Nos. 14-2174(L) & 14-2181

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PHILLIP PATRICK BACA, *et al.*,

Plaintiffs/Cross-Appellees,

v.

RICHARD J. BERRY,

in his official capacity as Mayor of Albuquerque,

Defendant-Appellee/Cross-Appellant,

LUIS ROBERTO VERA, JR., *et al.*,

Attorneys-Appellants/Cross-Appellees.

On Appeal From The United States District Court
For The District of New Mexico
Honorable William P. Johnson, No. CV 13-76 WJ/WPL

JOINT RESPONSE/REPLY BRIEF OF PLAINTIFFS/CROSS-APPELLEES AND ATTORNEYS-APPELLANTS/CROSS-APPELLEES

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STATEMENT OF RELATED CASES

This case is a cross-appeal, Nos. 14-2174(L) and 14-2181. There are no prior or related appeals.

INTRODUCTION

As the district court found, Plaintiffs and their former attorneys filed this civil rights suit in good faith, alleging violations of the federal and state constitutions and the Voting Rights Act. Only five-and-a-half months later, Plaintiffs moved to dismiss this case without prejudice, and the district court agreed that the record at that time did not support a dismissal with prejudice. This case barely left the starting block before both parties agreed it should be dismissed, and the fact that two years later it is *still* the subject of court proceedings leaves one wondering "how did we get here?"

The answer lies largely in the district court's abuse of discretion in refusing to grant Plaintiffs' dismissal motion and instead *sua sponte* staying the case based on its own concerns about "judicial economy." It was this legal error, rather than anything Plaintiffs or their former attorneys did, that "multiplied" any proceedings in this case. But even prior to that error, the answer lies in the city's confounding position, repeatedly advanced since July of 2013, that a dismissal without prejudice is the exact same thing as active litigation. This position flows neither from common sense nor the law, and it is certainly a view incapable of supporting an award of fees or sanctions. What is more, the city now paradoxically argues that Plaintiffs multiplied the proceedings by refusing to accept a dismissal with

prejudice, yet did not multiply the proceedings enough by actually litigating on the merits the very claims they sought to dismiss without prejudice.

As explained below and in Appellants' opening brief, this Catch-22 bears no relation to the law. Plaintiffs' suit had considerable merit or, at a minimum, was nowhere near the level of frivolousness required for fees and sanctions. Nonetheless, the city is pursuing sanctions not only against the civil rights attorneys who brought the suit, but also—in its cross-appeal—against the individual Plaintiffs who, as citizens of Albuquerque, sought only to protect their voting rights and those of their fellow Albuquerque citizens. The city's actions in pursuing sanctions against these citizens sends a chilling message about how the city will treat those who dare to stand up against its policies.

In this joint brief, Plaintiffs and their former attorneys respond in Section I to the city's cross-appeal of the district court's decision not to impose additional fees and sanctions against the individual Plaintiffs and their former attorneys, and reply in Section II to the city's opposition to the former attorneys' appeal of the district court's award of sanctions under 28 U.S.C. § 1927.

SECTION I: JOINT RESPONSE OF PLAINTIFFS/CROSS-APPELLEES AND ATTORNEYS-APPELLANTS/CROSS-APPELLEES

STATEMENT OF THE ISSUES

1. Did the district court correctly decline to award attorneys' fees to the city as the prevailing defendant in light of the city's concession that the case was filed in good faith and the fact that Plaintiffs' case was not frivolous, and given the district court's broad discretion to deny fees to prevailing defendants?

2. Did the district court properly decline to impose sanctions under Rules 16(f) and 37(d) against Plaintiffs and their former attorneys for alleged discovery violations in light of the court's broad discretion, the city's failure to seek an order compelling discovery, the city's eight-month delay in filing its sanctions motion, and the city's failure to comply with the district court's local rules regarding noticing depositions?

3. Did the district court properly decline to impose all fees the city sought after concluding that there was no legal basis for imposing certain portions of the requested fees?

STATEMENT OF THE CASE[1]

Plaintiffs are four Albuquerque citizens who brought suit in New Mexico state court on January 17, 2013 to vindicate their voting rights. The city council redistricting map they challenged kept the number of Latino-majority districts flat at three of nine, despite Latinos accounting for seventy-five percent of the city's population growth over the prior decade. A-29, 436.[2] The city subsequently removed the case to federal court. A-9. Five-and-a-half months later, on July 5, 2013, Plaintiffs filed a motion for voluntary dismissal without prejudice because of an intervening change in city election law. A-46. The city has conceded that Plaintiffs filed the suit in good faith. A-405; Add-4.

Following a Rule 16 initial scheduling conference on March 25, 2013, A-39, a pretrial order was entered setting the following schedule: Plaintiffs' expert witness disclosures due by May 23, 2013; the city's expert witness disclosures due by June 23, 2013; discovery to conclude by July 22, 2013; any discovery motions due by July 29, 2013; and any other pretrial motions due by August 6, 2013, A-41-43. The parties' Joint Status Report, which the district court adopted, stated that

[1] To avoid repetition, the Plaintiffs and Plaintiffs' counsel adopt by reference the Statement of the Case included in Appellants' opening brief on appeal, and set forth herein only those additional facts relevant to the city's cross-appeal regarding the fees and sanctions the district court declined to impose.

[2] References to Appellants' Appendix are denoted A-__, to the Addendum to Appellants' Opening Brief are denoted Add-__, and to the city's Supplemental Appendix are denoted Supp. A-__.

supplemental expert reports under Rule 26(e) would be due "within a reasonable time but no less than 45 days before trial." A-36. At the scheduling conference, the city stated that it was "willing to assist [Plaintiffs] with gathering relevant public data and avoid the expense or bother of usual discovery." A-39.

On April 5, 2013, Plaintiffs served their First Request for the Production of Documents. A-2-3. The city responded on May 3, 2013, merely objecting to eleven of thirteen requests, providing a website link in one response, and offering to mail documents responsive to another. A-3, A-150-55. The city served its First Amended Set of Interrogatories and Amended Requests for Production on May 31, 2013. A-3.

Plaintiffs served the expert reports of Dr. Lonna Atkeson and Mr. George Korbel on June 7, 2013, A-402, and the city served the expert report of Brian Sanderoff on June 25, 2013, A-3. Mr. Sanderoff contemplated the potential for supplemental expert reports and reserved the right to supplement his report, Supp. A-000016, an option the Joint Status Report adopted by the district court also permitted, A-36. Three days later, on June 28, 2013, the city served a notice of deposition of Mr. Korbel. A-104. Although the district court's local rules require fourteen days' notice, *see* D.N.M.LR-Civ. 30.1, the deposition was noticed for July 9, 2013, A-105, providing just twelve days' notice.

Three days later, on July 1, 2013—before the deadline to respond to the city's discovery requests had passed and over a week before the scheduled deposition of Mr. Korbel—Plaintiffs informed the city that they intended to dismiss their case. A-121. A motion to that effect was filed on July 5, 2013. A-46. Nonetheless, the city claims that it expended time thereafter preparing for Mr. Korbel's deposition. A-335.

On July 16, 2013, the city filed both an opposition to Plaintiffs' motion for voluntary dismissal without prejudice and a separate motion to dismiss the case with prejudice. A-49, A-82. The city contended that dismissal with prejudice was appropriate in part as a sanction under Rules 16(f) and 37(d) because Plaintiffs allegedly failed to respond to its discovery requests, served their expert reports after the due date, and provided insufficiently formal notice that they did not intend to proceed with Mr. Korbel's deposition. A-87-89. The city never sought to compel this discovery. A-187; Add-21.

The district court initially disagreed with the city, declining in a September 3, 2013 order to dismiss the case with prejudice. A-190; Add-24. But rather than grant Plaintiffs' motion to dismiss the case without prejudice, the court *sua sponte* stayed the case based solely on its view that this course of action "benefit[ted] judicial economy." A-190; Add-24. In doing so, the court rejected the city's discovery abuse allegations, concluding that "the Court finds no evidence on the

Court docket that [the city] ever sought formal judicial intervention for Plaintiffs' alleged failures to comply with the federal procedural rules." A-187; Add-21.[3]

With competing motions to dismiss on file, the court-ordered deadline of July 29, 2013 for discovery motions passed without any motion—including motions to compel or motions for attorneys' fees as a sanction for alleged discovery abuses—filed. Aside from a six-minute telephone status conference in November, A-192, no further proceedings occurred until the district court entered final judgment dismissing the case with prejudice on January 3, 2014. A-198. On January 17, 2014 the city sought, for the first time, attorneys' fees as a sanction against Plaintiffs and/or their counsel under Rules 16(f) and 37(d), A-208-10, alleging the same discovery violations that the district court had rejected as a basis for dismissal with prejudice, *compare id. with* A-87-89. This motion came two weeks after final judgment, A-198, nearly six months after the discovery-related motion deadline, A-42, nearly seven months after the allegedly insufficient notice of deposition cancelation and the due date for written discovery responses, A-105, and nearly eight months after Plaintiffs' expert reports were due, A-42. The city also sought attorneys' fees against the individual Plaintiffs pursuant to 42 U.S.C.

[3] When the district court ultimately dismissed the case with prejudice, it likewise declined to do so as a sanction under Rules 16(f) or 37(d). A-195; Add-16.

§§ 1988 and 1973*l*,[4] A-202-08, and sanctions against their former attorneys under 28 U.S.C. § 1927, A-210-11.

On February 3, 2014, the Albuquerque City Council passed a resolution urging the mayor to abandon his request for fees and sanctions. A-292-94. The resolution stated that "the 2010 redistricting process was in fact very difficult and controversial and it resulted in major changes in the City's Council districts, and the City Council was advised that the plan as adopted was not completely insulated from potentially valid legal challenges." A-292. Moreover, the resolution stated that "if citizens believe that the political process failed to give due regard to their legal rights and interests, their only recourse is through the courts," and that "citizens who stand up to challenge the actions of their government in court . . . should not be threatened with the possibility of crushing financial penalties[] and . . . such threats will negatively impact the willingness and ability of citizens to exercise their constitutional rights to challenge the actions of their government." A-292-93.

The mayor disregarded this resolution and continued to pursue fees and sanctions against both the city's citizens and their attorneys. But the district court declined to award attorneys' fees as a sanction under either Rules 16(f) or 37(d),

[4] Subsequent to the district court's consideration, § 1973*l* was re-codified as 5 U.S.C. § 10310. For the sake of consistency, however, Plaintiffs will continue to refer to the provision as § 1973*l*.

and declined to award the city attorneys' fees a prevailing defendant pursuant to 42 U.S.C. §§ 1988 or 1973*l*. The district court explained that

> awarding sanctions under these . . . rules and statutes would involve sanctioning the parties themselves, a result the Court does not find appropriate in this instance for the following reasons. First, the individual Plaintiffs were relying on the advice of counsel in continuing this litigation; second, the parties themselves are of modest means; and third, [the city] conceded at the hearing, and the Court finds, that this lawsuit was not filed in bad faith.

A-405; Add-4. Instead, the district court imposed sanctions only against Plaintiffs' former attorneys, pursuant to 28 U.S.C. § 1927, for vexatiously multiplying the proceedings from the date when the city served its expert report. A-405-07; Add-4-6.

After Plaintiffs' former attorneys noticed an appeal of the order imposing sanctions, the city decided to cross-appeal, pressing forward with its effort to penalize the individual Plaintiffs and obtain more sanctions on theories the district court had repeatedly rejected.

SUMMARY OF ARGUMENT

The city's cross-appeal, particularly its pursuit of fees against the individual Plaintiffs—its own citizens—is near frivolous. The city's scant effort to support its arguments suggests its true motivation is not to pursue a viable argument but instead to discourage future civil rights lawsuits. This Court must reject that strategy.

First, the city comes nowhere near establishing an entitlement to fees as a prevailing defendant. The Supreme Court has held that to obtain attorneys' fees, a prevailing *defendant* must establish that the plaintiff's suit was truly frivolous, unreasonable, and irrational, with no basis in fact or law, and that courts should not undertake *post hoc* reviews based on their ultimate conclusions on the merits. The city's paltry showing falls far short of meeting this standard. Plaintiffs' Voting Rights Act claim had significant merit. It was supported by an expert analysis the methodology of which this Court has endorsed. Had that analysis needed further development, the case schedule and the law permitted supplementation, though both parties moved for dismissal before that could have occurred. Plaintiffs' one-person, one-vote claim was amply supported by Supreme Court precedent. Even if these claims would not have ultimately prevailed, as a matter of law they were certainly not so frivolous or unreasonable to support an award of fees against the Plaintiffs. Moreover, even if the claims were frivolous, the city fails to present any argument that the district court nonethelesss abused its discretion in declining to award fees.

Second, the city's argument seeking fees for alleged discovery abuses under Federal Rules of Civil Procedure 16(f) and 37(d) fails for a host of reasons. The city distorts the case law to suggest the district court was *required* to impose sanctions if *any* discovery deadline was missed, but district courts have almost

unfettered discretion in deciding whether sanctions are warranted for discovery violations. The city does not even present an argument for why the district court abused its discretion by denying discovery sanctions. In any event, the district court was correct. The city never moved to compel any discovery; its request for sanctions is unreasonably late; it is ineligible for fees as a sanction because it did not properly notice the deposition of Plaintiffs' expert; Rule 37(d) does not even apply to an expert witness's deposition; the city suffered no prejudice as a result of any alleged discovery abuse; and the city makes no attempt to show how sanctions against the individual Plaintiffs are appropriate.

Third, the city's argument that it should be granted fees for the entirety of the case because Plaintiffs did not question the reasonableness of their time entries is misplaced. Plaintiffs contended that *no* fees or sanctions were appropriate, and the district court correctly rejected various of the city's requested avenues for obtaining fees and sanctions. Although the district court erred as a matter of law in imposing *any* sanctions, once it concluded that sanctions against Plaintiffs' former counsel were appropriate under 28 U.S.C. § 1927, it was required as a matter of law to tailor those sanctions to the conduct that multiplied the proceedings, not to grant *carte blanche* the city's entire request.

The city's cross-appeal has no merit and should be rejected by this Court.

ARGUMENT

I. The City Cannot Recover Attorneys' Fees Under 42 U.S.C. §§ 1988 or 1973*l*.

In its quest to penalize four Albuquerque citizens for attempting to protect their civil rights, the city primarily relies on 42 U.S.C. §§ 1988(b) and 1973*l*, which allow district courts, in their discretion, to award attorneys' fees to prevailing parties in civil rights cases. These fee-shifting provisions are designed to *encourage* plaintiffs to bring civil rights suits. *See* S. Rep. No. 94-1011, at 3 (1976); *reprinted in* U.S.C.C.A.N. 5908, 5910 ("All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain."). But awarding fees to the city—a prevailing *defendant*—would discourage other citizens of Albuquerque from standing up for their civil rights.

The city acknowledges that to prevail, it must satisfy the demanding standard of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), under which the district court had discretion to award fees only if Plaintiffs' claims were "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith . . . [or] the [P]laintiff[s] continued to litigate after [the claims] clearly became so." *Christiansburg*, 434 U.S. at 421-22; *see also Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983) (applying the *Christiansburg* standard to

§ 1988); *Shelby County v. Holder*, No. 10-651, __ F. Supp. 3d __, 2014 WL 2200898, at *15 (D.D.C. May 28, 2014) (applying the *Christiansburg* standard to § 1973*l*). This Court reviews the district court's rejection of the city's fees request for abuse of discretion but reviews the determination of frivolousness *de novo*. *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1581 (10th Cir. 1995); *see also D.A. Osguthorpe Family P'ship v. ASC Utah, Inc.*, 576 F. App'x 759, 764 (10th Cir. 2014) (unpublished) (reviewing frivolousness determination under § 1988 *de novo*). As explained below, the district court's finding of frivolousness was error, but, in any event, the district court's decision not to award fees against the individual Plaintiffs was well within its discretion.

A. Because Plaintiffs' Claims Were Not Frivolous, the City is Ineligible for Fees Under §§ 1988 and 1973*l* as a Matter of Law.

A frivolous claim lacks even "an *arguable* basis in either law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (emphasis added). "[A] finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible." *Denton v. Hernandez*, 504 U.S. 25, 33 (1992); *Blakely v. USAA Cas. Ins. Co.*, 633 F.3d 944, 949-50 (10th Cir. 2011) (relying on *Neitzke* and *Hernandez* to evaluate frivolousness in the § 1988 context).

Far from frivolous as of the date of receipt of Mr. Sanderoff's report—let alone from the outset of litigation—Plaintiffs' claims actually had significant

merit.[5] *See* Appellants' Opening Br. 31-43. Insisting that Plaintiffs' factual allegations and legal arguments were entirely frivolous—in other words, that the factual allegations were "irrational or wholly incredible" and the legal arguments lacked even an "arguable basis" in law—the city makes a variety of unjustified assertions.

Addressing Plaintiffs' Voting Rights Act claim, the city insists that its map benefited Hispanic voters and that Plaintiffs could not make out a claim under the Supreme Court's decision in *Thornburg v. Gingles*. A-408. As Appellants explained in their opening brief, *see* Appellants' Opening Br. at 37-40, however, Plaintiffs' expert conducted her analysis pursuant to the *Gingles* test. The city responds that she inappropriately collapsed the second and third *Gingles* factors in evaluating the presence of racially polarized voting and did not use the "magic words" from the *Gingles* decision that white voters in Albuquerque usually vote as a bloc to defeat the minority's preferred candidate. *See* City's Br. at 35. But in *Sanchez v. Colorado*, 97 F.3d 1303 (10th Cir. 1996), this Court approved the "conjunctive approach" to addressing the *Gingles* factors. *Id.* at 1315. "The

[5] Even if this Court agrees with the district court that Plaintiffs' claims became obviously frivolous once Plaintiffs received Mr. Sanderoff's report, Plaintiffs promptly sought to dismiss their claims, exactly what §§ 1988 and 1973*l* encourage. The case remained on the active docket only because the district judge, not Plaintiffs, refused to dismiss it. *Christiansburg*, 434 U.S. at 422. Holding Plaintiffs or their lawyers responsible for continuing to pursue claims they sought voluntarily to dismiss would make a hash of logic and law. *See* Appellants' Opening Br. 19–31; *infra* at Section II, Part I.

district court essentially collapsed these two preconditions, intertwining observations about whether Hispanics vote cohesively on some issues with general observations about racial bloc voting. However, as we have stated, both inquiries are rooted in the same statistical evidence offered to show minorities 'have expressed clear political preferences.' We therefore do not fault the conjunctive approach." *Id.* (quoting *Gomez v. City of Watsonville*, 863 F.2d 1407, 1415 (9th Cir. 1988); *see also Gomez v. City of Watsonville*, 863 F.2d 1407, 1417 (9th Cir. 1988) (finding vote dilution present despite lack of specific finding by district court that white voting bloc usually defeated minority-preferred candidates). As a matter of law, it thus simply is not the case that collapsing the second and third *Gingles* prongs made Plaintiffs' Section 2 claim so frivolous as to warrant fees and sanctions.

Moreover, even if Plaintiffs' experts had to conduct more analytical work to solidify their conclusions, they would have had an opportunity to supplement their reports. *See* Fed. R. Civ. P. 26(e); *Miller v. Pfizer, Inc.*, 356 F.3d 1326, 1332 (10th Cir. 2004) ("Supplemental disclosures are permitted, and indeed may be required."). Indeed, the parties *agreed* that expert reports could be supplemented up to forty-five days before trial, A-36, and no trial date was ever set. In fact, the city's expert specifically reserved the right to supplement his report. Supp. A-

000016. No one—the city included—envisioned that the case could not be developed further by either side after initial expert reports were served.

As for Plaintiffs' one-person, one-vote claim, the city argues that that maximum population deviation among the city council districts was within the generally acceptable ten percent range and that the city had a legitimate justification for deviation. A-409-10. The city ignores the plain text of *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *summarily aff'd*, 542 U.S. 947 (2004), which makes clear that a map with maximum deviations less than ten-percent may still be susceptible to constitutional challenge. "We need not decide . . . whether the mere use of a 10% population window renders Georgia's state legislative plans unconstitutional, because the policies the population window was used to promote in this case were not free from any taint of arbitrariness or discrimination." *Id.* at 1340 (internal quotation marks omitted). The city, citing cases that pre-date *Larios* by over two decades, asserts that "[t]here is no honest dispute . . . that plans having deviations of less than 10% enjoy a presumption of constitutional validity." City's Br. at 39. But that is exactly the dispute left open by *Larios*. *See* Thomas L. Brunell, *The One Person, One Vote Standard in Redistricting: The Uses and Abuses of Population Deviations in Legislative Redistricting*, 62 Case W. Res. L. Rev. 1057, 1063 (2012) (arguing that *Larios* "upset the commonly assumed notion

that 10 percent deviations fall within an effective constitutional safe harbor . . . [and] created uncertainty about what level of population deviation is allowed").[6]

More importantly, as was the case in *Larios*, 300 F. Supp. 2d at 1329, the redistricting map's deviations appear potentially discriminatory. The districts that had the largest population growth (*i.e.*, majority Hispanic districts) were largely over-populated in the redistricting, while the districts with the lowest population growth (*i.e.*, majority Anglo voters) were under-populated. *See* A-478, 480 (testimony of Plaintiffs' expert at sanctions hearing). Given growth trends, these population deviations will only worsen over time. This differential treatment of districts' population deviations was exactly the issue in *Larios*. Together with the outstanding legal question of whether use of a ten percent deviation presumption is at all constitutional, this raises substantial claims under *Larios*.

The city responds by pointing to data from the "full copy," City's Br. at 5, of Mr. Sanderoff's expert report, which it says demonstrates that the high-growth districts actually are only over-populated, when combined, by 1.6 percent. City's

[6] Moreover, there is no dispute that the city employed such a policy. The city's portion of the Joint Status Report filed with the district court makes this abundantly clear. Under the header "DEFENDANT'S CONTENTIONS," the city explained that "[t]he Redistricting Committee Guidelines provided . . . [t]o be equal in population in the context of state or local districting would require that the total population of any one district not constituting [sic] more than five percent off from a mathematically perfectly equal population across all districts." A-31-32. Mr. Sanderoff confirmed the city's "mere use" of this policy in his expert report, A-66, and he testified to the same at the sanctions hearing, A-434, A-440-41.

Br. at 39. The city never provided the district court with the "full copy" of Mr. Sanderoff's report; the district court only ever received the first ten pages of the report as an exhibit to the city's motion to dismiss. A-65-74 (corresponding to the city's Supplemental Appendix at Supp. A-000006-000015). The new version the city is adding to the record for the first time on appeal is sixty-five pages. Regardless, however, the "full copy" of Mr. Sanderoff's report actually supports Plaintiffs' *Larios* argument and not the city's position. Of the three most over-populated districts in the adopted map, two are Hispanic-majority districts (Districts 2 and 3) and one is a majority-minority district (District 5). Supp. A-000017-000018. On the other hand, the three most under-populated districts (Districts 4, 8, and 9) have the largest Anglo voting age populations (and the lowest Hispanic voting age populations) and were all among the slowest growing districts over the previous decade. Supp. A-000017-000018, Supp. A-000025. Moreover, the city's 1.6 percent figure is misleading because it disregards District 2, which is the most over-populated district but is not part of the city's calculation because it is a newly formed district whose growth rate relative to previous district lines is not reflected in Mr. Sanderoff's report.[7] In any event, the city does not

[7] New District 2 was formed by taking the downtown and surrounding neighborhoods from two former districts and combining them (former Districts 2 and 3). *Compare* Supp. A-000024 *with* Supp. A-000026; *see also* Supp. A-000018. Although the two former districts on the whole were not high growth,

dispute that on the whole the lowest growth areas were under-populated by its map while the highest-growth areas were over-populated, the same issue present in *Larios*.[8] That alone suffices to show Plaintiffs' suit was not frivolous.

The city also complains that "Plaintiffs never seriously made a *Larios* argument until the eleventh hour." City's Br. at 37. This reasoning (which the district court credited in sanctioning Plaintiffs' former counsel, *see* A-409-10; Add-8-9), is entirely unhinged from what happened in this case. Plaintiffs moved to dismiss before there was ever a chance to assert *any* developed legal arguments. Summary judgment motions were not due for over a month after the dismissal motion was filed. A-42. The trial date was not set. A-43. Plaintiffs were under no obligation to continue filing motions and making legal arguments on the merits after *both* parties had sought dismissal of the case, and during the stay entered *sua sponte* by the district court. Plaintiffs were clear in their briefing that they sought dismissal without prejudice because of the possibility they would assert the *Larios* argument at a later date. A-116. The city (and the district court) seem to expect that Plaintiffs should have somehow anticipated the city's motions for fees and sanctions, and, to "preserve" their ability to defeat such motions, should have

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Supp. A-000018, new District 2 includes the portions of those districts that had the highest population growth east of the river, s*ee* A-525.

[8] The city contends that Plaintiffs' preferred map also has population deviations. City's Br. at 39. But those deviations are consonant with population trends, such that low-growth areas are over-populated while high-growth areas are under-populated. A-525, Supp. A-000028-000029.

proceeded to file *more* substantive motions so as to not be accused of waiting until the "eleventh hour" to prosecute claims they only ever wanted to dismiss. This is nonsensical when the entire premise of the city's sanctions motion is that Plaintiffs were vexatiously multiplying the proceedings.[9]

But even assuming the city's criticisms of Plaintiffs' claims have some merit (which they do not), the city comes nowhere close to satisfying the *Christiansburg* standard. Under *Christiansburg*, frivolous claims are not just losers, but such obvious losers that any reasonable plaintiff would never have brought them. The Supreme Court has thus counseled that courts should avoid "*post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Christiansburg*, 434 U.S. at 421-22. "[E]ven if the law or the facts are somewhat questionable or unfavorable at the outset of litigation, a party may have an entirely reasonable ground for bringing suit," and "[a]llegations that, upon careful examination, prove legally insufficient to require a trial are not, for that reason alone, 'groundless' or 'without foundation' as required by *Christiansburg*." *Hughes v. Rowe*, 449 U.S. 5, 15-16 (1980).

Because so few claims can meet this exacting standard, this Court has explained that only in "rare circumstances" will "a suit [be] truly frivolous so as to

[9] Moreover, the city does not explain why Plaintiffs were required to present an expert opinion on the purely legal issue left open by *Larios* about whether the "mere use" of a ten percent policy by the city was unconstitutional.

warrant an award of attorneys' fees to the defendant." *Clajon Prod. Corp.*, 70 F.3d at 1581; *see also, e.g.*, *Thorpe v. Ancell*, 367 F. App'x 914, 920 (10th Cir. 2010) (unpublished) (same). Where this Court has found those "rare circumstances" to exist, the cases have involved things like wild accusations of misconduct supported by no evidence, *see Dill v. City of Edmond*, 162 F.3d 1172, 1998 WL 740962, at *2-3 (10th Cir. 1998) (unpublished table decision); *D.A. Osguthorpe Family P'ship*, 576 F. App'x at 763-65, dogged pursuit of purely speculative claims squarely refuted by available evidence, *see Twilley v. Integris Baptist Med. Ctr., Inc.*, 16 F. App'x 923, 926 (10th Cir. 2001) (unpublished), use of abusive litigation tactics to pursue obviously meritless claims, *see Crabtree ex rel. Crabtree v. Muchmore*, 904 F.2d 1475, 1478-79 (10th Cir. 1990), fantastic self-refuting allegations, *see Prochaska v. Marcoux*, 632 F.2d 848, 854 (10th Cir. 1980), abuse of the federal judicial system, *e.g. Chavez v. Bennett Propp*, 216 F.3d 1086, 2000 WL 702309, at *2-3 (10th Cir. 2000) (unpublished table decision), bad faith, *Taylor v. Coors Biotech Products Co.*, 951 F.2d 1260, 1991 WL 275643, at *2 (10th Cir. 1991) (unpublished table decision), and/or knowing pursuit of claims barred by uncontested procedural rules, *Santa Fe Ranchlands v. Santa Fe County*, 46 F.3d 1152, 1995 WL 41663, at *2-3 (10th Cir. 1995) (unpublished table decision). Put in this context, the city's criticisms of Plaintiffs' claims seem quite tame. Unlike in the aforementioned cases, no "rare circumstances" are present

here: Plaintiffs did not concoct a crazy conspiracy, knowingly ignore procedural rules that barred their claims, or abuse the federal judicial system.[10]

The city's argument is that Plaintiffs advanced purely speculative allegations that any reasonable plaintiff would have known were clearly refuted by the factual record. But, as explained above, Plaintiffs' claims found strong support in the law and the record. Voting patterns in Albuquerque indisputably reflect that Hispanics tend to vote one way and Anglos another, and Hispanic population growth indisputably exploded over the past decade. But, as discussed above, rather than create additional Hispanic majority districts, the city largely over-populated Hispanic-majority districts and under-populated Anglo-majority districts. These undisputed facts certainly gave Plaintiffs reason to believe that the city's map might violate Section 2 and the constitutional one-person, one-vote requirement.

[10] The city vaguely insinuates that Plaintiffs brought this case in bad faith. City's Br. at 50 ("Plaintiffs' actions and decisions would by design undermine the legitimacy of the plan. Distrust and doubt about the plan would discourage voters and invite cynicism and a lower turnout. Plaintiffs gamed the legal system."). But as the district court recognized, the city conceded below that Plaintiffs had *not* brought this case in bad faith, A-558, A-405 (acknowledging that the claims "were not brought in bad faith"), so the city has waived any reliance on bad faith on appeal, *see Walker v. Mather* (*In re Walker*), 959 F.2d 894, 896 (10th Cir. 1992) (holding that this Court generally should refuse to consider an issue conceded before the trial court). In any event, the city's unsupported speculation about the Plaintiffs' motivations fails to comport with reality. The city never explains why Plaintiffs, regular citizens of Albuquerque, would have had some nefarious intent to foment cynicism and undermine turnout, particularly given the city's repeated assertion that its map ensured reasonable representation for all communities of interest.

Thus, even if Plaintiffs' claims would have ultimately failed on the merits, the claims certainly cannot qualify as frivolous for purposes of §§ 1988 and 1973*l*. *See Hughes*, 449 U.S. at 15–16 (holding that claims are not frivolous merely because the facts are "somewhat questionable or unfavorable at the outset" or the case "upon careful examination . . . proves legally insufficient to require a trial"); *see also Jane L. v. Bangerter*, 61 F.3d 1505, 1517 (10th Cir. 1995) (holding that even unconvincing and novel legal theories are not frivolous for purposes of *Christiansburg* when they "ha[ve] not been squarely rejected by the Supreme Court and . . . [are] grounded in legal treatises").

In sum, the city has come nowhere close to showing that Plaintiffs continued to pursue claims that any reasonable litigant would have known were squarely refuted by a clear factual record and/or uncontested legal rules. Indeed, rather than evaluate whether Plaintiffs' claims are so frivolous as to satisfy *Christiansburg*, the city seems to equate the grant of a dismissal with prejudice with frivolousness, precisely the sort of *post hoc* reasoning the Supreme Court has warned against.[11] Accordingly, this Court should hold that because Plaintiffs' claims were not frivolous, the city is ineligible for fees as a prevailing defendant. *See, e.g., Ashby*

[11] *See also, e.g., Jones v. Texas Tech Univ.*, 656 F.2d 1137, 1146 (5th Cir. 1981) ("Because the court's findings appear to be no more than reiteration of its ultimate conclusions on the merits of Jones' claim . . . . , the court's findings of fact fall short of supporting its legal conclusion that Jones' lawsuit was frivolous.").

v. McKenna, 331 F.3d 1148, 1151 (10th Cir. 2003) (noting that an appellate court is free to affirm a district court decision on an alternative ground).

B. The District Court Reasonably Exercised its Discretion in Refusing to Award Fees.

Even if this Court agrees with the city that Plaintiffs' claims were or somehow became truly frivolous, this Court should affirm the district court's exercise of discretion not to award fees under §§ 1988 and 1973*l*. The city asserts that once *Christiansburg* is satisfied, the district court must award fees. That is flatly wrong. This Court, citing permissive language in §§ 1988 and 1973*l*, *see* 42 U.S.C. §§ 1988, 1973*l* (a district court "in its discretion, may allow" a prevailing party to recoup its attorneys' fees), has consistently held that a finding of frivolousness, unreasonableness, or a lack of foundation is a necessary but not sufficient condition for an award of fees. *See, e.g.*, *Prochaska*, 632 F.2d at 853; *Taylor*, 1991 WL 275643, at *2 (remanding a frivolous case likely filed and prosecuted in bad faith because "the ultimate determination of whether to grant attorney's fees rests in the discretion of the district court").

Here, exercising that discretion, the district court determined that it was inappropriate to award fees against these individual citizens of Albuquerque because "the individual Plaintiffs were relying on the advice of counsel in continuing this litigation" and the "Defendant conceded at the hearing, and the Court finds, that this lawsuit was not filed in bad faith." A-405. The city now

argues, in a scant two paragraphs, that the district court abused its discretion because "Plaintiffs presumably were involved in initiating the action, and certainly could have ceased pursuit of their claims," and courts should not allow civil rights plaintiffs to "hide behind the advice of counsel." City's Br. at 51-52 (internal quotation marks omitted).

Unsupported speculation about Plaintiffs' involvement in day-to-day case management comes nowhere close to demonstrating that the district court abused its discretion.[12] When considering whether to award attorneys' fees under a particular fee-shifting provision, a district court must exercise its discretion in light of "the large objectives" of that provision. *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 759 (1989) (quotation marks omitted). In this case, as the district court found, awarding fees would directly conflict with the "large objective[]" of §§ 1988 and 1973*l*: encouraging civil rights plaintiffs to bring non-frivolous suits.

For one thing, unlike civil rights claims that hinge on events that plaintiffs personally experienced, voting rights claims involve complicated fact patterns that only expert analysis can untangle. Most voting rights plaintiffs lack PhDs and

[12] In fact, taking the city's arguments to their logical extreme, district courts would always have to award fees to prevailing defendants in cases like this. Plaintiffs are always involved in initiating actions and can always cease pursuit (unless, as here, the district court improperly stays their case rather than allowing them to dismiss it), and plaintiffs always rely, to some extent or another, on advice of counsel.

have no experience interpreting dense expert reports. Indeed, in this case, the district court found frivolousness based entirely on its review of Mr. Sanderoff's expert report—not the type of inquiry that typical civil rights plaintiffs have any experience making. Thus, voting rights plaintiffs necessarily rely on advice of counsel to determine what the facts actually are, let alone whether those facts might support meritorious voting rights claims. Holding these Plaintiffs liable for reasonable reliance on advice of counsel would discourage future civil rights plaintiffs from bringing cases that similarly involve technical fact patterns and complicated legal rules.

Moreover, unlike many § 1988 plaintiffs, these Plaintiffs sought no damages or other form of relief that would specifically benefit them.[13] Instead, they simply attempted to perform a public service that would provide a diffuse benefit to an entire community. The willingness of Plaintiffs like these to sue is particularly dependent on limited downside risk. If bringing suit could provide them no distinct benefits but would expose them to potential liability for the defendant's attorneys' fees, they would have little incentive to risk their life savings. Instead, they would likely rely on their neighbors to vindicate their community's civil rights. And so would their neighbors, leaving no one willing to serve as a private

[13] For reasons explained above, the city has waived any argument that Plaintiffs brought this case in bad faith to achieve some self-serving purpose, and any such argument is purely speculative and frivolous in any event. *See supra* at n.10.

attorney general and protect the public interest, undermining the "large objectives" of §§ 1988 and 1973*l* by allowing civil rights violations to go unchallenged.

Given all of this, the city has fallen far short of demonstrating that the district court abused its discretion in denying the city's motion for fees against the individual plaintiffs under §§ 1988 and 1973*l*.

II. The District Court Did Not Abuse its Discretion in Declining to Impose Sanctions Against Plaintiffs or Their Former Attorneys Under Rules 16(f) and 37(d).

The district court also acted well within its discretion in declining to sanction Plaintiffs or their former attorneys under Rules 16(f) and 37(d). Under Rule 16(f), "the court *may* issue any just orders . . . if a party or its attorney . . . fails to obey a scheduling or other pretrial order." Fed. R. Civ. P. 16(f)(1)(C) (emphasis added). Under Rule 37(d), "[t]he court where an action is pending *may*, on motion, order sanctions if: (i) a party . . . fails, after being served with proper notice, to appear for that person's deposition; or (ii) a party, after being properly served with interrogatories . . . or a request for inspection . . . [,] fails to serve its answers, objections, or written response." Fed. R. Civ. P. 37(d)(1)(A) (emphasis added). The city attempts in its brief to turn the word "may" in both rules into a "must," implying through selective quotations, that if its allegations of discovery abuse are true, then it is automatically entitled to attorneys' fees as a sanction. *See* City's Br. at 53-54. That is not the law.

This Court "view[s] challenges to a district court's discovery sanctions order with a gimlet eye." *Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1320 (10th Cir. 2011). The district court has "such special discretion in this arena because of the comparative advantage [it] possess[es]" compared to the appellate court. *Id.*; *see also United States v. Brown*, 592 F.3d 1088, 1090 (10th Cir. 2009) (holding that the district court has "broad discretion" in deciding whether to impose discovery-related sanctions and that review is only for abuse of discretion (quotation marks omitted)); *Orjias v. Stevenson*, 31 F.3d 995, 1005 (10th Cir. 1994) (same); 8b Charles Alan Wright, *et al.*, *Federal Practice & Procedure* § 2284, at 470-71 (3d ed. 2010) (stating that district courts "have correctly reasoned that since the relevant subdivisions of Rule 37 use the word 'may' they have the discretion where appropriate to refrain from imposing sanctions for such reasons and on such conditions as they see fit"). Even *Mulvaney v. Rivair Flying Service, Inc.* (*In re Baker*), 744 F.2d 1438 (10th Cir. 1984), upon which the city heavily relies, emphasizes the district court's "very broad discretion to use sanctions where necessary" to manage discovery. *Id.* at 1440. The city is therefore flat wrong to suggest that the district court was required to impose sanctions upon a demonstration that discovery deadlines were missed.

Other than mischaracterizing the district court's level of discretion, the city points to no abuse of discretion by the district court in choosing not to sanction

Plaintiffs or their former attorneys under Rules 16(f) and 37(d). Nor could it; the district court's decision to decline to impose sanctions under these rules is correct for a number of reasons. *See Bailey v. U.S. Dep't of Agric.*, 59 F.3d 141, 142 (10th Cir. 1995) (stating that Court is "free to affirm a judgment of the district court on any grounds fairly supported by the record").

First, as the district court concluded in declining to dismiss the case with prejudice as a sanction under Rules 16(f) and 37(d), A-187; Add-21, the city never sought judicial intervention for any alleged discovery violation. The city thus never obtained an order compelling specific substantive responses and therefore cannot rely upon Rule 16(f) to contend that Plaintiffs' dismissal motion was insufficient to excuse further discovery obligations. *See* Fed. R. Civ. P. 16(f)(1)(C) (permitting district court to impose sanctions for failure to comply with court order).

Second, the city's motion comes much too late. "[A] Rule 37 motion for sanctions should be filed without unreasonable delay." *Lancaster v. Indep. Sch. Dist. No. 5*, 149 F.3d 1228, 1237 (10th Cir. 1998);[14] *see also Brandt v. Vulcan,*

[14] In *Lancaster*, this Court rejected the argument that a motion for sanctions under Rule 37(d) is *per se* untimely if filed after judgment is entered, disagreeing with the contrary conclusion of the Second Circuit in *Mercy v. Suffolk County*, 748 F.2d 52, 55-56 (2d Cir. 1984). In so holding, the *Lancaster* Court reasoned that "[t]he text of Rule 37 itself contains no time limitations on motions." 149 F.3d at 1236-37. Rule 37, however, expressly applies only to "[t]he court where the action is *pending*," Fed. R. Civ. P. 37(d) (emphasis added); *see Nichols v. Pierce*, 740 F.2d

Inc., 30 F.3d 752, 756 (7th Cir. 1994) ("[U]nreasonable delay may render such a motion untimely.").[15] In *Williams v. U-Haul Co. of Colorado*, 71 F. App'x 786, 788 n.3 (10th Cir. 2003) (unpublished), this Court concluded that a motion for sanctions was untimely where the "request c[ame] more than six months after the alleged infraction." Here, the city did not seek fees as a discovery sanction until January 2014—nearly eight months after Plaintiffs' expert reports were due, and nearly seven months after their discovery responses were due and Mr. Korbel's deposition was canceled. A-42, A-105, A-198. The city could have sought attorneys' fees as a sanction for this alleged conduct a reasonable time after it occurred—indeed, the city sought the sanction of dismissal on the basis of this same conduct under Rules 16(f) and 37(d) in July 2013. The delay in this case is longer than the delay this Court disapproved in *Williams*. And the very scheduling order that the city alleges *Plaintiffs* violated requires that any motions "related to

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1249, 1256 (D.C. Cir. 1984) ("A pending matter is one which is undecided . . . a lawsuit is pending from its inception through the final judgment."). Here, the city did not file its motion for Rule 37(d) sanctions until *after* final judgment had been entered and the case was therefore no longer pending before the district court. Plaintiffs and their former attorneys reserve the right to seek review of *Lancaster*'s holding on this basis should the Court reverse the district court's denial of fees under Rule 37(d).

[15] Although this Court has not passed on whether a Rule 16(f) sanctions motion must be timely filed, nothing about Rule 16(f) suggests it should be treated differently than the other sanctions provisions. *See Lancaster*, 149 F.3d at 1237; *Steinert v. Winn Grp., Inc.*, 440 F.3d 1214, 1223 (10th Cir. 2006) (motion for sanctions under 28 U.S.C. § 1927 "should not be unnecessarily or unreasonably delayed").

discovery"—which plainly includes a motion for discovery-related sanctions—were to have been filed by July 29, 2013. The city has offered no explanation for its tardy motion.

Third, the city's contention that Plaintiffs failed to provide sufficiently formal notice that they would not proceed with Mr. Korbel's deposition (which would have occurred *after* Plaintiffs had moved to dismiss the case) cannot support a motion for sanctions under Rule 37(d). Plaintiffs notified the city on July 1, 2013, three days after the city served its notice of deposition and more than a week before the deposition was scheduled, that Plaintiffs would be moving to dismiss their case. Although Plaintiffs did not at that time file a motion for a protective order and a notice of non-appearance per Local Rule 30.2, it should have been obvious to the city's counsel that Plaintiffs did not intend to proceed with the deposition of their expert. *Cf. EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, No. CIV-02-1644 JB/RJS, 2008 WL 2229553, at *7 (D.N.M. 2008) (where party failed to timely file notice of non-appearance "numerous discussions between the parties concerning . . . objections to the depositions, demonstrate[d] . . . substantial compliance with Local Rule 30.2"). Moreover, under the district court's local rules, "[s]ervice of notice of deposition . . . must be made at least fourteen (14) days before the scheduled deposition." D.N.M.LR-Civ. 30.1. Sanctions for failure to attend a deposition, in turn, may only be imposed where a

party is "served with proper notice." Fed. R. Civ. P. 37(d)(1)(A)(i). Here, the city's notice of Mr. Korbel's July 9, 2013 deposition was served on June 28, 2013, providing only twelve days' notice. Because the city did not serve "proper notice," it cannot seek sanctions based on Plaintiffs' alleged failure to provide sufficiently formal notification that Mr. Korbel's deposition would be cancelled.

Fourth, Rule 37(d) applies only when parties or their "officers, directors, or managing agents" fail to appear at their own depositions. Mr. Korbel was not Plaintiffs' "officer, director, or managing agent," and thus the city cannot recover fees under Rule 37(d) for his alleged unjustified failure to appear. *See Founding Church of Scientology of Wash., D.C., Inc. v. Webster*, 802 F.2d 1448, 1452–53 (D.C. Cir. 1986) (explaining that the rule's "managing agent" language refers to those authorized to speak on behalf of corporations).

Fifth, the city was not prejudiced by the lack of any discovery because Plaintiffs (and the city) moved to dismiss the case. Since there were no proceedings in which the city was required to defend the suit on the merits, the city cannot establish that the district court abused its discretion in denying sanctions for alleged discovery violations.

Sixth, even assuming some discovery violations did occur, the city has failed to show entitlement to any attorneys' fees. Although the city asserts that attorneys' fees are "mandatory sanctions" for noncompliance with discovery rules, City's Br.

at 54, that is a misstatement of clear law. "The rules, by their terms, limit assessments thereunder for the fees and expenses of the adverse party resulting from noncompliance." *Turnbull v. Wilcken*, 893 F.2d 256, 259 (10th Cir. 1990). Only upon a showing of "bad faith" does a district court have discretion to order a party to pay "the entire litigation costs of the adverse party." *Id.* The city does not contend that Plaintiffs or the former attorneys engaged in bad faith conduct, *see* City's Br. at 52-56; even if the city could demonstrate that the district court's denial of discovery sanctions was an abuse of discretion, it would be limited to the specific fees or expenses it incurred as a result of noncompliance. But the city has failed to identify any such fees or expenses, nor has it bothered to explain how the district court abused its considerable discretion in declining to award sanctions on this basis.

For these reasons, the district court plainly was well within its discretion in declining to impose sanctions on the basis of Rules 16(f) and 37(d), and that portion of its order should be affirmed. Moreover, even if this Court finds discovery sanctions warranted against Plaintiffs' former attorneys, it should defer to the district court's decision not to sanction the individual Plaintiffs themselves under Rules 16(f) and 37(d). "The intent is to impose the sanction where the fault lies," *In re Baker*, 744 F.2d at 1440, "i.e., with counsel or client," *Olcott v. Delaware Flood Co.*, 76 F.3d 1538, 1557 (10th Cir. 1996) (quotation marks

omitted). Here, observing that the individual Plaintiffs reasonably relied on advice of counsel throughout this suit and that these Plaintiffs did not willfully abuse the discovery process or otherwise act in bad faith, the district court correctly refused to hold Plaintiffs personally liable for the city's attorneys' fees, and the city has given no reason to second-guess this conclusion. A-405. This Court should therefore defer to the district court and reject the city's plea for discovery sanctions.[16]

III. The District Court Did Not Abuse Its Discretion by Declining to Award All Requested Fees.

The city appears to contend that the district court abused its discretion by not accepting the city's request for sanctions and fees *carte blanche* because the court's basis for imposing sanctions was not one advocated by *Plaintiffs*. *See* City's Br. at 56 ("Plaintiffs never argued that [the city] should only recover fees after a certain date . . . ."). This turns the law and facts on their head.

Plaintiffs contended that *no* sanctions and fees should be imposed because their claims were not frivolous.[17] The district court properly exercised its discretion to deny the city's motion with respect to Rules 16(f) and 37(d), and 42

[16] The city has not opposed the argument that at the very least Mr. Maestas should not be sanctioned and this Court should therefore accept that argument. The city did not even serve copies of its discovery requests upon Mr. Maestas, *see* Supp. A-000002, and therefore sanctions against him under Rules 16(f) and 37(d) would be particularly inappropriate.

[17] In addition, Plaintiffs objected to the time entries proffered by the city because redactions rendered them impossible to challenge. A-396.

U.S.C. §§ 1988 and 1973*l*. *See supra* Parts I and II. The district court thus properly declined to award any fees or sanctions that these provisions would allow. Plaintiffs' victory in preventing the imposition of *any* fees or sanctions under these provisions is not erased by their failure to argue in the alternative that, should such fees or sanctions be imposed, individual entries were unreasonable.

Although the district court erred in concluding that fees should be imposed as a sanction against Plaintiffs' former attorneys for vexatiously multiplying the proceedings under 28 U.S.C. § 1927, *see* Appellants' Opening Brief and Section II, *infra*, once it made that determination, it was *required* to "identify the extent of the multiplicity resulting from the attorney's behavior" and award only the "costs arising therefrom." *Braley v. Campbell*, 832 F.2d 1504, 1513 (10th Cir. 1987) (*en banc*); *see also Peterson v. BMI Refractories*, 124 F.3d 1386, 1396 (11th Cir. 1997) (limiting the amount of a § 1927 sanction to the "'costs, expenses, and attorneys' fees reasonably incurred" because of "excess proceedings" (quoting 28 U.S.C. § 1927)).

The city's argument that the district court abused its discretion by not imposing the city's entire legal bill for the case as a sanction is entirely at odds with the text of 28 U.S.C. § 1927 and the cases interpreting it. Plaintiffs were not required to argue both that no sanctions were appropriate and in the alternative that their attorneys *should* be sanctioned, but only for the time after service of Mr.

Sanderoff's expert report. Moreover, because the city *asked* for fees to be imposed as a sanction based upon the content of Mr. Sanderoff's report, A-560, A-561, A-562-63, it cannot now argue on appeal that the district court erred in imposing sanctions on the very basis it advocated. *See FTC v. Accusearch Inc.*, 570 F.3d 1187, 1204 (10th Cir. 2009) ("The invited-error doctrine precludes a party from arguing that the district court erred in adopting a proposition that the party had urged the district court to adopt." (internal quotation marks omitted)).

The cases cited by the city are inapposite. *See* City's Br. at 57-58. First, these cases do not involve fees awarded as a sanction, and are thus not limited by the requirement that the sanction amount be congruent with the objectionable conduct. Second, contrary to the city's contention, the court did not *sua sponte* conclude that the city's fees prior to the service of the expert report were unreasonable, rather, the district court concluded that the city was not entitled to any fees at all for that period because the event triggering sanctions had not yet occurred. Although the district court abused its discretion in imposing *any* sanctions, it certainly did not abuse its discretion by failing to impose *all* the fees requested by the city.

* * * * *

The only aspect of this case that might actually qualify as truly frivolous is the city's cross-appeal against the individual Plaintiffs. The city has little to gain

from receiving a fee award against the individual Plaintiffs—the question of frivolousness underlies both sanctions under § 1927 and fees under §§ 1988 and 1973*l*, and any discovery abuse sanctions would be the same whether awarded against the lawyers or the individual Plaintiffs. Moreover, even after failing to convince the district court that the individual Plaintiffs should be penalized, the city devotes just a few pages of its combined brief to the cross-appeal and makes nothing but conclusory and speculative arguments. This cross-appeal therefore has all the hallmarks of a strategic lawsuit against public participation: a lawsuit filed by those in power not to receive particular relief, but to discourage individual citizens from holding public officials accountable.

Unfortunately, the city may have already achieved this goal. Despite the city council's clear opposition to continued harassment of the individual Plaintiffs, the city has forced these four citizens to endure months of financial uncertainty and worry simply for having the gall to file a civil rights lawsuit in good faith. Media accounts of the case will undoubtedly discourage future citizens of Albuquerque from raising civil rights claims against the city. In order to ensure that future civil rights plaintiffs do not fear similar retribution for seeking redress of civil rights violations, the individual Plaintiffs request that this Court consider requiring the city to show cause why it should not be required to pay their attorneys' fees incurred as a result of the city's decision to mount a frivolous cross-appeal against

its own citizens. *See* Fed. R. App. P. 38 (allowing appellate courts to require parties to pay opponents' attorneys' fees for filing and prosecuting frivolous appeals); 28 U.S.C. § 1927 (allowing appellate courts to require attorneys to pay opponents' attorneys' fees for needlessly multiplying proceedings).

SECTION II: REPLY OF ATTORNEYS-APPELLANTS/CROSS-APPELLEES REGARDING 28 U.S.C. § 1927 SANCTIONS

SUMMARY OF ARGUMENT

The district court erred as a matter of law in imposing sanctions against Plaintiffs' former attorneys for "vexatiously multiplying" proceedings they sought to end with voluntary dismissal. The city's arguments to the contrary fall short.

First, the city does not dispute that the district court cited "judicial economy" as the basis for staying the case rather than granting Plaintiffs' dismissal motion; neither does it dispute that doing so is an abuse of discretion under Tenth Circuit law. As such, the district court, and not Plaintiffs' former attorneys, caused any multiplication of the proceedings. The city's only argument is that the court was actually helping Plaintiffs by refusing to grant their request—that the court just "gave them more time" to consider their claims. This is history rewritten. Plaintiffs did not seek time, they sought the freedom to consider their options on their own time and their own terms. The district court ordered Plaintiffs to remain in the case after Plaintiffs sought dismissal; it cannot now sanction their attorneys for complying.

Second, the city offers no response on the law as to how a district court can sanction attorneys for not immediately dropping their clients' case upon receipt of an opposing expert's report. The district court's unprecedented rationale is incompatible with the ordinary process of litigation. And the city plainly falls short of demonstrating that Plaintiffs' claims were so frivolous as to warrant sanctions.

Third, the city does not dispute that § 1927 requires an objective inquiry, and the city acknowledges that the district court engaged in a subjective, speculative inquiry into whether its expert report was the true cause of Plaintiffs decision to seek dismissal without prejudice. This was legal error. The city's only response is that the district court's analysis was proper because it stated its conclusions using objective-sounding words. It is not the terminology employed by the district court that matters, however, but rather its actual analysis. Here that analysis was subjective and therefore constituted legal error.

ARGUMENT

I. Plaintiffs' Attorneys Cannot be Sanctioned for "Multiplying" Proceedings They Attempted to End with Voluntary Dismissal.

A. The District Court's Abuse of Discretion in Staying the Case Rather Than Granting Plaintiffs' Motion for Dismissal Without Prejudice is Solely to Blame for any "Multiplication" of the Proceedings.

The district court, not Plaintiffs, multiplied the proceedings in this case by entering a stay even though both parties asked the court to dismiss the case, and

even though the district court acknowledged at the time that the "single question" before it was "whether this case should be dismissed with or without prejudice." A-186; Add-20. Its only stated reason for staying the case was to benefit judicial economy—to keep the case on its docket. As this Court has clearly held, denying a motion to dismiss for judicial economy constitutes an abuse of discretion. *See Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997); *Clark v. Tansy*, 13 F.3d 1407, 1411 (10th Cir. 1993); Appellants' Opening Br. at 21-23. Without this legal error by the district court, the case would have been dismissed and there would have been no further proceedings. This alone is the cause of any "multiplication"—to the extent there was any—of the proceedings.

The city does not take issue with the district court's conclusion at the time it issued its stay order that the record was "insufficient to warrant dismissal with prejudice" and that there was not "sufficient evidence that Plaintiffs should be punished for filing this lawsuit." A-190; Add-24.[18] The city's sole response is to contend that the district court was not acting solely based on judicial economy, but

[18] The city papers over the district court's conclusion in this regard, instead discussing the district court's later order dismissing the case with prejudice. *See* City's Br. at 21-23. But because the district court in September of 2013 had concluded the city would not suffer prejudice from the dismissal under the terms sought by Plaintiffs, yet declined to grant Plaintiffs' motion, it was the district court, and not Plaintiffs, that was responsible for the case continuing rather than ending.

instead "was merely giving Plaintiffs the time to evaluate the impact of the fall elections that they requested." City's Br. at 17-18.

The problem is that Plaintiffs did not ask the district court for more "time," they asked the district court to dismiss the case. They did not want a court supervising their deliberations about whether to re-file a lawsuit after the fall elections, nor did they want to operate on the court's, or the city's, timeframe. They wanted the ability to assess whether, when, and where a potential new suit would be filed, unbounded by obligations to opposing counsel or the court. Put simply, they wanted to be placed back in a pre-litigation stance. This was their right under Rule 41. "Absent legal prejudice to the defendant, the district court normally should grant . . . a dismissal" sought under Rule 41(a)(2). *Ohlander*, 114 F.3d at 1537; *see also Davis v. USX Corp.*, 819 F.2d 1270, 1274 (4th Cir. 1987) ("It is well established that, for purposes of rule 41(a)(2), prejudice to the defendant does not result from the prospect of a second lawsuit."); *id.* at 1274-75 ("Ordinarily the mere fact that the plaintiff prefers the state courts ought not to prevent his discontinuing his suit; one court is good as another." (quotation marks omitted)).

The court's only rationale for staying the case, rather than granting Plaintiffs' motion for dismissal without prejudice, was "judicial economy." A-190, Add-6. For whatever reason, the district court apparently wished to maintain

judicial supervision over Plaintiffs' decisional process of whether the city's Charter amendment had sufficiently ameliorated their vote dilution concerns.[19] But the court has no roving jurisdiction to force litigation to continue that both parties wish to end. The court should not have been involved at all after concluding that dismissal with prejudice was unwarranted.

It is irrelevant that Plaintiffs did not seek reconsideration of the district court's stay order or appeal its final judgment dismissing the case with prejudice. *See* City's Br. at 20-21. The city suggests, with no citation to any relevant law, *see id.*, that in order to contend that the district court's actions were the cause of any multiplication, Plaintiffs were required (apparently through clairvoyance) to anticipate the sanctions motion and thereby appeal the district court's erroneous orders. But there were any number of strategic reasons for Plaintiffs not to appeal the district court's judgment of dismissal with prejudice, even though it was wrong as a matter of law. *Cf. AeroTech, Inc. v. Estes*, 110 F.3d 1523, 1528 (10th Cir.

[19] The city questions Plaintiffs' citation to the Charter amendment as a rationale for dismissing the case without prejudice. City's Br. at 21-22. The district court, however, found that rationale "viable," A-188; Add-22, and in any event, the city is wrong. The results of the District 7 special election demonstrate that fact. In the primary, the top finisher—a Republican disfavored by Latinos—received less than fifty percent of the vote, while two Democratic challengers split the remaining vote. A-112, A-458-59. Prior to the Charter amendment, the Republican would have been elected. But in the run-off election in November 2013, the Latino-favored Democratic candidate won, and Albuquerque's city council switched from 5-4 Republican control to 5-4 Democratic control. This is exactly the scenario Plaintiffs thought might result when they sought dismissal without prejudice. A-112.

1997) (holding that district court, absent exceptional circumstances, may not award attorneys' fees when dismissing a case with prejudice under Rule 41, but may when dismissed without prejudice). Plaintiffs are not seeking to undo the district court's final judgment (even though it was in error), but rather are contending that the district court, through its improper stay order, was the cause of any multiplication—one of the central inquiries of a motion for sanctions under § 1927. Parties are not obligated to exhaust all possible appeals in order to preserve arguments in the event that a sanctions motion is filed. Were it otherwise, courts would be inundated with motions and appeals filed solely to "preserve" issues for potential sanctions motions. There is no waiver doctrine that requires this and the city offers no support in the law for its assertion of one. *See MacArthur v. San Juan Cnty.*, 495 F.3d 1157, 1160-61 (10th Cir. 2007) ("[M]ere conclusory allegations with no citations to the record or any legal authority for support does not constitute adequate briefing." (internal quotation marks omitted) (bracket in original)).

The city offers no viable response to the district court's abuse of discretion, which was the sole reason there was any "multiplication" of the proceedings in this

case after Plaintiffs sought dismissal.[20] The district court erred as a matter of law in concluding that Plaintiffs' attorneys were the cause of any multiplication.

B. Plaintiffs' Attorneys Cannot Be Sanctioned for Complying with the District Court's Stay Order.

Plaintiffs' attorneys cannot be sanctioned for complying with the district court's stay order, which required Plaintiffs to continue participating in the litigation until after the 2013 fall elections. As Plaintiffs' attorneys explained in their opening brief, where a court invites a path of conduct, it may not later sanction an attorney for following that course. *See* Appellants' Opening Br. at 24-25 (citing cases).

The city responds that the district court did not invite Plaintiffs to remain in the case despite seeking dismissal, but rather the court "merely acquiesced in Plaintiffs' request for more time." City's Br. at 24. As explained above, Plaintiffs did not "request . . . more time." They requested dismissal without prejudice and the attendant freedom to consider their options on their own time and own terms. Perhaps the city is correct that the word "invite" is not the best verb here—"order"

[20] The city also claims that it is "clear from the [district court's] decision . . . . sanctioning Plaintiffs' counsel under § 1927[] that the [district court] was convinced that Plaintiffs should have dismissed this case long before it entered the stay." City's Br. at 18. In fact, the district court (although wrong for all the reasons set forth herein) set the date at which it believed Plaintiffs should have dismissed their case at June 25, 2013, the week before Plaintiffs actually sought dismissal of the case.

is better. The district court ordered Plaintiffs and the city to remain parties to a case they both sought to dismiss.

The city's characterization of Plaintiffs' compliance with the district court's stay order as "drag[ging] the case out even after the elections," City's Br. at 24, reflects its strange and steadfast assertion that dismissal without prejudice is the same as active litigation. They are, in fact, the opposite of each other. In the former, there is no active case. There might be a case in the future or there might not. In the latter, there is an actual ongoing lawsuit. The city's misunderstanding of basic civil procedure is irrelevant in any event, because "it is well established that, for purposes of rule 41(a)(2), prejudice to the defendant does not result from the prospect of a second lawsuit." *Davis*, 819 F.2d at 1274.[21]

[21] The city also complains about Plaintiffs' attorneys' objection to the district court's extrajudicial determination—its "ascertain[ment]" of Plaintiffs' position after the status conference it canceled and never rescheduled—asserting that Plaintiffs "do not cite the Court to any decisions based on matters outside the proceedings." City's Br. at 25-26. But the city does so itself: "The [d]istrict [c]ourt also based its sanctions on Plaintiffs' unwillingness to make a decision even after the fall elections." *Id.* at 24; *see also* Sanctions Order at A-196. After the District 7 special election, the court canceled the status conference at which it was to learn the parties' respective positions and shortly thereafter dismissed the case with prejudice, so it had no way of knowing Plaintiffs' position regarding their suit except by relying upon information it apparently "ascertained" outside the official proceedings. *See United States v. Young*, 45 F.3d 1405, 1415 (10th Cir. 1995) (holding it inappropriate for court to "form dispositions or opinions relying upon knowledge acquired outside of such proceedings"). Plaintiffs were not required to object to the district court on this basis or seek disqualification of the district judge. *See* City's Br. at 26 n.7. Plaintiffs did not learn that sanctions would be imposed based upon an extrajudicial ascertainment until the sanctions

The fact that Plaintiffs wished for their case to be dismissed without prejudice is not, as the city asserts, a "refusal to make a decision." City's Br. at 18. It is *itself* a decision. A lawsuit can be meritorious *and* be one that Plaintiffs wish to dismiss without prejudice to their ability to refile. Plaintiffs maintained throughout (correctly) that their suit had merit. This does not obligate them, however, to continue with their suit. It was legal error for the district court to order Plaintiffs' counsel to do so, and then sanction them for complying.

C. Sanctions Were Improper Because Plaintiffs Had a Viable Argument for Dismissal Without Prejudice to Litigate the State Claim in State Court.

The district court also erred in its sanctions order by dismissing as "absurd," A-410; Add-9, Plaintiffs' offer to forego their Section 2 and federal constitutional claim and proceed only with their state constitutional claim in state court. Plaintiffs offered this as a compromise to the city's request that the entire case be dismissed with prejudice. Plaintiffs' offer had significant support in the law. "[T]he overwhelming majority of cases that have considered the issue have held that the fact that a voluntary dismissal will destroy federal jurisdiction is insufficient to constitute prejudice to a defendant." *Johnson v. Pharmacia & Upjohn Co.*, 192 F.R.D. 226, 228 (W.D. Mich. 1999); *see* Appellants' Opening Br. at 27-28 (citing cases).

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order was announced. Plaintiffs' former attorneys have appealed that order; nothing more is required to lodge this objection.

Rather than confront *any* of those "overwhelming majority" of cases or in any way distinguish them, the city rests on the *two* cases that reach the opposite conclusion. *See* City's Br. at 28. But even if the district court wished to become the third court in the small minority taking this view of the law, the "overwhelming majority" of courts agree with Plaintiffs, and it was accordingly inappropriate to *sanction* Plaintiffs' attorneys for advancing this well-supported legal theory.[22] *Cf. Proctor & Gamble Co. v. Amway Corp.*, 280 F.3d 519, 531-32 (5th Cir. 2002) (holding sanctions inappropriate where claim based on unsettled legal theory).

D. The Record Does Not Support the District Court's Sanctions Order.

The sparse docket sheet likewise demonstrates that the district court abused its discretion in concluding that Plaintiffs' attorneys had vexatiously multiplied the proceedings. The city does not dispute that there were hardly any "proceedings" in this case. *See* City's Br. at 28-29. Instead, it asserts that sanctions under § 1927 were appropriate because this case allegedly "required a great deal of behind-the-scenes management." *Id.*

That is not enough for sanctions. For § 1927 to apply, an attorney's conduct must "result[] in *proceedings* that would not have been conducted otherwise."

[22] It is not necessary, as the city suggests, for Plaintiffs to "offer any explanation as to why their state claims alone would have more merit than in combination with their federal claims." City's Br. at 27. It suffices that Plaintiffs wished to return to the forum in which they originally filed their lawsuit. *See, e.g.*, *Davis*, 819 F.2d at 1274-75; Appellants' Opening Br. at 27-28.

Peterson, 124 F.3d at 1396 (emphasis added). "The plain statutory language of [§] 1927 makes clear that this section is not a 'catch-all' provision for sanctioning objectionable conduct by counsel. . . . [The] conduct must multiply the *proceedings*." *Schwartz v. Million Air, Inc.*, 341 F.3d 1220, 1225 (11th Cir. 2003) (emphasis added). "[B]ehind-the-scenes management" and "proceedings" are not the same thing. Plaintiffs' attorneys were not responsible for the city's apparent flurry of "behind-the-scenes" activity after Plaintiffs sought to dismiss the case.[23] This case falls remarkably short of the standard for sanctions.

II. The Service of Mr. Sanderoff's Expert Report Cannot Trigger Sanctions.

A. An Opponent's Expert Report Does Not Trigger an Obligation to Abandon a Case Under Threat of Sanctions.

The district court erred in concluding that Plaintiffs' attorneys could be sanctioned for vexatiously multiplying the case by not abandoning their clients' case the same day they were served with the city's expert report. As Appellants' opening brief demonstrates, the district court's conclusion in this regard is totally at odds with the Federal Rules of Civil Procedure and with litigation practice generally. *See* Appellants' Opening Br. at 32-35; *Conroy v. Vilsack*, 707 F.3d 1163, 1168 (10th Cir. 2013) (proponent of expert testimony bears burden to prove

[23] The city *again* asserts that Plaintiffs "should not have continued after June of 2013," City's Br. at 29, blindly ignoring that Plaintiffs moved to dismiss their case in July of 2013. Voluntary dismissal—even if without prejudice—ends litigation, it does not continue it.

testimony is admissible); Fed. R. Civ. P. 26(b)(4)(A) (affording the right to depose an expert—a right nowhere conditioned about the possibility of paying sanctions for proceeding to do so); Fed. R. Civ. P. 26(e) (permitting parties to supplement expert disclosures); *Miller*, 356 F.3d at 1332 (same). The district court's imposition of sanctions on this basis appears unprecedented in the case law—and it is all the more unprecedented considering that the city's expert is the same person who drew the redistricting map that was the subject of the lawsuit.

The city does not offer any response to these authorities. *See* City's Br. at 29-32. Nor does it explain how the rights afforded by Rule 26—the right to proceed to depose an expert to learn faults in his analysis or the right to supplement one's own expert reports—can possibly withstand the district court's conclusion that Plaintiffs were required to drop the case upon the mere reading of Mr. Sanderoff's report. Instead, the city claims that the district court was "accommodati[ng]" Plaintiffs' attorneys by selecting June 25, 2013 as the date and in fact that the district court "did not rely solely on the content of Mr. Sanderoff's report." City's Br. at 30.

Not so. The district court stated that it:

> finds that the 'magic date' that this case was no longer viable and Plaintiffs' counsel unreasonably continued this matter was June 25, 2013, the date that Plaintiffs' counsel was provided with Mr. Brian Sanderoff's expert report. Upon reading that report, it would have been clear to a reasonable attorney that this case no longer had merit. .

> . . The Court will not award attorneys' fees incurred prior to June 25, 2013.

A-407; Add-6. The entire premise of its sanctions order is built upon Mr. Sanderoff's report.

The city questions whether Plaintiffs in fact would have supplemented their expert reports because according to the city there was no conflict among the reports and because "Plaintiffs did not indicate any intent to oppose Mr. Sanderoff's opinions at a time when supplementing would have been reasonable." City's Br. at 31. This makes no sense. The parties agreed that expert reports could be supplemented up to forty-five days before trial. A-36. Of course, Plaintiffs moved to dismiss the case in early July 2013 (as did the city), so there was no reason to supplement expert reports. Again, the city's argument is completely contradictory—it wants Plaintiffs' former attorneys sanctioned for "multiplying" the proceedings yet at the same time objects that Plaintiffs did not continue to prosecute their lawsuit vigorously enough at a time that *both* parties sought dismissal. And for the reasons addressed earlier regarding Dr. Atkeson's Section 2 analysis, there was very much a disagreement between the experts.[24] *See infra* Section I, Part I.

[24] Indeed, Mr. Sanderoff's report itself recognizes that he disagreed with Dr. Atkeson's analysis of white voter preferences. A-67-68. This led Mr. Sanderoff to come to different statistical conclusions regarding white bloc voting, A-68, which

Finally, the city claims that the district court erred by selecting June 25, 2013, and should have selected an earlier date. City's Br. at 30. But at the sanctions hearing, after conceding that the suit was filed in good faith, A-558-59, the city's counsel stated "Mr. Sanderoff's report was submitted June 25th, 2013. When Mr. Sanderoff . . . came up with his report . . . at that point, I think carrying on the action and continuing to seek a dismissal without prejudice . . . . could be viewed as – as being in bad faith." A-560; *see also* A-561 ("[T]he action either at the outset or at least by the time of Mr. Sanderoff's report was – was frivolous and should have been dismissed with prejudice."); A-562-63 (asserting that Plaintiffs' motion to dismiss without prejudice was caused by the receipt of Mr. Sanderoff's expert report). The city thus repeatedly told the district court that Mr. Sanderoff's report was the event that should trigger sanctions. Under the invited-error doctrine, the city cannot now claim, having conceded the suit was filed in good faith and having invited the district court to reach its conclusion, that the district court erred in not selecting an earlier date for sanctions. *See Accusearch*, 570 F.3d at 1204.

The city's arguments fall flat. The district court erred as a matter of law in concluding that sanctions could be imposed upon the mere service of an

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is the heart of third prong of *Gingles*—the prong the city wrongly accuses Plaintiffs' expert of failing to address.

opponent's expert report—particularly where that expert is the same person the city hired to draw the challenged map[25]—in light of the rights provided by Rule 26.

B. Mr. Sanderoff's Report, As a Matter of Law, Does Not Establish Plaintiffs' Claims were Frivolous and Does Not Support the Imposition of Sanctions.

Even if the mere service of an expert report *could* trigger a sanctions clock (it cannot), the service of Mr. Sanderoff's report certainly could not. The response to the city's argument that the case was frivolous is set forth in detail in Section I of this brief, *see supra* Section I, Part I, and those arguments are incorporated by reference herein so as to prevent duplication. Plaintiffs' Section 2 and one-person, one-vote claims had considerable merit, *see Sanchez*, 97 F.3d at 1315; *Gomez*, 863 F.2d at 1417; *Larios*, 300 F. Supp. 2d at 1340-41. If more analytical work was needed, and had Plaintiffs not already decided to seek dismissal, Plaintiffs' experts could have supplemented their reports. *See* Fed. R. Civ. P. 26(e); *Miller*, 356 F.3d

[25] As explained in Appellants' opening brief, the fact that Mr. Sanderoff was not only the city's expert witness but also the same person whom the city paid to draw its redistricting map makes the district court's reliance upon his report as the premise for its sanctions order all the more an abuse of discretion. *See* Appellants' Opening Br. at 32-34. The city responds that Plaintiffs did not question Mr. Sanderoff's bias at the district court, or at trial. *See* City's Br. at 33. But clearly there was no trial. And the first time the city officially disclosed Mr. Sanderoff's personal involvement in the case was at the sanctions hearing. A-425. Astonishingly, his expert report did not disclose the fact that he drew the map he was analyzing—and notably he did not mention this fact as part of his conclusion that the population deviations among the districts "were not used to advance any inappropriate agenda." A-66.

at 1332; A-36 (Joint Scheduling Order, permitting supplementation); Supp. A-000016 (city's expert reserving right to supplement). In any event, Plaintiffs' claims were far from frivolous or "indisputably meritless," *Milligan v. Archuleta*, 659 F.3d 1294, 1296 (10th Cir. 2011), so as to permit sanctions. Because the alleged frivolousness was the basis of the district court's sanctions order, this Court must correct that error of law and reverse. *See id.* at 1296 (holding that where determination of frivolousness turns on an issue of law, this Court's review is *de novo*).

III. The District Court Erred in Applying a Subjective, Rather than Objective, Standard in Imposing Sanctions.

The district court also erred in applying a subjective standard in imposing sanctions. The first time the district court considered the content of Mr. Sanderoff's expert report, it issued its stay order concluding that "the record is insufficient to warrant dismissal with prejudice. Defendants [sic] have not offered sufficient evidence that Plaintiffs should be punished for filing this lawsuit." A-190, Add-24. Four months later, the district court sanctioned Plaintiffs' attorneys, purportedly because it had by then determined that the content of Mr. Sanderoff's expert report should have caused Plaintiffs to abandon the lawsuit. A-407; Add-6. But the only difference in the district court's analyses is that when it imposed sanctions, it resorted to subjective speculation to divine the reasons Plaintiffs' counsel had sought dismissal without prejudice. The district court erred as a

matter of law in departing from its original objective analysis to a subjective analysis. *See Braley*, 832 F.2d at 1512; *Miera v. Dairyland Ins. Co.*, 143 F.3d 1337, 1342 (10th Cir. 1998).

The city disagrees because the district court couched its conclusions with the words "objective" and "reasonable" and because it alleges that Plaintiffs' subsequent failure to dismiss with prejudice after the fall elections was new evidence supporting sanctions. City's Br. at 43-44. Neither point has merit. First, the district court's subjective analysis cannot be ignored because it employed objective words in stating its conclusion. *See Fry v. Airline Pilots Ass'n, Int'l*, 88 F.3d 831, 843 (10th Cir. 1996) ("[W]hile the . . . district court correctly identified the [proper] standard, we conclude they misapplied that standard and directly and implicitly employed the wrong legal analysis"). Second, Plaintiffs' attorneys' actions after the fall election are irrelevant to the district court's conclusion that Mr. Sanderoff's expert report should have caused Plaintiffs' attorneys to abandon the case in June. The district court shifted from an objective to a subjective analysis based on no new evidence, and erred as a matter of law in doing so.

CONCLUSION

For the foregoing reasons, the portion of the district court's order declining to impose fees and sanctions against Plaintiffs and their former attorneys under 42 U.S.C. §§ 1988 and 1973*l*, as well as Rules 16(f) and 37(d), should be affirmed,

and the portion of the order imposing fees and sanctions against Plaintiffs' former attorneys under § 1927 should be reversed and vacated.

Dated: February 17, 2015

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs and Plaintiffs' former attorneys respectfully request oral argument in light of the important and sufficiently complex issues of the case.

CERTIFICATE OF COMPLIANCE WITH RULES 28.1 AND 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(A)(i) because it contains 13,799 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as indicated by Microsoft Office Word 2010's word-count function.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point Times New Roman.

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ECF CERTIFICATION

Pursuant to Section II(I) of the Court's CM/ECF User's Manual, the undersigned certifies:

1. All required privacy redactions have been made;

2. Hard copies of the foregoing brief required to be submitted to the Clerk's office are exact copies of the brief as filed via ECF; and

3. The brief filed via ECF was scanned for viruses using Malwarebytes Anti-Malware and is free of viruses.

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I, Jessica Ring Amunson, hereby certify that on February 17, 2015, I filed a true, correct, and complete copy of the foregoing Joint Response/Reply Brief of Plaintiffs/Cross-Appellees and Attorneys-Appellants/Cross-Appellees and its Addendum with the Court and served it on the following people via the Court's ECF System:

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ADDENDUM

INDEX

42 U.S.C. § 1988

§ 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

52 U.S.C. § 10310

§ 10310. Enforcement proceedings

(a) Criminal contempt

All cases of criminal contempt arising under the provisions of chapters 103 to 107 of this title shall be governed by section 1995 of Title 42.

(b) Jurisdiction of courts for declaratory judgment, restraining orders, or temporary or permanent injunction

No court other than the District Court for the District of Columbia shall have jurisdiction to issue any declaratory judgment pursuant to section 10303 or 10304 of this title or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of chapters 103 to 107 of this title or any action of any Federal officer or employee pursuant hereto.

(c) Definitions

(1) The terms “vote” or “voting” shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this chapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

(2) The term “political subdivision” shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

(3) The term “language minorities” or “language minority group” means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.

(d) Subpenas

In any action for a declaratory judgment brought pursuant to section 10303 or 10304 of this title, subpenas for witnesses who are required to attend the District Court for the District of Columbia may be served in any judicial district of the United States: Provided, That no writ of subpena shall issue for witnesses without the District of Columbia at a greater distance than one hundred miles from the place of holding court without the permission of the District Court for the District of Columbia being first had upon proper application and cause shown.

(e) Attorney's fees

In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, reasonable expert fees, and other reasonable litigation expenses as part of the costs.

Federal Rules of Civil Procedure Rule 16(f)

Rule 16. Pretrial Conferences; Scheduling; Management

. . .

(f) Sanctions.

(1) In General. On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate--or does not participate in good faith--in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) Imposing Fees and Costs. Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses--including attorney's fees--incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

Federal Rules of Civil Procedure Rule 37(d)

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

. . .

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) In General.

(A) Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent--or a person designated under Rule 30(b)(6) or 31(a)(4)--fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) Certification. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) Unacceptable Excuse for Failing to Act. A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) Types of Sanctions. Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.