Nos. 07-1090 & 08-539

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IN THE
SUPREME COURT OF THE UNITED STATES

REPUBLIC OF IRAQ,

Petitioner,

v.

JORDAN BEATY, et al.,

Respondents.

REPUBLIC OF IRAQ, et al.,

Petitioners,

v.

ROBERT SIMON, et al.,

Respondents.

**On Writs of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

PETITIONERS' MOTION TO STRIKE RESPONDENTS' SUPPLEMENTAL BRIEF

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April 14, 2008

Pursuant to Supreme Court Rule 21, petitioners Republic of Iraq et al. move to strike respondents' supplemental brief filed on April 13, 2009 because it violates Supreme Court Rule 25.5. Whereas the rule permits the filing of a supplemental brief only to present "intervening matter that was not available in time to be included in a [merits] brief," respondents' purported supplemental brief contains no such intervening matter and is simply a sur-reply brief that is not permitted by the rules. All the points addressed in the supplemental brief were covered in petitioners' opening brief, in the United States' brief, and extensively in respondents' own multiple responsive briefs. Respondents are of course entitled to choose new counsel to present oral argument to the Court after briefing has been completed. But that counsel is not thereby entitled to violate the Court's rules by also presenting an unauthorized sur-reply brief only a week before argument.[1]

DISCUSSION

Respondents do not even pretend that their brief involves "intervening matter that was not available in time to be included in a [merits] brief." Sup. Ct. 25.5. Respondents contend only that they are entitled to file a "response" to points made in petitioners' *reply* brief. *See* Supp. Br. 1 (arguing that because "Iraq's reply brief now devotes nine pages to the issue," respondents are entitled to a "supplemental response"); *id*. at 1, 2, 3, 4 (responding to points in the reply brief). But that is the very definition of a sur-reply. Indeed, all the authority cited in the supplemental brief pre-dates the merits briefing in these cases, in one instance by

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[1] Given the late date at which respondents filed their brief, petitioners will also be filing a conditional response to that brief for consideration in the event respondents' brief is not stricken.

more than 50 years. If respondents are entitled to file this brief, then *any* respondent would be entitled to file a sur-reply in *any* case without leave of Court (with an attendant sur-sur-reply by petitioners). The rules do not allow this.

What is even worse, the issue addressed in the supplemental brief was expressly covered in petitioners' opening brief, in the brief for the United States, and quite extensively in respondents' two opposition briefs. Respondents expressly *admit* that the issue addressed in their "supplemental brief" was addressed in petitioners' opening brief. *See* Supplemental Br. 1 ("Iraq's opening brief addressed that issue * * *."). It was also addressed in the brief for the United States, which was filed before respondents' merits briefs, *see* U.S. Br. 19-21, and was covered in detail in respondents' *own* two merits briefs (as well as in numerous amicus briefs supporting them). *See* Beaty Resp. Br. 7-25; Simon Br. 42-45, 48-49. Indeed, the *Beaty* respondents devoted almost their entire argument to this issue. Petitioners' reply brief thus devoted far *less* attention to these points than did respondents' own briefs, and all of petitioners' arguments served the precise function of a reply brief: to respond to arguments advanced in respondents' briefs. Respondents may now believe that their original arguments were insufficient, but that does not entitle them to violate the Court's rules—and fundamental fairness—by filing an unauthorized sur-reply only a week before argument.

The Court has denied motions by respondents to file sur-replies even where respondents have forthrightly labeled the briefs as such and sought leave to file them well in advance of oral argument. *See*, *e.g.*, *Stewart* v. *Dutra Construction Co.*, 542 U.S. 964 (2004); *C & A Carbone, Inc.* v. *Town of Clarkstown*, 510 U.S. 961

(1993). The Court should follow that same course here, where respondents have wrongly invoked Rule 25.5 to file an unauthorized sur-reply that contains not a single "intervening matter that was not available in time to be included in a brief," Sup. Ct. R. 25.5, and in fact addresses issues that were thoroughly addressed in their own merits briefs as well as the preceding briefs.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Court strike respondents' supplemental brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jonathan S. Franklin, a member of the Bar of this Court, certify that on this 14th day of April, 2009, a copy of the Petitioners' Motion to Strike Respondents' Supplemental Brief was sent by overnight delivery to:

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Counsel for Respondents	*Counsel for the United States as Amicus Curiae*

I further certify that all parties required to be served have been served.

_____

Jonathan S. Franklin