

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
JOHN DOE 1, <i>et al.</i> ,)	
)	
Plaintiffs,)	Civ. No. 17-2694 (ABJ)
)	
v.)	
)	UNOPPOSED MOTION FOR
FEDERAL ELECTION COMMISSION,)	LEAVE TO FILE SURREPLY
)	
Defendant.)	
_____)	

**DEFENDANT FEDERAL ELECTION COMMISSION’S
UNOPPOSED MOTION FOR LEAVE TO FILE SURREPLY**

This Court recognized during the December 18, 2017 conference that the Federal Election Commission (“FEC” or “Commission”) may need to seek leave to file a surreply to address theories not included in Plaintiffs’ Emergency Motion for Temporary Restraining Order and Preliminary Injunction (Docket No. 13 (“Pls.’ Br.”)) and indicated the Court would likely grant such a motion. (*See* Dec. 18, 2017 Hearing Transcript at 24:18-24 (“Hearing Transcript”).¹) Plaintiffs did indeed raise new theories, including arguing for the first time that the FEC’s disclosure policy exceeds its authority or alternatively is unconstitutional. Plaintiffs also dramatically expanded arguments or briefed issues for the first time due to the unique posture of this case, involving a record plaintiffs had not seen in advance of their filing and briefing under emergency timelines. Under these circumstances, a surreply would be helpful to the adjudication of the issues, and plaintiffs would not be prejudiced if one were filed. The FEC thus respectfully requests leave to file one. Pursuant to Local Civil Rule 7(m), counsel for the FEC has conferred with counsel for plaintiffs, and plaintiffs do not oppose this motion.

¹ The relevant pages of the transcript are attached hereto, under seal, as Exhibit 1.

“The standard for granting . . . leave to file a surreply is whether the party making the motion would be unable to contest matters presented to the court for the first time in the opposing party’s reply.” *Wultz v. Islamic Republic of Iran*, No. 08-CV-1460 (RCL), 2010 WL 4135913, at *1 (D.D.C. Oct. 20, 2010) (internal quotation marks omitted). Whether to grant such leave is committed to the sound discretion of the district court, which considers “whether the sur-reply is helpful to the adjudication of the motion” and whether the movant would be unduly prejudiced were leave to be granted. *Akers v. Beal Bank*, 760 F. Supp. 2d 1, 3 (D.D.C. 2011) (citation omitted).

Here, plaintiffs briefed several matters for the first time in their reply. Plaintiffs argued there that the Commission’s disclosure policy exceeds its authority and, alternatively, that the policy is unconstitutional. (Pls.’ Reply Mem. in Supp. of Mot. for a P.I. at 22-25 (Docket No. 25) (“Pls. Reply”).) Potentially because plaintiffs lacked knowledge about some of the underlying administrative proceedings, plaintiffs did not address in their opening brief a Federal Election Campaign Act provision important to the parties’ dispute, 52 U.S.C. § 30109(a)(4)(B), which requires the FEC to “make public” any “determination that a person has not violated” FECA and has been implemented in 11 C.F.R. § 111.20(a). The Court contemplated that plaintiffs would address this provision for the first time in their reply brief (Hearing Transcript at 11:6-17, 12:6-11), and their reply discusses that provision for nearly ten pages (Pls. Reply at 6-15). While plaintiffs spent only one-and-a-half pages of their opening brief discussing First Amendment issues (Pls. Br. at 10-12), their reply dedicates seven pages to various aspects of the First Amendment, including an extensive discussion of how the FEC’s deterrence rationale is unlawful. (Pls. Reply at 15-22.) Some of these arguments do respond to points made in the Commission’s brief responding to plaintiffs’ opening brief. In the circumstances here where the

FEC had only one business day to prepare its response to plaintiffs, the Court should deem the arguments as sufficiently new in the reply that there is good cause to provide the FEC the opportunity to respond.

Because the FEC has not had a sufficient opportunity to address numerous new or newly developed arguments in plaintiffs' reply, the Commission seeks leave to file a surreply by January 18, 2018. Though proposed surreplies are sometimes attached to motions for leave to file, the Commission here seeks leave in advance in order to assist with an orderly and efficient disposition of this expedited case.² Plaintiffs were afforded two weeks to prepare their reply, taking holidays into account, and the FEC thus asks for a commensurate period of time to prepare its surreply.

Respectfully submitted,

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January 10, 2018

² On December 22, 2017, Citizens for Responsibility and Ethics in Washington and Anne L. Weismann, the parties initiating the administrative matter out of which this case arises, filed a complaint against the FEC in this Court challenging the Commission's handling of the administrative matter. *Citizens for Responsibility & Ethics in Wash. v. FEC*, No. 17-cv-2770 (D.D.C.).