IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JESSICA GLENDENING, as next friend of G.W.; 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.,

Plaintiffs,

vs. Case No. 5:22-cv-04032-TC-GEB

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,

Defendants.

Response to Motion for Preliminary Injunction

Defendants submit this response in opposition to Plaintiffs' motion for preliminary injunction.

Nature of the Case

The Kansas Department for Aging and Disability Services (KDADS) protects Kansas' most vulnerable citizens. With oversight of four state hospitals, 726 long term care facilities, and all home and community-based services under KanCare, the agency is the second largest in the State in terms of budget and total number of employees.

Larned State Hospital (LSH) is one of the four state hospitals under KDADS' charge. LSH is the primary statewide provider of inpatient forensic services for individuals needing evaluations and restorative treatments for competency prior to being tried as a criminal defendant.

Plaintiffs are criminal defendants who require a competency evaluation or restorative treatment for their current state of incompetency. Due to factors beyond anyone's control, the LSH has been unable to meet the demand and currently has a wait time of several months. However, Defendants, in partnership with stakeholders throughout the State, have been working proactively on several programs to minimize delays. Multiple programs are currently undergoing implementation with the help of revised legislation that alleviates barriers to providing services, effective July 1, 2022. Additionally, a funding increase of $2.8 million became available for the current fiscal year and is being dedicated toward pathways for completing forensic competency in facilities in addition to just LSH.

Statement of Facts

1. The Larned State Hospital (LSH) is operated by KDADS. Exhibit 1, Brunner Affidavit.

2. Larned State Hospital (LSH) provides treatment under three distinct programs: Psychiatric Services Program, Sexual Predator Treatment Program, and the State Security Program (SSP). All three programs at LHS compete for the same resources. Exhibit 1, Brunner Affidavit.

3. The SSP (also known in the Kansas statutes as the State Security Hospital) serves as the primary treatment location for adult defendants referred by district criminal courts in Kansas to evaluate or restore competency, under K.S.A. 22-3302 and 3303. Exhibit 1, Brunner Affidavit

4. The LSH has a potential maximum of 120 beds for the State Security Program (SSP) — 90 beds for males, divided up into three 30-bed units; and 30 beds for females, to accommodate referrals from all Kansas district courts under K.S.A. 22-3302 and 3303. Exhibit 1, Brunner Affidavit.

5. In addition to referrals under K.S.A. 22-3302 and 3303, the SSP serves as space for referrals under K.S.A. 22-3430 (Treatment in Lieu of Confinement), as well as K.S.A. 22-3428

(Not Guilty Due to Lack of Mental State). Exhibit 1, Brunner Affidavit.

6. The goal of the initial evaluation is to determine if a criminal defendant is competent to participate in their defense of the pending criminal case. Exhibit 1, Brunner Affidavit.

7. If treatment is required, the treatment goal is to restore the defendant's competency so the criminal case can proceed. Exhibit 1, Brunner Affidavit.

8. For defendants who cannot be restored to competency, Defendant Howard as Secretary of KDADS is directed to file a care and treatment request to move that defendant to the Psychiatric Services Program at LSH or to Osawatomie State Hospital for involuntary care and treatment. This program is separate from the treatment under the State Security Program provided by LSH, at issue in this case. Exhibit 1, Brunner Affidavit.

9. Criminal defendants requiring competency evaluations and restorative services have increased 10% for both males and females over the last 6 years. Exhibit 1, Brunner Affidavit.

10. In 2018, LSH restructured its male population for safety reasons. Low-to-moderate risk of aggression and vulnerable patients are now required to remain separate from the high-risk aggression patients, limiting LSH's ability to combine these two populations. Exhibit 1, Brunner Affidavit.

11. Additionally in 2018, because of a Kansas Department for Health and Environment (KDHE) Plan of Correction, bed space was reduced from 30 to 28 on the unit identified for the low to moderate risk of aggression and vulnerable male forensic patients. Exhibit 1, Brunner Affidavit.

12. Prior to the Covid-19 pandemic, LSH experienced high rates of staffing vacancies and could not safely maintain all 120 available beds. LSH implemented a reduced admission to one of the male 30-bed units in the SSP. Exhibit 1, Brunner Affidavit.

13. Isolation requirements and protocols implemented during the COVID-19 global pandemic reduced the maximum available beds at LSH to 58 beds for males and 20 beds for females, for a total of 78 maximum beds available to the SSP. Exhibit 1, Brunner Affidavit.

14. Delays in court orders due to the Covid-19 global pandemic resulted in numbers for initial evaluations and restorative treatment to begin increasing in 2020 after a previous decrease. Exhibit 1, Brunner Affidavit.

15. In 2021, the Governor's Budget Amendment (GBA) restored funding for 30 additional beds. However, due to staffing shortages, the additional unit cannot safely be made available to accept new SSP patients. Exhibit 1, Brunner Affidavit.

16. Staffing shortages continue to exist for positions in direct care nursing, security, and psychologists to conduct forensic evaluations. Exhibit 1, Brunner Affidavit.

17. The State's approved FY2023 budget included the Governor's Recommendation of an additional $2.8 million from the State General Fund to the SSP. The additional funds became available July 1, 2022. Exhibit 1, Brunner Affidavit.

18. Plans for the spending the additional $2.8 million are underway and include discussions with the Community Mental Health Centers Association to coordinate efforts to contract expeditiously with local community mental health centers and promote mobile evaluation and competency restoration services. Exhibit 1, Brunner Affidavit.

19. Additionally, the funds will be utilized to pay a fixed rate per evaluation or hour of restoration services to increase capacity in jails. Exhibit 1, Brunner Affidavit.

20. The contracts and/or grants to deploy funds to CMHCs is on target to be in place by September 30, 2022. Exhibit 1, Brunner Affidavit.

21. At this time, LSH can safely fill a maximum of 78 beds in the SSP. Exhibit 1, Brunner Affidavit.

22. However, LSH has hired a psychologist who will work remotely in Northeast Kansas to conduct evaluations and restoration groups partnering with courts and jails. This additional psychologist position will allow the Chief Psychologist on the Larned campus to continue working with defendants already admitted, work on mobile pilot programs in other central Kansas counties and provide training for Mental Health Centers and community providers on conducting competency evaluations and restorative treatment. Exhibit 1, Brunner Affidavit.

23. Efforts continue to recruit and onboard additional staff to fill vacant positions in effort to safely open all available beds to the SSP. Exhibit 1, Brunner Affidavit.

24. LSH is also examining adding another private contact to help complete competency evaluations and conduct competency restorations. Exhibit 1, Brunner Affidavit.

25. K.S.A. 22-3302 and 3303 were amended by the Kansas Legislature through House Bill 2697, later merged with House Bill 2508, and signed into law by Governor Kelly on April 18, 2022.

26. A district court judge may order a psychiatric or psychological examination of a defendant by any appropriate state, county, or private institution or facility. K.S.A. 22-3302(c)(1)(A).

27. A district court judge may order any defendant who has been charged with a crime and found to be incompetent to stand trial to evaluation and treatment – conducted on an outpatient or inpatient basis – by any appropriate state, county, or private institution or facility. K.S.A. 22-3303(a)(1).

28. While many criminal defendants await treatment in county jails, the trial court judge has the discretion to release them into the community for treatment. K.S.A. 22-3303(a)(1).

29. Statutory changes effective July 1, 2022, allow for the expansion of the mobile competency pilot projects to other jurisdictions and changing the timeline for treatment

requirements. Before, LSH was required to hold a bed for all patients undergoing outpatient treatment because the statute mandated a 90-day deadline. Now, the statute allows up to 90 days for outpatient treatment and an additional 90 days if outpatient fails and admission to LSH is required. The additional 90-day allotment allows LSH to use the beds for more seriously ill patients, and still holds the defendant's place in line for LSH admission in the event outpatients attempts fail. Exhibit 1, Brunner Affidavit.

30. Sixty percent of the criminal defendants waiting for evaluation or restoration at LSH come from the six most populous counties in Kansas: (Sedgwick, Shawnee, Wyandotte, Johnson, Leavenworth, and Douglas). Exhibit 1, Brunner Affidavit.

31. Pilot programs for mobile evaluations and services proactively began in 2019 to target the most populous counties. Mobile evaluations have already increased community evaluations thus avoiding the expense and time of travel to LSH for 78 defendants to-date. Exhibit 1, Brunner Affidavit.

32. In 2022, twenty-one competency evaluations by mobile evaluation have been completed to-date. Exhibit 1, Brunner Affidavit.

33. In 2022, restoration work was expanded. Pilot programs with Shawnee, Douglas Wyandotte, and Sedgwick counties are underway. KDADS began discussions with Johnson County and hopes to add more programs in the second half of the year. Exhibit 1, Brunner Affidavit.

34. KDADS and LSH provide draft orders for district courts to use to make local referrals. Exhibit 1, Brunner Affidavit.

35. K.S.A. 22-3302 and 3303 mandate timelines for the length of an incompetent criminal defendant's interim evaluations and ultimate probability of attaining competency.

36. K.S.A. 22-3302 and 3303 do not mandate timelines for admission into a state

facility for the initial evaluation or for competency treatment to begin for a criminal defendant.

37. Some purported class members have yet to undergo an initial competency evaluation. *Doc. 5*, p. 4.

38. Some class members awaiting an initial competency evaluation will be determined to be competent to stand trial and will not require placement at LSH.

39. Most Plaintiffs require medication as part of their treatment to be restored to competency. Exhibit 1, Brunner Affidavit.

40. Statutory changes effective July 1, 2022, change the restrictions previously imposed and allow a district court to order the administration of prescription medication against the opposition of the criminal defendant outside of the LSH facility. Exhibit 1, Brunner Affidavit.

Argument and Authorities

It is unclear what modifications Plaintiffs requests through a preliminary junction, other than a magic wand to create new bed space, qualified staff, and the disappearance of the wait list. KDADS is not unsympathetic to Plaintiffs' concerns and has been working with stakeholders to secure necessary legislative reforms and additional budget allocations to implement solutions. These changes took effect July 1, 2022, and KDADS is in the process of implementing the enhancements.

Further, Plaintiffs' claims of unconstitutional violations do not hold water. The relief requested will do little or nothing to remedy the harms alleged.

I. Standard of Review

A preliminary injunction is an "extraordinary remedy and is never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To successfully obtain a preliminary injunction, the plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in

his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20.

The United States Supreme Court recently reemphasized that the moving party must satisfy four separate elements to succeed on a request for a preliminary injunction. *Ramirez v. Collier*, 142 S. Ct. 1264 (2022). The Tenth Circuit couches these elements as requirements – barring success unless all four elements are satisfied. *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 797 (10th Cir. 2019).

Plaintiffs request this Court's intervention to demand their admittance into Larned State Hospital. *Doc. 5*, p. 4. The Tenth Circuit warns against granting injunctions that "alter the status quo or that require the 'nonmoving party to take affirmative action—a mandatory preliminary injunction—before a trial on the merits occurs.'" *Att'y Gen. of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009) (quoting *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009)).

Because mandatory preliminary injunctions are disfavored, the requesting party is required to make a heightened showing of the required factors. *RoDa*, 552 F.3d at 1208-09. The heightened requirement exists "to minimize any injury that would not have occurred but for the court's intervention." *Id*. at 1209. Plaintiffs fail to meet this standard.

II. Plaintiffs' claims fail on their merits.

The first hurdle when securing a preliminary injunction under Federal Rule of Civil Procedure 65 is to show a "substantial likelihood of success on the merits." *Harmon v. City of Norman, Oklahoma*, 981 F.3d 1141, 1146 (10th Cir. 2020). Plaintiffs fall short of this burden on all claims.

A. Defendants do not deprive Plaintiffs of substantive due process.

The Due Process Clause of the Fourteenth Amendment prohibits a State from "depriv[ing] any person of life, liberty, or property, without due process of law." amend. XIV, § 1. Plaintiffs

claim a liberty interest in being free from incarceration absent a criminal conviction, to receive a timely competency evaluation, and to receive a speedy trial. *Doc. 5*, p. 13. But "involuntary civil commitment proceedings must balance this liberty interest with the State's legitimate interests in protecting the public from dangerous individuals and providing care for citizens who cannot care for themselves." *Matter of Quillen*, 312 Kan. 841, 850, 481 P.3d 791, 798–99 (2021), citing to *Addington v. Texas*, 441 U.S. 418, 425-26 (1979).

Plaintiffs are incarcerated because they are suspected of committing a crime and a court of competent jurisdiction has determined the incarceration should continue. Their rights are protected under the due process clause of the Fourteenth Amendment rather than the Eighth Amendment's proscription against cruel and unusual punishment. *Van Curen v. McClain Cnty. Bd. of Cnty. Comm'rs*, 4 Fed. Appx. 554, 556 (10th Cir. 2001). That "inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations." *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

Due process requires "that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). The court weighs the parties' respective interests to determine if a "reasonable relation" between the length of time from the court order to the inception of the competency evaluation exists. *Trueblood v. Washington State Dep't of Soc. & Health Servs.*, 822 F.3d 1037, 1043 (9th Cir. 2016).

To determine if the substantive due process rights of incapacitated criminal defendants has been violated, the court must balance the defendant's liberty interests against the relevant interests of the State. *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982). Here, the State has a significant interest in not trying incompetent defendants (leading to more time in custody); the State has significant interest in providing a secure jail facility while Plaintiffs wait their turn to receive

services (leading to administrative segregation for some criminal defendants who pose safety risks in jail); and the State has a significant interest in providing a secure and competent facility at Larned State Hospital (making some bed space unavailable due to lack of staff).

Plaintiffs here have been placed under arrest and given bond amounts for the safety of society. Liberty interests may be subordinated to the greater needs of society. *United States v. Salerno*, 481 U.S. 739, 750 – 51 (1987) ("While the Government's general interest in preventing crime is compelling, even this interest is heightened when the Government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community. Under these narrow circumstances, society's interest in crime prevention is at its greatest. … when an arrestee presents an identified and articulable threat to an individual or the community, we believe that consistent with the Due Process Clause, a court may disable the arrestee from executing that threat. Under these circumstances, we cannot categorically state that pretrial detention offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.") (internal citations omitted). Here, the State's interest outweighs those claimed by Plaintiffs.

"The government 'has a substantial interest in ensuring that persons accused of crimes are available for trials,' and confinement is 'a legitimate means of furthering that interest.'" *United States v. Deters*, 143 F.3d 577, 583 (10th Cir. 1998) (quoting *Bell*, 441 U.S. at 534). In *Deters*, the criminal defendant claimed that her confinement during the time of her preliminary competency evaluation violated her constitutional liberty interest. *Id*. at 581. The Tenth Circuit held that, so long as the district court had made findings of fact concerning the need for commitment – which includes the need to determine competency – the confinement is not unconstitutional. *Deters*, 143 F. 3d at 584.

Additionally, the confines of pretrial detention are reasonably related to a legitimate

governmental objective. *Bell*, 441 U.S. at 537. The *Bell* Court further explained:

> Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention. Traditionally, this has meant confinement in a facility which, no matter how modern or how antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial. Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into "punishment." … Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." These legitimate operational concerns may require administrative measures that go beyond those that are, strictly speaking, necessary to ensure that the detainee shows up at trial. For example, the Government must be able to take steps to maintain security and order at the institution … Restraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomforting and are restrictions that the detainee would not have experienced had he been released while awaiting trial.

Id. at 539-40.

Under this "rule of reasonableness," Plaintiffs' constitutional rights awaiting initial evaluation or restorative treatments are not violated. Though not ideal, the ripple effects of the global pandemic and resulting labor shortages have created reasonable delays. Restrictions posed by now-defunct legislation limited a district court's options in ordering treatments. As discussed further below, *infra* § V, *infra, pp*. 21-27 , implementation of solutions to the pandemic's effects, and enactment of recent statutory reforms are well underway.

The Constitution prohibits indefinite commitment. *Jackson v. Indiana*, 406 U.S. 715, 731 (1972). But KDADS is not causing an indefinite commitment of Plaintiffs; they are on a constantly advancing list awaiting evaluation or admittance into the Larned State Hospital. While not optimal, the line does progress, and criminal defendants are assured that their turn is ahead.

Additionally, Plaintiffs argue that the administrative segregation imposed by local county

jails provides an additional basis for violation of Plaintiffs' substantive due process rights. *Doc. 5*, p. 18, fn. 22. However, the case sited discusses inmates (not pretrial detainees) and the Tenth Circuit ultimately found no deprivation of due process when the reason for the segregation is central to the jail's purpose of ensuring the safety of all inmates. *Est. of DiMarco v. Wyoming Dep't of Corr., Div. of Prisons*, 473 F.3d 1334, 1345 (10th Cir. 2007).

Plaintiffs here are awaiting initial or restorative evaluations and held under the custody and control of local jails because they have been accused of committing a crime. They've been arrested by a law enforcement officer who believed their conduct violated a law; the charges have been reviewed by a state prosecutor and determined to warrant prosecution; they've been in front of a judge who held a bond hearing; and their competency has been called into question by the court, their counsel, or the prosecuting attorney. *See* K.S.A. 22-3302(a)(1). The district judge has options to assist the court in determining the criminal defendant's competency to stand trial. *Id*. Only when the director of a local county or private institution recommends KDADS perform the evaluation, and the judge declines other alternatives, is the criminal defendant placed on the waiting list for evaluation by LSH. *Id*. at (3).

Until then, Plaintiffs may be released on bail, provided options for community services, or remain in the control of the local jail – all determined by the district court judge. If it is in society's best interest to keep the plaintiff detained, they remain in the custody of the local sheriff until their admittance to LSH. The sheriffs' duty to maintain a secure jail facility is "evaluated in the light of the central objective of prison administration, safeguarding institutional security" even if constitutional rights of pretrial detainees are infringed. *Bell v. Wolfish*, 441 U.S. 520, 546–47 (1979) (internal citations omitted).

> Maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees. … [C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves.

> … Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. There is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates. Indeed, it may be that in certain circumstances they present a greater risk to jail security and order."

Id., at fn. 28.

Defendants are not responsible for Plaintiffs' treatment conditions until such time they admit Plaintiffs to LSH. Defendants have not created procedures to delay Plaintiffs' admittance to their care. Concerns regarding administrative segregation directed at Defendants are misplaced. However, local jails are justified in determining the safest environment for Plaintiffs for the good of all persons housed within their control. Plaintiffs are unlikely to succeed on this claim against Defendants.

Additionally, Plaintiffs claim an interest in being provided a speedy trial. *Doc. 5* at 13. But a criminal defendant's speedy trial rights are suspended during a competency evaluation. Though the Sixth Amendment guarantees an accused the right to a speedy a trial, a criminal defendant cannot be constitutionally tried while incompetent. *Medina v. California*, 505 U.S. 437, 439 (1992) ("It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial."); *see also Matter of Snyder*, 308 Kan. 615, 620, 422 P.3d 1152, 1155 (2018) ("That delays caused by questions of competency do not impinge on an accused's right to a speedy trial is well established."). Plaintiffs here have a suspended right that is not calculated into the competency evaluation or treatment timeline. Defendants do not violate any interest Plaintiffs have in a speedy trial and Plaintiffs are unlikely to succeed on the merits of this claim.

B. Defendants do not deprive Plaintiffs of procedural due process.

If a protected property or liberty interest is recognized, the Constitution may require certain procedures, such as a hearing, before depriving a person of that interest. *See Mathews v. Eldridge*,

424 U.S. 319, 333 (1976). But every state, including Kansas, "have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety." *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997). In *Henricks*, the United States Supreme Court upheld Kansas' statue pertaining to involuntary civil commitment of sexually violent predators. Here, Plaintiffs remain detained for purposes of evaluating and treating their mental illnesses. This evaluation and treatment are necessary to protect Plaintiffs' right to participate in their defense. Allowing proceedings to continue when a question of competency is raised would be a violation of the Plaintiffs' constitutional rights.

When the statute institutes a civil process meant to protect, even when the statute is "tied to criminal activity" it remains "insufficient to render the statut[e] punitive." *Hendricks*, 521 at 362, citing to *United States v. Ursery,* 518 U.S. 267 (1996). K.S.A. 22-3302 and 3303 provide the process for determining a criminal defendant's competency and the process to evaluate if restoration is possible or providing for involuntary commitment. Holding Plaintiffs for evaluation is "not retributive because it does not affix culpability for prior criminal conduct. Instead, such conduct is used solely for evidentiary purposes" and is thus constitutional. *See Henricks*, 521 at 362.

Additionally, when "such 'special and narrow circumstances' are present, the government's interest in preventing harm outweighs the 'individual's constitutionally protected interest in avoiding physical restraint'" *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1252 (10th Cir. 2008), quoting *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001). And "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment." *United States v. Salerno*, 481 U.S. 739, 746 (1987).

In cases in which preventative detention is of potentially indefinite duration, and where an

individual is being detained because he is dangerous to himself or his community, due process demands the presence of "some other special circumstance, such as mental illness, that helps to create the danger." *Zadvydas*, 533 U.S. at 691. But when the purpose of the detention is linked to the "stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others," the duration is "far from any punitive objective" and due process is not required. *Hendricks*, 521 U.S. at 363.

Pretrial detainees do not have a liberty interest requiring procedural due process unless they are subjected to punishment. *Peoples v. CCA Det. Centers*, 422 F.3d 1090, 1106 (10th Cir. 2005), *opinion vacated in part on reh'g en banc on different issue*, 449 F.3d 1097 (10th Cir. 2006). In *Peoples*, the plaintiff alleged a violation of his due process rights as a pretrial detainee when he was placed in segregation for thirteen months. *Id*. The Tenth Circuit, citing to *Bell*, 441 U.S. at 536-37 held that only punishment requires due process, and if there are other legitimate government purposes for the detention, no constitutional violations have occurred. *Id*.

> The determination of whether a condition of pretrial detention amounts to punishment turns on whether the condition is imposed for the purpose of punishment or whether it is incident to some other legitimate government purpose. If an act by a prison official, such as placing the detainee in segregation, is done with an intent to punish, the act constitutes unconstitutional pretrial punishment. Similarly, "if a restriction or condition is not reasonably related to a legitimate [governmental] goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment." On the other hand, restraints that "are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomforting." Obviously, "ensuring security and order at the institution is a permissible nonpunitive objective, whether the facility houses pretrial detainees, convicted inmates, or both." Thus, "no process is required if [a pretrial detainee] is placed in segregation not as punishment but for managerial reasons."

Id. (internal citations omitted).

Defendants are not responsible for Plaintiff's care during their time in the local jail. But jail authorities have a recognized interest in maintaining order in the local jails. *Bell v. Wolfish*, 441 U.S. at 546–47; *Est. of DiMarco*, 473 F.3d at 1345 (10th Cir. 2007). Defendants are not

inflicting punishment on Plaintiffs, even when delays in treatment occur. And the detention is not indefinite. Therefore, no due process is required and Plaintiff' claim fail on its merits.

C. Defendants do not deprive Plaintiffs Fourteenth Amendment rights prohibiting cruel and unusual punishment.

While Plaintiffs await initial or restorative evaluations, they are under the custody and control of local jails. KDADS takes control of a criminal defendant at the time a bed space is made available, not during the time they are in the custody of the county jail. Plaintiffs mistakenly name KDADS as the culprit of this alleged deprivation. *Doc. 5*, p. 2.

Pretrial detainees are protected under the Fourteenth Amendment's Due Process Clause rather than under the Eighth Amendment's proscription against cruel and unusual punishment. *Van Curen v. McClain Cnty. Bd. of Cnty. Comm'rs*, 4 Fed. Appx. 554, 556 (10th Cir. 2001). But the Eighth Amendment's standard of care using "deliberate indifference" provided in *Estelle v. Gamble*, 429 U.S. 97 (1976) is the same for pretrial detainees. *Howard v. Dickerson*, 34 F.3d 978, 980 (10th Cir. 1994). The duty to provide access to medical care extends to pretrial detainees. *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983).

A constitutional violation requires a showing of "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97 (1976). Deliberate indifference occurs when a need is intentionally denied, delayed, or treatment is intentionally interfered with. *Id*. at 104. "Negligence, gross negligence, and tort recklessness were all insufficient to justify liability. …an official or municipality acts with deliberate indifference if its conduct (or adopted policy) disregards a known or obvious risk that is very likely to result in the violation of a prisoner's constitutional rights" *Barrie v. Grand Cnty., Utah*, 119 F.3d 862, 869 (10th Cir. 1997) (internal citations omitted).

Plaintiffs are unlikely to succeed on the merits claiming cruel and unusual punishment for two reasons: First, they cannot show a deliberate indifference to their medical needs because

KDADS provides safe, comprehensive treatment to those within its care. There is no intentional denial of treatment by the Defendants, and the delays caused are not intentionally caused or interfered with by KDADS.

Second, Plaintiffs will not succeed on the merits of this claim because Plaintiffs have failed to join indispensable parties who control the care and treatment of Plaintiffs during their time in jail. This Court cannot provide complete relief among existing parties without jurisdiction over the counties operating the jails. *See* Fed. R. Civ. P. 19(a)(1)(A).

If Plaintiffs could show that their medical needs are intentionally being ignored, their grievance would be with the local jails charged with the custody and control of Plaintiffs until released to KDADS. Any allegations of a criminal defendant being placed in a solitary cell is a concern better addressed to the local jails who maintain defendants. *See Ramos v. Lamm*, 639 F.2d 559, 568 (10th Cir. 1980) ("a state must provide an inmate with shelter which does not cause his degeneration or threaten his mental and physical well-being.") (internal citations omitted).

Plaintiffs cannot show Defendants' policies or procedures intentionally disregard their needs for medical treatment. Further, changes allowing quicker evaluation and localized treatment are being implemented due to the legislative changes effective July 1, 2022. These changes also now allow medication to be administered over the objections of criminal defendants meeting specified criteria in effort to stabilize and improve their mental health by enforcing a court order permitting involuntary administration of medication to criminal defendants. K.S.A. 22-3303 (f)(4). District courts can now prevent the harms described by Plaintiffs by ordering the counties provide adequate care for persons either released to the community or while they remain in jail awaiting transfer. As acknowledged in Plaintiffs' motion, jails do not employ previously available tools only because they have not devoted adequate resources to their mentally ill

populations. *See Doc.* 5 at 21.

Plaintiffs are unlikely to succeed on the merits of this claim. KDADS is not deliberately indifferent to the serious medical needs of Plaintiffs. And Plaintiffs are not under the care and control of KDADS at the time of the alleged violations. KDADS has no control over the jails and the decisions they make regarding protocols for protection and safety. Once Defendants take custody of Plaintiffs, they provide care to Plaintiffs that is not deliberately indifferent to their serious medical needs.

III. Plaintiffs will not suffer irreparable injury absent a preliminary injunction because Defendants are already voluntarily taking the requested action.

Speculative or theoretical injury is not enough to warrant a preliminary injunction. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009). The injury must be "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *State v. U.S. Env't Prot. Agency*, 989 F.3d 874, 884 (10th Cir. 2021). A showing of only "possible" injury is too lenient a standard for a district court to order a preliminary injunction. *Winter*, 555 at 22. Rather, plaintiffs must "demonstrate that irreparable injury is *likely* in the absence of an injunction. *Winter*, 555 U.S. at 22, citing to *Los Angeles v. Lyons,* 461 U.S. 95, 103 (1983); *Granny Goose Foods, Inc. v. Teamsters,* 415 U.S. 423 (1974); *O'Shea v. Littleton,* 414 U.S. 488, 502 (1974) ("[A] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury").

As discussed more below, *infra* V., KDADS' resources are being utilized to undertake changes made to both the competency evaluation statute as well as the process for determining long-term competency solutions made this legislative session. Any presumed benefit claimed by Plaintiffs by a Preliminary Injunction is wholly speculative. Defendants are already working on changes that will make the most impact to the wait list. Plaintiffs fail to show an irreparable injury

remedied only by a Preliminary Injunction.

Further, Plaintiffs are unable to show current constitutional violations caused by Defendants. It is unclear what a preliminary injunction would provide in addition to the changes are already being implemented. *Infra* V. Issuing a preliminary injunction based only on a *possibility* of irreparable harm is inconsistent with "[the United States Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997) (*per curium*).

KDADS is already implementing the changes advocated by Plaintiffs. Plaintiffs' preliminary injunction requests Defendants to stop "maintaining a waitlist with unconstitutional wait times" and "develop and implement a remedial plan to bring wait times for competency evaluations and competency restoration treatment within constitutional limits." *Doc. 5* at 4. It is important to note that this is what KDADS is currently doing.

Therefore, there is no need for this Court to mandate actions that Defendants are already voluntarily undertaking to alleviate the Plaintiffs' grievances. Plaintiffs can show no irreparable injury caused in absence of a preliminary injunction.

IV. The damage caused by Plaintiff's interference outweighs any benefit conferred by a preliminary injunction

Plaintiffs' request ignores the impact escalated relief will have on the health and safety of mentally ill patients residing at LSH, the safety of the staff, and the public at large. Courts are cautioned against "granting injunctions that alter the status quo or that require the "nonmoving party to take affirmative action—a mandatory preliminary injunction—before a trial on the merits occurs." *Att'y Gen. of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009). Further, [i]t is in the public interest that federal courts of equity should exercise their discretionary power

with proper regard for the rightful independence of state governments in carrying out their domestic policy. *Commonwealth of Pennsylvania v. Williams*, 294 U.S. 176, 185 (1935).

Plaintiffs here are not asking this Court to stop the Defendants from doing something. They are asking this Court to force actions that may reduce the wait time for competency evaluation and treatment. This amounts to an affirmative action requiring Plaintiffs to meet the heightened standard. *See Att'y Gen. of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d at 776.

Any action above what KDADS is already implementing, *infra* V., damages the systems our society has in place. The State has significant interest in protecting society by arresting, charging, and prosecuting those accused of committing a violation of our laws. *See e.g.*, *United States v. Salerno*, 481 U.S. 739, 750 – 51 (1987). The State has an interest in ensuring those accused of crimes are available for trail. *See e.g.*, *Bell*, 441 U.S. at 534. And the State has a significant interest in providing a criminal defendant an evaluation to determine competency, and treatment for restoration to competency, in effort to allow defendants the ability to participate in their own defense and avoid violations of their due process. *See e.g.*, *Dusky v. United States*, 362 U.S. 402, 402 (1960). Maintaining these interests, even if they lead to waiting lists, outweigh any purported interest by Plaintiffs.

Further, Plaintiffs fail to show that Defendants are responsible for causing the harm alleged. *Supra* II. Decisions to arrest, detain, prosecute, deny bail, and request competency services are outside the control of Defendants. A mandate for Defendants to act beyond their current efforts will only result in unsafe staffing levels at LSH, a potential release of criminal defendants who may require incarceration, and more resources from KDADS going to litigation instead. These harms are not "minor" as Plaintiffs claim. Doc. 5, p. 32. Requested relief requires more than additional funds – it encompasses potential violations of significant state interests that lead to substantial damage.

V. A preliminary injunction is adverse to the public's interest.

Plaintiffs concede that changes to the very processes they complain of are afoot. *Doc. 5*, pp. 3-4. Interference by this Court at this time is adverse to the public's interest and will only delay KDADS' ability to progress. Defendants do not deny Larned State Hospital is unable to operate at full capacity. Exhibit 1, Brunner Affidavit. And KDADS acknowledges the need for additional resources to manage Larned State Hospital effectively. *Id*. The support for Plaintiffs' argument here comes from the Defendants' own statements encouraging the Kansas Legislature and Governor Kelly to provide needed additional resources to LSH – which they did. *Doc. 5*, p. 7, fn. 4; Exhibit 1, Brunner Affidavit.

In partnership with stakeholders, Defendants are implementing improvements, advocating for additional funding, supporting more localizes treatment options, and working towards less time spent in local jails awaiting treatment. Solutions that KDADS have preemptively implemented include the following:

A. Legislative Changes

KDADS collaborated with stakeholders throughout the State to recommend amendments to Kansas competency statutes, including K.S.A. 22-3302 and 3303. These partners provided recommendations and support for necessary changes. [1] *See Exhibit 2*, Proponent Testimony, Feb. 17, 2022. The Kansas Legislature passed the new legislation in the 2022 session and Governor Kelly signed House Bill 2508 into law, effective July 1, 2022.

These amendments alter the process and availability of services for conducting competency evaluations and restorative treatment to criminal defendants. The statutory changes made by House Bill 2508 provides for more locations where the district court can order competency evaluations

[1] The Court should note that Plaintiff's counsel is familiar with these efforts. The ACLU supported the changes by providing proponent testimony at the hearing held by the Kansas House Judiciary Committee on Feb. 17, 2022. *Exhibit 2*, Proponent Testimony, Feb. 17, 2022, p. 25-26.

and enhance the process for a criminal defendant to complete the competency evaluation without the need to transport to LSH. The previous statutory language authorized other "…appropriate state, county, private institution or facility…" to perform evaluations. But the amendments further allow evaluations to be conducted in person or by electronic means while the defendant is in jail, at an alternative secure location, or on pretrial release in the community.

The changes allow a mobile evaluation to be completed where the defendant is in the community using in-person or tele-video evaluators to complete the process without requiring local law enforcement to transport the defendant to LSH. Additionally, the revised statutes now allow for an outpatient path for competency restoration services that could be completed in facilities other than LSH while a defendant remained in jail, on pretrial release, or in another secure facility. However, allowance is still provided for a defendant to be moved to LSH if the community-based treatments fail. As noted below, these changes are already being utilized in pilot projects in our state's most populous counties.

The recent amendments also allow a court to reduce the number of physicians or psychologists appointed to conduct an evaluation from two to one. This simplification continues the important work of a private physician or psychologist to conduct evaluations, but reduces the required resources required.

Prior to House Bill 2508 a defendant could not be medicated over their objection unless the person was in a mental health crisis, or a determination was made the person required a dual care and treatment case because the person was found to be a "mentally ill person subject to commitment under K.S.A. 59-2945 et seq. The changes contained in House Bill 2508 will allow a court to order medication over objection when certain statutory criteria are satisfied, which should assist LSH to speed up the treatment for those charged with a felony and who meet criteria but have previously refused medication. It will also assist those in jails where services are

available.

And the amended statute requires, rather than just allows, district courts to credit the time during which the defendant was committed and confined to the underlying sentence. Finally, the amendments allow a district court judge to order outpatient treatment. This, along with the credited time requirement, reduces the chances a criminal defendant facing misdemeanor charges spends more time in jail than their underlying sentence would require. This also reserves the inpatient beds at LSH for defendants with more serious charges.

B. Mobile Evaluations

In 2019, KDADS began performing Mobile Competency Evaluations. Exhibit 1, Brunner Affidavit. These evaluations are completed at the local level with LSH psychologists or contract providers traveling to the counties to perform the restoration treatment and evaluation. LSH coordinates between counties, courts, jails and licensed clinical staff to complete forensic evaluations in a secured confinement setting or in alternative community settings where the criminal defendant is located. For defendants ordered for a competency evaluation pursuant to K.S.A. 22-3302, the initial evaluation can be done in the community, by LSH, or an agent of LSH. For criminal defendants ordered for competency treatment and evaluation pursuant to K.S.A. 22-3303, the court order allows for the evaluation and treatment to be done at any appropriate state, county, or private institution or facility by staff of LSH or its agent.

For defendants ordered for mobile competency by LSH or its agent, LSH makes an initial clinical assessment to determine if the individual can receive mobile competency restoration services. The clinical team reviews the information provided by the jail and any other information provided to determine if the defendant meets the criteria to be served locally. Criteria include: the defendant is not an imminent danger to self or others; the defendant's competency is likely to be restored in 60-90 days; the defendant is both medication and treatment compliant; the defendant

is motivated to participate in competency treatment; and the defendant does not have a medical condition likely to exacerbate psychiatric symptoms.

LSH continues to work with Kansas counties, courts, jails, and other community stakeholders to expand services for individuals awaiting admission for initial evaluation or restorative treatment. By increasing mobile competency orders and services, KDADS anticipates reducing wait times for evaluations and reducing transportation costs for the counties.

Even as the pandemic unfolded in 2020, LSH continued to reach out to courts, receiving orders for and conducting 27 mobile competency and same day evaluations; eliminating the need to admit 27 individuals to Larned for inpatient evaluations. And, in 2021, 18 mobile competency evaluations were conducted across the state, including for two individuals on bond who completed competency restoration treatment and evaluation in the community. So far in 2022, 19 competency evaluations have been completed through mobile competency across Kansas.

Further, KDADS budget for Fiscal Year 2022 includes an additional $2.8 million from the State General Fund for expansion of the pool of providers to conduct mobile competency evaluations and competency restoration services. The funding is being used to increase evaluators and mobile competency opportunities, which includes contracts with Community Mental Health Centers (CMHCs) to partner with local law enforcement and district courts to complete forensic competency reviews for criminal defendants without transporting or waiting for space at Larned State Security Hospital.

As explained by the State's Budget Director, Adam Proffitt, the $2.8M will be awarded as grants to the local CMHCs.

> The grants would be structured to allow CMHCs to design services in cooperation with courts and jails within their catchment areas to complete the competency evaluations needed by courts to continue criminal cases with shorter delays and increase the capacity around the state to perform competency restoration in jails. By specifically investing funds in reducing the waiting time for evaluation and restoration, criminal cases would move more quickly through the process resulting

> in reduced housing of mentally ill patients in jails. By reducing the backlog in cases, the space for forensic treatment at LSH could be reserved for the most severe cases and for the defendants criminally committed to LSH.

Exhibit 3, *Fiscal Note for HB 2697*, Feb. 17, 2022.

C. Localized Treatment

The budget for Fiscal Year 2022-2023 included $2.8 million to fund expanded competency work by the local Community Mental Health Centers (CMHC). Sixty percent of defendants waiting for evaluation or restoration at LSH come from the six most populous counties in Kansas. KDADS targets resources included in the final state budget for fiscal year 2023 to those counties with most defendants. Serving those defendants in their home communities reduces the demand on LSH beds, resulting in more free space to serve criminal defendants from other counties.

In addition to conducting initial competency evaluations locally, KDADS is currently conducting four pilot programs for local restorative treatments. The first pilot occurred in Shawnee County between jail officials, Valeo, and the LSH Team with a psychologist from LSH providing services in the jail. In the initial Shawnee County pilot with coordination program, four defendants were identified for initial participation and competency restorative treatments were provided at the jail. Three of those defendants cooperated with treatment and the reports to the court were written. One defendant was not successful and was admitted to LSH for inpatient restoration. Recently three additional defendants completed competency restoration in the Shawnee County Jail with reports pending completion. This pilot program is being replicated in Douglas, Sedgwick, and Wyandotte Counties.

This eliminates the need for criminal defendants to wait for an open bed at LSH before receiving treatment. Using outpatient treatment paths save the counties money in avoiding the transportation to LSH. More importantly, the provision of local treatment lowers the delay for criminal defendants to receive help. And the amended statute requires, rather than just allows,

district courts to credit the time during which the defendant was committed and confined to the underlying sentence.

Wyandotte County District Attorney Mark Dupree supported this idea of allowing treatment to occur inside of the jail, rather than transporting the criminal defendant to LSH. He stated:

> It reduces trauma to those individuals who suffer from mental illness while awaiting their competency evaluation by allowing them to remain in an environment they are familiar with and know the structures/routines of, i.e., the local jail. Under the current structure of determining and treating competency issues, a person suffering from mental illness gets booked into the jail, they begin learning the structures, policies, and routines of that institution, then they get removed from that learned environment to a brand-new environment and are required to readjust to a new set of policies and rules. Finally, when they are restored, they have to unlearn the policies and rules of one institution and adjust to the jail rules they learned months before. This increases significant trauma for the individual and encourages disruptive behaviors in the jail.

Exhibit 2, *Proponent Testimony*, Feb. 17, 2022, p. 8.

For criminal defendants on bond or conditional release, KDADS regularly partners with Community Mental Health Centers to coordinate treatment where the defendant lives. Exhibit 1, Brunner Affidavit. Community partners monitor the defendant and reduce the numbers waiting for admittance into LSH. Defendants who stop participating, or who are not progressing in the restoration process may still require admittance to LSH.

D. Same-Day Transportation

For those counties without an ability to evaluate criminal defendants at the local level, LSH started working with law enforcement to arrange multiple defendants requiring a competency evaluation to travel to LSH on one day. Criminal defendants arrive at LSH escorted by law enforcement officers and undergo their initial evaluation. This reduces the number of transports required from a single county. If admission to LSH is required, the incompetent defendant is placed on the waiting list while the district court finalizes the referral. While coordination makes this

solution challenging, it remains an option for means of efficient use of resources.

Solutions are currently being implemented to reduce lengthy wait times caused by the extenuating circumstances created by the COVID-19 pandemic, the fluctuating job market, and other unforeseen limitations on ordering evaluations and treatments. Plaintiffs' race to relief overlooks the impact their request will have on the public – opening immediate bed space without appropriate staffing levels can lead to injury of the LSH staff and/or patients and risk of escape of dangerous patients already confined to LSH. *See Exhibit 4*, Andrew Bahl, *String of worker attacks quietly hit Larned State Hospital, as officials search for staffing solutions*, Topeka Capital-Journal, Feb. 17, 2022. Rushing patients through care may result in inadequate or incomplete services provided. And pre-release may lead to depravations of other significant protections.

Additionally, any requested relief that is not already in-process would be nearly impossible to implement. Under Fed. R. Civ. P. 65(d)(1)(B), the Court must draft specific terms so as not to create a vague or general restraining order that cannot be easily obeyed or effectively enforced. Orders that require the implementation of complex administrative procedures and rely on state doctors to exercise professional judgment in a specific manner invite contempt motions based on subjective views of when a process is "not good enough" or "not fast enough." *See* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure, Civil § 2955, p. 351 (3d ed. 2013). Crafting the kinds of orders under Plaintiff's vague request can lead to ambiguities and complicate future litigation, redirecting tax-payer dollars to arguing technicalities instead of implementing solutions.

Ordering KDADS to decrease the wait time is unnecessary and duplicative. A court should consider the consequences in effort to avoid wasting judicial resources. *Haugh v. Booker*, 210 F.3d 1147, 1150 (10th Cir. 2000). Defendants are confident that the plans in progress will reduce the problems identified by Plaintiffs without court intervention.

Conclusion

This court should deny Plaintiffs' request because they cannot meet their heightened burden on any of the four required factors demonstrating the need for a preliminary injunction. Moreover, Defendants are in the process of implementing the relief Plaintiffs request, and KDADS is not the entity imposing the damage alleged. Defendants respectfully request this Court deny Plaintiffs' motion for a Preliminary Injunction to avoid unnecessary delay on the changes already underway.

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Certificate of Service

I hereby certify that I caused the foregoing to be electronically filed on the 25th day of July, 2022, with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to:

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