22-2183

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Matthew A. **Kezhaya**
Respondent / Appellant

v.

City of Belle Plaine, Minnesota
Movant / Appellee.

On appeal from the District of Minnesota

Case No. 0:21-cv-00336

Hon. Wilhelmina Wright, District Judge, presiding

OPENING BRIEF FOR KEZHAYA

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Summary of the case

In a prior suit, the District Court dismissed some of my client's claims "**WITHOUT PREJUDICE**" but did not grant leave to amend the complaint. *Satanic Temple v. City of Belle Plaine, Minnesota*, 475 F. Supp. 3d 950 (D. Minn. 2020). Then, the Magistrate denied my motion for leave to amend the complaint because I was "dilatory" for not announcing the motion until three months after the dismissal order. There was no consent for magistrate disposition. I filed the claims as a second suit. The District Court held out the Magistrate's order as a *de facto* bar, and dismissed the second suit with prejudice.

Dismissal was not punitive enough. I–the lawyer–was personally sanctioned $17,000. As held, I should have appealed a discretionary decision instead of electing my client's preauthorized right to petition for grievances. There was no explanation for why non-monetary damages were inadequate. And the City's fee affidavit was so deficient that the *quantum* of fees was rooted in an "estimate."

The Court should entertain oral argument; at 20 minutes each.

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JURISDICTIONAL STATEMENT

This is an appeal from a monetary sanctions order. A prior order announced that sanctions would be entered. (App. 294 R. Doc. 38, at 48.) However, the "bright-line" rule teaches that a sanctions order is not final and appealable until the *quantum* has been set. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988); *Lee v. L.B. Sales, Inc.*, 177 F.3d 714, 717 (8th Cir. 1999). The final order was entered on May 24, 2022. (App. 556 R. Doc. 58, at 1.) The judgment was entered on May 25, 2022. (App. 570 R. Doc. 59.)

The notice of appeal was due by June 24, 2022. FRAP 4(a)(1)(A) (30 days after judgment). It was filed on June 2, 2022, 9 days after judgment. (App. 573 R. Doc. 61.) The notice of appeal was timely.

The District Court had jurisdiction under 28 USC § 1331 (federal question: the complaint raised § 1983 claims asserting religious discrimination by a Minnesota municipality). There being a timely notice from a final and appealable order, appellate jurisdiction properly lies under 28 USC § 1291.

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Statement of the issues

1: The sanctions order is rooted in legal and factual error.

Black Hills Inst. of Geological Rsch. v. S. Dakota Sch. of Mines & Tech.,
12 F.3d 737 (8th Cir. 1993)

Kulinski v. Medtronic Bio–Medicus, Inc.,
112 F.3d 368, 373 (8th Cir. 1997)

Pulaski Cnty. Republican Comm. v. Pulaski Cnty. Bd. of Election Comm'rs,
956 F.2d 172 (8th Cir. 1992)

Semtek Int'l Inc. v. Lockheed Martin Corp.,
531 U.S. 497 (2001)

2: The $17,000 sanction was specious and arbitrary.

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990)

E.E.O.C. v. Prod. Fabricators, Inc.,
666 F.3d 1170 (8th Cir. 2012)

MHC Inv. Co. v. Racom Corp.,
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Petrone v. Werner Enterprises, Inc.,
42 F.4th 962 (8th Cir. 2022)

3: Prayers for fees-shifting and for reassignment.

In re Murchison,
349 U.S. 133 (1955)

Int'l Union, United Mine Workers of Am. v. Bagwell,
512 U.S. 821 (1994)

Liteky v. United States,
510 U.S. 540 (1994)

Satanic Temple v. City of Scottsdale,
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U.S. Const. amend. V

28 USC § 455(a), (b), (d)

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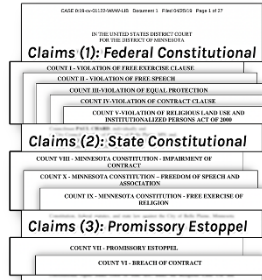
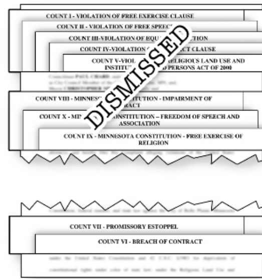
Statement of the Case

The Satanic Temple vs. Belle Plaine
Case Overview

Original complaint was filed, which contained three sets of claims;
(1) Federal Constitutional,
(2) State Constitutional, and
(3) Promissory estoppel.



Claims (1, 2) were dismissed *without prejudice*. The Promissory estoppel claim (3) was allowed to proceed.



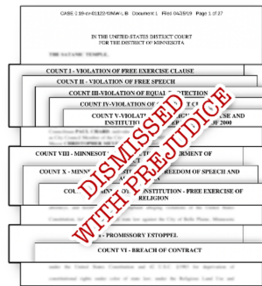
Kezhaya moved for leave to amend the complaint and reinstate claims (1, 2). The magistrate denied this.

COUNT VII - PROMISSORY ESTOPPEL
COUNT VI - BREACH OF CONTRACT

As claims (1, 2) remained dismissed *without prejudice*, they were brought as a second case.

2. Counts I through VI and VIII through X are **DISMISSED WITHOUT PREJUDICE**.

The district judge dismissed all claims with prejudice on *res judicata* grounds. Kezhaya sanctioned $17,000 for filing the second suit.



Kezhaya appeals the sanctions order as legally and factually erroneous, and seeks reassignment.

This appeal arises out of a constitutional tort case. My client is a religious organization which alleged that a small town opened a 'free speech zone' to accommodate its preferred religious viewpoint and then closed the 'free speech zone' to exclude my client. (App. 6 R. Doc. 1, at 4 ¶ 11.) The constitutional claims were dismissed "**WITHOUT PREJUDICE**" for a failure to plead sufficient facts. *Satanic Temple v. City of Belle Plaine, Minnesota*, 475 F. Supp. 3d 950, 966 (D. Minn. 2020). The order of dismissal "**WITHOUT PREJUDICE**" did not grant leave to amend nor set conditions upon doing so. *Id*.

A single claim for promissory estoppel survived the order of dismissal. *Id*. I engaged in discovery on the surviving claim. Through discovery and my independent investigation, I learned new facts which led me to conclude that I could reasonably and justifiably seek leave to correct the asserted pleading deficiencies. (App. 543 R. Doc. 57, at 62); (App. 268 R. Doc. 38, at 22) (I obtained most of my new information from a "government-data," or 'sunshine law,' request).

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Rather than have two open cases on the same *res*, I first sought leave to amend the first complaint. (App. 266 R. Doc. 38, at 20.) The Magistrate denied my motion on timeliness grounds. (App. 567 R. Doc. 38, at 21.) In lieu of appealing the discretionary decision, I opted to file the preauthorized second suit. (App. 289 R. Doc. 38, at 43.)

In retaliation, the City moved for sanctions based on an argument that the Magistrate's order was a *de facto* dismissal "with" prejudice. (App. 216 R. Doc. 19.) I timely objected, asserting that the Magistrate could not enter a dismissal with prejudice for lack of jurisdiction; that binding precedent gave me an objective ground to file the second suit; and, even if I was wrong, I had performed my research in good faith. (App. 240 R. Doc. 24.)

A hearing was held, and it did nothing to disrupt our prediction. (App. 482 R. Doc. 57.) Judge Wright asked no questions about the research on which my local counsel and I formed our unanimous opinion that the second suit was permissible. (Id.) Judge Wright

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made no inquiry into the soundness or validity of our analytical framework. (Id.) The only questions of interest to Judge Wright were whether we correctly answered the *res judicata* question, and whether my client is "religious because it is anti-religious." (App. 541 R. Doc. 57, at 60.)

That rhetorical question–"So it is religious because it is anti-religious?"–has rung continuously in my ears for the past year. The question was interposed after I explained that my client's Display is proselytizing in nature. (App. 540-541 R. Doc. 57, at 59-60.) More particularly, I indicated, the Display posits: "we are TST, we exist, you should look into us, and we're patriotic too." (App. 540 R. Doc. 57, at 59.) The Display proselytizes in accordance with my client's religious doctrine to refrain from "door-to-door proselytizing;" my client does not annoy people at the airport, they propagate their viewpoint by equally participating in 'free speech zones' whenever "a government opens the door to religion generally." (App. 540-541 R. Doc. 57, at 59-60.)

At no point did the City proffer evidence or argument that my client was "anti-religious." The City had not even contested the religiosity of my client, instead more narrowly contesting whether the Display was "central" to the religious viewpoint. (App 275 R. Doc. 38, at 29.) It does not appear of record where Judge Wright got the notion that my client was "anti-religious," this was a *sua sponte* objection raised on behalf of the defense only after I failed to give an impromptu sermon at the motion to dismiss stage.

To the joint surprise of my local counsel and myself, it was announced that we were to be monetarily sanctioned for bringing the second suit. (App. 293 R. Doc. 38, at 47.) We were told that we would be obligated to compensate the City for the sum of expenses the City "incurred" for defending against the second suit. (Id.) One of my local counsels promptly noticed a withdrawal, although not promptly enough to escape joint liability. (App. 319 R. Doc. 54, at 13); (App. 571 R. Doc. 59, at ¶ 3).

As directed (App. 293 R. Doc. 38, at 47), the City filed a

declaration in support of attorney's fees. (App. 295 R. Doc. 51.) The declaration omitted all fee agreements, proofs of payment, and invoices which could have evidenced the actual expenses "incurred" by the City for the defense. (App. 295-306 R. Doc. 51.) Through Minnesota's sunshine law, I procured proof that the City had no fee agreements, no proof of payment, nor even a single invoice pertaining to the case. (App. 323 R. Doc. 55, at 2.) Rather than procure evidence of expenses actually "incurred," I received the City's insurance agreement, which provides coverage for suits alleging constitutional violations.[1] The City's insurer "incurred" all expenses,

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[1] App. 416 R. Doc. 55-2, at 89 ¶¶ 1(a) (indemnifying against "damages") and 1(b) (indemnifying against defense-related costs)

"Damages" means "attorney's fees with respect to suits alleging violations under federal civil rights laws." App. 427 R. Doc. 55-2, at 101.

"Occurrence," with respect to municipal liability coverage, means a "wrongful act"

A "wrongful act" means "any actual or alleged … violation of any rights, immunities, or privileges secured by the Constitution and Laws of the United States of America." App. 433-434 R. Doc. 55-2, at 106-107.

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not the City. (App. 312-313 R. Doc. 54, at 6-7.)

In my opposition to the City's motion for attorney's fees, I argued the City's time logs were incomprehensible in some places and blatantly duplicative in others. (App. 313-318 R. Doc. 54, at 7-13.) The District Court conceded on this point and instead resolved to "estimate" a proper monetary sanction. (App. 568 R. Doc. 58, at 13-14.) The District Court counted up the City's briefing and found 10 of 52 pages (=19.23%) were relevant to the issue of sanctions. (Id.) Inexplicably, however, the District Court then rounded the fraction up to 50% of the City's request. (Id.)

I was ordered to pay about $17,000. (App. 570 R. Doc. 58, at 15.) Technically, my co-counsel were jointly liable but I alone moved for and paid the cash bond. (Id.); (App. 575 R. Doc. 62); (App. 581 R. Doc. 66); (App. 584 R. Doc. 69). I noticed the appeal promptly after the final order. (App. 61 R. Doc. 61.)

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Summary of the Argument

This brief is organized in accordance with the standard of review. *First*, we ask whether sanctions were permissible at the outset. They were not. The District Court conflated "distinguishable" with "frivolous." Further, the Magistrate's order did not and could not preclude the second suit. Judge Wright abused her discretion by rooting her sanctions order in two errant propositions of law.

Second, we inquire into the specific sanction at issue. Monetary sanctions were entered without any explanation as to why non-monetary sanctions were not sufficient. My error–if any–was rooted in ignorance as to the finer points of *res judicata*. A simple reprimand would have sufficed to deter me or others from like conduct in the future. Judge Wright abused her discretion by failing to consider non-monetary sanctions and, by extent, by failing to justify monetary sanctions.

Even if monetary sanctions were appropriate, the *quantum* of sanctions was specious and arbitrary. $17,000 is a substantial

sanction by any measure. That requires a rational explanation for why the ordered sum was no more than was necessary to deter like conduct. There was no such explanation. The amount was derived from giving the City half of what it wanted, solely based on an unexplained “estimate” of a little more than 2.6x the proportionate page count of the relevant argument. Judge Wright abused her discretion by entering a monetary sanctions order for an arbitrary sum.

Third, we ask about the appropriate relief on appeal. Obviously, a reversal of the sanctions order is necessary. But a straight reversal would not correct the injustice of my having to prosecute a duplicative appeal. Upon remand, the Court should direct proceedings to have the City’s attorneys of record pay my reasonable attorney’s fees and costs for this appeal. They chose to make this case personal; they should be forced to see their strategy to its logical end.

Upon remand, the Court should also direct reassignment. Judge Wright abused the punitive processes of government to chill my client’s ability to access the courts. Both of my co-counsel have

abandoned my client, and I suffered reputational harm and substantial monetary losses–both actual and consequential. Further, Judge Wright's rhetorical question into my client's "anti-religious" nature give any reasonable person good cause to question Judge Wright's ability to render a fair judgment in this case.

Argument

Standard of review

This Court reviews a district court's imposition of sanctions under Rule 11 for an abuse of discretion. *MHC Inv. Co. v. Racom Corp.*, 323 F.3d 620, 624 (8th Cir. 2003). An abuse of discretion is established if the court based its ruling on an erroneous view of the law or based its ruling on a clearly erroneous assessment of the evidence. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). An abuse of discretion may also be found in the failure to exercise discretion in the first place. *Petrone v. Werner Enterprises, Inc.*, 42 F.4th 962, 968 (8th Cir. 2022).

A sanction should be reversed when the district court based its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *MHC*, 323 F.3d at 624. Reviewing a district court's imposition of Rule 11 sanctions necessarily requires an examination of the underlying factual and legal claims, as well as the appropriateness of the sanction imposed. *Id.*

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The sanctions order is reviewed in two stages. *Kountze ex rel. Hitchcock Found. v. Gaines*, 536 F.3d 813, 818 (8th Cir. 2008); *Prof'l Mgmt. Assoc. v. KPMG, LLP*, 345 F.3d 1030, 1033 (8th Cir. 2003).

The first line of inquiry is whether sanctions are appropriate at all. *Ibid.* Sanctions are only appropriate if a legal contention is unsupported by (1) existing law; (2) a nonfrivolous argument for extending, modifying, or reversing existing law; and (3) a nonfrivolous argument to establish new law. FRCP 11(b)(2). These questions are resolved by an objective reasonableness standard. *Pulaski Cnty. Republican Comm. v. Pulaski Cnty. Bd. of Election Comm'rs*, 956 F.2d 172, 173–74 (8th Cir. 1992).

The second line of inquiry is whether the specific sanction is justified. *See Willhite v. Collins*, 459 F.3d 866, 869 (8th Cir. 2006)(separately treating the questions). A monetary sanction should be "no greater than sufficient to deter future misconduct by the party." *Id.* (citing *In re Kujawa*, 270 F.3d 578, 583 (8th Cir. 2001)); *see also* FRCP 11, Advisory Committee Notes 1993 Amendment

(addressing the Court's discretion in fashioning a particular sanction, but noting it is "subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.")

1: The sanctions order is rooted in legal and factual error.

This sanctions order should be reversed as erroneous, both legally and factually. The order suffers from two legal errors: (1) it conflates "distinguishable" with "frivolous;" and (2) it misapplies claim preclusion. It was an abuse of discretion to root the sanctions order in either legal error.

1.1: "Distinguishable" does not mean "frivolous."

It was not "frivolous" for me to rely on this Court's binding precedent–even if unpersuasively. *Kulinski v. Medtronic Bio–Medicus, Inc.*, 112 F.3d 368, 373 (8th Cir. 1997)

. This is not the first time this Court has encountered a sanctions order which reversibly conflated "unpersuasive" with "sanctionable." The sanctions order must be reversed because it confuses "distinguishable" with "frivolous." *See Black Hills Inst. of Geological Rsch. v. S. Dakota Sch. of Mines & Tech.*, 12 F.3d 737, 745 (8th Cir. 1993) (reversing a sanctions order for confusing the merits of an argument with the merits of bringing it). Before sanctions can lawfully issue, the punished argument must be objectively "frivolous, groundless, or advanced for an improper purpose." *Pulaski County*, 956 F.2d at 173-74. I, however, was sanctioned because the District Court found my authority "inapposite." (App. 289 R. Doc. 38, at 43); *see also Kulinski v. Medtronic Bio–Medicus, Inc.*, 112 F.3d 368, 373 (8th Cir. 1997) (Declining to "contort" a denial leave to amend into "a denial on the merits," where the denial of leave to amend was preceded by a dismissal without prejudice).

In *Black Hills*, the failure to apply the correct analytical framework required reversal. *Id.* As in *Black Hills*, a procedural question dominated both the underlying motion to dismiss and this motion for sanctions. In *Black Hills,* the question was whether a defendant was a proper party. *Id.* As there, the question below was whether a magistrate can enter a *de facto* dismissal with prejudice after the district judge had dismissed the claims "**WITHOUT PREJUDICE**." (App. 287 R. Doc. 38, at 41). In *Black Hills*, the lawyer was sanctioned for having errant legal reasoning. Id., 12 F.3d at 745. So was I. (App. 289 R. Doc. 38, at 43) (finding *Kulinski* "inapposite" and therefore sanctionable.)

The *Black Hills* Court reversed a sanctions order for conflating the merits of the suit with the merits of bringing it. *Id.* Judge Wright sanctioned me for being unpersuasive. Without more, that was reversible error. *Black Hills*, 12 F.3d at 745.

1.2: The second suit was not barred by claim preclusion.

The sanctions order is also unlawful because it misapplies claim

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preclusion The District Court held that the Magistrate's order was a dismissal "with" prejudice. (App. 294 R. Doc. 38 at 48). Three errors led to this conclusion: (1) the second suit had express preauthorization; (2) I tried every avenue to avoid having to bring the second suit; and (3) the denial of leave to amend is "irrelevant," *not* dispositive, to the claim preclusion analysis.

Standard of review

This issue requires application of *res judicata,* which is reviewed *de novo*. *St. Paul Fire & Marine Ins. Co. v. Compaq Computer Corp.*, 457 F.3d 766, 770 (8th Cir. 2006). *Res judicata* is the common law principle that a litigant who has had one fair chance to litigate a claim before an appropriate tribunal usually should not be given a second chance. *Restatement (Second) of Judgments* 1 Relation (1982). The "chance" to litigate a claim (of the kind that bars a second suit) must be a serious and genuine "opportunity to submit a dispute over legal rights to a tribunal legally empowered to decide it according to definite procedural rules." *Id.* Anything less is either "legally

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inconclusive," or is "fundamentally unfair." *Id.* In either event, errantly treating prior defective proceedings as having a preclusive effect "may be a denial of Due Process." *Id.*; *see also* U.S. Const. amend. V ("No person shall be deprived of property without due process of law") (cleaned up); Black's Law Dictionary, *Chose* (11th ed. 2019) (a "chose in action" is a property right, *in personam,* to which one is entitled but must regain possession through a lawsuit, such as the § 1983 constitutional tort claim which I filed for my client).

1.2.1: The second suit had explicit preauthorization.

The sanctions order is unlawful because I had explicit preauthorization to file the second suit. The premise for this sanctions order was that "the plaintiff *must* bring all claims at once against the same defendant relating to the same transaction or event." (App. 288 R. Doc. 38 at 42) (emphasis added). But a plaintiff need not *always* bring all claims at once. *See N. Assur. Co. of Am. v. Square D Co.*, 201 F.3d 84 (2d Cir. 2000). A second suit on the same *res* is permitted

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where the plaintiff has explicit preauthorization, such as by the subject order of dismissal "**WITHOUT PREJUDICE**." *Mountain Pure, LLC v. Turner Holdings, LLC*, 439 F.3d 920 (8th Cir. 2006). A dismissal "**WITHOUT PREJUDICE**" is such preauthorization. *Id.* Thus, "a judgment dismissed without prejudice does not create a res judicata bar." *Al-Saadoon v. Barr*, 973 F.3d 794, 801 (8th Cir. 2020); *see also Rosemann v. Roto-Die, Inc.*, 276 F.3d 393, 398 (8th Cir. 2002). The District Court explicitly preauthorized a second suit, then sanctioned me for filing it.

1.2.2: There was no "full and fair opportunity" to litigate.

The sanctions order is also unlawful because my client was denied its rightful "full and fair opportunity" to litigate the matter. *In re Anderberg-Lund Printing Co.*, 109 F.3d 1343, 1346 (8th 1997). Claim preclusion only bars lawsuits where the plaintiff had a "chance" to bring in all claims in the first action. *Restatement* 1 Relation. That "chance" requires a minimum standard of fairness. *Id.* That minimum standard requires a genuine "initial engagement of

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the merits." *Id.* Yet I was precluded from any discovery within spitting distance of answering why the City closed the forum. In effect, my client was denied its day in court. The religious favoritism and censorship claims have never been resolved, let alone addressed, on the merits.

And it was not for lack of trying. I filed every motion available to rein the ejected claims back into the first case. The sanctions order decries these motions as a "repeated disregard of court orders." (App. 561 R. Doc. 58, at 6). Far from sanctionable "misconduct," these were my efforts to exhaust all alternatives before filing the second lawsuit.

It is no coincidence that appellate "finality" and claim preclusion "finality" are interchangeable. *AVX Corp. v. Cabot Corp.*, 424 F.3d 28 (1st Cir. 2005). Both rules solve for the same root problem: jurists sometimes disagree. If jurists always agreed, there would be no social cost to reevaluating cases, the same result would be returned in every case. We do not live in that world, so indefinite litigation

entails a "social burden." *Restatement* 1 Relation. It rewards the litigious, and it contributes toward uncertainty. *Id.* Thus, we deter indefinite litigation by deterring successive litigation. *See id.*

Res judicata is a "mirror of legal justice itself." *Id.* The City and the District Court played a game of keep-away to prevent my client's claims from ever being heard in the first place. If *res judicata* allows for this outcome, then the "mirror" reveals systemic injustice in the *King* line of cases.

1.2.3: The order is unsupported by its cited authorities.

The sanctions order is also unlawful because it is unsupported by its cited authorities. (App. 292-239 R. Doc. 38, at 46-47). In each cited case, the denial of leave to amend was preceded by a final, appealable judgment. In my case, no judgment from the first case would be appealable because some of my client's claims had been ejected "WITHOUT PREJUDICE." Any attempted appeal would be improper piecemeal litigation. *See In re Anderberg-Lund Printing Co.*, 109 F.3d 1343, 1346 (8th Cir. 1997). That is because the denial of

leave to amend is "irrelevant" to the claim preclusion analysis. *Curtis v. Citibank, N.A.*, 226 F.3d 133, 139 (2d Cir. 2000). The denial of leave to amend is just a proxy to determine when claims have been forfeited "due to a plaintiff's failure to pursue all claims against a particular defendant in one suit." *Northern Assurance*, 201 F.3d at 88.

According to the district court, I should have appealed the denial of leave to amend, not start a new action. (App. 293 R. Doc. 38, at 47) (quoting *Airframe Sys., Inc. v. Raytheon Co.*, 601 F.3d 9, 16 (1st Cir. 2020)). Wrong. The Magistrate's order was not a "judgment" because the Magistrate lacked the power to issue a dispositive order. 28 USC § 636(b)(1)(A) ("a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, *except* a motion…to dismiss for failure to state a claim upon which relief can be granted…") (emphasis added); D. Minn. LR 72.1.

Even if the Magistrate's order explicitly enjoined me from filing the second action—it didn't—that would have usurped the traditional adjudicatory function of an Article III judge. *N. Bottling Co. v.*

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Pepsico, Inc., 5 F.4th 917, 924 (8th Cir. 2021). Before the Magistrate could issue a preclusive judgment, the Magistrate needed the written consent of both parties. *Id.* No such consent was requested or given. Absent the required consent, the Magistrate could not issue a "judgment."

A "*final* judgment" means "appellate finality." *Downing v. Riceland Foods, Inc.*, 810 F.3d 580, 586–87 (8th Cir. 2016); *AVX Corp. v. Cabot Corp.*, 424 F.3d 28, 32 (1st Cir. 2005). There is no appellate jurisdiction until the "entire controversy" (including the claims which were dismissed '**WITHOUT PREJUDICE**') is finally resolved. *Morris v. Barkbuster, Inc.*, 923 F.2d 1277, 1280 n. 6 (8th Cir. 1991). Appellate finality only accrues when the matter is no longer "open," "unfinished," or "inconclusive." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). When an order dismisses some but not all claims, the matter is still open, and an appeal is impermissible piecemeal litigation. *Mathers v. Wright*, 636 F.3d 396, 398 (8th Cir. 2011); *see also Mountain Pure*, 439 F.3d at 924 (a judgment lacks

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finality when some claims were previously dismissed "**WITHOUT PREJUDICE**"). Because the promissory estoppel claim was still open, even after the Magistrate's order denying leave to amend, the Magistrate's order could not become a "final judgment" without rewriting decades of precedent.

Nor was the Magistrate's order a "final judgment *on the merits*." The Magistrate denied leave to amend because the motion was untimely. (App. 271-290 R. Doc. 38, at 25-44). "Timeliness" is a procedural ground, not a merits ground. *Curtis v. Citibank, N.A.*, 226 F.3d 133, 139 (2d Cir. 2000). Even the District Court agreed that the Magistrate's order was "nondispositive". (App. 263 R. Doc. 38, at 17). At least, for purposes of affirming the order. (Id.) The order was given preclusive ("dispositive") effect for purposes of entering sanctions. (App. 293 R. Doc. 38, at 41-42.)

The Magistrate's order was not "final," was not a "judgment," and was not "on the merits." It was not the "final judgment on the merits" required for the first element of claim preclusion. *Costner v.*

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URS Consultants, Inc., 153 F.3d 667, 673 (8th Cir. 1998). Thus, the District Court got the law backwards when it found that the Magistrate's order was a *de facto* dismissal with prejudice. (App. 294 R. Doc. 38, at 48).

2: The $17,000 sanction was specious and arbitrary.

If the Court does find that some sanction was appropriate, then it should at least find that this $17,000 sanction was *not* appropriate.

2.1: A reprimand would have deterred like conduct.

First, the order enters a monetary sanction without the requisite explanation as to why a nonmonetary sanction would not deter like conduct. It is an error of law to enter the most punitive measure. FRCP 11(c)(4) (the law requires the least punitive measure).

There are several "proper considerations" to aid our district courts in deciding "what sanctions would be appropriate under the circumstances." FRCP 11 Advisory Committee Notes (1993 Amendment). They are:

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- Whether the improper conduct was willful, or negligent;
- Whether it was part of a pattern of activity, or an isolated event;
- Whether it infected the entire pleading, or only one particular count or defense;
- Whether the person has engaged in similar conduct in other litigation;
- Whether it was intended to injure;
- What effect it had on the litigation process in time or expense;
- Whether the responsible person is trained in the law;
- What amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; and
- What amount is needed to deter similar activity by other litigants.

FRCP 11, Advisory Committee Notes (1993 Amendment); compare (App. 482-556 R. Docs. 57-58).

But no part of this record includes any findings, or even any evidence, that would support an analysis of the above factors. Judge

Wright didn't even ask me what about the steps my local counsel and I took to determine that the second suit wasn't barred. (App. 482 R. Doc. 57.) It was an abuse of discretion to enter a monetary sanction without first considering the "relevant factor[s] that should have been given significant weight." *E.E.O.C. v. Prod. Fabricators, Inc.*, 666 F.3d 1170, 1172 (8th Cir. 2012).

A *lawful* sanctions order would have been a reprimand. Nearly 30 years ago, Rule 11 was changed to clarify the principle that "sanctions should not be more severe than reasonably necessary to deter repetition" of like conduct. FRCP 11, Advisory Committee notes (1993 Amendment). Reprimands are first among the "most prominent" of nonmonetary sanctions that the "current text of Rule 11 contemplates greater use of." *Wright & Miller*, 5A Fed. Prac. & Proc. Civ. § 1336.3, at n. 30 and accompanying text (4th ed.) (collecting authorities).

Despite the plain text, however, my proffered notion of a "mere reprimand" was declined. (App. 561 R. Doc. 58, at 6.) Judge

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Wright's basis for rejecting my request was my "repeated" disregard of court orders. (Id.) The record does not support this basis. I was charged with precisely one count of frivolity: 'disregarding' the Magistrate's order by filing the second suit. (App. 560 R. Doc. 58, at 5) The order offers no other explanation or discussion as to justify why the least punitive measure was a monetary sanction. It was an abuse of discretion to rely upon apparitional 'repeated' contempts. *Cooter*, 496 U.S. at 405.

2.2: The sanctions order gives the City a windfall.

Second, the order directs that I pay my adversary a windfall. I was promised that the monetary sanction would be that amount the City "incurred" in defense-related costs and fees. (App. 293 R. Doc. 38, at 47). Based on the City's own disclosures, that sum was $0. (App. 322 R. Doc. 55). Rule 11 therefore allows for no more than $0 in monetary sanctions. FRCP 11, Advisory Committee Notes at 1993 amendment (A monetary sanction paid to another party "should *not* exceed the expenses and attorneys' fees") (emphasis added). It was

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an abuse of discretion to enter a sanctions order in excess of what Rule 11 allows. *Cooter*, 496 U.S. at 405.

2.3: There was not even a lodestar analysis.

Third, the sanctions order failed to even apply a lodestar analysis. (App. 565-570 R. Doc. 58, at 10-15). The City so egregiously failed to meet its burden of proof that one was left only to speculate ("estimate") as to what a *lawful* sanctions order could be. (App. 568 R. Doc. 58, at 13). By any measure, the City overbilled the case. (App. 569 R. Doc. 58, at 14) (finding the City's hours log "unreasonably excessive.")

Normally when a party fails to meet their burden of proof, the law requires that the motion be denied. Black's Law Dictionary, *Burden of Proof* (11th ed. 2019). It was an abuse of discretion to speculate, vaguely based on page count, as to what degree to discount the City's overbilling logs. *Cooter*, 496 U.S. at 405.

Rather than scrutinize the City's time logs, the Court used a percentage-based reduction. (App. 569 R. Doc. 58, at 14). Half of a bad

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input is still a bad outcome. If these 'estimated' sanctions are affirmed, then this Court will encourage future parties to provide only "unreasonably excessive" and inadequately detailed records.

Moreover, this case involves a significant monetary sanction which requires a "detailed explanation" to support it. *MHC*, 323 F.3d at 628. Rather than address my myriad arguments for why the City's sought-after $34,000 was palpably insane, the District Court split the baby because that was affirmed in some statutory attorney's fees case. (App. 570 R. Doc. 58, at 15) (citing *Orduno v. Pietrzak*, 932 F.3d 710, 720 (8th Cir. 2019)). Ordinarily, fees-shifting cases involve a lodestar analysis based upon comprehensible evidence. *See Orduno v. Pietrzak*, 932 F.3d 710, 720 (8th Cir. 2019). There was no lodestar here, just an "estimate" of the proper windfall.

The order for me to pay $17,000 to my adversary lacked the requisite "detailed explanation" to support the *quantum.* Ordering sanctions absent this detailed explanation was an abuse of discretion. *Cooter*, 496 U.S. at 405.

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3: Prayers for fees-shifting and for reassignment.

If this Court agrees that a reversal is proper, then any remand instructions should include orders directing the City's counsel of record to pay me for this appeal, and for an order reassigning this case to a different District Court Judge.

3.1: Upon remand, the Court should direct fees-shifting.

The City's attorneys chose to make this case personal. They should be made to see their strategy to its logical conclusion. This second appeal is the product of a vexatious duplication of proceedings. 28 USC § 1927; FRCP 11(c)(2); *see also Vallejo v. Amgen, Inc.*, 903 F.3d 733, 749 (8th Cir. 2018). Sanctions under § 1927 are available to "winners and losers, or between plaintiffs and defendants." *Id.* These sanctions deter "the abuse of court processes." *Id.*

Sanctionable "abuses of court processes" include a Rule 11 motion prepared to "intimidate an adversary into withdrawing contentions that are fairly debatable." FRCP 11, Advisory Committee Notes (1993 amendment). Even if I erred in my conclusion that the

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second suit was not barred, it was at least "fairly debatable" that a dismissal "**WITHOUT PREJUDICE**" is an explicit preauthorization to file a second lawsuit. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505-06 (2001); Black's Law Dictionary, *Dismissed without prejudice* (11th ed. 2019); *Kulinski*, 112 F.3d at 373.

It was also an abuse of the court's processes for the City's attorneys to invoke Rule 11 in a transparent effort to intimidate me into dropping my client's claims. FRCP 11, Advisory Committee Notes (1993 amendment) (cautioning against Rule 11 motions prepared "to create a conflict of interest between attorney and client.")

The City's strategic use of Rule 11 sanctions was enough to shake my former co-counsel from the case, but I see it for what it is: sanctionable misconduct. Given that this misconduct violates legal principles, the City's attorneys of record should be ordered to pay for the resultant harm. FRCP 11(c)(5)(A). That sum is the reasonable attorney's fees entailed in opposing and appealing this sanctions order, with interest. The Court should remand to assess the proper

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quantum of the sanction.

3.2: Upon remand, the Court should direct reassignment.

Upon remand, the Court should also direct reassignment because Judge Wright is plainly biased. The fact of my client's religiosity was recognized by both the Internal Revenue Service and the federal judiciary well before the subject sanctions hearing. *Satanic Temple v. City of Scottsdale*, 2020 WL 587882, *7 (D.Ariz., 2020)..

Judge Wright ignored these adjudicative facts and instead demanded I assuage her concern that my client was "anti-religious." (App. 541 R. Doc. 57, at 60.) Judge Wright then punished me, an officer of this Court, for helping my client access the courts. That was a First Amendment retaliation action borne out of an apparent religious bias. Minimally, Judge Wright's rhetorical question as to my client's "anti-religious" nature gives rise to an appearance of partiality. Either way, reassignment is proper.

Standard of review

This Court reviews a request for reassignment for plain error if a

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timely motion to recuse was not made in the district court. *Burton v. Nilkanth Pizza Inc.*, 20 F.4th 428, 434 (8th Cir. 2021). More particularly, the Court's review "is narrow and confined to the exceptional case where error has seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 663 (8th Cir. 2003). Reversal is proper if the error prejudiced the substantial rights of the appellant and would result in a miscarriage of justice." *Id.* (cleaned up).

Reassignment is appropriate when a court's proceedings or rulings "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Sentis Grp., Inc., Coral Grp., Inc. v. Shell Oil Co.*, 559 F.3d 888, 904 (8th Cir. 2009).

More precisely, it is an objective question rooted in due process whether there is a "constitutionally intolerable probability of actual bias." *Cf. Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 882 (2009) (Fourteenth Amendment case). Due process requires that a litigant be "granted an opportunity to present his claims to a court

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unburdened by any possible temptation not to hold the balance nice, clear, and true." *Cf. Williams v. Pennsylvania*, 579 U.S. 1, 16 (2016) (Fourteenth Amendment case). The legal question is "whether the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.*, at 4. That is an objective standard, *id.*, and it is a component of the minimum standards of fairness upon which our system of justice is founded. *Withrow v. Larkin*, 421 U.S. 35, 46 (1975) ("a fair trial in a fair tribunal is a basic requirement of due process") (Fifth Amendment case).

3.2.1: Inquisition against the "anti-religious."

Reassignment is required because of Judge Wright's *sua sponte* inquisition against what she perceives to be the "anti-religious." The American Experiment is predicated upon the apparently-still-novel proposition that "Church and State should be separated." *Zorach v. Clauson*, 343 U.S. 306, 312 (1952). This aspect of the fundamental civil right to be free from religious oppression is enshrined in the First Amendment. *Id.*; see also U.S. Const. amend. I (the Religion

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Clauses). Pursuant to this constitutional cornerstone, it has long been held that "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson v. Jones*, 80 U.S. 679, 728 (1871).

The First Amendment is particularly important to our constitutional republic because the Founders "were a religious people divided into many fighting sects." *Zorach*, 343 U.S. at 319 (Black, J., dissenting). The separation of Church and State was a societal truce among the conflicting religions: we fight with our words, not with our votes. *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971) (subsequent treatment omitted) ("political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.")

This constitutional notion of separating Church and State is of particular importance to my client, and to me by extension, because it is the thin shroud that protects us from those "zealous sectarians entrusted with governmental power" who are wont to "torture,

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maim, and kill those they brand heretics, atheists, or agnostics." *Zorach*, 343 U.S. 319 (Black, J., dissenting) (cleaned up); *see also In re Weitzman*, 426 F.2d 439, 458 (C.A.Minn. 1970) (per curiam) (Judge Lay, concurring in judgment) ("The dark history of religious torment over enforced dogma is too recent for us to allow a religious inquisition for the price of [avoiding a constitutional question].")

My client is an organized collective of what a pernicious segment of "zealous sectarians entrusted with governmental power" would brand "heretics," "atheists," and "agnostics." Far from being "anti-religious," all and each of these religious viewpoints are entitled to be free from the establishment of an "official" federal religion, notwithstanding that their celebrants do not prostrate themselves before any deities. *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961);[2] *Satanic Temple v. City of Scottsdale*, 2020 WL 587882, *7 (D.Ariz.,

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[2] From *Torcaso*: "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Ethical Culture, Secular Humanism, and others." (cleaned up)

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2020);[3] *Fields v. Speaker of Pennsylvania House of Representatives*, 936 F.3d 142, 153 (3d Cir. 2019) ("The Supreme Court has moved considerably beyond the wholly theistic interpretation of the term religion;" and now "includes nontheistic and atheistic beliefs") (cleaned up).

There is no innocuous question as to whether a religious discrimination litigant is "anti-religious." Baked into the question is a premise that there is a *true* religion. By asking it, Judge Wright accused my client of being a *false* religion. The First Amendment waas supposed to protect my client from being on the wrong side of the "wall" between Church and State. *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 18 (1947).

At no point did I, the complaint, or any part of the record suggest that my client stood in *opposition* to whatever Judge Wright deems to be "religion." Short of an impromptu sermon, to be given by the

[3] In *Scottsdale*, after a bench trial, my client's viewpoint was held to be "religious" for purposes of religious discrimination claims.

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lawyer at a Rule 12(b)(6) hearing, Judge Wright seemed quite eager to write off my client's religious discrimination claims, *sua sponte*, *sans* evidentiary hearing, and *Scottsdale* notwithstanding. (R. Doc. 57, at 59-60.)

If Judge Wright could not control her compulsion to prejudge a religious rights claimant as "anti-religious," then the recusal statute required at minimum some fair notice to the parties; if not *sua sponte* recusal. 28 USC § 455(a), (b), (d); see also Michelle L. Jones, *Religiously Devout Judges: A Decision-Making Framework for Judicial Disqualification*, 88 Ind. L.J. 1089, 1104–11 (2013), which proposes a three-part decision-making framework highlighting the heightened consideration that should arise when: a party's religious affiliation "stands in opposition to a judge's religious affiliation" (*id.*, at 1106), or causes an "appearance of partiality" (*id.*, at 1108), or when a vote for a particular party may cause the judge to feel themselves in "material cooperation with evil" (*id.* at 1109).

Especially when the presiding judge is called upon to wield

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contempt powers, "justice must satisfy the appearance of justice." *In re Murchison*, 349 U.S. 133, 136 (1955). This is especially true whenever the presiding judge is called upon to wield contempt powers. Contempt powers are uniquely "liable to abuse." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994). A religiously offended judge tasked with considering a contempt motion is uniquely susceptible to "the most vulnerable and human qualities" when taking up the sole responsibility for "identifying, prosecuting, adjudicating, and sanctioning the [allegedly] contumacious conduct." *Id.*

Even this rhetorical hint that the case was prejudged on the merits compels a finding that there is a "constitutionally intolerable probability of actual bias." *Caperton*, 556 U.S. at 882; *see also Liteky v. United States*, 510 U.S. 540, 552 (1994) (the reasonable appearance of "bias" and "prejudice," as used in § 455(a), refers to "judicial predispositions that go beyond what is normal and acceptable.") Reassignment is necessary to ensure the systemic integrity of our justice system.

3.2.2: Obstruction and retaliation against an appeal.

Reassignment is also proper because the sanctions order was a textbook example of First Amendment retaliation. Disregard, *arguendo*, the broader questions of judicial immunity and general nonexistence of *Bivens* liability. *See Mireles v. Waco*, 502 U.S. 9, 12 (1991) (judges are immune for judicial actions taken with jurisdiction and Judge Wright unquestionably had federal question jurisdiction to hear this case); *Egbert v. Boule*, 142 S.Ct. 1793, 1809 (June 8, 2022) (Gorsuch, J., concurring) (calling for the Supreme Court to put the *Bivens* doctrine out of its misery).

A First Amendment retaliation requires three elements.

First, the plaintiff must have engaged in a protected activity. *Bennie v. Munn*, 822 F.3d 392, 397 (8th Cir. 2016). Unquestionably, the right to access the courts is a First Amendment protected activity. U.S. Const. amend. I (guaranteeing the right "to petition the Government for a redress of grievances"); *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387 (2011) ("The right of access to courts for

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redress of wrongs is an aspect of the First Amendment right to petition the government.")

This right to access the courts is one of "the most precious of the liberties safeguarded by the Bill of Rights," such that my client has First Amendment rights to hire me to assist its members in the assertion of their legal rights. *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967); *see also Thomas v. Collins*, 323 U.S. 516, 530-531 (1945) (especially sensitive is the subject right to petition for redress of religious and political grievances).

Beyond question, my client had a Petition Clause right to access the District Court. U.S. Const. amend. I. Also beyond question, my client had a right to appeal to this Court. 28 USC § 1291. We could not appeal the first suit because outlying claims had been dismissed "**WITHOUT PREJUDICE**." *Mathers*, 636 F.3d at 398. My client had a First Amendment right to preserve the appeal by obtaining a final and appealable disposition as to the whole controversy, and I had a fiduciary duty of competence to perfect the appeal. The second suit

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was the election of a First Amendment right–an action which Judge Wright explicitly contemplated and approved of by specifying that the dismissal was "**WITHOUT PREJUDICE**" to a second suit.

Second, the government official must have taken an adverse action against the plaintiff which would chill a person of ordinary firmness from continuing in the activity. *Bennie*, 822 F.3d at 397. Such adverse action chills a person of ordinary firmness when a government official "engaged the punitive machinery of government in order to punish Ms. Garcia [the plaintiff] for her speaking out." *Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003). In *Garcia*, the governmental tortfeasor inflicted "only petty offenses, not even misdemeanors," but this was still sufficient to meet the "ordinary firmness" test because even traffic tickets "have concrete consequences." *Garcia*, 348 F.3d at 729. This Court has addressed the consequences of a sanctions order. They are: "a symbolic statement about the quality and integrity of an attorney's work—a statement which may have a tangible effect upon the attorney's career." *Sec. Nat. Bank of Sioux City, IA v. Day*, 800 F.3d 936, 944 (8th Cir. 2015).

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Let there be no doubt that the order for sanctions resulted in "concrete consequences," or that a person of ordinary firmness would be chilled from continuing the representation: one of my co-counsel immediately withdrew from the case (App. 307 R. Doc. 54, at 13). The other one won't return my phone calls. I didn't just lose my heretofore-spotless reputation, I lost my only career contacts in my new home State. And I must explain away the order in every *pro hac vice* application and petition for admission. I have a national litigation practice, I'm sick of explaining away this order. And, lest we forget, the $17,000 bonus I was ordered to pay my adversary far exceeds the "concrete consequences" of a parking ticket.

Third, the adverse action must have been motivated "at least in part by the exercise of the protected activity." *Bennie*, 822 F.3d at 397. As in *Garcia*, we can directly trace the "punitive machinery of government" to my client's First Amendment protected activity: Judge Wright resolved to enter a monetary sanction specifically because my client elected to exercise its fundamental civil right to petition its government for the redress of a grievance. (App. 293 R.

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Doc. 38, at 47).

All three elements are present. Even without the "anti-religious" comment, a *prima facie* case can be made that Judge Wright intentionally sought to punish and deter my client from equal access to one of "the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers*, 389 U.S. at 222.

The in-court conduct of record puts this case among the "rarest" class, in which a litigant was subjected to a presiding judge who displayed a "clear inability to render fair judgment." *Liteky v. United States*, 510 U.S. 540, 552 (1994). The Court should reassign the case.

CONCLUSION / PRAYER FOR RELIEF

WHEREFORE the Court should:

(1) Vacate the sanctions order;

(2) Remand with a directive to immediately return my cash bond, with interest;

(3) Remand with a directive to have the City's attorneys of record pay me for preserving and prosecuting this duplicative appeal, to

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be determined by the District Court; and

(4) Remand with a directive that the District Clerk shall reassign the case to a judge who is, minimally, capable of appearing like they will enter a fair judgment.

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CERTIFICATE OF SERVICE

NOTICE IS GIVEN that I, Matt Kezhaya, efiled the foregoing document by uploading it to the Court's efile system on November 3, 2022 which sends service to registered users, including all other counsel of record in this cause. Paper service to follow upon the Clerk's instruction. –*Matt Kezhaya*

CERTIFICATE OF COMPLIANCE

This document complies with the page limitation of FRAP 32(a)(7)(B) (a principal brief may not exceed 13,000 words) because, excluding the parts of the document exempted by FRAP 32(f), this document contains **7,732** words.

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The electronic version of the brief and addendum have been scanned for viruses and are virus-free.

–*Matt Kezhaya*

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