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

PLAINTIFFS' SUPPLEMENTAL BRIEF REGARDING THEIR MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs in the above-captioned case moved this Court for a preliminary injunction on May 26, 2022. Briefing on Plaintiffs' motion was completed on August 8, 2022. The Court held a scheduling conference on August 10, 2022, and requested that the parties brief several issues raised by the Court in response to the parties' prior pleadings. Dkt. #19. In accordance with the Court's order, Plaintiffs hereby submit this supplemental brief of arguments and authorities in response to the Court's questions.

I. Principles of comity and abstention do not preclude the Court from granting Plaintiffs' requested relief.

No existing abstention doctrine precludes this Court's adjudication of Plaintiffs' constitutional claims. As noted in *Colorado River Water Conservation District v. United States*, abstention may be appropriate in four types of cases: (1) a case involving a federal constitutional issue that might be affected or mooted by a state court determination of state law ("Pullman" abstention); (2) a case presenting a question of state law that involves state policies whose importance transcends the result in the federal action, or where federal review would confuse a state's elaborate review system ("Burford" abstention); (3) a case in which relief granted by the federal court would interfere with a pending state proceeding ("Younger" abstention); or (4) where exceptional circumstances exist to avoid duplicate litigation (the "Colorado River" doctrine). 424 U.S. 800, 814-18 (1976). *Pullman* abstention could not possibly apply because this case does not concern any unsettled issue of state law. Similarly, *Burford* abstention cannot apply since a decision in this case will not interfere with a complex state regulatory scheme or administrative agency order. *Colorado River* abstention is inapplicable since there is no parallel litigation at issue. The only theoretically plausible abstention doctrine applicable in this case is *Younger* abstention: the Plaintiffs in this case are challenging their prolonged detainment awaiting a competency evaluation or restoration treatment, the origin of which is their pending state criminal court cases but which otherwise does not relate to any state legal or administrative question or proceeding.[1] However, because Plaintiffs are not seeking to enjoin their state court cases, are not otherwise

[1] Notably, Defendants did not ask for the application of *Younger* abstention to preclude the Court's review of this case. Neither Defendants' Response to Plaintiffs' Motion for a Preliminary Injunction, nor Defendants' Answer, argue that *Younger* abstention applies here. Defendants' arguments against Plaintiffs' Motion for a Preliminary Injunction essentially amounted to "we are already making changes and that is enough." Although the Court can raise abstention issues *sua sponte*, it is notable that the Defendants previously voiced no concern that an injunction in this case would implicate the principles of comity, equity, and federalism that *Younger* abstention is meant to address.

asking the Court to interfere in state court administration, and have no adequate procedural vehicle to raise their constitutional claims in their criminal cases, *Younger* is inapplicable.

In determining whether *Younger* abstention should apply to a federal civil rights case, the Court must consider whether: "(1) there is an ongoing state criminal, civil, or administrative proceeding, (2) the state court provides an adequate forum to hear the claims raised in the federal company, and (3) the state proceedings involve important state interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies." *Crown Point I LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1215 (10th Cir. 2003) (citation omitted). Abstention is the exception, not the rule; only "exceptional" circumstances merit *Younger* abstention. *Elna Sefcovic, LLC v. TEP Rocky Mt. LLC*, 953 F.3d 660, 669-70 (10th Cir. 2020). In the ordinary case, "the pendency of an action in [a] state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Id.* (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 367-68 (1989), and *Colorado River*, 424 U.S. at 817).

Younger abstention is inappropriate here for three reasons. First, *Younger* abstention is reserved for cases where a party seeks to interfere with ongoing state court proceedings, generally by asking a federal court to intercede and prevent criminal prosecution. That is not the type of claim or case currently before the Court. Second, Plaintiffs do not seek an injunction that would amount to continued federal oversight into the day-to-day operations of state courts. And finally, Plaintiffs and the putative class members have no meaningful state-based procedural mechanism through which they could redress the constitutional violations they allege in this case in their pending criminal state court cases.

A. Plaintiffs do not seek an injunction barring or otherwise interfering with their prosecutions in state court.

As a threshold matter, Plaintiffs are not asking this Court to enjoin a state law or ongoing state court proceeding, or otherwise interfere with a state court action. Importantly, Plaintiffs do not seek relief from prosecution on their underlying criminal charges, nor do they seek for this Court to interfere with or stop their underlying criminal prosecutions. Rather, Plaintiffs ask this Court to enjoin a *practice*, engaged in by Defendants, who are not a party to the state court litigation at all. That practice is the maintenance of a wait list with unconstitutionally long wait times for Plaintiffs to receive competency evaluations and competency restoration treatment. An injunction in this case would not interfere with, stall, enjoin, or subvert the prosecution of Plaintiffs or any of the putative class members.

Federal cases that do not challenge a state court prosecution itself, but rather seek to address an issue ancillary to that prosecution, are not subject to *Younger* abstention. *See generally* 17B Fed. Prac. & Proc. Juris. § 4252 (3d ed. 2022) (the *Younger* rule "does not bar a federal court from giving relief that may relate to a criminal matter if the federal relief will not hinder in any way the state criminal prosecution. The Supreme Court has held that state criminal practices can be challenged in federal court if the relief requested is not directed to the prosecution as such and if the federal claim is one that cannot be raised in defense of the criminal prosecution."); 17A Moore's Fed. Prac. § 122.72[1][b] ("*Younger* abstention is appropriate only if the federal court is asked to take an action that would interfere with (i.e., enjoin or have the practical effect of enjoining) state court proceedings"); *Compare Gerstein v. Pugh*, 420 U.S. 103, 108, n.9 (1975) (when injunction is "not directed at state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution," then the claim is "not barred by the equitable restrictions on federal intervention in

state prosecutions" that come from *Younger*), *with Cunningham v. Niemczyk*, No. 11-3187, 2011 U.S. Dist. LEXIS 146124, *1 (D. Kan. Dec. 20, 2011) (*Younger* abstention appropriate because the relief requested in the federal case would amount to a dismissal of the Plaintiffs' pending charge in state criminal court) *and Nivens v. Gilchrist*, 319 F.3d 151, 154 (4th Cir. 2003) (*Younger* abstention appropriate because Plaintiffs brought lawsuit to stop the criminal proceedings against them). Plaintiffs do not seek an injunction that would result in the dismissal of their criminal cases. Quite the opposite: they seek relief that would afford them the opportunity to have their underlying criminal cases proceed to resolution. In other words, an injunction issued in this case would not halt or dismiss state court proceedings, but instead would allow state courts to timely and efficiently move their criminal dockets forward. For these reasons, *Younger* is inapplicable to this case.

B. Plaintiffs do not seek continued federal oversight of state criminal proceedings.

Another reason that *Younger* abstention should not preclude this Court's review of Plaintiffs' claims is that this case does not implicate the concerns that *Younger* and its progeny are intended to prevent: namely, federal overreach into the management of state court proceedings. This case involves constitutional violations committed by the Kansas Department of Aging and Disability Services (KDADS) by virtue of their inability or unwillingness to take custody of people in need of competency evaluations and restoration treatment. Although state courts play a role in ordering competency evaluations and treatment, the relief Plaintiffs seek can be accomplished without interfering with those orders or otherwise controlling how and when state courts issue their orders. To the contrary, Plaintiffs seek to enforce state court orders in a timely manner, as required under the Constitution. Any injunction issued in favor of Plaintiffs would compel *KDADS's leadership* to take action; not the state courts. In other words, relief here would not interfere with

court operations, and nothing in the injunction requested by Plaintiffs would insert this Court into managing any aspect of state criminal court operations.

In this way, Plaintiffs are not asking this Court to engage in continued federal oversight of state court proceedings, as in *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974) (abstention appropriate where injunction sought "ongoing federal audit of state criminal proceedings" to prevent racial discrimination in setting bail and sentencing). Instead, Plaintiffs are seeking an injunction that would force KDADS's leadership—not the criminal courts—to comply with their obligations under state law and the Constitution, and provide competency evaluations and restoration treatment in a timely manner. As such, this Court can exercise jurisdiction over this case without running into the same conflict with principles of comity and equitable restraint that were present in *Younger* and *O'Shea*.

C. There is no proper procedural vehicle for each Plaintiff, or the Plaintiff class as a whole, to raise their constitutional claims within their state criminal cases.

Finally, even if this case involved claims for which *Younger* abstention may be appropriate—which it does not—there is no proper procedural vehicle in each Plaintiff's state court case to raise their substantive or procedural due process claims. The commitment orders have been entered, and Plaintiffs are not challenging those orders themselves. Plaintiffs' claims are regarding KDADS's failure to follow those orders in a timely manner. But state criminal courts do not have jurisdiction over KDADS to compel them to move faster; this Court, in the context of a civil rights lawsuit, does. *See generally* Exhibit A, Declaration of Audra Asher ("It is my experience and belief litigating many criminal cases before different judges that there is no adequate state criminal court procedural vehicle in which I could raise the constitutional issues inherent in excessively long wait times to access services at LSH."). Moreover, Plaintiffs cannot raise their constitutional claims with the criminal court—they are seeking a civil remedy, and such

claims are generally adjudicated by federal courts via lawsuits brought pursuant to 42 U.S.C. § 1983. And of course, putative class members, including those who will be placed on the waitlist for bed space at Larned State Hospital (LSH) at some point in the future, do not have the ability to address these constitutional violations at all, except through this lawsuit. Put simply, there is no procedural vehicle available to Plaintiffs to challenge the wait times at LSH.

The only plausible ways for Plaintiffs to even raise the issue of wait times at LSH is to fight the commitment order itself at the outset, or petition their individual criminal courts for release after they are forced to wait an unconstitutionally long period of time. But that relief is unlikely to be granted, given the criminal statutory and practical landscape regarding pretrial detention in Kansas. *See generally* Exhibit A, Declaration of Audra Asher ("The general consensus has been, and continues to be, that there is nothing anyone in the state criminal court system can do to get my clients into LSH sooner and that the state court judges do not have the ability to circumvent LSH's policies or have individuals moved up the wait list."). Further, forcing each individual putative class member to file such a petition—some of which may be granted, but many of which would not—would result in the patchwork enforcement of civil rights that a case like this aims to prevent. Such a "procedure" would also allow Defendants to avoid liability for their continued unconstitutional conduct—hardly a result that *Younger* would endorse.

Kansas criminal courts have recognized as much. In one criminal case in Lyon County, Chief Judge Merlin Wheeler sent an email to state senators and Secretary Howard, among others, begging for help in getting a criminal defendant into LSH in a timelier manner. *See* Exhibit B, Letter from Judge Merlin Wheeler, Nov. 19, 2021. In his letter, Judge Wheeler excoriates KDADS leadership, saying "[i]t is far past the time for the State of Kansas to recognize an utter failure generally to properly fund state and community mental health facilities, but more importantly to

ensure that individuals who are not competent to stand trial receive the necessary care." *Id.* at 2. Judge Wheeler goes on to request an investigation of the ongoing wait time crisis, and notes that his options for addressing the issue in criminal court are "limited." In fact, he stresses that the only way to address this in state court may be to issue a show cause order, dragging KDADS leadership into criminal court to demonstrate why they should not be held in contempt for their failure to address the profound inadequacies of their current systems. *Id.* Judge Wheeler recognized that "there are many others in this state in similar circumstances" to the criminal defendant about whom Judge Wheeler was writing. Proceeding through show cause orders and contempt proceedings in the 100+ criminal cases representing the entirety of the current LSH waitlist is surely not an "adequate" procedure for remedying the constitutional claims raised by Named Plaintiffs and the putative class in this case.

For these reasons, there is no adequate procedural mechanism for Plaintiffs to raise all of their claims within the context of their ongoing state court proceedings.[2]

II. This Court can and should rule on Plaintiffs' Motion before certifying a class.

This Court can and should rule on Plaintiffs' Motion for a Preliminary Injunction prior to class certification. There is no requirement in the Federal Rules that the Court certify a class prior to ruling on a motion requesting immediate or emergency relief. "[C]ase law supports this Court's authority to issue class-wide injunctive relief based on its general equity powers before deciding the class certification motion." *Fish v. Kobach*, 189 F. Supp. 3d 1107, 1148 n. 163 (D. Kan. 2016) (citing *Rodriguez v. Providence Comm'y Corr., Inc.*, 155 F. Spp. 3d 758, 2015 U.S. Dist. LEXIS 168836, 2015 WL 9239821, at *6 (M.D. Tenn. Dec. 17, 2015); *see also Planned Parenthood of*

[2] Plaintiffs also raise a claim in their complaint under the Americans with Disabilities Act (ADA). *See* Compl., Count 2. Although Plaintiffs do not move for a preliminary injunction on the basis of this claim, surely there is no viable argument that the state criminal court is poised to address Plaintiffs' ADA claim in the context of the Plaintiffs' criminal prosecutions. This merits against the application of *Younger* abstention to the case as a whole.

Kan. & Mid-Mo. v. Mosier, 2016 U.S. Dist. LEXIS 86948, at *26 (D. Kan. July 5, 2016); *Newberg on Class Actions* § 4:30 (5th ed. Dec. 2019 update) ("[A] court may issue a preliminary injunction in class suits prior to a ruling on the merits."). Courts in other jurisdictions have held the same. *See, e.g.*, *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 434 (6th Cir. 2012) ("Simply put, there is nothing improper about a preliminary injunction preceding a ruling on class certification."); *Abdi v. Duke*, 280 F. Supp. 3d 373, 400 (W.D. N.Y. 2017) ("Under appropriate circumstances, a court may grant preliminary injunctive relief in favor of putative class members before class certification, and correspondingly, assess the harm to putative class members when considering the preliminary injunction motion."); *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758, 766 (M.D. Tenn. 2015); *Lee v. Orr*, No. 13-cv-8719, 2013 U.S. Dist. LEXIS 173801, 2013 WL 6490577, at *2 (N.D. Ill. Dec. 10, 2013)); *J.O.P. v. United States Dep't of Homeland Sec*, No. 119-CV-1944, 409 F. Supp. 3d 367, 2019 U.S. Dist. LEXIS 129528, 2019 WL 3536786, at *4 (D. Md. Aug. 2, 2019) ("courts may enter class-wide injunctive relief before certification of a class").

Moreover, Plaintiffs and others similarly situated are impacted by and need immediate relief from Defendants' ongoing unconstitutional violations. Further delay will cause Plaintiffs and others to endure continued harm and deprivation of their rights, the significance and severity of which was detailed in Plaintiffs' Motion, Memorandum in Support, and Reply brief. *See* Dkt. #5, Mem. in Support of Mot. for Prelim. Inj. ("Mem.") at 8-12, 24-31, 29-31; Dkt. #17, Reply to Pl. Mot. for Prelim. Inj. ("Reply") at 15-19. And Plaintiffs have alleged sufficient facts demonstrating that class certification is likely. *See* Compl. ¶¶ 29-32. This court can and should grant a preliminary injunction before certifying the class to ensure Plaintiffs and putative class

members do not experience ongoing harm for additional months, if not years, as the parties complete the class certification process.

III. Other similarly-situated courts have granted a preliminary injunction to remedy identical constitutional violations alleged in this case.

The Court need not blaze a new trail to grant Plaintiffs' Motion for Preliminary Injunction. At least two federal district courts have granted relief to similarly-situated plaintiffs across the country in similar procedural postures.

In *Advocacy Center for the Elderly and Disabled v. Louisiana Dep't of Health and Hospitals*, 731 F. Supp. 2d 603 (E.D. La. 2010), a district court granted in part[3] a preliminary injunction against Louisiana state officials who had created a situation where "incompetent pretrial detainees awaiting a vacancy at Feliciana [the state mental hospital] simply languish[ed] in parish jails for extended periods of time without having been convicted of any crime." *Id.* at 605. Specifically, the district court enjoined and ordered the state officials to transfer to the state mental hospital "within twenty-one days of the issuance of this Order all Incompetent Detainees who (1) have been committed to Feliciana by court order, (2) are currently eligible for transfer to Feliciana, and (3) have not yet been transferred. This time period acknowledges that defendants will need time to prepare for the arrival of the Incompetent Detainees at Feliciana." *Id.* at 627. Plaintiffs in this case are asking for nothing more than a version of what the district court in *Advocacy Center* granted—a preliminary injunction ordering and enjoining state Defendants to provide competency examination and restoration treatment at LSH to Plaintiffs within a constitutional period of time. *Advocacy Center* provides strong precedent in favor of a preliminary injunction.

[3] The district court granted the motion for preliminary injunction as to plaintiffs' as-applied challenge to the constitutionality of defendants' scheme under the Fourteenth Amendment but denied the motion as to their facial challenge, finding they had demonstrated a likelihood of success on the former but not the latter. *Id.* at 624. Here, Plaintiffs have not lodged a facial constitutional challenge—their claims arise from the specific circumstances of the Named Plaintiffs and others similarly situated.

Similarly, the district court in *Oregon Advocacy Center v. Mink*, No. 02-339-PA, 2020 U.S. Dist. LEXIS 85933 (D. Or. May 13, 2020) modified a permanent injunction that had been in place since 2003, requiring state defendants to "[t]est and quarantine incoming patients to OSH [Oregon State Hospital]" within 14 days of receiving them, as part of an ongoing effort "toward eliminating the backlog of patients awaiting 'aid and assist' restoration at [OSH]."[4] Plaintiffs in that case brought Fourteenth Amendment challenges against state defendants due to the length of time that individuals were held in Oregon county jails awaiting competency examination and restoration treatment. The modified injunction was struck down on appeal for not being "suitably tailored to the factual circumstances," but on remand, the district court was permitted to conduct further fact-finding before crafting a more tailored injunction. *Oregon Advocacy Center v. Mink*, 322 F.3d 1101 (9th Cir. 2021). For purposes of this briefing, *Mink* confirms that injunctive relief is an appropriate means by which district courts can ameliorate the harms caused by unconstitutionally long wait times for competency examination and treatment.

Together, *Advocacy Center* and *Mink* demonstrate that granting injunctive relief to Plaintiffs and the putative plaintiff class in this case is wholly appropriate and in line with other courts' precedents.

IV. The legislatively-enacted reforms described by Defendants do not and will not ameliorate the constitutional violations that are present today.

In their response brief, Defendants identify several legislative provisions in HB 2508 that will address some of the logistical issues they claim are causing Plaintiffs' substantive due process and cruel and unusual punishment injuries. According to Defendants, the bill: (1) expands

[4] The original permanent injunction required "persons who are declared unable to proceed to trial pursuant to ORS § 161.370(2) be committed to the custody of the superintendent of a state hospital" no later than "seven days after the issuance of an order determining a criminal defendant to be unfit to proceed to trial because of mental incapacities under ORS § 161.370(2)." *Mink*, No. 3:02-cv-03339-MO, Dkt. #51 at 1-2 (D. Or. May 15, 2002).

locations where competency evaluations can be conducted, including by electronic means; (2) permits community-based restoration services; (3) permits an evaluation to be conducted by one doctor; (4) permits forced medication in limited circumstances; and (5) requires district courts to credit time served to an individual detained for competency services. It is unclear, however, whether these changes will actually reduce unnecessary detentions for individuals waiting for competency services and, if so, when.

As Dr. Dvoskin explained in his report, it is impossible to know whether HB 2508 could eventually speed up competency services. Dvoskin Rep. at 6. To date, HB 2508 has not altered Plaintiffs' status of prolonged, unnecessary pretrial confinement in county jails ill-equipped to treat their mental health conditions. Moreover, the year-plus backlog for services for over 100 individuals is so significant that the changes contemplated by HB 2508 are unlikely to significantly reduce wait times. This Court need not sit by while Plaintiffs' rights continue to be violated, relying on unsupported assurances from Defendants that their reforms will remedy the situation *eventually*, at some unknown point in the future. Even if the future impact of the legislative changes were less speculative, their implementation does not moot or otherwise resolve the underlying constitutional violations at issue. Plaintiffs' prolonged detention solely to wait for competency services is what violates the Constitution, not Defendants' underlying practices causing the delay. Until the wait time is no longer excessively long, Plaintiffs' rights are being violated and this Court is the appropriate body to end these violations.

The substance of many of the changes contained in HB 2508 also raise doubts about the potential positive impact of these provisions. Defendants' response brief notes that many of the bill's changes have already been in effect in the state's most populous counties since 2019 through mobile competency service pilot programs. Dkt. #15, Resp. Br. at 6, 22. Notably, Defendants also

claim that individuals in the state's most populous counties account for the bulk of current waitlist members. *Id.* at 6. Accordingly, it is not particularly encouraging that populous county waitlist membership is still incredibly high notwithstanding the fact that mobile evaluation and community-based restorations have been up and running for over two years in those counties. Moreover, the state's ability to forcibly medicate an individual over their objection is still quite limited and only permissible upon a court finding that, among other things, less intrusive alternatives have been considered and the medication is substantially unlikely to have side-effects that would undermine the fairness of the trial. Kan. Stat. Ann. § 59-2976.

Additional "solutions" proposed by HB 2508 are legally inadequate remedies for Plaintiffs' substantive due process and cruel and unusual punishment injuries. Time-served credit cannot cure the due process violations of individuals on the waitlist who will not be convicted, are facing charges that are presumptively non-custodial, or whose sentences, if convicted, would be far shorter than the time they have already spent awaiting competency services. Moreover, expedited release is categorically an impermissible remedy for a substantive due process claim alleged under Section 1983. *See Presier v. Rodriguez*, 411 U.S. 475, 500 (1973). Plaintiffs' due process injuries from a prolonged arbitrary pretrial detention are not cured by a faster release post-conviction. Finally, time served does nothing to alleviate Plaintiffs' cruel and unusual punishment claims. Limiting future incarceration time has no impact on the injuries sustained by an individual due to the conditions of confinement of their pretrial detention. In short: the implementation of HB 2508 provides no bar to the Court's adjudication of this lawsuit.

V. The legislatively-enacted reforms have no bearing on whether Plaintiffs are, today, afforded constitutionally-sufficient due process under *Mathews v. Eldridge*.

The fact that the Kansas legislature has enacted laws that may, at some hypothetical and speculative point in the future, reduce the constitutional harm identified in Plaintiffs' Motion for

Preliminary Injunction has no bearing on the Court's procedural due process analysis under *Mathews v. Eldridge*, 424 U.S. 319 (1976). Much as HB 2508 does not remedy Defendants' substantive due process or cruel and unusual punishment violations, *supra* Section IV, the reforms contained therein do not absolve Defendants of liability for ongoing procedural due process violations. Moreover, none of the provisions in HB 2508 on their face add procedural safeguards or otherwise alter the balance of Plaintiffs' and Defendants' interests in the case.

Under *Mathews*, courts assessing whether a procedural due process violation has occurred balance three factors: (1) the private interest affected; (2) the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and (3) the government's interest, including the burden that additional procedures would impose. *Id.* at 335. Plaintiffs are being deprived of their interests—specifically, their liberty interest and their interest in either proceeding to trial or being provided necessary medical care so they may be restored to competency—at this very moment. The Court should not discount the importance of those interests because the Kansas legislature has enacted laws that *might* protect those interests for other litigants in the future.

Although it is possible for a procedural due process challenge to become mooted by subsequent legislative changes, *see, e.g., Niang v. Tomblinson*, 139 S. Ct. 319 (2018) (granting petition for certiorari, vacating the decision of the Eighth Circuit, and remanding to the district court with instructions to dismiss as moot a procedural due process challenge to Missouri regulations imposing onerous licensing obligations on hairdressers after state legislature removed and ceased enforcement of those regulations), neither the changes enacted by the Kansas legislature nor the policies implemented by KDADS of its own accord have resolved the constitutional violations identified in the Motion. Named Plaintiffs and others similarly situated

continue to suffer a deprivation of their procedural due process rights. *See, e.g.* Mem. at 20-23; Reply at 11-15. In this circumstance, whatever legislative or administrative changes have been enacted or are anticipated have only a speculative effect—little comfort to the Named Plaintiffs and others currently languishing in county jails. The Court should not consider the speculative effect of pending or impending legislative reforms when considering the existence of a procedural due process violation under *Mathews*. Rather, the Court should conduct its analysis with its eye fixed on the current reality.

VI. Plaintiffs' liberty interest in avoiding a year or more of pretrial detention just to receive a competency evaluation or treatment is deeply rooted in our nation's history and traditions, and *Dobbs* does not preclude relief on Plaintiffs' substantive due process claim.

Plaintiffs have the constitutional right to be confined for a duration and in a manner that reasonably relates to the purpose of their commitment. *Glatz v. Kort*, 807 F.2d 1514, 1518 (10th Cir. 1986) (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)). This fundamental right can be traced throughout Supreme Court jurisprudence and our nation's common law traditions. While the Supreme Court recently reexamined the right to abortion under the substantive due process clause, it was "stated unequivocally that '[n]othing in [the] opinion should be understood to cast doubt on precedents that do not concern abortion.'" *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2288, 2280 (2022). Indeed, *Dobbs* seemingly discourages the re-litigation of other rights the Supreme Court has previously held to be protected by the substantive due process clause on account of its finding that abortion is "critically different from any other right that [the] Court has held to fall within the Fourteenth Amendment's protection of 'liberty.'" *Id.* Nevertheless, Plaintiffs have a clear substantive due process protection against pretrial detention that is prolonged solely because KDADS cannot provide timely competency evaluation or

treatment services, and this right is deeply rooted in our Nation's history and traditions. Neither *Dobbs* nor any other case has undermined that right.

A. Plaintiffs have a substantive due process right to not be confined longer than is reasonable to achieve the purpose of their confinement.

Fundamental constitutional rights that are not explicitly enumerated in the text of the Bill of Rights are protected by the Fourteenth Amendment's substantive due process clause. To determine whether the due process clause encompasses a particular right, courts analyze whether the right in question is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997); *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019). Even if a specific right has not been explicitly recognized throughout American legal history, it can still be "deeply rooted" if it is part of a broadly entrenched general right. *Dobbs*, 142 S. Ct. at 2236; *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (collecting cases on the substantive reach of liberty under the due process clause); *Kitchen v. Herbert*, 755 F.3d 1139, 1209 (10th Cir. 2014) (finding the specific right to same-sex marriage derived from the right to marry that the court had previously recognized at a broader level of generality). Here, Plaintiffs' specific right at issue—the right to have the duration and nature of their pretrial detention reasonably relate to the purpose of their confinement—is a key component of the more general, entrenched right to liberty. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that the [Due Process] Clause protects."). Even if Plaintiffs' right was defined more narrowly as the right to timely pretrial competency services, it would clearly be part of the broadly entrenched general right to liberty. Accordingly, Plaintiffs' right is "deeply rooted in our Nation's history and tradition" and "implicit in the concept of ordered

liberty such that neither liberty nor justice would exist if [it] were sacrificed." *Glucksberg*, 521 U.S. at 721 (internal citations omitted).

The Supreme Court has repeatedly held that pretrial detention is a "carefully limited exception" to the fundamental right to be free from physical restraint prior to conviction and that such confinement is only justified in a narrow set of circumstances. *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992); *see also Youngberg v. Romeo*, 457 U.S. 307, 316 (1992) ("[L]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action."); *United States v. Salerno*, 481 U.S. 739, 755 (1987); *Zadvydas*, 533 U.S. at 690. In particular, the Supreme Court has always required the government to show a reasonable relationship between the duration and nature of an individual's pretrial detention and the government's purpose in confining them. *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (invalidating 60-day detention of foreign-born individual under Chinese Exclusion Act in part because the length and terms of the confinement did not serve or advance the state's interest of deportation); *Foucha*, 504 U.S. at 79 (finding "Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed."); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *Reno v. Flores*, 507 U.S. 292, 305 (1993).

Additionally, cost saving and ease of logistical burden are not proper purposes to deprive someone of their liberty prior to a conviction. The Supreme Court has consistently rejected purported fiscal and logistical limitations as state justifications for infringing on an individual's Fourteenth Amendment rights. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618, 632-33 (1969); *James v. Strange*, 407 U.S. 128, 142-43 (1972); *Bounds v. Smith*, 430 U.S. 817, 825, 97 S. Ct. 1491, 1496 (1977) ("the cost of protecting a constitutional right cannot justify its total

denial"); *Estelle v. Williams*, 425 U.S. 501, 505 (1976) (the fact that a practice was "more convenient for jail administrators" provided "no justification for the practice" and "further[ed] no essential state policy").

The Supreme Court's jurisprudence regarding the fundamental right to reasonable pretrial detention did not develop in a historical vacuum. English common law generally prohibited detentions without convictions and limited the terms of pretrial confinement to what was necessary to achieve the government's goals of the confinement. *See, e.g.*, 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *297, *300 ("in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters, nor subjected to other hardships than such as are *absolutely requisite* for the purpose of confinement only") (emphasis added); *see also* The Habeas Corpus Act of 1679, 31 Car. 2, C. 2 (Eng.) (establishing the right against unreasonable pretrial detentions); Magna Carta, 1215 ch. 40 (1216) (establishing the right of a criminal defendant to "full and speedy justice…without detaining him long in prison"). Similarly, English and founding-era American justice systems did not permit trial delays on account of logistical issues and staffing shortages. *See, e.g.*, Timothy R. Schnacke et al., *The History of Bail and Pretrial Release*, PRETRIAL JUST. INST. 3, 6 (Sept. 23, 2010). As early as the 1300s, English law required travelling royal judges to be deployed to every county at least twice a year to ensure criminal defendants were not left in pretrial detention because local judicial staff were not available to process their cases. *See* Edward Coke, The Second Part of the Institutes of the Laws of England 42 (1817); 1 BLACKSTONE COMMENTARIES ON THE LAWS OF ENGLAND *131 (1st ed. 1765).

Plaintiffs have a well-established and deeply-rooted fundamental right against prolonged detention that bears no reasonable relation to the purpose of their confinement. As previously

explained in Plaintiffs' Reply Brief, the duration of Plaintiffs' detention in county jails is not reasonably related to a legitimate state interest but rather due to Defendants' failure to provide timely competency services. Reply at 5-10. Defendants detailed the reasons behind the year-plus long delays that Plaintiffs face in their Response brief, *see* Dkt. 15, Resp. at 3-5, which all essentially boil down to the State's unwillingness to invest in competency evaluation and restoration services. None of Defendants' purported justifications for their violation of Plaintiffs' rights fit within the narrow exceptions to Plaintiffs' unquestionably fundamental right that is at the core of the liberty protected by the due process clause.

B. The Supreme Court's recent decision in *Dobbs* does not preclude relief on Plaintiffs' substantive due process claim.

The *Dobbs* majority opinion belabored that its holding does not concern other substantive due process rights and explicitly stated that the decision should not "be understood to cast doubt on precedents that do not concern abortion." 142 S. Ct. at 2277-78, 2258, 2261, 2280. In addition to making these repeated express disclaimers, the Supreme Court thoroughly distinguished the right to abortion from other protections that derive from the Fourteenth Amendment's general guarantees of liberty and equality.

First, the Supreme Court reiterated its holding in *Washington v. Glucksberg* that fundamental rights need not be explicitly enumerated in the Constitution's text so long as they are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 2242. The Supreme Court then distinguished the right to abortion from a litany of other due process protections that the Supreme Court had found derived from the general rights of liberty and privacy, including interracial marriage, same-sex relationships, and contraception, noting that these cases did not involve the same critical moral questions posed by abortion. *Id.* at 2257-58. Notably, the Supreme Court did not find the lack of specific protections for these rights

throughout American history warranted their reexamination. The Supreme Court also dismissed concerns from the dissent and the Solicitor General that reversing *Roe v. Wade* would open up an assault on other due process protections recognized in the last thirty years and located in broadly framed rights to autonomy, privacy, and liberty. *Id.* The Supreme Court stated that the right to abortion was unique because it implicated a singular moral question about potential life.

Dobbs does not impact Plaintiffs' substantive due process claims in this case because Plaintiffs are not litigating any issues concerning abortion. Per the Supreme Court's opinion, nothing in the analysis undermines Plaintiffs' claims. Moreover, Plaintiffs can satisfy the *Glucksberg* standard. The specific liberty interest they assert—the right for the terms and duration of their detention to reasonably relate to the purpose of their confinement—is at the core of Anglo-American legal traditions. Even if this Court finds that the specific right to avoid arbitrary prolonged detention was not itself deeply rooted in our Nation's history and traditions, it clearly derives from bedrock protections against deprivation of liberty without conviction. *Dobbs* makes clear that the Due Process Clause protects specific rights, even where courts and legislatures had not previously recognized them, if they are integral parts of broadly entrenched general rights. Nothing in the opinion alters the viability of Plaintiffs' due process claims.

VII. Plaintiffs' cruel and unusual punishment claim is legally and conceptually different than their substantive due process claims.

Plaintiffs' Complaint and Motion for a Preliminary Injunction raise a Fourteenth Amendment due process claim related to their conditions of confinement and the denial of medical care, in addition to their claims related to substantive and procedural due process. This claim, encompassed in Count 4 of their Complaint, is akin to a claim of "cruel and unusual punishment" brought under the Eighth Amendment for individuals who are post-conviction, *see Poros v.*

Barnes, 624 F.3d 1322, 1326 (10th Cir. 2010), and is conceptually distinct from the broader substantive due process claim.[5]

Plaintiffs' cruel and unusual punishment claim relates to both the conditions of confinement in which they are housed as a result of Defendants' actions and the denial and/or delay of necessary medical care that KDADS is obligated by court order to provide. First, as noted in Plaintiffs' Motion, while on the waitlist for LSH, Plaintiffs are often confined to their cells, provided limited recreation time, and further decompensate as a result of the conditions in which they are forced to live. Mem. at 24-25. Denial of recreation time and extended stints in solitary confinement both constitute cruel and unusual punishment. *See Fogle v. Pierson*, 435 F.3d 1252, 1259-60 (10th Cir. 2006) (ruling that allegedly "being denied all outdoor exercise for the three years he was in administrative segregation" states an Eighth Amendment claim); *Rodgers v. Jabe*, 43 F.3d 1082, 1086 (6th Cir. 1995).

Plaintiffs are at risk of harm each day they remain incarcerated in local jails. *See generally* Mem. at 24-25; Dkt. #5-1, Dvoskin Rep. at 10. Defendants do not lack awareness of the harm Plaintiffs face. Indeed, they operate an entire *separate* physical facility for providing treatment to this population—Larned State Hospital—in recognition of the fact that jails are an inappropriate setting to provide care to restore individuals to competency. Plaintiffs and those similarly situated

[5] As noted in Plaintiffs' Motion, state actors have a constitutional obligation to provide individuals in confinement with adequate mental health care. *See generally Tafoya v. Salazar*, 516 F.3d 912, 916 (10th Cir. 2008); *Ramos v. Lamm*, 639 F.2d 559, 574 (10th Cir. 1980) (duty to provide health care extends to "psychological or psychiatric care"). States responsible for the custody and control of individuals in the criminal legal system may not be "deliberately indifferent" to serious medical needs, including mental health needs. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). The deliberate indifference inquiry involves both an objective and subjective component. *Strain v. Regalado*, 977 F.3d 984, 987 (10th Cir. 2020). The objective prong requires that the denial of care be sufficiently serious. *Id.* at 989-90; *Miller v. Glanz*, 948 F.2d 1562, 1569 (10th Cir. 1991). A medical need is sufficiently serious if it has been diagnosed by a physician or is plainly obvious that it merits medical attention. *See generally Oxendine v. Kaplan*, 241 F.3d 1272, 1276 (10th Cir. 2001). Substantial harm caused by delay in treatment can satisfy the objective prong if it is substantial. *Al-Turki v. Robinson*, 762 F.3d 1188, 1193 (10th Cir. 2014) (citing *Sealock v. Colorado*, 218 F.3d 1205, 1210 (10th Cir. 2000)). The subjective prong requires that the state official have a culpable state of mind—in other words, the Court must find that the state official knew of and disregarded an excessive risk to the incarcerated individual's health. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

are experiencing acute harm—decompensation, self-harm, suicidal ideation, and more—and Defendants know of this harm, yet continue to maintain a months-long waitlist for transfer to LSH. Forcing Plaintiffs to languish in county jails, where they continue to deteriorate and risk harm to themselves or others, amounts to deliberate indifference to Plaintiffs' need for (and Defendant's obligation to provide) an appropriate, therapeutic environment for Plaintiffs and those similarly situated.

Second, for the duration of the time Plaintiffs are incarcerated awaiting evaluation and treatment, KDADS is denying Plaintiffs essential mental health care services to which they are statutorily and constitutionally entitled. Officials are deliberately indifferent to serious medical needs when they prevent an incarcerated person from receiving treatment or deny access to medical personnel capable of evaluating the need for treatment. *See Sealock*, 218 F.3d at 1211 (citing *Ramos*, 639 F.2d at 575); *see also Prince v. Sheriff of Carter Cnty.*, 28 F.4th 1033, 1047-48 (10th Cir. 2022) (describing cases where delay or denial of treatment to arrestee was found to satisfy deliberate indifference). Plaintiffs require a specific type of medical care—namely, mental health treatment that will restore them to competency so they can proceed with their trial. Defendants are statutorily obligated to provide this care, yet have failed to do so. This is akin to the penicillin analogy the Court raised in the August 10, 2022 scheduling conference: failure to provide this type of care is similar to failing to provide penicillin to a person with an infection or cancer treatment to someone with leukemia. The delay in providing treatment is causing acute and ongoing harm, and amounts to deliberate indifference of the Plaintiffs' serious medical needs.

For these reasons, Count 4 of Plaintiffs' Complaint is legally distinct from their substantive due process claim, and Plaintiffs are entitled to relief on this claim independently of any other relief granted.

VIII. Defense attorneys and parents are appropriate "next friend" representatives of Plaintiffs pursuant to Fed. R. Civ. P. 17(c).

Addressing the Court's final question, Named Plaintiffs (three defense attorneys representing clients who are on the waitlist for LSH, and one mother of an adult individual who is on the waitlist) are appropriate "next friend" representatives of the real parties in interest in this case. Fed. R. Civ. P. 17(c) provides that an "incompetent person" who does not have an official guardian, fiduciary, or other legal representative, may be represented by a "next friend" in a lawsuit. Fed. R. Civ. P. 17(c)(2). Courts interpret the term "incompetent person" in Rule 17(c)(2) to include persons who are "without the capacity to litigate under the law of his state of domicile." *Graham v. Teller City, Colo.*, 632 Fed. App'x 461, 465 (10th Cir. 2015). Overall, the "next friend" must provide "an adequate explanation" for "why the real party in interest cannot appear on his own behalf." *Whitmore v. Arkansas*, 495 U.S. 149, 164 (1990). The Supreme Court has recognized that next friend litigation is often appropriate "on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves." *Id.* at 162-63.

Here, the parties in interest are individuals whose competence to stand trial has already been called into question by a Kansas court, or who have already been declared incompetent to stand trial by a doctor. The very nature of their claims in this lawsuit is that they are presumed incompetent to participate in legal processes, and therefore in need of further evaluation and/or treatment. Similar cases challenging wait times for state mental health evaluation and treatment have proceeded using "next friend" plaintiffs pursuant to Rule 17(c)(2). *See e.g.*, Compl., *J.H. v. Dallas*, Civ. Action No. 15-02057 (M.D. Pa. 2015); Order, Dkt. #131 at 15, *A.B. (Trueblood) v. Washington State Dep't of Soc. and Health Servs.*, No. 14-CV-1178 (W.D. Wa. 2015). And finally, Named Plaintiffs have significant relationships with the affected parties by virtue of being their

court-appointed attorney, or in the case of Laura Valachovic, an affected party's mother, and will indisputably represent the interests of the affected parties in this litigation.

For these reasons, it is fully appropriate and directly contemplated by Rule 17(c)(2) that Named Plaintiffs serve as "next friend" representatives for the individuals' claims in this suit. Defendants recognize as much, and raised no objection in their responsive pleadings.

CONCLUSION

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

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF KANSAS

/s/ Sharon Brett
Sharon Brett KS #28696
Kayla DeLoach KS #29242
Bria Nelson, KS #29046
6701 W 64th St. Suite 210
Overland Park, KS 66202
(913) 490-4100
sbrett@aclukansas.org
kdeloach@aclukansas.org
bnelson@aclukansas.org

NATIONAL POLICE ACCOUNTABILITY PROJECT OF NATIONAL LAWYERS GUILD

/s/ Lauren Bonds
Lauren Bonds KS #27807
1403 Southwest Boulevard
Kansas City, Kansas 66103
(620) 664-8584
legal.npap@nlg.org

Keisha James* (DC Bar #1658974)
PO Box 56386
Washington, DC 20040
(202) 557-9791
keisha.npap@nlg.org

Eliana Machefsky* (CA Bar #342736)
2111 San Pablo Avenue
PO Box 2938
Berkeley, CA 94702
(314) 440-3505
fellow.npap@nlg.org

STINSON LLP

/s/ Mark D. Hinderks
Mark D. Hinderks KS #27807
George F. Verschelden KS #21469
Benjamin Levin** (MO Bar # 70196)
1201 Walnut Street, Suite 2900
Kansas City, MO 64106
(816) 691-2706
mark.hinderks@stinson.com
george.verschelden@stinson.com
ben.levin@stinson.com

** Admitted Pro Hac Vice*
*** Pro Hac Vice Application Forthcoming*

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on this 31st 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