IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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., *Plaintiffs*, v. 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*.	Civil Action No. 5:22-cv-04032TC-GEB

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendants' response to Plaintiffs' Motion for Preliminary Injunction (the "Motion") should be rejected on procedural grounds and is unpersuasive on substantive grounds. As a threshold matter, Defendants waived their right to respond to the Motion by choosing to file their response over a month after it was due. Even if the Court decides to consider the response notwithstanding its untimeliness, Defendants do not contest the duration of time Plaintiffs are forced to languish on the waitlist and do not dispute, distinguish or even address the cases Plaintiffs have cited that establish that this duration violates the Constitution. Defendants instead attempt to obfuscate by stating that Larned State Hospital ("LSH") currently has a wait time of "several

months" and by re-framing the argument as one of whether Plaintiffs are subject to indefinite detention. This vague re-characterization of the wait time and attempted misrepresentation of the legal issue in the case establishes no dispute about the patently unconstitutional nature of the nearly year-long waits Kansans must endure to receive competency services. The average wait for competency restoration services in Kansas is 151 days, longer than any wait other courts have uniformly deemed to violate the Due Process Clause. This is the dispositive point of the case, and Defendants have nothing to say about it.

Moreover, Defendants presented no facts or legal authority on any of the preliminary injunction factors that weigh against granting the relief sought in Plaintiffs' Motion. The Court should grant the Motion and enjoin Defendants from maintaining their unconstitutional waitlist, which deprives Plaintiffs of their liberty interests in violation of substantive due process, procedural due process, and the right to be free from cruel and unusual punishment.

I. Defendants waived their right to respond to the Motion.

Plaintiffs' Motion should be considered unopposed due to Defendants' flagrant refusal to comply with this Court's rules. The District of Kansas requires response briefs to non-dispositive motions be filed within 14 days of service of the motion. D. Kan. Local Rule 6.1(d)(1). A party that fails to file a response brief in the time provided by Rule 6.1 waives their right to later file the brief. D. Kan. Local Rule 7.4(b). This Court has discretion to consider untimely filings if the failure to comply with deadlines is the result of excusable neglect. *See Hadd v. Aetna Life Ins*. Co., 2019 WL 7504840, at *1-2 (D. Kan. Jun. 18, 2019). The excusable neglect standard focuses on equity and weighs: (1) the danger of prejudice to the moving party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the delinquent party, and (4) whether the delinquent party acted

in good faith. *See Secure Techs. Int'l v. Block Spam Now LLC*, No. 04-2121-KHV, 2004 WL 2005787, at 17921, at *2 (D. Kan. Sept. 7, 2004).

Defendants missed their filing deadline by over a month and cannot show excusable neglect. Plaintiffs filed the Motion and supporting memorandum on May 26, 2022. Dkt. #4. Plaintiffs sent the brief via electronic mail to Defendants on May 26, 2022. Exhibit A, Email from Sharon Brett to Sherry Diel, May 26, 2022. Defendants retained counsel, David Cooper, on or before June 13, 2022. Exhibit B, Email from David Cooper to Sharon Brett, June 13, 2022. Defendants' counsel is registered as a filing user and has consented to electronic service of all documents. *See* Fed. R. Civ. P 5(b)(2)(E); D. Kan. Local Rule 5.4.2(e). Consent to electronic service extends to papers served over email, not just those filed through the Court's ECF system. D. Kan. Local Rule 5.4.2(e). Defendants therefore have been served via the electronic filing system and email pursuant to Rule 5(b)(2)(E). Defendants do not dispute that they received the Motion or that it otherwise did not reach them—the only exception for electronic service under Rule 5. Accordingly, Defendants were served at the latest on June 13, 2022 when a registered user who had proactively consented to electronic service began representing them.

Accordingly, Defendants' response was due fourteen days after the date of service on June 27, 2022. After Defendants failed to abide by this Court's deadline, Plaintiffs reached out to Defendants regarding their interest in seeking an unopposed extension. Exhibit C, Email from Sharon Brett to David Cooper, July 1, 2022. Defendants denied their need to seek an extension. Instead, they insisted that they had not been properly served and, absent any legal support for the assertion, unilaterally decided they would file their response on July 25, 2022. Exhibit D, Email from David Cooper to Sharon Brett, July 5, 2022.

It is difficult to ignore the parallels between Defendants' disregard for the constitutional requirements at issue in this case and their indifference to the rules of this Court. Just as Defendants seek to set their own timeline for when they will treat Plaintiffs irrespective of what the Fourteenth Amendment requires, they seek to set their own deadlines in defiance of this Court's rules. Defendants' intentional refusal to meet the Court's deadline or seek an extension does not meet the standard of excusable neglect. Plaintiffs have detailed the irreparable harm they suffer while awaiting evaluation and restoration treatment. *See* Dkt. #5 at 29-31. Moreover, the delay in question was not short. Defendants stalled proceedings for a month, shortening the Court's time with the briefing in the case and potentially slowing a decision on the Motion. Finally, Defendants have offered no reason for the delay other than their counsel felt like other matters were "a higher priority" and their bad faith assertion that the Motion had not been served due to Defendants' counsel delaying entering an appearance in the case. Whether the delayed entry of an appearance is an attempt at gamesmanship or the result of careless disregard for the importance of this case, neither cause constitutes excusable neglect.

Defendants' response is untimely and their delay is not the result of excusable neglect. Local rules and equity both support this Court considering Plaintiffs' Motion unopposed.

II. The relevant factors counsel in favor of a preliminary injunction.

In opposing Plaintiffs' Motion, Defendants concede that the wait time for admission to LSH is too long and must be remedied. Defendants' opposition to the Motion amounts to a request that the Court (and Plaintiffs) trust them to fix the problem. Defendants' argument chiefly depends on the supposition that the exceedingly long waitlist is justified by a compelling state interest and the harmless byproduct of a lack of funding. These arguments are disingenuous attempts to deflect blame and minimize the harm experienced by Plaintiffs. Further, Defendants do not set forth a

plausible connection between any state interest and the length of the waitlist; their arguments otherwise are contrary to law. Finally, Defendants' recently-initiated efforts to shorten the waitlist—which they describe at length in order to avoid grappling with the actual constitutional violations raised by Plaintiffs—are insufficient, unproven, and will not ameliorate the constitutional injuries currently being visited upon Plaintiffs. The Court should grant the Motion and preliminarily enjoin the unconstitutional wait times used by Defendants to deny competency evaluations and restoration treatment to Plaintiffs.

1. Likelihood of Success on the Merits

Defendants' contention that Plaintiffs are unlikely to succeed on the merits of their substantive due process, procedural due process, and cruel and unusual punishment claims is unconvincing and contrary to established precedent. Plaintiffs have made a strong showing that they are likely to succeed on the merits of their constitutional claims, and as such, this factor weighs in favor of a preliminary injunction.

i. Substantive Due Process

Defendants fail to assert a reasonable relationship between the length of time Plaintiffs are forced to wait for evaluation or treatment at LSH and any legitimate state interest, and fail to meaningfully contend with numerous precedents from other courts holding that *lesser wait times* than currently in place at LSH violate due process.

Defendants recognize that 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). They cite case law where courts have weighed the parties' respective interests to determine if a "reasonable relation" exists between the length of time from the court order of competency evaluation to the inception of the competency evaluation.

Trueblood v. Washington State Dep't of Soc. & Health Servs., 822 F.3d 1037, 1043 (9th Cir. 2016). Yet, when Defendants attempt to define a reasonable interest in keeping individuals confined in jails for months or years awaiting evaluation and treatment, Defendants come up short. Rather, Defendants emphasize their interest in (1) not trying incompetent defendants; (2) providing a secure jail facility to Plaintiffs awaiting mental health services; and (3) providing a secure and competent facility at LSH. Opp. at 9-10 (citing *United States v. Deters*, 143 F.3d 577, 583 (10th Cir. 1998) (identifying a substantial interest in ensuring that people accused of crimes are available for trials and stating that confinement is a legitimate means of furthering that interest)). Each of these purported interests may be valid, but sidestep the central issues of this case.

Plaintiffs do not take issue with these general statements of law. Plaintiffs have never questioned Defendants' interest in only trying competent defendants or in providing secure and well-run facilities. Nor have they denied the constitutionality of pretrial detention as a general proposition or that pre-trial confinement may be a means of furthering a legitimate state interest, as Defendants imply. Opp. at 10-11 ("[T]he confines of pretrial detention are reasonably related to a legitimate governmental objective." (citing *Bell v. Wolfish*, 441 U.S. 520, 545 (1979)). The citations to *Bell* and *Deters* are red herrings—an attempt to rebut a non-existent attack on the very idea of pretrial confinement. Plaintiffs take issue with a single narrow part of Kansas' pretrial scheme—the waitlist maintained by the Kansas Department for Aging and Disability Services ("KDADS") whereby incarcerated individuals are forced to languish in county jails for months and years pre-trial before they receive competency evaluation or restoration treatment.

The waitlist is unconstitutional not because Defendants lack *any* legitimate interest in this arena, but because *the length and duration of the waitlist neither furthers nor bears relation to those interests*. Some Plaintiffs have been or will be incarcerated awaiting a competency

evaluation or treatment for far longer than they would have been incarcerated if *they had been immediately convicted on the day they were arrested.* Surely, there is no legitimate state interest in forcing someone to remain in jail for months longer than they could be sentenced under the criminal code when the only purpose of that wait is to receive services that KDADS is statutorily obligated to provide. It is not necessary to delay competency services for months or years to ensure that Plaintiffs are not subject to a trial they cannot participate in. It is not necessary to delay competency services for months or years for public safety purposes, or to secure placement in a state mental health treatment program. And it is not necessary to delay competency services for months or years to ensure that Plaintiffs are available for trial.

The actual purpose of the waitlist is to allow Defendants to understaff and underfund LSH. In this regard, the policy is meant to advance the State's budgetary interests. Defendants acknowledge the waitlist is the result of a lack of resources at LSH. Defendants label this "not ideal," a tellingly understated description that is emblematic of the nonchalance with which Defendants treat their unconstitutional scheme.[1] Opp. at 11. The lack of connection between the waitlist and any legitimate state interest is fatal to Defendants' attempts to defend its constitutionality. *See Glatz v. Kort*, 807 F.2d 1514, 1518 (10th Cir. 1986) (the Due Process Clause requires that "the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.").

Indeed, Defendants have the analysis backward: the unreasonably lengthy waitlist contradicts and, in fact, stands in defiance of state interests insofar as it (1) likely discourages criminal defendants and their counsel from raising competency concerns for fear of being placed

[1] At a different point in their response, Defendants admit the wait times are "lengthy." Opp. at 27. Defendants thus admit they are detaining Plaintiffs for lengthy periods of time as they await trial for no other reason than that they have decided to under-resource and understaff LSH.

on the waitlist for months or years; (2) causes county jails to become more dangerous for jail staff as well as incarcerated individuals as a result of being forced to house individuals with mental health issues for which they are ill-suited to serve[2]; and (3) prevents KDADS from providing timely competency evaluations and restoration treatment to Plaintiffs. The interests of the State are served by the prompt provision of competency evaluation and restoration treatment to Plaintiffs.

Defendants attempt to defend the delays resulting from the waitlist as being reasonable in duration. Opp. at 11. Plaintiffs propounded evidence that individuals awaiting competency evaluations waited on average between 133 and 151.9 days, with some Plaintiffs waiting up to thirteen months for evaluation and treatment. Mot. at 6. *Defendants do not dispute this data in their response.* Courts analyzing the reasonableness of wait times in similar circumstances have spoken with a single voice in finding equivalent or substantially shorter wait times to be unconstitutional. *See Oregon Advoc. Ctr. v. Mink*, 322 F.3d 1011, 1121 (9th Cir. 2015) (one month); *Disability Law Ctr. v. Utah*, 180 F. Supp. 3d 998, 1012 (D. Utah 2016) (180 days); *Trueblood v. Washington State Dept' of Soc. & Health Servs.*, 2016 WL 4268933, at *13 (W.D. Wash. Aug. 15, 2016) (fourteen days); *Advoc. Ctr. for Elderly & Disabled v. Louisiana Dep't of Health & Hosps.*, 731 F. Supp. 2d 603, 620-21 (E.D. La. 2010) (six to nine months); *State v. Hand*, 192 Wash.2d 289 (2018), *aff'g* 199 Wash. App. 887, 401 P.3d 367 (2017) (61 days); *In re Loveton*, 244 Cal. App. 4th 1025, 1043-44 (60 days); *Willis v. Washington State. Dep't of Social and Health Serv's*, 2017 WL 1064390, at *6 (W.D. Wash. Mar. 21, 2017) (91 days); *Terry ex rel. Terry v. Hill*,

[2] *see* Jackson Overstreet, 61 Kansas sheriffs call for changes to Larned state hospital admin, process, KAKE.com, Nov. 4, 2021, https://www.kake.com/story/45125959/61-kansas-sheriffs-call-for-changes-tolarned-state-hospital-admin-process; Jay Armbrister, Sheriff of Douglas County, Testimony on HB 2697 – concerning crimes, punishment and criminal procedure; relating to competency to stand trial; mobile competency evaluations, Feb. 16, 2022, http://kslegislature.org/li/b2021_22/committees/ctte_h_jud_1/documents/testimony/20220217_07.pdf ("I wrote to my local Representatives, Senators, as well as agency heads at the state level to bring my perspective to the front of their minds (hopefully)."

232 F. Supp. 2d 934, 938, 945 (E.D. Ark. 2022) (six to eight months); *J.K. v. State*, 469 P.3d 434, 444 (Alaska Ct. App. 2020) (103 days).

Defendants neither address nor attempt to distinguish the bevy of case law cited in Plaintiffs' Motion. They do not because they cannot—the mine run of cases provides compelling authority for the proposition that there is no reasonable relation between, on one hand, a state's interest in the pre-trial detainment of mentally-ill individuals and, on the other hand, a policy that results in Plaintiffs waiting an unreasonable amount of time to receive competency evaluation and restoration treatment. Defendants have provided the Court no basis to stray from the well-established precedent that Defendants have no legitimate interest in delaying the provision of necessary mental health evaluation and treatment for Plaintiffs for periods of months and years.

Next, Defendants claim they "are not responsible for Plaintiffs' treatment conditions until such time they admit Plaintiffs to LSH" because they "have not created procedures to delay Plaintiffs' admittance to their care." Opp. at 13. This claim, which Defendants return to time and again in their response, is fallacious. First, Defendants cite no support for the proposition that they bear no responsibility for Plaintiffs until they step foot in LSH. This is because the proposition is unsupportable—a district court order committing an incarcerated individual to KDADS' care for evaluation and treatment pending trial under K.S.A. §§ 22-3302 or 3303 cannot be disregarded simply because KDADS precludes timely admission to LSH in favor of warehousing that individual in a county jail. Second, the waitlist created and used by Defendants is the only reason that Plaintiffs languish in county jails while waiting for a bed at LSH. It is illogical to assert that Defendants bear no responsibility for Plaintiffs' treatment conditions in county jails when it is their waitlist that consigns Plaintiffs to those same jails for months and years. Defendants should not be permitted to evade their responsibility to care for, examine, and restore Plaintiffs to competency

in a timely manner by implementing policies that keep Plaintiffs out of their own mental health facilities and in facilities operated by others (county jails) that they know are unequipped to provide necessary medical care and treatment. Even to the extent that other actors in the criminal legal system contribute to Plaintiffs' constitutional injuries, Defendants do not avoid liability because they are not the sole cause of Plaintiffs' harm. *See, e.g., Brower v. County of Inyo*, 489 U.S. 593, 599 (1989). Defendants are at least proximately causing a deprivation of Plaintiffs' constitutional rights.

Finally, Defendants claim Plaintiffs have no interest in a speedy trial because their speedy trial rights are suspended during a competency evaluation. Defendants rely on *Matter of Snyder*, 308 Kan. 615, 620 (2018), where the Kansas Supreme Court held that "delays caused by questions of competency do not impinge on an accused's right to a speedy trial[.]" Delays in bringing a defendant to trial due to a defendant's incompetency may not raise speedy trial issues standing alone. However, the delays in this instance cannot be attributable to Plaintiffs' incompetency for two reasons. First, some Plaintiffs on the waitlist are *waiting* to be evaluated for competency and, while on the waitlist, are *not* being evaluated for competency. Thus, the delays in bringing those Plaintiffs to trial cannot be attributed to their incompetency, because there is no incompetency to speak of while they await evaluation. Second, individuals awaiting competency restoration treatment do not have their speedy trial rights violated when they are actually receiving treatment to have their competency restored. But when they are warehoused for a year before that treatment even begins, due to the conduct of Defendants, then speedy trial rights are indeed implicated. *Matter of Snyder* is inapposite to the present case.

Defendants' arguments fail to undermine the fact that there is a substantial likelihood that Plaintiffs will prevail on their substantive due process claim.

ii. Procedural Due Process

Defendants' response to Plaintiffs' procedural due process claim mischaracterizes the role the waitlist plays in the State's mental health commitment scheme. Defendants acknowledge that the Constitution ensures that individuals are entitled to certain procedural safeguards before they are deprived of a protected liberty interest. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Defendants do not dispute that Plaintiffs are being deprived of a liberty interest when they are detained in county jails for months and years awaiting competency evaluation or restoration treatment.

To justify the waitlist, Defendants compare Plaintiffs' situation to the situation of "sexually violent predators" who were detained pursuant to a civil commitment scheme that was the focus of *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997). In that case, the Supreme Court upheld Kansas' civil commitment scheme where detainees—determined by the state to be dangerous and incompetent to stand trial due to mental abnormality—could be incarcerated on an ongoing basis until competency was restored. *Id.* This striking comparison is inapposite as a matter of law. In *Hendricks*, the Supreme Court upheld a *civil* commitment scheme attacked by petitioners on the grounds that Kansas' definition of "mental abnormality" ran afoul of substantive due process and on *ex post facto* and double jeopardy grounds. Although the Court discussed certain procedural safeguards provided to detainees in the context of its civil commitment scheme, it did not conduct a procedural due process analysis.

To be clear, this case is not about Kansas' civil commitment scheme, where individuals have already been evaluated and the courts have determined those individuals must be detained to ensure public safety. Rather, this case turns on evaluation and treatment to restore individuals to competency so they may constitutionally stand trial for criminal charges. In this case, Plaintiffs

are held in county jails for months and years before Defendants decide to examine and treat them at all. Many of these individuals are detained on low-level charges and pose absolutely no risk to anyone. Many may end up being acquitted of criminal conduct, or offered a plea to lesser charges once their competency is restored. The prolonged detention at issue here is not the same as the prolonged detention at issue in *Hendricks.*

But even if one were to analyze this case through the lens of *Hendricks*, Defendants' case suffers for the comparison. In *Hendricks*, the Court upheld Kansas' civil commitment scheme in part because the State's practice of holding individuals for treatment was "solely for evidentiary purposes, either to demonstrate that a 'mental abnormality' exists or to support a finding of future dangerousness." *Id.* at 362. Here, the waitlist does not serve an evidentiary or fact-gathering purpose—rather, it stands in defiance of that purpose, for as long as a Plaintiff is on the list, Defendants are not gathering evidence concerning the Plaintiff's mental state. And unlike in *Hendricks*, there is no dangerousness analysis in this process—Plaintiffs are detained in county jails as a matter of course, without regard to their dangerousness or their risk of flight. The logic of *Hendricks* provides no support for Defendants' procedural due process analysis.

Next, Defendants assert that the waitlist is constitutional because the government's interest in preventing harm outweighs Plaintiffs' constitutionally-protected interest in avoiding physical restraint due to the presence of "special and narrow circumstances." *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1252 (10th Cir. 2008) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001). In *Hernandez-Carrera*, that special and narrow circumstance was the detainees' immigration status, which is not a concern here. In *Zadvydas*, the special and narrow circumstance was a "harm-threatening mental illness," which is similarly not a concern here. 533 U.S. at 690.

First, it cannot be stressed enough that some Plaintiffs *have not been diagnosed with a mental illness and none have been found to be dangerous by any medical professional*. They are on the waitlist because they are either awaiting a competency evaluation or mental health treatment so they can assist in their defense at trial. *Zadvydas*, like *Hendricks*, examines the constitutionality of a civil commitment scheme—a process whereby an individual already assessed to be unfit to stand trial and a danger to themselves or others can be indefinitely detained as they receive mental health treatment removing the danger and restoring them to competency. The waitlist is not part of a civil commitment scheme. Plaintiffs are not subject to a dangerousness inquiry before being placed on the waitlist and warehoused in a county jail. And the waitlist, unlike a civil commitment scheme, serves no rehabilitative or non-punitive purpose—indeed, as noted above, it stands athwart to any such purpose by denying Plaintiffs treatment for months or years, and indeed runs counter to that purpose insofar as individuals warehoused in county jails are more likely to decompensate than to recover mental faculties. Dkt #1, Ex. 1, Expert Report of Joel A. Dvoskin, at 11 ("[T]he vast majority of American jails have grossly inadequate psychiatric and mental health services, causing inmates to decompensate even more rapidly.").

Finally, Defendants cite *Peoples v. CCA Det. Centers*, 422 F.3d 1090, 1106 (10th Cir. 2005) to defend the proposition that they may detain Plaintiffs so long as that detention is not meant for a punitive purpose. In *Peoples*, the Tenth Circuit considered whether a prison official had violated a detainee's due process rights by placing him in segregated confinement because of lack of bed space in normal quarters. *Id.* at 1094. The Tenth Circuit held this was not a due process violation because he was not segregated for punitive purposes but for managerial purposes—because, as the district court found, the authorities "acted in furtherance of legitimate penal objectives of safety and security of the institution." *Id.* at 1107 (quoting *Peoples v. Corrections*

Corp. of America, 2004 WL 2278667, at *5 (D. Kan. Mar. 26, 2004)). The analogy to *Peoples* fails because the detained individual in *Peoples* only challenged the constitutionality of the conditions of his confinement, not the length of his confinement pending trial. Plaintiffs, by contrast, challenge the constitutionality of the length of confinement itself, and do not rest their claim on the particular conditions of that confinement.[3] To be sure, the conditions of Plaintiffs' confinement—the fact they are warehoused in inadequate county jails for months or years, during which time many of them are segregated—should bear on the Court's analysis as it weighs the significance of the private interests affected against the government's interests. *See Mathews*, 424 U.S. at 335. But it is the duration of Plaintiffs' confinement and the unnecessarily long wait times that directly violates procedural due process. *Peoples* does not permit Defendants to evade their procedural due process obligations as long as they can assert any non-punitive or managerial purpose behind the length of their detention. And even if it did, Defendants cannot assert such a purpose when they have admitted that the reason for those unconscionable wait times boils down to inadequate or poorly managed resources. Opp. at 21 (pointing to Defendants' own statements "encouraging the Kansas legislature and Governor Kelly to provide needed additional resources to LSH[.]"); *see also Little v. Streater,* 452 U.S. 1, 15-16 (1981) (a pecuniary interest cannot justify a clear-cut and severe violation of detainees' procedural due process rights).

As Plaintiffs pointed out in their Motion, courts are asked to be particularly vigilant against the erroneous deprivation of procedural due process protections in the case of incarcerated

[3] Plaintiffs do not concede that Defendants are not on the hook for a procedural due process violation relative to the conditions of their confinement in county jails, including their segregation in solitary confinement. As explained in Plaintiffs' Motion, the Tenth Circuit has held that whether placement in segregation serves a penological purpose is only one factor in determining a procedural due process violation. Mot. at 18, fn. 22; *see Estate of DiMarco v. Wyoming Dep 't of Corr.*, 473 F.3d 1334, 1342 (10th Cir. 2007). There are three other factors, each of which cut in Plaintiffs' favor. Defendants blithely mischaracterize *Estate of DiMarco* when they claim that it excuses segregation so long as the purpose behind segregation is "central to the jail's purpose of ensuring the safety of all inmates." Opp. at 12.

individuals with intellectual disabilities.[4] *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). For the reasons explained above, Defendants' response on this claim is contrary to well-established precedent and at odds with the facts of this case. Plaintiffs have made a strong showing that they will succeed on their procedural due process claim.

iii. Cruel and Unusual Punishment

Defendants' response to Plaintiffs' cruel and unusual punishment claim ignores binding precedent and mischaracterizes their central role in Kansas' commitment scheme. Defendants assert that Plaintiffs are unlikely to prevail on their cruel and unusual punishment claim for two reasons: (1) Plaintiffs cannot show a deliberate indifference to their medical needs because KDADS provides adequate care to detainees, KDADS does not intentionally deny treatment, and KDADS does not cause the delays in treatment; and (2) Plaintiffs have failed to join indispensable parties, specifically the sheriffs of the counties where Plaintiffs reside while on the waitlist. Neither of these reasons withstand scrutiny.

Defendants begin with a howler: "Plaintiffs cannot show Defendants' policies or procedures intentionally disregard their needs for medical treatment." Opp. at 17. This is demonstrably untrue.

The deliberate indifference standard requires that the defendant-official must know of and consciously disregard a substantial risk of serious harm to inmate health or safety. *Blackmon v. Sutton*, 734 F.3d 1237, 1244 (10th Cir. 2013) (internal citations omitted). Plaintiffs' Complaint and the exhibits attached thereto, especially the expert report of Joel Dvoskin, show how Defendants' waitlist (a deliberate and intentional creation) disregards Plaintiffs' need for mental health evaluation and competency restoration treatment by denying those services for months and

[4] Not all Plaintiffs in this case have been diagnosed with a mental disability. However, all are being detained because Defendants have either diagnosed or suspect such a disability. The Court should exercise vigilance in either event.

years, robbing Plaintiffs of their liberty for irreplaceable chunks of their lives and, in some instances, causing irreversible harm to their mental state. Dkt. #5, Ex. 1, Expert Report of Joel A. Dvoskin, at 1-2. Defendants' argument here is so weak Defendants do not dwell on it; in the next sentence, they point to newly-enacted legislative changes "allowing [for] quicker evaluation and localized treatment," implicitly acknowledging the unconstitutionality of their current policies. *Id.* Plaintiffs obviously appreciate any effort by the Kansas legislature to enable quicker competency evaluations and restoration treatment for themselves and others similarly situated. But ameliorative actions by the legislature have not helped Named Plaintiffs or seemingly any of their putative class members to date, and are no substitute for an immediate end to the excessively long periods of time they wait for competency evaluations and restoration treatment.

Defendants' remaining arguments—that they do not intentionally deny treatment nor cause any delays in treatment—are undeveloped. For the sake of completeness, Plaintiffs note that the waitlist reflects an intentional choice to deny competency evaluations and restoration treatment to Plaintiffs for periods of months and years. It embodies a deliberate indifference to Plaintiffs' medical needs in violation of the prohibition against cruel and unusual punishment. Defendants argue that "[i]f Plaintiffs could show that their medical needs are intentionally being ignored, their grievance would be with the local jails," Opp. at 17, but this is fallacious. The jails, as Defendants are well aware, are unequipped to provide the competency evaluation and restoration treatment Plaintiffs require. Dkt. #5, Ex. 1, Expert Report of Joel A. Dvoskin, at 5. Moreover, Kansas law charges Defendants, not local jails, with providing competency evaluations and treatment. Yet, Defendants' waitlist consigns Plaintiffs to the jails for unreasonably long periods. Under these circumstances, it is absurd to suggest that Defendants can wash their hands of the effects of the waitlist merely because they have "no control over the jails[]" Opp. at p. 18.

For the same reason, it is ludicrous to suggest that it is the jails, and not the Defendants, who should be the target of Plaintiffs' grievance for the purposes of their cruel and unusual punishment claim.[5] The county sheriffs are not indispensable parties under any known rule of joinder,[6] and Plaintiffs have not joined them for a simple reason—they are not responsible for (1) stepping into the shoes of KDADS to provide competency evaluations or restoration treatment to Plaintiffs; (2) KDADS' decision to deny those services to Plaintiffs for months and years; or (3) KDADS' decision to warehouse Plaintiffs in their facilities during that unreasonably lengthy period. The Court should not allow Defendants to shrug off their responsibility for the harm Plaintiffs have endured. Defendants cannot avoid their statutory duty to provide necessary medical care to Plaintiffs by operating in such a way that they delay taking responsibility, instead leaving Plaintiffs in the hands of other state actors. This is especially true where Defendants have full knowledge that those other state actors are incapable of providing the care that Defendants are obligated to provide.

For the reasons explained above, none of the arguments offered by Defendants on this point undermine the fact that there is a substantial likelihood that Plaintiffs will prevail on their cruel and unusual punishment claim.

2. Irreparable Injury

It is not disputed that "[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable harm is necessary." *Kikumura v. Hurley*, 232 F.3d 950, 963

[5] Defendants also suggest that it is the jails who bear the responsibility for placing Plaintiffs in solitary confinement. But Plaintiffs' claims do not rest on their placement in solitary confinement. Even if they did, Dr. Dvoskin has opined that jails disproportionately segregate these individuals because they are not equipped to recognize their symptoms. Dkt. #5, Ex. 1, Expert Report of Joel A. Dvoskin, at 10. Defendants, being aware that county jails lack the resources to house mentally-ill individuals for any meaningful stretch of time, bear responsibility for the triage that county jails must employ as a result of Defendants' waitlist.

[6] Defendants refer to the county sheriffs as an "indispensable party" in passing but make no reference to the applicable federal rule or argument along those lines.

(10th Cir. 2001). Nor is it disputed that prolonged incarceration constitutes an irreparable injury, especially in the context of incarcerated individuals who suffer from mental illness. *See Lynch v. Baxley*, 744 F.2d 1452, 1458 (11th Cir. 1984); *Advoc. Ctr. for Elderly & Disabled*, 731 F. Supp. 2d at 625. Ignoring this established law, Defendants assert that no irreparable injury can be shown because they "are already working on changes that will make the most impact to the wait list." Opp. at 18. In other words, Defendants contend that there is no irreparable harm so long as Defendants represent that they are working to fix the problem giving rise to the preliminary injunction request. Not surprisingly, Defendants have no legal support for this proposition.

Defendants cite a host of proposed and ongoing changes to the mental health evaluation and treatment regime as evidence of their efforts to fix the problem. *See* Opp. at 21-27. Again, Plaintiffs appreciate any effort to enable quicker competency evaluations and restoration treatment for detained individuals currently awaiting trial. But such voluntary actions do not negate the fact that irreparable harm will continue to occur absent an injunction. Defendants' analysis is wrong as a matter of constitutional law.

Under *Kikumura*, when a constitutional right is involved, no further showing of irreparable harm is necessary. 232 F.3d at 963; *see also Adams v. Baker*, 919 F. Supp. 1496, 1505 (D. Kan. 1996) ("Where . . . allegations [of constitutional violations] are made, no further showing of irreparable harm is required."). And even if the Court requires a showing of irreparable harm, Plaintiffs have met this burden. *See, e.g.*, Dkt. #5, Ex. 1, Expert Report of Joel A. Dvoskin, at 11 ("[A]llowing patients to experience acute and untreated psychosis can have a long-term, and possibly permanent, negative effect on the trajectory of the person's illness[.]"). Defendants may be working toward reducing wait times, but the adoption of new policies by a state agency to halt its own unlawful conduct "does not moot the issue or need for injunctive relief." *Border Network*

v. Cty. of Otero, No. 07-CV-01045-MV/WPL, 2008 U.S. Dist. LEXIS 138174, at *9-*10 (D.N.M. Sep. 19, 2008) (finding plaintiffs had established irreparable harm despite the State's formal adoption of a procedure to fix an unconstitutional practice because the State had not shown that its prior conduct would not be repeated); *Doe v. Duncanville Indep. Sch. Dist*., 994 F.2d 160, 166 (5th Cir. 1993) (finding that voluntary cessation of unconstitutional practice did not preclude finding of irreparable harm because the district court reasonably believed the practice could be resumed absent the injunction); *A.O. v. Cuccinelli*, 457 F. Supp. 3d 777, 795 (N.D. Cal. 2020) (finding plaintiffs had established irreparable harm despite USCIS's renouncement of its unconstitutional practice because USCIS had not met the heavy burden of showing that the unconstitutional practice would not be resumed).

Given these authorities, Defendants cannot establish a lack of irreparable harm merely because they have announced and begun to implement certain policy changes meant to reduce the length of time detainees wait for competency evaluation and restoration treatment. First, Defendants do not squarely contend that their proposed changes will substantially reduce wait times. Even if they had, Defendants do not establish that their policy changes will eliminate their unconstitutional wait times. Dkt. #5, Ex. 1, Expert Report of Joel A. Dvoskin, at 6. They provide no assurances or evidence that the prolonged wait times will cease, or, if they do cease, that they would not resume at a later date if the policy changes are rescinded or prove inadequate to the challenge.[7]

Defendants obfuscate by claiming Plaintiffs' injuries are speculative, while describing Defendants' proposed solutions as concrete and assuredly successful. It is the opposite: Plaintiffs'

[7] An injunction has utility even if Defendants' statements about the effectiveness of its ongoing reform efforts are accepted at face value: It guarantees that Plaintiffs' rights are not subject to the whims of officeholders who, today, might support reform to align LSH's policies with the Constitution but who, tomorrow, might have a change of perspective or be replaced by those with altogether different views.

injuries are concrete and ongoing, whereas Defendants' proposed solutions are speculative and potentially insufficient. The Court should not ignore Plaintiffs' irreparable injuries—injuries being sustained at the time of filing and that will continue to be sustained until they are provided competency evaluations or restoration treatment—because Defendants for the time being are voluntarily implementing various piecemeal reforms that *might* reduce the waitlist in the future.

Defendants' arguments on irreparable injury are contrary to persuasive authorities establishing that the prospect of policy changes that *might* fix the constitutional infirmity do not render Plaintiffs' *current* injury any less irreparable. Plaintiffs have made a strong showing that they will continue to suffer irreparable injury absent a preliminary injunction.

3. Balancing of Harms

Defendants' response to the balance of harms analysis grossly misstates both their own interests and Plaintiffs' and is contrary to established law. After attempting to minimize Plaintiffs' injuries in one section, Defendants claim in the next that a preliminary injunction will harm the State's interest by "[damaging] the systems our society has in place." Opp. at 20. They claim an interest in (1) ensuring those accused of crimes are available for trial; (2) providing a criminal defendant an evaluation to determine and restore competency so they may stand trial and participate in their defense; and (3) arresting, charging, and prosecuting those accused of crimes. *Id.* They argue that a preliminary injunction will cause harm by violating those interests. Yet Defendants offer no evidence or authority in support of that argument.

The State has an undisputed interest in ensuring those accused of crimes are available for trial, in providing criminal defendants competency evaluation and restoration services, and in carrying out traditional law enforcement and prosecutorial functions. *But the prolonged nature of the waitlist does not advance those interests*. As for the first interest, there is no reason state actors

cannot ensure Plaintiffs are available for trial through the normal bail process. The practice of denying competency evaluations and restoration treatment for months and years—which causes Plaintiffs to be detained for unreasonably long periods with no assessment of dangerousness, flight risk, or even whether they suffer from a mental illness at all—is an impermissible method for advancing this interest. As for the second interest, the prolonged wait times *prevent* criminal defendants from receiving mental health evaluations and, if necessary, from being restored to competency so that they may stand trial and participate in their defense. As for the third interest, the waitlist does nothing to further the State's ability to arrest, charge, and prosecute individuals accused of crimes.[8]

Next, Defendants claim a preliminary injunction "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."[9] Opp. at 20. Here, Defendants acknowledge the requested preliminary injunction requires actions "beyond their current efforts"—an acknowledgement in tension with their earlier claim that they are "already implement[ing] the changes advocated by Plaintiffs." *Id.* at 19. If a preliminary injunction is issued, the litany of harms recited by Defendants could only occur if KDADS does not properly allocate funding to staff LSH at the required capacity or to provide the necessary services outside the walls of LSH.[10] In this regard, Defendants' objection essentially boils down to the idea that it would be harmed if it were made to spend the money necessary to fulfill its constitutional

[8] It must be noted that KDADS is not a law enforcement or prosecutorial agency and, as far as Plaintiffs are aware, does not arrest, charge, or prosecute anyone.

[9] Defendants twice invoke the costs of litigating this case as a factor weighing against a preliminary injunction. Opp. at 20, 27. If Defendants are so concerned with the costs of defending themselves, they may elect to lower their bills by consenting to a preliminary injunction and working with Plaintiffs on a joint proposed preliminary injunction.

[10] Even if a preliminary injunction is issued and Defendants decline to provide the financial resources to satisfy the injunction, it is not established that Defendants' only choice would be to rush individuals through evaluation or treatment or staff LSH at unsafe levels.

obligations. Yet, it is well established that when a plaintiff's "very liberty is at stake," that threatened harm "outweighs the mere threat of monetary loss." *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1226 (10th Cir. 2009); *see also Smith v. Sullivan*, 611 F.2d 1039, 1043-44 (5th Cir. 1980) ("It is well established that inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement."); *Ohlinger v. Watson*, 652 F.2d 775, 779 (9th Cir. 1980) ("Lack of funds, staff or facilities cannot justify the State's failure to provide [plaintiffs] with . . . treatment necessary."); *Advoc. Ctr. for Elderly & Disabled*, 731 F. Supp. 2d at 626 ("A state's constitutional duties toward those involuntarily confined in its facilities does not wax and wane based on the state budget."). Defendants do not address or distinguish this case law, which establishes that budgetary concerns alone do not excuse constitutional violations.

Because the harms to the State's interests identified by Defendants amount to budgetary complaints and finger-pointing, they cannot outweigh Plaintiffs' liberty interests in the balance of harms analysis. Plaintiffs have met their burden on this preliminary injunction factor.

4. The Public Interest

It is a matter of black-letter constitutional law that the public interest weighs in favor of a preliminary injunction. Defendants claim a preliminary injunction would be "adverse to the public's interest" because interference from this Court "will only delay KDADS' ability to progress." Opp. at 20. Defendants do not explain how or why a preliminary injunction requiring them to provide competency evaluation and restoration services to Plaintiffs within a constitutional period of time will delay KDADS's "ability to progress"—presumably, a reference to their aforementioned reform efforts. Instead, Defendants' arguments sidestep important precedent, misconstrue Plaintiffs' request for relief, and ignore how courts have crafted injunctions on this precise issue in other cases.

In their Motion, Plaintiffs established that the public interest is always served by an injunction that protects constitutional rights. *See Free the Nipple-Fort Collins v. City of Fort Collins, Colorado,* 916 F.3d 792, 807 (10th Cir. 2019) ("[I]t's always in the public interest to prevent the violation of a party's constitutional rights.") (internal citations and quotations marks omitted). Defendants do not address or attempt to distinguish this binding precedent. Instead, they lay out at length the "solutions" they have preemptively implemented. The solutions fall into four categories: (1) Legislative changes that make it easier to provide competency evaluations; (2) efforts by KDADS to provide mobile competency evaluations; (3) budget allocations by the legislature providing for competency restoration treatment in community mental health centers; and (4) efforts by KDADS to provide same-day transportation for multiple detainees in need of competency evaluations from local jails to LSH. Opp. at 21-27.

It is unclear how these proposed reforms bear on the public interest element of the preliminary injunction analysis. These efforts are steps in the right direction, but nothing in Defendants' opposition signals how or why additional efforts—including those imposed via a preliminary injunction—would somehow delay or impede the efforts described above. More fundamentally, pending reform efforts that might bear fruit in the future do not diminish the public's interest in the protection of constitutional rights for Plaintiffs who are currently being deprived of those rights as they languish in county jails, who may be aided by additional remedial steps ordered via a preliminary injunction.

Next, Defendants argue that a preliminary injunction will negatively impact the public interest because "opening immediate bed space without appropriate staffing levels can lead to injury of the LSH staff and/or patients and risk of escape" and because "[r]ushing patients through care may result in inadequate or incomplete services provided." Opp. at 27. This argument

misconstrues the request made by Plaintiff in their Motion. Defendants, by raising the specter of staff injuries, prisoner escapes, and rushed care, present an unsupported parade of horribles to distract from the weighty constitutional interests at issue.[11] To be clear, Plaintiffs do not ask for a preliminary injunction that would force Defendants to open bed space at LSH without appropriate staffing or to rush anyone through care. Rather, Plaintiffs ask for a preliminary injunction that will reduce the wait time to a constitutionally-acceptable period—whether that be by forcing Defendants to adequately resource and staff LSH, to provide the necessary services outside of LSH, or to take other measures that will affect the timely provision of competency evaluations and restoration services. A preliminary injunction protecting constitutional rights is always in the public interest—even when that injunction requires state actors to shift limited resources and rearrange priorities.

In their last gasp, Defendants claim that a preliminary injunction would be "nearly impossible to implement" because the Court would be forced to "draft specific terms" under Fed. R. Civ. P. 65(d)(1)(B). *Id.* First, Defendants do not connect this argument to any public interest analysis. Second, other district courts around the country have issued preliminary injunctions granting relief to plaintiffs detained under similar circumstances. *See, e.g.*, *Advocacy Ctr.*, 731 F. Supp. 2d at 627; *Oregon Advocacy Ctr. v. Mink*, 2020 WL 2465331, at *1 (D. Or. May 13, 2020). This Court is certainly no less capable than its peers of accomplishing this task.

Defendants' response fails to address well-established precedent holding that the public interest is always served by an injunction that protects constitutional rights. *Free the Nipple*, 916 F.3d at 807. Furthermore, their attempts to distract the Court from that binding precedent by citing

[11] Defendants also state that "pre-release may lead to depravations of other significant protections." Opp. at 27. Plaintiffs, respectfully, are unsure what "other significant protections" Defendants refer to. For purposes of this analysis, however, it is enough to note that Plaintiffs do not request "pre-release." They request only that they be provided timely competency examinations and restoration treatment.

to various ongoing reform efforts do nothing to undermine the fundamental fact that the public interest would be served by a preliminary injunction forcing Defendants to cease their violations of Plaintiffs' constitutional rights. Plaintiffs have met their burden on this final preliminary injunction element.

CONCLUSION

The Court should not consider Defendants' untimely response. Even it if it does, the response is contrary to the law and facts of this case and fails to address the substance of Plaintiffs' Motion. The Court should grant Plaintiffs' request for a preliminary injunction because they have met their heightened burden on the preliminary injunction factors. The Court should issue an injunction requiring Defendants to reduce the amount of time Plaintiffs are forced to languish in county jails as they await competency evaluations or competency restoration treatment to a constitutionally acceptable period.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on this 8th day of August, 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