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No. 706471

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARK ACARREGUI, NONOY FIGUEROA, MARK TRUMBAUER,
JAMES MOUNT, and all others similarly situated,

Appellants,

v.

CITY OF SEATTLE,

Respondent.

RECEIVED
COURT OF APPEALS, DIVISION I
JUN 27 11 13 AM '06

BRIEF OF RESPONDENT

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I. INTRODUCTION

The King County Superior Court, the Honorable Dean S. Lum, properly dismissed the lawsuit filed by the four Appellants (collectively, “Acarregui”) against the City of Seattle on the grounds of *res judicata*.¹

Acarregui was cited for running a red light. His violation was detected by an automated traffic safety camera (“red light camera”), and he does not deny that he ran a red light. Nor did he contest his citation in Seattle Municipal Court. Instead, he waived his right to a hearing and paid the \$124 fine that is assessed for running a red light in Seattle. By court rule, Acarregui’s decision to admit liability and pay his fine resulted in entry of a Municipal Court judgment that he had committed the infraction.

Years later, in this lawsuit, Acarregui sought a “second bite at the apple.” Bypassing the court that entered judgment against him, Acarregui filed a new lawsuit in Superior Court claiming that his citation had been improperly issued, and seeking restitution of the fine he had paid to the Municipal Court. This collateral attack on an existing judgment is flatly barred by *res judicata*, which prevents parties from re-litigating any claim or defense that was raised, or could have been raised, in an earlier action.

Under controlling Washington law, the exclusive remedy available to

¹ The facts and legal arguments presented here are equally applicable to each of the four Appellants. They are referred to jointly as “Acarregui” in accordance with RAP 10.4(e).

one seeking restitution of a fine paid in satisfaction of a Municipal Court judgment is to file a motion to vacate the judgment in Municipal Court. See *Doe v. Fife Municipal Court*, 74 Wn. App. 444, 874 P.2d 182 (Div. I, 1994). That relief cannot be obtained through a new lawsuit filed in a different court (even if filed as a putative class action), which is what Acarregui tried to do here. The Superior Court cited *Doe* as controlling the outcome of this case (RP at 50), yet Acarregui has not addressed or even cited it in his brief.

In fact, Acarregui says very little about *res judicata*, the sole issue on which the Complaint was dismissed. Instead, he devotes nearly his entire brief to issues that the Superior Court concluded did not need to be decided, given that the lawsuit is procedurally barred in its entirety. These include: the legality of the traffic citations (an issue that Acarregui failed to preserve for appeal, and that the City has successfully litigated in prior actions); class certification (an issue that was not briefed or decided in the Superior Court); and the sequencing of discovery. Seeking to dispose of the role of the lower court altogether, Acarregui asks this Court to not only reverse the *res judicata* dismissal but also to: (1) rule that the citations were invalidly issued; (2) certify a class of every vehicle owner who paid a fine for similar red light camera citations; (3) award full refunds to all of those vehicle owners; and (4) calculate and award prejudgment interest. Acarregui's desire to circumvent the Superior Court is understandable, given that Judge

Lum expressed on the record his “doubts about the plaintiffs’ position” on liability. RP at 52. But Acarregui does not explain why, even if the *res judicata* ruling were to be reversed, the case should not simply be remanded to give the Superior Court an opportunity to consider and render an initial ruling on each of the many issues it declined to reach.

II. COUNTERSTATEMENT OF ISSUES

1. Acarregui was cited for running a red light. He did not contest the citation, but instead paid the fine and allowed judgment to be entered against him by Seattle Municipal Court. Years later, he filed a new lawsuit in Superior Court seeking a refund of his Municipal Court fine. Did the Superior Court properly grant the City’s CR 12 motion to dismiss on the grounds of *res judicata*?
2. Did Acarregui fail to preserve for appeal (a) the issue of the legality of the citations and (b) his objections to the Superior Court’s order on the sequencing of discovery?
3. If this Court were to reverse the Superior Court’s *res judicata* ruling, should the case be remanded for further proceedings on the issues that have yet to be decided?
4. Did the Superior Court abuse its discretion when it stayed (a) briefing on class certification and (b) deposition discovery, pending resolution of dispositive motions?

III. COUNTERSTATEMENT OF THE CASE

A. Acarregui Ran a Red Light and Was Cited by the City.

Acarregui received a Notice of Infraction (“NOI”) from the City for a traffic infraction detected by a red light camera at an intersection in Seattle commonly known as “Five Corners.” CP 4. The NOI included photographs and access to video footage showing his infraction, and informed him that he had the right to contest his NOI in Municipal Court. CP 267 at ¶ 3, 279-82, 284-87, 289-92. Acarregui does not dispute that he committed the infraction, and instead of contesting the NOI in Municipal Court he chose to pay the \$124 fine. CP 4. Acarregui’s decision to admit liability and pay a fine resulted in entry of “a judgment that the defendant has committed the infraction.” Infraction Rules for Courts of Limited Jurisdiction (“IRLJ”) 2.4(b)(1) (emphasis added).

The camera that detected Acarregui’s infraction was located at the intersection of 45th Street NE, Union Bay Place NE, and NE 45th Place in North Seattle. 45th Street NE extends east and west of the intersection. Union Bay Place NE extends northwest and southeast of the intersection. NE 45th Place extends only northeast from the intersection. All three streets are arterials, although no camera was located on NE 45th Place.² During the

² During the time period that the Five Corners cameras were operating, local governments were allowed to operate red light cameras at “two-arterial intersections, railroad crossings,

four-year period of time that the Five Corners cameras were operated, 16,950 drivers were cited for red light violations at that intersection. CP 4, 12. For the convenience of the Court, an image of the intersection taken from Google maps is set forth below. (Street labels added).



and school speed zones.” RCW 46.63.170(1)(b) (pre-2012 version). Five Corners is, in fact, a “two-arterial intersection” within the meaning of that statute, because two arterials (45th Street NE and Union Bay Place NE) intersect there. Acarregui claims, however, that because a third arterial meets (but does not continue through) that intersection, this is not a “two-arterial intersection,” and that camera enforcement was therefore unauthorized there.

B. Acarregui Was Provided Numerous Procedural Opportunities to Contest His Infraction.

The NOI issued to Acarregui listed his procedural options, one of which was to request a contested hearing to challenge the validity of the NOI. CP 279-82, 284-87, 289-92. In connection with that hearing, Acarregui could have participated in a pre-hearing conference, retained counsel, obtained limited discovery, subpoenaed witnesses, challenged the admissibility of the City's evidence, and presented any additional evidence he could obtain independently. *See* IRLJ 2.6, 3.1, 3.3, 6.6. At the hearing, Acarregui could have argued that Five Corners was not a location at which camera enforcement was authorized. Indeed, as the record shows, some vehicle owners did raise that argument at contested Municipal Court hearings. CP 270-71, 324 at ¶¶ 3-4, 334, 336-37.³

Acarregui availed himself of none of these procedural options. Instead, he paid his fine and much later initiated new Superior Court litigation to collaterally attack the judgment that had been entered against him in Municipal Court.

³ Acarregui's procedural options did not end in Municipal Court. Had he lost his hearing, he could have appealed to King County Superior Court, and could have sought to stay enforcement of the judgment and avoid paying any fine. *See* IRLJ 5.2, Rules for Appeal of Decisions of Courts of Limited Jurisdiction ("RALJ") 2.5(a), 4.2(a), 4.3(a). If unsuccessful in Superior Court, he could appeal to this Court. RALJ 9.1(h); RAP 2.3(d). Alternatively, if Acarregui believed that the Municipal Court judgment had been improperly entered, he could seek to vacate it. IRLJ 6.7(a); CRLJ 60(b).

C. Other Courts Have Affirmed the Legality of the Five Corners Cameras.

The present action marks the fourth time that the validity of the Five Corners cameras has been litigated above the Municipal Court level. The City has prevailed in each of these cases. The City acknowledges that these prior decisions are not binding on this Court.⁴ However, the prior decisions are relevant to rebut Acarregui's unfounded claim that the City has somehow conceded that the Five Corners cameras were illegal. Br. of Appellants at 9, 33. To the contrary, the prior litigation shows that the City repeatedly and successfully maintained the cameras' legality during the entire period of time they were operating.⁵

In March 2010, U.S. District Court Judge John Coughenour granted a Rule 12 motion to dismiss in its entirety a class action complaint

⁴ Nor does the City claim that the prior decisions discussed in this section are *res judicata* as to Acarregui. Acarregui's lawsuit is barred by the judgment that was entered against him in Municipal Court, not by prior rulings against other litigants.

⁵ Acarregui's argument that citation to these rulings is improper under GR 14.1 is incorrect. First, GR 14.1 prohibits only citation to unpublished opinions of the Washington Court of Appeals; "it does not apply to citation to opinions or orders of other tribunals, such as orders issued by a superior court." Drafter's Comment, GR 14.1, reprinted in 2 Karl B. Tegland, *Washington Practice: Rules Practice GR 14.1*, at 49 (7th ed. 2011). Second, these opinions are not cited as legal "authority," but instead to show the relevant factual background and to rebut a baseless claim.

against Seattle and other cities that included the same “Five Corners” claim presented here. CP 267 at ¶¶ 4-5, 294-98, 200-01.⁶

In October 2010, King County Superior Court Judge Laura Gene Middaugh entered an order voiding a ruling made by a Municipal Court Magistrate that the Five Corners cameras were unauthorized. CP 267 at ¶ 6, 303-04. Although Judge Middaugh based her ruling on jurisdictional grounds,⁷ she also expressed her belief that the interpretation of the statute urged by Acarregui here makes “no sense in the light of the statutory intent, which is safety.” CP 267 at ¶ 7, 306. Judge Middaugh concluded that “[i]t makes absolutely no sense to say that two means only two and not more, instead of just at least two.” CP 306.

In November 2011, King County Superior Court Judge Bruce Heller reversed a Seattle Municipal Court Commissioner’s dismissal of a Five Corners infraction. CP 270-77. Judge Heller agreed with the City that Acarregui’s interpretation of the statute would produce an “absurd” result:

⁶ Judge Coughenour’s ruling was affirmed on appeal. *See Todd v. City of Auburn, et al.*, 2010 WL 774135 (W.D. Wash. 2010), *aff’d*, 425 Fed. App’x 613, 2011 WL 1189696 (9th Cir. 2011). Although the Five Corners issued was briefed on appeal, the Ninth Circuit held that the class action plaintiffs not adequately presented the issue in the lower court. *Id.*, 425 Fed. App’x at 616.

⁷ Because the Magistrate’s ruling had been made at a mitigation hearing (where, by law, liability has already been admitted), the Magistrate exceeded his jurisdiction in dismissing the infraction. CP 303-04.

Two arterials do intersect at this intersection.

So the question is whether the fact that an additional arterial also intersects at that particular intersection means that the cameras are not authorized. Everyone appears to agree that such a result makes little sense. If two arterials intersect with a non-arterial, cameras would be authorized. So why should the result be any different when three arterials intersect; in other words, when we have an even busier intersection. There is nothing in the legislative history that suggests that this was the intent of the statute.

....

This Court interprets the statute as applying whenever at least two arterials intersect, and therefore, the decision of the Seattle Municipal Court is reversed.

CP 275-77.

D. Because of Changes to the Governing Statute, the City Chose to Disable and Relocate the Five Corners Cameras Before the New Statute Took Effect.

RCW 46.63.170 was amended in a number of respects in 2012.⁸

The changes led the City to decide that the Five Corners cameras should be disabled before the new statute took effect. CP 267-68 at ¶ 8.

Operation of the Five Corners cameras ceased in early May 2012, more than a month before the effective date of the new statute. *Id.* The decision had been made and approved, and new locations for the cameras chosen,

⁸ Among other changes, section (1)(b) was rewritten. It now says: “Use of automated traffic safety cameras is restricted to the following locations only: (i) Intersections of two arterials with traffic control signals that have yellow change interval durations in accordance with RCW 47.36.022, which interval durations may not be reduced after placement of the camera; (ii) railroad crossings; and (iii) school speed zones.”

before the City had any notice of Acarregui's claim. CP 325-26 at ¶¶ 7-8. The decision was made following weeks of communications between the City Attorney's Office and City departments about the changes to the statute. *Id.*; CP 143-47, 149-50.⁹

E. Procedural History

The Complaint sought a refund of the fines paid by Acarregui and the other Appellants. CP 8 at ¶ 7.1. Unaware that the City had already disabled and relocated the Five Corners cameras, Acarregui also sought declaratory and injunctive relief, asking that the City be ordered to cease operating them. *Id.* at ¶ 6.2. Finally, the Complaint sought certification of a class of all vehicle owners who had received NOIs for traffic violations detected by the Five Corners cameras. CP 6-8.

In response to a motion for class certification and the issuance of deposition notices, the City moved for a protective order. CP 17-23. The City asked the Superior Court to stay class certification briefing and deposition discovery until the Court had ruled on the City's CR 12 motion

⁹ Acarregui devotes many pages to attempting to show that the City has "admitted" that the Five Corners cameras were illegal while they were operating. Br. of Appellants at 8-11, 33-34. (At the same time, Acarregui asks this Court to exclude the evidence that plainly rebuts this claim, namely the City's successful efforts to establish the cameras' legality in Superior Court appeals. *Id.* at 45-49.) As discussed below at 44-46, the City has admitted nothing of the kind. Its decision to disable the cameras (and subsequent legislative testimony regarding that decision) was based entirely on the changes to the statute, and possible future legal challenges to the cameras under the new statute.

to dismiss, which had already been scheduled for hearing. *Id.* The City argued that, because its motion to dismiss involved pure issues of law (including *res judicata*), the interests of judicial economy would not be served by having the parties devote substantial time to briefing class certification issues and engaging in deposition discovery when neither would be necessary if the City's motion were granted. *Id.* The Superior Court agreed, and granted the City's motion. CP 157-58.

On June 7, 2013, the Superior Court heard oral argument on the City's CR 12 motion to dismiss, and on Acarregui's own motion for summary judgment. RP 1-56. Following the argument, Judge Lum stated that he would grant the City's motion to dismiss on *res judicata* grounds (RP at 48-51), and then asked if it was necessary for him to rule on the legality of the Five Corners cameras. Acarregui's counsel initially asked for a ruling on that issue. RP at 52. However, when Judge Lum stated that "in all honesty, I have some doubts about the plaintiffs' position," Acarregui's counsel withdrew his request: "[I]n light of your comments, I guess I'll withdraw my request that you make a ruling." *Id.* In accordance with that request, the order of dismissal expressly did not decide whether the cameras complied with Washington law. CP 561.

Because the Five Corners cameras had been disabled and relocated before the Complaint had been filed, Judge Lum also held that Acarregui's

claims for declaratory and injunctive relief presented no judiciable issue, and dismissed them on ripeness grounds. CP 568.

The Superior Court's order granting the City's motion to dismiss was entered on July 10, 2013. CP 558-62. This appeal followed. CP 563.

IV. ARGUMENT

A. *Res Judicata* Bars Acarregui's Claims.

1. Acarregui May Not Collaterally Attack Final Municipal Court Judgments in Superior Court.

The Superior Court correctly dismissed Acarregui's claims because of the *res judicata* effect of the Seattle Municipal Court judgment.

Acarregui does not and cannot dispute that he could have asserted as a defense in Municipal Court the legal theory later asserted in the Superior Court Complaint, i.e., the camera that detected his infraction was in an unauthorized location. Instead, Acarregui waived his right to a hearing and paid his fine, resulting in entry of a judgment that he had committed the infraction. IRLJ 2.4(b)(1). In this action, Acarregui sought to re-litigate the earlier judgment in a different court. *Res judicata* does not permit this.

Res judicata bars a party from re-litigating all claims and defenses that were raised, or could have been raised, in an earlier action. *Loveridge v. Fred Meyer*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995); *Stevens County v. Futurewise*, 146 Wn. App. 493, 502, 192 P.3d 1 (2008). The doctrine exists to prevent piecemeal litigation, to ensure the finality of judgments, and to

prevent collateral attacks on judgments. *Id.*, 146 Wn. App. at 502-03; *In re Marriage of Aldrich*, 72 Wn. App. 132, 138, 864 P.2d 388 (1993) (*res judicata* “precludes re-litigation by collateral attack”). A motion filed in a different action constitutes a collateral attack. *Id.*

The party seeking to bar claims under *res judicata* principles must show an identity between the prior action and the second action by showing that the two cases have the same (1) parties, (2) subject matter, (3) cause of action, and (4) quality of the persons for or against whom the claim is made. *Stevens County*, 146 Wn. App. at 503. The doctrine applies to judgments from municipal court proceedings, just as it does to other court proceedings. *Reninger v. Dep’t of Corrections*, 134 Wn.2d 437, 449-50, 951 P.2d 782 (1998). Each element is met here:

- **The parties and quality of the parties are the same.** Acarregui and the City were parties to the Municipal Court judgment, just as they are parties to this lawsuit. The quality of the parties is the same, because Acarregui and the City occupy the same roles: (a) Acarregui violated traffic laws; and (b) the City made an infraction decision based upon a review of the evidence. Because the parties occupy the same roles in both actions, *res judicata* bars the second suit. *E.g., Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 397-98, 429 P.2d 207 (1967).

• **The subject matter is the same.** Both the Municipal Court proceedings and this lawsuit involve the validity of (and a possible defense to) the infraction issued to Acarregui.

• **The claims or defenses are the same.** *Res judicata* prevents re-litigation of claims or defenses that either were, or could have been, decided in the prior action. *See Norris v. Norris*, 95 Wn.2d 124, 130, 622 P.2d 816 (1980). Thus, a defendant may not withhold defenses in one action and attempt to assert those same defenses affirmatively in a second action. *Symington v. Hudson*, 40 Wn.2d 331, 338, 243 P.2d 484 (1952). “[A]n action based on an omitted defense cannot be permitted in guise of a claim for restitution of a former judgment already paid or for damages measured by its execution.” 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4414, at 326-27 (2d ed. 2002). Parties “must present all the facts and raise all the issues which may be relied upon . . . as a defense; hence the judgment in a case will operate as an estoppel . . . as to all grounds of . . . defense which might have been, but were not, presented and passed upon.” *White v. Miley*, 138 Wash. 502, 509, 244 P. 986 (1926). Acarregui’s claim is based entirely on a defense that he failed to assert in Municipal Court, and is therefore barred by *res judicata*.

2. A Motion to Vacate Filed in Municipal Court Is the Only Avenue of Possible Relief to Acarregui.

Under court rules and Washington case law, the only possible procedure available to Acarregui to recover the fine he paid in satisfaction of the Municipal Court judgment is to file a motion to vacate in Municipal Court. This issue was comprehensively addressed by this Court in *Doe v. Fife Municipal Court*, 74 Wn. App. 444, 874 P.2d 182 (1994). The Superior Court cited *Doe* as controlling authority in this case (RP at 50, observing that *Doe* “appears to be very similar if not directly analogous to our situation”). Yet Acarregui does not mention *Doe* in his opening brief.

a. Court Rules

Contested traffic infraction proceedings, including camera-detected infractions, are governed by the IRLJ. IRLJ 6.7(a) provides that motions to vacate judgments rendered by courts of limited jurisdiction are governed by CRLJ 60(b). That rule, identical to CR 60(b), provides the only possible remedy to Acarregui to undo the judgment that was entered against him. Relief under that rule, however, may only be sought from the court that actually entered the judgment.¹⁰ Simply put, Acarregui is in the wrong court.

¹⁰ Acarregui initially asked the Superior Court for relief under CR 60(b). CP 174-76. However, when the City pointed out that Acarregui was seeking that relief from the wrong court (CP 316), Acarregui withdrew the request. CP 459.

b. *Doe v. Fife Municipal Court*

Doe involved court costs that were assessed as part of deferred prosecution in connection with alcohol-related traffic offenses. Drivers who had paid those costs filed a class action lawsuit in superior court, claiming that the costs were illegal because there was no statutory authority to impose them. The lawsuit was dismissed by the superior court. On appeal, this Court agreed with the plaintiffs that the costs were not statutorily authorized. 74 Wn. App. at 450. However, this Court also held that the costs could not be recovered through a superior court lawsuit. Instead, the plaintiffs' exclusive remedy was to go back to Municipal Court and file a motion to vacate. *Id.* at 451-53.

The reasoning of *Doe* applies here. CrRLJ 7.8, the court rule before the court in *Doe*, tracks IRLJ 6.7 in that it provides that a Rule 60(b) motion to vacate is the exclusive means (aside from a direct appeal) of obtaining relief from a judgment in either a criminal or infraction case. The *Doe* court emphasized that CrRLJ 7.8 does not incorporate language from CR 60(c), which may permit independent actions to attack a judgment. *Id.*, 74 Wn. App. at 453. The court observed that the omission of the equivalent of CR 60(c) in the limited-jurisdiction rule "suggests that the [limited jurisdiction rule] was intended as the exclusive mechanism for a party to obtain relief from a judgment or order, and that an independent civil action [was], thus,

barred.” *Id.* IRLJ 6.7 closely parallels CrRLJ 7.8, and likewise incorporates only CRLJ 60(b), and not CR 60(c) or CRLJ 60(c) (which might otherwise permit an independent action to seek relief from judgment). As in *Doe*, Acarregui may challenge his underlying judgment only through a motion filed under IRLJ 6.7(a) and CRLJ 60(b). This lawsuit is an improper collateral attack on the prior judgments, and is barred.¹¹

In another similarity to this case, the *Doe* plaintiffs protested that municipal court relief was inadequate because the municipal courts are not empowered to hear class actions. This Court was not persuaded:

The Does next contends that CrRLJ 7.8(b) provides inadequate and ineffective relief for large numbers of people who are attempting to recoup court costs that were allegedly wrongfully assessed. . . . [T]hey argue that the district and municipal courts do not have jurisdiction to hear class action suits, award “money-had-and-received” damages or provide injunctive relief in this case. We reject these arguments. We see no barrier to a party obtaining effective relief, even in the absence of a class action suit. . . . [T]hat the Does might be unable to maintain a class action suit does not preclude their ability to recover the overpaid costs. . . . [T]he procedure [plaintiffs] would have to follow to obtain relief is quite simple.

74 Wn. App. at 454-55. The same reasoning applies here.¹²

¹¹ This Court noted in *Doe* that its interpretation of the court rules was supported by sound public policy reasons: “[J]udicial resources are employed more efficiently if the party who asserts a judgment or order as being void [] is first required to address its concerns to the court that issued the judgment or order.” 74 Wn. App. at 454.

¹² *Doe* is consistent with decisions from other states establishing that *res judicata* cannot be avoided by combining a large number of paid fines into a putative class action. *See*,

Under the applicable court rules and *Doe*, Acarregui's sole remedy is a motion to vacate filed in the Municipal Court. From the fact that he initially asked the Superior Court to vacate the Municipal Court judgments (CP 174), Acarregui evidently believes that he can meet the CR 60 standard. The City strongly disagrees that any basis for vacating the judgments exists. However, that issue need not be decided by this Court. The arguments made by Acarregui in support of his earlier request to vacate can be addressed if and when he files a CRLJ 60(b) motion in Municipal Court.

3. Courts Apply *Res Judicata* to Bar Post-Judgment Challenges to Red Light Camera Tickets and Other Traffic Infractions.

Courts in Washington and other jurisdictions have confronted attempts by plaintiffs to repackage paid camera and other traffic fines into new lawsuits. These claims have been consistently rejected.

In *Carroll v. City of Cleveland*, 2013 WL 1395900 (6th Cir. 2013), the Sixth Circuit Court of Appeals affirmed the dismissal of a class action complaint seeking to challenge camera-detected infractions on constitutional

e.g., *Mills v. City of Grand Forks*, 813 N.W.2d 574, 576-79 (N.D. 2012) (class action seeking recovery of allegedly excessive traffic fines barred by *res judicata* where defense had not been raised in original infraction proceeding); *Merrilees v. Treasurer, State of Vermont*, 618 A.2d 1314, 1316 (Vt. 1992) (no class action exception to *res judicata*; fines that had not been challenged in earlier proceedings could not be re-litigated). The fact that the class action plaintiffs had not been represented by counsel in the earlier proceedings has no effect on the application of *res judicata*. *Mills*, 813 N.W.2d at 579-80.

grounds.¹³ Because the plaintiffs in *Carroll* had paid their fines without raising the constitutional defenses, they were barred by *res judicata* from filing a new lawsuit challenging their citations:

Because payment of the fines levied in Appellants' citations, and acceptance of that payment by the City, was a final decision, the parties here are the same as the parties to the original citation, Appellants could have litigated all of the claims they raise here in an appeal to the Court of Common Pleas, and this suit arises out of the same common nucleus of operative fact as the traffic citations, the district court's decision to dismiss was correct.

Id. at *8. The same reasoning should apply here.

Similarly, in *Kovach v. District of Columbia*, 805 A.2d 957 (D.C. Ct. App. 2002), the plaintiffs filed a class action seeking return of fines paid as a result of camera-detected citations. Although the court cited collateral estoppel instead of *res judicata* in affirming the dismissal of the lawsuit, its reasoning is equally applicable here:

[Appellant] had the opportunity to contest the notice of infraction by introducing evidence and appearing before a hearing examiner . . . He chose not to do so. In failing to contest the infraction, appellant effectively acknowledged

¹³ Citation to unpublished federal opinions issued after 2007 is permitted under GR 14.1(b). GR 14.1(b) permits citation of an unpublished opinion "if citation to that opinion is permitted under the law of the jurisdiction of the issuing court." Fed. R. App. P. 32.1, in turn, allows the citation of unpublished federal opinions "issued on or after January 1, 2007." Relying on this rule, this Court has stated that parties may cite to unpublished federal appeals and district court decisions issued after January 1, 2007. *Washington State Communication Access Project v. Regal Cinemas*, 173 Wn. App. 174, 190 n.31, 293 P.3d 413 (Div. I, 2013). Pursuant to GR 14.1(b), copies of the unpublished cases cited herein are submitted with this brief in a separate pleading.

liability for running the red light.

Id. at 962.¹⁴

Res judicata has also been applied to bar re-litigation of other types of traffic violations. In *Holder v. City of Vancouver*, 2008 WL 918725 (W.D. Wash. 2008), the plaintiff received parking tickets, which he contested at the municipal court level and in subsequent appeals. *Id.* at *1. He then filed a new lawsuit in federal district court, seeking to vacate the municipal court judgment on the ground that the parking ordinance was unconstitutional. *Id.* at *2. The court held that *res judicata* barred the plaintiff from re-litigating his claims in a second action. *Id.* at *3. *See also* *Castello v. Alameda County Transit Parking Enforcement Ctr.*, 2008 WL 5412842, *1-2, n.6 (N.D. Cal. 2008) (dismissing challenge to parking ticket based on *res judicata*; [t]o the extent that plaintiff's complaint raises any new legal arguments . . . that could have been raised at the earlier proceedings, those arguments are also barred").

¹⁴ Several courts, in red light camera cases where *res judicata* was not asserted, have gone out of their way to note that such a defense would have been meritorious. *See Idris v. City of Chicago* 552 F.3d 564, 565 (7th Cir. 2009) ("because all plaintiffs had an opportunity to present their contentions in the administrative process, and then to state court, the City might well have had a good argument that claim preclusion bars this litigation"); *Akbar v. Daley*, 2009 WL 3055322, *3 (N.D. Ill. Sept. 18, 2009) (because plaintiff failed to raise defense at red light camera administrative hearing, "claim preclusion may bar any subsequent constitutional challenge in federal court").

4. Acarregui Relies on Non-Res Judicata Cases That Have No Relevance Here.

Even though the Complaint was dismissed on *res judicata* grounds, Acarregui does not address the elements of *res judicata*, does not explain how those elements are not present here, and does not address why the exclusive remedy holding of *Doe* does not apply.

Instead, he attempts to avoid *res judicata* by citing a hodgepodge of inapposite legal doctrines (including subject matter jurisdiction and collateral estoppel), and presenting the novel legal theory that the Municipal Court – which by statute has exclusive jurisdiction to adjudicate traffic citations – was somehow without jurisdiction to decide this one.

a. Orwick/Subject Matter Jurisdiction

Acarregui's reliance on *Orwick v. City of Seattle*, 103 Wn.2d 249, 692 P.2d 793 (1984) to oppose the application of *res judicata* is unavailing, for a number of reasons.

First, it is not a *res judicata* case. In *Orwick*, drivers whose speeding violations had been detected by radar filed a superior court action raising constitutional claims, and also seeking injunctive relief relating to the procedures used by municipal courts to adjudicate traffic violations. The plaintiffs' citations had been all dismissed before there had been any municipal court hearings, leaving no judgments that could

have preclusive effect or that could have been vacated. Neither *res judicata* nor claim preclusion is mentioned anywhere in *Orwick*.

The legal issue in *Orwick* was, instead, whether or not the dispute rested within the exclusive jurisdiction of the municipal court. The *Orwick* court held that it did not, because superior courts have original jurisdiction over “claims for equitable relief from alleged system-wide violations of mandatory statutory requirements by a municipal court and from alleged repetitious violations of constitutional rights by a municipality in the enforcement of municipal ordinances.” 103 Wn.2d at 251. But the issue here is not whether the Superior Court has jurisdiction to consider the merits of challenges to the validity of municipal traffic ordinances.¹⁵ It is what remedies are (and are not) available to litigants who seek to overcome, and to obtain restitution of money paid to satisfy, existing judgments.¹⁶

Even if this case were about subject matter jurisdiction, subsequent

¹⁵ If, for example, a Seattle taxpayer had filed a declaratory judgment action challenging the legality of the cameras while they were still operating, the Superior Court would arguably have jurisdiction to consider the merits. *E.g.*, *State ex rel. Boyles v. Whatcom County Superior Court*, 103 Wn.2d 610, 614, 649 P.2d 27 (1985) (taxpayers have standing to challenge allegedly illegal governmental acts).

¹⁶ In the *Todd* class action, Judge Coughenour first applied *Orwick* to reject an argument concerning the exclusive jurisdiction of the municipal courts. 2010 WL 774135, *2. He then applied *Orwick* to reject application of *res judicata* as well. *Id.* at *3. With due respect to Judge Coughenour, his reliance on *Orwick* – a case in which *res judicata* was not addressed and could not have applied – to reject application of *res judicata* was erroneous. The issue was briefed on appeal, but when the Ninth Circuit ruled in favor of Seattle and the other defendants on the merits, it opted not to address the *res judicata* issue. 425 Fed. App’x at 616-17.

developments have limited *Orwick*'s reach on that issue. Under RCW 7.80.010, a statute enacted three years after *Orwick*, "[i]nfraction jurisdiction resides exclusively in the district and municipal courts, i.e., courts of limited jurisdiction." *Post v. Tacoma*, 167 Wn.2d 300, 311, 217 P.3d 1179 (2009) (emphasis added). Acarregui's attempt to have the Superior Court step in to decide the validity of his traffic infraction runs afoul of this restriction. Later, in *City of Seattle v. McCreedy*, 123 Wn.2d 260, 276-77, 868 P.2d 134 (1994), the Washington Supreme Court held that a challenge to conduct "designed to enforce municipal ordinances" was subject to the exclusive jurisdiction of the municipal courts, and that the superior court lacked jurisdiction. The NOI issued to Acarregui was plainly "designed to enforce [a] municipal ordinance."

Finally, the present case does not present the sweeping claims for equitable relief that were under consideration in *Orwick*; in fact, this case involves no justiciable equitable claims at all. The only issue in this case is whether vehicle owners who paid fines should get their money back. Nothing in *Orwick* suggests that such a dispute belongs anywhere other than in Municipal Court.

b. Allegedly "Void" Judgment

Acarregui confuses his already misplaced discussion of jurisdiction by arguing that the Municipal Court lacked jurisdiction over his infraction is

the first place, and that the judgment is therefore “void.” Br. of Appellants at 16. This is simply wrong. Under RCW 7.80.010, infraction jurisdiction resides exclusively in municipal courts (in those cities that have established them). *Post*, 167 Wn.2d at 311. A claim that the cameras were illegal is a defense to liability, not a jurisdictional defect, and as the record shows the issue of the legality of the Five Corners cameras has been litigated on a number of occasions in Seattle Municipal Court. CP 270-71, 324 at ¶¶ 3-4, 334, 336-37.

The implications of Acarregui’s position are enormous; under his reasoning, the mere invocation of a claim that an infraction was illegally issued would divest the Municipal Court of its statutorily granted jurisdiction to decide the matter. The Municipal Court would be without jurisdiction to rule that the cameras were legal, or that they were illegal. And since the City can only pursue infractions in Municipal Court, simply raising an illegality defense would end the case. Here, the passage of time only complicates the matter. Acarregui’s NOI was issued in 2009. CP 279. This lawsuit was filed in 2012. Did the lawsuit somehow retroactively strip the Municipal Court of jurisdiction over his infraction?

But there is no need for this Court to delve into any of these questions. The issue is resolved by this Court’s decision in *Doe v. Fife Municipal Court*. There, this Court held that even though the underlying

Municipal Court judgments were “void” – the same ruling Acarregui urges – that did not open the door to a collateral attack through a new Superior Court lawsuit. Instead, the exclusive remedy was a motion to vacate filed in Municipal Court. 74 Wn. App. at 450-53. This Court noted that, under the applicable court rule, one of the grounds for relief from a judgment is that “[t]he judgment is void.” *Id.* at 451-52 (citing CrRLJ 7.8(b)(4)).

The same is true here. CRLJ 60(b)(5) provides that one of the grounds for vacating a judgment issued by a court of limited jurisdiction is that “[t]he judgment is void.”¹⁷ Acarregui may now raise this argument in Municipal Court under CRLJ 60(b)(5). Under *Doe*, that is the only remedy available to him.

c. *Hadley/Incentive to Litigate*

Acarregui also relies on *Hadley v. Maxwell*, 144 Wn.2d 306, 27 P.3d 600 (2001), another case that has nothing to do with *res judicata*. Acarregui cites *Hadley* for the proposition that a lack of incentive to litigate nominal fines should preclude application of *res judicata*. Br. of Appellants at 31-32. But the *Hadley* court was discussing the distinct

¹⁷ When Acarregui initially asked the Superior Court to “vacate” the Municipal Court judgment, one of the grounds he cited was that the judgment was “void.” CP 174-76 (citing CR 60(b)(5)).

doctrine of collateral estoppel. 144 Wn.2d at 311.¹⁸ As with *Orwick*, neither *res judicata* nor claim preclusion is mentioned anywhere in *Hadley*.

Acarregui misleadingly states that *Hadley* addressed the elements of *res judicata*. Br. of Appellants at 32 n.20 (“*Hadley* noted that one of the four requirements of *res judicata* is . . .”). But Acarregui has simply replaced the words “collateral estoppel” in *Hadley* with the words “*res judicata*” in his brief. In fact, *Hadley* only addresses collateral estoppel.

The two doctrines have distinct elements, and invoke different core principles:

Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties. . . . It is distinguished from claim preclusion in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of *issues* between the parties, even though a different claim or cause of action is asserted. . . . Claim preclusion, also called *res judicata*, is intended to prevent relitigation of an entire cause of action and collateral estoppel is intended to prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation.

Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 306, 96 P.3d 957 (2004) (citations, footnotes and internal quotations omitted).

¹⁸ One of the elements of collateral estoppel is that application of the doctrine “must not work an injustice on the party against whom the doctrine is to be applied.” *Hadley*, 144 Wn.2d at 311-12 (citing *Southcenter Joint Venture v. Nat’l Democratic Policy Comm.*, 113 Wn.2d 413, 418, 780 P.2d 1282 (1989)). This is not an element of *res judicata*. *Compare, Stevens County*, 146 Wn. App. at 503.

Since the core principles underlying *res judicata* – ensuring the finality of judgments, and preventing collateral attacks on them – are not at issue when there is no judgment to attack, courts are not surprisingly afforded some measure of flexibility when deciding whether certain issues may be revisited. In contrast, there is no Washington authority that introduces a “must not work an injustice” or lack of incentive to litigate element into *res judicata*.

Judge Lum, in ruling on the City’s motion to dismiss, remarked on the difference between the two doctrines, and noted that Acarregui was relying on an inapposite collateral estoppel case:

[T]here are cases which construe collateral estoppel, including *Hadley v. Maxwell*, but those – that’s a separate doctrine from the doctrine that applies here, which is *res judicata*.

RP at 49-50. Notwithstanding this admonition, Acarregui persists in citing *Hadley* to this Court as if it were a *res judicata* case.

d. Public Policy

Finally, Acarregui cites a treatise for the proposition that courts have “frequently” ruled against application of *res judicata* on public policy grounds. Br. of Appellants at 32 (citing 18 Charles Alan Wright, *et al.*, Fed. Prac. & Proc. § 4415, at 374 (2d ed. 2002)). But what the treatise actually says is that a “small number” of cases have defeated *res judicata*

“on broad grounds of public interest alone.” *Id.* Not one of the handful of cases cited is from Washington, and each involves impact on the general public interest that is not present here.¹⁹ Consequently, Wright & Miller caution against reading too much into these cases: “Each of these examples is open to fair debate. . . . They do not establish any broad principle that can be generalized to many cases.” *Id.* at 375.

No Washington court has recognized the existence of a “public policy” exception to *res judicata*. Acarregui does not address the standard used by Washington courts for application of *res judicata*, let alone explain why that standard ought now to be rewritten. Nor does he offer any guidance as to what a court should consider in deciding whether the usual test for *res judicata* should be disregarded.

Moreover, even if such an exception were eventually to be added in Washington, this case is not an appropriate vehicle in which to do it. Acarregui is asking this Court to add a “Just thought of a good defense” exception to the standard for application of *res judicata*, thereby allowing him to re-litigate his Municipal Court judgment years later in a different

¹⁹ The only authorities cited by Acarregui in support of a “public policy” exception to *res judicata* are a 1944 patent infringement case, where application of *res judicata* would have adversely affected the rights of numerous non-parties to the case, and a concurring opinion from a Seventh Circuit case. *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 669-70, 64 S. Ct. 268, 88 L. Ed.2d 376 (1944); *ITOFCA, Inc. v. Megatrans Logistics*, 322 F.3d 928, 933 (7th Cir. 2003) (Ripple, J., concurring).

court. This would undercut the core principles of *res judicata* – ensuring the finality of judgments and preventing collateral attacks on them. It would also, paradoxically, provide greater procedural rights to those vehicle owners who did not sit on their rights, but instead actually went to Municipal Court, raised an illegality defense, and lost. *E.g.*, CP 324 at ¶ 3, 334. *Res judicata* plainly bars those vehicle owners, who have had their day in court, from filing new lawsuits challenging their infractions.²⁰ There is no case law support or policy reason that would confer greater rights to those who waived their right to raise a defense in the first place.

Acarregui has stated that he was “not aware” of a potential defense concerning the legality of the cameras. CP 363. But there is no “I wasn’t aware” exception to *res judicata*; this is why the doctrine applies not just to defenses that were actually raised in the first proceeding, but to those that could have been raised. *Loveridge*, 125 Wn.2d at 763. Allowing Acarregui to re-litigate his judgment in a new lawsuit would remove this part of the existing *res judicata* standard that has been articulated by the Washington Supreme Court. If that standard is to be rewritten, it should be done by the Washington Supreme Court, and in a more fitting case than this one.

²⁰ The same would be true of a vehicle owner who went to court to contest the NOI, and ended up being ordered to pay a reduced fine.

B. The Other Issues Briefed by Acarregui Are Not Properly Before This Court and Can Be Addressed, if Needed, on Remand to the Superior Court.

Should this Court decide that the Complaint was correctly dismissed on *res judicata* grounds, there is no need for it to consider any of the other issues briefed by Acarregui. This case will be over (barring review by the Washington Supreme Court), and any further proceedings would involve the filing of a motion to vacate in Seattle Municipal Court.

However, even if this Court were to reverse the *res judicata* dismissal, it should not reach any of the other issues briefed by Acarregui. Acarregui offers no explanation as to why the Superior Court should not be given an opportunity to first consider and decide these issues on remand. Instead, adopting an “as long as we’re here” approach, Acarregui seeks to dispense with the lower court altogether and have this Court act as a surrogate trial court. As explained below, all of these issues are properly addressed, if at all, on remand to the Superior Court.

1. Acarregui Failed to Preserve for Appeal the Issue of the Legality of the Five Corners Cameras.

As a general rule, a party must raise an issue in the trial court in order to preserve it for appeal. RAP 2.5(a). The purpose of this rule is to promote judicial efficiency by allowing the trial court the opportunity first to consider all issues and arguments and correct any errors, thereby

avoiding unnecessary appeals. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). An important corollary to that principle is that a party may lose the right to appeal an issue by abandoning it, or by failing to seek a final ruling from the trial court on it. For example, a party that does not seek a final ruling on a motion *in limine* after receiving a tentative ruling has been found to waive the right to an appeal. *See, e.g., Erickson v. Robert F. Kerr, M.D., P.S., Inc.*, 125 Wn.2d 183, 194, 883 P.2d 313 (1994) (Durham, J., concurring); *State v. Noltie*, 116 Wn.2d 831, 844, 809 P.2d 190 (1991); *State v. Koloske*, 100 Wn.2d 889, 896, 676 P.2d 456 (1984), *overruled on other grounds*, *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988). Moreover, “an issue expressly . . . abandoned by a party at the trial level will not be addressed on appeal.” 15A Karl B. Tegland and Douglas J. Ende, *Washington Practice: Washington Handbook on Civil Procedure* § 88.3, at 735 (2012) (citing cases).

Acarregui has waived any right to have this Court “review” an issue that his attorney specifically asked Judge Lum not to decide: “[I]n light of your comments, I guess I’ll withdraw my request that you make a ruling.” RP at 52. When Judge Lum again offered to make a ruling on the issue, Acarregui’s attorney again asked that he not do so: “Your Honor, it’s not necessary.” *Id.* at 53. Nor did Acarregui take any steps, when the Superior Court’s written order expressly declined to reach the legality

issue (CP 561), to move for reconsideration or otherwise request a ruling. Acarregui will not be precluded from raising the issue again in Superior Court should this Court choose to reverse and remand, but the issue has been waived for purposes of this appeal.

2. Class Certification Was Neither Briefed Nor Decided in the Superior Court, and Should Not Be Decided by This Court.

Acarregui states repeatedly that the Superior Court “denied” his motion for class certification (Br. of Appellants at 2, 3, 34), and addresses the standard of review applicable to the “denial” of a motion for class certification. *Id.* at 16. Not only did the Superior Court never decide class certification, the issue was never fully briefed. The protective order entered by the Superior Court stated: “Briefing on any motion for class certification is stayed pending resolution of the dispositive motions that are scheduled to be heard on June 7, 2013.” CP 158. Because the City’s motion to dismiss was granted, nothing further has been done with respect to class certification – no discovery, no briefing, no decision by the Superior Court. Acarregui cites no authority under which an appellate court would or could certify a class under these circumstances.

The only two Superior Court orders that were identified in the Notice of Appeal were the order of dismissal and the protective order. CP 563-71. As such, those are the only orders that are before this Court.

RAP 5.3(a). Neither order made a ruling on class certification, which is therefore not an issue in this appeal.

3. Neither Damages Nor Prejudgment Interest Was Decided in the Superior Court, and Should Not Be Decided by This Court.

Even though no class has been certified, and even though no cause of action that would entitle Acarregui to restitution has been considered by the Superior Court, Acarregui asks this Court to go ahead and award nearly \$1.8 million in principal damages, and to also award prejudgment interest. As with class certification, this issue was not fully briefed in the Superior Court, was not considered or decided by Judge Lum, and was the subject of neither of the orders that is the identified in the Notice of Appeal. CP 563-71. As such, any consideration of damages is premature, and is not at issue in this appeal. RAP 5.3(a).

4. The Issues Decided by the Protective Order Are Now Moot.

Acarregui has appealed the Superior Court's decision to grant the City's motion for a protective order. The effect of the order was to defer briefing on class certification and deposition discovery until after the parties' respective dispositive motions had been decided. CP 157-58.

"Reversing" this decision would have no impact on this case. The dispositive motions have now been decided by the Superior Court. Should this Court affirm, there will be no need for class certification briefing or

discovery. Should this Court reverse and remand, discovery and briefing on class certification could proceed. Appellate courts will address moot issues such as this only if the issues are of “continuing and substantial public interest,” if guidance would be helpful to public officers, and the issue is likely to recur. *In re Personal Restraint of Dalluge*, 162 Wn.2d 814, 819, 177 P.3d 675 (2008). The sequencing of briefing and discovery in this particular case hardly rise to that level.

Moreover, the decision to defer class certification and discovery until after dispositive motions is entirely discretionary with the trial court. *See Sheehan v. Central Puget Sound Regional Transit Authority*, 155 Wn.2d 790, 807, 123 P.3d 88 (2005) (“trial court retains discretion, for purposes of judicial economy, to delay ruling on a motion for class certification until after hearing dispositive motions”)²¹; *Rhinehart v. Seattle Times*, 98 Wn.2d 226, 232, 654 P.2d 673 (1982) (trial court has “broad discretion to manage

²¹ *See also Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022-23 & n.6 (9th Cir. 2003) (to promote judicial efficiency, “[i]t would be better procedure for the district court to defer ruling on the class certification until making a decision whether the purported class representative can state a claim”); Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 8, 2d ed. (Fed. Judicial Ctr. 2009) (“the most efficient practice is to rule on motions to dismiss or for summary judgment before addressing class certification. Ruling on class certification may prove to be unnecessary”); 3 Newberg on Class Actions § 7.15 at 48-49 (4th ed. 2002) (class rulings may be made before, after or simultaneously with the disposition of motions to dismiss).

the discovery process”).²² Acarregui has made no showing that Judge Lum’s decision was an abuse of discretion.

Finally, Acarregui failed to make any showing in the Superior Court, through a CR 56(f) affidavit, that the depositions he sought to take would have had any impact on his ability to respond to the City’s CR 12 motion. Having failed to make this record, Acarregui’s right to complain that he was deprived of the right to obtain discovery has been waived. *See Avellaneda v. State*, 167 Wn. App. 474, 485 n.5, 273 P.3d 477 (2012) (plaintiffs’ failure to request a continuance under CR 56(f) to allow them to conduct additional discovery “waives the issue”).²³

5. The Superior Court’s Denial of the Motion to Strike Evidence of Prior Litigation Was Correct, and Has No Bearing on This Appeal.

The Superior Court denied Acarregui’s motion to strike all evidence relating to the earlier Five Cameras cases heard by Judges Middaugh and Heller (discussed *infra*, at pp. 8-9). CP 561; RP at 7-8. Acarregui argues that this evidence was improper under GR 14.1.

²² Federal courts commonly stay discovery in putative class actions pending dispositive motions on legal issues. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007); *Institute Pasteur v. Chiron Corp.*, 315 F. Supp.2d 33, 37 (D.D.C. 2004).

²³ Nor would Acarregui have been able to make such a showing. Not one of the subjects on which he sought deposition discovery (CP 48) had any relevance to the pure issue of law – the *res judicata* effect of the Municipal Court judgments – on which the City’s motion to dismiss was decided.

First, Acarregui is wrong as a matter of law. As noted above (at p. 7 n.5), GR 14.1 prohibits only citation to unpublished opinions of the Washington Court of Appeals; “it does not apply to citation to opinions or orders of other tribunals, such as orders issued by a superior court.” Drafter’s Comment, GR 14.1, reprinted in 2 Karl B. Tegland, Washington Practice: Rules Practice GR 14.1, at 49 (7th ed. 2011).

Second, Judge Lum’s refusal to strike this evidence does not affect this appeal. The prior Superior Court decisions played no role in his ruling on the City’s motion to dismiss.

Finally, the decisions of Judges Middaugh and Heller were not cited as legal “authority” (the City acknowledges that they are not binding on any other court), but instead to show the relevant factual background and to rebut Acarregui’s baseless claims about the City’s conduct. Judge Lum correctly observed that it was Acarregui who opened the door to introduction of this evidence: “[O]nce the plaintiffs allege certain kinds of actions by the City and engage in that kind of hyperbole in their briefing, the City is gonna respond. . . . [I]t’s simply a response to the assertions that were . . . placed by the plaintiff in their briefing and in their complaint.” RP at 8.

For example, Acarregui spends several pages quoting a local television story, which in turns quotes extensively from a Five Corners

ruling made by Seattle Municipal Court Magistrate Francis DeVilla. Br. of Appellants at 12-14. That is the very ruling that Judge Middaugh later vacated (CP 303-04), yet Acarregui does not want the Court to hear that part. Having opened the door to the procedural record by making false claims (i.e., that the City “knew” that the cameras were illegal and has “admitted” this), Acarregui is in no position to complain when the City introduces evidence to show what actually happened.²⁴

C. Should this Court Choose to Reach the Issue, It Should Rule That the Five Corners Cameras Complied With Washington Law.

As discussed above, the issue of whether the Five Corners Cameras were in an authorized location is not properly before this Court and should be addressed, if at all, on remand. Should this Court choose to decide this issue, it should rule that the cameras complied with the law.

1. The Five Corners Cameras Complied With RCW 46.63.170.

RCW 46.63.170 authorizes local jurisdictions to use cameras to enforce traffic laws. During the time that the Five Corners cameras were in

²⁴ Two statements made by Acarregui about this evidence require correction or clarification. His statement that the vehicle owner in the case decided by Judge Heller “failed to appear for the hearing” (Br. of Appellants at 46) is untrue. CP 525 at ¶ 3. And while it is true that the vehicle owner in the case decided by Judge Middaugh was not represented by an attorney, she was an experienced *pro se* litigant who filed not only a 15-page brief supported by more than 140 pages of declarations and exhibits, but also a separate motion to dismiss. CP 525 at ¶ 3.

operation the statute provided, in section (1)(b), that their use “is restricted to two-arterial intersections, railroad crossings, and school speed zones only.” These were locations which had been recognized to be “areas of high collision frequency.”²⁵ In 2005, the Seattle City Council passed Ordinance No. 121944, which authorized the use of red light cameras in Seattle “at intersections where two arterial roadways intersect.” CP 262-65.

a. The Plain Language of the Statute Supports the City’s Position.

Determining the meaning of the statutory phrase “two-arterial intersection” requires the Court to apply the rules of statutory construction with the goal of ascertaining and enforcing the legislature’s intent. *Rental Housing Ass’n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 536, 199 P.3d 393 (2009). Where the meaning of statutory language is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. *Id.* A court is to assess the plain meaning of a statute “viewing the words of a particular provision in the context of the statute in which they are found, together with related statutory provisions, and the

²⁵ The Senate Bill Report for SB 5369, a bill introduced in the 2003-04 legislative session that was substantively similar to the legislation that was eventually enacted, noted that school zones, two-arterial intersections and railroad crossings are among the areas “designated by the Washington State Patrol or county or city police as areas of high collision frequency.” The Senate Bill Report is available on the web site of the Washington Legislature: <http://dlr.leg.wa.gov/billsummary/default.aspx?year=2003&bill=5369>.

statutory scheme as a whole.” *Burns v. City of Seattle*, 161 Wn. 2d 129, 140, 164 P.3d 475 (2007).

The plain meaning of “two-arterial intersection” is that the location of camera enforcement must be one where two arterial streets intersect. Camera enforcement is allowed at such an intersection, whether or not additional streets are there as well.

The Seattle City Council’s ordinance reflects this common-sense understanding; a two-arterial intersection is one “where two arterial roadways intersect.” The presence of a third arterial does not change the fact that “two arterial roadways intersect” at Five Corners. What the statute plainly prohibits is camera enforcement at less busy intersections, such as locations consisting of the intersection of non-arterials, or of one arterial and one or more non-arterial streets. The only logical way to read the statute is that it set a minimum requirement for the size of the intersection. Otherwise, one would have to presume that the legislature wanted to allow camera enforcement at busy intersections, but not at very busy intersections. Such a ruling would contradict the principle that statutes should be construed to avoid “unlikely, absurd, or strained consequences.” *Thurston County v.*

City of Olympia, 151 Wn.2d 171, 175, 86 P.3d 151 (2004).²⁶

The incongruity of Acarregui's position is underscored by considering an intersection where two arterials intersect with one or more non-arterials. Camera enforcement would be permitted there, because there are only two arterials, which was the limitation prescribed in the statute. But no rationale has ever been identified (and Acarregui offers none) under which the legislature would have decided to allow camera enforcement at the intersection of two arterials and a non-arterial, but not at the intersection of three arterials.

Acarregui's misunderstanding of the statute is highlighted by his insistence that five separate arterials somehow intersect at Five Corners. Br. of Appellants at 7; CP 3.²⁷ Under this reasoning, the fact that the Seattle City Council re-named a portion of Union Bay Place NE in honor of Mary Gates could affect whether or not camera enforcement was legally permitted there. Plainly, this is not what the legislature had in mind. The legislature's concern was to identify "areas of high collision frequency," not to examine the names that happen to have been given to portions of particular streets.

²⁶ While Washington courts may advise that this rule of construction should be applied "sparingly" (Br. of Appellants at 27), they have not hesitated to apply it when appropriate. See cases cited below at p. 43.

²⁷ If Five Corners is a five-arterial intersection, what would a "two-arterial intersection" look like?

Acarregui spends many pages discussing issues that are not contested. There is no dispute that the streets at Five Corners are “arterials” as defined in the Seattle Municipal Code. Nor does the City dispute that the statute says that camera enforcement is “restricted” to certain locations “only,” but that does not answer the question of whether Five Corners is one of those locations. And the City agrees that the statute does not say “two or more”; by the same measure, it does not say “two and only two.” What is in dispute is the meaning of the phrase “two-arterial intersection,” and it is the City’s interpretation that most closely fits the plain language of the statute and the intent of the legislature.

b. Principles of Statutory Construction Support the City’s Position.

Should the Court conclude that the plain language of the statute does not support the City’s position, it should at least conclude that the statutory language is ambiguous. A statute is “ambiguous,” under Washington law, where its plain language “is subject to more than one reasonable interpretation.” *Cockle v. Department of Labor and Industries*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001). Once such a determination is made, the Court must consider the intent of the legislature, and the principle of interpreting statutes to avoid absurd results is squarely invoked. “Our purpose in interpreting a statute is to determine and carry out the intent of

the legislature, and we must presume that it did not intend absurd results.” *State v. Coucil*, 170 Wn.2d 704, 707, 245 P.3d 222 (2010). Here, the interpretation urged by the City is, at the very least, a “reasonable” one. The Seattle City Council passed Ordinance No. 121944 by a 9-0 vote, authorizing the use of safety cameras “at intersections where two arterial roadways intersect,” reflecting its understanding of the legislative intent.²⁸ Working from this authority, the Seattle Department of Transportation and the Seattle Police Department selected Five Corners as a location for camera enforcement. Given the divergence of opinion at the Municipal Court level, the prior Superior Court rulings, and the interpretation of the statute by the Seattle City Council and by other jurisdictions, this is at the very least an ambiguous statute. As such, judicial interpretation is appropriate, and application of the principle that the legislature “did not intend absurd results” would govern.²⁹

²⁸ Other jurisdictions in the State of Washington have construed the “two-arterial” language the same way in their implementing ordinances. *See* Pierce County Code § 10.42.010; Bonney Lake Municipal Code § 10.36.010; Bremerton Municipal Code § 10.42.010; Renton City Code 10-12-1(A).

²⁹ RCW 46.63.170 is not a criminal statute; red light camera violations carry only civil penalties, and are processed as parking tickets. RCW 46.63.170(2). As a result, the “rule of lenity,” under which ambiguous criminal statutes are to be construed against the government, has no applicability here. *Coucil*, 170 Wn.2d at 706-07. Acarregui’s reliance (Br. of Appellants at 30-31) on *State v. Hampton*, 143 Wn.2d 789, 24 P.3d 1035 (2001), which concerned the construction of an ambiguous statute in a criminal case, is misplaced.

Moreover, the Court may apply this rule of construction even in the absence of an ambiguity in the statute. Washington courts on numerous occasions have held that, in order to avoid an absurd result, the “spirit” of a statute should prevail over “express but inept” wording. They have reached this conclusion in the absence of any statutory ambiguity. *See, e.g., Vance v. XXXL Development, LLC*, 150 Wn. App. 39, 45, 206 P.3d 679 (2009) (“the spirit or purpose of an enactment should prevail over express but inept wording”); *State v. Day*, 96 Wn.2d 646, 648-49, 638 P.2d 546 (1981) (court held that statute prohibiting driving while intoxicated “within this state” did not apply to private property; “[w]e should avoid a literal reading resulting in unlikely, absurd or strained consequences”); *Janovich v. Herron*, 91 Wn.2d 767, 772-73, 592 P.2d 1096 (1979) (“a fundamental guide to statutory construction is that the spirit or intention of the law prevails over the letter of the law”).³⁰

This case merits application of this principle, even if the Court were to conclude that the statute is not ambiguous. This is a textbook situation in which the avoidance of absurd results, and giving precedence

³⁰ *See also Alderwood Water District v. Pope & Talbot, Inc.*, 62 Wn.2d 319, 320-21, 382 P.2d 639 (1963) (“[t]hat the spirit or the purpose of legislation should prevail over the express but inept language is an ancient adage of the law”); *State v. Brasel*, 28 Wn. App. 303, 309-10, 623 P.2d 696 (1981) (“the literal expression of legislation may be inconsistent with the obvious objectives or policy behind it”).

to the spirit of a law over arguably unclear wording, should apply.

2. The City Has Not “Admitted” That the Five Corners Cameras Were Unauthorized by Law.

Acarregui alleges that the City has “admitted” that the Five Corners cameras were in an unauthorized location, pointing to three events: (1) the City sought clarifying changes to RCW 46.63.170; (2) the City disabled the Five Corners cameras; and (3) City representatives provided testimony to the legislature in 2013. In fact, these events do nothing more than confirm what is set forth above, namely that the City believed the cameras were authorized while they were operating, fought to establish that in court when challenged, and disabled the cameras only when the governing statute was changed.

First, it is hardly surprising that the City would seek clarification of the statute. Beginning in 2009, the City was faced with inconsistent decisions at the municipal court level about the Five Corners cameras. Sometimes the legality of the cameras was affirmed. CP 324 at ¶ 3, 334 (rejecting argument that Five Corners cameras were illegal, and entering finding that the infraction had been committed). On other occasions, as the record discussed above shows, Municipal Court magistrates ruled that

the cameras were unauthorized.³¹ That the City sought amendments to the statute is not an “admission” of anything, just a reasonable step to take in the face of inconsistent interpretations of the statute, and to try to avoid the necessity of time-consuming appeals to Superior Court.

Second, the record is clear that the Five Corners cameras were disabled solely because of concerns about the 2012 amendments to the statute, and were disabled before the new statute took effect. CP 140 at ¶ 2, 149. Acarregui argues that the City’s deactivation of the cameras is admissible evidence. Br. of Appellants at 33-34. But the issue is not admissibility, and the City has never claimed that these actions cannot be considered by the Court. They are just not probative of anything at issue.

Finally, Acarregui provides an excerpt from testimony to the legislature in 2013 – long after the City had ceased operation of the Five Corners cameras. As an initial matter, none of this testimony is legally relevant. What a statute means is purely a decision for the Court, aided by recognized evidence of legislative intent and rules of interpretation. *Fellows v. Moynihan*, 175 Wn.2d 641, 649, 285 P.3d 864 (2012) (interpretation of a statute is an issue of law). No authority suggests that opinion testimony or a

³¹ In the *Rosen* case that is mentioned in the television news story (Br. of Appellants at 13), Seattle Municipal Court Commissioner Eisenberg dismissed a Five Corners infraction and the City appealed. The case was settled while the appeal was pending when the vehicle owner agreed to pay a mitigated fine. CP 324 at ¶ 4, 336-37.

purported “admission” as to how a statute should be interpreted is admissible or relevant.

Moreover, Acarregui mischaracterizes the testimony in two important respects. He includes lengthy statements from legislators and legislative staff who are not even employees or representatives of the City.³² He also misrepresents the legislative testimony of the two Seattle representatives who testified, Mr. Doss and Lieutenant Eric Sano. As both have explained, they were testifying (in Lieutenant Sano’s case, based only on second-hand understanding) about the reasons for the City’s decision to disable the Five Corners cameras following the 2012 amendments. CP 505-07, 511-12.³³ Neither was purporting to make any “admission” about the legality of the cameras while they were operating. *Id.*

³² For example the opinions of Kelly Simpson, a legislative staffer, about the scope of the prior version of the statute are not recognized legislative history and are not statements by the City. If this Court were inclined to consider this type of testimony, it could also consider the sworn statements of Greg Doss, who as a legislative staffer originally drafted the two-arterial restriction, following consultation with the Chair of the Senate Transportation Committee. CP 506-07. The language was intended only to address a concern that red light cameras might be used on small local roads or back streets. CP 507. But as much as the City would like to rely on this testimony, it is simply not determinative of how the Court should interpret the statute.

³³ Lieutenant Sano was not assigned to traffic enforcement until after the Five Corners cameras had been disabled. CP 512. He had no involvement with the cameras prior to that time, and offered his second-hand understanding of the reasons for their deactivation in response to questions from legislators. *Id.* Such an “admission” obviously proves nothing.

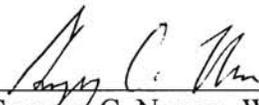
V. CONCLUSION

Acarregui is demanding that the City pay nearly \$1.8 million plus interest to drivers who ran red lights, based on a strained and irrational reading of the governing statute. At the same time, Acarregui has ignored the principles of *res judicata* that bar this action, and court rules and case law that provide that his remedy, if any, is to be found in Municipal Court.

The Superior Court correctly held that the Complaint is barred by *res judicata*. Its decision granting the City's motion to dismiss should be affirmed.

RESPECTFULLY SUBMITTED this 27th day of January 2014.

PETER S. HOLMES
Seattle City Attorney

By: 

Gregory C. Narver, WSBA #18127
Assistant City Attorney

Attorney for Respondent City of Seattle

CERTIFICATE OF SERVICE

I certify that on this date I caused a true and correct copy of the foregoing Brief of Respondent and the Respondent City of Seattle's GR 14.1(b) Submission of Unpublished Opinions to be served on the following by electronic mail and also in the manner indicated:

Stephen J. Crane Crane Dunham PLLC 2121 Fifth Avenue Seattle, WA 98121 <i>Counsel for Plaintiffs-Appellants</i>	Hand-delivered
Abel M. Tsegga TG Law Group PLLC P.O. Box 5246 Lynnwood, WA 98046 <i>Counsel for Plaintiffs-Appellants</i>	U.S. Mail, postage prepaid

DATED this 27th day of January, 2014.



Teresa Eidem

No. 706471

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARK ACARREGUI, NONOY FIGUEROA, MARK TRUMBAUER,
JAMES MOUNT, and all others similarly situated,

Appellants,

v.

CITY OF SEATTLE,

Respondent.

FILED
JAN 27 PM 3:55
COURT OF APPEALS
DIVISION I
SEATTLE, WASHINGTON

**RESPONDENT CITY OF SEATTLE'S GR 14.1(b) SUBMISSION
OF UNPUBLISHED OPINIONS**

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ORIGINAL

Pursuant to GR 14.1(b), Respondent City of Seattle submits copies of the following unpublished opinions that are cited in the Brief of Respondent. Citation to these unpublished federal opinions is permitted under GR 14.1(b), Fed. R. App. P. 32.1, and this Court's decision in *Washington State Communication Access Project v. Regal Cinemas*, 173 Wn. App. 174, 190 n.31, 293 P.3d 413 (Div. I, 2013) (stating that, under GR 14.1(b) and Fed. R. App. P. 32.1, parties may cite to unpublished federal appeals and district court decisions issued after January 1, 2007).

Ex. A: *Carroll v. City of Cleveland*, 2013 WL 1395900 (6th Cir. 2013)

Ex. B: *Castello v. Alameda County Transit Parking Enforcement Ctr.*, 2008 WL 5412842 (N.D. Cal. 2008)

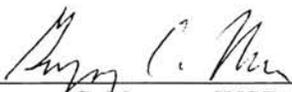
Ex. C: *Holder v. City of Vancouver*, 2008 WL 918725 (W.D. Wash. 2008)

Ex. D: *Todd v. City of Auburn*, 2010 WL 774135 (W.D. Wash. 2010)

Ex. E: *Todd v. City of Auburn*, 425 Fed. App'x 613, 2011 WL 1189696 (9th Cir. 2011)

RESPECTFULLY SUBMITTED this 27th day of January 2014.

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Attorney for Respondent City of Seattle

EXHIBIT A

***Carroll v. City of Cleveland*, 2013 WL 1395900 (6th Cir. 2013)**

Slip Copy, 2013 WL 1395900 (C.A.6 (Ohio))
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 2013 WL 1395900 (C.A.6 (Ohio)))

H

Only the Westlaw citation is currently available. NOTICE: THIS IS AN UNPUBLISHED OPINION. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.

NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

United States Court of Appeals,
 Sixth Circuit.

Colleen CARROLL, individually and on behalf of all others similarly situated; Sheila M. McCarthy and Patrick J. McCarthy, Executors of the Estate of Daniel R. McCarthy, Deceased, Plaintiffs–Appellants,

v.

CITY OF CLEVELAND, Defendant–Appellee.

No. 11–4025.
 April 5, 2013.

On Appeal from the United States District Court for the Northern District of Ohio.

Before BOGGS and WHITE, Circuit Judges; and BLACK,^{FN*} District Judge.

^{FN*} The Hon. Timothy S. Black, United States District Judge for the Southern District of Ohio, sitting by designation.

BOGGS, Circuit Judge.

***I** Daniel McCarthy and Colleen Carroll received traffic citations from automated cameras that the City of Cleveland put in place, pursuant to a newly passed ordinance. Both paid their fines, admitting liability for their offenses. Both, however, had leased their cars.

They were not vehicle owners and thus, as an Ohio appellate court later determined, they could not be fined under the ordinance. McCarthy and Carroll filed this class-action lawsuit in state court. The fines that the City collected, they alleged, were unconstitutional takings under state and federal law. The City removed to federal court. After a set of adverse decisions on their federal takings claims, in district court and on appeal, McCarthy and Carroll returned to state court and amended their pleadings, adding federal and state due-process claims. Again, the city removed to federal court. This time, the district court dismissed on claim-preclusion grounds. It reasoned that, because Appellants paid their fines without asserting their current claims, this subsequent suit is barred. For the reasons that follow, we affirm.

I

In 2005, the City of Cleveland began using automated cameras to photograph vehicles that were speeding or running a red light. The owner of the vehicle photographed would receive a notice of liability,^{FN1} and could choose either to pay a fine or to file an appeal. Paying the fine constituted an admission of liability. Likewise, failure to indicate an intent to appeal within twenty-one days “constitute[d] a waiver of the right to contest the ticket and [was] considered an admission [of liability].” CCO 413.031(k). The ordinance provided that appeals would “be heard by the Parking Violations Bureau through an administrative process established by the Clerk of the Cleveland Municipal Court.” *Ibid.* An owner unsatisfied with the outcome could pursue the matter further in the Court of Common Pleas. Ohio Rev.Code 2506.01(A). When reviewing an administrative decision under § 2506, that court has the power to “determine[] whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of

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substantial, reliable, and probative evidence.” *Dickson & Campbell, L.L.C. v. City of Cleveland*, 181 Ohio App.3d 238, 908 N.E.2d 964, 966 (Ohio Ct.App.2009) (quoting *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 735 N.E.2d 433, 438 (Ohio 2000)).

FN1. The implementing ordinance provided: “This civil enforcement system imposes monetary liability.” CLEVELAND CODIFIED ORDINANCE 413.031(a) [hereinafter CCO]. By its terms, liability for a traffic violation under the ordinance “shall not be deemed a conviction for any purpose and shall not be made part of the operating record of any person on whom the liability is imposed.” *Id.* at 413.031(d).

In February 2009, a panel of the Ohio Court of Appeals held that the City could not issue a notice of liability to a lessee, as the ordinance dealt only with vehicle owners. *Id.* at 968–71. Three months later, Appellants Daniel McCarthy and Colleen Carroll filed this class-action lawsuit in state court. Like the *Dickson & Campbell* plaintiffs, McCarthy and Carroll had both received notices of liability from the City for traffic violations photographed by an automated camera.^{FN2} Like the *Dickson & Campbell* plaintiffs, McCarthy and Carroll were lessees, not owners, of their vehicles. But unlike the *Dickson & Campbell* plaintiffs, McCarthy and Carroll paid their fines, rather than contesting their citations through the appellate process that the ordinance provided.

FN2. McCarthy received notices of liability for traffic violations on February 23, 2009, and March 3, 2009. Carroll received notices of liability for traffic violations on March 23, 2007, and August 15, 2007.

*2 Appellants' state-court complaint alleged that the fines levied against them, and all other vehicle

lessees who paid citations for traffic offenses captured by the automated cameras, violated the Takings Clause of the United States and Ohio Constitutions, U.S. Const. amend. V.; Ohio Const. art. I, § 19, and constituted unjust enrichment under Ohio law. Appellants also sought a writ of mandamus for a hearing in front of an administrative officer and a judgment declaring enforcement of the ordinance against lessees unconstitutional. The City removed the case to the United States District Court for the Northern District of Ohio. The district court dismissed, reasoning that Appellants could not state a takings claim because they paid their fines voluntarily, after being afforded due process. *McCarthy v. City of Cleveland*, No. 1:09-CV-1298, 2009 WL 2424296, at *4 (N.D. Ohio Aug.6, 2009). We affirmed the district court's dismissal of Appellants' federal claims because the money allegedly taken did not come from an identifiable fund. *McCarthy v. City of Cleveland*, 626 F.3d 280, 286 (6th Cir.2010). We remanded for further consideration of Appellants' state-law claims, however, because the Ohio Takings Clause is not necessarily coextensive with the federal Takings Clause. *Id.* at 287. Judge McKeague concurred separately, agreeing with the majority opinion in its entirety, but adding that Appellants' federal takings claims also failed because Appellants “did not exhaust the process available to them and did not obtain a final decision on any appeal.” *Id.* at 288.

On remand, the district court declined to exercise supplemental jurisdiction and remanded to Ohio state court. There, Appellants amended their complaint, adding federal and state substantive-due-process and procedural-due-process claims. The City again removed. This time, the district court ordered preliminary briefing on “Rooker–Feldman, Res Judicata, Exhaustion and all other jurisdictional issues.” After receiving the parties' submissions, the district court “determine[d] that [Appellants'] claims are precluded by *res judicata*.” *McCarthy v. City of Cleveland*, No. 1:11-CV-1122, 2011 WL 4383206, at *1 (N.D. Ohio Sept.20, 2011). Had Appellants contested their cita-

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tions, rather than paying their fines, the district court reasoned, they eventually could have presented all of the arguments that they pressed below. *Id.* at *2–*5. Because Appellants did not appeal through the administrative process that the ordinance offered, they lost the opportunity to make their claims.

II

At the outset, it is not clear which provision of the Federal Rules of Civil Procedure the district court used to dismiss Appellants' claim. The parties appear to suggest that we should treat the decision below as a Rule 12(b)(6) dismissal. *See* Appellants' Br. 11; Appellee's Br. 10. Appellees, though, never moved to dismiss under Rule 12(b)(6), and the district court did not rely on Rule 12(b)(6) in reaching its decision.^{FN3} Under these circumstances, the analytically better approach is to treat the decision as a dismissal under Rule 12(c), which allows a party to move for judgment on the pleadings, “[a]fter the pleadings are closed—but early enough not to delay trial.” *Fed.R.Civ.P. 12(c)*. The difference, however, is purely aesthetic: “We review de novo a district court's application of the doctrine of res judicata,” *Buck v. Thomas M. Cooley Law Sch.*, 597 F.3d 812, 816 (6th Cir.2010) (quoting *Bragg v. Flint Bd. of Educ.*, 570 F.3d 775, 776 (6th Cir.2009)), and apply “the same de novo standard applicable to a motion to dismiss under Rule 12(b)(6)” to a Rule 12(c) motion for judgment on the pleadings. *Keymarket of Ohio, LLC v. Keller*, No. 10–3294, 2012 WL 2086939, at *3 (6th Cir. Jun.8, 2012).

^{FN3}. Instead, the district court's “Legal Standard” section dealt only with the elements of *res judicata*.

*3 Thus, we apply our familiar motion-to-dismiss standard, construing the record in the light most favorable to the non-moving party and accepting as true all well-pleaded allegations in the complaint. *Robert N. Clemens Trust v. Morgan Stanley DW, Inc.*, 485

F.3d 840, 845 (6th Cir.2007). In this examination, we need not credit “a legal conclusion couched as a factual allegation.” *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). “[A] plaintiff's obligation to provide the ‘grounds’ of his ‘entitlement to relief, requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (internal alterations omitted). Instead, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). If the facts of the complaint do not meet this threshold, dismissal is proper.

III

We give a state-court judgment or decree the same preclusive effect that it would have in the rendering state's courts. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); *Ohio ex rel. Boggs v. City of Cleveland*, 655 F.3d 516, 519 (6th Cir.2011); *Hapgood v. City of Warren*, 127 F.3d 490, 493 (6th Cir.1997). This, of course, is a question of state law. We therefore examine Ohio law to determine whether *res judicata* bars Appellants' action. *Migra*, 465 U.S. at 81 (“[T]he preclusive effect in federal court of petitioner's state-court judgment is determined by Ohio law.”).

In Ohio, *res judicata* comprises two discrete doctrines: claim preclusion and issue preclusion. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 653 N.E.2d 226, 228 (Ohio 1995). The former makes “an existing final judgment or decree between the parties to litigation ... conclusive as to all claims which were or might have been litigated in a first lawsuit,” *Nat'l. Amusements, Inc. v. City of Springdale*, 53 Ohio St.3d 60, 558 N.E.2d 1178, 1180 (Ohio 1990) (internal

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quotation omitted); the latter “precludes the relitigation, in a second action, of an issue that has been actually and necessarily litigated and determined in a prior action which was based on a different cause of action.” *Whitehead v. Gen. Tel. Co.*, 20 Ohio St.2d 108, 254 N.E.2d 10, 13 (Ohio 1969).

Although the parties discuss both species of *res judicata*, claim preclusion is the linchpin of this case. Under Ohio law, “a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.” *Grava*, 653 N.E.2d at 229. From this holding, we have distilled four elements:

(1) a prior final, valid decision on the merits by a court of competent jurisdiction; (2) a second action involving the same parties, or their privies, as the first; (3) a second action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action.

*4 *Hapgood*, 127 F.3d at 493. If a case meets each of these criteria, claim preclusion “extinguishes the plaintiff’s claim ... the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all, or any part of the transaction or series of connected transactions, out of which the action arose.” *Grava*, 653 N.E.2d at 229. “The party asserting [claim preclusion] bears the burden of proof.” *Boggs*, 655 F.3d at 520.

At the threshold, and contrary to Appellants’ argument, claim preclusion “is ... applicable to actions which have been reviewed before an administrative body, in which there has been no appeal made pursuant to R.C. 2506.01.” *Wade v. City of Cleveland*, 8 Ohio App.3d 176, 456 N.E.2d 829, 831–32 (Ohio Ct.App.1982). As Appellants note, there was never an

administrative hearing in this case. But, as discussed below, the reason that Appellants did not receive a hearing is that they admitted their offenses by paying their fines. Just as claim preclusion applies to a party who settles a civil case and later attempts to litigate claims that she could have pursued in the case that she settled, so too does it apply to Appellants who, instead of contesting their citations, conceded civil liability by paying their fines. See CCO 413.031(a) (defining automated-camera system as “civil enforcement system”). Thus, if the City carries its burden to show that it meets the four elements of claim preclusion, Appellants’ suit may not proceed.

We move, therefore, to the four-part analysis outlined above. Our first question is whether there is a final judgment when a litigant admits liability by paying his traffic fine, and the City accepts his payment. There is: “Generally, a consent judgment operates as *res adjudicata* to the same extent as a judgment on the merits.” *Horne v. Woolever*, 170 Ohio St. 178, 163 N.E.2d 378, 382 (Ohio 1959). The preclusive effect of a final judgment, in other words, “does not change simply because the parties resolved the claim without vigorously controverted proceedings.” *Scott v. City of East Cleveland*, 16 Ohio App.3d 429, 476 N.E.2d 710, 713 (Ohio Ct.App.1984). This is so both when the prior proceeding was in court, see generally *Woolever*, 170 Ohio St. 178, 163 N.E.2d 378, and when the prior proceeding was a quasi-judicial administrative process, see generally *Scott*, 476 N.E.2d at 713.

The citations that Appellants received clearly indicated that paying the fine, rather than contesting the citation, was an admission of liability. Thus, by paying, each Appellant admitted that he or she committed the alleged traffic violation, without asserting any defenses. Like a settlement decree in a civil case, this qualifies as a final disposition. Appellees satisfy the first prerequisite for the application of claim preclusion.

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Appellants urge a contrary conclusion. They argue that, “because there was no hearing, no evidence present [sic] and no factual findings made, there was no valid decision by a court of competent jurisdiction.” Appellants' Br. 19. This argument ignores the nature of Appellants' admission. Had they chosen to contest the citations, Appellants would have received ample opportunity to develop the facts surrounding their citations and to present their arguments about the statute's constitutionality, first in an administrative proceeding, then in the Ohio court system. Instead of chancing litigation, Appellants admitted liability and paid their fines. They may not escape claim preclusion now “simply because the[y] ... resolved the claim without vigorously controverted proceedings.” *Scott*, 476 N.E.2d at 713. Payment of the fines, and acceptance of that payment by the City, qualifies as a final judgment.

*5 Without question, this action involves the same parties as the earlier traffic-citation action. We therefore proceed to the third element of the claim-preclusion analysis: whether this case raises claims that were, or could have been, litigated earlier. In Ohio, an administrative-hearing officer has somewhat limited powers. See *Evans v. Bd. of Educ. Southwestern City Sch. Dist.*, 425 F. App'x 432, 439 (6th Cir.2011) (“[T]he ... hearing officer was not empowered to consider L.E.'s constitutional or statutory claims.”). Under § 2506.01, however, a party may appeal a quasi-judicial administrative determination to the court of common pleas, as a matter of right. That court, during the course of its review, “determines whether the administrative order [was] unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence.” *Dickson & Campbell, L.L.C.*, 908 N.E.2d at 966 (internal quotation marks omitted).

Appellants allege that the City's fining lessees

violates: (1) the Ohio Constitution's Takings Clause; (2) the Ohio Constitution's guarantee of substantive due process; (3) the Ohio Constitution's guarantee of procedural due process; (4) the right to substantive due process secured by the United States Constitution; and (5) the right to procedural due process secured by the United States Constitution. Although the administrative-hearing officer, under Ohio law, does not have the authority to resolve these constitutional claims, the court of common pleas certainly could, on review of the administrative decision. *Dickson & Campbell, L.L.C.*, 908 N.E.2d at 966. Thus, had Appellants taken advantage of the opportunity for judicial review that the ordinance offered, they could have asserted each of the claims they raise here.

Appellants' counter-argument has some intuitive appeal, but withers under close scrutiny. Claim preclusion does not apply, they reason, because they could have brought neither a claim for damages nor a facial challenge to the ordinance's constitutionality when appealing a (hypothetical) adverse administrative decision in the court of common pleas. Appellants are correct on both points. “Section 2506.01 does not empower state courts to award damages for injuries suffered as a result of erroneous administrative decisions,” *Negin v. City of Mentor*, 601 F.Supp. 1502, 1505 (N.D. Ohio 1985), and a facial constitutional challenge to an ordinance is “inappropriate in an appeal brought pursuant to R.C. Chapter 2506.” *Grossman v. City of Cleveland Heights*, 120 Ohio App.3d 435, 698 N.E.2d 76, 80 (Ohio Ct.App.1997).

Neither of these principles, however, changes the outcome here. First, the only damages that Appellants seek are the fines that they paid. Had they successfully contested their citations in the first instance, they would not have owed anything. Had they failed, they would have owed precisely what they paid. The administrative process, in other words, could have afforded Appellants the very monetary relief they demand, had they taken advantage of it. Compare *Negin*,

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601 F.Supp. at 1505 (allowing § 1983 claim to proceed because plaintiff sought “damages for injuries suffered as a result of erroneous administrative decisions” (emphasis added)), with Second Amended Compl. 7–11 (seeking, under counts one through five, “a return of the funds [paid], plus interest, to the Plaintiffs and the Class, plus reasonable attorney fees”), and *id.* at 12 (seeking disgorgement based on principles of restitution). True, Appellants hope to proceed as a class, and therefore seek the return of *many* motorists' money. But aggregation changes only the scope, not the nature, of Appellants' claims. At bottom, Appellants could have obtained precisely the “damages” they request had they availed themselves of the ordinance's appellate procedure.

*6 Even so, Appellants might retort, the complaint sought attorney's fees and declaratory and injunctive relief, none of which is available in a § 2506 appeal. The trouble with this argument is twofold. First, a plaintiff pursuing an administrative appeal in Ohio need not limit herself to administrative claims. Rather, she may seek relief under *both* § 2506 and federal statutory law, as long as she follows the proper procedures. *See, e.g., Krol v. Seven Hills City Council*, No. 88695, 2007 WL 2269465, at *2 (Ohio Ct.App. August 9, 2007) (“On April 27, 2005, appellants filed an appeal of the board's decision in the Cuyahoga County Court of Common Pleas pursuant to R.C. 2605.01. Appellants sought and were granted leave to amend their complaint to raise claims under the American with Disabilities Act, and the Rehabilitation Act of 1973.” (internal citations omitted)); *Siemon v. Bailey*, No.2002–CA–10, 2002 WL 1438678, at *8 (Ohio Ct.App. July 5, 2002) (noting that plaintiff's “complaint raises due process and equal protection violations, a violation of Section 1983, Title 42, U.S.Code, a request for injunctive relief, and an R.C. Chap. 2506 appeal from an administrative decision.”). Second, “[t]he action authorized by R.C. 2506.01 is in the nature of an action for declaratory judgment.” *Concerned Citizens of Spring Valley v. Spring Valley Twp. Bd. of Zoning Appeals*, No. 01 CA 0059, 2002

WL 191575, at *9 (Ohio Ct.App. Feb.8, 2002); *see also State ex rel. Pilarczyk v. Riverside*, No. Civ.A. 20706, 2005 WL 1714206, at *7 (Ohio Ct.App. July 22, 2005) (“The constitutionality of [an administrative decision] may be attacked and injunctive relief ... obtained in a declaratory judgment action brought pursuant to R.C. Chapter 2506.”). Appellants, therefore, could have obtained all of the relief that they seek here during the course of the § 2506 appeal that they chose not to pursue.

Second, while Appellants correctly note that a facial constitutional challenge is not available in a § 2506 proceeding, they do not, and cannot, maintain such a challenge here. “A facial challenge alleges that a statute, ordinance, or administrative rule, on its face and under all circumstances, has no rational relationship to a legitimate governmental purpose.” *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 970 N.E.2d 898, 907 (Ohio 2012); *see also Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008) (“[A] plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the Act would be valid, i.e., that the law is unconstitutional in all of its applications.” (internal quotation marks omitted)). An as-applied challenge, by contrast, “alleges that the application of the statute in the particular context in which he has acted ... would be unconstitutional. The practical effect of holding a statute unconstitutional ‘as applied’ is to prevent its future application in a similar context, but not to render it utterly inoperative.” *Wymsylo*, 970 N.E.2d at 907.

*7 The claims here fall cleanly in the “as-applied” category. Appellants do not ask us to hold the entire ordinance unconstitutional in its every application. Rather, they seek return of *their* money, Second Amended Compl. 7–12, a writ of mandamus ordering the administrative hearing that *they* earlier waived, *id.* at 12, 970 N.E.2d 898, and a declaration that the City

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“had no legal authority to demand, collect or retain payment of fines from citizens of non-owners of vehicles [sic] under CCO 413.031.” *Id.* at 13, 970 N.E.2d 898 (emphasis added). These arguments deal uniformly with the ordinance as applied to lessees, not its facial validity. Appellants could have pursued the arguments that they raise here in the appellate process that they waived. See *Grossman*, 698 N.E.2d at 78–79 (explaining that a litigant need not “separately file an appeal of the administrative decision and a declaratory judgment challenging the constitutionality as applied of the ordinance at issue.”); see also *Dickson & Campbell, L.L. C.*, 908 N.E.2d at 969–71 (holding that vehicle lessee could not be liable under CCO 413.031 on review of § 2506 decision by district court). The City meets the third prerequisite for the application of claim preclusion.

Finally, claim preclusion applies only if the “second action aris[es] out of the transaction or occurrence that was the subject matter of the previous action.” *Hapgood*, 127 F.3d at 493. A “transaction,” under Ohio law, is “a common nucleus of operative facts.” *Grava*, 653 N.E.2d at 229 (internal quotation marks omitted).

That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts ... or would call for different measures of liability or different kinds of relief.

Ibid. (quoting *Restatement (Second) of Judgments* § 24 cmt. c (1982)).

Appellants' complaint alleges that the City's collecting automated-traffic-enforcement fines from lessees is unconstitutional. Their allegations begin and end with the issuance of a traffic citation. Cf. *Portage Cnty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106,

846 N.E.2d 478, 495 (Ohio 2006) (“Several developments followed construction of Lake Rockwell that render *res judicata* inappropriate.”); *Evans*, 425 F. App'x at 439 (“claim preclusion does not apply because the ‘transaction’ that was the subject matter of the suspension hearing was Smathers's suspension of L.E., and did not incorporate the entire course of conduct on which L.E. premised her § 1983 due process claims.”). It is true that some of Appellants' claims rest on “evidence or grounds or theories of the case not presented in the first action, or ... seek remedies or forms of relief not demanded in the first action.” *Grava*, 653 N.E.2d at 229. These differences, though, are irrelevant, as a matter of Ohio law. The facts that underlie this suit—the issuance of traffic citations to lessees, rather than owners, of vehicles—are identical to the facts that confronted the plaintiffs when they received their notices of liability. The City satisfies the fourth prerequisite for the application of claim preclusion.

*8 Because payment of the fines levied in Appellants' citations, and acceptance of that payment by the City, was a final decision, the parties here are the same as the parties to the original citation, Appellants could have litigated all of the claims they raise here in an appeal to the Court of Common Pleas, and this suit arises out of the same common nucleus of operative fact as the traffic citations, the district court's decision to dismiss was correct.^{FN4} Because we resolve the appeal on claim-preclusion grounds, we need not assess whether issue preclusion would also bar Appellants' claims.

FN4. *Lycan v. Cleveland*, No. 94353, 2010 WL 5075520, at *2 (Ohio Ct.App. Dec. 9, 2010), does not alter our analysis. There, the Ohio Court of Appeals held that vehicle lessees in circumstances identical to Appellants' were not “necessarily foreclose[d] [from] any right to equitable relief.” *Ibid.* *Lycan*, though, does not discuss whether claim preclusion

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would apply. It is, therefore, inapposite.

IV

Appellants could have litigated all of the claims that they now press through the ordinance's appeals process. Instead, they chose to settle with the City by paying their fines. The district court correctly concluded that claim preclusion bars Appellants' claims. We AFFIRM.

HELENE N. WHITE, Circuit Judge, concurring in part and dissenting in part.

There are many reasons why Plaintiffs' federal claims should fail, but I am not convinced that claim preclusion under Ohio law is one of them. The procedural due process claim attacks the procedures through which Cleveland determines liability under the ordinance. A defendant in a civil infraction proceeding challenging the adequacy of the procedures used to obtain the judgment of responsibility challenges the procedures, not the alleged infraction. That Plaintiffs had the opportunity to contest their liability goes to the merits of the procedural due process claim rather than the question of its merger or bar. Nevertheless, although not reached by the district court, it is clear beyond peradventure that Plaintiffs were provided with constitutionally sufficient procedural process. As the majority observes, they had ample opportunity to contest whether the ordinance applied to them as lessees.

As to the substantive due process claim, the allegation is that Cleveland arbitrarily and capriciously implemented a custom or policy to ignore the plain language of its ordinance and issue citations to individuals who leased, not owned, their vehicles. This too is based on a different nucleus of operative facts. However, this court previously affirmed the dismissal of Plaintiffs' claims based on the Fifth Amendment's Takings Clause. With that underpinning removed, all that remains is the general allegation that Cleveland violated Plaintiffs' substantive due process rights by

their arbitrary and capricious policy of enforcing the ordinance against them. But, in the context of "abusive executive action" "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198, 123 S.Ct. 1389, 155 L.Ed.2d 349 (2003) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)). Here, Cleveland did no more than apply an ordinance to a group of persons who were not included within its scope as determined by the Ohio court. This is hardly egregious official conduct given that Cleveland Codified Ordinance 413.031(p)(3) defines "vehicle owner" as "the person or entity identified by the Ohio Bureau of Motor Vehicles ... as the registered owner of the vehicle," and the BMV lists at least some lessees, as in *Dickson & Campbell, L.L. C. v. City of Cleveland*, as additional owners. 181 Ohio App.3d 238, 908 N.E.2d 964, 971 (Ohio Ct.App.2009) (Cooney, J., dissenting).

*9 Thus, I concur in the dismissal of Plaintiffs' federal due process claims, albeit for different reasons.

I would, however, remand the state claims so that the district court can remand them to state court under the circumstance that an Ohio court has permitted similar plaintiffs to pursue unjust enrichment claims. Although the majority accurately observes that *Lycan v. Cleveland* did not consider a res judicata defense, it did state that the question whether the plaintiffs claims to equitable relief were waived depended on the circumstances:

While we recognize that the appellants had the opportunity to challenge the imposition of the fines before they paid them, this opportunity does not necessarily foreclose any right to equitable relief. The law governing restitution allows the court to consider myriad factors in determining whether the retention of a benefit is unjust. *See Restatement of the Law, Restitution* (1937).

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Lycan, No. 94353, 2010 WL 5075520, at *2
(Ohio Ct.App. Dec. 9, 2010). Because Plaintiffs' un-
just enrichment claims are clearly a matter of state
law, it is not clear that the Ohio court would consider
them barred, and the federal claims have been re-
solved, I think it prudent to remand the state claims so
that the district court can again remand them to state
court.

C.A.6 (Ohio),2013.
Carroll v. City of Cleveland
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EXHIBIT B

Castello v. Alameda County Transit Parking Enforcement Ctr.,
2008 WL 5412842 (N.D. Cal. 2008)

Not Reported in F.Supp.2d, 2008 WL 5412842 (N.D.Cal.)
(Cite as: 2008 WL 5412842 (N.D.Cal.))

C

Only the Westlaw citation is currently available.

United States District Court,
N.D. California.
Eve Del CASTELLO, Plaintiff(s),
v.
ALAMEDA COUNTY TRANSIT PARKING EN-
FORCEMENT CENTER, Defendant(s).

No. C08-3012 BZ.
Dec. 22, 2008.

West KeySummaryJudgment 228  642

228 Judgment

228XIV Conclusiveness of Adjudication
228XIV(A) Judgments Conclusive in General
228k635 Courts or Other Tribunals Ren-
dering Judgment
228k642 k. Appellate Courts. Most
Cited Cases

Judgment 228  646

228 Judgment

228XIV Conclusiveness of Adjudication
228XIV(A) Judgments Conclusive in General
228k643 Nature of Action or Other Pro-
ceeding
228k646 k. Special Proceedings Other
Than Actions. Most Cited Cases

A plaintiff's complaint filed in federal court challenging the constitutionality of a statute governing administrative review of a parking violation was barred by the doctrine of collateral estoppel. The plaintiff had previously filed a writ of mandate in the state court which challenged the same statute based on the same constitutional grounds. The California Su-

perior Court entered a final judgment on the merits by determining that the statute was constitutional, and the California Court of Appeal affirmed. West's Ann.Cal.Vehicle Code § 40215.

Eve Del Castello, San Francisco, CA, pro se.

Raymond S. Lara, Oakland, CA, for Defendant.

ORDER GRANTING MOTION TO DISMISS
BERNARD ZIMMERMAN, United States Magistrate
Judge.

*1 Plaintiff, appearing pro se, challenges the constitutionality of the California statute which applied to a parking ticket she received. Defendant, Alameda County Transit Parking Enforcement Center, has moved to dismiss the complaint pursuant to Fed. R. Civ. Proc. 12(b)(1) and 12(b)(6).^{FN1}

FN1. All parties have consented to my jurisdiction for all proceedings including entry of final judgment, pursuant to 28 U.S.C. § 636(c).

On December 1, 2008, the Court held a Case Management Conference. Both parties were present. During the Case Management Conference, plaintiff stated that she no longer wanted her case to be heard before this Court but she wanted instead to be heard on appeal before the Ninth Circuit. Plaintiff was given until December 8, 2008 to file an opposition to defendant's motion. No opposition has been filed. I have nonetheless independently reviewed defendant's motion, and have concluded it should be granted.

In its motion, defendant argues that plaintiff's complaint should be dismissed because the issues she presents are precluded by the doctrines of collateral estoppel and *res judicata*.^{FN2} Defendant also argues

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that plaintiff's complaint should be dismissed pursuant to Fed. R. Civ. Proc. 12(b)(1) as moot.

FN2. The doctrine of *res judicata* "treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same 'claim' or 'cause of action.'" *Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc.*, 575 F.2d 530, 535 (5th Cir.1978); *see also McClain v. Apodaca*, 793 F.2d 1031, 1033 (9th Cir.1986). *Res judicata* encompasses two subsidiary doctrines, "claim preclusion" and "issue preclusion."

To determine the preclusive effect of a California state court decision, I must apply California law. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984) ("[A] federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.").

"The application of claim preclusion in California focuses on three questions: (1) was the previous adjudication on the merits, (2) was it final, and (3) does the current dispute involve the same 'claim' or 'cause of action'?" *Robi v. Five Platters, Inc.*, 838 F.2d 318, 324 (9th Cir.1988) (citing *Slater v. Blackwood*, 15 Cal.3d 791, 795, 126 Cal.Rptr. 225, 543 P.2d 593 (1975)). Claim preclusion also "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Brown v. Felsen*, 442 U.S. 127, 131, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979); quoted in *Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F.2d 1524, 1529 (9th Cir.1985).

The related doctrine of issue preclusion, or collateral estoppel, bars relitigation, even in an action on a different claim, of all "issues of fact or law that were

actually litigated and necessarily decided" in the prior proceeding. *Segal v. American Tel. & Tel. Co.*, 606 F.2d 842, 845 (9th Cir.1979); *see also Dodd v. Hood River County*, 59 F.3d 852, 863 (9th Cir.1995). "Under both California and federal law, collateral estoppel applies only where it is established that (1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding." *Hydranautics v. Film-Tec Corp.*, 204 F.3d 880, 885 (9th Cir.2000) (citing *Younan v. Caruso*, 51 Cal.App.4th 401, 406-07, 59 Cal.Rptr.2d 103 (1996)).

*2 Plaintiff's complaint, filed with this Court on June 18, 2008, challenges the constitutionality of section 40215 of the California Vehicle Code ("CVC") pursuant to the Fourth, Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution. Plaintiff's Petition for Writ of Mandate, filed with the California Superior Court of the County of Alameda on August 10, 2006, challenged the same section of the CVC pursuant to the same Amendments to the U.S. Constitution.^{FN3} On March 14, 2007, the Superior Court issued an Amended Order granting in part and denying in part plaintiff's Petition for Writ of Mandate.^{FN4} On April 27, 2007, the Superior Court issued a further Order stating that implicit in its earlier ruling was the determination that section 40125 of the CVC is constitutional. The Superior Court cited to *Tyler v. County of Alameda*, 34 Cal.App.4th 777, 40 Cal.Rptr.2d 643 (1995) ("On balance, we conclude that the statutory scheme for contesting parking tickets does not violate due process requirements.").

FN3. On a motion to dismiss, I may take judicial notice of matters of public record outside the pleadings. *Mack v. South Bay Beer Distributors*, 798 F.2d 1279 (9th Cir.1986); *Sears, Roebuck & Co. v. Metropolitan Engravers, Ltd.*, 245 F.2d 67, 70 (9th Cir.1956).

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FN4. Following a hearing held on March 8, 2007, the court initially granted plaintiff's petition without qualification; however, in response to a query by Alameda County regarding the breadth of the initial ruling, the court filed an amended order on March 14, 2007.

Plaintiff appealed the Superior Court's ruling to the California Court of Appeal, which issued a decision on March 2, 2008, affirming the constitutionality of section 40125 of the CVC and dismissing the appeal as moot. Plaintiff filed a Petition for Review of the Court of Appeal's ruling with the California Supreme Court, which was denied on May 14, 2008. From the record before me, it does not appear plaintiff sought review in the U.S. Supreme Court.^{FN5}

FN5. Plaintiff may not understand that a federal district court does not ordinarily have jurisdiction to review or alter a ruling of a state-court judge. See *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005) (approving dismissal of "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments."); *Worldwide Church of God v. McNair*, 805 F.2d 888, 890-91 (9th Cir.1986) (forbidding the filing of suits seeking de facto review of state-court decisions). If plaintiff is dissatisfied with a state-court ruling, her remedy is to seek timely and appropriate review through the state court system, which she did, and then review from the United States Supreme Court, to the extent it is available.

In light of this procedural background, I agree

with defendant that plaintiff's complaint is barred by the doctrines of claim and issue preclusion. Plaintiff's constitutional challenge of section 40125 of the CVC was an issue necessarily decided at the previous proceeding and is identical to the one which is sought to be relitigated by plaintiff in federal court; the first proceeding ended with a final judgment on the merits; and, the party against whom collateral estoppel is asserted was a party at the first proceeding.^{FN6}

FN6. To the extent that plaintiff's complaint raises any new legal arguments regarding section 40125 of the CVC that could have been raised at the earlier proceedings, those arguments are also barred. See *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378, 60 S.Ct. 317, 84 L.Ed. 329 (1940) ("res judicata may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.' " (citations omitted)).

For these reasons, defendant's motion to dismiss is **GRANTED**.^{FN7}

FN7. Because I find that plaintiff's claims are barred by the doctrines of claim and issue preclusion, I need not reach the issue of whether plaintiff's claim is moot. I note, however, that the "capable of repetition, but evading review" exception to the mootness doctrine may apply to some of plaintiff's claims. The exception applies where (1) the duration of the challenged action is too short to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to it again. *Bio-diversity Legal Found. v. Badgley*, 309 F.3d 1166, 1173 (9th Cir.2002).

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N.D.Cal.,2008.

Castello v. Alameda County Transit Parking Enforcement Center

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(N.D.Cal.)

END OF DOCUMENT

EXHIBIT C

Holder v. City of Vancouver, 2008 WL 918725 (W.D. Wash. 2008)

Not Reported in F.Supp.2d, 2008 WL 918725 (W.D.Wash.)
 (Cite as: 2008 WL 918725 (W.D.Wash.))

C

Only the Westlaw citation is currently available.

United States District Court, W.D. Washington,
 at Tacoma.

Lee A. HOLDER, Plaintiff,

v.

CITY OF VANCOUVER, Defendant.

No. C08-5099RBL.

April 3, 2008.

Lee A. Holder, Vancouver, WA, pro se.

Daniel G. Lloyd, City of Vancouver, Vancouver, WA,
 for Defendant.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

RONALD B. LEIGHTON, District Judge.

I. INTRODUCTION

*1 This matter comes before the Court on Defendant's Motion to Dismiss. (Dkt.# 5). Defendant claims that the court lacks subject matter jurisdiction over this matter by virtue of the *Rooker-Feldman* doctrine. See *Dist. Of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923). In addition, Defendant contends that even if this Court has jurisdiction, Plaintiff's claims are barred by virtue of the statute of limitations and res judicata. After reviewing the parties' submissions, the Court hereby GRANTS the Defendant's Motion to Dismiss and DISMISSES this case. The reasons are set forth below.

II. BACKGROUND

This case pertains to an ongoing battle over whether the Plaintiff rightfully stored his vehicles on

his property. The Plaintiff parked several unregistered vehicles behind his home in a rear yard. Neighbors complained to the City of Vancouver and the Plaintiff was eventually cited. The following facts are set forth in a light most favorable to the non-moving party:

On September 14, 1999, the City of Vancouver cited the Plaintiff for violation of three provisions of the Vancouver Municipal Code: 1) VMC 20.83.300 (open storage), 2) VMC 20. 81.440 (parking on unimproved areas), and 3) VMC 20.11.320 (parking within required setback areas). The City later amended its complaint to include a violations under VMC 8.40.020 (junk keeping) and VMC 8.38.020 (junk vehicles) The Plaintiff appealed the citations to the hearing examiner and several hearings resulted in a finding that the Plaintiff violated VMC 20.83.300 and dismissal of the citations for parking on unimproved areas and parking within required setback areas. The hearing examiner also concluded that he would dismiss the junk vehicle and junk keeping citations if the Plaintiff registered his vehicles. *Complaint*, p. 2 (Dkt.# 1). The Plaintiff then appealed to the Clark County Superior Court, which affirmed the hearing examiner's decisions, and remanded the open storage citation to the hearing examiner. The City and Plaintiff agreed that the citations would be dismissed if the Plaintiff did not appeal the superior court's order.

In 2005, the Plaintiff was cited for violation of VMC 17.14.290 (formerly VMC 20.81.440) for parking motor vehicles on unimproved surfaces. The Plaintiff claimed that res judicata precluded the City from citing him because of the decision in the 1999 proceedings. The Plaintiff appealed the citations to the hearing examiner, which resulted in a finding that the Plaintiff violated VMC 17.14.290. The Plaintiff appealed the hearing examiner's final order to the Clark County Superior Court. In his complaint, he also asserted a Land Use Petition Act (LUPA) claim against

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the City. The trial court upheld the hearing examiner's decision on the VMC 17.14.290 violation, and dismissed the LUPA claim.

The Plaintiff appealed the trial court's decision to the Washington Court of Appeals. The Plaintiff appealed the trial court's affirmation of the hearing examiner's decision regarding the VMC 17.14.290 violation. He did not appeal the trial court's dismissal of the LUPA claim. Holder argued that res judicata barred the City from issuing a notice of civil violation for storing or parking motor vehicles on an unimproved surface. Because LUPA is the exclusive means of judicial review of land use decisions, see *Holder v. City of Vancouver*, 136 Wash.App. 104, 108, 147 P.3d 641 (2006), the court dismissed the Plaintiff's appeal of the VMC 17.14.290 violation. According to the court, challenging the trial court's affirmation of the 17.14.290 violation did not satisfy RAP 2.3(b) for discretionary review. *Id.* at 105-06, 147 P.3d 641. The Plaintiff then petitioned the Washington Supreme Court for discretionary review, which denied his request. *Holder*, 162 Wash.2d 1011, 175 P.3d 1094 (2008).

*2 The Plaintiff filed this lawsuit on February 19, 2008, requesting this Court to reverse the hearing examiner's 2005 order, claiming that the City's parking ordinance is unconstitutionally vague. In addition, he also requests that the Court order the City to refund him all penalties assessed and filing fees, including a \$250 fee paid for a 1999 administrative hearing.

III. DISCUSSION

A. Federal Rule Civil Procedure 12(b)(6) Standard

A motion to dismiss for failure to state a claim for relief under Fed.R.Civ.P. 12(b)(6) should be granted only if, accepting all of the allegations of material fact as true, and construed in the light most favorable to the nonmoving party, the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir.1996). The plaintiff, however, must

plead factual allegations with specificity; vague and conclusory allegations of fact fail to state a claim for relief. *Colburn v. Upper Darby Township*, 838 F.2d 663, 666 (3rd Cir.1988). Dismissal may be based on either the lack of a cognizable legal theory, or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir.1990).

B. The Plaintiff's Claims are Barred by the *Rooker-Feldman* Doctrine

The Plaintiff admits that he is seeking "a review and decision based upon extrinsic fraud." (Dkt.# 6). Put simply, the Plaintiff wants to review what happened at the Clark County Superior Court and at the Washington State Court of Appeals. Furthermore, Holder claims that a *review* of the proceedings will show that the Defendant violated his constitutional rights. *Id.* at p. 12. Even if the Court views all the evidence in the light most favorable to the moving party, it lacks subject matter jurisdiction to *review* the proceedings and reject the findings of hearing examiner Joe Turner. See *Complaint*, p. 12 (Dkt.# 1).

The *Rooker-Feldman* doctrine holds that lower United States federal courts do not have subject matter jurisdiction to sit in direct review of state court decisions unless Congress has enacted legislation that specifically authorizing such relief. See *Rooker*, 263 U.S. at 415-16; *Feldman*, 460 U.S. at 486-87. In this case, the Court lacks subject matter jurisdiction because Congress has not authorized this Court to review a state court decision for code enforcement proceedings. See *Dubinka v. Judges of the Superior Court*, 23 F.3d 218, 221 (9th Cir.1994). The Plaintiff asks the Court to reject Hearing Examiner Joe Turner's 2005 interpretation of Vancouver Municipal Code and accept a prior interpretation by Hearing Examiner Larry Epstein from 2000. The Washington Court of Appeals considered and rejected this very same argument. *Holder v. City of Vancouver*, 136 Wash.App. 104, 108-09, 147 P.3d 641 (2006). The Plaintiff admits that he is seeking reversal of the final order entered by the

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City of Vancouver Hearing Examiner Joe Turner, which the superior court and court of appeals affirmed. *Response*, p. 1, (Dkt.# 6). The Plaintiff's claim is not viable in this Court because it violates the *Rooker-Feldman* doctrine.^{FN1} The Court hereby GRANTS the Defendant's Motion to Dismiss and hereby DISMISSES this action.

FN1. After the Defendant filed its Motion to Dismiss, the Plaintiff filed a Motion for Leave to Amend its Complaint. (Dkt.# 10). Because this Court lacks subject matter jurisdiction over this case, the Plaintiff's motion is hereby DENIED as moot.

C. Even if the Court had Jurisdiction Over this Matter, the Plaintiff's Civil Rights Claims are Barred by the Statute of Limitations

*3 On February 19, 2008, the Plaintiff filed this lawsuit, requesting the Court to "order a refund of penalties assessed and filing fees ... for the administrative hearing in 1999." *Complaint*, p. 12 (Dkt.# 1). He is seeking this recovery through 42 U.S.C. § 1983. The Plaintiff's claims are untimely because § 1983 claims are subject to a three-year statute of limitations. *See, e.g., Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 760 (9th Cir.1991). The Plaintiff needed to file this action by February 19, 2005, which he did not. The Plaintiff does not respond to the Defendant's allegation that his claims are barred by the statute of limitations. The Court hereby GRANTS the Defendant's Motion to Dismiss and hereby DISMISSES this action.

D. Even if the Court had Jurisdiction Over this Matter, the Plaintiff's Vagueness Challenge is Barred by Res Judicata

The Plaintiff claims that res judicata does not apply in this case because the Defendant cannot show a significant change between the first time he was charged with city code violations and the second. *Response*, p. 6 (Dkt.# 6). In addition, the Plaintiff challenges the vagueness of the Vancouver Municipal

Code 17.14.290 (parking on unimproved surfaces).

Under res judicata, a final judgment on the merits precludes the parties from relitigating issues that were or could have been raised in that action. *Allen v. McCurry*, 449 U.S. 90, 93, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). Accordingly, under Washington law^{FN2}, res judicata occurs when a prior judgment has a concurrence of identity with a subsequent action in four respects. There must be identity of 1) subject matter; 2) cause of action; 3) person and parties; and, 4) the quality of the persons for or against whom the claim is made. *Rains v. State*, 100 Wash.2d 660, 663, 674 P.2d 165 (1983).

FN2. A Court must apply the law of the state from which the prior action originated. *Allen*, 449 U.S. at 93.

The Plaintiff's constitutional challenge must fail because he had an opportunity at the Washington Court of Appeals to litigate these claims but did not. *See Schoeman v. New York Life Ins. Co.*, 106 Wash.2d 855, 859, 726 P.2d 1 (1986). First, the previous action pertained to a code violation assessed against the Plaintiff for improper parking of his vehicles. The subject matter in this case is identical to the claims Plaintiff litigated before the Washington Court of Appeals. Second, the prior lawsuit arises out of the same facts as the case before the Court. *See Rains*, 100 Wash.2d at 663, 674 P.2d 165 (citations omitted). In fact, the Plaintiff admits that the same evidence would be used in both actions. *See Complaint*, pp. 8, 10 (Dkt.# 1). Additionally, the Plaintiff raised a constitutional vagueness argument in the proceedings before the hearing examiner in 2005. *Id.* at Exh. F, p. 7.^{FN3} Third, the parties in the prior action are identical to the parties in the subsequent action, thus the third and fourth elements are satisfied. *See Rains*, 100 Wash.2d at 664, 674 P.2d 165. The Court hereby GRANTS the Defendant's Motion to Dismiss and hereby DISMISSES this action.

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FN3. Although the Plaintiff raised a constitutional vagueness challenge of a different ordinance, the Defendant points out that the Plaintiff obviously knew that he could raise a vagueness challenge as a defense in code enforcement proceedings. *Motion to Dismiss*, p. 10 (Dkt. # 5).

IV. CONCLUSION

*4 Based on the foregoing reasons, the Court GRANTS Defendant's Motion to Dismiss (Dkt.# 5) and DISMISSES this case. The Court lacks subject matter jurisdiction over this case, and even if it had jurisdiction, the Plaintiff's Motion for Leave to Amend (Dkt.# 10) is DENIED as moot.

IT IS SO ORDERED.

DATED this 4th day of April, 2008

W.D.Wash.,2008.
Holder v. City of Vancouver
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(W.D.Wash.)

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EXHIBIT D

***Todd v. City of Auburn*, 2010 WL 774135 (W.D. Wash. 2010)**

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H

Only the Westlaw citation is currently available.

United States District Court, W.D. Washington,
at Seattle.

Michael TODD, Gregory Stackhouse, Steve Blai, Vonda Sargent, Max Harrison, Zoann Chase–Billing, Ognjen Pandzic, Seungran Chwe, Daniel WU, Marcus Naylor, Melissa Miller, Len Johnson, Ashley Alm, Jim Ames, Blanca Zamora, Charles Mael, Somer Chacon, Brad Hampton, Nicholas Juhl, Georgina Luke, Judith Stredicke, Rich Newman, Mark Contratto, Aneva Freeman, Chris Cline, Tera Cline, Jim Abraham, Catherine Iwakiri, Vicki Wagner, Cody Edwards, Julie Williams, Michael Salokas, Barbara Keller, Craig Coates, Chris Sperlich, Lori Fleming, Ben Baccarella, Dalton Shotwell, Jere Knudtsen, Belinda Riba Greig Fahnlander, Donald Stave, Richard Merchant, David Roark, Timothy Morgan, Charles Gust, Casey Halvorson, Steven Moody, Richard Daiker, individually and on behalf of two classes of similarly situated persons, Plaintiffs

v.

The CITIES OF AUBURN, Bellevue, Bonney Lake, Bremerton, Burien, Federal Way, Fife, Issaquah, Lacey, Lake Forest Park, Lakewood, Lynnwood, Puyallup, Renton, Seatac, Seattle, Spokane, Tacoma,, as well as American Traffic Solutions (d/b/a “ATS”); American Traffic Solutions, LLC (dba “ATS Solutions”) and Redflex Traffic Systems, Inc., Defendants.

No. C09–1232JCC.
March 2, 2010.

Andrea T. King Robertson, The Rosen Law Firm, David Elliot Breskin, Breskin Johnson & Townsend PLLC, Edith A. Bowler, Bowler Law Office PLLC, Seattle, WA, Kim Williams, Roblin John Williamson, Williamson & Williams, Bainbridge Island, WA, for Plaintiffs.

Daniel B. Heid, Auburn City Attorney’s Office, Auburn, WA, Stewart Andrew Estes, Keating Bucklin & McCormack, James J. Dionne, Kathleen Haggard, Dionne & Rorick, Wayne D. Tanaka, Phil A. Olbrechts, Ogden Murphy Wallace PLLC, Scott L. Espiritu, Peterson Young Putra, Gregory Colin Narver, Seattle City Attorney's Office, Vanessa Soriano Power, Stoel Rives, Darcy W. Shearer, Fred B. Burnside, Stephen M. Rummage, Davis Wright Tremaine, Seattle, WA, Cheryl A. Zakrzewski, Bellevue City Attorney’s Office, Eric C. Frimodt, William A. Linton, Inslee Best Doezie & Ryder, Bellevue, WA, Mark Edwin Koontz, Bremerton City Attorney's Office, Bremerton, WA, Christopher D. Bacha, Kenyon Disend, Issaquah, WA, Patricia Ann Richardson, Federal Way City Attorney, Federal Way, WA, Christina Maria Mehling, Loren Dee Combs, VSI Law Group PLLC, Tacoma, WA, Joseph M. Svoboda, Lacey City Attorney’s Office/Ahlf Law Office, Lacey, WA, Bob C. Sterbank, City of Olympia City Attorney's Office, Olympia, WA, Heidi Ann Wachter, Lakewood City Attorney, Lakewood, WA, Cheryl Fandel Carlson, City of Puyallup, Puyallup, WA, Zanetta Lehua Fontes, Warren Barber & Fontes PS, Renton, WA, Mary Elizabeth Mirante Bartolo, City of Seatac, Seatac, WA, Rocco Treppiedi, Salvatore J. Faggiano, City of Spokane, Spokane, WA, William Cody Fosbre, Margaret Elofson, Michael James Smith, Office of City Attorney, Tacoma, WA, for Defendants.

ORDER

JOHN C. COUGHENOUR, District Judge.

*1 This matter comes before the Court on Defendants' motion to dismiss (Dkt. No. 108), Plaintiffs' response (Dkt. No. 118), and Defendants' reply. (Dkt. No. 119.) Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the mo-

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tion for the reasons explained herein.

I. BACKGROUND

In 2005, the Washington State Legislature passed a law granting municipalities the authority to issue citations to owners of vehicles that were photographed violating red lights or school speed zones. WASH. REV.CODE 46.63.170. Several municipalities throughout the state adopted the traffic camera program and contracted with either American Traffic Solutions, LLC or Redflex Traffic Systems, Inc. to provide equipment and services. (Mot. 4 (Dkt. No. 108).) Plaintiffs are a group of vehicle owners who were issued a notice of infraction (“NOI”) generated by a traffic camera. (Resp. 20 (Dkt. No. 118).) Plaintiffs are at different stages of the proceedings that ensued from the issuance of the NOI, but all have either paid or are subject to fines of \$101, \$104 or \$124. (*Id.*) Defendants are a group of municipalities in Washington State (“Defendant Cities”) and two companies that contracted with Defendant Cities to operate and maintain the traffic cameras.

Plaintiffs originally filed suit in King County Superior Court, but Defendants removed the case to this court pursuant to the Class Action Fairness Act, which grants original jurisdiction to federal district courts for any civil action in which the amount in controversy exceeds \$5,000,000 and is a class action in which any plaintiff is a citizen of a State different from any defendant. 28 U.S.C. § 1332(d)(2)(A). Plaintiffs challenge the legality of the traffic-camera program on the grounds that the fines are excessive, the contracts with the Defendant corporations are contrary to statute, and Defendant Cities failed to get the required approval for the NOIs from the Administrative Office of the Courts (“AOC”). Defendants dispute Plaintiffs’ claims and bring this motion to dismiss on the grounds that jurisdiction over claims relating to traffic infractions should be limited to the municipal courts.

II. APPLICABLE LAW

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a claim for “failure to state a claim upon which relief can be granted.” Although a complaint challenged by a Rule 12(b)(6) motion to dismiss need not provide detailed factual allegations, it must offer “more than labels and conclusions” and contain more than a “formulaic recitation of the elements of a cause of action.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The complaint must indicate more than mere speculation of a right to relief. *See id.* When a complaint fails to adequately state a claim, such deficiency should be “exposed at the point of minimum expenditure of time and money by the parties and the court.” *Id.* at 558. A complaint may be lacking for one of two reasons: (1) absence of a cognizable legal theory or (2) insufficient facts under a cognizable legal claim. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir.1984). In ruling on a defendant’s motion to dismiss under Rule 12(b)(6), the Court assumes the truth of the plaintiff’s allegations and draws all reasonable inferences in the plaintiff’s favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir.1987).

III. ANALYSIS

A. Jurisdiction

*2 Defendants argue that the Court lacks jurisdiction to hear Plaintiffs’ claims. The Seattle Municipal Court has statutory jurisdiction over traffic cases. WASH. REV.CODE 35.20.010(1). Municipal courts in all other Defendant Cities have exclusive original jurisdiction over traffic infractions arising under city ordinances. WASH. REV.CODE 3.50.020. However, this does not mean that municipal courts have original jurisdiction over any case conceivably related to the enforcement of municipal ordinances; many such cases will be outside their purview. *Orwick v. City of Seattle*, 103 Wash.2d 249, 692 P.2d 793, 796 (Wash.1984). The Supreme Court of Washington has held that “superior courts have original jurisdiction

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over claims for equitable relief from alleged system-wide violations of mandatory statutory requirements by a municipal court and from alleged repetitious violations of constitutional rights by a municipality in the enforcement of municipal ordinances.” *Id.* at 795.

The Court notes that there was some inconsistency with respect to the different claims and defenses made by different Plaintiffs in municipal court. (Reply 12–13 (Dkt. No. 119).) Before the filing of this case, some municipal courts allowed Plaintiffs to bring the claims that they repeat now. (*Id.*) This, Defendants argue, proves that municipal courts did indeed have jurisdiction to hear these claims. (*Id.*) Plaintiffs argue that the examples Defendants cite are merely instances where *Orwick* was not properly applied, and that because municipal courts lacked the authority to hear tort claims, Consumer Protection Act (“CPA”) claims, and equitable claims, prior arguments to the municipal courts should be disregarded and considered here afresh. (Resp. 11 (Dkt. No 118).) The Court agrees. Article IV Section 6 of the Washington State Constitution does not grant municipal courts the authority to hear equitable claims. These claims can be resolved consistently only in federal courts or Washington superior courts.

Defendants offer two more jurisdictional reasons why this Court should dismiss. First, Plaintiffs argue that municipal courts have jurisdiction over these claims and that where two tribunals have jurisdiction, the one first obtaining jurisdiction maintains it exclusively. *Yakima v. Int'l Ass'n of Fire Fighters, et al.*, 117 Wash.2d 655, 673–76, 818 P.2d 1076 (1991). Second, Defendants cite *Younger v. Harris*, 401 U.S. 37 (1971) for the position that a federal court must abstain in deference to state courts where: (1) there is an ongoing state proceeding; (2) the proceeding implicates important state interests; and (3) the federal litigant is not barred from litigating federal constitutional issues in that proceeding.

However, as stated above, the Court finds that municipal courts do not have jurisdiction over claims that relate to system-wide violations of statutory requirements in the enforcement of municipal ordinances. The Court agrees with Plaintiffs that they could be barred from litigating federal constitutional issues, and, accordingly, will not abstain from hearing Plaintiffs' claims.

B. Res Judicata

*3 Defendants argue that res judicata bars Plaintiffs' claims. Res judicata prevents a party from re-litigating all claims that were raised, or could have been raised, in an earlier action. *Stevens County v. Futurewise*, 146 Wash.App. 493, 192 P.3d 1, 6 (Wash.Ct.App.2008). Defendants cite several cases in which Plaintiffs failed to bring possible claims in municipal courts or superior courts and were therefore prohibited from bringing these claims in federal court. *Idris v. City of Chicago*, 552 F.3d 564, 565 (7th Cir.2009); *McCarthy v. City of Cleveland*, 2009 WL 2424296 (N.D. Ohio Aug.6, 2009); *Kovach v. District of Columbia*, 805 A.2d 957 (D.C.Ct.App.2002); *Dajani v. Governor & General Assembled of the State of Md.*, 2001 WL 85181 (D.Md. Jan.24, 2001). The Court finds these cases to be unpersuasive.

None of Defendants' cases is from Washington. As stated above, the Washington Supreme Court has stated that the superior courts have original jurisdiction over claims alleging system-wide violations in the enforcement of municipal ordinances. *Orwick v. Seattle*, 692 P.2d at 795. Defendants have not established that the states in which their cases were decided have similar laws. To the extent that Defendants' cases stand for the proposition that Plaintiffs should have brought their claims in municipal court, they simply do not apply to Washington law.^{FN1}

FN1. This logic also applies to Plaintiffs' failure to appeal the infractions. Because Superior Courts have *original* jurisdiction, Plaintiffs cannot be faulted for not engaging

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in an appeals process that would have skirted that jurisdiction.

Accordingly the Court finds that *res judicata* does not bar Plaintiffs' claims.

C. Declaratory and Injunctive Relief Claims

Plaintiffs present three challenges to the traffic camera system. The first is that Defendant municipalities violated due-process requirements when they failed to get approval for the NOIs from the Administrative Office of the Courts. (Resp. 6–9 (Dkt. No. 118).) Rule 2.1 of the Infraction Rules for Courts of Limited Jurisdiction (“ILRJ”) states: “Infraction cases shall be filed on a form entitled ‘Notice of Infraction’ prescribed by the Administrative Office of the Courts; except that the form used to file cases alleging the commission of a parking, standing or stopping infraction shall be *approved* by the Administrative Office of the Courts.” (emphasis added). WASH. REV.CODE 46.63.170(2) states: “infractions generated by the use of automated traffic safety cameras under this section shall be *processed* in the same manner as parking infractions, including for the purposes of RCW 3.50.100, 35.20.220, 46.16.216, and 46.20.270(3).” (emphasis added). Plaintiffs argue that because traffic camera infractions should be processed in the same manner as parking infractions, and the form used to file cases alleging parking infractions requires AOC approval, then NOIs generated by traffic cameras must also require approval. Not so.

The Code does not require a traffic camera infraction to be treated like a parking infraction in every single respect. WASH. REV.CODE 46.63.170(2) states only that when an infraction is generated, is to be processed like a parking infraction. This refers to individual NOIs given to individual drivers and the legal steps and consequences that ensue. The four code sections that WASH. REV.CODE 46.63.170(2) specifies, WASH. REV.CODE 3.50.100, 35.20.220, 46.16.216, and 46.20.270(3), confirm this interpretation in that they all concern aspects of post-infraction

procedure: treatment of funds collected by an infraction, renewal of a driver's license following infractions, and withholding of driving privileges following traffic offenses. AOC approval is not a step contemplated in the processing of any infraction; it is a way of ensuring, before any processing of infractions begins, that a municipality is using legally sufficient forms. Although NOIs from traffic cameras are processed like parking tickets, the forms are to be drafted in compliance with rules for traffic tickets. And ILRJ 2.1 states that NOIs for traffic tickets need only be on forms prescribed by the AOC, not approved by them. Plaintiffs have not alleged that the NOIs fail to meet any of the AOC's prescriptions.

*4 Plaintiffs' second challenge is that the fines generated by traffic cameras are excessive. WASH. REV.CODE 46.63.170(2) states that the fines “shall not exceed the amount of a fine issued for other parking infractions within the jurisdiction.” Plaintiffs argue that the Washington State Legislature intended for the fines to be no higher than a normal parking ticket, i.e. twenty dollars. (Resp. 4 (Dkt. No. 118).) Defendants respond that in the intervening five years, the Legislature could have clarified its views on fine limits if they felt they had been misinterpreted. (Mot. 23 (Dkt. No. 108).) A more plausible reading of the Code, Defendants argue, is that the municipalities may set fine amounts at or below those of the maximum fine allowed for parking infractions. (*Id.* at 22.) Traffic camera fines range from \$101 to \$124. (*Id.* at 23.) Fines for fire lane parking and disabled parking violations in each municipality range from \$175 to \$250. (*Id.*) While these fines are set by state law rather than municipal code (WASH. REV.CODE 46.16.381(7)-(9); WASH. REV.CODE 46.55.105(2)), Plaintiffs offer no reason to conclude that these fines are outside the jurisdiction of the city, and therefore an impermissible ceiling on fine amounts, given that WASH. REV.CODE 35A.12.140 allows municipalities to adopt state code by reference. The Court agrees that the Code grants municipalities flexibility in determining fine levels,

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and that the fines are not excessive.

Plaintiff's third challenge is that the municipalities' contracts with ATS and Redflex violate Washington law. WASH. REV.CODE 46.63.170(1)(i) states that "the compensation paid to the manufacturer or vendor of the equipment used must be based only upon the value of the equipment and services provided or rendered in support of the system, and may not be based upon a portion of the fine or civil penalty imposed or the revenue generated by the equipment." Plaintiffs argue that the contracts violate this statute in two ways, but they are misinterpreting the law.

First, the contracts contain "stop-loss" provisions. These provisions allow the municipalities to defer payment until the cameras generate enough revenue to cover their expense. (Mot. 18 (Dkt. No. 108).) But they do not change the amount that the municipalities must eventually pay the camera companies. (*Id.*) Plaintiffs insist that these provisions run counter to the prohibition on any system of compensation based on a portion of the revenue generated. (Resp. 6 (Dkt. No. 118).) The Court does not agree. Under this system, it is the payment schedule, not the amount of compensation, that is based on a portion of revenue generated. The stop-loss provisions have allowed the municipalities to purchase traffic enforcement on a layaway plan, but not to change the price.

Second, Plaintiffs argue that some contracts with Bellevue, Lynwood, Seattle, and Spokane include unlawful volume-based payments. The Lynwood contract, for example, states that ATS charges a fee of \$5.00 for the first infraction per camera, and then processes all following infractions via that camera during a month, up to 800, as part of the flat fee per camera. (Mot. 6 n. 6 (Dkt. No. 108).) However, when infractions per camera exceed 800 per month, Lynwood pays ATS a processing fee of \$5.00 per infraction over 800. (*Id.*) As with the stop-loss provisions, Plaintiffs argue that this is a system of compensation based on a portion of the revenue generated. Again,

Plaintiffs misread the statute. The statute specifically allows for compensation based on the value of services provided. WASH. REV.CODE 46.63.170(1)(i). The Court agrees with Defendants that the \$5.00 is a service charge, not a share of the revenues.

*5 Plaintiffs have failed to state facts sufficient to support their claims for declaratory and injunctive relief.

D. Additional Claims.

Plaintiffs also bring a claim for violation of the CPA and common law claims for Abuse of Process and Unjust Enrichment. (Resp. 32–36 (Dkt. No. 118).) But all of these claims are predicated on the finding that Defendants violated Washington law by entering into illegal contracts, charging excessive fees, and issuing unapproved NOIs. (*Id.*) As detailed above, the Court finds that Defendants' actions were not in violation of Washington law. Accordingly, Plaintiff's CPA and common law claims fail.

IV. CONCLUSION

Defendants' motion to dismiss (Dkt. No. 108) is GRANTED. The Clerk is DIRECTED to CLOSE the case.

W.D.Wash.,2010.

Todd v. City of Auburn

Not Reported in F.Supp.2d, 2010 WL 774135
 (W.D.Wash.)

END OF DOCUMENT

EXHIBIT E

Todd v. City of Auburn, 425 Fed. App'x 613, 2011 WL 1189696 (9th Cir. 2011)

425 Fed.Appx. 613, 2011 WL 1189696 (C.A.9 (Wash.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 425 Fed.Appx. 613, 2011 WL 1189696 (C.A.9 (Wash.)))

H

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)

United States Court of Appeals,
 Ninth Circuit.

Michael TODD; Gregory Stackhouse; Steve Blai; Vonda Sargent; Max Harrison; Zoann Chase-Billing; Ojnjen Pandzic; Seungran Chwe; Daniel Wu; Marcus Naylor; Melissa Miller; Len Johnson; Ashley Alm; Jim Ames; Blanca Zamora; Charles Mael; Somer Chacon; Brad Hampton; Nicholas Juhl; Georgina Luke; Judith Stredicke; Mark Contratto; Aneva Freeman; Chris Cline; Tera Cline; Jim Abraham; Catherine Iwakiri; Vicki Wagner; Cody Edwards; Julie Williams; Michael Salokas; Barbara Keller; Craig Coates; Chris Sperlich; Lori Fleming; Ben Baccarella; Dalton Shotwell; Jerry Knudtsen; Belinda Riba; Greig Fahnlander; Steven Moody; Rich Newman; Donald Stave; Richard Merchant; David Roark; Timothy Morgan; Charles Gust; Casey Halverson; Richard Daiker, individually and on behalf of two classes of similarly situated persons, Plaintiffs—Appellants,

v.

CITY OF AUBURN; City of Bellevue; City of Bonney Lake; City of Bremerton; City of Burien; City of Federal Way; City of Fife; City of Issaquah; City of Lacey; City of Lake Forest Park; City of Lakewood; City of Lynnwood; City of Puyallup; City of Renton; City of Seatac; City of Seattle; City of Spokane; City of Tacoma; American Traffic Solutions, Inc., doing business as ATS; American Traffic Solutions, LLC,

doing business as ATS Solutions; Redflex Traffic Systems, Inc., Defendants—Appellees.

No. 10–35222.

Argued and Submitted March 11, 2011.

Filed March 31, 2011.

Background: Motorists filed putative class action against cities in state court alleging that fines they received for speeding infractions captured on automated traffic safety cameras exceeded amounts permitted under state law, and violated statutory restrictions on form of compensation. After removal, the United States District Court for the Western District of Washington, John C. Coughenour, J., 2010 WL 774135, dismissed, and motorists appealed.

Holdings: The Court of Appeals held that:

- (1) fines did not exceed amounts permitted under state statute, and
- (2) cities' contracts with automated traffic safety camera companies did not violate statutory directive.

Affirmed.

West Headnotes

[1] **Automobiles 48A** **359.1**

48A Automobiles

48AVII Offenses

48AVII(C) Sentence and Punishment

48Ak359.1 k. In general. Most Cited Cases

Under Washington law, fines imposed by cities for speeding infractions captured on automated traffic safety cameras did not exceed amounts permitted under state statute limiting fine amount to “amount of

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a fine issued for other parking infractions within the jurisdiction,” even if fines exceeded amount charged for “standard” or “typical” parking infractions, or amount charged for infractions authorized solely by local law, where fines were less than fines imposed for disabled parking and other parking infractions. West's RCWA 46.63.170.

[2] Municipal Corporations 268 250

268 Municipal Corporations

268VII Contracts in General

268k250 k. Construction and operation. Most Cited Cases

Public Contracts 316H 274

316H Public Contracts

316HV Construction and Operation

316Hk271 Compensation

316Hk274 k. From special fund or appropriation. Most Cited Cases

Under Washington law, provisions of cities' contracts with automated traffic safety camera companies that allowed cities to delay payment of any fees greater than amount of revenues generated by citations that month until revenues exceeded monthly fee obligations did not violate statutory directive that “compensation paid must be based only upon the value of the equipment and services provided, and may not be based upon a portion of the fine or civil penalty imposed or the revenue generated by the equipment,” where cost neutrality provisions altered timing of fee payments in accordance with monthly revenue fluctuations, but did not base amount of fees upon portion of revenue generated. West's RCWA 46.63.170(1)(i).

*614 Edith A. Bowler, Bowler Law Office PLLC, David Elliot Breskin, Esquire, Daniel Foster Johnson,

Esquire, Breskin Johnson & Townsend PLLC, Andrea King Robertson, Robertson Law, PLLC, Seattle, WA, Kim Williams, Rob Williamson, Williamson & Williams, Bainbridge Island, WA, for Plaintiffs–Appellants.

Stewart A. Estes, Keating Bucklin & McCormack Inc. P.S., James Dionne, Kathleen Haggard, Dionne & Rorick, Wayne Douglas Tanaka, Ogden Murphy Wallace, P.L.L.C., Gregory Colin Narver, Seattle City Attorney's Office, Leonard J. Feldman, Esquire, Gloria S. Hong, Esquire, Vanessa Soriano Power, Stoel Rives, LLP, Frederick B. Burnside, Esquire, John Goldmark, Stephen M. Rummage, Esquire, Davis Wright Tremaine LLP, Seattle, WA, Daniel B. Heid, Esquire, City of Auburn, Auburn, WA, Cheryl Ann Zakrzewski, Esquire, Assistant City, Bellevue City Attorney's Office, Bellevue, WA, Mark Edwin Koontz, Assistant City, Bremerton City Attorney's Office, Bremerton, WA, Chris D. Bacha, Bob Sterbank, Kenyon Disend, PLLC, Issaquah, WA, Patricia Richardson, City of Federal Way, Federal Way, WA, Loren Dee Combs, VSI Law Group PLLC, Margaret Elofson, Deputy City, William Cody Fosbre, Chief Deputy City, Michael James Smith, Esquire, Office of the City Attorney, Tacoma, WA, Joseph M. Svoboda, Assistant City, Lacey City Attorney's Office, Lacey, WA, Heidi Ann Wachter, Lakewood City Attorney, Lakewood, WA, Diana Blakney, Michael B. Tierney, Tierney Law Office, Mercer Island, WA, Cheryl F. Carlson, City of Puyallup, Puyallup, WA, Zanjeta Lehua Fontes, Renton City Attorney, Renton, WA, Mary Mirante Bartolo, City of Seatac, Seatac, WA, Salvatore Faggiano, Rocco N. Treppiedi, Esquire, Office of the City Attorney, Spokane, WA, for Defendants–Appellees.

*615 Appeal from the United States District Court for the Western District of Washington, John C. Coughenour, District Judge, Presiding. D.C. No. 2:09–cv–01232–JCC.

425 Fed.Appx. 613, 2011 WL 1189696 (C.A.9 (Wash.))
 (Not Selected for publication in the Federal Reporter)
 (Cite as: 425 Fed.Appx. 613, 2011 WL 1189696 (C.A.9 (Wash.)))
 Before: FISHER, GOULD and TALLMAN, Circuit
 Judges.

MEMORANDUM ^{FN*}

FN* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36–3.

****1** The plaintiffs in this putative class action ran red lights or sped in school zones and were photographed by automated traffic safety cameras installed by the defendant cities and camera companies. The plaintiffs argue that the fines they received for these infractions exceed limits set by Revised Code of Washington section 46.63.170 and that payment provisions in the cities' contracts with the camera companies violate statutory restrictions on the form of compensation. They also contend the defendant cities should have had the Notices of Infraction (NOIs) used to issue the camera citations approved by the Washington Administrative Office of the Courts (AOC).

The plaintiffs sued in state court, and the defendants removed to federal court under the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. § 1332(d).^{FN1} The district court granted the defendants' Rule 12(b)(6) motion to dismiss. We affirm.

FN1. We do not consider the plaintiffs' argument, raised for the first time on appeal, that the district court should have remanded this case to state court under CAFA's local controversy exception, 28 U.S.C. § 1332(d)(4)(A). The plaintiffs forfeited this argument by not raising it in the district court, *see Hillis v. Heineman*, 626 F.3d 1014, 1019 (9th Cir.2010), and the potential applicability of the local controversy exception does not undermine the district court's jurisdiction. *See Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1022–24 (9th Cir.2007) (

“Implicit in ... subsection[] [1332](d)(4) is that the court *has* jurisdiction, but the court ... must decline to exercise such jurisdiction.” (emphasis added)).

I.

[1] The fines the defendant cities charge for infractions captured on traffic safety cameras do not exceed limits imposed by section 46.63.170. Under section 46.63.170(2), “the amount of the fine issued for an infraction generated through the use of an automated traffic safety camera shall not exceed the amount of a fine issued for other parking infractions within the jurisdiction.” Here, the camera fines plainly do not exceed the fines imposed for certain other parking infractions. *See, e.g.*, Wash. Rev.Code. § 46.16.381(7)–(9) (\$250 fine for disabled parking); Seattle, Wash., Mun.Code § 11.31.121 (same). They are therefore within statutory limits. Nothing in the statute limits camera fines to the amount charged for “standard” or “typical” parking infractions, or to the amount charged for infractions authorized solely by local law.

Because the plain language of section 46.63.170(2) unambiguously authorizes the fines the defendants impose, we are precluded from considering the plaintiffs' argument that the legislative history compels a contrary conclusion. *See State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 140 Wash.2d 615, 999 P.2d 602, 611 (2000) (“When words in a statute are plain and unambiguous, this Court is required to assume the Legislature meant what it said and apply the statute as written.”).

II.

The district court also correctly rejected the plaintiffs' challenges to two types of *616 compensation provisions in the contracts between the defendant cities and camera companies.

[2] The plaintiffs first challenge the “stop-loss” or

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“cost neutrality” provisions that allow the cities to delay payment of any fees greater than the amount of revenues generated by citations that month until revenues exceed monthly fee obligations. The plaintiffs argue that these provisions violate the statutory directive that “the compensation paid ... must be based only upon the value of the equipment and services provided ..., and may not be based upon a portion of the fine or civil penalty imposed or the revenue generated by the equipment.” Wash. Rev.Code. § 46.63.170(1)(i). We disagree. The cost neutrality provisions alter the timing of fee payments in accordance with monthly revenue fluctuations, but they do not base the amount of fees upon a *portion* of the revenue generated.

****2** We likewise reject the plaintiffs' contention that supplemental fee provisions in some of the defendants' contracts constitute fees improperly “based upon a portion of ... the revenue generated.” *Id.* The relevant provisions obligate certain cities to pay a \$5 service fee per citation issued above the first 800 citations per camera per month. These fees are permissible because they constitute “compensation ... based ... upon the value of the ... services provided or rendered in support of the system.” *Id.*

III.

The plaintiffs next argue the NOIs the cities issued to them violate statutory rules for approval of such notices. Under Revised Code of Washington section 46.63.060(2) and Infraction Rules for Courts of Limited Jurisdiction (IRLJ) 2.1(a), “the form used to file cases alleging the commission of a parking, standing or stopping infraction shall be approved by the Administrative Office of the Courts.” The plaintiffs argue that because section 46.63.170(2) requires that camera infractions “be processed in the same manner as parking infractions,” the NOIs generated for camera infractions must receive AOC approval in accordance with the IRLJ 2.1(a) command that NOIs “alleging the commission of a parking, standing or

stopping infraction” be AOC-approved.

We reject this argument for two reasons. First, we agree with the district court that section 46.63.170(2)'s directive that camera infractions “be processed in the same manner as parking infractions” must be construed in light of the accompanying list of purposes for which camera infractions are processed like parking infractions. All of the provisions listed concern aspects of post-infraction procedure rather than initial notification. *See* Wash. Rev.Code §§ 46.63.170(2), 3.50.100, 35.20.220, 46.16.216, 46.20.270(3). Second, section 46.63.170(1)(e) explicitly addresses the form and content of camera infraction notices, suggesting that the legislature expressed relevant restrictions on camera NOIs in this provision alone.

IV.

Finally, we decline to address the plaintiffs' challenge to the use of traffic cameras at three-arterial intersections or their claim that the defendants use “faulty traffic camera system technology.” These claims were not articulated in the briefing on the defendants' motion to dismiss and are therefore waived on appeal. *See Walsh v. Nev. Dep't of Human Res.*, 471 F.3d 1033, 1037 (9th Cir.2006).

Because we affirm the district court's dismissal of the plaintiffs' claims on the merits, we do not address the defendants' ***617** contention that the claims are barred by res judicata.

* * *

The district court correctly rejected the plaintiffs' challenges to the defendants' camera fine amounts, compensation arrangements and camera infraction NOIs.

The order granting the motion to dismiss is **AFIRMED**. The defendants' motion for judicial notice is **DENIED** as moot.

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****3 AFFIRMED.**

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