Emily Cooper OSB# 182254
Thomas Stenson OSB # 152894
Sarah Radcliffe OSB # 064775
Disability Rights Oregon
511 SW 10th Avenue, Suite 200
Portland, Oregon 97205
(503) 243-2081
ecooper@droregon.org
tstenson@droregon.org
sradcliffe@droregon.org

Jesse Merrithew OSB # 074564
610 SW Alder Street, Suite 415
Portland, Oregon 97205
(971) 229-1241
jesse@lmhlegal.com

Counsel for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

DISABILITY RIGHTS OREGON, METROPOLITAN PUBLIC DEFENDER SERVICES, INC., & **A.J. MADISON,**
Plaintiffs,

v.

PAT ALLEN, in his official capacity as head of the Oregon Health Authority, & **DOLORES MATTEUCCI**, in her official capacity as Superintendent of the Oregon State Hospital,
Defendants.

Case No.: 02-00339

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO MODIFY

I. INTRODUCTION

Plaintiffs join Defendants in recognizing the COVID-19 pandemic as a public health crisis requiring an extraordinary governmental response to mitigate the risks especially to those who are the most vulnerable to being exposed or dying from the virus. Plaintiffs oppose Defendants' motion because the Defendants are choosing to protect one group of vulnerable

people at the expense of another, in violation of the constitution. The right this Court recognized 18 years ago – the right to be free from prolonged, purposeless jail confinement – is more important today in light of this pandemic than it was when the order was entered. Then and now, we urge this Court to protect this constitutional right and prohibit the prolonged incarceration of people who have been court ordered into the Defendants care and custody for restoration services. People are suffering profoundly as a result of the Defendants' noncompliance. *See* Declaration of Cameron Taylor, Declaration of Jennifer Robins, Declaration of Katie Stanford.

Defendants move to amend the 2002 judgment requiring transfer of pretrial detainees "to the custody of the superintendent of a state hospital designated by the Department of Human Services as soon as practicable . . . [and] not later than seven days after the issuance of an order determining a criminal defendant to be unfit to proceed to trial. . . ." *Oregon Advocacy Ctr. v. Mink*, No. CV 02-339-PA, 2002 WL 35578888, at *1 (D. Or. May 15, 2002). Defendants premise their motion on COVID-19, specifically arguing that limiting admission of detainees would risk further spread of COVID-19 infection within the state hospital. However, OHA may consider other alternatives other than the state hospital pursuant to state statute. ORS 161.370(2)(a) (allowing commitment of aid-and-assist detainees to the "state hospital" or another "facility designated by the Oregon Health Authority"). Defendants' requested modification should be denied because it fails to address other alternatives that are more narrowly tailored to address the constitutional rights of pretrial detainees. Defendants' obligation to comply with the constitution and the existing order must be maintained. Plaintiffs request this Court to order Defendants to maintain compliance with the existing order. If Defendants assert that they cannot maintain compliance without violating state law, then the Court should authorize Defendants to override state law in order to maintain compliance with the constitution.

II. ARGUMENT

A. The Legal Standards for a Motion to Modify

Federal Rule of Civil Procedure 60 and the litany of court decisions interpreting this rule establish the basis for modifying a permanent injunction. An injunction can be modified "if a significant change either in factual conditions or in law renders continued enforcement detrimental to the public interest." *See* Fed. R. Civ. P. 60(b); *see also Horne v. Flores*, 557 U.S. 433, 447 (2009) (internal quotation marks omitted); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992). The moving party bears the burden of establishing sufficient facts to warrant a revision of an injunction. *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000) (citing *Bellevue Manor Assocs. v. United States*, 165 F.3d 1249 (9th Cir. 1999) and *Rufo*, 502 U.S. 367 (1992)). A party seeking to amend a permanent injunction must show: "a significant change either in factual conditions or in the law warranting modification of the decree" and that "the proposed modification is suitably tailored to resolve the problems created by the changed factual or legal conditions." *United States v. Asarco Inc.*, 430 F.3d 972, 979 (9th Cir. 2005). Any changes to factual conditions must make compliance "more onerous, unworkable, or detrimental to the public interest." *Id.* (internal quotations and citations removed).

Even if the moving party meets its burden demonstrating that changed circumstances warrant relief, the court must then consider whether the proposed modification is suitably tailored to changed circumstance. *Rufo*, 502 U.S. at 384. In cases like this, "suitably tailored" means that the modification in an adaption to changed circumstances but still fulfills the purpose of the original order. As discussed below, Defendants have not met their burden to warrant a revision nor is the proposed modification suitably tailored to protect the constitutional rights of pretrial detainees during a pandemic.

B. Motions to Modify Cannot Undermine Constitutional Standards

A modification under Federal Rule of Civil Procedure 60 "should not strive to rewrite the order so that it conforms to the constitutional floor." *Rufo,* 502 U.S. at 370. The foundational liberty interest under the due process clause is freedom from incarceration. *Oviatt ex rel. Waugh v. Pearce,* 954 F.2d 1470, 1474 (9th Cir.1992). Individuals have a fundamental liberty interest in being free from incarceration absent a criminal conviction, and there exist corresponding constitutional limitations on pretrial detention. *See Lopez–Valenzuela v. Arpaio,* 770 F.3d 772, 777–78, 780–81 (9th Cir. 2014) (en banc).

Here, the existing order recognizes this foundational right: "Incapacitated criminal defendants have liberty interests in freedom from incarceration and [also] in restorative treatment." *Mink,* 322 F.3d at 1121. A determination of what constitutes the constitutional floor for adequate treatment must be measured not by that which must be provided to the general correctional population, but by that which must be provided to those committed to a hospital for mental health competency services. *See Ohlinger v. Watson,* 652 F.2d 775, 777–78 (9th Cir.1981) ("a person committed solely on the basis of his mental incapacity has a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition"). "Lack of funds, staff or facilities cannot justify the State's failure to provide [such persons] with [the] treatment necessary for rehabilitation." *Mink,* 322 F.3d at 1121 (quoting *Ohlinger,* 652 F.2d at 779).

A motion to modify that leaves individuals with mental illness indefinitely confined in jail does not stop at the constitutional floor but sinks to the basement. The proposed modification undermines this Court's existing order and violates due process. Simply put, the state's responsibility to comply with the constitution is unwavering. Its bedrock responsibility is to

respond to every challenge without violating the constitutional rights of its citizens. It is well within Defendants ability and authority to comply; it is simply choosing not to consider alternatives outside of admission to the state hospital.

Plaintiffs shared several alternatives other than effectively shutting the front door of OSH, such as OHA using emergency powers and appropriated funds to rapidly expand community mental health options, especially for those individuals whom the state has already found to not or no longer meet hospital level of care. Cooper Declaration, Ex. A. Defendants rejected Plaintiffs' proposals and stood by their decision to effectively close admissions to those waiting in jail. *Id.* at Ex. B. That approach - indefinite confinement during an indefinite pandemic - is illegal and doesn't serve any legitimate public purpose. Defendants must use their authority and implement other alternatives beyond cracking the doors of the state hospital back open. There are more simplistic solutions to this problem that do not violate the constitution, including the outright release of prisoners held in violation of the constitution, or the acquisition of sufficient space for quarantine units in order to admit all people ordered into their care within seven days. It is up to Defendants to choose the solution to the problem, but they cannot decide to flagrantly violate the constitution and then ask for this Court's rubber stamp this position under the guise of federalism and comity.

C. Principles of Federalism Should Not Result in the Abdication of the Court's Authority to Enforce its Own Order and Protect Constitutional Rights

Citing to *Hook v. State of Ariz*., 120 F.3d 921, 926–27 (9th Cir. 1997), the state argues "principles of federalism weigh in favor of allowing OHA and OSH flexibility in determining the best approach for managing the Hospital's response to the COVID-19 Pandemic." Mtn. to Mod. at 9. Principles of federalism are not so flexible as to allow the state to violate the constitution

for months or to limit the Court's inherent authority to enforce an existing order to remedy those violations.

In crafting the *Younger* abstention doctrine, Justice Black articulated "the notion of comity" or "Our Federalism" as the "proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Justice Black goes on to warn against self-imposed judicial restraint as federalism "does not mean blind deference to 'States' Rights'." *Id.* Eight years later, the Supreme Court again admonished federal courts to exercise judicial restraint and to avoid enmeshing themselves in the minutiae of prison operations in the name of the Constitution. *Bell v. Wolfish*, 441 U.S. 520, 562, 99 S.Ct. 1861, 1886, 60 L.Ed.2d 447 (1979). In *Bell*, the constitutional challenges involved the crowded prison housing conditions, receiving packages, and searches. The *Bell* Court directed the federal courts to avoid distractions related to the day-to-day operations of a prison and instead focus their attention to the question of whether the practice or condition violates the Constitution. *Id.* at 544.

Here, the existing order already answers that constitutional question: the nature and duration of confinement (waiting for competency services beyond seven days) violates the due process rights of pretrial detainees. Plaintiffs do not ask the Court to tell the state what particular steps they must take to protect those rights; instead, we simply ask this Court to maintain the existing order and declare that the constitution remains the foundation of our government during a pandemic that will disproportionally impact people with disabilities in Oregon.

While the Supreme Court has issued clear guidance urging federal courts to abstain from complaints that unreasonably interfere with the proper running of state institutions, considerations of comity do not preclude federal district court from enforcing existing orders. *Kokkonen v. GuardianLife Ins. Co. of Am.*, 511 U.S. 375, 380, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) (Federal courts retain jurisdiction over proceedings that "enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees."). Principles of federal-state relationships, abstention, and comity do not dictate that federal courts ignore violations of constitutional rights over which they have jurisdiction. *Hickey v. District of Columbia Court of Appeals*, 457 F.Supp. 584, 586 (D.D.C. 1978).

Federalism and comity principles also do not apply in actions where a party is seeking relief from state practices that are unconstitutional. *Sourovelis v. City of Philadelphia*, 246 F.Supp.3d 1058, 1072 (E.D.Pa.2017). There, the plaintiffs were seeking relief from Philadelphia's civil forfeiture proceedings that resulted in the deprivation of property in violation of the 14th Amendment Due Process protections. The court properly considered its scope of authority, "The issue is not the power of the federal court to intervene to redress the violation, but rather the degree and nature of the intervention." *Id.* at 1072. There, the plaintiffs sought a declaration that the government's procedures were unconstitutional and an injunction enjoining those practices. *Id.* The *Sourovelis* Court concluded,

> "If Plaintiffs obtain their desired relief, the [Defendant] would be free to design any appropriate procedures, provided those procedures accord with due process. Accordingly, it does not violate notions of federalism and comity for this Court to exercise jurisdiction over the [Defendant] to remedy any due process violations."

Id. Here, the Court may properly use its inherent authority to enforce its order and maintain the constitutional floor of liberty without enmeshing itself in the minutia of OHA or OSH. Plaintiffs seek a clear declaration protecting the liberty interests of pretrial detainees ordered into OHA's

custody for mental health competency services. Plaintiffs do not ask this Court to order the state to take particular action to remedy this constitutional violation; merely, that they are enjoined from continuously violating the constitution. As Plaintiffs repeatedly have urged them, Defendants must design a response to this crisis that involves every person that has been ordered into their custody and control, not just those patients who were lucky enough to get admitted through the cracks.

D. The State Has Failed to Meet its Burden of Establishing Sufficient Facts to Warrant Modification

1. An effective state government should anticipate and plan for public health emergencies consistent with established law and guidance to protect all of its citizens.

There are no exceptions in federal law that suspend the obligation of states to comply with federal mandates including during a public health emergency. For example the United States Department of Justice (DOJ) issued guidance to states regarding their obligation to plan for emergencies that may disproportionately impact people with disabilities.[1]

> "One of the primary responsibilities of state and local governments is to protect residents and visitors from harm, including assistance in preparing for, responding to, and recovering from emergencies and disasters. State and local governments must comply with Title II of the ADA in the emergency- and disaster-related programs, services, and activities they provide."[2]

Here, while Defendants may not have anticipated this specific pandemic, the problem of communicable disease outbreaks in the Oregon State Hospital (OSH) is not new or unforeseeable. To justify a modification to a final judgment, a factual development must be "significant and unanticipated." *United States v. Asarco Inc.*, 430 F.3d 972, 979 (9th Cir. 2005); *see also Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 385 (1992). Beginning in 1952,

[1] *See Emergency Management Under Title II of the Americans with Disabilities Act*, at 1 (July 26, 2007) available at http://www.ada.gov/pcatoolkit/chap7emergencymgmt.htm.
[2] *Id; see also* Wendy F. Hensel & Leslie E. Wolf, *Playing God: The Legalities of Plans Denying Scarce Resources to People with Disabilities in Public Health Emergencies*, 63 FLA. L. REV. 719, 737-30 (May 2011).

Santiam Hall at OSH served to quarantine tuberculosis patients.[3] OSH had numerous patients infected during the 1918 influenza pandemic, though none died.[4] More recently, OSH quarantined three housing units in August 2007 and two more housing units again in January 2019 after norovirus outbreaks.[5] Any hospital, including OSH, should be able to foresee the need to quarantine incoming patients as appropriate, to practice good infection control, and to accommodate patients during disease outbreaks or consider other alternatives short of violating constitutionally protected interests.

2. Transferring detainees held in jails for Defendants' competency services after seven days is workable, reasonable, and recommended by national health authorities.

The challenges associated with the COVID-19 pandemic are very real. However, Defendants' previous bar to admission of aid-and-assist detainees is self-imposed, not a natural consequence of the pandemic. As reflected in their policy change the same day of the parties' status conference with this Court, OSH can provide appropriate and safe inpatient mental health care, with additional precautions consistent with the national guidance of public health authorities.[6] Further, admission to the state hospital is not the sole remedy for Defendants to

[3] Nat'l Park Serv., U.S. Dep't of Int., "Historic American Buildings Survey: Oregon State Hospital, North Campus, Santiam Hall," at 2, *available at* https://tile.loc.gov/storage-services/master/pnp/habshaer/or/or0600/or0631/data/or0631data.pdf

[4] Capi Lynn, *Salem and Northwest History: The Spanish Flu of 1918 Pandemic and How It Compares to COVID-19*, Statesman Journal, Mar. 29, 2020, *available at* https://www.statesmanjournal.com/story/news/2020/03/29/coronavirus-oregon-covid-19-spanish-flu-1928-salem/5083577002/.

[5] Bob Wernick, *State Hospital Patients Moved*, KPIC, Aug. 23, 2007 (noting "three wards" were quarantined after 170 patients and staff were sickened in a July-August outbreak) *available at* https://kpic.com/news/local/state-hospital-patients-moved; Jonathan Bach, *Norovirus Case at Oregon State Hospital Quarantines Two Units*, STATESMAN JOURNAL, Jan. 4. 2019, available at https://www.statesmanjournal.com/story/news/2019/01/04/norovirus-oregon-state-hospital-quarantine-two-units/2487945002/.

[6] Centers for Disease Control and Prevention, U.S. Dep't of Health & Human Servs., "Interim Guidance for Healthcare Facilities: Preparing for Community Transmission of COVID-19 in the United States," *at* https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-hcf.html; *see also* Center for Medicare & Medicaid Servs., U.S. Dep't of Health & Human Servs.,Guidance for Infection Control and Prevention of Coronavirus Disease (COVID-19) in Hospitals, Psychiatric Hospitals, and Critical Access Hospitals (CAHs), Mar. 30, 2020, *at* https://www.cms.gov/files/document/qso-20-13-hospitals-cahs-revised.pdf; and Substance Abuse and Mental Health Services Administration, U.S. Dep't of Health & Human Servs., Covid19: Interim Considerations for State

maintain compliance. Defendants only appear to argue that those alternatives were not explored due to the failure to receive their funding request from the legislature. Mot. to Mod. at 3.

OHA justifies its exclusionary policy through a series of unfounded assertions and unexamined anecdotes picked up by the media. *Id.* Defendants attach a series of declarations to their motion, but none of the evidence explains the foundation of the decision to bar patients or limit their admission. A single sentence states this policy was "necessary," although Defendants do not endeavor to explain why no other policy was adequate, what made this particular course necessary, or what the foundation for this expert opinion is. Decl. of Parry, at ¶10. The crux of the Defendants' motion is that this exclusionary policy is necessary, yet that claim is supported by no cognizable evidence nor does it fully consider the other alternatives to hospital admission.

The Defendants' Motion also assumes, without foundation, that the only way COVID-19 could enter a psychiatric hospital would be through the admission of a sick patient. None of the anecdotes from other states indicate that infection in other hospitals was introduced by a newly-admitted patient.[7] However, the patients at OSH and similar psychiatric hospitals are outnumbered roughly 3:1 by staff, who go home to their families and communities after every shift. Patients, by contrast, are essentially closed off from the community after admission. No evidence was provided to support a factual finding that the admission of a patients, properly screened consistent with national standards, represents a meaningful risk of COVID spread, relative to the risk of staff transmittal to patients or other staff.

Psychiatric Hospitals, Mar. 19, 2020, *at* https://www.samhsa.gov/sites/default/files/covid19-interim-considerations-for-state-psychiatric-hospitals.pdf.

[7] In Washington state, the Washington state epidemiologist evaluated the problem in the state psychiatric hospital, determining "some staff were infected in the community, worked while infectious, and were a source of infection to patients and other staff people." Scott Linquist, Letter to Karen Pitman, Apr. 9, 2020, *available at* https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/WSHFollowupletter.pdf.

Defendants' anecdotes of COVID outbreaks in New Jersey, Massachusetts, and Washington also disregard significant differences between those states and Oregon. As of April 19, 2020, Massachusetts has had more than 38,000 infections and 1700 deaths. Washington State has had more than 11,000 infections and 600 deaths. New Jersey has had more than 85,000 infections and 4200 deaths.[8] Oregon, by contrast, has 1,910 cases and 74 deaths as of April 19th. Defendants assume, without evidence or supporting expert opinion, that their restrictive admission policy alone kept OSH from having the serious outbreaks seen in psychiatric hospitals irrespective of the vast difference in the states' overall community-based COVID infection rate. If Defendants wish the Court to draw that conclusion, its assertion must be based on admissible evidence, not conjecture.

Likewise, the newspaper articles cited and high infection rates in other state hospitals could relate to systemic failures outside of limiting admission including failure to provide personal protective equipment (PPE), compelling sick staffers to show up for work, or failure to practice social distancing.[9] For instance, the New Jersey psychiatric hospitals were criticized for not practicing social distancing and because staff lacked adequate PPE.[10] Anecdotal information about psychiatric hospitals does not show that the only or the best way to limit exposure is to restrict admissions. Nothing in any of the evidence submitted explains or substantiates why

[8] Beatrice Jin, *Live Tracker: How Many Coronavirus Cases Have Been Reported in Each State?* Politico, Apr. 20. 2020, *available at* https://www.politico.com/interactives/2020/coronavirus-testing-by-state-chart-of-new-cases/.
[9] Susan K. Livio, Updated: 240 Infected, 5 Dead from the Coronavirus at State-Run Psychiatric Hospitals, NJ Advance Media, April 11, 2020, *available at* https://www.nj.com/coronavirus/2020/04/more-than-200-infected-5-dead-from-the-coronavirus-at-state-run-psychiatric-hospitals.html (describing mass failures to separate sick patients, lack of PPE, and other problems at NJ psychiatric hospitals); Keenan Willard, *Staff Member Dies of COVID-19 at El Paso Psychiatric Center*, KFOX-14, April 16, 2020 *available at* https://kfoxtv.com/news/local/a-staff-member-has-died-of-covid-19-at-the-el-paso-psychiatric-center (reporting that two staff came back from vacation, were told not to self-quarantine, and then became sick with the virus at work).
[10] Susan K. Livio, Updated: 240 Infected, 5 Dead from the Coronavirus at State-Run Psychiatric Hospitals, NJ Advance Media, April 11, 2020, *available at* https://www.nj.com/coronavirus/2020/04/more-than-200-infected-5-dead-from-the-coronavirus-at-state-run-psychiatric-hospitals.html

quarantining patients, wearing PPE, and taking other reasonable precautions – the same steps Defendants are now taking - were inadequate steps back in March 2020 to justify Defendants' request to modify the existing order.

Here, Plaintiffs applaud Defendants steps to provide testing to staff and to ensure appropriate screening and housing for patients already at the state hospital. These actions are not the center of this dispute. Instead, Plaintiffs seek an order from this Court requiring Defendants to both comply with the constitution, the order, and to develop other alternatives to maintain compliance other than exclusively focusing on the state hospital. OHA's self-imposed closed- or (more recently) cracked-door policy is not a necessary or appropriate response in and of itself to the pandemic. This expectation of our state's public health authority should not be too "onerous, unworkable, or contrary to the public interest" to justify modification of the order. Refusal to transfer people in need of inpatient treatment out of jail and into more clinically appropriate locations (including but not limited exclusively to the state hospitals) is a rejection of this Courts' order and a "substantial departure from professionally accepted minimum standards for treatment of incompetent individuals for whom defendants are responsible," as determined by the most relevant public health authorities. *Oregon Advocacy Ctr. v. Mink*, No. CV 02-339-PA, 2002 WL 35578910, at *6 (D. Or. May 10, 2002), *judgment entered*, No. CV 02-339-PA, 2002 WL 35578888 (D. Or. May 15, 2002), *aff'd*, 322 F.3d 1101 (9th Cir. 2003).

E. The Proposed Amendments to the Final Judgment in This Case Are Not Narrowly Tailored to the Challenges Related to the COVID-19 Pandemic

Regardless of the pandemic, the Oregon Health Authority (OHA) and the Oregon State Hospital (OSH) remains responsible for the care and custody of pretrial detainees the state courts have ordered as needing mental health competency restoration services. *See e.g.* ORS 161.370(2)(a). Even if the Court should find that the pandemic justifies some modification of the

order to provide Defendants with the clear authority to transfer these detainees to locations other than the state hospital, that modification should not undermine the fundamental nature of the original judgment in this case nor extend beyond the scope of the current emergency. Any modified judgment should "retain the essential features and further the primary goals" of the original judgment. *Keith v. Volpe*, 784 F.2d 1457, 1460 (9th Cir. 1986); *Rufo*, 502 U.S. at 391(relief on modification must be "tailored to resolve the problems created by the change in circumstances"). A judgment entailing specific, "enforceable deadlines," cannot be replaced with one without those deadlines. *State of Washington v. Moniz*, No. 2:08-CV-5085-RMP, 2015 WL 7575067, at *6 (E.D. Wash. Aug. 13, 2015). As the United States Supreme Court articulated in *Asarco Inc.*, modifications to permanent injunctions must be sufficiently narrowed in light of the relevant facts or circumstances cited to as the basis for modification. 430 F.3d at 979.

Here, we have an existing order with an enforceable, seven-day deadline. We also know that the state was appropriated $10.6 million dollars last year for the purpose of addressing "the shortage of comprehensive community supports and services for individuals with mental health or substance use disorders, leading to their involvement with the criminal justice system, hospitalizations and institutional placements."[11] Finally, we know that the Governor has issued a state of emergency that provides OHA with the broad authority to take "all actions necessary…to respond to, control, mitigate, and recover from the emergency…."[12] What we do not know is when the COVID-19 threat will be mitigated or contained. Even if we did know a date certain, a temporary public health emergency is not a legitimate basis to modify an 18-year-old order that seeks to uphold the constitutional floor of pretrial detainees whose only purpose of confinement

[11] Enrolled SB 973, Sec. 1 and 11, *available at* https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/SB973/Enrolled
[12] https://www.oregon.gov/gov/Documents/executive_orders/eo_20-03.pdf

is to receive Defendants' services. Plaintiffs urged Defendants to use its authority and consider these other alternatives to the state hospital. Cooper Decl. Ex. A. Defendants rejected those alternatives and instead improperly seek modification to the existing order. *Id.* at Ex. B.

It is also unclear how shifting the burden of caring for patients with serious mental illness to county jails during a pandemic is consistent with the state's legitimate interests in protecting and promoting public health. The proposed amendments to the long-standing order in this case do not serve the public interest. The natural effect of the state's proposal will be to ensure that people with serious mental illness remain in county jails, where treatment resources are scarce and the services for detainees with serious mental illness are even more limited by the COVID outbreak. The state defendants' arguments explain at length their concerns about bringing in jail detainees to the state hospital with possible undetected COVID. Those arguments address only why it is in the *Oregon State Hospital's* interest not to take in jail detainees, not why it is in the *public* interest to leave those detainees in county jails, where similar, if not worse, risks of further COVID spread exist. Those arguments also do not explain why other alternatives are unsound.

The crux of this Court's decision in 2002 was that "[i]ndefinitely imprisoning persons deemed unfit to proceed without adequate treatment is unjust and inhumane." *Oregon Advocacy Ctr. v. Mink*, No. CV 02-339-PA, 2002 WL 35578910, at *4 (D. Or. May 10, 2002). It remains true and undisputed that "county jails in Oregon have no capacity to provide mental health treatment that is designed to rehabilitate a person or restore the person to competency." *Id.* at *6.

Defendants do not pretend that jails are any better positioned to detect or to treat COVID than the Oregon State Hospital. The same concerns about close proximity, difficulty with social distancing, and challenges with hygiene apply with at least equal force to local jails in Oregon.

Today, the same balancing of harms roughly applies, albeit with higher stakes. Again, Defendants seek permission to allow detainees determined incompetent to be warehoused in county jails for an indeterminate period of time due to finite resources. Plaintiffs again argue that continuing delays in admission of detainees to a suitable facility (again, including beyond the state hospital) will only exacerbate existing and new harms to detainees and will not serve the public interest. While the public health backdrop of this debate has changed, the fundamental dispute is the same: hospitals remain better facilities for seriously mentally ill patients, and those patients have "a right to a reasonably timely transport to a treatment facility." *Id.*

III. CONCLUSION

Modifying an 18-year-old order to limit services from vulnerable people who are at particular risk in a jail setting isn't a modifying an order, it is negating the order and the constitution entirely. For these reasons, we respectfully request that this Court either deny the state's motion to modify or narrowly tailor the motion to consider non-hospital alternatives in order to address the temporal and uncertain duration of the COVID-19 pandemic.

DATED this 20th day of April, 2020.

DISABILITY RIGHTS OREGON

/s/ Emily Cooper
Emily Cooper OSB # 182254
ecooper@droregon.org
Thomas Stenson, OSB # 152894
tstenson@droregon.org
Sarah Radcliffe OSB # 064775
sradcliffe@droregon.org

LEVI MERRITHEW HORST PC

/s Jesse Merrithew
Jesse Merrithew OSB # 074564

Counsel for Plaintiff