In the

United States Court of Appeals

For the Seventh Circuit

No. 22-1903

EDDIE R. BRADLEY,

Plaintiff-Appellant,

v.

VILLAGE OF UNIVERSITY PARK, ILLINOIS,
an Illinois Home Rule Municipality, and
VIVIAN COVINGTON, Mayor of University Park, Illinois,
in her individual and official capacities,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 1:15-cv-08489 — **Charles R. Norgle**, *Judge*.

ARGUED DECEMBER 6, 2022 — DECIDED FEBRUARY 3, 2023

Before ROVNER, HAMILTON, and ST. EVE, *Circuit Judges*.

HAMILTON, *Circuit Judge*. This appeal is a sequel to our decision in *Bradley v. Village of University Park*, 929 F.3d 875 (7th Cir. 2019) (*Bradley I*). The Village of University Park hired plaintiff Eddie Ray Bradley in 2013 as chief of police and in 2014 renewed his contract for two years. In 2015, after new

elections changed the balance of political power in the village, Bradley was fired without notice or an opportunity for a hearing. Bradley brought this suit against the village and its mayor under 42 U.S.C. § 1983 for firing him without due process of law in violation of the Fourteenth Amendment. He also asserted several state-law claims.

The district court found in 2016 that Bradley failed to state a viable procedural due process claim under federal law and declined to exercise supplemental jurisdiction over the state-law claims. Dkt. 35 at 1, 3. In *Bradley I*, we reversed that dismissal and remanded the case. 929 F.3d at 899. The village had conceded that Bradley had a property interest in his job as chief. Accordingly, firing Bradley without notice or an opportunity to be heard, we found, would have deprived him of that property without due process of law. We rejected the district court's view that relief was not available under federal law on the theory that the due process violation by the mayor and village board had been "random and unauthorized." *Id.* at 879.

On remand, the defendants reversed course and argued that Bradley did *not* have a property interest in his job. The district court ultimately agreed with the defendants that they could reverse course and that Bradley did not have a property interest. The court granted summary judgment for the defendants on the federal due process claim. The court also granted summary judgment for the defendants on all state-law claims. Bradley has again appealed. We again reverse on Bradley's federal claim against the village itself.

In *Bradley I*, the defendants conceded that Bradley had a property interest in his job for the purposes of "this case," without making any effort to qualify or limit that concession

or to reserve their ability to dispute the issue later if they lost the first appeal. They should be held to that concession.

Based on that concession and our decision in *Bradley I*, Bradley is entitled to judgment of liability on his due process claim against the village. We remand the case to determine relief for Bradley on that claim. We also remand so that the district court may, if necessary, address Mayor Covington's qualified immunity defense. We affirm the judgment in all other respects: summary judgment for defendants on all state-law claims.

In Part I, we present the undisputed facts, and in Part II the procedural history of this case. In Part III, we explain how defendants previously waived the issue of Bradley's property interest in his job and why we hold them to that waiver. In Part IV, we hold that Bradley is thus entitled to summary judgment as to liability on his federal due process claim against the village. In Part V, we address the state-law claims, and in Part VI we address qualified immunity for defendant Covington.

I. *Undisputed Facts*

The essential facts are not disputed. In 2013, the Village of University Park convinced Eddie Ray Bradley to come out of retirement to become the new police chief. Bradley was given a written employment contract. In October 2014, the village and Bradley agreed to a new contract with a two-year term, through the end of 2016. The contract provided for a salary of $100,000 per year, full medical coverage, vacation time, sick leave, and a departmental car. If Bradley were terminated "without cause," he would be entitled to a "termination fee" equal to four months' salary.

Soon after a municipal election in 2015, however, the mayor and newly constituted village board placed Bradley on administrative leave. Thirteen days later, they fired him summarily, without giving him any notice of reasons or any opportunity to be heard. The letter firing Bradley did not try to justify his firing based on any sort of good cause. It suggested that he was being ousted by operation of state law because his employment contract extended his tenure beyond the term of the village officeholders who had appointed him, citing 65 Ill. Comp. Stat. 5/3.1-30-5(c) (2006) & 5/8-1-7(b) (1997). *Bradley I*, 929 F.3d at 880. "This meant, according to the village board, that Bradley's appointment as police chief terminated as of May 15, 2015 without needing a board vote, a statement of reasons, or a hearing. Bradley responded with a letter demanding an opportunity to be heard. He received no answer." *Id*. Bradley soon filed this suit.

II. *Procedural History*

Bradley's access to the federal courts was based on his claim that defendants had deprived him of a constitutionally protected property interest—in his job as chief of police—without due process of law. That Fourteenth Amendment claim established federal question jurisdiction under 28 U.S.C. § 1331 and allowed Bradley to invoke supplemental jurisdiction under 28 U.S.C. § 1367 to bring several state-law claims. Those supplemental claims included the common-law theories of defamation, false light invasion of privacy, and breach of contract, as well as claims under the Illinois Whistleblower Act and the Illinois Wage Payment and Collection Act.

A few days before discovery was to close, the district court ordered the parties to submit memoranda of law addressing

both the mayor's qualified immunity defense and our decision in *Michalowicz v. Village of Bedford Park*, 528 F.3d 530 (7th Cir. 2008). After the parties had briefed those issues, the district court dismissed Bradley's due process claim with prejudice. Dkt. 35 at 3. The district court construed that claim as alleging that defendants' "actions were 'random and unauthorized' by law." *Id.* at 2, quoting *Michalowicz*, 528 F.3d at 535, citing *Parratt v. Taylor*, 451 U.S. 527, 540–41 (1981). Bradley's termination therefore presented, the district court reasoned, one of those unpredictable occurrences where constitutional due process is satisfied so long as state laws "provide for a post-termination hearing." Dkt. 35 at 2. The Illinois Administrative Review Act, the court found, provided Bradley with an adequate post-deprivation remedy, so that Bradley's "choice" not to use the "appellate process available to him" under that Act was "fatal to his claim in federal court." *Id.* at 2–3.

We reversed in *Bradley I*, in which defendants conceded that "Bradley had a protected property interest in his continued employment," that "the mayor and the village board are the policymakers for their municipality," and that Bradley had "received no pretermination notice or hearing." 929 F.3d at 878. We determined that these points of agreement sufficed to prove "a due process claim under § 1983 against the individual officials and the village itself, where the village acted through high-ranking officials with policymaking authority." *Id.*

We explained that *Parratt* and its progeny had established a "pragmatic but narrow rule" whereby post-deprivation procedures may satisfy constitutional due process when "the deprivation is the result of a 'random, unauthorized act by a

state employee.'" *Id.* at 879, quoting *Hudson v. Palmer*, 468 U.S. 517, 532 (1984), citing *Parratt*, 451 U.S. at 541. We explained further that the *Parratt* defense has never applied "to employee due process claims where predeprivation notice and an opportunity to be heard could be provided in a practical way." *Id.* In Bradley's case, defendants agreed, "there was ample opportunity for a hearing." *Id.* at 878.

The decision to fire Bradley had also been "made by the top municipal officials," and we had long held "that 'a complaint asserting municipal liability under *Monell* by definition states a claim to which *Parratt* is inapposite.'" *Id.* at 879, quoting *Wilson v. Town of Clayton*, 839 F.2d 375, 380 (7th Cir. 1988). We therefore rejected defendants' theory "that their official action—taken by the village's highest-ranking officials with final policymaking authority—should be considered 'random and unauthorized' and thus excused under *Parratt*." *Id.* at 885. Because Bradley had adequately alleged a due process claim and defendants could not use *Parratt* to shield them from liability, we reversed the judgment of the district court and remanded the case. *Id.* at 899.

Regarding the issue of a property interest, we addressed the elements necessary to state such a claim and held that Bradley had plausibly alleged a violation of his due process rights:

> *The parties agree that Bradley had a protected property interest in his continued employment.* They agree that the mayor and the village board are the policymakers for their municipality on the subject. And everyone agrees that although there was ample opportunity for a hearing, Bradley received no pretermination notice or

> hearing. Those points of agreement suffice to prove a due process claim under § 1983 against the individual officials and the village itself, where the village acted through high-ranking officials with policymaking authority.

Id. at 878 (emphasis added). We reiterated both holdings in our conclusion remanding the case:

> Bradley has alleged a due process claim that follows the mainstream of due process law for public employees with for-cause protection: he was summarily fired, without notice or an opportunity to be heard before he was fired (or even after he was fired). *The village does not dispute these points.* The village's *Parratt* defense fails because it reads *Parratt* far too broadly, in a way that would conflict with *Monroe*, *Zinermon*, *Monell*, *Patsy*, and substantial precedent of this court.

Id. at 899 (emphasis added).

On remand from *Bradley I*, as noted, the defendants reversed course on the issue of a property interest. They sought and, over Bradley's strenuous objections, obtained leave to amend their answer to assert as an affirmative defense that Bradley had no protected property interest in his job as chief.[1]

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[1] To be clear, defendants' allegation that Bradley had no protected property interest in his job as chief of police is not actually an affirmative defense. "An affirmative defense is one that admits the allegations in the complaint, but avoids liability, in whole or in part, by new allegations of excuse, justification or other negating matters." *Reed v. Columbia St. Mary's Hosp.*, 915 F.3d 473, 477 n.1 (7th Cir. 2019), quoting *Divine v. Volunteers of*

In cross-motions for summary judgment, the parties continued to debate whether the property interest issue was open for further litigation after *Bradley I*. The district court eventually concluded that we had left the issue open and that Bradley in fact had no property interest in his job. On that basis the court granted summary judgment for defendants on the federal due process claim, as well as all state law claims. Bradley has again appealed.

III. *Defendants' Waiver of the Property Interest Issue*

In this second appeal, Bradley has invoked several doctrines to support reversal, including the mandate rule, the law of the case, waiver, and judicial estoppel. These doctrines often overlap. See, e.g., *Carmody v. Board of Trustees of Univ. of Illinois*, 893 F.3d 397, 407–08 (7th Cir. 2018) (discussing relationship between mandate rule and law-of-the-case doctrine); *United States v. Husband*, 312 F.3d 247, 250–51 (7th Cir. 2002) (remand does not include issues "waived or decided"). The most straightforward basis for resolving this appeal is that defendants waived the property interest question in the first appeal, so the issue was not within the scope of our remand.

Waiver is "the 'intentional relinquishment or abandonment of a known right.'" *Henry v. Hulett*, 969 F.3d 769, 786 (7th Cir. 2020) (en banc), quoting *United States v. Olano*, 507 U.S. 725, 733 (1993). In *Bradley I*, defendants intentionally and permanently abandoned the right to contest Bradley's property interest. Their express waiver thus limited the scope of our

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America, 319 F. Supp. 3d 994, 1003 (N.D. Ill. 2018). Establishing a property interest is an essential element of a plaintiff's affirmative due process case. A simple denial in an answer should be sufficient to put the element at issue.

remand to the district court. See *Husband*, 312 F.3d at 250 (waived issues are not included within "scope of remand").

Whether a particular issue is within or outside the scope of remand is "determined not by formula," *Husband*, 312 F.3d at 251, quoting *United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996), but through careful examination of the prior appellate proceedings, including: the issues presented, the remand instructions, the express holdings, the procedural posture, and the issues that were necessarily resolved either by implication or waiver. See *Flynn v. FCA US LLC*, 39 F.4th 946, 954 (7th Cir. 2022) (issues presented); *United States v. Adams*, 746 F.3d 734, 744 (7th Cir. 2014) (remand instructions); *Creek v. Village of Westhaven*, 144 F.3d 441, 445 (7th Cir. 1998) (express holdings); *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1291–92 (7th Cir. 1992) (procedural posture and implicit holdings).

"The gist of the doctrine is that once an appellate court either expressly or by necessary implication decides an issue, the decision will be binding upon all subsequent proceedings in the same case." *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991) (discussing law-of-the-case doctrine). So "any factors that limit remand are implicitly taken into account when this court remands a case." *Husband*, 312 F.3d at 250. "[W]hether an issue was waived on the first appeal is an integral and included element in determining the 'scope of remand.'" *Id.* When a party explicitly waives an issue, that waiver shapes the law of the case and the scope of any remand. Put another way, an issue or argument that a party has waived

permanently, and not solely for purposes of appeal, is simply not part of a remanded case.[2]

We review de novo the scope of a prior remand, including the application of the mandate rule and the law-of-the-case doctrine. *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 795–96 (7th Cir. 2005). Whether a party waived an issue in the course of a prior appeal is an issue of law that we likewise review de novo. *Husband*, 312 F.3d at 250–51.[3]

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[2] Defendants contend that Bradley waived arguing that the scope-of-remand doctrine—including the mandate rule, the law of the case, and waiver—foreclosing his arguing on remand and in this appeal that he had a property interest. They argue that Bradley's response to their amended answer and amended affirmative defenses was untimely, leaving both the district court and defendants "with the impression that Plaintiff was abandoning those averments." Defendants' waiver-of-waiver argument is not persuasive. As they acknowledge, long before their amended filings, Bradley had made these arguments and the district court had rejected them. He was not required to repeat himself ad nauseam. And ironically, defendants themselves waived their waiver-of-waiver argument by failing to raise it in the district court. See *United States v. Morgan*, 384 F.3d 439, 443 (7th Cir. 2004) (waiver argument can be waived by party it would help).

[3] Defendants argue that our standard of review with respect to the scope of remand should be only for abuse of discretion. The argument, we believe, misreads the precedents defendants cite. We may remand matters to a district court for it to exercise its sound discretion, as in the principal case defendants cite on the point. In *Houck ex rel. U.S. v. Folding Carton Admin. Comm.*, 881 F.2d 494 (7th Cir. 1989), a dispute had arisen about funds available in a massive antitrust settlement, beyond those needed to pay claims and expenses. In an earlier appeal, we had rejected the district court's approval of the parties' plan to use the *cy pres* doctrine to set up an "antitrust development and research foundation." We remanded the case for a fresh exercise of discretion in applying the *cy pres* doctrine. The district court and the parties tried to circumvent our decision. *Id.* at 502. Our

To frame the issue here, we address in Part A appellate waiver generally and a critical difference between waivers by appellants and by appellees. We then lay out in Part B defendants' explicit waiver on appeal in *Bradley I*. In Part C, we explain why we reject defendants' arguments for avoiding or limiting the effects of that waiver.

A. *Appellate Waiver by Appellants & Appellees*

An appellant may waive a non-jurisdictional issue or argument in many ways, such as by failing to raise the issue or argument in the district court, either at all or in a timely fashion, by failing to raise it at all in the party's opening brief on appeal, by failing to present a developed argument on appeal that engages with the reasoning of the district court, or by failing to respond in a reply brief to a new argument raised by appellee. See, e.g., *Williams v. Dieball*, 724 F.3d 957, 961–62 (7th Cir. 2013) (appellant failed to raise argument in district court); *Wilson v. Wilson*, 46 F.3d 660, 667 (7th Cir. 1995) (appellant first raised argument in motion for reconsideration); *Foster v. PNC Bank, Nat'l Ass'n*, 52 F.4th 315, 319 n.2 (7th Cir. 2022) (opening brief failed to address several claims); *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718–19 (7th Cir. 2012) (arguments may be waived if "underdeveloped, conclusory, or unsupported by law"); *Continental Western Ins. Co. v. Country Mut. Ins. Co.*, 3 F.4th 308, 318 (7th Cir. 2021) (argument waived where appellant provided no reasons and did not engage with the district court's reasoning); *Webb v. Frawley*, 906 F.3d 569, 582 (7th

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review of the scope of remand from the original appeal was de novo, but since that remand called for an exercise of discretion, our review of the district court's application of the *cy pres* doctrine was for an abuse of that discretion, which we found in its refusal to comply with our earlier reversal. *Id.* at 502–03.

Cir. 2018) (appellant's counterarguments waived on appeal where he "did not respond to [appellee's arguments] in his reply brief").

An appellant is ordinarily expected to assert any available grounds for reversal, on penalty of waiver. In some interlocutory appeals, however, a defendant-appellant may be required to concede some factual or legal points while reserving her ability to contest them later if the interlocutory appeal is not successful. For example, a defendant appealing a denial of qualified or absolute immunity must often concede facts or elements in order to obtain interlocutory review at all. E.g., *Leiser v. Kloth*, 933 F.3d 696, 700–01 (7th Cir. 2019) (defendant-appellant accepted facts in light most favorable to plaintiff for purposes of interlocutory appeal of denial of qualified immunity); *Lojuk v. Johnson*, 770 F.2d 619, 620 & n.1 (7th Cir. 1985) (noting that "issue of consent will, of course, be open to determination at trial" where defendant-appellant physician had to agree that plaintiff's treatment was without consent for purposes of appealing denial of absolute immunity).

Waiver is not precisely symmetrical for appellees and appellants. An appellee may also waive arguments by not raising them in a timely way in the district court, by failing to respond to an appellant's arguments at all, or by failing to offer a coherent, supported argument, among other grounds. See, e.g., *Jeppesen v. Rust*, 8 F.3d 1235, 1237 (7th Cir. 1993) (appellee's argument waived as it was not "presented to the district judge"); *Terry v. Gary Community School Corp.*, 910 F.3d 1000, 1008 n.2 (7th Cir. 2018) (appellee's counterarguments waived where appellee did not respond to appellant's argument); *Bowman v. Korte*, 962 F.3d 995, 998 (7th Cir. 2020) (argument waived where appellees made no "effort to defend the district

court's order … and instead, for the first time, urge[d]" a different legal theory); *McCottrell v. White*, 933 F.3d 651, 670 n.12 (7th Cir. 2019) (appellees' argument encompassed a single "sentence of their brief on appeal").

An important difference between waiver for appellants and appellees is that appellees do not waive issues or arguments when they merely fail to assert possible alternative grounds for affirmance. An appellee may have tactical, strategic, or financial reasons to seek to preserve a victory on a narrow ground, without wanting to fight all possible theories. "An appellee cannot waive an argument as easily as an appellant can … ." *Saccameno v. U.S. Bank Nat'l Ass'n*, 943 F.3d 1071, 1082 (7th Cir. 2019). The "failure of an appellee to have raised all possible alternative grounds for affirming the district court's original decision, unlike an appellant's failure to raise all possible grounds for reversal, should not operate as a waiver" because arguing "alternative grounds for affirmance is a privilege rather than a duty." *Schering Corp. v. Illinois Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996). Indeed, even "if an appellee forgoes a brief entirely, we may still affirm." *Saccameno*, 943 F.3d at 1082.[4]

Accordingly, an *appellee* will often concede certain issues or elements for purposes of an appeal where an appellant appeals a loss on other grounds. E.g., *Stepp v. Covance Cent. Lab. Servs., Inc.*, 931 F.3d 632, 634–35 (7th Cir. 2019) (defendant-appellee accepted that plaintiff's "discrimination complaints

[4] While we are at it, we also cannot resist pointing out that a party does not waive a defense or claim by opting not to file a motion for summary judgment, a motion for judgment on the pleadings, or a motion for dismissal under Rule 12(b)(6). Filing such motions is not obligatory.

were protected activities" for purposes of appeal where district court had granted defendant summary judgment without reaching merits of retaliation claim); *General Auto Serv. Station v. City of Chicago*, 526 F.3d 991, 994, 998–1000 (7th Cir. 2008) (defendant-appellee accepted for purposes of appeal district court's assumption that signage was lawful when first created where district court had ruled in favor of defendant on other grounds).

B. *Waiver in Bradley I*

Under these general principles for appellate waiver, as appellees in *Bradley I*, defendants could have signaled that they were conceding the property interest only "for purposes of appeal." If they had done so, they would have left the door open to dispute that element of Bradley's case in the event of a remand. The problem here is that defendants gave no sign in *Bradley I* that that was what they were doing, either in their brief or in oral argument. Their failure to do so amounted to an explicit waiver of their right to challenge that element of Bradley's due process claim.

Here is how the property interest issue was presented to us in *Bradley I*. In his opening brief in that appeal, Bradley argued that he had a protected property interest based on his 2014 contract and Illinois statutes. *Bradley I* Pl. Br. at 13–14. Defendants responded to that argument forcefully and clearly. They told us that Bradley had wasted his time arguing the point because it was not disputed: "In this case, the Village Defendants do not contest that Plaintiff had a protected property interest in his employment. Hence, Plaintiff's discussion of that topic in his opening Appellant's brief is superfluous. The only question before this Court is the level of process due." *Bradley I* Def. Br. at 14. At oral argument in *Bradley I*, we

confirmed this position with defendants' counsel, who told us that the defendants "stipulated" to the property interest in this court just as they had in the district court.

Our opinion in *Bradley I* took defendants at their word. We wrote: "The parties agree that Bradley had a protected property interest in his continued employment." 929 F.3d at 878. "The village has conceded that Bradley held a protected property interest in his job." *Id.* at 881. "As noted, the village concedes that Bradley had a property interest in his job protected by procedural due process. His protections were not just procedural but substantive." *Id.* at 882.

C. *Defendants' Counterarguments*

To avoid the consequence of their waiver in *Bradley I*, defendants offer three distinct arguments. They contend first that when they said they did not contest the issue "in this case," they really meant "in this appeal." We reject that argument because no evidence supports it. See *Hamer v. Neighborhood Housing Servs.*, 897 F.3d 835, 840 (7th Cir. 2018) (Courts "look to litigants' (and their attorneys') words and actions as objective manifestations, rather than asking what parties were thinking when they said or did something."). The differences between a case and an appeal and between stipulating for purposes of a case and stipulating or assuming a point for purposes of a particular motion or appeal are not mysteries.

We were told that the best evidence of this limited waiver is to be found in defendants' *Bradley I* brief. Specifically, counsel argued that the phrase "in this case" should be construed to mean only a limited waiver for the purposes of that appeal. That reading would upend the meaning of the word "case." Black's Law Dictionary defines "case" as a "civil or criminal

proceeding, action, suit, or controversy at law or in equity." *Case*, Black's Law Dictionary (11th ed. 2019). In both laymen's and lawyers' terms, "in this case" means "in this lawsuit." It does not mean only "for purposes of this appeal." There's a big difference between the two.

Advocates know how to phrase a limited waiver, and we know how to treat such waivers. E.g., *BRC Rubber & Plastics, Inc. v. Cont'l Carbon Co.*, 981 F.3d 618, 625 (7th Cir. 2020) (appellant "agrees for purposes of appeal …"); *Stepp*, 931 F.3d at 635 ("For purposes of this appeal, [appellee] accepts …"); *General Auto Serv. Station*, 526 F.3d at 994 ("Although [appellee] contested this point below, it has not quarreled with the district court's assumption for purposes of this appeal."); *Fuerst v. Clarke*, 454 F.3d 770, 772 (7th Cir. 2006) (appellee "concedes for purposes of this appeal …"); *Yorger v. Pittsburgh Corning Corp.*, 733 F.2d 1215, 1218 (7th Cir. 1984) ("for purposes of this appeal the parties do not dispute …").

In *Bradley I*, defendants never used any such standard language as "for purposes of this appeal" to qualify their concession. If they had said something like "we stipulate to the property interest for purposes of this appeal," or "we do not contest the property interest for these purposes only," then we would not find permanent waiver. But defendants' use of the phrase "in this case," rather than expressing a limited concession, conveyed an expansive and total waiver. Defendants were clear that whether Bradley "had a protected property interest in his employment" was "an issue not in dispute here." Indeed, they scorned Bradley's discussion of the issue in his opening brief, deriding it as "superfluous." In short, their concession came with no caveat or limitation. We see no basis for reading one into their arguments in *Bradley I*.

Second, defendants argue that the case came to us in *Bradley I* in an odd posture that prevented them from disputing the property interest. In their original answer, defendants had not denied that Bradley had a protected property interest in his job, and they had admitted that Bradley had been fired without any process. They also asserted no fewer than seventeen affirmative defenses. Five weeks later, defendants asked the district court for "leave to file an amended affirmative defense stating that," with respect to Bradley's federal due process claim, they "were not required to provide" Bradley with due process, citing statutes that they contended made Bradley's contract illegal. The district court did not immediately rule on that request. It was still open on the docket, at least formally, when the district court dismissed the case in September 2016, seven months after the motion had been filed. Dkt. 35 at 4.

After our remand, defendants tried to take back their earlier waiver in *Bradley I*. They renewed their as-yet unresolved motion to amend their affirmative defenses. Referring back to the request they had made before *Bradley I*, defendants contended that they had always "wanted to amend their affirmative defenses … to include that [Bradley] had no protected property interest in his employment." The district court granted defendants leave to amend, Bradley moved to strike, and the parties debated whether our remand allowed further litigation of the property interest issue. As noted above, the district court eventually allowed defendants to amend their answer and to dispute Bradley's property interest, and ultimately granted summary judgment for defendants on that basis.

Citing cases in which we have said that parties may not, in effect, amend their pleadings on appeal, e.g., *Hamlin v. Vaudenberg*, 95 F.3d 580, 583–84 (7th Cir. 1996) (declining to allow "appellate counsel to amend the complaint on appeal"), defendants argue that the district court's earlier failure to rule on their pending motion to amend prevented them from limiting in *Bradley I* the scope of their waiver of the property interest element. The argument is a non sequitur. The conclusion simply does not follow from the premise.

Defendants did not need to "amend their answer" on appeal to preserve the argument. If defendants had actually wanted to limit the scope of their stipulation that Bradley had a property interest, nothing prevented them from telling us so. They would only have needed to inform us that they had requested leave in the district court to amend and that, pending resolution of that motion, their concession was only for purposes of appeal.

Third, defendants contend that the property interest issue could not have been decided in *Bradley I* because the district court had not reached it in its original decision dismissing the case. Heading into *Bradley I*, the district court had not addressed the property-interest element, finding it only "not dispute[d]." Dkt. 35 at 2. Defendants contend that, because the existence of a property interest had not been argued in the district court, the issue was not "actually before" this court in *Bradley I*. And not being presented to this court, we could not have decided it.

For two reasons, this argument is a red herring. To begin with, although courts of appeals generally hesitate to decide issues not raised in the district court, there is no hard-and-fast rule preventing us from reaching such an issue. While it is

"the general rule, of course, that a federal appellate court does not consider an issue not passed upon below," whether a particular question may be taken up and resolved for the first time on appeal is a matter "left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 120–21 (1976). Broadly speaking, such discretion may be exercised "where the proper resolution is beyond any doubt, or where 'injustice might otherwise result.'" *Id.* at 121, quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941) (citation omitted).

In keeping with these principles, we have exercised our discretion, for example, "'to entertain arguments that turn on pure issues of law,' particularly arguments that would have been foreclosed in the district court by binding precedent." *Allen v. City of Chicago*, 865 F.3d 936, 944 (7th Cir. 2017), quoting *Hively v. Ivy Tech Community College*, 853 F.3d 339, 351 (7th Cir. 2017) (en banc) (hearing arguments not advanced in district court where question was one of law and district court "would have been powerless to overturn precedent"). We have allowed argument on waived issues where "'both parties have briefed and argued [the issue's] merits,' and where 'the benefit of a district court hearing is minimal because proper resolution of the issue is clear.'" *AAR Int'l, Inc. v. Nimelias Enters. S.A.*, 250 F.3d 510, 523 (7th Cir. 2001), quoting *United States v. Brown*, 739 F.2d 1136, 1145 (7th Cir. 1984). We have also chosen to overlook a party's waiver where that waiver "has caused no one"—neither the district court, nor this court, nor any adverse party—"any harm of which the law ought to take note." *Allen*, 865 F.3d at 944, quoting *Amcast Industrial Corp. v. Detrex Corp.*, 2 F.3d 746, 749–50 (7th Cir. 1993) (considering argument not raised in district court where

both parties had fully briefed on appeal the issue of pure statutory interpretation).

But *Bradley I*, like *Singleton*, was not such a case. See 428 U.S. at 121. To be sure, in *Bradley I* perhaps we might have been willing to exercise our discretion to decide the property-interest question even though it had not been presented to the district court. But defendants did not ask us to do that. They did not tee up that possibility by responding substantively to Bradley's contention in his opening brief that he had a property interest. Nor did defendants alert us that they wanted to preserve their ability to litigate the issue in case of a remand. Instead, defendants scoffed at Bradley's property interest argument as "superfluous." Defendants' waiver "was the foreseeable result of their own inaction," not "a fate that was pushed upon them" by their unresolved motion to amend their affirmative defenses. See *Goldman v. Gagnard*, 757 F.3d 575, 580 (7th Cir. 2014).

In short, no obstacle prevented defendants from disputing the property interest in *Bradley I* or even from limiting their concession to that appeal. It was their own choice, in their words, to "stipulate" that Bradley had a property interest. Defendants now seem at a loss to imagine what they could have done under the circumstances. The answer is simple: alert us to their pending motion and reserve the issue by saying that their concession of a property interest was "only for the purposes of this appeal."

Defendants' "concession" on Bradley's property interest was an explicit waiver, unqualified and permanent. As we have long made clear, such arguments that are explicitly "bypassed by the litigants, and therefore not presented in the court of appeals, may not be resurrected on remand" in the

district court. *Barrow v. Falck*, 11 F.3d 729, 730 (7th Cir. 1993); see also *Husband*, 312 F.3d at 250 ("[T]his court does not remand issues to the district court when those issues have been waived or decided."). Once permanently surrendered, the argument is no longer available. *Barrow*, 11 F.3d at 731. Defendants' explicit waiver created an implicit limit on the scope of our remand in *Bradley I*. Litigating this waived issue on remand was not consistent with that opinion.

IV. *The Federal Due Process Claim*

With the issue of Bradley's property interest resolved by defendants' waiver, the undisputed facts show that Bradley is entitled to summary judgment as to liability on his federal due process claim against the village. Section One of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." As we said in *Bradley I*, the "basic legal questions presented by due process cases like this are familiar: '(1) is there a property or liberty interest protected by due process; and (2) if so, what process is due, and when must that process be made available?'" 929 F.3d at 882, quoting *Simpson v. Brown County*, 860 F.3d 1001, 1006 (7th Cir. 2017). For public employees like Bradley, "a 'protected property interest in employment can arise from a state statute, regulation, municipal ordinance, or an express or implied contract.'" *Id.*, quoting *Crull v. Sunderman*, 384 F.3d 453, 460 (7th Cir. 2004). "When a public employee has a property interest in his or her job, the constitutional requirements for predeprivation procedures are well-established: notice of the proposed deprivation, a statement of reasons, and an opportunity to be heard in response." *Id.*, citing *Board of Regents v. Roth*, 408 U.S. 564, 569–70 (1972), and *Perry v. Sindermann*, 408 U.S. 593, 602–03 (1972).

In this case, defendants in *Bradley I* conceded that Bradley had a property interest, and we now reaffirm that their waiver formed an integral part of the law of this case. We thus need not decide definitively the source of Bradley's property interest. To be sure, as we discuss below, Bradley's employment contract was void ab initio, so it could not serve as the source of a federal due process right. But Bradley might have had a property interest arising out of the Illinois Municipal Code, which states that "no officer or member of the fire or police department of any municipality subject to this Division 2.1 shall be removed or discharged except *for cause*, upon written charges, and after an opportunity to be heard in his own defense." 65 Ill. Comp. Stat. 5/10-2.1-17 (2007) (emphasis added). In this case, whether the statute's substantive "for cause" protection applies to Bradley as chief of police has been rendered moot by defendants' waiver. We therefore express no opinion on this issue of Illinois municipal law. For our purposes in evaluating Bradley's federal due process claim, the property-interest element has been satisfied.

So too has the second element. As in *Bradley I*, defendants admit in this appeal that Bradley "received no process at all." 929 F.3d at 883. The undisputed facts establish that the policymakers for the village violated Bradley's federal due process rights. He is entitled to summary judgment as to liability on that claim.

V. *State-Law Claims*

The district court granted summary judgment for defendants on all of Bradley's state-law claims. On appeal, Bradley challenges only the dismissal of his state-law claims for breach of contract and under the Illinois Wage Payment and

Collection Act. We agree with the district court's dismissal of those claims.

As the district court recognized, when Bradley's employment contract was executed, "its duration extended beyond the completion of Mayor Covington's then first term in office." Dkt. 132 at 19. Under the Illinois Municipal Code, the corporate authorities of any municipality cannot "make contracts" with "a municipal manager, administrator, engineer, health officer, land planner, finance director, attorney, *police chief* or other officer who requires technical training or knowledge" that exceeds the term of the mayor or president holding office at the time the contract is executed. 65 Ill. Comp. Stat. 5/8-1-7(b)(1) (emphasis added). Nor can the "city council or board of trustees of a municipality … fix the term of office" of any appointed officer beyond "that of the mayor or president of the municipality." 65 Ill. Comp. Stat. 5/3.1-30-5(c). According to the Illinois courts, Bradley's employment contract would therefore be deemed "*ultra vires* and void *ab initio*." *Cannizzo v. Berwyn Twp. 708 Cmty. Mental Health Bd.*, 318 Ill. App. 3d 478, 251 Ill. Dec. 889, 741 N.E.2d 1067, 1071, 1074 (2000) (affirming dismissal of breach-of-contract claim against township where employment contract "extended for a duration longer than the term of the township supervisor").[5]

Because Bradley's employment contract was ultra vires, he lacks "a valid and enforceable contract," which he would

[5] Contrary to Bradley's reading of our opinion in *Bradley I*, we did not determine in that appeal whether Bradley had a "valid and enforceable contract." Rather, we simply acknowledged that defendants' conduct had not comported with the contract's procedural protections. 929 F.3d at 880 ("These actions did not comply with the termination provisions of Bradley's employment contract[.]").

need for his breach-of-contract claim. See *Khan v. Fur Keeps Animal Rescue, Inc.*, 2021 IL App (1st) 182694, 458 Ill. Dec. 873, 197 N.E.3d 286, 292 (2021); *Pepper Constr. Co. v. Palmolive Tower Condos., LLC*, 2016 IL App (1st) 142754, 405 Ill. Dec. 748, 59 N.E.3d 41, 66 (2016). The district court correctly granted defendants summary judgment on Bradley's breach-of-contract claim.

The same logic applies to Bradley's claim under the Illinois Wage Payment and Collection Act. To prove a claim under the Act, a plaintiff must prove "that: (1) the defendant was an 'employer' as defined in the Wage Payment Act; (2) the parties entered into an 'employment contract or agreement'; and (3) the plaintiff was due 'final compensation.'" *Catania v. Local 4250/5050 of the Communications Workers of America*, 359 Ill. App. 3d 718, 296 Ill. Dec. 161, 834 N.E.2d 966, 972 (2005), quoting 820 Ill. Comp. Stat. 115/2, 5. A valid and enforceable contract is necessary for a common law action for breach of contract, but the Wage Payment and Collection Act requires only an "agreement," which the courts interpret more broadly than a contract. An agreement "requires only a manifestation of mutual assent … without the formalities and accompanying legal protections of a contract.'" *Id.*, quoting *Landers–Scelfo v. Corporate Office Systems, Inc.*, 356 Ill. App. 3d 1060, 293 Ill. Dec. 170, 827 N.E.2d 1051, 1059 (2005). Still, a plaintiff must "plead facts showing mutual assent to terms that support recovery." *Landers–Scelfo*, 827 N.E.2d at 1059.

As evidence of mutual assent, Bradley points only to a purported acknowledgment by Mayor Covington in her deposition that he "deserved four months' salary if terminated" and to the employment contract itself—which was ultra vires. The quoted testimony does not show mutual assent. Mayor

Covington did not admit that she believed Bradley was actually owed four months' salary upon termination. She merely acknowledged that the written contract purported to require "a termination fee equal to four months salary," saying only, "I see that." We therefore agree with the district court that Bradley could not demonstrate the "mutual assent" necessary to prove a claim under the Wage Payment and Collection Act.

VI. *Qualified Immunity*

Qualified immunity shields government officials like Mayor Covington from individual liability for civil damages under 42 U.S.C. § 1983 and similar remedies "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Officials "are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018), quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012).

For reasons explained above, the undisputed facts establish that Mayor Covington's actions violated Bradley's constitutional right to due process of law. For purposes of her qualified immunity defense, the issue is whether her actions violated clearly established constitutional law.

"'Clearly established' means that, at the time of the officer's conduct, the law was 'sufficiently clear that every reasonable official would understand that what [she] is doing' is unlawful." *Id.*, quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (internal quotation marks omitted). There need not be "a case directly on point, but existing precedent must have

placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741, citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), and *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In other words, the "rule must be 'settled law,' which means it is dictated by 'controlling authority' or 'a robust consensus of cases of persuasive authority.'" *Wesby*, 138 S. Ct. at 589–90, quoting *Hunter v. Bryant*, 502 U.S. 224, 228 (1991), and *al-Kidd*, 563 U.S. at 741–42 (internal quotations marks omitted). "It is not enough that the rule is suggested by then-existing precedent." *Id.* at 590. Also, we "must not 'define clearly established law at a high level of generality, since doing so avoids the crucial question of whether the official acted reasonably in the particular circumstances that he or she faced.'" *Id.*, quoting *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014). Under the Supreme Court's guidance, we must determine whether it would have been clear, beyond debate, to an official in Mayor Covington's position that Bradley had a protected property interest.

The district court never reached the issue of qualified immunity. The parties' appellate briefing on qualified immunity has been sparse and seems to rely on materials outside the record. Whether police chiefs in Illinois municipalities are or may be entitled to for-cause protection is an important issue for those municipalities and their police forces. Anything we might say at this stage and on this record could disrupt Illinois law on the underlying merits. Accordingly, these are circumstances where we use our discretion not to reach this issue that the district court did not decide. See generally *Singleton*, 428 U.S. at 120–21.[6]

[6] We have considered whether the disagreement among the federal judges who have considered this case supports the mayor's defense of

Conclusion

We will attempt to leave no room for doubt about the scope of this remand. First, summary judgment for the village and Mayor Covington on Bradley's federal due-process claim is REVERSED. Bradley is entitled to summary judgment as to liability on his federal due process claim against the village itself. Summary judgment for the defendants on all state-law claims is AFFIRMED. We REMAND to the district court for further proceedings on damages for Bradley on his federal claim against the village, on Mayor Covington's defense of qualified immunity, and on such other issues as may arise, consistent with both this opinion as a whole and our specific mandates.

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qualified immunity. See generally *Wilson v. Layne*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."); *Gates v. Khokhar*, 884 F.3d 1290, 1303 (11th Cir. 2018) (same). We have not taken that path here because the premise for the judges' disagreement on the *Parratt* issue was that the mayor and the village board undertook a supposedly "random and unauthorized" *violation of state law*. We are hesitant to hold that a public official may invoke qualified immunity on a federal constitutional claim precisely because she violated state law. We also recognize that the issue of the mayor's qualified immunity may have limited practical importance to the parties, given the village's liability on the claim.