

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABBVIE INC.,

Plaintiff,

v.

ROBERT F. KENNEDY JR., et al.,

Defendants.

and

NATIONAL ASSOCIATION OF COMMUNITY
HEALTH CENTERS, INC.; RYAN WHITE
CLINICS FOR 340B ACCESS; 340B HEALTH;
UMASS MEMORIAL MEDICAL CENTER;
GENESIS HEALTHCARE SYSTEM,

Intervenor-Defendants.

Civil Action No. 26-cv-1190-RDM

**PLAINTIFF’S MOTION TO STRIKE OR, IN THE ALTERNATIVE, FOR LEAVE TO
FILE A SURREPLY IN OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS**

Pursuant to Local Rule 7 and this Court’s Standing Order, Plaintiff AbbVie Inc. (AbbVie), by and through undersigned counsel, respectfully moves this Court to strike Section I of the Reply in Support of the Motion to Dismiss filed by Intervenor-Defendants National Association of Community Health Centers, Inc. and Ryan White Clinics for 340B Access (together, “Intervenors”), ECF No. 52. In the alternative, AbbVie moves for leave to file a surreply in opposition to the new argument that comprises the majority of Intervenors’ reply in support of the motion to dismiss. In support of this motion, AbbVie states as follows:

1. AbbVie initiated this civil action on April 8, 2026. *See* Compl., ECF No. 1. Defendants—federal agencies and officials sued in their official capacities—moved to dismiss on June 16, 2026. *See* ECF No. 13. On July 6, nearly three months after AbbVie initiated this suit and

three weeks after Defendants moved to dismiss, Intervenor moved to intervene in this action. *See* Mot. to Intervene, ECF No. 26.

2. In their motion to intervene, Intervenor represented to the Court that they did not intend to file their own motion to dismiss, but instead asked only to join Defendants’ pending motion and to file their own reply brief in support of that motion. In making this request, they repeatedly assured AbbVie and the Court that their intervention would not prejudice any existing party because they would “participate in the same dispute and motion to dismiss already before the Court. Proposed Intervenor’s participation will therefore address the same legal and factual questions already presented in AbbVie’s Complaint and the Government’s motion to dismiss at this stage.” Mot. to Intervene at 41-42; *see id.* at 23 (“Proposed Intervenor does not seek to add new claims or defenses, or alter the existing briefing schedule.”); *id.* at 44 (“Proposed Intervenor also will not seek to expand the claims, add unrelated issues, or otherwise alter the scope of the case.”). In response to AbbVie’s specific concern that Intervenor would raise new arguments in their reply brief—to which AbbVie would have no ability to respond—Intervenor cited *Farmer v. EPA*, 759 F. Supp. 3d 101, 111 (D.D.C. 2024), for the proposition that the motion to intervene was proper precisely because the “motion to join raises no new arguments.” Intervention Reply at 10, ECF No. 42.

3. Despite these representations to the Court, Intervenor has now filed a reply brief in which *nine* of the fourteen pages of argument are dedicated to an entirely new theory based on *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). This argument was not raised by Defendants in the motion to dismiss that Intervenor joined—which did not cite *Thunder Basin*—nor was it raised in Defendants’ own reply in further support of that motion, ECF No. 50.

4. Even apart from the new theory’s flaws, which AbbVie would address more fully in any surreply, Intervenor’s new theory should not be considered at this stage because it was raised for the first time in a reply brief, depriving AbbVie of any opportunity to respond within the ordinary briefing sequence. Regardless, the theory is without merit. Intervenor’s theory is jurisdictional channeling under *Thunder Basin*, but that doctrine applies only where Congress has “substitut[e]” a district court’s “ordinar[y]” authority—based on “28 U.S.C. § 1331’s grant of jurisdiction for claims ‘arising under’ federal law”—with an “alternative scheme” of “review in a court of appeals following the agency’s own review process.” *Axon Enter., Inc. v. Fed. Trade Comm’n*, 598 U.S. 175, 185 (2023). Congress has not created any such alternative review scheme here. Indeed, the Administrative Procedure Act “permits [a plaintiff] to challenge right now [a] final agency action [by HRSA] under Section 340B.” *Amgen, Inc. v. Kennedy*, No. 24-3571-JEB, 2025 WL 2206948, at *3 (D.D.C. Aug. 4, 2025). Intervenor also relies heavily on case law addressing a distinct doctrine: the exhaustion of administrative remedies. But only the government can invoke such an exhaustion defense, and Defendants did not do so here. In any event, there is no “statute or rule that requires Plaintiffs to first exhaust the administrative process” under Section 340B before filing suit under the APA, “let alone one that says such a requirement is jurisdictional.” *Id.*

5. The applicable rule is clear: A party “cannot wait until the reply brief to present a new and different argument to the court.” *United States v. Van Smith*, 530 F.3d 967, 973-74 (D.C. Cir. 2008) (quotation marks omitted); accord *Twin Rivers Paper Co. v. SEC*, 934 F.3d 607, 615 (D.C. Cir. 2019) (“[A]rguments generally are forfeited if raised for the first time in reply.”); *Okpara v. Dist. of Columbia*, 174 F. Supp. 3d 6, 13 (D.D.C. 2016) (Moss, J.) (“[I]t is well-

established in this circuit that the Court need not address arguments raised for the first time in a party's reply.") (quotation marks omitted). That is precisely what Intervenor's have done here.

6. District courts routinely grant motions to strike new arguments "raised for the first time in [a party's] reply." *Jones v. Mukasey*, 565 F. Supp. 2d 68, 81 (D.D.C. 2008). This course is proper because "[c]onsidering an argument advanced for the first time in a reply brief is not only unfair to [the opposing party], but also entails the risk of an improvident or ill-advised opinion on the legal issues tendered." *Id.* (quoting *McBride v. Merrell Dow & Pharm.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986)). Striking Section I of Intervenor's reply brief is particularly appropriate here, where Intervenor's were granted intervention on the express condition that they would raise no new arguments.

7. In the alternative, AbbVie respectfully requests leave to file a surreply brief, with a maximum page limit of five pages, to be due fourteen days after this Court rules on this motion, to respond to Intervenor's new argument. In this District, "[t]he standard for granting leave to file a surreply is whether the party making the motion would be unable to contest matters presented to the court for the first time in the opposing party's reply." *Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C. 2001). As this Court has recognized, "courts routinely grant such motions when a party is unable to contest matters presented to the court for the first time in the last scheduled pleading." *Edelman v. SEC*, 239 F. Supp. 3d 45, 54 n.5 (D.D.C. 2017) (Moss, J.) (cleaned up); see *Ecological Rights Found. v. EPA*, 541 F. Supp. 3d 34, 56 (D.D.C. 2021) (similar). That circumstance is squarely presented here: No party raised a *Thunder Basin* argument until the last-scheduled reply, leaving AbbVie without any opportunity to respond. Indeed, Intervenor's themselves anticipated this very situation, representing in support of their motion to intervene that "if AbbVie takes the

position that Proposed Intervenor's anticipated reply brief raises new issues, it may seek to file a sur-reply." Intervention Reply at 11.

8. Pursuant to Local Rule 7(m), counsel for Plaintiff conferred with counsel for Defendants and Intervenor's. Defendants stated that they take no position on this request, and Intervenor's stated that they oppose this request. Non-moving parties 340B Health, UMass Memorial Medical Center, and Genesis HealthCare System also take no position.

A proposed order is filed with this motion.

Dated: September 10, 2026

Respectfully submitted,

s/ Allon Kedem

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2026, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system.

s/ Allon Kedem

Allon Kedem

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[PROPOSED] ORDER

Upon consideration of the Plaintiff's Motion to Strike Portions of Intervenor-Defendants' Reply Brief, it is hereby ORDERED that the motion is GRANTED. Section I is hereby stricken from Intervenor-Defendants' Reply Brief, ECF No. 52.

Upon consideration of the Plaintiff's Motion to File a Surreply in Opposition to Defendants' Motion to Dismiss, it is hereby ORDERED that the motion is GRANTED.

IT IS FURTHER ORDERED that the Plaintiff shall have fourteen (14) days from the date of this Order to file a surreply, not to exceed five (5) pages in length.

SO ORDERED this _____ day of September, 2026.

Randolph D. Moss
United States District Judge