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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
CASE NO. 1:20 CIV. 2134 (HON. MATTHEW F. KENNELLY)

MOTION FOR LEAVE TO FILE BRIEF OF PRISON & JAIL LAW SCHOLARS AS AMICI CURIAE SUPPORTING PLAINTIFFS-APPELLEES

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1. Pursuant to Federal Rule of Appellate Procedure 29(a), the prison & jail law scholars listed in Appendix A respectfully move for leave to file their brief as *amici curiae* in support of Plaintiffs-Appellees.
2. Amici are scholars specializing in the law of prisons and jails. They have substantial academic, pedagogical, and professional experience bearing on the legal questions presented, as well as a professional interest in the proper development of the law.
3. This *amicus* brief will aid the Court's decisional process in two respects. *First*, it clarifies the applicable legal requirements and explains the circumstances in which federal courts consider agency and professional organization standards in determining whether those legal requirements are satisfied. *Second*, it applies those governing principles to a particular agency standard—issued by the CDC—that was addressed at length below and that is cited repeatedly (but mistakenly) by Appellant as supporting his position. *Amici* are well positioned to address these important issues by virtue of their unique expertise; their perspective is precisely of the kind properly submitted in an *amicus* brief. *See Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003); *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000).
4. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that no party's counsel authored the brief in whole or in part; no party's counsel

contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amici* and their counsel—contributed money that was intended to fund preparing or submitting the brief.

5. Counsel for *amici* have conferred with counsel for the parties regarding consent to file this brief. Appellees have consented. Appellant stated that he did not consent. When asked to explain the grounds on which Appellant refused to consent, counsel to Appellant did not respond.

6. For the reasons set forth above, *amici* respectfully request leave to file the attached brief of *amici curiae* in support of Plaintiffs-Appellees.

Dated: July 24, 2020

Respectfully Submitted,
/s/ Joshua Matz

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APPENDIX A

Amici join this brief as individuals; institutional affiliation is noted for informational purposes only and does not indicate endorsement by institutional employers of positions advocated.

- **Margo Schlanger**, Wade H. and Dores M. McCree Collegiate Professor of Law, University of Michigan Law School.

- **Sharon Dolovich**, Professor of Law, Director, UCLA Covid-19 Behind Bars Data Project, Director, Prison Law and Policy Program, University of California, Los Angeles School of Law.

- **Hadar Aviram**, Thomas Miller '73 Professor of Law, University of California, Hastings College of the Law.

- **Bryonn Bain**, Associate Professor, Department of African American Studies, Department of World Arts and Cultures, Director, UCLA Prison Education Program, University of California, Los Angeles.

- **W. David Ball**, Professor, Santa Clara University School of Law.

- **Valena Beety**, Professor of Law, Arizona State University Sandra Day O'Connor College of Law.

- **Caitlin Henry**, Lecturer, Sonoma State University.

- **Aaron Littman**, Binder Clinical Teaching Fellow, University of California, Los Angeles School of Law.

- **Jules Lobel**, Bessie McKee Walthour Chaired Professor, University of Pittsburgh Law School.

- **Keramet Reiter**, Associate Professor, University of California, Irvine School of Law.

- **Judith Resnik**, Arthur Liman Professor of Law, Yale Law School.

- **Ira P. Robbins**, Barnard T. Welsh Scholar and Professor of Law, American University Washington College of Law.

- **David Rudovsky**, Senior Fellow, University of Pennsylvania Law School.

CERTIFICATE OF SERVICE

Counsel for *amici curiae* certifies that on July 24, 2020 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 24, 2020

By: */s/ Joshua Matz*
JOSHUA MATZ
Counsel for *Amici Curiae*

EXHIBIT A

No. 20-1792

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: No. 20-1792

Short Caption: Mays v. Dart

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Margo Schlanger, Sharon Dolovich, Hadar Aviram, Bryonn Bain, W. David Ball, Valena Beety, Caitlin Henry, Aaron Littman, Jules Lobel, Keramet Reiter, Judith Resnik, Ira P. Robbins, and David Rudovsky

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Kaplan Hecker & Fink LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

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ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

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N/A

Attorney's Signature: /s/ Joshua Matz Date: July 24, 2020

Attorney's Printed Name: Joshua Matz

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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INTEREST & IDENTITY OF *AMICI CURIAE*

Amici are scholars specializing in the law of prisons and jails. They have substantial academic, pedagogical, and professional experience bearing on the legal questions presented, as well as a professional interest in the proper development of the law. A full list of *amici* is attached as Appendix A.[1]

INTRODUCTION & SUMMARY OF ARGUMENT

The Sheriff contends that his attempted compliance with CDC guidelines defeats any finding that he violated the Fourteenth Amendment at the Cook County Jail. This argument is mistaken for two distinct reasons. *First*, the Sheriff's position is foreclosed by precedent holding that agency standards are not conclusive on the constitutional question of objective reasonableness. *Second*, the CDC guidelines are not the kind of agency standard that should receive weight in the constitutional analysis: they were issued early in the pandemic when information was even scarcer than currently, they have not been updated in relevant respects in light of new public health data, and they contain an irregular "feasibility" exception without any apparent basis in public health or safety principles. Given these considerations, the district court appropriately concluded that the Sheriff's efforts at complying with the

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amici* and their counsel—contributed money that was intended to fund preparing or submitting the brief. Appellees have consented to this filing, but Appellant has not.

CDC guidelines did not prevent legal scrutiny of his official conduct—including his decisions respecting group housing and double celling, which effectively preclude hundreds of detainees at the Cook County Jail from engaging in social distancing.

I. Pretrial detainees enjoy a presumption of innocence and therefore cannot be subjected to conditions amounting to punishment. *See Bell v. Wolfish*, 441 U.S. 520, 537 (1979). A prison official violates the rights of pretrial detainees when he acts "purposefully, knowingly, or perhaps even recklessly" and when his conduct is objectively unreasonable. *See McCann v. Ogle Cty.*, 909 F.3d 881, 886 (7th Cir. 2018); *see also Kingsley v. Hendrickson*, 576 U.S. 389, 395 (2015). While the Sheriff seeks to muddy the waters, the fundamental issue here is whether he acted in an objectively unreasonable manner by deciding to house hundreds of pretrial detainees in conditions that make social distancing impossible. With respect to that issue, the Sheriff suggests that his attempted compliance with CDC guidelines is conclusive. *See* Appellant's Br. at 34-36, 44-45, 48. This argument, however, rests on legal error. As federal courts have long recognized, compliance with agency and professional organization standards is neither necessary nor sufficient to satisfy the Constitution's requirement of objective reasonableness. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493, 539-40 (2011); *Bell*, 441 U.S. at 543 n.27; *United States v. Brown*, 871 F.3d 532, 536-37 (7th Cir. 2017); *Thompson v. Chicago*, 472 F.3d 444, 454 (7th Cir. 2006); *Gates v. Cook*, 376 F.3d 323, 337 (5th Cir. 2004). To be sure, these sorts

of standards may be "instructive in some cases." *Bell*, 441 U.S. at 543 n.27. But they can at most illuminate—and not answer—the constitutional question. This is clear from precedent analyzing the constitutional relevance of many other national standards, including those issued by the American Correctional Association (ACA) and those issued pursuant to the Prison Rape Elimination Act (PREA).

II. The district court treated the Sheriff's attempted compliance with the CDC guidelines as relevant but not controlling. This was reasonable. The CDC guidelines were created by an expert agency and contain many recommendations consistent with the CDC's advice to the general public—particularly regarding the importance of social distancing. However, the CDC guidelines were issued just a few weeks into the pandemic, have not been regularly updated, and have not kept pace with the latest science. Moreover, the guidelines do not purport to define a set of recommendations that would ensure health and safety in a jail, and they are thus different in kind than most other standards. The CDC guidelines instead offer a suite of recommendations and then provide—without any noted basis in public health principles—that some of these recommendations may not be "feasible in all facilities." Because the guidelines contain this irregular (and expansive) internal loophole, which invites officials to disregard public health principles where they see compliance as too costly or burdensome, they do not in fact define a health and safety standard worthy of much deference in deciding whether the Sheriff upheld constitutional requirements.

ARGUMENT

I. DUE PROCESS CLAUSE REQUIREMENTS ARE DISTINCT FROM AGENCY AND PROFESSIONAL ORGANIZATION STANDARDS

A. The Due Process Clause Requires that the Sheriff's Conduct at the Cook County Jail Be Objectively Reasonable

Pretrial detainees "have not been convicted of anything, and they are still entitled to the constitutional presumption of innocence." *Miranda v. Cty. of Lake*, 900 F.3d 335, 350 (7th Cir. 2018). They thus enjoy greater protections than persons convicted of crimes. In particular, they cannot be exposed to conditions that "amount to punishment." *Bell v. Wolfish*, 441 U.S. 520, 537 (1979). This rule follows from the Due Process Clause, which governs all "conditions-of-confinement claims brought by pretrial detainees." *Hardeman v. Curran*, 933 F.3d 816, 823 (7th Cir. 2019). In assessing such claims, courts do not require any proof of subjective malice. *See Kingsley v. Hendrickson*, 576 U.S. 389, at 395 (2015). They instead ask two questions: (1) whether the defendant "acted purposefully, knowingly, or perhaps even recklessly," and (2) whether the defendant's conduct was "objectively reasonable." *McCann v. Ogle Cty.*, 909 F.3d 881, 886 (7th Cir. 2018).

Here, the Sheriff seeks to reframe that inquiry in two respects. For starters, he argues that the constitutional analysis must address his full course of conduct in responding to the pandemic—and not his specific decisions that make social distancing impossible for many detainees. *See* Appellant's Br. at 23. That argument

is a distraction. His choice to impose this restriction is a distinct policy in its own right and a critical feature of his broader policy; in either case, it is no stray detail. The Sheriff is well aware of the threat posed by COVID-19; he knows that social distancing rests at the heart of any effort to contain it; and he made a considered choice to adopt the policies challenged here. The district court found that this decision resulted in a "heightened, and potentially unreasonable . . . risk of contracting and transmitting the coronavirus." *Mays v. Dart*, No. 20 Civ. 2134, 2020 WL 1987007, *27 (N.D. Ill. Apr. 27, 2020). The Sheriff's broader efforts, even those undertaken in good faith, do not preclude assessing whether the specific policy enjoined below violates detainees' constitutional rights.

As a fallback, the Sheriff implies that his decision to house detainees in conditions that make social distancing impossible does not reflect reckless disregard for the consequences. *See* Appellant's Br. at 24-33. But precedent forecloses his position. This is not like a case where "an officer's Taser goes off by accident," *Kingsley*, 576 U.S. at 396, or where doctors "mixed up [a patient's] chart with that of another detainee," *Miranda*, 900 F.3d at 354. The Sheriff knows that the virus is spreading through his jail and made a choice that foreseeably denies many detainees the single most effective preventive measure. In that respect, this is much more like a case where doctors "deliberately chose a 'wait and see' monitoring plan, knowing that [a detainee] was neither eating nor drinking nor competent to care for herself."

Miranda, 900 F.3d at 354. The district court did not err in holding the Sheriff responsible for making a decision with potentially deadly consequences.

That leaves only one final question: whether the Sheriff's conduct—specifically, his conduct in establishing the challenged policy on double celling and group housing—was objectively reasonable. This question does not turn on subjective good faith or on evidence of the Sheriff's motives; it looks only to the Sheriff's conduct and asks whether it is objectively reasonable. That assessment, in turn, cannot be undertaken "mechanically." *Kingsley*, 576 U.S. at 397. It requires the Court to "focus on the totality of facts and circumstances faced by the [Sheriff] and to gauge objectively—without regard to any subjective belief held by [the Sheriff]—whether [his] response was reasonable." *McCann*, 909 F.3d at 886. Of course, the Court must also account for the "legitimate interests" that stem from the Sheriff's institutional responsibilities. *Kingsley*, 576 U.S. at 397. In the end, it is for the Court to decide whether the Sheriff's decision reflects an objectively reasonable exercise of his power to control conditions at the Cook County Jail.

B. Agency and Professional Organization Guidelines May Illuminate the Objective Reasonableness Analysis but Cannot Control It

The Sheriff suggests that the objective reasonableness analysis must be cut short—and resolved in his favor—if he demonstrates compliance with the CDC Guidelines. *See* Appellant's Br. at 34-36, 44-45, 48. He does not assert that such

compliance is required, but rather that it affords him a constitutional safe harbor. That position is misplaced as a matter of settled constitutional law.

This is not the first time a federal court has been asked to defer to an agency or professional organization's standards about conditions of confinement. As the Fifth Circuit held in a leading case, compliance with such standards does not guarantee constitutionality: it would be "absurd to suggest that the federal courts should subvert their judgment as to alleged Eighth Amendment violations to [a professional group] whenever it has relevant standards." *Gates v. Cook*, 376 F.3d 323, 337 (5th Cir. 2004). The Supreme Court long ago established a clear limiting principle: while agency and professional guidelines "may be instructive in certain cases, they simply do not establish the constitutional minima" for purposes of assessing the objective reasonableness of carceral conditions. *Bell*, 441 U.S. at 543 n.27. Many courts have since reaffirmed that rule. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493, 539–40 (2011) ("[C]ourts must not confuse professional standards with constitutional requirements."); *Rhodes v. Chapman*, 452 U.S. 337, 348 n.13 (1981); *Tillery v. Owens*, 907 F.2d 418, 426 (3d Cir. 1990) ("Because we look to societal standards as our benchmark, expert opinions and professional standards, while instructive, are not determinative."); *Inmates of Occoquan v. Barry*, 844 F.2d 828, 839 (D.C. Cir. 1988) (reversing district court analysis as over-reliant on "standards promulgated by various professional organizations"); *Cody v. Hillard*, 830 F.2d 912,

914 (8th Cir. 1987) ("The Supreme Court has explicitedly [sic] rejected the proposition that such standards establish a constitutional norm.").

There are three principal reasons why federal courts do not treat compliance with agency and professional organization standards as either necessary or sufficient to satisfy the Constitution. *First*, in cases addressing whether noncompliance with these sorts of standards establishes a constitutional violation, courts have recognized that they are often contested or based on value judgments that might not be shared by society at large—and thus they cannot appropriately define what is objectively reasonable. *See Rhodes*, 452 U.S. at 348 n.13 ("[G]eneralized opinions of experts cannot weigh as heavily in determining contemporary standards of decency as 'the public attitude toward a given sanction.'" (citation omitted)). *Second*, it is the role of courts, not executive branch agencies and professional organizations, to define constitutional standards and assess objective reasonableness. *See Bell*, 441 U.S. at 543 n.27; *Gates*, 376 F.3d at 337. *Finally*, in a totality of the circumstances analysis, no single "framework" established by an agency or professional organization can be determinative in a particular case because no guidelines can properly anticipate all relevant factual considerations bearing on the legal determination. *Thompson v. Chicago*, 472 F.3d 444, 454 (7th Cir. 2006); *see also United States v. Brown*, 871 F.3d 532, 536–37 (7th Cir. 2017) ("An officer's compliance with or deviation from departmental policy doesn't determine whether he used excessive force."); *Orr v.*

Shicker, 953 F.3d 490, 502 (7th Cir. 2020) (noting that compliance with professionally developed medical protocols could not defeat an Eighth Amendment claim where the plaintiff's disease had progressed far enough to require treatment).

While many of these cases indicate that compliance with third party standards is not *necessary* to comply with the Constitution, it follows directly from their reasoning that compliance with such standards is likewise not *sufficient* to demonstrate compliance. *See Axelson v. Watson*, 746 F. App'x 600, 602 (8th Cir. 2018) ("[P]urported compliance with [a professional organization's] minimum standards did not establish, as a matter of law, that the unit was staffed according to the requirements of the Eighth Amendment"). Indeed, this Court has expressly said as much in the very closely related Fourth Amendment context, where police officer conduct involving the use of force is similarly subject to objectiveness reasonableness analysis. *See, e.g.*, *United States v. Brown*, 871 F.3d at 536–37 ("The excessive-force inquiry is governed by constitutional principles, not police-department regulations. An officer's compliance with or deviation from departmental policy doesn't determine whether he used excessive force. Put another way, a police officer's compliance with the rules of his department is neither sufficient nor necessary to satisfy the Fourth Amendment's reasonableness requirement." (citation omitted)); *Thompson*, 472 F.3d at 454 ("[W]hile the [police department's] General Order may give police administration a framework whereby

commanders may evaluate officer conduct and job performance, it sheds no light on what may or may not be considered 'objectively reasonable' under the Fourth Amendment given the infinite set of disparate circumstances which officers might encounter."); *see also N.S. v. Kansas City, Mo., Bd. of Police Comm'rs*, No. 4:16 Civ. 843, 2018 WL 10419366, at *3 (W.D. Mo. Feb. 7, 2018) ("National standards are relevant to the extent that they reflect the informed experience of the occupation or profession. They do not, in any way, supplant standards provided for by the law." (citation omitted)).

As these cases recognize, agency and professional organization standards answer different questions, and do so at a more abstract level, than the highly fact-intensive objective reasonableness inquiry that the Constitution entrusts to courts. Just as third parties cannot define what the Constitution requires, nor can they define what conduct satisfies it. *Cf.* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 13 (2010) (explaining that for purposes of tort law, an "actor's compliance with the custom of the community, or of others in like circumstances . . . does not preclude a finding of negligence"); *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932) (L. Hand, J.) ("[I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are

precautions so imperative that even their universal disregard will not excuse their omission.").

That is not to say agency and professional organization standards are entirely irrelevant. As the Supreme Court affirmed in *Bell*, they "may be instructive in certain cases." 441 U.S. at 543 n.27. This is particularly true where an issue is complex and specialized in ways that elude ordinary judicial experience and common sense. *See Brown*, 871 F.3d at 538 ("The level of factual complexity in the case may also bear on the relevance of expert testimony . . ."); *Carroll v. DeTella*, 255 F.3d 470, 472-73 (7th Cir. 2001) (assigning great importance to compliance with official environmental standards in a case where inmates sued under the Eighth Amendment based on alleged exposure to environmental hazards).

Consistent with these principles, federal courts consider agency and professional organization standards only to the extent that doing so fairly illuminates the ultimate issue of objective reasonableness. There are at last three fundamental considerations relevant to that determination: (1) whether the standards reflect an exercise of professional expertise on an issue beyond the ken of common sense; (2) whether the standards in fact establish a baseline of policies, procedures, or conduct that ensure health and safety; and (3) whether the standards are applicable to the fact pattern in a given case. In some respects, agency and professional organization standards thus receive something like *Skidmore* deference. *See Skidmore v. Swift &*

Co., 323 U.S. 134, 140 (1944) (articulating a standard of deference to agency action dependent upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

This approach is evident in how federal courts have treated such standards in the carceral context. The following examples exemplify that point:

American Correctional Association (ACA) Standards: The ACA was established in 1870 and began developing prison standards in the 1940s.[2] For the last eighty years, the ACA has published and updated standards to reflect the correctional field's evolving understanding of the professional operation of jails and prisons. The Committee on Standards consists of twenty experts and meets bi-annually to update existing standards and create new standards.[3] Other experts may also propose revisions and submit comments for the Committee to consider at their bi-annual meetings. *Id*. As a result, the ACA standards are based on a measure of

[2] *The History of Standards & Accreditation*, ACA, http://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards___Accreditation/About_Us/ACA_Member/Standards_and_Accreditation/SAC_AboutUs.aspx?hkey=bdf577fe-be9e-4c22-aa60-dc30dfa3adcb (last visited July 24, 2020).

[3] *Committee on Standards*, ACA, http://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards_and_Accreditation/Standards_Committee/Standards_Committee.aspx?WebsiteKey=139f6b09-e150-4c56-9c66-284b92f21e51&hkey=795105de-6a67-4769-b58a-0de6df7e8324&New_ContentCollectionOrganizerCommon=2#New_ContentCollectionOrganizerCommon (last visited July 24, 2020).

professional expertise and reflect meaningful expert deliberation. But by their plain terms, the ACA standards do not purport to establish a universal baseline of acceptable safety protocols. Rather, the ACA standards are designed only "to enhance correctional practices for the benefit of inmates, staff, administrators, and the public."[4]

Accounting for all this, courts occasionally consult the ACA standards while analyzing conditions of confinement claims, but do not assign them controlling weight in the constitutional calculus. *See, e.g.*, *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 375 n.3, 391 n.13 (1992) (noting that a district court reasonably relied on the ACA standards in issuing a consent decree, but observing that the standards did not establish the constitutional minimum in a challenge to double-celling); *Payette v. Hoenisch*, 284 F. App'x 348, 352 (7th Cir. 2008) (citing the ACA standards as "[c]onsistent with" constitutional holdings on permissible conditions of confinement); *Duran v. Elrod*, 760 F.2d 756, 759 (7th Cir. 1985) (concluding that "the Constitution does not forbid" a specific practice at odds with ACA standards); *see also Axelson*, 746 F. App'x at 602 (observing that "compliance with ACA's minimum standards did not establish" compliance with the Eighth Amendment).

[4] *Standards & Accreditation*, ACA, http://www.aca.org/aca_prod_imis/aca_member/ACA_Member/Standards_and_Accreditation/StandardsInfo_Home.aspx (last visited July 24, 2020).

Prison Rape Eliminate Act (PREA) Standards: These standards were created pursuant to the Prison Rape Elimination Act, which Congress passed in 2003 to "develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape." 34 U.S.C. § 30302(3). The final PREA standards are the result of a nine-year process, involving a massive study by the National Prison Rape Elimination Commission and the issuance of notice-and-comment regulations by DOJ based on the Commission's proposals. *See National Prison Rape Elimination Commission Report*, NAT'L CRIMINAL JUSTICE REFERENCE SERVICE (June 2009). Although the PREA standards reflect expertise and rigorous process, Congress did not make them binding on local or state prisons. *See* 34 U.S.C. § 30307(b). Courts have therefore considered the PREA standards in cases arising from carceral settings while emphasizing that they do not control the constitutional inquiry. *See J.K.J. v. Polk Cty.*, 960 F.3d 367, 384 (7th Cir. 2020) (en banc) ("PREA is not a constitutional standard, and jails are not required to adopt it."); *see also id.* (treating the fact that the defendants had "scoffed at PREA" as supporting the jury's evidentiary finding that the defendants had engaged in deliberate inaction).

Agency Guidelines: State and federal agency guidelines take many shapes, reflect varied levels of expert study, and address themselves to diverse issues. In general, where prisons comply with expert agency guidelines that credibly establish baseline health and safety standards for the general public, that compliance warrants

substantial deference because the Constitution does not require correctional facilities to be safer than the rest of American society. *See, e.g.*, *Carroll*, 255 F.3d at 472-73 (holding that a prison's compliance with EPA safety standards governing acceptable levels of lead and radium in the water supply defeated an Eighth Amendment claim); *Forbes v. Edgar*, 112 F.3d 262, 267 (7th Cir. 1997) (relying, in part, on a prison's compliance with CDC tuberculosis treatment guidelines to conclude that a warden had not shown deliberate indifference to the risk of infection). In contrast, where agency guidance sets a standard that is unreasonable as applied in a particular setting, courts assign it little weight in the constitutional analysis. *See, e.g.*, *Darrah v. Krisher*, 865 F.3d 361, 369 (6th Cir. 2017) (holding that limited compliance with an Ohio Department of Medical Health treatment plan was irrelevant where the specific treatment at issue was nonetheless plainly unreasonable); *French v. Owens*, 777 F.2d 1250, 1257 (7th Cir. 1985) ("The eighth amendment does not . . . require complete compliance with the numerous OSHA regulations.").

As these examples demonstrate, compliance with agency and professional organization standards is never conclusive under the Constitution. At most, it has some relevance in some cases as to some kinds of standards. The key question is always whether compliance with a particular standard in fact sheds light on whether an official acted in an objectively reasonable manner given the facts before them.

II. THE CDC GUIDELINES AT ISSUE HERE ARE ENTITLED TO LITTLE WEIGHT IN DUE PROCESS CLAUSE ANALYSIS

The district court concluded that the Sheriff's attempted compliance with CDC guidelines was relevant but not determinative of the objective reasonableness of his conduct. *See Mays*, 2020 WL 1987007 at *27 ("[T]he 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."). In reaching this conclusion, the district court navigated a middle ground between the parties, who framed the CDC guidelines are conclusive (the Sheriff) or irrelevant (Plaintiffs). This was a reasonable conclusion. Contrary to the Sheriff's position on appeal, the district court neither erred nor contravened the CDC guidelines in finding that his decision to continue using group housing and double celling was objectively unreasonable.

There are several features of the CDC guidelines that support the district court's middle ground approach: (1) they were created by a respected agency with expertise in controlling the spread of infectious diseases; (2) they were nonetheless created in the early days of the pandemic and have not been subject to active expert refinement in light of new public health data; and (3) they contain a broad, vague feasibility carve-out that is not itself based on any expert judgment about how to ensure health and safety in custody during the pandemic. We will discuss each of these points in turn and then return to the district court's analysis.

First, the CDC is an agency with substantial expertise in controlling the spread of infectious disease—and the guidelines do contain extensive recommendations about how best to slow the spread of the coronavirus in jails, prisons, and other detention facilities. These recommendations, moreover, are broadly consistent with the CDC's public health advice to the general public. That is particularly true of the CDC's position on the importance of social distancing, which the guidelines describe as a "cornerstone" of reducing disease transmission and which the CDC has elsewhere described as the "best way" to reduce the spread of the virus.[5] This accords with the overwhelming public health consensus that social distancing is the "only way to prevent . . . uncontrolled spread of the virus." Gonsalves Declaration ¶ 29 (Dkt. 55-7), *Mays v. Dart*, No. 20 Civ. 2134 (N.D. Ill. Apr. 14, 2020); *see also* Mohareb Declaration at 6 (Dkt. 64-3), *Mays v. Dart*, No. 20 Civ. 2134 (N.D. Ill. Apr. 19, 2020) ("Without social distancing, medical experience demonstrates that the rate of transmission will be rampant and uncontrolled.").

Second, although the CDC guidelines set forth useful and relevant scientific advice, they did not result from the sort of deliberative process or empirical research that ordinarily leads courts to defer to third party standards (such as the ACA and PREA standards). Indeed, the CDC issued its guidelines—without public comment

[5] *See Social Distancing*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (last visited July 24, 2020).

and amid reports of improper political interference[6]—just a few weeks after COVID-19 came to be widely recognized as an urgent public health crisis. Since the guidelines were issued on March 23, the CDC has issued only a single, partial update.[7] In the meantime, nine of the ten largest COVID-19 outbreaks in the country have been linked to jails, prisons, or detention centers, and the CDC has recognized that jails and prisons are struggling (and often failing) to contain the outbreak.[8] Given the many issues the CDC is now facing, it is perhaps understandable that the agency has not moved more quickly to update these guidelines in light of the latest public health data. But the minimal process surrounding issuance of the guidelines, as well as the CDC's failure to actively revisit and revise them (or to draw upon

[6] *See APHA condemns political interference in CDC work*, AMERICAN PUBLIC HEALTH ASSOCIATION (May 18, 2020), https://www.apha.org/news-and-media/news-releases/apha-news-releases/2020/apha-supports-cdc; *see also* Mike Stobbe and Bernard Condon, *Coronavirus data is funneled away from CDC, sparking worries*, ASSOCIATED PRESS (July 15, 2020), https://apnews.com/57de8f0d25d9066731e6bd8cad0373c4.

[7] The CDC also released supplemental guidance relating only to testing in jails and prisons but not to other preventative measures. *See Interim Considerations for SARS-CoV-2 Testing in Correctional and Detention Facilities*, CDC (July 7, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/testing.html. These recommendations are not at issue here.

[8] *See Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (July 16, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#clusters; Megan Wallace et al, *COVID-19 in Correctional and Detention Facilities – United States, February-April 2020*, CDC (May 15, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e1.htm.

public comment in doing so), cuts against presuming that the guidelines truly state a standard of objectively reasonable conduct for ensuring health and safety at jails.

Finally, and most important, the guidelines do not even purport to establish such a standard. They are thus different in kind than the ACA and PREA standards. To be sure, most of the language in the guidelines looks something like a health and safety standard. That includes the suite of recommended measures within jails and prisons that echo the public health consensus on COVID-19 (*e.g.*, calling for regular cleaning, infection control through the use of personal protective equipment, testing and tracing, and medical isolation of individuals who test positive). *See* Venters Declaration ¶ 19 (Dkt. 64-2), *Mays v. Dart*, No. 20 Civ. 2131 (N.D. Ill. Apr. 19, 2020). It also includes the guidelines' heavy emphasis on social distancing, which tracks a broader expert consensus that social distancing is crucial to reducing disease transmission. *See supra* at 17.

But then the guidelines assert that officials need not do any of that if they conclude it is not "feasible." More precisely, the guidelines note that "[n]ot all strategies will be feasible in all facilities," and that social distancing will accordingly "need to be tailored to the individual space in the facility and the needs of the population and staff." These "feasibility carveouts" are not presented as conclusions reflecting the CDC's unique expertise. Nor are they presented as arising from any sound principle of public health policy. That is because they are not. *See* Venters

Decl. ¶ 18 ("The fact that the CDC adds the phrase 'if possible' or 'if space allows' in its guidance specifically directed at detention centers . . . does not alter the clear medical consensus on social distancing."). Rather, the CDC appears to have simply asserted that standard public health measures—which it elsewhere urges the public to follow—may be weakened in jails without any health- or safety-based justification whatsoever. This is a bizarre carveout, given that the risk of disease transmission (and the need for preventive measures) is much greater for detained persons than members of the general public.[9]

On its face, this unexplained, unscientific feasibility carveout makes the CDC guidelines entirely different from the standards that federal courts occasionally consider in assessing objective reasonableness under the Constitution. The normal course would be for the CDC to issue guidelines aimed at ensuring health and safety; for officials to adopt policies appropriate for their own jails; and for courts to assess the constitutional adequacy of those policies with reference to the CDC's standards.[10] In contrast, it is abnormal for an agency to itself say that health and

[9] *See* Brendan Saloner, Kalind Paris, Julie A. Ward, et al., *COVID-19 Cases and Deaths in Federal and State Prisons*, JAMA (July 8, 2020) (reporting findings that the infection rate is 5.5 times higher in prisons as compared to the general public—and that the age-adjusted death rate is three times higher in prisons as compared to the general public).

[10] *See CDC Regulations*, CDC (June 30, 2016), https://www.cdc.gov/regulations/index.html (explaining that CDC rules and regulations are promulgated pursuant to notice and comment rulemaking).

safety guidelines can be disregarded if an official deems them too burdensome, and for an official to then claim that he is shielded from constitutional scrutiny because he complied with guidelines that contain the giant loophole. As the district court concluded, "from a constitutional-law standpoint, it is difficult to believe that 'do what you can, but if you can't, so be it' satisfies a jailer's 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." *Mays*, 2020 WL 1987007 at *27.

In sum, the CDC guidelines contain many recommendations about health and safety procedures in the carceral setting that reflect a reasoned exercise of agency expertise and that are consistent with its general advice about slowing disease transmission. These include its recommendations about the central role of social distancing. However, the CDC guidelines were produced in the early days of the pandemic, without public comment, and have seen no relevant updates since. Moreover, they contain a broad feasibility carveout that is not presented as arising from any settled public health principle and that the CDC does not claim is meant to advance health and safety in a carceral setting. The district court therefore concluded that the CDC's recommendations are particularly compelling as to the importance of social distancing—and that they lack persuasive force to the extent they give officials like the Sheriff *carte blanche* to ignore public health principles wherever

they deem compliance infeasible. *See id.* at *26–27. This decision was reasonable and consistent with precedent. *See supra* at 6–11. The Sheriff's position should therefore be rejected, and the decision below affirmed.

* * * * *

The Sheriff made a policy decision with respect to group housing and double celling that makes social distancing—the single most effective preventive measure—impossible for hundreds of detainees at the Cook County Jail. As the district court found, this conduct violated the Due Process Clause. Contrary to the Sheriff's assertions, it is not salvaged by his attempted compliance with the CDC guidelines, which quite unusually suggest that measures essential to preserving detainee health and safety can be ignored if they are difficult or costly to implement. Neither common sense nor the Constitution countenances that conclusion, which would undermine core safeguards, and which is at odds with this Court's precedents.

CONCLUSION

For the reasons set forth above, *amici* respectfully request that this Court affirm the judgment below.

Dated: July 24, 2020

Respectfully Submitted,
/s/ Joshua Matz

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CERTIFICATE OF COMPLIANCE

Counsel for *amici curiae* certifies that this brief contains 5,282 words, based on the "Word Count" feature of Microsoft Word 2016.

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this word count does not include the words contained in the Corporate Disclosure Statement, Table of Contents, Table of Authorities, and Certificates of Counsel. Counsel also certifies that this document has been prepared in a proportionally spaced typeface using 14-point Times New Roman in Microsoft Word 2016.

Dated: July 24, 2020

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CERTIFICATE OF SERVICE

Counsel for *amici curiae* certifies that on July 24, 2020 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 24, 2020

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APPENDIX A

Amici join this brief as individuals; institutional affiliation is noted for informational purposes only and does not indicate endorsement by institutional employers of positions advocated.

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