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10 *(Defendants Tony Thurmond in his official capacity and State Board of Education*  
 11 *members in their official capacity are governmental parties exempt from the provisions*  
 12 *of FRCP 7.1)*

13 **UNITED STATES DISTRICT COURT**  
 14 **SOUTHERN DISTRICT OF CALIFORNIA**

16 **ELIZABETH MIRABELLI, an**  
 17 **individual, and LORI ANN WEST, an**  
 18 **individual,**  
 19 **Plaintiffs,**  
 20 **v.**  
 21 **MARK OLSON, Superintendent of**  
 22 **EUSD, et al.,**  
 23 **Defendants.**

Case No. 3:23-cv-0768-BEN-WVG  
  
**THE STATE-LEVEL  
 DEFENDANTS’ REQUEST TO  
 STRIKE PLAINTIFFS’ SUR-  
 REPLY TO THE STATE-LEVEL  
 DEFENDANTS’ REPLY IN  
 SUPPORT OF THEIR MOTION  
 TO DISMISS THE COMPLAINT**  
  
**Hearing Date: August 23, 2023**  
**Time: 2:00 P.M.**  
**Courtroom: 5A**  
**Judge: Hon. Roger T. Benitez**

1 Plaintiffs’ most recent filing entitled “Plaintiffs’: (1) Response to CDE  
2 Defendants’ Objections, and (2) Objections to CDE Defendants’ Reply, in support of  
3 Plaintiffs’ opposition to CDE Defendants’ Motion to Dismiss” (Dkt. 31) is improper on  
4 two distinct grounds. First, no rule of civil procedure or local rule provides Plaintiffs the  
5 right to file the type of sur-reply represented by the filing in Dkt. 31. Second, a sur-reply  
6 is disfavored and typically only allowed in narrow circumstances where a party has  
7 made new arguments on reply, which did not occur here.

## 8 I. ARGUMENT

### 9 A. No Rule Permits Plaintiffs’ Sur-Reply in the Absence of Their Failure to 10 Request Leave of the Court for Such a Filing.

11 “Neither the Federal Rules of Civil Procedure nor the [United States District Court  
12 Southern District of California] Civil Local Rules provides a right to file a sur-reply  
13 because a sur-reply is not part of the ordinary process for the briefing of motions.”  
14 *Johnson v. Wennes*, 2009 WL 1161620, at \*2 (S.D. Cal.). Simply stated, the federal and  
15 local rules allow for the filing of a motion, the filing of an opposition by the Respondent,  
16 and the filing of a reply to that opposition by the movant. *Id.*

17 Because no rule permits Plaintiffs’ Dkt 31 filing, it is a sur-reply. “The  
18 respondent may not file a sur-reply unless leave of court is granted.” *Id.* A decision to  
19 grant or deny leave to file a sur-reply is “generally committed to the ‘sound discretion’  
20 of the court.” *Brady v. Grendene USA, Inc.* 2015 WL 6828400, at \*3 (S.D. Cal.), citing  
21 *Mitchell v. Donahoe*, 2013 WL 4478892, at \*10 (D.Ariz.). Here, Plaintiffs did not have  
22 leave and proceeded directly to filing their “objections” to the State-level Defendants’  
23 Reply. Accordingly, the court should strike Plaintiffs’ Dkt. 31 filing in its entirety.

### 24 B. The State-Level Defendants Make no new Arguments in Their Reply 25 Warranting the Filing of a Sur-Reply by Plaintiffs.

26 Even if Plaintiffs had requested such leave, the court should have denied the  
27 request because the State-level Defendants have not made any new arguments in their  
28 Reply. A court admitting arguments submitted for the first time in a reply brief should

1 protect the non-moving party against unfair surprises by allowing it an opportunity to  
2 respond. *Sherman v. Yahoo! Inc.* 2015 WL 5604400, at \*3 (S.D. Cal.), citing *Provenz v.*  
3 *Miller*, 102 F.3d 1478, 1483 (9th Cir.1996). In this regard, the court may choose to  
4 either “provide oral argument to the non-moving party or allow the non-moving party to  
5 file a sur-reply.” *Id.* [Citations omitted.] However, here, Plaintiffs’ attempt to  
6 characterize the State-level Defendants’ legal arguments in the Reply brief (Dkt. 30) as  
7 “new” is false.

8 First, Plaintiffs endeavored to incorporate prior briefing into their Opposition to  
9 the State-level Defendants’ Motion to Dismiss (Dkt. 28, p. 1, ll. 15-16.) In their Reply,  
10 the State-level Defendants merely addressed the fact that such incorporation by reference  
11 is improper on procedural grounds (Dkt. 30, p, 1-2.) In their sur-reply (Dkt. 31), the  
12 Plaintiffs now attempt to rebut the State-level Defendants’ well-founded procedural  
13 objection. Nevertheless, the State-level Defendants’ objection to the improper  
14 incorporation by reference does not constitute a new, substantive argument for which a  
15 sur-reply is justified.

16 Second, in their Motion to Dismiss, the State-level Defendants pointed out  
17 Plaintiffs had previously, and expressly, conceded the FAQs are non-binding. Dkt. 25 at  
18 p. 2, ¶15-16. Although Plaintiffs had every opportunity in their Opposition to the  
19 Motion to Dismiss (Dkt. 28) to address that argument, they chose instead to, for the first  
20 time, characterize the FAQs as “practically binding.” Dkt. 28, p. 7, ll.14-15. The State-  
21 level Defendants’ Reply simply reminded the court that Plaintiffs’ Opposition was  
22 contrary to their previous argument that the FAQs were non-binding. State-level  
23 Defendants also provided authority for the proposition that the court should treat such  
24 previous, contrary statements as a concession. Dkt. 30 at p. 3. Again, this was a proper  
25 reply argument to Plaintiffs’ Opposition, not a new substantive argument.

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**II. CONCLUSION**

The State-level Defendants respectfully request the Court strike Plaintiffs’ improper filing in its entirety at Docket 31.

Dated: August 18, 2023

Respectfully submitted,

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