IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JESSICA GLENDENING, as next friend of G.W.; AUDRA ASHER, as next friend of L.P.; COLIN SHAW, as next friend of C.B. and N.K.; and LAURA VALACHOVIC, as next friend of E.K., *Plaintiffs*, 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*.	Case No. 22-CV-4032-TC-GEB

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Dozens of Kansans who have not been convicted of a crime are currently detained in county jails for months because of Kansas' broken competency evaluation and restoration system. The Kansas Department of Disability and Aging Services ("KDADS") has forced county sheriffs to warehouse individuals with significant mental health issues because it has failed to evaluate and treat Kansans on a constitutionally timely basis. Plaintiffs bring this action to vindicate their Fourteenth Amendment due process rights and request a preliminary injunction to prohibit KDADS from maintaining a waitlist with wait times in excess of 30 days.

Kansans charged with crimes must be mentally competent to stand for trial. Pursuant to K.S.A. § 22-3302, KDADS must provide competency evaluations to charged individuals if the presiding judge finds reason to believe the individual is incompetent to stand trial. Then, if a charged individual is found incompetent to stand trial, KDADS must provide further evaluation and treatment until they are restored to competency. K.S.A. § 22-3303.

KDADS evaluates the competency of individuals charged with crimes and, when necessary, administers competency restoration treatment at Larned State Hospital ("Larned"). However, Larned is unable to timely provide these services to individuals requiring evaluation and treatment. The current wait time for a competency evaluation or treatment bed at Larned is 11 months. While they wait for competency evaluation or restoration treatment at Larned, people who have been charged but not convicted of a crime languish in county jails—often without any medical treatment—for periods that can exceed the time they would spend in jail or prison if convicted. By failing to provide timely competency evaluations and restoration treatments for individuals across the state, KDADS is flagrantly violating these individuals' procedural and substantive due process rights and their right to be free from cruel and unusual punishment under the United States Constitution.

Dr. Joel Dvoskin, an esteemed expert psychologist who regularly consults on the provision of mental health services in criminal justice settings and who has served as a monitor in federal court settlement agreements regarding the treatment of mentally-ill individuals incarcerated in state facilities, has opined that Kansas' wait list is an "outlier" among the 50 states in terms of the length of time detainees are forced to languish in county jails before receiving competency evaluation and restoration treatment. Ex. 1, Report of Dr. Joel Dvoskin (hereinafter "Dvoskin Rep.") at 13. Dr. Dvoskin opined that the wait list to enter Larned exacts a serious toll on detained

individuals, since "psychotic pretrial detainees are likely to remain psychotic longer if housed in a jail than if housed in a modern, competently run psychiatric hospital." *Id.* at 11. He has further opined that "[w]aiting lists for evaluation are inexcusable, as these evaluations can be provided regardless of the person's location by contracting with forensic mental health professionals (FMHPs)." *Id.* at 12. Moreover, Dr. Dvoskin described how the delays cause great harm to the incarcerated individuals by "allowing [them] to languish in stressful and often frightening jails" where their mental illness is "likely to get worse, in many cases adding considerable time . . . to the process of restoring competency." *Id.* at 5. He noted the delays "also cause harm to the jails that are ill-equipped to safely house and treat people with serious mental illness." *Id.* at 5.

Moreover, Dr. Dvoskin rejected the State's presumed justifications for the wait list, including a lack of providers to staff Larned, and/or a lack of funds to run Larned at full capacity. As Dr. Dvoskin detailed:

> The number of psychologists and psychiatrists who are willing to provide these evaluations is directly correlated with the amount of money they are offered for each evaluation. Considering the massive savings that have likely accrued because of Larned's reduced operating capacity, expense is no excuse.

Id. at 12. Dr. Dvoskin recognized that there are many options at KDADS' disposal for resolving the unconstitutional wait times for bed space at Larned.

Notably, in the 2022 legislative session, the Kansas State Legislature reformed K.S.A. §§ 22-3302 and 3303 to expand the number and type of facilities that could conduct competency evaluations and restoration treatment.[1] Governor Kelly signed these reforms into law on April 18, 2022. However, the implementation plan for the legislation remains unclear, and it is unclear what impact, if any, the reforms will have on wait times for beds at Larned, in part because the legislative

[1] *See* House Bill 2508 (eff. July 1, 2022), available at http://www.kslegislature.org/li/b2021_22/measures/documents/hb2508_enrolled.pdf.

reforms still give KDADS and the courts wide discretion regarding how to utilize these new options. *See* Ex. 1, Dvoskin Rep. at 6 (noting that H.B. 2508 gives KDADS "some additional freedoms" regarding where to place individuals in need of competency evaluations and restoration treatment, but reduction in wait times will depend on "how these freedoms are exercised"). The legislative reforms therefore represent an incomplete and speculative solution to the unconstitutional wait times currently in place, a harm that demands immediate redress.

Plaintiffs, who are Kansans charged with crimes awaiting either competency evaluations or competency restoration treatment before they stand trial, bring this class action lawsuit to vindicate their rights as well as the rights of other similarly situated individuals languishing in county jails across the state. While this lawsuit is pending, Plaintiffs seek a preliminary injunction preventing Defendants from maintaining a waitlist with unconstitutional wait times and ordering Defendants to develop and implement a remedial plan to bring wait times for competency evaluations and competency restoration treatment within constitutional limits. Every factor the Court considers when determining whether to grant a preliminary injunction weighs in Plaintiffs' favor. First, Plaintiffs are likely to succeed on the merits of their claim. Second, KDADS' ongoing statutory and constitutional violations are causing irreparable harm to Plaintiffs, who suffer each day in county jail as they wait for evaluation or treatment at Larned. Third, Plaintiffs' ongoing injury greatly outweighs whatever minimal damage the Defendants may suffer by complying with the Constitution. Finally, the injunction—if issued—would further the public interest. Because every preliminary injunction factor weighs in Plaintiffs' favor, Plaintiffs respectfully ask the Court to issue a preliminary injunction that would require Defendants to cease their categorically unconstitutional conduct.

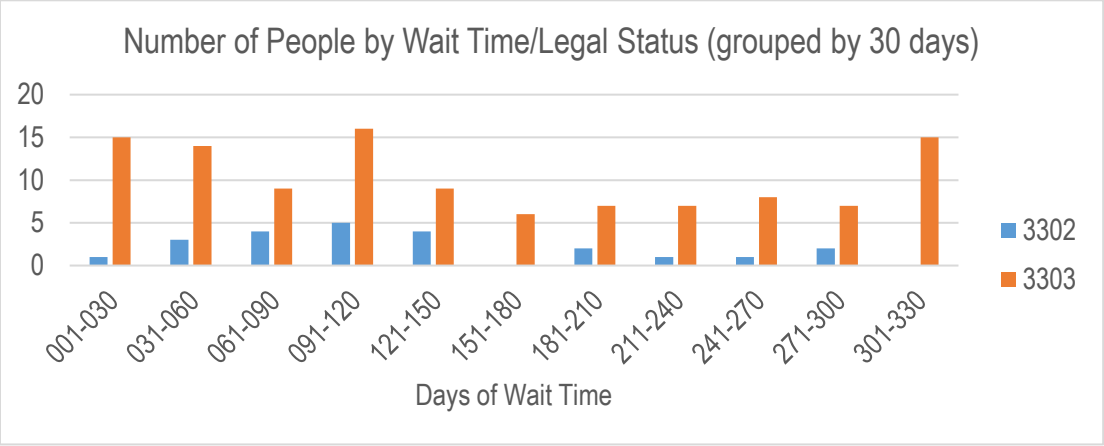
I. FACTUAL BACKGROUND

Under Kansas law, an individual charged with a crime, their counsel, or the prosecuting attorney can request a determination of the person's competency to stand trial. *See* K.S.A. § 22-3302(1). If, upon that request or the judge's own knowledge and observation, the judge finds reason to believe the person is incompetent to stand trial, then the court will suspend the criminal proceedings and conduct a hearing to determine the person's competency. *Id*. In advance of that hearing, the court can order a psychiatric or psychological examination of the person. *See generally* K.S.A. § 22-3302. In practice, courts generally order that the local correctional authority transfer the defendant to Larned for the evaluation. If, following the competency evaluation, the court determines that the person is not competent to stand trial, the court will order the person back to Larned for competency restoration treatment. *See* K.S.A. § 22-3303. These statutes do not provide deadlines mandating how quickly competency evaluation and restoration must begin to take place.

According to KDADS, Kansans can wait up to 11 months for admittance to the forensic unit at Larned, the only unit where individuals facing criminal charges undergo competency evaluation or receive competency restoration treatment. For example, on July 6, 2021, the court ordered that L.P. undergo competency restoration at Larned pursuant to K.S.A. § 22-3303, and L.P. was subsequently placed on the waitlist for a bed at Larned. *See* Ex. 2, Decl. of Audra Asher ("Asher Decl."), ¶ 5. That was nearly 11 months ago. Some individuals on the current waitlist for Larned are facing only misdemeanor charges which, by law, can result in sentences of no more than 12 months of incarceration in jail. K.S.A. § 21-6602(a). Many others are facing low-level felony charges which, by law, can result in sentences of no more than 18 months of incarceration. As such, individuals in some instances are spending more time detained in jail awaiting a competency evaluation and/or competency restoration treatment than they would spend in jail

and/or prison if they were speedily convicted of their crimes. For example, E.K. faces a criminal threat charge, and if convicted, E.K. would face a maximum sentence of 13 months, but given other circumstances, the sentence would likely be probation. Ex. 3, Decl. of Laura Valachovic ("Valachovic Decl."), ¶ 5. Yet, E.K. has already been incarcerated for 13 months and counting.

Analysis of data obtained by Plaintiffs' attorneys via a Kansas Open Records Act (KORA) request prior to the filing of this lawsuit showed that in January 2022, Kansans awaiting competency evaluations by Larned under K.S.A. § 22-3302 had been waiting, on average, 133 days. Those awaiting restoration treatment under K.S.A. § 22-3303 had been waiting, on average, 151.9 days. *See* Ex. 4, KDADS Resp. to KORA Request from ACLU of Kansas.[2] The graph below demonstrates how long individuals have been waiting for a bed at Larned pursuant to K.S.A. §§ 22-3302 or 22-3303, in 30-day increments, as of January 27, 2022. It illustrates that the wait for a bed at Larned for a vast majority of individuals in need of evaluation is longer than 30 days, and many more people in need of restoration treatment wait even longer for a bed. All of the named Plaintiffs have been waiting for more than 30 days to get into Larned.



[2] These numbers are based on an analysis of the wait times provided by KDADS in response to a Kansas Open Records Act Request filed by the ACLU of Kansas. One outlier—an individual awaiting transfer to Larned for over 800 days—was excluded from the analysis, as were all individuals who were currently bonded out of jail and awaiting their evaluations or treatment in non-carceral settings.

The Kansas Supreme Court's Ad Hoc Pretrial Justice Task Force found that "[i]t is . . . not unusual (during normal times) for a person to spend more time waiting to go to Larned than the entire sentence the defendant would have been given if the defendant had pled guilty, which is something they are not permitted to do until the competency evaluation is completed at Larned."[3]

State officials have repeatedly acknowledged the inexcusable lack of capacity at Larned causing the 11-month delay in the provision of mental evaluations and treatment. In 2021, the Governor's Budget Association responded to the crisis by restoring funding for 30 beds in Larned's forensic evaluation and treatment unit. However, KDADS has stated that Larned is not able to fill positions to staff the unit due to high staff vacancy rates.[4] Currently, the forensic unit is operating at reduced capacity. Although there are 120 beds dedicated to this unit, Larned is only filling approximately sixty-five percent of those beds at a time.

Kansas sheriffs have also recognized that this is a significant issue in need of immediate resolution. On October 25, 2021, over 60 Kansas sheriffs sent a letter to Governor Kelly expressing their concern about management and operations at Larned.[5] This letter cited issues with Larned's

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[3] Kan. Judicial Branch, *Pretrial Justice Task Force Report to the Kansas Supreme Court* 31 (Nov. 6, 2020), https://www.kscourts.org/KSCourts/media/KsCourts/court%20administration/Pretrial_Justice_Task_Force/PJTFReporttoKansasSupremeCourt.pdf.

[4] Scott Brunner, Deputy Secretary for Hospitals & Facilities KDADS, Proponent Testimony HB 2697 – concerning crimes, punishment and criminal procedure; relating to competency to stand trial; mobile competency evaluations, Feb. 17, 2022, http://www.kslegislature.org/li/b2021_22/committees/ctte_h_jud_1/misc_documents/download_testimony/ctte_h_jud_1_20220217_12_testimony.html.

[5] 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-to-larned-state-hospital-admin-process; KAKE News, *Kansas sheriffs send letter to governor asking for changes to KDADS, Larned State Hospital*, KAKE.com, Nov. 3, 2021, https://www.kake.com/story/45120737/kansas-sheriffs-send-letter-to-governor-asking-for-changes-to-kdads-larned-state-hospital.

policies on who is admitted as well as how long it takes to admit individuals in need of care.[6] The Kansas sheriffs requested major changes be made to Larned's admission process.[7] Finally, an April 2018 Performance Audit Report stated,

> Individuals may have trouble accessing services at the state's two mental health hospitals because of wait times and a lack of bed space. . . . K.S.A. 39-1602(h) requires community mental health centers to screen individuals to determine if they require treatment in a state mental health hospital. Some community mental health centers reported there can be significant wait times for admission to the state hospitals due to long wait lists and a lack of bed space. This means the community mental health center or the jail must potentially provide crisis management and stabilization services instead of an individual receiving the needed care at the state hospital.[8]

County jails are in no position to house severely mentally ill individuals for these extended periods of time.[9] Jail conditions can trigger and worsen mental illness.[10] Confining mentally ill patients "in close quarters with (and without adequate protection from) large numbers of antisocial persons with excess time and few productive activities results in bullying and predation." E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147, 150 (2013). In the words of Dr. Dvoskin, "the vast majority of American jails have grossly inadequate psychiatric and mental health services, causing inmates to

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[6] 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-to-larned-state-hospital-admin-process.

[7] *Id.*

[8] Performance Audit Report, Legislative Division of Post Audit, Legislature of Kansas, *Community Mental Health: Evaluating Mental Health Services in Local Jails* 23 (Apr. 2018), https://www.kslpa.org/wp-content/uploads/2019/07/1-Final-Report.pdf.

[9] *Id.* at 9, 29.

[10] *See* Katie Rose Quandt and Alexi Jones, Prison Policy Initiative, *Research Roundup: Incarceration can cause lasting damage to mental health* (May 13, 2021), https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/.

decompensate even more rapidly." Ex. 1, Dvoskin Rep. at 11. For example, L.P. has decompensated so significantly while waiting for KDADS to provide restorative treatment that he can no longer be brought over to the court for hearings. *See* Ex. 2, Asher Decl., ¶ 8. L.P. is a perfect example of how KDADS' failure to provide restorative care is creating additional barriers for mentally ill people who are trying to navigate Kansas' criminal justice system. Exposure to violence in "jails can exacerbate existing mental health disorders or even lead to the development of post-traumatic stress symptoms like anxiety, depression, avoidance, hypersensitivity, hypervigilance, suicidality, flashbacks, and difficulty with emotional regulation."[11] Moreover, Kansas jails are overcrowded,[12] making an already harmful carceral environment much worse for those experiencing serious mental illness.[13]

Because county jails are not sufficiently resourced or equipped, and their staff are not adequately trained, to provide services for individuals with serious mental illness, county jails often resort to confining individuals with serious mental illness in isolation or solitary confinement, away from the general population, until a bed becomes available at Larned.[14] For

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[11] *Id.*

[12] *Kansas jail looks at modular units to deal with overcrowding*, Assoc. Press, Nov. 27, 2017, https://apnews.com/article/6e0100481d044b5da2ea304d2356e92d; KAKE News, *Sheriff: Sedgwick County jail is facing overcapacity*, KAKE.com, Jan. 18, 2020, https://www.kake.com/story/41581561/sheriff-sedgwick-county-jail-is-facing-overcapacity; *Kansas Department of Corrections, Overcrowding issues to continue at state correctional facilities*, June 5, 2019, https://www.doc.ks.gov/newsroom/releases/overcrowding; KSN News, *Overcrowding at the jail: A growing problem during the pandemic*, KSN.com, Aug. 12, 2020.

[13] Quandt and Jones, *supra* n.10.

[14] Performance Audit Report, *supra* n.8 at 1, 23 ("A recent survey indicates many jails are not equipped to address the needs of individuals with mental health needs held in those jails;" "The 96 jails across the state are ultimately responsible for inmates' mental health needs while in jail, but jail staff do not have the expertise to provide necessary services.").

example, C.B. and N.K. both remain incarcerated at Shawnee County Detention Center, where they are housed in solitary confinement. *See* Ex. 5, Decl. of Colin Shaw ("Shaw Decl."), ¶ 10. Another Plaintiff, E.K., lives in similar conditions at the Douglas County Jail, isolated in either administrative segregation or the jail's medical unit. *See* Ex. 3, Valachovic Decl., ¶ 8.

Solitary confinement in Kansas jails can have a significant and harmful impact on a person's mental health.[15] The danger that incarceration poses for the mentally ill is greatly exacerbated when they are subjected to solitary confinement. As noted in the Journal of the American Academy of Psychiatry and the Law,

> The adverse effects of solitary confinement are especially significant for persons with serious mental illness, commonly defined as a major mental disorder (e.g., schizophrenia, bipolar disorder, major depressive disorder) that is usually characterized by psychotic symptoms and/or significant functional impairments. The stress, lack of meaningful social contact, and unstructured days can exacerbate symptoms of illness or provoke recurrence . . . . All too frequently, mentally ill prisoners decompensate in isolation, requiring crisis care or psychiatric hospitalization. Many simply will not get better as long as they are isolated.[16]

[15] *See* Second Amend. Compl. *Scriven v. Sedgwick Cty. Comm'rs, Bd.of et al.*, No. 20-cv-03110 (D. Kansas Nov. 30, 2021), ECF No. 79 (plaintiff with physical disabilities and a traumatic brain injury alleges he was placed on lockdown at Sedgwick County Jail for four days as punishment for asking to get undressed in his ADA-compliant cell instead of where he was directed); Amend. Compl., *Guebara v. Bascue et al.*, No. 19-cv-03025 (D. Kansas Aug. 26, 2019), ECF No. 11 (plaintiff alleges he was placed on lockdown for months at El Dorado Correctional Facility as punishment for requesting medical treatment, causing his health to deteriorate and leading him to attempt suicide); *see also* Noah Taborda, *As immigrant's health deteriorates in Seward County Jail, his wife pleads for mercy*, Kan. Reflector, Mar. 28, 2021, https://kansasreflector.com/2021/03/28/as-immigrants-health-deteriorates-in-seward-county-jail-his-wife-pleads-for-mercy (explaining that after an inmate with mental health issues was transferred to solitary confinement, "his mental health began to deteriorate…[and] he began to suffer from hallucinations and paranoia and began using concerning and suicidal language" before later attempting suicide).

[16] Jefferey L. Metzner and Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challengefor [sic] Medical Ethics*, 38 Journal of the American Academy of Psychiatry and the Law Online 104 (March 2010) http://jaapl.org/content/38/1/104, (footnote omitted).

Indeed, "[t]he shattering impacts of solitary confinement are so well-documented that nearly every federal court to consider the question has ruled that placing people with severe mental illness in such conditions is cruel and unusual punishment in violation of the U.S. Constitution"[17] and "the United States Department of Justice has found that the practice violates both the federal Constitution and federal statutory law."[18] The American Psychiatric Association has formally taken the position that "prolonged segregation of adult inmates with serious mental illness, with rare exceptions, should be avoided due to the potential for harm to such inmates."[19]

In other cases, people with severe mental illness—including many Plaintiffs in this case—may be housed in medical units, which operate as *de facto* isolation units with little programing, opportunities for recreation, or social interaction. KDADS' delays in providing people treatment

[17] Am. Civil Liberties Union, *Briefing Paper: The Dangerous Overuse of Solitary Confinement in the United States* 6 (Aug. 2014), https://www.aclu.org/other/stop-solitary-briefing-paper?redirect=criminal-law-reform-prisoners-rights/stop-solitary-briefing-paper; *see also Coleman v. Wilson*, 912 F. Supp. 1282, 1320-21 (E.D. Cal. 1995) ("defendants' present policies and practices with respect to housing of [prisoners with serious mental disorders] in administrative segregation and in segregated housing units violate the Eighth Amendment rights of class members"); *Madrid v. Gomez*, 889 F. Supp. 1146, 1265-66 (N.D. Cal. 1995) (holding prisoners with mental illness or those at a high risk for suffering injury to mental health in "Security Housing Unit" is unconstitutional); *Casey v. Lewis*, 834 F. Supp. 1477, 1549-50 (D. Ariz. 1993) (finding Eighth Amendment violation when "[d]espite their knowledge of the harm to seriously mentally ill inmates, ADOC routinely assigns or transfers seriously mentally ill inmates to [segregation units]"); *Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1988) (holding that evidence of prison officials' failure to screen out from SHU "those individuals who, by virtue of their mental condition, are likely to be severely and adversely affected by placement there" states an Eighth Amendment claim).

[18] Am. Civil Liberties Union, *supra* n.17, at 7; *see also* Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, Civil Rights Div., to Tom Corbett, Gov. of Pennsylvania, Regarding the Investigation of the State Correctional Institution at Cresson (May 31, 2013), http://www.justice.gov/crt/about/spl/documents/cresson_findings_5-31-13.pdf; Response of the United States of America to Defendants' Motion in Limine No.4: To Exclude the Statement of Interest 2-5, *Coleman v. Brown*, Case No. 2:90-cv-0520 LKK DAD PC, Doc. No. 4919 (E.D. Cal. Nov. 12, 2013) (summarizing the United States government's position on the applicability of the Eighth Amendment to the placement of prisoners with serious mental illness in solitary confinement for prolonged periods of time).

[19] Am. Psychiatric Assoc., *Position Statement on Segregation of Prisoners with Mental Illness* (Nov. 2017), https://solitarywatch.org/wp-content/uploads/2018/09/APA-Position-Paper.pdf.

therefore creates a Catch-22: there are no suitable, safe, appropriate places in county jails to house those awaiting competency evaluations or restoration treatment services. As a result, people with severe mental illness face housing conditions that range from un-therapeutic and problematic to outright dangerous. Dr. Dvoskin has opined that jails are a particularly "dangerous place for people with serious mental illness" due to the perception that they are unsafe, the general conditions of isolation, a lack of adequate psychiatric care, an intolerance among staff toward minor behaviors associated with psychosis, and the stigmas associated with mental illness that run rampant within the jails themselves. Ex. 1, Dvoskin Rep. at 9.

II. ARGUMENT

Plaintiffs meet the four-prong test for issuing a preliminary injunction under Federal Rule of Civil Procedure 65. As discussed further below, Plaintiffs have shown that: (1) there is a substantial likelihood of success on the merits; (2) they will suffer irreparable injury unless an injunction is issued; (3) the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the injunction, if issued, would further the public interest. *See, e.g.*, *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003). Accordingly, this Court should grant Plaintiffs' request for a preliminary injunction.

A. Plaintiffs are likely to succeed on the merits of their claims.

Plaintiffs are likely to establish that Defendants' actions, which violate their substantive and procedural due process rights and subject them to cruel and unusual punishment, are unconstitutional on the merits. In the Tenth Circuit, when a preliminary injunction seeks to mandate action, rather than prohibit it, or change the status quo, the movant must make a "strong showing" that they are likely to succeed on the merits. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 976 (10th Cir. 2004) (en banc), *aff'd and remanded, Gonzales*

v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006). Plaintiffs seek an injunction that prohibits KDADS from continuing to delay the competency evaluations and restoration treatment of those in Kansas jails for unconstitutionally long periods of time. However, even if Plaintiffs' prayer for relief were to be construed as mandating action by Defendants, Plaintiffs have met the heightened showing, and an injunction should issue.

1. Plaintiffs are likely to succeed on their substantive due process claim.

The Fourteenth Amendment's Due Process Clause provides that "no state shall . . . deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. Under the substantive component of the Due Process Clause, a state may not engage in conduct that "shocks the conscience" or otherwise "interferes with rights implicit in the concept of ordered liberty." *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citations omitted) (internal quotation marks omitted). To determine whether a state has violated a substantive due process right, a court must balance the individual's interest in liberty against the State's asserted reasons for restraining individual liberty. *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982). Here, Defendants are unconstitutionally infringing on Plaintiffs' liberty interest in (1) being free from incarceration absent a criminal conviction; (2) timely receiving the competency evaluation or restoration treatment that would allow them to stand trial for the crimes of which they are accused; and (3) receiving a speedy trial.

There is no question that Plaintiffs have a liberty interest in being free from incarceration absent a criminal conviction. *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."). The incarceration of a criminal defendant pending either a competency evaluation or restorative treatment operates as an exception

to the "general rule" that defendants cannot be detained prior to a judgment of guilt in a criminal trial. *Salerno*, 481 U.S. at 749. Nonetheless, 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." *Glatz v. Kort*, 807 F.2d 1514, 1518 (10th Cir. 1986) (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)). A mentally incompetent individual charged with, but not convicted of, a crime cannot be held "more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain" competency "in the foreseeable future." *Jackson*, 406 U.S. at 738. The nature and duration of their commitment must "bear some reasonable relation to the purpose for which the individual is committed." *Id.* at 738. Whether that reasonable relation exists is determined by "balancing their liberty interests in freedom from incarceration and in restorative treatment against the legitimate interests of the state." *Oregon Advoc. Ctr. v. Mink*, 322 F.3d 1011, 1121 (9th Cir. 2003).

KDADS is violating the substantive due process rights of Plaintiffs who are languishing in county jails for months on end awaiting competency evaluations or restorative treatment. Plaintiffs' ongoing and lengthy detention in county jails, which lack the resources to restore them to competency and will likely aggravate their illnesses, bears no reasonable relationship to "the purpose for which the individual is committed." *Jackson*, 406 U.S. at 738. Plaintiffs' detention in county jails is not in service of any restorative or medical purpose but solely the result of KDADS' failure to provide timely competency services and treatment.

Courts have recognized that forcing criminal defendants to wait weeks or months for restorative treatments violates their substantive due process rights. In *Mink*, the Ninth Circuit Court of Appeals held that the Oregon State Hospital ("OSH") was violating individuals' substantive due process rights by making them wait "weeks or months" for hospitalization. 322 F.3d at 1122

("Holding incapacitated criminal defendants in jail for weeks or months violates their due process rights because the nature and duration of their incarceration bear no reasonable relation to the evaluative and restorative purposes for which courts commit those individuals."). In *Mink*, the district court found that "incapacitated criminal defendants spent on average about one month in county jails before OSH accepted them for the requisite evaluation and treatment." *Id.* at 1106. The unconstitutional delay at issue in *Mink* is minor compared to the average current wait times for beds at Larned for either evaluations or restoration. As noted above, analysis of data obtained by Plaintiffs' attorneys via a KORA request prior to the filing of this lawsuit showed that in January 2022, Kansans awaiting competency evaluations by Larned under K.S.A. § 22-3302 had been waiting, on average, 133 days. Those awaiting restoration treatment under K.S.A. § 22-3303 had been waiting, on average, 151.9 days. *See* Ex. 4, KDADS Resp. to KORA Request from ACLU of Kansas; *see also supra* n.6. In particular, L.P. has been waiting for roughly 322 days for competency restoration treatment from Larned under K.S.A § 22-3303. *See* Ex. 2, Asher Decl., ¶ 5.

In *Disability Law Center v. Utah*, the district court considered whether the State could "[detain] incompetent defendants for months without adequate mental health treatment after a court has ordered them committed to DHS's custody to receive restorative treatment." 180 F. Supp. 3d 998, 1012 (D. Utah 2016). The district court held that plaintiffs had stated a plausible claim for relief because the purpose of the State's detention was "neither to restore their competency nor to evaluate whether their competency can be restored . . . The State imposes these conditions on incompetent criminal defendants simply because there is no room at [Utah State Hospital ("USH")]." *Id.* In that case, plaintiffs alleged a 180-day wait time for admission to USH. *Id.* at 1004.

Every other court that has considered this issue has similarly held that these lengthy delays violate the substantive due process rights of those detained. *Trueblood v. Washington State Dep't of Soc. & Health Servs.*, 2016 WL 4268933, at *13 (W.D. Wash. Aug. 15, 2016) ("Wait times beyond fourteen days are not constitutionally permissible in this case because longer wait times destroy the reasonable relation between the nature and duration of confinement and its purpose.");[20] *Mink*, 322 F.3d at 1122-23 ("We also uphold the district court's injunction requiring OSH to admit mentally incapacitated criminal defendants within seven days of a judicial finding of incapacitation."); *Advoc. Ctr. for Elderly & Disabled v. Louisiana Dep't of Health & Hosps.*, 731 F. Supp. 2d 603, 620-21 (E.D. La. 2010) (finding violations of substantive due process when there was a six- to nine-month waitlist for transfer to the state mental hospital); *State v. Hand*, 192 Wash.2d 289 (2018), *aff'g* 199 Wash. App. 887, 401 P.3d 367 (2017) (holding that the state hospital's 61-day delay in admitting defendant for competency restoration treatment was unreasonable and violated substantive due process rights without commenting on general reasonableness standard); *In re Loveton,* 244 Cal. App. 4th 1025, 1043-44, 1047 n.19 (Cal. App. 2016) (affirming the trial court's 60-day deadline, which the court had found "constitutes a reasonable time to effectuate a transfer from the county jail to a state mental hospital for evaluation and treatment[.]"); *Willis v. Washington State. Dep't of Social and Health Serv's*, 2017 WL 1064390, at *6 (W.D. Wash. Mar. 21, 2017) ("The nature and duration of Willis's ninety-one day detention, mostly in solitary confinement, bears no reasonable relation to the evaluative and restorative purpose for which he was committed such that a reasonable person would not have

[20] The district court originally enjoined the state from imposing wait times that exceeded seven days. *See Trueblood v. Washington State Dep't of Social and Health Services*, 101 F. Supp. 3d 1010, 1019 (W.D. Wash. 2016). The Ninth Circuit reversed, *Trueblood v. Washington State Dep't of Social and Health Services*, 822 F.3d 1037 (9th Cir. 2016), and on remand the district court revised its injunction to fourteen days.

known his incarceration was unconstitutional."); *Terry ex rel. Terry v. Hill*, 232 F. Supp. 2d 934, 938, 945 (E.D. Ark. 2022) (finding violations of substantive due process where plaintiffs waited months on end for evaluation services); *J.K. v. State*, 469 P.3d 434, 444 (Alaska Ct. App. 2020) ("[W]e have no difficulty in finding that the delay that occurred in J.K.'s case is far beyond any constitutional boundary" when defendant had been detained awaiting competency restoration treatment for 103 days at the time he moved for release on due process grounds).

Although these cases analyze different statutory schemes, they speak in one voice in declaring that multiple-month wait periods violate criminal defendants' substantive due process rights. In this case, the critical facts—(1) the duration of time Plaintiffs and others similarly situated wait in county jails before receiving competency evaluations or restoration treatment; and (2) the reason for that wait—are clearly established in the Complaint and acknowledged by KDADS in other forums, *including* communications to the Kansas State Legislature.[21] The delays in this case of months, and in some cases more than a year, exceed any wait time analyzed by a court in any of the above-cited cases and, thus, are not "reasonably related" to the legitimate state interest in the evaluation or restoration of competency or to any other legitimate state interest. Accordingly, these wait times violate the Due Process Clause. Dr. Dvoskin has opined that "[W]hile many states are struggling with waiting lists for competency restoration, Kansas is an outlier. The number of people who are languishing in jail and the lengths of time they remain there are unacceptable." Ex. 1, Dvoskin Rep. at 13. The staggering wait times exact a heavy toll. According to Dr. Dvoskin:

[21] *See, e.g.*, Scott Brunner, Deputy Secretary for Hospitals & Facilities KDADS, Proponent Testimony HB 2697 – concerning crimes, punishment and criminal procedure; relating to competency to stand trial; mobile competency evaluations, Feb. 17, 2022, http://www.kslegislature.org/li/b2021_22/committees/ctte_h_jud_1/misc_documents/download_testimony/ctte_h_jud_1_20220217_12_testimony.html.

> Research has demonstrated that allowing 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; moreover, a long period of untreated psychosis is especially associated with worse long-term outcomes in people with first-episode psychosis . . . the longer a person remains in jail, the longer it will take to restore them to competency and mental health.

Id. at 11.

Defendants' conduct in this matter amounts to a clear-cut violation of Plaintiffs' substantive due process rights. Defendants' conduct—specifically, forcing Plaintiffs in county jails to wait an average of 11 months to receive a competency evaluation or competency restoration treatment at Larned—shocks the conscience by making a mockery of the bedrock constitutional principle that detained criminal defendants may not be punished prior to an adjudication of guilt. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."). "Punishment prior to an adjudication of guilt" is the only way that Defendants' conduct can be characterized. It is additionally shocking—and even perverse—for Defendants to acknowledge Plaintiffs' need for mental health treatment or, at least, evaluation, but then subject those same Plaintiffs to conditions that will only exacerbate their actual or suspected mental health disorders by warehousing them in county jails, oftentimes in solitary confinement.[22]

[22] Indeed, the fact that many Plaintiffs detained in county jails are detained in solitary confinement gives this Court a second basis to find a likely violation of the Due Process Clause. The Tenth Circuit has identified four factors for the Court to consider in determining whether a liberty interest exists in an inmate's conditions of confinement: "(1) [whether] the segregation relates to and furthers a legitimate penological interest, such as safety or rehabilitation; (2) [whether] the conditions of placement are extreme; (3) [whether] the placement increases the duration of confinement, as it did in Wilkinson; and (4) [whether] the placement is indeterminate." *Estate of DiMarco v. Wyoming Dep't of Corr.*, 473 F.3d 1334, 1342 (10th Cir. 2007). Here, there is no penological interest in segregating Plaintiffs who are only in county jails because of Defendants' unconstitutional waitlist. The placement of Plaintiffs in solitary confinement is extreme in that it is likely to exacerbate Plaintiffs' existing mental illnesses. The placement likely increases the duration of confinement in that by exacerbating Plaintiffs' mental illness it moves them further away from the goal of competency [alternatively (or additionally): it likely increases the duration of confinement by confining Plaintiffs for greater durations than they would have been confined had they been speedily

Defendants' conduct is all the more shocking given that in some cases, the amount of time Plaintiffs are detained in county jails awaiting treatment *exceeds the length of the sentence they would serve if convicted of the crime they are charged with*, a virtually *per se* infringement on their liberty interest in being free from incarceration.[23] *See Disability Law Ctr. v. Utah*, 180 F. Supp. 3d 998, 1004 (D. Utah 2016) (holding it probative to plaintiffs' substantive due process claim that "incompetent defendants are held in jail awaiting transfer to USH for periods longer than the length of the sentence they would serve if found guilty of the crime with which they are charged.").[24]

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tried and convicted]. Finally, the placement is indeterminate in that it is unknown when a bed will open up for Plaintiffs at Larned. *See Silverstein v. BOP*, 704 F. Supp. 2d 1077, 1092 (D. Colo. Mar. 23, 2010) (holding that individual had a liberty interest in the conditions of his confinement where he was being subjected to solitary confinement without clear penological justification and where placement in solitary was for an indefinite period of time).

[23] In addition to the case law establishing a substantive due process violation where individuals are incarcerated for lengthy periods while awaiting competency evaluation or restoration, there is persuasive case law establishing a substantive due process violation where criminal defendants are subjected to a general excessive delay before standing trial. The due process clause is implicated when prolonged pretrial detention is excessive and thereby punitive. *United States v. Shareef*, 907 F. Supp. 1481, 1484 (D. Kan. 1995) (citing *United States v. Theron*, 782 F.2d 1510 (10th Cir. 1986)). Although there are "no bright lines for determining the constitutional limits on the length of time that the government may detain a person pending trial," the Court weighs several factors, including the length of detention, the party responsible for the delay, and the strength of evidence upon which detention was based, when determining if pretrial detention is excessive. *United States v. Gonzales*, 995 F. Supp. 1299, 1303 (D.N.M.), *aff'd*, 149 F.3d 1192 (10th Cir. 1998) (internal citations omitted). When considering the length of detention, the Tenth Circuit has acknowledged that "lower courts have generally found post-accusation [sic] delay 'presumptively prejudicial' at least as it approaches one year." *Castro v. Ward*, 138 F.3d 810, 819 (10th Cir.), *cert. denied*, 525 U.S. 971 (1998) (citing *Doggett v. United States*, 506 U.S. 647, 652 n.1 (1992)). Here, the 11-month delay indisputably "approaches one year" and thus may be regarded as presumptively prejudicial. Moreover, although the Defendants are not prosecutors, they are responsible for the delay in trial insofar as they are the policymaking authorities at Larned who have adopted policies resulting in the significant wait times. The final factor—the strength of evidence upon which detention was based—does not cut in either party's favor. In view of every factor, including most importantly the presumptively prejudicial length of delay, there is a substantial likelihood that Plaintiffs' prolonged pretrial detention, a result of Defendants' unconstitutional wait times, amounts to a violation of their substantive due process rights.

[24] By way of example, Plaintiffs recommend to the Court's attention Sheriff Armbrister's letter submitted to the Kansas House Judiciary Committee on February 16, 2022. 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 ("Isaac served nearly SIX YEARS for a charge he was eventually sentenced for a little over a year and 4

And that is precisely the issue that both E.K. and C.B. are facing at this moment in time. *See* Ex. 3, Valachovic Decl., ¶ 5; Ex. 5, Shaw Decl., ¶ 6.

The extraordinary and prejudicial wait times for competency evaluations or restoration treatment is undisputed, and there is no legitimate state interest justifying the delay. There is thus a strong likelihood that Plaintiffs will succeed on the merits of their substantive due process claim. This factor weighs in favor of a preliminary injunction.

2. Plaintiffs are likely to succeed on their Procedural Due Process Claim.

"Procedural due process ensures that individuals are entitled to certain procedural safeguards before a state can deprive them of life, liberty or property." *Becker v. Kroll*, 494 F.3d 904, 918 n.8 (10th Cir. 2007). "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). To evaluate whether procedural due process is satisfied, courts use the three-part inquiry the Supreme Court set out in *Mathews v. Eldridge*. 424 U.S. 319 (1976). This inquiry balances (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 administrative burden that additional procedural requirements would impose." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) (citing *Mathews*, 424 U.S. at 335). The importance of Plaintiffs' private liberty interest and the risk of erroneous deprivation of their procedural due process rights greatly outweighs the minimal administrative burden that KDADS would shoulder

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months for."). Moreover, the Pretrial Justice Task Force of the Kansas Supreme Court reported in November 2020 that it is "not unusual (during normal times) for a person to spend more time waiting to go to Larned than the entire sentence the defendant would have been given if the defendant had pled guilty, which is something they are not permitted to do until the competency evaluation is completed at Larned." Kansas Judicial Branch, *Pretrial Justice Task Force Report to the Kansas Supreme Court* 31 (Nov. 6, 2020).

if required to ensure that Plaintiffs receive timely competency evaluations and restoration treatment.

As explained *supra*, § II.A.1, Plaintiffs possess a liberty interest in freedom from incarceration, a liberty interest in receiving a competency evaluation or competency restoration treatment in a reasonable amount of time, and a liberty interest in their cases expeditiously proceeding to trial. A more important interest can scarcely be imagined, given that freedom from physical detention is "the most elemental of liberty interests" subject to special importance in the *Mathews* balancing test. *Hamdi v. Rumsfeld*, 542 U.S. 507, 529, 531 (2004) (finding an accused enemy combatant's liberty interest to outweigh even "the weighty and sensitive governmental interests" implicated by war and treason). *See also Addington v. Texas*, 441 U.S. 418, 425 (1979) ("This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.") (citations omitted). The harms associated with physical detention are sharpened in this instance given that Plaintiffs, who have been found or are suspected to be incompetent to stand trial and risk a worsening of their mental health condition while imprisoned in county jails that lack the resources or expertise to safely house them. Plaintiffs' strong liberty interest requires the strictest procedural protections.

Moving to the second element, the risk of an erroneous deprivation of Plaintiffs' liberty interests created by Defendants' practice of making Plaintiffs wait months to receive a competency evaluation or competency restoration treatment is acute and ongoing. Plaintiffs incarcerated in county jails awaiting a competency evaluation or competency restoration treatment risk being detained in those jails for a period longer than the period they would have been incarcerated had they been speedily convicted of their charged crime. The deprivation of an individual's physical liberty for a period longer than the maximum length of their sentence if convicted of the charged

crime is the definition of an erroneous deprivation, particularly in the absence of formal civil commitment proceedings. Additionally, delaying an individual's ability to stand trial through either a finding of competency or a return to competency prolongs their criminal case and, in turn, makes it difficult for their attorney to conduct factual investigations, identify witnesses, or engage in plea negotiations. *Mink*, 322 F.3d at 1119 n.10. Moreover, courts are asked to be particularly vigilant against the erroneous deprivation of procedural due process protections in the case of individuals incarcerated with intellectual disabilities. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

By instituting procedures that delay Plaintiffs from being admitted to Larned to receive competency evaluation and restoration treatment, and by refusing to institute procedures that would otherwise facilitate Plaintiffs' timely competency evaluation and restoration treatment, Defendants virtually guarantee the erroneous deprivation of Plaintiffs' strong liberty interests in being free from incarceration, in receiving necessary mental health treatment to facilitate competency restoration, and in seeing their cases proceed expeditiously to trial. Moreover, the value of preventing the deprivations of those fundamental rights cannot be overstated. For Plaintiffs, the value is the difference between spending months of their lives in the harsh conditions of a county jail, with all of the potentially irreversible harms that inevitably entails, and spending those months receiving necessary mental health treatment that could restore them to competency and move them toward resolving their pending criminal charge(s).

Finally, Defendants cannot claim any serious interest of their own to counter the high risk that their current procedures erroneously deprive Plaintiffs of crucial liberty interests. The only interest Defendants might claim is a pecuniary interest in avoiding the expenditures necessary to provide timely competency evaluation and competency restoration treatment to Plaintiffs currently

languishing for weeks and months in county jails. However, a pecuniary interest cannot justify a clear-cut and severe violation of Plaintiffs' procedural due process rights. *See Little v. Streater*, 452 U.S. 1, 15-16 (1981)*; see also Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983) ("Society's interest lies on the side of affording fair procedures to all persons, even though the expenditure of governmental funds is required.").

Because there is a strong likelihood that Defendants' conduct is violating Plaintiffs' procedural due process rights, this factor cuts in favor of a preliminary injunction.

3. Plaintiffs are likely to succeed on their Fourteenth Amendment Claim for Cruel and Unusual Punishment.

"[W]hen a plaintiff finds himself in the criminal justice system somewhere between the two stools of an initial seizure and post-conviction punishment[,] we turn to the due process clauses of the Fifth or Fourteenth Amendment and their protection against arbitrary governmental action by federal or state authorities" to evaluate claims of mistreatment. *Porro v. Barnes*, 624 F.3d 1322, 1326 (10th Cir. 2010). Although the Due Process Clause governs a pretrial detainee's claim of unconstitutional conditions of confinement, *see Bell v. Wolfish*, 441 U.S. 520, 535, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), the Eighth Amendment standard provides the benchmark for such claims. *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1022 (10th Cir. 1996); *see also Garcia v. Salt Lake Cnty*, 768 F.2d 303, 307 (10th Cir. 1854) (holding that, although the Eighth Amendment protects the rights of convicted prisoners and the Fourteenth Amendment protects the rights of pretrial detainees, pretrial detainees are "entitled to the degree of protection against denial of medical attention which applies to convicted inmates"); *Strain v. Regaldo*, 977 F.3d 984, 989 (10th Cir. 2020). Thus, the Eighth Amendment case law applies with equal force to pretrial detainees, like Plaintiffs, via the Fourteenth Amendment.

"The Eighth Amendment's prohibition of cruel and unusual punishment imposes a duty on prison officials to provide humane conditions of confinement, including adequate food, clothing, shelter, sanitation, medical care, and reasonable safety from serious bodily harm." *Tafoya v. Salazar*, 516 F.3d 912, 916 (10th Cir. 2008). "[T]he treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L.Ed.2d 811 (1994) (internal citation omitted). "The test for constitutional liability of prison officials involves both an objective and a subjective component." *Mata v. Saiz*, 427 F.3d 745, 751 (10th Cir. 2005) (quotations omitted). First, the prisoner must "produce objective evidence that the deprivation at issue was in fact 'sufficiently serious.'" *Id.* Second, the prisoner must establish that the responsible officials are deliberately indifferent to that deprivation by "present[ing] evidence of the prison official's culpable state of mind." *Id.* The prisoner must show that the responsible "official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Farmer*, 511 U.S. at 842.

Plaintiffs are likely to succeed on their Fourteenth Amendment cruel and unusual punishment claim because the conditions of their confinement are inhumane in that (1) they are housed in inevitably nontherapeutic and thus inappropriate settings within county jails—including in solitary confinement—as they await transfer to Larned, despite the fact that they likely suffer from mental illness severe enough to prevent them from standing trial; and (2) they are not being afforded necessary medical treatment. Their conditions amount to a serious deprivation of liberty interests and presents a substantial risk of harm. Moreover, Defendants are aware of these deprivations and yet nonetheless display deliberate indifference toward Plaintiffs' conditions.

First, individuals languishing in county jails awaiting competency evaluation or competency restoration treatment frequently do so in solitary confinement because they are

considered to be a threat to themselves or others and because jail employees lack an alternative means of ensuring other prisoners' safety.[25] As Dr. Dvoskin has observed, "inmates with serious mental illness commonly comprise a disproportionate number of inmates in lockdown settings such as administrative or disciplinary (punitive) segregation or other forms of restricted housing." Ex. 1, Dvoskin Rep. at 10. Plaintiffs remain in wholly inappropriate settings—that is, settings that are, at best, nontherapeutic, and, at worst, actively harmful—until a spot opens at Larned, which is to say they remain there for an indefinite and indeterminate period of time.

As discussed above, KDADS's failure to timely move those awaiting competency evaluation and restoration treatment into Larned places Plaintiffs and those similarly situated at grave risk of continued harm. Although KDADS cannot control the conditions in which people are housed at county jails, county sheriffs have made clear to KDADS and legislators that they do not have the capacity to safely house this population. Plaintiffs remain under the control of KDADS, even while warehoused at county jails until KDADS accepts them for transfer. KDADS is solely responsible for determining whether and how long Plaintiffs and those similarly situated will remain in the sheriffs' custody before being transferred to Larned. KDADS' failure to timely transfer Plaintiffs out of county jails therefore forces Plaintiffs to endure cruel and unusual punishment—including isolation and solitary confinement—for prolonged periods of time. *See, e.g., Indiana Protection & Advoc. Servs. Comm'n v. Comm'r,* 2012 WL 6738517 (S.D. Ind., Dec. 31, 2012) (holding that the Indiana Department of Correction's practice of placing prisoners with

[25] *See* Jefferey L. Metzner and Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for [sic] Medical Ethics*, 38 J. of the Am. Acad. of Psychiatry and the L. Online 104 (Mar. 2010), http://jaapl.org/content/38/1/104; Shawnee County Dep't of Corr. Adult Detention Center, Inmate Handbook 36 (Mar. 2019), https://snwebresources.blob.core.windows.net/corrections/document/policies-and-procedures/adult-detention-center/inmate_handbook_and_grievance_procedures.pdf (inmates can be placed in segregation if they are considered a security risk).

serious mental illness in segregation constituted cruel and unusual treatment in violation of the Eighth Amendment); *Jones 'El v. Berge*, 164 F. Supp. 2d 1096, 1101-02, 1125 (W.D. Wis. 2001) (granting a preliminary injunction requiring the removal of prisoners with serious mental illness from supermax prison); *Coleman v. Wilson*, 912 F. Supp. 1282, 1320-21 (E.D. Cal. 1995) ("defendants' present policies and practices with respect to housing of [prisoners with serious mental disorders] in administrative segregation and in segregated housing units violate the Eighth Amendment rights of class members"); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001), *adhered to on remand*, 154 F. Supp. 2d 975 (S.D. Tex. 2001) ("Conditions in TDCJ-ID's administrative segregation units clearly violate constitutional standards when imposed on the subgroup of the plaintiffs' class made up of mentally-ill prisoners"); *Madrid v. Gomez*, 889 F. Supp. 1146, 1265-66 (N.D. Cal. 1995) (holding prisoners with mental illness or those at a high risk for suffering injury to mental health in "Security Housing Unit" is unconstitutional); *Casey v. Lewis*, 834 F. Supp. 1477, 1549-50 (D. Ariz. 1993) (finding Eighth Amendment violation when "[d]espite their knowledge of the harm to seriously mentally ill inmates, ADOC routinely assigns or transfers seriously mentally ill inmates to [segregation units]"); *Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1988) (holding that evidence of prison officials' failure to screen out from SHU "those individuals who, by virtue of their mental condition, are likely to be severely and adversely affected by placement there" states an Eighth Amendment claim).

Defendants' policy of operating a long waitlist for forensic bed space at Larned consigns Plaintiffs to county jails for periods of weeks, months, or even years. These jails are ill-equipped to safely house Plaintiffs for a significant period of time, often resulting in their placement in

solitary confinement, itself an unsafe form of confinement for Plaintiffs or, indeed, for anyone. [26] In the words of Dr. Dvoskin, "there is virtual unanimity among experts that segregation should be avoided for any inmate or detainee who suffers from acute symptoms of serious mental illness such as severe depression or psychosis." Ex. 1, Dvoskin Rep. at 10. Moreover, Defendants are fully aware of the conditions of Plaintiffs' confinement as well as the significant toll that that confinement takes on their mental health.[27] Nonetheless, Defendants continue to inadequately staff Larned, creating a waitlist that ensures exactly that result. They are fully aware of and culpable for this serious deprivation of a constitutional right. Defendants' conduct amounts to a violation of Plaintiffs' Fourteenth Amendment rights to be free from cruel and unusual punishment.

Second, Plaintiffs' Fourteenth Amendment rights are being violated in that they are being denied access to medically necessary psychological healthcare for the duration of the period they are detained in county jails. *Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996) ("The states have a constitutional duty to provide necessary medical care to their inmates, including psychological or psychiatric care."). Defendants' duty to provide necessary psychological healthcare to incarcerated individuals extends to the Plaintiffs in this case, who require either

[26] Jefferey L. Metzner and Jamie Fellner, *supra* n.25; National Alliance on Mental Illness (NAMI), *Solitary Confinement*, https://www.nami.org/Advocacy/Policy-Priorities/Stopping-Harmful-Practices/Solitary-Confinement ("Solitary confinement for people with serious mental illness: . . . [c]auses extreme suffering . . . [d]isrupts treatment . . . [c]auses or worsens symptoms such as depression, anxiety, and hallucinations . . . [i]mpedes rehabilitation, recovery, and community re-integration . . . [and] [c]auses adverse long-term consequences for cognitive and adaptive functioning.").

[27] *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-to-larned-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).").

restorative mental health treatment or diagnostic attention from medical professionals before they can stand trial. The laws of Kansas place this responsibility squarely on Defendants, not on county jail employees. *See* K.S.A. §§ 22-3302, 22-3303. Any actual or suspected mental illness that could result in an individual being found incompetent to stand trial must, by necessity, be considered a serious medical condition for purposes of the Eighth Amendment. Thus, Plaintiffs are entitled to—but not receiving—medical attention for the duration of their confinement in county jails. This amounts to a serious deprivation of their constitutional right to psychological medical care.

In his expert report, Dr. Dvoskin confirms that the "vast majority of jails lack adequate psychiatric, psychological, social work, and nursing services, thereby decreasing the likelihood that prescribed medications are appropriate, effective, and preferred by the patient." Ex. 1, Dvoskin Rep. at 9. He opines that few if any jails are able to create an environment "in which a detainee feels like a patient." *Id.* Given the shortcomings of county jails in Kansas—confirmed by the same sheriffs who administer those jails, *see supra* at 25-26—Plaintiffs are indisputably being deprived of the basic psychological medical care to which they are entitled.

As to the subjective prong of Plaintiffs' cruel and unusual punishment claim, "[d]eliberate indifference to serious medical needs is shown when prison officials have prevented an inmate from receiving recommended treatment or when an inmate is denied access to medical personnel capable of evaluating the need for treatment." *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980). Here, the responsible officials in question—the Defendants—are indisputably denying Plaintiffs access to competency restoration treatment and competency evaluation by trained medical personnel by forcing them to wait in county jails for months until a bed opens up at Larned. Additionally, there is no doubt that Defendants are aware of this deprivation, given that a high-ranking KDADS official has testified to the Kansas State Legislature concerning this very

problem.[28] This fact alone shows deliberate indifference toward Plaintiffs' medical needs and a culpable state of mind insofar as Defendants were aware of facts from which the reasonable inference could be drawn that Plaintiffs were and are being deprived of their constitutional rights. Again, the facts of this case create a strong likelihood that Defendants are subjecting Plaintiffs to cruel and unusual punishment in violation of their Fourteenth Amendment rights. Because Plaintiffs have shown a strong likelihood of success on the merits of their Fourteenth Amendment claim, this factor cuts in favor of a preliminary injunction.

B. Plaintiffs will suffer irreparable injury absent a preliminary injunction.

"When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (internal quotations omitted). *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."). Plaintiffs have alleged violations of their rights under the Fourteenth Amendment in that they are being denied their procedural and substantive due process rights and are being subjected to cruel and unusual punishment due to Defendants' actions. Because constitutional rights are central to this case, this factor weighs in favor of a preliminary injunction.

Aside from the irreparable injury that inherently results from constitutional harm, Plaintiffs' incarceration in county jails as a result of Defendants' unconstitutional conduct causes actual irreparable injury in that they are incarcerated. *See, e.g., United States v. Washington*, 549 F.3d 905, 917 & n.17 (3d Cir. 2008) ("potential for excess prison time" is irreparable harm); *United*

[28] *See* Scott Brunner, Deputy Secretary for Hospitals & Facilities KDADS, *Proponent Testimony HB 2697 – concerning crimes, punishment and criminal procedure; relating to competency to stand trial; mobile competency evaluations*, Feb. 17, 2022, http://www.kslegislature.org/li/b2021_22/committees/ctte_h_jud_1/documents/testimony/20220217_12.pdf.

States v. Bogle, 855 F.2d 707, 710-11 (11th Cir. 1988) ("unnecessary deprivation of liberty clearly constitutes irreparable harm") (citation omitted); *Forchion v. Intensive Supervised Parole*, 240 F. Supp. 2d 302, 310 (D.N.J. 2003) (plaintiff's continued incarceration "is a harm which cannot be redressed following a trial."). Continued, unnecessary incarceration creates irreparable harm.

Finally, the prolonged incarceration of Plaintiffs in county jails constitutes an irreparable harm because it threatens to worsen their mental condition.[29] For the reasons explained above, and as explained by Dr. Dvoskin in his expert report, "because the jail environment is so harmful for people with psychoses, the longer a person remains in jail, the longer it will take to restore them to competency and mental health." Ex. 1, Dvoskin Rep. at 11. Other courts have found the same: the prolonged incarceration of the mentally ill awaiting competency evaluation or competency restoration treatment causes them irreparable injury as they await mental health services. *See, e.g., Lynch v. Baxley*, 744 F.2d 1452, 1458 (11th Cir. 1984) ("Temporary confinement in jail is particularly harmful to those who are mentally ill."); *Advoc. Ctr. for Elderly & Disabled* 731 F. Supp. 2d at 625 ("In addition, plaintiffs have presented evidence that continued incarceration could exacerbate the Incompetent Detainees' mental conditions."); *Terry*, 232 F. Supp. 2d at 940-41 ("Dr. Ross testified that the mental health system at the ASH needed to change because mentally ill inmates are suffering and the delay in evaluation and/or treatment makes it more difficult to treat inmates once they are admitted to the hospital.").

To the extent that the prolonged detention of Plaintiffs and others similarly situated in county jails threatens to exacerbate their mental illnesses, they are suffering irreparable harm. For example, G.W. is unable to communicate with his attorney, and suffers from a variety of diagnoses, including unspecified schizophrenia and a psychotic disorder, yet has been waiting for restoration

[29] *See* Katie Rose Quandt and Alexi Jones, *supra* n.10.

treatment since September 10, 2021. Ex. 6, Declaration of Jessica Glendening, ¶¶ 10-11. E.K. has refused all communication with his family and attorneys, which his mother attributes to his continuously declining mental state and the conditions in which he is currently confined. Ex. 3, Valachovic Decl., ¶ 8. L.P. continues to pick up new charges while incarcerated because of behaviors stemming from his mental illness, which is exacerbated by jail conditions. Ex. 2, Asher Decl., ¶ 7.

And even if Plaintiffs' mental illnesses are *not* being exacerbated by their detention in county jails, their lack of treatment needlessly prolongs their suffering, a constitutional harm in and of itself. Because there is a strong basis to believe that Plaintiffs are suffering irreparable harm while they remain incarcerated in jails due to Defendants' unconstitutional conduct, this factor heavily weighs in favor of a preliminary injunction.

C. The balance of harms tips in Plaintiffs' favor.

This Court must balance the irreparable harms identified above against the burden that the preliminary injunction will cause Defendants. *Fish v. Kobach*, 840 F.3d 710, 754 (10th Cir. 2016). In the Tenth Circuit, when a preliminary injunction seeks to mandate action, rather than prohibit it, or change the status quo, the movant must make a "strong showing" that the balance of harm tilts in their favor. *Id.* at 724. The balance of harm in this case tilts decisively in Plaintiffs' favor. When a constitutional right is at issue, even a temporary loss of that right usually trumps any harm to the defendant. *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 806 (10th Cir. 2019) (citing 11A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2948.2 & n.10 (3d ed. & Nov. 2018 update)). Plaintiffs' substantive and procedural due process rights as well as their right to be free from cruel and unusual punishment are at the

heart of this case. As such, Plaintiffs suffer and continue to suffer serious and, indeed, irreparable injury as a result of Defendants' waitlist.

By comparison, the harm to Defendants is minor. Defendants may need to expend additional funds to provide competency evaluations and restoration treatment in a constitutionally permissible amount of time. However, the Plaintiffs' "very liberty is at stake, and such a 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.").

Because Plaintiffs have made a strong showing that the balance of harms tilts in their favor, this factor weighs in favor of a preliminary injunction.

D. A preliminary injunction serves the public interest.

Finally, granting an injunction in this case will serve the public interest. The public interest is always served by an injunction that protects constitutional rights. *See Planned Parenthood of Kan., Inc. v. City of Wichita*, 729 F. Supp. 1282, 1292 (D. Kan. 1990) (public interest furthered by injunction that protected women's access to reproductive health care); *Free the Nipple*, 916 F.3d at 807 ("[I]t's always in the public interest to prevent the violation of a party's constitutional rights.") (internal citations and quotations marks omitted).

In addition to furthering the public's inherent interest in protecting the constitutional rights of its fellow citizens, preliminary injunctive relief will also benefit the public by removing a significant burden from the sheriffs operating county jails across the state. Kansas sheriffs have explained that forcing them to house individuals awaiting competency evaluation or restoration at Larned for almost a year places a significant burden on their finite resources, limiting the services they can provide to other incarcerated Kansans.[30] A preliminary injunction ordering Defendants to reduce wait times for incarcerated individuals awaiting a competency evaluation or competency restoration treatment would promote the efficient administration of Kansas county jails.

Here, the public interest, including the interests of the individuals incarcerated in county jails awaiting competency evaluations or competency restoration treatment and the interest of county jails across the state, will be furthered by a preliminary injunction. This factor cuts in favor of a preliminary injunction.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Preliminary Injunction and issue a preliminary injunction requiring Defendants to reduce the amount of time Plaintiffs and others similarly situated wait for competency evaluations and competency restoration treatment to a constitutionally acceptable period.

Dated this [ ] day of May, 2022.

[30] *See* Scott Brunner, Deputy Secretary for Hospitals & Facilities KDADS, *Proponent Testimony HB 2697 – concerning crimes, punishment and criminal procedure; relating to competency to stand trial; mobile competency evaluations*, Feb. 17, 2022, http://www.kslegislature.org/li/b2021_22/committees/ctte_h_jud_1/misc_documents/download_testimony/ctte_h_jud_1_20220217_12_testimony.html; Performance Audit Report, *supra* n.8 at 1, 29 ("A recent survey indicates many jails are not equipped to address the needs of individuals with mental health needs held in those jails;" "The 96 jails across the state are ultimately responsible for inmates' mental health needs while in jail, but jail staff do not have the expertise to provide necessary services.").

Respectfully submitted,

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** Pro Hac Vice Application Forthcoming*

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on this 26th day of May 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. I have also emailed a courtesy copy to Sherry Diel, Chief Counsel for the Kansas Department of Aging and Disability Services, at Sherry.Diel@ks.gov.

/s Sharon Brett
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