Exhibit A

No. 22-2948

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LISA ALCORN, as Independent Administrator of the Estate of TYLER LUMAR, Plaintiff-Appellant v. THE CITY OF CHICAGO, *et al.*, Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 17 C 5859 The Honorable Virginia M. Kendall District Judge

**PETITION FOR REHEARING OR
REHARING *EN BANC*
OF PLAINTIFF-APPELLANT LISA ALCORN**

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-2948

Short Caption: Alcorn v. City of Chicago, et al.

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

The Court prefers that the disclosure statement 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 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.**

(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 the item #3):

Lisa Alcorn, as Independent Administrator of the Estate of Tyler Lumar

(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:

The Khowaja Law Firm, LLC

O'Connor Law Group, LLC

Law Offices of Kenneth N. Flaxman, PC

(3) If the party or amicus is a corporation: **N/A**

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 or amicus' stock:

N/A

Attorney's Signature: /S/*Donald J Pechous* Date: October 26, 2023

Attorney's Printed Name: Donald J Pechous

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

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N/A

Attorney's Signature: /S/*Paul A. Castiglione* Date: October 26, 2023

Attorney's Printed Name: Paul A. Castiglione

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

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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Attorney's Signature: /S/*Bryan J O'Connor* Date: October 26, 2023

Attorney's Printed Name: Bryan J O'Connor

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-2948

Short Caption: Alcorn v. Chicago

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☑ ADDITIONAL ATTORNEY

(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):
Lisa Alcorn

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n/a

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervener'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/ Kenneth N. Flaxman Date: 10/25/23

Attorney's Printed Name: Kenneth N. Flaxman

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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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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n/a

Attorney's Signature: /s/ Joel A. Flaxman Date: 10/25/23

Attorney's Printed Name: Joel A. Flaxman

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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STATEMENT OF ISSUES THAT WARRANT REHEARING

1. Whether the panel decision creates an intra-Circuit split with this Court's previous holdings in *Driver v. Marion County Sheriff*, 859 F.3d 489 (7th Cir. 2017) and *Williams v. Dart,* 967 F.3d 625 (7th Cir. 2020) in which this Court held that the 48-hour rule of *County of Riverside v. McLaughlin,* 500 U.S. 44 (1991) does not apply outside the context of warrantless arrests and, thus, does not apply to persons who "qualify for release, and all that is left are the ministerial actions to accomplish that release which are within the control of the jail officials." *Driver*, 859 F.3d at 491.

2. Whether the panel's decision has created an inter-Circuit split with the Second, Third, Sixth, Eighth, Tenth, and Eleventh Circuits, when it concluded that there is no constitutional right to release on bail when an arrestee is prepared to post the amount of cash bond that had been set by the judge who issued the arrest warrant.

REQUIRED STATEMENT FOR REHEARING *EN BANC*

The panel opinion is contrary to this Court's decisions in *Driver v. Marion County Sheriff*, 859 F.3d 489 (7th Cir. 2017) and *Williams v. Dart,* 967 F.3d 625 (7th Cir. 2020). The linchpin of the panel opinion is its application of the "48-hour rule" of *County of Riverside v. McLaughlin,* 500 U.S. 44 (1991) to a person who has been arrested on a warrant and is prepared to post the cash bail set on that warrant. *Alcorn v. City of Chicago, Alcorn v. City of Chicago,* ___ F. 4th ___, *Alcorn*, No. 22-2948, 2023 WL 6631525, slip op. 3 (7th Cir. Oct. 12, 2023).

Before the panel decision, this Court refused to apply the "48-hour rule" of *McLaughlin* outside the context of warrantless arrests. In *Driver v. Marion County Sheriff*, 859 F.3d 489 (7th Cir. 2017), for example, this Court held that the 48-hour period of *McLaughlin* does not apply to persons who "qualify for release, and all that is left are the ministerial actions to accomplish that release which are within the control of the jail officials." *Id.* at 491. The 48-hour period "addressed the detention resulting from a warrantless arrest" and does not apply to "persons for whom legal authority for detention has ceased." *Id.*

Before the panel decision, this Court followed the rule that once an arrestee is ready to post bond, continued detention is "lawful for only such time as reasonable needed 'to merely process the release.'" *Williams v. Dart,* 967 F.3d 625, 635 (7th Cir. 2020), quoting, *Driver v. Marion County Sheriff*, 859 F.3d 489, 491 (7th Cir. 2017). The panel decision in this case departs from circuit precedent because it applies the 48-hour rule of *McLaughlin* outside the context of warrantless arrests. This departure warrants reconsideration by the *en banc* court.

The panel decision also conflicts with multiple Courts of Appeal. The panel concluded that no constitutional right to release on bail exists when an arrestee is prepared to post the amount of cash bond that the judge who issued the arrest warrant had previously set. The Courts of Appeals for the Second, Third, Tenth, and Eleventh Circuits follow a different rule: *see Murphy v. Hughson*, 82 F.4th 177 (2d Cir. 2023) (remanding for trial on the claim that the officers had unnecessarily delayed release on bail for as much as two hours); *Steele v. Cicchi*, 855 F.3d 494, 502

(3d Cir. 2017) (recognizing a constitutional right to release "once bail has been set"); *Wright v. City of Euclid,* 962 F.3d 852 (6th Cir. 2020) (remand for trial on claim of four hours of detention after cash bail had been posted); *Golberg v. Hennepin County*, 417 F.3d 808, 810 (8th Cir. 2005) (recognizing constitutional right to release on bail for person held in custody for ten hours after bail had been posted); *Dodds v. Richardson*, 614 F.3d 1185 (10th Cir. 2010) (constitutional right to release after bail has been set); *Campbell v. Johnson,* 586 F.3d 835 (11th Cir. 2009) (constitutional right to release once officers know that detainee is entitled to release).

STATEMENT OF THE CASE

Plaintiff's decedent, Tyler Lumar, was arrested by Chicago police officers on a warrant issued in a traffic case in Lee County, Illinois. The judge who issued the warrant had set bond at $500, 10 percent, which amounted to $50. Lee County relayed details to Chicago police regarding the bond that was set on the warrant and indicated Lee County would extradite if Lumar was unable to pay the bond on the warrant. However, the record is uncontroverted that Lee County informed Chicago police that if Lumar posted bond, Chicago police did not need to hold Lumar. This was consistent with Illinois law which provided that "any sheriff or other peace officer" is authorized to accept cash bail "and release the offender." 725 ILCS 5/110-9.

Lumar had $130 in cash with him when he was arrested. The police, acting pursuant to an express policy of the City, refused to permit Lumar to post bond, and held him overnight for a court appearance the next day.

The police transported Lumar to court, but before he could appear before the judge, plaintiff's decedent was arrested in the lockup: The officer in charge of the lockup claims that "he saw [plaintiff's decedent] pick up a bag and drop it behind a bench."[1] *Alcorn,* slip op. 4. According to the officer, the bag appeared to contain crack cocaine. *Id.*

Lumar was not permitted to appear before a judge, but was returned to the Chicago Police Department, where police officers completed paperwork for the new criminal charges.

Lumar ended his life during his second stint in police custody. Plaintiff's expert, Dr. John Fabian (a forensic and clinical psychologist) offered the opinion that the refusal of the officers to allow release on bond contributed to the decision of Lumar to take his life. (Brief of Appellant 16-17.)

The panel held that appellant could not complain about the refusal of the Chicago police officers to accept cash bond and release plaintiff's decedent from the station because the post-arrest detention was less than the 48-hour period of *McLaughlin*. *Alcorn*, slip op. 4. The panel applied this rule to reject appellant's argument that refusal to accept cash bond was a proximate cause of the in-custody suicide. *Alcorn,* slip op. 4-5.

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1 The Court, while not reaching appellant's argument that the arrest had been without probable cause, described the video evidence as "inconclusive." *Alcorn*, slip op. 3. Thus, the panel opinion acknowledged that the circumstances of Lumar's arrest at County were murky. The video, coupled with defendant Wlodarski providing two materially different versions of the event that caused Lumar's continued detention, essentially confirms the existence of a disputed issue of fact which should have precluded entry of summary judgment in favor of Wlodarski. See, *Maxwell v. City of Indianapolis*, 998 F.2d 431, 434 (7th Cir. 1993).

The panel did not reach the City's argument that it could not be sued for a deprivation of federal rights caused by its express policy because that policy had been compelled by a "General Administrative Order" of the Circuit Court of Cook County.[2] While not reaching the City's legal argument, the panel stated that the General Administrative Order "required" that plaintiff's decedent appear in bond court before he could post bond and described the General Order as mandating a "local bond hearings for all persons arrested on warrants issued by courts in Illinois but outside Cook County."[3] *Alcorn,* slip op. 2.

REASONS FOR GRANTING REHEARING

A. The Panel Opinion Is Contrary to Circuit Precedent

The panel decision is a sharp and unexplained departure from previous decisions of this Court and allows purposeless detention in contravention of the Fourth Amendment. The panel decision permits a police department to detain persons arrested on warrants for up to 48 hours, even though probable cause and the amount of bail have already been determined by a judge, and the detainee has the ability and desire to post bond immediately upon the conclusion of administrative processing.

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2 The City argued that it was merely following orders from the Chief Judge when its officers following a City Policy and refused to permit plaintiff's decedent to post bond. (Brief of Appellee City of Chicago at 10-12.)

3 The panel misapprehended the General Administrative Order and the authority of the Chief Judge of the Circuit Court of Cook County to set policy for the Chicago Police Department. *See infra* at p. 11.

More than 40 years ago, this Court stated as black latter law that "[f]or 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.7 (7th Cir. 1981).

The Court applied this rule in *Harper v. Sheriff of Cook County,* 581 F.3d 511 (7th Cir. 2009). There, while decertifying a Rule 23 class, the Court held that the constitutionality of detaining an arrestee after bond has been posted "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." *Id.* at 515.

Thereafter, in *Williams v. Dart,* 967 F.3d 625 (7th Cir. 2020), the Court applied the "principle that bail orders terminate law enforcement's authority to seize on the same charges." *Id.* at 635. In *Williams*, state court judges granted pretrial release subject to electronic monitoring. The Sheriff, who supervised electronic monitoring, disagreed with the release orders and ignored them. This Court 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.*

The panel rejected the consistently applied rule that an arrestee is entitled to release after paying bond and held instead that the 48-hour rule of *McLaughlin*

determines how long a person arrested on a warrant may be detained even when the person is ready, willing, and able to post the bail amount that a judge already set. *Alcorn,* slip op. 3.

The panel did not explain its departure from *Driver v. Marion County Sheriff*, 859 F.3d 489 (7th Cir. 2017) where the Court held that "the 48-hour rule makes no sense" when applied to an arrestee who is entitled to release. *Id.* at 491. Nor did the panel explain its refusal to follow *Mitchell v. Doherty*, 37 F.4th 1277 (7th Cir. 2022). *Mitchell* involved detention before a bond hearing — unlike this case where bond had been set when the warrant was issued. Thus, while the express holding of *Mitchell* does not apply here, the panel's decision is contrary to the determination in *Mitchell* that the 48-hour rule of *McLaughlin* does not apply once there has been a judicial determination of probable cause. *Mitchell*, 37 F.4th at 1289. [4]

The Supreme Court has repeatedly recognized that the probable cause hearing required by *Gerstein v. Pugh*, 420 U.S. 103, 116 (1975) applies only to persons "arrested without a warrant." *Id.* at 116. This was the core holding of *Gerstein*:

> … [A] policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a

4 Although it did not cite *Driver*, *Williams* or *Mitchell*, the panel did cite *Gordon v. Degelmann*, 29 F.3d 295, 300–01 (7th Cir. 1994), *Alcorn*, slip op. 4, for the proposition that "the federal court should assume that the police acted exactly as they were supposed to act under state law, then ask whether acting in this way is unconstitutional." *Id.* The panel answered this question in the negative, noting that "[under *McLaughlin*], the answer is obvious." *Id.* The panel got this wrong. Under *Driver*, *Williams* and *Mitchell*, the answer to the panel's question should have been "yes," because probable cause and the amount of bail had been determined when the warrant was issued.

> brief period of detention to take the administrative steps incident to arrest.
>
> ***
>
> When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.

Gerstein, 420 U.S. at 113-14. As this Court stated in *Armstrong v. Squadrito*, 152 F.3d 564 (7th Cir. 1998), *Gerstein* is a "decision [that] admittedly applies only to arrests without a warrant." *Id.* at 572.

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 instant case arises from an arrest made on a warrant, meaning it is unlike the warrantless arrests in *Gerstein* and *McLaughlin* because a judge had already found probable cause to arrest. See *Steagald v. United States*, 451 U.S. 204, 213 (1981). ("An arrest warrant is issued by a magistrate upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense and thus the warrant primarily serves to protect an individual from an unreasonable seizure.") The 48-hour rule of *McLauglin* has no application here

because that rule "governs the length of time which may elapse before a probable cause hearing." *Chortek v. City of Milwaukee*, 356 F.3d 740, 746 (7th Cir. 2004).

The Court should therefore vacate the panel opinion and set this case for argument *en banc* on whether it should overrule *Driver v. Marion County Sheriff*, 859 F.3d 489 (7th Cir. 2017), *Williams v. Dart,* 967 F.3d 625 (7th Cir. 2020), and *Mitchell v. Doherty*, 37 F.4th 1277 (7th Cir. 2022) to hold that the Constitution permits the police to hold for up to 48 hours a person arrested on a warrant who is ready, willing, and able to post predetermined bond.

B. The Panel Decision Creates a Conflict with the Second, Third, Sixth, Eighth, Tenth, and Eleventh Circuits.

Before the panel decision in this case, the circuits agreed with the holding of this Court in *Doyle v. Elsea*, 658 F.2d 512 (7th Cir. 1981):

> 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.

Id. at 516 n.6.

In *Murphy v. Hughson*, 82 F.4th 177 (2d Cir. 2023), the Second Circuit adopted the reasoning of the district court in *Lynch v. City of New York*, 335 F. Supp. 3d 645, 654 (S.D.N.Y. 2018), and remanded for trial on the claim that the officers had "unnecessarily delayed [release on bail] for as much as two hours." *Id.* at 189.

In *Steele v. Cicchi*, 855 F.3d 494, 502 (3d Cir. 2017), the Third Circuit recognized a constitutional right to release "once bail has been set," *id.* at 502, when, as in this case "there has already been a judicial determination that an arrestee is eligible for release on bail and bail has been set for that arrestee." *Id.*

In *Wright v. City of Euclid,* 962 F.3d 852 (6th Cir. 2020), the arrestee was held in custody for four hours after cash bail had been posted because the arrest was designated as "drug-related." *Id.* at 875. The Sixth Circuit held that this detention stated a Fourth Amendment claim and remanded for trial. *Id.*

In *Golberg v. Hennepin County*, 417 F.3d 808, 810 (8th Cir. 2005), the Eighth Circuit recognized a constitutional right to release on bail when the plaintiff had been held in custody for ten hours after her father had posted bail.[5]

In *Gaylor v. Does,* 105 F.3d 572 (10th Cir. 1997), the Tenth Circuit held that "an arrestee obtains a liberty interest in being freed of detention once his bail is set because the setting of bail accepts the security of the bond for the arrestee's appearance at trial and "hence the state's justification for detaining him fade[s]." *Id.* at 576. The Tenth Circuit reaffirmed this holding in *Dodds v. Richardson*, 614 F.3d 1185 (10th Cir. 2010), explaining that "an arrestee obtains a liberty interest in being freed of detention once his bail is set because the setting of bail accepts the security of the bond for the arrestee's appearance at trial." *Id.* at 1192.

5 The plaintiff's claim failed in *Golberg* because she was unable to identify a defendant who was culpable for the refusal to accept bail.

The Eleventh Circuit reached the same result in *Campbell v. Johnson,* 586 F.3d 835 (11th Cir. 2009), holding that "[t]he Fourteenth Amendment Due Process Clause includes the right to be free from continued detention after it was or should have been known that the detainee was entitled to release." *Id* at 840. The Court reaffirmed *Campbell* in *Alocer v. Mills,* 905 F.3d 944 (11th Cir. 2018), where the arrestee post bond but was held in custody "solely because of suspicion that she might be illegally present in the United States." *Id.* at 953.

The decision of the panel creates a circuit conflict that this Court should reconsider *en banc*.

C. The City Has No Defense to Its Unconstitutional Policy

The panel held that the police refused to permit plaintiff's decedent to post cash bond because of Chicago's written policy that "abided" by "General Administrative Order 2015-06, issued by the Chief Judge of the Circuit Court of Cook County." *Alcorn*, slip op. 3. This is the "merely following orders" defense which, since the Second World War, "has not occupied a respected position in our jurisprudence." *O'Rourke v. Hayes,* 378 F.3d 1201, 1210 n. 5 (11th Cir. 2004).

Plaintiff has discussed why the General Administrative Order at issue was entered improvidently and was void *ab initio*. (Brief of Appellant 31.) General Administrative Orders are intended "to insure the efficient operation of the court." *People ex rel. Bier v. Scholz*, 77 Ill. 2d 12, 18, (1979). These orders are limited to "the performance of judicial functions," *Knuepfer v. Fawell*, 96 Ill.2d 284 (1983).

In Illinois, the power to establish pretrial procedures rests exclusively with the legislature. *Agran v. Checker Taxi Co.*, 412 Ill. 145, 149 (1952); *see also People v.*

Stanley, 116 Ill. App. 3d 532, 535 (4th Dist. 1983) (power to require that prosecution request trial *in absentia*). Illinois law was in effect when the police refused to permit plaintiff's decedent to post bond and it required that all arrest warrants include the amount of cash bail required for release. 725 ILCS 5/107-9(d)(6).

"Municipalities do not enjoy any kind of immunity from suits for damages under § 1983." *Benedix v. Vill. of Hanover Park*, 677 F.3d 317, 318-19 (7th Cir. 2012). Additionally, as plaintiff has discussed, the City failed to raise and thus waived the collateral-bar doctrine as a defense. (Appellant Reply, pp. 6-7). Even if the City had properly asserted the defense it would be unavailing. "[T]he collateral-bar doctrine, which provides that injunctions must be obeyed (even if constitutionally infirm) until stayed or reversed by a higher court, *see Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 439 (1976), would block an award of damages against a public official who carried out a direct command of a judge, made in a case over which the court had jurisdiction." *Hernandez v. Sheahan*, 455 F.3d 772, 776 (7th Cir. 2006). In *Hernandez*, unlike the instant case, Hernandez appeared before a judge and the judge's command was "to hold [Hernandez], in particular." *Id*. at 777. Here, no Cook County court gave a direct judicial command to hold "Tyler Lumar." The Cook County court certainly did not have jurisdiction over Tyler Lumar when the GAO was issued a year before his arrest, and never obtained jurisdiction.

The City here did not just carry out the administrative order, it formulated its own express policy of purposeless detention and enforced it. The reasonableness

of the City's course of action is not an issue here. As the Supreme Court has explained, "[W]hen a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the 'reasonableness' of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes." *Owen v. City of Independence*, 445 U.S. 622, 649 (1980). "The threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those 'systemic' injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith." *Id*. at 652.

Conclusion

For the reasons stated herein, the plaintiff-appellant respectfully requests that this Court grant her petition for rehearing or rehearing *en banc*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

1. This petition for rehearing complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the petition contains 3,884 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This petition for rehearing 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 a proportionally spaced typeface using Microsoft Word in 12 point Century Schoolbook font and footnotes in 12 point Century Schoolbook font.

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