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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

SOUTHERN UTAH DRAG STARS, LLC,
and MITSKI AVALOX,

Plaintiffs,

vs.

CITY OF ST. GEORGE, CITY COUNCIL OF
ST. GEORGE, COUNCILMEMBER JIMMIE
HUGHES, COUNCILMEMBER DANIELLE
LARKIN, COUNCILMEMBER NATALIE
LARSEN, COUNCILMEMBER GREGG
MCARTHUR, COUNCILMEMBER
MICHELLE TANNER, MAYOR MICHELE
RANDALL, and CITY MANAGER JOHN
WILLIS,

Defendants.

**DEFENDANTS CITY COUNCIL OF ST.
GEORGE, COUNCILMEMBERS JIMMIE
HUGHES, DANIELLE LARKIN,
NATALIE LARSEN, GREGG
MCARTHUR, AND MICHELLE
TANNER; MAYOR MICHELE
RANDALL; AND CITY MANAGER
JOHN WILLIS’S REPLY
MEMORANDUM IN SUPPORT OF
THEIR MOTION FOR JUDGMENT ON
THE PLEADINGS**

Civil No. 4:23CV44

Honorable David Nuffer

INTRODUCTION

Defendants City Council of St. George, Councilmembers Jimmie Hughes, Danielle Larkin, Natalie Larsen, Gregg McArthur, and Michelle Tanner, Mayor Michelle Randall, and City Manager John Willis (collectively “Defendants”) have moved for judgment on the pleadings

on the claims against them. In their opposition memo, Plaintiffs acknowledged that dismissal of these individual defendants and the City Council “would have no effect on the course of the proceedings going forward.” [Dkt. #73](#), p. 15. Despite this, Plaintiffs have opposed the motion on the grounds that (1) there is no immunity for claims against individuals in their “official capacity,” and (2) even if there was immunity, it does not apply. These arguments fail for several reasons. First, they do not address the grounds for dismissal of the City Council as defendant. Second, the Supreme Court has applied absolute immunity to claims against individuals in their “official capacity,” beginning in *Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719 (1980) and continuing in *Bogan v. Scott-Harris*, 523 U.S. 44, 53-54 (1998). Finally, the immunity applies to the individual defendants. Plaintiffs have sued Defendants for (1) upholding a denial of a special use permit, and (2) “approv[ing] Ordinance No. 2023-03-003, which imposed a six-month moratorium on the Council granting new permits for special events on City property in the City of St. George.” Complaint, Par. 70. The individual defendants are immune from suit for approving an ordinance and hearing and deciding Plaintiffs’ appeal. For these reasons, and others set forth below, the Court should grant Defendants’ motion.

ARGUMENT

I. PLAINTIFFS CONCEDE THEIR CLAIMS AGAINST THE “CITY COUNCIL OF ST. GEORGE” ARE UNFOUNDED.

Defendants moved for judgment on the pleadings on Plaintiffs’ claims against the City Council of St. George, who Plaintiffs named as a Defendant in their Complaint. *See* Complaint, [Dkt. #2](#), Caption Page, Par. 16. In their opposition memorandum, Plaintiffs ignored Defendants’ arguments for judgment on the pleadings for the City Council. Therefore, Plaintiffs concede that the City Council is entitled to judgment on the pleadings.

II. ABSOLUTE IMMUNITY APPLIES TO CLAIMS AGAINST CITY OFFICIALS IN THEIR OFFICIAL CAPACITIES.

Plaintiffs argue that “absolute immunity is unavailable to the individual defendants because they are sued in their official capacities.” Dkt. #73, p. 7. This is incorrect, as shown by the Supreme Court’s decision in *Bogan v. Scott-Harris*, 523 U.S. 44, 53-54 (1998), which Defendants cited in their Motion. In that case, the Supreme Court held that local legislators were entitled to absolute legislative immunity, and it did not distinguish between claims brought against them in their official capacities, though the Supreme Court briefing makes clear that claims were brought against the officials in both their individual and official capacities. See Brief for Petitioners, 1997 WL 469403, * 7 (“Scott-Harris filed suit in the United States District Court for the District of Massachusetts, against the City of Fall River, Mayor Bogan, Councillor Roderick, and other City Councillors and officials, in their individual and official capacities ...”).

Bogan follows the Supreme Court’s decision in *Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719 (1980). In this case, the Supreme Court also applied absolute legislative immunity to a suit against an official in both his individual and official capacity. “Consumers Union and the Virginia Citizens Consumer Council brought an action pursuant to 42 U.S.C. § 1983 against the Virginia Court, the Virginia State Bar, the American Bar Association, and, in both their individual and official capacities, the chief justice of the Virginia Court, the president of the State Bar, and the chairman of the State Bar’s Legal Ethics Committee.” *Id.*, at 725-726 (emphasis added). The Supreme Court held that “the Virginia Court and its members are immune from suit when acting in their legislative capacity.” *Id.*, at 734. The Supreme Court did not distinguish between the claims brought against the defendants in their individual or official capacities.

The Eighth Circuit recently noted this in *Church v. Missouri*, 913 F.3d 736 (8th Cir. 2019), where it held that “legislative immunity ... forecloses suit against the governor.” *Id.*, at 753. It then addressed Plaintiffs’ exact argument in the following footnote:

The plaintiffs argue that legislative immunity is a personal defense that does not apply to official-capacity suits, like the one here. They cite *Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2009), quoting a Second Circuit decision: “immunity, either absolute or qualified, is a personal defense that is available only when officials are sued in their individual capacities; the immunities officials enjoy when sued personally do not extend to instances where they are sued in their official capacities.” *Roach*, 560 F.3d at 870, quoting *Almonte v. City of Long Beach*, 478 F.3d 100, 106 (2^d Cir. 2007). But under *Consumers Union*, legislative immunity applies to official-capacity suits. *Consumers Union*, 446 U.S. at 725-26, 734, 100 S.Ct. 1967. *See also Scott v. Taylor*, 405 F.3d 1251, 1254 n.4, 1255 (11th Cir. 2005) (analyzing *Consumers Union* and *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), and “hold[ing] that the legislator defendants in the instant official capacity suit for prospective relief are entitled to absolute immunity.”).

Id., at 753 n. 3 (emphasis added). Thus, *Church* makes clear that absolute immunity applies to claims brought against legislators in their “official capacity.”

Plaintiffs rely on two cases to support their position. The first is *Sable II v. Myers*, 563 F.3d 1120 (10th Cir. 2009). In that case, the Tenth Circuit held that absolute legislative immunity applies “only to legislators sued in their individual capacities, not to the legislative body itself.” *Id.*, 1123. Plaintiffs argue that this language precludes application of the immunity for claims brought against individuals in their official capacities, but this is not what the quoted language says. The quoted language only states that the immunity does not apply to legislative bodies. This is clear from the body of the decision because the Tenth Circuit did not even use the term “official capacity” or “official capacities.” If the Tenth Circuit had intended to make this distinction, it would have said so and addressed the Supreme Court precedent cited by Defendants above. Thus, *Sable II* does not preclude immunity for official-capacity claims.

Plaintiffs next rely on the Supreme Court’s decision in *Kentucky v. Graham*, 473 U.S. 159 (1985). This case does not support Plaintiffs’ position for several reasons. First, it was issued in 1985. If it precluded application of immunity for official-capacity claims, the Supreme Court would not have reached the decision it did in *Bogan* 13 years later, in 1998. Second, the *Graham* Court did not address *Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719 (1980), which allowed immunity for “official capacity” claims. Third, unlike the present case, *Graham* did not involve claims against the official’s municipal entity. Rather,

The Commonwealth was sued, not for damages on the merits, but only for attorney’s fees should the plaintiffs eventually prevail. Shortly after the complaint was filed, the District Court, relying on the Eleventh Amendment, dismissed the Commonwealth as a party.

Id., at 161-162. This is a critical distinction because the absence of a municipality as a defendant in *Graham* left the Plaintiffs with no avenue for recovery for “official capacity” claims other than against the individual defendants. That is not the case here. Plaintiffs have sued St. George City, and Defendants have not moved for judgment on the pleadings for St. George City. Thus, unlike *Graham*, Plaintiffs may proceed and recover against St. George City for their “official capacity” claims. In fact, Plaintiffs acknowledged that dismissal of these individual defendants and the City Council “would have no effect on the course of the proceedings going forward.” *Dkt. #73*, p. 15. For these reasons, *Graham* is distinguishable from the present case and does not preclude application of absolute immunity to claims against individuals in their official capacities.

III. ABSOLUTE IMMUNITY APPLIES TO THE ACTS PLAINTIFFS ALLEGED IN THEIR COMPLAINT.

Plaintiffs argue that “Defendants do not even attempt to meet their burden to show their entitled 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.” [Dkt. #73](#), p. 9. This is incorrect. Defendants’ Statement of Facts contains 15 facts that quote verbatim from Plaintiffs’ Complaint. In the argument section, Defendants again quote directly from Plaintiffs’ Complaint for the acts at issue:

Plaintiffs have sued Defendants for (1) upholding a denial of a special use permit, and (2) “[approv\[ing\]](#) Ordinance No. 2023-03-003, which imposed a six-month moratorium on the Council granting new permits for special events on City property in the City of St. George.” Complaint, Par. 70.

[Dkt. #70](#), p. 5. Thus, Defendants argue they are immune based on Plaintiffs’ own allegations.

Plaintiffs argue that “Defendants’ application of the Advertising Prohibition to deny the Plaintiffs’ permit application and subsequent upholding of said denial were administrative, rather than legislative, in nature, such that the legislative immunity does not apply. [Dkt. #73](#), p. 9. This is incorrect. According to Plaintiffs’ Complaint, the City Council Members, Mayor, and City Administrator engaged in two unlawful acts. First, “On March 16, 2023, the City Council approved Ordinance No. 2022-03-003, which imposed a six-month moratorium on the Council granting new permits for special events on City property in the City of St. George, except for completed permit applications received by the City prior to March 15, 2023.” Complaint, [Dkt. #2](#), Par. 70. Approval of a city ordinance is clearly legislative, and Plaintiffs don’t argue otherwise. Thus, absolute legislative immunity applies.

Plaintiffs next allege they appealed the denial of their permit application to the City Council. Plaintiffs make detailed allegations regarding this appeal, including that it was heard and decided by the City Council, in Paragraphs 75-94 of her Complaint. Plaintiffs argue that immunity does not apply to these acts because they “were administrative, rather than legislative, in nature ...

the decision to deny Plaintiffs' application was not bound up with any major public policy decision." [Dkt. #73](#), p. 10 This argument is undone, again, by Plaintiffs' own complaint. In Paragraph 117, Plaintiffs allege, "As alleged above, the City's policy and practice restrict and chill Plaintiffs' speech and expression protected by the First Amendment based on its content, its message, its speaker, and its viewpoint." *Id.* (Emphasis added). Thus, Plaintiffs have alleged these actions were based on policy, the very basis for individual immunity.

Plaintiffs ignore the Tenth Circuit's decision in *Guttman v. Khalsa*, 446 F.3d 1027 (10th Cir. 2006), which Defendants relied upon in their motion. In *Guttman*, the Tenth Circuit noted, "The Supreme Court has long recognized that officials in administrative hearings can claim the absolute immunity that flows to judicial officers if they are acting in a quasi-judicial fashion." *Id.*, [at 1033](#) (citations omitted). "For an official at an administrative hearing to be protected by absolute 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 control unconstitutional conduct." *Id.* (Citations omitted). However, "[j]udicial immunity is not overcome by allegations of bad faith or malice." *Id.*, [at 1033](#) (citing *Mireles v. Waco*, 502 U.S. 9, 12 (1991)). After setting forth this standard, the Tenth Circuit held that the hearing officer who heard an ADA appeal was "clearly protected by absolute immunity" and relied upon a similar decision in *Horwitz v. State Bd. of Med. Examiners*, 822 F.2d 1508 (10th Cir. 1987) where "a plaintiff challenged a decision made by the Colorado State Medical Examiners Board in Colorado." *Guttman*, [at 1033](#). Here, the City Councilors heard Plaintiffs' appeal and issued a decision. This is a quintessentially judicial function. Clearly the results of that decision were "likely to result in a damages lawsuit by the

disappointed parties,” as that is exactly what has happened, and there are sufficient safeguards to control unconstitutional conduct. These include a right to appeal to state district court, which this Court noted in its preliminary injunction order, and the present lawsuit against the City. Plaintiffs do not address any of the factors set forth in *Guttman*.

Rather than address *Guttman*, Plaintiffs instead cite a list of factors for consideration set forth by the Tenth Circuit in an earlier case, *Saavedra v. City of Albuquerque*, 73 F.3d 1525 (10th Cir. 1996). Plaintiffs omit the Tenth Circuit’s holding in *Saavedra*, which is instructive. The Tenth Circuit held, “We hold that the district court properly applied *Butz* and *Horwitz* in granting individual appellees absolute judicial immunity.” *Id.*, at 1530. The individual appellees included hearing officers and a chairperson who oversaw an employment termination hearing. The City Council Members fulfilled a similar function here. Moreover, an analysis of the five factors in *Butz* supports application of immunity. Plaintiffs’ appeal hearing was adversary in nature. Both the City and Plaintiffs made arguments, verbal and written, to the City Council. Plaintiffs presented evidence, and though they chose not to have a lawyer present, this was not prohibited. Finally, the City Council deliberated and rendered a 4-1 decision in favor of the City. The proceeding was nearly identical to that in *Guttman*. Therefore, the immunity applies.

The Plaintiffs also cite *Kamplain v. Curry County Board of Commissioners*, 159 F.3d 1248 (10th Cir. 1998). In *Kamplain*, the Tenth Circuit held that “because Defendants were acting in an administrative capacity when they banned Plaintiff’s attendance, participation, and speech at Commission meetings, they are not entitled to absolute legislative immunity.” *Id.*, at 1253. Plaintiffs were not banned from meetings, and *Kamplain* did not involve the application of any City Ordinance. Here, Plaintiffs allege that the City Council applied the Advertising Provision of

the City Code in violation of their First Amendment rights, and this Court found that Plaintiffs were substantially likely to prevail on this in granting a preliminary injunction. Interpretation and application of city code are not merely administrative, and Plaintiffs have not cited any cases where such interpretation and application of city code was not entitled to absolute immunity.

IV. DEFENDANTS ARE ENTITLED TO ATTORNEYS' FEES PURSUANT TO 28 U.S.C. § 1927.

Plaintiffs argue that “Defendants claim that Plaintiffs have filed a ‘frivolous lawsuit’.” [Dkt. #73](#), p. 13. This is incorrect. Defendants acknowledge the Court granted a preliminary injunction, and after the Court entered that order, they worked hard to help Plaintiffs hold their event on June 30th. Defendants have never claimed the entire lawsuit was frivolous. The full citation Plaintiffs reference states that Plaintiffs have “pursued a frivolous lawsuit against the city council members, mayor and city administrator.” [Dkt. #67](#), p. 5 (emphasis added). This is also clear from (1) Defendants’ motion, which did not seek judgment on the pleadings on the claims against St. George City, and (2) Defendants’ request for attorneys fees, where they argue fees should be given because “Plaintiffs sued the City Council, the individual council members, the mayor and the City Manager despite longstanding immunities and bars to suit.” *Id.*, p. 9. Thus, Defendants only raised 28 U.S.C. § 1927 with regard to the claims against the City Council and the individual defendants.

Plaintiffs concede they had no basis to sue the “City Council of St. George,” as they do not address the motion for this Defendant in their opposition.

Plaintiffs further acknowledge their claims against the individuals are unnecessary. In their opposition, they state:

Until Defendants filed this motion, naming the individual defendants and the City Council had had no impact on the proceedings in this case ... 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 the proceedings going forward.

Dkt. #73, p. 14-15. This representation shows that there was no reason to name the individuals and City Council as defendants. There is, however, a very real benefit to the individual defendants of dismissal – they will no longer be named defendants in a federal lawsuit. This is an enormous (and by Plaintiffs' own admission, unnecessary) burden for any individual.

Finally, Plaintiffs argue that Defendants have needlessly multiplied the proceedings. Moving for judgment on the pleadings based on legal standards for immunity is not needlessly multiplying the proceedings. Plaintiffs, not Defendants, chose to name these individuals even though it was, by their own admission, unnecessary. This is the definition of needlessly multiplying proceedings. For these reasons, Defendants submit [28 U.S.C. § 1927](#) applies to the claims against the individual defendants and the “City Council of St. George.”

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court grant Defendants' motion.

DATED this 5th day of September, 2023.

SNOW CHRISTENSEN & MARTINEAU

/s/ Scott Young
Scott Young
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of September, 2023, I electronically filed the foregoing **DEFENDANTS CITY COUNCIL OF ST. GEORGE, COUNCILMEMBERS JIMMIE HUGHES, DANIELLE LARKIN, NATALIE LARSEN, GREGG MCARTHUR, AND MICHELLE TANNER; MAYOR MICHELE RANDALL; AND CITY MANAGER JOHN WILLIS'S REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS** with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

/s/ Kathy Hulse