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.

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

PETITION FOR REHEARING EN BANC

Harold C. Hirshman
Samantha Reed
DENTONS US LLP
233 S. Wacker Drive
Suite 5900
Chicago, IL 60606
(312) 876-8000

Amanda Antholt
Equip for Equality
20 N. Michigan Ave.
Suite 300
Chicago, IL 60602
(312) 895-7330

Alan Mills
Uptown People's Law Center
4413 N Sheridan
Chicago, IL 60640

Save As Clear Form

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-1145; 19-1374; 19-1978

Short Caption: Rasho, et. al., v. Jeffreys, et. al.

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.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(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):
Plaintiff class representatives Ashoor Rasho, Patrice Daniels, Gerrodo Forrest, Keith Walker, Otis Arington, Donald Collins, Joseph Herman, Henry Hersman, Rasheed McGee, Fredricka Lyles

(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:
Dentons LLP, Equip for Equality, Uptown People's Law Center, Mayer Brown

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

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

n/a

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

n/a

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

n/a

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: /s/ Harold C. Hirshman Date: 2/16/2022

Attorney's Printed Name: Harold C. Hirshman

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

Address: 233 S. Wacker Drive, Suite 5900
Chicago, IL 60606

Phone Number: 312-876-8000 Fax Number:

E-Mail Address: harold.hirshman@dentons.com

Save As Clear Form

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-1145; 19-1374; 19-1978

Short Caption: Rasho, et. al., v. Jeffreys, et. al.

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.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(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):
Plaintiff class representatives Ashoor Rasho, Patrice Daniels, Gerrodo Forrest, Keith Walker, Otis Arington, Donald Collins, Joseph Herman, Henry Hersman, Rasheed McGee, Fredricka Lyles

(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:
Dentons LLP, Equip for Equality, Uptown People's Law Center, Mayer Brown

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

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

n/a

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

n/a

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

n/a

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: /s/ Samantha R. Reed Date: 2/16/2022

Attorney's Printed Name: Samantha R. Reed

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

Address: 233 S. Wacker Drive, Suite 5900
Chicago, IL 60606

Phone Number: 312-876-8000 Fax Number:

E-Mail Address: samantha@equipforequality.org

rev. 12/19 AK

Save As Clear Form

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-1145; 19-1374; 19-1978

Short Caption: Rasho, et. al., v. Jeffreys, et. al.

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.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(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):
Plaintiff class representatives Ashoor Rasho, Patrice Daniels, Gerrodo Forrest, Keith Walker, Otis Arington, Donald Collins, Joseph Herman, Henry Hersman, Rasheed McGee, Fredricka Lyles

(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:
Dentons LLP, Equip for Equality, Uptown People's Law Center, Mayer Brown

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

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

n/a

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

n/a

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /s/ Amanda Antholt Date: 2/15/2022

Attorney's Printed Name: Amanda Antholt

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

Address: Equip For Equality, 20 N. Michigan Ave. Chicago, IL 60304

Phone Number: 312-316-7905 Fax Number:

E-Mail Address: amanda@equipforequality.org

Save As Clear Form

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-1145; 19-1374; 19-1978

Short Caption: Rasho, et. al., v. Jeffreys, et. al.

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.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(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):
Plaintiff class representatives Ashoor Rasho, Patrice Daniels, Gerrodo Forrest, Keith Walker, Otis Arington, Donald Collins, Joseph Herman, Henry Hersman, Rasheed McGee, Fredricka Lyles

(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:
Dentons LLP, Equip for Equality, Uptown People's Law Center, Mayer Brown

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

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

n/a

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

n/a

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /Alan Mills Date: 2/15/2022

Attorney's Printed Name: Alan Mills

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

Address: Uptown People's Law Center
4413 N,. Sheridan Rd., Chicago, IL 60640

Phone Number: 773-769-1411 Fax Number: 773-769-2224

E-Mail Address: alan@uplcchicago.org

rev. 12/19 AK

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

RULE 35(b) STATEMENT

The panel majority vacated injunctive relief to more than 12,000 prisoners with mental illness suffering in Illinois prisons, entered after a lengthy evidentiary hearing before a veteran judge with over a decade of experience overseeing this case. In reversing the trial court's factual findings and vacating its carefully crafted remedy, the majority disregarded the long history of the Illinois Department of Corrections' (IDOC) knowledge of its grave deficiencies in care and failure to rectify those deficiencies.

The majority's decision conflicts with existing law in three ways. First, the decision to set aside the district court's factual findings, which were well supported by an abundant record and significant admissions by Defendants themselves, runs afoul of the clearly erroneous standard of review as established in *Anderson v City of Bessemer County, N.C.*, 470 U.S. 564, 573 (1985).

Second, the decision conflicts with this Circuit's deliberate indifference jurisprudence in *Wellman v. Faulkner,* 715 F.2d 269, 272 (7th Cir. 1983) and *Petties v. Carter,* 836 F.3d 722, 728 (7th Cir. 2016) (en banc). This Circuit has long held that evidence of *some* action does not necessarily negate liability and evidence that defendants continued in a course of conduct known to be ineffective at alleviating the risk of harm is evidence of deliberate indifference, not a defense to liability. The majority decision contradicts this precedent, holding instead that evidence of any effort, no matter how small, ineffective, belated, or tangentially related to the risk of harm at issue, is sufficient to defeat liability.

Third, the decision conflicts with precedent of the Supreme Court and other circuits regarding the Prison Litigation Reform Act's requirements for injunctive remedies aimed at curing ongoing and systemic constitutional violations. The panel majority ignores the plain text of the PLRA and expands this Circuit's precedent in *Westefer v. Neal,* 685 F.3d 679 (7th Cir. 2012), so far as to prohibit a district court from entering specific relief, even where the court has found it necessary due to the defendants' history of ineffectiveness and recalcitrance.

Finally, this case raises issues of exceptional importance regarding the appropriate role of the district court. By eviscerating the district court's factfinding function and its power to issue a meaningful remedy, the majority's decision diminishes the district court's critical role in overseeing systemic litigation.

BACKGROUND

Over the last ten years, three independent national experts in correctional mental health have examined the Illinois system and declared it to be in a state of emergency, unable to provide minimally adequate mental health treatment needed to prevent harm and unnecessary injury. The first expert issued a report in 2012, finding serious deficiencies in mental health treatment throughout Illinois prisons. (R.98; R.261:3-4.)

In 2013, the parties entered an agreed order wherein IDOC would make specific reforms to address the plight of mentally ill prisoners in segregation and, more broadly, remedy its deficient staffing to provide appropriate treatment throughout the system. (R.132.) IDOC submitted a staffing plan in 2014 detailing

the staff it needed to provide constitutionally adequate care to prisoners deemed seriously mentally ill (a subset of the total mentally ill population). (R.2633:45; PX.9.) Those positions went unfilled, and the promised reforms went unmet. Later that year, a second independent expert found that IDOC still was not providing even minimally necessary care for prisoners in the most isolated settings of segregation and crisis watch. (R.1758:78-82, 88-92; PX.10.)

In 2016, a comprehensive settlement was reached, with specific requirements for the provision of care. (R.711-1.) But within a year, the third expert and court monitor, Dr. Pablo Stewart, opined that IDOC still was not providing minimally adequate care. (R.1373.) IDOC was failing to manage psychotropic medications (*id.* at 46-49); conduct timely initial mental health evaluations (*id.* at 22); conduct individualized treatment planning (*id.* at 27-30); and provide sufficient treatment for patients in the isolated settings of crisis and segregation (*id.* at 42-43, 55-70.)

Between December 2017 and March 2018, the district court held six days of hearings on Plaintiffs' motion for preliminary relief, based on IDOC's ongoing failures in five essential areas of mental health treatment: evaluations, treatment planning, medication management, crisis watch, and segregation. (R.2070.) The district court heard remarkably consistent testimony from the independent court monitor, IDOC leadership, mental health staff, and prisoners about the inadequacies in care. (R.2070:15-20; *see also* R.2633:61 ("Defendants did not generally dispute their deficiencies in mental health care to inmates.")) IDOC's leadership admitted that IDOC was not and could not provide necessary care,

largely due to chronic understaffing, and that mentally ill prisoners were in danger. (R.2070:35-36; R.1758:50-53, 81, 93-95.)

Mentally ill prisoners in IDOC's most isolated settings of crisis watch and segregation were suffering. IDOC's practice for prisoners on suicide watch was to strip them of clothing and property and place them alone in a cell for 24 hours a day, with nothing to do or occupy their mind other than a single, daily 10-15-minute mental health assessment. (R.1757:74-75, 183-84; R.1758:14-15, 131; R.2374:87-88.) Likewise, IDOC's segregation population, about 80% of which have mental illness, spent 22 to 24 hours per day in their cells, (R.1757:103, 106-107), and IDOC's Chief of Mental Health testified that they were getting worse "across the board" without needed treatment. (R. 2070:29-30.)

IDOC was failing even the basics. Mental health evaluations—necessary to determine patients' needs and begin treatment—were significantly delayed. (R.1757:210-13.) Treatment plans were not individualized to patient needs. (R.1905:79-83.) And prisoners on psychotropic medications were waiting months too long to be seen by psychiatrists, "creating a seriously dangerous situation" where side effects and medication noncompliance went unaddressed. (R.2070:23-24.)

In May 2018, the district court issued findings on Plaintiffs' preliminary injunction motion, concluding that IDOC was not providing minimally adequate treatment in any of the five areas of care. The court entered relief specific to the violations in the five areas that, while broad, would require IDOC to provide minimal care necessary to protect class members from harm. (R.2070:39-42.)

Finding that "the most fundamental issue effecting each of these areas is the IDOC's deficiency in psychiatric and other mental health staffing," the court ordered IDOC to determine the number of staff necessary to provide adequate care, provide that staff, and update its staffing plan accordingly. (R.2070:15, 40-41.) In July 2018, IDOC submitted its new staffing plan, adding nearly 100 more clinical positions. (R.2633:21.)

In August 2018, the district court held hearings on Plaintiffs' permanent injunction motion and found that very little had changed. The harms to the class continued; care had not improved in any of the five areas. (R.2633:6, 19.) Despite an increase in one area of staffing (psychiatrists), IDOC still had not come close to fulfilling its staffing plan. (R.2633:21; R.2378:4.) The court deferred entry of a remedy, allowing IDOC to submit its own proposal. (R.2460:50; R.2633:11.) In response, IDOC submitted "a document containing simple generalities" insufficient to achieve the changes required, compelling the court to issue an injunction with mandates regarding care in the five areas. (R.2633:50.)

The court carefully crafted its order to address the five areas of care at issue. Those aspects of the order are not discussed by the panel majority, which focuses on staffing rather than the treatment deficiencies that violate the Constitution. The district court also found that improvements in care could not be achieved without the long-overdue staff increases. (R.2633:51-54.) The court refrained from ordering IDOC to achieve the higher staffing in its 2018 plan but sought to spur "immediate action" by ordering IDOC to at least meet the lower staffing levels of their 2014

plan, noting that the numbers may not be enough to provide constitutional care to the current, and much larger, caseload. (*Id.*) The court left the door open for IDOC to return to court to amend the staffing requirements if warranted. (*Id.*)

On appeal, the majority reversed the district court's factual finding that IDOC had been deliberately indifferent to the risks to mentally ill prisoners, finding that IDOC's efforts to respond to the risk were "reasonable." (Slip.Op. 10-13.) The panel also held that, even if the court had not erred in its factual findings, the scope of the injunction failed to comply with the PLRA. (Slip.Op.14-18.)

Judge Ripple, in dissent, showed that the district court's findings of fact were supported by the record and criticized the majority for failing to give those findings the deference to which they were entitled, especially in light of the trial judge's long history with this case. (Slip.Op. 21-34.). Judge Ripple further warned that the majority's precedent on injunctive relief created a "practically unworkable" standard for district judges dealing with "very important human problems and very real parties." (Slip.Op. 34-55.)

ARGUMENT

I. The Majority Decision Contradicts Precedent on the Clearly Erroneous Standard and Fails to Appropriately Defer to the District Court

The majority's decision to set aside factual findings of the district judge, who had presided over this case for over a decade and evaluated weeks' worth of testimony and documentary evidence, rewrites *sub silentio* the established precedent on the clearly erroneous standard. That precedent prohibits appellate courts from reversing factual determinations that an appellate judge finds "maybe

or probably wrong;" rather, the findings must strike the panel "as wrong with the force of a five-week-old, unrefrigerated dead fish." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.,* 866 F.2d 228, 233 (7th Cir. 1988)*; see Anderson v City of Bessemer County, N.C.*, 470 U.S. 564, 573 (1985) (an appellate court may not reverse factual findings *even if* it is convinced that it would have come to a different conclusion or weighed the evidence differently). Choosing one of two competing narratives cannot be clearly erroneous; if it were, the burden of proof in every case of this kind would be beyond a reasonable doubt.

As other circuits have held, substantial deference is even more necessary where, as here, "the district court has been overseeing complex institutional reform litigation for a long period of time." *Jeff D. v. Kempthorne*, 365 F.3d 844, 850 (9th Cir. 2004); *see also Navarro–Ayala v. Hernandez–Colon*, 951 F.2d 1325, 1338 (1st Cir. 1991); *Ruiz v. Lynaugh*, 811 F.2d 856, 861 (5th Cir. 1987). The district court's history with the case allows it to evaluate the evidence in context. In contrast, the panel majority failed to make such an analysis here, declaring everything that came before the 2016 settlement "largely irrelevant," (Slip.Op. 3), and ignoring the district court's analysis that many of the efforts put forward by IDOC "have gone on far too long without any significant attempt to adapt or modify" despite their ineffectiveness. (R.2633:29.)

In flouting longstanding precedent requiring review of the "entire" evidence, *Anderson,* 470 U.S. at 573, the majority also disregarded the evidence that IDOC's "efforts" were unlikely to resolve the harms at hand. For example, the majority

failed to consider that IDOC's efforts did not include changes to protocols to improve care for patients isolated 24/7 on crisis watch. And IDOC's recruitment efforts focused primarily on psychiatric providers, whose job in the IDOC is limited to prescribing and monitoring psychotropic medicines, whereas qualified mental health professionals (QMHPs) were needed to provide the bulk of the care found deficient. (R.1905:181-82.)

The district court, on the other hand, had weighed IDOC's efforts relative to the deficiencies in care at issue. Just as the few psychiatric increases cited by the majority were not intended to and did not resolve the failures in evaluations, treatment planning, crisis watch or care in segregation (all provided by QMHPs), IDOC's capital expenditures also fell short. There was no evidence that the electronic records system (still not implemented), far-off plans for a new hospital, or previously constructed residential treatment units would resolve these problems. The district court considered these efforts and found that, without enough staff to provide care, no amount of construction, form changes, or training programs would get the job done. (R.2633:20-21, citing Director Baldwin's testimony that buildings by themselves do not treat the inmates.) The majority did not explain why the district court was *required* to find IDOC's efforts "reasonable" when they were not targeted to the violations and harms at issue.

The majority also misunderstood the importance of the backlog data, concluding that IDOC's efforts *must* have been reasonable because they reduced backlogged psychiatric appointments. (Slip.Op. 13.) That conclusion was disputed,

but even if true, it would only go to the issue of medication management and not the four other areas of deficient care. (R.2633:23-24; *see also* R.2373:257 "backlog measures do not address quality of care in any way.")

The majority's evidentiary errors demonstrate precisely why, for both judicial economy and fairness, the appellate court should not act as factfinder when a district judge already has conscientiously considered and weighed voluminous evidence. *Anderson*, 470 U.S. at 5 (a trial on the merits is supposed to be the "main event," not a "tryout on the road").

II. The Majority Opinion Creates an Internal Conflict with this Circuit's Deliberate Indifference Caselaw

The majority's conclusion that IDOC's efforts were reasonable contradicts this Circuit's substantial precedent that persisting in a course of action known to be ineffective is unreasonable, evincing conscious disregard. *Petties v. Carter,* 836 F.3d 722, 728 (7th Cir. 2016) (en banc); *Gray v. Hardy*, 826 F.3d 1000, 1009 (7th Cir. 2016) ("Knowingly persisting in an approach that does not make a dent in the problem is evidence from which a jury could infer deliberate indifference.").

Moreover, in systemic prison cases, this Court's precedent holds that deliberate indifference can be demonstrated by patterns of negligent acts or by "such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care." *Wellman v. Faulkner,* 715 F.2d 269, 272 (7th Cir. 1983); *Phillips v. Sherriff of Cook County,* 828 F.3d 541, 554 (7th Cir. 2016) (same). The majority failed to address this governing authority or its application to the trial court's findings.

This matters because, in systemic prison litigation, the defendant is almost always doing *something*—including spending money on facilities, staffing, and some level of care. But this Court has repeatedly said that plaintiffs are not required to show that their needs were "literally ignored." *Petties,* 836 F.3d at 729. Rather, the question is whether the efforts defendants made are reasonable *in light of the problem at hand*. *See Farmer v. Brennan,* 511 U.S. 825, 832 (1994). The Third Circuit describes the appropriate analysis as "look[ing] to see whether the gap between the officials' actions or inaction and the problem they were trying to solve was so large that those actions display deliberate indifference." *Wharton v. Donberg*, 854 F.3d 234, 244 (3rd Cir. 2017). The majority's decision rejects this approach, instead requiring courts to accept *any* efforts as defeating deliberate indifference, regardless of their likelihood to cure the problem.

The district court considered IDOC's efforts based on the evidence as a whole and found that they were either irrelevant, insufficient in relation to the problems, and/or known to be ineffective. (R.2633:29, 44-45; R.2460:43-44.) Many were not new and not designed to address the risk of harm. For example, many of the problems were happening in the very units whose previous construction Defendants were now pointing to as evidence of "reasonable" efforts. Newer staffing efforts, including expanding telepsychiatry and working with a local university, had only been undertaken under pressure of litigation, and, like the other staffing efforts cited by the majority, were focused primarily on psychiatrists, not the QMHPs needed to provide much of the care that was still deficient.

Likewise, IDOC's own witnesses repeatedly admitted that unlimited overtime was ineffective and made the problems worse. Significant overtime was causing staff burnout and turnover, exacerbating the problem of understaffing rather than alleviating it. (R.2633:6, 15, 24-26.) Thus, the evidence showed unequivocally that Defendants "didn't *honestly* believe" that overtime was a solution. *See Zaya v. Sood*, 836 F.3d 800, 805-06 (7th Cir. 2016).

Rehearing is therefore required to correct this conflict in Seventh Circuit law.

III. The Majority Decision on the Injunction's Scope Conflicts with Supreme Court and Other Circuits' Precedent and Creates Insurmountable Hurdles for District Courts

a. The Majority Decision Conflicts with Precedent of the Other Circuits on the Crafting of the Remedies in the Face of Prolonged Recalcitrance

The majority held that, even if the district judge's factual findings were correct, the only available remedy was ordering IDOC to create its own remedial plan. This holding utterly ignores that the district court *did* give Defendants an opportunity to submit a plan, but the plan IDOC produced was too vague to be effective, especially in light of its record of making plans and promises that it failed to keep. While *Westefer* and the PLRA require the remedy to be narrowly tailored and extend no further than necessary to cure the violations, 18 U.S.C. § 3626(a)(1), a remedy that is limited to ordering what has already failed cannot and will not cure constitutional violations.

As the dissent explains, the district court was entitled to consider the IDOC's ineffectiveness and recalcitrance in crafting relief. Slip.Op. 34-49. The Supreme Court and several other circuits have held as much. *See e.g. Brown v. Plata*, 563

U.S. 493, 516 (2011); *Benjamin v. Fraser*, 343 F.3d 35 (2d Cir. 2003), *overruled on other grounds by Caiozzo v. Koreman,* 581 F.3d 63 (2d Cir. 2009); *Morales Feliciano v. Rullan*, 378 F.3d 42, 55 (1st Cir. 2004); *Armstrong v. Brown*, 768 F.3d 975, 985-86 (9th Cir. 2014).

The majority decision sets the Seventh Circuit in conflict with this precedent by stating that an institutional defendant's history of noncompliance does not matter. (Slip.Op. 17.) This rule would require district judges to grant the same deference to prison administrators who have continually shirked their duty to remedy constitutional violations after years of litigation as would be expected at the outset of a case. *Id.* But the Supreme Court has made clear that federal courts must not shrink from their obligation to enforce constitutional rights, even if it means "intrusion into the realm of prison administration." *Brown,* 563 U.S. at 511.

Nothing in *Westefer* or the text of the PLRA requires a court to ignore the history of a defendants' recalcitrance. *Westefer v. Neal* dealt with a finding that IDOC's procedures for assigning prisoners to the supermax prison failed to provide due process. 685 F.3d 679 (7th Cir. 2012). That constitutional violation could be cured with changes to a single policy, while this case deals with an entire mental-health system that has been perpetually unable to provide adequate care despite its policies and repeated agreements to do so over the course of more than a decade. There simply was no similar history of recalcitrance to consider in *Westefer*.

And the PLRA itself, while requiring deference to prison administrators, still allows courts to grant relief "necessary to correct" a violation of a federal right. 18

U.S.C. § 3626(a)(1); *Morales Feliciano*, 378 F.3d at 54 ("Congress left room [] for needed injunctive relief."). In a case where a recalcitrant defendant has failed to address "emergency" failures in care for years, the PLRA's plain language does not require the remedy to remain vague and deferential. If the record demonstrates that a more specific remedy is "necessary" to spur prison administrators to action, then the PLRA's "necessary to correct" language allows for that relief.

Moreover, the majority focuses on one aspect of the district court's remedy—the staffing requirements—and barely addresses the relief ordered on the treatment deficiencies that were found to violate the Constitution. Even if parts of the injunction were overly intrusive, the correct approach given the well-supported factual findings of deliberate indifference is to remand the case back to the district judge to reconsider the appropriate relief with guidance from this Court. Indeed, that is exactly what this Court did in *Westefer*. 682 F.3d at 686.

b. The Majority Decision Greatly Constricts District Courts' Ability to Fashion Relief Necessary to Cure Ongoing Constitutional Violations

The majority also constrains district courts' ability to order relief specific enough to rectify a complex problem. The panel states, on the one hand, that it does "not mean to say that an injunction imposing a specific numeric target automatically violates the PLRA," Slip.Op. 17, but the decision leaves district courts with no guidance on when specific numbers *are* appropriate. It is difficult to imagine a case more in need of specific numbers than this one, where more deferential efforts have continually failed, and the record demonstrates the numbers are, if anything, lower than what is necessary.

Determining the remedy necessary to achieve constitutionally adequate care in systemic prison cases is always a challenge. In *Brown v. Plata*, the Supreme Court discussed this issue in evaluating an order to reduce the population of California's prisons to enable the system to provide constitutionally adequate medical and mental health care. 563 U.S. at 539-541 (acknowledging that there are "no scientific tools available to determine the precise population reduction necessary to remedy a constitutional violation of this sort"). All that a district court can do is make "the most precise determination it [can] in light of the record before it." *Id.* at 541. There, the evidence showed a capacity limit as low as 130% might be required, but the three-judge panel issued a more deferential order requiring a population reduction to 137.5%.

Here, the court attempted to defer to IDOC's expertise several times before ordering specific relief, first asking IDOC in the preliminary injunction to evaluate and submit a plan for the staff necessary to provide constitutionally adequate care. (R.2070:40-41.) And after finding continued violations at the permanent injunction hearing, the court again gave IDOC the opportunity to craft a meaningful plan to address the ongoing harms to the people in their custody. (R.2460:50; R.2633:11.) Instead of doing that, IDOC pushed for a vague remedy without specificity or numerical targets. (R.2473-1:4.) The district court rejected this remedy, finding that "Defendants' proposal falls far short of addressing their constitutional violations. The record is clear that the Defendants know what needs to be done. When presented with yet another opportunity to establish a reasonable proposal to

address their constitutional deficiencies, they instead provided a document containing simple generalities." (R.2633 at 50).

The judge found that the only way to achieve minimally adequate mental health treatment in Illinois prisons was to increase mental health staffing, and the only way to achieve *that* was to give IDOC and its contractor specific numerical targets to motivate new approaches. (R.2633 at 53.) Just as the Supreme Court had approved of in *Plata,* the district court opted for the lower numbers in IDOC's own 2014 plan, rather than adopting the high end of the various staffing plans IDOC had developed over the years. The court also granted IDOC flexibility by specifying staffing numbers in the aggregate, rather than by facility. The court further required IDOC to re-evaluate its staffing needs and specifically allowed IDOC to move for adjustments to the staffing numbers as needed. (*Id.* at 52-3.) IDOC never returned to the district court to adjust the numerical targets under Section 1(c) of the order.

The panel's condemnation of this approach disarms district judges faced with recalcitrant prison officials who persistently ignore the Constitution. (*See* Brief of *Amici Curiae*.) Surely this is not what the PLRA or *Westefer* requires, and rehearing en banc is warranted to rectify this unwarranted limitation on injunctive remedies.

CONCLUSION

For these reasons, the Court should grant this Petition and order this case reheard.

/s/ Samantha R. Reed
Samantha R. Reed
One of the Attorneys for Plaintiffs

Harold C. Hirshman
Samantha Reed
DENTONS US LLP
233 S. Wacker Drive
Suite 5900
Chicago, IL 60606
(312) 876-8000

Amanda Antholt
Equip for Equality
20 N. Michigan Ave.
Suite 300
Chicago, IL 60602
(312) 895-7330

Alan Mills
Uptown People's Law Center
4413 N Sheridan
Chicago, IL 60640

CERTIFICATE OF COMPLIANCE

1. I, Samantha R. Reed, certify that this petition for rehearing complies with the type-volume limitation of Fed. R. App. P. 32(a), 35(b)(2), and 40(b)(1) and Circuit Rule 32(b), because it is 3,898 words in length, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I prepared this brief using Century Schoolbook font and Microsoft Word.

/s/ Samantha R. Reed
Samantha R. Reed

Counsel for the Plaintiffs

Harold C. Hirshman
Samantha Reed
DENTONS US LLP
233 S. Wacker Drive
Suite 5900
Chicago, IL 60606
(312) 876-8000

Amanda Antholt
Equip for Equality
20 N. Michigan Ave.
Suite 300
Chicago, IL 60602
(312) 895-7330

Alan Mills
Uptown People's Law Center
4413 N Sheridan
Chicago, IL 60640

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 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/ Samantha R. Reed
Samantha R. Reed

Counsel for the Plaintiffs

Harold C. Hirshman
Samantha Reed
DENTONS US LLP
233 S. Wacker Drive
Suite 5900
Chicago, IL 60606
(312) 876-8000

Amanda Antholt
Equip for Equality
20 N. Michigan Ave.
Suite 300
Chicago, IL 60602
(312) 895-7330

Alan Mills
Uptown People's Law Center
4413 N Sheridan
Chicago, IL 60640