UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

J.H., by and through his next friend, Flo Messier; L.C., by and through her next friend, Flo Messier; R.J.A., by and through his next friend, J.A.; Jane Doe, by and through her next friend Julia Dekovich; S.S., by and through his next friend, Marion Damick; G.C., by and through his next friend, Luna Pattela; R.M., by and through his next friend, Flo Messier; P.S., by and through his next friend M.A.S.; T.S., by and through his next friend Emily McNally; M.S., by and through his next friend Emily McNally; and all others similarly situated; **Plaintiffs,** **v.** **Teresa D. Miller, in her official capacity as Secretary of the Pennsylvania Department of Human Services; Edna I. McCutcheon, in her official capacity as the Chief Executive Officer of Norristown State Hospital; Valerie Vicari, in her official capacity as the Chief Executive Officer of Torrance State Hospital;** **Defendants.**	**Civil Action No. 1:15-cv-02057-SHR** **Judge Sylvia H. Rambo**

BRIEF IN SUPPORT OF PLAINTIFFS' SECOND RENEWED AND AMENDED MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

Once again in this litigation, negotiations between the Plaintiffs and the Department of Human Services ("DHS") have broken down. Once again, the Plaintiffs have engaged in a negotiation process with DHS—this time, lasting almost a year—to get DHS to commit to reducing the wait times for incompetent criminal defendants to receive treatment to constitutionally acceptable levels, to no avail. And, once again, Plaintiffs must move for a preliminary injunction to stop DHS from violating the due process rights of Pennsylvania citizens.

As the Third Circuit recognized just a few months ago, citing, *inter alia*, this very lawsuit, "[t]he shortage of psychiatric, or forensic, beds in [DHS] hospitals . . . has become a crisis that fails to effectively or compassionately address human need." *Geness v. Cox*, 902 F.3d 344, 363 n. 14 (3d Cir. 2018) (quoting Cty. Comm'rs Ass'n of Pa., *Increasing Forensic Bed Access for County Inmates with Mental Illness* (2018)). DHS has consistently assured Plaintiffs that it would resolve this crisis on its own, and that litigation was unnecessary. Plaintiffs have accordingly negotiated with DHS in good faith to find a workable solution to this problem. DHS, to be sure, has made progress in reducing wait times for admission to DHS hospitals. But the average wait times still far exceed the seven-day limit that the Fourteenth Amendment imposes. Indeed, wait times continue to exceed *sixty* days—which, *even DHS admits*, "fails to comply with Fourteenth

Amendment due process guarantees." First Interim Settlement, ECF 35, ¶ 1. DHS has had ample opportunity to correct this problem since Plaintiffs filed suit three-and-a-half years ago, yet has failed to do so.

Plaintiffs have made clear to DHS that the ongoing violation of incompetent criminal defendants' due process rights must end now. In May of last year, Plaintiffs advised DHS that it must reach closure by June 1, 2019.[1] Plaintiffs have negotiated all year with DHS, with the latter giving repeated assurances that it would solve the crisis this year. As a result of good faith negotiations, Plaintiffs were willing to extend their June 1 deadline to September, 2019. But DHS unilaterally broke off discussions with no explanation. Plaintiffs have no choice but to ask this Court to order DHS to stop violating the Constitution. Plaintiffs therefore exercise their rights under ¶¶ 4 and 10 of the Second Interim Settlement, ECF 59, and ask this Court to issue an injunction that would require DHS to reduce all wait times to seven days or less by September 1 of this year. This date is just under four years since this suit was first brought and more than 10 months since Plaintiffs gave DHS 12 months to come into compliance. DHS has had ample notice and opportunity to fix this problem. It is now apparent that absent a binding court order, the class members will continue to languish in jail, suffering

[1] Plaintiffs are not attaching as exhibits this or other correspondence referred to herein when they include, at least in part, settlement negotiations. Both parties have those correspondence, which can and will be produced to the court if they become necessary.

irreparable harm, when they are entitled to receive treatment in an appropriate mental health facility.

STATEMENT OF FACTS

A. EVENTS GIVING RISE TO LAWSUIT

The background to this lawsuit is described fully in Plaintiffs' Brief in Support of a Renewed and Amended Motion for a Preliminary Injunction, ECF 48, filed in May 2017. A summary of the background follows.

Plaintiffs are a group of mentally disabled criminal defendants who have been (a) examined and deemed incompetent by a psychiatrist to stand trial; and (b) ordered by a Pennsylvania state Common Pleas Court judge to undergo competency restoration treatment in either Norristown State Hospital ("Norristown") or Torrance State Hospital ("Torrance"). When Plaintiffs filed this lawsuit, DHS provided only about 200 beds for competency restoration treatment in Norristown and Torrance. The waitlist for admission to these hospitals grew to the hundreds. Plaintiffs would languish in jail—a punitive environment, without treatment or adequate mental health care, and often in solitary confinement—for months and even *years* while awaiting transfer. Plaintiffs are sick people, and the unbearably long wait times they have had to experience have caused them to grow even sicker.

The Fourteenth Amendment's Due Process Clause forbids such callous treatment. Federal courts have held that wait times that exceed *seven days* violate an individual's rights against improper detention. The Commonwealth's delays in transferring these defendants far exceed seven days. In fact, when this suit was first filed, the Commonwealth's delays were among the very worst delays in the United States—and might in fact have been *the* worst. Undersigned counsel investigated this case for over a year and brought suit only after efforts to resolve the matter consensually failed. Accordingly, in October 2015, Plaintiffs filed this putative class-action lawsuit to remedy DHS's systemic and indefensible violation of the due process rights of mentally disabled criminal defendants who are incompetent to stand trial. *See generally* Complaint, ECF 1.

B. THE FIRST INTERIM SETTLEMENT AND DHS'S FAILURE TO COMPLY

On January 27, 2016, on the eve of trial, Plaintiffs and DHS agreed to an interim settlement ("First Interim Settlement"), which this Court approved. *See* ECF 35. DHS stipulated in the interim settlement that wait times of sixty days were unconstitutional. *Id*. at ¶ 1. DHS also agreed not to oppose certification of a class of persons that have been declared incompetent by the courts to stand trial on criminal charges and who have been ordered committed to DHS hospitals for treatment to help them attain competence, *id*. at ¶ 2, thereby paving the way for class-wide, systemic relief.

The First Interim Settlement required DHS to do four things:

- *First*, by March 27, 2016, DHS needed to conduct "assessments" of all persons on the waitlists to be admitted to DHS hospitals, and of all hospital patients "to determine which persons would be eligible legally and clinically for less restrictive placement and, if so, what barriers exist to such a change in placement." *Id.* at ¶ 5. Additionally, DHS was required to assess why persons "not legally eligible presently for less restrictive placement . . . [are] not eligible and what it would take to make the person eligible." *Id.*

- *Second*, by April 27, 2016, DHS needed to make available an additional $1 million of funding "to create supportive housing opportunities" in Philadelphia. *Id.* at ¶ 3b.

- *Third*, by May 27, 2016, DHS needed to "create at least 60 new placement options in the Commonwealth of Pennsylvania." *Id.* at ¶ 3a. Furthermore, by June 27, 2016, DHS needed to create at least *another* 60 new placement options (for a total of at least 120) in the Commonwealth. *Id.* at ¶ 3c.

- *Fourth*, DHS pledged to work over the sixty days following the agreement with "Plaintiffs' expert, Dr. Joel Dvoskin, Plaintiffs' attorneys, and stakeholders identified as necessary or helpful by Defendants" in order "to develop a strategic plan for reducing the wait times for admission . . . to clinically appropriate competency-restoration-treatment placement options within a constitutionally allowable time period." *Id.* at ¶ 6.

The First Interim Settlement also contained provisions that would allow Plaintiffs to ask this Court to enjoin DHS from further constitutional violations, *id.* at ¶ 7, in addition to asking this Court to enforce the settlement agreement, *id.* at ¶ 12.

Plaintiffs put DHS on notice of its failure to comply with the First Interim Settlement as early as September 23, 2016. DHS failed to produce by March 2016 the required "assessments" of all persons on the waitlists to determine who would

be eligible for less restrictive treatment and the barriers to their placement in such arrangements. In mid-October of 2016, more than six months after the deadline, DHS produced an elaborate chart that included useful information about persons on the wait list but not the required determinations. DHS also failed to develop the required "strategic plan" under the Settlement Agreement. When DHS finally produced a plan on October 11, 2016, late again, it contained no clearly defined objectives, no deadlines, and no allocations of responsibilities.

Worst of all, over the course of eight months following the agreement, the class members' plight deteriorated. As Plaintiffs advised DHS, "there appears to be little progress" in wait time reduction, and noted, among other problems, "[t]he average wait time for class members in Philadelphia to be admitted to Norristown or otherwise transferred from jail is on average a staggering ***350 days***." *See* ECF 48-10, at 1 (emphasis in original). Over and over again, Plaintiffs made this observation in writing to DHS in letters dated November 15, 2016, *see* ECF 48-7, November 23, 2016, *see* ECF 48-11, and April 5, 2017, *see* ECF 48-12, as well as during an in-person meeting on December 5, 2016.

But DHS was unable to solve its constitutional crisis or to make clear how it might do so in the future. By May 2017, the goals of the First Settlement Agreement were in shambles. Not only did wait times continue to exceed sixty days—which, again, DHS had stipulated was unconstitutional—but the number of

people waiting on the two hospital waitlists *increased* such that more people were waiting *longer* than they did in January 2016.

C. THE SECOND INTERIM SETTLEMENT

DHS's cavalier attitude towards remedying the ongoing due process deprivations of Commonwealth citizens led Plaintiffs to file a renewed and amended motion for a preliminary injunction on May 11, 2017. *See* ECF 40. In the motion, Plaintiffs noted that "[t]he delays challenged in this case are unconstitutional and have not improved since the settlement last year," *id.* at ¶ 3, and that DHS has been "given ample opportunity to address the unconstitutional wait times" but has completely failed to do so, *id.* at ¶ 11.

On June 15, 2017, Plaintiffs and DHS entered into another interim settlement ("Second Interim Settlement"), which this Court again approved. *See* ECF 59. Generally speaking, the Second Interim Settlement had three components:

- *First*, DHS agreed to hire the independent consulting firm Policy Research Associates ("PRA"), which would "conduct a thorough assessment of DHS's competency-restoration systems and processes" and "produce a report that [would] identify a strategy and recommend tangible actions to reduce wait times." *Id.* at ¶ 1. DHS would then either implement the recommendations in the report or inform the Plaintiffs why implementation would not be feasible. *Id.* at ¶ 3.

- *Second*, upon receiving the PRA report, DHS agreed to negotiate with Plaintiffs "on a maximum allowable wait time, an outstanding legal issue the parties reserved in the interim Settlement Agreement and which the parties reserve once again." *Id.* at ¶ 4. If DHS failed to reach an

agreement with the Plaintiffs concerning such a maximum wait time, Plaintiffs retained the right to file a motion "asking the Court to issue a declaratory judgment, preliminary injunction, or final injunction setting the maximum allowable wait time." *Id.*

- *Third*, by March 15, 2018, DHS agreed to make available additional resources for competency-restoration patients awaiting treatment, including a new "minimum security" unit consisting of 50 new forensic beds and an additional 29 DHS-funded treatment slots. *Id.* at ¶ 2.

D. DHS'S CONTINUING FAILURE TO REDUCE WAIT TIMES TO CONSTITUTIONALLY ACCEPTABLE LEVELS

PRA issued its report on December 29, 2017, which stated that the Commonwealth's competency-restoration system was "broken," and that there was a clear "absence of state-level leadership and creative commitment." Ex. A at 12. PRA also made eleven concrete recommendations to assist DHS in attaining compliance. On January 16, 2018, DHS informed Plaintiffs that it would accept and implement all eleven of DHS's recommendations. Ex. B at 2. DHS assured Plaintiffs that it would review the resources available and "develop a more specific timeline" to implement those recommendations. *Id.*

On March 30, 2018, Plaintiffs sent an email to DHS commending the "significant reduction[] in the number of patients on the waitlist and the wait times" at NSH. Ex. C. Plaintiffs' email noted, however, that waitlist size and wait times had recently "stabilized," i.e., stopped decreasing. *Id.*

On May 21, 2018, Plaintiffs sent a letter notifying DHS that "the number of persons languishing in jail after having been initially determined to be incompetent

to stand trial (IST) remains unreasonably high and the wait times remain unconstitutionally long." Plaintiffs noted that the waitlist count has risen to 203 patients, which—while down from the high of 280 in the Fall of 2017—has "risen consistently" since mid-February, 2018. *Id.* Plaintiffs also noted that the wait times are still as high as nine months—far longer "than the 60 days that [DHS has] already stipulated violates constitutional norms." *Id.* Plaintiffs observed that:

> [A]s of today, DHS has no plan for bringing the system into compliance with constitutional norms. To be clear, by "no plan," we mean DHS has no definition of what it means to comply with constitutional norms and it has no deadline for when it is going to achieve these undefined norms. The plan seems to be to just keep trying to make improvements here and there. Most of these efforts are good and welcome, but they will not get us within constitutional limits anytime in the foreseeable future. And our clients—very, very sick people—are languishing in jails where they are housed unconstitutionally.

As a result, Plaintiffs advised DHS in express and unambiguous terms that ***"it is imperative that DHS commit to solving this problem once and for all"*** (emphasis added). To that end, Plaintiffs insisted that DHS bring itself into compliance within a year and that it add placements "of whatever type you determine are necessary," and that "wait times are reduced to no more than seven (7) days by June 1, 2019."

The May 21 letter prompted a new round of negotiations between Plaintiffs and DHS. Plaintiffs and DHS traded proposals in letters dated June 8, 2018, July 25, 2018, and August 13, 2018, and also met in person on July 24, 2018. Of

particular note, in its July 25, 2018 letter, Plaintiffs explained that it was willing to allow DHS to push the deadline to get wait times down to a constitutional level from June 2019 to September 2019—but no later.

Between October 4, 2018, when Plaintiffs sent DHS a proposal for a Third Interim Settlement agreement (which included a September 2019 deadline) until today, Plaintiffs have had to prod and cajole DHS to negotiate and finalize the details of a third settlement agreement. Since October 2018, the parties have had three substantive discussions on a potential agreement, the most recent one being a telephone call on January 23, 2019. Based on that discussion, Plaintiffs sent DHS a revised settlement agreement on January 28. Defendants failed to respond. When Plaintiffs prodded DHS on February 7 for a response, DHS advised that they would respond the week of February 11. Several weeks later, and with no further word from DHS, Plaintiffs sent a stern demand on February 25 for an immediate response. DHS neither replied nor acknowledged the entreaty.[2] Indeed, it was not until the evening of March 18—and only after Plaintiffs emailed a request for

[2] The chronology for the entire exchange is outlined in an February 25, 2019 email from ACLU Legal Director, Witold Walczak, to DHS. DHS has not disputed the chronology outlined in this email. Plaintiffs are prepared to submit the email and additional email documentation as necessary to corroborate further each of these events.

concurrence or non-concurrence *to this very motion*—that Defendants finally replied.

To this day, DHS has not provided a substantive response to Plaintiffs' January 28, 2019, draft settlement proposal. It has also been two months since DHS has communicated with Plaintiffs about settlement or resolving its ongoing constitutional violations. Needless to say, the failure to reach settlement has not been for a lack of trying on Plaintiffs' part.

Meanwhile, DHS's most recent waitlist, dated March 8, 2019, notes that one person has been awaiting admission to a DHS hospital since May 15, 2018—or for 297 days.[3] Other people have been waiting 162, 155, 141 and 140 days for admission to NSH. Thirteen people on the NSH list had been waiting more than four months, with another seventeen waiting more than three months. Overall, 45 people on the NSH list have been waiting more than the 60 days DHS has agreed is plainly unconstitutional. TSH wait times are down to between one and two months. The reduced wait times at both hospitals are a welcome improvement from two years ago, but still they far exceed constitutionally allowable maximum times.

[3] The wait times are based on DHS's referral date, which is the date on which DHS receives all necessary paperwork to effect the transfer. Plaintiffs have advised DHS that the operative start date must be the date of the state court commitment order, which tends to be between one and four weeks before the DHS referral date. Therefore, in reality the actual wait times described here are fifteen to thirty days longer.

It has been three-and-a-half years since DHS first assured Plaintiffs that it could fulfill its constitutional obligations without a court-ordered injunction. Plaintiffs have been informing DHS for *nearly a year* that it could avoid additional litigation if it could provide assurance that it would remedy the problem at issue by September 2019, to no avail. Accordingly, because the Plaintiffs and DHS have been unable to agree on a maximum allowable wait time, and have been unable to update the Second Interim Settlement, the Plaintiffs must exercise their rights under ¶¶ 4 and 10 of the Second Interim Settlement and seek a preliminary injunction.[4]

II. ARGUMENT

A. DHS'S CONTINUINING CONSTITUTIONAL VIOLATIONS REQUIRE ENTRY OF A PRELIMINARY INJUNCTION

Plaintiffs are entitled to a preliminary injunction because: (1) they are likely to succeed on the merits; (2) they are suffering and likely to continue to suffer irreparable harm in the absence of the injunction; (3) Defendants will not suffer greater harm than the Class A members if the injunction is granted; and (4) granting the injunction is in the public interest. *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 115 (3d Cir. 2018).

[4] Plaintiffs are willing to continue settlement discussions during the pendency of this motion.

1. Class A members are likely to prevail on the merits of their constitutional claims[5]

The United States Court of Appeals for the Third Circuit recently stated the controlling law in this case: "it is well-established that the extended imprisonment of pretrial detainees when they have been ordered to receive [mental health] services violates the Constitution." *Geness*, 902 F.3d at 363; *see also id.* (citing, *inter alia*, *Foucha v. Louisiana*, 504 U.S. 71, 77 (1992); *Trueblood v. Wash. State Dep't of Soc. & Health Servs.*, 822 F.3d 1037, 1039 (9th Cir. 2016); and *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1122 (9th Cir. 2003)). In fact, the Third Circuit has found that the "Commonwealth acknowledged as much" in the First Interim Settlement agreement *in this very case*. *See id.* at 363 n.14. In that agreement, DHS conceded that wait times for admission to DHS hospitals that

[5] Plaintiffs pled this action on behalf of two classes, Class A and Class B. Class A is defined as:

> All persons who are now, or will be in the future, charged with a crime in the State of Pennsylvania, and who: (a) are adjudged by a court to be mentally incompetent to stand trial; (b) are committed to Defendants for competency restoration treatment; and (c) have not been admitted by Defendants for such treatment within seven (7) days of the date of the court's commitment order.

See Complaint, Docket No. 1, ¶ 181. Class B plaintiffs are those who have already been committed to state hospitals, but are trapped there indefinitely. *Id.*, ¶ 193. Class B plaintiffs are not at issue in this motion.

exceed 60 days violate the Constitution, ECF 35 at ¶ 1—and wait times for admission *still* exceed 60 days.

Every federal court that has considered this issue has required that transfers must occur in less than twenty-one days. *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101 (9th Cir. 2003) (seven days); *Trueblood v. Washington State Dep't of Soc. & Health Servs.*, 101 F. Supp. 3d 1010, 1023 (W.D. Wash. 2015) (seven days absent individualized good cause finding), *vacated and remanded on other grounds*, 822 F.3d 1037 (9th Cir. 2016); *Advocacy Ctr. for the Elderly and Disabled v. Louisiana Dep't of Health and Hosps*, 731 F. Supp. 2d 603, 627 (E.D. La. 2010) (hereinafter "*Louisiana Advocacy Center*") (21 days). Other federal courts have determined that waits shorter than those Class A members presently endure in Pennsylvania are unconstitutional. *See Disability Law Ctr. v. Utah*, 180 F. Supp. 3d 998 (D. Utah 2016) (wait times of thirty to 180 days are unconstitutional).

DHS has been on notice for months that Plaintiffs have been seeking to resolve this issue once and for all by September 2019. DHS, however, has failed to complete an updated Settlement Agreement while the wait times continue to exceed any reasonable constitutional maximum. Accordingly, a preliminary injunction in this case is both necessary and appropriate.

2. Plaintiffs are suffering irreparable harm

Class A members are suffering irreparable harm because they are being detained for unconstitutional lengths of time in penal institutions and because they are not receiving adequate and necessary mental-health treatment. *See Geness*, 902 F.3d at 363 ("[D]etention in a jail is no substitute for mentally ill detainees who need therapeutic evaluation and treatment." (quoting *Trueblood*, 822 F.3d at 1039)). The Plaintiffs have a fundamental right to be free from imprisonment: "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (setting presumptively reasonable time limits on immigration detention); *see also United States v. Washington*, 549 F.3d 905, 917 & n.17 (3d Cir. 2008) (noting that the "potential for excess prison time" is irreparable harm).

Moreover, prolonged incarceration of severely mentally ill people, like the Class A members, threatens serious psychological harm. The district court in *Trueblood* made this abundantly clear:

> For class members suffering from mental illness, each additional day spent incarcerated—especially in solitary confinement—makes that class member's mental illness more habitual and harder to cure, resulting in longer restoration periods or in the inability to ever restore that person to competency. Longer restoration treatment periods increase the cost to the state and therefore to the public of treating that individual, and longer restoration periods stymie the efficient use of restoration bed space.

Trueblood, 2016 WL 4268933 at *13. The *Louisiana Advocacy Center* court similarly found that psychotic individuals' conditions can be exacerbated while in jail, *see* 731 F. Supp. 2d at 625, and another federal court cited evidence that delay in evaluation and/or treatment makes it more difficult to treat mentally ill inmates in the future, *see Terry ex rel. Terry v. Hill*, 232 F. Supp. 2d 934, 940-41 (E.D. Ark. 2002).

The combination of illegal imprisonment and failure to receive essential mental-health treatment while in detention unquestionably amounts to irreparable harm.

3. The harm to class members of not granting an injunction outweighs harm to DHS of ordering timely transfers to treatment, and an injunction is in the public interest

The cost to DHS of providing the resources needed to stop violating Plaintiffs' due process rights cannot be compared with, never mind outweigh, the heavy costs of the due process violations Plaintiffs currently face. A lack of funds is not a legitimate state interest. *See Mink*, 322 F.3d at 1121 ("Lack of funds, staff or facilities cannot justify the State's failure to provide . . . treatment necessary for rehabilitation." (internal quotation marks and citation omitted)); *Louisiana Advocacy Ctr.*, 731 F. Supp. 2d at 624 ("[L]ack of funding cannot justify the continued detention of defendants who have not been convicted of any crime, who are not awaiting trial, and who are receiving next to no mental-health services.");

Terry, 232 F. Supp. 2d at 944 ("[L]imited resources cannot be considered an excuse for not maintaining the institution according to at least minimum constitutional standards." (internal quotation marks and citation omitted)); *see also Monmouth Cty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 351 (3d Cir. 1987) (holding that county's financial burden is not a legitimate state interest to justify violating prisoners' rights).

Finally, it is in the public interest to ensure that individuals detained awaiting competency restoration treatment do not face excessive wait times in prisons and jails. The Commonwealth's purpose in holding Plaintiffs is to provide them with competency restoration treatment so that they might stand trial. However, the current excessive wait times undermine the Commonwealth's interest in treating Plaintiffs because while they languish without treatment, Plaintiffs' competency is likely to deteriorate further. *See Mink*, 322 F.3d at 1121 (explaining that such "incapacitated criminal defendants do not receive care giving them a realistic opportunity of becoming competent to stand trial"). Simply put,

> [t]he lengthy detention of incompetent defendants in county jails without adequate mental health treatment is not reasonably related to the State's interest in determining whether there is a substantial probability that the defendants' competency can be restored in the foreseeable future or to its interest in actually restoring their competency so they may quickly and fairly be tried. The State is instead undermining these goals by holding incompetent defendants in jail for months without providing them adequate treatment.

Disability Law Center, 180 F. Supp. 3d at 1012.

III. RELIEF

Plaintiffs request that this Court grant a preliminary injunction ordering DHS to transfer all Class A members to a non-punitive, mental-health setting for restoration treatment within seven days of the Common Pleas Court's commitment order, and ordering that this be accomplished and then maintained going forward by no later than September 1, 2019.

Plaintiffs ask that the Court impose the same seven-day time limit imposed by federal courts in *Mink* and *Trueblood*. The *Trueblood* court followed *Mink*, wherein the Ninth Circuit upheld the district court's ruling that mentally incapacitated criminal defendants must be admitted for treatment within seven days of a court's competency finding. 322 F.3d at 1123. Courts in both cases drew support for the maximum wait times from the language and history of the states' respective commitment statutes, but the overarching constitutional imperative is not subject to legislative vicissitudes: "Holding incapacitated criminal defendants in jail for ***weeks or months*** violates their due process rights because the nature and duration of their incarceration bear no reasonable relation to the evaluative and restorative purposes for which courts commit those individuals." *Id.* at 1122 (emphasis added). While some courts have used slightly longer periods, given DHS's lack of success in reducing the wait lists even to levels that *DHS itself* admits is constitutionally acceptable, this Court should enter the

maximally protective measure, and require DHS to implement that measure by September 2019 at the latest.

A seven-day transfer period strikes the appropriate balance between the manifest interests of the Class A members and any ill-defined countervailing interests that DHS might advance. Plaintiffs have a legitimate interest in freedom from incarceration absent a criminal conviction and in receiving competency restoration treatment. *Id.* at 1121 ("Incapacitated criminal defendants have liberty interests in freedom from incarceration and in restorative treatment."). DHS, on the other hand, has offered no legitimate interest in detaining Plaintiffs for more than seven days. To be sure, DHS faces administrative hurdles and resource constraints, but, as explained above, such limitations cannot justify Plaintiffs' prolonged incarceration. *Disability Law Ctr.*, 180 F. Supp. 3d at 1010 ("[A] state's . . . *sole justification* for[] continuing to detain a defendant pretrial after he has been declared incompetent—opposed to releasing him—is to evaluate whether there is a substantial probability that he will become competent in the foreseeable future." (emphasis added)).

CONCLUSION

For the forgoing reasons, Plaintiffs request a preliminary injunction setting a maximum allowable wait time of seven days from the date of the Common Pleas'

Court's commitment order, with a firm deadline of September 1, 2019, by which DHS must reduce the wait time to that maximum period.

Dated: March 19, 2019

Respectfully submitted,

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