No. 20-1792

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ANTHONY MAYS, individually and on behalf of a class of similarly situated persons, et al., *Plaintiffs-Appellees,* v. THOMAS J. DART, Sheriff, Cook County, Illinois, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Case No. 1:20-cv-02134 Hon. Matthew F. Kennelly, Judge Presiding, in his Capacity as Emergency Judge.

MOTION FOR STAY PENDING APPEAL

Pursuant to Rule 8(a)(2) of the Federal Rules of Appellate Procedure, Defendant-Appellant Sheriff Thomas J. Dart respectfully requests that this Court stay enforcement of the mandatory preliminary injunction order and any discovery related to the underlying complaint pending appeal. In support of his motion, Sheriff Dart states as follows.

INTRODUCTION

The Sheriff seeks a stay from the mandatory injunction order directing him to implement certain operational policies at the Cook County Jail related to the coronavirus pandemic. He is likely to succeed on the merits of this appeal because the court misinterpreted and misapplied the "objective reasonableness" standard governing constitutional claims brought by pretrial detainees. If the injunction remains in place throughout the appeal, the Sheriff will essentially cede control of critical and time-sensitive Jail operations to the district court, which has effectively made itself

"super-warden" of the Jail. That type of invasive oversight will cause irreparable harm, not only for violating fundamental principles of federalism and judicial restraint, but also because compliance will significantly hamper the Sheriff's ability to safely operate the Jail. Plaintiffs are not likely to suffer an unreasonable risk of harm if the injunction is stayed. Recent test data show that there are currently only 37 COVID-positive detainees in the Jail. The COVID test positivity rate is 3%, less than one-third of the rate in the surrounding community, which, by World Health Organization standards, indicates that the virus has been contained.[1]

The Sheriff sought a stay in district court, which was denied. However, the court failed to conduct any meaningful analysis of the relative harm to the parties in the event of a stay. In fact, the court failed to address the Sheriff's argument on the lack of harm to Plaintiffs at all. (Dkt.109, ROA2985). Applying the standard properly here, this Court should find that the Sheriff has established that he is entitled to a stay of enforcement of the injunction and stay any further proceedings in the district court while the case is on appeal.

PROCEDURAL HISTORY

On April 27, 2020, the district court entered a mandatory preliminary injunction against the Sheriff directing him to implement certain coronavirus-containment practices at the Cook County Jail, the vast majority of which have been in place since

[1] Johns Hopkins University Coronavirus Resource Center, https://coronavirus.jhu.edu/testing/testing-positivity (last visited June 5, 2020).

well before this lawsuit was filed. The injunction required the Sheriff to continue providing detainees with soap, facemasks, and cleaning supplies; to ensure that Cermak Health Services continues to administer COVID-19 tests to symptomatic detainees and those exposed to COVID-positive detainees, as medically indicated; and to implement strict six-foot social distancing during the Jail intake process and in the housing units, subject to certain exceptions. (Dkt. 73, ROA2017-18).

Five days later, the Sheriff filed a status report on implementation of the injunction, as the order required. In it, he stated that he was fully compliant with the terms of the injunction at that time. But he cautioned that he was close to reaching the "feasibility limit" of his ability to maintain strict social distancing in the housing areas, based on the ever-changing population at the Jail and the complex factors involved in making housing assignments. (Dkt.84, ROA2216-17).

Several days later, the Fifth, Ninth, and Eleventh Circuit Courts of Appeals issued orders staying enforcement of mandatory injunctions against local jails that were nearly identical to the one at issue here.[2] The appellate courts held that the injunction orders gave district courts the power to impermissibly interfere with jail operations, essentially making them "super-wardens" of the jails at a time when a jail director's expertise is most needed, and when a court's interference is most detrimental.

---

[2] *Swain v. Junior*, 2020 U.S. App. LEXIS 14301 (11th Cir., May 5, 2020); *Roman v. Wolf,* 2020 U.S. App. LEXIS 14331 (9th Cir., May 5, 2020); *Valentine v. Collier*, 2020 U.S. App. LEXIS 12941 (5th Cir., Apr. 22, 2020).

In light of this newly-developed case law, and a persistent threat of contempt for potentially running afoul of the injunction, the Sheriff filed a timely notice of appeal on May 11, 2020. Several days later, the Sheriff discovered that the coronavirus test positivity rate in the Jail had decreased dramatically, to the point of being nearly contained, according to World Health Organization standards. In light of these developments, the Sheriff moved to stay enforcement of the injunction pending appeal. On May 29, 2020, following argument by the parties, the district court denied the motion. (Dkt.109, ROA2976; Exh. A, Hearing Transcript, 5/21/20). The Sheriff now renews his motion in this Court.

ARGUMENT

The Seventh Circuit applies a "sliding scale" approach when deciding whether to issue a stay of a district court's ruling pending an appeal. *See Hinrichs v. Bosma*, 440 F.3d 393, 396 (7th Cir. 2006); *Sofinet v. INS*, 188 F.3d 703, 706-07 (7th Cir. 1999); *In re Forty-Eight Insulations, Inc.* 115 F.3d 1294, 1300-01 (7th Cir. 1997); *Cavel International, Inc. v. Madigan*, 500 F.3d 544, 547 (7th Cir. 2007). Under this sliding scale approach, "the more likely it is that [the party requesting injunctive relief] will succeed on the merits, the less the balance of irreparable harms need weigh towards its side; the less likely it is the [moving party] will succeed, the more the balance need weigh toward its side." *Sofinet v. INS*, 188 F.3d at 706-707 (quoting *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6 (7th Cir. 1992)).

In this case, the district court failed to conduct a meaningful analysis of the balancing of harms when ruling on the Sheriff's motion, and denied the motion based on the merits of the appeal alone. As such, it did not exercise its discretion as required under

the standard and its decision is not entitled to deference. *Cavel Int'l*, 500 F.3d at 547. The Court may conclude, on plenary review, that a stay is warranted.

I. The Sheriff is Likely to Succeed on Appeal Because the District Court Misapplied the Objective Reasonableness Standard.

Plaintiffs, a proposed class of pretrial detainees, alleged that the Sheriff failed to protect them from the risk of contracting coronavirus in the Jail. Following the United States Supreme Court's decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015), this Court applies the objective reasonableness standard under the fourteenth amendment to evaluate conditions of confinement claims brought by pretrial detainees. *Hardeman v. Curran*, 933 F.3d 816, 822 (7th Cir. 2019). It appears that this may be the first case to apply this emerging "objective reasonableness" standard in the context of the coronavirus pandemic.

When evaluating whether a jail director's conduct was objectively reasonable under the fourteenth amendment, courts must consider the "perspective of a reasonable [jail director]," including what he "knew at the time, not with the 20/20 vision of hindsight." *Kingsley*, 135 S. Ct. at 2473. The standard must be applied under the particular facts and circumstances of each case. *Id*. Courts also must "account for the 'legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained,' appropriately deferring to 'policies and practices that in th[e] judgment' of jail officials 'are needed to preserve internal order and discipline and to maintain institutional security.'" *Id*., quoting *Bell v. Wolfish*, 441 U.S. 520, 540 (1979). "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*." *Bell*, 441 U.S. at 539 (emphasis added).

The Sheriff's extensive efforts to prevent the spread of coronavirus in the Jail began in January, a full two months before the first case was confirmed and nearly 10 weeks before this lawsuit was filed. The Sheriff's Coronavirus Operation Plan and related protocols are all based on the Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (CDC Guidance), issued by the Centers for Disease Control and Prevention, the leading authority on managing the coronavirus outbreak. In interpreting the Guidance, the Sheriff consulted with representatives of the CDC, who toured the Jail facility on April 17 (Dkt.70, ROA1920), CDPH and IDPH, Cermak, and a team of retained subject matter experts. Despite these and many other proactive efforts, the district court concluded that the Sheriff's actions were objectively unreasonable, and he did not sustain his constitutional burden. However, the district court's interpretation of the objective reasonableness standard is flawed, and its decision likely to be reversed on appeal.

Among other things, Plaintiffs alleged that the Sheriff must implement strict social distancing throughout the Jail at all times. As Plaintiffs acknowledge, the Sheriff made significant efforts to implement social distancing in the housing tiers to the maximum extent possible, as part of his overall efforts to contain the spread of the virus. He opened 4 previously-closed divisions of the Jail in mid-March to enable more social distancing. (Dkt.62-5, ROA1687). He also assisted various criminal justice stakeholders in obtaining court-ordered bond modifications for over 1,300 eligible

detainees in an effort to reduce the Jail population. (Dkt.29-1, ROA377-79). Ultimately, the Sheriff was able to move nearly all detainees into single cells or in dorms occupied at 50% capacity or less to maximize social distancing. (Dkt.62-5, ROA1694-99).

However, due to physical and operational limitations at the Jail, the Sheriff is unable to implement strict social distancing in all housing tiers. Specifically, the Sheriff argued that it was not "feasible" to implement strict social distancing for certain detainee populations: (1) detainees in isolation, quarantine, or convalescent housing have restricted housing requirements because of their infection status; (2) detainees who are assigned to housing in the Residential Treatment Unit or the Cermak Urgent Care division of the Jail must remain in those housing areas physically equipped to manage their significant medical or mental health needs; and (3) detainees who might be at risk of suicide or self-harm if isolated in single-celled housing. (Dkt. 62, ROA1655-69). He also sought a security exception to allow double-celling for purposes of stabilizing a security disruption or fight. Nevertheless, it was objectively reasonable to comply with the CDC Guidance here, as with all other coronavirus policies at the Jail, by maximizing social distancing to the extent possible and relying on "feasibility exceptions" to accommodate a lack of physical space and staffing and operational considerations, based on the unique features of the Jail. (Dkt. 30-15, ROA704).

The district court disagreed. It held that the CDC Guidelines are an "important piece of evidence to consider" in assessing the Sheriff's conduct, but are not dispositive of objective reasonableness. (Dkt.73, ROA1994-95). Accordingly, it held that the Sheriff's conduct was not objectively reasonable here.

As a remedy, the court ordered the Sheriff to implement social distancing in the housing tiers, except for: (1) detainees in isolation, quarantine, or convalescent tiers; (2) detainees assigned to RTU or Cermak specialized medical housing due to medical or mental health needs; and (3) detainees who might be at risk of suicide or self-harm isolated in a single cell. The court denied the Sheriff's request for a security exception at the Jail. (Dkt.73, ROA1997-98).

In other words, after finding that the Sheriff was objectively unreasonable for relying on the CDC Guidance to implement social distancing as he did, the court enjoined the Sheriff to do precisely as he proposed. In doing so, the court necessarily negated the predicate constitutional violation that enabled it to grant relief. That is, if the challenged conduct becomes the court-ordered relief, then that conduct cannot be the basis for a constitutional violation. As a practical matter, where the Sheriff previously relied on his expertise and discretion to make housing assignments and had the flexibility to make adjustments as necessary, he is now bound by court order to make those previously-discretionary housing assignments, but cannot adjust them as necessary without running afoul of the injunction.

Certainly that cannot be the correct result. On the contrary, it is objectively reasonable for the Sheriff to rely on the CDC Guidance, including its "feasibility exceptions," in implementing the social distancing policy. Not only did the district court implicitly reach that conclusion with its order on relief, this Court has previously acknowledged as much. In *Carroll v. DeTella*, 255 F.3d 470, 472-73 (7th Cir. 2001), this Court held that it is reasonable for a prison official to rely on standards that a

government agency promulgates. "They can defer to the superior expertise of those authorities." *Id*. In the specific context of the CDC, this Court has held that it was objectively reasonable for a prison to rely on and implement CDC recommendations in response to a suspected infectious disease outbreak. *Forbes v. Edgar*, 112 F.3d 262, 267 (7th Cir. 1997). Accordingly, the Sheriff is likely to establish success on the merits of the appeal based on the court's improper application of the objective reasonableness standard.

II. Irreparable Harm to the Sheriff

While the likelihood of the success on the merits of the appeal is unquestionably a factor is evaluating the need for a stay, it need not be controlling. The sliding scale approach permits the Court to weigh the likelihood of success on appeal with the relative degree of harm in the absence of a stay holistically. Yet here, the district court concluded that the Sheriff's motion for stay was meritless without undertaking a meaningful analysis of the relative harms that would befall the Sheriff or Plaintiffs in the absence of an injunction. *See Cavel International*, 500 F.3d at 547.

At most, the district court expressed skepticism that ordering the Sheriff to comply with an injunction that forces him to do what he already was doing could cause irreparable harm. (Dkt.109, ROA2983). On the contrary, this is perhaps the most invidious harm of all. As explained above, when the court enjoins the Sheriff to do precisely what he was doing, the court necessarily negates the supposed constitutional violation that was the predicate for the injunction. If the challenged conduct becomes

the court-ordered relief, then that conduct cannot be the basis for a constitutional violation.

As the Fifth, Ninth, and Eleventh Circuits recently held, a mandatory injunction that restricts the Sheriff's ability to perform the most critical aspects of jail management impermissibly elevates the district court to "super-warden," in violation of longstanding federalism principles deeply rooted in United State Supreme Court precedent. The injunction essentially "transfers the power to administer the [Jail] in the midst of the pandemic from public officials to the district court." *Swain v. Junior*, 2020 U.S. App. LEXIS 14301, *13 (11th Cir., May 5, 2020). It puts the Sheriff in the impossible position of choosing to violate the order to preserve order at the Jail, or run to court to get a "permission slip" to lawfully perform the most fundamental Jail operation functions, which really is no option at all when these decisions need to made in a split-second. The district court did not address the Sheriff's arguments about the vital harm caused by the injunction as discussed in *Swain*, *Valentine*, or *Roman*. (Dkt.109, ROA2980).

There is no question that the coronavirus pandemic has had a profound impact on all aspects of society. Governments around the globe have struggled to find ways to respond to it. The Sheriff wisely enlisted public health experts at the federal, state, and local levels to assist in developing the appropriate response to the pandemic within the Jail, and did so well before the first case of coronavirus arrived there.

The Court's injunction undermines this reasoned and thoughtful approach, and the expert recommendations that it produced. It puts the Court in a superior position to

decide what should be done, what can be done, and what must be done under these circumstances. *Cf. Bell*, 441 U.S. at 539 (courts must defer to the sheriff's discretion to operate the jail as he sees fit, "rather than a court's idea of how best to operate a detention facility"). The Court's order is particularly troubling because its duration is open-ended, which places the Sheriff in the unbounded threat of contempt while exercising his inherent discretion to safely operate the Jail. All of this amounts to an irreparable harm.

The United States Supreme Court has long recognized that courts must defer to the expertise of correctional officials to operate their jails as necessary to preserve safety and order, and be permitted to exercise their "substantial discretion to devise reasonable solutions" the problems they face. *Florence v. Board of Chosen Freeholders*, 566 U.S. 318, 326 (2012). This is even more critical in the context of a federal district court interfering in the operations of a county jail, given the primacy of a local government's interest in operating its criminal justice system. Indeed, "it is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Woodford v. Ngo*, 548 U.S. 81, 94 (2006).

The harm is no more evident than it was this past weekend. In the midst of the coronavirus pandemic, Chicago and suburban Cook County endured a period of extraordinary civil unrest, resulting in unanticipated widespread rioting and looting. It resulted in the arrest of more than 1,000 people, many of whom the Sheriff will be ordered to detain and obligated to house. Yet, the Sheriff is constrained by the

injunction that requires him to implement strict social distancing in the housing tiers with limited exceptions that do not address this tension.

As the Sheriff cautioned in his May 1, 2020, Status Report, at some point, he will reach a "feasibility limit," where he cannot house all of the detainees according to the district court's aspirational, yet unmanageable, goals. That limit may arrive following an extraordinary situation like last weekend, or a more routine population spike following a particularly difficult day in the County. It may last a day, a week, or longer. But the Sheriff cannot refuse to accept custody of these individuals, and they come when they come. He does not have the luxury of constantly running back to court to get a "permission slip" to handle a situation that can, and should, be managed on the ground. In all likelihood, it would probably involve the needless exercise of the Sheriff proposing a solution to handle a population spike, and the court accepting it.

The district court, and Plaintiffs, repeatedly recognized the Sheriff's extraordinary efforts to maximize social distancing by opening 5 new divisions of the Jail (another division opened last week), helping obtain release for 1,300 eligible detainees, and managing the housing tiers like a chess match. He has always acted "in good faith" in doing so, and well before this lawsuit was filed. There is no reason to believe that he would discontinue these efforts absent the injunction order. The Sheriff is implementing social distancing throughout the Jail. But only he is in a position to know when his staff, also not immune from the impacts of the pandemic, may safely manage these strict social distancing practices and when it may not, requiring exceptions to manage the security issues inherent in Jail operations. Notably, in these

times of high emotion and frustration in the Jail, the court denied the Sheriff's requested security exception.

On May 5, 2020, the Eleventh Circuit stayed enforcement of a similar mandatory injunction entered by the district court against the Miami-Dade Corrections and Rehabilitations Department, enjoining it to continue implementing the same hygienic, sanitization, and social distancing policies that the Sheriff was ordered to continue implementing here. The appellate court found that the injunction "transfer[red] the power to administer the [jail] in the midst of the pandemic from public officials to the district court." *Swain*, 2020 U.S. App. LEXIS 14301, *13. The appellate court also found that "the injunction hamstrings [jail] officials with years of experience running correctional facilities, and the elected officials they report to, from acting with dispatch to respond to this unprecedented pandemic." *Id.* at *13-14. The jail director must be permitted to "respond to the rapidly evolving circumstances on the ground without first seeking 'a permission slip from the district court.'" *Id.* at *14, quoting *Valentine v. Collier*, 2020 U.S. App. LEXIS 12941, *9-10 (5th Cir., Apr. 22, 2020). Ultimately, the appellate court found that the district court elevating itself to the role of "super-warden" of the jail caused irreparable harm to the defendants. *Id*. at *13.

Swain followed from a decision by the Fifth Circuit just two weeks earlier in *Valentine v. Collier*, which also stayed a mandatory injunction that would require the Texas Department of Criminal Justice ("TDCJ") to enact a number of measures to control the spread of coronavirus. In addition to the shared reasoning in *Swain* as to the district court's intrusion upon the corrections officials' role, the *Valentine* court also held

that the district court impermissibly enjoined the TDCJ to follow its own laws and procedures. *Valentine*, 2020 U.S. App. LEXIS 12941, *9. The terms of the injunction "largely overlap[ped] with the TDCJ's COVID-19 policy requirements and recommendations," and in the district court's mind, that "promoted compliance" with those policies. However, an order enjoining a state actor to follow its own laws and policies is prohibited under the eleventh amendment. *Id.*, citing *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 (1984).

Moreover, the district court erred in imposing "extra measures" on the TDCJ, beyond what is required by the CDC Guidance, when there was no support for the conclusion that the Guidance was not constitutionally adequate. *Id.*; *Roman v. Wolf,* 2020 U.S. App. LEXIS 14331, *4 (9th Cir., May 5, 2020) (Collins, J., concurring in part and dissenting in part) (the district court cannot disregard the CDC's acknowledgement that the Guidance may be adapted to suit a particular facility's physical or operational limitations, and proposes reasonable alternatives). Indeed, the appellate court explained that the TDCJ's "ability to continue to adjust its policies is significantly hampered by the preliminary injunction, which locks in place a set of policies for a crisis that defies fixed approaches." *Id.* at *13. The appellate court found that the TDCJ would be irreparably harmed absent a stay of the injunction because it could not respond to the COVID-19 threat without first getting "a permission slip from the district court." *Id.*

Here, the court's preliminary injunction order is impermissible on all of these grounds. From the beginning, the Sheriff consulted with leading public health experts to ensure the coronavirus response followed the advice of public health officials, while

also recognizing the practical realities of operating the Jail. If he is forced to weigh the threat of contempt for possibly violating a term of the injunction while making the daily decisions necessary to safely operate the Jail, the Sheriff will suffer irreparable harm. For example, the Sheriff and his partners must be able to adjust the policies in place at the Jail as the CDC recommendations change, as in the case of changes to the testing protocols. Here, the Court sought to fashion guidelines for social distancing it felt was appropriate, not what was actually feasible in the Sheriff's judgment. While the district court nodded to the complexity of jail operations generally and the difficulty of managing the Jail during a global pandemic, those words ring hollow when it imposed obligations on the Sheriff that add to these difficulties exponentially. Staffing, detainee conduct, population fluctuation, and even the unforeseeable circumstances like the events of last weekend have a pervasive impact on Jail operations, and the Sheriff must retain the discretion and flexibility to manage those impacts without seeking a "permission slip" from the court.

III. Plaintiffs Will Not Be Harmed in the Absence of a Stay and the Balance of Harms Favors the Sheriff

Plaintiffs will not be irreparably harmed if the injunction is stayed. The question is not whether COVID-19 poses a harm, but whether Plaintiffs have shown that they will suffer irreparable harm in the absence of the injunction. Nevertheless, it is important to highlight that the Sheriff's policies have dramatically reduced the risk of infection in the Jail. The fourteen-day average COVID-testing positivity rate is now 3% of those tested over the past 14 days ending June 3—nearly one-quarter of the rate in

the surrounding community.[3] This metric represents the ratio of positive cases to the total number of tests administered to the population. Under World Health Organization (WHO) standards, the Sheriff has more than "flattened the curve" inside the Jail; the virus is at the critical containment rate of less than 5% over 14 days.[4] (Exh. B, Test Positivity Rate Report, June 4, 2020).[5] This achievement is noteworthy in and of itself, and particularly so in a congregate setting like the Jail.

In a recent joint press release issued with Cermak, the Sheriff and his team also documented that the number of new COVID-19 cases at the Jail has been decreasing steadily over the past four weeks. (Dkt.98-2, ROA2882). As of yesterday, there were 4,528 detainees in the Jail, 37 of whom are currently COVID-positive, and a total of 2,452 detainees who have tested negative.[6] Notably, the vast majority of the 37 positive cases are detainees entering the facility from the community during intake, and not spread of the virus among the existing Jail population. (Dkt.98-2, ROA2992). The district court did not mention these impressive data in its order denying the stay, let alone consider them in balancing the potential harm of lifting the injunction.

---

[3] https://www.dph.illinois.gov/restore
[4] Johns Hopkins University Coronavirus Resource Center, https://coronavirus.jhu.edu/testing/testing-positivity (last visited June 3, 2020).
[5] This report is an updated version of the document filed in support of the motion for stay in the district court.
[6] https://www.cookcountysheriff.org/covid-19-cases-at-ccdoc/; https://www.cookcountysheriff.org/wp-content/uploads/2020/06/CCSO_BIU_CommunicationsCCDOC_v1_2020_06_04.pdf (last visited June 5, 2020).

Make no mistake: these successes are a result of the testing and isolation policies in effect at the Jail since March, not the injunction, which essentially sought documentation of existing sanitation and hygienic procedures and to maximize social distancing wherever possible. (See, *e.g.*, Dkt. 109, ROA 2980). While the latter practices have always been part of the Sheriff's Coronavirus Operation Plan and have long been in practice, they are not the driving force behind containment. Since January 24, new detainees entering the Jail have been screened for coronavirus symptoms. On March 14, new detainees were being quarantined at intake before they could enter the general population. On March 20, Cermak was approved to administer testing in a non-hospital setting, and began testing immediately on approval. On March 23, COVID-positive detainees began being housed in medical isolation and the remainder of the detainee's tier was quarantined. On March 26, the Sheriff began converting every available cell from double-celled to single-celled, and moved detainees to dormitories in previously-closed divisions of the Jail, to enhance social distancing strategies. (Dkt.87-1, ROA2668-79). Plaintiffs filed their Complaint on *April 3*. The injunction was entered on *April 27*.

There has never been an allegation, let alone evidence, that the Sheriff is likely to stop the practices that have led to these results, and any suggestion to the contrary is purely speculative. As the district court has repeatedly recognized, "it cannot reasonably be disputed" that the Sheriff has undertaken "significant and impressive" efforts to control the spread of the virus in the Jail, and that he has always "acted in good faith, with the goal of protecting the people in his custody" in doing so. (Dkt. 73, ROA 1989). To now casually conclude, as the district court did, that staying the

injunction would "permit the Sheriff to lift [coronavirus-protective] measures" and "place the health of detained persons at serious risk," absent any actual allegation or evidence, is unfounded. (Dkt. 109, ROA 2985).

Given the impressive data showing the success of the Sheriff's policies, there is no likelihood that he will discontinue these procedures and jeopardize these highly successful results. The Sheriff has invested heavily in these procedures, which were well-researched, well-designed, and well-supported in consultation with public health agencies and retained experts and grounded in the CDC Guidance. The Sheriff has and will continue "in good faith" to implement these policies, as he has done for months. Given the success of the Sheriff's policies, and the confidence that they will continue to be implemented, the balance of harms weighs in favor of a stay to release the Sheriff from the bonds of the Court's oversight as "super-warden."

As to the public's interest, where the government is the party opposing the preliminary injunction, its interest and harm merge with the public interest. *Nken v. Holder*, 556 U.S. 418, 435 (2009). As discussed above, the Sheriff and the public interest will suffer irreparable harm if he must compromise the safe and efficient operation of the Jail to comply with ill-informed, if well-meaning, obligations under threat of contempt. Thus, it is in the best interest of all to stay enforcement of the injunction pending appeal.

CONCLUSION

For the foregoing reasons, Sheriff Dart respectfully requests that the Court stay enforcement of the preliminary injunction and all other discovery pending resolution of the appeal from the preliminary injunction order.

Robert T. Shannon
James M. Lydon
Gretchen Harris Sperry
Lari Dierks
HINSHAW & CULBERTSON LLP
151 N. Franklin Street, Suite 2500
Chicago, Illinois 60601
gsperry@hinshawlaw.com

By: */s/ Gretchen Harris Sperry*
One of the attorneys for Defendant
Thomas J. Dart, Sheriff of Cook County

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,837 words.

CERTIFICATE OF SERVICE

I certify that on June 5, 2020, the foregoing document was filed electronically using the court's CMF/ECF system, which will cause service to be made on all counsel of record.

/s/ Gretchen Harris Sperry

COVID-19 Test Positivity Rate in CCDOC
To: CCSO Executive Staff
Date: June 5, 2020
THIS IS A PRELIMINARY ANALYSIS – DELIBERATIVE PROCESS PRIVILEGED

Objective:
Defined as the ratio of positive cases to total tests within a population, test positivity rate (TPR) serves as a useful tool to identify the degree of spread for highly contagious diseases such as malaria. Due to limited COVID-19 testing capacity, researchers have suggested using TPR as a proxy to track the spread of the virus.

This memo provides a daily summary of COVID-19 tests and the test positivity rate for detainees in the Cook County Department of Corrections (CCDOC) from March 20, 2020 to June 3, 2020. It then compares the TPR before and after asymptomatic testing was introduced on April 16, 2020. TPR of detainees is calculated by dividing the number of detainees who tested positive over the total number of tests performed each day.

Analysis:
Table 1 shows the daily number of tests, positive cases, and the test positivity rate for detainees between March 20, 2020 and June 3, 2020. The dates for the number of positive cases are based on their test dates. For instance, if a detainee was tested on 3/20/2020 and tested positive on 3/23/2020, this positive case was categorized under 3/20/2020.

Table 1: Daily Number of Tests and Positive Cases

Test Date	Number of Tests	Number of Positive Cases	Test Positivity Rate
3/20/2020	5	5	100%
3/21/2020	7	5	71%
3/22/2020	9	8	89%
3/23/2020	8	7	88%
3/24/2020	22	21	95%
3/25/2020	24	21	88%
3/26/2020	27	24	89%
3/27/2020	18	18	100%
3/28/2020	50	48	96%
3/29/2020	7	6	86%
3/30/2020	23	21	91%
3/31/2020	19	17	89%
4/1/2020	23	21	91%
4/2/2020	21	14	67%
4/3/2020	11	11	100%
4/4/2020	11	8	73%
4/5/2020	6	6	100%

4/6/2020	22	19	86%
4/7/2020	37	32	86%
4/8/2020	23	21	91%
4/9/2020	17	17	100%
4/10/2020	14	11	79%
4/11/2020	18	17	94%
4/12/2020	11	10	91%
4/13/2020	17	12	71%
4/14/2020	13	11	85%
4/15/2020	13	11	85%
4/16/2020	17	7	41%
4/17/2020	66	43	65%
4/18/2020	7	6	86%
4/19/2020	12	7	58%
4/20/2020	80	36	45%
4/21/2020	82	25	30%
4/22/2020	40	7	18%
4/23/2020	60	12	20%
4/24/2020	72	5	7%
4/25/2020	68	21	32%
4/26/2020	46	1	2%
4/27/2020	57	9	16%
4/28/2020	67	10	15%
4/29/2020	31	7	23%
4/30/2020	39	13	33%
5/1/2020	87	14	16%
5/2/2020	46	13	28%
5/3/2020	51	3	6%
5/4/2020	68	2	3%
5/5/2020	96	17	18%
5/6/2020	51	8	16%
5/7/2020	40	4	10%
5/8/2020	36	1	3%
5/9/2020	40	3	8%
5/10/2020	35	1	3%
5/11/2020	34	2	6%
5/12/2020	35	0	0%
5/13/2020	88	3	3%
5/14/2020	44	1	2%
5/15/2020	46	1	2%
5/16/2020	42	4	10%
5/17/2020	72	2	3%
5/18/2020	32	0	0%
5/19/2020	53	1	2%

5/20/2020	47	4	9%
5/21/2020	78	1	1%
5/22/2020	58	3	5%
5/23/2020	85	0	0%
5/24/2020	95	6	6%
5/25/2020	80	5	6%
5/26/2020	85	1	1%
5/27/2020	59	0	0%
5/28/2020	71	7	10%
5/29/2020	78	4	5%
5/30/2020	62	0	0%
5/31/2020	69	1	1%
6/1/2020	101	0	0%
6/2/2020	115	5	4%
6/3/2020	109	5	5%
TOTAL	**3,408**	**753**	**22%**

Figure 1 graphs the daily test positivity rate. It does not label test positivity rate of 0% and 100% for a simpler display of the data points.

Figure 1: Change in Test Positivity Rate (March 20 – June 3, 2020)

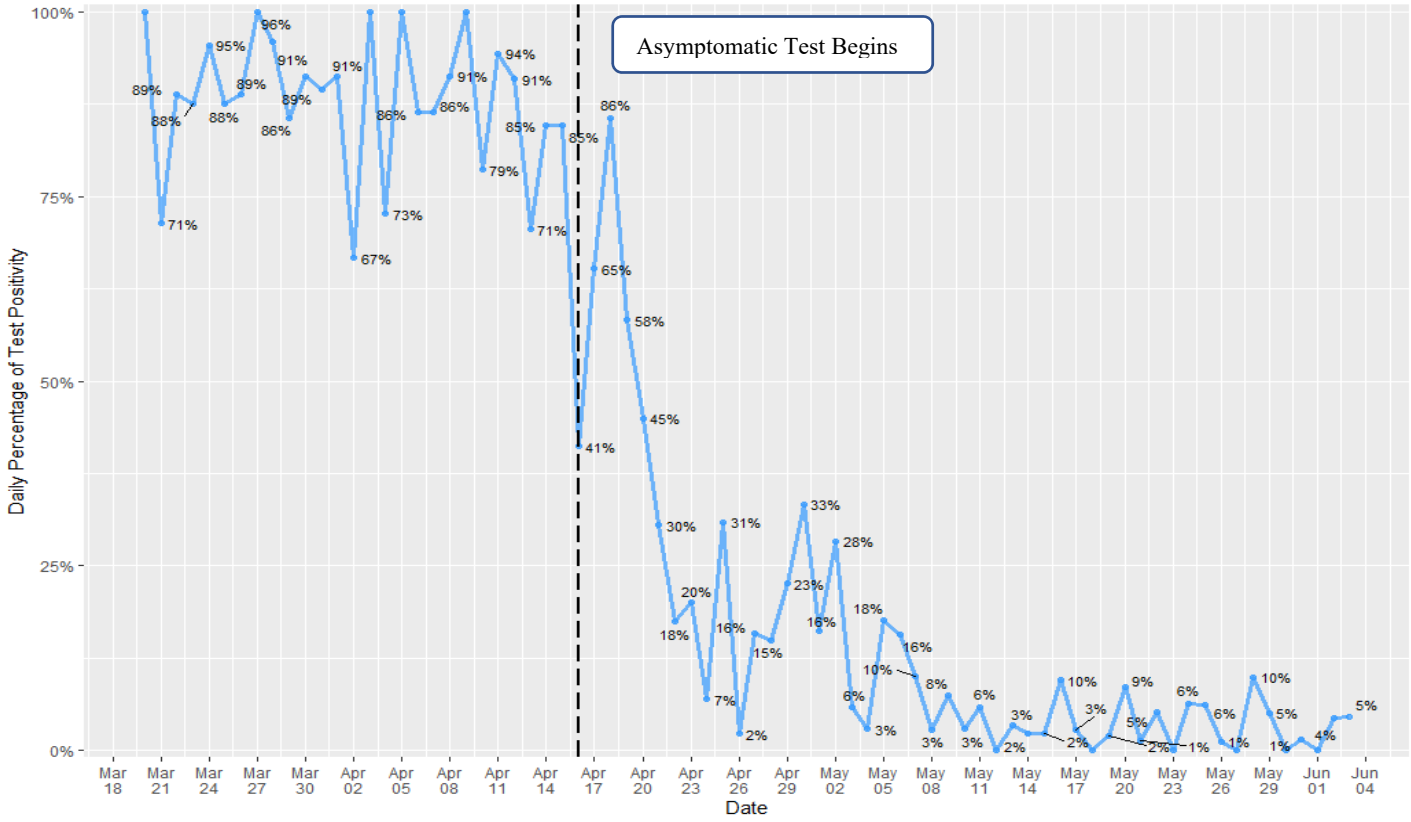

Table 2 compares the average test positivity rate of before and after the introduction of asymptomatic testing, which began on April 16, 2020. As the number of COVID-19 tests increased after April 16, 2020, the average test positivity rate decreased from 89% to 11%.

Table 2: Test Positivity Rate Before and After Asymptomatic Testing

	Number of Tests	Number of Positive Cases	Test Positivity Rate
Before (March 20 – April 15, 2020)	476	422	89%
After (April 16 – June 3, 2020)	2,932	331	11%

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

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.	)	**Case No. 20 C 2134**
THOMAS DART,	)	
Defendant-Respondent.	)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge, as emergency judge:

On April 27, 2020, the Court granted in part the plaintiffs' motion for a preliminary injunction in this class action lawsuit regarding conditions at the Cook County Jail, ordering some of the relief sought by the plaintiffs but denying a number of their requests. *See Mays v. Dart*, No. 20 C 2134, 2020 WL 1987007 (N.D. Ill. Apr. 27, 2020) ("*Mays 2*"). The preliminary injunction tracked a temporary restraining order entered about three weeks earlier but included one additional requirement. *See Mays v. Dart*, No. 20 C 2134, 2020 WL 1812381 (N.D. Ill. Apr. 9, 2020) ("*Mays 1*").

The preliminary injunction also directed the Sheriff of Cook County—the defendant in the case—to submit a report regarding compliance. The Sheriff did this on May 1, 2020. On May 6, 2020, the plaintiffs filed a response to the Sheriff's report in which they sought expedited discovery, contending they needed this to determine

compliance with the preliminary injunction. On May 11, the Sheriff objected and moved to strike the request for expedited discovery. Also on May 11, the Sheriff filed a notice of appeal from the preliminary injunction. Eight days after that, on May 19—a little over three weeks after entry of the preliminary injunction—the Sheriff moved for a stay pending appeal and repeated his request to strike the plaintiffs' proposed expedited discovery requests. At the request of the judge assigned to the case, the undersigned judge, acting as emergency judge, directed the plaintiffs to respond to the stay motion the next day and heard argument on the Sheriff's stay motion as well as the plaintiffs' expedited discovery request on May 21, 2020.

For the reasons stated below, the Court denies the Sheriff's motion to stay the preliminary injunction pending appeal and also denies the plaintiffs' request for expedited discovery.

Discussion

Familiarity with the Court's temporary restraining order and preliminary injunction decisions is assumed. The plaintiffs in this case contend that the Sheriff is violating the Fourteenth Amendment due process rights of persons detained at the Jail by failing to provide them with reasonably safe living conditions in the face of the coronavirus pandemic. In their motion for a preliminary injunction (as in their TRO motion), the plaintiffs sought wide-ranging relief. This included mandatory social distancing of detained persons throughout the Jail—relief that would amount to universal single-celling and then some; transfer of detained persons to electronic home monitoring; and convening a three-judge court under the Prison Litigation Reform Act to consider the release of detained persons. The plaintiffs also sought measures to identify and

separate medically vulnerable detained persons and to require coronavirus testing, cleaning of Jail facilities, and provision of personal protective equipment.

After extensive briefing and hearings, the Court granted the plaintiffs' motions, but only in part. The Court entered a TRO including certain requirements on April 9 and a preliminary injunction with those same requirements plus one more on April 27. On both occasions, however, the Court overruled the plaintiffs' requests for sweeping remedies, declining their requests to release detainees with medical vulnerabilities, mandate full "social distancing" throughout the jail, and convene a three-judge court to prisoner releases.

The Sheriff has moved to stay the preliminary injunction pending appeal, and plaintiffs have moved for expedited discovery to assess the Sheriff's compliance with the injunction. The Court addresses each request in turn.

1. Stay pending appeal

In deciding whether to stay an order pending appeal, a court considers whether the movant "has made a strong showing that he is likely to succeed on the merits"; whether the movant will be irreparably injured absent a stay; whether a stay "will substantially injure the other parties interested in the proceeding"; and "where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

a. Movant's likelihood of success

The Sheriff has not made a "strong showing" of likelihood of success. The record before the Court when it issued the preliminary injunction reflected that the people detained at the Jail faced a real and persistent danger to their health. As of April 9, when the Court issued a temporary restraining order that embodied most of the relief

extended via the preliminary injunction, the Jail had the largest single concentration of confirmed coronavirus infections in the entire country. *See Mays 1*, 2020 WL 1812381, at *2. At the time of the preliminary injunction, although the number of positive-tested detained persons in isolation had declined, the overall positive test numbers were continuing to increase (350 on April 17 vs. 289 on April 10), indicating that the virus was continuing to spread within the Jail. *See* Def.'s Resp. to Pls.' Mot. for Prelim. Inj. at 2-3. Before the issuance of the TRO and the preliminary injunction, the Sheriff had, undeniably, taken steps to attempt to stem the spread of the virus. But the Constitution does not say that so long as a jailer does *something*, he complies with constitutional obligations. Rather, if jailer does not take objectively reasonable steps to protect detained persons from a known and serious risk, he violates the Fourteenth Amendment. The Court concluded that plaintiffs had established a reasonable likelihood of showing the objective unreasonableness of some of the Sheriff's actions or inaction.

In seeking a stay of the preliminary injunction, the Sheriff contends that he has consistently acted in good faith, and the Court does not dispute this. But the Sheriff's intent was not and is not the issue. The law in this Circuit is clear that conditions of confinement cases involving pretrial detainees are judged by a standard of objective reasonableness, not by assessing whether the Sheriff had good or bad intentions. *See, e.g., Hardeman v. Curran*, 933 F.3d 816, 823-24 (7th Cir. 2019). The Court notes that in this regard, this case is nothing like two cases cited by the Sheriff in his motion to stay, in which appellate courts granted stays of coronavirus-related preliminary injunctions. *See Swain v. Junior*, 958 F.3d 1051 (11th Cir. 2020); *Valentine v. Collier*,

956 F.3d 797 (11th Cir. 2020). The courts in those cases found a significant likelihood of success on the part of the jailer largely due to the absence of evidence that the jailer exhibited the intent required by those Circuits, specifically, deliberate indifference. That is not the standard that applies in this Circuit or in this case. The Sheriff may not have exhibited deliberate indifference, but that is not the same as saying that his actions or inaction were objectively reasonable.

The Sheriff also contends that his approach has worked, citing decreases in the incidence of new coronavirus cases at the Jail over the last several weeks. There are at least two problems with this argument. First, it amounts to 20/20 hindsight. The Court ruled, and had to rule, based on the record as it was presented at the time, not based on how things turned out several weeks later. Second, the TRO and preliminary injunction directed the Sheriff to take steps he was not already taking or was not taking in an effective way. In particular, the Court's orders directed the Sheriff to do the following:

- cease the use of crowded "bullpens" holding multiple detained persons at intake;
- (on the preliminary injunction) enforce social distancing in most of the Jail;
- obtain and distribute facemasks to persons exposed to infected or quarantined detainees;
- establish a Sheriff's Office policy to implement prompt testing for detained persons exhibiting symptoms of coronavirus disease;
- enable actual, not just theoretical, access to adequate sanitation supplies; and
- actually enforce cleaning and sanitation requirements in areas of the Jail accessed in common, such as showers, bathrooms, and day rooms.

The Sheriff's argument about positive results does not account for the very real possibility that the measures ordered by the Court at the TRO and preliminary injunction stage contributed to those results.

On the merits, the Sheriff's primary argument appears to be that guidelines for prison and jail administrators issued by the Centers for Disease Control are determinative of the question of objective reasonableness and that he has consistently complied with them. This contention likewise has at least two flaws. First, the Sheriff has cited no authority establishing that an externally-created set of guidelines like these amounts to a constitutional measuring stick. Rather, the law in this Circuit is that such guidelines are relevant in determining objective reasonableness, but not determinative. *See, e.g., United States v. Brown*, 871 F.3d 532, 538 (7th Cir. 2017); *Thompson v. City of Chicago*, 472 F.3d 444, 454 (7th Cir. 1996). In the respect most pertinent to this case, the CDC guidelines set a feasibility or practicality limitation that, the Court concluded, could not be determinative of the constitutional question presented by plaintiffs' claims. Second, and perhaps just as importantly, the record established that the Jail had not yet reached feasibility limitations regarding the spacing of detained persons: the Jail's executive director so testified at the preliminary injunction hearing, indicating that the Jail had additional space that could be used to further spread out detainees. Thus the record reflected that the Sheriff's practices in this particular respect *did not* measure up to the CDC guidelines.

Next, contrary to the Sheriff's contention, the Court did not fail to give appropriate deference to the Sheriff's expertise or his interest in appropriate management of the Jail. To the contrary, the Court did exactly what the law requires. *See Mays 2*, 2020

WL 1987007, at *27 (citing *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2073 (2015); *Bell v. Wolfish*, 441 U.S. 520, 547 (1979)). Indeed, the Court rejected, both at the TRO and preliminary injunction stages, much—in fact most—of the relief sought by plaintiffs. Specifically, the Court declined to:

- order the Sheriff to identify and triage detained persons believed to be medically vulnerable;
- relocate vulnerable detainees to custodial (and perhaps non-custodial) locations other than the Jail;
- mandate full social distancing throughout the Jail;
- distribute personal protective equipment to every detained person;
- institute a robust program of coronavirus testing of all detainees throughout the Jail; and
- convene a three-judge court to consider releasing detained persons from the Jail.

On each of these points, the Court either found that plaintiffs were unlikely to be able to show the Sheriff's actions were objectively unreasonable, or deferred to the Sheriff's expertise and discretion, or both.

One certainly understand why, as a strategic matter, the Sheriff's motion for a stay omits any reference to what the Court *did not* order. But a look at the full picture confirms that the Court followed a careful and restrained approach, honoring both the constitutional entitlement of detained persons to reasonable measures to protect their physical health and the Sheriff's legitimate interest in maintaining security, preserving order, and making discretionary determinations regarding allocation of resources. The law is clear that a court must consider both. The Supreme Court has stated that

although courts must be "sensitive to . . . the need for deference to experienced and expert prison administrators," they "nevertheless must not shrink from their obligation to "enforce the constitutional rights of all persons, including prisoners. Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Brown v. Plata*, 563 U.S. 492, 511 (2011) (internal quotation marks and citation omitted).

In sum, the Court concludes that the Sheriff has not shown, let along "strongly" shown, that he is likely to succeed on appeal.

b. Irreparable injury to movant

The Sheriff's argument regarding irreparable injury likewise falls short. In fact, the Sheriff's position on this point is internally inconsistent. One the one hand, he contends that the Court has "undermine[d]" his "thoughtful and reasonable" approach to the coronavirus pandemic as it affects the Jail. Def.'s Mot. to Stay at 13. On the other hand, he contends that the Court has essentially ordered him to do what he was already doing, *id.* at 12, thereby inserting itself as an unnecessary watchdog. Both cannot be true at the same time. The fact is that the Court has done neither. The Court observes, though, that it is difficult to see how the Sheriff will experience "irreparable harm" if he has to comply with the injunction by doing what he says he would do anyway.

The Sheriff says that the additional burden imposed by court oversight amounts to irreparable harm. The upshot of this argument, however, is that any party appealing an injunction would *automatically* meet the irreparable harm requirement for a stay—because an injunction is, after all, an injunction. This cannot be the case. That aside, the Court has not imposed any monitoring requirements beyond the initial compliance

report, which the Sheriff filed over three weeks ago and thus which cannot possibly constitute irreparable harm. The Court declined plaintiffs' requests to appoint outside monitors and to permit inspections of the Jail's facilities.

Finally, at argument, the Sheriff's counsel seemed to suggest that the fact that the plaintiffs had served discovery requests and were thereby trying to, in effect, stick their noses into his operations and decision-making amounts to irreparable harm. This cannot be the case either. Again, as the Sheriff's counsel conceded, a case does not end with a preliminary injunction; it is commonplace for discovery to proceed in a lawsuit even after a preliminary injunction is issued. So dealing with discovery requests cannot possibly constitute irreparable harm either. (Regardless, as discussed below, the Court is relieving the Sheriff of the burden of responding to plaintiffs' discovery requests at this time).

Last but not least on the question of irreparable harm, it is noteworthy that the Sheriff waited more than three weeks after the issuance of the preliminary injunction before moving for a stay. This cuts against the contention that the Sheriff has experienced, or will experience, much harm at all, let alone harm appropriately considered to be irreparable.[1]

[1] It may be that the Sheriff's real concern involves the potential for future problems should increased population at the Jail limit his ability to comply with social distancing requirements. On this, though, it is worth noting that the Court specifically invited the Sheriff to make a request to include certain at-risk detainees among those who may be appropriately detained in group housing, *see Mays 2*, 2020 WL 1987007, at *34, and to return to court to loosen the preliminary injunction's requirements if changed circumstances call for it, *see id*. at *37. The Sheriff has not taken the Court up on either invitation.

c. Injury to parties other than movant

The next question is whether a stay will risk substantial injury to other interested parties, specifically to the plaintiff class. This is essentially the flip side of the point just addressed. The Sheriff did not voluntarily take all of the coronavirus-protective measures that he cites. Some were done pursuant to court order—either the TRO, or the preliminary injunction, or both. Staying the injunction would permit the Sheriff to lift measures and thereby again place the health of detained persons at serious risk. That risk cannot be discounted based on the Sheriff's assurances alone. Again, a number of the measures he took were instituted only after the Court's TRO or preliminary injunction. *See Mays 2*, 2020 WL 1987007, at *29. The Court finds that there is at least some risk of substantial injury to detained persons if the preliminary injunction is stayed.

d. The public interest

On the question of the public interest, the Sheriff cites *Nken v. Holder*, 556 U.S. 418, 435 (2009), for the proposition that the Sheriff, as a public official, effectively embodies the public interest. *See* Def.'s Mot. to Stay at 19. It is not quite that simple. Here the Sheriff is charged with protecting not just the public at large, but also the detained persons placed in his custody, all or nearly all of whom have family members on the outside. Their interests are part of the public interest. And the detained persons' constitutional rights—and their health and lives—are at stake. It is anything but clear that the Sheriff can claim the public interest mantle entirely for himself.

For the reasons described, the Court concludes that the Sheriff has not met the requirements for a stay of the preliminary injunction. The Court therefore denies his motion to stay.

2. Plaintiffs' request for expedited discovery

As the Court indicated earlier, and as the Sheriff's counsel conceded at argument, the appeal of a preliminary injunction does not require the rest of the case to come to a halt in the district court. Put another way, a preliminary injunction is not the final resolution of a case. It follows that a party who is preliminarily enjoined is not relieved of the obligation to provide discovery in response to appropriate requests. In addition, as the Sheriff likewise conceded at argument, an appeal does not prevent the district court from enforcing a preliminary injunction. *See, e.g., Union Oil Co. of Calif. v. Leavell*, 220 F.3d 562, 565-66 (7th Cir. 2000).

Plaintiffs' discovery requests, they say, are aimed at determining compliance. This is plainly not the case for all of them; some involve matters beyond the relief the Court ordered in the injunction. But this does not make those particular requests inappropriate. They are within the realm of permissible discovery for the ongoing litigation of the case—which, again, does not end with the issuance of a preliminary injunction. The same is true of the plaintiffs' other requests; all of them appear to be within the scope of permissible discovery under Federal Rule of Civil Procedure 26(b)(1).

Defendants say that the Court should, and perhaps must, put the brakes on the plaintiffs' requested discovery because of the appeal. The question of whether and to what extent plaintiffs may engage in discovery, however, is not an emergency issue within the scope of the undersigned judge's role as emergency judge. The only aspect that is urgent is the request for *expedited* discovery; that is what the undersigned judge took on when requested by the assigned judge to handle the motions for a stay and for

expedited discovery.

All of that aside, the Court concludes that the expedited discovery requests have not been properly served. Under Federal Rule of Civil Procedure Rule 26(d), a party "may not seek discovery" before the parties have conferred under Rule 26(f) or unless authorized by the Rules, a stipulation, or a court order. None of this has happened in this case. In particular, at the time the discovery had been served there had been no Rule 26(f) conference.

For these reasons, the Court directs that the Sheriff need not answer plaintiffs' current discovery requests. At the conclusion of the oral argument on the present motions on May 21, the Court directed the parties to submit a proposed scheduling order to the assigned judge by June 2, 2020 and to conduct their Rule 26(f) conference before that. Plaintiffs may re-serve their discovery requests following the Rule 26(f) conference and may, if appropriate, move the assigned judge to permit expedited discovery.

Conclusion

For the reasons stated above, the Court denies defendant's motion to stay the preliminary injunction pending appeal [dkt. no. 98] and denies plaintiffs' motion for expedited discovery [dkt. no. 85].

Date: May 29, 2020

MATTHEW F. KENNELLY
United States District Judge

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

ANTHONY MAYS, Individually and on behalf of a class of similarly situated persons, et all right. ., Plaintiffs, vs. COOK COUNTY SHERIFF THOMAS J. DART, Sheriff of Cook County, Defendants.	Case No. 20 C 2134 Chicago, Illinois May 21, 2020 1:15 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MATTHEW F. KENNELLY

APPEARANCES:

For the Plaintiffs:

MACARTHUR JUSTICE CENTER
BY: MR. LOCKE E. BOWMAN, III
MS. ALEXA VAN BRUNT
375 E. Chicago Avenue
Northwestern University School of Law
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-0844

LOEVY & LOEVY
BY: MS. SARAH COPELAND GRADY
311 N. Aberdeen Street
3rd Floor
Chicago, IL 60607
(312) 243-5900

APPEARANCES: (Continued)

For the Defendants:
HINSHAW & CULBERTSON, LLP
BY: MR. JAMES MATTHIAS LYDON
MR. ROBERT THOMAS SHANNON
MS. GRETCHEN HARRIS SPERRY
151 N. Franklin Street, Suite 2500
Chicago, IL 60606
(312) 704-3000

Court Reporter:
MS. CAROLYN R. COX, CSR, RPR, CRR, FCRR
Official Court Reporter
219 South Dearborn Street, Suite 2102
Chicago, Illinois 60604
(312) 435-5639

(The following proceedings were had telephonically and by video:)

THE CLERK: 20 C 2134, Anthony Mays v. Thomas Dart.

THE COURT: All right. So I think it will be helpful if maybe just one of the lawyers for the plaintiff can give the names of all the lawyers who are on the video for the plaintiffs.

MS. VAN BRUNT: Sure, your Honor. I am happy to do that.

This is Alexa Van Brunt, V-a-n B-r-u-n-t. Also on for plaintiffs are Sarah Grady, G-r-a-d-y, and Locke Bowman, B-o-w-m-a-n.

THE COURT: And defense counsel? You have to unmute.

MR. SHANNON: Your Honor, Robert Shannon on behalf of defendant. With me is Jim Lydon, our paralegal, Lisa Plaza.

Your Honor, I also wanted to let you know that Ms. Sperry is leading a panel presentation and she will be here stepping in at 1:30. We did not want to have to continue or delay the start of this, but it is my hope pending any (technical difficulties).

THE COURT REPORTER: You're breaking up.

THE COURT: So here's the problem.

You know, these video conferencing things, and maybe we don't have the best one in the world, they don't really expect that people are going to be using them over

speakerphones like you're doing. So we are getting -- I am hearing basically about a third of what you are saying, and the same is true of the court reporter. I can tell from her body language.

And so I didn't get -- I heard you say something about 1:30, but that's about all I could hear.

MR. SHANNON: Can you hear me better now, your Honor?

THE COURT: That's less feedback than the speakerphone was. Okay.

MR. SHANNON: Should I identify counsel for the defendants again?

THE COURT: Please do.

MR. SHANNON: Robert Shannon on behalf of defendant. With me is Jim Lydon. In the room is our paralegal, Lisa Plaza.

Ms. Gretchen Sperry is completing a panel, a CLE presentation, and she will be joining the room at approximately 1:30.

THE COURT: Ah, that was the 1:30 thing. I've got to step away and grab something.

So I actually -- so I've read everything that was submitted. Sorry. This is the clerk calling me. I have to take this.

Sorry. Give me a second.

(Brief interruption.)

THE COURT: Okay. So I actually want to start off with some questions. And I am going to start off with questions I have starting off with for defense counsel.

Does -- if the judge issues a preliminary injunction and the preliminary injunction gets appealed, does that deprive the district court of jurisdiction to deal with the rest of the case?

That's the question.

MR. SHANNON: This is Robert Shannon, your Honor.

THE COURT: That's all coming from you guys. I'm just telling you. All that whistling and feedback, all this feedback is coming from you guys.

You would be way better off doing this in front of your own screen at a computer somewhere.

(Technical difficulties.)

THE COURT: Did you hear my question, Mr. Shannon?

MR. SHANNON: Yes, your first one or the second one, Judge?

THE COURT: Well, the second one is why the heck aren't you doing this off of a computer?

My first question is does an appeal -- if the judge issues a preliminary injunction and the party who has been enjoined appeals the preliminary injunction, does that deprive the district judge of jurisdiction over the rest of the case?

(Technical difficulties.)

THE COURT: Okay. So we are going to -- you know, this is all coming from the conference people.

MR. SHANNON: Judge, we are going to call. Give us one moment.

(Brief interruption.)

THE COURT: I am just waiting for some sort of a thumb's up or something from the Hinshaw table so that you've got your act together so we can hear you.

MR. SHANNON: Your Honor, is this any better?

THE COURT: That's better. On that one, I am only hearing it twice, as opposed to ten times, so I guess that's better.

MR. SHANNON: Okay. Now we should be fine. Is that correct?

THE COURT: Yes, now you're fine. Now you're fine.

Okay. Answer my question, please.

MR. SHANNON: Can you hear me, your Honor?

Okay. Thumbs up.

Okay. Your Honor, I may, with your Honor's permission, ask Ms. Sperry to expand on this when she joins, but I think the answer to your question is that the district court does not lose jurisdiction for the permanent injunction, but loses any issues involved in the appeal.

Here what is somewhat unique --

THE COURT: No, you just answered my question. No,

stop.

So look, Mr. Shannon, with due respect, you just wasted ten minutes of my time. Okay? So you answered my question. Now I am going to ask another one. I will give you a chance to say whatever you want to say in a minute. I have got, like, 30 pages of briefs from you guys. I've got questions. I am going to get them answered, and I am going to get those questions answered and that's it.

So let's say a preliminary injunction gets appealed and somebody wants to do discovery toward the question of whether they should ask for a permanent injunction and, you know, what they need to prove their claims.

Does the district judge have the authority to deal with issues about that?

MR. SHANNON: Not if -- not if it is related to the appeal on the preliminary injunction, your Honor.

THE COURT: So I'll just tell you that one of the -- one thing I can tell you is that there is no case that you've cited -- there is no case that you've cited in any of your materials that says anything close to that.

So what's your authority? What's the case that says what you just told me?

And I'm going to tell you I've been a lawyer for 39 years, okay? Unless this has changed in the last two weeks, what you just said is just wrong. So tell me the case that

says it.

MR. SHANNON: It would only be in our brief, your Honor, and I will have Ms. Sperry, when she arrives, respond in any way that you are comfortable with, but I think what is unique about this particular case is that the threshold issue is that while plaintiffs may take the position that the district court could retain jurisdiction over discovery, quote/unquote discovery requests that were pending in advance of the notice of appeal, that is not the case here because those discovery requests, as we have set forth in our briefs, were legally and procedurally defective.

THE COURT: Yeah, so the problem with what you just said is that what that means, the upshot of that is that if a preliminary injunction gets appealed, the case has to come to a grinding halt, which is contrary to, like I said, the last 39 years I've been practicing law, unless something has changed in the past couple of weeks.

So let's just talk about an ordinary commercial, okay? Let's say you have a standard agreement not to compete. Plaintiff comes in and says the employee left, he's violating the covenant not to compete, he's soliciting customers, he's doing this, he's doing that. The judge issues a preliminary injunction. The employee who is a defendant in the case appeals the preliminary injunction. Okay. So there is a preliminary injunction in place, but that's not the end of the

case because a preliminary injunction is, by definition, preliminary.

And so now the plaintiff says, okay, I want to get more details about this. I want to find out who all the customers are that this person dealt with. I want to know what he said to them. I want to know, you know, what sales he made to them. So they start sending out discovery requests.

From what you just told me, they can't do that and the district judge would have to prevent them from doing that, which is just absolute poppycock, and that's about the nicest way I can put it.

So what's the case that says that?

MR. SHANNON: Well, your Honor, they're asking for emergency discovery, and as we've identified under an effective procedural mechanism, and I guess it feeds into the elements on the motion to stay, right? I mean, that would be the analysis.

THE COURT: Okay. So just as a person who makes decisions for a living, just a little practice point here. When somebody doesn't answer questions, that -- and they don't do it after the second try, that usually tells the decisionmaker that a truthful answer would not be good for the person who is answering the question.

MR. SHANNON: Your Honor, I am not --

THE COURT: So let me get to my next question.

Does an appeal from a preliminary injunction preclude the district court from enforcing the preliminary injunction if it's not stayed? Yes or no?

MR. SHANNON: Well, I would say, your Honor, only if a proper motion is filed, and that has not occurred. That was one of our points. If there was a rule to --

THE COURT: Don't add facts to my question. I'm asking the question in the way I'm asking it because that's the way I want it answered.

Does an appeal of a preliminary injunction that hasn't been stayed preclude the district court from enforcing it?

MR. SHANNON: Your Honor, what we argue in our brief is that it's -- the district court is divested of jurisdiction while the matter is up on appeal.

THE COURT: Okay. Is that a yes to my question, or is it a no?

MR. SHANNON: I'm losing track of the double negatives, your Honor.

THE COURT: It wasn't a double negative in the question.

So, look, you've got to listen carefully this time. And this is going to be your last opportunity to answer questions. If I get an evasive answer again, which is what you've been giving me, then I am just going to talk to

somebody else from now on.

Does an appeal by a dis- --

UNIDENTIFIED VOICE: I thought that --

THE COURT: Whoever is talking, shut up.

Does an appeal of a preliminary injunction that has not been stayed preclude the district court from enforcing the preliminary injunction? Yes or no?

MR. SHANNON: Your Honor, Ms. Sperry has arrived. Can I please ask her to respond to your question?

THE COURT: I just want somebody to answer the damned thing. You're wasting my time by even doing that. Answer the question, for crying out loud.

MS. SPERRY: The Court can enforce the injunction --

THE COURT: I want a yes or I want a no. I want a yes or I want a no.

MS. SPERRY: Yes.

THE COURT: Okay. So I can enforce it. Okay. So that's my first question.

So now I've got Ms. Sperry in the room. I am going to ask the question that Mr. Shannon wasn't answering before.

Does an appeal from a preliminary injunction deprive the district court of jurisdiction over the rest of the case? Yes or no?

MS. SPERRY: The rest of the case?

THE COURT: Right.

MS. SPERRY: No.

THE COURT: Okay. Thank you.

MS. SPERRY: The underlying complaint.

THE COURT: And both of those answers, by the way, are consistent with my understanding of the law.

Okay. So now I am going to get to my third question.

I don't care who answers this, and you don't have to preface it by can I permit this person to answer? I don't care who answers it. I just want somebody to answer it, okay?

So depending upon how I read the defendant's last brief, I'm not sure what your answer is to this question, which is why I'm asking it. A party who is a beneficiary of a preliminary injunction and who claims it's been violated, are they entitled to get discovery to try to find out if it's been violated?

MS. SPERRY: Not if it has not been ordered by the court as part of the preliminary injunction motion to monitor compliance.

THE COURT: So you have to get leave of court to just send out discovery requests?

MS. SPERRY: If it has not been --

THE COURT: Why would that be?

MS. SPERRY: In other cases, if the Court, as part of its preliminary injunction order, has permitted the parties to continue discovery for purposes of monitoring compliance, that

may be the case. It is not the case here.

THE COURT: Time out. So what's the provision in the Federal Rules of Civil Procedure that says that a party has to get leave of court to just serve discovery. I'm not talking about expedited. I'm just talking about regular discovery.

Let's just say that the plaintiffs have sent you, which by the way, they should have on May the 6th, they just sent you these discovery requests. Said, here's our discovery requests under Rule 34 of the Rules of Civil Procedure. Here's our request for production of documents, please answer these.

Would there be something wrong with that? You don't have to get leave of court to serve a Rule 34 request, do you?

MS. SPERRY: Here, I think, is the distinction, your Honor. They can serve discovery requests with respect to the complaint itself in pursuit of the underlying case in the trial moving toward a permanent injunction perhaps.

But with respect to monitoring compliance, unless it's specifically ordered by the court, our view is that there is no inherent right to pursue discovery if it's not ordered by court.

THE COURT: Okay. So I --

MS. SPERRY: For compliance.

THE COURT: I got your briefs in front of me here. So point -- tell me the page that has the case or cases on it

that say that or the rule or whatever it is. Where do I find this in the brief?

MS. SPERRY: Bear with me, Judge. I'm just getting my bearings here.

Oh, so the case of Bradford-Scott Data Corp. vs. --

THE COURT: What page of what brief?

MS. SPERRY: Page 6 of the defendant's motion to stay.

THE COURT: Okay. Hang on a second. This is the last thing, right?

MS. SPERRY: Correct, document 98-1.

THE COURT: I'm there. Page 6. Go ahead.

MS. SPERRY: Sure.

So the case of Bradford-Scott Data Corp. v. Physician Computer Network provides, and Griggs that it cites to, provides that the Court has jurisdiction over the remaining aspects of the case that are not on appeal.

There is -- but as far as monitoring compliance that is separate from and is part of the preliminary -- well, the order is part of the preliminary injunction order.

So if the party wanted to pursue, as I said, the underlying complaint and proceed through the normal channels of discovery, pursuing the permanent injunction perhaps on the complaint that remains, that would be different and that certainly is not the character of the discovery requests that

were issued here that purportedly are to monitor compliance, although, as you note from the filings, it goes far beyond what the Court actually ordered in the injunction itself.

THE COURT: Okay. So what you're telling me is that this Bradford whatever it is, Bradford hyphen something, this Bradford-Scott case says that you can't do discovery that amounts to trying to monitor compliance with a preliminary injunction and I think you said before unless the judge lets you.

MS. SPERRY: So in -- so Bradford-Scott says that the Court loses -- the district court loses jurisdiction over all aspects of the injunction that are on appeal with the exception of any of the underlying proceedings on the original complaint. The cases, for example, on page 7 of the brief, Perfecseal v. Heezen and the other cases cited by the plaintiffs, in those cases the ability to monitor, quote/unquote monitor, but the ability to pursue discovery with respect to compliance with the injunction was specifically ordered as part of the injunction order in those cases, which isn't the case here. And that the Court opted for the status report avenue of ensuring compliance.

THE COURT: Okay. All right. But you said a few minutes ago that -- I think you said a few minutes ago that the district court retains the ability to enforce the preliminary injunction even if it's on appeal if it's not

stayed, right?

MS. SPERRY: If it's not stayed, the Court -- the Court does have the ability to enforce it if it isn't stayed, that's true. That, in our view, does not entitle the other side to discovery upon it.

THE COURT: Okay. So are you saying, basically, that because there isn't something in the preliminary injunction that says you're entitled to do discovery, to do it, it's too late to change that now?

MS. SPERRY: That's our view, yes.

THE COURT: Huh, okay.

And your position is is that none of these discovery requests that you've been served with here has anything to do with what I call the rest of the case, in other words, whether the plaintiffs ought to be able to get a permanent injunction? Is that --

MS. SPERRY: I'm sorry. I'm thinking.

In our view, no, not as presented, no.

THE COURT: Okay. Because actually your argument kind of is that they are because you make the point on some of these requests that they go beyond what the preliminary injunction says. So it can't involve the preliminary injunction, it must involve the rest of the case.

MS. SPERRY: Well, they involve things that go beyond what the Court had ordered. I guess --

THE COURT: I understand, but that means they involve the rest of the case. I mean, my point is that your position kind of runs headlong into itself when it turns the corner.

MS. SPERRY: I understand what you're saying. I understand the distinction that you're making, and perhaps Mr. Shannon has a better view, if you don't mind, your Honor.

MR. SHANNON: Judge, can I add to the response, your Honor?

THE COURT: You can do it quickly, yeah, and responsively.

MR. SHANNON: So -- and I will work off of what the plaintiff has said. I mean, the plaintiff has asked for permission to issue this discovery. They are explaining and attempting to advise the Court that they have established good cause for issuance of discovery built around this notion of compliance.

And the difference I think, and some of this is procedural, but some of this is more of a gatekeeper function. The thing that's unique here, your Honor, is getting back to what I, frankly, have been talking about since the beginning of our conferences, that if it is discovery related to the permanent injunction, then we should be doing that by way of a real schedule, a real structure with a gatekeeper and a time line that everyone is operating off of the same page on, not these ad hoc, regular and routine emergency freestanding

requests that really, as you'll note from our brief, in our mind are akin to a rule to show cause or a motion for contempt, which carries a much more significant burden than just good cause to make us respond to this stuff that they deem appropriate at this point.

THE COURT: All right. I'm just trying to process that.

So it kind of sounded like what you were telling me is that if this discovery involves the rest of the case, they can't do it because there isn't a discovery schedule in place. Where is that coming from? Is that in the Rules of Civil Procedure somewhere?

MR. SHANNON: Well, I think -- I suppose it would be part of a district court scheduling order, your Honor, but to some extent, I'm operating off of custom, too, and that's -- if this matter is assigned to Judge Gettleman and the other permanent injunction hearings I have had, there is a schedule. It typically involves expert disclosures. It typically involves times to respond. It typically will involve motions to compel in the district court or whichever court is presiding will serve as the gatekeeper, but there is a structure. It's not this hovercraft, this kind of freestanding, we think we need this now because we would like to explore whether you're complying with the judge's order.

THE COURT: So -- so if the plaintiffs had just sent

out these things, and, you know, said, okay, this is our Rule 34 request for production, your response would be then, no, you can't do that because we don't -- the judge hasn't imposed -- hasn't set a discovery schedule, it sounds like. Is that right?

MR. SHANNON: I don't know that that would be our position, your Honor. I suspect that we would probably issue our own discovery, and at some point, we'd work out a schedule with the plaintiffs.

THE COURT: I don't know if that was a yes or if it was a no, but thanks.

Okay. So who wants to talk about this issue of on the plaintiffs' side about this issue of what, when and how and under what circumstances you're entitled to do discovery at this point?

MS. GRADY: Your Honor, I can handle that question.

So as an initial matter, we think the law on the jurisdictional point is clear that's separate from a showing, and that would be true because frankly these discovery requests are relevant to both the preliminary injunction and the permanent injunction, and a party always has the right to ask the Court for expedited or emergency discovery even before there is a scheduling order in place. We've done that in other cases. That is what Rule 26(d) expressly permits parties to do, to come to court and say I need this discovery

because there is an emergency here.

Sometimes that's statute of limitations. Sometimes it's something else, but that's an available mechanism for the Court.

The Court can order that discovery to be answered on an expedited schedule, and the cases that we have laid out in our brief at Docket 85 and also the brief we filed yesterday, that's at Docket 102, lay out the standard for that, that's good cause, and we've explained why we need that. I think, frankly, the substance of the case establishes what the emergency is and why we need the discovery to understand what the status of the situation is in the jail, especially given our declarations that we've submitted and establishing that the Sheriff's contention -- he's got everything well in hand is not so.

I'm happy to speak more about why the district court has jurisdiction. There can be really no dispute, for example, that the Court could order witnesses to give testimony in order to assess whether the defendants were in compliance with the preliminary injunction.

There can be no distinction between ordering them to do that and ordering them instead to tell us about that sort of a thing. And there's just no case that establishes that discovery about compliance is there's no jurisdiction for the order about compliance.

THE COURT: So why didn't you guys just serve these as discovery requests and rather than putting them in like, whatever it was, a response to a status report or something like that?

MS. GRADY: Well, I think that there are two -- two responses to that. One is that the timing that we believe is necessary to get responses is immediate. And for the reasons laid out in our brief, you know, we needed those responses right away, and I'm happy to defer to the brief on that.

THE COURT: 15 days have gone by, okay? So what's the second reason?

MS. GRADY: Okay. The other -- the other reason is that although we served waivers of service basically at the time we served our complaint, the defendants have not yet completed the waivers of service, and so I think under the Federal Rules, there may be some tricky issues about being able to demand that they respond to discovery without a court order.

THE COURT: Okay. That sounds like an actual reason. Okay.

Let me ask you on the plaintiffs' side. Again, it doesn't have to be the same person that answers all of these questions. I just make the observation that a good deal of at least the plaintiffs' last submission, maybe the one before that as well, kind of sounds more like, well, we really don't

think the preliminary injunction went far enough, you ought to be doing more, rather than give us discovery to ascertain compliance.

So I want to find out -- I basically have -- your discovery requests, your document requests, there's seven of them. If I can kind of boil those down to their essentials. Number one is information regarding the number of tests, number of positive tests.

Number two is information about the protocol for testing.

Number three is identification of people who have died from coronavirus disease.

Number four is identify everybody in the RTU, various things about them.

Number five is update the tier occupancy report.

Number six is provide supporting information for those who -- it has to do with group housing, why they have to be in group housing or why they can't be in group housing.

And then number seven was CCTV footage for a particular day for like about 10 or 11 tiers.

So I want to zero in on two of those. What does identifying people who have died and identifying who's in the RTU have to do with compliance with the preliminary injunction?

MS. VAN BRUNT: Your Honor, it's Alexa Van Brunt.

The people in the RTU, while not subject to the social distancing requirements, are subject to the requirements related to protective personal equipment and sanitation, and we have strong concerns about the state of affairs in the RTU and Cermak because of how crowded they are and because of reports we've received about additions in those units from detainees and their families.

THE COURT: How does that relate to discovery request number four? What you just said, how does it relate to discovery request number four?

MS. VAN BRUNT: Right. That relates to -- apologies -- to CCTV footage over the RTU.

As to number four, which seeks the actual booking information and medical designation, the Sheriff is in one of the exceptions to social distancing requirements, it lays out the documentation that is necessary for those exceptions, and one of those relates to the need to be in housing that is equipped for medical and mental health treatment.

So we want to assess whether everybody who is in RTU and in Cermak which are not socially distanced under the order are, in fact, there for a proper medical reason in accordance with the order.

THE COURT: Are you looking at request number four?

MS. VAN BRUNT: Yes, your Honor, but it does dovetail with request --

THE COURT: Okay. I understand, but it's a separate request, so it's its own thing. It's got a number on it. It's a paragraph, and it's separated from the other thing. So what is it in number four that's going to get you anything about what you just said?

MS. VAN BRUNT: The medical designation, your Honor.

THE COURT: What is a medical designation, as you understand that to be used by the Sheriff?

MS. VAN BRUNT: They have specific designations, these M3, M4.

THE COURT: Code, right? Yeah.

MS. VAN BRUNT: Yeah, the code for varying levels of physical and mental health needs and disability.

THE COURT: So you're trying -- so that would -- so that would enable you to ascertain what the -- you know what those codes mean presumably. That would unable you to ascertain what the designation is of each person in the RTU in Cermak.

MS. VAN BRUNT: We believe so. We know what the codes mean to the extent they were elucidated in the Sheriff's pleadings, and we used those codes because we thought it would be easiest for the Sheriff to respond using its own codes as opposed to ones we made up.

THE COURT: Okay. What about number three, information sufficient to identify everybody who has died.

What part of the preliminary injunction does that relate to?

MS. VAN BRUNT: Your Honor, that goes closely again, I'm sorry to use the word dovetails, but with testing, and we have received information that people who have been in the jail and who are immediately released have subsequently died and have not been counted in the Sheriff's numbers of people who were sick and then subsequently died as a result of being sick in the jail.

We think this is just a general issue of transparency about what the state of the disease is in the jail, frankly. This is the one that is possibly the least -- everything else is related to compliance, but, your Honor, we've got to say we need to know who actually is infected and who is dying as a result of this disease as a general matter, and we have grave concerns about what we are hearing in terms of the disparities between who is dying --

THE COURT: You're getting pretty far away from my question at this point.

MS. VAN BRUNT: Apologies.

THE COURT: So you think the Sheriff has got information about who's died after they left the jail, which is what number three really relates to?

MS. VAN BRUNT: Correct. It's that last phrase.

THE COURT: What makes you think they'd have that?

MS. VAN BRUNT: Well, if he doesn't have it, we'd

like to know that. It -- we --

THE COURT: Yeah, honestly, look, if you want to get yelled at like Mr. Shannon did for not answering questions, just keep it up. Okay? That's not an answer to my question. Do you want to answer my question?

MS. VAN BRUNT: Apologies. We don't know that he knows it, but we don't know.

THE COURT: I'm getting the feedback beeping again, which I'm pretty sure is coming from the conference room at Hinshaw. Just saying.

I want to go back -- again, we're just talking about the discovery requests at this point. So why isn't -- why isn't the right thing to do here -- so, well, actually, let me ask a different question. This picks up on something that either Ms. Grady or Ms. Van Brunt said.

So what's the story with returning the waiver of service, Mr. Shannon or anybody else on the defense side?

MR. SHANNON: We haven't answered yet, your Honor. I was not aware of that.

THE COURT: No, no, no. Did you hear my question? My question was where are you on returning the waiver of service?

MR. SHANNON: I was not aware of that, your Honor, and I will have to check on that.

THE COURT: Okay. Who on the plaintiffs' side is

familiar with when the waiver of service was sent?

MS. GRADY: Your Honor, I am happy -- I'm in the process of pulling that up.

THE COURT: I'm going to step away for a second and just grab one thing.

(Brief pause.)

THE COURT: Raise your hand if you're hearing that infernal beeping?

Okay. Raise your hand if it's driving you bonkers? Oh, it stopped. Okay. Maybe that's all it took. You just had to yell at it.

Are we close, Ms. Grady?

MS. GRADY: I'm so sorry, your Honor. I really did think that I was going to have it pulled up. It --

THE COURT: Maybe I should ask another question. Are you sure you sent one?

MS. GRADY: Well, I would expect my search to be doing a better job.

If I can have about three minutes, I can probably tell you as a confirmed matter that we did or that we probably didn't. If I can have one minute to look.

THE COURT: I'm actually going to go a different direction here for a second, but I've got to pull up the docket in order to do that, so just give me a second to do that.

All right.

MS. GRADY: Your Honor, while we are doing that, I can confirm that we did on April 4th.

THE COURT: Okay.

All right. So turning over to the defense. So they sent the waiver of service on April the 4th. What's going on with it?

MR. SHANNON: I'm going to have to find out, your Honor. I am not in a position --

THE COURT: If you don't know right now, there is not much point.

To the extent that the rules, you know, delay the initiation of discovery, basically what they talk about is they talk about the judge issuing a scheduling order and when the judge is supposed to issue a scheduling order, and it says that the judge must issue -- this is 16(b)(2), the judge must issue a scheduling -- the scheduling order as soon as practicable.

But unless the judge finds good cause for delay, the judge must issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.

Defendants appeared on April the 5th. The 5th plus 60 would be something like June the 3rd. Maybe June the 2nd. My math is maybe a little off there.

Okay. We're going to pause on the discovery, and we are going to come back to that in a second. Now I am going to talk about the main question.

So the last document that was filed on the request for a stay pending appeal was filed by the plaintiff, so I'd like to give Mr. -- whoever wants to deal with this on the defense side a chance to discuss the question of a stay pending appeal.

MS. SPERRY: Your Honor, I won't go too far out of our briefs, but there are a couple of points that I think are very important to keep in mind as to why a stay is warranted in this case.

In addition to the facts that we believe, given the uncertainty about the standard, legal standard, to be applied, certainly there is a likelihood of success on the merits of the appeal itself.

More importantly, the injunction must be stayed because the efforts that have been in place at the jail since well before this case has been filed have been successful in controlling the spread of the virus as demonstrated by the data that we submitted which show, most importantly, that the test positivity rate in the jail is now less than 6 percent.

The test positivity rate as a frame of reference in the northeast region of the state of the governor's order, for example, is somewhere around 18 percent, meaning that if all

of the detainees that are tested, and we have, and I'll get to this, but we have expanded greatly the number of detainees tested, but of all of them who are tested, less than 6 percent of them are testing positive, and of them, the vast majority of them are entering the jails from the community at intake. This is not due to the spread of the virus inside the jail.

So what all of this means is that the efforts that have been in place, the most important efforts that have led to this success have been, for example, the assignment of isolation housing for positive tests of detainees, quarantine housing for those who have been exposed, opening tiers of the jail to allow for social distancing in the housing areas, the efforts that have been made to obtain PPE and have the jail designated as a rapid testing site.

Those are all of the efforts that have led to these great successes that we are now seeing. They've been in place long before the suit was filed and certainly before the injunction itself was entered. Therefore, number one, there is no risk that the Sheriff is going to stop doing these structural efforts within the jail and compromise the success that he has had so far. And, number two, that those efforts have in and of themselves been responsible for these results.

The injunction largely reinforced the things that the Sheriff was already doing again before the suit was filed. So the harm, of course, is that now the Sheriff is in a position

of having to operate the jail under threat of contempt for making a decision that may be warranted, for example, by the CDC's recommendations. However, it might be in conflict with the Court's injunction.

And there are now three appellate circuits in this country that have determined that that in and of itself is a greater harm, the federalism issues that are raised by a federal court imposing these types of restrictions and interference on the Sheriff's inherent discretion to operate the jail safely, which, again, he has proven that he is doing, that that in and of itself is a greater harm than lifting the injunction because of the fact that the detainees are now at an extraordinarily low rate risk of infection, the absence of the injunction is not going to be of harm to them. Certainly not --

THE COURT: Okay. I am going to interrupt you for a second. Because --

MS. SPERRY: Yes.

THE COURT: -- I mean, in light about the first two-thirds of what you said, that we're already doing this, we're already doing that, and then largely the tenor of the written materials that have been filed is that you basically just ordered us to do stuff we were already doing, if that's true, I guess I'm really having a hard time coming to grips with the proposition that the Sheriff, which has to show

irreparable harm absent a stay, how the Sheriff is going to be irreparably harmed if there is not a stay in light of, you know, basically what the whole tenor of what your briefs say.

So, I mean, I know you want to focus on other things. You want to focus on there's no harm to the plaintiff because we're going to keep doing all these things, but let's zero in on that issue for me.

MS. SPERRY: Sure, of course.

The irreparable harm here, as the 5th, the 11th and 9th Circuits have found is that forcing -- essentially this injunction places the Sheriff in the position of having to consider a potential claim of contempt with the injunction order, which interferes with his inherent discretion to operate the jail as he sees fit.

And this is deeply rooted in the United States Supreme Court precedent about the federal courts not elevating themselves to the quote/unquote superwarden, as the 11th Circuit said it, micromanaging, essentially, the functions of the jail, and placing the sheriffs in the untenable position of having to say, well, I'm either going to be in contempt or I can operate the jail safely in the way that I have the inherent discretion to do, and that that, as a matter of federalism and otherwise, is an irreparable harm greater than any risk the plaintiffs --

THE COURT: I have two questions about that, two

questions about that. One is just to clarify.

So basically the irreparable harm is the fact that the Sheriff essentially, for want of a better word, has to look over his shoulder, right?

(Laughter.)

MS. SPERRY: That's correct.

THE COURT: That's what you're saying.

Okay. Then secondly, secondly, was it the -- and by the way, whatever that laughter was in the background, it's got to stop now.

And I'm going to just pause to let that sink in. It's got to stop now. Just pretend you're in a courtroom because effectively you are.

My second question is this: In any of the other cases that you had talked about, the three circuit court cases that you mentioned, Ms. Sperry, was there -- had the defendant in those cases taken the position, either in the district court or in the Court of Appeals, that they were already doing independently all of the things that they had been directed to do by the preliminary injunction?

MS. SPERRY: In those particular cases, your Honor, they had efforts in place to contain the spread of the virus. The court in some cases was ordering those jail directors to do that, sometimes more than that.

But, yes, they were already taking effective steps to

control the spread of the virus in the jail.

MR. SHANNON: Your Honor?

THE COURT: I am going to ask my question again. I am going to ask that question again, and I'm going to just pull it up on the realtime so I ask it exactly the same way as I asked it before. One second here.

Have the defendants in those cases taken the position, either in the district court or in the Court of Appeals, that they were already doing independently all of the things that they had been directed to do by the preliminary injunction?

Did you hear my question? Have the defendants in those cases taken the position, either in the district court or in the Court of Appeals, that they were already doing independently all of the things that they were directed to do by the preliminary injunction?

MS. SPERRY: Yes.

THE COURT: That's the question.

They did? Which one so I can go look. I want to go look. So tell me which one or which ones. They took that position either in the district court or the Court of Appeals.

MS. SPERRY: My recollection is that it was the Swain case from the 11th Circuit out of Miami-Dade County, and that the position was that they --

THE COURT: Just tell me the cases. No, no, no. I

gave you a really clear question. I asked it three times. You said yes. You said you think it's that case. What other ones?

I can go read them. I'll just go read them. I want to find out if that's what they said, so what's the other one if there is another one?

MS. SPERRY: The other is the Valentine case from the 5th Circuit.

THE COURT: Valentine. Okay. All right. Thank you.

MS. SPERRY: And the third is Roman out of the 9th Circuit.

THE COURT: Okay. So you're telling me, again, we are going back to my question. You're telling me that in each one of those cases if I go back and look, I am going to find that the defendant told either the district court or the Court of Appeals that they were already doing, independently of the preliminary injunction, everything that the preliminary injunction ordered them to do? I'm going to find that there because that was my question, is that right?

MS. SPERRY: That is my recollection as I sit here, your Honor, yes.

THE COURT: Okay.

All right. Right. Let me hear from the plaintiff on the question on the table.

MS. VAN BRUNT: My apologies, your Honor. I didn't

hear that very last bit.

THE COURT: I want to hear from the plaintiffs on the stay issue.

MS. VAN BRUNT: All right. I'll take irreparable harm if that's all right.

I think that the Sheriff's greatest weakness is that there has been and cannot be a showing of irreparable harm where the Sheriff states, as he did, that he is already complying with the preliminary injunction and fully intends to keep complying.

There's also the issue of timing. It's strange that there's been a three-week delay in filing a motion to stay. The harm is irreparable. One would expect that the filing would have come the day after or thereabouts.

There's also the fact that most of the irreparable harm the Sheriff mentioned is speculative, and possible future harm should changed circumstances request or mandate changes to the preliminary injunction. But as we put forth in our brief, the response for that is not a stay, but rather the Sheriff seeking a modification of the decree in accordance of those circumstances with an evidentiary basis for it. And so far there has been no such showing of proof.

Altogether, there hasn't been a showing of irreparable harm, and it's a balancing --

THE COURT: So what about this argument that --

actually, I am going to ask again that everybody who is not talking mute yourself. Everybody, phone, video, everybody, mute yourself. I can tell if you're muting yourself. Okay. So everybody do that right now. Anybody who is not talking, mute yourself.

Okay. So we've got Michael McAndrews who hasn't muted himself. We've got Matthew Hendrickson. We've got somebody named Donna. We've got somebody named Elizabeth Perado. We've got a couple of my law clerks apparently. We got a couple of wireless callers. Mute yourselves, people.

Thanks.

MS. SPERRY: Your Honor, I do think that some of the wireless callers are muted but for some reason don't appear as muted on the participants' list.

THE COURT: Okay. Anyway. What about this argument that the fact that the Sheriff essentially has to operate under scrutiny by a court at the risk of a potential contempt is enough irreparable harm? What do you have to say about that?

MS. VAN BRUNT: Your Honor, obviously, there is some burden involved in operating under a preliminary injunction order, which is why there was such a substantial process to get to this point already. And, of course, there is a level of judicial deference to jailers in operating their jails, that that is not in opposition to the mandates of the

Constitution.

And so in Brown v. Plata, we cite that in our brief, and Ms. Grady is happy to talk about the merits of the case, which is why we are here in the first place because there has been a sufficient showing at this stage of a violation of the Fourteenth Amendment objective reasonableness standard.

So there can't be a stay just because there is some onerous mandate attendant to having a preliminary injunction when there's already been an evidentiary showing that it's necessary.

THE COURT: Okay. So who is going to talk about the other stay factors?

MS. GRADY: Your Honor, I can talk about that.

I think the important thing that we think to keep in mind about Swain and Valentine and I would say the Roman in the 9th Circuit consists of about two or three sentences, so there's really not a discussion there laying out the factors. In fact, they do enforce the stay related to that.

For Swain and Valentine, they look at all of the things, and one of the things they talk about first and foremost is the likelihood of success on appeal. And it's in conjunction with that that they assess the burden on the state official in Valentine and the county in Swain because where they have assessed that the district court failed to properly make findings about the suggested intent, which was required

in both of those circuits, then the harm of having oversight was elevated. So it's all of those factors that have to be taken together.

We argue in our brief about why we think there are no merits arguments here. The Sheriff doesn't identify a legal issue. The arguments in the motion to stay largely disagree with the result that this Court reached but don't attack the evidence of the Court's weighing of that evidence, and there can be no real dispute that there is real harm to plaintiffs, especially given what counsel just identified, which is that if these measures were to suddenly be undone, the risk of infection would by their own admission virtually skyrocket.

The rule they ask for essentially, every jailer is irreparably harmed by anybody looking over their shoulder, which would mean any preliminary injunction involving a municipality or governmental entity would automatically be exempt from any district court preliminary injunction until a Court of Appeals had weighed in.

That's not the law. There's no case that says that, and this Court has to assess all the factors.

THE COURT: Okay.

MR. SHANNON: Your Honor, can I respond briefly, your Honor?

THE COURT: I don't know who that is.

MR. SHANNON: This is Robert Shannon, Bob Shannon on

behalf of defendant.

THE COURT: Briefly, yeah, you can respond briefly.

MR. SHANNON: I want to respond briefly, your Honor, on this notion of -- which we feel strongly about of harm to the Sheriff's Office, and I think the point is that plaintiffs' own actions here add texture to what the circuit cases are talking about, and it's not simply a matter of oversight or someone looking over, us having to look over our shoulder.

Your Honor's order was issued on April the 27th, 80 pages, and it's the emergency nature of how plaintiffs continue to approach this which is unique and which is significant.

This jail spent most of the month of April focused on this piece of litigation compared to others in the middle of trying to deal with a pandemic. It was a tremendous undertaking, extraordinarily burdensome, and we did our emergency work. And we filed our compliance report on May the 1st, and four days later we received a brand new set of emergency discovery requests asking that we respond within 48 hours. That's --

THE COURT: So I'm sorry. I need to interrupt you for a second, Mr. Shannon.

Are you saying the fact that you've got these discovery requests is part of the irreparable harm?

MR. SHANNON: We cannot and what the cases -- yes, your Honor, but if I can explain.

THE COURT: Just be -- can you please just say yes or no, and then you can expound? Is that a part of the irreparable harm?

MR. SHANNON: Yes.

THE COURT: Okay. So I have a follow-up question.

You basically are saying they can't do that, and so if I take that away, then there goes that irreparable harm.

Your position is, legally speaking, A, they can't ask for that discovery; and, B, I can't order it. And so if you're right, then that can't be part of the irreparable harm because it's kind of null and void, so to speak.

MR. SHANNON: If your Honor enters the stay and only then.

THE COURT: No, no, no, no, no. That's not what we are talking about. No, no. Completely independently. You said they can't do that discovery, period, because the preliminary injunction order itself did not contemplate discovery, and there has not been a scheduling order or anything else, and so they can't do the discovery completely independent of the stay.

And so now you're arguing, well, wait a second, Judge, the fact that we have to respond to all of this discovery, that's part of the irreparable harm. So, fine, I

get it. I get that's your argument.

So then that means that if I don't let them do the discovery, there goes that aspect of the irreparable harm, right?

MR. SHANNON: I do believe that, your Honor. But what I believe doesn't mean anything until a court orders it because their own actions have shown that they will continue to file things with an emergency request --

THE COURT: Okay. So if they were calling you on the phone five times a day, would that be irreparable harm, too?

MR. SHANNON: You know, it would be a factor to be considered under the circuit court decisions that say --

THE COURT: I'm sorry for interrupting. Go ahead and finish the point that you were going to make.

MR. SHANNON: And that's -- I'll close with this comment.

That is what is unique about this specific set of discovery requests, your Honor. It wasn't just discovery in the normal course of the permanent injunction. It's assuming non-compliance, asking for information to explore non-compliance under an emergency basis, responding within 48 hours after this jail had already been derailed for one month trying to accommodate the request and dealing with this hearing. And what the circuit court cases say, in a pandemic, a jail should not be subject to that.

THE COURT: Okay. I want to make an observation about that last comment, and then I am going to say what we are going to do going forward.

So I understand that a lot of people had to spend a lot of time dealing with the temporary restraining order motion and the preliminary injunction motion in this case. I understand that.

You just used the word derailed. Now, you can't on the one hand, you can't on the one hand say that we're doing all this stuff; you know, everything that you ordered us to do, we were already doing. As a jail running the jail, you can't say that on the one hand and on the other hand say that the jail was derailed by this lawsuit.

Maybe a bunch of lawyers were derailed by the lawsuit, and I know Mr. Miller had to spend a goodly amount of time on that. I greatly appreciate that. He spent a goodly amount of time on it, but you've got to pick your hyperbole a little bit more carefully. I'm just going to say that.

So here's what we're going to do. I'm going to take under advisement the motion to stay pending appeal. I am going to take under advisement the discovery requests and, I guess, the corresponding motion to strike them.

I'm going to color a little bit outside of the lines here, and if Judge Gettleman has a problem with this, you know, he can undo it obviously, and it's quite all right with

me because it's his case, but I'm going to -- because there is a case beyond the preliminary injunction because the plaintiffs have asked for a permanent injunction. So I'm going to direct the parties to have their -- to submit a proposed scheduling order under 16(b) by a week from next Monday. That's going to go to Judge Gettleman by the 2nd of June.

And so you're to have your conference under 26(f) at some appropriate point between now and then, but that's when the draft scheduling order is due to Judge Gettleman. So that at least as of June the 2nd, or whenever Judge Gettleman enters it, will take off the table at least the theoretical proposition that discovery can't be done absent a court order because the case doesn't end with a preliminary injunction. No case in history has ended after a preliminary injunction unless the parties have settled it, okay, or somebody has changed their mind and given up on it, I don't know.

So everything else is taken under advisement. Nobody has leave to file anything else. I've got plenty enough to work with based on what you've given me and on the arguments you've made today.

(Discussion off the record.)

THE COURT: All right. Thanks, everybody. Have a good rest of the day.

MS. GRADY: Thank you, your Honor.

MS. VAN BRUNT: Thank you.

MR. SHANNON: Thank you.

(Which were all the proceedings had in the above-entitled cause on the day and date aforesaid.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____ _____
Carolyn R. Cox Date
Official Court Reporter
Northern District of Illinois
/s/Carolyn R. Cox, CSR, RPR, CRR, FCRR

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

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.	)	**Case No. 20 C 2134**
THOMAS DART,	)	
Defendant-Respondent.	)	

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

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

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; 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.

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 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.

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)." *Id.* 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 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.

---

[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.

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 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-to-day 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 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 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 WL 1812381, at *14–15.

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

[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 (1981)). The same, of course, is true of a TRO.

this was one of the critical outbreak control measures outlined in the CDC Guidelines. *Id.* 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. *Id.* 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. *Id.* 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. *Id.* 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 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

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

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 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

[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 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.

Discussion

"A preliminary injunction is an extraordinary remedy." *Whitaker ex rel. 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 WL 1876328, at *2, 8–9 (S.D.N.Y. Apr. 15, 2020); *Jones v. Wolf*, No. 20-CV-361, 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.

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 (1992), *superseded by statute on other*

grounds as recognized in Porter v. Nussle, 534 U.S. 516 (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.

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 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 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 WL 1812381, at *3 (collecting cases). Because the plaintiffs cannot satisfy those requirements, the representative class has no likelihood of success on the merits.

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 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 (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.

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.*

[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.

at 360–62; *Bell v. PNC Bank, Nat. Ass'n*, 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 Prod. 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 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. *Id.* at *1–2. For the section 1983 claim, the court found the only common question "apt to drive the

resolution of the litigation," *id.* 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." *Id.* 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 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.

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 WL 1812381, at *6 (comparing, e.g., *Aamer v. Obama*, 742 F.3d 1023, 1032 (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 (2004); *Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979); *Preiser v. Rodriguez*, 411 U.S. 475, 499–500 (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 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 (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 (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 (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 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 (2004) (quoting *Wales v. Whitney*, 114 U.S. 564, 574 (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

[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 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 (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").

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.

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 WL 1812381, at *3 (citing *Lee v. Orr*, No. 13 C 8719, 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).

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. *See 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*, 135 S. Ct. 2466, 247 (2015) (quoting *Graham v. Connor*, 490 U.S. 386, 395 n.10 (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 (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 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 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,

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

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 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.

[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.

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 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 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

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

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 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 (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 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 id.* 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).

The plaintiffs, however, appear to take the position even if prisoner transfers

---

[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).

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, 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 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 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 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 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 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. § 3636(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.* § 3636(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.* § 3636(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 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 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." *Id.* 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. *Id.* 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. § 3636; *Brown*, 563 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 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.* § 3636(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. § 3636(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]

[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.

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 (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 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

MATTHEW F. KENNELLY
United States District Judge