

NO. 13-1816

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

PLAINTIFF-APPELLEE,

v.

ANDREW AUERNHEIMER,

DEFENDANT-APPELLANT.

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

**APPELLANT AUERNHEIMER'S (1) WITHDRAWAL OF MOTION TO
STRIKE APPELLEE'S 26,495-WORD BRIEF AS DEFICIENT, AND
(2) REQUEST FOR LEAVE TO FILE OVERSIZED REPLY BRIEF**

Tor B. Ekeland
Mark H. Jaffe
TOR EKELAND, P.C.
155 Water Street
Brooklyn, NY 11201
Tel.: (718) 285-9343
Email: tor@torekeland.com

Marcia C. Hofmann
LAW OFFICE OF MARCIA C. HOFMANN
25 Taylor Street
San Francisco, CA 94102
Tel.: (415) 830-6664
Email: marcia@marciahofmann.com

Orin S. Kerr
2000 H Street, N.W.
Washington, DC 20052
Tel.: (202) 994-4775
Email: okerr@law.gwu.edu

Hanni M. Fakhoury
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Tel.: (415) 436-9333
Email: hanni@eff.org

*Attorneys for Defendant-
Appellant Andrew Auernheimer*

Appellant Andrew Auernheimer, through undersigned counsel, hereby (1) withdraws the previously filed motion to strike the government's 118-page, 26,495-word brief as deficient, and (2) requests that this Court grant it permission to file an oversized reply brief in response to the government's oversized brief.

1. On August 5, 2013, the government requested leave to file an enlarged appellee's brief consisting of 26,500 words. On the same day the government filed its request, Mr. Auernheimer filed an objection to the government's request.

2. The Court stayed the briefing schedule on August 5, but it has yet to rule on the government's motion to file an oversized brief that has been pending for more than two months.

3. On September 20, 2013, the government filed an oversized brief anyway. As it indicated in its Certificate of Compliance, the government's brief is 26,495 words.

4. On September 23, 2013, Mr. Auernheimer filed a motion to strike the government's brief as deficient. Alternatively, he asked for permission to file an oversized reply brief of 13,300 words. *See Fed. R. App. P. 32(a)(7)(B)(ii)*. He also requested an extension of time to file his reply brief on October 25, 2013.

5. The Court has yet to rule on Mr. Auernheimer's motion.

6. The Court's staying of the briefing schedule and its failure to rule on any of the motions for oversized briefs leaves Mr. Auernheimer in a very difficult position. The government has acknowledged that Mr. Auernheimer's opening brief "raises serious substantive challenges to the Government's prosecution." United States' August 5, 2013 Motion For a Word Limit Extension at 2. Mr. Auernheimer is presently serving a 41-month prison term. He cannot be freed from prison until the Court rules on his appeal, and the Court cannot rule on his appeal until the briefs are finalized. Further, if this Court eventually rejects the government's brief, it will further delay the Court's adjudication of Mr. Auernheimer's appeal.

7. Rather than risk further delay, Mr. Auernheimer withdraws his opposition to the government's oversized brief and instead asks this Court grant him leave to file an oversized reply, which he will be prepared to do on October 25, 2013. As indicated in his motion dated September 23, 2013, Mr. Auernheimer's reply brief will be no more than 13,300 words, about half of the length of the Government's brief.

8. This course of action will permit the Court to lift the stay and set the case for oral argument and decision in the normal course of business.

9. The government has no objection to this request.

Dated this 14th day of October, 2013.

Respectfully submitted,

/s/ Hanni M. Fakhoury

Hanni M. Fakhoury
ELECTRONIC
FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109

Orin S. Kerr
2000 H Street, N.W.
Washington, DC 20052

Marcia C. Hofmann
LAW OFFICE OF
MARCIA C. HOFMANN
25 Taylor Street
San Francisco, CA 94102

Tor B. Ekeland
Mark H. Jaffe
TOR EKELAND, P.C.
155 Water Street
Brooklyn, NY 11201

*Attorneys for Defendant-
Appellant Andrew Auernheimer*

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 October 14, 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: October 14, 2013

By: /s/ Hanni M. Fakhoury
Hanni M. Fakhoury
ELECTRONIC
FRONTIER FOUNDATION

*Attorney for Defendant-
Appellant Andrew Auernheimer*