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

ANTHONY MAYS, *et al*.,	)	Case No. 1:20-cv-2134
	)	
Plaintiffs-Petitioners,	)	The Hon. Matthew F. Kennelly
	)	Emergency Judge
v.	)	
	)	The Hon. Robert Gettleman
THOMAS J. DART, Sheriff of Cook County,	)	Presiding Judge
	)	
	)	The Hon. David Weisman
Defendant-Respondent.	)	Magistrate Judge

PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION TO STAY AND TO STRIKE

Plaintiffs, by their undersigned attorneys and per this Court's order (Doc. No. 101), submit the following response in opposition to the Sheriff's motion to stay proceedings pending appeal of the Preliminary Injunction Order and to strike Plaintiffs' discovery requests for lack of jurisdiction.

INTRODUCTION

More than three weeks after this Court entered its preliminary injunction, and more than a week after the Sheriff filed his notice of appeal, the Sheriff has asked this Court to issue a stay that, practically speaking, stops this case in its tracks so that the Sheriff can pursue review in the Court of Appeals, which has suspended briefing until the Sheriff addresses the Seventh Circuit's concerns over its jurisdiction.[1] The Sheriff's motion fails to articulate any persuasive grounds for granting his request. He has not articulated even a plausible likelihood of success on the merits. Both the timing and the contents of his motion defeat any credible argument that the Sheriff will suffer irreparable harm absent a stay. And the Sheriff fails to acknowledge in any

[1] Were the Sheriff genuine in his contention that he will suffer irreparable harm if a stay is not entered, Plaintiffs would expect that he would already have addressed the Seventh Circuit's concerns regarding jurisdiction and requested an expedited briefing schedule.

meaningful fashion the substantial harm that the Sheriff's request would impose on Plaintiffs, whose very lives are at stake should the Preliminary Injunction be undone. The request to stay should be denied.

The Sheriff's stay motion is also aimed, once again, at preventing Plaintiffs and the class they represent from investigating the true conditions inside the Cook County Jail. Over the past weeks, Plaintiffs have amassed voluminous evidence of non-compliance, including the Sheriff's own admissions and declarations submitted on behalf of correctional officers and detainees—evidence that the Sheriff consistently and disrespectfully denigrates.[2] Further evidence submitted here shows that life in the Jail is not as the Sheriff describes. Declaration of Detainees (Ex. A hereto). This is of particular concern in light of new statistical evidence concerning the population of detainees: 1000 individuals are incarcerated, in the dangerous conditions, because they cannot pay a monetary bail amount, including over 100 who are incarcerated for inability to pay $1,000 or less. *See* Dec. of Sarah Staudt (Ex. B hereto). Many others are jailed awaiting trial on misdemeanors or on Class 4, non-forcible felonies. *Id.*

In short, conditions at the Jail remain dire. And the Sheriff has failed, again, to suggest why Plaintiffs have not met good cause for expedited discovery into what the Sheriff is doing to protect people's lives. As the Court retains jurisdiction over enforcement of its own order, the

[2] The Sheriff takes issue with the reliability of the Plaintiffs' submission of detainee declarations, which provide the parties and the Court with some insight into life behind the walls of the Jail during this pandemic. The lone case the Sheriff cites for this dismissive argument provides no support to his position. In *Hudson v. Preckwinkle,* the district court took issue with the expert's "heavy reliance" on unsworn declarations. *Hudson v. Preckwinkle,* 2015 WL 1541787, at *11 (N.D. Ill. Mar. 31, 2015). Far from stating that such declarations have no place before a district court, the court in *Hudson* wrote that reliance on such declarations was just one factor that went to the weight of the expert's conclusions. *Id.* For the Sheriff to dismiss the detainee declarations as non-probative, while at the same time resisting formal discovery mechanisms at every turn, suggests the Sheriff believes his actions are beyond review.

Sheriff's motion to strike should also be denied.

ARGUMENT

I. THE DISTRICT COURT RETAINS JURISDICTION OVER ENFORCEMENT OF THE PRELIMINARY INJUNCTION SO THAT THE MOTION TO STRIKE IS UNFOUNDED.

This Court has jurisdiction to order discovery into the Sheriff's compliance with the preliminary injunction, and to enter orders regarding the Sheriff's lack of compliance. *Union Oil Co. of Calif. v. Leavell*, 220 F.3d 562, 565-66 (7th Cir. 2000) (citing Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 16 Fed. Prac. & Proc. Juris. § 3921.2 (2d ed. 1996)); *Chrysler Motors Corp. v. Int'l Union, Allied Indus. Workers of Am., AFL-CIO*, 909 F.2d 248, 250 (7th Cir. 1990). In *Union Oil*, the Seventh Circuit held that a party's notice of appeal of an interlocutory injunction "does not stay enforcement of a district court's order. . . . A notice of appeal divests the district court of its control over those aspects of the case *involved in the appeal*, but whether the address of an injunction has complied is not a subject involved in the appeal." 220 F.3d at 565-66 (internal quotation marks and citations omitted) (emphasis in original); *Chrysler Motors Corp.*, 909 F.2d at 250 ("An interlocutory appeal does not divest the district court of jurisdiction . . . to determine whether the [the plaintiff] violated the injunction"); *Planned Parenthood of Wisc., Inc. v. Van Hollen*, 2013 WL 12233948, at *1-2 (W.D. Wis. Aug. 15, 2013) (permitting discovery to proceed despite pending appeal of preliminary injunction, but staying trial date). This is a commonsense application of the law—to hold otherwise would invite a party to flout an injunction's terms merely by filing an appeal.

Yet, Defendant argues this Court has no jurisdiction to entertain Plaintiffs' request for evidence, relying solely on *Bradford-Scott Data Corp. v. Physician Computer Network*, 128 F.3d 504, 505 (7th Cir. 1997) for this position. But the Seventh Circuit's opinion actually supports the

exercise of jurisdiction over Plaintiffs' discovery requests (as well as over any additional relief that may stem from the answers to those requests). *Bradford-Scott* holds that district courts retain jurisdiction to "conduct proceedings looking toward permanent injunctive relief while an appeal about the grant or denial of a preliminary injunction is pending." *Bradford-Scott Data Corp.*, 128 F.3d at 505; *see also Wisc. Mut. Ins. Co. v. United States*, 441 F.3d 502, 504 (7th Cir. 2006) (rule that filing of a notice of appeal divests the district court of jurisdiction of aspects of the case involved in the appeal "has several qualifications . . . perhaps the foremost of which is that an appeal taken from an interlocutory decision does not prevent the district court from finishing its work").

Defendant further avoids the straightforward teachings of Seventh Circuit precedent by arguing that Plaintiffs' request for discovery constitutes, in effect, a request for modification of the existing preliminary injunction. Def. Mot. at 7. The law is to the contrary. Plaintiffs have already provided significant support for the proposition that they are entitled to discovery into the Sheriff's compliance with the Court's injunctive order. *See* Doc. No. 93-1.[3] Those cases are in line with Rule 26(d) of the Federal Rules of Civil Procedure, which expressly permits courts to enter orders modifying the timing and sequence of discovery. Fed. R. Civ. P. 26(d)(1)-(3); *Restoration Hardware, Inc. v. Haynes Furniture Co.*, 2017 WL 3597518, at *2 (N.D. Ill. Mar. 13, 2017) (recognizing that Rule 26(d) authorizes a court to order expedited discovery); *Ibarra v. City of Chicago*, 816 F. Supp. 2d 541, 554 (N.D. Ill. 2011) (same).

[3] Defendant's brief, Def. Mot. at 8, n. 2, states that he was unable to access the cases cited by Plaintiffs in their reply brief, Doc. No. 93-1, that support this position: *United States v. Chappelle*, No. 118CV00943RLYTAB, 2019 WL 549379 (S.D. Ind. Jan. 4, 2019); *United States v. Jackson*, No. 1:18-CV-2000, 2018 WL 2731224 (N.D. Ill. May 17, 2018); *United States v. U.S. Contracting, LLC*, No. 1:15-CV-01536-WCG, 2016 WL 6995368 (E.D. Wis. Aug. 4, 2016). Plaintiffs checked the citations again and they are correct. They are also attached hereto as Exhibit C.

The consequence of Defendant's argument—that an order allowing discovery into compliance with a court injunction is itself a separate injunction—would entitle every party who disagreed with a district court's discovery orders to an appeal as of right. 28 U.S.C. § 1292(a). Defendant has cited no legal authority for such a startling proposition. To the contrary, the Seventh Circuit has repeatedly characterized discovery orders as the quintessential type of order not subject to interlocutory review. *See, e.g., Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009) ("[T]he rule remains settled that most discovery rulings are not final."); *Reise v. Bd. of Regents of Univ. of Wisc. Sys.*, 957 F.2d 293, 294 (7th Cir. 1992) (Discovery orders "even exceedingly burdensome discovery orders" are not appealable on an interlocutory basis) (collecting cases).

Plaintiffs' request is for access to discovery materials in order to permit them to determine whether, and to what extent, the Sheriff is complying with the Court's preliminary injunction order. *See* Doc. Nos. 85, 93-1. Such a request, and any subsequent motion practice regarding compliance should discovery indicate that the Sheriff is flouting the Preliminary Injunction, is well within this Court's jurisdiction, regardless of the pendency of Defendant's appeal of the injunction itself. *Union Oil Co.*, 220 F.3d at 565-66; *Chrysler Motors Corp.*, 909 F.2d at 250.

II. THE SHERIFF IS NOT ENTITLED TO A STAY OF DISTRICT COURT PROCEEDINGS PENDING RESOLUTION OF THE APPEAL.

Defendant sets forth the standard for a stay, which mirrors the preliminary injunction standard. Def. Mot. at 9. He cannot meet it and his motion for a stay should be denied.

A. The Sheriff is Unlikely to Succeed on the Merits Before the Seventh Circuit as this Court Correctly Ruled that the Sheriff was Objectively Unreasonable in His Handling of the COVID Pandemic in the Jail.

Defendant is unlikely to prevail on the merits of his appeal of this Court's preliminary injunction.

This Court's April 27, 2020 memorandum opinion and order, detailing the reasons for its preliminary injunction, was thorough in its discussion of both the evidence submitted by the parties and the controlling law. Although the Sheriff contends that "the district court misapplied the legal standard[,]" Doc. No. 98-1 at 9, he offers no meaningful challenge to this Court's citation to or interpretation of controlling precedents. To the contrary, the Sheriff's brief concedes that this Court properly determined that Plaintiffs' Fourteenth Amendment claims require an inquiry into the objective reasonableness of the Sheriff's conduct, based on the particular facts of the case at hand. *Compare* Doc. No. 98-1 at 10, *with* Doc. No. 73 at 52-54. And the Court, like the Sheriff, recognized that in assessing the Sheriff's objective reasonableness, the Court must "account for [the Sheriff's] legitimate interest in managing the Jail facilities" and "defer to policies and practices that are needed to preserve internal order and discipline and to maintain institutional security." Doc. No. 73 at 58 (internal quotation marks omitted); *see also* Doc. No. 98-1 at 10 (quoting virtually identical language). But the Court also properly recognized that judicial deference to jailers is not limitless; it is circumscribed by the Constitution, and in this case, by the Fourteenth Amendment. *See Brown v. Plata*, 563 U.S. 493, (2011) (although courts must extend deference to prison officials, courts "nevertheless must not shrink from their obligation to enforce the constitutional rights of all persons, including prisoners." (internal quotation marks omitted)).

The closest the Sheriff comes to identifying a legal issue he contends the Court got wrong is in arguing that the CDC's Guidance that social distancing may not be feasible in correctional settings is dispositive on the question of objective reasonableness. But the Court's application of Seventh Circuit precedent on this issue is above reproach. The Court correctly recognized the CDC Guidelines can be regarded as "an important piece of evidence to consider in assessing the Sheriff's conduct," without assigning them dispositive effect . Doc. No. 73 at 61; *see also id.* at

59-62 (discussing *United States v. Brown*, 871 F.3d 532 (7th Cir. 2017); *Carroll v. DeTella*, 255 F.3d 470 (7th Cir. 2001); *Thompson v. City of Chicago*, 472 F.3d 444, 454 (7th Cir. 1996)). The Sheriff's brief cites to no authority (binding or otherwise) that meaningfully disputes the Court's application of Seventh Circuit precedents to this case.

Instead, the Sheriff's motion simply disagrees with the conclusion that this Court reached. The Court came to that decision after a careful review of the voluminous evidence submitted by the parties, and an evidentiary hearing where both sides were permitted to offer expert testimony and argument regarding the motion for a preliminary injunction. Doc. No. 73 at 3-8, 11-28. And this Court's opinion provided a thorough reasoning as to why the evidence supported its injunction. *Id.* at 53-66. In determining that Plaintiffs were entitled to a preliminary injunction, this Court addressed the wealth of evidence in the record supporting its conclusion that hygiene, sanitation, PPE, and social distancing provisions were necessary—and narrowly tailored remedies—to protect against uncontrolled spread of COVID-19. *Id.* at 83-87. And the Court, in both its April 27 opinion and its earlier April 9 TRO decision, explained the evidence that enabled the Court to conclude that the Sheriff was not taking the actions necessary to protect Plaintiffs' health and safety. Doc. No. 47 at 18-20. On appeal, those factual determinations will be reviewed for clear error. *Valencia v. City of Springfield*, 883 F.3d 959, 966 (7th Cir. 2018); *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015) ("[W]e give substantial deference to the court's weighing of evidence and balancing of the various equitable factors.").

They are not clearly erroneous. And the Sheriff's brief does not meaningfully dispute the evidence. Instead, the Sheriff regurgitates a list of things the Sheriff did before the lawsuit was filed, including creating teams, holding meetings, and talking to people about the impending threat of COVID-19. Doc. No. 98-1 at 10-11. He does not dispute the Court's findings that at the time

of the Court's TRO and preliminary injunction, the injunctive measures ordered by the Court were not in place. And he does not dispute the Court's findings that hygiene, sanitation, PPE, and social distancing—the measures at issue in the Court's preliminary injunction—were and are necessary to control the spread of COVID-19 and protect people's lives. Instead, he contends that because he took various actions "in good faith," Def. Mot. at 12, 17, 18, he is immune from constitutional compliance, regardless of the reasonableness of those actions to address the threat of harm. That view has been squarely rejected by the Seventh Circuit. *Hardeman v. Curran*, 933 F.3d 816, 821 (7th Cir. 2019) (defendant's "motive" in taking action is not relevant to objective reasonableness inquiry). The Sheriff has raised no meritorious challenge to this Court's preliminary injunction order.

The Sheriff also argues throughout that, regardless of the merits of his challenge to the preliminary injunction order, the Court should stay this case simply because the preliminary injunction subjects the Sheriff to oversight by this Court. These arguments are unpersuasive. In its preliminary injunction opinion, this Court properly balanced its simultaneous responsibilities to exercise deference to the Office of the Sheriff, and to enforce the constitutional rights of detainees at the Jail. Doc. No. 73 at 58-59; *Brown*, 563 U.S. at 511 ("Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.").

The Sheriff relies on *Swain v. Junior*, ___ F.3d ___, 2020 WL 2161317 (11th Cir. May 5, 2020), and *Valentine v. Collier*, 956 F.3d 797 (5th Cir. 2020), to bolster his deference arguments. But *Swain* and *Valentine* cases are easily distinguishable from this case, primarily because they rest on different legal standards. The Eleventh Circuit issued a stay in *Swain v. Junior* after finding that the district court did not properly address, and the plaintiffs did not provide, evidence

sufficient to establish, the defendants' subjective intent. 2020 WL 2161317, at *4 (noting the lack of evidence "to establish that the defendants subjectively believed the measures they were taking were inadequate"). The stay order in *Valentine* was similarly reliant on a finding that that the district court improperly "treat[ed] inadequate measures as dispositive of the [d]efendants' mental state." *Id.* at 802; *see also id.* (noting the lack of evidence "that [defendants] subjectively believe the measures they are taking are inadequate").

As the Sheriff has acknowledged, his actions in this case must be evaluated according to a standard of objective reasonableness. *See, e.g.,* Def. Mot. at 10. This Court properly applied that standard and candidly recognized that Plaintiffs would have failed to meet their burden if deliberate indifference governed their claims. Doc. No. 73 at 56. This Court's opinion is thus very different from the district court injunctions at issue in *Swain* and *Valentine*, and the Sheriff has offered no argument that this Court committed any legal errors in assessing objective unreasonableness, or that Plaintiffs failed to provide sufficient evidence that the Sheriff's actions were objectively unreasonable.[4]

The cases, which in any event are not binding in this Circuit, are also distinguishable on the facts. For instance, the Eleventh Circuit in *Swain* identified specific and concrete countervailing interests that counseled against the preliminary injunction, finding that the district court's order that detainees be provided with soap and hand sanitizer would divert supplies of those products from other county facilities where they would be more critical. *Swain*, 2020 WL

[4] Defendant also cites to *Roman v. Wolf*, 2020 WL 2188048 (9th Cir. May 5, 2020), Def. Mot. at 15, but *Roman* actually supports Plaintiffs' position. The Ninth Circuit in *Roman* partially granted a motion to stay the district court's preliminary injunction order, but refused to stay the part of the order that required the prison to comply with the CDC's guidance governing correctional facilities. Given that much of this Court's Preliminary Injunction directly encompasses that guidance, *Roman* also advises against delay in the Order's implementation.

2161317, at *5. Likewise, *Swain* expressed concern that the district court's testing requirements would divert testing resources from other facilities. *Id.* The Sheriff has made no related claims here.

B. The Sheriff Has Not Demonstrated He Will Suffer Irreparable Harm Absent a Stay

The Sheriff's arguments about the irreparable harm he will suffer in the absence of a stay similarly amount to no more than a preference to operate without judicial oversight. *See, e.g.*, Def. Mot. at 13 ("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."). The substance of any claims extending beyond this simple truth ring hollow.

As a preliminary matter, the Sheriff cannot credibly assert that he is being "irreparably harmed" by an opinion that was issued over three weeks ago. *Cf. Arjo, Inc. v. Handicare USA, Inc.*, 2018 WL 5298527, at *9 (N.D. Ill. Oct. 25, 2018) (delay in preliminary injunction filing "undermines the moving party's argument that it will suffer irreparable harm") (citing cases); *see also New York v. United States Dep't of Commerce*, 339 F. Supp. 3d 144, 148 ("inexcusable delay in filing a motion to stay severely undermines the….argument that absent a stay irreparable harm would result." (citing *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir. 1993)). In the interim weeks, the Sheriff has filed a compliance report, a brief opposing Plaintiffs' discovery requests and a notice of appeal to the Seventh Circuit, *see* Doc. Nos. 84, 87, and 88-90; at no time before yesterday did he seek to stay the implementation of the Order. And he does not present any arguments here as to why he is subject to irreparable injury in this present moment, as opposed to when the Order was first entered.

Indeed, the Sheriff's arguments of irreparable injury are all entirely speculative. The Sheriff claims that a stay is appropriate because the Order hamstrings him from acting in accordance with changed circumstances, for instance, in the event new CDC guidance is published that requires him to alter protocols in the Jail. Def. Mot. at 16. But the theoretical possibility of "changed circumstances" does not warrant a stay when Defendant has failed to show an actual injury. *See In re Heotis*, 17 C 886, 2017 WL 4310513, at *5 (N.D. Ill. Sept. 28, 2017) ("A movant's fear of harm occurring that is only speculative is insufficient to meet the definition of an irreparable injury.") (quoting *In re Quade*, 496 B.R. 520, 527–28 (Bankr. N.D. Ill. 2013)). Further, if the Sheriff believes that new evidence entitles him to a modification of the terms of the Preliminary Injunction, he can and should move to modify the order. *Cf. Commodity Futures Trading Com'n v. Battoo*, 790 F.3d 748, 750 (7th Cir. 2015) (court may grant modification of preliminary injunction where the movant "has demonstrated that changed circumstances make the continuation of the injunction inequitable.").[5] That he has not done so suggests that nothing *has* changed, and that the Order is, as Plaintiffs have repeatedly shown (*e.g.*, Doc. Nos. 85, 93-1), appropriate and absolutely necessary to ensure the protection of detainee lives. *See* Section II(C), *supra*.

The Sheriff also argues that a stay is appropriate since the Court order amounts to a mandate of compliance with his "own policies," Def. Mot. at 16. He asserts that these policies have been "highly successful" in decreasing the rate of infection in the Jail, *id*. at 2, 18 ("There can be no doubt that the policies and procedures the Sheriff implemented at the Jail…are responsible for this remarkable result."), and that he "has and will continue" to implement those policies, *id*. at 18. First, if it is the Sheriff's position that the Court order only codifies the Sheriff's already-existing

[5] The Sheriff decries the fact that the Preliminary Injunction is "open ended." Def. Mot. at 13. Again, if the Sheriff has evidence to show the Order is no longer necessary, he should move to modify or revoke the terms of the Injunction.

official procedures, then it is hard to fathom how the continuation of the Order impedes his ability to run the Jail. *Hinrichs v. Bosma*, 440 F.3d 393, 402 (7th Cir. 2006) (denying motion to stay and finding no irreparable harm where injunction ordered same action as movant's stated practice). He provides no explanation on this point.

Second, as the Sheriff tacitly admits, conditions in the Jail have undeniably improved as a result of the Preliminary Injunction. *See* Def. Mot. at 4-6 (describing an increase in the number of tests administrated and the declining positive rate since mid-April). It is Plaintiffs' position that the Sheriff is not in full compliance with the order as a practical matter, and seek discovery as to his failure to implement sufficient testing and social distancing on the ground. *See* Doc. Nos. 85 and 93-1. But to the extent the Sheriff states that he is being irreparably injured by the continuation of a preliminary injunction that (as he admits) have demonstrably enhanced the welfare of detainees in his custody, it is difficult to perceive a more misguided argument.

In short, the Sheriff has failed to provide any evidence beyond mere speculation that the existing Order subjects him to any harm, let alone the irreparable kind.

C. Plaintiffs Will Be Substantially Injured if this Court Orders a Stay

In contrast, should a stay issue, Plaintiffs will suffer the very real and irreparable harm of increased risk to their health and life. *Cf. Wilson v. Williams*, 2020 WL 2308441 at *2 (N.D. Ohio May 8, 2020) (rejecting a request to stay preliminary injunction ordering the transfer of prisoners vulnerable to coronavirus because, among other things, the prisoners' potential injuries in event of a stay, which included "serious medical complications and possible death,") ("[I]t would be hard to overstate how much more serious the potential injuries to Petitioners are compared to those cited by Respondents.").

The Sheriff contends that staying the court's preliminary injunction would not harm the plaintiff class because (a) he is doing and intends to continue doing all that the preliminary injunction requires, and (b) the Sheriff's recent testing results demonstrate that the coronavirus is currently being managed in the Jail. These arguments simply lack merit.

First, it is deeply discordant for the Sheriff to insist that all is well within the Jail, and thus there would be no harm to Plaintiffs if the injunction were stayed, while at the same time continuing his vehement opposition to Plaintiffs' efforts to obtain limited discovery that would shed light on the realities behind Jail walls. The Sheriff's explanations and assurances regarding protection of the detainees in his care have been inconsistent and obfuscatory.

For example, in his May 1 report regarding compliance, the Sheriff complained that the preliminary injunction made it "more difficult to guarantee [the] protection" of protective custody detainees at heightened risk of sexual assault. *See* Doc. No. 84 at 14. When Plaintiffs sought discovery regarding the housing of this group of vulnerable detainees, the Sheriff countered that they "remain fully protected," even though they may encounter general population detainees in common areas and dayrooms. *See* Sheriff's 5/11/20 Response (Doc. No. 87-1) at 23. The Sheriff has never furnished an explanation of where these vulnerable detainees are housed—and he refuses to do so. There is similar opacity as to *all* Jail operations that pertain to the preliminary injunction and on which Plaintiffs have sought discovery. The justifications for housing detainees in close quarters on special needs RTU tiers are simply the Sheriff's say-so. The Sheriff adamantly opposes Plaintiffs' request to clarify, as to the specific detainees, the reasons why the Sheriff has determined they must be in housing that does not permit social distancing. Similarly he refuses to provide any clarity as to who is being tested in quarantine and on what metrics.

As an additional example, the Sheriff's account of the extent of coronavirus infection in the Jail has evolved. In early April, as the number of positive cases was increasing to an alarming number, the Sheriff's website began an idiosyncratic system of dividing the number of positive test results—separately reporting those who were "currently" positive and those who are "no longer positive and are being monitored at a recovery facility in the Jail." *See* https://www.cookcountysheriff.org/covid-19-cases-at-ccdoc/. The Sheriff's recent filing now reveals *three* categories of positive test results: "positives in isolation," "convalescent detainees" (described on the website as "no longer positive"), and "post-convalescent detainees" (also, presumably, "no longer positive" and also in "regular housing"). *See* Doc. No. 98-4. The exhibit now clarifies what the website has hidden for more than a month—the total number of known infections within the Jail from March 23 to the present, which equals 811 known infections (counting the seven who have passed away). *See id.*; and *compare* https://www.cookcountysheriff.org/covid-19-cases-at-ccdoc/ (reporting only 542 current and formerly positive cases).

In short—the Sheriff has not been transparent. He continues to take notable efforts to close the curtain on the Jail's operations. For these reasons, among others, there is "good cause" to allow the expedited discovery that Plaintiffs are seeking. Doc. Nos. 85, 93-1. But, in any event, the court should hesitate to simply trust the Sheriff's assurances that, with a stay, the health and safety of the detainees in the Jail will not be compromised.

Second, the Sheriff offers a false history of the events that preceded and followed the court's temporary restraining order and preliminary injunction. On April 9, when the TRO was entered, there were 312 known positive COVID-19 cases in the Jail. All of the cases had been identified in the span of just 18 days (from March 23) and the rate of increase was deeply

disturbing. *See* Doc. No. 98-4. Contrary to the Sheriff's public statements (at a press conference on March 27, the Sheriff Dart said "in the next day or two we'll have everyone in some type of single cell" (*see* https://www.facebook.com/196166530417661/videos/1455986534583494/)), many detainees were in double cells and dormitories long after this court's April 7 TRO. *See* Ex. 1 to Michael Miller 4/17/20 Dec. (Doc. No. 62-5) (showing close to 1500 detainees in double cells or dormitories as of April 17). Testing was limited; lack of tests rendered it infeasible for the Sheriff to test asymptomatic detainees. *See* Defendant's Post-Ruling Report (Doc. No. 51) at 12 (no testing of quarantined detainees who has been exposed to symptomatic or positive detainees). Bullpens were being used during the intake process. Throughout the Jail's divisions, there were complaints about lack of personal protective equipment (particularly masks) and lack of supplies for personal hygiene and for sanitation. *See, e.g.,* Doc. Nos. 1-10 through 1-19 (detainee declarations attached to Plaintiffs' 4/3/20 complaint); Doc. No. 55-5 (detainee declarations attached to Plaintiffs' 4/14/20 renewed motion for summary judgment); Doc. No. 64-5 (detainee declaration attached to Plaintiffs' 4/19/20 reply in support of renewed motion for preliminary injunction).

The TRO and the preliminary injunction pushed the Sheriff to make significant changes in Jail operations: (1) the Sheriff has discontinued the use of bullpens at intake and enforces social distancing there (*see* Doc. No. 51 at 3-7 (describing social distancing and other precautionary procedures implemented on April 10 in response to the TRO)); (2) the Sheriff has eliminated double celling and greatly reduced dormitory housing while enabling social distancing in most dormitory tiers (*compare* Michael Miller 4/6/20 Dec. Ex. 1 (Doc. No. 30-8) (showing occupancy levels in early April) *with* Michael Miller 4/17/20 Dec. Ex. 2 (Doc. No. 62-5) (showing reduced occupancy levels in dorms and single-celled tiers)); (3) the Sheriff has increased testing capacity

and tests (some) asymptomatic detainees (*see* Doc. No. 98-5 at 5 ("[o]n or about April 16, Cermak began testing asymptomatic detainees")); (4) by the Sheriff's report, massive efforts have been undertaken to secure PPE, sanitation supplies and personal hygiene materials, and to educate detainees and staff about their use (*see, e.g.,* Doc. Nos. 84-5 through 84-9 (listing sanitation and hygiene efforts within the Jail as of 5/1/20)).

The Sheriff makes much of the apparent decrease in the rate of new coronavirus infections among detainees in the Jail in the past four weeks. *See* Doc. No. 98-1 at 5. If the rate of infection is indeed slowing, it is hard to escape the conclusion that that outcome is the product of the court's intervention and the Sheriff's efforts to comply with the TRO and the preliminary injunction. When this case began—whatever the state of the Sheriff's planning and efforts at mitigation—the Jail was a national hotspot for coronavirus infection; the number of cases was multiplying at an alarming rate. If, taking the Sheriff at his word, the rate of infection has now leveled off, the most plausible inference is that the improvement has been driven by the court's intervention—not by the Sheriff's January planning.

Third, whatever the successes that have been achieved by virtue of the preliminary injunction, those successes are not grounds for a stay. *Cf. United States v. Oregon State Med. Soc.*, 343 U.S. 326, 333 (1952) ("[t]he sole function of an action for injunction is to forestall future violations"). If the spread of infection has indeed slowed as the Sheriff claims, that is reason to double down on the measures that have led to that result—social distancing, personal protection, hygiene and sanitation. This is hardly the time to let up on the pressure.

But more concerning, the Sheriff has made it abundantly clear that he has no ability and no intention to comply with the preliminary injunction's social distancing requirements in the event the Jail's population increases. The Sheriff staked out that position in his May 1 report regarding

compliance with the preliminary injunction, arguing there that it would not be feasible to continue social distancing within the Jail should the population rise above current levels, as is to be expected during the summer months. *See* Doc. No. 84 at 18-21.

The Sheriff reiterates the point in his motion for stay—complaining that the preliminary injunction will hinder operations by forcing him to request a "permission slip" in order to abandon social distancing in the event of a population increase. *See* Doc. No. 98-1 at 16. The Sheriff seeks a stay, in other words, because, perversely, he wants freedom from the requirement of social distancing in particular—chief among the measures that has led to the slowed rate of infection.

In contrast to the harms about which the Sheriff complains, the risk of irreparable harm to Plaintiffs is "hard to overstate." *Wilson*, 2020 WL 2308441 at *2. Seven detainees have died. Many remain infected. Many more have not been tested. The uncertain path of the coronavirus is well known to all of us. The risk to which Plaintiffs would be exposed if a stay were granted are enormous. They are, quite simply, risks that should not be taken.

D. Issuance of a Stay Will Harm the Public Interest.

It is always in the public interest for public figures to comply with the Constitution. *See, e.g., Whole Woman's Health Alliance. v. Hill,* 937 F.3d 864, 875 (7th Cir. 2019) ("Enforcing a constitutional right is in the public interest."); *Heitmann v. City of Chicago*, 2008 WL 1943239, at *5 (N.D. Ill. May 1, 2008) ("we also must consider the public interest in ensuring that defendant is in compliance with federal law"). Since the preliminary injunction in this case does no more than require such compliance, it necessarily follows that granting a stay would disserve the public interest.

Moreover, the coronavirus pandemic presents the extraordinary circumstance where an elevated risk of infection to persons confined *within* the Jail necessarily elevates the risk of

infection to persons *outside* the Jail—a risk that is actualized every time a corrections officer, other Sheriff's employee, contractor or others having business in the Jail enters and then leaves the facility. The Jail's walls cannot stop the spread of coronavirus. The public interest would be directly and significantly disserved by a stay that enabled relaxation of measures to control the spread of coronavirus.

The Sheriff's description of *Nken v. Holder*, 556 U.S. 418 (2009) misstates the case. The Court in *Nken,* a case about stays of removal orders in the immigration context, noted that the public has competing interests in "preventing aliens from being wrongfully removed" and in "prompt execution of removal orders." 556 U.S. at 436. To the extent the government in *Nken* also sought prompt execution of removal orders (the government opposed the stay), the court observed that the government's interest and the public interest merged. *Id.* But that is a far cry from broad, indefensible proposition that the Sheriff advocates—that the government's position somehow and always defines the public interest. For that proposition there is no support of which Plaintiffs are aware. And the facts of this case make very clear that the public has every interest in seeing the preliminary injunction order remain in force and the lives of detainees remain protected. *See Johnson v. Loftus*, 2008 WL 4542952, at *3 (N.D. Ill. Apr. 1, 2008) ("the public has a significant interest in ensuring that individuals are not imprisoned in violation of the Constitution").

CONCLUSION

For the foregoing reasons, Plaintiffs' respectfully request that this Court deny Defendants' Motion to Stay Proceedings Pending Appeal and to Strike their Discovery Requests.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alexa Van Brunt, an attorney, hereby certify that on May 20, 2020, I caused a copy of the foregoing to be filed using the Court's CM/ECF system and served upon all counsel who have filed appearances in the above-captioned matter.

/s/ Alexa A. Van Brunt
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