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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Citizens For Quality Education San Diego, *et al.*, Plaintiffs; v. **San Diego Unified School District, *et al.*,** Defendants.	Case No. 3:17-cv-1054-BAS (JMA) **OPPOSITION TO DEFENDANTS' EX PARTE MOTION TO FILE SUR-REPLY** Judge: Hon. Cynthia Bashant Magistrate: Hon. Jan Adler Trial Date: Not set

PRELIMINARY STATEMENT

Defendants have moved[1] this Court to file a sur-reply to Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction.[2] They assert that Plaintiffs "improperly" introduced "new" evidence "not included in their opening brief." (Defs.' Mot. 2.) This evidence, Defendants contend, was accompanied by "significant argument," including "several speculative statements." (*id.*) Plaintiffs respectfully oppose

[1] Defs.' Ex. Parte Mot. Sur-Reply ("Defs.' Mot."), ECF No. 52.
[2] Pls.' Reply to Defs.' Opp. to Pls.' Mot. Prelim. Inj. ("Reply"), ECF No. 51.

this request. *First*, in granting Plaintiffs' unopposed motion for expedited discovery,[3] this Court ruled that Plaintiffs "may file an enlarged reply, not to exceed twenty pages, to account for additional factual information obtained through the expedited discovery permitted under this Order."(ECF No. 28.) That is precisely what Plaintiffs have done. *Second*, Plaintiffs did not adduce any "new" evidence because Defendants produced—and thus knew about—every document Plaintiffs submitted except for the attorney declarations and a printout of a press release from the Anti-Defamation League, the latter of which was not cited to as evidence in the Reply brief. *Third*, Plaintiffs did not raise any new arguments in their Reply brief. Indeed, Plaintiffs are well aware that introducing new arguments in a reply is improper, and they accordingly limited theirs to rebutting Defendants' contentions and reinforcing why they merit injunctive relief. Defendants also failed to cite to a single example of a "new" argument raised in Plaintiffs' brief. *Fourth*, allowing Defendants to get the "last word" simply would be unfair—Defendants cannot charge in their opposition that this case is moot and then demand that Plaintiffs, as the movants, not be allowed to make the final argument.

In short, Defendants have no legitimate basis for filing a sur-reply, and they should not be permitted to prolong these proceedings and further burden Plaintiffs, who are suffering ongoing, irreparable harm, as well as this Court. Therefore, Plaintiffs respectfully request that the Court deny Defendants' motion.

DISCUSSION

1. Legal Standard

"Neither the federal rules nor the local rules permit a sur-reply as a matter of course." *Appel v. Concierge Auctions, LLC*, No. 17-CV-02263-BAS-MDD, 2018 WL 1773479, at *2 (S.D. Cal. Apr. 13, 2018). "Although the court in its discretion [may] allow the filing of a sur-reply, this discretion should be exercised in favor of allowing a sur-reply

[3] ECF No. 25.

only where a valid reason for such additional briefing exists." *Johnson v. Wennes,* No. 08-cv-1798, 2009 WL 1161620, at *2 (S.D. Cal. April 28, 2009); *see, e.g.*, *U.S. ex rel Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1203 (9th Cir. 2009). In general, a court will not consider evidence submitted for the first time in reply without giving the opposing party an opportunity to respond. *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996). "Evidence is not 'new,' however, if it is submitted in direct response to proof adduced in opposition to a motion" *Edwards v. Toys 'R' US*, 527 F.Supp.2d 1197, 1205 n. 31 (C.D. Cal. 2007); *see Terrell v. Contra Costa County*, 232 Fed.Appx. 626, 629 n. 2 (9th Cir. 2007) (evidence adduced in reply was not new where "[t]he Reply Brief addressed the same set of facts supplied in Terrell's opposition to the motion but provides the full context to Terrell's selected recitation of the facts").

2. The Court Expressly Authorized Plaintiffs to Seek Limited Discovery and Accordingly Enlarged Their Reply Brief to Account for Additional Facts.

Defendants contend that Plaintiffs "improperly" submitted new evidence and facts with their Reply. (Defs.' Mot. 2-3.) That argument is meritless for two reasons. First, as explained above, this Court expressly granted Plaintiffs the opportunity to include any relevant evidence obtained from their limited discovery. As this Court noted, "facts pertaining to the District's conduct after the public rescission of the Policy may be relevant to the question of whether Plaintiffs face ongoing irreparable harm from a policy that allegedly violates the First Amendment of the Federal Constitution." (ECF No. 28.) Second, Defendants ignore that they stipulated to produce to Plaintiffs' the requested records.[4] For that reason alone, the Court should deny Defendants' motion.

3. The Evidence Is Not "New" Because Defendants Produced the "Emails Directed to or Authored by SDUSD Employees and Officials."

Defendants improperly characterize their proposed sur-reply as a response to purportedly 'new' evidence (Defs.' Mot. 2-3), but in reality, that information was available

[4] ECF No. 27.

to them before they responded to Plaintiffs' Motion. *See, e.g.*, *Bigwood v. United States Dep't of Def.*, 132 F. Supp. 3d 124, 154 (D.D.C. 2015) (denying leave to file sur-reply in part because the argument in the reply that the opposing party wished to address "was neither novel nor unexpected"). Defendants reviewed, redacted, and produced the very same emails to which they seek (Defs.' Mot. 2) to respond. There is simply no reason why Defendants should belatedly address this information when they had the opportunity to do so in their Opposition to Plaintiffs' Motion for Preliminary Injunction.[5]

4. Plaintiffs Carefully Limited their Reply to Rebut Defendants' Opposition Arguments and Reinforce Why They Merit Injunctive Relief.

Defendants contend their sur-reply is necessary to respond to "speculative statements" that they allege Plaintiffs raised in their Reply. (Defs.' Mot. 2.) Defendants are mistaken. To be sure, it is well established that it is "improper for a moving party to introduce new facts or different legal arguments in the reply brief than those presented in the moving papers." *U.S. ex rel. Giles v. Sardie*, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000). On the other hand, it is entirely appropriate to introduce evidence that is necessary to contextualize selective factual assertions made in the opposition brief. *See Terrell*, 232 Fed. Appx. at 626. Here, Defendants' contentions are invalidated merely by looking over the Table of Contents in Plaintiffs' Reply brief. To simplify:

1. Plaintiffs replied to Defendants' argument that the case is moot.
2. Plaintiffs responded to Defendants' contention that Plaintiffs are no longer suffering irreparable harm.
3. Plaintiffs addressed Defendants' assertion that the balance of harm and the public favor tip towards Defendants and CAIR.
4. Plaintiffs replied to Defendants' opposition to the scope of the injunction.

Accordingly, Plaintiffs' responses were limited to (1) addressing the arguments and evidence raised in Defendants' Opposition; and (2) reinforcing Plaintiffs' argument that the Revised Policy was a "sham." *Edwards v. Aguillard*, 482 U.S. 578, 587 (1987) (holding

[5] ECF No. 32.

that in the Establishment Clause context, government's purpose for a challenged law must "be sincere and not a sham"). Plaintiffs' Reply brief raises no new issues for the Court's consideration.

CONCLUSION

Sur-replies are highly disfavored because they are "usually are a strategic effort by the nonmoving party to have the last word on a matter." *Liberty Legal Found. v. Nat'l Dem. Pty. of the USA, Inc.*, 875 F. Supp. 2d 791, 797 (W.D. Tenn. 2012). Like their request to respond to Council on American-Islamic Relations California's (CAIR) *amicus curiae* brief, Defendants' proposed sur-reply is simply an attempt to get the "last word" and to direct the Court's attention away from the merits of Plaintiffs' Motion for Preliminary Injunction. Therefore, Plaintiffs respectfully request that the Court deny Defendants' motion to file a sur-reply.

Respectfully submitted,

FREEDOM OF CONSCIENCE DEFENSE FUND

Dated: May 4, 2018

By: /s/ Charles S. LiMandri
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CERTIFICATE OF SERVICE

Citizens for Quality Educ. San Diego, et al. v. San Diego Unified School District, et al.
Case No.: 3:17-cv-1054-BAS-JMA

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to this action; my business address is P.O. Box 9520, Rancho Santa Fe, California 92067, and that I served the following document(s):

- **OPPOSITION TO DEFENDANTS' EX PARTE MOTION TO FILE SUR-REPLY.**

on the interested parties in this action by placing a true copy in a sealed envelope, addressed as follows:

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____ **(BY MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Rancho Santa Fe, California in the ordinary course of business. The envelope was sealed and placed for collection and mailing on this date following our ordinary practices. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

__X__ **(BY ELECTRONIC FILING/SERVICE)** I caused such document(s) to be Electronically Filed and/or Service using the ECF/CM System for filing and transmittal of the above documents to the above-referenced ECF/CM registrants. recipients via electronic transmission of said documents.

I declare under penalty of perjury, under the laws of the State of California, that the above is true and correct. Executed on May 4, 2018, at Rancho Santa Fe, California.

Kathy Denworth