UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPEECHNOW.ORG, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 08-248 (JR) OPPOSITION

DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE REPLY MEMORANDUM OR, IN THE ALTERNATIVE, TO FILE SURREPLY

On December 22, 2008, plaintiffs moved for leave to file a reply brief in support of their first and second motions in limine or, alternatively, for leave to file a surreply in opposition to the Commission's proposed findings of fact, and they attached their fifteen-page proposed brief. (Doc. 64.) Plaintiffs' motion for leave to file should be denied. The Court's order consolidating plaintiffs' motions with briefing on the parties' proposed facts precludes the filing of the proposed memorandum.

BACKGROUND

This case was brought pursuant to 2 U.S.C. § 437h, a provision of the Federal Election Campaign Act of 1971 which provides for judicial review of certain constitutional questions by the court of appeals sitting *en banc*. Under section 437h, this Court makes findings of fact and then certifies the constitutional questions to the court of appeals for decision.

The parties negotiated, and the Court adopted, a schedule which provided for expedited discovery, followed by cross-filing of the parties' proposed findings of fact and "responses" and "replies" thereto. (Docs. 27, 42, and 43 and Minute Orders (Oct. 2 and 17, 2008).) This

schedule provided for three rounds of filings related to the facts: proposed facts on October 28, 2008, "responses" to the proposed facts on November 21, 2008, and "replies" regarding the facts on December 12, 2008. (Docs. 44-45, 53-55, 57-2, 60, 62-63.)

Consistent with the case schedule, the Commission filed its Response to Plaintiffs' Proposed Findings of Fact and a memorandum in support of its response — including evidentiary objections — on November 21, 2008. (Docs. 55, 57-2.) In contrast, plaintiffs filed not only a response to the Commission's facts on that date, but also some additional untimely proposed findings of fact captioned as "rebuttal facts" and two "motions in limine" objecting to some of the Commission's proposed findings of fact and supporting exhibits. (Docs. 51-54.) Plaintiffs' "motions" would have shortened the time for the Commission's response to plaintiffs' arguments by a week — from December 12 to December 5 — and would have unilaterally allowed plaintiffs to have an additional round of briefing (as "replies" in support of their "motions") regarding the parties' proposed findings of fact. The Commission negotiated with plaintiffs for an extension of time to respond to plaintiffs' extra filings and plaintiffs consented to a two-business-day extension for the Commission's oppositions to plaintiffs' two "motions in limine," *i.e.*, until December 9, 2008. The Commission then filed an unopposed motion for such an extension. (Doc. 59.)

The Court held that plaintiffs' "motions" were not "motions in limine at all," and that the "motions will be considered arguments — objections to the Court's consideration of the material to which they refer. . . ." (Order, Dec. 9, 2008, Doc. 61.) The Court thus ruled that the Commission "may respond to those arguments in the context of its general briefing on the motion for certification and need not respond separately to the motions," and the Court accordingly denied the motion for an extension of time as moot. (*Id.*) Briefing therefore

concluded as scheduled on December 12, 2008.[1]

ARGUMENT

I. Plaintiffs' Motion Is Foreclosed By The Court's Order Of December 9

Plaintiffs' request to file a "reply" regarding their motions in limine is foreclosed by the Court's Order of December 9, which correctly recognized that plaintiffs' motions in limine merely contained arguments regarding the material cited in the Commission's proposed facts that should have been included in the existing agreed-upon briefing schedule for such arguments. (*See* Order, Dec. 9, 2008, Doc. 61.) The joint report and proposed schedule specified only three filings on predetermined dates (proposed findings of fact followed by two rounds of briefing), and did not provide for any evidentiary motions, let alone motions that would alter the proposed comprehensive briefing schedule. (Doc. 27 at 2.) If plaintiffs had wanted a fourth filing, they could have sought to have one included in the schedule, but they did not.

Plaintiffs argue (at 2) that they have had an insufficient opportunity to make arguments regarding the issue of legislative facts, but offer no explanation why they did not further develop their contentions in the briefs allotted for such argument.[2] Plaintiffs did, in fact, make arguments regarding judicial treatment of "legislative facts" in their response to the Commission's facts. (*See* Plaintiffs' Brief in Response to the FEC's Proposed Findings of Fact (Doc. 54) at 12 n.1, 13.) Plaintiffs thus cannot claim to be surprised that the Commission has argued that

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[1] As indicated in the Commission's Motion for Entry of Protective Orders (Doc. 46 at 5), the Commission will be seeking leave to file supplemental findings of fact based on new documents obtained through contested discovery motions. The documents related to the protective orders have been obtained and the proceedings related to third-party subpoenas in the Central District of California and before Judge Urbina in this District remain pending.

[2] In addition, while plaintiffs claim that their proposed brief is limited to the issue of "legislative facts," plaintiffs' brief contains responses to other arguments as well.

the concept of legislative facts supports its proposed facts.[3] Plaintiffs' "motions in limine" and response to the Commission's proposed findings of fact totaled 215 pages, and plaintiffs made a strategic choice not to devote more of those pages to argument regarding legislative facts.

Plaintiffs' argument (Mot. at 2) that the organization of the Commission's "reply" briefing supports their motion is similarly unavailing. Plaintiffs contend that "[b]ecause the FEC briefed the issues raised in Plaintiff's motions separately from other issues, Plaintiffs believe it makes the most sense to treat those documents as responses to the original motions, and the attached memorandum as a reply memorandum under Local Rule 7(d)." (*Id.*) It is true that for the convenience of the Court, the Commission responded to some of the arguments raised in the "motions in limine" in separate documents that followed the organization created by plaintiffs, but the Commission's main discussion of legislative facts to which plaintiffs now seek to respond was contained in the Commission's primary memorandum in support of its "reply." (FEC's Mem. in Support of Reply Regarding Proposed Findings of Fact at 2-13 (Doc. 63).) The fact that the Commission organized other arguments to track the arguments made in the "motions in limine" does not support plaintiffs' request for additional briefing. The Court's Order of December 9 has already rejected plaintiffs' request to place form over substance.

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[3] The parties have used the term "legislative facts" throughout this litigation. When the parties disagreed in the Joint Scheduling Report over the number of depositions that should be allowed, for example, the Commission noted that "there are a number of questions presented by this case that demand a development of various legislative facts, including a demonstration that unlimited contributions to a committee making independent expenditures pose a danger of corruption and its appearance." (Doc. 27 at 4.) Plaintiffs noted in response, *inter alia*, that "[e]ven if the FEC decides it is necessary to depose all six named Plaintiffs, it would still have four additional depositions to establish the 'legislative facts' to which it refers." (Doc. 27 at 5.) Similarly, plaintiffs issued a document request to the Commission on July 22, 2008, requesting "documents containing any legislative facts," and an interrogatory asking the Commission to "[i]dentify all persons with knowledge of legislative facts pertaining to the issues in this case and the legislative facts known to each." (Plaintiffs' First Set of Discovery Requests at 4, 6, 13, Gall Decl. Exh. BB (Doc. 51-30).)

Plaintiffs' alternative request that the Court accept plaintiffs' proposed brief as a surreply regarding the proposed facts should also be rejected. First, as explained above, plaintiffs had known for many months that the Commission was intending to support its case with legislative facts, and plaintiffs already addressed this issue in their "response" to the Commission's proposed facts. Second, the parties filed only two rounds of briefs regarding the proposed findings of fact, so the ordinary standards related to raising issues in reply briefs are inapplicable to what the parties referred to here as "reply" briefs. Those briefs were the second briefs filed, and thus were more akin to ordinary opposition briefs. Under plaintiffs' theory that they should be permitted to address arguments briefed for the first time by the Commission in its "reply" brief, the parties would be permitted to address a great number of the arguments made in the "reply" briefs. For example, the Commission would be permitted leave to file a surreply in response to plaintiffs' new argument that the Court cannot consider legislative facts because plaintiffs have filed an as-applied challenge. (Plaintiffs' Reply Mem. in Support of Their Proposed Findings of Fact for Certification at 6-11 (Doc. 62).) Again, if plaintiffs believed an additional round of briefing was necessary regarding the proposed facts, they should have sought to incorporate another round in the schedule.[4]

Plaintiffs have failed to demonstrate why they should be permitted to modify the existing briefing schedule in a way that unilaterally grants them a fourth round of filing related to the

[4] Even if the Court were to review the "reply" filings in this matter under the ordinary standards for determining whether to permit a surreply by examining whether the Commission made new arguments, plaintiffs should not be permitted leave to file a surreply. "The matter must be truly new." *United States v. Baroid Corp.*, 346 F. Supp. 2d 138, 143 (D.D.C. 2004) (citation omitted). As explained above, plaintiffs had already addressed the legislative facts concept. *See, e.g., Lightfoot v. District of Columbia*, 2006 WL 54430 (D.D.C. 2006) ("Here, the defendants' reply does not raise any new matters…."). Plaintiffs took a "litigation gamble" by not addressing legislative facts to the extent they now wish in their three rounds of filings, and plaintiffs' failure "to put forward [their] best case in [their] opposition is not grounds for permitting a surreply." *Baroid Corp.*, 346 F. Supp. 2d at 144.

proposed facts. Plaintiffs' motion should therefore be denied.

II. If Plaintiffs' Motion For Leave To File A Surreply Is Granted, The Commission Should Be Allowed To File A Similar Surreply

As we have shown, plaintiffs' motion for leave to file a surreply would allow plaintiffs to file four submissions on the proposed findings of fact, including two briefs opposing the Commission's proposed findings of fact (initial response and surreply). The Commission would be prejudiced because, under the governing schedule, it has filed only three rounds of submissions, including only one opposition to plaintiffs' proposed facts (Doc. 57-2), and it has not had an opportunity to respond to plaintiffs' December 12, 2008 filings.

Thus, if the Court grants plaintiffs' motion, the Commission should be permitted to file a surreply of equivalent length.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for leave to file a reply brief in support of their first and second motions in limine or, alternatively, for leave to file a surreply in opposition to the Commission's proposed findings of fact should be denied.

Respectfully submitted,

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Dated: January 5, 2008

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FOR THE DISTRICT OF COLUMBIA

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Plaintiffs,	)	
v.	)	Civ. No. 08-248 (JR)
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

[Proposed] ORDER

Upon full consideration of plaintiffs' motion for leave to file a reply memorandum in support of plaintiffs' first and second motions in limine or, in the alternative, for leave to file a surreply memorandum in opposition to the defendant Federal Election Commission's proposed findings of fact (Doc. 64), and having considered the defendant Federal Election Commission's opposition thereto (Doc. __),

It is hereby ORDERED that plaintiffs' motion (Doc. 64) is DENIED.

JAMES ROBERTSON
United States District Judge