The Honorable MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TRUEBLOOD *et al*. Plaintiffs, v. WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES *et al*, Defendants.	NO. C14-1178 MJP DEFENDANTS' RESPONSE TO PLAINTIFFS' SECOND MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION **NOTED FOR OCTOBER 8, 2014**

A temporary restraining order or "preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). Plaintiffs have not met their burden, and ask this Court to impose an unworkable and unnecessary order.

Three months after filing the complaint in this case, Plaintiffs claim that this Court's immediate intervention is necessary and seek a temporary restraining order. But the relief Plaintiffs seek makes no sense and is not supported by the facts or the law. Plaintiffs demand, for example, that the state "immediately staff and use all existing space with hardened security at the hospitals for forensic services[.]" Dkt. #41-1 at 3. Plaintiffs present no evidence that the State is not already doing that; and the reality is, the state is already utilizing such hospitals to

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full capacity. Plaintiffs also ask the Court to order that certain patients within state mental hospitals be transferred out of the secured forensic ward. Plaintiffs present no evidence as to how this would impact the health and safety of the vulnerable patients in civil wards, or the safety of hospital staff and the general public. The reality is that such transfers would generate few if any additional openings for criminal defendants, and would threaten the health of current patients and the safety of hospital staff and the general public. Plaintiffs next ask the Court to order the Department to "contract directly with all private evaluators . . . at each evaluator's regular rate, to conduct competency evaluations in addition to existing evaluators and those evaluators who can be pulled from outpatient evaluations to staff the additional inpatient units . . . ." Dkt. #41 at 3. This is made impossible by the lack of available evaluators in the market and the inability of the Department and the court to force third parties to contract with the State. "Pulling" evaluators away from other duties will only worsen wait times for other parts of the criminal defendant population. Plaintiffs cannot prove that the order they request would actually be workable or have any tangible effect on the putative class members, and have ignored the detrimental impacts their rash requests would have on other mentally ill persons in the State's care.

The Department is committed to addressing delays in competency services, just as it always has been. Delays in competency services are a complex problem that has arisen periodically over the last fifteen years. Each time criminal defendants face these delays, the Department has responded with solutions to address the problem. However, the nature of the problem has continued to evolve, as has the nature of the needed solutions. The Department has already implemented measures to address this current surge in criminal defendants who need competency services, and has requested new funding from the legislature to implement measures squarely aimed at evaluation and restoration. Preliminary injunctive relief, especially in the form of a TRO, is unnecessary to compel the Department to address these problems.

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I. COUNTER STATEMENT OF FACTS

Plaintiffs offer this Court broad generalizations paired with only the most extreme factual situations to support their request for relief. The plaintiffs also paint the Department as an obstinate entity that has refused to act in the face a constant problem, when in fact the Department has consistently responded to this situation, which has repeatedly changed in scope and nature over the last fifteen years. Declaration of Victoria Roberts (Roberts Decl.) ¶ 6. In the provision of forensic services, the Department is only one part of a complex system. *Id.* Many of the factors that directly control demand for the services, provision of staff for these services, and timeliness of evaluations and restoration are not controlled by the Department. *Id.* These external factors include arrest and referral of criminal defendants – including those with minor charges, unnecessary referral of criminal defendants for repeat evaluations, delays created by scheduling difficulties with defense counsel, a shortage of qualified doctors in the market to fill evaluator and psychiatrist openings, and a complete inability to control the manner in which jails treat criminal defendants. *Id.*

The Department has worked tirelessly to develop and implement short-term, long-term, and creative solutions to alleviate the compounding stress on the forensic mental health system. Roberts Decl. ¶ 3. These efforts have been focused on three main areas: space, staffing, and systemic changes. Roberts Decl. ¶ 4.

The Legislature sets a biennial funding level for operation of the state psychiatric hospitals, which includes a specific number of beds for forensic services. Western State Hospital (WSH) has 270 such beds; Eastern State Hospital (ESH) has 95 such beds. Roberts Decl. ¶ 4. These numbers have remained stagnant in the face of increasing forensic populations for nine years. *Id.* To improve timeliness and expand the available space for forensic patients at the state hospitals, the Department has submitted a decision package to the Office of Financial Management requesting a capital funding review at Eastern State Hospital and taken steps to streamline forensic bed utilization. Roberts Decl. ¶ 4a-c.

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In addition, the state hospitals have persistently dealt with staffing shortages in all areas of forensic services, but have faced particularly harsh shortages in forensically trained psychiatrists and forensic psychologists. Roberts Decl. ¶ 5. Psychiatrists and psychologists are at a premium. *Id*. Private, federal, and state agencies viciously compete to recruit professionals from this limited pool. *Id*. To improve and increase the staffing levels needed to provide adequate care and treatment for the ever-increasing number of forensic patients referred to the state hospitals the Department has aggressively recruited psychiatrists, requested additional staffing through decision packages, and renegotiated state employment contracts to improve recruitment and retention. Roberts Decl. ¶ 5a-e.

Finally, the Department has spearheaded efforts to address systemic change with forensic mental health community partners, in addition to the internal steps already discussed. Roberts Decl. ¶ 6. To improve and relieve an incredibly stressed and complicated forensic mental health system, the Department has pursued community mitigation options, obtained additional funding for community crisis services, organized key stakeholders meetings in the counties, and analyzed options for conducting community or jail-based restoration. Roberts Decl. ¶ 6a-d.

II. ARGUMENT

As the Supreme Court has repeatedly cautioned, "a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek*, 520 U.S. at 972. The Plaintiffs' request for preliminary injunction and TRO does not fulfill any of the elements necessary to meet this heavy burden. The request for a declaratory relief is equally flawed. It seeks a permanent declaratory order, not temporary emergency relief. The relief requested would also require the court to override decisions regarding the best interests of existing patients and the public, and impose radical changes to the management of the state hospitals. The plaintiffs have not

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established that placing existing patients in danger will produce any reduction in the harm they are alleging.

A. The Injunctive Relief Requested Has Already Been Implemented, Cannot Be Implemented, Or Will Have Little Or No Effect On The Harms Alleged

First, Plaintiffs ask this Court to order that the Department contract with outside evaluators. This mandate cannot be accomplished because of a lack of qualified persons to contract with, and such an order to contract has so many implied duties as to make it unworkable. Roberts Decl. ¶ 8. Second, Plaintiffs ask this Court to order the department to staff and use all existing space within hardened secure areas. The hospital is already doing this, and has requested funds to expand the amount of hardened secure areas. Roberts Decl. ¶ 4, 9; Declaration of Brian Waiblinger (Waiblinger Decl.) ¶ 19, 24; Declaration of Dorothy Sawyer (Sawyer Decl.) ¶ 15, 18. Finally, the Plaintiffs ask this Court to order immediate transfer of certain kinds of patients from forensic to civil areas. The Department has already transferred patients in this manner, and a Court order directing further transfers interferes with the professional judgment of hospital staff, creates an unworkable burden on the hospitals through unnecessary court involvement, and negatively impacts other patients in the care of the state hospitals. Roberts Decl. ¶ 10; Waiblinger Decl. ¶ 25; Sawyer Decl. ¶ 19.

1. Contracting With Evaluators

Plaintiffs request for relief (2) is not appropriate for a temporary restraining order or preliminary injunction. Enjoining Defendants to "contract with private evaluators" requires complicated and affirmative acts by the Department and thus must be considered under the heightened standard for mandatory injunctions. The Department, as a state agency, is governed by Wash. Rev. Code § 41.06.142 when contracting for services "that have been customarily and historically provided by employees in the classified service." Wash. Rev. Code § 41.06.142(1); See Roberts Decl. ¶ 8a. This statutory scheme requires notice to the

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employees and a demand for collective bargaining, all within prescribed timelines. See Wash. Rev. Code § 41.06.142(4).

In addition, Plaintiffs incorrectly assume availability of private evaluators, properly trained in forensic services, to accomplish the requested relief. The pool of forensic evaluators in Washington is small and finite. Roberts Decl. ¶ 8b. The Department has already implemented aggressive strategies to recruit these professionals. Roberts Decl. ¶ 5a-e. To practice in the area of forensic evaluation requires special skills and training that few have. Roberts Decl. ¶ 8b. Foreshadowing the potential impossibility of this request for relief, the court can look to the minimal effectiveness of Wash. Rev. Code § 10.77.073, enacted in 2013. The Legislature provided an opportunity for counties to contract with private evaluators for competency evaluations, rather than utilize the Department's evaluators. Wash. Rev. Code § 10.77.073. To date, only two counties have utilized this option, in part because of the small pool of trained and willing evaluators. Roberts Decl. ¶ 8b.

Furthermore, Plaintiffs' request for relief may have unintended consequences and negative impacts on the putative class members. Plaintiffs suggest $1500 per case for these contracted services. This generous rate, competitive with evaluator salaries and almost double the $800 paid to Wash. Rev. Code 10.77.073 evaluators, will simply shift the finite number of evaluators from work already being done to a higher pay scale, merely maintaining, or even decreasing, the current staffing levels of evaluators. See Roberts Decl. ¶ 8c. It does not increase the available pool of evaluators, the resource truly needed to have legitimate positive impacts. This dearth of available evaluators, coupled with the nuanced requirements in Wash. Rev. Code § 41.06, makes an already complicated and overly broad request border on impossible. The possibility the requested relief could be implemented in an enforceable way or reduce the alleged harms is minimal to none.

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2. Staff And Use All Existing Space Within Hardened Secure Areas

Plaintiffs' request for relief (3) is not appropriate for a temporary restraining order or preliminary injunction because the Department is already performing these tasks. Both hospitals fully utilize all currently funded space within hardened security for forensic services. Roberts Decl. ¶ 9, Waiblinger Decl. ¶ 5, Sawyer Decl. ¶ 10. The hospitals are actively reviewing all options for expanding this space to include the physical changes that would be required to make the space habitable as well as ensure adequate security. Roberts Decl. ¶ 9. However, even if additional space can be developed, time would be needed to recruit and hire psychiatrists and other core staff i.e. RNs, psychiatric security attendants, etc. *Id*. No additional space exists that does not require additional retrofitting to make the units hardened and secure. Plaintiffs request for injunctive relief is unnecessary because full utilization of secure space is already being done.

3. Immediate Transfer of Civil Patients And NGRIs With Court Management

Plaintiffs' request for relief (4) is not appropriate for a temporary restraining order or preliminary injunction because the immediate transfer of patients based on broad categories, and absent individualized treatment determinations, puts staff and patients at risk. Roberts Decl. ¶ 10, Decl. Waiblinger ¶ 25, Sawyer Decl. ¶ 19. Further, the state hospitals already make individualized determinations for patients in regards to the appropriate placement within the hospital.

In reference to the transfer of civil patients, ESH does not house any civil patients on its forensic units and WSH has changed its practices to reduce the number of civil patients on the forensic wards to only those whose legal posture or psychiatric acuity warrant continued stays on the forensic units. Roberts Decl. ¶ 9, Waiblinger Decl. ¶ 25a, Sawyer Decl. ¶ 19a. NGRI patients require staffing with different levels of training and certification than patients on civil wards. Roberts Decl. ¶ 10, Waiblinger Decl. ¶ 25b, Sawyer Decl. ¶ 19b. Patients cannot be mixed in therapeutic milieus without the appropriate staff and treatment available.

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Staff cannot interchange between different clinical populations without the appropriate training and licensure. Roberts Decl. ¶ 10, Waiblinger Decl. ¶ 25b, Sawyer Decl. ¶ 19b.

In spite of some of these logistical difficulties, DSHS is already reviewing options to move NGRIs in the community program, medically fragile NGRIs, or high-level NGRIs to other parts of the hospitals. Waiblinger Decl. ¶ 25c. However, none of these movements can happen in bulk without consideration for individualized treatment needs of all patients, forensic and civil. Roberts Decl. ¶ 10, Waiblinger Decl. ¶ 25, Sawyer Decl. ¶ 19. Determining the individual treatment needs of the forensic patients alone, as plaintiffs request, ignores the individualized treatment needs of civil patients that may share space with these forensic transfers. Furthermore, transfer of NGRI patients to civil units has adverse impacts on the civil population of the hospitals. Waiblinger Decl. ¶ 25a. Civil patients, by their nature, move in and out the hospital at much faster rates than NGRIs, many of whom stay for years. Waiblinger Decl. ¶ 25d; Sawyer Decl. ¶ 19d. Placement of NGRI patients on the civil units decreases bed availability for an already taxed civil commitment system. Waiblinger Decl. ¶ 25e; Sawyer Decl. ¶ 19e.

In addition, transferring patients within the state hospitals is a dynamic, fast-moving, and complicated process, governed by nuanced decisions. Roberts Decl. ¶ 10, Waiblinger Decl. ¶ 25, Sawyer Decl. ¶ 19. Patients' needs, both forensic and civil, can change rapidly with the course of mental illness. As clinical health changes, so do the environmental and staffing needs of patients. Plaintiffs request this Court to intervene in two state psychiatric hospitals to review and approve individualized treatment decisions that happen on a weekly, if not daily, basis. Waiblinger Decl. ¶ 25d, Sawyer Decl. ¶ 19d. The Court should not entertain this request to impose relief that would normally be granted at the conclusion of a full trial on the merits. Nor should this Court invade the province of professional judgment reserved to the state agency in charge on mental health delivery. Plaintiffs' request to "immediately transfer" broad and generic groups of patients with no consideration for their individual rights and

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treatment needs, or the treatment rights and needs of civil patients, except through review by this Court, is not only irresponsible and short-sighted, but potentially detrimental and dangerous to any patients and staff in the path of this massive shuffle. Waiblinger Decl. ¶ 25c, Sawyer Decl. ¶ 19c. The Court should not grant this relief.

B. Plaintiffs Do Not Meet the Requirements for Injunctive Relief

A plaintiff seeking a preliminary injunction must establish " 'that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.' " *Alliance for the Wild Rockies v. Cottrell*, 632F.3d 1127, 1131 (9th Cir. 2011) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The party requesting injunctive relief bears the burden of making a showing as to all four prongs. *Cottrell*, 632 F.3d at 1135. A mandatory injunction altering the status quo by granting, before trial, the very relief sought in the action is appropriate only in extraordinary circumstances. *LGS Architects, Inc. V. Concordia Homes of Nevada*, 434 F.3d 1150, 1158 (9th Cir.2006) (*overruled on other grounds*); *see also Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994). Because plaintiffs cannot make a showing as to all four prongs, their motion should be denied.

1. Plaintiffs Have Not Established a Likelihood of Success on the Merits

The plaintiffs have failed to establish that the time that people are waiting for evaluation violates the constitution. Plaintiffs contend that this case is controlled by *Oregon Advocacy Center v. Mink*, 322 F.3d 1101 (2003). In *Mink*, the Ninth Circuit Court of Appeals held that Oregon's delays in accepting mentally incapacitated criminal defendants for evaluation and treatment at the state mental hospital violated state law; once a defendant has been certified as incompetent by a court, state law dictated that it is the duty of the state, not the counties, to provide treatment; and that when the state is statutorily required to provide

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care, a criminal defendants' substantive due process rights are violated when an unspecified amount of time has passed without transfer from jail to the state hospital.

Because *Mink* is factually distinguishable in several critical respects, it is not controlling. In sharp contrast to *Mink*, Washington law does not clearly establish a maximum number of days a defendant may be held prior to evaluation. As discussed more fully below, this question of state law should be settled by certifying the issue to the Washington Supreme Court. Any relief or declarations of law that set a timeline are arguably arbitrary, because substantive due process rights are determined through an individualized analysis: the nature of the charges must be carefully balanced against the specific harms suffered by the criminal defendant. *See Youngberg v. Romeo*, 457 U.S. 307, 321 (1982).

In addition to being based on a clear state law, *Mink* was not burdened by the standing problems presented by the Americans With Disabilities Act (ADA) claims in this case. Not all members of the putative class have been adjudicated to be incompetent, and some may not suffer from a mental disease or defect. Therefore, they cannot establish that the class has standing to bring a claim under the ADA. An ADA claim requires a disability or "being regarded as having such an impairment. . . ." 42 U.S.C. § 12102(1)(A) & (C). This requirement is not met if the impairment is "transitory and minor," with an actual or expected duration of six months or less. 42 U.S.C. § 12102 (3)(B). A transitory impairment is not a mental disease or defect. Without an evaluation, it is impossible to determine whether the class members have a mental impairment, or whether they have an impairment that is transitory, such as a temporary mental condition caused by taking an illegal substance.

Finally, the plaintiffs are unlikely to succeed on the merits because they have failed to join indispensable parties who have control over the care and treatment of mentally ill criminal defendants in jail. In contrast to the Oregon law at issue in *Mink*, Washington law clearly allows for a criminal defendant to spend some amount of time in jail awaiting placement. The counties are necessary parties because "the court cannot accord complete relief among existing

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parties" without jurisdiction over the counties operating the jails. Fed. R. Civ. P. 19(a)(1)(A). The relief those parties could provide is real and tangible. County jails have authority to involuntarily medicate criminal defendants to stabilize and improve their mental health, and may enforce a court order permitting involuntary administration of medication to criminal defendants. *See Washington v. Harper*, 494 U.S. 210 (1990); *see Sell v. U.S.*, 539 U.S. 166 (2003). The Court could prevent many of the harms described by plaintiffs by ordering the counties provide adequate care for persons while they are in jail awaiting transfer. As thoroughly suggested in plaintiffs' motion, jails do not employ these tools only because they have not devoted adequate resources to their mentally ill populations.

2. Denying the Injunction Will Not Cause Plaintiffs to Suffer Irreparable Harm

While this Circuit has recognized that an "alleged constitutional infringement will often alone constitute irreparable harm," *Associated Gen. Contractors of Cal., Inc. v. Coalition For Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991), the relief requested will do little or nothing to remedy the harms alleged. Preliminary injunctive relief must be tailored to remedy the specific harm alleged. *McCormack v. Hiedeman*, 694 F.3d 1004, 1019-20 (9th Cir. 2012). The purpose of a preliminary injunction is to preserve the status quo between the parties pending a resolution of a case on the merits. *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1094 (9th Cir. 2010). The presumed benefit claimed by plaintiff is wholly speculative in nature.

The Department does not operate, nor do they have any control over the care and stabilizing treatment provided to the mentally ill in jails. Although plaintiffs only briefly discuss the role of the criminal justice system, that system plays a vitally important role in how the criminal defendants are treated when competency issues are raised. Each putative class member has been charged with a crime. These criminal defendants are being held in jail pursuant to their active criminal charges, *not because they need competency services*. The Department regularly admits and treats criminal defendants who are on personal recognizance

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in the community and criminal courts could, and do, place defendants somewhere else besides jail while awaiting competency services from the Department. Waiblinger Decl. ¶ 20; Leaders Decl. ¶¶ 15, 17. Attorneys for the State have in fact encouraged criminal courts to do so. Leaders Decl. ¶¶ 15, 17. Confinement of defendants resulting from the active criminal charges is wholly outside of the Department's control.

Plaintiffs make general factual statements about portions of the putative class, but do not share important details that must factor into this Court's decision. For example, plaintiffs repeatedly assert that many class members may spend more time in jail than they would if convicted. Dkt. #41 at 15: 11-22. However, many of the criminal defendants are charged with serious and violent crimes, which if convicted carry sentences far in excess of the time spent awaiting evaluation or restoration. Further, plaintiffs assert that criminal defendants languish in jail for long periods of time, but only smaller portions of that total time can be attributed to a wait for competency services. For example, plaintiffs assert that Q.M "has languished for five months" but his order for restoration treatment was only entered on August 13, 2014. As of this filing Q.M. will have waited 54 days for admission to the hospital, the remainder of his time in jail can only be attributed to his criminal proceedings.

The relief requested is not tailored to the harms alleged because even if it could be implemented, it would have no meaningful impact on the specific harms described by plaintiffs. As described above, the relief that will have some impact is already underway, and the remainder of the relief has no grounding in reality.

3. The Balance of Equities Tips Against Permitting the Plaintiffs To Override the Medical Decisions Made For Individual Hospital Patients

Plaintiffs contend that for the Department, the equities are purely financial in nature. This is incorrect. The Department has demonstrated that it is committed to providing timely evaluation and treatment, and is currently seeking significant new funds in order to meet this goal. Roberts Decl. ¶¶ 4-6. The balance of equities goes beyond the financial impact of the

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proposed relief. The Department is deeply concerned that the requested relief will impact the safety and security of patients, the safety of the hospital staff, and the ability of the patients' psychiatrists to render individualized treatment decisions. Roberts Decl. ¶ 10, Waiblinger Decl. ¶ 25, Sawyer Decl. ¶ 19. An order dictating that patients be transferred into non-secure civil areas of the hospital also negatively impacts those patients already receiving treatment on civil wards and those awaiting placement to civil mental health beds, many of whom are in community hospitals not fully equipped to handle these patients. Waiblinger Decl. ¶ 10. Further, because plaintiffs propose Court oversight of certain internal transfer decisions, the Court must consider the impact of exercising that oversight on internal hospital functions. The Supreme Court recognizes that such decisions are best left to those with the requisite knowledge and experience, concluding that "decisions made by the appropriate professional are entitled to a presumption of correctness." *Youngberg v. Romeo*, 457 U.S. 307, 324, (1982).

The injunctive relief requested offers no guarantees of relieving the waitlist for individuals facing pending criminal charges who require competency restoration; and plaintiffs offer no facts to support the allegation that the requested relief will serve its intended purpose. The balance of equities tips in favor of allowing the Department to continue to make the decisions which provide the best possible care to all patients, as determined by the psychiatrists and psychologists who are in the best position to make that medical decision.

4. Preliminary Injunction Is Contrary to the Public Interest

"[When] an injunction is asked which will adversely affect a public interest ... the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312–13 (1982). In fact, "courts . . . should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* at 312. As discussed above, the proposed relief will have consequences for other patients at the state hospitals, staff at those hospitals, and importantly, the criminal defendant putative class

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members. The minimal benefit that may be conferred by the relief is outweighed by these wide-ranging negative consequences, particularly when balanced against the speculative outcomes Plaintiffs associate with their proposed temporary orders.

The plaintiffs have entirely ignored the impact the requested relief will have on the health and safety of mentally ill patients housed in the civil ward of the State hospitals, the safety of the staff of the State hospitals, and the public at large. When the impact of an injunction has a potential for public consequences, the public interest must be considered. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009). The Supreme Court has cautioned that " 'courts . . . should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.' " *Id.* (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). When the public is impacted, it is appropriate to withhold relief, even if postponement is burdensome to the plaintiff. *Romero-Barcelo*, 456 U.S. at 312-13.

The Plaintiffs' race for relief asks this court to completely overlook the impact the requested relief will have on the public. The request for movement of patients between the forensic and civil wards of the State hospitals before such transfers are determined to be medically appropriate, places patients and staff at grave, physical risk. Roberts Decl. ¶ 10, Waiblinger Decl. ¶ 25, Sawyer Decl. ¶ 19. Patients in these different units may have different levels of acuity and can pose varying levels of risk for physical and sexual aggression. Waiblinger Decl. ¶ 25. These risk behaviors are, of course, not isolated to forensic patients, but occur in higher proportions for the population. Waiblinger Decl. ¶ 25a, b. Moving patients out of the forensic ward also places the general public at risk. The forensic wards provide tight layers of security against escape by making the units "hardened secure" space. Waiblinger Decl. ¶ 24, Sawyer Decl. ¶ 19b. Hardened security space means it has specialized ingress and egress with secure escape-proof fencing (rather than the traditional fire doors), secure sally-ports, escape-proof windows, modified ceilings that removes access panels, and

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additional cameras. Waiblinger Decl. ¶ 24, Sawyer Decl. ¶ 19b (noting slight differences between the two hospitals). In contrast, the civil wards are not secured in the same manner because they house populations that don't typically require the same level of security. Waiblinger Decl. ¶ 24, Sawyer Decl. ¶ 19b. The court should fully consider the serious consideration public officials and medical personnel have undertaken in determining how best to house and care for a disparate spectrum of mentally ill persons in the State's care, how to protect staff and the public from the risk of harm. *See Stormans*, 586 F.3d at 1140; *see also Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943) ("[I]t is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.") (internal quotation marks omitted).

The public will also be significantly impacted if the court orders that the State contract with all available private evaluators to conduct competency evaluations. Private evaluators are currently used primarily in two counties, Pierce and Spokane. These counties have taken advantage of Wash. Rev. Code § 10.77.073, enacted in 2013. If the State and these third parties could be ordered to enter such contracts, the result would be a reduction in outpatient evaluations. Plaintiffs are not expanding the pool of evaluators, rather attempting to pull evaluators from an already small and finite pool and simply pay them a higher rate. Roberts Decl. ¶ 8b, c. Because the public interest is involved, the district court must examine whether the public interest favors the Plaintiffs. *Stormins*, 586 F.3d at 1139 (quoting *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 965 (9th Cir. 2002).

C. The Requested Declaratory Relief Will Inappropriately Force a Final Judgment Based On A Deficient Record

Embedded within Plaintiffs' request for a TRO and preliminary injunction is a request for a declaratory judgment. It is not clear that such relief is ever available at this stage of the case. *See Original Great Am. Choc. Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d

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273, 276 (7th Cir.1992) (noting conflicting lower court authority as to whether "there is such a creature" as a "preliminary declaratory judgment," *Murray v. New York*, 604 F. Supp. 2d 581, 587 (W.D.N.Y. 2009). A declaration of rights is a final judgment on the merits and thus must await disposition on the merits. *See Cuviello v. City of Stockton*, CIVS07-1625 LKK/KJM, 2008 WL 4283260 (E.D. Cal. Sept. 16, 2008); *see also Breedlove v. Am.'s Serv. Co.*, CV09-8135-PCT-JAT, 2010 WL 1338089 (D. Ariz. Mar. 31, 2010) ("Plaintiffs claim to seek declaratory relief in addition to injunctive relief. Declaratory relief and preliminary injunctions are governed by different standards and are considered at different stages of litigation. As such, the Court considers plaintiffs' motion as a motion for preliminary injunction only."); *but see In re MCorp*, 101 B.R. 483, 485 (S.D. Tex.1989). The Declaratory Judgments Act itself agrees, stating that "[a]ny such declaration shall have the force and effect of a final judgment or decree . . ." 28 U.S.C § 2201.

A declaration is a permanent order that is distinguishable from both a TRO and preliminary injunction. If issued here, this permanent order would have the force and effect of a final judgment. That ruling will bind the parties going forward, and purport to answer the central legal question at issue in this case. Temporary relief contemplated in a temporary restraining order is meant to preserve the status quo or prevent an immediate harm pending a sufficient exploration of the facts in the case, not resolve significant legal questions that will dictate the ultimate resolution of the litigation.

1. Important Questions of State Law Suggest that Certification of Questions, Or Even Abstention, May Be Appropriate

In addition to being premature at this time, any constitutional declaration by this court will not have considered appropriate analyses of state law, as was done in *Mink*. Federal courts "should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them.' " *Brown v. Vail*, 623 F.Supp.2d 1241, 1244 (2009) (citing *Harrison v. NAACP*, 360 U.S. 167, 176

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(1959)). In denying the Plaintiff's first request for a TRO, Dkt. #15, this Court has already once ruled that the abstention doctrine enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), directed that judicial restraint was appropriate. This issue, and the meaning of the state statutes that govern competency services, continue to be actively litigated in the state courts.

Unlike the deadline contained in Oregon law, Washington law provides "performance targets" for admission to state hospitals in criminal cases. These performance targets explicitly state that "seven days or less" is the "performance target" for "a state hospital to extend an offer of admission to a defendant in pretrial custody for legally authorized treatment or evaluation services related to competency . . . ." Wash. Rev. Code § 10.77.068(1)(a)(i). In setting performance targets, the Legislature also explicitly found that there exists a "nonexclusive list of circumstances that may place achievement of targets for completion of competency services . . . out of the department's reach." Wash. Rev. Code § 10.77.068(c). Some of the specified reasons for inability to comply include things such as "an unusual spike in the receipt of evaluation referrals or in the number of defendants requiring restoration services has occurred . . . ." Wash. Rev. Code § 10.77.068(1)(c)(iv). With respect to the amount of time which may pass before an individual is admitted for evaluation or treatment, Washington law provides a performance target, rather than a deadline. Wash. Rev. Code § 10.77.068. State law recognizes that a number of factors may impede the ability to meet the target, and provides that the target "does not create any new entitlement or cause of action related to the timeliness of competency evaluations or admission for inpatient services related to competency to proceed or stand trial . . . ." *Id.*

The Washington statute also contemplates alternative placements, such as "an appropriate facility" or "an agency designated by the department." Wash Rev. Code § 10.77.086(1)(a)(i); Wash. Rev. Code § 10.77.088(1)(a)(i). If the *Mink* decision was predicated on the Oregon statute and the "the correlative duty to accept custody" that Oregon statute created on the state hospital, how can this Court render effective relief without proper

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interpretation of the Washington statute? These questions illustrate the legal complexity of the issue before this Court, and highlight the need for certainty concerning Washington State law before this Court attempts to adjudicate this case and fashion appropriate relief.

The plaintiffs mistakenly rely on Wash. Rev. Code § 10.77.220 as the source of a firm, seven-day deadline. However, the Washington State Supreme Court has held that Wash. Rev. Code § 10.77.220 applies to persons committed to the care of the State after a verdict of acquittal by reason of insanity and an order of commitment are entered. *State v. Sommerville*, 111 Wash. 2d 524, 535, 760 P.2d 932, 938 (1988). Despite this authority, some trial courts have incorrectly ruled that Wash. Rev. Code § 10.77.220 applies regardless of whether a verdict of acquittal by reason of insanity has been entered. Leaders Decl. Attach. B (this trial court order is currently on appeal to the Washington State Court of Appeals).

Further, the duty of who should provide treatment to incapacitated defendants pending placement, and where that placement can occur, is also governed by state statute. Plaintiffs argue "Akin to the circumstances in Mink, Washington state law places responsibility for ensuring constitutional compliance and timely treatment of pre-trial detainees in need of competency evaluation or restoration services solely with Defendants WSH and ESH operated by Defendant DSHS" Dkt. #41 at 12:7-10. But the *Mink* court only arrived at such a conclusion after determining that "the Oregon legislature's intent is clear from the text of the statute." *Mink*, 322 F.3d at 1115. While plaintiffs cite generally to Wash Rev. Code 10.77 for this proposition, Dkt. #41 at 12:10, the text of 10.77 actually differs in several important respects. Wash. Rev. Code § 10.77.088, which governs restoration of misdemeanants, contemplates that criminal defendants will indeed spend time somewhere else than the state hospital: "The fourteen-day period . . . shall be considered to include only the time the defendant is actually at the facility and shall be in addition to reasonable time for transport to or from the facility[.]" The Washington State Supreme Court has interpreted this statute to

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mean that "the individual may be forced to spend time in jail awaiting space at the appropriate institution." *Born v. Thompson*, 154Wash. 2d749, 755, 117P.3d 1098, 1101 (2005).

To the extent that there is uncertainty regarding state law, principles of federalism and comity require that he Washington State Supreme Court be permitted to interpret the applicable state law.

2. The Requested Relief That Is Not Already Being Provided Would Be Nearly Impossible To Implement

In Requests 2 – 4 of their TRO, the Plaintiffs seek orders requiring Defendants to engage in specific action, as opposed to refraining from an action. These requests usurp the administrative role of the State, and control managerial and medical decisions regarding the placement of patients and contracting for services. Furthermore, the more complicated the order is, the more it invites unanticipated second and third order consequences. For instance, asking the court to transfer patients out of secured forensic units, move certain categories of patients into blocks of some kind, and conditionally release other patients, would require the hospital psychiatrists to ignore the patients' individual needs, contrary to *Youngberg*.

The more complexity plaintiffs request in their motion, the more detailed and complicated the order must be when complying with Fed. R. Civ. P. 65(d), and in particular Fed. R. Civ. P. 65(d)(1)(B and C). Under Fed. R. Civ. P. 65(d)(1)(B), the Court must draft specific terms so as not to create a vague or general restraining order that cannot be easily obeyed or effectively enforced. Restraining orders that require the implementation of complex administrative procedures and rely on state doctors to exercise professional judgment in a specific manner invite contempt motions based on subjective views of when a process is "not good enough" or "not fast enough". *See* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure, Civil § 2955, p. 351 (3d ed. 2013). Crafting the kinds of orders sought by plaintiffs can lead to ambiguities and provide a fertile bed for secondary litigation and leverage by one party over another.

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Also, Plaintiffs preference for complex injunctive relief will lead to confusion about what is included or not included in the order. "Rule 65(d) strongly suggests that only those acts specified by the order will be treated as within its scope and that no conduct or action will be prohibited by implication, all omissions or ambiguities in the order will be resolved in favor of any person charged with contempt." *Id.* at § 2955, p. 350 (citing *New York Tel. Co. v. Commc'ns Workers of Am., AFL-CIO*, 445 F.2d 39, 48 (2d Cir. 1971)).

D. The *Younger* Abstention Doctrines Preclude This Court From Granting Injunctive Or Declaratory Relief

The *Younger* abstention doctrine generally directs federal courts to abstain from granting injunctive or declaratory relief that would interfere with pending state judicial proceedings. *Younger v. Harris*, 401 U.S. 37, 40-41, 91 S. Ct. 746, 748–49, 27 L. Ed. 2d 669 (1971). Absent extraordinary circumstances involving "great and immediate" irreparable loss, *id*. at 45, *Younger* abstention is proper where: (1) there are ongoing state judicial proceedings; (2) that implicate important state interests; and (3) there is an adequate opportunity in the state proceedings to raise federal questions. *Confederated Salish v. Simonich*, 29 F.3d 1398, 1405 (9th Cir.1994); *Wiener v. County of San Diego*, 23 F.3d 263, 266 (9th Cir.1994). In addressing *Younger* abstention issues, "district courts must exercise jurisdiction except when specific legal standards are met, and may not exercise jurisdiction when those standards are met; there is no discretion vested in the district courts to do otherwise." *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087, 1092 (9th Cir. 2008).

Throughout Washington, criminal courts continue to individually hear motions asking for findings that the Department has violated the due process rights of criminal defendants awaiting transport to state hospitals for competency restoration. *See* Leaders Decl. ¶¶ 3, 13, 15, 16. All of these hearings involve putative class members. The state courts are not making consistent findings on the statutory timelines, the existence or not of due process violations, or the appropriate remedies if violations or contempt is found. Leaders Decl. ¶ 17. These

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questions are beginning to percolate into the state appellate courts. At the conclusion of one of these trial court cases, defense counsel, Cassie Trueblood (next friend of A.B. in the instant case), requested the court to certify the issue as a controlling issue of law that warrants immediate review at the appellate level pursuant to Washington Rules of Appellate Procedure 2.3(b)(4). Leaders Decl. ¶ 11. Other trial courts have stated on the record that certification of this question as a controlling issue of law that warrants immediate review at the appellate level may be appropriate. Leaders Decl. ¶ 14. Another trial court order currently on appeal holds that Wash. Rev. Code § 10.77.220 controls for criminal defendants such as those in the putative class. Leaders Decl. ¶ 16. State trial courts are also employing judicial remedies like temporary release to provide relief to criminal defendants. Leaders Decl. ¶¶ 14, 15, 17.

The elements of *Younger* continue to be met in this case. There can be no dispute that there is already a state criminal proceeding currently ongoing for each putative class member. The criminal defendants' federal due process claims continue to be raised in state court proceedings, and nothing bars these defendants from continuing to do so. As discussed above, these proceedings also continue to implicate important state interests of law enforcement and public safety. As these issues work their way into the appellate review, state courts would greatly benefit from clarification of the conflicted state law questions.

Plaintiffs argue that extreme circumstances militate against abstention. But as demonstrated above, the Department is already taking concrete action to address delays. The Department's inability to comply with state court orders is not an obstinate refusal by the Department to address this problem, as Plaintiff suggests. Many state trial courts have repeatedly recognized this by refusing to find the Department in contempt, Leaders Decl. ¶ 17, and finding that the Department has not acted in bad faith. Further, because trial courts are demonstrating their ability to fashion appropriate and effective relief, like temporary release, extraordinary circumstances do not compel this Court to set aside the abstention doctrine. The burden rests on Plaintiffs to show that putative class members were "barred from raising [their]

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federal claims in the [state court] action[,]" *Lebbos v. Judges of Superior Ct.*, 883 F.2d 810, 815 (9th Cir.1989), not that putative class members did not achieve the desired result when the claims were raised in this state proceedings.

The Ninth Circuit has stated that if all the necessary factors for *Younger* abstention are present, "the district court has no discretion; it must dismiss." *Delta Dental Plan of California, Inc. v. Mendoza*, 139 F.3d 1289, 1294 (9th Cir.1998), *disapproved on other grounds*, *Green v. City of Tuscon*, 255 F.3d 1086, 1104 n. 18. The Ninth Circuit has held that "while there are only three 'threshold elements' to application of *Younger*, there is a vital and indispensable fourth element: the policies behind the *Younger* doctrine must be implicated by the actions requested by the federal court." *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1149 (9th Cir.2007) (citing *Gilbertson v. Albright*, 381 F.3d 965, 978 (9th Cir.2004)). Therefore, "the court does not automatically abstain, but abstains only if there is a *Younger-based reason* to abstain—i.e., if the court's action would enjoin or have the practical effect of enjoining, ongoing state court proceedings." *Id.* An alternative to *Younger* abstention presents itself through application of the alternative *Pullman* abstention doctrine. *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501, 61 S. Ct. 643, 645, 85 L. Ed. 971 (1941). This doctrine, which "remitted parties to the state courts for adjudication of the unsettled state-law issues" has largely been replaced by the practice of certification of a question to the state court. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76, (1997). This Court has already ruled once that abstention is appropriate in this case. Dkt. #15. The Court should again make this finding to deny the relief requested by Plaintiffs. However, should the Court choose to move forward with adjudicating this case, the Court should certify questions to the state court in harmony with the *Pullman* abstention doctrine.

III. CONCLUSION

This Court should deny all of the relief requested. The Plaintiffs are not entitled to a TRO or preliminary injunction because they have not made a clear showing as to all of the

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required factors. Further, the Plaintiffs propose relief that the Department has already implemented or cannot implement. The request for declaratory judgment embedded within the motion should also be denied.

RESPECTFULLY SUBMITTED this 6th day of October, 2014.

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CERTIFICATE OF SERVICE

Beverly Cox, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. I hereby certify that on this 6 day of October 2014, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 6 day of October 2014, at Olympia, Washington.

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