

**United States District Court
District of Columbia**

<p>Wisconsin Right to Life, Inc., <i>Plaintiff,</i></p> <p style="text-align: center;">v.</p> <p>Federal Election Commission, <i>Defendant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>Sen. John McCain et al., <i>Intervenor-Defendants.</i></p>	<p style="text-align: center;">Civil Action No. 04-1260 (DBS, RWR, RJL)</p> <p style="text-align: center;">THREE-JUDGE COURT</p>
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**Plaintiff’s Reply Supporting Its Motion for Leave to File a Reply
Supporting Its Motion For Temporary Restraining Order and Preliminary
Injunction**

Wisconsin Right to Life, Inc. (“WRTL”) has moved for leave to serve and file a reply supporting its August 25, 2006 Motion For Temporary Restraining Order and Preliminary Injunction. Defendant Federal Election Commission (“FEC”) opposes WRTL filing a reply supporting the Motion for Temporary Restraining Order and Preliminary Injunction, arguing that an “application” for preliminary injunction is not a motion, and therefore not subject to the rules and practices governing motion practice. Def.’s Opp. For Leave to File Reply 2 (Doc. #97, p. 2). But it cites no authority other than *expressio unius est exclusio alterius*, a doctrine applicable to unconstrued statutes, while Rule 65 and Local Rule 65.1(c) have been construed to allow replies.

In addition to the demands of good practice, Rule 65(a)(2) of the Federal Rules of Civil Procedure seems to require a separate motion for temporary relief when it refers to “an application for a preliminary injunction.” *See, e.g.,* C. Wright & A. Miller, Federal Practice and Procedure § 2949 (1973) (“The appropriate procedure for requesting a preliminary injunction is by motion”)

James Luterbach Constr. Co. v. Adamkus, 781 F.2d 599, 603 (7th Cir. 1986). Hence, there is authority for construing Fed. R. Civ. P. 65's "application" as a motion. Likewise, as the cases cited in WRTL's Memorandum in Support of Its Motion for Leave to File a Reply attest, District Courts in this Circuit have similarly interpreted Local Rule 65.1(c) to treat an "application" just as they would a motion under LCvR 7(d). The FEC provides no answer to this.

Nor did WRTL somehow waive a reply by choosing to file an "application" for preliminary injunction. First, there was no choice of procedures to secure a preliminary injunction, and the allowance of a reply is a matter of interpretation of the Rules and not of choosing between alternative procedures whereby a movant is expected to live with the consequences of differing requirements made applicable by her choice. Second, the timing of the motion was not "controlled only by plaintiff's own decision-making." Def.'s Opp. For Leave to File Reply 2 (Doc. #97, p. 2). The timing of the CCPA Ad depends on the actions taken by the United States Senate, in this case, its reluctance to appoint a conference committee. Unless sixty senators vote to bypass the current roadblock, the CCPA bill will die. A vote is projected for around September 11 or shortly thereafter. It can hardly be said, therefore, that WRTL's decisions dictated the timing of CCPA Ad and the need for application for a preliminary injunction.

Replies are quintessentially responses to arguments raised in memoranda opposing motions, and questions were raised in the hearing that the FEC will ostensibly address in their opposition. Contrary to the implication of the FEC's argument, there is no requirement that a movant allege surprise to be entitled to file a reply supporting its motion, *cf.* Def.'s Opp. For Leave to File Reply 2 (Doc. #97, p. 2). It stands the rationale supporting the practice of replies on its head to disallow one in circumstances where the reasons for allowing one are especially applicable. And, in any event,

if surprise is a requirement for leave to file a reply supporting a motion or application for temporary restraining order or preliminary injunction brief, WRTL is entitled to file one on that basis. While “the fundamental questions concerning the Court’s jurisdiction over WRTL’s latest request and the nature of the irreparable harm allegedly at stake,” *id.*, were addressed in WRTL’s brief, *see* Pl.’s Mem. Supp. Mot. for TRO and PI at 1, 2, 8, 9 (incorporating by reference arguments and the statement of the Case & Facts of WRTL’s summary judgment briefing), the Court’s questions at the hearing, which the FEC will no doubt feature in its opposition, effectively means that they are raised for the first time in the opposition to the motion.

WRTL should be given leave to file a reply because the applicable rules anticipate it, and the Defendant has offered no authority directly contradicting this nor made convincing arguments that the Rules should be otherwise interpreted in this instance.

Respectfully submitted,

/s/ James Bopp, Jr.

James Bopp, Jr., D.C. Bar #CO0041
Richard E. Coleson
Jeffrey P. Gallant
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/234-3685 facsimile
Lead Counsel for Plaintiff

M. Miller Baker, D.C. Bar # 444736
Michael S. Nadel, D.C. Bar # 470144
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, NW
Washington, D.C. 20005-3096
202/756-8000 telephone
202/756-8087 facsimile
Local Counsel for Plaintiff