

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, SOUTHERN REGION**

SOUTHERN UTAH DRAG STARS;
MITSKI AVALŌX,
Plaintiffs,

v.

CITY OF ST. GEORGE;
CITY COUNCIL OF ST. GEORGE;
COUNCILMEMBER JIMMIE HUGHES, in his
official capacity;
COUNCILMEMBER DANNIELLE LARKIN in her
official capacity;
COUNCILMEMBER NATALIE LARSEN in her
official capacity;
COUNCILMEMBER GREGG MCARTHUR in his
official capacity;
COUNCILMEMBER MICHELLE TANNER in her
official capacity;
MAYOR MICHELE RANDALL in her official
capacity;
CITY MANAGER JOHN WILLIS in his official
capacity,
Defendants.

Case No. 4:23-cv-00044-PK-DN

Judge David Nuffer
Magistrate Judge Paul Kohler

**PLAINTIFFS’ MEMORANDUM IN
OPPOSITION TO DEFENDANTS’
MOTION FOR JUDGMENT ON THE
PLEADINGS**

INTRODUCTION

On June 17, 2023, this Court granted Plaintiffs Southern Utah Drag Stars’ (“Drag Stars”) and Mitski Avalōx’s motion for a preliminary injunction, finding that Defendant City of St. George (the “City”) had likely violated Plaintiffs’ First Amendment rights by denying their application to hold a family-friendly drag show in a City-owned park.¹ The Court found that “[t]he record evidence is replete with statements and conduct of the City Councilmembers since at least June

¹ Mem. Decision and Order Granting Prelim. Inj., ECF No. 63 (“Prelim. Inj. Order”).

2022 which demonstrate severe animus towards [Plaintiffs'] protected speech and viewpoint.”² The Court ordered the City to reverse its decision to deny Plaintiffs’ application and to allow Plaintiffs to hold their event (which took place on June 30, 2023).³ And the Court admonished that “[t]he governing body and its members must never use pretended or pretextual reasons to hide the real reasons for denying individuals their constitutional rights. This is not only a fundamental breach of their oath and trust but also less than honest.”⁴

Undeterred by the Court’s ruling, Defendants now move for judgment on the pleadings. They do not dispute that the City was properly named as a defendant; nor does their motion attempt to defend the constitutionality of the City’s actions against Plaintiffs. Instead, Defendants argue that the various City officials named as defendants in their official capacities are entitled to absolute immunity for their legislative and quasi-judicial activities.⁵ And they claim that the mere act of naming those officials in the case caption entitles Defendants to sanctions under 28 U.S.C. § 1927.⁶

Defendants are incorrect on both fronts. It is black-letter law that the absolute immunity Defendants invoke is not available to officials who are sued in their official capacities, as the individual defendants are here. And even assuming that immunity were available here (it is not), it would not apply here because Defendants’ denial of Plaintiffs’ permit was neither legislative nor

² *Id.* at 42.

³ *Id.* at 55.

⁴ *Id.* at iii.

⁵ Defs.’ Mot. for J. on the Pleadings 5–8, ECF No. 67 (“Mot.”). Defendants also argue that the City Council (the official entity itself, rather than the individual Councilmembers) was not properly named as a defendant because it is not an entity capable of being sued. *Id.* at 8–9. Plaintiffs added the City Council as a defendant out of an abundance of caution, to preempt any argument that the denial of Plaintiffs’ application was attributable to the Council rather than to the City itself. In light of Defendants’ apparent concession that the City is the proper defendant here, Plaintiffs have no objection to removing the City Council from the list of defendants.

⁶ *Id.* at 9.

quasi-judicial in nature. Finally, Section 1927 allows the recovery of attorneys’ fees against an attorney who “so multiplies the proceedings in any case unreasonably and vexatiously”—not an attorney who does no more than name certain defendants in a complaint. Adding the officials to the case caption has not “multiplie[d] the proceedings” in this case in any way. Indeed, it is Defendants who, by filing this legally flawed motion, have multiplied proceedings and caused the Plaintiffs to expend additional time outside of the regular course of litigation in responding to these allegations.

The Court should deny the Motion in its entirety.

BACKGROUND

Drag Stars is an organization founded by Avalōx to foster diversity and community inclusiveness through the hosting of family-friendly drag shows in Southern Utah.⁷ On March 3, 2023, Drag Stars applied for a permit to host such an event in a City-owned park.⁸ On March 8, Drag Stars’ application and another application for an event titled “Pride 2023” were circulated to the City Council and flagged due to their “sensitive nature.”⁹ Then, on March 17, Councilmember Michelle Tanner—who has repeatedly and vocally opposed drag performances¹⁰—received a text message complaining about all age drag shows and vitriolically expressing moral disapproval of Drag Stars specifically.¹¹

Roughly an hour later, Tanner emailed City attorneys and the City Manager raising concerns about Drag Stars’ event.¹² Later the same day, Tanner sent a follow-up email stating that

⁷ Prelim. Inj. Order 4.

⁸ *Id.* at 5.

⁹ *Id.*

¹⁰ *Id.* at 42–43, 45.

¹¹ *Id.* at 7.

¹² *Id.* at 8.

she “did verify that Southern Utah Drag Stars has violated our ordinance by prematurely advertising. I believe this is also grounds for not issuing their permit.”¹³ Tanner was referring to a City ordinance that prohibited special event applicants from advertising their event prior to the issuance of an event permit (the “Advertising Prohibition”). The City had never previously enforced the Advertising Prohibition in the eight years it had been on the books.¹⁴

On March 31, after several weeks of working with Plaintiffs on planning their event, the City abruptly reversed course and denied Plaintiffs’ application, on the basis that Plaintiffs had violated the Advertising Prohibition.¹⁵ The City Council upheld that denial on appeal on April 11.¹⁶ Meanwhile, on April 6, the City Council amended the Advertising Prohibition to exempt a list of favored reoccurring and City-sponsored events.¹⁷ This had the effect of retroactively exempting a majority of the events that had been found to be in violation of the Advertising Prohibition along with Plaintiffs.¹⁸ The previous month, on March 16 (less than two weeks after Plaintiffs applied for a permit), the City Council had adopted an ordinance barring the processing of any new special event applications for six months (the “Moratorium”).¹⁹ The same reoccurring and City-sponsored events were also exempted from the Moratorium.²⁰

This was not the first time the City had sought to prevent drag shows from taking place. In early summer 2022, the HBO show *We’re Here*, which features three drag queens who travel to small towns to perform, sought and obtained a permit to tape an episode in St. George.²¹ On that

¹³ Prelim. Inj. Order at 8.

¹⁴ *Id.* at 9.

¹⁵ *Id.* at 13.

¹⁶ *Id.* at 18.

¹⁷ *Id.* at 13.

¹⁸ *Id.* at 16–17.

¹⁹ Prelim. Inj. Order at 5.

²⁰ *Id.*

²¹ *Id.* at 3.

occasion, the City Council ordered the City Manager to revoke HBO's permit.²² When the City Manager refused, citing constitutional concerns, the City Council forced him to resign.²³ The City Manager then threatened a wrongful termination claim, which the City settled for \$625,000.²⁴

Plaintiffs filed this action on May 23, 2023, alleging that the City's denial of their permit application violated their rights under the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution, as well under the Utah Constitution.²⁵ On May 30, Plaintiffs moved for a preliminary injunction ordering the City to reverse its denial and allow Plaintiffs to hold their event on June 30.²⁶

On June 17, the Court granted Plaintiffs' motion on several grounds.²⁷ It held, first, that the Advertising Prohibition and Moratorium were unconstitutionally overbroad,²⁸ and that the Advertising Prohibition was unconstitutionally vague.²⁹ Next, it held that the Advertising Prohibition and Moratorium were unconstitutional prior restraints on protected speech.³⁰ Turning to Plaintiffs' as-applied challenges, the Court held that Plaintiffs' planned drag show was speech protected by the First Amendment, dismissing Defendants' arguments to the contrary as "not merit[ing] discussion."³¹ It then concluded that the City's actions against Plaintiffs constituted impermissible content and viewpoint discrimination, and that the City could satisfy neither strict nor intermediate scrutiny.³² The Court's opinion contained a five-page recitation of facts detailing

²² *Id.*

²³ *Id.* at 4.

²⁴ *Id.*

²⁵ Compl., ECF No. 2.

²⁶ Mot. for Prelim. Inj., ECF No. 34.

²⁷ Prelim. Inj. Order.

²⁸ *Id.* at 23–30.

²⁹ *Id.* at 30–33.

³⁰ *Id.* at 33–37.

³¹ *Id.* at 37–39.

³² *Id.* at 39–48.

the City’s animus against drag performances, which the Court determined “demonstrate quintessential pretextual discrimination.”³³

Finding the other preliminary injunction factors satisfied,³⁴ the Court ordered the City to make one of two City-owned public spaces available, at Plaintiffs’ election, for Plaintiffs’ event on June 30.³⁵ On June 21, Plaintiffs elected to hold their event at the Sun Bowl.³⁶ The event took place on June 30 without major incident.

LEGAL STANDARD

A motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedures is evaluated by the same standards as a motion to dismiss for failure to state a claim under Rule 12(b)(6).³⁷ On such a motion, a court must “accept as true all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff.”³⁸ A court may dismiss a complaint under Rule 12(c) only if it “appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”³⁹ “A motion for judgment on the pleadings should not be granted unless the moving party has clearly established that no material issue of fact remains to be resolved and the party is entitled to judgment as a matter of law.”⁴⁰

³³ Prelim. Inj. Order at 42–46.

³⁴ *Id.* at 49.

³⁵ *Id.* at 55.

³⁶ Pls.’ Election Pursuant to Ct.’s Mem. And Order Granting Prelim. Inj., ECF No. 64.

³⁷ *Myers v. Koopman*, 738 F.3d 1190, 1193 (10th Cir. 2013).

³⁸ *Hunt v. Montano*, 39 F.4th 1270, 1278 (10th Cir. 2022) (internal quotation marks omitted).

³⁹ *Ramirez v. Dep’t of Corrections*, 222 F.3d 1238, 1240 (10th Cir. 2000) (internal quotation marks omitted).

⁴⁰ *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1228 (10th Cir. 2012) (internal quotation marks omitted).

ARGUMENT

I. Absolute Immunity Is Unavailable to the Individual Defendants Because They Are Sued in Their Official Capacities

The individual defendants are not protected by the absolute legislative and quasi-judicial immunities they purport to invoke.⁴¹ The very case on which Defendants rely states explicitly that absolute legislative immunity “applies . . . only to legislators sued in their *individual* capacities . . .”⁴² Where public servants are sued in their *official* capacities, however, the Supreme Court has explained that “[t]he only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment.”⁴³ In *Board of County Commissioners v. Umbehr*, the Supreme Court held that the legislative immunity claim raised by individual county board members was “moot,” “[b]ecause only claims against the Board members in their *official* capacities are before us, and because immunity from suit under § 1983 extends to public servants only in their *individual* capacities.”⁴⁴

This rule is in keeping with the purpose of legislative and other absolute immunities for public officials, which is to “enable[] [those] officials to serve the public without fear of personal liability.”⁴⁵ But an official-capacity suit, like this one, is “*not* a suit against the official personally, for the real party in interest is the entity” of which the officer is an agent (here, the City).⁴⁶ Where there is no risk of personal liability, there is no basis for absolute immunity.

Here, from the outset, Plaintiffs have explicitly sued the individual defendants in their

⁴¹ See Mot. 5–8.

⁴² *Sable v. Myers*, 563 F.3d 1120, 1123 (10th Cir. 2009) (emphasis added) (citing *Minton v. St. Bernard Parish School Bd.*, 803 F.2d 129, 133 (5th Cir. 1986)).

⁴³ *Kentucky v. Graham*, 473 U.S. 159, 167 (1985).

⁴⁴ 518 U.S. 668, 677 n.* (1996).

⁴⁵ *Sable*, 563 F.3d at 1123.

⁴⁶ *Kentucky*, 473 U.S. at 166.

official, not individual, capacities. Accordingly, Plaintiffs' claims are not brought against the individual defendants personally, and those defendants are not entitled to the personal immunity they claim.⁴⁷ Nor have Defendants raised any sovereign immunity arguments of the type that is cognizable in an official-capacity action, for the simple reason that municipalities such as the City are not entitled to sovereign immunity.⁴⁸ For this reason alone, Defendants' immunity arguments fail.

II. In Any Event, the Individual Defendants Do Not Satisfy the Requirements for Absolute Immunity

Defendants' immunity arguments fail for the independent reason that Defendants' actions at issue here do not satisfy the requirements for either legislative or quasi-judicial immunity.

A. Defendants Are Not Entitled to Legislative Immunity.

“Not all actions taken at a legislative meeting by a local legislator are legislative for purposes of immunity.”⁴⁹ Instead, “[w]hether actions . . . are, in law and fact, an exercise of legislative power depends not on their form but upon ‘whether they contain matter which is properly to be regarded as legislative in its character and effect.’”⁵⁰ “[A]t its core, the legislative function involves determining, formulating, and making policy.”⁵¹ Further, “the government official seeking immunity bears the burden of showing that an exemption from personal liability

⁴⁷ Defendants' claim that “Plaintiffs have threatened [Defendants] with personal liability” with this suit, Mot. 6, willfully ignores that, as stated in the caption of every document filed by Plaintiffs in this lawsuit, Plaintiffs have sued the individual defendants in their official capacities.

⁴⁸ See *Ambus v. Granite Bd. of Educ.*, 995 F.2d 992, 994 (10th Cir. 1993) (“[Eleventh Amendment] immunity extends only to the states themselves and to those governmental entities that are ‘arms of the state.’”); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280–81 (1977) (quoting *Meade v. Grubbs*, 841 F.2d 1512, 1525 (10th Cir.1988)).

⁴⁹ *Kamplain v. Curry Cty. Bd. of Comm'rs*, 159 F.3d 1248, 1252 (10th Cir. 1998).

⁵⁰ *Id.* (quoting *I.N.S. v. Chadha*, 462 U.S. 919, 952 (1983)). See also *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (holding that whether immunity attaches turns not on the official's identity, or even on the official's motive or intent, but on the nature of the act in question).

⁵¹ *Kamplain*, 159 F.3d. at 1251.

is justified.”⁵²

As an initial matter, Defendants do not even attempt to meet their burden to show their entitlement to immunity. Instead of pointing to allegations in the Complaint that would demonstrate why Defendants’ actions were legislative in nature, Defendants simply make the bald—and incorrect—assertion that legislative immunity applies, supported only by inflammatory rhetoric and lengthy block-quotes from distinguishable cases.

In any event, Defendants’ application of the Advertising Prohibition to deny Plaintiffs’ permit application and subsequent upholding of said denial were administrative, rather than legislative, in nature, such that legislative immunity does not apply. In *Kamplain v. Curry County Board of Commissioners*, for example, the Tenth Circuit found that a county board’s decision to ban the plaintiff from all future commission meetings was an administrative, rather than legislative, function, “[b]ecause the circumstances of [the] case did not concern the enactment or promulgation of public policy” and therefore it could not be said “that the bans were related to any legislation or legislative function.”⁵³ Here, likewise, in barring Plaintiffs’ drag event from a public forum, the City officials “were not voting on, speaking on, or investigating a legislative issue.”⁵⁴ Rather, they were simply enforcing a *pre-existing* ordinance (the Advertising Prohibition) against a specific entity seeking to host one event, which is an administrative function.⁵⁵

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *See id.* at 1252 (denying legislative immunity based on “actions whereby the Board applies known rules and legislation to make an administrative business decision”). *See also Felix v. City of Bloomfield*, 112CV00125JAPRHS, 2013 WL 12328850, at *6 n.5 (D.N.M. Nov. 12, 2013) (“Generally, the application of existing policies to specific facts is outside the sphere of legislative activity.”); *Crymes v. DeKalb County, Ga.*, 923 F.2d 1482, 1486 (11th Cir. 1991) (holding that denial of development permit “is the application of policy to a specific party” and therefore was not legislative in nature for the purpose of immunity); *Bragg v. Chavez*, CIV 07-0343 JB/WDS,

Defendants' reliance on *Sable v. Myers* is misplaced. In *Sable*, the Tenth Circuit held that city council members were entitled to legislative immunity for authorizing the city's use of eminent domain to obtain the plaintiff's property to expand a public works facility.⁵⁶ But in doing so, the court distinguished *Kamplain* on the grounds that the use of eminent domain authority was legislative in nature because it was "an exercise of discretion regarding a matter of public policy that would impact the functioning of public services for years to come."⁵⁷ In other words, the decision to purchase the plaintiff's land was part of the public policy decision to expand the public works facility, a decision that the court emphasized would have a significant "effect . . . on future government operations."⁵⁸ Here, by contrast, the decision to deny Plaintiffs' application was not bound up with any major public policy decision.⁵⁹ Instead, it constituted the discriminatory enforcement of a *pre-existing* ordinance that would not have widespread effects on future government operations.

B. Defendants Are Not Entitled to Quasi-Judicial Immunity.

Likewise, Defendants are not entitled to absolute quasi-judicial immunity based on their denial of Plaintiffs' appeal of the permit denial. For officials at an administrative hearing to enjoy quasi-judicial immunity, "(a) the officials' functions must be similar to those involved in the judicial process, (b) the officials' actions must be likely to result in damages lawsuits by disappointed parties, and (c) there must exist sufficient safeguards in the regulatory framework to

2007 WL 6367133, at *14 (D.N.M. Nov. 13, 2007) ("The actual execution and implementation of the laws, whether proper or improper, appear to be beyond the realm of legislative immunity.").

⁵⁶ 563 F.3d at 1126–27

⁵⁷ *Id.* at 1126.

⁵⁸ *Id.*

⁵⁹ See also *Weise v. Colorado Springs*, 421 F. Supp. 3d 1019, 1034–35 (D. Colo. 2019) (holding that city officials did not act in a legislative capacity when authorizing the filing of disciplinary complaints against the plaintiff, an attorney, for disclosing the contents of a government study).

control unconstitutional conduct.”⁶⁰ For example, the Tenth Circuit applied quasi-judicial immunity where (a) a hearing was adversary in nature; (b) individuals at the hearing had the right to counsel; (c) individuals had the opportunity to present evidence, provide testimony, and cross-examine witnesses; (d) the person overseeing the hearing was a professional hearing officer, was not considered an employee of the City, and was sufficiently independent from political pressure; and (e) the hearing panel made written findings of fact and issued a recommendation.⁶¹

Defendants fail to demonstrate that these requirements were met here. Instead, they again simply assert that the City Council was acting a judicial capacity when it decided Plaintiffs’ appeal. This *ipse dixit* is insufficient to meet Defendants’ burden.

And, indeed, the requirements for quasi-judicial immunity are not met. The Complaint does not allege that Plaintiffs had the right to counsel. The facts alleged in the Complaint demonstrate that Plaintiffs were functionally denied the opportunity to present evidence, provide testimony, and cross-examine witnesses, because the City gave Plaintiffs notice of the appeal hearing on Friday of Easter weekend and the hearing was held just two business days later on Tuesday.⁶² The individuals overseeing the appeal process—far from being non-employees of the City who were independent from political pressure—were the City Councilmembers themselves. And there were no safeguards in the regulatory framework applied by the City Council to protect against unconstitutional conduct; rather, as this Court has already found in granting Plaintiffs’ motion for a preliminary injunction, the Advertising Prohibition gave the City Council “unfettered

⁶⁰ *Guttman v. Khalsa*, 446 F.3d 1027, 1033 (10th Cir. 2009) (internal quotation marks omitted).

⁶¹ *Saavedra v. City of Albuquerque*, 73 F.3d 1525, 1528–30 (10th Cir. 1996) (interpreting the principles articulated in *Butz v. Economou*, 438 U.S. 478, 507 (1978)).

⁶² Compl. ¶ 91.

discretion” to grant or deny permits as it saw fit.⁶³ Finally, the City Council issued no written opinion.

In sum, the City Council was not acting in a judicial capacity when it decided Plaintiffs’ appeal. Even if the individual defendants were sued in their individual capacities, quasi-judicial immunity would not apply.

III. Defendants Are Not Entitled to Attorneys’ Fees Under 28 U.S.C. § 1927.

Finally, regardless of whether Defendants are entitled to judgment on the pleadings (they are not), they cannot recover fees under 28 U.S.C. § 1927. Defendants’ conclusory request for sanctions is not only unsupported but ignores the plain text of the statute, case law setting forth standards for imposing such sanctions, and case law explicitly rejecting sanctions in similar factual circumstances. That Defendants should make the weighty decision to seek such sanctions in the face of these controlling precedents is itself highly improper.

Section 1927 provides: “Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” The Tenth Circuit has described “this as an extreme standard, and [has] cautioned that a district court should act under § 1927 only in instances evidencing a serious and standard disregard for the orderly process of justice.”⁶⁴ Courts “‘strictly construe’ the statute, lest [the court] dampen ‘the legitimate zeal of an attorney in representing his client.’”⁶⁵

First, as a threshold matter, Defendants fail to support their request for sanctions. The

⁶³ Prelim. Inj. Order 35.

⁶⁴ *Frey v. Town of Jackson, Wyoming*, 41 F.4th 1223, 1245 (10th Cir. 2022) (internal quotation marks omitted).

⁶⁵ *Id.* (quoting *Baca v. Berry*, 806 F.3d 1262, 1268 (10th Cir. 2015)).

request consists of a single short paragraph, half of which simply quotes the text of Section 1927. This conclusory approach improperly shifts the burden to Plaintiffs to disprove that sanctions are warranted and is plainly an insufficient basis to award sanctions. Furthermore, Defendants' conclusory request fails to identify how the purported actions rise to the level of § 1927 sanctions.

Second, Defendants' claim that Plaintiffs have filed a "frivolous lawsuit"⁶⁶ is transparently baseless. As detailed above, this Court has already granted Plaintiffs' motion for a preliminary injunction, and Defendants did not appeal or seek to stay that decision. The Court's detailed factual findings in connection with that motion, which Defendants have not challenged, paint an alarming picture of Defendants' illegal and unconstitutional course of conduct and animus towards Plaintiffs' constitutionally protected speech, and conclusively refute any accusation of improper conduct by Plaintiffs in the filing of this suit. Defendants' unrepentant insistence that this lawsuit is frivolous—and, *a fortiori*, their request for sanctions—disregard and ignore this Court's fact-finding and legal conclusions.

Third, Defendants fail to cite any case law or evidence indicating that Plaintiffs' actions satisfy the stringent standards for Section 1927. Crucially, they identify no arguably sanctionable conduct other than the naming of the individual defendants and the City Council in the complaint. But "§ 1927 covers only the *multiplication*" of proceedings.⁶⁷ That "necessarily excludes the complaint that gives birth to the proceedings, as it is not possible to multiply proceedings until *after* those proceedings have begun."⁶⁸ Multiple courts have rejected applying § 1927 to allow defendants to recover the attorneys' fees they incurred merely in seeking dismissal of certain

⁶⁶ Mot. 5.

⁶⁷ *Steinert v. Winn Grp.*, 440 F.3d 1214, 1224 (10th Cir. 2006) (emphasis added).

⁶⁸ *Id.* at 1225.

named defendants.⁶⁹

Until Defendants filed this motion, naming the individual defendants and the City Council had had no impact on the proceedings in this case. The claims asserted against each Defendant are identical. That reflects the fact that the individual defendants are sued in their official capacities, and thus, as explained above, the City, not the individuals, is the “real party in interest.”⁷⁰ In line with this, the arguments raised by Defendants in response to Plaintiffs’ motion for a preliminary injunction did not differentiate between the different Defendants. All named Defendants have joined a single answer to Plaintiffs’ complaint.⁷¹ And all named Defendants are represented by the same counsel.

In sum, Defendants have failed to demonstrate any “causal connection between the objectionable conduct of counsel and multiplication of the proceedings, such that the conduct resulted in proceedings that would not have been conducted otherwise.”⁷² Rather, the only multiplication of proceedings in this case was caused by Defendants themselves by filing this motion while ignoring both black-letter law that absolute immunity is not available to officials who are sued in their official capacities and the actual nature of this suit. As explained above, established case law precludes absolute immunity for officials who are sued in their official

⁶⁹ *See id.* at 1226 (holding that the district court abused its discretion in awarding fees under § 1927 for preparing a motion to dismiss). *See also Associated Indem. Corp. v. Fairchild Industries, Inc.*, 138 F.R.D. 384, 389 (S.D.N.Y. 1991) (denying Section 1927 sanctions based on party’s unreasonable failure to consent to dismissal of defendant), *rev’d on other grounds*, 961 F.2d 31 (2d Cir. 1992); *Ross v. County of Lake*, 764 F. Supp. 1308, 1310 (N.D. Ill. 1991) (denying Section 1927 sanctions where plaintiff refiled claims against city that had already been dismissed and dismissal was upheld on appeal); *Anesthesia Advantage, Inc. v. Metz Grp.*, 708 F. Supp. 1180 (D. Colo. 1989) (denying Section 1927 sanctions for naming defendant in complaint who was later dismissed).

⁷⁰ *Kentucky*, 473 U.S. at 166.

⁷¹ Defs.’ Answer, ECF No. 66.

⁷² *Chung v. Lamb*, No. 20-1278, 2021 WL 4852417, at *3 (10th Cir. Oct. 19, 2021).

capacities. Confusingly, Defendants incorrectly base their motion on that argument that “[b]y filing claims against these immune civil servants, Plaintiffs have threatened them with *personal liability*.”⁷³ Defendants’ argument entirely disregards a fact made plainly clear in the complaint—that Defendants were sued in their official capacities.⁷⁴ And even if Defendants’ arguments were meritorious, the motion is entirely unnecessary, because the dismissal of the individual defendants and the City Council would have no effect on the course of proceedings going forward. Defendants cannot recover attorneys’ fees incurred through their own avoidable conduct.

CONCLUSION

For the foregoing reasons, Defendants’ motion for judgment on the pleadings and request for sanctions under 28 U.S.C. § 1927 should be denied.

Dated: August 22, 2023

Respectfully submitted,

By: /s/ Jeremy Creelan

Valentina De Fex
John Mejia
**AMERICAN CIVIL LIBERTIES UNION
OF UTAH FOUNDATION**
311 South State Street, Suite 310
Salt Lake City, Utah 84111
(801) 521-9862
vdefex@acluutah.org
jmejia@acluutah.org

Jeremy Creelan*
Rémi Jaffré*
Owen W. Keiter*
JENNER & BLOCK LLP
1155 Avenue of the Americas
New York, NY 10036
JCreelan@jenner.com
RJaffre@jenner.com
OKeiter@jenner.com

Emerson Sykes*
Joshua A. Block*
Elizabeth Gyori*

Nathaniel Castellano*
JENNER & BLOCK LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001

⁷³ Mot. 6.

⁷⁴ See Compl. 5.

**AMERICAN CIVIL LIBERTIES UNION
FOUNDATION**

125 Broad Street, Floor 18

New York, NY 10004

(212) 549-2500

esykes@aclu.org

jblock@aclu.org

egyori@aclu.org

** Appearing pro hac vice*

(202) 639-6000

NCastellano@jenner.com

Meredith Hurley*

Jocelyn Sitton*

JENNER & BLOCK LLP

353 N. Clark Street

Chicago, IL 60654

(312) 222-9350

MHurley@jenner.com

JSitton@jenner.com

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. The electronic case filing system sent a “Notice of E-Filing” to all e-filing counsel of record in this case.

/s/ Jeremy Creelan