

NO. 13-1816

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UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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UNITED STATES OF AMERICA,

PLAINTIFF-APPELLEE,

v.

ANDREW AUERNHEIMER,

DEFENDANT-APPELLANT.

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On Appeal From The United States District Court  
For The District of New Jersey  
Case No. 2:11-cr-00470-SDW-1  
Honorable Susan D. Wigenton, District Judge

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**APPELLANT AUERNHEIMER'S MOTION TO REJECT APPELLEE'S  
26,495-WORD BRIEF AS DEFICIENT, OR ALTERNATIVELY, MOTION  
TO FILE OVERSIZED REPLY BRIEF**

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Appellant Andrew Auernheimer, through undersigned counsel, asks this Court to reject the government’s 118-page, 26,495-word brief as it fails to conform to the required word limits under the Federal Rules of Appellate Procedure. Alternatively, it asks this Court to grant Mr. Auernheimer permission to file an oversized reply brief.

1. Federal Rule of Appellate Procedure 32(a)(7)(B)(i) limits the length of the parties’ principal briefs to 14,000 words. Mr. Auernheimer’s opening appellate brief fully complied with this Rule; its certificate of compliance indicates that it was 13,899 words long.

2. This Court’s Standing Order states that “motions to exceed the page or word limitations for briefs are strongly disfavored and will be granted only upon demonstration of extraordinary circumstances.” *See Third Circuit Standing Order Regarding Motions To Exceed The Page Limitations Of The Federal Rules Of Appellate Procedure* (January 9, 2012).

3. On August 5, 2013, in response to Mr. Auernheimer’s standard-length brief, the government requested leave to file an enlarged brief consisting of 26,500 words, 90% longer than otherwise permitted under the Federal Rules of Appellate Procedure. The government argued that it needed additional space because (1) Mr. Auernheimer’s opening brief “raises serious substantive challenges to the Government’s prosecution,” and that “several of the legal issues raised are

questions of first impression in this Circuit;” and (2) the government needed extra space to respond to the four *amici* briefs filed in support of Mr. Auernheimer’s position.

4. The Government also asked this Court to stay the briefing schedule while this Court considered its request. The Court granted the stay before Mr. Auernheimer could respond.

5. On the same day the government filed its request, Mr. Auernheimer filed an objection to the government’s request, asking this Court to deny the government’s request for extra words and to not stay the briefing schedule.

6. The next day, August 6, 2013, the government filed a letter with the Court, informing it that the parties had reached an agreement on when the government could file a brief. The government withdrew its request for a stay and instead asked for an extension of time to September 20, 2013, which was unopposed by Mr. Auernheimer. However, Mr. Auernheimer continued to object to permitting the government extra words.

7. To date, the Court has not ruled on the government’s motion for an extension of time or for extra words, nor has it lifted the stay.

8. On September 20, 2013, the government filed its answering brief. As it indicated in its Certificate of Compliance, the government’s brief is 26,495 words despite the 14,000-word limit in Fed. R. App. P. 32(a)(7)(B)(i). The

Government's brief is approximately 90% longer than the brief of the defendant, Mr. Auernheimer.

9. Most tellingly, despite urging the Court to grant it additional space to address the arguments of *amici*, it actually devotes only 11 of the 118 substantive pages in the brief to the arguments raised by *amici*. Over 100 pages of the government's brief are addressed to responding to Mr. Auernheimer's 60-page brief.

10. Mr. Auernheimer continues to maintain the government has provided no significant reason why it needed to file a brief nearly twice as long as provided by the Federal Rules of Appellate Procedure. Mr. Auernheimer's brief raised the serious legal challenges at issue within the 14,000-word limit; the government can respond adequately under the same length restrictions. Moreover, this case involves only a single appellant (Mr. Auernheimer) and a single appellee (the United States), and therefore it does not involve unusual circumstances such as "multi-appellant consolidated appeals in which the appellee seeks to file a single responsive brief or complex/consolidated proceedings in which the parties are seeking to file jointly" listed by this Court as extraordinary circumstances that might justify a longer brief.

11. For these reasons, Mr. Auernheimer asks this Court to reject the government's deficient brief and order it to file a brief conforming to the 14,000

word limit in Rule 32(a)(7)(B)(i). Should the Court order the government's brief be rejected, Mr. Auernheimer does not object to giving the government ten days from the date of the Court's order in order to file a compliant brief.

12. Should the Court accept the government's oversized brief, Mr. Auernheimer requests this Court grant him additional space in his reply brief to respond to the government's arguments. An adequate amount of extra space would be an additional 6,300 words – 90% of the otherwise routine 7,000 word limit – for a total reply brief length of 13,300 words, ensuring both parties receive additional space in roughly the same proportion. *See* Fed. R. App. P. 32(a)(7)(B)(ii).

Dated this 23rd day of September, 2013.

Respectfully submitted,

/s/ Hanni M. Fakhoury

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on September 23, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: September 23, 2013

By: /s/ Hanni Fakhoury  
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