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CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2021-CV-000299

IN THE STATE COURT OF KANSAS
DISTRICT COURT OF SHAWNEE COUNTY

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC., TOPEKA INDEPENDENT LIVING RESOURCE CENTER, CHARLEY CRABTREE, FAYE HUELSMANN, and PATRICIA LEWTER,

Plaintiffs,

v.

SCOTT SCHWAB, in his official capacity as Kansas Secretary of State, and DEREK SCHMIDT, in his official capacity as Kansas Attorney General,

Defendants.

Original Action No. 2021-CV-000299

PLAINTIFFS' MOTION TO STRIKE PORTIONS OF DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs move to strike portions of Defendants' Reply to Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss ("Reply" to Defendants' "Motion"), on the grounds that Defendants lodge a new argument for the first time that could have been raised in the original Motion. Defendants' failure to do so has denied Plaintiffs the opportunity to respond. Under the authority discussed below, the argument should be stricken.

I. Procedural Background

On August 23, 2021, Defendants filed a Motion to Dismiss Plaintiffs' Amended Petition. On September 3, Plaintiffs filed their Response in Opposition ("Opposition"). Defendants' Reply was originally due on September 17, but Plaintiffs agreed to Defendants' request that they be permitted an additional two weeks to respond, which the Court subsequently granted, setting a new deadline of October 1.

On October 1, Defendants submitted a 59-page brief—eight pages longer than the Opposition to which they replied. Throughout that voluminous and far-ranging brief is a brand-new argument that should have been raised, if at all, in Defendants' original Motion. Plaintiffs now move to strike those portions of Defendants' Reply.

II. Legal Standard

Issues may not be raised for the first time in a reply brief. In the appellate courts, this rule is explicit. *See, e.g.*, *Nat'l Restoration Co. v. Contractors, Inc.*, 41 Kan. App. 2d 1010, 1011 (Kan. App. 2009) ("It is well-established that new issues raised in a reply brief are not properly before an appellate court."). The practice not only violates Supreme Court Rule 6.05, but it "also denies an appellee the opportunity to respond to such issues," compromising the fundamental fairness of the proceeding. *Id.* Because Shawnee County District Court Rule 3.202 explicitly bars the parties from filing sur replies, the same rationale applies with equal force in district court proceedings.

See Rule 3.202(b) ("No sur replies will be allowed."). Courts in this district have emphasized the unequivocal nature of this rule, reprimanding counsel for even seeking leave to file a sur reply. *See Peters v. Winkler*, No. 04C1053, 2004 WL 4964955 (Kan. Dist. Ct. Nov. 04, 2004) ("At this point, the Plaintiff's Motion for Oral Argument and Motion for Sur Reply are moot. However, for future reference, counsel should refer to Shawnee County District Court Rule 3.202 which specifically provides that '[n]o sur replies will be allowed.'").

Thus, when a party denies its opponent an opportunity to respond to new issues by raising them for the first time in reply—as Defendants have done here—a motion to strike is appropriate and indeed necessary to ensure procedural fairness. Kansas' federal courts have recognized as much in refusing to consider new issues raised in a reply. *See, e.g.*, *Klima Well Serv., Inc. v. Hurley*, 133 F. Supp. 3d 1297, 1302 n.2 (D. Kan. 2015) ("Arguments raised for the first time in a reply brief are waived and will not be considered.") (citing *Water Pik, Inc. v. Med-Sys., Inc.*, 726 F.3d 1136, 1159 n.8 (10th Cir. 2013) ("We will not address this argument because it was not raised in Med-Systems' opening brief, thereby depriving Water Pik of an opportunity to respond.")).

III. Argument

The Court should strike Defendants' argument—made for the first time in their Reply—that because Plaintiffs' claims are "facial" in "nature," the Court need not make factual findings to resolve them. This is an argument that could have been made in the original Motion to Dismiss but was not. It does not respond to any new issue that Defendants could not have anticipated Plaintiffs would raise in their Opposition brief. Indeed, by its very nature, the new argument does not turn on anything in the Opposition brief at all, but rather on Defendants' characterizations of the allegations in Plaintiffs' *Amended Complaint*. Had Defendants made this argument in their Motion to Dismiss, Plaintiffs could and would have responded to it in their Opposition—and there

is ample case law that establishes that Defendants are flatly incorrect.[1]

Because Defendants waited to raise this new argument for the first time in their Reply, they have effectively denied Plaintiffs the opportunity to respond. *See* D.C.R. 3.202. Accordingly, the following portions of the Reply should be stricken and ignored by the Court:

1. "But the nature of their facial challenges renders it unnecessary to undertake factual discovery here, and the legal deficiencies in their causes of action make them ideally suited for resolution at this stage of the lawsuit." Reply at 1.

2. "The fundamental problem with Plaintiffs' argument is that they have raised only a *facial* attack on the statute. 'A facial challenge is an 'attack on a statute itself as opposed to a particular application' of that law.' In contrast to as-applied claims, *there are no necessary findings of fact in a facial challenge*. With facial attacks, 'courts must interpret a statute in a manner that renders it constitutional if there is any reasonable construction that will maintain the Legislature's apparent intent.' Such claims are disfavored and are generally resolved early in the proceeding because they typically rest on speculation, run contrary to

[1] Defendants' new "facial challenge" argument is incorrect for a variety of reasons. But most of all, it is fundamentally irreconcilable with Defendants' often-asserted contention that Plaintiffs' challenges must be resolved under the federal *Anderson-Burdick* standard. It is well-established that, even when resolving "facial attacks," courts must examine "*evidence in the record*" when employing the *Anderson-Burdick* standard to determine whether the burdens that the law imposes on fundamental rights are outweighed by the state's claimed interests. *See Crawford v. Marion County Election Board*, 553 U.S. 181, 189 (2008) (controlling op. of Stevens, J.); *see also id.* at 208 (opinion of Scalia, J.) (stating that the determination as to the burden on Plaintiffs' rights is "record based"); *Fish v. Schwab*, 957 F.3d 1105, 1125 (10th Cir. 2019), *cert. denied*, 141 S. Ct. 965 (2020). This is in part because identifying a law's burdens requires assessing its impact on not only voters as a whole, but also particular subclasses of voters who are uniquely impacted by the rule because of their factual circumstances. *Crawford*, 553 U.S. at 191; *Fish*, 957 F.3d at 1125. Further, under Kansas law the existence and strength of the state interests, which are weighed in the second part of the *Anderson-Burdick* balancing test, are themselves questions of fact. *See, e.g.*, *Workers of Kansas v. Franklin*, 262 Kan. 840, 863, 942 P.2d 591, 608 (1997) (even rational basis standard was satisfied only after "[t]he State [offered] facts . . . reasonably justif[ying] the [challenged] statute"); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 669, 440 P.3d 461, 496 (2019) (explaining that "the burden shifts to the government to establish the requisite compelling interest and narrow tailoring of the law to serve it" where there is an infringement of a fundamental right). Thus, federal appeals courts routinely reverse dismissals of *Anderson-Burdick* claims on the ground that dismissal is improper prior to the development of a factual record. *E.g.*, *Wilmoth v. Sec'y of New Jersey*, 731 F. App'x 97, 104 (3d Cir. 2018) ("[B]ecause the District Court granted [state's] motion to dismiss prior to discovery taking place, the parties were not afforded an opportunity to develop an evidentiary record, and thus we have no basis upon which to gauge the validity of the competing interests at stake."); *Soltysik v. Padilla*, 910 F.3d 438, 448 (9th Cir. 2018) (same).

the principle of judicial restraint, and threaten to short-circuit the democratic process by preventing laws representing the will of the people from being implemented." Reply at 41 (emphases in original, citations omitted).

3. In a case like this one where Plaintiffs have asserted exclusively *facial* challenges to the statute's constitutionality, thereby negating the need for the development of any factual record, resolution of the matter at the motion to dismiss stage is particularly appropriate. Reply at 45 (emphasis in original).

4. Accepting all of Plaintiffs' factual allegations as true, any burden on voters flowing from H.B. 2183, § 2 could not possibly amount to a denial of the right to vote under the *Anderson-Burdick* framework. This is all the more true under the facial challenge Plaintiffs have brought here and the deferential standard that the Court must apply. Reply at 53.

These passages are not mere responses to Plaintiffs' Opposition. They raise an entirely new argument not made in Defendants' lengthy opening brief, effectively requiring that the Petition alone set out all the facts on which this Court can rely to ultimately resolve this litigation. This is not the standard in Kansas or elsewhere. *See e.g., supra* n.1. Because Defendants failed to present their argument in their original Motion, the argument was waived, and the relevant portions of the Reply should be stricken.

To the extent Defendants argue that Plaintiffs' claims may be decided on the merits at this stage because there is no factual dispute, *see, e.g.*, Reply at 45, the only proper procedural vehicle to raise such a contention would be a motion for summary judgment after factual development on the extent of the burdens on Plaintiffs' rights and the precise state interests that purportedly justify them.

IV. Conclusion

Because the foregoing statements in Defendants' Reply raise an argument for the first time that could have been made in the original Motion to Dismiss, thereby denying Plaintiffs the opportunity to respond, they should be stricken and ignored by the Court.

Respectfully submitted, this 14th day of October, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was electronically transmitted via the Court's electronic filing system, to the following:

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