ORAL ARGUMENT NOT YET SCHEDULED

Nos. 15-5016, 15-5017

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHRISTOPHER VAN HOLLEN, JR.,
Plaintiff-Appellee,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee,

CENTER FOR INDIVIDUAL FREEDOM and HISPANIC LEADERSHIP FUND,
Intervenors-Defendants-Appellants.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR THE FEDERAL ELECTION COMMISSION

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May 11, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the Federal Election Commission ("FEC" or "Commission") submits its Certificate as to Parties, Rulings, and Related Cases.

(A) ***Parties and Amici***. Christopher Van Hollen, Jr. was the plaintiff in the district court and is an appellee in this proceeding. Center for Individual Freedom ("CFIF") and Hispanic Leadership Fund were intervenor-defendants in the district court and are appellants in this proceeding. The Commission was the defendant in the district court and is an appellee in this Court. Cause of Action Institute has filed an amicus brief in support of appellants.

(B) ***Rulings Under Review***. CFIF and Hispanic Leadership Fund appealed District Court Judge Amy Berman Jackson's order and opinion (Nov. 25, 2014, J.A. 404, 405) granting Van Hollen's motion for summary judgment, denying their cross-motions for summary judgment, and vacating 11 C.F.R. § 104.20(c)(9), as well as from all orders and rulings merged therein. In two filings dated February 23, 2015, CFIF specifically stated that among the orders it was appealing was the district court's May 1, 2013 order (J.A. 396) denying CFIF's motion for leave to amend its pleading. (Appellant CFIF's Corrected Certificate as to Parties, Rulings, and Related Cases at 4 (Doc. No. 1539114); Corrected Statement of Underlying Decision from Which Appeal Arises at 1-2 (Doc. No. 1539115).) The Commission

did not appeal the district court's summary judgment ruling, and its participation in this appeal is solely to defend the May 1 order. However, CFIF's opening brief does not include the order in its list of rulings under review and otherwise omits any reference to its appeal of that order. (*Compare id. with* Opening Brief for Appellant CFIF at ii-iii (Doc. No. 1546907)). For the reasons explained below, the Court should deem the May 1 order no longer a ruling under review.

(C) ***Related Cases***. This case was on review in this Court previously as *Center for Individual Freedom v. Van Hollen*, Nos. 12-5117, 12-5118, 694 F.3d 108 (D.C. Cir. 2012) (*per curiam*). The Commission knows of no other related cases as that phrase is defined in D.C. Circuit Rule 28(a)(1)(C).

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CFIF	Center for Individual Freedom
FEC	Federal Election Commission

COUNTERSTATEMENT OF ISSUE PRESENTED

Has the Center for Individual Freedom ("CFIF") waived all arguments that the district court erred in denying CFIF's motion for leave to amend its pleading where CFIF included the issue in initial filings in this Court but chose not to argue the issue in its opening brief?

COUNTERSTATEMENT OF THE CASE

In April 2011, Congressman Chris Van Hollen filed this lawsuit against the Federal Election Commission ("FEC" or "Commission"), an independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-146. (Complaint (J.A. 316).) Van Hollen contends that the Commission acted unlawfully in 2007 when it promulgated 11 C.F.R. § 104.20(c)(9), which governs the disclosure of donations to makers of electioneering communications, because that regulation is allegedly contrary to 52 U.S.C. § 30104(f)(2)(E) and (F). CFIF and Hispanic Leadership Fund intervened to defend the regulation and, like the FEC, argued that section 104.20(c)(9) was a lawful exercise of the Commission's power.

The district court twice granted summary judgment to Van Hollen. In the district court's first summary judgment opinion, it found that the Commission lacked statutory authority to promulgate the regulation under the first step of

review under *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). (Mem. Op. (J.A. 340, Mar. 30, 2012).) CFIF and Hispanic Leadership Fund appealed the Court's summary judgment determination, and the Court of Appeals reversed, holding that the FEC had statutory authority to promulgate the 2007 regulation under *Chevron* Step One. *Ctr. for Individual Freedom v. Van Hollen*, Nos. 12-5117, 12-5118, 694 F.3d 108, 110 (D.C. Cir. 2012) *(per curiam)* (J.A. 382). The Court of Appeals remanded for the FEC to consider whether to engage in rulemaking to clarify its regulations and, should the Commission decline, for the district court to then consider whether section 104.20(c)(9) "is reasonable, and thus entitled to deference under *Chevron* Step Two." (J.A. 386.)

Following the remand, the Commission declined to initiate a rulemaking and CFIF then unsuccessfully petitioned the agency for a specific rulemaking, asking that section 104.20(c)(9) be amended by removing a cross-reference in the regulation. (J.A. 393 ¶¶ 46-47.) CFIF next filed the motion that was expected to be the subject of this brief — the Motion for Leave to File Amended and Supplemented Answer and Crossclaims. CFIF asked to add three cross-claims: (1) that the FEC acted unlawfully by dismissing CFIF's petition for rulemaking; (2) that the regulatory scheme that preceded the promulgation of section 104.20(c)(9) in 2007 was unlawful and therefore should not be resuscitated if the

existing regulation is invalidated; and (3) that the statutory disclosure regime is unconstitutional as applied to CFIF and other corporations in the absence of a regulatory limitation based on donor purpose such as section 104.20(c)(9). ([Proposed] Am. and Supp. Answer and Crossclaims of Def. CFIF, J.A. 391-94.)

The FEC and plaintiff Van Hollen opposed CFIF's motion to amend. The FEC contended that the proposed cross-claims were not ripe and would delay the litigation and hinder judicial economy. (FEC Opp'n at 4-10 (D.D.C. Docket No. 88).) The Commission also asserted that the specific claims were, *inter alia*, either futile, outside the scope of the lawsuit, or unnecessary. (*Id.* at 8-11.) Plaintiff Van Hollen opposed CFIF's motion for several of the same reasons and because intervenors are not permitted to broaden the issues before a court. (Pl.'s Opp'n (D.D.C. Docket No. 86).)

The district court denied CFIF's proposed motion for leave to amend. (Order (J.A. 396).) The Court found that, as an intervenor, CFIF could not assert cross-claims that would expand the scope of the litigation. (Mem. Op. (J.A. 397-99, May 1, 2013).) The district court also determined, in the alternative, that even if an intervenor like CFIF could broaden the scope of litigation, the court would not exercise its discretion to allow such an amendment in this case because the proposed cross-claims involved facts that differed from those in the existing case and adding them would cause prejudice, delay, and increased costs. (J.A. 399.)

The district court subsequently granted summary judgment to Van Hollen under *Chevron* Step Two. (J.A. 404, 405.)

SUMMARY OF ARGUMENT

Although CFIF stated in its initial filings that it was appealing the denial of its motion for leave to amend its pleading, CFIF makes no argument about that district court order in its opening brief and mentions the order only in a footnote, which states without explanation that "[t]his brief does not independently challenge that order." As a result, CFIF has abandoned its appeal of that decision, and it is barred from initiating argument about the issue later, including in its reply brief or at oral argument.

ARGUMENT

I. STANDARD OF REVIEW

It is within the sound discretion of the district court to decide whether to grant leave to amend a pleading. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). If properly challenged, reversal of a district court's decision not to permit amendment would thus be appropriate only if there had been an abuse of discretion. *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 247 (D.C. Cir. 1987) (citing 6 Wright & Miller, Federal Practice and Procedure § 1484 (1971)).

II. CFIF HAS WAIVED ALL ARGUMENTS REGARDING THE DENIAL OF ITS MOTION FOR LEAVE TO AMEND

In its opening brief, CFIF does not assert, and thus has waived, any argument that the district court erred in denying CFIF's motion for leave to amend its pleading.

The FEC participated in this appeal after CFIF's February 23, 2015 filings explicitly indicated that it was appealing the district court's May 2013 denial of CFIF's motion for leave to amend. (Appellant CFIF's Corrected Certificate as to Parties, Rulings, and Related Cases ("CFIF's Corrected Certificate") at 4 (Doc. No. 1539114); Corrected Statement of Underlying Decision from Which Appeal Arises at 1-2 (Doc. No. 1539115).) Indeed, CFIF's Statement of Underlying Decision attached the May 2013 order and memorandum opinion. (CFIF's Corrected Certificate at 3-6 (attachments).)

The Commission did not appeal the district court's summary judgment decision. But as explained in the Commission's Unopposed Motion to Amend Briefing Schedule at 1-2 (Doc. No. 1541819), the portion of the judgment below reflecting the denial of the motion to amend was favorable to the Commission. The Commission was entitled to defend the district court's ruling without filing a cross-appeal, *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924), and intended to do so.

However, CFIF's opening brief omits any reference to its earlier statements that it was appealing the May 2013 order. (*See* Opening Brief for Appellant CFIF at ii-iii (Doc. No. 1546907).) CFIF's brief does not mention the denial of the motion for leave to amend in the Rulings Under Review, the Statement of the Issues, or the body of the Argument section. (*See generally id*.) The brief's sole reference to the May 2013 order is in a footnote, in which CFIF states without further explanation that "[t]his brief does not independently challenge that order." (*Id.* at 43 n.8.)

Arguments not made by appellants in an opening brief are waived. *Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) (*per curiam*) ("[Defendant] never raised this issue in its opening brief before us and therefore waived the argument in this court."); *see also Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 418-19 (D.C. Cir. 1996) (stating that an issue "would . . . be barred from consideration by this court" if a party "did not raise the issue in its opening brief"). This rule prevents unfairness to other parties, who must have an adequate opportunity to respond to arguments. *Corson & Gruman Co*, 899 F.2d at 50 n.4 ("We require petitioners and appellants to raise all of their arguments in the opening brief to prevent 'sandbagging' of appellees and respondents and to provide opposing counsel the chance to respond.")

The waiver rule also benefits the Court, which is denied the chance to make a reasoned decision in the absence of argument from all interested parties. *United States v. White*, 454 F.2d 435, 439 (7th Cir. 1971) (finding issue waived where the court has "not been presented with sufficient information or argument to allow an intelligent disposition of [the] issue"). For these reasons, courts routinely decline to rule on questions that have not been argued in opening briefs. *See Ala. Power Co. v. Gorsuch*, 672 F.2d 1, 7 n.34 (D.C. Cir. 1982) (*per curiam*) (identifying numerous cases, from this Circuit and others, in which the court declined to address a question because it was not argued, or not argued sufficiently, in the opening briefs).

In this case, CFIF has not merely failed to advance a particular argument, but it has altogether abandoned its appeal of the district court's May 2013 denial of the motion to amend. Although it is not entirely clear what CFIF means when it indicates that "this brief" does not "independently" challenge that order (Opening Brief for Appellant CFIF at 43 n.8 (Doc. No. 1546907)), CFIF's failure to make any argument about the order in its opening brief forfeits any opportunity for it to raise such arguments later, including in its reply brief or at oral argument. *See Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008) ("We need not consider this argument because plaintiffs have forfeited it on appeal, having raised it for the first time in their reply brief."); *Rollins Envtl. Servs. v. EPA*, 937 F.2d

649, 652 n. 2 (D.C. Cir. 1991) ("Issues may not be raised for the first time in a reply brief."); *Reyes–Arias v. INS*, 866 F.2d 500, 504 n. 2 (D.C. Cir. 1989) ("We are unpersuaded that this reference, appearing as it does rather belatedly in the reply brief, rises to the level of an argument."); *Trumpeter Swan Soc. v. EPA*, 774 F.3d 1037, 1044 (D.C. Cir. 2014) (argument cannot be raised for the first time at oral argument); *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 108 n.4 (D.C. Cir. 2003) (same). Although CFIF may have intended to leave itself some flexibility, there is no turning back now and any belated effort to raise the issue should not be countenanced. The district court's May 2013 order denying CFIF's motion for leave to amend its pleading is no longer at issue in this appeal.

CONCLUSION

For the reasons stated above, CFIF has waived any appeal of the district court's denial of CFIF's Motion for Leave to File Amended and Supplemented Answer and Crossclaims, and this Court should not consider any arguments about it.

Respectfully submitted,

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May 11, 2015

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 1,776 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P 32(a)(6) because the brief uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May 2015, I caused the Federal Election Commission's brief in *Van Hollen v. FEC*, Nos. 15-5016 & 15-5017, to be filed with the Clerk of the Court by the electronic CM/ECF System, thereby effectuating service on the following:

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I further certify that I also will cause the requisite number of paper copies of the brief to be filed with the Clerk.

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