Nos. 15-2051, 15-2052

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KATHERINE HAN-NOGGLE,
as daughter of the deceased Mary Han,
and ELIZABETH WALLBRO,
in her capacity as the personal representative
of the estate of Mary Han,
Plaintiffs-Appellees

v.

THE CITY OF ALBUQUERQUE, *et al.*,
Defendants-Appellants

On Appeal From The United States District Court
For The District of New Mexico
Honorable Carmen Garza, Case No. 2013-cv-00894 CG/GBW

BRIEF OF *AMICUS CURIAE* THE CAMPAIGN LEGAL CENTER SUPPORTING APPELLEES/CROSS-APPELLANTS AND URGING PARTIAL REVERSAL

J. Gerald Hebert
Joshua J. Bone
CAMPAIGN LEGAL CENTER
1141 K Street NW, Suite 1400
Washington, DC 20005
Telephone: (202) 736-2200
Facsimile: (202) 736-2222

CORPORATE DISCLOSURE STATEMENT

The Campaign Legal Center is a non-profit organization organized under Section 501(c)(3) of the Internal Revenue Code. The Campaign Legal Center neither has a parent corporation nor issues stock. There are no publicly held corporations that own ten percent or more of the stock of the Campaign Legal Center.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. This Court Should Reject the Excessively Permissive Rule 11 Test the City Urges and Should Instead Apply the *Christiansburg* Standard 3

A. The First Part of the *Christiansburg* Test Allows Fee Recovery Only in Rare Cases that Quality as Truly Frivolous, Unreasonable or Foundationless 5

B. At the Second Step of *Christiansburg*, the District Court Has Discretion to Refuse to Award Fees Even If Claims Are Frivolous, Unreasonable or Foundationless 12

II. The City of Albuquerque Is Improperly Pursuing Fees against Civil Rights Plaintiffs as a Matter of Course 13

CONCLUSION 22

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORDCOUNT LIMITATIONS 23

ECF CERTIFICATION 24

CERTIFICATE OF SERVICE 25

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Browder v. City of Albuquerque,
No. 14-2048, slip op. at 13 (10th Cir. June 2, 2015) 9

Chavez v. Bennett Propp,
216 F.3d 1086, 2000 WL 702309 (10th Cir. 2000) 6

Christiansburg Garment Co. v. EEOC,
434 U.S. 412 (1978) ....passim

Christopher v. Harbury,
536 U.S. 403 (2002) 8

Clajon Prod. Corp. v. Petera,
70 F.3d 1566 (10th Cir. 1995) 5, 6

Crabtree By and Through Crabtree v. Muchmore,
904 F.3d 1475 (10th Cir. 1990) 4

D.A. Osguthorpe Fam. Partn. v. ASC Utah, Inc.,
576 Fed. App'x. 759 (10th Cir. 2014) 5

Dill v. City of Edmond,
162 F.3d 1172, 1998 WL 740962 (10th Cir. 1998) 6

Hensley v. Eckerhart,
461 U.S. 424 (1983) 4

Hughes v. Rowe,
449 U.S. 5 (1980) 5

Jennings v. City of Stillwater,
383 F.3d 1199 (10th Cir. 2004) 8

Jones v. Texas Tech Univ.,
656 F.2d 1137 (5th Cir. 1981) 9

Lynch v. Barrett
703 F.3d 1152 (10th Cir. 2013) 10

Prochaska v. Marcoux,
632 F.2d 848 (10th Cir. 1980) 6, 12

Santa Fe Ranchlands v. Santa Fe County,
46 F.3d 1152, 1995 WL 41663 (10th Cir. 1995)..6

Stump v. Gates,
986 F.2d 1429 (10th Cir. 1993) 10

Taylor v. Coors Biotech Products Co.,
951 F.2d 1260, 1991 WL 275643 (10th Cir. 1991).......................................6, 12

Taylor v. Gilmartin,
686 F.2d 1346 (10th Cir. 1982) 11

Thorpe v. Ancell,
367 F. App'x 914 (10th Cir. 2010)...6

Twilley v. Integris Baptist Med. Ctr., Inc.,
16 F. App'x 923 (10th Cir. 2001)...6, 11

STATUTES AND RULES

42 U.S.C. § 1983..passim

42 U.S.C. § 1985..passim

42 U.S.C. § 1988..passim

10th Cir. R. 34...15

Fed. R. App. P. 29..1

Fed. R. Civ. P. 11 ....2, 3, 4

Fed. R. Civ. P. 12(b)(6)..19

OTHER AUTHORITIES

Isaac Benton, et al., "Suits Part of Political Process," *Albuquerque Journal*,
Jan. 19, 2014 17

Jeri Clausing, *New Mexico Police Scrutinized Over Adversary Mary Han's Death; Family Cries Foul*, Huffington Post, May 13, 2013 7

Joline Gutierrez Krueger, *Mary Han legal fee fight goes on*, Albuquerque Journal, Nov. 12, 2014 16

Katherine Mozzone, *Fees tied to city lawsuits divide City Council*, KRQE News 13, Oct. 20, 2014 18

S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) 3

STATEMENT OF INTEREST[1]

Amicus curiae The Campaign Legal Center is a nonprofit organization that works to protect voting rights. *Amicus* serves as counsel for Plaintiffs in *Baca v. Berry*, Nos. 14-2174 & 14-2181, currently pending before this Court, which also involves an attempt by the City of Albuquerque to recover its attorneys' fees as a prevailing civil rights defendant. *Amicus* therefore has a demonstrated interest in how this Court evaluates the very limited circumstances in which prevailing civil rights defendants are entitled to attorneys' fees. Moreover, *amicus* is considering filing future voting rights cases against jurisdictions in the Tenth Circuit—perhaps even Albuquerque—and is concerned that positions taken by the City of Albuquerque in litigation have already chilled the willingness of potential voting rights plaintiffs to come forward and challenge official racial discrimination. *Amicus* therefore has a significant interest in preventing this Court from adopting the city's misguided arguments as law throughout the Tenth Circuit—thus further chilling civil rights and voting rights advocacy. Because the city opposes the participation of *amicus* in this case, *amicus* has filed a motion pursuant to Fed. R. App. P. 29(b) for leave to file this brief.

[1] No party or party's counsel authored this brief in whole or in part, and no person, other than the *amicus curiae* Campaign Legal Center, contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

To determine the city's eligibility for fees as a prevailing civil rights defendant, this Court should apply the two-step standard from *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), rather than the Rule 11 test urged by Defendants. Under the *Christiansburg* framework, Defendants are ineligible for fees because Plaintiffs' claims are not frivolous, unreasonable or foundationless. If this Court finds that Plaintiffs' claims actually qualify as frivolous, unreasonable or foundationless, the Court should remand the case to the district court to determine whether fees are actually justified in this instance.

More broadly, in this case as well as others, the city of Albuquerque has attempted to subvert the civil rights enforcement structure that Congress has established. Rather than follow congressional and Supreme Court instruction by seeking fees only in egregious cases, the city has been pursuing an abusive policy of liberally seeking fees against civil rights plaintiffs under 42 U.S.C. § 1988 and other civil rights fee shifting provisions. To stop the city's continued persecution of civil rights plaintiffs, this Court should take this opportunity to clarify the legal standards surrounding prevailing civil rights defendants' entitlement to attorneys' fees.

ARGUMENT

I. This Court Should Reject the Excessively Permissive Rule 11 Test the City Urges and Should Instead Apply the *Christiansburg* Standard

When Congress drafted the laws that protect our civil rights, including 42 U.S.C. §§ 1983 and 1985, it primarily relied on private attorneys general—individual citizens—for enforcement. Knowing that individuals would often lack the financial wherewithal to bring even meritorious suits, Congress enacted provisions that allow prevailing parties in civil rights cases to recover their attorneys' fees. *See* 42 U.S.C. § 1988; S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) ("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.").

On their face, these fee-shifting provisions allow a prevailing "party"—either plaintiff or defendant—to recover its fees. *See* 42 U.S.C. § 1988. But because allowing prevailing civil rights *defendants* to recover their fees would subvert congressional purpose, the Supreme Court has required such defendants to satisfy the demanding standard set forth in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). Under that two-part standard, (1) if but only if a plaintiff's claims qualify as "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith . . . [or] the plaintiff continued to litigate after [the

claims] clearly became so," (2) a district court "may, in its direction" award fees to a prevailing civil rights defendant. *Id.* at 421-22; *see also Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983) (applying the *Christiansburg* standard to § 1988).

The two-part *Christiansburg* standard is well-established law, applied consistently in case after case by this Court, all other Circuits and the Supreme Court. But the city attempts to rewrite settled doctrine, paying lip service to *Christiansburg* while entirely ignoring the two-part *Christiansburg* standard. Relying instead on *Crabtree By and Through Crabtree v. Muchmore*, 904 F.3d 1475 (10th Cir. 1990), the city argues that "a court should engage in the same inquiry when reviewing a motion for attorney's fees under Section 1988 that it does when it reviews a motion for sanctions under Fed.R.Civ.P. 11." Appellants' Br. 29. In other words, the city urges this Court to hold the Plaintiffs—private citizens of Albuquerque—to the same standards as trained counsel. For instance, the city seems to think that it should automatically recover fees against the individual Plaintiffs because their *counsel* purportedly misrepresented the holding of a case. Appellants' Br. 38. Fortunately, that is not the law. The city (ironically) misrepresents this Court's holding in *Crabtree By and Through Crabtree*, which did not apply the Rule 11 standard to a prevailing defendant's motion for attorneys' fees, but instead applied the two-part *Christiansburg* standard to a motion for Rule 11 sanctions. *Id.* at 1478. The city has therefore

given this Court no good reason to abandon the two-part *Christiansburg* standard and rewrite the law in this case.

A. The First Part of the *Christiansburg* Test Allows Fee Recovery Only in Rare Cases that Quality as Truly Frivolous, Unreasonable or Foundationless

Under the first part of the *Christiansburg* standard, this Court must decide as a matter of law whether Plaintiffs' claims were frivolous, unreasonable or foundationless. *See Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1581 (10th Cir. 1995); *see also D.A. Osguthorpe Fam. Partn. v. ASC Utah, Inc.*, 576 Fed. App'x. 759, 764 (10th Cir. 2014) (unpublished) (reviewing frivolity determination under section 1988 *de novo*). Frivolous, unreasonable or foundationless claims are not just losers, but such obvious losers that any reasonable plaintiff would never have brought them. "[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). The Supreme Court has thus counseled courts to 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.

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 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, for instance, 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*, 904 F.2d at 1478-79, 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).

In their opening brief on cross-appeal, Plaintiffs convincingly explain why, unlike in the aforementioned cases, no "rare circumstances" are present here. Far from concocting a crazy conspiracy, knowingly ignoring procedural rules that barred their claims or abusing the federal judicial system, Plaintiffs brought reasonable, non-frivolous civil rights claims seeking justice for the suspicious death of a loved one and a bungled police investigation that the state Attorney General's office slammed.[2]

---

[2] Former New Mexico State Attorney General Gary King suggested that the Office of the Medical Investigator (OMI) change the cause of death to "undetermined" from "suicide" and wrote that APD "terribly mishandled" the investigation, which included many procedural irregularities. Appellants' App'x 203. Plausibly alleged irregularities include the following: (1) within five minutes of arriving at the scene, Deputy Chief Paul Feist ordered personnel to process Han's death as a suicide, meaning that an investigation suitable for an unattended death was not conducted; (2) as the crime scene was not tightly secured, twenty-six to fifty individuals entered the scene; (3) Han's diamond rings, mobile phone, and laptop went missing; (4) many high-ranking APD personnel not officially involved in the investigation entered Han's home the day she was found, including individual Defendants Public Safety Director Darren White, Deputy Chief Elizabeth Paiz, Deputy Chief Feist, and APD Crime Lab Manager Marc Adams, who all stayed inside for several hours; and (5) OMI records show that Han had 84.8% carboxyhemoglobin saturation levels in her blood, which is improbably high for death by ambient carbon monoxide poisoning in a car. These irregularities are all the more striking considering that the investigation into Han's death was a high-profile matter for the APD because Han was well known in Albuquerque as a successful civil rights attorney who had successfully represented police officers as well as plaintiffs in police brutality cases against the Albuquerque Police Department (APD), *see* Jeri Clausing, *New Mexico Police Scrutinized Over Adversary Mary Han's Death; Family Cries Foul*, Huffington Post, May 13, 2013, http://www.huffingtonpost.com/2013/03/13/nm-police-dept-scrutinized-mary-han-death_n_2866380.html, and, shortly before she died, had filed a widely publicized civil rights lawsuit against the APD, *see* Appellants' App'x 147–48.

Specifically, Plaintiffs' § 1983 claims (Counts I and II) rested on plausible allegations that police misconduct deprived Plaintiffs of their civil rights. Although the district court found Count I frivolous because individuals lack any right to a competent police investigation, Plaintiffs have clarified that they were in fact claiming that an active police cover-up denied them their right of access to the courts. Brief of Appellants at 13–20, *Han Noggle v. Albuquerque*, No. 14-2156 (10th Cir. Nov. 26, 2014); Appellants' App'x 52 (asserting in Count I of the Second Amended Complaint that Defendants violated Plaintiffs' "substantive and due process right of access to the courts"). Count I is thus similar to Count II, which the district court did not find frivolous.[3] And although the city insists (and the district court found) that, under *Christopher v. Harbury*, 536 U.S. 403 (2002), Plaintiffs must identify the specific "defendant in a potential wrongful death lawsuit" and "wrongful act" in order to prevail on their denial of access claims—put differently, the city insists that *Harbury* rewards effective cover-ups—the Supreme Court in fact clarified in *Harbury* that it had "no reason . . . to try to describe pleading standards for the entire spectrum of access cases" and held only

[3] The district court also found that Plaintiffs' claims against the official capacity Defendants were frivolous because Plaintiffs sued the city directly. Calling these claims "frivolous" rather than merely "duplicative" evinces the district court's misunderstanding of what "frivolous" actually means as a matter of law, but the issue is largely academic given the district court's correct determination that the city incurred no additional attorneys' fees defending against those duplicative claims.

that plaintiffs must "describe[]" the "predicate claim" "well enough to apply the 'nonfrivolous' test and to show that the 'arguable' nature of the underlying claim is more than hope." *Id.* at 416; *see also Jennings v. City of Stillwater*, 383 F.3d 1199, 1209 (10th Cir. 2004) (holding, contrary to the district court's description, only that denial of access claims must fail when plaintiffs received all possible relief by pursuing still-viable claims).

Here, Plaintiffs plausibly alleged a police cover-up of a wrongful death and the disappearance of property that Plaintiff Han-Noggle would have inherited. That wrongful death and property disappearance would have formed the factual predicates for claims the bungled investigation prevented Plaintiffs from filing, because Plaintiffs will now never know whom they could have sued. Finding Plaintiffs' denial of access claims frivolous, unreasonable or foundationless based on the city's bizarre reading of *Harbury* would therefore be exactly the sort of "*post hoc* reasoning" that the Supreme Court has warned against and that the district court repudiated when it refused to award fees on Count II. *Christiansburg*, 434 U.S. at 421-22; *see also 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.").[4]

Likewise, Plaintiffs' § 1985 claims (Counts III, IV and V) come nowhere close to meeting the first part of the *Christiansburg* standard. True, Plaintiffs lacked sufficient evidence when they filed their complaint to show that Defendants conspired to interfere with the ability of federal officers to carry out their duties, *see* 42 U.S.C. § 1985(1), nor did Plaintiffs have sufficient evidence at the time they filed their complaint to prove that Defendants were motivated by class-based invidious discrimination, *see* 28 U.S.C. §§ 1985(2), (3). But as the district court observed when denying fees on these claims, this lack of sufficient factual support resulted from the city's misconduct—*i.e.*, the seriously bungled police

[4] The city's brief relies exclusively on the first prong of the qualified immunity test—whether Defendants violated a constitutional right—rather than the second prong, which asks whether that right was clearly established. Particularly given the egregiousness of the police misconduct in this case, it is far from frivolous to suggest that the constitutional right to access the courts that Plaintiffs accuse Defendants of violating was clearly established. *See Browder v. City of Albuquerque*, No. 14-2048, slip op. at 13 (10th Cir. June 2, 2015) (In deciding the "clearly established law" question this court employs a "sliding scale" under which "the more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation."). Granted, *Lynch v. Barrett*, 703 F.3d 1152 (10th Cir. 2013), sheds some doubt on whether the denial of access right asserted here is currently clearly established in this Circuit, but *Lynch* postdates the events at issue in this case. Moreover, Plaintiffs have provided plenty of non-frivolous arguments to distinguish or overrule *Lynch*, including that it conflicts with a prior Tenth Circuit case that predates the events at issue. *See Stump v. Gates*, 986 F.2d 1429 (10th Cir. 1993) (unpublished).

investigation—and Plaintiffs "brought this suit in order to obtain information they were unable to access otherwise." Appellants' App'x 411.

Moreover, these allegations—even if insufficiently factually supported at this time—are hardly fanciful or extraordinary. Particularly given the Department of Justice's subsequent official investigation into police misconduct in Albuquerque,[5] it is perfectly plausible to suspect that Defendants might have conspired to impede the ability of federal officials to carry out their duties. And in light of precedent suggesting that § 1985's "class-based invidious discrimination" requirement could be satisfied not just by racial or gender discrimination but also by discrimination based on membership in a political party or residence in a particular state, *see Taylor v. Gilmartin*, 686 F.2d 1346, 1357 (10th Cir. 1982) (quoting legislative history), it is perfectly plausible to suggest that Defendants were motivated by Ms. Han's political beliefs or membership in a class of people opposed to the Albuquerque Police Department's conduct, and that this sort of class-based animus satisfies the statutory requirement. In any event, as the district court recognized, factual discovery may well have produced more specific evidence and enabled Plaintiffs to hold certain individuals and entities legally responsible under § 1985. Because Plaintiffs were "unable to proceed with

---

[5] For more information on this investigation, see *Investigation into Albuquerque Police Department*, The United States Attorney's Office for the District of New Mexico, Feb. 4, 2015, http://www.justice.gov/usao-nm/apd.

discovery," they were never able to find out whether their non-frivolous allegations actually had factual support (and to abandon those allegations if they ultimately lacked sufficient support). *See Twilley v. Integris Baptist Medical Center, Inc.*, 16 Fed App'x. 923, 926 (10th Cir. 2001) (finding claims frivolous, unreasonable and foundationless under *Christiansburg* where plaintiff continued to litigate after "it became clear during discovery that his claims lacked evidentiary support").

B. At the Second Step of *Christiansburg*, the District Court Has Discretion to Refuse to Award Fees Even If Claims Are Frivolous, Unreasonable or Foundationless

The city proceeds as if prevailing civil rights defendants should *always* recover fees when plaintiffs' claims qualify as frivolous, unreasonable or foundationless. That is flatly wrong. This Court, citing permissive language in § 1988, *see* 42 U.S.C. § 1988 (a district court "in its discretion, may allow" a prevailing party to recoup its attorneys' fees), and in *Christiansburg* itself, *id.* at 421–22, 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"). Thus, even if this Court were to agree with the city that Plaintiffs' claims were or somehow became truly frivolous, this Court should remand for the

district court to exercise its discretion and determine whether it would be appropriate to add injury to injury by allowing the city to recover fees against victims of its own misconduct.[6]

II. The City of Albuquerque Is Improperly Pursuing Fees against Civil Rights Plaintiffs as a Matter of Course

Recent behavior by the City of Albuquerque and statements by city officials suggest that this case is not an outlier. Unfortunately, the city seems to be pursuing attorneys' fees against civil rights plaintiffs as a matter of course. In essence, the city has taken the extreme position of signaling to civil rights plaintiffs that if they lose, they will be vulnerable to financial penalties in the thousands of dollars—enough to financially devastate the average resident—subverting the primary objective of Congress's civil rights enforcement scheme.

[6] The district court has already exercised this discretion on Count I, relying on equitable factors, specifically the Han family's "great hardship," to reduce the fee award below what the city has requested. The city now argues that the district court was precluded from relying on equitable considerations to reduce a fee award "in consideration of any factor except the plaintiff's financial resources." Appellants' Br. 42. But the city's argument is a red herring. Even if courts cannot *reduce* fee awards below the total amount to which parties are entitled based on factors other than ability to pay, courts can certainly consider equitable factors to determine whether parties are *entitled* to certain fee awards in the first place. The district court's failure to state clearly that it was exercising its discretion in determining the amount to which the city is entitled—as opposed to reducing the fee award below the full amount to which the city is entitled—is at most an inconsequential drafting error.

In *Baca v. Berry*, Nos. 14-2174 & 14-2181, currently pending before this Court, a group of Hispanic Albuquerque citizens brought a voting rights suit challenging the latest round of city council redistricting. They argued that the city's map packed Hispanic residents into majority-minority districts on the racially polarized west side of the city, in violation of Section 2 of the Voting Rights Act of 1965, and deviated from population equality to benefit Anglo voters and disadvantage Hispanic voters in violation of the Fourteenth Amendment's Equal Protection Clause. After Albuquerque changed its voting rules in a way that mitigated some of the harm of the map, the plaintiffs voluntarily sought dismissal of their case without prejudice. The city responded by seeking dismissal of the case with prejudice and pursuing sanctions and attorneys' fees against the plaintiffs and their counsel. Although the district court dismissed the claims with prejudice and sanctioned the plaintiffs' attorneys under 28 U.S.C. § 1927, it refused to sanction or award attorneys' fees against the individual plaintiffs because they were reasonably relying on advice of counsel and filed the lawsuit in good faith.

After the attorneys appealed the sanctions order against them—arguing, among other things, that the underlying voting rights case was far from frivolous—the city filed a cross-appeal against the individual plaintiffs seeking both attorneys' fees under § 1988 and 42 U.S.C. § 1973*l* and discovery abuse sanctions under various provisions. The city had little to gain from receiving a fee award against

the individual plaintiffs—the same question of frivolousness underlay both sanctions under § 1927 and fees under §§ 1988 and 1973*l*, and any discovery abuse sanctions would have been the same whether awarded against the lawyers, who actually managed the discovery process, or the individual plaintiffs. Pressing ahead nonetheless, the city devoted just a few pages of its combined response/opening brief to the cross-appeal and made nothing but conclusory and speculative arguments, even though it was required to show that the district court had abused its discretion when it concluded that the individual plaintiffs should not be penalized. Finally, at oral argument, counsel for the city acknowledged what the plaintiffs had been insisting from the outset: because the city could not show that the district court had abused its discretion by refusing to order the individual plaintiffs to pay the city's attorneys' fees, the city could not prevail in its cross-appeal and would abandon it. *Baca v. Berry*, Nos. 14-2174 & 14-2181, Oral Arg. Rec. 15:30–17:00.

Thus, in *Baca*, the city forced four of its own citizens to endure months of financial uncertainty for having the gall to file a civil rights lawsuit in good faith. Moreover, the plaintiffs' pro bono appellate attorneys spent significant time and money briefing and preparing to advocate for their clients on the cross-appeal, *see* 10th Cir. R. 34 (requiring counsel for "each party" to "be present for oral argument unless excused by the court"), only to have the city withdraw the cross-appeal at

the Eleventh Hour.[7] Likewise, in this case, the city—not satisfied with a partial fee award—seeks to impose even greater financial penalties against a grieving family that has already suffered from the death of a loved one and a botched police investigation.

Recognizing the absurdity of the city's position in these cases, the Albuquerque City Council passed resolutions condemning the city's continued pursuit of fees in this case and in *Baca*.[8] As City Councilor Diane Gibson exclaimed during council debate over the city's approach in this case: "You're punishing a family that's already had a great loss. . . . I can tell you this: If that were my sister and the police went to investigate her death, I'd be screaming and everybody in here would be doing the same thing." Joline Gutierrez Krueger, *Mary Han legal fee fight goes on*, Albuquerque Journal, Nov. 12, 2014, http://abqjournal.com/ 495012/news/city-fight-continues-over-legal-fees-in-suit-

[7] As a result of the city's conduct and that of its counsel, the individual plaintiffs are currently seeking sanctions against the city and its counsel for filing a frivolous cross-appeal in bad faith.

[8] The mayor subsequently vetoed both resolutions, and his vetoes were not overridden. Nonetheless, a majority of the city council in this case affirmed that "there are perhaps many instances where the City of Albuquerque should seek reimbursement for the expenditure of attorney's fees and costs related to unfounded claims against the City, [but] this case is not one of them because the facts and circumstances tend to show, at a minimum, significant controversy over the City's handling of the crime scene and death investigation." Res. R-14-125, 21st Council (City of Albuquerque 2014).

over-mary-han-death-2.html [*Mary Han legal fee fight goes on*]. Both city council resolutions recognize that these cases present an important question about the ability of all Albuquerque citizens to vindicate their civil rights. As City Council President Ken Sanchez commented during the same council debate, "I think this is such an important issue to the citizens of our community, especially if they are looking to file a lawsuit against the city of Albuquerque, that they are not in fear that they could be sued if their lawsuit doesn't prevail." *Id.*; *see also* Isaac Benton, et al., "Suits Part of Political Process," *Albuquerque Journal*, Jan. 19, 2014, http://www.abqjournal.com/339207/opinion/suits-part-of-political-process.html (editorial by three city councilors calling the city's pursuit of fees in *Baca* "reminiscent of the 'SLAPP suit'" and arguing that " the city should not proceed with the zeal and heavy-handedness that has been portrayed in recent media coverage" because of the impact on "the willingness and ability for citizens to exercise their constitutional rights to challenge the actions of their government").

Of course, instilling fear may be exactly what the city intends. City Councilor Don Harris, a vocal supporter of the city's pursuit of fees in these cases, argued during council debate that any civil rights plaintiff should know, prior to filing suit, that he or she might face liability for the city's attorneys' fees: "We want to make sure that if people sue the city and they lose, that there's some risk involved, because otherwise, everyone could sue the city for every reason or for no

reason and we wouldn't want that." Katherine Mozzone, *Fees tied to city lawsuits divide City Council*, KRQE NEWS 13, Oct. 20, 2014, http://krqe.com/2014/10/20/fees-tied-to-city-lawsuits-divide-city-council/ [*Fees divide City Council*]. In the same vein, Harris noted that "[r]eally what the Han family wants is a risk-free appeal. They want to be able to proceed, but at the same time be insulated from any consequences of having filed a lawsuit which the trial court has already decided should not have been brought." *Id*. The problem with these statements is that Congress has no interest in encouraging civil rights plaintiffs to think not once, not twice, but a hundred times before filing suit—plaintiffs should only be discouraged from filing the sorts of claims that any reasonable litigant or lawyer would know are truly frivolous, unreasonable or foundationless.

Even more telling, City Attorney David Tourek has suggested that the city considers the fact that civil rights plaintiffs have been unsuccessful to be an adequate justification for seeking fees against them. During two city council meetings, councilors pressed Tourek to explain why the city was seeking over $60,000 in attorneys' fees in this case when it had already received a fee award of $5,000 from the family of the deceased Mary Han, especially when the full requested amount might not cover the money spent to pursue the appeal, and when the requested amount—while small compared to the City's total budget for

external legal fees—would greatly burden Han's grieving family.[9] *Id.* at 348. Tourek responded that the city was pursuing fees based on "[t]he fact that we succeeded in the case." Appellants' App'x 353. Further expounding on the city's approach in these cases, Tourek explained that "[j]ust as in the redistricting lawsuit…the judge had made inclinations in his opinion the case was without merit. Then the district court judge made a determination based on the briefing that it did not have merit at a certain stage and awarded the city $50,000 in attorney's fees." *Id.* at 348; *see also id.* at 347 ("[This case] was, in my opinion, brought frivolously. It did not have merit. It had a claim that civil rights were violated. They were not, according to the United States District Court. And it will now be up to a United States District Court judge to make a determination whether the city should recoup its attorney fees."); *id.* ("The Court did find in [*Baca v. Berry*] at a stage had no merit and that the state case should have been dismissed and the United States District Court awarded $50,000 to the City of Albuquerque for attorney's fees."). These statements improperly equate the standards for dismissing a case under Federal Rule of Civil Procedure 12(b)(6) or awarding

[9] Councilor Diane Gibson, calling it "unconscionable" that the city would continue to pursue fees in this case, commented: "[E]ven if this lawsuit is successful, what would be recouped is probably not going to cover the city's cost in going after it." Appellants' App'x 348 Regarding the $50,000 fee award in *Baca v. Berry*, Councilor Garduno noted, "it seems like we spend a lot more than that on [attorneys'] fees that are external to the city, and I don't know what good they do us." *Id.*

summary judgment to defendants with the much higher *Christiansburg* standard for determining whether prevailing defendants are entitled to recover their attorneys' fees. In other words, directly counter to the Supreme Court's instruction in *Christiansburg* and *Hughes*, Tourek has relied on *post hoc* reasoning to justify pursuing fees against civil rights plaintiffs.

Perhaps the city would respond that it has an obligation to the taxpayers at least to *see* if a court will award it fees when it wins civil rights cases—and a related obligation to appeal disfavorable fee rulings. If so, this Court should set the city straight. Civil rights plaintiffs (many of whom have suffered enough already) suffer extreme emotional harm and financial anxiety even when the city pursues fees against them baselessly. Not only must they remain active participants in litigation that might otherwise be at an end[10]—thus incurring additional attorneys' fees and spending additional time consulting with their attorneys—but they also must worry that, as occurred here and in *Baca*, the much deeper-pocketed city might find a way to convince a judge that fees are actually justified. Thus, the Supreme Court's admonition that relying on "hindsight logic" to justify fee awards "could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success[,]" applies just as strongly to the city's

[10] For instance, in *Baca*, the plaintiffs chose not to appeal the dismissal of their claims with prejudice and were dragged back into the case by the city's cross-appeal.

baseless pursuit of fees in civil rights cases as a matter of course. *Christiansburg*, 434 U.S. at 422.

At best, then, the city's position reflects a misunderstanding of its responsibility to invoke § 1988 and the other civil rights fee shifting statutes in a responsible and legally justified way that is consistent with the primary purpose of the provisions. At worst, the city's position constitutes an active effort to intimidate civil rights plaintiffs. Regardless, intimidation is the natural and predictable result of the city's conduct. In order to undo some of the damage that has already been done, this Court should take this opportunity to clarify that prevailing civil rights defendants should only seek to recover their fees in truly egregious cases—not in *Baca*, where the city should have recognized the importance of the courts as a tool for vindicating political rights, and certainly not in this case, where the city should be apologizing to the plaintiffs rather than punishing them.

CONCLUSION

For the foregoing reasons, as well as the reasons presented in Plaintiffs' brief, this Court should reverse the district court's order awarding fees on Count I, as well as its determination that the official capacity claims were frivolous, and should affirm the district court's refusal to award fees on Plaintiffs' other claims.

Dated: June 23, 2015

Respectfully submitted,

/s/ J. Gerald Hebert

J. Gerald Hebert
Joshua J. Bone
CAMPAIGN LEGAL CENTER
1411 K St. NW, Suite 1400
Washington, DC 20005
202-736-2200
jbone@campaignlegalcenter.org

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORDCOUNT LIMITATIONS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because it contains 5,378 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.

Dated: June 23, 2015

/s/ J. Gerald Hebert

J. Gerald Hebert
CAMPAIGN LEGAL CENTER
1411 K St. NW, Suite 1400
Washington, DC 20005
202-736-2200

ECF CERTIFICATION

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

1. This brief requires no privacy redactions;
2. All paper copies of the foregoing brief required to be submitted to the Clerk's office will be exact copies of the version submitted electronically; and
3. The brief filed via ECF was scanned for viruses using the most recent version of McAfee Security Scan Plus and is free of viruses.

Dated: June 23, 2015

/s/ J. Gerald Hebert

J. Gerald Hebert
CAMPAIGN LEGAL CENTER
1411 K St. NW, Suite 1400
Washington, DC 20005
202-736-2200

CERTIFICATE OF SERVICE

I, J. Gerald Hebert, hereby certify that a copy of the foregoing Brief of *Amicus Curiae* Supporting Appellees/Cross-Appellants and Urging Partial Reversal was furnished through the Court's electronic filing service (ECF) to the following on this 23rd day of June, 2015:

Linda Helen Bennett: hbennett@swcp.com
Rosario D. Vega Lynn: vegalynnlawfirm@aol.com
Stephen G. French: sfrench@frenchlawpc.com
Philomena Hausler: phausler@hauslerlegal.com

/s/ J. Gerald Hebert

J. Gerald Hebert
CAMPAIGN LEGAL CENTER
1411 K St. NW, Suite 1400
Washington, DC 20005
202-736-2200