but, to the extent possible, also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems." *Id.*at 51. Here, Plaintiffs seek the same type of relief—an order directing the Defendants to devise and implement remedies to eliminate the unconstitutional wait times for competency evaluations and treatments.

Plaintiffs do not seek to invade on the decision-making or policy choices of the Defendants. Plaintiffs simply seek an injunction that would require the Defendants to perform their constitutional obligations to provide competency evaluation and treatment services in a timely manner. Thus, Plaintiffs' requested relief is nothing like *Rizzo v. Goode*, 423 U.S. 362 (1976), which was described by the Supreme Court as "an attempt by the federal judiciary to resolve a

'controversy' between the entire citizenry of Philadelphia and the petitioning elected and appointed officials over what steps might, in the Court of Appeals' words, '(appear) to have the potential for prevention of future police misconduct.'" *Id.* at 371. Nor is Plaintiffs' requested relief similar to *Signature Properties Intern. Ltd. Partnership v. City of Edmond*, 310 F.3d 1258, 1268-69 (10th Cir. 2002), where the mandatory injunction was related not to a constitutionally-protected property right, but to the defendant city's responsibility for upgrading a sewer system. Plaintiffs' requested relief is also nothing like *Marchesani v. McCune*, 531 F.2d 459 (10th Cir. 1976), a habeas case where a prisoner challenged his classification as a "special offender." The Tenth Circuit held it was not a clear abuse of discretion to classify the prisoner as a "special offender" given the nature of his convictions and the government's need to manage and control penal and correctional institutions. *Id.* at 461.

Defendants arguments here are unpersuasive, and should be overruled. Case law supports the issuance of a preliminary injunction, and Defendants cite no authority meaningfully demonstrating that a preliminary injunction here would be improper.

## III. Legislative changes have not ameliorated Defendants' constitutional violations and this Court—not the parties—has authority to order Defendants to devise a plan to cease their unconstitutional practices.

Defendants continue to ask the Court to excuse their constitutional violations because they claim to be doing their best with what they have. As Plaintiffs have repeatedly explained, the Constitution does not award brownie points to defendants who earnestly wish they were not breaking the law. It bears repeating that Defendants are not entitled to a different legal standard because they are trying their best. In their reply brief, Defendants present two new arguments related to the Court's question about the impact of legislative changes. First, Defendants argue that Plaintiffs have not sufficiently proven a negative—i.e., that legislative changes will not alleviate Defendants' constitutional violations. Second, Defendants provide an overview of Rule 65's

requirement that the Court order specific relief, and suggest that Plaintiffs bear the responsibility of devising what relief should be ordered. Neither argument is supportable.

**A. Legislative changes have not cured Plaintiffs' ongoing constitutional injuries and the absence of any improvement to date demonstrates relief is far from imminent.**

Defendants admit that their voluntary efforts to shorten restoration and evaluation wait times pursuant to HB 2850 have been in place for months. Dkt. #15. Yet they can point to no improvements for Plaintiffs or the putative class since the legislation became effective. Plaintiffs had not received treatment as of August 31, 2022 when they submitted their first supplemental brief. One month later they are still detained awaiting treatment. Notably, Defendants have produced no evidence that there are fewer people on the waitlist than before HB 2850 was enacted. They have also not provided any evidence that wait times are shorter. Legislative changes have yet to the move the needle for Plaintiffs or the similarly situated individuals that are awaiting competency services. This utter lack of improvement alone is persuasive evidence that Defendants' current voluntary efforts will not ameliorate the ongoing constitutional violations Plaintiffs challenge in this case.

In their attempt to distract the Court from the fact that legislative changes and subsequent voluntary efforts have not helped, Defendants mischaracterize the findings in Dr. Dvoskin's report. First, although Dr. Dvoskin drafted the report in May 2022, he was aware of, and explicitly referenced, the changes contemplated by the legislation and the fact that it would be supported by additional funds. Joel Dvoskin Rep. at 6. Based on his years of experience in state mental hospital administration, he concluded that the legislative changes that are now in place would likely be ineffective. Based on the absence of progress Defendants have made in the last three months, Dr. Dvoskin's assessment was clearly correct. Further, Plaintiffs are not merely complaining that the impact of voluntary efforts is *unclear* or *hypothetical*. As Plaintiffs' first supplemental brief details,

the changes Defendants claim will fix the problem have been in effect in the state's most populous counties for three years. Yet, these are the same counties Defendants admit have the longest wait times. *See* Dkt. #22 at 12-13. Defendants themselves present the most populous counties as beta testing sites for HB 2580's impact. *See* Dkt. #15 at 6, 22. The ineffectiveness of these programs provides further evidence that the legislation has not and cannot fix Defendants' constitutional violations. Plaintiffs agree that Defendants do not need a court order to tell them to continue what they are already doing. Defendants do, however, need a court order to dedicate sufficient funds and undertake appropriate measures to end unconstitutional delays in treatment.

**B. This Court—not the parties—has authority to specify appropriate steps to end Defendants' constitutional violations.**

Defendants spend the bulk of their response to the Court's question about the impact of legislative changes on a tangent about Rule 65. Defendants misconstrue the requirements of Rule 65 and invent an additional prong for the preliminary injunction test: that Plaintiffs, not the Court, must propose a detailed and specific order to be entitled to relief. This misrepresentation is inconsistent with the text of Rule 65 and the well-established discretion of courts to fashion appropriate relief to remedy constitutional violations. Fed. R. Civ. P. 65; *see also Franklin v. Gwinnet Cty. Pub. Sch.* 503 U.S. 60, 65-66 (1992).

In addition to inventing a burden for Plaintiffs to overcome to obtain relief, Defendants overstate the level of specificity courts are required to provide in a Court order. The specificity provisions of Rule 65(d) do not require courts to provide defendants with a step-by-step guide on how to stop illegal activity. Instead, Rule 65 requires specificity only to the point that an order makes clear what conduct is prohibited and leaves no confusion as to when the defendants are in violation of the order. *See Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam); *Prairie*

*Band of Potawatomie Indians v. Pierce*, 253 F.3d 1234, 1244 (10th Cir. 2001) (quoting *CF&I Steel Corp. v. United Mine Workers of America*, 507 F.2d 170, 173 (10th Cir. 1974) (a preliminary injunction "is vague when the delineation of the proscribed activity lacks particularity or when containing only an abstract conclusion of law, not an operative command capable of enforcement.").

Preliminary injunction orders requiring defendants to devise their own plan to end illegal activity are commonly issued and upheld. *Keyes v. School Dist. No. 1, Denver, Colo.*, 895 F.2d 659, 669 (10th Cir. 1990) (holding that injunction requiring school district to "disestablish and eliminate the effects of past racial segregation" satisfied Rule 65(d)'s specificity requirements even though it was "stated in general terms"); *Carranza v. Reams*, No. 20-cv-00977-PAG, 2020 U.S. Dist. LEXIS 82299 at *36 (D. Colo. May 11, 2020) (issuing preliminary injunction requiring county sheriff office to create and implement its own "plan to enhance the general steps already taken in the Jail in order to better protect . . . medically vulnerable individuals" in light of COVID-19); *Courthouse News Serv. v. Forman*, No. 4:22cv106-MW/MAF, 2022 U.S. Dist. LEXIS 103771 at *55 (N.D. Fla. Jun. 10, 2022) (granting preliminary injunction requiring Broward County Circuit Court to make civil rights complaints publicly available upon filing, but declining to "tell Defendants how they must facilitate timely public review" and instead allowing the government defendants "to choose their preferred solution"); *Hoffer v. Jones*, 290 F. Supp. 3d 1292, 1306 (N.D. Fla. 2017) (issuing preliminary injunction requiring Florida Department of Corrections (FDC) to provide timely Hepatitis C screening, evaluation, and treatment and instructing the FDC to prepare its own plan in light of the court's "broad" directions); *Georgia Advocacy Office v. Georgia*, 447 F. Supp. 3d 1311, 1327 (N.D. Ga. 2020) (determining injunction stated in general terms that

required state defendants to "ensure . . . equal educational opportunity" to Georgia students with disabilities was adequately specific under Rule 65(d)).

In fact, injunctions encouraging defendants to figure out the specific steps for solving their own problems are generally favored for separation of powers and public policy reasons. *Missouri*, 495 U.S. at 51 (noting "authorizing and directing local government institutions to devise and implement remedies not only protects the function of those institutions but, to the extent possible, also places the responsibility for solutions to the problems … upon those who have themselves created the problems.").

The rare times where appellate courts have found an order lacks specificity, it contained an undefined term or simply commanded defendants to "obey the law." *See e.g., Vallario v. Vendehey*, 554 F.3d 1259, 1268 (10th Cir. 2009). Plaintiffs are confident this Court can avoid both errors in this case. Here, were the Court to order Defendants to stop forcing people to wait months or more for competency services—i.e., if the Court were to order that Defendants provide these services within a set number of days—there would be no uncertainty or confusion as to when Defendants were in violation of the order. The order Plaintiffs have requested is sufficiently detailed to satisfy Rule 65(d). Even if it were not, this Court has the authority and discretion to draft an order that meets these requirements.

Although irrelevant to the Rule 65 specificity analysis, Defendants also complain that Plaintiffs have not provided them with enough of a roadmap for ceasing their constitutional violations. In fact, Plaintiffs have provided a menu of tested, specific steps Defendants can take to reduce the waitlist as well as provided many examples of other states that have accomplished what they claim is impossible. Dkt. #5 at 3, 14-17; Dvoskin Rep. 12-13. Few of Defendants' arguments

are responsive to the Court's question regarding the impact of legislative changes and none of them warrant denial of Plaintiffs' motion for preliminary injunction.

## IV. Defendants offer nothing in their response brief to contradict Plaintiffs' argument that the right to be free from arbitrary detention is deeply rooted in our nation's traditions.

Defendants continue to press the argument that an individual's fundamental right to liberty is only violated by an indefinite detention, and that all other detentions—including the sometimes year-plus confinements of Plaintiffs—are justifiable because the government has a weighty interest in detaining them. In support of this claim, Defendants cite *United States v. Deters* 143 F.3d 577, 584 (10th Cir. 1998). Notably, the woman incarcerated in *Deters* was not challenging her prolonged detention to receive competency services but rather the fact that she was ordered to receive an evaluation in a federal facility in Texas rather than the outpatient exam in California she had requested. *Id.* The defendant in *Deters* was challenging the fact that she had to undergo her exams in the federal equivalent of LSH.[5] There was no indication that the defendant was facing a long wait to be transferred to the secure medical facility and she had hardly waited a week after the ordered transfer to file the appeal asserting a due process challenge to her confinement. *See USA v. Deters*, Dkt. 6:96-cr-10089, ECF No. 24, 29 (D. Kan. 1996). In fact, part of the reason the Tenth Circuit upheld the confinement in *Deters* was because the District Court found outpatient evaluations *would take longer to attain* and "lead to further delay." *Deters*, 143 F.3d at 584. Here, Plaintiffs are effectively seeking what the incarcerated person in *Deters* was challenging. They are not arguing for release, but rather timely evaluations and restoration treatment, whether those take place in Larned or through a community-based provider. The facts here are so distinct from *Deters* that the Tenth Circuit's balancing of interests cannot plausibly apply.

[5] The defendant in *Deters* was ordered to undergo an evaluation in Carswell, Texas at an administrative security federal medical center.

Moreover, Plaintiffs reassert that the government's only interest in maintaining the current wait for competency evaluation and restoration services is cost and work aversion. The delay in providing competency services actually *undermines* many of the government's stated interests, including ensuring a defendant is competent to stand trial, as prolonged confinement in county jails make it more difficult to restore competency and increase the likelihood of relapse. Dvoskin Rep. 9-11. Prolonged delays in competency services also make county jails less secure locations for pretrial detainees. *Id.*

Though inconsistent with their position that only liberty from indefinite detention is deeply rooted, Defendants also seemingly concede that Plaintiffs have a fundamental right to be free from arbitrary detention. *See* Dkt. #25 at 14. However, they argue that Plaintiffs' detention is not arbitrary under a dictionary definition of the term and their purported government interest in detention. First, the legal definition of arbitrary is "without adequate determining principles, not done or acting according to reason or judgment." *J. Enterprises v. Board of Cty. Commissioners of Harvey County*, 253 Kan. 552 (1993). This is consistent with the definition used throughout Supreme Court jurisprudence where government action is held to be arbitrary if it bears no reasonable relationship to the government's purported objective. *Bell v. Wolfish*, 441 U.S. 520, 539 (1974); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Zadvydas v. Davis*, 522 U.S. 678, 712-13 (2001). As Plaintiffs have extensively explained, their prolonged detention to receive competency services is not based on any determining principles as there is no reasonable relationship between detaining a person for a year and Defendants' stated goals for the detention.

Finally, Defendants attempt to argue that the prohibition against arbitrary detention has no deeply rooted origins in our nation's history and that the sources Plaintiffs cited in their supplemental brief should be reduced to generalized rejection of pre-conviction confinement.

However, the commentaries and laws cited are much more specific than that. William Blackstone, in particular, comments on the importance of a reasonable relationship between the nature and purpose of confinement. *See* Dkt. #22 at 18. In sum, Defendants raise no new arguments that support denial of Plaintiffs' motion for preliminary injunction.

## V. The legislatively-enacted reforms have no bearing on Plaintiffs' procedural due process claim.

The Court asked the parties whether House Bill 2508 had any impact on Plaintiffs' due process claim and the elements set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Plaintiffs explained why House Bill 2508 did not resolve their claim. Dkt. #22 at 13-15. In their supplemental brief, Defendants analyzed whether the Court should use the analysis set forth in *Mathews* or in *Medina v. California*, 505 U.S. 437 (1992), and concluded that *Mathews* is the proper test. Dkt. #25 at 15-17. Defendants failed to address the Court's specific question in their supplemental brief, and instead incorporated the arguments set forth in their opposition to Plaintiffs' motion for preliminary injunction. Dkt. #25 at 17. As such, there are no new arguments for Plaintiffs to address, and Plaintiffs stand on their response to the Court's question as set forth in Dkt. #22 at 11-15.

Defendants go on to argue, for the first time, that "Plaintiffs fail to explain what additional procedural processes are required." Dkt. #25 at 17. Plaintiffs respectfully contend that Defendants may not raise new legal arguments in this supplemental brief beyond those that address the specific questions raised by the Court. The supplemental briefing ordered by the Court was not an opportunity for Defendants to get another bite at the apple in responding to Plaintiffs' underlying motion for a preliminary injunction. Nevertheless, Plaintiffs will address this meritless argument.

"Procedural due process ensures that individuals are entitled to certain procedural safeguards before a state can deprive them of life, liberty or property." *Becker v. Kroll*, 494 F.3d

904, 918 n.8 (10th Cir. 2007). Defendants do not dispute that Plaintiffs possess a liberty interest in freedom from incarceration, a liberty interest in receiving competency evaluation or competency restoration treatment in a reasonable amount of time, and a liberty interest in their cases expeditiously proceeding to trial. Defendants provide Plaintiffs with *no procedural safeguards* for the deprivation of these liberty interests when they indefinitely delay Plaintiffs' ability to receive competency evaluations or competency restoration treatment, including, in some cases, for a period longer than the period they would have been incarcerated if they had been convicted of their charged crime. Plaintiffs have no procedural safeguards when a court orders them to be admitted for competency evaluation or treatment, and instead, they end up warehoused in a county jail for months and months because LSH refuses to admit them pursuant to court orders. The required "additional procedural processes" are processes that would eliminate the unconstitutional delay in receiving competency evaluations and treatment.

Finally, Defendants continue to confuse the requirements under Kansas' civil commitment statutes with their obligations under the Constitution. Their confusion is aptly demonstrated by their citation to *Kansas v. Hendricks*, 521 U.S. 346 (1997), where the Supreme Court reversed a decision of the Kansas Supreme Court invalidating a state law establishing procedures for the civil commitment of mentally ill individuals who were likely to engage in predatory acts of sexual violence. Dkt. #15 at 14. Unlike in this case, plaintiffs in *Hendricks* did not state a procedural due process claim, and the Supreme Court in fact noted that the Kansas statute "afforded the individual a number of other procedural safeguards" in addition to placing the burden of proof on the State. *Id*. at 353. This case is not about whether Defendants are meeting their statutory obligations under K.S.A. § 22-3302 and does not challenge any state court determination as to whether Plaintiffs or putative class members require civil commitment. Rather, this case is about Defendants' failure to

meet their constitutional due process obligations by not providing competency evaluation or restoration services in a timely manner.

If an individual is ordered to receive competency evaluation or treatment on an outpatient basis, and the individual receives those services in a timely manner, then that individual is not a member of the putative class. Individuals who have been ordered to receive outpatient treatment are not the focus of this case. Instead, if a court has ordered one of the Plaintiffs or members of the putative class to receive competency evaluation or treatment services at LSH, then that evaluation or treatment must be rendered in a constitutionally timely manner. Defendants cannot abdicate their duty to honor Plaintiffs' civil rights by arguing that individuals who are not ordered to receive competency evaluation or treatment from Defendants do not suffer unconstitutionally long wait times. In short, Defendants' arguments regarding Plaintiffs' procedural due process claims are unavailing.

## VI. Defendants are obligated to provide medical care to Plaintiffs, and their failure to do so constitutes cruel and unusual punishment.

Defendants do not meaningfully engage with Plaintiffs' arguments regarding their cruel and unusual punishment claim. Instead, Defendants point fingers at the sheriffs of county jails, and say that any denial of medical care that stems from the delay in transfer to LSH must be attributed to the jails, rather than Defendants. Dkt. #25 at 19 ("Plaintiffs complaints about the conditions of their jail confinement must be brought against the sheriffs.").

To use Defendants' turn of phrase, "this assertion misses the mark." Dkt. #25 at 19. Defendants are obligated to provide medical care in the form of competency evaluations and treatment in the same way that another state medical agency may be obligated to prescribe penicillin for an infection. Dkt. #22 at 22. Defendants are obligated to provide medical care by statute and court order. Under the Eighth Amendment, as applied to pretrial detainees through the

Fourteenth Amendment, Defendants' denial of that necessary medical care amounts to cruel and unusual punishment. *See Sealock*, 218 F.3d at 1211; *Prince v. Sheriff of Carter Cnty.*, 28 F.4th 1033, 1047-48 (10th Cir. 2022).

Nothing in 42 U.S.C. § 1983 or the Cruel and Unusual Punishment clause limits liability for denial of medical care claims to only the housing institution currently incarcerating the plaintiff, as Defendants seem to imply. *See* Dkt. #25 at 19. Section 1983 claims sound in tort: the issue here is causation. As Plaintiffs pointed out in their opening supplemental brief, but for Defendants' actions here, Plaintiffs would not be denied the medical care they need, and to which they are statutorily—and constitutionally—entitled. *See* Dkt. #22 at 22.

No ducks are quacking here. *See* Dkt. #25 at 19. Plaintiffs are sick; so sick that it would be *unconstitutional to prosecute them until they get better*. They are experiencing acute harm while they languish in jail for months, if not years, waiting for necessary medical treatment—medical treatment that KDADS is *statutorily obligated to provide*. Plaintiffs have repeatedly pointed out that jails are not equipped to provide the level of care that these individuals need, which is why Kansas has the statutory scheme that it does: those in need of acute treatment to be restored to competency are to be transported to KDADS' custody to receive that necessary treatment. Yet Defendants conveniently ignore that reality, content to shrug their shoulders and blame the county sheriffs for the plight Plaintiffs face.

KDADs is statutorily and constitutionally obligated to provide a specific type of care to Plaintiffs and the putative class they represent. Defendants are not doing so in a timely manner. That denial of medical care *inflicts cruel and unusual punishment*—a separate and distinct claim raised by Plaintiffs in this case.

## CONCLUSION

For the foregoing reasons, none of the issues or concerns raised by the Court and none of the responses provided by Defendants should preclude the Court from entering a preliminary injunction in favor of the Plaintiffs. The evidence submitted to the Court and relevant legal precedent demonstrate that a preliminary injunction is appropriate, in the public interest, and necessary to vindicate the ongoing harms experienced by Plaintiffs as a result of Defendants' constitutional violations. Accordingly, Plaintiffs respectfully request that the Court grant the requested injunction.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that, on this 30th day of September, 2022, I electronically filed the foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s Sharon Brett
Sharon Brett