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

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| Theresa Kennedy, et al., | ) | |
| | ) | |
| *Plaintiff,* | ) | |
| | ) | No. 20-cv-1440 |
| *-vs-* | ) | |
| | ) | |
| City of Chicago, | ) | *(Judge Durkin)* |
| | ) | |
| *Defendant.* | ) | |

# PLAINTIFFS' RESPONSE TO DEFENDANT'S SECOND MOTION TO JUDGMENT ON THE PLEADINGS

The Court should deny defendant's second motion for judgment on the pleadings (ECF No. 168), because this case involves a municipal policy of the City of Chicago that has nothing to do with the "General Administrative Order" of the Circuit Court of Cook County that was the foundation for the Seventh Circuit's recent decision in *Alcorn v. City of Chicago*, 83 F.4th 1063 (7th Cir. 2023). Plaintiff shows below that *Alcorn* provides no basis to reconsider Judge Feinerman's ruling on the City's first motion for judgment on the pleadings. (ECF No. 136.)

## I. Background

### A. The Municipal Policy

Before September 18, 2023, all arrest warrants issued by a judge sitting in Illinois included the amount of cash bail, if any, that could be posted at a police station to obtain pre-rial release.[1] 725 ILCS 5/107-9(d)(7) (2022). Outside of the

[1] This changed on September 18, 2023, when the Safety, Accountability, Fairness and Equity-Today (SAFE-T) Act, Public Act 101-652, took effect. Under the SAFE-T Act, rather than including an amount of cash bail, an arrest warrant must now "specify the conditions

City of Chicago, a person arrested on an Illinois warrant could be released by posting cash bail at the police station. Not so in Chicago, unless the warrant had been issued by a judge sitting in Chicago—the "First Municipal District" in the Cook County Court System.[2]

Before September 18, 2023, Chicago required all persons, other than those arrested on a "Chicago warrant," to spend the night at a police station and be brought (in handcuffs) to bond court the next morning. The City applied the same policy to persons arrested on a weekend or a holiday on a "Chicago warrant." This is a relatively new policy.

Before April 24, 2012, the Chicago Police Department permitted persons arrested on a warrant where "the bond amount is indicated on the warrant … to post the indicated bond." (Chicago Police Department Special Order S06-12-02 (1998) at 4, Section IV(A)(5)(b), attached as Exhibit 1.)

The City amended the Special Order in April of 2012 to add a new provision, Section IV(B)(3), which states as follows:

> B. The station supervisor will ensure that:
>
> * * *
>
> 3. the following will be transported to Central Bond Court:

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of pretrial release." 725 ILCS 5/107-9(d)(7) (2023). For persons "arrested with or without a warrant," the Act permits a law enforcement officer, on arrest "for an offense for which pretrial release may not be denied" to release the arrestee on a "notice to appear." 725 ILCS 5/109-1(a-3) 2023).

[2] There are six districts in the Circuit Court of Cook County, as set out at https://www.cookcountycourt.org/ABOUT-THE-COURT/Organization-of-the-Circuit-Court.

a. all persons arrested on a warrant outside of the First Municipal District and no local charges,

b. all persons arrested on a warrant issued from Criminal Trial Court and no local charges, and

c. all persons arrested on all warrants on Saturday, Sunday, and Court Holidays.

(Chicago Police Department Special Order S06-12-02 (April 24, 2012) at 4, Section IV(A)5(b), attached as Exhibit 2.) The City reaffirmed this policy when it reissued the Special Order in 2019.[3] The policy remained in effect until November 15, 2023, when the City adopted procedures required by the abolition of cash bail in the "SAFE-T" act.[4] See above at 1 n.1.

### B. Plaintiffs' Challenges to the Municipal Policy

Plaintiffs raise two challenges to the municipal policy set out in Section IV(A)5(b) of Special Order S06-12-02.

#### 1. Unreasonable Detention

Plaintiffs rely on a line of cases from the Seventh Circuit recognizing a right to release from custody after bail has been set and the arrestee is ready to post bail. "For due process purposes, the constitutional liberty interest in release on bail arises after a magistrate has determined that an accused may be released upon deposit of whatever sum of money will ensure the accused's appearance for trial." *Doyle v. Elsea*, 658 F.2d 512, 516 n.6 (7th Cir. 1981).

[3] The version of the Special Order issued on August 26, 2019, and effective during the proposed class period, is attached as Exhibit 3.

[4] These procedures are set out in Chicago Police Department Special Order S06-01-13 (November 15, 2023), attached as Exhibit 4.

The constitutionality of detaining an arrestee after the arrestee is ready to post bond "depends on whether the length of the delay between the time the Sheriff was notified that bond had been posted and the time that the detainee was released was reasonable in any given case." *Harper v. Sheriff of Cook County*, 581 F.3d 511 (7th Cir. 2009).

More recently, the Seventh Circuit applied this rule in *Williams v. Dart*, 967 F.3d 625 (7th Cir. 2020). There, state court judges granted pretrial release subject to electronic monitoring. The Sheriff, who supervised electronic monitoring, disagreed with the release orders, and ignored them. The Seventh Circuit concluded that the challenge to the Sheriff's actions stated a Fourth Amendment claim because, once bail has been set, "courts tolerate only brief and reasonable administrative delay by a jailer in processing the release of an arrestee admitted to bail." *Id.* at 635.

The Seventh Circuit is not alone in recognizing a right to release once an arrestee is ready to post bail. This right has been recognized by the Second, Third, Sixth, Eighth, Tenth, and Eleventh Circuits.[5] Defendant mistakenly argues that the Seventh Circuit rejected this right in *Alcorn v. City of Chicago*, 83 F.4th 1063 (7th Cir. 2023). Plaintiffs respond to this argument below at 6-13.

[5] *Murphy v. Hughson*, 82 F.4th 177, 189 (2d Cir. 2023); *Steele v. Cicchi*, 855 F.3d 494, 502 (3d Cir. 2017); *Wright v. City of Euclid*, 962 F.3d 852 (6th Cir. 2020); *Golberg v. Hennepin County*, 417 F.3d 808, 810 (8th Cir. 2005); *Dodds v. Richardson*, 614 F.3d 1185, 1190 (10th Cir. 2010); *Campbell v. Johnson*, 586 F.3d 835 (11th Cir. 2009).

### 2. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment forbids "governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

The City has yet to explain why it treats a person arrested on a Chicago warrant differently than if that same person had been arrested on a warrant issued by a judge sitting in Bridgeview, Markham, Maybrook, Skokie, or Rolling Meadows—the districts that make up the Circuit Court of Cook County outside of the City of Chicago. Nor has the City been able to explain the part of its policy that treats similarly situated arrestees differently based on the day of the week of their arrest.

The Equal Protection Clause requires, at the very least, a 'rational reason' for disparate treatment of those who are similarly situated." *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 602 (2008). Plaintiffs' equal protection claim is that the policy does not "rationally favor a legitimate state interest." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

## C. The First Motion for Judgment on the Pleadings

On defendant's first motion for judgment on the pleadings, the predecessor judge (Feinerman, J.) concluded that the City's policy about out-of-county warrants was compelled by a "General Administrative Order" issued by the Chief Judge of the Circuit Court of Cook County. (ECF No. 136 at 5-7.) The district court rejected plaintiff's argument that the General Administrative Order, issued in 2015, could not have compelled the City to adopt its policy in 2012. (ECF No. 136

at 7-8.) The predecessor judge granted judgment in favor of the City against the four plaintiffs who had been arrested on out-of-county warrants (ECF No. 136 at 11) and subsequently refused to make a Rule 54(b) finding to allow an immediate appeal of that ruling. (ECF 142.) The court denied the City's motion against plaintiff Kennedy, finding that the Chief Judge's Order was "silent as to arrests on weekends or court holidays on warrants issued in Cook County," (ECF No. 136 at 8.)

> Judge Feinerman did not reach plaintiffs' Equal Protection Claim:
>
> And because [plaintiff Kennedy's] Fourth Amendment claim survives dismissal, it is unnecessary at this juncture to address her equal protection claim, which rests on the same facts and will involve the same discovery.

(ECF No. 136 at 10.). The predecessor judge left intact plaintiffs' challenge to the City's policy about refusing to accept cash bail on weekends or holidays from persons arrested on Chicago warrants and the policy of refusing to accept cash bail from persons arrested on warrants issued in Cook County outside of the City of Chicago. (*Id.*)

## II. *Alcorn v. City of Chicago* Should Be Limited to Cases involving "Local Bond Hearings" under the General Administrative Order

Defendant argues that plaintiffs' Fourth Amendment claim is foreclosed by the recent decision of the Seventh Circuit in *Alcorn v. City of Chicago*, 83 F.4th 1063, 1065 (7th Cir. 2023). (ECF No. 168 at 7-11.) Defendant reads *Alcorn* as setting out a black letter rule that the 48-hour limit established in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) defines how long the police may hold a person arrested on a warrant before allowing that person to post bail. (*Id.*)

Plaintiffs show below that the Court should reject defendant's reading of *Alcorn* because that reading assumes "that the Seventh Circuit meant … to upend its substantial body of case law," *Gupta v. City of Chicago*, No. 16 C 9682, 2017 WL 2653144 at *4 (N.D. Ill. June 20, 2017).

### A. The *Alcorn* decision

The first question resolved in *Alcorn* was the plaintiff's contention that when a person is arrested on a warrant and the warrant itself set a bond, the arrestee "should have been allowed to post immediately." *Alcorn*, 83 F.4th at 1064. The Seventh Circuit did not answer this broad question. Instead, the Court of Appeals started with its finding that the Chicago police officers were "abiding by"

> General Administrative Order 2015-06, issued by the Chief Judge of the Circuit Court of Cook County, [which] requires local bond hearings for all persons arrested on warrants issued by courts in Illinois but outside Cook County.

*Id.* at 1064-65.

Relying on the "local bond hearing" required by the General Administrative Order, the Seventh Circuit treated an arrest on an out-of-county warrant as the same as a warrantless arrest, holding that both are subject to the 48-hour rule of *Riverside County v. McLaughlin*, 500 U.S. 44 (1991): "Federal law does not prohibit presenting the arrestee to a local judge, provided that this is accomplished in a reasonable time not to exceed 48 hours." *Alcorn*, 83 F.4th at 1065.

Defendant asserts that "[t]he Seventh Circuit disregarded the general administrative order" (ECF No. 168 at 9) and urges this Court to read *Alcorn* as setting out a black letter rule that any person arrested on a warrant that ordered

release on posting a set amount of cash bond is subject to the 48-hour rule of *McLaughlin*. The Court should reject this reading of *Alcorn* because the 48-hour rule is limited to the length of detention after a warrantless arrest and "[o]ne panel of [the Seventh Circuit] cannot overrule another implicitly." *Brooks v. Walls*, 279 F.3d 518, 522 (7th Cir. 2002).

### 1. The 48-rule is limited to warrantless arrests

The Supreme Court held in *Gerstein v. Pugh*, 420 U.S. 103 (1975) that the Fourth Amendment entitles a person arrested without a warrant to a "prompt" probable cause hearing before a judge or magistrate. *Id.* at 113-14. The Court defined "prompt" as within 48 hours of the warrantless arrest in *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). The Court set this time limit (over the objections of Justice Scalia, who advocated for a 24-hour rule, 500 U.S. at 68), after accepting that it took 36 hours to process a person arrested without a warrant in Riverside County. *Id.* at 58.

The Supreme Court made plain in *Baker v. McCollan*, 443 U.S. 137 (1979) that *Gerstein* does not apply when, as in this case, a person is "arrested pursuant to a warrant issued by a magistrate on a showing of probable cause." *Id.* at 143. This is because "a person arrested pursuant to a warrant issued by a magistrate on a showing of probable cause is not constitutionally entitled to a separate judicial determination that there is probable cause to detain him pending trial." *Id.*

The *Gerstein* Court left no doubt that its rule does not apply when an arrest had been made on a warrant, which would have been issued after "a prior judicial

determination of probable cause." *Gerstein*, 420 U.S. at 116 n.18. Nor does the *Gerstein* rule apply when an arrest is made following an indictment, which "conclusively determines the existence of probable cause and requires issuance of an arrest without further inquiry." *Gerstein*, *Id.* at 117 n.19.

It is now black letter law that "[a] *Gerstein* hearing *follows* a warrantless arrest, and essentially replaces the probable cause determination that otherwise precedes issuance of an arrest warrant." *Garcia v. City of Chicago*, 24 F.3d 966, 973 n.2 (7th Cir. 1994). It is not surprising that the Seventh Circuit has repeatedly recognized that *Gerstein* is limited to warrantless arrests. *See, e.g.*, *Garcia v. Hepp*, 65 F.4th 945, 947 (7th Cir. 2023); *Pulera v. Sarzant*, 966 F.3d 540, 549 (7th Cir. 2020); *Driver v. Marion County Sheriff*, 859 F.3d 489, 491 (7th Cir. 2017); *Currie v. Chhabra*, 728 F.3d 626, 627 (7th Cir. 2013); *Luck v. Rovenstine*, 168 F.3d 323, 324 (7th Cir. 1999); *Willis v. City of Chicago*, 999 F.2d 284, 287 (7th Cir. 1993); *Patrick v. Jasper County.*, 901 F.2d 561, 567 (7th Cir. 1990); *Llaguno v. Mingey*, 763 F.2d 1560, 1573 (7th Cir. 1985); *Moore v. Marketplace Rest., Inc.*, 754 F.2d 1336, 1351 (7th Cir. 1985).

The Court should therefore not read *Alcorn* as upending these precedents to hold that the 48-hour rule applies to an arrest made on a warrant, i.e., when there has already been "a prior judicial determination of probable cause." *Gerstein*, 420 U.S. at 116 n.18. On the contrary, the Court should read *Alcorn* as holding that the "local bond hearings" mandated by the General Administrative Order require

the Court to treat an arrest on an out-of-county warrant the same as a warrantless arrest.

### 2. The 48-hour rule does not apply to persons, like plaintiffs, who "qualify for release"

In *Driver v. Marion County. Sheriff*, 859 F.3d 489 (7th Cir. 2017), the Seventh Circuit held that the 48-hour rule does not apply when arrestees "qualify for release, and all that is left at the ministerial actions to accomplish that release which are within the control of the jail officials." *Id.* at 491. *Driver* is consistent with *Alcorn* if the General Administrative Order is construed as mandating "local bond hearings" for persons arrested on out-of-Cook County warrants. In this view, the arrestee would not "qualify for release" until the court has conducted the "local bond hearing."

Plaintiffs, however, were not held in custody awaiting a "local bond hearing." Plaintiffs are not included in the General Administrative Order because they were arrested on warrants issued in Cook County.

Defendant seeks to distinguish *Driver* because there, "the plaintiffs appeared before a judge who set bond, the plaintiffs posted their bonds, and should have been released immediately afterwards, but were kept in police custody for days despite already posting bond." (ECF No. 168 at 10.) Plaintiffs, however, are indistinguishable from the arrestees in *Driver*, because (as the predecessor judge held in this case) the judge who issued the warrant "had already made the initial bail determination by the time [each plaintiff] was arrested." (ECF No. 126 at 10.)

### 3. The Fourth Amendment does not require a bail hearing within forty-eight hours after arrest

In *Mitchell v. Doherty*, 37 F.4th 1277, 1286 (7th Cir. 2022), the Seventh Circuit squarely held that "the Fourth Amendment does not require a bail hearing within forty-eight hours after arrest." *Id.* at 1289. Accordingly, *Mitchell* rejected the claims of plaintiffs who received probable cause hearings within 48 hours but were not released until after 48 hours when they were given bail hearings. Defendant does not cite *Mitchell* but asserts that *Alcorn* adopted the 48-hour rule for posting of bail after an arrest on warrant, and thereby overruled *Mitchell*. (ECF No. 168 at 9.)

One panel of the Seventh Circuit may not, course, reverse a decision by another. Absent en banc proceedings, "it takes a circulation to the full court under Circuit Rule 40(e) for one panel to overrule another." *Iqbal v. Patel*, 780 F.3d 728, 729 (7th Cir. 2015). The Court should therefore not read *Alcorn* as overruling any previous decision from the Seventh Circuit but, as explained below, should give it a "narrow reading." *Brooks v. Walls*, 279 F.3d 518 (7th Cir. 2002).

## B. *Alcorn* Must Be Afforded a "Narrow Reading"

This is not the first time that a district court has had to grapple with a decision from the Seventh Circuit that is claimed to be contrary to previous decisions of the Court of Appeals. For example, in *Gupta v. City of Chicago*, No. 16 C 9682, 2017 WL 2653144 (N.D. Ill. June 20, 2017), the plaintiff argued that *Silverman v. Board of Education of Chicago*, 637 F.3d 729 (7th Cir. 2011) overruled a

"substantial body of case law" from the Seventh Circuit. *Id.* at *4. The district court disagreed:

> There is no indication that the Seventh Circuit meant by that sentence to upend its substantial body of case law holding that negative performance reviews are not materially adverse actions unless accompanied by a tangible employment consequence. As the Seventh Circuit has cautioned: "That's not how precedent works. In this circuit it takes a circulation to the full court under Circuit Rule 40(e) for one panel to overrule another." *Iqbal v. Patel*, 780 F.3d 728, 729 (7th Cir. 2015) (holding that a later Seventh Circuit decision could not have overruled an earlier decision without so much as citing it). There was no Circuit Rule 40(e) circulation in *Silverman*.

*Gupta*, 2017 WL 2653144, at *4.

*Alcorn* therefore "could not have overruled" earlier decisions to establish the black letter rule urged by defendants that after an arrestee is ready to post cash bond, law enforcement officials may hold the arrestee in custody for 48 hours without an unreasonable seizure under the Fourth Amendment. (ECF No. 168 at 11.)

"Overruling requires recognition of the decision to be undone and circulation to the full court under Circuit Rule 40(e). [*Alcorn*] did not propose to overrule any decision, and the panel did not circulate its opinion to the full court before release." *Brooks v. Walls*, 279 F.3d 518, 522-23 (7th Cir. 2002). To reconcile the holding of *Alcorn* with the long line of authority that the 48-hour rule is limited to warrantless arrests, the Court should therefore afford a "narrow reading" to *Alcorn*. *Id.* at 523.

A "narrow reading" of *Alcorn* is that it only applies when a person is arrested on a warrant but is held in custody because a Circuit Court has ordered "local bond hearings" for anyone arrested on an out-of-county warrant.

The *Alcorn* court described General Administrative Order 2015-06 of the Circuit Court of Cook as one that "requires local bond hearings for all persons arrested on warrants issued by court in Illinois but outside Cook County." 83 F.4th at 1064. A narrow reading of *Alcorn* is that it applies only to such "local bond hearings."

A broader reading of *Alcorn*, like that urged by defendant, "would be inconsistent with Supreme Court precedent and would require [the Seventh Circuit] to overturn our own precedent on this and create a circuit split." *Lombardo v. United States*, 860 F.3d 547, 559 (7th Cir. 2017). The Court should therefore deny defendant's second motion for judgment on the pleadings.

## III. Plaintiff's Equal Protection Challenge

There is no dispute that Chicago treats persons arrested on a weekend or a holiday differently than persons arrested on a weekday. Nor is there a dispute that Chicago treats a person arrested on a warrant issued by a Cook County judge sitting outside of the City of Chicago differently than a person arrested on a warrant issued by a judge sitting in Chicago. Chicago cannot explain the reason for this disparate treatment, which makes out prima facie case of the denial of Equal Protection of Laws as guaranteed by the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment forbids "governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). The Clause forbids an "intentional violation of the essential principle of practical uniformity." *Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U.S. 350, 353 (1918); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 447 (1923). Treating similar groups differently requires that "the classification rationally further a legitimate state interest." *Nordlinger*, 505 U.S. at 10. As the Supreme Court stated in *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591 (2008):

> As we explained long ago, the Fourteenth Amendment "requires that all persons subjected to ... legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Hayes v. Missouri*, 120 U.S. 68, 71–72 (1887). When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to ensure that all persons subject to legislation or regulation are indeed being "treated alike, under like circumstances and conditions."

*Id.*. at 602.

Defendant offers a different view of the Equal Protection Clause, arguing that "practical uniformity" is only relevant when the less favored group is a "protected class" or the state action "targets an individual for discriminatory treatment." (ECF No. 168 at 12.) This is incorrect.

This Court acknowledged in *Pearson v. Village of Broadview*, No. 18-CV-567, 2018 WL 3036953 (N.D. Ill. June 19, 2018), that "the Equal Protection Clause 'protect[s] individuals against purely arbitrary government classifications, even

when a classification consists of singling out just one person for different treatment for arbitrary and irrational purposes.'" *Id.* at *3, quoting *Geinosky v. City of Chicago*, 675 F.3d 743, 747 (7th Cir. 2012). "Class of one" discrimination is a subset of intentionally treating one group differently from others similarly situated where "there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). As the Seventh Circuit stated in *FKFJ, Inc. v. Village of Worth*, 11 F.4th 574 (7th Cir. 2021), "[t]he Equal Protection Clause requires a 'rational reason' for disparate treatment of those who are similarly situated." *Id.* at 588, citing *Engquist v. Oregon Dept. of Agr.*, 553 U.S. at 602.

The Court should therefore deny defendant's motion for judgment on the pleadings on plaintiffs' Equal Protection claim.

## IV. Conclusion

The Court should therefore deny defendant's motion for judgment on the pleadings.

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