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 No.: 20-cv-2134 Hon. Matthew F. Kennelly, Judge Presiding, in his capacity as Emergency Judge

APPELLANT'S REPLY BRIEF

Gretchen Harris Sperry
Robert T. Shannon
James M. Lydon
Adam R. Vaught
Lari A. Dierks
HINSHAW & CULBERTSON LLP
151 North Franklin Street, Suite 2500
Chicago, IL 60606
(312) 704-3521
Counsel for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **PAGE**

Other Authorities

ARGUMENT

The essence of the Sheriff's argument on appeal is that the district misapplied the objective reasonableness test because it narrowly focused on social distancing efforts to the exclusion of all else, rather than view them in the context of the comprehensive coronavirus response efforts. Plaintiffs spill much ink highlighting their nine experts' "uncontested opinions" that social distancing is a necessary part of any coronavirus response plan, as though the Sheriff has made no effort to maximize distancing throughout the Jail. Plfs. Br. 43, p.30, 33-34. The Sheriff has never disputed that social distancing is important, but it—like testing, isolation, hygiene, PPE, and sanitization, for example—is one of many measures that must be implemented to effectively contain the spread of infection. The district court failed to account for that when it found the Sheriff's social distancing measures unreasonable and unconstitutional.

The question before this Court is whether, under the recognized authority of the CDC Guidance for correctional facilities, and relative to actions taken by other reasonable jailers across the country facing similar unprecedented issues (and lawsuits), the Sheriff acted reasonably to contain the spread of the virus at the Jail. Because the district court failed to properly apply the objective reasonableness standard—by narrowly

focusing on social distancing to the exclusion of all else, by focusing on the number of COVID-positive detainees as opposed to the Sheriff's containment efforts, by ordering the Sheriff to do what he already had been doing without the existence of an underlying constitutional violation—it erred as a matter of law. Plaintiffs contend that the court's findings and conclusions are entitled to unquestioned deference and are beyond all scrutiny. On the facts and the law, the district court erred in entering the injunction and it must be vacated.

I. The court not only misapplied the objective reasonableness test by failing to analyze the complete scope of the Sheriff's conduct, its conclusions are also contradicted by undisputed facts.

As argued in the Sheriff's opening brief, the district court improperly applied the objective reasonableness standard because it failed to consider the totality of the Sheriff's efforts to prepare for and respond to a possible coronavirus outbreak, and instead focused only on social distancing measures. Def. Br., p.24-34. Even if the court was correct in analyzing the objective reasonableness of social distancing measures in isolation, as Plaintiffs contend, it still erred in applying the standard.

In its April 9 TRO order, the district court acknowledged the Sheriff's "ongoing effort[s] to modify custodial arrangements" at the Jail to "permit greater separation of detainees," but "complete social

distancing" was not possible in the housing areas of the Jail because of "space constraints." R.281-82. In reaching that conclusion, the court considered and relied on the CDC Guidance, which "expressly recognizes" these limitations on full social distancing and suggests modifications to implement social distancing wherever possible, as space permits. R281-82. The Guidance also suggests that jailers work with their local health departments to develop strategies specific to their facilities.

The Sheriff continued ongoing efforts to maximize social distancing in the housing and common areas of the Jail, following the very Guidelines—and the very interpretation of those Guidelines—sanctioned by the district court. These efforts began in mid-March, when the Sheriff worked with criminal justice stakeholders to identify eligible detainees for release, resulting in a nearly 25% decrease in the jail population. ECF#87-1, p.8-9. He also began the process of opening four previously-closed divisions of the Jail (and recently opened a fifth division), which involves cleaning, furnishing, reconnecting utilities, staffing, and arranging meal and medical deliveries, among other things, on a very expedited schedule. *Id*., p.9; R104, R114-15. His advisors also asked representatives from CDPH and the CDC to tour the Jail and make recommendations for socially-distanced housing, among other things. ECF#70.

Within weeks, the first of these renovated divisions became available and, through the efforts of Executive Director Michael Miller, detainees began moving into single cells or new dorms. By April 17, Director Miller had moved an additional 2,130 detainees into single-celled housing (2,521 total), an increase of 545%. He reduced the number of double-celled detainees by 93% (from 3,906 to 260). Nearly all of the dorms in the general population tiers were occupied at 50% capacity, aside from those in Division 8 Cermak or RTU, or in quarantine or isolation. ECF#62-5, p.2-3, 7.

However, as the Sheriff often explained in the district court, there are certain areas of the Jail where full social distancing simply is not possible:

> (a) Quarantine, isolation, and convalescent housing. Quarantined detainees have been exposed to a symptomatic detainee and their movement is restricted for 14 days to prevent possible transmission. If they were double-celled or in a fuller capacity dorm at the time of quarantine, they must remain there until the observation period ends. According to the CDC, those in medical isolation and convalescence may be housed in separate cohort housing areas. R113-14; ECF#30-6, p.2-3; ECF#30-8, p.6.

(b) Self-harm. There is a contingent of detainees whom Cermak doctors believe are at risk for suicide or self-harm and cannot be single-celled. R134-44.

(c) Cermak and RTU. Detainees housed in Division 8, which contains Cermak Hospital and RTU, have severe medical or mental health needs and these housing areas are equipped to treat those conditions. Due to the number of detainees who need these specialized medical facilities, it is not possible to fully social distance here and they may need to be double-celled or in dorms over 50% capacity. R105-06; ECF#62-5, p.3.

(d) Dorm capacity. Director Miller testified that of the 300 detainees assigned to dorms outside of Division 8, virtually all were operating at less than 50% capacity, and he intends to further reduce capacity as space becomes available. R117-18; R145-47. With these modifications or exceptions, the Sheriff could otherwise implement full social distancing in all of the housing areas in the Jail. ECF#62, p.18-22.

Aside from these few instances, Director Miller was able to implement full social distancing in the housing tiers.

Nevertheless, the district court concluded that the Sheriff's efforts were constitutionally inadequate for two reasons. First, the court found that "hundreds" of detainees were being double-celled and "a significant number" of the dorms were operating at more than 50% capacity. R.62-63. Second, it found that the Sheriff "has yet to reach the feasibility limit on getting detainees out of group housing," because Director Miller has not yet implemented his "back pocket" plan to swap entire tiers of male and female detainees across entire divisions of the Jail to use the celled tiers more efficiently for social distancing purposes. R63; R147.

Double-celling and high-occupancy dorms. After finding the Sheriff's social distancing measures unconstitutional, the court ordered that double-celling and group housing were prohibited, except in the following situations: (a) in quarantine, isolation, and convalescent housing tiers; (b) where detainees are at risk of self-harm; (c) where detainees are assigned to specialty medical housing in Division 8, Cermak or RTU; and (d) where dorms are operating at 50% capacity or less. R64; *compare* pp.4-5, *infra*.

As more fully set forth in the Sheriff's opening brief, the court erred as a matter of law because it ordered the Sheriff to implement the precise modified social distancing measures already in place, precluding any

finding that the Sheriff's conduct was unconstitutionally unreasonable in the first instance. App. Dkt. 34, p.38-40. Not only do Plaintiffs not contest this conclusion, they evidently agree with it, conceding that "the areas where the Sheriff *credibly articulated feasibility limits* to enforcing social distancing—including in group housing equipped for medical or mental health treatment—were expressly exempted" from the injunction order.

Certainly Plaintiffs are advocating for this Court to bless the district court's factual findings and conclusions under a deferential standard. Plfs. Br., p.31. But the reality is they do not hold up to scrutiny. Both conclusions are flatly contradicted by the evidence and are clearly erroneous.

At the preliminary injunction hearing, Director Miller testified at length about the tier occupancy chart, updated the day before the hearing, which shows where detainees are housed throughout the Jail. SR339-44 (Def. Exh. 17). The chart's lists the division and tier location; the capacity of the tier; the current number of detainees on the tier; the percentage occupancy of that tier; whether the tier is single-celled, double-celled, or a dorm; and whether the tier is on quarantine or isolation status. *Id*.

This chart shows that the only tiers that were double-celled at this time were in Division 8, specialty medical housing in Cermak and RTU.

SR342-43. Miller also testified to that fact, in response to the court's questioning. R141-42. Contrary to Plaintiffs' reading of the facts, the court did not "determine[ ] that the evidence contradicted the Sheriff's claim that 'no detainees [are being] housed in double-occupancy cells without a medical or security reason." Plfs. Br., p.31. In fact, the court acknowledged this fact verbatim in its order. R20 ("Miller stated that there are currently no detainees housed in double-occupancy cells without a medical or security reason"). The chart also reflects that all but two of the dorms are occupied at less than 50% capacity, outside of Division 8 or on quarantine or isolation status. See SR340-41 (tier DIV2-D1-D48 at 81% and DIV2-D4-R37 at 59%).

Nevertheless, the court's finding of unconstitutionality is purportedly based on the fact that "hundreds" of detainees are being double-celled and a "significant number" are housed in dorms over 50% full. R62-63. But the injunction order explicitly exempts the prohibition on double-celling and high capacity dorms for detainees living in Cermak or RTU or those on quarantine or isolation status. In other words, the court found the Sheriff's social distancing measures unconstitutional based on two conditions he is not required to meet. R64. This is clear error and cannot support a constitutional violation.

The "back pocket" plan. The court 's conclusion that the Sheriff "has yet [to] hit the feasibility limit" on reducing capacity in the dorms is also contrary to the evidence. R63. Housing tiers open up in the newly-opened divisions on a rolling basis. R104; R114. Director Miller testified that his team works "every day" to single-cell as many people as possible to maximize social distancing "as room becomes available." R102; R115. Indeed, just one day earlier, Miller "[got] a tier up to par" and was able to move 20 more detainees out of the dorms and into single cells. R115.

When the court asked Miller if he had room to move more detainees into cells, Miller said he had a "plan in [his] back pocket" and was "working towards moving another large portion" of detainees out of the dorms. R147. As deceptively simple as it sounds, this "back pocket" plan is a serious operational undertaking to switch entire tiers of male and female detainees between different divisions of the Jail to use the celled tiers more efficiently. Understandably, for Miller, it is "going to take some time to move people around." R147; ECF#84, p.14-15. Strictly speaking, and contrary to the court's finding, this move was not, in fact, feasible at the time of the hearing. By this logic, the Sheriff would be in perpetual violation of his constitutional obligations for moves he has not yet

anticipated in tiers that are not yet available. The court's conclusion is clearly erroneous.

The Sheriff undertook extraordinary structural and operational measures to maximize social distancing in the Jail by facilitating reduction of the Jail population by nearly 25%; adding 33% more housing units by opening four previously-shuttered divisions of the Jail; increasing the number of single-celled detainees by 545%; and decreasing the number of double-celled detainees by 33%. By any reasonable jailer's standard, standing in Sheriff Dart's shoes, with the knowledge available to him at the time, the Sheriff's social distancing efforts were objectively reasonable, at least.

Plaintiffs might even grudgingly acknowledge that the Sheriff took at least "some action" to implement social distancing. But in Plaintiffs' view, it is not enough. Plfs. Br., 32, citing *Petties v. Carter*, 836 F.3d 722, 729 (7th Cir. 2017). They might grudgingly acknowledge that the Sheriff "supposedly began planning for COVID-19 in January," but never changed his conduct in the face of changed circumstances when the coronavirus "began spreading in uncontrolled fashion." Plfs. Br., p. 33.

Even if there was some question still remained as to whether the Sheriff's conduct was objectively reasonable, the constitution does not

require that he eliminate the risk entirely, only that he respond reasonably to the risk, which standard he has far exceeded. *Peate v. McCann*, 294 F.3d 879, 883 (7th Cir. 2002). The fact that Miller told the court he had a loosely-formed plan to swap tiers of detainees that had not yet been executed at the time of the hearing does not outweigh the extraordinary efforts the Sheriff took to maximize social distancing in the Jail.

The fact one dorm is at 81% capacity, housing 38 detainees in protective custody under the Prison Rape Elimination Act, does not outweigh the totality of the Sheriff's social distancing measures. R.121, 136-37. Detainees in protective custody have particular security concerns that restrict where they can be housed. Director Miller kept them together while developing a plan to allow them to socially distance but remain sufficiently separated from the general population. R137. Ultimately, the court disagreed that they should be exempt from the dorm density limits, and they were moved to secure socially-distanced housing when it became available. ECF#84, p.14. At the very least, it was a reasonable and legitimate objective to keep this vulnerable population safe while waiting for appropriate space to become available, but in any event does not by itself outweigh the Sheriff's other social distancing efforts. See *Hardeman v. Curran*, 933 F.3d 816, 827 (7th Cir. 2019) (Sykes, J., concurring). The Court

takes a "broader look" at the record and the totality of the circumstances when evaluating objective reasonableness. *McCann v. Ogle*, 909 F.3d 881, 887 (7th Cir. 2018). That standard has been met here.

II. The Sheriff reasonably relied on the CDC Guidance and its modifications when developing and implementing social distancing measures.

Where previously the district court recognized that strict social distancing requirements could be modified where "space constraints do not allow for a more preferable degree of social distancing" under the CDC Guidance, it now rejects that view as a cynical "do what you can, but if you can't, so be it" approach. R282; R62.

In doing so, the court dismissed this Court's holdings in *Forbes v. Edgar*, 112 F.3d 262, 267 (7th Cir. 1997) and *Carroll v. DeTella*, 255 F.3d 470, 472-73 (7th Cir. 2001), which recognize that a jailer can rely on government agency regulations, specifically those issued by the CDC, in satisfying its constitutional obligations. See also *McRoy v. Sheahan*, 188 Fed. Appx. 523 (7th Cir. 2006) (upholding the propriety of a jail policy that was "consistent with guidelines recommended by the [CDC]").

Plaintiffs argue that "agency regulations" may be relevant, but they are not dispositive on the question of constitutional adequacy. Plfs. Br., pp.36-38. However, the cases they rely on involve law enforcement

agencies attempting to use their own internal regulations to set and satisfy their constitutional obligations. See, *e.g., Thompson v. City of Chicago*, 472 F.3d 444, 454 (7th Cir. 2006). Under those circumstances, of course it would not be appropriate to permit a defendant to determine whether it met its own constitutional standards. But here, the Sheriff is relying on standards promulgated by the foremost authority on infectious disease control, and specifically on coronavirus, to respond to a fast-moving and ever-evolving global pandemic. The district court certainly recognized the CDC's authority to establish the appropriate standards in issuing its orders in this case, although it was selective in doing so.

Even if it was not per se reasonable to rely on the CDC Guidance, it certainly was reasonable to do so in this case. Plaintiffs' own expert, Dr. Venters, testified that the CDC Guidance is the "best set of guidelines" for jails to follow in this pandemic. They are the most "important" and "reliable" set of principles for jail settings. He agreed that they need to be modified based on the specific features of each jail, and that jail officials should consult their local health departments, just as the Sheriff's Office did in consulting with CDPH, to devise those modifications. R170-73.

While Dr. Venters opined that more could be done in addition to the CDC Guidance, he did not cite any other authoritative source the

Sheriff should have consulted, nor provide any solution for how full social distancing could be accomplished at the Jail. In fact, his only recommendation was that the Sheriff should bring in more officers to help enforce social distancing. R202-03. Director Miller testified that was already being done by the sanitation audit team and PPE Accountability Task Force that inspect the tiers every shift of every day. R216. In any event, even if Dr. Venters had proposed that the Sheriff implement different social distancing measures, that does not make the Sheriff's plan unconstitutionally unreasonable. *Lapre v. City of Chicago*, 911 F.3d 424, 432 (7th Cir. 2018) (the existence of other better possibilities or processes does not mean the defendant's were unconstitutional).

Indeed, Plaintiffs have not articulated what other reasonable social distancing measures the Sheriff should have taken. They have taken the position that the only reasonable solution is to release detainees *en masse*, ECF#55, p.10, but Dr. Venters did not even go that far, R163. He acknowledged that some jails have engaged in a review process to reduce the population—similar to the one the Sheriff assisted with in March that resulted in the release of over 1,200 detainees—but he opined that the "most critical" action is to have a dedicated housing officer to enforce social distancing. R163, R202. In any event, the Sheriff has no authority to

unilaterally release detainees. *Williams v. Dart*, 2020 U.S. App. LEXIS 23132, *15 (July 23, 2020) ("courts, not sheriffs, make pretrial detention decisions"). It cannot be unreasonable for the Sheriff not to do the impossible. See *Swain v. Junior*, 961 F.3d 1276, 1287 (11th Cir. 2020).

Nor is it reasonable to suggest that the best way to protect detainees is to release them from the Jail. Quite the opposite, in fact, where the testing positivity rate inside the Jail is now lower than anywhere else in the surrounding community. Kennedy, Sean, "You're More Likely to Catch Covid at Home Than in Jail," Wall Street Journal (July 24, 2020), https://www.wsj.com/articles/youre-more-likely-to-catch-covid-at-home-than-in-jail-11595628804?mod=searchresults&page=1&pos=1 (last visited July 31, 2020). See also App. Dkt. 12-1, p.2. Citing a recently-published CDC Report, the article notes that the Sheriff's "strict testing measures at intake and isolation…worked. The [Cook County J]ail now has almost as many inmates as before but less than 1% of the virus cases it did at the outbreak's peak." *Id*.

While the Court ordinarily would review the likelihood of harm to Plaintiffs at the time the injunction was entered, it is worthwhile for the Court to consider the state of the Jail as it is today. If the Sheriff is successful on appeal and the injunction is vacated, as the Court's stay

order might suggest, the Court should have confidence that Plaintiffs will not face any unreasonable risk of harm absent the injunction. The extraordinarily low rate of infection and 14 COVID-positive detainees currently at the Jail should give the Court that confidence. Def. Br., p. 2; https://www.cookcountysheriff.org/covid-19-cases-at-ccdoc/.

III. The CDC Report provides the Court with the results of the April 17, 2020, Jail tour and study of the efficacy of the interventions implemented at the Jail before the injunction.[1]

Commander Paige Armstrong, Epidemiology Team Lead for the CDC, published a report entitled "Outbreak of COVID-19 and Interventions in One of the Largest Jails in the United States—Cook

---

[1] On July 29, 2020, Appellant filed a motion in this Court to supplement the record (App. Dkt. 48) with the CDC Report. Not only does the CDC Report provide the results of the CDC representatives' April 17, 2020 Jail tour, which was discussed at length in the injunction hearing and is central to the issues on appeal, it also directly refutes arguments raised by Plaintiffs for the first time in their brief filed last week. On July 30, this Court denied the motion without prejudice and directed Appellant to first present the motion in the district court. (App. Dkt. 51). That motion was filed the same day (ECF#146) on an emergency basis, but was denied on July 31. Appellant filed a renewed motion to supplement in this Court on July 31, which remains pending as of the time of filing. (App. Dkt. 52).

Appellant alternatively submits that this Court can take judicial notice of the CDC Report (attached as Exhibit A) as the report of a government agency capable of verification through recourse to reliable authority. *Dobrota v. INS*, 195 F.3d 970, 973 (7th Cir. 1999) (appellate court may take judicial notice of a government agency report and consider its content for purposes of assessing reasonableness of conduct); *Lhanzom v. Gonzales*, 430 F.3d 833, 848 (7th Cir. 2005) (same); *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998) (judicial notice of reports of administrative bodies is proper).

County, IL, 2020," which is an analysis of the interventions implemented in response to the coronavirus outbreak at the Jail between March 1 and April 30, 2020. The report was written with equal contributions from representatives of Cermak Health Services, Cook County Health, CDPH, CDC, Cook County Sheriff's Office, and the University of Illinois at Chicago, most of whom participated in the CDC's April 17, 2020 Jail tour and study. The Report is central to the question of whether the Sheriff's comprehensive coronavirus response plan was objectively reasonable and provides this Court with a complete and independent picture of the conditions at the Jail before the injunction was entered.

In their brief, Plaintiffs argued that the dramatic decrease in the infection rate at the Jail "following the Sheriff's alleged compliance with the preliminary injunction" demonstrates that "the district court made the right choice" in ordering the Sheriff to take the actions he did. Plfs. Br., p.42. They further rely on the district court's conclusion that there was a "'very real possibility that the measures ordered by the [c]ourt at the TRO and preliminary injunction stage contributed to those results,'" even going so far as to suggest that "the preliminary injunction saved lives." Plfs. Br., p.17-19 (quoting ECF#109, p.17-18).

Contrary to Plaintiffs' assertions, the Sheriff's early intervention enacting a multifaceted coronavirus response plan was responsible for the dramatic decrease in the number of positive cases at the Jail, not the injunction order. Since early March, the Sheriff's Office has worked with CDPH and the CDC to craft policies and interventions specific to the Jail, mainly through the work of Rebecca Levin, the Office's public health policy advisor. Dkt.30-7, p.1. Through Levin's efforts, CDPH and CDC representatives toured the Jail twice—on March 26 and on April 17. Dkt.70, p. 2. CDPH issued a report with recommendations on March 27, many of which were in place and were being monitored for progress. Dkt.30-7, p.3; Dkt.70, p.5.

Three days before the injunction hearing, Levin submitted an affidavit describing the April 17 Jail tour. Dkt.70, p.3. A team of epidemiologists from the CDC and CDPH, led by Commander Armstrong, inspected the Jail, commenting on the cleanliness and active sanitization efforts happening throughout the facility. They noted the availability of masks for all detainees, although not all chose to wear them, as happens in the community at large. They specifically noted the increased social distancing and the reduced occupancy in the dorms since

March. Commander Paige Armstrong complimented these efforts, stating, "You guys are doing an amazing job." *Id*.

At the injunction hearing, Director Miller testified about his participation in the CDC tour. R140-41. The group toured 90% of the entire facility, visiting all areas they requested to see. They specifically toured several of the dorms, restrooms, and common areas, and commented on their cleanliness and organization. They expressed no concerns about the degree of social distancing occurring there. Miller also referenced the group's recognition of "how much [Jail officials] have done in the shortest amount of time," with Commander Armstrong noting that her team "couldn't get this far in a month with a cruise ship what you guys have been able to do in a couple of weeks." *Id*.

While the CDC's report of the tour was not available at the time of the hearing, the findings were published on July 14, 2020. Exh. A. The tour was part of a larger study to "investigate, identify, and interrupt transmission" of coronavirus at the Jail, and an analysis of the Sheriff's early intervention with a comprehensive coronavirus response plan. *Id*., p.3. The study analyzed the timeline of the outbreak trajectory within the Jail and the many strategies implemented to combat it, during the period from March 1 (or earlier) to April 30. *Id*., p.6, 16.

In January, Cermak began screening for coronavirus symptoms in detainees entering the Jail at intake. "Shelter in place" activities began March 9, restricting movement throughout the compound. In mid-March, outside visitation was suspended; the practice of quarantining new detainees for seven (later fourteen) days before entering the general population began; and detainee programs were suspended. *Id*. Single-celling and social distancing in the dorms began in late March and was largely implemented by April 21. Also in March, temperature checks and symptom screening began for staff, given their movement in and out of the Jail. *Id*., p.8-9. By April 2, all staff were required to wear surgical masks per then-current CDC guidelines. PPE Accountability Teams also had been trained and dispatched to monitor and encourage compliance throughout the Jail. By April 13, all detainees wore surgical masks. Rapid testing of detainees at intake began April 20. *Id*., pp.6-7, 16. After these interventions were implemented, the number of cases inside the Jail declined, even as cases increased in the community. *Id*., pp.8, 20.

The authors concluded that the "dynamic and aggressive application of intervention strategies" early in the course of the outbreak reduced transmission and prevented serious harm or death. *Id.*, p.10. They noted that "expanding [the Jail's] footprint to facilitate social distancing,

limiting movement, and implementing expanded testing…effectively slowed spread relative to the surrounding community even as cases there surged." Indeed, limiting movement within the Jail was "likely one of the most critical and timely interventions in gaining control of this outbreak." Increased testing at intake also helped limit new introductions of the virus. Surgical mask use, personal hygiene practices, and enhanced sanitization practices also contributed to reducing the spread of infection. *Id*., p.9.

Testing of asymptomatic detainees in mid-April following the CDC's revised guidelines assisted in reducing the spread of infection by identifying positive detainees and transferring them to medical isolation sooner. The authors also credit social distancing and the use of medical isolation tiers as an important part of reducing transmission. Indeed, they noted that few facilities will be able to accomplish the degree of physical distancing implemented at the Jail. *Id*., 9-10.

This study then examined the effect of the interventions at the Jail on the number of reported cases between March 1 and April 30. The total number of cases peaked the week of April 5 and continued to decline thereafter—two days after this lawsuit was filed and weeks before the preliminary injunction was entered. *Id*., p.21. The authors concluded that

the most effective way to interrupt coronavirus transmission is through a "dynamic and aggressive application of intervention strategies." *Id*., p.10.

As the Sheriff has always maintained, no one strategy is more effective than all others, except perhaps limiting movement within the Jail, as the report found. *Id*., p.9. A comprehensive approach incorporating a variety of strategies is the most effective way to control the spread of the virus. Without question, social distancing is a part of that comprehensive strategy, but not above all else. Even still, the Sheriff has accomplished social distancing to a degree not likely to be achieved by many, if any, other facilities. The comprehensive approach to containment efforts has been objectively reasonable, and the effectiveness of these strategies is due to early and aggressive intervention, not the injunction order and its flawed reasoning, contrary to Plaintiffs' arguments. Plfs. Br., pp. 17-19.

IV. The Sheriff never "agreed" that *Monell* liability was not implicated in this case, nor would he. Plaintiffs failed to articulate any theory of *Monell* liability in this case and it was never addressed by the district court.

Plaintiffs are correct that this matter was argued under the fourteenth amendment objective reasonableness standard in the district court. But by no means was there any "agreement" that *Monell* liability was not implicated. Plfs. Br., p.24; *Monell v. Dep't of Soc. Servs*., 436 U.S. 659 (1978). Nor could the parties agree that *Monell* did not apply. *Monell*

was not raised by the parties at this stage, although the Sheriff has not waived his right to do so should this case proceed further in the district court.

However, upon further investigation in response to Plaintiffs' contention, if this Court decides that *Monell* must be addressed as part of the decision on injunctive relief, then the issues in this case may become much simpler. *Snyder v. King*, 745 F.3d 242, 250 (7th Cir. 2014) (holding that the possibility of injunctive relief against a municipal defendant is not distinct from whether *Monell* liability is implicated); *Los Angeles Cnty. v. Humphries*, 131 S.Ct. 447, 453-54 (2010).

Plaintiffs brought this suit against Sheriff Dart in his official capacity, which is necessarily a suit against the Sheriff's Office. *Bridges v. Dart*, 950 F.3d 476, 478 n.1 (7th Cir. 2020). A municipality "cannot be subject to liability at all" unless the harm was caused by an official policy, a widespread custom or governmental practice, or a final policymaker, and that policy was the "moving force" behind the alleged constitutional injury. *Lozman v. City of Rivera Beach*, 138 S.Ct. 1945, 1951 (2018); *Thomas v. Cook County Sheriff's Dep't*, 604 F.3d 293, 303 (7th Cir. 2009). To establish liability, the plaintiff must show that the policymakers were deliberately indifferent to the known or obvious consequences of their policy. *Thomas*,

604 F.3d at 303. That is, they must have been aware of the risk created by the policy and failed to take appropriate steps to protect the plaintiff. *Id*.

Although Plaintiffs have never clearly articulated any theory of *Monell* liability on which they proceed—from pleading through appeal—arguably their complaint implicates any one of them. See, *e.g.*, ECF#2, p. 9, 12 (alleging that the Sheriff has failed to implemented the CDC Guidelines or any other public health measures); Plfs. Br., p. 24 (characterizing the issue as one involving "actions taken (and not taken) in response to the COVID-19 outbreak at the Jail…directly attributable to the Sheriff himself"). It is of no consequence. The district court made an express finding in this case that "the Sheriff has been anything but deliberately indifferent to the risk of harm" from coronavirus and Plaintiffs would be "unable to prevail" on any such claim. R56. Thus, if the deliberate indifference standard applies under *Monell*, the injunction must be vacated under any theory of liability.

CONCLUSION

For the foregoing reasons, Appellant Sheriff Thomas J. Dart respectfully requests that this Court vacate the preliminary injunction entered on April 27, 2020.

Respectfully submitted,

/s/ Gretchen Harris Sperry
Gretchen Harris Sperry
Robert T. Shannon
James M. Lydon
Adam R. Vaught
Lari A. Dierks
HINSHAW & CULBERTSON LLP
151 North Franklin Street, Suite 2500
Chicago, IL 60606
312-704-3521
gsperry@hinshawlaw.com

Counsel for Appellant

Certificates

Fed. R. App. P. 32(a)(7) Certificate

This brief complies with the type-column limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,234 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Gretchen Harris Sperry

Circuit Rule 30(d) Certificate

The undersigned certifies that all materials required by Cir. R. 30(a) and (b) are included in the appendix.

/s/ Gretchen Harris Sperry
Gretchen Harris Sperry
Counsel for Appellant