UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR., EDWARD H. CRANE, III, BRAD RUSSO, and SCOTT BURKHARDT Plaintiffs, v. FEDERAL ELECTION COMMISSION Defendant.	)	Civil Case No. 1:08-cv-00248 (JR)

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE REPLY MEMORANDUM IN SUPPORT OF THEIR FIRST AND SECOND MOTIONS IN LIMINE

In their reply memorandum in support of their proposed findings of fact, Plaintiffs explained why they filed separate motions in limine attacking the admissibility of specific documents on which the FEC relied. *See* Pls.' Reply Mem. in Supp. of Proposed Findings of Fact at 3 n.1. It is not uncommon for parties to file motions attacking their opponent's evidence in the context of briefing on substantive motions, whether the motions are briefed according to pre-agreed schedules or not. Indeed, the parties in the *WRTL II* and *McConnell* cases did just that. *See id*. Plaintiffs continue to believe that their motions in limine were appropriate and that the Court should allow their short reply in support of those motions on that ground alone. Accordingly, Plaintiffs will not reply further to the FEC's argument that their reply is foreclosed by the Court's order of December 9, 2008.

Aside from claiming that Plaintiffs' reply brief is foreclosed by the Court's order of December 9, 2008, the FEC contends that its reliance on the concept of "legislative facts" to admit thousands of pages of otherwise inadmissible evidence was not new at all, because Plaintiffs were, in effect, "on notice" that the FEC intended to rely on the concept of legislative facts in this case.[1] *See* FEC's Opp. to Pls.' Mot. for Leave at 3-4. In support of this claim, the FEC relies on the fact that it mentioned its desire to seek evidence in support of legislative facts during the parties' discussions about the schedule in this case and the fact that Plaintiffs briefly argued that the Court cannot take judicial notice of the evidence on which the FEC was relying in Plaintiffs' memorandum in response to the FEC's proposed findings of fact. *See id*. at 3, 4 n. 3. The FEC thus claims that Plaintiffs should not have been "surprised" that the FEC has relied on the concept of legislative facts to support its reliance on inadmissible evidence, late-designated witnesses, and the like. But the question is not whether Plaintiffs should have been surprised by the FEC's reliance on the notion of legislative facts at all; the question is whether Plaintiffs should have predicted that the FEC would rely on the concept of legislative facts to admit thousands of pages of exhibits—the vast majority of its evidence in this case—and to explain virtually every evidentiary and procedural transgression it committed. *Cf. Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 196 (D.C. Cir. 1992) ("To consider an argument discussed for the first time in reply would be manifestly unfair to the appellee who, under our rules, has no opportunity for a written response."); *Flynn v. Veazey Constr. Corp.*, 310 F. Supp. 2d 186, 190

[1] The FEC also claims that Plaintiffs' submission of rebuttal facts was somehow inappropriate under the parties' schedule. *See* FEC's Opp. to Pls.' Mot. for Leave at 2. This claim has nothing to do with the FEC's opposition to Plaintiffs' motion for leave, but for the record the FEC's argument makes no sense. Plaintiffs assumed from the time that the parties agreed on a briefing schedule that part of the purpose of the response briefs was to submit rebuttal facts, if necessary, because it is the logical and accepted practice in litigation for parties to introduce facts and arguments in rebuttal to their opponents facts and arguments only *after* their opponent has actually introduced those facts and arguments. In any event, the parties never specifically addressed the issue of rebuttal facts when they discussed the proposed schedule in this case and nothing in their schedule to which they agreed prevents either party from submitting rebuttal facts.

(D.D.C. 2004) (granting motion to file a surreply when "defendants raise[d] a new argument for the first time in their reply brief").

Indeed, in light of the FEC's statements during the parties' discussions of the schedule in this case, Plaintiffs had every reason to believe that the FEC would rely on *admissible evidence* and would follow the rules of civil procedure. As is reflected in the parties' scheduling report, the FEC indicated to Plaintiffs that it intended to seek evidence in support of certain legislative facts and that it desired to take depositions for that purpose. *See* Scheduling Report at 4. This was a clear indication that the FEC intended to use accepted means to obtain admissible evidence on which it intended to rely in the case. Otherwise, what would be the purpose of taking depositions at all, when the FEC could simply introduce the evidence it wanted by means of late-designated witness declarations, newspaper articles, and academic papers? The FEC appears to have decided, either because the Court did not grant its request to take more than ten depositions in this case or for other reasons, that raising the "legislative facts" argument was the better course than seeking to introduce actual admissible evidence. The FEC is free to make that argument, but its claim that Plaintiffs should have foreseen that it would do so, after it initially sought to take the generally accepted approach of following the rules of evidence and civil procedure, is preposterous.

Plaintiffs' reply brief does not rehash arguments Plaintiffs previously made. The brief focuses narrowly on the FEC's argument that "legislative facts" is a broad exception to the rules of evidence and civil procedure in cases such as this one and on the specific cases on which the FEC relied in support. The FEC raised that argument and relied on those cases for the first time in its responses to Plaintiffs' motions in limine, and it will not be prejudiced in the slightest if this Court grants Plaintiffs' motion for leave. *See, e.g.*, *Ben-Kotel v. Howard Univ.*, 319 F.3d

532, 536 (D.C. Cir. 2003) ("The district court routinely grants such motions [for a surreply] when a party is 'unable to contest matters presented to the court for the first time' in the last scheduled pleading.'") (quoting *Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C. 2001)); *Brown v. Samper*, 247 F.R.D. 188, 192 n.2 (D.D.C. 2008); *Alexander v. FBI*, 186 F.R.D. 71, 74 (D.D.C. 1998).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion to file a reply memorandum in support of their motions in limine.

Dated: January 13, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th Day of January 2009, a true and correct copy of Plaintiffs' REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE REPLY MEMORANDUM IN SUPPORT OF THEIR FIRST AND SECOND MOTIONS IN LIMINE was filed electronically using the court's ECF system and sent via the ECF electronic notification system to the following counsel of record:

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