IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, CENTER FOR BIOLOGICAL DIVERSITY, ENVIRONMENTAL INTEGRITY PROJECT, ECOLOGICAL RIGHTS FOUNDATION and OUR CHILDREN'S EARTH FOUNDATION Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY Defendant.	)	Case Nos. 19-cv-2181-KBJ, 19-cv-2198-KBJ, and 19-cv-3270-KBJ (Consolidated Cases)

OPPOSITION TO DEFENDANT'S MOTION FOR LEAVE TO FILE SUR-REPLY

Plaintiffs Ecological Rights Foundation and Our Children's Earth Foundation (collectively "EcoRights") respectfully request that the Court deny Defendant Environmental Protection Agency's ("EPA") Motion For Leave To File Sur-Reply. First, the documents that EPA complains about were of no surprise because they originated with EPA and were used only in support of arguments that were properly within the scope of replying to EPA's Opposition to EcoRights' Cross-Motion for Partial Summary Judgment. Second, in addition to being unwarranted, EPA's Motion will further clutter the Court's docket and will, by its own logic, require still further briefing in order to properly allow EcoRights, the party with the burden of proof, to submit its argument last. As a result, the Court should let the filed summary judgment briefs stand and avoid the further briefing that granting EPA's Motion would in fairness require. In the alternative, EcoRights respectfully requests that the Court grant it an opportunity to substantively

respond, with evidence, to EPA's Proposed Sur-Reply and that it end the briefing on EcoRights' Cross-Motion there. EcoRights has not included its substantive response to EPA's Proposed Sur-Reply here, apart from briefly noting the additional categories of evidence it would present in footnotes, to respect that the narrow issue here is whether to grant EPA leave to file a sur-reply, not the merits of the case.

EPA cites several cases for its proposition that leave to file a sur-reply should be freely granted. However, EPA's contention ignores a great deal of negative authority. "The Local Rules of this Court contemplate that there ordinarily will be at most three memoranda associated with any given motion: (i) the movant's opening memorandum; (ii) the non-movant's opposition; and (iii) the movant's reply." *Crummey v. Soc. Sec. Admin.*, 794 F. Supp. 2d 46, 62 (D.D.C. 2011) (citing LCvR 7). As a result, it is a well-settled fact that sur-replies are disfavored. *See, e.g., Hall v. Dep't of Labor*, No. 18-cv-5100, 2018 U.S. App. LEXIS 31116, at *2 (D.C. Cir. Nov. 1, 2018); *Crummey*, 794 F. Supp. 2d at 62. Whether to grant or deny leave to file a sur-reply is entrusted to the sound discretion of the court, and the courts routinely deny motions for leave to file a sur-reply.[1] If the courts did not typically reject motions for leave to file additional briefs then briefing could easily become "an endless pursuit." *Crummey*, 794 F. Supp. 2d at 63. It is EPA's burden to show that, despite these countervailing considerations, a sur-reply is warranted. *See, e.g., Hall*, 2018 U.S. App. LEXIS 31116, at *2; *Taylor*, 2016 U.S. App.

[1] *See, e.g., Hall*, 2018 U.S. App. LEXIS 31116, at *2; *Cunningham v. SEC*, No. 16-1237, 2017 U.S. App. LEXIS 5684, at *1 (D.C. Cir. Mar. 31, 2017); *Taylor v. Law Office of Galiher, Clarke & Galiher*, No. 15-7093, 2016 U.S. App. LEXIS 669, at *1 (D.C. Cir. Jan. 14, 2016); *Beaird v. Gonzales*, No. 07-5312, 2008 U.S. App. LEXIS 7647, at *1 (D.C. Cir. Apr. 4, 2008); *In re Papst Licensing GmbH & Co. KG Litig.*, 967 F. Supp. 2d 22, 37 n.21 (D.D.C. 2013); *Banner Health v. Sebelius*, 905 F. Supp. 2d 174, 187-88 (D.D.C. 2012); *Crummey*, 794 F. Supp. 2d at 62-64.

LEXIS 669, a*1. EPA has failed to meet that burden here.

EPA claims that it must respond to the exhibits that EcoRights attached to its Reply in Support of Its Cross-Motion for Summary Judgment showing recent instances of EPA withholding nonresponsive portions of responsive records under the Freedom of Information Act ("FOIA"). Ironically EPA's Proposed Sur-Reply attempts to rebut this evidence with its own new evidence, submitted for the first time with its Proposed Sur-Reply, in the form of declarations. *See Citizens for Responsibility & Ethics in Wash., et al. v. EPA*, 19-cv-2181, Dkts. 32-3, 32-4.[2] However, it was due to EPA's wrongful failure to comply with FOIA's deadlines that EcoRights was deprived of these records until after it had already filed its Cross-Motion for Partial Summary Judgment. *See* Dkt. 31-1 ¶ 6 (noting that EPA did not produce these records until March 25, 2020, after EcoRights served its Cross-Motion for Partial Summary Judgment on EPA on March 20, 2020). EPA was in control of these records before it served its opposition to EcoRights' Cross-Motion on April 17, 2020 and chose not to proactively make its argument at that time. As a result, it would be inequitable for EPA to withhold documents from EcoRights and then use its failure to timely produce these records as required by FOIA to get the last word on EcoRights' Cross-Motion here.

In addition, while the specific example is new, EcoRights pointed out that the risk that EPA would withhold nonresponsive portions of responsive records was one of its grounds for standing and ripeness since filing its complaint and throughout briefing. *See, e.g., EcoRights v. EPA*, 19-cv-3270, Dkt. 1 ¶¶ 8-13, 15, 28, 56-58 (complaint), Dkt. 11 at

[2] EcoRights cites docket entries pre-dating the Court's April 17, 2020 consolidation order as *EcoRights v. EPA*, 19-cv-3270 (D.D.C.) and docket entries post-dating the Court's consolidation order as *CREW, et al., v. EPA*, 12-cv-2181 (D.D.C.).

9, 17-20 (first Motion for Summary Judgment) (D.D.C.); *CREW, et al., v. EPA*, 12-cv-2181, Dkt. 28-1 at 9, 31-34 (Cross-Motion for Partial Summary Judgment) (D.D.C.). EPA's arguments urging dismissal of this claim focused on its allegations that EcoRights did not and could not show that there was any danger of EPA withholding a record on that basis and that EPA would never do so. *See CREW, et al., v. EPA*, 12-cv-2181, Dkt. 26 at 20-29 (D.D.C.) (alleging, *inter alia*, that EcoRights lacks standing because it cannot show EPA will likely withhold information on responsiveness grounds, that the claim is unripe until EPA withholds a portion of a responsive record on the basis of responsiveness, and that EcoRights fails to state a claim because EPA's regulations do not say it can withhold a portion of a record based on responsiveness); *CREW, et al., v. EPA*, 12-cv-2181, Dkt. 29 at 21-33 (D.D.C.) (same). In fact, the core of EPA's argument, made even after it had made the responsiveness withholding that EcoRights identified, was that "Plaintiffs have not cited any instance in which EPA withheld a portion of a record on grounds of responsiveness since the *AILA* court spoke to the issue in 2016. Accordingly, the outdated examples Plaintiffs cite do not suggest that EPA will withhold a portion of a record from Plaintiffs on grounds of responsiveness." *CREW, et al., v. EPA*, 12-cv-2181, Dkt. 29 at 21 (D.D.C.) (citation omitted).

"Where the movant's reply does not expand the scope of the issues presented, leave to file a surreply will rarely be appropriate." *Crummey*, 794 F. Supp. 2d at 63; *see also Banner Health v. Sebelius*, 905 F. Supp. 2d 174, 188 (D.D.C. 2012); *Kiewit Power Constructors Co. v. Sec'y of Labor*, 959 F.3d 381 (D.C. Cir. 2020). Here, EcoRights' arguments remained firmly within the scope of matters EPA raised in its Opposition to EcoRights' Cross-Motion, namely whether EPA ever has or will withhold allegedly

nonresponsive portions of responsive records. *See Bigwood v. Dep't of Defense*, 132 F. Supp. 3d 124, 154 (D.D.C. 2015) (holding that "the matter covered in the sur-reply 'must truly be new.'") (quoting *Pogue v. Diabetes Treatment Ctrs.*, 238 F. Supp. 2d 270, 277 (D.D.C. 2002)). That EcoRights would present this relevant material to the Court after receiving these improperly redacted records was not unexpected. *See Bigwood*, 132 F. Supp. 3d at 154 (holding that reply brief's response to issue directly raised in opposition brief "was neither novel nor unexpected.").[3] As a result, EPA lacks grounds to file a sur-reply.

EPA also attempts to insert new evidence, again in the form of declarations attached to its Sur-Reply, arguing about the "awareness review" process to which at least two of EcoRights' FOIA requests were subjected. However, as with the above information, this has been a clear part of EcoRights' claims since the beginning of this lawsuit. EPA failed to produce the awareness review materials to co-plaintiff Center for Biological Diversity within FOIA's deadlines, and these records were thus not available to EcoRights until it filed its Reply. EPA knew it had subjected EcoRights' FOIA requests to this predecessor of Administrator determinations and chose not to proactively address this in its briefing. In fact, it instead attempted to obscure this fact. *See, e.g., CREW, et al., v. EPA*, 12-cv-2181, Dkt. 29 at 11 (D.D.C.) (alleging that EcoRights' claims of harm resulting from Administrator determinations were too speculative because EcoRights alleged that "determinations on these requests *could* be subject to awareness review, political appointee determinations, and other political meddling with FOIA.")

[3] Should the Court grant further briefing on this issue, EcoRights has additional examples of EPA nonresponsiveness withholdings from another EcoRights FOIA request that it would also like to present to the Court.

(emphasis added by EPA, citation omitted). As a result, EPA lacks grounds to request a sur-reply. *See, e.g., Bigwood*, 132 F. Supp. 3d at 154.[4]

Finally, EPA attempts to submit further evidence, again in declarations attached to its Proposed Sur-Reply, which it alleges contradict EcoRights' evidence showing that FOIA centralization at EPA Headquarters has already caused additional processing delays for EcoRights' requests. However, again, these are arguments EcoRights has been making since the beginning, and they are arguments that EPA responded to. *See, e.g., CREW, et al., v. EPA*, 12-cv-2181, Dkt. 29 at 2-5 (D.D.C.). EPA repeatedly challenged whether EcoRights' requests were experiencing delay and this material naturally followed to rebut those claims. *See, e.g., Bigwood*, 132 F. Supp. 3d at 154.[5]

Even if EPA somehow did not reasonably foresee EcoRights raising these examples of harm with the Court, which EcoRights vigorously disputes, EPA's Proposed Sur-Reply is not helpful to resolution of this lawsuit. *See, e.g., Banner Health*, 905 F. Supp. 2d at 187. While the examples EcoRights has provided are clearly demonstrative of harm it has already experienced and of the likelihood of harm it will continue to experience, they are really just further support for points EcoRights has already made many times. Namely that EPA's FOIA processing has long been in terrible shape and that the new regulations will increase delay and wrongful withholdings. EPA's new arguments and proposed evidence do not rebut that.

That this information is harmful to EPA is not grounds to offer EPA another bite

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[4] Should the Court grant further briefing on this issue, EcoRights has evidence that rebuts EPA's claims about the benign nature of awareness review that it would present to the Court if granted leave to do so.

[5] As with the other issues, should EPA be allowed to submit its additional evidence on this issue, EcoRights has additional evidence on worsening delay at EPA relevant to this issue that it would like to bring to the Court's attention.

at the apple addressing it. EPA had all of this information when it filed its briefing and chose not to address it proactively, instead baselessly making claims that it did not exist. As a result, and because it is consistent with EcoRights' arguments throughout this litigation, the Court should deny EPA's Motion for Leave to File a Sur-Reply.

In the alternative, if the Court does grant EPA's Motion, EcoRights requests that the Court also grant it leave to provide a brief response to EPA's Proposed Sur-Reply, including factual support, and that it allow no further briefing on the merits of EcoRights' Cross-Motion. *See Am. Freedom Law Ctr. v. Obama*, No. 14-cv-1143, 2015 U.S. Dist. LEXIS 196951, at *5 (D.D.C. Jan. 9, 2015) (allowing party to file sur-reply, but also granting other party 21 days to file a response (less than 25 pages) to the sur-reply to which no response was authorized); *U.S. ex rel. Debra Hockett v. Columbia/HCA Healthcare Corp.,* 498 F. Supp. 2d 25, 35 (D.D.C. 2007) (discussing that filing "of what may be the world's first sur-sur-surreply" is "a position in which no Court should ever find itself.").

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Respectfully submitted,

*/s/ Suart Wilcox*_____

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