

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

	)	
UNITED STATES OF AMERICA,	)	
	)	
v.	)	Case No. 1:21-cr-138-JEB
	)	
AARON MOSTOFSKY,	)	
	)	
Defendant.	)	
	)	

**DEFENDANT MOSTOFSKY’S RESPONSE TO THE GOVERNMENT’S SUBMISSIONS  
OF LEGAL MEMORANDA AFTER THE BRIEFING CYCLE HAS CLOSED**

As the Court knows, in standard federal practice, when a party moves to dismiss a charge or claim, the government or other opposing party is then entitled to file a legal memorandum in opposition, following which the moving party may submit a brief in reply. The motion is then submitted for decision. LCrR 47. When a party is allowed to modify its legal position without limit in response to a motion to dismiss, effective judicial review can be thwarted. It is also inconsistent with the moving party’s right to the final briefing submission before decision.

In this case and related ones, the government has disregarded that rule. After briefing cycles on motions to dismiss have closed, the government has continued to submit additional legal memoranda in which it has changed its legal position on key issues several times. Here, after declining to address Mostofsky’s Commerce Clause challenge to a charge under 18 U.S.C. § 231(a)(3), the government superseded its indictment and filed another legal brief in opposition to Mostofsky’s motion to dismiss that count in order to address the commerce issue. ECF No. 76.

This morning, the government advised Mostofsky’s counsel that it would attempt to file yet another brief in reply to Mostofsky’s response to the government’s supplemental § 231(a)(3)

brief. ECF No. 80. Explaining the perceived need for additional briefing, the government writes that, before filing its supplemental brief, “Mostofsky had not argued that the allegedly defective commerce element in § 231(a)(3) was not severable. In other words, Mostofsky raised the issue of severability for the first time last week when he filed ECF77.” ECF No. 80, p. 2. Therefore, the government says, it must be given the right of reply even though it is not the moving party.

That does not make chronological sense. The Court permitted the government to file a supplemental brief arguing for the first time that its § 231(a)(3) charge satisfied that statute’s commerce element. In the supplement filed on November 24, the government contended, for the first time, that the commerce element was satisfied by virtue of Congress’s plenary police power over the District of Columbia. ECF No. 76. Before that submission, Mostofsky had not argued the severability issue because there was no occasion for it: the government had never asserted that its § 231(a)(3) charge rested on Congress’s police power in D.C. Severability was therefore “new” only to the extent that the government’s supplemental commerce submission was new. The government had an opportunity to argue severability in its November 24 supplemental submission (e.g., “even if Congress lacked authority under the Commerce Clause to enact § 231(a)(3), the portion of that statute applying in the states is severable”) but did not. That is plainly an argument forfeiture, particularly as the government’s commerce supplement was a by-leave submission filed after the close of briefing and after the government previously declined to allege or defend a commerce predicate for its charge in the first place.

This afternoon, the government filed yet another legal memorandum containing more arguments regarding its invalid charge under § 1512(c)(2). ECF No. 79 (attaching *United States v. Nordean*, 21-cr-175, ECF No. 236 (D.D.C. 2021)). The government did not seek the Court’s leave to file this supplemental legal briefing. Because the local rules provide that the moving

party is entitled to the final brief in the motion cycle, Mostofsky attaches to this filing the defendant's response in *Nordean* to the supplemental § 1512(c)(2) brief the government filed today in this case. Exh. 1.

Mostofsky requests that the Court direct the government not to file additional legal memoranda in connection with his pending motion to dismiss. If the government is allowed to continuously amend its legal theories with supplemental memoranda after dismissal briefing has closed, Mostofsky is denied the process due to him under the local rules.

Dated: December 7, 2021

Respectfully submitted,

/s/ David B. Smith

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**Certificate of Service**

I hereby certify that on the 7th day of December, 2021, I filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following CM/ECF user(s):

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And I hereby certify that I have mailed the document by United States mail, first class postage prepaid, to the following non-CM/ECF participant(s), addressed as follows: [none].

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