IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DISABILITY RIGHTS NORTH CAROLINA, *Plaintiff*, v. THE NORTH CAROLINA DEPARTMENT OF HEALTH AND AND HUMAN SERVICES and KODY KINSLEY, in his official capacity as Secretary of the North Carolina Department of Health and Human Services, *Defendants*.	)	Case No. 1:24-cv-335

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

NATURE OF THE CASE

This case arises from the prolonged pretrial detention of people with mental health or cognitive disabilities in North Carolina's jails. People charged with crimes who are determined or believed to be incapable to proceed to trial (ITP) are often detained in county jails for excessive periods of time – totaling seven months or more – awaiting court-ordered assessment and treatment. These prolonged wait times violate the Fourteenth Amendment's

Due Process Clause, Title II of the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act (RA).

This prolonged, non-restorative detention is profoundly harmful to ITP individuals, whose mental health or cognitive disabilities are so severe that their capacity to participate meaningfully in their own defense is in doubt. North Carolina jails are not equipped to treat or safely house such individuals, so ITP detainees often decompensate drastically during their prolonged detention. Their symptoms worsen, escalating the risks they pose to themselves and others and undermining the state's interest in capacity restoration. These conditions result from the North Carolina Department of Health and Human Services' (NCDHHS) failure to provide prompt capacity assessments and treatment to individuals who are determined or believed to be ITP.

Disability Rights North Carolina (DRNC),[1] in its capacity as a federally mandated protection and advocacy agency representing the interests of disabled North Carolinians, seeks a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure requiring NCDHHS and its Secretary to provide ITP detainees with (1) completed capacity assessments

[1] This Court has held that Plaintiff DRNC may assert associational standing on behalf of its constituents. *Timothy B. v. Kinsley*, No. 1:22-CV-1046, 2024 WL 1350071, at *37 (M.D.N.C. Mar. 29, 2024).

within fourteen days of a judicial order directing such assessment and (2) restoration services within fourteen days of a judicial determination that a detainee is incapable to proceed.

STATEMENT OF FACTS

The prosecution of a person who — by reason of mental health or cognitive disability — is incapable of understanding the legal proceedings against them or assisting in their own defense, violates the due process clause. *Dusky v. United States*, 362 U.S. 402 (1960). To safeguard the rights of ITP detainees, Defendants North Carolina Department of Health and Human Services and NCDHHS Secretary Kody Kinsley (collectively, "NCDHHS") are statutorily responsible for the prompt provision of ITP assessments and restoration services. *See* N.C. Gen. Stat. § 143B-10(e), N.C. Gen. Stat. §§ 15A-1000-1010.

NCDHHS routinely fails at this responsibility. Persons suspected of being ITP often spend lengthy periods — on average 68 days — in county jails awaiting initial assessments used to determine their capacity to proceed. Ex. 1 at 1. (spreadsheet compiling average wait times for capacity assessments); Ex. 2 (Singh Decl. explaining compilation of data). Once found ITP, detainees spend, on average, another 145 days in jail awaiting placement in a state psychiatric hospital for restoration services or involuntary commitment for

treatment. Ex. 3 (NCDHHS record indicating average wait times for transfer to a state psychiatric hospital). Many wait far longer. These prolonged waits, which do not account for other delays plaguing the ITP process, amount to months during which ITP individuals languish in jails because of NCDHHS' failure to provide mandated services.

I. NCDHHS is responsible for ensuring prompt evaluation and treatment of ITP detainees.

The Supreme Court has long held that a criminal defendant who is suspected of being incapable to proceed to trial can be detained only for the "reasonable period of time necessary" to determine whether their capacity may be restored in the foreseeable future. *Jackson v. Indiana,* 406 U.S. 715, 738 (1972). An ITP individual may be detained only to restore their capacity or to promptly initiate civil commitment proceedings. *Id.*

In an effort to comply with *Jackson*, the General Assembly enacted Article 56 of Chapter 15A. *See generally* N.C. Gen. Stat. §§ 15A-1001–1008; N.C. Gen. Stat. Ch. 15A, Subch. X, art. 56 official cmt. These provisions make NCDHHS responsible for administering services to ITP individuals. At any time during criminal proceedings, the prosecution, defense, or judge may question the defendant's capacity to proceed. N.C. Gen. Stat. § 15A–1002(a). Once capacity is in question, the court must hold a hearing to determine if they may proceed to trial. *Id.* § 15A–1002(b)(1). The court may order a capacity

assessment, which is administered under the rules of NCDHHS's Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services, "to examine the defendant and return a written report describing the present state of the defendant's mental health." *Id.* § 15A-1002(b)(1a). Defendants charged with felonies may instead be ordered to a state hospital to determine the defendant's capacity to proceed. *Id.* § 15A-1002(b)(2). A defendant undergoing capacity assessment may not proceed to trial until after their capacity hearing. *Id.* § 15A–1002(b).

When the assessment is completed, the court may order the temporary confinement or security of the defendant pending their capacity hearing and ruling. *Id.* § 15A–1002(c). In felony cases where examination occurred at a state hospital, the sheriff must transfer the defendant back to county custody. *Id.* § 15A–1002(b)(2).

Once a defendant is found ITP, the court may refer them for involuntary civil commitment (IVC) if it finds reasonable grounds that the defendant is a danger to themself or others. *Id.* § 15A-1003(a). Detainees then undergo an additional commitment evaluation and hearing to determine whether they will be involuntarily committed. N.C. Gen. Stat. § 122C-263(d); N.C. Gen. Stat. § 122C-266(a).

II. NCDHHS fails to provide evaluation and treatment services necessary to prevent excessive detention of ITP detainees.

In 2022 and 2023, 3,802 detainees had capacity assessments. Ex. 1 at 1. Around 20% of those assessed are ultimately found ITP. Ex. 4 at 17. (2022 webinar presented by NCDHHS personnel). Under *Jackson* and Article 56 of Chapter 15A of the North Carolina General Statutes, NCDHHS is obligated to provide statutorily-mandated evaluations and restoration services promptly, so that ITP detainees do not languish in jail without treatment. Indeed, Chapter 15A was drafted to codify *Jackson*'s mandate that ITP detainees not "be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." N.C. Gen. Stat. Ch. 15A, Subch. X, art. 56 official cmt.

NCDHHS oversees four Local Management Entities/Managed Care Organizations (LME/MCOs) charged with arranging for access to mental healthcare providers: Vaya Health, Trillium Health Resources, Partners Behavioral Health Management, and Alliance Health. Ex. 5 (NCDHHS webpage listing LME/MCOs). LME/MCOs manage capacity assessments for misdemeanor and some felony defendants. 10A NCAC 27H.0202, 0205. Other felony defendants are evaluated by Central Regional Hospital, which is also operated by NCDHHS. 10A NCAC 27H.0202, 0205. NCDHHS, through the

LME/MCOs, is responsible for ensuring that local forensic evaluators meet the demand for forensic evaluations in their regions. 10A NCAC 27H .0205(a).

Since 2022, ITP detainees have waited an average of 68 days from the issuance of a court order for an initial capacity assessment.[2] Wait times for assessments by LME/MCOs average 24 days, and waits at Central Regional Hospital average 127 days. Ex. 1 at 1. Some detainees wait far longer. Barbara Brown[3] waited for three months for her assessment report to be completed. Ex. 6 at 1, 3 (Brown records). Carl Cline, a 26-year-old man diagnosed with bipolar affective disorder, mania with psychotic features, schizophrenia, and schizoaffective disorder, waited in jail for over three months. Ex. 7 at 1, 5, 7 (Cline records). Dillon Ledford,[4] who was arrested for calling in a false bomb threat at a local school while in a state of psychosis, waited six months to receive a capacity assessment.[5]

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[2] These wait times indicate the average duration between the day that the assessment facility receives the assessment order and the day that the assessment report is completed. *See* Exs. 1-2.

[3] To protect these individuals' privacy, Plaintiff substituted pseudonyms and redacted potentially identifying or irrelevant information from individual ITP records that are attached as exhibits to this Motion. Records are used in accordance with releases provided by these individuals' guardians.

[4] Because Mr. Ledford appeared in the publicly-aired documentary *Fractured*, he is not referred to by pseudonym. *See Fractured*, Frontline, (March 5, 2024), https://www.pbs.org/wgbh/frontline/documentary/fractured/.

[5] *Id.*; Kara Fohner, *Man accused of making bomb threat remains in jail awaiting mental health treatment*, Gaston Gazette (June 2, 2023), https://www.gastongazette.com/story/news/crime/2023/06/02/man-jailed-for-nearly-a-year-awaiting-mental-health-treatment/70278534007/.

These wait times are not rare. Since 2022, 1,228 ITP detainees have waited for two months or more for completion of their initial assessment reports. Ex. 1 at 1. 744 of those waited three months or more, and 400 waited 120 days or more. *Id*.

Once found ITP, these individuals often endure an even longer wait to receive restoration services or other intensive treatment necessitated by their disabilities. NCDHHS oversees three psychiatric hospitals that handle almost all restoration treatment and involuntary commitment examinations: Central Regional, Broughton, and Cherry. Ex. 8 at 4. (NCDHHS webpage). In December 2022, 273 people were waiting to be admitted at a state psychiatric hospital, 191 of whom were ITP detainees. Ex. 4 at 20.

Major reductions in bed space and treatment capacity have left ITP detainees to languish in jail for months and sometimes well over a year. Dillon Ledford ultimately waited 531 days in detention before being admitted to Broughton Hospital.[6] Adam Anderson, who has schizophrenia and schizoaffective disorder, waited nine months for admission to Cherry State Hospital. Ex. 9 at 3, 4 (Anderson records). Carl Cline waited for 10 months for admission to Broughton Hospital. Ex. 7 at 8. Again, these instances of delay are not unique: Since January 2022, ITP detainees have waited an average of

[6] *Fractured*, Frontline, (March 5, 2024), https://www.pbs.org/wgbh/frontline/documentary/fractured/.

145 days for admission to a state psychiatric hospital after they are ordered for involuntary commitment. Ex. 3.

Except for one pilot program currently operating in the Mecklenburg County jail, North Carolina's jails are not equipped to provide restoration treatment. Ex. 10 (Dr. Murrie Decl.) ¶ 4(c). ITP detainees suffer greatly from this prolonged confinement in jail, facing increased risk of psychiatric decompensation, self-harm, and harm to others. *Id.* ¶ 8.

In a letter dated March 17, 2023, DRNC and the ACLU of North Carolina Legal Foundation (ACLU-NC) formally contacted NCDHHS to express concerns about prolonged detention of ITP detainees. Ex. 11. Since then, DRNC, ACLU-NC, and NCDHHS staff have met on at least three occasions to discuss these concerns, but NCDHHS has not indicated that they have a plan for limiting wait times. Nor have Counsel's public records requests to NCDHHS elicited any plans that would address these statewide issues in the foreseeable future. Ex. 12. (NCDHHS email).

QUESTIONS PRESENTED

1. Does Plaintiff demonstrate a likelihood of success on the merits of its claims that NCDHHS:

    a. violates the Fourteenth Amendment by failing to provide prompt capacity assessments and restoration services, resulting in the prolonged incarceration of ITP detainees?

b. violates the Fourteenth Amendment because the prolonged delays faced by ITP defendants meaningfully alter the fairness of their criminal legal proceedings, depriving them of their procedural due process rights?

c. violates the ADA and the RA in its methods of administering ITP evaluation and treatment programs?

2. Does Plaintiff demonstrate a likelihood of irreparable harm absent preliminary injunctive relief?

3. Do the public interest and balance of equities weigh in favor of granting preliminary injunctive relief?

4. Should this Court waive security ordinarily required under Fed. R. Civ. P. 65(c)?

STANDARD OF REVIEW

Parties seeking a preliminary injunction must establish that (1) they are likely to succeed on the merits of their claim(s); (2) they are likely to suffer irreparable harm in the absence of an injunction; (3) the balance of hardships weighs in the party's favor; and (4) the injunction serves the public interest. *HIAS, Inc. v. Trump*, 985 F.3d 309, 318 (4th Cir. 2021) (*citing Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008)). Plaintiff "need not establish a certainty of success," just "a clear showing that they are likely to succeed at trial." *Roe v. U.S. Dep't of Defense*, 47 F.3d 207, 219 (4th Cir. 2020). Plaintiff readily meets these requirements.

ARGUMENT

I. Plaintiff is likely to succeed on the merits of its claims.

NCDHHS' failure to provide timely capacity assessment and treatment violates ITP detainees' rights under the Fourteenth Amendment's Due Process Clause, the ADA, and the RA.

First, Plaintiff should prevail on its substantive due process claim because NCDHHS's own data shows that ITP detainees frequently sit in jail for months awaiting the assessments and treatment that NCDHHS is legally obligated to provide. This violates *Jackson*'s mandate that pre-trial detention of ITP defendants be limited to "a reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." 406 U.S. at 738.

Second, Plaintiff should prevail on the merits of its procedural due process claim because ITP detainees' liberty interest in restoration — and the related ability to participate meaningfully in their own defense — is infringed upon by NCDHHS's failure to provide timely assessment and treatment.

Finally, Plaintiff should succeed on the merits of its claims under Title II of the ADA and Section 504 of the RA. NCDHHS' methods of administering ITP assessment and treatment services have resulted in prolonged, non-restorative detention of people with mental health disabilities, in violation of the ADA and RA.

A. DRNC is likely to succeed on its substantive due process claim.

In North Carolina, ITP individuals routinely sit in jail for seven months or more awaiting assessments and treatment that NCDHHS is required to provide. These prolonged periods of pre-trial detention violate ITP detainees' substantive due process rights for three reasons: (1) the nature and duration of their confinement is not reasonably related to capacity restoration (and in fact undermine ITP detainees' chances of restoration); (2) such long periods of confinement effectively constitute punishment absent conviction of a crime; and (3) the denial of prompt restoration services deprives ITP detainees of their liberty interests in health and safety.

1. Prolonged confinement of ITP detainees in county jails is not reasonably related to capacity assessment or restoration.

The lengthy detention of ITP defendants in county jails, for no reason other than NCDHHS's failure to provide timely mandatory assessment and treatment, unreasonably deprives ITP detainees of liberty and violates the due process principles announced in *Jackson*.

In *Jackson*, the Supreme Court examined the case of an Indiana man who was intellectually disabled, deaf, and unable to communicate "except through limited sign language." 406 U.S. at 717. Mr. Jackson was charged with robbery, and the state court initiated Indiana's then-existing process for

determining his competency to stand trial. *Id.* As required by Indiana law, Mr. Jackson was examined by two psychiatrists, who both concluded that Mr. Jackson was unable to understand the charges against him or participate in his defense. *Id.* at 718. Both doctors testified that it was unlikely Mr. Jackson would ever gain competency to stand trial. *Id.* at 718-19. The court then ordered that Mr. Jackson be committed "to the Indiana Department of Mental Health until such time as that Department should certify to the court that the defendant is sane." *Id.* at 719 (internal quotations omitted). Mr. Jackson appealed this order, arguing that his due process rights were violated by the court's imposition of what amounted to indefinite commitment.[7] *Id.*

The Supreme Court agreed: "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.* at 738. Thus, a criminal defendant "committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." *Id.* If capacity restoration is not substantially likely, "the State must either institute the customary civil commitment proceeding

[7] Mr. Jackson also asserted equal protection challenges to several statutory provisions distinguishing between civil and criminal detainees. *Id.* at 723. DRNC does not raise similar claims in this case.

that would be required to commit indefinitely any other citizen, or release the defendant." *Id*.

Although *Jackson* involved a court order that effectively authorized indefinite detention, its central holding — that the nature and duration of pretrial detention must bear some reasonable relation to the purpose for which the individual is committed — applies here, too.

Following *Jackson*, courts have held that ITP detainees' due process rights are violated (or likely violated) when they are detained in jails for long periods awaiting assessment or treatment services. *See United States v. Donnelly*, 41 F.4th 1102, 1106 (9th Cir. 2022) (six-month detention awaiting inpatient restoration treatment is impermissible); *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1106, 1121-1123 (9th Cir. 2003) (affirming injunction requiring detainees to be admitted to state hospital within seven days of a court finding of incapacity to proceed; deeming wait times of one to five months impermissible); *United States v. McCarthy*, No. 5:21-CR-61-RBD-PRL, 2023 WL 8291666, at *3 (M.D. Fla. Nov. 22, 2023) (pre-hospitalization detention of five months violates due process); *United States v. Reeves,* No. 321CR00047KDBDCK, 2023 WL 5736944, at *3 (W.D.N.C. Sept. 5, 2023) (pre-hospitalization detention of nine months "simply cannot be squared with" *Jackson*); *Trueblood v. Washington State Dep't of Soc. & Health Servs.*, No. C14-1178-MJP, 2016 WL 4418180 (W.D. Wash. Aug. 19, 2016) (mandating 14-

day limit to detention of individuals awaiting a competency evaluation admission and seven-day limit to detention awaiting hospitalization for restoration services); *United States v. Smith*, 764 F. Supp. 2d 541, 545 (W.D.N.Y. 2011) (defendant's due process rights were likely violated by ten-week pre-hospitalization detention in county jail); *Advoc. Ctr. for Elderly & Disabled v. Louisiana Dep't of Health & Hosps.*, 731 F. Supp.2d 603, 620-21 (E.D. La. 2010) (finding waits of six to nine months for restoration treatment likely violated the Due Process Clause); *Terry ex. rel. Terry v. Hill*, 232 F. Supp.2d 934, 938, 944 (E.D. Ark. 2002) (wait times of eight months for evaluation and over six months for restoration treatment violated the due process clause); *see also United States v. Wayda*, 966 F.3d 294, 309 (4th Cir. 2020) (affirming district court dismissal of a civil commitment proceeding where the government detained the defendant for six months after he was deemed incompetent to proceed before initiating commitment proceedings); *Disability L. Ctr. v. Utah*, 180 F. Supp.3d 998, 1004 (D. Utah 2016) (denying motion to dismiss due process claims brought by pretrial detainees awaiting competency restoration services where "it is not uncommon for these individuals to remain incarcerated in county jails for six months or more").

Under *Jackson*, such lengthy detention is impermissible because it is not reasonably related to the goal of capacity restoration or even the state's interest in bringing defendants to trial. In *Mink*, for example, the Ninth

Circuit was unable to discern "a legitimate state interest in keeping mentally incapacitated criminal defendants locked up in county jails for weeks or months." 322 F.3d at 1121. The court pointed to evidence showing that Oregon's jails were largely unequipped to meet the needs of detainees with severe mental health disabilities, and that lengthy exposure to typical jail conditions might cause detainees to decompensate, posing a danger to themselves and others. *Id.* at 1106-07. Further, the Oregon State Hospital's (OSH) failure to promptly admit ITP defendants "not only contravenes the legislature's statutory mandate that OSH provide them with restorative treatment, it also undermines the state's fundamental interest in bringing the accused to trial" by depriving them of care that might restore competency. *Id.* at 1121. *Accord Terry*, 232 F. Supp.2d at 943 ("lengthy and indefinite periods of incarceration, without any legal adjudication of the crime charged, caused by the lack of space at [the state hospital] is purposeless and cannot be constitutionally inflicted").

So too here. In North Carolina, ITP detainees' average wait time for an initial assessment is 68 days, and their average wait time for admission to state hospitals for restoration treatment or IVC assessments is 145 days, with some ITP detainees waiting far longer. Ex. 1 at 1, Ex. 2. These average wait times are similar to or exceed periods deemed unconstitutional by the Ninth Circuit and numerous district courts. *See supra* at 14-15. Moreover, some ITP

detainees are held in pretrial detention for longer than they would be incarcerated if they were convicted. The statutory limit on detention is the maximum possible sentence, N.C. Gen. Stat. § 15A-1008(a)(2), and many defendants would receive a shorter sentence if they were tried and convicted or entered a plea bargain.

These lengthy waits in jail are not rehabilitative, nor are the impacts negligible. Quite the opposite: as Plaintiff's expert attests, long jail stays without treatment cause significant harm to persons with serious mental illnesses, who are at high risk of psychiatric decompensation in jail. Ex. 10 (Dr. Murrie Decl.) ¶ 8. The lack of appropriate care combined with the stress of the jail environment often leads to the re-emergence of psychiatric symptoms and an increase in self-injury and suicide attempts. *Id.* ¶ 11. People with serious mental illnesses are more vulnerable to harm from others while incarcerated, and often have difficulty following rules, resulting in disciplinary actions and segregation. *Id.* Timely assessment and treatment are "crucial to prevent harm" of ITP detainees in jails. *Id.* ¶ 12.

2. Lengthy detention of ITP individuals constitutes punishment without conviction.

As pretrial detainees not yet convicted of the charges against them, ITP defendants have a liberty interest in freedom from punishment. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (certain conditions of confinement may violate a

pretrial detainee's due process rights when those conditions amount to punishment of the detainee). The prolonged detention of pretrial detainees in county jails in North Carolina violates due process because it does not bear the requisite "reasonable relation" to the purpose of detention (to restore ITP defendants' capacity to stand trial). *Jackson*, 406 U.S. at 738. "[E]ven if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal." *Id.*

Here, time spent waiting is not restorative, and progress toward restoration is undermined during prolonged detention. Ex. 10 ¶¶ 11-17. North Carolina jails do not provide restoration services and indeed struggle to provide even basic mental health care, let alone the more intensive mental health care needed by persons with severe mental health disabilities need. *Id.* ¶¶ 10-14. And even jail-based restoration programs — of which there is currently one in the state — are not suitable for many individuals with serious mental health disabilities, or for those with significant physical disabilities, which are "not uncommon in jail." *Id.* ¶ 4(c). ITP detainees suffer acutely from prolonged detention, amplifying the punitive nature of the detention. *Id.* ¶¶ 9-16.

Without a reasonable relationship between detention and the goal of' detention, "a court may reasonably infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees." *Bell*, 441 U.S. at 539. *See also United States v. Theron*, 782

F.2d 1510, 1516 (10th Cir. 1986) ("Although pretrial detention is permissible when it serves a regulatory rather than a punitive purpose, we believe that valid pretrial detention assumes a punitive character when it is prolonged significantly"); *Disability L. Ctr.*, 180 F. Supp.3d at 1012 (plaintiffs alleged conditions of detention "amount[ing] to punishment" where "[t]he State detains incompetent defendants for months without adequate mental health treatment after a court has ordered them committed to [the state's] custody to receive restorative treatment . . . . The State imposes these conditions on incompetent criminal defendants simply because there is no room at [the state hospital]."); *Terry*, 232 F. Supp.2d at 942-43 (prolonged detention of individuals awaiting treatment at the state psychiatric hospital amounted to punishment because it was not related to any legitimate state goal).

3. Prolonged detention deprives ITP detainees of their liberty interest in restorative treatment.

ITP detainees also "have a liberty interest in receiving restorative treatment" while they are detained. *Mink*, 322 F.3d at 1121. A "lack of inpatient mental health treatment, combined with the prolonged wait in confinement, transgresses the constitution." *Terry*, 232 F. Supp. 2d at 943.

Jails do not provide adequate mental health care, let alone care that provides "a realistic opportunity of becoming competent to stand trial." Ex. 10 ¶ 10; *see also Mink*, 322 F.3d at 1122. County jails, where ITP defendants are

usually detained, lack the capacity or resources to provide the restoration treatment that ITP defendants are entitled to under the due process clause and North Carolina law. *Id.* ¶ 3(d). The longer that individuals with serious mental illness go without appropriate care, the greater likelihood that their restoration treatment will be prolonged and unsuccessful. *Id.* ¶ 17. Prolonged waits for treatment cause "substantial clinical harms . . . with longer waits associated with greater harms, and greater difficulty attaining their capacity to proceed upon eventual treatment." *Id.* ¶ 18. For some persons with severe psychiatric symptoms, prolonged delays in beginning treatment may lower their likelihood of eventual restoration. *Id.* ¶ 15. NCDHHS's failure to provide restoration services thus deprives ITP defendants of their liberty interest in restoration.

B. Plaintiff is likely to succeed on its procedural due process claim.

The due process clause also protects ITP defendants from prolonged detention in county jails because such detention prejudices their interest in having their cases proceed to trial or dismissal. A procedural due process inquiry must balance (1) "the private interest affected," (2) "the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards," and (3) "the Government's interest, including the . . . administrative burden that additional or substitute

procedures would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

First, ITP defendants have a clear liberty interest in not being incarcerated without being convicted of a crime. *Mink*, 322 F.3d at 1121; *Meachum v. Fano*, 427 U.S. 215, 224 (1976). Freedom from incarceration is "the most elemental of liberty interests." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004). Because NCDHHS has failed to provide timely evaluations and restoration services — and because trial proceedings cannot occur while evaluation or restoration is pending — ITP detainees are denied reasonably expedient resolution of their criminal cases. *See* N.C. Gen. Stat. Ann. § 15A-1001, 1002; *Dusky*, 362 U.S. at 402.

Second, ITP detainees' fundamental liberty interests, most notably their interest in curtailing or avoiding pre-trial incarceration, are significantly impaired when they are held for months awaiting assessment or treatment. For Dillon Ledford and Adam Anderson, this deprivation of freedom was so severe that they were detained for over a year and a half before receiving treatment.[8] *See* Ex. 9. Such prolonged detention curtails ITP detainees' ability to competently defend against the charges against them. While waiting, ITP detainees do not receive restoration treatment that would enable them to

[8] Fractured, *Frontline*, (March 5, 2024), https://www.pbs.org/wgbh/frontline/documentary/fractured/.

contribute to defense strategy, they are unable to negotiate plea bargains, and they encounter additional difficulties in locating witnesses and securing fresh witness memories. *See, e.g., Mink*, at 1119 n.10 (affirming that prolonged detention of ITP defendants violated due process because "[p]ersons unfit to proceed and held in county jails for more than a brief period suffer delays in receiving restorative treatment, which delays their return to competency, prolonging their criminal cases and making it difficult for their attorneys to learn from their clients about the crime or crimes charged, to identify witnesses, and to enter into plea negotiations."). And, as discussed, delays in the provision of restoration services make eventual restoration more difficult. Ex. 10 ¶¶ 15, 18.

Third, the state's only possible legitimate interests in detaining ITP defendants — attempting restoration to bring defendants to trial or pursuing involuntary commitment — are undermined by prolonged detention. Ex. 10 ¶¶ 15, 18; *see also Disability L. Ctr.*, 180 F. Supp.3d at 1011 (denying motion to dismiss where plaintiffs alleged that the state "is undermining [the goal of bringing ITP detainees to trial] by holding incompetent defendants in jail for months without providing them adequate treatment"); *Trueblood v. Washington State Dep't of Soc. & Health Servs.*, 73 F. Supp.3d 1311, 1316 (W.D. Wash. 2014) ("There is, however, no legitimate independent interest in delays within the system because delays undermine the state's 'primary

governmental interest' of bringing the accused to trial."). While expediting access to services for ITP defendants will require state resources, the state's interests in providing timely adjudication of ITP defendants' cases are served by curtailing the detention of ITP defendants.

C. Defendants' methods of administering services for ITP defendants violate the Americans with Disabilities Act and the Rehabilitation Act.

NCDHHS's methods of administering capacity assessments and restoration services defeat or substantially impair the benefits of those programs for individuals with mental health disabilities, and therefore violate Title II of the Americans with Disabilities Act (ADA) and section 504 of the Rehabilitation Act (RA).

Title II of the ADA requires that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Similarly, Section 504 of the RA states that no person with a disability shall "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

The "language and implementing regulations of the ADA and the RA are

virtually the same." *Frederick L. v. Dep't of Pub. Welfare of Com. of Pennsylvania*, 364 F.3d 487, 501 n. 2 (3d Cir. 2004). To the extent possible, the Fourth Circuit construes the ADA and RA to "require a plaintiff to demonstrate the same elements to establish liability." *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 461 (4th Cir. 2012).

ITP detainees, as individuals who have or are believed to have mental health disabilities or other cognitive disabilities, are individuals with a disability within the scope of the ADA and RA.[9] "Qualified individuals" under the ADA are those "who, with or without reasonable modifications to rules, policies, or practices . . . or the provision of auxiliary aids and services, meet[] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). Similarly, the RA defines a qualified individual with a disability as "one who meets eligibility requirements relevant to the receipt of services provided in the program or activity." 29 C.F.R. § 32.3.

Defendants' methods of administering ITP assessment and restoration services result in unnecessary detention in county jails instead of the prompt

[9] Both the ADA and the RA define "disability" to include (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. 42 U.S.C. § 12102(1); 29 U.S.C. § 705 (9).

placement of ITP detainees in community-based programs or state psychiatric hospitals where they may receive appropriate treatment. An entity subject to the ADA or RA may not utilize methods of administration that (1) subject disabled individuals "to discrimination on the basis of disability" or (2) have the "purpose or effect of defeating or substantially impairing accomplishment of the objectives" of the program or activity with respect to individuals with disabilities. 28 C.F.R. §§ 35.130(b)(3), 41.51(b)(3). "[A]n omission as well as a commission can be an actionable method of administration" if the act or omission causes harm. *Dunn v. Dunn*, 318 F.R.D. 652, 665 (M.D. Ala. 2016); *see also State Office of Prot. & Advocacy for Persons with Disabilities v. Connecticut,* 706 F. Supp. 2d 266, 277-78 (D. Conn. 2010) (allegations that a state agency failed to adequately assess and identify plaintiff's needs was sufficient to state plausible claims under the ADA and RA).

Here, Defendants are responsible for the control or oversight of every aspect of the assessment and treatment, including admission to community- or hospital-based assessments and services. The harms that Plaintiff's expert has identified as resulting from prolonged detention include decompensation, increased severity of symptoms of detainees' mental health disabilities (including increased risk of self-harm or suicide), and the heightened risk that restoration will become impossible. Ex. 10 ¶¶ 15, 18-19. NCDHHS' omissions have the effect of defeating or substantially impairing the accomplishment of

the objectives of the ITP statutes by failing to provide timely restoration treatment services to people with severe disabilities, prolonging their suffering and potentially altering their lifelong prognosis. Defendants' failures to assess detainees' long-term needs and ensure the availability of mental health professionals to conduct capacity assessments and appropriate restoration treatment are omissions which violate the ADA and RA. *See State Office of Prot. and Advocacy*, 706 F. Supp. 2d at 278.

D. ITP detainees will suffer irreparable injury absent a preliminary injunction.

ITP detainees will suffer irreparable harm without a preliminary injunction limiting the time spent in jail awaiting assessments, treatment, or initiation of IVC proceedings. Of course, "the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, 2 F.4th 330, 346 (4th Cir. 2021) (cleaned up); *see also Advocacy Ctr. for Elderly & Disabled*, 731 F. Supp.2d at 625 (pretrial detention of incompetent criminal defendants "clearly constitutes irreparable harm") (quotations omitted).

In this case, the harm to ITP detainees is irreparable, independent of its constitutional or statutory character. As outlined by Plaintiff's expert, ITP detainees suffer severe consequences from their prolonged detention:

- prolonged mental pain and suffering (including increased risk of

decompensation and isolation), Ex. 10 ¶¶ 19-20,

- greater risk of harm to themselves or others, *Id*. ¶ 11,
- Increased severity of psychological symptoms and decreased capacity for eventual restoration, *Id*. ¶ 18.

These consequences clearly constitute irreparable harm, as they may permanently exacerbate the conditions of ITP detainees and result in irreversible physical and mental harm. *See Advocacy Ctr.*, 731 F. Supp. 2d at 625 (finding irreparable harm where "continued incarceration could exacerbate the Incompetent Detainees' mental conditions.")

II. The balance of equities weighs strongly in favor of an injunction.

As discussed in detail above, the denial of timely assessments and restoration services violates the rights of ITP detainees under the Fourteenth Amendment, ADA, and RA and causes severe and irreparable harm. Further, "keeping mentally incapacitated criminal defendants locked up in county jails for weeks or months . . . undermines the state's fundamental interest in bringing the accused of trial." *Mink*, 322 F.3d at 1121. These ongoing violations of ITP detainees' rights far outweigh any harm NCDHHS might incur from a preliminary injunction.

III. A preliminary injunction serves the public interest

Preliminary injunctive relief will uphold the rights of North Carolinians

who languish in county jails awaiting capacity assessments, restoration treatment, or initiation of the IVC process. It is in the public interest to ensure that ITP detainees receive treatment to prevent decompensation and to enable the expedient resolution of their criminal cases. *See Advocacy Ctr.*, 731 F. Supp. 2d at 626 (finding strong public interests in protecting the Fourteenth Amendment rights of pretrial detainees and in criminal defendants proceeding speedily to trial). Compliance with the Constitution, the ADA, and the RA is always in the public interest, as the "public interest favors protecting constitutional rights." *Leaders of a Beautiful Struggle,* 2 F.4th at 346 (quotations omitted).

IV. The Court should waive Rule 65(c)'s security requirement.

Rule 65(c) of the Federal Rules of Civil Procedure provides that a "court may issue a preliminary injunction . . . only if the movant gives security." But "the district court retains the discretion to set the bond amount as it sees fit or waive the security requirement." *Pashby v. Delia*, 709 F.3d 307, 332 (4th Cir. 2013). Bond may be waived where "important federal rights" are at stake. *Taliaferro v. North Carolina State Board of Elections,* 489 F. Supp.3d 433, 440 (E.D.N.C. 2020) (waiving bond in case alleging violations of the ADA and RA). Security is intended to compensate the enjoined party for harm it may suffer from an improper injunction. *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174

F.3d 411, 421 n.3 (4th Cir. 1999).

Here, Defendants have no legitimate interest in continuing to subject ITP detainees to prolonged detention. Because this case implicates constitutional rights of pretrial detainees, waiver is appropriate.

CONCLUSION

For the foregoing reasons, this Court should issue a preliminary injunction ordering that (1) ITP detainees receive completed capacity evaluations no longer than fourteen days after a court orders such evaluations; and (2) ITP detainees be provided access to restoration treatment or initiation of IVC treatment no later than fourteen days following a court order directing such placement.

Respectfully submitted this is 13th day of May 2024.

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CERTIFICATE OF WORD COUNT

Pursuant to L.Cv.R. 7.3(d), I hereby certify that this brief is less than 6,250 words, as calculated by the word processing software used to prepare this brief.

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