No. 15-1305

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DONALD LEE MCDONALD,
Plaintiff-Appellant,

v.

GEORGE ADAMSON, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division
The Honorable Joan B. Gottschall
Case No. 13-C-2262

REPLY BRIEF OF APPELLANT

BLUHM LEGAL CLINIC
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-0063

SARAH O'ROURKE SCHRUP
Attorney of Record
RICHARD CIPOLLA
Senior Law Student
MICHAEL MENEGHINI
Senior Law Student

Counsel for Plaintiff-Appellant
DONALD LEE MCDONALD

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Defendants concede that the district court erred in applying claim preclusion to dismiss McDonald's federal complaint. (State Br. 11–12) ("McDonald is correct that claim preclusion does not bar his section 1983 action because claim preclusion does not apply 'if a court would not have had subject matter jurisdiction to decide that claim in the first suit involving the same cause of action,' . . . and the Court of Claims does not have subject matter jurisdiction over federal claims." (internal citations omitted)); (A.36) (district court order explicitly applying claim preclusion principles to dismiss his complaint).

Defendants likewise concede that many factual issues raised in the Illinois Court of Claims (ICC) complaint were not resolved by that body, and that McDonald raised additional, new factual allegations in his federal complaint. (State Br. 22) (requesting this Court affirm dismissal of McDonald's claims only with respect to Friday prayer, confiscated cassette tapes, and stolen prayer rugs). Specifically, the ICC never passed on McDonald's claims regarding the lack of Muslim cable channels, the disproportionate number of study classes for Muslims, the restriction on the number of Muslim volunteer visitors, and the prevention of Muslims calling the call to prayer. (A.29–30.) And in his federal complaint, McDonald raised for the first time that Defendant Adamson refused to hire a Muslim clerk to work in the Chapel Department, Defendant Adamson refused to provide a

clean area for Friday prayer, Defendant Edwards refused to let inmates clean the filthy floor before Friday prayer, and Defendant Hardy ignored McDonald's request for volunteers to be appointed to clean the floor. (A.9–12.) Given these concessions this Court need go no further to reverse so that McDonald can pursue his constitutional claims and, at a minimum, develop the factual allegations undergirding them.

Defendants also completely fail to address McDonald's other main argument, covering over five pages of his opening brief, *see* (App. Br. 21), that the district court erred in using Rule 12(b)(6) to dismiss McDonald's complaint (State Br. 11) (summarily stating that Rule 12(b)(6) can be used when the affirmative defense appears on the face of the complaint but not addressing McDonald's arguments as to why that general rule does not apply here). Rather than responding to McDonald and arguing the procedural posture or proper deference to the Court of Claims, most of Defendants' brief is spent articulating the details of Illinois law relating to issue preclusion. As a result, and for the reasons discussed below, this Court should refrain from resolving in the first instance the issue preclusion arguments that form the crux of Defendants' brief. And even if this Court does examine them, it should find that Defendants have not shown that issue preclusion should be applied here. Finally, the question of Friday prayer was not rendered moot by the prison's voluntary decision to restore it a few months ago, and the issue should be available to McDonald on remand.

I. This Court should not accept and resolve Defendants' issue-preclusion arguments in the first instance.

Having conceded that claim preclusion (res judicata) should not have been applied below, Defendants spend the bulk of their brief arguing that this Court should hold that the three discrete claims relating to Friday prayer, confiscated cassette tapes, and stolen prayer rugs are subject to issue preclusion (collateral estoppel). (State Br. 11–21.) Yet as McDonald pointed out in his opening brief, (App. Br. 9), the district court never considered issue preclusion. Defendants did not raise it as an additional affirmative defense, though they could have. FED. R. CIV. P. 8(c). McDonald also showed in his brief how the district court's approach meant that Defendants were not put to their burden of proof. (App. Br. 21) (stating that "these factual inquiries that the district court did not—but should have—addressed before [dismissing] shows that this case is truly not one that was appropriate to resolve under Rule 12(b)(6)" in part because Defendants did not and could not establish their affirmative defense). McDonald went on to show how the many "unresolved factual issues," *see* (App. Br. 9, 16–17, 19, 24), meant that McDonald's case was distinguishable from every other case where this Court has permitted the use of FED. R. CIV. P. 12(b)(6) for affirmative defenses, and also meant that the district court improperly shifted the burden from Defendants to McDonald. (App. Br. 24–25); *see also* (App. Br. 14, 21) (discussing the relative burdens on each party when affirmative defenses were at issue).

Defendants discuss none of this. Rather, on appeal, Defendants opt not to meaningfully defend the district court's decision to use Rule 12(b)(6) as the mechanism to resolve their affirmative defenses, which this Court construes as a waiver. *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012) (arguments waived on appeal if they are "underdeveloped, conclusory or unsupported by law").

The impact of Defendants' failure to address these arguments is manifest: it serves as a concession that the district court procedurally erred in resolving the case under Rule 12(b)(6). Given Defendants' acknowledgment of this procedural error, combined with Defendants' concession that the district court engaged in legal error when it applied claim preclusion, the most prudent course would be a remand for the district court to consider, in the first instance, whether Defendants can prove any affirmative defense.[1] *See Bailey v. Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 374*, 175 F.3d 526, 530 (7th Cir. 1999) (because affirmative defenses require factfinding this Court should "avoid . . . consider[ing] issues for the first time on appeal that require the factfinding abilities of the district judge"); *see also Wainwright Bank & Trust Co. v. Railroadmens Fed. Sav. & Loan Ass'n of Indianapolis*, 806 F.2d 146, 153 n.12

[1] McDonald did discuss collateral estoppel in his opening brief, including an assessment and application of this Court's test for preclusion. (App. Br. 16–21.) As discussed below, McDonald believes that he would prevail on that test if this Court opts to decide it. *See infra* pp. 6–13. In light of Defendants' concessions on appeal, however, McDonald now believes the best course would be a remand to the district court to consider all of these issues together.

(7th Cir. 1986) ("We have held on numerous occasions that we will not consider issues that were not argued before the district court."). And where, as here, the record as developed below contains sparse facts, there is even more of a reason for this Court to avoid deciding it prematurely. For example, as discussed in the opening brief, (App. Br. 24), the record simply does not reflect what process McDonald actually received at the ICC, the contours of the hearing, why he was denied discovery, and whether he even had the opportunity to seek counsel. If this Court determines that Defendants' concessions on appeal regarding res judicata require remand, then it would be most efficient and fair to allow those issues to be developed in the district court and proven by Defendants if they can. Once the district court views this issue through the proper procedural lens of an affirmative defense decided at summary judgment, *Sidney Hillman Health Ctr. of Rochester v. Abbott Labs., Inc.*, 782 F.3d 922, 928 (7th Cir. 2015), then it will necessarily consider Defendants' heightened burden of proof, something it did not do before. *See* (App. Br. 25).[2]

[2] The district court would also then have the opportunity to determine whether McDonald intended to sue the actors in their individual capacity as he alleged in his complaint, or in their official capacities, as Defendants now press on appeal. The district court could also grant McDonald leave to amend to clarify and expand his allegations, particularly given his pro se status.

II. Even if this Court does consider issue preclusion, it should find that Defendants have not satisfied their burden of showing that the ICC proceedings satisfied this Court's standard with respect to Friday prayer, confiscated prayer tapes, and stolen prayer rugs.

Even if this Court were to entertain the three facts that Defendants argue should be barred by issue preclusion, it still should find that applying preclusion would not be appropriate at this stage of the proceedings. This Court takes all well-pleaded facts in the light most favorable to McDonald. *Huri v. Office of the Chief Judge of the Circuit Court of Cook Cty.*, 804 F.3d 826, 829 (7th Cir. 2015). Further, as the Court is considering an affirmative defense at this premature stage, the burden on Defendants is high, and any set of conceivable facts defeats it. *Sidney Hillman Health Ctr. of Rochester*, 782 F.3d at 928. Defendants' defense of the ICC Order procedures does not meet this burden under this Court's *Buckhalter* test which requires: (1) that the ICC was acting in a judicial capacity; (2) that it resolved disputed issues of fact properly before it; and (3) that the parties had an adequate opportunity to litigate the issues. *Buckhalter v. Pepsi-Cola Gen. Bottlers, Inc.*, 820 F.2d 892, 895 (7th Cir. 1987).

1. The first and third prongs of the *Buckhalter* test are not met here because, at a minimum, the ICC did not permit McDonald to engage in discovery, which hindered his ability to present evidence.

This Court in *Buckhalter* set forth seven factors that establish when an agency is acting in a judicial capacity. These factors are not, contrary to Defendants' assertion, simply "various facts that supported" this Court's

conclusion. (State Br. 17–18.) Rather, the factors are minimum requirements; this Court in *Buckhalter* was, without qualification, describing the "same safeguards" that a trial in Illinois provides, and mandating that an agency must satisfy them in order to act in a judicial capacity. *Buckhalter*, 820 F.2d at 896. In fact, subsequent cases have applied the *Buckhalter* factors in just this way. *See, e.g.*, *Reed v. AMAX Coal Co.*, 971 F.2d 1295, 1300 (7th Cir. 1992) ("An agency acts in a judicial capacity when it provides the following safeguards . . . ."); *Novak v. State Parkway Condo. Ass'n*, 141 F. Supp. 3d 901, 907 (N.D. Ill. 2015) (applying the factor test similarly). The *Buckhalter* factors are: (1) representation by counsel; (2) pretrial discovery; (3) the opportunity to present memoranda of law; (4) examinations and cross-examinations at the hearing; (5) the opportunity to introduce exhibits; (6) the chance to object to evidence at the hearing; and (7) final findings of fact and conclusions of law. 820 F.2d at 896.

Defendants decline to engage meaningfully with the factors, except by rote recitation of the ICC procedural regulations. (State Br. 18.) That regulations exist, however, does not answer the relevant question of whether McDonald, *in this instance,* received the minimum safeguards that *Buckhalter* requires. On this record, all seven of the factors were either absent or insufficiently established by Defendants to satisfy the first prong of the *Buckhalter* test.

Defendants' attempt to gloss over the insufficiency of the process and safeguards actually afforded to McDonald is unavailing.[3] Even now, Defendants have not established precisely what happened in the ICC, but one thing is clear: McDonald was denied pretrial discovery despite requesting it. (R.29 at 11.) It also appears that the ICC ignored his motions. (R.29 at 11) ("[T]he Court of Claims refused to answer plaintiff's motion to compel discovery, or any motions by plaintiff as required by Court's rules . . . ."). With respect to the first factor, McDonald, a prisoner, did not retain counsel; it is unclear whether he had the ability or means to do so. The second and third factors of *Buckhalter* were absent, which also means the derivative rights in the fifth and sixth factors were absent as well. Additionally, the record is silent as to whether McDonald had an opportunity to examine or cross-examine anyone at the hearing, or even whether witnesses were permitted, under the fifth factor. Regarding the seventh factor, as noted below, the findings cannot be said to resolve the issues or the law because the Order failed to weigh the evidence or consider all the claims. Finally, the fact that McDonald could have filed for a rehearing or applied for the limited and exceptionally narrow *certiorari* review that resolved only due process violations is irrelevant. Those are not relevant factors—let alone dispositive ones—of whether the Court of Claims provided adequate procedural safeguards. If anything, these provisions only highlight the lack of "court

[3] Defendants are limited in their ability to now argue the process was adequate because McDonald raised his lack of process in the district court, (R.29 at 11), but Defendants chose not to respond in their two-page reply below, (R.30).

review of any adverse findings" necessary to enforce preclusion. *United States v. Utah Const. & Min. Co.*, 384 U.S. 394, 422 (1966). Thus, the ICC was not acting in a judicial capacity.

Although this Court did not provide an enumerated list of factors for the third prong of its test—the adequate-opportunity-to-litigate prong—it applied many of the same factors it considered when assessing whether the body acted in a judicial capacity. *Buckhalter*, 820 F.2d at 896 (noting that the complainant before the agency had an attorney, sought review of the agency's adverse decision, and he had an opportunity to present evidence and contest the other side's evidence). But unlike the plaintiff in *Buckhalter*, whom this Court found had received a "thorough and exhaustive opportunity" to "raise and address each issue" through multiple avenues of appeal, there is absolutely no evidence in the record that McDonald was given a similar chance. Indeed, the only evidence in the record belies it: McDonald averred that he sought, but was denied, the opportunity to obtain discovery from the defendants. And unlike *Buckhalter*, the scope of review that McDonald could have sought in the Illinois state courts was extremely limited. Therefore, Defendants did not establish either the first or third *Buckhalter* factors, and the ICC Order should not be given preclusive effect.

2. The ICC did not resolve issues of fact properly before it, even on the limited record available to it.

As noted above, McDonald was not allowed to develop the record through discovery. And what the ICC did with the paltry record before it does

not qualify as the type of factfinding that the Supreme Court envisioned when it permitted unreviewed agency decisions to be afforded preclusive effect. *See Univ. of Tenn. v. Elliott*, 478 U.S. 788, 799 (1986). First, the hearing in *Elliott* continued for five months and involved more than 100 witnesses and 150 exhibits, and generated over 5,000 pages of transcript. 478 U.S. at 792 n.2. Similarly in *Buckhalter*, the Administrative Law Judge produced a thirteen-page opinion following a four-day adversarial hearing with "exhaustive legal memoranda" and cross-examination of witnesses for a race discrimination claim. 820 F.2d at 894. McDonald's experience was nothing like this, and it would be reasonable to conclude that the ICC's cursory treatment of his claims simply did not constitute factfinding.

Even if this Court examines the ICC Order on its merits, the ICC simply recited all the issues that McDonald raised, and then went on to neither discuss, nor resolve, most of them. (A.33.) The two-page Order makes only two findings in a single paragraph: "Muslim services are offered every Friday" and he "was served non-vegan diet consistent with regular practice." (A.33–34.)[4] The ICC's bare-bones conclusions stand in stark contrast to the care the agencies provided to the claimants in *Elliott* and *Buckhalter*, and exempt on due process grounds McDonald's case from the preclusion rule established in *Elliott*. *See Haring v. Prosise*, 462 U.S. 306 (1983); *Kremer v.*

[4] Notably, Defendants' mootness argument, which hinges on the fact that Stateville recently restored Friday prayer to all inmates, is in direct conflict with the ICC's supposed factfinding that "Muslim services [had already been] offered every Friday." (A.34.)

Chemical Constr. Corp., 456 U.S. 461, 482 (1982); *Allen v. McCurry*, 449 U.S. 90, 95 (1980). Simply put, if an Order like the one issued by the ICC here constitutes adequate factfinding, then states will be free to wholly circumvent the federal venue that vindicates important constitutional rights.

Finally, Defendants spend most of their brief arguing Illinois preclusion law. But even if this Court were to find that the ICC satisfied the enumerated *Buckhalter* safeguards, the antecedent step before applying Illinois law is to determine what preclusiveness an Illinois state court would give to an ICC hearing. *Elliott*, 478 U.S. at 799. This is a bedeviling task, as Defendants concede. (State Br. 20) ("While defendants have not discovered a case . . . on whether a Court of Claims decision is given preclusive effect . . . ."). The first clue that typical issue preclusion principles may not apply stems from ICC's exclusive, but very limited, jurisdiction: administrative complaints by claimants against the state. It is a body unto itself, as is its decisionmaking; thus the preclusive reach of its decisions should be similarly circumscribed. 705 ILCS § 505/8. Another hint that the ICC decisions would not be accorded preclusive effect is the fact that the ICC's authorizing statute explicitly notes the preclusive effect of the ICC's decisions on itself, but the statute is silent as to the effect on state courts. 705 ILCS § 505/17 ("Any final determination against the claimant on any claim prosecuted as provided in this Act shall forever bar any further claim in the court arising out of the rejected claim."). Further, Defendants recognize

that this Court has at least provisionally determined that Illinois courts would not apply issue preclusion against a plaintiff like McDonald, one who lacks a legitimate opportunity to appeal the merits of a decision. (State Br. 20) (citing *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1020 (7th Cir. 2006) (citing *People v. Mordican*, 356 N.E.2d 71, 73 (Ill. 1976)) for proposition that under the "peculiar circumstance" when the party against whom collateral estoppel is sought has not had the opportunity to appeal the judgment in the initial action, preclusion should not apply); *see also Cirro Wrecking Co. v. Roppolo*, 605 N.E.2d 544, 553 (Ill. 1992) (applying *Mordican*'s "peculiar circumstances" rule in the civil context as well). However, claimants in the ICC do not have this right. *Rossetti Contracting Co. v. Court of Claims*, 485 N.E.2d 332 (Ill. 1985) (permitting only review for due process violations, not on the merits of the agency decision).

Rather than grapple with this necessary threshold finding, Defendants resort to misplaced analogies between McDonald's full-fledged judicial proceeding and arbitration decisions. (State Br. 21.) Arbitration decisions are almost wholly inapposite; they carry no preclusive effect in a subsequent § 1983 action, so the fact that Illinois courts might grant an arbitration decision in another context preclusive effect does not matter at all. *McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984). The unreviewable ICC Order is precisely the type of "peculiar circumstance" that this Court in *Sornberger* envisioned when declining to apply issue preclusion.

III. Defendants' voluntary cessation of an unconstitutional practice does not moot the Friday prayer issue.

What remains is Defendants' mootness argument relating to the Friday prayer practice. (State Br. 10.) However, Defendants have erroneously conflated constitutional mootness with postcommencement mootness. The former is a jurisdictional question—whether the power to decide a case *exists*. Under Article III of the Constitution, a federal court lacks the power to review moot cases. *See, e.g.*, *Commodity Futures Trading Comm'n v. Hunt*, 591 F.2d 1211, 1224 (7th Cir. 1979). The latter—at issue here—is a prudential matter relating to a federal court's *exercise* of its power. And it is well settled that "[a] defendant's voluntary cessation of allegedly wrongful conduct ordinarily does not suffice to moot a case." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 174 (2000). Defendants have not deprived this Court "the power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Otherwise, if a defendant's voluntary cessation were capable of mooting a case, it would leave a "defendant . . . free to return to his old ways." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

Defendants, as the party asserting mootness, bear a "heavy burden" if they are to persuade this Court that McDonald's claim was mooted by their voluntary conduct and must meet the "stringent" standard that "the challenged conduct cannot reasonably be expected to start up again. *Friends of the Earth*, 528 U.S. at 189; *see also Ciarpaglini v. Norwood*, 817 F.3d 541,

545 (7th Cir. 2016) ("Decisions by the Supreme Court and this court make clear that a defendant seeking dismissal based on its voluntary change of practice or policy must clear a high bar."). Although Defendant Adamson affirmed that Friday prayer services have been offered weekly since January 2016, (State Br. 10), "[s]uch a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which" is required, *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968). Defendants have not demonstrated that it is "absolutely clear" that the practice of only allowing Muslim inmates to attend Friday prayer service every other week "could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190. Indeed, McDonald has been complaining of violations of his constitutional rights for years, since at least 2009. Defendants cannot now, during the pendency of litigation, strategically manufacture mootness so as to avoid the adverse legal consequences of their actions, only to be free to return to their unconstitutional practices and policies as soon as the case is dismissed. Thus, this Court retains jurisdiction to provide McDonald relief he seeks with respect to the denial of Friday prayer service for every practicing Muslim in the facility.

CONCLUSION

For the foregoing reasons, as well as those in the opening brief, Appellant McDonald respectfully requests that this Court reverse the district court's dismissal of his complaint under Rule 12(b)(6) and further find that McDonald's Friday prayer claim is not rendered moot by Defendants' recent voluntary cessation of its practice of denying weekly Friday prayer to its Muslim inmates.

Dated: July 13, 2016

Respectfully submitted,

Donald McDonald
Plaintiff-Appellant

By: /s/ SARAH O'ROURKE SCHRUP
Attorney

RICHARD CIPOLLA
Senior Law Student
MICHAEL MENEGHINI
Senior Law Student

BLUHM LEGAL CLINIC
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Counsel for Plaintiff-Appellant
DONALD McDONALD

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Federal Rule of Appellate Procedure 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 3,683 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief 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 Office Word 2010 in 12 point Century Schoolbook font with footnotes in 11 point Century Schoolbook font.

/s/ SARAH O'ROURKE SCHRUP
Attorney
BLUHM LEGAL CLINIC
Northwestern Pritzker
School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

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Certificate of Service

I, the undersigned, counsel for the Plaintiff-Appellant, Donald McDonald, hereby certify that I electronically filed this brief and appendix with the clerk of the Seventh Circuit Court of Appeals on July 13, 2016, which will send notice of the filing to counsel of record in the case.

/s/ SARAH O'ROURKE SCHRUP
Attorney
BLUHM LEGAL CLINIC
Northwestern Pritzker
School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Dated: July 13, 2016