No. 20-990

IN THE
Supreme Court of the United States

THOMAS J. DART, SHERIFF OF COOK COUNTY, ILLINOIS,
Petitioner,

v.

ANTHONY MAYS, INDIVIDUALLY AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED PERSONS, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

EASHA ANAND
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
2443 Fillmore St., #380-15875
San Francisco, CA 94115

MEGHA RAM
KATHRINA SZYMBORSKI
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H St. NE, Suite 275
Washington, DC 20002

ALEC KARAKATSANIS
CIVIL RIGHTS CORPS
1601 Connecticut Ave. NW
Suite #800
Washington, DC 20009

SARAH GRADY
Counsel of Record
JON LOEVY
LOEVY & LOEVY
311 N. Aberdeen St.,3rd Floor
Chicago, IL 60607
(312) 243-5900
sarah@loevy.com

LOCKE BOWMAN
ALEXA VAN BRUNT
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER
SCHOOL OF LAW
375 East Chicago Ave.
Chicago, IL 60611

Counsel for Respondents

QUESTION PRESENTED

Should certiorari be granted where Petitioner affirmatively embraced the Seventh Circuit's reading of *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), and *Bell v. Wolfish*, 411 U.S. 520 (1979), below; where Petitioner has not pointed to any meaningful distinctions between the circuits on each side of the purported split (let alone a difference that would be outcome dispositive in this case); and where events on the ground are likely to overtake this Court's review?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

The petition for certiorari suggests that this case presents the question whether the Seventh Circuit's objective standard for reviewing conditions of confinement claims by pretrial detainees is correct. Petitioner has already answered that question. As Petitioner wrote in his brief below: "Several years ago, the United States Supreme Court issued its opinion in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), clarifying that pretrial detainees' constitutional claims brought under the Fourteenth Amendment are no longer reviewed under the deliberate indifference standard. They are now reviewed for objective reasonableness."[1]

And again before that, in a motion to the Seventh Circuit for a stay pending appeal: "Following the United States Supreme Court's decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015), this Court applies the objective reasonableness standard under the fourteenth amendment to evaluate conditions of confinement claims brought by pretrial detainees."[2]

And again before that, in the district court: "It was objectively reasonable for the Sheriff's Office to implement policies following CDC Guidance in the jail … A

[1] *Mays v. Dart*, Brief of Appellant, 7th Cir. Case No. 20-1792, Dkt. No. 23 at 20.

[2] *Id.*, Motion for Stay Pending Appeal, 7th Cir. Case No. 20-1792, Dkt. No. 12-1 at 20.

court must make this determination from the perspective of a reasonable officer."[3]

Dozens of times, across at least a half-dozen pleadings, Petitioner not only failed to object to the Seventh Circuit's standard for evaluating pretrial detainees' claims but affirmatively embraced it.

That alone is dispositive. This Court should not grant certiorari where the question presented was neither pressed nor passed upon below, let alone where a petitioner has affirmatively waived an argument. *See Meyer v. Holley*, 537 U.S. 280, 291-92 (2003). But even apart from the waiver problem, the petition does not meet this Court's criteria for certiorari. The petition doesn't identify any meaningful distinction between the circuits it identifies as faithfully following *Bell v. Wolfish*, 411 U.S. 520 (1979), and those it identifies as misapplying *Bell*, and it certainly doesn't identify any distinction that would change the outcome in this case.

In any event, all parties to this litigation hope that the end of the pandemic—and with it, the end of any need for the preliminary injunction at issue in this case—is nigh. Even if Petitioner hadn't waived any objection to the Seventh Circuit's standard many times over, and even if this case implicated a split, it *still* would not be prudent to grant certiorari, because

---

[3] *Mays v. Dart*, Deft's Br. in Opp. To Pl.'s Emergency Mot'n for Temporary Restraining Order or Preliminary Injunction, N.D. Ill. Case No. 20-2134, Dkt. No. 29-1 at 10-11.

events on the ground may overtake this Court's review.

The petition for certiorari should be denied.

STATEMENT OF THE CASE

1. On March 23, 2020, the Cook County Jail reported its first confirmed case of COVID-19. Pet. 7. At the time, COVID-19 had no cure and no vaccine. Pet. App. 33a. The Centers for Disease Control issued a series of guidelines for healthcare professionals operating in correctional institutions, including providing sufficient hygiene and cleaning supplies and implementing social distancing where feasible. Pet. App. 5a-6a. But Cook County Jail employees and detainees reported that detainees were "packed together," with no ability to socially distance, and had no access to face masks or cleaning supplies and only sporadic access to soap. *See, e.g.*, *Mays v. Dart*, Plaintiffs' Motion to Supplement the Record, N.D. Ill. Case No. 20-CV-2134, Dkt. 36-1 ¶¶7-8, 13-14, 22.

2. On April 3, 2020, Timothy Mays and Kenneth Foster—two pretrial detainees at the Cook County Jail with serious medical conditions that make them particularly vulnerable to complications from COVID-19—filed suit on behalf of a putative class of detainees and moved for a temporary restraining order. Pet. App. 133a, 135a. Respondents submitted testimony from five medical experts with substantial experience in correctional facilities, and reports from detainees, former detainees, and jail staff. Pet. App. 156a-164a.

The district court entered a temporary restraining order requiring Petitioner to provide soap, cleaning supplies, face masks, and prompt testing to detainees

but refused to order other requirements Respondent had asked for, including a process for identifying high-risk detainees and separating them from the general population. Pet. App. 153a-164a. A few weeks later, following the submission of hundreds of pages of evidence and an evidentiary hearing, the district court converted the requirements of the temporary restraining order into a preliminary injunction and added a requirement that Petitioner permit detainees to socially distance from one another in their housing units, with certain exceptions. Pet. App. 96a-106a. At that point, 788 detainees and staff had contracted COVID-19, and the positive testing rate for detainees was nearly 70 percent. *Mays v. Dart*, Appellant's Cir. R. 30(B) Appendix, 7th Cir. Case No. 20-1792, Dkt. No. 33-2 at 232:14-233:14.

3. Petitioner appealed to the Seventh Circuit. Judges Sykes, Brennan, and St. Eve agreed with the district court that the Sheriff's conduct should be evaluated using an objective standard, as articulated in *Bell v. Wolfish*, 411 U.S. 520 (1979), and *Kingsley v. Hendrickson*, 576 U.S. 389 (2015). Pet. App. 14a. The panel vacated some portions of the injunction and upheld others. Pet. App. 1a, 3a.

The panel reversed the portion of the district court's decision requiring social distancing, concluding that the district court "committed three distinct legal errors." Pet. App. 15a. First, the Seventh Circuit held that the district court "failed to consider the totality of the circumstances." Pet. App. 15a-18a. Citing *Kingsley*, the panel explained that the district court erred in focusing solely on the Sheriff's failure to so-

cially distance detainees without evaluating the Sheriff's entire course of conduct. *Id.* Second, the Seventh Circuit held that the district court erred because it did not afford sufficient deference to correctional administrators, as required by *Bell* and *Kingsley*. Pet. App. 18a-20a. Third, the district court recited the wrong legal standard when evaluating Petitioner's likelihood of success on the merits. Pet. App. 20a-24a.

In a section entitled "Remaining Relief," the panel upheld the portions of the district court's injunction requiring prompt coronavirus testing and provision of soap and face masks to detainees. Pet. App. 24a-26a. The Seventh Circuit concluded that, as to those measures, the district court correctly "assessed the requested relief considering the totality of the Sheriff's conduct, rather than reviewing it in isolation." Pet. App. 24a.

4. The Seventh Circuit's opinion upholding portions of the district court's injunction was entered on September 8, 2020. Pet. App. 1a. Those portions of the injunction have been in place since April 7, 2020. Pet. App. 130a. Petitioner did not request rehearing en banc from the Seventh Circuit or a stay from this Court.

REASONS FOR DENYING THE PETITION

I. Petitioner Has Waived Any Objection To The Seventh Circuit's Standard By Affirmatively Embracing It.

As Petitioner explained in his briefing before the Seventh Circuit, "[s]everal years ago, the United States Supreme Court issued its opinion in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), clarifying that

pretrial detainees' constitutional claims brought under the Fourteenth Amendment are no longer reviewed under the deliberate indifference standard." *Mays v. Dart*, Brief of Appellant, 7th Cir. Case No. 20-1792, Dkt. No. 23 at 20. "They are now reviewed for objective reasonableness." *Id*. Petitioner then went on to canvass the Seventh Circuit's cases, explaining how they properly implemented *Kingsley* and its predecessor, *Bell v. Wolfish*, 441 U.S. 520 (1979). *Id.* at 25-29.

Petitioner now claims that the Seventh Circuit's "efforts…to apply the *Kingsley* framework to jail conditions claims are misguided." Pet. 22. (Just what about the Seventh Circuit's articulation of *Kingsley* is "misguided," Petitioner never specifies.) But Petitioner never raised any concerns about the correct standard for pretrial detainee conditions claims in either the district court or the Seventh Circuit. Indeed, Petitioner affirmatively embraced the Seventh Circuit's standard, spending pages of his briefing below spelling out the standard before arguing only that the district court misapplied it. *Mays v. Dart*, Brief of Appellant, 7th Cir. Case No. 20-1792, Dkt. No. 23 at 23-29.

This Court ordinarily declines to consider arguments that have not been raised or considered below. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 148 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (evaluating waiver even where circuit precedent foreclosed argument). That rule is especially strong where a peti-

tioner not only failed to object to a legal standard below but affirmatively embraced it. *United States v. Olano*, 507 U.S. 725, 733-34 (1993) (difference between forfeiture and intentional waiver). There is no reason to depart from that practice here.

II. This Case Does Not Implicate A Circuit Split.

1. Petitioner claims a split between circuits that "faithfully apply *Bell*'s objective standard" and circuits that have adopted a "post-*Kingsley* standard" (also objective). Pet. 18-20. But as Petitioner acknowledges, the "*Bell* standard" and the "*Kingsley* standard" are one and the same. Pet. 3. *Bell* held that all claims of pretrial detainees should proceed under the Fourteenth Amendment's Due Process Clause, rather than the Eighth Amendment's Cruel and Unusual Punishments Clause, because pretrial detainees are presumed innocent, unlike convicted prisoners. 441 U.S. at 538-39. Treatment of pretrial detainees violates that clause if it is disproportionate to a legitimate, non-punitive government purpose—an objective, rather than a subjective, standard. *Id.* at 539-40. *Kingsley* applied *Bell* to the particular context of a pretrial detainee's claim of excessive force, reiterating that an objective, rather than a subjective, standard applies to pretrial detainees' claims. *Kingsley*, 576 U.S. at 391-92. *Kingsley* "does not change the standard articulated by *Bell*," as Petitioner acknowledges. Pet. 3.

Unsurprisingly, no circuit has held that *Kingsley* overturned *Bell*. The circuits that Petitioner criticizes as adopting a "post-*Kingsley* standard" continue to

discuss *Bell* and *Kingsley* interchangeably and rely on both in articulating the objective standard governing pretrial detainee claims. *See Darnell v. Pineiro*, 849 F.3d 17, 34 (2d Cir. 2017); *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1069 (9th Cir. 2016) (en banc). The Seventh Circuit is no exception. *See Miranda v. Cnty. of Lake*, 900 F.3d 335, 350 (7th Cir. 2018); *Hardeman v. Curran*, 933 F.3d 818, 821-23 (7th Cir. 2019); *id.*, at 826-27 (Sykes, J., concurring).

Petitioner never explains what difference there is between the circuits that "faithfully apply *Bell*" and those that adopt a "post-*Kingsley* standard," let alone how that difference would matter in this case. The circuits that changed course after *Kingsley* didn't do so because they thought *Kingsley* somehow altered *Bell*. Instead, the circuits Petitioner identifies as adopting a "post-*Kingsley* standard" are those that had previously evaluated pretrial detainees' claims using a subjective standard. When *Kingsley* made clear that pretrial detainees' claims were evaluated under an objective standard, the Second, Seventh, and Ninth circuits appropriately changed course and adopted an objective standard—the objective standard articulated by *Bell* and *Kingsley* and the standard that the Third, Fourth, and Eighth circuits (the "faithfully apply *Bell*" circuits) had already adopted even before *Kingsley*. *See Darnell*, 849 F.3d at 34; *Miranda*, 900 F.3d at 350; *Castro*, 833 F.3d at 1069.[4]

[4] Any purported split between the "faithfully apply *Bell*" circuits and the "post-*Kingsley* standard" circuits would not be ripe in any event. Petitioner's "faithfully apply *Bell*" circuits have not yet considered the impact of *Kingsley* on their standard. *See Hope*

True, a single circuit[5] continues to hold that a subjective deliberate indifference standard applies to some kinds of claims brought by pretrial detainees, limiting *Kingsley* to excessive force claims brought by pretrial detainees.[6] *See Strain v. Regalado*, 977 F.3d

---

v. Warden York Cnty., 972 F.3d 310 (3d Cir. 2020) (no mention of *Kingsley*); *Mays v. Sprinkle*, 992 F.3d 295, 301 n.4 (4th Cir. 2021) ("we have not directly addressed the import of *Kingsley*"; declining to do so in that case); *Stearns v. Inmate Servs. Corp.*, 957 F.3d 902, 908 n.6 (8th Cir. 2020) ("Without deciding the impact of *Kingsley*, we decline to address it here."); Pet. 18-19 (citing only a district court case for the D.C. Circuit's position).

[5] The other cases Petitioner cites as maintaining a subjective deliberate indifference standard have considered *Kingsley*, if at all, only in passing. *See Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64 (1st Cir. 2016) (opinion does not mention *Kingsley*; parties did not cite *Kingsley*, which was decided after most briefing was complete); *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 420 n.4 (5th Cir. 2017) (addressing *Kingsley* in a footnote; holding only that circuit was "bound by [its] rule of orderliness" to adhere to pre-*Kingsley* precedent); *id.*, at 424-25 (Graves, J., specially concurring in part) (urging court to revisit proper standard after *Kingsley*); *Richmond v. Huq*, 885 F.3d 928, 938 n.3 (6th Cir. 2019) (noting that "neither party cite[d] *Kingsley* or addresse[d] its potential effect in their briefing"); *Troutman v. Louisville Metro Dep't of Corr.*, 979 F.3d 472, 483 n.8 (6th Cir. 2020) ("[T]he question remains open whether *Kingsley* applies beyond excessive-force claims."); *Nam Dang v. Sheriff, Seminole Cnty. Fla.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) (footnote explaining that court "need not reach the question" whether *Kingsley* applies because it "could not affect" case).

[6] Even that one circuit likely would not apply a subjective deliberate indifference standard to this case. The Tenth Circuit appears to distinguish between "medical care" claims, to which it applies a subjective deliberate indifference standard, and other kinds of "conditions of confinement" claims, to which the *Kingsley*/*Bell* objective standard applies. *See Strain*, 977 F.3d at 993

984, 990-91 (10th Cir. 2020). But not even Petitioner defends the position that pretrial detainee claims are governed by a subjective standard. Pet. 3 (standard for pretrial detainee conditions claims "is an objective one"). Nor could he; as with his other arguments that the Seventh Circuit applied the wrong legal standard, Petitioner waived many times over any suggestion that claims by pretrial detainees are governed by a subjective standard.[7] Whatever the validity of *that* split, it's simply not implicated by this case.

In any event, as Petitioner explains, *Kingsley* selected an objective standard to review a pretrial detainee's excessive force claim—a kind of claim reviewed under a "heightened standard [to] reflect[] the realities of evaluating the amount of force used in the moment." Pet. 23. Other kinds of claims—claims about decisions that are not made "in haste, under

---

n.6 (distinguishing *Colbruno v. Kessler*, 928 F.3d 1155, 1163 (10th Cir. 2019)). It's not clear whether the Tenth Circuit would consider the instant case a "medical care" case or another type of "conditions of confinement" case—the portion of the injunction ordering soap, face masks, and cleaning supplies, at least, is difficult to call a "medical care" injunction. So even in the Tenth Circuit, it is possible that this case would be governed by an objective standard. *See also Miranda-Rivera*, 813 F.3d at 67 (medical care case); *Alderson*, 848 F.3d at 418 (same); *Richmond*, 885 F.3d at 934 (same); *Nam Dang*, 871 F.3d at 1276 (same).

[7] *See, e.g.*, *Mays v. Dart*, Brief of Appellant, 7th Cir. Case No. 20-1792, Dkt. No. 23 at 20 ("Several years ago, the United States Supreme Court issued its opinion in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), clarifying that pretrial detainees' constitutional claims brought under the Fourteenth Amendment are no longer reviewed under the deliberate indifference standard. They are now reviewed for objective reasonableness.").

pressure, and frequently without the luxury of a second chance," *see id.* (quoting *Hudson v. McMillian*, 503 U.S. 1, 6 (1992))—must be, if anything, *easier* to prove than excessive force claims. *Id.* If an objective standard applies to pretrial detainees' excessive force claims, an objective standard must apply to their other claims, too—as Petitioner acknowledges. *See id.*

2. Unsurprisingly, the errors Petitioner identifies in the Seventh Circuit's analysis have nothing to do with a legal error under *Kingsley* and *Bell*. The proof? Petitioner's merits section reprises *precisely the same arguments* that Petitioner made below, in the brief where it affirmatively embraced the Seventh Circuit's legal standard and argued only that "the district court erred in how it *applied* the objective standard."[8] *See Mays v. Dart*, Brief of Appellant, 7th Cir. Case No. 20-1792, Dkt. No. 23 at 21 (emphasis added).

Petitioner's arguments before this Court, too, are limited to whether the court below "erred in applying the objective standard," not whether the court chose the wrong standard. First, Petitioner protests that "contrary to the principles articulated in *Bell*, the

---

[8] *Compare, e.g.*, Pet. 27 ("The appellate panel also erred by failing to analyze the constitutionality of the Sheriff's *conduct* in response to this systemic risk as *Bell* requires … Instead, it focused its review on the *relief* granted."), 30 (arguing that the panel erred because it did not "analyze *all* of the measures taken by the Sheriff" and focused on a "small part") *with Mays v. Dart*, Brief of Appellant, 7th Cir. Case No. 20-1792, Dkt. No. 23 at 21 ("[T]he court's analysis erroneously focused on the reasonableness of the harm, and not on the Sheriff's actions..."), 28 ("The court should have considered the entirety of the Sheriff's efforts to mitigate the spread of infection.").

panel failed to give proper deference to the Sheriff's judgment." Pet. App. 27a. But the Seventh Circuit cited *Bell* itself in deciding the level of deference due to jail administrators. Pet. App. 18a-19a ("When evaluating reasonableness, . . . courts must afford prison administrators 'wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.'") (quoting *Bell*, 441 U.S. at 547). And, of course, deference to jail administrators isn't exclusive to *Bell*; *Kingsley* itself reiterated the need for deference. *See Kingsley*, 576 U.S. at 397 (courts must "appropriately defer[] to policies and practices that in the judgment of jail officials are needed") (cleaned up).

Second, Petitioner claims that the Seventh Circuit erred in looking at the Sheriff's actions in isolation, rather than "analyz[ing] *all* of the measures taken by the Sheriff in response to the risk of an outbreak." Pet. 30. But Petitioner acknowledges that the Seventh Circuit got it right when it evaluated (and reversed) the portion of the district court's injunction dealing with social distancing. *Id.* Of course, the Seventh Circuit applied the same "post-*Kingsley* standard" when it sided with Petitioner on the social distancing portion of the injunction as when it sided with Respondents on the other portions of the injunction. So whatever error Petitioner claims that the Seventh Circuit committed, it can't be choosing the wrong legal standard, because Petitioner endorses the lower court's analysis under that same legal standard in a different portion of the same opinion. *Id.*

Third, Petitioner argues that the panel "fail[ed] to analyze the constitutionality of the Sheriff's *conduct* in response to th[e] systemic risk as *Bell* requires" and instead "focused its review on the *relief* granted" and whether such relief was "consistent with the CDC Guidelines." Pet. 31 (emphases in original). But below, Petitioner relied entirely on Seventh Circuit cases for the proposition that the focus should be on "conduct" rather than "relief"—the very cases Petitioner now claims gave rise to an incorrect standard. *See Mays v. Dart*, Brief of Appellant, 7th Cir. Case No. 20-1792, Dkt. No. 23 at 26-29 (discussing *McCann v. Ogle Cnty., Illinois*, 909 F.3d 881, 886 (7th Cir. 2018), and *Hardeman v. Curran*, 933 F.3d 816 (7th Cir. 2019)). And the Seventh Circuit's discussion of whether the relief is "consistent with the CDC Guide-lines" relies entirely on *Bell* itself, not any purported post-*Kingsley* standard. Pet. App. 25a (citing *Bell*, 441 U.S. at 543 n.27).

Finally, Petitioner says the panel must have applied a wrong, new standard in upholding a portion of the injunction because there was "not a hint of any intent to punish detainees" on Petitioner's part. Pet. App. 29a. But neither *Bell* nor the Third, Fourth, or Eighth circuits—the circuits whose position Petitioner endorses—require a subjective "intent to punish." As *Bell* itself explains, a pretrial detainee may show a Due Process Clause violation even "[a]bsent a showing of an expressed intent to punish" so long as the treatment of the detainee "appears excessive in relation to" a legitimate government purpose. *Bell*, 441 U.S. at 538; *see Stearns v. Inmate Servs. Corp.*, 957 F.3d 902, 907 (8th Cir. 2020); *Hope v. Warden York*

Cnty., 972 F.3d 310, 326 (3d Cir. 2020); *Dilworth v. Adams*, 841 F.3d 246, 252 (4th Cir. 2016). Because Petitioner's preferred circuits don't require an "intent to punish" either, Petitioner's criticisms of the panel opinion have nothing to do with any ostensible circuit split.

3. Petitioner's "COVID-19 split" fares no better. Twelve of the 16 cases Petitioner cites are district court cases, not circuit court cases, and by Petitioner's own characterization, these tend to show "intra-circuit splits," where Petitioner believes district courts are not faithfully applying the circuit's rule, rather than any differences among circuits. Pet. 24-26. Of the circuit court cases, the only one (other than this case) from the "post-*Kingsley* standard" side of the purported split quoted *Bell* repeatedly, including for the proposition that district courts should "avoid imposing provisions that micromanage the Government's administration of conditions" because "[t]hese types of considerations are better left to the professional expertise of corrections officials." *Hernandez Roman v. Wolf*, 829 F. App'x 165, 175 (9th Cir. 2020) (quoting *Bell*, 441 U.S. at 540 n.23).

4. Ultimately, the petition's real disagreement with the opinion below was the Seventh Circuit's evaluation of the facts. Pet. 32-33. Petitioner argues that a separate medical entity, and not the sheriff, was in charge of testing (an argument Petitioner never made to the Seventh Circuit); that he should not have been forced to provide face masks because there was a global PPE shortage (although the district court specifically found that Petitioner *had* sufficient PPE to distribute to detainees); and that it had "exponentially

increased the amount of soap" it distributed even before the district court's injunction (although the district court found, as factual matter, that detainees had "received only a very small supply insufficient to permit the frequent hand-washing recommended by public health experts"). *Id.*; Pet. App. 158a.

This Court does not ordinarily entertain requests alleging fact bound error correction, and it should not do so here. Whereas other courts around the country required detention facilities to release prisoners or make other wholesale changes in the way they operated, the Seventh Circuit here upheld only the portions of the district court's injunction requiring Petitioner to provide soap, face masks, and testing to detainees. *Compare, e.g.*, *Valentine v. Collier*, 140 S. Ct. 1598 (2020), *and Barnes v. Ahlman*, 140 S. Ct. 2620 (2020), *with* Pet. App. 24a-26a. Accordingly, other detention officials around the country appealed immediately to the Supreme Court. *See, e.g.*, *Barnes*, 140 S. Ct. at 2621 (district court injunction imposed in May; Supreme Court stayed injunction in August). Petitioner, by contrast, has been content to operate under some form of the district court's injunction for nearly 15 months, without seeking a stay or any form of expedited review from this Court. Petitioner's conduct throughout this litigation demonstrates that the stakes of this case simply aren't high enough for this Court to intervene in the absence of any legal question or split in authority.

III. Rapidly Changing Conditions On The Ground Make Review Imprudent.

Even if Petitioner hadn't waived the argument he now makes (which he did), and even if this case implicated a split (which it does not), review *still* would not be warranted. The circumstances giving rise to this case have changed dramatically since the district court first granted an injunction over a year ago and continue to change from week to week. By the time this Court considers whether to grant certiorari—and certainly by the time this case would be argued—there may well be a basis to alter or dissolve the injunction.

1. When the district court granted Respondents' motion for a preliminary injunction on April 27, 2020, there was no effective treatment and no vaccine for COVID-19. Pet. App. 33a. More than 2,000 people died of COVID-19 on the day the district court granted a temporary restraining order; before the district court put in place a preliminary injunction less than three weeks later, more than 35,000 more Americans were dead. *See* New York Times, *Coronavirus in the U.S.: Latest Map and Case Count*, https://www.nytimes.com/interactive/2021/us/covid-cases.html (last accessed June 11, 2021). As the district court wrote, "schools have been closed; commercial establishments and workplaces have ceased operations, resulting in massive job losses; public events have largely been cancelled; and access to public spaces has been limited or barred entirely." Pet. App. 34a.

In the 15 months since, the pandemic landscape has shifted rapidly. Illinois went into lockdown, emerged, went into lockdown again, and emerged

again; today, case rates hover around three per 100,000 in Cook County, and that number has dropped 60 percent in the last two weeks. *See* State of Illinois Coronavirus Response, *Bridge Phase*, https://coronavirus.illinois.gov/s/bridge-phase (last accessed June 11, 2021); New York Times, *County Trends*, https://www.nytimes.com/interactive/2021/us/covid-cases.html (last accessed June 11, 2021). Chicago, where the Cook County Jail is located, will be "fully open" as of June 11, 2021. *See* Becky Vevea, *Bars, Restaurants & Gyms Can Open At Full Capacity June 11*, WBEZ Chicago, https://www.wbez.org/stories/bars-restaurants-and-gyms-can-open-with-full-capacity-june-11/75087486-64ac-41a5-8d57-f3c5fc8402f3 (June 3, 2021).

Most significantly, since the district court's injunction, multiple vaccines against COVID-19 have been developed and are now available to all Americans 12 years of age and older. Centers for Disease Control & Prevention, *Different COVID-19 Vaccines,* https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines.html (updated May 27, 2021). More than 60 percent of adults have already received at least one dose of a COVID-19 vaccine, and 50 percent are fully vaccinated. Centers for Disease Control & Prevention, *COVID-19 Vaccinations in the United States*, https://covid.cdc.gov/covid-data-tracker/#vaccinations (last accessed June 11, 2021).

2. The Cook County Jail is no exception. When the district court entered its injunction, Cook County Jail was the largest single source of COVID infections in the United States. *See* Timothy Williams & Danielle Ivory, *Chicago's Jail Is Top U.S. Hot Spot As Virus*

Spreads Behind Bars, New York Times, https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html (Apr. 8, 2020). As of this filing, there are just ten detainees who have tested positive. Cook County Sheriff, *COVID-19 Cases at CCDOC*, https://www.cookcountysheriff.org/covid/covid-19-cases-at-ccdoc/ (last accessed June 11, 2021). The jail began vaccinating detainees in late January, and in-person family visits resumed in March. *See* Kiran Misra, *Cook County Jail Starts Vaccinating Detainees for COVID-19*, South Side Weekly, https://southsideweekly.com/cook-county-jail-starts-vaccinating-detainees-for-covid-19/ (Feb. 4, 2021); NBC Chicago, *Vaccinated Cook County Jail Inmates Can See Visitors In-Person Starting Sunday,* https://www.nbcchicago.com/news/local/vaccinated-cook-county-jail-inmates-can-see-visitors-in-person-starting-sunday/2461027 (Mar. 12, 2021).

3. Because the circumstances of the pandemic change so rapidly, an injunction may be appropriate one day and inappropriate the next (or, conversely, more necessary than ever). For that reason, most parties concerned about the scope of COVID-19 orders have proceeded to this Court in an expedited fashion, recognizing that any arguments they made would be quickly overtaken by events.[9] In this case, by contrast,

---

[9] *See, e.g.*, *Barnes*, 140 S. Ct. at 2621 (district court injunction requiring jail to take COVID measures imposed in May 2020; this Court stayed injunction in August 2020); *Williams v. Wilson*, ___ S. Ct. __, 2020 WL 2988458 (Mem) (June 4, 2020) (district court injunction requiring prison to take COVID measures imposed in April 2020; this Court stayed injunction in June 2020) *Agudath Israel of Am. v. Cuomo*, 141 S. Ct. 63, 68 & n.3 (2020)

the district court entered its injunction on April 27, 2020; the Seventh Circuit upheld part of the injunction and reversed part of the injunction on September 8, 2020; and Petitioner did not seek this Court's intervention for more than four months, until January 2021, and did not seek a stay in the interim. Pet. iii, 1.

As a result, Petitioner's arguments about the correctness of the injunction have been rendered irrelevant by changing circumstances on the ground. For example, Petitioner argues that CDC guidance in April 2020 did not require most people to wear face masks. Pet. 32. Even if that were true and dispositive, CDC guidance by July 2020 recommended universal use of face masks, including in a correctional setting. Centers for Disease Control, *CDC calls on Americans to wear masks to prevent COVID-19 spread*, July 14, 2020, https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html. Granting certiorari today to make an argument about whether an injunction was justified by the state of the world in April 2020 that was overtaken by new research by July 2020 makes no sense.

4. That's particularly so since the end of the pandemic—and, by necessity, the end of the preliminary injunction—may well be nigh. The district court did not expect its preliminary injunction to last forever. "Typically, a preliminary injunction lasts until the

---

(executive order imposed COVID limitations on religious gatherings issued in October 2020; this Court stayed enforcement in November 2020).

trial on the merits, but the order the Court is entering is predicated on an underlying condition—the ongoing pandemic—that, one can hope, will not last indefinitely," it explained. Pet. App. 128a. "Currently we are not living in ordinary circumstances—hence the preliminary injunction—but once matters return to something approaching normal, it may be appropriate to loosen the requirements of the injunction." Pet. App. 129a. It encouraged the parties to revisit the scope of the injunction as soon as conditions allowed. Pet. App. 128a-129a.

Instead of seeking this Court's review, the Sheriff should take the district court up on its invitation to "loosen the requirements of the injunction" once "matters return to something approaching normal. *See* Pet. App. 129a. It is the district court, not this Court, that is best positioned to gather evidence and make determinations about the proper scope of the injunction with speed and flexibility. See *Horne v. Flores*, 557 U.S. 443, 447 (2009). And it would be particularly improvident for this Court to grant review when all parties to this case hope that we are in the waning days of the COVID-19 pandemic and that there will be cause to modify or even dissolve the injunction well before this Court could possibly consider this case.

CONCLUSION

Faced with a once-in-a-generation pandemic, the district court and Seventh Circuit fairly applied this Court's cases requiring greater constitutional protections for pretrial detainees than for convicted prisoners. Petitioner now seeks to re-litigate an injunction that we all hope will soon be mooted by the end of the pandemic, without pointing to a split in authority and

on the basis of an argument he affirmatively waived. The petition for a writ of certiorari should be denied.

Respectfully submitted,

EASHA ANAND
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
2443 Fillmore St., #380-15875
San Francisco, CA 94115

MEGHA RAM
KATHRINA SZYMBORSKI
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H St. NE, Suite 275
Washington, DC 20002

ALEC KARAKATSANIS
CIVIL RIGHTS CORPS
1601 Connecticut Ave. NW
Suite #800
Washington, DC 20009

SARAH GRADY
Counsel of Record
JON LOEVY
LOEVY & LOEVY
311 N. Aberdeen St.,3rd Floor
Chicago, IL 60607
(312) 243-5900
sarah@loevy.com

LOCKE BOWMAN
ALEXA VAN BRUNT
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER
SCHOOL OF LAW
375 East Chicago Ave.
Chicago, IL 60611

Counsel for Respondents