

Appeal No. 20-35540

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DISABILITY RIGHTS OREGON.,

Plaintiff-Appellant,

vs.

PATRICK ALLEN and DOLORES MATTEUCCI,

Appellants-Appellees.

**OPENING BRIEF OF APPELLANTS,
DISABILITY RIGHTS OREGON and METROPOLITAN PUBLIC
DEFENDER, INC.**

Appeal from the United States District Court
For the District of Oregon (Portland)
The Honorable Michael W. Mosman
United States District Judge
No. 3:02-CV-00339-MO

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant Disability Rights Oregon and Plaintiff-Appellant Metropolitan Public Defender, state that neither organization has a parent corporation and that no publicly-held companies hold 10% or more of either entity's stock.

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I. INTRODUCTION

For over eighteen years, the constitutional rights of pretrial detainees with disabilities have been protected by a permanent injunction requiring their timely transfer out of jail so that they may receive court ordered mental health services from Oregon State Hospital and Oregon Health Authority. The district court, whose 2002 reasoning and ruling was affirmed by this Court, ordered a seven-day bright line deadline for transfer of these patients from jails to the hospital. This deadline was determined after an evidentiary trial examining the risk of harm to these individuals languishing in jail, and applying the standard set by the Due Process Clause. *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1122 (9th Cir. 2003) *affirming* No.CV 02-339-PA, 2002 WL 35578910, at *7 (D. Or. May 10, 2002).

From the time the injunction was imposed in 2002 until 2019, and despite their protestations at the time that compliance with the injunction was beyond their control, the defendants have largely remained in compliance with this injunction. They stopped complying with the injunction in May 2019. Plaintiffs moved the district court to hold them in contempt. Defendants' defense to the contempt was the same as their defense to the original injunction: they claimed their lack of compliance was due to factors out of their control related to the increase in referral rates for mental health competency services. Over plaintiffs' objections and a

subsequent appeal to this Court, the district court provided defendants additional time to come into compliance, which they achieved in August 2019. At that time, plaintiffs cautioned that if defendants did not develop a long-term plan for maintaining compliance including rapidly expanding community-based services, compliance issues would persist.

In March 2020, in response to COVID-19, defendants unilaterally issued policies that effectively shut the Oregon State Hospitals' doors. No patients were admitted for several months. This caused the waitlist to grow exponentially to dozens of pretrial detainees languishing in jails for months. In their motion to modify the permanent injunction, filed after they began violating the injunction, defendants claimed that unforeseen circumstances related to the COVID-19 pandemic and related hospital patient safety was their basis for their request. Plaintiffs applauded the state's efforts to protect current hospital patients from the virus but opposed the modification to protect the rights of pretrial detainees with the additional, heightened risk posed by incarceration during this pandemic. Plaintiffs repeatedly urged the state to consider its statutory authority to transport pretrial detainees to community-based restoration services and other alternatives to prolonged confinement in jail. Defendants failed to provide any reliable evidence regarding why they could not take other reasonable steps to comply with the order. The district court again granted the defendants' request over plaintiffs' objections.

It modified the injunction to effectively allow the state to admit patients beyond seven days, with no clear end in sight, as long as defendants file reports and attend periodic status conferences. As a result, the constitutional rights of pretrial detainees were violated in perpetuity. Appellants seek this Court's relief.

II. STATEMENT OF JURISDICITON

This is an appeal from an order granting a motion to modify a final judgment. ER 1. The district court had jurisdiction to enter the original injunction under 28 U.S.C. § 1983. Therefore, it had jurisdiction over the motion to modify. Fed. R. Civ. Pro. 60(b)(5); *Bellevue Manor Assocs. v. United States*, 165 F.3d 1249, 1252 (9th Cir. 1999). This Court has jurisdiction over this appeal under 28 U.S.C. § 1292(a)(1); *Valdivia v. Schwarzenegger*, 599 F.3d 984, 988 (9th Cir. 2010). An order modifying a final judgment is an interlocutory order under § 1292. *Id.* Appellants filed a Notice of Appeal on June 12, 2020. ER 38.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. When a district court has entered a permanent injunction after a full evidentiary trial that sets a minimum deadline for compliance to comport with constitutional requirements, may it later amend the judgment to suspend those constitutional deadlines entirely and for an indefinite period?

2. When a district court modifies a permanent injunction based on a moving parties' allegations of necessity, may it disregard whether alternative means of compliance with the injunction are possible?
3. When a district court modifies a permanent injunction, should it consider the overall public interest to determine that the relief is narrowly tailored to properly balance both the state and public's interests?

IV. STATEMENT OF THE CASE

On March 19, 2002, Plaintiff-Appellants Disability Rights Oregon (DRO) (then known as "Oregon Advocacy Center") and the Metropolitan Public Defender (MPD) filed a complaint in the district court under 28 U.S.C. § 1983 alleging violations of the Due Process rights of its clients and impairment of its own obligations to those clients. ER 167. The lawsuit sought injunctive relief only. *Id.* Following a full evidentiary trial, the district court made extensive findings of fact, and entered a permanent, statewide injunction requiring Defendant-Appellees to admit patients ordered committed under state law to the state hospital or other treatment facility "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 ORS § 161.370(2)." ER 3.

Defendants appealed the injunction to this Court, which affirmed in all respects. *Oregon Advocacy Ctr. v. Mink*, 323 F.3d 1101 (9th Cir. 2003). Critical to the district court's legal conclusions supporting the injunction were its extensive findings regarding the suffering of people with mental illness in county jails around the state. ER 6-13. This Court cited those same findings in affirming the district court. *Mink*, 323 F.3d at 1106-7. Among the findings made by the district court:

10. None of the jails in which these persons are held is able to provide treatment designed to restore a person found unfit to proceed to competency. People found unfit to proceed are often overtly psychotic and require special housing or segregation. They are unpredictable and disruptive, taking up valuable resources needed for the care of other inmates. If they refuse to take medications, they often decompensate rapidly. They often are confined in their cells for 22 to 23 hours a day because of their behavior. This exacerbates their mental illness.

11. Necessarily, the jails' only system for controlling inmates is disciplinary, which is behavior driven. Such a system is ineffective for mentally ill persons, and possibly harmful...

17. Promptly admitting persons found unfit to proceed is critical. This population has a high suicide risk, and psychosis can be an emergency requiring immediate treatment...

22. Every day of delay in transport harms those found unfit to proceed and hampers their ability to defend themselves. Attorneys and investigators are impaired by having to prepare a case months after the incident has occurred. The treatment-deprived client cannot provide information to the attorney, a defense cannot be prepared, and witnesses who may be critical to the case cannot be identified and may be unavailable at a later time. Trials, pleas and other means of

resolving prosecutions are delayed while these Appellants are incarcerated and awaiting eventual hospital admission and treatment.

ER 10, 11, 12.

Starting in roughly 2013, the State of Oregon watched as the number of individuals admitted to the Oregon State Hospital in need of restoration to competence rose by leaps and bounds, until the number of aid-and-assist patients at the Oregon State Hospital comprised more than 50% of its total patients. ER 152. In the fall of 2018, the hospital reached a breaking point and stopped admitting aid-and-assist detainees within seven days. *Id.* This period of noncompliance persisted from November 2018 to August 2019. CR 133. Plaintiffs sought relief from the district court but the district court declined to order any relief. CR 85, 91, 127.

On March 16, 2020, without leave of court, defendants announced that due to COVID-19, the state would effectively suspend admission to the Oregon State Hospital for all pretrial detainees adjudged incompetent to stand trial and court ordered for mental health competency services, with the exception of those individuals who would meet narrow emergency criteria. CR 151 and ER 125.¹

¹ No pretrial detainees met this narrow criteria nor were admitted between March 16, 2020, and April 13, 2020. ER 131.

On April 9, 2020, defendants agreed to begin limited admissions to the state hospital but acknowledged to the district court that the state would likely continue to violate the injunction with no clear deadline for compliance. CR 151, at 5. The effect of defendants' inaction was to cause thirty-two seriously ill pretrial detainees to languish in jail instead of being admitted to the hospital within seven days in violation of the district court's existing order. *See id.* at 5-6. Plaintiffs asked that any requested relief be narrowly enough tailored to balance the state's interests against interest of individuals with disabilities held in jail based on criminal accusations who have been court ordered to receive mental health competency services. CR 155.

On April 17, 2020, defendants sought to retroactively ratify their March 16th announcement to effectively halt admissions to the state hospital by filing their motion to modify. *See* CR 151. The defendants' motion sought court permission to delay the admission of any incompetent pretrial detainee for any period of time indefinitely. *Id.* Defendants admitted in their motion that they had ceased admitting patients (except on a limited emergency basis) from March 16, 2020 to April 13, 2020. *Id.* While defendants had slowly resumed admissions, that process was seriously delayed, fell far outside the trial court's seven-day window, and would continue to lag behind the requirements of the trial court's order until at

least June 2020. *Id.* Defendants alleged that this delay was necessary because of its fears of introducing patients infected with COVID-19 into the hospital. *Id.* ER 125. Defendants didn't produce any independent expert reports or evidence regarding mitigating the risk to this virus but instead relied upon declarations of hospital staff and google searches using "COVID-19 psychiatric hospital" as a search term to explain their actions. ER 125.

Plaintiffs opposed the motion, arguing the state had not met its burden to justify a modification and that its proposed modification was unlawful in any case because it would effectively allow the state to violate the constitution. Plaintiffs argued that even with limited admissions, the state could comply with the 2002 injunction. *See* CR 155. Defendants did not show that they could not, for instance, expand their quarantine capability within the hospital by allowing less seriously ill patients to move to community settings, directing some patients to other facilities designated by the state consistent with existing state statute, or transferring pretrial detainees to community based restoration programs. *Id.* at 10-12.

On May 6, 2020, the district court heard argument and gave defendants an opportunity to respond to some of these concerns and meet their burden, as well as the court's own concern that compliance could be sped up by introducing testing. Plaintiffs argued the original order articulated that the time to transport pretrial detainees was seven days based on constitutionally protected liberty interests and

that defendants should not be left to their own judgment to devise deadlines. ER

72-74. The District Court responded:

I don't view this challenge today as a challenge to the underlying order on its own terms, and if it were, I would reject that for the principles you've already written about and just referred to. So I agree with you there. So the question is whether the COVID-19 issues surrounding this pandemic represent something like the flood you referenced, something that requires a temporary new schedule and response to what would otherwise be the seven-day order that we return to as soon as possible.

ER 74. In response, defendants provided mere argument without evidence that they were pretty sure that the state had done everything to admit pretrial detainees (under the state's statute ORS 161.370 or ".370 patients") including discharging all existing .370 patients who no longer require hospital level of care and "if our predictions are right, we should be caught up sometime next month." ER 81-84.

Recognizing that the existing permanent injunction and the related constitutional liberty interests are to be honored, the district court indicated how it was leaning to rule:

My inclination is to allow a modification that is grounded in testing, order testing, and allow only the degree of further time necessary to do the testing and get the results in a medically sound way, on top of an order that moves any patients that aren't moved that are not .370 patients, and sends into community treatment or placement those who don't need to be sent directly to the State Hospital.

ER 94. The Court's resulting minute order asked defendants to "produce further briefing" on topics such as steps to maximize hospital capacity, testing capacity,

and “a new proposed modification to the injunction that includes a specific timeframe for transportation of .370 patient to OSH.” ER 194.

On May 12, 2020, the parties appeared before the district court and presented argument. ER 40. Plaintiffs argued that the state had still failed to meet its burden including responding to the district court’s instruction to provide information regarding how and when the state will maximize hospital capacity, why the state couldn’t discharge patients from jail into community restoration programs, and what specific timeframe the state could timely transfer patients from jail to the hospital to comport with the constitution. ER 43-46. Without evidence or briefing to respond to these outstanding questions, defendants simply stated they would be in compliance “at the end of June unless we just get an absolute flood of orders from the county.” ER 51. At the end of the May hearing, the district court ruled:

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.

ER 52. In its subsequent two-page order, the district court granted the state's motion to modify with certain limitations: Defendants would file progress reports every three weeks, introduce regular testing among newly admitted patients to open up new beds faster, appear at periodic status conferences, and inform the district court if it came into compliance with the terms of the original seven-day order. ER 2. However, the order did not include a reference to any specific timeframes to transport patients to the hospital to modify the previous order's constitutional bright line of seven days. *Id.*

In its July 13, 2020 progress report to the district court, defendants state that they have substantially complied with the seven-day admission timeline but anticipate they may not maintain compliance as soon as the end of July 2020 not because of COVID-19 infection disease protocols – their sole basis for their motion to modify – but because of discharges not keeping pace with admission. ER 34.

The district court's first status conference post modification occurred on August 3, 2020, when plaintiffs again raised the state's ongoing obligations to discharge patients in order to timely admit patients within seven days. ER 22. Instead of ordering an immediate response given defendants impending lack of noncompliance, the Court pushed out the "close watch" on the state by another three months. ER 24. The injunction remains modified. This appeal follows.

V. SUMMARY OF THE ARGUMENT

The district court abused its discretion by granting the state's motion to modify a permanent injunction when the state did not meet its burden to prove that compliance was impracticable by other means, and without a showing that the modification was in the public interest. The district court further erred by issuing an overbroad order modifying the 2002 injunction, indefinitely suspending the right to due process for pretrial detainees languishing in Oregon jails without any interim standards for speedy transport of detainees found incompetent to stand trial. Because the district court erred in modifying a permanent injunction, this Court should remand to the district court with an order to reverse its modification.

VII. ARGUMENT

The district court abused its discretion by granting a motion to modify that indefinitely suspends compliance with a foundational constitutional requirement for due process of law and fails to protect the public's interests.

A. Standard of Review

A district court ruling on a motion to modify an injunction is reviewed for abuse of discretion, use of an erroneous legal standard, or clearly erroneous findings of fact. *ACF Indus. Inc. v. California State Bd. of Equalization*, 42 F.3d 1286, 1289 (9th Cir. 1994). In examining whether a district court erred in granting a motion as a matter of law, the appellate court must conduct a de novo review

without deferring to the decision of the district court. *Cedar Rapids Community School Dist. v. Garret F. by Charlene F.*, 106 F.3d 822, 824 (8th Cir. 1997), *aff'd*, 526 U.S. 66, 119 S.Ct. 992, 143 L.Ed.2d 154 (1999) (standard of review for district court's interpretation of federal statutes is de novo).

B. The District Court Abused Its Discretion in Modifying the Original 2002 Injunction Below Its Constitutional Threshold.

A district court may not modify an injunction in a manner that would “create or perpetuate a constitutional violation,” nor may the court “rewrite” a judgment “so it conforms to the constitutional floor.” *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 391 (1992). 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).²

² A determination of constitutionally adequate treatment for pretrial detainees must be measured not by that which must be provided to the general jail population, but by that which must be provided to those committed for mental incompetency. *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”).

This Court recently reiterated that the state “had no legitimate interest in keeping [detainees] locked up in county jails for weeks or months following an incompetency determination.” *Trueblood v. Washington State Dep’t of Soc. & Health Servs.*, 822 F.3d 1037, 1044 (9th Cir. 2016) *citing Mink*, 322 F.3d at 1121. The protracted jail detention of those found incompetent violates the due process clause. *Id.* “Incapacitated criminal defendants have liberty interests in freedom from incarceration and in restorative treatment.” *Mink*, 322 F.3d at 1121.

The district court’s modification order in the present case does not explain nor address how the due process rights of Oregon pretrial detainees are preserved by keeping them in county jails. The 2002 judgment already found that unnecessary and protracted confinement in county jails “exacerbates their mental illness.” ER 10. In explaining its basis for granting the modification, the district court did acknowledge the constitutional liberty principle but indicated that a modification or “temporary new schedule” for compliance may be necessary during a pandemic but “only the degree of further time necessary.” ER 74, 94. However, the district court’s resulting modification order is indefinite as it does not include a temporary schedule nor a narrowly limited time period for defendants to transport patients and thus comply with the constitution. *See* ER 1-2. Further, the “close watch” the district court articulated it would have over defendants actions has been extended, at defendants’ request, from weeks to months with the next

status hearing not scheduled until November 2020. ER 22. In the intervening months, dozens of pretrial detainees will indefinitely languish in jail conditions that were already determined harmful to people with disabilities. That determination was made prior to a pandemic that disproportionately kills people with underlying conditions.

The district court's order in this matter, effectively suspending compliance with a due process requirement indefinitely, violates the prerequisite in *Rufo* that a modification cannot "create or perpetuate a constitutional violation" nor rewrite judgment so it "conforms to the constitutional floor." 502 U.S. at 391; *Taylor v. United States*, 181 F.3d 1017, 1024 n.13 (9th Cir. 1999); *Gilmore v. California*, 220 F.3d 987, 1006 n.23 (9th Cir. 2000). Where granting a requested modification would tend to allow further constitutional violations, the district court can and should deny the motion. *Hook v. State of Ariz.*, 907 F. Supp. 1326, 1343 (D. Ariz.), *aff'd sub nom. Hook v. Arizona Dep't of Corr.*, 107 F.3d 1397 (9th Cir. 1997), *as amended on reh'g and reh'g en banc* (Apr. 22, 1997) (where stopping funding for special master was likely to create more constitutional violations, the district court would not modify the injunction). Changed factual circumstances alone do not allow a district court to modify a final judgment that not only permits indefinite constitutional violations but also undermines the foundations of due process. The

principle is simple: no one can give permission slips to violate the constitution; that's exactly what the district court's order purports to do.

C. The District Court Abused Its Discretion by Granting a Motion to Modify When Appellees Failed to Meet Their Burden of Proving a Legitimate Factual or Legal Basis

Federal Rule of Civil Procedure 60 and the litany of court decisions interpreting this rule establish the process and basis for modifying a permanent injunction. Modification of an injunction is appropriate “if a significant change either in factual conditions or in law renders continued enforcement detrimental to the public interest.” *Horne v. Flores*, 557 U.S. 433, 447 (2009) (internal quotation marks omitted); *see also Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992) (modification may be appropriate where changed factual conditions make compliance with a decree substantially more onerous, where a decree proves to be unworkable because of unforeseen obstacles, or where enforcement of a decree without modification would be detrimental to the public interest).

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*). 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 omitted). 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 391.

Here, plaintiffs concede that, as a general proposition, the COVID-19 pandemic has wrought significant changes to all aspects of our lives, and to the administration of hospitals and jails in particular. Public health officials have explained that this virus disproportionately impacts people with disabilities and presents a higher risk of infection rate in congregate care facilities like hospitals and jails. However, plaintiffs strenuously disagree that the state’s sole option to respond to this crisis and keep patients (and prospective patients) safe is to sharply limit who is admitted to the state hospital. As early as March 19, 2020, plaintiffs sent a counter proposal strongly urging the state to use its emergency authority to transfer pretrial detainees to other designated locations instead of the state hospital including existing or newly expanded outpatient restoration programs. CR 156-A. The state ignored this proposal and stood by their unilateral decision to simply halt or limit admissions to the state hospital.

The state failed to suitably tailor their motion to resolve the problem of COVID-19 infection risk to incoming patients or pretrial detainees who have been court ordered into the state's care and custody. While conceding that the defendants' submission in support of its motion to modify was "inadequate," ER 52, the district court erred when it issued a two-page order granting the state's motion. The order lacked any reference to findings of fact or law nor any specific timeframes or objective metric to transport patients to the hospital to modify the previous order's constitutional bright line of seven days. *Id.*

In *Flores v. Lynch*, 828 F.3d 898, 910 (9th Cir. 2016), the Ninth Circuit rejected a similarly sweeping modification to a consent decree governing immigrant detention. The federal government, in *Flores*, sought to remove certain protections for some unaccompanied minors apprehended by immigration authorities originally provided for in a consent decree, because of a recent surge of young people detained by immigration authorities. 828 F.3d at 909. This Court stated that "we cannot fathom how a 'suitably tailored' response to the change in circumstances would be to exempt an entire category of migrants from the Settlement, as opposed to, say, relaxing certain requirements applicable to all migrants." *Id.* Just as the *Flores* Court found that federal immigration authorities could not strip minors accompanied by parents of their rights in order to preserve the rights of unaccompanied minors, the Oregon defendants cannot leave patients

in psychiatric crisis in jails indefinitely in the name of protecting other patients. *Id.* at 909 (holding the “creation of statutory rights for *unaccompanied* minors does not make application of the Settlement to *accompanied* minors “impermissible”) (emphasis in original). Indefinite suspension of a constitutional mandate in favor of a formless, standardless modification is an error because it effectively abolishes any meaningful protection of the due process rights of pretrial detainees with disabilities who are at even greater risk of harm by prolonged confinement in local jails during an infectious disease pandemic.

D. The District Court Erred to the Extent It Held Defendants Could Not Maintain Compliance with the Original Order

In issuing the order modifying the permanent injunction, the district court wrongly relied on defendants’ self-assessment that they could not maintain compliance with the 2002 injunction, disregarding several alternative courses of action that could have furthered defendants’ legitimate interests and ensure defendants continue to meet its constitutional obligations. Bare allegations of inability to comply with an injunction are not adequate evidence to support a modification. *Asarco*, 430 F.3d at 984. While this was not plaintiff appellants’ motion nor related burden, we did provide several reasonable alternatives that defendants could take to both limit admission to the state hospital during a pandemic and maintain their compliance with the previous order including diverting the most stable patients already resident at the hospital to community

placements or diverting pretrial detainees found incompetent to community placements or other sites other than the Oregon State Hospital. *See* CR 155, 168-

A. To the extent defendants could not find such placements, they still retain the existing state statutory authority to recognize or designate new placements.³

Ultimately, defendants produced no evidence and the district court made no factual findings on these points.

E. The District Court Erred by Failing to Retain the Essential Features of the Original Order and Consider the Public Interests

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

³ It bears repeating that the district court already found in 2002, and this Court affirmed, that any claimed lack of resources is an insufficient justification given the gravity of harm at issue. *Mink*, 322 F.3d at 1121 (“Lack of funds, staff or facilities cannot justify the State's failure to provide [such persons] with [the] treatment necessary for rehabilitation.”) (citation omitted); *Oregon Advocacy Ctr. v. Mink*, No. CV 02-339-PA, 2002 WL 35578910, at *6 (D. Or. May 10, 2002).

sufficiently narrowed in light of the relevant facts or circumstances cited to as the basis for modification. 430 F.3d at 979.

The crux of the trial court's holding in 2002 was: "Indefinitely 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-19 than the Oregon State Hospital. While the public health backdrop of this debate has changed, the fundamental dispute is the same: prolonged jail confinement harms incompetent pretrial detainees and those putative patients have "a right to a reasonably timely transport to a treatment facility." *Id.*

The district court wrongly considered only the narrow issue of whether limiting admissions to the Oregon State Hospital was detrimental to defendants' interests, rather than the larger public interests. *Horne*, 557 U.S. at 453 (modification permissible where continued enforcement "detrimental to public interest"). Defendants presented no evidence and the district court made no findings suggesting that local jails in Oregon were better prepared or more capable of addressing the needs of seriously mentally ill people during the pandemic.

Defendants presented no evidence and the district court made no findings that the spread of COVID-19 within county jails would be less severe, more easily managed, or otherwise in the public interest. Showing that the operation of the Oregon State Hospital would be simplified by protracted delay of admission of certain pretrial detainees is not the same thing as finding that the public interest on the whole favors that delay or that the state hospital is the only option to provide the court ordered services. For example, existing state law allows defendants to transfer pretrial detainees from jail to community based restoration services. *See e.g.* ORS 161.370(2)(c)(B). We also do not know 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 is to receive defendants' services.

VIII. CONCLUSION

Because the district court exceeded its authority in modifying a permanent injunction protecting the liberty interests of pretrial detainees and mitigating the harms inflicted by prolonged incarceration of people with disabilities, this Court should reverse the district court's order and remand with an order to reimpose the original injunction.

STATEMENT OF RELATED CASES

Appellants MPD and DRO are not aware of any pending related cases.

DATED: September 21, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jesse Merrithew, certify that on September 21, 2020 I filed electronically a copy of this opening brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, and that all parties to whom I am required to provide service are registered CM/ECF users, and that service of the motion and declaration shall be accomplished by the appellate CM/ECF system.

Date: September 21, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,341 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using [insert name and version of word processing program] Times New Roman 14-point font.

Date: September 21, 2020.

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