No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2015, this Court decided *Kingsley v. Hendrickson*, 135 S. Ct. 2566 (2015), announcing for the first time that Fourteenth Amendment due process claims alleging excessive force against pretrial detainees must be evaluated under an objective standard. *Kingsley* is an extension of *Bell v. Wolfish*, 441 U.S. 520 (1979), which long ago set forth the objective standard to be applied to detainees' challenges to their conditions of confinement. But circuit courts across the country have misconstrued *Kingsley* and are deeply divided about whether and how it altered the *Bell* standard for evaluating jail conditions claims. Accordingly, the question presented here is:

> Whether *Kingsley v. Hendrickson* abrogated or modified the standard for evaluating pretrial detainees' claims challenging their conditions of confinement under the Fourteenth Amendment, as set forth in *Bell v. Wolfish*.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding below were:

Petitioner Thomas J. Dart, Sheriff of Cook County, Illinois, in his official capacity; and

Respondents Anthony Mays, individually and on behalf of a class of similarly situated pretrial detainees.

RELATED PROCEEDINGS

Mays v. Dart, et al., 20-cv-2134, U.S. District Court for the Northern District of Illinois. Judgments entered April 9, 2020 and April 27, 2020.

Mays v. Dart, et al., No. 20-1792, U.S. Court of Appeals for the Seventh Circuit. Judgment entered September 8, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Thomas J. Dart, Sheriff of Cook County, Illinois, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 974 F.3d 810 and is reproduced at Pet. App. 1a-28a. The district court's order granting the plaintiffs' request for a preliminary injunction is reported at 456 F. Supp. 3d 966 and is reproduced at Pet. App. 29a-129a. The district court's order granting the plaintiffs' request for a temporary restraining order is reported at 453 F. Supp. 3d 1074 and is reproduced at Pet. App. 130a-172a.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 8, 2020. (1a-28a). Pursuant to the Court's March 19, 2020 order, this Petition was timely filed within 150 days of the final judgment. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United Sates; nor shall any state deprive any person of life, liberty, or property, without due process of law…" U.S. Const. amend. XIV, § 1.

The statutory provision involved is 42 U.S.C. § 1983, which states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State…subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…"

STATEMENT OF THE CASE

Nearly forty years ago, the Court issued its opinion in *Bell v. Wolfish*, 411 U.S. 520 (1979). It defined the standard for evaluating pretrial detainees' challenges to their conditions of confinement under the fourteenth amendment due process clause: punishment may not be inflicted on a pretrial detainee. Unless the conditions of confinement amount to punishment, a detainee is not deprived of his due process rights. The standard for evaluating punishment is an objective one: detainees can make their case by showing an expressed intent to punish, or that the challenged conditions were unrelated to, or were excessive in relation to, a legitimate nonpunitive governmental purpose.

In 2015, the Court issued its opinion in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), defining the standard for evaluating excessive force claims brought by pretrial detainees. *Kingsley* is merely an extension of *Bell*, as applied to the particular circumstances of an excessive force claim. But it does not change the standard articulated in *Bell* or alter its fundamental precepts. *Kingsley* stands for the same proposition as *Bell*: a pretrial detainee cannot be punished in violation of his due process rights—but the standard is expressed differently for an excessive force claim, given the nature of the allegations in each. If anything, *Kingsley* brought to light that a jail official's conduct must be viewed under a heightened standard approaching recklessness. But the post-*Kingsley* standards for conditions of confinement claims emerging from the appellate circuits in the past five years misstate its relevance and have caused

confusion for the courts and jail officials. Nowhere is this confusion more evident than in the case below from the Seventh Circuit, which applies its iteration of the standard inconsistently within same opinion. (1a-28a)

The case below also reveals the abiding need to address this issue now, as the nation continues to grapple with the COVID-19 pandemic. Many lawsuits have been filed across the country challenging safety protocols implemented in jails and detention centers and the outcomes of these cases span a wide spectrum. In some cases, courts have effectively become "superwardens" of the jails, issuing mandatory injunctions that direct wardens to implement policies and protocols on the minutiae of jail operations. These outcomes run directly contrary to *Bell* and its progeny, which established the imperative of affording significant deference to jail officials' expertise in managing complex jail operations and respecting the functions of government expressly reserved to the executive and legislative branches. For these reasons, this Court must grant certiorari to clarify the analytical framework to be applied to pretrial detainees' conditions of confinement cases as distinguished from excessive force claims.

A. Factual Background

In January 2020, well before any governmental acknowledgement of the looming global coronavirus pandemic, Cook County Sheriff Thomas J. Dart and a team of subject matter experts were already planning for the arrival of the virus at the Cook County Jail, one of the largest single-site jail complexes in the

country. (4a) As the district court and the appellate panel recognized, the Sheriff took "numerous proactive measures to prevent the spread of COVID-19." (6a) The in-house Environmental Health Specialist at the Sheriff's Office activated emergency sanitation protocols and worked with the Cook County Department of Public Health to develop enhanced disinfection and sanitization practices in Jail housing units, common areas, and eating spaces. (6a) The Office would later hire two expert consultants—one of whom was a former CDC Director—to advise on sanitation and public health best practices. (7a)

During this time, the Office also worked with Dr. Concetta Mennella, who operates Cermak Health Services, the hospital and urgent care facility inside the Jail, to devise medical protocols in case of an outbreak. With the intake area of the Jail being the most vulnerable point of entry, they implemented a coronavirus screening and isolation procedure for all new detainees. (6a; Appellant's Br. 4) Each detainee received a coronavirus screening at intake and was placed in quarantine for seven (later fourteen) days before entering the general population. The Office also created quarantine and isolation tiers for those who would be exposed to or infected with the virus, according to standards set by the Centers for Disease Control and Prevention (CDC). (5a; Appellant's Br. 5)

In early March, the Office created the Critical Incident Command Center (CICC) to monitor all COVID-related incidents that could impact Jail operations and drafted the first iteration of its Coronavirus Operation Plan. The latter follows the CDC's Interim Guidance on Management of

Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (CDC Guidelines). (5a) The CDC Guidelines recognize the functional and operational limitations present in densely-populated correctional facilities. The CDC explicitly states that its Guidelines "may need to be adapted based on individual facilities' physical space, staffing, population, operations, and other resources and conditions." (5a-6a)

In mid-March, the Office began the process of opening three (later four) previously closed divisions of the Jail to allow for more single-celled housing and reduce density in the dormitory units. (6a) This was an extraordinary undertaking: deep cleaning the buildings, connecting utilities, staffing the divisions, and arranging logistics for meal and medication deliveries on a very expedited schedule. (Appellant's Br. 8)

The Office also coordinated with the courts, prosecutors, and public defenders to secure the release of more than 1,200 detainees—over 20% of the Jail's population—to electronic monitoring or other modified conditions of bond. (7a)

Elsewhere within the Sheriff's Office organization—before the President of the United States had even declared a national state of emergency—the in-house Public Health Advisor coordinated with state and local public health departments to create updated protocols on housing and testing requirements, use of personal protective equipment (PPE), sanitation protocols and minimizing the public health risk upon a detainee's

release into the community. (Appellant's Br. 8-9) Because there was a global PPE supply shortage, the Office also had daily contact with representatives from the Federal Emergency Management Agency, Senator Richard Durbin's office, and the Illinois Governor's office to obtain PPE from the national strategic stockpile. (6a) The CDC did not recommend the universal use of face masks at this time and cautioned that limited PPE supplies should be used only by medical professionals, symptomatic individuals, or jail staff and others who could bring the virus in from the community. (Appellant's Br. 10, 13) The Office also successfully lobbied to become one of the first sites in the country to administer the newly developed ID Now coronavirus rapid test. (7a)

All of these actions occurred before the first reported case of coronavirus at the Jail on or about March 23, 2020. A few days later, representatives from the CDC and local public health department toured the Jail and advised on its protocols and compliance with the CDC Guidelines. (Appellant's Br. 12)

B. District Court Proceedings

Temporary Restraining Order (TRO). Two weeks later, a putative class of detainees sued the Sheriff challenging the conditions of confinement at the Jail, claiming the Sheriff's Office had not taken any meaningful steps to mitigate the spread of coronavirus. They first sought categorical release through a class-wide *habeas* proceeding. (7a) They also asserted a claim under 42 U.S.C. § 1983 and sought a mandatory temporary restraining order

(TRO) demanding that the Sheriff implement the CDC Guidance at the Jail and many other specific operational measures. In response, the Sheriff demonstrated that all of the requested relief had already been implemented at the Jail. He attached twelve affidavits of Jail personnel documenting the ongoing efforts taken to contain the spread of the virus. (Appellant's Br. 4-13) While the district court relied heavily on the affidavits submitted by plaintiffs, it largely ignored the Sheriff's. (149a-154a)

After a telephonic hearing, on April 9, the district court granted plaintiffs extraordinary relief in the form of a TRO affirmatively ordering the Sheriff to: establish "a policy requiring prompt coronavirus testing" of certain detainees identified by the court; provide facemasks to detainees who have been "exposed to a symptomatic detainee (even if not coronavirus-positive)"; enforce social distancing during intake, including "suspending the use of bullpens"; provide sufficient amounts of soap or hand sanitizer and sanitization supplies, and establish a policy requiring regular sanitization of surfaces, including "monitoring and supervision to ensure that it takes place." (168a-170a) At that time, the court rejected plaintiffs' request to order social distancing in the housing areas of the Jail based on the CDC's acknowledgment that space constraints often prohibit the ability to enforce complete social distancing in those areas. The court also credited the Sheriff's "ongoing effort to modify custodial arrangements" in the housing areas to increase single-celled and socially-distanced dorm housing, even though it was not required by the TRO. (158a)

Preliminary Injunction. After the Sheriff submitted his court-ordered report on implementation of the TRO mandates, plaintiffs moved for a preliminary injunction. They sought an order to implement full six-foot social distancing throughout the Jail, and largely abandoned their pursuit of the issues in the TRO. (49a) The Sheriff argued that he had greatly expanded social distancing in the housing units. By opening shuttered divisions of the Jail and reducing the Jail population by over 20%, he increased the amount of single-celled housing by 545% and reduced the capacity of the dorm housing to less than 50% in nearly all rooms. (Appellate Br. 17-18) But he could not accommodate full social distancing for detainees assigned to specialty medical housing areas or those detainees in quarantine, isolation, or convalescent tiers based on their COVID-19 status.

The district court held an evidentiary hearing at which the Jail's First Executive Director, Michael Miller, testified. (50a-55a) Miller testified about pages of occupancy charts showing where detainees were housed throughout the Jail, broken down by division and tier, listing maximum capacity and current percentage occupancy, security designation, and related detail about housing assignments. Miller testified about how he used this data to inform ongoing housing assignments. He moved detainees from tier to tier as space became available to maximize single-celled and socially-distanced housing, while also balancing traditional factors like security classifications and other special considerations. (45a-46a)

Miller also testified that representatives from the CDC and the Chicago Department of Public Health toured the Jail a week earlier. (45a) CDC Commander Paige Armstrong commended the Office for "doing an amazing job" implementing social distancing, sanitization practices, and compliant use of PPE. (Appellate Br. 18) Plaintiffs' expert testified generally about the medical course of the coronavirus and why social distancing was one among many effective tools for limiting the spread of infection, but offered no specific testimony about the Sheriff's conduct or the Jail.

Nevertheless, on April 27, the district court issued an order imposing a mandatory preliminary injunction. The court commended the Sheriff's "significant, and impressive, effort to safeguard detained persons in his custody from infection by coronavirus" and expressed that "the Sheriff and his staff have acted in good faith, with the goal of protecting the people placed in his custody." (93a) Indeed, the court found that "the Sheriff has been anything but deliberately indifferent to the risk of harm to pretrial detainees from coronavirus." (93a)

Despite these laudatory remarks, the court found that the Sheriff's response to the coronavirus was objectively unreasonable and unconstitutional. (101a) ("group housing and double celling subject detainees to a heightened, and potentially unreasonable and therefore constitutionally unacceptable, risk of contracting and transmitting the coronavirus"). The court previously ruled that CDC Guidelines did not require social distancing in jails where it was not feasible due to space limitations, but then changed

course. (96a n.8) It found that despite Miller's detailed testimony on housing assignments, "the Sheriff has [not] yet hit the feasibility limit" on socially-distanced housing. (101a) It then ordered the Sheriff to implement socially-distanced housing in all tiers, except where detainees were assigned to restricted housing units for serious medical or COVID-related conditions. (102a-103a)

The court also converted the terms of the TRO to a preliminary injunction. Despite repeatedly recognizing the Sheriff's compliance with the TRO, and plaintiffs' failure to challenge it, it nevertheless concluded that "there is at least a possibility that these important measures could slip to the wayside, despite the Sheriff's best intentions, as he works to manage the complexities of the Jail during this public health crisis." (106a, 119a)

C. The Seventh Circuit's Decision

On appeal, the Sheriff argued that the district court failed to examine the totality of the Sheriff's actions taken in response to the coronavirus threat, focusing too narrowly on social distancing, which was but one aspect of a comprehensive set of protocols. The Sheriff also argued that the district court improperly shifted the burden to the Sheriff to prove why the TRO mandates should not be converted to a preliminary injunction and absolved plaintiffs of their burden of proof. The Sheriff also argued that the district court elevated its ideals above the Sheriff's expertise and judgment when deciding on the appropriate measures to take in response to the outbreak.

The Seventh Circuit reversed as to the social distancing mandate, but affirmed as to the converted TRO mandates. (1a-28a). Without articulating an actual legal framework, the appellate panel held that the "objective reasonableness standard" applied, with citation to *Kingsley v. Hendrickson*. (17a) As to the social distancing mandate, the panel found that the district court erred on three distinct grounds: (1) it narrowly focused its analysis on social distancing, exclusive of the other exhaustive measures implemented; (2) it failed to give proper deference to the Sheriff on housing matters, which involve jail security concerns; and (3) it applied the wrong preliminary injunction standard. (15a)

As to the terms converted from the TRO, the panel noted that the district court "did not revisit its analysis" in the preliminary injunction order. Therefore, the panel looked to the district court's reasoning in the TRO order, issued three weeks earlier. (24a) The panel did not analyze whether the Sheriff's conduct was unconstitutional or unreasonable. Rather, its discussion focused only on the relief granted by the court; that is, whether the mandates imposed by the court were consistent with CDC Guidelines. (25a-26a) Finally, the panel concluded that while the district court again failed to defer to the Sheriff's interests in managing the complexities of the Jail, as with its social distancing analysis, it was "less troubled" here because the converted TRO terms did not involve safety and security concerns. Thus, it found no legal error. (26a)

REASONS FOR GRANTING THE PETITION

Forty years ago, this Court issued its opinion in *Bell v. Wolfish*, 441 U.S. 520. In that case, the Court articulated the standard for evaluating conditions of confinement claims brought by pretrial detainees:

> "[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.' Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Id*. at 539.

In the years since, the appellate circuits have strayed from this standard, creating an entrenched split among the circuits. The most recent departure followed from this Court's opinion in *Kingsley v. Hendrickson*, which extended *Bell*'s holding to formally establish a standard for analyzing detainees' excessive force claims. Yet several circuits have misconstrued the holding in *Kingsley*, viewing it as a new or modified standard for evaluating jail conditions cases, abrogating *Bell*. Their clumsy efforts to force jail conditions claims into the excessive force framework of *Kingsley* has caused unnecessary confusion and undermined the fundamental principles of *Bell*. This Court must grant certiorari to reaffirm the vitality of *Bell* and restore consistency in these important analyses.

In *Bell*, a putative class of detainees filed suit challenging the conditions of their confinement at the federal Metropolitan Correctional Center, asserting a variety of complaints. Among them was the contention that their assignment to two-person cells violated their constitutional rights to privacy under the due process clause. *Id*. at 530.

The issue in the case required the Court to establish the standard to be applied to claims challenging "the constitutionality of conditions or restrictions of pretrial detention," which only implicate due process rights. *Id*. at 535. In such cases, "the proper inquiry is whether those conditions amount to punishment of the detainee," because detainees "may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id*. There is no dispute that the government may constitutionally detain these individuals after their arraignments and bail hearings, and may subject them to certain restrictions and conditions while in detention.

However, not every condition imposed during pretrial detention amounts to unconstitutional "punishment." Only those conditions and restrictions that rise to the level of punishment violate the constitution. *Id*. at 536-37. Some loss of freedom, privilege, and comfort is expected. It is only when those deprivations become punitive in nature do they violate a detainee's due process rights. *Id*. at 537.

Punishment may be shown by a jail official's expressed intent to punish. *Id*. at 538. Absent that, the determination turns on "'whether an alternative

purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Id.*, quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963); see also *id.* at 539 n.20 (unduly harsh conditions cannot be imposed to accomplish an objective where other less harsh methods could be implemented).

Thus, "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'" *Id.* at 539. "Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court may permissibly infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Id.* Importantly, "[c]ourts must be mindful that these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility." *Id.*

When the Court issued its opinion in *Kingsley v. Hendrickson* in 2015, it extended these principles to excessive force claims brought by pretrial detainees. Given the Court's recognition that pretrial detainees are protected under the due process clause, and not the cruel and unusual punishment clause of the Eighth Amendment, they deserve different treatment. But until *Kingsley*, it had not articulated the standard to be applied to review excessive force claims under the Fourteenth Amendment. Several of the appellate circuits began grafting the Eighth Amendment

analysis on to pretrial detainees' claims based on a passing reference in *Bell* that detainees were entitled to "at least" as much protection as convicted prisoners. See, e.g., *Miranda v. County of Lake*, 900 F.3d 335, 350 (7th Cir. 2018); *Bell*, 411 U.S. at 545. Thus, several circuits required detainees to prove that the officer had the subjective intent to "maliciously and sadistically" use excessive force against the pretrial detainee. *Farmer v. Brennan*, 511 U.S. 825, 835-36 (1994). But in *Kingsley*, this Court clarified that such claims brought by detainees under the Fourteenth Amendment must be viewed in accordance with the principles in *Bell*; *i.e.*, whether the use of force objectively amounted to punishment. 135 S. Ct. at 2472.

The simple mechanics of an excessive force claim led to a different articulation of the due process standard from the one set forth in *Bell*. In *Bell*, the question is whether the conditions imposed were unrelated to any legitimate nonpunitive purpose or excessive in relation to that purpose. In *Kingsley*, the question is whether a reasonable officer in the same situation armed with the same knowledge as the accused officer would have applied the same degree of force under the circumstances. Both standards ultimately reflect the same inquiry—whether the detainee has been subject to unconstitutional punishment—but each is expressed differently based on the governmental actions being analyzed. The test set forth in *Kingsley* is: (1) whether the use of force was deliberate, *i.e.*, purposeful, knowing, or reckless, rather than negligent; and (2) whether the amount of force used is, constitutionally speaking, "excessive," or objectively unreasonable under the circumstances.

Kingsley, 135 S. Ct. at 2472-73. *Kingsley* explains how the principles set forth in *Bell* are applied in a specific context, but it does not change the standard set forth in *Bell* for evaluating detainees' conditions of confinement claims.

Yet that is precisely how at least three circuit courts of appeal—the Second, Seventh, and Ninth Circuits—have applied *Kingsley* over the past five years. Among them, they cannot agree on a single formulation of a post-*Kingsley* standard, which is to be expected given the difficulty of fitting a square peg into a round hole. These courts have not only created confusion among and within the circuits, but have deviated fundamentally from the teachings of *Bell* by minimizing the considerable deference given to jail administrators in operating their facilities. Other circuits have faithfully applied the *Bell* standard to pretrial detainees' conditions of confinement claims. Still others have confined *Kingsley* to the excessive force context, but continue to apply the Eighth Amendment's subjective deliberate indifference test to detainees' conditions of confinement claims. This Court must grant certiorari to address the wide disparity that has developed among the circuits, particularly since *Kingsley*.

I. The Circuit Courts Of Appeal Are Deeply Divided Over The Standard Applied To Alleged Due Process Violations Brought By Pretrial Detainees Challenging The Conditions Of Confinement.

The circuit courts of appeal have become deeply divided over the analytical framework to be applied to conditions of confinement claims brought by pretrial detainees under 42 U.S.C. § 1983. While *Bell v. Wolfish* articulated the proper standard forty years ago, a majority of the circuits courts of appeal have since diverged from *Bell*, creating a patchwork of different standards, some of which undermine the fundamental principles on which *Bell* stands. Since this Court's opinion in *Kingsley v. Hendrickson* in 2015, the divide has only grown.

Four circuits—the Third, Fourth, Eighth, and D.C. Circuits—faithfully apply *Bell*'s objective standard, analyzing whether the challenged conditions amount to impermissible punishment because they are not related to a legitimate nonpunitive governmental purpose. See *Hope v. Warden York Cty. Prison*, 972 F.3d 310, 326 (3d Dist. 2020) (acknowledging *Kingsley* but continuing to apply traditional *Bell* analysis to detainee's jail conditions claims); *Dilworth v. Adams*, 841 F.3d 246, 252 (4th Cir. 2016) (same); *Stearns v. Inmate Services Corp.*, 957 F.3d 902, 908-09 (8th Cir. 2020) (declining to address the impact of *Kingsley* and continuing to apply traditional *Bell* analysis to detainee's jail conditions claim); *O.M.G. v. Wolf*, 2020 U.S. Dist. LEXIS 129300, *37-38 (D.D.C. 2020) (acknowledging *Kingsley* but continuing to apply

traditional *Bell* analysis to detainee's jail conditions claims).

Four circuits—the First, Sixth, Tenth, and Eleventh Circuits—apply the subjective deliberate indifference standard first articulated in *Farmer*, 511 U.S. at 835. The standard, which is applicable to Eighth Amendment claims brought by convicted prisoners, analyzes whether the complained-of conditions reflect a conscious disregard of a known risk of serious harm, rising to the level of criminal recklessness. See *Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 74 (1st Cir. 2016) (recognizing that *Kingsley* applies to pretrial detainee's excessive force claim, but applying *Farmer* standard to jail conditions claim); *Richmond v. Huq*, 885 F.3d 928, 938 n.3 (6th Cir. 2018) (recognizing that *Kingsley* "calls into serious doubt" whether a detainee still must prove the subjective prong, but nevertheless applying the *Farmer* Eighth Amendment standard); *Strain v. Regalado*, 977 F.3d 984, 990-91 (10th Cir. 2020) (confining *Kingsley* to excessive force claims and declining to extend it to jail conditions claims); *Nam Dang v. Sheriff, Seminole Cty. Fla.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) (same).

The Fifth Circuit has developed a unique hybrid standard in which it applies *Bell*'s objective punishment standard to detainees' attacks on "general conditions, practices, rules, or restrictions of pretrial confinement," but applies *Farmer*'s subjective deliberate indifference standard where the claim challenges "episodic acts or omissions." See *Hare v. City of Corinth*, 74 F.3d 633, 643 (5th Cir. 1996); *Alderson v. Concordia Parish Corr. Facility*, 848 F.3d

415, 419 n.4 (5th Cir. 2017) (declining to revisit the *Hare* standard in light of *Kingsley*).

The remaining three circuits—the Second, Seventh, and Ninth Circuits—have construed *Kingsley* as modifying or abrogating the *Bell* standard for pretrial detainees' jail conditions claims. And even among these circuits, they cannot agree on a single formulation of a post-*Kingsley* standard.

- *Darnell v. Piniero*, 849 F.3d 17, 35 (2d Cir. 2016) (after *Kingsley*, a pretrial detainee must "prove that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety. In other words, the 'subjective prong' (or '*mens rea* prong') of a deliberate indifference claim is defined objectively");

- *Castro v. City of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (after *Kingsley*, a pretrial detainee must prove: "(1) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (2) those conditions put the plaintiff at substantial risk of suffering serious harm; (3) the defendant did not take reasonable available measures to abate the risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the

defendant's conduct obvious; and (4) by not taking such measures, the defendant caused the plaintiff's injuries"; detainees must prove "something akin to reckless disregard"); and

- *Miranda v. County of Lake*, 900 F.3d 335, 353 (7th Cir. 2018) (announcing that *Kingsley* extends to claims of inadequate medical care, but struggling to articulate a workable standard); *Hardeman v. Curran*, 933 F.3d 816, 823 (7th Cir. 2019) (same, with respect to conditions of confinement claims); *McCann v. Ogle*, 909 F.3d 881, 886 (7th Cir. 2018) (states the post-*Kingsley* standard as: (1) whether the defendants acted purposefully, knowingly, or perhaps even recklessly when they considered the consequences of their handling of the plaintiff's case; and (2) whether the challenged conduct was objectively reasonable, considering the totality of facts and circumstances faced by the defendant without regard to the defendant's subjective belief that the response was reasonable, but failing to discuss *Bell*).

If *Kingsley* has changed anything, it has finally articulated what has long been implied in the *Bell* analysis. While the standard is described as objective, it necessarily incorporates a state of mind component, such that the jail official's actions must rise to the level of recklessness. This is consistent with the fundamental principles of entity liability. "'[M]unicipal liability under § 1983 attaches where–and only where–a deliberate choice to follow a course of action is made from among various alternatives' by city policymakers." *City of Canton v. Harris*, 489 U.S.

378, 389 (1989), quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 483-84 (1986). And that decision must reflect a "deliberate indifference" to a detainee's rights for there to be any liability. *Id*. at 392. It has since been viewed as objective deliberate indifference, measured against a standard of recklessness. *Farmer*, 511 U.S. at 836-37.

But the efforts of the Second, Seventh, and Ninth Circuits to apply the *Kingsley* framework to jail conditions claims are misguided and have caused confusion among jail officials and the courts. The *Kingsley* framework—focusing on (1) whether an individual officer's use of force was intentional or reckless rather than negligent, and (2) the objective proportionality of the response—is incongruous with a conditions of confinement claim. These circuits have concluded that the "logic" of *Kingsley* extends to jail conditions claims, but in fact, the opposite is true: *Kingsley* is itself an extension of *Bell*, as applied to the unique circumstances of an excessive force claim. The ultimate question underlying *Bell* and *Kingsley* may be the same as to prohibiting punishment, but the path to answering that question is not: whether a detainee has been subjected to punishment fundamentally depends on the mechanics of the claim.

There are other ways in which the mechanics of an excessive force claim differ from that of a jail conditions case, warranting a different analysis. For example, an Eighth Amendment jail conditions case is subject to a deliberate indifference standard, which examines whether the jail official made a conscious decision to disregard an excessive risk of harm of which it is subjectively aware. *Farmer*, 511 U.S. at

837. However, in an Eighth Amendment excessive force analysis, the inquiry focuses on whether an individual officer applied force "'maliciously and sadistically for the very purpose of causing harm,'" or with "'a knowing willingness that [harm] occur.'" *Id.* at 835-36, quoting *Hudson v. McMillian*, 503 U.S. 1, 6 (1992). This heightened standard reflects the realities of evaluating the amount of force used in the moment, which requires consideration of the fact that decisions are made "'in haste, under pressure, and frequently without the luxury of a second chance.'" *Id.*

So too must a Fourteenth Amendment excessive force claim reflect a different reality of circumstance than a Fourteenth Amendment jail conditions claim. Most concerning is that applying a *Kingsley* standard to a jail conditions case will necessarily collapse the inquiry and effectively impose strict liability on the officials. As to the first prong, focusing on intentionality, a jail administrator's decision to implement one set of policies over alternative ones is necessarily an intentional, knowing decision. That prong will always be satisfied. As to the second prong, the jail administrator is making that decision knowing that there is a risk of harm, which is the reason the challenged policies are being implemented. In essence, the risk of harm itself is being used to establish a culpable state of mind, which turns the entire inquiry about "reasonableness" on its head, particularly if the risk is not eliminated, as in the case below. (See 89a-104a)

This Court should grant certiorari to resolve the circuit split about whether *Kingsley* abrogated or modified the *Bell* standard applied to pretrial

detainee's conditions of confinement claims. The Court should ensure uniformity among the circuits and provide jail officials guidance in operating their facilities.

II. This Circuit Split Is Particularly Evident In Cases Analyzing Challenges to COVID-19 Protocols Under The Fourteenth Amendment.

As but one example, the courts' confusion on the proper standard for Fourteenth Amendment challenges to conditions of confinement is reflected in the widely different treatment given to cases challenging COVID-19 protocols in detention facilities. Not only do the outcomes vary from jurisdiction to jurisdiction—and in some cases, within the same circuit—they also reveal a departure from fundamental principles set forth in *Bell*, virtually eliminating the considerable deference given to jail administrators to manage the complexities of their facilities. As a result, jail administrators are dealing with unprecedented court interference with jail operations while also managing an unprecedented global pandemic behind the jail walls.

First Circuit: Intra-circuit split. See *Gomes v. U.S. Dep't Homeland Sec.*, 2020 U.S. Dist. LEXIS 115070, *6-8 (D.N.H. July 1, 2020) (acknowledging the continuing uncertainty since *Kingsley* and collecting cases reflecting an intra-circuit split). Compare *Baez v. Moniz*, 460 F. Supp. 3d 78 (D. Mass., May 18, 2020) (concluding pretrial detainees had to show subjective deliberate indifference) with *Yanes v. Martin*, 464 F. Supp. 3d 467 (D.R.I., June 2, 2020) (concluding that

Kingsley did away with the need for civil detainees to show the "subjective state of mind that is a hallmark of 'deliberate indifference' or 'reckless disregard' formulations'").

Second Circuit: Applying modified *Kingsley* standard. Compare *Fernandez-Rodriguez v. Licon-Vitale*, 2020 U.S. Dist. LEXIS 116749, *45-47, 56 n.199 (S.D.N.Y July 2, 2020) (citing *Darnell*, and while not deciding the proper standard, concludes plaintiffs would fail under either standard) with *Jones v. Wolf*, 2020 U.S. Dist. LEXIS 58368, *8-18, 33-34 (W.D.N.Y.) (applying *Darnell* and applying an objective deliberate indifference standard)

Third Circuit: Applying *Bell* standard. *Hope v. Warden York Cty. Prison*, 972 F.3d 310, 326 (3d Cir. 2020) (applying *Bell* standard to pretrial detainee's conditions claim: court must consider the totality of circumstances and assess whether conditions are (1) rationally related to their legitimate purpose or (2) excessive in relation to that purpose)

Fourth Circuit: Intra-circuit split. Compare *Coreas v. Bounds*, 451 F. Supp. 3d 407, 421-23 (D. Md. April 3, 2020) (applies deliberate indifference to conditions and inadequate medical care claims) with *Baxley v. Jividen*, 2020 U.S. Dist. LEXIS 239699, *47-49 (S.D.W. Va. Dec. 21, 2020) (discusses *Kingsley* and suggesting it may be time to reevaluate the standard, but ultimately applies deliberate indifference standard to medical care claims) and *Aslanturk v. Hott*, 459 F. Supp. 3d 681, 695-96 (E.D. Va. May 8, 2020) (applies *Bell* standard to jail conditions claim)

Fifth Circuit: Applying *Bell* standard. *Hernandez v. Mora*, 2020 U.S. Dist. LEXIS 106184, *22-23 (N.D. Tex. June 15, 2020); *Barrera v. Wolf*, 455 F. Supp. 3d 330, 338- (S.D. Tex. April 17, 2020)

Sixth Circuit. Applying objective standard. *Cameron v. Bouchard*, 815 Fed. Appx. 978, 984-85 (6th Cir. 2020) (declining to decide whether *Kingsley* or deliberate indifference standard applies, but claim fails under either standard)

Seventh Circuit: Applying modified *Kingsley* standard. *Mays v. Dart*, 947 F.3d 810 (7th Cir. 2020)

Ninth Circuit: Applying modified *Kingsley* standard. *Roman v. Wolf*, 2020 U.S. App. LEXIS 30510, *15 (9th Cir. 2020)

D.C. Circuit: Intra-circuit split. Compare *Banks v. Booth*, 2020 U.S. Dist. LEXIS 107762, *16-18 (D.D.C. June 18, 2020) (applying *Kingsley* standard in absence of guidance by D.C. Circuit) with *O.M.G. v. Wolf*, 2020 U.S. Dist. LEXIS 129300, *37-38 (D.D.C. July 22, 2020) (applying *Bell* standard)

III. The Seventh Circuit's Approach Falls On The Wrong Side Of The Split And This Case Is An Ideal Vehicle To Address The Question.

The Seventh Circuit's decision in *Mays v. Dart* is a study in contradiction that illustrates perfectly the problem with grafting the *Kingsley* excessive force framework onto a conditions of confinement claim. By trying to view a jail conditions claim from the lens of an excessive force claim, the panel asked the wrong

question in evaluating the constitutionality of the Sheriff's conduct. Its approach runs contrary to the fundamental principles set out in *Bell*, which, if applied, would have produced a different result as to the converted TRO claims. First, the panel failed to focus its inquiry on the primary question of whether any detainees were subjected to impermissible punishment as a result of the COVID-19 protocols implemented at the Jail. Second, contrary to the principles articulated in *Bell*, the panel failed to give proper deference to the Sheriff's judgment respecting other complexities of jail operations—magnified immeasurably when dealing with a global pandemic—not just those affecting security.

Under *Bell*, the appellate panel should have analyzed whether the detainees were subjected to any unconstitutional punishment as a result of the COVID-19 protocols implemented at the Jail. That is, was the Sheriff's comprehensive coronavirus response "reasonably related to a legitimate governmental objective" and proportionate relative to that objective, or was it "arbitrary or purposeless," permitting the court to infer that their purpose was to inflict punishment? *Bell*, 441 U.S. at 539. In applying this standard, courts must be "mindful that these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility." *Id*.

While jail security is an important objective in operating a jail, it is far from the only consideration that justifies the need for certain conditions without raising the inference that they were intended as

punishment. *Id.* at 540. The Court has long acknowledged the "problems that arise in the day-to-day operation of a corrections facility [that] are not susceptible of easy solutions," without the need to exhaustively "detail the precise extent of th[ose] legitimate governmental interests." *Id.* at 540, 547. Jail administrators are responsible for resolving complex issues related to many different aspects of jail operations and internal order, which "require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches." And this is particularly true in the context of coronavirus response strategies: the Constitution empowers those "politically accountable officials of the States" to make health and safety decisions on behalf of their constituents, and not "subject [them] to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people.'" *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, C.J., concurring).

Here, had the appellate panel applied *Bell* as intended, it would have framed its analysis in terms of whether the comprehensive measures implemented in response to the threat of a coronavirus outbreak subjected any detainees to unconstitutional punishment. That is, were the COVID-19 protocols related to a legitimate nonpunitive governmental objective, or were they arbitrary and purposeless, implying an intent to punish the detainees?

Under the proper framework, the panel could not have avoided the conclusion that the extensive protocols implemented represented a balancing of different options—all of which were intended to protect the detainees from the spread of a highly-contagious novel coronavirus, while operating within a complex environment with limited resources—not to impose punishment. The panel recognized the Sheriff's efforts in consulting with local, state, and federal public health officials two months before the first case of coronavirus entered the Jail, making preparations long before an outbreak occurred. (7a) He created quarantine and isolation housing for detainees who may become infected or exposed, enacted enhanced sanitization protocols, sought to access the national strategic stockpile of PPE during a global pandemic, and lobbied to have the Jail named as one of the first sites in the country where the coronavirus rapid test would be administered. (7a) The panel recited the Sheriff's "substantial efforts to increase social distancing, such as opening shuttered divisions of the Jail, creating new single-cell housing, and decreasing the capacity of dormitories." (18a) It also acknowledged the "extensive other measures" taken to prevent the spread of the virus throughout the Jail. (18a)

The Sheriff's comprehensive approach to containing the coronavirus was anything but "arbitrary or purposeless," revealing not a hint of an intent to punish detainees. *Bell*, 411 U.S. at 539. Indeed, the district court itself lauded the Sheriff's "significant, and impressive, effort to safeguard detained persons in his custody from infection by coronavirus" and expressed that "the Sheriff and his

staff have acted in good faith, with the goal of protecting the people placed in his custody." (93a) The court explicitly remarked that "the Sheriff has been anything but deliberately indifferent to the risk of harm to pretrial detainees from coronavirus." (93a) Taken together, these comments belie the very suggestion that the Sheriff acted recklessly or unconstitutionally in devising and implementing the COVID-19 protocols at the Jail. See *City of Canton*, 489 U.S. at 389; *Farmer*, 511 U.S. at 836-37.

While the appellate panel faulted the district court for not considering the entirety of the Sheriff's coronavirus response efforts before imposing the social distancing requirement, "especially in a case involving a systemic claim like here," it curiously did not apply that same logic when analyzing the remaining terms of the injunction. (17a) The panel correctly found that the scope of the district court's review focused too narrowly on social distancing efforts alone, rather than considering that in the context of the dozens of other measures implemented. But when it came to the four converted TRO mandates, the panel found the Sheriff's actions were constitutionally inadequate—even though they too were but a small part of the same set of protocols. And the claim remained a systemic one that required the panel to analyze *all* of the measures taken by the Sheriff in response to the risk of an outbreak. The scope of the Sheriff's comprehensive response did not change from the time the TRO was entered to the time the preliminary injunction issued. The panel's view of that factor also should not have changed. The Sheriff may satisfy his constitutional obligations without

entirely eradicating the risk of harm. *Farmer*, 511 U.S. at 844.

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: that is, was the decision to implement some COVID-19 protocols versus others so arbitrary and purposeless that it rose to the level of unconstitutional punishment? Instead, it focused its review on the *relief* granted: were the terms imposed by the district court consistent with the CDC Guidelines and, essentially, did the court "split the win"?[1]

The converted TRO mandates affirmatively ordered the Sheriff to: establish "a policy requiring prompt coronavirus testing" of certain detainees identified by the court, not required by the CDC

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[1] As the Sheriff argued on appeal (Appellate Br. 38-41), it was error for the district court to convert the TRO terms when it was no longer litigated at the preliminary injunction stage, and the appellate court erred in relying on that analysis, written three weeks earlier. See 24a ("When the district court issued the preliminary injunction, it did not revisit its analysis on any of these measures. Because the discussion pertaining to these measures resides in the temporary restraining order, we turn there for our analysis."). But that does not preclude review by this Court, where the question concerns whether the appellate panel applied the proper legal standard and the record contains the facts necessary to evaluate the application of the proper standard. See *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 429 (2006); *Hope v. Warden York Cty. Prison*, 972 F.3d 310 (3d Cir. 2020) ("The District Court turned due process on its head when it required the party against whom it ordered injunctive relief to prove why such relief should not be continued.").

(164a); provide facemasks to detainees who have been "exposed to a symptomatic detainee (even if not coronavirus-positive), which was contrary to CDC recommendations at the time (161a); enforce social distancing during intake, including "suspending the use of bullpens," an issue raised by the court, not the parties (157a); provide "sufficient amounts" of soap or hand sanitizer and sanitation supplies and require "monitoring and supervision to ensure that it takes place." (158a-160a)

As the Sheriff argued in response to the TRO petition, and supported with twelve affidavits that the district court scarcely considered, there were legitimate nonpunitive reasons for not undertaking these measures. The Sheriff's decision on which measures to implement, or not, involve complex operational decisions balancing resources, safety, priority, and the Sheriff's authority to act. See *Newsom*, 140 S. Ct. at 1613-14. All of those decisions were made in consultation with local, state, and federal public health officials and subject matter experts.

First, the Sheriff had no authority to develop policies for administering coronavirus tests. Those were medical decisions to be made by Cermak staff, which was in the midst of a global testing supply shortage at the time the TRO was entered. (164a) Second, there also was a global shortage of PPE. Consequently, the CDC specifically advised against giving facemasks to anyone other than medical staff, symptomatic detainees, and correctional officers or others who could bring the virus in from the community, as the district court expressly recognized.

(161a) The Sheriff prioritized the limited number of supplies in accordance with CDC guidelines. Frankly, the district court's order contradicted CDC guidelines at the time and forced the Sheriff to reallocate these limited resources. Third, the number of detainees entering the Jail dropped significantly because of the courts' and prosecutors' decisions to defer remand, which allowed for sufficient distancing and reduced the need for any "special enforcement" of social distancing in these areas. (92a) Moreover, the Sheriff had already created screening protocols at intake and procedures to quarantine all new detainees for up to 14 days before entering the general population, which offered additional protection against the spread of the virus. Finally, the Sheriff exponentially increased the amount of soap and cleaning supplies distributed. No detailed logs were kept about daily distribution of supplies at that time because, in the Sheriff's judgment, at those early stages just days after the first case of coronavirus was detected, staff resources were better spent on other frontline coronavirus-related efforts.

Because the appellate panel did not apply the proper *Bell* standard, it failed to properly analyze the Sheriff's conduct, or afford it the proper deference. Instead, the panel deferred to the *district court's* judgment about the measures it thought best to implement, in stark contrast to *Bell*'s teachings. The panel also concluded that it was "less troubled" with the district court's lack of deference to the Sheriff's experience and authority in implementing other COVID-19 protocols, and "did not find legal error" with these aspects of the mandatory injunction, because they did not strictly involve jail security

issues. (26a) But it was not the district court's place to make judgment calls about jail best practices. Nor does the appellate panel have ability to trivialize such interference.

The "wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government." *Bell*, 411 U.S. at 562; *Newsom*, 140 S. Ct. at 1613-14. This Court has long recognized and respected that jail administrators should be "accorded 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." *Id.* at 548 n.30. That applies to matters affecting jail security, but also to the myriad other complex issues affecting jail operations. Resolving those matters may justify imposing certain conditions without an inference of punishment arising. *Id.*

"Judicial deference is accorded not merely because the [jail] administrator ordinarily will…have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial." *Id.* at 548. For those reasons, "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Id.* at 548 n.30. "In the absence of *substantial* evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Id.* at 547-48, quoting *Pell*

v. Procunier, 417 U.S. 817, 827 (1974) (emphasis added).

As in *Bell*, the district court—and by extension, the appellate panel—"simply disagreed with the judgment" made by the Sheriff about the operational considerations involved or the means required to further those interests. *Id.* at 554. But such "unguided substitution of judicial judgment for that of the expert prison administrators on matters such as this is inappropriate." *Id*. While the district court's preferred protocols, blessed by the appellate court, "may be a reasonable way of coping with the problems of security, order, and sanitation," it is "not…the only constitutionally permissible approach to these problems." *Id*.

That is not to say that courts must take a "hands-off" approach to its evaluation of jail administration. *Id*. at 562. But courts may not "trench[ ] too cavalierly into areas that are properly the concern" of jail officials and become "enmeshed in the minutiae of prison operations." *Id.* 554, 562. When analyzing the constitutionality of a jail administrator's conduct relative to jail conditions, "the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan." *Id.* Of course, constitutional rights must be "scrupulously observed," but "the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution." *Id*.

Had the court applied the *Bell* standard when analyzing the plaintiffs' challenge to the COVID-19

protocols, the outcome here would have been different. This error is consequence of a lack of clarity on the appropriate standard to apply to pretrial detainees' challenges to conditions of confinement since *Kingsley*. This error is being repeated in courts across the country, as similar lawsuits are being filed in jails and detention centers nationwide. The Court should grant certiorari to reaffirm the legal framework set forth in *Bell* and provide proper guidance to courts and jail administrators going forward.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 15, 2021

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DATED SEPTEMBER 8, 2020

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 20-1792

ANTHONY MAYS, INDIVIDUALLY AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED PERSONS, *et al.*,

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 20-cv-2134 — **Matthew F. Kennelly**, *Judge.*

August 18, 2020, Argued
September 8, 2020, Decided

Before SYKES, *Chief Judge*, and BRENNAN and ST. EVE, *Circuit Judges.*

Appendix A

ST. EVE, *Circuit Judge*. Plaintiffs—a class of detainees at the Cook County Jail—brought this action against Cook County Sheriff Thomas Dart after the Jail reported an outbreak of COVID-19, the disease caused by the novel coronavirus that has sparked a global pandemic. Plaintiffs contend that the Sheriff has violated their Fourteenth Amendment Due Process rights by failing to provide them with reasonably safe living conditions as the pandemic rages. Plaintiffs seek various forms of relief, including an injunction requiring the Sheriff to implement certain procedures related to social distancing, sanitation, diagnostic testing, and personal protective equipment ("PPE") to protect them from the virus for the duration of the pandemic.

After a hearing, the district court granted a temporary restraining order imposing several forms of relief, including but not limited to, mandates requiring the Sheriff to provide hand sanitizer and soap to all detainees and face masks to detainees in quarantine. The district court declined to order relief in several instances, though: most notably for our decision today, the district court rejected Plaintiffs' request to prohibit double celling and group housing arrangements to permit adequate social distancing.

Plaintiffs subsequently moved for entry of a preliminary injunction, requesting an extension of the relief the district court previously mandated in the temporary restraining order and, among other things, renewing their request for socially distanced housing. After another hearing, the district court switched course

from its prior ruling and granted the renewed social distancing request, albeit with certain exceptions. The district court also granted the request for an extension of the relief included in the temporary restraining order. The Sheriff appealed.

We conclude that, in the course of its analysis regarding double celling and group housing, the district court committed three distinct legal errors: the district court failed to consider the Sheriff's conduct in its totality, failed to afford proper deference to the Sheriff's judgment in adopting policies necessary to ensure safety and security, and cited an incorrect legal standard when evaluating the likelihood that Plaintiffs' claims will succeed on their merits. Given these legal errors in evaluating the likelihood of success on the merits of Plaintiffs' claims, we reverse the district court with respect to the portion of the preliminary injunction mandating socially distanced housing. Regarding the remaining relief, however, the district court made detailed factual findings, properly considered the Sheriff's conduct in its totality, and closely tailored the relief it ordered to the guidelines promulgated by the Centers for Disease Control and Prevention ("CDC"). We therefore affirm all other aspects of the preliminary injunction.

I. Background

A. Factual Background

At present, COVID-19 requires no introduction: the novel coronavirus causing this disease has spread

around the world, resulting in an unprecedented global pandemic that has disrupted every aspect of public life. The virus, SARS-CoV-2, causes symptoms ranging from fever to shortness of breath to loss of smell and can lead to serious health effects—including damage to internal organs and, in many cases, death. People over the age of sixty-five and with certain preexisting health conditions face a heightened risk of severe illness resulting from COVID-19. The virus transmits rapidly from person to person, primarily through respiratory droplets emitted by coughing or sneezing that can travel multiple feet and remain in the air for several hours, and also through lingering particles on surfaces. People may transmit the virus despite a lack of symptoms, making it difficult to take necessary precautions.

Society has, though, taken many precautions to attempt to curb the spread of COVID-19. Many states, including Illinois, presently require wearing face coverings in public spaces in order to slow the spread of COVID-19. States have ramped up testing capacity and contact tracing to identify those who have interacted with persons who later tested positive for the virus. Illinois and most other states implemented stay-at-home orders that forced people to socially distance, limiting interpersonal contacts and group activities: schools transitioned to remote learning, restaurants and bars closed, and officials largely cancelled public events.

The Cook County Jail is an enormous facility with the population of a small town. The inherent nature of the Jail presents unique challenges for combatting the

spread of COVID-19: it is designed to accommodate large and densely-packed populations. Many detainees reside in "dormitory" units, meaning hundreds of detainees sleep in a single room on closely-spaced bunk beds, and there are many common spaces where detainees are in close proximity to one another. On April 8, 2020, *The New York Times* reported that, at that time, the Jail was the largest known-source of coronavirus infections in the United States. Timothy Williams and Danielle Ivory, *Chicago's Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars* (April 8, 2020) N.Y. Times, https://www.ny-times.com/2020/04/08/us/coronavirus-cook-county-jail-chi-cago.html (last visited August 27, 2020). When Plaintiffs filed their motion for a preliminary injunction, on April 14, 541 detainees and Jail staff had tested positive for COVID-19. By April 23, only a few days before the district court issued the preliminary injunction that is the subject of this appeal, six detained persons had died from complications.

On March 23, the Center for Disease Control issued Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities ("CDC Guidelines"). The document "is intended to provide guiding principles for healthcare and non-healthcare administrations of correctional and detention facilities" to "help reduce the risk of transmission and severe disease from COVID-19" in light of the unique challenges correctional and detention facilities present. The Guidelines recommend various measures, including making available sufficient hygiene and cleaning supplies, frequently cleaning and disinfecting high-touch surfaces and objects, and implementing social distancing strategies

where feasible, among many others. The Guidelines note, in bold font, that the "guidance may need to be adapted based on individual facilities' physical space, staffing, population, operations, and other resources and conditions." Additionally, in the section recommending the implementation of social distancing in jails, the CDC's guidance notes "[s]trategies will need to be tailored to the individual space in the facility and the needs of the population and staff."

The Cook County Sheriff, who is responsible for operating the Jail, took numerous proactive measures to prevent the spread of COVID-19. As early as January 24, Roland Lankah, the Sheriff's in-house Environmental Health Specialist and epidemiologist, began coordinating with the Cook County Health Infection Control Department to develop a plan for an outbreak. That plan involved increasing disinfection and sanitization, devising protocols to screen detainees for symptoms, and moving infected detainees to separate housing. Upon Governor Pritzker's declaration of Illinois as a disaster area on March 9, the Sheriff set up a space for new detainees to quarantine for seven to fourteen days before entering the general population. By mid-March, First Assistant Executive Director Michael Miller was working to open three closed divisions of the Jail to create more single-cell units and reduce density. The Sheriff also coordinated with Senator Durbin's office, the Federal Emergency Management Agency, and Governor Pritzker's office to receive priority access to the national stockpile of PPE in Illinois. The Sheriff engaged various consultants, including a former CDC Director, to improve sanitation policies, policies

relating to medical screening, and use of PPE. In coordination with other stakeholders in the Cook County criminal justice system, the Sheriff undertook efforts to reduce the Jail population through securing release or electronic monitoring for over 1,200 detainees. And, on April 1, the Sheriff's Office contacted local authorities to obtain approval to administer Abbott Laboratories' rapid test at the Jail. Cermak Health Services, a division of the Cook County Health and Hospital Systems, began administering these tests soon thereafter.

B. Procedural Background

On April 3, Anthony Mays and Kenneth Foster, two detainees at the Cook County Jail, sued Cook County Sheriff Thomas Dart on behalf of "all people who are currently or who will in the future be housed in the Cook County Jail for the duration of the COVID-19 pandemic." The class includes two subclasses: Subclass A, which consists of all people who are at an elevated risk of complications from COVID-19 due to age or an underlying medical condition, and Subclass B, which consists of all people housed on a tier where someone has tested positive for the virus. They assert violations of their rights under the Fourteenth Amendment to reasonably safe living conditions, bringing claims under 42 U.S.C. § 1983 and for writs of habeas corpus under 28 U.S.C. § 2241.

1. Temporary Restraining Order

Plaintiffs moved for a temporary restraining order, requesting that the district court order the Sheriff to

enact multiple measures designed to prevent the spread of COVID-19. On April 9, after conducting a hearing via telephone and reviewing numerous affidavits Plaintiffs submitted, the district court issued a temporary restraining order, though one considerably narrower than the order Plaintiffs requested. This temporary restraining order compelled the Sheriff to do the following:

- To establish "a policy requiring prompt coronavirus testing of detainees who exhibit symptoms consistent with coronavirus disease as well as, at medically appropriate times and to the extent feasible based on the acquisition of sufficient testing materials, detainees who have been exposed to others who have exhibited those symptoms or have tested positive for coronavirus."

- To enforce "social distancing during the new detainee intake process, including suspending the use of bullpens to hold new detainees awaiting intake."

- To provide "soap and/or hand sanitizer to all detainees in quantities sufficient to permit them to frequently clean their hands" and "adequate sanitation supplies to enable all staff and detainees to regularly sanitize surfaces and objects on which the virus could be present, including in all areas occupied or frequented by more than one person (such as two-person cells, as well as bathrooms and showers)."

- To establish "a policy requiring sanitization between all uses of frequently touched surfaces and objects as well as monitoring and supervision to ensure that such sanitization takes place regularly."

- To "provide facemasks to all detainees who are quarantined—i.e., those who have been exposed to a detainee who is symptomatic (even if not coronavirus-positive)."

In imposing this relief, the district court made detailed factual findings about the policies the Sheriff had enacted and his successes and shortcomings in executing those policies. Throughout its decision, the district court relied heavily on the CDC Guidelines. Where the district court elected to impose the requested relief, the court noted that the evidence showed the Sheriff's collective actions fell short of those recommended in the CDC Guidelines.

In several instances, though, the district court declined to implement additional relief where the evidence revealed that the Sheriff already had a policy in place—such as one requiring a fourteen-day quarantine of all new detainees—or existing measures were sufficient—such as those to enforce the use of PPE by Jail staff who come into contact with detainees. The court also overruled Plaintiffs' requests for mandatory social distancing throughout the Jail and a directive to identify detainees who are at high risk for complications from COVID-19. In these instances, the court was unpersuaded that Plaintiffs were likely to succeed on the merits of their claim that the Sheriff's conduct posed a constitutional violation.

Regarding social distancing in particular, the district court acknowledged the Sheriff's "ongoing effort[s] to modify custodial arrangements" at the Jail to "permit greater separation of detainees," but noted that "space constraints" at the Jail preclude "complete social distancing." The court cited the CDC Guidelines, which "expressly recognize that complete social distancing may not be possible in the sleeping areas of a jail." The court also acknowledged that "[s]pace constraints at the Jail do not allow for the more preferable degree of social distancing that exists in the community at large." The court thus concluded that "plaintiffs have [failed] to show a reasonable likelihood of success on their contention that the Sheriff is acting in an objectively unreasonable manner by failing to mandate full social distancing" and that this was "particularly so because the Sheriff's submission reflects an ongoing effort to modify custodial arrangements at the Jail in a way that will permit greater separation of detainees.»

2. Preliminary Injunction

On April 14, Plaintiffs moved for entry of a preliminary injunction. Relevant to our decision today, Plaintiffs sought to extend the relief the court imposed in the temporary restraining order and again requested a mandate for social distancing throughout the Jail. The Sheriff opposed the motion, and, regarding the request for social distancing, argued that his efforts were consistent with the CDC Guidelines, that he had already taken substantial steps to implement social distancing, and that further steps were impossible. The Sheriff submitted a progress

report on efforts to contain the coronavirus. Regarding social distancing, the progress report described efforts to open previously closed divisions, transition 175 tiers to single-cell housing, and reduce dormitory capacity to below fifty percent, except for detainees in certain medical or restricted housing. The Sheriff also had worked with criminal justice stakeholders to secure the release of more than 1,200 detainees with appropriate bond conditions, increased single-cell housing at the Jail by approximately 545%, and decreased double-celled housing at the Jail by over 90%.

The district court conducted a preliminary injunction hearing via videoconference and permitted each side to call one witness in addition to submitting affidavits. The court ultimately granted Plaintiffs' motion in part. Regarding Plaintiffs' § 1983 claim, the court conditionally certified the proposed class to the extent Plaintiffs requested a conversion of the temporary restraining order to a preliminary injunction and a mandate requiring increased social distancing. The court then proceeded to the question of whether Plaintiffs had demonstrated that they had a "better than negligible chance" of succeeding on their contention that the Sheriff's conduct in addressing the risks posed by exposure to the coronavirus is objectively unreasonable. The court acknowledged the "significant, and impressive, effort" the Sheriff had undertaken, and noted that, if this were an Eighth Amendment claim, this finding regarding the Sheriff's efforts would likely end the matter.

The court focused on Plaintiffs' renewed request for a policy precluding double celling and group sleeping arrangements to facilitate social distancing. The court first explained that the CDC Guidelines, which set a feasibility limitation on social distancing practices, are relevant but not dispositive. The court then determined that "group housing and double celling subject detainees to a heightened, and potentially unreasonable and therefore constitutionally unacceptable, risk of contracting and transmitting the coronavirus." Thus, after making a passing reference to the Sheriff's interest in discipline and security in the Jail and dismissing the Sheriff's contention that he faced feasibility limitations on further social distancing, the court concluded that Plaintiffs were reasonably likely to succeed on their contention that group housing and double celling is objectively unreasonable, except in certain situations. In arriving at this conclusion, the court did not discuss any other aspect of the Sheriff's response to COVID-19; instead, the court limited its discussion solely to the importance of social distancing. The court also rejected the Sheriff's argument that his compliance with the temporary restraining order rendered its extension into a preliminary injunction unnecessary because the court could not conclude that the constitutional violations would not recur absent such an extension. The court did not revisit any of its findings related to the measures it ordered in the temporary restraining order.

Regarding the remaining preliminary injunction factors, the district court determined that Plaintiffs had shown that, without additional measures, they would likely suffer irreparable harm—including severe illness

and death—and that damages could not fully remedy the risk they faced. Lastly, the district court determined the balance of harms weighed in favor of Plaintiffs. The court therefore issued a preliminary injunction extending all of the relief included in the temporary restraining order, with the additional requirement of a policy precluding group housing and double celling except in certain situations, such as when a medical or mental health professional has determined a detainee poses a risk of suicide or self-harm if placed in a single cell or when a detainee requires medical treatment not available in socially distanced housing.

The Sheriff appealed, challenging the entire preliminary injunction but directing the bulk of his arguments to the prohibition against double celling and group housing.

II. Discussion

"To obtain a preliminary injunction, a plaintiff must show that: (1) without this relief, it will suffer 'irreparable harm'; (2) 'traditional legal remedies would be inadequate'; and (3) it has some likelihood of prevailing on the merits of its claims." *Speech First, Inc. v. Killeen*, 968 F.3d 628, 637 (7th Cir. 2020) (quoting *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1068 (7th Cir. 2018)). If a plaintiff makes such a showing, the court proceeds to a balancing analysis, where the court must weigh the harm the denial of the preliminary injunction would cause the plaintiff against the harm to the defendant if the court were to grant it. *Courthouse News Serv.*, 908 F.3d at 1068. This

balancing process involves a "sliding scale" approach: the more likely the plaintiff is to win on the merits, the less the balance of harms needs to weigh in his favor, and vice versa. *Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 895 (7th Cir. 2001). Mandatory preliminary injunctions—those "requiring an affirmative act by the defendant"—are "ordinarily cautiously viewed and sparingly issued." *Graham v. Medical Mut. of Ohio*, 130 F.3d 293, 295 (7th Cir. 1997); *see also Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013) (review of a preliminary injunction is "even more searching" when the injunction is "mandatory rather than prohibitory in nature.")

While we review the district court's balancing of the harms for an abuse of discretion, we review its legal conclusions de novo and its findings of fact for clear error. *C.Y. Wholesale, Inc. v. Holcomb*, 965 F.3d 541, 545 (7th Cir. 2020). "[A] factual or legal error may alone be sufficient to establish that the court 'abused its discretion' in making its final determination." *Lawson Prod., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1437 (7th Cir. 1986). "Absent such errors," however, "we afford a district court's decision 'great deference.'" *Speech First, Inc.*, 968 F.3d at 638 (quoting *Valencia v. City of Springfield*, 883 F.3d 959, 966 (7th Cir. 2018)).

A. Socially Distanced Housing

We first address the portion of the preliminary injunction aimed at socially distanced housing because that is the thrust of the Sheriff's appeal. The parties do not dispute the district court's conclusions regarding the

first two elements of the preliminary injunction standard: that Plaintiffs would suffer irreparable harm and that traditional legal remedies would be inadequate. Rather, the debate focuses entirely on the likelihood of success on the merits of their claim that the Sheriff's actions (or inaction, as Plaintiffs contend) in response to COVID-19 are objectively unreasonable. We therefore limit our discussion to this threshold requirement.

We conclude that the district court committed three distinct legal errors: the court failed to consider the totality of the circumstances, the court failed to afford proper deference to the Sheriff's judgment in adopting policies necessary to ensure safety and security in the Jail, and the court recited an incorrect legal standard when evaluating the likelihood that Plaintiffs' contentions will succeed on their merits. We address each of these errors in turn.

1. Totality of the Conduct

We start with the proper scope of the analysis under the more recent objective reasonableness inquiry for pretrial conditions of confinement claims. In *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S. Ct. 2466, 192 L. Ed. 2d 416 (2015), the Supreme Court concluded that, when bringing an excessive force claim, a "pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable," rather than demonstrate deliberate indifference. *Id.* at 396-97. Recognizing "that the Supreme Court has been signaling that courts must pay careful attention to the different

status of pretrial detainees," we held in *Miranda v. Cty. of Lake*, 900 F.3d 335 (7th Cir. 2018), that a pretrial detainee's claims of inadequate medical care also "are subject only to the objective unreasonableness inquiry identified in *Kingsley*." *Id.* at 352. We saw "nothing in the logic the Supreme Court used in *Kingsley*" to support a "dissection of the different types of claims that arise under the Fourteenth Amendment's Due Process Clause." *Id.* We likewise subsequently expanded this holding to encompass conditions of confinement claims under the Fourteenth Amendment Due Process Clause. *Hardeman v. Curran*, 933 F.3d 816, 823 (7th Cir. 2019) (citing *Kingsley*, 576 U.S. at 396-97). Accordingly, we must analyze Plaintiffs' claim under the objective reasonableness inquiry articulated in *Kingsley*.[1] *Id.*

The Supreme Court described the application of the objective reasonableness standard in *Kingsley*: "A court (judge or jury) cannot apply this standard mechanically. Rather, objective reasonableness turns on the facts and circumstances of each particular case." 576 U.S. at 397. We reiterated this principle in *McCann v. Ogle Cty., Illinois*, 909 F.3d 881 (7th Cir. 2018), explaining that, when evaluating whether challenged conduct is objectively

1. Both the Sixth Circuit and the Eleventh Circuit have recently addressed conditions of confinement claims involving the coronavirus in prison settings. *See Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020), in *Swain v. Junior*, 961 F.3d 1276 (11th Cir. 2020). These Circuits, however, apply an Eighth Amendment deliberate indifference standard to pretrial detainee conditions of confinement claims rather than the objectively unreasonable claim that we apply, and thus focus on a subjective element that is not at issue here.

unreasonable, courts must "focus on the totality of facts and circumstances." *Id.* at 886.

The district court erred by narrowly focusing its objective reasonableness analysis almost exclusively on social distancing instead of considering the totality of facts and circumstances, including all of the Sheriff's conduct in responding to and managing COVID-19. Citing *McCann*, the district court wrote, "To succeed on their claim, the plaintiffs must show that the Sheriff's conduct in addressing the risks posed by exposure to coronavirus is objectively unreasonable *in one or more respects*." (emphasis added). The district court then went on to emphasize social distancing and the Sheriff's efforts to implement social distancing to the exclusion of the Sheriff's other actions. This analysis incorrectly ignored the totality of the circumstances. It may very well be the case that a particular aspect of an action is so lacking that the failing on this one factor will lead a court to correctly conclude the entire course of challenged conduct was objectively unreasonable. It may also be that some actions or inactions are more consequential than others. But that does not mean that the court should evaluate each aspect of the disputed actions in a vacuum, especially in a case involving a systemic claim like here. Rather, the court must consider the total of the circumstances surrounding the challenged action.

In addition, the district court hinged its decision to impose a social distancing directive on the basis of one, and only one, key factual finding: "At the current stage of the pandemic, group housing and double celling subject

detainees to a heightened ... risk of contracting and transmitting the coronavirus." We do not suggest that this finding was erroneous: the district court had before it a voluminous evidentiary record about the importance of social distancing to reducing transmission of COVID-19. Instead, we take issue with what was missing: absent from the district court's reasoning was any mention of the totality of the measures the Sheriff already had taken to combat the spread of COVID-19, including those regarding social distancing. By the time the district court issued the preliminary injunction, the Sheriff had already implemented several such measures. Notably, and as the district court initially acknowledged in its temporary restraining order, these included substantial efforts to increase social distancing, such as opening shuttered divisions of the Jail, creating new single-cell housing, and decreasing the capacity of dormitories. The Sheriff had also undertaken extensive other measures to prevent and manage the spread of COVID-19 at the Jail. By failing to evaluate the request for a policy precluding double celling and group housing in light of the other aspects of the Sheriff's COVID response, the district court did not properly consider the totality of the facts and circumstances when evaluating the objective unreasonableness of the Sheriff's actions.

2. Deference to Correctional Administrators

We turn to a second error: the failure to defer to correctional administrators in a matter implicating safety and security concerns. "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.'" *Henry v. Hulett*, F.3d _, 2020 U.S. App. LEXIS 25390, 2020 WL 469188, (7th Cir. 2020) (en banc) (quoting *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)). Likewise, a court must "account for the legitimate interests that stem from the government's need to manage the facility in which the individual is detained." *Kingsley*, 576 U.S. at 397. Thus, "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Bell*, 441 U.S. at 548 (quoting *Pell v. Procunier*, 417 U.S. 817, 827, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974)). Correctional administrators must have "substantial discretion to devise reasonable solutions to the problems they face," particularly when safety and security interests are at stake. *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 566 U.S. 318, 326, 132 S. Ct. 1510, 182 L. Ed. 2d 566 (2012). Thus, "as part of the objective reasonableness analysis ... deference to policies and practices needed to maintain order and institutional security is appropriate." *Kingsley*, 576 U.S. at 399-400.

When evaluating Plaintiffs' request for a policy precluding group housing and double celling, the district court made a passing reference to its obligation to "account for and give deference to the Sheriff's interest in managing the Jail facilities and to practices that are needed to preserve order and discipline and maintain security." The district court, however, did not discuss in a

meaningful way how, if at all, the considerable deference it owed to the judgment of prison administrators impacted its analysis. Undoubtedly, safety and security concerns play a significant role in a correctional administrator's housing decisions: jails and prisons require some degree of flexibility in choosing cell assignments, as they need to ensure, for example, that detainees are assigned to the living quarters corresponding with their security classifications and factoring in particular vulnerabilities that increase security risks. This is especially true at the Jail where the population fluctuates daily given the number of bookings and releases that take place. Correctional officers similarly must have the freedom to quickly reassign inmates when fights or other emergency situations occur that threaten the safety of staff and inmates. This is perhaps no more important than at a facility like the Cook County Jail, which houses a wide range of detainees accused of committing up to the most serious of violent offenses. Given the deference courts owe to correctional administrators on matters implicating safety concerns and the substantial role that security interests play in housing assignments, the failure to consider these interests was a legal error.

3. Likelihood of Success on the Merits

Lastly, we address a third issue: the proper standard for evaluating the likelihood of success on the merits when considering a motion for a preliminary injunction. The district court began its analysis of Plaintiffs' request for a policy requiring socially distanced housing by noting that, to demonstrate a likelihood of prevailing, Plaintiffs must

show "only a better than negligible chance of success." The district court explained this is a "low threshold."

As we just explained in *Illinois Republican Party v. Pritzker*, F.3d __, 2020 U.S. App. LEXIS 28118, 2020 WL 5246656, at *2 (7th Cir. Sept. 3, 2020), "the 'better than negligible' standard was retired by the Supreme Court," and is not the proper standard to apply when evaluating the likelihood of success on the merits in a preliminary injunction motion. The standard originated in *Omega Satellite Prod. Co. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982). But like many instances of selectively quoted phrases, we did not use this phrase as an unadorned statement of the applicable standard. We said in *Omega*:

> If the harm to the plaintiff from denial of the preliminary injunction would be very great and the harm to the defendant from granting it very small, then the injunction should be granted even if the defendant has a better chance of prevailing on the merits than the plaintiff, provided the plaintiff's chances are better than negligible; and vice versa.

Id. at 123. As readily apparent, in context, we were explaining no more than what has become known as our sliding scale approach. Since *Omega*, though, we have at times—confusingly—cited the "better than negligible" phrase as if it were the proper standard for evaluating the likelihood of success on the merits at the preliminary injunction stage. *See Ill. Republican Party*, 2020 U.S. App. LEXIS 28118, 2020 WL 5246656 at *2 (collecting cases).

The Supreme Court has invoked a higher standard. In *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008), the Court stated that "[a] plaintiff seeking a preliminary injunction must establish that he is *likely* to succeed on the merits." *Id.* at 20 (emphasis added). Similarly, when discussing the requisite showing to establish irreparable injury, the Court explained that its standard "requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Id.* at 22 (emphasis in original) (rejecting the Ninth Circuit's "possibility" standard as "too lenient"). The Court provided further guidance in *Nken v. Holder*, 556 U.S. 418, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009), which set forth the standard governing motions for a stay pending appeal. Though a different context, "[t]here is substantial overlap between [the traditional stay factors] and the factors governing preliminary injunctions." *Id.* at 434 (citing *Winter*, 555 U.S. at 24). This is "not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Id.* The Court reiterated that under the "traditional" standard for a stay, the first factor asks "whether the stay applicant has made a strong showing that he is likely to succeed on the merits." *Id.* at 425-26 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987)). For that showing, the Court made clear, "[i]t is not enough that the chance of success on the merits be 'better than negligible,'" quoting with disapproval this court's decision in *Sofinet v. INS*, 188 F.3d 703, 707 (7th Cir. 1999). *Id.* at 434.

We thus reiterate that a plaintiff must demonstrate that "its claim has some likelihood of success on the merits," *see, e.g., Eli Lilly and Co. v. Arla Foods, Inc.*, 893 F.3d 375, 381 (7th Cir. 2018), not merely a "better than negligible" chance. What amounts to "some" depends on the facts of the case at hand because of our sliding scale approach. *See Ty, Inc.*, 237 F.3d at 895.

Here, in reliance on our prior precedent, the district court recited the incorrect "better than negligible" standard several times. In various instances, though, the district court's analysis indicates that it, in fact, applied a higher standard. In particular, the district court at times used language that Plaintiffs were "reasonably likely to succeed on their contention," and the court ultimately concluded that Plaintiffs had "far surpassed" the "better than negligible" standard. Thus, were the recitation of the incorrect standard the district court's only error, we could not say that the district court abused its discretion in imposing the social distancing requirement. But, when coupling this with the district court's other errors, we cannot be certain that Plaintiffs' showing of the likelihood of success on the merits of their claim would have surmounted the appropriate standard. We therefore reverse the portion of the preliminary injunction precluding double celling and group housing at the Jail.

We emphasize that we do not address the merits of whether Plaintiffs have demonstrated that they have suffered a constitutional violation. Indeed, our discussion solely addresses the legal errors the district court committed in the course of its preliminary injunction

analysis. We reverse this portion of the preliminary injunction on the basis of these legal errors alone.

B. Remaining Relief

In the temporary restraining order, the district court granted several measures of relief to Plaintiffs, including requirements that the Sheriff implement procedures and policies related to sanitation, testing, and provision of face masks to detainees in quarantine. When the district court issued the preliminary injunction, it did not revisit its analysis on any of these measures. Because the discussion pertaining to these measures resides in the temporary restraining order, we turn there for our analysis.

We affirm the aspects of the preliminary injunction that the district court converted from the temporary restraining order. In that order, the district court made detailed factual findings about the risks of COVID-19, the Sheriff's existing policies, and the execution of these policies, relying on hearing testimony and affidavits from Plaintiffs' experts, detainees, and correctional administrators. Importantly, the district court assessed the requested relief considering the totality of the Sheriff's conduct, rather than reviewing it in isolation. For example, the district court declined Plaintiffs' request to mandate testing of new detainees since the Sheriff already had in place a policy requiring detainees to quarantine for fourteen days upon their arrival to the Jail.

The district court also carefully considered the Sheriff's conduct in light of the CDC Guidelines and

hewed closely to the Guidelines in its explanation of each measure of relief it ordered. The CDC Guidelines—like other administrative guidance—do not themselves set a constitutional standard. *See Bell*, 441 U.S. at 543 n.27 (noting that recommendations of a Department of Justice task force "regarding conditions of confinement for pretrial detainees are not determinative of the requirements of the Constitution"); *cf. J.K.J. v. Polk Cty.*, 960 F.3d 367, 384 (7th Cir. 2020) (en banc) (concluding that the guidelines set by the Prison Rape Elimination Act do not set a constitutional parameter under the more demanding *Monell* deliberate indifference standard). Indeed, "while the recommendations of these various groups may be instructive in certain cases, they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question." *Bell*, 441 U.S. at 543 n.27. But even if not dispositive, implementation (and proper execution) of guidelines that express an expert agency's views on best practices are certainly relevant to an objective reasonableness determination. *United States v. Brown*, 871 F.3d 532, 537 (7th Cir. 2017) (noting that evidence of policy or procedure may be relevant to an objective reasonableness inquiry, even though it does not set the constitutional standard). This is particularly true here, where the CDC Guidelines provide the authoritative source of guidance on prevention and safety mechanisms for a novel coronavirus in a historic global pandemic where the public health standards are emerging and changing.

The CDC Guidelines differ in material ways from the police department regulations at issue in our decision in *Thompson v. City of Chicago*, 472 F.3d 444 (7th Cir.

2006). In *Thompson*, we determined that a policy on the use of force established by the police department did not dictate the constitutional standard for the use of force. *Id.* at 454; *see Brown*, 871 F.3d at 537 (clarifying the holding of *Thompson*). But the CDC Guidelines, arising from an expert, independent agency, are entitled to greater weight than a police department's internally-crafted regulations. *See Brown*, 871 F.3d at 537 ("[I]f compliance with departmental policy were the applicable legal standard, the police department itself would become the arbiter of Fourth Amendment reasonableness—a prospect that would have horrified those responsible for the Amendment's ratification."). The district court thus properly relied on these Guidelines in the course of its preliminary injunction analysis.

We note that, as it did with its discussion of Plaintiffs' request for an order precluding double celling and group housing arrangements, the district court made only a passing reference to the Sheriff's interest in managing Jail facilities and its obligation to defer to policies and practices necessary to preserve order and security. Likewise, the court did not meaningfully discuss this deference in its analysis. We are less troubled, though, given the nature of the relief ordered. Whereas safety and security concerns are fundamental to housing assignments, this is not true to the same degree for measures pertaining to sanitation, testing, and providing facemasks. We therefore do not find legal error.

Lastly, we address a motion by the Sheriff to supplement the record with a CDC report—entitled

"Outbreak of COVID-19 and Interventions in One of the Largest Jails in the United States—Cook County, IL, 2020"—and, alternatively, the Sheriff's request that this Court take judicial notice of it. We deny the motion to supplement the record as the district court has yet to consider this document in the first instance. *See Tonyan v. Dunham's Athleisure Corp.*, 966 F.3d 681, 684 n.1 (7th Cir. 2020). We similarly decline to take judicial notice. "The Federal Rules of Evidence permit a court to take judicial notice of a fact that is 'not subject to reasonable dispute' because it is 'generally known' or 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.'" *United States v. De La Torre*, 940 F.3d 938, 952 (7th Cir. 2019) (quoting Fed. R. Evid. 201(b)). The contents of this report—the Sheriff's COVID-19 interventions and their purported impact—are not "'generally known,' at least to us." *Id.* Further, we cannot determine if the sources can reasonably be questioned because the parties dispute who authored the report and the district court has not had the opportunity to make any factual findings on the author. Nor are the contents "incontrovertible," as its authors "were not subject to *Daubert* challenges, cross-examined, or tested with competing expert testimony." *Id.* The contents of the report are thus "arguably subject to reasonable dispute," and therefore are not a proper subject of judicial notice.

III. Conclusion

We commend Judge Kennelly for his handling of the motion, particularly in light of the many novel issues posed by the onset of COVID-19 and the case's emergent nature.

We nevertheless REVERSE in part and VACATE the portion of the preliminary injunction precluding double celling and group housing because of the legal errors that arose as the district court applied the objective reasonableness standard recently announced in *Kingsley*. We AFFIRM the remainder of the preliminary injunction ruling.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED APRIL 27, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ILLINOIS, EASTERN DIVISION

April 27, 2020, Decided;
April 27, 2020, Filed

Case No. 20 C 2134

ANTHONY MAYS, INDIVIDUALLY AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED PERSONS; AND JUDIA JACKSON, AS NEXT FRIEND OF KENNETH FOSTER, INDIVIDUALLY AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED PERSONS,

Plaintiffs-Petitioners,

vs.

THOMAS DART,

Defendant-Respondent.

Appendix B

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:[1]

Anthony Mays and Kenneth Foster, both of whom are detained at Cook County Jail while awaiting trial on criminal charges, have sued Cook County Sheriff Thomas Dart, who operates the Jail, on behalf of a class of similarly situated persons. Mays and Foster allege the Sheriff has violated the constitutional rights of persons detained at the jail by failing to provide them with reasonably safe living conditions in the face of the current coronavirus pandemic. They assert claims under 42 U.S.C. § 1983 and for writs of habeas corpus under 28 U.S.C. § 2241.

On April 9, 2020, the Court granted the plaintiffs' motion for a temporary restraining order in part. The Court directed the Sheriff to: (1) establish and implement, within two days' time, a policy requiring prompt coronavirus testing of detained persons with symptoms consistent with coronavirus disease; (2) within two days' time, eliminate the use of "bullpens" to hold groups of new detainees during the intake process; (3) begin to provide inmates and staff, within one day, soap and/or hand sanitizer sufficient to enable them to frequently clean their hands, and sanitation supplies sufficient to enable them to regularly sanitize surfaces in areas used in common; (4) establish and carry out, within two days' time, a policy requiring sanitation of all such surfaces between each use;

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1. Judge Kennelly is addressing this matter as emergency judge pursuant to paragraph 5 of Second Amended General Order 20-0012.

and (5) within three days' time, distribute facemasks to all detained persons quarantined due to their exposure to a person exhibiting symptoms consistent with coronavirus disease. The Court overruled the plaintiffs' request for additional temporary relief, including a mandate for implementation of "social distancing" throughout the Jail and to provide facemasks to every detained person. The Court also concluded that the plaintiffs seeking habeas corpus relief had failed to exhaust available state court remedies.

The plaintiffs have now moved for entry of a preliminary injunction and other relief. They again seek writs of habeas corpus, based on newly discovered facts that they contend provide a basis to excuse their failure to exhaust state court remedies. They also seek conversion of the temporary restraining order to a preliminary injunction, and they again request an order requiring implementation of social distancing throughout the Jail, as well as transfer of detained persons from the Jail to other locations within the Sheriff's control, including electronic home monitoring. The plaintiffs also request the convening of a three-judge court under the Prison Litigation Reform Act to consider entering a "prisoner release order" within the meaning of that statute.

For the reasons stated below, the Court converts the terms of the temporary restraining order to a preliminary injunction and enters further preliminary injunctive relief regarding social distancing but denies the plaintiffs' other requests for relief.

Appendix B

Factual Background

The following discussion of relevant facts concerning coronavirus, the Cook County Jail facilities, and the parties' claims and defenses is taken from undisputed facts, the affidavits and documentary evidence submitted by the parties, and the testimony and exhibits offered at the evidentiary hearing held on April 23, 2020.

A. The coronavirus pandemic

The rapid global spread of the novel coronavirus has led to a pandemic of extraordinary scale. The Court's decision on the plaintiffs' motion for a temporary restraining order includes a discussion of the gravity of the public health threat associated with this virus. *Mays v. Dart*, No. 20 C 2134, 2020 U.S. Dist. LEXIS 62326, 2020 WL 1812381, at *2 (N.D. Ill. Apr. 9, 2020).

Symptoms of the disease caused by the novel coronavirus—what has come to be known as COVID-19, which the Court will refer to as coronavirus disease—include fever, cough, and shortness of breath, and the health effects can be very severe, including serious damage to the lungs and other internal organs, and death. People who are sixty-five years of age or older and those with certain pre-existing health conditions, including chronic lung disease, moderate to severe asthma, serious heart conditions, diabetes, chronic kidney disease, liver disease, a body mass index of forty or higher, and other conditions have a heightened vulnerability to severe illness if they contract the coronavirus.

Appendix B

The rapid transmission of coronavirus has been attributed to several characteristics. Respiratory droplets containing the virus emitted by an infected person, though coughing or sneezing for example, can travel several feet and may persist in the air for several hours. In addition, because the virus can persist on some surfaces for up to three days, transmission can occur even without physical proximity to an infected person. Moreover, those who contract the virus may be asymptomatic for days or even for the entire duration of the infection but can still transmit the virus to others, making it more challenging to readily identify infected individuals and respond with necessary precautions.

There is currently no known effective treatment for coronavirus disease and no vaccine to prevent people from contracting it. Medical professionals and public health experts agree—and the evidence in this case demonstrates beyond peradventure—that the only way to curb the spread of the virus is through a multi-faceted strategy that includes testing to identify those who have been infected; isolation of those who test positive or develop symptoms consistent with the disease; quarantining those who may have come into contact with the virus; frequent sanitation of surfaces; frequent handwashing; and use of personal protective equipment (PPE) such as facemasks. And a key tactic recommended by public health experts to curb the spread of coronavirus disease has been to keep people apart from each other—what has come to be known as "social distancing." The Centers for Disease Control's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional

and Detention Facilities ("CDC Guidelines"),[2] defines social distancing as "the practice of increasing the space between individuals and decreasing the frequency of contact to reduce the risk of spreading a disease (ideally to maintain at least 6 feet between all individuals, even those who are asymptomatic)." 2020 U.S. Dist. LEXIS 62326, [WL] at 4.

Social distancing has effectively been mandated by most state governments as a critical strategy in combatting the pandemic. Here in Illinois, the state has been under a statewide stay-at-home order first imposed by Governor J.B. Pritzker effective March 20, 2020, the goal of which is to limit person-to-person contacts to curb transmission of the virus. Activities not deemed "essential" have been shut down. People have been strongly urged, and in many situations directed (by governments, employers, commercial establishments, and so on) to maintain space between themselves and others. In addition, the wearing of PPE, primarily facemasks, has been strongly advised and now required in some situations, particularly when people may come into contact with others.

The effect of the stay-at-home orders imposed in Illinois and most other states, along with advice by national officials to limit contacts and group activities, has been dramatic: schools have been closed; commercial establishments and workplaces have ceased operations, resulting in massive job losses; public events have largely

2. The Guidelines were issued on March 23, 2020 and are available at https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf.

been cancelled; and access to public spaces has been limited or barred entirely. Entire sectors of the national economy have slowed to a snail's pace. Society has paid a very high price to curb the spread of this highly contagious virus.

B. Operation of the Cook County Jail

The Sheriff runs the Cook County Jail. As the Court stated in its written decision on the plaintiffs' motion for a temporary restraining order (TRO), the Jail is "a very large physical facility—actually a campus of separate physical facilities—whose population, if one considers including both detainees and staff, is the size of a small (but not all that small) town." *Mays*, 2020 U.S. Dist. LEXIS 62326, 2020 WL 1812381, at *1. Managing the Jail is extraordinarily challenging because of the size of its population and physical facilities, the diverse needs of the detainees, the Sheriff's public safety obligations, and his obligations to the criminal justice system. The Sheriff's public safety obligations require him to consider the appropriate custodial conditions for each detained person. As the Court has noted, the Jail's population "runs the gamut from persons with lengthy criminal records who are accused of committing violent crimes to non-violent offenders in custody for the first time who, perhaps, remain in custody only because they and their families were unable to post bond money." *Id.* And the Sheriff's obligations to the people in his custody, most of whom are detained awaiting trial on crimes for which they are therefore entitled to a presumption of innocence, require him to provide care sufficient to account for each

individual's physical and mental health conditions. This is no small task, particularly given that populations in custody are statistically more likely to have adverse health conditions, both physical and mental.

Adding an infectious disease outbreak to these conditions further complicates the difficult challenge of managing the Jail. The very nature of the Jail's setup and day-today operations facilitates rapid transmission of communicable diseases like the one caused by the coronavirus. First, the Jail's physical facilities are designed to accommodate large populations, all densely housed, and many in congregate settings. In particular, the Jail has many so-called "dormitory" units, which in normal times may house as many as hundreds of detained persons in a single room with closely-spaced bunk beds.

Second, the Jail is a closed environment with many spaces used in common. Persons detained there—even those housed in single-occupancy cells—do not have individual bathing facilities; toilets are typically used in common; they eat in groups under normal circumstances; and they come into contact with each other and with correctional officers in other common areas. And even when confined, detainees are in close proximity, in adjoining cells and in tiers that use a common ventilation system.

Third, the routine operations of the Jail require high levels of movement of people. Detained persons must be escorted from their cells to common areas like shower and bathroom facilities. In normal times they are escorted to court hearings and recreational areas (all or

nearly all of which have come to a stop). Finally, large numbers of staff personnel, as well as vendors, move in and out of the Jail and its various areas on a daily basis. In doing so, these individuals have contact with other members of the community at large, who themselves may have contracted coronavirus. Thus staff members and contractors potentially can carry the virus both into and out of the Jail.

Limiting exposure to the coronavirus in the Jail is therefore a significant challenge. Infection rate data reflects that it has been challenging to effectively curb transmission of the highly infectious coronavirus in the setting of the Jail. As of April 6, 2020, the infection rate within the Jail was an order of magnitude higher than the rate of infection in Cook County. *Mays*, 2020 U.S. Dist. LEXIS 62326, 2020 WL 1812381, at *8. And on April 8, 2019, the New York Times reported that, at that time, the Jail was the largest-known source of coronavirus infections in the United States. See Timothy Williams and Danielle Ivory, *Chicago's Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars* (April 8, 2020), N.Y. Times, https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html (last updated April 23, 2020).

Procedural History

A. Plaintiffs' suit and motion for a temporary restraining order

The plaintiffs, Anthony Mays and Kenneth Foster, are detained at the Cook County Jail and have been housed on

tiers in which at least one person had been infected with the coronavirus. On April 3, 2020, they sued the Sheriff on behalf of themselves and others similarly situated, with allegations stemming from the risks the coronavirus poses to their health. The plaintiffs seek to represent a class and two putative subclasses. The class consists of "all people who are currently or who will in the future be housed in the Cook County Jail for the duration of the COVID-19 pandemic." Compl. (dkt. no. 1) ¶ 60. "Subclass A consists of all people who, because of age or previous medical conditions, are at particularly grave risk of harm from COVID-19." *Id.* ¶ 61. "Subclass B consists of all people who are currently housed on a tier where someone already tested positive for the coronavirus." *Id.* ¶ 62. Mays and Foster both have medical conditions that heighten their risk of serious health consequences from an infection by the coronavirus.

In their complaint, the plaintiffs alleged that because the Sheriff was not implementing measures to control the spread of the coronavirus at the Jail, especially those recommended in the CDC Guidelines, the conditions in the Jail facilitated rapid transmission, putting the health of detained persons at great risk. In support of this contention, the plaintiffs attached several affidavits to their complaint from individuals who had spoken to persons detained at the jail. These affidavits reported the following conditions at the Jail in late March and early April:

- detained persons were not receiving soap, hand sanitizer, or facemasks;

- facemasks that they made for themselves out of cloth were being confiscated;

- detainees were being housed in bunks or beds that were between two and four feet apart from each other;

- many detained persons were living in dormitory-style housing, where dozens of individuals shared a single room;

- detained persons were being held at intake in so-called bullpens, where numerous detainees were held together for extended periods in a crowded cell; and

- the Jail's staff was not regularly sanitizing common surfaces or providing detainees with cleaning supplies to do this themselves.

The day they filed suit, the plaintiffs moved for the issuance of writs of habeas corpus for the members of subclass A and for a TRO or preliminary injunction on behalf of the class as a whole, requiring the Sheriff to take action to control the rapid spread of the coronavirus at the Jail. The plaintiffs also moved to certify their proposed class and subclasses.

After an extended hearing on the motion for a temporary restraining order, the Court issued a written decision on April 9, 2020 denying the request for writs of habeas corpus and partially, but not entirely, granting the

motion for a TRO. *Mays*, 2020 U.S. Dist. LEXIS 62326, 2020 WL 1812381, at *6, 14-16. In ruling on this motion, the Court considered the affidavits from medical experts, individuals who had spoken to detainees, and those from Jail officials and employees. The Sheriff had raised a hearsay objection to the Court's consideration of the affidavits from individuals who had spoken to detainees, but hearsay may be considered in ruling on a motion for a TRO or for a preliminary injunction. *See SEC v. Cherif*, 933 F.2d 403, 412 n.8 (7th Cir. 1991).[3] The TRO directed the Sheriff to take the following actions: (1) establish and implement a policy requiring prompt testing of symptomatic detainees, and—if medically appropriate and feasible based on the availability of testing materials—detainees who may have been exposed to the virus; (2) implement social distancing during intake and suspend the use of bullpens to hold detained persons awaiting intake; (3) provide all detained persons with adequate soap or sanitizer for hand hygiene; (4) provide staff personnel and detained persons with adequate cleaning supplies to regularly sanitize surfaces and objects, including in high-traffic areas such as shower facilities; (5) establish a policy requiring frequent sanitation of these areas; and (6) provide facemasks to all detained persons in quarantine. *Mays*, 2020 U.S. Dist. LEXIS 62326, 2020 WL 1812381, at *14-15.

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3. "Given its temporary nature, 'a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.'" *FTC v. Lifewatch Inc.*, 176 F. Supp. 3d 757, 761 (N.D. Ill. 2016) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981)). The same, of course, is true of a TRO.

Appendix B

The Court denied several of the plaintiffs' requests for relief. They sought an order mandating social distancing throughout the facility, not just at intake, arguing that this was one of the critical outbreak control measures outlined in the CDC Guidelines. 2020 U.S. Dist. LEXIS 62326, [WL] at *10. The Court declined to mandate social distancing beyond intake, reasoning that there are space constraints at the Jail and the Guidelines expressly recognized that social distancing may not be feasible in a correctional facility. *Id.* The Court also declined the plaintiffs' request for direct screening of medically vulnerable detainees before they show symptoms of infection, also because the CDC Guidelines did not mandate this. *Id.* In addition, the Court denied the plaintiffs' request to require the Sheriff issue facemasks to every detained person, as the CDC Guidelines recommended this only for those who had come into contact with a symptomatic individual. 2020 U.S. Dist. LEXIS 62326, [WL] at *12, 15. Finally, the Court declined the plaintiffs' request to transfer the members of subclass B to a safe facility or other forms of custody, because the plaintiffs had failed to show that the other protective measures that the Court had ordered would be inadequate to protect detained persons from the health risks associated with the coronavirus outbreak. 2020 U.S. Dist. LEXIS 62326, [WL] at *15. The Court also declined subclass A's request for emergency writs of habeas corpus, concluding that they had failed to exhaust available state court remedies. 2020 U.S. Dist. LEXIS 62326, [WL] at *6.

B. The Sheriff's response and current conditions at the Jail

1. April 13 status report

On April 13, pursuant to the Court's direction, the Sheriff filed a status report regarding compliance with the TRO. First, with respect to the directive to test symptomatic detainees, the Sheriff reported that Cermak Health Services, an arm of Cook County that provides healthcare to persons detained at the Jail, maintains the supplies for medical testing and actually administers such tests.[4] According to the Sheriff, Cermak had determined that it would not be medically appropriate to test all detained persons in quarantine. The Sheriff therefore instructed his personnel to isolate and refer symptomatic detainees to Cermak for further evaluation and testing.

As to the order to maintain social distancing during the Jail's intake process, the Sheriff implemented a modified procedure that maintains six feet of distance between all detained persons awaiting intake and provides them with facemasks. Use of the bullpens was discontinued.

Regarding the order to distribute facemasks, the Sheriff stated that he had acquired and on hand sufficient surgical masks to distribute to all quarantined detainees and employees and that he was continuing his efforts to obtain additional masks. Additionally, the Sheriff was

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4. From a chain-of-command standpoint, Cermak is under the control of Cook County, not the Sheriff.

in the process of procuring cloth masks that would be available to any detained person who requested one.

The Sheriff further reported that on April 9, he delivered approximately 28 gallons of hand sanitizer and 980 bars of soap for distribution in the Jail. He also ordered distribution of soap and sanitizer twice per week going forward. The Sheriff noted concern that some detained persons may use the soap or hand sanitizer as a weapon and that some might try to consume hand sanitizer. These considerations required the Sheriff to determine on a detainee-by-detainee basis whether to distribute hand sanitizer or soap.

With respect to the sanitation-related directives in the TRO, the Sheriff reported that he had distributed cleaning supplies to staff and detained persons on April 10. He also issued a sanitation policy to ensure that frequently touched areas such as doorknobs and phones are sanitized between uses. He issued another a policy requiring each living unit officer to ensure that surfaces are routinely cleaned and sanitized during the officer's shift. Additionally, the Sheriff stated that he was planning to hire an independent contractor to professionally clean the Jail.

2. April 17 updates from the Sheriff

On April 17, three days after the Sheriff submitted his status report, officials from the Chicago Department of Public Health (CDPH), including one designated as a CDC epidemic intelligence service officer, inspected

the Jail. These officials had toured the Jail roughly a month prior, on March 20, and issued recommendations for controlling COVID-19 at the Jail. A report from this inspection, dated March 27, was introduced in connection with the preliminary injunction hearing held on April 23. The March 27 recommendations from the CDPH included screening and classifying inmates based on their level of risk associated with coronavirus disease and "considering mass release of inmates to decompress the jail for urgent public health reasons." Levin Dec. (dkt. no. 70) at 10.

A report from the more recent April 17 had not yet been received by the Sheriff as of the April 23 hearing. The Sheriff therefore submitted statements and testimony from two Jail officials who participated in the April site visit: Rebecca Levin, a senior public health advisor to the Sheriff, and Michael Miller, the Executive Director of the Cook County Department of Corrections. Levin stated that during the April 17 inspection, the officials commended the Jail's efforts to reduce density in housing units. Miller testified that the officials visited two of the dormitory units—Dorm 4, the largest dormitory unit, and Dorm 2—and commented positively about the organization and cleanliness of these spaces.

In a declaration dated April 17, Miller also provided an update to the Sheriff's April 14 status report on efforts to control the coronavirus outbreak at the Jail. He reported that each person detained in a quarantine tier was receiving a new surgical-type facemask each day. Miller anticipated that at its current rate of consumption of masks, the Sheriff would exhaust his supplies on June 7, 2020. He added that, "as supplies permit," the Sheriff

planned to distribute masks to detainees who are not on quarantine tiers. Miller Dec., Def.'s Resp. to Renewed Mot. for Prelim. Inj., Ex. E (dkt. no. 62-5) ¶ 24.

Although the TRO did not require the Sheriff to implement social distancing beyond modifying his intake procedures, Miller reported in his April 17 affidavit that the Sheriff had engaged in a significant effort to increase social distancing at the Jail. Specifically, he reported the following measures: opening previously closed divisions to better distribute detainees across available space; converting housing on 175 tiers to single-occupancy cells only; limiting dormitory units to fifty percent of capacity, with the exception of detainees in medical or "restricted housing," *Id.* ¶ 12; and limiting the number of detained persons released into dayroom common areas to half the number assigned to that area. He reported that beds in dormitory units have been spaced so that they are at least six feet apart, and if beds are bolted to the floor, then detained persons are distributed so that there is six feet of distance between occupied beds.

Attached to Miller's declaration was a spreadsheet with the occupancy rates as of April 17 on each tier of the Jail, including units in Cermak and Division 8, the Residential Treatment Unit (RTU). Miller later explained that the RTU provides twenty-four-hour access to medical care and houses people who have medical needs (though the level of need was not described). This spreadsheet showed, apparently contrary to the statement in Miller's declaration, that some dormitory units were still occupied above fifty percent capacity. For example, Tier D of Dorm 1 in Division 2, which was not then under quarantine, was

occupied at eighty-one percent capacity. In addition, many dormitory units in the RTU, Division 8, were occupied at nearly full capacity. For example, Tier 2F was occupied at ninety-seven percent capacity, and Tier 2G was occupied at one hundred percent capacity. (Also, Tiers 2Q and 2R in Division 6 were occupied at sixty percent and sixty-three percent capacity, respectively. They are not labeled as dormitory units in the spreadsheet, but they each have a forty-person capacity.)

The Sheriff submitted additional evidence reflecting that his ability to implement social distancing had increased by virtue of, among other things, a significant expansion of the electronic home monitoring program. He offered a chart showing a steady decline in the Jail's daily population over the previous month, including a reduction of roughly 230 detainees between April 9, when the Court issued the TRO, and April 17. Another chart showed a steady increase in the jail's electronic home monitoring population over the previous month, with an increase of approximately 300 detainees on electronic home monitoring between April 9 and April 17. The Sheriff also offered evidence, however, that utilization of this program had been extended to its outside limits, or nearly so, in light of the apparent exhaustion of program vendor's supply of monitoring equipment.

3. Plaintiffs' reports regarding conditions at the Jail

In anticipation of the preliminary injunction hearing, the plaintiffs submitted a number of affidavits identifying problems or deficiencies in the Sheriff's compliance

with the directives in the TRO. These affidavits were from individuals who had spoken to detained persons between April 14 and April 18, and they described these persons' current experiences at the Jail. According to these affidavits, symptomatic individuals are not being tested. Additionally, although facemasks are now being distributed, detainees reported, it is not happening regularly.

The detained persons discussed in the affidavits also reported inadequacies in cleaning and sanitation practices at the Jail. Several stated that detained persons lack cleaning supplies for their individual cells and that some common spaces lack cleaning supplies as well. And even where cleaning solution is available, they reported, cloths or wipes have not been provided to enable use of the solution. A number of detainees also reported that commonly used objects, such as telephones, are not being sanitized between uses. In addition, they stated, the Jail's staff has not been cleaning cells, and some common areas are cleaned only every other day, meaning they stand uncleaned despite multiple uses and repeated touching by numerous detained persons and potentially staff personnel.

The detainees also reported an inability or great difficulty in practicing social distancing. In common areas where detained persons eat, several stated, it has been impossible to practice social distancing due to the arrangement of picnic-style benches. Tape or paint markings have been placed on the floor in some dayrooms to designate appropriate space for social distancing, but,

they reported, some correctional officers have mocked the practice of social distancing, and many have failed to enforce it. By way of example, detained persons have been using, at the same time, telephones that are spaced only two feet apart.

C. The renewed preliminary injunction motion

In their renewed motion for a preliminary injunction, filed on April 14, 2020, the plaintiffs contend that the Sheriff's efforts in response to the TRO "have not worked and cannot work to abate the spread of the disease" caused by the coronavirus. Pls.' Renewed Mot. for Prelim. Inj. (dkt. no. 55) at 4. The plaintiffs focus primarily on two inadequacies of the Sheriff's efforts to date: failure to identify and transfer medically vulnerable detainees out of the Jail, and insufficient social distancing, which, the plaintiffs contend, "is the *only* way to prevent intolerable risk to [their] health and lives." *Id.* at 2.

The plaintiffs request the following in their renewed motion for a preliminary injunction. First, they ask for a preliminary injunction ordering the Sheriff to mandate social distancing throughout the Jail. In support of this request, the plaintiffs have submitted the declaration of Dr. Gregg Gonsalves, an epidemiologist at the Yale School of Medicine and School of Public Health, who opined that social distancing is "the only way to prevent further, essentially uncontrolled, spread of the virus" in the Jail. *Id.*, Ex. G (dkt. no. 55-7) ¶ 29. In the alternative, the plaintiffs argue that if the Court concludes that additional social distancing is not possible, an order should

be entered requiring the Sheriff to transfer detained persons to another safe facility, or the Court should request convening a three-judge panel with the authority to order the release of detainees, as required under the Prison Litigation Reform Act . *See* 18 U.S.C. § 3626(a)(3)(B). In addition, subclass A has renewed its request for issuance of emergency writs of habeas corpus.[5]

In response, the Sheriff argues that he has sufficiently addressed the risks to the health of persons in his custody, in accordance with constitutional requirements, through the protective measures he has already implemented; his efforts were consistent with the recommendations in the CDC Guidelines; and he has taken substantial steps to implement social distancing. The Sheriff also appears to contend that further implementation of social distancing was not realistically possible in the Jail at this time. In response to the plaintiff's contention that the Sheriff has not adequately abated the risk of infection to medically vulnerable detainees, he argues that he cannot screen such individuals, because he does not have access to detained persons' health information. Furthermore, the Sheriff has explained, he already refers all medical complaints and issues to Cermak, and nothing more on his part is required to satisfy the requirements of the Fourteenth Amendment.

In their reply brief, the plaintiffs acknowledge that the Sheriff has taken "dramatic steps" to increase social

5. The plaintiffs also sought expedited discovery, but that largely became a moot point in light of later developments, so the Court does not discuss the request here.

distancing in the Jail. Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 6. They contend, however, that these efforts have been insufficient to remedy the constitutional violation. They reaffirm their request to immediately convene a three-judge court to determine whether to release detained persons. They also reaffirm their request for a preliminary injunction mandating social distancing throughout the Jail as well as transfer of detained persons to "some other safe location," *id.* at 2, and they ask the Court to issue such an order contemporaneously with a request to convene a three-judge panel. Additionally, the plaintiffs ask the Court to convert the TRO to a preliminary injunction.

1. Hearing on motion for preliminary injunction

The Court held an evidentiary hearing on the preliminary injunction motion by videoconference on April 23, 2020. In light of the unusually compressed time schedule necessitated by the development of the coronavirus pandemic and increases in confirmed coronavirus infections at the Jail, the Court determined that it would consider the parties' affidavits (giving due consideration to issues regarding weight) and would permit each side to call one live witness. Executive Director Miller testified as the Sheriff's witness; he offered, among other things, updates to his April 17 affidavit regarding the Sheriff's efforts to manage the coronavirus outbreak.

With respect to screening medically vulnerable detainees, Miller testified that the Jail was doing what it could based on the limited medical information that it has

available. Miller explained that Cermak conducts a medical evaluation of every detained person at intake, and based on this, it transmits information called "alerts" to the Jail to inform housing decisions based on medical needs. These alerts do not contain any diagnostic information; rather, they simply specify the accommodations necessary to address a medical need. For example, an alert from Cermak may inform the Jail that a detained person should be housed on a bottom bunk, but it will not state the medical reason for this determination. Miller testified that Cermak has not "yet" created an alert for those who have heightened risk of severe health consequences from a coronavirus infection. Without such an alert, Miller explained that the Jail is conducting coronavirus screening based on any medical information about a detained person that it already has, including existing alerts.

Miller also reported that the Jail had made additional efforts to implement social distancing. To encourage persons housed in dormitory units to stay at their beds rather than congregating in common spaces, the Jail has been providing them with free books, writing pads, and puzzle books. In addition, Miller stated, detainees throughout the Jail are now released to use shared shower facilities one at a time. In common areas, six-foot intervals have been demarcated with spray paint markings. Correctional officers, Miller said, have been trained to enforce social distancing by first communicating to detained persons the importance of maintaining the distance, and if that fails, using disincentives such as loss of microwave privileges. Miller acknowledged that despite this, detainees have not always been practicing

social distancing and that they continue to congregate in common spaces such as eating areas.

Miller reported that the Jail's staff has worked diligently to increase the Jail's ability to reduce the density of the population in its housing units. Over the past month, he stated, the Jail has opened up several hundred additional housing units. Between April 17 and April 23, the Jail doubled the number of detainees housed in single-occupancy cells, and this effort included moving 260 detainees out of double-occupancy cells. Miller stated that there are currently no detainees housed in double-occupancy cells without a medical or security reason. Most of those who are still in double-occupancy cells, he said, are either housed by Cermak or are designated by Cermak as requiring placement in a double-occupancy cell due to a health condition or possible suicide risk. Miller did not explain why a health condition might require placement in a double-occupancy cell. Some of those in double-occupancy cells have been placed there, he said, due to disorderly conduct—though, again, he did not explain how double-celling serves a security purpose in such situations. Miller acknowledged on cross examination that social distancing is impossible for persons housed in double-occupancy cells.

Miller also reported that roughly 1,000 detainees are still being housed in dormitory units. He stated that approximately seventy percent of that population must remain in those units due to a medical need, though he did not explain this. As for the remainder, Miller cited one possible non-medical reason that some detainees must

remain in dorm units: they are housed there in accordance with requirements of the Prison Rape Elimination Act. He explained that it would be "very challenging to try to separate those individuals and keep them protected as we need to under the PREA Act so that those individuals are not vulnerable in other areas while they're incarcerated." April 23, 2020 Tr. at 46-47. Again, however, Miller did not explain this.

Miller supplemented his testimony with an updated spreadsheet showing the occupancy of the Jail's housing units as of April 23. This spreadsheet showed that the capacity of almost every tier that was not in Cermak, the RTU, or under quarantine was fifty percent or below. However, in Division 2, Tier D1-D was at eighty-one percent capacity, and Tier D4-R was at fifty-nine percent (Tier D3-B was right at fifty percent). A number of Cermak and RTU tiers had occupancy rates as high as ninety-seven or one hundred percent.

On cross examination, the plaintiffs' counsel asked Miller about the high occupancy levels in certain Cermak and RTU tiers reported in the April 17 and April 22 spreadsheets. Miller explained that Cermak needed to house those individuals together to be able to provide them with access to care at all hours of the day or night. Miller acknowledged that social distancing was not possible for those housed in the Cermak and RTU tiers.

Plaintiffs' counsel also asked Miller about a high occupancy rate listed in the April 17 spreadsheet for a tier (referenced above) that was not in Cermak, the RTU, or

under quarantine: Tier D of Dorm 1 in Division 2, which was then at eighty-one percent capacity. The April 22 spreadsheet showed that the dorm was still at the same capacity. Miller stated: "There's another security level and/or issue with having this many people on this tier that we've had to abide by." *Id.* at 31. He did not clarify the nature of the security issue. Miller acknowledged that social distancing was not possible for detainees on that tier.

When the Court asked Miller if there was still room at the Jail to move more detainees out of dorms and into cells, Miller responded, "I do have a plan in my back pocket." *Id.* at 57. He explained that he was working on moving people out of Dorms 1, 2, and 3. He added that the Jail is considering reconfiguring housing arrangements on tiers for detainees who are women to see if there is a way to create more capacity, presumably to disperse the much larger population of detainees who are men.

As for cleaning and sanitation of common areas, Miller reported that detainees have been given the supplies they need to do sanitation; he attributed shortfalls in sanitation to their own behavior. For example, he stated, at each microwave stations and shared showers and toilets, detained persons have been provided cleaning solution so that they can sanitize the facility prior to use.

Finally, Miller stated, to ensure implementation of its response measures, such as sanitation of common areas or use of PPE, the Sheriff has deployed "audit teams" that oversee these efforts. For example, the Jail has a

PPE audit team that patrols PPE use and educates staff members and detained persons who are not using PPE properly.

Plaintiffs called as their hearing witness Dr. Homer Venters, a medical doctor with over a decade of experience in correctional health. Dr. Venters is the former Deputy Medical Director of the New York City Jail Correctional Health Service, a position in which he oversaw care of detainees and medical policies governing care in New York City's twelve jails. He had previously submitted a declaration along with plaintiffs' preliminary injunction reply brief. At the hearing, he testified that, in his view, the Jail's coronavirus response efforts have three key deficiencies: (1) lack of a cohesive coronavirus response plan; (2) failure to screen for individuals at higher risk of experiencing severe health consequences from a coronavirus infection; and (3) insufficient social distancing.

First, Dr. Venters explained that having a cohesive plan, rather than a collection of policy documents that address different aspects of emergency response, is a critical first step to addressing an outbreak of a communicable disease in a jail facility. He stated that because jails are such complex systems, employing and housing several thousand people, it is not possible to respond to a large outbreak without a single, coordinate plan that coordinates response measures implemented by security, health, and administrative staff.

Second, Dr. Venters testified that screening medically vulnerable individuals is critical so that they can

immediately receive heightened surveillance of possible symptoms of a coronavirus infection. This heightened surveillance would entail daily checks on those individuals for symptoms such as elevated temperature, shortness of breath, and fatigue.

Third, Dr. Venters emphasized the importance of social distancing in combatting the spread of coronavirus. In his declaration, Dr. Venters stated that medical literature on the coronavirus confirms that social distancing is an essential strategy in controlling an outbreak. During the hearing, he explained that because the coronavirus spreads so easily through respiratory droplets emitted from an infected person, transmission "is greatly impeded by physical distance that we establish through social distancing." *Id.* at 67.

During his testimony, Dr. Venters emphasized that practicing social distancing only in some specific areas of a congregate setting like the Jail is insufficient to curb virus transmission rates. Because people are densely packed in many contexts during routine operations of a detention facility—e.g., sleeping areas, dayrooms, shower facilities, and areas where medication is dispensed—it is critical to implement social distancing throughout the entire facility. Dr. Venters explained that a "lack of a full commitment or complete commitment to social distancing" in the Jail would promote faster transmission of the coronavirus, and more detainees and staff would become "seriously ill." *Id.* at 74. In his declaration, Dr. Venters had observed that the concern about severe health effects is heightened when considering detainees, because they are statistically more

likely than the general public to have pre-existing health problems such as cardiovascular disease and cancer.

Dr. Venters also discussed the importance of communication with detainees and staff as a means to ensure that they practice social distancing in an appropriate way. Specifically, he said, to ensure widespread observance of this practice, individuals must understand what social distancing means and why it is important.

On cross examination, Dr. Venters acknowledged that outbreak management in a correctional setting imposes "unique challenges," *id.* at 79, and that the CDC Guidelines are "now the most important set of principles" on response, *id.* at 81. He also acknowledged that the CDC Guidelines provide that social distancing might not always be feasible in a correctional setting.

Dr. Venters testified that although use of single-occupancy cells facilitates social distancing, doing so poses a risk of increasing detainees' psychological distress from social isolation. He also testified that the Jail's practice of housing detainees with mental health conditions in double-occupancy cells is inappropriate, because they cannot practice social distancing at all. Though these two concerns point in opposite directions, Dr. Venters reconciled them by clarifying that, in the current pandemic environment, housing detainees in single-occupancy cells is preferable to double-occupancy because social distancing is critical. To address the psychological toll of isolation in single-occupancy cells, Dr. Venters testified, the Jail should

provide opportunities for detained persons to come out of their cells and benefit from engagement with others in common areas while practicing social distancing.

Dr. Venters's testimony largely buttressed the points made by several other medical doctors and epidemiologists in affidavits and declarations that the plaintiffs had attached to their complaint and briefing of this motion. The plaintiffs' medical, public health, and correctional health experts have analogized the conditions in the Jail to those on cruise ships, which have experienced some of the largest concentrated outbreaks of the coronavirus. Specifically, these experts observe, a jail, like a cruise ship, is an environmentally enclosed, congregate-living setting with high levels of movement of people. Mohareb Dec., Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj., Ex. B (dkt. no. 64-3) at 5; Gonsalves Dec., Pls.' Renewed Mot. for Prelim. Inj., Ex. G (dkt. no. 55-7) ¶¶ 17, 27; Med. Profs.' Dec., Compl., Ex. B (dkt. no. 1-2) ¶¶ 24, 25, 26.

In particular, Dr. Amir Mohareb, a medical doctor who is a biothreat response expert and an instructor at Harvard Medical School, used the example of the Diamond Princess cruise ship to highlight the importance of social distancing. The Diamond Princess sailed from Japan to Hong Kong in January of this year. After one of its passengers tested positive for the coronavirus in the last week of January, "strict precautions of hand hygiene and cabin isolation were implemented for all crew and passengers." Mohareb Dec. (dkt. no. 64-3) at 5. Despite these efforts, 700 of the people who had been on the ship tested positive for the virus over the course of the

following month. This example, Dr. Mohareb, said, reflects that in the context of a congregate living arrangement like a cruise ship, hand hygiene and cabin cell isolation are insufficient to control the transmission of the coronavirus. He stated that a jail, which is similarly a congregate environment, "constitutes an equal or greater risk setting to that of a cruise ship." *Id.*

Dr. Mohareb explained that because respiratory droplets emitted by an infected person can travel up to six feet and be inhaled by another, social distancing is "a necessary intervention to prevent the spread of infection" from the coronavirus. *Id.* at 3, 6. He emphasized that social distancing is particularly important because an infected person may be mildly symptomatic or not symptomatic at all. Dr. Mohareb also noted that numerous authoritative bodies, including the CDC, the World Health Organization, and the Infectious Diseases Society of America, have recommended social distancing to control the transmission of coronavirus. He added that mathematical modeling supports a conclusion that social distancing is "the primary means by which individuals can be safely protected from the threat of COVID-19." *Id.* at 5.

All of the plaintiffs' expert affidavits emphasized the critical need to implement social distancing in order to meaningfully control the spread of the virus. Gonsalves Dec. ¶ 29 (social distancing is the "only way" to control outbreak); *see also* Rasmussen-Torvik Dec., Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj., Ex. C (dkt. no. 64-4) ¶ 9. They reiterated Dr. Venters's point that the very design of a correctional facilities promotes

transmission of the coronavirus because it densely packs large groups of people together. Dr. Gonsalves stated that although correctional facilities are like cruise ships in that they are enclosed environments, they present an even higher risk of rapid transmission of the coronavirus because of "conditions of crowding, the proportion of vulnerable people detained, and often scant medical care resources." Gonsalves Dec. ¶ 17. In a joint declaration, five medical doctors with experience working in a correctional setting—including three doctors who had worked at the Jail—similarly observed that the "crowded congregate housing arrangements" of jails and prisons promote the transmission of respiratory illnesses like the coronavirus disease. Med. Profs.' Dec. (dkt. no. 1-2) ¶ 24.

Beyond providing additional support for the points in Dr. Venters's testimony, the plaintiffs' other medical and public health experts added that the risks of severe health consequences from a coronavirus infection are not limited only to those who have preexisting medical conditions or are over the age of sixty-five. According to Dr. Gonsalves, "young and healthy individuals may be more susceptible than originally thought." Gonsalves Dec. ¶ 5. He reported that in March, the CDC reported that one-fifth of infected people between the ages of twenty to forty-four had been hospitalized. Dr. Mohareb also stated that "a fraction of patients with COVID-19 in all groups go on to develop severe respiratory disease." Mohareb Dec. at 1.

At the conclusion of the April 23 preliminary injunction hearing, the Court extended the TRO, which was set to expire that day, pending its ruling on the motion for a preliminary injunction.

Appendix B

Discussion

"A preliminary injunction is an extraordinary remedy." *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017). A court's determination of whether to issue a preliminary injunction or temporary restraining order involves a two-step inquiry, with a threshold phase and a balancing phase. *Id.* First, the party seeking the preliminary injunction has to make a threshold showing, which has three elements: (1) reasonable likelihood of success on the merits of the claim; (2) irreparable harm to the movant absent preliminary injunctive relief; (3) lack of adequate remedies at law. *Id.* If the movant makes the threshold showing, the court proceeds to the balancing step, in which it determines "whether the balance of harm favors the moving party or whether the harm to other parties or the public sufficiently outweighs the movant's interests." *Id.*

Because they request relief that changes the status quo or requires the Sheriff to take affirmative action, the plaintiffs are requesting what is sometimes referred to as "mandatory" preliminary injunctive relief. *See Graham v. Med. Mut. of Ohio*, 130 F.3d 293, 295 (7th Cir. 1997); *O'Malley v. Chrysler Corp.*, 160 F.2d 35, 37 (7th Cir. 1947); *cf. Schrier v. Univ. Of Co.*, 427 F.3d 1253, 1260 (10th Cir. 2005) ("[D]etermining whether an injunction is mandatory as opposed to prohibitory can be vexing."). Mandatory preliminary injunctions typically are "cautiously viewed and sparingly issued." *Graham*, 130 F.3d at 295 (quoting *Jordan v. Wolke*, 593 F.2d 772, 774 (7th Cir. 1978)); *see also Knox v. Shearing*, 637 F. App'x 226, 228 (7th Cir.

2016). But "there may be situations justifying a mandatory temporary injunction compelling the defendant to take affirmative action" based on the circumstances, *Jordan*, 593 F.2d at 774, and "the clearest [of] equitable grounds," *W. A. Mack, Inc. v. Gen. Motors Corp.*, 260 F.2d 886, 890 (7th Cir. 1958). At least two courts have recognized the unusual nature of mandatory preliminary injunctions and yet issued them after finding violations of the rights of people in custody during the coronavirus pandemic. *See Barbecho v. Decker*, No. 20-CV-2821 (AJN), 2020 U.S. Dist. LEXIS 66163, 2020 WL 1876328, at *2, 8-9 (S.D.N.Y. Apr. 15, 2020); *Jones v. Wolf*, No. 20-CV-361, 2020 U.S. Dist. LEXIS 58368, 2020 WL 1643857, at *2, 14-15 (W.D.N.Y. Apr. 2, 2020).

In assessing each claim, the Court will address the first threshold requirement for a preliminary injunction: likelihood of success on the merits, which requires showing only a "better than negligible" chance of success. *Whitaker*, 858 F.3d at 1046 (quoting *Cooper v. Salazar*, 196 F.3d 809, 813 (7th Cir. 1999)). Generally speaking, "[t]his is a low threshold," *id.*, but the Court gives the matter greater scrutiny here in light of the fact that plaintiffs are seeking affirmative conduct by the Sheriff.

A. Habeas corpus claim

Plaintiffs and subclass A have petitioned for a writ of habeas corpus under 28 U.S.C. § 2241. The Court first addresses the issue of exhaustion of remedies and then considers subclass A's ability to satisfy the criteria for a representative action.

Appendix B

1. Exhaustion

As the Court concluded in its TRO decision, a petition for a writ of habeas corpus under 28 U.S.C. § 2241 is the appropriate mechanism for a state pretrial detainee to challenge his or her detention. *Jackson v. Clements*, 796 F.3d 841, 843 (7th Cir. 2015). "Because a pre-trial detainee is not yet in custody pursuant to the judgment of a State court, relief under 28 U.S.C. § 2254 is not available." *Id.* (internal quotation marks omitted).

Section 2241 has no express exhaustion requirement, but courts apply a common-law exhaustion rule. *Richmond v. Scibana*, 387 F.3d 602, 604 (7th Cir. 2004). A pretrial detainee must "exhaust all avenues of state relief" before seeking a writ of habeas corpus through a section 2241 action. *See United States v. Castor*, 937 F.2d 293, 296-97 (7th Cir. 1991). Although there are exceptions, "the hurdle is high." *Richmond*, 387 F.3d at 604. In deciding whether an exception applies, courts "must balance the individual and institutional interests involved, taking into account 'the nature of the claim presented and the characteristics of the particular administrative procedure provided.'" *Gonzalez v. O'Connell*, 355 F.3d 1010, 1016 (7th Cir. 2004) (quoting *McCarthy v. Madigan*, 503 U.S. 140, 146, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992), *superseded by statute on other grounds as recognized in Porter v. Nussle*, 534 U.S. 516, 122 S. Ct. 983, 152 L. Ed. 2d 12 (2002)) . A court may excuse exhaustion where:

> (1) requiring exhaustion of administrative remedies causes prejudice, due to unreasonable

> delay or an indefinite timeframe for administrative action; (2) the agency lacks the ability or competence to resolve the issue or grant the relief requested; (3) appealing through the administrative process would be futile because the agency is biased or has predetermined the issue; or (4) where substantial constitutional questions are raised.

Id.

It is undisputed that a state court has the authority to release a pretrial detainee. A person who is detained in Illinois may challenge his or her detention by seeking judicial review of his or her bond. 725 Ill. Comp. Stat. Ann. 5/110-6. On March 23, 2020, in response to an emergency petition filed by the Cook County Public Defender, the Presiding Judge of the Cook County Circuit Court's Criminal Division issued an order setting out an expedited bond hearing process that applied to seven designated classes of detained persons. Def.'s Resp. to Mot. for TRO, Ex. E (dkt. no. 31-1) at 1-2. The seven classes included those at an elevated risk of contracting coronavirus due to their ages or underlying medical conditions—that is, the putative members of subclass A. *Id.* The expedited hearings took place from March 24 through March 27. *Id.* at 3-5. Although the expedited hearings do not appear to be currently ongoing, Cook County's courts are still available for emergency matters, and judges are hearing motions to review or reduce bail daily at all locations where court is held. Def.'s Supp. Resp. to Mot. for TRO, Ex. A (dkt. no. 41-1) at 1.

Appendix B

In the TRO decision, the Court concluded that the plaintiffs—who both were named as representatives of subclass A—could not show that they exhausted available state remedies before petitioning for habeas corpus because they did not "contend that they sought expedited bond hearings or initiated any sort of state proceedings challenging their bonds." *Mays*, 2020 U.S. Dist. LEXIS 62326, 2020 WL 1812381, at *6. The Court declined to excuse exhaustion because it found that the state's existing bond reduction process is "anything but futile"; the plaintiffs did not show that the process is "unduly time-consuming in a way that undermines their claimed constitutional rights"; and they did not show that state courts cannot remedy the type of constitutional violations they raise. *Id.*

After the Court issued its decision, the plaintiffs' counsel learned that Foster had sought release in the Circuit Court of Cook County through an expedited bond hearing. (The plaintiffs do not contend that Mays separately sought release in state court prior to the filing of this lawsuit.) Foster is charged with domestic battery, robbery, and unlawful restraint. Pls.' Renewed Mot. for Prelim. Inj., Ex. F (dkt. no. 55-6) at ECF p. 3 of 17. His bail was set at $50,000, requiring him to post $5,000 to be released, which he is unable to afford. *Id.* In his motion to reduce bond, he described his serious medical conditions and explained that they place him at a heightened risk of becoming critically ill if he contracts coronavirus. *Id.* at ECF p. 4-5 of 17. He also argued that it would violate his constitutional rights to keep him in custody during the coronavirus pandemic. *Id.* at ECF p. 13 of 17. On April 2,

2020, a state trial judge heard and denied Foster's motion. *See id.* at ECF p. 16 of 17.

The plaintiffs argue that Foster has sufficiently presented his request to the state courts and should not be required to do more. They acknowledge that he has not exhausted all avenues of state relief: he could appeal the state court's denial of his motion to reduce his bond, but plaintiffs do not contend that he done so. They argue, however, that the Court should excuse exhaustion based on the futility of an appeal or the Court's equitable authority to excuse exhaustion. They contend that an appeal would take weeks to pursue, making appellate remedies practically unavailable to him in light of the urgency of the coronavirus pandemic and causing an unreasonable delay that would force him to continue to suffer the alleged harm. In support of this contention, they offer an affidavit from Lester Finkle, the Chief of Staff to the Cook County Public Defender, who explains the procedure for interlocutory appeals of denials to modify bail. Pls.' Renewed Mot. for Prelim. Inj., Ex. C (dkt. no. 55-3). Under Illinois Supreme Court Rule 604(c), before a defendant can file such an appeal, he must file a verified motion in the trial court providing certain information about himself. *Id.* ¶ 2. Only after the trial court denies the verified motion can the defendant file an appeal. *Id.* The affidavit submitted by the plaintiffs reflects that this process typically takes two to four weeks. *Id.* ¶ 5. After that, if the appellate court denies the defendant's appeal, he can seek discretionary review in the Illinois Supreme Court. *Id.* ¶ 3. Based on this information, the plaintiffs argue that their state-court remedies are futile or practically unavailable and that

requiring them to pursue these remedies would unfairly prejudice them.

The plaintiffs' contentions are not persuasive. Their only evidence, Finkle's affidavit, describes how long such an appeal would take under ordinary circumstances. But here we are not dealing with not ordinary circumstances. The affidavit does not adequately show how the state appellate process would be expected to work for a medically vulnerable detainee claiming that due to a global pandemic that has infiltrated the Jail, he faces immediate risk of serious health consequences unless his bail is reduced. We know the state courts are capable of dealing with emergency requests of this type promptly and efficiently; Cook County trial court judges dealt quickly and efficiently with hundreds of such requests in late March, and they continue to do so now. There is no reason to believe that the Illinois Appellate Court would treat such an appeal as an ordinary, run-of-the-mill bail issue and would refuse to deal with it promptly. Although a court may excuse exhaustion in the unusual case where a state process would cause an unreasonable delay, *see, e.g.*, *Gonzalez*, 355 F.3d at 1016, the plaintiffs have not established that this is so in the present situation.

The plaintiffs also contend that the existing bond review processes provide no effective remedy for the claims that the class members advance in this case. Specifically, they contend that the Illinois statute governing bail, 725 Ill. Comp. Stat. Ann. 5/110-5, does not require state courts to consider a detained person's medical health in deciding whether to set or reduce

the amount of bail and that state judges making those decisions would not be expected to consider the medical risks at the Jail. But they point to no evidence that state courts are not *permitted* to consider detained persons' medical conditions, let alone that state courts reviewing bonds are not actively considering detained persons' medical conditions in light of the coronavirus pandemic. To the contrary, the evidence in the record suggests that state courts *are* considering the medical dangers the coronavirus presents to detained persons. As the Court indicated in its TRO decision, between early March and early April 2020, the Jail's population decreased by over 1,175 detainees, *Mays*, 2020 U.S. Dist. LEXIS 62326, 2020 WL 1812381, at *6; since then, the population has decreased by at least 300 more detainees, *see* Def.'s Resp. to Renewed Mot. for Prelim. Inj., Ex. A (dkt. no. 62-1) at 1. An affidavit submitted by the plaintiffs reflects that this reduction in the Jail's population has occurred, at least in part, because state court judges have granted bond reductions. *See* Pls.' Renewed Mot. for Prelim. Inj., Ex. B (dkt. no. 55-2) ¶ 3 (state courts released 719 detainees through an expedited process for bond reconsiderations in light of the coronavirus pandemic). In short, the contention that state courts cannot or will not consider detained persons' medical conditions in bond review proceedings is unsupported. Accordingly, the Court concludes that the plaintiffs have not shown that the state courts do not provide an effective remedy for detained persons with medical conditions that place them at a high risk of severe illness or death if they contract coronavirus.

The plaintiffs also appear to argue that the state courts cannot provide an adequate remedy because, they

contend, unlike the federal habeas claims in this case, state courts can consider factors other than medical need. That contention is based on an erroneous premise, which the Court will discuss momentarily, that a district court addressing a habeas corpus petition challenging jail conditions under section 2241 cannot or would not consider other factors such as whether a detainee poses a threat to public safety. The bottom line is that the plaintiffs have not shown that the bond reduction remedy offered by the state courts is any less effective than a federal remedy.

For these reasons, the Court concludes—as it did in its TRO decision—that the plaintiffs have no likelihood of success on the habeas corpus claim advanced by them on behalf the representatives of subclass A due to their failure to exhaust available state court remedies.

2. Representative action

Even if the plaintiffs could establish some likelihood of success on their contention that the failure to exhaust state remedies should be excused, they would be unable to satisfy the criteria for a representative action. Although the Court need not actually certify a representative action at this point, before issuing a preliminary injunction it would need to find that the requirements for such an action conditionally would be met. *Mays*, 2020 U.S. Dist. LEXIS 62326, 2020 WL 1812381, at *3 (collecting cases). Because the plaintiffs cannot satisfy those requirements, the representative class has no likelihood of success on the merits.

Appendix B

In the Seventh Circuit, the Federal Rule of Civil Procedure that governs class actions, Rule 23, does not apply to habeas corpus proceedings. *Bijeol v. Benson*, 513 F.2d 965, 967-68 (7th Cir. 1975); *cf. Rodriguez v. Hayes*, 591 F.3d 1105, 1117 (9th Cir. 2010). But representative actions—which are analogous to class actions—on rare occasions can be brought in habeas corpus proceedings. *Bijeol*, 513 F.2d at 967-68; *see also United States ex rel. Morgan v. Sielaff*, 546 F.2d 218, 220-21 (7th Cir. 1976); *Kazarov v. Achim*, No. 02 C 5097, 2003 U.S. Dist. LEXIS 22407, 2003 WL 22956006, at *8 (N.D. Ill. Dec. 12, 2003); *United States ex rel. Green v. Peters*, 153 F.R.D. 615, 619 (N.D. Ill. 1994); *Faheem-El v. Klincar*, 600 F. Supp. 1029, 1033 (N.D. Ill. 1984). The Seventh Circuit has not "set down a strict formula which must be mechanically followed" before people in custody can bring a representative habeas corpus action. *Morgan*, 546 F.2d at 221. Instead, it has suggested that courts can look to the provisions of Rule 23 in determining whether a representative action is appropriate, though courts need not "precisely" comply with Rule 23. *Id.* n.5. The Court thus finds that Rule 23 is instructive in analyzing whether plaintiffs can bring a representative action. The parties seem to agree; they discuss the issue within the framework of Rule 23.

To bring a class action, and by analogy a representative action, a plaintiff must show that the proposed class meets the four requirements of Rule 23(a): "numerosity, commonality, typicality, and adequate representation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). In addition, "the proposed class must satisfy at least one of the three

requirements listed in Rule 23(b)." *Id.* at 345. The plaintiffs here rely on, or analogize to, Rule 23(b)(2), which applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

The parties dispute whether subclass A satisfies each requirement of Rule 23, as applied to representative actions, apart from numerosity. The Court discusses each disputed requirement in turn.

a. Commonality

To establish that they are likely to satisfy the commonality requirement, the plaintiffs must show that there likely "are questions of law or fact common to" the members of subclass A. Fed. R. Civ. P. 23(a)(2). "That language is easy to misread." *Wal-Mart*, 564 U.S. at 349. "Commonality requires the plaintiff[s] to demonstrate that the class members have suffered the same injury." *Id.* at 349-50 (internal quotation marks omitted). In addition, "[t]heir claims must depend upon a common contention" for which the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350. Thus "what matters . . . is not the raising of common 'questions' . . . but rather, the capacity of a [representative] proceeding to generate common answers apt to drive the resolution of the litigation." *Id.* at 350 (emphasis omitted). "Where the same conduct or practice by the same defendant gives

rise to the same kind of claims from all class members, there is a common question." *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014).

Subclass A conditionally satisfies the commonality requirement because the plaintiffs likely can show that its members "suffered the same injury." *See Wal-Mart*, 564 U.S. at 349-50. Specifically, the members of subclass A can show that the Sheriff's response to the coronavirus pandemic gave rise to their habeas claim. In addition, the plaintiffs point to several questions the determination of which, they contend, will resolve issues that are central to the validity of their habeas claim. For purposes of commonality, the Court need consider only one: whether coronavirus presents so severe a risk of harm to some people in the Sheriff's custody such it is unconstitutional to confine them in in the Jail.[6] In a representative proceeding, a common answer to that question likely would drive the resolution of the litigation by resolving a core issue underlying subclass A's request for a writ of habeas corpus.

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6. The Court notes that the plaintiffs posed different questions in their motion for class certification than in their reply brief in support of their motion for a preliminary injunction. *Compare* Pls.' Mot. to Cert. Class (dkt. no. 6) at 7-8 *with* Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 21-22. Which particular question the Court identifies as conditionally satisfying the commonality requirement makes no difference for the purpose of this opinion. Regardless, at least one question the plaintiffs pose in their reply brief would also satisfy the commonality requirement: whether detainees in the Jail, as a matter of due process, are entitled to practice social distancing consistent with people in the community at large.

The Sheriff contends that subclass A cannot satisfy the commonality requirement because its members seek habeas corpus relief that would require individual proceedings or determinations. But issues pertaining to the individualized nature of the desired injunctive relief go to the requirements of Rule 23(b), not commonality. *See id.* at 360-62; *Bell v. PNC Bank, N.A.*, 800 F.3d 360, 379-80 (7th Cir. 2015). In other words, the commonality requirement of Rule 23(a) does not demand that the relief ultimately awarded to each plaintiff be the same. *See id.; Suchanek*, 764 F.3d at 756 (commonality of relief is not essential); *In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599, 602 (7th Cir. 2014) ("[The commonality requirement as discussed in] *Wal-Mart* has nothing to do with commonality of damages."). Nor is this a case in which the commonality requirement is not satisfied because individual plaintiffs experienced the harm in meaningfully different ways. *Cf. Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 497-98 (7th Cir. 2012) (class of disabled students did not meet commonality requirement where its members likely experienced alleged violations of federal and state law in different ways). The putative members of subclass A all experienced the alleged harm from the Sheriff's response to coronavirus in the same or similar ways, specifically their allegedly increased risk of exposure to the virus. In addition, all of them raise the same kind of claim, and their claims all involve a common question that would resolve a central issue of that claim.

The Court acknowledges that, in a case raising claims similar to the habeas corpus claims asserted in this one, another judge in this district recently took a

different approach with regard to commonality. A putative representative class of convicted prisoners in *Money v. Pritzker*, No. 20-CV-2093, 2020 U.S. Dist. LEXIS 63599, 2020 WL 1820660 (N.D. Ill. Apr. 10, 2020), also sought habeas corpus relief and medical furloughs or home detentions under section 1983 based on an allegedly inadequate response to the coronavirus pandemic by the director of the Illinois Department of Corrections. 2020 U.S. Dist. LEXIS 63599, [WL] at *1-2. For the section 1983 claim, the court found the only common question "apt to drive the resolution of the litigation," 2020 U.S. Dist. LEXIS 63599, [WL] at *15 (quoting *Wal-Mart*, 564 U.S. at 350), was "which class members should actually be given a furlough," *id.* That question did not satisfy the commonality requirement, the court found, because "individualized determinations" would be necessary to answer it. *Id.* The court also indicated that the habeas claim would not be "suitable for representative or class treatment" because "release determinations must be made on an individual basis regardless of the vehicle for considering and effectuating them." 2020 U.S. Dist. LEXIS 63599, [WL] at *21 n.15. The court did not clarify whether it based its finding that the habeas claim would be unsuitable for representative or class treatment on the commonality requirement or another Rule 23 consideration. *See id.*

This Court respects the court's decision in *Money*, which it cites as persuasive authority elsewhere in this opinion. But to the extent that the court in *Money* found that the putative classes failed to satisfy the commonality requirement because their requested relief would entail

individualized determinations, this Court departs from the analysis in *Money*. As indicated, the commonality requirement does not mean that the relief ultimately awarded to each plaintiff must be the same. Thus whether the release determinations would need to be made on an individual basis does not factor into the Rule 23(a) commonality analysis.

The Court concludes, for the reasons stated above, that the putative class satisfies Rule 23(a)'s commonality requirement.

b. Typicality

The Sheriff contends that the putative subclass does not meet Rule 23(a)'s typicality requirement. He does not explain why, and he is incorrect. The named plaintiffs' habeas corpus "claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other [subclass] members and is based on the same legal theory." *Lacy v. Cook County*, 897 F.3d 847, 866 (7th Cir. 2018) (alteration omitted). "This requirement is meant to ensure that the named representative's claims have the same essential characteristics as the claims of the class at large." *Id.* (internal quotation marks omitted). Typicality is satisfied for subclass A because the named plaintiffs have alleged the same injurious conduct stemming from the Sheriff's response to the coronavirus pandemic as the other members of the subclass and have advanced the same legal theory as the subclass at large.

c. Rule 23(b)(2)

Rule 23(b)(2) is the sticking point for the habeas corpus plaintiffs' attempt to bring a representative action on behalf of subclass A. As indicated, Rule 23(b)(2) allows for class certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). It "applies only when a single injunction or declaratory judgment would provide relief to each member of the class," not "when each individual class member would be entitled to a *different* injunction." *Wal-Mart*, 564 U.S. at 360.

The Sheriff contends that the putative subclass A does not satisfy Rule 23(b)(2) because the plaintiffs seek individualized relief. He suggests that any habeas corpus proceeding would need to account for each subclass member's individual circumstances, including, for example, the danger each detainee would pose to the public if released. The plaintiffs expressly concede that the relief would need to be at least partly individualized. They contend, however, that this could be achieved through "brief, individual proceedings" without defeating class certification. Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 23; *see also* Pls.' Renewed Mot. for Prelim. Inj. (dkt. no. 55) at 16.

In actions where plaintiffs seek an injunction that "would merely initiate a process through which highly individualized determinations of liability and remedy

are made," Rule 23(b)(2) is not satisfied. *Jamie S.*, 668 F.3d at 499 (7th Cir. 2012) (injunction that established a system for identifying disabled children and implementing individualized education plans and remedies did not satisfy Rule 23(b)(2) because it "merely establishe[d] a system for eventually providing individualized relief"). *Compare id. and Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 893 (7th Cir. 2011) (in case challenging insurer's performance of hail storm damage appraisals, injunction requiring class-wide roof reinspection did not satisfy Rule 23(b)(2) where it "would only initiate thousands of individualized proceedings to determine breach and damages") *with Chi. Teachers Union, Local No. 1 v. Bd. of Educ. of City of Chi.*, 797 F.3d 426, 441-42 (7th Cir. 2015) (proposed class was maintainable under Rule 23(b)(2) where plaintiffs asked the court for a declaration that a school board's policies violated Title VII and prospective relief including a moratorium on a challenged practice and the appointment of a monitor).

The plaintiffs concede that issuing writs of habeas corpus in this case would entail individualized proceedings but not that Rule 23(b)(2) precludes them from proceeding on a representative basis. They suggest that the type of supposedly brief, individualized proceedings they seek "have long been commonplace in class litigation." Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 23. But the cases they cite to support that proposition are distinguishable from this one. Both *Barnes v. District of Columbia*, 278 F.R.D. 14 (D.D.C. 2011), and *Dunn v. City of Chicago*, 231 F.R.D. 367 (N.D. Ill. 2005), *amended on reconsideration*, No. 04 C 6804, 2005 U.S.

Dist. LEXIS 30888, 2005 WL 3299391 (N.D. Ill. Nov. 30, 2005), involved individualized proceedings on damages under Rule 23(b)(3), not individualized proceedings for injunctive relief under Rule 23(b)(2). *See Barnes*, 278 F.R.D. at 19-23; *Dunn*, 231 F.R.D. 367, at 375-78. *Dunn* also involved class members who had variations in how they *experienced* the constitutional violations—an issue the court properly discussed as part of the commonality analysis, not the Rule 23(b)(2) analysis. *See id.* at 372.

Even if the plaintiffs did not concede it, individualized proceedings would be required for writs of habeas corpus that the plaintiffs seek because the Prisoner Litigation Reform Act (PLRA) applies to their habeas corpus claims. Under the PLRA, in tailoring any prospective or preliminary injunctive relief "in any civil action with respect to prison conditions," a court must "give substantial weight to any adverse impact on public safety," among other considerations. 18 U.S.C. § 3626(a)(1)(A), (a)(2). The PLRA defines "civil action with respect to prison conditions" as "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." *Id.* § 3626(g)(2). Thus if the plaintiffs' habeas claims constitute civil actions as defined by the PLRA, the Court would need to give substantial weight to the public safety of granting writs, which would require consideration of, among other things, any danger each individual member of subclass A poses to the public.

Appendix B

As the Court indicated in its TRO decision, the question of whether detained persons can even use a section 2241 petition to challenge the conditions of their confinement has divided courts. *Mays*, 2020 U.S. Dist. LEXIS 62326, 2020 WL 1812381, at *6 (comparing, e.g., *Aamer v. Obama*, 742 F.3d 1023, 1032, 408 U.S. App. D.C. 291 (D.C. Cir. 2014) (a prisoner may challenge the conditions of his confinement in a federal habeas corpus petition) and *Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008) (same) with *Spencer v. Haynes*, 774 F.3d 467, 469-70 (8th Cir. 2014) (section 2241 petitions may not challenge conditions)). The Seventh Circuit has expressed a "long-standing view that habeas corpus is not a permissible route for challenging prison conditions," at least when a prisoner's claim does not have "even an indirect effect on the duration of punishment." *Robinson v. Sherrod*, 631 F.3d 839, 840-41 (7th Cir. 2011). But the Seventh Circuit has also noted that "the Supreme Court [has] left the door open a crack for prisoners to use habeas corpus to challenge a condition of confinement." *Id.* at 840 (quoting *Glaus v. Anderson*, 408 F.3d 382, 387 (7th Cir. 2005)) (citing *Nelson v. Campbell*, 541 U.S. 637, 644-46, 124 S. Ct. 2117, 158 L. Ed. 2d 924 (2004); *Bell v. Wolfish*, 441 U.S. 520, 526 n.6, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979); *Preiser v. Rodriguez*, 411 U.S. 475, 499-500, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973)).

In the TRO decision, the Court said that it did not need to decide the question of whether the plaintiffs could challenge conditions of confinement in a habeas corpus proceeding definitively at the time but stated that were it "required to address this point, [the Court] would not

consider it to be an absolute bar to plaintiffs' motion for a temporary restraining order." *Mays*, 2020 U.S. Dist. LEXIS 62326, 2020 WL 1812381, at *6. The Court stated that "[t]he plaintiffs' claims, as they have framed them, *do* bear on the duration of their confinement (they contend, ultimately, that they cannot be held in the Jail consistent with the Constitution's requirements), and they are not the sort of claims that are, or can be, appropriately addressed via a claim for damages." *Id.*

But the plaintiffs' claims also bear on the conditions of their confinement: they challenge the constitutionality of the conditions in the Jail during the coronavirus pandemic, and they contend that the conditions are so deficient that it is unconstitutional for subclass A to be confined at the Jail. The Seventh Circuit has not expressly addressed whether the PLRA applies to habeas corpus petitions that involve conditions of confinement, but it has not foreclosed the application of the PLRA to such petitions. *Cf. Walker v. O'Brien*, 216 F.3d 626, 634 (7th Cir. 2000) (stating that actions "brought under section 2241 . . . as habeas corpus petitions are not subject to the PLRA"—but not addressing such petitions that challenge the conditions of confinement); *see also Thomas v. Zatecky*, 712 F.3d 1004, 1005 (7th Cir. 2013) (*Walker* holds, among other things, "that a *collateral attack* under § 2241 or § 2254 is not a 'civil action' for the purpose" of the PLRA (emphasis added)). By specifying that a "civil action with respect to prison conditions . . . does not include habeas corpus proceedings challenging the fact or duration of confinement in prison," the language of the PLRA appears suggests that it may cover other types of habeas corpus

proceedings, including, potentially, those challenging the conditions of confinement. *See Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659, 198 L. Ed. 2d 96 (2017) (courts should interpret a statute in a way that would "give effect, if possible, to every clause and word"). And at least some courts addressing the issue have suggested that the PLRA applies to habeas corpus petitions involving the conditions of confinement. *See Jones v. Smith*, 720 F.3d 142, 145, 145 n.3 (2d Cir. 2013) (the PLRA does not apply to "habeas petition[s] seeking to overturn a criminal conviction or sentence" but presumably would apply to conditions-of-confinement habeas claims brought under section 2241); *Blair-Bey v. Quick*, 151 F.3d 1036, 1042, 331 U.S. App. D.C. 362 (D.C. Cir.) (habeas corpus petitions challenging conditions of confinement "would have to be subject to the PLRA's . . . rules, as they are precisely the sort of actions that the PLRA sought to address"), *on reh'g*, 159 F.3d 591, 333 U.S. App. D.C. 1 (D.C. Cir. 1998).

Accordingly, the Court concludes that the PLRA applies to the plaintiffs' habeas corpus claim. The PLRA's mandate that a court "give substantial weight to any adverse impact on public safety" before issuing preliminary injunctive or prospective relief thus would apply to the habeas corpus claim. *See* 18 U.S.C. § 3626(a)(1)(A), (a)(2). To do so, the Court would need to consider the circumstances of the detained persons and any threat they pose to public safety, which plainly would vary from one person to another. This is a process that would render the claim unsuitable to certification under Rule 23(b)(2) or its analogy for representative actions.

The plaintiffs also state, in two sentences found at the very end of a small-type, twenty-four-line footnote, that a release order would not require a court to resolve individualized questions regarding safety because such an order would give the Sheriff discretion on which detained persons to release. Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 21 n.16. The plaintiffs make this point with respect to commonality for their section 1983 claim, not on the question of whether the habeas corpus claim may be handled on a representative basis. They nowhere attempt to explain how the Court could condition the issuance of writs of habeas corpus on detainee-specific decisions made by the Sheriff. As this Court stated in its TRO decision, "[t]he issuance of [a] writ of habeas corpus through a section 2241 petition is a federal remedy (in other words, it does not depend on state law)." *Mays*, 2020 U.S. Dist. LEXIS 62326, 2020 WL 1812381, at *7. Nor could the issuance of a writ depend on subsequent decisions by a detained person's custodian. The habeas corpus claim proceeds *against* the custodian based on the fundamental, long-standing rule that a person in custody "may be liberated if no sufficient reason is shown to the contrary." *Rumsfeld v. Padilla*, 542 U.S. 426, 435, 124 S. Ct. 2711, 159 L. Ed. 2d 513 (2004) (quoting *Wales v. Whitney*, 114 U.S. 564, 574, 5 S. Ct. 1050, 29 L. Ed. 277 (1885)). The only remedy available for a habeas corpus claim is liberation of the person in custody. *See id.* It is difficult to imagine a writ of habeas corpus that would tell a jailer to release the petitioner—unless he decides it would not be a good idea to do so. Plaintiffs offer no authority supporting the proposition that a writ of habeas corpus could appropriately be issued in this way.

In sum, though representative habeas corpus actions do not need to comply "precisely" with Rule 23, *Morgan*, 546 F.2d at 221 n.5, the plaintiffs cannot meet the requirements for representative treatment.[7]

Because the plaintiffs' habeas corpus claims founder on the exhaustion requirement, and because they have not established that the claims may be pursued on a representative basis, their representative action on behalf of subclass A has no likelihood of success on the merits. Accordingly, the plaintiffs' request for the Court to release medically vulnerable members of subclass A on unsecured or non-monetary bail conditions pending review of their habeas corpus claims is moot.

B. Section 1983 claim

The Court next addresses the question of likelihood of success on the plaintiffs' section 1983 claim, dealing with conditional class certification first, followed by the merits. The Court then addresses certain provisions of the PLRA as applied to the section 1983 claim.

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7. The Court acknowledges that this is different from the conclusion it reached in the TRO decision, in which it conditionally certified subclass A. *See Mays*, 2020 U.S. Dist. LEXIS 62326, 2020 WL 1812381, at *4. But that was, of course, a provisional decision. And even for a non-conditionally certified class, a court may alter or amend an order granting class certification at any point before final judgment. Fed. R. Civ. P. 23(c)(1)(C); *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982) (class certification order is "inherently tentative," and a district court "remains free to modify it in the light of subsequent developments in the litigation").

Appendix B

1. Conditional class certification

For their section 1983 claim, the plaintiffs seek class-wide relief in the form of a preliminary injunction. But because the plaintiffs only recently filed the lawsuit, there has not yet been a class certification ruling. As the Court indicated in its TRO opinion, "[t]his does not foreclose the possibility of relief for the plaintiffs at this stage, because a district court has general equity powers allowing it to grant temporary or preliminary injunctive relief to a conditional class." *Mays*, 2020 U.S. Dist. LEXIS 62326, 2020 WL 1812381, at *3 (citing *Lee v. Orr*, No. 13 C 8719, 2013 U.S. Dist. LEXIS 173801, 2013 WL 6490577, at *2 (N.D. Ill. Dec. 10, 2013); *Al Otro Lado v. Wolf*, 952 F.3d 999, 1005 n.4 (9th Cir. 2020); *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 433 (6th Cir. 2012); *Howe v. Varity Corp.*, 896 F.2d 1107, 1112 (8th Cir. 1990)). "Furthermore, Federal Rule of Civil Procedure 23(b)(2) 'does not restrict class certification to instances when final injunctive relief issues' and permits certification of a conditional class for the purpose of granting preliminary injunctive relief." *Id.* (quoting *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012)).

As indicated, to bring a class action a plaintiff must show that the proposed class meets the four requirements of Rule 23(a): "numerosity, commonality, typicality, and adequate representation." *Wal-Mart*, 564 U.S. at 349. In addition, "the proposed class must satisfy at least one of the three requirements listed in Rule 23(b)." *Wal-Mart*, 564 U.S. at 345. The plaintiffs rely on Rule 23(b)(2).

Appendix B

As an initial matter, the Court must clarify the scope of the class or subclasses for which the plaintiffs have sought certification. They assert count 1 under section 1983 on behalf of all putative members of a class consisting of "all people who are currently or who will in the future be housed in the Cook County Jail for the duration of the COVID-19 pandemic." Compl. (dkt. no. 1) ¶ 60. In their reply brief in support of their motion for a preliminary injunction, however, the plaintiffs indicate that they also request injunctive relief for claims under section 1983 specifically for the putative members of proposed subclass B, which consists of "all people who are currently housed on a tier where someone has already tested positive for the coronavirus," *Id.* ¶ 62. *See, e.g.*, Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 29 (requesting the transfer of members of putative subclass B). Accordingly, the Court takes this as meaning that, with respect the section 1983 claim, the plaintiffs seek injunctive relief on behalf of both the overall class and subclass B.

The parties dispute whether the class and subclass B satisfy each requirement of Rule 23, except for numerosity. The Court's analysis earlier in this opinion finding that subclass A (the subclass seeking habeas relief) satisfies the typicality and commonality requirements apply to the overall class and subclass B as well. Specifically, the class and subclass B satisfy the commonality requirement because their members "have suffered the same injury" and their claims "depend upon a common contention" for which class action proceedings will "generate common answers apt to drive the resolution of the litigation." *Wal-*

Mart, 564 U.S. at 350 (emphasis omitted). As with subclass A, the claims members of the class and subclass B raise at least one common question that satisfies Rule 23(a)'s commonality requirement: whether coronavirus presents so severe a risk of harm to those in the Sheriff's custody that their conditions of confinement are unconstitutional. For the reasons previously discussed, Rule 23(a)'s commonality requirement does not involve whether each member of the class would be entitled to identical relief.

The Class and subclass B also satisfy Rule 23(a)'s typicality requirement. Each member's section 1983 claim arises from the Sheriff's response to the coronavirus pandemic—"the same event or practice or course of conduct"—and "is based on the same legal theory." *See Lacy*, 897 F.3d at 866 (alteration omitted).

The Court's analysis under Rule 23(b)(2), however, differs from its analysis regarding the habeas corpus claim. Again, Rule 23(b)(2) allows for class certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). It "applies only when a single injunction or declaratory judgment would provide relief to each member of the class," not "when each individual class member would be entitled to a different injunction." *Wal-Mart*, 564 U.S. at 360.

A good deal of the injunctive relief that the plaintiffs seek would provide relief to the entire class via a single order. Specifically, on behalf of the overall class,

the plaintiffs request a single order mandating social distancing and/or extending the TRO or converting it to a preliminary injunction, which would provide the same relief to each class member. Accordingly, the class satisfies the requirements of Rule 23(b) to the extent the plaintiffs request relief under section 1983 mandating social distancing and/or extending the TRO or converting it into a preliminary injunction.

The plaintiffs' requests for prisoner transfers and/or releases on behalf of subclass B, however, likely would entail individual determinations to some degree. The parties do not dispute that the PLRA applies to the plaintiffs' section 1983 claim or that the 1983 claim involves prison conditions. As discussed earlier with regard to the habeas corpus claim, before granting prospective or preliminary injunctive relief on the section 1983 claim, the PLRA requires the Court to "give substantial weight to any adverse impact on public safety," in addition to making other findings. 18 U.S.C. § 3626(a)(1)(A), (a)(2). As indicated, the Sheriff contends that these individual determinations prevent certification under 23(b)(2). As the Court has discussed, the plaintiffs contend (albeit only in a footnote) that a court would not be required to make those individual determinations because a court could grant a single injunction while delegating those questions to the Sheriff. Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 21 n.16; *see also Brown*, 563 U.S. at 537-38 (three-judge court adequately considered "public safety by leaving" decision "of how best to comply with its population limit to state prison officials"). The Court recognizes that analysis of whether the Sheriff

may exercise discretion in carrying out a transfer or release order may be different for the section 1983 claim. Among other differences, a petition for habeas corpus contemplates a singular form of relief with regard to habeas—release from custody—whereas a court has a broader spectrum of possible relief under section 1983. S*ee Rumsfeld*, 542 U.S. at 435; *Preiser*, 411 U.S. at 484-86, 489. The range of injunctive relief available under section 1983 may allow courts to "leave details of implementation to [a] State's discretion by leaving sensitive policy decisions to responsible and competent policy state officials." *See, e.g., Brown*, 563 U.S. at 538. The Court need not decide that issue now, however, because, as it will explain later in this opinion, at this point it concludes that the predicate under the PLRA for convening a three-judge court or ordering prisoner transfers has not been established.

In sum, the Court conditionally certifies the class to the extent the plaintiffs request relief under section 1983 requiring social distancing and/or extending the TRO or converting it to a preliminary injunction. The Court declines to decide whether subclass B satisfies the requirements of Rule 23(b) because it is not necessary to do so at this time.

2. Likelihood of success on the merits

The injunctive relief requests remaining for determination are the class's requests to require social distancing throughout the Jail and (it appears) advance identification and further screening of detained persons with conditions that make them more vulnerable to severe

health consequences from coronavirus disease, as well as their request to convert the TRO to a preliminary injunction. (The Court addresses in later sections the plaintiffs' request to require the Sheriff to transfer detainees out of the Jail and to convene a three-judge panel.)

The claims of the class arise under the Due Process Clause of the Fourteenth Amendment. "When a state actor [ ] deprives a person of his ability to care for himself by . . . detaining him . . . , it assumes an obligation to provide some minimum level of well-being and safety." *Johnson v. Rimmer*, 936 F.3d 695, 706 (7th Cir. 2019) (quoting *Collignon v. Milwaukee County*, 163 F.3d 982, 987 (7th Cir. 1998)). The Due Process Clause requires a jailer to provide a pretrial detainee with food, shelter, and basic necessities, including reasonably adequate sanitation, ventilation, bedding, hygienic materials, and utilities, *Hardeman v. Curran*, 933 F.3d 816, 820 (7th Cir. 2019), and to "meet[ ] the person's medical needs while he is in custody," *Johnson*, 936 F.3d at 706. More broadly, the Due Process Clause protects pretrial detainees, who "have not been convicted of anything," *Miranda v. County of Lake*, 900 F.3d 335, 350 (7th Cir. 2018), from conditions that "amount[ ] to punishment." *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S. Ct. 2466, 2472, 192 L. Ed. 2d 416 (2015) (quoting *Graham v. Connor*, 490 U.S. 386, 395 n.10, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)); *Hardeman*, 933 F.3d at 823.

Here there is no question that the plaintiffs' claims involve conditions that are sufficiently serious to invoke

the Fourteenth Amendment; the Sheriff does not argue otherwise. A pretrial detainee may establish a Fourteenth Amendment violation based on a condition, or combination of conditions, posing an "unreasonable risk of serious damage to [his] future health." *Henderson v. Sheahan*, 196 F.3d 839, 847 (7th Cir. 1999) (decided under Eighth Amendment "deliberate indifference" standard). *See Helling v. McKinney*, 509 U.S. 25, 33, 35, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993) (Eighth Amendment case; "exposure of inmates to a serious, communicable disease" that poses a risk of future harm is a deprivation sufficiently serious to invoke constitutional protections). This is precisely where persons detained in the Jail find themselves. The coronavirus is indisputably present in the Jail. And the persons detained there are housed in settings that facilitate its transmission. This is true throughout the Jail, given the close proximity in which even single-celled detained persons are housed and the fact that they occupy common areas like bathrooms, showers, and dayrooms where other inmates congregate or have been present. And it is particularly true for detained persons who are doubled celled and those who are still housed in the dormitory units, where dozens (or more) spend twenty-four hours per day, or close to it, in the same room. It is equally undisputed that persons are detained in these settings with the knowledge of the Sheriff and his personnel, who have assigned them to live in these quarters while aware of the risks of virus transmission. All of this, taken together, is sufficient for the plaintiffs to have well more than a "better than negligible chance," *see Whitaker*, 858 F.3d at 1046, of establishing the threshold requirement of their due process claim—conduct that

the Sheriff knows puts detainees at a significant risk of serious harm from coronavirus. *See Kingsley*, 135 S. Ct. at 2472; *Miranda*, 900 F.3d at 353. Meeting this threshold requirement of the due process standard does not require an intent to cause harm; it requires only knowledge of "the physical consequences" of one's conduct. *Kingsley*, 135 S. Ct. at 2472.

The primary dispute before the Court, and the point on which the Sheriff focuses his defense, involves the second requirement of a due process claim. To succeed on their claim, the plaintiffs must show that the Sheriff's conduct in addressing the risks posed by exposure to coronavirus is objectively unreasonable in one or more respects. *See, e.g., McCann v. Ogle County*, 909 F.3d 881, 886 (7th Cir. 2018). At the preliminary injunction stage, however, the plaintiffs are not required to prove this definitively; they are required only to establish a reasonable likelihood that they will ultimately succeed in proving it.

The plaintiffs concede that the Sheriff and others have taken significant steps to reduce the Jail's population and to decrease the number of persons housed in groups or double celled. They argue, however, that the Sheriff's actions do not go far enough and that detained persons continue to be unreasonably exposed to a risk of serious harm. The plaintiffs contend that social distancing is not being enforced even in units where detained persons are single celled, given joint usage of showers, toilet facilities, and dayrooms. And, they say, social distancing is not even a possibility for the hundreds who are double celled or remain in dormitory units. The plaintiffs also contend

that despite policies promulgated by the Sheriff, proper sanitation—in particular, frequent cleaning of surfaces and facilities used in common, distribution of cleaning materials to detainees, and so on—is not actually being carried out on the ground. Finally, the plaintiffs contend—and it is undisputed—that nothing has been done by the Sheriff to enable him to identify, in advance, detained persons with medical or other conditions that make them particularly vulnerable to serious illness should they contract the coronavirus.

The Sheriff argues that he and others have taken significant steps to reduce the risk to detained persons from coronavirus. One critical aspect of this is a very significant reduction in the overall population of the Jail, accomplished by bond reductions issued by judges and by expansion, to its limits, of the Sheriff's electronic home monitoring program. In addition, in recent weeks, there have been far fewer new detainees admitted on a daily basis than has been the case historically, presumably due to fewer arrests. At the same time, the Sheriff has taken steps to increase capacity, including by reopening previously shuttered buildings and parts of buildings within the Jail complex. Together, these actions have enabled the Sheriff to take further steps to separate persons who remain detained in the Jail. Specifically, a far greater percentage of detainees are now in cells by themselves. And far fewer are housed in the dormitory units than before, with many having been transferred to single-cell units. In addition, at the Sheriff's direction, detainees have been provided guidance regarding social distancing. The Sheriff has also instituted policies to

enhance sanitation practices and to carry out these policies. He has also implemented the distribution of facemasks to certain detained persons—in particular, those who are in quarantine—consistent with the availability of supplies, and he has undertaken efforts to acquire more. (Some of this has taken place as a result of the TRO entered on April 9.)

It cannot reasonably be disputed that the Sheriff has undertaken a significant, and impressive, effort to safeguard detained persons in his custody from infection by coronavirus. And based on the record, including the testimony of Executive Director Miller at the April 23 hearing, the Court is satisfied that the Sheriff and his staff have acted in good faith, with the goal of protecting the people placed in his custody, consistent with his obligation to maintain security.

Were this an Eighth Amendment case involving convicted prisoners, the efforts the Court has just described likely would be the end of the story. To prevail in a case involving a convicted prisoner, a plaintiff is required to show that the prison official was *deliberately indifferent* to the risk of harm to the plaintiff—in other words, the official knew about but disregarded that risk. *See, e.g., Orr v. Shicker*, 953 F.3d 490, 499 (7th Cir. 2020); *Garcia v. Armor Corr. Health Serv., Inc.*, 788 F. App'x 393, 395 (7th Cir. 2019). Were the plaintiffs in this case required to make that showing, they would be unable to prevail; the Sheriff has been anything but deliberately indifferent to the risk of harm to pretrial detainees from coronavirus.

But because this is a case involving persons detained prior to an adjudication of their guilt or innocence, the Sheriff's good intentions are not dispositive of the plaintiffs' claims. There is a critical difference between a claim regarding conditions of confinement brought by pretrial detainees like the plaintiffs and one brought by a convicted prisoner under the Eighth Amendment, who unlike a pretrial detainee can constitutionally be subjected to punishment. *See Hardeman*, 933 F.3d at 824 (Eighth Amendment standard is "more demanding"). The standard by which a court evaluates a claim by a pretrial detainee like the plaintiffs "is solely an objective one." *Kingsley*, 135 S. Ct. at 2473. The plaintiffs are not required to show that the Sheriff had an intent to punish or to harm them, *id.;* indeed, they need not show any sort of malicious or bad intent at all. Rather, what they are required to show—actually, on a preliminary injunction, simply establish a reasonable likelihood of showing—is that the Sheriff's conduct with respect to the particular condition has been objectively unreasonable in one or more respects. *See McCann*, 909 F.3d at 886. In applying this standard, a court "focus[es] on the totality of facts and circumstances" the defendant faced "to gauge objectively—without regard to any subjective belief held by the [defendant]—whether the response [to the conditions] was reasonable." *Id.*

The plaintiffs contend that the Sheriff's response to the coronavirus outbreak at the Jail has not been objectively reasonable or sufficiently protective of the people in his custody, at least with respect to the issues currently before the Court—social distancing, sanitation, and identification and monitoring of highly vulnerable

detainees. In evaluating the plaintiffs' contentions, the Court assesses objective reasonableness "from the perspective of 'a reasonable [official] on the scene,' based on what the [official] knew at the time." *Mays*, 2020 U.S. Dist. LEXIS 62326, 2020 WL 1812381, at *9 (quoting *Kingsley*, 135 S. Ct. at 2473). The question, in the present context, is whether the Sheriff "acted reasonably to mitigate the risks to [the] health and safety of detainees." *Id.* (citing *Hardeman*, 933 F.3d at 825; *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017)). And in determining the reasonableness of the Sheriff's actions, the Court "must account for his legitimate interest in managing the Jail facilities," and it must "defer to policies and practices that 'are needed to preserve internal order and discipline and to maintain institutional security.'" *Id.* (quoting *Kingsley*, 135 S. Ct. at 2473); *see Bell*, 441 U.S. at 547.

The fact of the matter is that the Sheriff's actions have not eliminated the risk to detained persons; far from it. But this, too, is not dispositive. Although a jailer must make a reasonable effort to abate conditions that pose an excessive risk to the health or safety of the people in his custody, the fact that he fails to prevent actual harm does not mean that his response was unreasonable. *See Dale v. Poston*, 548 F.3d 563, 569 (7th Cir. 2008) (applying Eighth Amendment deliberate indifference standard). More specifically, the Constitution does not require a detention facility to provide "foolproof protection from infection" by a communicable disease. *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997) (applying Eighth Amendment standard); *see also Smith v. Sangamon Cty. Sheriff's Dep't*, 715 F.3d 188, 191 (7th Cir. 2013) (applying Eighth

Amendment standard; "Prison and jail officials are not required to guarantee [a] detainee's safety." (internal quotation marks omitted)). That said, the ongoing risk to detained persons at the Jail, confirmed by increases in the number who have tested positive for coronavirus and the death of six detained persons from coronavirus disease as of April 23, is the backdrop against which the Court must view the Sheriff's conduct.

The Court begins with the question of social distancing. As the plaintiffs see it, a policy that fails to fully implement social distancing throughout the Jail—which indisputably has not happened—cannot possibly be considered an objectively reasonable response to the coronavirus outbreak there. At least until full social distancing is enforced, the plaintiffs contend, detained persons face an unacceptably high risk of death or serious harm to their health.

The Sheriff's position is likewise simple and straightforward. His implementation of a coronavirus response plan at the Jail complies, he says, with the CDC Guidelines, and for this reason his actions have been objectively reasonable. The Guidelines, he points out, do not require social distancing in correctional facilities where it is not feasible given physical space, population, and staffing.[8] The plaintiffs respond that the

8. Largely based on this aspect of the CDC Guidelines, the Court, in deciding the TRO motion, declined to require the Sheriff to enforce social distancing other than during the intake process, one very obvious point at which social distancing was not taking place. The TRO ruling, however, is neither final nor binding. The

CDC Guidelines are not a surrogate for constitutional due process requirements.

To support his position that compliance with the CDC Guidelines should effectively be dispositive, the Sheriff cites *Carroll v. DeTella*, 255 F.3d 470 (7th Cir. 2001). There the Seventh Circuit held that a convicted prisoner could not show that prison officials had been deliberately indifferent to his lack of access to safe drinking water, because radium concentrations in the prison's drinking water were at a level that the U.S. Environmental Protection Agency deemed at the time to be safe. *Id.* at 472-73. The court noted that because prisoners are not entitled to better quality of air, water, or environment than the general public, prisons do not have "a duty to take remedial measures against pollution or other contamination that the agencies responsible for the control of these hazards do not think require remedial measures." *Id.*

The Sheriff's reliance on *Carroll* is unavailing. First of all, the plaintiffs do not suggest any entitlement on the part of pretrial detainees to conditions that exceed health and safety standards applicable to the general public. But that aside, the CDC Guidelines, unlike the EPA standards relied upon in *Carroll*, do not say or suggest that compliance makes detained people safe. This is particularly so in view of the fact that the Guidelines include feasibility qualifiers, particularly in relation to

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Court has reassessed the matter with the benefit of more thorough briefing and a more complete record.

social distancing. *See* CDC Guidelines at 1, 3, 4, 11. Given this limitation, the Guidelines are not the same as a safety standard set by a regulatory agency.

For their part, the plaintiffs suggest that the CDC Guidelines "shed no light" on whether the Sheriff's conduct has been objectively reasonable, in conformity with constitutional requirements. Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 10 (quoting *Thompson v. City of Chicago*, 472 F.3d 444, 454 (7th Cir. 1996)). The Court disagrees with this as well. The plaintiffs rely to a significant extent on *Thompson*. There the court, considering a claim of excessive force against a police officer—a claim also determined by a standard of objective reasonableness—stated that a policy on the use of force established by the police department was "completely immaterial [on] the question of whether a violation of the federal constitution has been established." *Id.* at 454. But later, in *United States v. Brown*, 871 F.3d 532 (7th Cir. 2017), the Seventh Circuit clarified that *Thompson* simply means that a police department's own policies do not establish the standard of what is reasonable for purposes of the Constitution. *See id.* at 537 ("Despite its strong language, *Thompson* should not be understood as establishing a rule that evidence of police policy or procedure will *never* be relevant to the objective-reasonableness inquiry."). The court explained in *Brown* that, in the fact-intensive objective reasonableness analysis, evidence of national or widely used police policies could be relevant to helping a factfinder understand how a reasonable officer might have behaved under the circumstances that faced the defendant. *Id.* at 538. The

court noted that the relevance of such policy evidence may turn on the "factual complexity" of the circumstances facing the defendant, and it may be less relevant in circumstances in which a factfinder can rely on common sense to determine the reasonableness of conduct. *See id.*

Here—unlike, perhaps, a relatively simple excessive force claim against an arresting officer—the circumstances facing the Sheriff in operating the Jail are quite complex. In these circumstances, guidance from an expert body like the CDC is beneficial in assessing the objective reasonableness of the Sheriff's conduct in the face of an ongoing outbreak. Indeed, in *Forbes*, the Seventh Circuit concluded that a prison's response to a case of active tuberculosis in its facility had been objectively reasonable in part because it had implemented and effected the recommendations of the CDC. *Forbes*, 112 F.3d at 267.

In sum, the CDC Guidelines are an important piece of evidence to consider in assessing the Sheriff's conduct, but they cannot be appropriately viewed as dispositive standing alone. Indeed, the CDC's recommendations on tuberculosis were not dispositive in *Forbes;* the court also considered other facts—noting, for example, that the prison had only one case of active tuberculosis, "a far cry" from an outbreak. *Id.* As the Court has indicated, one reason why the CDC Guidelines are not appropriately viewed as dispositive of the plaintiffs' due process claims is the way in which they account for feasibility. Although feasibility may be a consideration in determining objective reasonableness, *see Gayton v. McCoy*, 593 F.3d 610, 622 (7th Cir. 2010) (decided under deliberate indifference

standard), no case of which the Court is aware sets it as a dispositive factor. That, however, is exactly what the CDC Guidelines do, at least if read as the Sheriff suggests: they set a feasibility or practicality limitation on social distancing practices that they also call "a cornerstone of reducing transmission of respiratory diseases such as COVID-19." CDC Guidelines at 4. One can certainly understand why the CDC, a public health body, has acknowledged these sorts of limits upon its ability to prescribe guidelines for managing jails. But from a constitutional-law standpoint, it is difficult to believe that "do what you can, but if you can't, so be it"[9] satisfies a jailer's constitutional obligation to take objectively reasonable steps to mitigate known risks to the life and health of people in his custody who are detained awaiting determination of their guilt or innocence.

Currently the Sheriff is housing hundreds of detained persons under conditions that make social distancing completely impossible or nearly so, or at least very difficult. Those for whom it is completely impossible are the detainees who are double celled. Those for whom it is at least very difficult and likely impossible are detainees who are housed in dormitory units that are not operating at a greatly reduced capacity. Specifically, a significant number of the existing dormitory units are operating at or greater than fifty percent capacity. Based on the record before the Court, social distancing is practically impossible in such units, and this cannot be completely attributed to detainee

9. The Court does not intend by this to suggest that this is the attitude of the Sheriff, the Executive Director, or their staff. Here the Court is characterizing a legal argument, not any person's behavior.

conduct or misconduct: if people are kept in groups in relatively close quarters, it is entirely predictable that they will have difficulty maintaining separation.

At the current stage of the pandemic, group housing and double celling subject detainees to a heightened, and potentially unreasonable and therefore constitutionally unacceptable, risk of contracting and transmitting the coronavirus. Such arrangements make it impossible or unduly difficult to maintain social distancing, a "cornerstone" of the reduction of coronavirus transmission among detainees. The Court, however, must account for and give deference to the Sheriff's interest in managing the Jail facilities and to practices that are needed to preserve order and discipline and maintain security. *See Kingsley*, 135 S. Ct. at 2473; *Bell*, 441 U.S. at 547. These include documented considerations that make group or double celling appropriate or necessary. Feasibility limitations imposed by existing or otherwise available physical facilities are also taken into account, though this is not and cannot be a controlling factor. In this regard, it is worth noting that despite general statements by both sides to the contrary, it does not appear, based on the evidence, that the Sheriff has yet hit the feasibility limit on getting detainees out of group housing, even if one considers only the Jail complex itself. *See* Apr. 23, 2020 Hearing Tr. at 57:2-19 (testimony by Executive Director Miller referencing the possibility of further moves of detained persons out of dormitories).

Based on the evidence submitted, the Court finds that the plaintiffs are reasonably likely to succeed on

their contention that group housing or double celling of detained persons is objectively unreasonable given the immediate and significant risk to their life and health from transmission of coronavirus, except in the following situations:

- Persons detained in tiers or dormitories currently under quarantine following a positive test for the coronavirus within the tier or dormitory, as this makes it inadvisable to transfer them to other housing arrangements until the quarantine period has expired (what the Sheriff refers to as "quarantine tiers").

- Detained persons who have tested positive for the coronavirus and are under medical observation (what the Sheriff refers to as "isolation tiers"), a housing arrangement that the CDC Guidelines specifically authorize.

- Detained persons who have tested positive for coronavirus and are recovering (what the Sheriff refers to as "convalescent tiers"), which the CDC Guidelines likewise authorize.

- Double-celled or dormitory-housed detainees for whom there is a documented determination by a medical or mental health professional that single-celling poses a risk of suicide or self-harm.

- Persons detained housed in a dormitory unit that is at less than fifty percent capacity, which the record reflects will permit adequate social distancing.

- Detained persons committed, at the documented direction of a medical or mental health professional, to a group housing unit that is equipped for medical or mental health treatment, if but only if there is not available space in an appropriate housing or medical unit that permits full social distancing.

Detained persons housed in any of the listed "acceptable" arrangements will, however, need facemasks that are replaced at appropriate intervals and must be provided with instruction on how to use a facemask and the reasons for its use. They also must be instructed, at regular intervals, on the importance of social distancing.

The Court has omitted from the list above two categories of detained persons referenced in Executive Director Miller's affidavits and testimony: persons put into group housing or double celled because of conduct issues (including those who Miller referred to during his testimony as "our disorderly . . . population," Apr. 23, 2020 Tr. at 52:6) or for reasons associated with the PREA. On the record as it currently stands, the plaintiffs have a reasonable likelihood of succeeding on a contention that it is objectively unreasonable to effectively preclude social distancing for such persons. With regard to PREA detainees, the proposition that they cannot be single celled is counterintuitive, to say the least.[10] And with regard to individuals with conduct issues, without more the Court cannot say that there is an objectively reasonable basis

10. This is so whether these persons are alleged perpetrators or likely victims, which is not clear from the record.

to hold them in a setting that does not permit adequate social distancing. With regard to detained persons in these categories, the Court is willing to entertain a properly-supported request by the Sheriff to include them in the category of persons who may be appropriately detained in group housing, perhaps with appropriate distancing.

Beyond what the Court has described, the plaintiffs have not established a reasonable likelihood of success on their due process claims. Specifically, the Court is not prepared to say that it is constitutionally inappropriate, in light of the coronavirus pandemic, to detain persons in the Jail in any form of group housing or to detain them in single cells given the likelihood of multiple uses of common facilities and areas. This would be tantamount to saying that, in the present circumstances, the Constitution prohibits detaining people in jails. The plaintiffs have not established, and are not likely to be able to establish, that this is so.

Next, the Court addresses the plaintiffs' contentions regarding advance identification of detained persons who are especially vulnerable to severe illness or death if they contract the coronavirus. The Court remains unpersuaded that the plaintiffs have a reasonable likelihood of showing that this is objectively unreasonable and thus violative of those class members' constitutional rights. The plaintiffs' experts opined that screening is important so that vulnerable individuals can be monitored for symptoms. Miller explained, however, that any person with symptoms consistent with coronavirus disease is already provided immediate screening and treatment,

and medical professionals treating such a person will have immediate access to his or her medical records (which include an inventory of medical conditions reported by the detained person upon intake or thereafter). Though, as the Court stated in its TRO decision, advance identification of persons with heightened vulnerability would appear to be a good practice and perhaps a best practice, the plaintiffs have not shown that failing to do so is, under the circumstances, objectively unreasonable.

Finally, the Court addresses the plaintiffs' request for extension of the TRO. The TRO required the Sheriff to establish and implement a policy regarding coronavirus testing; provide cleaning supplies to detainees and staff and soap and/or hand sanitizer to detained persons; establish and implement a policy regarding sanitization of frequently touched surfaces; and provide facemasks to all detained persons who are quarantined. *Mays*, 2020 U.S. Dist. LEXIS 62326, 2020 WL 1812381, at *14-15. The plaintiffs ask the Court to convert these requirements into a preliminary injunction. The Sheriff argues that the Court need not extend or convert the TRO because he has complied with it and continues to do so.

A court "retains the power to grant injunctive relief" even after the defendant ceases the allegedly unlawful conduct. *Milwaukee Police Ass'n v. Jones*, 192 F.3d 742, 748 (7th Cir. 1999); *see also United Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 563 F.3d 257, 275 (7th Cir. 2009). The moving party must show that such relief still is required. *Milwaukee Police Ass'n*, 192 F.3d at 748. "The necessary determination is that there exists some

cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *Id.* (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633, 73 S. Ct. 894, 97 L. Ed. 1303 (1953)); *see also United Air Lines, Inc.*, 563 F.3d at 275 ("The court may consider how easily former practices might be resumed at any time in determining the appropriateness of injunctive relief."). Where the cessation of an allegedly wrongful activity occurred "only after a lawsuit has been filed," a district court is "within its discretion" to find that the cessation was "not voluntary, and that even a voluntary cessation is not determinative." *Id.*

Although the Sheriff appears to have complied with the TRO, the Court cannot say that the constitutional violations the Court sought to address will not recur absent an extension of the TRO's requirements. The Sheriff's actions to develop policies on sanitation and coronavirus testing, distribute soap and cleaning supplies, and distribute facemasks to detained persons who are quarantined—at least those done after the April 9 TRO—cannot be said to have been undertaken entirely voluntarily. Rather, they were done in response to the TRO, and there is at least some evidence of problems in carrying out the TRO's directives. In addition, without a court order, there is at least a possibility that these important measures could slip to the wayside, despite the Sheriff's best intentions, as he works to manage the complexities of the Jail during this public health crisis. For these reasons, the Court concludes that it is appropriate to convert the TRO to a preliminary injunction.

3. Transfer

The plaintiffs next request the transfer of members of subclass B out of the Jail "to another safe location in the Sheriff's custody." Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 2. Until recently, they primarily suggested that such a location could include "home confinement or electronic home monitoring." Pls.' Resp. to April 3, 2020 Ord. (dkt. no. 26-1) at 17; *see also* Pls.' Renewed Mot. for Prelim. Inj. (dkt. no. 55) at 16-17 (requesting transfer without specifying the location to which detained people should be transferred). But in their most recent reply brief, they suggest that this also could include transfer to "another correctional space, a hospital or medical facility, a clinic, [or] administrative furlough." Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 29. The Sheriff contends that, under the PLRA, only a three-judge court may order such transfers and that, regardless, he lacks the authority to transfer detainees to electronic home monitoring. The Court starts with the threshold issue: whether this Court may, on its own, order the transfer of detained persons as proposed by the plaintiffs.

As indicated, under the PLRA, "[i]n any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court." 18 U.S.C.§ 3626(a)(3)(B). The PLRA defines "prisoner release order" as "any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or

nonadmission of prisoners to a prison." 18 U.S.C. § 3626(g)(4). It defines "prison" as "any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law." *Id.* § 3626(g)(5). This definition plainly includes the Jail.

The plaintiffs contend that the transfer of detained persons that they seek would not be a prisoner release order because it would simply involve moving them from one place under the Sheriff's control to another place under his control. That misses the mark. Transfers to home confinement, administrative furlough, or electronic home monitoring in particular—which, at least up until they filed their reply brief, are the primary forms of transfer the plaintiffs have requested—would constitute prisoner release orders because they would have "the purpose or effect of reducing [the] population" of the Jail. *Id.* § 3626(g)(4); *Money*, 2020 U.S. Dist. LEXIS 63599, 2020 WL 1820660, at *12 (transfers of prisoners to temporary medical furlough or home detention within the state's custody would constitute prisoner release orders because "the PLRA does not focus on custodial status under state law, nor does it say anything about whether the reduction of population is temporary or permanent."). Population reduction is the "whole point" of the transfers the plaintiffs seek—they propose to prevent or curb the spread of coronavirus to detained persons, and in particular those who are vulnerable, by reducing the Jail's population. *See* 2020 U.S. Dist. LEXIS 63599, [WL] at *13.

The transfers sought by the plaintiffs would constitute prisoner release orders for an additional reason: they

would direct the release of detained persons out of the Jail. *See* 18 U.S.C. § 3626(g)(4). The plaintiffs contend that, for people confined at home at the direction of a state authority, a home may amount to a prison within the meaning of the PLRA. To be sure, the list of institutions that qualify as prisons under the PLRA is not limited to those specified in the statute. *Witzke v. Femal*, 376 F.3d 744, 753 (7th Cir. 2004) (confinement in a drug rehabilitation halfway house qualified as confinement in a correctional facility under the PLRA). But, as defined by the PLRA, a prison is a facility. *Id.* § 3626(g)(5). The common definition of a facility is "a building or establishment that [provides a service or feature of a specified kind]."[11] That does not appear to cover a person's home; a home, even one in which a person is residing subject to a court or law enforcement authority's order, is not a place that provides specified services or features.[12] It is hard to see the PLRA's definition of "prison" stretching that far. In addition, even if home confinement and/or electronic home monitoring constitutes imprisonment under state law (an issue the Court need not decide), an order mandating the transfer of prisoners out of the Jail to confinement in their homes likely would constitute a prisoner release order because it would "direct[] the release [of prisoners] from . . . a prison" to another place of confinement, 18 U.S.C. § 3626(g)(4).

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11. *Facility*, Oxford English Dictionary Online, https://www.oed.com/view/Entry/67465?redirectedFrom=facility& (last visited April 26, 2020).

12. *Home*, Oxford English Dictionary Online, https://www.oed.com/view/Entry/87869?rskey=8yYRsS&result=1&isAdvanced=false (last visited April 26, 2020).

The plaintiffs, however, appear to take the position even if prisoner transfers have the effect of reducing the prison population, a single-judge court may order them where the basis for the order is not crowding or overcrowding. They may be correct. One of the PLRA's requirements for the entry of a prisoner release order by a three-judge panel is that "crowding is the primary cause of the violation of a Federal right." 18 U.S.C. § 3626(a)(3)(E)(i). Some courts have concluded that single-judge courts can order the transfers of prisoners, at least to other facilities, where the purpose of the transfer involves the prisoners' medical needs or vulnerabilities. *See Plata v. Brown*, No. C01-1351 TEH, 427 F. Supp. 3d 1211, 2013 U.S. Dist. LEXIS 90669, 2013 WL 12436093, at *9-10, 15 (N.D. Cal. June 24, 2013) (ordering the transfer to other institutions of certain medically high-risk categories of prisoners out of two prisons where they were at risk of contracting Valley Fever, a disease not spread through human-to-human contact); *Reaves v. Dep't of Correction*, 404 F. Supp. 3d 520, 523-24 (D. Mass. 2019) (denying a stay pending appeal and explaining why the PLRA permitted the court to order the transfer of a quadriplegic prisoner to a medical facility equipped to care for him in *Reaves v. Dep't of Correction*, 392 F. Supp. 3d 195 (D. Mass. 2019), *appeal docketed*, No. 19-2089 (1st Cir. Nov. 4, 2019)); *see also Money*, 2020 U.S. Dist. LEXIS 63599, 2020 WL 1820660, at *12 n.11 (suggesting that a single-judge courts can order prisoner transfers for reasons other than crowding). This conclusion seems correct: because three-judge courts can order prisoner releases only where crowding is the primary cause of the violation of a federal right, 18 U.S.C. § 3626(a)(3)(E)(i), to ensure the vindication

of people in custody's constitutional rights, the PLRA must be read to permit courts to order transfers where some other condition causes the violation of a constitutional right. *See Plata*, 2013 U.S. Dist. LEXIS 90669, 2013 WL 12436093, at *9-10.

But a single judge's ability to order a prisoner transfer for reasons other than crowding makes no difference in this case: the primary basis for the transfers the plaintiffs request is to reduce crowding in the Jail. *See Money*, 2020 U.S. Dist. LEXIS 63599, 2020 WL 1820660, at *13 (plaintiffs' suggestion that they did not seek a remedy for overcrowding "contradict[ed] the allegations of their complaint and their entire theory of the case"). To put it in simple terms, one of plaintiffs' core contentions is that their constitutional rights are being violated because social distancing, which they contend is crucial to protect their health, has not been or cannot be accomplished at the Jail. Social distancing is essentially the converse of overcrowding. Thus it is apparent that the plaintiffs' request for prisoner transfers or releases *is* based on overcrowding.

To be more specific, one of the central allegations in the complaint is that the crowded conditions in the Jail "ensure the continued[,] rapid, uncontrolled spread of COVID-19 within the Jail and beyond—because the Jail is not and cannot be isolated from the larger community" and "because the Jail is a crowded, congregate environment." Compl. (dkt. no. 1) ¶ 2; *see also, e.g., id.* at ¶¶ 20, 25-26, 30-35, 37-41, 46, 51. The plaintiffs hinge their legal arguments on the contention that "without a reduction of the Jail's

population, the lives and safety of the persons confined there cannot be reasonably protected" because "social distancing is not possible with the current jail population." Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 1; *see also, e.g.*, Pls.' Renewed Mot. for Prelim. Inj. (dkt. no. 55) at 1 ("The virus is spreading rapidly in the jail . . ., and that is not surprising: People are sleeping within three feet of each other, eating and using showers in close proximity to each other, and touching the same surfaces."). They contend that the imperative of social distancing is an undisputed "medical necessity" and that "[a]ll of the evidence in this record supports that proposition." Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 3. As indicated, they cite evidence from a range of sources—including the CDC, the governor of Illinois, the City of Chicago, and medical and epidemiological experts—reflecting that social distancing is among the most effective and important interventions to reduce the spread of coronavirus and protect public health right now. *Id.* at 3-5; *see also, e.g.*, Pls.' Renewed Mot. for Prelim. Inj. (dkt. no. 55) at 4-8. And, crucially, they contend that social distancing at the jail is impossible *because of its current population levels. Id.* at 10 ("[I]f the current population of a jail unavoidably creates intolerable risk to life and health then the current population must change."); *see also id.* at 10-13; Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 6-8. In short, the plaintiffs are requesting transfers because social distancing is impossible; with that in mind, it is incongruous to contend that crowding is not the basis or primary basis for seeking compelled transfers. *See Money*, 2020 U.S. Dist. LEXIS 63599, 2020 WL 1820660, at *13.

Citing *United States v. Cook County*, 761 F. Supp. 2d 794 (N.D. Ill. 2000), the plaintiffs contend that the PLRA applies only to prisoner release orders that are "explicitly related to population caps," not to all such orders stemming primarily from crowding. Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 32 (citing *id.* at 796-97). That interpretation stretches the statute's language too far. Even if "[s]ponsors of the PLRA were especially concerned with courts setting 'population caps,'" *Plata*, 2013 U.S. Dist. LEXIS 90669, 2013 WL 12436093, at *10 (quoting *Gilmore v. California*, 220 F.3d 987, 998 n. 14 (9th Cir. 2000)), the PLRA's text does not limit prisoner release orders issued by three-judge courts to only orders that set population caps, *see* 18 U.S.C. § 3626(a)(3)(E). *United States v. Cook County* does not suggest otherwise. The three-judge court in that case found "that overcrowding [was] a primary cause of unconstitutional conditions at the jail" because it caused, among other things, "excessive force by guards, grossly unsanitary and unhealthy conditions, and grossly inadequate medical (including mental-health) care." *Cook County*, 761 F. Supp. 2d at 797. Although these conditions might have existed even without overcrowding, overcrowding made them worse. *Id.* at 797-98. Thus the purpose of the prisoner release order in *Cook County* was not merely to set prison caps but, rather, to address constitutional violations caused primarily by overcrowding. *See id.* The same is true in this case: the severe medical risks posed by coronavirus would exist even if the Jail was not crowded, but the plaintiffs contend the crowding at the Jail significantly enhances those risks and makes the outbreak more challenging to control. The purpose of a transfer order would be to address alleged

constitutional violations stemming from coronavirus due to crowding in the Jail, and that is the type of order than only a three-judge court may issue.

4. Three-judge court

The plaintiffs also have asked the Court to convene a three-judge court "to consider whether and to what extent to enter a prisoner release order." Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 2. Under the PLRA, "[i]n any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court." 18 U.S.C.§ 3626(a)(3)(B). The Sheriff contends that the requirements for convening a three-judge court have not been met.

The PLRA provides that no court may enter a prisoner release order unless two requirements are met. 18 U.S.C. § 3626(a)(3)(A). First, a court must have "previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order." *Id.* § 3626(a)(3)(A)(i) (the "previous order requirement"). In addition, the defendant must have "had a reasonable amount of time to comply with the previous court orders." *Id.* § 3636(a)(3)(A)(ii) (the "reasonable time requirement").

Together, these requirements ensure that a three-judge court's prisoner release order is a "last resort remedy." *Brown*, 563 U.S. at 514. A party requesting a prisoner release order and the convening of a three-judge court must file "materials sufficient to demonstrate" that

both requirements have been met. *Id.* § 3636(a)(3)(C). A federal judge can also request *sua sponte* the convening of a three-judge court if both requirements are met. *Id.* § 3626(a)(3)(D). The judge need not consider the likelihood of whether a three-judge court would issue a prisoner release order. *See Plata v. Schwarzenegger*, No. C01-1351-TEH, 2007 U.S. Dist. LEXIS 56031, 2007 WL 2122657, at *1 (N.D. Cal. July 23, 2007).

a. Previous order requirement

The Court starts with the previous order requirement. It previously entered an order for less intrusive relief by issuing the TRO. *Mays*, 2020 U.S. Dist. LEXIS 62326, 2020 WL 1812381, at *14-16. The Sheriff contends that the TRO does not satisfy the PLRA's previous order requirement because it did not include an order requiring social distancing. In the TRO decision, the Court found that the plaintiffs had failed "to show a reasonable likelihood of success on their contention that the Sheriff is acting in an objectively unreasonable manner by failing to mandate full social distancing." 2020 U.S. Dist. LEXIS 62326, [WL] at *10. The Court declined to order relief with respect to social distancing throughout the Jail but required the Sheriff to enforce social distancing in connection with the new detainee intake process. 2020 U.S. Dist. LEXIS 62326, [WL] at *14.

The previous order requirement is "satisfied if the court has entered one order [that] 'failed to remedy' the constitutional violation." *Brown v. Plata*, 563 U.S. at 514. Neither the statute nor the relevant case law suggests that

a court must attempt all possible steps short of release before requesting the convening of a three-judge court. *See* 18 U.S.C. § 3626; *Brown*, 563 U.S. at 514-16. And the PLRA does not require a previous order involving a particular type of remedy; instead, it simply requires a previous order that attempted but failed to remedy the constitutional deprivation itself. *See id.* In *Brown*, the Supreme Court affirmed an order of a three-judge court mandating a population limit for California's prison system as a remedy for constitutional violations in two class actions, one involving a class of prisoners with serious mental disorders and the other involving prisoners with serious medical conditions. *Id.* at 499, 502. The Court found that district courts "acted reasonably when they convened a three-judge court," despite recent, ongoing plans to address the at-issue constitutional violations, because they "had a solid basis to doubt" that the "additional efforts . . . would achieve a remedy." *Id.* at 516.

In the TRO, the Court ordered relief less intrusive than a prisoner release order. Specifically, it required the Sheriff to establish and implement policies regarding coronavirus testing and sanitation in the Jail, implement social distancing during the new detainee intake process, provide adequate soap and/or hand sanitizer and sanitation supplies, and provide facemasks to all detained persons who are quarantined. *Mays*, 2020 U.S. Dist. LEXIS 62326, 2020 WL 1812381, at *14-15. Because the TRO has not remedied the overall claimed constitutional violation—deficient conditions in the Jail during a pandemic—it satisfied the PLRA's previous order requirement.

b. Reasonable time requirement

Additionally, before a three-judge court is convened under the PLRA, the defendant must have "had a reasonable amount of time to comply with the previous court orders," as indicated. *Id.* § 3626(a)(3)(A)(ii). This provision "requires that the defendant have been given a reasonable time to comply with *all* of the court's orders." *Brown*, 563 U.S. at 514 (emphasis added). In some situations, a court may need "to issue multiple orders directing and adjusting ongoing remedial efforts" while it "attempts to remedy an entrenched constitutional violation through reform of a complex institution." *Id.* at 516. "Each new order must be given a reasonable time to succeed, [and] reasonableness must be assessed in light of the entire history of the court's remedial efforts." *Id.* But a court may request the convening of a three-judge court even while its remedial efforts are ongoing; otherwise, a court unreasonably would have "to impose a moratorium on new remedial orders" before a three-judge court considers the issuance of a prisoner release. *Id.*

In *Brown*, the Supreme Court found that defendants in the two consolidated cases had reasonable time to comply with court orders where one court had "engaged in remedial efforts" for five years and the other court had done so for twelve years. *Id.* Remedial efforts were ongoing when the district courts requested three-judge courts, but those ongoing efforts merely attempted "to solve the crisis" through the same "basic plan[s]" as earlier efforts. *Id.* at 515. In one case, a special master the district court appointed to oversee remedial matters

had issued over seventy remedial orders. *Id.* The courts had no "assurance[s] that further, substantially similar efforts would yield success absent a population reduction." *Id.* Indeed, advances that had been made in one case were "'slip-sliding away' as a result of overcrowding." *Id.* (quoting court-appointed special master).

The plaintiffs contend that the Sheriff has had a reasonable time to comply with the Court's previous order. They have requested a preliminary injunction ordering social distancing, but, in light of the urgency of the situation, they also have requested the convening of a three-judge court to consider the question of prisoner release. The plaintiffs appear to contend that if an injunction directing social distancing does not remedy the alleged constitutional violations, then only the immediate release of prisoners by a three-judge court will achieve a remedy, so a three-judge court needs to be ready to issue a ruling as soon as that time comes. The Sheriff contends that he has not reasonably had time to comply with any such order because the Court has not directed him to implement social distancing throughout the Jail.

The Court recognizes that determination of what amounts to a "reasonable time" to comply with a court's previous orders may depend on the circumstances, and here the circumstances are extraordinary, involving an infectious virus that can be transmitted quickly from person to person. So here, perhaps, a "reasonable time" may amount to days or a small number of weeks, not years as may be the case in other situations. Undue delays in responding to the coronavirus pandemic may place detained persons' health and lives in imminent danger.

Unlike in *Brown*, however, the ongoing remedial efforts in this case might remedy the ongoing constitutional violation—which, to be clear, involves the objective reasonableness of the Sheriff's response to the coronavirus outbreak, not existence of coronavirus itself—if given adequate time. The Sheriff has offered evidence that may be understood to suggest that he is making a substantial effort to comply with the Court's order and attempt to improve the conditions of confinement at the Jail in response to the coronavirus pandemic. As detailed earlier in this opinion, he has complied with the TRO by implementing social distancing at intake; developing and implementing a plan to distribute soap, sanitizer, and cleaning suppliers more frequently; and providing facemasks to detained persons housed on tiers under quarantine. In addition, he has made efforts to spread out detainees within the Jail, even though the TRO did not mandate it. As detailed earlier, he has opened up previously closed units, doubled the number of persons housed in single-occupancy cells, attempted to ensure that detained persons are assigned beds in dorm units that are spaced more than six feet apart, and adopted various practices to encourage detained persons to practice social distancing in dorms and in common areas. As the Court has explained, it believes that the narrowly tailored relief it is ordering via this opinion appropriately addressed the claimed constitutional violations on which the plaintiffs have shown a likelihood of success. Unlike in *Brown*, the additional relief ordered in this decision is not based on the same "basic plan" as earlier efforts but rather takes a different and focused approach. *Brown*, 563 U.S. at 515. In short, it will require preventative public health measures

that the Court has not previously ordered and that the Sheriff has not shown he has implemented.

Further, although the PLRA's previous order requirement refers to a single order, its reasonable time requirement uses the plural "orders." *Compare* 18 U.S.C. § 3626(a)(3)(A)(i) *with id.* § 3626(a)(3)(A)(ii); *see also Brown*, 563 U.S. at 514. Nothing in the statute or the relevant case law indicates that a court must convene a three-judge panel after issuing only one order. Rather, the case law reflects that a court can, and perhaps in some circumstances should, make additional efforts beyond a single TRO before convening a three-judge court to consider ordering the release of imprisoned or detained persons. *See id.* (releasing prisoners is a "last resort remedy"). This seems particularly true where, as here, a Court has a basis on which to issue an additional order that is not "substantially similar" to its previous order and thus can attempt a new approach to remedying the constitutional violation that might "yield success." *Cf. Brown*, 563 U.S. at 515.

For these reasons, the Court is not persuaded that it has given its less-intrusive orders "a reasonable time to succeed," *Brown*, 563 U.S. at 516; that the Sheriff has "reasonable amount of time to comply" with those orders, 18 U.S.C. § 3626(a)(3)(A)(ii); or that the Sheriff could have reasonable time to comply in light of the further efforts the Court is taking in this order to remedy the claimed constitutional violations. The Court concludes that the PLRA's reasonable time prerequisite for the convening of a three-judge court has not yet been satisfied.

For these reasons, the Court declines to request the convening of a three-judge court.[13]

5. Irreparable harm

In addition to showing a likelihood of success on the merits, the plaintiffs must show that they will likely suffer irreparable harm without a preliminary injunction. *Whitaker*, 858 F.3d at 1044. Irreparable harm is "harm that cannot be repaired and for which money compensation is inadequate." *Orr v. Shicker*, 953 F.3d 490, 502 (7th Cir. 2020) (internal quotation marks omitted). The plaintiffs must show more than a "mere possibility" of harm but not that harm has already occurred or is certain to occur. *Whitaker*, 858 F.3d at 1045. "[A] remedy for unsafe conditions need not await a tragic event." *Helling v. McKinney*, 509 U.S. 25, 33, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993).

The plaintiffs have satisfied this requirement. They have shown a likelihood that, without additional measures to expand and enforce social distancing and the continuation of measures aimed at enhancing sanitation of surfaces within the Jail and otherwise curbing the spread of coronavirus among detained persons, some of the class members will contract the virus. If they contract coronavirus, class members—particularly those over the age of sixty-five or with certain preexisting health

13. As the Court has previously advised the parties, however, immediately after the issuance of the TRO, the Court advised the chief circuit judge of the pendency of the case and the potential need, at some point, to convene a three-judge court.

conditions—risk severe health consequences, including death. These grave risks to health are not an insignificant possibility for the class members, all of whom are live in the Jail's congregate environment, where the coronavirus has been spreading for weeks and where detained persons—even those who sleep their own cells—share spaces like common areas and showers. Therefore, the plaintiffs have adequately shown a likelihood that they will suffer irreparable harm without a preliminary injunction.

6. No adequate remedy at law

The plaintiffs also must show that they have no adequate remedy at law should the preliminary injunction not issue. *Whitaker*, 858 F.3d at 1046. They are not required to show that a remedy is "wholly ineffectual" but rather "that any award would be seriously deficient as compared to the harm suffered." *Id.* Where harm cannot be practicably remedied by monetary damages, there is no adequate legal remedy. *See id.; Foodcomm Int'l v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003); *see also W.S.R. v. Sessions*, 318 F. Supp. 3d 1116, 1126-27 (N.D. Ill. 2018) (no adequate remedy of law to address harm from prolonging child's separation from parent). The plaintiffs have clearly shown that the risk of harm to their health and possibly their lives cannot be fully remedied through damages, and therefore they have shown that they have no adequate remedy at law.

7. Balancing of harms

"Once a moving party has met its burden of establishing the threshold requirements for a preliminary

injunction, the court must balance the harms faced by both parties and the public as a whole." *Whitaker*, 858 F.3d at 1054. The nature of the balancing analysis depends on the moving party's likelihood of success: the higher the likelihood, the more the balance tips in favor of granting injunctive relief. *Id.* Before issuing an injunction ordering a defendant to perform an affirmative act, which can impose "significant burdens on the defendant," a court must give "careful consideration [to] the intrusiveness of the ordered act, as well as the difficulties that may be encountered in supervising the enjoined party's compliance with the court's order." *Kartman*, 634 F.3d at 892 (discussing certification of a class seeking mandatory injunctive relief).

The Sheriff argues that the balance of harms weighs against issuing a preliminary injunction because he is doing the best he can to contain the spread of coronavirus at the Jail, including, he contends, following the CDC Guidelines to the greatest extent possible. He argues that an order requiring him to implement more health and protective measures would be disruptive to his ongoing and persistent efforts to protect detainees from coronavirus. He also argues that the Court should defer to his expertise and judgment regarding the best policies and practices to implement at the Jail, particularly in light of the fundamental need for him to maintain internal security and order. *See Bell*, 441 U.S. at 547-48. The plaintiffs contend that the risk of severe health consequences or death to the class members is so grave that it tips the balance of harms in favor of granting a preliminary injunction. Additionally, the plaintiffs argue

the public's interest in containing outbreaks of coronavirus favors granting injunctive relief.

The Court concludes that the balance favors granting preliminary injunctive relief to the plaintiffs to the limited extent contemplated by this order. First, as detailed above, the plaintiffs have presented ample evidence of conditions that pose an unreasonable risk of serious harm to the class members' health and, despite the laudable strides the Sheriff has made since the Court issued the TRO, at least some shortcomings in the Sheriff's mitigation of that risk. This evidence tips the balance in favor of injunctive relief because, as the Court has explained, the plaintiffs have far surpassed their burden of demonstrating a "better than negligible" likelihood of success on the merits. *Whitaker*, 858 F.3d at 1046 (quoting *Cooper v. Salazar*, 196 F.3d 809, 813 (7th Cir. 1999)). The interest of the public in containing the spread of coronavirus further tips the balance in favor of injunctive relief.

As it did in issuing the TRO, the Court acknowledges the deference owed to the Sheriff in the operation of the Jail and in his development of internal procedures to maintain safety, order, and security and to response to this severe crisis. The Court recognizes the immense amount of time and work that the Sheriff and his staff have spent trying to respond to this crisis. The Court further recognizes that compliance with judicial orders impose burdens on the Sheriff and his staff, in no small part by requiring them to devote some of their limited time and resources to following a court's directives.

The Court has taken these considerations into account in ordering the limited relief described in this order. It has ensured that the relief is narrowly drawn, extends no further than necessary, and is the least intrusive means necessary to address the shortcomings discussed earlier in this opinion. The Court has tailored the relief to account for deference to the Jail's ongoing planning and efforts to address the risks associated with the coronavirus outbreak. The Court also has, as indicated earlier, taken into account the enhanced requirements for issuing what it has referred to as a "mandatory injunction." And the Court has concluded that it will not encounter significant obstacles in supervising the order despite its mandatory nature. Despite these considerations, the risk to the health and safety of detainees and others is sufficient to permit and require preliminary injunctive relief.

C. Preliminary injunctive relief

For the reasons stated above, the plaintiffs have met the criteria for a preliminary restraining order with regard to at least parts of Count 1 of their complaint. The Court orders as follows and will also include this in a separate preliminary injunction order issued under Federal Rule of Civil Procedure 65(d).

- The Sheriff shall maintain and carry out a policy requiring prompt coronavirus testing of: (1) detained persons who exhibit symptoms consistent with coronavirus disease, and (2) at medically appropriate times, detained persons who have been exposed to others who have exhibited those

symptoms or have tested positive for coronavirus. With regard to the category (2), the Sheriff must acquire and maintain sufficient testing materials so that determination of the appropriateness of testing such persons is made pursuant to medical and public health considerations and not the availability of testing materials.

- The Sheriff shall enforce social distancing during the new detainee intake process, including continued suspension of the use of bullpens and other multiple-person cells or enclosures to hold new detainees awaiting intake.

- The Sheriff shall provide soap and/or hand sanitizer to all detainees in quantities sufficient to permit them to frequently clean their hands.

- The Sheriff shall provide sanitation supplies sufficient and adequate to enable all staff and detainees to regularly sanitize surfaces and objects on which the virus could be present, including in all areas occupied or frequented by more than one person (such as two-person cells, as well as bathrooms, showers, and other surfaces in common areas). The Sheriff shall also maintain and carry out a policy requiring sanitization between all uses of frequently touched surfaces and objects as well as monitoring and supervision to ensure that such sanitization takes place regularly.

- The Sheriff shall provide facemasks to all detained persons who are quarantined—i.e., those who have been exposed to a detained person who is symptomatic (even if not coronavirus-positive). The facemasks must be replaced at medically appropriate intervals, and the Sheriff must provide the users with instruction on how to use a facemask and the reasons for its use.

- The Sheriff shall establish by no later than April 29, 2020 and shall put into effect by no later than May 1, 2020 a policy precluding group housing or double celling of detained persons, except in the following situations:

    - Persons detained in tiers or dormitories currently under quarantine following a positive test for the coronavirus within the tier or dormitory ("quarantine tiers");

    - Detained persons who have tested positive for the coronavirus and are under medical observation ("isolation tiers");

    - Detained persons who have tested positive for coronavirus and are recovering ("convalescent tiers");

    - Double-celled or dormitory-housed detainees for whom there is a documented determination by a medical or mental health professional that single-celling poses a risk of suicide or self-harm;

- Persons detained housed in a dormitory unit that is at less than fifty percent capacity; and

- Detained persons committed, at the documented direction of a medical or mental health professional, to a group housing unit that is equipped for medical or mental health treatment, if but only if there is not available space in an appropriate housing or medical unit that permits full social distancing.

- Detained persons housed in any of the listed "acceptable" arrangements must be provided with facemasks that are replaced at medically appropriate intervals. The detained persons must be provided with instruction on how to use a facemask and the reasons for its use. They also must be instructed, at regular intervals, on the importance of social distancing.

- On May 1, 2020, the Sheriff shall file a report regarding his compliance with the terms of the preliminary injunction.

Finally, the Court will entertain submissions by the parties regarding the duration of the preliminary injunction, in particular the social distancing provisions. Typically, a preliminary injunction lasts until the 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. Under ordinary circumstances, there is nothing

constitutionally inappropriate about housing detained persons in groups and allowing them to come into contact with each other. 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. The Court (either the emergency judge or the assigned judge) will address this with the parties at a future date.

Conclusion

The Court grants the plaintiffs' motion for preliminary injunction in part and denies it in part as set out in this Memorandum Opinion and Order [dkt. no. 55].

Date: April 27, 2020

/s/ Matthew F. Kennelly
MATTHEW F. KENNELLY
United States District Judge

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, DATED APRIL 9, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ILLINOIS, EASTERN DIVISION

Case No. 20 C 2134

ANTHONY MAYS, INDIVIDUALLY AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED PERSONS; AND JUDIA JACKSON, AS NEXT FRIEND OF KENNETH FOSTER, INDIVIDUALLY AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED PERSONS,

Plaintiffs-Petitioners,

v.

THOMAS DART,

Defendant-Respondent.

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:[1]

1. Judge Kennelly is addressing this matter as emergency judge pursuant to paragraph 5 of Second Amended General Order 20-0012.

Appendix C

Anthony Mays and Kenneth Foster[2] are pretrial detainees at Cook County Jail in Chicago, Illinois. On behalf of themselves and a putative class, they have sued the Cook County Sheriff Thomas Dart, who operates the Jail, alleging that he has violated their rights under the Fourteenth Amendment by failing to provide them with reasonably safe living conditions in the face of the current coronavirus pandemic. The plaintiffs assert claims under 42 U.S.C. § 1983 and for writs of habeas corpus under 28 U.S.C. § 2241. They have moved for entry of a temporary restraining order requiring the Sheriff to take additional precautions to stem the spread of coronavirus into and within the Jail. Ultimately, plaintiffs contend, they cannot be held at the Jail in a way that is consistent with their constitutional rights—though they do not seek outright release from custody as part of their motion for a temporary restraining order. Rather, they seek changes in the Sheriff's policies, including in how they are carried out, as well as, for one proposed subclass, a change in the locations where they are kept in custody. *See* Emerg. Mot. for Temp. Restraining Order of Prelim. Inj., dkt. no. 2, at 15-16, 17-19 (spelling out the relief sought on the request for a TRO).

The Court begins by acknowledging the importance of the issues presented by the parties. The Sheriff is responsible for operating and administering a very large physical facility—actually a campus of separate physical

2. The claim for Foster is brought by Judia Jackson, his next friend, because plaintiffs' counsel attempted to contact Foster by telephone but were unable to reach him due to the Jail's operational limits arising out of the coronavirus pandemic.

facilities—whose population, if one considers including both detainees and staff, is the size of a small (but not all that small) town. This is an extraordinarily difficult task. The detainee population runs the gamut from persons with lengthy criminal records who are accused of committing violent crimes to non-violent offenders in custody for the first time who, perhaps, remain in custody only because they and their families were unable to post bond money. And it also runs the gamut from young, healthy persons to older detainees with serious medical or mental health issues. Operating the Jail, even under normal circumstances, is a very challenging task that occupies a large, full-time staff of policymakers, subject matter experts, and front-line correctional officers, medical and mental health workers, counselors, and others. And these are not normal circumstances. Fashioning a public policy and public health response to the coronavirus pandemic has challenged government officials across our country and throughout the world, who are facing a crisis unlike any we have faced for decades, and perhaps generations. The task is no less difficult, and no less unfamiliar, for administrators of jails.

This does not mean, however, that constitutional protections fall by the wayside. Government officials in our country are bound by constitutional requirements even when they are dealing with difficult and unfamiliar challenges to public health and safety. Persons accused of crimes who are detained pending trial do not shed their constitutional rights at the jailhouse door. The government has determined to lock them up pending determination of their guilt or innocence, and by doing so the government

takes on an obligation to protect their health and safety. And it cannot be forgotten that by requiring this, we safeguard the health and safety of the community at large—from which the detainees have come and to which they and the officers guarding them will return.

In light of these considerations, and for the reasons stated below, the Court issues a temporary restraining order, though considerably narrower than the order the plaintiffs have requested. In particular, the Court declines the plaintiffs' request to require the Sheriff to move certain of them to other forms of custodial arrangements such as home incarceration.

Background

Mays and Foster have serious medical conditions that make them highly vulnerable to complications arising from what has been termed COVID-19, a novel form of coronavirus that is causing a global pandemic. (The Court will use the term coronavirus.) As of this morning, 432,550 Americans and over 1,502,610 people around the world have been diagnosed with the virus—figures that understate its spread, as they include only those who have managed to get tested. *See* Coronavirus Resource Center, Johns Hopkins Univ. & Med., https://coronavirus.jhu.edu/ (last updated April 9, 2020, 8:38 A.M.). Over 89,910 have died, including over 14,800 Americans. *Id.* At present, there is no known cure and no known vaccine.

People over the age of 65 and people of all ages with serious underlying medical conditions face an elevated

risk of suffering from severe illness if they contract coronavirus. Because the virus spreads more rapidly when people are in close contact with each other, government officials have drastically reduced activity involving person-to-person contact in cities, nations, and economies around the world, including Chicago and Illinois.

Reducing the spread of the virus is, however, especially challenging in jails and prisons. The Cook County Jail is a complex where, at any given time, thousands of detainees live in either barracks-style dormitories, shared cells, or individual cells as they await trial on the crimes of which they have been accused. As of April 8, 2020, 251 detainees and 150 employees at the Jail have tested positive for coronavirus, and one detainee has died of apparent complications from it. *See* COVID-19 Cases at CCDOC, Cook County Sheriff's Office, https://www.cookcountysheriff.org/covid-19-cases-at-ccdoc/ (last updated April 8, 2020, 5:00 P.M.). While the Court was drafting this opinion, the news broke that the Jail is the largest single known source of infections in the nation. *See* Timothy Williams and Danielle Ivory, "Chicago's Jail is Top U.S. Hot Spot as Virus Spreads Behind Bars" (April 8, 2020), N.Y. Times, https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html (last updated April 9, 2020, 8:47 A.M.). The plaintiffs allege that conditions at the Jail—including, for example, the very close proximity in which detainees are held in the Jail's housing divisions and intake areas, inadequate distribution of soap and sanitation supplies for detainees, and a lack of personal protective equipment (PPE) for detainees who have been exposed to others with symptoms of the virus—violate constitutional requirements.

Appendix C

On April 3, 2020, the plaintiffs filed this lawsuit. In Count 1, they allege, under 42 U.S.C. § 1983, that the Sheriff has violated their Fourteenth Amendment right to constitutionally adequate living conditions by failing to implement appropriate measures to control the spread of the virus. In Count 2, they petition for writs of habeas corpus through 28 U.S.C. § 2241 because, they contend, they cannot constitutionally be detained at the Jail during the pandemic.

At the same time the plaintiffs filed suit, they moved to certify a class consisting of "all people who are currently or who will in the future be housed in the Cook County Jail for the duration of the COVID-19 pandemic." Compl., dkt. no. 1, ¶ 60. They also requested certification of two subclasses. "Subclass A consists of all people who, because of age or previous medical conditions, are at particularly grave risk of harm from COVID-19." *Id.* ¶ 61. "Subclass B consists of all people who are currently housed on a tier where someone has already tested positive for the coronavirus." *Id.* ¶ 62.

The plaintiffs also immediately moved for a temporary restraining order or preliminary injunction requiring implementation of specified preventive and protective measures at the Jail. *See* Emerg. Mot. for Temp. Restraining Order of Prelim. Inj., dkt. no. 2, at 15-16. The measures that the plaintiffs seek to implement would require the Sheriff to triage medically vulnerable detainees, enable social distancing, provide detainees with adequate supplies for sanitation and handwashing, distribute PPE to detainees, and take additional

steps when quarantining and isolating symptomatic of coronavirus positive detainees, among other things. And, as indicated, their motion seeks relocation of certain class members to other custodial locations. On April 7, 2020, the Court held a hearing on the motion, at which counsel appeared and argued via telephone.

Discussion

A. Conditional class certification

The plaintiffs seek classwide relief in the form of a temporary restraining order, but because the lawsuit was just filed there has not yet been a class certification ruling. This does not foreclose the possibility of relief for the plaintiffs at this stage, because a district court has general equity powers allowing it to grant temporary or preliminary injunctive relief to a conditional class. *Lee v. Orr*, No. 13 CV 8719, 2013 U.S. Dist. LEXIS 173801, 2013 WL 6490577, at *2 (N.D. Ill. Dec. 10, 2013) (citing *Ill. League of Advocates for the Developmentally Disabled v. Ill. Dep't of Human Servs.*, No. 13 C 1300, 2013 U.S. Dist. LEXIS 90977, at *10-11 (N.D. Ill. June 28, 2013)); *see also Al Otro Lado v. Wolf*, 952 F.3d 999, 1005 n.4 (9th Cir. 2020); *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 433 (6th Cir. 2012) ("[T]here is nothing improper about a preliminary injunction preceding a ruling on class certification."); *Howe v. Varity Corp.*, 896 F.2d 1107, 1112 (8th Cir. 1990). Furthermore, Federal Rule of Civil Procedure 23(b)(2) "does not restrict class certification to instances when final injunctive relief issues" and permits certification of a conditional class for the purpose of

granting preliminary injunctive relief. *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012); *see also Howe*, 896 F.2d at 1112 (affirming grant of a preliminary injunction to a conditional class).

Under Rule 23(a), the four prerequisites for class certification are numerosity, commonality, typicality, and adequate representation. *Beaton v. SpeedyPC Software*, 907 F.3d 1018, 1025 (7th Cir. 2018). "Once these four prerequisites are satisfied, the potential class must also satisfy at least one provision of Rule 23(b)." *Rosario v. Livaditis*, 963 F.2d 1013, 1017 (7th Cir. 1992). The plaintiffs have made a sufficient showing for conditional certification of Subclasses A and B for the purpose of the present motion for a temporary restraining order.

As for the first prerequisite, numerosity, there is "no magic number" that is regarded as sufficient, but forty is generally accepted as sufficient to satisfy Rule 23(a). *Mulvania v. Sheriff of Rock Island Cty.*, 850 F.3d 849, 859 (7th Cir. 2017). It is undisputed that there are over 4,000 detainees in the Jail, and the plaintiffs cite statistics that in incarcerated populations, on average 15 percent of the detainees have asthma, 10 percent have heart conditions, 10 percent have diabetes, and 30 percent have hypertension. Applying even the lowest of these percentages to the detainee population of over 4,000 yields hundreds of detainees with medical conditions that heighten the risk of harm from a coronavirus infection. This is sufficient to establish numerosity for conditional certification of Subclass A. As for Subclass B, the plaintiffs have likewise sufficiently demonstrated numerosity for

purposes of conditional certification. Over two hundred detainees have tested positive for coronavirus, and most detainees are housed in tiers which are shared with anywhere from forty to several hundred other detainees. This is sufficient to show that there are likely far more than forty detainees in proposed Subclass B.

There is also commonality with respect to the claims of Subclass A member and Subclass B members. Commonality requires at least one question common to all the class members, the answer to which is "apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). Both subclasses' claims turn on a common question of whether detainees are facing an unconstitutional risk of harm to their health due to conditions in the Jail that facilitate the spread of coronavirus and the absence of protections adequate to stem its spread.

The Seventh Circuit has explained that a named plaintiff's claims are typical if they "arise[ ] from the same event or practice or course of conduct that gives rise to the claims of other class members and [are] based on the same legal theory." *Lacy v. Cook County*, 897 F.3d 847, 866 (7th Cir. 2018). The claims of the named plaintiffs here are typical of the class, because the named plaintiff and the members of the class all contend that they face a serious risk of contracting coronavirus due to the Jail's allegedly deficient living conditions and precautions, and they and the class seek the same relief. In addition, the named plaintiffs' claims are typical of the putative members of Subclass A, who all contend that they face an elevated risk

of experiencing complications if they contract coronavirus, and of the putative members of Subclass B, who all claim exposure at the Jail to someone who has already tested positive.

There is also adequate representation of both subclasses by Foster. Under this requirement of Rule 23(a), the named plaintiff must be a member of the putative class and must have the same interest and injury as other members. *Beaton*, 907 F.3d at 1027. Foster alleges that he faces heightened risk of harm from coronavirus infection because he suffers from stomach cancer, lung disease, asthma, and bronchitis, so he is a member of putative Subclass A. And because several people on Foster's tier have tested positive for coronavirus, he is also a member of putative Subclass B. Foster shares an interest with members of both subclasses in relief from the jail conditions that the classes allege have put them at risk severe risk of health harm from coronavirus.

In sum, the requirements of Rule 23(a) are sufficiently met to allow provisional certification of both subclasses for purposes of the motion for temporary restraining order.

Rule 23(b)(2) permits class actions if "the party opposing the class has acted or refused to act on grounds that apply generally to the class," so that injunctive or declaratory relief is appropriate for the class as a whole. The plaintiffs satisfy this requirement because they seek "the same . . . injunctive relief for everyone" in the class and in each subclass. *See Chi. Teachers Union, Local No. 1 v. Bd. of Educ. of Chi.*, 797 F.3d 426, 442 (7th Cir. 2015).

For these reasons, the Court conditionally certifies Subclasses A and B for the purpose of the motion for a temporary restraining order.

B. Temporary restraining order

The Court addresses in this decision only the plaintiffs' motion for a temporary restraining order, not their motion for a preliminary injunction. One reason is that the motion involves at least some disputed facts that potentially require an evidentiary hearing before they may be determined. *See Dexia Credit Local v. Rogan*, 602 F.3d 879, 884 (7th Cir. 2010); *Promatek Indus., Ltd. v. Equitrac Corp.*, 300 F.3d 808, 814 (7th Cir. 2002), *as amended* (Oct. 18, 2002); *Syntex Ophthalmics, Inc. v. Tsuetaki*, 701 F.2d 677, 682 (7th Cir. 1983). The motion for preliminary injunction is therefore left for later consideration.

The standard for issuing a temporary restraining order is identical to that governing the issuance of a preliminary injunction. *Trs. of the Chi. Reg'l Council of Carpenters Welfare Fund v. Norem*, No. 17 C 4851, 2017 U.S. Dist. LEXIS 170743, 2017 WL 4620798, at *2 (N.D. Ill. Oct. 16, 2017) (citing *Long v. Bd. of Educ., Dist. 128*, 167 F. Supp. 2d 988, 990 (N.D. Ill. 2001)). A court's determination of whether to issue a preliminary injunction or temporary restraining order involves a two-step inquiry, with a threshold phase and a balancing phase. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017). At the threshold phase, the moving party must show: (1) without the requested

relief, he will suffer irreparable harm during the pendency of his action; (2) traditional legal remedies would be inadequate; and (3) he has some likelihood of success on the merits. *Id.* If the movant satisfies these requirements, the court proceeds to the balancing analysis "to determine whether the balance of harms favors the moving party or whether the harm to other parties or the public sufficiently outweighs the movant's interests." *Id.*

The Court also notes that the plaintiffs are arguably seeking what is sometimes referred to as a "mandatory injunction," that is, a restraining order that requires an affirmative act by the defendant. Mandatory injunctions are "ordinarily cautiously viewed and sparingly issued." *Graham v. Med. Mut. of Ohio*, 130 F.3d 293, 295 (7th Cir. 1997).

1. Likelihood of success on the merits

The moving party "need not demonstrate a likelihood of absolute success on the merits." *Whitaker*, 858 F.3d at 1046. A "better than negligible" chance of success is sufficient. *Id.* (quoting *Cooper v. Salazar*, 196 F.3d 809, 813 (7th Cir. 1999)).

a. Habeas corpus

Plaintiffs and subclass A have petitioned for a writ of habeas corpus under 28 U.S.C. § 2241, which is the appropriate way for a state pre-trial detainee to challenge his or her detention. *Jackson v. Clements*, 796 F.3d 841, 843 (7th Cir. 2015). "Because a pre-trial detainee is not

yet in custody pursuant to the judgment of a State court, relief under 28 U.S.C. § 2254 is not available." *Id.* (internal quotation marks omitted).

Section 2241 has no express exhaustion requirement, but courts apply a common-law exhaustion rule. *Richmond v. Scibana*, 387 F.3d 602, 604 (7th Cir. 2004). A pretrial detainee must "exhaust all avenues of state relief" before seeking a writ of habeas corpus through a section 2241 action. *See United States v. Castor*, 937 F.2d 293, 296-97 (7th Cir. 1991). Although there are exceptions, "the hurdle is high." *Richmond*, 387 F.3d at 604. In deciding whether an exception applies, courts "must balance the individual and institutional interests involved, taking into account 'the nature of the claim presented and the characteristics of the particular administrative procedure provided.'" *Gonzalez v. O'Connell*, 355 F.3d 1010, 1016 (7th Cir. 2004) (quoting *McCarthy v. Madigan*, 503 U.S. 140, 146, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992), *superseded by statute on other grounds as recognized in Porter v. Nussle*, 534 U.S. 516, 122 S. Ct. 983, 152 L. Ed. 2d 12 (2002)). A court may excuse exhaustion where:

> (1) requiring exhaustion of administrative remedies causes prejudice, due to unreasonable delay or an indefinite timeframe for administrative action; (2) the agency lacks the ability or competence to resolve the issue or grant the relief requested; (3) appealing through the administrative process would be futile because the agency is biased or has predetermined the issue; or (4) where substantial constitutional questions are raised.

Id.; *see also Chazen v. Marske*, 938 F.3d 851, 863 (7th Cir. 2019) (applying futility exception).

It is undisputed that a state court has the authority to release a pretrial detainee. A detainee in Illinois may challenge his or her detention by seeking judicial review of his or her bond. 725 Ill. Comp. Stat. Ann. 5/110-6.[3] And on March 23, 2020, in response to an emergency petition filed by the Cook County Public Defender, the Presiding Judge of the Cook County Circuit Court's Criminal Division issued an order setting out an expedited bond hearing process that applied to seven designated classes of detainees. Defs.' Resp., Ex. E (dkt. no. 31-1) at 1-2. The classes included those at an elevated risk of contracting coronavirus due to their ages or underlying medical conditions—that is, the putative members of Subclass A. *Id.* The expedited hearings took place from March 24 through March 27. *Id.* at 3-5. Although the expedited hearings do not appear to be currently ongoing, Cook County's courts are still available for emergency matters, and judges are hearing motions to review or reduce bail daily at all locations where court is held. Defs.' Supp. Resp., Ex. A (dkt. no. 41-1) at 1.

The plaintiffs do not contend that they sought expedited bond hearings or initiated any sort of state

3. At the hearing held on April 7, 2020, though not in their supplemental brief filed after the hearing, the plaintiffs advanced another futility argument, specifically that the risk to their health could not be asserted as a basis to allow release on bond. The argument is unsupported, and it is undercut by the numerous bond reductions and releases that have taken place in recent weeks, largely as a result of the coronavirus outbreak.

proceedings challenging their bonds.[4] Instead, they contend that exhaustion is futile because the bond review process does not move quickly enough. The defendants, in turn, contend that the plaintiffs should have sought reductions of their bonds through the expedited and/or emergency hearings that were available, may now seek release via other established processes, and that these processes are not futile.

The plaintiffs in subclass A cannot show that they exhausted available state court remedies before petitioning for habeas corpus. As indicated, the plaintiffs have not sought bond reductions at all. And the record reflects that this process is anything but futile. During the week the expedited bond hearings were held, the Jail's population decreased by 424 detainees. Defs.' Resp., Ex. B (dkt. no. 30-2) ¶ 27. Since March 9, the Jail's population has decreased by 1,175 detainees—bringing it to a record low, at least for the past few decades—and even since the completion of the expedited bond hearing process, the Jail's population has decreased by over 265 detainees. *E.g.*, *id.* ¶¶ 10, 28-29.

Nor have the plaintiffs established that the existing and available process for review of their detention is unduly time-consuming in a way that undermines their

4. At the hearing, but not in any of their briefs, the plaintiffs suggested that the Public Defender's motion could serve to exhaust their claims. But they were not named parties to that motion and, regardless, the state court's ruling on that motion would undermine their argument because it made possible an *additional* avenue of relief.

claimed constitutional rights. They say the process, in its entirety, could take several weeks or months. But this assumes a given detainee will lose at every stage and will have to appeal all the way to the state supreme court. In the Court's view, it is rather incongruous to call an otherwise available process unnecessarily time-consuming or futile when one has made no effort to initiate it. More to the point, the plaintiffs point to no evidence that detainees who have sought bond hearings are currently facing undue delays. Thus although a court may excuse exhaustion in unusual circumstances if it would cause an unreasonable delay, *see, e.g.*, *Gonzalez*, 355 F.3d at 1016, the plaintiffs have not made the necessary showing. And to the extent they contend that the requirement of exhaustion should be excused due to the nature of the constitutional questions they raise, they have made no showing that the state courts cannot remedy these claimed violations.

In sum, the habeas corpus claim on the part of the representatives of subclass A is barred due to their failure to exhaust available state court remedies. As a result, the subclass has no likelihood of success on the merits.[5] This renders moot the plaintiffs' request for the Court to establish a procedure for the expedited consideration of release of the members of subclass A, which the plaintiffs sought only with respect to the habeas corpus claim.

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5. If the plaintiffs wish to seek prompt appellate review of this ruling, the Court is willing to consider dismissing Count 2 of their complaint for failure to exhaust and certifying the ruling for immediate appeal under 28 U.S.C. § 1292(b). Any such request should be presented to the undersigned judge in his capacity as emergency judge.

Though this determination renders the parties' other arguments regarding habeas corpus superfluous, the Court will address certain of them to ensure a more complete record and to eliminate issues from the need for future consideration. First, the parties dispute whether detainees can even challenge the conditions of their confinement through section 2241—an issue that has also divided courts. *Compare, e.g.*, *Aamer v. Obama*, 742 F.3d 1023, 1032, 408 U.S. App. D.C. 291 (D.C. Cir. 2014) (a prisoner may challenge the conditions of his confinement in a federal habeas corpus petition) *and Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008) (same) *with Spencer v. Haynes*, 774 F.3d 467, 469-70 (8th Cir. 2014) (section 2241 petitions may not challenge conditions). The Seventh Circuit has expressed a "long-standing view that habeas corpus is not a permissible route for challenging prison conditions," at least when a prisoner's claim does not have "even an indirect effect on the duration of punishment." *Robinson v. Sherrod*, 631 F.3d 839, 840-41 (7th Cir. 2011). But the Seventh Circuit has also noted that "the Supreme Court [has] left the door open a crack for prisoners to use habeas corpus to challenge a condition of confinement." *Id.* at 840 (internal quotation marks omitted) (citing *Glaus v. Anderson*, 408 F.3d 382, 387 (7th Cir.2005); *Nelson v. Campbell*, 541 U.S. 637, 644-46, 124 S. Ct. 2117, 158 L. Ed. 2d 924 (2004); *Bell v. Wolfish*, 441 U.S. 520, 526 n.6, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979); *Preiser v. Rodriguez*, 411 U.S. 475, 499-500, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973)). Were the Court required to address this point, it would not consider it to be an absolute bar to plaintiffs' motion for a temporary restraining order. The plaintiffs' claims, as they have framed them, *do* bear on

the duration of their confinement (they contend, ultimately, that they cannot be held in the Jail consistent with the Constitution's requirements), and they are not the sort of claims that are, or can be, appropriately addressed via a claim for damages. The Court need not, however, decide this point definitively at this point.

Next, the Sheriff argues that he has no authority to release detainees because, he contends, only the criminal trial court has authority to release a person in custody. Citing the Illinois County Jail Act, 730 Ill. Comp. Stat. Ann. 125/14, the Sheriff contends that he can transfer pretrial detainees—which, his counsel conceded at the hearing (contrary to statements in the Sheriff's brief), could include placing them in home custody—but that he lacks authority to release them outright. This argument has no bearing on the petition for habeas corpus. The issuance of writ of habeas corpus through a section 2241 petition is a federal remedy (in other words, it does not depend on state law), and a habeas corpus petition is *always* addressed to the prisoner's custodian, in this case the Sheriff. *Rumsfeld v. Padilla*, 542 U.S. 426, 447, 124 S. Ct. 2711, 159 L. Ed. 2d 513 (2004) ("Whenever a § 2241 habeas petitioner seeks to challenge his present physical custody within the United States, he should name his warden as respondent."). Whether the Sheriff has authority under state law to release detainees on his own does not matter.

Finally, the Sheriff also suggests that the subclass A plaintiffs' habeas corpus petition is barred by *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669

(1971), which "requires federal courts to abstain from interfering with pending state proceedings to enforce a state's criminal laws and certain other types of law as well." *Sweeney v. Bartow*, 612 F.3d 571, 573 (7th Cir. 2010). Although the Seventh Circuit has held that *Younger* abstention may apply to a habeas corpus petition, *id.*, there is no basis to abstain here, as there is no pending state proceeding. The Sheriff's real argument is non-exhaustion, not *Younger* abstention.

b. Section 1983 claim

The Fourteenth Amendment protects pretrial detainees, who are entitled to a constitutional presumption of innocence, from being held in conditions that amount to punishment. *Miranda v. County of Lake*, 900 F.3d 335, 350-51 (7th Cir. 2018). Analysis of a due process challenge to conditions of confinement involves two steps. *See Miranda*, 900 F.3d at 353. The first is a determination of whether the defendant's conduct was purposeful, knowing, or "perhaps even reckless[]," *id.*, with respect to the "physical consequences in the world" of his conduct. *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S. Ct. 2466, 2472, 192 L. Ed. 2d 416 (2015). The conditions created by the defendant's conduct must be, "from an objective standpoint, sufficiently serious." *See Gray v. Hardy*, 826 F.3d 1000, 1005 (7th Cir. 2016).[6] The

6. The claim in *Gray* was brought by a convicted prisoner, not a pretrial detainee, and therefore his claim was governed by the Eighth Amendment, not the Fourteenth Amendment. The analyses of conditions-of-confinement claims under Fourteenth Amendment and Eighth Amendment overlap in the assessment of

second step is an assessment of the reasonableness of the defendant's conduct, in light of the "totality of facts and circumstances" facing the defendant. *McCann v. Ogle County*, 909 F.3d 881, 886 (7th Cir. 2018). The reasonableness of the defendant's conduct is measured objectively "without regard to any subjective belief held by the [defendant]." *Id.*

i. Knowing conduct and seriousness of conditions

The Sheriff does not dispute that his establishment of certain policies and his non-establishment of others that are sought amounts to knowing conduct; at the hearing. For a condition created by a defendant's conduct to be "sufficiently serious" to violate a detainee's Fourteenth Amendment rights, the defendant's knowing acts or omissions must result "in the denial of the minimal civilized measure of life's necessities." *See Gray*, 826 F.3d at 1005 (quoting *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)). Actual, present harm is not required; conditions that pose an "unreasonable risk of serious damage to the [detainee's] future health" may violate a detainee's Fourteenth Amendment rights. *See Henderson v. Sheahan*, 196 F.3d 839, 847 (7th Cir. 1999). To determine if conditions of confinement pose an "unreasonable risk" to pretrial detainees' future health,

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whether the conditions were sufficiently severe, but they diverge in the assessment of the propriety of the defendant's conduct: the standard is subjective for Eighth Amendment claims (which require a showing of deliberate indifference) and objective for Fourteenth Amendment claims (which require a showing of unreasonableness). *See Hardeman v. Curran*, 933 F.3d 816, 822 (7th Cir. 2019).

a court must make a "scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury to health will actually be caused" by the conditions. *Id.* A court must also consider whether the risk of harm was "not one that today's society chooses to tolerate." *Id.*

The plaintiffs are reasonably likely to succeed in showing that at least some of the conditions they cite pose an unreasonable risk to their future health. *See id.* The scientific evidence in the record—including the Center for Disease Control's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities ("CDC Guidelines") and a declaration from medical doctors submitted by the plaintiffs—reflects that coronavirus is highly contagious, persists in the environment, and may be hard to detect by observation of symptoms only. The virus apparently spreads easily, through coughing or sneezing; droplets with the virus can remain in the air for up to three hours. Additionally, and importantly for purposes of the present case, coronavirus apparently persists on plastic and stainless steel surfaces for up to two to three days. Those who have been infected with the virus may not become symptomatic for up to fourteen days. In light of these qualities and the present lack of a vaccine or cure for the virus, frequent handwashing, social distancing, sanitation of surfaces, and the use of PPE are the only available methods to protect against coronavirus infection.

In the context of this evidence, the plaintiffs have demonstrated that certain of the conditions created by

the intentional actions of the Sheriff enable the spread of coronavirus and significantly heighten detainees' risk of contracting the virus. First, the affidavits from current and recently released detainees reflect that Sheriff's personnel have not been cleaning common spaces after a detainee on the tier has tested positive for coronavirus.[7] The affidavits submitted by the plaintiffs also reflect that detainees are being housed under conditions that make social distancing impossible, thereby facilitating the spread of coronavirus. Many detainees are in congregate living situations, in which anywhere from forty to over a hundred detainees are housed in a single room. The beds in these open living spaces are very close together, separated by only one to four feet. And detainees who are housed in single-or dual-occupancy cells still must use common bathroom facilities, which are typically shared by forty to fifty people, including large groups at a single time.

The affidavits submitted by the plaintiffs further suggest that detainees currently lack the means to attempt to protect themselves from a potential coronavirus infection. Although they are sharing tier with someone who has tested positive for coronavirus, the plaintiffs contend, the Sheriff has not provided them with adequate supplies of soap, with cleaning supplies, or with PPE such as facemasks. The record reflects that only symptomatic

7. Although the Sheriff objects that many of the plaintiffs' affidavits contain hearsay, it is well established that a Court may consider hearsay in ruling on a preliminary injunction motion (and thus on a motion for a temporary restraining order). *See SEC v. Cherif*, 933 F.2d 403, 412 n.8 (7th Cir. 1991).

detainees have been issued facemasks and that detainees otherwise have not received any PPE. The plaintiffs' affidavits reflect that requests for facemasks have been refused by Jail personnel and that when detainees have resorted to making their own masks from cloth, those masks have been confiscated.

The plaintiffs also contend that the Jail is not screening its population to identify, and separate, detainees who have heightened vulnerability to coronavirus disease due to age or preexisting medical conditions. As a result, the plaintiffs contend, those detainees are housed, and will in the future be housed, in tiers where a detainee has tested positive. The plaintiffs argue that this places these vulnerable detainees at a high risk of severe health consequences.

The statistical evidence that exists also indicates that the conditions at the Jail have created a significant and unreasonable risk to the plaintiffs' future health. The Jail currently has the highest rate of new coronavirus infections in the country, and it far exceeds that of Cook County. As of April 6, 2020, the infection rate in Cook County was 1.56 per 1000 people, whereas in the Jail, it was 50 per 1,000 people. The disparity between these rates tends to support the contention that the conditions at the Jail facilitate the spread of coronavirus and exacerbate the risk of infection for detainees.

The plaintiffs have shown a reasonable likelihood of success on their contention that at least some current conditions at the Jail relating to the Sheriff's response

to the coronavirus outbreak collectively create a risk of harm from coronavirus that is "not one that today's society chooses to tolerate." *See Sheahan*, 196 F.3d at 847. In recognition of the importance of social distancing, Illinois' governor has instituted a statewide stay-at-home order. Frequent handwashing, use of PPE such as facemasks, and sanitizing of commonly used surfaces have, in the past several weeks, become routine precautions employed by the general population. Under the circumstances, plaintiffs are reasonably likely to succeed on their contention that conditions at the Jail create an unreasonable risk to their health that is sufficiently serious to bring their due process rights into play, thus requiring assessment of the reasonableness of the Sheriff's actions.

ii. Objective reasonableness

Objective reasonableness is assessed from the perspective of "a reasonable [official] on the scene," based on what the officer knew at the time, *Kingsley*, 135 S. Ct. at 2473; from that perspective a court determines if the official acted reasonably to mitigate the risks to health and safety of the detainees. *See Hardeman*, 933 F.3d at 825; *see also Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017). In assessing the reasonableness of the Sheriff's conduct, the Court must account for his legitimate interest in managing the Jail facilities and must defer to policies and practices that "are needed to preserve internal order and discipline and to maintain institutional security." *Kingsley*, 135 S. Ct. at 2473 (quoting *Bell*, 441 U.S. at 547).

The Sheriff argues that his conduct has been objectively reasonable because he has promulgated

policies and procedures intended to implement the CDC Guidelines, which both parties have expressly relied upon as a guide to assessing the reasonableness of the Sheriff's conduct. The establishment of a policy that is consistent with authoritative guidance and best practices may, in fact, comply with constitutional requirements. But establishing appropriate policies does not fully discharge the Sheriff's constitutional obligations; a policy is only as good as its execution. In this case, the plaintiffs challenge certain of the Sheriff's policies as inadequate and thus unreasonable, but they also challenge the implementation of other policies that may be facially adequate. For example, the plaintiffs offer an affidavit from a correctional officer who states that, despite the Sheriff's declared policy, facemasks are being rationed and are not readily available for Jail staff. And they likewise offer affidavits from recent detainees and from persons who have spoken with current detainees that are indicative of objectively unreasonable deficiencies in the implementation of certain of the Sheriff's declared policies.

With these considerations in mind, the Court assesses the plaintiffs' likelihood of success on its challenges to the Sheriff's actions in response to the health risks to detainees posed by coronavirus.

a. Medical triage of vulnerable detainees

The plaintiffs contend that the Sheriff has not established a process to identify detainees who are in high risk categories for complications from coronavirus or measures to separate vulnerable detainees from others

who are confirmed or suspected of having the virus. The Sheriff contends he has worked to establish policies that are consistent with the CDC's guidelines and that identify potentially vulnerable detainees. He points to evidence that Sheriff's personnel are working to help the state courts expedite case and bond review hearings by identifying detainees who are considered at a high risk of having complications from the virus based on age or medical conditions. But apart from using medical alerts in the Sheriff's office's computer system, the submissions made to the Court offer no description of an actual process for identifying vulnerable detainees.

Given the widely acknowledged risks to medically vulnerable individuals, it undoubtedly would be advisable for the Sheriff to identify, in advance of any symptomatology, detainees who are in high-risk categories. The CDC's guidance says that correctional facilities should ensure that detainees are medically evaluated and treated "at the first signs of COVID-19 symptoms," including a determination regarding whether an individual is in a high-risk category. Defs.' Resp., Ex. O (dkt. no. 30-15), at 23. Knowing in advance who the high-risk detainees are, and maintaining an accessible record of this, would facilitate more careful monitoring and treatment of the medical condition of any such person who develops symptoms consistent with coronavirus disease. But the CDC's guidance does not require correctional facilities to identify medically vulnerable detainees before they show symptoms or to segregate them from other detainees in advance. For purposes of the present motion, the Court cannot say that the plaintiffs are likely to succeed on their

contention that the Sheriff's claimed failure to identify these detainees in advance is objectively unreasonable.

b. Social distancing

The plaintiffs contend that the Sheriff's policies run afoul of social-distancing guidance; the Sheriff has not mandated this within the Jail; and current housing arrangements make social distancing impossible or virtually so, at least in many of the Jail's divisions. In several areas, detainees are housed in congregate setting somewhat euphemistically called "dormitory"-type rooms—really, more like a military barracks, with dozens of inmates in close-quarters bunkbeds in a single large room. In others, detainees are doubled-celled in very small rooms. And in most areas of the Jail, large groups of detainees share showers, bathrooms, and dayrooms, as is common in most pretrial detention facilities. The plaintiffs contend that this runs afoul of CDC guidance and unreasonably endangers detainees' health. The Sheriff contends that he is undertaking what he contends are reasonably feasible efforts to socially distance detainees and to educate them on the need for social distancing and how to practice it. The Sheriff also contends that he is working to reduce the occupancy of the Jails' dormitory-style housing by as much as fifty percent. He also points to a policy that requires the isolation of new detainees from the Jail's general population for fourteen days as of April 6, 2020 (up from seven days in an earlier iteration of the policy).

At the April 7 hearing, however, defense counsel was unable to confirm whether such efforts make it possible

to separate detainees' beds by six feet or, indeed, how much separation exists in the dormitory-type buildings. The only evidence in the record suggests that detainees likely are still packed rather closely in those facilities. In addition, the record appears to reflect that the Sheriff continues to maintain the historical practice of holding all new detainees awaiting intake for extended periods in enclosed, crowded cells commonly called bullpens. This occurs even before new detainees—all of whom have come from the community at large—are medically evaluated. This, it would appear, is a volitional, knowing policy choice by the Sheriff.

Plaintiffs have shown a reasonable likelihood of success on their contention that the intake procedure is objectively unreasonable and creates an undue risk of harm to new detainees who are thereby exposed to others who have not been medically evaluated and may have coronavirus disease symptoms. The CDC's guidance recommends that correctional facilities "[e]nforce increased space between individuals in holding cells, as well as in lines and waiting areas such as intake." Defs.' Resp., Ex. O (dkt. no. 30-15), at 11. There is no evidence that the Sheriff is enforcing those measures, particularly with respect to the intake process; indeed, what evidence exists is to the contrary.

It is less clear, however, that the Sheriff's existing housing arrangements for admitted detainees may be considered objectively unreasonable. In this regard, the CDC's guidance is not as definitive as plaintiffs suggest; it acknowledges that space limitations may require a departure from better social-distancing practices. Though

the existing situation likely increases the risk to detainees, the CDC's guidance expressly recognizes that complete social distancing may not be possible in the sleeping areas of a jail. Space constraints at the Jail do not allow for the more preferable degree of social distancing that exists in the community at large. The Court concludes that plaintiffs have filed to show a reasonable likelihood of success on their contention that the Sheriff is acting in an objectively unreasonable manner by failing to mandate full social distancing. This is particularly so because the Sheriff's submission reflects an ongoing effort to modify custodial arrangements at the Jail in a way that will permit greater separation of detainees.

c. Sanitation

The plaintiffs contend that, although sanitation and handwashing are considered to be among the best defenses against the spread of coronavirus, the Sheriff's policies fail to provide for sufficient distribution of soap, sanitizing agents, and cleaning products to detainees. In particular, the plaintiffs note, the Sheriff's coronavirus response plan does not provide for the distribution of sanitation supplies to detainees at all. Affidavits submitted by and on behalf of both current and former detainees reflect that detainees are not being given sanitation supplies to clean cells or shared showers that have not otherwise been sanitized, and that they either have not received soap or received only a very small supply insufficient to permit the frequent hand-washing recommended by public health experts. In addition, a correctional officer who has submitted an

affidavit in support of plaintiffs' motion[8] states that access to soap and sanitation supplies also pose a problem for Jail staff who have some responsibility for cleaning areas under their observation and control. For his part, the Sheriff contends he is working to distribute supplies more frequently, to implement more frequent and thorough sanitary measures, and follow the CDC's guidelines.

The CDC's guidance advises correctional facilities to ensure that sufficient amounts of sanitation and cleaning supplies are available and that detainees have free soap "sufficient to allow frequent hand-washing." Defs.' Resp., Ex. O (dkt. no. 30-15), at 8. The CDC also advises that frequently touched surfaces should be cleaned and disinfected several times a day. The Sheriff, however, has offered nothing to indicate that his policies ensure the provision of sufficient soap to detainees (let alone that it is being provided free of charge, assuming that is a relevant consideration for present purposes). By contrast, there is plenty of evidence to the contrary. The Sheriff also points to policies that call for sanitation and cleaning supplies to be made available to detainees, but he offers no evidence that this is actually happening on the ground, and as indicated the plaintiffs have offered significant evidence reflecting that it is *not* happening. This means that it is

8. At the hearing, defense counsel attempted to cast doubt upon the credibility of the correctional officer, saying that he had been involved in other disputes or lawsuits with the Sheriff. The Court does not and need not make a credibility determination at this stage, other than to note that the officer's statements are consistent with those made by detainees in other affidavits submitted by the plaintiffs.

highly likely, as the plaintiffs contend, that numerous areas subject to common access in the Jail, including dayrooms, other common areas like showers and bathrooms, two-person cells, and the dormitory-type rooms, are going uncleaned for extended periods, thus increasing the risk of transmission of coronavirus by detainees not yet isolated as symptomatic who have been in or touched objects in those areas. The Court cannot at this point quantify the risk, but the significant number of confirmed coronavirus infections among detainees certainly suggests the risk is significant. For these reasons, the Court concludes that plaintiffs have shown a reasonable likelihood of success on their claim that the execution of the Sheriff's policies regarding sanitation and sanitation supplies is objectively unreasonable.

d. PPE

The plaintiffs next contend that the Sheriff's policies do not require providing PPE to every detainee and that this is objectively unreasonable under the circumstances. The first of these propositions appears to be undisputed: detainees as a whole are not being issued facemasks or other forms of PPE. Current and former detainees have stated via affidavits that they did not receive any PPE, that only detainees with symptoms received PPE, that detainees' requests for PPE have been denied by Sheriff's personnel, and that when detainees tried to make their own face coverings, officers have confiscated them. The Sheriff has offered no contrary evidence on these points. The plaintiffs also suggest that some, but not all, correctional officers wear or have been wearing PPE in the

Jail—at least, not until recently (though even this appears to be disputed via the affidavit from the correctional officer submitted by the plaintiffs on the morning of April 7). The Sheriff contends that he has been proactively working to obtain PPE and conform with best practices regarding its use, including, as of recently, requiring all employees to wear PPE in the Jail. The Sheriff also offers evidence that he has created a team of officers who patrol tiers checking that correctional staff are appropriately are using PPE.

The CDC's guidelines for detainees' use of PPE recognize some flexibility; they require symptomatic detainees to wear masks but do not mandate this for those detainees' close contacts. But the CDC's guidance also indicates that asymptomatic detainees should get "face masks for source control as feasible based on local supply, *especially if housed as a cohort*." Defs.' Resp., Ex. O (dkt. no. 30-15), at 25 (emphasis added). Based on the record before the Court, the Sheriff's office gives PPE only to symptomatic detainees—a significant but still relatively modest proportion of the total detainee population at this point—even though the Sheriff currently has enough supplies to provide PPE to employees for at least a month. Because current guidance indicates that even cloth masks can reduce the spread of coronavirus, and the virus is spreading rapidly throughout the Jail, the plaintiffs have a reasonable likelihood of success on their contention that it is objectively unreasonable for the Sheriff to fail to provide facemasks at least to those detainees who are in quarantine—i.e., those who have been exposed to a detainee who is symptomatic (even if not coronavirus-positive). This failure creates an increased risk of further

spread of coronavirus to other detainees, not to mention Jail staff and, by extension, members of the general public with whom those staff members have contact. The plaintiffs likewise have shown a reasonable likelihood of success on their contention that the Sheriff is not enforcing the use of PPE by Jail staff who come into contact with detainees, which poses a similar risk to detainees given those staff members' exposure to others outside the Jail.

e. Quarantine and isolation

The plaintiffs also criticize the Sheriff's policies on quarantining detainees who have been exposed to other detainees who have exhibited symptoms consistent with coronavirus disease. The policy, as discussed earlier, calls for quarantining the entire tier where any such detainee was housed for a fourteen-day period, extended if someone else in the tier thereafter exhibits symptoms. But plaintiffs' criticism is not that the policy is inappropriate. Rather their contention appears to be that in the near to medium term the Sheriff's practice will make it impossible for him to manage the crisis given the number of tiers that likely will be under quarantine. Plaintiffs' position, it seems to the Court, amounts to a contention that the practice of quarantining is likely to fail, so the Court will ultimately have to order detainee releases now to relieve the pressure. That, however, is not the issue currently before the Court, and in any event the plaintiffs have not made the showing that this is an appropriate remedy at this point.[9]

9. For this reason, and because the requirements of 18 U.S.C. § 3626(a)(3)(A) have not been met, the Court need not address the applicability of section 3626 to the plaintiffs' request for relief. The

The Sheriff contends that he is following the CDC's guidance and has implemented it. As indicated, he has quarantined for at least fourteen days any detainee who has been in contact with a symptomatic detainee, and if a tier is quarantined, no new detainees are admitted to it or transferred from it. In addition, symptomatic detainees are moved to isolation tiers, and coronavirus-positive detainees are moved to different isolation tiers, for at least fourteen days. The plaintiffs offer no evidence reflecting that this is not what the Sheriff is doing.

The CDC's guidance does not require correctional facilities to individually isolate detainees who have tested positive for coronavirus or have been in close contact with someone who has. Rather, the CDC recognizes that some facilities may not have enough individual cells for individual isolation and may need to quarantine together groups of detainees exposed to others who have tested positive. The CDC's guidance further states that if a correctional facility has a need to isolate or quarantine detainees in groups, detainees with confirmed coronavirus cases should not be placed into isolation with symptomatic detainees or other detainees. The Sheriff's policies follow this recommendation, and the plaintiffs point to no evidence that he is not implementing those policies. The Court concludes that plaintiffs have not shown a reasonable likelihood of success on their contention that the Sheriff's quarantining policies and practices are objectively reasonable.

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same is true with regard to subclass B's request to be transferred to alternate custodial locations. At least at present, the plaintiffs are not seeking release from custody.

f. Coronavirus testing

The plaintiffs contend—and it is reasonable to believe—that there are likely more infections in the Jail than currently reported because of the limited availability of coronavirus tests. They ask the Court to order the immediate implementation of rapid testing. The Sheriff contends that Cermak Health Services has obtained approval to start administering a rapid testing process developed by Abbott Laboratories as of April 7. But when the Court asked at the hearing—on April 7—about the status of that testing, the Sheriff's counsel did not know whether or how it was being implemented. Rather, counsel said that this was up to Cermak, which is controlled by Cook County, not the Sheriff.

The CDC's guidance does not offer a specific recommendation on how widely testing should be done. It does imply, however, that people who are symptomatic should be tested if feasible. In light of the evidence that the Sheriff now has access to rapid coronavirus testing, it is not objectively reasonable for the Sheriff himself—not just Cermak Health Services—to fail to have a policy in place regarding implementation of prompt testing, in particular for detainees who exhibit symptoms consistent with coronavirus disease. *See, e.g.*, *Calhoun v. Ramsey*, 408 F.3d 375, 380 (7th Cir. 2005) (failure to have a policy may, in certain circumstances, constitute an unconstitutional policy).

2. Irreparable harm and inadequate remedy at law

To meet the threshold requirement for a temporary restraining order, the plaintiffs must also demonstrate that without it, they will suffer irreparable harm for which they lack an adequate remedy at law. *Whitaker*, 858 F.3d at 1044, 1046. This requires a showing of more than a "mere possibility" of harm, but harm need not be a certainty in order for a court may grant relief. *Id.* at 1044.

The plaintiffs have adequately shown a likelihood that they will suffer irreparable harm without a temporary restraining order. Some of the plaintiffs—at least those over the age of 65 or with preexisting health conditions—risk severe health consequences, including death, if they contract coronavirus disease. For others, a coronavirus infection may result in permanent lung damage. These grave risks to health are not an insignificant possibility for the plaintiffs, all of whom are housed in units or tiers in which a person has tested positive for coronavirus, all or nearly all of whom are housed in close proximity with others, and many and likely most of whom have not been given sufficient soap or sanitation supplies, let alone PPE. "[A] remedy for unsafe conditions need not await a tragic event." *Helling v. McKinney*, 509 U.S. 25, 33, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993). And because the risk of harm to plaintiffs is a grave threat to their health and possibly their lives, they have shown a risk of harm for which "it is not practicable to calculate damages" and therefore has no adequate remedy at law. *See Foodcomm Int'l v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003); *cf. W.S.R. v. Sessions*,

318 F. Supp. 3d 1116, 1126 (N.D. Ill. 2018) (no adequate remedy of law to address harm from prolonging child's separation from parent).

3. Balancing of harms

"Once a moving party has met its burden of establishing the threshold requirements for a preliminary injunction, the court must balance the harms faced by both parties and the public as a whole." *Whitaker*, 858 F.3d at 1054. The nature of the balancing depends on the moving party's likelihood of success: the higher the likelihood, the more the balance tips in favor of granting injunctive relief. *Id.*

The Sheriff argues that this balance tips against entry of a temporary restraining order because an injunction requiring him to implement additional health and protective measures would be disruptive to his ongoing efforts to address the spread of coronavirus in the Jail. The Sheriff also argues that the Court should defer to the Jail's practices and its execution of policies that preserve internal order, discipline, and security in the facility. *See Bell*, 441 U.S. at 547. The plaintiffs contend that their risk of severe health consequences or death as a result of coronavirus infection is so grave that it tips the balance in favor of granting a temporary restraining order. Additionally, the plaintiffs argue that the public health interest in limiting the spread of the virus also favors granting relief.

The Court concludes that the balance favors granting injunctive relief to the plaintiffs to the limited extent

contemplated by this order. First, as detailed above, the plaintiffs have presented ample evidence of conditions that pose an unreasonable risk of serious harm to the class members' health and at least some shortcomings in the Sheriff's mitigation of that risk. As the Court has detailed, this showing, on the points identified earlier, surpasses the plaintiffs' burden of showing a "better than negligible" chance of success. *Whitaker*, 858 F.3d at 1046. Furthermore, the interest of the public in containing the further spread of this highly contagious virus also favors granting relief to the plaintiffs.

The Court again acknowledges the deference owed to the Sheriff in the operation of the Jail and in his development of internal procedures to maintain safety, order, and security and to response to this severe crisis. The Court has taken these considerations into account in ordering the limited relief described in this order. The Court has tailored this relief to account for deference to the Jail's ongoing planning and efforts to address the risks associated with the coronavirus outbreak. The Court has also, as indicated earlier, taken into account the enhanced requirements for issuing what it has referred to as a "mandatory injunction." The risk to the health and safety of detainees and others is sufficient to invoke this form of relief.

C. Remedy

For the reasons stated above, the plaintiffs have met the criteria for a temporary restraining order with regard to at least parts of the claim Count 1 of their complaint.

The next question is what remedy is appropriate under the circumstances. The Court addresses in turn each category of remedy the plaintiffs seek.

1. Coronavirus testing

The plaintiffs seek an order requiring the Sheriff to acquire access to rapid coronavirus testing and ensure that all people who enter the Jail with the virus can be quickly identified and medically isolated. They also seek an order requiring the Sheriff to quarantine all new detainees until test results become available or, if testing cannot be done, for fourteen days unless they become symptomatic.

In light of the evidence that the Sheriff now has access to rapid coronavirus testing, and for the reasons previously stated, the Court grants plaintiffs' request only to the following limited extent. The Court directs the Sheriff to establish by April 11, 2020, and to implement immediately thereafter, a policy requiring prompt coronavirus testing of detainees who exhibit symptoms consistent with coronavirus disease as well as, at medically appropriate times and to the extent feasible based on the acquisition of sufficient testing materials, detainees who have been exposed to others who have exhibited those symptoms or have tested positive for coronavirus.

Because evidence shows the Sheriff has a policy in place requiring a fourteen-day quarantine of all new detainees (the apparent length of coronavirus's incubation period), the Court declines to require further testing or

quarantining of new detainees before housing them in the general population, though the Sheriff should account for new detainees in his testing plan.

2. Quarantining and social distancing

The plaintiffs also seek an order requiring the Sheriff to medically isolate all detainees who are positive for COVID-19 in a controlled, monitored environment in which they are not at risk for infecting others; quarantine all detainees who are symptomatic and/or have been exposed to a confirmed case of COVID-19 in such an environment; and mandate social distancing among all detainees. For the reasons described earlier, the Court at this time directs only that the Sheriff enforce, effective on April 11, 2020, social distancing during the new detainee intake process, including suspending the use of bullpens to hold new detainees awaiting intake.

3. Sanitation

The plaintiffs next seek an order requiring the Sheriff to provide sufficient soap and hand sanitizer to all detainees so that they may frequently wash their hands. In addition, they seek an order directing the Sheriff to provide sanitation supplies to enable all staff and detainees to regularly sanitize surfaces and objects on which coronavirus could be present and to provide supervision to ensure that sanitizing takes place between uses of those surfaces and objects. They also seek an order directing the Sheriff to educate all staff and detainees on the importance of regularly sanitizing all surfaces and objects on which the virus could be present.

For the reasons stated above, the Court directs the Sheriff to begin, by April 10, 2020, providing soap and/or hand sanitizer to all detainees in quantities sufficient to permit them to frequently clean their hands. The Court also orders the Sheriff to begin, by April 10, 2020, providing adequate sanitation supplies to enable all staff and detainees to regularly sanitize surfaces and objects on which the virus could be present, including in all areas occupied or frequented by more than one person (such as two-person cells, as well as bathrooms and showers). The Court further directs the Sheriff to establish, by April 11, 2020, a policy requiring sanitization between all uses of frequently touched surfaces and objects as well as monitoring and supervision to ensure that such sanitization takes place regularly. In light of evidence that the Sheriff has established education programs on preventative measures pertaining to coronavirus, the Court declines to impose any further requirements in this regard.

4. PPE

For the reasons the Court has described, it declines plaintiffs' request for an order requiring the Sheriff to provide *all* detainees with PPE. Instead, the Court orders the Sheriff, effective April 12, 2020, to provide facemasks to all detainees who are quarantined—i.e., those who have been exposed to a detainee who is symptomatic (even if not coronavirus-positive).

It appears to the Court that, as of the date of the hearing, the Sheriff is adequately enforcing the use of

PPE by Jail staff who come into contact with detainees, so the Court declines to impose further requirements in that regard.

5. Adequate medical staff

The plaintiffs request the Court to order the Sheriff to provide adequate medical staff to monitor all detainees within the Jail. Because the plaintiffs have pointed to no evidence that the Jail's medical staff are under the purview of the Sheriff, as opposed to Cermak Health Services, the Court declines to impose this requirement upon the Sheriff. The Court also notes that the record does not sufficiently reflect a current lack of adequate medical staff, making the requested relief inappropriate as part of a temporary restraining order even were this a matter under the control of the Sheriff.

6. Medical triage of vulnerable detainees

For the reasons stated above, the Court declines to enter an order requiring the Sheriff to immediately identify or segregate all medically vulnerable detainees even if they are not showing symptoms.

7. Transfer of Subclass B members

Finally, the plaintiffs have requested an order requiring transfer of the putative members of Subclass B to a safe facility or other forms of custody. They contend that even the implementation of reasonable sanitation and other related procedures is insufficient to protect these

class members, some of whom may already have been exposed to coronavirus, from contracting the disease. The Court concludes that plaintiffs have not demonstrated that the requirements of this temporary restraining order, coupled with the steps the Sheriff is already taking to prevent the spread of the disease, are insufficient and thus denies this requested relief.

Conclusion

For the foregoing reasons, the Court grants in part plaintiffs' motion for a temporary restraining order [dkt. no. 2] with regard to Count 1 of the complaint but otherwise denies the motion. The Court enters a temporary restraining order to the extent explained in the relief section of this opinion. The Court directs the Sheriff to file a report by 4:00 p.m. on April 13, 2020 regarding his implementation of the Court's directives. The case is set for a telephonic status hearing before the undersigned judge, as emergency judge, on April 14, 2020 at 9:00 a.m. The Clerk will provide the parties with call-in information prior to April 14.

/s/ Matthew F. Kennelly
MATTHEW F. KENNELLY
United States District Judge

Date: April 9, 2020