

**[ORAL ARGUMENT SCHEDULED FOR NOVEMBER 21, 2017]**

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No. 17-5171

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**In the U.S. Court of Appeals for the District of Columbia Circuit**

ELECTRONIC PRIVACY INFORMATION CENTER,  
*Plaintiff-Appellant,*

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY,  
*ET AL.,*  
*Defendants-Appellees.*

APPEAL FROM U.S. DISTRICT COURT FOR THE DISTRICT OF  
COLUMBIA, No. 1:17-cv-1320-CKK (HON. COLLEEN KOLLAR-KOTELLY)

**MOTION FOR LEAVE TO FILE NOTICE OF  
SUPPLEMENTAL AUTHORITY IN SUPPORT OF MOTION  
FOR LEAVE TO FILE BRIEF FOR *AMICUS CURIAE* EAGLE  
FORUM EDUCATION & LEGAL DEFENSE FUND IN  
SUPPORT OF APPELLEES IN SUPPORT OF AFFIRMANCE**

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Legal Defense Fund

Pursuant to FED. R. APP. PROC. 27 and Circuit Rule 27, movant Eagle Forum Education & Legal Defense Fund (“EFELDF”) requests leave to file a Notice of Supplemental Authority in support EFELDF’s pending motion for leave to file an *amicus curiae* brief in support of the defendants-appellees Presidential Advisory Commission on Election Integrity *et al.* EFELDF requests leave to make this procedurally anomalous filing due to the confluence of two other unusual procedural aspects of this case: (1) rather than file an opposition to EFELDF’s motion, plaintiff-appellant Electronic Privacy Information Center (“EPIC”) elected to disparage EFELDF’s proffered brief in a footnote to its reply brief on the merits, Reply Br. at 3, n.3; and (2) under the expedited briefing schedule, a merits panel is already assigned, which means that the panel that will decide EFELDF’s unopposed<sup>1</sup> motion for leave to file will be the merits panel, not a separate motions panel.

While, in the normal course, a motions panel would review only EFELDF’s unopposed motion and its accompanying *amicus* brief, the merits panel will have access to EPIC’s disparaging footnote. That access potentially prejudices EFELDF’s leave to file, without the opportunity that the rules provide to support its motion for leave to file with a reply that counters the arguments against the filing. Fed. R. App. P. 27(a)(4). EFEDLF thus respectfully requests this opportunity to respond.

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<sup>1</sup> EPIC withheld its consent to the *amicus* brief, but did not file an opposition.

Since EPIC's footnote rests primarily on one inapposite decision, *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001), EFELDF seeks this Court's leave to file the accompanying Notice of Supplemental Authority in support of EFELDF's pending motion to address *Eldred* and EPIC's indirect attack on EFELDF's pending motion. Although EFELDF does not seek to supplement the merits briefing, this Court has the power to allow an *amicus* to supplement the merits briefing with either a reply, FED. R. APP. P. 27(a), 29(a)(7), or a notice of supplemental authority, FED. R. APP. P. 27(a), 28(j). so the Court clearly has the power to allow a Notice of Supplemental Authority in support of a motion for leave to file to cure the non-moving party's collateral attack on the proffered filing. Alternatively, this Court could grant leave to file the accompanying document pursuant to FED. R. APP. P. 27(a), 28(j), thus allowing both parties the opportunity to respond under Rule 28(j).<sup>2</sup>

EFELDF does not seek to supplant the parties here by inserting itself further than its station as a would-be *amicus*. While it does not seek *more* than the rules allow, EFELDF nonetheless seeks to counter EPIC's gambit to provide EFELDF *less* than the rules provide. In lieu of this filing, EFELDF offered EPIC the

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<sup>2</sup> Although EFELDF's primary form of requested relief – namely, a notice of supplemental authority in support of a motion – has no procedural requirements, per se, in the rules, EFELDF has styled its notice in the format of Rule 28(j) (*i.e.*, a 3509-word letter). Because EFELDF's *amicus* brief had 5,695 words, the addition of these 350 words would not put EFELDF over the 6,500 words allotted to *amicus* briefs.

opportunity to announce EPIC's belated consent to EFELDF's *amicus* brief, but EPIC declined. By contrasting the situation here with the one in *Eldred*, movant EFELDF respectfully submits that the accompanying notice will aid the Court's consideration of either – or both – the pending motion or the underlying appeal.

WHEREFORE, for the foregoing reasons, movant Eagle Forum Education & Legal Defense Fund respectfully requests leave to file the accompanying Notice of Supplemental Authority in support of EFELDF's motion for leave to file an *amicus curiae* brief in support of the defendants-appellees.

Dated: October 4, 2017

Respectfully submitted,

/s/ Lawrence J. Joseph

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 4th day of October, 2017, I electronically filed the foregoing motion for leave to file – in conjunction with the accompanying notice of supplemental authority – with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system, causing the service on counsel for the parties to this action via electronic means.

/s/ Lawrence J. Joseph

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