Nos. 19-1145, 19-1375 & 19-1978

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ASHOOR RASHO, ET AL.,
Plaintiffs/Appellees,

v.

ROB JEFFREYS, DIRECTOR OF THE ILLINOIS DEPARTMENT OF CORRECTIONS, AND MELVIN HINTON, ACTING STATEWIDE MENTAL HEALTH SUPERVISOR OF THE ILLINOIS DEPARTMENT OF CORRECTIONS,
Defendants/Appellants.

On Appeal from the United States District Court
for the Central District of Illinois
Case No. 07-C-1298
Honorable Michael M. Mihm

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, AND RODERICK & SOLANGE MACARTHUR JUSTICE CENTER IN SUPPORT OF REHEARING EN BANC AND AFFIRMANCE

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-1145, 19-1375, 19-1978

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STATEMENT OF *AMICI CURIAE*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 1.7 million members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU established the National Prison Project (NPP) in 1972 to protect and promote the civil and constitutional rights of incarcerated people. The NPP has decades of experience in prisoners' rights class-action suits and since 1990 has represented incarcerated people in five cases before the U.S. Supreme Court. Courts nationwide repeatedly recognize the NPP's special expertise in cases dealing with confinement conditions.[1]

The ACLU of Illinois is the ACLU's state affiliate, with more than 75,000 members and supporters across Illinois. The ACLU of Illinois has appeared before numerous courts, including this Court, in a wide range

[1] *See, e.g.*, *Plyler v. Evatt*, 902 F.2d 273, 278 (4th Cir. 1990); *Palmigiano v. Garrahy*, 707 F.2d 636, 637 (1st Cir. 1983); *Duvall v. O'Malley*, No. CV ELH-94-2541, 2016 WL 3523682, at *9 (D. Md. June 28, 2016); *Dockery v. Fisher*, 253 F. Supp. 3d 832, 856 (S.D. Miss. 2015); *Riker v. Gibbons*, No. 3:08-cv-00115-LRH-VPC, 2010 WL 4366012, at *4 (D. Nev. Oct. 28, 2010); *Diaz v. Romer*, 801 F. Supp. 405, 410 (D. Colo. 1992), *aff'd*, 9 F.3d 116 (10th Cir. 1993).

of institutional reform cases. Currently these include *Lippert v. Jeffreys*, No. 1:10-cv-04603 (N.D. Ill.) (consent decree on behalf of Illinois state prisoners with physical healthcare needs), and *Monroe v. Jeffreys*, No. 3:18-cv-00156-NJR-MAB (S.D. Ill.) (ongoing class action on behalf of transgender prisoners in Illinois state prisons).

The Roderick & Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at Northwestern Pritzker School of Law and at the University of Mississippi School of Law, as well as in New Orleans, St. Louis, and Washington, D.C. RSMJC attorneys have led civil-rights litigation addressing police misconduct, compensation for the wrongfully convicted, and the treatment of incarcerated men and women. RSMJC litigates appeals related to the civil rights of incarcerated men and women.

All parties have consented to this brief's filing. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no

other person other than *amici*, their members, or their counsel contributed money intended to fund preparing or submitting the brief.

SUMMARY

The Court should revisit this case en banc because the panel's errors will reverberate far beyond this opinion. The panel displaces standard appellate deference to district court factfinding, deference rooted in district courts' special familiarity with the often complex record in institutional reform litigation. The effect will be to undermine the authority of district courts to manage such litigation, and so this appeal "involves a question of exceptional importance." Fed. R. App. P. 35(a)(2). As the dissent warned, the panel ruling puts the Seventh Circuit "on a lonely course" in conflict with the Supreme Court and other circuits. *Id.* 35(b)(1)(A). En banc rehearing is urgently needed.

ARGUMENT

I. If Unable to Consider Officials' Prior Intransigence and Noncompliance, District Courts Will Be Powerless to Craft Effective Remedies in Institutional Reform Cases.

The panel opinion's errors upset the settled distribution of responsibility between trial and appellate courts for managing ongoing litigation, and do so in a case with particularly high stakes for Illinois's citizens suffering from mental illness. The decision improperly reversed the district court's factual finding of deliberate indifference, finding instead that

"IDOC officials took reasonable steps to cure the deficiencies identified by the plaintiffs." Op.2. "Even if those steps were not fully successful," the majority concluded, "their reasonable effort to address a known risk of harm shows that they did not recklessly disregard that risk." *Id.* According to the panel, "[e]vidence that the defendant responded reasonably to the risk, even if he was ultimately unsuccessful in preventing the harm, negates an assertion of deliberate indifference." *Id.* at 10.

This standard simply sets aside years of the district court's active management of this complicated case. It substitutes the panel's own conclusions for the district court's experienced judgment. As Judge Ripple correctly pointed out in dissent, the Illinois officials' decisions can appear "reasonable" only if viewed "in a temporal vacuum." Op.33 (Ripple, J., dissenting).

The district court rightly chose instead to judge the reasonableness of those decisions in the context of the ongoing mental healthcare crisis in Illinois prisons. To take only one example among many: the court-appointed monitor testified he had spoken with a prisoner who, after "several months" in "segregation" (solitary confinement), "display[ed] the signs of being psychotic," or "losing touch with reality." R.1757 at 112-13.

The man told the monitor about a "black spot" in his cell that was "talking to him, asking him to give blood"; he would "cut [him]self" to "pay [the spot] blood," but then the spot "want[ed] more blood." *Id.* at 113:1-2, 5-7. The monitor testified that "[w]hen a mentally ill individual is placed into segregation, they should be getting more treatment" to prevent such dramatic deterioration—but he had "not seen any evidence" that was happening in Illinois prisons. *Id.* at 120:9-15.

This man's hellish experience and countless others like it were the basis for the district court's well-supported conclusion that "Defendants ha[d] failed to achieve a minimum level of medical service to avoid the label of cruel and unusual punishment." R.2460 at 27-28.[2] Yet the panel effectively ignored this finding and the evidence supporting it on the grounds that officials had made some effort at the eleventh hour, *knowing* their actions were temporary, unsustainable, and largely ineffective.

[2] There is evidence that long-term solitary confinement and inhumane prison conditions alone are "cruel and unusual" under the Eighth Amendment, which "refers to the effect of the punishment, not the intent that motivates it." John F. Stinneford, *The Original Meaning of "Cruel"*, 105 Geo. L.J. 441, 444 (2017); *see also id.* at 502-03 & n.388.

The majority opinion leaves this man and countless other vulnerable class members unprotected by the courts despite clear evidence of officials' obstructionism. Nor are such effects limited to this case: The decision strips district courts in Illinois, Indiana, and Wisconsin of their power to meaningfully respond to similar indifference there—even in the face of horrific and unnecessary suffering.

Indeed, per the majority, "[t]he details of this lengthy litigation are largely irrelevant." Op.3. That amounts to a dismissal of the district court's on-the-ground assessment that officials thwarted its remedial orders over nearly three years. So much for the notion that a district court "generally is considered the most informed interpreter of its own prior rulings and findings." *Morales Feliciano v. Rullan*, 378 F.3d 42, 53 (1st Cir. 2004). The majority opinion undermines district courts' authority to enforce compliance in these impactful cases.

Without the ability to consider previous intransigence or noncompliance, district courts will have little power to craft effective remedial frameworks in institutional reform litigation. Under the majority's standard, nearly *any* effort in the general direction of compliance—or to

avoid additional court-imposed remedies—will render state officials immune from a deliberate indifference finding. And a perfunctory effort may suffice no matter how late it comes, how begrudgingly it is carried out, or how ineffective it turns out to be. That is not and should not be the law. *See Petties v. Carter*, 836 F.3d 722, 728 (7th Cir. 2016) (en banc) ("[W]e look at the totality of an inmate's medical care when considering whether that care evidences deliberate indifference to serious medical needs."); *Woodward v. Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917, 924 (7th Cir. 2004) (affirming verdict where suicidal prisoner was evaluated by medical professional seven days after screening, in violation of immediate evaluation requirement).

The panel's heavy-handedness strikes at the heart of how reform litigation functions by eviscerating the authority of district courts. Federal district courts have long been the focal point of institutional reform litigation. *See, e.g.*, *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014) (affirming class certification in case involving systemic Eighth Amendment violations); *Parsons v. Ryan*, 949 F.3d 443 (9th Cir. 2020) (affirming sanctions for officials' failure to comply with orders); *Doe v. Cook Cnty.*, 798 F.3d 558 (7th Cir. 2015) (district court-appointed administrator running

county's juvenile detention center)[3]; *Braggs v. Dunn*, 367 F. Supp. 3d 1340, 1359 (M.D. Ala. 2019) (finding failure to provide constitutionally required care for prisoners with mental illness); *Braggs v. Dunn*, No. 2:14cv601-MHT, 2021 WL 6112444, at *2 (M.D. Ala. Dec. 27, 2021) (ordering relief to address "four years of severe [mental health] understaffing and the likelihood of four more"). In fact, "many public institutions still operate under orders issued and supervised by federal courts," Mark Kelley, Note, *Saving 60(b)(5): The Future of Institutional Reform Litigation*, 125 Yale L.J. 272, 275 (2015). And district courts, with primary institutional competence in weighing evidence and factfinding, necessarily must play the leading role in managing litigation and making on-the-ground, fact-intensive determinations about the need for and scope of relief.[4]

[3] One expert called *Doe* "a historic action that altered the course of juvenile detention and improved the health, safety, well-being, and positive life outcomes of many of Chicagoland's most challenging juvenile offenders." David W. Roush, *Reforming Conditions of Confinement in Juvenile Detention*, 2015 J. Applied Juv. Just. Servs. 31, 36.

[4] In an analogous recent context, this court en banc emphasized the proper limits of factual review on appeal. *See J.K.J. v. Polk Cnty.*, 960 F.3d 367, 378 (7th Cir. 2020).

If allowed to stand, the decision will undermine institutional reform cases in this circuit. A district court must have leeway to ensure compliance with its orders; the alternative is to cast doubt on the authority of those orders. Because that would hollow out the Eighth Amendment and hobble district courts' ability to award effective relief, the Court should rehear this case en banc.

II. The Panel's Decision Departs From Controlling Precedent and Sets Up a Circuit Split.

This Court should also rehear the case en banc because the panel decision conflicts with decisions by the Supreme Court and other circuits. Fed. R. App. P. 35(b)(1)(A). As discussed above, the panel's intrusive review rejects the settled clear error standard that appeals courts must use for factual findings. *See, e.g.*, *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."); *In re Veluchamy*, 879 F.3d 808, 817 (7th Cir. 2018) (similar); *Pinkston v. Madry*, 440 F.3d

879, 888 (7th Cir. 2006) ("[c]lear error is an extremely deferential standard of review"). This conflict alone justifies en banc review.

And on the merits, the panel decision "sets [this] circuit on a lonely course ... in conflict with the controlling precedent of the Supreme Court and with the decisions of the other circuits." Op.34 (Ripple, J., dissenting). *Brown v. Plata*, 563 U.S. 493 (2011), instructs that "even when acting within the constraints of the PLRA, a district court's approach to fashioning a remedy may be informed by the history of both the constitutional violation and of the failed efforts to solve the problem through other means." Op.41 (Ripple, J., dissenting).

Courts in other circuits have thus properly considered officials' ineffectiveness and recalcitrance when fashioning and refining remedies. For example, in *Plata v. Schwarzenegger*, the Ninth Circuit rejected California's least-intrusive-means argument because the district court appointed a receiver "[a]fter attempting less drastic remedies," "after long periods of working closely with State authorities to try to bring them into compliance," and "only after the State admitted its inability to comply

with consent orders." 603 F.3d 1088, 1097 (9th Cir. 2010); *see also Armstrong v. Brown*, 768 F.3d 975, 984-85 (9th Cir. 2014) (similar); *Porretti v. Dzurenda*, 11 F.4th 1037, 1051-52 (9th Cir. 2021) (similar).

Morales, a First Circuit opinion, affirmed a continuing injunction in part because Puerto Rico's "acceptance of the need for reforms ha[d] ranged from inconsistent to grudging ... and progress has been correspondingly slow." *Morales*, 378 F.3d at 55.[5] Similarly, the Second Circuit affirmed a district court's order against municipal prison administrators, noting that "the record shows a troubling pattern of noncompliance and misrepresentations." *Benjamin v. Schriro*, 370 F. App'x 168, 170 (2d Cir. 2010). In light of that history, the court summarily rejected the officials' appeal. *Id.* at 171. These sister circuits (and the district court in this case) correctly recognize that, in prison litigation as in all else, past is prologue. The decision here veers off in an entirely different direction, with its

[5] In fact, Puerto Rico's Secretary of Health argued that the slow pace of progress was itself reason to dissolve the continuing injunction. *Morales*, 378 F.3d at 55-56. The First Circuit noted that "[t]he district court has cultivated this tree patiently and at great expense, and it would be rash for us to insist that it be uprooted just when it shows promise of bearing fruit." *Id.* at 56.

shrug that "[t]he details of this lengthy litigation" were "largely irrelevant." Op.3.

Most concerning, the procedural posture of this case—clear error review of a factual finding—supercharges its precedential effect. By finding clear error, the panel necessarily concluded that the district court's finding was *not* "plausible in light of the record viewed in its entirety," *Reynolds v. Tangherlini*, 737 F.3d 1093, 1104 (7th Cir. 2013), was *not* a "permissible view[] of the evidence," and *was* "illogical or implausible," *Estrada-Martinez v. Lynch*, 809 F.3d 886, 895 (7th Cir. 2015). If the strong evidence of deliberate indifference in this record does not even allow a *plausible* or *permissible* finding of deliberate indifference, then deliberate indifference is all but impossible to prove. If left to stand, this majority opinion will create a barrier to finding deliberate indifference in *any* case with arguable evidence of "reasonable efforts" by prison officials.

That would be a roadmap for officials to evade life-saving court orders. In virtually every case alleging systemic issues, state officials can point to *something* they have done to address the issues. For example, in *Morales*, officials challenged the district court's constitutional findings, arguing "that some noteworthy advances have been made in the delivery

of health care to inmates." 378 F.3d at 54. The First Circuit paid no heed: "[h]owever laudable the advances may be, ... [w]e hold, without serious question, that the district court's findings and conclusions about the incidence of continuing constitutional violations are adequately anchored in the record." *Id.*

And if merely doing *something*—anything—is a complete defense, the end result is obvious: an entire category of the Eighth Amendment's protections will simply be out of reach in this circuit. The cynical reality of this opinion is that ineffective measures, taken at the last minute, will insulate officials and their constitutional violations from judicial oversight. Because this conflicts with Supreme Court precedent and other circuits' considered opinions—as well as with the rule of law itself—the en banc Court should revisit the case.

CONCLUSION

For these reasons and those in Appellees' petition, the Court should vacate the panel opinion and rehear the appeal en banc.

Dated: February 17, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This amicus brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Circuit Rule 29 because this brief contains 2,557 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This amicus brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point size and Century Schoolbook style.

/s/ Robert N. Hochman
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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2022, I caused the foregoing to be electronically filed with the U.S. Court of Appeals for the Seventh Circuit via the CM/ECF system, which will automatically send email notifications of such filing to all attorneys of record.

/s/ Robert N. Hochman
Robert N. Hochman