No. 20-35540

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OREGON ADVOCACY CENTER; METROPOLITAN PUBLIC DEFENDER SERVICES, INC.,

Plaintiffs - Appellants,

and

A. J. MADISON,

Plaintiff,

v.

PATRICK ALLEN, et al,

Defendants - Appellees.

APPELLEES' BRIEF

Appeal from the United States District Court
for the District of Oregon

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APPELLEES' BRIEF

INTRODUCTION

The district court acted well within its discretion in temporarily modifying the injunction in light of the ongoing pandemic. Since 2002, the Oregon State Hospital (OSH) and the Oregon Health Authority (OHA) have been subject to a permanent injunction that requires the state hospital to admit criminal defendants who are unable to aid and assist in their own defense in a timely manner and within seven days of a trial court order under Or. Rev. Stat. § 161.370. In March, OSH[1] temporarily suspended the admission of most patients to the state hospital to prevent the spread of COVID-19 and to have time to establish protocols and prepare the necessary infrastructure to safely admit new patients. OSH informed the district court of its actions, explained that it would likely fall out of compliance with the seven-day deadline, and gave the court and plaintiffs notice that it would seek modifications to the injunction because the pandemic was a significant change in the factual circumstances.

OSH presented evidence to the district court explaining the changes to its admissions process and its operations that were necessary to prevent the

[1] Unless context requires otherwise, this brief uses "OSH" to refer to both the Oregon Health Authority and the Oregon State Hospital.

transmission of COVID-19 and to contain an outbreak, should one occur. OSH also presented evidence to explain why taking those steps resulted in delayed admissions for aid-and-assist patients and how OSH was working to reduce the backlog. The district court granted the motion to modify and approved OSH's process for admitting patients to specialized units where they could be tested and quarantined before transfer to the general population. The district court reiterated the original injunction's requirement to admit aid-and-assist patients within seven days and ordered OSH to inform the court when it regained compliance.

The district court correctly modified the injunction. The injunction retains the core features of the original: OSH must admit its aid-and-assist patients as soon as practicable and in a timely manner. The modifications recognize that the extraordinary circumstances of the COVID-19 pandemic justify a temporary reprieve from the seven-day deadline, which is not a requirement of due process. This court should affirm.

STATEMENT OF JURISDICTION

OSH accepts plaintiffs' statement of jurisdiction.

STATEMENT OF ISSUES

Did the district court abuse its discretion by temporarily lifting the injunction's seven-day deadline in light of the COVID-19 pandemic?

PERTINENT AUTHORITIES

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rule of Civil Procedure 60(b)(5) provides:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> * * *
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable[.]

STATEMENT OF THE CASE

A. The *Mink* injunction requires OSH to admit aid-and-assist patients within seven days of a court order.

In 2002, District Judge Owen Panner issued a permanent injunction requiring OSH "to ensure that persons who are declared unable to proceed to trial pursuant to [Or. Rev. Stat.] § 161.370(2) be committed to the custody of the superintendent of a state hospital * * * as soon as practicable." The court

ordered that "admissions must be done in a reasonably timely manner, and completed not later than seven days after the issuance of an order determining a criminal defendant to be unfit to proceed to trial because of mental incapacities under [Or. Rev. Stat.] § 161.370(2)." (E.R. 3-4).

This court affirmed. *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101 (9th Cir. 2003), concluding that OSH violates "the substantive due process rights of incapacitated criminal defendants when it refuses to admit them in a timely manner." *Id*. at 1121–22. Under that standard, the court further concluded that the district court acted within its discretion in imposing the seven-day admission requirement:

> The record in this case regarding the purpose and mandate of the statute, as well as the harms caused by OSH's delays, supports imposition of a reasonably short time limit. The district court set the time limit at seven days based in part on the Oregon legislature's choice of that time limit in the now-superseded version of the relevant state statute. *See* [Or. Rev. Stat.] § 161.370(3) (1999).

Id. 1122 n 13.

B. Or. Rev. Stat. § 161.370 requires admission to OSH for patients who cannot be treated in the community.

In 2019, the Legislative Assembly made extensive revisions to Or. Rev. Stat. § 161.370 to narrow the criteria for ordering a criminal defendant to the state hospital and to authorize a broader range of options for the trial court to

consider in addressing a defendant who is unable to aid and assist. The statute provides:

> The court and the parties shall at the hearing determine an appropriate action in the case, and the court shall enter an order necessary to implement the action. In determining the appropriate action, the court shall consider the primary and secondary release criteria as defined in Or. Rev. Stat. 135.230, the least restrictive option appropriate for the defendant, the needs of the defendant and the interests of justice. Actions may include but are not limited to:
>
> > (A) Commitment for the defendant to gain or regain fitness to proceed under subsection (3) or (5) of this section;
> >
> > (B) Community restoration as recommended by the community mental health program director or designee;
> >
> > (C) Release on supervision;
> >
> > (D) Commencement of a civil commitment proceeding under Or. Rev. Stat. 426.070 to 426.170, 426.701 or 427.235 to 427.290;
> >
> > (E) Commencement of protective proceedings under Or. Rev. Stat. chapter 125; or
> >
> > (F) Dismissal of the charges pursuant to Or. Rev. Stat. 135.755.

Or. Rev. Stat. § 161.370(2)(c).

The key considerations for whether a criminal defendant can be committed to the state hospital for aid-and-assist treatment are the acuity of the symptoms, the defendant's dangerousness, and the seriousness of the charges. Or. Rev. Stat. § 161.370(3)(a), (5). In order to commit a defendant to the state

hospital, the trial court must find "that the defendant is dangerous to self or others as a result of a qualifying mental disorder, that a hospital level of care is necessary due to the defendant's dangerousness and the acuity of symptoms of the defendant's qualifying mental disorder, and that * * * the services and supervision necessary to allow the defendant to gain or regain fitness to proceed are not available in the community." Or. Rev. Stat. § 161.370(3)(a). The court cannot order the commitment of a defendant if the most serious offense is a violation; if the most serious offense is misdemeanor, the court can only commit the defendant upon the recommendation of a certified evaluator that the defendant requires a hospital level of care. Or. Rev. Stat. § 161.370(5)(a)-(b). If the court does not make the findings required by subsection (3)(a), if commitment is prohibited by subsection (5), or if the court determines that care other than commitment would better serve the defendant and the community, the court "shall release the defendant on supervision for as long as the unfitness endures." Or. Rev. Stat. § 161.370(4)(a).

When a criminal defendant is committed to the state hospital, that person receives treatment until he or she regains the capacity to stand trial. Or. Rev. Stat. § 161.370(9)(a). A criminal defendant committed to the hospital may be discharged for treatment in a community setting if certain conditions are met, including authorization by the trial court. Or. Rev. Stat. § 161.370(9)(b). If the

hospital determines that an aid-and-assist patient is no longer dangerous to self or others, that a hospital level of care is not necessary, or that the services to treat the patient are available in the community, the hospital notifies the trial court. Or. Rev. Stat. § 161.370(9)(b)(A). The trial court then orders an evaluation by the appropriate community mental health program and sets a hearing to determine whether community treatment is warranted. Or. Rev. Stat. § 161.370(9)(b)(B)-(C). Ultimately, the decision to discharge a patient for community treatment is made by the trial court, not OSH. Or. Rev. Stat. § 161.370(9)(b)(C).

C. OSH serves aid-and-assist patients and other individuals who require hospital level of care under state law.

OSH is part of OHA and provides psychiatric treatment for adults throughout the state who need hospital level of care. (S.E.R. 24). Hospital level of care includes the following: 24-hour care; on-site nursing, psychiatric and other credentialed professional staff; treatment planning; pharmacy, laboratory, food and nutritional services; and vocational and educational services. (S.E.R. 24). Services provided by OSH include psychiatric evaluation, diagnosis, and treatment, as well as community outreach and peer support. (S.E.R. 24).

OSH serves three populations: (1) civilly committed patients, who have been found by the court to be an imminent danger to themselves or others, or

who are unable to provide for their own basic health and safety needs due to their mental illness; (2) those found guilty except for insanity (GEI) in a criminal case; and (3) aid-and-assist patients, who have been arrested but are not able to participate in their defense because of a mental illness. (S.E.R. 25–26).

OSH has two campuses, one in Salem, Oregon, and one in Junction City, Oregon. (S.E.R. 24). OSH serves more than 1,565 people per year and employs more than 2,000 staff. The campuses are composed of units containing various numbers of beds. Units are licensed as either secure residential treatment facility or hospital-level-of-care. Within the hospital-level-of-care designation, units are designed to provide either progressive care, intensive care, or high-acuity psychiatric care. (S.E.R. 24).

D. In response to the pandemic, OSH paused admission of most aid-and-assist patients to prevent the spread of COVID-19 and asked the district court to modify the injunction.

On March 16, 2020, OSH informed the district court via letter that it had implemented a new policy to limit admissions to the hospital in light of the pandemic to GEI revocations and aid-and-assist patients who met the criteria for expedited admissions based on the acuity of their symptoms and risk of harm. (S.E.R. 4). OSH also informed the court that it was likely that the hospital temporarily would fall out of compliance with the *Mink* injunction's

seven-day deadline because of its efforts to prevent the spread of COVID-19. OSH explained that it intended to file a motion to modify the injunction under Federal Rule of Civil Procedure 60(b)(5). (S.E.R. 4–5).

OSH conferred with plaintiffs on proposed modifications, and the district court held a status conference on April 9, where the court requested that OSH file a motion to modify. (E.R. 132). OSH filed its motion and supporting materials on April 17. (C.R. 151). On May 6, the court held a hearing on OSH's motion, and concluded and requested supplemental briefing. (E.R. 91). OSH's evidence in support of the modifications is summarized below.

As COVID-19 took hold in the Pacific Northwest, OSH took steps to protect its patients from an outbreak. (S.E.R. 25, 30-38 (detailing efforts to plan for and mitigate the impacts of COVID-19). OSH identified 251 hospital patients at risk of serious illness if infected with COVID-19. Of those patients, another 71 were especially high risk. (S.E.R. 25).

OHA Director Patrick Allen signed an order to restrict OSH admissions effective March 16. (S.E.R. 25). The order restricted new admissions to patients entering under GEI revocations and aid-and-assist patients who met the previously established criteria for expedited admissions. (S.E.R. 39-42). OSH also suspended all non-essential in-person visitation for its patients and began medically screening all OSH employees entering both campuses. (S.E.R. 26).

During the week of March 15, OSH restructured its units to allow for isolation of potentially infected patients and protection of high-risk patients. (S.E.R. 26). OSH designated three units as protective units for patients who would be at high risk if they were infected with COVID-19. (S.E.R. 26). OSH also designated one unit at the Salem campus and one at the Junction City campus for patients under investigation (PUI) for COVID-19 and positive COVID-19 cases. (S.E.R. 26). OSH also modified the HVAC system for those units to protect patients within the units and the rest of the hospital. (S.E.R. 26). Creation of the new high-risk protective units and the COVID-19 PUI isolation units required moving the patients previously in those units to other units within the hospital. (S.E.R. 26).

OSH trained its staff on the use of personal protective equipment, and provided additional training for treating patients during the pandemic. (S.E.R. 27). OSH adjusted its treatment programs to limit patients' exposure to individuals from other units and limited areas where patients and staff could congregate. (S.E.R. 27)

OSH began admitting aid-and-assist patients on April 13, in the order in which the court orders were signed. (S.E.R. 27). To mitigate the risk of introducing COVID-19 to the state hospital and to come back into compliance with the seven-day requirement, OSH created three new admissions monitoring

units. OSH admits small groups of patients onto one of the monitoring units over a four-day period. (S.E.R. 75). Once admitted to a monitoring unit, patients receive medical screening and COVID testing, followed by a quarantine of seven to eleven days, and then additional screening before transitioning to the appropriate unit within the hospital. (S.E.R. 75). Each unit is then cleaned over a two-day period. Under that process, each admissions monitoring unit is able to accept new aid-and-assist patients every fourteen days. (S.E.R. 75).

In the event that a patient is admitted with symptoms resembling COVID-19, OSH admits them directly to the PUI isolation unit. (S.E.R. 28). If a patient begins exhibiting symptoms while on one of the admissions monitoring units, the hospital transfers that patient to the PUI isolation unit, and then carefully monitors all the other patients in that unit for signs of illness. (S.E.R. 28).

Because of OSH's temporary limits on admissions due to the pandemic, there were 49 persons under .370 orders who could not be admitted to OSH within seven days of the order by mid-April, when OSH filed its motion to modify the injunction. (*See* S.E.R. 49). By the modification hearing on May 12, there were 33 persons who had been waiting more than seven days for admission. (*See* S.E.R. 78).

OSH anticipated that it would be able to admit new patients within seven days by the end of June. (S.E.R. 76). OSH explained that its ability to do so would depend on the number of new patients added to the admission list during that time, as well as the number of new GEI revocations; the number of patients who can be returned to county jails at the completion of their restoration to competency; and the steps needed to monitor new admissions if it appears that COVID may have taken hold in any new group of admitted patients. (S.E.R. 76–77).

OSH also set out the steps it had taken to maximize its capacity to treat patients who require hospital level of care. OSH explained that it continually evaluates patients for community restoration under Or. Rev. Stat. § 161.370(9)(b), and works with community mental health providers to locate potential placements for those patients. (S.E.R. 29). Between March 16 and the modification hearing on May 12, OSH was able to discharge nine patients to community restoration under the (9)(b) process and was working with community providers and the courts to discharge another fifteen patients for community treatment. (S.E.R. 74). OSH further explained that it had taken steps to maximize space for new patients within the hospital by shifting its population within its established units, including moving GEI patients from hospital-level-of-care units to secured residential treatment when appropriate.

(S.E.R. 73). OSH was unable to identify other actions that would permit it to return to compliance with the seven-day deadline more quickly. (S.E.R. 74).

E. The district court found that modification was necessary in light of the pandemic.

At the hearing on May 6, the district court explained that the motion to modify presented competing concerns: the need to provide timely treatment to those patients who need a hospital level of care and the need to prevent the spread of COVID-19 at the hospital. In that explanation, the court rejected plaintiffs' argument that OSH had simply closed its doors to new patients:

> So there are important competing principles here, the most important of which is this undergirding constitutional provision that people deemed, for example, not to be competent are entitled to get out of a jail facility and into—typically hospital, but at least some form of treatment within the requirements of due process. Here with Judge Panner's order, that's in seven days. And that's a vitally important principle that needs to be honored.
>
> There is, in this current crisis, a very important competing concern. It's a concern held by people for whom we are attempting to restore competency or otherwise treat who are in the State Hospital already and everyone else throughout the chain not to be subjected to COVID-19 in such a way that puts them at risk of their lives. And so that has to be taken very seriously into account and represents, on the facts of this case, truly a crisis and not merely an opportunity to get out from under an onerous order. I think it inaccurate to say that what the State has done here is close its doors to such patients in response to this crisis. Instead, it has slowed entry to allow quarantine, which is a widely accepted response in many settings, including across the Bureau of Prisons, for example, the Federal Bureau of Prisons to this crisis, and recognized widely as an important and effective tool to reduce the risk to people at the incoming facility. So I reject the idea that what

> has happened here is Oregon State Hospital has simply closed its doors.

(E.R. 89–90).

The court also accepted OSH's position that it could not simply transfer patients to community settings.

> I accept as generally true for folks who need a hospital level of care that simply sending them from the jail to a community placement is an inadequate answer, and it's not only inadequate in terms of the level of care they need, but creates an additional transport with additional attendant risks, potentially fatal risks to everyone involved by their movement.

(E.R. 90–91).

At the hearing on May 12, after considering the supplemental information from OSH, the court granted the motion to modify the injunction. The district court found that OSH had presented facts to show a change in circumstances and that modification was necessary in light of the pandemic:

> It is, of course, a troubling and concerning issue about a very vulnerable population in a difficult time, and while I don't want to minimize in any way the seriousness of the arguments made by plaintiffs here, I believe the recent efforts of defendants to meet the challenges of this pandemic in a way that does all that they can safely do within the opinions of their medical advisors and the limitations of what we know about how to handle this terrible disease, for the safety of all involved, including the people who are being admitted, has been remarkable, and I'm impressed with what's been done.
>
> So I don't want to quibble at the borders or the edges of what's been submitted, which has been the subject of serious discussions with medical experts who opine that, for example,

> some quarantining is necessary even with testing. I accept that as accurate.
>
> So I am granting the motion to modify. I will—I agree that what's been submitted is inadequate, so I will draft an order modifying, and then that will—we don't know the end time, so I'm just going to set out until August a status conference in this case, and in the interim I'll have the defendant submit a brief report to the Court every three weeks between now and the date I'm about to give you in August, outlining the basic numbers and timetables. And then we'll just see where this goes, but I think it's necessary, in light of the pandemic, to modify the injunction, and I intend to keep a close watch on the efforts made to make this happen as quickly as possible. Without a rise in new admissions, this should be over with by as early as June, in which case we'll up the date of the hearing and make sure that's the case and move back to the earlier seven-day time period as quickly as humanly possible.

(E.R. 51-52).

On May 13, the court issued its order modifying the injunction and temporarily lifting the seven-day deadline. The core modification to the injunction authorizes OSH's process to test and quarantine all incoming patients, which had slowed admissions to the hospital. The modified injunction requires the following:

> Test and quarantine all incoming patients to OSH, as described in Defendants' Supplemental Brief [162]. The testing and quarantine period for incoming cohorts should not exceed **14 days**—i.e., every 14 days, a cohort should be tested, quarantined, and admitted to the general population, and a new cohort should be admitted for testing and quarantine.

(E.R. 2 (Emphasis in original)). The process is set out in detail in OSH's supplemental brief. (S.E.R. 67). The court also ordered OSH to submit periodic

status reports to court, attend status hearings, and notify the court when OSH achieved "compliance with the injunction—i.e., a lag time of no more than **7 days** between the date that a criminal defendant is determined to be unable to aid and assist in his defense and the date at which he is admitted to OSH for restoration." (E.R. 2 (Emphasis in original)).

ARGUMENT

The trial court correctly modified the injunction. OSH put on evidence that preventing the spread of COVID-19 within the state hospital required a pause in admissions of aid-and-assist patients. Implementing a testing and quarantine procedure slowed admissions when they restarted. Those circumstances resulted in an admissions backlog. The district court concluded that modification was necessary in light of the pandemic and approved the process OSH proposed—allowing for a slower pace of admissions to account for COIVD-19 protocols and conditions—while requiring OSH to resume compliance with the seven-day deadline as quickly as possible and reporting progress regularly to the court. The modifications are supported by the facts and the law.

A. The district court had broad discretion to modify the injunction.

This court reviews modifications to an injunction under Rule 60(b)(5) for abuse of discretion. *United States v. Asarco*, 430 F.3d 972, 978 (9th Cir. 2005).

Under Rule 60(b)(5), the requesting party bears the burden of establishing that a significant change in circumstances, either in fact or law, warrants a modification. *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 383–86 (1992). A modification is appropriate when a "decree proves to be *unworkable because of unforeseen obstacles*" or "when enforcement of the decree without modification would *be detrimental to the public interest*." *Id*. at 384 (citations omitted) (emphasis added); *see also*, *Asarco*, 430 F.3d at 979. Where the moving party meets its burden, the modifications must be suitably tailored to the changed circumstances. *Rufo,* 502 U.S. at 386.

The district court has substantial discretion under Rule 60(b)(5) to modify the injunction, after taking "all the circumstances into account[.]" *Bellevue Manor Assoc. v. United States*, 165 F.3d 1249, 1256 (9th Cir.1999); *see also Hook v. State of Ariz.*, 120 F.3d 921, 925 (9th Cir. 1997) (holding that the district court abused its discretion in ruling that state department of corrections did not meet its burden of demonstrating changed factual circumstances to warrant modification where evidence showed unforeseen, increased security concerns for the institution, its employees, and the prisoners). Courts must take a "flexible approach" to Rule 60(b)(5) motions addressing institutional reform decrees because such decrees often remain in force for

many years and raise sensitive federalism concerns. *Horne v. Flores*, 557 U.S. 433, 448–50 (2009).

B. The district court correctly ordered modifications to the injunction.

Plaintiffs acknowledge that the COVID-19 pandemic is a change in circumstances that has affected "all aspects of our lives," including "the administration of hospitals and jails in particular." (Opening Br. at 17). The dispute in this case concern the appropriate response to those changed circumstances. The record before the district court showed that OSH took the necessary steps to prevent the spread of COVID-19 and to maximize the hospital's ability to safely admit new patients during the pandemic. The district court's modifications to the injunction are suitably tailored to the changed circumstances, which rendered enforcement of the seven-day deadline both unworkable and contrary to the public interest.

1. The pandemic rendered compliance with the seven-day admission requirement temporarily unworkable and contrary to the public interest.

At the time of the modification hearing, compliance with injunction was unworkable because OSH could not protect its patients from the pandemic and still admit new patients within seven days. OSH presented evidence that the hospital has a population of patients at elevated risk for COVID-19 and that psychiatric hospital across the county had suffered outbreaks of COVID-19.

(S.E.R. 9-22). OSH's evidence explained in detail why it was necessary to test and quarantine incoming patients and the many changes to OSH's infrastructure and processes that were necessary to create specialized units for admitting new patients. The district court accepted OSH's evidence that it had taken necessary steps to protect its patients and approved OSH's process for testing and quarantining new patients. (E.R. 51-52).

For related reasons, the record also shows that enforcing the seven-day deadline would not be in the public's interest. OSH is the only place for individuals with .370 orders who require hospital level of care to receive restorative treatment. That treatment cannot proceed effectively during a COVID-19 outbreak at the hospital. To preserve OSH's ability to provide restorative services, it had to ensure that it could limit the risks of COVID-19 transmission and that it had reorganized its operations to be able to contain an outbreak, should one occur. The district court evaluated the competing interests in providing timely treatment and in containing COVID-19 and concluded that modification was necessary. (E.R. 51–52, 89–91). Because enforcing the seven-day deadline without the protective measures would have been contrary to the public interest, the district court properly ordered modifications to the injunction.

2. The modifications are suitably tailored to the changed circumstances.

The district court's modifications to the injunction are suitably tailored to the changed circumstances. Those modifications authorize the testing and quarantining process implemented by OSH and require regular updates to the district court concerning the backlog of aid-and-assist admissions and OSH's efforts to return to compliance with the seven-day deadline. That deadline is still the goal, and the injunction's requirement that OSH admit aid-and-assist patients as soon as practicable remains in effect. The modifications simply recognize that the pandemic is a change in circumstances that temporarily excuses compliance with the seven-day deadline, to the extent necessary to address issues related to COVID-19.

C. Plaintiffs have not shown that the district court abused its discretion.

Although plaintiffs raise several overlapping arguments against the modifications, those arguments reduce to two proposition: (1) OSH failed to prove that there were no alternatives to slowing admissions and placing individuals subject to .370 orders on a waitlist; and (2) the modifications violate the due process rights of criminal defendants waiting to be admitted. Plaintiffs are wrong on both counts.

1. The record shows that OSH is the only treatment option for aid-and-assist patients who require hospital level of care.

Plaintiffs argue that OSH failed to show that it could not comply with the seven-day requirement because there were "several alternative courses of action that could have furthered defendants' legitimate interests and ensured defendants continue to meet its constitutional obligations." (Opening Br 19-20). That argument does not accurately reflect the record.

When OSH initially proposed modifying the injunction, plaintiffs responded that OHA should consider using emergency powers to place individuals outside of the hospital, by "rapidly expanding the existing community based restoration services, designating new or existing mental health beds for use by aid-and-assist patients, or discharge to community based settings with wraparound mental health services, if appropriate." (S.E.R. 48). Plaintiffs suggested that OHA could use hotel rooms, in lieu of the state hospital, to house and treat patients on .370 orders. Plaintiffs acknowledged that state law was a barrier to that approach and proposed a modification to the injunction that would preempt state law. (S.E.R. 49). OSH responded it was "simply impossible" to establish a hospital level of care in a non-hospital setting, like a hotel. (S.E.R. 52). In its briefing, OSH acknowledged that the district court had authority to override state law, but explained that such a

drastic option should be a last resort and was not warranted here. (C.R. 151 at 14).

Under Or. Rev. Stat. § 161.370, the individuals ordered to the state hospital are those who cannot be treated in the community. The record does not show that OSH had any alternatives for treating those patients that require a hospital level of care. Rather, OSH presented evidence that it had been unable to identify any viable options aside from the actions it had taken to increase capacity at the state hospital. (S.E.R. 73–74). Further, OSH continually evaluates its patient population to determine those who can receive services in the community instead of the hospital and makes efforts to discharge those patients. (S.E.R. 74). Nor is there any evidence in the record to support plaintiffs' bare assertion that OHA could have created additional treatment options for aid-and-assist patients. Nor is there any evidence that some other alternative could have provided treatment to pretrial detainees more quickly than the process OSH proposed. All the evidence shows that OSH was taking the reasonable steps within its power to address the pandemic and to ensure that it could safely treat its patients and admit new ones.

Moreover, the district court found that modification of the injunction was "necessary, in light of the pandemic" and accepted OSH's evidence that it was taking appropriate steps to mitigate the risk of the pandemic while continuing to

admit patients. (E.R. 51-52). Plaintiffs incorrectly assert that the district court viewed the factual basis for the modification as "inadequate," citing the court's explanation for why it was modifying the injunction. (Opening Br. at 17 (quoting E.R. 52)). When the district court stated that "what's been submitted is inadequate," it was describing the terms of OSH's proposed modifications to the injunction, not the record. The court's comment explains why the court drafted the modification order itself to impose mandatory "constraints" on the modification. (E.R. 2). Again, the court found that OSH had established the factual basis for modifying the injunction. (E.R. 52).

Plaintiffs also assert that the district court failed to consider whether modifying the injunction was in the broader public interest and, instead, narrowly focused on whether the modifications would serve the narrow interests of the state hospital. (Opening Br. at 21-22). Plaintiffs appear to argue that OSH needed to prove that jails "were better prepared or more capable of addressing the needs of seriously mentally ill people during the pandemic" or that the "spread of COVID-19 within county jails would be less severe [or] more easily managed" before the district court could modify the injunction. (Opening Br. at 21-22).

That argument is misplaced. There is no dispute that the county jails are not an appropriate place to treat individuals who need restoration services or

that jails pose a risk of COVID-19 transmission. Neither OSH nor OHA control the county jails. As explained above, maintaining the capability of the state hospital to provide restoration services free of COVID-19 and in a way that permits OSH to contain a COVID-19 outbreak is very much in the public interest. OSH did not need to prove that jails were superior in order to seek modification. Moreover, the record shows that the district was mindful of the broader public interest and balanced those concerns in modifying the injunction. (E.R. 51–52, 89–91).

2. The district court's modifications to the injunction are suitably tailored to protect the due process rights of individuals ordered to the state hospital for treatment.

Plaintiffs broadly attack the modifications as permitting an indefinite violation of the due process rights of pretrial detainees, asserting that the district court gave OSH "permission slips to violate the constitution." (Opening Br. at 15). That is not the case. The modified injunction retains the due process protections of the original but recognizes that a measure of flexibility is warranted due to the ongoing pandemic.

The 2002 injunction requires OSH to admit patients subject to .370 orders "as soon as practicable. This shall be fulfilled by providing full admission of such persons into a state mental hospital or other treatment facility so designated by the [Oregon Health Authority], in accordance with Oregon's

existing applicable statutory provisions. These admissions must be done in a reasonably timely manner, and completed not later than seven days after the issuance of an order determining a criminal defendant to be unfit to proceed to trial because of mental incapacities under [Or. Rev. Stat.] § 161.370(2)." (E.R. 3-4).

Plaintiffs acknowledged at the modification hearing on May 6, 2020, that the seven-day deadline in the *Mink* injunction is not a bright-line requirement of the Due Process Clause and was, instead, "a wise benchmark to use in this case." (E.R. 73). This court's opinion in *Mink* makes the same point: due process requires admission for treatment in a reasonably timely manner and ordering the seven-day deadline was within the district court's discretion based on the record. 323 F.3d at 1122 & 1122 n. 13.

The modifications retain the core due process requirements of the original injunction: OSH must still admit aid-and-assist patients as soon as practicable and in a reasonably timely manner. The modifications excuse the seven-day deadline, but only to extent that testing, quarantining, and treating incoming patients is required by the pandemic. The modifications reflect that what is reasonable and practicable during the pandemic is different than in normal times.

Plaintiffs also attack the modified injunction as an "indefinite suspension" of the due process rights of pretrial detainees, suggesting that OSH could simply disregard the seven-day deadline. (Opening Br. at 15, 19). But that is not what the modifications do. The modifications do not suspend the right of pretrial detainees to treatment within a "reasonable time," which is the due process requirement, and the modifications do not relieve OSH of the obligation to admit patients as soon as practicable.[2] To the extent that plaintiffs object to the modifications not having a firm end date, that is because of the nature of the pandemic itself, which continues to grow. Because there was no fixed deadline, the district court required regular compliance reports and hearings to ensure OSH continued to make progress in reducing the backlog in admissions, while the modifications are in place.

Lastly, plaintiffs argue that the modifications are not suitably tailored because they protect the health and safety of those already admitted to the hospital by extending the detention of those who remain in county jails.

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[2] Plaintiffs included OSH's compliance report from July 14, 2020, and the transcript from the hearing on August 3, 2020 in its excerpt of record. Those materials are not part of the record for the district court's modification order, which was issued on May 13, 2020. Nevertheless, those materials show that OSH was able to admit almost all aid-and-assist patients within seven days or less by June 2, 2020, and had been able to remain in compliance since that time. (E.R. 22, 37).

(Opening Br. 18-19). As above, that argument disregards the manifest need of OSH to prevent the spread of COVID-19 in the hospital and to have procedures and infrastructure to contain on outbreak. Such procedures protect those currently admitted and those that will be admitted in the future. Simply put, the hospital cannot provide effective restorative treatment to current patients if it is overrun with COVID-19 nor can it admit new patients if unable to contain the pandemic within the hospital itself. The modifications—by authorizing OSH's admissions process—do not protect current patients at the expense of those waiting to be admitted; they protect both groups.

CONCLUSION

This court should affirm the district court's modifications to the injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7), Federal Rules of Appellate Procedure, I certify that the Appellees' Brief is proportionately spaced, has a typeface of 14 points or more and contains 6,173 words.

DATED: December 3, 2020

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OREGON ADVOCACY CENTER; METROPOLITAN PUBLIC DEFENDER SERVICES, INC., Plaintiffs - Appellants, and A. J. MADISON, Plaintiff, v. PATRICK ALLEN, et al, Defendants - Appellees.	U.S.C.A. No. 20-35540 STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6, Circuit Rules of the United States Court of Appeals for the Ninth Circuit, the undersigned, counsel of record for Appellees,

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certifies that he has no knowledge of any related cases pending in this court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2020, I directed the Appellees' Brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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