
**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

MICHAEL MARCAVAGE, JAMES
DEFERIO, AND FAITH DEFERIO

Plaintiffs-Appellants,

v.

CITY OF CHICAGO, OFFICER
ANDREWS, OFFICER GERARDO
MADRIGAL, SERGEANT GERARDO
TENEYUQUE, DEPUTY CHIEF
DANIEL DUGAN, AND
METROPOLITAN PIER AND
EXPOSITION AUTHORITY,

Defendants-Appellees.

Appeal from the United States
District Court for the Northern
District of Illinois, Eastern Division

No. 06-cv-3858

Hon. Milton Shadur,
District Judge.

BRIEF OF DEFENDANT-APPELLEE

METROPOLITAN PIER AND EXPOSITION AUTHORITY

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ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

The plaintiffs' jurisdictional statement is not complete and correct.

The district court had jurisdiction under 28 U.S.C. § 1331. Plaintiffs' complaint alleged violations of federal rights under the First Amendment, Fourth Amendment, Equal Protection Clause of the Fourteenth Amendment, and the Civil Rights Act (42 U.S.C. § 1983). Jurisdiction over the plaintiffs' state law claims arose under 28 U.S.C. § 1367(a).

This Court possesses jurisdiction under 28 U.S.C. § 1291. On July 20, 2009, the district court entered final judgment pursuant to Rule 54(b), dismissing plaintiffs' claims against all of the defendants except the Metropolitan Pier and Exposition Authority (the "Authority"). A-44, R.179.¹ Plaintiffs moved to alter or amend the district court's judgment on July 30, 2009. R.180. The motion to alter or amend was denied on August 21, 2009. R.188. Plaintiffs' filed their notice of appeal on September 18, 2009. R.195. That appeal was docketed as appellate case number 09-3335 and has since been consolidated with this appeal.

On December 16, 2009, the district court entered a final judgment dismissing plaintiffs' claims against the Authority. R.222. With the dismissal of

¹ Record materials that are not included in one of the appendices are cited by the district court's docket number ("R.__"). Items in the appendix attached to plaintiffs' opening brief ("A-__") or plaintiffs' separately bound appendix ("SA-__") are referred to by the appendix's page number. The plaintiffs' brief is cited as "Pls.' Br." and the plaintiffs' brief in the consolidated appeal is referred to as "Pls.' Br. in Case No. 09-3335."

the Authority as the lone remaining defendant, all claims against all parties were adjudicated. Plaintiffs filed their notice of appeal the next day. R.223.

STATEMENT OF THE ISSUE

In dismissing plaintiffs' claims against the City of Chicago (the "City") and several of its police officers on summary judgment, the district court held, "plaintiffs lose on their contention that the [Authority's permitting] policy was not a content-neutral time, manner and place regulation." A-30.

The issue presented is whether, based on the district court's ruling, the doctrine of issue preclusion bars plaintiffs' claims against the Authority that allege its permitting policy violates the First Amendment.

STATEMENT OF THE CASE

Plaintiffs sued the City and several of its police officers for violations of the First Amendment and the Illinois Religious Freedom Restoration Act, in addition to other causes of action. On cross-motions for summary judgment, the district court dismissed all of plaintiffs' federal claims against the City and its police officers, before foregoing supplemental jurisdiction over the state law claims. A-43-44. Essential to its dismissal of the First Amendment claims, the district court held that the Authority's permitting policy for Navy Pier and Gateway Park did not violate the First Amendment by placing restrictions on free speech and the

exercise of religion, but rather was a “content-neutral time, manner and place regulation.” A-28-30.

Plaintiffs also brought First Amendment and Illinois Religious Freedom Restoration Act claims against the Authority. These claims challenged whether the Authority’s permitting policy constituted permissible time, manner, and place restrictions on free speech and the exercise of religion. Relying upon the district court’s summary judgment ruling for the City, the Authority moved for judgment on the pleadings against plaintiffs. R.191.

The district court granted the Authority’s motion. A-2. “Because this court has already found that Authority’s permit policy is facially constitutional, defensive issue preclusion operates to prevent plaintiffs from relitigating that issue.” A-6. Finding no remaining issues, the district court dismissed plaintiffs’ action against the Authority with prejudice. A-10-11.

STATEMENT OF FACTS

Because the only issue before this Court is whether plaintiffs are barred from re-litigating the constitutionality of the Authority’s permitting policy, plaintiffs’ recitation of the facts leading up to and surrounding their arrest by the City’s police officers, including their discussion of the Authority’s policy, is irrelevant to this appeal. The Authority has not participated in any summary judgment motions at this juncture and therefore has not made its own factual

record of the events described in plaintiffs' Statement of Facts. If plaintiffs' claims are barred by issue preclusion (also known as collateral estoppel), the expense of making such a record will be unnecessary. The relevant facts for issue preclusion are the proceedings before the district court that determine whether the constitutionality of the Authority's permitting policy was actually litigated and necessary to the summary judgment decision in favor of the City.

A. The District Court Ruled that the Authority's Permit Policy is Constitutional.

Plaintiffs and the City litigated the constitutionality of the Authority's permitting policy in cross-motions for summary judgment. The City "argu[ed] the restrictions imposed on plaintiffs' expressive activities were reasonable and content-neutral time, place and manner restrictions" and added "that pursuant to Authority's written policy it may legitimately require persons wishing to engage in expressive activities to obtain a permit first." A-22, 28; see also R.140 at 2-4, 13. The City's brief explained that, "[B]eing told to conform to the [Authority's] permit policy - did not infringe [plaintiffs'] First Amendment rights." R.140 at 4. The City's briefing set out the standards and relevant facts for analyzing the constitutionality of the Authority's restrictions (as well as restrictions at Soldier Field and Wrigley Field) (R.140 at 2-6) and then argued the content-neutrality of the time, place and manner of the restrictions (R.140 at 7-9), the narrow-tailoring of the restrictions (R.140 at 9-11), and the alternative

channels left open to communication by the restrictions (R.140 at 11-13). The district court found “the City and its officers expressly structured their arguments with reference to the constitutionality of Authority’s policy.” A-5.

Plaintiffs responded to the City’s arguments. They spent much of their brief contesting whether the restrictions were content-neutral time, place, and manner restrictions (R.152 at 2-6), were narrowly-tailored (R.152 at 6-11), and left open alternative channels of communication (R.152 at 11-12). While plaintiffs argued “they never intended to challenge” the permit policy’s constitutionality in their own motion for partial summary judgment (A-8), the motion did argue that restrictions imposed at the Authority’s sites (Navy Pier and Gateway Park) were not permissible content-neutral time, place and manner restrictions. R.141-3 at 14-15.

In response, the City again explained that alternative channels of communication were open to plaintiffs and that “plaintiffs conspicuously ignore the [Authority’s] permit requirement” which the City explained had been upheld as valid. R.154 at 14-17.

The plaintiffs’ reply explicitly addressed the constitutionality of the Authority’s permitting policy. “[T]he Policy on which Defendants rely requiring a permit for all speech in Navy Pier, Gateway Park and the South Sidewalk is unconstitutional.” R.167 at 9. In arguing the policy’s unconstitutionality,

plaintiffs relied primarily on *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002). R.167 at 9.

Judge Shadur carefully considered plaintiffs' arguments. The district court rejected plaintiffs' reading of *Watchtower* and cited recent cases noting that "permit requirements are routinely imposed on the use of public parks and other public spaces for expressive uses" to dispose of plaintiffs' First Amendment claims. A-29-30. The district court "expressly found Authority's permit policy to be facially constitutional." A-10.

B. The District Court Dismissed Plaintiffs' Claims Against the Authority Based on Issue Preclusion.

After the district court ruled on the constitutionality of the Authority's policy in the summary judgment proceedings, the Authority moved for judgment on the pleadings. The Authority explained that the court's summary judgment ruling "resolve[d] all legal grounds for plaintiffs' claims against the Authority," because the court had concluded "the Authority's written policy of requiring permits at Navy Pier and Gateway Park is constitutional on its face." R.191 at ¶ 10. The district court agreed.

In finding plaintiffs' claims against the Authority barred in the present action, the district court explained it could not ignore how "the City placed the issue of the policy's constitutionality squarely at issue in their memorandum in support of summary judgment." A-8. In addition, the district court observed the

“true nature of [plaintiffs’] claim” required it to examine the constitutionality of the Authority’s permitting policy in ruling on plaintiffs’ claims against the City and its police officers. A-8-9. As plaintiffs’ counts against the Authority relied on allegations that its permitting policy was unconstitutional, overbroad, and a prior restraint (R.12 at Count I, II, & III), the court found that the earlier summary judgment ruling against plaintiffs precluded “relitigating the constitutionality of Authority’s permit policy” and precluded plaintiffs’ claims against the Authority. A-10-11.

SUMMARY OF THE ARGUMENT

The Authority’s permitting policy was held constitutional on its face in plaintiffs’ case against the City and its police officers. Plaintiffs are precluded from re-litigating that issue against the Authority under the doctrine of issue preclusion. Any argument by plaintiffs regarding the facial constitutionality of the Authority’s policy is limited to their appeal against the City and its police officers, where plaintiffs have failed to present grounds for overturning the district court. Because the Authority’s policy was never applied against the plaintiffs, they have no as-applied claims against the Authority.

STANDARD OF REVIEW

“This court reviews de novo the district court’s ruling on a Rule 12(c) motion.” *Supreme Laundry Serv., L.L.C. v. Hartford Cas. Ins. Co.*, 521 F.3d 743, 746

(7th Cir. 2008) (internal citations omitted). The standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) apply to Rule 12(c) motions, see *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 633 (7th Cir. 2007), but the district court found the complaint should be dismissed even under *Conley v. Gibson*, 355 U.S. 41 (1957). A-3 at n.2.

ARGUMENT

It is a “fundamental precept of common-law adjudication * * * that an issue once determined by a competent court is conclusive.” *Teague v. Mayo*, 553 F.3d 1068, 1073 (7th Cir. 2009) (quoting *Arizona v. California*, 460 U.S. 605, 619 (1983)). In granting the City’s summary judgment motion, the district court decided the constitutionality of the Authority’s permitting policy. A-28-30. Issue preclusion prevents plaintiffs from re-litigating that issue against the Authority.

I. The District Court Correctly Determined that Issue Preclusion Disposed of Plaintiffs’ Claims Against the Authority.

Issue preclusion is a common-law doctrine created by the courts to prevent a party who has already had a “full and fair opportunity to litigate” an issue from litigating that issue a second time. *Taylor v. Sturgell*, 553 U.S. 880, 128 S.Ct. 2161, 2171 (2008). The purpose of the doctrine is to reduce “the expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing * * * inconsistent decisions.” *Id.* (internal

brackets and citations omitted). Where the judgment barring re-litigation of the issue is a federal judgment, the federal common law of preclusion is applied. *Id.*

For federal issue preclusion to apply, four elements must be satisfied:

“1) the issue sought to be precluded must be the same as that involved in the prior action,

2) the issue must have been actually litigated,

3) the determination of the issue must have been essential to the final judgment, and

4) the party against whom estoppel is invoked must be fully represented in the prior action.” *Washington Group Intern., Inc. v. Bell, Boyd & Lloyd LLC*, 383 F.3d 633, 636 (7th Cir. 2004).

The district court found all four elements were met here and dismissed the action. Plaintiffs only dispute that the first three elements are met.

A. Constitutionality of the Authority’s Policy is the Same Issue that has Already Been Decided Against Plaintiffs in a Final Judgment.

The first element of issue preclusion has been met. Plaintiffs do not dispute that the issue decided in the City of Chicago litigation, the constitutionality of the Authority’s permitting policy, is the same issue that the district court barred plaintiffs from litigating in this dispute. They therefore waive any argument to the contrary. *Bodenstab v. County of Cook*, 569 F.3d 651, 658 (7th Cir. 2009). Plaintiffs’ other arguments are not supported by the case law.

1. *The issue may arise in the same case.*

Plaintiffs argue issue preclusion cannot be applied in the same action. Pls.' Br. at 14. That is not the law of this Circuit. "[T]he 'requirement' of a final judgment implies" issue preclusion is "normally asserted in a separate case from the one in which the judgment or ruling sought to be used as a bar to further litigation was rendered," but "there are exceptions to this principle too." *Amcast Indus. Corp. v. Detrex Corp.*, 45 F.3d 155, 158 (7th Cir. 1995) (collecting cases).²

One of the exceptions is where a final judgment occurs in the middle of a case. *Avitia v. Metro. Club of Chicago, Inc.*, 924 F.2d 689 (7th Cir. 1991) (cited in *Amcast*, 45 F.3d at 158). In *Avitia*, a final judgment arose when the district court denied the plaintiffs' pre-trial motion for a court order reinstating two plaintiffs discharged by the defendant employer. *Id.* at 690-91. The court found a provision in the Fair Labor Standards Act prevented the plaintiffs from seeking equitable relief. *Id.* at 690. When later, in the same case, plaintiffs sought injunctive relief to reinstate the discharged plaintiffs and stop employer harassment prior to trial, the court again denied the motion because plaintiffs were prevented from seeking equitable relief. *Id.* at 690. The Seventh Circuit affirmed because the first decision precluded plaintiffs from re-litigating the issue. *Id.*

² Any suggestion that the Authority is attempting to invoke preclusion "in an effort to prevent the loser from exhausting his appellate remedies" would be baseless. *Amcast*, 45 F.3d at 160. Plaintiffs had ample opportunity to exhaust their appellate remedies regarding the Authority's policy in their appeal against the City. See Part II below.

A final judgment arose in the middle of this case, too. When the district court ruled for the City and its police officers under Rule 54(b), a final order was entered for issue preclusion purposes. *See Bank of Lincolnwood v. Fed. Leasing, Inc.*, 622 F.2d 944, 949 n.7 (7th Cir. 1980); 18A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4432 (2d ed. 2002) (“[w]hen properly entered, [Rule 54(b)] judgments are final for purposes of preclusion as well as appeal.”). Rule 54(b) allows an appeal when the court enters a judgment for fewer than all of the parties, even if identical claims remain between the pending parties. *Nat’l Metalcrafters v. McNeil*, 784 F.2d 817, 821 (7th Cir. 1986).³

Issue preclusion is a “flexible doctrine[],” *Amcast*, 45 F.3d at 160, and plaintiffs have not provided a logical reason to limit its application to different actions. When finality is met, as is the case here, the same principles that argue for issue preclusion in separate actions –reducing the expense of litigation, conserving judicial resources, and promoting consistency across judicial decisions– argue for preclusion in the same action. *Amcast* and *Avitia* clarify that reference to prior *actions* when listing the elements of issue preclusion is an artifact from discussing the typical case rather than a limiting condition.

³ Plaintiffs have not challenged the appropriateness of the Rule 54(b) certification in their summary judgment appeal (Pls.’ Br. in Case No. 09-3335 at Jurisdictional Statement), but because this Court has a duty to establish for itself whether it has appellate jurisdiction, *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998), the Authority has highlighted the propriety of the certification here.

The cases cited by plaintiffs are not to the contrary. In *United States v. Sherman*, 912 F.2d 907, 909 (7th Cir. 1990), this Court noted that Sherman failed to cite any issue preclusion cases involving separate rulings in the same proceeding. That is not true here. Moreover, *Sherman's* holding turned on the first ruling being a “temporary ruling” and not final for issue preclusion purposes. *Id.* at 909-10. *Amcast* clarifies *Sherman's* holding by citing *Sherman* to explain how finality is established for preclusion purposes immediately before stating that issue preclusion may occur in the same case. 45 F.3d at 158.

Freeman United Coal Mining Co. v. Office of Workers' Compensation Program, 20 F.3d 289, 293-94 (7th Cir. 1994) is simply inapposite. The *Freeman* court was not concerned about preclusion occurring in the same case, but about petitioner invoking preclusion based on a ruling that occurred *after* the ruling petitioner sought to preclude. *Id.* at 294 (“the first judgment can scarcely be faulted for ignoring a second judgment that had not yet been entered”) (citation omitted).

2. *Issue preclusion does not have to be plead as an affirmative defense.*

Plaintiffs are mistaken that Rule 8(c) required the Authority to plead issue preclusion as an affirmative defense and raise the defense in its motion for judgment on the pleadings. Pls.' Br. at 14-15. Because the “benefits of precluding relitigation of issues * * * run not only to the litigants, but also to the judicial

system,” the district court was free to raise issue preclusion *sua sponte*. *Studio Art Theatre of Evansville, Inc. v. City of Evansville, Ind.*, 76 F.3d 128, 130 (7th Cir. 1996).

The Authority’s motion provided all of the necessary facts for the court to invoke preclusion. The Authority closed its motion by concluding that judgment on the pleadings was appropriate because, “[i]n sum, this Court has ruled that the Authority’s written policy of requiring permits at Navy Pier and Gateway Park is constitutional on its face. That resolves all legal grounds for plaintiffs’ claims against the Authority.” R.191 at ¶ 10. Plaintiffs in *Florasynth Laboratories v. Goldberg*, 191 F.2d 877, 880 (7th Cir. 1951), also objected that Rule 8(c) required defendants to plead preclusion as an affirmative defense. This Court rejected that contention, explaining that where “defendants’ motion to dismiss alleged facts,” “shown to be true by the Court’s own records” and “constitut[ing] a complete defense to the action alleged in the complaint,” “there appears no good reason why an answer should be first required.” *Id.* A remand to amend the answer accomplishes nothing here.

Plaintiffs’ contention that they were not on notice of issue preclusion’s potential impact on their claims is unsupported. In addition to the language in the Authority’s motion, the Court specifically asked plaintiffs to submit a supplemental brief addressing the impact of the earlier summary judgment ruling after their initial response brief failed to address the issue and attempted

to argue the merits of the Authority's policy instead.⁴ See R.209, R.213. The supplemental brief argued that the summary judgment ruling was "not inconsistent with [plaintiffs'] constitutional challenge" to the Authority's permitting policy and reiterated the same arguments that plaintiffs make in this appeal about *Grossman v. City of Portland*, 33 F.3d 1200 (9th Cir. 1994). R.214 at 1, 14. The district court considered plaintiffs' arguments and rejected them. A-7-9. These arguments are also disposed of herein at Part I-C.

Even if plaintiffs were not on notice, they must identify how lack of notice prejudiced them. Absent a valid argument that preclusion does not apply in the present circumstances, they have not been prejudiced. Nor have they identified any prejudice. Where lack of notice is not prejudicial, the error is harmless and the court's decision should be affirmed. See *Timms v. Frank*, 953 F.2d 281, 286-87 (7th Cir. 1992); cf. *Blaney v. West*, 209 F.3d 1027, 1031-32 (7th Cir. 2000). If a lack of notice were plaintiffs' problem, they should have filed a Rule 60(b) motion to reconsider. *Id.* They did not.

3. *The burden of persuasion was the same in both proceedings.*

Plaintiffs correctly point out that issue preclusion requires the burden of persuasion to be the same in the second proceeding as it was in the first. Pls.' Br.

⁴ The district court could have granted summary judgment *sua sponte* to the Authority without any motion by the Authority based on its summary judgment ruling in favor of the City, *Malak v. Associated Physicians, Inc.*, 784 F.2d 277, 280 (7th Cir. 1986), but it let plaintiffs brief the issue instead.

at 15 (citing *Freeman*, 20 F.3d at 294). That requirement was met here. Both proceedings required proof by a preponderance of the evidence.

Plaintiffs err in arguing that their burden of persuasion was heavier on the City's summary judgment motion than it was on the Authority's motion for judgment on the pleadings. Pls.' Br. at 15. They have confused the burden of persuasion, "i.e., which party loses if the evidence is closely balanced" with the burden of production, "i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding." See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005). The burden of persuasion remains the same throughout the proceedings, whether at the motion to dismiss, summary judgment, or trial stage, but the burden of production may change. *Thompson v. Haynes*, 305 F.3d 1369, 1376 (Fed. Cir. 2002).

A preclusion rule based on the burden of production, which is what plaintiffs really advocate, makes no sense. Where the issue in the first case was decided at trial, requiring the same burden of production before invoking preclusion would obligate the court and the parties to proceed all the way through trial a second time, even though results in the second case would be foreordained. The case law does not support such a rule, see, e.g., *Washington Group Intern.*, 383 F.3d at 635, 637 (affirming Rule 12(b)(6) dismissal based on issue preclusion where prior case (*In re Acme Metals, Inc.*, 257 B.R. 714, 720-21

(Bankr. D. Del. 2000)) was decided on summary judgment), and plaintiffs have provided no case law to support such a proposition.⁵ The burden of production has no logical impact on an issue preclusion analysis.

B. The Authority's Policy was Actually Litigated.

The second element of issue preclusion has been met. The district court properly concluded "the City placed the issue of the policy's constitutionality squarely at issue in their memorandum in support of summary judgment." A-8. The Authority's Statement of Facts highlights that summary judgment was replete with arguments regarding the Authority's policy. Plaintiffs' block quote from the City's summary judgment brief further indicates the constitutionality of the Authority's policy was before the Court. Pls.' Br. at 16 ("even if this Court were to conclude that the [the Authority's] permitting requirement for Gateway Park violates the First Amendment...").

Plaintiffs' admission that the constitutionality of the Authority's policy was argued in the City's response brief and plaintiffs' own reply brief is sufficient to meet the "actually litigated" requirement. Pls.' Br. at 18. An issue does not have to be "thoroughly litigated" for issue preclusion to apply. *Cont'l Can Co., U.S.A. v. Marshall*, 603 F.2d 590, 596 (7th Cir. 1979). The "actually litigated" requirement is met when the issue was disputed "and the trier of fact

⁵ The *Freeman* case cited by plaintiffs referred to burdens of persuasion, not production.

resolved it” “no matter how slight the evidence on which a determination was made.” *Id.* Plaintiffs’ strategic decision to hold back certain arguments or to focus their efforts on other arguments does not mean the Authority’s policy was not “actually litigated.”

Plaintiffs may not get around the requirement by simply pointing out that the district court could have decided the case on other grounds. Otherwise, a litigant might “avoid the conclusive effect of collateral estoppel, by design or by inadvertence, by denoting as irrelevant an issue clearly raised by his opponent and by refusing to introduce evidence on the issue.” *Cont’l Can.*, 603 F.2d at 596. Plaintiffs have cited no case law to support their position that the issue here was not “actually litigated.”

C. The Constitutionality of the Authority’s Policy was Essential to Final Judgment.

The third element of issue preclusion has been met. The issue that was actually decided must be necessary to the judgment for issue preclusion to bar a subsequent proceeding. *See* 18 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 132.03[4] (3d. Ed. 2010) (referring to the “necessarily decided” requirement). The district court specifically relied on its holding that the Authority’s policy was a “content-neutral time, manner and place regulation” to dispose of plaintiffs’ First Amendment claims at Navy Pier. A-28-30.

But plaintiffs contend the district court did not have to address the Authority's policy, because the issue was not crucial to plaintiffs' summary judgment arguments. Pls.' Br. at 18-20. This ignores the City's arguments. "[D]enoting as irrelevant an issue clearly raised by [their] opponent" does not let plaintiffs "avoid the conclusive effect of collateral estoppel." *Cont'l Can*, 603 F.2d at 596. The district court ruling is clear that the City raised the Authority's policy as a defense to the First Amendment claims against it. A-22, 28.

Grossman v. City of Portland does not help plaintiffs either. 33 F.3d 1200. They misread *Grossman* as distinguishing between cases where a plaintiff directly challenged probable cause and cases where the plaintiff chose not to challenge probable cause. Pls.' Br. at 21. Constitutionality was only an issue in *Grossman*, contend plaintiffs, because probable cause was not challenged. But it is the "true nature of a [plaintiff's] claim," not the gloss put on the claim by a plaintiff, that controls. A-9 ("*Grossman* does not hold that a claimant can restrict the court's evaluation of a claim by partitioning the issues.>").

The *Grossman* court was not concerned with whether anyone had challenged probable cause. It explained, rather, that because probable cause had been found, the district court was "required [to] evaluate the ordinance's constitutionality." 33 F.3d at 1204. The district court's approach of resting its holding on probable cause and not addressing the question of constitutionality

—the same approach advocated by plaintiffs here— was an “unusual approach” according to *Grossman* and one which it ultimately reversed. *Id.* at 1203.

According to *Grossman*, the district court had to reach the policy’s constitutionality in light of its probable cause finding. Furthermore, the City moved for summary judgment on *all* of the claims against it and its police officers. Plaintiffs were not solely alleging claims based on a lack of probable cause, but also First Amendment violations by the City (compare R.12 at Count IV and V with Count VIII), so a ruling solely on probable cause would not have disposed of every claim.

Plaintiffs suggest the district court could have arrived at the same result by ruling only on the police officers’ qualified immunity. Pls.’ Br. at 19. It is questionable under *Grossman* whether that is true. But even if the court *could* have dismissed the claims against the City without ruling on the Authority’s policy, what matters for issue preclusion is what the court did.⁶ “[A] finding is necessary if it was central to the route that led the factfinder to the judgment reached, even if the result could have been achieved by a different, shorter and

⁶ The City argued qualified immunity as an afterthought in its motion for summary judgment —R.140 at 22 (“Assuming *arguendo* that Plaintiffs could establish a violation of their First and Fourteenth Amendment rights, they cannot show that those rights were clearly established in the context of the events at issue.”)— and the district court treated it as such. A-38 (all of plaintiffs’ claims are already “torpedoe[d]” but the court will discuss qualified immunity because the parties briefed it). The qualified immunity discussion was the “and by the way” portion of the opinion. A-10.

more efficient route.” *Hoult v. Hoult*, 157 F.3d 29, 32 (1st Cir. 1998) (internal citations and quotation marks omitted).

Even if the court had held that the Authority’s policy was constitutional as an alternate ground along with qualified immunity, the ruling with respect to the Authority’s policy would still be necessary to its decision. In the Seventh Circuit, each of two independent and alternate grounds are considered essential for issue preclusion purposes. *Magnus Elecs., Inc. v. La Republica Arg.*, 830 F.2d 1396, 1402 (7th Cir. 1987) (applying “the general rule” that “an alternative ground upon which a decision is based should be regarded as ‘necessary’ for purposes of determining whether the plaintiff is precluded by the principle[] of * * * collateral estoppel from relitigating in a subsequent lawsuit any of those alternative grounds.”) (citing *Winters v. Lavine*, 574 F.2d 46, 67 (2d Cir. 1978)).⁷

⁷ This is the governing rule in the Second, Third, Seventh, Ninth, Eleventh, and District of Columbia Circuits. 18 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 132.03[4][b][ii] (3d. Ed. 2010), and plaintiffs do not offer case law to the contrary. But the Authority would be remiss, if it did not point out that this court has suggested in dicta that the opposite rule applies. In interpreting federal black lung regulations, this Court cited authority from circuits taking the opposite view to explain as an aside that its interpretation was “consistent with general principles of issue preclusion.” *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1008 (7th Cir. 1997), but see *Schellong v. United States INS*, 805 F.2d 655, 658 (7th Cir. 1986) (offering contrary dicta).

Peabody is not controlling here. First of all, the holding of *Magnus Electronics* has never been overturned. Second, leading authorities and other circuits have treated *Peabody* as dicta by continuing to rely on *Magnus Electronics* when stating the Seventh Circuit Rule. *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 251 (3d. Cir. 2006) (citing “holding” of *Magnus Electronics*); 18 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 132.03[4][b][ii] (3d. Ed. 2010). Third, the dicta in *Peabody* has not been relied upon in any published Seventh Circuit decisions. Finally, later cases have

Finally, plaintiffs correctly point out that the Authority was not part of the initial summary judgment motions. Pls.' Br. at 20. Plaintiffs then ask how they could have challenged the Authority's policy if the Authority never had an opportunity to defend the policy. *Id.* The answer is simple and consistent with the case law: the City defended the policy. *Schiro v. Farley*, 510 U.S. 222 (1994), cited by plaintiffs, does not hold that issue preclusion requires both parties to have participated in the prior proceeding --- a doctrine known as mutuality. *Schiro* holds that in the criminal context, a jury's failure to return a verdict does not have issue preclusive effect unless the record established the issue was actually and necessarily decided in the defendant's favor. *Id.* at 236. Nothing in *Schiro* suggests that the doctrine of mutuality, once required for issue preclusion but since purged when preclusion is used defensively, see *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 (1979), has risen from the ashes. Issue preclusion applies as long as the party *being precluded* was a participant in the prior proceeding. *Id.* at 326-32 (recognizing abandonment of mutuality requirement for defensive preclusion).

suggested that *Peabody* was dealing with "special preclusion rules that apply in the [black lung regulatory]" area as opposed to ordinary rules of preclusion. *Midland Coal Co. v. Dir., Office of Workers' Comp. Programs*, 358 F.3d 486, 489 (7th Cir. 2004).

D. The District Court Proceedings were Fair.

The Seventh Circuit will only “question the [first] hearing’s fairness for the purposes of applying [issue preclusion] * * * where fairness concerns are especially pronounced.” *Avitia*, 924 F.2d at 691. This may occur where (1) different forums were involved which afforded “disparate measures of procedural protection,” (2) material information was concealed by the prevailing party in the first case, or (3) where the issue was not relevant to the initial litigation so there was no incentive to litigate the issue vigorously. *Id.*

Plaintiffs argue the earlier proceedings were unfair, because they did not have an opportunity to adjudicate whether the Authority’s policy was constitutional. Pls.’ Br. at 22. This is a reiteration of plaintiffs’ earlier arguments. Plaintiffs had the opportunity to argue the Authority’s policy and the incentive to do so, because the City raised the policy to defend itself and its police officers.

The one preclusion case dealing with fairness cited by plaintiffs clarifies the incentive to litigate, not the decision to litigate thoroughly, is the dispositive factor.⁸ In *Kunzelman v. Thompson*, this Court held earlier proceedings were fair

⁸ The other cases cited by plaintiffs, which include an unpublished district court opinion and a dissent, have nothing to do with issue preclusion. *Sun v. Board of Trustees of the University of Illinois*, 473 F.3d 799, 810 (7th Cir. 2007), discusses why default judgments are inferior to merits decisions. The doctrine of issue preclusion agrees, which is why default judgments do not meet the “adequately litigated” requirement. *In re Gallo*, 573 F.3d 433, 437 n.4 (7th Cir. 2009). No default judgment was entered here. Plaintiffs cite the dissent in *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1275 (7th Cir. 1983) (Coffey, J. dissenting), but even if it were not a dissent, *Analytica* has nothing to do with

where the litigants had the “incentive to fight [the preclusive] motion to dismiss, but simply did not exercise the opportunity.” 799 F.2d 1172, 1177-78 (7th Cir. 1986). Preclusion was not applied in *Kunzelman*, however, because the doctrine was invoked against parties who were not part of the earlier action. *Id.* at 1178. Under *Kunzelman*, plaintiffs’ failure to exercise their opportunity to litigate the issue to its fullest on summary judgment does not make preclusion unfair.

II. The Constitutionality of the Authority’s Policy is Not Before the Court in this Appeal.

Plaintiffs devote Part II of their brief to arguing the facial constitutionality of the Authority’s permitting policy. By briefing the constitutional issues in this appeal, plaintiffs impermissibly broaden the scope of the appeal beyond the issue decided by the district court: whether plaintiffs are precluded from moving forward with their claims based on the Authority’s policy. The doctrine of issue preclusion bars plaintiffs from rearguing the policy’s constitutionality in this case (and this pending appeal) against the Authority. *Taylor*, 128 S.Ct. at 2171 (issue preclusion “preclude[s] parties from contesting matters”) (internal quotation marks and citations omitted). Revisiting the merits of the Authority’s policy in

issue preclusion. *Id.* (discussing fairness of whether or not a law firm should be disqualified from representing a client). *Byrton Dairy Prods. v. Harborside Refrigerated Services* has nothing to do with preclusion. 1997 U.S. Dist. LEXIS 4590, **10-11 (N.D. Ill. 1997) (discussing fairness in exercising venue over third-party defendant).

this appeal would create “the expense and vexation attending multiple lawsuits” and the waste of “judicial resources” that issue preclusion seeks to prevent. *Id.*

Plaintiffs had the opportunity to appeal the district court’s ruling on the constitutionality of the Authority’s policy in their pending appeal against the City. Appeal Case No. 09-3335. They failed to provide any reason for overturning the decision on the Authority’s policy in that appeal’s opening brief and cannot raise new arguments in their reply brief. *Bodenstab*, 569 F.3d at 658. In that appeal, they again make the argument that the district court could not decide the constitutionality of the Authority’s policy because it was not challenged in plaintiffs’ motion for summary judgment, while ignoring that the City raised the issue in its motion. Pls.’ Br. in Case No. 09-3335 at 36-39 (discussing *Grossman*). Without more, this Court should affirm the district court’s finding on the policy’s constitutionality in plaintiffs’ appeal against the City.⁹

⁹ The other arguments made in plaintiffs’ briefing against the City on the constitutionality of the Navy Pier arrests are references to *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983), and *Board of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), suggesting that absolute prohibitions of speech are not permissible. Pls.’ Br. in Case No. 09-3335 at 39. These are the same cases and arguments offered to the district court. R.152 at 9, R.141 at 14-15. The district court rejected these arguments for failing to confront the Authority’s permitting requirement. A-28-29. Because plaintiffs still fail to confront the permitting requirement in appealing the summary judgment ruling (and fail to address the authorities cited by the district court, *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002), and *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121 (7th Cir. 2001)), the holding should be affirmed in that appeal.

Plaintiffs cannot remedy their failure to provide a reason for overturning the summary judgment ruling on the Authority's policy in the case against the City by briefing the issue in the present appeal of the district court's issue preclusion ruling. Plaintiffs must take their appeal of the merits issue against the party whom they litigated it against: the City. To require the Authority to defend the merits of the permitting policy's constitutionality, the very issue on which it is claiming issue preclusion, not only violates the preclusion doctrine but is also inappropriate for other reasons.

The Authority should not be asked to defend its policy for the first time before this Court of Appeals. As plaintiffs point out, the Authority was not a party to the summary judgment briefing between plaintiffs and the City, which means the Authority "never had an opportunity to defend its policy" before the district court. Pls.' Br. at 20. It has not developed a record or briefed any arguments regarding the dispute. Because the non-mutual party will rarely have made a record on the merits when moving for preclusion, the lack of a mutuality requirement for modern issue preclusion only makes sense if it is accepted that the merits are not before a court considering preclusion. *Parklane*, 439 U.S. at 328 (recognizing mutuality misallocates resources if a defendant "is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action") (internal citations and quotation marks omitted).

The Authority has not litigated the constitutionality of its policy to this point, because issue preclusion makes the expense of re-litigating a complex issue unnecessary. If this Court determines that issue preclusion does not apply, whether the Authority's policy is constitutional should be remanded to the district court, not decided in plaintiffs' appeal against the Authority.

III. The Authority Never Applied its Policy to Plaintiffs.

Plaintiffs contend that a First Amendment as-applied claim remains.¹⁰ Pls.' Br. at Part III. The purported claim is based on the exact same allegations as plaintiffs' facial claim and is mentioned only once in their complaint,¹¹ which is no doubt why the district court dismissed plaintiffs' action against the Authority in its entirety. A-10-11. If plaintiffs felt the court had failed to address an existing claim, they should have filed a Rule 60(b) motion for the court to reconsider.

The district court was correct to treat plaintiffs' First Amendment claims as facial, rather than as-applied, challenges. A-29. Plaintiffs' amended complaint

¹⁰ The Tenth Circuit has written that treating as-applied challenges as legally distinct from earlier facial challenges is a "tenuous distinction" for purposes of issue and claim preclusion. *Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319, 1323 (10th Cir. 1998) (applying issue preclusion and claim preclusion to bar as-applied due process and equal protection claims related to same actions as earlier facial claims).

¹¹ R.12 at ¶ 14 ("Defendant MPEA's "Policy for Public Expression at Navy Pier and the Headlands" (attached as Exhibit A), which requires a permit be obtained in order to engage in First Amendment protected activity, is unconstitutional on its face and applied against Plaintiffs."). Paragraph 1 of their Complaint also mentions an as-applied claim in the Equal Protection context, but plaintiffs' Equal Protection claim is not plead against the Authority. Compare R.12 at ¶ 1 with Count VI.

lacks the necessary allegations for an as-applied claim against the Authority as it does not allege that the Authority directed, or even threatened, plaintiffs' arrest. R.12. The record cited by plaintiffs does not suggest that Authority personnel physically prevented plaintiffs from accessing Navy Pier, only that plaintiffs were told they could not protest. SA-33-34, SA-37-38. Plaintiffs do not allege any unconstitutional activity by the Authority's security personnel, nor have they named Authority personnel in their lawsuit.

Plaintiffs' own briefing rebuts the purported as-applied claim. Their opening brief admits the Authority never applied its permitting policy against them. *See United States v. One Heckler-Koch Rifle*, 629 F.2d 1250, 1253 (7th Cir. 1980) (admissions in brief may be treated as admissions on file). Plaintiffs state unequivocally that, "In reality, no [Authority] security personnel told Andrews to have any plaintiff arrested for trespassing or any other reason." Pls.' Br. at 10. Because the Authority never applied its policy against plaintiffs by instigating their arrest, plaintiffs are left only with the precluded facial challenge. *See Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1064 (7th Cir. 2004) (facial challenge is "appropriate and necessary" because as-applied review would require plaintiffs' arrest, and threat of arrest might chill speech); *Schultz v. City of Cumberland*, 228 F.3d 831, 850 (7th Cir. 2000) (ordinance violators "can bring as-applied challenges to the Ordinance * * * assuming [defendant] enforces it against

them") (emphasis added); accord *Graff v. City of Chicago*, 800 F.Supp. 576 (N.D. Ill. 1992) (plaintiff who had not applied for and not been denied permit had no as-applied claim, only facial claim). Plaintiffs further admit in their briefing against the City, "[the Authority's] practice is to allow any group to engage in free speech activity in Gateway Park without obtaining a permit." Pls.' Br. in Case No. 09-3335 at 19.

The admissions in plaintiffs' briefing mirror the defenses raised in the Authority's answer where it explained 1) plaintiffs failed to allege any conduct by the Authority or its agents violating plaintiffs' rights and 2) no case or controversy exists because (a) the Authority did not request or order that plaintiffs be arrested and did not restrict their exercise of speech at Gateway Park, (b) the Authority welcomes plaintiffs to return to Gateway Park and exercise their rights at any time, and (c) the Authority has a practice of not requiring permits for small groups like plaintiffs. R.26 at "Defenses and Affirmative Defenses." These affirmative defenses can be considered on a Rule 12(c) motion for judgment on the pleadings, *McCready v. eBay, Inc.*, 453 F.3d 882, 892 n. 2 (7th Cir.2006), and this Court may affirm the judgment on any basis that appears in the record. *Bivens v. Trent*, 591 F.3d 555, 559 (7th Cir. 2010).

Grossman counsels against plaintiffs' as-applied claim, too.¹² The city of Portland, Oregon, was held liable in that case for actions of its employees when city police officers applied Portland's unconstitutional ordinance against Mr. Grossman by arresting him. But absent the unconstitutional arrest by agents of the city, *Grossman* recognized there was no claim against the city. 33 F.3d at 1203 ("city cannot be held liable absent a constitutional violation by the arresting officer"); accord *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (where city officer "inflicted no constitutional injury" on plaintiff, "it is inconceivable that [defendant city] could be liable"). Because the arresting officer in this case was not acting on behalf of the Authority, according to plaintiffs, the Authority cannot be liable for an as-applied claim.

CONCLUSION

Plaintiffs had their day in court with regards to the Authority's permitting policy. They are precluded from having another. The district court's dismissal of the action against the Authority should be affirmed.

¹² The *City of Dearborn* and *Berger* cases cited by plaintiffs are inapposite, because the ordinances in those cases did not need to be applied to the plaintiffs as those courts were only analyzing facial challenges. *American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 607, n.5 (6th Cir. 2005) (court considered "exclusively" facial claims); *Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009) (appeal of summary judgment on facial claims when as-applied claims were settled).

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Certificate Of Compliance With Rule 32(A)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel for Appellee-Defendant Metropolitan Pier and Exposition Authority certifies that the foregoing brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and contains 7,286 words exclusive of the cover, table of contents, table of authorities, and certificates of counsel.

Dated: May 21, 2010

J. Bishop Grewell

Circuit Rule 31(E) Certification

The undersigned counsel of record for Defendant-Appellee Metropolitan Pier and Exposition Authority hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e), a version of the brief in non-scanned, searchable PDF format.

Dated: May 21, 2010

J. Bishop Grewell

Certificate of Service

The undersigned, an attorney, certifies that I served on the counsel listed below by U.S. mail, postage prepaid, on May 21, 2010, two copies of the Brief of Defendant-Appellee Metropolitan Pier and Exposition Authority and an electronic version of the brief as filed pursuant to Circuit Rule 31(e).

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