

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

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

PLAINTIFFS' MOTION TO FILE BRIEF SURREPLY

Plaintiffs, by counsel, move the Court for leave to file the following as a response to defendant's request (ECF No. 179 at 8-9) that the Court afford precedential weight to the Seventh Circuit's denial of rehearing in *Alcorn v. City of Chicago*, 83 F.4th 1063 (7th Cir. 2023). Defendant does not oppose the filing of a surreply.

1. The general rule is that “attaching precedential weight to a denial of rehearing en banc would be unmanageable.” *Luckey v. Miller*, 929 F.2d 618, 622 (11th Cir. 1991). The Seventh Circuit applied this rule in *Moore v. Anderson*, 222 F.3d 280 (7th Cir. 2000) when it wrote that “because a summary denial of a petition for rehearing does not explain the bases for the denial, it is “insufficient to confer any implication or inference regarding a court’s opinion relative to the merits of a case.” (*Id.* at 284, cleaned up.) The First Circuit described an attempt to rely on claimed precedential effect of the denial of rehearing as “utterly without merit because surely the denial of a petition for rehearing can have no greater precedential

effect than the denial of a petition for certiorari, which is to say none.” *Fernandez v. Chardon*, 681 F.2d 42, 52 n.7 (1st Cir. 1982).

2. Defendant is correct that the arguments raised in the rehearing petition in *Alcorn* are also raised in plaintiffs’ objections to the motion for judgment on the pleadings in this case. (ECF No. 169 at 8-9.) Defendant is also correct that those arguments in *Alcorn* did not result in the grant of rehearing or a vote on rehearing en banc. *Id.* A likely explanation for the denial of rehearing en banc is that no active judge on the Seventh Circuit believed that *Alcorn* changed the law of the circuit.

The Court should therefore refuse to attach any weight to the denial of rehearing en banc in *Alcorn v. City of Chicago*, 83 F.4th 1063 (7th Cir. 2023).

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